Admiralty Practicum

Volume 1988
Issue 1 *Winter 1988*

Article 2

A. Kemp Fisheries, Inc. v. Castle & Cook, Inc., Bumble Bee Seafoods Division, United States Court of Appeals, Ninth Circuit, 25 July 1988, 852 F.2d 493

St. John's University
School of Law
Jamaica, NY 11439

ST. JOHN'S UNIVERSITY — SCHOOL OF LAW

Admiralty Law Society

Recent Admiralty Cases

VOLUME 10, No. 3 WINTER 1988

Published by the Admiralty Law Society of St. John's University School of Law to bring to the attention of practitioners, public officials and public interest attorneys the highlights of current court decisions in the field. This issue prepared under the supervision of Michael Bain, Director of Publications.

A. KEMP FISHERIES, INC. v. CASTLE & COOK, INC., BUMBLE BEE SEAFOODS DIVISION

United States Court of Appeals, Ninth Circuit, 25 July 1988
852 F.2d 493

Parol evidence is inadmissible to determine the terms of a charter agreement where the agreement is not ambiguous and it is recognized by both parties as a final and complete embodiment of the terms.

FACTS: Kemp Fisheries, Inc. (Kemp), and Bumble Bee Samoa Inc. (Bumble Bee), a fully owned subsidiary of Castle & Cooke, Inc. agreed that Kemp would charter, with an option to purchase, the M/V City of San Diego. Kemp chartered the vessel to fish for herring and salmon in Alaska from April to August 1983. In February, they signed a letter of intent which served as their agreement, "pending preparation and execution of final documentation required for the bareboat charter and option to purchase."

Bumble Bee prepared the final bareboat charter agreement after reviewing drafts of it with Kemp's attorney. Kemp signed the agreement even though it did not provide for the engines to be in good working order, nor did it represent that the freezing system would be suitable for his needs, both of which Kemp thought would be arranged. The final agreement contained no such provisions, and in fact, disclaimed all warranties, express and implied. Despite his reservations, Kemp signed the agreement without voicing his concerns to Bumble Bee.

During the herring season two out of three engines that powered the freezing system broke down. Since Kemp could not freeze the fish properly, he had to sell them at lower prices. Kemp sued Bumble Bee in admiralty for breach of the charter agreement, intentional and negligent misrepresentation, estoppel, and rescission, claiming that Bumble Bee agreed to provide engines in good working order and that the freezing system would meet its specific needs.

The trial court found the charter agreement ambiguous, and admitted parol evidence to clarify the parties' intent. Bumble Bee was held liable because of the vessel's inablity to freeze herring and salmon resulting from Bumble Bee's breach of warranties.

ISSUE: Did the trial court err in admitting parol evidence to determine the terms of the charter agreement when all three parties had the opportunity to review and revise the agreement before signing it?

ANALYSIS: In its reversal, the Ninth Circuit rendered judgment for Bumble Bee because the charter agreement was an integrated contract. It was complete and comprehensive, and the letter of intent was a recognition by the parties that the charter would be the final documentation of their agreement. If a contract is integrated, "Extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract," *Pacific Gas and Electric Co. v. G.W. Thomas Drayage & R. Co.*, 69 Cal. 2d 33, 69 Cal. Rptr. 561, 565, 442 P.2d 641, 645 (1968).

"The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is ... whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 570 (9th Cir. 1988). The charter agreement here, was not "reasonably susceptible" to the district court's interpretation that it warrants the seaworthiness of the vessel, the condition of the engines, and the capacity of the freezing system.

Sub-paragraph 3B related to the condition of the vessel prior to delivery. It guaranteed neither the accuracy of the survey nor the seaworthiness of the vessel. Sub-paragraphs 3E and F make it clear that Kemp's acceptance of delivery released Bumble Bee from responsibility for the vessel's condition and cannot be interpreted reasonably to warrant seaworthiness. Nor should the court have admitted evidence that Bumble Bee warranted the condition of the engines and the capacity of the freezing system because sub-paragraphs 3B, E, and F do not even mention them, and are not "reasonably susceptible" to that interpretation.

The Court of Appeals emphasized that sub-paragraph 3E stated that after accepting delivery, "Kemp shall not be entitled to make or assert any claim against the owner on account of any representation or warranties, express or implied, regarding the vessel". Sub-paragraph 3F provided that Kemp's acceptance of the vessel was conclusive evidence that it inspected the vessel and "deemed" it seaworthy and suitable for its needs. The court

(Continued ...)

Kemp v. Bumble Bee *(Cont.)*
concluded that these clauses clearly and unequivocally communicated that the risk of unseaworthiness would fall on Kemp once it accepted the vessel. Bumble Bee effectively waived all warranties.

In addition, the Court of Appeals noted that Kemp and Bumble Bee are corporations familiar with business transactions. Kemp's attorney received the charter with Bumble Bee in the month before signing, and changes were incorporated into the final charter. These factors persuaded the court to hold that "nothing suggested that the agreement was not recognized by both parties as final and complete."

The Court of Appeals reversed the trial court's judgment; Bumble Bee is not liable for Kemp's losses.

Laura Dilimetin '90

FMC CORPORATION v. MAJORIE LYKES AND LYKES BROS. STEAMSHIP CO., INC.

United States Court of Appeals, Second Circuit, 30 June 1988
851 F.2d 78

To determine the "customary freight unit" within the meaning of limitation of liability with respect to the Carriage of Goods by Sea Act, the courts should examine the bill of lading and the filed tariff which expresses the contractual relationships of the parties.

FACTS: In October 1982, the FMC Corporation (FMC) shipped 30 small fire engines from Pennsylvania to Egypt on the SS Majorie Lykes under an agreement with the Lykes Brothers Steamship Company (Lykes). The carrier charged the shipper on a lump sum basis, and a description of the goods recited on the bill of lading was "30 Unboxed-Fire Engines". The same bill reflected a lump sum charge of "$4250/ea. x 30". There was no mention of value of the goods within the bill of lading. As the fire engines were being unloaded, Lykes dropped one engine onto two others destroying all three. FMC replaced the three fire engines at a total cost of $165,254 and commenced an action in the district court seeking damages under the Carriage of Goods by Sea Act (COGSA).

After a bench trial, the district court found Lykes liable for the damage, recognizing that in the absence of declaration of value of goods in the bill of lading, COGSA limits the carriers liability to $500 per customary freight unit.

The district court, seeking to determine what unit the parties actually used to compute the freight charged for the shipment, looked first to the bill of lading and the filed tariff. Both documents recited a lump sum rate, $4250 for each of the 30 fire engines. However, in attempting to discern the intent of the parties, the district court looked beyond these two documents and also considered the parties negotiations.

Prior to arriving at the agreed lump sum shipping rate, the parties had negotiated for a rate based on a weight/measurement unit of 40 cubic feet. They assumed that each fire engine measured 1700 cubic feet, although as it turned out later, the actual measurement was 1522.5 cubic feet. Lykes initially offered to ship the freight at $165 for each 40 cubic foot unit and later reduced its offer to $125 per unit. Before measuring the fire engines to determine the actual number of cubic feet involved, the parties agreed to a lump sum rate of $4250 per fire engine. FMC contended that this lump sum figure was arrived at by multiplying a rate of $100 per weight/measurement unit by 42.5, the number of 40 cubic foot units in an assumed 1700 cubic feet fire engine. Based on the negotiations, the district court concluded that the customary freight for this shipment was 40 cubic feet, that there were 127.5 units in the three damaged fire engines, and thus at $500 per unit, that Lykes was liable for $63,750.

ISSUE: Whether in determining a "customary freight unit" within the meaning of the limitation of liability provision of COGSA (46 U.S.C. App. §1304 (5)), the court should examine prior negotiations as well as the bill of lading and filed tariff?

ANALYSIS: The Court of Appeals for the Second Circuit reversed the district courts decision because the bill of lading and the filed tariff were conclusive on the question of the customary freight unit for this shipment and entered a judgment of $1500 for the plaintiff.

The limitation of liability provision of COGSA, 46 U.S.C. App. §1304 (5) provides that "neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in the case of goods not shipped in packages, per customary freight unit, ..."

FMC could have eliminated the limitation of liability by declaring a higher value of the goods in the bill of lading. In this case, no value at all was declared in the bill. Since the fire engines were not shipped in packages, the carriers liability is limited to the $500 per "customary freight unit." The question presented, therefore is, what is the "customary freight unit?"

The cases discussing the meaning of "customary freight unit" are inconsistent. While some courts have held that the customary freight unit is the measurement "customarily" used to calculate the rate to be charged, the Second Circuit has taken a different approach. In the Second Circuit the customary freight unit is the actual freight unit used by the parties to calculate freight for the shipment at issue. *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1016 (2d Cir.) *cert. denied*, 474 U.S. 902, 106 S.Ct. 229 88 L.Ed 220 (1985).

In this case the description of the goods recited on the bill of lading and filed tariff was clear. Where there is no ambiguity in either the bill of lading or the tariff, there is no need for the district court to consider any of the parties earlier negotiations, and in doing so, the district court erred.

Thus, the intent of the parties as to the customary freight unit is the Second Circuit standard, and in determining that intent the courts must look to the bill of lading and the tariff. Absent any ambiguity there, the inquiry is ended, and both parties are bound to the freight unit therein adopted. This rule provides certainty and fairness to both sides. The intended freight unit is set forth in the bill of lading, and before shipment either party could require that a different unit be expressed.

Glenn T. Henneberger '91