THE PENGUIN:
Trouvé v Owners of the M.T. Penguin

Supreme Court
Unsworth, C.J.
16 October 1968

Shipping — bareboat charter — whether owner liable on contracts made by master.
Shipping — holding out — whether absence of notice of a charter can make owner liable as having held out the master as his agent.

The plaintiff paid for disbursements on behalf of the ship at the request of the master, believing him to be the agent of the owner. He asked for, and was shown, the ship's papers but saw no notice and was not told that the ship was under charter. The plaintiff sued the owner, alleging that on the facts, the master had been held out to be the agent of the owner.

HELD: (i) On a demise charter, where the vessel is manned by the charterer, the owner is not liable on contracts made by the master, unless there has been a holding out.

(ii) Absence of notice cannot amount to holding out where the duty to give notice was on the charterer.

Cases referred to in the judgment.

Sandeman v Scurr (1866) L.R. 2 Q.B. 86.
Baumwoll v Furness [1893] A.C. 8.
The Tolla [1921] P. 22.

Action for moneys due.

This was an action for moneys disbursed on behalf of a ship at the request of her master.

S. Benady Q.C., and B. Vaughan for the plaintiff.
J.J. Triay for the defendant.

22 November, 1968: The following judgment was read—

The plaintiff in this case claims as agent the sum of £3,171. 2s. 8d. in respect of disbursements on account of the motor tanker Penguin which, it is alleged, were incurred at the request of the defendant at the port of Donges in France. The defendant denies liability and counterclaims damages for the wrongful arrest of the vessel.

The plaintiff at the time of the commencement of the action was Marcel Trouvé who was a ships broker but since his decease the action has been carried on in the name of his widow, Marie-Joseph Trouvé. The defendant is the Jackson Steamship Co. which is the owner of the Penguin (previously known as the Beaulieu). The Penguin was at the time of the disbursements let on charter to the Crest Navigation Co. and it is for the decision whether under the circumstances the Jackson Steamship Co. is liable as the owner of the vessel. It is agreed between the parties that for the purposes of this action English law alone is applicable notwithstanding any statement to the contrary in the pleadings.

The action is brought against the ship and owners by virtue of s. 1 of the Administration of Justice Act, 1956. The claim comes within subsection (1) (k) (l) (m) (n) and (p) of that Act in so far as it relates respectively to towage, pilotage, materials supplied, dock charges and disbursements. In these circumstances by virtue of s. 3 (4) of the Act the action only lies if the defendant would be liable in an action in personam and all the shares are beneficially owned by the defendant. It has been agreed that all the shares are beneficially owned by the defendant and the issue is whether the defendant, the Jackson Steamship Co., would be liable in an action in personam.

The documentary evidence, including the charter-party, has been agreed and is included in a bundle of documents marked 1 to 15. The plaintiff called as a witness M. Jean Claude Harrouet and I accept his evidence. The defendant elected not to call evidence and submitted that there was no case to answer.

The facts are as follows:—

(1) The owner of the Penguin was at all material times the Jackson Steamship Co.

(2) On 30 March 1966, the Jackson Steamship Co. let the vessel for a period of 10 years to the Crest Navigation Co. on the terms of a charter-party which included the following provisions:—

> "14. CHARTERER TO MAN, etc.: From the delivery date to the expiry of this charter, Charterer shall, at its own expense, or by its own procurement, man, victual, navigate, operate, supply and fuel the vessel.....
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> 19. LIBELS:
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> A. Neither Charterer nor the master of the vessel nor any other person shall have the right, power, or authority to create, incur or permit to be placed or imposed upon the vessel any liens whatsoever other than for crew's wages or salvage. Charterer agrees to carry properly certified copies of this charter and mortgage, if any, with the ship's papers on board the vessel, and agrees to exhibit the same to any person having business with the vessel, and agrees also

to exhibit the same to any representative of the Owner or the Mortgagee on demand. If the vessel shall be libelled or attached, the Charterer will forthwith take such steps as may be necessary to discharge or release the vessel therefrom within ten (10) days from the date same became effective by filing a bond or undertaking, or otherwise.

Charterer agrees to notify any person furnishing repairs, supplies, towage, or other necessaries to the vessel that neither Charterer nor the Master have any right to create, incur, or permit to be imposed upon the vessel any liens whatsoever, except the crew's wages and salvage. Such notice as far as may be practicable shall be in writing. Charterer shall keep notices, printed in plain type of such size that the paragraph of reading matter shall cover a space not less than six inches wide by nine inches high, framed, prominently in the chart room and in the Master's cabin of the vessel as follows:

"NOTICE OF BAREBOAT CHARTER"

"This vessel is the property of JACKSON STEAMSHIP COMPANY. It is under charter to CREST NAVIGATION COMPANY and, by the terms of this charter neither the Charterer nor the Master has any right, power or authority to create, incur, or permit to be imposed upon the vessel any lien whatsoever, except for crew's wages and salvage."

The Charterer agrees also to display on board any notices required by the Mortgagees in a conspicuous place and to maintain same during the life of the mortgage in accordance with requirements of the mortgage."

(3) During the week ended 30 July 1966, the plaintiff was offered the agency for the Penguin at the port of Donges in a telegram from "Churco" of Jacksonville and there was reference in subsequent telegrams to a Mr. Church who would be representing "Churco". The plaintiff at the time did not know the name of the firm which used the telegraphic address of "Churco" but it was in fact the Crest Navigation Co.

(4) On 30 July 1966, the Penguin arrived at the port of Donges and M. Harrouet dealt with the agency on behalf of the plaintiff. He asked for the ship's papers, that is to say, the register, the crew list, individual declarations for customs and the store list. The register which was produced was not the register of the Penguin but the register for the Beaulieu with the name "Penguin" written on the back. M. Harrouet did not see any notice to the effect that the vessel was under charter and neither the master nor anyone else told him that this was the case. If M. Harrouet had seen a notice (and he had ample opportunity to see one if it had been there) he would not have given credit but would have referred the matter back to his employers. M. Harrouet assumed that the master represented the owner and thought that he was giving credit to the vessel. The invoices and other documents were signed by the master and in a few cases by the chief officer. After the work had been performed the master told M. Harrouet to send the accounts to the Crest Navigation Co. M. Harrouet did not refer to any conversations with Mr. Church though he saw him on the vessel with the master. There was no mention of the Jackson Steamship Co.

(5) The Penguin sailed from Donges on 1 August and on the 2nd the plaintiff reported to the Crest Navigation Co. and enclosed the discharging time sheets.

(6) On 26 August 1966 the plaintiff duly sent his bill of account to the Crest Navigation Co.

(7) There had been no payment by 26 October 1966 and on that date the plaintiff wrote a further letter to the Crest Navigation Co. asking for an early settlement of the account.

(8) On 29 November 1966 the plaintiff caused the Penguin to be arrested and it remained under arrest until 9 February 1967.

(The correspondence before action was then set out.)

Learned counsel were not agreed as to the proper inference to be drawn from the evidence in so far as it relates to the appointment of the master and notice of the existence of the charter. I think that (in the absence of any evidence to the contrary) the proper inference to be drawn from cl. 14 of the charter, and the surrounding circumstances, is that the master was appointed by the charterer. In so far as cl. 19A is concerned, I think that the proper inference to be drawn from the evidence of M. Harrouet (in the absence of any rebutting evidence by the defendants) is that the charterer failed to comply with the requirement as to notice prescribed by that clause.

Counsel for the defendant submitted that there was no case to answer on the ground that an owner who has chartered his ship under a bareboat charter is not liable on contracts made by the charterer or his agent with third parties. On the other hand counsel on behalf of the plaintiff submitted that on the particular facts of this case the master was held out as the agent of the owner so as to make the owner liable on the contract.

The principles relating to holding out and apparent authority are set out in Arts. 7 and 86 of Bowstead on Agency (13th Edition, 1968) in this way:—

"Article 7

AGENCY BY ESTOPPEL

Where any person, by words or conduct, represents or permits it to be represented that another person is his agent, he will not be permitted to deny the agency, with respect to anyone dealing, on the faith of any such representation, with any person so held out as agent, even if no agency exists in fact.

Article 86

APPARENT (OR OSTENSIBLE) AUTHORITY

Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no actual authority."

The application of these principles of agency to charter-parties has been considered in a number of cases which were referred to by counsel.

In the case of *Sandeman v Scurr* [1] a ship was chartered for a voyage from Oporto to the United Kingdom to load a cargo of wine and other merchandize. The master was to sign bills of lading without prejudice to the charter. The ship was consigned to the charterer's agents at Oporto and was put out by them as a general ship without any intimation that she was under charter. The plaintiff shipped some casks of wine and received bills of lading in the common form signed by the master. The wine was stored by a stevedore appointed by the charterer's agents and paid by them. The wine having leaked from improper storage a claim was brought by the plaintiff against the owners of the ship. It was held that as the charter did not amount to a demise of the ship and the owners remained in possession by their servants, the master and crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine as he had delivered it to be carried in the ship in ignorance that she was chartered and had dealt with the master who was still the owner's master with the ordinary authority of a master to receive goods and give bills of lading by which the owners would be bound.

The authorities were considered and the law stated by Cockburn, C.J., in his judgment [2] as follows:—

> "The result of the authorities, from *Parish v Crawford* downwards, and more especially the case of *Newberry v Colvin*, in which the judgment of the Court of Exchequer Chamber reserving the judgment of the Court of Queen's Bench, was affirmed on appeal by the House of Lords, is to establish the position, that in construing a charterparty with reference to the liability of the owners of the chartered ship, it is necessary to look to the charterparty, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and as subsidiary thereto, to have the use of the vessel and the services of the master and crew.
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> In the first case, the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also. If the master, by the agreement of his owners and the charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners; in other words, he retains that relation to his owners out of which by the law merchant arises the authority to sign bills of lading by which the owner will be bound."

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[1] (1866) L.R. 2 Q.B. 86. [2] At p. 96.

In the case of *Baumwoll v Furness* [1] the owner of a ship registered as such let her by charter-party for a period of four months. The charter-party provided that the master, officers and crew should be paid by the charterer, that the master should be under the orders of the charterer, that the charterer should indemnify the owner from all liabilities arising from the master's signing bills of lading and that the owner should maintain the ship in a thoroughly efficient state in hull and machinery for the service and pay for the insurance on the ship. The charterer took possession of the ship and appointed the master, officers and crew (except for the chief engineer who was appointed by the owner in exercise of the option given to him by the charter-party). The charterers sent the ship to New Orleans where goods were shipped under bills of lading some of which were signed by the master and some by the agent of the charterer. Neither the master nor the charterer's agent had any authority in fact from the owner to pledge his credit. The bills of lading contained no reference to the charter-party and the shippers had no notice of its terms. The goods having been lost at sea during the currency of the charter, owing (as was alleged) to the unseaworthiness of the ship, the shippers sued the owners for the loss. It was held that the master not being the servant or agent of the owner and having no authority to pledge his credit the owner was not liable. In the course of the judgment in the House of Lords Lord Herschell said this:—

> "But then it is suggested that the liabilities which arise as between the shipper of goods and the shipowner, may be regarded as to some extent exceptional, that although, looking at the matter apart from the relationship to which I have just alluded, there might be a difficulty in establishing liability, the liability nevertheless may be made out where the relationship of shipper and shipowner is found to exist. But there may be two persons at the same time in different senses not improperly spoken of as the owner of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is, for those purposes during that time, in point of law to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordships' judgment, as I apprehend, which would detract in the least from the law as it has been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person, who, although not the absolute owner of the vessel, is, during a particular adventure, the owner for all those purposes."

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[1] [1893] A.C. 8.

In the case of *The Tolla* [1] the plaintiffs, steamship brokers, at the request of the master of a Norwegian vessel made various disbursements on behalf of the vessel. The plaintiffs were not aware that the vessel was under time charter until they had made the disbursements when the master told them to send the accounts to the time charterer. The plaintiffs did so, and failing to receive payment brought an action in rem against the vessel. It was held that the master had authority to pledge the owner's credit so as to make the owner liable on the contract.

It appears from the authorities that in the case of a demise charter, where the ship is manned by the charterer, the owner is not liable on contracts made by the master with third parties unless there are some special circumstances which establish that the master was held out by the owner as his agent in accordance with the principles set out in Art. 7 of Bowstead. Different considerations apply where the ship is manned by the owner because in such a case the master may remain the servant or agent of the owner and be liable on contracts within the scope of the master's apparent authority in accordance with the principles set out in Art. 86 of Bowstead. Examples of the application of these principles are to be found in *Baumwoll's* case and *The Tolla*. In *Baumwoll's* case it was held that the owner was not liable on contracts made by the master as the charter-party amounted to a demise of the ship and the case of *The Tolla* appears to have proceeded upon the basis that it was a time charter without a demise of the ship.

In applying these principles to the case at present under consideration it is necessary to examine the terms of the charter-party and the particular facts of the case.

The charter in this case is described as a bareboat charter. The charterer took delivery of the vessel and was given the use of all the furniture and equipment, the ship was unmanned and the charterer was entitled to operate the ship throughout the world. I am satisfied that the charter-party in this case amounted to a demise of the vessel within the meaning of the authorities mentioned above. It follows from this that the owner is not liable on contracts made by the master unless it is established that the master was held out by the owner as his agent.

The arguments in support of a holding out all centered around the fact that the plaintiff had no notice of the existence of the charter but it is clear from the authorities mentioned above that the failure to give notice is not sufficient to establish a holding out and make the owner liable for the acts of the master. The question of notice was considered in the House of Lords in *Baumwoll's* case and Lord Watson set out the law in this way:—

> "My Lords, I also am of opinion that the judgment of the Appeal Court ought to be affirmed. At the time when the bills of lading were signed and also at the time when the goods of the appellants suffered damage, the ship was in the possession and under the control of the charterers, who employed

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1 [1921] p. 22.

their own master and crew in her navigation. That point once fixed, it appears to me that there is really no substantial question which can arise upon this appeal. We have heard a very able argument from the Bar, and a great deal of authority has been cited, upon points which I think it unnecessary to discuss at large. They have been sufficiently dealt with in the judgment which has just been delivered by the Lord Chancellor.

The master who signed the bill of lading was the servant and agent of the charterers and not the servant and agent of the respondent Furness. In that state of facts, the appellants in order to succeed here, must establish that the present case forms an exception from the general rule that a man is not liable upon contracts made by persons who are neither his agents nor his servants. They argued that the respondent remains liable for contracts made by the charterers' agent with shippers who had no notice of the terms of the charter. For that proposition no authority whatever was produced. All the decisions cited at the Bar, so far as they had any bearing upon such circumstances, appear to me to point very distinctly to the opposite conclusion. No doubt, when a shipowner who enters into a charter-party without parting with the possession and control of his ship seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the instrument. That, however, is a question as to the limitation of the powers of an actual agent who has known powers according to law. Notice of the limitation must be given to those who deal with the agent in order to disable them from contracting with him. But I know of no principle or authority which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship in order to prevent the servant of the charterer from pledging his credit."

For the reasons given above I have reached the conclusion that the plaintiff has not established a holding out so as to make the owner liable on contracts made by the master.

There is also the further point that the failure to give notice in this case was due, not to the conduct of the owner, but to that of the charterer and his agent, the master, who failed to comply with the requirements regarding notice in cl.19 of the charter-party. In these circumstances the owner cannot be made liable on the doctrine of holding out as the whole basis of that doctrine is that the representations that are relied upon must be made by, or with the authority of, the person whom it is sought to make liable on the contract.

I am satisfied, after considering the terms of the charter-party and all the circumstances of the case, that the plaintiff has not established a holding out or shown any contractual relationship between the plaintiff and the Jackson Steamship Co. The plaintiff's claim accordingly fails.

It follows from the above finding that the plaintiff had no right to cause the Penguin to be arrested and the defendant is accordingly entitled to damages for wrongful arrest of the vessel.

The plaintiff's claim is dismissed and there will be judgment for the defendant on both claim and counterclaim. The damages are referred for assessment to the Registrar.