J.P. HOLMEN LIMITED *v.* KATTY

SUPREME COURT (Kingsley, J.): November 2nd, 1950
(Civil App. No. 17/50)

[1] **Employment—safety—claims under Workmen's Compensation Ordinance (cap. 268)—liability in case of workmen employed by contractors —employer liable only when work undertaken in or for his usual business—existence of regular practice in employer's kind of business irrelevant:** It is not everything done in the interest of an employer's business which is work undertaken in the course of or for the purposes of his business so as to render him liable to pay compensation under s. 23 (1) of the Workmen's Compensation Ordinance (*cap.* 268) to a person employed by a contractor engaged to work on his behalf: the question of liability is to be solved by considering whether the work is that usually undertaken by the particular employer in question, and not by considering whether there is a regular practice in that kind of business governing such work (page 67, line 25—page 68, line 17).

The respondent brought an action against the appellants in a magistrate's court to recover compensation under s.23(1) of the Workmen's Compensation Order (*cap.* 268).

The appellants were shipping agents who owned a number of barges used for transport purposes in the harbour vicinity. When two of their barges became unserviceable, they engaged a contractor to dismantle them. A workman employed by the contractor suffered injury in the course of this work, and compensation was claimed in respect of this injury under s.23(1) of the Workmen's Compensation Ordinance.

The trial magistrate found that the dismantling of barges was work done in the course of the appellant's business, though no evidence was led to show that they normally did it or that it was the normal practice in their business to do it.

On appeal, the Supreme Court considered the circumstances in which an employer could be held liable for an injury to a workman employed by a contractor, and whether they pertained in the present case.

Cases referred to:

(1) *Bush* v. *Hawes,* [1902] 1 K.B. 216; (1901), 85 L.T. 507, applied.

(2) *Dittmar* v. *Wilson, Sons & Co.,* [1909] 1 K.B. 389; (1908), 100 L.T. 212, distinguished.

(3) *Skates* v. *Jones & Co.*, [1910] 2 K.B. 903; (1910), 26 T.L.R. 643, *dicta* of Cozens-Hardy, M.R. applied.

(4) *Spiers* v. *Elderslie Steamship Co. Ltd.*, [1909] S.C. 1259; (1909), 46 Sc. L.R. 893, applied.

Legislation construed:

Workmen's Compensation Ordinance (Laws of Sierra Leone, 1946, *cap.* 268), s.23(1):

> "Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person otherwise than as a tributer (which other person is in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Ordinance which he would have been liable to pay if that workman had been immediately employed by him . . . ."

Dobbs for the appellants;
Margai for the respondent.

KINGSLEY, J.:

The short but important point in this appeal is whether the work of dismantling barges was work undertaken by the appellants within the meaning of s.23(1) of the Workmen's Compensation Ordinance (*cap.* 268). This section is an exact replica of s.6(1) of the English Workmen's Compensation Act of 1925 and so in coming to my decision I have been on safe ground in examining the various cases referred to in *Willis's Workmen's Compensation*, 31st ed. (1938). The relevant passage in the learned magistrate's judgment reads:

> "In the first place, was the work of dismantling the barges undertaken by the defendant company in the course of or for the purposes of their trade or business? It is in evidence that the defendant company are shipping agents; as such they would normally possess barges and small craft for the transport of cargo from ship to shore, and *vice versa*."

So far the learned magistrate was perfectly correct. Though the point was not brought out as clearly as it ought to have been by learned counsel, I think it a reasonable inference from the evidence that the appellants do in fact own their own barges which they use for transport purposes in the harbour vicinity, and possibly a little further afield also. But the magistrate then went on:

> "And where a barge is unserviceable, they would normally

break it up so as not to be a danger to navigation or an obstruction, or otherwise dispose of it. It seems to me therefore that the dismantling of the barge was a work which was being done in the course of their business."

With the greatest respect to the learned magistrate, I find it difficult to see whence he derives this information. There is certainly nothing on the record which I can see to indicate what shipping agents in general or the appellants in particular do when their barges become unserviceable. The fact that the appellants have had two barges demolished cannot of itself necessarily mean that they demolish all their barges. When this evidence about the two barges was given, the witness was clearly being asked about what work Reffell had done for the appellants. It may well be, to use the magistrate's words, that they "otherwise dispose of them." I should here say that in my view no fault is to be attached to the magistrate for having had to fall back on assumptions. Both learned counsel seem to me to have been somewhat remiss in not having dealt more fully with the point of this appeal when the material witnesses were in the box. Both seem rather to have concentrated on the other point as to who in fact was the respondent's employer.

The two really relevant passages occur in the evidence of Mr. Holmen and Mr. Smidt respectively. The former said: "Reffell demolished two barges under separate contracts." And the latter said: "He (that is, Reffell) took contracts with the company to dismantle some wooden barges and transport the timber. The price of each contract was £30. The £30 was an all-in price to cover everything." As there was no evidence that the appellants build their own barges or do any shipbuilding at all, the reasonable inference seems to be that as far at any rate as two of their barges are concerned, the appellants employed an independent contractor to take them to pieces, and then either sold the timber or used it for some other purpose. Now was this act of theirs done in the course of or for the purpose of the appellants' business? In his judgment the learned magistrate said: "The work 'undertaken' does not only refer to work which the principal normally undertakes to do for others in the course of his business but also work which he does on his own account." He quoted two well-known cases: *Skates* v. *Jones & Co.* (3) and *Bush* v. *Hawes* (1). He has, I think, if I may say so, with respect, been content to glance either at their respective headnotes only or at the passage in *Willis* which refers to these cases.

In the former case, two shopkeepers and a billiard saloon keeper decided to go into the skating-rink business, for which purpose they purchased an iron building. Its re-erection they handed out to be done by a contractor, one of whose men met with the accident from which the case arose. It was held that the work of putting up a skating-rink was no part of the usual business of the shopkeepers and their colleague the billiard saloon keeper, and that therefore the building of it was not "undertaken" in the course of or for the purposes of their business.

Applying this test to this appeal, I can see no evidence at all that the work of dismantling a barge is part of the appellants' usual business. In his judgment in *Skates* v. *Jones & Co.* (3), Cozens-Hardy, M.R. quoted with approval the case of *Spiers* v. *Elderslie Steamship Co. Ltd.* (4), where it was held by the Court of Session that shipowners who contracted for the cleaning of the boilers in one of their vessels were not liable to pay compensation to a man employed by the contractor who was injured by the accident. It was part of their business to have their boilers in good condition, but not to do the operations to put them in good condition. Applying this ruling to this appeal, I cannot see any evidence that it was part of or in any way connected with the appellants' business to dismantle their barges. They are after all shipping agents, not shipbuilders or shipbreakers. Cozens-Hardy, M.R. later in his judgment said this ([1910] 2 K.B. at 907–908; 26 T.L.R. at 643–644):

> "It is not everything done in the interest of the trade or business which falls within the section. I shrink from saying that a cotton spinner who finds one of his boilers out of order and contracts with a boilermaker to replace it with a new boiler is liable to pay compensation to one of the workmen employed by the boilermaker. That work was *required* by the cotton spinner, but not *'undertaken'* by him. He never held himself out as a boilermaker. It was not part of his trade or business to erect boilers, and the whole section has no application to him."

Applying this ruling to this appeal, it seems to me, with great respect to the learned magistrate, to put the respondent completely out of court. All that happened in this case surely is this: the appellants found that one of their barges had become unserviceable and wanted it dismantled, so that instead of being a dead loss its timber could in some other way be disposed of, for which purpose they gave the work to Mr. Reffell an independent contractor. To use the precise words of Cozens-Hardy, M.R., the work was *required*

by the appellants but not *undertaken* by them. The learned Master of the Rolls then went on (*ibid.*, at 908; 644): "If, however, a man who carries on the trade of a builder builds a house for himself, but contracts with another builder to do part of the work, I think such a case would fall within the section." I think it must be this sentence which has led the learned magistrate astray. But in my view a builder doing a building job for himself, though through a sub-contractor, can have no relation to shipping agents, about whom there is no evidence of either shipbuilding or shipbreaking being part of their regular business, handing out to a sub-contractor the breaking-up of one of their barges. As it is stated in *Willis*, at 193:

> "In deciding the question it is not permissible to consider whether there is a regular practice in the particular kind of trade to do such work, or whether other persons in the trade do that work for themselves. The question is to be solved by considering the business and work usually undertaken by the particular trader who is alleged to be the principal."

Reference is made there to the second of the cases on which the learned magistrate relied, namely, *Bush* v. *Hawes* (1). In this case a builder, about to put up a building with an iron roof, handed out the roof part of the work, as it was no part of his usual business to do such roof work. One of the sub-contractor's men was killed and his claim for compensation against the builder failed, the trial judge having found that it was no part of the latter's business to erect iron roofs.

As far as this appeal is concerned, I can see no evidence at all that it was ever part of the appellants' business as shipping agents to dismantle even their own barges. All that the evidence can at the most add up to is that on two occasions the appellants, finding one of the barges unserviceable, decided to have it dismantled and its timber used for other purposes. For this purpose, they handed out the two jobs at an all-in price to a sub-contractor named Reffell.

I have dealt at some length with the two cases of *Skates* v. *Jones & Co.* (3) and *Bush* v. *Hawes* (1) because they were apparently both relied on by the learned magistrate. In fairness to the respondent, I have of course considered several other well-known cases on this question, including that of *Dittmar* v. *Wilson, Sons & Co.* (2). Each case, as Cozens-Hardy, M.R. said here ([1909] 1 K.B. at 396; 100 L.T. at 213), must be decided on its own peculiar conditions. In my view *Dittmar's* case cannot help the respondent. In it coal merchants with depots in various parts of the world carried on