LLOYD'S LAW REPORTS

Editor:
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CASES JUDICIALLY CONSIDERED

STATUTES CONSIDERED

CONTENTS

NOTE: These Reports should be cited as "[1985] 2 Lloyd's Rep."

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

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HOUSE OF LORDS

Apr. 22 and 23, 1985

RHESA SHIPPING CO. S.A.
v.
HERBERT DAVID EDMUNDS

RHESA SHIPPING CO. S.A.
v.
FENTON INSURANCE CO. LTD.

(THE "POPI M")

Before Lord FRASER OF TULLYBELTON, Lord DIPLOCK, Lord ROSKILL, Lord BRANDON OF OAKBROOK and Lord TEMPLEMAN

Insurance (Marine) — Perils of the sea — Whether loss of vessel proximately caused by peril of the sea or by negligence of crew — Whether loss due to defective, deteriorated and decayed condition of vessel — Whether owners exercised due diligence.

The plaintiff owners of the vessel *Popi M* insured the hull and machinery of the vessel for $300,000 being 30 per cent. of the vessel's insured value of $1 million, with the first defendant, a representative Lloyd's underwriter. The policies were on the Lloyd's S.G. form providing cover against perils of the sea and incorporated the Institute Time Clauses, Hulls — F.P.A. which extended the cover to include loss of the vessel directly caused by the negligence of the master, officers or crew provided such loss had not resulted from want of due diligence by the owners.

The remaining 70 per cent. of the insured value of the vessel was placed with the second defendants (Fentons) and a number of other insurers. Fentons themselves were parties to three policies of insurance accounting together for 3.22 per cent. of the total. The policies incorporated the Institute Time Clauses, Hulls, without the exclusion of claims for particular average.

On Aug. 5, 1978, *Popi M* was sailing eastwards through the Mediterranean in calm seas and fair weather when shortly before 11 a.m. there was a large and sudden entry of water into her engine room through her shell plating on the port side. The engine room quickly filled with water and about mid-day the vessel's crew abandoned her. Water continued to fill the aftermost compartments of the vessel and at about 6 15 p.m. her bow reared in the sea and she sank stern first in deep water a few miles off the coast of Algeria.

The plaintiffs claimed under the time policies. They claimed that the loss of the vessel was proximately caused by a peril of the sea or alternatively by negligence of the crew.

The defendants denied that the loss was caused by a peril of the sea. They attributed the loss to the defective, deteriorated and decayed condition of the vessel. Alternatively if the loss was caused by the negligence of the crew, the defendants argued that the plaintiffs had failed to show that they exercised due diligence.

———*Held*, by Q.B. (Com. Ct.) (BINGHAM, J.), that (1) on the evidence the submission by the defendants that the loss was caused by wear and tear would be rejected;

(2) although the submission by the plaintiffs that the cause of water entering the vessel was contact by the vessel with a moving submerged object, i.e., a submarine, was inherently improbable, on the balance of probabilities that explanation would be accepted and since such a collision with a submarine fell within the policy cover against perils of the sea, the plaintiffs succeeded against each defendant for his proportionate share of the insured value of the vessel.

The defendants appealed.

———*Held*, by C.A. (Sir JOHN DONALDSON, M.R., O'CONNOR and MAY, L.JJ.), that on all the evidence that the learned Judge heard he ruled out the wear and tear explanation; there was no evidence that wear and tear could nevertheless still have been the explanation, but by some other mechanism which none of the experts had thought of or could even postulate as a possiblity; there was however, strong evidence that the entry of sea water into *Popi M* was fortuitous; the learned

Judge's conclusion that the loss of the vessel was due to a peril of the sea, i.e., the fortuitous entry of sea water, was clearly correct and the appeal would be dismissed.

On appeal by the defendants:

———*Held*, by H.L. (Lord FRASER OF TULLYBELTON, Lord DIPLOCK, Lord ROSKILL, Lord BRANDON OF OAKBROOK and Lord TEMPLEMAN), that (1) a Judge was not bound always to make a finding one way or the other with regard to the facts averred by the parties; here the learned Judge adopted an erroneous approach by regarding himself as compelled to choose between two theories both of which he regarded as extremely improbable or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible; he should have borne in mind and considered carefully in his judgment the third alternative namely that the evidence left him in doubt as to the cause of the aperture in the ship's hull and that in those circumstances the plaintiffs had failed to discharge the burden of proof which was on them (*see* p. 5, cols. 1 and 2; p. 6, cols. 1 and 2; p. 7, cols. 1 and 2);

———*La Compania Naviera Martiartu v. The Corporation of the Royal Exchange Assurance*, (1922) 13 Ll.L.Rep. 298, considered.

(2) the only inference which could justifiably be drawn from the primary facts found by the learned Judge was that the true reason for the loss of the vessel was in doubt; and neither the learned Judge nor the Court of Appeal were justified in drawing the inference that there had been a loss by perils of the sea whether in the form of collision with a submerged submarine or any other form; the appeal would be allowed (*see* p. 7, col. 2).

The following case was referred to in the judgment of Lord Brandon:

La Compania Naviera Martiartu v. The Corporation of the Royal Exchange Assurance, (C.A.) (1922) 13 Ll.L.Rep. 298; [1923] 1 K.B. 650.

This was an appeal by the defendants, Mr. Herbert David Edmunds and Fenton Insurance Co. Ltd., from the judgment of the Court of Appeal ([1984] 2 Lloyd's Rep. 555), dismissing their appeal from the judgment of Mr. Justice Bingham ([1983] 2 Lloyd's Rep. 235) given in favour of the plaintiffs, Rhesa Shipping Co. S.A. and holding inter alia that the loss of the vessel *Popi M* was caused by a peril of the sea and that the plaintiffs could claim under the insurance policies issued by the defendants.

Mr. Geoffrey Brice, Q.C. and Mr. M. N. Howard (instructed by Messrs. Hill Dickinson & Co.) for the defendants; Mr. Anthony Colman, Q.C., Mr. Jonathan Gilman and Mr. Alan Pardoe (instructed by Messrs. Horrocks & Co.) for the plaintiffs.

The further facts are stated in the judgment of Lord Brandon of Oakbrook.

Judgment was reserved.

Thursday, May 16, 1985

JUDGMENT

Lord FRASER OF TULLYBELTON: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. I agree with it, and for the reasons given by him I would allow this appeal.

Lord DIPLOCK: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. I agree with it and for the reasons which he gives I would allow the appeal.

Lord ROSKILL: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook. For the reasons which he gives in his speech I too would allow this appeal.

Lord BRANDON OF OAKBROOK: My Lords, this appeal arises out of two consolidated actions in the Commercial Court in which the owners of the vessel *Popi M* ("the ship") claim against hull underwriters for the alleged total loss of the ship by perils of the sea. The shipowners succeeded at first instance (Mr. Justice Bingham) and an appeal by underwriters to the Court of Appeal (Sir John Donaldson, M.R. and Lords Justices O'Connor and May) was dismissed. Underwriters now, with the leave of the Appeal Committee, bring a further appeal to your Lordships' House.

My Lords, the appeal does not raise any question of law, except possibly the question what is meant by proof of a case "on a balance of probabilities." Nor do the underwriters challenge before your Lordships any of the primary findings of fact made by Mr. Justice Bingham. The question, and the sole question, which your Lordships have to decide is whether, on the basis of those primary findings of fact, Mr. Justice Bingham and the Court of Appeal were justified in drawing the inference that the ship was, on a balance of probabilities, lost by perils of the sea.

In approaching this question it is important that two matters should be borne constantly in mind. The first matter is that the burden of

proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

The second matter is that it is always open to a Court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the shipowners have failed to discharge the burden of proof which lay upon them.

This second matter appears clearly from certain observations of Lord Justice Scrutton in *La Compania Naviera Martiartu v. The Corporation of The Royal Exchange Assurance*, (1922) 13 Ll.L.Rep. 298; [1923] 1 K.B. 650. That was a case in which the Court of Appeal, reversing the trial Judge, found that the ship in respect of which her owners had claimed for a total loss by perils of the sea, had in fact been scuttled with the connivance of those owners. Having made that finding, Lord Justice Scrutton went on to say, at pp. 304 and 657:

> This view renders it unnecessary finally to discuss the burden of proof, but in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship . . . and an examination of all the evidence leaves the Court doubtful what is the real cause of the loss, the assured has failed to prove his case.

While these observations of Lord Justice Scrutton were, having regard to his affirmative finding of scuttling, obiter dicta only, I am of opinion that they correctly state the principle of law applicable. Indeed Counsel for the shipowners did not contend otherwise.

My Lords, the relevant findings of fact, made by Mr. Justice Bingham after a hearing which occupied 12 days, were as follows:

(1) The ship was an old one build in 1952. By 1976 she had become very seriously run down. Since 1976 she had been repaired in an unmethodical way, but the ship as a whole, and her shell plating in particular, were still in a generally wasted condition.

(2) The ship was constructed with the bridge amidships, three holds (nos. 1, 2 and 3) forward of the bridge and two further holds (nos. 4 and 5) abaft the bridge.

(3) The engine room occupied the space between the three forward and the two after holds. A shaft tunnel ran after from the engine room, in which there were contained not only the propeller shaft but also the bilge lines serving the two after holds.

(4) There was a watertight door between the engine room and the shaft tunnel, which was normally left open, but which, if securely closed, would prevent water running from the engine room into the shaft tunnel or vice versa.

(5) The bilge lines serving the two after holds were fitted with non-return valves which, when in position, allowed pumps to draw water from the bilges of those two holds, but prevented water from running the other way into them.

(6) The buoyancy of the ship's various compartments was such that, if the engine room spaces alone became flooded, the ship would remain afloat. But, if the after holds became flooded as well, the ship would sink.

(7) On July 29, 1978 the ship left Rouen laden with a full cargo of sugar in bags and bound for Hodeidah in the Yemen. Her drafts on leaving were such as to show that she was slightly, but in no way excessively, hogged.

(8) During the voyage prior to her sinking the ship experienced good weather and light seas, except for a few days after passing Ushant and entering the Bay of Biscay. During those few days she encountered north-north-westerly winds up to force 7, with correspondingly high seas and rolling of the ship. After rounding Cape Finisterre on Aug. 1, 1978, until her sinking she navigated continuously in light winds and calm seas.

(9) The events which led to the sinking of the ship began in the engine room at about 10 50 a.m. on Aug. 5, 1978. The ship was then in the Mediterranean opposite the coast of Algeria. At or about that time there was a loud noise with some accompanying vibration and large quantities of sea water gushed into the engine room through an aperture in the shell plating on the port side.

(10) The main part of the aperture was vertical, extending from below the plates forming the floor of the engine room and running about 2 metres up the ship's side. There was also a smaller horizontal aperture.

(11) Upon the entry of water in this way the pumps were put on to the engine room bilges, but could not cope with the inflow. One of the third engineers, who was in the engine room at

that time, was further ordered to close the watertight door between the engine room and the shaft tunnel, which he set about doing.

(12) The entry of water was not, in the event, confined to the engine room, but extended also to the two after holds. There were two reasons for this. The first reason was that the third engineer did not succeed in closing completely the watertight door between the engine room and the shaft tunnel. The second reason was that the non-return valves in the bilge lines serving the two after holds had earlier been removed for maintenance, and, because of interruption by the more urgent work, had not as yet been replaced.

(13) In this situation the general alarm was sounded and the crew were ordered to take their places by the lifeboats. At about 11 40 a.m. the lifeboats were lowered and a S.O.S. signal was sent out. At about noon an order to abandon ship was given.

(14) Upon that order being given the crew went into the lifeboats and were later picked up by a British tanker which had come on the scene in response to the S.O.S. signal. Those on board the tanker made various efforts to save the ship, all of which failed. At about 6 15 p.m. the ship sank stern first in deep water.

My Lords, with regard to the cause of the ship's loss, the shipowners relied at one time on negligence of the crew (which was also covered by the relevant policies) as an alternative to perils of the sea. Subsequently, however, the shipowners accepted that, even if the loss had been contributed to in some way by negligence of the crew, such negligence could not, in all the circumstances of the case, be regarded as the proximate cause of the loss. The shipowners' case accordingly rested, and rested only, on loss by perils of the sea.

It is important to observe that this was not a case of a ship being lost with all her crew in circumstances when the immediate cause of the entry into her of sufficient water to make her sink is unexplained. On the contrary Mr. Justice Bingham was able to make clear and positive findings with regard, firstly to the way in which water entered the ship, namely, through a large aperture in the shell plating on her port side in way of the engine room; and, secondly, with regard to the manner in which the water, having once entered the engine room, later flooded the two after holds as well, making it inevitable that the ship should sink. In the state of knowledge which existed it is not surprising to find that the shipowners were strenuously pressed, both at the pleading stage and during the trial before Mr. Justice Bingham to specify the perils of the sea on what they relied as having been the proximate cause of creating the aperture in the ship's shell plating which led to her loss.

The shipowners relied on their pleadings, and sought to rely at the trial, on the principle that, if a seaworthy ship sinks in unexplained circumstances in good weather and calm seas, there is a rebuttable presumption that she was lost by perils of the sea. The shipowners were, however, unable to rely on this principle for two reasons. The first reason was that Mr. Justice Bingham felt unable to make a finding one way or the other on the question whether the ship was seaworthy. The result is that all possible explanations of the ship's loss have to be approached on the basis that it is as likely that she was unseaworthy as that she was seaworthy. The second reason was that, as I have already indicated, the loss did not occur in unexplained circumstances : on the contrary, the reasons why she sank, apart from the cause of the fatal aperture itself, were as clear as they could possibly have been.

The shipowners felt bound to concede that two causes of the aperture, which they canvassed at one time, could be eliminated as impossible. The first of these causes was collision with a submerged rock: this could be eliminated because the ship was navigating in a much-used sea lane, and the relevant charts showed deep water all round without any rocks. The second cause was collision with a floating object: this could be eliminated because such an object would have been washed clear of the ship's side in way of the engine room by the bow wave which the ship, proceeding at her full speed of about 11½ knots, would have been creating.

The elimination of these two possibilities left the shipowners with only one remaining possibility, namely, a collision with a submerged object of some kind. In this connection an unarmed torpedo was mentioned, but very sensibly not treated as a serious possibility. That left, as the only remaining possibility for consideration, a collision with a submerged submarine, travelling in the same direction as the ship and at about the same speed, and that was the event that Mr. Justice Bingham, by processes of reasoning which I shall examine shortly, ultimately found to have been the proximate cause of the loss.

My Lords, Counsel for the shipowners contended before your Lordships that his case had never been tied irrevocably to a loss by any specified peril of the sea: in particular it had never been tied to loss by collision with a submarine. It seems to me, however, that once it was shown that the water which sank the ship had entered through an aperture in her shell plating, the burden of proof was on the

shipowners to show what peril of the sea, if any, could be shown, on a balance of probabilities, to have created that aperture. The shipowners could not, in my view, rely on a ritual incantation of the generic expression "perils of the sea", but were bound, if they were to discharge successfully the burden of proof to which I have referred, to condescend to particularity in the matter.

I come back now to the processes of reasoning by which Mr. Justice Bingham found that collision with a submarine was, on a balance of probabilities, the proximate cause of the ship's loss. In order to make these processes clear it is necessary to have in mind a matter which I mentioned earlier that, although underwriters sued by shipowners for the total loss of a ship by perils of the sea are not under any obligation to plead in their defence, or to seek to prove at the trial, some alternative cause of loss against which the ship was not insured, they are perfectly entitled to do so if they wish. In the present case underwriters did exercise their right to plead and try to prove an alternative cause of loss, the cause so relied on being prolonged wear and tear of the ship's hull over many years, resulting in her shell plating opening up under the ordinary action of wind and wave and without collision with any external object.

My Lords, the result of underwriters putting forward this alternative cause of the ship's loss was to lead Mr. Justice Bingham into approaching the decision which he had to make as being a simple choice between the cause of loss relied on by the shipowners and the alternative cause of loss put forward by underwriters. Although he had in an earlier part of his judgment referred expressly to the observations with regard to burden of proof made by Lord Justice Scrutton in *La Compania Martiartu v. The Corporation of the Royal Exchange Assurance*, (1922) 13 Ll.L.Rep. 298; [1923] 1 K.B. 650 at pp. 304 and 657, which I quoted earlier, he does not seem, when he came later in his judgment to the point of actual decision, to have given any consideration at all to the third possible solution to the case contemplated in those observations. That third possible solution would have been to say that he was left in doubt as to the proximate cause of the ship's loss, and that, in those circumstances, the shipowners' actions should be dismissed on the simple ground that they had not discharged the burden of proof which lay upon them.

Mr. Justice Bingham had before him a mass of expert evidence relating to the possibilities that the proximate cause of the ship's loss was a collision with a submerged submarine on the one hand or wear and tear of the shell plating on the other. Dealing with the submarine theory first, he stated seven cogent considerations which militated strongly against that theory. I do not propose to set out, or even try to summarise, those seven considerations. I think it helpful, however, to state the first consideration, which I regard as having a certain convincing simplicity about it, namely, that no submarine was seen before or after the casualty.

Having set out the seven cogent considerations which militated strongly against the submarine theory to which I have just referred, Mr. Justice Bingham [1983] 2 Lloyd's Rep. 235 at p. 246 expressed his conclusion about the theory in this way:

> I think it would be going too far to describe a collision between the vessel and a submarine, rupturing the shell plating of the vessel, as impossible. But it seems to me to be so improbable that, if I am to accept the plaintiffs' invitation to treat it as the likely cause of the casualty, I (like the plaintiffs' experts) must be satisfied that any other explanation of the casualty can be effectively ruled out.

Mr. Justice Bingham then went on to examine the alternative wear and tear theory put forward by underwriters. He went through the essential features of the complex expert evidence which had been adduced before him, and, having done so, expressed his conclusion [1983] 2 Lloyd's Rep. 235 at p. 248, as follows:

> They [the underwriters] are not, of course obliged to prove that explanation even on a balance of probabilities, but unless I am satisfied that some degree of probability attaches to it, I am left with no explanation but the owners'.

Then, after a further reference to the expert evidence, he continued:

> In the result, I find myself drawn to conclude that the defendants' wear and tear explanation must on the evidence be effectively ruled out. That leaves me with the choice between the owners' submarine hypothesis and the possibility that the casualty occurred as a result of wear and tear but by a mechanism which remains in doubt.

The passages which I have quoted from Mr. Justice Bingham's judgment amply support the observations about his approach to the case which I made earlier. These observations were to the effect that he regarded himself as compelled to make a choice between the shipowners' submarine theory on the one hand and underwriters' wear and tear theory on the other, and he failed to keep in mind that a third