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HOUSE OF LORDS

Jan. 28, 29 and 30, Feb. 2, 1976

THE "ESCHERSHEIM"

Before Lord DIPLOCK,
Lord SIMON OF GLAISDALE,
Lord KILBRANDON,
Lord SALMON and
Lord EDMUND-DAVIES

Salvage — Admiralty actions in rem — Salvage operation off coast of Spain following collision between Sudanese ship and West German ship — Sudanese ship beached on Spanish coast becoming total loss and causing subsequent pollution — Action in Spain pending against owners of Sudanese ship and salvors — Whether claims within jurisdiction of Admiralty Court — Whether by terms of Lloyd's salvage agreement claims should be decided by arbitration — Whether Court should exercise its discretion and stay proceedings in England — Arbitration Act, 1950, s. 4 (1) — Administration of Justice Act, 1956, s. 1 (1) (d), (e), (g), (h), (j), s. 3 (4).

A collision took place off the coast of Spain between the Sudanese ship *Erkowit* and the West German ship *Dortmund* as a result of which the engine room of the *Erkowit* was holed and became flooded. The West German tug *Rotesand* went to her aid and on her arrival a salvage agreement on Lloyd's Open Form was signed on board the *Rotesand* by the master of the *Erkowit* and the agents of the salvors. The *Rotesand* then took the *Erkowit* in tow and later beached her in a sinking condition off La Corunna.

The salvors tried to salve the *Erkowit,* but she became a total loss, and most of her cargo and the personal effects of her master and crew were lost or damaged. Part of the cargo consisting of insecticide in drums was washed off her deck or out of her holds and caused pollution of the sea along the Spanish coast with consequent interference with fishing in the area. As a result of this pollution, including further pollution caused by fuel oil that was said to have escaped from the *Erkowit,* the Spanish Government on behalf of numerous Spanish fishermen brought an action in Spain against both the owners of the *Erkowit* and the salvors for damages. This action was still pending when four actions in rem were started in England, two for damages against the owners of the *Dortmund* by the owners and cargo-owners of the *Erkowit,* and two by the same plaintiffs against the salvors alleging negligent salvage. The owners of the *Erkowit* claimed damages for breach of contract and negligence in respect of the loss of their ship and potential liability to the Spanish Government for pollution of the sea; the master and crew and the cargo-owners likewise claimed similar damages for loss of their personal effects and the cargo, respectively.

The salvors claimed firstly that these two latter actions were not within the Admiralty jurisdiction of the Court pursuant to s. 1 (1) of the Administration of Justice Act, 1956, should not have been brought in rem, and thus should be struck out; secondly, that the claims of the owners of the *Erkowit* and the owners of the cargo were claims which, by the terms of the Lloyd's salvage agreement under which the salvage operations were carried out, should be decided by arbitration, and the *Erkowit's* action except in so far as it related to the claim of the master and crew, and the cargo's action in its entirety, should be stayed.

———*Held,* by Q.B. (Adm. Ct.) (BRANDON, J.), ([1974] 2 Lloyd's Rep. 188), (A) (1) on the jurisdiction issue, all the paragraphs of s. 1 (1) of the Administration of Justice Act, 1956, should be construed in the usual way, giving their words their ordinary and natural meaning in the context in which they appeared, bearing in mind that the 1956 Act was passed for the purpose, inter alia, of giving effect to the adherence of the United Kingdom to the "International Convention Relating to the Arrest of Seagoing Ships" made in Brussels in 1952, and there was a presumption that the legislature, in giving effect to the Convention, intended to fulfil the international obligations of the United Kingdom rather than depart from them;

(i) although the alleged negligent beaching of the *Erkowit* was carried out by the tug *Rotesand* and was alleged to have been caused by, or been consequential on, the beaching, that did not make the tug the physical instrument of the damage in accordance with the principle applied in *Currie v. M'Knight,* [1897] A.C. 97; for those reasons none of the claims came within par. (*d*) of s. 1 (1);

(ii) under s. 1 (1) (*e*), the liability for pollution was, on the case put forward, a loss consequential on damage received by the *Erkowit,* and the claim relating to it was a claim for such damage within the meaning of par. (*e*), and the expression " claim for damage " in par. (*e*) should be given the same meaning as if the words " arising out of " had been used instead of the word " for "; thus the second part of the claim of the owners of the *Erkowit,* as well as the first part, came within par. (*e*), but not the claim of the master and crew for their lost effects, or that of the cargo-owners for the loss of or damage to cargo, for claims under par. (*e*) referred only to claims by the owners of, or other persons interested in, a ship which received damage, and not to claims by other persons consequential upon, or connected with, such damage;

(iii) s. 1 (1) (*g*) should be construed as covering passengers' baggage only, and not as extending to the belongings of those who were on board the ship, not as passengers or travellers but as employees of the shipowners in order to man and operate her;

(iv) as to par. (*h*), in deciding whether a particular agreement was an agreement relating to the use of a ship or not, the Court should look at the substance of the matter, and in the present case under the agreement made, the tug *Rotesand* was engaged to salve the *Erkowit* and her cargo, and as it was an agreement which was primarily one by which the *Rotesand* was used to tow the *Erkowit* to a place of safety, it was an agreement for the use of a ship according to the ordinary and natural meaning of that expression; for those reasons, the claims of both the owners of the *Erkowit* and the owners of her cargo came within s. 1 (1) (*h*);

(v) none of the claims raised in the actions for negligent salvage came within par (*j*) for the words " any claim in the nature of a salvage " were apt to cover only claims by salvors for salvage remuneration; accordingly,

(2) the whole of the claim of the owners of the *Erkowit* in the ship's action for negligent salvage though not within s. 1 (1) (*d*) or (*j*), was within s. 1 (1) (*e*) and (*h*);

(3) the claim of the master and crew in the same action was not within s. 1 (1) (*d*), (*e*), or (*g*);

(4) the claim of the owners of the *Erkowit's* cargo in the cargo action for negligent salvage though not within s. 1 (1) (*d*), (*e*) or (*j*) was within both s. 1 (1) (*g*) and (*h*); it followed that the salvors' application to strike out succeeded in relation to claim (2), but failed in relation to claims (1) and (3);

(B) assuming that the claims of the owners of the *Erkowit* and her cargo-owners could not be struck out, and should be stayed pursuant to s. 4 (1) of the Arbitration Act, 1950, two questions arose (a) whether the claims concerned were claims which, by the terms of the Lloyd's salvage agreement, were referred to arbitration, and (b) if so, should the Court in its discretion grant or refuse a stay; as to (a), cl. 4 of the salvage agreement and succeeding clauses were geared to claims by contractors for salvage remuneration and did not fit claims by owners of salved property for negligent salvage, but that fact did not cut down the effect of the perfectly plain words of cl. 1 that the expression " in the same way " must be interpreted as meaning " in the same way if and so far as applicable ", and that, where and to the extent that the mode of dealing with claims by contractors prescribed in cl. 4 and succeeding clauses was not applicable, the residual provisions towards the end of cl. 7, applying the ordinary English law of arbitration, should be regarded as governing the procedure to be followed; for those reasons the Court accepted the case for the salvors that the claims of the owners of the *Erkowit* and the owners of her cargo were claims which, by the terms of the salvage agreement, were referred to arbitration; as to (b) on multiplicity of proceedings, the fact that there had to be proceedings both in Spain and England did not seem to be any reason for duplicating proceedings in England—the decisive factor was the need to avoid duplication of proceedings in England with all the consequences with regard to delay, additional costs and the risk of conflicting decisions which such duplication would involve; accordingly, the Court would exercise its discretion by refusing a stay in either action.

On appeal by the defendants:

———*Held,* by C.A. (CAIRNS and SCARMAN, L.JJ., and SIR GORDON WILLMER) ([1976] 1 Lloyd's Rep. 81), that (1) the Court had jurisdiction to entertain the claims of the owners of the *Erkowit* and those of the owners of the cargo under s. 1 (1) (*d*) for " damage done by a ship " meant " damage done by those in charge of a ship, with the ship as a noxious instrument ", and in the present case the damage had been caused by the *Rotesand* negligently beaching the *Erkowit* in an exposed position;

(2) the Court also had jurisdiction under s. 1 (1) (*h*), for the salvage agreement constituted an " agreement for the use of a ship ";

(3) there were no grounds for interfering with the Judge's decision that the application

for a stay should be refused for he had exercised his discretion in the proper way.

Appeal dismissed.

On appeal by the defendants:

———*Held,* by H. L. (Lord DIPLOCK, Lord SIMON OF GLAISDALE, Lord KILBRANDON, Lord SALMON and Lord EDMUND-DAVIES), that (1) Part 1 of the Administration of Justice Act, 1956, dealt with the jurisdiction of the High Court and there was no reason why the words " an agreement relating to the use or hire of a ship " should not be given their ordinary wide meaning which would include the salvage agreement (*see* p. 8, col. 1);

———*R. v. Judge of City of London Court,* [1892] 1 Q.B. 273, distinguished.

(2) the claims of both shipowners and cargo-owners fell within par. (*h*) in that they were claims in connection with *Rotesand* and were enforceable under s. 3 (4) by an action in rem against *Rotesand* or any of her sister ships (*see* p. 8, col. 1);

(3) the intervening failure of the defendants to take steps to avert the risk of damage caused to *Erkowit* by beaching her, did not prevent *Rotesand* from remaining the actual instrument by which the damage subsequent to the beaching was done and the shipowners' and cargo-owners' claims fell within par. (*d*) (*see* p. 8, col. 2);

(4) the arrest of *Rotesand* as security for the cargo-owners' claim was not authorized by par. (*g*) in that par. (*g*) only permitted the arrest of a ship in which the goods, which had been lost or damaged, were carried in an action in rem by the cargo-owners against the owners of the carrying ship (*see* p. 9, col. 1);

(5) the description " any claim for any damage received by a ship " in par. (*e*) described a claim arising " in connection with " a ship that received the damage and as the owners of that ship would be the plaintiffs they could not invoke the Admiralty jurisdiction by an action in rem against their own ship (*see* p. 9, cols. 1 and 2).

Appeal dismissed.

The following cases were referred to in Lord Diplock's judgment:

Alina, The, (1880) 5 Ex.D. 227;

Currie v. M'Knight, (H.L. (Sc)) [1897] A.C. 97;

Post Office v. Estuary Radio Ltd., (C.A.) [1968] 2 Q.B. 740;

R. v. Judge of City of London Court, [1892] 1 Q.B. 273;

Salomon v. Customs and Excise Commissioners, (C.A.) [1966] 2 Lloyd's Rep. 460; [1967] 2 Q.B. 116;

Vera Cruz, The, (C.A.) (1884) P.D. 96.

This was an appeal by the defendants, Unterweser Reederei, the owners of the *Rotesand,* which was a sister ship of *Eschersheim,* from the decision of the Court of Appeal ([1976] 1 Lloyd's Rep. 81) which had dismissed the appeal from the decision of Mr. Justice Brandon ([1974] 2 Lloyd's Rep. 188) refusing to stay an action by the plaintiffs, the owners of the Sudanese vessel *Erkowit,* and the owners of cargo on board her, in respect of her loss after prolonged salvage operations following a collision between *Erkowit* and *Dortmund* on Mar. 30, 1970.

The appellants submitted that the appeals should be allowed for the following among other reasons:

" 1. The Respondents' claims are not claims for ' damage done by a ship ' within the meaning of section 1(1) (d) of the Act of 1956.

2. Alternatively the Respondent Shipowners' claims for indemnities are not claims for ' damage done by a ship '.

3. The Respondent Shipowners' claims for indemnities are not claims for ' damage received by a ship ' within the meaning of section 1(1) (e) of the Act of 1956.

4. The Respondent Cargo Owners' claims are not claims for ' damage received by a ship '.

5. The Respondent shipowners' claims are not claims for ' loss of or damage to goods carried in a ship ' within the meaning of section 1(1) (g) of the Act of 1956.

6. Insofar as the Respondents' claims are within section 1(1) (e) and/or (g), they are not claims in connection with the ' ROTESAND ', and the Appellants were not the charterers of or in possession or control of the ' ERKOWIT ', so that the Respondents' claims are not enforceable by actions in rem against sister ships of the ' ROTESAND '.

7. To hold that section 3(4) of the Act covered claims under section 1(1) (e) or (g) in this case would be to construe the Act in such a way that the United Kingdom would be in breach of its obligations under the Convention, and would be objectionable as opening the door to an indefinite category of claims not covered by the Convention.

8. The Respondents' claims are not claims arising out of 'any agreement relating to the use or hire of a ship' within the meaning of section 1(1) (h) of the Act of 1956.

9. Section 1(1) (h) covers only agreements which are directly for the use or hire of a specific ship and not more general agreements in the performance of which a ship or ships may have to be used but which are by no means confined to the use of a ship or ships.

10. Mr. Justice Brandon and the Court of Appeal paid insufficient regard or gave insufficient weight to the immediate and historical context of the words in section 1(1) (h).

11. The construction of this paragraph adopted by the Courts below would lead to the inclusion of claims in an action in rem which are not claims 'in connection with the ship' used for the performance of part of the agreement on any natural construction of those words.

12. The Respondents' claims are not claims in the nature of salvage within the meaning of section 1(1) (j) of the Act of 1956.

13. There is no other provision or enactment conferring Admiralty jurisdiction in respect of the Respondents' claims.

14. If part of the Respondents' claims are exercisable in rem, the Respondents are not entitled to pursue other parts of their claims in personam.

15. The decisions of the Court of Appeal and of Mr. Justice Brandon were in part wrong".

The respondents contended that the judgment of the Court of Appeal was right in refusing to strike out their claim, and that it should be affirmed, for the following among other reasons:

"(i) the Respondents are entitled to invoke the Admiralty jurisdiction because their claim and the whole of their claim lies within any one of paragraphs (d), (e) and (h) of Section 1(1) of the 1956 Act;

(ii) insofar as it may be necessary to rely upon other paragraphs to invoke the Admiralty jurisdiction, the Respondents submit that their claim and the whole of their claim also lies within paragraphs (g) and (j) of Section 1(1) of the 1956 Act, contrary to the opinions of the members of the Court of Appeal;

(iii) the Respondents are entitled to institute proceedings *in rem* against the Appellants' ship 'JADE' pursuant to Section 3(4) of the 1956 Act whichever of the paragraphs relied upon in Section 1(1) of the 1956 Act is apt to cover their claim".

Mr. John Willmer, Q.C., and Mr. Nicholas A. Phillips (instructed by Messrs. Richards, Butler & Co.) for the appellant defendant; Mr. Michael Thomas, Q.C., and Mr. Anthony Clarke (instructed by Messrs. Ince & Co.) for the respondent plaintiffs, the owners of *Erkowit*; Mr. David Steel (instructed by Messrs. Walton & Co.) for the respondent plaintiff cargo-owners.

The facts are stated in the judgment of Lord Diplock.

Judgment was reserved.

Wednesday, Mar. 31, 1976

JUDGMENT

Lord DIPLOCK: My Lords, in these conjoined appeals the owners of the ship *Jade* seek to set aside writs issued in actions in rem against that vessel, on the ground that by reason of their subject-matter the claims in the actions lie outside that part of the jurisdiction of the High Court that may be invoked by an action in rem.

There are two actions: in one of them, the owners of the ship *Erkowit* ("the shipowners") are the plaintiffs; in the other, the owners of the cargo on the *Erkowit* ("the cargo-owners"). The facts that are relevant to the question of jurisdiction are set out in the judgment of Mr. Justice Brandon and call for no more than a brief summary here.

On Oct. 30, 1970, the *Erkowit*, a vessel on the Sudanese registry, was involved in a collision with a German vessel and was badly holed. This happened in the Bay of Biscay some 50 miles from La Corunna. Some three hours later in response to a summons a salvage tug the *Rotesand* arrived on the scene from La Corunna and a salvage agreement in Lloyd's open form ("the salvage agreement") was entered into by the master of the *Erkowit* on behalf of the shipowners and the cargo-owners and by the tugmaster on behalf of the appellants in these appeals ("the salvors") who are professional salvors. The salvage agreement was signed on the *Rotesand*, the master and crew of the *Erkowit* having by this time