LLOYD'S
LAW REPORTS

Editor:
Miss M. M. D'SOUZA, LL.B.
of the Middle Temple, Barrister

1984
Volume 2

Printed by Holmes and Sons (Printers) Ltd., 10 High Street, Andover. Tel. 0264 3456

CASES JUDICIALLY CONSIDERED

CASES JUDICIALLY CONSIDERED—*continued*

STATUTES CONSIDERED

CONTENTS

NOTE: These Reports should be cited as "[1984] 2 Lloyd's Rep."

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

LLOYD'S LAW REPORTS

Editor: Miss M. M. D'SOUZA, LL.B., Barrister

[1984] VOL. 2] The "Marion" PART 1

HOUSE OF LORDS

Apr. 2, 3, 4, 5 and 9, 1984

THE "MARION"

Before Lord DIPLOCK, Lord SCARMAN, Lord ROSKILL, Lord BRANDON of OAKBROOK and Lord BRIGHTMAN

Admiralty practice — Limitation of liability — Vessel anchored off Hartlepool — Anchor fouled oil pipeline — Master not using up-to-date charts — Whether plaintiffs had established that incident occurred without their actual fault or privity — Whether plaintiffs entitled to limit their liability — Merchant Shipping Act, 1894, s. 503 — Merchant Shipping (Liability of Shipowners and Others) Act, 1958, s. 2 (1).

On Mar. 14, 1977, the plaintiffs' vessel *Marion* (which was managed by F.M.S.L.) came to anchor in a position about 2.7 miles east of The Heugh which was about one mile from the Tees Fairway buoy.

On Mar. 18, *Marion* attempted to weigh her anchor. She was however unable to do so because her anchor had fouled an oil pipeline which ran from the Ekofisk Field through Tees Bay to Teesside. The pipeline was severely damaged by *Marion's* anchor.

The owners of the pipeline and other companies who contended that they had suffered loss by reason of the damage to the pipeline claimed damages exceeding U.S. $25,000,000.

The plaintiffs claimed a decree limiting the amount of their liability in damages in respect of this incident to $982,292.06. The plaintiffs admitted that the damage was caused partly by the negligence of one of their servants in that the reason the *Marion* came to anchor so close to the pipeline was that her master (Captain Potenza) was unaware of its existence because he was navigating with the aid of a chart which had been published in 1953 and printed with small corrections up to 1959 but not corrected up-to-date. If he had looked at an up-to-date chart of the area he would have seen marked thereon the position of the pipeline and such a chart was available in the *Marion's* chartroom.

The sole issue between the parties was whether the plaintiffs should be regarded as having established that the incident occurred without their actual fault or privity within the meaning of those words in s. 503 of the Merchant Shipping Act, 1894, as amended by the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, s. 2 (1) and which provided inter alia:

> The owners of a ship British or foreign, shall not where . . . any of the following occurrences take place without their actual fault or privity . . . (d) where any loss or damage is caused to any property . . . or any rights are infringed through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship . . . or through any other act or omission of any person on board the ship . . . be liable in damages beyond the following amounts . . . (ii) in respect of such loss damage or infringement as is mentioned in paragraph . . . (d) of this sub-section . . . an aggregate amount not exceeding the amount equivalent to 1000 gold francs for each ton of their ship's tonnage.

The questions for decision of the Court were: (1) What action should have been taken by F.M.S.L. as reasonably prudent ship managers to ensure that *Marion* was supplied with up-to-date charts? (2) if some further action should have been taken had the plaintiff owners established a sufficient probability that even if it was not, the omission had no bearing upon the casualty? (3) if the answer to the first two questions showed that there was fault on the part of F.M.S.L., was that fault a fault for which that company was liable upon the footing respondeat superior or was it the fault of somebody for whom the company was liable because his action was the very action of the company itself?

———*Held*, by Q.B. (Adm. Ct.) SHEEN, J.), that on the facts and the evidence the plaintiffs were entitled to a decree of limitation.

On appeal by the defendants:

———*Held*, by C.A. (Sir JOHN DONALDSON, M.R., DUNN and PURCHAS, L.JJ.), that the plaintiffs had not established that the casualty was caused without their actual fault or privity and the appeal would be allowed.

The plaintiffs appealed.

———*Held*, by H.L. (Lord DIPLOCK, Lord SCARMAN, Lord ROSKILL, Lord BRANDON of OAKBROOK and Lord BRIGHTMAN), that (1) it was the duty of the managing director to ensure that an adequate degree of supervision of the master of *Marion*, so far as the obtaining and keeping of up-to-date charts were concerned, was exercised either by himself or by his subordinate managerial staff each of whom was fully qualified to exercise such supervision; in so far as the managing director failed to perform his duty in this respect such failure constituted in law actual fault of the plaintiffs (*see* p. 7, col. 1);

(2) the managing director, during the prolonged period when he was absent in Greece, was in frequent contact with F.M.S.L. and there would have been no practical difficulty about his being informed of the Liberian report and its contents; it was an inescapable inference from the fact that he was not told of the report and its contents, that the instructions he left behind him when he went to Greece, with regard to the matters about which he required that he should be kept informed were insufficiently clear, or insufficiently precise, or insufficiently comprehensive; it was therefore at least in part the managing director's own fault that he was not told of the report and, in so far as it was his own fault, it constituted, as a matter of law, actual fault of the plaintiffs (*see* p. 8, col. 2);

(3) there were therefore two actual faults of the plaintiffs: first in the managing director's failure to have a proper system of supervision in relation to charts and secondly in failing, when he departed to Greece to give his subordinate managerial staff instructions with regard to the matters about which he required to be kept informed which were sufficiently clear precise and comprehensive; the plaintiffs could not establish that these two faults did not contribute to the damage of the pipeline; and the appeal would be dismissed (*see* p. 8, col. 2; p. 9, col. 1);

———*The Norman*, [1960] 1 Lloyd's Rep. 1; *The Lady Gwendolen*, [1965] 1 Lloyd's Rep. 335 and *The England*, [1973] 1 Lloyd's Rep. 373, approved and applied.

The following cases were referred to in the judgment of Lord Brandon:

England, The, (C.A.) [1973] 1 Lloyd's Rep. 373;

Lady Gwendolen, The (C.A.) [1965] 1 Lloyd's Rep. 335; [1965] P. 294;

Norman, The (H.L.) [1960] 1 Lloyd's Rep. 1.

This was an appeal by the plaintiffs, Grand Champion Tankers Ltd. from the decision of the Court of Appeal [1983] 2 Lloyd's Rep. 156 allowing the appeal of the defendants, Norpipe A/S, the owners of the pipeline and other companies interested in the pipeline from the decision of Mr. Justice Sheen ([1982] 2 Lloyd's Rep. 52) given in favour of the plaintiffs and holding that they were entitled to limit their liability in respect of damage caused to the pipeline by the plaintiffs' vessel *Marion*.

Mr. Anthony Clarke, Q.C. and Mr. Jeremy Russell (instructed by Messrs. Clyde & Co.) for the plaintiffs; Mr. A. G. S. Pollock, Q.C. and Mr. David Steel (instructed by Messrs. Coward Chance) for the defendants.

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

Judgment was reserved.

Thursday, May 17, 1984

JUDGMENT

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 dismiss this appeal.

Lord SCARMAN: My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives, I would dismiss the appeal with costs.

Lord ROSKILL: My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Brandon of Oakbrook. I agree with it and for the reasons which he gives I would dismiss this appeal.

Lord BRANDON OF OAKBROOK: My Lords, on Mar. 12, 1977, the Liberian tanker *Marion*, owned by the appellants, left Hamburg for Teesside in order to load a cargo there. On Mar. 14, 1977, *Marion* arrived near the entrance to the Teesside Fairway, but, because there was no loading berth immediately available for her, she was obliged to come to anchor and wait. The place where her master, Captain Potenza, chose to anchor her was off Hartlepool about 2.7 miles east of The Heugh and about one mile from the Tees Fairway buoy. Four days later, on Mar. 18, 1977, a loading berth having become available for her, *Marion* tried to weigh anchor so as to enable her to proceed inward to that berth. Her efforts to do so, however, failed because her

anchor had fouled a pipeline on the seabed which carried oil from the Ekofisk Field through Tees Bay to Teesside. As a result of the anchor of *Marion* so fouling the pipeline, and of her efforts to haul it up after that had happened, the pipeline was severely damaged.

On Sept. 27, 1977, the 13 named respondents, all of whom are oil companies of one kind or another, brought an action against the appellants in the Admiralty Court in which they alleged that the fouling of the pipeline by the anchor of *Marion*, and the damage to the pipeline resulting from such fouling, had been caused by the negligence of the servants or agents of the appellants on board that ship. The amount of the damages claimed in the action exceeded U.S. $25,000,000.

On July 23, 1981, the appellants formally admitted liability for the fouling of the pipeline and the consequential damage done to it. On the following day, July 24, 1981, the appellants began an action of their own in the Admiralty Court against the 13 named respondents and all other persons having claims in respect of the damage to the pipeline, in which they claimed a decree that they were entitled to have their total liability in respect of such damage limited to the sum of £982,292.06, pursuant to the relevant provisions of the Merchant Shipping Acts, 1894-1979.

The limitation action was tried by Mr. Justice Sheen over a period of 32 days in January, February and March 1982. On Mar. 30, 1982 the learned Judge, in a reserved judgment, decided the action in favour of the appellants and granted them the decree of limitation of liability which they sought (*see* [1982] 2 Lloyd's Rep. 52).

By notice of appeal dated May 10, 1982, the 13 named respondents appealed to the Court of Appeal against the decision of Mr. Justice Sheen. The appeal was heard by a division of the Court of Appeal consisting of Sir John Donaldson, M.R. and Lords Justices Dunn and Purchas over a period of seven days in April and May, 1983. On May 20, 1983, the Court of Appeal, in reserved judgments, unanimously allowed the appeal, ordered that the appellants be refused a decree of limitation of liability, and refused them leave to appeal to your Lordships' House (*see* [1983] 2 Lloyd's Rep. 156). Leave for the appellants to do so was later given by the Appeal Committee.

My Lords, the issues between the parties have fortunately been considerably narrowed since the lengthy hearing of the action before Mr. Justice Sheen. The following matters of fact and law, or of mixed fact and law, were common ground before your Lordships. Firstly, that, if the appellants are entitled to limit their liability, the sum of £982,292.06 referred to earlier is the correct amount of their limited liability. Secondly, that the immediate cause of the damage to the pipeline was the negligence of the master of *Marion*, Captain Potenza, in navigating by reference to a long obsolete chart on which the pipeline was not shown, leading him to let go his anchor in a place where, if he had been aware of the presence of the pipeline, as he would have been if he had navigated by reference to an up-to-date chart, he would never have done. Thirdly, that, having regard to the express terms of s. 503 of the Merchant Shipping Act 1894, as amended by the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, the material parts of which are to be found set out in full in the judgment of Mr. Justice Sheen, the appellants are only entitled to have their liability limited if they can prove that the damage to the pipeline occurred without actual fault on their part. Fourthly, that, on the true construction of the statutory provisions referred to above, the burden of proving (a) that there was no actual fault of the appellants, and (b) that, if there was any such actual fault, it did not contribute to the damage to the pipeline, is in either case upon the appellants. Fifthly, that, since the appellants had delegated the management and operation of *Marion* wholly to an English company, Fairfield-Maxwell Services Ltd. (F.M.S.L.), the person whose fault would constitute, as a matter of law, the actual fault of the appellants, is the managing director of F.M.S.L., Mr. Downard. Sixthly, that, whereas F.M.S.L. employed three other persons in a managerial capacity, namely Mr. Lowry as operations manager, Mr. Graham as assistant operations manager and Mr. Martinengo (an engineer) as superintendent, no faults of theirs, if they occurred, could constitute, as a matter of law, the actual fault of the appellants.

There were two main respects in which it was contended for the 13 named respondents that the appellants had failed to discharge the burden of proving that there had been no fault on the part of Mr. Downard which contributed to the damage to the pipeline. First, it was said that the appellants had not proved that Mr. Downard had a proper system for ensuring that the charts and other nautical publications on board *Marion* (a) were not obsolete or superseded, or (b) if still current, were kept corrected up-to-date at all times. Secondly, it was said that the appellants had not proved that there had been no fault of Mr. Downard in failing to ensure that there was brought to his notice a document received by F.M.S.L. from the Liberian Marine Inspectorate on Apr. 28, 1976

and known as a Safety Inspection Report, relating to an inspection of *Marion* in February 1976. That report stated among other things—

> . . . Navigational charts for trade of vessel corrections omitted for several years . . .

and it was said that, if Mr. Downard had seen that report and read that statement, he would, on his own admission, have taken immediate and radical steps, which his subordinates did not take, to put matters right.

It will be necessary later to examine the evidence, and the findings of the two Courts below, with regard to the two criticisms of Mr. Downard referred to above. Before doing that, however, it will, I think be helpful to indicate the approach which Courts have in recent years adopted to questions of actual fault on the part of shipowners or ship managers in contested limitation actions.

The question whether, where damage had been done by a ship, such damage occurred without the actual fault of her owners or managers is primarily one of fact, to be decided by reference to all the circumstances of any particular case. Such a question involves nevertheless an element of law, in that the answer to it must depend, in part at least, on what approach Courts dealing with contested limitation actions adopt, in relation to safety of navigation, to the responsibilities of masters on the one hand and shipowners or ship managers on the other.

There was a time when Courts dealing with contested limitation actions considered that shipowners or ship managers sufficiently discharged their responsibilities if they appointed a competent master and thereafter left all questions of safe navigation, including the obtaining at their expense of all necessary charts and other nautical publications, entirely to him. That former approach of such Courts has now been out of date for more than 20 years, as appears from the decision of the Court of Appeal in *The England*, [1973] 1 Lloyd's Rep. 373.

The issue in that case was whether Mr. Groen, the owner of a motor coaster which traded frequently to the port of London without the assistance of a pilot, was guilty of actual fault contributing to a collision between his ship and another in the River Thames, in that he had failed to take any, or any proper, steps to ensure that the master of this ship had on board, and available for his use, a copy of the latest Port of London River Byelaws. It was held by the Court of Appeal, reversing the Admiralty Judge, that Mr. Groen had been guilty of actual fault in this respect, and that it had not been proved that such fault did not contribute to the collision.

In relation to that issue, Sir Gordon Willmer, who was the acknowledged master of Admiralty law in his time, said at p. 383:

> It may be that 20 years ago what Mr. Groen did and did not do might have passed muster; but the decision of the House of Lords in the case of *The Norman*, [1960] 1 Lloyd's Rep. 1, seems to me to have thrown quite a fresh light on the extent of the managerial duties of owners and managers, especially in relation to the supply of navigational information and publications to their vessels. It seems to me that it is no longer permissible for owners or managers to wash their hands so completely of all questions of navigation, or to leave everything to the unassisted discretion of their masters. This relatively new approach, as I think it is, was well illustrated by the decision of this court in *The Lady Gwendolen*, [1965] P. 294; [1965] 1 Lloyd's Rep. 335. I am not going to go into the details of that case, the facts of which were very different from those of the present case, but I venture to quote two sentences from the judgment which I myself delivered in that case . . . On pp. 345 and 346 of the respective reports I am reported as saying: " . . . It seems to me that any company which embarks on the business of shipowning must accept the obligation to ensure efficient management of its ships if it is to enjoy the very considerable benefits conferred by the statutory right to limitation."
>
> Then, after referring to another case called *The Radiant*, [1958] 2 Lloyd's Rep. 596, where again the facts were quite different from those of the present case, I proceeded to quote a sentence which I had used in delivering judgment in that case, and which again I think is appropriate to this case: " . . . The fundamental fault in respect of which I am disposed to blame Mr. B. [— that is the manager —] is that he never had any proper comprehension of what his duty as managing director of a fleet of this sort was . . ." It appears to me that Mr. Hendrikus Groen was very much in the same position as the managing owner in that case.

My Lords, I am of the opinion that what Sir Gordon Willmer there described as "this relatively new approach", begun by your Lordships' House in *The Norman* in 1960 and continued by the subsequent decisions of the Court of Appeal in *The Lady Gwendolen* in 1965 and *The England* in 1973 should now be regarded as the correct approach in law to the problem of actual fault of shipowners or ship

managers in contested limitation actions. It follows that I regard it as right to apply that approach to the facts of the present case.

I shall consider first the criticism of Mr. Downard that he had no proper system for ensuring that the charts on board *Marion* (a) were not obsolete or superseded, or (b), if still current, were kept corrected up-to-date. It was not, and could not sensibly, have been disputed that, in order to ensure the safe navigation of a ship on the voyages undertaken by her, three requirements with regard to charts have to be fulfilled. The first requirement is that she should have on board, and available for use, the current versions of the charts necessary for such voyages. The second requirement is that any obsolete or superseded charts, which might formerly have been proper for use on such voyages, should either be destroyed, or, if not destroyed, at least segregated from the current charts in such a way as to avoid any possibility of confusion between them. The third requirement is that the current charts should either be kept corrected up-to-date at all times, or at least that such corrections should be made prior to their possible use on any particular voyage.

Mr. Downard took over as managing director of F.M.S.L. in the summer of 1975, and he was assisted, as I have already indicated, by three subordinates with managerial responsibilities, Mr. Lowry as operations manager, Mr. Graham as assistant operations manager, and Mr. Martinengo as superintendent. His system with regard to charts was to make the master of *Marion* solely responsible for ensuring, with the aid of one or more of his deck officers, that the three requirements referred to above were fulfilled. The master indented for the charts which he thought necessary and F.M.S.L. paid the bill for them. F.M.S.L. also continued a practice, which had been begun in December, 1974, before Mr. Downard took over as managing director, of sending to *Marion* on a regular basis all weekly Admiralty Notices to Mariners and all chart correction traces relating to Admiralty charts. Mr. Downard, deliberately and as a matter of considered policy, did not either himself, or through Mr. Lowry or Mr. Graham, exercise any supervision of any kind over the way in which the master of *Marion*, who was ordinarily for many years Captain Potenza, performed the responsibilities with regard to charts which had been assigned to him. The criticism made of this system is that it provided no means by which Mr. Downard could know whether those responsibilities were being discharged properly or not. In fact Captain Potenza had for years a curious propensity for using out-of-date or uncorrected charts in preference to current and corrected charts, of which, because of the absence of any supervision in this field, Mr. Downard remained blissfully unaware.

In considering whether this lack of supervision was a fault on Mr. Downard's part, the practices of other reputable shipowners at or about the same time is clearly relevant, although, unless the evidence of such practices is all one way, or nearly all one way, it cannot be decisive. The parties adduced before the learned Judge at the trial a whole mass of evidence, both oral and written, with regard to the practices of other reputable shipowners. His judgment is reported in [1982] 2 Lloyd's Rep. 52, and he expressed his conclusions about this evidence in a paragraph on p. 64 which reads:

> The totality of the evidence has left me in no doubt that a large majority of shipowners of high reputation regard the provision of charts and their maintenance as matters which are quite properly left to the responsibility of the master. In the light of all the evidence which I have heard I am quite satisfied that a prudent shipowner is entitled to regard the provision of charts as the responsibility of the master unless he has good reason to think that the master is not carrying out his responsibility. In that event further action is required. It may even become necessary to relieve the master of his command.

If the first sentence of this paragraph with regard to the totality of the evidence relating to practice had been justified, it would have represented a finding of fact by the trial Judge which, though not in theory decisive in showing Mr. Downard was not in fault for using the system which he did use, would in practice have gone a long way in that direction. The Court of Appeal, however, did not accept that either the finding of fact, or the conclusion drawn from it by Mr. Justice Sheen, were justified by the evidence. The report of the judgments of that Court is to be found in [1983] 2 Lloyd's Rep. 156, from which it appears that the leading judgment was, at the request of Sir John Donaldson, M.R., delivered by Lord Justice Dunn. Lord Justice Dunn, after referring to the passage from the judgment of Mr. Justice Sheen set out above, said at p. 164:—

> . . . I am bound to say, having been taken through the relevant transcripts of evidence of the expert witnesses, that I am very doubtful if I would have come to the same conclusion as the learned Judge.

Although Lord Justice Dunn does not there say in terms that he would, in the light of the evidence, have reached a conclusion about its

overall effect contrary to that reached by Mr. Justice Sheen, I think it is clear from other parts of his judgment that that is indeed what he would have done.

Be that as it may, at the hearing of this appeal before your Lordships, you were, very sensibly, referred to only comparatively small parts of the vast mass of evidence on practice. Instead, Counsel for the 13 named respondents placed before your Lordships, in the form of two schedules, the contents of which were not seriously challenged by Counsel for the appellants, a summary of the essential evidence of practice adduced on either side. Those schedules show, as Counsel for the appellants had no alternative but to admit, that the finding of Mr. Justice Sheen that, on the totality of the evidence, a large majority of shipowners of high reputation regard the provision of charts and their maintenance as matters which are quite properly left to the responsibility of the master, without any supervision by owners or their managerial representatives, cannot be supported.

The schedules instead are indicative of three main matters. The first matter indicated by them is that, while a substantial number of reputable shipowners do rely solely on their masters for obtaining and maintaining charts, without exercising any supervision over them in this respect, a majority of such shipowners are not content with such a system or lack or system. That majority, while relying primarily on their masters for obtaining and maintaining charts, exercise a degree of supervision over them in order to satisfy themselves that they are carrying out properly their duties in that field. The forms of supervision used vary considerably, depending no doubt on the size of the companies concerned, the number and types of ship which they operate, and the trades in which such ships are employed. The forms of supervision used, however, include, first, regular or random checks by marine superintendents or other qualified managerial staff when ships are visited by such persons in port; secondly, the complete overhaul, in the form of inspection and checking of chart rooms and their contents, at regular or irregular intervals; and, thirdly, the complete landing of the contents of chart rooms for inspection and checking, again at regular or irregular intervals.

The second main matter which the schedules indicate is that the practice of relying solely on the master, without exercising any supervision over him, is characteristic mainly of shipowners in the U.S.A. It further appears, from some of the evidence, that one reason for this sole reliance is, as one witness very frankly put it, that some shipowners "do not want to know." That deliberate ignorance may well be attributable to the fear of the award of punitive damages by juries in the U.S.A. in the event of marine casualties caused by the use of obsolete or uncorrected charts of which, if shipowners did exercise supervision, they might be found to have been actually or constructively aware.

The third matter which the schedules indicate is that, during the last 20 years or so, an increasing number of shipowners have adopted a system involving at least some degree of supervision of their masters in relation to charts.

Marion operated under the Panamanian flag until 1975, when, following her purchase by the appellants, she changed to operating under the Liberian flag. On that change it became the appellants' duty to pay regard to Liberian Notices to Mariners issued not only after, but also before, her change of flag.

In March, 1972, the Bureau of Maritime Affairs of the Republic of Liberia had issued a marine notice, addressed to shipowners, masters and officers of merchant ships, informing them that an amendment adopted by the I.M.C.O. Assembly should from then onwards apply to all Liberian ships. That notice stated:—

> All ships shall carry adequate and up-to-date charts, sailing directions, lists of lights, notices to mariners, tide tables and all other nautical publications necessary for the intended voyage.

In August, 1972, a further marine notice was issued by the Liberian authorities. It was addressed to shipowners, masters and officers of merchant ships and it expressly described its subject-matter as "Navigational Charts, Publications and Notices to Mariners". The full text of the notice is set out in the judgment of Lord Justice Dunn on p. 163. For present purposes it is sufficient to say that it included the following significant passage:—

> Reports on investigations of strandings and other navigational casualties continue to show an alarming increase in the number of such accidents wherein the direct or proximate cause has been attributed to failure to have on board up-to-date charts, publications, notices and similar navigational data.

My Lords, I quoted earlier a passage from the judgment of Lord Justice Dunn in the Court of Appeal dealing with the evidence of practice, and expressing a doubt, which the schedules placed before your Lordships amply justify, about the conclusion reached by Mr. Justice Sheen on that evidence. It now becomes apposite to set out a further passage from the judgment of Lord Justice Dunn which follows