LLOYD'S LAW REPORTS

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LLOYD'S

LAW REPORTS

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[1980] VOL. 1] The "Nawala" PART 1

HOUSE OF LORDS

July 25 and 26, 1979

N.W.L. LTD.
v.
NELSON AND LAUGHTON

SAME v. WOODS

(THE "NAWALA")

Before Lord DIPLOCK,
Lord FRASER OF TULLYBELTON
and Lord SCARMAN

Practice — Injunction — Trade dispute — Owner employing crew on terms unacceptable to union — Vessel likely to be blacked — Whether dispute a "trade dispute" — Whether owners entitled to injunction restraining union from "blacking" vessel — Effect of Trade Union and Labour Relations Act, 1974, ss. 13, 17, 29.

In 1974, the vessel *Fernbay* was owned by a Scandinavian partnership, flew the Norwegian flag and was manned by a Norwegian crew whose rates of pay were among the highest of all seafaring men. However, in 1978, the drop in the market and the high crewing costs of the Norwegian crew meant that the vessel could no longer be run at a profit. Her value was $8,000,000 and her mortgage was $15,000,000, so that she was running at a big loss.

The partnership therefore consulted W. who had a considerable financial interest in the vessel and as a result of various discussions, a private company called N.W.L. (the plaintiffs) was formed in Hong Kong, the beneficial owners of the shares in that company being a Swedish company called Navigare in which W. was very influential.

The plaintiffs then bought *Fernbay*. The vessel was registered in Hong Kong as a British vessel, her port of registry was changed from Oslo to Hong Kong and her name from *Fernbay* to *Nawala*. She was managed by S. the head of an organisation in New York which was expert in the management of ships, and a crew of 32 members were recruited in Hong Kong, signed up for a year and then flown to Hamburg to join the vessel. The crew belonged to no trade union at all, and the seamen in Hong Kong had no adequate union to bargain on their behalf.

The wages of the Hong Kong crew were low compared to European standards and very much lower than that of the Norwegian crew and the International Transport Workers Federation (I.T.F.) on becoming aware of the change effected by the partnership, took the view that the plaintiffs were using the Hong Kong registry and the crew as a "front" to conceal the true ownership of the vessel, so that the crew could be paid low wages. Therefore when *Nawala* arrived in England in February, 1979, with a cargo of iron ore and berthed at Redcar a member of I.T.F. went on board and requested the plaintiffs to sign an agreement in I.T.F. terms. The request was ignored and *Nawala* completed discharging and left.

On June 18, 1979, *Nawala* again arrived off Redcar with another cargo of iron ore and the I.T.F. representative informed the ship's agent that the vessel would be blacked unless I.T.F. terms were complied with.

On June 19, the plaintiffs obtained an injunction restraining the blacking but this was discharged on appeal. The dockers and tugmen refused to "black" the vessel and discharge was completed on June 27 when she sailed for Narvik in Norway.

There was a possibility that the vessel might be "blacked" at Narvik or any other port she went to since I.T.F. had affiliates all over the world and on June 26, the plaintiffs applied for an injunction to stop the "blacking" at Narvik or elsewhere. The plaintiffs contended that the crew were content with their wages and that they (the crew) would not sign an I.T.F. agreement since this would jeopardize employment of Hong Kong seamen.

Held, by DONALDSON, J., that the application would be refused.

The plaintiffs appealed. The defendants, the representatives of the I.T.F., relied on the Trade Union and Labour Relations Act, 1974 the material sections of which provided inter alia:

> 13. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort . . .

29. (1) In this Act "trade dispute" means a dispute between employers and workers, or between workers and workers which is connected with one or more of the following . . . (a) terms and conditions of employment . . . (e) membership or non-membership of a trade union on the part of a worker . . . (g) machinery for negotiation or consultation and other procedures, relating to any of the foregoing matters . . .

29. (3) There is a trade dispute for the purposes of this Act even though it relates to matters occurring outside Great Britain.

29. (4) A dispute to which a trade union or employers' association is a party shall be treated for the purposes of this Act as a dispute to which workers or as the case may be employers are parties.

Further s. 28 (1)(b) provided that a trade union need not consist wholly of or mainly of workers but could consist wholly or mainly of constituent or affiliated organisations and s. 17(2) provided inter alia:

. . . the Court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing the matter or matters which would . . . afford a defence to the action.

_____*Held,* by C.A. (Lord DENNING, M.R., WALLER and EVELEIGH, L.JJ.), that (1) since s. 28 (1)(b) made a federation the equivalent of a trade union, and s. 29(4) put the trade union in the position of a worker and since the dispute concerned the terms and conditions of the employment of the Hong Kong crew which were on board *Nawala* at Redcar, although the crew did not quarrel with their conditions of employment, this was a trade dispute connected with terms and conditions of employment and qualified for immunity under s. 13;

(2) there was a likelihood of the I.T.F. succeeding at the trial of the action in showing that they had immunity under s. 13 of the Act and in view of s. 17(2) it would not be proper for the Court to grant an injunction to stop the "blacking".

Appeal dismissed.

On appeal by the plaintiffs, the question being: Had the defendants shown upon the evidence such a likelihood of establishing that what they had done or threatened to do at Redcar was done or threatened in contemplation or furtherance of a trade dispute as would justify the Court in exercising its discretion in favour of refusing the injunction sought?

_____*Held,* by H.L. (Lord DIPLOCK, Lord FRASER OF TULLYBELTON and Lord SCARMAN), that (1) a "trade dispute" was defined in s. 29(1) by reference to (a) the parties to it and (b) to the subject matter with which it was connected and here there was a dispute between the I.T.F. and the plaintiffs at the time the threats of blacking *Nawala* at Redcar were made (*see* p. 7, col. 1; p. 11, col. 1; p. 13, col. 2); sub-s. (4) made it clear that the I.T.F. qualified as workers within the meaning of sub-s. (1) and the fact that the Hong Kong crew were content with their existing articles and were not in dispute with the plaintiffs, as to their own terms and conditions of employment, was immaterial (*see* p. 7, col. 1; p. 14, col. 2; p. 15, col. 1);

(2) the threat of blacking and attempts by the defendants to induce port workers to adopt this course were acts done "in contemplation or furtherance of a trade dispute" within the meaning of s. 13(1) (*see* p. 7, col. 1); in any sensible meaning of the words, the making and maintenance of threats and attempts were done in furtherance of a trade dispute between I.T.F. and the plaintiffs that was connected with terms and conditions of employment of existing and future crews of *Nawala,* and it was immaterial whether the dispute also related to other matters or had an extraneous i.e. personal or political motive (*see* p. 7, col. 2; p. 9, col. 1);

_____*The Camilla M,* [1976] 1 Lloyd's Rep. 26, overruled.

(3) s. 17(2) provided that the Court in exercising its discretion was to have regard to the likelihood of the defence being established at the trial and the word "likelihood" was a word of degree, the weight given to the likelihood of establishing the defence varying according to the degree of likelihood (*see* p. 10, col. 2; p. 12, col. 1; p. 13, cols. 1 and 2); the Court in exercising its discretion whether or not to grant an interlocutory injunction ought to put into the balance of convenience in favour of the defendants those countervailing practical realities i.e. (i) that the real dispute was between employer and trade union; (ii) that the threat of blacking was being used as a bargaining counter; (iii) that it was the nature of industrial action that it could be promoted effectively only so long as it was possible to strike while the iron was hot; and (iv) that the grant or refusal of an interlocutory injunction generally disposed finally of the action (*see* p. 9, col. 2; p. 12, cols. 1 and 2);

(4) (per Lord DIPLOCK and Lord FRASER) the degree of likelihood of success of the special defence under s. 13 beyond it being more probable than not was clearly relevant (*see* p. 11, col. 1; p. 12, col. 2; p. 13, cols. 1 and 2); as was the degree of irrecoverable damage likely to be sustained by the employer, his customers and the general public if the injunction was refused and the defence ultimately failed (*see* p. 11, col. 1);

(5) (Lord SCARMAN agreeing) on the evidence the defendants had a virtual certainty of establishing their defence of statutory immunity and the appeals would be dismissed (*see* p. 11, col. 1; p. 16, col. 2).

Appeals dismissed.

The following cases were referred to in the judgments:

American Cyanamid Co. v. Ethicon Ltd., (H.L.) [1975] A.C. 396;

Attorney General v. Prince Ernest Augustus of Hanover, (H.L.) [1957] A.C. 436;

British Broadcasting Corporation v. Hearn, (C.A.) [1977] 1 W.L.R. 1004;

Camilla M, The (C.A.) [1979] 1 Lloyd's Rep. 26;

Chill Foods (Scotland) Ltd. v. Cool Foods Ltd., (Sc. Ct.) 1977 S.L.T. 38;

Conway v. Wade, (H.L.) [1909] A.C. 506;

General Assembly of the Free Church of Scotland v. Johnson, (Sc. Ct.) (1905) 7 F. 517.

Huntley v. Thornton, [1957] 1 W.L.R. 321;

Magistrates of Edinburgh v. Edinburgh, Leith and Granton Railway Co., (Sc. Ct.) (1847) 19 S.J. 421;

Stratford (J.T.) & Son Ltd. v. Lindley, (H.L.) [1964] 2 Lloyd's Rep. 133; [1965] A.C. 269.

These were consolidated appeals by the plaintiffs, N.W.L. Ltd., the owners of the vessel *Nawala,* from the decisions of the Court of Appeal (Lord Denning, M.R., Waller and Eveleigh, L.JJ.) [1979] 2 Lloyd's Rep. 317, and (Lord Salmon and Stephenson, L.J.) Note [1979] 2 Lloyd's Rep. 325, given in favour of the defendants, Mr. John Nelson (an official of the National Union of Seamen) and Mr. Brian Laughton (an official of the International Transport Workers Federation) (I.T.F.) and Mr. James Woods (an official of the National Union of Seamen) and refusing to grant the plaintiffs an injunction restraining the defendants from blacking the vessel *Nawala.*

Mr. Cyril Newman and Mr. Murdoch Gair (instructed by Messrs. Clifford-Turner) for the defendant respondents; Mr. Roger Buckley, Q.C., Mr. Christopher Clarke and Mr. Timothy Charlton (instructed by Messrs. Holman, Fenwick & Willan) for the plaintiff appellants.

The appeals were dismissed on July 26, the reasons for the decision to be given at a later date.

The further facts are stated in the judgment of Lord Diplock.

Thursday, Oct. 25, 1979

JUDGMENT

Lord DIPLOCK: My Lords, in these consolidated appeals the plaintiffs ("the shipowners"), a Hong Kong company, all of whose shares are beneficially owned in Sweden, seek to prevent officials of the International Transport Workers' Federation ("I.T.F.") from inducing port workers in England and elsewhere to "black" their vessel *Nawala.*

In an endeavour to stop the blacking before the damage had been done, they applied in each of the actions for interlocutory injunctions. In the first action, against the defendant Woods, Mr. Justice Donaldson granted an interlocutory injunction, thinking that the judgment of the Court of Appeal in *The Camilla M,* [1979] 1 Lloyd's Rep. 26 compelled him to do so. This injunction was discharged by a Court of Appeal consisting of Lord Salmon and Lord Justice Stephenson (Note [1979] 2 Lloyd's Rep. 325). In the subsequent action against the defendants Nelson and Laughton, Mr. Justice Donaldson refused the shipowners' application and his refusal was upheld by a Court of Appeal consisting of Lord Denning, M.R. and Lords Justices Waller and Eveleigh ([1979] 2 Lloyd's Rep. 317). Against these two decisions of the Court of Appeal that the shipowners are not entitled to interlocutory injunctions, these appeals (now consolidated) have been brought to your Lordships' House by leave of the Court of Appeal.

The cases arise out of the threat by I.T.F. that industrial action will be taken against *Nawala* unless the shipowners conform to I.T.F.'s requirements as to the wages and conditions of employment of the members of its crew. I.T.F., which has its headquarters in London, is an international federation of national trade unions, in 85 different countries, representing transport workers of all kinds including seamen. As is well known in shipping circles and to the commercial Judges, it has a policy as respects vessels which sail under what it describes as "flags of convenience"—an expression which it uses with a much extended meaning as covering all vessels that are registered in a country which is not the domicile of the beneficial owner of the vessel. That policy is described in detail in the judgment of the Court of Appeal in the action against Woods (see p. 326 of [1979] 2 Lloyd's Rep.), and is placed in its worldwide perspective in the judgment of Mr. Justice Donaldson in the action against Nelson and Laughton. It may be summarised as follows.

I.T.F. endeavours to exert such "industrial muscle" as its affiliated national unions are prepared to exercise at its behest in order to compel the owners of vessels sailing under flags of convenience (in this extended sense) to employ their officers and seamen on terms of standard articles prepared by I.T.F. and providing for wages at rates said to be the middle rates paid to ships' crews under collective agreements negotiated by national trade unions for ships on their national

registries in European countries outside the communist bloc. An alternative way of buying off industrial action inspired by I.T.F. is to change the vessel's flag by transferring its registry to that of the country of domicile of its beneficial owner, whereupon he will be obliged to negotiate terms of employment and wages of crews with the national seamen's union affiliated to the I.T.F. The ultimate aim is to abolish throughout the world the use by shipowners of flags of convenience as I.T.F. defines them.

Your Lordships are in no way concerned with the economic wisdom or the moral justification of this policy. The evidence in the instant appeals confirms what the evidence in *The Camilla M* suggested, that the policy does not command the approbation of seamen and their national trade unions in those countries of Asia which have traditionally formed the recruiting grounds for many thousands of seamen eager to serve under articles that provide for wages which, although much lower than those demanded by their European, North American and Australasian counterparts, are, nevertheless, much higher than anything that they could hope to earn in land-based work in their own countries. Their competitiveness as candidates for manning the merchant navies of the world depends upon their cheapness. Their natural fear, as indicated by the evidence, is that if their competitiveness is reduced by forcing shipowners who employ them to pay to them wages at the middle rate paid to European seamen, their chances of sea-faring employment will be very much reduced. This readily accounts for the attitude taken up by the Indian crew in *The Camilla M* and by the Hong Kong crew in the instant case.

The history of *Nawala* which led to her selection as a target of I.T.F.'s campaign against flags of convenience and the way in which that campaign has been carried on against her up to July 3, 1979, are set out in such vivid detail in the judgment of Lord Denning, M.R., delivered on that date, that rather than repeat it in less readable style, I recommend reference to it direct (see p. 318 et seq. of [1979] 2 Lloyd's Rep.) and will restrict myself to stating in summary form such facts as are essential in order to identify the questions of law which fall to be decided by your Lordships. *Nawala* did not, however, remain stationary while the lawyers were arguing about her, nor has she done so between July 3, 1979, and the hearing in the Appellate Committee of the shipowners' appeal to this House. A further chapter to Lord Denning's saga of *Nawala* must also be recounted briefly.

Nawala is a large bulk-carrier with a capacity of more than 120,000 tonnes d.w.t. She was built in Germany in 1974 for Scandinavian shipowners and entered on the Norwegian registry. She was manned by a Norwegian crew at rates of wages that had been negotiated by their national trade union and are among the highest current in European countries. When the slump in the freight market came she was trading under the Norwegian flag but at a loss. Her owners were unable to meet the mortgage payments and sold her to buyers based in Sweden, who for the purpose of transferring her to Hong Kong registry formed a Hong Kong company of whose shares a Swedish company was beneficial owner. The Hong Kong company became the nominal owner of the vessel, and a Hong Kong crew was engaged at very much lower wages to take the place of the Norwegian crew. It was not necessary for *Nawala* to visit Hong Kong in order to effect the change of flag or to engage the Hong Kong crew. The crew was engaged there by an agency that was officially licensed in the colony to do so. The crew signed their articles there and were flown to Hamburg where they joined the vessel.

Nawala, under her new flag and manned by her new and much lower paid crew, was engaged by her new owners upon chartered voyages world-wide. Early in 1979 she had berthed at Redcar with a cargo of Australian iron ore for British Steel. A representative of I.T.F. boarded her and demanded of the master that he sign on behalf of the shipowners an agreement with I.T.F. that they would enter into articles with the crew on standard I.T.F. terms. The demand was refused. When she arrived at Redcar on her next consecutive voyage with a similar cargo on June 15, 1979, Mr. Woods, who was an official of both I.T.F. and the English National Seamen's Union, repeated the demand and said that if it were not complied with *Nawala* would be "blacked" by the port workers. He and later Mr. Nelson and Mr. Laughton attempted to persuade port workers who belonged to other unions affiliated to I.T.F. to refuse to allow her to enter her berth, to unload her if she got there or to let her leave it. In the result these attempts, when they were resumed after the interlocutory injunction granted by Mr. Justice Donaldson had been lifted by Lord Salmon and Lord Justice Stephenson on June 21, 1979 (see Note [1979] 2 Lloyd's Rep. 325), were unsuccessful because they were resisted by the trade unions to which the port workers belonged. So *Nawala* succeeded in unloading her cargo and sailed away from Redcar to Narvik to load a cargo of Norwegian iron ore for carriage to the Netherlands.

She was off Narvik waiting for a berth when the shipowners' appeal against the refusal of Mr. Justice Donaldson of an interlocutory injunction against the defendants Nelson and Laughton was heard by the Court of Appeal (see [1979] 2 Lloyd's Rep. 317), and I.T.F. had by telegrams dispatched from London and a personal visit by the defendant Nelson persuaded the national trade union there, the Scandinavian Transport Workers' Federation, to black her. On that very day, July 3, 1979, a Judge of the appropriate Court of first instance in Narvik stayed the shipowners' application to prevent the Norwegian blacking, apparently to await the final determination of the English litigation; but on July 12 the stay was removed by an Appellate Court and the case remitted to the Judge at Narvik for further consideration. On July 19, 1979, he granted the shipowners a temporary injunction against the blacking of *Nawala* at Narvik. She proceeded to her loading berth, loaded a full cargo and left on July 22 bound for Ijmuiden in the Netherlands. The stop press news, received on July 26, the last day of the hearing before this House, was that the Dutch trade unions of which port workers at Ijmuiden were members were threatening to black *Nawala* there. If she is not prevented from carrying out the future voyages for which she is already fixed she will be returning to discharge a cargo of iron ore at a port in England, but not until the autumn of this year.

The interlocutory injunction which the shipowners seek against all three defendants is in the terms of that granted by Mr. Justice Donaldson against the defendant Woods, but discharged by the Court of Appeal, viz. an injunction against:

> . . . Issuing instructions to and/or encouraging stevedores and/or tug operators and/or their employees and/or pilots or others concerned with the discharge and/or free passage and operation of the M.V. Nawala to break their contracts of employment or otherwise howsoever interfere with such discharge, free passage or operation.

My Lords, these words are not restricted to prohibiting instructions or encouragement given within the jurisdiction to parties to contracts of employment made and to be performed within the jurisdiction. Questions of great nicety in private international law might arise if it were sought to enforce this injunction in respect of instructions or encouragement of port workers employed in Narvik to "black" *Nawala* there or of port workers anywhere else outside the jurisdiction of the English Court. The possible significance of such jurisdictional problems appears to have been overlooked by the Court of Appeal in *The Camilla M* where the port at which the blacking of the vessel was enjoined was Glasgow, a place outside the jurisdiction of the English Courts.

However, I do not think it necessary for your Lordships to enter upon a consideration of these questions now. The jurisdiction of an English Court to entertain against such a defendant upon whom its process can be served within the jurisdiction, an action for an allegedly wrongful act committed *outside* the jurisdiction is dependent upon the act being not only unlawful in the place where it was committed but also being one which, had it been committed in England, would have amounted to a tort in English law. So, if what the defendants in the instant case did at Redcar had succeeded in procuring the blacking of *Nawala* there, but even then would not have constituted a tortious act in English law, an English Court would have no jurisdiction to entertain an action based on similar conduct by the defendants at Narvik, and a fortiori would have no jurisdiction to entertain a quia timet action to restrain it.

I understand your Lordships to be of the opinion, which I also share, that even if the defendants had succeeded in inducing port workers at Redcar to break their contracts of employment and to black *Nawala,* they would not have committed any tort in English law, because their conduct was excused by s. 13 of the Trade Union and Labour Relations Act, 1974, as amended by the Amendment Act of 1976. So any similar conduct outside England cannot be the subject matter of any action, quia timet or otherwise, which English Courts have jurisdiction to entertain.

I turn then to the crucial question in this appeal which, since it relates to an application for an interlocutory injunction, not a final one, I take it to be this: Have the defendants shown upon the evidence such a likelihood of establishing that what they did or threatened to do at Redcar was done or threatened in contemplation or furtherance of a trade dispute, as would justify the Court in exercising its discretion in favour of refusing the injunction sought?

The relevant sections of the Act are s. 13 which confers the immunity for acts done in contemplation or furtherance of trade disputes, s. 29 which says what is meant by a trade dispute, s. 17 which imposes restrictions on the grant of interlocutory injunctions and s. 28 which makes it clear that a federation of trade unions such as I.T.F. is itself a trade union within the meaning of the Act. The first three of these sections deserve to be reproduced in full:

13(1) An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only—

(a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance; or

(b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or to interfere with its performance.

(2) For the avoidance of doubt it is hereby declared that an act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only that it is an interference with the trade, business or employment of another person, or with the right of another person to dispose of his capital or his labour as he wills.

(3) For the avoidance of doubt it is hereby declared that—

(a) an act which by reason of subsection (1) or (2) above is itself not actionable; (b) a breach of contract in contemplation or furtherance of a trade dispute; shall not be regarded as the doing of an unlawful act or as the use of unlawful means for the purposes of establishing liability in tort.

(4) An agreement or combination by two or more persons to do or procure the doing of any act in contemplation or furtherance of a trade dispute shall not be actionable in tort if the act is one which, if done without any such agreement or combination, would not be actionable in tort.

29. Meaning of trade dispute

(1) In this Act "trade dispute" means a dispute between employers and workers, or between workers and workers, which is connected with one or more of the following, that is to say—

(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;

(c) allocation of work or the duties of employment as between workers or groups of workers;

(d) matters of discipline;

(e) the membership or non-membership of a trade union on the part of a worker;

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures.

(2) A dispute between a Minister of the Crown and any workers shall, notwithstanding that he is not the employer of those workers, be treated for the purposes of this Act as a dispute between an employer and those workers if the dispute relates—

(a) to matters which have been referred for consideration by a joint body on which, by virtue of any provision made by or under any enactment, that Minister is represented; or

(b) to matters which cannot be settled without the Minister exercising a power conferred on him by or under an enactment.

(3) There is a trade dispute for the purposes of this Act even though it related to matters outside Great Britain . . .

(4) A dispute to which a trade union or employer's association is a party shall be treated for the purposes of this Act as a dispute to which workers or, as the case may be, employers are parties.

(5) An act, threat or demand done or made by one person or organisation against another which, if resisted, would have led to a trade dispute with the other, shall, notwithstanding that because that other submits to the act or threat accedes to the demand no dispute arises, be treated for the purposes of this Act as being done or made in contemplation of a trade dispute with that other.

(6) In this section—

"employment" includes any relationship whereby one person personally does work or performs services for another;

"worker" in relation to a dispute which an employer is a party, includes any worker even if not employed by that employer.

(7) In the Conspiracy and Protection of Property Act 1875, "trade dispute" has the same meaning as in this Act.

17. Restriction on grant of ex parte injunctions and interdicts

(1) Where an application for an injunction or interdict is made to a court in the absence