LLOYD'S LAW REPORTS

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CASES JUDICIALLY CONSIDERED

CASES JUDICIALLY CONSIDERED—*continued*

CASES JUDICIALLY CONSIDERED—*continued*

STATUTES CONSIDERED

CONTENTS

NOTE:—These Reports should be cited as "[1973] 1 Lloyd's Rep."

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

CONTENTS—*continued*

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COURT OF APPEAL

Friday, June 23, 1972

THE "SAINT WILLIAM" (OWNERS) v. "JAN LAURENZ" (OWNERS)

(THE "JAN LAURENZ" (NO. 2))

Before Lord DENNING, M.R., and Lord Justice CAIRNS

Admiralty practice — Appointment of assessor with experience in handling vessels under 1000 tons.

This was a motion by the plaintiff owners of the motor vessel *Saint William* for the appointment of an assessor to sit with the Court in a pending appeal by the plaintiffs from a decision of Mr. Justice Brandon, sitting with a Nautical Assessor, on Feb. 3, 1972 ([1972] 1 Lloyd's Rep. 404). Mr. Justice Brandon held that they were equally to blame with the owners of the motor vessel *Jan Laurenz* for damages and costs arising out of a collision between the two vessels in the Manchester Ship Canal on Mar. 22, 1968. The defendants had denied negligence and counterclaimed damages against the plaintiffs.

Mr. I. Ward and Mr. D. F. R. Cox (instructed by Messrs. Alsop, Stevens, Batesons & Co.) for the appellant plaintiffs; Mr. Michael Thomas and Mr. S. A. G. L. Gault (instructed by Messrs. Ince & Co.) for the respondent defendants.

JUDGMENT

Lord DENNING, M.R.: This is an unusual application. An Admiralty case has recently been tried by Mr. Justice Brandon. It arose out of a collision between the motor vessel *Saint William* and the motor vessel *Jan Laurenz* — one of them being of 781 tons and the other about one-third of the tonnage both well under 1000 tons. The collision occurred in the Manchester Ship Canal. At the hearing of the case the Nautical Assessor was one of the Elder Brethren. Now, on the appeal to this Court, Mr. Ward, who appears for the owner of the *Saint William,* applies that this Court should be assisted by an assessor, a certificated master, who has experience in piloting vessels in the Manchester Ship Canal of a similar size. Most of the Elder Brethren, who are retired masters, have been in command of the big ships across the ocean. Few of them, I imagine, would have much experience of the small coastal vessels or vessels under 1000 tons. In these circumstances it does seem appropriate that the Court should have the assistance of an assessor who has experience of these small vessels. We are told by the Admiralty Marshal that quite recently the Admiralty Registrar, in a case arising out of a collision between coastal vessels, made an order for an officer having experience in handling vessels of less than 1000 tons to be appointed to advise. So here we think that in this case it would be desirable. An order should be made that this Court should be assisted by one officer experienced in the handling of vessels of less than 1000 tons in narrow waters. We do not need two assessors. It is not a case which would warrant great expense. We certainly do not think that any officer should be excluded because he knows the Manchester Ship Canal. Indeed nearly all of those available would be expected to have a knowledge of it to a greater or less extent. Nor will we make an order that he *must* have had experience in piloting vessels in the Manchester Ship Canal. We expect that most of those available would have had some experience of it. If there is no one of the Elder Brethren who has that experience,

it may well be that one of the officers on the Home Office list for Wreck Inquiries might be available at a suitable time. If the Admiralty Marshal cannot find one available at a suitable time, then he would be quite ready to ask the parties to submit names from whom one can be selected. So we grant the application to this extent: the assessor for this Court is to be an officer experienced in the handling of vessels of less than 1000 tons in narrow waters.

Lord Justice CAIRNS: I agree.

Mr. WARD: My Lord, in the motion I also ask for the costs of this application. There is provision to agree this sort of thing beforehand. It was not agreed and I therefore ask for the costs.

Lord DENNING, M.R.: Mr. Thomas, what do you say about the costs?

Mr. THOMAS: My friend has not had a complete victory in the motion, but a halfway house has been reached. May I ask that the costs be costs in the appeal?

Lord DENNING, M.R.: Costs costs in the appeal.

COURT OF APPEAL

Oct. 23, 24, 25, 1972

RIVER THAMES INSURANCE CO. LTD. v. AL AHLEIA INSURANCE CO., S.A.K.

Before Lord DENNING, M.R., Lord Justice MEGAW and Mr. Justice BRABIN

Insurance — Reinsurance treaty — Confirmation and agreement of underwriting accounts — Whether initialling of accounts by reinsurer's agent sufficient — Whether equitable set-off applicable — Alleged miscalculation of portfolio transfer — Whether dispute which should go to arbitration.

Practice — Order 14 proceedings — Reinsurance treaty — Action for amount due on underwriting accounts — Whether initialling of confirmation and agreement of underwriting accounts by reinsurer's agent sufficient — Alleged miscalculation of portfolio transfer — Whether dispute which should go to arbitration — Whether equitable set-off applicable.

In 1963, the plaintiffs and the defendants entered into a reinsurance treaty whereby the plaintiff reassured agreed to cede and the defendant reinsurers agreed to accept a 5 per cent. quota share of all and every insurance and reinsurance accepted by the reassured after Jan. 1, 1963, through the underwriting agency of B.W. & Co.

Article VI of the treaty provided:

> The accounts for each year's underwriting shall be kept separately in the usual way of keeping underwriting accounts.
>
> As soon as may be practicable after the close of each Quarter the "Reassured" shall prepare and submit to the "Reinsurers" through [B.W. & Co.] a Statement of Account showing the "Reinsurers" proportions of all premiums, returns of premiums, claims and refunds, reinsurance premiums and reinsurance recoveries as aforesaid, expenses and disbursements in connection with the subject matter of this Agreement, but any errors or omissions in any such account may be corrected upon discovery.
>
> The accounts shall be confirmed by the "Reinsurers" within one month after they have been rendered and the balance on either side shall become payable six months from the date the accounts are agreed.

Article X of the treaty provided:

> Whereas the "Reinsurers" desire to be relieved of liability in respect of each year of account at the end of the third year, it

is hereby understood and agreed, for the purposes of this treaty, that a portfolio transfer into the second year of the following year of account shall be effected by Messrs. Bland, Welch and Company Limited charging the "Reinsurers" with their share of the amount considered by the "Reassured" to be sufficient to liquidate all known and unknown outstanding liability for the Underwriting Account in question. At the same time the outstanding premium reserve for the underwriting Account in question shall be released to the "Reinsurers".

On Aug. 5, 1968, the defendants told B.W. & Co. to address future correspondence to the defendants' London agents. Certain accounts were rendered on Sept. 25, 1969, (showing a balance due from the defendants) and were returned by the defendants' agents on Mar. 9, 1970, initialled by them and with a letter saying:

With reference to your letters . . . regarding settlement and confirmation of balances on this treaty, as you are aware the question of settlement of all outstanding balances due between yourselves and [defendants] is at present the subject of separate correspondence. However, pending agreement of those matters we confirm that the balances of £13,170.17.0d., U.S. $161090.98 and C. $1728.70 have been entered in our books.

The account was not paid and on May 16, 1972, the plaintiffs issued a writ against the defendants for the balance due and commenced Order 14 proceedings for summary judgment.

MOCATTA, J. gave judgment for the plaintiffs for £78,781.97 (which the defendants paid into a joint account) and the defendants appealed:

———*Held,* by C.A. (Lord DENNING, M.R., MEGAW, L.J., and BRABIN, J.), (1) that the letter of Mar. 9, 1970, together with the initialling of the accounts by the agents was a confirmation of the accounts such as to satisfy art. VI and that the reinsurers became liable to pay the accounts so confirmed and agreed (*see* p. 6, cols. 1 and 2; p. 7, col. 1; p. 8, col. 2);

(2) that, under art. X, the reinsured was to fix the amount for the portfolio transfer, and, in the absence of fraud or bad faith, once the account was confirmed and agreed that amount was binding on the reinsurers; that, therefore, there was no arguable issue of fact or law; and the plaintiffs were entitled to summary judgment (*see* p. 7, col. 2; p. 8, col. 2).

Appeal dismissed.

This was an appeal by Al Ahleia Insurance Co., S.A.K., of Kuwait, from a judgment of Mr. Justice Mocatta in the Queen's Bench Division (Commercial Court) on July 19, awarding River Thames Insurance Co. Ltd., of Fenchurch Street, London, £78,781.97 and £13,241.84 interest under a treaty of re-insurance between the parties.

The grounds for the appeal were :

" 1. That the learned Judge misdirected himself in holding that the principles applied by the Court of Appeal in *Dawnay v. Minter and Trollope & Colls Ltd.* (1971) 1 WLR 1205 and *Frederick Mark Ltd. v. Schield* (1972) 1 Lloyd's Rep 9 in relation to an architect's interim certificate and similar principles applied by the Commercial Judge in Chambers in two unreported cases in relation to charterparties should be applied to the Reinsurance Treaty between the Plaintiffs and the Defendants.

" 2. That the learned Judge misdirected himself in holding that the question of whether or not the principles referred to in 1 hereof should be applied to the said Treaty was not in itself a triable issue.

" 3. That the learned Judge misdirected himself in holding that this is not a case where there is reasonable ground for an enquiry or account in order to ascertain the amount recoverable and in not applying the principle applied by the House of Lords in *Wallingford v. Mutual Society* (1880) 5 App. Cas 685 and by the Court of Appeal in *Contract Discount Corporation Ltd. v. Furlong* (1948) 1 AER 274.

" 4. That the learned Judge misdirected himself in holding that on the true construction of Articles III, V, VI and XII of the said treaty the Defendants are bound to pay a confirmed account in full notwithstanding that they have reasonable ground for believing that the said account is based on mistakes of fact in the compilation thereof.

" 5. That the learned Judge misdirected himself in holding that the construction of the treaty as set out in 4 hereof is not a triable issue and in holding that it was not a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 6. That the learned Judge misdirected himself in construing the word 'confirm' in Article VI of the said treaty to be equivalent to the word 'agree' in all respects material to this case.

" 7. That the learned Judge misdirected himself in holding that the construction of Art. VI of the said treaty as set out in 6 hereof is not a triable issue and in holding

that it was not a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 8. That the learned Judge ought not to have attempted to construe the correspondence in Exhibit KHAS 1 exhibited to the Affidavit of Mr. Saunders sworn on 19th July 1972 because the said correspondence was patently an incomplete selection.

" 9. That the learned Judge misdirected himself in construing the letter of 9th March 1970[1] included in the said Exhibit KHAS 1 as a confirmation of the Plaintiffs' accounts in a sense equivalent to an agreement thereto by the Defendants and in construing the letter of 29th April 1970 as leaving no doubt of the correctness of his aforesaid construction of the letter of 9th March 1970.

"10. That the learned Judge misdirected himself in holding that the construction of the said letter of 9th March 1970 and the said letter of 29th April 1970 and the construction of the whole of the said correspondence are not triable issues and in holding that the construction of the said letters was not a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 11. That there was no evidence on which the learned Judge could find that the Defendants had agreed to or admitted the Plaintiffs' said accounts.

" 12. That the judgment was against the weight of the evidence in that the learned Judge found that the Defendants had agreed to or admitted the Plaintiffs' said accounts.

" 13. That the learned Judge misdirected himself in holding that the Defendants' contention that they did not agree to or admit the Plaintiffs' said accounts is not a triable issue and in holding that the said issue was not a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 14. That the learned Judge misdirected himself in holding that the Defendants' contention that the Plaintiffs have not fulfilled their obligation under Article V to produce receipts and vouchers is not a triable issue and a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 15. That the learned Judge misdirected himself in holding that the Defendants' contention that certain claims have been allocated to the incorrect year of account (some examples of which are given in Exhibit FH3 to the affidavit of Mr. Harmans sworn on 18th July 1972) is not a triable issue and a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 16. That the learned Judge misdirected himself in holding that the Defendants' contention that certain facultative reinsurance recoveries were not credited to the Defendants is not a triable issue and a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 17. That the learned Judge misdirected himself in holding that the Defendants' contention that the Plaintiffs had not refunded to the Defendants the amounts due under the letter of credit scheme is not a triable issue and a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 18. That the learned Judge misdirected himself in holding that the Defendants' contention that the Plaintiffs have overstated the Defendants' share of claims outstanding on 31st December 1968 by £33,417 is not a triable issue and a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 19. That the learned Judge misdirected himself in holding that the Defendants' contention that the Plaintiffs have miscalculated the portfolio transfer is not a triable issue and a difference between the parties which ought to be referred to arbitration in accordance with the said treaty.

" 20. That there was no evidence on which the learned Judge could find that the Defendants had dilly-dallied for long periods of time.

" 21. That the learned Judge wrongly exercised his discretion not to stay these proceedings by acting on an erroneous principle and under a misapprehension of the relevant facts.

" 22. That the learned Judge misdirected himself in holding that there was no triable issue between the parties or other reason for which there ought to be a trial."

By their respondents' notice the respondents contended that Mr. Justice Mocatta's orders should be affirmed on grounds additional to those relied on by the learned Judge, namely that (as argued before the learned Judge but not referred to in his

[1] See p. 6, col. 2, *post*.