IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 39 of 1985

Between:

QUEENSLAND INSURANCE (FIJI) LTD Appellant

and

WONGS SHIPPING LTD Respondent

K. Chauhan for the Appellant
V. Parmanandam for the Respondent

Date of Hearing: 28th October, 1985
Delivery of Judgment: 8th November, 1985

JUDGMENT OF THE COURT

Roper, J.A.

At 7.30 a.m. on the 2nd December, 1981 the vessel "Evelyn", an auxiliary cutter owned by the Respondent company, left Suva for Vunisea on Kadavu where it arrived at about 3.30 p.m. After unloading cargo and passengers the Evelyn left Vunisea on the tide for Tavuki at about 10.30 p.m. It was a fine night but moonless. There was little wind and the sea was calm. While making its way to the open sea through a passage estimated by the Captain, Luke Moce Saunabula, to be in excess of 1,200 feet wide, the Evelyn went aground near the John Wesley Bluffs having travelled

something under two miles from the Vunisea wharf.

The "Evelyn" came off the reef on the next high tide and under its own power, but accompanied by another of the Respondent's vessels, went to Tavuki to unload cargo and thence to Suva where she was slipped. There was considerable damage to the hull which has cost in excess of $20,000 to repair.

The Appellant, as the Respondent's insurers under a "Time" policy of marine insurance for the period 12th February, 1981 to 11th February, 1982, has refused to indemnify the Respondent for its loss and this appeal is against the decision of Kermode J., who held that the Appellant was liable so to do.

The policy of insurance indemnified the Respondent in respect of four vessels, including the "Evelyn", against perils of the sea and the other usual perils found in a Standard British hull policy, and extended the cover by an "Inchmaree" clause which takes its name from the vessel in Thames and Jersey Marine Insurance Co. v. Hamilton Fraser & Co. (1887) 12 A.C. 484, where the House of Lords restrictively read "perils of the sea" in the then new age of steam vessels not to include damage from a pump clogged through valve failure.

The clause reads :

"7. This insurance includes loss of or damage to the subject matter insured directly caused by -

(a) Accidents in loading discharging or shifting cargo or fuel
Explosions on shipboard or elsewhere
Breakdown of or accident to nuclear installations or reactors on shipboard or elsewhere
Bursting of boilers breakage of shafts or any latent defect in the machinery or hull.

Neglegence of Master Officers
Crew or Pilots
Negligence of repairers provided
such repairers are not Assured(s)
hereunder

(b) Contact with aircraft
Contact with any land conveyance,
dock or harbour equipment or
installation
Earthquake, volcanic eruption or
lightning

provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

Masters Officers Crew or Pilots not to be considered as part Owners within the meaning of this clause should they hold shares in the Vessel. "

In its statement of claim the Respondent pleaded both the "perils of the sea" cover, the "peril" being the stranding, and the extended cover provided by the "Inchmaree" clause without specifying in the latter case the cause of damage relied on. There is a further pleading, which, while not described as an alternative cause of action could hardly be regarded as anything else, to the effect that the Appellant by its actions had accepted liability for the loss. There was a good deal of evidence relating to this plea but because of the findings of the trial Judge on other issues it was unnecessary for him to consider it.

The Appellant's defence was in essence a plea that the Respondent had knowingly sent the "Evelyn" to sea in an unseaworthy condition and that the stranding was attributable to that condition. Such a defence was open on both the "perils of the sea" pleading and that dependant on the "Inchmaree" clause. Section 40(5) of the Marine Insurance Act (Cap. 218) reads :

" (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but, where with the privity of the assured the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. "

And the "Inchmaree" clause provides cover against loss "provided such loss or damage has not resulted from want of due diligence by the Assured owners or managers".

The Appellant's allegation of unseaworthiness involved the "Evelyn" steering gear which was of the chain and rod type. From each side of a quadrant attached to the rudder head a chain ran forward through sheaves along each side of the vessel to the steering shaft, so that as the steering wheel was turned the quadrant was pulled one way or the other. It was alleged that there was excessive slackness in the chains with the result that when the helm was applied rapidly either to port or starboard from the amidship position the slackened chain caused a riding turn to gather on the steering wheel shaft so jamming it. A movement of the helm in the opposite direction cleared the obstruction.

This appeal is against the trial Judge's findings that the "Evelyn" was not unseaworthy in the manner alleged, that its owners had no knowledge of any defect that would make it unseaworthy, and that the stranding occurred in such circumstances that the Appellant was liable to indemnify the Respondent both under the "perils of the sea" cover and the "Inchmaree" clause. The trial Judge's conclusion was that the proximate, that is, direct cause of the loss was the negligence of the Master.

Mr. Chauhan advanced 16 grounds of appeal,

many of them overlapping, with the 13th being subdivided into six heads. In the main they amount to allegations that the verdict was against the weight of evidence, or that the trial Judge's evaluation of it, or the inferences he drew from it were erroneous and unjustified. It follows that most of the grounds can be dealt with together and in a general way, but there are some which require individual attention, the first is that the trial Judge erred in law in not admitting in evidence the report of the preliminary enquiry held by the Fiji Marine Board into the grounding of the "Evelyn". It transpired that what Mr. Chauhan really sought to have admitted was not the Board's report, which in fact held the Master, Luke Moce, negligent with cancellation of his Master's ticket for three months, but the evidence given before the Board by the Master and "Evelyn's" engineer. It may be that the report itself would be admissible as a Public Document but we agree with the trial Judge that the evidence given before the Board would not be admissible. The point is in any event academic because the Master gave evidence at the trial, having been subpoened by the Appellant.

Mr. Chauhan's second specific complaint was that the Judge erred in admitting evidence of negligence on the part of the Master, it not having been specifically pleaded in the Respondent's statement of claim.

No objection was taken up by Mr. Chauhan at the trial to the admissibility of the evidence of the Master's negligence, and it was clear from the outset what the issues were, so no question of prejudice arose. The Appellant alleged loss through unseaworthiness which was in the knowledge of the owners, while the thrust of the Respondent's evidence was lack of knowledge on the owners' part if there was unseaworthiness, which was denied, with the proximate cause of the loss being the Master's negligence so that the "Inchmaree" cover applied. This

was a case where there was no need for the Respondent to have relied on the "Inchmaree" clause, and so undertake the burden of proving the Master's negligence. It could have relied solely on the "peril of the sea" cover, for the most obvious cases of such a peril are grounding or foundering. That the "Evelyn" struck the reef and suffered damage was never in dispute so that if the Respondent had so restricted its pleadings the whole burden would then have been cast on the Appellant to prove loss through unseaworthiness, with the Respondent being able to call evidence of the Master's actions as a counter. We see no merit in this ground of appeal, and in fact the way the Respondent elected to conduct its case worked to the Appellant's advantage.

We turn now to Mr. Chauhan's more general complaint that the evidence did not support the trial Judge's conclusions, or that he misinterpreted it or drew erroneous conclusions from it. We see no profit in reviewing the evidence concerning the owners' alleged knowledge of pre-existing unseaworthiness and will restrict our review to the evidence concerning unseaworthiness and the proximate cause of the grounding.

When the "Evelyn" left Vunisea for Tavuki Josua Wailili was on the wheel and a clerk, Josefa Mara, who had worked for the Respondent company for three years, was sitting on the hatch on deck. He could see both Josua and the Master, Luke, who was standing by the mast giving Josua directions in Fijian to steer right or left. It was a dark night and according to Josua the "Evelyn" was travelling at its maximum speed of 6 knots. Josefa said that for a period of three minutes before the vessel struck the reef the Master gave no orders to the helmsman. Josefa Mara was not cross-examined. Josua confirmed Josefa's evidence concerning the Master's silence but thought its period was five minutes. Mr. Chauhan argued that this difference in times was significant but we do not agree. Josua said that there

was no trouble with the steering on that night and indeed there had been none in his three years as "Evelyn's" helmsman. One can imagine the pandemonium that would have reigned on the "Evelyn" on that night if the steering had jammed while it was in a narrow channel on a dark night, but on the unchallenged evidence of Josefa there was silence, and according to Josua no reduction in speed.

According to the Master, Luke, Josua had reported that the steering was jammed. He said he told Josua to turn the wheel the other way to clear it but that had no effect. He then ordered a reduction in speed but the vessel went aground. He said that the wheel had jammed many times in the past and he had complained time after time to the Respondent's Managing Director, Mr. Wong. On each of the steering chains there is a rod and adjusting screw which will take up the slack in the chains. Luke Moce said that when the adjustment was made with the screw there was no problem with the steering and that he had tightened the screws before leaving Vunisea on that night. He further said that when the "Evelyn" came off the reef the steering was "working all right".

In his written report to the Marine Board made on the 5th December Luke Moce made no mention of jammed steering, and indeed gave no explanation for the grounding.

On the question of unseaworthiness the Appellant had relied on the evidence of Mr. D.E. Worthington, a marine surveyor. He had inspected the "Evelyn" on the 24th December. He described the steering gear as being in poor condition consistent with lack of maintenance, and referred to the slackness in the chains which caused a riding turn which jammed the steering when the helm was applied rapidly. He expressed the opinion that the proximate cause of the grounding was the jamming of the

steering which would have been in the same unsatisfactory state when the vessel left Vunisea as when he saw it. The evidence of Luke Moce does not support the latter conclusion. Mr. Chauhan was critical of the trial Judge's rejection of Mr. Worthington's conclusions but even had he accepted his view that the vessel was in an unseaworthy condition when it left Vunisea because of the defect in the steering, the unchallenged evidence of Josefa, and Luke Moce's silence, rules out that condition as being the proximate cause of the grounding.

In our opinion the Appellant's liability to indemnify was established beyond all doubt and in only one respect do we join issue with the trial Judge's findings and that concerns costs. At the conclusion of his judgment he said :

> " Had the defendant properly investigated the cause of the stranding the claim would have been met and the plaintiff company saved considerable trouble and loss which it cannot recover from the defendant. "

He then ordered the Appellant to pay costs on the higher scale and it can be inferred that he did so because of his view of the Appellant's merits.

We must agree with Mr. Chauhan that in the light of Mr. Worthington's report the Appellant was justified in putting the Respondent to proof. We therefore order that costs in the court below be on the lower scale and otherwise the appeal is dismissed with costs to the Respondent to be fixed by the Registrar.

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Vice President

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Judge of Appeal

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Judge of Appeal