IN THE SUPREME COURT OF FIJI

Civil Jurisdiction
Action No. 1081 of 1982

BETWEEN:

WONG'S SHIPPING CO. LTD Plaintiff

and

QUEENSLAND INSURANCE (FIJI) LTD Defendant

Mr V Parmanandam for the Plaintiff
Mr K Chauhan for the Defendant

JUDGMENT

The plaintiff's claim against the defendant company is to be indemnified for the damage sustained by its vessel 'Evelyn' which went aground on a reef near Vunisea, Kadavu, on the evening of the 2nd day of December, 1981.

The vessel was at the time of the mishap covered by a Marine Insurance policy No. 33 M/116268 dated the 12th June 1981, issued by the defendant company. Under the policy the defendant undertook to indemnify the plaintiff in respect of "Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the subject matter of this insurance."

The defendant denies liability and alleges that the plaintiff's loss was not occasioned by any of the perils covered by the policy and, alternatively, that the vessel was knowingly and wilfully sent to sea in an unseaworthy condition by the plaintiff company.

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The alleged unseaworthy condition is said to be the condition of the steering gear on the vessel which, as a result of that condition, suddenly jammed as the vessel was passing a beacon resulting in the vessel going aground on the reef.

The contract of marine insurance was a 'time policy', that is to say it was a contract to insure the vessel for a definite period of time and not just for the one adventure or voyage.

Subsection (5) of Section 40 of the Marine Insurance Act provides as follows:

> "(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 the unseaworthiness."

The policy contains what is known in marine insurance circles as the "Inchmaree clause."

The "Inchmaree" was a steamer insured by a time policy in the ordinary form on the ship and her machinery, including the donkey engine, which was being used in pumping water into the main boilers. Either accidently or due to the negligence of the engineer a valve which should have been left open was closed. This caused damage to the donkey engine.

The House of Lords in The Thames & Mersey Marine Insurance Company Limited v Hamilton Fraser & Co (1887) 12 A.C. 484 reversing the decision of the Court of Appeal (17 Q.B.D.195), held that whether there was negligence or not the injury to the 'Inchmaree' was not covered by the policy as such a loss did not fall under the words "perils of the seas".

This case resulted in Inchmaree clauses being inserted in marine policies.

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Clause 7 of the Institute Time Clause annexed to the defendant's said policy is what is termed an "Inchmaree Clause." It provides as follows:-

> "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
>
> . Negligence 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 the 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."

The plaintiff in its Statement of Claim invoked the "Inchmaree" claim mentioning negligence of "master officer crew or pilots" but did not specifically plead that damage had resulted from the negligence of the 'Evelyn's' captain.

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It did however plead that the vessel had run aground and sustained damage particulars of which were given.

No objection was taken by the defendant to the form of pleading. The defendant was aware that the plaintiff was claiming that the damage was caused by the stranding of the vessel, an alleged peril of the sea, and also as a result of the negligence of the captain which it alleged was covered by the "Inchmaree" claim in the policy.

In the "Rules of Construction of Policy" in the Marine Insurance Act Rule 7 provides as follows:-

> "7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

The defendant alleges the vessel at the time was not seaworthy and that she had put to sea in that condition with the knowledge of the plaintiff's manager or director.

In the recent case of Skandia Insurance Company Limited v Skoljarev and Another (1978-80) 142 C.L.R.345 the High Court of Australia considered the issue of burden of proof in a Marine Time Policy.

Mason J at pp 386,387 made these statements:

> "It has always been held that the insured carries the burden of proving that the loss was due to the perils of the sea. He must therefore show on a balance of probabilities that the loss was attributable to a fortuitous accident or casualty of the seas."

> "The insured is not required to establish that the vessel was seaworthy at the commencement of the voyage as an essential element in his cause of action."

> "It has been universally stated that the onus of proof of unseaworthiness is on the insurer."

"In a time policy he (i.e. the insurer) carries the onus of proving that, with the privity of the insured, the ship was sent to sea in an unseaworthy state in which event he is not liable for any loss attributable to that unseaworthiness."

I will consider the issue of burden of proof after stating the facts.

Before stating the facts, a description of the steering system of the 'Evelyn' at the time of the mishap will assist in understanding its alleged failure to operate properly due to jamming.

The steering gear was a chain and rod type. From a quadrant attached to the rudder head chains went from both sides of the quadrant along the port and starboard sides of the vessel and around the steering wheel or helm in nautical parlance. The chains were held in position by sheaves which allowed free movement of the chains

Of particular importance in this case was the presence of two rod and chain adjusting screws attached to the chains on either side which were used to take up any slack in the chains. They were also called ring screws by one of the witnesses.

Mr. D.E. Worthington, a marine surveyor inspected the 'Evelyn' on the 24th day of December, 1981 after its mishap as it lay on the hard at the Government Slip Way at Walu Bay and submitted a written report to the defendant company. The report is item 8 in the agreed list of documents.

His inspection of the steering gear disclosed that there was full play of the rudder to the extent of 10° i.e. moving without application of the helm. He found slack in the steering chains. When the helm was rapidly applied either to port or starboard from the amidship position slackness in the forward chains caused a riding turn to gather on the steering wheel shaft. This effectively jammed the steering until the helm was applied in the opposite direction.

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The port chain he found to be severely corroded, but he did not state that this played any part in the jamming. It was evidence of lack of proper maintenance.

The defendant contends that the steering gear of the vessel had been in that condition for some considerable time before Mr Worthington inspected the vessel to the knowledge of the plaintiff.

The 'Evelyn' could not legally proceed to sea without a valid sea going certificate (Section 47 Marine Board Act).

There are three types of survey carried out by the Marine Board - sight, full and special. No certificate will be issued by the Board for a vessel to proceed to sea without a survey certificate which is valid only for 6 months. Before it can be renewed another survey of the vessel is required.

The 'Evelyn' had a full survey on the 4th November, 1980. Survey was carried out, as were all such surveys, by a surveyor employed by the Marine Board.

The report dated 18th January, 1981 by the surveyor specifically indicates that the steering gear was checked. His comment on the form (Exhibit O) about the steering gear was that it was "good" indicating it was in good condition.

On the 21st July 1981 the same surveyor did a sight survey on the vessel. There were no special comments about the steering except the same comment 'good'.

I accept those reports as establishing that on the dates of the two surveys the steering gear of the 'Evelyn' was in proper working order and the vessel was seaworthy.

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At the time of the mishap the 'Evelyn' was about due for its annual full survey. There was a valid sea going certificate in respect of the Evelyn in force at the time the vessel went on the reef.

The 'Evelyn' left Suva for Kadavu at 7.30 a.m. on 2nd December, 1981. There is no evidence that when she left on that voyage the steering was in the condition mentioned by Mr Worthington. She arrived at Vunisea at about 3.30 p.m.

Vunisea is in a bay on the northern coast of Kadavu. Charts indicate that there are a number of reefs in the vicinity. Evidence also indicates that there are beacons marking a channel but none of them has a light at night.

The 'Evelyn' left for Tavuki at about 10 p.m. that day. The night was dark and the Captain was on deck forward of the helm directing the helmsman.

It was at this stage of the evidence that there is a conflict. The plaintiff called two witnesses. One was the vessel's quartermaster, Josua Wailili, who normally was at the helm. The other was Josefa Mara, a clerk employed by the plaintiff, who was on deck at the time the vessel went aground.

The defendant called the captain of the 'Evelyn' Luke Moce.

As to the credibility of these three witnesses the evidence of Josefa Mara must be accepted in toto. He did not have much to say but what he did say was important.

Mr. Chauhan did not cross examine this witness but, appreciating his oversight, he asked permission of the Court to ask the witness a question which brought a reply that the witness did not know what had caused the vessel to go on the reef.

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The House of Lords case of Browne v Dunn (1893) 6 R.67 is the authority for the proposition that where Counsel decline to cross examine a witness the evidence of that witness must be accepted as factual.

The Captain did not impress me at all whereas I was impressed by the other two witnesses. The evidence of Josefa Mara supports that of Josua Wailili in one important aspect which establishes that Luke Moce was not telling the truth. I will refer to his evidence after referring to Josua's evidence and that of the Captain.

Josua said the vessel was proceeding at full speed (6 knots) and the Captain was forward of the mast directing him by saying (in Fijian) "right" "left". He says that for 5 minutes before the vessel went aground Captain Luke had given him no instructions.

Josua denied that the steering jammed that night. He had been three years on the 'Evelyn' and had during all that time been the helmsman. He said he had never had any trouble with the steering and he emphatically denied Luke's allegation that the steering had jammed when going to starboard. He stated that Captain Luke had not asked for the engine to be slowed down.

He also refuted an allegation made by Luke that there had been frequent trouble with the steering gear previously. He had never heard the Captain complain about the steering. He said steering gear (chain) had been replaced in January 1981 and it was not true that steering jammed two months later.

In answer to a question from the Court he said the passage was straight and wide and vessel had gone aground on the seaward side of the reef where there was a beacon.

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Captain Luke's version is that Josua was at the helm and he the Captain was directing him by saying right and left. He ordered the engine to be slowed and Josua said the chain had 'got stuck' (i.e. jammed) and then the vessel went aground. Captain Luke said it was not the first time the chain had jammed - it had happened frequently in the past. A new ring screw and chain had been fitted in January 1981 and two months later it had jammed again and had happened about 20 times.

He said that when the ring screw was tightened up "it went well". Two months later there would be the same trouble.

He said the vessel was travelling at about 3 knots and he admitted that if it had been going at full speed the vessel would have gone on the reef.

Under cross examination he stated that when the vessel came off the reef the steering was all right. He tested it himself. The vessel then proceeded to Tavuki and later returned to Suva. He experienced no trouble with the steering.

He made written statement after the grounding about the incident and admitted he had made no mention therein of the alleged defective steering. He gave no explanation, in that statement as to how the vessel went on the reef.

He also stated in evidence that when the ring screws were tightened slack in the chains would be taken up, that it was the duty of the crew to keep the screws tight. He also saw to the screws being tightened. He then made admissions which should have resulted in the defendant admitting liability. I quote Captain Luke's words:

> "I did see that screw was tightened up before we left Vunisea. There was no slack when we left Vunisea. When we left Suva on that voyage there was no slack."

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The vessel only travelled about 1 mile on leaving Vunisea before going on the reef. The chains had been tightened before leaving and the possibility of those chains becoming loosened in so short a distance is so remote that it can be ignored.

Josua Mara confirmed the positions on deck of the helmsman and the Captain. He also confirmed that the Captain was directing the helmsman and that for 3 minutes before the vessel went on the reef the Captain gave no instructions to Josua.

The 3 minutes silence is highly significant and satisfies me that not only was Captain Luke not telling the truth but it was one more indication of his negligence. There was a beacon on the reef where the vessel went aground and the Captain should have seen it had he been keeping a proper look out. If he was unable to see it because the night was dark it was negligence on his part to proceed to sea at all.

I accept Josua's evidence which establishes that the night was dark and he could not see well and that the vessel was travelling at 6 knots when it grounded. I accept also that he experienced no trouble at all with the steering which on the Captain's evidence had been checked and the chains adjusted shortly before the vessel left Vunisea.

Mr Worthington's survey report is of no assistance to the defendant on this issue and there is no proper basis or justification for the opinion he expressed that "the steering gear would have been in the condition noted upon the vessels departure from Vunisea." He should not have expressed that positive opinion in his report to the defendant. He failed also to point out in his report the ease and speed with which any jamming of the helm could be cleared. His report left the impression that the jamming was the cause of the stranding.

Mr J S Figgess, a ship pilot and master mariner and a surveyor of vessels, in answers to questions by the Court whether the helmsman would have had any difficulty in steering if the helm jammed said:-

> "All he has to do is move wheel in opposite direction. If it had happened earlier and on several occasions helmsman would have been aware of the situation and responded to it."

A vessel moving at 6 knots does not turn like a motor vehicle. It would be slow to respond to the helm at that speed and the helmsman would have had plenty of time to turn the wheel the other way if Luke had seen the beacon and called a warning. However, I am satisfied and find as a fact that the steering did not jam that night.

Accepting Mr Worthington's report does not establish that the steering gear was inoperative at the time of the mishap. Even he stated that the steering was jammed until the helm was applied in the opposite direction - a movement which could only have taken a second or so to make.

However, the evidence before me establishes beyond any reasonable doubt that there was no trouble with the steering after the vessel left Vunisea nor after the mishap and on its return to Suva under its own power.

The burden of establishing the vessel was unseaworthy at the time lay on the defendant. It has failed to discharge that burden.

I find as a fact that the cause of the stranding was the negligence of Captain Luke in ordering the vessel to sea on a dark night in waters with reefs which were not marked by lighted beacons. In particular he was negligent in failing to leave the bay at a slow speed or to reduce speed and failing to keep a proper lookout.

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The plaintiff has established that the damage to the vessel resulted from stranding on the reef on the night in question.

I find as a fact that stranding on a reef is a peril of the sea which is covered by the policy. The damage which the vessel sustained was also damaged covered by the policy in the Inchmaree clause (clause 7), namely, as a direct result of the negligence of master Luke.

The only other issue to consider is whether it has been established that the proviso to the clause operates to negative the operative part of the clause. The burden of establishing this was on the defendant.

Mr Wong Hoy Sing, the managing director of the plaintiff company, denied all knowledge of any defective steering gear. Even if it was in fact defective there is no evidence before me that any officer of the company was aware of the fact.

The Company was aware that the vessel travelled at night but a certificated Captain was employed and it was not negligent of the company or indicative of any want of diligence not to have taken steps to prohibit sailing of the vessel at night in unlit coastal waters. Vessels do travel at night and provided care is exercised reefs, if their existence is known, can be avoided.

I hold as a fact that the defendant company has failed to establish that the vessel was unseaworthy or that the company had knowledge of any defect in the vessel's steering. I hold that the company is liable under the policy to indemnify the plaintiff company.

It was agreed by counsel that only the issue of liability should be tried and if the defendant was held liable to refer the question of assessment of damages to the Chief Registrar.

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It appears that the measure of damages might be in the vicinity of the sum of $21,558 the amount of Carpenters Industrial tender for repairs. That tender was however, subject to a rise and fall condition. The amount of $29,529 claimed by the plaintiff exceeds the amount for which the vessel was covered under the policy.

The plaintiff also claims interest on the amount found to be owing by the defendant at the rate of 13.5 per centum per annum.

The Court has power under section 3 of the Law Reform (Miscellaneous Provisions)(Death & Interest) Act to award interest on debts and damages.

I consider this a proper case in which to award interest. I have no evidence on the trading banks current rate of interest or whether the plaintiff had to borrow money to pay for the repairs. It could, however, have invested the money at 12% interest and it is that rate I propose to accept.

The claim form is dated 12.2.81. Allowing reasonable time for the defendant to process it, order that interest at the rate of 12% be paid by the defendant to the plaintiff on the amount which the Chief Registrar assesses as being the loss sustained by the plaintiff. Interest is to be calculated from the 1st day of March, 1982.

There will be judgment for the plaintiff for the loss sustained by the plaintiff in respect of the stranding of the vessel 'Evelyn' to be assessed by the Chief Registrar with interest thereon at the rate and from the time hereinbefore ordered.

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

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which it can not recover from the defendant. Mr Parmanandam abandoned the company's claim for loss of profits which was not covered by the policy.

The plaintiff company is to have the costs of this action to be taxed on the higher scale if not agreed.

R.G. KERMODE

J U D G E

SUVA,

12th April, 1985