

Case No: AD-2015-000131

Neutral Citation Number: [2016] EWHC 1093 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: Friday, 11 March 2016

Before :

MR. JUSTICE TEARE

Between :

Nautical Challenge Limited	<u>Claimants</u>
- and -	
Evergreen Marine (UK) Limited	<u>Defendant</u>

Miss V Selvaratnam QC (Instructed by **Clyde & Co**) appeared on behalf of the **Claimant**
Mr J Turner QC (Instructed by **Ince & Co**) appeared on behalf of the **Defendant**

Judgment

Mr. Justice Teare :

1. This is an application by Evergreen Marine UK Limited to amend Part 1 of its collision statement of case. Amendments have been made to a number of the answers to the questions raised in Part 1, but it is only those amendments in relation to Articles 8, 10 and 13 which are opposed.
2. The principles which guide the court in determining applications of this nature were summarised by Gross J in the case of *The Topaz* [2003] 2 Lloyds 19 at paragraph 13. He refers there to the relevant principles in these terms:

“ Part I of the [Preliminary Act] (now a Collision Statement of Case) is not a pleading; it constitutes a set of formal admissions which the party concerned must file promptly and “blind” ... it is well-established that leave to amend in this regard is not lightly given because any such amendment involves departure from a formal admission and is likely to be made with knowledge of the opposing case...”

He then notes that there is another course, which is not to amend the Preliminary Act but to lead evidence contrary to it. He also makes the important point which is:

“In practical terms, a refusal of leave to amend Part I of a PA may not be the end of the matter; while the party concerned will be held to the admissions contained in the PA, the Court is not similarly bound; the Court must, regardless, proceed on the evidence which ‘it deems most accurate and trustworthy’...”

3. So he went on to decide the application in that case after what he described as “close scrutiny”.
4. Miss Selvaratnam has said, relying on the Admiralty and Commercial Courts Guide, that permission to amend will only be granted in exceptional circumstances. That paragraph of the guide, N5.7, does contain a difficulty, it seems to me, in that, having made the reference to “exceptional circumstances”, it then refers to the principles applicable as set out in the case of *The Topaz* and, as I have just indicated, the case of *The Topaz* does not in terms say that leave will only be granted in exceptional circumstances. However, as Miss Selvaratnam has pointed out, there is considerable authority which has been collection in Meeson , Chapter 7, between paragraphs 7-52 and 7-57 which would appear to support the need for exceptional circumstances.
5. It may well be that depending upon the nature of the amendment which is sought, that exceptional circumstances will be required before some amendments can be permitted, but I would prefer to decide this matter by reference to the principles set out by Gross J which are referred to in terms in the Admiralty and Commercial Courts Guide.
6. That being so, it is necessary to look at the particular amendments. Just before doing so, I would observe that the application for leave to amend was made in an application notice, Part C of which sets out the evidence upon which the application is based. In particular, paragraph 3 said as follows:

“By letter dated 15 January 2016, the claimant’s solicitors objected to certain of the answers given in Part 1 of the defendant’s CSoC. As a result,

a reappraisal of the defendant's CSoC was carried out, leading to the draft amended CoSC, which both better answers the questions in Part 1 and reflects the case that it wishes to advance in Part 2. In addition, those aspects of Part 1 that had been based solely upon material in the MAIB report into the collision have been deleted."

7. Article VIII is the article which asks the question: what was the position, course steered and speed through the water of the ship when the other ship was first seen? The answer as originally given was that the vessel was proceeding along the channel on a course of 314 degrees true at a speed of 12 knots. It added "as instructed by Jebal Ali, Port Control".
8. The proposed amendment also says that the vessel was proceeding along the channel on a course of 314 degrees true at a speed of about 12 knots. But what is added is the position of the vessel at that time. It was not originally stated but is now said to be "at a position not particularly noted at the time but now thought to have been no later than between about the number 6 and the number 3 buoys". The further amendment to be noted is that the suggestion that the course and speed were "as instructed by Jebal Ali, Port Control", has been deleted.
9. It does not appear to me that this change seeks to withdraw any material admission by Evergreen. On the contrary, the course and speed are the same and whilst the new answer gives a position for the vessel, it is clear that that is now an estimate and that at the time the position was not particularly noted. So nothing which was admitted is now sought to be withdrawn. Insofar as Miss Selvaratnam's clients wish to say that the Evergreen ship had not noted its position at the time, they can still say that.
10. Miss Selvaratnam says on an application of this nature, it is incumbent upon the applicant to explain what is the evidence upon which it is now said that the vessel was at the time between number 6 and number 3 buoys. I have no doubt that that estimate comes from the reappraisal of the defendant's case referred to in Part C of the application notice. It is true that the details of the reappraisal are not set out, but I have no doubt that the person drafting this looked at the chart, looked at the evidence and did his or her best to come to a view as to where the vessel was at that time. The estimate given is between number 6 and number 3 buoys.
11. Miss Selvaratnam also says there should be an explanation as to why the assertion that this course and speed were "as instructed by Jebal Ali, Port Control" has been removed. I infer from Part C of the application that this is one of those matters which was based solely upon material in the MAIB report and Mr Turner said as much in his reply. It therefore seems to me, having looked carefully at the amendments to Article VIII, having given them the close scrutiny which is appropriate and borne in mind that leave to amend the Preliminary Act should not lightly be given, that it is appropriate to make the amendment in paragraph 8.
12. Paragraph 10 asks the question: what is the distance and bearing of the other ship if and when her echo was first observed by radar and also the distance, bearing and approximate heading of the other ship when first seen? The original answer to this article was confusing, insofar as in answer to the question about the radar, it was said, "Alexandra I appeared to be drifting about 10 to 15 degrees off Eversmart's port bow about a mile to the northwest and well clear of the buoy channel exit route", and in relation to the second part of the question, the answer was simply given, "As described in paragraph 10(a) above", which possibly suggests that that was a visual observation rather than a radar observation.

13. That uncertainty is now clarified by the amendment to the answer. In relation to the question about radar observation, the answer is, "Not particularly noted". That perhaps makes clear what was in fact the position under the old answer. That is now a clear admission that the echo was not particularly noted. So far as the answer to (b) is concerned, there are two differences in the present answer. The first is that, whereas the bearing of the other ship was said to be "about 10 to 15 degrees off the port bow", it is now said to be, "about 10 degrees on the port bow". That is a difference but one would be surprised if that was a material difference. At any event, the answer makes clear it is an estimate.
14. The other matter which is added is that in the original answer, there was no distance of the other ship when first seen. We now have an estimate that it was "about 1½ miles". That is no doubt part and parcel of the reappraisal of the case which was necessary when it was pointed out that there had been no statement of the distance. So it seems to me, again having given that matter close scrutiny, that it is appropriate to give leave to amend. No admission which has been made is now sought to be withdrawn. On the contrary, there is now a clear admission with regard to radar.
15. The final Article to which objection is taken is Article XIII, which requires the maker of the Preliminary Act to identify the alterations which were made to the course and speed of the ship after the other ship was first seen and what steps were taken to avoid collision. Miss Selvaratnam said in her skeleton argument that a wholly new case has been pleaded. I am not, with respect, sure that that is right. Under the original answer, it was effectively said that the only steps taken to avoid collision were shortly before the collision when the Master of the Eversmart ordered the helm hard to starboard, but a collision could not be avoided. Under the new answer, that position remains the case. It may be a case which will give Mr Turner's side considerable difficulty, but it does not appear to me to have changed.
16. What has been added is that in-between the observation of the other ship and the action taken at the last to avoid collision, is the pleading that the Eversmart slowed down to disembark a pilot and, having done so, then increased speed. That is new. However, I understand from paragraph 3 of the case memorandum that it is common ground that Eversmart was outbound and had disembarked her pilot. It does not appear that that incident is in dispute.
17. It is necessary for that matter to be added because it is necessary for the person making the PA to state what alterations to the speed were made and, although these alterations to speed were not made with regard to the other vessel, they were made after the time in Article VIII. So in order to give the full and complete answer which paragraph N5.6 of the Guide requires, it is appropriate that that be added.
18. So again, it does not appear to me that the admission that the only steps taken were at the last has been withdrawn in any way. It remains there. So again, having given this matter close scrutiny and borne in mind that permission to amend will only rarely be granted, it seems to me in the circumstances of this case appropriate to grant permission to make those amendments.
19. Miss Selvaratnam asked me to make clear that on applications of this nature, the deponent, the person who made the statement of truth, should explain why it is that he gave the statement of truth. The statement of truth is, of course, very important and cannot lightly be made. But I am not persuaded that it is appropriate on applications of this nature to make them even longer than they already are to require matters of that nature to be gone into in the

sort of detail that Miss Selvaratnam suggests is appropriate. She is, of course, quite right to say that the application should be supported by evidence. This application was. It refers to the reappraisal and to the removal of matters contained solely in the MAIB report. It may well be that the evidence could have been fuller and made matters clearer than they are, but in my judgment, matters are sufficiently clear to enable me to allow these amendments.