

IN THE PRIVY COUNCIL

19 of 1970

ON APPEAL  
FROM THE SUPREME COURT OF JAMAICA

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
10 MAY 1973  
25 RUSSELL SQUARE  
LONDON W.C.1

B E T W E E N:

ARNOLD MALABRE AND COMPANY LIMITED (Defendant)  
Appellant

--and--

KINGSTON PILOTAGE AUTHORITY (Plaintiff)  
Respondent

CASE FOR THE APPELLANT

RECORD

10 1. This is an appeal from the Judgment of the Court of Appeal of Jamaica (Mr. Justice Waddington presiding, Mr. Justice Shelly and Mr. Justice Luckhoo) dated the 5th day of April 1968 dismissing an appeal from the Judgment of His Honour Mr. H.R. Campbell delivered on the 14th day of November, 1966 whereby he found proved each of two complaints by the Respondent against the Appellant and ordered the Appellant to pay £27.6.11 in respect of the first complaint and £27.6.10 in respect of the second complaint together with costs taxed at the sum of £234.0.1. P53 P34 pp 1-2 P43

20 2. These complaints were filed to determine whether on its true construction The Pilotage Law (Law 23 of 1957) (hereinafter referred to as 'The Law') has so changed the law hitherto prevailing as to entitle the Respondent as Pilotage Authority for the port of Kingston to two sets, instead of one set, of fees in respect of pilotage services rendered in the Port to either an inward or an outward bound ship. The Law creates compulsory and optional pilotage limits in the Port. For pilotage from berth to the compulsory 30 pilotage limit (or vice versa) the Appellant says that pilots are entitled to one fee only, whilst the Respondent contends that pilots are entitled to one fee between the compulsory and optional pilotage limits and another fee between the optional pilotage limit and berth.

40 3. The relevant background facts and the principal statutory provisions are set out in the Judgment of Mr. Justice Waddington from line 31 on page 54 to line 10 of page 59 of the Record and the Appellant adopts that passage as part of its Case. To avoid duplication it is not separately repeated here. References hereinafter made to regulations are to the Pilotage (Board) PP 54-59

RECORD Regulations, 1957.

4. Regulations 33 (1) and (3) provided as follows:-

"33. (1) The fees in respect of pilotage services within the compulsory pilotage limits of first class ports shall be as follows-"

"33. (3) The fees payable in respect of pilotage services in optional pilotage areas shall be the same as are prescribed by paragraphs (1) and (2) above."

Regulations 14 (1) (f) and (j) and 14 (2) provided: 10

"14. (1) The pilotage services at outports shall be under the general supervision of the Marine Superintendent, and an outport pilot shall -  
(f) not leave a ship piloted by him unless she is berthed alongside a wharf or jetty or brought to a safe anchorage or if outward bound, until the appropriate limits have been reached:

Provided that in the case of an outward bound ship, the pilot may, with the approval of the master, leave the ship before the appropriate limits are reached if, by reason of weather conditions his return to shore will be endangered by remaining on such ship until such limits are reached. 20

(j) when he is about to take charge of a ship which is outward bound. or which is about to be moved from where she is lying, go on board and report himself to the master or officer in command before the appointed timeso as to enable her to be moved out frcm the wharf or jetty or to proceed to sea or to her destination;" 30

"14. (2) The duties of an outport pilot in regard to an outward bound ship shall commence as soon as such ship begins to unmoor for the purpose of proceeding to sea.

On inbound ships his duties shall commence when he boards the ship in any position within a pilotage area."

Pp41 -42 5. The Resident Magistrate in his Judgment held as follows:- 40

"This Court cannot find that the compulsory limit must go to the foreshore passing over the

optional line. In the outports all the optional areas are inshore of the optional line and so it must be in the port of Kingston. The Law gives power to the Board to define the limits of pilotage and the Board can make regulations for defining pilotage areas and distinguishing the part which is compulsory and the part which is optional and this has been done.

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The Master is given instead of the old excused limit the right to navigate in the optional area with or without a pilot and this he can choose. A Master clearly could never be prosecuted if the limits were not defined and set apart. The law could never intend that pilots only paid an optional fee when they did some particular work like moving a ship from dock to dock and yet when a vessel coming into port pay only one fee for service over the compulsory limit and over the optional limit."

20 6. The Appellant appealed to the Court of Appeal of Jamaica and that Court by a majority (Mr Justice Waddington dissenting) dismissed the appeal. Mr. Justice Shelly, who was one of the majority, rejected the construction of regulation 30 which would make the whole of the pilotage area for the Port of Kingston a compulsory pilotage area and make a part of that same area an optional pilotage area, and also rejected the concept of looking at the nature of the voyage on which a ship is engaged in order to determine whether it is navigating in a compulsory pilotage area. His Lordship  
30 concluded that -

PP 53-80  
pp 62-71

(1) The compulsory pilotage area and the optional pilotage area of the port of Kingston are mutually exclusive;

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(2) A pilot is entitled to be paid a separate fee in respect of services performed within the limits of each area by virtue of regulations 15 (1), 15 (2), 33 (1) and 33 (3), on inward and outward bound ships

P 71

40 7. Mr. Justice Luckhoo, who was also one of the majority, expressed the view that sections 32 and 34 of the Law do not appear to contemplate an optional pilotage area of a port being part of a compulsory pilotage area, or vice versa; that the amounts in the scale of prescribed fees do not really assist in the determination of the question in issue in this case; and that the provisions of regulation 14 must be read subject to the provisions of sections 32 and 34 of the Law and are applicable only in so far as they do not conflict with the provisions of those sections, with the result that the provisions of the regulation cannot  
50 extend the obligation of compulsory pilotage laid down in sections 32 and 34 of the Law.

PP 71 -  
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PP 53 8. Mr. Justice Waddington, who dissented, distinguished  
 -62 between a "limit" and an "area" and held that  
 irrespective of whether the pilot referred to in the  
 complaints engaged in navigation in the optional area  
 he was still performing pilotage services within the  
 compulsory limit for which he was engaged and which  
 attracted the fees prescribed by regulation 33 (1).  
 His Lordship accordingly concluded that the  
 Legislature did not intend to make any such radical  
 change in the general pattern of fees payable as was  
 contended by the Respondent, and that the fees  
 prescribed by regulation 33 (3) were only intended to  
 be payable for such services as a pilot was engaged to  
 perform exclusively within the optional area.

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9. If the Respondent's argument were correct the  
 enactment of the Law would have had the effect of  
 doubling the pilotage fees hitherto payable in respect  
 of the services of a pilot for an inward bound ship  
 from the compulsory pilotage limit of a port to berth  
 or safe anchorage, and similarly for an outward bound  
 ship. But there is no or no sufficient warrant for  
 ascribing such an intention to the Legislature.  
 Moreover, the master of an incoming foreign ship would  
 be entitled to dispense with the services of a pilot  
 once the optional pilotage limit was reached, thereby  
 not only hazarding his ship, but also endangering the  
 port.

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10. Regulation 14 is applied to the port of Kingston  
 by regulation 3 (2) of The Pilotage (Authority)  
 Regulations, 1957, contained in the Second Schedule  
 to the Law. Regulation 14 (1) (f) forbids a pilot to  
 leave a ship piloted by him unless she is berthed  
 alongside a wharf or jetty or brought to a safe  
 anchorage, or if outward bound, until the appropriate  
 limits have been reached. This has the effect of  
 rendering it compulsory for an inward bound ship to  
 take a pilot even within the optional pilotage limit.  
 Similarly, when a pilot is about to take charge of a  
 ship which is outward bound he is required by regulation  
 14 (1) (j) to go on board and report himself to the  
 master before the appointed time so as to enable her to  
 be moved out from the wharf or jetty or to proceed to  
 sea or her destination. Although where a harbour  
 movement only was contemplated, this provision might be  
 construed as applying only in the event of the option  
 to take a pilot having been exercised, regulation 14 (2)  
 states that a pilot's duties in regard to an outward  
 bound ship shall commence as soon as such ship begins to  
 unmoor for the purpose of proceeding to sea.

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11. The limits of the pilotage areas are defined by  
 regulation 30 and are depicted in relation to Kingston  
 on the chart (exhibit 2). The very fact that in relation  
 to every port the optional pilotage limit is inshore of  
 the compulsory pilotage limit suggests that it is only

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for movements occurring exclusively within the optional pilotage limit that pilotage is not intended to be compulsory. There is in any event no warrant for adopting the optional pilotage limit as itself constituting an inshore compulsory pilotage limit.

10 12, Regulation 15 stipulates that the fees specified in Part IV of the regulations shall be payable in respect of pilotage services within the compulsory or optional limits respectively of any port. Part IV of the Regulations consists of regulation 33. Paragraph (1) prescribes the fees payable in respect of pilotage services "within the compulsory pilotage limits", whereas paragraph (3) states that "the fees payable in respect of pilotage services in optional areas shall be the same as are prescribed" by paragraph (1). The Appellant says that the effect of stipulating that the fees shall be "the same" (rather than at a particular "rate", as in paragraph(2)) is that the prescribed fees are payable for pilotage services within compulsory pilotage limits irrespective of whether such services are rendered either wholly or in part in an optional pilotage area. It makes no difference whether the services rendered within compulsory pilotage limits are rendered within an optional pilotage area: the fee is the same.

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30 13. In each port the optional pilotage area consists of the area between the optional pilotage limit and the foreshore. The compulsory pilotage area consists of the area between the compulsory pilotage limit and either the foreshore or (as Mr Justice Waddington held) the optional pilotage limit. If it consists of the whole pilotage area, the Appellant says that because all the services are rendered within the compulsory pilotage limit the fees prescribed by regulation 33 (1), and only those fees, are payable. If the compulsory pilotage area is separate from the optional pilotage area, then whether or not the master of an inward or outward bound ship avails himself of the right to pilot and conduct his own ship within the optional pilotage limits, the fees payable are the same, because the pilot has been engaged to pilot the ship inward to her berth or (as the case may be) outward to the compulsory pilotage limit and has made available his services for that purpose.

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50 14. It is for services rendered in accordance with regulations 14 (1) (f) and (j) and 14 (2) that a pilot falls to be paid and the services prescribed by those regulations are consonant with the practice before 1957 on occasions where a pilot was engaged.

15. The Appellant will accordingly submit that the Judgment of the Court of Appeal of Jamaica was wrong and ought to be reversed for the following amongst other

REASONS

- (1) BECAUSE the same, and no different, fees are payable for all pilotage services rendered within the compulsory pilotage limit of the Port of Kingston irrespective of whether any are rendered in the optional pilotage area; 10
- (2) BECAUSE the fees prescribed for services in the optional pilotage area are applicable only to services rendered exclusively within that area;
- (3) BECAUSE the Legislature cannot be supposed or shown to have intended any departure from the law prevailing before the enactment of the Pilotage Law 1957 namely that only one fee was payable to a pilot for conducting an inward bound ship to a berth or anchorage in the port and one further fee for conducting that ship to sea; 20
- (4) BECAUSE whether or not the optional pilotage area forms part of the compulsory pilotage area the fees payable for pilotage services depend on what the services are which the pilot has been engaged to perform;
- (5) BECAUSE the regulations prohibiting the pilot from leaving an inward bound ship until she is at berth or safe anchorage and stipulating that his duties in regard to an outward bound ship shall commence as soon as such ship begins to unmoor, make plain that the master of such ship is bound to take and employ a pilot even in the optional pilotage area; 30
- (6) BECAUSE the judgments of the majority of the Court of Appeal of Jamaica were wrong and ought to be reversed;
- (7) BECAUSE the judgment of the Presiding judge in the Court of Appeal was right and ought to be affirmed. 40

ANDREW LEGGATT.

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