

21/85

IN THE PRIVY COUNCIL

No. 27 of 1984

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES  
ADMIRALTY DIVISION

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B E T W E E N :

CANDLEWOOD NAVIGATION CORPORATION LIMITED Appellant  
(Defendant)

A N D :

MITSUI O.S.K. LINES LIMITED First Respondent  
(First Plaintiff)

MATSUOKA STEAMSHIP CO. LIMITED Second Respondent  
(Second Plaintiff)

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CASE FOR THE RESPONDENTS

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Ref: 35/67

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ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES  
ADMIRALTY DIVISION

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BETWEEN

CANDLEWOOD NAVIGATION CORPORATION  
LIMITED

Appellant  
(Defendant)

and

MITSUI O.S.K. LINES LIMITED

First Respondent  
(First Plaintiff)

MATSUOKA STEAMSHIP CO. LIMITED

Second Respondent  
(Second Plaintiff)

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CASE FOR THE RESPONDENTS

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THE SUBJECT MATTER OF THE APPEAL:

1. The proceedings the subject of this appeal were heard and determined by Yeldham J. in the Admiralty Division of the Supreme Court of New South Wales. His Honour entered judgment for both plaintiffs, and the appellant, the defendant in the proceedings, seeks in this appeal to have the damages awarded to the first respondent (the first plaintiff in the proceedings) taken away altogether and the

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damages awarded to the second respondent (the second plaintiff in the proceedings) reduced.

2. The proceedings arose out of a collision at sea, off Port Kembla on the coast of New South Wales, between the "Mineral Transporter", owned by the appellant, and the "Ibaraki Maru", in the early hours of 10th July 1981. At the time of the collision the "Ibaraki Maru" was at anchor and the "Mineral Transporter" was drifting. At the hearing before Yeldham J. the appellant admitted negligence, but claimed that there was contributory negligence on the part of the master and crew of the "Ibaraki Maru". That issue was resolved by the learned judge adversely to the appellant. It is understood, however, that the appellant does not seek to challenge his Honour's decision on that point.

3. On the issues as to damages, there was a substantial measure of agreement between the parties on the primary facts, and the matters in dispute were identified in written submissions. The evidence in relation to such facts as were not formally agreed was not the subject of significant challenge. Subject to one

202 1.30

332-353

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qualification, the learned judge resolved the issues as to damages in favour of the respondents. The qualification concerns a particular matter relating to the calculation of the first respondent's economic loss and the learned judge accepted in part the appellant's argument on that point. No challenge is made by the respondents to that aspect of the decision.

380 1.15-  
391 1.30  
391 1.30-393

THE ISSUES AS TO DAMAGES:

4. The "Ibaraki Maru", a vessel of about 63,000 gross tons, was used for the transportation of coal. At the time of the collision the vessel was awaiting a berth at Port Kembla where she was to take on board a cargo of coal to be transported to Japan. The vessel was owned by the first respondent, and was the subject of a bareboat charter to the second respondent, and a time charter back to the first respondent. It was common ground that the responsibility to bear the cost of the repairs occasioned as a result of the collision fell upon the second respondent. There was also agreement as to the amount of that cost. The daily rate of hire payable

207 1.15  
209-216  
217-230  
407

under the time charterparty by the first respondent to the second respondent was ¥2,464,000, and it was ultimately agreed between the parties that, pursuant to the provisions of the charterparty, while the vessel was laid up for repairs as a result of the collision, the daily rate payable to the second respondent was reduced by ¥1,920,000 from ¥2,464,000 to ¥544,000.

333 1.10,  
350 1.20

5. The main issue as to damages involves a question of principle as to whether the first respondent can recover economic loss in the form of loss of net profits it would have made from the use of the vessel during the period when it was laid up as a result of the collision and wasted charter hire.

6. Another issue that affected the claim of both respondents related to the fact that the loss which each suffered was increased by a trade union "black ban", the details of which were set out in an agreed statement of facts, which extended the time during which the "Ibaraki Maru" was laid up for repairs.

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7. Finally, there was some dispute as to

the currency in which judgment should be given.

348 1.20

THE ECONOMIC LOSS ISSUE:

8. The facts relevant to the first respondent's claim included the following:

(a) The first respondent was both the owner and the time charterer of the vessel.

(b) Arrangements involving a bareboat charter and a time charter back to the owner are not unusual and the possibility of their existence would be known to someone in the position of the appellant's owner and master.

386-7

177 1.15-25

(c) The "Ibaraki Maru" at the time of the collision bore distinctive markings identifying it as belonging to the first respondent's fleet.

177 1.15-20

193 1.25

(d) On the voyage in question the vessel was to carry coal pursuant to a fixture note entered into between the first respondent and Sumitomo Metal Industries

Limited. That fixture was cancelled owing to the collision but an alternative fixture was arranged after the vessel had been repaired. The first respondent lost net profits that would have been made from the use of the vessel but for the collision. Further, the first respondent was under a continuing obligation to pay some charter hire while the vessel was laid up for repairs.

9. As appears from the first respondent's written statement of its claim in relation to damages, and from the written submissions filed by the parties on the issues as to damages, there was no challenge by the appellant to the proposition that, if the first respondent was entitled to be compensated for the economic loss it suffered as a result of the collision, the appropriate manner in which to calculate that loss was to add the net profits and the charter hire referred to in 8(d) above. Apart from the relatively minor issue of quantification referred to in 3 above the only issue raised

324-331

332-353

before the trial judge was the matter referred to in 5 above, and it was raised in relation to both elements of the first respondent's claim and was argued to apply equally to both. The net profits which formed the first element of the claim were calculated after allowing for the full charter hire that would have been payable if the vessel had been operating normally. In view of the first respondent's continuing obligation to pay hire for the vessel at an agreed rate whilst the vessel was laid up, reimbursement of the net profits it would have earned would not have fully reflected its actual loss. This was not disputed at the hearing.

10. The learned Judge, after considering the authorities on the subject of liability for economic loss resulting from negligent acts, made the following findings, which the respondents submit are correct:

390-1

- (a) There was a sufficient degree of proximity between the appellant's negligence and the first respondent's loss for it to be concluded that the appellant owed a duty of care to the first respondent and that the first



respondent's loss was not too remote;

- (b) the appellant knew or should have been aware that it was at least likely that the "Ibaraki Maru" would be the subject of a time charter and that the time charterer would be likely to suffer economic loss if the ship was damaged;
- (c) if it be relevant, the fact that the vessel carried the distinctive marks of the first respondent identified the first respondent individually, and not merely as a member of an unascertained class, as a party likely to suffer economic loss;
- (d) if it be relevant, it would be appropriate to regard the voyage as a joint operation between the two respondents.

11. Recent decisions, both of the High Court of Australia and of the House of Lords, have rejected the notion that as a general rule purely economic loss is not recoverable by way

of damages for negligent acts (Caltex Oil (Aust.) Pty. Ltd. v. The Dredge (Willemstad) 136 C.L.R. 592; Junior Books Ltd. v. Veitchi Co. Ltd. (1983) A.C. 520). The present case, viewed the light most favourable to appellant, is almost precisely the example chosen by Stephen J. in the former case (136 C.L.R. 592 at 569) to illustrate the "arbitrary nature" and "unattractive quality" of such a general rule .

12. Certain earlier authorities which were relied on by the appellant, and which denied to a time charterer a right to recover economic loss resulting from damage to the chartered vessel, whether or not they were correctly decided on their particular facts, now need to be regarded with some caution in the light of the modern authorities referred to above. In any event, the decision of the House of Lords in Morrison Steamship Co. Ltd. v. Greystoke Castle (1947) A.C. 265, applied in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (1964) A.C. 465, was an example of the courts permitting recovery for economic loss not consequential upon damage to the plaintiff's property in a maritime case. Moreover, if it be necessary, it is submitted that circumstances

that the first respondent was the owner of the vessel, and that the voyage was in the nature of a joint venture between the two respondents, would have resulted in the permitting of recovery of the the damage in question even under the earlier authorities referred to above.

13. In the present case the first respondent suffered economic loss as the direct and foreseeable consequence of physical damage to a thing in which the first respondent had a proprietary interest. It is only by denying that the first respondent had any relevant proprietary interest in the vessel that the appellant takes the first step towards bringing the case within the area of potential difficulty relating to recoverability of "purely" economic loss. Even if that step be taken, it is submitted that there is no reason, either in principle or in policy, for denying, in the particular circumstances of this case, that the appellant owed to the first respondent a duty of care or for concluding that the damages sustained by the first respondent are too remote to be recoverable.

14. Insofar as the appellant seeks to maintain that the same rule against recovery of purely economic loss prevents the second respondent from claiming, as a head of damages, reduction in charter hire payable whilst the vessel was laid up for repairs the respondents submit that:

- (a) the considerations referred to above apply with at least equal force here;
- (b) there is no dispute that the appellant owed a duty of care to the second respondent, so that the alleged rule is in any event irrelevant;
- (c) the authorities relating to the position of a time charterer as plaintiff are not in point.

15. To allow the claim of the second respondent points up the illogicality of denying the claim of the first respondent, at least in relation to the wasted hire, for that was in truth a loss that was apportioned between the respondents by the terms of the time charter.

THE BLACK BAN ISSUE:

16. The question of principle is whether the loss due to the extra time taken for which the vessel was laid up for repairs, which was related to the industrial action referred to in the evidence, is recoverable by the respondents. That question is to be considered in the light of the agreed facts, the evidence of a witness who spoke of the subject and the trial judge's knowledge and appreciation of local conditions, all of which were relevant to his finding of fact that the loss was foreseeable.

382-4,  
409,  
188 1.10-30

17. There is no error of law in the learned judge's approach to the problem, which was consistent with authority (H.M.S. London 383 (1914) P. 72; Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (1961) A.C. 388; Home Office v. Dorset Yacht Co. Ltd. (1970) A.C. 1004); Mount Isa Mines Ltd. v. Pusey 125 C.L.R. 383; Jaensch v. Coffey 58 A.L.J.R. 427).

18. The finding of fact made by the learned judge was both open to him and correct. In

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particular there is no basis for disturbing his finding that it was reasonably foreseeable that from time to time ships requiring repairs would be delayed by reason of strikes called or bans imposed by trade unions. 383 1.30

THE CURRENCY ISSUE:

19. The only area of dispute on this subject concerned the costs of repairs incurred by the second respondent. 348 1.15, 407

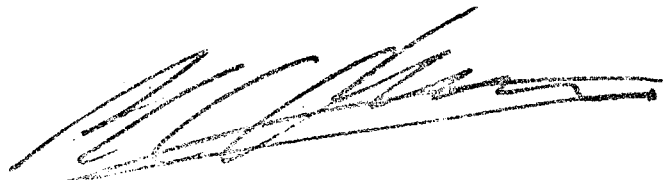
20. The relevant principles of law were not in dispute (The Despina R. (1979) A.C. 685).

21. The learned judge's finding of fact, that the respondent conducted its operations in yen and that it had outlaid its normal currency to meet the expenditure on the repairs, was open on the evidence and correct. 385 1.10

22. The respondents submit that the appeal should be dismissed with costs for the following amongst others.

REASONS

- (1) BECAUSE the respondents were, in the circumstances, entitled to damages for the economic loss sustained by them.
- (2) BECAUSE the respondents' damages were properly assessed as including loss for the whole of the time the vessel was laid up for repairs even though part of that time was extended by industrial action.
- (3) BECAUSE the damages were awarded in the proper currency.

A. M. GLEESON.B. C. OSLINGTON.