

**E. ITOBAR PTY LIMITED v. C. N. MACKINNON AND COMMERCIAL UNION ASSURANCE CO. PLC**

*A decision of Macrossan J. of the Supreme Court of Queensland, 25 October, 1983.*

The vessel "Galway Bay" sank in the early hours of the morning of 17 August 1983 and was totally lost off the Queensland coast some 15 miles from Point Lookout. The vessel was owned by a company having as one of its directors and shareholders the skipper of the vessel (the other being his wife). The vessel was mortgaged to a finance company and also to a firm of solicitors who had formerly acted for the owner. The skipper had been convicted of a number of criminal offences.

Underwriters denied that the vessel had been lost by reason of an insured peril; they asserted that the vessel had been scuttled, relied on non-disclosure of material facts and that, through a displaced hose carrying seawater, the loss was due to ordinary wear and tear.

The evidence given by the skipper of the vessel, concerning his first suspicions that something was wrong, was that the vessel did not feel "right" in its movements, that he then went to investigate in the engine room and found water in it. On further examination he found water pouring into the engine room from a disconnected hose in the section lying between a valve and a pump on a seawater line that led from a seacock in the hull to an outlet on deck. The line was used to draw seawater from below the water line for use on the deck for the vessel's general purposes. When questioned as to the possible cause of the rupture in the hose line the skipper gave evidence that the clip which secured the hose to the pump had not corroded and there was no evidence of any split in the hose line itself. He could not give any explanation as to how the hose could have come off, although he did say there was some vibration throughout the vessel under operating conditions.

In examining the burden of proof that the parties were required to meet in relation to the various issues in the trial, Macrossan J. accepted that the law in Australia was that the standard of proof of scuttling was on a balance of probabilities as ordinarily appropriate in a civil matter — but that that standard should only be applied while giving due consideration to the seriousness of the allegation: *cf Rejtek v. McElroy*<sup>1</sup> and *R. v. The Justices at Biloela, ex parte Marlow (No. 2)*.<sup>2</sup>

Having considered all the evidence his Honour stated that he was not able to find that the loss of the vessel was due to ordinary wear and tear nor did he consider that it was necessary for him to decide whether there had been negligence of the master or crew. He went on

<sup>1</sup> (1965) 112 C.L.R. 517.

<sup>2</sup> [1983] 1 Qd R. 552.

to say that in the present case he thought the following choices were open to him:

[A] fortuitous dislocation in the pumping line occurred which, although unlikely, may have been due to vibration or some other unknown cause, I being prepared to assume that that would bring into operation a peril of the seas, or, on the other hand, that the vessel was deliberately scuttled by the act of its master as proved by strong inference in the circumstances. Alternatively, there is the possibility that in circumstances of suspicion and in view of the probabilities one may simply not be persuaded that the loss was due to the fortuitous dislocation of the salt water line.<sup>3</sup>

His Honour then concluded that the plaintiff's case must fail as he was unable to conclude that the plaintiff proved its case and that the defendants had proved their case raised on the issue of scuttling.

Another interesting part of the judgment of Macrossan J. was that relating to the burden of proof in relation to perils of the sea. His comments on this aspect of the case are also worth repeating in full.

On these technical aspects I am prepared to assume in favour of the present plaintiff that an inrush of water caused by the dislocation of the hose line while the engine was pumping and circulating external seawater through it under pressure for the ordinary purposes of operation of the ship, would constitute a peril of the seas even though the general state of the sea and wind was not a contributing factor. But the burden of showing that the loss was due to a cause such as this, which might thus be regarded as falling within the policy, remains on the insured and if in response to an evidentiary onus arising in the circumstances, the insurers adduce some evidence of scuttling then, even if it is insufficient to sustain a finding of scuttling it may still be sufficient to prevent a finding on the balance of probabilities of loss due to a peril of the seas.<sup>4</sup>

On the issues of non-disclosure his Honour noted that the law which prevailed in Queensland was now different from that which prevails in the United Kingdom as a result of the recent decision of *C.T.I. v. Oceanus*,<sup>5</sup> in which Kerr L.J. confessed that he regarded himself as having been "wrong" in the view which he had earlier expressed in *Berger and Light Diffusers Pty Ltd v. Pollock*.<sup>6</sup> Mac-

<sup>3</sup> Transcript of the judgment of Macrossan J. at p. 28.

<sup>4</sup> Transcript of the judgment of Macrossan J. at p. 27. References to *The "Vaincuer"* [1974] 2 Lloyd's Rep. 398 and *Palamisto S.A. v. Ocean Insurance Ltd* (1972) 2 Q.B. 625 per Cairns L. J. at 647 are made at this part of the judgment.

<sup>5</sup> *Container Transport International Inc. & Reliance Inc. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep. 476.

<sup>6</sup> [1973] 2 Lloyd's Rep. 442.

rossan J. felt constrained to follow the Queensland Full Court decision in *Vischer Enterprises Pty Ltd v. Southern Pacific Insurance Co. Ltd*<sup>7</sup> — although he cast doubt on the correctness of that decision which suggests that in applying the standard of the judgment of a prudent insurer it must be determined whether the insurer in question would have been influenced in fixing the premium or determining whether to take the risk.

On either basis Macrossan J. considered that the prior convictions of the skipper should have been disclosed notwithstanding the fact that they occurred at a time well in the past. He was not, however, persuaded that the judgment of a prudent insurer would have been influenced by the fact that receivers and managers had taken possession of the insured vessel for a brief period, prior to the commencement of the relevant insurance and it had then been returned to the insured, or by the fact that a firm of solicitors also had a mortgage on the vessel for a modest amount, or that the total indebtedness on the mortgage was a little more than had been formerly revealed.

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<sup>7</sup> [1981] Qd R. 561.