21/85

No. 27 of 1984

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES
ADMIRALTY DIVISION

BETWEEN:

CANDLEWOOD NAVIGATION CORPORATION LIMITED

Appellant (Defendant)

AND:

MITSUI OSK LINES LIMITED

First Respondent (First Plaintiff)

MATSUOKA STEAMSHIP CO. LIMITED

Second Respondent (Second Plaintiff)

CASE FOR THE APPELLANT

SOLICITORS FOR THE APPELLANT

Richards Butler & Co.,
5-17 Clifton Street,
LONDON. EC2A 4DQ

Ref: DIF/PT/E173/032

SOLICITORS FOR THE RESPONDENTS

Ince & Co.,
Knollys House,
11 Byward Street,
LONDON. EC3R 5EN

Ref: 35/67

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1. This appeal is brought from a decision of 18th October, 1983 of his Honour Mr. Justice Yeldham sitting in the Admiralty Division of the Supreme Court of New South Wales. The only issues to be raised on the appeal are two questions of principle related to damages.

2. The proceedings arose out of a collision off Port Kembla, New South Wales, on 10th July, 1981 between a vessel owned by the first respondent (The Ibaraki Maru) and a vessel owned by the appellant (The Mineral Transporter). Both vessels were, along with others, anchored off Port Kembla awaiting a berth at that port. They had been anchored approximately 1.2 miles from each other for a number of days when, in the early hours of 10th July, 1981, the starboard anchor of The Mineral Transporter failed in circumstances not alleged to amount to negligence on the part of her owners or those for whom they were responsible.

Record p.354 line 30 - p.355 line 5

3. The learned trial judge however held that there had been negligence by those on board the Mineral Transporter in not taking steps, after failure of the anchor, to avert the collision which took place shortly thereafter. His Honour further held that those on board the Ibaraki Maru had not been guilty of contributory negligence which was causally related to the collision. No appeal is brought from these findings.

Record p.361 line 13

Record p.380 line 1

4. At the time of the collision the Ibaraki Maru was the subject of a bareboat (or demise) charter from the first respondent to the second respondent. There was also in existence a time charter bearing the same date from the second respondent to the first respondent. The first respondent was accordingly owner and time charterer.

5. Under the bareboat charter, the second respondent was liable, as against the first respondent, to bear the cost of repairs resulting from collision and such cost in relation to the subject collision was in fact borne by it. It was agreed that, upon the proper construction of the time charter, the daily hire payable by the first respondent to the second respondent was reduced to 22% of the normal hire whilst the vessel was undergoing repairs.

Record p.380 line 10

Record p.380 line 30

6. The second respondent claimed, and was held entitled to recover, the cost of temporary repairs effected in Australia and final repairs effected in Japan, as well as the amount by which the hire was reduced whilst the vessel was not operational.

Record p.384 line 10

7. The first respondent claimed, and was also held entitled to recover, the amount of hire (22% of the normal rate) it had to pay whilst the vessel was not operational and also the profits it estimated it would have earned, but was not able to earn, during the same period.

Record p.393 line 1

8. It was agreed between the parties that the period for which the vessel was not operational included a period of 32.79 days during which temporary repairs to the Ibaraki Maru in Australia were delayed by reason of the imposition of a "black-ban" by the Painters & Dockers Union. A similar black-ban was imposed in respect of the Mineral Transporter. The bans were designed to persuade the owners of the two vessels to have permanent repairs effected in Australia and were stated to be in support of the Union's campaign to persuade foreign vessels trading regularly to Australia to undergo repairs and maintenance in Australia. Record p.381 line 3 10 Record p.381 line 10

9. One issue which arises on this appeal is whether in quantifying the damages awarded to both the first and second respondents, the learned trial judge correctly included the abovementioned "black-ban" period of 32.79 days. This issue is dealt with later.

10. The other issue which arises on this appeal is whether as a matter of principle the time charterer first respondent was entitled to recover the economic loss, in the form of time charter hire paid and lost profits, said to have been suffered by it. 20

11. The issue raises a question of a fundamental importance in maritime law and in the law of negligence generally.

THE ECONOMIC LOSS ISSUE

13. The position of a time charterer (such as the first respondent) of a vessel which is damaged by the negligence of a third party has been well settled for many years. The Court of Appeal held in Chargeurs Reunis v. English & Amercian Shipping Co. (1921) 9 Ll.L.R. 464 that the time charterer could not recover from the third party damages in respect of his economic loss. This decision was followed by Hewson J. in The World Harmony 1967 P. 341. That this was the law was stated also in Elliott Steam Tug v. The Shipping Controller (1922) 1 K.B. 127 at 139.9, it being said by Scrutton L.J. that:

> "At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognise a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right. ... It is for this reason also that charterers under a charter not amounting to a demise do not and cannot sue in the Admiralty Court a wrongdoer who has sunk by collision their chartered ship." (At 139.7)

14. The principle is generally regarded as stemming from Cattle v. Stockton Waterworks Co. (1875) L.R. 10 Q.B. 453 where the plaintiff's contract to build a tunnel on land of another was made more expensive to perform by reason of the flooding of the land caused by the negligence of the defendant. The principle was confirmed by the House of Lords in Simpson v. Thomson (1877)

3 App.Cas. 279 where it was held that an underwriter had no direct right of action against a wrongdoer for the underwriter's economic loss caused by the wrongdoer's negligence. Similarly, in Societé Anonyme v. Bennetts (1911) 1 K.B. 243 a tug owner was held to have no right to recover his economic loss from a third party who negligently sank his tow. To similar effect were the decisions in Anglo-Algerian Steamship Company Limited v. The Houlder Line Limited 1908 1 K.B. 659; Weller & Co. v. Foot and Mouth Disease Research Institute 1966 1 Q.B. 569; and Margarine Union Gmbh v. Cambay Prince Steamship Co. Ltd. (The "Wear Breeze")1969 1 Q.B. 219. (See also Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd. 1955 A.C. 457.)

15. In the United States the same principle was recognised in Robins Dry Dock & Repair Co. v. Flint (1927) 275 U.S. 303 (2nd Circ.) in which a time charterer failed in his action against a dock owner for delay caused by negligent repairs to the time-chartered vessel.

16. The law as so settled was not in the appellant's submission altered by the decision of the House of Lords in Morrison Steamship Company Limited v. Greystoke Castle (Cargo Owners) 1947 A.C. 265. The speeches of the majority turned on the existence of what was found to be a common or joint adventure between the ship and cargo owners. The fact that the cargo owners had their cargo on board the damaged vessel was seen

by Lord Roche as distinguishing Societé Anonyme v. Bennetts ibid - the cargo owner's obligation was, from the occurrence of the general average act, "a direct obligation to share the expenses incurred by reason of the common danger and acts done to meet it" (at 281.2). "The shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk" (at 282.8 citing The Mary Thomas 1894 P. 108). In incurring expenditure, the shipowner, as well as acting for himself, acted as agent for the cargo owners (at 281.2, 294.9, 312.1). There was by reason of the principles of general average a "mutual obligation entered into by ship and cargo owners resulting in the undertaking of a common adventure" (at 296.9).

17. There were thus very special considerations which led the majority to permit the cargo owners to recover their economic loss, notably, the propinquity of their property to the peril and the risk they shared with the shipowner in relation to that peril. No such considerations obtain in the present case. In the appellant's submission, the decision is best understood as authority for the proposition that economic loss is recoverable where the plaintiff's property has been threatened with injury although actual injury has been averted (see Weller v. Foot and Mouth Disease Research Institute ibid at 583 C-D). The validity of that

proposition as the law presently stands is indicated in Junior Books Limited v. Veitchi Limited 1983 A.C. 520 at 535E and 544E-G.

18. The decision in Hedley Byrne & Co. Limited v. Heller & Partners Limited 1964 A.C. 465 confirmed that purely economic loss, where not consequential on physical damage or injury to the plaintiff's person or property, could not be regarded as never recoverable. In the class of case there under consideration, namely negligent misstatements, the House of Lords would have permitted recovery only in the event of clearly defined criteria being met. The necessary elements of reliance and knowledge of reliance in particular have the effect of confining recovery within strictly limited bounds. Lord Roskill in Junior Books Limited v. Veitchi Limited 1983 A.C. 520, said in relation to the recovery of economic loss that "the concept of proximity must always involve, at least in most cases, some degree of reliance" (at 546). It is clear from this statement that it will only be in a rare case (if at all) that the courts will permit recovery by a plaintiff of purely economic loss where his person or property has neither been injured nor threatened and the element of reliance is absent. In England, the only decisions where such recovery has occurred would appear to be Ministry of Housing and Local Government v. Sharp 1970 2 Q.B. 223 (in which the plaintiff suffered loss by reason of someone else relying upon the defendant's statement), Ross v. Caunters 1980 Ch. 297 (a decision of Sir Robert

Megarry V.-C. which followed Sharp) and two decisions (Schiffart v. Chelsea Maritime Ltd. (The "Irene's Success") 1982 1 Q.B. 481 and The "Nea Tyhi" 1982 1 Lloyd's Rep. 606) which were overruled by the Court of Appeal in Leigh and Sillivan Limited v. Aliakmon Shipping Co. Limited (Times, 8th December, 1984).

19. Neither Sharp nor Ross v. Caunters bears any analogy to the present case. They deal not with the recovery of economic loss flowing from damage to the property of a third party, but with situations more akin to that dealt with in Hedley Byrne.

20. Home Office v. Dorset Yacht Co. Limited 1970 A.C. 1004 and Anns v. Merton London Borough 1978 A.C. 728, were concerned with physical damage to property of the plaintiff. Although heralding a more flexible approach to the identification of duties of care, there was no suggestion in either of those cases that the limitations on recovery of purely economic loss should necessarily be discarded. Lord Reid in the former case (at 1027B) recognised that "causing economic loss is a different matter" to causing physical damage which was the subject of Lord Atkin's celebrated dictum in Donoghue v. Stevenson 1932 A.C. 562. So also Lord Wilberforce in Anns v. Merton acknowledged that special considerations arise in relation to economic loss (at 752 A-C). In neither case was any attempt made to re-define the circumstances in which there could be recovery for purely economic loss.

21. The question which arose and was decided by the House of Lords in Junior Books v. Veitchi, ibid, was "whether the relevant Scots and English law today extends the duty of care beyond the duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself" (at 545B, 532B). One view which had been open was that Donoghue v. Stevenson applied in its express terms to such a situation (for example, Megaw L.J. in Batty v. Metropolitan Property Realisations Limited (1978) Q.B. 554 at 570; semble Lord Wilberforce in Anns v. Merton at 759). In any event, Junior Books confirmed that there could be recovery in this limited class of case which was at least akin to that spoken of by Lord Atkin. Furthermore, special considerations were found to enable the requirement of proximity to be satisfied. In particular, the relationship between the proprietors and sub-contractors was "as close as it could be short of actual privity of contract" (at 456C) and there was reliance by the proprietors upon the skill and experience of the sub-contractors, together with knowledge by the sub-contractors of that reliance.

22. That this decision was confined to a limited, although important, question is confirmed by the later decision of the House of Lords in Tate & Lyle Industries Limited v. Greater London Council 1983 2 A.C. 509 in which Lord Templeman (in a speech concurred in by the other members of the House) said:

"My Lords, in the cited relevant cases from Donoghue v. Stevenson to Junior Books the plaintiff suffered personal injury or damage to his property. In the present case Tate & Lyle assert that they have suffered damage to their property caused by interference with their right to use their jetties for the benefit of their sugar refining business. But this assertion assumes that Tate & Lyle possess the right to use their jetties in the sense that they are entitled to the maintenance of a depth of water in the relevant parts of the Thames sufficient to enable vessels of the requisite size to load and unload at the jetties. The question is whether Tate & Lyle possess any right to any particular depth of water. If they have any such right then they will have a remedy for interference with that right. But if they have no such right then interference with the depth of water causing damage to Tate & Lyle's business constitutes an injury for which Tate & Lyle have no remedy. The L.C.C. caused siltation to the bed of the river which is owned by the P.L.A. Tate & Lyle can only succeed if they establish that they were obstructed by the L.C.C. in the exercise by Tate & Lyle of rights over the river bed vested in Tate & Lyle" (at 530-1).

23. The actions of the L.C.C. affected the property of the Port of London Authority which was not, as was held, property in or over which Tate & Lyle had any rights. That their licences to construct jetties were rendered less profitable by the negligent acts of the L.C.C. affecting the property of a third party, did not entitle them to damages.

24. In the appellant's submission, the position thus reached is that, whilst no artificial distinction is to be drawn between physical and economic or financial loss (see Junior Books ibid at 545 per Lord Roskill) such that no economic loss is to be regarded as recoverable, the law has as a matter of policy allowed the recovery

of economic loss only in the following special circumstances:

(a) Where the economic loss is consequential upon physical injury to the plaintiff's person or property.

(b) Where such loss is consequential upon threatened physical injury to the plaintiff's person or property.

(c) Where such loss arises not from harm done to the plaintiff's person or property by faulty work but simply from faults being present in the work itself.

(d) Where such loss arises from negligent misstatements made in the context of a special relationship as described in Hedley Byrne and perhaps in other related circumstances (Ministry of Housing v. Sharp; Ross v. Caunters).

25. Accordingly, the authority of the line of cases commencing with Cattle v. Stockton Waterworks and including the cases referred to above in which time charterers were denied recovery remains unaltered and is in fact confirmed by the decision in Tate & Lyle Industries. The claim of the first respondent must accordingly fail.

26. This result accords with the views recently expressed by the United States Court of Appeals, 5th circuit in State of Louisiana v. M/V Testbank (11th February, 1985) where various claimants who suffered economic loss as a result of a collision between two vessels which

caused a chemical spill and subsequent closure of the Mississippi River gulf outlet failed. The decision in Robins Dry Dock & Repair Co. v. Flint ibid was followed.

27. The question of recovery of economic loss was considered by the High Court of Australia in Caltex Oil (Australia) Pty. Limited v. The Dredge Willemstad (1975-6) 136 C.L.R. 529. In permitting the recovery of purely economic loss in significantly extended circumstances, the decision is not consonant with the authorities referred to above and should not be followed.

28. Nevertheless, it is respectfully submitted that the learned trial judge erred in concluding that the principles as enunciated in Caltex necessitated a finding for the first respondent in the instant proceedings.

29. The relevant criteria for recovery identified by Gibbs J. and Mason J. were similar:

> "In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act." (Gibbs J. at 555.)

"A defendant will then be liable for economic damage due to his negligent conduct when he can foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct." (Mason J. at 593.)

30. It is difficult to see, as was said by Lord Fraser in Junior Books (at 532-3), why the defendant's knowledge of the identity of the person likely to suffer from his negligence is relevant (see also the criticism of Caltex by Oliver and Robert Goff L.L.J. in Leigh and Sillivan ibid). This aside, it is submitted with respect that the learned trial judge clearly misapplied the tests stated by Gibbs and Mason J.J. Yeldham J. said:

"I do not understand Gibbs J. or Mason J. in The Willemstad to have stated that knowledge of the precise identity of the palintiff by the alleged tortfeasor was a necessary ingredient. In my opinion a proper reading of the various judgments indicates that it would be sufficient, in a case such as the present, that the defendant knew or should have been aware that it was at least likely that the Ibaraki Maru, like many other vessels, would be the subject of a time charter and hence the charterer would be likely to suffer economic loss if the ship was damaged. The fact that a tortfeasor may not know the precise identity of the time charterer is irrelevant. As would undoubtedly be known to the owners of the Mineral Transporter, it is very common for commercial vessels to be the subject of charters of various kinds and in particular time and voyage charters. If in fact evidence is required that the first plaintiff individually, and not merely as a member of an unascertained class of time charterers who are likely to exist, would be likely to suffer economic loss, then it is provided in the present case by the fact that the Ibaraki Maru carried the distinctive marks of the first plaintiff." (Underlining added.) Record p.390 line 10

31. It was, with respect, the very point that was made by Gibbs and Mason J.J. that it was not sufficient

that the defendant knew of the plaintiff "merely as a member of an unascertained class". Yeldham J. interprets the judgments in a precisely opposite fashion in concluding that it was sufficient that the (first) plaintiff was a member of an unascertained class of time charterers. That this was his approach is confirmed by the underlined portion of the passage quoted.

32. The second of the matters relied upon by Yeldham J. in the passage quoted above, namely the so-called "distinctive marks", should not, with respect, have been regarded as of any weight. The evidence of the Master of the Ibaraki Maru was that that vessel had an orange funnel which indicated that the vessel was of the Mitsui-OSK Line. The only other evidence on this topic was given by Captain Ford, an expert who had had extensive sea-going experience in Australian and international waters, as follows:

Record p.193 line 20

Record pp.163-4

"Q. You are familiar with the markings or colourings of their funnels?

A. By familiar, I can occasion recognise a line, but I wouldn't say I am - there's so many, so diverse.

Q. I understand that, but Mitsui-OSK Line is a well-known line?

A. Not me.

Q. At all events, vessels of the size of the vessel that you see depicted in this photograph are commonly operating around the Port Kembla area?

A. Yes, she's the usual type.

Q. The colouring of the funnel of the vessel identifies the line which owns the vessel or operates the vessel?

A. Usually.

Q. If somebody wanted to find out who was the owner of that vessel and knew the colour of the funnel, you would not expect it to be difficult to find out?

A. I don't think there is any literature on funnels. It is only by somebody say sailing in a ship or familiar with it who would say, 'Oh yes, that belongs to the Steinbeck Line" or something like that." Record p.179 line 10

33. The "distinctive marks" therefore comprised only the colouring of the funnel. There was no evidence that the "Mitsui-OSK" line was well-known, in fact the only evidence (that of Captain Ford) was to the contrary. Further, Captain Ford's evidence indicated that there was no means of obtaining information as to what an orange funnel denoted other than accidental contact with some person who happened to know the relevant line. Thus, the evidence was far from providing any foundation for an inference that the appellant knew or had the means of knowing that the Ibaraki Maru was of the Mitsui-OSK Line.

34. Even if it had been properly held that the appellant had that knowledge, that fact would not have had any relevance. The knowledge would have been entirely consistent with the undoubted fact that the first respondent was the owner of the vessel. It would not have indicated anything as to whether or not there

was a time charter in existence in favour of the first respondent, it being the time charter which gave rise to the economic loss suffered by it.

35. The third matter relied upon by Yeldham J. to justify his finding that the tests of Gibbs and Mason J.J. were satisfied was expressed as follows: 460

> "In the present case also, if it be necessary, the first plaintiff had a reversionary interest in the vessel, of which it was owner as well as time charterer and, as I have earlier said, it would be appropriate to regard the voyage as in effect a joint operation between the two plaintiffs." Record p.391 line 1

36. He had earlier found that the first plaintiff (first respondent to this appeal) "was owner as well as time charterer of the vessel and that there was, in substance, a joint venture between the plaintiffs". 470 Record p.387 line 18

37. How the existence of the bareboat or time charter, or both, can be said to have given rise to a "joint venture" is not clear. Neither involves any sharing of profits or other circumstances analogous to a partnership, nor was the cargo of the first plaintiff set forth on the vessel operated by the second respondent at risk in some common adventure such as was found in Morrison v. Greystoke (Cargo Owners) ibid. 480

38. In Caltex itself the refined oil carried through the pipeline was the property of Caltex but the relevant agreement provided that the risk of damage or loss

rested with Australian Oil Refining Pty. Limited (the owner of the pipeline)(ibid at 531.1). That ownership by Caltex was not suggested by any of the members of the High Court to give rise to a "common adventure", even though the concept of a "common adventure" was seen as possibly relevant at least by Gibbs J. (at 555.8), and Stephen J., erroneously in the appellant's respectful submission, thought that other circumstances gave rise to "something akin to Lord Roche's 'common adventure' (at 576.7). So also in the present case where the bareboat charter placed the relevant risks on the second respondent, the fact of ownership of the vessel by the first respondent becomes irrelevant. The existence of the time charter does not add anything. It is simply a contract as a result of which the first respondent may make profit through operation of the vessel. It is no different to the contracts in Cattle v. Stockton Waterworks ibid, and Tate & Lyle v. G.L.C. ibid.

39. Stephen J. in Caltex countenanced recovery of economic loss "where there exists a degree of proximity between the tortious act and the injury such that the community will recognise the tortfeasor as being in justice obliged to make good his moral wrongdoing by compensating the victims of his negligence" (at 575.8). The learned trial judge found that this proximity existed in the present case. He relied

on the matters referred to above in paragraphs 30 and 35 to support that conclusion and in addition said that relevant to his conclusion was:

> "The fact that the defendant must necessarily have known that it was likely that the commercial vessel damaged by its negligence would be the subject of a time charter, and that such damage would be productive of consequential economic loss in the form of loss of the profits the charterer would have made from the use of the vessel during the period when it was laid up as a result of the collision."

Record p.391 line 10

40. However, this does no more than state in effect that the damage was foreseeable which on any view is in itself insufficient to found recovery. In any event, there was no basis for saying that it was "likely" (as distinct from "possible") that a commercial vessel damaged by the defendant's negligence would be the subject of a time charter.

41. The features leading to a finding of "proximity" by Stephen J. in Caltex were similar to those relied upon by Gibbs and Mason J.J. in reaching their findings. In particular, knowledge of the identity of the plaintiff was seen as important. Another feature to which he attached importance was the nature of the damages claimed. These reflected the loss of use of the pipeline "representing not some loss of profits arising because collateral commercial arrangements are adversely affected but the quite direct consequence of the detriment suffered, namely the expense directly incurred in employing alternative

modes of transport" (at 577.5). These features are absent in the present case and there are no others which would here justify a finding of the relevant proximity.

42. The first respondent fails to meet the criterion stated by Jacobs J., namely, injury to the plaintiff's person or property or a "physical effect" on such person or property. He referred to the cases in which time charterers have failed to recover as being ones consistent with the principle he enunciated (at 600). His views are, it is submitted, more consonant with the authorities referred to earlier in this Case than those of the other members of the High Court who participated in the decision in Caltex.

43. The judgment of Murphy J. in Caltex does not, it is respectfully submitted, elucidate the relevant principles to be applied.

44. So far as the implications of a decision in favour of the first respondent to this appeal are concerned, it is, with respect, important to bear in mind that the range of potential claimants would be likely to be large, there being many enterprises which hold contracts dependent upon or which are otherwise interested in the uninterrupted operation of a commercial vessel. Those who may have their commercial interests affected by negligent damage to a vessel

would include tug operators, stevedores, ship repairers, marine surveyors, voyage and sub-charterers and companies which have arranged charters to commence in the future. Outside the maritime field, reversal of the principle in Cattle v. Stockton Waterworks would have far-reaching implications which have for many years deterred the Courts from allowing unrestricted recovery of economic loss. Although this "floodgates argument" has been the subject of criticism (for example Junior Books per Lord Roskill at 545-6; but note 539E), it has, correctly in the appellant's respectful submission, been regarded by courts time and again as fundamental to their attitude to the recovery of pure economic loss.

45. With respect to the shipping market in particular, there are special factors operating which have been conveniently summarised by recent commentators:

> "The shipping market is a highly volatile one, full of risks. There are few surprised losers whom justice needs to compensate. Virtually all of the risks, and certainly those concerned with collision damage and the associated delays, are known. They are taken into account either in fixing freight and hire rates or in arranging insurance cover. At present, owners and charterers undoubtedly conduct their business on the basis that losses such as those in The Mineral Transporter and the blocking cases are not recoverable." (N.J.J. Gaskell in Lloyd's Maritime & Commercial Law Quarterly, February 1985, pp.112-3; the "blocking cases" referred to are those United States authorities in which the Courts have considered the ramifications of a vessel negligently causing the blocking of a shipping route or outlet.)

> "Ship chartering is a major commercial venture, and it is difficult to imagine a class of potential plaintiffs better able to appreciate

> and insure directly against accident risks ... Furthermore, these cases generally arise from a collision between two ships, at least one and probably both of which will be covered by insurance. To allow the claim may amount to shifting the loss by the most expensive means available from party to party and from insurer to insurer. Since the premiums for both first party insurance and liability insurance are paid by the same class, ship operators, the exclusionary rule should operate to the benefit of all the members of that class. The rates for liability insurance should decrease if the exclusionary rule should operate to the benefit of all the members of that class. The rates for liability insurance should decrease if the exclusionary rule precluded liability for commercial losses, and charterers who wish to protect themselves could obtain first party insurance, or more probably, pay a slightly higher premium for the policy that they already hold. The overall cost of insurance should decrease and the cost of individual commercial loss policies should reflect the actual risk which the parties to the contract may anticipate." (Economic Negligence: Feldthusen, page 248.)

46. A judicial recognition of the importance of certainty in maritime law is to be found in the speech of Lord Diplock in Federal Commerce v. Tradax Export 1978 A.C. 1 at 1-2. Allowing recovery of economic losses of the nature claimed by the first respondent in this case, contingent upon satisfaction of some arbitrary criterion such as knowledge of a negligent Master of the identity of the owner of a vessel with which his vessel was about to collide, could only be destructive of such certainty. In such a case, the result might, for example, turn on the extent to which night had fallen when the innocent vessel first came into view.

THE BLACK-BAN ISSUE

47. The facts agreed between the parties as to this issue are set out in paragraph 8 above. The only

additional evidence on this topic was given by Captain Ford to the effect that he was aware of a long-standing campaign by the relevant union to require foreign vessels to undertake repairs in Australia rather than elsewhere but not aware of any black-ban having been imposed prior to July, 1981 in support of such campaign.

Record p.188 line 6 et seq.

48. The question which arises is whether the delay caused by the black-ban was "of a class or character foreseeable as a possible result" of the negligence (Overseas Tankship (U.K.) Limited v. The Miller Steamship Co. Pty. 1967 A.C. 617 at 636) or, to put it in other words, whether delay caused by the black-ban was the "very kind of thing" likely to happen as a result of the negligence (Home Office v. Dorset Yacht Co. Limited 1970 A.C. 1005 at 1030C).

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49. Certainly, strikes called for industrial reasons would have to be regarded as reasonably foreseeable. However, the black-ban was not of that character. It was an act unrelated to the relationship of employer and employee. It was essentially political in nature, being a means by which an interested organisation sought to coerce foreign shipowners to have repairs and maintenance to their vessels undertaken in Australia. The fact that the act was one of a trade union is purely incidental.

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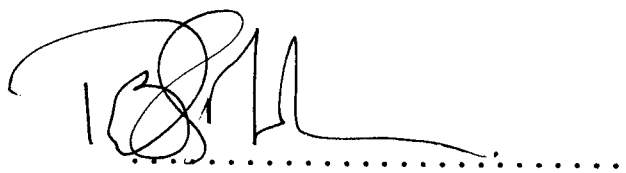
The ban might equally have been imposed by ship repairers (by refusing to perform temporary repairs in Australia unless the shipowners agreed to have final repairs effected in Australia) or by marine surveyors or others interested in the subject matter of the campaign.

50. In the appellant's submission, the "class" into which the instant act falls is not to be determined simply by the co-incidental fact of the identity of the actor. The question must be whether it was reasonably foreseeable that the respondents would be likely to suffer loss as a result of acts designed to ensure that repairs and maintenance of foreign-owned vessels were effected in Australia. There being no evidence of any such acts having ever been performed prior to the subject collision, this question must be answered in the negative. 10

For the reasons given above, the appellant respectfully submits that this appeal should be allowed with costs.

DATED: 22nd March, 1985



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