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The 'Atlantik Confidence' - No Weakening of the Test to Deny Limitation

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On 30th March 2013, a fire broke out in the engine room of the "Atlantic Confidence". (the "Vessel") Within a few hours the Master made the decision to abandon the Vessel. The Vessel listed to port and eventually sank on 3rd April. The Vessel was carrying various project cargoes for discharge at ports in the Middle East.

Owners, Kairos Shipping ("Owners") sought to limit their liability based on the Vessel's tonnage and the limits in the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol). A limitation fund was constituted in the English Admiralty Court by way of Letter of Undertaking provided by The Standard P&I Club at £7.3 million plus interest [www.steamshipmutual.com/publications/Articles/atlantikconfidence0814.htm].

AXA Insurance, one of the interested cargo insurers ("Cargo") sought, in this stage of the action before Mr Justice Teare, to break limitation relying on Article 4 of the Convention claiming that the sinking occurred due to a:

> *'personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'.*

The burden of proof in seeking to break limitation is upon the party seeking to do so. The burden is a heavy one because of the nature of the conduct which must be proved. Cargo's case was that the Owner scuttled the vessel. It was alleged that the fire was deliberately started and that the sinking was upon the instruction of the alter ego of the Owners, Mr. Ahmet Ali Agaoglu, the sole shareholder and director.

It was common ground that Cargo must prove its case on the balance of probabilities and that in determining whether Cargo has discharged that burden the court's approach should be the same as it is when an Owner makes a claim on a hull insurance policy and the insurer alleges that the ship was scuttled.

The approach is summarised by Aikens J. in *Brownsville Holdings Ltd v Adamjee Insurance Co.* (*The Milasan*) [2000] 2 Lloyd's Reports 458 as follows:

> *"(4) if a defendant insurer is to succeed on an allegation that a vessel was deliberately cast away with the connivance of the owner, then the insurer must prove both aspects on a balance of probabilities. However as such allegations amount to an accusation of fraudulent and criminal conduct on the part of the owner, then the standard of proof that the insurer must attain to satisfy the Court that its allegations are proved must be commensurate with the seriousness of the charge laid. Effectively the standard will fall not far short of the rigorous criminal standard;*
>
> *(5) although there is no "presumption of innocence" of the Owners, due weight must be given to the consideration that scuttling a ship would be fraudulent and criminal behaviour by the Owners;*
>
> *(6) when deciding whether the allegation of scuttling with the connivance of the Owners is proved, the Court must consider all the relevant facts and take the story as a whole. By the very nature of these cases it is usually not possible for insurers to obtain any direct evidence that a vessel was wilfully cast away by her owners, so that the Court is entitled to consider all the relevant indirect or circumstantial evidence in reaching a decision;*
>
> *(7) it is unlikely that all relevant facts will be uncovered in the course of investigations. Therefore it will not be fatal to the insurers' case that "parts of the canvas remain unlighted or blank" (see Michalos and Sons v Prudential Insurance (The Zinovia) [1984] 2 Lloyd's Rep 264 at p.273 per Bingham J.);*
>
> *(8) ultimately the issue for the Court is whether the facts proved against the Owners are sufficiently unambiguous to conclude that they were complicit in the casting away of the vessel;*
>
> *(9) in such circumstances the fact that an owner was previously of good reputation and respectable will not save him from an adverse judgment;*
>
> *(10) the insurers do not have to prove a motive if the facts are sufficiently unambiguously against the Owners. But if there is a motive for dishonesty then it may assist in determining whether there has been dishonesty in fact."*

After a six week hearing involving extensive factual and expert witnesses, Mr Justice Teare found that the sinking was a deliberate scuttling:

> *"The vessel was deliberately sunk by the master and chief engineer at the request of Mr. Agaoglu, the alter ego of the Owners. In those circumstances the loss of the cargo resulted from his personal act committed with the intent to cause such loss. The loss of the cargo was the natural consequence of his act as he must have appreciated. There can be no doubt that he intended the cargo to be lost just as much as he intended the vessel to be lost. It follows that the Owners' claim for a limitation decree must be dismissed."*

In reaching his decision Mr Justice Teare, assessing the evidence, made the following findings:

1. The vessel was lost at sea after a fire. There was a real and substantial possibility that that fire was started deliberately;
2. The engine room flooded. That flooding could have been caused deliberately; and
3. At about the same time the ballast double bottom tanks nos. 4 and 5 on the portside were flooded. That flooding could have been caused deliberately.

The Judge considered that whilst the improbable can happen it was difficult to accept that three improbable events may have occurred in rapid succession.
Such reasoning is often relied upon in alleged scuttling cases. In *The Ioanna* (1922) 12 LLR 54 Greer J. said:

> *"Now an improbability does not prove that the thing did not happen, but one improbability throws possibly some doubt upon it, and one requires stricter proof where the event is improbable than where it is a probable or likely event. Still one improbability would not be sufficient to justify me in coming to the conclusion that the event did not happen. But when there are two improbabilities the likelihood of it happening is still more remote, and when there are three it is more remote still."*

The Vessel sank in deep water which meant it could not be inspected with a view to determining the cause of the fire or the cause of the sinking.

The available evidence was, therefore, limited to surveys of the vessel prior to the final voyage, the observations of the fire by the chief engineer and second engineer and photographs of the vessel taken after the vessel had been abandoned and before she sank.

As regards the evidence the Judge found there were a number of events which, whilst taken alone, might not have been of great weight but cumulatively were suggestive of a deliberate casualty. These included that before the fire:

1. The master was ordered to change route into deep water; and
2. There was an unscheduled abandon ship drill.

And after the fire:

1. The chief engineer was reluctant to allow others in the engine room;
2. He told the master on the bridge after CO2 had been injected and shortly before the vessel was abandoned that there was a risk of explosion from diesel oil tanks when it is unlikely that he held that opinion;
3. The master delayed in sending a distress message and failed to alert Owners to the casualty before he abandoned ship;
4. He failed to investigate the list to port;
5. He failed to remove the chart from the bridge; and
6. After the vessel had been abandoned the master and chief engineer returned twice to the vessel.

No evidence was put forward to indicate that the master and chief engineer had a motive themselves but there was evidence to suggest the involvement of senior employees in the Owners' office:

1. The office instructed the master to follow a route which would take the vessel into deep water;
2. There was a telephone call between the master and the office after the master had been requested to change route and to ring the office. It is likely that the master's instructions to scuttle were then confirmed;
3. 2 superintendents were sent to the casualty on board “HEATHER” – a vessel in the same management;
4. The purpose of sending “HEATHER” was said to have been to provide a report and photographs but neither superintendent provided a report;
5. The superintendents did not take a camera with them but instead took with them some tools; and
6. Owners did not inform the salvors of HEATHER's presence in Muscat at the same time as the salvage team.

Taking all of the above the Judge felt these indicated the involvement of Mr. Agaoglu. He had motive to arrange the sinking. His companies were in real financial difficulty and it is likely that he was under pressure from his bank. This would be resolved by the insurance proceeds of US$22 million. For all those reasons the Judge held that Mr. Agaoglu requested the deliberate sinking of the vessel and was unable to accept his evidence that he did not do so.

Limitation is considered virtually unbreakable and and whilst this decision is not ground breaking as regards the law, and does not suggest any weakening of the test to deny limitation, it is remarkable for its finding.

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