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VERSLOOT DREDGING
v
HDI GERLING
[2013] EWHC 1666

THE "DC MERWESTONE".

A SPOTLIGHT ON PERILS OF THE SEA AND UNSEAWORTHINESS AND DUE DILIGENCE IN TIME POLICY HULL CLAIMS

BACKGROUND

This case in the Commercial Court before Mr Justice Poppelwell related to a Dutch registered gearless cargo vessel. The case was decided against the Owners who were claiming for a new engine and gearbox on the basis of a fraudulent device in the claims process. However, more interesting are Mr Justice Poppelwell's findings relating to Perils of the Seas, Unseaworthiness and Due Diligence and their interplay.

Hull cover was placed on ITC Hulls 1/10/83 together with the Institute Additional Perils Clause (IAPC). Of particular relevance to the claim were:

- Clause 6.1 of the ITC Hulls clauses providing cover for "Perils of the Seas"
- Clause 6.2.3 of the ITC Hulls Clauses (The Inchmaree clause) providing cover for loss/ damage from: "negligence of Masters Officers Crew or Pilots… provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers".
- The IAPC cover under Clause 1.2 for loss/damage from "negligence incompetence or error of judgement of any person whatsoever… the cover provided…is subject to the proviso that

FINDINGS

The judge made the following findings of fact in relation to the casualty:

- The flooding had originated in the bowthruster room of the vessel which housed the emergency fire pump.
- During loading of the cargo prior to the casualty the crew had used the fire pump system to de-ice the hatches and the deck.
- At the end of this operation the crew failed to close the sea suction and drain the pump.
- The water froze in the system and caused the pump to crack and the filter lid to be displaced. As the suction valve was open water could enter the vessel through both of these physical defects.
- There was an ingress of seawater into the bowthruster room when the ice in the emergency fire pump system melted.
- There was a lack of watertight integrity in the bulkheads in that the duct keel tunnel was not watertight.
- The seawater accordingly found its way into the engine room through the defective duct keel.
- The vessel's engine room pumping system was defective in that the pumping

system was inadequate to deal with the ingress of seawater.

On the basis of these facts the judge made the following findings of law:

- There was a loss by "perils of the seas".
- The loss was proximately caused by this insured peril and would be covered even though the loss would not have happened but for the misconduct or negligence of the Master or Crew.
- There had to be a fortuity (accident) but the fortuity might arise in what caused the hole or in what caused the seawater to enter the hole or a combination of both. Provided that you can show an element of fortuity as described above then the entry of seawater would not be classified as "the ordinary action of wind or waves".
- If the immediate cause of the ingress was fortuitous then prima facie the loss would be by perils of the seas even if that cause was crew negligence. Therefore crew negligence could be a fortuity.
- There would be a "peril of the seas" even if the prior cause of ingress was unseaworthiness of the vessel unless the unseaworthiness was a debility (for example, a latent defect) of such a kind as to prevent the ingress being fortuitous because it was inevitable in any sea conditions. The fact that the negligence of the crew in this case rendered the vessel unseaworthy was not a bar to a fortuitous ingress of seawater constituting a peril of the seas.
- It was irrelevant that the crew negligence could as easily have happened on land. It was not necessary to establish that the fortuity which gave rise to the ingress of seawater was itself "of the seas"
- Unseaworthiness was not the cause of the loss. A vessel's unfitness to encounter foreseeable weather conditions did not prevent the loss as being regarded as one by perils of the sea.
- Under a time policy some kinds of unseaworthiness were capable of defeating a claim for loss by "perils of the sea" but not all types of unseaworthiness. The distinction was between unseaworthiness from a condition which was "inherent" and one that arose from some "external" event.

The judge also made some useful comments on the effect of the due diligence clauses:

- A want of due diligence was to be equated with a lack of reasonable care/ negligence.
- The underwriters bore a dual burden of proving (a) that the assured was negligent and (b) that such negligence was causative of the loss.
- The want of due diligence provision in the Inchmaree clause was confined to causes of loss and damage which were proximate causes. The words "resulted from" should be read as synonymous with "been caused by".
- The judge found no lack of due diligence on the facts of the case.

COMMENT

- Underwriters should note that cover for perils of the sea will include cases where the fortuity arises from negligence of the crew.

- In a time policy not every type of unseaworthiness will defeat such a claim; only where the unseaworthiness is inherent and has not been caused by some external event.
- The due diligence proviso in the Inchmaree clause and in the IAPC clause requires underwriters (a) to prove the assured was negligent and (b) that such negligence was causative of the loss.
- Although it was not necessary to decide the point in this case, it would seem that even if there had been a lack of due diligence on behalf of the Owners or Managers in this case then the assured would still have recovered under the "perils of the sea clause" on the basis that if the causes of loss are of approximately equal efficiency and one is an insured peril and the other, though outside the scope of the policy, is not an excluded peril then the insured can recover. This is on the basis that recovery for crew negligence is not an excluded peril, but is simply a peril that will not be covered unless due diligence has been observed by the relevant parties (see: **The Miss Jay Jay [1987] 1 LLR 32**).

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