The Court of Appeal re-affirms the law on exercise of due diligence

English law The classic English case setting out the exercise of due diligence required under English law is generally regarded as being the MUNCASTER CASTLE decision.1 This case was first heard by the High Court in 1958. The decision was appealed to the Court of Appeal and from there to the House of Lords, which gave judgment just before Christmas 1960. Interestingly, judgment was in the amount of GBP 974, plus interest and costs.

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1 - Riverstone Meat Co. Pty Ltd. v. Lancashire Shipping Co. Ltd. (1961)1 Lloyd's Rep. 57.

The facts were as follows. The MUNCASTER CASTLE experienced heavy weather during a voyage from Australia to London. Cargo in No. 5 lower hold was damaged by sea water. The most probable method of ingress was found to be leakage through inspection covers over storm valves. These covers had been replaced before the vessel's prior voyage from the UK to Australia, immediately after an inspection of the valves themselves, but the court found that the securing nuts had been improperly fitted. The replacement of the covers and fitting of the nuts was carried out by a fitter employed by a firm of ship-repairers who were instructed by the owners' managers' superintendent to remove the covers for the inspection mentioned.

The question for the judge was simple. It was accepted that the shipowners had, through their superintendent, acted diligently in selecting the (competent) ship-repairers. An employee (the fitter) of the ship-repairers had been negligent in his work. This negligence would not have been discoverable by the superintendent or by Class in the performance of the usual duties. Were the shipowners liable to cargo interests for the fitter's negligence? Put another way, had owners proved that they had exercised the due diligence required of them by law?

The judge decided that they had and found them not liable. Cargo interests appealed. They argued that part of the exercise of due diligence had been delegated by owners to the ship-repairers and that, as a result of the negligence of their employee, the ship-repairers had failed to exercise that due diligence. After due consideration, the Court of Appeal agreed with the judge in the High Court and rejected cargo owners' appeal.

Cargo interests then appealed to the House of Lords, who, by a five-nil verdict, reversed the two previous decisions and found in favour of the cargo owners and against the shipowners. Unusually, all five Law Lords commented on the case and put forward reasoned arguments in support of their decision to allow the appeal. In itself, this is perhaps indicative of the importance of this case. Space does not allow a full review of their Lordships' decision, but it can be summarised by saying that they decided that the exercise of due diligence required from a shipowner under Article III Rule 1 of the Hague Rules covered not only the shipowners, their employees and servants (who, it was not disputed, had exercised due diligence), but also their sub-contractors and agents, whether independent or not. Their Lordships decided that the ship-repairers and their (negligent) employee fell into the second category. On this basis, the shipowners were held liable.

Many people might well see this as an unfairly heavy responsibility. What more can a shipowner do beyond acting responsibly, both in his own actions and in the selection of a competent and reputable sub-contractor? In practice, the answer is probably "not very much". As a result of the MUNCASTER CASTLE decision, the question is, arguably, irrelevant in many cases. Negligence of some sort, on the part of someone acting on behalf of the shipowner, will often be the cause of a serious incident. Leaving aside a "management of the ship" type argument, a shipowner trying to prove the exercise of due diligence is, as a result of this decision, likely to face a difficult task. Although this has not been tested in court, advice received by Gard suggests that much may depend on the purpose of the work being performed by the sub-contractor in question.[2] In other words, if the work is carried out specifically for the vessel in question (as was the case in the MUNCASTER CASTLE and as is likely to be the case when repairs to a vessel or her equipment are carried out), the English courts are likely to find a shipowner liable as a result of negligence on the part of the sub-contractor or his employee(s), unless the owner can produce evidence, on his own behalf and on behalf of the sub-contractor, showing that both parties took all steps and precautions which were reasonable in the circumstances. However, if a sub-contractor's work is being done generally for the shipping industry and not specifically for the vessel in question, it is arguable that an owner can not be expected to be responsible for (i.e., exercise due diligence on behalf of) such a sub-contractor. All an owner has to do is to appoint a reputable sub-contractor. An example of this could be a company making navigational equipment for the shipping industry as a whole, which happens, by accident, to supply a

defective part to a particular vessel. The part itself comes from stock: it is not specifically made or supplied for that vessel.

2 - See article "Due diligence to make a vessel seaworthy" in this issue of Gard News.

Nevertheless, for 40 years, the legal position in England has remained unchanged and unchallenged. Attempts by carriers to avoid the authority of the MUNCASTER CASTLE case have been few and far between. The method used has normally been to try to distinguish the facts of a particular case from those of the MUNCASTER CASTLE, rather than to argue against the legal basis of that decision.

A recent English decision, initially by the High Court and later by the Court of Appeal, has upheld the reasoning behind the MUNCASTER CASTLE case and has again confirmed that a very heavy burden of proof rests on a carrier attempting to show that he has exercised "due diligence to make the vessel seaworthy". The case in question concerns the vessel FJORD WIND.[3] The Court of Appeal gave judgment in July this year.

3 - Eridania SpA & others v. Rudolf A. Oetker & others (2000)2 Lloyd's Rep. 191.

The facts of the case were as follows. The vessel loaded a cargo of soya beans at ports in Argentina for carriage to Europe in July 1990. A few hours only after departure, a crankpin bearing on the main engine failed. Repairs would have taken several months. Having received notice of frustration of the voyage from the shipowners, cargo interests arranged for the cargo to be transhipped and on-carried to destination. They then sued both the shipowners and the disponent owners, under the bill of lading and sub-charterparty, in an attempt to recover the costs of transhipment and on-carriage.

Two main issues arose. The first was whether, contractually, the disponent owners were simply obliged to exercise due diligence to make the vessel seaworthy, or whether a clause in the voyage charterparty constituted an absolute warranty of seaworthiness. The second was whether the vessel was unseaworthy at the commencement of the voyage and if so, whether the disponent owners had complied with their contractual obligation.

At the first hearing, the judge decided that, for the voyage in question, the obligation on the disponent owners was to exercise due diligence only. No absolute warranty of seaworthiness applied to this voyage. However, the vessel was found to have been unseaworthy at the commencement of the voyage. The vital question, therefore, was whether disponent owners had exercised the required due diligence and could prove that they had done so.

Investigations revealed that there had been a history of crankpin failures in the previous ten years. The most recent had occurred some 17 months before the voyage. The Court accepted that the owners had carried out detailed investigations, both before and after the casualty, in an attempt to establish the cause of the recurring problem with the crankpin bearings. The engine builders had been consulted each time a problem arose. There was nothing to indicate that the work performed by the engine builders was inadequate or inappropriate. Nor were owners at fault for not involving independent consultants or experts. Nobody could find out why the problem kept on happening. Therefore, the owners argued, they and their servants had done everything that was reasonably possible to identify and rectify the problem.

The first instance judge and the three Court of Appeal judges all disagreed with owners. They approached the question from the opposite end and underlined the well-known fact that it is for owners to discharge the burden of proof of showing that they (and those for whom they were responsible) had exercised due diligence. The fact that neither owners nor the engine builders were able to identify the cause of the problem placed owners at a disadvantage and the only way they could discharge the burden of proof was by showing that they and those for whom they were responsible had carried out all the investigations which a reasonably competent person would have done in the same circumstances. It was here that owners' argument broke down. During the trial, owners put forward no evidence from the engine builders as to what they had

done to identify and rectify the problem. Nor did owners explain why no such evidence was put forward.

Faced with the lack of any evidence from the engine builders, the judge decided that the owners had not discharged the burden of proof resting on them to prove the exercise of due diligence. Owners were accordingly found liable. The three Court of Appeal judges endorsed this view.

The FJORD WIND is thus distinguishable from the MUNCASTER CASTLE, in that the former case was decided mainly on the "burden of proof" point, whereas the latter made new law as to the extent of due diligence required from a shipowner. Nevertheless, the FJORD WIND underlines the principles laid down by the House of Lords in 1960 and re-states the difficulty facing a shipowner seeking to convince an English court that he has exercised due diligence to make his vessel seaworthy.

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