Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Wavertree Sailing Ship Company, Limited v. *Love, and another, from the Supreme Court of New South Wales; delivered 22nd May* 1897.

Present:

LORD HERSCHELL.
LORD WATSON.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Herschell.*]

The Appellants were the owners of the sailing ship "Wavertree" which carried goods for several consignees amongst whom were the Respondents on a voyage from London to Sydney. Whilst the vessel was in the port of Sydney and before the cargo was discharged a fire broke out on board and expenditure was incurred which gave rise to a claim for general average contribution from the owners of the cargo. On the 10th of June 1892 an average bond was executed between the master of the vessel of the one part and the several consignees of the cargo of the other part. The master thereby undertook to deliver to the parties of the second part their respective consignments, and they on the other hand agreed to pay their proper and respective proportions of any general average charges to which they might be liable and forthwith to furnish to the captain or owners of the ship a correct account and particular of the

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value of the goods delivered to them respectively in order that any such general average charges might be ascertained and adjusted in the usual manner. It was further agreed that the consignees should deposit in a bank in the joint names of Dalton on behalf of the master and owners and Anderson on behalf of the depositors 20 per cent. on the amounts of the estimated value of their respective interests. Power was given to the trustees to advance to the master or owners such sums as might be certified by the average adjuster or adjusters employed to adjust and state the general average charges to be a proper sum to be from time to time advanced. Subject thereto the deposits were to be held upon trust for the payments of the general average to the parties entitled thereto, with an ultimate trust for the depositors respectively. The bond contained the following clause :—" Provided always " that nothing herein contained shall constitute " the average adjuster or adjusters who may be " employed arbitrator or arbitrators or his or their " adjustment or statement a final settlement " between the parties hereto."

The present action was brought in respect of a breach of the agreement by the Respondents to furnish a correct account and particular of the value of the goods delivered to them in order that the general average charges might be ascertained. The statement of claim alleged that the Plaintiffs had made frequent applications to the Defendants to furnish such account and particular but that the Defendants had always refused to furnish the same. The defence set up was that the Defendants had always been ready and willing to supply particulars for an average statement to be made up in Sydney but that the Plaintiffs refused to have the average settlement made up in Sydney and claimed that they were entitled to have the same made up in and

according to the law of the port of Liverpool. As regards the allegation that the Plaintiffs claimed the right to have the average statement made up according to the law of Liverpool, it may be at once stated that there was no evidence of it and moreover that as regards general average the law of the port of Sydney does not differ from the law prevailing at Liverpool.

The controversy between the parties arose in this way. The Appellants having employed Messrs. Loftus & Co. of Liverpool to make out a general average statement, that firm sent through Messrs. Dalton Brothers the ship's agents at Sydney a circular letter to the several consignees asking for certain particulars which they needed. The Respondents thereupon took up the position that the average bond contemplated the general average being adjusted at Sydney that in employing average staters at Liverpool the Appellants were taking an improper course and that the Respondents were under no obligation to supply particulars for use by those gentlemen.

It is obvious that there has been a breach of the obligation with the Respondents in express terms undertook unless there was a condition implied in the agreement that the Appellants should employ an average stater residing at Sydney to make up a general average statement. The Judge in Equity held, and the Supreme Court have sustained his view, that there was such an implied condition and that the Respondents had therefore justified their refusal to furnish the necessary particulars.

Their Lordships are unable to concur in the view taken by the Court below. It was founded upon the provision in the average bond that the particulars were to be furnished in order that the general average charges might be ascertained and adjusted "in the usual manner," these words being regarded as requiring that an average

stater at Sydney should be employed to prepare the average statement and as excluding the employment of an average stater residing elsewhere. In their Lordships' opinion this view involves a misconception of the nature and functions of an average statement and of the position of the shipowner and other parties interested in relation to it.

The profession or calling of an average stater or average adjuster as it is sometimes called is of comparatively modern origin. The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons or indeed to employ any one at all. He might if he pleased make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater it is merely as a matter of business convenience on his part. The average stater is not engaged nor does he act on behalf of any of the other parties concerned nor does his statement bind them. It is put forward by the shipowner as representing his view of the general average rights and obligations but the statement or adjustment is open to question in every particular by any of the parties who may be called on to contribute. The average bond entered into in the present case no doubt contemplated that an average stater would be employed and if not so employed the shipowner could have derived no benefit from the provisions which enable the trustees if they think fit to make advances out of the monies deposited and ultimately to distribute them in accordance with the average statement. But the bond imposes

no obligation to employ an average stater and it expressly provides that nothing therein contained should constitute the average adjuster who might be employed an arbitrator or his adjustment or statement a final settlement between the parties to the bond. It is difficult to see, then, whence an obligation on the part of the shipowner to have an average statement prepared by an average adjuster residing at Sydney can be derived or what right the other parties liable to make general average contribution can have to dictate that the shipowner shall employ an average stater residing at a particular place any more than they have to designate the particular person to be employed. It is true that at most ports where adventures terminate or the interests divide, and no doubt at Sydney, professional average staters of competent skill are to be found, but this is not universally the case. And it is quite conceivable that the shipowner might not be willing to entrust the preparation of the statement to any of the very limited number of average staters who might be found at some of the smaller ports. The most convenient course would doubtless be, in many, perhaps in the majority of cases, to put the matter in the hands of an average adjuster practising his calling at the port of discharge, but this would not always be so. Many cases may however be suggested where it would be to the advantage of all parties that the services of an average stater elsewhere should be engaged.

The learned Judges in the Court below rested their judgment mainly on the law laid down by Lord Tenterden in the case of *Simonds* v. *White*, 2 B. and C. 805. "The shipper of goods" said the learned Judge "tacitly if not expressly assents "to general average as a known maritime usage "which may according to the events of the "voyage be either beneficial or disadvantageous.

" And by assenting to general average he must " be understood to assent also to its adjustment " at the usual and proper place; and to all this " it seems to us to be only an obvious consequence " to add that he must be understood to consent " also to its adjustment according to the usage " and law of the place at which the adjustment " is to be made." The words relied on are that the shippers must be understood to assent to the adjustment of general average "at the usual and " proper place." In their Lordships' opinion however these words do not refer to the preparation of an average statement but to the actual settlement and adjustment of the general average contributions. The preparation of a general average statement which does not bind the shipper is not "the adjustment" of general average. In order to understand Lord Tenterden's language it is necessary to bear in mind what would happen if all parties stood on their rights. The shipowner would hold the goods until he obtained the general average contribution to which they were subject. If the owner of the goods disputed his claim, he would appeal to the tribunals of the country to obtain possession of them on payment of what was due. These tribunals would have to determine whether the owner of the goods was entitled to them and what payment he must make to release them. It would naturally follow as Lord Tenterden said that the parties must be understood as consenting to the adjustment according to the law there administered. But all this has in their Lordships' opinion nothing to do with the mere employment by the shipowner of an average adjuster to prepare a statement on his behalf. In Lord Tenterden's time professional average adjusters were not as commonly to be found in the different ports of discharge as they are at present.

It was argued that if the shipowner procured the statement by means of an average stater at a distance shippers might be subjected to much delay and consequent prejudice. Their Lordships do not doubt that the shipowner must act reasonably and that if owing to his taking an unreasonably long time in presenting his general average statement other parties are prejudiced and suffer damage by unreasonable delay he may incur liability. But no such question arises here. The only matter in issue is whether it can be laid down as a proposition of law that the Appellants were bound to employ an average stater at Sydney and having failed to do so are not in a position to insist that the Respondents were bound to furnish them with the requisite information pursuant to their contract. In their Lordships' opinion such a proposition cannot be maintained. They will therefore humbly advise Her Majesty that the judgment appealed from should be reversed and judgment entered for the Appellants and that the Respondents should pay the costs of this appeal and in the Court below.