Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Ajum Goolam Hossen & Co. (*Appellants*) *and Hajee Cassim Joosub and Another* (*Intervening Appellants*) v. *The Union Marine Insurance Company, Limited* (*Respondents*), *from the Supreme Court of Mauritius; delivered 2nd March* 1901.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Lindley.*]

This is an action on four policies of insurance on cargo shipped on board the S.S. *Taif* to be carried from Port Louis in Mauritius to Bombay. The underwriters defend the action on the ground that the ship was unseaworthy when she sailed. The burden of proving that she was so is on them and the sole question is whether they have established their contention. In the Court below the Chief Justice held that they had not; but his two colleagues Justices Moncrieff and Oliver Smith came to a different conclusion. The decision of the Court was therefore in favour of the underwriters and against the Plaintiffs and from this decision the Plaintiffs have appealed.

The underwriters have the great advantage of the undoubted fact that the vessel capsized and

sank in less than 24 hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe; and there is no doubt that if nothing more were known they would be entitled to succeed in the action. If nothing more were known unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon and which a Court ought to act upon if unassisted by a jury. But if as in this case other facts material to the inquiry as to the seaworthiness of the ship are proved those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed such unseaworthiness cannot be properly treated as established and the defence founded upon it must fail. The law on this point was finally settled in *Pickup* v. *Thames and Mersey Marine Insurance Company* 3 Q.B.D. 594 which followed *Anderson* v. *Morice* L.R. 10 C.P. 58. In these cases the Court pointed out the danger and error of acting on the presumption in favour of unseaworthiness in case of an early loss of which the assured cannot prove the cause; and the Court pointed out the necessity of bearing in mind that the defence of unseaworthiness must be overruled unless supported by a sufficient weight of evidence in its favour after duly considering all the evidence bearing on the subject including of course the very weighty evidence with which the underwriters start their case.

In this case an enormous mass of evidence has been given as to the condition of the ship before and when she sailed and as to the mode in which she was loaded. Much of such evidence

is very conflicting but the following results are clear and some of them are really not in controversy.

1. The ship herself was a screw steel steamship. She was built in 1884 to carry over 2,000 tons dead weight. She was altered about four years afterwards so as to increase her free board and this reduced her dead weight carrying capacity to a little over 1,900 tons. She had made several voyages in safety with full cargoes after her alteration. She was classed 100 A 1 at Lloyd's, and no one suggests that she was otherwise than tight staunch and strong and so far as construction and repair were concerned in every way fitted for her voyage.

2. She had two water ballast tanks; one in the fore part of the ship between the bow and the engine room; the other in the after part between the engine room and the stern. Nothing turns on the fore tank; but much turns on the after tank. There is great difficulty in ascertaining with accuracy the capacity of the tank and how much water if any was in it when the ship sailed. So far as their Lordships can make out the tank would hold some 80 tons of water of which most if not all had been pumped out before she sailed. The pumps by which the tank was filled and emptied were in proper working order and the master could regulate the quantity of water in the tank as and when he thought proper both before and for long after sailing indeed until shortly before she went down.

3. Her mean draught was 20 feet $4\frac{1}{2}$ inches; and as already stated her carrying capacity was somewhat over 1,900 tons. If her water ballast tank was empty or nearly so she had less than 1,800 tons of coal, cargo, water, and

stores on board. The amount of water in her after tank cannot on the evidence have exceeded 40 tons and their Lordships think it was much less and in fact nothing worth mentioning.

4. The ship always had a list to port. The cause of it is not known. Its amount appears to have depended on the weight and stowage of her cargo and coals and on the quantity of water in the ballast tanks. When on a voyage the list would also depend on the force and direction of the wind and waves. The amount of the list when the ship left port on her last voyage is one of the most controverted matters in this case and is very difficult to ascertain. Some witnesses say it was very heavy and serious as much as 14 or 15 degrees; others say not more than 1 or 2 degrees. Their Lordships have come to the conclusion that when she sailed her list, which was at one time serious, had been greatly reduced and was not greater than usual and was a slight ordinary list and not a source of danger.

5. The ship was loaded with nearly 21,000 bags of sugar weighing about 1,607 tons. These bags were stowed in the hold with the exception of some 300 or 350 bags which were stowed in the saloon cabins, the lazaret, the dispensary and the after peak. The stowage was made by competent persons and although one or two faults were found with it during the loading, it appears to have been proper and satisfactory. She had carried over 21,000 bags safely on previous voyages.

6. The captain applied in the morning of the day she sailed for authority to sail but this was refused on the ground that the ship was too deep in the water and had too great a list. These objections were removed by pumping

out water from the after tank and he then obtained his clearance papers.

7. The ship sailed from Port Louis at about 2 o'clock p.m. on the 23rd September 1896 with a proper crew. A pilot took her out. Her draught then did not exceed 20 ft. 4½ in. on an even keel. Her load line was above water. She had a slight list to port. The pilot remained with her an hour. He attached no importance to the list and says distinctly that he could see nothing the matter with her and that she was neither overloaded nor top heavy.

8. There was a fresh breeze and a confused sea and shortly after the pilot left her the captain ordered the after tank to be refilled in order to steady the ship, or to trim her more by the stern, it is not clear which. Sails were also set and were kept set during the night until 6 a.m. The wind was on the starboard side and would therefore tend to increase the list to port. The list had not increased when the tank was filled and the sails were set. At 9.30 the captain went to bed, the list not having then increased. At 10.30 he was called because some water had got into the saloon and had wetted some sugar. He gave orders to remove the wet bags and he then went to bed again.

9. The list at that time was no worse than before. After this the list greatly increased but it was not reported to him and nothing was done to diminish it. At 4.10 a.m. he was called up, the ship having then a strong list and shipping water heavily. He ordered her course to be altered and her after tank to be pumped out. This was done so far as it was then possible to do it. The list however increased; at 5.30 the sails were taken in; at

6 a.m. she was well on her broadside and would not steer and at 8.45 she fell over and went down. The wells had been sounded periodically and there was no water and she did not leak.

Such are the facts. There is no proof whatever that the ship was in danger when the captain ordered water to be pumped into the after tank. There is no evidence to show that if the great increase of the list which took place after 10.30 p.m. had been reported to the captain it could not then have been remedied. He says he thinks it could. But when he came on deck after 4 a.m. it was too late to right the ship.

The unseaworthiness relied upon by the Defendants is stated in their sixth plea to arise from the ship being overloaded top heavy and crank when she started on her voyage. Danger from water in her after tank is not referred to. It was contended by the Defendant's Counsel that with such a cargo as the ship had and stowed as it was she was unsafe when she sailed whether her after tank was empty or full. If empty she was top heavy and unstable, if full she was overloaded and too deep in the water. The difficulty in accepting this view is that the direct evidence is very strong to show that when she left port she was neither overloaded nor top-heavy. The port authorities objected to her sailing when she was too deep in the water and had a heavy list; but they allowed her to sail when these defects were cured by pumping out water from her after tank. This not only lightened the ship and brought her load line up but considerably reduced the serious list which she had when the port authorities refused to let her sail. Their Lordships are satisfied that when she sailed she was not too deep in the

water. Indeed overloading in this sense was practically abandoned in the Court below and was negatived by all the Judges.

On the inquiry at Colombo some of the crew said that in their opinion she was overloaded; and opinions were expressed that she must have been top heavy. But there was much evidence the other way, and weighing the whole evidence as it now stands their Lordships agree with the Chief Justice in accepting the pilot's evidence that she was neither overloaded nor top heavy when she left port.

The other Judges also negative top-heaviness but they think her after tank was half full of water and that this was a source of danger.

Their Lordships are of opinion that the evidence tends more strongly to show that the loss of the ship was attributable to mistakes made in her management after she sailed rather than to her unseaworthiness when she sailed. The balance of the evidence is against rather than in favour of her unseaworthiness at that time.

It was strongly contended that the captain filled the after tank early on the voyage because he knew that the ship was unstable with a full cargo and an empty after water tank. It was contended that his desire was to sail if he could with a full cargo and a full tank and that when prevented from doing this by the port authorities he satisfied them by pumping water out intending to pump it in again as soon as he got out to sea. But the pumping out of water from the after tank began on the 22nd of September before any difficulties with the port authorities arose; and as already stated there is no proof whatever that it was necessary to fill the after tank to avoid danger whether present or prospective. It may have been desirable to do so for other reasons; but to give effect to the theory in question would be to substitute conjecture for proof. On previous voyages with full cargoes the after tank

appears to have been sometimes empty and sometimes full although the captain's evidence on this head is far from satisfactory.

A great point was made in the Court below, that the ship sailed with a large quantity of water in her after tank and that the weight and wash of this water was or at all events might become a source of danger. This contention seems to have made a great impression on Mr. Justice Moncrieff, and Mr. Justice Smith. Indeed, their judgments are mainly based upon it. It took the Plaintiffs somewhat by surprise as it was inconsistent with the Defendants' main contention, that the tank was empty when the ship sailed and being empty that she was top heavy. The suggestion that water in the tank made the ship unseaworthy, was not seriously pressed before their Lordships. The fact that the quantity of water in the tank cannot now be satisfactorily ascertained even approximately and the fact that it could be increased or diminished with ease if desired probably accounts for the practical abandonment of this point by the experienced Counsel who conducted the case for the underwriters before their Lordships. They fell back on overloading and top-heaviness. Even if water in the tank might be a source of danger the judgment of Lord Blackburn in *Steel* v. *The State Line Steamship Company* L.R. 3 A. C. 72 shows that a ship ought not to be treated as unseaworthy by reason of something objectionable but easily curable by those on board.

The case is no doubt one of difficulty and no one can be surprised that the underwriters defended the action on the ground of unseaworthiness. But as the evidence came out they were forced from one theory to another and they have failed to prove their case.

It is supposed that the cargo must have shifted; but this is a mere supposition and there

is no evidence of any bad stowage or other cause to account for any shifting of the cargo. All is conjecture. The real cause of the loss is unknown and cannot be ascertained from the evidence adduced in this action. But underwriters take the risk of loss from unascertainable causes; and after carefully weighing all the evidence and bearing in mind the presumption of unseaworthiness on which the underwriters rely their Lordships have come to the conclusion that unseaworthiness at the time of sailing is not proved. They agree with the Chief Justice and feel compelled to differ from his colleagues. The consequence will be that they will humbly advise His Majesty to allow the Appeal and to order judgment to be entered for the Plaintiffs in the action for the sum assured and damages in the nature of interest at 4 per cent. per annum from the 21st December 1896 until payment and costs, other than those occasioned by joining the shipowners as interveners. The Insurance Company must pay the costs of the Appeal of the Plaintiffs except those occasioned by the intervention of the shipowners.

As regards the shipowners who were added as interveners and who appealed separately their Lordships consider that the Plaintiffs having joined them for their own convenience ought to pay their costs of the action and intervention and that against them the action should be dismissed with costs and their Lordships will so advise His Majesty. It would be unjust to the underwriters to order them to pay the costs of the shipowners' Appeal and they must bear their own costs of that.

As the Appeals have been consolidated, one order will be drawn up on both Appeals.