Privy Council Appeal No. 50 *of* 1927.

Capt. J. A. Cates Tug and Wharfage Company, Limited - - *Appellants*

v.

The Franklin Fire Insurance Company of Philadelphia, Pennsylvania *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE, 1927.

Present at the Hearing :

VISCOUNT HALDANE.
VISCOUNT SUMNER.
LORD SHAW.
LORD MERRIVALE.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT SUMNER.]

The appellants were the owners of the motor tug boat " Radius " when she was sunk in collision just outside the entrance to Burrard Inlet, the harbour for the City of Vancouver, on the 26th August, 1925, and went down in about fifteen fathoms.

She was covered at the time by two policies of insurance, issued by the respondents, one for $24,000, so valued, on hull ($12,000), and machinery ($12,000), against all risks, and the other on disbursements for $6,000 on the like value, against total or constructive total loss only, with a limited part of any general average and salvage. Both policies contained the following clauses :—

> " In ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. . . . Warranted to be subject to English law and usage as to liability for and settlement of any and all claims,

and also sue and labour clauses in the usual terms. The disbursements policy further contained the words " to follow Hull underwriters in the event of total or constructive or compromised total loss."

The plaintiff company sent to the underwriters' agents notice of the accident on the day of the collision and notice of abandonment on the day after, which on the 3rd September the respondents refused in writing to accept " at that stage." Prompt arrangements were also made by the agents to ascertain the exact position of the sunken tug. This was done without difficulty, oil being observed on the surface in the neighbourhood of the place of collision. The spot was buoyed on the 27th August, and on the 28th August a diver was sent down, who reported the tug to be resting on the bottom there, right side up, and though holed in one place amidships otherwise apparently undamaged. Thereupon a contract was made with salvors on the 29th August to raise her for $6,500, no cure, no pay, and by the 2nd September she had been raised and towed inshore. Next day she was beached and the hole was temporarily patched. Examinations and surveys followed, those made for the underwriters being detailed surveys by skilled surveyors, those on the other side amounting to little more than a general look round without detailed estimates.

The result was that the appellants were advised by one witness (Moscrop), thus :—" I didn't think she would be worth fixing up. I thought it would be cheaper to build a new boat and put the money in that," and by another (Lucas), that the cost of repairing the engine would be probably four or five thousand dollars, which would make it worth about five thousand.

On the other hand, detailed estimates based on the surveys were furnished to the underwriters and tenders to do the work were made by responsible ship-repairers at Vancouver for amounts ranging from $10,348 to $14,730. There were further admitted items for expenses of various kinds, amounting to $3,042. The appellants' witnesses did not address themselves to the point that the expense of repair had to be compared with an insured value of $24,000, or realise that the question could not be solved by asking merely whether it would pay the owners best to abandon at the outset and buy a new tug, or to undertake the work of effecting the necessary repairs. On the underwriters' figures, which were the only figures presented " in accordance with English usage in the settlement of claims," there could be no constructive total loss, unless the highest estimate and no other was adopted, and even then the margin would only be $272.10.

While the surveys and estimates were being made, the salvors happened to ask the underwriters' representative whether, if the wreck were to be sold, they could be given a chance to purchase. A non-committal reply was given at the moment, but a little later

an offer of $12,500 was made by word of mouth, to include the $6,500 salvage. In return a request was made that the offer should be put into writing, which was done, but after an interval of some three weeks this offer was withdrawn. The appellants knew nothing of this incident until after litigation had begun, so that, whatever else may be made of it, estoppel, on the basis of a representation available to the appellants and a consequent change of position on their part, is out of the question.

It was on this incident that the judgment turned, which the Trial Judge gave in favour of the appellants for a total loss. He held that, by reason of these communications between the underwriters and a third party, there had been a binding acceptance of the abandonment, which had been tendered by the assured, in spite of their formal refusal of it. He held that they had done an act which could only be justified under a right derived from abandonment, " for," said he," does not the solicitation and receipt of a *bona-fide* bid to purchase necessarily imply power to make title should the bid be accepted ? " Their Lordships can only say, as the Court of Appeal said, that it does not. The underwriters in this tentative negotiation did not act as owners of the tug or exercise dominion over it, and they did not purport to sell and convey or to make a title for that purpose. An agreement to sell, had it been concluded, would only have been an executory contract, which they would be able to perform if and when they chose to accept the abandonment, but in itself it could not be an act of ownership. As a matter of fact, this everyday proceeding was nothing more than a precaution, equally available in connection with proving a defence in case they should resist the claim or with preparing to make the best of the loss if they should give up the contest and elect to pay. The analogy of goods sold by sample, or delivered on approbation to a person, who thereupon sells them over to a third party and so determines his right to elect whether he will take the goods or return them, is one which, though it was urged on their Lordships by counsel at the bar, it is impossible to adopt.

As the Trial Judge had not tried the issues of actual, constructive or partial loss, or of the amounts payable accordingly, the Court of Appeal proceeded to determine them on the shorthand notes of a very copious examination and cross-examination of the witnesses on both sides. To this course no objection was taken. The plaintiffs did not seek to have the case sent back to the Trial Judge to complete the hearing ; the defendants were content to take the decision of the Court of Appeal. In the result the Court, having the fullest materials before them on questions which were essentially questions of figures and of fact and depended little on the credibility of the respective witnesses, came in effect to the conclusion that the loss was not an actual total loss, for the tug was clearly capable of being salved and repaired, as any prudent uninsured owner would have seen ; that, on a comparison of the aggregate cost of

salvage, repairs and incidental expenses with the insured value, there was such a margin as made the loss partial only, and that as to the amount of that partial loss the $11,500, tendered before action and paid into Court, taken together with the amount of the salvage bill, which the underwriters had discharged, sufficed to satisfy the assured's claim.

The contentions of the appellants, before their Lordships were (1) that there was a constructive total loss, because the assured had been " deprived of the possession of his ship . . . by a peril insured against," and because it was unlikely that he could recover (Marine Insurance Act, Section 60 (2)), unlikely, that is, at the time when he gave his notice of abandonment; and (2) that when the tug went to the bottom there was an actual total loss, in accordance with Lord Halsbury's well-known observation in the case of the " Blairmore " (1898, A.C., at p. 593).

> " In this case a controversy has been raised which I had thought had long since been laid to rest . . . . " I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again, and I think, in construing a contract, now for many years a common contract, no one could doubt that that contract was intended by the parties to contemplate the loss of a ship as comprehending the case of her being sunk."

The first contention is disposed of at once as soon as it is appreciated how probable the recovery of the tug was, even when the notice of abandonment was given. The tug had sunk near to a great city and within the neighbourhood of its harbour. Skilled persons and modern appliances were available to raise her. The weather caused no difficulties: the exact spot where she sunk was easily ascertained. She was neither very large nor very heavy. The diver at once found that she rested conveniently on a gravel bed and was neither broken up nor in danger of going to pieces. Experience at Vancouver showed, as experience has shown in many other similar places, that it was quite a feasible operation to raise such a vessel. Even the depth in which she lay, and the fear, in any case rather a remote one, that tides and currents might have shifted her position into much deeper water, was at once found to have nothing in it. The appellants accordingly failed to bring themselves within Section 60 (2), and it is unnecessary to consider the question which has been raised (see Arnould on Marine Insurance, 11th Ed., Section 1097), whether or not the old rule, which makes the commencement of the action the crucial moment in considering whether a constructive total loss has occurred, has been modified by Sections 61 and 62.

As to the second argument, Lord Halsbury's observation has unfortunately been so applied in this case as in itself to reawaken controversies, which in his time were well settled. If Lord Halsbury meant to decide that, when the " Blairmore " sank, she was, then and there, totally lost, the whole discussion, on which the rest of his judgment and the judgment of his colleagues turn, was otiose, nor was any notice of abandonment required at all. So far, however, from the action being, as in this view it

was, for an actual total loss, it had from the first been brought for a constructive total loss (24 Rettie 893), and the issue was whether, by raising her at their own expense, the underwriters could insist on eliminating this item of salvage from the comparison between her repaired value and the costs of putting her in a position to be repaired and of then repairing her, and could on this footing successfully aver that there was only a partial loss, namely, the cost of the repairs themselves (Lord Watson, pp. 601 and 602; Lord Herschell, p. 610). What Lord Halsbury said was not necessary to the decision nor was it part of the reasoning on which the decision of the House was based, and it expresses only his opinion at that time on the particular fact which the case presented, viz., that this ship had been sunk in a squall in sixty fathoms (24 Rettie at p. 898), while laid up in ballast in San Francisco Bay in the year 1896. The physical possibility of raising a sunken ship depends not only on the place where she lies, her size and injuries, and the available facilities for salvage work, but also on the existing state of the salvors' art, which, since 1896, has made very considerable advances. Lord Halsbury's remark must not be taken as meaning that any ship is an actual total loss whenever she is under water, nor even when she is submerged in such circumstances as to present to salvors a problem of some difficulty. It does not therefore avail to relieve the appellants from the necessity of proving a constructive total loss in this action.

The rest of the case raises questions of figures only, as to which the Court of Appeal had materials fully sufficient to justify their findings without being open to review except upon questions of principle. It was argued that such a question was to be found in the estimates of the cost of repairs presented by the underwriters, and that, as against them, the assured was entitled to pin them down to their highest estimate, since all were put forward as worthy of credit and none could therefore be discredited by the underwriters themselves. There is one obvious fallacy in this ingenious argument. This evidence was not given in respect of a fact, which was within the cognisance of those who presented it. The subject was a matter of opinion and was strictly one of estimate, not of knowledge. The witnesses were qualified technically, and their business was, by their special skill, to assist the Court in solving the question in issue, namely, the true cost of repairs. On their evidence the Court had to exercise a judicial selection and this was properly done, nor can their Lordships now review it. A figure was chosen, which failed to establish either a constructive total loss or a partial loss to an amount in excess of the aggregate of the sum paid into Court and of the salvage service, of which the plaintiffs had the gratuitous benefit, and with this conclusion their Lordships do not interfere. They will accordingly humbly advise His Majesty that this appeal ought to be dismissed with costs.

In the Privy Council.

CAPT. J. A. CATES TUG AND WHARFAGE COMPANY, LIMITED

v.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNYSYLVANIA.

DELIVERED BY VISCOUNT SUMNER.

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