FTCC 057/13 2013 B. NO. 57

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN:
SEA COACH BOAT COMPANY LIMITED
70A OFF SIR SAMUEL LEWIS ROAD
ABERDEEN
FREETOWN - PLAINTIFF

AND

STACO INSURANCE COMPANY (SL) LIMITED
24 UPPER BROOK STREET
FREETOWN - DEFENDANT

BEFORE THE HONOURABLE MR, JUSTICE SENGU KOROMA – JSC DELIVERED ON THE 5TH APRIL, 2019.

E. Paps-Garnon for the Plaintiff – present
A. Thompson for the Defendant – present

THE ACTION

1. By a Writ of Summons dated the 1st day of June, 2013, the Plaintiff claims against the defendant for the following: -
    1. The sum of $250,000.00 (or the equivalent in Leones) being monies due under an insurance Policy No. SSL/MH/0034/10.
    2. Further or in the alternative, damages.
    3. Interest on the said sum of $250,000.00 from the 3rd day of October, 2012 until payment.
    4. Any further or other relief
    5. Costs

2. In the particulars of claim, the Plaintiff alleges that it is and was at all material times the owner of the Marine Vessel MV Princess Caroline ("the Vessel") which was inured by the Defendant's policy of Marine Insurance No. SSL/MH/0034/10 dated 29th December, 2011

("The Policy") against the perils enumerated in the Policy, including Perils of the seas ("the perils") for a period spanning 29th December, 2011 – 30th September, 2012.

3. On the 26th September, 2012, while insured under the policy, and at Cape Light House off Aberdeen, Freetown, the Vessel encountered real storm of exceptional violence and sank.

4. The Plaintiff gives particulars as follows: -
   a. the Vessel was safely moored as per standard regulations and regularly checked;
   b. there was a storm of a particularly violent nature such that through no fault of the Plaintiff, the vessel snapped its moors during the storm and ran aground off the Cape Light House area where it hit some rocks and suffered substantial damage to its hull;
   C. the Plaintiff did it utmost best to salvage the vessel and moved it to Aberdeen Bridge area where the vessel still contained taking in water;
   d. the Plaintiff immediately notified the Defendant of the damage to the vessel caused by the storm of the 26th September, 2012 and the defendant then sent over its own "Marine Salvage Experts" to oversee the Salvage rescue operations;
   e. for their own reasons, the Defendant's Salvage experts then proceeded to deliberately drill several large holes in the hull of the vessel thus eventually causing the vessel to take in massive amounts of water leading to a total loss of the vessel on the 3rd October, 2012; and
   f. the Defendant then abandoned the sunk vessel without any recourse to the Plaintiff.

5. The Plaintiff alleges further and in the alternative that the salvage Experts of the defendant were negligent in their actions.

6. The Plaintiff gave the following as particulars of negligence: -
   a. That it was the Defendant's duty to properly evaluate the damage to the Plaintiff's vessel and take all necessary care to conduct the salvage in a safe and timely manner; and

b. that the Defendant's workmen, contrary to standard practice in such salvage operations, negligently drilled holes in the vessel without due care and attention thus causing further damage to the vessel and ultimately leading to its final sinking.

7. The Plaintiff further alleges that as a result of the defendant's negligence, the Vessel because a total loss by perils of the Sea but that notwithstanding, the Defendant in breach of the contract of Insurance has failed and refused to pay the Insured sum of $250,000.00 or any sum to the Plaintiff despite several requests to do so.

8. A Memorandum and Notice of Appearance was entered for the Defendant to the Writ of Summons issued in this action on the 1st July, 2013 and a defence filed on the 13th August, 2013.

THE DEFENCE

9. The Defendant files a defence dated the 14th day of August, 2013 as follows:

1) The Defendant admits that the Plaintiff was and is at all materials times the owner of MV Princess Caroline.

2) The Defendant avers that at the time of the alleged damage the Insurance Policy had not been renewed by the Plaintiffs and that the renewal was only done in December, 2012 after it had expired since 30th September, 2012.

3. The Defendant denies paragraph 4 of the particulars of claim in its entirety and further avers as follows: -

(a) That the alleged sinking of the "Princess Caroline" was done with the sole intention of claiming the Insurance payment and in utmost bad faith by the Plaintiff and its agents;

(b) that because the Plaintiff could not use the vessel as water taxi between Freetown and Lungi as did the original Owners; the Plaintiff devised a means of minimising its loss by causing damage to the vessel with a view to claiming insurance payment.

© The vessel did not in any way snap as it was removed and handed over by Class Diving Officials to

the servants and/or Agents of the Plaintiff when they asked for their vessel before it was moved to Aberdeen Bridge where the Plaintiff carries out its business;

(d) that the Plaintiff upon bringing the vessel to Aberdeen Bridge placed it in a position they knew would lead to it being flooded. They did not take adequate precautions to avert or minimise the effect of the waves on the vessel and it is the belief of the Defendant that this was done with the view to making a fraudulent Insurance claim for the vessel which was at the time of the damage useless to the Plaintiff as aforesaid;

(e) that the Plaintiff took the vessel from the Care of Class Diving intact and thereafter negligently and/or deliberately mishandled the vessel thereby causing serious damage to it with an intention to make an insurance payment claim against the Defendant; and

(f). contrary to what is stated in sub paragraph C of paragraph 4 of the Plaintiff's particulars of claim, the Plaintiff deliberately grounded the vessel at Aberdeen Bridge where they knew the water would flood inside and did not take any serious steps to avert the obvious risk of damage by persistent rising tides and surrounding rocks.;

4) that the Defendant because of the customer relationship they had in existence with the Plaintiff carried out major mitigating efforts to help reduce the loss and this was done with utmost care and according to standard salvage procedures and practice;

5) that the damage done to the vessel does not amount to total loss but to damages that can be readily repaired and Defendants had invited Surveys who informed it that it could be repaired at a cost of not more than US$40,000.00; and

6) that the defendant could not pay the sum claimed as there was no policy covering the vessel at the time of the damage and/or loss (which is also denied).

THE REPLY

10) The Plaintiff filed a reply on the 15th day of January, 2014 as follows:

a) That the "Princess Caroline" was properly covered by the Insurance Policy on the 26th day of September, 2012 when the storm caused the "Princess Caroline" to snap its mooring and run aground;

b) that the Plaintiff will contend the averments contained in Paragraph 4(c) of the Statement of Defence and will say that the vessel was never handed over to the Plaintiff as claimed but rather snapped its mooring cables as a direct result of the violent storm and ran aground thus causing substantial damage to the hull of the vessel;

c). the Plaintiff will say contrary to paragraph 4 (f) of the Statement of Defence, the Defendant was responsible for the ultimate grounding of the vessel through the ineffectual and negligent salvage operations that deliberately holed the vessel causing it to be completely flooded thereby directly leading to its sinking; and

4. As to paragraph 5 of the Statement of Defence, the Plaintiff will say that the only reason the Defendant appeared to make some "Mitigating efforts" to salvage the vessel was that it well knew that the vessel was covered by Insurance during and after the storm.

DIRECTIONS

11. Direction were given by Showers J (as she then was on the 10th day of April, 2014

HEARINGS

12. The matter came for hearing before me on the 2nd December, 2016. It was however adjourned several times at the instance of either of the Counsel or both of them. The Plaintiff's witness started his testimony on 14th March, 2017.

13. At the said hearing the Plaintiff was represented by E. Paps-Garnon Esq. and the Defendant by R.S.V. Wright Esq.

14. PW.1 – Anders Peter Hansen. He described himself as a Salvage and Marine Contractor and Engineer and has been in the profession for a period of 31 years of which 16 has been spent in Sierra Leone. PW1. knew the parties to the action.

15. He testifies that he was hired by the Defendant herein to carry out survey of the vessel "MV Princess Caroline". He carried out the survey as contracted and prepared a report. The survey report was tendered as Exhibit "A^{1-10}.

16. The other documents which were e-mails between PW1 and the Defendant's Managing Director are tendered as Exhibit "B^{1-3}". PW1 also prepared an Invoice for the survey carried out which he tendered as "Exhibit C".

17. He clarifies that he was contracted by phone and in person to carry out the said survey to assess the damages done to the vessel. In carrying out the investigation, PW1 took the following factors and consideration
    (i). Documents relating to the vessel of the Plaintiff. He found out that they were regular.
    (ii) Time of the Incident. The incident occurred on the 26th September, 2012.

18. PW1 recalls that at the instruction of a Mr. Shallop, he had constructed a Jetty at the cape jetty with 10 mooring points. The said Mr. Shallop allowed the Plaintiff to use one of them. This was where the "Princess Caroline" was moored and the site was secured.

19. PW1. explains that the incident occurred during the night and the Plaintiff was contracted.

20. PW1 reports that when he checked the vessel, what he saw was disappointing. Someone had bored hole on it before the accident. The engine was filled with water as the repairs compromised the integrity of the vessel. The representative of the Defendant informed him that he had hired a group of Marine workers.

21. PW1 admitted seeing the Insurance documents of the Plaintiff in respect of the vessel.

22. PW1 concludes that he submitted his report to the Defendant.

CROSS-EXAMINATION OF PW1

23. PW1 answers that the incident took place during the night

24. He recognises page 4 of Exhibit "A" under the heading "events".

25. PW.1 recalls being contracted by the Defendant's Managing Director to carry out the survey. He recognizes Exhibit "B" paragraph 1. It is an email from the Defendant. He did not reply to it. He however insists that he was instructed by the Defendant to prepare a report.

26. PW1 testifies that he started the investigation in January, 2013. He however visited the site before commencement of work when he went to see where the vessel was. On arrival he saw machines pumping water out of the boat. PW1 however could not confirm that he included the leakage in his report.

27. PW1 denies that he was out of the country at the material time and can produce his passport as evidence.

28. He agrees that the vessel was originally owned by the Jamal Shallop but to his knowledge, it was only used for Sea trials and not to ferry passengers.

29. PW1 insists that the vessel had 50 percent possibility to land as it had a double hull. It could also land under the bridge. However special arrangements should have been made to make that possible.

30. PW1 cannot tell what happened to the rope of the vessel. He explains that it will take half a day to take the vessel to the dockyard.

31. PW1 denies refusing to write the report because the Managing Director of the Plaintiff was his friend. He insists that he did not reply to the email because the Defendant Managing Director had been dodging him for 8 months.

32. PW1 states that he sent the Report and Invoice at the same time. The Report was sent earlier.

RE:-EXAMINATION

33. PW1 recognizes Exhibit "C" the Invoice and it is dated 1st March, 2013. A draft report was sent on the 1st March, 2013 but he did not get any response from the Defendant. The Defendant was using different email addresses. E-mails were exchanged between the 14th and 16th March, 2013. After that, there was no response from the Defendants until he received communication from the Plaintiff's solicitors.

PW2: OLUSEGUN JAJI

34. PW2 is the Managing Director of the Plaintiff Company. The Defendant is their Insurer. He is in court in respect of the Plaintiff's vessel "Princess Caroline" which had an accident while insured with the Defendant.

35. PW2 recalls the 26th September, 2012 when he was informed that the vessel was taking in water. He called the Managing Director of the Defendant. By the time Managing Director got to the scene, the vessel had been towed to Aberdeen. This was because the vessel had to be moved to prevent it from sinking completely. In the presence of the said Managing Director, the Plaintiff tried to save the vessel by taking it to shallow waters and keep the boat afloat as that was where the engine was.

36. PW2 told the said Managing Director that when the tide drops, they would be able to see the damage.

37. The Defendant Managing Director commented that the vessel would not be able to go to the slipway as it would only sink. The

Defendant later came with about 15 men from the Marine Slipway to salvage the vessel.

38. Later in the afternoon, the men brought by the Defendant started boring holes in the vessel. They made about 20 holes. Their intention was to move the vessel to the Marine Shipway. The boring of holes did not salvage the situation and so the Plaintiff continued bailing water out of the vessel and all of these happened in the presence of the Defendant.

39. The vessel eventually went down and when this happened, the Plaintiff by letter dated 5th October, 2012 wrote to the Defendant informing it of the situation. The Defendant replied by a letter dated 19th October, 2012 acknowledged receipt of Loss Report and informed the Plaintiff that the claim had been registered by a letter dated 13th November, 2012.

40. The Defendant informed the Plaintiff of the appointment of Messrs Class Diving to investigate the circumstances leading to Princess Caroline taking in water and determine the extent of the damage.

41. PW2 testifies that the Defendant had earlier on carried out repairs on the vessel because they wanted to start operations.

42. PW2 recognises a letter dated 4th March, 2013 relating to Grand Metropolitan Associates whose Officials informed him that they were sent by the Defendant.

43. PW2 testifies that the vessel was in the custody of the Defendant when the Insurance Policy lapsed.

CROSS EXAMINATION

44. PW2 answers that the incident occurred in September, 2012 and his claim was for total loss.

45. The boat was not running passenger service but denies that he waited until the Insurance was about to expire before the vessel was destroyed.

46. The Certificate of Fitness was provided by M.T.U of South Africa. The original owner had not built a Jetty nor had the Plaintiff. The vessel was therefore moored for over a year.

47 PW2 recognises Page 19 of Bundle 1 – This was an application to the Guaranty Trust Bank for a loan facility.

48. PW2 agrees that the Plaintiff did not submit a survey report but this was because it was not required.

49. PW2 explains that the vessel's ropes snapped on 26th September, 2012 when this happened, the Managing Director of the Defendant invited the Marine Slipway Staff to salvage it. A day or so thereafter, the vessel was moved to Aberdeen.

50. PW2 agrees that it was the responsibility of the Owner to try as best as possible to salvage the vessel. He denies loading it with sandbags but rather moored it by the coast. He also arranged for 24 hour plumbing out of the water.

51. PW2 insists that had the vessel been taken to Kissy it could have been repaired.

52. PW2 denies that when he paid his insurance he unsuccessfully urged the Defendants to back date it.

CASE FOR THE PLAINTIFF

THE DEFENCE:
DW1 - KUNLE MICHAEL ADERINOLA

53. DW1 is the Managing Director of the Defendant. He refers to the Plaintiff as one of their Insured and recalls the morning of the 27th September, 2019 when PW2 informed him by Mobile Phone that one of the ropes of Plaintiff's vessel anchored at Sierra Light House had snapped. He went there together with the PW2 and the Defendant's Accountant. On arrival, he found out that the Plaintiff was using a pumping machine to bail out water from the vessel but the vessel was afloat at the time.

54. DW1 considers the notification and visit as a claim notification. He then advised PW2 to move the vessel to a shallower part of the Jetty, repair the boat and send the bill to the Defendant. The PW2 refused on the ground that he would need to take the vessel to Senegal. He therefore indicated that he would be claiming for total loss. DW1 thereafter visited the vessel on a regular basis.

55. On the 5th October, 2012, DW1 receives a letter dated 3rd October, 2012 from the Plaintiff informing him that the vessel had sunk. He visited the site and found out that the vessel has been moved to a shallower part as it was now at the very deep part of the water. Subsequent visits revealed that the vessel was still clearly visible during low tides and will be partially visible during high tides. It was later found out that sand bags had been placed in the vessel

56. DW1 contacted the Sierra Leone Ports Authority and the PW1 to inspect the vessel. He also saw one Saidu Tarawallie a Marine Pilot. Saidu Tarawallie – DW2 brought Marine workmen to move the vessel to shallower part. DW1 also contracted an International loss adjustor and they both submitted a report to him.

57. The DW2 testifies that at the time the boat sank, the insurance policy of the vessel had expired.

CROSS EXAMINATION OF DW1

58. DW1 admits previously paying out premium of Le200, 000,000/00 to the Plaintiff Company in respect of another vessel.

59. DW1 agrees that he inspected the vessel. They checked the entire length and breath of the vessel. The vessel was not repaired but was moved from one point to another. He confirmed receiving a Survey Report on the MV Caroline dated 30th October, 2012.

60. Dw1 insists that experts were employed to salvage the vessel. He also insists that they were in the position to honour all Insurance claims.

61. **DW2 – Saidu Tarawallie**. He was contacted by DW1 who told him that there was a problem with one of his vessels. He then went to Aberdeen when it was high tide so could not find the vessel. He later boarded the vessel but did so after there was low tide on 25th October, 2012. DW2 discovered that there was water halfway into the vessel and saw sandbags in the engine room. The bags of sand were an added weight and could not keep he vessel afloat.

62. In his opinion because of the location of the Sandbags (each vessel has gross storage and net tonnage) it would cause the vessel to go down. DW2 denied placing the Sandbags in the vessel. He opined that where the vessel located was a cause for concern. When a vessel has problems it should be grounded.

CROSS-EXAMINATION

63. DW2 answered that as Marine Pilots; they do not only bring in vessels but also test their seaworthiness.

64. DW2 replied that he was not commissioned to salvage the vessel and so did not ask for the Manual of MV Princess Caroline. He was asked to see the scene and make recommendations in a report.

65. DW1 admitted that he drilled holes in the vessel to drain out water. He also pumped out water.

ISSUES IN DISPUTE

66. Having analysed the evidence in this matter, it is my conclusion that there are three issues in dispute to wit:

a) Whether or not the Plaintiff's vessel MV Caroline was covered by a valid Insurance Policy at the time of the alleged accident and loss;
b) Whether or not the alleged loss was partial loss or total loss; and
c) Whether the Plaintiff was negligent. I shall hereby deal with these issues sequentially.

A) **INSURANCE POLICY**

67. The vessel MV Caroline was insured by the Defendant with two other vessels by group Policy Number SSL/0034/10 for the period 29th December, 2011 to 30th September, 2012. The value of the vessel was US$250,000,000/00. The Insured was named as Olusengu Jaji.

68. In his submission on this point, Rowland S.V. Wright Esq. for the Defendant argues that the group Insurance Policy SSL/MH/0034/10 HSD expired on the 30th September, 2012 and the premium for renewal was only paid in December, 2012 bearing in mind that the alleged loss took place after the expiration of the previous insurance policy.

69. He further argues that the vessel was not validly covered by Group Insurance Policy No. SSL/MH/0034/10. Mr. Wright submits that the Plaintiff did not fulfill the requirements of possession of valid Insurance cover in the light of the fact that the Plaintiff failed at all times during the duration of the policy to ensure that the vessel was seaworthy and have an annual survey report, which were continuing warranties for the subsistence of the referred policy. In support of this, Mr. Wright refers to the testimony of DW2 to the effect that PW2 never produced/and or furnished the Defendant company with a certificate that the vessel was seaworthy, and, more particularly a survey report in respect of same at all times during the purported Insurance coverage.

70. Mr. Wright further argues that from the evidence as state above there was no annual survey report, neither was the vessel seaworthy as warranted to enable it to be part of the new policy, as a vessel that had sunk was in any case not seaworthy for insurance purposes and could not form part of the cover (Page 101 of the Court Bundle), He also referred to clause 5 of the Institute Time clauses under the rubric "Termination at Page 36 of Bundle 2, the absence of periodic Survey report as required by page 5 (Supra) the Certificate of Seaworthiness, especially when no time for extension of time for survey has been granted which fundamentally means there could not have been a valid and legal insurance covering the vessel from the outset.

71. Mr. Paps-Garnon for the Plaintiff had this to say in reply to Mr. Wright:

"The primary argument of the Plaintiff is that the vessel was properly insured at the time of the original accident on the 26th September, 2012. The Plaintiff submitted that it is for the Court to look at the accident encompassing the twin facts of (a) the storm and (b) the running aground of the vessel and make finding as t- whether this was covered within the policy".

72. Analysing the facts of this case, it can be reasonable to conclude that the original accident occurred on the 26th September, 2012. It is not in dispute that the vessel MV Caroline was insured by the Defendant on the 26th 2012 when the accident occurred. The final sinking for which the Plaintiff is claiming total loss took place on the 3rd October, 2012. There is no denying that the sinking would not have happened at that time had the events of the 26th December, 2012 not occurred. To my mind, they form a chain of events that cannot be separated from one another.

73. It is my conclusion therefore that the material time for determining whether the policy was valid is the 26th day of September, 2012. The policy was to expire on the 30th September, 2012. It would therefore be safe to conclude that the Insurance Policy was valid for the purposes of this action.

Perils of the Sea

74. In addition to the arguments surrounding the validity of the Insurance Policy is the question of firstly whether the alleged loss was caused by one of the perils covered by the Policy and secondly whether the manner by which the vessel was destroyed covered by the loss.

75. In his submission, Mr. Wright on this point states that the burden of proving that the loss was caused by a peril insured against is on the assured. In support of this he cited the cases of **AUSTIN V DREWE (1815) 4 Camp 360; EVERETT-V-LONDON ASSURANCE CO. (1865) 19 CB (NS) 126; MARSDEN-V-CITY AND COUNTY ASSURANCE CO. (1865) LR I C.P. 232**. He submits that the Plaintiff failed to explain the manner in which the loss came about and how it fell under the policy. The omission is most fundamental as it fails to show whether the category of peril was causal and proximate link to the loss, which said omission is fatal to their case. Since an Insurance Company is not automatically liable to pay compensation until and

unless it is clearly shown that the loss falls under one of the perils actually covered by the policy – **ASTROVLANIS COMPANIA NAVIERA SA V LINARD (1972) 2 Q.B 611 and (1972) 2 Lloyd's Rep 187; PALAMISTO GENRAL ENTERPRISES SA V OCEAN MARINE INSURANCE CO. LTD (1972) 2 Q.B. 625.**

76. In his submission on this point, Mr. Paps-Garnon argues that the accident of the 26th September, 2012 was covered by the policy. He refers this Court to the Policy of Insurance, particularly to clause 6 thereof. The relevant paragraph is 6.1 which provides that:

77. This Insurance covers loss or damage to the subject matter insured caused by:

6.1.1 – Perils of the Sea rivers or lakes or other navigable waters: Mr. Paps-Garnon set out the definition of "Perils of the Sea" as defined by Black's Law Dictionary 6th Edition as follows:-

78. "In maritime and Insurance Law, natural accidents peculiar to the Sea, which do not happen by the intervention of Man nor are to be prevented by human prudence. Hence to recover on Marine Insurance Policy insuring loss by perils of the Sea, vessel must be seaworthy when it is sent to Sea. Perils of the Sea are from (1) storms and waves (2) Rocks, Shoals, and rapids; etc all losses caused by the action of the wind and water acting on the property insured under extraordinary circumstances, either directly or immediately, without the intervention of other independent active external causes are losses by "Perils of the Sea or other perils and dangers within the meaning of the usual clause in a policy of Marine Insurance.

79. Mr. Paps-Garnon submits that examples (1) and (2) above fall squarely within the loss claimed by he Plaintiff and exactly as pleaded in the Plaintiff's Statement of Claim. They are that there was a storm and the vessel ran aground on the Lighthouse rocks. He cited the case of **VINING-V-SECURITY INS CO. OF NEW HAVEN LA; and HALSBURY'S LAWS OF ENGLAND 4TH EDITION VOL. 25 PARAGRAPH 151** under the Rubric "Extraordinary violence of winds or waves not necessary".

80. In analysing these submissions, I must first of all state clearly that the definition of Perils of the sea given by Black Law Dictionary 6th Edition represents the Common Law position regarding perils of the Sea which I shall adopt here. To the extent of that definition, Article 6.1.1 of the Insurance Police covers loss referred to in that definition. The facts surrounding the accident and the subsequent sinking of the vessel are not in dispute here and it would therefore not serve any purpose to narrate them.

81. What is in dispute is the question of responsibility. That brings up the issue of negligence which I shall address in due course.

82. Before concluding on this point, let me review some of the authorities cited:

> The Defendant cited the Case of **AUSTIN & ANOR V. DREWE**: This case relates to an insurance "against all damage which the assured shall suffer by fire shock and utensils in their regular build sugarhouse". This case is clearly inapplicable in this matter.

83. EVERETT. This case deals essentially with the construction of the Phrase `loss or damage occasioned by fire" and not the issues in dispute here. The facts relate to damage resulting from disturbance of the atmosphere by explosion of gun fire.

WAS THE LOSS TOTAL OR PARTIAL?

84. In his submission, Mr. Paps-Garnon argues that the vessel was a constructive total loss. He refers to Halsbury Laws of England, 4th Edition at paragraph 292 defines a constructive total loss as

> "There is a constructive total loss where the subject matter insured is reasonably abandoned an account of actual loss appearing to be unavoidable or because it could not be preserved from actual loss without an expenditure which could exceed its value when the expenditure has been incurred".

85. He submits that the Plaintiff was fully within his rights to elect to treat the vessel as a total loss and properly informed the Defendant as such. What the Defendant could have done was to have commissioned a proper survey on the costs of repairs if it chose to dispute the only

standing report before the Court which is Exhibit "A". The evidence of DW2 that the vessel could be repaired should not be accepted as he was not an expert in such matters.

86. Mr. Wright on the other hand argues that any loss to the boat was self inflicted and the Plaintiff failed to show this Honourable Court any realistic or practical step it took to properly by save or salvage the vessel and/or mitigate its loss as required by law.

87. In resolving this disputed issue, I shall rely on the testimonies of the PW1 and DW2.

88. PW1, a Marine Expert in his report concludes, amongst others as follows: "The wreck is a 100 percent loss as the salvage and sending it to dry dock will cost more than the actual value of the vessel, the engines can only serve to be used for spare parts after a thorough overhaul of the components".

89. DW 2, on the other hand who describes himself as a Marine Pilot, under cross examination states that one of his functions was to test whether a boat was Seaworthy but admits that Marine Pilots do not carry out repairs. He also agrees that the Defendant did not commission them to salvage the vessel. He insists that the vessel could have been repaired.

90. In the absence of a proper report by an expert countering that of Exhibit "A", this Court is left with little choice but to admit Exhibit "A" as representative of the state of the vessel at the material time. I therefore hold that the vessel was a total loss.

91. The final issue for determination is that of negligence.

92. In his submission, Mr. Wright argues that the allegation of negligence on the part of the Defendant has to be juxtaposed with the issue of salvage. The Defendant owed no duty of care to the Plaintiff to attempt to salvage the vessel and/or mitigate the loss. But did not so purely as a third party and to render some assistance under the concept of "salvage" by a third party, the Defendant attempted to save the

vessel by drilling holes to let the water out. This method according to DW2 was the correct approach.

93. Mr. Wright further submits that by the evidence of DW1 and DW2, the sole decision for the Plaintiff to ground the vessel in the deepest end of the Sea and the position in which the vessel was grounded were cumulative factors operative in the demise of the vessel.

94. On the issue of negligence, Mr. Paps-Garnon submits that the Plaintiff got the vessel off the rocks at Cape Light House in the middle of the storm and used another vessel to tow the vessel to Aberdeen, safely grounded it and used its own pumps to pump out water from the said vessel. He further submits that in Exhibit "A". PW1 stated that "the Sea Coach (Plaintiff) contacted the African Salvage Company in Freetown but they were however on operations for African Mineral in the Pepel area and could not assist in lifting the vessel".

95. He concludes that the Defendant owed a duty of care as it had voluntarily taken over the salvage of the vessel.

96. In resolving this issue, I shall again refer to the only expert evidence in this case – Exhibit "A".

97. In exhibit "A", the Expert describes the events of the 26th September, 2012. He states as follows: `` the Princess Caroline moored at its position at Cape Sierra Light House, was caught in a storm arising within few minutes and without any warnings the waves rose to 1 - 1½ meters and a storm from North to East, forced the vessel to lose the mooring lines, and it drifted towards man of War Bay. The Onboard Security crew of two men, launched the emergency anchor, but this attempt failed due to shallow waters. The grounding of the vessel on the rocks caused damage to the hull structure, with some water impressing through the hull. The Plaintiff's staff quickly had water pumps brought onboard and started pumping out the water".

98. The Expert further described the Salvage efforts of the Plaintiff which he found to be satisfactory. However on the 3rd October, 2012, the damage to the vessel was too much for the crew and the water ingresses into the Engine room and on to the top of the engine.

99. The Expert also describes the salvage efforts of the Defendants. He states that "the team contracted by the defendant made holes in the glass fiber hull on the side, which led to huge water ingression into the hull compartments. The purpose of the holes was unknown and merely served as further damage to the already damaged hull".

100. The Expert concludes as follows: -

(i) The right decision made by Sea Coach (the Plaintiff) to tow the vessel to the Aberdeen Bridge Marine, where the water was more calm and access to the wreckage is easy minimised the cost of wreckage removal. It would have cost more had it remained at the Lagonda Complex area as the area was the sailing path for the hovercraft transport vessel etc.

101. On the Defendant, the Expert reported that their involvement in bringing the wreck back to its former operational standard, by using a group of mariners to perform glass fibre repair works on the vessel whilst grounded at Aberdeen Bridge (which drying up in the low tides and have 2-3- meter of water during high tide), caused more damage to the hull and overall wreck.

102. I accept the analyses of PW1 in Exhibit "A" and hold that there in no evidence of self inflicted damage or scuttling and negligence. Most of the cited by the Defendants in this respect are of little effect in the matter.

103. On the payment to the Plaintiff, the Expert recommends at least ¾ of the insured value of the vessel. He bases this calculation on the fact that the Defendant hired a team without knowledge of saving the vessel from further damage. I accept this recommendation as just and fair. This is more so because it was the Defendants who hired the PW1 in the first place to survey the vessel. This was a report done and made to the Defendant Managing Director.

104. In the circumstance, I order as follows: -

1. Judgment is given in favour of the Plaintiff in the sum of US$187,000.00 being 3/4th of the Insured value of the MV Princess Caroline.

2. Interest thereon at the rate of 2 percent per annum from the 18th day of June, 2013 to date of Judgment.
3. Cost to taxed if not agreed.

Thompson: In the circumstance, I wish to make an application. In view of this Lordship's final Judgment, I make a viva Voce application for a stay of execution of the Judgment pursuant to Supreme Court Annual practice Page 1078 para 59/13/9. The application is predicated on the basis that the Defendant would wish to exercise its right of appeal in the Court o Appeal

Paps-Garnon: He is saying that the application is predicated on their right of appeal. The reason for grant of stay has nothing to do with an intention to appeal. There must be special circumstances. By nature of the defendant, they should not be appealing.

Secondly, to ask for a stay at this point is not consistent with practice and procedure. The Judgment has not been perfected. There has also not been an offer of costs.

Thompson: It is by virtue of the referred paragraph which I shall read. Special circumstances can only matter when it is not made on the spot. He referred to the case of Tuck-V-Southern countries

COURT:
The matter is adjourned to Tuesday 16th April, 2019 for ruling on this application.

RULING DATED THE 16TH APRIL 2019

1. Mr. Thompson on behalf of the Defendant made a viva voce application for a stay of execution of the Judgment of this Court dated 15th day of April, 2019. This application was made immediately after the delivery of the Judgment. He submitted that the Application was made pursuant to paragraph 59/13/9 page 1078 of the Supreme Court Practice. Mr. Thompson further submitted that the application was predicated on the basis that the Defendant would wish to exercise its rights of appeal to the Court of Appeal.

2. In response, Mr. E. Paps-Garnon for the Plaintiff argued that the reasons for the application for the grant of a stay had nothing to do with the right of Appeal. In order for a stay to be granted, there must be special circumstances.

3. In reply Mr. Thompson referred to the case o TUCK V SOUHERN COUNTIES DEPOSIT BANK (1888) T. 1392.

4. I have looked at the passage in the English Supreme Court Practice, 1999 referred to by the Mr. Thompson. The relevant part is that "The application should, if possible be made to the Court below at the time its gives Judgment but if not, it can be made subsequently on notice"

5. There is nothing in this passage dispensing with the requirement of special circumstance as a condition for grant of a stay.

6. It is not denied that the application could be made viva voce. On this I agree with the Thompson but the overriding principle in an application of this nature is that special circumstances must be shown.

7. However the interest of Justice I have looked closely at the case cited by Mr. Thompson- TUCK-V- SOUTHERN COUNTIES DEPOSIT BANK (1888) Ch Rep T. 1392 .

8. This case deals with the law on Bill of sale. After Judgment was given in favour of the Plaintiff, the Defendant has now moved for stay of execution under the Judgment pending an appeal.

9. J.G. BULCHER for the Plaintiff submitted that stay of execution order of a Judgment would only be granted on special grounds, to be supported by an affidavit. He cited the ANNUAL PRACTICE 1889 Page 785 the cases of **BRADFORD V. YOUNG (28 CH. D. 18; BARKER V. LAVERY (14 Q.B.D. 769).**

10. Counsel for the Defendant in his submission referred this Court to the ANNUAL PRACTICE, 1999 (a very modern version of what is mentioned in the TUCK Case.

11. In TUCK, KAY J. had this to say" where such an application (application for stay of execution) is made at the moment of giving Judgment, and when the Court has all the facts before it, the Court may see reason to grant it but when the application is made sometime afterwards, when the Judge cannot be expected to remember the facts, how can it be reasonable to ask the Court to make an order that the Judgment be suspended, when no special circumstances for suspending it has not been shewn" I must refuse this application".

12. This decision clearly does not help the Defendant's application. The first part of the Judgment of AKY J gave the Judge a discretionary power by the use of the word "ANY". The second part deals with the need to show special circumstances. The most important aspect here is that though the Defendants made their application on the 17th May, 1889, the same day on which the Judgment was delivered, the KAY J refused the application. The appeal from the decision of KAY J did not include that on stay of execution.

13. It is my conclusion therefore that the Defendant cannot at this stage make an application for a stay of execution.

14. Considering the seriousness of the legal issues relating to Marine Insurance in this case, the Defendant must show special circumstances which he has failed to do in this case.

15. In the circumstance, the Application fails. No order as to costs.

.....

Hon. Mr. Justice Sengu Koroma (JSC)