Status: ⛔ Negative Judicial Treatment

*563 The “Ikarian Reefer”

In the Commercial Court

25 February 1993

[1993] F.S.R. 563

Before: Mr. Justice Cresswell

25 February 1993

Practice—Expert witnesses—Duties and responsibilities of expert witnesses.

In a marine insurance claim, the parties called expert witnesses to give evidence upon a number of topics, such as the cause of a fire aboard.

The learned judge was of the view that several of the expert witnesses called had misunderstood their duties and responsibilities and had thereby contributed to the great length of the trial.

He therefore devoted a section of his judgment[1] to this matter and it is this which is now reported.

Representation

Anthony Clarke, Q.C. and Nigel Jacobs instructed by Clifford Chance appeared for the plaintiffs. Stephen Tomlinson, Q.C. and Stephen Kenny instructed by Ince & Co., appeared for the defendants.

Cresswell J.:

I. the claim, the defence, the legal principles and the question for decision

A. The Claim

The plaintiff company (incorporated in Panama) were the owners of the *Ikarian Reefer* . In 1985 the plaintiff company (“the plaintiffs”) formed part of the extensive shipping interests of the Comninos Brothers (“Comninos”). By a policy of marine insurance No. 132875 HD the *Ikarian Reefer* was insured from February 1985 against, *inter alia*, perils of the sea, fire and barratry. Under the policy the vessel was valued at US$3 million of which 87.5 per cent. was subscribed by the defendants (amongst others). (The defendants do not suggest that the placing of a value of US$3 million on the vessel for the purposes of insurance was other than in the normal course of business).

Chase Manhattan Bank NA (“Chase Manhattan”) were mortagees of the vessel. By an assignment of insurance dated 5 December 1983 the plaintiffs assigned to Chase Manhattan their interest in any insurance of the vessel and the benefits thereof. By a Deed of Assignment dated 17 January 1989 Chase Manhattan assigned to Den Norske Creditbank plc (“Den *564 Norske”) their interest in any insurance of the vessel. By a Deed of Assignment dated 24 October 1989, Den Norske assigned to the plaintiffs their interest in any insurance of the vessel. The plaintiffs are accordingly entitled to claim against the defendants in respect of the actual and/or constructive total loss of the vessel.

On 12 April 1985 at about 2300 hours the *Ikarian Reefer* ran aground on the shoals off Sherbro Island, Sierra Leone, in the course of a voyage from Kiel to Abidjan in ballast. At about 0100 hours on 13 April fire broke out in the engine room of the vessel. The fire spread to the accommodation and at about 0115 hours those remaining on board abandoned ship. The crew were picked up at about 0330 hours by the Yugoslav flag vessel the *Ljubljana* .

The plaintiffs' case is that the *Ikarian Reefer* became an actual or constructive total loss, in consequence of a peril insured against, namely fire (and/or perils of the sea). The plaintiffs contend that loss by fire includes loss by deliberate fire. If, however, the fire must be accidental and if, contrary to the plaintiffs' primary contention, the court finds that the fire on *Ikarian Reefer* was the deliberate act of the master or crew, the plaintiffs claim a loss by barratry.

B. The Defence

The defendants' primary case is that the vessel was wilfully cast away in that it was both deliberately run aground and deliberately set on fire by or with the connivance of those beneficially interested in the plaintiffs. The defendants say that it is to be inferred that the Master, officers and crew would only have cast the vessel away on the instructions or with the connivance of her beneficial owners.

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After considering the legal principles involved and other topics, the learned judge continued:

V. **expert evidence**

A. Exchange of Evidence—Expert Witnesses

Section XV of the Guide to Commercial Court Practice[2] summarises the Commercial Court practice as to exchange of evidence—expert witnesses. On the hearing of the summons for directions on 6 December 1989 Hirst J. ordered that the parties be at liberty to call up to eight expert witnesses at the trial, provided that their reports be exchanged not later than six months before the trial, supplementary reports to be exchanged not later than one month before the trial. Throughout the trial I held regular reviews with counsel in an attempt to reduce the extent of the expert evidence and save time. I gave a number of further directions to this end. By way of example, following the failure of a meeting between certain experts to narrow the issues in relation to the fire, on 30 July 1992 I directed the exchange of ***565*** supplementary reports on any new materials which any expert wished to advance. Despite these efforts a great deal of time was taken up by expert evidence, particularly as to the cause of the fire. Although this was in part due to the complexity of certain of the evidence, other factors contributed to the unnecessary length of the trial. By way of example about seven days were spent as to the heating valve mechanism put forward by Professor Dover on behalf of the defendants. This mechanism was not pursued in the defendants' closing submissions.

I will refer to some of the duties and responsibilities of experts in civil cases because I consider that a misunderstanding on the part of certain of the expert witnesses in the present case as to their duties and responsibilities contributed to the length of the trial.

B. The Duties and Responsibilities of Expert Witnesses

The duties and responsibilities of expert witnesses in civil cases include the following:

> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v. Jordan [1981] 1 W.L.R. 246* at 256, *per* Lord Wilberforce.
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> 2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: *Polivitte Ltd. v. Commercial Union Assurance Co. plc [1987] 1 Lloyd's Rep. 379* at 386, Garland J. and Re J [1990] F.C.R. 193, Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
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> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J, supra*).
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> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
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> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J, supra*). In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth

without some qualification, that qualification should be stated in the report: Derby & Co. Ltd. and others v. Weldon and others , The Times, 9 November 1990, *per* Staughton L.J.

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, ***566** these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).

The learned judge concluded his judgment thus:

Conclusions

The grounding of the *Ikarian Reefer* was not deliberate but was due to negligent navigation by the Master. The underwriters have not proved to the relevant standard that the *Ikarian Reefer* was deliberately set on fire. If, contrary to my conclusion, the vessel was deliberately set on fire by a member of the crew, the defendants have not proved that the owners in any way consented, or were privy, to that action. If the burden of disproving privity lay on the owners, I would hold that they had discharged it. If, contrary to my conclusion, the vessel was deliberately set on fire I consider that Mr. Cook's original explanation is the most likely. About five members of the crew had been ordered to remain on board—a fire started by one crew member who did not want to stay on board would have forced those ordered to remain to abandon the vessel.

It follows that there must be judgment for the owners for the appropriate sum.

In conclusion I would like to acknowledge with gratitude the great help I have received throughout this case from the legal teams on both sides . . .

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1. The judgment ran to over 200 pages in all.

2. Supreme Court Practice 1993, Vol. 1, para. 72/A19, p. 1249 .