

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

In the exercise of its Admiralty Jurisdiction

CASE NO. AC26/2000

Name of ship: **The Oil Rig "South Seas Driller"**

In the matter between:

**THE SHERIFF OF THE HIGH COURT FOR THE
MAGISTERIAL DISTRICT OF THE CAPE**

Plaintiff

and

PRIDE FORAMER S.A.

First Defendant

FORAMER S.A.

Second Defendant

SOMASER S.N.C.

Third Defendant

Admiralty action in personam

JUDGMENT DATED 28 NOVEMBER 2000

CONRADIE, J:

On 10 February 1999 the drilling rig 'South Seas Driller' broke its moorings in Table Bay harbour as the result of a south easterly gale. It was blown about in the harbour where it collided with the M.V. Limb ('the Vessel'), four other ships moored in the Ben Schoeman dock and a harbour container crane.

It is alleged by the plaintiff that it was the fault of the master, officers or crew that the moorings parted. The defendants, as charterers of the rig, are said to be liable for their negligence.

The Vessel had been arrested on 23 December 1998 and was sold by public auction on 16 March 1999 pursuant to a rule *nisi* issued by this court on 5 February 1999 which was later confirmed. As a result of the damaged condition of the Vessel, its sale realised only 225 000,00 US dollars. The proceeds were paid into a fund established for that purpose. The plaintiff avers that but for the damage the Vessel would have been sold for 800 000,00 US dollars.

The plaintiff bought the wage claims of crew members against the Vessel. He paid the crew and took cession of their claims. He also paid for accommodation for the crew and bore the expense of their repatriation. His claim is for the amount that he failed to recover from the fund because, owing to the collision damage to the Vessel, the sale did not yield enough to reimburse him for the claims which he had bought and the expenses which he had incurred

Mr Wallis, for the excipient, argued that the claim of the plaintiff is a claim for pure economic loss. *Mr Fitzgerald* for the plaintiff-respondent as his first line of defence to the attack on the pleading, contended that the plaintiff sues for the diminution in value of the Vessel due to the collision. I disagree. The plaintiff is not claiming the difference in the pre- and post-collision values of the Vessel. He claims *his* loss – a loss of a different kind - which, although it is tied to the

reduction in the value of the Vessel, does not correspond to it. It is not the type of loss which the owner would have been able to claim from the defendants.

Mr Fitzgerald, abandoning an earlier position that this court was bound to apply English law to the resolution of the dispute between the parties, contended in the alternative that South African law recognised a duty of care owed by the defendants to the plaintiff in circumstances like the present. He argued that the plaintiff, as a creditor of the Vessel, was a foreseeable plaintiff in respect of whom it would not be unfair or unreasonable to impose such a duty of care.

The test for liability for pure economic loss is whether the wrongdoer owed the injured person a duty of care to avoid negligent conduct causing him pure economic loss. (*Shell & BP South African Petroleum Refineries (Pty) Ltd and Others v Osborne Panama SA* 1980 (3) SA 653 (D & CLD) 653 at 659A – 660A confirmed in *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd and Others* 1982 (4) SA 890 (AD) at 900G – 901 H).

The duty of care concept is policy based. It is a device used by the courts to control the incidence of liability in delict for pure economic loss. One of the important considerations is the fear of creating indeterminate liability. For, as Boberg puts it in *The Law of Delict* p 104, 'the economic consequences of an act may greatly exceed its physical effects'.

Our law has not recognised the right of a creditor to sue a wrongdoer for damage caused to his debtor's estate, not even where the damage is caused to an asset

of the debtor over which the creditor has established security for his claim. A banker who has lent money to the owner of a building on the security of a mortgage bond over the building, has no claim against someone who has negligently set fire to it. That is so despite the fact that the wrongdoer should have appreciated that his act might cause harm to someone with a security interest in the property. It may be that the position would be different where the owner is for some reason unable to sue so that the only claimant is the creditor, but this is not the case here.

In the present case, the owner's rights of ownership in the undamaged Vessel were, by the collision, transformed into ownership of the damaged Vessel plus a right of action against the wrongdoer for the diminution in value of the Vessel. Evidently this right of action was not attached. Only the damaged Vessel was sold. This means that the right to claim damages remains with the erstwhile owner of the Vessel. *Mr Fitzgerald* argued that if the former owner were to sue it could not be compelled to contribute any recoveries to the Fund. I do not think that this is correct. The right to sue is an asset in the estate of the former owner. It can be attached by a creditor. That would give a creditor the title to sue. There is no question of the plaintiff being remediless. That is one consideration.

There is another, and very important, one. There may be, and probably are, large economic losses suffered by many persons as a result of the collisions of the drilling rig with the various ships. By having to undergo repairs, all the vessels would have been delayed. Charterers of these ships would inevitably have

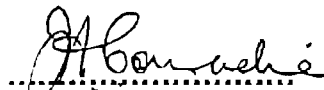
suffered losses. In English law they have no right of action. *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd and Another, The Mineral Transporter, The Ibaraki Maru* [1985] 2 All ER 935 (PC). See also *Leigh and Silavan Ltd v Aliakmon Shipping Company Ltd, The Aliakmon* [1986] 2 All ER 245 (HL) Shippers of goods, also, would inevitably suffer losses. I take only one example. The errant rig damaged a container crane belonging to the harbour authority. If this disrupted its operations the owners of goods of which loading was delayed would have suffered losses. Perishable goods waiting to be loaded may have had to be preserved at additional cost or might have spoiled. On the authority of *Osborne Panama* (supra), these (pure economic) losses would not be recoverable from the defendants. The losses which I have postulated are due to the putting out of commission of the damaged ships and the crane. The loss sustained by the plaintiff is more intimately tied to the reduction in value of the Vessel. Nevertheless, the fact that the plaintiff's claim intimately depends upon the actual damage to the Vessel (and the quantum thereof) instead of flowing from its unseaworthiness is not a sufficiently cogent distinguishing feature to make it fall into a different category.

I accordingly conclude that Aquilian liability should not in the present case be extended so as to impose liability for pure economic loss on the defendants.

Mr Wallis asked for the costs of two counsel to be allowed although his junior, *Mr Wragge*, was unable to assist him at the hearing. Since the drawing of heads of argument does not form a distinct item in a party and party bill of costs, it seems

to me that junior counsel would not be entitled to any fee for preparation and trial. I nevertheless allow the costs of two counsel to cater for the settling of the notice of exception and other work where two counsel may have been engaged.

1. The exception is allowed with costs which are to include the costs, where appropriate, consequent upon the employment of two counsel.
2. The plaintiff's particulars of claim are set aside, but the plaintiff is given leave to substitute amended particulars of claim by not later than 31 January 2001.


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J.H. CONRADIE
