1982 September 17

[SAVVIDES, J.]

K. CHELLARAM AND SONS (LONDON) LTD., AND ANOTHER,

Plaintiffs,

v.

OVERTANIA SHIPPING COMPANY LTD.,

Defendants.

(*Admiralty Action No.* 501/78).

Subrogation—Doctrine of subrogation—Damages for loss of cargo —Consignees and consignors indemnified by Insurance who by letter of subrogation assigned their rights and remedies to insurers—And authorised them to make use of their name as plaintiff in any action against the shippers—Irrespective of letter of subrogation once claim paid by insurers as a matter of equity actions at Law should be brought in the name of plaintiffs and not the insurers—And in case of refusal by the plaintiffs to use their names in the proceedings they can be compelled to give use of their names by proceedings in equity—Present proceedings properly instituted by and in the name of the plaintiffs and not in the name of the insurers.

By a clean bill of lading No. 5 dated 20th of October, 1977 issued at Bourgas, Bulgaria, the defendants contracted to take on board their ship "MASSYS" a cargo of 10,000 cartons of "BALKAN Brand tomato paste of a total net weight of 140,000 tons, for carriage from Bourgas, Bulgaria to Apapa/Lagos, Nigeria and deliver the same in like good order and condition to plaintiffs No. 2, the consignees thereof. The plaintiffs were the holders of the said bill of lading. The goods were delivered by plaintiffs No. 1, as consignors to the defendants in good condition and loaded by the latter on their ship for carriage in accordance with the terms of the bill of lading. The said goods never reached their destination, as in the course of the trip the said ship sunk off Conakry and both the ship and the cargo were lost. It was the allegation of the plaintiffs that

the said ship sunk as a result of the negligence of the defendants which caused to the plaintiffs the loss of U.S. dollars 146,547 51 being the value of the lost cargo of the plaintiffs

Plaintiffs admitted that they were indemnified by the New India Assurance Company (Nigeria) Ltd. pursuant to a marine insurance and by letter of subrogation they assigned their rights and remedies to the said insurers The said letter of subrogation was subject to an express term set out therein authorising the insurers to make use of plaintiff's names in any action or proceedings and that the plaintiffs undertook, if called upon, to institute such action or proceedings and give any evidence necessary and take any necessary step for the execution of such judgment

In an action for U S $146,547 51 *as damages for breach of contract for the loss of the above cargo and, in the alternative, as damages suffered by the plaintiffs due to the fault and/or negligence of the defendants, their servants and agents*

Held, after finding that the defendants were negligent and that the sinking of the vessel and the loss of plaintiffs cargo was the result of such negligence and that the damage suffered by plaintiffs as a result of such loss, was U.S dollars 146,547 51 which was the value of the goods according to the invoice produced, that irrespective of the express term in the letter of subrogation whereby the plaintiffs were bound to institute the present proceedings in their own names, once the claim has been paid by the insurers, it is well settled as a matter of equity notwithstanding the fact that the rights to recover against third persons passed from the assured to the insurer, that actions at law should be brought in the name of the plaintiffs and not the insurer, and in case of refusal by the plaintiffs to use their names in the proceedings, they can be compelled to give the use of their names by proceedings in equity, subject to a proper indemnity to them as to costs; that, therefore, the present proceedings have been properly instituted by and in the name of the plaintiffs and not in the name of the insurers; and that judgment will, therefore, be given in favour of the plaintiffs against the defendants as per claim, with legal interest from today and costs

Judgment for plaintiffs as per claim with costs

Cases referred to:

Edwards & Co. v. *Motor Union Insurance Co.* [1922] L.J., K.B., Vol. 91, 921.

Admiralty action.

Admiralty action by plaintiffs for damages for breach of contract and/or for loss of a cargo of 10,000 cartoons of tomato paste.

A. Stylianides (Mrs.) for *G. Cacoyannis,* for the plaintiffs.

No appearance for the defendants.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The claim in this admiralty action is for U.S. dollars 146,547.51 as damages for breach of contract for loss of a cargo of 10,000 cartons of tomato paste shipped by plaintiffs on board the defendants' ship "MASSYS" for carriage from Bourgas, Bulgaria to Apapa /Lagos, Nigeria, and, in the alternative, as damages suffered by the plaintiffs due to the fault and/or negligence of the defendants, their servants and agents.

The plaintiffs No. 1 and No. 2 are companies of limited liability. Plaintiffs (1) are incorporated in England and plaintiffs (2) in Nigeria. They both carry, inter alia, the business of merchants. The defendants are a company of limited liability incorporated in Cyprus and at all material times to this action, were the sole owners of the ship "MASSYS".

By a clean Bill of Lading No. 5 dated 20th of October, 1977 issued at Bourgas, Bulgaria, the defendants contracted to take on board their ship "MASSYS" a cargo of 10,000 cartons of "BALKAN" Brand tomato paste of a total net weight of 140,000 tons, for carriage from Bourgas, Bulgaria to Apapa/Lagos, Nigeria and to deliver the same in like good order and condition to plaintiffs No. 2, the consignees thereof. The plaintiffs are the holders of the said bill of lading photocopy of which was produced at the hearing and is exhibit 1 before this Court. The goods were delivered by plaintiffs No. 1, as consignors to the defendants in good condition and loaded by the latter on their ship for carriage in accordance with the terms of the bill of lading. The said goods never reached their destination, as in the course of the trip the said ship sunk off Conakry and both

the ship and the cargo were lost. It is the allegation of the plaintiffs that the said ship sunk as a result of the negligence of the defendants which caused to the plaintiffs the loss of U.S. dollars 146,547.51 being the value of the lost cargo of the plaintiffs.

According to the particulars set out in paragraph 6 of the petition, the alleged negligence of the defendants consisted of:

"(a) Allowing an explosion to take place in the crank case of the generator No. 2 of the ship.

(b) Suffering and/or allowing the fire caused by the explosion to spread rapidly to the whole of the engine room and engineers' accommodation, which eventually led to the burning and sinking of the said ship.

(c) Failing to take any or any reasonable precautions to prevent fire to start and/or to spread all over the ship.

(d) Failing to take any or any reasonable steps to restrict, confine or control the said fire in the engine room.

(e) Allowing the said ship to commence the subject voyage with a faulted generator which during the voyage was exploded.

(f) Failing to maintain properly or at all the engine or any part of the said ship.

(g) Failing to provide any or any adequate fire extinguishers and/or appliances or apparatus.

(h) Allowing the said ship to commence the subject voyage though they knew and/or ought to have known that the same was not in a seaworthy condition.

(i) Failing to take any or any reasonable precautions to prevent the starting of the fire and/or to prevent the same to cause damage to the said cargo.

(j) The plaintiffs will further rely on the doctrine of res ipsa loquitur."

In the alternative, the plaintiffs allege that the defendants when they received on board their ship the said cargo, the ship

was not reasonably fit and/or properly equipped and/or seaworthy for carriage of the goods to their knowledge and permitted the ship to sail though the generator and/or the engine were in a faulty state which resulted to its explosion during the voyage and caused the burning and the sinking of the said ship and its cargo.

By their answer the defendants deny the allegations of the plaintiffs set out in the petition and allege that if such loss was the result of the act, neglect or default of the master or other servants of the defendants in the navigation or management of the ship, the defendants will rely on Article IV Rule 2(a) of the Hague Rules whereby they are exonerated from any liability. They further allege that the fire in the engine room was not caused through any fault or privity of the defendants and that in any event if the defendants are found liable, their liability cannot exceed a sum of Sterling £38,840.17 under the Merchant Shipping Act, 1894. Furthermore, it is alleged that the plaintiffs had been fully indemnified for their loss by their insurers and in consequence all plaintiffs' rights, if any, have been transferred to the said insurers.

By their reply the plaintiffs admit that they have been indemnified against their loss by their insurers, the New India Assurance Company (Nigeria) Limited and that by letter of subrogation dated 16th August, 1978, the plaintiffs assigned to the said insurers all their rights and remedies against the defendants. By the said letter of subrogation the insurers were entitled to exercise their rights of subrogation and to sue in the name of the plaintiffs as they did in the present action.

Counsel for the plaintiffs by registered letter dated 7th November, 1980 addressed to the defendants, asked for certain particulars in respect of the allegations contained in their answer and after their failure to give such particulars, applied to the Court for an order for particulars. By their application plaintiffs sought particulars in respect of the allegation in the defendants' answer-

(a) under paragraph 4 in that the loss arose and resulted from the act neglect or default of the Master or other servants of the defendants in the navigation and management of the ship for which the defendants were not responsible under the Hague Rules.

(b) Under paragraph 5 in that the loss arose and resulted from fire in the engine room caused through no actual fault or privity of the defendants and as to the circumstances under which the fire is alleged to have occurred.

(c) Under paragraph 6 as to their allegations that the defendants exercised due diligence before and at the beginning of the voyage to make the vessel seaworthy.

(d) Under paragraph 7 of the reliance by the defendants of section 502 of the Merchant Shipping Act and the implied allegation that the loss and damage occurred without the defendants' actual fault or privity.

When such application came up for hearing, counsel for the defendants applied for an adjournment to communicate with his clients, which was granted to him. After several adjournments of the application for particulars, counsel for defendants applied for leave to withdraw as his instructing solicitors in the U.K. had requested him to contact the defendants directly and that the lawyer in Greece who was representing the defendants and through whom he was communicating with them, informed him that his instructions were withdrawn by the defendants.

Leave was granted to counsel for the defendants to withdraw. Counsel for plaintiffs to avoid further delays withdrew the application for particulars and applied for a date of hearing of the action. The action was subsequently fixed for hearing and defendants were served with a notice of the time and place of hearing but failed to attend the Court at the hearing.

In support of their claim plaintiffs produced photocopies of (a) the bill of lading, (exhibit 1), (b) of a telex dated 30.3.1978 sent by Lloyd's agents (exhibit 2), that the cargo was inspected by the State Sanitary Authorities at the factory and a phitosanitary certificate issued and that after such inspection the cargo was transported from the factory and loaded on board the ship of the defendants, (c) copy of the invoice showing the value of the cargo (exhibit 3), (d) letter of subrogation signed by the plaintiffs in favour of the New India Assurance Company (Nigeria) Ltd. (exhibit 4), (e) survey of the ship made by a surveyor appointed by Lloyd's agents on behalf of the Salvage Association in respect of the circumstances leading up to the loss of the m.f.v. "MASSYS" (exhibit 5).

The survey of the ship was prepared by the surveyor on information supplied by the Master and other members of the crew at an inquiry which was conducted under the chairmanship of the surveyor with the consent of all parties concerned, at which the following were present:

The Lloyd's Agents Representative, the Solicitor for P. & I. Club, the Representative of the Owners, the master of the vessel, the chief engineer, the second engineer and the surveyor. The questions put and the answers given by the persons concerned have been included in the surveyor's report (exhibit 5).

The facts leading to the sinking of the vessel, as appearing from the statements taken from the master and other members of the crew and contained in the Lloyd's Survey Report, are shortly as follows:

In the course of the voyage it was noticed that the ship was losing speed to the extent of the speed being reduced from 8 knots down to maximum 6 knots. As a result, the ship made an unscheduled entry into Dakar where certain repairs were carried to the engine as well as to the auxiliary engines. Whilst at Dakar, the Master was relieved and replaced by another as he had to return to Greece for family reasons. After the ship sailed from Dakar, defects to the hydraulic pump for steering gear were noticed and the 2nd engineer was trying to find out the defect whilst in the engines room. After he carried out certain repairs, he proceeded to his cabin for a coffee. He, however, informed the Chief Engineer that there was a heavy noise coming from the Port side generator aux. engine, and that the port generator auxiliary engine was started up. Also, that the Star auxiliary engine had been left running, off load, and that the noise was still excessive. Then a noise of a heavy explosion was heard and upon immediate examination by the two engineers, it was found that the port auxiliary engine, crank case and block, had been blown to pieces. When entering the engines room the two engineers found that there was considerable smoke and that fire had broken out on the Port side of the engines room. The time of fire breaking was not noted by the Chief Engineer as, according to the statement of the Master, he was very nervous and in the circumstances not noticing time. The Chief Engineer tried to extinguish the fire with a portable fire extinguisher without any success. The

fire was extending but no water could be used to extinguish the fire from the available hoses as fire pumps and deck water services were on the port side of the engines room. The emergency pump in forepeak could not be used as there were no means of playing the water on the fire. The fire alarm was rung and the crew was mustered. Another explosion followed in the engine room and as the fire was extending and there were no means of fighting it and as there was no response by any other vessel after the "May day" signal was sent out, the life-boats were lowered and the crew left the ship and was collected by a Russian ship which approached the area. As a result of the fire, the ship sank and carried with it in the wreck its cargo. The crew at the time of the wreck consisted of ten members, the Master, two engineers (one of whom had no engineer's certificate), two greasers, four seamen and one cook. Before the new Master enrolled at Dakar, two other members of the crew had been paid off in Lauriac Greece, one of whom was the wireless operator of the ship, and were not replaced. After the wireless officer left, his duties were carried out by the master who had a wireless telegraphy certificate.

It took the ship more than six weeks from the time it left Bulgaria to arrive at Dakar and the reason for that, as appearing in the Survey Report, was because the engines could not do more than 6 knots due to dirty hull and leaking piston rings in main engine.

It has been contended by counsel for plaintiffs that the sinking of the vessel and the loss of plaintiffs' cargo was as a result of the negligence of the defendants who allowed the ship to commence its voyage though they knew and/or ought to have known that the engines were not in a good working condition and with leaking pistons and a dirty hull. The defendants, counsel for plaintiffs contended, though aware at the time when the voyage began that the condition of the engines was such as it could not allow the ship to travel at its normal speed of 8 knots and that the maximum they could achieve in their condition was six knots, allowed it to travel for more than 6 weeks in such condition. Counsel for plaintiffs finally submitted that the failure of the defendants to have adequate fire extinguishers in good working condition, is an additional ground for negligence.

In the light of the evidence before me, I agree with counsel for plaintiffs on the grounds put forward by him based on the facts disclosed in the Lloyd's Survey Report, that the defendants were negligent for the reasons stated by counsel for plaintiffs and that the sinking of the vessel and the loss of plaintiffs' cargo was the result of such negligence.

I find the damage suffered by plaintiffs as a result of such loss, as being U.S. dollars 146,547.51 which is the value of the goods according to the invoice produced as exhibit 2.

Before concluding, however, I have to consider whether, in the light of the admission by the plaintiffs that they have been paid their loss by their insurers, they were entitled to institute the present proceedings.

Plaintiffs in their reply to the defence, they admitted that they were indemnified by the New India Assurance Company (Nigeria) Ltd. pursuant to a marine insurance and by letter of subrogation they assigned their rights and remedies to the said insurers. The said letter of subrogation which was produced at the hearing as exhibit 4, was subject to an express term set out therein authorising the insurers to make use of plaintiffs' names in any action or proceedings and that the plaintiffs undertook, if called upon, to institute such action or proceedings and give any evidence necessary and take any necessary step for the execution of such judgment.

The doctrine of subrogation has been summarised in *Edwards & Co.* v. *Motor Union Insurance Co.* [1922] L.J., K.B., Vol. 91, p. 921 by McCardie, J., as follows:

> "The doctrine of subrogation must be briefly considered. It was derived by our English Courts from the system of Roman law. It varies in some important respects from the doctrine as applied in that system, and indeed, the actual term 'subrogation' does not, I think, occur in Roman law in relation to the subjects to which it has been applied by English law - see Dixon on the Law of Subrogation (Philadelphia, 1862), ch. i. The doctrine has been widely applied in our English body of law as, for example, to sureties and to matters of ultra vires as well as to insurance. In connection with insurance it was recognised ere the beginning of the eighteenth century.

In *RANDAL* v. *COCKRAN*, decided in 1748, it was held that the plaintiff insurers, after making satisfaction, stood in the place of the assured as to goods, salvage, and restitution in proportion for what they paid. As the Lord Chancellor (Lord Hardwicke) said: 'The plaintiffs had the plainest equity that could be'. It is curious to observe how this doctrine of subrogative equity gradually entered into the substance of insurance law, and at length became a recognised part of several branches of the general common law. In *MASON* v. *SAINSBURY* (3 Dougl., at p. 64), Lord Mansfield said: 'Every day the insurer is put in the place of the insured'. Buller, J., in the same case, in approving judgment for the plaintiff insurer, said (3 Doug., at p. 64): 'Whether this case be considered on strictly legal principles, or upon the more liberal principles of insurance law, the plaintiff is entitled to recover'. The more liberal principles were based on equitable considerations; and in the well-known case of *BURNAND* v. *RODOCANACHI* (51 L.J. Q.B., at p. 552; 7 App. Cas., at p. 339), Lord Blackburn said in reference to a marine policy: 'if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back'. This equity springs, I conceive, solely from the fact that the ordinary and valid contract of marine insurance is a contract of indemnity only. The point was put most clearly by Brett, L.J., in *CASTELLAIN* v. *PRESTON* (52 L.J. Q.B., at p. 370; 11 Q.B.D., at p. 386), when he said: 'The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only'. That is the principle embodied in section 79 of the Marine Insurance Act, 1906. If, then, subrogation is based on indemnity, it is well to consider the features flowing from subrogation. This matter is neatly stated in Porter on Insurance (6th ed.), p. 236, as follows: 'This right rests upon the ground that the insurer's contract is in the nature of a contract of indemnity,

and that he is therefore entitled upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to the right of action of the assured against them'. See, too, Arnould on Marine Insurance (10th ed.), Vol ii., s. 1226, and MacGillivray on Insurance, p. 733.

If once the claim is paid, then, as a matter of equity, the rights to recover against third persons pass from the assured to the insurer, although the legal right to compensation remains in the assured, and although actions at law must be brought in the name of the assured and not of the insurer—see *LONDON ASSURANCE CO.* v. *SAINSBURY* and *KING* v. *VICTORIA INSURANCE CO.*

As pointed out in MacGillivray (p. 740), it follows from this equity that if the assured, upon tender of a proper indemnity as to costs, refuses the use of his name, the insurer can by proceedings in equity compel him to give the use of his name. This has long been settled law".

MacGillivray to whom reference is made in the above, reads as follows:

"There is probably no obligation on the part of the assured to take any active steps to prosecute his claim. If there is any danger of a claim being lost by lapse of time, loss of evidence or other cause, the insurers have the remedy in their own hands by paying the loss and then commencing proceedings in the assured's name. If the assured upon tender of a proper indemnity as to costs refuses to give the use of his name the insurer can, by proceedings in equity, compel him to do so and since the Judicature Act, 1873, instead of taking double proceedings, the same purpose can be effected by joining the assured as defendant in an action brought in the name of the insurers against the parties liable. The insurers cannot repudiate the assured's claim against them, and at the same time insist upon his taking steps to enforce his claim against third parties so as to preserve their right of subrogation". (See MacGillivray on Insurance Law, 5th Ed. Vol. 2, para. 1899 at p. 922).

So, irrespective of the express term in the letter of subrogation whereby the plaintiffs were bound to institute the present proceedings in their own names, once the claim has been paid by the insurers, it is well settled as a matter of equity notwithstanding the fact that the rights to recover against third persons passed from the assured to the insurer, that actions at law should be brought in the name of the plaintiffs and not the insurer, and in case of refusal by the plaintiffs to use their names in the proceedings, they can be compelled to give the use of their names by proceedings in equity, subject to a proper indemnity to them as to costs.

In the result, I find that the present proceedings have been properly instituted by and in the name of the plaintiffs and not in the name of the insurers.

Judgment is therefore given in favour of the plaintiffs against the defendants as per claim, with legal interest from today and costs. Costs, to be assessed by the Registrar.

Judgment as per claim with costs