

IN THE HIGH COURT OF JUSTICE
ADMIRALTY COURT
KING'S BENCH DIVISION

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 6 June 2024

BEFORE:

MASTER DAVISON

BETWEEN:

THE OWNERS OF THE "CHRISTOS THEO"

Claimants

- and -

THE OWNERS OF THE "ALIKI"

Defendants

MR J TURNER KC (instructed by Hill Dickinson) appeared on behalf of the Claimants
MR T HILL KC (instructed by Stann Law Limited) appeared on behalf of the Defendants

JUDGMENT

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1. MASTER DAVISON: This is my judgment on two applications and a case management issue which took up most of last Tuesday. These were the defendants' application for specific disclosure, the claimants' application for further information and a question as to the framing of the issue for expert evidence from marine engineers. I have decided that all three should be resolved in the defendants' favour and I will try to express my reasons economically.
2. The starting point is that the defendants have very clearly demonstrated a prima facie case, (I emphasise that I, of course, make no actual findings), that there was a malfunction of the main engine or main engine control system in the minutes leading up to the near miss, which prevented the crew of Christos Theo from putting the main engine astern. There were in fact seven failed attempts to do so. This in turn necessitated the dropping of the anchors, bringing Christos Theo to a violent stop, (the master's description), which seems to have been the cause of the damage to the vessel.
3. That there was a malfunction is denied. In the claimants' further information of 28 June 2023, the claimants aver that the main engine went astern, though (again without making an actual finding to that effect) it seems obvious that it did not, or did not in any effective way.
4. In the claimants' defence to paragraph 5 of the defendants' collision statement of case, it is pleaded that the main engine will not go into reverse until the main engine speed has decreased below reversing level, to which the master has added in his witness statement that the forward speed through the water of the vessel would also have to decrease to "somewhere around 5 knots". But the engine management system states at paragraph 4.3.2.2 that, "the engine can be put astern when the forward speed of the engine is 22 RPM or less," which was the case from 11.11.16 on the day of the incident some 15 minutes before the near miss occurred.
5. The pleadings and the master's witness statement are also, on the face of them, flatly at odds with the evidence of the vessel's performance during her sea trials, though I acknowledge the limitations of a direct analogy with a laden passage in the canal.

6. To add to the foregoing is the fact that in the minutes leading up to the incident, there were no fewer than 23 relevant alarms sounding in the engine control room. One of the alarms sounded 20 minutes before the incident commenced and was an alarm from the engine governor system.
7. The case against the claimants is summarised at paragraph 34(c) of the defendants' collision reply:

"The main engine failed to start on at least seven occasions during the period immediately leading up to the grounding, as particularised above. The exact reason for this is unknown pending full and proper disclosure by the claimant. However without prejudice to the foregoing, currently the most likely cause of the start failures was the malfunctioning of the governor system which is the primary speed control device for the main engine and/or the malfunctioning of the starting system or associated components."

8. I therefore agree with Mr Hill KC that there are presently issues as to:
 - (i) Whether the main engine malfunctioned;
 - (ii) If so, why; and
 - (iii) Whether, and if so to what extent, the crew of Christos Theo knew or ought to have known about it.
9. I further think that there has been a disappointing lack of candour and transparency in the claimants' pleaded case, or, to put that slightly more kindly, that they have failed to engage sufficiently with the issues I have described. It is unsurprising that the defendants should in these circumstances be pursuing a searching and thorough disclosure request and that they are sceptical of the claimants' efforts hitherto.
10. I turn to the disclosure application itself. Although it is my own classification, not that of the parties, the documents sought seem to me to fall into three broad categories.
 - a. The first is documents in which or by which the incident was captured, reported or investigated and these comprise items 2, 3, 8 and 20.

- b. The second is documents which would disclose prior problems or failings in the main engine or the main engine air start system or the main engine control system, and these comprise items 9 to 16 and 22 to 27 inclusive.
 - c. And thirdly, vessel specific manuals for the main engine and associated systems which would disclose whether the factory settings, as I might call them, had been altered or modified and these comprise items 29 and 34 to 37 inclusive.
11. Of these categories, Mr Turner KC, though without specific instructions, did not oppose an order in respect of the third category. Mr Hill KC was content with the wording offered if it extended also to the manufacturer, which I take to be uncontentious.
12. As to the first and second categories, Mr Turner KC had a variety of preliminary or general objections, none of which was in my view well-founded, specifically:
- (a) I do not agree that the documents would only be relevant if the defendants pleaded a case on apportionment or degree of apportionment. The documents are obviously relevant to the issue of whether there was a malfunction at all. Secondly, it would be unreasonable to expect a fully worked-up case on apportionment in the absence of the documents or all of the documents relevant to the claimants' culpability, if there be culpability. To put that slightly differently, Mr Turner KC's point seems to me puts the cart before the horse.
 - (b) I do not agree that disclosure issues should be postponed to await the claimants' response to the defendant's collision reply, though to be fair that was Mr Turner KC's secondary or tertiary case to use his description.
 - (c) I do not agree that the disclosure sought is train of inquiry disclosure; it obviously is not.
 - (d) I do not agree that the application can be characterised as speculative or a fishing expedition. On the contrary, and somewhat at the risk of mixing metaphors, the

claimants have presented the defendants with a smoking gun and can hardly complain if the defendants vigorously pursue a document search to establish how and why the trigger was pulled.

(e) Finally, though this was a substantive rather than a preliminary threshold objection, I have felt unable to accept Mr Christos Theodorou's repeated assertions that searches have been conducted with negative results and/or that, "no other documents are known to exist." I have three reasons:

(i) In some cases, for example items 10 and 13, that simply defies belief;

(ii) In others, for example item 11, he has been shown to have been wrong or incomplete;

(iii) Mr Theodorou's evidence stands in contrast to the evidence of the defendants' marine engineering expert, Mr Shortall, which provides a cogent and compelling basis for the likely existence and relevance of further documents and which I prefer to the evidence of Mr Theodorou. At any rate, Mr Shortall's evidence provides a proper and sufficient basis to make orders for specific disclosure.

13. The outcome is that for almost all the items, I will make an order that requires a further search. In the event that the search is or is still negative, or the documents are no longer in the possession or the control of the claimants, I will order a disclosure statement. I have yesterday evening circulated a draft order, which we will come back to and the precise terms of which can if necessary be refined.
14. Given my overall conclusion, I will confine what I have to say about the individual items to a few remarks about each class. I emphasise that I have considered carefully all the evidence and the arguments in respect of each item.
15. I will come first to category 1, namely documents in which or by which the incident was captured, reported or investigated. The first item is item 2. There is a prima facie basis for the existence of a fair engine control room bell book containing entries

additional to those in the rough bell book which has been disclosed. I will make an order in respect of this document.

16. As to the engine control room notebooks, I consider these fall more neatly into items 9 and 12 and I will defer consideration of them to then.
17. Item 3, the issue here is as to the scope of what has been disclosed. What has been disclosed is limited to emails. The emails remarkably make no reference to the inability of the crew, despite seven attempts, to engage the main engine astern, or to the numerous alarms which sounded. On the face of it, this is very surprising and I have no hesitation in ordering a further and wider search. I do not accept at face value the statement from Ms Maria Theodorou that communications were exclusively by email and telephone and the draft order I have circulated reflects that.
18. Item 8, which is the photographs, I will not order because in this case I think that the application is speculative in the sense that it speculates that further photographs exist. I think that the malfunction, if such it was, was not one that would be captured on a photograph or video. To be added to these considerations is the difficulty of contacting the relevant crew members at this distance in time.
19. Item 20, for the reasons given by Mr Shortall, I consider it likely that there would have been an internal investigation report and that the flag state incident report does not satisfy the ISM code and is therefore unlikely to be that report. I will order a further search which will include any reports by or correspondence with the five technicians and Mr Nikos Artavanis who were on board the vessel in the Great Bitter Lake and who are referred to in the email from the master to Kumar(?) dated 9 January 2021.
20. I turn then to my second general category which is documents which will disclose prior problems or failings in the main engine or the main engine start system or control system. Items 9, 10, 12 and 13 can be grouped together.
21. Given that Christos Theo was to dry dock after this voyage for her five-yearly special survey, it is highly unlikely that the engine room defects list, item 13, could have

contained only three entries, all of which were closed. I strongly suspect that the list supplied is not a complete list and I will order a further search.

22. The workbooks and notebooks, handover notes and/or reports maintained by senior engineering and electrical engineering staff, items 9 and 12, also touched upon in item 2, are plainly relevant, the more so given the upcoming five-year survey. So are emails regarding the main engine and its control systems between these staff and the technical department, item 10. I am unable to accept at face value the statement that all relevant emails have been disclosed or that the limited disclosure given in respect of items 9 and 12 is complete. I will order a further search and/or disclosure statement.
23. Item 11, which is engine room repairs. For the reasons given by Mr Shortall, which include the age of the vessel, I consider it implausible that there was just one engine room repair in the requested period. Further, there is evidence of work to the tachometer, an integral part of the engine control system in November 2020, so the assertion of just one repair is demonstrably incorrect. It follows that I will make an order in respect of this item.
24. Items 14 and 15 relate to spare parts. What appear likely to be missing are the spare parts lists for the engine control system and the pneumatic control system fitted to the main engine. I will make an order in respect of items 14 and 15 to that extent. I will not make an order in respect of "purchase orders, requisitions, delivery notes, equipment landed ashore notes." To the extent that these documents exist or did exist, they would add little or nothing to the spare parts lists themselves.
25. Items 16 and 23 to 27, these all relate to maintenance of the main engine, the air start system and the control system for the main engine. There is quite a lot of evidence about these six items and I will summarise only very briefly why I think an order is justified in respect of all six.
 - (i) The maintenance records of the air compressors are incomplete;
 - (ii) Given the incident and the role of the air start system in it, it seems implausible that no work was carried out on the air start system when the vessel was dry docked;

(iii) The planned maintenance system disclosure given appears on the face of it to be confined to the mechanical parts of the main engine and to exclude the pneumatic and electrical parts. This observation is relevant to items 23, 26 and 27; and

(iv) The planned maintenance system disclosure also excludes the telegraph system. As with the air start system, it seems implausible that there is no record of this system being serviced at dry dock. A similar observation can be made in respect of the main engine control system, bridge control and telegraph.

I will make an order in respect of these six items.

26. Finally, item 22. The extract of the telegraph log which has been supplied begins on page 3 and at 08.47 hours, which was after the vessel commenced the passage and after the testing of machinery at anchorage. The first two pages, which must exist or have existed, are plainly relevant and I will make an order in respect of those.
27. That deals with the specific disclosure application. Before coming to the exact terms of an order, I will deal with the other matters.
28. The first is the wording of the question for the experts. I will adopt and approve the defendants' proposed wording which was initially agreed by the claimants. It is not a valid objection that the first part of the wording invites the experts to express an opinion on a matter of fact which is ultimately for the court. Experts often do that. The question whether the main engine malfunctioned, is one which involves or resorts to expert input, so there is nothing inappropriate in them being free to express their views on this. I also see no problem with the use of the word "defectively"; that seems to me to encapsulate neatly the relevant inquiry. Further, this is the question that the marine engineers have hitherto been instructed to consider and neither has, to my knowledge, expressed any misgivings about the phrasing of it. By contrast, I find the wording suggested by Mr Turner KC to be somewhat vague and at one remove from the real guts of the issue which the experts must confront.
29. I turn lastly to the application for further information. I do not at all agree that paragraphs 5 to 9 of the defendants' particulars of their Collision Statement of Case fail

to comply with the order to provide particulars as to what Christos Theo ought reasonably to have done but failed to do in order to bring her to a controlled stop and to avoid the grounding. I regard the application for further information as argumentative and amounting to cross-examination. I fully accept that the rules, as amended in line with Andrew Baker J's recent comments as to formulaic pleadings, require a cards on the table approach, but that, in my view, has been done. No further information is reasonably required. If I were to accede to the application, I would be going far beyond the spirit and the letter of Rule 61.4 and paragraph 4 of the Practice Direction and also Baker J's remarks in the *Panamax Alexander* with which I know both counsel are very familiar. These are matters for trial not for interlocutory skirmishing.

(After further submissions)

30. I am persuaded by Mr Turner that it might well be unfair on the paying party to summarily assess the costs. What I will say is that the defendants should have their costs in any event, not in the case, but they should be either subject to detailed assessment at the conclusion of the case. I will say that the claimants must make an interim payment on account of those costs of £70,000.

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