QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

22 February; 10 May 2011

SALDANHA
v
FULTON NAVIGATION INC
(THE "OMEGA KING")

[2011] EWHC 1118 (Admlty)

Before JERVIS KAY QC, Admiralty Registrar

Practice — Conflict of laws — Jurisdiction — Forum non conveniens — Indian crewmember of Marshall Islands vessel sustaining personal injury whilst vessel at anchor in United Kingdom territorial waters — Crewmember obtaining default judgment against shipowner — Shipowner challenging jurisdiction — Whether relevant jurisdiction that of vessel's flag or of littoral state — Whether forum non conveniens — Whether default judgment should be set aside Private International Law (Miscellaneous Provisions) Act 1995, section 11 — CPR 13.3(1).

The claimant, an Indian national, was the chief engineer on board the defendant's ship *Omega King*. The vessel was registered in the Marshall Islands. On 6 January 2008 *Omega King* was at anchor off the coast of Wales in United Kingdom territorial waters. During the night the weather conditions deteriorated and the vessel began to drag her anchor. The master decided to weigh anchor. However, the locking pin on the chain stopper jammed, preventing the capstan from raising the anchor. The claimant was asked to go forward and inspect the pin to see whether the problem could be resolved. As the claimant was inspecting the pin a large wave broke over the bow, knocking the claimant against a bollard as a result of which he sustained personal injury. He was taken ashore for hospitalisation in Bristol and later in London before being repatriated to India where he underwent further outpatient treatment.

The claimant issued a claim form against the defendant claiming damages in tort, and obtained permission to serve the claim form out of the jurisdiction. On 24 June 2010 the claim form and other documents were served on the Trust Company of the Marshall Islands, which was the statutory agent for service of process for the defendant. The documents were then sent to the ship's managing agents in Piraeus but the managing agents had moved office to Athens, and said that they did not receive the documents.

In August 2010 the claimant obtained a judgment in default of filing an acknowledgement of service. A copy of the default judgment came to the attention of the defendant's P&I Club on 8 December 2010.

On 29 December 2010 the defendant issued an application: (i) challenging the jurisdiction of the court; (ii) asserting forum non conveniens; and (iii) seeking an order that the default judgment be set aside. On 22 February 2011 the defendant's solicitors signed an acknowledgment of service indicating an intention to defend the claim and an intention to contest the jurisdiction.

As to jurisdiction, Practice Direction 6B para 3.1 of the Civil Procedure Rules provided:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where:
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> . . .
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> (9) A claim is made in tort where:
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> (a) damage was sustained within the jurisdiction; or
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> (b) the damage sustained resulted from an act committed within the jurisdiction."

The defendant accepted that the incident took place in United Kingdom territorial waters, but contended that para 3.1(9) had to be interpreted in the light of the definition of "jurisdiction" in CPR Part 2.3, which provided:

> "(1) In these Rules:
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> 'jurisdiction' means, unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales."

The defendant submitted that in the present case the context did require otherwise, and that since the tort arose wholly upon a foreign-flagged vessel it was the jurisdiction of the ship's flag state which had to apply. Alternatively, if the court did have jurisdiction the defendant had a real prospect of successfully defending the claim.

————*Held* by QBD (Admlty Ct) (JERVIS KAY QC, Admiralty Registrar) that the default judgment would not be set aside.

(1) Where a tort was committed entirely on board a foreign vessel whilst in the territorial waters of a littoral state, and where neither the claimant nor the defendant was subject to European Union regulations, the general rule was that the relevant law for jurisdictional purposes was the law of the littoral state in which the events constituting the tort occurred and not the law of the vessel's flag. There was no reason why that general rule should not apply in the present case. Both limbs of Practice Direction 6B para 3.1(9) were satisfied (*see* paras 13 to 17);

————*MacKinnon v Iberia Shipping Co Ltd* [1954] 2 Lloyd's Rep 372 and *Union Shipping New Zealand Ltd v Morgan* [2002] 54 NSWLR 690 considered.

(2) The defendant's forum non conveniens submission would be rejected. England was the proper forum for the determination of the claim (*see* paras 18 and 19).

(3) The defendant had failed to show that it had a reasonable prospect of successfully defending the claim. It had not adduced any evidence to rebut the inference that the vessel dragged her anchor as a result of the defendant's negligence and that it was such negligence which resulted in the claimant being asked to go forward and to suffer the injury which he sustained (*see* paras 26, 31 and 32);

————*The Po* [1990] 1 Lloyd's Rep 418, *The Princeton* (1877–78) LR 3 PD 90, *The Port Victoria* [1902] P 25, and *The Velox* [1955] 1 Lloyd's Rep 376 considered.

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The following cases were referred to in the judgment:

Booth v Phillips [2004] EWHC 1437 (Comm); [2004] 2 Lloyd's Rep 457;

Cooley v Ramsey [2008] EWHC 129 (QB);

Danmarks Rederiforening v LO Landorganisationen i Sverige Case C-18/02 ECR I-1417; [2004] 2 Lloyd's Rep 162";

ED&F Man Liquid Products Ltd v Patel (CA) [2003] EWCA Civ 472;

MacKinnon v Iberia Shipping Co Ltd [1954] 2 Lloyd's Rep 372;

Po, The [1990] 1 Lloyd's Rep 418; (CA) [1991] 2 Lloyd's Rep 206;

Port Victoria, The [1902] P 25;

Princeton, The (1877–78) LR 3 PD 90;

Roerig v Valiant Trawlers Ltd (CA) [2002] EWCA Civ 21; [2002] 1 Lloyd's Rep 681;

Sayers v International Drilling Co NV (CA) [1971] 2 Lloyd's Rep 105; [1971] 1 WLR 1176;

Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada) (HL) [1987] 1 Lloyd's Rep 1; [1987] AC 460;

Union Shipping New Zealand Ltd v Morgan [2002] 54 NSWLR 690;

Velox, The [1955] 1 Lloyd's Rep 376.

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This was an application by the defendant Fulton Navigation Inc challenging the jurisdiction of the court and applying to set aside a default judgment obtained by the claimant Kennedy Paul Saldanha on his claim for damages for personal injuries sustained on board the defendant's vessel *Omega King* whilst in United Kingdom territorial waters.

Bernard Doherty, instructed by Thomas Cooper, for the defendant; Robert Weir QC, instructed by Bridge McFarland, for the claimant.

The further facts are stated in the judgment of Jervis Kay QC, Admiralty Registrar.

Judgment was reserved.

Tuesday, 10 May 2011

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JUDGMENT

JERVIS KAY QC:

The background

1. The claimant is an Indian national who was, at the material time, the First Engineer on board the defendant's ship *Omega King*. The ship is registered in the Marshall Islands. At the relevant time the ship was lying at anchor off the coast of Wales whilst awaiting a berth at Port Talbot, Avonmouth. It is common ground that the anchorage place was within United Kingdom waters. On the night of 6 January 2008 the weather conditions deteriorated and became severe. There were strong winds and the height of both waves and swell increased. The vessel began to drag her anchor. Apparently the master decided to weigh anchor. It appears that the locking pin on the chain stopper was jammed as a result of the forces exerted on it. The restraining pin had bent and jammed thus preventing the capstan or windlass from raising the anchor. The deck crew being unable to resolve the situation, the First Engineer was asked to inspect the pin to see whether the matter could be resolved. The claimant went forward and inspected the pin. He then went to the engine room to get a grinder. On his return to the forecastle the claimant was inspecting the fore end of the pin when a large wave broke over the bow. He was knocked or fell against a nearby bollard and thereby suffered injury. The claimant was taken ashore for hospitalisation. He remained in hospital undergoing surgery and receiving treatment, firstly in the Frenchay Hospital in Bristol and then a hospital in London. He was finally discharged from hospital on 15 February 2008. After that he was repatriated to India where he underwent further outpatient treatment.

2. The claimant commenced proceedings and obtained permission to serve the claim form out of the jurisdiction. Before that happened there had been correspondence between the claimant's solicitor and Gard (UK) Ltd ("Gard"), the representatives of the P&I insurers of the vessel. Gard are based in London. The purpose of the correspondence was to enquire whether the owners would appoint London solicitors and whether there was any dispute as to the geographical position of the vessel at the time of the claimant's injury. Gard indicated that service was to be made on the owners. They did not take exception to the ship's position as proposed.

3. According to the affidavit of service made by Philip Okney, an attorney licensed to practise in the Marshall Islands, the claim form (and other necessary court documents) was served on the Trust Company of the Marshall Islands (TCMI) on 24 June 2010 which is the "statutory agent for service of process for Fulton Navigation Inc".

4. The documents were then sent to Omega, the ship's managing agents in Piraeus. Apparently Omega had moved office to Athens and there is a question as to whether the documents were received in Greece. There is a receipt for the documents at the Piraeus office dated 6 July 2010: the documents do not appear in the log book of documents received by the Piraeus office. Omega contends that it did not receive the documents. No acknowledgment of service or challenge to the jurisdiction was made and judgment was entered in August 2010. A copy of that default judgment came to the attention of the defendant's P&I insurers on 8 December 2010. On 29 December 2010 the defendant issued the application seeking: (i) a declaration that the court has no jurisdiction to hear the claim; (ii) a declaration that the court will not exercise its jurisdiction in respect of this claim; and (iii) an order that the judgment will be set aside. On 22 February 2011 Thomas Cooper, the defendant's solicitors in England, signed an acknowledgment of service indicating an intention to defend the claim and an intention to contest the jurisdiction.

5. The application raises the following issues:

(a) Does the court have jurisdiction to hear the claim?

(b) If so, should it exercise its discretion to permit the claim to proceed in this country: the forum non conveniens point?

(c) Should time be extended for challenging the jurisdiction?

(d) Should the court set aside the judgment already obtained in default of a defence being filed?

Does the court have jurisdiction to hear the claim?

6. This claim is brought in tort. By Practice Direction 6B para 3.1:

"3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where:

. . .

(9) A claim is made in tort where:

(a) damage was sustained within the jurisdiction; or

(b) the damage sustained resulted from an act committed within the jurisdiction."

7. The claimant's case is that when the injury occurred the vessel was lying in a position of latitude 51° 20.9' north, longitude 003° 23.3' west. That position has been plotted by Captain Clive Hill and is said to be within the territorial waters of the United Kingdom (for these purposes Wales). The claimant's solicitors informed Gard in correspondence that this was the claimant's case at an early stage and it has never been contradicted. At the hearing Mr Doherty, for the defendant, asserted that the injury happened over five miles off the coast but did not provide an alternative position nor one which was outside the territorial waters. At the hearing Mr Doherty conceded that the incident took place in United Kingdom territorial waters. In any event, on the basis of the evidence available, it is clear that the ship's position at the relevant time was within territorial waters.

8. Mr Weir QC submitted that is an end of the matter because the accident occurred within the territorial waters of England and Wales and that this fact is not disputed. On the face of the Practice Direction referred to above that appears to be right: however Mr Doherty has drawn attention to the definition of jurisdiction under CPR Part 2.3, which provides: "(1) In these Rules: 'jurisdiction' means, unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales". Mr Doherty submitted that, in this case, the "context requires otherwise". He did not seek to explain what it was about the context of Practice Direction 6B para 3.1(9) which gave rise to any suggestion that a different definition of jurisdiction should be applied but he did seek to argue that where a tort occurs which arises wholly upon a foreign-flagged vessel it is the jurisdiction of the ship's flag state which must apply. He founded this submission on the basis of European law arising under: (a) Council Regulation (EC) No 44/2001 of 22 December 2000 (Brussels I) which provides that the primary basis for jurisdiction is the domicile of the defendant. He drew attention to the decision of the European Court of Justice in *Danmarks Rederiforening v LO Landorganisationen i Sverige* Case C-18/02 ECR I-1417; [2004] 2 Lloyd's Rep 162 in which the court considered the jurisdictional aspects of a tort which was "wholly internal to a ship". According to Mr Doherty it is the ratio of that case that it was for the national court to decide where the relevant loss arose and, in that context, the nationality of the ship would be a factor. However Mr Doherty drew attention to the suggestion in the judgment that the nationality can play a decisive role if the national court reaches the conclusion that the damage arose on board the relevant ship.

9. Mr Doherty accepted that jurisdiction in the present case is not governed by Brussels I but he submitted that it is desirable that English common law rules are aligned with European rules. He also submitted that Regulation (EC) No 864/2007 of the European Parliament of the Council of 11 July 2007 ("Rome II") applies to cases where a choice of law was available. He therefore submitted that, under Brussels I, if an accident wholly internal to a ship was held to have occurred in the flag state of the

ship then the same interpretation should hold under Rome II. Thus he submitted that if the damage happens in the flag state for the choice of law purposes it should also be held to have occurred in the flag state for jurisdictional purposes. It should be noted that, unlike the present case, the *Danmark* case was concerned with matters arising within the jurisdiction of the European Court. It is also to be noted that it involved a claim in tort against a Swedish trade union in respect of a Danish ship which was trading between England and Sweden. In that case it is not clear where the tortious act or acts took place. A further problem is that Mr Doherty's argument lacks cohesion. On his own argument Brussels I suggests that the flag state may be taken into account when considering the jurisdictional aspects but it does not rule out other factors. Nor do I think that the same criteria need necessarily be applied to issues of jurisdiction as to the choice of law. In any event the European rules do not apply to the present situation and Mr Doherty has been unable to point to any English authority which suggests that, in circumstances such as the present, they should. It is also worth noting that principles of international comity apply not only within Europe but also upon a worldwide basis, particularly with respect to maritime law.

10. Mr Weir submitted that the authorities and learned books strongly suggest that Mr Doherty's submissions were not well founded. Thus in *Booth v Phillips* [2004] 2 Lloyd's Rep 457 it was held by Mr Nigel Teare QC, as he then was and sitting as a Deputy High Court Judge, that where an English seaman died on board a vessel in Egypt the damage had partially arisen in England because that was where his wife and estate had suffered some of the damage. It was held that the English court had jurisdiction. In that case the ship was not registered in the United Kingdom nor was the seaman employed by an English company but the master (the first defendant) was domiciled in England. The owners were Liberian and the ship management company was Jordanian. It is to be noted that the court held that there were real issues against the first defendant and that, therefore, the second, third and fourth defendants were proper parties. In *Cooley v Ramsey* [2008] EWHC 129 (QB), Tugendhat J held, citing the judgment in *Booth v Phillips* with approval, that the English court did have jurisdiction in a case where an Englishman had been injured in New South Wales but had returned and, being disabled, had continued to suffer financial loss in England.

11. In *Roerig v Valiant Trawlers Ltd* [2002] 1 Lloyd's Rep 681 a Dutchman employed on an English-registered trawler was killed and his widow sued for damages. The question was whether benefits accrued or accruing under Dutch law should be taken into account or disregarded for the purposes of section 4 of the Fatal Accidents Act 1976. It was held that English law should be applied and Dutch law disregarded. The case is only concerned with applicable law rather than jurisdiction and I do not find it helpful in the present context. Had there been an issue concerning jurisdiction I think that it would have been resolved by having regard to the rules which clearly govern disputes between a claimant and a defendant, both of whom were subject to the EC regulations. The defendant was based in England and therefore the appropriate jurisdiction was England. Similar considerations apply to the decision in *Sayers v International Drilling Co NV* [1971] 2 Lloyd's Rep 105; [1971] 1 WLR 1176 which was also a case about the appropriate law to be applied to the dispute rather than jurisdiction.

12. In *MacKinnon v Iberia Shipping Co Ltd* [1954] 2 Lloyd's Rep 372 (Court of Session) it was held that where a tortious act had occurred on a United Kingdom ship (registered at a Scottish port) within the territorial waters of the Dominican Republic, the event should be taken to have occurred in the Dominican Republic and not Scotland. The issue was whether solatium, which is a remedy peculiar to Scots law, could be recovered in circumstances where the injury had taken place in the waters of the Dominican Republic. The courts held that solatium was only recoverable if it was established that the law of the locus delicti would also apply the same principles. In the course of giving judgment Lord Carmont said (at page 374 col 1):

> "The pursuer has reclaimed, and we heard an interesting argument in support of both branches of the case. Mr Kissen contended that, as the vessel was only at anchor within the Dominican waters, the locus of the quasi-delict was 'the ship' and that the law of its flag Scots law applied. Accordingly, as the law of the flag and the law of this forum coincided, no heed need be paid to Dominican law, and the pursuer was therefore justified in making no mention of it in his pleadings. The argument was presented in two aspects: (1) that a ship within territorial waters of a foreign country did not lose the benefit of the law of its flag merely by being anchored off the coast of the littoral country; and (2) that, in any event, so long as the events complained of in an action were entirely internal to the vessel, as in the present case, there was nothing to support the view that the locus of the occurrence was the littoral territory, whatever its extent or extension.
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> There is much to be said for both branches of the pursuer's argument as to locus from a practical and common-sense point of view. If the occurrence giving rise to the present case had

happened when the vessel was four miles off the Santo Domingo coast, the law of the flag would have applied, and it would not have been of any moment whether the vessel was at anchor or not. It may seem strange that a vessel proceeding along the coast of a continent, but allowing her course to bring her within three miles of the coast, should find the same occurrences as are averred in this case treated as having taken place within the territory of the littoral State which the vessel was passing at the time. That was the contention of the defenders, and they put no emphasis on the fact of anchoring. It was enough, they said. that the vessel could be shown to be albeit by calculations made ex post facto in the waters accorded by international law to the littoral State as part of the State's territory and subject to its law. The difficulty of telling in certain cases where the vessel is, at the time an event takes place, was not blinked by the defenders; and it is, indeed, obvious that there is a certain aspect of absurdity present when the instance is taken of a ship coasting along, close to several countries in succession, while an internal repair operation is going on. The owners would find themselves liable to investigate that internal episode resulting in an employee's injury from the standpoint of the law of several countries that were being passed in succession. An episode in an airplane suggests even greater absurdities. I am unable, however, to find any real support for the pursuer's contention that mere passing along within territorial waters does not displace the law of the flag, or that something more intimate, if I may so phrase it, than anchoring is necessary to vouch presence within a State. But even a ship moored to a quay in a foreign harbour has little real connection with the law of the harbour's State, until something brings the ship or its master, crew or passengers into some relation to that State.

This brings me to the pursuer's supporting argument, that, even conceding the relevance of the law of the littoral State where there is some act done by those in charge of the vessel which affects the Government of the littoral State or its subjects, or indeed any person external to the vessel, yet, when everything takes place within the ship itself, there is no ground for invoking the law of the littoral State so as to displace the law of the flag. I find this argument attractive, but to give effect to it would be breaking new ground and running counter to everything to be found in the treatises on international law, with one exception which I shall discuss in a moment, and, as regards the decisions which bear on the principle of international law with which we are concerned, we were referred to only a single case (and that the decision of a Judge of first instance) which seems to impinge on what is otherwise treated as settled.

It is plain from what was said by Lord Atkin, when delivering the opinion of the Privy Council in the case of *Chung Chi Cheung* [1939] AC 160; (1938) 62 Ll L Rep 151, that in modern times the idea of even a Government ship being a 'floating island', belonging to and retaining the law of the country of its flag, has been abandoned. Much less, then, can it be urged with success that a private trading vessel can claim extraterritoriality. As in *Chung Chi Cheung*'s case, sup, the delict took place while the vessel was being navigated and not even at anchor, it is plain that it is the mere presence of a ship within territorial waters that is conclusive. This is in harmony with what is stated by Dicey and Cheshire in the learned treatises associated with their names. But the pronouncements of these learned authors in their texts are supported by reference to authority. I refer to the cases of *The Halley* (1868) LR 2 PC 193; *Carr v Fracis Times & Co* [1902] AC 176; *The Arum* [1921] P 12; *Yorke v British and Continental Steamship Co Ltd* (1945) 78 Ll L Rep 181. These cases point conclusively to the *locus delicti* being the country having the territorial waters within which the ship was at the relevant time, and that it matters not a whit whether the vessel was navigating or at anchor, in a roadstead or tied up to a quay, and also, what is equally clear, whether the events founded on as the basis of the delict or quasi-delict are wholly internal to the vessel, or partly external to it as in the case of a collision between vessels in territorial waters. Against this view, Mr Kissen for the pursuer relied on the case of *The Reresby v The Cobetas* (1923) Sc LT 719 in which Lord Blackburn, sitting in the Outer House, found some reason for not following *The Halley*, sup, which was cited to him, which is not easy to justify or even to appreciate. In my opinion, *The Reresby* was wrongly decided."

13. Mr Doherty submitted that the decision in *MacKinnon v Iberia Shipping Co Ltd* is not binding. It is true that the main issue was the applicable law but it considers a number of aspects which have been raised by the parties in the present case and, since it was a decision of the Inner House which approved and applied the approach of earlier decisions of the Privy Council and of English courts, there can be little doubt that it is persuasive. For these purposes I take the ratio of the decision in *MacKinnon* to be that the law of the flag state is applicable where a ship is in international waters but not once it has entered territorial waters.

14. Mr Weir QC referred to the decision of the New South Wales Court of Appeal in *Union Shipping New Zealand Ltd v Morgan* [2002] 54 NSWLR 690 in which it was held that where a tort was committed entirely on board a foreign ship in the process of unloading and whilst moored in the territorial waters of New South Wales then the law of the littoral state (NSW), not the law of the flag, applied. At para 55 of his judgment Heydon JA said:

> " . . . it must be remembered that the defendant pointed to no case in the British Commonwealth which has held or said that *MacKinnon v Iberia Shipping Co Ltd* was wrongly decided or that the law of the flag should be applied to a tort occurring on a ship in territorial waters."

15. Mr Weir has also drawn attention to the editions of *Dicey, Morris and Collins on the Conflict of Laws*, 14th Edition, 2006, and Cheshire, North and Fawcett, *Private International Law*, 14th Edition, 2008. Paragraphs 35-068 to 35-076 of *Dicey, Morris and Collins* considers maritime torts and distinguishes between those committed on the high seas and those in territorial waters. With respect to cases which are internal to a single ship, such as an injury occurring on board a ship, it is said that the relevant law is that of the place at which the vessel is registered. With respect to acts committed in territorial waters the learned authors have recognised there was an argument that, where an act is committed on board a ship at anchor in or passing through territorial waters which had no connection with the littoral state, the law of the ship's flag should apply. However the learned authors submit that the provisions contained in part III of the Private International Law (Miscellaneous Provisions) Act 1995 c 42 should apply. Section 11 of that Act provides:

> "(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur."

There are some provisions in section 12 allowing the general rule to be avoided in certain circumstances but no argument was put forward by the defendant that they applied and in my judgment they do not do so. It follows that there is no reason why the general rule as to the applicability of the littoral state should not apply. Furthermore, as the authors point out, it is considered that there is no English authority which precludes the common law rules as to choice of jurisdictions applying so that the law of the littoral state should be followed. I do not understand the authors of *Private International Law* to differ from that approach. A caveat to the above may be that the EC regulations override these principles where both the parties are subject to the regulations in the sense that the defendant may be entitled to be sued in the courts of his own country (sed quaere in cases where the claim has been brought in rem, see *The Po* [1991] 2 Lloyd's Rep 206). Nonetheless it appears that section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 combined with the ratio in *MacKinnon* provide a sensible and workable modus operandi for establishing jurisdiction which accords with the provisions of CPR Practice Direction 68 para 3.1(9).

Conclusion

16. For the reasons set out above I consider that Mr Weir's submission is correct and that CPR Practice Direction 68 para 3.1(9) requires consideration of the physical location of the ship when the act was committed which gave rise to the damage sustained. That was in Welsh waters. I do not accept Mr Doherty's argument that the context requires that the law or the jurisdiction of the flag state should be applied and, in my view, for the reasons set out above, the surrounding circumstances entirely support the opposite conclusion.

17. Further CPR Practice Direction 68 para 3.1(9) alternatively allows consideration of where the damage was suffered. In my view there can be no doubt that a considerable portion of the continuing pain and suffering occurred when the claimant was hospitalised within the jurisdiction and that following *Booth v Phillips* that is sufficient to found jurisdiction. In my judgment both limbs of para 3.1(9) are applicable. The court therefore has jurisdiction to entertain the claim however there is still the question of whether the court should nonetheless exercise its discretion in accordance with the principles of forum non conveniens.

Forum non conveniens

18. Mr Doherty correctly refers to the principles set out in *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1; [1987] AC 460; however he now finds himself in the rather strange position of having initially argued that the appropriate jurisdiction is the Marshall Islands, nonetheless submitting that the appropriate forum is India. He gives a number of reasons as to why there are relevant Indian connections, including the fact that the employment contract was subject to the law of India. However the claim is made in tort and, for reasons already given above, the relevant law to be applied is the littoral law, namely that of England and Wales. In the event that Indian law does prove to be relevant it may be proved by expert evidence. Similarly with regard to the issue of the Indian witnesses, Mr Doherty submits that they will *all* be Indian. With respect to the factual

aspects leading up to the accident itself this may, assuming that the present judgment is set aside, be true but it also seems to me that such issues as there may be will be restricted to the situation in which the vessel was when the anchor began to drag, the advisability of sending the claimant forward, whether it should have been avoided, whether the claimant should have been provided with better equipment and other aligned matters. The reality is that these relate to matters of seamanship upon which the ship's master, who I understand to be Indian, might be expected to give evidence but it seems unlikely that there will be other witnesses who will need to give oral evidence. The Admiralty Court is well used to considering matters of seamanship and it is unlikely that it will be faced with any difficulties dealing with the type of issues which might arise in this case. Insofar as there may be issues arising under Indian law Mr Weir QC has pointed out that the defendant's own expert on Indian law accepts that the claim as presently pleaded could succeed in Indian law. In those circumstances it is difficult to see why there is any greater convenience in having the matter heard in India rather than in England.

19. Mr Doherty further submitted that there was no strong connection to England. I disagree. The incident occurred in bad weather conditions off the Welsh coast and the appropriate steps which should have been taken will need to be considered against that background. Furthermore a significant part of the claimant's medical treatment took place in England. The expert medical evidence which will be necessary is largely available in England and not in India. At present the injuries are not admitted and therefore the medical evidence may be considered to be in dispute. Either the claimant will need to prove his case, having instructed new medical experts in India, or transport his experts to India. Weighing these matters in the balance I am persuaded that England is the proper forum for the determination of this claim.

Should time for disputing jurisdiction be extended?

20. The reality is that the defendant has raised the issue of jurisdiction in the sense that it has challenged the propriety of permitting the service of the claim form out of the jurisdiction. That has meant that the necessary considerations relating to jurisdiction have, in fact, been considered but decided against the defendant. In the circumstances further consideration as to whether the defendant should have been allowed to raise the point when it did would seem pointless. However as a matter of completeness it is to be noted that Mr Weir QC pointed out that the defendant should have filed an acknowledgment of service but this had not been done and which, in turn, affected the timing of the application. Mr Weir QC submitted that, in the circumstances, the defendant's difficulties were of its own making. In fact I was provided with a copy of a completed form of an acknowledgment of service dated 22 February 2011. I do not know whether that has been filed. However Mr Weir did not take serious exception to the defendant being allowed to argue the jurisdiction issue or even the application to set aside judgment. Whether to allow the defendant to do so is a matter of discretion. It seems to me that, although there was proper service, the claim form may not have reached Gard. It is probable that this was caused by defective systems within the defendant's own organisation. Nonetheless once the defendant and Gard had become aware that a judgment had been entered the reaction took place within a reasonably short time. Mr Weir QC also points out that the application should have been to extend time for filing an acknowledgment of service in conjunction with an application under CPR Part 11. Nonetheless I take the view that the defendant did seek to act promptly within the spirit of CPR Part 13.3(2) and, had it been necessary, I would have allowed the defendant the extra time to take the jurisdiction point as, in fact, occurred. For the purposes of CPR Part 13.3(2), I accept that the application to set aside the default judgment was made timeously.

Setting aside the default judgment

21. The defendant has not sought to argue that the default judgment was defective and it follows that this is not a case for mandatory setting aside judgment under CPR Part 13.2 but rather one where the matter is discretionary under CPR Part 13.3(1). That provides:

> "In any other case the court may set aside or vary a judgment entered under Part 12 if:
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> (a) the defendant has a real prospect of successfully defending the claim: or
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> (b) it appears to the court that there is some other good reason why:
>
> (i) the judgment should be set aside or varied: or
>
> (ii) the defendant should be allowed to defend the claim."

The principles

22. The defendant must show a reasonable prospect of successfully defending the claim and it is not enough to simply show an arguable defence. In *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 Potter LJ said at para 9:

> "... the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that

under the former the overall burden rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 23.3(1) may encounter a court less receptive to applying the test in his favour than if they were a defendant advancing a timely round of resistance to a summary judgment under CPR 24.2."

Further, note 13.3.1 of the 2011 White Book states:

"The discretionary power to set aside is unconditional. The purpose of the power is to avoid injustice . . . The defendant is seeking to deprive the claimant of a regular judgment which the claimant has validly obtained in accordance with Pt 12; this is not something which the court will do lightly."

23. The case pleaded in para 7 of the particulars of claim alleges that the injury arose by reason of breaches of the duty of care or negligence by the defendant, his servants or agents. The particulars pleaded in paras 7.1 to 7.7 largely relate to the safety of the claimant whilst he was on deck. The particulars in paras 7.8 to 7.12 are concerned with the how the difficult or dangerous situation arose, namely allowing the vessel to remain at anchor in weather conditions where there was a real prospect of the anchor dragging. Both Mr Weir QC and Mr Doughty, the claimant's solicitor in his witness statement, point out that the defendant has not provided a draft defence. Therefore no positive defence has been put forward. Mr Weir QC submitted: "There is a ready inference of negligence and no proper response to this".

24. Mr Doherty submits that there is real prospect of successfully defending the claim. In his skeleton he has submitted:

"The circumstances of the accident show that there were heavy seas and high winds and the ship faced a problem when it started to drag its anchor and a bent locking pin prevented the anchor being raised. The claimant as chief engineer was asked to lend his expertise to the problem of cutting the pin and decided that a grinder was the best method. While he was inspecting the pin, a wave washed over the deck and threw him into a bollard. These facts do not appear to be in dispute."

25. Mr Doherty has also submitted that although Mr Weir QC says that the accident raises an inference of negligence that is disputed. Mr Doherty then goes on to consider whether the nature of the work to be done on deck raised a potential risk and whether that risk was unreasonable. He says that if the work was to be done was done it is not obvious how harnesses etc would have prevented the injury and that decisions on these aspects cannot to be made until the evidence has been heard. Mr Doherty submitted that: "The Defendant will say that the activity was not a high risk one and that no risks were run which were not reasonably necessary and proportionate to the importance of the ends to be achieved. This defence is far from fanciful".

26. Although Mr Doherty sought to persuade the court that there is a defence with respect to the risks of the claimant going on deck, in my judgment he failed to persuade me that this is an appropriate case for the default judgment to be set aside. There are two reasons for coming to this conclusion. First, for the defendant to say that such case as he has raised is "far from fanciful" is akin to saying that he has an "arguable defence". That is insufficient to satisfy the test of whether "the defendant has a real prospect of successfully defending the claim". Secondly Mr Doherty has restricted his submissions to the aspects concerning the claimant's attendance on deck and has not addressed the important issue of whether the defendant's servants were causally negligent in allowing the situation to develop in the first place.

27. Mr Weir QC has submitted that the accident raises an inference of negligence and, in my view, he is correct. The defendant has admitted that the situation was one where the vessel began to drag. There is a long line of authority which holds that this places the burden of explaining how that came about without negligence on the owners of the dragging vessel. In *The Po* [1990] 1 Lloyd's Rep 418 Sheen J at first instance said (at page 423 col 1):

"It appears to be common ground that the collision was brought about by *Po* dragging her anchor. This calls for some explanation. The defendants will have to satisfy the Court that the collision occurred despite the exercise of reasonable care."

The learned judge's approach was not overturned In the Court of Appeal, see [1991] 2 Lloyd's Rep 206.

28. The approach is of some antiquity, see *The Princeton* (1877–78) LR 3 PD 90 in which Sir Robert Phillimore, after consulting with the Elder Brethren said:

"We think that the collision was caused by the dragging of the anchor of the *Princeton,* to prevent which proper measures were not taken. I

therefore pronounce the *Princeton* alone to blame."

29. Further in *The Port Victoria* [1902] P 25 The President (Sir F H Jeune) said:

"It seems to me clear that if a vessel by negligence drags down towards another, and if it is a natural consequence that the other vessel is obliged to take a step which involves her in some expenditure, that is damage for which the first vessel is liable. Applying those principles to this case, the first question is, was the *Port Victoria* negligent? Now, certainly, the *Norman* was not negligent in taking up the position she did, because she appears to have given the other vessel a berth of three-quarters of a mile, and the Elder Brethren tell me that was a proper allowance to make, and that no fault is to be alleged against the *Norman* on account of the position she took up. Then the *Port Victoria* undoubtedly dragged down towards her. As regards negligence, I should have thought it was almost a case of res ipsa loquitur."

30. In *The Velox* [1955] 1 Lloyd's Rep 376 two vessels had sheltered in a loch and during a storm of exceptional severity the defendant's vessel had dragged her anchors and collided with the plaintiff's vessel. Willmer J held that in the exceptional weather good seamanship required exceptional precautions, which the defendants' vessel had failed to take.

31. In the present case it is common ground that *Omega King* dragged her anchor. It was this which caused the decision to be made to attempt to lift her anchor and steam away. At that point it was discovered that the pressure on the anchor chain had caused the pin to bend. It is therefore self evident that the reason why the chief engineer was asked to go forward arose from the potentially dangerous situation into which the ship had fallen when she had started to drag. In my judgment it is self evident that there is a very strong inference that ships do not get into this type of situation without negligence having occurred. Either the problems should be sufficiently foreseen so as to be avoided at an early stage but, if they are not, it is usually possible to alleviate the effects of wind, waves and current by appropriate engine and rudder manoeuvres short of actually weighing anchor and steaming away. As the above observation by Willmer J indicates exceptional conditions may require exceptional precautions or exceptional skill.

32. In my judgment it is for the defendant to provide a rational explanation of how the dangerous situation arose without negligence on the part of the defendant's servants. Lacking any such explanation the defendant has totally failed to establish that it has any, let alone a reasonable, prospect of successfully defending the claim.

Conclusion

33. The present judgment against the defendant will not be set aside.