

SOUTH AFRICA / JUDGMENT

Nel v Toron Screen Corporation (Pty) Ltd and Another (600/94) [1996] ZASCA 80 (23 August 1996)

[1996] ZASCA 80

COURT

Supreme Court of Appeal

BEFORE

Scott, Howie

CASE / FILE NUMBER

600/94

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I have had the benefit of reading the judgment prepared by my brother, Scott JA. For the reasons that follow, I am unable to agree with the conclusion reached by him.

3 I shall, consequently, also assume that the appellant bears the onus of excluding that the loss of the Wave Dancer could have been caused by accidental external damage prior to the inception of the insurance cover. Where I differ from my learned brother is that in my view the appellant has, on the facts, excluded just that.

In my opinion the probabilities, emerging from an analysis of the facts under consideration, are that if accidental external damage was the cause of the loss of the Wave Dancer, it occurred after the inception of the insurance cover. I mention the salient facts:

- (1) It is common cause that the appellant was a fastidious boat-owner who, after acquiring the Wave Dancer, extensively rebuilt and overhauled her. He maintained her in an impeccable condition. He insisted that she be carried on board the Michaelis in a specially constructed cradle. On the day in question he took her out to sea to ensure that the oil levels in the engine and gearbox were correct. Prior to that he had spent three days cleaning the boat.
- (2) There is no evidence to suggest that at the date of the inception of the insurance cover, the Wave Dancer was anything other than 100% ship

The Wave Dancer was used by Toron on the sea off the Grand Comore and during that period she was not treated kindly. The following facts are

The vessel was intended to carry four or five souls. During filming sequences at the Grand Comore there were sometimes up to thirty people on board. The uncontroverted evidence is that under these circumstances the vessel could be strained. (b)

The hatch between the deck and the engine compartment was damaged. (c)

Toron's employees left the vessel unattended for two weeks at the Grand Comore. It became filthy, and the appellant had to (a)

On the day in question the appellant took the vessel out to sea. His evidence is that there was no ingress of water below decks when he left the moorings, (6)

There was a considerable sideways swell running and the Wave Dancer had to throttle back to avoid undue stress or shipping water. (7)

Water entered the vessel from below deck, and its ingress was such that three bilge pumps could not contain it. (8)

The appellant did not find a rupture in any of the pipes or tubes after he had become aware of the ingress of water.

(9) The witness .Schoeman, who is a yacht broker, boat builder and owner of a boat maintenance company, and who has been involved in the marine industry and has sailed around the world, identified the following possible causes for the loss of the Wave Dancer:

A seacock could have been damaged, allowing an ingress of water. But such damage would have caused the immediate inflow of water. (b)

(c) The vessel could have been damaged when it was off-loaded. The witness has had experience of damage caused in this way, especially when the crane has put the boat down roughly. A crack could result, which would open up only later due to the stresses while sailing. The lapse of time before this happens depends on the twisting of the boat in the water and the roughness of the sea.

In my view it is unlikely that the vessel was damaged by external accidental means prior to its shipment from Durban . There is no iota or tittle of evidence of such damage. On the probabilities the appellant, a meticulous and caring owner would have noticed such damages when the vessel was lifted out of the water and onto the freighter. It is inconceivable that he would have allowed the vessel to be used on open seas well-knowing that it had been damaged. The probabilities also indicate that had the boat been damaged prior to the insurance cover, it would have become clear much sooner, having regard to the sudden ingress of water into the vessel on the day in

question. In my view, all the facts point to a more immediate preceding cause for the loss of the vessel. It must not be forgotten that the vessel was not only bodily lifted out of the water onto the freighter (where prior external damage would have been discernible) but that it was used for some weeks at the Comores prior to its loss.

Consequently, I take the view that the appellant has proved the necessary facts to exclude the reasonable possibility of external damage to the vessel having occurred prior to the inception of the insurance cover.

In my view, this inference '...seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one' - per Selke J in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734 C - D, a passage approved by this Court in *A A Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614 H - 615 B.

It follows that the court a quo ought to have found that the loss of the Wave Dancer was covered by the insurance policy and that Toron should have taken steps to claim the indemnity from Mutual and Federal and remit it to the appellant. Its failure to do so

Counsel were requested by this Court to argue the question whether the appellant's claim was not a maritime claim and whether the Transvaal Provincial Division had jurisdiction to adjudicate upon the matter.

The issue can be disposed of in a few words. Even assuming the claim to be a maritime claim for the purpose of the Admiralty Jurisdiction Act 105 of 1983 ('the Act') the question of the jurisdiction of the court, a quo was never raised in nor decided by that court. That being the case, regard must be had to sec 7 of the Act. Two principles relevant to the jurisdiction question emerge from an analysis of that provision, viz.

- (i) It is not peremptory that maritime actions be heard by an Admiralty Court . Such court is empowered by sec 7 (1) (a) to decline to exercise its admiralty jurisdiction if it is of the opinion that any other court in the Republic or any other court or arbitrator, tribunal or body elsewhere can more appropriately hear the matter.

10 proceedings before a provincial or local division of the Supreme Court, such court should determine the issue and if it decides that the matter relates to a maritime claim, it shall order that the matter be proceeded with in a maritime court.

Conversely it follows that if the question of jurisdiction is not raised before such court, and it therefore fails to make a decision, it is not precluded from exercising its ordinary jurisdiction. Hence the proceedings in such court may not then be attacked in this Court.

There are two further matters which have to be mentioned. The first relates to interest. The appellant sued for payment of R250 000 being the market (and insured) value of the Wave Dancer and interest on that sum 'a tempore more calculated at the legal rate'. It is common cause that on the second day of the trial, i.e. 17 August 1993, the parties agreed upon the quantum of the appellant's damages at R230 000. The appellant accordingly became entitled to interest on that amount as from 17 August 1993. (See *Standard Chartered Bank of Canada v Nedperm Bank Ltd*

[1994] ZASCA 146; 1994 (4) SA 747 (A) at 778 A - B).

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The first defendant (Toron) is ordered to pay the plaintiff (Nel) the sum of R230 000, together with interest thereon at the rate laid down in the Prescribed Rate of Interest Act 55 of 1975, from 17 August 1993 to the date of payment, and the plaintiff's costs. (b)

The plaintiff is ordered to pay the costs of the second defendant (M & F). (a)

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3 accepted by the appellant. It was common cause on the pleadings that the agreement was concluded in Durban.

Broadly stated, it was agreed that the Wave Dancer would be shipped to the Comores on 2 August 1989 where she would be used by Toron for the filming of the sequences in question. The appellant was to supply a crew of two to operate the vessel on filming days and two persons to care for her on non-filming days. Toron was to pay the appellant an amount of R300 per day plus an additional R400 per day for each day the vessel was used for filming. Toron undertook to insure the Wave Dancer through named brokers "for all risks - the value of the craft being R200 000". The cover was subsequently increased by agreement to R250 000.

It is common cause that the Wave Dancer was included in the items insured by Toron with the second respondent ("M & F") in terms of 4

a policy of marine insurance in relation to the voyage of the vessel, Michaelis, from Durban to the Comores. The cover, as agreed, was the amount of R250 000. In addition the Wave Dancer was insured by Toron with M & F for the same amount in terms of a time policy described by M & F in its plea as its "standard Yacht and Motorboat Insurance Policy". This is the only policy relevant in the present case and I shall refer to it simply as "the policy".

The appellant was flown to the Grande Comore and arrived a few days before the arrival of the Wave Dancer aboard the Michaelis. Filming commenced shortly thereafter but took much longer than had been anticipated. The appellant, who had his own business as a motor mechanic, was obliged to return to Durban temporarily. In his absence he arranged for a friend to take his place as the skipper of the Wave Dancer during filming. By the beginning of October the filming had been completed and

5 the Wave Dancer was due to be shipped back to Durban on 6 October 1989.

On the afternoon of 4 October 1989 the appellant wished to check the oil levels in the engine and gear box. The Wave Dancer was at her moorings outside the coral reef off the northern tip of the island. Because of the heavy swell he decided to cruise to calmer waters in the vicinity of Castle Rock on the western side of the island. He also thought he would do some fishing on the way. He was accompanied by a friend who had arrived from Durban a few days earlier. While proceeding south about 2 kilometres off the island and at a slow speed it was discovered that the vessel was shipping water. The appellant was unable to ascertain the source of the leak. The pumps could not cope and the engines were put out of action. The appellant radioed for help and at one stage no fewer than three ski-boats were alongside to render assistance. Attempts to tow the

Wave Dancer to safety were unsuccessful. She finally sank about 4 kilometres off the island where she had drifted in the absence of power. The depth of the sea at that point ruled out any attempt at salvage.

With the consent of Toron and to avoid what was described as a three-way correspondence the appellant submitted a claim on the policy directly to M & F. It was dated 18 December 1989 and was supported by a statement made to the brokers two months earlier. On 6 February 1990 M & F repudiated the claim on the ground that it did not accept the appellant's account of how the vessel had sunk and at the same time reserved its rights in respect of the policy in the event of the matter proceeding to court. It contended in fact that the appellant had scuttled the Wave Dancer.

The appellant in due course instituted action against both Toron and M & F in the Transvaal Provincial Division. The claim against Toron

7 was founded upon the contract concluded in July 1989 and also in delict. No attempt was made to establish delictual liability on the part of Toron nor would there appear to have been any possible basis for such liability. The claim in contract was based on three separate and distinct grounds. The first was that the contract was subject to an implied or tacit term that Toron would compensate the appellant for any damage to or loss of the vessel while she was in the Comores. It was alleged that because of the total loss of the vessel Toron was obliged to pay the appellant an amount equivalent to her full value which it was subsequently agreed amounted to the sum of R230 000. Second, it was alleged that in breach of an implied or tacit term that Toron would claim on the policy and pay the proceeds to the appellant in the event of the loss of the vessel, Toron had failed to take steps to recover the amount payable under the policy. The third ground was that to the extent that the policy may not have covered the risk of loss 8 in the circumstances in which it occurred Toron was similarly in breach of its obligation to insure the vessel in the manner provided for in the contract.

As far as the claim against M & F is concerned, it was alleged that the appellant was a party to the policy or alternatively that "the benefit clause" in the policy constituted a stipulation alteri in favour of the appellant which had been accepted. The appellant did not, however, persist in the claim against M & F and it was not considered by the court a quo.

The principal defence raised by Toron in answer to the appellant's claim was in effect that the appellant had scuttled the Wave Dancer and that on this ground alone the claim had to be dismissed. Most of the evidence adduced at the trial was devoted to this issue. The trial court (Southwood J) found that although it was "strange" that the Wave Dancer should suddenly have sprung a leak no proper factual basis had been laid in evidence to support the allegation that the vessel had been

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scuttled, and that the view expressed by certain of the "rescuers" that the appellant had adopted a "pessimistic" and "obstructive" attitude during the salvage attempt and that the vessel could have been saved, lacked cogency as it was not supported by facts to show how this could have been

achieved. Southwood J considered that the probabilities were against the conclusion that the appellant had scuttled the vessel, particularly as the appellant and his friend had gone to sea dressed only in shorts and t-shirts and without a dingy. (They were however in radio contact with the shore and with other vessels in the vicinity.) The learned judge accordingly found that the Wave Dancer had not been scuttled.

The appellant was nonetheless held not to have established his claim in contract against Toron. The court a quo found against him on grounds one and three. As to ground two, it appears that counsel on both sides assumed that the policy did not cover the loss and the issue was not

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dealt with by the court a quo. The action was accordingly dismissed with costs. With the necessary leave (including leave in respect of ground two) the appellant appeals to this Court. Counsel for Toron did not attack the finding of the court a quo with regard to the alleged scuttling of the vessel. The issue was accordingly not argued before us.

No reference was made in the pleadings or in the course of the trial to the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act") and the court a quo simply exercised its ordinary civil jurisdiction. Having regard to the nature of the claim and the provisions of the Act counsel were requested prior to the hearing in this Court to submit heads of argument with regard to the question whether or not the Transvaal Provincial Division had jurisdiction to entertain the action. Before dealing with the question it is necessary to refer to certain of the more relevant provisions of the Act. (As the action was commenced prior to the amendment of the Act by Act 11 87 of 1992 I shall refer in the first place to the various provisions in their unamended form.) Section 1(l)(v) defines "ship" as meaning:

"... any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not."

[This definition was not amended in 1992.]

Section 1(l)(ii) lists a number of maritime claims. Of particular relevance are those referred to in paragraphs (i) and (r). These paragraphs read:

"(i) any claim relating to any charter party or the use or hire of a ship"; and

"(r) any claim relating to marine insurance or any policy of marine insurance, including any claim by or against any association, society or mutual insurance organization concerned mainly with the protection and indemnity of

12 its members in respect of any maritime claim." [The equivalent provisions following the 1992 amendment are respectively s 1(1)(j) and s 1(1)(u).] "Admiralty action" is defined in s 1(1)(i) as meaning: "... proceedings in terms of this Act for the enforcement of a maritime claim." (The definition was amplified in 1992 but not in a manner relevant to the present case.)

Section 3 makes provision for the enforcement of a maritime

claim by way of an action in personam or an action in rem. The relevant provisions with regard to the former are s 3(1) and s 3(3)(a). They read: "3 (1) Subject to the provisions of this Act any maritime claim may be enforced by an action in personam.

- (3) An action in personam may not be instituted in a court of which the area of jurisdiction is not adjacent to the territorial 13 waters of the Republic unless -
- (a) in the case of a claim contemplated in paragraph (a), (b), (i) or (r) of the definition of 'maritime claim', the claim arises out of an agreement concluded within the area of jurisdiction of that court."

[Section 3(3)(a) was amended in 1992 but only to the extent that the reference to paragraphs (i) and (r) in the definition of maritime claim was replaced by a reference to the equivalent paragraphs, being (j) and (u).]

Section 7 of the Act deals with the question of jurisdiction. Of

relevance are subsections 7(2) and 7(4). They read:

"7(2) When in any proceedings before a provincial or local division, including a circuit local division, of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is one relating to a maritime claim, the court shall forthwith decide that question, and if the court decides that- (a)

the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act; (b)

the matter is not one relating to a maritime claim, the (a) 14

action shall proceed in the division having jurisdiction in respect of the matter: Provided that if jurisdiction was conferred by the attachment of property by a person other than an incola of the court, the court may order the action to proceed as if the property had been attached by an incola, or may make such other order, including an order dismissing the action for want of jurisdiction, as to it appears just.

(3)

(4) No appeal shall lie against any decision or order made under subsection (2)."

It is apparent from the provisions of s 3(3) that an action in

personam for the enforcement of a maritime claim contemplated in paragraph (i) or (r) of the definition of "maritime claim" (now paragraphs

- (j) and (u)) may not be instituted in the Transvaal Provincial Division in the exercise of its admiralty jurisdiction unless the claim arises out of an agreement which was concluded within the area of jurisdiction of that court. The provisions are clearly peremptory and the parties to such an action may 15

not by submission confer jurisdiction on the court. It follows that once the court decides in terms of s 7(2) that the matter proceeding before it is a maritime claim of the kind referred to above which does not arise out of an agreement concluded within the area of its jurisdiction the court would not be competent to continue to hear the matter and it would have to be proceeded with in a court competent to exercise admiralty jurisdiction.

Turning to the facts, it is clear that the Wave Dancer is a "ship" as defined in the Act. On behalf of the appellant it was contended that the claim was not a maritime claim and did not fall within the meaning of either paragraph (i) or (r). Given the wide and indefinite meaning of the prepositional phrase "relating to", (as to which see *Mak Maditerranee SARL v The Fund Constituting the Proceeds of the Judicial Sale of the M C Thunder 9S D Arch, Interested Party* 1994 (3) SA 599 (C) at 605G -606G) there would seem to be little doubt that the appellant's claim is one

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relating to "any charter party or the use or hire of a ship" and also to "marine insurance or any policy of marine insurance". Nonetheless, in view of the conclusion to which I have come as to the meaning of s 7, I shall merely assume without finally deciding that the claim is indeed a maritime claim. As previously mentioned, it is common cause on the pleadings that the agreement between the appellant and Toron was concluded in Durban, ie not within the jurisdiction of the Transvaal Provincial Division.

On the basis of the foregoing it follows that had the question contemplated in s 7(2) been raised in the court a quo, whether mero motu or by the parties, it must be accepted on the assumption just made that it would have been decided that the claim was a maritime claim and the matter accordingly would not have been able to proceed in that court for want of jurisdiction. The question that arises is: what is the consequence of the court a quo in the exercise of its ordinary civil jurisdiction having

17 adjudicated upon a claim which is a maritime claim in terms of the Act? Prior to the coming into operation of the Act on 1 November 1983 the various divisions of the Supreme Court, sitting as colonial courts of admiralty, exercised the admiralty jurisdiction of the English High Court as that jurisdiction existed in 1891 when the Colonial Courts of Admiralty Act 1890 came into operation. The ordinary parochial jurisdiction of the Supreme Court and its jurisdiction as a colonial court of admiralty overlapped to a certain extent. The result was that in such an event, whether the dispute between the parties was determined in accordance with Roman-Dutch or English law depended upon the court in which the plaintiff decided to bring his action. In

practice, however, problems associated with this concurrent jurisdiction arose most frequently in connection with the ranking of competing claims. One of the objects of s 7(2) was no doubt to remove this undesirable state of affairs. 18 The Act considerably increased the jurisdiction of the admiralty court. In terms of s 6(1) Roman-Dutch law is to be applied with regard to what may conveniently be called the "new maritime claims" while English admiralty law, as it was on 1 November 1983, is to be applied to any matter in respect of which a pre-1983 South African court of admiralty had jurisdiction prior to that date. (cf *Transol Bunker BV v MV Andrico Unity and Others, Grecian- Mar SRL v MV Andrico Unity and Others* 1989(4) SA 325 (A) at 334 H - J.) Section 7(2) does not, however, seek to draw a distinction between the old and the new maritime claims although in the case of the latter, Roman-Dutch law would be applied regardless of whether a court were to exercise its admiralty jurisdiction or its ordinary civil jurisdiction. Nonetheless, the admiralty court has different rules and procedures as well as special powers conferred in terms of the Act and the existence of concurrent jurisdictions even in relation to the new maritime 19 claims could have unsatisfactory consequences. The Act does not expressly exclude maritime claims from the ordinary jurisdiction of the Supreme Court. But if a maritime claim is instituted in a provincial or local division (including a circuit local division) exercising its ordinary civil jurisdiction the question will ordinarily arise whether the claim is a maritime claim or not. The question may be raised by one or other of the parties or by the court *mero motu*. Once the court decides that it is a maritime claim, s 7(2) requires that the matter "shall be proceeded with in a court competent to exercise its admiralty jurisdiction". To this extent, and subject to the discretion of a court to decline to exercise its admiralty jurisdiction in terms of s 7(1)(a), the intention underlying s 7(2) is undoubtedly that maritime claims are to be heard by the court exercising admiralty jurisdiction and by no other court. (See *Shaw Admiralty Jurisdiction and Practice in South Africa* 2.) It has been 20

suggested that because of the peremptory nature of s 7(2) the admiralty court has exclusive jurisdiction to hear maritime claims. (See *Staniland Admiralty Jurisdiction over Wrecks* (1991) 108 SALJ 594 at 596; *Annual Survey of SA Law* 1993 at 723; *LAWSA* vol 25 para 172; see also *Pistorius Pollak on Jurisdiction* 2 ed (1993) at 15; *Peros v Rose* 1990 (1) SA 420 (N) at 424 D.) But the peremptory provisions of s 7(2) become applicable only once the court decides that the claim is a maritime claim. It is this decision which has the effect of depriving the court of its ordinary civil jurisdiction to hear the matter. I can see no justification for construing the section otherwise.

It is apparent from the provisions of s 7(2) that the legislature sought to avoid protracted disputes as to whether a claim was properly one for adjudication by a court exercising its ordinary or admiralty jurisdiction. Once the question is raised and the matter decided, that decision is final.

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(See s 7(4).) Accordingly, had the court *a quo* considered the matter and decided that the claim in the present case was not a maritime claim, that decision could not have been challenged in this Court; nor could it have been contended that the court *a quo* had no jurisdiction. In my view, the failure of the court *a quo* to make the decision contemplated in s 7(2) has the same consequence. It is not open to this Court now to decide a question which the Act expressly enjoined the court a

quo to decide and then as a consequence of that decision to hold that the court a quo had no jurisdiction to hear the matter.

I return to the merits of the appeal. It is convenient to deal first with the second ground on which the appellant based his claim in contract, ie that the loss was covered by the policy and that in breach of its obligations to do so, Toron failed to take steps to recover the amount payable under the policy. It was common cause on the pleadings that the

22 agreement concluded between the appellant and Toron was subject to a tacit term that in the event of the loss of or damage to the Wave Dancer Toron would pay over to the appellant any amounts which the former recovered from the insurer in respect of such loss or damage. The court a quo found, in addition, that the agreement was subject to the further tacit term that in the event of loss of or damage to the vessel Toron would take the necessary steps to recover from the insurer any amounts payable under the policy. This finding was not challenged and the existence of such a tacit term appears not to have been the subject of dispute in the court below. It was also common cause that following the loss and the rejection of the claim by M & F, Toron failed to take steps to recover any amount under the policy. On the contrary, Toron joined forces with M & F in taking up the attitude that the appellant had scuttled the vessel and that accordingly nothing was recoverable under the policy. At the trial Toron and M & F were 23 represented by the same counsel. It appears from the minute of a pre-trial conference that M & F agreed to indemnify Toron in respect of the appellant's claim.

As previously mentioned, it was assumed by counsel in the

court below that the circumstances in which the loss occurred were such that it did not fall within the perils insured against in terms of the policy. In this Court counsel for the appellant (who did not appear at the trial) argued that the loss was indeed covered by the policy.

Section 1 of the policy is headed "Loss or Damage to the Vessel and Incidental Expenses" and contains a variant of the so-called "Inchmaree" clause (introduced in England following the decision in *The Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co (The Inchmaree)* [1887] 12 App Cas 484 (HL)). English decisions as to the meaning of expressions used in the clause are accordingly of assistance and

24 are persuasive authority. (See *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987(1) SA 842 (A) at 857 E - F.) The clause reads:

"This policy covers, subject to the exclusions below and any special conditions, loss of or damage to the vessel caused by fire, external accidental means or by (1)

accidents in loading, discharging or handling stores, gear, equipment, machinery or fuel, (2)

bursting of boilers, breakage of shafts, explosions, contact with aircraft, malicious acts or latent defects in the hull or machinery (excluding the cost and expense of replacing or repairing the defective part), (3)

theft of the entire vessel or her boat(s), (4)

theft or dropping off or falling overboard of outboard motor(s) provided it is securely locked to the vessel or her boat(s) by an anti-theft device in addition to the normal method of attachment, (5)

theft of machinery including outboard motor(s), fittings or equipment, following upon forcible entry into the vessel or place of storage. (1)

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(6) negligence of any person whatsoever, but excluding the cost of making good any defect resulting from either negligence or breach of contract in respect of any repair or alteration work carried out for the account of the Insured an/or the Owners or in respect of the maintenance of the vessel,

provided such loss or damage has not resulted from want of due diligence by the Owners of the vessel, or any of them, or by the Managers, or by the Insured."

There are nine listed "exclusions". Only the first is relevant.

It reads: "The insurers shall not be liable for:

(1) wear and tear, depreciation, deterioration from use or loss or damage caused by vermin."

On behalf of the appellant it was contended that the evidence

established that the sinking of the vessel was caused by "external accidental means" or by a "latent defect in the hull or machinery" of the vessel, both being perils insured against. It is clear that the appellant was obliged in the first place to prove facts establishing one or other of these causes. (See 26 Eagle Star Insurance Co Ltd v Willey 1956(1) SA 330 (A) at 334 C - 335 A.) On behalf of Toron, on the other hand, it was contended that the more likely cause of the loss was ordinary wear and tear. Counsel for the appellant submitted that because wear and tear was one of the listed exclusions, it followed that the latent defect cover under the policy had to be construed as including wear and tear and accordingly it was for the insurer, and hence Toron, to prove that wear and tear was the cause of the loss. I am unpersuaded that the policy is to be construed in this way. The distinction between loss caused by a latent defect as opposed to wear and tear is one which is well recognised. Merely because wear and tear is listed as an exclusion does not, I think, justify giving the latent defect cover under the policy such a wide meaning, particularly when regard is had to the clause read as a whole. Nonetheless, and in view of the conclusion to which I have come on the evidence, it is unnecessary to have to decide the 27 issue finally and I shall simply assume that the appellant bore the onus of excluding wear and tear as the proximate cause of the loss. The appellant was, of course, unable to identify the source of the leak which resulted in the sinking of the Wave Dancer. In these circumstances it follows that in order to establish that the loss was caused by one or other of the two perils upon which he relies, he would necessarily have had to exclude on a balance of probabilities any other proximate cause of the loss.

Before reverting to the facts, it is necessary to consider briefly

the distinction between loss caused by a latent defect as opposed to wear and tear. A defect, in the context of the Inchmaree clause, is defined in Arnould's Law of Marine Insurance and Average 16^{ed} para 831 at p 697 as being:

"a condition causing premature failure which is present in the relevant part of the hull or machinery when it is constructed or installed in the vessel, or which comes into existence as a result of the way in which the relevant part was designed, constructed or

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installed." This proposition is based on the decision in *Prudent Tanker Ltd SA v The Dominion Insurance Co Ltd (The "Caribbean Sea")* [1980] 1 Lloyd's Rep 338 QB (Com.Ct.). In the same case Goff J, in relation to the word "latent", applied the test adopted in contracts of affreightment, namely "a defect which could not be discovered on such an examination as a reasonably careful skilled man would make" (at 347 - 348).

A loss caused by wear and tear on the other hand is one which is inevitable in the ordinary course of events. It arises in consequence of a part simply wearing out or by general debility brought about by use. Both in English law and in Roman-Dutch law the insurer of a ship would not be liable for loss caused by ordinary wear and tear, unless the policy provided otherwise (In England the position is governed by statute. As to the Roman-Dutch law, see LAWSA vol 12 para 303.) The underlying

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reason for its exclusion is that the insurance is against accidents which may happen and not against events which in the ordinary course of things must happen. (See D M Davis, Gordon & Getz *The South African Law of Insurance* 4th ed 393 - 394.) The principle is well illustrated in *Wadsworth Lighterage & Coaling Company Ltd Sea Insurance Company Ltd* [1929] 34 LIL Rep 285 where the sinking of a 50 year-old wooden barge moored in dock on a calm night was attributed to wear and tear in circumstances where the finding was that the barge had reached such a state of debility through constant use and bumping that it had, in the words of Scrutton LJ at 287, "at last come to the end of its tether".

It can and no doubt does happen that a latent defect in the hull or machinery of a ship does not manifest itself immediately but after the lapse of time and with ordinary wear and tear. In other words, because of the defect a part, whether of the hull or machinery, may fail significantly

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sooner than it should and without signs of undue wear and tear. Although in such circumstances wear and tear may play a role in the loss, as pointed out by Goff J in *The Caribbean Sea*, supra, at 347, it would be the defect and not the ordinary wear and tear that would be the proximate cause of the loss.

Finally, it should be observed that while an insured would ordinarily be obliged to adduce evidence identifying the precise cause of the loss and the particular defect responsible therefor, such evidence is not necessarily essential. In principle there can be no reason why, in the absence of evidence as to the precise cause of the loss, an insured should not in appropriate circumstances be able to establish inferentially that the loss was occasioned by a latent defect.

Against this background I turn to the cause of the sinking of the Wave Dancer. In response to the respondents' allegation that the vessel

31 had been scuttled, various possible causes of the leak were advanced in evidence on behalf of the appellant. Mr Eric Schoeman who described himself as a yacht broker and boat builder with much experience of fibreglass-constructed vessels, expressed the view that the most likely cause of the loss was that the hull of the Wave Dancer had on a previous occasion sustained a small crack which was not noticed and which had then opened up in consequence of the stress placed upon the hull by the heavy side-swell through which the vessel had sailed on the afternoon in question. He thought that the initial damage possibly could have occurred during the course of loading or unloading when the Wave Dancer was shipped to the Comores, or she could have hit a small object floating in the sea while travelling at speed. He explained that when travelling at speed the bow of a vessel like the Wave Dancer rises out of the water but periodically "slams" back into the sea with much noise. He expressed the view that had 32

the Wave Dancer hit a small object while travelling in this manner the impact could well have gone unnoticed by those on board. It was common cause, however, that the Wave Dancer could not have struck anything in the course of her last voyage without the appellant being aware of it.

Mr Schoeman also suggested various other possible causes of the leak arising from a latent defect. These included the failure of the hull at a weak spot caused by an undetected airpocket in the fibreglass or the failure of some part at one or other of the various apertures below the water-line. He described any such aperture which is closed with a fitting as a potential source of sea water. He considered, however, that it was unlikely that the ingress of water had occurred through a rupture in the flexible hoses leading from the seacocks to the cooling system of the engines. The reason for this conclusion was twofold: first, because the appellant at the time had checked the hoses and found no leak, and second,

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because the rupture of one of the hoses and the failure of sea water to reach the cooling system of the engine concerned would have resulted in a pronounced change in the tone of that engine which the appellant, as a mechanic, would have noticed immediately.

Mr Donald Oliver, a marine surveyor of Durban who gave evidence on behalf of the respondents, conceded that the causes of the leak suggested by Mr Schoeman were "possibilities" but characterised them as "remote". In Mr Oliver's view the water had entered the vessel through the flexible hoses leading from the seacocks. This view, however, was based on the assumption that the Wave Dancer had been scuttled and the hoses deliberately cut.

It is significant that at no stage during the trial was it ever suggested that the cause of the leak was ordinary wear and tear. On the contrary, it was common cause that (subject to the reservation to which I

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shall refer later) the Wave Dancer was surveyed on 29 July 1989 at the instance of the insurers and described by the surveyor, Captain C C Creasy, in his report dated 3 August 1989 as having been "constructed and maintained quite superbly". The appellant purchased the Wave Dancer in 1985. Thereafter she was removed from the water for a period of some 18 months and completely refurbished. The appellant gave detailed evidence of what was done. He explained that he wanted everything to be "one hundred percent". It was also clear from his evidence that he was meticulous in maintaining the vessel. None of this evidence was ever challenged.

If the vessel was not scuttled, and this was found on the probabilities to have been the case, there remain, in broad terms, three other possible causes of the loss. They are: (i) that the vessel sustained some external accidental damage which was aggravated by the side-swell; (ii)

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that there was a failure of the fibreglass of the hull or some part or fitting below the water-line in consequence of a latent defect; and (iii) that there was a failure of the fibreglass of the hull or some part or fitting below the water-line in consequence of either ordinary wear and tear or a patent defect.

In the light of the evidence as to the condition of the Wave Dancer to which I have just referred it is most improbable, I think, that ordinary wear and tear could have been the proximate cause of the loss. The same is true of a patent, as opposed to a latent, defect; provided that the word "defect" in the policy is construed in the manner referred to previously in this judgment and not as including a condition caused by some subsequent external accidental means, eg a collision with a floating object. [In the latter event, and for the reasons I shall advance later, there would be no justification, in my view, for the inference that such condition

36 must have been latent and not patent.] What remains therefore is a cause falling into either category (i) or (ii) above. In the event of (ii), the loss would, of course, constitute a peril insured against. Whether a cause falling into category (i) would be covered by the policy or not would depend, however, upon whether the initial damage which subsequently gave rise to the loss occurred during the period of the insurance. Such damage, even assuming it to be latent, would not in my view constitute a "defect" within the meaning of the policy. (See the definition of "defect" in Arnould's Law of Marine Insurance and Average previously quoted; see also p 697 footnote 42.) Indeed, the policy draws a clear distinction between loss caused by a "defect" and loss caused by "external accidental means". The cause contemplated in category (i) would be "external accidental means". In order to establish that the loss of the Wave Dancer was covered by the policy the appellant was accordingly obliged to prove on a

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balance of probabilities that in the event of the loss having occurred as contemplated in category (i) the initial damage must have occurred at some stage subsequent to the vessel being removed from the water in Durban and loaded on board the Michaelis. There can be no basis for construing the policy as covering loss caused by damage which occurred prior to the period of insurance.

Before reverting to the facts, it is necessary to stress that an insurer faced with a claim arising from the sinking of a ship from an unknown cause is under no obligation to prove or even suggest a cause which does not fall within the risks covered by the policy. The onus of proving that the ship was lost in consequence of a risk covered by the policy remains throughout on the insured. In *Rhesa Shipping Co S A v Edmunds; Rhesa Shipping Co S A v Fenton Insurance Co Ltd (The "Popi M")* [1985] 2 Lloyd's Rep 1 (HL) Lord Brandon emphasized the importance

38 of constantly bearing in mind "two matters" when considering the question whether the loss of a ship which sinks from unknown causes falls within the scope of the risks insured against (in that case, "perils of the sea"). I quote the relevant passage (at 2 - 3) in full:

"In approaching this question it is important that two matters should be borne constantly in mind. The first matter is that the burden of proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

The second matter is that it is always open to a Court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the shipowners have failed to discharge the burden of proof which lay upon them."

On the hypothesis that the cause of the loss in the present case

falls into category (i), the question that must be answered is whether the

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appellant established on the probabilities that the initial damage to the hull was sustained during the period of the insurance and not before. As previously mentioned, the Wave Dancer was surveyed on 29 July 1989. It appears from the surveyor's report, which was handed in by consent, that the vessel was observed to be in excellent condition. But, as emphasized in the report, the survey was carried out with the vessel afloat at her moorings in Durban Harbour and the inspection of the hull was limited to the "topsides". There is accordingly nothing in the report to exclude the existence as at 29 July 1989 of a crack in the fibreglass of the hull below the water-line and the report is of no assistance on the issue.

The purpose of Mr Schoeman's evidence was mainly to show that there were a number of possible explanations for the sinking and so refute the inference that the vessel had been scuttled. Of the various possibilities which he postulated the one which he thought the most likely

40 was the one falling into category (i) ie that the hull had sustained a small crack as a result of a collision with some object or in the course of loading or unloading and which with time had deteriorated and then opened up on the day in question. But his attention was at no stage directed to the question presently in issue which is the length of time a crack in the hull could have existed prior to the vessel sinking on 4 October 1989; nor was he ever asked if it was even possible to express an opinion on the matter. Mr Schoeman did say at one stage in his evidence that the initial damage could have occurred a month before. But it is clear from the context in which this remark was made that he was not attempting to place any limitation on the length of time that could have elapsed between the initial damage and the subsequent loss. On the contrary, he suggested at a later stage in his evidence that the initial damage could have occurred during the course of loading or unloading when the Wave Dancer was shipped to the 41 Comores. This took place some two months before the loss. The appellant testified at length as to the extent to which the Wave Dancer was refurbished after he had acquired her in 1985. But no evidence was adduced regarding the more important question as to when last the hull had been inspected and more particularly whether the appellant had used the opportunity of inspecting the hull when the Wave Dancer was taken out of the water to be shipped to the Comores. There was also no attempt to establish the unlikelihood or otherwise of the vessel having sustained damage prior to leaving Durban. There was no evidence, for example, as to the manner and extent to which the vessel had been used during the weeks or months preceding 2 August 1989. Nor was any evidence adduced regarding such matters as the volume of water which had ordinarily found its way into the bilges of the Wave Dancer and whether there had been an increase in volume and if so, when. An increase in 42 volume, of course, would have been indicative of a leak, possibly through a crack in the hull. Merely because no mention was made in evidence of any damage to the hull at the stage when the vessel was taken out of the water to be shipped to the Comores (and therefore it can be inferred that no damage was observed) does not justify the inference that such damage did not exist. Indeed, Mr Schoeman suggested that the initial damage (assuming this theory for the sinking to be correct) could have been no more than a small crack. According to the surveyor's report there appeared to be "some evidence of grass" on the hull under the water. In the circumstances, had the kind of damage postulated by Mr Schoeman existed when the vessel was taken out of the water, something more than a cursory look at the hull may well have been required to observe the damage. In the absence of evidence that the hull was examined and if it was, the nature of such examination, or some other factual basis, any inference that the 43 damage did not exist at that stage, in my view, would be wholly without foundation. The possibility of the Wave Dancer striking some floating object while travelling at speed in the manner described by Mr Schoeman is no less remote at the Comores than in the sea off Durban. There was certainly no evidence to suggest the contrary. In short, there was no evidence of any objective facts which may have served to justify the inference that had there been some initial

damage to the vessel as postulated by Mr Schoeman, such damage would have occurred during the period of insurance rather than prior to that period.

No doubt the loading of the Wave Dancer on board the Michaelis and the subsequent unloading exposed the hull to additional risk of damage. But although the appellant was presumably present on both occasions no evidence was led regarding the details of the loading and unloading operations; nor was there evidence of any incident or event

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which may have suggested that the hull was damaged on either occasion. It appears that there were occasions on which the Wave Dancer was taken over the coral reef at high tide. (Her moorings were beyond the reef.) This too would have involved an additional risk. But no evidence was adduced which might have suggested that the hull came into contact with the reef. It is in any event unlikely that had this occurred it would have gone unnoticed by those on board.

Ships do not ordinarily sink without apparent reason. Even accepting therefore that the Wave Dancer was not scuttled, it must necessarily follow, I think, that something very unusual must have happened. Indeed, the loss of the vessel in the manner contemplated in category (i) would have been a most unusual occurrence. It was not suggested that anything like this had ever happened before. But once it is acknowledged that the cause of the sinking, whatever it was, must have

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been wholly out of the ordinary, any attempt to categorize one possibility in relation to the precise cause of the sinking as more likely than another becomes, I think, in the absence of some proper factual foundation, a matter of mere speculation.

On the basis of the evidence adduced in the court a quo and applying the ordinary rules applicable to reasoning by inference in civil cases (see *A A Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614 H - 615 B) I can accordingly see no justification for concluding that had the hull been damaged in this way, such damage would have occurred at the Comores during the period of insurance rather than at some earlier stage. It follows that in the event of the loss having occurred in the manner contemplated in category (i), it has not been established that the damage would have occurred during the period of insurance.

For the reasons previously advanced I do not think that the

46 word "defect" in the policy is to be construed as including a condition caused by some external accidental means, such as a collision with a floating object. But even if the word were to be construed in this way, the appellant would still have been obliged to establish that the "defect" was one which was latent and not patent. In other words, he would have had to have shown that the "defect" was not one which would have been discovered on such an examination "as a reasonably careful skilled man would make". In the absence of evidence that the hull was subjected to a careful examination or any examination at all, whether by the appellant himself

(who testified at length on other matters) or by anyone else, there can be no justification in my view for inferring that had there been such a "defect" it would have been latent. The mere fact that the "defect", had it existed, might not have been noticed when the vessel was removed from the water would not be sufficient to justify the inference that it was latent. 47

In the result not only does the actual cause of the sinking remain unknown but even assuming it was one of the causes postulated by Mr Schoeman, the appellant nonetheless failed, in my view, to prove on a balance of probabilities that the loss fell within the scope of the risk insured against in terms of the policy. (Compare the *Popi M*, supra; *Lamb Heading Shipping Co Ltd and Others v Jennings (The "Marel")*

[1994] 1 Lloyd's Rep 624 (CA)). The second ground on which the appellant relied in contract accordingly cannot be upheld.

It is convenient to deal next with the third ground, ie that in the event of the loss not being covered by the policy *Toron* was in breach of its obligation to insure the *Wave Dancer* "for all risks". In rejecting this ground Southwood J concluded that the phrase "for all risks" was not to be construed as covering all loss or damage however caused (cf *British and Foreign Marine Insurance Co, Ltd v Gaunt* [1921] 2 AC (HL) at 46) and

48 that in the absence of evidence (presumably of policies that were available) the appellant had failed to show that the policy in question was not "for all risks". (It is worth noting that the cover afforded under the *Inchmaree* clause ("latent defects in the hull and machinery") is wider than the standard cover against "perils of the sea" in that it is not limited to loss or damage proximately caused by "perils of the sea" and includes inherent vice. See the *Caribbean Sea*, at 347; *Scindia Steamships (London) Ltd v London Assurance* [1937] 1 KB 639 at 648.) In my view, however, the correct approach is to determine by reference to the contract (and if necessary evidence of background and surrounding circumstances) the extent of the cover which the parties are to be presumed to have intended by the phrase "for all risks" (see *Yuill & Co v Scoff Robson* [1907] 1 KB 685). In the present case the parties quite clearly could not have intended the cover to extend to a loss caused by damage to the vessel which had 49 occurred prior to the commencement of the insurance (or by a patent defect in the hull). I turn finally to the first ground on which the appellant based his claim in contract, ie that the contract was subject to an implied or tacit term that *Toron* would compensate the appellant for any damage to or loss of the *Wave Dancer* while she was in the Comores. In the court a quo it was argued that an implied term to this effect had to be imported into the contract. This was rejected by Southwood J; in my view correctly. In this Court counsel for the appellant conceded the correctness of the court a quo's conclusion and argued instead that the term which had to be imported into the contract was a tacit and not an implied term. (As to the distinction see *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532C - 533C.)

I am unpersuaded that there is any room for such a tacit term.

It is not sufficient that a term sought to be imported is reasonable; the implication must be made as a matter of necessity. I can see no such necessity in the present case. The contract obliged Toron in express terms to insure the Wave Dancer. It was clearly contemplated that Toron would be liable to the appellant in respect of any amounts recoverable under the policy. I can see no basis for the implication that in the event of damage to or loss of the vessel, Toron's liability would extend beyond that obligation. The term sought to be introduced, moreover, would have the effect of rendering the insurance provision unnecessary. It follows that the first ground too, cannot be upheld.

I would accordingly dismiss the appeal with costs. D G SCOTT HOWIE JA - Conkurs

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