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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A 14/81

731

BETWEEN HAROLD KEITH SIMON of Taieri Mouth, Fisherman

Plaintiff

[redacted]

AND THE MINISTER OF TRANSPORT

Defendant

Hearing : 20 - 22 September 1982

Counsel : G A Howley for plaintiff
D L Wood and R P Bates for defendant

Judgment : 19 October 1982

JUDGMENT OF WHITE J

The facts of this case can be stated briefly. The plaintiff is a fisherman fishing out of Taieri Mouth near Dunedin. He decided to buy a larger vessel than the one that he already owned. He inspected the F V "Tidesong" then at Riverton and decided that it would be suitable. He knew that he would have to fit some equipment on it, but felt that there would not be any technical problems with installation. He asked for and was shown a certificate of survey issued by the Ministry of Transport for the vessel.

The plaintiff claimed that, relying on the certificate, he bought the vessel for $45,000 on 19 June 1979. The additional equipment was fitted by October 1979. As the certificate expired on 16 October 1979, the plaintiff arranged for inspections by officers of the Ministry of Transport in Dunedin in order to get a new certificate. Inspections took place on 15 and 18 October 1979. A new certificate was declined because decaying planking was found which made it unseaworthy.

The plaintiff instructed shipbuilders, Miller & Tunnage to inspect the vessel. They reported that major work would have to be done on the vessel at an estimated cost of $26,900. The plaintiff then arranged for a qualified ship surveyor to inspect the vessel.

The plaintiff did not have any repairs carried out on the vessel from 19 June 1979 to 18 October 1979, and the plaintiff did not do any fishing for a period. He also claimed that he was unable to work in the 1980/81 fishing season.

The basis of the plaintiff's claim was that he relied on the Certificate of Survey issued to the vendor by the Department to buy the vessel. He alleged that the decay should have been discovered by a prudent inspector in October 1978 as it was in areas that should have been inspected for the purpose of granting a certificate under the Shipping and Seamen Act 1952.

The plaintiff claimed that the losses he suffered were due to the negligence of the first defendant acting through its agents. The plaintiff's specific allegations were as follows :

1. The decay was of such a nature that any proper inspection would have discovered it.

2. The decay could not have occurred between the date of the first inspection in October 1978 and the issue of the certificate on 15 October 1979 when the second inspection was carried out and the rot was found.

3. It was clear from the extent of the decay that it was present during 1978 and readily discoverable by any competent surveyor of ships carrying out a survey competently and properly.

It was alleged that a part of the statutory requirement for survey is an examination for decay which was not carried out.

It was claimed that the defendant knew or ought to have known that persons having dealings with ships rely on such surveys and therefore they owe a duty of care to all persons dealing with ships to ensure that the surveys are accurate.

The defence was that the certificate issued under s 213 of the Shipping & Seamen Act 1952 was issued for the purposes of establishing primarily the limits beyond which the ship was not fit to ply or proceed, the number of persons for whom accommodation was provided and the number of passengers that the ship was fit to carry. It was claimed that no

warranties as to the condition of the vessel were given or implied. The defendant claimed further that it owed no duty of care to the plaintiff and that it was not foreseeable by the defendant that the plaintiff would rely on the certificate as a guide to the structural condition or monetary value of the vessel. Finally it was alleged for the defence that any loss suffered by the plaintiff was due to the plaintiff's own negligence in the following respects :

(a) In failing to properly inspect the vessel at the time of purchase

(b) In failing to make adequate inquiries, or obtain advice, as to the condition of the vessel

(c) In proceeding to upgrade the vessel without properly establishing the condition of the vessel at that time.

The plaintiff's claim for damages comprised :

(1) The original purchase price of the vessel less equipment salvaged;

(2) The cost of installation of extra equipment;

(3) The loss of net profit from being unable to fish in the period up to 30 September 1980;

(4) Interest on the purchase price of the vessel, less the equipment salvaged;

(5) General damages $15,000.

The general principles applicable to a case such as this were considered by Cooke J in Rutherford v Attorney General (1976) NZLR 403. In that case the appellant agreed to purchase a truck if the owner could obtain a certificate of fitness which could only be issued by the Ministry of Transport. Having been informed that the certificate had been granted the appellant purchased the truck. About a week later he became suspicious regarding the trucks performance and took it to another of the Ministry of Transport's testing stations. The test revealed that it was unsafe or potentially unsafe and required a considerable sum spent on it before a certificate would be issued. The appellant sued both the vendor and the Ministry. Both claims failed in the District Court on the grounds that the vendor had given no warranty and that the Ministry owed no duty of care to the purchaser. The appellant appealed only against the decision in favour of the Ministry. The appeal was allowed. Cooke J observed that the situation was not covered clearly by authority. He then said (at p 411) :

> "When such a situation is encountered in the field of negligence law, it seems to me that the proper approach, as indicated by all the leading modern authorities from Donoghue v Stevenson (1932) AC 562 onwards, is to look at all the material facts in combination, in order to decide as a question of mixed law and fact whether or not liability should be imposed. Ultimately it may be simply what Lord Morris of Borth-y-Gest was content to call a decision as to whether it is fair and reasonable that a duty of care should arise Dorset Yacht Co Ltd v Home Office (1970) AC 1004, 1039; or it may be described as a question of the policy of the common law, which is the way in which Lord Denning and Sachs LJ looked on the Bognor Regis case

(1972) 1 QB 373, 390, 400. Lord Pearson said in the Dorset Yacht case that to some extent the decision in that case must be 'a matter of impression and instinctive judgment as to what is fair and just'. That applies equally to the present case. But it is more than Chancellor's-foot justice. The courts have evolved signposts or guidelines or relevant considerations - involving such notions as neighbours, control, foresight, proximity, opportunity for intermediate examination, deeds or words, the degree and kind of risk to be guarded against - and these are all available to be used as aids to the end result. I think, with respect, that it is very important to have regard to something else that Lord Pearson said in the Dorset Yacht case. Negligence is often conveniently analysed into components but :

> '...it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage.' "

In Rutherford's case (supra) Cooke J found that a duty of care arose. He then considered a number of points "in combination" and held that negligence had been established. He emphasised that his decision was based on "the particular combination of circumstances". It is useful, I think, to summarise what they were :

1. The legislature provided no specific remedy for negligence in the issue of certificates of fitness so that relevant principles of the common law were left to operate.

2. The vehicle was of a type requiring a certificate of fitness which the Ministry alone could issue. Thus there was a monopoly situation and a clear instance of control of events by the defendant.

Up to that point it will be seen that there are marked similarities in Rutherford's case and the present case. They are considerations which lead to the conclusion, in the words of Lord Morris of Borth-y-Gest, quoted by Cooke J, that "it is fair and reasonable that a duty of care should arise". In my opinion the duty to exercise reasonable care in carrying out an inspection of a ship for survey certificate is a duty which should extend to a purchaser of a vessel in circumstances such as arose in the present case. The extent of that duty having regard to the purchaser's position is another question but the first question in the present case is whether on the evidence there was a breach of the duty of care as alleged.

In Rutherford's case negligence was admitted. In the present case it is the primary issue for determination as a question of fact. On the basis that there is a duty of care owed to the plaintiff the onus is on the plaintiff to prove on the balance of probabilities,on the preponderance of the evidence, that the defendant's employee, Mr Love, failed to properly carry out the survey of the vessel in October 1978. If the answer to that issue is "No", that is an end of the matter. If the answer is "Yes", then there are other matters which require consideration.

It is necessary now to review the evidence as to the allegation of negligence and the submissions of counsel regarding it.

Mr Howley submitted that the combination of the evidence established that the fungus rot was able to be discovered and should have been established by the surveyor (Mr Love) using reasonable and proper methods and that the reason it was not detected was not because it was not there and discoverable but because the proper testing was not carried out.

Mr Howley submitted that the extent of the rot found in October 1979 had reached a state of deterioration which was not what witnesses would have expected to occur within a year and that the extent of what was found should be regarded as a situation of res ipsa loquitur. Referring to the evidence of Mr Love Mr Howley submitted that it showed that his work as a surveyor was "cursory". He submitted that that conclusion was supported by the evidence of Mr Larkins who, it was said, had expressed the view that Mr Love's methods would not have accomplished the object of detecting rot. Mr Howley based his submissions on the evidence of the witnesses as to methods used in carrying out inspections and in particular, as I have said, the evidence of Mr Love which he submitted revealed a failure to exercise reasonable care in carrying out the inspection in 1978. It was also submitted that the only reasonable inference to draw from the nature of the decay found on inspection in 1979 was that it must have been present, and discoverable, in October 1978, if the inspection had been carried out then with reasonable care.

In dealing with the primary issue Mr Wood submitted that the certificate issued in October 1978 could not be treated as a guarantee that twelve months later, on another survey, the vessel would be found to be seaworthy. He submitted that the certificate could not be relied on in that way. In fact, Mr Wood pointed out the vessel had been operated as an inshore fishing vessel and was shown to have been seaworthy within the greater part of the 12 month period.

It was submitted that it was for the plaintiff to take into account the date of the survey certificate and if he thought fit carry out his own inspection, or have an inspection carried out regarding the condition of the vessel. These considerations were also relied on as the basis of the alternative defence of contributory negligence. As to the evidence it was submitted that it was not a question of the existence of rot but of its detection, in short whether it was a reasonable inference that decay should have been discovered in October 1978 by a surveyor carrying out his duty. In the result the basic issue arose out of the inspection by the surveyor in October 1978. On the assumption that what was found in October 1979 was sufficient to establish that decay was present in October 1978, the question remained whether on the balance of probabilities, it was in an advanced state and discoverable by an adequate inspection on survey at that time.

The plaintiff said he was aware of the necessity of fishing vessels requiring a survey certificate and that if the "Tidesong" had not had one he would not have purchased the vessel. The work he had done on the vessel was done at Port Chalmers. The ship-wrights had not drawn attention to any rot. The plaintiff simply said, "They never found any rot", and they were not expected to look for it. As far as the plaintiff was concerned he did not notice any rot then or later. He had sailed the vessel from Riverton to Taieri Mouth and to and from Port Chalmers and had had no trouble. He agreed that had he chosen he could have used the ship for inshore fishing right up to the time another certificate was due. As to the extent of the decay after it was discovered the plaintiff said that he did not think that it was so bad that the vessel could not put to sea.

It was at this stage that the plaintiff sought the opinion of Captain Daish, a Master Mariner who, after seagoing service had been ashore for eight and a half years engaged in nautical surveying, valuation and assessing. He described himself as "a nautical surveyor". He agreed in cross-examination that he did not hold a first-class marine engineer's certificate, and did not know whether that was a necessary qualification in New Zealand for carrying out surveys of hulls. He said he was familiar with methods involved in surveying vessels such as the "Tidesong". Captain Daish

said that "one would normally sound timber to obtain a ringing sound to make sure there was no rot "using a finger, a small hammer, screwdriver or similar instrument, looking in places "where water was liable to lie for any time". This method, he said, would be used for examining the exterior and the interior of a vessel, but that the method would not normally be possible if there was a fibre glass layer on the exterior as in the case of the "Tidesong". Asked where a person would look for rot he said the chain locker, along the keel, around the steering gear, rudder post and cavity for the propeller and anywhere where water was liable to lie or there was a damp atmosphere. When he went on to the vessel his attention was drawn to various areas of rot which had been chiselled out with a screwdriver by the officers of the Marine Department. He did not see rot in undisturbed areas and he commented that the vessel was very well painted and maintained. From the extent of the rot Captain Daish said that it would have been there a year before it was found in October 1979. Captain Daish described the decay as the same "as occurs round the window of a house". When referred to his report Captain Daish referred to the development of decay over a period. He said he "would not like to hazard an opinion as to how soon after rot had occurred it would be detected - it might be slow growing". He added that "once it started to this extent, one should be able to pick it up very quickly". Captain Daish agreed in cross-examination that the limitation of twelve months

for a survey certificate was "because it is recognised over twelve months there can be defects appear which require survey again". He said he had not experienced a case of one survey of a vessel when it was found in good condition and coming back a year later and surveying the same vessel. As to the speed of development of rot Captain Daish was asked whether he agreed it would depend on conditions just how soon and how quickly rot developed. The question was, "Fungi starts slowly and it takes a hold and spreads more rapidly?" Captain Daish agreed. He also agreed that there were "a whole lot of circumstances which lead to growth of rot". The following extract from the notes of evidence records Captain Daish's opinion on the extent of the decay that he saw. These questions and answers were in cross-examination.

> "If evidence is given by experienced surveyors for department that it's not unusual to survey vessel one year and discover no rot but discover a year later extensive rot requiring replacing timber to an extensive degree, do you accept that? I don't think I could accept they would find no rot and then find extensive areas the next. What they could find is localised rot on second survey but not to extent that was evident in 'Tidesong'.
>
> From your experience you are called in for particular purpose? In my own - for fishing boats, previously I was area adviser for sea scouts which necessitated annual inspections for wooden boats. I've been experienced in yachting. You haven't had experience in wide variety of fishing boats you've inspected from one year to the next? Not fishing boats no."

"Presence of rot was evident to you because of disturbed areas : the areas so disturbed were quite easily accessible? very. Would you like to venture opinion as to how discernible they would've been in June of that year? To a surveyor who was going round looking for it they would've been discernible. It wouldn't have been discernible to anyone else in June of that year? I wouldn't like to make an opinion because I don't know if paint work was disturbed. If paintwork, someone making visual ex. paint-work was good, then it wouldn't be discernible. If surveyor was looking for rot it would've been discernible with normal precautions one takes to ascertain, sounding and the like to ascertain rot.

Are you suggesting three months earlier paintwork could well have not been disturbed? I can't tell what condition paint work was in three months before.

Court : Did you see any areas then where paint work disturbed? No But there would've been other areas disturbed by sounding. There were other areas which were suspect from your own sounding? Yes."

In re-examination Captain Daish was asked again about normal methods of testing for rot. He said it would be a very incomplete survey if someone did not test for rot "without carrying out a sounding or probing test to determine if rot was present."

The first witness called for the defence was the previous owner of the "Tidesong" Mr McDonald. He had bought the "Tidesong" in July or August 1973 in Bluff and moved it to Riverton where, over four years, he completely overhauled it. He said that in the course of the work he found no rot. He completely repainted the interior. He described working on the "upper structure round the bulwarks" which he sanded down.

He commented that he "scraped some" and that was the last job he did "about August September 1977. In the course of the work he had drilled holes in the hull and did not find "any soft spots at all". Mr McDonald was definite that at the time he sold the vessel in June 1979 there were "no defects" and "definitely no rot anywhere in it". He, of course, did not hold himself out as having a surveyor's qualifications. He did not sound for rot because, as he said, he did not know how to do it. He gave evidence of the 1978 survey. He said he was always there when the surveyor was on the vessel and that Mr Love had not sounded for rot.

Mr Wilson, senior ship surveyor at Timaru had inspected the "Tidesong" on occasions commencing in 1974 and had inspected the hull. This inspection was described as "visual using screwdriver, hammer, looking for obvious signs". He referred to the "sounding system" and "probing the wood at close intervals". No rot was found. His last inspection was on 20 March 1976. Mr Wilson was asked about the state of decay as indicated by the photographs. If that had been present, he said, "it would have been picked up by me". Mr Wilson said he did not agree with Mr Daish as to how the rot had occurred. He also commented that it "is a known fact that what you don't find on one survey you find in another and that's what's happening round the country at the present time". He was asked to consider the photographs of the "worst" bulwark section where rot was discovered and whether

he thought if it had been tested by a screwdriver a year before October 1979 the rot would have come to light. His answer was "possibly". Asked more specifically whether testing would have revealed the rot in 1978 he said he was unable to offer an opinion because of dry rot. He was asked, "Would you have expected it to respond to that sounding test when the survey was done the year before"? The answer was"not necessarily."

The evidence of the next witness Dr Butcher, who holds the degree of Ph D in microcology, and is Research Field leader in wood preservation at Rotorua was important. He had examined "wood samples from the vessel". He thought at the time that the rot could have taken two to three years to develop. There was "quite a distinction", he said, "when infection occurs and rot is discernible". He thought that because of the type of timber and indifferent treatment with preservative it would be quite difficult to detect". He felt there was a distinct possibility that the rot was present in October 1978 but that it could have developed to a severe stage within a one year period. He visualised an acceleration of decay due to the timber partially drying while the vessel was laid up for three and a half to four months. Summed-up his opinion was : "My opinion is that some rot could well have been present (in November 1978) but there was possibly considerable difficulty in detecting it and one reason for that was that the timber in question was only partially treated with preservative".

Referring to the methods of detecting decay Dr Butcher was familiar with both "sounding" and "probing". On this subject he said, "Sounding depends largely on experience of the operator. In my opinion at best it gives you a 60 per cent chance of detecting decay. Probing has advantages in that you can push into the centres of the wood being examined but it is a structured test and it would be impossible to probe sufficiently to detect every potential area of early decay." He referred to the presence of fibre glass on the outside and paint on the inside preventing loss of moisture as conditions suitable for decay development. His conclusion was that with the possibility of rot developing in the "inner zone of the wood" it would then be difficult to detect by probe or hammer tests. Cross-examined by Mr Howley Dr Butcher said that in his view "the possibility of infection occurring and fungus developing sufficiently to this advanced decay level in less than one year is doubtful". The problem was when it could be detected. Asked to enlarge on this important aspect of the evidence Dr Butcher said it was quite possible in his view that the minimum period from infection to the state disclosed in October 1979 would be three to four years. As to when it would be likely to manifest itself to someone looking for it, he said, "with sufficient luck of sampling the correct place there was a possibility it could have been detected but I consider that the chance of detecting it in an extensive state could well have occurred within the time frame of one year". He was asked which year

and answered, "Between 1978 and 1979". Pressed on this subject later the evidence was :

> "But you are saying that within less than six months this rot developed at a stage, October 1979 from a stage 1978 where it would've been noticeable? Yes."

As was to be expected Mr Howley cross-examined Dr Butcher as to the acceleration of rot. Again I quote a passage from the evidence which contains the opinion of Dr Butcher :

> "What is likelihood? You can say anything is possible. Please tell us, knowing where this boat was, accepting we have cold conditions, knowing that water was likely to come into it at any time and no rot from 1974 - what is likelihood this rot you are not able to see? I think there is reasonably strong likelihood that it couldn't have been detected.
>
> If you say it takes three to four years minimum likelihood is that it is only in last three to 4 months it's visible?No. It's impossible to sample every individual piece of boat. In these particular areas it's obviously it's an area that should've been inspected but if decay came from inside outside there could've been quite a sound outer zone which was resistant to a probe. That's all I can state.
>
> You say it would take 3 to 4 years to reach this stage, you also say likelihood is it would n't be visible until last few months of that period? Six months rather than few months I thought we'd agreed. When we're talking about 4 year period, not necessarily a 3 - 4 year decay. It's when infection occurred. Infection is not rot. There's the organism first spread throughout wood, before it starts to decay. We're not talking about 3 - 4 year period of rot actually, but when infection occurred and then to this advanced state.
>
> Accepting all that you say it is likely that this would not manifest itself until the last six months of that period? Yes."

At the close of Dr Butcher's evidence I asked a question and I record the passage from the notes of evidence :

> "Thinking in terms of a year before that date, are you able to say whether you think it more probable than not that the situation could've been detected by the methods you've heard described by someone who understood what he was doing a year before? I think there would've been, it would've been not probable. That he would've been able to? Yes. If instead of a year we go back to June 1979 what then?One would've thought that the probability of detection would've increased."

The evidence of Mr Love was of course very important as a senior surveyor of ships responsible for the inspection in October 1978. He accompanied a Mr Walker, who has since died, when the "Tidesong" was surveyed in 1977. He described the survey in 1977 which included inspection of the new work done by Mr McDonald. He referred to "a visual and probe test on the vessel" as they progressed. In 1978 Mr Love inspected the vessel on his own for the survey. The survey was again described. I now quote from his evidence :

> "Then proceeded on to deck. I done deck survey. I did it with probe. I always carry probe and a light and a screwdriver. Most surveyors have their own tools of trade, some prefer a hammer. I prefer the probe and a light. On this occasion I actually used the probe. Not so much the light for upper deck but in confined spaces in lower decks using a light highlights and emphasises any abnormalities in structure. I hold it at an angle so that if there's a ripple or discoloration it shows it up tenfold.
>
> I heard Mr McDonald say he didn't think I carried out any sounding.

In fact : sounding on a vessel .. I didn't do any sounding. On a vessel of this nature of five eighth inch double diagonal planks with fibre glass exterior very hard to sound because of nature of the construction. In my opinion and in opinion ... the sound given off is not inducive to a good estimation of condition of the wood.

COURT: Sounding from inside - are you talking generally, fibre glass does that affect inside? Effect of double diagonal planks on fibre glass gives you resonance. It doesn't give you a true ring as you would get from an ordinary wooden plank. I find it's a hit and miss method at the best of times. I used a probe, plus the light."

Mr Love said that at the 1979 survey he definitely did not discover rot. I propose now to quote Mr Love's evidence in cross-examination :

"You went round with probe? I usually carry an old oyster opening knife which is tapered at one end, it has a round end on it. You go round making holes all over the boat? No I use knife that you must try to avoid puncturing paint work if you possibly can. How can you use probe without damaging? Usually look for evidence of any defects. What with? Torch and some people use a knocking system. You didn't puncture the woodwork? In a few places I most probably did. In areas where you might get rot. What areas? Behind bulwarks, between deck planking where stem and deck planking meet, between plank joints where water can get in and lie. You didn't go sticking holes in the bulwarks? It wasn't necessary. Because you didn't see evidence of any rot? There was no evidence. Apart from perhaps the odd jab where it wouldn't be seen you didn't put holes anywhere? I satisfied myself as was visible to my eye and my experience that there wasn't any rot. I don't generally do any sounding. It's not usually on this type of boat. I'm marine engineer. What is your experience of wooden ships? I've done hundreds at least 50 to 60 per annum. I've done them for some years now. I'd been in Invercargill office since 1975. I took over Mr Walker's vessels, wooden vessels in 1976

but previous to that I was no stranger to wooden fishing boats. But what is your experience in examining wooden fishing boats in 1977? By that time I'd examined 50 to 60. To get qualifications do you have to have knowledge of wooden boats? I didn't have to have previous experience with wooden boats. I was a chief engineer in the navy. I didn't have to know about wooden boats. My experience in the navy would necessitate knowledge of wooden boats. As an engineer in the navy you weren't involved in survey work? I was in West Coast of Africa yes. Do you know that the reason the work was being done by Mr ... was to 'upgrade structural deficiencies'? Yes. Did you know or was there a record he had tested it for rot in 1974? Not in this record. Did you know? 1974 I wasn't in the district. In your inspection in 1977 you were primarily concerned the department's requirements had been carried out? Of course. Because of that requirement and fact you were treating it as a new boat you weren't looking for rot? You are always interested in looking for rot in a fishing boat. You wouldn't be thinking of there being any rot? We are all the time. You didn't test it for rot in 1977? I tested it for rot in 1977 yes. In the same fashion as you tested it in 1978? Yes. "

Mr Love also gave evidence as to painting. Below deck he said most of the interior, "the hull, beams, the skin, everything you see". Asked about the bulwarks, he said - "they were painted, newly painted, the most recent job".

The next witness was Mr Larkins who described himself as a "shipwright inspector" with 38 years experience in the wooden boat industry and 17 years experience with the Ministry of Transport. He first saw the "Tidesong" on 15 October 1979 with the two other Dunedin officers who, the evidence showed, had somewhat different qualifications and, when practicable,

worked as a team. He had discovered some of the rot. His method was to use an eight inch screwdriver. He is recorded as saying - "In some instances I sound and other instances I screw with pressure to probe it. That is pressing the screwdriver against it. On this occasion I did that in most places on the vessel accessible to me." He said that if there were no outward signs he still probed selecting usually all accessible hull in the vessel. He said there was no particular spot that he selected. Mr Larkins was asked about evidence given by Captain Daish regarding sounding wood "that had rot present but which had dried out". He had not agreed with the evidence. Regarding the sounding method Mr Larkins had this to say - "In the case of the "Tidesong" sounding wouldn't be a good method. Probing would be the most efficient way."

Mr Larkins said he had experienced wooden vessels which one year had been passed free of rot and on the next inspection extensive rot had been found which had not been detected 12 months before. He had experienced this on two occasions in recent years. One of these was the Otago Harbour Board pilot launch and the other was a fishing vessel.

In cross-examination Mr Larkins' evidence on his method of testing reads as follows :

"When you examined 'Tidesong' you did it with screwdriver? Correct. Big screwdriver?Yes. When you go aboard a wooden ship you make holes everywhere?No. Visually or sounding you suspect there is rot, until then you don't gouge out the wood; when you so suspect it then you gouge out the wood?Yes. You agree with Captain Daish that for practical purposes you prefer to sound it, you don't go round making hóles everywhere? I haven't been asked why I probed the 'Tidesong'. I went into quad space on request of Mr Mackinnon who said there was a bolt sticking through and under the deck was quite wet. I scraped deck head where there was light film of decay, this made me suspicious and I began to probe hull. That was the start of the location of rot. Bolt was sticking through. It was an untidy part from a previous occasion. You didn't start making holes until you were suspicious? Correct. I ask you again you agree with Capt Daish practical way is to sound it? In some cases you can. I still say that on multi skin hull sounding is very deceptive result. On multi skin hull where you don't see obvious signs of rot you then go and make holes? I've had 38 years of experience round wooden boats and I don't destroy. I'm asking you, you do make some test which you consider is proper before you damage the boat and one test is the sounder? I'm not denying this is a method.

COURT: Do you use that method? Yes on occasions."

I quote now another important part of Mr Larkins' evidence :

"Mr Simon gave evidence that you expressed surprise that this rot had reached such an extent? Did you express surprise to Mr Simon? I probably did. I can't remember the conversation. Mr Simon has said there was a lot of chat about the condition. Were you surprised? I think I would be. It was most unusual this boat apparently free from decay a year before? I've no knowledge of the rapid extent of rot. You've had long experience of wooden boats?Yes. Was it surprising to you this vessel could've reached that decay when one year before it had no sign of rot? I must admit there must've been rot, whether discernible or not I don't know.

> Were you in Court when Mr Love gave evidence? Yes. He tests for rot - you remember what he said? Yes he mentioned using oyster knife. We use a light to see our way through hull. Would you agree from what he told us wouldn't have discovered the rot? It would've discovered rot with his probing."

The next part of Mr Larkins' evidence in cross-examination covered the important question of the methods used by Mr Love. I quote the record :

> "I'll read to you from evidence p 48 lines 13 - 24. There were three areas. Having heard that I put it to you it's clear from your own examinations that is not what an experienced surveyor doing a proper survey would do to find rot on a ship? That wouldn't be my procedure. Because you wouldn't believe you could discover rot in that fashion...
> MR WOOD OBJECTS
> I put it to you the description of what I've just read is a cursory examination for rot?I can't speak for another surveyor's methods in examining a boat. I've got my own. That's not the way you would do it? Correct. Because you don't think you would discover rot in that fashion? Being a shipwright inspector my sole purpose is to discover any defects in a vessel therefore I have to be extremely careful. Because you don't carry out an examination like that because you would not discover rot - in that fashion. In that fashion I put to you you would do more than rely first of all on visual examination to see whether there was rot? Correct. You would do more to rely solely on visual examination to see if you would probe on wooden vessel?Yes. Because you do not believe you would discover rot by examining it in that way? Correct."

In re-examination Mr Larkins said that in endeavouring to discover rot when there was no visual sign of it he would go to damp areas, dark inaccessible areas where water might lie and that in such areas he would definitely use a probe.

Another aspect of surveys was referred to by Mr Larkins. He was asked, "Do you know of your own experience whether it is common practice for people to get a detailed certificate of survey before they purchase ships? The answer was, "Yes at the permission of the then owner."

Mr Mackinnon a senior surveyor of ships at Dunedin was present with Mr Larkins engaged on the October 1979 survey inspection. As to sounding he said he certainly did not feel sounding would prove anything "because of the construction". He was cross-examined by Mr Howley and I quote from the notes of evidence :

> "You do not believe sounding method as particularly useful with the 'Tidesong' construction? correct. If there is no visible rot how would you determine rot present? I would use a probe. I don't mean a sharp instrument. I mean a blade about an inch wide. You don't go round sticking holes in the ship? No. You lean a blade against it? Yes to see if there's any softness in the wood. If there isn't you are satisfied? Every witness has told us about rot - this type of rot starts from interior of the wood and works out? Yes. Leaning on outside of wood with blade unless the rot had come to the surface it wouldn't tell you anything? This wood is only five eighths inch thick. If that is so, sounding methods would let you know if there is rot?No.
>
> From thickness of wood you would expect to get evidence of rot very soon it had started? No, it would need to be reasonably well advanced. Up to the stage it was near the surface? You would feel it when it came half way through the wood surely. Not before? I couldn't tell. I wouldn't know."

The final witness called by Mr Wood was Mr Fitzgerald, senior surveyor of ships of the Marine Division stationed at Nelson. He explained that

Captain Daish would not be qualified in New Zealand to undertake the work done by Mr Fitzgerald, Mr Love, Mr Wilson and Mr Mackinnon because he did not have the qualifications required by the Marine Division. A first-class marine engineer's certificate is required. Without any disparagement to Captain Daish it was pointed out that his qualifications are those of a nautical and navigational officer whose expertise does not involve "the structure of ships". It was said that Captain Daish has the qualifications of a surveyor of cargo, not inspection of small vessels "or for that matter any vessel".

He described a certificate of survey as "documentary proof that the vessel has met the requirements of the law. Those are to be seaworthy, satisfactory for the purposes for which it is intended to be used, namely, to be of structural soundness, to enable it to be so used to satisfaction of a surveyor of ships".

Dealing with methods of surveying it is of importance to note the evidence of this experienced witness that he knew of no text books on the subject, his view being that surveying of such vessels is "a matter of experience and judgment".

Regarding rot in wooden ships he said :

"This question of rot is always a factor. In my experience I've known of vessels which I've surveyed in one year and made a declaration and surveyed the following year and found extensive rot. One year I found no rot and the second year I had. It's something that you must to some extent expect that you will find rot at any particular survey. I've no records of frequency of this. I have a boat under survey at this particular time where it did happen. I have surveyed this boat for a good number of years probably ten or twelve years. I surveyed it 12 months ago and found a considerable area of rot actually in wheel house and I had inspected the same boat the year before and year before that. I'm quite confident there was no discoverable rot at those previous surveys, yet there was rot there this last survey. This is a big boat. The timbers in wheel house - it covered quite a big area three quarters inch thick, rot extended about five feet - corner post in wheel house for about five feet aft and approximately two feet high and was in corner post as well. I hadn't noticed that the year before and was quite confident it wasn't there the year before.

Court : You mean that literally? I mean it was not discoverable."

Mr Fitzgerald gave evidence of his personal experience regarding the use of the departmental file, commenting that it was not "any sort of guarantee or surety of the standard of the vessel". He then described other steps available to a prospective purchaser as follows :

"The vessel could be presented for survey during the currency of a certificate if the owner of vessel requests the department to carry out survey and this is something that quite often happens that a purchaser quite generally requests that vessel be surveyed and be delivered with certificate of survey. It's not statutory requirement that a certificate issued within certain time prior to purchase. There is in fact no requirement for an owner to advise the department that it has sold it.

If asked for a survey now we are in the position of not being able to refuse it. That gives the purchaser 12 months from that date."

Mr Howley cross-examined the witness as to his personal experience. Again I quote a paragraph from the notes of evidence :

"How many boats have you personally surveyed when one year later the rot is so bad that a certificate couldn't be issued? I've surveyed wooden ships. How many which showed no signs of rot in one survey and in next annual survey were rotted to extent that no certificate could be issued? I've already answered the question I've no records of such situations. I put it to you that is because you have never experienced it? No you are wrong. How many? A considerable number. In fact those vessels I found rot which affected structural strength seaworthiness wouldn't permit me to be satisfied with their seaworthiness and construction I want to make this clear. I am talking about a ship you surveyed one year and there was no rot and then the next year so much rot no certificate? It would've prevented me signing a declaration is one where previous survey had been done by me myself. I recall another vessel which I surveyed. I found a deficiency in caulking. I requested this caulking be repaired, recaulked. I inspected what was the finished job. I examined the boat for rot as I normally do. At the next survey I found a considerable amount of rot in the hull planking running down both sides of the stem i e the bowel. I found that the seams which I had requested to be caulked had in fact not been done by a shipwright but fisherman owner had tried to do it himself and unsuccessfully. As a consequence fresh water had gained access down the sides of stem and into space between planking where they are fastened on to the stem. This had caused rot to enter the ends of the planking and caused a considerable number of plank ends to be rotten to extent the fastens, nails were actually loose. This was quite a dangerous condition. It required the removal and replacement of considerable number of planks. This all happened between surveys? 12 month period."

In the course of cross-examination Mr Howley asked why a purchaser was not entitled to rely entirely on the certificate. The answer was that the certificate is not issued for the purposes of a purchaser but for the purposes of the law - to comply with the Act. Mr Howley later put it to the witness that the reason for the certificate being for one year was because it was assumed that between one year and another a ship would continue to be safe to go to sea. Put more precisely the question was, "It is a necessary assumption that ships are fit for the following year having just been surveyed". The answer was "Yes."

Mr Howley questioned the witness as to the specific qualifications for a surveyor which Captain Daish did not have and put it that a first-class marine engineer's certificate would not help a person "with rot in wooden boats". Mr Fitzgerald did not agree and pointed out that to be entitled to sit for the certificate a candidate must have spent the appropriate time at sea as a marine engineer and also served an apprenticeship for five years.

Mr Fitzgerald described the progress of rot and said that the only way to discover the "infection as it developed was to examine the timber surfaces by getting down to bare timber." In the period of growth he said : "There is no way of detecting it by sounding or probing." The final stage was the destruction of the cells of the wood so that "they

actually crumble". And he said, "This is the final stage when it is observable and the timber has started to collapse. Mechanical strength is destroyed when it starts to crumble. Up to that point mechanical strength is not affected nor its soundness."

Finally Mr Fitzgerald provided a description on the onset of rot as follows :

> "Rot depends on firstly fresh water, an adequate supply of fresh water which scientists which must put brown rot above 35 per cent. It requires warmth and preferably darkness. It's a fungus like a mushroom. Darkness - wholly out of the light? Not necessarily but out of some light.
>
> These photos of port bulwark : if ship out in open it would be sometimes in light and sometimes in rain? Except that it is painted surface and the rot wouldn't be working from outside. It would be exposed to sunlight. Conditions there, fibre glass on outside and paint on inside, rot would continue to operate?Yes. In those positions you see it there could be it accelerated by having been exposed to more water or would you say because of paint and fibre glass no further water would get at those areas we are looking at there? It must've received adequate supply of fresh water. Continuing? Yes the timber itself is wet. During rain it would soak up water. How would water get to rot in that ship if it was fully painted on one side and the other there was fibre glass? Water could gain access through edge seam of the deck where deck meets bulwark. This boat has a deck margin running against bulwarks. Each of planks are probably about four to six feet wide butted side with side. With cracking of paint and shrinking and expanding of timber in sun, paint cracks and allows water to get right down into the boat even. Boat sitting in sun below decks in closed compartments temperature build-up is considerable even in cold weather.

> Temperature build-up in confined space such as this - right at stern in boat, in quadrant, temperature could on a day like today or late winter could reach 70 to 80 degrees and create the conditions, the temperature conditions conducive to growth of the rot. Any water in that space, rain or other water, would evaporate. It would condense out on the surfaces inside this space, condensation is prime cause of rot in a boat. It may even be salt water, evaporation from salt water is distilled fresh water. This provides the fresh water requirement for the fungus to grow."

This was a case where witnesses had their own opinions but throughout the case I was impressed by their frankness and practical knowledge.

It was understandable that the plaintiff should have come to the conclusion that the extent of the rot found in October 1979 was such that it should have been discovered when the survey was carried out in 1978. Surprise was apparently expressed by the surveyors themselves in 1979 and the plaintiff was supported in his conclusion by a report he received from Captain Daish.

On the other hand, however, there was the evidence not only of surveyors who had been on the vessel in the course of their duties but evidence also of experts who understood the problem and were persons of very considerable experience. They were able to explain the methods of testing and the manner in which rot in wooden ships of the type in question

can and does develop.

Captain Daish was not as well qualified as other witnesses to express opinions on appropriate methods of carrying out a survey of a wooden vessel. It should also be noted (as already recorded) that he was careful to say that he "would not like to hazard an opinion as to how soon after rot occurred it would be detected - it might be slow growing". There was ample evidence from others with experience on this topic. As to "sounding" and "probing" it is to be noted that Captain Daish said that it would be a very incomplete survey without testing by "sounding or probing". The underlining is mine.

Having considered the evidence as a whole I am not persuaded that the fact that Mr Love did not use the sounding method was evidence of a failure on his part to carry out the survey in 1978 with reasonable care. There was ample evidence that the probing method was an alternative and that it was a preferable alternative in carrying out a survey of the particular vessel.

The question remained, however, whether the evidence supported Mr Howley's submission that Mr Love's inspection of the vessel in 1978 was a "cursory" one and inadequate in the circumstances.

Mr Howley relied on Mr Larkins' answers in cross-examination which I have already recorded at

p 23 of this judgment. The passage from Mr Love's evidence put to Mr Larkins as "a cursory examination" was not a complete description of the survey work carried out by Mr Love. Earlier Mr Larkins had said that the rot would have been discovered with probing. While I agree that Mr Larkins' evidence as to the procedure he followed gave a picture of a closer check than Mr Love's I do not regard that as establishing that Mr Love's inspection was inadequate. It must be remembered that Mr Love was not asked in cross-examination to describe in detail how he used his probe. I certainly did not gain the impression that his examination was "cursory". Mr Love's evidence of the examination in 1977 described in some detail "a visual and probe test on the vessel as we progressed". As quoted above Mr Love was asked in cross-examination whether he had tested in the same way in 1978. His answer was "Yes".

In weighing the evidence as to whether there was evidence of a failure of reasonable care on Mr Love's part a very important factor was whether on the balance of probabilities the rot was discoverable on proper inspection in 1978. I am satisfied that the weight of the evidence is against that inference being drawn. The expert witnesses had the opportunity of seeing the extent of the rot and the circumstances were fully investigated. The presence of rot is one thing. The discovery of it by recognised methods of testing is another. In my view, accepting the evidence of Dr

Butcher and Mr Fitzgerald, as I do, the reasonable inference to draw from the evidence is that on the balance of probabilities the state of rot found in 1979 could have developed from a state in which it was not discoverable on adequate inspection by a competent surveyor in 1978. This conclusion strongly supports the view that there was insufficient evidence to show that Mr Love was negligent in carrying out the 1978 survey.

For these reasons I am satisfied, on the balance of probabilities, that the plaintiff's allegations of negligence fail. That being my conclusion on the facts it is unnecessary to consider other questions which were raised in the case.

If necessary I shall hear counsel as to costs or memoranda may be filed.

J.

12 October 1982.

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