[HIGH COURT OF AUSTRALIA.]

EASTERN ASIA NAVIGATION CO. LTD. . APPELLANT;

AND

FREMANTLE HARBOUR TRUST COMMISSIONERS AND THE COMMONWEALTH OF AUSTRALIA. } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1950. PERTH, *Sept.* 7, 8, 11, 12, 13, 14, 15, 18, 19. 1951. MELBOURNE, *March* 19. Latham C.J., Fullagar and Kitto JJ.

*Harbours and Harbour Trusts—Ship in harbour damaged by fire—Ignition of oil on surface of water—Parts of harbour subject to possession orders of Commonwealth under National Security (General) Regulations—Occupied by vessels of allied navies—Liability of Commonwealth—Liability of Harbour Trust Commissioners—Negligence—Nuisance—Principle in Rylands v. Fletcher—Statutory corporation—Whether entitled to immunities of Crown—Fremantle Harbour Trust Act* 1902 (*W.A.*) (2 *Edw. VII. No.* 17—*No.* 38 *of* 1928), *ss.* 40, 65,* 67 —*Fremantle Harbour Trust Regulations, reg.* 87*—*National Security (General) Regulations* (*S.R.* 1939 *No.* 87—1946 *No.* 156), *reg.* 54.

The *S.S. Panamanian* was extensively damaged by fire while berthed in Fremantle Harbour at a berth to which the ship had been directed by an officer of the Fremantle Harbour Trust Commissioners. Berths adjacent, and close to that occupied by the ship, were the subject of possession orders made by the Commonwealth under reg. 54 of the *National Security (General) Regulations* by which the use and occupation of the berths were committed to the commanders of allied forces. At the relevant time those berths were occupied by submarines and mother ships of allied navies. The owners of the *S.S. Panamanian,* alleging that combustible oil on the surface of the harbour was ignited, and that the spread of the fire caused the damage, brought an action for damages against the Fremantle Harbour Trust Commissioners for breach of warranty, negligence and nuisance, and against the

* The provisions of s. 65 of the *Fremantle Harbour Trust Act* 1902 and of reg. 87 are set out at p. 359 (*post*).

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Commonwealth for negligence, nuisance and breach of the strict duty arising under the rule in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330. At the time the fire commenced there was on the surface of the harbour dieselene which had escaped from naval vessels and furnace oil which had escaped from other ships.

*Held*,

As regards the Fremantle Harbour Trust Commissioners,

(1) By *Latham* C.J., that the Fremantle Harbour Trust was an independent corporation capable of being sued and exercising its powers and performing functions without being subject to ministerial control and was therefore not entitled to the immunity of the Crown.

*McGough* v. *Fremantle Harbour Trust Commissioners*, (1904) 7 W.A.L.R. 136, approved.

(2) By *Latham* C.J. and *Fullagar* J., that reg. 87 of the *Fremantle Harbour Trust Regulations* which purported not only to limit but also completely abolish all liability in respect of ships was not authorized by s. 65 of the *Fremantle Harbour Trust Act* and was invalid and that on the evidence the plaintiff was not bound contractually by the terms of that regulation.

(3) By the whole Court, that as the evidence showed that the Trust had taken every possible step to prevent the spread and accumulation of oil and that as the oil was not possessed of any specially inflammable quality and as its presence must have been obvious to the master of the *Panamanian*, the Trust had not omitted to take reasonable care to prevent damage to shipping either in not giving warning of the presence of the oil or in any other respect.

(4) By the whole Court, that as the oil did not approach the ship through any act or omission of the Trust, or any person for whose acts it was responsible, it could not be held liable in nuisance.

As regards the Commonwealth,

(5) By the whole Court, that the evidence did not establish any negligent act or omission by any person for whose conduct the Commonwealth was responsible.

(6) By *Fullagar* and *Kitto* JJ. and *semble* by *Latham* C.J., that on the evidence the Commonwealth had not such control of every part of the Harbour as would affect it with liability for a nuisance committed by the persons in charge of the vessels from which the oil was discharged.

(7) By *Latham* C.J. and *Kitto* J., that the bringing of oil-fuel to a berth in a harbour and there dealing with it as fuel for oil-burning vessels is an accepted incident of an ordinary purpose to which a harbour berth is reasonably applied and accordingly there was no liability based upon the principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330.

Decision of the Supreme Court of Western Australia (*Dwyer* C.J.), *Eastern Asia Navigation Co. Ltd.* v. *Fremantle Harbour Trust Commissioners and the Commonwealth of Australia* (*The Panamanian*), (1949) 51 W.A.L.R. 94, affirmed.

APPEAL from the Supreme Court of Western Australia.

On 17th January 1945 an extensive fire occurred on the north wharf of the inner harbour of Fremantle. By the *Fremantle Harbour Trust Act* 1902 (W.A.), Fremantle Harbour was vested in and placed under the control of the Fremantle Harbour Trust Commissioners (hereafter referred to as the Trust), a statutory corporation incorporated by the Act.

The *S.S. Panamanian*, an oil-burning steel vessel over 600 feet in length, 15,000 tons register, was lying at berths Nos. 7 and 8 of the north wharf, to which she had been directed on 29th November, 1944, by the harbour master, an officer of the Trust.

On 17th January 1945 berths Nos. 2, 3, 4 and 5 of the north wharf were occupied by submarines and mother ships of the United States and Royal Netherlands Navies; berth No. 6 by a mother ship and submarines of the Royal Navy.

In 1940 certain regulations under the *National Security Act* 1939 were applied to the port of Fremantle and Harbour Trust Regulations were modified to meet certain naval requirements. Japan entered the war in December 1941 and from March 1942 the inner harbour at Fremantle was used as a submarine base. At the outset no charge was made for occupation of berths but later a charge was made under arrangements made by the Commonwealth with the American government. On 17th January 1945 berths Nos. 2, 3 and 4 were the subject of possession orders made by the Commonwealth under reg. 54 of the *National Security (General) Regulations*. Having made such orders the Commonwealth did not take physical possession of the areas to which the orders related, but by such orders committed the use and occupation of such areas to others, viz., the Commander of the Allied Naval Forces based in Western Australia. After 17th January 1945 somewhat similar orders were made with respect to berths Nos. 5 and 6.

On 17th January 1945 the *S.S. Panamanian* was loading flour for Calcutta. About 3 p.m. on that day a piece of hessian (a bag which had been cut open) about six feet by eight feet was seen to be smouldering on the deck of the ship. Someone stamped on the hessian but it still smouldered. J. E. Durnin, a lumper employed by the stevedores loading the ship, threw it over the starboard side of the ship between the ship and the wharf, intending to throw it into the water. The hessian caught on the timber of the wharf about eighteen inches above the water. The temperature at that time was about 107 degrees in the shade. The hessian

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

flared up and within at most two or three minutes a sheet of flame shot up and the ship caught fire and was badly damaged.

The Eastern Asia Navigation Co. Ltd., who claimed to be the owners of the *S.S. Panamanian*, brought an action for damages in the Supreme Court of Western Australia against the Trust and the Commonwealth. It alleged that the presence of large quantities of inflammable oil, viz., furnace oil and dieselene, floating upon the surface of the water in the inner harbour, and particularly near the *Panamanian*, was the real and effective cause of the fire.

The evidence showed beyond question that from time to time there were large quantities of oil on the surface of the water. The *S.S. Panamanian* was an oil-burning vessel, and the submarines used large quantities of oil known as dieselene.

The evidence showed that the equipment of the *Panamanian* for preventing the escape of oil was exceptionally good, though doubtless some oil escaped, as in the case of all oil-burning ships, and particularly when they are old ships. The *Panamanian* was an old ship. All the witnesses who gave evidence on the matter agreed that wherever oil-burning ships used a harbour there was some oil on the water of the harbour but that, generally speaking, no one ever regarded it as a fire danger.

The dieselene used by the submarines was stored in tanks which were about a mile and a half from the north wharf. During the five weeks immediately preceding 17th January 1945 about 11,000 tons of dieselene were supplied at the north wharf to naval vessels. The submarines fuelled either direct from a two-way pipe which ran between the wharf and the tanks or from mother ships in the harbour which were supplied by the tanks. When the submarines came home from sea to the harbour much of their oil had been used, and their oil tanks, in order to preserve the trim of the vessels, had been filled with water. The normal operation of fuelling tanks was to force oil into them, which forced the water out. A certain amount of oil inevitably escaped with the water. On occasions the oil tanks were cleaned in the harbour by being blown out, and the water with some residue of oil escaped into the harbour.

The commercial ships in the harbour used a fuel oil described in the evidence as furnace oil. This oil was heavier and darker than dieselene oil. The dieselene was a relatively light and thin oil. When a small percentage of furnace oil is mixed with dieselene the mixture becomes dark and is not visually distinguishable from furnace oil, as was shown by certain exhibits.

Expert evidence was given as to the conditions under which oil lying on water could catch fire. When oil is deposited on or mixed with water it remains on or rises to the surface. It spreads at a rate depending upon the viscosity of the oil and the cleanliness of the water. It tends to stick to particles of matter on the surface of the water and accordingly, if water, as often is the case in any harbour, is not clean, the oil does not spread as quickly as in the case of clean water. Dieselene spreads to a very thin film upon clear water very quickly—in a few seconds. Furnace oil, which is heavier and more viscous, spreads more slowly, but also within a few minutes becomes a film. If it is impeded in its spread by matter of any kind in the water, including other oil, it may remain for a time in the form of a blob or lens. The thickness of an oil film or deposit obviously depends upon the quantity of oil and upon whether or not it is in a confined space and upon the degree of movement in the water. Generally oil in a harbour spreads out to a thin slick which may be objectionable as constituting pollution of water, but is not considered to be a fire danger. Normally a slick of oil on water cannot be ignited, but if the deposit of oil is sufficiently thick it can burn as an oil fire. There is very little difference between dieselene and furnace oils in respect of inflammability. In each case the thinner the film the less is its capacity for ignition.

Scientific evidence given on behalf of the plaintiff and the Trust showed that a film of furnace oil was more easy to ignite than dieselene. Both are regarded as " safe oils ". Any of the oils could be ignited by the direct application of flame except in the case of a very thin oil film—one-twentieth of an inch or less. The evidence also showed, however, that a film of either oil an eighth of an inch in thickness would burn if a wick were used, or if circumstances occurred which amounted to the provision of a wick. The strength of any fire constituted by the burning of an oil film would depend upon the thickness of the film. If the film assumed the form of what the scientific witnesses called a lens, that is, a thick deposit, the fire would be stronger. The evidence for both plaintiff and the two defendants was to the effect that the oil on the water could not have become ignited unless the burning hessian acted as a wick.

On 1st November 1943 the *Edendale*, a small vessel lying at berth No. 10 on the west of the berth subsequently occupied by the *Panamanian*, caught fire. It was believed at the time that the extent of the *Edendale* fire, however it started, was due to the

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

presence of oil upon the surface of the water in the vicinity of the ship.

After the *Edendale* fire the Trust concerned itself very diligently with the problem presented by the presence of oil. It had employed every method its officers could devise; it had made diligent inquiries from other authorities faced with a similar problem; but every expedient had failed. There was no evidence that any device could have been adopted which the Trust neglected. The evidence was rather to the effect that world-wide efforts to find an effective means of coping with oil on harbour waters have proved futile.

As against the Trust, the plaintiff sought to establish liability on the grounds that the Trust impliedly warranted that the berth at which the plaintiff's ship was lying at the time of the fire was safe, whereas in fact such berth was not safe, because the Trust had allowed large quantities of oil to accumulate there; that the Trust knew or ought to have known that the accumulation of oil at the berth to which the *Panamanian* had been directed or permitted to go by the Trust constituted a danger to the vessel, and failed to give warning to the plaintiff; that the Trust was negligent in that it allowed the oil to accumulate and did not take reasonable care to remove it, and its servant, the harbour master, directed the vessel to a berth which he knew or ought to have known was unsafe; and that the presence of the oil was a continuing nuisance for which the Trust was responsible.

As against the Commonwealth, the plaintiff sought to establish liability on the grounds that it was in possession and control of those parts of the inner harbour which were the subject of possession orders and that in such parts it permitted submarines to moor, and that submarines there discharged large quantities of oil which escaped from that portion of the harbour so occupied by the Commonwealth and accumulated in that portion of the harbour occupied by the *Panamanian*; that it was negligent in permitting the escape of oil from the submarines and from that part of the harbour occupied by it; and that the escape of oil constituted a continuing nuisance for which the Commonwealth was responsible.

The Trust pleaded, *inter alia*, that it was part of the use and service of the Crown, and therefore entitled to the immunities of the Crown; denied the contract and, alternatively, alleged that any contract made with the plaintiff did not include the alleged warranty as to safety of the harbour by virtue of reg. 87 of the *Fremantle Harbour Trust Regulations* purporting to be made under s. 65 of the *Fremantle Harbour Trust Act* 1902.

The Commonwealth pleaded, *inter alia*, that it was not in occupation, possession or control of any of the parts of the harbour.

Section 65 of the *Fremantle Harbour Trust Act* 1902 provides that "The commissioners may make regulations under this Act for all or any of the following purposes", and the specified purposes are numbered from (1) to (53). No. (4) is: "Regulating all matters relating to the protection of life and property, and the safe navigation of the harbour". No. (7) is: "Regulating the mode and place of mooring and anchoring of ships, and their position and government in the harbour, and their unmooring and removal out of the harbour". Nos. (39) to (47) relate to limitation of liability of the Trust in respect of goods. They are very detailed and entitle the commissioners in those specific cases to provide for exemption from liability for damage to goods. No. (53) enables the commissioners to make regulations generally for duly administering and carrying out the powers vested in the commissioners by the Act.

Regulation 87 of the *Fremantle Harbour Trust Regulations* provides: "*Vessels at Owners' Risk.* The Trust shall not accept any responsibility for the safety or otherwise of vessels lying within the Port, and all such vessels, whether at an anchorage or moored alongside any wharf, or at any mooring buoy, are at all times at the sole risk of the master or owners thereof. No instruction or direction given by the Harbour Master or other officer of the Trust to the master of any vessel, and no act performed by the Harbour Master or other officer of the Trust in respect of any vessel; shall place any responsibility for the security or safety of any such vessel upon the Trust".

The trial judge (*Dwyer* C.J.) dismissed the action against both defendants (*Eastern Asia Navigation Co. Ltd.* v. *Fremantle Harbour Trust Commissioners and the Commonwealth of Australia* (1)). *Dwyer* C.J. held that the Trust was not entitled to the immunity of the Crown and was in the position of an independent corporation and could sue and be sued in its own name; that reg. 87 of the *Fremantle Harbour Trust Regulations* in that it purports to relieve the commissioners of all liability in tort, is ultra vires the *Fremantle Harbour Trust Act*; that oil was not brought on to the Trust's land nor by its permission, but was brought on to the land by third persons acting under statutory powers, and the rule in *Rylands* v. *Fletcher* (2) was not applicable to either defendant; that a contractual relationship had been established between the plaintiff and the Trust, and that reg. 87 was a term of such contract protecting

(1) (1949) 51 W.A.L.R. 94.

(2) (1868) L.R. 3 H.L. 330.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

the Trust; that the Commonwealth was not in occupation of the territory the subject of its various possession orders; that the plaintiff had no such right in possession as to entitle it to sue in nuisance; that on the facts the plaintiff had not established that the presence of dieselene on the harbour waters was the cause of the fire spreading to and damaging the plaintiff's ship; and that on the facts, there was no practical method of removing oil from harbour waters and the Trust had taken all reasonable precautions to prevent the outbreak of fire and it had not been negligent.

From this decision the plaintiff appealed to the High Court of Australia.

*T. S. Louch* K.C. (with him *N. de B. Cullen*) for the appellant. The Harbour Trust Commissioners are charged by statute to maintain its harbour and to keep its wharves in good repair. Apart from statute the commissioners are under a duty, so long as they keep the harbour open for public use, to take reasonable care that those who care to use it might do so without danger to life or property. The extent of this duty has been illustrated in many cases of which the following appear to be the most important:—*Aiken* v. *Kingborough Corporation* (1); *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (2); *The Queen* v. *Williams* (3); *The Moorcock* (4); *The Bearn* (5); *Liebigs Extract of Meat Co. Ltd.* v. *Mersey Docks & Harbour Board* (6); *Lindenhall (Owners)* v. *Port of London Authority* (7); *Owners of the S.S. Towerfield* v. *Workington Harbour and Dock Board* (8).

If for any reason the harbour is not safe the commissioners are under a duty to warn users of the danger. The plaintiff is entitled to recover either as upon an implied contract or in tort. If there is an implied contract then such contract is subject, *inter alia*, to valid regulations but not to invalid regulations. The court will imply all terms which are necessary to give business efficacy to the contract. The trial judge held the regulation (reg. 87 of the *Fremantle Harbour Trust Regulations*) to be ultra vires and invalid. That decision was clearly right (*Henwood* v. *Municipal Tramways Trust (S.A.)* (9) and *Weir* v. *Victorian Railways Commissioners* (10) and *London Association of Shipowners and Brokers* v. *London & India Docks Joint Committee* (11)). There

(1) (1939) 62 C.L.R. 179, at p. 204.
(2) (1866) L.R. 1 H.L. 93.
(3) (1884) 9 App. Cas. 418.
(4) (1889) 14 P.D. 64.
(5) (1906) P. 48.
(6) (1918) 2 K.B. 381.
(7) (1944) 78 Lloyds List Reports 215.
(8) (1949) P. 10.
(9) (1938) 60 C.L.R. 438.
(10) (1919) V.L.R. 454.
(11) (1892) 3 Ch. 242.

is no evidence of any special contract between the plaintiff and the commissioners. The trial judge considered that the invalid regulation had been incorporated as a term of a contract under which the ship entered the port. The case was dealt with as one to which the principles said to have been established in the "ticket cases" could be applied. The court must be satisfied that the document relied upon was intended to be a "contractual document" (*Richardson, Spence & Co. & The "Lord Gough" Steamship Co. Ltd.* v. *Rowntree* (1); *Cheshire and Fifoot, Law of Contracts*, 1st ed. (1945), p. 87). The express contract, if one were made, was made prior to the ship's arrival and the regulation, a copy of which was handed to the master on arrival, could not be a term of such contract: *Olley* v. *Marlborough Court, Ltd.* (2). The master would have no authority to enter into a contract incorporating the provisions of the invalid regulation (*Scrutton* on *Charter Parties*, 15th ed. (1948), p. 74).

The trial judge was not satisfied that the presence of dieselene on the surface of the water was a contributing factor to the fire. Such a finding was not open to the trial judge so far as the Harbour Trust Commissioners are concerned, the relevant facts having been admitted in their defence. The question is one of the proper inference to be drawn from admitted facts and in these circumstances an appellate court can and should substitute its own conclusions for those of the trial judge: *Montgomerie & Co. Ltd.* v. *Wallace-James* (3); *Dominion Trust Company* v. *New York Life Insurance Co.* (4).

The *Edendale* fire is of importance because it fixes the commissioners with knowledge that the presence of oil on the water constituted a fire danger. This knowledge places the commissioners under a duty to warn the plaintiff. The commissioners were under a statutory duty to maintain the harbour and the defence of *volenti non fit inuria* is not available when the action is based on a breach of a statutory duty: *Baddeley* v. *Earl Granville* (5). On the facts it had not been established that the plaintiff either had knowledge of or accepted the risk. An agreement to incur a known risk must be established: *Letang* v. *Ottawa Electric Railway Co.* (6); *Osborne* v. *London & North Western Railway Co.* (7).

The act of Durnin in throwing overboard the bag was not such a voluntary act of conscious volition as to relieve the commissioners

(1) (1894) A.C. 217.
(2) (1949) 1 K.B. 532.
(3) (1904) A.C. 73, at p. 75.
(4) (1919) A.C. 254, at p. 257.
(5) (1887) 19 Q.B.D. 423.
(6) (1926) A.C. 725.
(7) (1888) 21 Q.B.D. 220.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

from liability: *Burrows* v. *Marsh Gas Co.* (1); *Philco Radio & Television Corporation of Great Britain, Ltd.* v. *J. Spurling, Ltd.* (2).

There was no contractual relationship established between the plaintiff and the Commonwealth. The plaintiff's action against the Commonwealth is based in tort and arises from the following facts:—(1) that the Commonwealth took exclusive possession and control of portions of the harbour; (2) that while in possession of such areas it permitted depot ships to berth there and to store large quantities of dieselene there, and to fuel submarines therefrom; (3) that the Commonwealth knew that whenever a submarine fuelled, some quantity of oil was spilt—the actual quantity depending on the alertness of the naval personnel carrying out the operation; (4) that it knew that dieselene was spilt and found its way into other parts of the harbour, and accumulated on the surface of the water; (5) that it did not take any efficient steps to prevent the discharge of dieselene into the harbour or any steps whatever to prevent it from spreading to other parts of the harbour; (6) that the Commonwealth knew of the *Edendale* fire and knew that oil spilt on the water constituted a danger to ships using the harbour.

The Commonwealth, by its possession orders (made under the *National Security* (*General*) *Regulation* 54) acquired an exclusive right to possess the land against the whole world, including the persons rightfully entitled to the possession of the land at common law (*Minister of State for the Army* v. *Dalziell* (3)). The definition of "land" in the *National Security* (*General*) *Regulations* includes "land covered with water". The plaintiff's ship occupied a berth adjoining a berth in possession of the Commonwealth. The plaintiff and the Commonwealth were neighbours and the Commonwealth for this reason was under a duty of care towards the plaintiff: *M'Alister* (*or Donoghue*) v. *Stevenson* (4). The Commonwealth was negligent in that it did not take sufficient steps to prevent the spillages of dieselene. Even if negligence cannot be established the Commonwealth is liable on the principle of *Rylands* v. *Fletcher* (5); *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (6); *Read* v. *J. Lyons & Co., Ltd.* (7). The fuelling of submarines in the circumstances was an unnatural user of the land. The Commonwealth can shelter behind its statutory powers only if it can show that the spillage of the oil was an inevitable consequence of the exercise of such powers: *Manchester Corporation* v. *Farnworth* (8).

(1) (1870) L.R. 5 Ex. 67.
(2) (1949) 2 K.B. 33.
(3) (1943) 68 C.L.R. 261.
(4) (1932) A.C. 562, at p. 580.
(5) (1868) L.R. 3 H.L. 330.
(6) (1921) 2 A.C. 465.
(7) (1947) A.C. 156.
(8) (1930) A.C. 171, at p. 183.

The plaintiff's action against the Commonwealth can also be based in nuisance—both private and public. The plaintiff as a shipowner occupying a berth has sufficient title to maintain an action for private nuisance (*Pollock* on *Torts* (1923), 12th ed., p. 406). The Commonwealth is liable for damage resulting from the nuisance because it "continued" the nuisance: *White* v. *Jameson* (1); *Sedleigh-Denfield* v. *O'Callaghan* (2).

So far as public nuisance is concerned the harbour is to be dealt with as a highway: *Denaby & Cadeby Main Collieries, Ltd.* v. *Anson* (3). The orders made by the Commonwealth did not take away the right of public navigation in the harbour. *Davidson & Co.* v. *M'Robb or Officer* (4). Upon the plaintiff suffering damage it had a private right of action based on public nuisance. The nuisance in this case was the escape of dieselene (*Job Edwards, Ltd.* v. *Company of Proprietors of Birmingham Navigations* (5); *Company of Proprietors of Margate Pier & Harbour* v. *Margate Town Council* (6)).

*O. J. Negus* for the Harbour Trust Commissioners. There was no contractual relationship established between the plaintiff and the commissioners and in the absence of contract there can be no warranty. The ship entered the harbour in exercise of a public right: *Melbourne Harbour Trust Commissioners* v. *Colonial Sugar Refinery Co. Ltd.* (7). No consideration passed between the commissioners and the plaintiff. The payment of dues was made not by the plaintiff but by the charterers and the obligation to pay was based in statute and not in contract. It was in the nature of a tax and the payment was made to the Crown. The commissioners were agents for collection. The point is considered in *British Petroleum Co. Ltd.* v. *Attorney-General for Ceylon* (8). If there were a contract no warranty of absolute safety can be implied. The obligation is only to take reasonable care: *Mersey Docks & Harbour Board Trustees* v. *Gibbs* (9). The plaintiff must establish negligence: *Hall* v. *Brooklands Auto Racing Club* (10). Only such a term as is necessary to give business efficacy to a contract should be implied: *Scanlan's New Neon* v. *Tooheys Ltd.* (11); *The Moorcock* (12); *Hamlyn & Co.* v. *Wood & Co.* (13). Any implied warranty is ousted by reg. 87, which, if there were

(1) (1874) L.R. 18 Eq. 303.
(2) (1940) A.C. 880.
(3) (1911) 1 K.B. 171.
(4) (1918) A.C. 304.
(5) (1924) 1 K.B. 341.
(6) (1869) 20 L.T. 564.
(7) (1925) 36 C.L.R. 230, at p. 273.
(8) (1926) A.C. 147.
(9) (1866) L.R. 1 H.L. 93.
(10) (1933) 1 K.B. 205.
(11) (1943) 67 C.L.R. 169.
(12) (1889) 14 P.D. 64.
(13) (1891) 2 Q.B. 488.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

a contract, was incorporated as an express term. It matters not that the regulation was invalid as such: *Weir* v. *Victorian Railways Commissioners* (1); *Gregory* v. *Commonwealth Commissioner of Railways* (2); *London Association of Ship Owners & Brokers* v. *London & India Docks Joint Committee* (3). The warranty at its highest could only be a warranty to take reasonable care. The standard of care which is reasonable is a standard judged according to the conditions then existing. There is no obligation to warn of the possibility of a danger being created by the intervention of a third party. The knowledge gained from the *Edendale* fire was not of general application but was limited to the berth where the *Edendale* then was and to the danger to a ship of the *Edendale's* size. The nature and cause of the *Edendale* fire was never established. The plaintiff committed various breaches of the Harbour Trust Regulations and may have been a trespasser.

At best it was a licensee: *Ellis* v. *Fulham Borough Council* (4); *Coates* v. *Rawtenstall Corporation* (5); *Aiken* v. *The Warden, Councillors and Electors of the Municipality of Kingborough* (6). The commissioners' duty in tort was to take reasonable care. The commissioners are not under any express statutory duty to act as insurers of the plaintiff's ship. There is no implied statutory duty: *Mersey Docks & Harbour Board Trustees* v. *Gibbs* (7). The extent of the duty depends upon the true interpretation of the statute: *Sharpness New Docks & Gloucester & Navigation Co.* v. *Attorney-General* (8); *Attorney-General for Ireland* v. *Lagan Navigation Co.* (9). Such duties as are imposed on the commissioners by their Act are owed to the Crown and not to any individual shipowner: *Atkinson* v. *Newcastle Waterworks Co.* (10); *Cowley* v. *Newmarket Local Board* (11); *Butler* v. *Fyfe Coal Co. Ltd.* (12); *Dawson & Co.* v. *Bingley Urban District Council* (13). The commissioners cannot be held liable for non-feasance: *Sanitary Commissioners of Gibraltar* v. *Orfila* (14); *Municipality of Pictou* v. *Geldert* (15). The statutory duty can be put no higher than a duty to take reasonable care. The test of negligence is the foresight of damage possessed by the reasonable man: *Weld-Blundell* v. *Stephens* (16); *Hay or Bourhill* v. *Young* (17). The commissioners

(1) (1919) V.L.R. 454.
(2) (1942) 66 C.L.R. 50.
(3) (1892) 3 Ch. 242.
(4) (1938) 1 K.B. 212.
(5) (1937) 157 L.T. 415.
(6) (1939) 62 C.L.R. 179.
(7) (1866) L.R. 1 H.L. 93.
(8) (1915) A.C. 654.
(9) (1924) A.C. 877.
(10) (1877) 2 Ex. D. 441.
(11) (1892) A.C. 345.
(12) (1912) A.C. 149.
(13) (1911) 2 K.B. 149.
(14) (1890) 15 App. Cas. 400.
(15) (1893) A.C. 524.
(16) (1920) A.C. 956.
(17) (1943) A.C. 92.

are not liable in nuisance. The plaintiff had no title sufficient to sustain an action based in nuisance. The commissioners were in no way responsible for the presence of oil and the absence of a practical way of preventing it from accumulating would absolve the commissioners from liability: *Smith* v. *Great Western Railway Company* (1).

*H. G. Alderman* K.C. (with him *N. B. Goode*) for the Commonwealth. The Commonwealth was acting under its prerogative power to make war and to assist an ally. The only relevant specific section of an Act is section 63 (1) (f) of the Defence Act. Conduct of the defence of a country gives a very wide discretion: *Hawley* v. *Steele* (2). The Commonwealth can be under no liability based in negligence because:—(a) U.S.N. was not a Commonwealth's agent. (b) The Commonwealth had nothing at all to do with the supply of the oil, did not own it, handle it or advise or interfere with its supply or use in any way. The case against the Commonwealth must rest in private or public nuisance. To establish liability in nuisance as against a Public Authority acting within its powers negligence must be proved: *Longhurst* v. *Metropolitan Water Board* (3). To establish liability in public nuisance there must be an interference with a right which is shared by all His Majesty's subjects. The public had no right to use the wharves or to navigate in the harbour. The interference must be substantial: *St. Helen's Smelting Co.* v. *Tipping* (4); *R.* v. *Bartholomew* (5). The fact that an accident happened is no proof of substantial interference: *Noble* v. *Harrison* (6). There is no finding of any substantial interference. The plaintiff had no possessory right which would enable him to sue in private nuisance: *Malone* v. *Lasky* (7); *Metropolitan Properties, Ltd.* v. *Jones* (8); *Hill* v. *O'Brien* (9). The Commonwealth was not in possession or occupation of the land. Legal title is not equivalent to occupation: *Hall* v. *Beckenham Corporation* (10). *De facto* control is necessary. The ground of responsibility in nuisance is possession and control of the land from which the nuisance proceeds: *Bank View Mills Ltd.* v. *Nelson Corporation* (11). The Commonwealth did not continue or adopt any acts or omissions on the part of allied navies. Failure to terminate a licence does not amount to the continuing

(1) (1926) 42 T.L.R. 391.
(2) (1877) 6 Ch. D. 521, at p. 528.
(3) (1947) 177 L.T. 483.
(4) (1865) 11 H.L.C. 642 [11 E.R. 1483].
(5) (1908) 1 K.B. 554.
(6) (1926) 2 K.B. 332.
(7) (1907) 2 K.B. 141.
(8) (1939) 2 All E.R. 202.
(9) (1939) 61 C.L.R. 96.
(10) (1949) 1 K.B. 716.
(11) (1943) K.B. 337.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

March 19.

of a nuisance committed by a licensee: *Bowen* v. *Anderson* (1); *Malzy* v. *Eichholz* (2). The use to which the harbour was put was a natural and ordinary user of the land at the relevant time: *Torette House* v. *Berkman* (3).

*Cur. adv. vult.*

The following written judgments were delivered.

LATHAM C.J.: On 17th January 1945 an extensive fire occurred in Fremantle harbour. The *S.S. Panamanian*, an oil-burning steel vessel, over 600 feet in length, 15,000 tons register, was lying at a berth at the north wharf in the inner harbour, to which she had been directed by the harbour master, an officer of the Fremantle Harbour Trust. Neighbouring berths were used by submarines of the Royal Navy and of allied navies under arrangements made by the Commonwealth. The submarines used large quantities of the oil fuel known as dieselene. Other ships, including the *Panamanian*, used oil fuel described as furnace oil. The *Panamanian* was loading flour for Calcutta. The evidence showed beyond question that from time to time there were large quantities of oil on the surface of the water. A piece of hessian (a bag which had been cut open) about six feet by eight feet was seen to be smouldering on the deck of the ship. It had been used to cover a winch which was being used on the ship. Someone stamped on the hessian but it still smouldered. One J. E. Durnin threw it over the starboard side of the ship between the ship and the wharf, intending to throw it into the water. (Durnin was not employed by either of the defendants, the Fremantle Harbour Trust or the Commonwealth, but was an employee of the stevedore who was loading the ship.) The hessian caught on timber of the wharf about eighteen inches above the water. It flared up and within at most two or three minutes a sheet of flame shot up and the ship caught fire and was badly damaged. About 1,000 feet of wharf was burned. The plaintiffs, claiming to be the owners of the ship, sued the Fremantle Harbour Trust and the Commonwealth of Australia for £300,000 damages. The learned trial judge, *Dwyer* C.J., dismissed the action against both defendants. The plaintiff appeals to this Court.

The plaintiff alleged in its statement of claim that the Harbour Trust was in control of the harbour, that the plaintiff paid moneys to the Trust for accommodation of the ship, and that the arrange-

(1) (1894) 1 Q.B.D. 164.
(2) (1916) 2 K.B. 308, at pp. 315-317, 319, 320.
(3) (1940) 62 C.L.R. 637.

ments made for berthing the vessel involved a warranty that the harbour was reasonably safe for use, and the plaintiff claimed damages for breach of warranty. The plaintiff also claimed that the Harbour Trust was negligent in allowing large quantities of inflammable oil to accumulate on the surface of the water, in failing to take steps to remove it, and in giving no warning to the plaintiff of the known danger. Accordingly there were alternative claims for damages for negligence and for nuisance. As against the Commonwealth the claim was based on the fact that the Commonwealth had, under National Security Regulations, taken what was said to be possession, occupation and control of berths on the north side of the harbour close to berth No. 8, which was occupied by the *Panamanian*, and had allowed those berths to be used by large numbers of submarines and their mother ships. It was stated in evidence that at the relevant time about 250 submarines were using Fremantle harbour as a base. It was alleged by the plaintiff that the oil, or the major part of the oil, which was on the surface of the water was attributable to the submarines and other naval vessels, that the Commonwealth was in control of the area of the harbour which they used, and that the Commonwealth was liable for the damage caused to the *Panamanian* because it had allowed large quantities of a dangerous material, namely combustible oil, to be accumulated in that area and had failed to prevent its escape. This claim was based upon the principle of *Rylands* v. *Fletcher* (1). It was further alleged that the Commonwealth was guilty of negligence in failing to prevent the escape to and accumulation of oil in the other parts of the harbour.

The defendant Harbour Trust by its defence alleged that the plaintiff was not a legal person entitled to sue and denied that it was the owner of the *Panamanian*. It admitted its own incorporation and claimed that the defendant Trust was part of the use and service of the Crown and servants thereof and that therefore the action did not lie. It alleged that the Commonwealth lawfully took exclusive possession and control of certain portions of the harbour and allowed ships to be berthed there and alleged that the Trust had no control over those portions of the harbour. The Trust denied any contract with the plaintiff and, alternatively, alleged that any contract that was made with the plaintiff did not include the alleged warranty as to safety of the harbour. The Trust relied upon reg. 87 of the regulations made under the *Fremantle Harbour Trust Act* 1902 (W.A.), which provided that the defendant did not accept any responsibility for the safety of

(1) (1868) L.R. 3 H.L. 330.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

vessels lying within the port. The Trust admitted that the ship entered the harbour with the consent of the Trust and that the berthing master directed the ship to moor at No. 8 berth. It denied that moneys were paid to the Trust by the plaintiff or on behalf of the plaintiff. The Trust admitted that quantities of oil or inflammable liquid accumulated on the waters of the harbour in the vicinity of No. 8 berth on the north wharf and admitted also that the Trust knew of the said accumulation, but denied that the oil or inflammable liquid constituted a danger. The Trust admitted that on 17th January 1945 the oil and inflammable liquid became ignited and that the fire spread to the *Panamanian*. (The other defendant, the Commonwealth, denied this allegation.) The Trust also admitted that large quantities of oil and inflammable liquid were discharged from or escaped or flowed from the submarines and other vessels of war in the parts of the harbour occupied by the Commonwealth and that it accumulated at other parts of the harbour, including berth No. 8, north wharf. (These allegations were denied by the Commonwealth.) The Trust denied the allegation in par. 12 of the statement of claim that the harbour in the vicinity of the north wharf was in an unsafe and dangerous condition and that the accumulation of oil constituted a continuing nuisance. The Trust alleged that if on 17th January there were accumulations of oil on the surface of the harbour the Trust did not cause and had no power to and could not by any reasonable precautions prevent or avoid the accumulations, that the Trust neither caused nor permitted the oil to be or to come on the surface of the harbour or to accumulate and, accordingly, was not liable for causing or permitting any nuisance in relation thereto. Particulars under this allegation stated that the oil was discharged into the harbour from submarines or other vessels of war moored in the part of the harbour under the control of the Commonwealth. The Trust pleaded that if the Trust caused or permitted any nuisance as alleged and if the plaintiff were the owner of the steamship, nevertheless the plaintiff was not entitled by reason of such ownership alone to sue in respect of the nuisance. The Trust alleged that the plaintiff, through the master of the vessel or its agents, knew of the accumulations of oil and voluntarily and willingly agreed to take the risk of any damage to the vessel arising from the ignition of any such oil. The Trust also alleged that if the Trust was guilty of negligence the damage to the ship was not caused by that negligence but by the new and intervening act of a third party, namely, of the person who threw the burning hessian over the side of the ship. The Trust further alleged that

the plaintiff failed to take precautions against accidents by fire which were required by the regulations and that the oil on the waters in the vicinity of No. 8 berth, north wharf, was discharged either wholly or in part from the *Panamanian* itself. The Trust also relied on contributory negligence on the part of the plaintiff in that the plaintiff knew of the danger from the oil and that the person who threw the hessian overboard was a servant of the plaintiff. (The latter contention was expressly withdrawn by both defendants upon the hearing of the appeal.) It was further alleged that the master of the ship failed to warn persons of the danger of throwing burning objects into the harbour. There was no evidence that the master gave such a warning, but there was no evidence that he knew or ought to have known that it would be dangerous to throw such an object into the water. There was also an allegation that the ship was not equipped with proper apparatus in proper order for fighting a fire. The finding of the learned trial judge that the evidence did not support this allegation was not effectively challenged. There was fire-fighting apparatus which was immediately brought into use and it was not shown that it was deficient in any way.

By amendments of the defence the Harbour Trust alleged that the danger of oil or inflammable liquid becoming ignited by the application of fire was not an unusual danger, that, if it was, the Trust was unaware that there was any such danger and, further, that the master of the vessel was given knowledge and warning of the danger.

The defendant the Commonwealth of Australia alleged that the plaintiff was not a competent plaintiff in respect of the alleged nuisance. It alleged that if the harbour was unsafe the master of the vessel knew that this was the case and that there was a risk of damage to the vessel by the ignition of oil and nevertheless allowed the ship to remain moored at No. 8 berth and so voluntarily accepted the risk of damage. The Commonwealth also relied upon the defence of act of a third party and upon contributory negligence. The Commonwealth denied that it was in possession, occupation or control of any parts of the harbour or that large quantities of oil escaped and accumulated or that it was negligent in allowing or failing to prevent the escape thereof and preventing the accumulation thereof. It denied that the oil constituted a continuing nuisance and denied that on 17th January 1945 the oil became ignited.

*Dwyer* C.J. held that the plaintiff was a company entitled to sue and that it owned the *Panamanian*. These issues were not

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

very actively pressed on behalf of the defendants upon the appeal, though they were not formally abandoned. I agree with the decision of *Dwyer* C.J. upon these points. The learned trial judge also held that the Trust was not entitled to the immunity of the Crown, following and applying the decision of the Full Court in *McGough* v. *Fremantle Harbour Trust Commissioners* (1). The Trust is established as an independent corporation which exercises its powers and performs its functions without being subject to ministerial control. The Trust can be sued—*Fremantle Harbour Trust Act* 1902, s. 40. Any balance of moneys levied and collected by the Trust is paid into the Treasury (s. 58) and regulations made by the Trust must be approved by the Governor (s. 67). But these provisions, as was held in *McGough's Case* (1) do not put the Trust in the position of a Government department. The same conclusion was reached in the case of a substantially identical statute in *Sydney Harbour Trust Commissioners* v. *Ryan* (2).

I propose to deal in the first place with the defence of the Trust based upon reg. 87 of the *Harbour Trust Regulations*. Regulation 87 is in the following terms:—"*Vessels at Owners' Risk.*—The Trust shall not accept any responsibility for the safety or otherwise of vessels lying within the Port, and all such vessels, whether at an anchorage or moored alongside any wharf, or at any mooring buoy, are at all times at the sole risk of the master or owners thereof. No instruction or direction given by the Harbour Master or other officer of the Trust to the master of any vessel, and no act performed by the Harbour Master or other officer of the Trust in respect of any vessel, shall place any responsibility for the security or safety of any such vessel upon the Trust."

If this regulation applies it is clear that the action against the Trust must fail. The plaintiff contends that the regulation is invalid because it is not authorized by the *Fremantle Harbour Trust Act* 1902 as amended.

Section 65 of the Act provides that "The commissioners may make regulations under this Act for all or any of the following purposes", and the specified purposes are numbered from (1) to (53). No. (1) is "Regulating all matters relating to the protection of life and property, and the safe navigation of the harbour." No. (7) is "Regulating the mode and place of mooring and anchoring of ships, and their position and government in the harbour, and their unmooring and removal out of the harbour." Nos. (39) to (47) relate to limitation of liability of the commissioners in respect of goods. They are very detailed and entitle the commis-

(1) (1904) 7 W.A.L.R. 136.

(2) (1911) 13 C.L.R. 358.

sioners in those specific cases to provide for exemption from liability for damage to goods. No. (53) enables the commissioners to make regulations generally for duly administering and carrying out the powers vested in the commissioners by the Act. Section 67 provides that every regulation shall, upon approval by the Governor and publication in the *Government Gazette*, have the force of law.

Apart from a statute or regulation validly limiting liability, a body such as the Harbour Trust which offers accommodation in a harbour to ships is bound to take reasonable care that ships entering and using the harbour may do so in safety: *Parnaby* v. *Lancaster Canal Co.* (1); *R.* v. *Williams* (2), and other cases cited in *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 646. The question which arises is whether the Trust is empowered by the statute to escape all liability by making a regulation such as reg. 87. That regulation abrogates an important principle of law which otherwise is applicable to the Trust. There is no provision in the long list of purposes for which the Trust may make regulations which can be relied upon as expressly authorizing reg. 87. The particular provisions contained in pars. (39) to (47) show that the legislature paid particular attention to the subject of limitation of liability by regulation. These paragraphs are confined to allowing limitation of liability in respect of goods in cases which are defined in very specific and detailed terms. I take as an example par. (42), under which regulations may be made—"Providing that the commissioners shall in no case be liable for the contents of packages of goods which are so packed or secured that the contents are not plainly visible, or the character thereof not ascertainable on receipt of the goods without the goods being unpacked or opened."

It is plain that a general regulation providing that the Trust should be under no liability in respect of goods in vessels or on wharves would not be authorized by the Act. In *London Association of Shipowners & Brokers* v. *London & India Docks Joint Committee* (3), a company which was the owner of certain docks and which was subject to a statute which conferred a power to make regulations and by-laws, issued a compulsory code of regulations for shipowners using the docks. The regulations, however, were not duly confirmed as by-laws and therefore did not take effect as by-laws. It was held that if the company were unrestricted by statute, it could as owner make any regulations it might think proper for the use of its property. It was pointed out, however,

(1) (1839) 11 A. & E. 223 [113 E.R. 400].
(2) (1884) 9 App. Cas. 418.
(3) (1892) 3 Ch. 242.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

that the powers were not unchecked by statute—"The Legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define, that is, limit the right conferred, and as implying a prohibition against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes and authorized to acquire land for such purposes cannot, I think, admit of any doubt."—per *Lindley* L.J. (1). In my opinion this principle is applicable in the present case, with the result that it should be held that the Trust had no power to make a regulation such as reg. 87 whereby it not only limited but completely abolished all liability in respect of ships. If the legislature had intended that the Trust should have power to make such regulations limiting or abolishing its liability as it might think proper, the express provisions with respect to limitation of liability contained in pars. (39) to (47) of s. 65 would have been quite unnecessary.

It was argued for the plaintiff, however, that, even if reg. 87 were invalid, the contract (if any) between the Trust and the plaintiff included a term that the plaintiff would obey all the regulations, including reg. 87. It is a sufficient answer to this contention that this defence was not pleaded. The Trust relied upon reg. 87 simply as a legal provision applying to the plaintiff and not as constituting a term in a contract. In the case last cited it was said that though alleged regulations might not be binding as regulations, they might become binding by agreement if they were assented to. But this issue was not raised by the pleadings, and in my opinion it would be wrong to allow the defendant to rely upon it upon appeal. But I add that the evidence does not show any agreement to be bound by the regulations. A copy of the regulations was handed to the master of the ship, but this was done after the arrangements for the accommodation of the ship had been made with the ship's agents. The contract had therefore already been made before the regulations were given to the master. But in any event there was no evidence of any agreement to be bound by the regulations. Before a party can be bound by a contract there must be an intention to be bound by what are alleged to be the terms of the contract. When regula-

(1) (1892) 3 Ch., at p. 251.

tions are presented as binding provisions of law a party who becomes aware of them should not be presumed, in the absence of very specific evidence to the contrary, to be agreeing to accept them as contractual provisions. If they are valid regulations, he will be bound by them because they are valid. If they are not valid he is not bound by them unless it is quite clearly shown that he agreed to them as terms of a contract which he made. This is not shown in this case. In my opinion the defence of the Harbour Trust based upon reg. 87 fails from all points of view.

In 1940 certain regulations under the *National Security Act* 1939 were applied to the port of Fremantle and *Harbour Trust Regulations* were modified to meet certain naval requirements. Japan entered the war in December 1941 and from March 1942 the inner harbour at Fremantle was used as a submarine base. At the outset no charge was made for occupation of berths, but later a charge was made under arrangements made by the Commonwealth with the American Government. The Commonwealth exercised powers under reg. 54 of the *National Security* (*General*) *Regulations* and took possession of certain berths, allowing them to be used by submarines belonging to the Royal Navy, the United States Navy and the Netherlands Navy. Under these arrangements berths Nos. 2, 3, 4, 5 and 6 on the north wharf (to the west of berth No. 8 occupied by the *Panamanian*) were in succession used for naval vessels and particularly for submarines and their mother ships. All these berths were so used in January 1945. In all cases the actual possession order was made some time after occupation by the naval vessels had begun. The learned trial judge, in my opinion rightly, regarded this circumstance as unimportant. The berths were in fact occupied by the submarines and other vessels under Commonwealth authority with the consent of the Harbour Trust before the orders under reg. 54 were made. But formal orders had been made in respect of all these berths except No. 6 before 17th January 1945.

The Trust contends that it is not liable for any damage caused by the burning of oil which had escaped from naval vessels because the part of the harbour occupied by those vessels was under the control of the Commonwealth and not under the control of the Trust. The Commonwealth, on the other hand, contends that the taking of possession by the Commonwealth of that part of the harbour under National Security Regulations was a purely formal act merely for the purpose of arranging a convenient method of payment by the United States authorities for the use of the harbour by their submarines and that if the Harbour Trust was

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

not still in control the naval authorities of the United States, the Netherlands Navy and the Royal Navy were in control of the relevant part of the harbour.

When the possession orders were made the consequence under reg. 54 (2) of the *National Security (General) Regulations* was that the land taken could be used by or under the authority of the Minister of State for the Army for such purposes and in such manner as he might think expedient in the interests of the public safety or the defence of the Commonwealth or for maintaining supplies and services essential to the life of the community. Regulation 54 (2) provided that the Minister might do or authorize persons using the land to do in relation to the land anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest. The possession orders related to berths described as quayage. The taking of the berths placed the Commonwealth in the position of occupier of the portions of the north wharf to which the orders related. The naval forces controlling the vessels which were permitted to use the wharves were in the position of licensees. The consequence of what was in fact done under the regulations cannot be evaded or destroyed by describing it as merely formal. The taking of the berths gave to the Commonwealth the right to use or to allow others to use the berths in the only way in which as berths they could be used, namely, for the mooring and servicing and loading and unloading of vessels. When the Commonwealth acquired this right the Trust was unable to exercise any control over the part of the harbour occupied by the submarines and their attendant vessels. The Trust cannot be held to be responsible for the bringing of oil to that part of the harbour or for any spillage of oil therein. But oil, as will be seen, came from that part of the harbour and from time to time collected round and near the *Panamanian*. The plaintiff contends that, though the Trust did not bring the oil to the harbour and even though the Trust may not be responsible for any spillage, yet the Trust could and should have made the harbour safe by taking reasonable steps to get rid of the oil, or, at least, should have warned ship masters of the danger constituted by the presence of large quantities of floating oil. The plaintiff's case against the Harbour Trust, whether founded on breach of warranty, on negligence, or on nuisance, depends upon proving also that by reason of the matters aforesaid the ship was damaged in consequence of the oil catching fire and the fire spreading to the ship. As against the Trust, the plaintiff is not concerned with drawing any distinction between dieselene

from the submarines and furnace oil which escaped from other ships, unless, indeed, as argued for both the defendants, the oil near the *Panamanian* which caught fire was oil negligently discharged from the *Panamanian* herself.

The plaintiff's case against the Commonwealth depends upon proof that the oil which caught fire was substantially dieselene which came from the submarines and their mother ships, and that the Commonwealth either negligently allowed the oil to escape and spread over the harbour, or was liable as for a nuisance. There was a great deal of evidence—and none to the contrary effect—that the quantity of oil on the water in the harbour varied with the presence of submarines and with the number of submarines in the harbour.

The western berths on the north wharf were used by naval vessels. The harbour was also largely used for commercial purposes. Ships using the harbour were oil-burning and fuelled in the harbour. The dieselene used by the submarines was stored in tanks which were about a mile and a half from the north wharf. During the five weeks immediately preceding 17th January 1945 about 11,000 tons of dieselene were supplied at the north wharf to naval vessels. The submarines fuelled either direct from a two-way pipe which ran between the wharf and the tanks or from mother ships in the harbour which were supplied from the tanks. When the submarines came home from sea to the harbour much of their oil had been used, and their oil tanks, in order to preserve the trim of the vessels, had been filled with water. The normal operation of fuelling tanks was to force oil into them, which forced the water out. A certain amount of oil inevitably escaped with the water. On occasions the oil tanks were cleaned in the harbour by being blown out, and the water, with some residue of oil, escaped into the harbour. The commercial ships used a fuel oil described in the evidence as furnace oil. This oil was heavier and darker than dieselene. The dieselene was a relatively light and thin oil. When a small percentage of furnace oil is mixed with dieselene the mixture becomes dark and is not visually distinguishable from furnace oil, as was shown by Exhibits PAO and PAN. Thus evidence that the oil which was seen by many witnesses near and under the north wharf was dark in colour does not show that it was furnace oil, or even that it was principally furnace oil. The learned trial judge found that the oil round the *Panamanian* on the day of the fire was probably ninety per cent of dieselene and ten per cent of furnace oil, though no accurate estimate could be made. There is no reason for displacing this finding.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

The defendant did not satisfy the learned trial judge that the *Panamanian* herself was (as alleged by the defendants) responsible for discharging a large quantity of oil into the water immediately before the time of the fire and that this fact explained the fire. The evidence showed that the equipment of the *Panamanian* for preventing the escape of oil was exceptionally good, though doubtless some oil escaped, as in the case of all oil-burning ships, and particularly when they were old ships. The *Panamanian* was an old ship. All the witnesses who gave evidence on the matter agreed that wherever oil-burning ships used a harbour there was some oil on the water of the harbour, but that, generally speaking, no-one ever regarded it as a fire danger. There is no finding that the servants of the plaintiff were negligent in their control and management of the *Panamanian* in relation to the possible escape of oil, and the evidence would not, in my opinion, support any such finding.

Several expert witnesses gave evidence as to the conditions under which oil lying on water could catch fire.

When oil is deposited on or mixed with water it remains on or rises to the surface. It spreads at a rate depending upon the viscosity of the oil and the cleanliness of the water. It tends to stick to particles of matter on the surface of the water and, accordingly, if water, as is often the case in any harbour, is not clean, the oil does not spread as quickly as in the case of clean water. Dieselene spreads to a very thin film upon clear water very quickly—in a few seconds. Furnace oil, which is heavier and more viscous, spreads more slowly, but also within a few minutes becomes a film. If it is impeded in its spread by matter of any kind in the water, including other oil, it may remain for a time in the form of a blob or lens. The thickness of an oil film or deposit obviously depends upon the quantity of oil and upon whether or not it is in a confined space and upon the degree of movement in the water. Generally oil in a harbour spreads out to a thin slick which may be objectionable as constituting pollution of the water, but is not considered to be a fire danger. Normally a slick of oil on water cannot be ignited, but if the deposit of oil is sufficiently thick it can burn as an oil fire. There is very little difference between dieselene and furnace oils in respect of inflammability. In each case the thinner the film the less is its capacity for ignition.

Scientific evidence was given on behalf of the plaintiff and the defendant Harbour Trust. This evidence was directed to explaining the origin and the spreading of the fire or to excluding suggested explanations. R. P. Donnelly, a witness for the Harbour Trust,

whose evidence was accepted by the learned trial judge, conducted experiments with dieselene and furnace oil. His evidence and the evidence of other scientific witnesses, Professor Bayliss and Professor Ross, and of oil technologists, dealt with the possibility of igniting oil which was floating on the surface of water. The evidence specified the flash point and fire points of oil of different descriptions. When the temperature of oil is raised to a certain degree in a closed vessel and a flame is introduced a flash of flame occurs. This temperature fixes the closed flash point of the oil. The open flash point (in the open air) is higher. The fire point is reached when the flashes stabilize as a flame and the oil vapour burns at the oil surface. Thus when the temperature is raised to the fire point the oil will burn. Aviation spirit, motor spirit and benzol spirit can be ignited though the temperature of the oil is below freezing point; that is to say, they ignite if a flame is brought near enough to them to ignite the volatile elements which they give off. The flash point of lighting kerosene is between 100 and 125 degrees F. and of dieselene and furnace oil between 180 and 200 degrees F. The fire point of a sample of dieselene which was tested after the fire was 252 degrees and of furnace oil 275 degrees. If the oil has been exposed to the air the flash and fire points are higher—i.e., the oil was safer. The evidence showed that a film of furnace oil was more easy to ignite than dieselene. Both are regarded as "safe" oils. Any of the oils could be ignited by the direct application of flame except in the case of a very thin oil film—one-twentieth of an inch or less. The evidence also showed, however, that a film of either oil an eighth of an inch in thickness would burn if a wick were used or if circumstances occurred which amounted to the provision of a wick. A film of three-sixteenths of an inch thickness of dieselene into which a piece of hessian eighteen inches by nine inches was dropped, half-in and half-out, became ignited and burned as an oil fire a minute and a half after the hessian was lighted. Oil came into the wick by capillary action, the flame became larger and hotter and when the flame in the wick reached the oil surface the oil in contact with the wick burned and the fire spread. But a lighted cigarette or match dropped into such a film of dieselene or furnace oil would go out. The strength of any fire constituted by the burning of an oil film would depend upon the thickness of the film. If the film assumed the form of what the scientific witnesses called a lens, that is, a thick deposit, the fire would be stronger. The evidence for both plaintiff and defendants was to the effect

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

that the oil on the water could not have become ignited unless the burning hessian had acted as a wick.

The evidence showed that the American submarines began to use the harbour (under Commonwealth authority) in October 1942. Later Royal Navy submarines and Dutch submarines also used the north wharf. Berths Nos. 2 to 6 were taken by the Commonwealth for the use of the naval vessels and part of No. 7 was in fact used by naval vessels on the day of the fire. During the period preceding the fire there were from time to time large quantities of oil on the surface of the harbour. (On the day of the fire oil was traced by one witness from berth No. 8 to berths Nos. 4 and 5—a distance of more than 1,000 feet.) The oil drifted about the harbour quite irregularly, moving in accordance with the tides and the strength of the current from the Swan River, which ran into the eastern end of the harbour. It fouled ships and wharves and made the mussels uneatable. It tended to accumulate especially along the north wharf and under the wharf rather than in the middle of the harbour and at the south wharf where the river current was stronger. In particular, the oil accumulated at berths Nos. 9 and 10, which were east of No. 8, where the *Panamanian* was lying.

The wharf where the *Panamanian* lay and to the east thereof was constructed of timber. The western part of the wharf was made of concrete. The rise and fall of the daily tide was three to four feet. The timber of the wharf which was periodically in contact with the water became soaked with oil and was in an inflammable condition.

The dangerous state of the wharves and the possibility of fire occurring as a result of the accumulation of oil on the surface of the harbour were matters which were known to both the Harbour Trust and the Commonwealth before the fire took place. This proposition is established by the evidence as to a fire on the *S.S. Edendale*.

On 1st November 1943 the *Edendale*, a small vessel lying at No. 10 berth, to the west of the berth subsequently occupied by the *Panamanian*, caught fire. The deck of the *Edendale* was about level with the wharf. (A number of witnesses pointed out that the *Panamanian* is a large vessel and that her deck was some twenty feet above the wharf.) It was believed at the time by all concerned that the extent of the *Edendale* fire, however it started, was due to the presence of oil upon the surface of the water in the vicinity of the ship. There was a difference of opinion between those who had some knowledge of the facts as to whether the fire was due to a spark caused by oxywelding or oxycutting opera-

tions or whether it was due to the ignition of a paint pot. But, whatever may have been the origin of the fire, the oil floating upon the water caught fire and burned.

The *Edendale* fire naturally caused anxiety to the harbour authorities and the naval authorities. Mr. G. V. McCartney, the manager of the Harbour Trust, was very concerned about the matter, more in relation to the wharves than in relation to the ships, which he thought could look after themselves. He made inquiries in many directions in order to discover a method of dealing with the oil and diminishing fire danger—not only in Western Australia but in the eastern States. Many suggestions were made and tried—mechanical and chemical methods, spreading absorbent material upon the water &c.—but all of them failed. It was shown that the Harbour Trust did its best to diminish any danger from floating oil. There was no evidence to show that anything further could have been done.

After the *Edendale* fire the Harbour Trust officials concerned themselves very actively with the problem presented by the presence of oil. Representations were made to the naval authorities, and the harbour master, the fire and vigilance officer and other officers were directed to make reports daily, or as considered necessary, on the matter of the presence of oil in the harbour (21st December 1943). The manager kept his officers up to the mark in relation to this matter and on many occasions insisted upon obtaining reports. The reports showed that there were from time to time quantities of oil in the harbour, but that sometimes the harbour, or most of the harbour, was quite clear (21st January 1944). It was reported on 28th January 1944 that the amount of oil was not considered to be dangerous. On 9th January 1944 the harbour master reported as follows :—" The presence of oil in the harbour remains the same, namely, there is always a certain amount in the vicinity of the U.S. mother ships, which at times finds its way to various parts of the harbour, but is not in sufficient quantities to be a menace anywhere and I have not had to resort to drastic measures to clear it up. The Fire and Vigilance Officer still maintains a strict watch on it and reports daily."

On 15th November 1944 it was reported by the harbour master that oil was very bad at the eastern end of the north wharf at Nos. 9 and 10 berths, but that with the change of tide all the oil had disappeared. On 27th December 1944 Captain Nicholls, of the United States Navy, wrote to Mr. McCartney, the manager of the Harbour Trust, reporting findings of fact and recommendations of a board convened for the purpose of investigating the pollution of

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

waters of the harbour. The findings of fact blamed *U.S.S. ARD*-10 (a floating dock) and the south slipway as a source of pollution of the harbour with diesel oil because of the dumping of fuel ballast tanks of submarines for the purpose of inspecting tanks, flood valves and flood valve gaskets, and it was reported that the presence of oil near the floating dock was a fire hazard. It was admitted that oil had on some occasions entered the harbour during the "topping off" of the fuel tanks and submarines. Remedial measures were recommended, including the exercise of extreme care in topping off tanks and draining oil from the supply hose and the taking of precautions by all United States naval vessels to prevent pumping oily bilge water over the side. On 8th January 1945 it was reported to the harbour master that there was a decided improvement in the amount of oil in the inner harbour and that the oil moving with the tide never remained in one place for any length of time, that the bulk of it either went up the river or outside the harbour. There are, however, other references in the reports to oil being trapped near the north wharves. On 12th January 1945 the Royal Navy submarines were warned by Rear-Admiral Pope, R.A.N., Naval Officer in Charge, Fremantle, about the necessity for reducing discharge of oil to a minimum when fuelling and pumping bilges. On 10th January Mr. McCartney, referring to these reports, inquired whether the average quantity of oil still to be seen represented a hazard in any way and he received the following reply, dated 15th January 1945, from the harbour master:—"I do not consider the average quantity of oil still to be seen represents a hazard. About five times during the month the accumulation of oil was bad and then it certainly was a menace."

These reports showed beyond question that the harbour authorities and the naval authorities considered that the oil which appeared irregularly but in large quantities on the surface of the harbour was a real fire danger.

The last report which I have quoted was made on 15th January 1945. The fire which damaged the *Panamanian* took place on 17th January 1945 shortly after 3 p.m.

On that day the whole of the north wharf was occupied by vessels—at the western end a tanker, *Bralanta*; then to the east three United States tenders; then six United States submarines; then the *Euryale*, with four submarines outside her; then the *Anthedon* with four submarines outside her; then a Royal Navy ship, the *Maidstone*, with two submarines outside her, one Royal Navy and the other Royal Netherlands Navy—then at berth

No. 8 the *Panamanian* with the *Umgeni* outside her. (The burning hessian was thrown between the *Panamanian* and the wharf because the *Umgeni* was lying alongside the *Panamanian* on the other side.) Next to the *Panamanian* was the *Sam Jack*, and at berth No. 10 at the extreme eastern end of the harbour the *Fitzroy*, a dredge.

On 17th January the temperature was 107 degrees in the shade. The learned trial judge accepted the evidence of a witness who said that early in the morning there were no signs of oil round the *Panamanian*. Later in the day, however, a great deal of oil collected near the *Panamanian*. A witness called on behalf of the Harbour Trust, Mr. F. A. Ball, who was in charge of diving operations at the *Panamanian* on the morning of 17th January, had frequently observed oil in the harbour, especially when the submarines were there. On 17th January the oil was so thick that it was swept away with a broom while the diver got down so that it would not get on his face glass and prevent him seeing. Ball also swept the oil away before the diver came to the surface again. The oil extended from the bow of the vessel to about amidships. The fire, as already stated, began when a burning hessian bag was thrown overboard. The ship caught on fire almost instantaneously. The following account of the fire is taken from a report to the Commonwealth Marine Salvage Board made by C. J. R. Webb, a salvage officer, on 22nd January 1945, four days after the fire :—" The fire as far as I can ascertain, was caused by one of the men working in the *Panamanian* : it was ' smokeoh ' and Stevedores and workmen &c. were sitting about the deck when one of them threw overboard a bag which was burning ; it is stated that he stamped it out first, but the fact remains that he threw it over the side and it ignited the oil fuel, dieselene, distillate &c. or whatever it may have been, that seems to lie thickly on the surface in many parts of Fremantle Harbour, and in all probability most thickly under the wharves where it is mixed with floating timber, flour and wheat dust and debris of all kinds and continuously coats the wharf piles with the rising and falling of the tides. The ignition seems to have been instantaneous and flashed over the fore part of *Panamanian* setting her ships side and fore part, bridge, boat deck &c. alight immediately and at the same time the wharf went up and was on fire along the face and beneath at once. *H.M.S. Maidstone* the R.N. Submarine Depot Ship was lying alongside the wharf port side too and head up and very close, and the flash set her on fire forward especially on the port bow and forecastle &c. ; she was dragged away by tugs and extinguished

H. C. OF A. 1950-1951. EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS. Latham C.J.

her own fire. Two U.S. submarine depot ships proceeded out of harbour almost immediately under their own steam, as did a number of submarines, and other vessels in the vicinity were removed by tugs while the remainder, including one cruiser and various corvettes, stood by to move at once if ordered."

This report is not itself evidence of the facts which it states but, in my opinion, it accurately states the effect of the evidence given by all the witnesses of the fire. The fire raged through the late afternoon, evening and night. It burned over 1,000 feet of wharf (burning against both the tide and the wind). It was ultimately put out largely by the assistance of the U.S. Marine salvage vessel *Chanticleer*. The opinion as to the origin of the fire entertained at the time by the naval authorities can be seen in the report on the damage to the *Maidstone* made by Captain L. M. Shadwell, R.N., on 2nd February 1945, in which he reported as follows:—"The circumstances attending the incident as seen from *Maidstone* were briefly as follows. It appears that as the result of some inflammatory material being thrown overboard from *S.S. Panamanian* or from the jetty, oil fuel and oil residue floating on the water between the *Panamanian* and the wooden jetty, and extending thereunder, became ignited and the fire started to spread along the edge of the jetty towards *Maidstone's* berth."

The learned trial judge stated his conclusions in the following words:—"The theory propounded by the Plaintiff is that the water under the wharf was covered for a large part of the space contiguous to Berths 6, 7 and 8, with dieselene and that this burst into flame and burnt the ship and wharf. That propounded by Mr. Donnelly is that the oil which ignited was a comparatively small quantity of furnace oil probably so recently discharged from the ship that it was still in lens formation in the sheltered place between the wharf and the ship, and that the burst of flame was from this so starting the fire which did the damage to the ship, and that the spread along the wharf was not attributable to the presence of dieselene at all but to the inflammability of the wooden structure in midsummer conditions on a day of exceptionally high temperature. Both theories depend on the occurrence of wick action. There are difficulties in accepting the former proposition when once it has been established, as I think it has been, that the ultimate film of dieselene is not ignitable, since any dieselene under the wharf in order to have moved to and spread over the particular locality where it is alleged to have been while retaining ignitable thickness of film must have been quite recently spilled

and in tremendous quantities. Both theories seem improbable and I should like to be better assured that the possibility of the fire extending from the burning hessian to the wharf structure and the ship without the interposition of an oil conflagration was still more improbable. However, the onus is on the Plaintiff to prove the necessary facts to establish his claim and this I think has not been done. I am not satisfied that the presence of dieselene on the surface water, which is the real basis of the Plaintiff's claim, was a contributing factor to the fire." Thus the plaintiff contended that dieselene on the water burst into flame and that the fire spread from the dieselene and burned the ship and the wharf. The defendants relied on Mr. Donnelly's opinion that some furnace oil on the water which came from the *Panamanian* was ignited and that this started the fire. In each case the ignition of the oil on the water was explained by the suggestion that the lower end of the hessian must have fallen into the water so that the hessian acted as a wick. His Honour held that both theories were improbable and said that he would like to be better assured "that the possibility of the fire extending from the burning hessian to the wharf structure and the ship without the interposition of an oil conflagration was still more improbable". His Honour, that is to say, considered that the more probable explanation of the origin of the fire was that the burning bag set the oil-impregnated wharf on fire and that the fire on the wharf spread to the ship and thus caused the damage of which the plaintiff complains—that is, that the fire on the ship was not caused by any oil fire on the water.

It is difficult upon the evidence to be satisfied of the exact order of events which caused the fire to spread to the ship. One thing that is clear upon the evidence is that the bag burned for a short time as it hung on the timber of the wharf and that then there was a sudden flash and flame up the side of the ship and on to the deck of the ship and that the fire immediately became uncontrollable. All the expert witnesses had a difficulty in explaining how it was possible for such a sudden spread of the fire to occur. It must be remembered that it was a very hot day and that the wharf timbers were in a highly inflammable state, and it is possible that the oil on them caught fire from the bag and flared up without any oil on the water in the vicinity of the *Panamanian* making any contribution, at least at that time, to the burning of the ship. As his Honour said, the onus was on the plaintiff to establish its claim. It was necessary for the plaintiff to satisfy the court as to the cause of the fire which caused the damage to the ship. His Honour was not satisfied that the plaintiff had shown that the

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

presence of dieselene on the surface of the water at the time of the fire was a contributing factor to the fire. Accordingly the learned judge held that the plaintiff necessarily failed in its claims against both the Trust and the Commonwealth.

But in my opinion the probabilities upon all the evidence are that the sheet of flame which roared twenty feet above the wharf to the deck of the ship was caused by the sudden ignition of a large quantity of oil on the surface of the water. I have already referred to much positive evidence of eye-witnesses which supports such a conclusion. There is no evidence (scientific, technical or other) which is really inconsistent with it. I proceed, therefore, to deal with the case upon the basis that the plaintiff established certain allegations contained in pars. 8 and 13 of the statement of claim. In par. 8 the plaintiff alleged ignition of oil on the surface of the water " and in consequence thereof the said North Wharf caught fire and the fire spread to the said steamship ". (I have omitted the words " or was negligently allowed to spread ".) In par. 13 the plaintiff alleged that the oil on the harbour became ignited " and in consequence thereof the fire spread to the said steamship ". These allegations, as quoted, were, in my opinion, proved.

The two defendants were united in opposing the plaintiff, but the Trust would have been content to succeed in the action by showing that the Commonwealth was liable and the Trust was not and the Commonwealth adopted a corresponding attitude towards the Trust.

The Commonwealth denied the allegations in the statement of claim which have just been mentioned. The onus was on the plaintiff to establish its case, one essential element in which was ignition of dieselene oil on the water, the fire spreading therefrom either directly to the ship or by way of the wharf to the ship. As I have just said, in my opinion the evidence did establish this element of the plaintiff's case.

But the Commonwealth could not be liable to the plaintiff unless the Commonwealth was for some reason responsible for dieselene being on the water just before the fire. The evidence shows, in my opinion, that the Commonwealth was not so responsible. The Commonwealth allowed submarines and other vessels to use the berths which the Commonwealth secured for them under National Security Regulations, but those in charge of the vessels, even if they were negligent (which is not established), were not the servants or agents of the Commonwealth. No negligence on the part of the Commonwealth was established.

(I refer hereafter to the plaintiff's claim as based upon the principle of *Rylands* v. *Fletcher* (1), i.e., independently of negligence.)

The Harbour Trust, on the other hand, did not deny the allegations in pars. 8 and 13 of the statement of claim which have just been quoted. The Trust pleaded in defence in such a way as to pass the liability, if any, over to the Commonwealth. It admitted the accumulation of inflammable oil, contended that the Commonwealth was responsible therefor, and admitted that the oil caught fire and that the fire spread from the oil to the ship—though not by way of the wharf. These admissions were contained in par. 26 of the defence, in which the Trust admitted that the oil or other inflammable liquid on the surface of the harbour on 17th January 1945 " became ignited and the fire spread to the said steamship " but denied that the fire spread from the north wharf. Thus it is not possible for the Trust to escape liability upon the ground that it was not shown that the fire started in the oil and thence spread to the ship. It was not necessary for the plaintiff to give any evidence to establish the contrary proposition as against the Trust.

I proceed, therefore, to consider the case against the Trust upon the basis that there were accumulations of oil in the harbour known to the Trust and at least believed by the Trust to be dangerous, that the oil was in fact dangerous, that it caught fire and that the fire spread from the oil to the ship.

But these facts do not in themselves show that the Trust was liable for the resulting damage. There is in my opinion no basis for a claim against the Trust based on nuisance. The Trust did not bring the dieselene to the harbour and could not have prevented it from being brought there. As to claims based on contract (breach of warranty) or tort (negligence) the obligation of the Trust was not an obligation to provide a harbour that was absolutely safe. The Trust was not in the position of an insurer. The duty of the Trust was to take all reasonable care to see that the harbour was safe for vessels which it allowed to berth there. The evidence shows, in my opinion, that the Trust did everything that it was possible to do to reduce the danger from floating oil. The position disclosed by the evidence is that it was simply impossible to get rid of floating oil, though the Trust did its best to deal with it. There was no evidence that anything better could have been done by anybody. Rear-Admiral Pope said in his evidence with respect to the problem of oil-pollution of harbours—" The whole world has been trying to get a solution to this without

(1) (1868) L.R. 3 H.L. 330.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

success", and this statement fairly represents the evidence of all witnesses upon this subject.

But it is urged for the plaintiff that the Trust should have warned the plaintiff of the danger created by the oil, and that it did not do so. There is evidence by a witness Mills of a conversation on a ferry with the captain of the *Panamanian* in which something was said about oil being a danger. But the captain was not asked any questions upon the matter when he gave evidence, there are surrounding circumstances of improbability attaching to the evidence, and there is no finding by the learned trial judge as to the alleged incident.

The *Edendale* had caught fire, but it was a small ship lying almost level with the wharf. There is no evidence that danger to large steel ships, as distinct from wharves, was apprehended by anyone. How the fire actually came to roar up on to the deck of the *Panamanian* is still a mystery. Probably the very hot day, the oil on the timber of the wharf, an up-draught between the ship and the wharf, and possibly some gear hanging over the ship's side all contributed to what was a most unexpected disaster. The evidence leaves the fire in the category of an accident for which it is not shown that any breach of duty by either defendant was responsible. It would, in my opinion, be unreasonable to hold that the Trust was under a duty to warn all ships that there was oil on the harbour (which they could see for themselves) and, further, that the oil might catch fire and that no burning material should be thrown into the water. The danger which was apprehended was the danger that the wharves might catch fire. It is not necessary for a harbour authority to warn ships that if a wharf catches fire ships will be in danger. Such a risk is obvious and needs no advertisement to reasonable men.

There was no suggestion in argument that, if some warning had been given, any means of self-protection could have been adopted which would have saved the ship in the events which happened. As a general rule the safest thing to do with a burning object on a ship will be to throw it into the water. It is not likely that a warning that there might be oil on the water and that the oil might catch fire would have prevented the instinctive act of Durnin in throwing the smouldering hessian overboard. If the *Umgeni* had not been lying alongside the *Panamanian* the hessian would have gone into the water and, according to the technical scientific evidence, no fire would have resulted. There is, in my opinion, no satisfactory ground for holding that, even if any suggested warning had been given, the fire would not have taken

place. If this be so, the fact that no warning was given does not impose liability upon the Harbour Trust.

The plaintiff might have sought to make a case based upon the fact that the timber of the wharf at berth No. 8 was impregnated with oil and was therefore in a dangerous condition for which the Trust was responsible. If a wharf in such a condition caught fire, the fire would or might spread with great rapidity to shipping lying alongside the wharf. Under the *Harbour Trust Act*, s. 26 (b), it is provided that the commissioners shall cause wharves, docks, piers, jetties, &c., to be kept in good repair. The Trust is therefore subject to a duty to keep them in good repair and when the statutory obligation is added to the common-law obligation to provide a harbour as safe as reasonable care can make it (subject only to any statutory limitations of this obligation) it may well be the case that the Trust should be held to be liable for damage caused by a failure to observe the statutory obligation created by s. 26 (b). The view that the Trust would incur a liability if it failed to perform its duty under s. 26 (b) is supported by the terms of s. 26 (c). This sub-section provides that the Trust shall cause the wharves, docks, piers, jetties, &c., to be well and sufficiently lighted, but that a breach of the duty imposed by the sub-section shall not confer a right of action by any person who may suffer damage therefrom. Thus it is provided that in the case of damage arising from insufficient lighting there shall be no remedy against the Trust. There is a conspicuous absence of any such provision in the case of sub-s. (b) dealing with keeping the wharves in repair. It is certainly arguable that a breach of this duty gives a right of action to a shipowner lawfully using the port who is injured by the breach : *Groves* v. *Wimborne* (1) ; *Phillips* v. *Brittania Hygienic Laundry Co., Ltd.* (2).

If a harbour authority negligently allows its wharves to become soaked with oil so that they are in a dangerously inflammable condition it should in my opinion be held that they have failed to keep the wharves in proper repair. A tenant of a house who was bound to keep the house in good repair could not be held to have performed his obligation if he allowed it to become soaked with inflammable oil.

But no case was made by the plaintiff founded upon the oil-impregnated condition of the wharves. If such a case had been made further evidence might have been adduced by the defendant to explain more precisely the extent of oil-impregnation and the significance of it and whether the Trust could have done anything

(1) (1898) 2 Q.B. 402. (2) (1923) 1 K.B. 539.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Latham C.J.

about it. The Trust admitted in its defence that the oil on the water became ignited and that the fire spread from the oil to the ship and the case against the Trust was fought upon this footing. It would be wrong, in my opinion, at this stage to work out a new case for the plaintiff based upon the condition of the wharves and the failure of the plaintiff to keep the wharves in good repair.

The plaintiff relied upon the rule in *Rylands* v. *Fletcher* (1), contending that the Commonwealth or the Trust accumulated dieselene or allowed it to be accumulated in ships, that it escaped and that therefore the Commonwealth or the Trust is liable for the resulting damage independently of negligence. But, apart from any questions as to whether the Commonwealth or the Trust should be treated as having brought the dieselene into the harbour, the accumulation and use of the dieselene (and also of the furnace oil) by ships in the harbour was a natural and ordinary use of the harbour. In my opinion, therefore, the rule in *Rylands* v. *Fletcher* (1) is not applicable.

Accordingly I am of opinion that the case of the plaintiff against both the Trust and the Commonwealth fails for the reasons stated.

Various other defences were raised—*volenti non fit injuria*, *novus actus interveniens*—but, in view of the conclusion which I have stated it is unnecessary to examine them. The appeal should be dismissed.

FULLAGAR J. The remarkable facts of this case have been very fully stated in the judgment of the Chief Justice, which I have had the advantage of reading. I need not recapitulate them, and I think I can express my own view of this case fairly shortly.

There can be no doubt that at the time of the fire on *S.S. Panamanian* and for a considerable time before there had been present on the surface of the waters of the inner harbour at Fremantle a very considerable quantity of inflammable oil. Officers of the Fremantle Harbour Trust were very concerned about it, not merely as a source of pollution but as a source of danger from fire. Their concern greatly increased after the fire on the *S.S. Edendale*. There can also, in my opinion, be no doubt that the great and extremely sudden conflagration, which occurred on the afternoon of 17th January 1945 had for its immediate cause the presence of inflammable oil adjacent to the *Panamanian*. The burning or smouldering bag might eventually have set fire to the understructure of the wharf without the presence of oil, but, if this had happened, there would not have been the sudden belching

(1) (1868) L.R. 3 H.L. 330.

up of sheets of flame almost immediately after the throwing overboard of the bag. It may well have been that the oil which first caught fire was not oil on the surface of the water but oil which had clung to, and to some extent impregnated, the understructure of the wharf with the rise and fall of the tides. The suddenness and magnitude of the conflagration suggests that some gasification may have taken place, but at this stage of the case this can be no more than a matter for speculation. What seems to be established beyond doubt is that oil was responsible, and that the oil which was responsible had originally been on the surface of the water.

*Dwyer* C.J., who tried the action, and from whom this appeal comes, said :—" I am not satisfied that the presence of dieselene on the surface water, which is the real basis of the plaintiff's claim, was a contributing factor, to the fire." I take this to mean that, in his Honour's opinion, the real basis of the plaintiff's claim was that the fire had its origin in dieselene on the surface of the water between the ship and the wharf. With great respect, I think that this is putting the plaintiff's claim on too narrow a basis. His Honour is dealing with a particular theory, as to the chain of causation which led to so great a disaster. But all sorts of theories are open, and the plaintiff in a case like this is not to be pinned to a theory. The purely *factual* basis of the plaintiff's case is much broader. It is no more and no less than that the presence of inflammable oil in the vicinity of the ship was the cause of the fire. It is, in my opinion, impossible to hold that this factual basis was not established.

Because of the opinion which I have ultimately formed in this case I will not pursue this matter further or indicate in detail the reasons why I cannot agree with the passage quoted. The judgment of *Dwyer* C.J. did not, as I read it, rest only on the " finding " to which I have referred. It rested ultimately, I think, as to each defendant, on points as to which I agree with his Honour. But the finding with which I have taken leave to disagree could, of itself, have formed a sufficient basis for judgment for both defendants, and I have thought that I ought to express my disagreement with it. The case does not depend on the credibility of witnesses or on any point as to which a trial judge is in any substantially better position than a court of appeal. Mr. Louch's elaborate analysis of the evidence convinced me that what I have called the purely factual basis of the plaintiff's claim was established beyond reasonable doubt, and I think that this Court must deal with the case on the footing that the plaintiff proved every

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Fullagar J.

primary fact that it had to prove. Whether those facts involve the secondary or inferential fact of negligence, or otherwise result in the liability of either defendant, is another matter altogether. The position of each defendant must, of course, be considered separately.

1. *The Fremantle Harbour Trust Commissioners.*—As to this defendant, I may clear the ground by saying at once that I agree with the opinion of the learned Chief Justice of this Court as to reg. 87 of the regulations made by the Commissioners under their Act. It is clear, in my opinion, that this defendant cannot escape liability either on the footing that reg. 87 was a valid law, applicable because it was part of the proper law of a contract between the plaintiff and this defendant, or because its terms formed part of that contract. This point being out of the way, the liability of this defendant has to be considered (a) as arising out of contract, (b) as arising out of tort.

(a) Where one party enters upon premises in the occupation or under the control of another party in pursuance of a contract between them, the law generally implies a term relating to the safety of the premises. The parties are, of course, at liberty to make such express provisions on the subject as they see fit, but, if they do not do so, the law will imply such a provision as appears reasonable in all the circumstances. In doing this, "the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have" (per *Bowen* L.J. in *The Moorcock* (1). There is, I think, no single and universal rule as to the nature of the implication to be made. It depends on the nature of the contract and on circumstances. Sometimes, as in *Francis* v. *Cockrell* (2), what practically amounts to a warranty of safety is implied. It seems to be well settled, however, that a harbour authority does not impliedly warrant the safety of its harbour. In *Owners of S.S. Lindenhall* v. *Port of London Authority* (3) *Scott* L.J. said :—"The obligation at law of the Port of London Authority would, of course, include the usual implied warranty that the dock authority had taken reasonable care to see that the dock was fit for a ship to come into it." Cf. *The Moorcock* (4) (per *Bowen* L.J.). In the present case I would say that the Fremantle Harbour Trust impliedly promised that it had taken and would take reasonable care to see that its

(1) (1889) 14 P.D. 64, at p. 68.
(2) (1870) L.R. 5 Q.B. 501.
(3) (1944) 78 Ll.L.R. 215, at p. 221.
(4) (1889) 14 P.D. 64, at p. 70.

harbour and wharves were safe for ships to use, and that it would give warning of any latent danger which it could not remove or had not removed. The latter part of the promise would, of course, only apply to dangers of which it knew or would, if it had exercised reasonable care, have known.

Now *Dwyer* C.J. has clearly found, I think, that there was no breach on the part of the defendant Trust of any such contractual duty as that which I have attempted to formulate. And a careful consideration of all the circumstances of the case has convinced me that no other finding was really open on the evidence. I do not propose to go into details. The Commissioners and their officers clearly, I think, realised the danger, and felt great anxiety about it. They did what they could about it. They tried various expedients, which are mentioned by *Dwyer* C.J., and they made strong representations to those in charge of the submarines—representations which seem to have met with a measure of success. But there was not very much that they *could* do about it. For indeed it seems that, in these days when a large proportion of ocean-going ships use more or less inflammable oil either as a furnace fuel or in internal combustion engines, the problem presented by the presence of oil on the waters of closed harbours is (or was at the time of the trial of this action) generally regarded by those most concerned as a serious but unsolved problem. There are just two points which might be thought to found a case against the Trust, and a word or two must be said about each.

It was said, in the first place, that the Trust ought to have known, and taken special steps to deal with, a specially dangerous aggregation of oil, or some specially dangerous condition caused by oil, in the immediate vicinity of the *Panamanian*. Although *Dwyer* C.J. was sceptical about it, I think it practically certain that there was some such specially dangerous condition caused by oil in the immediate vicinity of the *Panamanian*. There is strong evidence that oil tended to collect between the north wharf and the ships berthed there, and that servants of the Trust knew of this and tried to disperse the oil from time to time. But again I think that they did all that they could do. I am unable to suggest any reasonable precaution that was neglected.

It was said, in the second place, that the Trust ought to have warned the master of the *Panamanian* about the presence of oil in the harbour. But, whether the evidence of the master's conversation with Mills be accepted or not, the presence of oil was obvious, and it cannot safely be inferred that, if a warning had been given, the disaster would not have happened. I think, indeed, that

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Fullagar J.

there is much to be said for the view that it would at least have been a wise precaution to warn the master of the *Panamanian* specially about the conditions existing alongside and under the north wharf, but it would be unsafe to say that this would have made any difference. Indeed, on the whole, I think it more probable that it would have made no difference. The case is not like the case of a sunken obstruction in a harbour, where the only reasonable assumption to make is that, if a warning were given of its existence, a ship would be steered clear of it.

(b) A claim against the Trust in tort could, I think, take one of two forms only. It could be based directly on negligence regarded as a breach of a common-law duty to be careful in the management and control of the harbour. Or it could be based on nuisance, the alleged cause of action lying in the escape of fire from the harbour premises to the ship. The mere presence of the oil in the harbour was not, in my opinion, a nuisance in any sense relevant to the present case. It was not harmful *per se* to the ship.

So far as the first suggested cause of action in tort is concerned, it is, I think, disposed of by what I have said in connection with the alleged cause of action in contract. I agree with *Dwyer* C.J. that there can be, in such a case as this, no common-law duty involving a higher standard of care than is imposed by the term implied in the contract between the parties. Whether the implied contractual duty excludes the possibility of a common-law duty existing apart from contract is a question which need not be considered. If we assume the co-existence of the two differently based duties in this case, it will be true to say that, if there is no breach of the former, there is no breach of the latter. And I have already said that, in my opinion, there was no breach of the contractual duty of care.

Actually the same considerations, in my opinion, dispose—though less directly—of any cause of action for nuisance. We were informed by counsel that the statute 14 Geo. III, c. 78, s. 86, is in force in Western Australia. It provides that no action shall lie against any person on whose estate any fire shall accidentally begin. This is, as Sir John *Salmond* observed, a " very ill-drawn enactment ", and its effect on the common law is perhaps to some extent a matter of controversy. It was interpreted in *Filliter* v. *Phippard* (1) as making the occupier of premises from which fire escapes liable if, but not unless, either the origin or the escape of the fire was due to the negligence of himself or of some person for

(1) (1847) 11 Q.B. 347.

whose conduct he can fairly be considered responsible. So interpreted Sir John *Salmond* regarded it as merely declaratory of the common law. But, whether this view be correct or not, the Trust could not, in my opinion, even apart from the statute, be made liable at common law in this case. In *Turberville* v. *Stamp* (1) *Holt* C.J. said :—" If a stranger set fire to my house, and it burns my neighbour's house, no action will lie against me." The report adds : " Which all the other justices agreed ". The actual lighting of the fire here was due to the act of a person who was clearly in the position of a stranger in relation to the Trust. The origin of the fire was accidental, and it was impossible to prevent its escape. The only possible basis of liability on the part of the Trust is, I think, negligence in allowing an inflammable substance to accumulate on its premises, and, as I have said, I do not think that that basis is established.

2. *The Commonwealth.*—It seems to me that there is no evidence of any negligent act or omission on the part of any servant or agent of the Commonwealth. So far as the claim in nuisance is concerned, it involves, I think, these premises. The Commonwealth, it is said, was in legal possession and control of a part of the harbour. On that part of the harbour its licensees deposited inflammable oil, which escaped to another part of the harbour, and there caught fire. The fire escaped to the ship and there did damage. I am disposed to think, and am prepared to assume, that, if all the above premises were established, the Commonwealth would be liable to the plaintiff. But one short answer to the claim against the Commonwealth seems to me to be that the Commonwealth never really had possession of the parts of the harbour where the oil was deposited. It may be said the Minister for the Army purported to act under reg. 54 of the *National Security (General) Regulations*, and certain " orders " were signed, the effect of which is dubious, but which seem to have amounted to little more than announcements that the Minister had taken or was taking possession. But possession was never formally taken, and I do not think that the Commonwealth ever assumed such actual possession and control of any land or water as would render it liable for nuisance. Naval ships had been in the relevant part of the harbour before any " order " was signed, and the actual position did not really change after the signing of the " orders ". The Harbour Trust expected to be paid for the use made of its premises by the naval vessels. The Commonwealth was the Australian political entity responsible for the waging of war, and

(1) (1697) 1 Ld. Raym. 264 [92 E.R. 944].

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Fullagar J.

it was convenient for a variety of reasons that allied navies should deal directly with the Commonwealth rather than with States or State authorities in such matters as the use of Australian harbours. The best course was conceived to be that the Trust should look to the Commonwealth for payment for the use made of its premises by naval vessels, and that what was paid by the Commonwealth should be a matter to be dealt with in the final settling of accounts among the allied belligerents. It was decided to adopt this course, and the making and publication of the "orders" under reg. 54 seem to have been intended to provide what was thought to be, though it probably was not in fact, a necessary formal basis for the arrangement. But liability in nuisance depends on actual possession or control, and the Commonwealth never assumed actual possession or control. As *Dwyer* C.J. said, "no sort of physical possession can be imputed to it."

In my opinion, the appeal should be dismissed.

KITTO J. While lying at the No. 8 berth, which is part of the north wharf in the Fremantle harbour, the *S.S. Panamanian* was seriously damaged by fire. The fire had its origin in the throwing of a piece of smouldering hessian from the deck of the ship into the space between the ship and the wharf. The hessian burst into flame as it fell, and was caught on a piece of the wharf structure a few inches above water level. A sheet of flame shot upwards and set fire to inflammable material on the ship's deck, and extensive damage ensued.

The water in the vicinity of the ship was covered with oil. Such a state of affairs was common in Fremantle harbour, and particularly in this part of it, for the action of currents and tides tended to make oil accumulate about the eastern end of the north wharf, and No. 8 berth was towards the eastern end. Inevitably the wooden piles and cross-beams of the wharf had become more or less impregnated or coated with oil, and consequently more inflammable than they would otherwise have been.

Several theories have been advanced to explain how the flame may have proceeded from the hessian to the deck of the ship. The learned trial judge thought it possible, though he did not find, that the fire extended from the hessian to the wharf structure and thence to the ship, without the interposition of an oil conflagration. Suggestions have been made that the flame of the burning hessian may have set fire to some of the ship's gear hanging from the deck, or even to the paint on the ship's side. But the speed and intensity of the fire, and the fact that it spread, not only to

the ship, but also for a great distance along the under-part of the wharf against wind and tide, lend strong support to the theory that the flaming hessian reached down from the beam on which it was caught to the surface of the water and ignited the oil, and that it was the oil conflagration which was the immediate source of damage to the ship.

The plaintiff as owner of the ship sued the Fremantle Harbour Trust Commissioners and the Commonwealth, basing its case upon the theory last-mentioned, and alleging that the defendants were liable on various bases for the damage attributable to the presence of the oil on the water. The causes of action alleged against the Harbour Trust were breach of contract, negligence and nuisance, and the causes of action alleged against the Commonwealth were negligence, nuisance and breach of the strict duty arising under the rule in *Rylands* v. *Fletcher* (1). The learned trial judge was not satisfied that the oil on the water was a cause of the burning of the ship, but it was strongly contended on the hearing of the appeal that on the evidence his Honour should have been so satisfied. I shall assume that the contention is well-founded, and consider whether on this assumption the plaintiff is entitled to succeed, taking first the case against the Commonwealth, and then the case against the Harbour Trust.

The facts alleged against the Commonwealth were, briefly, that it had possession and control, under orders made pursuant to reg. 54 (2) of the *National Security* (*General*) *Regulations*, of certain berths forming part of the north wharf and lying to the west of No. 8 berth; that the Commonwealth allowed dieselene to be brought to these berths by pipe-line, dieselene being the oil-fuel used by submarines; that the Commonwealth allowed a large number of submarines and their mother ships, including many vessels belonging to the Royal Navy, the United States Navy and the Netherlands Navy, to use these berths; that dieselene was there supplied to these vessels; that in the course of their activities while using the berths they, from time to time, allowed large quantities of dieselene to escape into the harbour; and that the oil which caught fire alongside the *Panamanian* was wholly or substantially dieselene which had thus come to be floating on the waters of the harbour.

Suppose all this to be true; let it be assumed also that the escape of dieselene from the naval vessels involved negligence of which the plaintiff was entitled to complain; still there is a hiatus in the case of the plaintiff against the Commonwealth in so far as

(1) (1868) L.R. 3 H.L. 330.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Kitto J.

it is based upon negligence. For none of the oil about the *Panamanian* was shown to be dieselene which got into the water by the conduct of any persons for whose negligence the Commonwealth is responsible. It may all have come from vessels belonging to navies other than the Australian, and, though it was by permission of the Commonwealth that these vessels were using the berths controlled by the Commonwealth, the officers in command of them were not in the position of agents of the Commonwealth for whose acts the Commonwealth is vicariously liable. The British, United States and Netherlands vessels using the berths had not become part of the Commonwealth naval forces; they were allied forces; and, even if the plaintiff could have maintained proceedings against them for the negligent discharge of oil into the harbour, it clearly cannot attribute any negligence of theirs to the Commonwealth.

But the cause of action under the rule in *Rylands* v. *Fletcher* (1) is independent of negligence, and it was contended that the application of that rule entitles the plaintiff to succeed against the Commonwealth. The proposition is that dieselene is a dangerous substance in the sense in which that expression is used in the statement of the rule; that the Commonwealth brought or allowed to be brought, large quantities of dieselene on to premises in its occupation and control, namely, the berths in respect of which the orders had been made under reg. 54 (2); and that the Commonwealth therefore came under an absolute liability for any damage resulting from the escape of the dieselene from those premises.

I doubt whether dieselene should be regarded as a dangerous substance in the relevant sense by reason of the degree of its inflammability; but even if it should be so regarded the present case appears to me to be quite outside the *Rylands* v. *Fletcher* (1) principle. It is by no means clear that the dieselene (if it was dieselene) which was beside the *Panamanian* when the fire occurred had escaped from the premises covered by the orders made under reg. 54 (2). How far out from the wharf the "quayage" to which they referred extended is a matter of some uncertainty; and many of the submarines which used the harbour were moored, not to the wharf, but to other submarines or vessels arranged in tiers. But, be that as it may, the consideration which seems to me fatal to the attempted application of *Rylands* v. *Fletcher* (1) is that strict liability which the principle of that case imposes does not arise where the dangerous thing escapes from premises upon which it was brought as an accepted incident of some ordinary

(1) (1868) L.R. 3 H.L. 330.

purpose to which the premises are reasonably applied by the occupier: *Wise Bros. Pty. Ltd.* v. *Commissioner for Railways (N.S.W.)* (1). Having regard to "all the circumstances of the time and place and practice of mankind" (to use the language of Lord *Porter* in *Read* v. *J. Lyons & Co. Ltd.* (2), I am of opinion that the bringing of oil-fuel to a berth in a harbour and there dealing with it as fuel for oil-burning or motor vessels using the berth is an accepted incident of an ordinary purpose to which the berth is reasonably applied.

As regards nuisance, I have already stated my opinion that the persons in charge of the British and allied naval vessels were not agents of the Commonwealth, and it is necessary to add only that I can see no ground for concluding that the Commonwealth, by reason of the orders made under reg. 54 (2), had such control of any part of the harbour as would affect it with liability for a nuisance, if there was any, committed by those persons. Accordingly I am of opinion that the case against the Commonwealth fails.

Quite different considerations apply to the Harbour Trust. No contention based upon *Rylands* v. *Fletcher* (3) was or could be advanced. The first way in which the case was put was that payment was made by or on behalf of the plaintiff to the Harbour Trust for the use of the harbour by the *Panamanian*, and that the Harbour Trust therefore came under a contractual obligation which was broken, either by allowing oil to accumulate round the *Panamanian*, or at least by failing to warn her master of the presence of the oil or of facts concerning its liability to ignite which were known to the Harbour Trust. Secondly, it was submitted that the conduct so relied upon as being in breach of contract constituted also the tort of negligence. The two contentions may be considered together, because the contractual duty of the Harbour Trust cannot be put higher than the duty upon which the charge of negligence is rested. The duty was, not indeed to have the harbour reasonably fit for use by the *Panamanian*, but to take reasonable care that the ship should not be exposed to danger in using the accommodation for which payment was made: see per Lord *Blackburn*, *Mersey Docks & Harbour Board Trustees* v. *Gibbs* (4); *Pyman Steamship Co.* v. *Hull & Barnsley Railway Co.* (5).

The evidence, in my opinion, made it abundantly clear that the presence of the oil near the *Panamanian* was not due to any breach

(1) (1947) 75 C.L.R. 59, at pp. 68, 70, 73, 74.
(2) (1947) A.C. 156, at p. 176.
(3) (1868) L.R. 3 H.L. 330.
(4) (1866) L.R. 1 H.L. 93, at p. 107.
(5) (1914) 2 K.B. 788, at p. 796.

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Kitto J.

by the Harbour Trust of the duty of reasonable care which it owed to the plaintiff. The Trust had been most diligent in its efforts to prevent oil from being discharged into the harbour, and to find means of getting rid of it when it was there. It had employed every method its officers could devise; it had made diligent inquiries from other authorities faced with a similar problem; but every expedient had failed. There was no evidence that any device could have been adopted which the Trust neglected. On the contrary, the evidence establishes that world-wide efforts to find an effective means of coping with oil on harbour waters have proved futile.

But it is said that at least the Harbour Trust should have given a warning to the master of the *Panamanian*. There was no need to tell him that there was oil about. The presence of oil in harbours frequented by oil-burning and motor ships is a matter of common experience. That large quantities of oil floated from time to time on the water of Fremantle Harbour, and tended to collect especially towards the eastern end of the north wharf, was apparent to the eye of any ordinarily observant person. The *Panamanian* had not only visited the harbour on other occasions, but had actually been lying in the harbour for weeks before the fire occurred. The duty of reasonable care clearly did not include an obligation to warn the master of the ship of a fact which was patent to the beholder, and which he had the most ample opportunity to appreciate for himself. Indeed the plaintiff pressed much more strongly its contention that there was a fact known to the Harbour Trust, and unknown to the master, of which warning should have been given, namely, that the oil on the harbour had been proved liable to become ignited. If the fact had been, and the Harbour Trust knew or ought reasonably to have known, that the oil was of a specially inflammable character so as to constitute an unusual hazard of which the master was unaware, the duty of reasonable care would clearly have obliged the Harbour Trust to give due warning of the danger. Even then the plaintiffs would not be entitled to recover unless the omission to give the warning was proved to have been a cause of the disaster which occurred. But the scientific evidence in the case established that there is no significant difference between dieselene and ordinary furnace oil as regards inflammability. Both are in the category of relatively safe oils.

Had it not been for one fact, there would have been nothing upon which a suggestion could be based that the Harbour Trust had or should have had any information not shared by the master

as to the inflammability of the oil on the harbour. The one fact was that, to the knowledge of the Harbour Trust but not of the master, the inflammability of the oil on the harbour had been proved a little over a year before, when a small ship, the *Edendale*, had been burnt. How the fire was caused was not known; some said that a spark from oxywelding equipment had ignited the oil, others that a paint-pot had caught fire and been thrown into the oil. But certainly oil on the surface of the water burned; and thereafter the officers of the Harbour Trust had to think of its wooden oil-soaked wharves, and the naval authorities had to consider submarines and shore installations of great importance in the conduct of the war. The *Edendale* fire impressively demonstrated that the possibility of oil burning on water could not be dismissed. Yet it was an isolated occurrence; it appears never to have happened in the harbour before, and apparently it was far removed from the ordinary experience of harbour authorities. Indeed the evidence does not provide any instance of an oil-fire on the waters of any harbour, and the plaintiff relies upon the incident as equipping the Harbour Trust with special knowledge. If that knowledge had been knowledge of a degree of inflammability peculiar to the oil which was being found on the Fremantle harbour, the Trust should clearly have imparted it to the masters of ships coming into the danger zone which that oil created; but, as I have said, there is in fact no appreciably greater degree of inflammability in dieselene than in furnace oil, and it follows that the only lesson which the *Edendale* fire really taught was that in very special circumstances oil of the kinds frequently found in harbours can be ignited while floating on the water. What circumstances would enable this to occur the *Edendale* fire did not reveal; but the evidence in this case establishes that more is needed than the application to the oil of such flames as are ordinarily to be expected in harbours. A lighted cigarette or match, for instance, may be dropped into oil-covered water with impunity. The experiments described in the evidence suggest that there must be something in the nature of a wick; and it was because of this that the theory was advanced, with some show of probability, that what happened in the case of the *Panamanian* fire was that the hessian hung from the wharf structure to the oil on the water, and thus, by an unlucky chance, provided the equivalent of a wick.

Thus the only information which the Harbour Trust could have given to the master of the *Panamanian* was that there are conditions of rare occurrence in which oil on harbour waters can be set alight; and the question is whether the Trust owed a duty to

H. C. OF A. 1950-1951.

EASTERN ASIA NAVIGATION CO. LTD. v. FREMANTLE HARBOUR TRUST COMMISSIONERS.

Kitto J.

the plaintiffs to communicate this information. Its duty was, as I have said, not to ensure, but to use reasonable care, that the ship should not be exposed to danger. The information should have been communicated if, but only if, its non-communication was inconsistent with such reasonable care. "A measure of care determined by the degree of danger is . . . the utmost that either party would envisage, and . . . the law demands that and no other standard of duty"; *Read* v. *J. Lyons & Co. Ltd.* (1), per Lord *Uthwatt*. To fulfil its duty the Harbour Trust was not bound to guard the ship against every conceivable eventuality, but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience: *Fardon* v. *Harcourt-Rivington* (2), per Lord *Macmillan*. It had no duty to communicate any information unless it might reasonably be anticipated that the ship would be affected by its non-communication: cf. *Hay or Bourhill* v. *Young* (3). The criterion of the duty which lay upon the Harbour Trust is to be found in what Lord *Wright* called "the concept of reasonable foresight": *Hay or Bourhill* v. *Young* (4). What, then, could reasonably have been foreseen as the result of omitting to give the master the facts which the Harbour Trust had learned from the *Edendale* fire? What difference could it possibly have made? I fail to see how the ship would have been any less likely to suffer as it did, even if its master had himself witnessed the *Edendale* fire and had known what little the Harbour Trust knew about its causation. The danger was a remote one, and it required such peculiar conditions in order to result in damage that it is difficult to see how it could have been effectively guarded against. I am therefore unable to see any breach of duty on the part of the Harbour Trust in omitting to tell the master of the *Panamanian* the very unilluminating facts of the *Edendale* fire. Some misapprehension has arisen, I think, from the intensity of the alarm felt by some at least of the Harbour Trust officials in consequence of that fire. I do not criticise their very proper concern to prevent such a thing from recurring. But the measure of their fear is not the measure of the degree of danger, and has no bearing upon their duty to the shipowners; it was not their duty to inspire the same apprehension as they felt themselves. They had only a duty to give such information as was reasonable to enable the master to protect his ship. In that duty I see no reason to think that they failed.

(1) (1947) A.C. 156, at p. 186.
(2) (1932) 146 L.T. 391, at p. 392.
(3) (1943) A.C. 92, at p. 102.
(4) (1943) A.C., at p. 107.

I am therefore of opinion that the claim based upon breach of contract and upon negligence as a tort cannot succeed. Only the claim based upon nuisance remains. It is not necessary to decide whether there can be nuisance to a ship. The short answer to the claim is that even if it is a nuisance to cause or allow oil to come into proximity to a ship, the Harbour Trust is not guilty of having done so. The oil did not approach the ship through any act or omission of the Harbour Trust or of any person for whom it is responsible. In fact the Trust did all it could to prevent such a thing from happening. It violated no right of the plaintiff, and it is therefore under no liability.

I agree that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors: for the appellant, *Frank Unmack & Cullen*; for the respondent the Fremantle Harbour Trust Commissioners, *Parker & Parker*; for the respondent the Commonwealth, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

F. T. P. B.