

ORIGINAL

(37)

IN THE HIGH COURT OF AUSTRALIA.

7024  
ORIGINAL

FREDERICK LEYLAND & CO. LIMITED.

v.

THE SHIP "KAIRANGA".

REASONS FOR JUDGMENT.

SYDNEY.

Judgment delivered at  
on MONDAY THE 8th SEPTEMBER, 1941.

# ORIGINAL

FREDERICK LEYLAND & Co.Ltd. v. THE SHIP 'KAIRANGA'.

ORDER.

Appeal dismissed with costs.

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND Ltd. v THE SHIP 'EMPIRE STAR'

ORDER.

Appeal dismissed with costs.

FREDERICK LEYLAND & CO. LTD V. THE SHIP "KAIRANGA".

JUDGMENT.

RICH, A.C.J.

FREDERICK LEYLAND & CO LTD. V. THE SHIP " KAIRANGA".

Judgment .

Rich A.C.J.

The appeals in this case were heard together and argued at some length and with great care. The view I formed at the conclusion of the hearing that the decision of Dixon J. was right has been confirmed by the perusal and consideration of the evidence. In cases of this character a Court of Appeal should be slow to upset the judgment arrived at by the trial judge who had the opportunity of seeing and hearing the witnesses. And I have found nothing to compel me to arrive at a different conclusion except that there are some probable grounds for accepting the view expressed in the judgment of Williams J. which I have had an opportunity of reading, that the speed of the Empire Star was in excess of that found by Dixon J.

The appeals should be dismissed with costs.

FREDERICK LEYLAND & CO.: LTD. V THE SHIP "KAIRANGA".

JUDGMENT.

STARKE J.

Appeal from a judgment of my brother Dixon, sitting in the Admiralty jurisdiction of this Court, in which he pronounced the ships "Empire Star" and "Kairanga" equally to blame for a collision between them which took place in Sydney Harbour on the 7th. March 1940 about eleven o'clock at night.

The "Empire Star" was a motor ship of some 13,748 tons gross register, which was outward bound. She had been lying at No. 21 Wharf, Pyrmont, Darling Harbour, and began to move away about 10.34 p.m. By 10.59, the ship had swung into Darling Harbour and was ready to proceed. She was then lying with her stem pointing in a northerly direction abreast Peacock Point in Darling Harbour or thereabouts. The ship "Kairanga" was a vessel of about 2,830 tons gross register and was inward bound. She was abreast Fort Denison to the eastward of the Harbour Bridge at 10.53 p.m. or, coordinating her time with that of the "Empire Star", at 10.53½ p.m., and was proceeding towards a berth in Darling Harbour. The weather was fine and clear with light northerly airs, with the tide half ebb of about one knot.

The vessels collided westward of the Harbour Bridge about 11.8 p.m. The "Kairanga" was considerably <sup>ma</sup>damaged; the collision broke the cable of <sup>her</sup> the port anchor and the anchor and some three fathoms of cable attached were subsequently located at the bottom of the harbour and raised. My brother has fixed the point of collision as somewhere about the position from which the anchor was raised. This was 598 feet from the north-west corner of the wharf at Dawes Point (No.1 of Walsh Bay) on a bearing 337° 08' and an approximate distance of 970 feet from the centre light of the Harbour Bridge on a bearing of 273° or 274°. This finding was reasonably open upon the

evidence and, in my opinion, it was right. It would be enough to say that it should not be set aside unless the Court was convinced that it was wrong. S.S. Nontestroom v S.S. Sagaporack 1927 A.C. 37.

The course of the "Empire Star" from her position in Darling Harbour at 10.59 p.m. was in a northerly direction in that harbour until she reached Millers Point, where she would swing round on a starboard helm towards the Harbour Bridge, under which she would go. My brother was of opinion that she had gone too far north in her swing. After rounding Miller<sup>s</sup> Point, an outbound vessel should keep to the southern side of the channel and should not exceed a speed of 6 knots an hour which the senior pilot of Sydney Harbour said was "the regulated speed allowed". It is possible, with the point of the collision fixed, to make some approximation of the speed of the vessels. The collision took place at about 11.8 p.m. and the "Empire Star" travelled from the point where she was lying with her engines stopped abreast Peacock Point in Darling Harbour in 8 minutes. I cannot make that distance, on the charts, and with the arc of the swing, less than 5000 feet (1700 feet from Peacock Point to Millers Point and 3300 feet from Millers Point to the point of collision). According to the Admiralty standard, a knot or nautical mile represents 6080 feet. A speed of one knot an hour is therefore in round figures 100 feet per minute. The average speed of the "Empire Star" in travelling the distance mentioned was therefore about  $6\frac{1}{4}$  knots, but she worked up that speed from a motionless position in Darling Harbour, and despite the fact that she went dead slow round Millers Point. (Bridge Log. 11.1 Dead Slow both (engines). Vessel swinging. Engine Room Log. 11.2 Dead Slow ahead (both)). The master said the vessel would do about 4 knots on "Dead Slow", or "three knots over the ground". "It is not easy," said my brother Dixon, "to say what the speed of the 'Empire Star' was at the moment of impact, but I estimate it at about 4 knots". My brother, I think, underestimated the speed

at that point, but whether he did so or not I am satisfied upon the material which I have set forth that the speed of the "Empire Star" between Millers Point and the point of collision ~~exceeded~~, <sup>exceeded</sup> on her course towards the Harbour Bridge, ~~an~~ <sup>the</sup> average speed of  $6\frac{1}{2}$  knots, and probably reached 8 or 9 knots.

Further, my brother held that the "Empire Star" did not keep a proper look out. The senior pilot of Sydney Harbour deposed that approaching the Harbour Bridge from the westward involved some danger, partly because of the angle of approach and partly because of the lights around the harbour. The master and the pilot of the "Empire Star" also spoke of a glare which the lights of a place of amusement known as Luna Park threw on the water of the harbour and made it difficult to see inward bound vessels. No doubt exists that the master and the pilot on the bridge and the chief officer and the "bosun" on the forecastle head of the "Empire Star" were keeping a "look out", but somehow they missed the inward bound "Kairanga" until she was emerging from the Harbour Bridge some two ships lengths or about 1100 feet away. Admittedly, she had both her navigation and her masthead lights burning. She must have been in sight soon after the "Empire Star" rounded Millers Point, and it is difficult to understand how she was missed. Those on board blame the shore lights, but my brother reached the conclusion that a proper look out was not kept. I should have had some difficulty in reaching that conclusion, for it seems unlikely that the master, the pilot, the chief officer, and the "bosun" all neglected a duty which they were obviously anxious to and were at their stations to perform. The glare of the shore lights spoken of by the master and the pilots has somewhat impressed me, but I cannot say that I am convinced that my brother was wrong in his finding. The difficulty, however, of seeing an inward bound vessel approaching and coming through

the Harbour Bridge makes abundantly clear the danger and risk of excessive speed on the part of an outbound vessel.

The case of the "Kairanga" remains for consideration. She was abreast Fort Denison, on the eastern side of the Harbour Bridge, about 10.53 p.m., or 10.53½ p.m., to coordinate her times with those of the "Empire Star". She went under the Bridge northward of the red <sup>on the</sup> light, <sup>on the Bridge</sup> probably some 50 to 100 feet northward, according to her master's estimate. From abreast Fort Denison to the point of collision is, according to the charts, about 5,700 feet, which the "Kairanga" covered against an ebb tide of 1 knot in 14½ minutes, or at an average speed of nearly 4 knots. Her speed was clearly not excessive. Her master says that immediately after clearing the Bridge he saw the green light and the masthead light of a ship coming down and he stopped his engines. It is plain from the <sup>place</sup> ~~point~~ of the collision that he went to port and cut across the "Empire Star" into his wrong water; that is, on the southern side of the channel. The master explained that the course of the "Empire Star" was across his bows, and hence his order to port. But my brother did not accept this explanation, nor do I. The master, I rather think, was making a short cut to Darling Harbour instead of following the usual and proper course for an inward bound vessel, namely the northern side of the channel, and in a westerly direction towards Blues Point, where a southerly swing would be made towards Darling Harbour.

The collision was thus occasioned by the default of both vessels, and I agree ~~with my brother~~ that it is impossible to establish different degrees of blame. The result is that the appeal and cross appeal should be dismissed.

LEYLAND & CO. LTD. -V- THE SHIP "KAIRANGA"

JUDGMENT.

McTIERNAN J.

I agree that the appeal and cross-appeal should be dismissed. There is ample evidence to support the findings of fact set out in the judgment of Dixon J., and these findings fully justify His Honour's conclusion that both ships were at fault. There is other evidence with which these facts cannot be reconciled. But His Honour has by reference to his findings of fact indicated the evidence which he regarded as trustworthy. This Court has no means of testing the credibility of the witnesses. No conclusion, therefore, can be safely founded on any ~~xxx~~ evidence inconsistent with the facts found by Dixon J. Neither these findings nor His Honour's view as to the parts of the evidence which should be acted upon has been shown to be irreconcilable with any ~~fixthe~~ fact ascertained independently of the recollection of a witness. In my opinion the conclusion that the two ships were blameworthy in equal degrees for the collision should be sustained.



FREDERICK LEYLAND & CO. LTD. v. THE SHIP "KAIRANGA"

Judgment.

Williams J.

This is an appeal from the judgment of Dixon J. sitting in the Admiralty Jurisdiction of this Court.

The suit arose out of a collision which occurred between the motor vessel Empire Star and the ship Kairanga at 11.07½ p.m. Empire Star time on the night of 7th March 1940, in the narrow waters of Sydney Harbour, immediately to the west of the Sydney Harbour Bridge. His Honour held that both ships were equally to blame for the collision and decreed that a moiety of the damage to each ship should be borne by the owners of the two ships.

The two suits were consolidated, the owners of the ship Empire Star being treated as plaintiffs and the owners of the ship Kairanga as defendants. Both parties appealed against His Honour's decision and the two appeals were heard together.

In the locality where the collision occurred outgoing vessels should keep on the southern and incoming vessels on the northern side of the channel, midchannel being treated as passing immediately beneath the red centre light of the Bridge although in reality it is a slight distance, apparently some 40 feet, to the north of the light. When ships pass under the Bridge in order to proceed to Darling Harbour they should keep to the north of this centre light and then proceed in a westerly direction pointing between Blues Point and the north of Goat Island until they are approaching Blues Point when they can veer to the south. Outgoing vessels from Darling Harbour should keep on a course with a starboard swing as close to the southern shore as possible until they are straightened up to pass under the Bridge and set their course for Fort Denison. The appellant contended that the Empire Star, which was proceeding to sea from Darling Harbour, was maintaining this course and the collision occurred because the Kairanga, which was proceeding to Darling Harbour, veered to Port ~~just~~ after passing under the Bridge <sup>on</sup> the north side of the light, and trespassed into the southern channel; while <sup>the</sup> respondent insisted <sup>that</sup> the Kairanga was maintaining her proper course and the collision occurred because the

Empire Star steered out of Darling Harbour north to Blues Point, where she turned to starboard, and, in attempting to cross the Kairanga's bows, collided with her in the Kairanga's own waters.

The learned trial Judge did not state specifically which witnesses he believed and which he refused to accept, but found the facts and left this Court of Appeal to determine this matter, so far as it became material, from his findings. It appears to me that His Honour must have rejected the evidence tendered on behalf of the Kairanga, and could only have partially accepted the evidence tendered on behalf of the Empire Star, because, while he certainly did not countenance the story of the visit to Blues Point, he held that she did not keep a proper look out and also went so far north as to be in her wrong water. He believed that the Kairanga ported once and probably twice and also failed to keep a proper lookout. He found the collision occurred somewhere about where the anchor of the Kairanga was raised from the harbour bottom, its position being slightly south of a fair division between the northern and southern courses.

His Honour has dealt with the material facts in considerable detail and it is unnecessary for me to recapitulate them. Each appeal is really against his findings of fact, the attitude of a Court of Appeal in such a case ~~is~~ being clearly defined by the <sup>e</sup>speeches of their Lordships in Powell and Wife v. Streatham Manor Nursing Home 1935 A.C. 243.

A finding of fact on which I feel inclined to differ from His Honour relates to the speed at which the Empire Star was travelling at the moment of impact. He estimated it at about 4 knots. The evidence shows that a safe speed for such a vessel in the locality would be not more than 6 knots. I believe that her speed was in excess of this. The point where the anchor was raised is 598 ft. from the north west corner of the wharf at Dawes Point (No. 1 of Walsh Bay) on a bearing 337.08°. Its approximate distance is 970 ft. from the centre light of the Harbour Bridge on a bearing of about 273 or 274°. This point is at least 4000 ft. from the point where the bow of the Empire Star was placed by her Captain and Pilot, namely just about abreast of the lower end of Dalgety's Wharf, when this ship, at 11 o'clock, having

been manoeuvred out of the Wharf where she was lying at Pyrmont, had been turned around and was ready to commence her voyage. At 11 o'clock by her Bridge Movement Record Book her engines were given the order "slow ahead both"; at 11.01 "dead slow both vessel swinging"; at 11.05 "half ahead port"; at 11.06 "slow ahead both"; at 11.07 "full astern starboard"; and 11.07½ "full astern both". Considerable argument ensued during the hearing of the appeal as to the position of the ship when the above order was given at 11.05. The Pilot said the order was given rounding Millers Point, and I am willing to assume as Mr. Windeyer submitted that the exact position of the ship when the order was given is doubtful. Mr. Evans contended that her position was off the point marked on the chart as Millers Point. The Pilot placed her midway between this spot and No. 10 Wharf Walsh Bay, while Mr. Windeyer insisted she was about opposite to Nos. 6 to 8 Wharves. There is no doubt the ship was proceeding generally speaking on a swing to starboard and that this order was given to assist this swing. It seems to me unnecessary to determine her exact position <sup>because</sup> the distance from where the vessel commenced her voyage at 11 o'clock to the point of impact at 11.07½ was <sup>as I have said</sup> at least 4,000 ft. so that the ship averaged about 5 knots between the two points. As the engines were running dead slow while the vessel was swinging between 11.01 and 11.05, and were only restored "slow ahead both" at 11.06, I would infer that at the moment of impact the Empire Star must have been doing about 8 knots. It was quite 2,000 ft. from where the Pilot placed her at 11.05 to this point so that to cover this distance in 2½ minutes she would have had to average this speed. In my opinion, therefore, the Empire Star was, if anything, more to blame than His Honour considered her to be.

I can see no reason to differ from His Honour's finding that a proper lookout was not kept on the Empire Star. It was suggested that the glare on the water from the lights at Luna Park and on the Bridge prevented those who were responsible from seeing the Kairanga <sup>sooner,</sup> but, if this were so, <sup>there</sup> that would be all the more reason for her proceeding down the Harbour cautiously and at a slow speed. His Honour said that it was hard to believe that any difficulty existed in the Empire Star

seeing the Kairanga's lights while she was still on the eastern side of the Bridge, at all events as far east as Kirribilli, and that the Kairanga should have seen the lights of the Empire Star sooner and, therefore, before she ported on emerging from the Bridge. The Kairanga passed Fort Denison at 10.53½, Empire Star time, when her engines, which were then going at full speed, were placed on slow ahead. Mr. Evans after estimating her speed, having regard to the weight she had on, from Fort Denison to Kirribilli at 5½ knots and from Kirribilli to the Bridge at 5 knots hazarded the opinion that her bridge, which is 75 ft. from the stem of the vessel, should have emerged from under the Harbour Bridge at 11.2½. But it seems to me the evidence rather suggests that this only happened shortly before 11.05½. I draw this conclusion from His Honour's finding that she then ported and the evidence of the helmsman Currie that she did this whilst her engines were still propelling the ship. At 11.05½ the order was given for her engines to stop, and at 11.06½ to go full astern. I am inclined to think that at 11.05½ the Empire Star was <sup>approximately</sup> ~~apparently~~ in the position fixed by Mr. Evans and that the two vessels only became visible to each other at or very shortly <sup>before</sup> ~~after~~ this time. The two vessels could not have seen each other, as His Honour <sup>appears to have</sup> ~~thought~~, while the Kairanga was in the vicinity of Kirribilli which is 2,500 ft. to the East of the Bridge. The order to port must have been given before the Captain of the Kairanga sighted the Empire Star. The important finding against the Kairanga by His Honour that this order was given cannot be disturbed. It was one to which he would only have come after a most careful consideration of the whole of the relevant evidence, including the demeanour and credibility of the material witnesses. There is ample oral evidence to support it and it is corroborated by the position of the anchor. In fact Mr. Evans found himself forced to argue that this position does not fix the true point of impact. He suggested the collision occurred at a point where some scattered pig iron and coal were found on the harbour bottom about 300 ft. to the north of this <sup>position</sup> ~~point~~. His Honour found that the starboard bow of the Empire Star struck the starboard bow of the Kairanga at an angle of about 20°. It was therefore almost a head on collision. The

Kairanga was drawing 5 ft. more water at the bow than the Empire Star. The bow of the Empire Star cut through the hawser holding the port side anchor at the gipsy of the windlass with the result that the anchor with 6 ft. of hawser attached thereto sank to the bottom. Mr Evans suggested the vice like grip of the two ships held the anchor while the Empire Star pushed the Kairanga from where they collided to above where the anchor was found. It appears to me to be more probable that the cutting occurred very soon after the moment of impact and that the anchor immediately sank to the bottom. The Empire Star then forced the Kairanga in the direction where the large pile of debris comprising pig iron and coal and part of a rope hawser were found about 300 ft. to the east. This debris consisted of a large part of the contents of the Kairanga's forehead hold. ~~When~~ The scattered debris in the northern channel was either swirled there by the commotion in the water at the moment of impact, when the propellers of both vessels were proceeding full astern, or, more probably, dropped when the Kairanga was being towed to Goat Island where she was beached after the collision.

There was therefore ample evidence to support His Honour's conclusion that both vessels were at fault. The collision would not have occurred if the Kiaranga had not ported but had proceeded on the proper course. The Empire Star does not appear to have seen her until very shortly before 11.07 when she blew ~~her~~ one blast as a signal she was going to starboard and gave the <sup>engine</sup> order "full astern starboard". Probably the collision was then inevitable, but, if the Empire Star had not been proceeding at an excessive speed and had kept a proper lookout, there should have been time for her to see the Kairanga as the vessels approached each other and to have gone to starboard or astern at an earlier stage and thereby averted the collision.

Both appeals should be dismissed.