

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

FEDERAL STEAM NAVIGATION CO. LTD.

V.

THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT

Judgment delivered at Sydney,
on Friday, 17th December, 1954.

ORIGINAL

FEDERAL STEAM NAVIGATION COMPANY LIMITED

v.

THE COMMONWEALTH OF AUSTRALIA

ORDER

Appeal dismissed with costs

FEDERAL STEAM NAVIGATION COMPANY LIMITED

v.

THE COMMONWEALTH OF AUSTRALIA

DIXON C.J.
McTIERNAN J.
FULLAGAR J.
KITTO J.
TAYLOR J.

FEDERAL STEAM NAVIGATION COMPANY LIMITED

V.

THE COMMONWEALTH OF AUSTRALIA

JUDGMENT

DIXON C.J.
McTIERNAN J.
FULLAGAR J.
KITTO J.
TAYLOR J.

This is an appeal from an order of Kinsella J. made in an Admiralty suit adjudging the respondent, who was the defendant in the suit, entitled to recover from the appellant the loss suffered by the former in respect of damage caused to H.M.A.S. "Australia" in a collision between that vessel and the appellant's vessel, the steamship "Somerset". The suit had been instituted by the appellants for the purpose of recovering the damages suffered by it as a result of the collision, but this claim failed and the respondent's counterclaim succeeded.

At the time of the collision the "Somerset" was under compulsory pilotage whilst the "Australia", the flagship of Rear Admiral Eaton, was under the command of Captain Morrow. The former vessel is a single screw steamer of 5,670 tons net register and her overall length is 495 feet. The overall length of the "Australia" is 630 feet.

The collision between the two vessels took place on the southern side of Port Jackson in Woolloomooloo Bay whilst the "Australia" was endeavouring to berth, with her bows to the north, at the cruiser wharf. The cruiser wharf, which runs north and south, is situated on Garden Island on the eastern shores of the bay and almost immediately to the north of the Captain Cook Dock, the entrance to which extends

from near the southern end of the wharf, westwards into the bay for a distance of approximately 450 feet. At the western extremity of the entrance to the dock is situated what is called Round Head and from this point the wharves, which line the remaining portion of the eastern shore of the bay, extend in a general southerly direction for some 2,500 to 3,000 feet. The wharf running south immediately from Round Head is known as the fitting out wharf and, on the day of the collision, a frigate, the H.M.A.S. "Shoalhaven", was berthed there with her stern approximately twenty feet south of Round Head. Mrs. Macquarie's Point constitutes the western headland of the bay and from this point to a position due west of Round Head the western shore of the bay runs a little east of south. Thereafter its course alters to a little west of south and it pursues that general direction until it reaches the narrow southern end of the bay. The four fathoms line on the western shore of the bay between Mrs. Macquarie's Point and a position west of Round Head runs approximately parallel to the shore line and distant about 150 feet from it.

On the day of the collision, the 4th December, 1951, the "Australia" was the first of the two vessels to enter the bay. She entered it stern first from the main body of the harbour and, for the purpose of assisting in her manoeuvre, two tugs, the "Hero" and the "Lindfield", were in attendance. Those on board the "Somerset" observed the entry of the "Australia" into the mouth of the bay but their view of the movements which immediately followed was obscured by Garden Island which then lay to the west or south-west of them. But at a later stage, when they opened up the bay, or a substantial part of it, they were able to see that the prevailing north-east breeze was causing difficulty in berthing the "Australia". She was then lying some distance laterally off the cruiser wharf. The vessel had fallen away to the south-west and her bows, having fallen off more rapidly than

the stern, were headed towards the north-west. The two tugs were endeavouring to take up appropriate positions on the port side of the "Australia" for the purpose of moving her into her berth. She continued, however, to fall away towards the south-west, her bows continuing to fall off more rapidly than her stern. At one stage it was found necessary to give the vessel slight headway to avoid contact between her stern and Round Head. The after engine-room movement book shows that from about 3.43 p.m. until approximately 4 p.m. her starboard screws were going half astern at eighty to one hundred revolutions and for part of this time her port screws were going ahead at the former rate. Thereafter, the starboard screws were stopped until two minutes before the collision at 4.14 p.m. when they were put half ahead at eighty revolutions for three minutes, that is, until one minute after the collision. After 3.57 p.m. the port screws were stopped until approximately 4.02 p.m. when they were put slow ahead for about a minute and then were increased to eighty revolutions *apart from two quite minor movements,* for three quarters of a minute. Thereafter they remained stopped until the moment of collision when they were put slow astern for one minute. During this period the "Somerset" was proceeding from an anchorage some distance to the east of Garden Island with the intention of berthing at a wharf on the eastern side of Woolloomooloo Bay towards its southern extremity. Her course from this anchorage to that point would bring her past the northern end of Garden Island and, somewhere about Fort Denison, it would have been necessary for her to commence to turn to port in order to proceed south down the western side of the bay. This general course was followed by the "Somerset" and the two vessels came into collision on the western side of the bay in close proximity to the four fathoms line approximately six-hundred feet to the south of Mrs. Macquarie's Point. As we have already said, the collision occurred at 4.14 p.m., but before it occurred the

"Australia" sounded four short blasts. After the "Somerset" had passed to the north of Garden Island she was observed from the bridge of the "Australia" and this signal was later given because the former vessel either had entered, or gave every appearance of being about to enter, Woolloomooloo Bay and it was considered that a situation had arisen within the contemplation of Regulation 32 of the Port of Sydney Regulations. That regulation is in the following terms:

"When a steam vessel within the port is for any reason not under command and cannot keep out of the way of an approaching vessel, or when it is unsafe or impracticable for such vessel to keep out of the way of any other vessel, she shall signify the same by four blasts of the steam whistle or sound signal in rapid succession, each blast being of about one second's duration, and after such signal all other vessels shall be kept out of the way of such steam vessel, but this signal is only to be given in a case of extreme necessity".

Nevertheless, the "Somerset" continued on her course and the vessels came into collision. The first impact was between the stem of the "Australia" and the port side of the "Somerset" some 240 feet from her stem. Thereafter the vessels remained in contact for a brief period and considerable damage was done to an extensive portion of the "Somerset's" port side aft of the initial point of the collision. The angle of impact between the "Australia's" fore and aft line on the port side and the fore and aft line of the "Somerset" was somewhere between 30° and 50° and the impact twisted the stem of the "Australia" slightly to starboard.

There is no dispute between the parties concerning the facts in the general form in which we have stated them. The real dispute between the parties is concerned with matters which arise against this general background and they may be briefly stated. The respondent, which was the defendant in the action, maintains that the cause of the collision was, in the language of Regulation 32, the failure of the "Somerset" to keep out of the way of the "Australia". Lack of room in the bay for the "Australia" to manoeuvre in the difficult position in which she found herself, it was said, created a situation justifying the use of the signal in question and, accordingly, it was sounded. Furthermore, those on the "Australia" claimed - and this was a critical matter in the case - that it was sounded some seven minutes before the collision and, therefore, at a

time when those in charge of the "Somerset" had ample room to manoeuvre before entering the bay. On the other hand witnesses called on behalf of the appellants strongly denied that the signal was given at such an early stage and maintained that it was given not earlier than two minutes before the collision. Some of these witnesses claimed that it was given only a moment or two before the collision whilst others were prepared to concede that two minutes might have elapsed between the giving of the signal and the first impact. Of course if the signal of four blasts had been given only a minute or two before the collision then it was given at a time when the "Somerset" was already inside the bay and proceeding down on its western side on a course adjacent to the four fathoms line. Captain Olsen, the pilot on the "Somerset", added that the signal was completely and utterly unnecessary and said that at the time it was given he judged that there would be plenty of room for the "Somerset", on her course to her berth, to pass clear of the "Australia" and this, he says, she would have done if the "Australia" had not made a "decided forge ahead" as the "Somerset" commenced to cross her bows. He estimated that he would have passed clear of the "Australia" by some two hundred feet if this had not occurred and to some extent he was supported by the master of the "Somerset" and others on that vessel. None of these witnesses, however, appeared to think that there would have been a margin as great as two hundred feet, the master estimating the probable margin at seventy-five feet to one hundred feet. Those on the "Australia", however, denied that their vessel moved forward at all and stoutly maintained that she was lying still in the water when the "Somerset", on a course which would, at the outside, have cleared the "Australia" by, perhaps, inches only, put her helm hard aport and struck the "Australia" on the port side of her stem. To establish how this could happen expert evidence was relied upon to establish the possibility of a ship under

port helm moving laterally to port for some comparatively minute but, apparently, undefined distance. But when it is borne in mind that the initial point of impact on the port side of the "Somerset" was abaft her pivoting point and that the "Australia" remained in contact with the port side of the "Somerset" for some considerable distance beyond that point this explanation becomes quite incredible. Such a helm order was in fact given on the "Somerset" immediately before the collision and it was given, it was said, in order to swing the after part of that vessel out of the way of the advancing "Australia".

Faced with the conflict of fact which is apparent from this brief statement of the matters in controversy the learned trial judge accepted the respondents' evidence and found the appellant solely to blame for the collision. In particular, he found that the four blast signal was given at the time deposed to by the respondents' witnesses and that, at that time, the "Somerset" was able to and should have refrained from entering the bay. Further, he accepted the evidence of those on the "Australia" that she did not move forward during any part of the last two minutes before the collision.

The functions of a Court of Appeal in dealing with appeals on questions of fact have been frequently and precisely defined but counsel for the appellant, who referred to the relevant authorities, contended that there are special reasons why this Court should completely re-examine the facts of this case for itself. The finding of the learned trial judge, he says, was based upon the acceptance of the evidence given by a number of witnesses who deposed quite emphatically to the fact that the four blast signal was given as much as seven minutes before the collision, and also to the fact that the "Australia" did not move forward at any time during the last two minutes before the collision. The navigating officer of the "Australia" claimed to have made a contemporaneous note of the time when the signal was given and this note was received in evidence. Neither did the evidence on the second point

purport to be merely a matter of casual or hasty impression, but, on the contrary, it was said to be ^{the} result of deliberate and precise observations made both by the navigating officer and Captain Morrow. Accordingly, it was said, if this evidence on either point was erroneous it was deliberately so and refusal to accept the evidence on one point should result in its rejection on the other. Then, it is said, with some force, that the evidence with respect to the second of the matters referred to was clearly erroneous and reasons were advanced for concluding that the "Australia" did move forward at some stage during the last few minutes. The substantial matters relied upon to establish this were threefold. Firstly, it was said that it was quite impossible for the "Somerset" to have been struck at the position at which, admittedly, she was struck, unless the "Australia" was at the time moving in the direction of the course of the "Somerset". Secondly, it is established that for two minutes before the collision the starboard screws of the "Australia" were going half ahead at eighty revolutions and that her port anchor was dropped immediately before the collision. Thirdly, it is said, the inference that the "Australia" did go ahead should be drawn from a study of a photograph of the two vessels which was taken some little time after the collision and which showed the stern of the "Australia", apparently, considerably further away from the "Shoalhaven", at her berth at the fitting-out wharf, than the respondents' witnesses placed her immediately before the collision, that is approximately thirty feet.

It is convenient to deal first with the last of these matters. The photograph in question had been taken **an unidentifiable** from ~~/~~ position some two thousand feet or so away from the vessels and attempts were made by ingenious methods to fix the distance as shown between the side of the "Shoalhaven" and the stern of the "Australia" at approximately one hundred and thirty to one hundred and forty feet. The stern of the "Australia",

it was said, did not proceed further to the west after the collision and it was, therefore, contended that she must have advanced approximately one hundred feet to this point at some time during the last two minutes before the collision. But, in ~~our~~ opinion, it would be quite unsafe to draw any such inference from the photograph; the factors which are subject to margins of error are far too numerous to allow this to be done. In the first place this estimate depends upon the accuracy of the first estimate of thirty feet. Secondly, any degree of distortion in the original photograph or in the composite photograph which was subsequently prepared would seriously affect the estimate as would also any variation between the place from which the original photograph was taken and that from which the surveyor, who was called to give evidence, took his sights. Again, it is apparent that the impact of the collision itself must have tended to swing the stern of the "Australia" to port and thus increase the distance between her stern and the "Shoalhaven". Finally, it is quite impossible to say how long after the collision the original photograph was taken or what happened during the interval to the "Australia's" stern.

The second matter, without more, would suggest a forward movement on the part of the "Australia", but Captain Morrow gave evidence to the effect that the "Hero", which at that time was endeavouring to get into position on the port bow of the "Australia", had imparted some sternway to her and the starboard engine order at 4.12 p.m. was given to counteract this and to avoid the possibility of striking the "Shoalhaven". During the hearing of the appeal ~~we were~~ at a loss to understand why in these circumstances the port screws were not put ahead instead of those on the starboard side. Such a movement, it was conceded, would have tended to throw the stern of the "Australia" away from the "Shoalhaven" and her stem away from the course of the "Somerset", but it may have

been a correct manoeuvre to oppose directly any motion imparted by the tug, and indeed, there may have been good reason why the port engines should not have been put ahead. It was said that the second tug was on her port quarter and that this may have been the explanation why this course was not pursued. At all events no attack was made upon Captain Morrow during the course of the trial for not having done so and it is not for this court in those circumstances to attach any importance to that circumstance. Nor, we should hasten to add, do we see any reason to doubt Captain Morrow's explanation why he thought it necessary to give the order in question for, unless it be accepted, we are faced with the spectacle of an experienced naval officer giving an order which inevitably - and for no reason at all - must have caused the stem of his vessel to move ahead and to port on to the course of the "Somerset". Such a conclusion would be so much out of keeping with reality that it should not, in our opinion, be accepted. We have little doubt that at the time the order was given a situation of extreme delicacy had arisen and that Captain Morrow was faced with the task of endeavouring to keep the "Australia" - a large vessel - completely still in the water until the "Somerset" had passed. It was the only course open to him if damage was to be avoided both to the "Somerset" forward and to the "Shoalhaven" aft, and, if the situation had been created by a decision on the part of the pilot on the "Somerset" to ignore the "Australia's" signal at a time when he might reasonably have taken steps to keep out of the latter's way, the appellant has little of which to complain if, in endeavouring to pursue it, the "Australia" made some slight forward movement.

The first of the matters referred to by counsel for the appellant makes it reasonably clear to our minds, however, that the stem of the "Australia" did advance on to the course of the "Somerset". This could have occurred either

because the former vessel was continuing bodily to fall off to the south-west, or because of the engine movement referred to, or because of a combination of both factors. The first of these factors did, according to a great deal of the evidence, continue to operate and it is possible that the engine movement produced some additional slight forward motion. But the evidence is that, even if the "Australia" had been completely still in the water and without a tug exerting some force on her port bow, some forty-five seconds would have elapsed before any headway was attained. We are satisfied that, in the circumstances as they existed, any headway which developed was very little indeed. It in no way resembled a "surge" or "decided forge ahead" as deposed to by some of those on the "Somerset" and was not the result of any lack of care on the part of those in charge of the "Australia". Nor, on the whole, are we surprised that those on the "Australia" were prepared to swear that their vessel did not move forward at all; it may well have seemed that this was so and, as the vessel was still drifting away to the south-west, it would have required observations too precise and too constant to be expected at such a time to detect the small degree of headway which the "Australia" may have attained.

The views which we have expressed on this aspect of the case do not, in our opinion, require the court to reject the evidence given by those on the "Australia" concerning the other events which preceded the collision, and, more particularly, that concerning the time at which the four short blasts were sounded. No doubt those witnesses from the "Australia" who swore that their vessel made no headway at all at any stage during the last two minutes were quite emphatic about it and claimed that the observations made by them established that fact. But a finding in spite of this evidence that probably she did attain slight headway during the last half minute or so before the collision is not, as was contended,

so destructive of their credibility as to compel the court to reject the balance of their evidence. This would be sufficient to dispose of this appeal, for we are firmly of the opinion that any slight forward movement of the "Australia" did not result from any failure on the part of Captain Morrow to exercise due care in the management of his vessel. On the finding, as made by the learned trial judge, that the four blasts were sounded some seven minutes before the impact the "Somerset" received due warning of the situation which had arisen and it was her clear duty to keep out of the way. Again, on that assumption, the action of the pilot in ignoring the warning that, in effect, the "Australia" was, or was likely to become an obstruction in his path, was imprudent in the extreme and his action in continuing to come on created a situation in which it became imperative to endeavour to maintain the "Australia" completely still in the water. The fact that this result was not completely achieved does not, in the circumstances which prevailed, indicate that there was any lack of skill or care at that stage on the part of the "Australia".

But in view of the very full argument which has taken place we prefer to state our own reasons for thinking it probable that the four blasts were sounded sufficiently long before the collision to allow the "Somerset" to keep clear and not to dispose of this issue merely by pointing to the finding of the learned trial judge. The speed of the "Somerset" as she passed Garden Island was said to be about three knots, or a little more, and as Woolloomooloo Bay opened up it must have been apparent to those on board that vessel that some difficulty was being experienced in the berthing of the "Australia". It will be remembered that at one stage, as the latter vessel drifted to the south-west, her stern came close to Round Head, and she was given a little headway in order to clear it. Presumably, this was in the period between

approximately two and four minutes past four when, according to the after engine room movement book, the port screws were going, first, slow and, later, half ahead. This period ended some ten minutes before the collision and at that time the "Somerset" must have been at least half a mile from the point of collision. Even at that stage the "Australia" must have shown signs of becoming an obstruction in the "Somerset's" course and her continued falling off during the next few minutes must have rendered this possibility increasingly apparent. The drift of the "Australia" across the bay was comparatively slow and unhurried, but some six or seven minutes before the collision she must have been occupying a great deal of the navigable water between Round Head and the western shore. At this stage the "Somerset" was well back from Mrs. Macquarie's Point and was probably about ^{or just beyond} the point where she would commence her turn to port to enter the bay. As she commenced this turn it must have been apparent to those on the "Australia" that there would be a serious risk of collision unless the "Somerset" kept out of the way or unless the drift of their own vessel could be arrested immediately. But Captain Morrow's experience during the previous seven or eight minutes gave him no sure grounds for thinking that the drift of his vessel would be arrested immediately. The two tugs had, so far, failed to achieve this and, whatever course was thereafter adopted, the time had come when it was imperative that the attention of those on the "Somerset" should be directed to the "Australia's" predicament. At that stage it was practicable, and it would have been prudent, for the "Somerset" to have kept out of the way and why Captain Morrow should have refrained from giving the signal until two minutes, or less, before the collision is beyond our comprehension. It may be said, of course, that it may not have occurred to him earlier to sound the signal in question, but we would find it difficult to believe that, in the circumstances as they existed some six

or seven minutes before the collision, it was a course which did not readily occur to him or which was not, just as readily, pursued. This view is consistent with the sworn evidence of those on the "Australia" that the signal was given about this time and we prefer to accept it rather than the conflicting evidence from those on the "Somerset" that it was not given until two minutes, or less, before the collision.

The pilot on the "Somerset" maintained that the signal was not given until he reached Mrs. Macquarie's Point, but, nevertheless, he says that if the "Australia" had not made "a decided forge ahead" he would have passed her bows with two hundred feet to spare. Moreover, he says that the signal, even at that stage, was completely and utterly unnecessary. Believing, as we do, that there was no "decided forge ahead" on the part of the "Australia" we find it impossible to accept his statement that he would have passed the "Australia" two hundred feet away if she had not attained headway. We are fortified in this view by the fact that the master of the "Somerset" thought the margin would be only seventy five to one hundred feet, but we believe, also, that this estimate was the product of wishful thinking and that the margin, if any, would have been much less. In these circumstances the following comments may be made. First of all, if the signal was given at the time deposed to by those on the "Somerset" then it was delayed for a substantial time after its necessity had become reasonably apparent and we are unable to appreciate why any such delay should have occurred. Secondly, if it was not given until then it is impossible to understand the pilot's statement that it was completely unnecessary for, by this time, a very serious risk of collision had arisen. It may be that his other statement, that it was given too late to enable him to keep out of the way, would be explained on this hypothesis. But the statement that at that stage there was no danger is, in our opinion, beyond belief. We should, perhaps, add that the master and

officers of the "Somerset" did not recognise the signal and, presumably, paid little attention to it. Their estimates of the time when it was given were made at some later stage when they became aware for the first time of the nature of the signal which had been given. Finally, if the signal was given some seven minutes before the collision the pilot may have thought the signal was unnecessary. At that stage the "Somerset" was a considerable distance back from the ultimate point of collision and there was still room for her to pass to the west of the "Australia" if the drift of the latter vessel could have been arrested at that point of time. On the evidence we think it is probable that the pilot, believing that it would be arrested before the "Australia" reached his course, ignored the signal and preferred to take the risk of coming on. In the circumstances, we think it probable that the risk of collision was appreciated by Captain Morrow shortly after the "Australia's" stern had cleared Round Head and when he found, a few minutes later, that his vessel was continuing to fall away. At that stage the "Somerset" was in a position to keep clear but the pilot preferred to ignore the warning signal and trust entirely to his own assessment of the situation. In ignoring the signal and continuing to come on there was, in our opinion, a failure on his part to comply with the duty clearly imposed upon him by Regulation 32, and, in pursuing this course, he placed his own ship in a state of danger and doubly imperilled the "Australia". The subsequent events do not, for the reasons already given, provide any foundation for the allegation that the "Australia" was either wholly or partially responsible for the collision and accordingly we are of the opinion that the pilot's failure to keep out of the way was the sole cause of the collision.

Reference should be made to one further matter. Counsel for the respondent contended that on the form of the

pleadings the respondent should be held liable to the appellant if upon the evidence it should appear that the "Australia" moved ahead at any stage during the last two minutes before the collision. His contention was that on the pleadings the issue on this aspect of the case was whether the "Australia" attained headway and, further, that if this issue should be resolved against the respondent, then it should be held liable. We have no doubt that if the correct conclusion were that, whilst the "Somerset" was crossing the bows of the "Australia", the latter vessel suddenly moved forward an appreciable distance, this circumstance might very well be held to constitute the cause of the collision. But the views which we have expressed do not amount to such a finding, and, indeed, negative any relevant act of negligence on the part of those in command of the "Australia". It is true that there was an issue between the parties as to whether the "Australia" moved forward but the liability of the respondent depends upon the extent of the movement and the circumstances in which it was made, and it is clear that a mere finding that she did move forward to some slight extent and that this was not occasioned by the negligence of those in command of the "Australia" does not entitle the appellant to succeed either wholly or in part.

For the reasons which we have given we are of the opinion that the appeal should be dismissed.