Indexed as:

Tulloch v. Canada (Department of Fisheries and Oceans)

Between
Les Tulloch, Plaintiff, and
Her Majesty The Queen in The Right of Canada as represented by The Department of Fisheries and Oceans, Fishing Vessel Insurance Plan, and the Minister of Fisheries and Oceans, Defendants

[1988] F.C.J. No. 454

21 F.T.R. 72

32 C.C.L.I. 36

10 A.C.W.S. (3d) 443

Action No. T-2120-87

Federal Court of Canada - Trial Division
Vancouver, British Columbia

Martin J.

Heard: May 18, 1988
Judgment: May 25, 1988

Insurance (Marine) -- Warranties as to ship's master -- Owner and master appointing unapproved master -- Unapproved master leaving ship with third person -- Whether policy valid or void when ship sank in hands of third person.

This was an action by the plaintiff for payment out under an insurance policy against his fishing vessel. The plaintiff was the owner and master of a fishing vessel. The plaintiff took out hull and machinery insurance under the Federal Fishing Vessel Insurance Plan. Due to injuries sustained while out fishing the plaintiff was required to leave the vessel to receive treatment. He appointed another person to act as master, which was in violation of the insurance policy. That person subsequently appointed a third person with little experience to master the boat. That third person

was the only person on the boat when it capsized and sank after being swamped by heavy seas. The insurer denied liability due to the fact that there was no approved master on the boat at the time it sank.

HELD: The action was allowed. There was no breach of the warranty in the insurance policy. The plaintiff did not appoint the third person as an alternate master of the vessel prior to or at the time of the loss. The third person was not necessarily the master of the boat because he was the only person on board. The policy was not in effect during the time that the second person was acting as master but the policy became valid again when that second person left the ship.

G. Bisaro, for the Plaintiff.
A. Louie, for the Defendants.

MARTIN J.:-- The Plaintiff claims for the loss at sea of his fishing vessel "WAVIE II" under the provisions of a hull and machinery insurance policy issued by the Federal fishing Vessel Insurance Plan on the 10th day of December, 1986 for the one year period from November 21, 1986 to November 21, 1987.

The vessel, in company with five other similar vessels, had been about to start prosecuting the geoduck fishery at Smith's Inlet off the coast of British Columbia on June 3, 1987 when the plaintiff, the owner and the master of the vessel, left the vessel to go to Vancouver for medical treatment of an injury which he had sustained a few days earlier. Prior to leaving the vessel he appointed one Rick St. Clair, master. He directed St. Clair to carry on the fishery operations and to report to him daily in Vancouver.

By June 11, 1987 when the quotas for the geoduck fishery had been just about filled and the weather was not favourable for continuing it in any event, St. Clair and a diver left the vessel and flew by small plane to Port Hardy on Vancouver Island, a distance of some thirty nautical miles. As there was only a three man crew to begin with, this left one Thomas Grimm on the vessel by himself. Prior to leaving St. Clair had secured the vessel and instructed Grimm to remain on it until the plaintiff returned on Sunday, June 14.

However the day after St. Clair and the other crewman had left the vessel, the masters of the other five vessels decided to discontinue their fishing operations and to sail to Port Hardy. Grimm, who had little sea experience with "WAVIE II", decided to accompany the others. Without obtaining or even looking for permission from either the plaintiff or St. Clair, and without taking the precaution of getting a spare crew member from one of the other five vessels to assist him, he took charge of the plaintiff's vessel and by himself, but in company with the other five vessels, set out

out for Port Hardy on June 12th.

When she had completed a little more than one quarter of her intended voyage, the vessel was struck aft by a wave which flooded the laseret and which, because the pumps could not keep up with the sea water which then continued to enter the vessel in her lowered condition, ultimately caused her to sink. Grimm was forced to abandon the vessel but was fortunate enough to be picked up by one of the other five fishing vessels almost immediately.

It is common ground that the loss was brought about by a peril of the sea and that the vessel was insured against such a peril. The sole ground, and I emphasize this because it is just that, upon which the defendants deny liability in this action is

> "...because the plaintiff did not comply with the express warranty pleaded in paragraph 5 (c) herein, by having Thomas Grimm as the master of the insured vessel at the time of the alleged loss, without prior approval of the fishing vessel insurance plan or by the Minister of fisheries and Oceans or by Her Majesty."

The express warranty to which the defendants refer is one of three contained in clause 12 of the policy and is as follows:

> Warranted free from any claim for loss, damage or expense where anyone other than the Assured is Master of the insured vessel named in Clause 1 herein without prior approval of the Plan. On such approval the Plan may charge an additional premium as a condition thereof.

In the course of the trial evidence was introduced to show that St. Clair had previously been designated and approved by the defendants to act as master of the insured vessel. In argument, counsel directed themselves to the issue of whether the plaintiff should or should not have reasonably concluded that, at the time of the loss, St. Clair was or was not an approved alternate master. It was also argued that even if St. Clair was not an approved alternate master, the policy was not thereby voided from the time St. Clair was appointed master because the so-called warranty only suspended the operation of the policy during the time that the vessel was mastered by St. Clair.

While all that argument is interesting, it has absolutely nothing to do with the matter before me. In this matter, the defendants have denied liability on the basis only that by having Grimm as master of the vessel at the time of the loss without the prior approval of the defendants, there had been a breach of the warranty contained in Clause 12.

The short, simple answer to this defense raised by the defendants is that because the plaintiff did not have Grimm as master of the vessel at the time of the loss, there has been no breach of warranty. I expressed the rather hasty view in the course of argument that Grimm must have been the master because he was the only person on board at the time of the loss. I can see the error in that observation for, as a counsel pointed out to me, that would, given the appropriate circumstances,

constitute as master a person who simply stole the vessel.

I agree with counsel for the plaintiff that the position of master carries with it some notion of appointment to that position by the owner. I realize that in the prosecution of any kind of a fishery with a small vessel and a crew of three, there will be no written or even verbal contract setting out the duties or even the appointment of the master. In most cases, there will be an unspoken understanding or simply an acquiesence that another is to act as master, but there will nevertheless be compliance with the notion of approval by the owner, without which a person cannot be said to occupy the position of master.

In this matter, Grimm cannot be said to have been the master of the vessel at the time of the loss. I accept the plaintiff's evidence that he was completely unaware Grimm had attempted to take the vessel by himself from Smith's Inlet to Port Hardy. I also accept St. Clair's evidence that his instructions to Grimm were to stay on the secured vessel until the plaintiff's expected arrival on Sunday, the 14th of June. I doubt that St. Clair's instructions were that specific but I have no doubt that both he and Grimm clearly understood that this was the plan.

Because there is not the slightest evidence that the plaintiff, either by himself or through his designated master St. Clair, expressly or impliedly, appointed, assented to or acquiesced in Grimm assuming the position of, or in any way acting as, master of "WAVIE II" at the time of her loss at sea on June 12, 1987, I find that the defendants have wrongfully denied liability to the plaintiff for the loss of his fishing vessel and direct that the defendants indemnify the plaintiff for his loss in accordance with the terms of his policy of insurance to which reference has already been made.

Because the issue is not raised by the pleadings, I am not required to address the consequences of St. Clair acting as master of the vessel. However, on the basis that it may assist the parties in resolving any differences which may arise following this decision, I will, very briefly, give my views on that issue.

There is no doubt that St. Clair was appointed by the plaintiff to act as master of the vessel. Nor is there any doubt that the plaintiff knew or ought to have known that St. Clair was not, at the time he acted as master in 1987, approved by the defendant.

In 1986 when the plaintiff obtained approval for St. Clair to act as alternate master, the approval of the previously designated alternate master was rescinded. If, as the plaintiff contends, he believed St. Clair was already covered as an alternate master under his 1986-87 policy, then he should have expected to see St. Clair's approval rescinded when he requested and obtained approval for one Gary Blinn to act as alternate master in March of 1987. The fact that the approval did not rescind the approval which the plaintiff said he believed he had for St. Clair under the 1986-87 policy should have caused the plaintiff to realize that St. Clair was not an approved alternate master in March of 1987.

Moreover, the approval he obtained for St. Clair in October of 1986 was specifically for St. Clair

to act as master from October 15, 1986 until November 21, 1986. It was clear from the terms of the letter to the plaintiff that St. Clair's approval did not continue beyond November 21, 1986.

Finally the new, policy for 1986-87 issued on December 10, 1986 contained the usual warranty clause specifying that there could be no claim for loss where anyone other than the insured was master of the insured vessel. There was nothing in the policy to indicate that St. Clair was approved under that policy and it specifically provided for the prior approval of anyone other than the assured to be master.

I do not doubt the plaintiff's evidence that he believed St. Clair was covered as an approved alternate master under his 1986-87 insurance policy. I simply say that the plaintiff ought to have known better from all of the documentary evidence to the contrary. The plaintiff is an obviously intelligent college graduate who, I suspect, did not pay much attention to the various written notices or policies as he received them and, without reason and contrary to the contents of the documents, wrongfully assumed that St. Clair was covered under his 1986-87 policy.

Given that St. Clair was not an approved alternate master under the plaintiff's 1986-87 policy what then is the effect of his becoming master on June 3, 1986? Counsel for the defendants argues that the policy was thereby voided from June 3, 1986 onwards while counsel for the plaintiff submits that the operation of the policy was only suspended during the period that St. Clair was master.

In my opinion the latter view is the correct one based on the 1982 decision of the British Columbia Court of Appeal in Century Insurance Company of Canada v. Case Existological Laboratories Ltd. (Cause No. CA 800998) as approved by Richie, J. of the Supreme Court of Canada in [1983] 2 SCR 47. In that case a warranty similar to the present one was found to be descriptive of when the policy would be in force and not a condition that would avoid the policy from the time of non-compliance. There the Court found that the operation of the policy would be suspended only during the period that the owner warranted the presence of a watchman and the watchman was not present.

In this case the owner warranted that there would be an approved master and for a period of time St. Clair, who was not approved, was master of the vessel. In my view the operation of the policy was suspended only during the time that St. Clair was master.

Pursuant to Rule 337 (2)(b) of the federal Court Rules, counsel for the plaintiff is given leave to prepare a draft judgment giving effect to this decision and to move for judgment accordingly. I direct that counsel for the plaintiff submit the draft judgment to counsel for the defendants for his approval as to form prior to moving for judgment. If counsel for the defendants is not prepared to approve the form of the draft judgment, both counsel have leave to address me on that issue.

MARTIN J.