"EVER SMART" collision with "ALEXANDRA 1": The Crossing and Narrow Channel Rules

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On 19 February 2021 the Supreme Court delivered a seminal judgment in the first appeal in a collision to come before the highest court since the mid 1970s and overturned the decisions of both Mr Justice Teare [2017] 1 Ll.R. 66 and of the Court of Appeal [2019] 1 Ll.R. 130.

On 11 February 2015 the outbound ***Ever Smart***, a large container ship, collided with the inbound ***Alexandra 1***, a VLCC, within the pilot boarding area, just outside the dredged entrance/exit channel to the port of Jebel Ali. The appeal concerned two questions relating to the application of the "crossing rules" as set out in rules 15 – 17 of the International Regulations for Preventing Collisions at Sea 1972. The Supreme Court emphasised that the Collision Regulations must be capable of implementation by all vessels as defined in the Rules, irrespective of their technological capabilities [72].

The Questions on the Appeal

The first question for determination was whether the crossing rules are inapplicable or are to be disapplied where an outbound vessel (***Ever Smart***) is navigating within a narrow channel and has a vessel (***Alexandra 1***) on a crossing course approaching the narrow channel with the intention of and in preparation for entering it. This question concerned the inter-relationship between the crossing rules and the "narrow channel rules" (rule 9).

The second question was whether it is necessary for the putative give-way vessel to be on a steady course for the crossing rules to be engaged. The "putative give-way vessel" is the vessel which, if the crossing rules apply, would be required by rule 15 to keep out of the way of the other vessel. In practical terms it is the vessel which has the "putative stand-on vessel" on her starboard side.

Both Teare J. and the Court of Appeal answered both questions "yes" with the consequence that the crossing rules were either not engaged at all or, if engaged, were overridden by the narrow channel rules. Teare J. apportioned liability 80% (***Ever Smart***) and 20% (***Alexandra 1***) and this was upheld by the Court of Appeal.

The decision of the Supreme Court

The Supreme Court disagreed. Before addressing the two questions the Supreme Court emphasised the international character of the Collision Regulations and their application to *"mariners of all nationalities, of all types (professional and amateur), in a wide range of vessels and in worldwide waters"*: see [37] – [45]. In this regard the Supreme Court referred to the well-known statement of Lord Wright in ***The Alcoa Rambler*** [1949] AC 236 (PC) at p 250 that *"wherever possible"* the crossing rules *"ought to be applied and strictly enforced because they tend to secure safe navigation"*. See also Atkin LJ in ***The Ulrikka*** (1922) 13 Ll.L.Rep 367 at 368. At [46] - [74] the Supreme Court carried out a detailed analysis of the context and purpose of the crossing rules, addressing the meaning of "heading", "course" and "bearing" and emphasising the existence of a risk of collision when two vessels are approaching each other on a more or less steady bearing: see rule 7(d)(i).

The Supreme Court also considered the effect of rule 2(a) and (b). Rule 2(a) had been heavily relied upon by the ***Alexandra 1*** interests for the dis-application of the crossing rule but this argument was rejected as "misconceived": [66]. In essence the Supreme Court held that:

a. The crossing rules were of such importance in the context of collision avoidance that "they should not lightly be treated as inapplicable" [68].

b. Any tension between the obligation of the stand-on vessel to keep her course and speed and to comply with another rule should *"be resolved by treating the stand-on obligation as moulded for the purpose of permitting compliance with the other rule"* [69]. Teare J. and the Court of Appeal had erred in treating the rules as inconsistent either generally (Teare J.) or on the particular facts (the Court of Appeal).

c. Any ouster of one rule must be limited to the minimum strictly necessary to avoid danger and uncertainty: [70].

The Second Question

The Supreme Court first addressed the second question and held that neither the give-way vessel nor the stand-on vessel had to be on a steady course for the crossing rules to be engaged: [75] – [115]. In essence the Supreme Court held that two crossing vessels may be approaching each other and remain on a steady bearing, (with consequent risk of collision) without either vessel being on a steady course.

> " .... if two vessels, both moving over the ground, are crossing so as to involve risk of collision, the engagement of the crossing rules is not dependent upon the give-way vessel being on a steady course. If it is reasonably apparent to those navigating the two vessels that they are approaching each other on a steady bearing (over time) which is other than head-on, then they are indeed both crossing, and crossing so as to involve a risk of collision, even if the give-way vessel is on an erratic course. In such a case, unless the overtaking rule applies, the crossing rules will apply." [111]

Although it was in issue on the facts, the Supreme Court also considered that the stand-on vessel need not be on a steady course for the engagement of the crossing rules [112] – [114].

The Supreme Court concluded that, subject to the first question, the crossing rules were engaged even though *"ALEXANDRA 1 was not on a steady course, or speed"* [115].

The First Question

The Supreme Court identified a number of relevant factual situations where the inter-relationship between the crossing and narrow channel rules needed to be considered. The Supreme Court sought "to determine with clarity and as precisely as possible" [124] the circumstances in which the crossing and narrow channel rules would apply in the vicinity of the entrance to a channel

Three broad groups of cases were identified [134]:

> "Group 1 are vessels which are approaching the entrance of the channel, heading across it, on a route between start and finishing points unconnected with the narrow channel. They are approaching the entrance of the channel, but not intending or preparing to enter it at all. Group 2 are vessels which are intending to enter, and on their final approach to the entrance, adjusting their course to arrive at their starboard side of it. ..... Group 3 are approaching vessels which are also intending and preparing to enter, but are waiting to enter rather than entering .... "

The crossing rules would clearly apply in a Group 1 case. The crossing rules would not apply in relation to Group 2 "because the approaching vessel is both preparing and intending to enter it, and already shaping (ie adjusting her course and speed to do so), on her final approach". The decisions in ***The Kaiser Wilhelm Der Grosse*** [1907] P 36 and 259, ***The Canberra Star*** [1962] 1 Lloyd's Rep 24 and ***Kulemesin v HKSAR*** [2013] 16 HKCFA 195 fell within Group 2.

However the present case fell with Group 3 because ***Alexandra 1*** had not yet shaped to enter the narrow channel on her final approach. The Supreme Court held that the crossing rules should continue to apply to a "Group 3 waiting vessel, or any vessel approaching the channel intending to enter it, which has yet to shape her course to enter it on her starboard side of it" [138]. Further there were no reason why the outbound vessel could not comply both with the crossing and narrow channels: [139] – [140].

At [145] the Supreme Court concluded on the first question as follows:

> "Where an outbound vessel in a narrow channel is crossing with an approaching vessel so as to involve a risk of collision, the crossing rules are not overridden by the narrow channel rules merely because the approaching vessel is intending and preparing to enter the narrow channel. The crossing rules are only overridden if and when the approaching vessel is shaping to enter, adjusting her course so as to reach the entrance on her starboard side of it, on her final approach."

Apportionment will now be re-determined by Sir Nigel Teare on the basis that the crossing rules applied from about C-23 and that the Alexandra 1 was the give-way vessel.

Simon Rainey Q.C. and Nigel Jacobs Q.C. represented the successful ***Ever Smart*** Interests. They were instructed by Ince Gordon Dadds LLP (Christian Dwyer, Sophie Henniker-Major and James Drummond) in consultation with Stann Law Limited (Faz Peermohamed).

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Simon Rainey QC

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Simon Rainey QC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis ("fantastically intelligent and tactically astute"). He is acclaimed for his advocacy skills ("a stunning advocate") and his cross-examination ("excruciatingly superb"). But he is equally well known to his clients as a cheerful team player, who rolls up his sleeves in long and complex trials and arbitrations and who prides himself on high standards of client care ("incredibly user friendly" and "lovely to work with").

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"He has a manner which goes down extremely well with judges and arbitrators alike." (Legal 500, 2021)

Nigel Jacobs QC is a specialist in shipping, insurance, commodity and commercial disputes. His work covers the full range from casualty work (collisions, salvage, unsafe port and limitation) through to disputes in relation to commodities, marine insurance, joint ventures, guarantees, and letters of credit, as well as "traditional" charterparty, carriage of goods by sea and contractual claims. He appears both in the High Court and in arbitration. He is also regularly instructed in (worldwide) freezing injunction, anti-suit injunctions and jurisdictional disputes. His recent arbitrations (2019) include the shipment of a cargo of rail damaged during transit, a claim by brokers to commission and the construction of a Pool Agreement. He is currently involved in an unsafe port case (South America) and a number of other casualties, including the "Ever Smart" and the "Saga Sky". He also accepts appointments as an arbitrator.

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