1951
Oct. 23
1952
Oct. 10

BETWEEN:

THE SHIP *PETERBOROUGH* ..... } DEFENDANT-APPELLANT;

AND

THE BELL TELEPHONE CO. OF CANADA .... } PLAINTIFF-RESPONDENT.

Shipping—Damage to cable caused by ship dropping anchor in a No-Anchorage Area—Negligence or inevitable accident—Findings of trial judge—Damages—Appeal from judgment of District Judge in Admiralty dismissed.

Appellant ship damaged respondent's cable which was laid from the north to the south shore of the St. Lawrence River between the City of Quebec and the City of Levis. At the hearing of the appeal appellant did not dispute the finding of fact of the trial judge that the cable had been torn away and damaged by the anchor of appellant ship. The appeal to this Court is based on the contention that the respondent has not proven negligence on the part of appellant and that such damage as was caused was the result of inevitable accident. It was established that respondent's cable was laid in a no-anchorage area, that the charts showed its position and that the Port Regulations which were duly published and were known to all pilots prohibited anchoring in that area.

The ship had left Quebec for Miami and had proceeded a short distance downstream when its engines failed completely and it began to drift upstream. One anchor was dropped and after some further drifting of the vessel it caught and held and the vessel came to a stop. When the anchor was heaved it was learned that it had fouled a cable. While preparing to pass a light line under the cable to raise it and free the anchor the anchor turned and the cable slipped off it and disappeared.

Held: That appellant failed to establish its plea of inevitable accident as the reason for the failure of its engines and equipment, such failure having been the reason for appellant dropping its anchor.

2. That in not dropping the second anchor which the vessel carried as required by the regulations, and as the pilot ordered, the crew of the vessel did not use that prudence and care in the emergency which they were required to exercise in endeavoring to halt the vessel's drift in order to avoid damage to the respondent's property, the means for which were at hand but in part not resorted to; the crew left undone something it could and should reasonably have done.

3. That there is no evidence to support the contention that the cable was laid or maintained in such a way as to have contributed to the accident or the resulting damage.

4. That under the existing circumstances the respondent did all it could reasonably be expected to do to minimise its loss and recover the whole or the major part of the cable.

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APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

C. Russell McKenzie, Q.C. and *Brock F. Clarke* for appellant.

P. C. Venne, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (October 10, 1952) delivered the following judgment:

This is an appeal from a judgment of Mr. Justice Smith, Deputy Judge in Admiralty, dated January 17, 1951, by which the respondent was awarded the sum of $11,484.86, with interest and costs. The trial was commenced and all the evidence heard before Mr. Justice Cannon, D.J.A., who died before hearing argument. Subsequently, an order was made by consent that the case be argued and decided on the evidence previously taken, Smith, D.J.A. at such hearing being assisted by Capt. T. C. Bannerman, Master Mariner, as assessor.

The plaintiff-respondent instituted proceedings to recover damages in respect of the loss of its submarine cable under the St. Lawrence River between the City of Quebec and the City of Levis. It claimed that on the evening of November 22, 1945, the defendant vessel let go its anchor within the "No-Anchorage Area" in which the said cable was laid, and that the said anchor dragged or fouled the cable, tearing it from its moorings on the Quebec side of the river, with the result that the cable disappeared and has never been recovered.

The evidence was that at about 7:30 p.m. on November 22, 1945, the appellant vessel, with Pilot Drapeau on board, cleared from Princess Louise Basin in the Harbour of Quebec and proceeded downstream bound for Miami. The *Peterborough* is a vessel of the Corvette type with a length of 208 ft., a beam of 53 ft., and a moulded depth of 17 ft. Her gross tonnage is approximately 771 tons and she was built in Canada in 1943.

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As she cleared the Princess Louise Basin, the weather was cold and snowing with a strong, easterly wind. There was at the time a rising tide running about 6 knots, with a set towards the Quebec side of the channel.

The vessel had proceeded downstream a very short distance when her engines failed completely, and, according to the evidence of the Pilot, this occurred at a point about 2,400 feet below Princess Louise Basin; the Chief Engineer's Log fixes the time at 7:45 p.m. At the same time, the auxiliaries, including the dynamo, ceased to function and the lights of the vessel were extinguished.

Under instructions from the Pilot, the Master, Chief Officer, Second Mate and other members of the crew immediately proceeded to the forecastle and let go the starboard anchor. At the time, the ship was being carried upstream and towards the Quebec side of the river by the force of wind and tide. According to the testimony of the Pilot, he also immediately ordered that the port anchor be let go, but the answer to this order was that although this anchor was in place, there was not sufficient chain. In any case, the port anchor was never lowered and the vessel continued to drift upstream towards the Quebec shore until 90 fathoms of chain had been let out, when the anchor finally caught and held and the vessel was brought to a stop at a point from 200 to 300 feet off the Quebec Ferry pontoon. The testimony of the Second Mate Poitras is that, before the anchor finally held, it caught and came away twice. According to Poitras, from 20 to 30 minutes elapsed between the time that the order was given to let go the starboard anchor and the moment when the 90 fathoms of chain had run out.

The evidence is that after the 90 fathoms had been let go, the anchor held almost immediately and the vessel ceased to drift and remained in the same place during the hour or hour and a half required to get the engines into operation. When the repairs had been completed at about 9:15 o'clock, and the ship again had steam on her boilers, orders were given by the Master to weigh anchor. The evidence of the Pilot, who was operating the telegraph, is that when they started to heave the anchor it was found to be caught and that he, at that moment, remarked to the ship's officers that there was a cable located in that

immediate vicinity. He states that the vessel was manoeuvred for upwards of three-quarters of an hour at slow, stop, and half ahead in an effort to free the ship's anchor. There is some divergence between the testimony of the Pilot and that of the Second Officer as to when it was discovered that the anchor had fouled, and as to the steps which were taken in the matter of clearing the cable. According to the Second Officer when the Master gave the order to weigh anchor, the vessel was put slow ahead and the anchor heaved. It was only when the anchor came into view that it became known that it had fouled a submarine cable. The evidence of Poitras is that preparations were made to pass a light line under the cable so as to raise it and thus free the anchor, but that while these preparations were in progress, the anchor turned and the cable which had been lying loose across the flukes of the anchor, slipped off of its own accord and disappeared, whereupon the order "full ahead" was given and the ship proceeded on her voyage. It appears that it was approximately ten o'clock when the anchor was finally cleared.

At about 9:55 o'clock of the same evening, the telephone service between Quebec and Levis was interrupted. An automatic signal system in the office of the respondent company indicated trouble in Submarine Cable No. 1 and Mr. Jolicoeur, an employee of the company, called Mr. Boyer (the plaintiff's toll wire chief and supervisor in charge of cables) to report the interruption. Mr. Boyer and others immediately investigated and found that Submarine Cable No. 1 from Quebec to Levis had been completely torn from its terminal on the Quebec side of the river (its mooring chain being broken) and had disappeared. The proof is that plaintiff's said cable was a very heavy submarine cable with double steel armour, weighing twelve pounds to the foot, and that it must have required a very considerable force or strain to tear it away from its moorings. The said cable was anchored to the wharf at each terminal by means of a heavy chain with links $\frac{5}{8}''$ or $\frac{3}{4}''$ thick and three inches in length, said chain being attached to the cable and to an iron rail (railroad rail) bolted to the wharf. From the side of the wharf the cable passed through a chute to a manhole where it was spliced with Cable No. 2 and then proceeded to the central office.

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It is apparent that the damage to the plaintiff's cable coincided in point of time with the hooking of the cable above mentioned by the anchor of the defendant vessel. There can be no doubt that the vessel's said anchor had dragged a considerable distance before it finally caught and held. As above noted, the testimony of the Pilot is that the vessel had proceeded 2,400 feet down the river after leaving Princess Louise Basin. The evidence is that the entrance to Princess Louise Basin is 1,850 feet below the cable terminal and that the Quebec Ferry Pontoon is 550 feet above the said terminal (a distance which coincides approximately with the 90 fathoms of chain which had been let out before the vessel was brought up, since the ship had reached a point almost opposite the said Ferry Pontoon before its anchor finally held). It is apparent, therefore, that she had drifted upwards of 4,800 feet from the time the engines failed until she was finally held by her anchor.

The above findings of fact are taken directly from the judgment of Smith, D.J.A. I agree with them entirely, and in fact they were not seriously challenged at the hearing in any respect.

On this evidence, the trial Judge found that the cable was torn away and damaged by the anchor of the defendant ship, and that finding is not now disputed. He also considered and rejected the defendant's plea of inevitable accident as well as the other defences raised, and awarded the plaintiff damages in the sum of $11,484.46.

The appeal is based mainly on the submission that the respondent has not proven negligence on the part of the appellant, and that such damage as was occasioned to the respondent's cable was the result of inevitable accident.

I am in agreement with the learned trial Judge that the respondent had established a *prima facie* case of negligence and that the defendant had the burden of proving its defence of inevitable accident. In Marsden's Collisions at Sea, 9th Ed., p. 42, the principle is stated thus:

> If she (a ship) damages another ship in consequence of the giving way or insufficiency of her gear or equipment, a prima facie case of negligence arises.

In the instant case, the fact that the engines of the vessel failed within fifteen minutes after she left her berth, and that she drifted out of control for a distance of almost a mile before her anchor caught in the respondent's cable, is *prima facie* proof of negligence.

Reference may be made to *The Daphne,* (1) where at p. 56 Bateson, J. said:

> I do not think I need bother to refer to any of the cases that have been cited to me. I had better mention the case of the *Submarine Telegraph Company* v. *Dickson,* 15 C.B. (N.S.) 759, with regard to the law of the matter, which I thought was very simple. The learned Attorney-General tells me that it has already been well laid down in that case that if you pick up another man's cable you have got to explain yourself and if you show that you did not know that it was there it lies upon the plaintiff to show that you ought to have known or did know, and so on. Then he cited the case of the *Exeter City,* 12 Ll.L. Rep. 423, a decision of Mr. Justice Hill, to support the case that that if a vessel was allowed to drag it was negligence.

In the instant case it is established that the respondent's cable was laid in a no-anchorage area, that the charts showed its position and that the Port Regulations which were duly published and were known to all the pilots (including Pilot Drapeau) prohibited anchoring in that area.

The Privy Council in *The Marpesia* (2) adopted the language of Dr. Lushington in *The Europa* (3), and defined "inevitable accident" to be "that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill," and this must now be regarded as an authoritative definition.

> To sustain the defence of inevitable accident, the defendant must either show what was the cause of the accident, and show that the result of the cause was inevitable; or it must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of those possible causes that the result could not have been avoided. (*The Merchant Prince,* (1892) p. 179).

At the trial, the only explanation of the failure of the ship's engines which the appellant attempted to make was that water got into the fuel oil as a result of condensation taking place in the fuel oil tanks, was carried through the fuel pipes and extinguished the fires.

(1) 50 Ll. L.L.R. 51.
(2) (1872) L.R. 4 P.C. 220.
(3) (1850) 14 Jur. 627, 629.

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The only members of the ship's crew to testify were the Second Officer, Poitras, and the Stoker, Marcotte, and the former had no knowledge as to why the engines failed. Marcotte stated that it was caused by water getting into the fuel line due to condensation in the tanks. In substance, his evidence was as follows:

D.—Et vous dites qu'à un moment donné de l'eau, par le fait de la pompe, s'est introduite dans les bouilloires?

R.—Voyez-vous la pompe, il y a une succion et on était supposé prendre l'huile, c'est divisé de chaque côté et il y a une succion là-dedans, et probablement c'est chauffé, cette huile-là, et le froid, c'était au mois de novembre, il faisait froid, et cela s'est condensé; il y a eu de l'eau qui s'est formée, qui est venue dans l'huile et quand on est parti ça marchait très bien. Tout à coup, la pompe a pris un peu d'eau peut-être, et cela a passé dans le "heater", et ensuite dans le feu.

D.—Est-ce que cette eau qui s'est introduite était en dehors ou en dedans de la pompe? Je ne comprends pas très bien comment l'eau puisse s'être introduite comme cela?

R.—Je ne suis pas ingénieur, je suis seulement chauffeur, mais mon idée à moi, toujours...

He also stated that it was not necessary to make any repairs to the oil pump, but simply to remove the water and relight the fires, and that he assisted in doing so. No other witness was able to give direct evidence as to the actual cause of the breakdown.

The theory put forward by the respondent was that the engine failure was caused by a break in the oil pump. In support of that contention, the respondent filed as Ex. P4 a photostatic copy of the Chief Officer's log book, signed by the Master, produced by the appellant at the trial, and to the admissibility of which the appellant's counsel raised no objection. It is now submitted that in the absence of any proof as to who made the entries therein, it is inadmissible as hearsay. An official log book is made admissible in evidence by s. 269 of the Canada Shipping Act, 1934. If Ex. P4 is not, in fact, the official log, it would appear to be the engineer's log and is, therefore, admissible evidence *against* the owner (*The Earl of Dumfries* (1)).

It contains the following entry:

7:30 p.m.—All clear of pier and full away towards Miami

7:45 p.m.—Had to anchor just off pier, lights of ship out *and oil pump broken*

8·30 p.m.—Repairs done started to away anchor

(1) (1885) 10 P.D. 31.

The entry that the oil pump was broken is in direct contradiction to that of Marcotte, and to some extent is supported by para. 13 of the Statement of Defence:

Para. 13. After the defendant ship had been underway for about an hour, it was reported to the bridge by the engine-room that the fuel oil pump was not functioning and that it would be necessary to stop the engines.

In addition, the pilot, who was called as a witness for the respondent, stated that when he noticed that the speed of the vessel was lessening, he asked the officer of the watch to ascertain the cause and was told almost immediately thereafter, by someone from the engine-room, that "Le couvert de la pompe est sauté." This evidence was admitted over the objection of counsel for the appellant. He now submits that it was inadmissible as hearsay. The general principle, I think, is that statements as to the cause of a collision when made by the ship's Master, are admissible on the ground that he is the agent of the owners; but that such statements made by others of the crew are inadmissible (*The Europa* (1); *The Actaeon* (2)). On the other hand, statements by seamen and others on board made at the moment of collision have in some cases been admitted as part of the *res gestae* (*The Schwalbe* (3); *The Mellona* (4)). Under the circumstances disclosed, I am of the opinion that this statement is part of the *res gestae* and is therefore admissible.

Mr. Falardeau, a marine engineer, gave evidence for the appellant as an expert. He had been employed as fireman at the shipyard of Davis & Son, Shipbuilders, where the appellant ship had been undergoing repairs just prior to the date in question under his immediate supervision. When the repairs were completed, the vessel was submitted to a "dock try" of 4½ hours, and he stated that all the equipment worked well. One of the items in the work sheet was "fuel pump, cleaned and in good working order," and Falardeau stated that at the test it worked well. Speaking as an expert, he testified that condensation resulting in the presence of water in the fuel line might be an explanation for the failure of the ship's engines; he admitted, of course, that he had no personal knowledge of what actually occurred.

(1) 13 Jur. 856.
(2) 1 Spinks, E. & A. 176.
(3) (1859) Swab. 521.
(4) (1846) 10 Jur. 992.

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I am in agreement with the opinion of the trial Judge that the weight of the evidence is that the failure of the ship's engines was caused by a defect in or the breakdown of the fuel pump rather than by the presence of water in the fuel line. That defect or breakdown, however, was not explained in any way and there is no evidence as to why it occurred or whether it could have been prevented by the exercise of ordinary care.

It is of importance to note, however, that Mr. Falardeau, after describing the manner in which condensation could occur and cause the fires to be extinguished, stated that he personally had knowledge of another ship in which precisely the same situation had developed; and that it was well known to engineers in oil-burning ships that such a condition was liable to occur unless it was guarded against, particularly in the autumn when it was frequently experienced. He further stated that the normal way to provide against such an occurrence was to make provision for extra tanks and the installation of taps at the bottom of the reservoirs where the presence of water could be detected and the water run off. He said that in the Merchant Marine it is common to make such provision, but in Naval vessels of the Corvette type—such as this—no such equipment was provided.

In view of this evidence, it seems to me of little importance to determine whether the pump was broken or whether water got into the fuel line. If it were the former, the appellant has given no explanation as to how it occurred. If it were the latter, it would be a case of proceeding to sea with inadequate equipment, inadequate, that is, in the sense that it was insufficient to meet conditions which were to be expected and which could be guarded against by well known and simple means. That, in my opinion, constitutes negligence.

If a vessel is negligently allowed to be at sea in a defective or inefficient state as regards her hull or equipment, and a collision occurs which probably would not have occurred but for her defective condition, the collision will be held to have been caused by the negligence of her owners (Marsden's Collisions at Sea, 9th Ed., 14). In this case, if the breakdown had not occurred, it would not have

been necessary to drop the anchor and the cable would not have been fouled. If, in fact, the pump were broken within a very short time after the commencement of the voyage, then in the absence of an explanation as to how the break occurred, there would seem to be an irresistible inference that it was defective at the outset. If condensation occurred, it was a happening which could and should have been prevented by the provision of suitable equipment.

I am therefore in agreement with Smith, D.J.A. that the appellant failed to establish its plea of inevitable accident as the reason for the failure of its engines and equipment. Even had it proved inevitable accident in that respect, the question still remains as to whether the hooking and tearing away of the cable could have been avoided by the exercise of reasonable care, or whether that also was inevitable.

There can be no doubt whatever that in the emergency, and because the wind and tide were carrying the vessel into an area where danger was likely to occur to itself, and possibly to shore installations and other shipping, it was necessary to let go its anchor whether within or without a no-anchorage area. In doing so, and with knowledge of the existence of the respondent's cable, it was its duty to take all reasonable measures to avoid damage to the cable, and failure to do so would render her liable for any damage so caused.

Under existing regulations, the ship was required to have, and in fact did have, two anchors. Notwithstanding the orders of the pilot that both anchors be lowered, only the starboard anchor was let go. The pilot states that the reason assigned for not lowering the port anchor was that it had not sufficient chain. Second Officer Poitras does not deny that the pilot ordered the dropping of the port anchor, but states that it was found unnecessary to do so as the starboard anchor was sufficient to hold the vessel. The evidence, however, is that the starboard anchor by itself was insufficient to immediately hold the vessel; it caught and came away twice and held only after the vessel had drifted from fifteen to twenty minutes—a distance of nearly one mile.

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In *The Pladda,* (1) Sir Robert Phillimore stated at p. 39:

> We are of the opinion that had an anchor been let go, the collision would probably have been avoided. At all events the Master would have done all that was possible in the circumstances and have rendered this accident, to use the words of Dr. Lushington, "less probable".

Reference may be made to Marsden's Collisions at Sea, p. 21 (and the cases therein referred to) where it is stated:

> But if there is negligence in not letting go an anchor, or in not having an anchor ready to let go when the vessel is adrift she cannot sustain a defence of inevitable accident.

Smith, D.J.A. adopted the opinion of the nautical assessor that, as a measure of reasonable prudence and ordinary good seamanship, the second anchor should have been let go as soon as it was ordered by the pilot, and that had it been let go at that time it would have been reasonable to expect that the vessel's drift would have been arrested sooner than it was. He was further of the opinion that if both anchors had been promptly lowered, it was reasonably possible that the vessel would have stopped before the anchors reached the cable. There is ample evidence to support that finding and it should not be disturbed. It must follow, therefore, that in the emergency the crew of the vessel did not use that prudence and care which they were required to exercise in endeavouring to halt the vessel's drift in order to avoid damage to the respondent's property, and the means for which were at hand, but in part were not resorted to. It left undone something which it could and should reasonably have done, something which if done would in all probability have avoided any possible damage. The vessel must therefore be held liable for the respondent's loss.

It is further contended that the respondent laid and maintained the cable at its own risk, that it was faultily laid in that it was too short, and that it constituted an obstruction to navigation. None of these contentions is established by the evidence.

The respondent, under the provisions of the Navigable Waters Protection Act, applied for and by P.C. 121, dated January 9, 1942 (Ex. P. 5), was granted permission to lay the cable, subject to the condition that an easement should be secured from the National Harbours Board to lay and

(1) (1876) 2 P.D. 34.

maintain the said cable. That easement was obtained from the Board (Ex. P. 6) and the cable was laid in accordance with the plans submitted and approved. Both in the Order in Council and the grant of the easement, it was provided that the respondent company should not be deprived of any legal recourse it might have against any vessel, person or persons damaging the said cable wilfully, *or through negligence.* Moreover, I am unable to find anything in the evidence which would indicate that the cable constituted an obstruction to navigation.

At the time of the accident, the cable had a length of 400-600 feet in excess of that required to reach from shore to shore, that length being sufficient to permit it to be raised to the surface when inspection or repairs were required. Originally, it had been somewhat longer, but on account of damages sustained it had been somewhat shortened. After the accident, the new cable was made still longer for the reason that it could be laid further from another cable between the same terminals.

In my opinion, there was no duty cast upon the respondent company when laying the cable in a no-anchorage area (where damage by ships' anchors would not normally be anticipated) to lay it at such length and in such a manner as to be able to withstand all strains and stresses to which it might be subjected by a ship's anchor which had fouled it, or in such a way that it could not be fouled by a ship's anchor. Here the cable was subjected to very great strain for perhaps three quarters of an hour while the vessel made attempts to release its anchor, and the further strain of raising it to the surface. In my opinion, the result would have been precisely the same had the cable been somewhat longer. Due to the fact that the anchor was hooked on the cable at a point very close to the Quebec terminal (the precise distance is not stated, but the vessel itself was about 150 feet from that shore), practically the whole of the resulting strain would be placed on that terminal. There is no evidence whatever that that terminal which was completely torn away, was improperly constructed or inefficiently maintained. I agree with the opinion of the trial Judge that it is impossible to find that the cable was laid or maintained in such a way as to have contributed to the accident or the resulting damage.

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The only other matter raised in the appeal was the question of damages. Smith, D.J.A., in computing the damages, found on the evidence that the cost of installing a new cable of similar length was $11,659.80; from that amount he deducted depreciation on the old cable of $1,961.98, and added the outlay of $1,787.04 made in attempting to recover the lost cable, awarding the respondent $11,484.86, with interest and costs. I am satisfied that this method of assessing the damages was a proper one and that on the evidence the amounts ascertained were computed on recognized accounting practices. The main objection raised was that certain overhead charges were included in the computation, but for the reasons stated by the learned trial Judge, I am of the opinion that they were properly included.

It is submitted, however, that there was the duty on the respondent to minimize its loss and that by proper diligence it could have recovered the whole or the major part of the cable. There is a possibility that the cost of repairing the cable, had it been recovered, would have been less than the cost of installing a new one. As has been stated, the cable was pulled from its moorings on the Quebec shore and disappeared and has not since been seen. No one is able to state with certainty the extent to which it has been broken and damaged.

Steps were taken to locate the cable and the same procedure was followed as had been used successfully on other occasions. Dragging operations were carried out on the following day in an effort to locate and raise the loose end on the Quebec side, and after sweeping the entire area where it was likely to be found, it could not be located and the search there was abandoned. On a subsequent day, further efforts were made to locate it by under-running the cable from the Levis side; but at a point about 1,000 feet from the shore, the cable was found to be snagged on the bottom and the line broke. Due to the nature of the bed of the river at that point, it was considered that it would be impossible to locate the cable at the other side of the snag.

Because of these conditions, the lateness of the year and the fact that navigation had closed, the extremely bad weather conditions existing at the time, and that it was

considered that further efforts would be unsuccessful and additional expenses were unwarranted, it was decided to abandon the search. It was realized, also, that as the end of the cable had been exposed to the water and other parts of the cable had probably been damaged, the cost of necessary repairs in the event of the cable being found would be very great. It is true, as contended for the appellant, that the total time involved in searching for the cable was not very great; there is a possibility that under more ideal seasonal and weather conditions, more extensive efforts might have led to better results. But under the existing circumstances, I am satisfied that the respondent did all that it could reasonably be expected to do and that the decision to proceed no further—a decision arrived at in good faith—cannot now be condemned.

For these reasons, I am of the opinion that the judgment of Smith, D.J.A. must be affirmed. The appeal will therefore be dismissed with costs.

Judgment accordingly.