

Victoria
1965

BRITISH COLUMBIA ADMIRALTY DISTRICT

Nov. 15-18

BETWEEN:

Victoria
Nov. 23

ERIK JOHNSON, FOREST JAMES FERGUSON, GILBERT GEORGE, JEROME BOND AND JAMES E. REILLY	}PLAINTIFFS;
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AND

THE SHIP *PACIFIC WIND*.....DEFENDANT.

Shipping—Preliminary Act—Leave to amend refused—Special leave to adduce contrary evidence granted—Admission of fact in Preliminary Act made under mistake—Strength of admission.

In an action for damages resulting from a collision of ships plaintiffs applied to amend their Preliminary Act and for special leave to adduce evidence contrary to their Preliminary Act.

Held: (1) In accordance with the settled practice leave to amend the Preliminary Act was refused but leave to adduce evidence contrary to the Preliminary Act was granted. *Pallen v. the "Iroquois"* (1912) 17 B.C.R. 156; *The Canadian Lake & Ocean Navigation Co. v. The Ship "Dorothy"* (1906) 10 Ex. C.R. 163; *The "Seacombe"*. *The "Devonshire"* [1912] P. 21; *Montreal Transportation Co. v. New Ontario Steamship Co.* (1908) 40 S.C.R. 160 at 172, referred to.

(2) Any statement of fact in a Preliminary Act is a formal admission binding on the party making it and special leave must be sought to adduce evidence contrary thereto. Where such leave is granted and it is shown that an admission of fact in the Preliminary Act was made under mistake the strength of such admission will vary according to the conditions under which the Preliminary Act was prepared.

ACTION for damages for loss sustained in a collision at sea.

David Brander Smith and *T. P. Cameron* for plaintiffs.
J. I. Bird, Q.C. and *W. Forbes* for defendant.

GIBSON J.:—In this action the plaintiff Johnson, as owner of the ship *Unimak*, her fishing gear and equipment, and part of her cargo of fish, and the plaintiffs Ferguson, Bond, George and Reilly, as owners of the rest of her cargo of fish, and for their respective personal belongings, claim against the ship *Pacific Wind* for the losses sustained by them when the said *Unimak* sank and became a total loss as a result of a collision between it and the said ship *Pacific*

Wind on the 24th day of November, 1963, in Tolmie Channel at the juncture of Tolmie Channel and Graham Reach, being waters on the inside passage of the coastal waters of British Columbia lying between Princess Royal Island and the mainland.

At the trial of this action I had the advice of two assessors, namely, Captain R. E. S. Armstrong and Captain John Wigman.

The collision between these said vessels occurred about 5.15 A.M. that day, the visibility being good, the sky overcast and the sea smooth, with the tide flooding to the North with a force of about 1 knot, approximately two hours before high water.

Prior to the collision the M.V. *Unimak* (which is a fishing vessel of about 57.8 feet in length, beam 17.1 feet and powered by a 220 h.p. G.M. diesel single screw engine) was proceeding Southerly. Its crew consisted of the Master, Forest James Ferguson, and three other crew, namely, Gilbert George, Jerome Bond and James E. Reilly, being all fishermen, and all of this crew participated in some measure in the navigation of this vessel.

The other vessel, *Pacific Wind*, prior to the collision was proceeding Northerly. It was a coastal tanker 230 feet in length, 39 feet in beam, being of 1,561 tons gross, with two Fairbanks-Morse engines of 1400 h.p. driving a single shaft. At the time this ship was loaded to her marks. The crew consisted of 20 in number, namely, the Master, 3 Mates, the Chief Engineer, 3 engineers, 6 able bodied seamen, 3 oilers, the cook, the messman and the mess boy. The Master was Captain Ernest Leith, the First Mate was Vincent Thom, the Chief Engineer was Edward Hyde, the Second Engineer was Victor William Pituskin, and the helmsman at the material time was Cecil George Drover.

At the commencement of the trial and before any evidence was adduced, the plaintiffs made three motions, namely: Firstly—to amend their Preliminary Act; Secondly—to amend their pleadings to add a personal injury claim for the plaintiff Jerome Bond, to amend paragraph 4 thereof which concerned a statement of fact as to the location of the collision, and to add to paragraph 11 thereof by detailing further particulars of negligence; and Thirdly—to

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ask for special leave to adduce evidence contrary to their Preliminary Act.

In accordance with the settled practice, leave to amend their Preliminary Act was refused to the plaintiffs, see: *Pallen v. The Iroquois*¹; *The Canadian Lake & Ocean Navigation Company Limited v. The Ship Dorothy*²; *The Seacombe. The Devonshire*³; *Montreal Transportation Company v. New Ontario Steamship Company*⁴.

Leave to amend pleadings of the plaintiff to add the said personal injury claim was also refused because no particulars were given of the nature of this claim, no medical examination had been had at the time of trial, although the defendant required that such a medical examination be had, and because I was of opinion that the assessment of these damages for personal injury, for which it was proposed to claim only in the sum of \$866.10, should be assessed by me and not referred to the Registrar for such purpose, and as a consequence this plaintiff was not ready to proceed with this claim at this trial. Leave to amend the pleadings otherwise was granted because there was no prejudice to the defendant caused by granting the same.

Leave to adduce evidence contrary to the Preliminary Act of the plaintiffs was also granted, it being noted at the time that, although any statement of fact in a Preliminary Act is a formal admission binding upon the party making it, the plaintiff must ask for such special leave to adduce evidence contrary thereto and, when such leave is granted, then any such admission of fact contained therein, as such, does not constitute an estoppel in that it may be shown the same was made under mistake, in which event the Court may be satisfied that such was the case while at the same time recognizing that it still is evidence against the party making it and its strength will vary according to the conditions under which the Preliminary Act was prepared.

The place of collision between these two vessels may be more particularly described in this way: It occurred at the junction of Tolmie Channel, Graham Reach and Hiekish Narrows as shown on the Canadian Hydrographic chart published by the Department of Mines and Technical

¹ (1912) 17 B.C.R. 156.² (1906) 10 Ex.C.R. 163.³ [1912] P. 21.⁴ (1908) 40 S.C.R. 160 at 176.

Surveys, Ottawa, being Chart No. 3738, entitled "Sarah Island to Swanson Bay".

Tolmie Channel lies between Sarah Island and Princess Royal Island, and is on the West side of Sarah Island. Hiekish Narrows is on the East side of Sarah Island. The North end of Sarah Island is in Latitude 52° 51' N. and Longitude 120° 30.5' W.

Tolmie Channel varies in width from 7 cables to 9 cables between the Southerly location referred to on the said chart as Ditmars Point and Sarah Head to the North. There are no salient indentations or points in this channel. The North end of this channel as Sarah Head is approached has a turn in it. This turn is about 5° to the East as it opens into Graham Reach to the North.

Graham Reach then runs North from Tolmie Channel and has a width of about 9 cables at its South end and it gradually narrows to 5 cables at a point Northerly referred to as Swanson Point. Swanson Point is 8 miles to the North of Sarah Head. The shorelines of Graham Reach are physically the same as those of Tolmie Channel, with the exception that to the East is an inlet running East which is called Green Inlet, which is approximately 2½ miles North of Sarah Head.

In both Tolmie Channel and Graham Reach there are numerous small streams flowing into them. Both these channels are deep channels with no off-lying dangers. In other words, both are clear channels with two steeply wooded shores.

In the critical area where this collision occurred there are two aids to navigation. Firstly, at Sarah Head, which again is at the point where Tolmie Channel runs into Graham Reach, there is a group flashing white light. Secondly, on Quarry Point, which is on the Western shore of Graham Reach and on the Eastern side of Princess Royal Island, and which is 11 cables, 340° true from Sarah Head, there is a flashing green light.

At any time there is only a weak tidal current in these channels running to the North with the flood and to the South with the ebb. As stated, at the time of this collision, namely about 5.15 A.M. on the 24th November, 1963, the tide was still flooding and it had about two hours before it reached high water.

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As also briefly referred to above, at the time of the collision there was very little wind, the sea was smooth, visibility was good and the sky was overcast.

By their Preliminary Act dated the 16th July, 1964, the plaintiffs with reference to Particular 3 (The place of the collision) answered: "Between Butedale, British Columbia, and Klemtu, British Columbia, in Tolmie Channel approximately 2 miles north of the entrance of Green Inlet and approximately one-eighth of a mile from the west shore of Tolmie Channel aforesaid"; to Particular 8 (The lights, if any, carried by her) answered: "Two white mast head lights, one each on the foremast and mainmast, red and green side lights, white stern light and various shaded lights apparently emanating from accommodation"; to Particular 9 (The distance and bearing of the other ship when first seen) answered: "Distance approximately five miles, bearing approximately S.S.E. magnetic"; to Particular 10 (The lights, if any, of the other ship which were first seen) answered: "The two white mast head lights referred to in Paragraph 8"; to Particular 11 (The lights, if any, of the other ship, other than those first seen, which came into view before the collision) answered: "The red and green side lights referred to in Paragraph 8"; to Particular 12 (The measures which were taken and when, to avoid the collision) answered: "At approximately 5:10 A.M. when the men on watch in the pilot house realized the vessels were on a collision course and that danger of collision existed, the M.V. *Unimak* altered course to starboard approximately half a point and steered approximately S x E½ E, and at approximately 5:15 A.M. when it became apparent that collision was inevitable the main engine of the *Unimak* was stopped"; to Particular 13 (The parts of each ship which first came into contact) answered: "The bow of the *Pacific Wind* struck the *Unimak* on the starboard side approximately eight feet abaft the *Unimak's* bow"; to Particular 14 (What sound signals were given, if any, and when) answered: "No sound signals were given."; to Particular 15 (What sound signals, if any were heard from the other ship, and when) answered: "No sound signals were heard from the other ship."; to Particular 16 (What fault or default, if any, is attributed to the other ship) answered: "(a) No proper

lookout kept on board the M.V. *Pacific Wind*. (b) Those on board the M.V. *Pacific Wind* improperly neglected to take in due time proper measures for avoiding a collision with the M.V. *Unimak*. (c) Those on board the M.V. *Pacific Wind* failed to observe the provisions of Rule 18, Paragraph (a), of the Regulations for Preventing Collisions at Sea. (d) Those on board the M.V. *Pacific Wind* failed to observe the provisions of Rule 25, Paragraph (a), of the Regulations for Preventing Collisions at Sea.”

By their Statement of Claim dated the 22nd day of June, 1964, the plaintiffs alleged before the amendment granted to their pleading that the M.V. *Unimak* was approximately 4 miles North (of the entrance to Green Inlet) and after amendment they alleged that it was approximately “abeam” (of the entrance to Green Inlet) at about 5.00 A.M. on the day of this collision; (this would put this vessel before the amendment 5½ miles North of Quarry Point at this time, and after the amendment ½ mile North of Quarry Point;) that at about 5.10 A.M. the man on watch in the pilot house of the M.V. *Unimak* observed the 2 white masthead lights of the defendant ship *Pacific Wind* approaching from approximately 3 miles to the South and on a collision course with that of the M.V. *Unimak* which at the time was exhibiting the required lights; that the M.V. *Unimak* altered her course to starboard and steered approximately “S x E½ E” but after steering so for approximately 5 minutes it became apparent that both vessels were still on a collision course so that those on watch in the pilot house of the M.V. *Unimak* stopped the *Unimak’s* main engine; that the *Unimak’s* head swung to port and the *Pacific Wind* struck the *Unimak* on the starboard side approximately 8 feet abaft the *Unimak’s* bow, thereupon the Master and crew abandoned the vessel and she sank shortly thereafter and became a total loss; that those on board the defendant ship *Pacific Wind* were negligent in: (a) There was no proper lookout kept on board the defendant ship, (b) Those on board the defendant ship improperly neglected to take in due time proper measures for avoiding a collision with the plaintiffs’ ship, (c) Those on board the defendant ship failed to observe the provisions of Rule 18, Paragraph (a) of the Regulations for Preventing Collisions at Sea, and

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(d) Those on board the defendant ship failed to observe the provisions of Rule 25, Paragraph (a) of the Regulations for Preventing Collisions at Sea.

By its Preliminary Act dated the 3rd day of August, 1964, the answers of the defendant ship *Pacific Wind* with reference to Particular 7 (The course and speed of the ship when the other was first seen, or immediately before any measures were taken with reference to her presence, whichever was the earlier, and all subsequent alterations to the course or speed of the ship up to the time of the collision) answered: "342° magnetic; when the ships were less than one mile apart, M/V *Pacific Wind* altered course 10° to starboard and about one minute later, altered a further 15° to starboard and immediately thereafter, altered course hard to starboard. Speed: About 10½ knots."; to Particular 8 (The lights, if any, carried by the ship) answered: "M/V *Pacific Wind* was exhibiting one white foremast light, one white mainmast light, red and green sidelights and a white stern light."; to Particular 9 (The distance, bearing and approximate heading of the other ship when first seen) answered: "About six miles, bearing on the port bow and apparently heading on a southerly course."; to Particular 10 (The lights, if any, of the other ship which were first seen) answered: "White mast headlight and green sidelight."; to Particular 11 (The lights, if any, of the other ship, other than those first seen, which came into view before the collision) answered: "Shortly after the white mast headlight and the green sidelight were first seen, M/V *Unimak* showed her red light and continued so to do until the ships were slightly less than one mile apart, when she again showed her green light."; to Particular 12 (The measures which were taken, and when, to avoid the collision) answered: "When those on the M/V *Pacific Wind* observed the red light of the M/V *Unimak* bearing on the port bow, they maintained their course in the expectation that the two vessels would pass safely port to port. When the two vessels were slightly less than one mile apart, M/V *Unimak* altered her course to port and showed a green light. Those on the M/V *Pacific Wind* observed the said green light for a short interval and when it did not change, they altered course 10° to starboard so as to give M/V *Unimak* more room and they sounded one short blast on

their whistle. About one minute later, since the M/V *Unimak* was still showing a green light, those on the M/V *Pacific Wind* altered course a further 15° to starboard and blew one short blast on their whistle. Almost immediately thereafter, those on the *Pacific Wind* altered course hard to starboard and blew one short blast on the whistle and put their engines on standby.”; to Particular 13 (The parts of each ship which first came into contact and the approximate angle between the two ships at the moment of contact) answered: “The stem of M/V *Unimak* struck the M/V *Pacific Wind* on the port side about twenty feet aft of the stem at an angle of slightly less than 90°.”; to Particular 14 (What sound signals were given, if any, and when) answered: “One short blast was sounded on three distinct occasions to indicate three alterations of course to starboard as indicated in paragraph 12 hereof.”; to Particular 15 (What sound signals, if any, were heard from the other ship, and when) answered: “None.”; to Particular 16 (What fault or default, if, any, is attributed to the other ship) answered: “(a) Excessive speed; (b) Failing to keep a proper or any lookout; (c) Failing to keep to her own starboard side of mid-channel; (d) Failing to pass M/V *Pacific Wind* port to port as they could and ought to have done; (e) Failing to keep M/V *Unimak* under proper or any control whereby the said vessel was carried or allowed to proceed into the channel reserved for vessels proceeding northward in Graham Reach; (f) Having at the wheel or in control of the vessel an incompetent person or one with insufficient knowledge of navigation or the Regulations for Preventing Collisions at Sea; (g) Failing to ease, stop or reverse engines in time or at all; (h) Failing to signal any alteration of course; (i) Improperly and at an improper time altering course to port in an attempt to cross ahead of M/V *Pacific Wind*; (j) Failing to comply with Rules 25, 28 and 29 of the Regulations for Preventing Collisions at Sea.”

By its Statement of Defence dated the 4th day of August, 1964, the owners of the vessel *Pacific Wind* alleged that shortly before 0500 hours on the 24th November, 1963, “those on the *Pacific Wind* observed at an estimated distance of six miles, bearing on the port bow, a white mast headlight and green sidelight of a vessel south-bound which

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later proved to be the motor vessel *Unimak*. Shortly thereafter, the M/V *Unimak* showed her red light and those on the *Pacific Wind* maintained their course in the expectation that the two vessels would pass safely port to port. At all material times, the *Pacific Wind* maintained a course well to her own starboard side of mid-channel"; that "shortly before the collision, the motor vessel *Unimak* altered her course to port and showed her green light whereupon those on the *Pacific Wind* altered their course to starboard and sounded one short blast on the whistle. Very shortly thereafter when the M/V *Unimak* continued to show a green light and was apparently attempting to cross the bow of the *Pacific Wind*, those on the *Pacific Wind* again altered course to starboard and blew one short blast on the whistle and immediately thereafter altered course hard to starboard and blew one short blast on the whistle"; that "notwithstanding the efforts of M/V *Pacific Wind* to avoid the oncoming vessel *Unimak*, the said vessel came on and with her stem struck the port side of the *Pacific Wind* at an angle of slightly less than ninety degrees. The M/V *Unimak* later sank and her master and crew were rescued by those on the *Pacific Wind*."; that "the negligence of the plaintiffs, their servants or agents, in the navigation or management of the *Unimak*" consisted of: "(a) excessive speed; (b) failing to keep a proper or any lookout; (c) failing to keep to her own starboard side of mid-channel; (d) failing to pass M/V *Pacific Wind* port to port as they could and ought to have done; (e) failing to keep M/V *Unimak* under proper or any control whereby the said vessel was carried or allowed to proceed into the channel reserved for vessels proceeding northward in Graham Reach; (f) having at the wheel or in control of the vessel an incompetent person or one with insufficient knowledge of navigation or the Regulations for Preventing Collisions at Sea; (g) failing to ease, stop or reverse engines in time or at all; (h) failure to signal any alteration of course; (i) improperly and at an improper time altering course to port in an attempt to cross ahead of M/V *Pacific Wind*; (j) failing to comply with Rules 25, 28 and 29 of the Regulations for Preventing Collisions at Sea."

On this hearing all of the plaintiffs gave evidence except the owner, Erik Johnson, namely, the Master, Forest James

Ferguson, and the other members aboard, Gilbert George, Jerome Bond and James E. Reilly. According to them in the vessel *Unimak* they had left their fishing area North and West of the place of collision on the previous afternoon and were proceeding Southerly with their cargo of fish to deliver it. The Master had handed over the helm of the *Unimak* to Bond at about 4.30 a.m. on the 24th November, 1963, and he had gone down into the engine room and was there at the time of the collision. Bond was at the helm at the time of the collision and with him in the wheelhouse was George. Reilly was asleep below deck at the time of the collision.

It is clear from the evidence that both Bond and George had only a most elementary knowledge of navigation, that Bond had no knowledge of the Rules of the Road, and that George, in so far as is relevant in this action, only knew in so far as these Rules are concerned that ships should pass port to port. Although the vessel *Unimak* was radar-equipped, neither Bond nor George knew much about how to operate it, and in any event they did not use it as an aid at any material time. Bond and George really jointly, prior to and at the material time, were navigating the vessel *Unimak*. Bond was steering this ship along the West shore of Graham Reach, aided from time to time by remarks made to him by George, as George made observations of the channel, and Bond in effect at all times was merely following the shoreline. He was not following any compass course. He had received no instructions as to what course to navigate (and I so find notwithstanding evidence from Ferguson to the contrary) and he had no real knowledge of the channel. Both Bond and George were guided in their navigation of the *Unimak* following the shoreline by the snow on the shoreline and by the trees. In effect, at all material times, they were navigating in a fashion which has been referred to irreverently as "beachcombing".

At some point in Graham Reach channel I find that both Bond and George saw the two mast lights of the ship *Pacific Wind* and immediately prior to the collision George saw the red running light of the ship, but on their evidence I am unable to make any finding as to the location of the point of collision between these two vessels, in so far as it would prove where such point was on a North-South

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axis. In so far, however, as determining where the point of collision was on an East-West axis, I am of the opinion that their evidence is of substantial assistance in determining the same.

The evidence of the defendant that is of assistance in the adjudication of this matter was given by the Master, Ernest Leith, the First Mate, Vincent Thom, and to a lesser extent by the Engineer, Edward Hyde, and Cecil George Drover (the helmsman prior to and at the time of the collision). It is clear that Thom was an experienced and competent ship's officer and that the ship was well equipped with navigation aids to assist him on the morning of this collision. Among other things it had radar which he employed at all material times. Prior to the collision Thom was on duty in the wheelhouse and Drover was the helmsman.

Thom at the trial marked the chart of Tolmie Channel and Graham Reach which was filed as Exhibit 10. This chart is the same chart as was filed as Exhibit 1, and is merely another copy. On this chart he marked the respective positions of the vessel *Pacific Wind* and the vessel *Unimak* when he said they were approximately six miles apart. Thom said he knows these positions so marked are reasonably accurate because he plotted them on the night of the collision by using radar.

The collision took place following what manoeuvres these two vessels made within this six-mile area.

The Northerly position marked on Exhibit 10 by Thom indicates the position of the vessel *Unimak* at that time. It is marked "A1" and is a position in Graham Reach approximately three miles North of Sarah Head and about 3 cables from the West shore of Graham Reach and about 4 cables from the East shore.

The Southerly position marked as "A" on Exhibit 10 is the position of the vessel *Pacific Wind*, and is a point about three miles South of Sarah Head in Tolmie Channel and about mid-channel.

Thom says the ship *Pacific Wind* was then following a course of 342° magnetic. This is the course which is marked on Exhibit 9, which is another copy of the same chart as Exhibit 10, which chart came from the wheelhouse of the *Pacific Wind* and was the chart used in that ship on the day of this collision. Although some evidence was given that

this 342° course was the course followed by the vessel *Pacific Wind* while South-bound only, on cross-examination of Thom it was clear, and I so find, that this course was a reciprocal course.

(At this juncture it is significant to observe, from looking at this course marked on Exhibit 9, that the vessel *Pacific Wind*, in following such a course, as according to the evidence was its normal practice, in proceeding Northerly passing through Tolmie Channel and Graham Reach, would not be at all times on its own starboard side of the channel. While this might be an acceptable practice during daylight hours, at night time a more prudent practice to follow would be not to follow so long a straight track, but instead to vary the direction of the course from time to time to conform with the direction of the channel. For instance, to illustrate what will result in following such a long straight track Northerly as plotted on the chart, Exhibit 9, this course, as it runs past the Quarry Point light, is well over West of mid-channel.)

In brief, what transpired as these two vessels approached each other within this said six-mile North-South axis I find was as follows:

Bond on the *Unimak* having been told by George that he was too close to the West shore hauled his vessel to port, and according to George ran for about five minutes on whatever course that was taken as a result by the *Unimak*. Then Bond, seeing the white mast lights of the *Pacific Wind* said to George that he thought this vessel was going to pass on the starboard side of the *Unimak*. George told him not to let it pass on their starboard side and to haul the *Unimak* to starboard, which Bond did. George said that then he saw the lower mast light of the two mast lights of the *Pacific Wind* to his right of the upper mast light. From this it is a reasonable inference, and I so make such an inference on advice from the Assessors, that *Pacific Wind* at that juncture was shaping a course to port of mid-channel close to Quarry Point.

Bond then caused the *Unimak* to run along on this new course and at some point of time shortly after, in observing the vessel *Pacific Wind*, said he thought it was about a quarter mile away. George said that he thought it was about 400 to 500 feet away. George then stepped out of the

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wheelhouse of the *Unimak* by opening the starboard door and looked ahead and observed that the *Pacific Wind* was then only about 100 to 200 feet away. At this point both Bond and George became alarmed and Bond stopped or stalled the engine of the *Unimak* and after that the *Unimak* moved to port. Precisely why she moved to port on the evidence it is impossible to say, except to find that it did in fact so move for some short distance, and that the collision between these two vessels happened within a very short time after the engine of the *Unimak* stopped. From the evidence of both Bond and George as to their observations subsequently, it is clear that the point of impact on the *Unimak* was on its starboard side immediately forward of its wheelhouse, at approximately its anchor windlass, and that the point of impact on the ship *Pacific Wind* was on its port side about 20 feet from its bow.

Bond, George and Ferguson then gave evidence of getting into a lifeboat and being subsequently picked up by the crew of the *Pacific Wind* and while aboard the latter, observing the sinking of the *Unimak*.

The First Mate Thom of the *Pacific Wind* said that when his ship was at said point marked "A" on Exhibit 10, that he observed from the wheelhouse the green running light of the *Unimak* when the latter vessel was at the position he marked "A1" on Exhibit 10 six miles away. He caused the ship *Pacific Wind* to continue on a course 342° magnetic and at some later point saw that the *Unimak* was showing its red running light. Then at some time later he observed that the *Unimak* again was showing its green running light, and after waiting a short time he gave an order to the helmsman to haul 10° to starboard. He said he identified his position in the channel then as being on course 342° a little South of Sarah Head. He did not cause the speed of the *Pacific Wind* to be reduced then, or at any time before the collision. He says his ship altered to this 10° change of course and about a minute later he gave an order to haul 15° to starboard. His ship was then at some point North of Sarah Head. He said the *Unimak* was still showing its green running light. He said almost immediately thereafter he gave the order full astarboard and that almost immediately there was a collision between the *Pacific Wind* and the *Unimak*. He said that just before the impact he put the engines on "stand-by". At the time of

the collision he put the engines on "stop". He then gave an order to haul to port and then he put the engines "full astern". At this latter time Captain Leith came to the wheelhouse and took over.

Then according to Captain Leith, he caused the *Pacific Wind* to go "half ahead" at which time the bow of his ship was swinging to starboard and the stern to port, and shortly after the *Pacific Wind* turned in clockwise fashion and came back and picked up the crew of the *Unimak*. Then aboard the *Pacific Wind* he and the said crew observed the *Unimak* sinking.

According to Thom, also, there were whistle signals made by the *Pacific Wind* at the time he gave each said order of change of course to starboard above referred to.

On all the evidence it is clear from the time the ship *Pacific Wind* was at point "A" marked by Thom on Exhibit 10, to the point of collision, that *Pacific Wind* was proceeding at from 10 to 11 knots (the defendant by its Preliminary Act admits the speed to be 10½ knots); and that the *Unimak* from the position marked by Thom "A1" on Exhibit 10 until very shortly before the collision was proceeding at about 8 knots.

It follows that predicated on the ship *Pacific Wind* proceeding from the North from said point "A" at 10 knots and the ship *Unimak* proceeding South from said point "A1" at 8 knots, these ships come together in Graham Reach somewhere at a point in an East-West line about 4 cables North of Sarah Head. Where precisely in such East-West line these ships did come together (on such premises) is dependent firstly on precisely at what positions the *Pacific Wind* made its said manoeuvres to starboard and how far off the 342° course such manoeuvres took that ship before the collision, and also on how close to the West shore of Graham Reach *Unimak* was at all material times during the said manoeuvres it made, as it proceeded along that shoreline. A reasonable inference, however, as to the point of collision can be made from the evidence of Captain Leith who said that, immediately after the collision, the bow of his ship was about 2 cables from the East shore of the channel of Graham Reach, as he was about to turn around the ship after putting it "half ahead" and that he succeeded in so turning around the *Pacific*

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Wind without running into the shore. Of necessity, therefore, the point of collision, if it occurred on this East-West line, must have been practically in the centre of the channel.

It follows also that predicated on the ship *Pacific Wind* proceeding Northerly from said point "A" on Exhibit 10 at 11 knots to the point of collision and the *Unimak* proceeding Southerly from said point "A1" on Exhibit 10 at 8 knots to the point of collision, the point of collision is somewhere at a point on an East-West line about 3 cables South of Quarry Point in Graham Reach. Inferring again in the same fashion from the same evidence of Captain Leith, this would put the point of collision still about mid-channel.

In both these premises no allowance has been made for current. However, from all the evidence it is a reasonable inference, and I so find, that the current was not more than 1 knot. Allowing for this tide would merely move the East-West axis of these two results further North.

All of the evidence on the point of the sinking of the *Unimak* I find is inconclusive and is not of assistance in determining the cause or contributing cause of this collision. I find it strange, however, that those in charge of the *Pacific Wind* did not make precise and accurate measurements of this place of sinking when they were in such an excellent position to do so, but I make no finding in respect to such failure on their part.

The Preliminary Act of the plaintiffs obviously was improperly prepared. About the only thing that is at all precise and correct in it is the statement that the mast lights and the red running light of the *Pacific Wind* were seen prior to collision. Because such statements were in the Preliminary Act I am reinforced in my belief that Bond and George were truthful witnesses, and their evidence as a result was of substantial assistance in determining where the point of collision was on an East-West axis (but not on a North-South axis). The other statements in the Preliminary Act, fortunately for the plaintiffs, because of the evidence generally, were not material in deciding what was the cause or any contributing cause of this collision.

The Preliminary Act of the defendant was in accordance with the evidence given at this trial in all material respects.

In particular this is true of the speed and tract of the *Pacific Wind*. Such statements were of substantial assistance in this adjudication.

From a consideration of the above, and making inferences therefrom, and from a consideration of all of the evidence, in the result I find that this collision between the vessel *Unimak* and the vessel *Pacific Wind* occurred about mid-channel in Graham Reach at a point on an East-West line, which line is probably about 3 cables South of Quarry Point.

I find also that both those in charge of the vessel *Unimak* and those in charge of the vessel *Pacific Wind* were to blame for this collision.

The negligence of those in charge of the vessel *Unimak* I find consisted in (1) permitting an incompetent crew to be in charge of it at all material times, (2) keeping an inadequate lookout, having regard to the conditions of this channel at this material time, (3) failing to take reasonable precautions when a collision was imminent, as prudent seamen should, and (4) navigating the *Unimak* just prior to and at the time of the collision in about the centre of the channel.

I find that the negligence on the part of those in charge of the *Pacific Wind* consisted in (1) pursuing the course referred to above, of 342° magnetic, at a point in Tolmie Channel which would not keep the vessel on the starboard side of the channel at all times, thereby breaching Rule 25 of the Rules of the Road, (2) in not reducing the speed of the *Pacific Wind* when it should have been obvious to any prudent seaman that a risk of collision existed at the time, when proper remedial action might have avoided a collision or reduced its consequences, and (3) in navigating the *Pacific Wind* just prior to and at the time of the collision in about the centre of the channel.

The decision of First Mate Thom not to reduce the speed of the *Pacific Wind* but instead to maintain its speed and manoeuvre to starboard may have initiated in a substantial way the sequence of events which led to this collision between these two vessels. If the time such decision was made could be accurately determined, those in charge of the

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Pacific Wind could be substantially to blame for this collision in my opinion. Because, however, of the inconclusiveness of the evidence as to precisely when the first order was given to manoeuvre the vessel *Pacific Wind* to starboard, I find it is not possible to establish the degrees of fault respectively of those in charge of the *Unimak* and those in charge of *Pacific Wind* and liability is therefore apportioned equally.

The plaintiffs therefore shall have judgment accordingly against the defendant and there shall be a reference to the Registrar to assess the damages.

The plaintiffs shall be entitled to costs against the defendant.