

THE APPLICATION OF THE COLLISION REGULATIONS: EVERGREEN MARINE (UK) LTD V NAUTICAL CHALLENGE LTD (THE ALEXANDRA 1 & THE EVER SMART) [2021] UKSC 6

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The judgment of the Supreme Court of the United Kingdom in *Evergreen Marine (UK) Ltd v Nautical Challenge Ltd (The Alexandra 1 & The Ever Smart)*¹ is likely to become the leading authority on the interpretation of the Collision Regulations.² As Sir Nigel Teare put it, ‘the light that has been shone on the application of the crossing rule by the Supreme Court will burn brightly in the Admiralty Court for a great many years’.³ Cases in appellate courts on the Collision Regulations being a rare thing,⁴ that light is likely to reach beyond English shores and even to the Antipodes.

The Facts

At 23:42:22 local time (GMT+4) on 11 February 2015, the *Ever Smart* and the *Alexandra 1* collided in the pilot boarding area outside the dredged entrance/exit channel to the port of Jebel Ali in the United Arab Emirates.⁵

The *Ever Smart* was a large container vessel laden with 48,564 mt of containerised general cargo. It was outbound from Jebel Ali and had been proceeding along the channel until shortly before the collision.⁶

The *Alexandra 1* was a very large crude carrier laden with 113,915 mt of condensate. It was the inbound vessel and was waiting in the pilot boarding area to pick up a pilot who was on the *Ever Smart* before entering the channel.⁷

The *Ever Smart* failed to keep a good visual and radar lookout.⁸ It therefore did not see the *Alexandra 1* until the collision was about to occur.⁹ It was proceeding at full sea speed, travelling at 12.4 knots when the collision occurred.¹⁰ 30 seconds before the collision, Port Control asked *Ever Smart* if it was clearing to starboard. Both the pilot (on board the pilot boat) and the master of the *Alexandra 1* told the *Ever Smart* to go hard to starboard. The master of the *Ever Smart* gave the order, but it was too late to avert the collision.¹¹

14 minutes before the collision, the master of the *Alexandra 1* overheard a conversation between Port Control and the tugboat *Zakheer Bravo*, in which Port Control told the tug to proceed at least one mile astern of the *Alexandra 1*.¹² The master mistakenly assumed that the vessel in question was the *Ever Smart* and therefore that the *Ever Smart* would be passing one mile astern.¹³ As a result of this misunderstanding, the *Alexandra 1* did not turn towards the starboard side of the approaches to the channel but continued across the approaches.¹⁴

Two minutes before the collision, the master of the *Alexandra 1* sighted the *Ever Smart* and observed that it was not turning to port as he expected based on his misunderstanding of the conversation. He put the ship’s engine full astern, but this had little effect on its speed (which was 2.3 knots at this time).¹⁵ 1 minute before the collision,

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¹ *Evergreen Marine (UK) Ltd v Nautical Challenge Ltd* [2021] UKSC 6 [2021] WLR 1436, [2021] 1 Lloyd’s Rep 299 (*The Alexandra 1 & The Ever Smart (SC)*).

² Convention on the International Regulations for Preventing Collisions at Sea 1050 UNTS 16 (opened for signature 20 October 1972, entered into force 15 July 1977) (‘Collision Regulations’).

³ *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2022] EWHC 206 (Admlty) (*The Alexandra 1 & The Ever Smart (reapportionment)*) [3].

⁴ The Supreme Court in *The Alexandra 1 & The Ever Smart (SC)* noted at [1]: “This is the first appeal in a collision action to come before the Supreme Court. Indeed, it is approaching 50 years since the last such appeal before the House of Lords - *The Savina* [1976] 2 Lloyd’s Rep 123.”

⁵ *Ibid* [5].

⁶ *Ibid*.

⁷ *Ibid*.

⁸ *Ibid* [26].

⁹ *Ibid* [13](ix).

¹⁰ *Ibid* [13](viii).

¹¹ *Ibid* [13](ix).

¹² *Ibid* [12](vi).

¹³ *Ibid* [12](vii).

¹⁴ *Ibid* [12](x), [26].

¹⁵ *Ibid* [12](xii).

the master informed Port Control that the *Ever Smart* was not changing course and that there would be a collision.¹⁶ 30 seconds before the collision, he told the *Ever Smart* to go hard to starboard and switched on the deck lights of the *Alexandra 1*.¹⁷ But it was too late to avoid the collision.

In Admiralty Court, Teare J found that both vessels were at fault in the collision. The *Ever Smart* was at fault in:¹⁸

- (a) breaching the narrow channel rule by not keeping to the starboard side of the narrow channel;¹⁹
- (b) keeping a defective radar and visual lookout and making assumptions on the basis of scanty information;²⁰ and
- (c) proceeding at an excessive speed, which was a consequence of its failure to keep a good lookout.²¹

The *Alexandra 1* was at fault in failing to keep a good aural lookout, which meant that after a misunderstood radio conversation it did not turn to starboard towards the channel.²²

The Judge assessed the *Ever Smart*'s culpability to be very serious²³ and the *Alexandra 1*'s to be substantial.²⁴ The *Ever Smart* was much more culpable than the *Alexandra 1*.²⁵ In considering causative potency, he found that there was little difference in the contributions of each vessel to the occurrence of the collision, but the *Ever Smart* contributed far more to the damage from the collision because of its speed.²⁶

Teare J apportioned liability at 80% to the *Ever Smart* and 20% to the *Alexandra 1*.²⁷

The Collision Regulations and the Issues

The issues before the Supreme Court related to the interpretation and interaction of two parts of the Collision Regulations. One the one hand, there was rr 15-17 (known as 'the crossing rules'):²⁸

Rule 15 - Crossing Situation

When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

Rule 16 - Action by Give-way Vessel

Every vessel which is directed to keep out of the way of another vessel shall so far as possible, take early and substantial action to keep well clear.

Rule 17 - Action by Stand-on Vessel

(a)(i) Where one of two vessels is to keep out of the way the other shall keep her course and speed.

(ii) The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.

(b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.

¹⁶ Ibid [12](xiii).

¹⁷ Ibid [12](xiv).

¹⁸ Ibid [26].

¹⁹ *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666 ('*The Alexandra 1 & The Ever Smart (HC)*') [73]-[74].

²⁰ Ibid [75]-[83].

²¹ Ibid [84]-[88].

²² Ibid [99]-[101].

²³ Ibid [111].

²⁴ Ibid [112].

²⁵ Ibid [113].

²⁶ Ibid [116].

²⁷ Ibid [118].

²⁸ Collision Regulations (n 2) rr 15-17.

(c) A power-driven vessel which takes action in a crossing situation in accordance with subparagraph (a)(ii) of this Rule to avoid collision with another power-driven vessel shall, if the circumstances of the case admit, not alter course to port for a vessel on her own port side.

(d) This Rule does not relieve the give-way vessel of her obligation to keep out of the way.

The vessel that has the other vessel on its starboard side is required to keep clear under r 15 and is known as the ‘give-way vessel’.²⁹ The other vessel is required to keep its course and speed. It is known as the ‘stand-on vessel’.³⁰

Whether there is a risk collision is determined by r 7:³¹

Rule 7 - Risk of Collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

(b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.

(c) Assumptions shall not be made on the basis of scanty information, especially scanty radar information.

(d) In determining if risk of collision exists the following considerations shall be among those taken into account:

(i) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change;

(ii) such risk may sometimes exist even when an appreciable bearing change is evident, particularly when approaching a very large vessel or a tow or when approaching a vessel at close range.

On the other hand, there was r 9 (‘the narrow crossing rule’):³²

Rule 9 - Narrow Channels

(a) A vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable.

...

The two questions before the Supreme Court were:³³

(a) Are the crossing rules inapplicable where an outbound vessel is navigating within a narrow channel and has a vessel on her port (or starboard) bow on a crossing course approaching the narrow channel with the intention of and in preparation for entering it?

(b) Must the putative give-way vessel be on a steady course before the crossing rules can be engaged?

Teare J answered both questions in the affirmative.³⁴ The Court of Appeal, in a judgment delivered by Gross LJ, upheld his decision on both points.³⁵

The Supreme Court, in a judgment delivered by Lord Briggs and Lord Hamblen, allowed the appeal on both issues.

²⁹ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [2].

³⁰ *Ibid.*

³¹ Collision Regulations (n 2) r 7.

³² Collision Regulations (n 2) r 9.

³³ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [35].

³⁴ *The Alexandra 1 & The Ever Smart* (HC) (n 19) [40]-[64], [70]-[71].

³⁵ *Evergreen Marine (UK) Ltd v Nautical Challenge Ltd* [2018] EWCA Civ 2173, [2019] 1 All ER (Comm) 303 (‘*The Alexandra 1 & The Ever Smart* (CA)’) [57]-[85], [89]-[92].

The Supreme Court, as the lower courts had done, sat with two Elder Brethren of Trinity House (Captain Nigel Palmer OBE MNM and Commander Nigel Hare RN) as Nautical Assessors to advise on matters of navigation and seamanship.³⁶

Interpreting the Collision Regulations

The Supreme Court began by considering the proper approach to the interpretation of the Collision Regulations. It observed that they were an international treaty and as such ‘should be interpreted by reference to broad and general principles of construction rather than any narrower domestic law principles’.³⁷ This included the basic rule of interpretation contained in art 31(1) of the Vienna Convention on the Law of Treaties:³⁸

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The Court said that the object and purpose of the Collision Regulations ‘is to promote safe navigation and specifically the prevention of collisions at sea’.³⁹ In order to achieve this purpose, a practical approach was necessary:⁴⁰

The international character of the Collision Regulations and the safety of navigation mean that they must be capable of being understood and applied by mariners of all nationalities, of all types (professional and amateur), in a wide range of vessels and in worldwide waters. They should accordingly be interpreted in a practical manner so as to provide clear and readily ascertainable navigational rules capable of application by all mariners. They are meant to provide international “rules of the road”.

The Supreme Court endorsed earlier judicial statements that the crossing rules should be strictly enforced and broadly interpreted:⁴¹

43. The interpretation of the crossing rules should have due regard 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”. For the same reason Lord Wright stated (at p 250) that it had “been found advantageous” for a “wider scope to be given to the crossing rule” in cases of doubt on a strict application of the rules.

44. As Atkin LJ stated in *The Ulrikka* (1922) 13 Ll L Rep 367, 368:

“I desire to say as has already been said over and over again here and in the Admiralty Court, that it is of extreme importance strictly to maintain the enforcement of [the crossing rules]. These two rules are a bright light to navigators; and I suppose day by day and hour by hour they operate to prevent collisions at sea. It appears to me of the highest importance to enforce them and enforce them strictly.”

A steady course requirement?

The Court considered first the issue of whether a steady course was required for the crossing rules to apply.

The Court helpfully distinguished between and defined heading, course and bearing:

³⁶ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [36].

³⁷ *Ibid* [38].

³⁹ *Ibid* [40].

⁴¹ *Ibid* [43]-[44].

- (a) ‘The heading of a vessel is the direction (expressed as a point or number of degrees on a compass) in which she is pointing at a particular moment in time’;⁴²
- (b) ‘The course of a vessel is the direction, again expressed by reference to the points or degrees of a compass, in which she is moving’;⁴³ and
- (c) Bearing ‘is the direction in which one vessel appears when viewed from another at a particular moment in time, expressed again in terms of the points or degrees of a compass’.⁴⁴

Under r 7(d)(i), a risk of collision exists if the compass bearing of an approaching vessel does not appreciably change: in other words, if it is on a steady bearing.⁴⁵

However, a vessel may be on a steady bearing without being on a steady course:⁴⁶

She may be manoeuvring through a crowded anchorage, or to pick up a pilot. She may be moving so slowly as not to answer precisely to her rudder. She may be altering her heading so as to cope with a strong tide, or she may be lying with her engines stopped and her rudder secured, drifting here and there under the influence of the wind. She may be waiting to enter a narrow channel, or a harbour, with her engines stopped, but nonetheless moving over the ground under the influence of wind or tide. She may simply be a yacht under power with an inattentive helmsman.

The Court gave multiple reasons for why a vessel should not have to be on a steady course for the crossing rules to apply:⁴⁷

- (a) r 15 made no mention of ‘course’, much less ‘steady course’;
- (b) the rules were generally very clear and precise about the requirements for them to be engaged;
- (c) the risk of collision does not depend on the vessels being on a steady course;
- (d) this would leave a vacuum where there was a risk of collision, but no provision governing who should give way.
- (e) it may be difficult to observe whether another vessel is on a steady course; and
- (f) a steady course requirement would undermine the simplicity and certainty of the rules.

The Court then considered whether the authorities demanded a different conclusion. The lower courts had relied upon the judgment of the Privy Council in *The Alcoa Rambler*, where Lord Wright had said:⁴⁸

Articles 19 and 21 [which contained the crossing rules in the Collision Regulations in force at the time] presuppose as their essential conditions that the vessels must be crossing vessels and crossing so as to involve a risk of collision. It is only when these conditions are present that the articles apply, ... But the problem does not depend merely on physical circumstances. As the purpose of articles 19 and 21 is to impose a duty on the give-way ship to keep clear, that ship must be in a position to appreciate what the situation is and to know what the other ship is doing, and whether it is on a course at all or, if so, on what course. ...

The ordinary idea of a course is a sufficiently constant direction of a ship on the same line or heading. This will enable a navigator when he sees the other vessel to know if she is on a crossing course. He can often only become aware of that if he can keep the other vessel under observation for sufficient time to ascertain if she is or is not changing her heading. In the open sea this is the usual procedure. ... If, however, it had been possible to watch her movement for some time, the manoeuvre would not have shown that she was keeping a steady course: her heading would have been altering to port. A curved or curving course, constantly changing under a port helm would not have enabled the give-way vessel to decide how to act for her. Accordingly, of the two conditions that she should be on a course and that the give-way vessel should be able to ascertain that, neither was fulfilled.

⁴² Ibid [48].

⁴³ Ibid [49].

⁴⁴ Ibid [52].

⁴⁵ Collision Regulations (n 2) r 7(d)(i).

⁴⁶ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [76].

⁴⁷ Ibid [83].

⁴⁸ *The Alcoa Rambler* [1949] AC 236, 248-250.

The Alcoa Rambler involved a situation with a curving and partially-hidden course where it was not apparent that the vessels were on a steady bearing. The Supreme Court concluded that Lord Wright was using bearing, heading and course interchangeably⁴⁹ and was merely saying that a steady bearing showing the vessels were on a crossing course was necessary for the crossing rules to apply.⁵⁰ The Court said:⁵¹

If it were otherwise it would mean that even though two vessels were on an ascertainable crossing course involving a risk of collision, as shown by a steady bearing observation, the paradigm case for the application of the crossing rules, those rules would not apply because the approaching vessel's actual course happened not to be "steady", a consideration of no independent relevance to the risk of collision.

In *The Savina*, Lord Simon had said of *The Alcoa Rambler*:⁵²

That case establishes, in my judgment, that, for the duties under the crossing rules to apply, so as to impose on a vessel the duty to give way, both vessels must be keeping a steady course involving risk of collision and the give-way vessel should be able to ascertain that the other vessel is on such a course.

The Court considered that Lord Simon might simply have been saying that the vessels must be on a steadily crossing course. If he had been meaning that a steady course was requirement, his observation was obiter and should not be followed.⁵³

The judgment of Brandon J in *The Avance*⁵⁴ was 'the only prior English case in which the crossing rules have been excluded because the give-way vessel was not on a settled course.'⁵⁵ *The Alcoa Rambler* was the only authority referred to and there was no analysis of how it established this rule. Accordingly, the Supreme Court declined to follow *The Avance*.⁵⁶

The Court of Appeal considered that a steady course requirement was necessary so that the stand-on vessel could realise the need to keep its course, stating that 'it takes two to cross'.⁵⁷ However, the Supreme Court pointed out that crossing did not require a steady course, as opposed to a steady bearing. The absence of a steady course did not mean that a vessel could not take compass bearing or make radar observations of the other vessel.⁵⁸

The Court concluded that a steady course was not required for the crossing rules to apply.⁵⁹ While this case involved a give-way vessel, the Court considered that a steady course requirement would not apply to a stand-on vessel either. While a stand-on vessel must keep its course once the rules apply, it does not have to already be on a steady course for them to apply.⁶⁰

The Crossing Rules and the Narrow Channel Rule

The other issue was whether the narrow channel rule displaced the crossing rules.

Where two vessels are proceeding along a narrow channel in different directions and approaching each other, the crossing rules will not apply even if their courses are crossing. This is because the narrow channel rule and the crossing rules could lead to conflicting requirement in some cases, such as in a curving channel.⁶¹

⁴⁹ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [94].

⁵⁰ *Ibid* [93].

⁵¹ *Ibid* [95].

⁵² *The Savina* [1976] 2 Lloyd's Rep 123, 132.

⁵³ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [101].

⁵⁴ *The Avance* [1979] 1 Lloyd's Rep 143 (Admlty).

⁵⁵ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [102].

⁵⁶ *Ibid*.

⁵⁷ *The Alexandra 1 & The Ever Smart* (CA) (n 35) [92].

⁵⁸ *The Alexandra 1 & The Ever Smart* (SC) (n 1) [108].

⁵⁹ *Ibid* [111].

⁶⁰ *Ibid* [112].

⁶¹ *Ibid* [119].

Vessels approaching each other in such a channel might well appear to be in a crossing situation but safety is ensured if both vessels keep to the starboard side of the channel rather than one of the vessels keeping to the course she may be on at the time when the crossing situation arises.

However, the crossing rules apply in a narrow channel in some cases, such as where one vessel is crossing the channel or where two channels meet.⁶²

The Supreme Court approved the proposition that where ‘both rules may reasonably be complied with, obedience to both rules is incumbent upon the vessels.’⁶³ It then asked ‘in what circumstances can it be said that both rules may not reasonably be complied with, so that it is necessary that one should be displaced by the other?’⁶⁴

The Court identified three types of situations involving vessels in the area just outside the entrance to a narrow channel:⁶⁵

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... They may be stationary, or moving, although still waiting to enter.

It was undisputed that crossing rules applied in Group 1 cases, but not in Group 2 cases.⁶⁶ But the parties disagreed about whether they applied in Group 3 cases like this. *Nautical Challenge Ltd*, the respondent, argued that the crossing rules should be disapplied when the vessel was ‘preparing and intending to enter’ the channel and were therefore inapplicable in Group 3 cases.⁶⁷ *Evergreen Marine (UK) Ltd*, the appellant, argued that they should only be disapplied once the ‘vessel is actually shaping to enter, adjusting her course and speed to arrive at the entrance on her starboard side of it, on her final approach’.⁶⁸ Accordingly, they would apply in Group 3 cases.

The Court held that the crossing rules did apply in a Group 3 cases. The crossing rules should be applied wherever possible and only disapplied if there was a compelling necessity.⁶⁹ Disapplication is necessary in Group 2 cases because, once the vessel is shaping and adjusting its course to enter the narrow channel, its course is determined by the need to comply with the narrow channel rule when it enters the channel. Applying the crossing rules in this situation could result in a conflict between the rules. But this conflict does not arise in a Group 3 case, as the vessel’s course is not yet determined by its planned entry into the narrow channel.⁷⁰

The ‘shaping to enter’ test was also clearer and more practical in application. A leaving vessel might be unsure of whether an approaching vessel is intending and preparing to enter the channel.⁷¹

The Court of Appeal relied on two cases to support its conclusion that the crossing rules were inapplicable, but the Supreme Court thought neither case supported this conclusion. *The Canberra Star* was a case where vessel was shaping to enter the channel.⁷² So was *Kulemesin v HKSAR*, although Lord Clarke used the expressions ‘approaching a narrow channel and intending to proceed along it’ and ‘shaping to enter the narrow channel’ interchangeably.⁷³

⁶² Ibid [120]-[123], citing *The Empire Brent* (1948) 81 Ll L Rep 306, 312; *The Leverington* (1886) 11 PD 117, 188; *The Ashton* [1905] P 21.

⁶³ Ibid [124], citing *Marsden & Gault on Collisions at Sea* (Sweet & Maxwell, 14th ed, 2016) [5-302].

⁶⁴ Ibid [125].

⁶⁵ Ibid [134].

⁶⁶ Ibid [135].

⁶⁷ Ibid [136].

⁶⁸ Ibid.

⁶⁹ Ibid [137], [142].

⁷⁰ Ibid [138]-[139].

⁷¹ Ibid [141].

⁷² Ibid [131], citing *The Canberra Star* [1962] 1 Lloyd’s Rep 24.

⁷³ Ibid [133], citing *Kulemesin v HKSAR* [2013] 16 HKCFR 195 at [225].

The Court of Appeal also relied on the advice of the Elder Brethren regarding a scenario of ‘an incoming vessel crossing to the starboard side of the channel to prepare for entry’.⁷⁴ The Elder Brethren said that it should be possible to avoid a risk of collision through prudent seamanship, but the Supreme Court did not see this as inconsistent with the fact that the risk could also be avoided by applying the crossing rules. The Court also thought the Elder Brethren’s advice of adjusting speed to avoid the risk of collision was similar to the crossing rules. In any case, it said that the interpretation of the Collision Regulations was a matter for the court, not the Elder Brethren.⁷⁵

The Court in fact thought that the scenario supported the application of the crossing rules:⁷⁶

The vessel approaching from the East will have to cross the line of the channel before she can turn to port to shape a course to get to her starboard side of it, taking her across the bows of the vessel leaving the channel. The narrow channel rules therefore do nothing to help either vessel avoid a collision, still less do they explain which vessel should keep clear of the other. If the crossing rules do not apply, then the risk of collision inherent in their approaching each other on a steady bearing is not addressed by any Rule.

The Court therefore found that the crossing rules did apply in this case.

The case on remittal

The Supreme Court remitted the matter back to the Admiralty Court to reassess the apportionment of liability,⁷⁷ where Sir Nigel Teare altered the apportionment of liability to be 70% to the *Ever Smart* and 30% to the *Alexandra 1*.⁷⁸

Sir Nigel, in considering the Supreme Court’s judgment on remittal, described the Court’s approach of disapplying the crossing rule where there was ‘compelling necessity’ to do so as ‘novel’.⁷⁹ He sought to identify what the source of the ‘compelling necessity’ to disapply the crossing rule when a vessel is on its final approach and was shaping to enter a narrow channel, saying that it could not be the narrow channel rule (because it did not apply until the vessel was in the channel) or the obligation of good seamanship (because this argument had not found favour with the Supreme Court).⁸⁰

His Lordship identified two possible reasons for why there was a compelling necessity to disapply the crossing rule in this situation. The first explanation was that ‘there was no longer a crossing situation which involved a risk of collision’.⁸¹ The second explanation was that:⁸²

... once a vessel was on her "final approach" she was, in sense, committed to those adjustments of course and speed which were necessary to enable her to arrive at the entrance to the channel and on the starboard side of it so that she no longer had the freedom of action required to keep out of the way of the other vessel.

Sir Nigel preferred the first explanation. However, it is difficult to see how the lack of a risk of collision creates a ‘compelling necessity’ to disapply the collision rule. This might be a reason why it was unnecessary to apply the rule in this situation, but to treat the lack of necessity for applying it as sufficient reason to disapply it is to invert the Supreme Court’s test.

The Supreme Court in fact explained that:⁸³

the necessity to disapply the crossing rules arises because, once she is shaping and adjusting her course to enter the narrow channel, the approaching vessel is already having her navigation

⁷⁴ Ibid [143].

⁷⁵ Ibid [143].

⁷⁶ Ibid [144].

⁷⁷ Ibid [148].

⁷⁸ *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2022] EWHC 206 (Admlty), [185].

⁷⁹ *The Alexandra 1 & The Ever Smart (reapportionment)* (n 3) [30].

⁸⁰ Ibid [35].

⁸¹ Ibid [36].

⁸² Ibid [36].

⁸³ *The Alexandra 1 & The Ever Smart (SC)* (n 1) [138].

determined by the need to be in compliance with rule 9(a) when she reaches the entrance, that is, to arrive at her starboard side of it, on a course which enables her to continue on her starboard side of the channel.

This is closer to Sir Nigel's second explanation. But the Supreme Court also said that 'the narrow channel rules, and not the crossing rules, apply as between the leaving vessel and a vessel' shaping to enter the channel.⁸⁴ Contrary to Sir Nigel and despite the literal terms of the rule, the Supreme Court did treat the narrow channel rules as applying when a vessel was shaping to enter the channel.

Comment

The striking feature of this case is the starkly different views taken on both issues taken by the Supreme Court and the lower courts (in judgments delivered by two highly experienced admiralty lawyers).⁸⁵

In my view, the Supreme Court was right on both issues. The flaw of the lower courts' judgments was to focus unduly on statements in previous authorities. In doing so, they lost sight of the text and purpose of the Collision Regulations. The Supreme Court rightly put the Collision Regulations' safety purpose at the heart of the analysis, emphasising the need for clear and easy to apply rules that leave no gaps in who has the responsibility to keep clear.

The lower courts also ignored the status of the Collision Regulations as an international treaty. Notably neither lower court referred to the Vienna Convention on the Law of Treaties, whereas the Supreme Court began its analysis by referring to it and emphasising the international character of the Collision Regulations. Judicial decisions are only a subsidiary means of interpretation for treaties,⁸⁶ yet the lower courts gave them more focus than the text and purpose of the treaty, which are supposed to be the primary focus of the interpretative exercise.

But the Supreme Court's treatment of *The Alcoa Rambler* is unconvincing. Lord Wright cannot have been using 'course' to mean a crossing course because he expressly treated them as distinct in saying that the question was whether the vessel 'was on a crossing course or on a "course" at all'.⁸⁷ In referring to a 'course', he must have meant a steady course because every vessel has a course unless it is stationary (and the vessel was not stationary in *The Alcoa Rambler*). Nor can he have meant a steady bearing when he said a course because a steady bearing would involve a crossing course.

However, these observations were perhaps obiter and, in any case, the Privy Council decision was not binding on the English courts. The Supreme Court, having carried out a deeper analysis of the text and purpose of the Collision Regulations, was right not to follow them.

In charting a new course for the Collision Regulations, the Supreme Court has put the focus back on safety and clarity. Hopefully this will reduce the number of collision cases in future.

⁸⁴ Ibid [135].

⁸⁵ Ibid [30], the Supreme Court referred to Gross LJ as 'an experienced Admiralty practitioner'.

⁸⁶ See Statute of the International Court of Justice, art 38(1)(d); Vienna Convention on the Law of Treaties (n 38) art 32.

⁸⁷ *The Alcoa Rambler* (n 47) 247.