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*Ports of Auckland Limited v
Southpac Trucks Limited [2009]
NZSC 112 (SC)*

MLAANZ, Napier New Zealand 2010

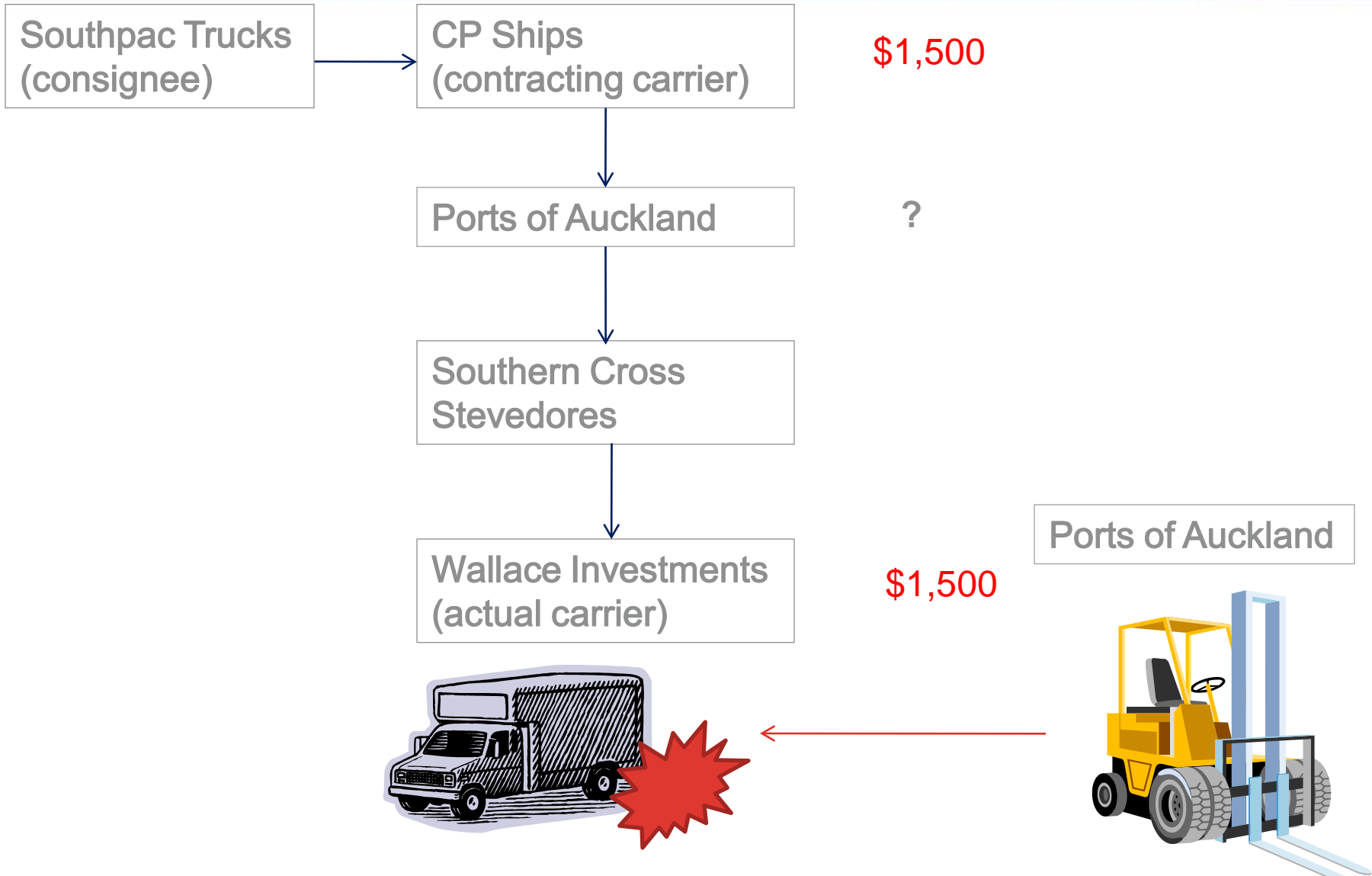
*Aisha Lala
26 February 2010*

Hello, my name is Aisha and today I will be talking about a case by the name of Ports of Auckland Limited and Southpac Trucks Limited.

This litigation has wound its way up from the District Court and has now been decided by New Zealand's highest court. The decisions of the High Court and Court of Appeal have been the subject of some earlier case notes at this conference, so I thought that it was in order to comment on this now final decision of the Supreme Court.

The decision provides clarification of the law in relation to liability of sub-contractors in a carriage of goods. It also has a wider message about the approach to interpreting the governing statute, the Carriage of Goods Act 1979. The Carriage of Goods Act is a code which applies to the domestic carriage of goods in New Zealand.

The facts



I'm going to start off by describing the contractual arrangement between the parties and the context of how this dispute between Southpac and Ports of Auckland arose.

The contractual arrangement

1. Kenworth Trucks (as shipper) and Southpac Trucks (as consignee) entered into an agreement with CP Ships to transport 6 Kenworth trucks from Australia to New Zealand
2. CP Ships was responsible for the goods during the international carriage as well as the short domestic carriage between discharge from the carrying vessel and a designated pick-up area at the port.
3. CP Ships subcontracted the stevedoring and driving of the trucks across the port to Ports of Auckland Limited (POA).
4. POA then entered into an agreement with another stevedore, Southern Cross who in turn engaged Wallace Investments to off-load and transport the trucks across the port.

The facts

While Wallace's employee was driving one of the trucks across the port to the pick-up zone, the truck crashed into a forklift.

The forklift was being driven by an employee of the Ports of Auckland who was not assisting with transport of the trucks. The forklift driver was at fault for the collision. The cost to repair the damaged truck was around \$60,000.

How did the litigation arise?

The governing statute, the Carriage of Goods Act, specifies that two types of carrier can limit their liability. The 'contracting carrier' and the 'actual carrier'.

This meant that Southpac's claim against both CP ships and Wallace would be limited by the Act. Ports of Auckland however, was neither the contracting carrier or the actual carrier of the trucks. Ports of Auckland's involvement was limited to arranging another party to transport the trucks.

The litigation arose because Southpac's claim against CP Ships or Wallace Investments was limited to an amount of \$1,500 under the limitation provisions in the Act.

Because of that statutory limitation, Southpac held POA liable for the damage to the truck. Southpac said that Ports of Auckland was liable for the negligence of its employee who drove the forklift into the truck.

Southpac claimed that PoA was liable for the full \$60,000. It's reason for doing so was because the forklift driver's conduct had nothing to do with the carriage of the truck. Southpac said that PoA's vicarious liability arose independent of the contractual arrangement of carriage of the

truck. In other words, Southpac were trying to hold PoA liable as a independent third party, and not in PoA's role as a carrier.

Carriage of Goods Act 1979

6 – Other remedies affected

Notwithstanding any rule of law to the contrary, *no carrier shall be liable as such, ...* (emphasis added)

Section 6 - CGA

Section 6 of the Act sets out the liability of carrier's generally. Unlike the provision dealing specifically with limitation, s 6 does not draw a distinction between the contracting carrier and the actual carrier.

Section 6 says notwithstanding any rule of law to the contrary no carrier shall be liable as such whether in tort or otherwise, personally or vicariously, for the loss of or damage to any goods.

So was POA a 'carrier' within the meaning of the Act?

A 'carrier' is defined as:

Anyone, who in the ordinary course of business, carries or procures to be carried goods owned by another person. It also includes a person who in the ordinary course of business performs or procures a service incidental to carriage of the goods.

If POA was a 'carrier' as defined and section 6 applied to it and Southpac had no claim for the \$60,000.

The litigation through the lower courts and the Supreme Court focused on this issue – whether PoA was a carrier and came within section 6.

The Supreme Court's reasoning

Policy

- No fault
- Apply to parties that procure contracts of carriage
- Certainty to cargo, carriers and insurers

Policy

In reaching its decision as to whether POA was a carrier (as defined) and came within section 6, the Supreme Court placed particular emphasis on the policies underlying the Carriage of Goods Act. In particular it considered the Law Reform and Select Committee reports preceding the enactment of the legislation.

Those reports showed an intention to create a regime where carrier's liability at common law was to be removed and replaced by a statutory (limited liability) regime which depended on the role a carrier was fulfilling at the time the damage occurred.

The regime was intended to be a **no-fault system** where liability for loss during carriage lies where the balance of convenience places it.

The Rules were not only intended to apply to parties transporting the goods in a physical sense, but also to parties that **procure to perform contracts of carriage**, or procure to perform incidental services - *whether or not those parties take part in the carriage itself* (for example freight forwarders)

By restricting the liability of all parties involved in the carriage of goods and capping the amount of compensation available based on the number of units tendered to the carrier – the new law was intended to provide more **certainty**.

The Court was persuaded of the need for certainty to owners of cargo, carriers and those parties insurers. The idea was that when the parties knew where the risk lay, they could allocate their commercial arrangements accordingly.

The Supreme Court's decision

Held:

1. POA was a 'carrier'
2. Section 6 applies to a 'carrier'
3. A 'carrier' is entitled to the protection in the Act

Result:

1. POA was not liable for the \$60k damage
2. Southpac's claim was limited to \$1,500 against CP Ships

The Supreme Court decided POA was a 'carrier' (as defined) either because it arranged or *procured* Wallace to transport the trucks across the port to the pick-up zone, or because POA arranged the stevedoring (an incidental service).

Having absorbed the underlying policies of the Act, the Court simply said that because Ports of Auckland was a 'carrier' (as defined) at the relevant time of the damage, section 6 must apply to it.

As a result of that finding,

- POA was protected from a claim in tort by Southpac
- Southpac's recourse was limited to a claim for \$1,500 against the contracting carrier, CP Ships.

Implications

- *Status* vs capacity of a carrier
- Broad immunity for sub-contractors
- Commercial certainty
- A purposive approach to interpreting the Act

Implications

In the wake of this decision it is now clear that it is the **status rather than the capacity** that a party is acting in, that determines whether the statutory immunity in section 6 of the Act applies. The Court summed this up by saying that *'all that is required for protection is that the party being sued is acting as a carrier (as defined) of the goods at the time they are damaged.'*

There are limited exceptions to that immunity in the Act. The two notably one being where the parties agree in writing otherwise, or where the carrier or its employee intentionally causes the loss or damage. None of the exceptions applied in this case.

The decision is of some significance to subcontractors such as those operating in ports as well as other freight forwarding companies. Now that fault and cause are largely irrelevant there is a **broader immunity to parties who procure** the performance of carriage of goods and incidental services. We could probably expect now see fewer cases reaching courts, but query whether this is for the right reason.

I think that another final message to draw from this case is the approach the court has taken to interpreting the provisions of the Act. The Supreme Court was not shy about letting the policies underlying the legislation drive the result.

That might be something that practitioners may want to bear in mind when confronting other issues that arise out of the provisions of the Act. The Supreme Court's approach in this case is a timely reminder that the principles founding the Act may well defeat technical arguments.

That brings my casenote to a close, are there any questions or comments from the floor.

Criticisms

Strained interpretation

While the Court's purposive reasoning does have its commercial merits, some provisions of the Act were subject to a strained interpretation – for example – s 15 – the provision dealing with limitation says that only two types of carrier are entitled to limit – the contracting carrier and the actual carrier. It could be argued that the Act only contemplated that the contracting carrier and actual carrier could limit their liability since only those two types of carrier are stated as being able to limit their liability.

Is the immunity for carriers too wide?

Another criticism is that the ambit of the immunity is now too wide.

As an example the Court comments on a situation posed by counsel where instead of a fork-hoist a (hypothetical) imbibed Port's of Auckland CEO collides with Southpac's truck during a mad port-driving rampage. The Court commented that so long as the CEO was engaged on port business and not a frolic of his own, the Act would protect both him (as an employee) and POA (as employer) in relation to any loss or damage.

That result can be rationalized by the court preference of the status of the carrier being paramount, rather than the capacity in which the carrier or its employees are acting.

Summary

Despite the potential shortcomings mentioned, the decision does have its merits.

It will (hopefully) bring more certainty both commercial insurance arrangements and liability for damage / loss arising out of the domestic carriage of goods.



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