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## **Abstract**

### **New Zealand Maritime law year in review 2007**

Leaving aside the case of *Keybank National Association v The Ship 'Blaze'* addressed elsewhere at this conference, there have been a couple of New Zealand decisions which will be of interest internationally, and a decision under the NZ Carriage of Goods Act 1979 which will be of interest to importers to New Zealand and their insurers.

*'Tasman Pioneer'* is a recent decision dealing with the interpretation and application of the carrier's 'navigation and management' defence under Article 4 rule 2(a) of the Hague Visby Rules.

*Birkenfeld v Yachting New Zealand* is a case on limitation of liability under the NZ enactment of the Convention on Limitation of Liability for Maritime Claims, 1976, which has been considered by the Court of Appeal and the Supreme Court of New Zealand (New Zealand's highest court).

*Ports of Auckland Limited v Southpac Trucks* applies a generous purposive construction of NZ's domestic carriage legislation in limiting the liability of carriers.

## MLAANZ Conference 2007

### New Zealand Maritime law 2007 - Year in review

Leaving aside the case of *Keybank National Association v The Ship 'Blaze'* addressed elsewhere at this conference, there have been a couple of New Zealand decisions which will be of interest internationally, and a decision under our Carriage of Goods Act 1979 which will be of interest to importers to New Zealand and their insurers.

#### **'Tasman Pioneer'**

The New Zealand High Court has decided that the carriers' defence under Article 4 Rule 2(a) of the *Hague Visby Rules* exempting them from liability for cargo loss, is only available if the 'act, neglect or default of a master, mariner, pilot, or the servants of the carrier' is in the *bona fide* 'navigation or in the management of the ship'.

The case arises from the grounding of the '*Tasman Pioneer*' in the entrance to the Bungo Suido, Japan in the early hours of the morning on 3 May 2001 (*New Zealand China Clays Limited & Ors v Tasman Orient Line CV* (CIV 2002-404-3215 High Court Auckland, Williams J, 31 August 2007, unreported). Cargo was lost and cargo interests brought proceedings for recovery against the contractual carrier, Tasman Orient Line CV.

Cargo interests had asserted that the ship was physically unseaworthy but the Court found the onus of proving unseaworthiness fell to cargo interests and they had not discharged that burden. There was no challenge to the competence of the master or any assertion that the carrier had failed to exercise due diligence in hiring him.

However, the Court found that the plaintiffs had proved that early and proper notification of the grounding by the master to the authorities would likely have resulted, hypothetically, in their on-deck cargo not being lost through water damage. There would have been significant pumping capacity additional to the ship's pumps available and progressively deployed before the sea level reached on-deck cargo.

The Court then went on to find that while the actions of the master were in the navigation and management of the ship, the carrier was not entitled to the defence under Article 4 Rule 2(a). As many readers will know, that rule provides:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

- (a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship

In determining that what the master did were matters of 'navigation' or 'management' of the '*Tasman Pioneer*' the Court adopted the distinction between a 'neglect to take reasonable care of the ship...as distinct from the cargo' by reference to the well-known decision *Gosse Millerd v Canadian Government Merchant Marine Ltd* as well as other authorities. It found that the whole of the master's actions should be properly seen as errors affecting both ship and cargo thus leading to a finding that the ship should normally be held entitled to the exemption under Article 4 Rule 2(a).

However, the Court found that was not an end to the matter.

The Court records that all the master's decisions prior to the grounding were made in good faith but that was not the position after the grounding. He failed to take a number of actions a trained and conscientious master would take in such situations. In particular he never complied with his duty to notify the coastguard of the casualty and the ship's position and condition. He also failed for what on his own admission was over two hours - and was probably longer - to comply with his obligation to report the casualty to the ship's managers and, when he did report, he said nothing about the cause of the reported water ingress, nothing about the grounding, and minimised the damage to the ship. Later telexes show the master was persisting with his lie to the ship's managers.

The Court found that none of those actions could have been motivated by the master's paramount duty to the safety of the ship, crew and cargo. None could have been motivated by his obligations as a master, particularly the obligation to report and take whatever steps were recommended to minimise the danger to life, to navigation and avoid the risk of pollution. All of those actions can only have been motivated by the master implementing a plan designed to absolve himself from responsibility or blame for the grounding and lend a veneer of plausibility to his falsehood. It followed that while what happened just before the grounding and for several hours afterwards may have been an 'act, neglect or default of the master...in the navigation or in the management of the ship' his actions did not amount to an 'act, neglect or default' in the *bona fide* 'navigation or management of the ship'.

The defendant's position was that whatever the master does in the navigation or management of the ship - even with an ulterior intent - remains within the exception in Article 4 Rule 2(a). Tasman argued that was consistent with the history leading up to the compromise between owners and cargo interests represented by the Rules and as long as owners exercised due diligence in making a ship seaworthy, both physically and with competent crew, they were entitled to rely on the exceptions reflecting the risks arising from the common venture of sea voyages including damages arising from the act, neglect or default of master and crew in the navigation and management of the ship. Tasman was not privy to any conduct of the master of '*Tasman Pioneer*' said to have caused the plaintiffs' loss and so was not liable.

While acknowledging that the necessity for a demonstration of good faith is not addressed in Article 4 Rule 2(a) the Court rejected Tasman's argument and found that the rules imply such a premise and that various cases (though not directly applicable to this rule) which had addressed the question of a master's *bona fides*, justified such a finding.

The High Court decision is but the opening skirmish in this action, it being the subject of an appeal to the Court of Appeal.

### ***Ports of Auckland Limited v Southpac Trucks Limited [2007] 2 NZLR 656***

The New Zealand Carriage of Goods Act 1979 applies a no fault regime to all domestic carriage of goods.

With only few exceptions (eg inherent vice, saving or attempting to save life or property in peril) the contractual carrier has absolute liability for loss or damage to goods but only up to a limit of \$1,500 per 'unit of goods' as defined.

Southpac Trucks Limited ordered six Kenworth trucks to be imported from Victoria. CP Ships was the carrier and the trucks were loaded at Melbourne and discharged at Auckland. POAL was contractually responsible to CP Ships for unloading the trucks. POAL subcontracted with

Southern Cross Stevedores Limited who in turn subcontracted Wallace Investments Limited to do the job. The trucks were unloaded by Wallace.

POAL was responsible for unloading Kenworth trucks from the *Rotoiti*, by driving them off the ship and across the wharf owned and maintained by POAL, to a marshalling and storage area, there to await collection by Southpac's carrier. As one of the Kenworth trucks was being driven by a Wallace employee across Bledisloe wharf, following discharge from the *Rotoiti*, an accident occurred. A fork hoist driven by an employee of POAL, carrying an oversized load of timber, collided with the truck which suffered substantial damage. Repair costs totalled \$60,201.64.

POAL filed a defence admitting negligence on the part of the fork lift driver, but asserting that POAL was an "actual carrier" until delivery of the truck to Southpac at Auckland and the truck comprised one unit of goods pursuant to s 3 of the Act; and POAL's liability, if any, for damage to the truck was to CP Ships only, as contracting carrier, (and not to Southpac), and in any event its liability was limited to the sum of \$1,500.

Section 6 of the Act provides:

6 Other remedies affected

Notwithstanding any rule of law to the contrary, no carrier shall be liable as such, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by him except—

- (a) In accordance with the terms of the contract of carriage and the provisions of this Act; or
- (b) Where he intentionally causes the loss or damage.

The District Court judge held that POAL was undoubtedly a "carrier" for the purposes of s 6, but that it was not a carrier "as such" for the purposes of Southpac's claim, because "... the relevant capacity in which the putative carrier is acting is all important". He observed there was nothing exceptionable about the manner in which the Kenworth truck was driven by POAL's subcontractor. Rather, the focus was on the admitted negligence of the driver of POAL's fork hoist. Southpac's claim against POAL was brought in reliance on the negligence of a driver who was not performing any service at all in relation to the carriage of Southpac's truck.

As the Judge saw it:

... whatever its relationship with or to Southpac as regards the moving of the truck from the ship to the parking area, the damage arose from the quite unrelated and unintended intervention of the fork hoist. And in respect of that activity it cannot be said that, vis-à-vis the Kenworth, Ports of Auckland was a carrier as such.

On appeal the High Court has overturned the District Court and concluded that neither the language nor the purpose of the Act permits a party such as Southpac to maintain a cause of action against a carrier to which s 6 applies, even where, as here, there has been a breach of tortious duty on the part of an employee not at the time engaged in the carriage of the goods concerned.

The judge found that because the collision occurred during the currency of the contract of carriage between Southpac and CP Ships, when POAL's subcontractor was carrying out incidental services as stevedores, and POAL was providing wharfinger services and

warehousing facilities, POAL was a carrier 'as such' under section 6. That was consistent with the intention of the statutory framework of liability under the Act.

Even given that the Act is a code and in light of its purpose it is difficult to see the rationale in affording POAL the protection of the Act by reference to its status under the contract of carriage. The fact that the negligent forklift driver was employed by POAL was entirely unrelated to POAL's contractual obligations under the contract of carriage. Had he been employed by a different entity, that entity would have been liable and unable to rely upon POAL's contract of carriage.

The High Court declined leave to appeal, but the Court of Appeal has recently granted leave.

***Birkenfeld v Yachting New Zealand Inc [2007] 1 NZLR 569 (CA & SC)***

New Zealand's highest court has determined that a rigid inflatable boat (RIB) is a ship for the purposes of limitation of liability under New Zealand's enactment of the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) (*Birkenfeld v Yachting New Zealand Inc* (judgment delivered 10 November 2006)).

In doing so it has recognised that limitation of liability applies to all 'vessels used in navigation' large or small and for whatever purpose (commercial or domestic), though the original rationale for limitation was to facilitate commercial shipping and the commercial shipping trade. The effect of the decree is to limit YNZ's liability, if any, to the minimum liability available under the LLMC (a figure less than US\$500,000).

The RIB in question was a small 'ship', being an SR5M Searider (rescue model) Avon, 5.4 metres long fitted with a 50 hp 4 stroke engine. The High Court, Court of Appeal and Supreme Court all found there was no doubt that it fell within the statutory definition 'every description of vessel...used or intended to be used in navigation, however propelled'.

The claim arose from a collision off the coast of Greece in 2002 between Ms Kimberly Birkenfeld who was sailing her windsurfer, and the RIB owned by Yachting New Zealand (YNZ) and driven by Mr Bruce Kendall a former world champion windsurfer and Olympic gold medallist. Mr Kendall was engaged in training athletes in a pre-Olympic regatta in preparation for the Olympics the following year. Sadly Ms Birkenfeld was badly hurt as a result of the accident. The Greek coastguard investigated the collision at the time and found that Mr Kendall was not at fault, but Ms Birkenfeld brought her claim in New Zealand against both YNZ and Mr Kendall seeking \$15 million in general damages plus other losses.

While denying any liability, YNZ sought and obtained a limitation decree limiting liability. Limitation is difficult to 'break'. A claimant must prove the defendant intended to cause the injury, or was reckless with knowledge that the injury would probably result. The High Court found that the acts of Mr Kendall in driving the RIB could not possibly be the personal acts of YNZ, so YNZ was entitled to limit liability. Ms Birkenfeld did not challenge that particular finding on appeal.

The substance of her appeals was that the RIB was not a 'ship' for the purposes of the legislation, so YNZ could not limit. In particular:

The New Zealand statute had to be interpreted in light of the original rationale of the LLMC, ie to facilitate commercial shipping and the commercial shipping trade. As the LLMC was not

intended to apply to pleasure craft or other non-commercial ships, the New Zealand statute should not apply to a RIB.

Her case was further supported (she said) by the requirement that to determine the level of limitation, ships are measured in accordance with the International Convention on Tonnage Measurement of Ships 1969 (Tonnage Convention). Because that convention does not apply to ships of less than 24 metres in length, such ships cannot qualify for limitation.

Research for the case on behalf of YNZ disclosed some interesting differences as to implementation of the LLMC in common law jurisdictions. For example, while the LLMC applies to 'seagoing ships', and Australia has implemented the Convention wholesale, there is no requirement that a ship be 'seagoing' for limitation in the UK, Canada or New Zealand. However, because domestic legislation is drawn from the terms of the LLMC, courts consider case law from other jurisdictions with a view to uniformity of interpretation of those terms.

So YNZ relied upon overseas case law relating to the definition of 'ship', some of which were limitation cases. English 'ship' cases included for example, a 24 foot long fishing coble (*Ex parte Ferguson v Hutchison* (1871) QB 280) a barge (*The Mac* (1882) P 126), a 'motor vessel' (*The Annie Hay* [1968] 1 All ER 657) and a yacht (*The Alastor* [1981] 1 Lloyds LR 581). In Canada, ships include a jet boat used on a lake three and a half miles long (*Chamberland v Fleming* 12 DLR (4<sup>th</sup>) 688 (1984)), and a 32 foot pleasure craft (*Whitbread v Walley* 77 DLR (4<sup>th</sup>) 25 (1990)). There were no New Zealand cases expressly relating to interpretation of 'ship' in the context of limitation, but New Zealand courts had found a kayak (*Thompson v Police*) a 57 foot Vindex launch (*Harris v The vessel 'Marie II'*), and a dinghy (*Wilson v Nightingale Trading Limited*) to be ships.

The recent Australian case of *Smith v Perese* [2006] NSWSC 288, in which the Court applied limitation to a five metre long abalone fishing vessel, further undermined Ms Birkenfeld's claim that 'ship' only applies to large commercial ships. That Court found that in light of Article 15 of the LMCC the starting point is that it does apply to ships of less than 300 tonnes unless provision is made otherwise (and it is not either in Australia or New Zealand). The New Zealand Court of Appeal adopted the analysis of the Australian court in that case.

As to Ms Birkenfeld's reliance upon the Tonnage Convention, both the Court of Appeal and Supreme Court simply found that the legislation provided for an alternative method of measurement where the gross tonnage could not be ascertained in accordance with that Convention. So the Tonnage Convention did not determine the availability of the right to limit.

The Court of Appeal acknowledged that Ms Birkenfeld's best argument was founded upon her reliance on a recent decision of the English Court of Appeal in *R v Goodwin* [2005] 1 Lloyd's LR 432; a decision in which leave to appeal to the House of Lords was also declined. In that case the court found that a jetski was not a 'vessel used in navigation' under the Merchant Shipping Act 1995. The New Zealand Court of Appeal chose to find that the case seemed to turn on the particular issues involved with jetskis, and noted that the decision had been the subject of some academic criticism. In any event there was nothing to suggest that the RIB was not used in navigation in the sense of planned movement, as required by the test in that case.

The Court of Appeal also observed that while the New Zealand Maritime Transport Act is to be read 'in the context of the law of the sea, and if possible, consistently with that law', that approach did not assist in this case. A RIB clearly falls within the definition in the Act of 'every description of vessel...used or intended to be used in navigation, however propelled' and the

terms of the LMCC did not warrant any other view. In other words, the meaning of 'ship' under the New Zealand Act may be broader than that intended under the LMCC (for example, applying as it does only to 'seagoing ships') but accession by New Zealand to the LMCC did not limit interpretation of the broader definition enacted in domestic legislation.

As an aside, the Court of Appeal has also denied Ms Birkenfeld special leave to appeal the award of costs in favour of YNZ on the application for the decree. Ms Birkenfeld relied upon various English authorities to suggest costs be apportioned but the Court confirmed that this practice has changed since the authorities relied upon and in any event it was open to the court to exercise his discretion in awarding costs to YNZ in light of a Calderbank letter written prior to commencement of the proceeding: *Birkenfeld v Yachting New Zealand Inc* [2007] NZCA 314 Unreported.

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