

# The Tasman Pioneer

Tasman Orient Line CV v NZ China Clays Ltd & Ors [2009] NZCA 135

MLAANZ CONFERENCE - SEPTEMBER 2009

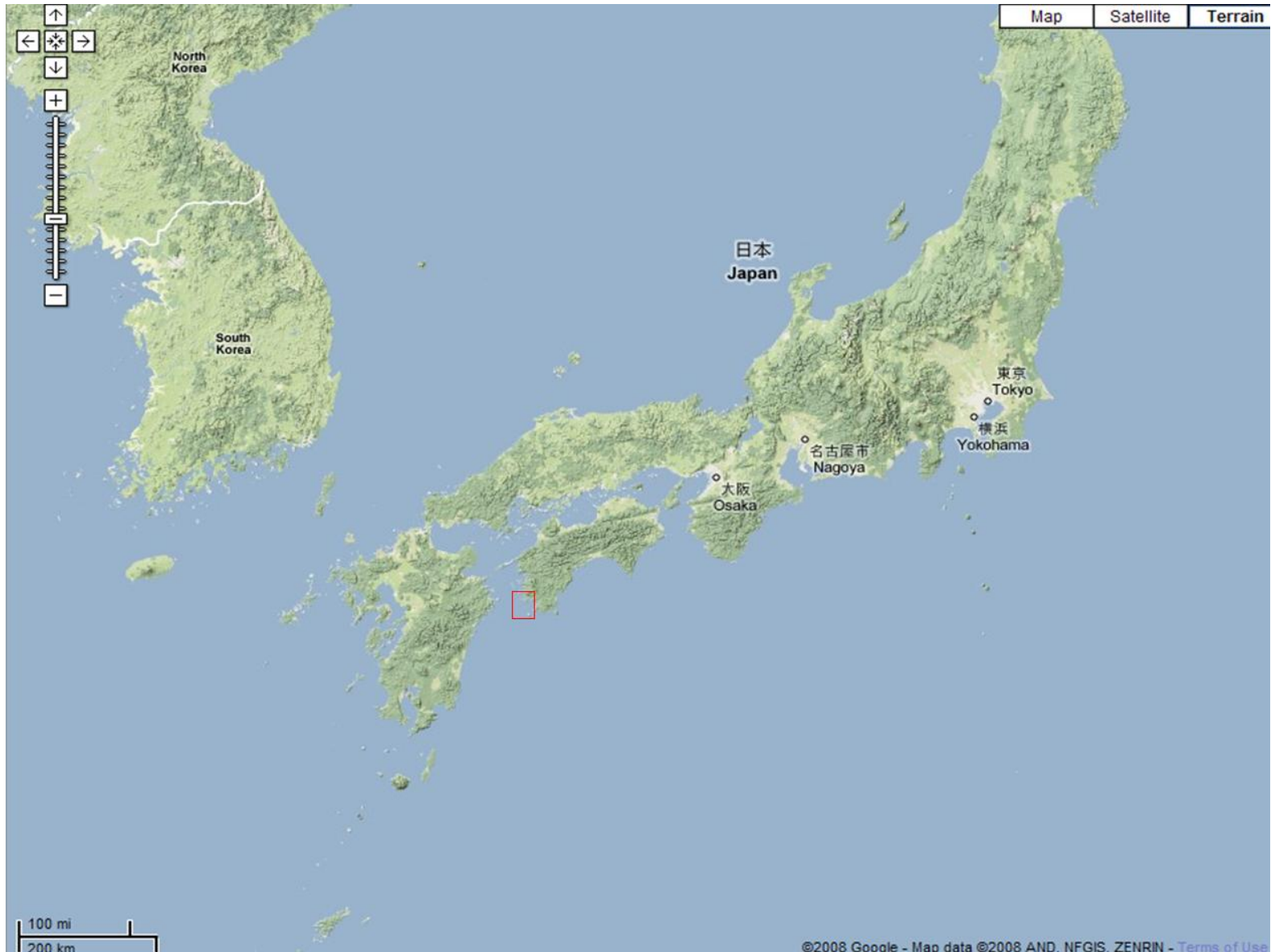
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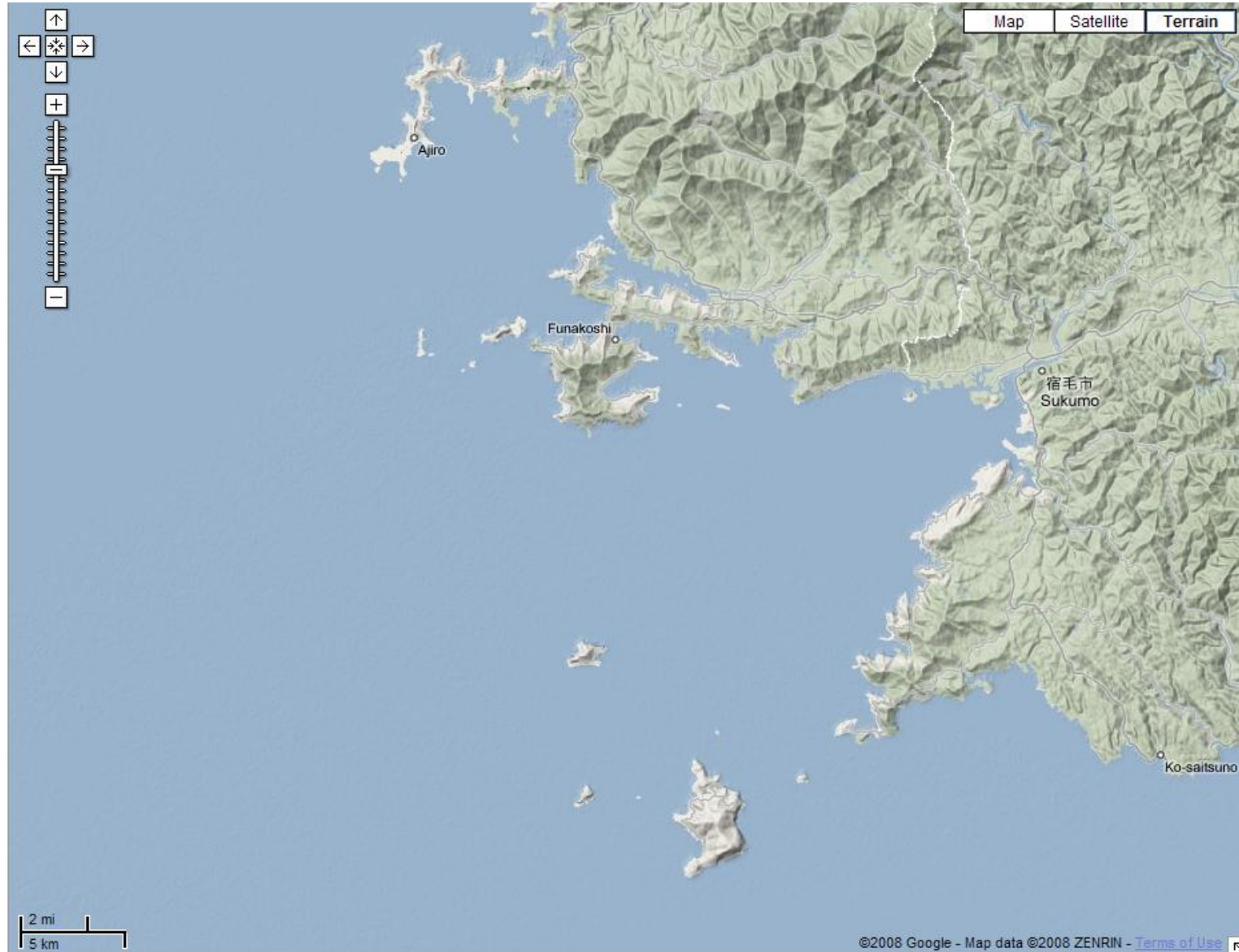


# The Hague-Visby Rules: Art 4.2(a)

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.







# High Court – Justice Hugh Williams

## Master's actions post grounding - causation

- Master's actions post grounding:
  - Failed to notify coastguard
  - Delayed notifying ship management
  - Continued at full speed
  - Ordered crew to alter the ship's charts and lie to investigators
- Had master acted properly, salvors would have arrived earlier and on deck cargo would probably have been saved.

# High Court cont.

## Actions within article 4.2(a)?

- “the ‘act, neglect or default’ of those in charge of the ship must be bona fide ‘in the navigations or in the managements of the ship’ to entitle the carrier to the Art 4 R 2(a) exemption” at [234]
- Master’s actions “designed to absolve himself from responsibility or blame” at [240]
- Therefore:
  - Art 4.2(a) not available
  - Tasman Orient liable for damage to on-deck cargo

# Court of Appeal

## Approach to the Hague-Visby Rules

*THE BUNGA SEROJA* (1998) 196 CLR 161, [8]

- The rules must be read:
  1. “as a whole”;
  2. “in light of the history behind them”; and
  3. “as a set of Rules devised by international agreement for use in contracts that could be governed by any of several different legal systems.”



# CA majority: Justice Baragwanath

**“in light of the history behind them”?**

- “I have concluded that the Rules are to be construed as a comprehensive international convention, unfettered by any antecedent domestic law, and that the practice of text writers and some judges to heark back to the old English common law is erroneous” at [31]

# CA majority cont.

## Approach to the Hague-Visby Rules cont.

- Purposive interpretation:
  - Section 5, Interpretation Act 1999
  - Art 31, Vienna Convention
- “a principle that broadly expressed exemptions are to be read down to do substantial justice in accordance with apparent purpose of the contractual legislation read as a whole” at [56]

# CA majority cont.

## The text

- Start with art 3.2:
  - “Subject to article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried”
- Art 4.2(a) could be read broadly or narrowly
- Read in light of other provisions: art 4.4

# The Hague-Visby Rules: Art 4.2(a)

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... in the navigation or in the management of the ship.

# CA majority cont.

## Conclusion

- “I am satisfied that such behaviour, carried out for the selfish purposes of the master, and wholly at odds with the carriers’ obligations under art 3.2, is not conduct ‘in the navigation or in the managements of the ship’ within the meaning of art 4.2(a).” at [60]

# CA dissent – Justice Fogarty

## Approach to interpretation

- *The Bunga Seroja*
- Purposive:
  - Interpretation Act
  - Vienna Convention
- “the interpretation should be wholly faithful to the text.” Though, as always, in “the context of the whole set of rules, and in the light of the object and purpose of those rules” at [109]

# CA dissent cont.

## The text

- Agree “it is essential to read art 4.2(a) as a qualification only of the principal duty on the carrier in art 3.2” at [100]
- Natural language of art 4.2(a) not qualified
  - Includes intentional conduct
  - Proposed refinement not a true interpretation

# The Hague-Visby Rules: Art 4.2(a)

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... in the navigation or in the management of the ship.



# CA dissent cont.

## “in light of the history behind them”

- *The Bunga Seroja*, McHugh J at [73]:
  - “it seems likely that the English common law rules provided the conceptual framework for the Hague Rules... The Rules should be interpreted with that framework in mind”
- *Marriott v Yeoward* [1909] 2 KB 987
- *The Theodoros Bulgaris* [1933] 45 Lloyd’s Rep 74

# CA dissent cont.

## Conclusion

- “There is no threshold requirement of *bona fide* conduct... nor that decisions must be made as part of the charterer’s voyage. It is sufficient that the loss occurs by reason of an act, neglect or default of the master in the navigation and management of the ship” at [156]

# Cross appeal – heat damaged goods

- Majority, Justice Chambers:
  - heat damage also a result of master's post grounding conduct
  - Therefore, Tasman Orient liable
- Justice Fogarty
  - Salvors' decisions made in management of the ship
  - Therefore, art 4.2(a) applies and Tasman Orient would not be liable

# Appeal to Supreme Court

**Tasman Orient Line CV v NZ China Clays Ltd & Ors [2009] NZSC 70**

## APPELLANT'S GROUND OF APPEAL

- Did the conduct of the Master following the grounding disentitle the appellant to the protection of Article IV, Rule 2(a) of the Hague Visby Rules?

# Appeal to Supreme Court

**Tasman Orient Line CV v NZ China Clays Ltd & Ors [2009] NZSC 70**

## RESPONDENTS' GROUNDS OF APPEAL IN SUPPORT OF CA

1. Were the decisions of the Master following the grounding made *bona fide* for the safety of the ship, the crew and the cargo?
2. Did the conduct of the Master amount to barratry?
3. Did the appellant fail to discharge the onus of proving where the damage occurred and what caused it?
4. Did the appellant fail to establish that it was not at fault?

