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Recent Developments in Australian Maritime Law

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4 September 2009

HWL EBSWORTH LAWYERS

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- With more than 500 lawyers, including over 100 partners, working from offices in Melbourne, Sydney and Brisbane, we are a preeminent, National commercial law practice.
- The firm has the largest group of specialist maritime and trade lawyers of any firm in Australia (i.e. 6 Partners: 23 lawyers)
- I head up the firm's Maritime & International Trade practice in Victoria, complementing the Firm's market leading teams in Sydney and Brisbane

Disclaimer

The information provided in this presentation is in summary form and is designed to alert parties to developments of general interest. The information is not comprehensive, is not offered as advice, and should not be used to formulate business or other fiscal decisions.

Introduction

- 1) APC Marine Pty Ltd v. Ship “*APC Aussie 1*” [2009] FCA 690
- 2) Tai Shing Maritime CO SA v. The Ship “*Samsun Veritas*” as surrogate for the Ship “*Tai Hawk*” [2008] FCA 1546
- 3) Mei Ying Su v. Australian Fisheries Management Authority (No.2) [2008] FCA 1485
- 4) Parlux Spa v. M & U Imports Pty Ltd [2008] VSCA 161
- 5) Judgments to watch out for in 2009/2010 !
 - (a) Seafood Imports Pty Ltd v. ANL Singapore Pte Ltd (VID1246/2006)
 - (b) “*APL Sydney*” (various matters)
 - (c) “*Pacific Adventurer*” (various matters)

APC Marine Pty Ltd v. Ship “APC Aussie 1” [2009] FCA 690

- Bareboat charter of the barge “*APC Aussie 1*” from APC to Trident under a modified “*Barecon 2001*”.
- VID 234/09: APC brought an application to arrest the vessel for unpaid hire.
- VID 244/09: Trident in turn applied to restrain APC from re-taking possession of the vessel.
- Cl.11(b): “*Charterers shall pay to the Owners ... lump sum ... payable not later than 30 running days in advance, the first lump sum being payable on the date and hour of delivery to the Charterers. Hire shall be paid continuously throughout the charter period.*”
- Additional Cl.32(b): “*Owners shall raise invoice at or before beginning of each calendar month for that month hire (where applicable) and the Charterers are to pay hire amount within the same month that invoice charged for ...*”

“APC Aussie 1”

- Cl.28: “(a) Owners shall be entitled to withdraw the vessel ...and terminate the charter with immediate effect by written notice to Charterer if: (i) Charterers fail to pay hire in accordance with Cl.11. However, where failure due to oversight, negligence, errors or omissions on the part of Charterers”, Owners give 10 clear days notice for Charterer to correct breach before may terminate.
- Cl.44: “Where a conflict exists between the clauses in part II and “additional clauses” mentioned herein, additional clauses take precedence.”
- Charterparty was dated 27/06/08 & addendum 21/02/09.
- Ship delivered 20/02/09 and APC invoiced Trident for \$2,250,000 for 21/02 to 23/03 (30 days). Trident paid in full 27/02/09.

“APC Aussie 1”

- On 23/03/09, by Cl.11(b), another \$2,250,000 arguably became due but no hire was paid by Trident.
- Trident argued that it should have been invoiced \$525,000 (23/03 to 31/03), and sought to have dispute referred to arbitration as per Cl.30
- APC ignored the dispute resolution clause and purported to terminate the bareboat charter and retake possession of the ship.

KEY ISSUE:

- Had the Charterparty effectively been brought to an end?

“APC Aussie 1”

HELD:- 25/06/09

- Cl.32 was only adjectival to Cl.11 and only contained machinery for the raising of invoices and the making of payments, and unlike Cl.11, “*did not impose on the Charterers any substantive obligation to pay hire.*”
- However, the “*absolute*” right under Cl.11 to terminate was qualified by the “*anti-technicality*” provision in Cl.28(a)(i), such that if Owners were satisfied that the failure to pay was due to an “*oversight, negligence*” etc. by Trident they had to give 10 clear days notice to rectify failure.
- Here, APC adopted a flawed “intermediate course”:- didn’t purport to terminate immediately, and didn’t give the prescribed amount of notice for termination.
- Therefore Charterparty had NOT been validly terminated on 8/04.

“APC Aussie 1”

- VID 234/09:- Arrest Application by APC dismissed with costs.
- VID 244/09:- As at 17/04 (date of Interlocutory Injunction as against APC) the Charterparty had not been validly terminated, so Injunction dissolved and Trident pay APC’s costs.

Tai Shing Maritime Co. South Australia v. Ship “Samsun Veritas” as Surrogate for the Ship “Tai Hawk” [2008] FCA 1546

- At 5 PM on 15/10/08 the “*Samsun Veritas*” arrested in Port Headland WA laden with 140,000 tonnes iron ore.
- Harbour Master informed the Admiralty Marshal that significant spring tides expected and risk vessel could ground at berth or in port if not moved by 9 AM on 16/10/09. And if miss such deadline, vessel not able to leave safely for at least 1 week.
- The Admiralty Marshal sought urgent Orders vessel be permitted to sail to safe anchorage outside of the port, also outside 12nm Territorial Sea.
- In addition to safety concerns, the berth owners intervened and informed Court that there were significant financial considerations if vessel could not vacate (eg. extensive programmed shipping movements at Port Headland with potential exposure to losses of \$86 Million per week)

Tai Shing Maritime v. “Samsun Veritas”

- Plaintiff did not oppose, and suggested vessel sail to Port of Dampier which otherwise en-route for ship to Asia, but to do so, first sail out of Territorial Sea, then back in.

KEY ISSUE:

- Could/should the Court permit the ship to sail, whilst under arrest, to a safe berth at another port, and in particular, where such transit would involve the ship leaving the territorial waters and the jurisdiction of the Federal Court?

HELD:- 25/06/09

- The Court considered:
 - authorities in which vessels were permitted to sail while under arrest (eg. the “*Iron Shortland*” ((1995) 59 FCR 535) and the “*Boomerang I*” ([2006] FCA 859);

Tai Shing Maritime v. “Samsun Veritas”

- the case of the “*Martha II*” ([1996] FCA 136), in which one judge ordered a movement that permitted sailing outside the territorial sea (Olney J.), and a subsequent judge refused any further such movement (Sheppard J.);
- authorities where such rights to move the vessel were not granted (eg. the “*Socofl Stream*” ([1999] FCA 42);
- secondary authorities of note (“The Law and Practice of Admiralty Matters”, 2007: Derrington and Turner)
- Court ordered that the vessel be permitted, whilst under arrest, to sail with all dispatch and without deviation to the Port of Dampier to a designated berth, buoy or other anchorage until further Court order.

Mei Ying Su v. Australian Fisheries Management Authority (No.2) [2008] FCA 1485

- 29/03/08 the “*Mitra 2139*”, a Taiwanese registered fishing boat sailed south from Indonesian waters towards the border of the AFZ, stopping at a point the Master had calculated was 11 nm north of that maritime boundary. Calculation made with reference to a relatively new Indonesian made GPS that had been programmed by the manufacturer, who had indicated to the Master that a certain “*line*” appearing on the GPS charts was the programmed border of the AFZ.
- Indeed, the information in the GPS and/or the manufacturer’s instructions was not accurate:- vessel actually 7 nm inside the AFZ.
- The vessel was seized by the Navy under s.106C of the *Fisheries Management Act 1991* (Cwth), and in an effort to prevent the forfeiture of the vessel and its nets etc. the vessel’s owners commenced proceedings seeking a declaration for the return to it of same.

Mei Ying Su

- The Act provided, as relevant, two strict liability offences:
 - Section 100: Offence to use a foreign fishing boat in the AFZ.
 - Section 101: Offence to have in one's possession or charge within the AFZ a foreign boat equipped for fishing.
- Section 100: No clear and cogent evidence adduced by AFMA to prove that the vessel had been used for commercial fishing in the AFZ.
- Section 101: No doubt vessel was foreign, was equipped to fish and was located in the AFZ.

KEY ISSUE:

- Vessel owner raised a defence under s.9.2(1) of the *Criminal Code*: - “*mistake of fact*”, adducing evidence that the Master was mistaken as to whether or not a fact existed which, if it had existed as he thought, the vessel would have been 11 nm north of the AFZ and would not have constituted an offence under the Act.
- Which party bore the onus of proof? Was this defence made out?

Mei Ying Su

HELD:- 3/10/08

- Owners evidentiary onus to raise defence.
- Onus reverted to AFMA to disprove or negative the defence of mistake of fact, the standard of proof being “*on the balance of probabilities*”.
- The mistake was, in a sense, the “*vicarious mistake*” of the Taiwanese GPS supplier in thinking that the line in the GPS was the AFZ border.
- Was not a mistake as to a legal entitlement to do something. It was a mistaken statement about a particular physical phenomenon.
- Was it an objectively “*reasonable*” mistake within the terms of s.9.2? Did the Master “*unreasonably*” fail to have regard to any other information available to him which would have revealed his mistake? (eg. various charts on the vessel that did show the correct border, and radio contact with other Taiwanese fishing vessels?)

Mei Ying Su

- Court held that the Master was objectively “*reasonable*” in his consideration, as there was nothing in the circumstances that reasonably required the Master to cross-check his GPS.
- AFMA had failed to prove that the vessel was not in the AFZ as a result of a mistaken but reasonable belief of fact.
- The seized things were returned to the vessel’s owners.

Parlux SpA v. M & U Imports Pty Ltd (2008) 250 ALR 340

- M&U purchased 10,000 electric dryers from Parlux “*FOB Italian Port*”. Container loaded at Parlux’s premises. Carriage by truck to Milan. Carriage by rail to Port. Loaded onto vessel for carriage to Melbourne. Discharged and carriage by truck to M&U’s premises in Melbourne. Only 6,188 dryers were found in the container on opening.
- M&U successfully sued Parlux in the Sup Ct Vic for breach of contract. Justice Byrne held that the dryers had gone missing in the Italian leg of transit. Parlux appealed that judgment in the instant case.
- M&U also sued its freight forwarder Gava International, alleging breach of the contract evidenced by the BOL issued by Gava. Justice Byrne held that Gava entered into two contracts with Parlux (not M&U), and that the Italian land leg of the carriage was not covered by the BOL. M&U appealed that judgment in the instant case.
- Strong evidence the container not tampered with while on the vessel or in Australia, and evidence that the container’s seal could have been incorrectly/insufficiently affixed to the container at Parlux’s premises.

Parlux SpA

- Incomplete fixing of seal could permit opening during the Italian leg prior to the seal being properly sealed (by unknown persons) prior to being loaded on board the vessel. So Parlux's appeal was dismissed.

KEY ISSUE:

- Ultimate issue in the cross-appeal by M&U against Gava was whether the BOL covered the Italian leg of the transit. If it did, then prima facie, Gava would be liable to M&U under the BOL.

HELD:- 26/08/08

- BOL on a standard FIATA Multimodal Transport Bill of Lading form, but Cl.1 stated "*these conditions shall also apply if only one mode of transport is used*", and indeed, the terms on the reverse were all drawn so as to be applicable to either single or multi-modal transport.

Parlux SpA

- Following the “*Starsin*”, the Court held that the most important part of the BOL is the front.
- The BOL did not have a standard term stating words to the effect that, unless both the “*place of receipt*” and “*place of delivery*” on the face were filled in, the BOL would be deemed “Port-to-Port”. Fact that neither boxes were filled in strongly suggestive the parties did not intend the BOL to apply to any transport other than the sea transport.
- As the BOL did not impose any obligations on Gava with regard to the Italian leg of the carriage, Gava could not be liable to M&U for the disappearance of the dryers before the container was loaded in Italy.
- M&U’s cross-appeal against Gava was dismissed.

Judgments to Watch Out For in 2009/2010!

- *Seafood Imports v. ANL Singapore* (VID 1246/2006): (Justice Ryan)
 - Cargo claim involving frozen seafood from Japan to Melbourne and the “*Latent Defect*” defence as it applies to a reefer container.
 - Key issues that may be dealt with in the pending judgment are:
 - Level of detail required in any Statement of Claim.
 - Burden of proof
 - Relationship between Art.4r.2(p) and Art.4r.1 HVR.
- “*APL Sydney*” various cases relating to applicability of 1976 “*Limitation of Liability Convention*”.
 - Claims totalling \$130 million odd relating to the fouling of a gas pipeline in Port Philip Bay by the “*APL Sydney*”.
 - Judgment pending in an action under Art.2 of the Convention, where two Claimants argued their economic loss claims were not covered by the Convention: (Justice Finkelstein)

Judgments to Watch Out For in 2009/2010!

- “*APL Sydney*” (cont.)
 - Judgment pending in an action under Art.6 of the Convention, where Claimants argued that there was more than one “distinct occasion” with the obvious consequences for all:
(Justice Rares)
 - Pursuit of substantive negligence claims to follow (which may be effected by the pending judgments.)
- *QUD-214/09:- Owners of the “Pacific Adventurer” v. State of QLD and Ors* relating to applicability of 1976 “*Limitation of Liability Convention*”.
 - Claims relating to the oil spill and loss of containers from the “*Pacific Adventurer*” in Moreton Bay in which Owners are seeking limitation under the 1976 “*Limitation of Liability Convention*”.
 - Statement of Claim filed for Owners on 26/08/09.

Thank You

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