



HW  
LEBSWORTH  
LAWYERS

# **Recent Developments in Australian Maritime Law**

**Maurice Thompson**

**Partner  
HWL Ebsworth Lawyers**

**15 October 2010**

# HWL EBSWORTH LAWYERS

- A preeminent National commercial law practice with more than 500 lawyers, including over 100 partners, working from offices in Melbourne, Sydney and Brisbane.
- The firm has the largest group of specialist maritime and trade lawyers of any law firm in Australia (i.e. 8 Partners: 22+ 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.

## Cases Reviewed

- 1) DV Kelly Pty Ltd v. China Shipping (Australia) Agency Co Pty Ltd [2010] NSWCTTT 136
- 2) Seafood Imports Pty Ltd v. ANL Singapore Pte Ltd (2010) FCA 702
- 3) The Ship “Gem of Safaga” v. Euroceanica (UK) Ltd (2010) 265 ALR 88
- 4) EMAS Offshore Pte Ltd v. Ship “*APC Aussie 1*” (No.2) [2009] FCA 1583
- 5) Australian Fisheries Management Authority v. Su (2009) 176 FCR 95
- 6) Owners of the “Pacific Adventurer” (P) QUD214/2009

# DV Kelly Pty Ltd v. China Shipping (Australia) Agency Co Pty Ltd [2010] NSWCTTT 136

- Kelly imported furniture from Vietnam in containers and had contracted with China Shipping for the transit of the goods.
- The China Shipping BOL provided for a set number of “free” days, following which “detention fees” would be imposed, which were calculated on a daily basis and increasing over time.
- Kelly returned the container 72 days after the free period and was charged \$8,514.
- Kelly argued that it was prevented from returning the container sooner as the container had been in the possession of its supplier who would not release it, as Kelly owed the supplier money.

## **KEY ISSUE:**

- Did the “detention fees” constitute unenforceable penalties or enforceable liquidated damages?

- Kelly argued the charges did not represent a genuine pre-estimate of China Shipping's loss from the late return of the container as:
  - the charge did not fluctuate with the economic climate; and
  - the true measure of China Shipping's loss was the lesser cost to hire a replacement container from a third party.
- China Shipping argued that the charges:
  - were a genuine pre-estimate of its loss from the late return of the container; and
  - when calculated on basis of the pre-estimated demand for containers, future economic climate was not considered.

**HELD:-**

- Tribunal held in favour of Kelly, finding that the detention charges were not a "genuine pre-estimate of loss", noting that China Shipping could have rented a container from a third party for less than the detention charge.

- Tribunal cited the distinction between liquidated damages and penalties per the High Court in *Ringrow Pty Ltd v. BP Australia Pty Ltd* [2005] HCA 71, commenting that “... *the amount claimed ... as a container detention fee is ‘extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have flowed from the breach’...*”

### **COMMENT:-**

- Is this the appropriate test to apply in the circumstances?
- If there is a breach of the contract if the container is not returned within the “free period”, then perhaps. But if there is no breach, then perhaps the test is not appropriate, as shouldn’t the shipping line be entitled to charge the client on a sliding scale for the period the container is covered by the contract.
- Reference to the cost to rent a container does not account for any lost profits, nor potential loss of goodwill when the shipping line finds itself short of containers.
- China Shipping has filed an appeal.



# Seafood Imports Pty Ltd v. ANL Singapore Pte Ltd

(2010) FCA 702

- Plaintiff imported a container load of frozen seafood from Japan. On outturn, the seafood was found to have suffered considerable damage as a result of having been carried off temperature.
- Plaintiff filed a statement of claim that did not plead to any particular negligence on the part of the shipping line, relying on “good in, bad out”.
- The container was one of some 1500 that, post voyage, were found to have been in a batch that was susceptible to a malfunction in the reefer unit due to an incompatibility between the reefer’s controller and the software installed by the manufacturer.
- The Defendant, the contractual carrier, argued, among others, that:
  - A prima facie case had not been made out as no evidence had been adduced as to the condition of the seafood on shipment;
  - Any damage was as a result of “latent defect” in the container such that it could raise a defence under Art.4r.2(p) of the applicable unmodified HVR.

## **KEY ISSUE:**

- What was the applicable burden of proof? Was it dictated by the *Gamlen* case, the *Bunga Seroja* case, the *Stemcor* case, or something else?
- What is sufficient evidence for the purposes of proving “good order” on shipment?
- What is a carrier’s obligations post “delivery” to a consignee:- does the carrier have obligations post “tackle to tackle”?

## **HELD:-**

- The Court adopted a *Bunga Seroja* approach.
- Circumstantial evidence derived from the survey of the condition of the goods on outturn was sufficient to prove “good order” on shipment.
- That while the damage was probably caused by the reefer’s controller having become stuck in defrost mode as a result of the alleged incompatibility of the components in the reefer, this did not cause the damage.

- The damage was caused by the length of time the unit was stuck in defrost mode which could have been prevented had the carrier detected the container was malfunctioning during a systematic monitoring program and duly rectified the problem.
- The defendant had argued that as the reefer's logs evidenced that the unit also became stuck in defrost mode after "delivery" when the container was being monitored by the container yard (with records), that the yard's failure to identify the malfunction supported the view that the malfunction was a "latent defect". The Court rejected this argument.
- The Court held that the carrier's obligation post "delivery" extended to ensuring that the container did not have a propensity to become stuck in defrost mode while at the port terminal.

### **COMMENT:-**

- While a statement of claim may plead the bare minimum, and neither plead to specific alleged breaches of the HVR or negligence, or particularise such, a carrier will need to proceed on the basis that it must adduce evidence sufficient to disprove any allegation that it may have been in breach of any duty or the HVR.

## The Ship “Gem of Safaga” v. Euroceania (UK) Ltd

(2010) 265 ALR 88

- Euroceania was disponent owner of the “JBU Opal” and “JBU Onyx”, both time chartered to WAM Singapore Pte Ltd (WAMS), a subsidiary of West Asia Maritime Ltd (West). Side letter stated that West was ultimately responsible for WAMS obligations under the time charterparty.
- Early Feb ‘07 West had signed an MOA for the purchase of the vessel. Mid Feb ‘07 purchase agreement had addendum, such that Four M Maritime Private Ltd (Four) would be incorporated as joint buyer. Late Feb Feb ‘07 West and Four entered “Co-Ownership Agreement” where West “absolutely own” 9/10<sup>th</sup>, and Four “absolutely own 1/10<sup>th</sup> shares. MD of West and his wife owned shares in Four. Four held small parcel of shares in West.
- WAMS defaulted on the charterparty. Euroceania proceeded *in rem* arresting alleged surrogate “Gem of Safaga” on basis that s.19(b) Admiralty Act engaged, as West controlled “JBU” vessels at the time cause of action arose, and was owner of “Gem of Safaga” at the time writ was issued. West sought arrest be set aside and release of the vessel.

## **FIRST INSTANCE:**

- Court dismissed West's motion, holding that Four's nominal beneficial interest was held on a resulting trust for West, West not having appropriately assigned the 1/10<sup>th</sup> share in the beneficial interest in the vessel, and Four having provided no consideration for its purchase of the 1/10<sup>th</sup> share. West was therefore the beneficial owner of 10/10 shares of the vessel and the "relevant person" for purposes of s.19(b).
- West appealed.

## **KEY ISSUE:**

- Did Four's 1/10<sup>th</sup> share entitle it to a beneficial share in the vessel, such that West would not then qualify as the relevant person within the meaning of s.19(b)? Is a part ownership sufficient?

## **HELD:-**

- The Addendum bringing in Four created a new agreement. Consideration was given by parties mutually agreeing to discharge the MOA, and Four gave further consideration by undertaking, jointly with West, the buyer's obligations under the contract.

- The Loan documents for purchase funds evidenced that West and Four were jointly and severally liable for the loan. So could not follow that West provided the whole of the purchase price such that a resulting trust would arise over Four's 1/10<sup>th</sup> share in favour of West.
- Section 19(b) uses the expression “the owner” deliberately, such that if there is more than 1 owner, all co-owners of the surrogate vessel must be “relevant persons” in respect of a claim to permit *in rem* proceedings against such surrogate vessel. The ALRC Report for the enactment of the Admiralty Act supported this construction.
- Four was not a “relevant person” and that element in s.19(b) was not satisfied, such that the *in rem* proceeding and arrest against the surrogate vessel “Gem of Safaga” could not be maintained.

## EMAS Offshore Pte Ltd v. Ship “APC Aussie 1” (No.2)

[2009] FCA 1583

- *APC Marine v. “APC Aussie 1”* [2009] FCA 690 was reviewed in this segment at 2009 Conference. Facts now spawned 2 proceedings in Vic Fed Ct, 2 in NSW Fed Ct, Singapore arbitration and South African arbitration.
- The barge “APC Aussie 1” owned by APC. Demise chartered to TDJV. As result late payment of hire by TDJV, APC evoked an anti-technicality clause in the DCHy and sought to terminate the DCHy. APC sought to arrest the barge to regain possession. Arrest was refused.
- TDJV began a tow of the barge from Australia to Singapore for redelivery. Towed by “Lewek Kea”, owned by EMAS, time chartered to TDJV. Tow broke and vessel taken to Newcastle. EMAS arrested the barge claiming damages against TDJV for breach of the time charter. *In rem* writ named TDJV as the “relevant person” per s.18 Admiralty Act. After proceedings commenced, APC validly terminated the DChr to TDJV and retook possession, subject to it remaining in the continuing custody of the Admiralty Marshal. Also entered an Appearance in EMAS matter.

- APC paid \$1.439M into Court as security for EMAS's claim, plus \$92.1k for costs and expenses of the Marshal in relation to custody of the ship while under arrest, including the release.
- EMAS paid \$100k in 3 instalments on demand by the Marshal.
- Marshal's total costs ex GST were \$91.6k, whereas had \$192.1k for such.

**KEY ISSUE:**

- Which party is liable for the Marshal's costs of the arrest, maintaining the res and the release, in circumstances where both the party seeking arrest (EMAS) and the party seeking release (APC) have paid money into Court arguably for such? Which undertaking prevails? The one on behalf of arresting party (per r.41), or the one on behalf of releasing party (r.53)?

**HELD:-**

- Under r.41, undertaking on behalf of arresting party covers costs and expenses of Marshal in relation to the arrest, including costs/expenses in relation to the ship while under arrest.



- Under r.52 & r.53, undertaking on behalf of releasing party covers costs and expenses of Marshal in relation to the ship while under arrest including costs/expenses associated with the release of the ship.
- R.75C, if Court accepts more than one undertaking or security in relation to Marshal's costs, may make orders as to fair allocation of responsibilities between undertakings and security and release undertakings.
- Key is in mischief of the undertakings. R.41 is to ensure Marshal can meet costs of arrest and preserve res while under arrest, noting that arrest itself is to obtain security for Plaintiff's claim and hopefully flush Appearance of relevant person *in personam*. R.53 different. Once ship released, Marshal can't resort to it as security for his costs/expenses. So releasing party, usually the relevant person who has provided alternative security for the plaintiff's claim, should bear primary responsibility for costs/expenses of Marshal, as it has regained the ship. If no relevant person and claim proved, ship sold and costs/expenses have priority from the sale funds.
- EMAS responsible for costs/expenses of Marshal for actual arrest. APC responsible for rest of Marshal's costs/expenses plus to top up security already paid in, by value of costs/expenses taken from EMAS funds.

# Australian Fisheries Management Authority v. Su

(2009) 176 FCR 95

- *Mei Ying Su v. Australian Fisheries Management Authority (No.2)* [2008] FCA 1485 was reviewed in this segment at 2009 Conference.
- Taiwanese fishing boat seized by the Navy under s.106C of the Fisheries Management Act for fishing illegally within the AFZ. In an effort to prevent the forfeiture of the vessel and its nets, the vessel's owners commenced proceedings seeking a declaration for their return. Su argued "mistake of fact" per s.9(2) of Criminal Code, that he was misled into believing that he was 11 nm north of AFZ when in fact he was 7 nm inside the AFZ, by a line programmed into the new GPS by the manufacturers.
- The ultimate onus was on AFMA to disprove or negative the defence of mistake of fact, the standard of proof being "*on the balance of probabilities*". Court held that the Master was objectively "*reasonable*" in his consideration and that 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 vessel and nets were returned.
- AFMA appealed in this proceeding.

## **KEY ISSUE:**

- Whether Master's mistake concerned the location of the AFZ boundary (which was said to be a mistake of law) or the location of the vessel relative to the AFZ boundary (which was said to be a mistake of fact?)

## **HELD:-**

- The Master's fundamental mistake was in thinking that the "red line" shown on the GPS represented the location of the AFZ border. Acting on that mistaken belief, he placed the vessel at a position 11 nm north of the "red line", thereby mistakenly thinking that the vessel would be north of the AFZ border and therefore outside the AFZ.
- The GPS device enabled the Master to determine his position relationally. He was not concerned with where, as provided by law, the AFZ was, or where precisely the vessel was, but where his position was in relation to the AFZ, wherever its boundary might be. His mistake was "objectively reasonable" in the circumstances and no reason for him to have cross-checked his GPS by paper chart or radio enquiries.
- Appeal dismissed.

## Owners of the “Pacific Adventurer”

Unreported:- (P)QUD214/2009

- During cyclone “Hamish” general cargo vessel “Pacific Adventurer” lost 31 containers overboard to east of Cape Moreton, Queensland, with the loss resulting in the rupturing of the vessel’s port side fuel tanks spilling 270 tonnes of oil which fouled the pristine South East Queensland beaches.
- The vessel’s owners instituted proceedings to limit their liability under the Convention on Limitation of Liability for Maritime Claims 1976 (“LLMC”) as enacted into Australian domestic law, which ability to limit was granted swiftly, and with virtually no opposition.
- Clean-up costs quickly rose to \$34 million. The vessel owners could limit their liability to some \$17.5 million, so enormous public pressure was placed on the owners to provide compensation over and above the limitation amount. The owners agreed to provide a total of \$25 million.
- The response of the Queensland Government, however, was extremely robust and vocal, led by QLD Premier Bligh in the period of an election.

## COMMENTS:-

- Contrary to the overriding mischief behind the LLMC that vessel owners/operators be permitted to limit their liability so as not to make the vital business of shipping a prohibitively risky venture, the QLD Government threatened, and the Federal Government actually did, increase the Protection of the Sea Levy which is used to fund Australia's "National Marine Oil Spill Contingency Plan". Raised from 9.6 cents to 11.25 cents per net registered ton per quarter.
- Interesting development, as it means that all of the shipping industry contributes to the "Pacific Adventurer" clean up costs through the levy and importers/exporters may suffer a competitive disadvantage as direct costs are passed on and insurance premiums rise for trade to/from Australia.
- The Governments' and the owners inaction to remove all of the lost containers poses a continuing problem for the QLD fishing industry that the limitation fund will not address. Certain prime historical fishing grounds were closed following the incident and while opened, there remains the risk that a container may eventually foul a vessel's nets, or collide with a vessel itself.

- Where would such a claimant's claim then sit relative to a fund that was established to limit liability that had long been exhausted?
- Was there the possibility for a 2<sup>nd</sup> "Distinct Occasion"? Then? If not, what about new cause of action? Is there a case against the QLD Government?
- Interesting procedure offered by the Court for the validation of private sector claims. Claimants have the ability to have their claim collated, examined and recommended for settlement out of the fund by a Claims Validation Team financed in part by the vessel owners. Otherwise, or if they disagreed, they had the opportunity to revert to the Court.
- Once recommendations have been made, the claims validation team will propose a settlement to the claimant, and if accepted, a settlement agreement will be signed between the claimant, the QLD Government (as the party with the largest claim against the fund) and the vessel owners, which will then be submitted to the Court.
- Provided total private sector claims do not exceed the limitation fund, the QLD Government will apply to the Federal Court for approval to pay claims out of the fund.

- This reinforces the view that a claimant will have an interest in the validity and quantum of another claimant's claim against the fund, and that all clients should be entitled to expect close scrutiny of any such claims, such that invalid, or otherwise valid but overinflated claims are not permitted against the fund to the detriment of a share in the fund by other claimants with valid claims both in terms of liability and quantum.

*Thank You*

**Maurice Thompson**  
**Partner**  
**HWL Ebsworth Lawyers**

Level 26, 530 Collins Street, Melbourne VIC 3000

Phone +61 3 8644 3517

Fax 1300 365 323

[maurice.thompson@hwlebsworth.com.au](mailto:maurice.thompson@hwlebsworth.com.au)

[www.hwlebsworth.com.au](http://www.hwlebsworth.com.au)