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The Goliath – Can Ship Owners Limit Liability for Wreck Removal Costs?

CSL Australia Pty Ltd v Tasmanian Ports Corporation Pty Ltd (The Goliath) *[2024] FCA 824*

A recent Federal Court of Australia decision means there are now competing decisions in Australia and Hong Kong on whether wreck removal expenses are subject to limitation in jurisdictions that have chosen not to enact Article 2(1)(d) of the 1976 Convention on Limitation of Liability for Maritime Claims. We summarise the decision in *The Goliath* case and analyse the reasons in detail.

Factual Background

On 28 January 2022, the MV Goliath, a 11,754-GRT cement carrier owned and operated by CSL Australia Pty Ltd, collided with two tugs, the York Cove and the Campbell Cove, and the wharf at the Port of Devonport, all owned by the Tasmanian Ports Corporation Pty Ltd (TasPorts). The two tugs sank, emitting diesel fuel and other hydrocarbons.

TasPorts commenced proceedings in the Federal Court of Australia against CSL for breach of contract, negligence and public nuisance, claiming damages of A$22,606,359 comprising:

a. A$2.17 million for loss of the tugs;

b. A$114,869 for the loss of hydrocarbons;

c. A$2,958,595 for the cost of hiring replacement tugs;

d. A$117,152 for the damage to the wharf; and

e. A$17,245,743 for the cost of containing, removing and disposing of hydrocarbons (bunker fuel), and removing and disposing of the tugs (wreck and fuel removal).

This decision concerns claim (e) for wreck and fuel removal only. These claims did not arise from any liability resulting from exercise of a statutory power.

CSL commenced its own limitation proceedings to constitute a limitation fund of A$15,704,201 under the Convention on Limitation of Liability for Maritime Claims (1976) as amended by the Protocol of 1996 (1976 Convention).

Issue to be Determined

tasports wanted to avoid the application of maritime limitation to the wreck and fuel removal claim. Therefore, TasPorts sought a declaration that the wreck and fuel removal claim (e) was not subject to limitation on the following two bases:

- the wreck and fuel removal claim does not fall within Article 2(1) of the 1976 Convention and therefore is not subject to maritime limitation; and
- CSL contractually waived or excluded any right to rely on limitation as against it, by clause 26.2 of the TasPorts standard terms and conditions (STCs).

Summary of Federal Court of Australia Findings

TasPorts' application failed. The Federal Court found that CSL was entitled to limit liability in respect of the wreck and fuel removal claim because:

- the wreck and fuel removal claim fell within Article 2(1)(a) of the 1976 Convention and was therefore subject to maritime limitation;
- Australia's decision not to implement Article 2(1)(d) did not have the effect of carving out from Article 2(1)(a) wreck removal claims that would otherwise have fallen within Article 2(1)(a); and
- clause 26.2 of the TasPorts STCs operated to exclude only contractual limitations of liability but not CSL's right to limit its liability under the 1976 Convention.

Hong Kong and Australia Approaches Compared

Of particular interest is the differing approaches to the construction of the Limitation Convention Articles 2(1)(a) and (d) of the Federal Court of Australia in *The Goliath* to the Hong Kong Court of Final Appeal in *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd* [2023] HKCFA 20; (2023) 26 HKCFAR 297 *(The Star Centurion)*.

The Hong Kong and Australian Courts both proceeded on the basis that Article 18(1) of the 1976 Convention that provides for contracting states to choose not to enact Article 2(1)(d) evinced an intention that Article 2(1)(d) would cover some ground separate to Article 2(1)(a).

The difference was that the Hong Kong Court held that this was achieved by carving out Article 2(1)(d) claims from Article 2(1)(a) and so excluding all claims for wreck removal from maritime limitation (in jurisdictions that had not enacted Article 2(1)(d)).

In contrast, the Australian Court found that Article 2(1)(d) covered unique ground pertaining to claims arising from the exercise of a statutory right or power, and therefore the intention was achieved without Article 2(1)(d) disturbing the interpretation of Article 2(1)(a).

Resolving The Goliath *and* The Star Centurion

There are now competing decisions in Australia and Hong Kong on whether wreck removal expenses are subject to limitation in jurisdictions that have chosen not to enact Article 2(1)(d) of the 1976 Convention. This creates international uncertainty as to the ability of:

- liable shipowners to preserve their right to limit liability for the cost of removing third party wrecks; or
- innocent shipowners to make a full recovery of wreck removal costs incurred in respect of their damaged vessels.

An appeal on *The Goliath* may provide some certainty. However, in the meantime, in the event of an incident in Australia:

- liable shipowners will be entitled to limit their liability for wreck removal cost, unless the claims are advanced by a statutory or public authority; and
- it occurs to us that this outcome may, in particular circumstances, drive shipowners/port authorities to ensure that such claims are incurred by public/port authorities and recovered direct against the liable vessel.

The Goliath – *Detailed Reasons Explained*

We proceed from here to discuss *The Goliath* decision reasons in detail.

1976 Convention Article 2(1)

The construction of Article 2(1) of the 1976 Convention is central to this decision, and is set out in full here:

1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
    a. claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom
    b. claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage
    c. claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;
    d. claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship
    e. claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship
    f. claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures

The Limitation of Liability for Maritime Claims Act 1989 (Cth) (Limitation Act) section 6 implements the 1976 Convention in Australia and exercises the right provided by Article 18(1) of the 1976 Convention to exclude the application of Article 2(1)(d) and (e), as follows:

> Subject to this Act, the provisions of the Convention, other than paragraphs 1(d) and (e) of Article 2, have the force of law in Australia.

TasPorts' argument centred on whether Article 2(1)(d) acted to carve out from Article 2(1)(a) claims in respect of raising, removal, or destruction of a ship which is sunk. If successful, this argument would mean that the wreck and fuel removal claim was:

- outside of Article 2(1)(a), by reason of being within Article 2(1)(d); and
- not subject to limitation due to Article 2(1)(d) not being enacted in Australia.

This argument was significantly bolstered by the Hong Kong Court of Final Appeal decision in *The Star Centurion*, where it was held that wreck removal expenses were not subject to limitation, on the following basis:

- the wreck removal expenses fell within Article 2(1)(d), which (like Australia) was not enacted in Hong Kong;
- by reason of falling within Article 2(1)(d), these expenses were carved out from Article 2(1)(a); and
- the purpose of Article 18(1) can only be achieved if the decision of a reservation of Article 2(1)(d) has some effect, which it would not, if claims covered by Article 2(1)(d) were also covered by Article 2(1)(a).

Justice Stewart, in deciding *The Goliath* observed that:

> … the Court's reasoning [in *The Star Centurion*] rests on the fundamental misconception that unless what is within Article 2(1)(d) is carved out of Articles 2(1)(a) and (c), Article 2(1)(d) would have no work to do.

Justice Stewart considered that Article 2(1)(d) had significant work to do and that there were categories of claims that fell within Article 2(1)(d) and not Article 2(1)(a), for example statutory claims for government authorities to recover any expenses involved in removing a wreck from the wreck's owner.

Further in support of this conclusion is the history of Article 2(1)(d) that indicates that the purpose of Article 2(1)(d) was to:

- extend the right to limit to claims that were not otherwise covered by Article 2(1)(a) and (c); and
- allow contracting states the option not to apply Article 2(1)(d) and thereby exclude owners' ability to limit against the claims of public authorities for wreck removal.

This purpose is in stark contrast to the outcome of *The Star Centurion*, which has the effect of removing all claims relating to wreck removal from limitation where Article 2(1)(d) is not enacted, which per Justice Stewart "is to drive a coach and horses through the international limitation regime and substantially undermine its intended uniformity".

For these reasons, Justice Stewart considered *The Star Centurion* was incorrectly decided and should not be followed.

Justice Stewart instead held that:

- claims falling within Article 2(1)(d) should not be carved out of Articles 2(1)(a) and (c); and therefore
- CSL is entitled to limit its liability for the wreck and fuel removal claim by reason that the claims are within Article 2(1)(a).

TasPorts Contractual Exclusion

TasPorts also maintained an argument that clause 26.2 of its STCs had the effect of excluding CSL's ability to limit its liability under the 1976 Convention. The TasPorts STCs contained the following relevant clauses:

> 26.2 To the fullest extent permitted by Law, all rights, representations, guarantees, conditions, warranties, undertakings, remedies or other terms that are not set out in these Terms and Conditions are expressly excluded.
>
> 26.4 Where TasPorts is precluded from excluding its liability by Law, TasPorts' liability is in all circumstances limited to:
>
> (a) the re-supply of the services; or
>
> (b) where TasPorts decides at its discretion that the re-supply of services is not practicable, then liability is limited to the payment of the cost of having the services supplied again, subject to clause 26.1.

TasPorts reasoned that the 1976 Convention was a form of remedy or other term available to CSL and was thereby expressly excluded by clause 26.2.

CSL submitted that clause 26.2 was limited only to contractual "rights, representations, guarantees, conditions, warranties, undertakings, remedies or other terms", and not all rights, specifically, not rights arising under statute.

Relying on the ordinary rules of contractual construction, the Court agreed with CSL, concluding:

> the text of clause 26.2 is most obviously to be read as saying that to the fullest extent permitted by law, all rights, representations, guarantees, conditions, warranties, undertakings, remedies or other terms that would otherwise arise from the contract that are not set out in the STCs are expressly excluded; rights and remedies that arise dehors the contract are not excluded by the clause.

CSL was therefore successful on both bases and entitled to limits it liability in respect of the wreck and fuel removal claim.

Chris Sacre
Chris.sacre@hallandwilcox.com.au
+61 424 788 840
https://hallandwilcox.com.au/people/chris-sacre/

Kendall Messer
Kendall.messer@hallandwilcox.com.au
+61 8 9215 3011
https://hallandwilcox.com.au/people/kendall-messer/

Rebecca Flynn
Rebecca.flynn@hallandwilcox.com.au
+61 7 3231 7737
https://hallandwilcox.com.au/people/rebecca-flynn/

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