

**UK Standard Conditions for Towage and s74(3) TPA:
PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v
The Owners of the Ship 'Koumala' [2007] QSC
(Helman J, 19 April 2007)**

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Introduction

This case¹ concerns damage done to the ship *Pernas Arang* (the Ship) as a result of a collision between it and the tug *Koumala* (the Tug) whilst the Tug was readying itself to tow the Ship. The case deals with the important question as to whether the warranty to exercise due care and skill imposed by s74 of the *Trade Practices Act 1974* (Cth) (TPA) applies to a towage contract, or whether such a towage contract can be said to fall within the exception contained within ss3, which reads:

S74 Warranties in Relation to the Supply of Services

- (3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:
- (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored.

The case also considers whether the collision occurred 'whilst towing' within the meaning of that phrase in the contract.

The facts

The towage was the subject of a contract between Dalrymple Marine Services Pty Ltd (the Defendant) and the owner of the Ship, PNSL Berhad (the Plaintiff). The terms of the towage contract were the UK Standard Conditions for Towage and Other Services (1974 revision) (UK Standard Conditions), and the fee for the service to the Ship was agreed at A\$12,500.²

The collision occurred on 28 February 1995. The Ship, a dry bulk carrier, was approaching the Dalrymple Bay Coal Terminal (the Terminal) at the port of Hay Point, Queensland in order to load a cargo of coal. The Tug and another tug, the *Kungurri*, were preparing to tow the Ship to the Terminal. A pilot was on board the Ship and had ordered the tugs, then on the port side of the Ship, to 'make fast' at points on the starboard side. The Tug crossed ahead of the Ship, but once on the starboard side it turned quickly to starboard and was seen to be blowing black smoke.³ It lost steering due to a blocked air filter element in the starboard generator which provided power for steering. Within a minute or so,⁴ the Tug collided with the Ship, causing damage sufficient to abort the planned loading of cargo and require repairs to be effected in Brisbane.⁵

The finding - negligence

Helman J found as fact that the Master of the Tug and its engineer had been negligent on several grounds (many other grounds alleged were not made out). His Honour found that the engineer should have promptly switched power from the failed starboard generator to the port generator, rather than

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¹ PNSL Berhad v Dalrymple Marine Services Pty Ltd; PNSL Berhad v The Owners of the Ship 'Koumala' [2007] QSC [29].

² Ibid, [28].

³ Above n 1, [4].

⁴ The exact time between loss of steering and collision was not certain, but the judge found it was between one and a half and two minutes – par [11]. It was another 5-7 minutes before the steering control was restored.

⁵ Above n 1, [4].

having wasted time attempting to operate the generators in parallel.⁶ If the engineer had done so, the power would have been restored in time to prevent the collision. The Master was negligent in failing to steer the Tug away from the Ship in the time available between the first sign of a generator problem and the loss of steering. He was also negligent for not immediately stopping the main engine to slow the movement of the Tug towards the Ship.⁷ However, Helman J found that the effective cause of the collision was the engineer's negligence because, if power had been restored to the steering when it should have been, then the Master would have been able to steer the Tug off the collision course or stop it completely.⁸

The parties had agreed that if the Defendant was liable, the damages were limited to 167,000 special drawing rights pursuant to the *Limitation of Liability for Maritime Claims Act 1989* (Cth).⁹

Applicability of s74 and s68 TPA – the arguments

The decision then focused on the applicability of two provisions under the TPA, s74 and s68. They read as follows:

S74 Warranties in relation to the supply of services

- (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.
- (2) Where a corporation supplies services to a consumer in the course of a business and the consumer...makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result....
- (3) A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:
 - (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored.... (emphasis added)

S68 Application of provisions not to be excluded or modified

- (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:
 - (a) the application of all or any of the provisions of this Division;
 - (b) the exercise of a right conferred by such a provision;
 - (c) any liability of the corporation for breach of a condition or warranty implied by such a provision; or
 - (d) the application of section 75A; is void.
- (2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

⁶ Ibid [40].

⁷ Ibid [38].

⁸ Ibid [40].

⁹ Ibid, [2].

It was not in issue that the towage contract was a contract for the supply of services to which the *TPA* applied – it was a contract for the supply of services by a corporation in the course of a business, for a sum less than A\$40,000.¹⁰ The Plaintiff contended that s74 applied to the contract, and was breached by the failure of the engineer and/or the Master to act with due care and skill. The Plaintiff claimed that the Defendant was not entitled to rely upon the exclusion clauses in the UK Standard Conditions because they had the effect of excluding the liability of the Defendant under s74 and as such were rendered void by s68.

The Defendant alleged that the warranties in s74 did not apply as the contract fell within the exception contained in s74(3) as the contract was ‘for or in relation to the transportation ... of goods’. The definition of ‘goods’ in the *TPA* includes ships. The Defendant submitted that either the contract was one for or in relation to the transportation of goods, being the Ship, or alternatively, the contract was one in relation to the transportation of goods, being the coal, which was to be loaded onto the Ship. The Defendant argued¹¹ that if the towage contract was not a contract ‘for’ the transportation of the Ship it was undoubtedly a contract ‘in relation to’ transportation of either the Ship or the coal.¹² The Defendant submitted that this construction of ss3 accorded with a common sense and commercial approach to the statute,¹³ relying on *Comalco Aluminium Limited v Mogul Freight Services Pty Ltd*¹⁴ (*Comalco*) and *Wallis v Downard –Pickford (North Queensland) Pty Ltd*.¹⁵

The decision – *TPA*

Helman J considered whether the towage contract could be said to have been a contract for or in relation to the transportation of goods.

‘Contract for the transportation of...’

Helman J pointed out that the two cases relied upon by the Defendant had not decided what constitutes the *transportation* of goods; and that in the *Comalco* case, Sheppard J had been content to apply the section to ‘the commercial shipping of goods to an overseas destination’.¹⁶ He posed the question - is towing a ship the same as transporting that ship or its cargo?¹⁷ His Honour considered definitions of transport and concluded:

There is, I think, a distinction in ordinary language between carrying or conveying something and towing it... in my view then the towing contract was not a contract for the transportation of either the ship or any cargo carried by the ship. Was it however a contract *in relation to* the transportation of ship or cargo?¹⁸

‘Contract in relation to the transportation of...’

Helman J cited with approval the treatment given to that phrase by the Full Court of the Federal Court in the judgement of *Braverus Maritime Inc. v Port Kembla Coal Terminal Ltd & Anor*.¹⁹ While only obiter, the court in that case stated that if the pilotage services had been by way of a contract, it would not have been *for* the transportation of goods, nor *in relation to* the transportation of goods for the purposes identified by s74(3). As the Full Court had noted, ‘the purpose of ss3 was to ensure the well known law governing transportation of goods (by air land or sea) was not radically amended by s74’ and ‘with that purpose in mind, there is no relevant relationship between the contract to provide the services and the transport of goods’.²⁰ Helman J agreed with this analysis, and applying the same reasoning, found that there was no relevant relationship between a contract to provide towing services

¹⁰ Ibid [43].

¹¹ Ibid [45].

¹² Ibid [44] and [47].

¹³ Ibid, [47].

¹⁴ (1994) 113 ALR 677.

¹⁵ (1994) 179 CLR 388.

¹⁶ Above n 1, [46].

¹⁷ Ibid.

¹⁸ Ibid [48].

¹⁹ (2005) 148 FCR 68.

²⁰ Above n 1, [59], quoting the *Braverus* judgement ibid at 118.

and the transportation of goods.²¹ While agreeing that there is a connection between the services and transportation of goods, in His Honour's view it lacked the relevant relationship, and there was 'no reason to conclude that the purpose of s74(3) extended to removing contracts like towing contracts from the purview of s74(1) and (2).'²²

As a result the Defendant was not able to rely on the UK Standard Conditions to exclude liability as the exemption clause was rendered void by s68 TPA.²³

If the UK Standard Conditions apply, did the accident occur 'whilst towing'?

Whilst not necessary given his conclusions on the TPA argument, Helman J outlined his findings on the effect of the UK Standard Conditions. The Defendant relied on cl 1, 3 and 4 asserting that it was exempt from liability as the collision occurred 'whilst towing'. That phrase is defined in the UK Standard Conditions as follows:

The expression 'whilst towing' shall cover the period commencing when the tug ... is in a position to receive orders direct from the Hirer's to commence pushing, holding, moving, escorting, or guiding the vessel or to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner...²⁴ (the Definition)

The Defendant relied on the fact that the collision occurred while the Tug was in the course of moving in response to the pilot's direction, and that as such it was in the course of carrying out orders at the time of the steering failure. The Plaintiff claimed the Tug was not at that time ready to receive orders such that would fall within the Definition.

His Honour conducted a review of the case law concerning the phrase 'whilst towing'. In essence it depended on whether the pilot's order requiring the Tug to move to starboard of the Ship was of such a nature that it was part of the towing process or merely preparatory. He drew considerable support from Herring CJ in *Australasian Steamships Pty Ltd v Koninklijke-Java-China Lynen*²⁵ who said:

The orders that a tug is to be in a position to receive are orders which can only be carried out when the tug is in a state of readiness, and this means both correctly positioned so far as the vessel is concerned and with everything ready on the tug itself to pick up the necessary ropes or lines...²⁶

and from Simon Rainey's text *The Law of Tug and Tow*:

The towage service is to commence... when the tug, in all practical respects, is alongside and at the disposal of the tow... the epithet "direct" signifies the close proximity and immediacy of preparation between tug and tow... such, realistically and commercially, is when the towage service in fact begins.'²⁷

His Honour concluded that the order given by the pilot was a general order, not a specific order as contemplated in the definition. The true question was whether at any time after that general order was given and before the steering failure, the Tug was in fact in a position to receive orders direct from the Ship to commence pushing, holding, moving escorting or guiding it or to pick up ropes or lines.²⁸ His Honour concluded that the Tug was not in the requisite position to respond to any of the specific orders referred to in the definition.²⁹ It was manoeuvring to put itself in that position but had not yet reached it at the time when the steering failed. From that point on, it was not in a position to receive orders direct from the Ship in due to the failure.³⁰ As a result, the Defendant would not have been entitled to rely on the exemption clause, even if it had not been rendered void by the operation of the TPA.

²¹ Above n 1, [50].

²² Ibid.

²³ Ibid [51].

²⁴ Ibid [32], quoting cl 1(b)(iv) of the UK Standard Conditions.

²⁵ [1955] VLR 108.

²⁶ Ibid p112.

²⁷ Above n 1, [59] citing Simon Rainey *the Law of Tug and Tow (and allied contracts)* London LLP 1996 p 61.

²⁸ Above n 1, [60].

²⁹ Ibid [64].

³⁰ Ibid [62].

Comment

As yet it is not clear if the Defendant plans to appeal the decision. Regardless of any appeal, towage operators and their advisors should now consider rewriting their standard terms to comply with the *TPA* and, in particular, to take advantage of s68A.³¹ By doing so, a towage operator can reduce their likelihood of being liable for the full amount of the loss.³² A towage operator could effectively limit its liability for damage arising from negligence to the invoice cost of the service in question. In the *PNSL* case, that would have been the difference between A\$12,500 (plus interest) and approximately A\$306,000.³³

³¹ 'SECT 68A

Limitation of liability for breach of certain conditions or warranties

(1) Subject to this section, a term of a contract for the supply by a corporation of goods or services other than goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 68 by reason only that the term limits the liability of the corporation for a breach of a condition or warranty... to:

(a) in the case of goods, any one or more of the following:..

(b) in the case of services:

(i) the supplying of the services again; or

(ii) the payment of the cost of having the services supplied again....'

³² Subject to any right to limit liability under the *Limitation of Liability for Maritime Claims Act 1989*(Cth).

³³ Being the approximate value of 167,000 SDRs as at 20 April 2007.