

NEW ZEALAND CHINA CLAYS LTD V TASMAN ORIENT LINE CV (UNREPORTED, CIV-2002-404-3215, WILLIAMS J, 31 AUGUST 2007)[§]

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This case is the substantive determination of the proceeding noted in Volume 18 of the *MLAANZ Journal* in respect of preliminary applications for a limitation decree and fund.¹ Some four years after the limitation decree was granted the case has come to trial, with the main legal issue being whether the carrier was entitled to rely on the exemption in Article 4 Rule 2(a) of the Hague-Visby Rules ('Rules') for the 'act, neglect, or default of the master mariner, pilot, or servants of the carrier in the navigation or in the management of the ship'.

1 Facts

The proceeding involved a claim by cargo interests whose deck cargo was damaged following the grounding of the 21,115 tonne cargo vessel *Tasman Pioneer* off the coast of Japan in 2001. The *Tasman Pioneer* was sub-time chartered by Tasman Orient Line CV ('Tasman Orient'), and was carrying New Zealand cargo to various Asian ports. The circumstances of the grounding were not unusual in themselves (in the range of cases in which large container vessels have run aground). The vessel had been running behind schedule and the master tried to make up time by transiting through a restricted passage at night. However, the master was let down by the ship's radar and, despite efforts to pull out of the manoeuvre, the *Tasman Pioneer* grounded heavily. The vessel was not stranded but suffered serious damage including flooding of a number of compartments.

Although the grounding resulted from the usual combination of poor decision making and equipment failure that often marks out maritime misadventure, the actions of the master after the grounding were extraordinary. Instead of notifying the Japanese coast guard and seeking assistance, the master continued to steam full speed for at least two hours and covered some 22 nautical miles before anchoring. During the vessel's flight from the scene it took on large quantities of water and eventually the sea reached the deck cargo, causing substantial damage.

The master then instructed the crew to lie to the coast guard investigators to persuade them the ship had impacted with an unidentified floating object. The crew initially followed the master's orders to the point where one of the mates erased the course actually sailed from the ship's chart and substituted a false course. However, the crew eventually acknowledged to the investigators what had actually happened, which led in due course to the master confessing to the true circumstances and his subsequent prosecution by Japanese authorities.

2 The Claims

Cargo interests alleged breach of bailment and contract under the bills of lading issued by Tasman Orient. They also asserted that at the time of the casualty the ship was unseaworthy.

In its defence, Tasman Orient argued the damage to the cargo was not caused by the post grounding actions of the master, and asserted that the carrier was protected by the exemption contained in Article 4 Rule 2(a). They denied that the vessel was unseaworthy.

In response, the cargo interests argued that the master's actions and omissions caused more extensive flooding and damage than would otherwise have occurred and were not bona fide or for the navigation or management of the ship. They asserted that the master's actions were reckless before the grounding and that he misconducted himself in a number of ways following it.

[§] The full-text judgment is available at <http://jdo.justice.govt.nz/jdo/GetJudgment/?judgmentID=125882> and <http://www.maritimelaw.org.nz/0907.html>.

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¹ Browne, J, '*Tasman Orient Line CV v Alliance Group Ltd (The "Tasman Pioneer")*' [2004] 1 NZLR 650; [2003] 2 Lloyd's Rep 713 (HC)' (2004) 18 *MLAANZ Journal* 189.

3 Key Issues

The central issues between the cargo interests and Tasman Orient were whether the master's actions had caused the damage to the cargo, and, if so, whether the carrier was entitled to rely on the protection of Article 4 Rule 2(a). The Court concluded that there was not sufficient evidence to demonstrate unseaworthiness.

3.1 Causation of Loss

The first question was whether the decision of the master not to anchor and notify the coast guard of the grounding as soon as possible was causative of the damage to the cargo. The cargo interests alleged that if early and proper notification had been given to the authorities, their intervention would have prevented the damage.

The Court considered in some detail the evidence about how the authorities would have responded had they been informed immediately of the grounding. It concluded that, if notification had been given in a timely way, salvage equipment would have reached the vessel in time to save the on deck cargo.

3.2 Construction of Article 4 Rule 2(a)

Once causation was determined, the critical issue became whether the carrier was entitled to the benefit of the Article 4 Rule 2(a) exemption.

The cargo interests claimed that the exemption is inapplicable if damage is caused when the master engages in conduct intended to conceal the time, place and circumstances of the casualty. They argued that in that situation the actions of the master are not bona fide actions in the navigation or management of the ship, such as are required for the exemption to apply.

They further contended that the master's wilful conduct following the grounding of the vessel was not in good faith and was so contrary to proper seafaring practice as not to be recognisable as amounting to navigation or management of the ship.

The carrier's position was that, if the cargo damage arose as a result of want of care by the master in the navigation or management of the ship, the carrier is not liable to cargo interests under Article 4 Rule 2(a).

3.2.1 Plaintiff's arguments

In the absence of direct authority the cargo interests relied on a number of judgments to try to demonstrate the alleged requirement for good faith on the part of the master.

Of some factual similarity was the French appeal court decision of *Lucille Bloomfield and Ronda*.² In this case, the *Ronda* was holed in a collision and the captain, trying to avoid salvage costs, delayed calling for assistance. As a result the *Ronda* and its cargo were lost when the vessel sank at its mooring. The court held that the captain 'had in this way committed serious negligent acts, which could be described not as nautical faults but commercial faults and moreover his only worry was to avoid salvage costs'. The carrier was held liable to cargo.

*The Hill Harmony*³ was the case that received the most attention in the judgment. It required the English courts to determine whether a master's decision to take an alternative route, contrary to the charterer's directions, was a matter of employment (for which the owners were liable under the charter party) or a matter of navigation for which they were not. The English Court of Appeal held that the master's decision was made bona fide for the safety of the vessel and was therefore a matter of navigation. However, the House of Lords overturned this conclusion and held that any error which the master made was not an error in the navigation or management of the vessel, essentially because it did not concern any matter of seamanship.

The cargo interests concluded that decisions made by a master which are not bona fide are not navigation or management of the vessel and do not come within the exemption. Further, only acts intentionally, even if

² Cour d'Appel de Rouen (1970 *Jurisprudence Française* 667).

³ [1992] 2 Lloyds Rep 209 (CA); [2001] 1 Lloyds Rep 147 (HL).

misguidedly, done in or incident to the navigation or management of the vessel fall within the exemption. The cargo interests submitted that, in the case of *The Tasman Pioneer*, the master's misconduct was motivated by a dishonest intention to try to absolve himself from responsibility for damaging a ship. They argued that, even if the master's actions did concern management or navigation, because he did not act bona fide to safeguard the interests he was bound to protect, this exemption was not available to Tasman Orient.

3.2.2 The carrier's response

Tasman Orient submitted that the correct interpretation of the exemption was that, even if damage to the cargo arose indirectly from a failure to adequately care for the vessel, so long as the carrier exercised due diligence as to seamanship and providing a competent crew, it was not vicariously liable for its servants or agents and therefore not liable for any loss or damage to cargo. Tasman Orient argued it was not privy to the conduct of the master which caused the plaintiff's loss and was accordingly not liable. It maintained that, provided the vessel interests appointed appropriately qualified seamen, they are protected from the consequences of incorrect decisions made by the master and the crew.

Tasman Orient relied on the case of *The Bunga Seroja*⁴ which noted that the Rules confer a very wide range of immunities upon carriers and, although it is 'going a long way', Article 4 Rule 2(a) exculpates carriers from vicarious liability for their servants and agents in managing and navigating ships. The judgment noted that the 'antidote' may be that carriers do have a duty to properly man their ships and, by doing that, a carrier should be regarded as having fulfilled its obligations in that regard to shippers under Article 3 Rule 1(b).

Tasman Orient sought to distinguish *The Hill Harmony* on the basis that in that case the master's decision was made before the voyage commenced and was not in response to circumstances arising during the voyage, ie it was not navigation and did not relate to seamanship. It submitted that the French case of *Lucille Bloomfield and Ronda* was consistent with that principle, because the decision of the master to delay the salvage was a decision made when the vessel was in port.

Tasman Orient also referred to a number of cases concerning conduct falling within and outside of the exemption and submitted that all were examples of the principle that whatever the master does in management or navigation — even with an ulterior intent — remains within the exemption. One example of particular interest was a decision of the German Federal Court of Justice in *Cita*.⁵ In that case the officer of the watch changed the vessel's course and then fell asleep — only waking once the ship had run aground and was about to sink. The vessel had a watch-alarm, designed to keep the watch officer awake, but the evidence was that this was routinely turned off. The court held that the exemption applied despite the deliberate action by the crew in turning off the alarm.

4 Judgment

In the absence of directly analogous case law, the Court undertook the task of interpreting Article 4 Rule 2(a) from first principles, applying the approach adopted by the High Court of Australia in *The Bunga Seroja*. That is, the Rules must be read as a whole, in light of the history behind them, and as a set of Rules devised by international agreement for use in contracts that could be governed by any of several different legal systems.

The Court accepted that it should strive to adopt an interpretation which conforms to any uniform understanding of the Rules found in decisions of the courts of other trading countries in accordance with international comity. However, it considered that none of the decided cases were closely comparable on their facts.

4.1 Were the Master's Actions in the 'Navigation' or 'Management' of the Ship?

The Court first considered whether the master's actions were in the navigation or management of the vessel, in terms of Article 4 Rule 2(a). In analysing this issue, the Court adopted the distinction described in *Scrutton*⁶ and

⁴ *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad* (1998) 158 ALR 1.

⁵ Federal Supreme Court (*Bundesgerichtshof* — BGH) 26 October 2006 — IZR 20/04 (see also http://www.onlinedmc.co.uk/mv_cita_supreme_court.htm).

⁶ Boyd, *Scrutton on Charterparties and Bills of Lading* (20th Ed, 1996) 243-244.

by Tetley⁷ between a ‘neglect to take reasonable care of the ship ... as distinct from the cargo’.⁸ The Court accepted that where ‘both ship and cargo have been affected by the same error then the carrier is usually exculpated’.⁹

Justice Williams held that all of the captain’s actions, though to differing extents, could properly be seen as errors affecting both ship and cargo. In the terms described by Greer LJ in *Gosse Millard v Canadian Government Merchant Marine Ltd*,¹⁰ the cargo was indirectly damaged by the master’s primary negligence in failing to care for the ship and failing to use the vessel pumps adequately to manage her movement and stability. Therefore, the master’s actions were in the navigation or management of the vessel. The Court found that Tasman Orient had satisfied its burden of proving it came within the prima facie parameters of the exemption in Article 4 Rule 2(a).

4.2 Must the Act, Neglect or Default in the Navigation and Management of the Ship be Bona Fide for Those Purposes?

Having decided that the exemption was prima facie applicable, Justice Williams turned to consider whether the bona fides of the master’s actions could affect the carrier’s protection.

The Rule itself does not expressly require the master’s actions to be bona fide. The Court noted that the Rules do not deal with this topic generally and that the *travaux préparatoires* were not helpful. Also, the issue of good faith had only infrequently been addressed in precedent cases.

However, the Court concluded that the Rules imply a premise that the master’s actions must have been undertaken in furtherance of the master’s paramount duty of safely caring for the ship, cargo and crew. Further, the Rules presuppose that the carrier’s intentions or actions must be in furtherance of its obligations under the Rules.

Justice Williams therefore held that the ‘act, neglect or default’ of those in charge of the ship must be bona fide in the navigation or in the management of the ship to entitle the carrier to the benefit of the exemption.¹¹

There would seem to be every reason to read a good faith requirement into the rule to entitle the carrier to qualify for the immunity from responsibility the rule provides. This is the case irrespective of whether a lack of *bona fide* [sic] is seen as underpinning entitlement to the exemptions provided by the rules, or whether the navigation or management which is not conducted *bona fide* in accordance with the master and crew’s paramount obligation to care for the ship, cargo and crew safety was so antithetical to that paramount obligation and proper seafaring practice as not to be regarded as qualifying or amounting to navigation or management under the rules.

The Court concluded that the master’s initial decision to try to use the restricted passage to speed up the voyage and his subsequent decision to abort the passage was motivated by good faith. However, after the grounding, the master’s decisions were designed to absolve himself from responsibility or blame for the grounding. Consequently, those actions did not amount to an ‘act, neglect or default’ in the bona fide navigation or the management of the ship and the exemption did not apply. Judgment was therefore awarded in favour of the cargo interests.

The decision is being appealed, and is scheduled to be heard by the New Zealand Court of Appeal in June 2008.

⁷ Tetley, W, *Marine Cargo Claims* (3rd Ed, 1998) 397-398.

⁸ Paras [135], [219].

⁹ Para [219].

¹⁰ [1928] 1 KB 717.

¹¹ Para [234]. It appears that the judgment contains an unintended error of expression here. In order to make sense, the passage should either read ‘that is the case irrespective of whether a lack of *mala fides* is seen as underpinning entitlement to the exemptions provided by the rules’ or ‘that is the case irrespective of whether *bona fides* is seen as underpinning entitlement to the exemptions provided by the rules’.

5 Comment

The Court's interpretation of Article 4 Rule 2(a) appears to have come as a surprise to many commentators. In so far as the writers are aware, none of the major cargo texts had identified any bona fides element to the Article 4 Rule 2(a) exemption prior to this decision. In fact, one of the texts comments that the exemption applies even to wilful or reckless conduct.¹² This suggests that the implication of a good faith requirement is, at the very least, not obvious.

The outcome has been questioned in a number of international case notes. Much of the flavour of the criticism has been about whether it can be right that the carrier's entitlement to rely on the exemption depends on the subjective intention of the master. The Court's finding means that the circumstances of cargo losses resulting from navigation or vessel management decisions are likely to be examined closely to ascertain the master's motivation — and substantial liabilities may fall to be determined on the basis of what was in the master's mind at the time.

At least one commentator has opined that the exemption is given to the carrier and that, if the carrier has satisfied its duty under the Rules to man the vessel properly, it would upset the balance of the liability regime to remove that exemption based on the master 'making an uncharacteristic decision, motivated by self-preservation, when under extreme pressure'.¹³

So, is this the right outcome? As a simple matter of 'fairness' it is easy to justify liability when the vessel employed by the carrier has damaged the cargo in such an outrageous fashion. But does imposing liability on the carrier in these circumstances accord with the allocation of risk provided by the Hague-Visby Rules?

As *The Tasman Pioneer* judgment recognised, the Rules are designed to balance the competing interests of shippers and carriers, in circumstances where carriers had previously sought to avoid contractual responsibility to what was considered an unreasonable extent. In return for the carrier incurring strict obligations to look after the cargo, the Rules have granted the carrier a number of exemptions from liability, as well as other limitations.

It is instructive to look at the nature of the exemptions from liability granted by Article 4 Rule 2. With two exceptions, all of these exemptions, including that in Rule 2(a), relate to matters that fall outside the direct control of the carrier. When the master is in control of a vessel at sea there is practically nothing that the carrier can do directly to constrain the master's immediate behaviour. The carrier can provide incentives for the master to conduct himself or herself properly, but it cannot guarantee the master's behaviour.

Rule 2(a) is different in nature from most of the other Article 4 exemptions, in that it protects the carrier from liability in circumstances where the carrier would otherwise generally be liable to cargo.¹⁴ However, on an ordinary reading of the Rule there is no requirement to look at the intention of the master. The Rule simply refers to default in the navigation or management of the ship. The hard question is: what comprises the navigation or management of the ship? Is it only navigation or management performed bona fide within the scope of the master's duties, or is it any action that can properly be described as navigation or management?

If the purpose of the exemption is accepted to be to allocate risk on the basis that the carrier is responsible for matters within its control, then in the writers' view it is difficult to justify the implication of a gloss on the rule to limit navigation or management to 'well intentioned' actions on the part of the master. In the event the vessel is grounded by an ill-motivated but 'personal' decision of the master, both vessel and cargo interests stand to lose. In this situation the carrier is equally exposed to the master's behaviour as the cargo interests (assuming the carrier has discharged its obligation to provide a properly manned and seaworthy vessel). It can be argued that this is just another example of the risks faced by the maritime venture in the same way that the vessel is exposed to the risk of fire (not caused by the actual fault or privity of the carrier); act of God; act of war and so on¹⁵.

On this analysis, there is no need to go beyond the ordinary meaning of the words to give effect to the allocation of risk contemplated by the Rules.

¹² Treitel et al, *Carver on Bills of Lading* (2nd Ed, 2005) 607.

¹³ Rory MacFarlane, Ince & Co, *Shipping E-brief*, February 2008.

¹⁴ Another example is Rule 2(l) — saving life or property — which is recognised because of the importance of incentivising this behaviour

¹⁵ See Article 4 Rules 2(b), (d), (e).

5.1 A Moot Point?

Whatever view may be taken of the decision, and whether it stands on appeal, the circumstances of the *Tasman Pioneer* grounding are extraordinary and are unlikely to be replicated with any frequency (hence the absence of analogous cases). In any event, the exemption itself seems destined to have a relatively limited remaining life. The latest UNCITRAL Draft Convention on the Carriage of Goods by Sea does not retain the nautical fault defence, and current indications are that this convention has much better prospects of widespread adoption than the unsuccessful Hamburg Rules (which also omitted the nautical fault defence).