

UK Standard Conditions for Towage and s74(3) Trade Practices Act 1974 (Cth) before the Queensland Court of Appeal and the High Court

Dalrymple Marine Services Pty Ltd v PNSL Berhad; The Owners of the Ship 'Koumala' v PNSL Berhad

[2007] QCA 429 (30 November 2007)

[2008] HCA Trans 246 (18 June 2008)

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Introduction

This case 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 latter was readying itself to tow the ship. The judgment of the trial judge has been noted in a previous issue of this journal.¹ The towage operator Dalrymple Marine Services Pty Ltd (Dalrymple) appealed from that decision to the Queensland Court of Appeal which dismissed that appeal. Dalrymple then sought special leave to appeal to the High Court. Both the appeal and the special leave application are the subject of this casenote.

The *Koumala* is a significant case for two reasons. First, it 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. Subsection 3 reads:

S74 (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).

Secondly, it discusses the operation of the phrase 'whilst towing' as it is used in the UK Standard Conditions for Towage and other Services (Revised 1974) (UK Standard Conditions).

The facts

The towage was the subject of a contract between Dalrymple and the owner of the ship, PNSL Berhad. The terms of the towage contract were the UK Standard Conditions and the fee for the service to the ship was agreed at \$12,500.²

The collision occurred on 28 February 1995. The ship, a dry bulk carrier, was approaching the Dalrymple Bay Coal terminal at the port of Hay Point, Queensland in order to load a cargo of coal. The tug and another, the *Kungurri*, were preparing to tow the ship to the terminal. A pilot was on board the ship and had ordered the tugs to 'make fast' at points on the starboard side. At the time of that order, the tug was 1 nautical mile away. The tug steamed towards the ship and, once close by, crossed ahead of its bow. Once on the starboard side of the ship the tug turned quickly to starboard and was then seen to be blowing black smoke.³ It had lost steering due to a blocked air filter element in the

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¹ (2007) 21 A&NZ Mar LJ 101. The first instance decision of Holman J has now been reported at (2007) FLR 243.

² Cite (2007) FLR 243 at [29]. Because the consideration was under the *TPA* threshold of \$40,000 the shipowner was considered a 'consumer' of services under the *TPA*.

³ (2007) FLR 243 at [4].

starboard generator providing 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 to as to effect repairs in Brisbane.⁵ The time between the giving of the pilot's orders and the collision was about 20 minutes.⁶

The trial judge found that the incident did not occur 'whilst towing' within the meaning of the UK Standard Conditions, which meant that the tug could not exclude its liability under the contract. The trial judge found that the tug had been negligent. S74 did apply to the contract and ss3 was not triggered. Even if the incident had occurred 'whilst towing' the exclusion in UK Standard Conditions could not be relied upon by the tug as it was rendered void by s68 of the *TPA*.

Judgment of Court of Appeal (Supreme Court of Queensland)⁷

Dalrymple appealed from the first instance decision of Helman J.⁸ The appeal was on 2 primary grounds –

- first, that the collision occurred 'whilst towing' (in which case an exclusion clause in the contract would apply) and
- secondly, that the towage contract was caught by the exception in s74(3), such that s74 did not operate and the contractual exclusion was operable (the *TPA* issue).

Justices Williams and Muir gave separate judgments, with which Justice Daubney concurred.

'Whilst towing'

Dalrymple sought to argue that the exclusion clause contained within the contract was triggered because the collision occurred 'whilst towing' within the meaning of that phrase as contained in the Standard Conditions:

The expression 'whilst towing' shall cover the period commencing when the tug... is in position to receive orders direct form the hirer's vessel 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, and ending when the final orders from the Hirer's vessel to cease... and the vessel is safely clear of the vessel.

The Court of Appeal agreed with the trial judge that the incident did not occur 'whilst towing'. A review of the authorities convinced the court that the definition required the tug to be in close proximity to the vessel - either to receive orders 'direct' or to pick up ropes or lines,⁹ (even if some manoeuvring was required to get to the lines).¹⁰ Only at that point would the defined state of affairs exist which would lead to an application of the exemption clause.

The order from the pilot was not given at a time when the tug was sufficiently proximate within the terms of the definition. The judgments sought to distinguish various cases where prior to a collision, the tug had made close approaches for the purposes of acting on orders.¹¹

Dalrymple argued that just prior to the steering failure, the tug was in a sufficiently proximate position, in terms of being able to take direct orders or take on lines. Williams JA said that the tug:

Was proceeding to a point where she would have been able to accept orders directly from the [vessel] and pick up the necessary ropes or lines. But she never reached that point. When heading towards the starboard side...and about 150 metres away, the

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

⁵ *Ibid* [4].

⁶ [2007] QCA 429 per Williams JA at [6].

⁷ Unreported, [2007] QCA 429 (30 November 2007).

⁸ (2007) FLR 243.

⁹ Williams JA at [7], Muir JA at [53].

¹⁰ Williams JA at [12].

¹¹ See Williams JA at [9]–[28], Muir JA at [55]–[62].

steering failed...from that moment on until the collision occurred the *Koumala* was not in a position to accept orders or carry them out.

Muir JA found that if the tug was, just prior to the steering failure, in close proximity as the definition required (or within 'hailing distance'¹²) it was only for a matter of seconds. To argue that, technically, the requirements were met for the vessel to be acting 'whilst towing' and then seconds later, suffer the steering failure was 'too restrictive'. On a practical commonsense view, all facts were to be considered:

Including the disposition of the *Koumala's* crew, the speed of the *Koumala*, the manoeuvres it was required to undertake before coming alongside...and the *Koumala's* mechanical capacity to carry out relevant orders. On the state of the evidence there is no reason to conclude that the primary judge's finding that the *Koumala* was not in a position to receive relevant orders direct was wrong.

The question of 'hailing distance' as a measure of physical proximity between tug and tow was discussed at various points in the judgment.¹³ It was apparently accepted by Dalrymple as one of the criteria required for the tug to be 'in position to receive orders direct' as established by the authorities.¹⁴ As we shall see, a different view was taken by Dalrymple in its special leave application.

The *TPA* argument

Strictly speaking their honours did not need to deal with the *TPA* point, because they had found that the exemption clause did not apply. However, the Court considered it desirable to give their views on the *TPA* argument.

Dalrymple had argued that s74(3)*TPA* was triggered in one of two ways – either because the towage contract facilitated the transportation of coal which the vessel was about to load (the first argument), or that the towage contract was itself a contract for the transportation of goods, as the definition of 'goods' in s4 of *TPA* includes a ship (the second argument). Either way, Dalrymple contended that the subsection applied, which removed towage from the ambit of the warranty imposed by s74(3).

The Court of Appeal rejected Dalrymple's arguments unanimously,¹⁵ finding no error in the trial judge's findings in this regard.

Briefly disposing of the second argument, the Court found that the contract was not a contract to transport, carry or take the ship from one place to another. It was for the purpose of guiding the ship to its berth under its master and on the pilot's advice.¹⁶

The first, albeit 'stronger'¹⁷ argument did not fare much better. Justices Williams and Muir both cited the dicta of the Full Court of the Federal Court in *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd v Anor*,¹⁸ (*Braverus*), that had been similarly relied on by the trial judge in *Koumala*. In the *Braverus* case, the Full Court of the Federal Court decided that there was no relevant contract for pilotage onto which the warranty in s74 could be grafted.¹⁹ Nonetheless, dicta made it clear that had there been a contract, the court would have held that subsection 3 would not exempt it from the operation of the warranty. A contract for pilotage would not be a contract 'in relation to transportation of goods':

Was it a contract in relation to the transportation of goods for the purposes identified by the subsection? We think not. The purpose of s 74(3) was to ensure that the well-known law governing transportation of goods (by air, land or sea) and storage of goods was not to be radically amended by s 74, in particular given the well

¹² Williams JA at [9], [20] applying *The Apollon* [1971] 1 Lloyd's Rep 476 at 480 (per Brandon J).

¹³ See Williams JA at [7], [9]-[10], [15], Muir JA at [55]- [56], [64] – [69].

¹⁴ Muir JA at [55] – 'the correctness of these propositions was not disputed by the appellant.'

¹⁵ Ibid. Williams JA, [32] – [35]; Muir JA [73] – [83]. Daubney J concurred with the reasons for judgement of Williams and Muir JJA: [87].

¹⁶ Ibid. Muir JA, [81], with whom Daubney J concurred. Williams JA did not deal with this argument expressly.

¹⁷ Williams JA at [82].

¹⁸ (2005) 148 FCR 68.

¹⁹ (2005) 148 FCR 68 [192].

established insurance arrangements in respect thereof: Explanatory Memorandum accompanying *Trade Practices Revision Bill* 1986 at para 153; see Heydon JD *Trade Practices Law* Vol 2 at para 16.850. With that purpose understood, there is no relevant relationship between the contract to provide the services and the transportation of goods. It could be no more said that a contract to provide pilotage services related to the transportation of goods because it was a necessary precondition to get the ship to the berth, than it could be said that a contract to repair the ship before sailing related to the transportation of goods because, without the repairs, the ship would not sail.²⁰

The key to the operation of s74(3) was to identify the purpose of the contract.²¹ Here the contract could not be said to be ‘for’ the purpose of transporting the coal’ (although the towage contract was a necessary prerequisite for loading the coal). The contract:

concerns a service to be rendered to the ship itself without regard to whether the ship is laden or unladen, and without regard to the identity, characteristics or movement of any goods. Nor can the ‘purpose of the business for whom the [coal is] transported’ be relevant to a contract of towage. Such purposes and the identity of the relevant business are not matters of concern to the tug owner.²²

Dalrymple’s appeals were dismissed.

Application for special leave to appeal to the High Court

Dalrymple applied for special leave to appeal to the High Court. The special leave application was heard on 18 June 2008.

Dalrymple sought the right to argue an appeal before the High Court to consider the following issues:

- whether the ‘whilst towing’ clause required the tug to be in position to take up ropes and lines, as indicated by the judgment of JA Williams, or needed to be in ‘hailing distance’ or some other proximity to the ship as suggested by JA Muir;
- whether the proper interpretation of s74(3) was to focus on the purpose of the transportation, rather than the connection referred to by the words ‘for or in relation to.’
- Whether *Braverus* was inconsistent with the High Court judgment in *Wallis v Downard-Pickford (North Queensland) Pty Ltd*,²³ and whether *Braverus* was distinguishable from the *Koumala* case in any event as towage has a more direct connection with transportation than pilotage services.²⁴

Dalrymple argued the case had public importance as the interpretation of s74(3) was relevant beyond towage contracts and submitted it was important to reconcile the judgments in *Wallis* with those in *Braverus*. Dalrymple argued that the High Court decision in *Wallis* meant that the critical question was the purpose of the transportation, rather than the words ‘for or in relation to’, which were emphasised in *Braverus*.²⁵ Dalrymple argued that the relevant question was: is the transportation ‘for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported’. If so, the ss3 exemption was satisfied, and this interpretation was consistent with the objective of the TPA, namely to protect consumers.²⁶ If it is necessary to consider the connection between the towage and the transportation, then the words ‘for or in relation to’ should not be read down or given a narrow interpretation as they are words wide enough to cover every conceivable connection.²⁷

²⁰ Ibid, [195].

²¹ Ibid. Williams JA at [33]; [80] – [83].

²² Ibid. Muir JA at [83].

²³ (1993- 1994) 179 CLR 388.

²⁴ Applicant’s written summary of argument [1] – [4].

²⁵ Ibid, [27]

²⁶ Applicant’s written summary of argument [20] – [25], [28]

²⁷ Citing *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 367 per Dawson J.

Dalrymple submitted that the UK Standard Conditions were of great importance and represented arrangements about which shipowners, tug operators P&I Clubs and insurers conduct their affairs, and that this decision was likely to create uncertainty as to the scope and operation of those Standard Conditions.

In response, PNSL argued that Dalrymple was misconstruing the *Wallis* case.²⁸ There had been no issue in that case as to whether the contract for carriage of the police officer's domestic belongings constituted a contract for transportation. Clearly it was. Therefore the Court in that case did not need to dwell on the words 'for or in relation to the transportation... of goods' but moved on to consider the contentious point as to whether that transportation was for 'a commercial purpose'. In the case before the Court, it was entirely correct to consider whether the contract of towage at issue in the present case answered the description of a contract 'for or in relation to the transportation or storage of goods'.²⁹ Further, Dalrymple's interpretation of s74(3) would result in a very large proportion of contracts between corporations and consumers being removed from the ambit of s74, thus severely limiting its operation.³⁰ In effect, it would mean not only those involved in the transportation of goods being entitled to rely on s74(3) but also those concerned with providing services to the transport industry.³¹ As to the issue of uncertainty over the scope and operation of the Standard Conditions, PNSL argued that the US Courts have found such contractual clauses to be void against public policy³² and in any event, towage operators are entitled to limit their liability for breach of the s74 warranty pursuant to s86A TPA.³³

After a short adjournment, Acting Chief Justice Gummow pronounced the decision of the Court:

'The actual decision of the Queensland Court of Appeal on question [sic] of whether section 74(3) of the *Trade Practices Act* was engaged is not attended by doubt. That being so, the matter does not provide a suitable vehicle to explore questions of construction and application of the United Kingdom Standard Conditions... that would otherwise arise. The applications are dismissed...

Comment

The decisions of the lower courts concerning s74(3), and that of the Federal Court in *Braverus*, have effectively been given the High Court's imprimatur. Clearly the court was not so convinced about the veracity of the lower court's conclusion on the 'whilst towing' point. However, until overturned, the judgment of the Queensland Court of Appeal will remain binding in Queensland, and persuasive elsewhere, as regards the interpretation of that provision of the UK Standard Conditions.

It was submitted to the High Court that the consequence of s74 (3) was 'inevitably to increase towage costs'.³⁴ That will only be the case if the towage operators do not amend their standard terms. As a result of this case, towage operators and their advisors should now write standard terms that comply with Australian laws. It is possible for an effective limitation of liability contained in a set of standard terms to reduce the towage operator's liability for damage arising from negligence to the invoice cost of the service in question.³⁵ In this case, that would have been the difference between \$12,500 (plus interest) and 167,000 SDRs.³⁶

²⁸ Respondent's written summary of argument, at [4].

²⁹ Ibid [5].

³⁰ Ibid [10].

³¹ Ibid. Examples given were contracts made by a corporation that fitted tyres to trucks that transported goods, a corporation which painted trucks or cargo planes, or a corporation which provided accountancy or legal services to a carrier.

³² Ibid [16], citing *Bisso v Inland Waterways Corporation* 349 US 85 (1955)

³³ Ibid.

³⁴ Counsel for the Appellant, transcript of Special Leave Application [2008] HCA Trans 264.

³⁵ **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:

.....

Each towage operator in Australia may choose to amend their own terms independently. However it would be far wiser for them to commission an Australian version of the UK Standard Conditions.³⁷ That would assist in uniformity and consistency of interpretation within Australia. Perhaps at the same time the troublesome notion 'whilst towing' could be reconsidered with the notion of a triggering event that is more amenable to proof and less likely to lead to litigation. Such a clause may rely, for instance, on a combination of a specified distance from the vessel and a requirement as to the purpose of the tug's approach.

In a more general sense, the attitude of the Court of Appeal and High Court toward the *TPA* and maritime law is telling. It seems no longer worth arguing, before courts at least, that the so called 'consumer provisions' of the *TPA* ought not apply to commercial transactions. Further, there is no indication from the courts that maritime law can be considered in some way immune from the operation of the *TPA* and its provisions; in fact, there is now every indication to the contrary. There may be concerns that this somehow marks Australian law as deviating from international comity.³⁸ A case could be made for amending of the *TPA* so as to excise maritime and other commercial international transactions from its influence,³⁹ although, in relation to s74, the case is weakened somewhat because of the legislative entitlement to limit liability to the cost of the service. It is within the power of towage operators to achieve much the same end by adapting their trading conditions to take advantage of the local legislative landscape. The conclusion of the High Court in the *Koumala* case makes that process a necessity for towage operators who wish to limit their liability to a reasonable sum.

(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....

³⁶ The agreed limitation amount in this case. As at the date of the High Court decision, one SDR equalled AUD \$1.71. If the judgment sum was to be calculated at 18 June 2008, Dalrymple would have been obliged to pay AUD \$285,570.

³⁷ Any issues this might have in competition law are outside the purview of this paper.

³⁸ Although, in reality, maritime cases are brought in the domestic courts and the domestic laws of any country will be brought to bear on such a case.

³⁹ Or at least clarifying the application of the *TPA* to matters maritime -See K. Lewins 'Maritime Law and the *TPA* as a 'mandatory statute' in Australia and England: Confusion and Consternation?' (2008) 36 *Australian Business Law Review* 78 at 132 – 136.