Pure economic loss and the *1976 Convention*: Qenos Pty Ltd v Ship 'APL Sydney' [2009] FCA 1090

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Introduction

In *Qenos Pty Ltd v Ship 'APL Sydney'* [1] (Qenos) the Federal Court of Australia was required to decide whether a claim for pure economic loss in negligence was limited by the *Convention on Limitation of Liability for Maritime Claims* 1976 (*the 1976 Convention*).[2] The principal issue was the correct construction of Articles 2.1(a) and (c) of the *1976 Convention*.

The plaintiff, Qenos Pty Ltd, commenced in rem proceedings against the ship 'APL Sydney' which had severed a submarine pipeline owned by a third party. Qenos argued it had suffered consequential loss which fell outside the limitation clauses mentioned above. On the plaintiff's construction, Article 2.1(a) was not triggered unless the plaintiff had suffered 'concrete loss'. Furthermore Qenos argued the loss was not captured under Article 2.1(c) as the word '*rights*' in that clause was limited to statutory or proprietary rights. Three other negligence actions were brought by other parties against the shipowner on similar grounds, including by Huntsman Chemical Co. Australia Pty Ltd which argued for the same construction of the *1976 Convention* as Qenos. The parties agreed the question should be decided by way of determination of a preliminary point of law.

Australia has a long history of decisions allowing recovery for pure economic loss, which makes the issues in Qenos significant. Ironically the landmark decision in this area also involved a ship severing a submarine pipeline.[3]

Facts

On 13 December 2008 the ship '*APL Sydney'* was anchored in Port Phillip Bay awaiting berth when the ship drifted and dragged her anchor. The anchor struck a submarine pipeline jointly owned by Esso Australia Resources Pty Ltd and BHP Billiton Petroleum (Bass Strait) Pty Ltd. The pipeline transported ethane gas to the plaintiffs who in turn used it to manufacture polyethylene. They contended the shipowner by its servants or agents negligently caused the pipeline to rupture which in turn resulted in economic loss to their respective companies'.[4]

In general the plaintiffs' loss was said to result from: a) switching to alternative inputs, at higher cost, for polyethylene production; b) the need to find alternative means to meet customer demand; and c) in some cases, loss of customers because of inability to meet demand. The Huntsman claim totalled $AUD7 million dollars. The exact amount of Qenos' claim was not revealed at the hearing save that it was in excess of $AUD30 million dollars. The limitation fund set up by the defendant to meet the claims arising from the collision was approximately $AUD32.2 million dollars.[5] If the plaintiffs' claims fell outside the ambit of the *1976 Convention*, as they alleged, then the shipowner's liability would not fall within the fund. Essentially this would mean the plaintiffs' claims would be unlimited.

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[1] [2009] FCA 1090. The decision was concurrent with: Huntsman Chemical Co. Australia Pty Ltd v The Ship "APL Sydney" QUD 431 of 2008.

[2] *Qenos Pty Ltd v Ship 'APL Sydney'* [2009] FCA 1090: Order of Finkelstein J delivered 28/10/09 [2].

[3] See: *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1977) 11 ALR 227 (Caltex). The case is only superficially similar to Qenos. In Caltex, The Dredge "Willemstad" severed the submarine oil pipeline nine times. The plaintiff did not own the pipeline and it sustained only economic loss. It was subsequently held in *Ballast Trailing NV v Decca Survey Australia Ltd* (unrep. NSW Sup Ct 1980 and affirmed on appeal unrep NSW Sup Ct CA, 1981) the owners of The Dredge "Willemstad" were not entitled to limit their liability under the relevant statutory scheme as each time the pipeline was cut was held to be a distinct occasion. As the damages amount claimed did not exceed nine times the limitation amount the claims were under the limitation and allowed. See Martin Davies and Anthony Dickey, *Shipping Law*. (3rd ed. 2004) 471-2.

[4] *Qenos Pty Ltd v Ship 'APL Sydney'* [2009] FCA 1090 [1].

[5] Ibid [3]-[6].

Issues and Arguments

Under the *1976 Convention* a shipowner is entitled to limit liability to an amount calculated with reference to the ship's tonnage for claims that are captured by Article 2. Article 2 provides:

> Article 2
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> *Claims subject to limitation*
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> 1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
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> (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… [emphasis added][6]

The plaintiffs accepted their claim for pure economic loss was consequential on damage to the ethane pipeline. However, they argued for a narrow construction of Art 2.1(a). They contended liability could be limited only where losses caused to the property owner were consequential upon the loss of or damage to that property. As the plaintiffs did not have any proprietary interest in the submarine pipeline there was no limitation available to the defendant.[7]

The plaintiffs' arguments on Art 2.1(c) were not mentioned in any great detail by Finkelstein J but could be inferred from his Honour's overall analysis. What that analysis highlighted was the plaintiffs' case relied on a construction of the word '*rights*' which included only statutory and proprietary rights.[8]

The Decision

His Honour began by highlighting the purpose and policy behind the *1976 Convention*. The policy was to protect shipowners and proportionately distribute the limited funds amongst claimants.[9] Similar provisions in the United States had been broadly and liberally construed in order to encourage investments in shipbuilding.[10]

To interpret the *1976 Convention*, his Honour turned to the *Vienna Convention on the Law of Treaties 1969* (*Vienna Convention*). In particular his Honour focussed on Art 31 and 32. He stated that there are three elements to construing a treaty in accordance with Art 31 being a) the ordinary meaning of words; b) the context of the words; and c) the purpose of the treaty.[11] Where the meaning of words is ambiguous or absurd, Article 32 allows a court to have recourse to supplementary material, including the negotiating history of the treaty.[12]

Finkelstein J then examined arguments for and against the plaintiffs' construction of Art 2.1(a) of the *1976 Convention*. On the one hand, some academic argument supported a narrower interpretation[13] while on the other hand there was case law emanating from the English jurisdiction that seemed to support a wider view.[14] Finkelstein J concluded that on a common sense (bona fide) reading of the Article, bearing in mind the purpose of the *1976 Convention* and consistent with decided case law, the

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[6] Ibid [7] citing *Convention on Limitation of Liability for Maritime Claims 1976* Article 2.
[7] Ibid [21].
[8] Ibid [29], [36].
[9] Ibid [8].
[10] Ibid citing *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595 and *Just v Chambers* 312 US 383, 385 (1941).
[11] Ibid [14].
[12] Ibid [17].
[13] Ibid at [22]-[24] citing S Derrington and J Turner, *The Law and Practice of Admiralty Matters* (2007)
[14] Ibid [26]-[27] citing *Aegean Sea Traders Corporation v Repsol Petroleo SA* [1998] 2 Lloyd's Rep 39 *and The "Breydon Merchant"* [1992] 1 Lloyd's Rep 373.

plaintiffs' claims should be limited by Art 2.1(a).[15] Although this disposed of the case, his Honour went on to consider whether the plaintiffs' claims would be captured under Art 2.1(c). [16]

His Honour proceeded to examine a range of extraneous documentary records in order to ascertain what the scope of the word '*rights*' in Art 2.1(c) might be.[17] The documents included:

- the wording of the limitation clause in Art 1 of the *International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships* 1957 (*1956 Convention*) which is the precursor to the *1976 Convention;*
- submissions by parties negotiating the scope of word 'rights' prior to adoption of the *1956 Convention* and *1976 Convention*; and
- the travaux preparatoires of the *1976 Convention*.

What seems clear from his Honour's analysis is this: by the time the negotiating parties met for the fifth time to discuss the proposed wording of Art 2.1 (c) in the *1976 Convention* the 'issue in contention … was whether "rights" should include contractual rights'.[18] The question as to whether the term should be limited to statutory or proprietary rights was, by and large, settled in the negative. In support of this His Honour quoted the French submission on the topic and commented: 'It is clear that the French representative was of the view that "rights" were not confined to property rights.'[19]

With that background in mind, His Honour offered a definition of the term 'rights' under the *1976 Convention* as including 'a[ny] legally enforceable claim which results from the act or omission of another person.'[20] This conclusion was reinforced when his Honour considered the interaction between Art 2.1(a) and Art 2.1(c). Restricting Art 2.1(c) to proprietary rights would leave Art 2.1(a), with its focus on property damage, with little work to do. It followed that claims in tort for pure economic loss would in any event fall within Art2.1(c).[21]

Finally, his Honour declined to consider English law or be drawn on the difficulty at common law in recovering for pure economic loss in reaching his conclusion. In reasoning he explained the approach ran counter to accepted principles of construction; and 'ignores the fact that in most civil law countries it is permissible to bring a claim for pure economic loss.'[22] This was consistent with His Honours conclusion that domestic law usually has no place in the construction of international treaties.[23]

Conclusion

The Federal Court has shown it will interpret the limitation clauses under Article 2 of the *1976 Convention* widely in light of the Convention's clear policy as displayed by extraneous material. Inherent in that approach is an acknowledgement that the language in Article 2 is ambiguous as regards pure economic loss. Currently it seems in Australia pure economic loss in negligence is covered, if not by Art 2.1(a) of the *1976 Convention*, then by Art 2.1(c). While the policy behind limitation of liability might make this result compelling, until the High Court decides the point, the law is not settled.

At the time of writing this case note, no application for appeal has been filed.[24]

[15] Ibid [28].
[16] Ibid.
[17] Ibid [32].
[18] Ibid [33].
[19] Ibid.
[20] Ibid [35].
[21] Ibid [37].
[22] Ibid [38].
[23] Ibid [15].
[24] At 30 October 2009.