TASMAN ORIENT LINE CV v NZ CHINA CLAYS LTD & ORS (THE *TASMAN PIONEER*) [2009] NZCA 135

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The *Tasman Pioneer* concerned the interpretation of article 4 rule 2(a) of the *Hague Visby Rules* (the Rules), which provides the carrier with an exemption for damage arising from 'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship'. In particular, the issue was whether the carrier's exemption from liability in that Rule applies where damage is caused by a master's deliberate attempt to cover up an earlier mistake. In the course of this debate, the two principal judgments focus on the approach to be taken in interpreting international conventions.

1 Facts

In May 2001, *Tasman Pioneer* was sailing from New Zealand via Yokohama, Japan to Busan, Korea. From Yokohama, the planned route was to sail west along Japan's southern coast and then through Bungo Suido, the Japan inland sea, and Kanmon Strait before crossing Korea Strait to her destination. There was evidence that the master, Captain Hernandez, was under a certain amount of pressure from Tasman Orient and its manager, Technomar, to maintain his schedule. The master was also concerned to arrive at Kanmon Strait at a favourable point of the tide because of the significant current in that area.

After leaving Yokohama, the ship dropped behind schedule and the master decided that rather than passing west of Okino Shima, the usual route for vessels entering Bungo Suido from the south, he would shorten steaming time by 30-40 minutes by taking the ship through a deep but narrow channel between the island of Biro Shima and the south-western extremity of the island of Shikoku. The master had taken this route before, though generally in much smaller vessels.

As they approached the channel, the master had charge of the navigation of the ship. The *Tasman Pioneer* was making 15 knots into a nor'wester of about 36 knots and a one metre swell. The sky was dark with a visibility down to about two miles and with Biro Shima slightly on the port bow about 1.2 miles distant. About two minutes after the course change to enter the channel, the starboard radar lost all images. The master decided to pull out of the channel and ordered 'hard port'. When the radar came back on line shortly thereafter it showed Biro Shima at a distance of only 800 yards on the ship's port side. The master ordered to starboard but after about five seconds the ship impacted. From a speed of 15 knots the 22,000 tonne vessel was immediately slowed to six or seven knots and developed a list to port of about 8-10 degrees after 5-10 minutes.

Compartments were flooded to correct the list and pumping operations commenced. Although neither the master nor crew knew this at the time, the outer hull had suffered significant damage with breaches of the hull resulting in flooding of a number of compartments. Also, cargo hold bilge wells were damaged allowing sea water into the holds.

After the grounding, the master did not notify the Japanese coast guard or seek other assistance. He continued to steam at full speed for over two hours and covered some 22 nautical miles before anchoring. A passing vessel noticed the ship listing and advised the coast guard. The coast guard sent a patrol boat which came upon the *Tasman Pioneer* at anchor about six hours after the grounding. Salvors were eventually notified and arrived at the vessel later that day but by then the on deck cargo was already damaged.

The master did not advise the vessel managers of an incident until after anchoring. When he did so, he simply advised that the vessel had a list and that water had been found in the holds. He later added that he believed 'the vessel had hit an unidentified object'. The master instructed the crew to lie to the coast guard investigators with a view to persuading them that the ship had taken the main channel and that the impact had been with an unidentified floating object. On the master's instructions, the course sailed was erased from the ship's charts and a false course was substituted. The true course of events emerged during the investigation and the master was later prosecuted in Japan in relation to the incident.

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The present case was a claim by various cargo interests to recover damages for the on deck cargo.[1]

2 High Court – Justice Williams

It was common ground at all stages of the case that the master's actions in taking the short cut east of Biro Shima and the attempt to abort the passage, both of which led to the grounding, came within the exemption in art 4.2(a). The carrier was therefore exempted from liability for damage resulting from the grounding itself.
In the High Court,[2] Justice Williams found that the damage to the on deck cargo was not caused by the grounding but rather by the master's actions after the grounding, in not alerting the coastguard and not seeking the closest sheltered anchorage and thereby delaying the arrival of the salvors. Had the master acted properly, it was found that the salvors would have arrived 5-6 hours earlier and the on deck cargo would probably have been saved.[3]

The issue then was whether the master's actions after the grounding came within art 4.2(a), being acts 'in the navigation or in the management of the ship'. Justice Williams found that:

> There is… both logic and authority for the proposition 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 Art 4 R 2(a) exemption.[4]

He also found that the actions after the grounding 'can only have been motivated by Captain Hernandez implementing a plan designed to absolve himself from responsibility or blame for the grounding and lend a veneer of plausibility to his falsehood.'[5] Therefore, the carrier was not entitled to the exemption in art 4.2(a) and was liable for the damage to the on deck cargo.

3 Appeal

Tasman Orient appealed to the Court of Appeal, which by a majority dismissed the appeal. The principal judgment for the majority was delivered by Justice Baragwanath with Justice Chambers concurring. Justice Fogarty delivered a dissenting judgment.

None of the judgments disagreed with the findings of fact in the High Court, the focus instead being on the approach taken to interpreting the Rules.

3.1 Majority – Justice Baragwanath

3.1.1 Approach to Interpretation

Both the majority and dissenting judgments referred, as the High Court did, to the High Court of Australia's judgment in *Great Metal China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (*The Bunga Seroja*),[6] where the majority held that the Rules must be read:[7]

1. As a whole;

2. In the light of the history behind them; and

3. As a set of rules devised by international agreement as regulating contracts governed by several quite different legal systems.

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[1] An earlier case addressed preliminary applications for a limitation decree and fund: *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650 (High Court).
[2] *New Zealand China Clays Ltd v Tasman Orient Line CV* (Unreported, CIV-2002-404-3215, Williams J, 31 August 2007).
[3] Ibid [214].
[4] [234].
[5] [240].
[6] (1998) 196 CLR 161.
[7] [168].

However, the judges differed in applying the second consideration of reading the Rules in the light of the history behind them. While supporting the first and third considerations in *The Bunga Seroja*, Justice Baragwanath expressed reservations about reading the Rules in the light of the history behind them. He concluded that:

> The Rules are to be construed as a comprehensive international convention, unfettered by any antecedent domestic law, and that the practice of text writers and some judges to heark back to the old English common law is erroneous.[8]

He comments that while it may be useful to identify the provenance of a concept in the Rules, 'concentration on judicial decisions from the pre-Hague era carries risk of adopting a construction inconsistent with its policies'.[9] He sees the Rules as a deliberate rejection of the former laissez faire regime, and designed to prohibit 'exorbitant exemption clauses' which had previously been common and therefore there should be no assumption that the pre-Hague law still applies.[10] Instead, he sees the Rules as setting a sensible compromise between the interests of shippers and carriers.[11]

On the subject of the relevance of their history in the Rules' interpretation, Justice Chambers added that the deliberations of the *Hague Conference* should not be considered as an aid to interpretation on the basis that most signatories were not involved in the negotiations and because the modern context of shipping is so different from what it was when the Rules were developed.[12]

Acknowledging that there is no authority which discusses the situation at issue in this case, Justice Baragwanath turned to general principles of statutory interpretation, particularly that modern statutory interpretation is purposive. Justice Baragwanath referred to section 5 of the *Interpretation Act 1999*(NZ), which provides that regard must be had to purpose as well as text,[13] and to article 31 of the *Vienna Convention on the Law of Treaties*, which requires that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[14]

Justice Baragwanath also referred to *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc*,[15] where the House of Lords held, at 1370, that even where there is high relevant authority to the contrary, courts may be persuaded 'to depart from an earlier decision where that decision has been demonstrated to work unsatisfactorily in the market place and to produce manifestly unjust results.'

Justice Baragwanath also noted that exemption clauses in statutes ought to be strictly construed and endorses the contra proferentem approach of the dissenting judgment of Lord Justice Greer in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* ('*Gosse Millerd*')[16] that art 4.2(a) should not be read so broadly that the paramount duty in art 3.2 to safely carry, keep and care for the cargo is largely nullified. Justice Baragwanath considered that this approach has developed into a principle that 'broadly expressed exemptions are to be read down to do substantial justice in accordance with apparent purpose of the contractual legislation read as a whole'.[17]

For all of these reasons, Justice Bargwanath found that the pursuit of certainty was insufficient to rely on the pre-Hague cases such as *Marriott v Yeoward*,[18] a case referred to by Justice Fogarty in his dissent, which found that a contract with a liability exemption similar to art 4.2(a) protected the carrier against even felonious acts by a servant.

[8] [31].
[9] [37].
[10] [43].
[11] [49].
[12] [69].
[13] [46].
[14] [48].
[15] [2005] 1 WLR 1363.
[16] [1928] 1 KB 717 (Court of Appeal).
[17] [56].
[18] [1909] 2 KB 987 (King's Bench).

3.1.2 Text of the Rules

Having set out his approach to interpretation of the Rules, Justice Baragwanath then turned to the Rules themselves, starting with art 3.2 and the carrier's primary responsibility to carefully carry, keep and care for the goods carried. That obligation is then subject to art 4, and particularly in this case art 4.2(a), which exempts the carrier from damage arising from 'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.'

Justice Baragwanath noted that art 4.2(a) could be read broadly, so as to include all acts, or narrowly so that 'act' and 'default' are read eiusdem generis with 'neglect' and so do not include reckless or wilful misconduct.[19] He appears to suggest a middle ground, following a purposive interpretation of art 4.2(a) in light of the surrounding Rules. Justice Baragwanath also noted that interpreting art 4.2(a) must be a balance so as to not second guess navigational decisions by masters, but also to not render meaningless a carrier's primary obligation in art 3.2 to carefully carry, keep and care for the cargo.[20]

As an example, Justice Baragwanath used the Rule on liability for deviations. Article 4.4 provides that a carrier is not liable for any loss resulting from a reasonable deviation, therefore, Justice Baragwanath holds that it can be presumed that a carrier is intended to be liable for an unreasonable deviation and art 4.2(a) should be read to exclude such unreasonable deviations. In making these comments, Justice Baragwanath cites *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* ('*The Hill Harmony*')[21] as an example of an unreasonable deviation that did not come within art 4.2(a), although *The Hill Harmony* has been taken as authority for quite different propositions at different times, with the High Court and Justice Fogarty also taking different views of it.

The majority, therefore, agreed with the High Court that good faith of the master was relevant to art 4.2(a). In terms of where it fits in the analysis, however, Justice Baragwanath preferred that good faith be seen as part of the 'wider issue of whether the conduct takes the carrier outside the terms of its statutory and contractual obligations' rather than as an implied term of the Rules.[22]

On the facts of the present case, Justice Baragwanath agreed with the High Court that the master's conduct after the grounding was outrageous and was fundamentally at odds with the purpose of the contract of carriage and the legislative regime.[23] He concluded:

> I am satisfied that such behaviour, carried out for the selfish purposes of the master, and wholly at odds with the carriers' obligations under art 3.2, is not conduct "in the navigation or in the management of the ship" within the meaning of art 4.2(a).[24]

Justice Chambers concurred, and accordingly, the appeal was dismissed.

3.2 Dissent – Justice Fogarty

3.2.1 Approach to Interpretation

In his dissenting judgment, Justice Fogarty followed a similar approach to construction of the Rules as the majority. Like the majority, Justice Fogarty referred to *The Bunga Seroja* as the approach to be taken to interpreting the Rules as well as article 31 of the *Vienna Convention* and the *Interpretation Act* on purposive interpretation.

One of the major differences in approach was that Justice Fogarty placed a stronger emphasis on the ordinary meaning of the text, stating that 'the interpretation should be wholly faithful to the text', though still reading it in context and in light of the object and purpose of the rules.[25] Another difference was that Justice Fogarty supported the second consideration in *The Bunga Seroja* that the Rules should be interpreted in light of their

[19] [50].
[20] [54]-[55].
[21] [2001] 1 AC 638 (House of Lords).
[22] [63].
[23] [59].
[24] [60].
[25] [109].

history, particularly referring to Justice McHugh's comments in that case that 'it seems likely that the English common law rules provide the conceptual framework for the *Hague Rules*'[26] and that 'the Rules should be interpreted with that framework in mind.' Justice Fogarty clearly disagreed with Justice Chambers' warning against considering the deliberations of the *Hague Conference*, referring to the Conference several times throughout his judgment as to the purposes and policies behind the Rules.

3.2.2 Text of the Rules

Justice Fogarty began his judgment by agreeing that it was essential to read art 4.2(a) as a qualification only of the principal duty on the carrier in art 3.2. However, in looking at the context of the other exemptions in art 4.2, Justice Fogarty noted that they all show a general policy that the ship owner is not to be an insurer against loss caused beyond the carrier's control, the carrier being separate from the master, crew and servants on the vessel.[27]

Justice Fogarty then turned to the text of art 4.2(a) and did not see any ambiguity. He had no doubt that 'act, neglect or default' includes intentional conduct and found nothing to suggest its application depends on the motives of the master.[28]

The 'act, neglect or default' must be 'in the navigation or in the management of the ship' to come within art 4.2(a), but this is the only qualification. He found that the natural language of art 4.2(a) does not qualify the word 'act' by any notion of the quality of the act, be it laudable or culpable, and he added that the refinement adopted by the High Court and the majority – that the acts must be in good faith or for the purpose of the voyage – cannot be a true interpretation of the rule.

3.2.3 History of the Rules

Justice Fogarty notes from the deliberations of the *Hague Conference* that the text of art 4.2 is largely taken from common provisions in British bills of lading and also refers to *The Bunga Seroja* where it was noted that the Rules were intended to confer a wide range of immunities on carriers.

Accordingly, Justice Fogarty refers to two pre-Rules cases in particular, which fortify his interpretation of art 4.2(a). The first was *Marriott v Yeoward*, where the Court found that the words 'any act, neglect or default whatsoever' in an exemption clause in a bill of lading, are quite unqualified and therefore include even felonious acts of the carrier's servants. Justice Fogarty notes that although the wording of that clause was slightly different to art 4.2(a) (the words 'any' and 'whatsoever' not being present in that rule), there is still no qualification other than 'in the navigation or in the management of the ship'.[29] Therefore art 4.2(a) should also be read to include wilful misconduct of a master. Another case referred to[30] was *Bulgaris and Ors v Bunge & Co Ltd* ('*The Theodoros Bulgaris*'),[31] which considered a similar exemption clause in the bill of lading. In that case, the Court made obiter comments that even deliberate desertion of a ship in calm weather would be an act, neglect or default of the master and therefore within the contractual exemption.

On the basis of his interpretation of art 4.2(a), supported by the pre-*Hague* cases, Justice Fogarty disagreed with the majority and found that, although it was an extraordinary set of facts, the master's conduct was an act, neglect or default in the navigation or management of the ship, and therefore, Tasman Orient should not be liable for the damage to the on deck cargo.

3.2.4 Addressing Other Arguments

Having laid out the basis for his decision, Justice Fogarty then addressed the various contrary arguments from the High Court decision, the respondents and the majority in the Court of Appeal.

[26] [110].
[27] [111], [113].
[28] [117]-[118].
[29] [130].
[30] [131].
[31] [1933] 45 Lloyd's Rep 74 (King's Bench).

Good Faith Authorities

Justice Fogarty distinguishes the authorities relied on by the High Court in support of implying a good faith element into the exemption, finding that none of them are authority for qualifying art 4.2(a) with a requirement that decisions be made in good faith.[32]

Justice Fogarty particularly considers *The Hill Harmony* as the strongest case for the respondent cargo interests and a key case in the High Court decision.[33] In *The Hill Harmony*, the charterer had directed the master to take a particular route and the master instead took a different and longer route. The House of Lords found that the direction was as to employment of the vessel, which the master was bound to follow and the owners were liable for the extra costs and delay. If the direction had been as to navigation of the vessel, the master could have taken whichever route he saw fit and the owners could have relied on art 4.2(a). Justice Fogarty distinguished *The Hill Harmony* because it was about employment of the vessel and was not an examination of the consequences of decisions made under stress following a grounding.[34] Therefore, he found it was not an appropriate guide in applying article 4.2(a) to the facts of the present case.

Conduct for the Purpose of the Voyage

Justice Fogarty then addresses an alternative argument of the respondents that for conduct to come within the art 4.2(a) exemption, it must be for the purpose of the voyage. Justice Fogarty also dismisses this argument,[35] as it still depends on qualifying 'act' in art 4.2(a) by purpose and would involve too much uncertainty. He pointed out that in this case, after the grounding, the vessel was still moving towards its destination of Busan in Korea and therefore the only difference was the master's purpose in doing so. While this was a reasonably clear case of wilful misconduct, other circumstances could easily involve mixed motivations on the part of the master in protecting the ship and their career and therefore be harder to determine whether they came within the exemption.[36]

Responding to Majority

Justice Fogarty's judgment is largely structured around addressing the judgment of the High Court, however, he does make a few additional points to respond to the reasoning and comments of the majority. First, he noted that he did not think that art 4.4 on deviations was intended to complement art 4.2 (and therefore art 4.2(a) should not be read to exclude unreasonable deviations). Secondly, Justice Fogarty distinguished Lord Justice Greer's judgment in *Gosse Millerd*, referred to be the majority, as addressing the distinction between care of cargo and care of the ship, whereas here, the master's conduct was clearly in the navigation of the ship and not related to just the cargo. And finally, Justice Fogarty justified his use of pre-Rules common law cases on the basis that the words of art 4.2 were adopted knowing their common law history and without any apparent intent to change it.

4 The Cross Appeal

In addition to the main appeal already discussed, there was a cross appeal by the New Zealand Dairy Board concerning some cargo that was being transported in refrigerated containers, reefers, and was damaged by heat rather than water.

In the High Court, Justice Williams found that in the absence of temperature charts from the reefers, it would be unsafe to conclude Tasman Orient failed in its obligation to care for the reefers and therefore found that they were not liable. The New Zealand Dairy Board appealed this finding.

Justice Chambers addressed the cross appeal for the majority, finding that although the evidence was unclear, the heat damage was probably caused after the grounding when the power to the reefers was turned off,[37] and

[32] [148].
[33] [137]-[148].
[34] [146].
[35] [151].
[36] [154].
[37] [90].

that the power was probably turned off due to concern about cables running through the water.[38] On this analysis, the cargo suffered heat damage when the power was turned off because the water had reached deck level, which was a direct consequence of the master's conduct after the grounding. Therefore, following Justice Baragwanath's reasoning on the main appeal, Justice Chambers found that Tasman Orient could not rely on art 4.2(a) and was liable for the heat damaged cargo.[39] Justice Baragwanath concurred and the cross appeal was allowed.

Justice Fogarty dissented on the cross appeal without any detailed reasons.[40] He agreed with the findings of fact of Justice Chambers and then said that '[w]hatever the reasons the salvors turned off the generators, their decisions were made in management of the ship' and therefore within art 4.2(a) and Tasman Orient should not be liable. However, even if Justice Fogarty had adopted Justice Chamber's reasoning on the cross appeal (that the damage was ultimately a result of the water reaching deck level and therefore a result of the master's conduct), he would still have dismissed the cross appeal as he had found the master's post grounding conduct came within art 4.2(a).

5 Appeal to Supreme Court

It is now nine years since the grounding, and these judgments from the Court of Appeal are not the end of the matter. Tasman Orient was given leave to appeal the decision to the Supreme Court.[41] Tasman Orient's ground of appeal was: 'did the conduct of the Master following the grounding disentitle the appellant to the protection of Article IV, Rule 2(a) of the *Hague Visby Rules*?'

The respondents put forward additional grounds in support of the judgment of the Court of Appeal, being: were the decisions of the Master following the grounding made bona fide for the safety of the ship, the crew and the cargo?; Did the conduct of the Master amount to barratry?; Did the appellant fail to discharge the onus of proving where the damage occurred and what caused it?; And did the appellant fail to establish that it was not at fault?

The Supreme Court heard the case in October 2009. At the time of writing, the decision was still reserved.

6 Conclusion

As with the High Court, the Court of Appeal's judgment in the *Tasman Pioneer* was received with mixed views. Some considered that the approach of the majority still leaves too much uncertainty,[42] or does not recognise the allocation of risk agreed in the *Hague Visby Rules*.[43] Others approved the majority's approach finding the dissenting judgment too simplistic and literal, saying it would leave the art 4.2(a) exemption almost limitless.[44] No doubt the decision of the Supreme Court will also be heavily debated.

Given the rarity of the facts in this case and the recent development of the *United Nations Convention for the Carriage of Goods Wholly or Partly by Sea* (known as the '*Rotterdam Rules*'),[45] which does not have an equivalent exemption clause, the approach to art 4.2(a) in the *Tasman Pioneer* may have limited significance. However, the discussion in the Court of Appeal judgments on the approach to interpretation of international conventions will continue to be relevant to the application of the *Hague Visby Rules* and other international conventions.

[Editor's note: On 16 April 2010 the Supreme Court handed down its decision allowing the appeal: [2010] NZSC 37. We will bring you a casenote on that decision in a later issue of the journal.]

[38] [93].
[39] [95].
[40] [162].
[41] *Tasman Orient Line CV v New Zealand China Clays Ltd & Ors* [2009] NZSC 70.
[42] Peter Stockli, 'New Zealand Court of Appeal Divided on "Navigation or Management of the Ship" Defence' *TT Talk* 1 May 2009, 118.
[43] Rory MacFarlane and Victoria Waite, 'Hague-Visby Rules – Must Default or Neglect in the Navigation or Management of a Ship be "Bona Fide"?' <http://www.incelaw.com> at 27 August 2009.
[44] Paul Myburgh, 'Charting the Limits of the Nautical Fault Exemption: The *Tasman Pioneer*' [2009] *Lloyds Maritime Commercial Law Quarterly* 291.
[45] The *Rotterdam Rules* will come into force one year after it is ratified by 20 states. As at March 2010, 21 states have signed the Convention, but none have yet ratified it.