INTERPRETING THE INTENTIONS OF CONTRACTING PARTIES: *Tritton Resources Pty Ltd v Ever Rock Navigation SA* [2019] FCA 276

Sophie Priebbenow*

Introduction

There were five core issues in contention in *Tritton Resources Pty Ltd v Ever Rock Navigation SA*.[1] Of these, the issue that the Court considered in the greatest depth was whether, on an objective reading of the evidence and the conduct of the parties, extensions of the limitation period under Article 3(6) of the Amended Hague-Visby Rules ('Rules') applied to all plaintiffs. The Rules are set out in Schedule 1A of the *Carriage of Goods by Sea Act 1991* (Cth) ('Act'). The answer to this question connected with the inquiry as to which parties, if all were within time, still retained title to sue. The grounds on which the various plaintiffs could or could not claim turned on other considerations, focusing especially on the rights of successive holders of bills of lading and the impact of transferring a bill of lading (BOL) on the original holder's right to sue for loss and damage to cargo.

Facts

The issues in this case stemmed from the grounding of the *MV Ikan Jahan* on 18 December 2011 on Manuk Island, Indonesia on a journey between Newcastle, Australia and Tuticorin, India. The ship was grounded for four weeks and was required to enlist the aid of a salvor before it could proceed. The salvor, Fukada Salvage and Marine Works Co Ltd (Fukada) drew up the salvage agreement with Ever Rock Navigation SA (Ever Rock) on 19 December 2012. In 2014, Ever Rock, Fukada, and SAH & Co (representing the owners and underwriters of the cargo on board the ship) established a tripartite 'settlement agreement'. By this agreement the parties decided what was due to Fukada and what portion of the salvage renumeration was to come from the cargo owners.

The cargo aboard *MV Ikan Jahan* had been shipped pursuant to a BOL naming Tritton Resources Pty Ltd (Tritton) as the shipper and stating that it was 'to order of JP Morgan Metals and Concentrates LLC' (JP Morgan). The owner of the vessel, Ever Rock, had agreed a time charterparty with PCL (Shipping) Pte Ltd (PCL), whom subsequently agreed a voyage charterparty in 2011 with Tritton. Both Tritton and JP Morgan were plaintiffs in this case on account of their cargo interests, as well as Sterlite Industries (India) Ltd (Sterlite).

The competing interests in this action arose out of successive contracts of sale involving the plaintiffs in both 2007 and 2011.[2] The former was between Tritton (as seller) and JP Morgan (as purchaser). In that agreement, title over the goods and responsibility for loss or damage were treated as transferring to the purchaser from the moment that the cargo passed the ship's rail at the end of the voyage.

The second cargo sale (in 2011) was between JP Morgan as seller and Sterlite as purchaser. When the *MV Ikan Jahan* grounded, Sterlite had been transferred the risk of loss or damage to the cargo, but not actual title over the goods.

The arrangement for the transferral of risk in the latter sale differed from the former in that risk passed once the ship reached the port of loading at the conclusion of the voyage, and JP Morgan was obliged to purchase insurance for Sterlite. On 14 February 2012, consistent with the agreement between itself and JP Morgan, Sterlite (on the day after the *MV Ikan Johan* arrived in the agreed port) paid 90% of its invoice to JP Morgan. The lead insurer for the policy that JP Morgan acquired on Sterlite's behalf was AEGIS Electric and Gas International Services Ltd (AEGIS). AEGIS was regarded as acting for all other cargo insurers. The policy addressed both salvage and general average costs. The policy that JP Morgan obtained also encompassed JP Morgan as an insured.[3]

In November 2015, Ever Rock declared general average following the grounding of the ship, and after engaging Asai & Ichikawa of Japan as general average adjusters, requested that the plaintiffs pay a total of US$719,817.88 in respect of the copper cargo. The plaintiffs refused and themselves sought an order for indemnity against general average. They also pursued damages based on Ever Rock's breach of the plaintiffs' contracts of carriage, and the subsequent loss and damage to them resulting from that breach.[4]

* LLB Student, TC Beirne School of Law, University of Queensland.
[1] [2019] FCA 276 ('*Tritton Resources*').
[2] Ibid [16]–[17] (Derrington J).
[3] Ibid [18]–[22] (Derrington J).
[4] Ibid [34] (Derrington J).

In mid-2017, the plaintiffs commenced these proceedings against Ever Rock for failing to exercise due diligence to ensure seaworthiness prior to and at the beginning of the ship's journey. The plaintiffs' claims were founded on the pure economic loss that resulted from the time the ship was inoperable, and not physical damage to the cargo that may have been consequent on the grounding.

The seaworthiness obligation is enshrined in Article 3(1) of the Rules. The question of Ever Rock's compliance with this obligation was not, however, discussed in this case.[5]

Federal Court Judgment

Section 11(1)(a) of the Act provides that parties to contracts of carriage for goods transferred from Australia to somewhere outside of it are assumed to have agreed to the terms of the Act, including Sch 1A (containing the Rules). As the *MV Ikan Jahan* departed from Newcastle the *Sea-Carriage Documents Act 1997* (NSW) ('SCD Act') was also applicable to the BOL.

The questions put before the Court were as follows:[6]

1. whether the defendant granted an extension of the limitation period under Article 3(6) of the Rules to the plaintiffs to commence these proceedings;

2. whether the limitation period provided for in Article 3(6) of the Rules applies by extension of time to these proceedings;

3. if any limitation applies to these proceedings, whether the defendant is estopped from relying on that defence;

4. what are each of the plaintiffs' interests in the cargo and whether any of the plaintiffs has title to sue; and

5. whether the plaintiffs are entitled to claim a loss in respect of the salvage agreement with Fukada.

The capability of the plaintiffs to bring a claim for indemnity against salvage payments and general average hinged on Article 3(6) of the Rules, as laid out below and quoted by the Court:[7]

> Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may, however, be extended if the parties so agree after the cause of action has arisen.

The first question was answered in the affirmative.[8] The limitation period for claims in respect of the goods aboard *MV Ikan Jahan* was extended multiple times from 6 December 2012 to 18 December 2015,[9] and then again on several occasions up to 18 July 2017 in negotiations between the Japan P&I Club (on behalf of Ever Rock) and AEGIS (for the cargo owners), and their representatives.[10] This was done in accordance with the Rules.

Ever Rock maintained that all time extensions granted on and after 11 December 2015 were new agreements between different parties than the original extensions. The plaintiffs asserted that the extensions were a variation of the contract of carriage that the BOL evidenced. The preferred interpretation in this decision was that the extensions were sequential variations to a single agreement.[11] That is, the extensions operated as agreed amendments to the original BOL, subject to Article 3(6) of the Rules.

This answer was not determinative of the proceedings but did impact on Ever Rock's argument that JP Morgan alone, and not Sterlite, was intended to benefit from the time extensions granted subsequent to 11 December 2015.[12]

[5] Ibid [12] (Derrington J).
[6] Ibid [6] (Derrington J).
[7] Ibid [39] (Derrington J).
[8] Ibid [109] (Derrington J).
[9] Ibid [44]–[53] (Derrington J).
[10] Ibid [54]–[66] (Derrington J).
[11] Ibid [103] (Derrington J).
[12] Ibid [72] (Derrington J).

The negotiations of the parties and the intentions of their correspondence were analysed in reference to the honest, reasonable behaviour expected from parties to a business contract.[13] The relations between the defendant Ever Rock and the plaintiffs were objectively of this nature. Shipping is a highly specialised industry and the knowledge that is particular to persons in the industry, including legal practitioners, necessarily informs the construction of commercial agreements.[14] In this case, Derrington J drew attention to the case *Stolt Loyalty* and the importance in that case of commercial context, and the perspective of a 'reasonable recipient' of the telex that was being interpreted.[15]

In reviewing the negotiations, Derrington J regarded it as common ground that the extensions granted up to 18 December 2015 encompassed all three plaintiffs as parties with an interest in the matter.[16] During negotiations, reference was made to the BOLs of the plaintiffs and to the notion of 'cargo interests' rather than specific parties.[17] The evidence revealed that it was industry practice amongst 'cargo lawyers' to seek an initial time extension on behalf of all parties with an interest in the cargo, including both cargo underwriters and lawful holders of BOLs for that cargo.[18]

Derrington J considered it obvious that Japan P&I Club knew it was negotiating with AEGIS, which had paid the cargo owners' salvage costs, and would agitate and enforce any cause of action that Sterlite initiated under its legal rights as a cargo owner. Sterlite was therefore in indirect consideration. It was also plain on the facts that the Japan P&I Club, by the Letter of Undertaking, was prepared to accept claims due from Ever Rock in respect of *all* cargo owners and insurers (by subrogation to any arising claim).[19]

For Ever Rock to prove that the content of the time extensions had altered to include (or exclude) parties after 11 December 2015, it was practically necessary to indicate substantial and material alterations had been made to the pre-existing arrangement.[20]

It was accepted that there was ambiguity in the wording of the extension granted on 11 December 2015. However, the objective reasonable person could not fail to see that there was no material change in the parties' dealings that would operate to exclude prior agreements. The extension given on that date extended to all claims in which the cargo insurers maintained an interest and that arose under the BOLs. The extensions were no more strictly worded than those granted prior to 11 December 2015 and were in fact issued to the plaintiffs 'as per the previous extension'.[21] The Japan P&I Club knew what AEGIS was and the parties that it insured, and continued to provide extensions for those 'clients' rather than resorting to more specific wording in order to exclude one party or another. A request for an extension of time by AEGIS was equivalent to requesting an extension of time in which it could bring a subrogated claim on behalf of any of its insureds. Further, an express restriction on the time extension could have been provided easily by Ever Rock if it so desired.[22]

These examples are not exhaustive of the arguments that the Court accepted as persuasive, however they serve to indicate the line of reasoning accepted as conclusive.[23]

The exact wording of the second question put before the Court was considered somewhat vague. In answer to it, Derrington J stated that the time bar was no defence to any of the plaintiffs' claims, as proceedings had been commenced within the extended period, which again applied to all the plaintiffs.[24]

Regarding the third question, it was held that there was no room for an estoppel claim in the context of the case, nor did the Court's findings warrant the inquiry. Nonetheless it was briefly considered. The plaintiffs first put forward a case for estoppel by representation, the necessary elements of which were absent.[25] The estoppel by convention argument submitted by the plaintiffs was also rejected.[26] The finding that the time extensions encompassed all plaintiffs also diminished any claim that the plaintiffs' failure to commence proceedings earlier

[13] Ibid [75] (Derrington J).
[14] Ibid [97] (Derrington J).
[15] [1995] 1 Lloyd's Rep 598, 601.
[16] *Tritton Resources* (n 1) [52].
[17] Ibid(Derrington J).
[18] Ibid [85] (Derrington J).
[19] Ibid [77]–[80] (Derrington J).
[20] Ibid [83] (Derrington J).
[21] Ibid [92] (Derrington J).
[22] Ibid (Derrington J).
[23] Ibid (Derrington J).
[24] Ibid [110].
[25] Ibid [116]–[117] (Derrington J).
[26] Ibid [122]–[123] (Derrington J).

caused them detriment. The situation might have been different if the 11 December 2015 extension benefitted JP Morgan only, but that was demonstrably not the case. The plaintiffs' rights were in contract; however, if no contractual claim was available, then a claim based on estoppel by representation could technically be made out.[27]

The fourth question was, what were each of the plaintiffs' interests in the cargo, and did any of the plaintiffs have title to sue? Several sections of the SCD Act were relevant for this part of the discussion. Under s 5 of the SCD Act, the lawful holder of a BOL is a person with possession of it in good faith, either as consignee of the goods or as the recipient of it via delivery, and s 8(1) provides for the transfer of contractual rights to successive lawful holders of the BOL. Under s 8(5) of the Act, transferees of BOLs are entitled to exercise their rights for the benefit of previous holders of the BOL, that suffered some loss or damage in connection with the goods. The final section that Derrington J drew attention to was s 9(1), which specifies that, where s 8 also applies, the transferral of a BOL extinguishes the original holder's rights to pursue damages for some loss or damage they suffered.

When the ship grounded, JP Morgan was the legal holder of the BOL and had title to the goods although Sterlite had assumed risk over the cargo. Regardless of the operation of the SCD Act, and of the BOL itself, JP Morgan was the legal owner of the goods and was required to contribute to Fukada's salvage costs, therefore it had a claim in negligence for that loss.[28] The maritime lien over the cargo for the salvage costs extended to the cargo that JP Morgan still owned. Derrington J accepted the conclusion from other authorities that a salvor's lien over cargo is equivalent to damage to that property.[29] Both the value of cargo and the proprietary rights of cargo owners were diminished by the maritime lien. JP Morgan's negligence claim extended both to property damage to the cargo, and to consequential loss. JP Morgan was entitled to the full scope of its common law rights; it could not however pursue concurrent claims in contract and tort.

Sterlite, moreover, was entitled to pursue all actions against Ever Rock arising under the BOL, of which it became the lawful holder upon endorsement and delivery (in accordance with ss 8 and 9 of the SCD Act).

Further, the sections of the SCD Act which Derrington J had laid out established that Tritton had no cause of action available. Tritton had previously transferred the BOL to JP Morgan before the ship's grounding, therefore its rights to sue in connection with loss or damage under that BOL were extinguished (s 9(1) of the SCD Act).[30]

The fifth question asked whether the plaintiffs were entitled to claim a loss in respect of the salvage agreement with Fukada. Derrington J answered this inquiry 'yes'.[31] This conclusion was subject to the answer to the fourth question, in that both Sterlite and JP Morgan were entitled to sue in respect such loss resulting from the salvage agreement with Fukada, while Tritton had no entitlement to claim in respect of the salvage agreement.

Conclusion

A key aspect of this decision is the emphasis on the concept of a 'substantial and material alteration' to prior business arrangements in order to successfully argue that the *status quo* of the negotiations had shifted. As Derrington J noted, Ever Rock could in specific terms have excluded one of AEGIS's insureds from the benefits of the time extensions had it so intended, and the Court would have given regard to that fact. In that sense the decision also reiterates the importance of parties negotiating in the clearest possible terms to achieve their own commercial ends and that the industry-standard knowledge and experience of parties will affect how their actions are construed by courts.

It is possible that future cases will expand on the concept of a 'substantial and material alteration' that Derrington J alluded to and regarded as a necessity in this case, with reference to the factual matrix that here militated against its existence.

[27] Ibid [138] (Derrington J).
[28] Ibid [156].
[29] Ibid [157]; *The Breydon Merchant* [1992] 1 Lloyds Rep 373, 376; *Qenos Pty Ltd v Ship APL Sydney* (2009) 187 FCR 282, 290 [27].
[30] *Tritton Resources* (n 1) [144], [166] (Derrington J).
[31] Ibid [168].