The Honourable Justice James Douglas
Supreme Court of Queensland

"A tug too far

The 'Koumala' [2007] QCA 429

'whilst towing'

'for or in relation to the transportation of goods' "

MLAANZ 35th ANNUAL CONFERENCE

A TUG TOO FAR

THE KOUMALA [2007] QCA 429

"WHILST TOWING"

"FOR OR IN RELATION TO THE TRANSPORTATION OF GOODS"

A Paper delivered at the WA Maritime Museum, Fremantle

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by the Hon Justice James Douglas

A Judge of the Supreme Court of Queensland

The decision in *The Koumala* (*PNSL Berhad v Dalrymple Marine Services Pty Ltd* [2007] QCA 429) deals with two legal issues significant for those who own and operate tugs and those who use their services. The first was whether the collision that led to the litigation occurred "whilst" the tug was towing the ship. The second was whether s 74(3) of the *Trade Practices Act* 1974 (Cth) applied to the facts and that depended on whether the contract of towage was one for or in relation to the transport of goods.

The facts

The facts were relatively straightforward. While the tug, the *Koumala*, was about one nautical mile from the ship, the *Pernas Arang*, off the Dalrymple Bay Coal Terminal in North Queensland, it received an order by radio to approach the ship. The ship was then under the control of a pilot and was being brought into the coal terminal. When the *Koumala* had approached to within about 150 metres of the *Pernas Arang* it lost steering and then collided with and damaged the ship. The trial judge was satisfied that there had been negligence in the management of the tug and assessed damages in favour of the plaintiff at $583,965.09.

The trial judge's narrative of the event relied principally on the evidence of Captain Roscoe, the pilot on the *Pernas Arang*:[1]

> "[47] ...
>
> > [5] The account I have given of the movements of the *Pernas Arang* and the tugs is drawn from the account given in an incident report compiled for the Regional Harbourmaster of the Queensland Department of Transport – Marine Operations within twenty-four hours of the incident by Captain Roscoe, a pilot of great experience who had piloted ships since 1978. ... In a statement by Captain Roscoe, dated 10 November 2006 ... he was, however, able to give an account of the berthing procedure adopted for a ship like the *Pernas Arang*. The invariable practice was, he said, to use the ship's main engine and rudder when required while the ship was moving to a berth at the Dalrymple Bay Coal Terminal. The ship's engine was used turning both forward and astern with the rudder to control the ship's speed and direction during the berthing operation from a time before the tugs' making fast to the ship through to

[1] See paras [47]-[49] of [2008] QCA 429.

the ship's being brought alongside the berth. The ship's main engine may at times have been stopped for short periods, as when the tugs were being made fast to the ship. Captain Roscoe said that he had never piloted a 'dead' ship to berth at the Dalrymple Bay Coal Terminal and he had never heard of its being done. The tugs assist in the berthing of a ship by easing her into the berth, pushing her into the berth when required, or holding her off when required.

[6] Referring to the question of control of a berthing, Captain Roscoe said this in paragraph 9 of exhibit 24:

> 9. The operation to move a ship such as the 'Pernas Arang' to berth at Dalrymple Bay Coal Terminal is under the control of the ship's master on the pilot's advice. By 'control' I mean that the pilot has the conduct of the ship in all respects including all orders concerning the ship's main engine and rudder, and the placement and manoeuvres of the tugs, to effect the berthing operation. In all berthing operation [*sic*] I have been involved in at Dalrymple Bay Coal Terminal, the tug masters and crew have controlled only their own tug, in response to the orders they receive from the pilot in conjunction with the master. The operation has never been under the control of the tug masters."

The circumstances surrounding the accident

[48] ...

'[1] ...When the collision occurred the *Koumala* and another tug, the *Kungurri*, were preparing to tow the *Pernas Arang* ...

[3] At 7.00 a.m. on 28 February 1995 Captain Stephen Roscoe, senior marine pilot, boarded the *Pernas Arang* to take her from sea to port alongside the Dalrymple Bay Coal Terminal no. 2 berth. At 7.15 a.m. she was heading at 185° true making four knots. (A knot, one nautical mile per hour, is 1.852 kilometres per hour.) Her engine was stopped. The tide was flooding from north to south. There was a low to moderate south-easterly swell. ... Visibility was good. The *Koumala* and the *Kungurri* were attending the *Pernas Arang*. They were ordered by Captain Roscoe by radio to make fast starboard shoulder and starboard quarter.

[4] ...The *Koumala* crossed ahead of the *Pernas Arang* from port to starboard at approximately 90° to the *Pernas Arang's* heading. Once on the starboard side of the *Pernas Arang* the *Koumala* then turned quickly to starboard and was seen to be blowing black smoke. At 7.20 a.m. the *Koumala* collided heavily head-on with the starboard side of the *Pernas Arang*. [In the collision the *Pernas Arang* was damaged, but the *Koumala* was not.] ... After the collision the *Koumala* lay dead in the water for a short time before she could be brought

> alongside the *Pernas Arang*, and then normal towing operations proceeded without incident. …'
>
> [49] The order to make fast forward on the starboard bow was received by the *Koumala* when it was approximately one nautical mile off the port bow of the *Pernas Arang*. The following narrative in the reasons is mainly taken from the evidence of Captain Eisen, the Captain of the *Koumala*:
>
> '[10] … Captain Eisen steered the *Koumala* so that she approached the *Pernas Arang* fine on the port bow and then crossed to the starboard side of the ship, turning the *Koumala* to starboard through a turn bringing her back towards the starboard side of the *Pernas Arang*, intending then to make a further turn to starboard to bring her alongside the *Pernas Arang* where a line could be secured. During the execution of those manoeuvres, as the *Koumala* was coming out of the first turn and was heading towards the *Pernas Arang's* starboard side, the steering failed on the *Koumala* approximately 150 metres from the *Pernas Arang*. …The *Koumala*, moving at approximately five knots towards the *Pernas Arang* at approximately 95° true, then collided with her. … approximately one and a half to two minutes elapsed between loss of steering and collision.
> …
> [13] Those on board the *Koumala* at the time of the incident, apart from Captain Eisen, were three deck hands, and the tug's engineer, Mr John Smith.
>
> [14] As the *Koumala* approached the *Pernas Arang* the forward mooring team on the *Pernas Arang* were ready to throw a heaving line down, but only one member of the *Koumala's* crew was on the deck near the forward winch as she approached the *Pernas Arang*. Two crew members were required to carry out the procedure of taking a heaving line from the ship and then tying it to the tug's heavy towing line which was then passed out and made fast to the ship: one crew member controlled the forward winch and the other passed the line…'."

The legal issues raised by these facts arose because the parties used the United Kingdom Standard Conditions for Towage and Other Services (revised 1974) ("the Standard Conditions").

"Whilst towing"

The most relevant condition was that in cl. 1(b)(iv) which provided:

> "The expression 'whilst towing' shall cover the period commencing when the tug ... is in a position to receive orders direct from 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 pushing, holding, moving, escorting or guiding the vessel or to cast off ropes or lines has been carried out, or the tow rope has been finally slipped, whichever is the later, and the tug ... is safely clear of the vessel."

The relevance of that condition was that, if the incident occurred "whilst towing" as that expression is defined in the Standard Conditions then the defendants' liability for damages for negligence would be excluded, unless overridden by the operation of s 74 of the *Trade Practices Act*.

There have been several decisions on the "whilst towing" clause both in Australia and Britain but none reported in recent decades and none that were delivered by appellate courts. This decision is also significant because the High Court of Australia refused special leave to appeal from the decision of the Queensland Court of Appeal on 18 June 2008.

There were two significant sets of reasons in the Court of Appeal delivered by Williams JA and Muir JA. Williams JA agreed generally with the reasoning of Muir JA but examined the cases separately. Daubney J agreed with each of the other judgments.

Williams JA's factual conclusions were expressed as follows:

> "[29] Here the *Koumala* was proceeding to a point where she would have been able to accept orders directly from the *Pernas Arang* and to pick up the necessary ropes or lines. But she never reached that point. When heading towards the starboard side of the *Pernas Arang*, and about 150 metres away, the steering failed on the *Koumala*. From that moment on until the collision occurred the *Koumala* was not in a position to accept orders or carry them out. It follows in my view that the learned judge at first instance was correct in concluding that towing had not commenced and the collision did not occur "whilst towing" within the protection of the Standard Conditions.

His legal analysis relied primarily upon the test developed by Brandon J in *The Apollon*[2]:

> "It seems to me that, for a tug to be in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, three conditions must be fulfilled. The first condition is that the situation is such that those on board the tug can reasonably expect the ship to give the tug an order to pick up ropes or lines. The second condition is that the tug is ready to respond to such orders if given. The third condition is that the tug should be close enough to the ship for the order to be passed direct: in other words, that the tug should be within hailing distance."

His Honour analysed that decision and later decisions, recognising that whether or not an incident occurred "whilst towing" was in itself a question of fact which must be determined in the light of all the surrounding circumstances. He explained one decision relied upon particularly by the defendants, *Partafelagid Farmur v Grangemouth and Forth Towing Company Ltd.*[3] The appellant had argued that a statement by Lord Hill Watson in that decision that "the tug has only to be in a position to receive orders direct from the ship to pick up ropes or lines and there is no necessity for the tug itself to be in a position to take up the ropes or lines"[4] meant that *The Koumala* did not herself need to be in a position to take up the ropes or lines.

His Honour treated this statement by Lord Hill Watson as an obiter dictum and in conflict with an earlier decision of Sir Boyd Merriman P in *The Uranienborg*[5] to this effect:

> "... I have come to the conclusion that clause 1 means what it says and that the clause attached when the tug is in a position to receive orders to pick up ropes or lines. This presupposes that the ship is ready to give such orders, if they are required. But I cannot accept Mr Naisby's submission that a tug can thereafter put herself outside the clause by getting into a position which may for a short period make it impossible for her to carry out such orders. To import such a condition when the tug is already in attendance on the ship and therefore in danger of incurring damage would ... be without justification. I find that here the collision occurred while towing and there must be judgment for the defendants accordingly."

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2 [1971] 1 Lloyd's Rep. 476, 480.
3 [1953] 2 Lloyd's Rep. 699.
4 [1953] 2 Lloyd's Rep. 699 at 701.
5 [1936] P 21, 27.

The Uranienborg had also been applied by Herring CJ in one of the few earlier Australian decisions on the clause, *Australian Steam Ships Pty Ltd v Koninklijke-Java-China Paketvaart Lynen N.V. Amsterdam.*[6] Williams JA also analysed the decision in *The Impetus*[7] consistently with the decisions of Brandon J in *The Apollon* and Herring CJ in *Australian Steam Ships*.

Muir JA analysed the facts similarly, saying:

> "[64] The order to the *Koumala* by radio to "make fast starboard shoulder and starboard quarter" was not given when the *Koumala* was "in a position to receive orders direct", because of the distance between the subject vessels at that time. Before the *Koumala* could be in that position it had to be ready to respond to orders of the type identified in the definition and it had to be within hailing distance, or, at least, within close proximity to the *Pernas Arang* ..."

In applying the law to those facts he concluded:

> "[66] In order to determine whether the towing period commenced, it is necessary to apply the definition of "whilst towing" to the facts and to determine, in a practical commonsense way, whether the requirements of the definition have been fulfilled in substance. The appellant's approach, necessitated by the facts, merely looks to see if for a few seconds, at best, the requirements of the definition were technically met. Regard is had only to physical proximity of the two vessels and the fact that the *Koumala* was proceeding to carry out the radioed order. This approach is too restrictive. All the facts must 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 the *Pernas Arang* 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."

On the special leave application, the applicants argued that the Standard Conditions did not require the tug to be in a position to carry out the order and criticised Muir JA's conclusion that *The Koumala* was not within hailing distance or at least within

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6 [1955] VLR 108.
7 [1959] 1 Lloyd's Rep 269.

close proximity to the *Pernas Arang* as inappropriate in modern times where orders are made by radio. Their Honours were not persuaded to grant special leave by those arguments.

The conclusion expressed by Gummow ACJ on behalf of the three members of the High Court on the special leave application in dismissing that application was that the actual decision of the Court of Appeal on whether s 74(3) of the *Trade Practices Act* was engaged was not attended by doubt. That makes it convenient then to examine that second issue raised by the case.

Section 74(3) of the *Trade Practices Act*

Section 68 of the *Trade Practices Act* provides that any term of a contract that purports to exclude, restrict or modify the application of all or any of the provisions of that division of the Act is void. Section 74 implies a warranty in every contract for the supply by a corporation in the course of a business of services to a consumer that the services will be rendered with due care and skill and that any material supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied. This was a consumer contract because the towage contract was for less than the prescribed amount of $40,000 in s 4B of the Act. It was also relevant that the interpretation section, s 4, included "ships" in the definition of goods.

The main relevant subsection was, however s 74(3)(a) which reads:

> "(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:
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> (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;"

The interpretation of this subsection is, I expect, of greater interest to the local industry than the Court of Appeal's analysis of the Standard Conditions. Mr Thompson SC for the applicants in the special leave application, in arguing why the interpretation of this subsection justified the grant of leave, submitted that the consequence of the Court of Appeal's interpretation of the subsection would be to

increase towage costs and, perhaps, have the effect that tug operators would be less inclined to put their tugs at risk in situations of salvage or towage.

His arguments against the applicability of s 74(3) to the contract included:

- There was a contract **for** the transportation of goods, meaning the ship. He relied there on the fact that the Act expressly defined goods to include a ship;
- In the alternative, there was a contract **in relation to** the transportation of the ship;
- Further or in the alternative, there was a contract **in relation to** the transportation of the coal to be loaded on to the ship.

The defendants in their application for the grant of special leave relied justifiably on the width of the words "in relation to". In other contexts those words can bear a particularly wide meaning. There is an argument, however, that where those words create an exemption to the effect of a remedial statute they might be construed more narrowly than in other contexts.[8]

The explanatory memorandum accompanying the *Trade Practices Revision Bill* 1986 quoted in Heydon, *Trade Practices Law* at para [16.850] arguably provided some comfort to the defendants:

> "However, a new subs 74(3) will provide that the section does not apply to contracts for the storage or transportation of goods for a commercial purpose, or contracts of insurance. Contracts of insurance are covered by the *Insurance Contracts Act* 1984 and there is no need for additional regulation in this area. **In the area of transportation and storage of goods for the purpose of a business, business parties have well-established insurance arrangements which sometimes involve the limitation of liability in a way contrary to s.74. No useful purpose would be served in upsetting these arrangements, and for this reason contracts for the storage and transport of goods for a commercial purpose have been exempted from the application of the section.**" (Emphasis added.)

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[8] Cf. *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 313 and *Evans v Crichton-Browne* (1981) 147 CLR 169, 205-206.

The result in *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd,*[9] might also have been thought to assist the defendants. There Sheppard J said, in a case where the issue was whether a consignment note, requiring the packing of aluminium coils as well as their transport from Sydney to Auckland, fell outside the effect of s 74(3) in respect of the packing of the goods:

> "In my opinion the proper approach to the construction of the words 'contract for the supply… of services to a consumer' in subs 74(1) is to construe the expression broadly and in a commonsense and commercial way. A similar approach is required in relation to the words, 'a contract for or in relation to the transportation… of goods for the purposes of a business, trade…' in subs 74(3). The purpose of the contract was to secure the movement of a number of aluminium coils from Comalco's premises at Yennora near Sydney to the premises of New Zealand Can in Auckland. Necessary incidents of that contract were the picking up of the coils from Comalco's premises, the carriage of them to Mogal's depot, the packing of them into containers in which they could be shipped and the carriage of the containers to the wharf where they would be loaded on to a vessel. **In my opinion it is not right to split the contract up into one involving a contract for the supply of the various types of services that were required to achieve the purpose of the contract, namely, the movement of the coils from Sydney to Auckland. I think this contract was plainly a contract for the transportation of goods. The provisions of subs 74(3) of the Act therefore apply and operate to remove this contract from the reach of subs 74(1).**
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> There is no authority directly in point on the question. But I mention in passing the judgment of Wilcox J at first instance in *E v Australian Red Cross Society* (1991) 27 FCR 310 at 353-355; 99 ALR 601, where his Honour dealt with the suggested application of ss 71 and 74 of the Trade Practices Act to the circumstances of that case. I refer also to the judgment of Lockhart J on appeal in relation to his treatment of the appellant's argument based on s 71 of the Act ((1991) 31 FCR 299 at 304–306; 105 ALR 53)." (Emphasis added.)

As it was, Williams JA referred more particularly to the statement of Sheppard J that the words in s 74(3) be construed "broadly and in a common sense and commercial

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[9] (1993) 113 ALR 677, 689. See also *Halsbury's Laws of Australia* at para. [270-1470].

way" directing one's mind to the purpose of the contract.[10] In dismissing the arguments Williams JA expressed himself briefly:

> ""[34] To my mind the purpose of the contract between the appellant and respondent here was the towing of the respondent into port. The contract was to be performed by providing the towing services; that is why the Standard Conditions applied. Although the words "in relation to" are broad it would be, in my view, fanciful to conclude that this contract was in relation to the future transportation of the goods to be loaded onto the *Pernas Arang*.
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> [35] I agree with what was said by the Full Court of the Federal Court in *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd* (2005) 148 FCR 68, especially the passage quoted by Muir JA."

Muir JA referred particularly to an obiter dictum from that decision:[11]

> "[195] The pilotage services were provided (on this hypothesis) under a contract between Braverus and the Corporation. That contract was not for the 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 established insurance arrangements in respect thereof: Explanatory Memorandum accompanying *Trade Practices Revision Bill 1986* (Cth) at para 153; see Heydon JD, *Trade Practices Law*, Vol 2 at [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."

In rejecting an argument that *Braverus Maritime Inc* could be distinguished because a contract for towage involved services for the provision of locomotive power and contributed to the movement of goods, his Honour went on to say:

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10 See at para [33].

11 *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd* (2005) 148 FCR 68, 118 quoted by Muir JA at [2008] QCA 429 at para. [77].

> "[81] The contract was not for the purpose of transporting, carrying or taking the ship from one place to another. As the primary judge pointed out, it was for the purpose of guiding or assisting it to its berth at the completion of its unladen journey under the ship's master on the pilot's advice. The evidence of Captain Roscoe was that 'the pilot has the conduct of the ship, in all respects, including all orders concerning the ship's main engine and rudder, and the placement and manoeuvres of the tugs, to effect the berthing operation'. The ship was not 'transported' or 'taken' to the berth by the tug."

There was certainly a reasonable argument that the purpose of this contract was to secure the movement of the ship to the coal terminal to load goods, namely coal, for transport elsewhere and Muir JA did express the view that the appellant had a stronger argument where the coal to be carried was regarded as "goods". He also concluded, however, that the nexus must be between the contract and the "transportation ... of goods for the purposes of a business ... carried on ... by the person for whom the [coal is to be] transported". He pointed out that the evidence was silent as to the identity of that business and person.[12]

The High Court must have adopted a similar view and, presumably, was influenced by the apparent consistency of the decision with the obiter dictum in *Braverus Maritime Inc*. In another case evidence about the purposes of the business carried on by the person for whom the relevant goods are to be transported might be helpful but it seems more likely to me now that the subsection will be limited to contracts in relation to goods consigned, for example, on board a ship.

It may be a question of first impression, however, as many problems of construction of documents are. I must confess that my first reaction to this argument based on s 74(3) was negative. To put it another way, when my junior, Mr Franc Asis, came into my chambers with enthusiasm in the latter half of 2001, when I was still at the Bar, urging that we should plead s 74(3) of the *Trade Practices Act* on behalf of the plaintiff, a course which he eventually persuaded me should be done, I would have been very surprised if I had then been told that was the point which ensured the result for our client in the High Court.

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[12] See at para. [82].

Conclusion

I expect, however, that the consequences for the industry will not be dramatic. Section 68A of the *Trade Practices Act* permits limitation of liability for the supply of services other than goods or services of a kind ordinarily required for personal, domestic or household use or consumption. The limitation in the case of services is to the cost of the supply of the services again or the payment of the cost of having the services supplied again. That power to limit liability can be circumvented if the person to whom the services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract, something determined by a Court having regard to all the circumstances of the case including whether the buyer knew or ought reasonably to have known of the existence and extent of the term having regard among other things to any custom of the trade and any previous course of dealing between the parties.

Ms Kate Lewins delivered a paper dealing with this topic at the MLAANZ conference three years ago. It was referred to in the submissions before the Queensland courts and, I am sure, suggested some helpful arguments to the plaintiff. Her conclusion remains valid:[13]

> "Assuming that s 74 does apply to towage contracts, towage contractors would be well advised to reconsider their reliance on UK standard conditions. Either they should be finessed to account for local law; or perhaps it is time for the towage industry to come up with a set of Australian standard conditions for towage."

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[13] *What's the Trade Practices Act Got To Do With It? Section 74 and Towage Contracts in Australia,* Murdoch University Electronic Journal of Law No.1 2006 p. 58, at p. 76.