

DEVELOPMENTS IN MARITIME LAW

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1. Introduction

While the New Zealand courts have not been particularly busy with maritime cases in the last couple of years, the international nature of maritime law means that there have been a significant number of decisions in other jurisdictions which have a direct effect on our law.

As many of you will be aware, maritime law has, as a result of the nature of its subject matter, a significant international component. New Zealand law in the maritime field is founded to a very significant extent on international conventions and the principles established by English courts. In our admiralty jurisdiction, New Zealand law has its origins in the law developed by the Court of Admiralty in England and the New Zealand High Court, sitting in its admiralty jurisdiction, applies the law developed by that Court. In other areas of maritime law, such as the law relating to charterparties and the carriage of goods by sea, there is relatively little New Zealand case law and the principles established by the case law in other jurisdictions, in particular in the English courts, will often be applied by our courts. This need to look at other jurisdictions applies with particular force where the courts are interpreting an international convention which applies in New Zealand. The consistent international application of such conventions is particularly important for maritime commerce and courts have to be particularly conscious of the way in which a particular Convention has been interpreted internationally to ensure that the needs of certainty and consistency are met.

2. Carriage of goods by sea

New Zealand, like many other countries in the world, has adopted the Hague-Visby Rules ("HVR") as part of its law. Under section 209 of the Maritime Transport Act 1994 ("MTA"), the HVR apply by force of law. The HVR are a set of international rules adopted by international convention which regulate

liabilities for the carriage of goods by sea. Three recent decisions in the English courts have decided significant points under the HVR which are of relevance to our law. To an extent, the fact that points of construction under the HVR are still being decided some 80 years after the Convention which gave us the original Hague Rules is surprising, but that is the ongoing process by which the operation and application of such an international agreement is clarified by courts sitting around the world.

In *The Rafeala S* ¹ the House of Lords upheld the decision of the English Court of Appeal (and the leading judgment of Rix LJ) that a straight bill of lading was a bill of lading under Article 1(b) of the HVR. This meant the HVR applied to the shipment which gave rise to the claim before the courts. The HVR are expressed to apply to contracts of carriage covered by a "bill of lading or any similar document of title". After lengthy consideration of the background to the original Hague Rules, the textbooks and the arguments of principle the Court of Appeal had reversed the decision of the experienced maritime arbitrators and the Commercial Court judge and held that a straight bill of lading was a bill of lading for the purposes of the HVR. (The court also held that such a bill of lading was "a similar document of title".) The conclusion that a straight bill of lading was a bill of lading under the HVR was upheld by the House of Lords. The central argument of principle in this case was whether a bill of lading, which was not freely negotiable, but could only be negotiated to the named consignee, was still a bill of lading under the HVR. The straight bill of lading shared the other features of a bill of lading, namely that it was a receipt evidencing the terms of the contract of carriage and a document of title which had to be produced to obtain the goods, but it could not be said to be negotiable in the same way as a standard "order" bill of lading. Both Rix LJ and their Lordships concluded that a straight bill of lading sufficiently shared the general features of a standard bill of lading to be a bill of lading within the HVR.

It should be noted that work has been ongoing for a number of years to produce a new cargo liability regime which, when complete, will be introduced to replace the Hague, Hague-Visby and Hamburg Rules. This new regime, if

adopted, will create significant changes. It is likely to rely on other matters apart from the nature of documentation issued for its application.²

In *The Jordan II*³ the House of Lords declined to overrule earlier authority which had been followed for many years, in relation to the nature of the obligations under the HVR. Under Article III Rule 2 of the HVR, a carrier is obliged to “properly and carefully load, handle, stow, carry, keep careful and discharge the goods carried”. In earlier decisions⁴ the English courts had held that there was nothing to prevent a carrier contracting for others to perform these obligations and that such an agreement defined the scope of the carrier’s responsibility by contract rather than limiting the application of the HVR and, as a result, did not fall foul of Article III, Rule 8 of the HVR. Article III, Rule 8 renders null and void and of no effect a “clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this Article, or lessening such liability otherwise than as provided in the Rules”. In the *Jordan II*, a carrier had carried goods on FIOST charterparty terms (“free in, out, stowed and trimmed”.) The bill of lading incorporated the charterparty terms. When the cargo was discharged, it was alleged by the receivers that the cargo had been damaged due to the manner of stowage and the manner of discharge. The terms of the charterparty, which had been incorporated into the bill of lading, when read together, provided that responsibility for stowage would be undertaken by the charterer and shipper. Responsibility for discharge lay with the charterer and receiver. The owners defended the claims and argued that they were not liable. In the High Court and in the Court of Appeal, the courts found in favour of the owners. The clauses in the charterparty and bill of lading were effective to transfer responsibility for cargo work at the port of the loading and at the port of discharge. They were not null and void under Article III, Rule 8.

¹ *JJ MacWilliam Co Inc v Mediterranean Shipping Co SA* [2005] UKHL11

² see www.uncitral.org for the latest draft of the new Convention. Transport Law Group

³ *Judal Iron and Steel Co Ltd & Ors v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)*, [2004] UKHL 47

⁴ See dictum of Lord Devlin in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 318 and *G.H. Renton & Co Ltd v Palmyra Trading Corporation of Panama (The Caspians)* [1952] AC 149

In the House of Lords, the cargo claimants asked their Lordships to depart from earlier established precedent and strike down the contractual clauses under Article III Rule 8. Their Lordships declined to do so. Lord Steyn, who gave the leading judgment, stressed the importance of certainty in international trade law. The position established in the earlier case law could only be departed from if it could be demonstrated that it had worked unsatisfactorily in the market place and had produced manifestly unjust results. Their Lordships did not find that this high threshold had been reached in this case. None of the arguments advanced by cargo owners to support a literal approach to Article III, Rule 2, which would impose a duty on the owners which could not be transferred by contract, were accepted. Their Lordships found that the approach in the earlier cases was not based on any technical rules of English law, but on “a perspective relevant to the interests of maritime nations generally”. Accordingly, the international perspective and the need for settled principle supported the owners’ position.

This decision of the House of Lords has made it clear that a carrier can contract with the bill of lading holder so as to provide that it undertakes no responsibility for the operations of loading, stowing and discharge. It should be noted that there may still be circumstances where the carrier may be liable for the improper performance of the operations of loading, stowage and discharge under a bill of lading, notwithstanding such contractual arrangements. If the loading operations make the ship unseaworthy, then the carrier will remain responsible, because the obligation to provide a seaworthy ship under the Article III, Rule 1, is a non-delegable, non-transferable duty. Liability may also be incurred by the owner where the master actively intervenes in loading and stowing operations which are performed by the charterer and its stevedores under the contractual arrangements.

The third decision concerning the application of the HVR concerns the application of the package limitation under the HVR where a carrier stows cargo on deck in breach of contract. In *The Kapitan Petko Voivoda*⁵ the Court of Appeal upheld the decision of the Commercial Court in which Justice

⁵ 2003 EWCA CW451; [2003] 2 Lloyd, Rep 1,

Langley had declined to follow the earlier decision in *The Chanda*⁶. In *The Chanda*, Justice Hirst had decided that a carrier which stowed cargo on deck in breach of contract could not rely on the package limitation under the HVR. This decision was followed by the New Zealand High Court.⁷ Ultimately, the decision came down construing the provisions of the relevant Article of the HVR – Article IV, Rule 5. It was submitted by the cargo claimants that a breach of the obligation to stow under deck by the carrier was so significant that the package limitation could not apply. The argument was rejected primarily because the Court found that the use of the words “in any event” in Article IV, Rule 5 meant that the package limitation applied whether the breach of contract was serious or not and whether or not the cargo was stowed above and below deck.

In my view each of the above decisions is likely to be followed and applied in New Zealand.

3. International Conventions

In the regulation of shipping operations, international convention plays a very significant role. New Zealand now has in place, under the rule making powers under the MTA 1994, the mechanism by which to bring international conventions relating to such matters as the safe operation of ships and the prevention of marine pollution, quickly into New Zealand domestic law, once they have been ratified by the New Zealand Parliament. This means that those working and advising in the maritime area have to watch for the development and ratification of international Conventions.

In the last 10 years, New Zealand has made significant advances in bringing the important international Conventions dealing with the safe operation of ships and the prevention of pollution into our law.⁸ In the near future we are likely to see increasing international cooperation in these areas and the consistent development and revision of international conventions.

⁶ [1989] 2 Lloyd, Rep 294

⁷ *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd (The Pembroke)* [1995] 2 Lloyd; Rep 290

⁸ For a summary of the current position in relation to the major conventions relating to marine pollution see the chapter in marine pollution in *Environmental and Resource Management Law (2005) Butterworths*

In the near future we will see Conventions which as the Hazardous and Noxious Substance Convention (“HNS”) and the Bunkers Convention come up for ratification. The HNS applies a civil liability regime, similar to the regime where currently applies to the carriage of oil in bulk, to the carriage of hazardous and noxious substances. The Bunkers Convention provides a liability regime for spills from bunkers. In these and other areas, Conventions, if ratified, can be brought into New Zealand law relatively quickly by the rule making process under the MTA.

The international nature of the maritime business is reflected in the sources of law which we rely on in New Zealand. Just as maritime commercial people have to work in a world wide market, maritime lawyers have to work with a range of international sources of law which have a direct influence on New Zealand law. Indeed, this is the charm and attraction of this area of the law. I hope that this short paper has given you an insight into the nature of maritime law and how it develops.