Case Notes

Tasman Orient Line CV v Alliance Group Ltd (The "Tasman Pioneer") [2004] 1 NZLR 650; [2003] 2 Lloyd's Rep 713 (HC)

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Although the limitation of liability provisions in the *Maritime Transport Act 1994* (NZ) ("MTA") have been in force for almost a decade, *The Tasman Pioneer* is the first, and to date only, case in which a limitation decree has been granted in New Zealand.[1]

Facts

This litigation arose from the grounding of the vessel the *Tasman Pioneer* off the coast of Japan in 2001. The ship, sub time-chartered by Tasman Orient Line CV, was travelling from New Zealand to various ports in Asia carrying New Zealand cargo. It was running late. On a "dark and stormy night" the master decided to take a shortcut by sailing through a fairly narrow channel which had no navigational aids. The bad weather had dramatically reduced visibility and had the effect of rendering the ship's radars unstable. Unsurprisingly, the ship ran aground, resulting in substantial damage to the cargo.[2]

The judgment was concerned with two applications. In the first, Tasman Orient sought a decree of limitation pursuant to the MTA. In the second application, Alliance Group Ltd, one of the cargo interests, made an application for an order that, in the event there was a decree of limitation, a limitation fund be constituted.

Case

The case came before Williams J in the Auckland High Court. The first application was always going to succeed, as it was not opposed. Indeed, because of a presumption in the High Court Rules,[3] the Court was obliged to make a limitation decree. However, due to the lack of New Zealand precedent on the topic, His Honour nevertheless examined the limitation issue in detail.

In order for a limitation decree to be granted, a sub-time charterer had to come within the definition of "owner" in the MTA. The term "owner" was defined to include "charterer", although it was not clear whether this embraced only a demise charterer, or whether it extended to other forms of charterer. After a careful review of limitation of liability, including its history both in England and in New Zealand, the Court concluded that the term did include a sub-time charterer.

This conclusion seems entirely correct, especially since Tasman Orient was the carrier under the various bills of lading. In fact, the English Court of Appeal recently

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[1] No limitation decree was granted in the earlier unreported decision *Sea Tow Ltd v The Ship "Katseui Maru No 8 KXN"* (HC Auckland, AD 736/96, 8 May 1996, Salmon J).

[2] For some pictures of the casualty see the Vero Marine website at <http://www.veromarine.co.nz/dirvz/marine/marine.nsf/Content/PhotoFeature0009> at 22 April 2004.

[3] See Rule 792(8)(c) of the *High Court Rules*: "If at the hearing of the application it appears to the Court that it is not disputed that the plaintiff has a right to limit the plaintiff's liability, the Court must make a decree limiting the plaintiff's liability and fix the amount to which the liability is to be limited…"

commented that the proposition that a charterer can limit its liability in respect of cargo damage is "obviously correct".[4]

The remaining issue before a limitation degree could be granted was whether Tasman Orient's conduct disentitled it from a decree in its favour. The Court had to be satisfied that the negligent navigation was not a result of Tasman Orient's personal act or omission done with intent to cause damage, or done recklessly and with knowledge that damage would probably result.[5]

The New Zealand legislation paraphrases article 4 of the *Convention on the Limitation of Liability for Maritime Claims* 1976 ("The Limitation Convention"). The authorities surrounding article 4 of the Limitation Convention make it clear that the "personal act or omission" is much more than merely an act of an agent of Tasman Orient; it must be a personal act or omission of someone who *was* Tasman Orient at that particular time. This is an extremely hard standard to meet and in fact "there have been no examples in English law of the defence being successfully run in the maritime context".[6] Thus the higher limits under the Limitation Convention are balanced with the fact that it is almost impossible to break them.

The "personal act or omission" phrase in section 85 of the MTA and article 4 of the Limitation Convention is very similar to a phrase used in other maritime conventions. In *The Pembroke*,[7] Ellis J in obiter dicta suggested that the reckless stowing of machinery on board by the master could be attributed to the carrier under the Hague-Visby Rules. Williams J refused to follow *The Pembroke* on this point, preferring to rely on the traditional views expressed in *The Lion*[8] and *The European Enterprise*.[9]

The Court therefore concluded that Tasman Orient could limit their liability against anyone, except perhaps against the ship's owner, Rimba Shipping Company Inc. Subsequently it has been held that charterers cannot limit their liability against owners in respect of claims for the loss of the ship, as such claims do not fall within article 2 of the Limitation Convention.[10]

Since on the facts it was clear that the master's actions could not be said to be those of Tasman Orient (especially since the master was employed by either the owner or ship management company), a decree of limitation was ordered which limited Tasman Orient Line's liability from more than NZ$21 million to around NZ$7 million.

The second application concerned the constitution of a limitation fund. This is where the problems associated with the "peculiar and unsatisfactory technique"[11] of paraphrasing the convention came to the fore. When the statutory provision governing the constitution of a limitation fund was examined, a problem emerged. Section 89 of the MTA reads:

> **89. Court may consolidate claims**
> (1) Where 2 or more claims are made or expected against any person who is alleged to have incurred liability in respect of any claim of a kind referred to in section 86(2) of this Act, that person may apply to the High Court to have the claims consolidated.

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[4] *CMA CGM SA v Classica Shipping Co Ltd* [2004] 1 Lloyd's Rep 460 (CA), [16].
[5] MTA, s 85(2).
[6] *MSC Mediterranean Shipping Co SA v. Delumar BVBA (the MSC Rosa M)* [2000] 2 Lloyd's Rep 399, [14].
[7] *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd (The Pembroke)* [1995] 2 Lloyd's Rep 290.
[8] *R.G. Mayor (T/A Granville Coaches) v P&O Ferries Ltd (The Lion)* [1990] 2 Lloyd's Rep 144.
[9] *Browner International Ltd v Monarch Shipping Co Ltd (The European Enterprise)* [1989] 2 Lloyd's Rep 185.
[10] *CMA CGM SA v Classica Shipping Co Ltd*, supra n 4.
[11] Broadmore, Tom, "New Zealand" in Griggs, Patrick, and Williams, Richard, *Limitation of Liability for Maritime Claims* (3rd ed) LLP Ltd, London, 1998 at 251.

> (2) On any such application, the Court may –
> (a) Determine the amount of the applicant's liability, and distribute that amount rateably among the several claimants; and
> (b) Stay any other proceedings pending in the same or any other Court in relation to the same matter; and
> (c) Proceed in such manner and give such directions relating to the joining or excluding of interested persons as parties, the giving of security, the payments of costs, or otherwise, as the Court thinks just.

The only Rule on the topic simply provides that any order limiting liability "may make any provision authorised by section 89".[12]

The problem was that section 89 allows for consolidation of claims "referred to in section 86(2) of this Act". While section 86(1) of the MTA refers to claims which *can* be subject to limitation of liability, section 86(2) actually refers to claims which are *not* subject to limitation. Therefore, according to the literal wording of the legislation, the Court had no power to order a limitation fund to be constituted.

There was no argument as to whether section 89 of the MTA was a result of a drafting error and if so whether it was one that could be corrected by the Court.

In his judgment, Williams J examined the legislative history of section 89 of the MTA. Essentially the anomaly entered the legislation by way of an amendment in 1987 to the predecessor of the MTA, the *Shipping and Seaman Act 1952* (NZ). Further research indicated that the anomaly entered the 1987 Amendment Act as a result of a submission from the Ministry of Transport to the Communications and Road Safety Committee who in turn recommended the change when it reported back to the House of Representatives. The anomaly was carried through into the MTA when it was enacted in 1994. Thus the evidence was of a deliberate change rather than a drafting error, although it is fair to say that it was a change without an obvious reason. This meant the Court did not feel able to construe the reference in section 89 of the MTA to section 86(2) as being a reference to section 86(1).

The Court therefore held that it did not have jurisdiction to order that a fund be constituted. This conclusion meant the issue of whether a fund should be ordered where liability was contested did not have to be answered. The Court did say that it would have accepted a Club letter from Tasman Orient's P&I Club instead of a payment into court.

Comment

In the writer's opinion the reference in section 89 of the MTA to section 86(2) is a drafting error. There is no good reason why section 89 should refer to claims which are *not* subject to limitation, while there are many good reasons why it should refer to claims which *are* subject to limitation. Furthermore, it seems that the literal reading of section 89 effectively renders Rule 792(11) superfluous. Paul Myburgh has also pointed out that section 88(1)(a) of the MTA states that the units of account shall be converted to New Zealand dollars on the date on which the limitation fund is constituted.[13] He argues that this provision is redundant unless section 89 is interpreted in such a way that does not preclude the court from exercising an inherent jurisdiction to order the constitution of a limitation fund.

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[12] *High Court Rules*, Rule 792(11).
[13] Myburgh, P., "The limitations of the Limitation Convention" (2003) 25 *Maritime Advocate* 23.

Although there are cases where the reference in an Act to one subsection has been read as referring to another subsection,[14] the added difficulty here was that the change appeared to have been deliberately made not once but twice. Even if section 88(1)(a) had been referred to the Court, it is doubtful that the result would have been any different.

This case illustrates the danger of giving effect to international conventions by paraphrasing them. The text of the Limitation Convention was settled on after substantial debate. However, the New Zealand legislature seems to have thought it could improve on this international effort by altering the text of the Convention. This odd technique introduced anomalies and created difficulties for all involved. It seems that the technique of paraphrasing conventions is giving way to the superior method of placing the convention in a schedule and declaring it to have the force of law,[15] although the old technique still reappears from time to time.

In some ways the case highlights more fundamental difficulties within Common Law legal systems in relation to the effect of international law. Although treaties once ratified are binding at international law, they have no effect at domestic law until incorporated into legislation.[16] The reasoning behind this dualist doctrine is that entering into treaties is a function of the executive,[17] and it would be wrong for the executive to bind the country without Parliamentary approval. Perhaps in our modern globalised world this strict dichotomy between international and domestic law needs to be softened.

The case also illustrates the deficiencies with the Convention itself. The Convention leaves matters of procedure up to the jurisdiction where the litigation takes place. Hence, even if the Convention achieved universality of the substantive law, the law could be applied quite differently in different forums, watering down the noble aim of uniformity. This deficiency is seen in the present case in that, even if the Court had held that there had been a correctable drafting error, there was the added difficulty that there was no application for consolidation before the Court.[18]

In conclusion, this was a very interesting case, and it is perhaps not the last time we will hear of the *Tasman Pioneer*, as Tasman Orient are disputing any liability whatsoever by relying on an exclusion under the Hague-Visby Rules.

[14] *Lindner v Wright* (1976) 14 ALR 105 (NT SC).
[15] See for example the *International Convention on Salvage* 1989 which is found in Schedule 17 to the MTA and by section 216 of the MTA declared to have the force of law.
[16] Unincorporated treaties are frequently taken into account in judicial review cases (see for example *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA)) and to resolve statutory ambiguities.
[17] *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (PC).
[18] See the terms of s 89 of the MTA.