

Shipping Law

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Legislative Developments

There were no major legislative changes in the period under review. There may, however, be some significant developments on the horizon. For the last few years, the Ministry of Transport has been signalling a comprehensive review of the Maritime Transport Act 1994 (“the MTA”), the omnibus statute that regulates most aspects of the coastal and international New Zealand shipping industry. This news was welcomed by the New Zealand maritime community. The MTA was produced in a political pressure cooker. Abolition of cabotage and liberalization of coastal shipping was the only morsel subjected to intensive taste-testing — and even that had to be sent back to the parliamentary kitchen afterwards. The rest of the dish was served up with unseemly haste. Over a decade later, a thorough review of the more undercooked provisions of the MTA is long overdue. It is therefore worrying that the review of the MTA seems to have dropped off the legislative menu in the latest Ministry of Transport annual reports and statements of intent. The General Election next year is likely to delay the review further. Given that over 99 per cent of New Zealand’s international economic activity depends on a high-quality international maritime law regime, it would be inexcusable if a comprehensive review of the MTA were to be elbowed off the Ministry’s policy agenda by more photogenic and voter-friendly issues like transport congestion in Auckland, public transport, minority access to transport, and climate change.

The Ministry has recently released three discussion documents. The first of these relates to coastal shipping. In its most recent statement of intent, the Ministry indicated that, in response to a recent New Zealand Shipping Federation report, *From Roadways to Waterways: Enhancing New Zealand’s Surface Transport Options*, it had decided to develop “a discussion document that will explore the current coastal shipping sector in New Zealand, overseas trends and benefits of coastal shipping”; see Ministry of Transport, *Statement of Intent: 2007–2010*, 29 (<http://www>).

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transport.govt.nz/assets/NewPDFs/MOT-SOI-2007-2010.pdf). Aficionados of Ministry of Transport discussion documents will have read this news with a sense of déjà vu, recalling as we do the key recommendations in the Ministry's 1990 discussion document, *A New Course for Coastal Shipping*, and the Ministry's 2000 shipping industry review, *A Future for New Zealand Shipping*, (discussed in [2001] NZ Law Review 105–107), which have yet to be implemented. Any naïve excitement that, a mere 17 years after first setting a new course on coastal shipping we might actually be getting under way, is immediately dashed on a closer reading of *Sea Change: Transforming Coastal Shipping in New Zealand*, November 2007 (<http://www.transport.govt.nz/assets/NewPDFs/MOT13222-Sea-Change.pdf>) ("*Sea Change*"). For a start, it is not so much a discussion document as a "draft strategy". The Government has clearly already decided that, in order to reduce land transport congestion and to assist in our international climate change obligations, New Zealand coastal shipping needs to double in volume, picking up at least 30 per cent of all interregional domestic freight in New Zealand by 2040. While this draft strategy will no doubt be welcomed by the shipping industry, it is hardly uncontroversial. Land transport lobby groups might have a fair bit to say about it. In addition, the environmental impact of commercial shipping on ports, coastal regions, and the general environment is coming under increasing scrutiny, and the news is not all positive; see, for example, Intertanko, "A Comprehensive Strategy for the Reduction of Air Pollution from Ships", 7 October 2007 (<http://www.intertanko.com/templates/Page.aspx?id=42839>); Howden, "Shipping pollution 'far more damaging than flying'", *The Independent*, 11 October 2007 (http://environment.independent.co.uk/climate_change/article3043734.ece).

Long on rhetoric and glossy photography, and short on analysis, *Sea Change* looks very much like a recycled, dumbed down, and prettified version of the rejected 2000 shipping industry review, with most of the more contentious issues elided. For example, there is no real attempt to grasp the nettle of eradicating anticompetitive practices in coastal and international New Zealand shipping. We are merely told that policy issues "could" include the scale, efficiency, and competitiveness of ports; see *Sea Change*, 35. The issue of competition between shipping companies is similarly glossed over. On the equally controversial issue of cabotage, the draft strategy confirms that the Government will "retain the policy underlying" s 198 of the MTA, but notes that "clarification may be needed of how Section 198 should be interpreted in relation to carriage of coastal cargo by overseas transit vessels"; see *Sea Change*, 36. This is, of course, a very far cry from 1994, when the Labour Party denounced the National Party's open coast shipping policy as a "national disgrace" and vowed to "rectify the situation and give protection back to New Zealanders and to New Zealand shipping companies"; see Braybrooke, (1994) 540 New Zealand Parliamentary Debates, 1616–1617.

It is difficult to see how the stated goal of doubling New Zealand coastal shipping by 2040 will ever be reached while there is no apparent political will to make difficult or unpopular decisions touching on the competitiveness and efficiency of the large commercial players in the New Zealand shipping industry.

The second Ministry of Transport discussion document concerns port and harbour and navigation safety management (<http://www.transport.govt.nz/assets/NewPDFs/portandharbourweb.pdf>). This is a particularly welcome and overdue initiative. While Maritime New Zealand's development of a voluntary New Zealand Port and Harbour Marine Safety Code in 2004 was a step in the right direction, it arguably failed to go far enough to remedy the radical damage inflicted on New Zealand's port and harbour safety system by the privatization of port companies and local government reforms in the 1990s, which ultimately contributed to the groundings off the New Zealand coast of the *Jody F Millennium*, *Tai Ping*, and *Capella Voyager* in 2002 and 2003; see [2003] NZ Law Review 287–289; Myburgh, “New Zealand Port and Harbour Marine Safety Code: Gap-Plugging or Panacea?”, Maritime Law Association of Australia and New Zealand Annual Conference, Napier, 31 March 2007.

It is to be hoped that this discussion document, which provides a comprehensive and substantial analysis of the issues, will attract a significant response from all sectors of the maritime community, and will result in central government finally reassuming an appropriate degree of responsibility for the regulation of port and harbour and navigation safety management in New Zealand.

The third Ministry discussion document provides an opportunity for public comment on the proposed implementation of four international maritime environmental Conventions or Protocols promulgated under the aegis of the International Maritime Organization: namely, the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001; the 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims 1976; the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil 1973; and the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000.

It must be said that New Zealand's track record in signing up to international maritime environmental Conventions is not exactly stellar. Indeed, one Australian commentator has characterized New Zealand's persistent non-involvement in international maritime environmental law as involving “indolence, or some such similar quality”; see White, “Oil Pollution in the Australian and New Zealand Region” (1993) 67 ALJ 191, 200. While it is obvious that New Zealand is still playing catch up with the implementation of these four Conventions and Protocols, this initiative is to be applauded,

and it is hoped that the consultation and implementation process will progress smoothly and quickly. The lengthy delay in implementing some of these international instruments highlights the need for New Zealand to be more actively involved in the work programme of the International Maritime Organization, and for greater priority to be given by the Ministry of Transport to the more timely domestic enactment of relevant international maritime law instruments.

Limitation of Liability for Maritime Claims

Limitation of liability for maritime claims is one of the unique features of international maritime law, and, together with the concept of corporate limited liability, it represents one of the more significant general exceptions to the private law principle of full compensation for civil wrongs. Although there is ongoing debate about its genesis, the concept of limitation of liability for maritime claims was well established in the Netherlands by the 17th century, as evidenced by Grotius' observation (2.11.13, *De Jure Belli ac Pacis*, Morrice (trans), London, 1715):

[I]t is very ill done of the *Roman Laws*, to make every Man of the *Ship* become Responsible for whatever the *Master* does. ... Insomuch that in *Holland*, where *Merchandize* has of late mightily flourished, this *Roman Law*, neither *formerly*, nor *now*, is of any Force. Nay, on the contrary it is order'd, that the whole *Company* in *general* shall be answerable no farther, than for the *Value* of the *Ship*, and of the *Goods* that are in it.

From Europe, the concept of limitation of liability spread throughout the maritime world, to the extent that nowadays almost all maritime jurisdictions apply some form of limitation of liability, either based on the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957 or the Convention on Limitation of Liability for Maritime Claims 1976 ("the Limitation Convention 1976"), or on domestic statutes (most notably the United States, which has refused to sign up to either of the Limitation Conventions, and still bases its limitation of liability regime on the Limitation of Vessel Owners' Liability Act 1851, 46 USC app §§181–189 (1994)).

New Zealand is a signatory to the Limitation Convention 1976. As discussed previously in this Review and elsewhere, the Limitation Convention 1976 has been given domestic effect in New Zealand in a highly piecemeal and unsatisfactory fashion, by redrafting and paraphrasing some key Convention provisions, but not others, in Part VII of the MTA; see [2005] NZ Law Review 295–298; Myburgh, "The Limitations of the

Limitation Convention” (2004) 25 Maritime Advocate 23–24 (http://www.maritimeadvocate.com/i25_newz.php). The shortcomings of this drafting and implementation technique were graphically exposed in *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650, where Williams J granted the plaintiff’s application for a decree limiting its liability, but went on to conclude that there was no jurisdiction in New Zealand to constitute a limitation fund, due to Parliament’s failure to enact faithfully Art 11 of the Limitation Convention 1976 regarding the constitution of limitation funds, and to the nonsensical drafting of s 89 of the MTA. Section 89 provides that the court can, on application, consolidate limitation claims, determine the amount of the owner’s liability, and distribute this amount rateably among all claimants, but only in respect of those claims in s 86(2) that the Act (and the Convention) expressly says are *not* subject to limitation of liability!

The problems with the drafting of Part VII of the MTA, and broader concerns about the justice of the concept of limitation of liability itself, were again brought to the fore in proceedings arising from a tragic incident in 2002 in the Saronikos Gulf, 1.5 miles off the coast of Greece. A rigid inflatable boat (“RIB”) owned by Yachting New Zealand Inc (“YNZ”) and driven by Kendall, collided with Birkenfeld, an American athlete, on her windsurfing board. Birkenfeld suffered severe injuries as a result of the collision, is now confined to a wheelchair, and has been diagnosed as suffering from post-traumatic stress disorder. Birkenfeld brought a claim in Wellington for \$15 million in damages against Kendall, YNZ and the International Sailing Federation Ltd, a United Kingdom entity (although the claim against the third defendant was subsequently abandoned).

In *Yachting NZ Inc v Birkenfeld* [2005] NZAR 727, YNZ sought a decree limiting its liability to a total sum of less than NZ\$400,000 on an application of the tonnage formula in s 87(1)(a) of the MTA, which provides that ships of “not more than 300 gross tons” are entitled to limit liability to 166,677 Special Drawing Rights or SDRs (roughly NZ\$345,000 as one SDR is currently worth around NZ\$2.07). YNZ’s argument was that it met all the requirements of the MTA: it was the “owner” of the RIB (s 85(1)(a)); the RIB was a “ship” (s 85(1)(a) read with s 84); and Birkenfeld’s claim for personal injury was “directly connected with the operation of the ship” (s 86(1)(a)) and therefore subject to limitation of liability. YNZ further argued that Birkenfeld could not discharge the onus of breaking limitation by establishing that YNZ had caused her injuries intentionally, or recklessly and with knowledge that such injuries or damage would probably result (s 85(2)). After examining the contractual and factual relationship between YNZ and Kendall, Keane J held that any fault on the part of Kendall could not be attributed to YNZ, which was entitled to a decree limiting its liability.

Keane J’s decision to grant a limitation decree to YNZ was unsuccessfully appealed by Birkenfeld to the Court of Appeal; see *Birkenfeld v Yachting*

NZ Inc [2007] 1 NZLR 596. Leave to appeal to the Supreme Court was subsequently declined; see *Birkenfeld v Yachting NZ Inc* [2006] NZSC 93; [2007] 1 NZLR 596, 605.

The arguments against limitation of liability raised by Birkenfeld, who represented herself, were: first, that r 792 of the High Court Rules 1985 had not been complied with; second, that the RIB was not a “ship” for the purposes of s 85 of the MTA; and third, that, in any event, the effect of Art 15(2) of the Limitation Convention 1976 was to exclude small vessels under 300 tons like the RIB from the limitation of liability regime altogether.

As to the first argument, r 792(8)(d) provides that, if it appears that any defendant “does not have sufficient information to enable the defendant to decide whether or not to dispute that the plaintiff has a right to limit the plaintiff’s liability”, the court must give appropriate directions to enable the defendant to obtain the appropriate information and must adjourn the hearing. In the High Court, Birkenfeld sought an adjournment on the basis of the considerable difficulties she faced with the case as a layperson, and because she would be arguing that the RIB was “neither a cargo (shipping) interest or a cruise industry interest” (Defendant’s Memorandum, 11 July 2005). Keane J refused to grant an adjournment as there was no clear indication what information she was seeking. In the Court of Appeal, Birkenfeld clarified that she sought further information about her arguments that the RIB was not a “ship” for the purposes of the Limitation Convention 1976, and the interrelationship between that Convention and the International Convention on Tonnage Measurement of Ships 1969 (“the Tonnage Convention”). The Court of Appeal noted that r 792 “reflects the position in the United Kingdom” (see the Civil Procedure Rules 1998 (UK), r 61.11; Practice Direction to CPR Part 61 — Admiralty Claims, para 10.16; Form ADM21, *Declaration as to Inability of a Defendant to File and Serve Statement of Case under a Decree of Limitation*, March 2002) and that its purpose is to enable the defendant to decide whether to dispute limitation of liability (para 27). As such, its focus is on matters of fact rather than issues of law. The Court noted that, although Birkenfeld had been put on notice in early 2005 of YNZ’s intention to apply for a decree limiting liability, and the basis on which it intended to apply, she had failed to ask for further information at that point, and was therefore not entitled to a further adjournment.

Given the ancient pedigree of maritime law, it is a matter of some bemusement to non-maritime lawyers that there should still be ongoing debate over what is, or is not, a “ship”. The debate usually involves one or more of three broad issues: whether non-traditional structures such as uncompleted vessels, hulks, dredges, or oil rigs are ships (see, for example, the gloriously entitled *Fletcher Steel v Un-named Double Ended Gravel Dredge* (HC Dunedin, AD 22, 27 July 1988, Holland J) where a floating gravel dredge and floating screening plant were held not to be ships); the

non-traditional use and operation of a vessel other than in “navigation” (see, for example, *Steedman v Scofield* [1992] 2 Lloyd’s Rep 163 and *R v Goodwin* [2006] 1 Lloyd’s Rep 432 (UKCA) where “messing about” on a jet ski was held not to amount to a ship “used in navigation”, but compare *Thompson v Police* (HC Wellington, AP 250-92, 21 December 1992, Gallen J) where a kayak in a political demonstration was held to be a ship); and where a vessel lies on the somewhat fluid divide between “ships” and “boats” (which can manifest itself in arguments over size, ocean-going ability, and mode of propulsion).

There is simply no uniform maritime law definition of what constitutes a ship. The answer is very dependent upon the specific statutory context and legal issue being analysed. It is therefore disappointing that in the High Court in *Birkenfeld* Keane J held, without any citation of authority, that “there can be no issue” that the RIB was a “ship” as defined in s 84 of the MTA, since “[e]ven a windsurfing board can be” (para 20). In fact, the authorities, such as they are, would tend to suggest that surfboards and windsurfing boards will not normally be regarded as ships, because they fail to meet the fundamental criteria of a hollow vessel-like structure and an ability to navigate, at least in the stricter *Steedman* or *Goodwin* sense; see *Raft of Timber* (1844) 2 W Rob 251, 255; 166 ER 749, 751; *The Mac* (1882) 7 PD 126 (UKCA), 131; *Polpen Shipping Co Ltd v Commercial Union Assurance Co Ltd* [1943] KB 161, 167; *Wells v The Owners of the Gas Float Whitton No 2 (The Gas Float Whitton No 2)* [1897] AC 337 (HL), 345.

The Court of Appeal examined this issue more closely. The Court noted Birkenfeld’s argument that most of the cases referred to by YNZ were not relevant, because they dealt with the definition of a “ship” in other statutory contexts (para 31). The Court further declined, with respect correctly, to apply the dubious line of authority in *Steedman* and *Goodwin* to the case before it, although its stated reason for doing so — that *Goodwin* “seems to turn on the particular issues involved with jet skis” — is less than compelling (para 38).

The Court of Appeal then considered the crux of Birkenfeld’s argument: that the Limitation Convention 1976 was only ever intended to apply to commercial shipping; and that *Smith v Perese* [2006] NSWSC 288, which is apparently the only case in which the Limitation Convention 1976 has been held to apply to a small, non-seagoing craft, should be distinguished, as it involved a commercial abalone diving vessel. The Court acknowledged that the original rationale of the Limitation Convention 1976 was to protect international commercial shipping companies from unlimited liability (para 33). However, the Court, like the Supreme Court of New South Wales in *Perese*, refused to restrict itself to the original rationale for the Limitation Convention 1976, or to the paradigm of the “seagoing ship” referred to in Art 1(2) thereof. Instead, the Court applied as the “critical definition” the

extensive definition of “ship” in s 84 of the MTA, which provides that a ship means “every description of vessel (including barges, lighters, and like vessels) used or intended to be used in navigation, however propelled; and includes any structure (whether completed or not) launched and intended for use as a ship or part of a ship; and also includes any ship used by or set aside for the New Zealand Defence Force” (para 35).

In reaching this conclusion, the Court noted (para 36) that the MTA is to be read “in the context of the international law of the sea and, if possible, consistently with that law”; see *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA), 57. The Court’s reliance on *Sellers* in this context is somewhat ironical, in that Keith J in *Sellers* read *down* the provisions of the MTA to comply with the texts of relevant international Conventions to which New Zealand is a party. However, in *Birkenfeld* the Court of Appeal was of the view that the extensive definition in s 84 of the MTA was consistent with the Limitation Convention 1976, because Art 15(2) provides:

A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are:

- (a) according to the law of that State, ships intended for navigation on inland waterways;
- (b) ships of less than 300 tons.

A State Party which makes use of the option provided for in this paragraph shall inform the depositary of the limits of liability adopted in its national legislation or of the fact that there are none.

New Zealand, like Australia, has made no notification in respect of Arts 15(2)(a) or 15(2)(b) of the Limitation Convention 1976. Following the reasoning in *Perese* (paras 185–186), the Court of Appeal in *Birkenfeld* held that the effect of Art 15 of the Limitation Convention 1976 is that the Convention “does apply to ships of less than 300 tonnes [sic] unless provision is made otherwise” (paras 42–43). It should be noted in passing that the Court appears to have confused metric tonnes (a measure of mass equal to 1,000 kilograms) with gross tonnage (a measure of the moulded volume of all enclosed spaces of the ship) throughout its judgment. This howler has unfortunately been carried through into the reported versions of the Court of Appeal judgment.

The Court of Appeal also rejected *Birkenfeld*’s argument that, for the purposes of establishing the limitation on liability, ships’ tonnage is to be measured with reference to the Tonnage Convention. As the Tonnage Convention applies only to ships exceeding 24 metres in length, the RIB could not have been measured in accordance with the Tonnage Convention, and the limitation of liability regime should therefore not apply. The Court noted that s 87(1) of the MTA refers to ships *up to* 300 tons, and that s 87(5)(c)

of the MTA provides for an alternative procedure for measurement where the gross tonnage of a ship is unable to be ascertained by applying the rules in the Tonnage Convention (para 44).

The Supreme Court declined Birkenfeld's application for leave to appeal, noting (para 7):

On the question whether only sea-going ships are envisaged by the Limitation Convention, we consider Ms Birkenfeld's arguments to be misconceived. Article 15(2)(a) allows a state party to regulate by specific provisions of national law the system of liability to be applied to vessels which are, according to the law of that state, ships intended for navigation on inland waterways. It is plain that if a state party does not so regulate, the Limitation Convention applies to all vessels, whether or not intended for navigating inland waterways. The s 84 definition contains no restriction.

Let us assume that the Court of Appeal and Supreme Court's interpretation of Art 15(2) of the Limitation Convention 1976 is correct: that the Convention *prima facie* applies to all ships, whether seagoing or not, and to all ships, however small. The fact remains that New Zealand has not notified its intention to the Convention Depository to regulate such issues separately under its own domestic legislation, and is therefore arguably in breach of its international obligations in so doing. If the Court of Appeal were serious about applying *Sellers*, it should have concluded that the lower limitation threshold in s 87(1)(a) of the MTA is inconsistent with New Zealand's international obligations under the Limitation Convention 1976 to notify this lower limit. On this analysis, Birkenfeld should at least have been entitled to the standard limitation amount of 333,000 SDRs set out in Art 6(1)(a)(i) of the Limitation Convention 1976 in respect of personal injuries caused by ships not exceeding 500 tons, which is double the total amount provided for by s 87(1)(a) of the MTA.

But it is by no means clear that the Court of Appeal and Supreme Court's interpretation of the Limitation Convention 1976 was correct. A disjunctive interpretation of Arts 15(2)(a) and 15(2)(b), which treats the two provisions as dealing with two distinct issues regarding the Convention's scope of application, is arguably more consistent with the original rationale of the Limitation Convention 1976, the reference to "a seagoing ship" in Art 1(2) of that Convention, and state practice (in that most of the State Parties making notifications under Art 15(2) have made separate notifications in respect of non-seagoing vessels (Art 15(2)(a)) and smaller vessels (Art 15(2)(b))). Given this, perhaps Birkenfeld's submission that the Limitation Convention 1976 does *not* apply to non-seagoing vessels unless notification is made to *extend* the scope of application of the Convention was not entirely misconceived. At any rate, the expansive definition of "ship" in s 84 of the

MTA should not have been applied without a more thorough examination, on the *Sellers* principles, of whether it accords with New Zealand's international obligations under the Limitation Convention 1976.

The limitation decree made by Keane J was served on Kendall and the International Sailing Federation, and was advertised in Greece. No further claims were lodged. YNZ then offered to settle Birkenfeld's claim for NZ\$734,003. The offer was not accepted. In *Birkenfeld v Kendall* (HC Wellington, CIV-2004-485-1657, 27 September 2007, Randerson J), YNZ and Kendall applied for the distribution of the limitation fund to Birkenfeld and the permanent stay of any further proceedings in this matter.

Birkenfeld resisted this application on the ground that there is no jurisdiction under s 89 of the MTA to order a limitation fund to be constituted or payment distributed from the fund. This was the conclusion reached by Williams J in *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650, paras 69–71, and it was followed in the *Birkenfeld* case by Randerson J, without reference to subsequent academic criticism of Williams J's interpretation of s 89 of the MTA; see [2005] NZ Law Review 298; Browne, "*Tasman Orient Line CV v Alliance Group Ltd (The 'Tasman Pioneer')*" (2004) 18 MLAANZ Journal 189. With respect, it still seems obvious to me that the reference in s 89(1) of the MTA to s 86(2), instead of s 86(1), is a simple typographical error, and should have been construed accordingly. If the Court thought that it could not depart from the literal wording of s 89 of the MTA, it should at least have exercised its inherent jurisdiction in order to constitute a limitation fund.

In any event, despite the decision that the Court had no jurisdiction to constitute a limitation fund or distribute it, a stay of proceedings under r 477 of the High Court Rules 1985 was granted, on the basis that YNZ "has offered to pay to the plaintiff the maximum amount she could lawfully recover if the claim were successful" (para 24).

Randerson J further held that the maximum limitation ceiling capped Birkenfeld's claims against *both* YNZ and Kendall, on the basis of ss 84 and 86(3) of the MTA, read with Art 11(3) of the Limitation Convention 1976 (paras 44–45). The latter reliance on Art 11 would seem to be logically inconsistent with an adoption of Williams J's approach in the *Tasman* case that Parliament intended to give only partial domestic effect to the Limitation Convention 1976. On that approach, Art 11 can have no influence on New Zealand law, as it has not been "domesticated".

The *Birkenfeld* case highlights yet again the sorry state of Part VII of the MTA, as well as the pressing need to review the MTA and properly re-enact the Limitation Convention 1976. It also illustrates the importance of signing up to the 1996 Protocol to the Limitation Convention 1976. The limitation amounts in the Limitation Convention 1976 have become severely eroded by inflation since 1976. If the unamended 1996 Protocol were in force in New

Zealand, the relevant limitation ceiling in the *Birkenfeld* case would have been two million SDRs, or around NZ\$4.14 million. The tragic nature of this incident and its aftermath also brings into sharp relief the more fundamental debate about the justice of the concept of limitation of liability for maritime claims, particularly in the context of non-commercial maritime activities and personal injury and loss of life claims; see, for example, Gauci, “Limitation of Liability in Maritime Law: An Anachronism?” (1995) 19 *Marine Policy* 65.

Ship Mortgages and the PPSA

The decision in *KeyBank National Association v The Ship “Blaze”* [2007] 2 NZLR 271 has already been discussed by others in this Review ([2007] NZ Law Review 385–387); see also Lala, “*KeyBank National Association v The Ship ‘Blaze’*” (2007) 21 A & NZ Maritime LJ 183 (<https://maritimejournal.murdoch.edu.au/index.php/maritimejournal/article/viewFile/44/69>). I shall therefore confine myself to brief comments on the decision from a maritime law perspective.

It will be remembered that the *Blaze*, an ocean-going yacht less than 24 metres in length, was registered in the United States and was subject to a registered preferred United States ship mortgage held by KeyBank National Association. The vessel was then brought to New Zealand, where it was sold to a New Zealand purchaser, Walters/Barrington Charters Ltd, which registered its interest as the purchaser of the personal property under the Personal Property Securities Act 1999 (“the PPSA”) two days before KeyBank registered its security interest under the PPSA.

Walters argued that his rights as purchaser of the yacht trumped KeyBank’s rights under the United States preferred ship mortgage, on a simple application of s 52 of the PPSA, which provides that a “buyer or lessee of collateral who acquires the collateral for value takes the collateral free of an unperfected security interest in the collateral, unless the unperfected security interest was created or provided for by a transaction to which the buyer or lessee is a party”. Baragwanath J disagreed, holding that s 70 of the Ship Registration Act 1992 (“the SRA”) applied in this instance; that s 70 of the SRA overrode s 52 of the PPSA; and that KeyBank’s preferred United States ship mortgage therefore enjoyed priority. Baragwanath J was of the view that the contrary conclusion would have negative consequences, and that his view was mandated by public international norms. Finally, Baragwanath J concluded that equitable principles might have a bearing on the outcome of the case.

With respect, in my view, almost all of these findings are problematic. First, as the proponent and drafter of the prototype of s 70 of the SRA, I

can say with some authority that s 70 was intended only to overrule the decision of the Court of Appeal in *The Betty Ott* (*The Ship "Betty Ott" v General Bills Ltd* [1992] 1 NZLR 655), which incorrectly applied the majority *lex fori* approach of the Privy Council in *The Halcyon Isle* (*Bankers Trust International Ltd v Todd Shipyards Corp* [1981] AC 221). *The Halcyon Isle* was a case about whether a claim enjoying maritime lien status under the *lex causae*, but not the *lex fori*, ought to be recognized as a maritime lien by the forum. The majority of the Board in *The Halcyon Isle* controversially held that recognition of foreign maritime liens is a matter for the *lex fori* rather than the *lex causae*, as maritime liens are creatures of procedure and jurisdiction. The decision in *The Betty Ott* distorted this precedent by extending it to a situation where the status of a foreign-registered ship mortgage was not recognized as a result of a narrow, mechanical application of the *lex fori*, and it therefore ranked below a local unregistered charge over a vessel. This, despite the acknowledgment of the majority in *The Halcyon Isle* that ship mortgages were different from maritime liens, as they gave rise to substantive legal rights. Parliament therefore reversed the decision in *The Betty Ott* by providing in s 70 of the SRA:

- Where a question arises in New Zealand as to the priority of instruments creating securities or charges in respect of a ship registered under the law of a foreign country, instruments creating securities or charges in respect of the ship and duly registered in respect of the ship under that law shall —
- (a) Have the same effect as a mortgage registered in respect of a ship under this Act; and
 - (b) Be accorded the priority that they would have been accorded if they had been registered under this Act.

It is important to note that s 70 of the SRA is not a general deeming provision automatically providing all foreign ship mortgages with the same legal status and priority as New Zealand-registered ship mortgages in all contexts. The entire provision is carefully made conditional on a “question [arising] in New Zealand as to the priority of instruments creating securities or charges in respect of a ship registered under the law of a foreign country”. In other words, s 70 of the SRA only applies where there is an issue of how a New Zealand court should rank two or more competing security interests in a foreign-registered vessel, which was precisely the situation in *The Betty Ott*. Is this the situation in *The Blaze*? In my view, it is plainly not. Although Baragwanath J refers to KeyBank’s and Walters’ “respective securities” (para 1) and appears to accept KeyBank’s argument that this is “a priority dispute” (para 54), the issue here is in fact whether a purchaser for value took title to the ship free of a single security interest generated by an existing foreign ship mortgage.

Walters' argument that s 70 of the SRA has no application in this case because it does not involve a "question [arising] in New Zealand as to the *priority of instruments creating securities or charges* in respect of a ship registered under the law of a foreign country" (summarized by Baragwanath J at para 49, emphasis added) therefore seems to me to have considerable force. Any broader construction of s 70 of the SRA does violence to the words of the provision, and applies it outside the specific context for which it was carefully crafted, namely as an antidote to *The Betty Ott*. Nonetheless, Baragwanath J rejected this argument, apparently concluding by reference to s 33 of the Interpretation Act 1999 that the reference to "instruments" in the plural in s 70 of the SRA includes the singular, and that KeyBank's single security interest was therefore covered by s 70 of the SRA (para 50). Baragwanath J did not venture to explain how a question might arise "as to the priority" of a single security instrument — a thorny riddle that brings to mind the famously intractable Zen *kōan* of Hakuin Ekaku: "In clapping both hands, a sound is heard. What is the sound of one hand?"

Having decided that s 70 of the SRA applied and afforded KeyBank's United States preferred ship mortgage the legal status and priority of a New Zealand-registered ship mortgage, Baragwanath J went on to hold that "the PPSA can have no application to securities that fall directly or (via s 70) indirectly within the SRA. Since KeyBank's security is protected by the PPSA [sic: surely the SRA?], it succeeds ..." (para 82).

Section 23(e)(xi) of the PPSA expressly excludes from its ambit all mortgages over ships "24 metres register length" or longer. Arguably, s 23(e)(xi) therefore impliedly includes within the ambit of the PPSA all mortgages over ships less than 24 metres in length, like the *Blaze*. Nonetheless, Baragwanath J held, on an application of generalia specialibus non derogant, that the SRA, as the more specific earlier statute, remained in force in respect of mortgages over all *registered* ships less than 24 metres in length, despite the later enactment of the more general PPSA. This reasoning only holds water, of course, if s 70 of the SRA applies in the first place. I have argued above that it does not. In any event, an application of the generalia specialibus maxim to a perceived clash between the SRA and the PPSA regimes does not bear close scrutiny. As Baragwanath J noted, Parliament was advised by the Law Commission to exclude from the ambit of the proposed PPSA all ship mortgages registered or required to be registered under the predecessor of the SRA (see New Zealand Law Commission, *A Personal Property Securities Act for New Zealand*, NZLC R 8 (April 1989)), but chose not to heed this advice, instead drafting s 23(e)(xi) of the PPSA to exclude from the ambit of the PPSA only mortgages over ships 24 metres in length or longer (para 60). It is difficult to think of a clearer example of implied repeal of a previous statute. In my view, Baragwanath J's approach also ignores another fundamental interpretation principle: that Parliament

should be assumed to have been aware of its earlier legislation (the SRA) when it enacted the later legislation (the PPSA). If Parliament chose not to make the PPSA expressly subject to the SRA in the case of mortgages over ships less than 24 metres in length, it is a fair assumption that Parliament intended the later PPSA regime to override the earlier SRA regime and be conclusive in respect of mortgages over ships that are less than 24 metres in length and are present in New Zealand.

In my view, KeyBank's preferred United States ship mortgage ought, nonetheless, to have been afforded the status of a registered foreign ship mortgage, not by virtue of s 70 of the SRA, but on an application of the normal common law private international rule that determines the validity and legal status of foreign ship mortgages by reference to the law of the ship's flag; see, for example, *The Colorado* [1923] P 102 (UKCA), which survives *The Halcyon Isle*, and is therefore still applicable in New Zealand (at least on the narrow interpretation of the majority in *The Halcyon Isle* that *The Colorado* involved an examination and application of the law of the ship's flag (French law) to see whether a *hypothèque* executed and registered in France over a French ship created a proprietary right in the ship which the English court would recognize as similar enough in legal character to an English mortgage). However, the common law rules have to give way to the clear parliamentary intention expressed in s 52 of the PPSA.

According to Baragwanath J, this conclusion would give rise to absurd results, as it would amount to a parliamentary policy of invalidating all existing mortgages registered under the SRA over New Zealand ships under 24 metres in length (para 70). This simply does not follow. While the priority of small ship mortgages registered under the SRA might conceivably be affected by the perfection of another party's security interest under the PPSA, the SRA ship mortgage would remain valid. And the risk of losing priority could easily be avoided by registering one's security interest under both the SRA and the PPSA. Indeed, before the enactment of the SRA and the PPSA, registration under multiple registers was also required to safeguard one's security interest in small vessels; see Shipping and Seamen Act 1952; Chattels Transfer Act 1924; Companies Act 1955. It would undoubtedly have been much tidier and simpler if Parliament had listened to the Law Commission's advice and excluded all ship mortgages from the PPSA. But Parliament chose not to, and the results do not create a sufficient absurdity to warrant flouting Parliament's clear intention.

Baragwanath J also noted that "New Zealand is a mecca for visiting yachts", many of which are under 24 metres in length. It would therefore be "bizarre" if the owners and mortgagees of these foreign yachts "in the fleet accompanying the America's Cup event in the Hauraki Gulf ought, to protect their position, to have filed a New Zealand PPSA financing statement immediately the vessel entered New Zealand waters" (para 80). Again,

with respect, this simply does not follow. Foreign owners' and mortgagees' interests in foreign-registered yachts will only be affected by the PPSA if the vessel is sold, or becomes subject to a new security interest, while in New Zealand. In those circumstances, is it really so "bizarre" that the PPSA should govern such transactions, when a raft of other New Zealand legislation applies to foreign vessels and crew while they are in New Zealand territorial waters? Despite the ongoing public law and nationality dimensions of ship registration referred to by Baragwanath J (para 72), the 19th-century "floating island fiction" has long since been exploded. From a private law perspective, ships are nothing more or less than personal property, and, as such, may be subject to relevant local property law regimes if they are bought, sold, or used as collateral while in territorial waters.

Finally, Baragwanath J concluded that s 52 of the PPSA could not override KeyBank's preferred United States ship mortgage, because this would be contrary to public international law norms, especially the United Nations Convention on the Law of the Sea 1982, 21 ILM 1261 (1982) ("UNCLOS"), as well as the developing "just and seamless system of private international law" (para 76). With respect, it is difficult to see the relevance of much of this. Only a handful of provisions in Part VII of UNCLOS have anything to say about ship flags and ship registration. Neither UNCLOS nor the United Nations Convention on Conditions for Registration of Ships 1986, 26 ILM 1229 (1987) has anything particularly useful to say about registered ship mortgages, except for Art 11(2)(i) of the latter Convention, which says that ship mortgages should be registered "as stipulated by national laws and regulations". However desirable it may seem, there is no *ius gentium* of registered ship mortgages. Each State organizes and administers its own ship registration system based on its own domestic statutes and conflict of laws rules. Such commonality as exists is largely a product of the historical development of maritime law, and more contemporary harmonization endeavours, such as the Commonwealth shipping arrangements. There are, however, absolutely fundamental conceptual and practical differences between ship registration and ship mortgage systems in Common Law and Civil Law maritime jurisdictions, not to mention Socialist or post-Socialist systems; see generally Myburgh, "Arresting the Right Ship", in Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law* (2005) 283, 290–292. The resolution of such complex and intricate comparative and private international law issues is not assisted by the application of a broad-brush, "blue skies" approach.

Domestic Carriage of Goods

In *Ports of Auckland Ltd v Southpac Trucks Ltd* [2007] 2 NZLR 656, the High Court had occasion to interpret when a carrier is liable “as such” for the purposes of s 6 of the Carriage of Goods Act 1979 (“the COGA”). As Allan J pointed out (para 2), this lies at the heart of the COGA, the mandatory statutory regime regulating the rights and liabilities of parties to contracts for the domestic carriage of goods by all modes of transport. Section 6 of the COGA provides:

Notwithstanding any rule of law to the contrary, no carrier shall be liable as such, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by him except —

- (a) In accordance with the terms of the contract of carriage and the provisions of this Act; or
- (b) Where he intentionally causes the loss or damage.

Southpac Trucks Ltd (“Southpac”) ordered six Kenworth trucks from Victoria. The trucks were carried from Melbourne to Auckland on the *Rotoiti* by Australia New Zealand Direct Line (“ANZDL”), a division of CP Ships (UK) Ltd (“CP Ships”). CP Ships was party to a terminal contract with Axis Intermodal (“Axis”), a trading division of Ports of Auckland Ltd (“POAL”). The terminal contract between CP Ships and Axis/POAL provided that Axis/POAL “assumed responsibility for unloading the Kenworth trucks from the *Rotoiti*, by driving them off the ship and across the wharf owned and maintained by POAL, to a marshalling and storage area, there to await collection by Southpac’s carrier” (para 6). The terminal contract allowed Axis/POAL to subcontract any of its obligations, which it did to Southern Cross Stevedores Ltd, which in turn subcontracted its obligations to Wallace Investments Ltd (“Wallace”). The terminal contract provided in cl 4.1(c) that POAL, as the Operator, “shall be liable for loss or damage to cargo caused by the negligence or fault of the Operator, its employees, agents or subcontractors”; but cl 4.2(c)(iv) of the terminal contract further provided that “where the Carriage of Goods Act 1979 applies, the defences and limits of liability provided for in that Act shall apply to any claim against the Operator”.

As one of the Kenworth trucks was being driven by a Wallace employee across Bledisloe Wharf following discharge from the *Rotoiti*, a fork hoist driven by an employee of POAL and carrying an oversized load of timber collided with the truck, causing damage of over NZ\$60,000. POAL admitted that its employee driving the fork hoist was negligent, but argued that its liability was limited to NZ\$1,500 under the COGA, on the grounds that the truck constituted one “unit of goods” under s 3 of the COGA; CP Ships

was the “contracting carrier” under the COGA; and POAL was providing incidental carriage services as an “actual carrier” until such time as the trucks were delivered to Southpac. POAL also argued that, in terms of the COGA liability framework, it was liable to CP Ships as the “contracting carrier”, rather than to Southpac as the consignee.

In the District Court, Judge Joyce QC held in favour of Southpac, because POAL’s fork hoist driver was not acting as a carrier, and was therefore not liable “as such” under s 6 of the COGA, and because the damage was caused by the “quite unrelated and unintended intervention of the fork hoist” (para 16). The Judge therefore entered judgment for the full amount of the damage incurred by the truck.

On appeal to the High Court, Allan J overturned Judge Joyce’s judgment, holding that, as POAL (through its subcontractor Wallace) was acting as an “actual carrier” when the collision occurred, it was only liable “as such” under the COGA, even though one of its employees had negligently caused the collision. Although Allan J professed not to be relying overly much on s 10 of the COGA, which largely provides for the responsibility and liability of multiple actual carriers inter se, this provision does appear to have influenced his reasoning, in that he adopted a narrow, temporal analysis of the actual carrier’s obligations; see, for example, para 41: “In a temporal sense, the contract of carriage was on foot at the time of the collision ...”. Section 10(2) provides that an actual carrier is liable “as such” to the contracting carrier for the loss of or damage to any goods occurring at any time when the actual carrier is separately responsible for the goods.

On Allan J’s approach, therefore, POAL is acting as the “actual carrier”, and can only be liable within the confines of the COGA liability regime to CP Ships, as the “contracting carrier”, from the moment that POAL unloads the truck until the moment that POAL delivers the truck to Southpac. On this analysis, if a POAL employee were to damage the truck seconds prior to unloading, or seconds after delivery to Southpac, Southpac would be entitled to recover its full damages from POAL. However, in the period between unloading and delivery, short of intentional damage by POAL, or possibly use of the truck by POAL for purposes totally extraneous to the contract (such as “use as a grandstand from which to view yacht races”; see para 45), the effect of the COGA is that POAL owes no liability to Southpac as the consignee, and only limited liability to CP Ships as the “contracting carrier”.

Allan J was of the view that this approach accorded with the “elements of simplicity and certainty which the [Carriage of Goods] Act was designed to bring about”, and that arguments about “dual liability” would give rise to greater complexity (para 51). That may be so, but does Allan J’s approach accord with the text and purpose of the COGA?

The first point to be made is that the Act is entitled the *Carriage of*

Goods Act 1979, rather than the *Damage to Goods Act 1979*. The concepts of “carriage” and “carrier” are thus fundamental to the scope of application of the COGA. “Carriage” is not defined in s 2 of the COGA, except to the extent that it includes “any incidental service”, which in turn is defined as meaning “any service (such as that performed by consolidators, packers, stevedores, and warehousemen) the performance of which is to be or is undertaken to facilitate the carriage of the goods pursuant to a contract of carriage”.

The meaning of “carriage” was considered at some length by Judge Joyce QC in *Victory Christian Church Auckland v Fatialofa* [2001] DCR 27. Judge Joyce held that moving a piano from a stage to the floor (and dropping it in the process!) could constitute “carriage” under the COGA. The Judge adopted the ordinary dictionary meaning of the word “carriage” and then went on to point out that “the Act has no need separately and comprehensively to define carriage *because it can only apply when the task is one performed by a carrier as such*. It comes down to whether or not that was so here. If the issue is approached in that way, then problems of where contracts of carriage lines are to be drawn evaporate. Contracting parties (or those in their shoes) and carriers alike, can readily see where they stand and, if necessary, insure accordingly” (para 26, emphasis added). Judge Joyce’s analysis was upheld on appeal to the High Court; see *Victory Christian Church Auckland v Fatialofa* (HC Auckland, AP146-SW00, 1 May 2001, O’Regan J). Given the direct relevance of this High Court precedent, it is surprising that it was not cited or discussed by Allan J in his judgment.

“Actual carrier” is defined in s 2 of the COGA as meaning: “in relation to the carriage of any goods ... every carrier who, at any material time, is or was in possession of the goods ... for the purpose of performing the carriage or any stage of it or any incidental service ...”. There are a number of crucial points that flow from this definition. First, the definition of a carrier is relational. A carrier can only be such *in relation to the carriage of any goods*. It follows that, if there is no direct relationship between a party and the carriage of the relevant goods, the party cannot be a carrier in relation to those goods, and therefore cannot incur liability as a carrier under the COGA. Second, in addition to the relevant time period emphasized by Allan J, a carrier must have possession of the goods *for the purpose of performing the carriage or any stage of it or any incidental service*. The COGA therefore does require a factual investigation of the carrier’s purpose and intent in handling the goods, a point that may have been indirectly conceded by Allan J in his discussion of the abovementioned “using trucks as a grandstand” example (para 45).

What then, do the words “as such” mean in ss 6 and 16(2) of the COGA? According to Allan J’s “unitary liability” theory, they mean that, if POAL or one of its employees, agents or subcontractors was acting as an “actual carrier” at the time of the collision, the entire organization and all of its

employees, agents, and subcontractors can only be held liable “as such”, that is, “as a carrier” to the limited extent provided for by the COGA. The Wallace employee driving the truck at the time of the collision was probably acting as an “actual carrier”, and was therefore only liable “as such” under the COGA (although there may be some definitional quibbles about whether “driving” the goods equates to “carrying” them). However, it cannot by any stretch of the imagination be said that the POAL employee driving the fork hoist, who was neither acting as a carrier *in relation to the carriage of the trucks*, nor in possession of the trucks *for the purpose of performing their carriage*, met any of the definitional requirements of an “actual carrier” under s 2 of the COGA. And, if the fork hoist driver was not an actual carrier under s 2 of the COGA, it follows that POAL is also not protected under the COGA from vicarious liability *for the fork hoist driver’s actions*.

Allan J’s “unitary liability” approach, with respect, seems to have lost sight of two things. First, although the COGA is a mandatory and comprehensive statutory regime, it is by no means a complete code. It replaces the common law principle of full compensation for loss or damage only to the extent that it applies directly to *carriers* and *carriage of goods* — the COGA does not generate a limited liability zone that applies to entire organizations or areas while carriage of goods is occurring in the vicinity. Second, the purpose of the COGA was to restate and reform the law *relating to the carriage of goods* within New Zealand. The COGA was intended to function as a largely no-fault, limited liability regime for carriers who cause loss or damage to goods whilst carrying the relevant goods. It was never intended to provide a general charter for parties to evade their liability for loss or damage caused by any other random negligent acts or omissions of their other non-carrying employees. Judge Joyce’s approach appears to be much more in tune with the letter and the spirit of the COGA.

Good Faith and Art 4r2(a) of the Hague-Visby Rules

The latest chapter in the litigation arising from the grounding of the *Tasman Pioneer* off the coast of Japan on “a dark and stormy night” in 2001 (see *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650, para 5) played out recently in *New Zealand China Clays Ltd v Tasman Orient Line CV* (HC Auckland, CIV-2002-404-3215–3218, 31 August 2007, Williams J), where the plaintiff cargo interests sued Tasman Orient Line CV (“Tasman Orient”) for breach of contract and breach of bailment on two main grounds: the carrier had breached its obligations under Art 3 r 1(a) of the Hague-Visby Rules to exercise due diligence to make the ship seaworthy (paras 250–295); and the carrier was not entitled to rely on the Art 4 r 2(a) Hague-Visby Rules exemption for “[a]ct, neglect, or default of the master, mariner, pilot, or the

servants of the carrier in the navigation or in the management of the ship” (paras 215–242).

In respect of the first ground, Williams J followed the approach to burden of proof adopted in *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Lloyd’s Rep 719, 735, and held that the plaintiff cargo interests bore the burden to prove that the ship was unseaworthy before and at the beginning of the voyage, as required by Art 3 r 1(a) of the Hague-Visby Rules, and had failed to discharge that burden (see paras 275, 282, 290 & 292–295).

As to the second ground, Williams J analysed the actions of Captain Hernandez to determine whether they were actions in the “navigation” or “management” of the ship. Williams J held that two main aspects of the master’s actions had played a causal role in the damage to the cargo: his decision to transit the passage east of Biro Shima and his subsequent attempt to abort the transit, and his decision not to advise the Japanese coastguard and the owners and managers of the ship for several hours, but instead to continue the passage with a significantly damaged ship. Applying the principles in *Gosse Millard v Canadian Government Merchant Marine Ltd* [1928] 1 KB 717 (UKCA), 741–770 (upheld by the House of Lords in [1929] AC 223) and *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638 (HL), Williams J concluded that the actions of Captain Hernandez could not be seen as “solely, or even primarily, a neglect to take reasonable care of the cargo”, or an “exploitation of the earning potential of the vessel”. Instead, they related to seamanship and the “navigation” or “management” of the ship (paras 223–225). Or, to use the French terminology, the master’s actions amounted primarily to *faute nautique* rather than *faute commerciale*. As a consequence, the carrier was prima facie entitled to rely on the exemption provided by Art 4 r 2(a) of the Hague-Visby Rules.

Williams J held, however, that this was not the end of the matter. There was the further issue of whether the exemption in Art 4 r 2(a) of the Hague-Visby Rules extends to an “act, neglect or default of the master” that was not *bona fide* in the “navigation or in the management of the ship” (para 227). Analysing the behaviour of Captain Hernandez, the Court found that, while his actions prior to the grounding could be seen as having been taken in good faith, his behaviour after the grounding could not (para 240):

None of those actions can have been motivated by Captain Hernandez’ paramount duty to the safety of the ship, crew and cargo. None could have been motivated by his obligations as a master, particularly the obligation to report and take whatever steps were recommended to minimize the danger to life, to navigation and avoid the risk of pollution. All those actions 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.

While conceding that the Hague-Visby Rules do not expressly deal with the topic of good faith, doubting the utility of the *travaux préparatoires* (although it might be argued that there are some marginally illuminating references to Art 4 r 2(a) in the *travaux*), and noting that the precedents did not invariably refer to, or discuss, the requirement of good faith in connection with Art 4 r 2(a), Williams J nonetheless concluded that judicial analysis of Art 4 r 2(a) was based “on the underlying premise that, no matter into which category the master’s actions fell, they must still have been undertaken in furtherance of the master’s paramount duty of safely caring for the ship, cargo and crew” (para 230). Williams J held that the structure and wording of the Hague-Visby Rules themselves implied such a premise of bona fides, as indicated by the references in the Rules to the carrier’s “due diligence”, the requirement to “properly and carefully [handle] the goods carried”, and the limitations placed on the carrier’s exemptions. Williams J also listed instances where the courts have expressly addressed the question of the master’s *fides* and concluded (para 234):

There is accordingly 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. There would seem to be every reason to read a good faith requirement into the Rule to entitle the carrier to qualify for the immunity from responsibility the Rule provides. That is the case irrespective of whether a lack of *bona fides* is seen as underpinning entitlement to the exemptions provided by the Rules or whether “navigation” or “management” which is not conducted *bona fide* in accordance with the master and crew’s paramount obligation to care for the ship, cargo and crew safely is so antithetical to that paramount obligation and proper seafaring practice as not to be regarded as qualifying or amounting to “navigation” or “management” under the Rules.

Williams J concluded that Tasman Orient had failed to discharge its burden of proof of demonstrating its entitlement to the exemption provided by Art 4 r 2(a) of the Hague-Visby Rules, as correctly construed on the basis of the implied good faith requirement. The plaintiffs were therefore entitled to judgment for breach of contract and breach of bailment.

There was a further issue, which appears not to have been fully pleaded, as to whether Tasman Orient was vicariously liable for the actions of Captain Hernandez. Here, the *Tasman Pioneer* was owned by Rimba Shipping Co Ltd (“Rimba Shipping”), and was time chartered on an NYPE form to Tasman

Orient Line (Cyprus) Ltd, which in turn sub-chartered the vessel on a back-to-back basis to Tasman Orient. The sub-charter incorporated the terms of the head charterparty and obliged Tasman Orient to observe the head charterparty terms. The head charterparty obligated Rimba Shipping as owner to meet crew wages and other costs, but provided in the standard employment clause that the master was “under the orders and directions of the Charterers”.

Williams J noted that both owner and charterer are potentially included in the definition of “carrier” under Art 1(a) of the Hague-Visby Rules, and it is the “carrier” on whom most of the rights and obligations under the Rules devolve (para 246). Where shipowners employ the crew, they are vicariously liable for the negligence of the master and crew, but if the charterer employs the crew, it is the charterer who is vicariously liable for its employees’ negligence. Here, Tasman Orient was obliged to observe the terms of all the charterparties. There were cross-indemnities within them. Although Rimba Shipping may have been obliged to meet crew wages, Captain Hernandez was subject to Tasman Orient’s directions. Tasman Orient gave him directions and he reported regularly to it. Therefore, as between the plaintiffs and Tasman Orient, Tasman Orient was vicariously liable for the actions of Captain Hernandez.

The relevance of this issue of vicarious liability is not entirely clear, at least not to the plaintiffs’ claims framed in breach of contract or breach of bailment. Here, the only relevant issues would be whether the bills of lading under which the plaintiffs acquired title to sue under s 13B of the Mercantile Law Act 1908 were charterer’s (ie Tasman Orient’s) or owner’s (ie Rimba Shipping’s) bills; and whether Tasman Orient or Rimba Shipping (or both) were identified or defined as the carrier in the relevant bills of lading; see Girvin, *Carriage of Goods by Sea* (2007) 143–147.

There is nothing that divides cargo and carrier interests quite like Art 4 r 2(a) of the Hague-Visby Rules; see, for example, Weitz, “The Nautical Fault Debate (The Hamburg Rules, the US COGSA 95, the STCW 95 and the ISM Code)” (1998) 22 *Tulane Mar LJ* 581. It is therefore unsurprising that Williams J’s judgment has already sparked some debate. It has been suggested that the decision has the potential to “add an additional level of complexity and uncertainty to cargo claims of any substance, with ex post facto analysis of the master’s conduct and the motivation behind it forming an important part of any casualty investigation — no doubt something that will be of concern to vessel interests” (see <http://www.avoarchive.com/display.php?id=1164>). There is some force to this argument. However, in the vast majority of cases, the master’s conduct will clearly fall within the normal purview of navigational or management *faux pas*, and cargo interests will be hard pressed to advance a plausible allegation of bad faith. Williams J’s factual findings regarding the master’s conduct in this case would seem to

be at the extreme end of the spectrum, and the precedents suggest that such outrageous conduct will be rarely encountered. And it could equally be argued that certainty will ultimately be better served if the judicial appeals and academic commentaries that will inevitably flow from this significant decision either fully illuminate the role of good faith in relation to Art 4 r 2(a) of the Hague-Visby Rules, or extinguish it altogether, rather than leaving it to flicker on as an elusive will-o'-the-wisp.

