

Shipping Law

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Reports

A *Grounding of the Jody F Millennium*

The period under review was marked by two major groundings of commercial vessels off the New Zealand coast – the *Jody F Millennium* at Gisborne on 6 February 2002 and the *Tai Ping* at Bluff on 8 October 2002.

The Maritime Safety Authority recently released its final Accident Report on the *Jody F Millennium* grounding. The Authority's report (available online at <<http://www.msa.govt.nz>>) makes for interesting bedtime reading. It includes a detailed narrative of the key events leading up to, and conditions prevailing at the time of the grounding. Although finding (para 3.1.3) that weather and sea conditions that were "more severe than forecast, exceeded past experience and could not have been reasonably foreseen" were the most significant cause of the casualty, the Authority concludes that there were serious deficiencies in the management and operation of Port Gisborne and in the conduct of both the master and the pilot leading up to the casualty.

In respect of Port Gisborne Ltd, the Authority notes (paras 3.2.2 et seq) that the port company failed to dredge the port channel frequently, to undertake frequent hydrographic surveys to ensure that advertised depths were maintained, or to undertake formal risk and safety assessments to determine maximum limits of length and draught, the effects of weather on shipping operations and the adequacy of mooring systems. There was "a total absence of any structured written operational plans or risk management contingencies for the safe operation of the port of Gisborne".

Adsteam Port Services Ltd, the company to which Port Gisborne Ltd contracted out pilotage and towage services, is criticised in the report for failing to define its pilots' responsibilities or to provide a structured system of relief pilots. Finally, the Gisborne District Council, charged under the Local Government Act 1974 to appoint the harbourmaster for Gisborne, comes under fire for allowing a full-time harbourmaster operating in the port of Napier to be appointed as the harbourmaster for Gisborne on an "as and when required" basis. The Authority concludes (para 3.7.1) that this appointment "was incompatible with the proper discharge of a harbourmaster's functions. His involvement with the port had in practice amounted to a mere 15 hours work in the previous five months. That gave him neither effective supervision of navigational safety within the port nor availability in an emergency."

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In the light of this rather disquieting catalogue of systemic failures, the report's key recommendation (para 5.6) is particularly welcome:

That the Director of Maritime Safety and the Ministry of Transport give consideration to the introduction of a port company safety code and/or appropriate Maritime Rules establishing a standard marine safety code for the operation of New Zealand commercial ports, similar in nature to the United Kingdom Port Marine Safety Code (and accompanying Guidelines) published by the UK Department of Environment and the Regions (DETR) in March 2002.

This recommendation is, of course, not without historical irony. New Zealand used to have uniform central legislation regulating ports. It was called the Harbours Act 1950. It was repealed as part of the New Zealand port reform process, which also saw the abolition of the old-fashioned public Harbour Boards, the subsequent rebirthing of New Zealand port companies as privatised and compulsorily commercially competitive entities, the privatisation of pilotage services, and the transfer of vital navigational safety responsibilities to the Regional Councils, in many respects the weakest link of local government. As the report acknowledges (paras 2.11.14-2.11.15), the result of this reform process is that core maritime safety responsibilities for New Zealand commercial ports are now fragmented across at least six persons or entities, and have to be sourced in at least five different pieces of legislation.

The Authority's recommendation that New Zealand adopt a port safety code that "consolidates the statutory and other obligations in relation to marine safety in ports and the responsibility of relevant persons", based on the UK model (which, in turn, was a response to the grounding of the *Sea Empress* off Milford Haven in 1996), is very sensible. If adopted, it could provide an overdue counterbalance to the narrow ideology underpinning the Port Companies Act 1988, which insists that the "principal objective of every port company shall be to operate as a successful business".

However, a mere consolidation or guide to best practice may still not provide a complete answer to dysfunctional port companies or indifferent regional councils. Given that maritime safety in general is quite properly treated as a paramount national issue that falls under the central and uniform jurisdiction of the Maritime Safety Authority, it seems odd that the key component of maritime safety in New Zealand commercial ports should be regulated at local or regional level, with varying degrees of success, as the Authority's report on the *Jody F Millennium* graphically illustrates. A more fundamental re-examination of the wider issue of port governance would seem to be called for, this time through the lens of maritime safety, rather than that of economic reform.

B *Port Companies and Market Power*

One of the key recommendations of the Shipping Industry Review, commented on in the last Review (see [2001] New Zealand Law Review 105-

107), was that the Commerce Commission should investigate allegations of anti-competitive practices and monopoly pricing by port companies. Instead, the Ministries of Transport and Economic Development commissioned an independent study of port companies' market power. The economic consultant's final report, *Port Companies and Market Power – A Qualitative Analysis* (available online at <<http://www.med.govt.nz>>), was completed in April 2002. The report provides an exhaustive (and, to a reader not versed in the “dismal science” of economics, a somewhat exhausting) analysis of market power, the New Zealand ports industry, market definition, competition and market power, market power concerns and the adequacy of existing regulatory and governance arrangements.

The report identifies four ways in which port companies appear to have exercised market power over “captured” customers: by levying excessive charges for port services; by gaining financial returns in excess of those earned in other industries; by being unwilling to negotiate on prices in good faith and generally being unresponsive to customer requirements; and by adopting pricing structures that led to the cross-subsidisation of port services from captive to non-captive users. However, it finds that these problems affect only a limited share of the transactions between ports and their customers. Accordingly, large-scale policy responses “such as a price inquiry or major changes to general competition laws and other industry-specific legislation impacting on the ports industry” are not justified, as these are “likely to have the effect of distorting the largely efficient outcomes achieved by a mostly competitive ports industry”. After toying with the notion of a small-scale policy response along the lines of a “light-handed” alternative dispute resolution mechanism, the Report concludes (Chapter 8):

In this circumstance a legitimate policy response is to continue with the current arrangements. Put another way, the present state of the world is not “first best” in the sense that the exercise of any market power by ports could be driving market outcomes away from competitive levels and imposing welfare losses. However, imposing requirements that are potentially intrusive runs the risk of ultimately imposing costs on the industry that outweigh the current welfare losses, even if the policy response was effective in eliminating the welfare losses. The policy response would therefore take us to an inferior state of the world. We are currently in a “second best” world, but probably not by a large order of magnitude. There is, however, a very real risk of moving to a “third best” outcome if a truly light-touch policy approach cannot be designed and implemented successfully.

The Government appears to have accepted this advice that second best can, at least in the realm of economics, amount to the best of all possible worlds, and announced in December 2002 that no specific action would be taken in respect of port competition and market power. The same fate seems to have befallen all the other recommendations of the Shipping Industry Review.

Foreign Fishing Crews and Forfeiture

The Fisheries (Foreign Fishing Crew) Amendment Act 2002 began life as the Foreign Fishing Crew Wages and Repatriation Bond Bill 2000. The aim of this Bill was to protect the financial position of foreign fishing crews if their New Zealand operator went into receivership. The impetus for the Bill was the financial collapse in 1998 of Abel Fisheries Ltd after the five Russian fishing vessels it had chartered to fish its quota were forfeited to the Crown following Abel's conviction for quota management offences. This collapse had its sequel in the Court of Appeal in *Kareltrust v Wallace & Cooper Engineering (Lyttleton) Ltd* [2001] 1 NZLR 401, where a local engineering firm unsuccessfully sought to enforce its statutory right of action in rem for work it carried out on the vessels prior to forfeiture, and in *Karelrybflot AO v Udovenko* [2002] 2 NZLR 24, where the few remaining members of the Russian crew succeeded in their wages claims (see [2001] New Zealand Law Review 114-123).

As originally drafted, the Bill provided for all fishing companies to pay a bond in cash, or guarantee an equivalent amount by way of an insurance policy, to create a fund to cover foreign crews' minimum wages and repatriation costs in the event of a financial collapse. In the Select Committee, the Bill was subjected to intense lobbying from the fishing industry, which argued that its provisions imposed an unfair and costly burden on the entire industry. As a consequence, the Select Committee decided to take up the Seafood Industry Council's alternative proposal of a system of voluntary self-regulation, which seems largely to involve the printing and distribution of multilingual brochures informing foreign crews and masters of their rights under New Zealand employment law.

Having been gutted by the Select Committee, the sole remaining clause of the Bill was brought back to the House and duly passed into law. The Fisheries (Foreign Fishing Crew) Amendment Act 2002 amends the definition of "interest" in section 256 of the Fisheries Act 1996, which allows any person claiming an interest in forfeit property to apply to the Court for relief from the effect of forfeiture on that interest.

In general terms, section 256 is a marked improvement over the former regime in the Fisheries Act 1983, which gave the Minister of Fisheries an absolute discretion to dispose of forfeit property or allow relief from forfeiture. Given the potential complexity of forfeiture cases, and the devastating effect that forfeiture may have on innocent third parties, it is appropriate that such matters should be determined by the courts on the basis of detailed statutory guidelines, rather than by the exercise of an unfettered ministerial discretion.

However, the definition of "interest" in section 256 is bizarre. In respect of New Zealand fishing vessels, "interest" means, as one would expect, "a legal or equitable interest in that forfeit [vessel] that existed at the time of forfeiture". However, with regard to foreign fishing vessels or foreign-flagged vessels chartered to New Zealand operators, section 256 originally provided that ownership was the only recognised "interest" qualifying for an application for relief from forfeiture. The Fisheries (Foreign Fishing Crew) Amendment Act 2002 now extends the definition of "interest" in foreign

vessels to include “an interest, as determined by the Employment Relations Authority or any court, that any fishing crew have in unpaid wages” and “an interest in costs incurred by a third party (other than the employer) to provide for the support and repatriation of foreign crew employed on the vessel”.

This amended definition of “interest” at least affords fishing crews protection for their maritime lien or employment claims (although it is not clear whether this protection will be particularly effective in practice – in most cases crews will only bring their wages claims *after* their vessel has been forfeited to the Crown, whereas the section seems to require determination of wages claims *prior* to forfeiture, or at least prior to an application for relief from forfeiture; and the poor master seems to have been inadvertently excluded from this protection) and provides the fishing industry and other third parties with some level of comfort that they will be reimbursed if they support and repatriate foreign fishing crews.

However, what is the rationale for limiting relief from forfeiture to these groups only in respect of foreign vessels (but not New Zealand vessels)? Why should local repairers, suppliers, mortgagee banks, and other parties with a legal or equitable interest in foreign fishing vessels working New Zealand fisheries waters be excluded from applying for relief from forfeiture? The Abel Fisheries collapse and the ensuing litigation suggest that it is precisely these local parties who need extra statutory protection. Unlike foreign masters and crews, their claims do not enjoy the protection of a maritime lien, and their statutory rights of action in rem are easily thwarted, either by the forfeiture of the vessel itself, or by an orchestrated transfer of ownership of the vessel which takes immediate effect on its release from forfeiture.

The nationality or ownership of a vessel used to commit fisheries offences in New Zealand waters is quite rightly not regarded as relevant to the issue of forfeiture. It is both illogical and outrageous that the nationality of forfeit vessels should determine whether innocent third parties can apply for relief from forfeiture.

Health and Safety in Employment

The Health and Safety in Employment Amendment Act 2002, which came into force in May 2003, extends the application of the Health and Safety in Employment Act 1992 to ships in certain circumstances, and repeals Part II of the Maritime Transport Act 1994, which imposed on New Zealand shipowners health and safety obligations in similar terms to the Health and Safety in Employment Act. These obligations were policed by the Maritime Safety Authority. The Authority has also been nominated to administer the new Act, in so far as it applies to the maritime industry.

What, then, has changed? The aim of the new Act is to provide consistent and clear health and safety coverage across the whole maritime industry. By bringing both wharf-side and ship operations under the ambit of the same Act, one can hopefully avoid complicated and frustrating

demarcation issues (see (2002) New Zealand Parliamentary Debates, Health and Safety in Employment Amendment Bill 2002, Report from the Select Committee, 17 December 2002, Peter Brown):

When ships come into port the people working in the holds are governed by the Occupational Safety and Health Service, the crew is governed by the Maritime Safety Authority, and the people on the wharves are governed by the Occupational Safety and Health Service. We believe that should all come under one umbrella. ...

A prime example of the need for that was a ridiculous situation that occurred in New Plymouth. There was a crane failure, 2 tonnes of cargo went down the hold, and the two inspectors, one from the Occupational Safety and Health Service and the other from the Maritime Safety Authority, did not know who was in charge, because that depended on the particular component in the gear that had failed.

However, the drafting of the new Act falls somewhat short of this aim. The repealed Part II of the Maritime Transport Act imposed health and safety obligations on every "employer of seafarers on a New Zealand ship". By contrast, the new Act covers any person "employed or engaged under an employment agreement or contract of services governed by New Zealand law to work on board a New Zealand ship or on board a foreign ship carrying coastal cargo while the foreign ship is on demise charter to a New Zealand-based operator" or "performing work on a foreign ship while it is carrying out petroleum operations in New Zealand continental waters". The Act also applies to that person's employer or principal, and to their ship as a place of work.

At first blush, the new Act appears to offer considerably more comprehensive coverage, in the sense that it applies to both employees and contractors, and to foreign ships as well as New Zealand ships. (At the risk of being pedantic, the reference to foreign ships carrying coastal cargo while on demise charter to New Zealand-based operators is otiose. Such ships, being entitled to be registered under section 8(1)(b) of the Ship Registration Act 1992, are in fact "New Zealand ships", as defined in section 2(1) of the same Act.)

However, the Achilles heel of the new Act's coverage is the requirement that the relevant employment or services contract be governed by New Zealand law. Sections 22 and 23 of the Maritime Transport Act 1994 lay down minimal employment obligations in respect of New Zealand crews, but do not require employment contracts to be governed by New Zealand law. There is likewise no mandatory governing law requirement in respect of foreign-flagged vessels demise chartered to New Zealand-based operators. It will therefore be ridiculously easy for unscrupulous owners or operators to avoid the application of the new Act by inserting an appropriate choice of foreign law clause in their employment or services contracts. Unless the courts, having regard to the purpose of the legislation, are willing to strain the words of the new Act considerably, it may in practice provide maritime workers with more attenuated and uncertain health and safety coverage than they previously enjoyed.

Such important legislation should clearly provide mandatory coverage for all workers on New Zealand ships worldwide and on foreign ships working New Zealand coastal waters. That this objective could be very easily achieved through proper drafting, is illustrated by section 103(5) of the Fisheries Act 1996, which simply provides that the Minimum Wage Act 1983 and the Wages Protection Act 1983 shall apply to foreign fishing vessels while they are in New Zealand fisheries waters, regardless of whether the crews' contracts are governed by New Zealand law, and extends the jurisdiction of the New Zealand courts accordingly.

Re-arrest and Security

In *Det Norske Veritas AS v The Ship "Clarabelle"* (HC Auckland AD 35 SD 01, 12 March 2002) Det Norske Veritas (DNV) applied to the High Court to re-arrest the fishing vessel *Clarabelle*. DNV had earlier commenced admiralty proceedings in respect of a disputed payment for a survey conducted by DNV for the *Clarabelle's* owners. The *Clarabelle* was arrested and then released on payment of security. At issue was whether the Registrar had assessed the amount of security correctly. DNV contended that security should be calculated on the basis of its reasonably arguable best case, including estimated future interest on the claim and likely costs to be incurred in a future defended hearing. The shipowners argued that the security required should only include interest and costs as at the date of the application for release. The Registrar fixed security at the lower level sought by the shipowners.

Fisher J held that, although the High Court Rules did not expressly provide for jurisdiction to re-arrest a vessel on the basis that the original security ordered was inadequate, the "gap-filling" provision in Rule 767 nonetheless empowered the Court to determine the appropriate procedure in such a case. In any event, as Fisher J noted, the High Court clearly has inherent admiralty jurisdiction to re-arrest a vessel to obtain adequate security (see *Re The Ship "Hero"* (1865) Brown & Lush 447; 167 ER 436).

His Honour saw the power to order re-arrest as involving a "broad discretion which must, of course, be exercised judicially". Although Fisher J was willing to accept that, on the principle laid down in *The "Moscanthy"* [1971] 1 Lloyd's Rep 37, the plaintiff was prima facie entitled to sufficient security to cover the amount of its claim, including interests and costs on the basis of its best reasonably arguable case, the Court still had to decide what level of security, if any, is justified in the circumstances of each individual case (para 14): "It should not be assumed that security at a Rolls Royce level is the inalienable right of a plaintiff simply because the Admiralty jurisdiction has been invoked". After weighing up relevant factors, his Honour decided (para 20) that this was a relatively low-risk case, and it would be "oppressive to order re-arrest for the purpose of obtaining security at the higher sum sought by DNV. The usual reasons for ordering security at the highest possible level in an Admiralty case are diluted in this one."

The Court of Appeal disagreed. In *Det Norske Veritas AS v The Ship "Clarabelle"* [2002] 3 NZLR 52; [2002] 2 Lloyd's Rep 479, the Court held (paras 27, 31-32) that the power to release and re-arrest does not involve the exercise of a broad, largely unfettered discretion:

[I]n our view the principles relevant to the determination of the present application to re-arrest are clear and well settled. First, following arrest a plaintiff is entitled to security assessed on a reasonably arguable best case basis in terms of the *Moscanthy* principle. Departure from that approach may be appropriate, in which case strict terms designed to provide adequate alternative security ... are to be expected. But the present was not a case in that category. The parties' representations to the Registrar concerned only the level of security. It was not suggested with reference to the *Clarabelle* that its owners were incapable of providing security, but would submit to other terms designed to achieve the same end. Rather the issue was solely one of quantum. As to that, a result was reached by the Registrar which was unsupportable in principle.

Second, we do not accept the argument that re-arrest for the purpose of provision of increased security is only appropriate in exceptional circumstances. On the one hand there is a rule, or immunity, against re-arrest. Its expression is ordinarily couched in terms of the need to avoid oppression or unfairness to a ship's owner who has already provided security and thereby secured the release of the ship in the first place. But, on the other hand, there are clear exceptions to that rule, including in the situation where security was fixed at an inadequate amount initially, or where the actions of the owner have rendered originally adequate security inadequate. In such cases, an application to re-arrest may be granted in fairness to the plaintiff.

The Court of Appeal's approach is to be preferred, both as being in line with international admiralty practice (see eg *Atlantic Shipping (London) Ltd v Ship Captain Forever* (1995) 97 FTR 32; *The Ruta* [2000] 1 Lloyd's Rep 357; and Articles 13(3) of the Arrest Convention 1952 and 5(1)(2) of the Arrest Convention 1999) and as giving proper recognition to the real underlying function of arrest, which is to provide security for the plaintiff's claim; that is, to ensure that the res or an appropriate substitute fund is available for judgment to be enforced against it. This function of arrest, which is one of the distinctive features of the action in rem, will undoubtedly be eroded if release may be ordered on provision of a substitute fund that, in the context of the particular claim, affords less security to the plaintiff than the original res. (Assuming, of course, that it has not become merely a quaint and old-fashioned heresy to insist that the action in rem does have any distinctive features and is somewhat more than just an action in personam in historical drag: see *The Indian Grace (No 2)* [1998] 1 Lloyd's Rep 1.)

Arresting Aircraft and Wrongful Arrest

As every maritime law student hopefully knows, an aircraft is not a ship. Even a seaplane is not a ship. This has been settled law since *The Glider Standard Austria SH 1964* [1965] 2 All ER 1022. Although the Admiralty Act 1973, which is modelled on the Administration of Justice Act 1956 (UK), does

make reference to “aircraft”, on closer examination, the reach of New Zealand admiralty jurisdiction over aircraft is actually very limited. Sections 4(1)(i), (j) and (k) of the Admiralty Act include salvage, towage and pilotage claims against aircraft in the list of claims in respect of which the courts have admiralty jurisdiction. The towage and pilotage claims are further circumscribed by section 2 of the Act, which provides that “towage” and “pilotage”, in relation to an aircraft, mean towage and pilotage while the aircraft is waterborne. Finally, section 5(1) of the Act expressly provides for the enforcement of maritime liens against aircraft by means of an action in rem, but section 5(2), which provides for statutory rights of action in rem in other cases, is framed exclusively in terms of enforcement against ships. As a consequence, New Zealand admiralty jurisdiction against aircraft is clearly limited to in rem enforcement of maritime salvage liens over aircraft and in personam enforcement of towage and pilotage claims in respect of waterborne aircraft.

Transpac Express Ltd v Malaysian Airlines (HC Auckland AD 36 SD 99, 18 June 2002) is therefore noteworthy for involving an invocation of the admiralty jurisdiction to arrest a Boeing 737 over a carriage of goods dispute. Astonishingly, a warrant of arrest was obtained from the Auckland High Court and the aircraft remained under arrest for two days before being released. The plaintiff subsequently acknowledged that there had been no jurisdiction whatsoever to arrest the aircraft under the Admiralty Act. The plaintiff’s claim for breach of contract was unsuccessful.

Smellie J upheld the defendant’s counter-claim for abuse of process and wrongful arrest. His Honour found that the classic rule in *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945 (PC), later affirmed in *The Strathnaver* (1875) 1 App Cas 58 (PC), is part of New Zealand law. In *The Evangelismos* the Privy Council said (359):

Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would justify a Court of Admiralty giving damages [for wrongful arrest], as in an action brought at common law damages may be obtained. ... The real question in this case ... comes to this: is there or is there not reason to say that the action was so unwarrantedly brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?

Smellie J noted that the Supreme Court of Canada was asked in *Armada Lines Ltd (now Clipper Shipping Lines) v Chaleur Fertilizers Ltd* [1997] 2 SCR 617 to depart from the *Evangelismos* rule, but declined to do so, on the basis that any reform in the area of wrongful arrest is best left to the legislature (compare, eg, section 34(1)(a)(ii) of the Admiralty Act 1988 (Cth), which provides that a party may recover damages arising out of the arrest of property if the arrest was obtained “unreasonably and without good cause”).

Applying the *Evangelismos* rule to the facts of the case, Smellie J found that the plaintiff’s erroneous view that there was jurisdiction to arrest the aircraft under the Admiralty Act was merely an error of judgment devoid of

any element of bad faith or gross negligence, particularly in the light of the urgency and time constraints of the case. However, the plaintiff had acted in bad faith or was grossly negligent in bringing admiralty proceedings on what it knew, or ought to have known, was not a binding charter, and this amounted to both a wrongful arrest and an abuse of process.

This case involved a textbook application of the *Evangelismos* rule to a particularly egregious example of bad behaviour on the part of a plaintiff. As such, the court did not squarely have to address the issue of whether the *Evangelismos* rule strikes the correct balance between defendant and plaintiff in cases of rank incompetence or serious errors of judgment that nonetheless fall short of bad faith or gross negligence. Making the necessary allowances for the heat and stress of the moment, why should a plaintiff not incur liability for immobilising a commercially valuable asset when it was, or should have been, beyond doubt that there was no admiralty jurisdiction on the plain wording of the Act? Where an error of judgment in respect of jurisdiction is discovered, or should reasonably have been discovered, after arrest, why should a plaintiff not be under a positive duty to ensure that the arrested property is released immediately? Is it not adding insult to injury to require the defendant to argue for the release of its wrongfully detained asset? In such (thankfully rare) cases, the Australian legislative reform, which lowers the *Evangelismos* threshold to one of general negligence, may have something to offer in terms of encouraging or enforcing a culture of research before arrest.

Carriage of Goods and the Gold Clause Trap

In *Dairy Containers Ltd v The Ship "Tasman Discoverer"* [2002] 1 NZLR 265; [2001] 2 Lloyd's Rep 665, a shipment of coils of electrolytic tin plates being carried from Busan in Korea to Tauranga was damaged by sea water (for a more detailed discussion of this case, see Paul Myburgh "'All That Glisters': The Gold Clause, the Hague Rules and Carriage of Goods by Sea" (2002) 8 NZBLQ 260). The shipowner, Tasman Orient Line, admitted liability, but argued that its liability was limited to £5,500 (£100 x 55 damaged coils) on the basis of a clause in the bill of lading that incorporated the Hague Rules and then provided that:

for the purpose of this sub-paragraph the limitation of liability under the Hague Rules shall be deemed to be £100 sterling, lawful money of the United Kingdom per package or unit...

The consignee, Dairy Containers, argued that it was entitled to recover its total actual loss. Williams J agreed with Dairy Container's interpretation of the bill of lading and package limitation. Adopting the approach taken in two previous Gold Clause cases, *The Rosa S* [1988] 2 Lloyd's Rep 574 and *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co (The Nadezhda Krupskaya)* [1989] 1 Lloyd's Rep 518, his Honour concluded that the shipowner had fallen into the "Gold Clause trap" by incorporating all of the Hague Rules into its bill of

lading. In so far as the modification of the Hague Rules quoted above produced a package limit lower than that in the Hague Rules, it was therefore rendered null and void by Article III rule 8 of the Hague Rules. Instead, the reference to the £100 package limitation in Article IV rule 5 should be read together with Article IX of the Hague Rules, which provides that “monetary units mentioned in this Convention are to be taken to be gold value”. On this analysis, the carrier’s package limitation was the current market value of the standard weight of gold which made up £100 when the Hague Rules were adopted in 1924, which amounted to a total package limit of over NZ\$1 million.

The difficulty with this analysis, as the Court of Appeal pointed out in *Dairy Containers Ltd v The Ship "Tasman Discoverer"* [2002] 3 NZLR 353; [2002] 2 Lloyd's Rep 528, is that this case did not involve an attempt to “contract out” of a mandatory application of the Hague Rules. Rather, it was agreed by the parties that the Hague Rules were *not* mandatorily applicable to the carriage in question. As such, it became a straightforward issue of construing a bill of lading which incorporated a treaty text, not as a binding treaty, but as part of its contractual terms. The Gold Clause cases cited in the High Court were therefore simply not relevant, as they both involved carriage to which the Hague Rules had mandatory application.

The Court of Appeal took the wording of the bill of lading “piece by piece” and held (para 25) that the gold value package limitation in Article IV rule 5 read with Article IX of the Hague Rules had been “replaced for the purposes of the present contract by a new limit which is written in terms of national currency only ... and which makes no reference at all to gold value.” The Court held that the carrier’s liability was therefore limited to £5,500 in ordinary or paper currency. Dairy Containers has been granted leave to appeal to the Privy Council.

The Court of Appeal’s approach would seem to accord with common sense and general principles of contract interpretation. In particular, as the bill of lading clause in this case did not involve an attempt to displace the mandatory application of the Hague Rules, it was appropriate to adopt a “common sense reading of the bill of lading as a whole” (para 30) rather than a hostile reading of any modifications to the standard Hague Rules (which would have been appropriate if the Hague Rules applied, as an international Convention, by force of law). It is difficult to see why the carrier would have inserted the specific reference to “£100 sterling, lawful money of the United Kingdom” and stipulated that the Hague Rules should be “construed accordingly”, if it did not intend to signal a departure from the default gold value monetary units used in the Hague Rules. Although “lawful money” might not signal such a departure as clearly as a reference to, for example, “paper money”, “nominal value” or “face value”, it is in my view a considerably less plausible interpretation that “lawful money of the United Kingdom” was intended to mean the gold value equivalent of £100 sterling in 1924. Although the Coinage Act 1971 (UK) still specifies the value of a gold sovereign, the United Kingdom officially abandoned the gold standard in

1931. Given this historical context, “lawful money of the United Kingdom” is far more likely to mean the folding stuff.

This case provides a salutary lesson for both parties to bills of lading. On the one hand, consignees need to be aware that, if the Hague Rules do not have mandatory application, all that glisters by incorporation into the bill of lading may indeed not be gold. On the other hand, carriers should beware the “gold clause trap”, but only where it is relevant (which also involves an understanding of when the Hague Rules have mandatory application), and should signal any contractual modifications to the Hague Rules very clearly and carefully.

Surveys and Negligence

Attorney-General v Carter (CA 72/02, CA 74/02, 13 March 2003) involved a claim for economic loss suffered as a result of reliance on certificates of survey allegedly negligently issued by the Marine Division of the Ministry of Transport (MOT), and Marine and Industrial Safety Inspection Services (M&I) on which the MOT’s and later the Maritime Safety Authority’s survey responsibilities devolved.

In 1994 the plaintiffs purchased the *Nivanga* from a Fijian company. The *Nivanga* was inspected by MOT and later M&I and two interim certificates and a final certificate of survey were issued under the now-repealed statutory framework of sections 206 and 216 of the Shipping and Seamen Act 1952. The Court of Appeal analysed the statutory survey requirement and, unsurprisingly, concluded (para 15) that it “was and is focused on matters of safety and seaworthiness of ships”. The Court held that this emphasis on maritime safety was reinforced by the introduction of the Maritime Transport Acts 1993 and 1994 and the creation of the Maritime Safety Authority.

The Court discussed at some length the general theoretical basis of liability for negligent misrepresentation (for an excellent critique of the Court’s reasoning, see Allan Beever “All at Sea in the Law of Negligent Misrepresentation” (2003) 9 NZBLQ (forthcoming)). Returning to the specific facts of this case, the Court concluded (para 34) that it could not reasonably be said that in issuing the survey certificates the MOT or M&I owed the plaintiffs a duty of care not to harm their economic interests in the *Nivanga*, because a relationship of proximity did not exist between the parties. First, the statutory framework and purpose of the survey certificate was to ensure safety and seaworthiness of ships, rather than to protect the plaintiffs’ economic interests. Secondly, given the focus on safety and seaworthiness, the plaintiffs did not come within those class of persons who were reasonably entitled to rely on the safety and seaworthiness of the surveyed ship, such as passengers on the ship, or crew, or other seafarers.

The Court was of the view that it was therefore not necessary to address policy issues, but nonetheless noted (para 35):

There is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence. Whether it be a case of failing to issue or of issuing a survey certificate, the threat of legal liability for economic loss might subject the survey authority to inappropriate pressures to the detriment of the overall public interest.

The Court thought that the safety focus of the survey regime was another policy factor pointing away from imposing a duty of care against economic loss. The Court was reinforced in its decision by similar reasoning in cases such as *The Morning Watch* [1990] 1 Lloyd's Rep 547; *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648 (CA); and *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] 1 AC 211 (HL). The Court therefore held that it would not be "fair, just or reasonable" to impose a duty of care on the MOT and M&I of the kind argued by the plaintiffs, and upheld the High Court's decision to strike out the plaintiffs' causes of action based on negligence.

It is obvious from the judgment that the plaintiffs' specific claims were unlikely to succeed, as they faced further difficulties in respect of proof of reliance, causation, limitation issues and remoteness of damage. Nonetheless, the Court's blanket finding that the MOT and M&I owed no duty of care in negligence to shipowners in conducting surveys and issuing survey certificates because the focus of the regulatory framework is to ensure maritime safety, seems more than a little counter-intuitive, particularly when precisely the same regulatory framework is frequently used by the Maritime Safety Authority to sheet liability home to other negligent participants in the maritime industry.

And, whilst there may be difficulties squaring the plaintiffs' specific claims for *economic loss* with the policy concerns of a maritime safety regulatory framework, the Court of Appeal's apparent suggestion that shipowners are generally not included in the class of persons entitled to rely on survey certificates as part of that maritime safety framework, is surprising. The regulatory schemes of the Shipping and Seaman Act 1952, and even more clearly the Maritime Transport Act 1994, were and are intended to promote safety for *all* participants in the New Zealand maritime industry, not just "passengers on the vessel or as crew or as other seafarers, damaged in a material way by the allegedly negligent certificates" (para 34). This view suggests an overly narrow reading of the purpose and scheme of the relevant Acts.

Further, the Court of Appeal's reference to the English courts' unwillingness to impose a duty of care on classification societies may not be entirely on point. Apart from obvious differences in status and function between private classification societies and state-regulated surveyors, one of the more significant factors which led the Court of Appeal and the House of Lords in *The Nicholas H* to refuse to recognise a duty of care owed by classification societies was the policy concern that to do so would (per Lord Steyn, 240):

enable cargo-owners, or rather their insurers, to disturb the balance created by the Hague Rules and Hague-Visby Rules as well as by tonnage limitation provisions, by enabling cargo-owners to recover in tort against a peripheral party to the prejudice of the protection of shipowners under the existing system. For these reasons I would hold that the international trade system tends to militate against the recognition of the claim in tort put forward by the cargo-owners against the classification society.

This policy concern – that imposing a duty of care on classification societies would result in the circumvention or “short-circuiting” of the contractual framework of an agreed international carriage liability regime and the unreasonable targeting of “deep-pocket” parties outside that framework who are not protected by its checks and balances – is simply not relevant in *Attorney-General v Carter*.

Finally, the Court’s refusal to recognise a duty of care on the part of MOT or M&I in respect of ship survey certificates would seem to be wholly inconsistent with the earlier Supreme Court decision of *Rutherford v Attorney-General* [1976] 1 NZLR 403 (which was not cited in *Attorney-General v Carter*, but was cited with approval by the Court of Appeal in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282), in which Cooke J upheld a claim for economic loss arising from a certificate of fitness for a heavy motor vehicle negligently issued by the Ministry of Transport pursuant to s 143 of the Transport Act 1962. His Honour’s conclusions about the MOT’s duty of care in *Rutherford* (413-414) are quoted here in full to illustrate the sharply contrasting approaches to this issue:

No attempt is being made to make the ministry liable as on a contractual warranty of the vehicle's condition. All that is contended is that a purchaser in such proximity to the ministry, in point of time and effect, as was this plaintiff is entitled to assume that reasonable care has been exercised in issuing the certificate and to rely on the certificate as amounting to a representation by the ministry that such care has been exercised. ...

Presumably the ministry's statutory powers of control are imposed in the interests of all road users, whether motorists, passengers, pedestrians or others. If there is any duty of care, there is no justification in the nature of the ministry's functions for excluding from its scope a purchaser of the vehicle. ...

Only pecuniary loss was suffered. As already indicated, I think this weighs somewhat against the claim. On the other hand the plaintiff is claiming no more than the cost of the work insisted on by the ministry, after a reasonably careful inspection, in order to qualify for a certificate. No loss of profits nor any other compensation is claimed. ...

The legislature has provided no specific remedy for negligence in the issue of a certificate of fitness. Any relevant principles of the common law have been left to operate. In my judgment it is in the public interest that the common law should supply a remedy in a case like the present.