

ADMIRALTY IN WONDERLAND

Danzas AG v. Hally Press Ltd

An airplane is not a ship.¹ Even a seaplane is not a ship.² Despite the beguilingly simple and settled nature of this proposition, the New Zealand Court of Appeal recently had to reconsider it in the highly unusual context of whether a Warsaw Convention claim, which was brought against an aircraft in the admiralty jurisdiction, was time-barred.³ In holding that the claim was not, the Court of Appeal reached some surprising and, it is submitted, erroneous conclusions about the nature of New Zealand's admiralty jurisdiction, and its relationship with the general civil jurisdiction.

Facts

Hally Press Ltd claimed NZ\$948,677 for damage to a heavy duty printing press carried by Danzas AG and Malaysian Airline System (MAS) from St. Gallen, Switzerland to Auckland, New Zealand. Carriage was subject to the Warsaw Convention, Art 29(1) of which provides that the "right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination..."⁴ Here, the two-year limitation period expired on 21 December 2001. Hally issued proceedings in admiralty, in the form of an admiralty action in rem and in personam,⁵ in the New Zealand High Court on 12 December 2001. Hally's statement of claim cited "the aircraft registered as N524MC", Danzas, and MAS as defendants.

MAS agreed to accept service on condition that Hally discontinued its action against the aircraft and removed the proceedings from the admiralty jurisdiction. Hally therefore filed a notice of discontinuance against the aircraft on 12 February 2002, together with an amended statement of claim

¹ *The Glider Standard Austria SH 1964* [1965] P 463; [1965] 2 Lloyd's Rep 189; *Emerald Airways Ltd v. Nordic Oil Services Ltd 1996 SCLR 86*; 1996 SLT 403; *Transpac Express Ltd v. Malaysian Airlines HC Auckland, AD 36-SD99*, 18 June 2002.

² *Watson v. RCA Victor Co Inc (1934) 50 Ll LR 77*; *Polpen Shipping Co Ltd v. Commercial Union Assurance Co Ltd [1943] 1 KB 161*.

³ *Danzas AG v. Hally Press Ltd (2004) 17 PRNZ 181*.

⁴ The Warsaw Convention has the force of law in New Zealand by virtue of the Civil Aviation Act 1990 (NZ), s 91C, read with s 91A and Sch 4.

⁵ Following the decision in *UDC Finance Ltd v. The Ship "Star of Auckland"* (1989) 2 PRNZ 185 that admiralty actions brought both in rem and in personam were permissible, the High Court Rules (Judicature Act 1908 (NZ), Sch 2) were amended expressly to provide for such actions: see HCR, rr 769(1), 771(6).

deleting all references to the aircraft and the admiralty jurisdiction, and requested the Registrar to transfer the proceedings to the general civil jurisdiction. Nicholson J subsequently issued a consent order transferring the proceeding “[p]ursuant to s. 12 of the Admiralty Act 1973”.⁶ MAS accepted service, filed a statement of defence, and did not challenge jurisdiction.

Danzas, however, was not party to this arrangement. When eventually served, Danzas filed a notice of appearance under protest, objecting to the court’s jurisdiction and applying for Hally’s claims against it to be struck out. Danzas argued that Hally’s “admiralty action” commenced on 12 December 2001 was a nullity, as the court lacked any admiralty jurisdiction in respect of the claims. Hally’s later action in the general civil jurisdiction, whilst valid, had only commenced in February 2002, after the Art 29 limitation period had expired. Hally’s Warsaw Convention right to claim damages against Danzas was therefore extinguished.

Admiralty jurisdiction

The Admiralty Act 1973 (NZ), which is still largely based on the Administration of Justice Act 1956 (UK), confers some admiralty jurisdiction in respect of aircraft, but its scope is highly limited. Section 5(1) of the Admiralty Act provides that claims giving rise to maritime liens may be enforced against “any ship, aircraft, or other property” by means of an action in rem, but the only potential candidate would seem to be property and life salvage involving aircraft.⁷ Further, although the list of maritime claims in section 4(1) of the Admiralty Act includes claims in the nature of towage and pilotage of aircraft while waterborne,⁸ section 5(2) of the Admiralty Act only creates statutory rights of action in rem against the relevant *ship*, or a sister *ship*. By implication, therefore, claims for towage and pilotage of waterborne aircraft may only be enforced in admiralty by means of an action in personam.

Here, Hally was relying on section 4(1)(g) (claims “for loss or damage to goods carried in a *ship*”) or section 4(1)(h) (claims “arising out of any agreement relating to the carriage of goods in a *ship* or to the use or hire of a *ship*”) of the Admiralty Act to found jurisdiction. In the High Court Harrison J readily held, and Hally’s counsel conceded, that an aircraft was simply not a ship for the purpose of these two sections, and that Hally should thus not

⁶ *Supra*, fn 3, at 183.

⁷ Admiralty Act 1973 (NZ), s 4(1)(i), read with the Maritime Transport Act 1994 (NZ), ss 216, 219A, and Sch 6 (International Convention on Salvage 1989).

⁸ Admiralty Act 1973 (NZ), s 4(1)(j), (k), read with the s 2 definitions of “towage” and “pilotage” of aircraft.

have commenced its proceedings in admiralty.⁹ The Court of Appeal agreed with this finding, at least in respect of Hally's admiralty action in rem.¹⁰

Concurrency of admiralty and general civil jurisdictions

However, the Court of Appeal refused to accept that Hally's action was therefore a nullity. Instead, the Court of Appeal upheld the ruling of the High Court that, when exercising its admiralty jurisdiction, the High Court always has concurrent civil jurisdiction. As a consequence, even if the High Court had no *admiralty* jurisdiction in respect of Hally's claim, the action was nonetheless properly brought in the *civil* jurisdiction within the Warsaw Convention limitation period. This conclusion is controversial, as it turns on its head the traditional view that (1) New Zealand's admiralty jurisdiction is discrete and distinct from the general civil jurisdiction; (2) plaintiffs choose to bring their claims either in admiralty or in the general civil jurisdiction, subject to the Court's powers of transfer; and (3) concurrency of jurisdictions can only be achieved by filing parallel actions both in admiralty and in the general civil jurisdiction.¹¹

The Court of Appeal based its finding on concurrency of jurisdictions on three grounds. First, the Court emphasized the unitary and integrated nature of the High Court's overall jurisdiction. There is no separate Admiralty Court or Admiralty Division in New Zealand.¹² Even when hearing claims in admiralty, the High Court "still acts as the High Court of New Zealand. The proceedings are still filed in that Court. The Judge is acting as a Judge of the High Court, not as a Judge of the Court of Admiralty."¹³ Admiralty proceedings are merely a subset of general civil proceedings, and the rules on

⁹ *Hally Press Ltd v. Danzas AG* HC Auckland, CP78-SD02, CIV2090/02, 15 July 2003, paras [9]-[10]. "Ship" is defined in the Admiralty Act 1973 (NZ), s 2, as including "any description of vessel used in navigation". "Aircraft" is defined in the same section by reference to the Civil Aviation Act 1990 (NZ), which defines aircraft as "any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth".

¹⁰ See *supra* fn 3, at 183: "[T]he aircraft ought not to have been cited as a party to an action in rem because a claim in Admiralty was not available under s 4 Admiralty Act 1973 in such circumstances". However, the Court of Appeal did not expressly acknowledge that there was, equally, no admiralty jurisdiction in personam in the circumstances.

¹¹ See *Linton v. Taranaki Harbour Board* [1959] NZLR 523; *Illman Jones Inc v. The Ship "Dasher 1"* (1986) 3 PRNZ 585; *Moore v. Westpac Banking Corp* HC Auckland, A486/79, AD357/83, 30 April 1984; discussion in P.A. Myburgh, "New Zealand" in M.A. Huybrechts (ed), *International Encyclopaedia of Transport Law* (Kluwer Law International, 2002) paras 49-50.

¹² The Admiralty Act 1973 (NZ), s 3(1) provides that the "admiralty jurisdiction conferred by this Act ... [m]ay be exercised by the High Court in rem and in personam".

¹³ *Supra* fn 3, at 189.

admiralty practice are incorporated into the High Court Rules (HCR). The Court of Appeal concluded, therefore, that “in exercising its [admiralty] jurisdiction in personam, the [High] Court is exercising its Civil jurisdiction in relation to the ... causes of action against the individual defendants”.¹⁴

There are difficulties with this reasoning. It may be argued that the Court of Appeal significantly overstates the level of integration of the two jurisdictions. Whilst the High Court exercises both general civil jurisdiction and admiralty jurisdiction, the latter is a special, limited, and largely codified statutory jurisdiction conferred by the Admiralty Act. And, although the Admiralty Rules 1975 were revised and incorporated into the HCR as Part 14 in 1998, the general Rules on proceedings in the civil jurisdiction only apply to admiralty proceedings where they are not “modified by or inconsistent with” Part 14 of the HCR or the Admiralty Act.¹⁵ As Part 14 of the HCR and the Admiralty Act set out comprehensive separate requirements, forms, and procedures for admiralty actions in rem and in personam, the general Rules would seem to have only marginal “gap-filling” application to the issue of whether there was admiralty jurisdiction in this case. Further, even if the Court of Appeal’s conclusion that exercising admiralty jurisdiction in personam also amounts to an exercise of the general civil jurisdiction is correct, this does not seem to address the issue in this case. Hally’s admiralty action in personam against Danzas failed to come within the admiralty jurisdiction. As a consequence, there was simply no valid admiralty jurisdiction in personam for the Court to exercise on 12 December 2001.

Secondly, the Court of Appeal referred to the situation in England, noting that it was “abundantly clear” that the English High Court has concurrent civil and admiralty jurisdiction.¹⁶ The Court rejected the argument that the English experience is not comparable because there is no New Zealand equivalent to section 5(5) of the Supreme Court Act 1981 (UK), which expressly provides that the jurisdiction of the English High Court belongs to all Divisions alike. Instead, the Court held that the “established position in England, from which New Zealand Admiralty law and procedure emanated”, indicated concurrency of admiralty and general civil jurisdiction.¹⁷

But the histories of admiralty jurisdiction in the United Kingdom and in New Zealand have, in fact, been quite different. For a start, New Zealand admiralty jurisdiction has never been subject to the sweeping unification and integration effected by the Judicature Acts of 1873 and 1875 (UK).¹⁸ Indeed,

¹⁴ *Ibid.*

¹⁵ HCR, r 766.

¹⁶ *Supra* fn 3, at 188, citing *The Cheapside* [1904] P 339 (CA).

¹⁷ *Supra* fn 3, at 189.

¹⁸ Cf. A. Beck “Admiralty and General Jurisdiction” [2004] NZLJ 395 at 396. Beck applauds the Court of Appeal’s decision in *Danzas* on the ground that, to “accede to an approach which

until the Admiralty Act came into effect in 1976, the New Zealand Supreme Court (the predecessor of the High Court) exercised admiralty jurisdiction as a separate Colonial Court of Admiralty.¹⁹ The Admiralty Act vested admiralty jurisdiction in the High Court, but there are clear indications in the preparatory documents and the Admiralty Act itself that the admiralty and general civil jurisdictions were nonetheless still conceived of as separate and distinct.²⁰ In particular, if Parliament had intended to integrate fully the admiralty and general civil jurisdictions of the Court, there would have been no need to enact section 12 of the Admiralty Act, which provides that the “Court may, of its own motion or upon application, at any stage order that any proceedings be transferred from or to the Court in its admiralty jurisdiction”. In introducing the second reading of the Admiralty Bill, the Minister of Justice indicated that the power to transfer proceedings between the admiralty jurisdiction and the “ordinary jurisdiction” was considered necessary to provide “a measure of reciprocity” between the two jurisdictions.²¹ The legislative history of the Admiralty Act, therefore, does not support the Court of Appeal’s monistic view of New Zealand’s admiralty and general civil jurisdictions.

Thirdly, the Court of Appeal construed section 3(2) of the Admiralty Act as confirming the concurrency of the admiralty and general civil jurisdictions.²² Section 3(2) provides:

In exercising the jurisdiction conferred by this Act, the Court may exercise at the same time any of its other civil jurisdiction, whether statutory or otherwise, and all powers incidental thereto.

The Court of Appeal rejected the argument that section 3(2) was irrelevant, as there had been no valid exercise of the admiralty jurisdiction in this case, and there was thus, as a matter of logic, no “other civil jurisdiction” to exercise at the same time. The Court of Appeal held that the High Court had exercised the jurisdiction conferred by the Admiralty Act in determining whether Hally’s claim fell within the admiralty jurisdiction, and that this had triggered the Court’s other civil jurisdiction as well.

requires entirely separate claims to be brought in admiralty smacks of the minefield which bedevilled the Courts in England prior to the Judicature Acts of 1873”.

¹⁹ See the Colonial Courts of Admiralty Act 1890 (Imp), s 2(2); *Admiralty Jurisdiction: Report of the Special Law Reform Committee on Admiralty Jurisdiction* (Wellington, 1972) 3.

²⁰ *Ibid.* One of the reasons cited for reform was that the existing demarcation between New Zealand’s admiralty jurisdiction and “the common law jurisdiction of the Supreme Court” was not clear enough.

²¹ See NZ Parliamentary Debates, vol. 384, 18 July 1973, 2461.

²² *Supra* fn 3, at 189.

It does seem rather odd to characterize the High Court's determination that there was *no* admiralty jurisdiction in rem or in personam in this case as amounting to an *exercise* of admiralty jurisdiction. Moreover, the legislative history of section 3(2) again does not seem to support the Court of Appeal's construction. Section 3(2) was added to the Admiralty Act by the Admiralty Amendment Act 1975 because of concerns that the jurisdiction conferred by the Admiralty Act was not sufficiently wide to enable the High Court sitting in admiralty to grant equitable remedies, such as specific performance and injunctions.²³ The purpose of section 3(2) was therefore to *supplement* an existing, separate admiralty jurisdiction,²⁴ and to avoid the need to bring parallel proceedings in admiralty and in the general civil jurisdiction. The provision was never intended to bootstrap general civil jurisdiction via the Admiralty Act in the event of an *absence* of admiralty jurisdiction. Moreover, the enactment of section 3(2) would seem to underline Parliament's view of the admiralty jurisdiction as distinct from the general civil jurisdiction, rather than to provide evidence confirming concurrency of the jurisdictions.

Correction of "irregularities"

The Court of Appeal further held that the High Court had been entitled to "regularize" Hally's admiralty action by transferring it to the general civil jurisdiction under section 12 of the Admiralty Act, as the admiralty proceeding was "an irregularity only, and not an act beyond the High Court's overall jurisdiction".²⁵

Whilst the HCR do grant broad powers to amend defects or errors in pleadings, and cure non-compliance with the requirements of the HCR,²⁶ they do not appear to grant to the High Court powers to remedy a lack of substantive admiralty jurisdiction under the Admiralty Act. This is not to suggest that Hally's erroneous invocation of the admiralty jurisdiction was irremediable. The appropriate course of action would have been to refile proceedings in the general civil jurisdiction (which is, in effect, what Hally did in February 2002). However, regardless of whether the "irregularities" in Hally's admiralty action were cured by means of transfer to the general civil jurisdiction, amendment of pleadings, or refiling proceedings, the awkward fact remains that all these steps occurred nearly two months after Hally's

²³ I.M. Mackay "The Admiralty Act 1973 – Part II" [1976] NZLJ 387, 391.

²⁴ As the Court of Appeal itself acknowledged (*supra* fn 3, at 188-189), in the earlier case of *JE Dennis Ltd v. "The Steel Mariner"* HC Rotorua, AD1/95, 1 August 1997, where the High Court joined a misrepresentation action on the basis of s 3(2) of the Admiralty Act, in rem admiralty jurisdiction already existed. The use of s 3(2) was thus purely "an addition to it".

²⁵ *Supra* fn 3, at 189-190, citing *The Sheaf Brook* [1926] P 61; (1926) 24 Ll LR 95 (CA).

²⁶ See HCR, rr 5 and 11.

Warsaw Convention right to damages had been extinguished. It is very difficult to understand how “regularizing” Hally’s action in February 2002 could have retrospectively resurrected a Convention claim that was already “extinguished, dead and gone forever”.²⁷

International law and “technical” arguments

Danzas cited several authorities on the Hague-Visby Rules in its submissions. In the High Court Harrison J found these of little help, preferring instead to decide the issue “by reference to the codified provisions of the Admiralty Act and the High Court Rules”.²⁸ The Court of Appeal briefly referred to the Hague-Visby Rules case-law,²⁹ but neither Court appears to have taken into account any jurisprudence or academic commentaries on Art 29 of the Warsaw Convention. It is suggested that these could have been of assistance, for at least two reasons.

First, although the Convention limitation period may appear harsh, it was designed to achieve certainty in international transport law, and was an integral part of the international compromise embodied in the uniform air carrier liability regime.³⁰ For these reasons, it is appropriate for domestic courts to enforce the Convention limitation period strictly. The onus is on the plaintiff to comply punctiliously with Art 29. If the Court of Appeal had carefully considered the international policy underpinning Art 29, it might have taken a more jaundiced view of a plaintiff which erroneously invoked the admiralty jurisdiction to enforce its Convention right to damages just 10 days before the two-year limitation period expired, and might not have been quite so dismissive of the defendant’s arguments as “technical and designed to avoid dealing with proceedings on the merits”.³¹

Secondly, a consideration of the jurisprudence and commentaries on Art 29 might have led the Court of Appeal to conclude that the central question in this case was not whether the High Court had overall competence *in abstracto* to hear claims for breach of contract, negligence, or bailment; but whether, on the facts, the plaintiff’s *admiralty action* against Danzas was validly commenced *in the admiralty jurisdiction* before the expiration of the Art

²⁷ *Timeny v. British Airways plc* (1991) 102 ALR 565, 578 per Bollen J.

²⁸ *Supra* fn 9, at para [13].

²⁹ *Supra* fn 3, at 187.

³⁰ See, eg, R.L. Buckler and R.I. Fisher, “The Time Bomb in the Warsaw Convention: *Gal v. Northern Mountain Helicopters* and a Review of the Law on Article 29” (2001) 34 UBC LR 553, 560-561.

³¹ *Supra* fn 3, at 190. See too Beck, *supra* fn 18, at 396, who refers to the need to avoid “barren technicalities”.

29 limitation period. It is submitted that the short answer to that question should have been, "No. An aircraft is not a ship."

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