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Trade & Transport News

WELCOME TO THE LATEST EDITION OF PIPER ALDERMAN'S TRADE & TRANSPORT NEWSLETTER. WE DISCUSS BELOW SOME RECENT DECISIONS IN THE TRADE & TRANSPORT INDUSTRY AND HOPE THAT YOU WILL FIND THEM OF INTEREST AND RELEVANT TO YOUR BUSINESS.

March 2008

Antarctic Whaling - debunking the myths and finding solutions

by Frazer Hunt

The annual battle between environmental groups and Japanese whalers in the Antarctic took a new twist last month. Two crew members from Sea Shepherd's vessel "Steve Irwin" were detained for three days on the Japanese whaler "Yushin Maru No 2", after attempting to hand the master a letter demanding that the harpooning cease.

Sea Shepherd accused the Japanese whalers of hostage taking whilst the whalers accused Sea Shepherd of piracy. In addition, the Humane Society International Inc. obtained an injunction against the Japanese whalers in the Federal Court of Australia for breach of the provisions of the *Environmental Protection & Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**) for whaling in the Australian Whale Sanctuary without a permit. In this article, I shall review the background to the controversy and attempt to cut through all the double-speak.

The Antarctic Treaty entered into force in 1961 aiming to ensure Antarctica would be used exclusively for peaceful purposes, including scientific research. Originally, 12 countries, including Australia, were signatories. Prior to the Antarctic Treaty, Australia had sovereignty over an exclusive economic zone. This extended to waters adjacent to the baseline of Australia's external territories, including the Australian Antarctic Territory, which is recognised by only four nations (New Zealand, France, Norway and the United Kingdom), who themselves have asserted similar claims over various parts of the Antarctic land mass. Japan has rejected Australia's attempt to exercise jurisdiction over waters, including the Australian Antarctic Territory, that are considered by Japan to be the high seas.

"Scientific Whaling"

In 1982, the International Whaling Commission passed a global moratorium on commercial whaling. After failing to overturn the moratorium, Japan justifies its continuing whaling activities by labelling it "scientific whaling" within Article VIII of the 1946 International Convention for Regulation of Whaling. Japan continues to conduct its whaling research program and expects to kill up to 935 Minke whales and 50 Fin whales this season.

In 1999, the Commonwealth Parliament enacted the EPBC Act to protect the environment, particularly for matters of national environmental significance and conservation of biodiversity and heritage

within the Australian Antarctic Territory. A whale sanctuary was created and whaling is prohibited in the sanctuary without a permit. Japan carries out at least part of its whaling program in the sanctuary without a permit, as required under the EPBC Act. Whilst the Commonwealth Director of Prosecutions is responsible for prosecuting any offences under the EPBC Act, the DPP has not sought to prosecute any parties for whaling in the Australian Antarctic Territory.

Taking action

The Australian Government has failed to prosecute offences under the EPBC Act. So on 15 January 2008, the Humane Society International Inc. obtained an injunction against the Japanese whalers in the Federal Court of Australia: *Humane Society International Inv. v Kyodo Senpaku Kaisha Ltd*. The respondent was a Japanese company and the owner of numerous vessels which were engaged, and are currently engaged, in whaling in the Australian Whale Sanctuary without a permit under the EPBC Act. Whilst the injunction was granted, the Humane Society International Inc. has acknowledged that the respondent had no presence or assets within the jurisdiction and that unless its vessels entered Australia, thus exposing themselves to possible arrest or seizure, there is no practical mechanism by which the orders of the court can be enforced. As Japan does not recognise the Australian Antarctic Territory and regards this area as the high seas, it will not consider itself bound the injunction to refrain from whaling in this area.

Whilst some commentators have advocated the possibility of seizing vessels owned by Kyodo Senpaku Kaisha such as "Yushin Maru No 2", this would be inflammatory and contrary to international law, being a violation of the Antarctic Treaty. Indeed, seeking to enforce the injunction would almost certainly undermine Australia's broader interests in the region, including its Antarctic territorial claim and free trade negotiations with an important trading partner. To that end, an earlier hearing against Kyodo Senpaku Kaisha Ltd was derailed in 2005 when the former Attorney General, Philip Ruddock, intervened over concerns that the case would spark a diplomatic row.

In the meantime, Greenpeace and the Sea Shepherd Conservation Society have continued in their attempts to stop the whaling through both peaceful and forceful means. Sea Shepherd is a self-proclaimed policing organisation and seeks to justify its conduct (ramming vessels, throwing acid on decks, etc) based on the United Nations World Charter for Nature, Section 21(c), (d) and (e) which provides:

"States and, to the extent that they are able, other public authorities, international organisations, individuals, groups and corporations shall:

> implement the applicable international legal provisions for the conservation of nature and the protection of the environment;

> ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction;

> safeguard and conserve nature in areas beyond national jurisdiction."

Nevertheless, Sea Shepherd has no official mandate or authorisation to enforce any legislation. Certainly, to suggest that Sea Shepherd was entitled to send two crew members from their ship "Steve Irwin" to board the "Yushin Maru No 2" to hand a letter to the master is unjustifiable and could be regarded as trespass. However, accusations of piracy/ harassment/terrorism vs hostage taking/ kidnapping (depending upon your perspective) and the war of words in the press have little, if any, chance of breaking the impasse.

Moving forward

The real issue is whether killing nearly 1,000 whales in one season can be regarded as "scientific" research for the purposes of the Whaling Convention. Whilst it might have been necessary to conduct scientific research through lethal means in 1946, the subsequent developments in non-lethal techniques suggest the definition of "scientific" research needs to be reviewed. Having killed whales for 18 years without achieving its "scientific" goals, and having increased its kill quota, it may be possible to argue that there are limits to the concept of "scientific whaling" and that Japan cannot use this loophole to conduct what is essentially commercial whaling. Australia could challenge the legitimacy of Japan's whaling program in the International Court of Justice or the International Tribunal for the Law of the Sea using international law, rather than Australian law (which Japan does not recognise as applicable in the region). If the Australian Government truly had the nerve to bring this matter to conclusion, it would have better prospects than all the hand-wringing that we have witnessed to date.

House of Lords confirms arbitration clauses cover all disputes

Premium Nafta Products Limited (20th defendant) and others v Fili Shipping Company Limited (14th claimant) and others ("Premium Nafta") [2007] UKHL 40

by Andrew Robertson

The resolution of disputes by contractually agreed mechanisms, such as arbitration, empowers parties to a contract to determine how and where disputes touching on the contract are resolved. In Premium Nafta, the United Kingdom House of Lords had to consider how they would deal with an argument that the contract itself arose from bribery.

> If it can be set aside, does that mean the arbitration agreement is set aside as well?

> What happens if the bribery is not eventually established?

> Do you then have to go back to arbitration?

Even if the arbitration agreement operates, it usually will not contemplate dealing with a dispute about how the contract came into existence. Does that mean the question of the existence of the contract is dealt with differently from disputes arising under the contract?

The House of Lords decided that you answer these questions by assuming, subject to express words, that all issues should be resolved in the one arbitral process which can itself consider whether the contract was properly formed.

The Court's attitude to arbitration

In considering the issues the Court (Lord Hoffmann provided the leading judgment, agreed by the other Law Lords) made some general comments about arbitration. The process is consensual and depends upon the intention of the parties as expressed in the agreement. However, the words are selected before the dispute arises and (per Lord Hoffmann)

"Businessmen in particular are assumed to have entered into agreement to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets the language".

What this means is that (per Lord Hope of Craighead) *"Taken overall, the wording indicates that arbitration may be chosen as a one-stop method of adjudication for the determination of all disputes".*

It is clear the Court is consciously aware of the consequences for arbitration and to make a fresh start (the expression actually used by Lord Hoffmann) in considering arbitration agreements by rejecting an overly-literal approach to the construction of the arbitration agreement and its application.

Scope of the arbitration agreement

The House of Lords was clear that the Courts of England, following a line of authorities from other jurisdictions, including the Australian decision of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, should take a broad approach to the construction of arbitration clauses. Rather than engage in an analysis of *"various linguistic nuances"* they should presume, unless there were clear words to the contrary, the arbitration agreement was entered into for a rational business purpose with disputes to be decided by the same tribunal.

One should then look to the words to see if there is anything in the language to suggest that the dispute was not to be resolved by the contractually agreed mechanism.

Effect of allegations about how the arbitration agreement came about

The allegation was, but for the alleged bribery, that the arbitration agreement would never have arisen. The Court considered the common law background of the doctrine of separability. That doctrine provides that an arbitration agreement exists separately to the rest of the contract in which it sits. It can survive if the rest of the contract has been struck down. That doctrine is supported by section 7 of the Arbitration Act 1996 (UK) which, for the United Kingdom, established the doctrine beyond any doubt there may have been from the English Common Law authorities.

The submission that the arbitration agreement must fall if the main agreement was procured by bribery was exactly the kind of argument section 7 was intended to prevent.

"If the arbitration agreement has been agreed, the parties will be presumed to have intended the question of whether there is a concluded agreement to be decided by arbitration."

Hence even if there were allegations of bribery the parties must arbitrate as agreed.

Consequences

The reasoning for this decision is strongly pro-arbitration and suggests that Courts will strive to hold parties to their arbitration agreements – both in the way the Court looks at the words of the agreement and in the response to arguments that parties may raise to avoid the agreement. This is consistent with some recent Australian decisions such as *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.

While the decision on the separability doctrine was strongly influenced by section 7 it should be noted that doctrine of separability has been recognised in Australia in *Ferris v Plaister* (1994) 34 NSWLR 474 and also supported in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192. So although the question of the status of the separability doctrine has not been resolved by statute as in England, Australian precedent suggests it is likely that a decision in this country would be consistent in upholding the arbitration agreement even if the main agreement's existence was the subject of allegations about how it was first formed.

Piper Alderman has specialised lawyers able to assist you in dealing with issues arising from the negotiation or enforcement of arbitration agreements.

Air Waybill Changes

by Frazer Hunt

The International Air Transport Association (IATA) has announced the industry-preferred version of the IATA Air Waybill Conditions of Contract (Cargo Service Conference Resolution 600b) has been approved and will be effective on 17 March 2008, replacing the current Conditions of Contract, Resolution 600b(ii).

The amendments abbreviate and modernise the previous "conditions of contract" and invoke both the Warsaw Convention and the 1999 Montreal Convention, which are compulsory to international air carriage if the conventions are in force in both the country of departure and destination. As Australia is not a signatory to the Montreal Convention, it has no relevance to air carriages to and from Australia. Clause 4 of the new conditions of contract provide:

> *"For carriage to which neither the Warsaw Convention nor the Montreal Convention applies, Carrier's liability limitation shall not be less than the per kilogram monetary limit set out in the Carrier's tariffs or general conditions of carriage for cargo lost, damaged or delayed, provided that any such limitation of liability in an amount less than 17 SDR per kilogram will not apply for carriage to or from the United States."*

It is likely this clause has been drafted in anticipation of US statute amendments along the same lines which will render void any limitation provisions in the carrier's standard terms and conditions (STCs) if they do not provide for carriage to or from the United States. Carriers/forwarders using the new wording for their air waybills should ensure that their STCs are updated if they intend to carry any goods by air to or from the United States.

Buyer's title to sue under a bill of lading endorsed "in blank"

by Ryan Lynch

Under the *Sea-Carriage Documents Act 1997,* (NSW), a bill of lading is capable of transfer by endorsement, or as a bearer bill, by delivery without endorsement (usually marked "to order") where the bearer would present the bill to accept delivery of the cargo. The Australian case of *Hilditch Pty Ltd v Dorval Kaiun,* whilst affirming that an endorsement "in blank" of a bill of lading issued "to order" converts to a bearer document, presents a novel argument raised by the carriers that the buyer did not have title to sue under such a bill of lading because it was not properly endorsed due to the anonymity of the signatures on the reverse of the bill presented by the buyer.

The case of *Hilditch Pty Ltd v Dorval Kaiun* involved the purchase of a consignment of 400 metric tonnes of Yubase 6 (a lubricant for motor engines) by Hilditch from SK Corporation (Korea). The Yubase 6 was shipped pursuant to a voyage charterparty between SK Corporation and Dorval, with three original tanker bills of lading being issued for the consignment. The Yubase 6 was pumped into various tanks aboard the M.V. "Golden Lucy I" at Ulsan, Korea and carried to Port Botany in Sydney. A leak permitted the Yubase 6 to become admixed with a consignment of caustic soda during discharge operations but before the Yubse 6 passed the ship's manifold at the port of discharge.

Rares J held that Dorval breached Article 3, Rule 2 of the Australian Carriage of Goods by Sea Act, incorporating the Amended Hague Rules, for pumping the Yubase 6 through contaminated valves and lines during discharge operation. The

court noted that the obligation of the carriers under Article 3 Rule 2 of the Amended Hague Rules is a compound one, requiring not only the carrier to exercise reasonable care in the carriage and discharge of the cargo, but also to have a sound system for discharging those cargoes.

Dorval argued that it was entitled to the benefit of Article 4 Rule 2(i), which provides, inter alia, that the carrier shall not be responsible for loss or damage arising or resulting from an act or omission of the shipper or owner of the goods, his agent or representative. Dorval alleged that Hilditch permitted discharge to continue in circumstances where it knew that Yubase 6 was in good condition in the ship's tanks but was discharging at the ship's manifold in a contaminated condition. However, Rares J found that the predominant responsibility for the damage rested with Dorval.

In its primary defence however, Dorval alleged that Hilditch had no title to sue as endorsee of the bill of lading for the purposes of the *Sea-Carriage Documents Act 1997* (NSW) as they claimed there was no endorsement on the bill of lading presented by Hilditch in Sydney. Relevantly, Hilditch established an irrevocable letter of credit with the National Australia Bank in favour of SK Corporation, where the bank required a full set of three shipped on board charterparty bills of lading made out to the order of the shipper and endorsed in blank. Hilditch only received one of the three original bills of lading from the National Australia Bank, and on it were two separate signatures. One signature omitted the name of the author or any indication on whose behalf it had been signed, the other signature was placed above a stamp by the Export-Import Bank of Korea.

Dorval claimed the bill of lading presented by Hilditch was not endorsed and thus not transferable as a bearer bill of lading because the signatures were anonymous. Rares J noted a Dorval employee's signature on a Dorval commercial invoice matched the "anonymous" signature of the bill of lading, and commented it was unlikely SK Corporation would present documents which did not comply with the express requirements of the documentary credit for a bill endorsed "in blank". His Honour concluded it was clear that the signature on the bill of lading was a valid endorsement "in blank".

Certain Underwriters of Lloyds v Inlet Fisheries Inc.

by Frazer Hunt

The US 9th Circuit Court of Appeals handed down its decision on 11 February 2008, confirming the doctrine of *uberrimae fidei* (utmost good faith) applies to vessel pollution insurance policies covering statutory environmental liabilities.

Whilst most P&I clubs cover pollution liabilities, most do not cover liability under the Oil Pollution Act of 1990 (**OPA**) which significantly increases both the regulation and pollution liabilities of entities engaged in the transportation and production of oil within the United States. Accordingly, stand-alone pollution insurance policies are common in the United States.

In this case, Inlet was an Alaska-based fish buying and processing business with a stand-alone pollution insurance cover for its fleet of vessels. The previous insurer cancelled its policy due to Inlet's failure to conduct vessel surveys and pay premiums. Inlet's broker sought cover in the Lloyds market and in response to a request for "pollution loss history", indicated "none" in the application. Although Inlet was not asked to do so, it also failed to disclose information concerning the condition of its vessels, financial state or the fact that its previous insurer had cancelled the policy.

During the policy period, one of Inlet's vessels spilt oil and pollutants when it sank in Alaska. Inlet made a claim under its vessel pollution policy, at which point Lloyds commenced an investigation into both the incident and Inlet generally. Upon learning of the undisclosed facts, the state of the vessels and its pending bankruptcy, underwriters filed a suit in the US District Court seeking a declaration the policy was void "ab initio" under the doctrine of *uberrimae fidei*. Inlet counterclaimed and argued Alaska state law, and not federal law, applied.

The Court held that state law will control the interpretation of a marine insurance policy only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice. In this case, the Court held that the marine insurance doctrine of *uberrimae fidei* applied to American maritime insurance law. The Court then had to decide whether marine insurance included vessel pollution insurance and referred to three "central conceptual elements" (quoting Thomas J Schoenbaum, Admiralty and Marine Law 17-1 (fourth edition. 2004):

1 "it is a contract of *indemnity* against loss";

2 "the indemnity … is only triggered by an accident or fortuity"; and

3 the "adventure" or peril insured against must be specifically *maritime* in character".

The Court had little difficulty in applying these three conceptual elements to find that vessel pollution insurance fell within the boundaries of marine insurance and admiralty law and that the vessel pollution policy issued to Inlet was appropriately characterised as being marine insurance. Accordingly, the court declared that underwriters were entitled to rescind the policy.

We were alerted to the case by Forrest Booth of San Francisco attorneys, Severson & Werson. Forrest described the decision as "the most important decision in marine insurance that has been decided in over 20 years … An applicant for insurance must disclose all material facts known to him, even if not asked. This may seem obvious to an Australian or English lawyer, but I can assure you that it has been hotly litigated in the US for years, and the cases did not always come out the right way". Thanks Forrest.

Case Note:

New Zealand China Clays Ltd & Anor v Tasman Orient Line CV, 31 August 2007, Unreported

by Maurice Lynch

The New Zealand High Court recently handed down a landmark decision regarding the operation of Article 4 rule 2(a) of the Hague Visby Rules which exempts carriers from liability for cargo damage caused by negligent navigation or management of the ship. In this case, the carrier's lack of good faith after the initial damage, leading to further damage, precluded the carrier from relying upon the defence.

Cargo interests brought a claim against the Tasman Orient Line after their vessel, the "Tasman Pioneer", ran aground in the Bungo Sound off the coast of Japan. The claim was based inter alia, on breach of Article 3 rule 2 of the Hague Visby Rules which provides that the carrier should "properly and carefully load, handle, stow, carry, keep for and discharge the goods carried". The defendant sought to rely upon the defence in Article 4 rule 2(a) of negligent navigation and management by the master of the ship. The case dealt with the following issues:

1 The definition of the phrase "neglect in the navigation and management of a ship"

2 The scope of the defence, in particular, whether the defence requires an element of good faith.

Facts

The "Tasman Pioneer", a tween deck multi-purpose general cargo vessel, sailed from New Zealand to Japan and Korea in April 2007. On 1 May 2007, the ship left Yokohama, Japan for Korea via the Bungo Sound. On 2 May 2007, the master realised he was behind schedule and to make up time he decided not to use the route commonly used by ships entering the Bungo Sound. Instead, contrary to the opinions of the second and third mates, he sailed at night and in poor visibility into the narrow passage between the island of Biro Shima and the promontory Kashiwa Shima. Shortly after entering the passage, the ship's radar lost all images and the master ordered "hard port" in an attempt to abort the passage. During this manoeuvre, the radar was reconfigured and indicated the ship was less than four cable lengths from Biro Shima. The master then ordered "go starboard" but the ship hit the sea floor and began to list, taking on water. The master flooded the starboard tanks to correct the list allowing the ship to steam ahead at full speed. It did so for 22 nautical miles. The master did not at any stage contact the Japanese coast guard or the ship's manager. The coast guard was only notified after a passing ship reported a ship sailing with a list. The ship continued to take on water until 10 May 2007 when it was beached and the cargo removed. Although the below deck cargo was damaged during the initial impact, the master's action in deciding to keep steaming ahead to deeper water, after hitting the sea floor, exposed the deck cargo to significant water damage.

Following investigations the captain told the crew to lie. He then informed authorities he had followed an orthodox route and had hit an unidentified floating object. He later confessed the true nature of his actions and was prosecuted in Japan.

The decision

The New Zealand High Court had to deal with the defence of negligent navigation raised by the carrier under Article 4 rule 2(a) of the Hague-Visby Rules.

1 The exemption of liability was held to only apply to activities primarily concerned with the ship as a navigational unit, not with the ship as a cargo-carrying unit. This is a vital distinction as negligent navigation is

an exemption from liability under Article 4 rule 2(a), while negligent handling of cargo makes the carrier liable under Article 3 rule 2(a). The Court considered that none of the master's actions could be said to amount to a failure to take care of the cargo.

2 The plaintiffs argued the exemption does not apply unless the master's actions were carried out in good faith. The Court held that whilst the Hague-Visby Rules do not state that good faith is required for this particular exemption, a requirement of good faith can be implied into Article 4 rule 2(a) by reason of the carrier's obligation to exercise due diligence when making the ship seaworthy, properly manning and equipping the ship and making all holds, refrigerating and cool chambers and other parts of the ship fit for carriage prior to commencement of the voyage, under Article 3 rule 1 (a) and rescind the exemption for want of due diligence in Article 4 rule 1.

The Court found that while the master's decision to take a short cut was made in good faith, his conduct after the initial impact, especially not informing authorities, was not exercised in good faith and so the carrier could not rely on the exemption of liability within Article 4 rule 2 (a).

Significance

The decision creates a high threshold requirement of due diligence or good faith in the navigation of the ship by the carrier's employees before the carrier can rely on the exemption from liability in Article 4 rule 2 (a). In effect, the decision creates an additional requirement into Article 4 rule 2(a) by implying an obligation of good faith.

The decision is a little controversial however, as the exemption from liability is given to the carrier. Assuming the carrier had exercised good faith when appointing the master, the carriers would normally be entitled to rely on the defence of negligent navigation where the damage resulted from the subjective intention of the master who was motivated to protect his own interests and when at no point was the carrier responsible for not exercising good faith. This is particularly relevant here where the carrier was a sub-charterer and could not be vicariously liable for the master's action where the master was employed the by owners of the vessel.

Mark Ruaro & Anor v Catherine Ferrari & Anor [2007] FCA 2022 – Judgment delivered

by Amanda Lazarou

Mr Mark and Mrs Secilia Ruaro were the owners of a 56 foot wooden motor yacht named "Seaquest" built in 1938 by the Holmes Brothers. It was destroyed on 24 August 2003 during a severe storm in Rose Bay, Sydney, after the schooner "Pavana" dragged its mooring, colliding with "Seaquest". Whilst the vessels remained tangled together for about an hour, "Seaquest's" mooring line was ultimately severed, causing her to drift until she collided with Rose Bay Wharf, becoming a constructive total loss.

Mr & Mrs Ruaro brought a claim in the Federal Court against Catherine Ferrari, the owner of "Pavana", and Holmeport Marine Pty Ltd, the provider of "Seaquest's" mooring arrangement in negligence, for misleading and deceptive conduct under section 52 of the Trade Practices Act and for breach of the implied warranties under section 74 of the Trade Practices Act. However, the judgment only considered the claim against Holmeport, with the claim against Ms Ferrari having been discontinued at some earlier stage.

Negligence

Mr & Mrs Ruaro allege that Holmeport owed them a duty of care (1) to keep proper lookout in times of severe weather to check on the safety of "Seaquest" and also (2) to provide secure moorings to ensure that other vessels did not drag their moorings and cause damage to "Seaquest". However, Mr Ruaro had entered into a Mooring Agreement with Holmeport containing, amongst other things, an exclusion clause. In that case, the Court found that the Agreement afforded Holmeport protection for any liability for a breach of any duty of care.

Alleged breach of section 52 of the Trade Practices Act

Mr & Mrs Ruaro alleged that in two statements made by an employee of Holmeport to Mr Ruaro in 1996 and 2000 that Holmeport represented the mooring provided for "Seaquest" would be suitable for the purposes of mooring of "Seaquest". However, it was clear from the evidence given by Holmeport's employee and Mr Ruaro, that the statements relied upon were to the effect that the "Seaquest" would not be moved from its mooring

and that the mooring would continue to be available for "Seaquest", rather than any assurances that the mooring would be suitable for "Seaquest". On that basis, the Court found that Holmeport did not make any misleading or deceptive statements to Mr & Mrs Ruaro that induced them to continue to keep "Seaquest" at Holmeport.

Alleged breaches of section 74 of the Trade Practices Act

Section 74 requires (1) services to be undertaken with due care and skill and (2) the services provided would be reasonably fit for their intended purposes.

Mr & Mrs Ruaro alleged that Holmeport breached an implied term of the Mooring Agreement that all services were to be provided with due care and skill pursuant to section 74(1) of the Trade Practices Act. However, the Court found that the rights conferred to the Ruaros under the Mooring Agreement did not extend to the safekeeping of "Seaquest", and provided only for a non-exclusive licence to moor "Seaquest", which Holmeport had clearly provided.

In addition, Mr & Mrs Ruaro alleged the Mooring Agreement contained a further implied term pursuant to section 74(2), that all services would be reasonably fit for the purpose of providing a mooring for "Seaquest".

However, the Court held no such warranty could be implied into the Mooring Agreement as neither of the Ruaros, either expressly or by implication, made known to Holmeport the particular purpose for which the relevant services were required. Nor would such a warranty be implied in circumstances where Mr & Mrs Ruaro did not rely, or it was unreasonable for them to rely, on Holmeport's skill and judgment. However, the Court held it was clear in all the circumstances that Mr & Mrs Ruaro did not rely on the skill and judgment of Holmeport, particularly having regard to the clauses incorporated into the Mooring Agreement whereby Mr Ruaro expressly acknowledged and warranted that he examined the facilities and relied on his own judgment in accepting the use of the facilities. On that basis, the Court held that Holmeport did not breach its obligations under section 74 of the Trade Practices Act.

Value of "Seaquest"

Whilst the Court found that Holmeport was not liable to Mr & Mrs Ruaro, they did consider what the measure of damages would have been had the liability issues been determined differently.

Mr & Mrs Ruaro had contended, if their claim succeeded, they were entitled to be put back in a position they would have been in back but for the loss of "Seaquest". The interesting issue that was considered at trial was what the proper measure of those damages would have been. Holmeport contended the proper approach to the quantum of damages was the market value of "Seaquest" at the time and place of its loss in Rose Bay on 24 August 2003. Surprisingly, the Court found that in cases of movable items such as vessels etc, valuations from around the globe could be taken into account, provided that the cost of obtaining those valuations (ie, the transport of the item to the place of loss) was taken into account.

End note

Mr & Mrs Ruaro have appealed Emmett J's decision in relation to the alleged breaches of section 74 of the Trade Practices Act, and Holmeport has also appealed his findings in relation to valuation. The matter is next before the Court in early March. However, a trial date has not yet been set.

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