Trade & Transport News

WELCOME TO THE THIRD 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.

Court of Appeal approves trial judgment in the *"Eternal Wind"*

A person who negligently causes damage to another's property may be held liable for economic loss suffered by a third party who is closely related to the injured property owner.

In the September 2005 edition of this newsletter, the Supreme Court of Queensland held in *Fortuna Seafoods Pty Ltd v The Ship 'Eternal Wind'* [2005] QSC 004 that the owner of a vessel that had collided with a fishing trawler, the *'Melina T'*, owed a duty of care not only to the trawler operator, but also to a related company of the operator that conducted the business of marketing the trawler's catch. That judgment has been upheld by the Queensland Court of Appeal in *Fortuna Seafoods Pty Ltd v The Ship 'Eternal Wind'* [2005] QCA 405.

The Court of Appeal held that '*Eternal Wind*' did, at the time of the collision, have sufficient knowledge of the likelihood that a collision with '*Melina T*' that rendered her inoperable would not only cause the trawler's operator to suffer loss of profit, but also any closely associated marketer and processor of the trawler's catch. This was because the use in the fishing industry of vertically integrated business structures, whereby one entity operated a trawler and a closely associated entity marketed and processed that trawler's catch, was very common, such that '*Eternal Wind*' could be taken to have been aware of that usage.

The Court of Appeal's decision confirms a significant step in the broadening of the persons to whom a tortfeasor owes a duty to take care not to cause economic loss.

Arrest of bunkers as security for arbitration

There is no statutory authority to arrest bunkers owned by a relevant person when those bunkers were not the property with which the relevant maritime claim was concerned.

The Full Court of the Federal Court of Australia has held in *Metall Und Rohstoff Shipping & Holdings BV v Owners of bunkers onboard the Ship 'Genco Leader'* [2005] FCAFC 162 that bunkers purchased by the defendant relevant person, Maywal Limited, and laden onboard a vessel, '*Genco Leader',* after commencement of arbitration proceedings by the plaintiff on an unrelated time charter made in respect of another vessel '*Tolmi*', were not capable of arrest pursuant to section 17 of the *Admiralty Act 1988* (Cth).

This was because, on the proper understanding of section 17, property arrested under that section must be properly connected with the general maritime claim under consideration. The Court stated that the Act was not intended to provide claimants with means of attaching their claim to *any* property of the defendant. The bunkers arrested by Metall Und Rohstoff had no connection with the charter party claim that was being arbitrated and were, accordingly, not capable of arrest.

Claimants should carefully consider the existence of the relationship between their claims and the property sought to be arrested before commencing arrest proceedings.

Payment of aviation policy premium by instalments

By continually accepting late payment of premium instalments by an insured, insurers may be held to have agreed that punctual payment of the instalments was not essential to the maintenance of cover under the policy.

In *Waterman v Gerling Australia Insurance Company Pty Ltd* [2005] NSWSC 1066, Justice Brereton has held insurers under an aviation policy were not permitted to deny the existence of a convention between themselves and their insured whereby late payment of premium instalments would not result in the automatic lapse of cover under the policy, despite an express provision to the contrary in the policy.

In 1997, the insurers issued an aviation policy to the insured, Mr Waterman. It was agreed that the policy premium would be paid by instalments, but that any late payment of the instalments would result in a deemed cancellation of the policy at midnight on the due date of any overdue instalment. That policy was renewed in 1998 and the insured aircraft was damaged during the period of cover. Throughout their dealings, however, Mr Waterman tendered premium payments after their due date, but insurers accepted those overdue payments. At the time of damage to the insured aircraft, the current premium instalment was overdue.

Amongst other things, Mr Waterman contended that there was a convention between himself and insurers, whereby cover would not lapse upon payment of premium instalments becoming overdue. After considering the course of dealings between the parties to the policy, in particular insurers' (i) repeated acceptance of late payments of premium and (ii) failure to notify Mr Waterman of their decision shortly before the loss of the aircraft that, in future, prompt payment of premium would be insisted upon, Justice Brereton accepted that Mr Waterman's contention was correct, and that insurers were not entitled to cancel the policy for late payment of premium.

Insurers should bear in mind Justice Brereton's decision in writing business where premium is to be paid by instalments and in ensuring prompt payment of those instalments, so that their rights under the policy are not prejudiced, should they wish to rely upon such provisions.

Freight forwarders as carriers

A freight forwarder will be held to be the contractual carrier of goods where a bill of lading issued by the freight forwarder manifests, on its front page, an intention that the freight forwarder will be the contractual carrier.

In *Vastfame Camera Ltd v Birkart Globistics Ltd* (2005, High Court of Hong Kong, Stone J, 5 October 2005), plaintiff cargo owners commenced proceedings against defendant freight forwarder for wrongful delivery of cargo described in a bill of lading issued by the freight forwarder. The freight forwarder defended the claim on the basis that it was not the contractual carrier of the cargo.

The forwarder's bill of lading named the plaintiff as "shipper" and the consignee was noted as "to order". The bill of lading was signed by the forwarder, and bore the usual statements concerning shipment of the cargo onboard the carrying vessel in good order and condition. The terms on the reverse side of the bill of lading, however, were at variance with the document's front side. Importantly, one of the terms on the reverse side stated that the forwarder was an agent only, and was not the carrier of the cargo described in the bill of lading. A final important matter was that the ocean carrier's waybill, issued to the forwarder by Mitsui OSK Lines, recorded the forwarder as "Shipper" of the cargo.

Applying the principles set out by the House of Lords in *The 'Starsin'* [2003] 2 WLR 711, Justice Stone held that the inconsistent terms on the reverse side of the forwarder's bill of lading were not sufficient to overcome the intention manifested on the front of the bill that the forwarder was intended to be the contractual carrier of the cargo. Accordingly, the plaintiff cargo owner was correct in proceeding against the forwarder for wrongful delivery of the cargo.

Freight forwarders must bear this decision in mind in formatting and preparing their house bill of lading.

In particular, forwarders must consider whether or not the front of the bill of lading sufficiently notifies the shipper of the forwarder's status as agent only.

State liability of government for detention of vessel pursuant to port state control measures

The Canadian government was not liable in damages to owners of a vessel for detention of that vessel pursuant to port state control measures, because that detention was not unreasonable.

Owners of the vessel, "*Lantau Peak*", sought damages against the Canadian government following detention of the vessel pursuant to the *Canada Shipping Act 1985* (Can) and the port state control measures set out in the *Memorandum of Understanding on Port State Control in the Asia-Pacific Region*. The vessel had been detained for conduct of repairs to its structure, following a finding by investigators that the vessel's hold frames were badly corroded by rust.

A Full Court of the Federal Court of Canada in *The Queen v Budiskuma Puncak Sdn Bhd* [2005] FCA 267, allowing the government's appeal from a trial judge's decision to award damages to owners in the amount of CAD$4,344,859, has held that the vessel had not been wrongly detained and that the owners were not entitled to any damages in lieu of that detention. The Court found that the proper basis for consideration of the owners' claim was a public law judicial review of the government's decision under the *Canada Shipping Act* to detain the vessel and order repairs to it, rather than a consideration of the claim on the basis of the private law of negligence.

It was found that the government's decision to investigate and detain the vessel was both within its power to do so and was not so unreasonable as to not constitute a proper exercise of its discretion under the Act. This was because the decision to order repairs to the vessel were based on unbiased expert inspections and a reasonable finding that the vessel was unsafe to proceed to sea.

This decision highlights to vessel owners and agents the importance of maintaining the safety of their vessels, and to port state control administrators of ensuring that decisions to detain vessels are properly informed by unbiased and expert reports on vessel safety.

Breaking limit under the Warsaw Convention

When arguing that an air carrier is not entitled to limit its liability under the Warsaw Convention due to the involvement of its employees or agents' employees in the theft of a cargo, it is not necessary for a cargo-owner to prove precisely which employee was involved in that theft.

In *Ericsson Ltd v KLM Royal Dutch Airlines* (unreported, High Court of Hong Kong, Stone J, 20 December 2005), the plaintiff cargo owner, Ericsson Ltd, sought to break the limitation of liability available to the carrier of the cargo, KLM, and its agents, including the terminal cargo handler, otherwise available under Article 22 of the Warsaw Convention, as amended by the Hague Protocol. Ericsson contended that it was entitled to break limit because employees of KLM or its agent, the terminal cargo handler, were involved in the theft of two cargoes of mobile telephones from the Hong Kong airport terminal. Article 25 of the Convention provides for the inapplicability of the limits of liability set out in Article 22 in such circumstances.

At trial, Ericsson was unable to prove the precise identity of the employees of the cargo handler who were involved in the theft. Justice Stone, however, was satisfied that the thefts could not have been executed without the involvement of employees, albeit unidentified employees, of that cargo handler. That finding of fact was, in Justice Stone's opinion, sufficient to show that servants or agents of the cargo handler, and thus KLM, had intended to cause the loss suffered by Ericsson for purposes of Article 25 of that Convention.

Cargo-owners, air carriers and their insurers should bear this evidentiary requirement in mind when confronted with an allegation that the loss of cargo was occasioned as a result of an "inside job".

Particular attention should be given to whether or not the circumstances surrounding a loss, while not pin-pointing the identity of a particular employee, nonetheless make it clear that a theft could not have been effected without the involvement of employees of the carrier.

Waiver of lien for port charges

A port operator may by its conduct waive its entitlement to a lien over a vessel, and so its entitlement to arrest her, as security for unpaid port charges.

For 4 years, the barge "*Katy B*" was moored at a pier operated by the Puerto Rico Ports Authority. Following a dispute between the barge's owner and the Port Authority, port charges payable in respect of the barge remained outstanding. The Port Authority had a common law lien over the barge as security for those port charges. In order to facilitate a sale of the barge and its departure from the mooring, and following a meeting with the barge's owner, the Port Authority sent a letter to the barge's owner confirming that the Port Authority had no objection to the vessel's sale, and that it agreed that the unpaid port charges were the subject of litigation in a local court. Subsequently, however, the Port Authority sought to arrest the barge pursuant to its lien. The barge's new owner contended that the Port Authority, by the letter sent to the previous owner, had waived its lien and was not entitled to arrest the barge.

In *Puerto Rico Ports Authority v Barge 'Katy B'* (unreported, US Court of Appeals (5th Cir.), 25 October 2005), the Court of Appeal held that the letter sent by the Port Authority had effected a waiver of its lien, such that there was no jurisdiction for the arrest of the barge. This was because, by the letter sent to the barge's owner and its conduct in a meeting with the barge's owner, the Port Authority had clearly manifested an intention that it would surrender its lien over the barge. Accordingly, the barge was released from arrest for want of jurisdiction.

Lienholders generally must consider the possibility of inadvertently waiving their liens during commercial negotiations with their debtors.

The desirability of reaching a commercial outcome must be weighed against the creditworthiness of the debtor before taking steps that might waive a lien over the debtor's property.

Piper Alderman Lawyers

Sydney
Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
Phone: + 612 9253 9999
Facsimile: + 612 9253 9900

Melbourne
Level 9
60 Collins Street
Melbourne VIC 3000
DX 30829, Collins St
Phone: + 613 8665 5555
Facsimile: + 613 8665 5500

Brisbane
Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
Phone: + 617 3220 7777
Facsimile: + 617 3220 7700

Adelaide
167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
Phone: + 618 8205 3333
Facsimile: + 618 8205 3300

enquiries@piper-alderman.com.au

www.piper-alderman.com.au\TransportTrade

For further information contact **Frazer Hunt**, Partner in charge Trade & Transport on **fhunt@piper-alderman.com.au**

If you are not on the mailing list and would like to be included please contact Sarah Hawkins, at **shawkins@piper-alderman.com.au**