IN THE SUPREME COURT OF NEW ZEALAND

SC 39/2009
[2010] NZSC 37

BETWEEN	TASMAN ORIENT LINE CV Appellant
AND	NEW ZEALAND CHINA CLAYS LIMITED AND OTHERS Respondents

Hearing: 28 and 29 October 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: B D Gray QC and N A Beadle for Appellant
P R Rzepecky and M A Flynn for Respondents

Judgment: 16 April 2010

JUDGMENT OF THE COURT

A The appeal is allowed.

B Judgment is entered for the appellant against all the respondents.

C The respondents jointly are ordered to pay the appellant costs of $30,000 and reasonable disbursements in this Court, together with costs in the High Court and the Court of Appeal.

REASONS

(Given by Wilson J)

Introduction

[1] On 3 May 2001 the *Tasman Pioneer*, a Cypriot-registered vessel of 16,748 gross tonnes under sub-charter to the appellant, was on a voyage from Yokohama in Japan to Busan[1] in South Korea. Because he was behind schedule, the Master (Captain Hernandez) decided to pass through a narrow channel between Biro Shima Island and the mainland of southern Japan, rather than going around the island.

[2] In poor weather, the *Tasman Pioneer* struck rocks on the island side of the channel while steaming at about 15 knots. The Master should have immediately ascertained what, if any, damage had resulted. Had he done so, he would have discovered that the hull had been holed and sea water was entering. He should then have notified the nearby Japanese coastguard and the owners of the vessel. In all probability, the ready availability of salvage services would in that event have ensured that there was no damage to the respondents' cargo on the *Tasman Pioneer*, said by them to have a total value of in excess of 20 million New Zealand dollars.

[3] What the Master actually did, apparently motivated by a concern for his own position if the truth emerged, was to attempt to conceal what had occurred from the authorities and the owners. To that end, he steamed for some hours towards a point where he would have rejoined the course he would have taken had he gone outside Biro Shima Island. Meanwhile, the flooding of the vessel by sea water continued and was increased by the ship's passage through the water. Captain Hernandez also falsified the course plot on the relevant chart and, when he did report to the coastguard and the owners, downplayed the extent of the damage and incorrectly stated that it had been caused by collision with a semi-submerged object, probably a container. Captain Hernandez also attempted, necessarily but unsuccessfully, to involve deck officers and crew in a conspiracy to conceal what had actually occurred. By the time salvage assistance was finally sought the respondents' cargo

---

1 Previously known as Pusan.

was a total loss. In the present proceedings, the respondents seek to recover that loss from the appellant.

[4] The cargo was being carried under contracts of carriage between the appellant and the respondents governed by New Zealand law. Section 209(1) of the Maritime Transport Act 1994 confers the "force of law" in this country on the Hague-Visby Rules, as set out in the Fifth Schedule to the Act. Whether the respondents can recover from the appellant turns on the interpretation and application of those Rules, which resulted from significant amendments in 1968 and 1979 to rules previously known as the Hague Rules.

Hague-Visby Rules

[5] Article 1 of the Rules defines the "carrier" as including "the owner or the charterer who enters into a contract of carriage with a shipper". The appellant is therefore a "carrier" for the purposes of the Rules.

[6] Article 3.1 and 3.2 then impose the following, among other, obligations on the carrier:

> (1) The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
>
> (a) Make the ship seaworthy;
>
> (b) Properly man, equip and supply the ship;
>
> (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
>
> (2) Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

[7] In return, art 4 confers certain exemptions on the carrier, including those set out as follows in art 4.2:

> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from–

(a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

...

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

...

(p) Latent defects not discoverable by due diligence;

(q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Paragraph (q) is a general provision which applies to "other" causes not addressed specifically in the preceding paragraphs.

[8] The scheme of the Rules is clear. Carriers are responsible for loss or damage caused by matters within their direct control (sometimes called "commercial fault"), such as the seaworthiness and manning of the ship at the commencement of the voyage. They are not however responsible for loss or damage due to other causes, including the acts or omissions of the master and crew during the voyage ("nautical fault"). This allocation of risk is confirmed by art 3.2 being made subject to art 4 and by the inapplicability of the art 4.2(b) and (q) exemptions in the event of "actual fault or privity" of the carrier. The allocation of responsibility between the carrier and the ship on the one hand and the cargo interests on the other promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums.[2]

---

[2] See *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp* (the "*Bunga Seroja"*) [1998] HCA 65, 196 CLR 161 at [16] per Gaudron, Gummow and Hayne JJ. As analysed in the recent judgment of this Court in *Ports of Auckland Ltd v Southpac Trucks Ltd* [2009] NZSC 112, [2010] 1 NZLR 363 per Blanchard J, the Carriage of Goods Act 1979 similarly specifies the basis for the allocation of risk between domestic carriers and the owners of the goods being carried.

[9] Mr Gray QC, for the appellant carrier, and Mr Rzepecky, for the respondent cargo interests, agreed that the exemption conferred by art 4.2(a) should be read down to some extent, but differed as to that extent. Mr Gray submitted that the exemption should apply in the absence of barratry, which is, in general terms, conduct of the master or crew of a vessel intended to prejudice the owners of the vessel or its cargo. Mr Rzepecky however sought to extend the qualification to include not only barratry but also acts of gross negligence and actions which, because they were not undertaken in good faith, could not be said to be "in the navigation or in the management of the ship".

[10] Accordingly it is common ground between the parties, we think rightly, that the art 4.2(a) exemption does not apply in the event of barratry. It is therefore necessary to ascertain what is barratry for the purposes of the Rules. Fortunately, the Rules themselves provide a ready answer to that question.

[11] Paragraph 4.5(e), as inserted into the Rules in 1968, limits the availability of the limitation of quantum otherwise conferred by art 4.5 by stating that:

> Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

[12] To like effect, art 4bis.4, which was also inserted in 1968, limits the protection which art 4bis confers on the employees or agents of a carrier by providing that:

> Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

[13] Although neither art 4.5(e) nor art 4bis.4 uses the term "barratry", both are directed to damage with actual or imputed intent, which is the essence of barratry.[3] The words of these paragraphs should therefore be adopted as the definition of barratry for the purposes of another provision in the same Rules, art 4.2(a).[4] It follows that the test for establishing barratry as an implicit qualification to the exemption conferred by that paragraph is whether damage has resulted from an act or omission of the master or crew done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

High Court and Court of Appeal

[14] The appellant pleaded, and the respondents admitted, that the appellant had provided a competent master and crew. In the High Court, Hugh Williams J rejected the allegations of the respondents that the *Tasman Pioneer* was unseaworthy at the commencement of the voyage[5] and that the actions of the Master, before and after the grounding, were not in the navigation or management of the ship.[6] However the Judge upheld the respondents' claim in breach of contract and breach of bailment because he found that the art 4.2(a) exemption was only available where the actions of those in charge of the ship are "bona fide" (in the navigation or management of the ship) and those of Captain Hernandez after the grounding were not.[7]

[15] The Judge rejected a claim by one cargo owner, the New Zealand Dairy Board, which raised a different issue. Their cargo of dairy produce was being carried on deck in "reefers" (refrigerated containers), powered by a generator independently of the ship's generation capacity. Problems occurred with that generator between Auckland and Yokohama, and power was lost. The Board argued that its produce was damaged by that loss of power and not by the events following

---

3 See Stewart C Boyd et al (eds) *Scrutton on Charterparties and Bills of Lading* (21st ed, Sweet & Maxwell, London, 2008) at 216: barratry "covers any wilful act of wrongdoing by the master or mariners against the ship and goods without the privity of the shipowner".

4 Rule 11 of the Second Schedule to the Marine Insurance Act 1908 defines barratry to much the same effect as including "every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer".

5 *New Zealand China Clays Ltd v Tasman Orient Line CV* HC Auckland CIV-2002-404-3215, 31 August 2007 at [290].

6 At [226].

7 At [242].

the grounding. Hugh Williams J found that it was "possible" but "speculative" that the damage had occurred before the *Tasman Pioneer* reached Yokohama. The claim was therefore not made out.[8] The Judge did not explain why his implicit finding that the damage probably occurred after the vessel left Yokohama did not result in the Board's claim being in materially the same position as the other cargo claims, which succeeded before him.

[16] The carrier appealed to the Court of Appeal and the Dairy Board cross-appealed. The Court divided. By a majority (Chambers and Baragwanath JJ), the appeal was dismissed and the cross-appeal allowed. Fogarty J would have allowed the appeal and dismissed the cross-appeal.

[17] The reasons of the majority for dismissing the appeal were given by Baragwanath J. He concluded that the conduct of the Master was not an "act, neglect or default ... in the navigation or in the management of the ship" for the purposes of art 4.2(a) because such "selfish" and "outrageous" behaviour could not be conduct in the navigation or management of the ship.[9] The Judge advanced four related reasons for not giving literal effect to the words of art 4.2(a). First, "the raison d'être of the Hague Rules was to depart to a significant degree from the laissez-faire of the common law and to prohibit exorbitant exemption clauses".[10] Secondly, there should not be "narrow focus on text without regard to context".[11] Thirdly, a "purposive" construction is now required.[12] Fourthly, the domestic legislation is giving effect to an international convention.[13]

[18] Fogarty J, dissenting, thought that the phrase "act, neglect or default of the master" in art 4.2(a) included intentional conduct,[14] "be it laudable or culpable",[15] and that the application of the clause did not depend on the motive of the master.

---

8 At [304].
9 [2009] 3 NZLR 58 at [57]–[60].
10 At [43].
11 At [44].
12 At [46].
13 At [47].
14 At [117].
15 At [155].

Contrary to the view of the majority, the Judge considered that it was appropriate to refer to common law authorities interpreting bills of lading in terms similar to art 4.2(a) because the delegates at the convention which developed the Hague Rules knew of the common law provenance of that provision and did not intend to give it a different meaning.[16]

[19] Chambers J, who gave the reasons of the majority for allowing the cross-appeal, concluded that the damage to the Dairy Board's cargo had probably occurred after the grounding[17] when it was necessary for the salvors to turn off the generator which supplied the power for the refrigeration of that cargo. Because, however, the damage was accordingly the direct consequence of the post-grounding conduct of Captain Hernandez, which both Hugh Williams J and Baragwanath J had correctly characterised as "outrageous", the art 4.2(a) exemption did not apply and the Dairy Board claim must therefore succeed.[18] Consistently with his approach to the respondents' claims generally, Fogarty J held that the decision of the salvors to turn off the generator was made in the management of the ship and the exemption therefore did apply, with the consequence that the claim failed.[19]

Article 4.2(a)

[20] In light of the judgments of the High Court and the Court of Appeal and the submissions of counsel, and given that, as is common ground, art 4.2(a) does not apply in the event of barratry, four possible interpretations of that paragraph are before this Court. First full effect is to be given to the ordinary meaning of the words of that paragraph (the position of Fogarty J, supported by Mr Gray). Next, the paragraph has no application where a master or crew have acted in bad faith, as Hugh Williams J thought. Thirdly, the protection conferred by the paragraph does not apply in the event of "outrageous" behaviour, as the majority of the Court of

---

16 At [160].
17 At [90].
18 At [95].
19 At [162].

Appeal found, because such behaviour cannot be said to be in the navigation or management of the ship. Fourthly the paragraph does not apply where either good faith is lacking or the conduct of the master or crew has been grossly negligent (as Mr Rzepecky submitted).

[21] We have difficulty in understanding the basis on which Hugh Williams J implied a requirement of good faith into art 4.2(a). His approach requires the reading into the paragraph of words which do not appear in it. The authorities on which he relied[20] provide no support for the introduction into the article of a general requirement of good faith.

[22] In the first of these authorities, the *Star of Hope*,[21] the question was whether the Master had voluntarily stranded his ship in a genuine emergency. *Boudoin v J Ray McDermott and Co Inc*[22] raised the issue of whether the Captain had acted reasonably in remaining in the path of a hurricane. In *Phelps, James & Co v Hill*[23] the question was whether a deviation for repair was reasonably necessary, not whether it was made in good faith. The *Chyebassa*[24] and the *Bulknes*[25] required consideration of whether illicit acts of the crew or third parties were in the navigation or management of the ship. The *Hill Harmony* raised the finely-balanced question of whether the decision of a master to follow a "rhumb line" rather than the shorter "great circle" route across the Pacific Ocean should be classified as a navigational decision or as a possible breach, at the outset of the voyage, of the obligation to the time charterer to proceed with the utmost dispatch.[26]

[23] We also have difficulty in understanding the contention of Chambers and Baragwanath JJ that art 4.2(a) was designed to change the common law. The

---

20 At [233].

21 *Star of Hope* 76 US 203 (1869).

22 *Boudoin v J Ray McDermott and Co Inc* 281 F 2d 181 (5th Cir 1960).

23 *Phelps, James & Co v Hill* [1891] 1 QB 605.

24 *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd* (the "*Chyebassa*") [1966] 2 Lloyd's Rep 193 (CA).

25 *The "Bulknes"* [1979] 2 Lloyd's Rep 39 (QB).

26 *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* (the "*Hill Harmony*") [2000] UKHL 62, [2001] 1 AC 638: the High Court and the Court of Appeal thought it was a navigational decision but the arbitrators, who were ultimately upheld by the House of Lords, concluded that it was a commercial one.

inclusion in bills of lading of a similar term was a long and well-settled practice when ship-owners and cargo interests came together at a conference of the International Law Association at the Hague in 1921 to settle the rules governing the international carriage of goods in a form which became known as the Hague Rules. The common law had given strict effect to the wide exclusion of owners' liability,[27] provided that the act or omission had occurred during a voyage and was in relation to both the ship and the cargo or to the ship alone, and not just to the cargo.[28] The Hague *travaux préparatoires*[29] reveal that the owners' representatives, while prepared to concede on quantum issues where liability was imposed, were insistent on retaining the exclusion of liability in the circumstances specified in what became art 4.2(a). The cargo interests accepted this position, provided that it was understood that liability for barratry was not excluded. The owners' representatives accepted this qualification.[30]

[24] Far from changing the position at common law, the Hague Rules therefore reaffirmed that (in the absence of barratry) the owners' exemption from liability at common law remained. The common law authorities therefore remain relevant. In the words of Halsbury:[31]

> If words occurring in the Hague-Visby rules have had meanings assigned to them by judicial construction when used in contracts for the carriage of goods by sea before those Rules had the force of law, the proper approach to the construction of those words in the Rules is that there is no reason to suppose that the words should bear a different meaning in those Rules.

---

27 See for example *Marriott v Yeoward Brothers* [1909] 2 KB 987, where the theft by crew members of a passenger's luggage was held to come within the phrase "any act, neglect or default whatsoever." The position originally differed somewhat in the United States, presumably because of the greater influence of cargo interests. Exemption clauses in such wide terms were held to be against public policy until the Harter Act was enacted in 1893 and, while imposing certain responsibilities on ship owners, excluded their liability for "damage or loss resulting from faults or errors in navigation or in the management of the ... vessel".

28 See *The Glenochil* [1896] 1 P 10 and the dissenting judgment of Greer LJ in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1928] 1 KB 717 at 739, upheld on appeal by the House of Lords at [1929] AC 223. The latter case took the continued relevance of common law authorities to be uncontroversial (see the House of Lords at 237 per Viscount Sumner). This was also the approach of the High Court of Australia in *Great China Metal Industries Co Ltd v Malaysian Shipping Co* (the *"Bunga Seroja"*) [1998] HCA 65, 196 CLR 161 at [73] per McHugh J and at [133] per Kirby J.

29 Admissible as an aid to interpretation, if the Rules are otherwise ambiguous, pursuant to Art 31 of the Vienna Convention on the Law of Treaties.

30 See Michael F Sturley (ed) *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (Fred B Rothman & Co, Littleton, Colorado, 1990).

31 *Halsbury's Laws of England* (5th ed, 2008) vol 7 Carriage and Carriers at [370].

[25] More specifically, the relevance to art 4.2(a) of common law authorities on the interpretation of the same provisions in bills of lading was demonstrated by the acceptance by other delegates at the Hague Conference of the words of Sir Norman Hill, representing British ship owners:[32]

> This clause, Article IV, is the shipowners' clause. Now, Sir, I would venture to remind the Committee that we have dealt with the cargo interests clause in Article III, and we have agreed and accepted the actual words that the cargo interests have put forward imposing the obligations on the ship with regard to seaworthiness, and, what is more important, we have accepted Article III. (2), which says that "The carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care, and unloading of the goods carried." We have not sought to weaken those or qualify those in any way. When we come to Article IV (2) our big point is the navigation point, and what we have asked is that we should have the words which from time immemorial have certainly appeared in all British bills of lading. "Faults or errors" have not appeared. They have been added. Our old words were: "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship," and we would ask, Sir, in our clause to have our old words; leave out "faults or errors," and put in our old words instead.

[26] Counsel for both parties sought to support their argument by reference to recent European decisions. Mr Gray referred to the *MS Cita*,[33] a decision of the Federal Court of Justice of Germany which held that the ship owner was not liable under the Hague Rules where an employee had turned off a watch alarm, fallen asleep and run the ship aground because that was "nautical" rather than "commercial" fault. Mr Rzepecky sought to rely on the *Quo Vadis*,[34] a judgment of the Court of Appeal of the Hague, the Netherlands, which held that the failure of the Master to ensure that the air inlet to the engine room was closed, despite a storm warning, was a "serious error" but could not be characterised as "reckless and with knowledge that damage will probably result". It appears to us that both authorities are consistent with the proposition that art 4.2(a) exempts a ship owner from liability for the actions of master and crew unless the damage is intentional or the consequence of subjective recklessness.

[27] That formulation is also consistent with s 85(2) of the Maritime Transport Act, which provides that the limitation of liability otherwise conferred by Part 7 of

---

32 Sturley at 248–249.
33 *MS Cita* 1 ZR 20/04 (26 October 2006).
34 *Quo Vadis* Schip en Schade 2002, No 82 (13 March 2001).

the Act does not apply where loss, injury or damage is caused intentionally or "recklessly and with knowledge that such loss or injury or damage would probably result."[35]

[28] The other reasons of Chambers and Baragwanath JJ for departing from the ordinary meaning of the words of art 4.2(a) all come down to the proposition that a purposive approach should be adopted when interpreting that paragraph. But that begs the question of what its purpose is. As we have said, that purpose is to make carriers responsible for loss or damage caused by matters within their direct control, but not otherwise.[36] Giving full effect to the ordinary meaning of the words of art 4.2(a) is entirely consistent with that purpose of the Rules. The opening words of the paragraph ("act, neglect or default") are sufficiently wide to encompass all acts or omissions of master or crew. However culpable the conduct, and whether or not it is intentional, the owner or charterer is not, subject only to barratry, deprived of the benefit of the exemption conferred by the paragraph.

[29] This interpretation is supported by eminent writers. In *Scrutton on Charter Parties and Bills of Lading,* Stewart Boyd QC and his co-authors express the view that:[37]

> Where an exception of negligence of the shipowner's servants is clearly expressed, full effect will be given to it, so that even the most culpable recklessness on their part will not render him liable.

To like effect, Sir Guenter Treitel QC and Professor F M B Reynolds QC express the opinion in *Carver on Bills of Lading* that:[38]

> It seems that the exception extends even to a wilful or reckless act of any person within the list, ie master, mariner, pilot or servants of the carrier (as opposed to the carrier himself) for the words of Art 4.2(a) do not in fact refer to negligence, but to "act, neglect or default".

---

35 Reflecting art 4 of the Convention on Limitation of Liability for Maritime Claims 1976 (the "London Convention"). A limitation action over the present claims was the subject of a previous judgment of Hugh Williams J, reported as *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650.

36 At [8] above.

37 Boyd at 218.

38 Guenter Treitel and FHB Reynolds *Carver on Bills of Lading* (2nd ed, Sweet & Maxwell, London, 2005) at [9–211].

[30] In summary, the text of art 4.2(a), the scheme of the Rules, the common law authorities, the *travaux*, cases on the Hague Rules, cognate definitions and the views of eminent textbook writers all support the exemption of owners from liability for the acts or omissions of masters and crew in the navigation and management of the ship unless their actions amount to barratry.

[31] When this test is applied to the present facts, the outcome is clear. The actions of Captain Hernandez following the grounding were reprehensible, but they were actions in the navigation or the management of the *Tasman Pioneer*. Captain Goodrick, a Master Mariner who gave expert evidence at trial for the respondents about the conduct of Captain Hernandez, accepted that, putting aside questions of intention and motive, his actions were in the navigation or management of the ship. There was no evidence to the contrary.

[32] The owner and the charterers had no knowledge of the decision of Captain Hernandez to pass through the channel between Biro Shima Island and the mainland and there was no evidence of a practice of taking that course. As we have noted,[39] the Master attempted to conceal the grounding from the owner and charterers. They cannot be said to have authorised the actions of the Master or to have acquiesced in them. It follows that, unless the respondents are able to establish barratry, their claims are defeated by art 4.2(a).

Was barratry pleaded?

[33] In order to rely on the barratry qualification to art 4.2(a), the respondents must have pleaded that the actions of Captain Hernandez amounted to barratry. They did not do so. To the contrary, they pleaded that his conduct following the grounding;[40]

> ... was intended to allow him to misrepresent and lie about the true circumstances of the casualty so as to absolve himself from blame and in particular to hide his reckless decision to transit the inside channel of Biro Shima Island in order to take a short cut route ...

---

39 At [3] above.

40 At [3.2] of their 30 August 2006 Reply to Statement of Defence.

The appellant admitted this allegation.[41]

[34] The failure of the respondents to use the word "barratry" in their pleading would not have been fatal to their ability to advance such a claim if they had pleaded the necessary elements. But, as we have said,[42] those elements included an act or omission with intent to cause damage to the ship or to the cargo or recklessly and with knowledge that damage would probably result. The actual pleading of the Master's intention, as set out in the previous paragraph, was of an intention to derive personal benefit, which cannot possibly be construed as an intention to cause damage to the cargo, or as recklessness with knowledge that damage to it would probably result. An essential element of barratry not having been pleaded, the respondents cannot now argue that the Master's actions constituted barratry.

[35] The pleading point is not an unmeritorious technical one. The appellant did not call Captain Hernandez to give evidence at trial. It was entitled to adopt that course in the knowledge that it was not being alleged by the respondents that the Master had, following the grounding, been actuated by any intent to damage the ship or the cargo. To the contrary, the respondents alleged a different motivation, which the appellant admitted.

Dairy Board claim

[36] Hugh Williams J implicitly found that the damage to the Board's produce probably occurred after the *Tasman Pioneer* left Yokohama. The only logical explanation for the damage occurring during that part of the voyage was that it must have occurred when the salvors were required to turn off the generator. Baragwanath and Chambers JJ expressly so found. On this point, Fogarty J agreed. There are therefore concurrent findings of fact to that effect. In order to persuade this Court to reverse these findings, the respondent Dairy Board would have to advance compelling arguments. It has not done so.

---

41 At [3.2] of its 22 February 2007 Statement of Defence to Reply dated 30 August 2007 [sic].

42 At [13] above.

[37] Because the Board's produce was lost when the power required for its refrigeration was turned off by the salvors, the effective cause of its loss was the grounding. Article 4.2(a) therefore applies to the Board's claim, just as it applies to all the other claims by the respondents. The Board cannot therefore recover from the appellant.

Result

[38] The appellant is protected by the art 4.2(a) exemption from all the claims by the respondents, including the Dairy Board. The appeal is therefore allowed. Judgment is entered for the appellant against all of the respondents.

[39] The respondents jointly are ordered to pay the appellant costs of $30,000 in this Court together with their reasonable disbursements, to be fixed if necessary by the Registrar. The costs order in the Court of Appeal is reversed. Failing agreement, costs in the High Court are to be fixed by that Court in the light of this judgment.

Solicitors:
DLA Phillips Fox, Auckland for Appellant
McElroys, Auckland for Respondents