CaseNote

April 2010

Strong Wise Limited v Esso Australia Resources Pty Limited (2010) FCA 240, 18 March 2010

This case is of interest for two reasons, One: it contains a detailed examination of the conduct of a Master and Pilot in dealing with a dangerous situation in bad weather in which an anchor had dragged in order to ascertain how many "incidents" occurred for the purposes of determining whether one or more limitation funds needed to be set up by the owners; Two: because it contains criticisms of the conduct of the Pilot (who gave evidence) and the Port Authority (the latter was not a party to the action and gave no evidence in the proceedings) in dealing with the dangerous situation with which they were confronted.

There a strong sense of déjà vu in relation to this case for Sydney legal practitioners, which once again involves a pipeline being damaged causing substantial loss to both the owner of the pipeline and third parties.

The action was brought by the owner of the "APL Sydney" seeking an entitlement to limit its liability pursuant to the *Limitation of Liability for Maritime Claims Act 1989* (Cth). The limitation sum is approximately $32 million, but the claims being made by Esso Australia Resources Pty Limited and BHP Billiton Petroleum (Bass Straight) Pty Limited are estimated to exceed $66 million.

Justice Rares in the Federal Court found that there was more than one incident giving rise to these claims and therefore more than one limitation fund needs to be provided by shipowners.

The issue for the court was whether or not the claims arose "on any distinct occasion", that being the language of article 6(1)(b) of the 1976 Limitation Convention, which is given effect to by the *Limitation of Liability for Maritime Claims Act 1989*.

The essential facts are that the ship dragged her anchor and fouled the pipeline during a gale in Port Phillip Bay, Melbourne in December 2008. The pipeline carried ethane gas at high pressure from Mordialloc on the eastern side to Altona on the western side of the bay.

Esso and BHP argued that there were at least four "distinct" occasions and, quoting from the judgment, they were as alleged to be follows:

"**(1)** the navigational errors leading to the initial fouling of the pipeline by the anchor around 15:44 to 15:45;

(2) the order at 15:46:01 that the ship's engine go astern. That allegedly caused the pipeline to be pulled further out of its trench for an appreciable distance and bent more;

(3) the order at about 16:19:51 that the engine go ahead. That allegedly caused the pipeline to rupture and to further deform together with the loss of a volume of ethane gas; and

(4) the order at 16:27:59 that the engine go astern. That allegedly caused the anchor to re-engage with a portion of the severed pipeline on the eastern side, drag it further out of its trench, bending it to almost a right angle before severing about 6 to 7 metres of pipe."

Esso and BHP argued that each of the last three engine movements caused new and separate, additional damage to the pipeline that was not inevitable or a necessary consequence of the initial fouling by the anchor or, in the case of each later engine movement, the immediately preceding engine movement.

Cases involving damaged pipelines have in Port Botany, New South Wales generated significant legal cases in the past. The case of *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"* (1976) 136 CLR 529 is well known as a leading authority in Australia on the circumstances in which parties can claim damages for pure economic loss.

A second significant New South Wales decision (arising from the same facts) was that of the New South Wales Court of Appeal in *Ballast Trailing NV v Decca Survey Australia Limited*, which again involved The Dredge "Willemstad". In that case, the owners of the dredge were held not entitled to invoke the right to limit their liability under section 3 of *Merchant Shipping (Liability of Shipowners & Others) Act 1900*. The court had found that there were nine separate occasions, each of which produced damage in respect of which a liability arose when the dredge had struck the pipeline on each of nine passages across a stretch of water that had been separated by intervals of approximately an hour and a quarter. Hope JA had observed in that case:

> "No doubt incidents may be so close to one another that, as a matter of degree, it may be possible and proper to regard them as involving one distinct occasion."

The shipowner, seeking to limit its liability in that case had argued that "the acts causing damage to the pipes involved only one distinct occasion because there was essentially only one operation, and the causes of the damage were continuing causes. One cause was the incorrect marking of the track plotter chart. That, so it is submitted, was an act which took place on only one occasion. The other cause was a failure to use other means of ensuring that the dredge did not cause damage to the pipelines, those other means being the conventional navigational system. This failure was said to flow from some decision, conscious or unconscious, not to use those systems, and thus also to be a single act. It is submitted that in

these circumstances, and having regard to the fact that all the acts of dredging took place within what was described as a closed period of time, namely, the night in question, only one distinct occasion was involved.

The Court of Appeal found:

> "In my opinion the learned trial judge was right in regarding each of the occasions when the dredge returned to the dredging site from the dumping site as a separate occasion. On each such occasion the master and pilot of the dredge had an opportunity of making use of conventional navigational methods to determine the position of the dredge in relation to the pipelines, and on each such occasion failed to do so."

A third case in New South Wales was that of *The Dredge "W.H. Goomai" v Australian Oil Refinery Pty Limited* (1989 94 FLR 298) in which the owners of the dredge were held disentitled from relying on limitation.

As Rares J pointed out the New South Wales Court of Appeal in the *Ballast Trailing* case applied the English Court of Appeal decision in *The Schwan* (1892) P419 where Lord Esher MR had suggested the following test:

> "So if you run into one ship half an hour before you run into another, what difference does it make? It is not the time which is the substantial thing; but whether both are the result of the same act of want of seamanship, and, if they are not, the [Merchant Shipping] Act does not apply, except as to each of them separately."

In the same court Bowen LJ said:

> "It is clear that you must examine the section in each case to see what particular damage is caused by the same act of improper seamanship; that if you find two acts which are distinguished one from another, which lead to loss or damage, then the double loss or damage is not entirely due to the same act. It is due to two acts instead of to one act. Otherwise, as has been pointed out, a ship might after making one blunder go blundering up the whole river. It is quite impossible to take that view. The question is, what unseamanlike act of the person in charge of the ship has caused a particular accident?"

An earlier decision, which is also quoted by Rares J, is that of Butt J in *The Creadon* (1886) 5 Asp. M.C. 585 where it was held that a second collision was inevitable after the first had occurred. Butt J allowed the owners to limit their liability to one fund. He found that the two collisions were so close together that:

> "...:the first was the substantial and efficacious cause of the second, and that there was no separate act of negligence on the part of those in charge of *The Creadon* in respect of the second collision."

The issue for Rares J, as contended for by Esso and BHP, was "whether the subsequent acts, neglects or defaults on which they relied were the inevitable consequence of the initial fouling or whether the ship, her master and the pilot had the time and opportunity to avoid each of them".

Rares J identified his reasoning process as follows:

> "I am of opinion that a claim arises on a distinct occasion within the meaning of the Convention in the following way. Where a single act, neglect or default of a shipowner places him in such a relationship that, as a matter of commonsense, it is a cause of loss or damage suffered by a third party, that third party will have a claim under article 2 of the Convention. And, such a claim will be caused by an occurrence and, so, will arise on that distinct occasion for the purposes of articles 6, 7, 9 and 11.
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> But where a subsequent act, neglect or default of the same shipowner separately operates to cause different or separately identifiable loss or damage to the same third party, or to others, then a new claim or claims will arise on that later distinct occasion. The latter occasion is distinct because, first there is a new event (the separate act, neglect or default), secondly, there is new loss or damage and thirdly, the new cause is, as a matter of commonsense, not a necessary or inseparable consequence of the earlier act, neglect or default.
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> Thus, whether one occasion is distinct from another will depend upon whether the causes of the claims that arise from each act, neglect or default are sufficiently discrete that, as a matter of commonsense, they can be said to be distinct from one another."

The shipowner contended that everything following the fouling was attributable to what it had done to cause that original act, neglect or default. That argument was rejected. It is surprising that the shipowners did not seek to attribute all the damage to the fact that the ship had dragged its anchor and that everything done thereafter was an attempt to re-anchor the vessel in the appropriate location identified by the Port Authority, thus identifying the failure to anchor correctly or the dragging of the anchor as the distinct incident to which the Convention was directed.

Rares J analysed the movements of the vessel and heard extensive expert evidence of eight witnesses whose evidence was given concurrently before him, albeit the ships records of helm or rudder orders were not available. It was presumed they had been removed by ATSB in the course of its investigation.

In concluding his judgment, His Honour expressed the preliminary view that the shipowner was entitled to limit its liability for:

> "The first occasion by establishing a limitation fund in the maximum amount calculated using the formula in articles 6 and 11 of the Convention. That fund would be available to pay all claims other than those for which claims arose on the second distinct occasion.
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> The second occasion by establishing another limitation fund. That fund would be available to pay all claims that arose because of the additional damage done to the pipeline by the ship's movements ahead causing the rupture and astern after it, the extra time for repair of the pipeline, including additional consequential loss claimed by Qenos, Huntsman and other parties, and the loss of escaped gas."

Another interesting aspect of the decision relates to the roles of the pilot and the Port Authority. The pilot had left the vessel which was under compulsory pilotage as it approached its anchoring position and before the vessel had come to anchor, because presumably, of the deteriorating weather conditions. Rares J held:

> " I am satisfied that the pilot's departure from the bridge before the ship had been brought up to anchor, particularly in the prevailing conditions, was a breach of his obligation to undertake the compulsory pilotage of the ship. Unless she had been brought up to anchor, the ship was still required to be under pilotage. If anything went wrong with the anchoring, as it did in this case, the master would be in the invidious position of potentially breaching the compulsory pilotage requirements of the Port of Melbourne were he to use the engines to manoeuvre the ship or attempt to re-anchor her. That position was exacerbated because the pilot directed the anchoring to be south west of the pipeline, a valuable and potentially dangerous infrastructure resource in the port, in a gale where the wind would blow the ship towards the pipeline if she were not brought up to anchor. That is just the position in which Captain Xu was placed, contributed to by the conduct of the pilot and later by the port authorities."

By about 14:36 hours the pilot had disembarked. Less than 10 minutes later the Master formed the view that the ship was dragging her anchor and 15 minutes later he sought permission from harbour control to heave the anchor and to re-anchor further away from the pipeline. That request was refused and he was told that he could not heave the anchor unless a pilot was on board. Captain Xu again sought permission at 15:25 from Harbour Control to move the ship and this time he was successful in obtaining permission.

Rares J held that the master should have ignored the refusal of harbour control at 15:07 to allow him to move the ship and he should have begun heaving the anchor then and there. His Honour said:

> " I do not accept that he was absolved of his right and duty to exercise that responsibility by the unhelpful refusal of harbour control to give its permission. The dragging of the anchor should have been addressed no later than then. As events transpired, it was too late to begin heaving the anchor when harbour control belatedly gave its permission at 15:25"

In relation to events after the fouling of the pipeline, His Honour found that the pilot, who had reboarded the vessel had incorrectly plotted the ship's position and had made an incorrect assumption as to where the cable led. He also ignored the fact that the vessel had been windrode for quarter of an hour after he had reboarded the vessel. His Honour found that in these circumstances both the master and pilot were negligent when putting the engine dead slow ahead and this caused the pipeline to be ruptured and a not insignificant quantity of gas to escape.

It is of interest to revisit a part of the New South Wales Court of Appeal's decision in *The Dredge "W.H. Goomai"* which was referred to earlier. In the leading judgment in that case, McHugh JA quoted from Sir Owen Dixon's essay "Jesting Pilate" in which he said:

> "The legal system would seem to assume always that the course of human affairs is discoverable, that there is time and opportunity for enquiry, that the connection of events or causes can be ascertained, that principles of conduct can be determined by forms of reasoning and that intentions of men and documents are neither so fleeting nor so unreal as to be proof against a dialectical search. In this the law adopts a standpoint that of necessity must be denied to those whose responsibility is to act at the call of events. In their case the need of knowledge often is no less. They would wish in matters of consequence to know as much of the situation with which they are about to deal, and to know with as much certainty, as a judicial enquiry is considered to assure. But they cannot. More often than not they must do their best, profiting by whatever information they already possess and summoning experience to their aid, but using, in place of the prolonged search after truth of the judicial process, their own intuitive judgment."

Rares J himself points to some of the expert evidence called in the case in which the experts had themselves changed their opinions on important matters radically. As Rares J said:

> "These changes underscored the very difficulty of the situation in which Captain Xu had to act. Since three experienced and knowledgeable experts changed their already differing views of what a reasonable master in Captain Xu's position ought to have done, there is an immediate incentive to caution in my making criticisms of his conduct."

In another important passage of his judgement, Rares J said as follows:

> "It is disturbing that the port authority, through harbour control, not only did not prohibit the pilot's suggestion of breaking the cable instantly, it did not even appear (at least from the radio communications with the pilot and *APL Sydney*) to have had any emergency plan for the contingency that was unfolding, let alone a sound plan that absolutely prohibited using oxyacetylene or gas axe equipment if there were the slightest risk that the pipeline had been fouled or could be ruptured. The port authority's pilots and harbour control radio operators should have been trained to meet such a contingency and have had instilled in them that on no account should any source of fire be used to release an anchor possibly fouled on the gas pipeline. The gas pipeline was a significant item of infrastructure for Melbourne. It was also a marine hazard marked on the Admiralty chart and, no doubt, was one reason for there being compulsory pilotage in Port Phillip Bay. The evidence before me disturbingly does not suggest that the harbour control authorities, who had dismissed Captain Xu's sensible request to move his ship to safety at 15:05, in fact had any training or emergency plan to deal with the consequence of their direction to him that unfolded."

After hearing a considerable amount of evidence from the experts, Rares J held that a reasonable master in Captain Xu's position following a realisation about 15:48 that the anchor may have fouled the pipeline, and after a reasonably short period of consideration, of about 10 to 20 minutes "could only have arrived at a conclusion that letting the cable go from the bitter end was the correct and necessary course of action.". Rares J found that the further manoeuvring of the vessel in going ahead which commenced at 16:19:51 was negligent. That was a distinct occasion which he found caused further damage to the pipeline. An Appeal Court may be asked to consider that Rares J had ignored the wise words of Sir Owen Dixon quoted above and assumed a far greater degree of knowledge and awareness by the Pilot and the Master in finding that there was more than one "incident".

This case clearly has a long way to go before it reaches finality.

Stuart Hetherington
Partner
T: 02 8281 4477
E: swh@cbp.com.au