MARITIME CASES WITH AN OVERSEAS CONNECTION

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In this article I review two New Zealand cases with an international flavour.

The first case involved the issue of what right New Zealand courts have to prosecute New Zealand residents who have allegedly committed offences outside New Zealand. The question was considered in the fisheries context[1].

The defendants were a New Zealand citizen and a Tongan citizen (residing in New Zealand) who were the master and "alternative master" of a Cook Islands-registered vessel, which had allegedly been fishing illegally within Australian waters. The defendants were prosecuted in New Zealand under section 113A of the Fisheries Act, which provides that no New Zealand national, and no person using a New Zealand-registered vessel, may take or transport fish in another country's fisheries jurisdiction unless it is taken or transported in accordance with the laws of the foreign country.

The defendants defended the prosecution on a number of grounds, some of which could be generally described as an assertion that the New Zealand court should not be involved in what was a foreign matter. While acknowledging that section 113A was unusual in its reach, the New Zealand court was satisfied that it could entertain the prosecution of these defendants in these circumstances.

The provision was entirely consistent with New Zealand's international obligations to impose sanctions on its nationals offending in foreign fisheries jurisdictions. The defendants tried to argue that they could not be convicted by a New Zealand court of breaching Australian fisheries legislation unless it could be shown that they had been prosecuted and convicted in Australia. The court found that there did not need to be an Australian conviction.

The provision imposed a burden of proof on the defendants to show that they had been lawfully fishing in the Australian jurisdiction. There was concern that allowing such prosecutions could breach the provision known as "double jeopardy", which provides that a prior conviction or acquittal operates as a bar to further prosecution.

This issue did trouble the court somewhat, but the judge noted here that they had not in fact been prosecuted in Australia, and could not be subsequently prosecuted because the Australian legislation had a time bar. The flag state for the vessel, the Cook Islands, did not (at the time) have any relevant fisheries legislation that could have been used to prosecute the defendants.

Accordingly, the defendants were in the unfortunate position of being prosecuted in New Zealand, even where they could not be prosecuted by the flag state of the vessel they were operating, nor by the country they were operating the vessel in.

This appears to be the first test of the foreign jurisdiction reach of the Fisheries Act. Similar provisions apply to offending on the high seas. This is a highly unusual provision allowing the New Zealand courts to punish offending which takes place in a foreign country. However, New Zealand fishermen have now been warned that the courts will apply the provision to review what happens overseas and should act accordingly.

The second case[2] may well have much greater importance in an international context. It examines the responsibility of masters following a casualty and the impact on cargo claims if the master does not act in good faith. This decision is one of several arising from the grounding of the *Tasman Pioneer* in the inland sea of Japan in May 2001.

Claims for damages to deck cargo have been brought before the New Zealand courts by New Zealand-based cargo interests. The defendant, being a sub-time charterer, sought to exclude liability for damage to the cargo by relying on article 4R2(a) of the Hague-Visby Rules, which is incorporated in New Zealand law by section 209 of the Maritime Transport Act. This exclusion provides that:

"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 vessel".

This exclusion did apply to the original grounding because it was apparent that the master had simply made a mistake when navigating the vessel. However, it was found that it did not cover the subsequent actions of the master following the grounding. The master had delayed notifying the Coastguard of the casualty and of the ship's position and condition.

The master also failed to properly notify the situation to the ship's managers, and when he eventually did he left out significant details. Had the Coastguard been notified earlier, significant loss could have been prevented.

It was found that these actions could only have been motivated by the master implementing a plan designed to absolve himself of responsibility or blame for the grounding. Accordingly, his actions were not good faith actions made in the navigation or management of a ship. It flowed from this that the Hague-Visby liability exemption did not apply to events which occurred after the grounding.

This exposed the plaintiff (even though it did not directly employ the master) to very significant losses. This appears to be the first case where the element of good faith has been applied into this particular Hague-Visby provision. Obviously this highlights for masters the risks involved in trying to cover up the cause or affect of a maritime casualty.

FOOTNOTES

1 Ministry of Fisheries v Tukunga and Another, District Court Wellington. CRI 2005-085-6992. March 30, 2007

2 New Zealand China Clays Limited v Tasman Orient Line CV, High Court Auckland. CIV 2002-404-3215, Williams J. August 31, 2007