IN THE COURT OF APPEAL OF NEW ZEALAND

CA519/2007
[2009] NZCA 135

BETWEEN	TASMAN ORIENT LINE CV Appellant
AND	NEW ZEALAND CHINA CLAYS LIMITED First Respondent
AND	IMERYS MINERALS JAPAN KK Second Respondent
AND	NEW ZEALAND DAIRY BOARD Third Respondent And Cross-Appellant
AND	NESTLE KOREA LIMITED Fourth Respondent
AND	CHONG KUN PHARMACEUTICALS Fifth Respondent
AND	NIPPON NZMP LIMITED Sixth Respondent
AND	MAEIL NEW ZEALAND CHEESE COMPANY LIMITED Seventh Respondent
AND	DONG SUH FOODS CORP Eighth Respondent
AND	CHOHEUNG CHEMICAL IND CO LIMITED Ninth Respondent
AND	ALLIANCE GROUP LIMITED Tenth Respondent
AND	ZHEJIANG FUBANG GROUP CO LIMITED Eleventh Respondent

	AND	SHIN YANG LEATHER CO LIMITED Twelfth Respondent
	AND	SHIN OH CO LIMITED Thirteenth Respondent
	AND	DSI COMPANY LIMITED Fourteenth Respondent
	AND	KWANG SUNG HIGH-TECH CO LIMITED Fifteenth Respondent
	AND	ONG SEO TRADING CO LIMITED Sixteenth Respondent
	AND	NEW ASIA TRADING CO LIMITED Seventeenth Respondent
	AND	PPCS LIMITED Eighteenth Respondent
	AND	SUNGRIM ENTERPRISE CO Nineteenth Respondent
	AND	SHINY LEATHER CO LIMITED Twentieth Respondent
	AND	SUN JIN NEO TECHNO LIMITED Twenty-First Respondent

Hearing: 25 November 2008

Court: Chambers, Baragwanath and Fogarty JJ

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

Judgment: 9 April 2009 at 12pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The third respondent's cross-appeal is allowed.

C The appellant must pay the respondents costs for a complex appeal on a band A basis and usual disbursements. We certify for second counsel.

D The matter is referred back to the High Court for that Court to deal with any outstanding matters.

REASONS

BARAGWANATH J

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[1] New Zealand, in common with other states, has adopted the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading (1968) 1412 UNTS 128 (the Hague-Visby Rules) to regulate carriage of goods by sea (in Maritime Transport Act 1994, s 209(1) and Schedule 5). They stipulate the responsibilities and liabilities of sea carriers and also their rights and immunities (art 2). Two provisions are of particular importance for the purposes of this appeal:

First, art 3.1 and 3.2:

> 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.

Second, art 4.2 and 4.4:

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;

…

(q) any other cause arising without the actual fault and privity of the carrier, or without the 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.

…

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

(Emphasis added.)

[2] In the High Court (HC AK CIV2002 404 3215 31 August 2007), Hugh Williams J held at [226] that misconduct of the master of the *Tasman Pioneer* following a grounding was to be regarded as an "[a]ct, neglect or default… in the navigation or in the management of the ship". However, because it was not performed in good faith, the carrier was not entitled to the protection of art 4.2 in a claim by shippers whose goods were damaged as a result (at [242]).

[3] I have reached a similar conclusion by a slightly different route. It is that in the extraordinary circumstances the master's conduct was not "act, neglect or default … in the navigation or in the management of the ship" within the meaning of art 4.2 and for that reason the carrier's appeal should be dismissed.

Facts

[4] The appellant carrier Tasman Orient Line CV (TOL) operates a freight liner service from Auckland, New Zealand via Yokohama, Japan to Busan, South Korea. The respondent shippers (NZ China Clays and Imerys Minerals Japan KK) contracted with TOL for the carriage of their goods as deck cargo on the *Tasman Pioneer* from Auckland to Busan. From Yokohama the *Tasman Pioneer*'s normal course was west along the southern coast of the large central Japanese island of Shikoku, and from there roughly north-west through the Bungo Suidō (Bungo Channel) leading up to the Hayasui Seto (Hōyo Strait) at the entrance to the Naikai Seto (Japan Inland Sea). From there access is gained to Kanmon Strait leading to the Sea of Japan which is then crossed to reach Busan at the south-east corner of South Korea.

[5] More specifically, the conventional track lay to the west of the small island of Okino Shima which lies off the south-west corner of Shikoku and from there veered north-north-west towards Hayasui Seto.

[6] TOL intended that the voyage from Yokohama last just under 48 hours and that the ship arrive at Busan at 1700 hours on 3 May 2001. To do that it was necessary for the ship to passage the Kanmon Strait, which is narrow and with a significant current. Compulsory pilotage is required.

[7] The master, Captain Hernandez, with 36 years experience at sea, was concerned to arrive at the Kanmon Strait at a favourable point of the tide. About 14 hours into the journey he realised that the ship was behind schedule because of unfavourable sea conditions, and decided not to take the usual route for vessels entering the inland sea. Instead he elected to take this 22,000 ton vessel inside Okino Shima and indeed through a narrow passage between Biro Shima island, to

the east of Okino Shima, and the Shikoku promontory of Oshime Hana. That was expected to shorten the journey by 30 to 40 minutes. He had previously navigated the passage but, except for a single occasion, in vessels of only 4,000 tons.

[8] Before the *Tasman Pioneer* entered the channel the master had taken over the navigation of the ship. It was nearly 0300 hours. The sky was completely dark, with visibility down to about two miles. There were rain squalls which can blank out radar images. There was a northwesterly gale of some 36 knots and with a fetch of some 50 nautical miles there was a swell of about two metres. There was potential for encountering other traffic and for complex tidal conditions which brought the prospect of added turbulence. About two minutes after changing course to enter the passage Captain Hernandez lost all images on the radar. He instructed the second mate to reconfigure it, and while he was doing that, Captain Hernandez ordered "hard port". The second mate reconfigured the radar which showed the island of Biro Shima at a distance of only about 800 yards on the ship's port side. He checked from the port wing and shouted to the master "go starboard". Captain Hernandez confirmed the order but after about five seconds the *Tasman Pioneer* grounded. The crew felt two impacts from the bow, which were like grinding vibrations, each of about two to three seconds in duration, with a similar interval in between. The *Tasman Pioneer* had struck Biro Shima on its port side, while travelling at about 15 knots. Although the crew were unaware of the extent of the damage they knew almost immediately it was highly likely to have been significant. From a speed of 15 knots the vessel had slowed to six or seven knots. The ship developed a list to port that grew to about three degrees after five minutes and eight to ten degrees in five to ten minutes. All hands were roused and ballast tanks were flooded to correct the list. Pumping operations commenced. A port water ballast tank was found to be flooded and shortly after it was found that numbers 1 and 2 cargo holds were also taking water and further pumping was undertaken.

[9] Following the grounding Captain Hernandez did not at any time alert the Japanese coastguard. He continued to steam at full speed through the passage and into the Inland Sea. He did not advise the owners' agents until after he anchored, which was about two and a half hours later, near the intersection of his course with the course such vessels would normally have taken. After anchoring the master

instructed the crew to lie to investigators with a view to persuading them that the ship had been on the usual course and had impacted with an unidentified floating object. The second mate was instructed by Captain Hernandez to erase the course actually sailed from the ship's chart and substitute a false course purporting to show *Tasman Pioneer* passing on the normal course, west of Okino Shima and Biro Shima.

[10] During this journey after the grounding, for a distance of 22 nautical miles, the *Tasman Pioneer* was making maximum speed, about 15 knots, into the nor'-west gale of some 35 knots, with swell estimated at around two metres in the more exposed parts of the passage. By the time the vessel anchored it was down at the bow.

[11] The coastguard learned of the casualty by a message from a passing vessel. A patrol boat came upon the *Tasman Pioneer* at anchor at about 0900 hours. The Japanese coastguard found the vessel with numbers 1 and 2 cargo holds flooded, and only about two metres of freeboard on the foc'sle deck, with a five to six metre trim by the head. By 10 am a Lloyds Open Form "No pay no cure" salvage agreement had been reached between Nippon Salvage, who had tugs nearby, and the Swedish Club of P and I.

[12] It was accepted by Captain Landelius, an expert witness for TOL, that it was the duty of the master to report the episode to the ship's owners no later than 0315 to 0330 on 3 May. They would immediately have communicated with the Japanese authorities.

[13] In a careful and detailed judgment the trial Judge at [214] found that the master's conduct after the grounding resulted in the loss of the shippers' deck cargo. This was because had the Japanese coastguard been notified the Judge found it was highly probable that with its local expertise it would have recommended reducing speed and making for the nearest sheltered anchorage with shelving bottom in case beaching was required. A large bay to the north-north-west called Sukumo Wan met all those criteria. At a point some eight nautical miles from Biro Shima it permits anchorage and is protected to the north by hills of over 700 metres. The Pilot Book

states that large vessels can anchor there. The sea bottom has a gradual slope from a depth of some 40 metres and it is possible to beach vessels there. It could have been reached in about an hour at reduced speed. But the master disregarded his obligation to report and passed by the bay.

[14] Furthermore, had the master reported the grounding, Nippon Salvage, with salvage tugs nearby on 24 hour standby would have been notified much earlier. All the actions relating to salvage would have started some five to six hours earlier than they in fact did.

[15] Hugh Williams J concluded:

> [197] Even allowing a certain leeway in those hypothetical calculations, the appropriate conclusion is that salvors with pumps would have been available to *Tasman Pioneer* within about two hours after the 1218 hrs photo, the *Seiha Maru No.2* with its major pumping capacity and heavy portable pumps would have been on site and deploying pumps well before the 1530 hrs photograph and the *Hayashio Maru No.2* would have arrived about an hour after that photograph was taken.
>
> [198] Even if that hypothesis is allowed a little further latitude and the extra pumping capacity not arrived until a little after the times mentioned, the same conclusion would be appropriate. The ship was only sinking relatively slowly and accordingly, if the extra pumping capacity had not been deployed even up to the 1550 hrs photograph condition or, possibly, even a little later, the plaintiffs' on-deck cargo would not have been inundated.

It is common ground that neither the ship owner nor the ship is liable for what Hugh Williams J at [181] found was "unwise" behaviour on the part of the master in choosing to take the shortcut. The reason is contained in art 4.2(a) (see [1] above).

[16] While the precise scope of the article is a matter of controversy which must be considered, there is no doubt that, the master having selected the narrow passage as what he considered to be a legitimate means of access to the Bungo Suidō, the carrier is entitled to the protection of art 4.2(a) in relation to the damage caused by the rock which the vessel struck. The "act, neglect and default of the master" did not entail liability on the owner, which was not personally at fault. See to like effect *President of India v West Coast Steamship Company (The Portland Trader)* [1964] 2 Ll L Rep 443 (US Court of Appeals) where the vessel ran aground in the Sulu Sea.

Instead he instructed that the vessel steam at some 15 knots to the north-west in order to join the standard track from which he had departed by the shortcut through the passage. He instructed the second mate to make a false entry on the chart and to have recorded in the log that the vessel had passed to the west of Okino Shima. As it continued to the north-west into the gale and 2 metre seas it developed a list to port which grew to 8-10 degrees after 10 minutes as the vessel took on water. The master continued this course for two and a half hours, before anchoring in a less protected position to the west of Shikoku.

The judge's decision

[17] Hugh Williams J found at [204] and [205] that, had the master complied with his obligations and duly reported the event, salvors would have reached the ship before the water level reached the on-deck cargo. The arrival of the salvors' additional pumping capacity would probably have saved that cargo: at [214]. As it was, the ingress of water increased progressively to the extent that by the time the salvors arrived the deck had sunk below sea level, and the on-deck cargo was unable to be saved.

[18] He accepted the evidence of the shippers' expert, Captain Goodrick, that the master's claimed reason for not anchoring earlier – need to change to another fuel – was a complete fabrication.

[19] Hugh Williams J found that that was not sufficient for art 4.2(a) to apply. He found that the exemption does not apply unless the "act, neglect or default of the master" was *bona fide* in the "navigation or management of the ship". The Judge's careful reasoning should be reproduced:

> [230] … the fact that the issue of good faith has only infrequently been addressed in precedent cases may arise from the fact that the fides of those responsible for the ship has not often been challenged. Even so, judicial discussions as to whether the actions in contention were in "navigation" or in "management" of the ship and thus Art 4 R 2(a) applied appears to have been based on the underlying premise that, no matter into which category the master's actions fell, they must still have been undertaken in furtherance of the master's paramount duty of safely caring for the ship, cargo and crew.

[231 The Hague-Visby Rules imply such a premise. They require carriers to "exercise due diligence" (Art 3 R 1(a)) and rescind the exemption for "want of due diligence" (Art 4 R 1).

[232] They require the carrier to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" (Art 3 R 2). They exempt shippers from responsibility for actions without their "act, fault or neglect" (Art 3 R 3). That the exemption in Art 4 R 2(a) is not absolute is indicated by comparing the exemption from responsibility under that Rule as contrasted with exemption from "all liability whatsoever" under Art 3 R 6. All of that presupposes that the carrier's intention or actions must be in furtherance of its obligations under the Rules and in particular the obligation under Art 3 R 2.

[233] In addition, authorities have addressed the question of *fides* on occasions. The *Star of Hope* spoke of a master's "honest intent to do a duty", *Boudoin* spoke of a master's "good faith judgment", *Phelps, James & Co* spoke of a master "acting *bona fide*" and, from a different view of the matter, the theft of the storm valve and removal of the access hatch in *The Chyebassa* and *The Bulkes* were acts of the crew so unrelated to management as not to be characterised as such. Further, in The *Hill Harmony* the Court of Appeal spoke of the master having a "duty to reach a *bona fide* decision". That issue does not appear to have been expressly addressed in the House of Lords but, though reversing the Court of Appeal, there is no reason to suppose their Lordships departed from the Court of Appeal's observation about the master's *bona fides* since there was little doubt the actions of the master of The *Hill Harmony* were taken in an honest though mistaken view of what he was entitled to do in the navigation of the ship.

[234] There is accordingly both logic and authority for the proposition that the "act, neglect or default" of those in charge of the ship must be *bona fide* "in the navigation or in the management of the ship" to entitle the carrier to the Art 4 R 2(a) exemption. There would seem to be every reason to read a good faith requirement into the Rule to entitle the carrier to qualify for the immunity from responsibility the Rule provides. That is the case irrespective of whether a lack of *bona fides* is seen as underpinning entitlement to the exemptions provided by the Rules or whether "navigation" or "management" which is not conducted *bona fide* in accordance with the master and crew's paramount obligation to care for the ship, cargo and crew safely is so antithetical to that paramount obligation and proper seafaring practice as not to be regarded as qualifying or amounting to "navigation" or "management" under the Rules.

[235] While it has been held that Captain Hernandez's actions were in the navigation or in the management of the *Tasman Pioneer*, it therefore becomes necessary to consider whether they were *bona fide* for her navigation or management.

[236] There can be little doubt that the master's initial decision to use the passage east of Biro Shima was motivated by good faith. He was endeavouring to save time and keep to schedule as the ship's managers required. He had used the passage before. Had it not been for the conditions, including the failure of the radar, and his decision to try to abort the passage, it may have been accomplished successfully.

> [237] Even the decision to abort the passage, though probably arising from panic, should be seen as a navigational decision reached in good faith.
>
> [238] The same cannot be said of the decisions and actions taken by Captain Hernandez after the grounding.
>
> [239] What he did was earlier recounted. What he failed to do was take a number of the other actions Captain Goodrick said a trained and conscientious master would take in such situations. In particular, he never complied with his duty to notify the coastguard of the casualty and the ship's position and condition. He also failed for what on his own admission was over two hours – and was probably longer – to comply with his obligation to report the casualty to the ship's managers and, when he did report, he said nothing about the cause of the reported water ingress, nothing about the grounding, and minimized the damage to the ship. Later Technomar telexes show Captain Hernandez was persisting in his lie as they say the "master believes that vessel hit an unidentified object".
>
> [240] None of those actions can have been motivated by Captain Hernandez' paramount duty to the safety of the ship, crew and cargo. None could have been motivated by his obligations as a master, particularly the obligation to report and take whatever steps were recommended to minimize the danger to life, to navigation and avoid the risk of pollution. All those actions can only have been motivated by Captain Hernandez implementing a plan designed to absolve himself from responsibility or blame for the grounding and lend a veneer of plausibility to his falsehood.
>
> [241] It follows that while what happened just before the grounding and for several hours afterwards may have been an "act, neglect or default of the master … in the navigation or in the management of the ship" his actions did not amount to an "act, neglect or default" in the *bona fide* "navigation or in the management of the ship".

[20] In short, the Judge concluded that, while the conduct of the master occurred "in the navigation…of the ship", it was performed in bad faith and in breach of what he held to be an implied term of art 4.2(a). He therefore gave judgment for the shippers against the carrier.

Submissions on appeal

[21] For the carrier Mr Gray QC submitted that the judge was right to hold that conduct of the master occurred "in the navigation…of the ship" but wrong to impute an obligation of good faith. Mr Rzepecky for the shippers contended to the contrary. He further submitted that in any event the conduct did not occur "in the navigation…of the ship".

[22] The shippers pleaded a written contract of carriage with TOL evidenced by a bill of lading and subject to the Hague-Visby Rules.

[23] TOL pleaded its standard terms and conditions, which included:

> **20. METHODS AND ROUTES OF TRANSPORTATION**
>
> The Carrier may at any time and without notice to the Merchant:
>
> … … …
>
> (d) proceed by any route at its discretion (whether or not the nearest or most direct or customary or advertised route) at any speed and proceed to or stay at any place or port whatsoever once or more often and in any order;

It also pleaded art 4.2(a).

[24] The reply to the statement of defence pleaded:

> **Captain Hernandez' Post Grounding Misconduct**
>
> 3.1 Following the grounding of the Tasman Pioneer, Captain Hernandez failed to take appropriate action for the safety of the ship, crew and cargo and to limit or avoid damage to the cargo.
>
> Particulars
>
> (1) Proceeding to take the Tasman Pioneer around the eastern side of Biro Shima Island and into the inland sea;
>
> (2) Failing to anchor immediately;
>
> (3) Continuing to steam into the inland sea for at least 4 hours at a speed of approximately 10 knots;
>
> …
>
> (7) Failing to immediately alert the Japanese Coastguard;
>
> …
>
> (9) Failing to accurately report to the location of the grounding to the Japanese Coastguard and the vessel's management;
>
> …
>
> (10) Failing to provide accurate information as to the circumstances of the grounding in a timely manner;
>
> …

(12) Causing delay over the appointment of Nippon Salvage Company Limited which maintains a 24 hour, 365 per day watch at its Moji Base;

(13) Steaming for an excessive length of time and distance before finally anchoring;

(14) Placing the vessel's hull under excessive pressure by continuing to steam at an excessive speed under all of the circumstances set out above, which increased the rate of flooding through the damage to holds 1 & 2.

3.2 Captain Hernandez' conduct following the grounding referred to in paragraph 3.1 above, 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…

Particulars

(1) Captain Hernandez lied to the Japanese Coastguard and the vessel's owners about the true time of the casualty, stating that it had occurred at 355 hours on 3 May 2001;

(2) Captain Hernandez erased the course plot from the relevant chart and replotted a course for the vessel showing a route around the eastern side of Biro Shima Island intending to hide the fact of the actual route taken by the vessel;

(3) Captain Hernandez informed the vessel's representatives, that he had collided with a semi-submerged object, probably a container instead of informing them that he had run the vessel aground on Biro Shima while travelling at a speed of 15 knots.

(4) Captain Hernandez lied about the circumstances to the Japanese Coast guard, giving a similar explanation to that referred to in (4) above.

(5) Captain Hernandez counselled deck officers and crew to lie to the Japanese Coastguard and support his explanation about the circumstances of the casualty;

(6) Captain Hernandez downplayed the true extent of the damage to his vessel which caused the owners to delay in instructing Nippon Salvage and agreeing the terms of the salvage.

3.3 None of the acts, or omissions referred to in paragraph 3.1 and 3.2 above were decisions made by Captain Hernandez bona fide and for the navigation or management of the ship.

3.4 As a result of Captain Hernandez [sic] misconduct referred to in paragraphs 3.1 and 3.2 above, the condition of the ship and the amount of flooding into hulls was significantly worsened causing more extensive damage to the cargo on board than would otherwise have occurred.

> 3.5 Had Captain Hernandez made bona fide decisions for the management and navigation of the vessel under the circumstances, the flooding into holds 1 and 2 would not have reached past the tweendecks in each hold. As a result, the plaintiffs' cargo would not have been damaged.
>
> Particulars
>
> (1) Slowly moving the vessel to the nearby sheltered anchorages behind Kahiwa on the Eastern side of Okino-shima or the bay east of Asabie headland;
>
> (2) Beaching the vessel in the same sheltered area;

[25] The carrier responded:

> It … admits that following the grounding Captain Hernandez did not:
>
> (1) Anchor immediately but continued to steam within Bungo Shidō [sic], which is the body of water that lies to the south of the entrance to the Japanese Inland Sea;
>
> (2) Alert the Japanese coastguard or seek assistance from other vessels in the area;
>
> (3) Accurately report the location of the grounding to the Japanese coastguard or the vessel's owners/managers.

The issue

[26] The issue is whether the carrier is protected by art 4.2(a) from the consequences of the master's conduct following the collision with the rock. The issue raises a difficult and important question of construction of the Hague-Visby Rules on which there is no binding authority and very limited guidance in the authorities.

The text of the Rules

[27] Articles 3.1 and 3.2, art 4.2 (a) (b) and (q) and art 4.4 are reproduced at [1]. The crucial question concerns the scope of art 4.2(a).

[28] Verbally the phrase "act, neglect or default" can be read broadly, so as to embrace any kind of conduct, even negligence. It can also be read as limited to

conduct which may be negligent or entail other breach of duty but does not extend to wilful misconduct.

[29] The phrase "in the navigation or in the management of the ship" may also be read broadly, as relating to anything done with the navigation or management of the ship. Or it may be read more narrowly. Article 4.4 excludes from infringement "any deviation in saving or attempting to save life or property at sea or any reasonable deviation". It may be inferred that other sorts of deviation remove the protection of art 4.

Approach to construction of the Rules

[30] In *Great Metal China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (*The Bunga Seroja)* (1998) 196 CLR 161 a majority of the High Court of Australia at 168 expressed the view that the Hague-Visby Rules must be read:

(1) as a whole;

(2) in the light of the history behind them; and

(3) as a set of rules devised by international agreement as regulating contracts governed by several quite different legal systems.

I consider that (1) and (3) are indisputable. (2) presents more difficulty.

[31] With regard to (2), the nineteenth century ascendancy of the United Kingdom in shipping continued until after WWI. It remained influential in the drafting of the Hague Rules. But to what extent can the former common law of England still be said to inform the interpretation of the Rules? I have concluded that the Rules are to be construed as a comprehensive international convention, unfettered by any antecedent domestic law, and that the practice of text writers and some judges to heark back to the old English common law is erroneous. But because the practice is deep-seated and relied upon by Fogarty J it is necessary for us to outline briefly what we are departing from and how the Hague Rules took a different course.

[32] The former common law had classified carriers by sea as common carriers: *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338 (Exch) at 340-341. The carrier was thus strictly liable for damage or loss to cargo occurring in the course of a voyage unless it could establish both absence of negligence on its part and that it was due to one of a narrow range of excepted causes (act of God, act of public enemies, shipper's fault and inherent vice of goods).

[33] But the British and most European courts and what later became courts of the Commonwealth viewed such risk allocation as a default rule applying only in the absence of agreement to the contrary. So, to avoid liability, carriers in England took advantage of the common law of contract rule that parties could agree to exclude liability even for their own negligence (*In re Missouri Steamship Co* (1889) 42 Ch D 321 (CA)). Common form clauses excluded liability for deviation and barratry (defined in the Marine Insurance Act 1908, Schedule 2, R 11 as "every wrongful act wilfully committed by the master").

[34] In the United States the federal courts held that such clauses were contrary to public policy (eg *Compania de Navigacion la Flecha v Brauer* 168 US 104 (1889) at 117). By the Harter Act 1893 (US) the United States prohibited clauses granting exclusion of negligence. By the Shipping and Seamen Act 1903 New Zealand legislated to limit the scope of contracting out; Australia followed in 1904 and Canada in 1910. In August 1924 the International Convention for the Unification of Certain Rules Relating to Bills of Lading (1924) 120 LNTS 155 (the Hague Rules) was concluded. Its evolution is recounted in Professor Sturley's *The Legislative History of the Carriage of Goods Act and the* Travaux Préparatoires *of the Hague Rules* (1990). By the start of World War II the overwhelming majority of the world's shipping was committed to the Hague Rules, which had received effect by the enactment of a series of domestic statutes including the Carriage of Goods by Sea Act 1924 (UK), the Sea Carriage of Goods Act 1940 and the Sea-Carriage of Goods Act 1924 (Cth). The amending Hague-Visby Rules made minor changes in 1968, none of which is important for the purposes of this case. The Hague-Visby Rules received domestic effect in the Carriage of Goods by Sea Act 1971 (UK), though the corresponding Australian and New Zealand statutes were not enacted until 1991 and 1994 respectively.

[35] The practice of continued reference to the former law resulted in a tension between *The Bunga Seroja's* second and third potential guides to interpretation. In *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 (HL), in construing the Hague Rules Lord Atkin correctly emphasised the international scope of the Rules (at 343):

> For the purpose of uniformity it is… important that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

[36] In *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223 (HL) in considering the concept of "management of the ship" in art 4.2(a) Lord Hailsham LC focused on English domestic law, an approach with which must now be seen as anachronistic (at 230):

> The words in question first appear in an English statute in the Act now being considered; but nevertheless they have a long judicial history in this country. The same words are to be found in the well known Harter Act of the United States, and as a consequence they have often been incorporated in bills of lading which have been the subject of judicial consideration in the Courts in this country. I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

[37] However useful in identifying the provenance of a concept adopted in the Rules, concentration on judicial decisions from the pre-Hague era carries risk of adopting a construction inconsistent with its policies. Given the deliberate rejection of the former laissez-faire regime, that is especially so in the context of what is here the crucial expression "act, neglect or default… in the navigation or in the management of the ship".

[38] In the sixth (1910) edition of Scrutton *Charterparties and Bills of Lading* Sir TE Scrutton and FD MacKinnon stated:

> 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.

They cited at 216 *Marriott v Yeoward Bros* [1909] 2 KB 987 (KB) where it was held at 996 that the exception "any act, neglect, or default, whatsoever" of servants etc protected the carrier against even felonious acts by a servant. In *Bulgaris v Bunge & Co Ltd* (1933) 45 Ll L Rep 74 (KB) MacKinnon J (as he had then become) was prepared at 81 to state as obiter that deliberate abandonment of a vessel by its crew constituted "act, neglect or default of the master…in the navigation or in the management of the vessel" from which art 4.2(a) would protect the shipowner.

[39] I accept the submission of Mr Gray QC for the appellant that certainty is a high interest in commercial matters. As Lord Mansfield observed in *Vallejo v Wheeler* (1774) 1 Cowp 143; 98 ER 1012 at 1017 (KB):

> In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.

[40] That passage was adopted in *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2005] 1 WLR 1363 by the House of Lords who placed at the forefront of their reasons for dismissal of the appeal the fact that a particular construction of art 3.2 had been the subject of a decision of that House in 1956.

[41] No doubt for that reason two masters of commercial law, Sir Guenther Treitel and Professor Reynolds, have endorsed the result of *Marriott v Yeoward* without considering citation to be necessary. See *Carver on Bills of Lading* (2ed 2005) at [9-211]: "it seems that the exception extends even to a wilful or reckless act of any person within the [4.2(a)] list". Likewise Cooke & ors *Voyage Charters* (3ed 2007) state at [85.264]: "[i]ntentional faults, such as barratry…may well…fall within the breadth of the words."

[42] But here there are, in my respectful opinion, four related reasons why it is insufficient in this case simply to rely on a *Marriott v Yeoward* approach.

[43] The first is that 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. So there should be no assumption that the law remains unaltered.

[44] The second is that the narrow focus on text without regard to context, adopted by Scrutton LJ in *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1928] 1 KB 717 (CA), has been firmly rejected in favour of the often cited dissenting judgment of Greer LJ in that case, confirmed on appeal from the Court of Appeal's decision ([1929] AC 223) and relied upon by Hugh Williams J in the present case. It is to similar effect as the approach of Wright J In *Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424 (KB), holding that (at 439):

> A negligence or exception clause in a statute, as in a contract, ought…to be strictly construed.

Greer LJ stated at 743-744:

> I think it is incumbent on the Court not to attribute to Art. IV., r. 2 (*a*), a meaning that will largely nullify the effect of Art. III., r. 2, unless they are compelled to do so by clear words. The words "act, neglect or default in the management or navigation of the ship," if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art. III., r. 2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last mentioned Rule. In my judgment, a reasonable construction of the Rules requires that a narrower interpretation should be put on the excepting provisions of Art. IV., r. 2 (*a*). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of Art. IV., r. 2 (*a*), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To hold that this is the effect of Art. IV., r. 2 (*a*), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment, the reasonable interpretation to put on the Articles is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1.) negligence in caring for the safety of the ship; (2.) failure to take care to prevent damage to the ship, or some part of the ship; or (3.) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship's purposes. It is worth while noting that Art. IV., r. 2 (*a*), is not directed to acts, neglects or defaults in the course of management of the ship, but acts, neglects or defaults in the management of the ship. All the cases in our Courts where the ship has been held to be excused come under one or other of these heads.

[45] The immediate effect of the judgment was to make the distinction, now accepted in European decisions on art 4.2(a), between what in French is called "faute nautique" for which the carrier is exempted and "faute commerciale" for which it is held liable. But this appeal raises the question whether that is a sufficient distinction.

[46] The third is that modern statutory construction is purposive. Expressed in terms of s 5 of the Interpretation Act 1999, regard must be had not only to text but to purpose. And consequences matter. As was acknowledged in *Jindal Iron and Steel*, even where there is high relevant authority to the contrary (at 1370):

> … the House might… be persuaded…to depart from an earlier decision where that decision has been demonstrated to work unsatisfactorily in the market place and to produce manifestly unjust results.

[47] The fourth is that in this case the domestic legislation gives effect to an international convention. I adopt the formulation by Kirby J in *The Bunga Seroja* :

> [137] The approach of this Court to the construction of an international legal regime such as that found in the Hague Rules must conform to settled principle. Reflecting on the history and purposes of the Hague Rules, *the Court should strive*, so far as possible, *to adopt* for Australian cases *an interpretation which conforms to any uniform understanding of the Rules found in the decisions of the courts of other trading countries*…. It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by serious disagreements between different national courts… *What is at stake is not merely theoretical symmetry in judicial interpretation. There is also the practical matter that insurance covers most losses occurring in the international carriage of goods by sea. It is therefore important, so far as possible, that the parties and their insurers should know in advance who will bear the loss and thus who should carry the direct cost of insurance premiums… Disparity of outcomes and uncertainty about the Rules produce costly litigation without positive contribution to the reduction of overall losses to cargo*. This said, the achievement of a uniform construction of an international standard is often elusive…
>
> [138] In construing a text such as the Hague Rules, this Court, to the greatest extent possible, should prefer the construction which is most consistent with that which has attracted general international support rather than one which represents only a local or minority opinion…. That is a reason why it would be a mistake to interpret the Hague Rules as a mere supplement to the operation of Australian law governing contracts of bailment. That law, derived from the common law of England, may not be reflected in, or identical to, the equivalent law governing carriers' liability in civil law and other jurisdictions. The Hague Rules must operate in all jurisdictions, whatever their legal tradition. Similarly, care must be taken in

> importing into decisions about the Hague Rules, judicial authority derived from the time before those Rules were adopted.
>
> (Emphasis added.)

[48] There is no authority which discusses the kind of situation with which this appeal is concerned. It is therefore necessary to identify and apply the principles underlying the Rules. The Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (art 31.1). Recourse may be had to supplementary means of interpretation when the interpretation according to art 31 leads to ambiguity or obscurity or leads to a result which is manifestly absurd or unreasonable (art 32). A construction which allowed one party wilfully to defeat the objects of the other would not comply with the Convention.

[49] The Hague-Visby Rules display a plain intent to strike a sensible balance between the competing interests of shipper and carrier. One starts, like Greer LJ in *Foreman and Ellams Ltd*, with art 3.2. The carrier has a primary responsibility properly and carefully to carry, keep, care for, and discharge the goods carried. But that obligation is subject to art 4. That exempts the carrier from loss resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. Then, vitally, art 4.2(a) exempts the carrier from liability for loss or damage arising or resulting from –

> 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

[50] What is the true construction of that subclause? It can be read broadly as in *Marriott v Yeoward*; or narrowly so that "act… or default" are read eiusdem generis with "neglect" and not extended to reckless, let alone wilful, misconduct; and it can be read purposefully in the light of other provisions of the Rules. For example, art 4.4 states:

> Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

[51] It is reasonable to infer that deviation falling outside the protection of that provision does constitute infringement or breach. Yet such deviation may well be the result of act or omission of the master or crew. It follows that the broad language of art 4.2(a) is to be read down as not conferring immunity at least for that kind of conduct. That was the result in *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638 (HL), where the master's adoption of a longer rumb line course instead of the shorter great circle course was held not to be justifiable in terms of art 4.2(a).

[52] It might be argued that, because there the charterparty required the master to prosecute his voyages with the utmost despatch, *The Hill Harmony* is distinguishable from the present case, where the charterparty conferred discretion to deviate. But a court is reluctant to read an exemption clause as permitting conduct inconsistent with the main purpose of the contract. A contract is to be read as a whole and any deviation, to be permissible, must be consistent with the contract voyage: *Glyn v Margetson & Co* [1893] AC 351 (HL). The court will be slow to give an exemption clause such wide ambit as to effectively empty of content the obligations of the party relying upon it: *Suisse Atlantique Société d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) at 482; *Tor Line AB v Alltrans Group of Canada Ltd (The TFL Prosperity)* [1984] 1 WLR 48 (HL).

[53] Lord Steyn has argued that there has been a shift from literal methods of interpretation of contracts towards a more commercial approach: *Sirius Insurance Co (Publ) v FAI General Insurance Ltd* [2004] 1 WLR 3251 (HL) at [19]. He cited the example of the tyrant Temures who, having promised a garrison that no blood would be split if they surrendered, buried them all alive. In construing a statutory contract of the present kind a sensible and proportionate approach is required.

[54] Certainly, as the cases show, for the most part the courts must defer to the conduct of the master. The Hague-Visby Rules, hammered out by international expert participants and widely endorsed in domestic legislation, have secured international assent to a trade-off between the competing interests of shippers and ship-owners. Article 4.2(a) is not to be read narrowly so as to substitute second guessing by lay judges for navigational decision-making by expert mariners.

[55] Nor however is it to be read so widely as to render meaningless the obligation of the carrier under art 3.2. To exonerate a carrier from conduct of similar quality to deviation, namely conduct that is radically at odds with the art 3.2 obligation, by sacrificing the shipper's interests for wholly incompatible selfish interests of the master, goes over the boundary of the art 4.2(a) protection.

[56] To treat the former laissez-faire jurisprudence as settling the interpretation of an international convention designed at least in part to do away with the laissez-faire approach would carry *The Bunga Seroja's* second guide further than is reasonable. A century after the sixth edition of *Scrutton* there is much to be said for the argument that, in construing art 4.2(a), the time has come to bury the pre-Hague Rules authorities. In today's conditions the *contra proferentem* approach of Wright J and Greer LJ has developed into a principle that broadly expressed exemptions are to be read down to do substantial justice in accordance with apparent purpose of the contractual legislation read as a whole.

[57] Here it is now common ground that the carrier is protected by art 4.2(a) in respect of loss or damage resulting from collision with the rock. Hugh Williams J found:

> [236] There can be little doubt that the master's initial decision to use the passage east of Biro Shima was motivated by good faith. He was endeavouring to save time and keep to schedule as the ship's managers required. He had used the passage before. Had it not been for the conditions, including the failure of the radar, and his decision to try to abort the passage, it may have been accomplished successfully.

[58] The British Admiralty Pilot described the narrow channel between Biro Shima and Oshime Hana as "deep and… used by large vessels". Having successfully traversed it previously, the master's decision to employ it, albeit in quite unsatisfactory conditions, could not be described as deliberately courting hazard and therefore reckless. Still less was the grounding deliberate. Whatever its true construction, there is no authority which would regard such conduct as infringing art 4.2(a). The law must give effect to the fact that the resolution of a deep difference between shippers and shipowners was by a broadly expressed exemption to the rule of art 3.2.

[59] The subsequent conduct is another matter and can only be described as outrageous. It was fundamentally at odds with the purpose of both the contract of carriage and the legislative regime designed to achieve a sensible compromise between competing interests. The judge's conclusion was clear:

> [240] None of those actions can have been motivated by Captain Hernandez' paramount duty to the safety of the ship, crew and cargo. None could have been motivated by his obligations as a master, particularly the obligation to report and take whatever steps were recommended to minimize the danger to life, to navigation and avoid the risk of pollution. All those actions can only have been motivated by Captain Hernandez implementing a plan designed to absolve himself from responsibility or blame for the grounding and lend a veneer of plausibility to his falsehood.

[60] I are satisfied that such behaviour, carried out for the selfish purposes of the master, and wholly at odds with the carriers' obligations under art 3.2, is not conduct "in the navigation or in the management of the ship" within the meaning of art 4.2(a). While the conduct is less extreme than thefts by stevedores, which in *Brown & Co Ltd v T & J Harrison* (1927) 27 Ll L Rep 415 (KB) at 418 MacKinnon J held not to be "in the navigation or in the management of the ship", the point is similar. The decision was upheld on appeal and followed by McNair J in *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd (The Chyebassa)* [1966] 1 Ll L Rep 450 (QB).

[61] Such a conclusion is consistent with the judgment of the Cour d'Appel de Rouen of 26 May 1970 cited in Tetley *Marine Cargo Claims* (4ed 2008) at 959 and reported in *Jurisprudence Française* at 667. There the vessel was damaged in a collision and the captain, instead of beaching the ship, spent valuable hours trying to avoid salvage costs. That was held not to be conduct in the management of the ship.

[62] The conclusion is sufficient to resolve this case. There is accordingly no need to address further the interesting question whether, as leading texts suggest, art 4.2(a) would protect the carrier against reckless or even deliberate misconduct such as barratry. But it may be thought unlikely that a modern court would endorse the dicta in *Bulgaris v Bunge*.

[63] Nor is it necessary to examine what part, if any, concepts of good faith may play in such cases. That topic was the subject of a Symposium of the Research

Centre for Business Law, the University of Auckland with essays by distinguished contributors: Bigwood (ed) (2005) 11 NZBLQ 371. At [233], Hugh Williams J cited a number of Hague-Visby Rules judgments which refer to conduct as being in good faith. My inclination is to regard lack of good faith as bearing on the wider issue of whether the conduct takes the carrier outside the terms of its statutory and contractual obligations rather than the approach of Hugh Williams J, to treat good faith as itself an implied term of the Rules. But in the event the result is the same.

[64] While not part of the reasoning which has led to my conclusion it may be noted that the rule in art 4.2(a) is to be reversed by the new United Nations Convention for the Carriage of Goods Wholly or Partly by Sea (2009). The General Assembly adopted the Convention on 11 December 2008. It will open for signature in September 2009 in Rotterdam, and the rules contained in it will be known as the "Rotterdam Rules". They will take effect upon ratification by 20 states, and represent the result of several years' work by the United Nations Commission on International Trade Law. The new Convention is less favourable in many aspects to carriers than are the Hague-Visby Rules. Chapter 5 of the Convention deals with liability of the carrier for loss, damage or delay. Article 17 provides:

> **Basis of liability**
>
> 1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4 [being the period from receipt to delivery of goods].
>
> 2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18 which refers to the master].
>
> …
>
> 4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:
>
> > (a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or
> >
> > (b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not

> attributable to its fault or to the fault of any person referred to in article 18.

Article 18 provides:

> **Liability of the carrier for other persons**
>
> The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:
>
> … (b) The master or crew of the ship;
>
> …

Decision

[65] I would dismiss the appeal.

[66] For the reasons given by Chambers J I would allow the cross-appeal.

[67] The respondents should have costs for a complex appeal. I would certify for second counsel.

[68] The case should be referred back to the High Court to deal with any outstanding matters.

CHAMBERS J

TOL's appeal

[69] I agree with Baragwanath J, for the reasons he gives, that TOL's appeal must be dismissed. In particular, I endorse Baragwanath J's approach to the construction of the Hague-Visby Rules. In my respectful view, it is erroneous to place any weight nowadays on the deliberations of the proceedings of the Hague Conference in August-September 1921 as a guide to how the Rules should today be interpreted. Over 80 countries have now adopted the Rules in some form or another; most of them were not represented at the 1921 conference and accordingly could not remotely be said to have committed in any way to the travaux preparatoires. Further,

the circumstances surrounding shipping and the carriage of goods by sea are today quite different from those pertaining nearly a century ago.

The New Zealand Dairy Board's cross-appeal: introduction

[70] Part of the claim against TOL brought by the New Zealand Dairy Board, the third respondent and a cross-appellant, related to damage to dairy products stowed in refrigerated containers (reefers) on hatches 3 and 4. These products, unlike other goods on the ship, were not damaged as a result of immersion in seawater; rather, they were damaged by heat, as a result of the reefers being left off-power at some stage during the voyage. Of the Board's total claim of USD498,727, USD187,301 represented the value of the heat-damaged dairy products.

[71] At trial there was an issue as to when the heat damage had occurred. The Board argued the damage occurred before the grounding, as a result of a malfunction of the generator (genset) put on the deck for the purpose of supplying power to the reefers. TOL submitted the damage occurred after the grounding as a result of action by the salvors. The salvors, it was argued, had had to turn off electricity supply to the reefers as part of the salvage operation.

[72] Hugh Williams J held that "no … conclusion [could] be safely reached": at [304]. He seems to have inclined towards the view that the damage was probably caused after the grounding; he did, after all, describe the alternative thesis as "speculative": at [304]. In any event, His Honour ruled that the Board's claim was "not made out": at [305].

[73] From that determination, the Board has appealed.

Issues on the cross-appeal

[74] Three issues arise on the cross-appeal. The first is when the damage occurred. Mr Rzepecky, for the Board, reiterated the submission he had made in the High Court that it was probable the damage had occurred prior to the grounding.

But, he submitted it did not in fact ultimately matter whether he was right on that; whenever the damage occurred, TOL was responsible to compensate for it. We think this point does have to be resolved, however, as TOL accepts it would be liable if the damage occurred pre-grounding. If it happened afterwards, TOL relies on art 4.2(a) by way of defence.

[75] For the reasons which follow, I find the damage probably occurred after the grounding. That leads to the second issue: what caused the damage?

[76] The third issue is: has TOL a defence?

When did the damage occur?

[77] According to Mr Gray, the fact there was an issue as to when the damage occurred came to light only at the start of the trial. He told us that his side had not even realised heat damage was alleged. His side had believed that the entire case involved water damage. While it is true the schedule to the Board's statement of claim did refer to "heat damage" with respect to some products, I can well understand why TOL was taken by surprise. The way the claim itself was structured indicated the damage had arisen from flooding following the grounding. Paragraph 8.1 referred to the grounding. Paragraph 8.2 referred to the breach of the *Tasman Pioneer*'s hull and the eventual flooding of its holds. Paragraph 8.3 then refers to "the plaintiffs' various cargoes" being "lost or damaged". A reasonable reading of that pleading would have led one to conclude that the loss or damage arose from the flooding of the hull, which in turn arose from the grounding.

[78] Be that as it may, TOL, both at trial and before us, did not take any pleading point to the effect that it was not open to the Board to allege the heat damage had occurred prior to the grounding. But the state of the pleadings is nonetheless relevant to a complaint Mr Rzepecky made both at trial and before us. This complaint related to TOL's alleged failure to discover the relevant Partlow charts. The refrigeration unit on each reefer container has a temperature recording device which produces a chart called a Partlow chart. This records the refrigeration unit's operation during transit, including the constant operating temperature of the unit.

Mr Rzepecky submitted that, had the Partlow charts been discovered, the Board would have been able to find out whether the refrigeration units had malfunctioned prior to the grounding. Mr Rzepecky invited us to draw an inference from TOL's failure to discover the charts that the refrigeration units had failed.

[79] I am not prepared to draw such an inference for these reasons. First, given the pleadings, I can well understand why TOL would have regarded the pre-grounding Partlow charts as irrelevant and therefore non-discoverable.

[80] Secondly, if the Board had considered them relevant, it could have sought additional discovery prior to trial. It did not do so.

[81] Thirdly, it could have introduced the charts at trial, either by means of cross-examination of a relevant TOL witness or by serving a subpoena duces tecum. It did not take either step.

[82] Fourthly, it transpired that the General Average surveyors, who represented both Hyopsung Shipping Corporation and the respondents, did review the Partlow charts on 13 June 2001. The surveyors, in their report of 16 November 2001, referred to those charts. That report was part of the voluminous common bundle of documents, but no one referred it to the Judge. Probably, therefore, it did not become part of the evidence. Whether it did or not, the crucial point is that the partlow charts had been available to the Board.

[83] In those circumstances, it would be quite wrong to draw an inference adverse to TOL's interests from the absence of these charts.

[84] Before I review the evidence, I record one matter on which counsel were agreed. That is, TOL has the onus of establishing it has a defence in respect of the damage caused to the relevant cargo. TOL's concession was properly made: see Girvin *Carriage of Goods by Sea* (2007) at [26.43] and Aikens and others *Bills of Lading* (2006) at [10.151]. Article 3.2 states that subject to the provisions of art 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. TOL acknowledged, both at trial and before us, that, if

the heat damage had been caused prior to the grounding, TOL would have no defence under art 4.2(a) as the damage would not have arisen or resulted from "act, neglect or default … in the navigation or in the management of the ship". TOL did not plead any other art 4.2 exception. For this reason, it was incumbent on TOL to establish first that the damage probably occurred after the grounding.

[85] Unfortunately, the evidence as to when the power was off is unclear. But, in the end, Mr Gray has satisfied me that the heat damage was probably caused after the grounding.

[86] First, it is clear from the very detailed log kept by Captain Kuroki, the salvage master, that between 3 and 10 May (ie following the grounding) power supply to the reefers was erratic. His evidence was that some of the power cables to the reefers had had to be cut away as they had been damaged by the swell. It had not been possible to utilise the ship's own generators as there had been a need to reduce the consumption of diesel oil being taken from the settling and service tanks.

[87] Secondly, Captain Landelius, a master mariner fulfilling the role of Special Casualty Representative on this occasion, arrived on the salvage scene on 10 May 2001. When he arrived, the generator which was supposed to provide power to the refrigerated containers was not on the deck. He was told it had been removed by the salvors, but he did not know the reason. He immediately asked the salvage master to have the generator brought back on-board. That was done the following day, after the beaching. After the generator was hooked up again, it worked satisfactorily. The relevance of his evidence for present purposes is that it confirms there was a period after the grounding when the reefer generator was not in place. The Board's counsel did not cross-examine the captain on this evidence.

[88] Thirdly, there was in evidence a detailed report from Clancey Vanguard Limited, loss adjusters retained for the purpose of adjusting general average, particular average, and the claim on the Protecting and Indemnity Association. The parties agree this report formed part of the High Court record pursuant to r 441O(4) of the (then) High Court Rules. Clancey Vanguard carefully reviewed the salvors' records as to when power was "turned off" with respect to each reefer container and

then "turned on" again. Clancey Vanguard's conclusion on this topic was as follows:

> The dates and times are somewhat diverse, but do indicate that broadly speaking the power is recorded as having been "turned off" sometime during 3rd May and broadly restored on or around 10th May. The Daily Site Reports issued by the salvors, The Nippon Salvage Co., Ltd., copied later, indicate that the salvage master boarded the vessel at 1928 on 3rd May, by which time it appears that most if not all of the containers' power had been turned off. There are no records in the salvors' detailed daily reports to indicate that they required power to the containers to be restricted for purposes connected with the salvage operations, until 6th May when they report at 1533 that "one of the two generators was stopped to save consumption of diesel oil…" and at 1600 they note that "generator of the vessel was used to supply power to 7 reefer containers on the deck of No. 4 cargo hold by request of the vessel's superintendent".
>
> We enquired of Mr Goran Rudelius, of The Swedish Club's Hong Kong office, who attended the casualty from 4th May for his recollection of events surrounding the power to the reefer containers. He provided us with a draft statement issued by the vessel's chief officer at Kokura in May 2001, in which he reports that the vessel's generators were running when the crew abandoned the vessel late on 3rd May. He further reports that these were still running when the master, chief engineer, second engineer and he returned to the vessel with the salvors early on 4th May. He also comments: "We had a large number of reefer containers on deck. To supply them with electricity the charterers had placed a big diesel generator in a container on hatch No. 3. This power pack worked but the cables to the containers were now running through the water at the forward part of hold No. 3 and it was dangerous to use it. We stopped it and instead we plugged in as many reefer containers as possible on the ship's power. The cables then came from the aft part and did not run through water".
>
> Mr Rudelius has confirmed that "the cables from the charterers' power pack were running through water and it was deemed dangerous to use them. Thus the power pack was stopped and power was supplied to the reefer containers from the ship's generator".
>
> The available evidence therefore indicates that the power to the containers was not restricted to assist in the salvage operations, either at the insistence of the salvors or at the initiative of any person in authority. Rather the facts point to the power being interrupted due to the charterers' generator cables running through water; attempts to run the containers from the ship's generator may or may not have been successful.

[89] The only real evidence suggesting the damage may have occurred before the grounding comes in some telexes Captain Hernandez sent in the period 20 April to 25 April. In those telexes, Captain Hernandez had recorded that the "deck genset" was stopping from time to time, "due to high temperature". He requested that Power Hire, the contractors responsible for the machinery, look at the problem when the

ship reached Yokohama. Whether it was repaired at Yokohama is not apparent from the evidence given at trial.

[90] While it is certainly possible, on the evidence, that the heat damage was caused before the grounding, the more likely explanation is that it occurred after it, in the prolonged period when we know the power was off. Prior to the grounding, the problem appears to have been more intermittent; although the power was cutting off, it appears that Captain Hernandez and his crew had been able to restart the generator following the stoppages.

What caused the damage?

[91] Mr Gray submitted that, on the evidence, there were two explanations as to why the power had been cut off following the grounding. The first possibility was that the power was turned off to conserve it for the purpose of salvaging the vessel and its cargo. He submitted that the diesel needed to maintain power supply was in limited supply as it could not be pumped from below given the trim of the vessel. Obviously, he submitted, the ship's power was needed to enable pumping of seawater into aft ballast tanks and out of numbers 1 and 2 holds, which were full of seawater as a result of the grounding.

[92] The alternative explanation, he submitted, was that the generator had to be turned off due to its cables running in water, rendering it dangerous. Either way, he submitted, the loss fell within the defence available to TOL under art 4.2(a).

[93] I find it impossible on the evidence to work out exactly why the generators were turned off or removed. I suspect the reason why the evidence is skimpy is that, as I have said, TOL was rather taken by surprise on this issue: see above at [77]. On balance, the more likely explanation appears to be the concern that the cables from the charterers' power pack were running through water. This led in turn to the power pack being stopped (and then removed), with power being supplied to the reefer containers, but only after a time, from the ship's generator: see the Clancey Vanguard report, quoted above at [88]. It would certainly seem, however,

from the evidence of Captain Landelius that, by 10 May, the reefers were off-power, as otherwise he would not have been so concerned to insist that power be restored.

Has TOL a defence?

[94] If my analysis above is correct, then the principal reason why the reefers went off-power after the grounding is that seawater reached deck level, rendering the generator unsafe to use. If that is right, then TOL's problem is Hugh Williams J's finding that seawater reached deck level only because of Captain Hernandez' post-grounding conduct. Hugh Williams J's crucial finding of fact was set out at [214] of his judgment:

> In the light of all those matters, the answer must be that the plaintiffs have proved that early and proper notification by Captain Hernandez to the authorities would likely have resulted, hypothetically, in their on-deck cargo not being lost through water damage. There would have been significant pumping capacity additional to the ship's pumps available and progressively deployed before the sea level reached on-deck cargo.

[95] Once again, therefore, this damage was a direct consequence of Captain Hernandez' post-grounding conduct, which Baragwanath J has rightly described, as did the trial judge, as "outrageous": at [59] above. Just as TOL is not entitled to art 4.2(a) protection for water-damaged goods, nor is it entitled to protection for heat-damaged goods. All the damage is a consequence of Captain Hernandez' post-grounding actions; but for them, seawater would never have reached deck level.

[96] I appreciate this is a different conclusion from that reached by Hugh Williams J. With respect to him, I have not been able to work out exactly why he found in TOL's favour on this point. Mr Rzepecky's explanation is that the judge reversed the onus of proof, and wrongly considered it was for the Board to prove exactly why the loss had occurred. Certainly, some of the statements in this part of the judgment and in particular in [304] do suggest the judge thought the onus of proof lay on the Board. So perhaps that is the explanation; certainly it is clear the judge was far from certain as to exactly what had happened with respect to power supply to the reefers following the grounding.

[97] As I have already indicated, TOL accepted before us that it bore the onus of proving it was entitled to rely on the art 4.2(a) exception in respect of the damaged goods; in other words, it bore the burden of proving that the damage was probably due to an "act, neglect, or default…in the navigation or in the management of the ship". Like the trial judge, I have found the evidence difficult to analyse, but in the end have concluded that the loss of power to the reefers was probably the consequence of seawater at deck level, which in turn points to the cause being Captain Hernandez' outrageous conduct. In those circumstances, the art 4.2(a) defence is not available, and the Board's claim should have succeeded.

[98] As it turns out, therefore, it does not actually matter, on my view of the case, whether the heat damage occurred prior to the grounding or after it. If it occurred prior, the art 4.2(a) defence is plainly not available. If it occurred after, I have found that the heat damage was probably caused by Captain Hernandez' outrageous conduct. Either way, TOL does not have a defence to its failure to properly look after these particular goods.

[99] For these reasons, I would allow the cross-appeal.

FOGARTY J

[100] I do not agree with my colleagues. I would allow the appeal and dismiss the cross-appeal. I do not disagree with any of the findings of fact, at trial, which have not been altered on appeal. I agree that it is essential to read art 4.2(a) as a qualification only of the principal duty on the carrier in art 3.2.

The appeal

The appellant's submissions

[101] The principal argument of counsel for the appellant is that the words "act, neglect or default" as a matter of ordinary language, covers more than mere negligence, and extends to intentional faults, including recklessness or wilful default.

Mr Gray argued that Hugh Williams J had fallen into an error of law by failing to adequately address the historical background to the making of these rules; that he did not analyse the rules as a means of allocating risk between the carrier (rather than the master) and cargo interests ie the shippers. He argued that the Judge had incorrectly applied the decisions of the House of Lords and Court of Appeal in *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638 (HL) and [1999] 4 All ER 199 (CA).

The respondents' submissions

[102] The respondents supported the judgment of Hugh Williams J that the master has a duty to act bona fide in the management and navigation of the vessel. Mr Rzepecky submitted that there is a difference between acts intentionally but misguidely done in or incidental to the management or navigation of the vessel and acts done without any regard whatsoever to the management or navigation of the vessel. Relying on *The Hill Harmony* he argued that an act of navigation requires the master to make decisions which are bona fide and in good faith for the safety of the ship, its crew and cargo. Similarly, decisions not made bona fide will not be recognised as decisions made "in" the management of the ship.

[103] Conscious that it might be difficult to persuade this Court to imply a term into the Rules, let alone a qualification of bona fide conduct, Mr Rzepecky also restated the argument in a way which focussed on the purpose of the rule. In this way he endeavoured to avoid an interpretation of art 4.2(a) which relied on the state of mind of the captain. He submitted that, viewed objectively, the captain's conduct after the grounding could be seen to be wholly incompatible with his duties "in navigation and management of the ship" and therefore outside the scope of the exemption. The exemption was designed to recognise the responsibility of the master to make decisions in the navigation or in the management of the ship during the voyage. It was never intended to apply to a situation such as this where the master used his command of the ship to take it on a course designed to protect his reputation by concealing the fact of grounding and allow him to present the lie that while on a normal course the vessel had hit a submerged object. This was a course

of conduct wholly outside the purpose for which the master was entrusted with the ship and the cargo and so outside the purpose of the exemption in art 4.2(a).

[104] Developing this submission Mr Rzepecky emphasised the word "in" and argued that the phrase "in the navigation or management of the ship" was intended to be read in the context of decisions made for the safety of the ship, its crew and cargo. Rather, what the master did was the opposite of that. It was wilful conduct for his own interest and so the exemption does not apply.

Analysis

[105] The whole of art 4.2 provides:

> 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.
>
> (c) Perils, dangers and accidents of the sea or other navigable waters.
>
> (d) Act of God.
>
> (e) Act of war.
>
> (f) Act of public enemies.
>
> (g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
>
> (h) Quarantine restrictions.
>
> (i) Act or omission of the shipper or owner of the goods, his agent or representative.
>
> (j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general.
>
> (k) Riots and civil commotions.
>
> (l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(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.

(Emphasis added)

Principles of interpretation

[106] The Hague-Visby Rules, the 5th Schedule to the New Zealand Maritime Transport Act 1994, are the enactment of an international convention. The approach to these rules was analysed in depth by the High Court of Australia in *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation (the "Bunga Seroja")* (1998) 196 CLR 161. In their judgment Gaudron, Gummow and Hayne JJ said at [8]:

> In understanding the operation of the Hague Rules, there are three important considerations. The rules must be read as a whole, they must be read in light of the history behind them, and they must be read as a set of rules devised by international agreement for use in contracts that could be governed by any of several different, sometimes radically different, legal systems.

And further at [38]:

> Because the Hague Rules are intended to apply widely in international trade, it is self-evidently desirable to strive for uniform construction of them. As has been said earlier, the rules seek to allocate risks between cargo and carrier interests and it follows that the allocation of those risks that is made when the rules are construed by national courts should, as far as possible, be uniform. Only then can insurance markets set premiums efficiently and the cost of double insurance be avoided.

[107] McHugh J said at [70]:

> *Treaty interpretation*
>
> 70. The Schedule to the *Sea-Carriage of Goods Act* enacts the Hague Rules as domestic law. Prima facie, the Parliament intended that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. The guiding principles of treaty interpretation are found in the Vienna Convention on the Law of Treaties. Article 31 provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of its object and purpose. Under Art 32, interpretative assistance may be gained from extrinsic sources in order to confirm the meaning resulting from the application of Art 31 or to determine the meaning of the treaty when the interpretation according to Art 31 leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". Those extrinsic sources include the travaux preparatoires and the circumstances of the conclusion and history of the negotiation of the treaty. Primacy must be given, however, to the natural meaning of the words in their context, as I recently pointed out in *Applicant A v Minister for Immigration and Ethnic Affairs* [(1997) 190 CLR 225].
>
> (Citations omitted.)

In accordance with the ordinary meaning of the terms and their context and in the light of its object and purpose

[108] This principle of interpretation in art 31 of the Vienna Convention is very similar to the standard principle of the interpretation of statutes now contained in s 5(1) of the Interpretation Act 1999:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[109] With these considerations in mind I think that the interpretation should be wholly faithful to the text. Nonetheless the language of particular provisions must, as always, be read in context, and in particular the context of the whole set of rules, and in the light of the object and purpose of those rules.

[110] History has shown that uniformity of interpretation across legal systems has not been a feature of the Hague Rules. But that fact does not displace the need to approach the task of application of the Rules keeping in mind the intention of the

Convention that they be an international set of rules. McHugh J said in *The Bunga Seroja* at [73]:

> The historic development of the Hague Rules and the travaux preparatoires is described in some detail in the reasons for judgment of other members of the Court. The aim of the Rules was to harmonise the diverse laws of trading nations and to strike a new arrangement for the allocation of risk between cargo and carrier interests. However, the Hague Rules were a compromise rather than a codification of any accepted and uniform practice of shippers. Consequently, one needs to be cautious about using the pre-existing law of any country in interpreting the Rules. But that said, the fact is that the "immediate impetus for the Hague Rules came from the British Empire" [citing Professor Sturley's *The Legislative History of the Carriage of Goods by Sea Act and the* Travaux Preparatoires *of the Hague Rules* (1990), vol. 1 at 8]. Furthermore, British lawyers and representatives of British carrier and cargo interests dominated the Committees responsible for the drafting of the Rules which eventually became the Hague Rules. That being so, it seems likely that the English common law rules provided the conceptual framework for the Hague Rules – certainly the key terms of Arts III and IV are the subject of much common law doctrine. The Rules should be interpreted with that framework in mind.
>
> (Citations omitted.)

[111] An examination of the deliberations of the proceedings of the Hague Conference on 31 August 1921 reveal that the content of art 4.2 is largely taken from provisions which commonly appeared in British bills of lading. In broad terms art 4.2(a) adopted a common law as distinct from continental code approach inasmuch as it enumerates exceptions rather than stating a principle. The original draft of the Rules used different criteria in sub-rule (a) coming from the United States Harter Act. It also had a clause excluding the carrier from the responsibilities for barratry – meaning an act of the master or crew to defraud the ship owner or the cargo interest. Each one of the sub-paragraphs (a) through to (p) inclusive refer to causes of loss which are beyond the control of the carrier, treating the carrier one removed from the master, mariner, pilot or servants of the carrier on board the vessel at sea.

[112] Clause (q) is a wrap-up clause which is intended to capture other such causes not due to the actual fault or privity of the carrier or its agents or servants. During the deliberations of the Conference on the second day of the proceedings on 31 August the chairman said:

> With regard to (q) the Committee appears to me to have adopted the principle that the ship owner ought not to be an insurer against the

> interference of other parties. If that is so, it is difficult to see how you are going to balk at (q), how you fail to adopt (q), it is merely to give general effect. Then is (q) agreed? (*Agreed*)

[113] That principle fits (q) precisely but also falls within a general policy that a ship owner ought not to be an insurer against loss caused beyond the ship owner's control.

[114] This analysis is, I think, consistent with Callinan J's analysis of the whole of art 4 in *The Bunga Seroja*, where he said at 241, paragraph [221]:

> In my opinion, a detailed analysis of the Rules leads to a different result from what might be reached on the basis of the statements made in many of the cases cited and does, with respect, form a sound basis for the observations made by Mason and Wilson JJ in *Gamien*. It is immediately obvious that the Rules are intended to confer a very wide range of immunities upon carriers. Rule 1 strongly conveys the notion that liability should be sheeted home to the carrier only in respect of a want of appropriate care (due diligence) on its part. In some respects therefore, the specific instances of immunities set out in r 2, might be regarded as superfluous. Each of items 2(d), (e), (f), (g), (h), (j), (k), (l), (m), (n) and (p) in all or most cases would involve no fault on the part of the carrier. The notion that the carrier is not to be liable without actual fault is reinforced by (q). It seems to be going a long way, as (a) does, to exculpate the carrier from vicarious liability for its servants or agents in managing and navigating the ship. However the antidote may be that the carrier does have a duty "to properly man…the ship" pursuant to Art III, r 1(b) and by doing that should be regarded as having fulfilled its obligations in that regard to the shipper.

[115] Sub-paragraph (a) fits naturally into the reality, at that time, that the master, at sea, being in command and responsible for the safety of the crew, its cargo, and the ship, has to make decisions in the navigation and management of the ship all the time. Mr Gray is right to caution the Court against taking into account the modern day constant contact between the owner or charterer or their agents on shore and the bridge of the ship.

[116] The Conference could have adopted a policy that the ship owner was going to be liable for the consequences of such decisions by the master. It decided to the contrary. That decision is plain from the language of sub-paragraph (a) read as a whole in the immediate context of the surrounding sub-paragraphs of art 4.2 and in the broader context of the function of the Rules and the responsibilities of the master at sea. All of these factors then go to what is "the ordinary meaning of the terms in

their context and in the light of its object and purpose": art 31 of the Vienna Convention.

Consideration of natural meaning

[117] I have no doubt that the phrase "act, neglect or default of the master" includes intentional conduct.

[118] There is nothing in that phrase or in the clause as a whole which suggests that its application depends on the motive of the master.

[119] However, act, neglect or default of the master must be "in the navigation or in the management of the ship" so it is not any act, neglect or default of the master.

[120] I keep in mind also that the phrase is intended to apply in respect of "loss or damage" arising or resulting from such conduct of the master in the navigation or in the management of the ship.

[121] Furthermore, the clause is intended to apply vis-à-vis the carrier and the shipper or cargo interests. So obviously it is intended to apply to loss or damage of cargo.

[122] Reading "loss or damage" as being "loss or damage of cargo" is not adding or implying anything into the rules. It is another way of reminding oneself that the function of art 4 is to qualify the duty on the carrier to look after the goods being carried (the cargo) imposed by art 3.2.

[123] I think it is contrary to the natural and normal meaning of sub-paragraph (a) to confine its application to loss or damage arising from the negligence of the master. Were the word "act" not present, that summation might well be possible. But the word "act" is neutral as to quality and so applies independently of culpability. That must be its meaning unless it can be argued that the next phrase after the comma – "neglect or default" – somehow places the first word "act" into some subset of negligent conduct.

[124] I am fortified in this view by a consideration of the case law authorities. I know from the deliberations of the Hague Conference that art 4.2(a) was adopted from English bills of lading. The phrase "act, neglect or default" was at the time used in common law contracts of carriage. This was before the Hague Rules came to be negotiated in 1921. An important decision is the case of *Marriott v Yeoward* [1909] 2 KB 987 (KB). This was an action brought by Mrs Marriott to recover damages for the loss of certain personal effects which were carried by Yeoward Bros on board their ship *Ardeola* on a voyage. On the back of her passenger ticket were a number of exemption clauses of which number 7 was in these terms (at 988):

> The steamer her owners and/or charterers are not responsible for any loss, damage, injury, delay, detention (or maintenance or expense during same) of or to passengers or their baggage or effects, or for the non-continuance or non-completion of the voyage, by whatsoever cause or in whatever manner the matters aforesaid may be occasioned, and whether arising from the act of God, King's enemies, restraint of princes rulers or people, disturbances, perils of the seas rivers or navigation, collision, fire, thieves (whether on board or not), accidents to or by machinery, boilers or steam, unseaworthiness of the steamer even existing at the time of sailing, or from any act neglect or default whatsoever of the pilot master mariners or other servants of the steamer her owners and/or charterers, or from restriction of quarantine or from sanitary regulations or precautions which the ship's officers or Local Government authorities may deem necessary, or the consequences thereof or otherwise howsoever; the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage and effects, including risks of embarking and disembarking, and whether by boat or otherwise.

[125] The similarity between this clause and the whole of art 4.2 can be noticed immediately. This decision focussed on the words:

> … from any act neglect or default whatsoever of the pilot master mariners or other servants of the steamer her owners and/or charterers ...

[126] The difference between this clause and art 4.2(a) is that the rule does not contain the emphatic words "any" and "whatsoever". I will return to that difference shortly.

[127] The goods which Mrs Marriott, the plaintiff, lost were stolen from two of her trunks. Much of the argument was as to whether or not the conditions on the back of the ticket bound Mrs Marriott, so also the reasoning of the Judge, Pickford J.

[128] The Judge approached the meaning of the exemption clause *contra proferentem*. He said at 994:

> Assuming that the conditions form part of the contract, the next question is whether they protect the defendants against the felonious act of their servants. In order to answer that one must examine closely the language of the condition upon which the defendants rely, bearing in mind the principle that a man cannot by stipulation excuse himself for the wrongful act of his servants unless he does so in plain and unambiguous language. If the language is ambiguous it must be construed against him, and whether particular language is ambiguous or not is a matter which it is not always easy to determine.

[129] Having considered similar terms and decisions upon them in other cases, the Judge reasoned as follows at 996:

> The words "any act neglect or default whatsoever" are quite unqualified. They are not "any act unless felonious," but "any act".

[130] Mr Rzepecky submitted that this Court would be wrong to place any weight on the decision in *Marriott* because of the emphatic word "whatsoever". It is a characteristic of English drafting then, and to a lesser extent now, to use more words than necessary. There is no doubt that the emphatic words "any" and "whatsoever" ensure that the total phrase is quite unqualified. It does not follow that if those emphases are removed that the phrase "act, neglect or default" becomes qualified. Qualified by what? The qualification would have to appear expressed in the text or be necessarily implicit in the text. It is expressed in the text in art 4.2(a). It is qualified by the words "in the navigation and management of the ship". That is the qualification. Otherwise it is unqualified. If the conduct is in the management or navigation of the ship then the conduct includes all acts, neglects or defaults and so by necessary inference any act, neglect or default.

[131] *Marriott* was followed by MacKinnon J in the case of *Bulgaris and Ors v Bunge & Co Ltd* [1933] 45 Lloyd's Rep 74 (KB). Mr Bulgaris and others were owners of a steam ship *Theodoros Bulgaris* which had been abandoned by her crew because of damage by a gale in the Bay of Biscay. It was ultimately salvaged. The owners sought from the cargo interests a contribution to the cost of salvage, a claim which was admitted. But the cargo interest counterclaimed for damages which they

allege they had sustained because the vehicle had been improperly abandoned in breach of the bill of lading and charterparty.

[132] The bill of lading provided:

> The shipowner shall not be responsible for loss or damage arising or resulting from: act, neglect, or default of the master, mariner, pilot, or the servants of the shipowner in the navigation or in the management of the ship.

(This is, of course, what I now recognise as art 4.2(a).)

[133] MacKinnon J reasoned (at 81):

> Now, supposing it was a breach of duty by the captain and crew of the *Theodoros Bulgaris* to desert her as they did, the question is whether the shipowner would be none the less relieved from liability for damages for the consequences of that desertion of the ship, by reason of the terms of this clause. First of all, even if it had been the grossest and deliberate and wilful desertion of the ship in calm weather, I think that would still be an act, neglect or default of the master for which, under these words, the owners would be relieved. With regard to that, I must bear in mind that it has been held that even culpable recklessness on the part of the captain or crew is, *vis-à-vis* the owner, an act, neglect or default for which under such a clause he is relieved of responsibility. The strongest case, I think, of that is the case of *Marriott v. Yeoward Brothers*, [1909] 2 K.B. 987.

[134] That dictum is technically obiter because the Judge also held that the master and crew did not prematurely abandon the vessel. It was in the context of saying that even if they did such a wilful and deliberate act it would be an act in the navigation or management of the ship.

Are there authorities to the contrary?

[135] As set out above Hugh Williams J relied at [233] of his decision upon a number of authorities finding that a master has a duty to act in good faith.

[136] There are numerous situations whereby it is natural for a court to find that the master has a duty to act reasonably under all circumstances and to make decisions which are bona fide and in good faith. The master is after all an employee. Depending on the contractual arrangements the master's obligations can be owed not only to his personal employer but also, as we will see, to other persons, by contract.

The fact that the master will have a duty to his employer and possibly other persons to act reasonably and in a bona fide manner is not of itself sufficient to justify construing art 4.2(a) as confined to conduct by the master falling within that duty.

[137] The best case for the respondents on this appeal is that of *The Hill Harmony*, also the case principally relied on by Hugh Williams J at [233].

[138] Whistler were the charterers of the *Hill Harmony* and they sub-chartered her to Kawasaki. This particular charter party provided among other things:

> 8. That the captain shall prosecute his voyage with the utmost despatch, and shall render all customary assistance with ship's crew and equipment…The captain shall be under the orders and directions of the charterers as regards employment and agency.

[139] This particular charter party also incorporated the Hague Rules and so the art 4.2(a) exception.

[140] The charterers gave orders to the master that the vessel was to take the shorter northern Great Circle route but the master proceeded by the more southerly rhumb line route, with the resulting increase in the time taken for two voyages and the bunkers consumed. On the first voyage the *Hill Harmony* took six and a half days longer to get to her destination and consumed 130 tonnes more fuel and on the second she took three days longer and consumed some 69 tonnes more. The loss to the charterers was about $US89,800. The owners denied liability for the charterer's loss. They contended that they were not obliged to send the vessel on the shortest route and furthermore were entitled to reject orders from the charterers to take the shortest route.

[141] In an influential article, by an experienced arbitrator, Mr Donald Davies ("Right to Routes" (1999) LMCLQ 461), cited by Lords Bingham and Hobhouse, the author summed up the dispute as depending on whether or not the routing instruction to the master from the charterers is an order as to employment under cl 8 (in which case he said that the master is obliged to comply with it unless he can justify a contrary position on the grounds of, for example, safety) or an order as to

navigation (in which case he said that the master can make his own decision and the owners are absolved from liability by way of the art 4.2(a) exception.

[142] The majority of the arbitrators and a unanimous House of Lords decided that the routing instruction to take the Great Circle route was an order as regards employment which the Captain had to prosecute with the utmost despatch. Clarke J in the Queen's Bench division and a unanimous bench of the Court of Appeal held that the decision of the master to take the more southerly rhumb line route fell within the art 4.2(a) exception as a decision in the navigation of the vessel.

[143] Nourse LJ in the Court of Appeal at 216 said:

> It seems to me, as Mr Hamblin submitted, that the master's decision was a decision on navigation because it was a decision upon what course or combination of courses to follow in prosecuting the overall voyage, and because of the reason for the decision, made bona fide, was the master's concern for the safety of the vessel.

[144] Potter LJ, whose judgment was regarded as the leading judgment by the House of Lords, also used the concept of bona fide. He said at 211:

> In my opinion the structure and terms of the charter-party in this case, so far as the material obligations of the master/owners are concerned, are such that they do no more than reflect the pattern of implied obligations which are imposed on the parties to a time charter in the absence of such express terms. The obligation of the master/owners was to proceed with the 'utmost despatch' (which in my view adds nothing to the concept of reasonable despatch) from port to port or other nominated destination without deviation, ie by the direct route or by a route which, though not direct, was a usual and reasonable route. They were also obliged to operate the ship in accordance with the charterers' orders as to its employment. However, neither obligation displaced the right and responsibility of the master in matters of navigation and, in particular, to decide upon the course or courses to be followed when prosecuting the voyage as properly defined, having regard to weather conditions and other hazards of navigation. In that respect he had a duty to reach a bona fide decision based upon his own judgement and experience. As to the question of the reasonableness of that decision, if the master was negligent or unreasonable in his judgment, then the liability of the owners for such negligence depended upon the scope of any relevant exemption clause in that respect, and in particular in this case art IV, r 2a.

[145] It is not necessary to go into the detail of the House of Lords' reasoning. Suffice to say their Lordships rejected the proposition that the master's decision had been "in navigation" for the purposes of art 4.2(a). Rather, they considered that the

order to take the Great Northern Circle route plainly related to the employment of the vessel.

[146] The majority decision of the arbitrators and that of the House of Lords proceeds on the premise that a direction to take the Great Circle route was a reasonable one, or to put it another way, good seamen could safely take appropriate vessels on the route. There was evidence that there had been 360 passages within a relatively short period of the instruction. On the other hand, the master concerned had taken a vessel on the route and suffered significant storm damage. The arbitrators and the House of Lords were distinguishing between a charterer's decision to take the strategic decision as to whether or not to deploy the vessel on a difficult voyage, from the tactical decisions which the master of the vessel would inevitably have to make during the course of that voyage. See Lord Hobhouse at 657-658:

> The meaning of any language is affected by its context. This is true of the words "employment" in a time charter and of the exception for negligence in the "navigation" of the ship in a charterparty or contract of carriage. They reflect different aspects of the operation of the vessel. "Employment" embraces the economic aspect – the exploitation of the earning potential of the vessel. "Navigation" embraces matters of seamanship. Mr Donald Davies in the article I have referred to suggests that the words "strategy" and "tactics" give a useful indication. What is clear is that to use the word "navigation" in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Sumner pointed out, where seamanship is in question, choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason, as did Clarke J, from the fact that the master must choose how much of a safety margin he should leave between his course and a hazard or how and at what speed to proceed up a hazardous channel to the conclusion that all questions of what route to follow are questions of navigation.

That is what the case was about. It was not in any way an examination of the consequences of decisions made by a master under personal stress following a grounding. I cannot have any confidence that the reasoning of their Lordships in *Hill Harmony* is appropriate to guide me in deciding the application of art 4.2(a) to this set of facts.

[147] It is true that in a number of passages in the speeches of the House of Lords their Lordships naturally refer to art 4.2(a) in the context of an exception for

negligence. The passage quoted from Lord Hobhouse above is an instance of this. But it does not follow that the judgment should be read as a considered opinion of their Lordships as to the scope of art 4.2(a) in respect of misconduct. The focus of their Lordships was on a dispute between the charterers and the owners and upon the balance to be achieved between art 8 requiring the captain to be under the order of the charterers as regards employment and its reconciliation with art 4.2(a). The use of the term "bona fide" may have been because of some scepticism as to the reason given by the master to take the rhumb line route. The master never sought to justify this decision. See Lord Bingham at 643, viz:

> … despite his lack of candour concerning his reasons for taking the rhumb line on the second disputed voyage…

[148] *The Hill Harmony* is not an authority for qualifying art 4.2(a) as being preconditioned on the decisions being made by the master bona fide. Nor do any of the other decisions relied upon by Hugh Williams J support that proposition.

[149] As already noted, Mr Rzepecky had an alternative argument, namely that it is necessary for the charterer to show that the conduct was for the purpose of the voyage. He argued that *The Hill Harmony* draws a clear distinction between the power of the charterer to define the voyage, distinct from the judgements as to seamanship employed by the master in operating the vessel during the voyage. Mr Rzepecky argued that the master has a basic obligation to take the vessel on the voyage required by the charterer.

[150] Mr Rzepecky argued that when Captain Hernandez took the damaged *Tasman Pioneer* away from the grounding, at full speed into the nor'-wester, to the plain disadvantage of the carrier and the cargo interests, he was no longer operating the vessel for the purpose of the charterer's voyage. He was in fact "in flight" from the event of grounding, knowledge of which would bring an end to his career. He was using the vessel for his own purposes, not the charterer's. So while he was in fact navigating the vessel and managing it (for example, he was directing pumping) he was not doing it for the purpose of the charterer's voyage from Yokohama to Busan in Korea. Therefore, the exemption did not apply. The exemption avails the

carrier only when the master is complying generally with the charterer's instruction as to the voyage the vessel is to undertake.

[151] This argument has the same deficiencies as the bona fide argument. It makes the application of art 4.2(a) depend upon the purpose of the master when navigating and managing the ship. It qualifies "act" by purpose.

[152] Were this construction of art 4.2(a) to be adopted it would raise many problems as to uncertainty. Consider the particular aspects of the facts here. The argument relies on drawing a distinction between the voyage from Yokohama to Busan and the "flight" of the vessel to the point where it finally anchored in Bungo Suidō but close to the coast north of the island of Yokoshima. The line of the second flight voyage was actually towards Busan and appears to have been plotted in order to intersect with what would have been the normal track of the vessel, as part of the cover-up as to what had actually happened. So it is a different voyage not because of the direction in which the vessel went but because of the purpose or reason why the master was navigating it in that direction.

[153] We also need to pause to reflect that perils at sea are anticipated in art 4.2. If the master had contacted the local coastguard and taken their advice, found by Hugh Williams J to be likely to be to go into the Bay of Sukumo Wan, that journey too would have been a voyage distinct from the planned voyage from Yokohama to Busan. After the grounding, the fact is that the planned voyage had come to an end prematurely. Yet, no-one could suggest that the proper response to the grounding would fall outside art 4.2(a).

[154] Accordingly, were this interpretation of art 4.2(a) to be adopted it would impose on adjudicators a judgement as to whether or not the master's response to a calamity at sea was proper or not. I acknowledge that this set of facts is a reasonably clear case of wilful misconduct. No-one has suggested disturbing the findings of misconduct made by the trial Judge. But I can also envisage that there can be many circumstances following a shipping calamity where there may well be some kind of compromise by the master motivated in part by an effort to protect his or her career,

reflecting that fragility of judgement by a professional person when called upon to make difficult decisions following upon a mistake.

[155] Ultimately one has to go back to consider whether or not this proposed refinement of the application of art 4.2(a) can be confidently found to be a true interpretation of the rule. I do not think so. I acknowledge that this is an extraordinary set of facts. But the natural language of r 2(a) appears not to qualify the word "act" by any notion of the quality of the act, be it laudable or culpable.

[156] For these reasons I am of the view that the judgment of the High Court should be reversed. There is no threshold requirement of *bona fide* conduct. Nor is there a threshold requirement that the decisions must be made as part of the charterer's voyage. It is sufficient that the loss occurs by reason of an act, neglect or default of the master in the navigation and management of the ship. Hugh Williams J was right to find that this was the cause of the loss of the cargo.

[157] Since preparing the above reasoning, I have had the benefit of reading in draft the reasons of Baragwanath and Chambers JJ. Their reasoning has not changed my opinion. It is always difficult to summarise competing opinions and indeed one's own. But I do attempt some explanation as to why I think we differ, and why I find I am not persuaded to join with them in dismissing the appeal. I confine myself to points not already self-evident from my reasons so far.

[158] I think it is not self-evident that art 4.4 is intended to complement art 4.2(a). So I do not think the presence of art 4.4 justifies an interpretation of art 4.2(a) which allows "other sorts of deviation [to] remove the protection of art 4": see Baragwanath J at [29]. Deviation seems to me to be a special topic which merited a special rule.

[159] I think the reasoning of Greer LJ in *Gosse Millerd* needs to be read in the context of the material facts of that case, which were that cargo was damaged by being exposed to rain while the cargo hatches were off. As the quoted extract at [44] shows, Greer LJ was examining whether art 4.2(a) "would cover any act done on board the ship which relates to the care of the cargo". The problem posed by the

facts in that case was that they could be characterised either as want of care of the cargo or management of the ship. In this case we are examining acts of the master, most of the material ones being in the navigation of the ship after the grounding. The challenge in construing art 4.2(a) can be as to what extent it extends beyond navigation: see Lord Hailsham in *Gosse Millerd* at 231 citing Gorell Barnes J in *The Ferro* [1893] P. 38 at 44, 46.

[160] I think it is legitimate to use the common law cases interpreting the common law predecessors to art 4.2, because the terms of this rule were deliberately adopted by the delegates at the convention, knowing their common law provenance, without any intention that they would be given a different meaning.

[161] I would allow the appeal.

Cross appeal

[162] I agree with the findings of fact in the reasons of Chambers J. The question becomes whether the decisions to turn off the generators were made in management of the ship, as distinct from the cargo. Whatever the reasons the salvors turned off the generators, their decisions were made in management of the ship, rather than the cargo. Therefore, the art 4.2(a) defence applies. I would dismiss the cross appeal.

General conclusion

[163] Accordingly, I would find that TOL has the benefit of art 4.2(a) in respect of all the loss suffered by the plaintiffs so that there should be judgment for TOL against the plaintiffs.

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