

June 30 2006

PAGE 1

Forfeiture of a vessel and security interests in bunkers

PAGE 2

A bailee's duty to protect goods from theft

Double insurance and forum selection

PAGE 3

Marine hull voyage cover and breach of warranty

Warranting that a yacht will be "fully crewed at all times"

PAGE 4

Storms, barges and bailment

Trade & Transport News

WELCOME TO THE FOURTH EDITION OF PIPER ALDERMAN'S TRADE & TRANSPORT NEWSLETTER. WE DISCUSS BELOW SOME RECENT DECISIONS IN THE TRADE & TRANSPORT INDUSTRY AND HOPE THAT YOU WILL FIND THEM OF INTEREST AND RELEVANT TO YOUR BUSINESS.

Forfeiture of a vessel and security interests in bunkers

The powers of seizure and forfeiture under the Fisheries Management Act extend to bunkers on board a seized vessel at the time of seizure, and those bunkers are not themselves capable of arrest under the Admiralty Act

The applicant in *Scandinavian Bunkering AS v The Bunkers on board the ship "Taruman"* [2006] FCAFC 75 sought, in effect, to assert a maritime lien over fuel oil on board "Taruman", a fishing vessel that had been seized by the Commonwealth and forfeited as a result of its being used for illegal fishing activity in Australian waters. The Commonwealth submitted that (i) the seizure of the vessel operated in relation to not only the vessel but also the fuel oil on board the vessel, and (ii) in any event, bunkers are not property capable of arrest under the *Admiralty Act 1988* (Cth).

The Full Court of the Federal Court of Australia concluded that, properly construed, the power of the Commonwealth under the *Fisheries Management Act 1991* (Cth) to seize and forfeit a vessel being used in contravention of that Act was broad enough to include the bunkers on board that vessel. Accordingly, the Commonwealth was entitled to the fuel oil in relation to which the applicant sought to claim a maritime lien.

The Full Court also concluded that, after its decision in *The "Genco Leader"* [2005] FCAFC 162, bunkers on board a ship could not be separated from the ship itself in an application to exercise the powers of arrest set out in section 17 of the *Admiralty Act*. This was because the bunkers were part of the "ship" for purposes of that power of arrest; the bunkers alone, and without an arrest of the ship itself, were not capable of arrest.



A bailee's duty to protect goods from theft

A car dealer, and bailee of an expensive automobile, was able to prove that it had not been negligent in causing the theft of that automobile from its showroom, because it had taken reasonable steps to ensure the security of that showroom and of the keys to the automobile

The New South Wales Court of Appeal, in *Terry Hogan Prestige Cars Pty Ltd v Opera Investments Pty Ltd* [2006] NSWCA 139, considered whether or not a car dealer responsible for the storage of a Mercedes Benz car at its premises while on consignment sale had breached its duty as bailee of that car to protect it from theft.

Opera Investments, the owner of the car, had delivered the car to Terry Hogan Prestige Cars so that Terry Hogan Prestige Cars would attempt to sell it on behalf of Opera Investments. The car was kept in Terry Hogan Prestige Cars' showroom, the front wall of which consisted only of plate glass windows, which were not bordered by steel bollards (as are often seen at the front of shopping centres, car showrooms and the like). The keys to the car, while not kept in a locked box, were kept well out of plain sight. Thieves smashed the glass windows at the front of the showroom, found the car's keys and drove the vehicle back out through the front of the showroom.

Opera Investments submitted that, as bailee of the car, Terry Hogan Prestige Cars ought to have both (i) erected steel bollards at the front of the showroom, and (ii) kept the car's keys in a safe with appropriate procedures in place to ensure that access to the keys was strictly limited. Terry Hogan Prestige Cars submitted that, in heavily securing the doors to the showroom, including the regular vehicle access at the back of the showroom, and in keeping the keys out of plain sight, it had discharged its duty to protect the car from theft.

Justice Hodgson (with Justices Ipp and Basten agreeing) considered that the major issue was Terry Hogan Prestige Cars' protection of access to the car's keys. His Honour held that Terry Hogan Prestige Cars would not be required to take the step of securing those keys in a safe, and that the steps it had taken in keeping the keys out of plain sight were reasonable in the circumstances. Accordingly, Terry Hogan Prestige Cars had proven that it had not been negligent in causing the theft of the car from its showroom.

The Court's decision shows that the steps required to be taken by a warehouseman in storing and securing goods will always depend on the particular circumstances of the warehouse facility and the goods being stored. Certainly, where vehicles are kept about the warehouse, it is important that the keys either be kept well out of plain sight or in a secure safe or lock-box.

Double insurance and forum selection

An insured who is double insured under policies that each contain separate exclusive jurisdiction clauses designating two different jurisdictions will be required to proceed under the two separate policies in the agreed jurisdictions

In the English High Court's decision in *Konkola Copper Mines plc v Coromin Ltd* (No 2) [2006] EWHC 1093, the insured plaintiff had two separate policies covering the same risk of loss occasioned by a shaft collapse at its copper mine in Zambia. One of the policies contained an English law and exclusive jurisdiction clause, the other contained what was determined by Justice Colman to be a Zambian law and exclusive jurisdiction clause. The plaintiff commenced proceedings against both insurers in the English courts.

The insurer under the policy that provided for the Zambian courts to have exclusive jurisdiction over any dispute under that policy sought orders effectively dismissing the English proceedings commenced against it. The plaintiff resisted, arguing that, while it had breached the Zambian jurisdiction clause, it would be more just if the disputes under the two policies were each determined together in the English Courts.

Justice Colman held that, while the possibility of disposing of both of the policy disputes in the one jurisdiction was both convenient and attractive, it was more important to enforce the public policy of holding the plaintiff to its bargain, that is, its agreement that any dispute under the Zambian policy would be litigated in the Zambian courts. Accordingly, the English proceedings brought against the Zambian insurer in contravention of the Zambian jurisdiction clause were dismissed.

Marine hull voyage cover and breach of warranty

Cover under a voyage policy of marine hull insurance will not commence until the vessel is actually under way; the policy will not respond to damage suffered while the vessel is at a berth waiting to commence the insured voyage

Sun Alliance & London Insurance and Ors v PT Asuransri Dayin Mitra TBK [2006] EWHC 812, a decision of the English High Court, involved a marine hull voyage policy issued in respect of a chemical tanker and written by the Defendant insurer on the standard London Institute of Underwriters terms. The policy was reinsured by the Plaintiffs. While berthed in South Korea, the vessel was struck by a typhoon and was damaged.

The cover was for a delivery voyage from South Korea to Indonesia. The policy stated, “Class: KR”. Justice Langley accepted that this statement constituted a warranty by the shipowner that the vessel would be in class for the duration of cover. In fact, the vessel was not, at any time material to the policy, in

class. Consequently, Justice Langley held that, on its own, the shipowner’s failure to have the vessel in class constituted a breach of warranty such that the claim under the policy should fail.

The policy stated that cover was “from Yeo Su”. Justice Langley held that this statement meant that cover under the policy would not have commenced until the vessel was actually under way from South Korea to Indonesia; because the vessel was damaged while still berthed in South Korea, cover under the policy could not be taken to have commenced at the time that the typhoon struck. Accordingly, the claim failed for that further reason.

Justice Langley’s decision underlines the importance to insureds under marine policies of paying close attention to the terms and warranties of those policies and in considering the risks that they want to insure against.

Warranting that a yacht will be “fully crewed at all times”

A warranty in a marine hull policy that the insured vessel will be “fully crewed at all times” will be construed so as to require that at least one crew member remain on board the vessel 24 hours per day, every day, even when the vessel is berthed

The “*Newfoundland Explorer*” was insured under a marine hull policy issued on the standard London Institute of Underwriters form. While berthed at Fort Lauderdale in the United States, she was badly damaged by fire and a claim was made under the policy. The insurer denied liability for the claim on the basis that the vessel, in breach of a warranty in the policy, was not crewed at the time that the fire started.

Justice Gross, of the English High Court, in *GE Frankona Reinsurance Ltd v CMM Trust No 1400 [2006] EWHC 429*, considered the warranty given by the vessel owner, “Warranted fully crewed at all times”. His Honour concluded that the warranty required that, at least, the vessel owner keep one crew member on the vessel at all times. Further, Justice Gross determined that “at all times” meant 24 hours per day, every day, whether or not the vessel was at sea or berthed. Accordingly, the claim

under the policy failed, because there was no contest that, when the fire started, the crew member in charge of the vessel was ashore, some 20 kilometres away.

Finally, Justice Gross concluded that the warranty under consideration, properly construed, ought to be read as containing two exceptions, being (i) emergencies necessitating departure from the vessel, and (ii) temporary departures from the vessel for purposes of performing crew duties, but always subject to the crew member remaining in the vicinity of the vessel.

Justice Gross’ decision highlights the need for insureds under non-commercial hull policies to closely consider their obligations in relation to the operation and maintenance of the vessel, including her crewing arrangements.



Storms, barges and bailment

For the user of a dumb barge to become a bailee of that vessel, the user and operator of the barge's berth must have control over that barge. Where the barge-owner's tug remains nearby and responsible for the management and supervision of the barge, the operator of the berth at which the barge is tied up is not in control of the barge and does not owe duties to the owner as bailee

In *Mercury Launch & Tug Ltd v Texada Quarrying Ltd* [2006] FC 464, the Canadian Federal Court was invited to consider whether or not (i) the defendant berth operator was a bailee of a dumb barge damaged during a storm off the British Columbian coast, and (ii) the Defendant had been negligent in allowing the barge to be damaged in that storm.

The plaintiff had entered into a contract with a third entity, CLC, for the provision of the barge. CLC directed that the barge be towed by a tug operated by the plaintiff to a loading facility operated by the defendant. The barge was tied up by the defendant at its loading facility and the plaintiff's tug moored at a convenient place approximately 1 kilometre away. Heavy weather was experienced at the loading facility, and the defendant took steps to further secure the barge. As the weather worsened, the plaintiff's tug returned to the berth and the crew members assisted the defendant further to secure the barge. Subsequently, the barge broke loose and was damaged in a collision with the berth and surrounding rocks.

Justice Gauthier concluded that the defendant was not a bailee of the barge. This was because, at all times, the plaintiff's tug and her crew remained in control of the barge and could decide whether or not it remained at its berth. The mooring of the tug some distance from the barge did not change this conclusion, because the tug's Master was expected to monitor the weather and return to the barge if he considered that the barge should be removed from the berth. It followed that the essential element in a bailment, being control of the bailed property, was not present.

In considering whether or not the defendant had been negligent in its berthing of the barge, Justice Gauthier considered that (i) a prudent mariner would not have considered the forecasted weather to require the removal of the barge from the berth, (ii) the ties used to secure the barge to the berth were in good condition and were appropriate, and (iii) the defendant had not represented to the plaintiff that the barge would be safe at the berth in the weather subsequently encountered by the barge. His Honour concluded that the defendant had not been negligent in its handling of the barge, and that the plaintiff's claim would be dismissed.

This decision shows the importance to vessel owners and operators of closely monitoring the weather expected to be encountered by a vessel, and taking prompt action if it is anticipated that a vessel will have trouble in the forecast weather if steps appropriate to the individual vessel are not taken to ensure its safety.



Important Disclaimer: The material contained in this publication is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the firm nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of any articles. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser.

Piper Alderman Lawyers

Sydney

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

Melbourne

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

Brisbane

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

Adelaide

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

[enquiries@
piper-alderman.com.au](mailto:enquiries@piper-alderman.com.au)

[www.piper-alderman.
com.au/TransportTrade](http://www.piper-alderman.com.au/TransportTrade)

For further information
contact **Frazer Hunt**,
Partner in charge
Trade & Transport
on [fhunt@piper-
alderman.com.au](mailto:fhunt@piper-alderman.com.au)