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Sellers v Maritime Safety Inspector - [1999] 2 NZLR 44

Court of Appeal Wellington
17 September; 5 November 1998
Richardson P, Keith and Blanchard JJ

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Shipping and navigation -- Offences -- Vessel registered in Valletta left Opua for an overseas port without clearance under s 21(1) of the Maritime Transport Act 1994 -- Whether s 21(1) creates an offence committed within New Zealand waters enforceable only by proceedings in a New Zealand Court, without any related powers being exercisable on the high seas -- Whether a port state has power to impose requirements on foreign ships if the requirements are to have effect on the high seas -- Whether legislation regulating maritime matters should be read consistently with international law -- Whether Maritime Safety Authority to operate within the context of the international obligations and rights of New Zealand -- Maritime Transport Act 1994, ss 2(1), 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21(1), 22, 23, 24, 25, 26, 28, 29, 31, 32, 33, 39(1) and (2), 42(1) and (4), 47(2), 55(4), 107, 172, 192(1), 198, 271(1) and (4), 298(3), 386, 395(2), 397(5), 431, 432 and 461 -- Chemical Weapons (Prohibition) Act 1996, s 4(2) -- Hazardous Substances and New Organisms Act 1996, s 6 -- Ozone Layer Protection Act 1996, s 4 -- Continental Shelf Act 1964 -- Crimes Act 1961 -- Driftnet Prohibition Act 1991 -- Fisheries Act 1996 -- Marine Mammals Protection Act 1978 -- New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987 -- Submarine Cables and Pipelines Protection Act 1996 -- Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 -- United Nations Convention on the Law of the Sea Act 1996.

Sellers was the owner and master of the cutter *Nimbus* registered in the Port of Valletta. Between 30 April 1995 and 3 May 1995, as master, he permitted the *Nimbus* to leave Opua for an overseas port without obtaining clearance under s 21(1) of the Maritime Transport Act 1994. He returned on or about 26 December 1995. He was prosecuted for a breach of the Act and convicted by the District Court. Sellers had refused to carry the radio and emergency locator beacon equipment required as a minimum by the Director of Maritime Safety in the guidelines he had issued for the exercise of his powers under s 21 and as a consequence Sellers did not seek the required clearance. His defence was based on the principle of the freedom of the high seas. His appeal was dismissed in the High Court but he was granted leave to appeal to the Court of Appeal.

Held:

1 An essential feature of the freedom of the seas was that the state of nationality of a ship (the flag state) had exclusive jurisdiction over the ship when it was on the high seas subject only to exceptional cases expressly provided for in international treaties (see page 46 line 42).

2 Section 21(1) of the Maritime Transport Act created an offence committed within New Zealand internal waters, at the point of departure from port, and which could be enforced only by proceedings brought in a New Zealand Court, without any related powers being exercisable on the high seas. The effect however, was to place requirements on the

freedom to navigate on the high seas (see page 48 line 31, page 48 line 38).

3 Section 21 did not purport to control entry into New Zealand ports by reference to the adequacy of the vessel, its equipment and crew (see page 49 line 9).

4 Since the word "place" in the section relates only to a landfall, the terms of the section were limited to voyages which have a landfall outside New Zealand. They could not apply to a circumnavigation of New Zealand or a non-stop circumnavigation of the Pacific or of the globe (see page 49 line 15).

5 A port state had no general power unilaterally to impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have effect on the high seas. Any requirements could not go beyond those generally accepted; the Court was referred to no generally accepted requirements relating to equipment so far as pleasure craft were concerned. Any port state powers related only to those foreign ships which are in a hazardous state (see page 57 line 6).

6 Legislation regulating maritime matters should be read in the context of the international law of the sea and, if possible, consistently with that law (see page 57 line 16).

R v Dodd (1874) 2 NZCA 598, *Re The Award of the Wellington Cooks and Stewards' Union* (1906) 26 NZLR 394, *R v Keyn* (1876) 2 Ex D 63 at p 85 and *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at p 289 applied.

7 The expression "a pleasure craft" in s 21(1) of the Maritime Transport Act could not be interpreted as meaning only New Zealand-registered ships (see page 59 line 49).

8 All that the director could be entitled to be satisfied about in relation to the adequacy of a foreign pleasure vessel, her equipment and her crew was to ensure compliance with accepted international standards and rules, to the extent that they allowed that judgment to be made by a coastal state. That extent would be widened when and to the extent that international law allowed (see page 62 line 1).

9 The director in the procedures for the grant of a clearance under s 21(1) had set minimum requirements which were not permitted by international law. Those requirements were in breach of the powers conferred by s 21(1). The appellant should not be held to be committing an offence for not complying with requirements set without lawful authority (see page 62 line 16).
Appeal allowed: conviction and sentence quashed.

Other cases mentioned in judgment

Controller and Auditor-General v Sir Ronald Davison [1996] 2 NZLR 278 (CA).

Governor of Pitcairn and Associated Islands v Sutton [1995] 1 NZLR 426 (CA).

Lauritzen v Larsen 345 US 571 (1953).

Le Louis (1817) 2 Dods 210; 165 ER 1464.

Murray v Schooner Charming Betsy 6 US (2 Cranch) 64 (1804).

Post Office v Estuary Radio Ltd [1968] 2 QB 740; [1967] 3 All ER 679.

R v Kent Justices, ex parte Lye [1967] 2 QB 153; [1967] 1 All ER 560.

SS Lotus (The case of the) - France v Turkey PCIJ 1927 Series A No 10.

Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529; [1977] 1 All ER 881 (CA).

Appeal

This was an appeal against conviction in the District Court for breach of s 21(1) of the Maritime Transport Act 1994.

George Bogiatto for the appellant.

John Burton and *Nicola Rickit* for the respondent.

Cur adv vult

The judgment of the Court was delivered by

KEITH J.

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William Rodman Sellers was the owner and master of the 34'6" cutter *Nimbus*, registered in the Port of Valletta. Between 30 April 1995 and 3 May 1995, as master, he permitted the *Nimbus* to leave Opua for an overseas port without obtaining the clearances which the Maritime Safety Authority contends he required under s 21(1) of the Maritime Transport Act 1994. He returned on about 26 December 1995. He was prosecuted for a breach of the Act and convicted by the District Court at Kaikohe. His appeal was dismissed in the High Court by Morris J [(Whangarei, AP 16/97, 16 February 1998)] who granted him leave to appeal to this Court.

The facts in brief are that Mr Sellers refused to carry the radio and emergency locator beacon equipment required as a minimum by the Director of Maritime Safety in the guidelines he issued for the exercise of his powers under s 21. As a consequence, he did not obtain - indeed he really did not seek - the required clearance. He stated his position of principle in this way:

> ``My maritime art is based on the mystery of the sea. It is religious to me, being alone, simple and strong with the sea - not with radios - the radio has stuffed everything . . . but the mystery of the ancient sea will outlast man. I am protesting on religious grounds to attempts to restrict free and private movement on the open sea."

Freedom of the high seas: exclusive flag state jurisdiction

In legal terms the objection was based on the principle of the freedom of the high seas. That freedom, including the freedom of navigation, is one of the longest and best-established principles of international law. An essential feature of

the freedom is that the state of nationality of a ship (the flag state) has

exclusive jurisdiction over the ship when it is on the high seas. That proposition, to be found in art 92 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to which New Zealand is party and which in this respect is considered to be declaratory of customary international law, is subject only to ``exceptional cases expressly provided for in international treaties'' (1982 Int Leg Mat 1261). The exceptions are to be related to the recognition in art 87(2) that the freedoms of the high seas are to be exercised by all states with due regard for the interests of other states in their exercise of the freedoms.

Over the past three centuries the world community occasionally and cautiously has expressly provided for such exceptions. The truly exceptional character of the cases appears from two instances, one relating to fundamental human rights, the other to environmental disaster. Although in 1815 the nations assembled at the Congress of Vienna had declared the slave trade to be repugnant to the principles of humanity and to the universal laws of morality and had expressed the desire to cooperate to the most prompt and efficient and universal suppression of the trade by all the means at their disposal, two years later Lord Stowell, the great Admiralty Judge, held that a British warship did not have the right to search and seize a French ship on the basis that it was employed in the slave trade. He stated [in *Le Louis* (1817) 2 Dods 210 at p 243] as one fundamental principle of public law:

> ``. . . that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority of the subjects of another.''

He exempted pirates from that protection on the basis that they were enemies of every country and at all times. He rejected an attempt to equate piracy and slave trading. ``Be the malignity of the practice what it may, it is not that of *piracy*, in legal consideration'' (p 248). He then memorably rejected a proposition that the ends could justify the means:

> ``To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by tramping on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful; is as little consonant to private morality as to public justice'' (p 257).

It followed that treaties authorising visit and search were essential if the freedom of navigation of slave traders was to be stamped out. The process of negotiating those treaties was slow and difficult with the major multilateral treaties being concluded only late in the nineteenth century.

The second example of an express exception arose from the *Torrey Canyon* disaster in 1967. Two years later the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (970 UNTS 211) authorised states parties (including New Zealand) in the event of grave and imminent danger threatening their coast line or related interests from oil pollution following a maritime casualty which might reasonably be expected to result in major harmful consequences, to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate that danger. The measures are to be proportionate to the actual or potential damage and are not to go

beyond what is reasonably necessary. The exercise of the right is subject in general to obligations to consult in advance with affected states, especially the flag state; to notify others who may be affected and to take into account any views they express; to consult with independent experts named by the International Maritime Organization (IMO); and to use best endeavours to avoid risk to human life. (See also art 221 of UNCLOS.) That convention has been declared to be a marine protection convention for the purposes of the Maritime Transport Act, Part XX of which appears to give effect to its terms by empowering the Director of Maritime Safety to take measures in respect of shipping casualties.

Jurisdiction based on effects?

Those two exceptions to the general principle of exclusive flag jurisdiction concern the actual exercise of enforcement jurisdiction on the high seas. A different attitude might be expected to be adopted in respect of the exercise of legislative or judicial jurisdiction in respect of activities occurring on foreign vessels on the high seas. That expectation can be highlighted by turning to the wording of the provision of the Maritime Transport Act which is in issue in this case. Section 21(1) is as follows:

> **21. Pleasure craft departing for overseas** -- (1) No master of a pleasure craft shall permit that pleasure craft to depart from any port in New Zealand for any place outside New Zealand unless -
>
> (a) The Director has been notified in writing of the proposed voyage and the full name of the person who is in command of the pleasure craft; and
>
> (b) The Director is satisfied that the pleasure craft and its safety equipment are adequate for the voyage; and
>
> (c) The Director is satisfied that the pleasure craft is adequately crewed for the voyage; and
>
> (d) The pleasure craft and the master comply with any relevant maritime rules.

That provision can be seen as doing no more than creating an offence which is committed within New Zealand internal waters, at the point of departure from port, and which can be enforced only by proceedings brought in a New Zealand Court, without any related powers being exercisable on the high seas. On that basis, neither the exercise of legislative jurisdiction nor the exercise of judicial jurisdiction over alleged breaches of it relates to events outside New Zealand or even outside New Zealand internal waters.

The reality is of course quite different. The effect, if not the purpose, of the provision is to place requirements on the exercise of the freedom to navigate on the high seas by reference to the adequacy of the ship, her crew and her equipment for the voyage (relevantly defined in s 2(1) as a journey by water from one port to another port). The Director of Maritime Safety in his evidence about his approach to the exercise of his powers under s 21 indeed makes that effect or purpose clear when he mentioned the following as being among the matters he had considered:

> ``(a) Of the approximately 500 yachts departing New Zealand, past experience indicates that each year a number of them will get into difficulties en route to their intended destination and within the area of the Pacific Ocean for which New Zealand has responsibility for
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> *[1999] 2 NZLR 44 page 49*
>
> search and rescue. That area is approximately six million square miles of ocean and is one of the largest areas of responsibility in the world.
>
> (b) The most useful aids to effective search and rescue missions are emergency locator beacons and radio transceivers."

It is those two pieces of equipment which are critical in this case. The vast area to which the director refers extends from the mid-Tasman in the west to the mid-Pacific in the east and from near the equator in the north to Antarctica in the south.

Two points may be made about the scope of s 21. It does not purport to control entry into New Zealand ports by reference to the adequacy of the vessel, its equipment and crew. Were such an approach to be adopted it would of course have to reckon with New Zealand's rights and obligations under the Convention and Statute on the International Regime of Maritime Ports of 1923 (58 LNTS 285).

The second is that since the word ``place'' in the section relates only to a landfall, the terms of the section are limited to voyages which have a landfall outside New Zealand. They would not apply to a circumnavigation of New Zealand or a

non-stop circumnavigation of the Pacific or indeed of the globe.

Now it is of course possible for the legislature of New Zealand to enact laws which relate to certain events occurring in other countries and for the Courts of New Zealand to enforce those laws - as regularly happens. That must also be so in respect of certain events occurring on foreign ships. This appears from the reasoning and the decision of the Permanent Court of International Justice in a leading case decided 70 years ago [*The case of the SS Lotus - France v Turkey* PCIJ 1927 Series A No 10 at p 25]. It first emphasised the exclusivity of flag state jurisdiction on the high seas in words reflected in the provision of UNCLOS quoted earlier:

> ``It is certainly true that - apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law."

But it then went on to qualify that proposition so far as legislative and judicial jurisdiction was concerned:

> ``But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the
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> *[1999] 2 NZLR 44 page 50*
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> high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas *produces its effects on a vessel flying another flag or in foreign territory*, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which *the effects of the offence have taken place* belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent." (Emphasis added.)

The reference to ``the effects of the offence" in the last sentence might be seen as supporting a contention that, because of the responsibilities which New Zealand has to provide search and rescue services in the vast area of the Pacific Ocean mentioned by the director in his evidence quoted earlier, it should be able to exercise powers like those in issue in the present case. Those responsibilities are stated in broad terms in art 98 of UNCLOS codifying, first, the duty of mariners to render assistance to those in peril at sea and, second, the duty of coastal states to:

> ``. . . promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements [to] co-operate with neighbouring States for this purpose."

That obligation has been supplemented by the International Convention on Maritime Search and Rescue 1979 (1984 - 1985 AJHR A44) and by resolutions of the Assembly of the IMO relating to navigational warning services and the promulgation of maritime safety information.

The particular point to note about art 98(2) is that the convention does not recognise or confer any rights or powers on coastal states in support of the responsibility. A more general point about arguments based on any ``effects of their offence" doctrine appears from the particular decision in the *Lotus* case and the resulting reaction to it. They demonstrate the limits arising from any such doctrine. On the casting vote of the President, the Court decided that Turkey had criminal jurisdiction over the French officer of the watch on the French mail steamer *Lotus* which was in a collision with a Turkish vessel in which Turkish nationals perished. For the Court this was a case of concurrent

jurisdiction. The international community disagreed with that particular conclusion, on three occasions - in preparing the convention of 1952 relating to penal jurisdiction on matters of collision (439 UNTS 233), the 1958 Convention on the High Seas (450 UNTS 82) and UNCLOS. According to art 97 of UNCLOS:

> 1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.
>
> 2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
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> *[1999] 2 NZLR 44 page 51*
>
> 3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

That emphasis on the exclusive criminal and disciplinary jurisdiction of the flag state and the state of nationality or certification of the defendant in respect of matters of the navigation of the high seas also comes through strongly in the detail of the conventions and rules concerned with working and living conditions at sea, the safety of life at sea, and marine pollution. Port and coastal states do however have some relevant powers in respect of those three matters. We now turn to those matters and the relative powers of interested states.

Port state powers

The International Labour Organisation in adopting maritime conventions regulating working and living conditions at sea has emphasised the generally exclusive duties and powers of the flag state. One important convention which also illustrates an important if limited break from flag state exclusivity is the 1976 Convention Concerning Minimum Standards in Merchant Ships (1977 AJHR A7B, p 48) [(the ILO Convention)]. It is the flag state alone which undertakes: (1) to enact the law governing safety, social security, conditions of employment and living arrangements required by the convention; (2) to exercise effective jurisdiction or control over those matters in respect of its ships; (3) to ensure the existence of adequate complaint and other proceedings relating to certain matters in respect of its ships; (4) to ensure that seafarers employed on its ships are properly qualified or trained; (5) to verify compliance by inspection of its ships; and (6) to hold official inquiries into serious marine casualties involving its ships.

This convention arose in part from a concern about vessels flying so-called ``flags of convenience'' issued by a state of registration in exercise of its freedom, recognised by art 91 of UNCLOS and its predecessors, to confer nationality on ships, which was not meeting its obligations, as now stated in art 94 of UNCLOS, to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. In particular, according to para 3:

> 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
>
> (a) the construction, equipment and seaworthiness of ships;
> (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
> (c) the issue of signals, the maintenance of communications and the prevention of collisions.

That obligation is given content by para (5):

> 5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

The International Labour Conference's answer to the flag of convenience problem was, first, to confer some limited authority on states to warn their seafarers of the possible problems of signing on to vessels the state of registration of which was not applying adequate standards and, second, to empower a port state which:

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> . . . receives a complaint or obtains evidence that the ship *does not conform to the standards of this Convention* . . . [to] report . . . to the [flag state and] the Director-General of the International Labour Office, and [to] *take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health*.
>
> In taking such measures, the Member shall forthwith notify the nearest maritime, consular or diplomatic representative of the flag State and shall, if possible, have such representative present. It shall not unreasonably detain or delay the ship (para 4). (Emphasis added.)

According to the New Zealand Government report [1977 AJHR A7B] on the conference which adopted the convention, discussion on that provision:

> ``. . . produced sharply defined attitudes within the Committee upon the right of a state to take any action in respect of a ship of another state which had not ratified the Convention. The USSR Government member led strong claims that any such action was contrary to the Constitution of the ILO, and clearly at variance with the Vienna Convention (Law of Treaties) which established the general rule that a treaty does not create obligations for another state without its consent. Some of the members who supported this contention were, however, prepared to concede that action by a port state was acceptable in respect of a flag of convenience ship because of the absence of a genuine link between ownership of the vessel and its country of registry.
>
> It was, however, successfully argued that there must necessarily be a balance between the powers of a port state in its responsibility for safety and health on all ships in its ports and the normal control of a flag state over its ships. This being so, and there being adequate safeguards to prevent improper interference and also that the inspection and control procedures did not differ greatly from those employed under Conventions of the International Maritime Consultative Organisation (where the sufficiency of the ship itself or its equipment were questioned), the Committee accepted by vote the provisions of Article 4 giving a ratifying port state authority to act in respect of unconforming ships of another state whether or not that state had ratified the Convention" (pp 15 - 16).

As indicated in that report, the treaties relating to safety at sea similarly emphasise the role of the flag state while acknowledging a role for the port state in limited circumstances. We take the International Convention for the Safety of Life at Sea 1974 (SOLAS) as subsequently amended. The principal state obligations and powers throughout that lengthy document (in its 1997 consolidated edition, published by the IMO, it is in excess of 500 pages) are placed on the flag state. That primary role is reflected in the requirement that states recognise the safety certificates issued by other states. But the authorities of a port state may exercise control to the extent of verifying that the certificates are valid and that the condition of the ship and its equipment corresponds substantially with the particulars of the certificates and with the regulations to ensure that the ship will remain fit to proceed to sea without danger to the ship or persons on board. If there are breaches or the certificate is no longer valid the port officer is to take steps to ensure that the ship will not sail. That power is subject to important constraints, for instance to prevent undue detention or delay, with the sanction of compensation. The powers are reflected in the Maritime Transport Act, eg s 55. The Minister of Transport in moving the

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second reading of the Bill, as well as stressing the effort that had gone into ensuring that the Bill gave effect to the maritime conventions, also emphasised the port state powers included in the measure which, he said, incorporated the powers approved by the IMO just a month before (541 *New Zealand Parliamentary Debates*, p 2090, 22 June 1994). The convention concerned with the competence of the crew, as opposed to the adequacy of the ship, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (amended through to 1995) (STCW Convention) confers similar powers of control on port states (1991 - 1993 AJHR A66).

Those powers are now the subject of regional memoranda of understanding on port state control which are aimed at

ensuring that powers such as those in SOLAS and the ILO Convention are employed by port states in the interests of enhanced safety. The memorandum for the Asia-Pacific area (the Tokyo memorandum), adopted in 1993 and since amended, has the following preambular paragraphs. [The sixth and seventh paragraphs] contrast the roles of flag and port states. [The fifth, eighth and ninth paragraphs] indicate a balanced approach to the exercise by port states of their powers.

> [1] **Recognizing** the importance of the safety of life at sea and in ports and the growing urgency of protecting the marine environment and its resources;
> [2] **Recalling** the importance of the requirements set out in the relevant maritime conventions for ensuring maritime safety and marine environment protection;
> [3] **Recalling** also the importance of the requirements for improving the living and working conditions at sea;
> [4] **Noting** the resolutions adopted by the International Maritime Organization (IMO), and especially Resolution A682(17) adopted at its 17th Assembly, concerning regional co-operation in the control of ships and discharges;
> [5] **Noting** also that the Memorandum is not a legally binding document and is not intended to impose any legal obligation on any of the Authorities;
> [6] **Mindful** that the principal responsibility for the effective application of standards laid down in international instruments rests upon the administrations whose flag a ship is entitled to fly;
> [7] **Recognizing** nevertheless that effective action by port States is required to prevent the operation of substandard ships;
> [8] **Recognizing** also the need to avoid distorting competition between ports;
> [9] **Convinced** of the necessity, for those purposes, of an improved and harmonized system of port State control and of strengthening cooperation and the exchange of information.

What the memorandum aims at is an effective system of port state control with a view to ensuring that, without discrimination, foreign merchant ships calling at regional ports comply with the standards laid down in certain instruments, including the International Convention on Load Lines 1966, SOLAS, the STCW Convention, the International Regulations for Preventing Collisions at Sea 1960, the 1976 ILO Convention mentioned earlier, and to anticipate a later part of this judgment the Protocol relating to Intervention on the High Seas in cases of Pollution other than Oil 1973 as amended. The

headings are inspection, rectification and detention in the case of deficiencies which are clearly hazardous to safety, health or the environment.

These port state powers have four significant features:

> 1. they continue to play a secondary role to that of the flag state;
> 2. they are reserved to ships which are in a dangerous state;
> 3. the determination of danger is by reference to agreed international standards; the coastal state has no power to impose additional requirements;
> 4. they do not in general extend to pleasure craft; some limited provisions of SOLAS relating to safety of navigation (for instance the duty to rescue, the duty to carry charts, safety routes) do, but they do not extend to areas of safety and other certification nor to detention; cf reg 1 of ch V with reg 3(a)(v) of ch 1. See also the exclusions from the Load Lines Convention and the STCW Convention, art III.

The lack of a unilateral national power to create safety obligations for foreign ships on the high seas is also to be inferred from the express denial of any such power of a coastal state in respect of a foreign ship once it has left port and is passing through the territorial sea to the high seas; see UNCLOS art 21(1) and (2), the latter of which limits the law of coastal states on design, construction, manning and equipment of foreign ships to giving effect to generally accepted international rules or standards.

The further submissions made on behalf of the Maritime Safety Authority in response to a Minute from the Court argued that customary international law allows the port state to have control over matters of external effect where that is necessary to protect an important state interest, even when this means that, in fact, the requirements imposed by the port state will have effect on the high seas.

That proposition goes far beyond the current state of the law as we understand it from the materials already mentioned. We have considered the materials counsel put forward in support of the proposition. They included two recent commentaries on the law of the sea, but one of those commentaries, and apparently the other, limit the port or coastal state powers to ships which are unseaworthy or unfit to proceed to sea - feature 2 of the regulatory conventions noted above. That limit is not included in the proposed coastal state power, nor in s 21 as it has been applied.

More significant than the commentaries are the one piece of state practice and the particular provisions of UNCLOS quoted to establish the proposition. As will appear, they do not help establish a broad port or coastal state power. Rather they support the much narrower one already suggested. The Canadian Arctic Waters Pollution Prevention Act 1970 (1969 - 1970 C 47) recites in its preamble the recognition by the Canadian Parliament of its obligation and its determination:

> . . . to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the [Eskimo] and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic.

The powers claimed applied to arctic waters within 100 nautical miles of the nearest Canadian land. The statute prohibited the deposit of waste in the area and provided for the prescribing of shipping safety control zones. Regulations could be made prohibiting ships from navigating in those zones unless they complied with certain safety standards relating to construction, crewing and other matters. Pollution prevention officers were given the power to board ships in the zones, inspect them, and order them out of the zone if they were in breach. Offences were established and provision was made for forfeiture.

Canada was claiming a very special interest in respect of a unique area of special importance and quality. Even so, it plainly had doubts about its position under international law since on the day the Bill was introduced into Parliament it narrowed its acceptance of the jurisdiction of the International Court of Justice by excluding disputes in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada. As Prime Minister Trudeau put it, international law at the time did not sufficiently protect countries on the pollution aspect of international waters. It was important for Canada to take forward steps to help international law develop while looking to the possibility of international action on the matter (9 ILM 600). As he anticipated, a week later the United States rejected the proposed legislation:

> International law provides no basis for the proposed unilateral extensions of jurisdiction on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction (9 ILM p 605).

It expressed concern about the precedent that would be established, and called for international solutions rather than national approaches. It was working for appropriate action within the United Nations framework, looking to a new treaty on such matters. (The early stages of the process that led to UNCLOS were already underway.) It referred to the 1969 conference which had adopted the intervention convention mentioned earlier, and looked to the amicable resolution of the matter; for the Canadian reply see 9 ILM p 607. A major aspect of that resolution is to be seen in the adoption 12 years later of art 234 of UNCLOS:

> *Ice-covered areas*

> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

According to an authoritative commentary, this provision, sometimes called the Arctic article, has several unusual features. It is one of the few provisions of the convention negotiated directly between the states involved - here Canada, the USSR and the United States - and incorporated into the various texts without opposition. It picks up a theme of art 194 (about marine

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pollution) with its reference to rare or fragile ecosystems. And it is the only provision in Part XII on the protection and preservation of the marine environment which accords a coastal state the right to adopt and enforce within its exclusive economic zone its own non-discriminatory laws relating to marine pollution. To that extent, it is a lex specialis (Shabtai Rosenne and Alexander Yankov volume editors, Myron Nordquist editor-in-chief, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol IV p 393). The broader significance of the provision is that yet again we see a great reluctance to recognise or confer coastal state powers to impose national law on foreign vessels on the high seas (even within the country's exclusive economic zone) to protect coastal interests.

The two provisions of UNCLOS cited in support of the respondent's broad proposition about port state powers are taken from Part XII, the ``Protection and Preservation of the Marine Environment'', a set of provisions which is not of course directly relevant. Under art 211(3), states which establish particular requirements to prevent, reduce and control the pollution of the marine environment as a condition of entry to their ports or internal waters or for a call at their off-shore terminals are placed under certain obligations. The limit of subject-matter and the limit to rules relating to entry indicate that no broader principle of port state power to protect national interest is evidenced by this provision. That appears as well from the remaining detail of art 211 which gives major emphasis to agreed international rules and standards and, while allowing certain state laws relating to (a) the territorial sea, requires that they do not hamper the right of innocent passage, and to (b) the exclusive economic zone, requires that they conform and give effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conferences. The article does recognise that those international rules might be inadequate to meet special circumstances, but for that purpose it establishes an international procedure for elaborating appropriate national responses. Again that is far from the proposed broad national power.

Article 218, the second provision cited, provides no support for that proposition that coastal states have powers to extend unilateral requirements protecting an important state interest to foreign ships on the high seas. The provision simply enables the coastal state to investigate and, if appropriate, institute proceedings in its own Courts in respect of a vessel voluntarily within one of its ports relating to discharges from that vessel outside its internal waters, continental shelf or exclusive economic zone in violation of applicable *international* rules and standards established through the competent international organisation or general diplomatic conference. In addition, the provision makes it plain that the discharge may have had nothing at all to do with the port state: it may for instance have occurred in the internal waters of another state. (See also art 220.)

The emphasis throughout this part, as in other areas of maritime law applicable to the high seas, is on the establishment of rules by international processes and on the duty of the flag state to enforce them (see also arts 216 and 217). But, as with the safety and crewing requirements considered earlier in this judgment, port states may have a role in respect of foreign vessels. They are obliged in certain circumstances to prevent a foreign vessel within one of their ports from sailing. But:

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- as in those other areas, the vessel must be in violation of applicable international rules and standards

relating to seaworthiness; and

- the vessel must thereby threaten damage to the marine environment (art 219; see also the safeguards in arts 223 - 233).

Again the proposed power is much wider.

Our conclusion on the relevant rules of international law is, accordingly, that a port state has no general power to unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have effect on the high seas. Any requirements cannot go beyond those generally accepted, especially in the maritime conventions and regulations; we were referred to no generally accepted requirements relating to the equipment particularly in issue in this case so far as pleasure craft were concerned. In addition, any such port state powers relate only to those foreign ships which are in a hazardous state.

The Maritime Transport Act 1994 and international law

It is in the above context that the Maritime Transport Act, in particular s 21, is to be understood and interpreted. New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea and, if possible, consistently with that law, *R v Dodd* (1874) 2 NZCA 598, and *Re The Award of the Wellington Cooks and Stewards' Union* (1906) 26 NZLR 394 (Full Court). In the latter case, concerned with industrial conditions on board ships engaged in the trans-Tasman trade, Cooper and Chapman JJ quoted the following statement of principle from the judgment of Sir Robert Phillimore in the major English case concerning criminal jurisdiction over foreign mariners, *R v Keyn* (1876) 2 Ex D 63 at p 85:

> ``. . . it is an established principle as to the construction of a statute that it should be construed, if the words will permit, so as to be in accordance with the principles of international law."

That principle is stated in similar words in a recent case in this Court concerned with air transport, *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 at p 289.

In the Maritime Transport Act itself, Parliament recognises the primacy or at least the central significance of international law. According to its title it is an Act:

> (b) To enable the implementation of New Zealand's obligations under international maritime agreements.

The second of the principal functions of the Minister of Transport under the Act is

> (b) To ensure New Zealand's obligations under the Conventions are implemented and to administer New Zealand's participation in them (s 5).

Other comparable provisions govern the actions of *all persons* operating under the particular Act, eg Chemical Weapons (Prohibition) Act 1996, s 4(2), Hazardous Substances and New Organisms Act 1996, s 6 and the Ozone Layer Protection Act 1996, s 4. This case would have been much easier had that approach been adopted here with the

consequence of the Maritime Safety Authority being expressly and generally bound by relevant international law.

Maritime rules promulgated by the Minister must not be inconsistent with international standards relating to maritime safety and the health and welfare of seafarers to the extent adopted by New Zealand (s 39(1); see also s 39(2)(a)). Similarly the Minister's powers to make maritime protection rules are conferred with the purposes of implementing New Zealand's obligations under any maritime protection convention, enabling New Zealand to become party to treaties relating to the protection of the marine environment, and implementing recommended international practices and standards (s 386).

That emphasis on compliance with, and implementation of, relevant parts of international law appears as well throughout almost every part of the Act, including those on the liability of shipowners (Parts VII and VIII), construction and survey (Part X), load lines (Part XI), safety at sea including collisions (Part XII), safety services (in Part XIV), carriage of goods by sea (Part XVI), salvage (Part XVII), and marine pollution, protection of the marine environment and related civil liability (Parts XVIII - XXVII). The emphasis is also to be found throughout other relevant parts of the statute book such as the Continental Shelf Act 1964, the Crimes Act 1961, the Driftnet Prohibition Act 1991, the Fisheries Act 1996, the Marine Mammals Protection Act 1978, the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987, the Submarine Cables and Pipelines Protection Act 1996, the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 and notably the United Nations Convention on the Law of the Sea Act 1996, the title to which says it is an Act ``to *complete* the implementation in the law of New Zealand of the United Nations Convention on the Law of the Sea'' (emphasis added).

Section 5 of the Maritime Transport Act, quoted earlier, calls on the Minister to ensure that New Zealand's convention obligations are implemented. It places no such direct general obligation on the Maritime Safety Authority or on its Chief Executive, the director, although many particular provisions require compliance, eg ss 42(1), (4), 47(2)(a), 55(4), 271(1), (4), 298(3), 395(2) and 397(5). In addition the authority owes relevant general obligations towards the government. According to s 432 which is in a form common for many Crown entities:

> **432.** **Authority to comply with policy directions** -- (1) In the exercise of its functions and powers under this Act, the Authority shall have regard to the policy of the Government in relation to maritime matters, and shall comply with any directions relating to that policy given to it in writing signed by the Minister. As soon as practicable after any such direction is given, the Minister shall publish in the Gazette and lay before the House of Representatives a copy of that direction.
>
> (2) The Minister shall not give any direction under subsection (1) of this section which requires the Authority to do, or refrain from doing, a particular act, or bring about a particular result, in respect of any particular person or persons.

Counsel indicated that there were no relevant ministerial directions given under subs (1) of that provision. That is not however the end of the matter. The first part of the provision requires the authority (which must include its Chief Executive) to have regard to the policy of the government in relation to maritime matters. There can be no doubt that that policy - manifested so recently in the terms of the legislation the government had promoted - included compliance with New Zealand's obligations under international law in respect of those maritime matters relating to the authority's wide-ranging functions

listed in s 431. It is the authority which has the major role at the operational level of ensuring that those obligations are met. While Parliament has deliberately distanced the government through the Minister from day-to-day decision making by creating the authority (a distance emphasised by subs (2) of s 432 forbidding a ministerial direction on a particular matter), the authority is to operate within that context of the international obligations - and rights - of New Zealand.

Section 21: its meaning and application

Against that background, we return to the terms of s 21(1). There was no objection to the requirement of para (a) of notification of departure. It can be related to the information-sharing provisions of the 1979 Search and Rescue Convention and to standard immigration requirements. Morris J indeed found that Mr Sellers had complied with that obligation. Nor was any question raised about para (d) concerning compliance with relevant maritime rules. None were referred to with the exception of the rules about lights implementing relevant parts of the international collision regulations. Further, according to Mr Burton, for the safety authority, there is no power to make maritime rules for pleasure craft unless they are designed to give effect to international texts.

Any potential conflict between the statutory power and the relevant rules of international law accordingly relates to the exercise by the director of powers relating to crewing (para (c)) and especially to the adequacy of the craft and its safety equipment (para (b)).

Three possible readings to remove any conflict were identified in the course of argument: foreign pleasure craft might be completely excluded, the territorial scope of the provision might be read narrowly, or the director's powers might be read as subject to the relevant rules of international law.

Courts have frequently read down general legislative wording (any person, any worker, any place, any ship) by reference to relevant principles and rules of international law and especially of the law of the sea. We have already mentioned early New Zealand cases to that effect. The United States Supreme Court in rejecting a personal injury claim by a Danish sailor, employed on a Danish ship, and injured in the port of Havana, similarly refused to give a literal reading to a United States statute giving a right of action to ``*Any seaman* who shall suffer personal injury in the course of his employment," (emphasis added) *Lauritzen v Larsen* 345 US 571 (1953). Justice Jackson cited a judgment of Chief Justice Marshall about a criminal statute prohibiting certain acts on the high seas when committed by ``any person or persons":

> ``. . . the Court determined that the literal universality of the prohibition `must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them' [*United States v Palmer* 3 Wheaton 610 at p 631] and therefore would not reach a person performing the prescribed acts aboard the ship of a foreign state on the high seas (p 578).

That doctrine of construction accorded with ``the long-heeded admonition" of Marshall CJ in another case that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, *Murray v Schooner Charming Betsy* 6 US (2 Cranch) 64 (1804) at p 118.

Is it possible to interpret the expression ``a pleasure craft" in s 21(1) as meaning only New Zealand-registered ships? We do not think it is. While that

might have been possible had the provision appeared alone, the usage throughout the Act denies that possibility. The Act distinguishes between different categories of ships for different purposes, eg:

(a) a ship;
(b) a New Zealand ship;
(c) a foreign ship; and
(d) a foreign ship in New Zealand waters.

The duty to aid those in peril at sea uses three of those categories: the obligation is owed to all ships (a), by masters of New Zealand ships (b), and of foreign ships in New Zealand waters (d) (s 32; see also s 172). The powers of detention

exercisable on clear grounds of hazard apply to all ships (a) but any seizure of a foreign ship (c) in breach of a convention is forbidden (ss 55 and 397; the limit in s 55(4) is not expressly constrained to foreign ships).

Perhaps most significantly, the set of provisions concerned with duties relating to maritime activity of which s 21 is part, use all the categories, carefully distinguishing between them. So s 19 states the duties of the master of ``a ship'' (a) and ss 28 and 29 regulate the rights of crew and master of ``a ship'' (a) in respect of liens and wages. The duty to report dismissals (s 20) of crew members relates only to New Zealand ships (b) - as do the various duties relating to health and safety on ships (ss 6 - 16, 23 - 26). The only express references to foreign ships (c) in that set of provisions is by way of inclusion but only if they are in New Zealand waters (d): the obligations, already mentioned in part, to help those in danger, report navigational dangers and notify accidents (ss 31 - 33).

The Act also carefully identifies foreign ships (or ``a ship other than a New Zealand ship'') when they are to be subject to the provision or are to be excluded from it, eg in addition to ss 31 - 33, 172 and 397 mentioned above, ss 107 (wrecks), 198 (relating to coastal shipping) and 461 (requiring the consul to be notified of the detention of a foreign ship). There are also the many references to ``convention ships''.

Other references to ``pleasure craft'' in the Act also support its general reading when the expression is not qualified by plain context (as in s 22 where pleasure craft are excepted from the obligations relating to New Zealand ships). So ``pleasure craft'' are totally exempt from marine safety charges (s 192(1)). In that provision, as in s 21, the meaning appears plain beyond question. The provision applies to foreign pleasure craft as well as to New Zealand ones. So does s 21.

Can the territorial scope of the provision be read down so that it applies only to New Zealand internal waters and does not have effect on high seas activities or on the exercise of rights of innocent passage through the territorial sea? Again the answer must be negative. The provision is concerned with the adequacy of the ships, the equipment and the crew ``for the voyage''. The ``voyage'', as s 2(1) confirms, is the journey from the New Zealand port through the New Zealand territorial sea, over the high seas, into foreign territorial seas and foreign internal waters to the foreign port.

We come to the third possibility, that the powers of the director to make determinations in respect of the adequacy of the ship, equipment and crew must be exercised in accordance with the relevant rules of international law. Thus, to the extent that pleasure craft are required or may become subject to requirements, say under SOLAS or rules of the International Telecommunication Union, to have certain equipment and meet certain

standards, and that the port state has relevant powers under such internationally accepted rules, the powers under s 21 may be exercised. That is to say, the statutory powers would develop along with the relevant rules of international law. The international developments would give the provision an increased content as and when the internationally accepted standards and port state powers were enhanced.

At first such a variable reading, distinguishing between foreign and local craft, would appear to be difficult to reconcile with the seemingly generally applicable wording of paras (b) and (c) of s 21(1). We would however note that the director himself has adopted procedures which apply differently to those yachts and crews which have successfully completed an offshore voyage in the previous 12 months and those that have not.

Much more significant than that practice is, first, the strong general emphasis of national legislatures in drafting national law concerned with international maritime matters and, second, of national Courts in interpreting and applying it, on compliance with the principles, rules and processes of the relevant parts of international law.

More specifically, the New Zealand Parliament has made that clear in the ten statutes listed earlier, in the last of which it stated its understanding that it had *completed* the implementation of UNCLOS in the law of New Zealand. Similarly in major maritime cases, decided last century and this, in the United States and the United Kingdom, as well as in New Zealand, eminent Judges, including Marshall, Stowell and Phillimore, have striven to read legislation consistently with

international maritime law. Apparently general references to vessels, people and places are limited in accordance with the flag state principle if that can be done - as it regularly has been. That that process is not necessarily a restrictive one appears from the judgment of Stout CJ in the *Wellington Cooks and Stewards' Union* case. He read the law-making power of the New Zealand General Assembly in 1906 as capable of growth, development and adaptation and as extending to the New Zealand-registered ships voyaging overseas, an extension consistent with the flag state principle.

More recently, English Courts have also construed an Act of Parliament as having a wider (territorial) application than it had at the date of its enactment, as international law allowed the extension of British territorial waters and that extension was effected through the exercise of the prerogative, *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA), applying *R v Kent Justices, ex parte Lye* [1967] 2 QB 153 (DC).

That some legislation is capable of having a varying application, even without express amendment, following the development of relevant rules of international law also appears from the law of foreign state immunity. A recent judgment of this Court has held that the general right of all ``employees'' to seek remedies from the Employment Court was not available to an employee of the Governor of Pitcairn, *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426. According to a number of decisions around the Commonwealth, the extent of that disability has shrunk and as a consequence the extent of Court jurisdiction and other powers conferred by statute have probably broadened without the statute being specifically amended, see eg *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (CA) at pp 555 - 557, 578 - 579 and *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 at p 314.

We return to the substance of s 21(1)(b) and (c) and to the related limits arising from international law. Under that law all that the director would be entitled to be satisfied about in relation to the adequacy of a foreign pleasure vessel, her equipment and her crew would be to ensure compliance with accepted international standards and rules, to the extent that they allow that judgment to be made by a coastal state. To repeat, that extent will be widened when and to the extent that international law allows.

We consider that the gloss proposed in the preceding paragraph is consistent with the wording of s 21(1)(b) and (c) when that provision is read, as it must be, in its wider context. To repeat, for centuries national law in this area has been essentially governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change.

The director in his procedures for the grant of a clearance under s 21(1) has set minimum requirements which are not permitted by international law. Those requirements are in breach of the powers conferred by s 21(1) as that provision is to be understood at present. Mr Sellers should not be held to be committing an offence for not complying with requirements set without lawful authority.

Result

It follows that we allow the appeal and quash the conviction and sentence. We need not go on and consider the further argument based on administrative law grounds, that the director in adopting his procedures had adopted too inflexible a policy.

Only a handful of the particular sources referred to in his judgment appear to have been referred to the Courts below. Many of them were raised from the Bench in the course of the oral argument in this Court and were the subject of further helpful written submissions by counsel made in response to a Minute of the Court.Appeal allowed: conviction and sentence quashed.

Solicitor for the appellant: *George Bogiatto* (Auckland).

Solicitors for the respondent: *Izard Weston* (Wellington).

Reported by: Kersie Khambatta, *Barrister*.