FEDERAL COURT OF AUSTRALIA

Visscher v Teekay Shipping (Australia) Pty Ltd (No 4) [2012] FCA 1247

Citation:	Visscher v Teekay Shipping (Australia) Pty Ltd (No 4) [2012] FCA 1247
Parties:	**TIMOTHY VISSCHER AND TEEKAY SHIPPING (AUSTRALIA) PTY LTD ACN 079 641 580**
File number:	NSD 308 of 2007
Judge:	**KATZMANN J**
Date of judgment:	9 November 2012
Catchwords:	**SHIPPING AND NAVIGATION** – Admiralty – masters and seamen – seaman's wages – alleged delay in payment of wages on discharge from ship – *Navigation Act 1912* (Cth), ss 75(1), 78, 83 – application of provisions to a salaried deck officer remunerated under a certified agreement – relationship between certified agreement and provisions of Pt 2 of the *Navigation Act* – operation of s 83 of the *Navigation Act* – whether certified agreement void to the extent of any inconsistency – meaning of "discharge" for purposes of ss 75, 78 – whether seaman discharged at the end of voyages – whether "wages" in ss 75, 78 includes accrued leave – whether delay in payment of wages due to seaman's act or default, a reasonable dispute as to liability for the wages or to any other cause not attributable to the wrongful act or default of the owner or master of the ship **INDUSTRIAL LAW –** relationship between certified agreement and provisions of Pt 2 of the *Navigation Act* – whether employment came to an end by resignation or constructive dismissal – constructive dismissal by demotion – where rescission of promotion repudiation of contract of employment – whether rescission effective – whether employee accepted repudiation **STATUTORY INTERPRETATION** – implied repeal – whether industrial agreement effected implied repeal of *Navigation Act* – construction of collective agreement – division and headings **WORDS AND PHRASES** – "final settlement" – "wages"
Legislation:	*Acts Interpretation Act 1901* (Cth) ss 15AA, 18A *Admiralty Act 1988* (Cth) ss 4(3)(t), 37(1)

Merchant Seamen (Payment of Wages and Rating) Act 1880 (Imp) s 4(4)
Merchant Shipping Act 1854 (Imp) ss 187
Merchant Shipping Act 1894 (Imp) ss 134, 135
Navigation Act 1912 (Cth) ss 6, 46, 68, 75, 76, 77, 78, 83
Workplace Relations Act 1996 (Cth) ss 5(3)(a), 170CD(1B), 170LT, 170LU, 170LX, 170LY, 170LZ, 170M, 170N; Pt VIB

Cases cited:

Amcor Ltd v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241
Ansett Australia Limited (subject to Deed of Company Arrangement) v Australian Licensed Aircraft Engineers' Association [2003] FCAFC 209
Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd (1998) 80 IR 208
Australian Securities and Investment Commission v Fortescue Metals Group Ltd (2011) 190 FCR 364
Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153
Breslin v Maritime Overseas Corp 622 F Supp 195 (SDNY 1987)
Caine v Palace Steam Shipping Company [1907] 1 KB 670
Collie v Fergusson 281 US 52 (US 1930)
Commissioner of Police New South Wales v Gray (2009) 74 NSWLR 1
Concrete Constructions (NSW) Pty Limited v Nelson (1990) 169 CLR 594
Doyle v Sydney Steel Co Ltd (1936) 56 CLR 545
Easling v Mahoney Insurance Brokers (2001) 78 SASR 489
Gilkinson v Repatriation Commission (2011) 197 FCR 102
Goodwin v Phillips (1908) 7 CLR 1
Gurran v Tarbook Pty Ltd [1996] IRCA 453
Hamzy v Tricon International Restaurants (2001) 115 FCR 78
Hargreaves v National Safety Council of Australia (1997) 77 FCR 272
Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508
K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309
Kucks v CSR Limited (1996) 66 IR 182
Management 3 Group Pty Ltd (in liq) v Lenny's Commercial Kitchens Pty Ltd [2011] FCAFC 162
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006)
Mobil Oil New Zealand Ltd v The Ship "Rangiora" (No 2) [2000] 1 NZLR 82
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451

Palace Shipping Company Ltd v Caine [1907] AC 386
Quickenden v O'Connor (2001) 109 FCR 243
Re Commonwealth Works and Services (Northern Territory) Award (1960) 1 FLR 336
Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc (2003) 214 CLR 397
Re The Great Eastern Steamship Company (1885) 5 Asp. M.C. 511
Reed v Blue Line Cruises (1996) 73 IR 420
Saraswati v The Queen (1991) 172 CLR 1
Short v F W Hercus Pty Limited (1993) 40 FCR 511
The "Arosa Star" [1959] 2 Lloyd's Rep 396
The Cubadist 252 F 658 (DC Ala 1918)
The Elmville (No 2) [1904] P 422
The Federated Seamen's Union of Australasia v The Commonwealth Steamship Owners' Association (1922) 30 CLR 144
The Gee-Whiz [1951] 1 Lloyd's Rep 145
The Halcyon Skies [1977] 1 QB 14
The Rainbow (1885) 5 Asp. MC. 479
The "Tacoma City" [1991] 1 Lloyd's Rep 330
The Tergeste [1903] P 26
The Thomas Tracy 24 F2d 372 (CCA 2nd Circ 1928)
The Velma L Hamlin 40 F2d 852 (CCA 4th Circ 1930)
The Wilhelm Tell [1892] P 337
Thomson v Orica Australia Pty Ltd (2002) 116 IR 186
United States Trust Company of New York v Master and Crew of Ship "Ionian Mariner" (1997) 77 FCR 563
Visscher v Australian Industrial Relations Commission (2007) 170 IR 419
Visscher v Giudice (2009) 239 CLR 361
Visscher v Teekay Shipping (Australia) Pty Ltd [2006] AIRC 270
Visscher v Teekay Shipping (Australia) Pty Ltd (2011) 198 FCR 575
Wahlgren v Transfield Power Systems Manufacturing [1996] IRCA 375
Watson v Foxman (1995) 49 NSWLR 315
Western Excavating Ltd v Sharp [1978] 1 QB 761

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Date of hearing:	30 August 2010; 7, 8, 9, 10, 11, 15 May 2012
Date of last submissions:	16 May 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	275
Counsel for the Applicant:	The applicant appeared in person
Counsel for the Respondent:	Mr M Leeming SC (7 to 15 May 2012) with Mr B Cross; Mr G Hatcher SC (30 Aug 2010) with Mr B Cross
Solicitor for the Respondent:	Norton Rose Australia

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 308 of 2007**

BETWEEN:	**TIMOTHY VISSCHER** **Applicant**
AND:	**TEEKAY SHIPPING (AUSTRALIA) PTY LTD ACN 079 641 580** **Respondent**

JUDGE:	**KATZMANN J**
DATE OF ORDER:	**9 NOVEMBER 2012**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs.

3. By **30 November 2012**, the respondent file submissions, not exceeding five pages, together with any affidavit(s), in support of any application to vary order 2.

4. The applicant file any submissions, not exceeding five pages, in reply to those submissions by **16 January 2013**.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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REASONS FOR JUDGMENT

1 This case is concerned with the meaning, scope and application of s 78 of the *Navigation Act 1912* (Cth), a provision which, despite its antiquity, has never previously been the subject of judicial attention. Section 78 provides for potentially heavy penalties for shipowners and operators who do not pay seamen promptly when they are discharged from their ships and cannot bring themselves within one of the statutory exceptions.

2 The applicant, Timothy Visscher, is a merchant seaman. For over a decade now he has been in dispute with his former employer, Teekay Shipping (Australia) Pty Ltd ("Teekay"). The dispute started in 2001 after Teekay told him that it was rescinding his promotion to Chief Officer. Mr Visscher claims he never accepted that the rescission was valid and it is common ground that he continued to serve as Chief Officer for the duration of his employment. The dispute has taken the parties to the Australian Industrial Relations Commission ("AIRC") and then all the way to the High Court: *Visscher v Giudice* (2009) 239 CLR 361 ("*Giudice*"). In that proceeding Mr Visscher alleged that in February 2004 he was constructively dismissed from his employment when he was told, in effect, that he would be demoted and he applied to the AIRC for reinstatement. Teekay, for its part, insisted that the rescission of the promotion in 2001 was valid, that since then he had only been acting in the position of Chief Officer, and that there had been no constructive dismissal. That dispute is ongoing. The AIRC proceeding is pending in Fair Work Australia as a result of the orders made by the High Court and the transitional

provisions of the *Fair Work Act 2009* (Cth). The present application arises out of the same circumstances.

3 Mr Visscher alleges that on 3 March 2004 he was discharged from the crude oil tanker, *MV Broadwater*, his employment with Teekay was at an end, and that he asked for, but was not then paid, all his entitlements (specifically a payment in respect of accrued leave and wages for three days' work). He also alleges that he later accepted an offer of casual employment from Teekay for a second tour of duty on the *Broadwater* in April–May 2004 but was not paid a casual loading. In addition, he claims that a purported payment of his accrued leave nine days after he was discharged from the ship on 26 May 2004 did not satisfy Teekay's obligations. He claims that the failure to pay these entitlements at or before each time he was discharged from the ship means that Teekay owes him "wages" within the meaning of the *Navigation Act* and that, consequently, for each day since he should be paid wages at double rates as, he maintains, the Act mandates. In the result, he claims he is entitled to in excess of $7.4 million for unpaid wages.

4 Teekay denies the claim in its entirety. It insists that it paid Mr Visscher all his entitlements and owes him nothing. In respect of the second of the two voyages, Teekay denies he was employed as a casual and therefore entitled to a casual loading. In any case it submits that the relevant provisions of the *Navigation Act* do not apply to Mr Visscher because he was paid a salary, not a wage. It also contends that his employment was governed by the terms of a collective agreement ("the Certified Agreement") certified by the AIRC under the *Workplace Relations Act 1996* (Cth) ("WR Act") (since repealed), which, it submits, prevails over inconsistent provisions of the *Navigation Act*. (Mr Visscher, on the other hand, argues that the agreement is void to the extent of any inconsistency.) In any event, Teekay maintains that it made a bona fide payment on termination and the section was not intended to penalise a shipowner or operator who did that. In the alternative, it relies on the defences contained in s 78 itself, contending that the delay in payment is due to Mr Visscher's delay in making the claim, to a reasonable dispute as to liability for the wages, or to some other cause not attributable to its wrongful act or default. In 2010 Teekay applied for summary judgment. Although it succeeded at first instance, a Full Court set aside the judgment: *Visscher v Teekay Shipping (Australia) Pty Ltd* (2011) 198 FCR 575 ("*Visscher*").

5 In the event that Mr Visscher's approach is in principle correct, the parties also disagree about how wages should be calculated for the purpose of determining the amount Teekay should pay under s 78, and over what period of time the penalties should run.

6 Broadly speaking, then, the following questions arise for determination:

(1) Do the relevant provisions of the *Navigation Act* apply to Mr Visscher? This in turn involves two subsidiary questions:

- Do the relevant provisions of the *Navigation Act* apply to a salaried officer employed on terms determined by a contract of employment and a certified agreement or are they limited in operation to seamen employed only under articles of agreement?
- If not, does the Certified Agreement effect an implied repeal of those provisions of the *Navigation Act* or is the Certified Agreement void to the extent of any inconsistency?

(2) If there is no implied repeal, was Mr Visscher discharged from the ship within the meaning of s 75 at the conclusion of the two voyages? Was his employment terminated at the same time?

(3) Did Mr Visscher sail the second voyage as a casual (thus entitling him to a casual loading)?

(4) Was the non-colourable payment on termination a payment of wages for the purposes of ss 75 and 78?

(5) If ss 75 and 78 apply, was the delay in payment due to:

- Mr Visscher's own act or default;
- a reasonable dispute as to liability for the wages; or
- a cause not attributable to Teekay's wrongful act or default?

(6) If the *Navigation Act* applies and the defences are not made out, what is the value of the claim?

7 Before considering these questions, however, it is necessary to refer to the facts and the legislative framework against which they are to be resolved.

The facts

8 Many of the facts are uncontentious. Unless otherwise indicated, the following account records facts and conversations the substance of which are either not in dispute or are the subject of agreement.

9 Teekay is a shipping company. At the relevant time it operated a fleet of ships used mainly for transporting oil for oil companies, refiners and traders.

10 Mr Visscher started working for Teekay 4 March 2000. He was taken on as a casual but was later offered permanent employment as Third Mate (also known as Third Officer). The offer was confirmed in writing on 26 March 2001 ("the letter of offer") and Mr Visscher accepted it on 30 March 2001.

11 The letter of offer set out the terms and conditions of Mr Visscher's employment. It stipulated that salaries were to be paid monthly by electronic transfer and any accrued entitlements were to be paid when he left the company. The letter of offer also incorporated the terms and conditions of employment contained in an enterprise agreement called the Teekay Australia/AMOU (Deck Officers) Agreement 1998 (the predecessor of the Certified Agreement) and the Maritime Industry Seagoing Award (MISA) 1998 as varied, in accordance with the WR Act.

12 Mr Visscher very quickly impressed his employer. Within a day or so of the offer, he was invited by Teekay's Marine Operations Manager, Capt Mark Board, to join the *Samar Spirit* as Chief Officer (also known as First Mate), a position of prestige and responsibility, second only in status to the ship's master.

13 Mr Visscher accepted the offer and joined the *Samar Spirit* as Chief Officer on 6 April 2001. When he arrived home from his tour of duty on 7 September 2001, he opened a letter from the company offering him a permanent promotion to Chief Officer with effect from 4 August 2001. He said he was elated to read it and accepted the offer the same day. His joy, however, was short-lived.

14 Around 6 September 2001 the Australian Maritime Office Union ("AMOU") had notified Teekay that it intended to take strike action over promotions Teekay had made during

the bargaining period for the new enterprise agreement. Mr Visscher's promotion was one of these. As a result, on 7 September 2001, Teekay notified the AIRC of the existence of an industrial dispute and sought its assistance to resolve the dispute by conciliation. Then, on 11 September 2001, the Commissioner who dealt with the dispute (Commissioner Raffaelli) recommended that all recent promotions be rescinded.

15 On 20 September 2001 Teekay informed Mr Visscher in writing that it had decided to comply with Commissioner Raffaelli's recommendation and it would therefore rescind his promotion. From that time Mr Visscher continued to work as a Chief Officer, though he was formally regraded as a Third Mate. Despite the regrading he continued to be paid at the same rate as a Chief Officer. From July 2003 at the latest, it came to him, however, in two components – as a base grade salary and a higher duties allowance. Teekay asserts that it paid him this way from 20 September 2001, but only one pay slip from October 2001 (which, to the contrary, showed that Mr Visscher was paid one amount as ordinary salary at the applicable rate for a Grade 1 Chief Officer) and pay slips from July 2003 onwards (which supported Teekay's assertion) were in evidence. Neither party offered any explanation for the missing pay slips and neither made anything of the matter.

16 In the wake of the dispute a new enterprise agreement (the Teekay Australia/AMOU (Deck Officers) Sea-Going Officers Agreement 2001) was approved by the AIRC on 5 March 2002 and came into force on 5 May 2002. This is the Certified Agreement. Annexed to the Agreement was a grading list recording Mr Visscher as a Third Mate.

17 On 5 July 2002, while Mr Visscher was at sea, Pat Condon, Teekay's Acting Marine Operations Manager, wrote to Mr Visscher at his home address, offering him a permanent promotion to the position of Second Mate Grade 1 effective 1 July 2002. Mr Visscher told Mr Condon about three weeks later on approximately 24 July 2002 (before he had actually received the letter) that he would not accept the promotion because he had already been promoted to Chief Officer in 2001. There is no evidence to suggest that Mr Visscher replied to this letter and his evidence was that he never agreed to be Second Mate, that he never received any official notice from Teekay that he had been graded Second Mate, and that he had never seen a grading list recording him as such. It seems that grading lists were made available to employees. But it was never put

to Mr Visscher in cross-examination that he had ever seen one showing his grade as Second Mate.

18 Mr Visscher served on the *Samar Spirit* until 4 January 2004 when he asked to be relieved of his position after a disagreement with the master of the ship. Mr Visscher stated that on 8 January 2004 he received a telephone call from Phillip Bray, a personnel officer for Teekay. In the course of the conversation, Mr Bray said to him:

> You've asked to get off the Samar. We'd intended keeping you there as Mate. As you've asked to get off, we'll sail you as Second Mate, probably on a products tanker.

19 The reference to "Mate" in the second sentence is a reference to Mr Visscher's previous engagement as Chief Officer. Mr Visscher said he replied:

> We'll cross that bridge when we come to it.

20 The next day Mr Bray rang Mr Visscher again, asking him to sail a trip "as Mate" on the *Broadwater* to relieve one or two other officers, leaving three days later. Mr Visscher agreed and then Mr Bray told him that after that tour he would be sailing as Second Mate, to which he said he simply responded: "Like I said Phil, I'll join the Broadwater on Monday".

21 On 13 January 2004 Mr Visscher joined the *Broadwater* as Chief Officer.

22 Mr Visscher was scheduled to disembark in Sydney on 25 February 2004. Three days beforehand, on 22 February 2004, he prepared an email to send to Teekay's vessel manager Vince Scott. The email read as follows:

> In January 2004 I was advised by Mr. Phil Bray of [Teekay] that subsequent to my current posting as Chief Officer on the MT Broadwater, I would be required to sail as Second Mate.
>
> This constitutes a demotion from my position of Chief Officer and it is unacceptable. Demotion is a constructive termination of our contract of employment by Teekay. I will therefore consider my employment as being terminated by Teekay upon leaving the MT Broadwater on or about 25 February 2004.
>
> At your earliest convenience please pay into my bank account all entitlements.

23 Mr Visscher had shown a draft of the email to the ship's master, John McLellan, around two days earlier. Capt McLellan said in evidence (which I accept) that he was disappointed to read it. He said he told Mr Visscher that if he were a company manager he would interpret the

email as a resignation. He said he did not want Mr Visscher to resign; they had a very good working relationship. Mr Visscher said it was not a resignation and asked him to send it, otherwise he would himself. Mr Visscher then forwarded the email from his personal account (copying Capt McLellan), and the email was sent to Mr Scott. Within an hour of doing so, Capt McLellan took a phone call from Mr Scott, who told him he had received Mr Visscher's email and would accept his resignation. Capt McLellan said: "Tim told me he does not view this as a resignation". Mr Scott replied: "It is, and I will confirm in writing shortly".

24 Two days later, on 24 February 2004, Mr Scott wrote to Mr Visscher:

> It was with regret that I received your communication of 22nd February 2004 regarding your future position with Teekay Shipping (Australia).
>
> I feel that I must bring to your attention the following points so as no future misunderstanding may arise.
>
> 1)I am surprised by your statement,
>
> "This constitutes a demotion from my position as Chief Officer"
>
> as you have never been graded Chief Officer in Teekay. You are currently graded Second Mate.
>
> 2) You have a contract of employment with Teekay as a Deck Officer. You were originally employed as a Third Mate. Teekay does not consider a demotion in rank for any officer to constitute constructive dismissal.
>
> 3) On this basis Teekay is treating your email as a resignation.
>
> Please confirm acceptance and receipt of this letter by signing and returning, in the pre-paid envelope the enclosed copy of this letter.

25 Capt McLellan received the letter by email on 25 February 2004, the day the ship arrived in Botany Bay. He then called Mr Visscher into his office where he presented him with the letter and covering email. Capt McLellan said that Mr Visscher insisted he had not resigned and would "deal with this in [his] own way". Both the terms of this conversation and their implications are in contention and I will return to them later. It is not in contention, however, that Mr Visscher asked Capt McLellan for his discharge and Capt McLellan gave it to him. Mr Visscher considers that, as at that date, his employment with Teekay was terminated at its initiative, notwithstanding that the certificate of discharge recorded the reason for discharge as "leave".

26 After his discharge from the *Broadwater* Teekay continued to make monthly salary deposits into Mr Visscher's bank account as it had done for the duration of his employment. In

both March and April 2004 he was paid $5,580.66. This occurred despite the fact that on 9 March 2004 Mr Visscher joined the *Pacific Sentinel*, a ship that was neither owned nor operated by Teekay.

27 On 8 March 2004, the day before he joined the *Pacific Sentinel*, Mr Visscher replied to Mr Scott's letter of 24 February 2004. He insisted that his promotion to Chief Officer remained valid, alleged that Teekay's purported rescission of it in September 2001 was a breach of contract, and maintained that Mr Bray's advice in January was (in effect) an anticipatory breach. He said he regarded Teekay's conduct as a demotion and therefore a termination of his employment and emphatically rejected the notion that he had resigned. He concluded his letter as follows:

> I have enjoyed excellent relations with Teekay. I have performed well above the standard it might have expected and it has expressed its satisfaction with my work. It will be a great shame if we are now to descend to litigation. I suggest that an informal conference be urgently convened to reach a resolution.

28 By email the same day he informed Mr Scott that he would be travelling overseas "for an imprecise time" and had lodged an application in the AIRC for relief in relation to the termination of his employment. As the majority of the High Court pointed out in *Giudice* at [37], by implication, s 170CD(1B) of the WR Act (inserted by item 9 of Sch 1 of the *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth), which commenced on 30 August 2001) treated demotion as a termination of employment where it involved a significant reduction in the remuneration or duties of the employee.

29 In fact the AIRC application was not filed until the next day. It was supported by Mr Visscher's email to Mr Scott of 22 February 2004 and Mr Scott's reply of 24 February 2004. Mr Visscher then set off for sea on the *Pacific Sentinel*.

30 The evidence indicates that there was no response to Mr Visscher's letter to Mr Scott of 8 March 2004 and that Mr Visscher had no contact from Teekay until about a week later when its assistant vessel manager, Doug Craig, sent him an email asking him to telephone to arrange a meeting at Teekay's offices. Mr Visscher phoned soon after receiving the email, agreeing to the meeting, telling him he was just home from sea. On 26 March 2004 Mr Visscher attended a meeting with Mr Craig and Teekay's Director of Human Resources, David Parmeter.

31 In his affidavit Mr Parmeter said he told Mr Visscher at the meeting that his email of 22 February 2004 was:

> effectively notice of resignation from Teekay. However, if you change your mind, Teekay would have no objection to you withdrawing your resignation and continuing to sail with Teekay.

32 In his "notice of facts, issues and contentions" dated 16 August 2010 Mr Visscher admitted that these words were said to him. Yet, without objection, Mr Parmeter was cross-examined about this evidence, presumably in an effort to undermine his credit, based on subtle differences between what he said in his statement to the AIRC and what appeared in his affidavit. The most significant of these was that the statement to the AIRC referred to "a resignation", not a "notice of resignation". Mr Parmeter denied there was a difference and, ultimately, nothing was made of this in submissions.

33 Mr Visscher said they were unable to resolve their dispute but, after the meeting he told Mr Craig that if they could sort out their differences he was even prepared to sail on the *Samar Spirit* when the master left.

34 Three days later, on 29 March 2004, Mr Visscher wrote an open letter to Mr Parmeter, offering to withdraw his application to the AIRC. The letter continued:

> My understanding now is that at 3 March 2004, the day I deemed my employment to be terminated, I was listed as continuing sailing as Chief Officer, which of course does away with any question of my employment being terminated by reason of a demotion. I think that it would have been better for all concerned if I had been told about that earlier in the piece, but the Company remained silent on the point and I knew nothing different.

35 Mr Parmeter's evidence was that he concluded from this that Mr Visscher would continue in Teekay's employment.

36 Then, on 5 April 2004, Mr Scott telephoned Mr Visscher. He told him he was looking at a computer monitor that indicated he had been scheduled to join the *Broadwater* on 8 April. Mr Visscher remonstrated that he could not understand how that could be so as he no longer worked for Teekay. Mr Scott replied, "*Well, that's in dispute, we say you still work here and you're due to rejoin*". Mr Visscher said he was in correspondence with Mr Parmeter and would sort things out with him. That same day Mr Visscher received a letter from Mr Parmeter in response to his open letter of 29 March 2004. Mr Parmeter said that the company welcomed his

decision to discontinue the proceedings in the AIRC "*and is happy for you to continue in employment as a Deck Officer*". He said the company's position was that there had been no interruption in his employment as a deck officer, but to avoid confusion made a number of points emphasising the company's position that his permanent grading was as Second Mate, that he was required to "*act up*" indefinitely as Chief Mate and would be considered for permanent appointment to the position in accordance with the procedures laid down in the Certified Agreement. Mr Visscher replied half an hour later, reiterating his position that he had a contract appointing him as Chief Officer and protesting his "wrongful" demotion. Mr Parmeter did not reply, but Mr Scott wrote the next day offering Mr Visscher a temporary promotion to Chief Mate for his next swing period on the *Broadwater*.

37 On 7 April 2004 Mr Visscher replied to Mr Scott, accepting the offer on a "without prejudice" basis and, on 8 April 2004 Mr Visscher rejoined the *Broadwater* as Chief Officer under the command of Capt Donald McAlpine. On 14 May 2004 Teekay deposited $5,170.50 (the same monthly salary he had always received whilst serving on the *Broadwater*) into his bank account. He remained at sea until 26 May 2004. That day he was issued with a certificate of discharge, once again recording the cause of discharge as "leave".

38 On 27 May 2004 Mr Visscher sent a fax to John Brecht, Teekay's Human Resources coordinator, copied to Mr Craig. He asked Mr Brecht to arrange for the payment to him of "all entitlements". He referred him to s 75 of the *Navigation Act*. On 31 May 2004 Mr Brecht wrote to Mr Visscher stating that Teekay considered Mr Visscher to be on "regular leave" after which he would return to the *Broadwater* and as such, they would continue to pay his accrued leave on a monthly, rather than lump sum, basis. Mr Brecht said the letter was faxed. Mr Visscher denied receiving it by fax but did receive it by post on 2 June 2004.

39 On 1 June 2004 Mr Visscher sent a fax to Mr Brecht, copied to Mr Craig, informing him that he had accepted casual maritime employment elsewhere commencing 10 June 2004. Upon receipt of the fax Mr Brecht telephoned Mr Visscher. The contents of this conversation were disputed, but it is clear that Mr Brecht sought confirmation that Mr Visscher would not be rejoining the *Broadwater*, that Mr Visscher confirmed as much, and that after the call Mr Brecht advised the payroll department to pay Mr Visscher his termination entitlements. Mr Brecht wrote to Mr Visscher on 2 June 2004, confirming that he would not return to the *Broadwater* and

advising that Teekay regarded him as having resigned with effect from 1 June 2004 and would process his outstanding entitlements by 4 June 2004.

40 On 4 June 2004 a final payment of $24,246.91 was paid into Mr Visscher's account. The amounts paid in January to May were based on one-twelfth of the salary payable to a Second Mate Grade 1 and the after-tax difference between the salary of a Chief Officer and a Second Mate Grade 1. Mr Visscher was never paid a casual loading.

41 From the time of the final payment on 4 June 2004 until, at the earliest, two years later, Mr Visscher did not make a claim that he had been underpaid or that he disputed the amount that Teekay had paid to him.

The legislative background

The Navigation Act 1912

42 The historical background to the *Navigation Act* is discussed in some detail in the judgment of the Full Court in *Visscher* (at [41]–[54]). At the time the legislation was enacted, the industrial landscape was very different from what it is now. Seafarers signed onto a ship for a voyage. The only agreement was made between seafarer and ship's master (the articles of agreement). It concluded at the end of the voyage when the seafarer was discharged from the ship. The terms of the engagement were exclusively recorded in the articles of agreement: see *Visscher* at [48] and [49]. There was no separate contract of employment.

43 There was a vast disparity of bargaining power between shipowners and seamen. In *The "Minerva"* (1825) 1 Hagg. 347, for example, Lord Stowell described (at 355) the shipowners as "gentlemen possessed of wealth and intent … conversant in business, and possessing the means of calling in the aid of practical and professional knowledge". In contrast, he referred to seamen as "generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves". The *Navigation Act*, like its imperial forebears, provided for such protection and, notwithstanding the growth in power of the maritime unions, those protections remained in place over 90 years later when Mr Visscher served on the *Broadwater*.

44 The *Navigation Act* prohibits the master and the owner or operator from taking the ship to sea with a seaman engaged to serve on it as a member of the crew unless the master has entered into articles of agreement with the seaman in the prescribed form (s 46). Such an agreement may be made for a single voyage or, if the voyages of the ship are on average less than six months in duration, it may extend over two or more voyages for up to six months in toto (s 50). When a seaman is discharged from a ship, the master must sign and give the seaman a discharge in accordance with the prescribed form and return any previous discharge (s 61). The prescribed form is Form 2 of Appendix 1 of *Marine Orders – Part 53*: *Employment of Crews, Issue 1* (Order No.2 of 1993) (Cth) ("*Marine Orders – Part 53*"), see cl 4.4. There are penalties (including a fine or two years imprisonment or both) for knowingly signing or giving a false certificate of discharge or fraudulently altering one (s 68).

45 Division 10 of Pt 2 of the *Navigation Act* (ss 70–94) deals with seamen's wages. I have already referred to ss 75 and 78. But it is convenient to recapitulate.

46 Section 75 provides:

> (1) Where a seaman is discharged, the seaman shall, before or at the time of discharge, be paid the amount of wages due up to that time, less any deductions specified in the account required to be delivered under subsection 76(1).
>
> Penalty (on the owner and master): $1,000.
>
> (3) It is a defence to a prosecution for an offence against subsection (1) if the person charged proves that the failure to pay to the seaman the amount of his or her wages in accordance with that subsection was due to the seaman's act or default, to a reasonable dispute as to liability for those wages or to any other cause not attributable to the wrongful act or default of the person charged or of any person acting on his or her behalf.

47 Section 76(1) states that the master who discharges a seaman at any port must deliver to the seaman at the prescribed time "a full and true account of his or her wages and of the deductions made or to be made", in the prescribed form or in a form approved by the Australian Maritime Safety Authority by instrument in writing. Failure to comply with the provision carries a penalty of $1,000. The prescribed form is Form 4 of Appendix 1 of *Marine Orders – Part 53* and the prescribed time is at least two hours before the seaman is discharged: cl 4.5.2, *Marine Orders – Part 53*. Form 4, entitled "Account of Wages", provides for the following information to be recorded: the name of the ship, the name of the seafarer, the reference number of the agreement, the rating, a statement of earnings (indicating wages, including when they

began, when they ceased, amounts per week, month and day, other earnings and total earnings), a statement of deductions (including allotments and payments) and a reconciliation. There is provision for both the master and the seafarer to sign, evincing their agreement that the statement is a correct account of the earnings and deductions of the seafarer. I should point out that Mr Visscher made much of Teekay not providing him with an account of wages but (in contrast with s 75) the statutory obligation is on the master of the ship, not the owner or operator.

48 Section 77 deals with the time wages should be paid. It relevantly provides:

> (1) Subject to any provision to the contrary in his or her agreement and to subsection (2), a seaman entered on board a ship shall, after all lawful deductions have been made:
>
> (a) be paid, on the first day of each month, the wages earned by the seaman during the period that commenced on the sixteenth day, and ended on the last day, of the month last preceding that month; and
>
> (b) be paid, on the sixteenth day of each month, the wages earned by the seaman during the period that commenced on the first day, and ended on the fifteenth day, of that month.
>
> (2) Where, on a day on which a seaman is required to be paid wages under subsection (1), the ship on which he or she is entered is not in port, or is in a port at which there is no bank, the seaman shall be paid the wages within a period of 24 hours after the arrival of the ship at a port at which there is a bank.
>
> …

49 Section 78 is in the following terms:

> If a seaman's wages are not paid in accordance with section 75 before or at the time the seaman is given his or her discharge from a ship, the seaman's wages shall continue to run until the time of the final settlement of his or her wages (and shall be payable at double rates for any period after the time the seaman is given his or her discharge from the ship) unless the delay is due to the seaman's act or default, to a reasonable dispute as to liability for the wages or to any other cause not attributable to the wrongful act or default of the owner or master of the ship.

50 "Discharge" when used as a noun is defined in s 6 as the certificate of discharge given to a seaman upon his or her discharge from a ship. "Discharge" as a verb or verb auxiliary is not defined. But a person who, pursuant to the articles of agreement, ceases temporarily to be a member of a crew of a ship is not to be taken as having been discharged from the ship: s 6(4C).

51 Thus, (and it is common ground in this case) the penal provisions of ss 75 and 78 are not enlivened when a seaman goes on leave. Indeed, Mr Visscher's case is that his entitlement

under s 78 arises because, at the time he was discharged from the *Broadwater* on 3 March 2004 and again on 26 May 2004, his employment with Teekay had come to an end.

52 The provision for doubling wages for a contravention of s 75 was introduced by an amendment to the *Navigation Act* in 1958: *Navigation Act 1958* (Cth). It appears from the parliamentary debates to have been inserted to reflect a clause in the then current seamen's award, although there were similar provisions in the English merchant shipping legislation.

53 Teekay was the owner of a number of ships, but it merely operated the *Broadwater* under a lease arrangement. That is immaterial, however, as s 6(4) of the *Navigation Act* extends the meaning of owner (unless the contrary intention appears) to include the operator. It was not suggested that the contrary intention was apparent in s 78.

54 Section 83 is of some importance but I will deal with it later in the context of the arguments to which it relates.

The Workplace Relations Act 1996

55 In 1952 specific provisions were inserted into the *Navigation Act* to afford arbitral jurisdiction to the Commonwealth Court of Conciliation and Arbitration to determine wages and conditions applying to seafarers. This jurisdiction was later removed from the *Navigation Act* and incorporated into the *Conciliation and Arbitration Act 1904* (Cth) and, later still, given to the AIRC by the *Industrial Relations Act 1988* (Cth). Similarly, the WR Act provided in s 5(3)(a) that matters pertaining to the employment of maritime employees were industrial issues over which the AIRC had jurisdiction.

56 Part VIB of the WR Act provided a mechanism for the making and certification by the AIRC of certain agreements, particularly at the level of a single business or part of a single business. The WR Act set out preconditions for the AIRC to approve an agreement. The agreement had to pass the no-disadvantage test set out in Pt VIE: s 170LT(2). It had to have been genuinely approved by a valid majority of persons whose employment would be subject to it: s 170LT(5). Its terms had to have been explained in ways appropriate to the person's particular circumstances: s 170LT(7). It had to include procedures for preventing and settling disputes about matters arising under the agreement: s 170LT(8). The AIRC was obliged to refuse to certify an agreement in certain defined circumstances: s 170LU. The agreement only

came into operation when it was certified: s 170LX. During the operation of a certified agreement the agreement was to prevail over an award or order of the AIRC to the extent of any inconsistency: s 170LY. It was also to prevail over terms and conditions of employment specified in a State law, award or agreement to the extent of any inconsistency, save with respect to matters of occupational health and safety, workers' compensation, apprenticeship and any matters prescribed by the regulations or protections against harsh, unjust or unreasonable termination of employment. And, to the extent of any inconsistency, it was to displace prescribed conditions of employment specified in a Commonwealth law prescribed by the regulations. See s 170LZ.

57 If the application for certification stated that it was made under Div 2, a certified agreement bound the employer and all persons whose employment was, at any time when the agreement was in operation, subject to it: s 170M. I interpolate that in this case the application for certification was not in evidence but there was no dispute that the Certified Agreement was binding on Teekay, the officers and the AMOU and the agreement itself so provided (cl 5).

58 The WR Act provided the mechanism for extending, varying or terminating an agreement: Pt VIB Div 7. It stipulated a framework for negotiations: Pt VIB Div 8. It prohibited coercive conduct in the making, varying or termination of an agreement: Pt VIB Div 9 (s 170NC). It imposed civil penalties and other remedies for contraventions of an agreement: Pt VIB Div 10 and Pt VIII Div 1 (s 178). It gave the power to a court of competent jurisdiction to order the employer to pay the employee an amount the employer was required to pay but did not pay: s 178(6). It also gave employees the right to sue for payments that should have been made under an award, order or agreement, but imposed a six year limitation period in which action could be taken: s 179.

The Certified Agreement

59 Clause 4 of the articles of agreement Mr Visscher signed for each of his two voyages on the *Broadwater* provided that:

> Subject to any industrial award or agreement that is applicable, the Master will pay to a seafarer wages at the rate specified in relation to that seafarer.

60 The relevant industrial agreement was the (2001) Certified Agreement. The parties to that agreement were Teekay, the AMOU and "all employees engaged as Masters or Deck

Officers who [were] members of the AMOU on vessels defined as the "fleet" operated or managed by Teekay Australia" (cl 3).

61 By reason of the WR Act, the Certified Agreement had the force of law: *Giudice* at [71], approving in this respect a statement by Buchanan J in the Full Court (*Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 ("*Visscher v AIRC*")) at [56]. Cf. *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [11].

62 The articles of agreement for the first voyage provided that the agreement was subject to the Maritime Industry Seagoing Award as varied from time to time. The articles of agreement for the second voyage contained the same provision but also provided that they were subject to "EBA's [enterprise bargaining agreements] ratified by the AIRC as varied from time to time". Plainly, the agreement for each voyage incorporated the Certified Agreement. Cf. *Quickenden v O'Connor* (2001) 109 FCR 243.

63 The Certified Agreement provided, amongst other things, for a dispute settlement procedure (Part 2), the conditions of employment (Part 3) (including hours of work and rest periods, salaries, training, offers of employment, selection criteria, induction and probation, and air travel), employee performance and career progression (Part 4) (including cessation of employment), leave (Part 5), occupational health and safety (Part 6), and employee benefits (Part 7) (including superannuation, safety and industrial clothing, expenses and allowances, amenities, redundancy pay, funding of telephone calls and reimbursement of expenses).

64 Clause 13 dealt with salaries. Officers were to be remunerated at a base rate that was consistent with the classification in which they were sailing (13.1). The salaries were to be paid for leave periods on the basis of the salary rate at which the leave was accumulated (13.2). Officers relieving in a higher rank were to be paid at the grade 1 rate for that rank for periods of duty and while on leave from those periods of duty (13.4). Clause 13.9 dealt with the calculation and method of payment of salaries. Salaries were to be paid monthly on the 15th day of each month unless otherwise agreed and deposited directly into the officer's nominated bank account. The amount of the monthly salaries, allowances and deductions were to be calculated by dividing the annual rates by 12.

65 Where officers were employed on a casual basis (that is, not made permanent) they were to be paid a loading of 6.7% of their salary (24.1).

66 Cessation of employment was covered by the remainder of cl 24. Officers were required to give seven days' notice in writing if employed less than three months, otherwise 28 days' notice in writing (24.2). Officers giving notice to terminate their services in accordance with cl 24.2 were also required to comply with cl 27 (concerning swing arrangements) (24.3). A permanent officer whose services would be terminated had to be given written notice or payment in lieu in accordance with a scale set out in cl 24.4. Had Teekay wanted to terminate Mr Visscher's employment in it would have been required to give him 60 days' notice or 28 days' salary (24.4.4). Officers guilty of serious misconduct on a vessel or in relation to their employment could be summarily dismissed with no entitlement to wages, travel or other allowances (24.5).

67 Provision for accrued leave was made in cll 26 and 28. Clause 5.2 provided:

> This agreement is to be read and interpreted wholly within the MISA 1999 (the Award); provided that where there is any inconsistency between the Agreement and the Award, this agreement will prevail to the extent of the inconsistency.

Does the *Navigation Act* apply?

68 On their face the relevant statutory provisions apply to deck officers as well as deck hands. Sections 75 and 78 refer to a "seaman". "Seaman" is defined in s 6 to mean:

> a person employed or engaged in any capacity on board a ship on the business of the ship, other than:
>
> (a) the master of the ship;
>
> (b) a pilot; or
>
> (c) a person temporarily employed on the ship in port.

69 But Teekay submitted that ss 75 and 78 do not apply to Mr Visscher because they are concerned with seamen who were paid wages and he was not, nor entitled to be. Rather, pursuant to his contract of employment and the Certified Agreement, he was paid an annual salary in monthly instalments by direct deposit into his bank account. For this reason alone, Teekay's case is that s 78 does not apply to him. The first question, then, is whether the *Navigation Act* only applies to wage, and not salary, earners.

Does the* Navigation Act *only apply to wage and not salary earners?

70 The answer to this question depends on whether "wages" in the Act is apt to include salaries.

71 In my view the narrow interpretation Teekay urged is unwarranted. In the first place, the definition itself does not call for it. In the second place, in its ordinary meaning, "wages" may include salary. In the third place, there is authority against it.

72 There is no exhaustive definition of wages in the *Navigation Act*. "Wages" are merely defined in an inclusive way in s 6 as "includes emoluments".

73 The Macquarie Dictionary defines wage(s) as:

> that which is paid for work or services, as by the day or week; hire; pay.

74 It defines a salary as:

> a fixed periodical payment paid to a person for regular work or services, especially work other than that of a manual, mechanical, or menial kind.

75 The Oxford English Dictionary defines "wage" (in the relevant sense) as:

> a payment to a person for service rendered. Formerly used widely, e.g. for the salary or fee paid to persons of official or professional status. Now (exc. in rhetorical language) restricted to mean: the amount paid periodically, esp. by the day or week or month, for the labour or service of an employee, worker, or servant.

76 On the other hand, it contrasts "wages" and salaries" defining "salary" as:

> Fixed payment made periodically to a person as compensation for regular work: now usually restricted to payments made for non-manual or non-mechanical work (as opposed to *wages*).

77 In *Gurran v Tarbook Pty Ltd* [1996] IRCA 453 Lee J (who was concerned with the meaning of the term "relevant wages" in s 170CD of the *Industrial Relations Act*) noted:

> In its ordinary meaning the word "wages" has been used to describe the regular payments made by an employer to a worker for labour provided to the employer by the worker, that is, the payments made for other than "white-collar jobs". (See: *Mutual Acceptance Co Ltd v FCT* (1944) 69 CLR 389 per Rich J at 398.) It is to be distinguished from the meaning applied to the word "salary" which refers to a fixed sum or stipend paid by periodical instalments to an employee for regular work performed by the employee being work of a non-manual or non-mechanical kind.

78 After the passage quoted above, however, his Honour observed:

> In common parlance the difference between "wages" and "salary" has become blurred in recent years and occasionally wages may be used in a generic sense to include payments received as salary. There is nothing in Div 3 of Pt VIA to indicate that the terms of the Division are restricted to employees who are workers who receive wages stricto sensu and that the Division does not extend to employees who receive salary. Having regard to the secondary meaning of the word wages and the apparent application of Div 3 to employees generally, the expression "relevant wages" used in s170CD should be taken to include salary paid to an employee.

79 Marshall J endorsed this approach in *Hargreaves v National Safety Council of Australia* (1997) 77 FCR 272 at 277.

80 In my opinion, this is the sense in which "wages" is used in the *Navigation Act*. It is a periodic payment for work performed as an employee.

81 As the Full Court pointed out in *Visscher* (at [53]), the courts have taken a broad view of the meaning of "wages" (referring to the discussion by Black CJ in *United States Trust Company of New York v Master and Crew of Ship "Ionian Mariner"* (1997) 77 FCR 563 at 582). "Wages" has therefore been held to include meal allowances (*The Tergeste* [1903] P 26), bonuses (*The Elmville (No 2)* [1904] P 422), insurance contributions (*The Gee-Whiz* [1951] 1 Lloyd's Rep 145) and contributions to a pension fund (*The Halcyon Skies* [1977] 1 QB 14 at 26). There is authority that it excludes severance pay because severance pay is in the nature of compensation for the loss of the expectation of an offer of further employment rather than consideration for service: *The "Tacoma City"* [1991] 1 Lloyd's Rep 330 ("*The Tacoma City*") esp at 348 per Dillon LJ. But this decision has been widely criticised: Ng M, "The Protection of Seafarers' Wages in Admiralty: A Critical Analysis in the Context of Modern Shipping" (2008) 22 A & NZ MarLJ 133 at 149–150 and the cases referred to there.

82 "Wages" constitute remuneration for services: *The Tacoma City* at 346. Salaries are paid as remuneration for services. In *Mobil Oil New Zealand Ltd v The Ship "Rangiora" (No 2)* [2000] 1 NZLR 82, which was concerned with a claim for wages under the *Admiralty Act 1973* (NZ), it was held (at 87) that wages constitute "any form of payment which had been promised in return for the seafarer's agreement to work on the ship".

83 Importantly for present purposes "wages" has also been interpreted in the same context to include paid leave, being an addition to wages which the seaman can "be fairly said to have earned by his services": *The "Arosa Star"* [1959] 2 Lloyd's Rep 396 at 402–3.

84 In any case, "emolument" is defined in the Oxford English Dictionary as:

> Profit or gain arising from station, office, or employment; dues; reward, remuneration, salary.

85 Similarly, "emolument" is defined in the Macquarie Dictionary to mean:

> profit arising from office or employment; compensation for services; salary or fees.

86 I therefore conclude that, for the purposes of the *Navigation Act*, salaries are "wages" either so-called or by reason of the extended statutory meaning.

87 But this conclusion does not dispose of the question whether ss 75 and 78 apply to a salaried deck officer. The answer to that question also turns on the proper construction of the sections and their relationship to the Certified Agreement.

88 It is common ground that Mr Visscher's salary was not determined by the articles of agreement, but by the Certified Agreement, an agreement certified under s 170LT of the WR Act. As Teekay pointed out, ss 75 and 78 contemplate that the source of a seaman's right to wages is the agreement signed between him and the master (the articles of agreement). Similarly, ss 75 and 78 contemplate payment of wages on "discharge", and that is different from the rights conferred by the Certified Agreement. It is Teekay's position that the rights and obligations created by the awards and agreements made pursuant to the WR Act are inconsistent with the provisions of the *Navigation Act* on which Mr Visscher relies. For example, it argues that Mr Visscher cannot be entitled to both an annual salary paid by monthly direct deposits into a bank account (plus a higher duties allowance if relieving in a higher rank) (see especially cll 13.12, 13.9 and 13.4), *and* be entitled to be paid in full "before or at the time of a discharge" (which is to say, before he actually leaves the vessel). Mr Visscher accepted as much, although he responded that the Certified Agreement is void to the extent of the inconsistency. He relied on s 83 of the *Navigation Act* and cl 35 of the Certified Agreement and, in particular, cl 35.1. Clause 35 is in the following terms:

> **35 NAVIGATION, SEAFARERS REHABILITATION AND COMPENSATION ACTS**
>
> 35.1 Nothing in this Agreement shall be construed as limiting the rights of any officer are under the *Navigation Act* 1912 as amended.
>
> 35.2 The *Navigation Act* 1912 as amended and Marine Orders, applies in respect of all officers covered by this Agreement.
>
> 35.3 Seafarers Rehabilitation and Compensation Act, 1992, and Regulations made hereunder will be read in conjunction with this Agreement and applies in respect of all officers covered by this Agreement.

89 Teekay, however, argued that the relevant provisions of the *Navigation Act* are confined in their operation to those seafarers whose terms and conditions of employment are regulated only by articles of agreement.

Do ss 75 and 78 of the* Navigation Act *apply to seafarers whose employment is regulated only by articles of agreement? If not, what is the effect of s 83 of the Act?

90 I propose to deal first with Mr Visscher's submission.

91 The first part of the submission obtains some support from an observation made by the Full Court in *Visscher*. Referring to s 83(1)(a) and (3) the Full Court (at [59]) asserted that Mr Visscher's entitlement to be paid wages in accordance with ss 75(1) and 78 of the *Navigation Act* "overrode any other agreements between the parties *including the certified agreement*". (Emphasis added.) The operation of s 83, however, was not an issue in the proceeding before the Full Court. It was not an issue on the application for summary judgment. And it was made without the benefit of argument. It is, with respect, an overstatement.

92 Section 83 of the *Navigation Act* relevantly provides:

> **83 Recovery of wages**
>
> (1) No seaman shall, by any agreement:
>
> (a) be deprived of any remedy for the recovery of his or her wages; …
>
> …
>
> (3) Every stipulation in any agreement, inconsistent with any provision of this Act, shall be void.
>
> …

93 Teekay argued that s 83 does not apply to oust the operation of the Certified Agreement, notwithstanding the Full Court's observation. It relied on the definition of "agreement" in s 6 of the *Navigation Act*, to which the Full Court had referred earlier in its reasons but which in this

context may have been overlooked. Teekay submitted that the words "any agreement" did not include the Certified Agreement because the definition did not capture it.

94 There is much to be said in favour of this argument. Section 6(1) relevantly provides that, unless the contrary intention appears, "agreement" "in relation to a seaman belonging to a ship" [that is a crew member – see s 6(4A)] means the agreement between the master of the ship and the seaman. The expression "articles of agreement" is defined in s 6(1) as having the same meaning. In other words, generally speaking, "agreement" is synonymous with "articles of agreement". Yet in this instance I do not think that "any agreement" should be taken to be limited to "articles of agreement". As the Full Court pointed out, historically the courts would not recognise changes to the terms of service that were negotiated during the voyage. One of the purposes of the *Navigation Act* and its English predecessors was to protect the rights of seafarers by ensuring that the terms on which they were engaged to serve on a ship at sea were identified and agreed to before the voyage. Doubtless, this purpose was also behind s 83. Construing the section in the way Teekay urged would defeat that purpose. But not so if it is read so as to exclude the Certified Agreement. Construing the section in this way would promote, not subvert the statutory purpose.

95 Section 83 precludes a master or owner from entering into an agreement with a seaman of the kind mentioned in the section. For two reasons, the Certified Agreement was not such an agreement.

96 First, it was not an agreement between the master or owner and the seaman. It was an agreement between the shipowner, all its salaried deck officers and their industrial association. See WR Act, Pt VIB.

97 Secondly, it was an agreement of a special character.

98 In *The Federated Seamen's Union of Australasia v The Commonwealth Steamship Owners' Association* (1922) 30 CLR 144 ("the *FSU* case") the shipowners argued that the articles of agreement coupled with the provisions of the *Navigation Act* constituted a complete code for the regulation of the rights and duties of seamen with which "the profane hand of the Court of Conciliation" was not entitled to interfere. In a passage to which the Full Court in *Visscher* did not refer, Higgins J held (at 161–2) that it was a sufficient answer to this argument

to say that ss 46 and 83 of the Act refer only to agreements and the award was not an agreement but the determination of a dispute where the parties were unable to reach agreement and a compulsory binding order. A certified agreement is not an award but its effect is the same.

99 In the *FSU* case Isaacs J cited with approval (at 158) the following remarks made by Gorell Barnes J (later Lord Gorell) in *The Wilhelm Tell* [1892] P 337 at 348:

> The policy of the law is to protect seamen from improvident arrangements, and to encourage their exertions to save life and property. An agreement which secures these objects appears to me to be unobjectionable.

100 The Certified Agreement was such an agreement.

101 I do not consider that it was intended that the section would extend to an enterprise agreement, negotiated by the union on behalf of the employees and to which it is also a party, approved by the independent umpire, and having the force of law.

102 For these reasons, the Certified Agreement was not an agreement within the meaning of s 83 with the result that any stipulation in it that is inconsistent with the *Navigation Act* is not void.

103 The next question is whether the Certified Agreement effected an implied repeal of the relevant provisions of the *Navigation Act*.

***Did the Certified Agreement effect an implied repeal of the relevant provisions of the* Navigation Act?**

THE LEGAL PRINCIPLES

104 "Very strong grounds" are required to support such an implication. It can only arise where "the two enactments are so inconsistent or repugnant that they cannot stand together": *Goodwin v Phillips* (1908) 7 CLR 1 at 10. In *Saraswati v The Queen* (1991) 172 CLR 1 Gaudron J remarked at 17:

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other: see *Butler v Attorney-*

General (Vict.) (1961) 106 CLR 268.

105 Similarly, in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 Gummow and Hayne JJ observed at 585–6:

> [T]o read one statute as abrogated by other than express words in a later statute is a large step, different in character from the construction of parts of a subsisting whole. It is one thing to treat an earlier statutory provision as repealed by a subsequent enactment, and another to say that, as a matter of construction, whilst both provisions remain in force the power conferred by one of them is insusceptible of exercise in certain factual circumstances.

106 The proper approach is to read the provisions of the Certified Agreement and the *Navigation Act* together: cf. *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at [28]; *Commissioner of Police New South Wales v Gray* (2009) 74 NSWLR 1 at [109]–[110].

107 In the *FSU* case where the relationship between the *Navigation Act* and the *Conciliation and Arbitration Act* was in issue, Isaacs J said (at 157) that the two Acts stood "side by side". He said there was no room in the statutory language or judicial precedent for an implication that the Arbitration Court under its Act could override a provision of the *Navigation Act*. Higgins J said (at 162) that there was "nothing, from first to last, in the *Navigation Act* purporting to repeal any part of the Conciliation Act, or necessarily involving its repeal" and Starke J expressed a similar opinion (at 163–4).

108 I am unpersuaded that any change in this position was intended by the WR Act. Indeed, the WR Act points in the opposite direction. Section 170LZ(4) provided that an agreement certified by the AIRC pursuant to s 170LT of the WR Act (as the Certified Agreement was) displaces certain conditions of employment specified in some particular Commonwealth laws to the extent of any inconsistency. But the *Navigation Act* is not one of those laws. That tells against the likelihood that repeal is implied.

THE OPERATION OF CL 35.1 OF THE CERTIFIED AGREEMENT

109 Clause 35.1 of the Certified Agreement provides that nothing in the Agreement shall be construed as limiting the rights of any officer under the *Navigation Act*. On its face, that also points to an intention that the Agreement would not remove the rights conferred by ss 75, 76 and 78 of the Act. The clause is entitled "Navigation, Seafarers Rehabilitation and Compensation

Acts". For this reason Teekay argued that the clause does not assist Mr Visscher because it was limited in its operation to matters relating to occupational health and safety. For the following reasons I reject the argument.

110 A certified agreement is to be construed in the same way as an award: *Ansett Australia Limited (subject to Deed of Company Arrangement) v Australian Licensed Aircraft Engineers' Association* [2003] FCAFC 209 ("*Ansett*"); *Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd* (1998) 80 IR 208 at 212. Thus, a narrow or pedantic approach is unwarranted, but a court is "not free to give effect to some anteriorly derived notion of what would be fair or just": *Kucks v CSR Limited* (1996) 66 IR 182 at 184 per Madgwick J. As his Honour went on to explain:

> The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for.

111 This oft-cited passage was approved in *Ansett* at [8].

112 In *Short v F W Hercus Pty Limited* (1993) 40 FCR 511, where the question was raised as to whether it was legitimate to look at the history of a clause in an award to interpret its meaning, Burchett J said (at 518):

> The context of an expression may … be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read.

113 In this case I was not taken to the history of the clause. I note, however, that no such clause appears anywhere in the 1998 agreement. Indeed, the 1998 agreement does not even mention the *Navigation Act*. I regard this circumstance, without more, as a neutral consideration. In the result, I am left with the words themselves and their place in the document.

114 There is room for the operation of the narrow construction preferred by Teekay. Clause 35 is found in Part 6, the heading of which is "Occupational Health and Safety". The heading is part of the context and should be taken into account in determining the meaning of the clause: cf. *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) 169 CLR 594 at 601. On its face, Part 6 has nothing to do with rights to recover unpaid wages.

115 Clause 35 is one of four clauses. The subheading to the first – cl 33 – is also "Occupational Health and Safety". The second cl 34 is headed "Compensation" but is directed to the objective of an injury-free workplace. Clause 35 is the third. The fourth – cl 36 – is headed "Sick Officers Landed" and extends the operation of certain provisions of the *Navigation Act* making shipowners liable for medical and related expenses in certain circumstances to all officers, including masters, who, under the Act, do not fall within the definition of "seaman". It would be odd to find a clause intended for general operation sandwiched between other clauses dealing with a specific topic.

116 The placement of cl 35.1 tells against it having an operation outside the area of occupational health and safety. If the intention of the Certified Agreement were to limit all rights, and not merely those concerned with matters of occupational health and safety, one would expect it to be located elsewhere in the Agreement. If it were intended to apply to rights to recover wages, then one might expect to find it in Part 3.

117 Div 14 of Pt II of the *Navigation Act* confers rights on seamen (including officers) with respect to matters connected in a broad sense, at least, to occupational health and safety. Section 127, for example, requires that certain expenses associated with the treatment, maintenance and conveyance of sick or injured seamen be paid by the shipowner. Section 132 provides for a right to wages for sick or injured seamen left on shore (up to a maximum of three months). At the time the Certified Agreement was entered into, there were also Marine Orders dealing with health matters: *Marine Orders – Part 9: Health - Medical Fitness, Issue 5* (Order No. 22 of 1999) (Cth).

118 On the other hand, Part 6 of the Agreement does not apparently impose any limit on the rights of any officer.

119 Reading cl 35 in context, however, requires consideration, not merely of the text of the clause, the Agreement as a whole, and other particular provisions of it, but also the legislative background against which it was made and in which it was to operate: cf. *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [30]. The *Navigation Act* is part of that legislative background.

120 In any case, although the words must be read in their context, the starting point of construction (whether the instrument be a statute or a contract) is with the words themselves. The language used in cl 35 is wide. It is also unambiguous. It is not confined in its terms to occupational health and safety issues. If its intention were to preserve only particular rights and not all rights, why not say so?

121 In *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 321 where the question was whether s 133 of the *Motor Vehicles Act 1959* (SA) (which provided that certain contracts were void) should be read down because of the subject-matter of the other provisions in the part of the Act where it appeared, Gibbs CJ considered (at 312) that the words of the section should be given their ordinary meaning where the section went beyond, but did not contradict, the purpose of the other provisions in the part, make them less effective, bring about an inconvenient, improbable, unjust, absurd or irrational result, or render the words obscure or doubtful.

122 Deane J, with whom Gibbs CJ, Brennan and Dawson JJ agreed, said at 322–3:

> The fact that the operation of the plain words of a statute extends beyond the requirements of the particular legislative scheme which provided the context and occasion of their enactment provides of itself no sufficient warrant however for refusing to give effect to the words which the legislature has seen fit to use. This is particularly the case where the proposed confinement of those plain words would exclude applications of the words actually used to circumstances to which their application would be neither unexpected nor surprising …

123 His Honour also said that because the language of the section was clear, the section should not be read down by reason of the heading either. The same approach applies to the interpretation of a contract: Lewison K and Hughes D, *The Interpretation of Contracts in*

Australia (Lawbook Co, 2012) [5.13], p 205. In *Management 3 Group Pty Ltd (in liq) v Lenny's Commercial Kitchens Pty Ltd* [2011] FCAFC 162 the Full Court said at [39]:

> If the words are plain and unambiguous they must be given their plain meaning, even if that leads to a capricious or unreasonable result *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109-10 per Gibbs J). However, if the ordinary meaning of the words is inconsistent with other clauses of the Contract, that may be a reason to depart from the plain meaning.

124 Taking into account the text of cl 35, the Part in which it appears and the Agreement as a whole, as well as the legislative background against which it was made and in which it was to operate, I conclude that cl 35 should not be read down to refer only to the limited rights of officers conferred by Div 14 of Pt II of the *Navigation Act*. Clause 35 evinces an intention that the Agreement operate alongside the *Navigation Act* and the rights the Act confers.

ARE THE *NAVIGATION ACT* AND CERTIFIED AGREEMENT IRRECONCILABLE?

125 The Certified Agreement provides no remedy for the recovery of unpaid salary or leave entitlements. That does not necessarily mean that it was intended that a seafarer retain his or her rights under s 78 of the *Navigation Act*, as the unpaid entitlements could be recovered in an action for breach of contract, but it is a pointer in that direction. It also demonstrates the absence of any direct inconsistency.

126 Teekay argued, however, that the central provisions of the *Navigation Act* are irreconcilable with the Certified Agreement. It pointed out that the Act proceeds on the basis that there is a contract between the master and the seaman for a strictly limited period of time (six months or the end of the voyage) after which the master may discharge the seaman. It also submitted that the Act proceeds on the basis that:

(a) the articles of agreement are the source of the right to be paid;

(b) the approval of "the proper authority" (the Australian Maritime Safety Authority ("AMSA")) is required to add or amend the articles of agreement;

(c) payment is to be made in cash (referring to ss 75, 77 and 78);

(d) payment is made solely by reference to the number of days served with no provision for leave (i.e. no provision for paid leave); and

(e) the seaman will only be paid one day's wages for each day worked.

127 For the reasons I have already given, I do not accept that there is no provision for paid leave. I also do not accept that the *Navigation Act* proceeds on the basis that wages must be paid in cash (unless the submission is only intended to distinguish payment in kind). Otherwise, I accept these submissions. Aspects of the Act are archaic. They originate from the time when seafarers signed up with a ship for a voyage, a time that preceded the regulation of wages and conditions by any system of arbitration. Moreover, until 1998 "ratings" (seafarers who were not officers) were engaged through an industry registration scheme run by AMSA and their contracts of employment were made, not with shipowners, but with masters. Nevertheless, once it is accepted that "wages" includes salaries and leave entitlements, that a deck officer is a "seaman" within the meaning of the Act, and that masters ("so far as the case permits") have the same rights, liens and remedies for the recovery of their wages as seamen (see s 94(1)), it does not necessarily follow from the facts to which Teekay points that all or any of the central provisions of the Act are irreconcilable with the Certified Agreement. The sections to which Teekay referred to do not stipulate that payment be made in cash and it is not inconsistent with the Act for the payment to be made into the nominated bank account of the seafarer. Indeed, any delay brought about by the ship not being at a port where there is a bank (see s 77(2)) is avoided by the direct deposit arrangements for which the Agreement provides. In this respect, the Certified Agreement is more beneficial than the Act and for the reasons given in the *FSU* case, no inconsistency arises.

128 The question in the *FSU* case was whether the Court of Conciliation and Arbitration had the power to make a binding award that included a clause requiring wages to be paid fortnightly when s 77(2) of the *Navigation Act* required that they be paid monthly. By a majority (Knox CJ and Gavan Duffy J dissenting) the Court held that it did and that the clause was not inconsistent with the Act. In reaching that conclusion Isaacs J noted (at 156–7) first, that the relevant clause did not surrender any protection given by the Parliament. Secondly, there was nothing to suggest that the interests of Australian seamen or the community would be prejudiced by the payment of wages on a more frequent basis than that for which the Parliament provided. Nor was there anything to suggest that Australian shipowners could not be trusted in their own interests to agree to more frequent payments. His Honour continued:

> Nothing in fact can be suggested but the arbitrary will of Parliament that monthly payments generally—not in any case earlier, whatever the necessities of the seamen, but possibly later, according to the convenience of the shipowners—shall be rigidly adhered to notwithstanding both parties, the superintendent approving, desire otherwise. It is so extraordinary a conclusion that nothing but the most express direction of the Legislature

> could establish it. The finding by the Arbitration Court, after hearing evidence that it is beneficial, is strong proof that no known evil exists to exclude it.

129 Mr Visscher submitted that the Certified Agreement, which rewards seafarers whether they are on board ship or on leave (see especially cl 13.2), is inconsistent with s 77 of the *Navigation Act*. According to him, s 77 provides for payment only of wages earned while serving on board a ship. I do not accept the submission. It is based on a false premise. Section 77 does not provide that wages claimed are earned only on board ship. That was a requirement of s 10 of the *Admiralty Court Act 1861* (Imp) but it is not a requirement of s 77 or of the *Admiralty Act 1988* (Cth). Further, leave is also earned and payment of salary for leave periods is payment for "wages" earned.

130 Mr Visscher also submitted that s 77 of the *Navigation Act* is inconsistent with cl 13.9 of the Certified Agreement, which provides for a monthly payment consisting of a payment in arrears for one fortnight and in advance for another, in contrast with s 77(1) which provides for payment of wages fortnightly in arrears. But both cll 13.2 and 13.9 are more beneficial for seafarers than s 77. It follows from the decision in the *FSU* case that they could not then be regarded as inconsistent with it.

131 In any event, and in answer to all these submissions, s 77(1) begins with the phrase "subject to any provision to the contrary in his or her agreement". "Agreement", as I have already observed, means "articles of agreement" and, as I observed at [59], cl 4 of the articles of agreement provided that payment of wages was subject to any applicable industrial award or agreement. Mr Visscher argued that this clause only applies to the rate of wages but I reject the argument. It seems to me that its intention was to pick up, not merely the rate of wages, but also all matters dealt with in the relevant award or agreement relating to the manner and method of payment. Consequently, to the extent of any inconsistency, the provisions of s 77(1) must yield to the regime in the Certified Agreement.

132 In my view, however, there is no manifest inconsistency between the *Navigation Act* and the Certified Agreement. There is no necessary implication in the Certified Agreement of an intention to repeal the relevant provisions of the *Navigation Act*. Nor are the rights conferred by the Act apparently insusceptible of exercise by salaried officers. The rights conferred by the Act are longstanding. Absent express terms, it would be surprising if, by the Certified Agreement, the parties intended to remove them. Indeed, cl 35 suggests otherwise.

133 For all these reasons it seems to me that the Certified Agreement does not effect an implied repeal of the relevant provisions of the *Navigation Act*, and no provision of the Certified Agreement is void by reason of inconsistency with the *Navigation Act*. In my opinion, the Certified Agreement was intended to work hand in glove with the *Navigation Act*.

134 Thus, whether Mr Visscher is entitled to the relief he seeks depends on whether he can bring himself within the terms of s 78 and, if so, whether Teekay can bring itself within one of its exceptions. It is to these questions that I now turn.

Was Mr Visscher discharged at the conclusion of the two voyages? Was his employment terminated at the same time?

135 For s 75 (and therefore s 78) to apply, Mr Visscher must have been "discharged" at the conclusion of each voyage. As I mentioned in [50] "discharged" is not defined in the *Navigation Act*, but the noun "discharge" is defined in s 6 as "the certificate of discharge given to a seaman upon his or her discharge from a ship". The effect of the certificate, as Mr Visscher put it, is to sever the relationship between the seafarer and the master but not the relationship between the seafarer and his or her employer. The evidence shows that a certificate of discharge may be given to a seaman in a range of different circumstances, including when the seaman takes leave. It is common ground that a certificate of discharge is given when a seaman changes his articles. That is what happened when Mr Visscher left the *Broadwater* in Dampier on 3 May 2004. In each case the seaman remains an employee of the shipowner. Yet, Mr Visscher does not contend that the provisions of ss 75 and 78 apply in these cases.

136 Unless the contrary intention appears, the verb should have the corresponding meaning: *Acts Interpretation Act 1901* (Cth), s 18A. The arguments in this case proceeded on the assumption that s 75 only applies where a seaman is discharged from employment. But I do not consider that it is limited in its application in this way, except where the termination of employment coincides with discharge from the ship. The *Navigation Act* regulates service on ships. A seaman enters into articles of agreement with the master for service on a ship. A certificate of discharge is provided when the seaman leaves the ship, that is, when he leaves the service of the master, not when he leaves the service of the employer. The rights conferred by s 78 are rights conferred on discharge from a ship, not discharge from employment.

137 But the rights accruing on discharge do not apply if the seaman leaves the ship temporarily. Section 6(4C) of the *Navigation Act* provides that:

> A person who, in pursuance of articles of agreement, ceases temporarily to be a member of the crew of a ship shall not be taken to have been discharged from the ship.

138 Clause 7A of the articles of agreement provided that:

> A seafarer who is temporarily absent from the ship in accordance with the terms of an award or agreement relating to his/her service as a seafarer shall cease temporarily to be a member of the crew of the ship.

139 Plainly, then, if Mr Visscher, in accordance with the terms of his contract, ceased temporarily to be a member of the crew of the *Broadwater* on 3 March 2004 and/or on 26 May 2004, he was not "discharged" from the ship for the purpose of s 75 (so as to trigger the operation of s 78), regardless of whether his employment came to an end at that time. That is because (with one qualification to which I will come later) the claim for the first voyage is a claim for accrued leave entitlements. Under the terms of his contract Mr Visscher was only entitled to be paid those entitlements on leaving the company. Those entitlements were only due on 3 March 2004 if discharge from the *Broadwater* coincided with termination of employment. It is therefore necessary to determine whether Mr Visscher's employment was terminated on 3 March 2004. That depends on whether he resigned and Teekay accepted his resignation or whether, as Mr Visscher maintained, he was constructively dismissed.

140 Mr Visscher's case was that Capt McLellan had accepted that his employment with Teekay had come to an end and it was not necessary to decide these questions. Attractive though it may be to accept that proposition, for a number of reasons I cannot do so.

141 In para 46 of his first affidavit of 27 April 2007 Mr Visscher said that he discussed Mr Scott's letter with Capt McLellan but that Capt McLellan told him it would be no good discussing the matter with Mr Scott, who, from the content and tone of his letter, seemed to be "very firm". In para 48 of that affidavit Mr Visscher said that the conversation ended with the following exchange:

> Mr Visscher: My employment with Teekay is at an end due to Teekay's intention to demote me. Please give me my discharge when I leave the vessel when we arrive in Kurnell.
>
> Capt McLellan: I agree.

142 Although Mr Visscher produced contemporaneous diary notes to support his account of some conversations, he did not do so in relation to this particular conversation. Indeed, neither party appears to have made a contemporaneous note of it. That Mr Visscher asked for his discharge is not controversial. But in the absence of a contemporaneous record, there must be some doubt about the precise terms of the conversation.

143 The words attributed to Capt McLellan in this exchange acquired some importance in the Full Court appeal in *Visscher*. The Full Court interpreted them to mean that Capt McLellan was agreeing that Mr Visscher's employment was at an end. But, assuming these words were uttered, they were ambiguous. With what was he agreeing? Was he agreeing with the proposition that Mr Visscher's employment was at an end? Was he agreeing with Mr Visscher's assertion that Teekay was intending to demote him? Was he agreeing that his employment was at an end for that reason? Or was he merely agreeing to give Mr Visscher his discharge when he left the vessel at Kurnell?

144 After the Full Court allowed the appeal, Teekay adduced its evidence. Capt McLellan said that he did not at any time accept Mr Visscher's resignation but he also said that he could not remember the above exchange or a conversation to that effect. That is scarcely surprising. The first time he was asked to apply his mind to the conversation was in March this year. Mr Visscher, on the other hand, has been through two court cases in which this conversation was an important feature. That fact alone, however, does not mean that everything Mr Visscher said must be true. Indeed, I think it is very likely that Mr Visscher's recollection of events has been coloured by his ongoing dispute with Teekay.

145 Capt McLellan did give Mr Visscher a certificate of discharge when he left the *Broadwater* in Kurnell. The certificate, however, recorded the reason for discharge as "leave". The signatures of both Capt McLellan and Mr Visscher appeared on the document. Capt McLellan's evidence, which I accept, was that "leave" signified that the seaman would be on shore for a period of time before returning to the *Broadwater* or another of Teekay's ships. On the face of the document, then, Mr Visscher was not discharged within the meaning of s 75 when he left the Broadwater on 3 March 2004.

146 In cross-examination Capt McLellan said he did remember talking to Mr Visscher about his draft email and Mr Scott's fax and Mr Visscher insisting he had not resigned.

147 In a statement filed in reply to Capt McLellan's affidavit on 11 April 2012, Mr Visscher said that in the same conversation the following exchange took place:

> Capt McLellan: Vince Scott seems very firm in what he writes. **You are no longer employed by the Company.** It will do you no good to discuss the letter with him.
>
> Mr Visscher: **Yes, that is certainly the case.** My employment with Teekay is at an end due to Teekay's intention to demote me. Please give me my discharge when I leave the vessel when we arrive in Kurnell.
>
> Capt McLellan: **Very well**, I agree. **Teekay are fools for letting someone like you go like this. It is a shame.**
>
> (Emphasis added.)

148 The words appearing in bold above remove the ambiguity in the words "I agree". The first two emboldened passages appeared in Mr Visscher's affidavit in reply sworn on 27 April 2010 but not in his first affidavit sworn three years earlier. The emboldened words in the last two sentences, attributed to Capt McLellan, appeared for the first time in the statement filed in April this year. None of the emboldened passages appeared in the statement Mr Visscher prepared for the AIRC proceeding in August 2004. There, the notion that Mr Visscher's employment had ended was entirely his. The AIRC statement might cast a different light on the first comment attributed to Capt McLellan that Mr Scott seemed "very firm". It leaves open the inference that Capt McLellan's comment might simply have related to the requirement that Mr Visscher sail as Second Mate. None of the detail of the conversation that emerged in the evidence in this Court, so many years later, appeared in the AIRC statement.

149 Having now heard from Capt McLellan, I think it is most unlikely that he agreed at the time that Mr Visscher's employment was at an end. And I do not accept that Capt McLellan actually told Mr Visscher that he was no longer employed by Teekay. Indeed, I do not accept that any of the additional words were uttered. Why, in the case of the first two additional sentences, they emerged three years after the first affidavit was sworn (and six years after the event) and, in the case of the last, five years afterwards (and eight years after the event), was never explained. Whatever the reason, however, I do not think the additional evidence is reliable.

150 First, it is unlikely that Mr Visscher's memory has improved over the years since the conversation took place. In fact, the contrary is more likely. As McLelland CJ in Eq observed in *Watson v Foxman* (1995) 49 NSWLR 315 at 319:

> human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

151 Secondly, Mr Visscher's evidence contains one obvious misrepresentation. In his second affidavit (sworn in April 2010) he insisted that neither the AMOU nor Teekay had told him of any threat by the union to take protected industrial action over his promotion. That evidence was, at best, misleading, at worst false. On 6 September 2001 a circular was sent by email to AMOU members on all Teekay ships alerting them of the union's intention to go on strike over the recent promotions. Later that day Fred Ross, a former AMOU president, sent an email to one of Teekay's second mates stating that he had completed the legal formalities to take protected industrial action from 10 September 2001. These two emails were forwarded by the master of the *Karratha Spirit* to the ship's Chief Officer and on the following day to Mr Visscher at his home email address. Doubtless, it was in response to the information in these emails that Mr Visscher wrote to the union on 10 September 2001 giving notice that he would sue the AMOU if it did anything to affect his income, referring to its attempt to instigate industrial action that could affect his promotion. During cross-examination (in May 2012), Mr Visscher's maintained that what he said in his second affidavit was correct, and after his attention was specifically drawn to this chain of emails he said the correspondence had "slipped [his] mind" but maintained that Teekay and AMOU had not told him of the threat of industrial action. In my view, this evidence was disingenuous.

152 Thirdly, Capt McLellan thought very highly of Mr Visscher. In 2001 he had written to Teekay that it was rare to sail with someone so dedicated. Mr Visscher said they got along "like a house on fire". I therefore consider it is unlikely that he would readily have agreed to an assertion that the employment of his valued deputy was at an end. If he did, indeed, signify agreement with Mr Visscher, as Mr Visscher testified, in my view, all he was doing was

agreeing to give him his discharge. This conclusion is supported by what Capt McLellan said in cross-examination:

> MR VISSCHER: Now, from this discussion you had with Scott, from the email which I had sent, from your own interpretation of that it being a resignation, coupled with the Scott letter?
>
> MR McLELLAN: I didn't say it was a resignation.
>
> …
>
> MR VISSCHER: When the Scott letter arrived, and you gave it to me, all those things point to one common fact: that I won't be returning to the ship after I'm discharged, would you agree with that?
>
> MR McLELLAN: Not necessarily.
>
> MR VISSCHER: Well, can you explain why?
>
> MR McLELLAN: Yes. You told me you weren't resigning. Mr Scott said he was accepting your resignation, so a master would usually enter one of four standard entries when a person was leaving the ship. One would be "leave", one would be "resign" – you hadn't resigned, or you told me you hadn't, dismissed" – you weren't dismissed, and the other entry would usually be in relation to illness. So I used my best professional judgment, at that time, in 2004, to enter the word "leave".

153 If Capt McLellan had regarded Mr Visscher's employment as at an end, it is inconceivable he would have given him a discharge certificate recording the cause of leaving the ship as "leave". Capt McLellan's evidence was that if a seafarer were to leave a ship of which he was the master in circumstances in which their employment was coming to an end he would have recorded either dismissed or resigned. He stressed that he would write "leave" where he understood the person to be returning to the ship. Capt McLellan had over 30 years of experience of seafaring in Australia. As I mentioned earlier, it is a criminal offence to knowingly sign or give a false certificate of discharge (*Navigation Act*, s 68). It is easy to understand why Capt McLellan would have been concerned to get it right.

154 The certificate of discharge appears to have been prepared on 25 February 2004 but when on that date it is impossible to say. That date appears in numerals in a box underneath the subheading "Particulars of Discharge, Death, Disappearance or Desertion". It is then crossed out and the date 3 March 2004 (the date the ship arrived in port) is inserted in numerals beside it. 25 February 2004 appears at the side of the certificate of release in a box below. It is also crossed out there and above it "3/3/04" and "March" appears. Similar alterations are made in Part 7 of the document, the section containing details of sea service. Capt McLellan conceded

that he probably "populated" the document in advance of the ship's arrival in port and that he probably wrote the word "leave" before he had the conversation with Mr Scott. But he was emphatic that he did not sign it until the ship arrived in port on 3 March. The cause of leaving the ship remained unaltered. I do not believe that, if Capt McLellan considered Mr Visscher's employment with Teekay was at an end, the certificate of discharge would not in some way reflect that position. Assuming that the certificate was partially completed before the conversation with Mr Visscher on 25 February 2004, I do not accept that Capt McLellan carelessly disregarded what he had written concerning the reason for discharge before signing it or giving it to Mr Visscher.

155 Mr Visscher, however, relied on an email Capt McLellan sent him on 7 April 2004 stating:

> Hi Tim,
>
> A little bird informed me you would continue your employment with TK. I really hope this is correct as I felt so sorry regards the last swing and the way it all turned out for you.
>
> Just relax and enjoy yourself, you will do OK I am sure. Let everything take care of itself you have so much to offer.
>
> I leave Monday to go out west for courses and join the Karratha Spirit. I am sure I will be happier there after being on the Broadie for too long!!
>
> Anyway Tim I am pleased you will be staying and fly west where we can sail again.
>
> Take good care and once again thanks for all your help last swing.
>
> Keep in touch.
>
> John

156 Mr Visscher put to Capt McLellan in cross-examination that this e-mail only made sense if he had known that Mr Visscher's employment was not going to continue. But Capt McLellan did not agree. He said that when Teekay told him that Mr Visscher would be returning to the *Broadwater* he thought back to the word "leave" on the certificate and it "reinforced the idea in [his] mind" that it was the correct entry to make. It is, of course, possible that Capt McLellan was merely reconstructing events. He frankly admitted that he did not recall "a lot" of the conversation and it appears that no detailed statement was taken from him about the events in question until March this year. But I accept this evidence as a genuine recollection. Capt McLellan impressed me as a very honest witness. I made a note to that effect during his cross-examination. He had no apparent incentive to support Teekay's case over Mr Visscher's. While it might be thought extraordinary for him to remember what was in his mind when he

completed one of many certificates of discharge, this was an extraordinary set of circumstances that he might very well remember.

157 I have come to the conclusion that Capt McLellan wrote "leave" on the certificate of discharge because he believed that the dispute between Mr Visscher and the company would in time be resolved, that one or other party would come to his or its senses or reach an accommodation, and that Mr Visscher would return to the *Broadwater* or to another of Teekay's ships.

158 Capt McLellan gave evidence that Mr Scott told him he would accept the resignation and that he should receive written confirmation soon. Capt McLellan said that he was told to hand Mr Visscher the hard copy letter of acceptance of his resignation after he received it on board ship. That might suggest that Teekay had, indeed, accepted Mr Visscher's resignation. Still, the only letter Capt McLellan received from Teekay soon after his conversation with Mr Scott invited Mr Visscher to confirm acceptance and receipt. That expression is ambiguous. It might mean merely acceptance and receipt of the letter. But Mr Visscher did not take it that way and neither do I. Under the terms of the Certified Agreement resignation did not take effect immediately. The Certified Agreement required that any officer, who had been employed for more than three months, provide 28 days' notice in writing (cl 24.2). Teekay could certainly waive or shorten the period of notice. On the other hand, the evidence does not indicate that this was Teekay's intention. Mr Parmeter, who had seen and vetted the letter before it was sent, said that he had experience of seafarers making threats in relation to their employment to achieve a particular outcome. As Director of Human Resources, he said, his practice was not to accede to these tactics. He said he required Mr Visscher to take a positive step to confirm his intention to end the employment. In cross-examination he confirmed this was the company's intention:

> MR PARMETER: Well, my recollection is that we see this – what was happening – as a threat of resignation and we wanted to be clear that you intended to go ahead with it.
>
> MR VISSCHER: Can you tell the court how you intend to be clear?
>
> MR PARMETER: By having the sentence at the end of the letter requiring you to respond to our letter.

159 As he did not take that step, Mr Parmeter said he was satisfied that Mr Visscher's "threat to resign" was an empty one.

160 In the circumstances, it seems that the purpose of the request that Mr Visscher confirm acceptance and receipt was to ensure that Mr Visscher really intended to leave Teekay's employ and his email of 22 February 2004 was not simply a rush of blood to the head. In other words, it was an attempt to call his bluff. All the evidence indicates that Mr Visscher was a valued employee and that Teekay was keen to retain his services. I do not consider (despite what Mr Scott may have said to Capt McLellan) that Teekay regarded its contract with Mr Visscher to be at an end. On the contrary, on 12 March 2004 Teekay deposited $5,580.66 into Mr Visscher's bank account just as it had always done and did so again on 14 April 2004 and on 14 May 2004. That conduct is inconsistent with the proposition that Teekay was treating Mr Visscher as having resigned.

161 So the next question is whether the employment was terminated at Teekay's initiative because of its anticipatory breach, or, as Mr Visscher put it, he was constructively dismissed.

Was Mr Visscher constructively dismissed?

162 Mr Visscher's case is that he was constructively dismissed in January 2004 when he was told by Mr Bray that he would be required to sail as Second Mate, a position confirmed by Mr Scott in his letter of 24 February 2004. For this purpose it does not matter whether termination on this basis would be sufficient under s 170CD(1B) of the WR Act to entitle Mr Visscher to relief under that Act. What matters is whether Teekay's conduct was in breach of its contract with him sufficient to entitle him to treat the contract as being at an end. If an employer engages in conduct which amounts to "a significant breach going to the root of the contract of employment" or which shows that it no longer intends to be bound by one or more of its essential terms, then the employee is entitled to treat himself or herself as discharged from further performance. In that event, the employee terminates the contract by reason of the employer's conduct and so is "constructively dismissed". See *Western Excavating Ltd v Sharp* [1978] 1 QB 761 at 769–70 per Lord Denning MR, Lawton and Eveleigh LJJ agreeing (although, as Professor McCarry has pointed out, the reference to constructive dismissal needs to be read in the statutory context of the case: G McCarry, "Constructive Dismissal of Employees in Australia" (1994) 68 ALJ 494 at 500). Breach by the employer of the implied term of mutual trust and confidence may be enough.

163 In *Easling v Mahoney Insurance Brokers* (2001) 78 SASR 489, a decision of the Full Court of the Supreme Court of South Australia, Olsson J (who dissented on other grounds) said (at 514) that:

> the notion of constructive dismissal implies the existence of conduct on the part of an employer which is plainly inimical to a continuance of a contract of employment according to its express or implied terms. The authorities establish the concept that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. An intention to repudiate need not be proved. Rather, it is a matter of objectively looking at the employer's conduct as a whole and determining whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

164 Allsop J cited these remarks with approval in *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 ("*Thomson*") at [141].

165 Although more commonly constructive dismissal is alleged in cases where an employee is given Hobson's choice of resigning or being sacked (McCarry (above at 513) considers that the label is unnecessary, if not misleading), there is no doubt that a demotion may amount to a constructive dismissal. *Thomson* was such a case. In *Thomson* the employee alleged that her employer discriminated against her on the ground of her sex and pregnancy by assigning her, after she returned to work from maternity leave, different duties and responsibilities which his Honour found (at [53]) to be "of significantly reduced importance and status of a character amounting to a demotion (though not in official status or salary)" and conduct in serious breach of the implied term of trust and confidence entitling the employee to treat the contract as at an end. The evidence in this case is that the job of a Chief Officer is very different from the job of a Second Mate. Not only does it carry a significantly higher income, it enjoys a higher status. The Second Mate keeps the 12 to 4 navigation and cargo watches. He or she is also the ship's medical officer, navigator and stationery officer, responsible for keeping charts and publications up to date. The Chief Officer, on the other hand, is the second in command of the ship. As Chief Officer Mr Visscher said he kept the 4 to 8 navigation and cargo watches; was responsible for all cargo operations, crew management and deck, accommodation and pump room maintenance; and devised cargo plans which incorporated procedures calculated to minimise sheer force and bending moments while maintaining adequate transverse stability. He also gave unchallenged evidence that he liaised directly with "all manner of external personnel; terminal, port and government representatives and regulators". He described the position of Chief Officer

as "the visible face of Teekay, the person in the storefront, so to speak". Plainly, the position of Second Mate was a position of lesser responsibility, lower pay and inferior status.

166 Before the question of breach can be considered, however, there is an anterior issue to resolve. What were the terms of Mr Visscher's contract when he was told he would be sailing as Second Mate? Was he employed, as he alleged, as Chief Officer or, was he in fact employed, as Teekay claimed, as Second Mate? This in turn raises the question whether Teekay's rescission of his promotion in 2001 was effective, in other words, whether the earlier contract was brought to an end. As the majority pointed out in *Giudice* (at [69]), if the contract appointing him a Chief Officer remained on foot, Teekay did not intend to carry it out. That would have been sufficient without more to constitute a repudiation, which Mr Visscher could have accepted.

167 Mr Visscher undoubtedly *had* a contract with Teekay to work as a Chief Officer. He was offered a permanent promotion to the position on 21 August 2001 and he accepted the offer on 7 September 2001. The promotion was backdated to 4 August 2001 and he was paid as Chief Officer from that date. A grading list dated 10 September 2001 listed him as Chief Officer. In its letter to Mr Visscher of 20 September 2001 Teekay acknowledged that the promotion was made and accepted in good faith.

168 By its letter of 20 September 2001 Teekay repudiated that contract: *Giudice* [81]. Whether that conduct was effective to bring the contract to an end, however, depends on whether Mr Visscher accepted the repudiation. The majority observed in *Giudice* (at [59]) (and the position is no different here) that Mr Visscher's case is that he refused to accept the rescission and that Teekay resiled from its threat to demote him. Their Honours said:

> Such an outcome is possible, for when a contract continues on foot it remains in force for the benefit of both parties and a party's refusal to perform may be withdrawn (*Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 250).

169 There is much to be said in favour of Mr Visscher's case. Despite the rescission, for over two years he worked for Teekay without interruption as Chief Officer and was paid the salary of a Chief Officer, albeit that it appears that for at least some part of the time it was made up of ordinary pay plus higher duties allowance. He also made it plain to Teekay on more than one occasion that he did not accept that Teekay's conduct was lawful.

170 He first did so within a week of receiving Teekay's letter. On 26 September 2001 he sent a fax to Teekay informing the company that he did not agree that his promotion had been rescinded and enquiring as to whether Teekay had terminated his employment. The next day he received a telephone voice message from Teekay to the effect that his employment had not been terminated and he wrote to the company to confirm that. He also suggested that Teekay obtain advice regarding demotion and constructive termination.

171 The next week he attended Teekay's offices and told Capt Board that he did not accept "interference" with his promotion and stated there was no basis for it. He said that Commissioner Raffaelli had no jurisdiction to make the recommendation. Capt Board assured him that he would continue to sail as Chief Officer and he did. Mr Visscher said that he regarded his contract of employment as Chief Officer as continuing on foot. He said (and his evidence was not contradicted) that, in June 2002, some time after he rejoined the *Samar Spirit*, he told Teekay's area manager, Noel Lacey, that he did not accept the rescission of his promotion and that Teekay had in place a contract employing him as Chief Officer.

172 On 17 October 2001 (nearly a month after Teekay wrote to tell him the promotion had been rescinded) Teekay sent Mr Visscher a pay slip recording his classification as "M1–G1" (meaning First Mate/Chief Officer, Grade 1) and paid him the monthly amount referable to an annual salary for a Grade 1 Chief Officer set out in the then current 1998 certified agreement. The pay slip made no reference to acting in a higher duties position. Although the later pay slips (from July 2003) did record that his monthly payments comprised ordinary salary and a higher duties allowance, they continued to record his classification as M1–G1.

173 As I mentioned earlier, Mr Visscher's name appeared in an appendix to the Certified Agreement which recorded that he was employed as a Third Mate as at 15 February 2002 and that he had commenced employment, at that rank, on 23 March 2001. Although the Full Court in *Visscher v AIRC* considered that Mr Visscher would be bound by that, the majority in the High Court in *Giudice* held otherwise, stating (at [39], [78]–[79]) that the Certified Agreement could not alter his ranking under his existing contract. Mr Visscher said (and his evidence was not challenged) that he never saw a grading list with his name on it at any time during his service on either the *Samar Spirit* or the *Broadwater*.

174 The uncontradicted evidence is that when, on 24 July 2002, Mr Visscher was told by Mr Condon that he had been promoted to Second Mate, he said he would not accept the promotion as he had already been promoted to Chief Officer. He also said that when he returned home from the voyage on the *Samar Spirit* later that day to find a letter from Mr Condon containing the offer of promotion (which pre-dated their conversation), he disregarded it. There is no evidence that he formally accepted the promotion and he continued to work without interruption as a Chief Officer.

175 Despite this, Stephen Bertram, Teekay's Human Resources Manager and former Lead Payroll Specialist, gave evidence that from 1 July 2003 until the end of his employment Mr Visscher's permanent grading was that of Second Mate (at grade 1, 0–2 years). Under the Certified Agreement, that commanded an annual salary of $95,951 (or $7,995.92 per month). Mr Bertram said, and the payroll records from July 2003 to April 2004 show, that Mr Visscher was paid in addition a higher duties allowance of $796.16 per month ($9,553.92 per year) to make up a salary of a Grade 1 Chief Officer ($105,505). There is no evidence about the period between October 2001 and June 2003. That Mr Bertram confined his evidence, without explanation, to the period from 1 July 2003 could suggest a unilateral variation of the contract of employment at this time.

176 On 26 June 2003 Capt Board wrote to Mr Visscher, referring to an agreed position between Teekay and the union about a grading list which did not show him as having attained a permanent promotion to Chief Officer. In its defence Teekay pleaded that the agreement with AMOU included a promotions policy which blocked Mr Visscher's permanent promotion to Chief Officer but no evidence was led to support the pleading and nothing was made at the trial of the contents of Capt Board's letter.

177 Mr Visscher replied to Capt Board by letter dated 30 July 2003. Although the letter was not tendered in this proceeding, in his statement to the AIRC (which was) Mr Visscher said that in it he referred to previous correspondence and "reserved all [his] rights".

178 In the AIRC proceeding Commissioner Redmond said he was convinced that from the pay slips a man of ordinary intelligence (and Mr Visscher was at least that) would have fully understood what the ordinary rate of pay was and what the higher duties allowance represented and Mr Visscher never contested the fact that he was receiving a higher duties allowance:

Visscher v Teekay Shipping (Australia) Pty Ltd [2006] AIRC 270 at [106]. As the majority in the High Court observed, however, the Commissioner made no findings about statements made by Mr Visscher or conduct on his part after he received the 20 September 2001 notice of rescission which might have suggested that he accepted that his promotion had been rescinded: *Giudice* at [49].

179 The pay slips aside, the evidence before me does not support the inference that Mr Visscher accepted that the promotion had been rescinded.

180 The problem with the pay slips, however, is that since his promotion in 2001 they showed that he had always been graded as a Chief Officer Grade 1. There is no direct evidence to explain the apparent conflict in the pay slips, but the inference from evidence given by Mr Bertram is that the reason for the payment on 17 October 2001 is that the payroll department had not caught up with the change in Mr Visscher's status. As for the continuing references to Mr Visscher's classification as M1–G1, read with the other information showing the payment of a higher duties allowance, it is not inconsistent with the proposition that he was merely acting in that position. Clause 13.04 of the Certified Agreement provides that officers relieving in a higher rank will be paid grade 1 for that rank whilst on duty and on leave. Mr Bertram's evidence was that where a seafarer's graded rank differs from his sailing rank, he is paid a higher duties allowance. The Certified Agreement provides for annual performance appraisals as a prelude to advancement. The Agreement indicates that a competent officer will move up at least one grade every two years. Mr Visscher's performance appraisals were not tendered but all the evidence indicates he was more than competent at his job. Yet, although he served as a Chief Officer for more than two years, his grade did not change.

181 In this Court there was little cross-examination on the issue and only a brief extract of the transcript of Mr Visscher's evidence in the AIRC was tendered, none of which assists Teekay. Mr Visscher agreed that the pay slips showed that his ordinary rate of pay was that of a Second Mate and that the higher duties sum brought the amount up to that of a Chief Officer but he said that the only reason he knew this was that he had been cross-examined about it in the AIRC. While at first blush this may appear disingenuous, there is no evidence to indicate that at the relevant time Mr Visscher read his pay slips or that, if he did, he paid any attention to manner in which his salary was made up. As long as he was being paid a Chief Officer's salary, he would have no reason to study his pay slips.

182 In my view the evidence does not establish that Mr Visscher accepted Teekay's repudiation of the Chief Officer contract.

183 Consequently, I find that the 2001 rescission was not effective to terminate the Chief Officer contract and that it remained on foot. It follows that, if Mr Visscher were required to sail as Second Mate, as he contended, that would have been a demotion and the statements made by Mr Bray and Mr Scott amounted to an anticipatory breach of his contract, which he was entitled to treat as a ground for termination. He did so when he wrote to Mr Scott on 22 February 2004. Accordingly, when he was discharged from the *Broadwater* on 3 March 2004, his employment had come to an end and he was entitled to be paid his accrued leave as well as any outstanding salary.

184 The position with respect to the second voyage, however, is different. I am not satisfied that, when Mr Visscher was given his certificate of discharge from the *Broadwater* on 26 May 2004, his employment then came to an end or, put another way, that he was permanently discharged from the ship. In his first affidavit Mr Visscher stated (at [74]) that about a week before he left the ship he told the master he wanted to be discharged from the vessel. But the context, which emerged in oral evidence only, is quite different from either a termination of employment or the conclusion of a tour of duty.

> HER HONOUR: Sir, [*scil.*] the question I have asked you is what did the master say to you when you told him you wanted to be discharged from the vessel?
>
> MR VISSCHER: He said, "I will arrange it," or words to that effect.
>
> HER HONOUR: It may be convenient to get Mr Visscher's evidence of precisely what he told the master.
>
> MR HATCHER: I think so, your Honour.
>
> HER HONOUR: Mr Visscher, what were the words you used to the master, to the best of your recollection, that prompted that answer?
>
> MR VISSCHER: I told the master words to the effect of, "I am to attend an AIRC hearing for termination of employment against Teekay Shipping, and if we carry on to Indonesia I will not be able to attend the hearing, and I request to go on leave." That's the word I said, "To attend the hearing."

185 This evidence supports the conclusion that Mr Visscher ceased temporarily to be a member of the crew of the *Broadwater* when he left the ship on 26 May 2004. The certificate of discharge that was issued to him duly recorded the reason for discharge as "leave". The contract

came to an end at a later time and as a result of a repudiation by Mr Visscher, which Teekay did not accept until 1 June 2004.

186 It follows from what I have just said and from the terms of s 6(4C) that the obligation to pay wages under s 75 was not enlivened when Mr Visscher was discharged from the *Broadwater* on 26 May 2004. Consequently, the penalty for which s 78 provides is not payable for any failure to pay wages in respect of the second *Broadwater* voyage.

Did Mr Visscher sail the second voyage as a casual?

187 In any case, Mr Visscher's claim in respect of the second voyage turns on whether he was employed to sail in April–May 2004 as a casual. For the reasons that follow, I am not satisfied that he was then employed as a casual.

188 Clause 24.1 of the Certified Agreement provided for a casual loading of 6.7% and there is no dispute that Teekay did not pay it. Nor is it in dispute that Mr Visscher never claimed to be a casual employee deprived of the casual loading until June 2006, more than two years after he was discharged from Teekay's employment.

189 The evidence does not clearly establish the basis upon which Mr Visscher undertook the second voyage. In theory, there are four possibilities: he continued to work as a permanent employee; he worked under a new contract, as a permanent employee; he worked under a new contract as a temporary employee for a fixed term (the duration of the voyage); or he was employed as a casual.

190 There are a number of authorities dealing with the meaning of "casual worker", "casual employee" and "casual employment". See, for example, *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545; *Reed v Blue Line Cruises* (1996) 73 IR 420 at 425 and *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at [38]. But none of the authorities is relevant here as cl 24.1 provided:

> Where an officer is employed on a casual basis (ie. not made permanent) they shall be paid a loading of 6.7% of their salary.

191 In other words, there were only two classes of employees. If an officer was not made permanent, he or she was a casual. In his first affidavit Mr Visscher said that he understood

from the correspondence that he was employed as a casual employee for a specific period of time. I do not accept this evidence. If that was his understanding I would expect a reference to it in the contemporaneous correspondence, particularly in the light of the ongoing legal and industrial dispute. When he asked for payment of his "entitlements" in his fax of 27 May 2004, Teekay sought clarification of the request. Mr Brecht wrote to Mr Visscher on 31 May 2004:

> We refer to your fax of 27th May 2004, and our subsequent telephone conversation, regarding your request for payment of your entitlements.
>
> We have clarified with you that this request relates to your outstanding leave balance, as a consequence of what you claim to be your "constructive dismissal" from Teekay.
>
> Teekay rejects any assertion that you have been dismissed from our employ, "constructively" or otherwise. We regard you as having commenced a period of regular leave, and have you scheduled to rejoin the vessel "*Broadwater*" as Chief Officer at the completion of your current period of leave.
>
> As such, your accrued leave will continue to be paid to you on a monthly basis, rather than as a lump sum.

192 Although Mr Brecht was cross-examined about the statements in the third paragraph, he was not challenged about the contents of the second. Be that as it may, the question must be determined objectively; the parties' subjective intentions are irrelevant. In considering what the parties objectively intended, it is necessary to consider the text of the relevant documents, the surrounding circumstances known to the parties at the time and the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Australian Securities and Investment Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at [221] per Finkelstein J.

193 The evidence is that when a casual seaman engaged for a single tour of duty was discharged from a ship the certificate of discharge recorded the reason for discharge as "complete relief" or words to that effect. That did not occur here.

194 Certainly, Teekay did not consider Mr Visscher to be a casual employee. In fact, it acted as if there had been no interruption of his employment. It continued to pay his salary into his bank account every month. That conduct is relevant in determining whether this was a new contract or a continuation or reinstatement of the old: *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [24] per Heydon JA.

195 On 6 April 2004 Teekay sent Mr Visscher a letter offering him what it called "a temporary promotion to the position of Chief Mate Grade 1 for your next swing period on the *Broadwater*" at a higher salary. That is inconsistent with an offer of casual employment.

196 On 7 April 2004 Mr Visscher sent a fax to Mr Parmeter in the following terms (without the typographical errors):

> I have not received a reply to my fax message to you dated 5/4/04.
>
> I suggest the following compromise between the Company and me.
>
> 1. I take up the appointment on the Broadwater tomorrow, as Chief Officer, and complete the ensuing tour of duty of about 6 weeks duration.
> 2. I do this on the basis that the Company requires someone to undertake the work urgently.
> 3. By taking up the position outlined in (l.) above, it is not an admission that my contention that I have validly been appointed to the position of Chief Officer and cannot be demoted is incorrect. I maintain that is correct.
> 4. Similarly, by taking up the position it is not an admission by the Company that its contention is incorrect, namely that it had the right to, in effect, change my status from Chief Officer.
> 5. **We are both undertaking these steps simply as a compromise and without prejudice to the position of either of us**.
>
> Obviously you should let me know urgently whether you agree with this.
>
> If you do agree a simple way of finalising this aspect will be for you, or someone, to sign a copy of this letter, writing under their name as duly authorised agent of Teekay Shipping (Australia) Pty Ltd, and sending it to me by fax. I will, in turn, sign a copy of what you fax to me, and send it to you by fax.
>
> (Emphasis added.)

197 Mr Parmeter replied by fax the same day agreeing to the suggested course of action, stating:

> I am writing in response to your fax message of today's date, copy attached.
>
> I agree with your suggested course of action on the basis:
>
> 1) it is the best way forward in the current circumstances;
>
> 2) the parties "agree to disagree" and their respective positions still stand; and
>
> 3) **your joining of the Broadwater tomorrow as Chief Officer is without prejudice to either party's position.**
>
> …
>
> (Emphasis added.)

198 Mr Visscher joined the *Broadwater* the next day as arranged. His case is that the contract for casual employment was made up by these three documents.

199 There is some difficulty in inferring what the parties agreed to when the most obvious point of agreement between them was that they agreed to disagree, but it is indisputable that Mr Visscher agreed to join the *Broadwater* "without prejudice to either party's position", that is, knowing and respecting Teekay's position that there had been no interruption in his permanent employment. Neither party contended at the time that he was employed as a casual. Mr Visscher called no evidence to indicate that Teekay had agreed to employ him as a casual. And there was no mention in any of the three "contractual" documents of pay rates. I find that on its proper construction the agreement between the parties was that Mr Visscher would sail the *Broadwater* for the voyage on the same terms as he had previously sailed. That was as a member of Teekay's permanent staff at the same salary as he had previously been paid.

200 It follows that the claim for unpaid casual loading for the second voyage must fail.

Was the non-colourable payment a payment of wages for the purposes of ss 75 and 78?

201 Teekay argued that on 4 June 2004 it made a bona fide payment of Mr Visscher's entitlements and that s 78 does not apply in such a case. It relied, in particular, on the judgments of Madgwick J in *Wahlgren v Transfield Power Systems Manufacturing* [1996] IRCA 375 and the Full Bench of the Commonwealth Industrial Court in *Re Commonwealth Works and Services (Northern Territory) Award* (1960) 1 FLR 336 ("the Northern Territory case"). Both these cases dealt with provisions in awards providing for payment of waiting time where employees were not paid on their regular pay days.

202 In *Wahlgren* the award provided that wages be paid during ordinary working hours and, if an employee was kept waiting for his wages on pay day after the usual time for ceasing work, he was to be paid at overtime rates for the period he was kept waiting. Madgwick J said:

> Mr Wahlgren has read this clause as setting out to impose condign penalties on an employer who has not in a timely way paid his employee all that is due. But that is not the purpose of the clause, as it seems to me the facts of this case and a plain reading of the clause show. Mr Wahlgren comes to the court claiming some hundreds of thousands of dollars, being overtime calculated from the middle of 1990 to date [six years]. That an employer who has made a slip, apparently because of a rush of blood to the head of the supervisor, but has corrected it six months later, could, years afterwards, be held liable to pay hundreds of thousands of dollars to the employee is a result so fantastic that

> a court could only acquiesce in it if the language of the instrument in question was so clear that nothing could stand in the way of its application.

203 His Honour held that, on a plain reading of the clause, it was

> concerned with the position where an employer negligently, foolishly, incompetently or arrogantly fails to pay an employee what the employer bona fide conceives to be due on the regular pay day and where the employee is consequently kept waiting at the workplace.

204 By analogy, Teekay submitted that the entitlement conferred by s 78 only applies to a situation where the employer negligently, foolishly, incompetently or arrogantly fails to pay an employee what the employer bona fide conceives to be due.

205 In the Northern Territory case the award required that wages be paid weekly or fortnightly at the option of the employer. The relevant clause read:

> If an employee who is not absent from work is not paid on the regular pay day, he shall be paid waiting time at the ordinary rate from close of business on pay day until time of actual payment provided that not more than eight hours pay shall accrue in respect of each twenty-four hours of waiting. Provided always that if the delays caused by circumstances outside the control of the employer, this subclause shall not apply.

206 Joske and Eggleston JJ, with whom Spicer CJ agreed, held (at 342) that the employer was not liable to pay waiting time under the clause if it had paid to the employee on the regular pay day an amount which was a bona fide payment of all moneys believed to be due to him or her under the award, although it was not the precise sum representing the total amount of all moneys then in fact due.

207 But that is not what occurred here. If payment for accrued leave was due on 3 March 2004, as I have found, payment was not then made. It was not apparently made until three months later on 4 June 2004.

208 What is more, unlike the cases on which Teekay relied, here there are statutory exceptions. In my view, on the proper construction of s 78, unless a shipowner can bring itself within one of those exceptions, it must pay the penalty. That is not to say that the bona fides of a shipowner may not be relevant. But whether it is depends on whether it is relevant to one of the exceptions.

209 The next question, then, is whether Teekay has made out any of the exceptions for which s 78 provides.

Was the delay in paying wages due to the act or default of the seaman?

210 This contention is based on the notion that Mr Visscher did not claim that he was underpaid until, at the earliest, two years after the time for payment had passed.

211 Mr Visscher's evidence was that he wrote to the paymaster at Teekay on 5 June 2006 by fax and by post in the following terms:

> I received a certificate of discharge from service on the vessel Broadwater dated 3 March 2004.
>
> I received a certificate of discharge from service on the same vessel dated 26 May 2004.
>
> On each occasion I was entitled to be paid my full entitlements. But I was not paid them.
>
> Accordingly, my employer was, and is, in breach of the relevant provisions of the *Navigation Act* 1912 (the Act).
>
> Accordingly, pursuant to s.78 of the Act my wages continue to run and are payable at double rates until paid to me.
>
> Please let me know within seven days whether or not you propose paying me.
>
> S.76(1) of the Act provides that the Master shall deliver to the seaman on discharge an account of wages and of deductions. This was not done.
>
> Please inform me within seven days whether or not you propose to comply with that requirement.
>
> I am returning to sea for several weeks. Can you address your reply to my brother…

212 Teekay claims it did not receive this letter and the first notification it had of such a claim was on 2 August 2006, after Mr Visscher sent a second letter, apparently by fax. Mr Visscher did not tender any record of transmission or proof of postage. But I accept Mr Visscher's evidence that he sent the 5 June letter and I conclude that on the balance of probabilities Teekay received it and replied to it. The letter dated 2 August 2006 is addressed to Mr Parmeter. It begins with the words "I refer to your letter of 16 June 2006". The 16 June letter was not tendered by either party. Mr Parmeter did not refer to it. Commonsense suggests it was a response to Mr Visscher's 5 June letter. The 2 August letter provides greater detail about the claim made in the 5 June letter. It particularised the amounts Mr Visscher said he was owed. It raised for the first time the claim that Mr Visscher was employed as a casual for the second voyage and was entitled to a casual loading. In all likelihood Mr Parmeter received the 5 June

letter and on 16 June asked Mr Visscher to provide further particulars, which he gave on 2 August.

213 There are several difficulties with Teekay's argument.

214 The first difficulty arises from the statutory context. In the United States laches has defeated claims for the double wage penalty. See Norris MJ, *The Law of Seamen* (Vol 1, 4th ed, Lawyers Co-operative Publishing Company, 1985) ("Norris") §17:21. But s 37 of the *Admiralty Act* relevantly provides:

> (1) A proceeding may be brought under this Act on a maritime claim, or on a claim on a maritime lien or other charge, at any time before the end of:
>
> (a) the limitation period that would have been applicable in relation to the claim if a proceeding on the claim had been brought otherwise than under this Act; or
>
> (b) if no proceeding on the claim could have been so brought—a period of 3 years after the cause of action arose.
>
> (2) …
>
> (3) …
>
> (4) …
>
> (5) The law relating to laches does not apply in relation to a claim brought within a period fixed by or under this section.

215 It is common ground that Mr Visscher's claim is, or amounts to, a general maritime claim within the scope of s 4(3)(t) of the *Admiralty Act*, which includes a claim for wages by a crew member of a ship.

216 The originating application was filed on 2 March 2007 – one day before the expiration of the three year period after the cause of action arising out of the first voyage expired. Accordingly, it was brought within the time prescribed by s 37(1) of the *Admiralty Act*. Subsection (5) evinces a legislative intention that a claim brought at any time within the period will not be defeated by delay. In the circumstances, it is unlikely that the act or default with which s 78 of the *Navigation Act* is concerned includes a delay by a seaman in the making of a claim within the period during which the limitation period is running.

217 Secondly, the seaman is under no obligation to ask for his wages on discharge. He is entitled to be paid regardless. Moreover, the *Navigation Act* requires the master to provide him

with an account of his wages and Teekay admits that no account was given in this case. The responsibility for accurate record-keeping does not lie with the seaman. In my opinion, it was not the intention of the legislature to deny a seaman his remedy under s 78 when, within the statutory limitation period, the seaman complains he has been underpaid and particularly when he never received the account that might have disclosed the underpayment.

218 Thirdly, there is no apparent connection between the delay in paying Mr Visscher and his 2006 letter of demand. After all, as will be seen, Teekay paid him all the wages due on 3 March 2004 by 4 June 2004.

219 I am not therefore satisfied that the delay in paying Mr Visscher was due to his act or default.

Was the delay in the payment due to a reasonable dispute as to liability for the wages?

220 Mr Visscher submitted that:

> The defence of a reasonable dispute as to liability for the wages is confined to the ordinary meaning of the words of s 78 of the Act. That defence does not take in matters of a class which are not wages and not in the Articles; "termination benefits" are of that class. The ordinary meaning of the wording in s 78 of the Act is clear, it is not ambiguous. It is not permissible for the Court to change or put its own meaning on the words and the operation of section 78 of the Act from "… a reasonable dispute *as to liability for the wages*" to "… a reasonable dispute *as to the obligation to pay the wages*".
>
> (Original emphasis.)

221 This submission must be rejected. First, the three days' wages and accrued leave, though payable on termination, are not termination benefits. Secondly, I have already found that "wages" for the purpose of the *Navigation Act* includes payment for accrued leave. If they did not, then Mr Visscher could not make out his claim and there would be no need to consider any of the defences. The question here is whether, at or before discharge on 3 March 2004, there was a dispute as to liability to pay wages (including accrued leave) and, if so, whether the dispute was reasonable.

222 As the liability to pay wages due on discharge depended on whether Mr Visscher was being permanently discharged from the ship and, in the case of the accrued leave entitlement, in particular, whether his employment had come to an end, a dispute about those circumstances was

a dispute about liability to pay wages due on discharge. So was there a dispute about the circumstances in which Mr Visscher was discharged from the *Broadwater*?

223 The Full Court pointed out that there is an important difference between a dispute as to liability to pay wages due on discharge and a dispute about the way in which the parties would engage thereafter: *Visscher* at [57]; referring to *Palace Shipping Company Ltd v Caine* [1907] AC 386 ("*Palace Shipping*"). There was certainly a dispute here about whether Mr Visscher would sail as a Second Mate in future. But the evidence persuades me that there was also a dispute about whether Mr Visscher's employment had come to an end at the time he left the *Broadwater* on 3 March 2004 and so, whether he was owed wages on discharge.

224 Mr Visscher's position was that the company had informed him he was to be demoted from Chief Officer to Second Mate, that the demotion constituted a constructive dismissal, and in this way his employment had been terminated. The company disputed that. Teekay made it clear to him that it considered he had a contract to serve as Second Mate, not Chief Officer, that there could therefore be no question of a demotion and so no question of constructive dismissal. Consequently, (as Teekay did not intend to dispense with his services) his employment could only come to an end at Mr Visscher's initiative (which, under the Certified Agreement, it will be recalled, would require 28 days' notice). Thus, on 24 February 2004, before Mr Visscher left the *Broadwater*, it asked Mr Visscher to confirm he had resigned. He did not. Indeed, he insisted he had not resigned and told Capt McLellan as much. Nor did he clarify his position before he left the ship on 3 March 2004. In these circumstances, Teekay continued to treat him as a permanent employee. As mentioned, on 12 March 2004, as usual, Teekay paid him his monthly salary, which included a fortnight's salary in advance. Plainly it would not have done so if it did not dispute Mr Visscher's assertion that his employment was at an end.

225 The Full Court in *Visscher* inferred on the limited evidence before it (and without referring to the continuing salary payments) that at the time of his discharge from the *Broadwater* on 3 March 2004 there was no dispute that Mr Visscher's employment was at an end; he and Capt McLellan were in agreement that it was. As I have said, having now heard from Capt McLellan, (for the reasons I have given) I do not accept that Capt McLellan agreed with Mr Visscher at or before his discharge from the *Broadwater* on 3 March 2004 that his employment was at an end. Capt McLellan was at least unsure of Mr Visscher's status and left open the prospect that he would return to the ship.

226 The next question is whether Teekay has shown that the dispute was reasonable. It is, of course, one thing for the Court to find that Mr Visscher's employment had in fact come to an end at the time of his discharge but another to hold that it was unreasonable at the time to dispute that it had.

227 The authorities on the meaning of "reasonable dispute as to liability" in this context are scant. I was not referred to any Australian authority and my own researches have uncovered none.

228 The expression "reasonable dispute as to liability" appeared in s 4(4) of the *Merchant Seamen (Payment of Wages and Rating) Act 1880* (Imp), which provided that, in the event of wages not being paid, they remained payable until the time of final settlement "unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the act or default of the owner or master". The provision was later reproduced in s 134(c) of the *Merchant Shipping Act 1894* (Imp).

229 In *The Rainbow* (1885) 5 Asp. MC. 479 a master of a ship claimed he was not paid amounts owing to him from voyages and when he threatened to proceed against the ship he was relieved of his command. He then issued a writ, alleging that he had been wrongfully dismissed, claiming amongst other things ten days' double pay and wages to date of final settlement or judgment (pursuant to s 187 of the 1854 Act). The claim for ten days' double pay was made under s 187 of the *Merchant Shipping Act 1854* (Imp), which imposed on the master or owner of a ship a liability to pay to a seaman a sum not exceeding ten days' double pay where payment was refused or neglected "without sufficient cause".

230 The shipowners denied that any amounts remained due from the two voyages. They also denied that they had dismissed the master and contended that he terminated the contract himself by bringing the litigation. Alternatively, they said they were justified in dismissing him.

231 Butt J found that there was both a sufficient cause and a reasonable dispute as to liability. He continued:

> It could never have been meant that, where there was a *bona fide* question as to liability, shipowners should be visited with the penalties prescribed by those statutes.

232 In *Re The Great Eastern Steamship Company* (1885) 5 Asp. M.C. 511 the plaintiffs had been engaged by the ship's commander for a single voyage but were discharged without being paid their wages. They originally brought an action *in rem* to enforce their maritime lien for wages against the ship. But the shipping company was wound up and the claim was then brought against the mortgage debenture-holders in the winding up. The defendants relied on s 4(4) of the 1880 Act, arguing that there was a reasonable dispute as to liability or, alternatively, that the delay in payment was due to another cause not being the act or default of the owner or master of the ship. Chitty J found that there was no reasonable dispute as to liability to pay the wages. He observed that there was no dispute before the claim was raised in the Admiralty action and when the dispute did arise it was not reasonable, although the report does not indicate why. He did not exclude the possibility that a question of law could give rise to a reasonable dispute as to liability. Otherwise, the case provides no guidance on the way the defence should operate.

233 In *Palace Shipping* the House of Lords rejected the shipowner's defence that there was a reasonable dispute as to liability but the circumstances of that case were far removed from the present.

234 The facts in *Palace Shipping* were as follows. During the Russo-Japanese war, at the risk of the ship being captured or sunk, a ship's master directed his crew to sail with the ship's cargo of coal (declared contraband of war by both belligerents) to a Japanese naval base that was within the geographical limits of the voyage laid down in the articles of agreement. When the crew refused to continue the voyage at Hong Kong, they were taken before the harbour master and sentenced to ten weeks' imprisonment. The wages they had already earned were not paid to them but used to defray the costs of maintaining them in prison. After they had served their sentences and were returned home to the UK, they sued the shipowner, amongst other things, for wages and maintenance and general damages for breach of the agreement. The primary judge held that the crew were justified in refusing to continue the voyage at Hong Kong and so their conviction was unlawful and afforded no answer to the action. He gave judgment for the plaintiffs for the amount of their wages down to the date of their arrival in the UK. The shipowner appealed and the plaintiffs cross-appealed. The basis of the cross-appeal was that the plaintiffs were entitled to recover wages down to final settlement of their claim and also to recover general damages. The appeal was dismissed and the cross-appeal allowed in a limited

respect: *Caine v Palace Steam Shipping Company* [1907] 1 KB 670. The shipping company then appealed to the House of Lords.

235 Their Lordships unanimously dismissed the appeal. Lord Loreburn LC (at 391) described the conduct of the shipowner and the master as "a piece of calculated oppression, designed to force into a hazardous enterprise, partaking of the risks of war, seamen who had agreed to serve on a peaceful voyage". He said the master had no right to require the men to sail to Sasebo where they were at risk of losing their employment and their kit, of being cast adrift in a Russian port during war and of their ship being destroyed on the high seas, exposing them to "whatever danger that might involve". In that case the wages that were due to the seamen were never paid and their Lordships held that the refusal to pay, indeed the entire conduct of the shipowner "from beginning to end", was illegal.

236 In the United States 46 USC §596 provided for payment of double wages in similar circumstances. The section has been amended and replaced several times (most recently by 46 USC §10313). For relevant purposes the changes are immaterial. There, when a seaman was not paid the balance of wages due at the time of, or within a specified period from, discharge, the master or owner has been obliged to pay two days' wages for each day payment is delayed if "without sufficient cause" the payment is not made or refused. After an extensive review of the authorities Norris wrote at §17:5 that, "generally, where the refusal or failure to pay results from an honest difference of opinion arising from the matter in dispute – a dispute about which honest men are apt to differ – the courts will be loathe to declare a penalty when later one of the disputants has been proved wrong". In *The Cubadist* 252 F 658 (DC Ala 1918), for example, Ervin DJ said at 662:

> There are … cases where a master may have just cause to doubt whether the seaman is entitled to demand his pay, or cases where it may be a very close question. I do not think that the statute was intended to penalize any master or vessel for exercising sound judgment and discretion, or to require them to surrender such judgment under a penalty of double pay.

237 His Honour considered that, where payment was withheld in the exercise of a "reasonable and proper discretion" and the "question was doubtful", the imposition of the double penalty would depend on the court's finding on the reasonableness or sufficiency of the excuse.

238 In *The Velma L Hamlin* 40 F2d 852 (CCA 4th Circ 1930) at 854–5 the Circuit Court of Appeals approved these statements, holding that the penalty was not available where payment is withheld in good faith under a reasonable belief that it is not due. Cf. *The Thomas Tracy* 24 F2d 372 (CCA 2nd Circ 1928) where a master's honest misinterpretation of the articles was held to constitute sufficient cause. In *Collie v Fergusson* 281 US 52 (US 1930) at 191 the Supreme Court took a similar approach, considering that the double wage penalty was not available where the refusal was "in some reasonable degree morally justified".

239 Similarly, in *Breslin v Maritime Overseas Corp* 622 F Supp 195 (SDNY 1987) Metzner SDJ observed that it was necessary to look to the motivation of the shipowner in failing to make proper payment. He said that the penalty should not be imposed if there was "a good faith belief" that payment was not due.

240 In my opinion the same thinking is behind s 78 of the *Navigation Act*. The exceptions must be interpreted in the light of its purpose. A construction that would promote that purpose must be preferred to one that would not: *Acts Interpretation Act*, s 15AA. The purpose of s 78 is no different from the purpose of the comparable US provision, that is, to secure prompt payment of seamen's wages and so protect them from "the harsh consequences of arbitrary and unscrupulous actions" of their employers (*Collie* at 191). In *Palace Shipping* the Lord Chancellor described the purpose of s 134 of the 1894 *Merchant Shipping Act* in similar terms ([1907] AC at 392), namely "to require prompt payment and to prevent evasion of this duty either by carelessness or dishonesty". In *The Velma L Hamlin* Circuit Judge Parker stated (at 854):

> The statute was intended to penalize shipowners who, without sufficient causes, withhold the wages of seamen. It was not intended to prevent them from contesting in good faith their liability for demands made upon them or to subject them to ruinous penalties, if, upon a contest made in good faith, it should turn out that they were wrong.

241 The same may be said of s 78 of the *Navigation Act*. In my view, "a reasonable dispute as to liability" encapsulates these considerations. As Butt J held in *The Rainbow* of the ancestral provisions of the English legislation, the statute was not intended to prevent shipowners from disputing liability in good faith. Nor was it intended to subject them to potentially ruinous penalties if, upon a contest made in good faith, they were proved to be wrong. Teekay disputed liability in good faith. Its refusal to pay was not arbitrary or capricious. Nor was Teekay

carelessly or dishonestly avoiding its obligations. On the contrary, it refused to pay for sound reasons, given at the time, albeit that ultimately it turns out it was mistaken.

242 After Teekay rescinded Mr Visscher's promotion in 2001, the Certified Agreement was negotiated with the AMOU, the union to which Mr Visscher belonged, and then approved by the independent umpire, the AIRC. Clause 23.4 of the Agreement provided that "the grading (or rank/service) list attached will be the basis for future promotions/transfers, etc". The Certified Agreement recited that it was binding on the employer, the union and the officers (including Mr Visscher). As noted, the attached list (Appendix A) showed Mr Visscher as a Third Mate. Later, Teekay promoted him to Second Mate and paid him as such, though his salary was topped up by a higher duties allowance while he was assigned the duties of a Chief Officer. Teekay regularly sent him pay slips recording this information and Mr Visscher never queried the payments of the allowance. From 2 July 2002 Mr Visscher's name appeared as Second Mate on at least ten separate grading lists (which were annexed to Mr Parmeter's affidavit), each of which recorded his grading date as July 2002. The last of these is dated 3 February 2004. No doubt these matters informed Mr Scott's statement that Mr Visscher was "currently graded Second Mate" and his refusal to countenance that a direction that he sail as Second Mate would amount to a demotion. I have no doubt that Mr Scott honestly believed what he told Mr Visscher and the company's records gave him good reason to do so. The same is true of Mr Parmeter.

243 At the time Mr Visscher left the Broadwater on 3 March 2004 there was, as I have found, a dispute about his status. Teekay never received the signed acceptance of the 22 February letter Mr Scott had requested in order to confirm that Mr Visscher was resigning. Indeed, Mr Visscher did not respond to the letter until six days after he had been discharged from the *Broadwater* and, when he did, he maintained he had been demoted and had not resigned. As I have already observed, the ship's master was, at least, uncertain whether Mr Visscher would be returning to the ship and was hopeful of the parties reaching an accommodation. The question whether Mr Visscher had been constructively dismissed, as he asserted, was a question of law, the answer to which necessitated an examination of the dealings between the parties over a number of years and an analysis of the cases. It transpires that I have not endorsed Teekay's view of Mr Visscher's contract, but there is nothing to suggest that its approach to the question was arbitrary, capricious or malicious. Indeed, the AIRC thought it was right and so did a Full Court of this Court, which held that Teekay was bound by the Certified Agreement to treat

Mr Visscher at the relevant time as Second Mate: *Visscher v AIRC* at [56]–[58]. The High Court (by a majority) held that the Court had erred. But it is difficult not to resist the conclusion that Teekay's conduct was reasonable when three judges of this Court and one on the High Court considered that its position was correct in fact and in law.

244 In these circumstances I am satisfied that "wages" were not paid to Mr Visscher upon his discharge from the *Broadwater* on 3 March 2004 because there was a reasonable dispute as to Teekay's liability to pay them at that time and that that dispute continued until 1 June 2004 when Teekay accepted its liability. But for its honest belief that he remained in its employment during that period, I have no doubt Teekay would have acceded to Mr Visscher's request for payment of his entitlements, as it did later when it became clear that the employment relationship was at an end. Consequently, I am satisfied that the delay in payment was due to a reasonable dispute as to liability.

Was the delay in payment due to another cause not attributable to the wrongful act or default of the shipowner?

245 In the circumstances, it is unnecessary for me to answer this question but I do not consider that Teekay has made out this defence. I will shortly indicate my reasons.

246 In my opinion the purpose of this exception is to excuse a master or shipowner (or operator), who at or before discharge from the ship, through no fault of its own, does not pay the wages due. The onus is on the shipowner to bring itself within the exception. That means that unless the shipowner proves that its wrongful act or default did not contribute to the delay it will fail. (Cf. *Gilkinson v Repatriation Commission* (2011) 197 FCR 102 at [5] on the meaning of "attributable to".) Even if the exception should be read more narrowly, so as to excuse a shipowner (or operator) whose wrongful act or default did not contribute to the other cause to which the delay in payment is due, the result in this case will be the same.

247 Teekay argued that the entire dispute with Mr Visscher was caused by the AMOU's industrial action over the promotions in 2001. The delay in payment was due to the disagreement between the parties about Mr Visscher's employment status. But there are two difficulties with Teekay's argument. First, the AMOU's conduct is too remote. The union only threatened to strike over the promotions. Teekay's response to the threat was to notify a dispute, not to rescind Mr Visscher's promotion. Nothing the union did could affect Mr Visscher's

contract. The second problem with the argument is that, even if some blame can be sheeted home to the union, Teekay cannot absolve itself.

248 I have found that the rescission of the promotion was a repudiation of the Chief Officer contract. That was a wrongful repudiation; it was unlawful: *Visscher v AIRC* at [49] and [54]. As Buchanan J pointed out in *Visscher v AIRC* at [40] in a passage not criticised in the High Court:

> The breach of Mr Visscher's contract was not, at least at that time, legally immunised by the fact that it was the result of industrial compromise or that it had the active endorsement of the AIRC. By its letter dated 20 September 2001 Teekay declared that it would no longer be bound by its legal obligations towards him.

249 Thus, to the extent that the delay in payment can be traced back to the industrial dispute, its cause was the resolution of that dispute by the acceptance of the Commissioner's recommendation and that was a cause to which Teekay's wrongful act contributed. The union's conduct merely sparked the dispute. The rescission of the promotion was not made in response to the union's threat. It was made in response to the Commissioner's recommendation. It was Teekay's decision to accept the Commissioner's recommendation. The Commissioner, himself, pointed out to Mr Visscher (in correspondence an extract of which appears in the judgment of *Visscher v AIRC* at [27]) that he made the recommendation in an attempt to settle the dispute by conciliation; but "it was ultimately the Company's decision to act in the way it did". Moreover, it was also Teekay who wrongly maintained (over Mr Visscher's protestations) that the rescission was effective.

What would the claim have been worth?

250 In case I am wrong about the question of reasonable dispute as to liability for wages, I should determine what the true value of Mr Visscher's claim would have been.

What was Mr Visscher owed on 3 March 2004?

251 The statement of claim has been through several iterations. In its final form (the second further amended statement of claim), filed on 12 April 2012, Mr Visscher alleged that at 3 March 2004 he was owed $15,030, based on the alleged value of 49 days' accrued leave and three days' wages earned during his first *Broadwater* voyage, at $289.055 per day. Of that

amount he claims $6,237 (after crediting the gross value of the salary payment Teekay made on 12 March 2004) together with the penalty payable under s 78.

252 As his last salary payment was made on 13 February 2004 and his next on 12 March 2004, I accept that on 3 March 2004 he was owed three days' salary. Clause 28.2 of the Certified Agreement provides that leave accrues based on the number of days on the ship (including the day of joining and the day of leaving the ship) minus two days. As Mr Visscher's first *Broadwater* voyage lasted 51 days, there appears to be no dispute that, if his employment came to an end on 3 March 2004, he was then entitled to payment for the 49 days' leave accrued on the *Broadwater*.

253 For completeness, I should point out that the parties agreed that Mr Visscher's accrued leave balance as at 3 March 2004 was actually 153 days. Since he only accrued 49 days' leave from the first *Broadwater* voyage, this figure must include 104 days' leave accrued on other ships before he joined the *Broadwater*. But Mr Visscher's pleadings, which he was granted leave to amend multiple times throughout the proceeding, have always been limited to a claim for entitlements earned whilst on the *Broadwater* only — that is, in relation to the 3 March 2004 claim (the only claim I have upheld), 49 days' leave. Mr Visscher would have been aware, from March 2010 at the latest (when Mr Bertram filed an affidavit explaining how the 4 June 2004 payment was comprised), that Teekay had also paid him for leave earned before he joined the *Broadwater*. At one stage in his written submissions Mr Visscher did claim that payment for 153 days' leave was due on 3 March 2004, but when this inconsistency was pointed out during the May 2012 hearing, he expressly limited his claim to the amount appearing in his second further amended statement of claim (which included only 49 days' leave). Later in the hearing, in an exhibit entitled "ultimate particularisation of the applicant's claim", Mr Visscher confirmed that his claim in this proceeding related to his time on the *Broadwater* only. As the magnitude of Mr Visscher's claim has changed no less than five times, it is understandable that counsel for Teekay were concerned to pin him down, and the value of his claim is rightly confined to his pleadings.

Did Teekay pay what was owed on 3 March 2004 by 4 June 2004?

254 Mr Visscher contended that Teekay's 4 June 2004 payment "bears no relationship or resemblance" to what he was owed on 3 March 2004, such that $6,237 of his wage and accrued

leave entitlements as at 3 March 2004 remains unpaid. Although Mr Visscher set off the payment Teekay made on 12 March 2004, he submitted that the 4 June 2004 payment related only to his entitlements arising from his "second period of employment" (the second voyage).

255 I reject this submission.

256 A transaction history document produced from Teekay's payroll archive, annexed to Mr Bertram's affidavit, indicated that the 4 June 2004 payment contained a number of components including ordinary salary of $262.88 for 1 June 2004; a higher duties allowance of $706.59 for the days Mr Visscher was on board the ship in May 2004, which Teekay accepted should have been paid in May, a termination payment representing accrued but unused annual leave of $41,797.92; and a "leave differential" of $1,229.99. The remaining amounts represented tax and various reimbursements and deductions.

257 Teekay paid Mr Visscher for 159 days' leave (which the parties agreed was Mr Visscher's accrued leave balance as at 1 June 2004). If, as Mr Visscher submitted, the payment related to the second *Broadwater* voyage alone, Mr Visscher would only have been paid for 41 days of accrued leave, being 47 days' leave accrued from 8 April to 26 May 2004, less six days' leave taken between disembarking the ship on 26 May to Teekay's acceptance of his resignation on 1 June 2004.

258 Teekay paid the accrued leave at the daily rate for a Grade 1 Second Mate ($262.88 per day, being $26.17 lower than the Grade 1 Chief Officer rate). Mr Bertram asserted, and the arithmetic confirms, that the leave differential was paid to bring the rate up to that of a Chief Officer and related to the 47 days accrued during Mr Visscher's second *Broadwater* voyage only. There is no apparent reason why Mr Visscher was not paid the equivalent of the higher duties allowance for the first voyage. On any view of the matter, the 49 days' leave he accrued during the first *Broadwater* voyage should have been paid at the Chief Officer rate. This equates to a shortfall of $1,282.33 (49 days × $26.17).

259 Nevertheless, as I have found that Mr Visscher's employment ended on 3 March 2004, Teekay should be credited for part of the salary payments it paid him on 12 March and 14 April 2004. (In his second further amended statement of claim, Mr Visscher only deducts the March salary payment from the $15,030 he was owed as at 3 March 2004). I have found that

Mr Visscher was only employed for three days in March (until 3 March) and 23 days in April (from 8 April). By paying him his full monthly salary, Teekay paid him an additional 35 days' of wages (at Grade 1 Chief Officer rates). These payments should be treated as part payment of the 49 days' leave Mr Visscher earned on the first *Broadwater* voyage, such that only 14 days' leave (at Grade 1 Chief Officer rates) remained outstanding as at 14 April 2004 ($4,046.77). I am prepared to treat this balance as having been fully paid by 4 June 2004, given that Teekay paid the 49 days' leave on that day, albeit at Second Mate Rates ($14,163.70).

260 Accordingly, by 4 June 2004 Mr Visscher had been fully paid for the 49 days' accrued leave and the three days' ordinary wages that were due on 3 March 2004.

What is meant by "final settlement"?

261 It remains for me to decide what is meant by the term "final settlement" in s 78. The words are ambiguous. The issue is whether they refer to the payment of the outstanding wages or whether they refer to the payment of the outstanding wages at double rates, so that, even where the wages due on discharge under s 75 have been paid in full, the shipowner continues to be liable to pay them until and unless the payment was made in full at double rates.

262 Mr Visscher was not paid wages due to him on his 3 March 2004 discharge from the *Broadwater* on or before that time. He was, however, paid for the three days' wages on 12 March 2004, nine days after discharge (when his salary would have been due) and by 4 June 2004 for the entirety of the leave he accrued during his first *Broadwater* voyage. Teekay contended "final settlement" occurred at this time. Mr Visscher, on the other hand, submitted that "final settlement" refers to the time when the wages due on discharge and the penalty payable under s 78 are both paid. Accordingly, his case was that there will be no final settlement until the time a court decides that the penalty is payable and makes orders determining the matter.

263 There is little authority on the meaning of "final settlement" in this context. Mr Visscher relied on *Palace Shipping*. But I do not think the decision goes so far as to support the construction he placed on the words.

264 In *Palace Shipping*, having found that none of the exceptions applied, the Lord Chancellor, with whom Lords Macnaghten and James of Hereford agreed, held (at 392) that the seamen's wages continued to run and be payable *until they received them*. His Lordship held that "final settlement" in s 134 of the 1894 *Merchant Shipping Act* meant "*payment* or other such settlement as that section prescribes" (emphasis added).

265 The first point to make about *Palace Shipping* is that s 134 did not provide for wages to double until final settlement. The *Merchant Shipping Act* contained a provision for payment of double rates, but that only applied to seamen on home-trade ships where payment was not made without reasonable cause (s 135) and there was a limit of ten days' double pay. Moreover, two days' pay was only payable "for each of the days during which payment [was] delayed", not for any days after payment was made.

266 Section 134(a) imposed an obligation on the owner or master of a ship to pay the seaman at the time he lawfully left the ship at the end of his engagement, the lesser of £2 or a quarter of the balance of wages due to him and the remainder within two clear days after he left the ship. Section 134(b) provided for final settlement with the seaman's consent to be left to a superintendent under regulations of the Board of Trade. Nothing their Lordships said assists in the resolution of the current controversy.

267 The second point is that in *Palace Shipping* no money was paid until the judgment of the Court of Appeal.

268 In my opinion, "final settlement" in s 78 of the *Navigation Act* means payment in full of the wages due on discharge from the ship. Wages do not continue to run at double rates beyond the time the amount outstanding on discharge has been paid in full. In this respect the purpose of the section is no different from the purpose of s 77(3). Section 77(3) provides (in substance) that, subject to certain defences (including the same defences as appear in s 78), if a payment of wages is not made at the required time, the seaman is entitled to recover from the owner or master in addition to the outstanding wages, a sum equal to two days' pay for each of the days during which payment of the wages is delayed (up to a maximum of 14 days).

269 The section is a remedial one but it is penal in effect. I do not accept that it was intended to continue to penalise a shipowner (or operator) after the entire amount due on discharge has

been paid. To so construe it would be oppressive. In the absence of clear words that is a construction to be avoided.

What is the double rate payable under s 78?

270 Mr Visscher submitted that the penalty under s 78 should be calculated by reference to a daily rate derived by dividing the annual salary by 182.5, i.e. half of 365 (being the number of days in the year). The submission was based on the premise that seamen are only paid for the six months a year that they sail. From this premise Mr Visscher argued that the correct daily rate was $578.11 and that the penalty should be payable at double that rate ($1,156.22) for each day until final settlement.

271 I reject the submission.

272 As I mentioned earlier, cl 13.2 of the Certified Agreement provides that "salaries paid for leave periods will be paid on the basis of the salary rate that the leave was accumulated". I take this to mean that if at the time the leave accumulated an officer was earning an annual salary of $105,505 (the then applicable salary for a Grade 1 Chief Officer and the basis of the monthly salaries paid to Mr Visscher from 1 July 2003 when the then current salary scale came into effect) then leave would be paid as a proportion of that sum. The leave paid to Mr Visscher on 4 June 2004 incorporated 49 days' leave for the first voyage but, when regard is had to the sum that was paid, it is clear that it was calculated on the basis of dividing the annual salary for a Second Mate by 365. Were it not for the use of the Second Mate's salary, this was the correct approach. The annual salary may be paid for services rendered on board ship, but it is paid to an officer each month whether he is serving on a ship or he is on leave. The daily rate at which he or she accrues leave is therefore determined by dividing the annual salary by 365. Thus, if the penalty is to be fixed by reference to a daily rate, the correct daily rate is half the amount Mr Visscher claimed, namely $289.055, which is derived by dividing the annual salary payable to a Chief Officer by 365. I say "if the penalty is to be fixed by reference to a daily rate" because the section does not refer to a daily rate. It merely provides that the wages shall be payable at double rates. Nevertheless, both parties proceeded on the basis that if s 78 applied, the amount due should be calculated on a daily basis.

273 It follows that if I am wrong in the view I have taken about the question of reasonable dispute, Mr Visscher would be entitled to be paid wages at double rates from 3 March 2004 until 4 June 2004 (93 days). Based on a doubled rate of $578.11 per day, that figure is $53,764.23.

Conclusion

274 In summary, I would answer the questions arising in the proceeding in this way:

(1) The relevant provisions of the *Navigation Act* applied to Mr Visscher as a salaried officer. The 2001 Certified Agreement did not effect an implied repeal of those provisions, nor was it void.

(2) Mr Visscher was discharged from the *Broadwater* on 3 March 2004 and his employment came to an end on that date. After he rejoined the ship on 8 April 2004, he sailed until 26 May 2004 when he took leave. He was not then permanently discharged from the ship and his employment did not come to an end until 1 June 2004.

(3) Mr Visscher did not sail the second voyage as a casual and no wages are outstanding from that voyage.

(4) The payment made on 4 June 2004 was a payment of wages for the purposes of ss 75 and 78 of the *Navigation Act*.

(5) The delay in payment was not due to Mr Visscher's act or default but it was due to a reasonable dispute as to liability for the wages and so no penalty is payable under s 78.

(6) If, to the contrary, the obligation under s 78 is enlivened, Mr Visscher would be entitled to be paid $53,764.23.

275 The proceeding must therefore be dismissed. Mr Visscher should pay Teekay's costs.

I certify that the preceding two hundred and seventy-five (275) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann.

Associate:

Dated: 9 November 2012