HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

CSL AUSTRALIA PTY LTD ACN 080 378 614

Appellant

and

TASMANIAN PORTS CORPORATION PTY LTD ACN 114 161 938
First Respondent

INCITEC PIVOT LTD ACN 004 080 264
Second Respondent

INCITEC FERTILIZERS PTY LTD ACN 103 709 155
Third Respondent

VIVA ENERGY AUSTRALIA LTD ACN 004 610 459
Fourth Respondent

PERSONS WHO MAY HAVE A CLAIM WITHIN THE MEANING OF ARTICLE 2 OF CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976 (AS AMENDED BY THE 1996 PROTOCOL TO AMEND CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976)
Fifth Respondent

APPELLANT'S REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise reply to the argument of the First Respondent

2. The issue in this Appeal is (as acknowledged at RS [2]) whether TasPorts' *para 22(e)* wreck removal claim is limitable under Art 2(1)(a). That turns on the proper construction of para (a) of Art 2(1) – a provision of the 1976 Convention that has force of law in Australia – and not on the scope of para (d) – which does not have force of law – or the scope or exercise of the Art 18 reservation, as TasPorts contends and Full Court found.

3. Neither TasPorts nor the Full Court addressed this issue in terms. That is, neither asked nor answered whether TasPorts' wreck removal claim was within the plain language and therefore scope of Art 2(1)(a). Instead, TasPorts has embraced (at RS [7], [9]) the Full Court's erroneous approach of starting with the scope of para (d) and working backwards by elimination to hold that if a claim is of a kind described in that paragraph and the Art 18 reservation is exercised, then it is removed from limitation under the LLMCA even if it is also within the express terms of Arts 2(1)(a) or (c) and thus otherwise limitable.

4. At RS [27] TasPorts mischaracterises the exercise of applying Art 2(1)(a) as a contortion by positing a false question involving reconciling meaning between several paragraphs of Art 2(1). However, as the UK Supreme Court observed in *The Flaminia UKSC* at [130], [138] and [142], Art 2(1) should be applied according to its terms and by reference to the particular *claim* made and circumstances in which it arises. That approach eschews any artificial attempt at such reconciliation and instead applies the language of each head of limitation within Art 2(1) that has force of law to the facts of that *claim*. There is nothing convoluted or contorted in that approach which simply calls for the application of the ordinary meaning of the words used, in this instance in Art 2(1)(a) (AS [13]). Here, TasPorts claims loss of or damage to property (the Tugs) occurring in direct connection with the operation of the ship (*Goliath*) and consequential loss arising from that damage (the cost of removing the damaged Tugs). As such, that claim (including its wreck removal component) plainly falls within the terms of Art 2(1)(a) (AS [27]) as the primary judge rightly found (PJ [99]; CAB 34). TasPorts does not deny that its wreck removal claim is within the ordinary meaning of the words of Art 2(1)(a). Rather, it erroneously contends that those words should be read down by reason of the existence of para (d) and the existence and exercise of the Art 18 reservation. The reasons why that contention is

erroneous have already been explained in CSL's principal submissions.

5. In effect, TasPorts' approach gives Art 2(1)(d) precedence as a *lex specialis*. But that is contrary to what was said in *The Flaminia UKSC* and the approach it endorsed (described above) which focuses on the language of the available heads of limitation and recognises potential dual characterisation (AS [42]-[46]). TasPorts' approach is not warranted by the text of Art 2 or Art 18. Nor is it justified by the chapeau to Art 2(1) or the right of reservation conferred by Art 18. It is also not supported by the *travaux* (cf RS [44]-[54]).

6. TasPorts also seeks to justify its construction by invoking the maxim *generalia specialibus non derogant* (RS [15]) where the application of a general provision would neutralise a special provision dealing with the same subject matter, the special provision must prevail. While this maxim may reflect a commonsense consideration, "*it is not a mechanical rule, everything depends on the context. And ultimately the matter is one of judgment*."[1] In light of *The Flaminia UKSC*, it is not possible to treat Art 2(1)(d) simply as a specific provision contrasted with a general catch-all in Art 2(1)(a). Art 2(1)(a) is not a general catch-all provision, as *The Flaminia UKSC* demonstrates. In any event, the maxim applies where the "*general*" provision would neutralise the effect of the special provision. For the reasons already advanced, Art 2(1)(a) does not neutralise Art 2(1)(d). Article 2(1)(d) captures claims not encompassed by Art 2(1)(a) (AS [31]). This maxim "*has its place where contrariety is manifest*".[2] But no such contrariety exists here. To borrow the expression of the UK Supreme Court refusing to apply the maxim in a different statutory context, the heads of limitation set out in Art 2(1) are "*simply different provisions concerned with overlapping aims and with overlapping applications*".[3]

7. Despite TasPorts' express approval of Art 2(1)(d) having an exclusive operation (RS [27]), it is at pains at RS [6] and [75] to contend that the Full Court did not reason that Articles 2(1)(a) and (d) are mutually exclusive. But that contention is inconsistent with the Full Court's conclusions that it was not contemplated that any claims for wreck removal would fall within para (a), hence the need to add paras (d) and (e) so as to make those claims subject to limitation (AS [101]; CAB 102); para (d) was intended to encompass all claims for wreck removal expenses (AJ [57]; CAB 91); and the exercise of the Art 18 reservation results in such claims not being limitable under Art 2(1) even

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[1] *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, at 622 per Lord Steyn.
[2] *Reseck v Commissioner of Taxation* (1975) 133 CLR 45 at 53 per Stephen J.
[3] *Cusack v Harrow London Borough Council* [2013] 1 WLR 2022, at [61] per Lord Neuberger.

where they fall within the terms of para (a) (AJ [123]; CAB 107) as TasPorts' claim was found here. Those conclusions and their underlying reasoning necessarily exclude any concurrent application of Art 2(1)(a) to wreck removal claims and give Art 2(1)(d) exclusive operation, even where it does not have force of law. That cannot be reconciled with the dual characterisation identified in *The Flaminia UKSC* which the Full Court purported to accept at AJ [42]; CAB 87 (cf RS [6]).

8. TasPorts asserts (RS [29]) that CSL has left unexplored examples of claims falling within Art 2(1)(d) but not Art 2(1)(a). But it is not necessary to explore the metes and bounds of Art 2(1)(d) in order to construe Art 2(1)(a) or determine whether TasPorts' *para 22(e)* claim falls within its terms. CSL denies that it has been unable to offer any clear guidance in this regard (cf RS [33]). But if there were a concern that paras (a) and (d) overlapped entirely (which does not appear to be contended), that was addressed at AS [59]. Insofar as a further example is useful or necessary, CSL refers to the situation and claims described in AS [31]). This demonstrates the utility of the inclusion in Art 2(1) of paras (d) and (e) in addition to (a) and (c), as well as the legal consequence of a Contracting State exercising the Art 18 reservation, viz excluding from limitation that range of claims limitable under Art 2(1)(d) but not (a) (as the primary judge found: AS [35]).

9. *The Flaminia UKSC* is an example of where a claim is limitable under one head of Art 2(1) (viz para (e))[4] despite not being limitable (on the facts of that case) under another head (viz para (a)) (see AS [43]). That same logic applies to Art 2(1)(a) and (d). That a claim of the type described in para (d) is not limitable because para (d) has not been enacted does not mean that that claim is not limitable under para (a) despite falling within its express terms. There is nothing odd or eccentric about that position (cf RS [10]). Nor is it incoherent (cf RS [40] and *The Star Centurion*) or an absurd result (cf RS [41]).

10. The foregoing demonstrates not only that there is utility in the reservation in Art 18 under CSL's construction (AS [35] and para [8] above) but also that there can be utility in that reservation without having to adopt a construction of Art 2(1) that gives paras (d) or (e) exclusive dominion over all claims falling within them (cf RS [27]). CSL's construction does not water down or marginalise Art 18 (cf RS [26], [34]). On CSL's construction, its scope remains co-extensive with Art 2(1)(d). It is TasPorts who impermissibly relies on Art 18 to read down the express terms of Art 2(1)(a), a provision to which Art 18 has no

[4] para (e) forming part of UK law because by s.185 of and Sch 7 to the *Merchant Shipping Act* 1995, the UK had exercised the Art 18 reservation in respect of only Art 2(1)(d) and not (e): *The Flaminia UKSC* [49].

application. TasPorts' claim (RS [41]) that on CSL's construction "*the Convention State's exercise of the right of reservation would make no difference to the availability*" in a case for limitation for wreck removal expenses arising from a wrongful sinking of a ship misapprehends the critical question. Limitation by whom ? Limitation by the owner of the sunken ship is foreclosed. But limitation by the wrongdoing ship is available. There is nothing in the Convention text or extrinsic material to suggest that States intended the para (d) reservation or its exercise to extend to the paradigm instance of wreck removal claims referred to in RS [41] or to suggest that in that situation limitation should not be available to the wrongdoing ship for claims for the removal of the other ship. On the contrary, that reservation was directed at a different and narrower concern (AS [39]).

11. TasPorts' submissions also overlook the related distinction that limitation is relevantly calculated by reference to the tonnage of the limiting ship under Art 6(1). The point is that in real terms the limitation question at issue in that paradigm instance depends on which shipowner is seeking to limit its liability.[5] The limitation amounts available to each owner would be different, depending on the tonnage of their respective ship. TasPorts' submissions do not allow for this fundamental characteristic of limitation.

12. TasPorts likewise contends at RS [23] that as a matter of coherence, the exercise of the reservation in Art 18 is a "*single, indivisible opportunity*" to exclude from the operation of the 1976 Convention all claims described by Art 2(1)(d) regardless of whether they are also within another paragraph of Art 2(1). For reasons already identified, this approach to coherence is misconceived. Nor does the text of the Convention or extrinsic material support such a broad intention (see also para [10] above). To the extent that TasPorts contends (at RS [44]-[54]) and the Full Court found (at AJ [101]-[112]; CAB 102-105) otherwise, that is based on an erroneous interpretation of the *travaux*.

13. At RS [31]-[32], TasPorts contends that CSL's construction of Art 2(1) invites uncertainty for a Contracting State at the time it considers whether or not to exercise the reservation in Art 18. But there is no uncertainty. Following *The Flaminia UKSC* a Contracting State would understand that if it exercises the Art 18 reservation, then claims of the types described in Arts 2(1)(a)-(c) and (f) will be limitable and claims that are not

[5] for example, if Ship A allided with anchored Ship B which sank as a result then there may be claims against Ship A or its owners which they would be entitled to limit under Art 2(1)(a) by reference to the tonnage of Ship A. On CSL's construction, that would include any claim for raising and removing Ship B. The owners of Ship B would be entitled to limit any claim against them for the costs of removal of their Ship under Art 2(1)(d) if enacted, but not under Art 2(1)(a). This would be by reference to the tonnage of Ship B.

as described in those paragraphs of Art 2(1) will not.[6]

14. Contrary to RS [55], [56] and [79], neither CSL's nor the primary judge's construction depends on the *travaux*. The correct construction rests on the plain and ordinary meaning of the express words of Art 2(1)(a), construed as endorsed in *The Flaminia UKSC;* a construction that (as the primary judge rightly found) encompasses TasPorts' *para 22(e)* claim. Nevertheless, the *travaux* confirms that para (d) was introduced to extend the scope of limitation beyond (a) and (c), not to create a *lex specialis* provision (AS [38], [39]; para [5] above). Logically, where para (d) has force of law, no purpose is served by giving it exclusive operation over para (a). That is not changed by either the reservation in Art 18 to not enact para (d) or the exercise of that reservation.

15. The principle of "*commercial insurability*" reflected in the *travaux* (AS [40]) reinforces this interpretation (cf RS [56]). What clearly emerges from the *travaux* is that claims for damage to third-party property occurring in direct connection with the operation of an insured ship was always intended to be limitable, and no reservation under Art 18 was permitted or intended for such claims. This approach ensures predictability for insurers because they can realistically assess wreck removal exposure for an insured vessel by reference to its specifications, trade, and operating environment and set premiums accordingly. What insurers cannot reasonably do is account for the unknowable particulars of every other vessel with which the insured ship might collide with and sink.[7]

16. CSL's construction accords with the ordinary meaning of the terms of Art 2(1) (consistent with *The Flaminia UKSC* approach), especially para (a); recognises that para (d) was intended to extend, not displace, the ambit of para (a); and promotes "*commercial insurability*" by ensuring predictable and rational risk allocation between shipowners and their insurers vis-à-vis the ship by reference to whose tonnage limitation is calculated.

Dated: 11 December 2025

Gregory Nell SC
New Chambers
(02) 9221 3639
nell@newchambers.com.au

Martin Scott KC
Owen Dixon Chambers West
(03) 9225 8798
mrscott@vicbar.com.au

Nicholas Wallwork
Quayside Chambers
(08) 9460 5274
nwallwork@quaysidechambers.com

[6] see also *Barameda Enterprises Pty Ltd v O'Connor* [1988] 1 Qd R 359 at 374 per Macrossan J.
[7] for example, a seagoing fishing vessel's insurer cannot reasonably price the risk and costs of removing the wreck of an oil tanker, whereas the oil tanker's insurer can factor a claim for such costs into its premium.