FEDERAL COURT OF AUSTRALIA

Visscher v Teekay Shipping (Australia) Pty Ltd [2011] FCAFC 137

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| Citation: | Visscher v Teekay Shipping (Australia) Pty Ltd [2011] FCAFC 137 |
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| Appeal from: | Visscher v Teekay Shipping (Australia) Pty Ltd [2011] FCA 1 |
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| Parties: | **TIMOTHY VISSCHER v TEEKAY SHIPPING (AUSTRALIA) PTY LTD** |
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| File number: |  |
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| Judges: |  |
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| Date of judgment: | 4 November 2011 |
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| Catchwords: | **ADMIRALTY** – seafarer’s wages – relevant principles – obligation of shipowner to pay seafarer’s wages before or at the time of discharge under s 75 of the *Navigation Act 1912* (Cth) *–* whether shipowner had defence based on a reasonable dispute as to its liability for wages within the meaning of s 78 of the *Navigation Act 1912* (Cth) – whether seafarer, when obtaining his discharge, accepted as repudiation shipowner’s insistence of his holding lower rank, after earlier promotion to chief officer withdrawn – shipowner failing to pay wages and accrued leave at time of discharge from ship – whether seafarer entitled to claim extra wages under s 78 during period after his discharge and before final payment under s 75 – whether parties’ later agreement that seafarer serve on a further voyage in higher rank without prejudice to their positions as to his actual rank capable of evidencing reasonable dispute as to shipowner’s liability for wages at earlier time of seafarer’s discharge – no evidence before primary judge that there was reasonable dispute as to shipowner’s liability for wages including accrued leave at time of seafarer’s discharge**Held:**  primary judge erred by summarily dismissing seafarer’s proceedings for wages under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) on the basis that seafarer had no reasonable prospect of success – there was a sufficient likelihood that the shipowner could not establish the defence in s 78 of the *Navigation Act 1912* (Cth)  |
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| Words & phrases: | “wages”, “discharge”, “articles of agreement”, “running agreement” |
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| Legislation: | *Admiralty Act 1988* (Cth) ss 4(3)(t),15(2)(c)*Federal Court of Australia Act 1976* (Cth) s 31A*Federal Court Rules 1979* (Cth) O 20 r 5*Maritime Labour Convention 2006**Merchant Shipping (Payment of Wages and Rating) Act 1880* (Imp) s 4*Merchant Shipping Act 1854* (Imp) s 187*Merchant Shipping Act 1894* (Imp) s 135, 189(3)*Navigation Act 1912* (Cth) ss 6, 46, 50, 61, 62A, 63, 68, 75, 75A, 76, 77(1), 78, 82, 83 *Seamen’s Articles of Agreement Convention 1926**Workplace Relations Act 1996* (Cth) s 170CE *Halsbury’s Laws of England* (Vol 93, 5th ed) (LexisNexis, London, 2008)J Kay, *The Law of Shipmasters and Seamen* (2nd ed) (Stevens & Haynes, London 1895)Lord Tenterden, *Law of Merchant Ships and Seamen* (11th ed, ed by Sir William Shee) (Shaw & Sons, London, 1867)Lord Tenterden, *Law of Merchant Ships and Seamen* (14th ed) (Shaw & Sons, London, 1901)N Meeson, *Admiralty Jurisdiction and Practice* (3rd ed) (Lloyd’s of London Press, London, 2003)SC Derrington and JM Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, London, 2007)W Porges and M Thomas, *British Shipping Laws;* *The Merchant Shipping Acts* (Vol 11)(Stevens & Sons, London, 1963)  |
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| Cases cited: | *Cutter v Powell* (1795) 6 Term Rep 320 cited*Delaroque v The SS Oxenholme Co Ltd* (1883) 1 C & E 122 cited*Federation Seamen’s Union of Australasia v Commonwealth Steamship Owners’ Association* (1922) 30 CLR 144 cited*Frazer v Hatton* (1857) 2 CB(NS) 512 cited*Lang v St Enoch Shipping Co Ltd* 1908 SC 103 cited*Liosatos v Australian National Line* (1964) 111 CLR 282 followed*Palace Shipping Company Ltd v Caine* [1907] AC 386 applied*Re The Great Eastern Steamship Co; Claim of Williams* (1885) 5 Asp MLC 511 cited*Spencer v The Commonwealth* (2009) 241 CLR 118 cited *The “Juliana”* (1822) 2 Dods. 504 cited*The “Minerva”* (1825) 1 Hagg 345 cited*The Rainbow* (1885) 5 Asp MLC 479 cited*The Turgot* (1886) 11 PD 21 cited*United States Trust Company of New York v Master and Crew of Ship “Ionian Mariner”* (1997) 77 FCR 563 cited*Visscher v Giudice* (2009) 239 CLR 361 cited  |
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| Date of hearing: | 5 August 2011 |
|  |  |
| Date of last submissions: | 6 September 2011 |
|  |  |
| Place: |  |
|  |  |
| Division: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 68 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Mr GJ Hatcher SC with Mr B Cross |
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| Solicitor for the Respondent: | Norton Rose Australia |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| in admiralty |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 12 of 2011 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | TIMOTHY VISSCHERAppellant |
| AND: | TEEKAY SHIPPING (AUSTRALIA) PTY LTDRespondent |

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| JUDGES: | GREENWOOD, RARES AND FOSTER JJ |
| DATE OF ORDER: | 4 NOVEMBER 2011 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be allowed with costs.
2. The orders made by the primary judge on 4 January 2011 be set aside.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| in admiralty |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | TIMOTHY VISSCHERAppellant |
| AND: | TEEKAY SHIPPING (AUSTRALIA) PTY LTDRespondent |

|  |  |
| --- | --- |
| : | GREENWOOD, RARES AND FOSTER JJ |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

**THE COURT:**

1. This appeal involves a general maritime claim by Timothy Visscher as a member of the crew of the ship *MV Broadwater* for wages, including emoluments, he alleged that his former employer, Teekay Shipping (Australia) Pty Ltd, is liable to pay him under ss 75 and 78 of the *Navigation Act 1912* (Cth) (**the Act**): cf s 4(3)(t) of the *Admiralty Act 1988* (Cth). Relevantly, Mr Visscher asserted that while he was at sea on *Broadwater*, in late February 2004, Teekay demoted him from Chief Officer to second mate and so effected his constructive dismissal. He contended that he was given his discharge from *Broadwater* by her Master on 3 March 2004 but not paid his full wages, thus entitling him to payment of the outstanding wages and, from 3 March 2004 until he is paid in full, wages calculated at double rates as provided in s 78 of the Act.
2. Teekay succeeded in persuading the primary judge that Mr Visscher’s claim should be dismissed under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) because he had no reasonable prospect of successfully prosecuting it. Teekay relied on the defence in s 78 that its delay in paying Mr Visscher was due to a reasonable dispute as to its liability to pay him wages. In order to demonstrate this, it relied on its conduct in September 2001, first, in rescinding Mr Visscher’s promotion to Chief Officer at that time, but thereafter, in continuing to engage and pay him to sail as a Chief Officer until 2004, and, secondly, on the parties’ conduct in the four months after 3 March 2004.

# The legislative scheme

1. For the purposes of the Act, unless the contrary intention appeared, s 6(1) provided the following definitions:
* **articles of agreement** and **agreement** meant, in relation to a ship, the agreement between the master of a ship and her crew and, in relation to a seaman belonging to a ship, the agreement between the master of the ship and the seaman;
* **discharge** meant the certificate of discharge given to a seaman upon his or her discharge from a ship;
* **seaman** meant, a person employed or engaged in any capacity on board a ship on the business of the ship other than her master, a pilot or a person employed temporarily on the ship in port;
* **wages** included emoluments.
1. In addition, where a person became a member of the crew of a ship pursuant to articles of agreement, he was deemed to belong to the ship for the purposes of the Act until he ceased to be a member of her crew (s 6(4A)). A person who, in pursuance of articles of agreement, ceased temporarily to be a member of the crew, first, was deemed to cease to belong to the ship until he again became a member of her crew (s 6(4B)) but, secondly, was, in those circumstances, not to have been taken to have been discharged from the ship (s 6(4C)).
2. Part II of the Act dealt with masters and seamen. Division 8 of Pt II of the Act (which included ss 46 and 50) dealt with the engagement of seamen, Div 9 with their discharge and Div 10 with their wages. Relevantly, s 46(1) provided that a master must not take a ship, and the owner must not suffer or permit the ship to be taken, to sea with a seaman engaged to serve on her unless the master had entered into articles of agreement with the seaman that complied with s 46. The articles of agreement had to be in the prescribed form, prepared in duplicate and signed first by the master, then by the seaman and dated (s 46(2)). In addition to those in the prescribed form, the articles could include lawful provisions agreed on between the master and seaman and approved by a superintendent, being relevantly, a person approved by the Australian Maritime Safety Authority (**the Authority**) (s 46(4)).
3. Articles of agreement could be made for one voyage, or if voyages of the ship averaged less than six months duration, could be extended to continue over two or more voyages for no longer than six months, provided that, if the ship was at sea when the six months expired, such an agreement would remain in force until the ship’s arrival at its port of destination and “… the crew shall be considered … discharged when the employment ends” (s 50(1) and (2)). The latter agreements were referred to in the Act as **running agreements**. Importantly, s 50 described the consequences that attached to a running agreement that had been in force for more than six months. First, the master could discharge any seaman, and any seaman could obtain his discharge, when the ship reached a port in Australia other than its destination and was not proceeding directly, or by intermediate ports to the port of discharge mentioned in the agreement (s 50(3)). Secondly, a seaman could not be discharged, or discharge himself, on less than 24 hours’ notice (excluding Saturdays) before the ship left the port (s 50(4)). Thirdly, if a seaman was discharged or claimed his discharge under s 50(3), he was entitled to receive from the master a free passage to the proper port of return, wages and a victualling allowance until he arrived there (s 50(5)).
4. When a seaman was discharged from a ship, the master had to sign and give him a discharge in accordance with the prescribed form (s 61(a)). Special provisions applied to discharge of a seaman outside Australia by force of s 62A, including a requirement that if the ship was sold, transferred or disposed of at a port in a country that was not prescribed for the purposes of the Act, the master then had to discharge each seaman entered on board the ship notwithstanding anything in the articles of agreement, unless the seaman consented in writing to continue to serve on her (s 62A(3)). In such a case, the seaman had the same rights to facilitate his return to the port of destination as he would have had if he were discharged under s 50(3) (s 62A(4)). It was an offence to give a seaman a discharge that falsely indicated the capacity in which he had actually served or the time in which he had served in that capacity (s 63, see too s 68).
5. The critical provisions of the Act for present purposes are in Div 10, namely:

“75 Payment of wages on discharge

(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.

76 Account of wages on discharge

(1) The master of a ship who discharges a seaman at any port shall deliver to the seaman at the prescribed time and in the prescribed form or in a form approved by the Authority by instrument in writing, a full and true account of the wages of the seaman and of the deductions made or to be made for any reason from those wages.

1. Wages to run on in certain cases

**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.” (emphasis added)

1. The Act contemplated that wages would be payable at a rate per month (s 75A). Subject to any contrary provision in the articles of agreement, a seaman entered on board a ship had to be paid the wages earned, less any lawful deductions, on the first day of a month during the period between the sixteenth and last days of the preceding month, and again on the sixteenth day of a month for the period between the first and fifteenth days of that month (s 77(1)). However, if the ship was not in port or, it was, but there was no bank on the day that his wages were required to be paid under s 77(1), he had to be paid within 24 hours after the arrival of the ship at a port at where there was a bank (s 77(2)). If the wages were not paid when required, s 77(3) gave the seaman the right to recover them as wages together with up to two days’ pay for every day up to 14 days of the delay or such lesser time as the Court thought just in the circumstances (s 77(3) and (4)).
2. However, it was a defence if payment on the due date was impracticable and it was made as soon as practicable thereafter or, as in ss 75(3) and 78, the delay was due to the 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 (s 77(5)). And, s 82(1) provided that a seaman’s right to wages began at the earlier of the time he commenced work or when the articles of agreement specified he would commence work or be present on board. In addition, if the seaman was re-engaged to serve on a ship on the same day as his earlier service on her terminated, he was not entitled to double pay for that day, but if his new engagement was at a higher rate of wages, he was entitled to wages for that day at the higher rate (s 82(2)). Importantly, s 83(1)(a) and (d) provided:

“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.”

# Background

1. In late March 2001, Mr Visscher accepted an offer of permanent employment with Teekay as a third mate. Very soon afterwards, Teekay offered him a temporary position on its tanker, the *MV Samar Spirit*, as Chief Officer (or first mate) which Mr Visscher accepted.
2. On 21 August 2001, while he was at sea, Teekay wrote to Mr Visscher offering him a permanent promotion as a Chief Officer, which he accepted by letter dated 7 September 2001. Around this time, the Australian Maritime Officers Union threatened to take industrial action against Teekay in respect of their negotiations for a new enterprise bargaining agreement. One issue that was significant during those negotiations concerned permanent promotions of some deck officers that Teekay had made.
3. On 11 September 2001, the Union and Teekay appeared at a hearing in the Australian Industrial Relations Commission (**the Commission**) at which the Commissioner recommended, among other steps, that Teekay rescind its recent promotions. On 20 September 2001, Teekay wrote to Mr Visscher saying that it had:

“… decided to capitulate and rescind the promotions. This is extremely unfortunate as the promotions were **made in good faith by the company** **and accepted** in good faith by the individuals.

What this will mean for you at this present time is still a little unclear.” (emphasis added)

1. Mr Visscher replied on 26 September 2001 refusing to accept rescission of his promotion and asking if his employment had been terminated. He met with Teekay’s marine operations manager, Capt Mark Board on 3 October 2001 and they discussed the letter of 20 September. According to Mr Visscher’s evidence, Capt Board told him that the matters were out of his hands but that “[a]s far as I am concerned you’ll stay on the *Samar Spirit* as Mate”, meaning his current position as Chief Officer. And that is just what happened for over two years. From then, Teekay paid Mr Visscher at the rate of Chief Officer and he performed the duties of that rank on *Samar Spirit* until he had a personal disagreement with her master in November 2003.

# The 2001 certified agreement

1. On 5 May 2002 the Commission certified a new agreement between Teekay and the Union that was to remain in force until 1 July 2004 (**the 2001 certified agreement**). Officers were to be remunerated at the stipulated base rate of pay consistent with the classification (i.e. rank) in which they were sailing (cl 13). Where an officer was relieving in a higher rank, he was to be paid for that duty and while he was on leave from that period of duty, at grade 1 level for that rank (cl 13.4). The certified agreement provided that an officer who, relevantly, had been employed for more than three months had to give 28 days’ notice in writing and comply with the provisions of cl 27 concerning swing arrangements (cll 24.2, 24.3). Swing arrangements were agreed to be designed to provide officers with a regular duty and leave cycle (cl 26.1). The swing arrangement was that there would be a cycle of six weeks duty followed by six weeks leave, subject to expansion of both where the exigencies of a longer voyage so required (cl 27). Leave would accrue on the basis that there would be a two-crew swing, so that when one crew was on duty, the other would be on leave (cl 28).
2. The primary judge concluded that the certified agreement made no provision for payment of leave that had been accrued. Her Honour observed that cl 15 of the contract of employment offered by Teekay to Mr Visscher on 26 March 2001 provided that accrued leave would be paid out when he left Teekay. Her Honour proceeded on the basis that Mr Visscher had an entitlement to be paid accrued annual leave on termination of his employment.

# The events of late 2003 and early 2004

1. In late December 2003 when *Samar Spirit* had returned from her then voyage, Mr Visscher, who had sailed on her as Chief Officer since 2001, asked Doug Craig, Teekay’s assistant vessel manager, for a transfer to another ship after his next tour of duty that ended in late January 2004. Mr Visscher’s evidence was that Teekay had a practice of transferring Chief Officers to other ships in its fleet after they had served about two years on one ship. He said that Mr Bray telephoned him at home on 8 January 2004 and told him that Teekay had intended he stay on *Samar Spirit* as Chief Officer, but that as he had requested a transfer, he would sail as a second mate, probably on a products tanker. Mr Visscher said that he replied: “We’ll cross that bridge when we come to it.”
2. This exchange had a history that needs explanation. After Teekay purported to “rescind” Mr Visscher’s promotion in 2001, it maintained that he was employed as a third mate, despite posting him to *Samar Spirit* as Chief Officer and paying him the salary of that rank. As Heydon, Crennan, Kiefel and Bell JJ recorded in their account of background in *Visscher v Giudice* (2009) 239 CLR 361 at 376 [42]-[44], when the 2001 certified agreement between Teekay and the Union came into force on 5 March 2002, Mr Visscher was included in the schedule of officers as having the rank of third mate. Then, on 5 July 2002, Teekay wrote to Mr Visscher offering him a position as second mate. Their Honours noted that his evidence was that he rejected this offer as unnecessary given his existing contract of employment as a Chief Officer. However, subsequently to this time, Mr Visscher appeared as a second mate on the updated gradings list forming part of the certified agreement. Mr Visscher’s pay slips showed that the salary of Chief Officer he received was the sum of the lower rate for the position he was recorded as having on the gradings list from time to time (i.e. second or third mate) and the amount of the difference between that salary and that of a Chief Officer.
3. On 9 January 2004, according to Mr Visscher’s evidence, Mr Bray telephoned Mr Visscher again and offered him a tour of duty as Chief Officer on *Broadwater* that required him to meet her in Sriracha, Thailand. Mr Visscher’s evidence was that Mr Bray told him that after this tour of duty finished he would be sailing as a second mate and that he had responded by saying only that he would join *Broadwater* as requested.
4. Mr Visscher arrived on board *Broadwater* at Sriracha, Thailand, on 13 January 2004. He signed articles of agreement that day as Chief Officer for a voyage with a return port of Sydney using the part of a form headed “Engagement”. This form had three headed parts, “Engagement”, “Details of sea service” and “Discharges and releases”, conforming to the requirements of ss 46, 63 and 61 of the Act. I will refer to this as “**the engagement and discharge form**”. The articles had been opened for the ship’s two crews on 3 November 2003 as a running agreement. Part 5 of the articles of agreement provided that each seafarer who signed would serve on board the ship for a period of six months from 3 November 2003 (cl 1). The master would pay wages to each seafarer at the rate specified in relation to him “[s]ubject to any industrial award or agreement that is applicable” (cl 4). A seafarer who was temporarily absent from the ship in accordance with the terms of an award or agreement relating to his service as a seafarer, would cease temporarily to be a member of the crew of the ship (cl 7A). As soon as practicable thereafter, he would leave the ship and rejoin her at the time and place directed by the master or owner (cl 7B). The articles of agreement expressly provided that they did not derogate from and were subject to the Act (cl 9).
5. Of course, Mr Visscher had been engaged for just the one voyage on *Broadwater*, and so at its termination, he would cease to be a member of her crew unless he were re-engaged. As the end of this tour of duty approached, Mr Visscher sent an email on 22 February 2004 to Mr Vincent Scott, Teekay’s vessel manager, headed “Termination of employment”. The email referred to Mr Bray’s advice in January 2004 that when his tour of duty on *Broadwater* finished he would be required to sail as a second mate. Mr Visscher wrote that this constituted a demotion from his position as Chief Officer and was unacceptable to him. He continued by saying that demotion was a constructive termination of the contract of employment and:

“I will therefore consider my employment as being terminated by Teekay upon leaving the MT Broadwater on or about 26 February 2004.

At your earliest convenience please pay into my bank account all entitlements.”

1. Critically, Mr Scott replied by letter on 24 February relevantly stating:

“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 of Chief Officer’

**as you have never been graded Chief Officer in Teekay**. You are currently graded Second Mate.

1. 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.
2. **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.” (emphasis added)

1. After its receipt on board *Broadwater*, Mr Visscher discussed the letter with her Master, Capt John McLellan. According to Mr Visscher’s evidence, Capt McLellan told him that it would be pointless to discuss the matter with Mr Scott and the conversation continued:

“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 at Kurnell.

Capt McLellan: **I agree**.” (emphasis added)

1. On 3 March 2004, while *Broadwater* was at Kurnell in Botany Bay, Capt McLellan completed the engagement and discharge form by inserting details of Mr Visscher’s sea service on her between 13 January 2004 and noted on the form “Leave” as the reason Mr Visscher ceased to be a member of the crew. In the section headed “Discharges and releases”, Capt McLellan completed the particulars of discharge as 3 March 2004 at Botany Bay, adding that the cause of leaving the ship was, again, “Leave”. Both Capt McLellan and Mr Visscher then signed the engagement and discharge form, the Master doing so against a statement: “I, the master hereby release the seafarer whose signature appears above from all claims under this agreement”.
2. Later, on 3 March 2004, Mr Visscher left *Broadwater*. He claimed that he was then owed $15,609.00 in leave entitlements and this had not been paid to him on or before his discharge from the ship. He also claimed that he did not receive an account of wages at the time of his discharge. Mr Visscher said that following this, Teekay continued to pay his wages monthly without his knowledge.

# Subsequent events

1. On 8 March 2004, Mr Visscher replied by facsimile to Mr Scott’s letter of 24 February 2004. He disputed Teekay’s conduct since late September 2001 purportedly “rescinding” his promotion to Chief Officer and its subsequent assertions that he had a lesser rank. He referred to Mr Bray’s telephone engagement of him as Chief Officer on *Broadwater* for “a single swing” (i.e. voyage) and Mr Bray’s statement that at its completion he would be required to sail as second mate. Mr Visscher asserted that the latter requirement was a breach of contract and that his departure from *Samar Spirit* had occurred due to a breakdown in his relations with her Master. Mr Visscher wrote that Mr Bray’s January 2004 statement as to his status amounted to a demotion and, hence, a constructive termination of his employment. He rejected Mr Scott’s characterisation of his letter of 22 February as a “resignation”. Mr Visscher concluded his letter by referring to his previously excellent relations with Teekay and suggesting they hold an urgent conference as a better course than litigation.
2. Mr Visscher was offered, and accepted, casual employment on another shipowner’s vessel on the same day. He also commenced proceedings on 8 March 2004 in the Australian Industrial Relations Commission seeking relief in relation to the termination of his employment under s 170CE of the *Workplace Relations Act 1996* (Cth), claiming that he had been constructively dismissed by way of demotion, relying on the exchange of correspondence in February 2004. Later, on the same day, Mr Visscher notified Mr Scott of his new posting and of having commenced the proceedings in the Commission. Those proceedings remain pending following the decision in *Giudice* 239 CLR 361.
3. On 15 March 2004, Mr Craig sent Mr Visscher an email that requested him to ring and arrange a meeting as soon as possible. Soon after, when he had returned home, Mr Visscher telephoned Mr Craig and arranged a meeting that occurred on 26 March 2004 with Teekay’s director of human resources, David Parmeter, also in attendance. Mr Visscher claimed that after the meeting, he walked to a hotel with Mr Craig for a meal and was told by him that he could offer him another tour on *Broadwater* as Chief Officer. Mr Visscher said that he would even have been prepared to sail on *Samar Spirit* when her Master left her. However, Mr Visscher told Mr Craig that he was in doubt as to whether his relationship with Teekay could be restored since Mr Parmeter had been adamant that he was only a second mate.
4. After this meeting, Mr Visscher wrote to Mr Parmeter on 29 March 2004. He said that he was prepared to withdraw his application to the Commission that he felt he had been compelled to file on the basis of Mr Bray’s statement that he would be required to sail as second mate. Mr Visscher claimed in his letter that based on what Mr Craig had told him at the hotel:

“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**.” (emphasis added)

He sought confirmation of his suggestion that he discontinue his proceedings.

1. According to Mr Visscher’s evidence, he was telephoned by Mr Scott on 5 April 2004. Mr Scott told him that he was scheduled to sail from Kurnell in Botany Bay on *Broadwater* on 8 April. Mr Visscher replied that he no longer worked for Teekay. He claimed that Mr Scott said “Well that’s in dispute, we say you still work here and you’re due to rejoin”. Mr Visscher said that he was dealing with Mr Parmeter. Also on 5 April, Mr Parmeter replied to Mr Visscher’s letter of 29 March, reiterating that he had a permanent grading of second mate with Teekay but that due to a current shortage of deck officers there was an ongoing, but indefinite, need for him to act as a Chief Officer. Mr Visscher replied immediately rejecting Mr Parmeter’s assertion that he was a second mate.
2. On 6 April, Mr Scott wrote to Mr Visscher offering him “a temporary promotion to the position” of Chief Officer for his next swing on *Broadwater*. Mr Visscher replied the next day proposing a compromise that he sign on the following day for a tour of duty on *Broadwater* as Chief Officer on the basis that neither side was making any admissions and without prejudice to the proceedings in the Commission. Mr Parmeter wrote back later that day accepting that compromise and agreeing to disagree.
3. At the end of his second tour of duty on *Broadwater*, Mr Visscher asked for his discharge and received it from the Master on 26 May 2004. On the next day, he told Teekay of his discharge and asked for his entitlements to be paid. What followed is not in issue in this appeal and it is not necessary to describe those matters. Mr Visscher has remained in dispute with Teekay ever since.

# The decision of the primary judge

1. The primary judge had fixed the proceedings for a final hearing to commence on 30 August 2010. However, six days before then, Teekay filed a notice of motion seeking that the proceedings be dismissed summarily under O 20 r 5 of the *Federal Court Rules 1979* (Cth) (**the old Rules**). That rule provided that the Court could dismiss or stay proceedings, or claims for relief in them, that it was satisfied were frivolous, vexatious or an abuse of the process of the Court. Teekay’s solicitors unhelpfully asserted, without elaboration, that the basis of its application was that Mr Visscher’s evidence and the pleadings “reasonably exclude the possibility that facts essential to the success of the claim will be able to be established”.
2. Her Honour began hearing the motion on the day originally fixed for the final hearing of the proceedings. Before the primary judge and on this appeal, Teekay was represented by senior and junior counsel and Mr Visscher represented himself. On the second day of the hearing before the primary judge, Teekay applied by consent to amend its motion to seek summary judgment under s 31A of the *Federal Court of Australia Act* as well as, or in the alternative to, O 20 r 5 of the old Rules. Teekay contended that the facts in Mr Visscher’s evidence demonstrated that it had an unassailable defence for the purposes of s 78 of the Act. This was that there was no reasonable prospect that Mr Visscher could negate Teekay’s position that there was a reasonable dispute as to his entitlement to be paid his wages immediately after his discharges from *Broadwater* on 3 March 2004 and 26 May 2004. Since the appeal has been confined to the position at the time of the first of those occasions, it is not necessary to consider the second. Suffice to say, that having regard to the conclusion we have reached that neither the primary judge nor this Court was given adequate assistance by Teekay as to the law, we would be disposed to grant Mr Visscher leave, if he is so advised, to make a fresh application for leave to appeal in respect of the balance of his proceedings.
3. The primary judge reasoned, as Teekay had urged, that at the conclusion of his first tour on *Broadwater*, it had refused to accept either that Mr Visscher’s employment had terminated or that he was entitled to termination pay, including for accrued leave. Her Honour accepted Teekay’s argument that the parties were in a dispute about whether Mr Visscher’s employment had been terminated at the end of that voyage. Teekay also argued that the evidence and pleadings showed the reasonableness of that dispute. The primary judge found that Teekay continuously treated Mr Visscher as a second mate who was carrying out the duties of a Chief Officer. The primary judge recorded that the majority in *Giudice* 239 CLR at 388 [81] had accepted that Teekay’s 20 September 2001 notice of rescission of Mr Visscher’s promotion to Chief Officer had not automatically brought his contract of employment to an end. The majority held that for this to occur, it was necessary that Mr Visscher accept this rescission as a repudiation before the contract could be terminated and the question whether it had been was yet to be decided by the Commission. Her Honour found:

“In all the circumstances, whatever the rights or wrongs of the dispute about termination by constructive dismissal in February-March 2004, on the material available thus far, it could not sensibly be suggested that the dispute was not reasonable. The applicant’s assertion that he had been “wrongfully demoted without good reason or explanation” in his fax to Mr Parmeter of 5 April 2004 is no answer. The evidence shows that the respondent rescinded the promotion because of a recommendation from the AIRC, and not peremptorily, and that its justification for reserving the right to require him to sail in the lower position of Second Mate, was that it considered that to be his permanent position. The respondent’s position (as Mr Parmenter put it in his letter of the same date) was that there had been no interruption in the employment. As the respondent was reasonably of the view that the employment was continuing, one would not reasonably expect it to accede to a demand for “wages” that the applicant claims were payable on termination or to pay a loading that was due only if the employment had been terminated and a new, casual contract entered into. **I am satisfied that there was a reasonable dispute as to liability for “wages” payable on termination because there was a reasonable dispute as to whether the applicant had been terminated in the first place**.” (emphasis added)

1. The primary judge characterised Mr Visscher’s case as requiring that the liability of Teekay to pay wages on his discharge from *Broadwater* “was contingent upon his employment having been terminated at the same time”. She found that he had no reasonable prospect of defeating Teekay’s defence that there was a reasonable dispute as to both that fact and the fact that his wages had become payable on or as a result of such a termination. Accordingly, the primary judge exercised her discretion to give judgment for Teekay under s 31A(2) of the *Federal Court of Australia Act*.

# The issues on the appeal

1. Mr Visscher argued that her Honour erred by finding that a reasonable dispute for the purposes of establishing a defence under s 78 was established because of there being a dispute about whether his employment had been terminated at the end of his first tour of duty on *Broadwater*. He pointed to the words of s 78 that the delay had to be due, relevantly, “… to a reasonable dispute as to liability for **the wages**”. Mr Visscher contended that there was no dispute that Teekay was liable to pay him for all his wages and entitlements up to 3 March 2004 at the rates applicable for a Chief Officer. This was because he had served in that rank throughout the period from September 2001, however Teekay wished to assert it had classified him.
2. Teekay supported the reasoning by the primary judge. It contended that the dispute as to the rank at which Mr Visscher was graded and the efficacy of its “rescission” of his promotion was a dispute within s 78. It argued that this dispute could be characterised as a continuous one involving agreements to disagree, as was evidenced, so it said, in the events that followed 3 March 2004. It said that it had continued to pay Mr Visscher after 3 March 2004 as it had before then until June 2004 when the relationship finally ended. Teekay said that Mr Visscher’s letter of 8 March 2004 initiated further discussions and was evidence of the continuing dispute as to its liability to pay wages under s 78. It said that he went back to work on the second tour of duty aboard *Broadwater* while they agreed to disagree. It said that the parties were not agreed on 4 March 2004 that Mr Visscher’s employment was at an end.
3. Teekay claimed that the following matters were compelling evidence that there was no reasonable prospect that Mr Visscher could succeed in his claim under s 78 of the Act. It did not receive a resignation from Mr Visscher in response to Mr Scott’s letter of 24 February 2004. Teekay continued to pay Mr Visscher as if nothing had happened. It also relied on Capt McLellan’s notation of “Leave” as the reason for his discharge on the engagement and discharge form completed on 3 March 2004 together with inconclusive conversations on or after 26 March 2004 about the future of the parties’ relationship. Teekay’s notice of contention sought to uphold her Honour’s order on the basis that she should have found that there was no evidence to support Mr Visscher’s claim that he had any entitlement for accrued leave.
4. The Court drew Teekay’s counsels’ attention to Mr Visscher’s evidence of the conversation between him and the Master of *Broadwater* that had not been referred to in the reasons of the primary judge. There, Mr Visscher said his employment was at an end because of Teekay’s intended demotion and asked for his discharge when the ship arrived at Kurnell. He said the Master agreed. Senior counsel responded that it was not necessary for the primary judge to refer to every piece of evidence.

# The Admiralty jurisdiction in respect of a seaman’s wages

1. Admiralty Courts have long exercised jurisdiction over claims by seamen for the recovery of wages earned under an ordinary agreement in respect of service at sea. The practice evolved for there to be articles of agreement to reflect the terms of the contract between the crew and the owners, usually made through their representative, the master. Eventually, legislation in the United Kingdom and its now former colonies, such as Australia, stipulated the importance of the role of articles of agreement.
2. The concepts used in Pt II of the Act of articles of agreement and discharge as well as the right of seafarers to be paid or recover wages when they have been discharged from a ship were not new in 1912. Those concepts and rights had a long history, although some of the expressions used in the Act may now seem unfamiliar.
3. The Admiralty Courts adopted a benevolent and protective attitude towards seamen to avoid overreaching by shipowners: SC Derrington and JM Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, London, 2007) at [4.33], N Meeson, *Admiralty Jurisdiction and Practice* (3rd ed) (Lloyd’s of London Press, London, 2003) at [2.108]: see too *Federation Seamen’s Union of Australasia v Commonwealth Steamship Owners’ Association* (1922) 30 CLR 144 at 157-158 per Isaacs J, 164 per Starke J; *United States Trust Company of New York v Master and Crew of Ship “Ionian Mariner”* (1997) 77 FCR 563 at 582E-583B per Black CJ with whom Lockhart J and Burchett J agreed. Meeson referred to two decisions by Lord Stowell that explained and exemplified this approach. In the first, *The “Juliana”* (1822) 2 Dods. 504 at 509 [165 ER 1560 at 1562], Lord Stowell said:

“The common mariner is easy and careless, illiterate and unthinking; he had no such resources, in his own intelligence and experience in habits of business, as can enable him to take accurate measures of postponed payments, with proper estimates of profit and loss.”

1. In the second case, *The “Minerva”* (1825) 1 Hagg 345 at 352 [166 ER 123 at 125-126], Lord Stowell explained that two particular obligations were necessary in a mariner’s contract; the description of the intended voyage and the rate of wages payable. He held that these terms were simple and intelligible. His Lordship observed that since legislation in 1729 (being the *Merchant Seamen Acts* (Imp) of 1729 and 1761-62, 2 Geo II c. 36 and 2 Geo III c. 31 s 1), these two terms were required to be in writing signed by the seaman not later than three days after coming on board the ship and they were conclusive and binding on all the parties. Lord Stowell rejected attempts at contracting out of the legislatively prescribed articles of agreement saying (1 Hagg at 355, [166 ER at 126-127]):

“On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side is a set of men, 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. Everybody must see where the advantage must lie between parties standing upon such unequal ground, and accordingly these special engagements so introduced into the mariners’ contract lean one way, to the disadvantage of the mariners, and to the advantage of their employers, by increasing the duties of the former, and diminishing the obligations of the latter.”

1. The Courts would not recognise changes to the terms of service that were negotiated during the voyage, whether the new terms benefitted or disadvantaged the seafarer. The reason given was that there was no consideration (i.e. in addition to that given by the original articles of agreement) for the new terms, since the seaman had signed on for the voyage, whatever exertions may be imposed by circumstances, such as the sea or the weather that they encountered: *Frazer v Hatton* (1857) 2 CB(NS) 512 at 521-527 per Williams, Crowder and Willes JJ. Moreover, as Lord Loreburn LC said in *Palace Shipping Company Ltd v Caine* [1907] AC 386 at 391, it may still be correct that despite legislative provisions that have been made for the protection of seamen “… the ancient power of the Admiralty Court to shelter them from wrong is not superseded”.
2. No doubt, another reason for the reluctance of the Courts to recognise the enforceability of a new, supervening or additional contract made after the master and a seaman had signed onto articles of agreement, was supplied by public policy. Generally, it would be very undesirable to allow either the crew or the master to negotiate new terms while the ship was at sea. Likewise, if such a new contract were enforceable, each side could seek to hold the other to ransom by demanding new terms, for example, when the ship was in peril or far from the seafarers’ home port. Nonetheless, some exceptions to this principle have been accepted as discussed in *Halsbury’s Laws of England* (Vol 93, 5th ed) (LexisNexis, London, 2008) at [465].
3. Thus, the articles of agreement came to play a vital role in regulating the relationship between the master (and owners) and the crew for each particular voyage. And, because the seafarer had been engaged in the service of the ship at sea, Admiralty Courts recognised his entitlement to a maritime lien and to arrest the ship if his wages had not been paid. Derrington and Turner trace this lien back to 1597 (op cit at [4.33]). Originally, the seaman’s lien extended only to the freight earned by the owner for the voyage: *The Juliana* 2 Dods at 510 [165 ER at 1563]. There, Lord Stowell said, “Freight, wherever acquired, is the mother of wages” (2 Dods at 516 [165 ER at 1565]). This lien is now recognised in s 83(1)(b) and (2) of the Act, as well as s 15(2)(c) of the *Admiralty Act*: see too “*Ionian Mariner”* 77 FCR 563.
4. In the same way, discharge of the seafarer at the conclusion of the service stipulated in the articles of agreement was also a significant incident of the relationship. Once the seaman was discharged, both he and the owners could negotiate afresh for the terms of the next proposed tour of duty to be embodied in new articles of agreement.
5. The concepts of a seaman signing articles of agreement to serve on a ship and being discharged from the ship were well known when the Act was passed in 1912. Indeed, these concepts have also been reflected in the *Seamen’s Articles of Agreement Convention 1926*  of the International Labour Organisation (in Art 3 relating to the requirements that articles of agreement be signed by both the shipowner and the seaman and that they contain particular provisions, and in Arts 11-14 relating to the discharge of the seaman) and in its successor, the *Maritime Labour Convention 2006* (in Reg 2.1-2.6 and Standard A2.1-2.6, as to the seafarers’ employment agreements and provisions, particularly Standard A2.1(4)(g)(iii) and guideline B 2.1.1 relating to the circumstances in which the seafarer will be discharged): see too *Re The Great Eastern Steamship Co; Claim of Williams* (1885) 5 Asp MLC 511 at 514; 53 LT 594 at 596 per Chitty J.
6. Some provisions of Pt II of the Act had their origin in the nineteenth century Merchant Shipping legislation of the United Kingdom. Relevantly, s 187 of the *Merchant Shipping Act 1854* (Imp) required payment to a seaman of his wages by the master or owner of a home trade ship and of all other ships at stipulated times, including, respectively, at the time of his discharge or within five days of his discharge, and, in all cases, the seaman was entitled to be paid one quarter of what was due at the time of his discharge. That section also provided that every master or owner who:

“… neglects or refuses to make payment in manner aforesaid, **without sufficient cause**, shall pay to the seaman a sum not exceeding the amount of two days’ pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, such sums shall be recoverable as wages.” (emphasis added)

1. This was substantially re-enacted to apply only to home trade ships by s 135 of the *Merchant Shipping Act 1894* (Imp). However, in the case of foreign-going ships, s 4 of the *Merchant Shipping (Payment of Wages and Rating) Act 1880* (Imp) and later, s 134 of the 1894 Act, required the master or owner to pay each seaman at the time he lawfully left the ship the lesser of £2 or a quarter of the balance due to him, and the remaining balance within two business days, failing which, any amount not paid, unless the delay were due to the seaman’s fault or “to any reasonable dispute as to liability”, the seaman’s wages continued to run until payment; i.e. he was entitled to be paid for every day after his discharge until he was paid in full: *Great Eastern Steamship* 5 Asp MLC at 515, 53 LT at 597; see too: J Kay, *The Law of Shipmasters and Seamen* (2nd ed) (Stevens & Haynes, London 1895) pp 364-366; Lord Tenterden, *Law of Merchant Ships and Seamen* (14th ed) (Shaw & Sons, London, 1901) pp 226-229, see too (11th ed, ed by Sir William Shee) (Shaw & Sons, London, 1867) at pp 480-481.
2. A purpose of the Act and its United Kingdom predecessors was to protect the rights of seafarers by ensuring that, first, the terms on which they were engaged to serve on a ship at sea were identified and agreed to, as evidenced by articles of agreement being signed by the owners (usually by the master on their behalf) and the seafarer and, secondly, on the seafarer being discharged from the service on the ship on the voyage for which he had, literally, signed on. The consequence of the restrictions on the length of running agreements is that seafarers who serve one employer often on one ship, will enter into a series of successive limited engagements: cf *Liosatos v Australian National Line* (1964) 111 CLR 282 at 290 per Barwick CJ.
3. The right of a seafarer to be paid his wages in full after performing his service, and to be paid his whole wages if he fell ill and was put ashore before its completion, can be traced to the *Laws of Oleron* (Tenterden, 11th ed at p 480): *Cutter v Powell* (1795) 6 Term Rep 320 at 325 per Grose J. Often, the seafarer’s contract to serve on a voyage was an entire obligation that could operate harshly, such as disentitling his estate to payment if he died before the end of the voyage: *Cutter* 6 Term Rep 320. The Courts have taken a broad view of “wages”, including emoluments, to which seafarers are entitled as recompense for work done under a contract of employment, as explained by Black CJ in *Ionian Reefer* 77 FCR at 582.
4. The significance of the rights to wages conferred on seafarers by the Act was discussed in *Liosatos* 111 CLR 282. The Court held that a seaman who was unable to complete a voyage by reason of an illness or disease he had contracted in the service of the same ship under earlier articles of agreement had a right to recover wages under s 132 of the Act which his current articles of agreement purported to limit. Barwick CJ said that the task of construction of s 132 was (111 CLR at 286):

“… to determine the extent of the obligation it imposes upon the responsible party irrespective of, and indeed, despite those considerations which might have prevented him assuming such an obligation contractually, or which might be ground for an implication restricting the express terms of a bargain which had been voluntarily made.”

1. The expressions “sufficient cause” and a “reasonable dispute as to liability” in the *Merchant Shipping Acts* of 1854, 1880 and 1894 were construed in a number of authorities that had not been referred to the primary judge or the Full Court. The owners or master was entitled to exculpation from the penal liability for non-payment of wages where there was a *bona fide* question as to liability: *Frazer* 2 CB(NS) at 527; *The Rainbow* (1885) 5 Asp MLC 479 at 482; 53 LT 91 at 93 per Butt J. Whether a dispute on a question of law or fact was reasonable, depended on the circumstances of the case including the nature of any question of law: *Great Eastern Steamship* 5 Asp MLC at 514; 53 LT at 597. Thus, a small sum found due only after settlement of involved accounts was held to have been withheld due to a reasonable dispute as to liability in *The Turgot* (1886) 11 PD 21 at 24 per Hannen P.
2. However, the assertion by the owners or master of a cross claim against the seaman in answer to an admitted claim for wages did not give rise to a reasonable dispute as to liability because s 4 of the *Merchant Shipping (Payment of Wages and Rating) Act 1880* (Imp) did not provide for such a defence: *Delaroque v The SS Oxenholme Co Ltd* (1883) 1 C & E 122 at 123 per Stephen J; see too W Porges and M Thomas, *British Shipping Laws;* *The Merchant Shipping Acts* (Vol 11)(Stevens & Sons, London, 1963) at [260] p 98 n 10.
3. There is an important distinction between a dispute as to liability to pay the seaman the wages that are due to him at the time of his discharge and a dispute about the way in which the parties would engage thereafter: *Palace Shipping* [1907] AC at 392 per Lord Loreburn LC, with whom Lord James of Hereford agreed on this point at 395, at 393 per Lord Macnaghten and at 397 per Lord Atkinson: see too *Lang v St Enoch Shipping Co Ltd* 1908 SC 103. In those cases, the crews of ships carrying coal refused to continue sailing them to Japanese ports after learning of that destination, while at sea, during the Russian-Japanese war of 1905. The crews were discharged at Hong Kong and sentenced to imprisonment for refusing to proceed. They remained unpaid up to the end of the proceedings in the Court of Appeal and Second Division of the Court of Session. Those Courts found that the crews were entitled to refuse to undertake a voyage involving personal danger by carrying goods that each combatant in the war considered contraband, because such a voyage was of a different nature to the peaceful commercial voyage on which they had agreed to serve. The majority of the House of Lords held that the refusal of the owners to pay the crew their wages to the date of discharge in Hong Kong was unjustified and that they had been wrongfully discharged there. Once the certificate of discharge had been signed, the master had to pay the wages due by force of s 189(3) of the *Merchant Shipping Act 1894* (Imp) (which required him to pay the amount of wages due to a seaman who had been left abroad by reason of his unfitness or inability to continue the voyage). The non-payment attracted the operation of s 134 of that Act.
4. In other words, their Lordships held that there was no reasonable dispute as to liability because the wages were undoubtedly due. Rather, they held that the wrongful act or default of the owner requiring the crew to sail further on a voyage on which they were not bound to go and for which they had not agreed to sail, concerned a different dispute that did not involve liability for the wages at the time of discharge: *Palace Shipping* [1907] AC at 392, 393, 397; *St Enoch Shipping Company* 1908 SC 103.

# Consideration

1. Teekay confused the issues before the primary judge. We are of opinion that there was no sufficient basis on which Teekay could argue that it was entitled to have the proceedings against it dismissed summarily under s 31A or O 20 r 5 in respect of Mr Visscher’s claim to be paid wages under s 78 of the Act upon his discharge on 3 March 2004. First, on the only evidence before the primary judge and the Full Court, Mr Visscher and Capt McLellan agreed that he would be discharged and his employment would be at an end when he left the ship at Kurnell on 3 March 2004. Secondly, Mr Visscher’s entitlement to be paid wages in accordance with ss 75(1) and 78 of the Act overrode any other agreements between the parties including the certified agreement: s 83(1)(a) and (3); see too *Liosatos* 111 CLR at 286 per Barwick CJ, 300 per Taylor J, 300-301 per Menzies J, see too at 294-295 per Kitto J in dissent.
2. The evidence before the primary judge did not demonstrate that there was any dispute as to Teekay’s liability for Mr Visscher’s wages at the time. According to him, he made his request to the Master for his discharge in late February or early March 2004. On the evidence, they both agreed that Mr Visscher’s employment by Teekay would be at an end, on the basis of Teekay’s letter of 24 February 2004, when he left *Broadwater* at Kurnell. There was no evidence of any dispute concerning Mr Visscher’s claim that his employment was at an end after his discussion with Capt McLellan relating to his discharge, until 26 March 2004. That triggered Teekay’s obligation under s 75(1) to pay Mr Visscher his wages, at or before the time of his discharge, including emoluments such as accrued leave. On the evidence, Teekay ignored the consequence of Capt McLellan agreeing that Mr Visscher’s employment was at an end when he signed his discharge on 3 March 2004. It asserted that somehow a dispute had arisen that it had not communicated to Mr Visscher. It was not apparent that there was any dispute about Mr Visscher’s entitlements to wages up to 3 March 2004, whether or not he had resigned or his employment was terminated, in either case effective at the time of his discharge. Any dispute, such as it was, involved Teekay’s assertion that if, after 3 March 2004, Mr Visscher continued in its employ, he would be paid and hold rank as second mate. That was not a dispute about Teekay’s liability to pay him the wages and entitlements he had asked the master to pay him at 3 March 2004 on his discharge based on the common position that up to then he was entitled to a Chief Officer’s wages. Rather, it was a dispute about the terms and conditions on which he might continue thereafter to be employed.
3. Teekay did not identify any evidence of a dispute as to its liability to pay wages due under s 75(1) at 3 March 2004. It is not self evident that Teekay could establish its assertions at a trial. It had said nothing to Mr Visscher to indicate that it considered that he remained its employee until the meeting of 26 March 2004. In contrast, Mr Scott had written on 24 February 2004 that Teekay was treating Mr Visscher’s insistence on his right to maintain his 2001 promotion as Chief Officer as a “resignation”. His letter had said, incorrectly, that Mr Visscher had never been graded as Chief Officer. And, according to Mr Visscher’s currently unchallenged evidence, Capt McLellan agreed with Mr Visscher, as Teekay’s agent, that his employment would be at an end when he was discharged on 3 March 2004. It is unarguable that all his entitlements to wages up to then had to be calculated on the basis of Mr Visscher’s actual service in the position of Chief Officer, regardless of the status Teekay may have assigned to him: cf *Giudice* 239 CLR at 383-384 [65]-[66].
4. Accordingly, it is difficult to understand what possible dispute could have existed as to Mr Visscher’s entitlement to his wages at 3 March 2004. Whether he resigned or accepted Teekay’s repudiation, his employment was at an end on that day as Capt McLellan, on the evidence, agreed. Mr Visscher began proceedings in the Commission five days later arguing that he had been constructively dismissed. Teekay remained silent in the face of that assertion until 26 March 2004. That silence is not suggestive of the existence of a dispute as to its liability for Mr Visscher’s wages. There does not appear to have been any difference at that time about what Mr Visscher was due. The difference was between Teekay’s assertion that he had resigned and Mr Visscher’s assertion that he had been dismissed. But, Teekay did not pay him on either basis (resignation or dismissal) nor did it give him the account of wages on discharge required by s 76(1) of the Act.
5. None of the relevant authorities was referred to by Teekay or Mr Visscher (who was not legally qualified) before either the primary judge or the Full Court. After reserving judgment, the Court invited the parties to make written submissions as to the relevance of the decision in *Palace Shipping* [1907] AC 386. Teekay noted in its submissions filed in response that at the hearing before the primary judge it had accepted that there was a triable issue as to whether Mr Visscher was entitled to be paid for leave days that he had accrued but not taken.
6. The articles of agreement that Mr Visscher signed when joining *Broadwater* incorporated the 2001 certified agreement. The expression “wages” as used in the Act includes emoluments (s 6(1)). The primary judge observed that there was no provision in the 2001 certified agreement entitling an officer to payment for accrued leave. Teekay’s notice of contention had sought to extend that observation into a finding that there was no evidence to support Mr Visscher’s claim to be entitled to payment for accrued leave. Teekay’s contention must fail. Her Honour’s observation was in error because cl 28 expressly provided for leave to accrue as the officer earned it by serving on a ship (see too cl 13.2). That amounted to a present right to be paid for the leave so accrued. If an officer left Teekay’s employment, there is no reason to think that his right to be paid accrued leave did not crystallise, so as to be payable then and there. It is difficult to understand how cl 28 of the 2001 certified agreement, which refers to leave accrual, does not mean what it says, so that a seaman is entitled to paid leave calculated according to the time served on the ship.
7. Thus, if Mr Visscher’s claim be found proved at a trial, it is difficult to see what defence Teekay could have to its liability to pay him all of his accrued entitlements at the time he was discharged from *Broadwater* on 3 March 2004.
8. *Palace Shipping* [1907] AC 386 demonstrates that Mr Visscher had more than a reasonable prospect of successfully prosecuting his claim because there was no dispute as to Teekay’s liability to pay Mr Visscher his wages and entitlements due on 3 March 2004, so as to provide a defence to the requirement in s 78. It follows that there was, at least, a sufficient likelihood that Teekay had no defence to his claim to wages up to 3 March 2004.

# Conclusion

1. Accordingly, we are of opinion that her Honour erred in concluding that Mr Visscher had no reasonable prospect of successfully prosecuting the part of the proceeding concerning his entitlement to be paid wages, including emoluments, due on his discharge on 3 March 2004 for the purposes of s 31A(2) of the *Federal Court of Australia Act*. There was a real question for trial under s 78 of the Act: cf *Spencer v The Commonwealth* (2009) 241 CLR 118 at 130-132 [22]-[25] per French CJ and Gummow J, 141 [60] per Hayne, Crennan, Kiefel and Bell JJ. Indeed, on the material before her Honour it is difficult to see what defence Teekay had for not paying Mr Visscher on 3 March 2004 what was due to him in full.
2. We would allow the appeal with costs and order that the orders made by the primary judge on 4 January 2011 be set aside. The consequence is that the proceedings on the claim based on Teekay’s failure to pay Mr Visscher his wages in full on 3 March 2004 must go to trial. It will be a matter for the primary judge to determine, consistently with these reasons, what orders should now be made on Teekay’s motion for summary judgment or summary dismissal.

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| I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Greenwood, Rares and Foster. |

Associate:

Dated: 4 November 2011