

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV 2009-485-2395

UNDER the Judicature Amendment Act 1972
IN THE MATTER OF the Maritime Transport Act 1994
BETWEEN SURVEY NELSON LIMITED
Plaintiff
AND THE DIRECTOR OF MARITIME NEW
ZEALAND
Defendant

Hearing: 26 November 2009

Counsel: H A Cull QC, P Dawson and J Burton for the Plaintiff
K I Murray for the Defendant

Judgment: 26 November 2009

ORAL JUDGMENT OF MILLER J

[1] This is an application for interim orders under the Judicature Amendment Act 1972.

[2] The plaintiff, SNL, operated until 20 November 2009 a “Safe Ship Management System”. SNL was an approved operator of that system under Maritime Rules that the defendant, the Director of Maritime New Zealand, administers under Part 4 of the Maritime Transport Act. On that day the Director cancelled SNL’s approval.

[3] I refused an ex parte application for relief that was filed on 24 November, and directed that the application be heard on notice today.

The Safe Ship Management (SSM) regime

[4] The SSM regime was established by Rules promulgated under ss 17(4)(a), 34, and 36(j) of the Act. The Director administers those Rules under s 339. Part 21 s 2 of the Rules deals with the safe management and operation of New Zealand's domestic fleet. The New Zealand Safe Ship Management Code is an appendix to the Rules.

[5] It is common ground that the Rules provides that every commercial vessel must be covered by an approved SSM system, which must include a safety policy and operations and procedures, all designed to ensure that ships are operated safely. Compliance is verified by approved organisations, colloquially called "safe ship management companies" that manage the vessel's SSM system. SNL was such an approved organisation. That meant that it had to possess a valid accreditation issued by a recognised accreditation body, and must possess quality assured supplier status under NZ/ISO 9001:1994.

The decision to cancel SNL's approval

[6] SNL has been an approved organisation since the SSM regime was introduced in 1998. It appears that the Director has had serious concerns about its performance for several years. The company was audited in 2006, 2007, and 2008. Those audits resulted in reservations about ship surveys being undertaken under its SSM system and the quality of "safety regulatory functions" delegated to SNL.

[7] The Director appointed two reviewers to "conduct oversight" of SNL. They reported on 15 May 2009. Their conclusions, as summarised in a staff report of 27 August to the Director, were:

1. Whilst there are fairly comprehensive systems in place within SNL's Head Office, which have had some improvements since our involvement, these are still not effective in assuring the way in which the business operates and particularly how surveyors in the field are required to deliver ... the systems in place in essence are not effectively implemented in their operation.

2. SNL having implemented some changes to their core systems are now focussing on training their surveyors in these system requirements ... of key concern is the fact that the surveyors we have interviewed are functioning in a fairly independent manner, rather than being clearly linked to the systems in place. System compliance ... is what drives action rather than understanding their functions should be taking a holistic approach to the vessel and its operation.
3. We have spoken at length with Terry and Jean Reynolds regarding how they should be managing the conversations with their surveyors and how they need to drive them. They have progressed this to some extent, not enough or quick enough from our perspective and now need to accelerate this process.

[8] SNL was given the opportunity to comment on the reviewers' report. The theme of the response was that SNL was improving its methods and staff training. SNL commented that it had reason to believe its standards were higher than those of other SSM companies. The reviewers responded that while SNL were starting to use the correct language, "words are easy" and SNL had not learned from past mistakes. They stated:

The accurate assessment of the risk and a suitable risk management plan should be the sole mission of any of the safe ship management companies I would have expected to see a structured response based on a timeline on how and when they will complete the new systems and processes together with a training program to change the culture of the organisation. At this time there is no agreement on what systems and processes need to be completed together with very little information on what tuition the surveyors will actually receive.

[9] The Director concluded that the four consecutive reports demonstrated, despite the support that SNL had received, "a consistent pattern of SNL systems not delivering against the core requirements of an SSM company". Although SNL had outlined initiatives it would take to address the latest report, it offered no timelines, nor described how peer review would be undertaken. SNL had "previously demonstrated that it is unable to deliver on intentions". The "key issues" were described as:

1. The authorisation of a company as an SSM Company under Part 21 of the maritime rules (the rules) requires the Director to have confidence that the company does not only have a robust safety management system in place, but also has the ability through requisite quality management controls to implement the safety management system across all the operators and vessels it services.

2. The exercise of regulatory functions by an authorised SSM company depends on that company having a full appreciation and implementation of the safety objectives that underpin the regulatory regime without undue consideration of conflicting commercial interests.
3. The conduct of surveys within the SSM system is dependent on robust quality control to ensure the safety of vessels is not compromised by ad hoc decision making.

[10] On 7 September the Director wrote to SNL, attaching the staff report outlining the above conclusions, and stating that:

I have decided to propose revocation of the approval as an SSM company made in accordance with s 44(1) of the MTA and rule 21.12 of the maritime rules.

[11] The Director gave notice under ss 44(2) and 51(2) of the Act that the proposed decision would take effect on 9 October, unless she decided otherwise before that date. She invited submissions. She later granted SNL an extension until 20 October, and still later, until 20 November.

[12] SNL protested this decision vigorously, maintaining that the Director lacked the jurisdiction that she had asserted under the Act, which depended on SNL's approval being a "maritime document" as defined in the Act. It also rejected the substance of the complaint, saying that its systems were not deficient. It complained that the Director had failed to identify any valid ground for cancelling under R 21.12(6), and observed that the Director had signed a contract for services with SNL as recently as June 2008. These criticisms were made in a letter of 14 August and expanded upon at length in a paper entitled "Response to Director's Notice". In the latter document, SNL complained that the Code, which is a non-binding guideline with no statutory standing, is poorly drafted and confusing and gives little guidance to industry participants. SNL had been assessed against a poorly defined standard, and the Director's grounds for cancellation were both unclear and not expressed in terms of R 21.12. SNL responded in detail to what it understood to be the Director's every concern expressed in the various reports. It concluded that there was no legitimate justification for what it characterised as a sustained focus on SNL.

[13] On 14 October, the Director gave notice of her intention to investigate whether Terence Reynolds, one of the principals of SNL, is a fit and proper person to serve as a recognised surveyor.

[14] In a letter of 20 October 2009 the Director advised:

I have noted your submissions about whether or not approval of an SSM system is a maritime document or not. It seems to me that the provisions of the Act govern, not least because they afford your client greater procedural protection than a more summary withdrawal of approval action under rule 21.12(6).

[15] A meeting was held on 22 October, the minutes of which are in evidence. It appears that the Director's concerns were discussed in some detail.

[16] Following this meeting and correspondence in which SNL both reiterated its concerns about jurisdiction and offered to implement new risk profiling systems, the Director confirmed her decision by letter of 20 November. She stated:

I agree with the recommendation made by Ms Forsyth and hereby confirm my decision to withdraw the approval granted to SNL under maritime rule 21.12 with immediate effect. The grounds for my decision are as follows:

- (a) *Failure to ensure adequate delivery of Safe Ship Management system.* The approval of an organisation (SSM Company) under rule 21.12(1) carries with it the obligation to ensure the implementation of a structured and documented system that enables owners and ship and shore based personnel of ships to execute a comprehensive safety and pollution prevention policy. The obligation is met when the SSM Company system delivers, through its inspections and oversight, appropriately maintained and surveyed vessels. Numerous examples cited in the various reports over the past 18 months and highlighted again in Ms Forsyth's memorandum, demonstrate the SNL has failed to ensure an adequate delivery of its safe ship management system.
- (b) *Concerns for safety.* The failure to deliver a safe ship management system not only raises questions regarding SNL competence to provide vessel owners with sufficient assistance and oversight to implement a comprehensive quality manual but also raises serious doubts about the ability of SNL to properly manage the carrying out of inspections and survey of vessels to ensure that they are maintained appropriately and are fit for their intended purpose.

[17] She added that although she could have withdrawn approval summarily under R 21.12(6), she had “treated your approval as a maritime document” to afford SNL higher standards of procedural fairness, including a right of appeal to the District Court under s 424.

[18] Attached to the Director’s letter was a document called “Revocation of Delegation under Maritime Transport Act”. It withdrew, in reliance on s 444(8) of the Act and s 76 of the Crown Entities Act 2004, delegations granted to Mr Reynolds and his wife Jean Reynolds under ss 43(1), 43(4)(a), 43(5), 45(1)(a), and 54(2) of the Act.

[19] Some 750 vessels rely on SNL’s systems. In consequence of the Director’s decision, they must find a new system and management company. However, the Director has exempted them from the requirement to “belong to” an SSM company until their next out of water survey, while encouraging them to make contact with another SSM company without delay. Some of them have expressed disbelief at Maritime New Zealand’s decision and confidence in SNL’s work.

Is SNL’s approval a maritime document?

[20] Section 44 of the Act authorises the Director to revoke a “maritime document”, which is defined in s 2 as “a licence, permit, certificate, or other document issued under Part 5” of the Act. One of the provisions of Part 5, s 34, provides that maritime rules may be made that require a maritime document be held by, or in respect of:

- Persons or organisations having direct involvement in ship operations or ship or maritime product safety services: s 34(1)(d);
- Persons or organisations that provide ... [t]he testing, inspecting, audit, or certification of ships or maritime products: s 34(1)(f);
- [S]uch other persons ... and maritime related services ... in support of the maritime system: s 34(1)(j)

[21] Section 34 further provides:

(2) The requirements, standards, and application procedure for each maritime document, and the maximum period for which each document may be issued or recognised, as the case may be, shall be prescribed by maritime rules.

(3) Subject to any maritime rules, a maritime document may be issued or a document may be recognised as a maritime document, as the case may be, by the Director for such period and subject to such conditions as the Director considers appropriate in each particular case.

[22] Part 21 of the Rules defines certain documents as maritime documents, and sets out maximum periods for which they may be issued or recognised. But it neither refers to an approval of an SSM system or operator nor specifies a maximum period for which it may be issued or recognised. In this respect it differs from other defined maritime documents, which are regulated in a similar manner; they are granted on application made under s 35 of the Act, follow a prescribed form, and subsist for a prescribed period. Rule 21.12(1) simply requires that the Director grant approval if an application has been made in writing and the Director is satisfied that:

- the organisation possesses a valid certificate issued by a recognised accreditation body indicating that the organisation has implemented an approved quality assurance system; and
- the scope and field of application of the quality assurance system is for the safe management of ships in accordance with the New Zealand Safe Ship Management Code; and
- the organisation has been granted quality assured supplier status.

[23] Further, the criteria for revocation of a maritime document are set out in s 49 of the Act, while those for SSM approval are found in R 21.12.

[24] I conclude that it is arguable that SNL's approval was not a maritime document, and so could not be withdrawn under s 44 of the Act. Further, it is arguable that the criteria for withdrawal were not those under s 49; rather, the Director had to comply with R 21.12(6):

- (6) If at any time after an organisation's safe ship management system has been approved by the Director under rule 21.12(1)–
- (a) the organisation ceases to have a valid certificate issued by a recognised accreditation body indicating that the organisation has implemented a quality assurance system which has been approved by that body and is subject to continuing audit; or
 - (b) the scope and field of application of the organisation's quality assurance system ceases to be for the safe management of ships in accordance with the New Zealand Safe Ship Management Code; or
 - (c) the organisation ceases to have quality assured supplier status as referred to in rule 21.12(1)(c); or
 - (d) the organisation fails to meet the requirements of rules 21.12(3), 21.12(4), 21.12(5), 21.13(6), 21.13(8) and 21.13(10);

then the Director may, in writing, withdraw his or her approval of that organisation's safe ship management system, and that system will cease to be an approved safe ship management system under Part 21.

[25] The initial notification of 7 September 2009 did not cite any specific part of R 21.12(6). Mr Murray accordingly was obliged to refer to the letter of 11 October which referred to R 21.12(6), thereby linking to R 21.13(10) which provides that:

The organisation must carry out inspections of each ship for time to time to ensure that the ship and its equipment are being maintained in accordance with the approved maintenance plan and remain fit for their intended purpose. These inspections are to include the inspections required by rule 46.17, and such inspections are to be independent of any audit required by rule 21.13(8).

[26] Mr Murray submitted that the reality is that over an extended period of time SNL's SSM system has enabled vessels, including passenger vessels, to continue operating when they were not fit for their intended purpose.

[27] I accept that a great deal of detailed information was provided to SNL over a period of time. However, it is plainly arguable that at no point in the withdrawal process did the Director clearly invoke specific grounds for withdrawal under R 21.12(6). It is necessary not only to identify which provisions were relied upon, but also to identify the facts on which the Director relied. That was not done with any clarity. Rather, the complaints were expressed in a remarkably diffuse way and

appeared to put the whole of the conduct of SNL's business and attributes of its Directors in issue. In my view, the reference to R 21.12(6)(d) on 20 October 2009 could not sufficiently address that problem, at least on the material before me. This development was late and it was not accompanied by specific instances of SNL allowing vessels to continue operating when they were not fit for purpose.

[28] In the circumstances there must be a real question whether the Director acted lawfully. To say this is not to deny, as Mr Murray forcefully submits, that it may be SNL was fully aware of the specific problems and the Director's many attempts to see them rectified, particularly by the time the Director actually made her decision. Those are matters, however, for the ultimate hearing of this case.

[29] That brings me to the question of interim relief under s 8 of the Judicature Amendment Act. The principles are well known and I will refer to *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423. There can be no doubt that interim relief is necessary to preserve the position of the applicant. I have concentrated on the merits because this is a case in which, if the merits were very weak, public safety concerns might well compel the Court to deny relief. I am not persuaded, and indeed, Mr Murray properly did not attempt to persuade me that reinstating approval will result in any immediate safety risks. In particular, reinstatement does not preclude the Director from auditing the status of any ships that concern the Director or which are coming up for survey. It is not clear that there are any such vessels at present.

[30] Accordingly, there will be interim relief. Specifically:

- (1) there will be an interim declaration that the plaintiff is to continue as an approved SSM company, pending further order of the Court;
- (2) there will be an interim order that the Director is to withdraw the notice of withdrawal that was given to industry participants, pending further order of the Court;

- (3) there will be an interim order that the delegations referred to in the notice of 20 November 2009 are to continue in effect, pending further order of the Court.

[31] The plaintiff has succeeded on this application, but it remains the case that the Director may well be able to show that the process followed was fair, that there was jurisdiction to withdraw approval, and that the decision was reasonable. In these circumstances, costs will be reserved.

[32] There will be leave to apply.

Miller J

Solicitors:

Dawson & Associates, Nelson for the Plaintiff

S Winson, Maritime New Zealand, Wellington for the Defendant