

Customs Trade and Transport Update

January 2011

New South Wales Supreme Court overturns “container detention” decision

According to various reports, the New South Wales Supreme Court has overturned the decision of the New South Wales Consumer Trader and Tenancy Tribunal (“Tribunal”) in the *DV Kelly* case (see our updates of 7 May 2010, 13 May 2010 and 25 October 2010). Many of you will recall that the decision of the Tribunal had found that certain container detention fees charged by the Australian agent of a shipping line were unenforceable as being a penalty rather than damages due to the size of the amount claimed.

In our various updates and in subsequent discussions during CBFA Member Forums and in other seminars, we pointed out that one of the potential limitations to the Tribunal decision was that it seemed to be an unusual case to be determined by the Tribunal given its limited jurisdiction. We advised that an appeal was pending to the New South Wales Supreme Court and that one ground of appeal was that the Tribunal did not have jurisdiction to hear the matter (even though the representative

of the agent for the shipping line did not object to the Tribunal hearing the matter).

At this stage, the full decision of the New South Wales Supreme Court has yet to be released which limits the information which can be provided. However, the reports suggest that the New South Wales Supreme Court decision was confined to overturning the Tribunal decision on the basis that the Tribunal did not have jurisdiction to hear the matter. The decision of the New South Wales Supreme Court does not appear to have addressed the other substantive issues raised during the hearing before the Tribunal. Accordingly, those substantive issues remain alive (as they have done for some time). Importantly those issues include the following:

- Whether contractual provisions enable shipping lines or their Australian agents to charge such detention fees in the first instance.
- Whether the quantum of charges being levied by shipping lines or their Australian agents are reasonable and would be enforceable as damages or whether they would be construed as penalties and be unenforceable.
- Whether a shipping line or its Australian agent can invoke liens as a means to enforce the amounts claimed to be owing.

Clearly, the decision of the New South Wales Supreme Court does remove one of the few available recorded decisions which have found that the amounts claimed by shipping companies or their Australian agents are unenforceable. However, the decision of the New South Wales Supreme Court does not

address the other substantive issues which still need to be considered on a “case by case” basis. At the same time, the impending commencement of the *Personal Properties Securities* legislation will have an impact on the ability of parties to create and exercise liens and it will be of interest to see how shipping companies and Australian agents change practices to accommodate the requirements of the new legislation.

We will keep you informed of developments and will provide a further detailed review of the decision of the New South Wales Supreme Court once it has issued.

Contact us

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