

CITATION: *Loria v Maritime Safety Queensland (Department of Transport and Main Roads) & Anor* [2014] QCAT 406

PARTIES: Jean-Paul Loria
(Applicant)
v
Maritime Safety Queensland (Department of Transport and Main Roads)
Stephen Leslie Torpey
(Respondents)

APPLICATION NUMBER: GAR149-13

MATTER TYPE: General administrative review matters

HEARING DATE: 13 June 2014

HEARD AT: Brisbane

DECISION OF: **Senior Member O’Callaghan**

DELIVERED ON: 25 August 2014

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of Maritime Safety Queensland to approve Stephen Torpey’s application to establish a buoy mooring is confirmed.**

CATCHWORDS: GENERAL ADMINISTRATIVE REVIEW – where application to review decision to allow buoy mooring to moor commercial vessel – whether mooring significantly interfered with marine safety

Transport Operations (Marine Safety) Act 1994 (Qld), s 4, s 203B, s 203C
Transport Operations (Marine Safety) Regulations 2004 (Qld), s 209, s 210
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr Loria represented himself

RESPONDENT: Maritime Safety Queensland was represented by Mr McMillan of Counsel
Mr Torpey represented himself

REASONS FOR DECISION

- [1] Mr Torpey is a resident of the Esplanade a Brisbane riverside street in the suburb of Yeronga. In 2011 Maritime Safety Queensland ('MSQ') approved his application to establish a restricted use buoy mooring in the river opposite his house. The mooring was to moor his commercial vessel "Cruise Me".
- [2] The mooring was installed in March 2012. Some other residents of the Esplanade (including the applicant Mr Loria) were not happy with the decision of MSQ and they sought an internal review. The decision to grant the authority was confirmed by MSQ and Mr Loria (as a representative of the 'residents action group') has applied to the Tribunal to review that decision.

The Legislation

- [3] The enabling legislation covering the decision to grant the authority and the review of the decision is the *Transport Operations (Marine Safety) Act 1994* (Qld) ('TOMSA') and the *Transport Operations (Marine Safety) Regulations 2004* (Qld) ('TOMSR').
- [4] Part 9 Division 4 of the TOMSR governs buoy mooring.
- [5] Pursuant to the provisions of those regulations Mr Torpey needed the approval of the general manager (as defined in the TOMSA or his delegate) to establish the buoy mooring.¹
- [6] Section 210 of the TOMSR provides for the limitations on buoy mooring approvals.
- (1) The general manager ... may approve the establishment of a buoy mooring only if the general manager ... is satisfied the mooring does not significantly interfere with –
- (a) marine safety; or
- (b) the effectiveness or efficiency of the Queensland maritime industry.
- [7] Section 203B of the TOMSA makes provision for an internal review of an original decision by 'a person whose interests are affected by the decision'.² The decision to grant the approval is an original decision.³
- [8] Section 203C provides for an external review of the reviewed decision by QCAT if the review decision is not the decision sought by the applicant.⁴

¹ Schedule TOMSA – s 4; TOMSR s 209(b).

² TOMSA s 203B(1)(a).

³ Ibid s 203.

The Decision

- [9] On 15 March 2011 a delegate of the general manager, regional harbour master, Captain Richard Johnston, made the decision to grant the buoy mooring authority to Mr Torpey.
- [10] A shortage of skilled contractors following the 2011 Brisbane floods resulted in a delay to the installation of the buoy mooring until March 2012.
- [11] Mr Justin Williams (Brisbane Region Area Manager with MSQ) gave evidence⁵ that following the installation of the buoy mooring in April 2012 he received an oral complaint from a resident of the Esplanade – Mr Nolan.
- [12] He said following that initial complaint MSQ received a number of further communications from other residents and that these communications had an emphasis on concerns about aesthetics and property value decline because of the buoy mooring.⁶
- [13] Mr Williams and a marine officer Mr Prendegast, attended a community meeting in June 2012 at which these residents also raised safety concerns in relation to the mooring.
- [14] In February 2013 the Office of the Minister for Transport and Main Roads received a submission from “The Residents Action Group” asking that the Minister overturn the decision to grant the authority.
- [15] MSQ treated the submission as an application for internal review of the decision under s 203B. On 23 March 2014, the general manager Mr Patrick Quirk confirmed the decision to grant the approval (‘the Review Decision’). The residents action group filed an external review of this decision with QCAT.
- [16] The Review Decision was subsequently amended by MSQ to correct an error in the description of the vessel (‘the Amended Review Decision’). The Amended Review Decision is dated 6 May 2013. This decision is also subject to the Tribunal’s review.
- [17] The purpose of the review by the Tribunal is to produce the correct and preferable decision, following a fresh hearing of the matter on its merits. The Tribunal considers the matter afresh, making its own decision according to law and based on the evidence before it at the time of the hearing.⁷

⁴ Ibid s 203C.

⁵ Exhibit 7 – Affidavit of Justin Williams dated 22 April 2014 at para [15].

⁶ Ibid at [16].

⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (‘QCAT Act’) s 20.

Mr Loria's Arguments

- [18] The residents group represented by Mr Loria say that the correct and preferable decision would be to refuse Mr Torpey's application for a buoy mooring.
- [19] In their original submissions for internal review the group had put forward a number of arguments which they say supported their position that the authority should be revoked. These included that the buoy mooring and the vessel Cruise Me when moored to the mooring was a safety hazard to rowers; that there was a failure to consult with neighbours before the decision was made; the length of the vessel exceeded that allowed in the authority; Mr Torpey had been in breach of the conditions of the approval because the mooring was not installed within 30 days as required; and allocation of the mooring was inconsistent with the Brisbane City Plan.
- [20] Mr Quirk dealt with all of the grounds in the submission in some detail in his statement of reasons. He ultimately came to the decision to confirm the decision of the harbour master to approve the application for a buoy mooring authority.
- [21] In his application to QCAT to review the Review Decision Mr Loria restricted his argument to two grounds:
- (i) The vessel Cruise Me had not been surveyed to ensure it was no more than 6 metres as required.
 - (ii) The decision ignored the evidence concerning the safety risk to rowers.
- [22] In the Amended Review Decision, MSQ confirmed that the vessel "Cruise Me" had been measured at less than 6 metres. Mr Quirk attached a copy of the certificate of compliance to his statement of reasons. Accordingly Mr Loria did not pursue the first ground of review and the hearing was confined to the argument that the buoy mooring and the vessel created a safety hazard.
- [23] Marine safety is a factor that the decision-maker, and on review the Tribunal, must have regard to in deciding whether the buoy mooring authority should be granted.
- [24] The TOMSR provide that a buoy mooring may be approved only if it does not significantly interfere with marine safety.⁸
- [25] Mr Loria says that the buoy mooring does significantly interfere with marine safety in that it is a hazard to the rowers who use that stretch of the river. The MSQ say there is insufficient evidence to support this argument. Mr Torpey doubts that the safety concerns are the true motivation for the residents action. He also disputes there is sufficient evidence of safety risks. He says if the decision to approve the authority was revoked he would suffer financial consequences of having to moor his boat elsewhere.

⁸ TOMSR s 210.

Does the buoy mooring significantly interfere with marine safety?

The applicants evidence

- [26] Mr Loria had filed his own submissions, affidavits of other residents of the Esplanade (Denis Nolan, Patricia Smith, Katharina Loria, Richard Ingelido and Susan Ingelido) and affidavits of Katherine Lambros – a rower who uses that stretch of the river, William Hatfield – a rower and engineer and David O'Brien – a rower and president of the Tatts Rowing Club.
- [27] Mr Loria, Ms Loria and Mr and Mrs Ingelido chose not to be available for cross-examination and as such limited weight is given to their statements of evidence.
- [28] David O'Brien is a rower and president of the Tatts Rowing Club. His evidence, to the extent it purported to be expert evidence as to the danger of the buoy mooring to rowers, was objected to by MSQ. I allowed his affidavit to be tendered and for him to give oral evidence on the basis that I would subsequently consider MSQ's objection.
- [29] I accept MSQ's argument that it is not established that David O'Brien is '*an expert*' with respect to marine safety. He has no maritime qualifications and as such his opinion as to whether or not the mooring and vessel represent a safety hazard has little weight. I have however had regard to his evidence as to his own personal experience in rowing near the vessel.
- [30] His evidence in this regard was that since 2012 he has rowed passed the vessel 50 to 100 times in light and in dark conditions. He has never collided with the vessel but nearly did on one occasion. He said in cross-examination about the incident that it involved '*an error of judgment on his part*'. He said he has constantly check to see where the vessel is.
- [31] Mr Hatfield is an engineer. He has many years experience as a skipper of boats. He is also a rower.
- [32] As with Mr O'Brien he has no academic qualifications in marine safety or boat construction. Accordingly, I have had regard only to his evidence about his personal experience with the mooring and vessel. I have given little weight to his opinion as to whether or not the boat in the way it is constructed represents a safety hazard.
- [33] He gave oral evidence that on the day before the hearing he had personally rowed close to the vessel to carry out an inspection. He said he was '*within 2 feet*'. He said the design of the boat presented a safety hazard in that the centre hull had a clearance of about 200 millimetres or less to each outside hull and that this had the capacity to trap someone.
- [34] He conceded when he was near the boat he did not become trapped.
- [35] He also said he rows past the vessel four to five times a week. He has never collided with the vessel but he did once collide with the moor.

He conceded that *'all the time'* he as a rower had to correct his course to avoid obstacles in the river.

- [36] Katherine Lambros is a rower. She said she uses that stretch of the river as a rower herself and also as a rowing coach. She said she would have rowed past the vessel in excess of 100 times. She says the location of the vessel and the buoy mooring is an area of high traffic rowing, used by school crews, college crews, elite rowers and recreational rowers.
- [37] She said the location of the buoy mooring and the vessel creates an obstacle that compromises rowers safety. She explained that when rowing the rower faces away from the direction of travel. To keep a proper look out the rower must check over both shoulders in between rowing strokes.
- [38] She said the location of the vessel means that rowers rowing downstream have to swing wide to avoid the vessel and that places them on a collision course with upstream rowers.
- [39] She said she had witnessed more than 30 *'incidents'* involving the vessel. She said that rowers are reluctant to report such incidents to MSQ as there is a chance that the rowers will be in trouble for failing to keep a proper lookout. Ms Lambros said she and other rowers tell each other when coming to the location to *'lookout'* and *'remember it's there (the vessel)'*.
- [40] Patricia Smith was one of the members of the residents action group residing at the Esplanade. In her written statement she gave evidence concerning six incidents that she had witnessed. She attached photos of the incidents to her statement. She said she had witnessed the incidents and that her husband (Mr Nolan) had taken the photos. Her evidence was that whilst she referenced the photos in making her affidavit she also had an independent recollection of the following events:

a) 17 November 2012

She saw that a white skull boat had collided with the moored pontoon boat. She saw a rescue tinnie approach the skull and help remove the skull and the rowers rowed away. Photos were produced which showed a white skull, a tinnie in close proximity to the vessel.⁹

b) 23 January 2013

She saw a rowing skull with two rowers collide with the vessel. She said she saw the skull get stuck under the pontoon.

The relevant photo attached to her statement shows the skull close to the vessel and one rower pushing away from the vessel.¹⁰

⁹ Annexure A to Affidavit of Patricia Jay Smith Exhibit 4.
¹⁰ Annexure B to Affidavit of Patricia Jay Smith Exhibit 4.

c) 14 August 2013

She saw a white skull collide with the vessel and the skull overturned. Ms Smith said a tender boat came from the other side of the river and assisted the rower. The photos attached show a boat overturned in the river and a person in a tinnie assisting the rower. The vessel Cruise Me is in the photo some metres from the overturned skull.

d) 28 October 2013

She saw a male rowing a single skull collide with Cruise Me. Again she says an operator of a tender boat came to the rowers assistance. The photo attached showed the skull some distance from Cruise Me.

e) 8 November 2013

She saw two rowers collide with Cruise Me, the skull overturned and required assistance from a tender boat. The photo attached shows an overturned skull in the water some distance from the vessel.

[41] Ms Smith says she had witnessed no further incidents since February 2014.

[42] Mr Nolan gave oral evidence. He is Ms Smith's husband. He also provided a sworn affidavit stating that he had also witnessed the incidents. He annexed the same photos as attached to Ms Smith's affidavit and gave evidence that he took the photos.

[43] In cross-examination it was put to both Ms Smith and Mr Nolan that their affidavits were very similar and indeed identical in some paragraphs.

[44] Both witnesses denied any collusion and said they prepared their affidavits separately in different rooms. In view of the similarities I find it difficult to accept that they did not have regard to each others affidavit. It is highly likely that the affidavits were either prepared together or one copied from the other.

[45] In light of their evidence refuting any collusion, I place minimal weight on their evidence but accept the photographs which do show some six incidents of rowing skulls coming into close contact with the vessel and in some instances being overturned.

MSQ's Evidence

[46] Evidence on behalf of MSQ was given by Justin Williams, the Brisbane Region Area Manager. He said he was responsible for managing the regional regulatory activities for water compliance within the Brisbane Regional Area as well as managing educational initiatives to improve recreation or commercial and passive craft activities.

[47] He said at the time Mr Torpey's application was assessed and approved in 2011 there was no evidence to suggest that the approval of the buoy mooring would interfere with marine safety or the effectiveness or

efficiency of the Queensland Maritime Industry. He gave evidence about what had happened since the buoy was installed in 2012. This evidence is relevant. The Tribunal is considering the matter afresh and deciding whether or not the authority should be approved on the basis of the evidence available at the time of the hearing not at the date of the approval.

- [48] He said that since 2012 there have been some safety concerns raised by local residents.
- [49] He said that upon becoming aware of concerns MSQ carried out investigations into the incidents.
- [50] He caused a search to be done of MSQ Marine Incident Management Database to see what incidents had been reported. He said some of the incidents referred to in Ms Smiths and Mr Nolan's affidavits had been reported but most of the incidents MSQ learned of upon receiving the material in the applicant's statements.
- [51] He said his investigations revealed that MSQ could only identify the rowers involved in one of the incidents referred to in the applicant's affidavits. That was the incident on 23 January 2013. It was only in that case they were able to obtain sufficient information to fully investigate the incident. He said in the other cases either the rowers could not be contacted or if they could they were not willing to cooperate with MSQ.
- [52] Mr Williams said the investigation report¹¹ into the January incident indicates that the vessel involved was a two man vessel and both rowers were seated with their backs facing the direction of travel. They said in interview that they would look around from time to time in the direction of travel to look out for hazards. The report recorded that, one rower did see the vessel but she was carried down stream quickly than anticipated. The report concluded that the rowers failed to keep a proper look out. The rowers involved were subsequently issued with warning infringement notices.
- [53] Mr Williams also gave evidence that in March 2014 he conducted a comprehensive risk assessment of the buoy mooring. He was assisted by Mr Paul Campbell from MSQ and Mr Peter Cumminings a risk assessment expert with Queensland Rail. The risk assessment report was produced by Mr Williams.¹²
- [54] The report indicates the likelihood of consequences of identified hazards associated with the buoy mooring and Cruise Me.
- [55] The results show that of the four hazards identified the only one of concern is '*collision with a vessel underway*'. It has a risk rating of '*high*'

¹¹ Exhibit 7 - Attachment JW15.

¹² Exhibit 7 - Attachment JW19.

after the implementation of certain control measures identified in the report.

- [56] Mr Williams explained that this hazard is assessed as a '*high risk*' because of the severe possible consequences if the hazard occurs. The risk assessment and the ratings matrix indicate however that¹³ after certain control measures are implemented (for example vessels maintain a lookout, education of rowers by clubs and Rowing Queensland regarding the location of hazards) whilst the consequences remain severe the likelihood of the hazard occurring was assessed as '*rare*'.
- [57] Mr Torpey also gave evidence. He said he questioned whether the motive of Mr Loria and other members of the resident action group in challenging the location of the buoy mooring was to ensure the safety of the rowers.
- [58] He said he believed the real concern of the residents was that they thought the location of Cruise Me may cause a reduction in the value of their properties.
- [59] It is noted that Mr Nolan and Ms Smith conceded in evidence that whilst property values was a concern to them initially, their primary concern was for the safety of the rowers. As indicated above I have some reservations about the credibility of their evidence.
- [60] Mr Torpey said that he concedes there have been some incidents with rowers as reported. He says the fault must also lie with the rowers for not giving due care and attention.
- [61] He said it is actually safer to have the vessel moored where it is in front of his home. He said as an example during heavy rain in 2013 he could see from his house that the mooring was moving. He was able to paddle out, separate the mooring from the boat and take the boat to safety.
- [62] He says (and this was confirmed by Mr Williams) that if the buoy mooring were not there, there is nothing to prevent him simply anchoring the boat in the same location. He said this would represent a much greater safety risk to the rowers and other users of the river. Mr Williams agreed.
- [63] Mr Torpey conducted his own written survey of residents of the Esplanade and asked if they had any concerns about the buoy mooring and whether they had witnessed any incidents. He presented to the Tribunal 14 responses from residents who indicated they had no concerns and had not witnessed any incidents.
- [64] The survey included responses from two residents who said they were frequent rowers. For example one resident stated

¹³ Exhibit 7 - Attachment JW19 at page 183.

... our crew rows upstream passed Cruise Me twice a week and has rowed in that direction for over 7 years. We as rowers, know it is our duty of care to watch where we are going and be aware of what is around us.¹⁴

- [65] As with the applicant's affidavits the weight to be given to this statement is reduced as the respondents to the survey were not available for cross-examination.
- [66] I find in giving appropriate weight to the limited evidence available that there have been some incidents including at least one collision and some 'near misses' involving the buoy mooring, the vessel and rowers.
- [67] I am satisfied however on the basis of this evidence that the mooring does not significantly interfere with marine safety as alleged by the applicant.
- [68] I do not doubt that some of the rowers using that stretch of the river would prefer the vessel were located somewhere else.
- [69] I have had regard to the 'Queensland Government Code of Conduct, Safe On Water Conduct on the Brisbane River'.¹⁵
- [70] The Code of Conduct is said to have application to all vehicles operating in Queensland waterways. The guidelines for 'passive craft (which include rowing boats) include a guideline that '*passive craft should be aware of what is around them. The obligation is to maintain a proper look out and if in doubt stop*'.
- [71] The existence of this guideline supports the view that all persons using the river have an obligation to contribute to the safety of its use. The vessel and buoy mooring represent an obstacle that rowers using that part of the river should be aware of. As with all obstacles, the vessel and the mooring will present some risk to rowers. However when considering the obligation of all users of the river to have regard to their own and others safety, the buoy mooring does not significantly interfere with marine safety.
- [72] As there is no evidence or argument that there is any other basis for refusing Mr Torpey's application for the authority, the correct and preferable decision is to confirm the decision of MSQ to grant the authority.
- [73] I order accordingly.

¹⁴ Survey response from Julie Nolan included in the bundle of documents filed by Mr Torpey on 7 April 2014.

¹⁵ Exhibit 7 - Attachment JW21.