IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0009 of 2023
Court of Appeal No. ABU 0049 of 2021

BETWEEN	:	**PDL INTERNATIONAL PTE LIMITED**
		Petitioner
AND	:	**1. CRUZ HOLDINGS LIMITED**
		2. CCB ENVICO PTY LIMITED
		Respondents
Coram	:	**The Hon. Mr. Acting Chief Justice Salesi Temo** **Acting President of the Supreme Court**
		The Hon. Mr. Justice Terence Arnold **Judge of the Supreme Court**
		The Hon. Madam Justice Lowell Goddard **Judge of the Supreme Court**
Counsel	:	**Mr. P David KC, Mr. T Ashley, Mr. N Prasad and Ms. P Verma for the Petitioner** **Mr. V Kapadia for the First Respondent**
Date of Hearing	:	**14 June, 2024**
Date of Judgment	:	**30 August, 2024**

JUDGMENT

Temo, AP

[1] I agree entirely with the judgment of His Lordship Mr. Justice Terence Arnold.

Arnold, J

Introduction

[2] The liability of shipowners has long been limited in a way that has not applied to other business operators. William Tetley describes the position as follows:[1]

> One of the peculiarities of carriage by sea, as opposed to the law governing other forms of transportation, is the principle that a shipowner may limit its liability to persons suffering loss or damage, or even personal injury or death, as a result of the operation of the ship. The owner's liability is limited to a maximum sum per occurrence, which the claimants share out of a "limitation fund", established by way of judicial "limitation proceedings", initiated by the shipowner.

[3] This limitation has been justified as being necessary in the public interest to maintain the financial viability of the shipping industry, although it may be that the conditions which were thought to justify that approach in the past no longer exist.[2] Be that as it may, the limitation system is deeply engrained and is likely to remain so for the foreseeable future.[3]

[4] In common law jurisdictions such as Fiji, the limitation is based on a vessel's tonnage and has been imposed by statute, currently Part 5 of the Maritime Transport Act 2013 (MTA 2013). The right to invoke the limitation is not confined to registered or beneficial owners of ships – relevantly for present purposes, it has been extended to include charterers. The tonnage basis for calculating limitation and the extension of the right to invoke limitation to charterers reflect the approach adopted in two international conventions, namely the International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships 1957 (the 1957 Convention) and the Convention on Limitation of Liability for Maritime Claims 1976 (the 1976 Convention).[4] Fiji has

---

1 William Tetley *International Maritime and Admiralty Law* (2002 Éditions Yvon Blais, Canada) at 271 (footnotes omitted).

2 See, for example, the discussion in Aleka Mandaraka-Sheppard *Modern Maritime Law Vol 2: Managing Risks and Liabilities* (3rd ed, Informa Law, 2013) at 739-740.

3 For a detailed discussion of the law on limitation see Barnabas Reynolds and Michael Tsimplis *Shipowners' Limitation of Liability* (Wolters Kluwer, 2012).

4 The 1976 Convention is increasingly replacing the 1957 Convention around the world: see Tetley, above n 1, at 276. The LLMC Protocol 1996 to the 1976 Convention raised the limitation levels.

acceded to the 1957 Convention but not the 1976 Convention. I will examine the significance of this later in this judgment.

Factual background

[5] The First Respondent, Cruz Holdings Limited (Cruz), was the registered owner of the MV "Southern Phoenix", a general cargo ship with an overall length of just under 90 metres and a gross tonnage of 3,113. On 6 May 2017, the MV "Southern Phoenix" capsized and sank in the port of Suva. At the time, the vessel was under a time charter to the Petitioner, PDL International PTE Limited (PDL), for a voyage to Tarawa, Kiritimati and Lautoka from 3 May to 3 June 2017. The charter was evidenced by a Liner Booking Note dated 2 May 2017. The Second Respondent, CCB Envico Pty Limited (CCB), was a shipper with a claim in relation to cargo aboard the MV "Southern Phoenix".

[6] The details of the capsize and sinking are not relevant at this stage, so a short summary will be sufficient. The vessel was in a berth at the port. When the loading of cargo had been completed and bunkering was underway, the vessel began to list, apparently as a result of the accidental ingress of seawater. When the vessel developed a significant list, the harbour master ordered that it be towed off its berth. As this was occurring, the vessel capsized and ended up lying on its port side almost completely under water about 200 metres offshore.

The proceedings

[7] Anticipating that there would be claims against it following the casualty to MV "Southern Pheonix", Cruz sought a decree of limitation of liability under Part 5 of the MTA 2013. Its amended writ of summons dated 26 July 2017 named as defendants Concrete Solutions (Fiji) Limited (which had cargo aboard the vessel) and "All other persons claiming or being entitled to claim damages by reason of, or arising out of the casualty to the MV "Southern Phoenix" which occurred on 6 May 2017". The decree was granted, and Cruz constituted a limitation fund in the amount of FJ$1,713,573.64.

[8] On 12 October 2017, PDL issued a summons in which it sought a number of orders. For present purposes, it is sufficient to note that PDL sought leave to be joined as

another plaintiff in Cruz's proceedings. PDL argued that because MV "Southern Pheonix" was under charter to it at the time of the casualty, it was, for limitation purposes, an "owner" within the meaning of section 77 of the MTA 2013 and was entitled to limit its liability in accordance with sections 79 and 81 of the MTA 2013.

[9] Importantly for this appeal, PDL argued that it was entitled to limit its liability by reference to the fund constituted by Cruz, so that all claims arising out of the casualty to the MV "Southern Phoenix" had to be dealt with from that fund. PDL said there was one exception to this, namely any claim that it might have against Cruz under the Booking Note governing its time charter, which was expressed to be subject to English law and London arbitration.

[10] Several of the orders sought by PDL were granted by consent. In particular, there was no dispute that PDL was an "owner" for limitation purposes and was entitled to a decree of limitation. However, one claimant, CCB, while not objecting to PDL being joined to the case, opposed PDL's application to limit its liability by reference to the fund constituted by Cruz. CCB argued that PDL should constitute its own fund. Presumably, this was in the belief that an additional fund would mean that there was more compensation to be shared among claimants.

[11] In a decision dated 8 May 2020, the High Court held that if PDL wished to rely on its right to limit its liability, it could not simply rely on the limitation fund constituted by Cruz but had to constitute a further limitation fund itself for claims against it.[5]

[12] PDL then sought leave to appeal to the Court of Appeal against this decision, the principal ground being that it was entitled to take the benefit of the limitation fund established by Cruz and was not required to establish a separate fund itself. Because the limitation decree was an interlocutory matter, PDL required leave from the High Court, which declined it.[6] However, leave to appeal was granted by a single Judge of the Court of Appeal.[7]

---

5 *PDL International PTE Ltd v Cruz Holdings Ltd* Admiralty Action No. HBG 1 of 2017, 8 May 2020

6 *PDL International PTE Ltd v Cruz Holdings Ltd* [2021] FJHC 273.

7 *PDL International PTE Ltd v Cruz Holdings Ltd* [2022] FJCA 7.

[13] In the result, the Court of Appeal dismissed PDL's appeal,[8] agreeing with the High Court that PDL could not take the benefit of the limitation fund constituted by Cruz but had to constitute its own fund. The Court ordered PDL to pay Cruz costs of $5,000. PDL then petitioned this Court for leave to appeal.

Petition for leave to appeal

[14] PDL submits that this matter meets the criteria in section 7(3) of the Supreme Court Act 1998 in that it raises a far-reaching question of law regarding the operation of the maritime law of limitation in Fiji. The Court of Appeal's judgment, PDL argues, leaves the Fiji's law of limitation uncertain and at odds with the law that prevails internationally. In support of these contentions, PDL argues that the Court of Appeal adopted the wrong approach to the interpretation of Part 5 of the MTA and failed to put the issue before it in its proper context.

[15] In its written submissions, PDL summarised the essential question for this Court as being:

> Where a maritime incident occurs that allows a ship's owners and charterers to limit liability for all claims arising on a distinct occasion, does Part 5 contemplate a single limitation sum that can be relied on by all persons within the definition of "owner" (which includes charters and others), or a separate sum in respect of each "owner"?

[16] Even though this question has arisen in what is technically an interlocutory application, I have no doubt that it is an important legal issue, particularly given Fiji's reliance on sea transportation. In my view, the section 7(3) criteria are met, and I would grant PDL leave to appeal.

The Courts below

[17] To give a brief preliminary overview, as previously noted, Fiji has acceded to the 1957 Convention but not the 1976 Convention. Despite that, the relevant Fiji legislation, Part 5 of the MTA 2013, incorporates elements from the 1976 Convention, as I will outline

[8] *PDL International PTE Ltd v Cruz Holdings Ltd* [2023] FJCA 39.

in more detail below. One important element of the 1976 Convention that Part 5 of the MTA 2013 does not explicitly incorporate, however, is Article 11(3).

[18] Article 11(3) of the 1976 Convention makes it clear that a limitation fund constituted by one person within the defined class of "owner" is deemed to be constituted by all persons within the class. So, to put it in the context of the present case, a limitation fund constituted by the registered owner of a vessel (ie, Cruz) is deemed to be constituted by a charterer of the vessel as well (ie, PDL) because charterers fall within the extended definition of "owner". PDL argues that the absence of a similar provision from the 1957 Convention and from Part 5 of the MTA 2013 is not significant because Article 11(3) simply made explicit what the position was (and remains) under the 1957 Convention in any event; moreover, the terms of Part 5 produce the same outcome. Accordingly, PDL argues, it is not required to constitute a separate limitation fund.

[19] As will be apparent, neither the High Court nor the Court of Appeal accepted PDL's argument. I will focus on the reasoning of the Court of Appeal, where Justice Jameel delivered a judgment with which the other members of the Court agreed.[9]

[20] Jameel JA described PDL's principal contention as follows:[10]

> [PDL] urges this court to interpret the provisions of the [Maritime] Transport Act … by reading into the Act, the deeming provisions of Article 11(3) of the Convention on Limitation of Liability for Marine Claims, 1976 **…**, although Fiji is not a signatory to the said Convention.

[21] The learned Judge gave the following summary of the policy behind limitation of shipowners' liability:[11]

> The need to limit liability was triggered by the public policy need to encourage shipping, and restore confidence in ship owners, who had previously been subjected to heavy damages, over and above even the value of the vessel. It is easy to imagine the sense of urgency and self-protection that triggered the creation of the rules of limitation, in a world when international transportation was predominantly confined to travel by sea. In **The Bramley Moore** (1963) 2 Lloyd's Rep.151, at p 437, Lord Denning said limitation of liability is *"not a matter of justice, it is a rule of public policy which has its origin in history and*

---

9 An unusual feature of this case is that, at least in the argument before this Court, there was no party opposing the Petitioner's position. This means that Court of Appeal's reasoning is of particular importance.

10 *PDL International PTE Ltd v Cruz Holdings Ltd*, above n 8, at para [3].

11 *PDL International PTE Ltd v Cruz Holdings Ltd*, above n 8, at para [27].

> *its justification in convenience"*. Thus, the principle of limitation of liability was designed to encourage shipping by protecting shipowners against having to bear heavy pecuniary damages flowing from the negligent navigation of their ships on the part of their servants and agents.

[22] Jameel JA characterised PDL's argument as being that "the court should interpret a statute on the basis of policy, rather than on the basis of the words used in the legislation …" and rejected that approach. Her Honour said:[12]

> … it is important to note that [PDL's] argument that the court should interpret a statute on the basis of policy, rather than on the basis of the words used in the legislation, is certainly devoid of legal basis, and has therefore to be rejected. Further, [PDL] does not contend that there is any ambiguity in the MTA. Therefore, there is no need to ascertain the intention of the legislature.

[23] The learned Judge considered that the meaning of the language in Part 5 of the MTA 2013 was plain and meant that PDL had to constitute its own limitation fund. The Judge relied particularly on the definitions of "limitation of liability" and "owner" in section 77.[13] The Judge said:

> In my view, the plain meaning of the words in section 77(b) of the MTA, which provide that when a ship is chartered, the "*owner*" means the charterer, without doubt requires the charterer to do what an owner would have done if the ship had not been chartered, that is constitute its own limitation fund, if it intended to seek the benefit of limitation of liability. It cannot possibly be contended as is done by [PDL], that the legislature contemplated that the liability of a charterer, can be foisted on the registered owner.

The Judge also rejected PDL's arguments based on the aggregation provisions.[14]

[24] Her Honour also appears to have been troubled by the fact that there is no mechanism in the MTA 2013 whereby PDL could be made to contribute to the limitation fund. She said:

> Thus, the fact that PDL decided to have itself joined as a plaintiff in an existing action instead of instituting its own independent action for a decree of limitation of liability, cannot be used as a basis on which to claim that a single fund constituted by an existing plaintiff, can also be utilized to its benefit, *independent and irrespective of any financial commitment on its part*.
>
> (Emphasis added).

---

12 *PDL International PTE Ltd v Cruz Holdings Ltd*, above n 8, at para [47].

13 *PDL International PTE Ltd v Cruz Holdings Ltd*, above n 8, at paras [53]-[57].

14 *PDL International PTE Ltd v Cruz Holdings Ltd*, above n 8, at para [60]-[62].

[25] I return to the Court of Appeal's analysis later in these reasons.

Analysis

[26] To resolve this appeal it is necessary to place the issue it raises in context. This means that the former and current legislative provisions and the two Conventions must be considered. This consideration must be undertaken against the background that limitation of shipowners' liability was intended to protect the financial position of shipowners (and others within the defined class) even though its effect was, at least in some cases, to prevent those who suffered loss from obtaining full, or even substantial, compensation. This protective approach was justified as being in the public interest in order to sustain the viability of sea transportation.

[27] Before I begin that discussion, however, I should say something about the approach to be adopted to the interpretation of domestic legislation that gives effect to international treaties, especially given the observations in the Court of Appeal's judgment about the approach to interpreting Part 5 of the MTA 2013.

Interpretation of legislation giving effect to treaties

[28] Treaties may be implemented in domestic legislation in different ways and, even if not implemented legislatively, may nevertheless be relevant to the interpretation and/or application of legislation.[15] In terms of implementation, treaties may be implemented *directly* by being given the force of law domestically or *indirectly* by means of statutory provisions which attempt to implement the obligations in the treaty by paraphrasing the treaty rather than enacting its precise wording. As to interpretation/application, a statute may provide that officials must take particular treaty obligations into account when exercising their statutory powers or otherwise carrying out their statutory functions; or treaty obligations may be relevant to the interpretation of a statute where those obligations bear on the particular matter dealt with in the statute. In this latter situation, the statute should be interpreted consistently with the country's international obligations to the extent that its wording allows.

---

[15] For a helpful discussion of this topic, see Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis 2015) at 501-519.

[29] Because the statutes which I discuss below provide examples of both direct and indirect treaty implementation, it is necessary to consider the approach to interpretation that applies to such statutes. The first point to make is that the Vienna Convention on the Law of Treaties 1969 states the generally accepted rules of customary international law for the interpretation of treaties. Article 31(1) provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The notable feature of Article 31(1) is that it requires that the ordinary meaning of words in a treaty be determined in their context and in light of the object and purpose of the treaty. That is, it requires an approach which is different from that articulated in the Court of Appeal's judgment.

[30] Article 32 of the Vienna Convention provides that preparatory materials and other aids may be referred to in order to confirm an interpretation resulting from the application of Article 31, or to determine the meaning where interpretation in accordance with Article 31 results in an ambiguous or obscure meaning or produces a manifestly unreasonable or absurd result. Again, this is different from the approach articulated by the Court of Appeal.

[31] These principles obviously apply where a treaty is directly incorporated into domestic law. They also apply where a treaty is indirectly implemented in domestic law, although in that situation the particular language chosen by the legislature will have to be carefully considered. That is because, although the legislation will be intended to implement the treaty, its terms may differ from the terms of the treaty in ways that are significant.

[32] There is one last point. As the majority judgment of the Court of Appeal in *Air Fiji Ltd v Houng-Lee* shows,[16] the courts must be conscious of the international jurisprudence when seeking to interpret and apply treaties in a local setting. That case concerned the compensation of victims of aviation accidents in terms of the Warsaw Convention 1929.

---

16 *Air Fiji Ltd v Houng-Lee – Majority Judgment* [2005] FJCA 84.

The majority considered a number of decisions from overseas jurisdictions and had regard to international developments more generally in reaching their decision.

[33] I now turn to consider the relevant statutes and conventions, beginning with the Marine Act 1986.

The Marine Act 1986

[34] The purpose of the Marine Act was to "regulate shipping, to give effect to certain international maritime conventions and for related purposes". One of the international conventions identified was the 1957 Convention.

[35] Limitation of liability was dealt with in Part 9 of the Marine Act. Section 177(1) provided that the 1957 Convention was to "have the force of law as part of the law of Fiji".[17] It is, therefore, an example of the direct implementation of a treaty. Under section 178(1), a person who was entitled to limit their liability under the 1957 Convention could apply to the High Court[18] for a determination of the limit of their liability where a claim either was, or was about to be, made against them. The Court had the power to make appropriate orders (section 178(2)). Section 180 empowered the responsible Minister to make regulations in relation to matters that were "necessary or convenient to be prescribed for the purpose of carrying out or giving effect to the applied provisions of the [1957] Convention" and specified certain matters that could be addressed in regulations.[19] The 1957 Convention and a Protocol to it were annexed to the Marine Act as Schedules 6 and 7 respectively.

[36] Incorporating the 1957 Convention into the law of Fiji meant that detailed statutory provisions to give effect to the Convention's terms were unnecessary. Rather, the Convention's terms, having the force of law, could be applied directly by practitioners and the courts. Accordingly, it is important to know exactly what the 1957 Convention provided. I will not give a comprehensive description of it, but rather will focus on matters relevant to this case.

---

17 There was one exception to this, which is not relevant to the issues in this case.

18 Then called the Supreme Court.

19 As far as I have been able to ascertain, no regulations were ever made under section 180.

What did the 1957 Convention relevantly provide?

[37] The 1957 Convention, which is still the applicable treaty in a number of states (including Fiji), enables a shipowner to constitute a limitation fund calculated by reference to the tonnage of the vessel which suffers the casualty. The limitation fund is available for the payment of claims that are subject to limitation. The fact that the fund has been established means that claimants are prevented from taking further action against the shipowner's property. The procedure for establishing and making payments from the limitation fund is a matter for the State in which the fund is constituted.

[38] Apart from its underlying policy of protecting shipowners by limiting their liability to claimants, there are four particular features of the 1957 Convention that are relevant in the present context:

(a) First, the 1957 Convention expanded the group of people entitled to establish a limitation fund. In particular, charterers were treated in the same way as "owners". Article 6(2) provided:

> (2) Subject to paragraph (3) of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself: *Provided that the total limits of the owner and all such other persons in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with Article 3 of this Convention.*
>
> (Emphasis added.)

The italicised proviso is relevant to the next point, aggregation of claims.

(b) Second, Article 2 provided for the aggregation of claims. Given its importance to the argument, I set the provision out in full:

> *Article 2*. (1) The limit of liability prescribed by Article 3 of this Convention shall apply to *the aggregate of personal claims and property claims which arise on any distinct occasion* without regard to any claims which have arisen or may arise on any other distinct occasion.

> (2) When the aggregate of the claims which arise on any distinct occasion exceeds the limits of liability provided for by Article 3 the total sum representing such limits of liability may be constituted as one distinct sum.
>
> (3) The fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.
>
> (4) After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant.
>
> (Emphasis added.)

The words of the italicised proviso to Article 6(2) are also relevant in this context because they suggest that the limitation of liability applies to all claims arising out of a distinct occasion no matter who within the class they are against. I will return to these provisions later in this judgment. For the moment I simply note that 1957 Convention appears to aggregate personal and property claims arising on a particular occasion irrespective of whether the claims are directed against a one or more persons who fall within the definition of "owner".

(c) Third, the limits of liability were set at a relatively low level. As will become apparent, these limits have been increased significantly over time.

(d) Fourth, under Article 1 a shipowner lost the right to take advantage of limitation where "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner". In England and similar jurisdictions, the owner carried the burden of showing that their conduct did not contribute to the accident giving rise to the claim.[20] Accordingly, if a shipowner was negligent and this contributed to the casualty, the right to limit was lost. Commentators suggest that it was relatively easy for a claimant to avoid the application of limitation because of the difficulty faced by shipowners in establishing a lack of fault on their part.[21]

---

20 Under Art 1(6), the question of who carried the burden of proof was left to local law. In the United Kingdom and Commonwealth countries, the shipowner carried the burden: see Tetley, above n 1, at 284, fn 67 and 68.

21 See, for example, Sarah Derrington & James Turner QC *The Law and Practice of Admiralty Matters* (2nd ed, OUP 2016) at [10.05]; Mandaraka-Sheppard, above n 2, at [7.2.1].

[39] I turn now to the relevant features of the 1976 Convention.

What did the 1976 Convention relevantly provide?

[40] Although the 1976 Convention continued to reflect the policy underlying the 1957 Convention and retained its essential structure, it made some significant changes in particular areas. I mention three:

(a) First, the liability limits were increased significantly, meaning that greater compensation was available for claimants. (The limits were raised further in the LLMC Protocol 1996.)

(b) Second, the circumstances in which an "owner" lost the right to claim limitation were tightened. The new disqualification arose only where it was "proved that the loss resulted from [the owner's] personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result".[22] Experience has indicated that it is almost impossible for claimants to establish this and thus avoid the operation of the limitation.[23]

(c) Third, the group of persons entitled to invoke limitation of liability was expanded to include salvors and insurers of those entitled to limit their liability.[24]

[41] In addition, the 1976 Convention made it clear in Article 11(3) that a fund constituted by one of the persons fitting within the definition of "shipowner" was deemed to be constituted by all those within the category. This was reinforced by Article 9, which provided for the aggregation of claims, and by Article 13, which extended the protection of limitation not only to the person who constituted the fund but to all persons "on behalf of whom the fund has been constituted" (which would include those falling within the "deeming" provision).

---

22 1976 Convention, art 4.

23 See, for example, the discussion in *Daina Shipping Company v Te Runanga o Ngati Awa* [2013] NZHC 500, [2013] 2 NZLR 799 at [26]-[30]; Derrington & Turner, above n 21, at [10.05] and [10.100]-[10.102].

24 See Art 1 of the 1976 Convention.

[42] I now come to the current legislation, the MTA 2013.

The Maritime Transport Act 2013

[43] The MTA 2013 repealed the Marine Act.[25] Like the Marine Act, the MTA 2013 annexed the 1957 Convention as a schedule, although it did not provide that the Convention was part of the law of Fiji. Indeed, apart from stating in section 2 that various conventions are set out in the schedules, the MTA 2013 does not seem to make any specific reference to the 1957 Convention. Rather, it deals with limitation of liability in Part 5.

[44] Given that Fiji has not acceded to the 1976 Convention, Part 5 is rather confusing because it is largely based on provisions from the 1976 Convention. It appears that Part 5 was modelled on the equivalent New Zealand legislation, namely Part 7 of the Maritime Transport Act 1994 in the form it was when the MTA 2013 was first promulgated as the Maritime Transport Decree 2013. The provisions in Part 7 of the New Zealand Act were first introduced in 1987 and were broadly consistent with the 1976 Convention's principal provisions even though New Zealand had not acceded to the 1976 Convention at that stage.[26] Part 7 of the New Zealand Act was an example of indirect implementation because it attempted to give effect to elements of the 1976 Convention in substance but did not enact them verbatim.[27]

[45] In any event, the outcome as far as Fiji is concerned is, as PDL's counsel Mr David KC rightly submitted, that the substantive provisions in Part 5 of the MTA 2013 are substantially derived from the 1976 Convention.[28]

[46] Accordingly, the position is that Part 5 of the MTA 2013 incorporates elements of the 1976 Convention that differ from those of the 1957 Convention even though the 1957

---

25 See section 283.

26 See the Shipping and Seamen Amendment Act 1987, section 22; see Derrington & Turner, above n 21, at paras [10.33]-[10.34].

27 In its original form, Part 7 of the New Zealand Act proved problematic, mainly because it attempted to state the effect of the 1976 Convention in the language of the legislative drafter rather than of the Convention. The New Zealand Parliament eventually abandoned this approach and made the 1976 Convention and the LLMC Protocol part of the law of New Zealand: see section 84A of the Maritime Transport Act 1994.

28 Some elements of the adaption from the New Zealand legislation were not carried out as carefully as they should have been. For example, section 81(1)(d) of Part 5 uses the words "subject to subsection (4)" even though there is no subsection (4) to section 81. Those words appear to have been taken directly from the equivalent provision in the New Zealand Act (section 86(3)(d)).

Convention is annexed to the MTA 2013 and Fiji has not acceded to the 1976 Convention. Obviously, this creates some complexity in interpreting Part 5.

[47] Relevantly, Part 5 of the MTA 2013:

(a) Defines "limitation of liability" to mean "the aggregate amount of liability of any one or more persons in accordance with this Part" and "owner" to include charterers (section 77);

(b) Appears to show an intention to extend the right to take the benefit of the limitation to insurers as the 1976 Convention did, although this is not entirely clear (section 78(1)(c));[29]

(c) Provides that "owners" lose the right to limit in accordance with the formula in the 1976 Convention rather than with that in the 1957 Convention (section 78(2));

(d) Contains an aggregation clause in similar terms to that contained in the 1976 Convention (section 81(1));

(e) Utilises the limits of liability from the 1976 Convention rather than those from the 1957 Convention (section 83).

[48] Having briefly stated the relevant effect of the conventions and statutes, I will attempt to draw the various threads together so as to state a concluded view.

Drawing the threads together

[49] As I have noted, the 1976 Convention contained a provision (Article 11(3)) which made it clear that a limitation fund constituted by one of the persons falling within the definition of "owner" was deemed to be constituted by all others within the definition.

---

[29] The equivalent New Zealand provision provided that the listed persons (including insurers) were entitled to limit their liability whereas section 78(1) of the MTA 2013 provides that the listed persons are not personally liable for any act done in good faith. It is not clear whether the different language of section 78(1) is intended to express the same point as the New Zealand provision.

There is no such explicit provision in the 1957 Convention, in Part 5 of the MAT 2013 or in the New Zealand legislation on which Part 5 seems to have been modelled.

[50] Despite the lack of an equivalent to Article 11(3) in the 1957 Convention and in Part 5 of the MTA 2013, I think it clear that under both the Convention and the MTA 2013 the same position applies, ie, that a limitation fund constituted by an owner in the context of a particular casualty to a vessel is treated as having been constituted by all who fall within the definition of "owner" and are thus entitled to invoke limitation in relation to that casualty. My reasons are as follows.

[51] First, at paragraphs [38](a) and (b) above I quoted two extracts from the 1957 Convention which are powerful indicators that the intention of the Convention's framers was that there would be a single limitation fund for those entitled to claim limitation arising out of a distinct occasion rather than a number of individual funds constituted by each allegedly liable person.

[52] The first extract was Article 6(2). It will be recalled that the proviso to Article 6(2) provides:

> Provided that the total limits of *the owner and all such other persons* in respect of personal claims and property claims arising on a distinct occasion *shall not exceed the amounts determined in accordance with Article 3 of this Convention*.
>
> (Emphasis added.)

The second extract was Article 2(1), dealing with the aggregation of claims. It provides:

> The limit of liability prescribed by Article 3 of this Convention shall apply to *the aggregate of personal claims and property claims which arise on any distinct occasion* without regard to any claims which have arisen or may arise on any other distinct occasion.
>
> (Emphasis added.)

Both these extracts point to there being a single limitation fund for all those within the description "owner" who are entitled to limitation on a distinct occasion. Article 2(1) is particularly telling because it refers simply to the aggregate of *claims* arising on a distinct occasion but does not require that they be claims against the same person.

[53] Second, those involved in the preparatory works to the 1976 Convention considered that the 1957 Convention contemplated aggregation of "all claims arising on one distinct occasion against the owner, charterer and operator of the ship and all persons for whom they are responsible".[30] Academic commentators have made the same point. For example, Reynolds and Tsimplis say that the 1957 and 1976 Conventions:[31]

> prescribe that the limits of liability apply to the aggregate of claims rather than to each separate claim. *Moreover, the limits of liability cover the aggregate liability of all persons entitled to limited liability rather than the liability of each defendant*.
>
> (Emphasis added.)

Martin Davies & Anthony Dickey make the same point about the effect of the aggregation clause in the 1976 Convention (Article 9(1)):[32]

> The fact that several different parties are entitled to limit their liability under the Convention does not mean that the limited amount is available several times over. For example, consider the following situation. Ship A is damaged in a collision caused entirely by the fault of ship B. The owners of ship A proceed against the owner, the time charterer and the master of ship B in personam, and against the ship in rem. If the limited amount available under the terms of the Convention is [$x], the owners of ship A can only recover [$x] altogether, not [$x] from each of the parties entitled to limit their liability.

[54] Third, as I noted above, the Court of Appeal was critical of PDL for urging the Court to have regard to the purpose of Part 5 of the MTA 2013, viewed in light of the purpose of 1957 Convention, which is reflected also in the 1976 Convention.[33] However, with respect, that criticism was misplaced. Given that (i) Fiji has acceded to the 1957 Convention, (ii) the 1957 Convention was, at least until the passage of the MTA 2013, explicitly part of Fijian law, and (iii) the 1957 Convention is now annexed to the MTA 2013, it remains relevant to understanding Part 5 of the MTA 2013. Although Part 5 gives statutory force to particular elements of the 1976 Convention, the 1957 Convention is the convention to which Fiji has acceded. The elements of the 1976 Convention that are incorporated into Part 5 are effectively an overlay on the 1957 Convention as far as Fiji is concerned, albeit a substantial overlay.

---

30 Comité Maritime International *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* at para [416].

31 Reynolds and Tsimplis, above note 3, at 114.

32 Martin Davies & Anthony Dickey *Shipping Law* (3rd ed, LawBook Co, 2004) at 460 (footnotes omitted).

33 *PDL International PTE Ltd v Cruz Holdings Ltd*, above n 8, at paras [45]-[47].

[55] In my view, the effect of the 1957 Convention was to aggregate claims against different persons within the definition of "owner" where they arose out of a distinct occurrence so that a single limitation figure applied to all the claims taken together. Apart from reflecting the language used, this view is consistent with the purpose of the 1957 Convention to protect owners (broadly defined) from the crippling effects of full liability.

[56] But if there is any doubt about that, it is removed by section 81 of the MTA 2013. That section enacts the aggregation clause from the 1976 Convention. That aggregation clause is Article 9(1)(a), which provides:

> The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:
>
> (a) Against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or fault he or they are responsible;

The person or persons referred to are those falling within the definition of "shipowner", that is, the owner, charterer, manager and operator of a seagoing ship.

[57] Section 81(1)(a) of Part 5 of the MTA 2013 is virtually identical. It provides:

> The limitation of liability under this Part—
>
> (a) applies to the aggregate of relevant claims arising on any distinct occasion against—
>
> (i) the owner of the ship and any seafarer or other person for whose act, omission, neglect or fault the owner is responsible;

"Owner" is defined in s 77 of the MTA 2013 to include among others, the owner, charterer and person responsible for the navigation and management of the ship.

[58] Given that Article 9(1) and section 81(1)(a)(i) are essentially identical, they must have the same effect. Like the commentators cited at paragraph [53] above, I consider that their language contemplates a grouping together of relevant claims against those "owners" facing liability under one liability figure. Furthermore, the definition of "limitation of liability" in section 77 of the MTA 2013 as meaning "the *aggregate amount of liability* of any *one or more persons* in accordance with this Part" (emphasis added) also contemplates a grouping together of those facing liability under one liability

figure. As a consequence, unlike the Court of Appeal, I do not regard it as significant that Part 5 of the MTA 2013 does not contain an explicit equivalent of Article 11(3) of the 1976 Convention.

[59] Finally, as I noted earlier, Jameel JA said in her judgment:[34]

> In my view, the plain meaning of the words in section 77(b) of the MTA, which provide that when a ship is chartered, the "*owner*" means the charterer, without doubt requires the charterer to do what an owner would have done if the ship had not been chartered, that is, constitute its own limitation fund, if it intended to seek the benefit of limitation of liability. *It cannot possibly be contended as is done by the Appellant, that the legislature contemplated the liability of a charterer, can be foisted on the registered owner*.
>
> (Emphasis added.)

[60] The last sentence in this extract indicates that a factor which influenced the Court of Appeal is the absence of any mechanism in the MTA 2013 for the sharing of costs where a charterer such as PDL seeks to take the benefit of a limitation fund established by an owner. This point arose in an English case, *Metvale Ltd v Monsanto International SARL (The "MSC Napoli")*,[35] a case where the 1976 Convention applied.

[61] A large container vessel had suffered damage in heavy weather and was beached on the English coast. Claims against the vessel's owner exceeded £100 million. The owner constituted a limitation fund of £14.71 million. The vessel was subject to some "slot" charters.[36] Because two slot charterers had containers on board at the time of the casualty and faced possible liability to cargo claimants, they wished to limit their liability.

---

34 *PDL International PTE Ltd v Cruz Holdings Ltd,* above n 8, at para [53]. For the sake of completeness, I note that I do not agree with the significance the Court of Appeal gives in this extract to the use of the words "means" in section 77(b) of the MTA 2013. When section 77(b) is seen in context, it is implausible that the use of "means" rather than "includes" was intended to fundamentally change the operation of the limitation of liability regimes contemplated by the 1957 and 1976 Conventions.

35 *Metvale Ltd v Monsanto International SARL (The "MSC Napoli")* [2008] EWHC 3002 (Admlty), [2009] 1 Lloyd's LR 246.

36 In effect, slot charterers simply hire some space on a vessel and enter into agreements with shippers to carry their cargo in that space (or slot).

[62] There were two preliminary questions to be determined:

(a) First, was a slot charterer a "shipowner" for the purposes of Article 1 of the of the 1976 Convention and so entitled to limit its liability under the Convention and the relevant English legislation?

(b) Second, if so, was the limitation fund constituted by the owner deemed to be constituted by the slot charterer under the 1976 Convention and the relevant English legislation?

[63] Teare J held that slot charterers did fall within the definition of "owners". The Judge noted that a literal reading of the phrase "charterer … of a seagoing ship" might suggest that the definition did not include a charterer of *part* of a ship (ie, a slot charterer).[37] The learned Judge did not accept this approach, saying that "a literal meaning must give way to a purposive construction".[38] On the first question, His Honour concluded:[39]

> …in accordance with the ordinary meaning of the word charterer and in light of the evident object and purpose of the convention, a slot charterer is within the definition of shipowner and therefore entitled to limit his liability.

[64] Teare J went on to hold that the limitation fund constituted by the ship's owner was deemed to be constituted by the slot charterers. The Judge concluded with the following observation:[40]

> Whilst that is clear, there is no clarity as to whether the person who has put up the fund is entitled to any form of contribution from those who take the benefit of the fund as "shipowners". The convention does not deal with that matter, at any rate expressly. Whether there is any right to contribution or restitution may have to depend on the general law.

[65] The point to be made about this is that, unlike Jameel JA, Teare J did not regard the absence of a cost-sharing mechanism in the 1976 Convention or the relevant English legislation as indicating that the slot charterers would have to constitute their own limitation funds. Rather, that issue would have to be dealt with under the general law.

---

37 *The MSC Napoli*, above n 35, at para [18].
38 *The MSC Napoli*, above n 35, at para [19].
39 *The MSC Napoli*, above n 35, at para [21].
40 *The MSC Napoli*, above n 35, at para [24].

Decision

[66] I conclude that PDL is entitled to limit its liability by reference to the limitation fund constituted by Cruz and is not required to constitute its own separate fund. Accordingly, I would allow the appeal and quash the costs award made by the Court of Appeal in favour of Cruz. In the circumstances, I would make no order for costs in this Court.

Goddard, J

[67] I fully endorse the reasoning and decision of Hon. Justice Arnold.

Orders of the Court

1. *Leave to appeal is granted.*
2. *The appeal is allowed.*
3. *The order for costs made by the Court of Appeal is quashed.*
4. *There is no order for costs in this Court.*

The Hon. Mr. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

SUPREME COURT FIJI

The Hon. Mr. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Madam Justice Lowell Goddard
Judge of the Supreme Court