

# **The Constitution of Limitation Funds:** towards certainty and coherence?

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# Fundamental role of establishing fund

- *“But the foundation of the relief, administered first in Chancery and afterwards in admiralty, is the provision on the part of the shipowner of the fund representing his maximum liability. The court then administers the fund brought into court by the shipowner. The court ascertains the claims upon it, marshals them and distributes the fund rateably among the claimants. In principle the title to relief of such a nature is a substantive right enforceable by independent proceedings.”*
  - James Patrick & Co Ltd v Union Steamship Co of New Zealand Ltd 1938 60 CLR 650, p.673

# Legislative history

- Limitation statutes go back a long way – rarely applied or examined in NZ courts
- NZ statutes based on UK provisions consistently had procedural provisions giving court powers to determine amount of shipowner's liability to claimants, distribute the amount rateably among claimants, stay other proceedings and to make such as orders as it thought fit for security for amount
- Necessary to administer the limitation process

## Error or not?

- Problem caused by paraphrasing LLMC 1976 Convention and forcing it into NZ legislation
- Shipping and Seamen Amendment Act 1987 enacted LLMC Convention which became Part 7 MTA 1994
- Cross – reference of procedural provision to claims which were not subject to limitation and not those which were.

# The Tasman Pioneer and Rena

- High Court took the view that there was no drafting error capable of correction in s 89 MTA in The Tasman Pioneer so that Owner could not be ordered to constitute fund for distribution between claimants
- In case arising from Rena grounding – High Court held drafting error which could be corrected on interpretation and in any event willing owner could constitute fund

# Force of law to LLMC Convention and Protocol

- Concern at inadequate limits in LLMC Convention after Rena
- Move to implement LLMC and Protocol – no “paraphrasing” this time – simply given force of law as Schedules 8 and 9 by s 84A MTA.

# Articles 11- 13 LLMC Convention

- Articles provide for constitution of fund, distribution (including Owner's rights of subrogation to rights of claimants whose claims settled) and constitution of fund as bar to other actions.
- Article 14 provides for rules of procedure of State party to apply subject to other Articles of Chapter III of the Convention.

# Current situation

- Law now in Convention provisions in Schedule 8 MTA setting out rights to constitute fund and related provisions
- No procedural rules in the HCR on constitution of fund
- Suggest some short rules consistent with Convention Articles would assist parties – example UK Civil Procedure Rules – Part 61.11 (18) –(20) – part of wider review Part 25 Admiralty HCR?
- Tortuous path to clarity but we seem to be getting there