SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

Limitation a Rare but Interesting Bird

The law of Limitation may be a "fairly rare bird" but when it does arise, it produces some interesting cases, the MLAANZ New Zealand Branch Conference heard last November.

Paul David KC and Tom Ashley, both of Eldon Chambers, Auckland, profiled and reflected on recent cases including Article 4 of the LLMC [Convention on Limitation of Liability for Maritime Claims] Protocol on Interpretation, involving a recent United Kingdom case on whether a party was an "operator" and entitled to limit, and the first limitation case in the Supreme Court of Tonga.

Limitation had its statutory beginnings in 1733 when a master stole a cargo of gold, and was created to encourage merchants to trade. Statutory development occurred through Merchant Shipping Acts which applied to Commonwealth countries, and the search for international uniformity led to the 1996 Protocol.

Fundamentally, limitation is unique to maritime law, with a global cap on claims arising from occurrences that are within lists of claims. It creates certainty and is an efficient means of addressing all claims from an incident.

It is always hard to break. The 1957 Convention – which introduced "without actual fault or privity" – was superseded by the "virtually unbreakable" 1976 LLMC Article 4, which sets a very high test to break limitation. There has to be a personal act or omission by the shipowner causing the loss, with intent to cause such loss or recklessly with knowledge such loss would probably result.

New Zealand limitation proceedings are rarely seen, with the largest being the Tasman Orient and Rena cases, and these revealed problems with the implementation of international conventions and keeping New Zealand law up to date. All states should keep substantive law up to date and have effective procedures because the law may need to be applied in circumstances of urgency.

Court decisions have shown the difficulty of breaking limitation. One such was *Splitt Chartering* [2021] EWCA Civ 1880 in which a firm was contracted to repair a coastal railway, with rock armour being placed in a dumb barge for transporting to the shore. The contractor, Stema, was responsible for the tug and barge to the shore.

In bad weather the unmanned dumb barge dragged anchor and damaged an underwater cable, leading to litigation to determine responsibility and was Stema entitled to limit?

The High Court held that an "operator" included the entity that directed people to go on the vessel and operate it with their permission. The Court of Appeal reversed this and determined Stema was not an operator but merely a service provider – the High Court had effectively given limitation to any party providing crew to operate machinery even if they had no other role in the broader operation of the vessel. This was not consistent with being the operator of the ship.

Mr Ashley added the observation that seeking a limitation should not be construed as an admission of liability.

The first limitation case in the Kingdom of Tonga (*DS Venture Limited v Tonga Cable Limited* [TCL] Tongan Supreme Court 68/2019), involved a small oil and chemical tanker where the anchor came loose and snagged an Internet cable on approach to port, robbing Tonga of Internet service for some weeks and creating a classic multiple many-claim situation.

TCL, the owner of the cable, made a claim of US$1.237 million against the vessel owner, who in response commenced proceedings for a general limitation decree, naming TCL as defendant

Tonga had not gazetted the 1976 LLMC and 1996 Protocol, so the 1957 Convention limits applied by statute – reducing the limitation cap to about US$400,000.

The shipowner had to prove the occurrence did not take place with its actual fault or privity under the 1957 Convention, and filed evidence about the incident. TCL delayed its decision on opposition, sought further time and then finally withdrew opposition – some months later than it should have done.

The Court ruled TCL should bear its own costs up to the time when it should have withdrawn. Costs became a central issue because TCL had engaged overseas lawyers and failed in their attempt to have higher hourly rates applied under Tongan procedural rules because an application was not made at the outset.

A new claim against the fund was submitted by TCL in the reduced sum of US$238,000. In his final ruling, the Chief Justice significantly reduced TCL's claims due to the way the company had conducted its case.

Only one other claim was submitted against the fund by a company for financial loss arising from expenses in providing satellite connectivity. The claim was ruled inadmissible as a matter of Tongan law – on English law tort principles.

Summarising, Mr David said Tonga found it had the same problem as New Zealand after the Rena casualty in not having kept its laws up to date. It was a reminder for all states, because doing so is important for international trade and commerce.

His advice for claimants, whether named defendant or a claimant lodging a claim after a decree, was " … understand the test for any challenge to the right to limit – the unbreakable LLMC. Make informed early decisions on whether the limitation decree can be defended.

"As regard any claim to be made – work out early the nature of the claim and whether it is valid and the recoverable quantum. It should be simple."

March 2023