SMC SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Breaking tonnage limitation

The Hong Kong High Court issued a judgment on 12/4/2016 to dismiss a cargo owner's action in respect of breaking a barge owner's tonnage limitation. [HCAJ 178/2014]

Introduction

On 11/3/2015, the Court, upon application by the barge owner (Floata Consolidation Limited), granted a decree of limitation ("**Decree**") under the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap 434 ("**Ordinance**") in relation to an incident which took place on 23/3/2014 ("**Incident**") when a barge "FLOATA 97" ("**Barge**") was carrying out mid-stream operations beside the vessel "Heung-A Singapore" ("**Vessel**") at the North Lamma Anchorage. The Incident resulted in *inter alia* damage to a number of containers of cargo.

There was an application by Mr Cheung Wai Yiu ("**Mr Cheung**") by summons dated 18/5/2015 ("**Summons**") for an Order setting aside the Decree. Mr Cheung claimed to be the owner of a cargo of automobile accessories stored in a container No. FCIU 9055093 ("**Container**") leased by him. He said the Container fell into the sea and the cargo inside was lost.

The Law

Section 12 of the Ordinance provides:

> "Subject to this Part, the provisions of the Convention on Limitation of Liability for Maritime Claims, 1976 set out in Schedule 2 ["**1976 Convention**"] …have the force of law in Hong Kong."

The 1976 Convention as set out in Schedule 2 of the Ordinance provides:

"

ARTICLE 1

Persons entitled to limit liability

1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.

….

ARTICLE 2

Claims subject to limitation

1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability–
   (a) claims in respect of loss of life or personal injury or loss of or damage to property … occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

….

ARTICLE 4

Conduct barring limitation

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."

In "*Saint Jacques II*" [2003] 1 Lloyd's Rep 203, 207-8, Gross J summarised the legal framework of the 1976 Convention in this way:

> *"The law on limitation under the Convention*

16. For present purposes, the legal framework may be summarized as follows:

(1) For reasons of policy, the right of shipowners and certain others to limit their liability is long-established in English Law and is now (as already remarked) contained in the Convention. Three features stand out when the Convention is compared with its predecessor Convention, the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships ('the 1957 Convention'); the Convention provides: (i) for a higher limit of liability; (ii) that the burden of proof now rests on the party seeking to 'break' the limit; (iii) that that burden is (intentionally) a very heavy burden, Mr. Justice Sheen's observations in *The Bowbelle*, [1990] 1 W.L.R. 1330, that the Convention conferred on the shipowner an 'almost indisputable right to limit', were cited with approval in *The MSC Rosa M*, [2000] 2 Lloyd's Rep. 399, esp. at paras 11 and following and in *The Leerort*, [2001] EWCA Civ. 1055; [2001] 2 Lloyd's Rep. 291, especially at paras 9 and following.

(2) A glance at art. 4 of the Convention suffices to indicate just how heavy is the burden resting on the party challenging the shipowner's right to limit. As Mr. Justice David Steel expressed it in *The 'MSC Rosa M'* (sup.), at para 14; '… absent, as in the present case, any allegation of intent, the person challenging the right to limit must establish both reckless conduct *and* knowledge that the relevant loss would probably result.'

(3) The nature of these two requirements (recklessness and knowledge) and the relationship between them appear from two authorities on the Warsaw Convention (as amended) governing the carriage of goods and persons by air ('the Warsaw Convention'). As to conduct being reckless, Lord Justice Eveleigh said this, in *Goldman v. Thai Airways Ltd.*, [1983] 1 W.L.R. 1186, at p. 1194:

> 'When conduct is stigmatized as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly, he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. That is the ordinary meaning of the word … One cannot therefore decide whether or not an act or omission is done recklessly without considering the nature of the risk involved …'

In *Nugent v. Goss Aviation*, [2002] 2 Lloyd's Rep. 222, Lord Justice Auld, spoke (at p. 227) of recklessness as involving:

> '… an obvious risk of damage and failure to give any thought to the possibility of it or recognition of the risk and going on to take it …'

It is plain that 'knowledge' here means *actual* not *constructive* knowledge. Again, in *Nugent*, Lord Justice Auld, said (at p. 229):

> '… the additional ingredient is actual knowledge, in the sense of appreciation or awareness at the time of the conduct in question, that it will probably result in the type of damage caused. Nothing less will do.'

Plainly, the two requirements of recklessness and knowledge are separate and cumulative; a challenge to the right to limit will fail if (for instance) only recklessness but not knowledge is established…

…

(4) Valuable as are these authorities on the Warsaw Convention as to the meaning of "recklessly" and "knowledge" in the present context, matters do not end with them. <u>The test under the Convention for defeating the right to limit is still higher than that found in the Warsaw Convention, in respect of both the act or omission in question and the relevant knowledge; so: (i) under the Convention, the act or omission in question must be the 'personal' act or omission of the party seeking to limit; by contrast, the exception to the right to limit contained in the Warsaw Convention applied to the act or omission of 'the carrier his servants or agents' (art. 25 thereof); (ii) under the Warsaw Convention, the relevant knowledge is that 'damage would probably result' (art. 25); under the Convention, the relevant knowledge under art. 4 is that 'such loss' would probably result.</u>" (emphasis added)

In *The Leerort* [2001] 2 Lloyd's Rep 291 at 294-5, Lord Philips MR explained the "very heavy" burden on a claimant seeking to avail itself of Art 4 of the Convention as thus:

"10. At p. 535, col. 2; p. 1335 [of *The Bowbelle* [1990] 1 Lloyd's Rep 532; [1990] 1 WLR 1330, Mr Justice Sheen] commented:

> 'I return to consider the Convention of 1976, under which shipowners agreed to a higher limit of liability in exchange for an almost indisputable right to limit their liability. The effect of articles 2 and 4 is that the claims mentioned in art. 2 are subject to limitation of liability unless the person making the claim proves (and the burden of proof is now upon him) that the loss resulted from the personal act or omission of the shipowner committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This imposes upon the claimant a very heavy burden.'

> 11. It is worth pausing to consider just how heavy that burden is. The language of art. 4 of the Convention echoes, though not exactly, that of art. 25 of the Warsaw Convention as amended at The Hague, 1955, which addresses the right of limitation of liability in relation to carriage by air…
>
> ....
>
> 13. The limitation provisions in relation to merchant shipping provide even greater protection than those in relation to carriage by air. It is only the personal act or omission of a shipowner which defeats the right to limit. A shipowner is defined in art. 1 as the owner, charterer, manager or operator of a seagoing ship. Thus, to defeat the right to limit, it is necessary to identify the causative act or omission on the part of such a person that caused the loss. Furthermore, it is only conduct committed with intent to cause such loss, or recklessly with knowledge that such loss would probably result, that defeats the right to limit. It seems to me that this requires foresight of the very loss that actually occurs, not merely of the type of loss that occurs. That certainly appears to have been the conclusion of Mr. Justice Steel in *The MSC Rosa M*, [2002] 2 Lloyd's Rep. 399 at p. 401…" (emphasis added)

Under RHC O 75 r 40, any person with a claim against the plaintiff in respect of the casualty may apply to set aside a limitation decree. The application must be supported by an affidavit showing he has "… sufficient prima facie grounds for the contention that the plaintiff is not entitled to the relief given him by the decree".

In summary, in order to deprive the barge owner of the right to limit its liability under the 1976 Convention ie to "break the limit", Mr Cheung had to establish (the burden being on him) *sufficient prima facie grounds* that the loss of the Container (i) resulted from the personal act or omission on the part of the barge owner; (ii) with intent to cause *such* loss or recklessly with *actual* knowledge that *such* loss would probably result.

Mr Cheung confirmed that he would only rely on recklessness.

According to the affirmations of Mr Ng Tai Sing Carven, vessel operations manager of the barge owner, what happened was this.

(1) At 3:00am, the Barge arrived at the Anchorage and was anchored next to the Vessel. The Barge then began unloading containers from the Vessel. At or around 3:43am, some containers fell onto the Vessel while others fell into the sea.
(2) The operation of the Barge was contracted out to Eastrend Development Limited ("**Eastrend**") whose person in charge was Mr Sin Kwai Sam ("**Mr Sin**"). At the time of the Incident, there were three crew members on the Barge viz Mr Sin, Mr Khan Shoukit Abbas and Mr Tsoi Ming Wah.
(3) Mr Sin was the derrick operator on the Barge. He had 25 years of experience in operating derricks. He held a Certificate of Safety Training Course for Works Supervisor for Shipboard Cargo Handling and a Certificate of Training for Shipboard Cargo Handling Basic Safety Training Course.
(4) After the Incident, Mr Sin was prosecuted for an offence under sections 34(4) and 34(5) of Merchant Shipping (Local Vessels) (General) Regulation, Cap 548F ("**Offence**") "as the cargo was not loaded, stowed and secured so as to prevent loss of the cargo overboard". He pleaded guilty and was fined HK$2,500. This was the only criminal prosecution to date.
(5) Mr Khan and Mr Tsoi were both experienced (10 years or more) barge hookers and held a Certificate of Training for Shipboard Cargo Handling Basic Safety Training Course.
(6) In the course of the Incident, Mr Tsoi twisted his left foot when dodging the containers. A crew member on board the Vessel was fatally injured by the falling containers.

Sections 34 (4), (5) and (8) of Merchant Shipping (Local Vessels) (General) Regulation, Cap 548F, read:

> "(4) Any cargo carried by a local vessel shall be so loaded, stowed and secured as to prevent loss of the cargo overboard.
>
> (5) If subsection (1) or (4) is contravened, the coxswain of the vessel commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.
>
> ….
>
> (8) In proceedings for an offence under subsection (5), (6) or (7), it is a defence for the defendant to show that he took all reasonable precautions and exercised all due diligence to avoid commission of the offence."

It would therefore appear that a guilty plea to an offence under sections 34(4) and (5), at most, implies a defendant accepts he cannot avail himself of the defence under section 34(8). In other words, the defendant

has not taken all reasonable precautions or exercised all due diligence - in legal parlance, he has been negligent.

In consequence of the death of a crew member on board the Vessel, the Marine Department launched an investigation and subsequently published a report dated 29/4/2015 ("**Report**"). The Report contains a succinct summary of what happened as well as the three factors which, in the view of the Marine Department, contributed to the Incident. It was set out in full as follows.

"6. **Conclusion**

6.1 At about 0130 on 23 March 2014, [the Barge], carried 67 containers of different sizes, was towed from the Stonecutters Island Public Cargo Working Area to the North West Lamma Anchorage for loading containers.

6.2 At about 0300, the derrick lighter was moored alongside *the Vessel* at the North West Lamma Anchorage. The port side of [the Barge] was secured to the starboard side of *the Vessel*. Cargo works was started shortly after [the Barge] was secured to *the Vessel*.

6.3 The cargo hold of [the Barge] had almost fully stowed with highly stacked containers at both the forward and aft leaving only the mid-section was vacated to receive containers. However, the unevenly distributed containers to one side caused [the Barge] to list to port.

6.4 At about 0345, a container in cargo hold bay no.15 of *the Vessel* was being lifted up by the derrick crane of [the Barge], [the Barge] then listed further to port resulting in the collapse of containers. Four containers fell onto the deck of *the Vessel* and ten containers fell into the sea.

6.5 At the material time, an able-bodied seaman was working on deck the starboard side of *the Vessel*, he was unfortunately hit and crushed to death by the falling containers.

6.6 The investigation into the accident revealed that the main contributing factors were:

i. The containers inside the cargo hold of [the Barge] were not evenly distributed to prevent unduly listing of [the Barge];
ii. The containers inside the cargo hold of [the Barge] were not properly stowed and secured; and
iii. No risk assessment had been conducted prior to the commencement of cargo works."

In order to "break the limit", Mr Cheung had to establish by evidence *sufficient prima facie grounds* of the following:

(1) the loss of the Container resulted from a personal act or omission of the barge owner which was reckless ("**1st Requirement**");
(2) actual knowledge of the barge owner that *such* loss would probably result ("**2nd Requirement**").

It was the firm view of the Court that Mr Cheung failed to identify and establish on the evidence any causative personal act or omission of the barge owner, let alone that such act/omission was reckless. In other words, Mr Cheung failed to satisfy the 1st Requirement, even on a *prima facie* basis. That spelt the end of his application.

The "act or omission" that Mr Cheung primarily relied on was that of the crew on board the Barge, particularly that of Mr Sin. Mr Cheung variously referred to the unsatisfactory manner of loading and unloading of containers by crew members of the Barge, Mr Sin's guilty plea to the Offence and so on. Mr Cheung relied on the conclusion in the Report that three factors had contributed to the Incident ie uneven distribution of containers in the cargo hold resulting in undue listing of the Barge, improper stowing, securing, lashing, stacking of containers and the absence of risk assessment prior to the commencement of cargo works. Mr Cheung identified Mr Sin as the person-in-charge of the Barge and submitted that Mr Sin's acts had to be attributable to the barge owner.

The critical question was: could the crew members' act or omission be regarded as the barge owner's personal act or omission? In the view of the Court, the answer was no.

Where a ship is owned by a corporation, which is invariably the case in practice, the identification of the act or omission of the shipowner presents particular difficulty. This question frequently arose under sections 502 and 503 of the Merchant Shipping Act 1894 which excluded or limited the liability of shipowners for various kinds of loss or damage occurring without their "actual fault or privity".

In *The Lady Gwendolen* [1965] P 294, the question arose as to whether a collision, caused principally by the fault of the master of the vessel traveling at excessive speed in very thick fog, occurred without the "actual fault or privy" of the company which owned the vessel. On the facts of that case, the Court of Appeal found

certain failures on the part of the company's management at *board* level which contributed to the collision, that the Company was therefore guilty of "actual fault" and upheld the first instance judge's refusal to grant a decree of limitation of liability. Wilmer LJ was prepared to take it one step further. At 343G, his Lordship expressed the view that the head of the company's traffic department with responsibility for running its ships, albeit *not* a director, could be regarded as someone whose action was the very action of the company itself, so far as concerns anything to do with the company's ships. Hence, his "actual fault or privity" was attributable to the company for the purpose of defeating its attempt to limit its liability for the collision.

One thing is clear from *The Lady Gwendolen* – the fault of the master traveling at excessive speed, which should be obvious, was *not* regarded as the actual fault or privity of the company. At pp 342D – 343B, Wilmer LJ said:

> "I think the true view is that where shipowners delegate the performance of a duty of the kind conveniently described as "non-delegable" they are held constructively guilty of fault for its non-performance. This means that so far as liability is concerned they cannot escape. But such fault falls short in my view of what is meant by "actual fault" within the meaning of section 503 of the Act of 1894. Constructive fault goes only to liability, and leaves untouched the question whether there is such actual fault on the part of the shipowners themselves as will defeat their right to limitation. This seems to me to accord with the view expressed by Buckley L.J. in *Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd.*, as follows: 'The words 'actual fault or privity' in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents.'
> It follows that, in my view, the question of actual fault or privity cannot be determined on the artificial basis contended for by the defendants. On the contrary, I think that it is necessary to examine in detail the facts of each particular case in order to see what in fact the shipowners did, or omitted to do, which could fairly be said to constitute actual fault on their part. Where, as here, the shipowners are a limited company, it is almost inevitable that difficult questions will arise. It is necessary to look closely at the organisation of the company in order to see of what individual it can fairly be said that his act or omission is that of the company itself." (emphasis added)

The approach to the question of a ship-owning company's "actual fault or privity" in *The Lady Gwendolen* can be traced back to at least *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705. In that case, Viscount Haldane LC was of the opinion that the true construction of section 502 of the Merchant Shipping Act 1894 required the "fault or privity" of somebody who was *not* merely a servant or agent for whom the company is liable upon the footing "*respondeat superior*", but somebody for whom the company is liable because his action was regarded as the very action of the company itself. It is therefore clear from *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* and the long line of cases which followed that the wrongs of servants or agents in themselves would not constitute the actual "fault or privity" of the shipowner.

The true principle upon which *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* was decided, in particular the celebrated test of "directing mind and will" of a company in Viscount Haldane LC's speech, was subject to fresh explanation in *Meridian Global Fund Management Asia Ltd v Securities Commission supra.* At 509B-E, Lord Hoffmann said:

> "Against this background of general principle, their Lordships can return to Viscount Haldane. In the *Lennard's* case the substantive provision for which an attribution rule had to be devised was s 502 of the Merchant Shipping Act 1894, which provided a shipowner with a defence to a claim for the loss of cargo put on board his ship if he could show that the casualty happened 'without his actual fault or privity'. The cargo had been destroyed by a fire caused by the unseaworthy condition of the ship's boilers. The language of s 502 excludes vicarious liability; it is clear that in the case of an individual owner, only his own fault or privity can defeat the statutory protection. How is this rule to be applied to a company? … Instead, guided by the language and purpose of the section, he looked for the person whose functions in the company, in relation to the cause of the casualty, were the same as those to be expected of the individual shipowner to whom the language primarily applied. Who in the company was responsible for monitoring the condition of the ship, receiving the reports of the master and ship's agents, authorising repairs etc? This person was Mr Lennard, whom Viscount Haldane described as the 'directing mind and will' of the company. It was therefore his fault or privity which s 502 attributed to the company."
> (emphasis added)

There is no doubt that under the 1976 Convention, a shipowner's right to limit its liability will similarly *not* be defeated by the wrongs of its servants or agents.

First and foremost, Art 4 of the 1976 Convention uses the phrase "*personal* act or omission". Moreover, by comparison with the 1957 Convention, the 1976 Convention is meant to impose a very heavy burden on the party seeking to "break the limit" in return for shipowners agreeing to a higher limit of liability than before - the 1976 Convention even reversed the previous burden of proof by resting it on the party seeking to break the limit: "*Saint Jacques II*" *supra* at [16] referred to in paragraph 7 above.

The "act or omission" that Mr Cheung relied upon in breaking the limit was that of the crew on board the Barge, particularly that of Mr Sin. Mr Cheung pointed to Mr Sin as the person in charge of the Barge whose act should be attributed to the barge owner.

Neither Mr Sin nor the two other crew members were servants or agents of the barge owner as such – they were employed by Eastrend which was an independent labor contractor. But even if they were, that would not improve Mr Cheung's position. Their "act or omission" was not to be regarded as the "act or omission" of the barge owner for the purpose of Art 4 of the 1976 Convention. First, Mr Sin was not a director of the barge owner or part of its senior management. Second, while Mr Cheung argued that Mr Sin was the person in charge of the Barge, that, even if true, again would not improve Mr Cheung's position. Every vessel has, or must have, someone in charge of it. Normally, it is the master but that does not make his act or omission that of the company which owns the vessel. *The Lady Gwendolen* is a good illustration of this point.

In the case in question, there was no evidence as to the organization structure of the barge owner. Nor was there evidence of the functions and responsibilities of any particular individual within the senior management of the barge owner whose act or omission *may potentially be* regarded as the act or omission of the barge owner.

Wilmer LJ said "Where, as here, the shipowners are a limited company… It is necessary to look closely at the organisation of the company in order to see of what individual it can fairly be said that his act or omission is that of the company itself."

What was required of Mr Cheung, but was lacking in evidence, was the identification of (i) a person, either a director or, if not, at least someone sufficiently senior within the barge owern's management, who could be regarded as the "directing mind and will" of the barge owner exercising its function as owner of the Barge; (ii) the act or omission which was said to be causative of the Incident and the loss of the Container; (iii) which act or omission was *prima facie* reckless.

Nowhere in Mr Cheung's affirmations had he established who that person might be or what his causative act or omission was. Similarly, nowhere in the Report had the Marine Department identified failings on the part of an individual within the barge owner's board of directors or senior management which were causative of the Incident. The three contributing factors set out in para 6.6 of the Report all pointed to the fault of the crew on board at the time of the Incident.

To conclude, for the above reasons, the Court was of the view that Mr Cheung had failed to meet the 1st Requirement even on a *prima facie* basis. The application had to fail.

<u>*Disposition*</u>

The Summons was dismissed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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