Hilary Term
[2025] UKSC 14
On appeal from: [2023] EWCA Civ 1007

JUDGMENT

MSC Mediterranean Shipping Company SA (Appellant) *v* Conti 11 Container Schiffahrts-GmbH & Co KG MS "MSC Flaminia" (Respondent)

before

Lord Hodge, Deputy President
Lord Briggs
Lord Hamblen
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON
9 April 2025

Heard on 5 and 6 February 2025

Appellant
Julian Kenny KC
Michal Hain
(Instructed by Mills & Co Solicitors Ltd (Newcastle upon Tyne))

Respondent
Christopher Smith KC
David Walsh KC
(Instructed by HFW LLP (London))

LORD HAMBLEN (with whom Lord Hodge, Lord Briggs, Lord Leggatt and Lord Burrows agree):

1. The principle of limited liability for maritime claims is an established feature of international maritime law. It entitles the shipowner and certain others involved in ship operation to limit their liability for claims arising out of a maritime casualty or incident to a particular sum. Its roots lie in a recognition of the importance of maritime trade and the need to encourage investment in it.

2. In the United Kingdom limitation is governed by the 1976 Convention on Limitation of Liability for Maritime Claims as amended by the amending Protocol of 1996 ("the 1976 Convention"), which is given the force of law by section 185 of the Merchant Shipping Act 1995. Under the 1976 Convention shipowners and salvors are entitled to limit their liability (article 1.1) and the "shipowner" means "the owner, charterer, manager and operator of a seagoing ship" (article 1.2). The right to limit is given in respect of specified types of claim (article 2) and, in particular, claims for damage to property occurring on board or in direct connexion with the operation of the ship (article 2.1(a)).

3. This appeal concerns the circumstances in which a charterer may limit its liability in respect of claims made by the shipowner. As a matter of English law it is well established (and common ground on the appeal) that there is no right to limit its liability in respect of claims by a shipowner for loss of or damage to the vessel – see *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] EWCA Civ 114, [2004] 1 All ER (Comm) 865, approved (obiter) by the Supreme Court in *Gard Marine and Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35, [2017] 1 WLR 1793.

4. The principal issues on this appeal are (i) whether there is a further and wider principle that there is no right for a charterer to limit its liability in respect of claims by a shipowner for losses originally suffered by it (as opposed to recourse claims) and (ii) whether the claims made by the shipowner fall within article 2.1 of the 1976 Convention and, if so, whether the fact that they result from damage to the vessel means that there is no right to limit.

Factual background

5. The appellant ("MSC") is a container line operator, which runs liner services carrying containerised cargo around the world. The respondent ("Conti") is the owner of a container ship, the "MSC Flaminia" ("the Vessel").

6. The Vessel was chartered by MSC under a time charter on the New York Produce Exchange form ("the Charter"), initially made in November 2000 and extended several times.

7. On 14 July 2012, while the Vessel was in mid-Atlantic en route from Charleston, South Carolina, to Antwerp, an explosion occurred in the no 4 cargo hold which led to an extensive fire on board. The explosion was caused by auto-polymerisation of the contents of one or more of three tank containers laden with 80% divinylbenzene ("DVB") which had been shipped at New Orleans. Three of the Vessel's crew lost their lives, extensive damage was caused to the Vessel, and hundreds of containers were destroyed.

8. Conti engaged salvors, Smit Salvage BV ("Smit"), to bring the fire under control and to salve the Vessel and cargo. Seawater was sprayed into the Vessel which resulted in about 30,000 mt of firefighting water, contaminated with dangerous and toxic residues, remaining in the holds after the fire was brought under control. On 20 July 2012 Smit began towing the Vessel towards mainland Europe.

9. On 28 August 2012, an agreement was reached with the German authorities and the Vessel was allowed to proceed to Wilhelmshaven in Germany.

10. Significant costs and expenses were incurred by Conti in relation to the passage to Wilhelmshaven. In particular, payments were made to national authorities in Belgium, France, the UK, and Germany, most of which related to claims by the German and UK authorities under the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. These claims related to preventative and precautionary measures taken in those jurisdictions in the event that bunker oil leaked from the Vessel and causing pollution in their territorial waters.

11. The Vessel arrived at Wilhelmshaven on 9 September 2012 for the discharge of sound and damaged containers that needed to be removed before the Vessel could be moved to a repair facility. This commenced on 28 September 2012. Discharge of the sound and damaged containers was ultimately completed on 18 December 2012. The process of decontaminating cargo, releasing sound cargo, and destroying unsound and sound but unclaimed cargo continued thereafter, into 2013 and beyond.

12. During this time, Conti incurred various costs and expenses, all of which had to be incurred in order, ultimately, to repair the Vessel. These included berth dues, quayside space rental and service charges (€18.3m); cargo handling and disposal costs (€9.2m); customs agents' fees (€210,000); disbursements and bunker supplies (€4.2m); fire experts' fees (€880,000), and additional services and miscellaneous expenses (all figures approximate).

13. A further issue that needed to be considered by Conti at this time was the disposal of the firefighting water on board the Vessel, which had to be removed before repairs could commence. Discharge of the firefighting water was arranged and was completed on 1 March 2013 at a cost of around €7.1m.

14. After the discharge of the majority of the firefighting water, there remained on board the Vessel about 30,500 mt of waste material, consisting of approximately 14,800 mt of fire-damaged solid cargo (ie the contents of the containers), 7,800 mt of contaminated water, and 5,400 mt of steel scrap. Most of this steel scrap consisted of damaged cargo containers, but there was also fire-damaged structural steel from the Vessel. All of this waste material was contaminated by dangerous and toxic residues which needed to be removed before repairs to the Vessel could be carried out. Conti arranged for this waste to be removed at facilities in Romania.

15. On 15 March 2013 the Vessel left Wilhelmshaven, arriving in Romania on 30 March but only berthing on 17 May. On 20 July discharge of the waste commenced but on 16 October it ceased, it being decided to have the remainder of the waste discharged in Denmark.

16. On 8 November 2013, the Vessel left Romania for Denmark and arrived on 22 November. Upon arrival in Denmark, discharge operations commenced and were completed by 2 February 2014. The following day the Vessel departed for Romania.

17. Conti incurred costs and expenses in the sum of about €24.8m removing the waste from the Vessel.

18. The Vessel arrived in Romania on 17 February 2014 and repair work was commenced. It was completed on 12 July 2014. Sea trials were completed on 14 July 2014 and the Vessel was ready to return to service on 15 July 2014.

19. Conti incurred costs and expenses in the sum of about US$21m repairing the Vessel plus various disbursements.

20. The Vessel was re-delivered to MSC under the Charter on 23 July 2014.

Proceedings

21. In 2012, cargo claimants issued proceedings against not just MSC (the bills of lading being charterers' bills) and Conti but also the DVB's shippers, Stolt-Nielsen USA

Inc and Stolt Tank Containers BV (together "Stolt"), and its manufacturer, Deltech Corp ("Deltech"), in the United States District Court for the Southern District of New York.

22. In September 2018, the District Court found that Stolt and Deltech were liable to the cargo claimants, that the claims against MSC and Conti failed, and that MSC and Conti were entitled to a full indemnity in respect of their losses from Stolt and Deltech, with quantum to be determined later. An appeal by Stolt and Deltech was dismissed by the US Court of Appeals for the Second Circuit on 30 June 2023.

23. The Charter provided for London arbitration. An arbitration was started in 2012 but it was actively prosecuted only much later, after the US proceedings had been progressed. Conti sought to recover from MSC the extensive losses it had suffered by reason of the casualty. The tribunal held that Conti was entitled to an indemnity and/or damages in respect of MSC's breaches of clause 78 of the Charter and article IV rule 6 of the Hague Rules (which had been incorporated into the Charter) for shipment of a dangerous cargo and also to outstanding hire. It awarded Conti approximately US$200 million.

24. By a limitation claim form dated 21 July 2020, MSC claimed a limitation decree. Pursuant to an order dated 5 October 2021, the limitation fund was established by the provision of a letter of undertaking from the Standard Club UK Ltd.

25. In October 2022, there was a four-day trial before the Admiralty Judge, Andrew Baker J, of the issue whether any of Conti's claims against MSC were claims within article 2.1 of the 1976 Convention and so subject to limitation. The judge held that they were not: *MSC Flaminia* [2022] EWHC 2746 (Admlty), [2023] Bus LR 686.

26. MSC appealed. Following a two-day hearing in July 2023, the Court of Appeal (Males and Falk LJJ and Sir Launcelot Henderson) dismissed MSC's appeal on 1 September 2023: [2023] EWCA Civ 1007, [2024] 1 All ER (Comm) 364, [2024] Bus LR 311.

27. On 19 December 2023, the Supreme Court (Lord Hodge, Lord Hamblen and Lady Simler) granted permission to appeal.

28. In March 2024, MSC, Conti, Stolt and Deltech entered into a confidential multiparty settlement agreement settling all proceedings, except for the appeal to the Supreme Court.

29. The four claims in relation to which MSC contends that it has a right to limit are:

(1) payments to national authorities for the purposes of arranging for the Vessel to be allowed to be moved to Wilhelmshaven (to cover the cost of measures taken to guard against the risk of the Vessel's bunkers leaking from her);

(2) the costs of discharging sound and damaged cargo, and of decontaminating the cargo, at Wilhelmshaven;

(3) the costs of removing firefighting water from the holds; and

(4) the costs of removing waste from the Vessel.

The history of limitation

30. In order to address some of the arguments raised in relation to the object and purpose of limitation and the nature of limitable claims it is necessary to address briefly the history of limitation and the background to the 1976 Convention.

31. The growth in trade in the 17th century led to the statutory adoption of limitation of liability in many continental jurisdictions. Early examples of limitation of liability statutes include the Statutes of Hamburg (1603), the Swedish Maritime Code of Charles XI (1667) and the Marine Ordinance of Louis XIV (1681). These allowed a shipowner to abandon the vessel to claimants after a casualty and to limit its liability to the post-casualty value of the vessel and freight.

32. The first limitation of liability statute in this country was the Responsibility of Shipowners Act 1733. The purpose of promoting maritime trade and investment was specifically set out in the preamble to the Act which stated that it was "of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels, to prevent any discouragement to merchants which will necessarily tend to the prejudice of this kingdom". It limited liability to the value of the vessel before the casualty and freight, but only in respect of theft by the master or crew. In 1786 this was extended to any act on the part of the master or crew occurring without the privity and knowledge of the shipowner. In the Merchant Shipping Act 1854 the right to limit was extended to loss of life and personal injury claims and the limit was linked for the first time to the tonnage of the vessel. A shipowner was able to put up a fund in the limitation amount and leave claimants to pursue claims against the fund which would be distributed rateably. This differed from the continental European approach based on abandonment (which was adopted in the United States by the Limitation of Liability Act 1851).

33. Earlier limitation legislation was consolidated in section 503 of the Merchant Shipping Act 1894 ("the 1894 Act") under which the owners of a ship (British or foreign) could limit their liability for loss of life or personal injury or for property damage which occurred "without their actual fault or privity". The limit was calculated on the basis of the vessel's tonnage. Under section 71 of the Merchant Shipping Act 1906 the "owner" was deemed to include "any charterer to whom the ship is demised".

34. The first attempts to establish international uniformity of the principles of limitation of liability led to the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels ("the 1924 Convention"). Under the 1924 Convention shipowners could limit their liability to an amount equal to the value of the vessel, freight and accessories but subject to a cap based on the vessel's tonnage in respect of most liabilities.

35. Under article 1 of the 1924 Convention "the liability of the owner of a seagoing vessel" was limited to a calculable amount in respect of various specified heads of liability. Article 10 provided that where "the person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in Article 1, the provisions of this convention are applicable to him." Limitation did not apply to "obligations arising out of acts or faults of the owner of the vessel" (article 2 (1)).

36. The United Kingdom signed the 1924 Convention but did not ratify it (or implement its provisions). Limitation continued to be governed by section 503 of the 1894 Act. The 1924 Convention was eventually ratified or acceded to by around 15 states.

37. The Comité Maritime International ("CMI") revisited the question of limitation in the 1950s. This resulted in the 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships ("the 1957 Convention"). The 1957 Convention adopted the British approach to limitation based on the tonnage of the vessel rather than its residual value. It also increased the differing limits for property damage and for loss of life and personal injury claims.

38. Article 1 of the 1957 Convention provided that "the owner of a seagoing ship may limit his liability" in respect of "claims arising from any of the following occurrences", which were then specified. Article 6(2) extended the right to limit liability to the charterer, manager and operator of the ship and to the servants of the owner, charterer, manager and operator. It provided:

> "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 liability 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."

39. Under the 1957 Convention there was no right to limit if "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner", language reflecting section 503 of the 1894 Act.

40. The 1957 Convention was more widely adopted, being ratified or acceded to by around 46 states including the United Kingdom. The United Kingdom amended section 503 of the 1894 Act to incorporate a number of the features introduced by the 1957 Convention as prescribed by the Merchant Shipping (Liability of Shipowners and Others) Act 1958. These included extending the right to limit to "any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship".

41. By the 1970s it was increasingly apparent that changes were needed to ensure that the limitation system was more appropriate to modern conditions. The major changes made by the 1976 Convention were a significant increase in the limits of liability balanced against making it far more difficult to lose the right to limit.

42. Limitation was now to be calculated by reference to the ship's gross rather than net tonnage and the limits were expressed in special drawing rights, as defined by the International Monetary Fund. It was common knowledge that the revised limitation value was designed to be a figure at which insurance would be reasonably available rather than the value of the vessel and freight. This reflected the more modern view that limitation encourages maritime trade by ensuring that insurance is available at a reasonable cost. It thereby also ensures that there are insurance monies to back the enforcement of claims.

43. A person's right to limit was only to be lost if a claimant could prove "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" (article 4). This renders the limit unbreakable in all but the most extreme of cases.

44. The 1976 Convention also extended the right to limit to salvors (article 1.1) and to insurers (article 1.6).

45. The 1976 Convention's revised limits were soon eroded by inflation. This led to the 1996 Protocol which increased the limits and provided a procedure by which the limits of liability can be quickly amended.

46. The 1976 Convention has been widely accepted internationally and around 70 states have ratified it and/or the 1996 Protocol. It has been ratified by the United Kingdom and given the force of law by section 185 of the Merchant Shipping Act 1995.

The 1976 Convention

47. Under the 1976 Convention shipowners, as defined, and salvors have the right to limit. Article 1 provides:

> "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.
>
> 2. The term 'shipowner' shall mean the owner, charterer, manager and operator of a seagoing ship."

48. The right to limit is given in relation to specified claims. The claims which are "subject to limitation" are set out in article 2, which provides:

> "*Article 2.* CLAIMS SUBJECT TO LIMITATION
>
> 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 (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
>
> *(b)* Claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

> *(c)* Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;
>
> *(d)* Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
>
> *(e)* Claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
>
> *(f)* Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.
>
> Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1 *(d), (e)* and *(f)* shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable."

49. Paragraph 1(d) of article 2 does not have the force of law in the United Kingdom (see section 185 of and Schedule 7 to the Merchant Shipping Act 1995).

50. Article 3 sets out five categories of claim which are excluded from limitation, including claims for salvage or contribution in general average (article 3(a)) and claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage (article 3(b)).

51. Article 4 identifies the circumstances in which a person's conduct bars the right to limit.

52. Article 9.1 provides for the aggregation of all non-passenger claims which arise on a distinct occasion against all persons falling within the definition of shipowner under article 1.2:

> “1. 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 persons or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible;
>
> …
>
> 2. The limits of liability determined in accordance with Article 7 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Article 1 in respect of the ship referred to in Article 7 and any person for whose act, neglect or default he or they are responsible.”

53. Article 10 provides that limitation of liability may be invoked notwithstanding that no limitation fund has been constituted.

54. Article 11 provides for the constitution of a limitation fund and states that a fund constituted by one of the persons mentioned in paragraph 1(a) or paragraph 2 of article 9, or his insurer, “shall be deemed constituted by all” such persons.

55. Article 12 governs distribution of the fund, the basic principle being that the fund is to be distributed among the claimants in proportion to their established claims against the fund.

Treaty interpretation

56. Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (“the Vienna Convention”) provide:

> “Article 31
>
> General rule of interpretation

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

57. I summarised the proper approach to treaty interpretation in the light of articles 31 and 32 of the Vienna Convention in *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2021] UKSC 51, [2021] Bus LR 1678, paras 34 to 42, and *FIMbank plc v KCH Shipping Co Ltd (The Giant Ace)* [2024] UKSC 38, [2024] Bus LR 1845, para 34. In outline:

(1) International conventions should in general be interpreted by reference to broad and general principles of interpretation rather than any narrower domestic law principles.

(2) The relevant general principles include articles 31 and 32 of the Vienna Convention.

(3) Regard may be had to the travaux préparatoires ("the travaux") as a supplementary means of interpretation.

(4) In considering the object and purpose of a Convention it is appropriate to have regard to its history, origin and context.

(5) International conventions should be interpreted in a uniform manner and regard should therefore be had to how they have been interpreted by the courts of different countries. This will be particularly important if there is shown to be a consensus among national courts in relation to the issue of interpretation.

The English law authorities

58. The arguments advanced on the appeal fall to be considered against the background of three important decisions in this jurisdiction on the 1976 Convention,

namely *Aegean Sea Traders Corpn v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd's Rep 39*, The CMA Djakarta* and *The Ocean Victory.*

The Aegean Sea

59. The vessel grounded on rocks while proceeding to berth at La Coruna to discharge a cargo of crude oil and broke in two and exploded. The vessel and most of her cargo were lost and there was widespread pollution. The owners suffered significant losses and liabilities for which they contended that the charterers were responsible for ordering the vessel to an unsafe port. Claims were made for (1) the value of the vessel; (2) bunkers on board; (3) freight that would have been earned; (4) an indemnity against liabilities incurred under Spanish legislation giving effect to the International Convention on Civil Liability for Oil Pollution Damage 1969 in respect of (i) claims for property damage; (ii) property clean up costs or preventative measures and (iii) loss of use and loss of profits claims by boat owners, fishing and other businesses and local and national authorities; (5) potential liability to Cristal Ltd, a company formed by oil companies to provide additional compensation for oil pollution, and (6) sums paid to salvors.

60. The owners contended that under the 1976 Convention a charterer was only entitled to limit liability in respect of third party claims made against it when acting in the capacity of shipowner. A charterer was not entitled to limit in his capacity as a charterer vis à vis the shipowner. The charterers contended that there was nothing in the language of the 1976 Convention that limited the charterer's right to limit in such a way; a charterer was entitled to limit in respect of claims within the scope of the 1976 Convention in whatever capacity he acted and not merely as a "quasi owner".

61. Thomas J accepted the owners' case. His principal reasons for so concluding were:

> (1) The use of the phrase in article 6(2) of the 1957 Convention that the provisions of the Convention were to apply to a charterer "in the same way as they apply to an owner" made it "clear" that "charterers were to be accorded the protection of limitation in the same way as that benefit was applicable to the shipowner" and therefore only in respect of a "liability he would have been under had he been the shipowner" (p 45).
>
> (2) Although this phrase is not used in the 1976 Convention "the same result has been achieved by different drafting and retaining the charterer within the categorization 'shipowner'. This points to the view that the charterer is to be treated as a shipowner and entitled to limit for the claims brought against him when he acts in the capacity of a shipowner" (pp 47-48).

(3) Articles 9 and 11 were significant in providing for the aggregation of all the claims against those categorised as "shipowner" and for a single fund to be constituted on behalf of all those in that category:

> "In my view, the combined effect of these articles is important. As there is provision for a fund for those categorised as shipowners and that fund is to cover both charterers and owners, it is difficult to see how charterers can claim the benefit of limitation through that fund when a claim is brought against them by owners. Owners are entitled to the benefit of limitation for a claim by charterers as that claim is being brought by charterers not when performing a role in the operations of the ship or when undertaking the responsibility of the shipowner, but in a different capacity, usually through their interest in the cargo being carried" (p 49).

(4) If charterers were entitled to limit in relation to claims such as those made that would diminish the limitation fund available to third party claimants:

> "It cannot have been intended that either the limitation amount or the fund be reduced by direct claims by the owners against charterers for the loss of the ship or the freight or the bunkers; it was intended for claims by cargo interests and other third parties external to the operation of the ship against those responsible for the operation of the ship. To permit claims of the type advanced by owners against charterers for the direct losses they suffer to come within the scope of the limitation amount or the fund would diminish what was available to others" (p 50).

62. If he was wrong in so concluding, Thomas J addressed whether the claims made were claims which were subject to limitation under article 2. His conclusion in relation to each claim was as follows:

(1) Claim for the value of the vessel – this was not subject to limitation. It was not a loss of property "occurring in direct connection with the operation of the ship" within article 2.1(a) "because it is the operation of the very ship that must cause the loss of property; the ship cannot be the object of the wrong" (p 51).

(2) Claim for bunkers on board – this was subject to limitation. "Operation of the ship" is not limited to action occurring on the ship and extends to the selection of a safe port and an order to proceed there. This was a loss of property "occurring in direct connection with the operation of the ship" within article 2.1(a) (p 51).

(3) Claim for freight that would have been earned – this was not subject to limitation. The loss of freight consequent upon the loss of the ship was not within article 2.1(a). Nor was it within article 2.1(c) as it was a claim for the infringement of contractual rights (p 52).

(4) Claim for an indemnity against liabilities incurred under Spanish legislation – this was subject to limitation. The underlying claims were either for "damage to property" or for "consequential loss resulting therefrom" within article 2.1(a). "The claims for direct damage by the pollution are either claims in respect of damage to property polluted by oil (as the property was damaged by the oil which escaped as a result of the stranding of the vessel on the rocks) or that damage to the property, as well as the clean up and prevention claims and the loss of profits claims are consequential loss claims within art. 2.1(a) resulting from the loss of the cargo" (p 52). The claims for loss of profits resulted from the "infringement of rights other than contractual rights" and so were within article 2.1(c). The claims for pollution caused by the bunkers and the claims for the pollution caused by the cargo would also fall within article 2.l(d) (claim for "removal" or "rendering harmless" anything that "has been on board the ship") and (e) (claim for "removal" or "rendering harmless of the cargo of the ship") respectively, in so far as they related to clean up or pollution prevention costs. The claims are not within article 2.1(f) as the claim is made by the shipowner who is "the person liable in respect of measures taken in order to avert or minimize loss" (pp 52-53).

(5) Claim for potential liability to Cristal Ltd – this was subject to limitation for the same reasons as the pollution claims (p 53).

(6) Claim for sums paid to salvors – this was not subject to limitation in so far as the payment related to the ship as it is a consequential loss resulting from the loss of the ship. It was, however, subject to limitation in so far as it related to the cargo as "that part can properly be characterized as a consequential loss resulting from the loss of the cargo" (p 55).

The CMA Djakarta

63. In *The CMA Djakarta* [2003] EWHC 641 (Comm), [2003] 2 Lloyd's Rep 50 at first instance David Steel J endorsed the approach of Thomas J. In that case there was an explosion and fire on board the vessel attributable to the shipment of dangerous cargo, with salvage services then provided, discharge of containers both damaged and undamaged, and substantial repairs to the ship. The owner brought a claim against the charterer for the cost of the repairs, together with an indemnity in respect of sums paid to salvors, its liability to contribute in general average and for its exposure to cargo claims.

64. David Steel J held that a charterer was only entitled to limit in respect of claims made against it in its capacity as owner rather than charterer and so none of the claims made were subject to limitation. His principal reasons for so concluding were:

> (1) The inclusion of charterers within the category of shipowners in article 1.2 of the 1976 Convention - "it seeks to harmonize the rules for limitation of liability for maritime claims by reference to only two categories of persons: 'shipowners' on the one hand and 'salvors' on the other. The use of an all embracing category of 'shipowners' suggests to me that individual members of that class, such as 'charterers' may, as with 'managers' or 'operators', be exposed to claims by reason of activities usually associated with ownership" (para 30).
>
> (2) The history of article 1 and the wording of article 6 of the 1957 Convention - the phraseology that the provisions of the Convention apply to charterers "in the same way as they apply to an owner" "strongly suggests, in my judgment, that the relevant charterer has to be exposed to one or more of the prescribed claims in a setting analogous to that which would usually implead an owner" (para 41).
>
> (3) The implications of there being a single fund which would be depleted by owners' claims if the charterer were entitled to limit - "To put it no higher, it would be surprising if, say, the owners having constituted a fund by reason of the perceived need to limit exposure to cargo-owners, the charterers could invoke the very same fund as deemed to be constituted by them as well and furnishing a limit to all the claims for which the members of the class were liable, including the cross-claim between the owners and the charterers" (para 47).

65. David Steel J also held, in agreement with Thomas J, that damage to the vessel does not fall within article 2.1(a) – "The property damaged cannot be the very same thing

as the operation of which caused the damage" (para 52). He further commented (at para 54) that:

> "… the whole history of limitation, both in its domestic and in its international form, is premised on the relevant claims having arisen either from damage to property on board or, alternatively, from damage to third party property caused by the operation of the ship".

66. The judgment of the Court of Appeal was given by Longmore LJ, with whom Neuberger and Waller LJJ agreed. He agreed with much of the reasoning of Thomas J and David Steel J but not with their conclusion that charterers are only entitled to limit when acting in their capacity as owners. He noted (at para 7) that:

> "… their conclusion that a charterer is not entitled to limit his liability to the owner for such a claim stems from a feeling, shared by many a United Kingdom shipping lawyer, that damage to the ship, by reference to whose tonnage the limit is to be calculated, was never intended to be part of the statutory limitation scheme or (to put the matter another way) the shipowner was never intended to be obliged to look to the limitation fund (put up, at any rate primarily, to satisfy claims brought against shipowners) and himself be obliged to share in that fund to the detriment of other claimants on that fund."

67. He also agreed (at para 25) with the passage from the judgment of Thomas J (cited at para 61(3) above) concerning the combined effect of articles 9 and 11.

68. In Longmore LJ's view, however, these considerations "more effectively support a conclusion that the claims in respect of which an owner or a charterer can limit do not include claims for loss or damage to the ship relied on to calculate the limit rather than a conclusion that a charterer can only limit in respect of operations he does qua owner" (para 25). As he noted, most claims brought by a shipowner against a charterer will consist of a claim for damage to the ship (para 7).

69. His main reason for disagreeing with Thomas J and David Steel J was that considering the ordinary meaning of the word "charterer" in article 1.2, in accordance with article 31 of the Vienna Convention, it "connotes a charterer acting in his capacity as such, not a charterer acting in some other capacity" (para 13) and that to say "that a charterer must be acting qua owner or as if he were owner is … to impose a gloss upon the wording of the Convention and accord it a meaning other than its ordinary meaning" (para 15).

70. He agreed, however, with their conclusion that there is no right to limit in respect of loss or damage to the ship. The wording "loss of or damage to property occurring on board" in article 2.1(a) was "not apposite to include loss of or damage to the ship itself since neither the loss of a ship nor damage to a ship can be said to be loss or damage to property on board" (para 22). Nor was the wording loss or damage "occurring…in direct connexion with the operation of the ship" apt "to cater for a case where the very ship, by reference to the tonnage of which limitation is to be calculated, is lost or damaged because the loss envisaged is loss to something other than that ship herself" (para 23). His conclusion (at para 26) was that:

> "…the ordinary meaning of art. 2.l(a) does not extend the right to limit to a claim for damage to the vessel by reference to the tonnage of which limitation is to be calculated."

71. Longmore LJ then addressed whether the claims made were subject to limitation.

72. He concluded that the claim for cost of repair to the ship was not subject to limitation as damage to the ship itself does not fall within article 2.1(a).

73. In relation to the claim for sums paid to salvors it was argued that this was not a cost of repairing the damage to the ship but a "free-standing" claim falling within article 2.1(a) or 2.1(f). Longmore LJ rejected that argument (at para 29):

> "If, however, a claim for loss of or damage to the ship is not itself a claim within art. 2.l(a), a claim for amounts paid to salve the ship cannot be within art. 2.l(a) since it is not a claim in respect of loss or damage to property within the Article for the reasons given above. It may be that a claim to recover the cost incurred of salving a vessel is best understood as a claim for consequential loss resulting from the damage to the ship; but a claim for that consequential loss is still a claim in respect of damage to the ship and it cannot be brought within art. 2.l(a) or 2.l(f)."

74. Longmore LJ held that the same principle applied to the owners' claim to be indemnified against their liability in general average – "Any contribution made by the shipowners will be made as a result of the damage to the vessel and does not, therefore, fall within art. 2.1 (a)" (para 30).

75. Finally, Longmore LJ concluded that the claim for an indemnity from cargo claims brought by cargo owners was subject to limitation – "The claim is a result of 'loss of or

damage to property . . . occurring . . . on board the ship'. It, therefore, falls within art. 2.1 (a)" (para 32).

The Ocean Victory

76. The vessel grounded and became a total loss while attempting to leave the port of Kashima in Japan in a severe gale. Claims were made in respect of the agreed value of the vessel; damages in respect of SCOPIC expenses (ie salvage remuneration paid under the "Special Compensation P and I Club" clause); wreck removal expenses and loss of hire.

77. The main issue on the appeal to the Supreme Court was whether the charterers were in breach of charter in ordering the vessel to an unsafe port. The Supreme Court held that they were not as the weather conditions were "an abnormal and unexpected occurrence". Lord Clarke of Stone-cum-Ebony (with whom the other Justices agreed) went on to consider (obiter) whether, if the charterers had been in breach, they would have been entitled to limit their liability under the 1976 Convention. He framed the question as being whether the charterers "can limit their liability for the loss of the vessel and consequential losses arising out of the loss of the vessel" (para 60). The answer to that question largely depended on whether *The CMA Djakarta* was correctly decided.

78. Lord Clarke set out the approach and reasoning of Longmore LJ in considerable detail and stated that he agreed with him. In particular, he agreed with the conclusion that in order for charterers to limit liability it was not necessary that the claims should arise from the charterers' role qua owners – "I agree that Longmore LJ's conclusions in that regard were correct for the reasons he gave and do not need to revisit them" (para 71). He also agreed with the conclusion of Thomas J, David Steel J and Longmore LJ that "the ordinary meaning of article 2.1(a) does not extend the right to limit to a claim for damage to the vessel by reference to the tonnage of which limitation is to be calculated" (para 84). His conclusion was that if there were a breach of the safe port warranty, the charterers would not be entitled to limit their liability (para 87). Although this was not expressly stated, it would appear that this must have been on the basis that all the claims made were for the loss of the vessel or for consequential losses arising out of the loss of the vessel.

79. As a result of the decision of the Court of Appeal in *The CMA Djakarta* and its approval by the Supreme Court in *The Ocean Victory* it is established as a matter of English law that there is no right to limit under article 2.1(a) of the 1976 Convention in respect of a claim for loss of or damage to the vessel or for consequential loss resulting therefrom. Subject to an argument on consequential loss addressed below, this was accepted by MSC. The vessel means the vessel by reference to the tonnage of which limitation is to be calculated – the limiting vessel.

The judgments below

80. Before the Admiralty Judge, Andrew Baker J, Conti drew a distinction between "insiders" (being anyone within the extended definition of "shipowner" in article 1.2 and any person for whose act, neglect or default they are responsible) and "outsiders" (being any other person) (see para 11). Conti argued that the right to limit under article 2.1 only applies to claims in respect of losses suffered in the first instance by an outsider. Tonnage limitation never applies to an insider's claim against another insider, as in this case (see para 79).

81. Andrew Baker J rejected this argument for the following reasons in particular (at para 80):

> "The owner and charterer of a seagoing ship are both insiders. Either may have property on board exposed to the risk of being lost or damaged through the other's actionable breach. Most obviously, a charterer may own some or all of the cargo being carried; and as Mr Kenny noted, pertinently for a case about a container ship casualty, a containership owner may own some or all of the containers being carried. Or again, bunkers on board will normally be owned by one or other of them. On the ordinary meaning of the language of article 2.1(a), a cargo claim by the charterer against the owner, or a claim by the owner against the charterer for loss of or damage to its containers, or a claim by either against the other for loss of or damage to its bunkers, is a claim in respect of loss of or damage to property occurring on board. There is nothing in the language of article 2.1(a) indicating or requiring (for it to make sense) an exception not stated for claims by one insider against another".

82. Andrew Baker J nevertheless held that there was another overarching reason why MSC was not entitled to limit its liability in this case, namely that Conti's claim was a single claim for damage to the ship and consequential loss resulting therefrom and therefore not within article 2.1:

> "…the correct claim characterisation in this case is that, from the perspective of the Amended 1976 Convention, Conti made good in the arbitration a claim (singular) in respect of damage to the ship (including consequential loss resulting from having a damaged ship); and tonnage limitation does not apply to such a claim…a claim properly characterised as a claim in respect of damage to the ship cannot sensibly be, and on the language of

> article 2.1 is not, a claim subject to tonnage limitation by reference to the tonnage of the damaged ship in question" (para 103).

83. The judge found that all the costs claimed were costs which "(a) needed to be incurred if the ship was to [be] repaired; (b) were in fact incurred to enable Conti to have the ship repaired or as part of the repairs themselves" (para 108).

84. He also found that "after the casualty, the ship could not complete her voyage, … because she was damaged, not because the cargo was (partly lost and) damaged" and that "the ship therefore needed a port of refuge" (para 158(i)(ii)).

85. In case he was wrong in his characterisation of the claim made, the judge also addressed whether the claims made fell within any of the specific sub-paragraphs of article 2.1. His conclusion was that none of the claims was subject to limitation.

86. Before the Court of Appeal a different version of the insider/outsider argument was advanced by Conti. This was that a charterer can limit its liability in respect of, and only in respect of, liabilities that originate outside the group of entities that are defined as "shipowners" for the purposes of limitation, identified in article 1.2; thus an "insider" charterer, whose right to limit arises only because it falls within the definition of "shipowner", cannot limit its liability in relation to claims by the actual owner (another "insider") in respect of losses suffered by (and only by) the actual owner; the claims for which a charterer can limit require an underlying original loss or expense to have been suffered or incurred by an "outsider". I shall call this the "owners' original loss qualification". The Court of Appeal accepted Conti's submission and so held that MSC could not limit its liability. MSC appeals against that decision.

87. The Court of Appeal did not accept that MSC could not limit its liability because Conti's claim was a single claim for damage to the ship and consequential loss resulting therefrom. It concluded that it was open to MSC to argue that the various losses which Conti seeks to recover fall within one or more of the paragraphs of article 2.1 and are therefore subject to limitation. Conti says this conclusion was wrong and relies on that as an additional or alternative reason for dismissing MSC's appeal.

88. The Court of Appeal then considered (obiter) whether the claims fell within any of the paragraphs of article 2.1. It concluded that the claims for payments to national authorities for the costs of removing firefighting water and for the costs of removing waste did not fall within article 2.1 and so would not have been subject to limitation. MSC appeals against that conclusion. The Court concluded that the claim for the costs of discharging and decontaminating cargo fell within article 2.1(e) and so would have been

subject to limitation. Conti says this conclusion was wrong and relies on that as an additional or alternative reason for dismissing MSC's appeal.

The issues on the appeal

89. The issues on the appeal may be summarised as follows:

> (1) Whether a charterer can limit its liability for claims by an owner in respect of losses originally suffered by the owner itself.
>
> (2) Whether any of Conti's claims fall within article 2.1 of the 1976 Convention and, if so, whether the fact that they result from damage to the Vessel means that there is no right to limit.

Issue 1 - Whether a charterer can limit its liability for claims by an owner in respect of losses originally suffered by the owner itself.

Ordinary meaning

90. The issue of interpretation is the meaning of the word "claims" in article 1.1 and article 2.1 of the 1976 Convention. Conti's case is that, in their context and in the light of the object and purpose of the 1976 Convention, the word "claims" in these provisions means, in relation to claims made by an owner against another "insider", claims other than in respect of losses originally suffered by the owner itself.

91. Leaving aside for the moment context and object and purpose, it is very difficult to see how this can be the meaning of the word "claims". "Claims" is in fact a defined term under the 1976 Convention. In article 1.1. the "claims" for which liability may be limited are those "set out in Article 2". Article 2.1 then provides that the "following claims" shall be subject to limitation of liability. Various types of "claims" are then set out. "Claims" in article 1.1 and article 2.1 therefore means the claims which are specified in article 2 to be subject to limitation of liability. None of those specified claims differentiates between whether the claims are made by owners or other "insiders", or whether they are made against owners or other "insiders". On Conti's case, however, if a claim is made by one "insider", the owner, against another "insider" it is subject to the owner's original loss qualification, but not otherwise. This results in an unstated bar on limitation which only arises where the claim is made by one particular type of "insider", the owner, and only in respect of a loss of a particular character, namely an original loss.

92. Conti's case on the meaning of claims therefore involves reading in qualifying words – ie the owners' original loss qualification. That is to give a gloss to the word "claims". That is precisely what the Court of Appeal decided in *The CMA Djakarta* was not permissible (in that case in relation to the word "charterer" – see para 69 above).

93. This is a point made by commentators on the Court of Appeal decision.

94. For example, Tettenborn and Rose, *Admiralty Claims*, 2nd ed (2024) refer to this as "the *Flaminia* rule" and comment as follows (at paras 7-047-7-048):

> "[The 1976 Convention] is subject to interpretation not by resort to general theories but to recognised rules for construction of its provisions. Moreover, the *Flaminia* rule complicates understanding of the current law, since it provides that a claim that is, according to the words of the Convention, literally subject to limitation is, without its being discernible from the words of the Convention, not subject to limitation.
>
> As a matter of simple construction, the Convention does not contain a statement of the *Flaminia* rule or lay down a rule that directly applies to the point under consideration."

95. By way of further example, in a case note in the *International Maritime and Commercial Law Yearbook 2024* by Ralph Morley it is said (at p 46):

> "The Limitation Convention in its current form enacts a policy choice which recognises that others, including charterers, managers and salvors, play roles that facilitate international trade and recognises that they should also be encouraged to do so. It is thus open to question whether it is necessary or desirable to read into the Limitation Convention the restriction found by the Court here, which is not present in its wording."

96. Conti's case also involves the word "claims" having a different meaning in different contexts – an implausible construction. In relation to claims against owners, whether by "insiders" or "outsiders", it means any claim specified in article 2. In relation to claims by owners against other "insiders", it means any claim specified in article 2 other than claims by an owner in respect of original loss suffered by it.

97. It also involves a striking asymmetry between one type of "shipowner", namely "the owner", and all the other types of "shipowner", namely the "charterer, manager and operator". Yet under article 1.2 they are all equally defined as being a "shipowner" without any suggestion of differential treatment. Take, for example, a casualty which led to claims for the loss of empty containers on board the ship. On the face of it that would be a claim subject to limitation being "in respect of… loss of or damage to property… occurring on board… the ship" within article 2.1(a). On Conti's case, if the charterers owned the containers and claimed against the owners then the claim would indeed be subject to limitation. If, however, the owners owned the containers and claimed against the charterers then it would not be.

98. Conti did not suggest that the context of the 1976 Convention was of particular significance in this case. It was not suggested that there was any relevant agreement or instrument within article 31.2(a) or (b) of the Vienna Convention. Under article 31.2 the context is otherwise generally focused on the "preamble and annexes" to the text of the treaty. The preamble to the 1976 Convention provides:

> "The States Parties to this Convention, Having recognized the desirability of determining by agreement certain uniform rules relating to the limitation of liability for maritime claims, Have decided to conclude a Convention for this purpose and have thereto agreed as follows:"

99. The desirability of uniformity tells one nothing about the appropriateness or otherwise of the owners' original loss qualification.

100. Conti did, however, lay great stress on considerations of object and purpose. In relation to the object and purpose of the 1976 Convention Longmore LJ stated as follows in *The CMA Djakarta* at para 11:

> "As to object and purpose the parties agreed:
>
> > (a) that the general purpose of owners, charterers, managers and operators being able to limit their liability was to encourage the provision of international trade by way of sea-carriage;
> >
> > (b) that the main object and purpose of the 1976 Convention was to provide for limits which were higher than those previously available in return for making it more difficult to 'break' the limit, to use the colloquial

> phrase. Before 1976, any person, arguing in the United Kingdom that the limit should not apply, only needed to show 'actual fault or privity' on the part of the party relying on the limit. Under the 1976 Convention the (now higher) limit is to apply unless it can be shown that the loss resulted from the personal act or omission of the party relying on the limit 'committed with intent to cause such loss or recklessly with the knowledge that such loss would probably result'. It is thus particularly difficult to break the limit, but the amount available for compensation is higher than it was previously;
>
> (c) one of the other objects of the Convention was to enable salvors to claim that their liability could be limited in the same way as owners and charterers; this reverses *The Tojo Maru* [1972] AC 242.
>
> It is not in my view possible to ascertain with certainty any object or purpose of the 1976 Convention beyond this common ground."

101. Lord Clarke cited this paragraph with apparent approval at para 76 of *The Ocean Victory*. Conti did not suggest that the object and purpose identified in *The CMA Djarkarta* materially advanced its case.

102. Conti submitted, however, that there were further aspects of object and purpose which it was appropriate to take into account, having regard to the history and origin of the 1976 Convention. In particular, Conti contended that:

> (1) The main purpose of limitation is to protect shipowners from being exposed to crippling liabilities and to encourage investment by them in shipping.
>
> (2) The primary reason for extending the class of persons entitled to limit to charterers and others was to avoid circumvention of the limits of liability by the bringing of claims for which owners would otherwise be liable against those other persons.
>
> (3) Limitation has never been available in relation to claims made by owners.

(4) This was clearly the case under the 1957 Convention and there was no intention to change that in the 1976 Convention.

103. I shall assume, without deciding, that it is appropriate to have regard to these matters although they go beyond the only object and purpose identified in *The CMA Djakarta* and arguably extend to supplementary means of interpretation which may only be considered in the circumstances specified in article 32 of the Vienna Convention.

104. As to the main purpose of limitation, it is no doubt true that originally limitation was concerned with the protection of shipowners and investment by shipowners. In the 1924 Convention, however, the right to limit was extended to "the principal charterer". In the 1957 Convention it was extended to "the charterer, manager and operator of the ship" and their servants. In the 1976 Convention it was extended to salvors and insurers. Limitation is therefore clearly no longer confined to the protection of shipowners.

105. It is also incorrect to view limitation as being solely concerned with the investment and contribution which shipowners can make to maritime trade. The role of charterers, managers, operators, salvors and insurers are all integral to that trade. Indeed, this is recognised in para 11(a) of *The CMA Djakarta* which refers to the encouragement to the provision of international trade provided by the limitation of the liability of charterers, managers and operators as well as owners. Even if one focuses only on owners and their investment in ships, a more nuanced approach to ownership in the limitation context is required. As stated in the British Maritime Law Association response to the 2008 CMI Questionnaire on the right of charterers to limit liability as set out in the *CMI Yearbook 2009* at p 366:

> "In talking of 'owners' in the context of limitation, a broad definition is required; one that includes 'charterers'. In the last 30 years owners and charterers have come to be more closely associated with the operation of ships. Many owners in practice arrange for their vessels to be 'chartered' out to associated companies or companies linked to banks who have lent them money to build and operate the vessels. In effect the owners and charterers will often be found to be operating the ship together as if they were parties to a joint venture."

Whilst these comments largely reflect specific developments occurring since the 1976 Convention, the fact that a charterer may be the effective operator of a ship was recognised even at the time of the 1957 Convention (see paras 108-109 below).

106. Further, as Tettenborn and Rose observe in *Admiralty Claims* at para 7-014:

> "Asserted historical justifications for limitation may provide guidance on the desirability and/or availability of limitation but not necessarily on matters of detail, which depend on the proper construction of currently applicable legislation, which has evolved to take account of a variety of factors".

107. As to the reason for extending the right to limit to charterers, Conti relied in particular on the following textbook explanations of the extension of the class of persons entitled to limit made by the 1957 Convention:

> (1) Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims,* 4th ed (2005) at p 8: "the primary reason for extending the class of persons entitled to limit [in 1957] was to overcome the problem first encountered in the case of *The Himalaya*, namely, attempts by a claimant, in order to circumvent the effects of limitation of liability, to bring a claim against some person other than the owner for example, the master of the vessel".
>
> (2) Carver, *Carriage by Sea*, 11th ed, (1963) which described the change as "a vital change in the law" which protected "a carrier party to a contract of carriage who is not the shipowner in a suit by the other party to the contract, or by a third party in tort".

It was submitted that the intention was, therefore, to prevent opportunistic claimants who had a claim against the owner from suing a charterer, manager or operator in place of the actual owner.

108. This is, however, an oversimplification. The problem in *The Himalaya* (*Adler v Dickson* [1955] 1 QB 158) was claims being brought against the servant or agent of the owner (in that case the master and boatswain). This was addressed by extending the right to limit to servants of an owner, charterer, manager or operator of the ship (article 6(2)). There were, however, other reasons for extending the right to limit to a charterer, manager or operator; in particular, their close involvement in the operation of the ship.

109. As Thomas J held in *The Aegean Sea*, the travaux for the 1957 Convention showed a "clear legislative intent" behind extending the right to limit to charterers, as follows (at p 45):

> "The view was clearly expressed that it was not justifiable to exclude charterers from the benefits enjoyed by demise charterers; the charterer was often the effective operator of the

> ship and should have the benefit of limitation. A person who fulfilled the role of a shipowner and therefore incurred the liabilities a shipowner would incur should, it was thought, have the benefit of the same protection as the shipowner. One of the common situations where a charterer would incur the liabilities of a shipowner was where charterers' bills of lading had been issued without a demise clause or identity of the carrier clause or where claims were brought in jurisdictions in which such clauses were not recognized as effective (see Tetley: Marine Cargo Claims (3rd ed, 1988))."

110. As to whether limitation has ever been available in respect of claims made by owners, Conti pointed out that under article 1 of the 1924 Convention the specified heads of liability in relation to which there was a right to limit were in respect of "the liability of the owner of a seagoing vessel". They were liabilities of the owner and therefore could not encompass claims made by the owner. The same applies to article 1 of the 1957 Convention under which it was "the owner of a seagoing ship" who could limit liability in relation to claims arising from specified occurrences. Both Conventions recognised, however, that limitation was not limited to the liability of the owner. It was extended to the "principal charterer" in the 1924 Convention and to the "charterer" and others in the 1957 Convention. In that context the liabilities or claims subject to limitation in article 1 of those Conventions were necessarily not a liability of the owner or a claim made against the owner. In such a case, the Conventions did not specify or limit to whom those liabilities were to be owed or the persons by whom those claims might be brought.

111. As to continuity between the 1957 Convention and the 1976 Convention, both Thomas J in *The Aegean Sea* and Males LJ in this case considered that it was clear that the 1957 Convention did not make the claims made by owners subject to limitation because of the use of the words in article 6(2) that the provisions of the Convention were to apply to the charterer and others "in the same way as they apply to an owner himself". There has, however, been no decision on the effect of that wording. Nor was there any support in the commentaries for that interpretation prior to *The Aegean Sea*. Thomas J considered that it was "clear" (p 45) that they meant that the charterer was only entitled to limit in so far as he acted in the capacity of an owner, but in *The CMA Djakarta* the Court of Appeal held that that was wrong. In the present case, the Court of Appeal considered it was "entirely clear" (para 73) that they meant something different, namely that the charterer was not entitled to limit in respect of claims by an owner for losses originally suffered by it. Strikingly, the Court of Appeal decision is seemingly the first time this interpretation has been put forward. It would be surprising, moreover, if applying the provisions "in the same way as they apply to an owner" means doing so differently as between the owner and other "insiders" and with the stark asymmetrical consequences already identified. It is certainly possible that the words simply mean that the Convention shall apply to a charterer as if the word "charterer" had been substituted for "owner" throughout.

112. Another possibility raised in argument was that the words mean that there is only a right to limit if the claim is one which could have been made against the owner. This, however, leads to many complications. If the criterion is whether the same claim could be brought against the owner, then that would mean that there would be no right to limit in respect of a cargo claim made against a charterer under a charterers' bill of lading (a paradigm case for limitation) because that is a claim which can only be made against the charterer as the contractual carrier. If the criterion is whether the claim could have been brought against the owner on some other legal basis, then that begs the question of what legal basis and the law which is to govern that question and requires the consideration of hypothetical claims.

113. A further possible approach raised by Males LJ was that "a charterer cannot be liable 'in the same way' as an owner would be in respect of a claim brought by the owner against the charterer for breach of the charterer's obligations under the charterparty" (para 74). But article 6(2) of the 1957 Convention does not require the charterer to be "liable" in the same way as an owner. Rather it provides that the provisions of the Convention are to apply to the charterer "in the same way as they apply to an owner". That may simply mean that where a claim is made against a charterer arising from any of the occurrences specified in article 1 then the charterer may limit liability in the same way as the owner would be entitled to do so in respect of such a claim – ie article 1 applies to a charterer as if the word "charterer" had been substituted for "owner".

114. In my view it is therefore far from clear that a principal charterer (under the 1924 Convention) and a charterer (under the 1957 Convention) would not have been entitled to limit its liability in respect of a claim made by an owner for an original loss suffered by it. If so, then the fact that there may have been no apparent intent to change the nature of the charterer's right to limit as between the 1957 and the 1976 Convention begs rather than answers the question.

115. In any event, the critical consideration is the meaning of the wording of the 1976 Convention, not the different wording used in an earlier Convention.

116. For all these reasons, I am not persuaded that going beyond the object and purpose identified in *The CMA Djarkarta* assists Conti's case, still less that it justifies glossing or qualifying the word "claims".

Manifestly absurd or unreasonable?

117. Conti submitted that it would be manifestly absurd or unreasonable to interpret article 2.1 so as to enable MSC to limit in respect of Conti's claims, which are all for damage to the Vessel and consequential losses suffered by Conti. This is because Conti's claims would, in those circumstances, be paid out of a fund which is deemed to have been

established on behalf of Conti. Moreover, it would, in those circumstances, require Conti to diminish the fund to the detriment of third party claimants (such as the cargo claimants) for whose benefit the fund is primarily established. For this purpose, article 32 of the Vienna Convention makes it clear that it is legitimate to have regard to the travaux and the circumstances of the conclusion of the 1976 Convention, which would include earlier Conventions. I have already addressed above, however, why the further materials relied upon by Conti do not assist its case.

118. Conti placed particular reliance on the combined effect of articles 9 and 11, an aspect that all judges who have considered the issue have regarded as being significant. As Males LJ stated (at para 70):

> "…all of the judges who have had to consider the 1976 Convention have regarded the provisions of articles 9 to 11 as of critical importance in ascertaining how it should be interpreted. I agree with Thomas J in *The Aegean Sea* at p 49 lhc that it is difficult to see how a charterer can claim the benefit of limitation through a fund intended to cover both owner and charterer when a claim is brought against the charterer by the owner; and with David Steel J's observations in *The CMA Djakarta* [2003] 2 All ER (Comm) 21, para 44 that the 'requirement of a community of interest between those falling within the category "shipowner" is underlined by the machinery of a single fund', and that articles 9 to 11:
>
> > '45 … are only consistent with all those identified as within the class of shipowner having a common potential exposure to the relevant claims and a common interest in funding the limit of liability, all the more so when no provision is made for allocation of the cost of putting up the fund among the members of the class.'"

119. It is not, however, necessary to interpret article 2.1 in the way contended for by Conti in order to avoid the suggested absurd and unreasonable consequences. If, as Conti submitted, its claims are all for damage to the Vessel and consequential losses suffered by Conti then in general they will not be subject to limitation. As established by *The CMA Djakarta* and *The Ocean Victory*, claims for loss of or damage to the ship and consequential loss resulting therefrom are not limitable under article 2.1(a). That principle already provides protection against absurdity and unreasonableness. In *The CMA Djakarta* the Court of Appeal recognised the force of the points made by Thomas J and David Steel J in relation to articles 9 and 11 but considered that they were adequately addressed by their decision that liability cannot be limited for claims for loss or damage to the ship or consequential loss resulting therefrom. The same applies to this case.

120. The two principal concerns which arise from the combined effect of articles 9 and 11 are that (i) if an owner has to claim against the fund then he may end up paying his own claim and (ii) the owners' claims will deplete the fund that would otherwise be available for claimants against the fund. Both these concerns assume that there is a fund, which is not necessarily the case. Under article 10 limitation may be invoked without the constitution of a fund.

121. As to (i), most claims made by owners against charterers will be for loss of or damage to the ship, as Longmore LJ stated in *The CMA Djakarta* (at para 7). Such claims are not subject to limitation under article 2.1(a). If owners are to have a claim against the fund it is only likely to be if they are the owners of property which is damaged on board (such as containers) or other property damaged by the operation of the ship (such as another ship or a wharf). Those are, however, exactly the types of claim which should be subject to limitation and which should be made against the fund (if there is one). If it is, then the owner will benefit since its proportionate share of the fund will be returned to it rather than distributed to the other claimants.

122. Even on Conti's case there will be circumstances in which the person who puts up a fund has to claim against the fund. If, for example, the bills of lading are charterers' bills it may well be the charterer who puts up the fund. If the charterer is also the owner of cargo on board which is lost or damaged then it will have to claim against the fund. By way of further example, a recourse claim under article 2.2 may well have to be made against a fund constituted by the person making the claim, whether owner or charterer.

123. MSC advanced a further reason why there is no "pay your own claim" problem which is that a claim can be made for the cost of putting up and paying out the fund. This submission was accepted by Andrew Baker J (at paras 85-87) but rejected by the Court of Appeal (para 79). This court was provided with various example cases designed to show how such a claim for an indemnity could be made and why it would not be subject to limitation (as it represented a liability which had already been limited). I would prefer to leave this issue to be dealt with in a case in which such a claim is made, rather than on a hypothetical basis.

124. As to (ii), the owners' claims which are likely to lead to significant depletion of the fund are claims for loss of or damage to the ship or consequential loss resulting therefrom. These are, however, not subject to limitation under article 2.1(a). In so far as the owners have claims for cargo or other property loss or damage then those are claims which are appropriately to be made against the fund. All such property owners should share proportionately in the fund.

125. For all these reasons, I do not consider that a charterer being entitled to limit in respect of losses originally suffered by the owner does lead to absurd or unreasonable

consequences, or sufficiently absurd consequences to justify glossing the word "claims" or reading in qualifications to it.

126. Conversely, there are unreasonable consequences which result if Conti's case were correct, as illustrated by the asymmetry which results (see, for example, para 97 above). There are also definitional difficulties. For example, if an owner is to be treated differently from other insiders it becomes essential to determine what is meant by "owner". At one stage counsel for Conti suggested that it meant the registered owner. At another it was said it meant the "actual owner", which would cover the legal and the beneficial owner, but apparently not the demise charterer. By way of another example, it would become necessary to define what is meant by an "original" loss. Does that apply to claims for indemnity in relation to a liability for a loss suffered by another?

Conclusion on Issue 1

127. For all these reasons I conclude that a charterer can limit its liability for claims by an owner, including in respect of losses originally suffered by the owner itself.

Issue 2 - Whether any of Conti's claims fall within article 2.1 of the 1976 Convention and, if so, whether the fact that they result from damage to the Vessel means that there is no right to limit.

Wide application?

128. Before considering the specific paragraphs of article 2.1 which are relied upon, I need to address a prior issue raised by MSC which is that it says that article 2 of the 1976 Convention should be given as wide an application as possible.

129. In support of this proposition MSC relied upon the following:

> (1) Lord Reid's statement in *The owners of the Motor vessel Tojo Maru v N V Bureau Wijsmuller (The Tojo Maru)* [1972] AC 242, 269E that he would apply the provisions of section 503 of the 1894 Act to "all cases which can reasonably be brought within their language".
>
> (2) Thomas J's citation and endorsement of that approach in *The Aegean Sea* in which he said that he "ought to … apply the provisions of the Convention, if possible, to all cases which can reasonably be brought within the language of the Convention" (at p 46).

(3) In the United States, the Supreme Court stated in *Just v Chambers* (1941) 312 US 383, 385 that: "The statutory provision for limitation of liability, enacted in the light of the maritime law of modern Europe and of legislation in England, has been broadly and liberally construed in order to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner."

(4) More recently, in the Federal Court of Australia, Stewart J in *CSL Australia Pty Ltd v Tasmanian Ports Corporation Pty Ltd* (*The Goliath*) [2024] FCA 824 refused to follow a decision of the Hong Kong Court of Final Appeal on the point before him saying (at para 145): "I am alive to the importance of developing a uniform international jurisprudence on the Convention, but I am also alive to the importance of giving effect to its principal purpose, namely to expand upon and protect the rights of limitation."

130. In principle, I can see no reason why the provisions of the 1976 Convention in general or article 2 in particular should be applied either narrowly or widely. Although the Convention recognises that limitation is desirable, the circumstances in which there was to be a right to limit under article 2 was a matter of discussion and negotiation between the participating state representatives. The resulting agreement is set out in the Convention which should be applied according to its terms. It is what it is. That is also consistent with the approach to interpretation set out in the Vienna Convention and the importance attached to the ordinary meaning of the words used.

131. Most of the passages relied upon by MSC do not support its argument. Lord Reid's statement in *The Toju Maru* was made in the context of rejecting an argument that the provisions of the 1894 Act should be construed strictly (because it concerns limitation of liability). There can be no objection to applying the provisions of the Convention "to all cases which can reasonably be brought within their language" but that does not involve any presumptive rule of interpretation. In *The Aegean Sea* Thomas J simply endorsed what Lord Reid had earlier said.

132. It is not entirely clear what Stewart J is referring to when he said in *The Goliath* that the principal purpose of the 1976 Convention was "to expand upon and protect the rights of limitation". In so far as he means that its purpose was to increase the limits of liability but to make it more difficult to lose the right to limit then he is correct, but that does not require or justify the adoption of any particular approach to interpretation.

133. The citation from *Just v Chambers* provides some support for MSC's case but that relates to the United States limitation statute and their courts' approach to its

interpretation. As a matter of English law there is no rule that either the provisions of the 1976 Convention generally or article 2 in particular should be construed broadly, liberally or widely. Nor is there any support in the Vienna Convention for such an approach.

134. I therefore reject MSC's case that the provisions of article 2 should be given a wide application.

135. I shall now address whether any of Conti's claims fall within article 2.1 of the 1976 Convention, considering each relevant paragraph in turn.

Article 2.1(a)

> "Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom".

136. MSC seeks to limit under this sub-paragraph its liability in relation to all four claims in issue – ie (1) payments to national authorities for the purposes of arranging for the Vessel to be allowed to be moved to Wilhelmshaven; (2) the costs of discharging sound and damaged cargo, and of decontaminating the cargo, at Wilhelmshaven; (3) the costs of removing firefighting water from the holds, and (4) the costs of removing waste from the Vessel.

137. MSC contended that that all of these costs are consequential losses arising from the initial loss of and damage to the DVB which caused the explosion and fire. It submitted that a claim for a loss that would not have happened but for damage to the cargo, or which was effectively caused by the cargo damage even if not predominantly caused by it, is a claim within the language of "consequential loss resulting" from cargo damage.

138. I consider this argument to be misconceived. It introduces a causation issue which is not relevant to the application of article 2.1(a), which is concerned with the nature and characterisation of the claim being made, not the underlying cause or causes of that claim.

139. If, for example, cargo is damaged because of damage to the ship, a claim by a cargo owner for damage to its cargo is not a claim in respect of damage to the ship, as MSC accepted before Andrew Baker J, who observed (at para 55):

> "… If the involvement of ship damage in causing cargo damage does not make a claim for compensation for damage to cargo a claim in respect of damage to the ship, then by parity of reasoning the involvement of cargo damage in causing ship damage does not make a claim for compensation for damage to the ship a claim in respect of damage to cargo. The causal contribution of cargo damage in the damage to the ship does not turn a claim for damaging the ship into a cargo claim… MSC's argument errs in treating the scope of article 2.1(a)–(e) as a factual matter of causation rather than an issue of claim characterisation."

140. If, by way of further example, the claim was for the loss of the vessel it is common ground that the claim would not fall within article 2.1(a). The fact that the loss of the vessel may have been caused by damage to the cargo is nothing to the point. It does not affect or alter the fact that the claim is for the loss of the vessel and therefore not limitable under article 2.1(a).

141. The same applies if the claim was for the damage to the vessel. That is this case. On the findings made by the judge all of these costs were necessarily incurred in order to repair the Vessel and were therefore part of the cost of repairs. The cost of repairing damage to a vessel is a claim for damage to the vessel and is not limitable under article 2.1(a).

142. Even if, which is not this case, some of the costs are consequential losses resulting from the damage to the Vessel rather than a claim for damage to the Vessel, the causation issue raised by MSC is equally irrelevant. If the claim is for consequential losses resulting from damage to the Vessel then it falls outside article 2.1(a). The fact that those losses might also be said to be consequential losses resulting from damage to the cargo does not change that. The claim being made is for damage to the ship, not damage to the cargo. It is for the consequential loss suffered by the shipowner, not that of any cargo owner. The fact that if a claim was being made for damage to the cargo it might be that the losses could be said to result from such damage is not a question that arises. It is necessary to address the application of article 2.1(a) by reference to the claim being made, not a claim which might have been but is not being made.

143. MSC relied on the fact that in the Australian case of *Qenos Pty Ltd v Ship "APL Sydney"* [2009] FCA 1090, (2009) 187 FCR 282 it was held that a claim for pure economic loss falls within article 2.1(a) – ie a claim which was not consequential upon property damage. Assuming that that may be so, that is not relevant in this case. This is not a claim for pure economic loss; if it is a claim for consequential loss, it is a claim which is consequential upon property damage, namely the damage to the Vessel. This is

not a case where the claim for consequential loss (if any) can be divorced or separated from the property damage claim being made.

144. MSC's argument is also contrary to the decision in *The CMA Djakarta*. That was also a dangerous cargo case in which it could be said that all the loss and damage originated from damage to the cargo on board. The consequential claims for the sums paid to salvors and for liability in general average were nevertheless held not to fall within article 2.1(a) as they resulted from the damage to the ship.

Article 2.1(f)

> "Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures."

145. Article 2.1(f) concerns mitigation costs – costs incurred to avert or minimise a limitable loss. As Andrew Baker J stated (at para 151), its evident purpose is "assimilating…claims for compensation or recompense in respect of the burden of mitigation efforts with claims for compensation or recompense in respect of loss sought to be mitigated."

146. MSC relies on article 2.1(f) in relation to two of the claims: (i) the payments to national authorities for the purposes of arranging for the Vessel to be allowed to be moved to Wilhelmshaven and (ii) the costs of removing firefighting water.

147. In relation to the payments to the national authorities, on the judge's findings the Vessel proceeded to Wilhelmshaven as a port of refuge because the Vessel was damaged, not because the cargo was damaged (para 158(i)(ii)). In so far as this was a mitigatory step and expense, it primarily related to the Vessel, not her cargo. In any event, on the judge's findings this was a necessary expense for the repair of the Vessel and is part of the cost of such repairs. It was not incurred to avert or minimise loss or damage which might otherwise occur, but rather to remedy loss or damage which had already occurred. Such a claim does not fall within article 2.1(f).

148. In relation to the firefighting water MSC contended that it was sprayed into the Vessel as part of the salvage operation which was directed at saving both the Vessel and her cargo. If a measure is taken equally in order to mitigate limitable and non-limitable losses it can reasonably be described as one taken in order to mitigate limitable loss. Where, as in this case, averting limitable losses is a real or effective objective of the

measure in question then the claim for the cost of that measure is limitable under article 2.1(f).

149. In my view MSC's argument addresses the wrong question and does not properly focus on the claim being made. This is not a claim for salvage expenses; it is a claim for the removal of firefighting water from the Vessel after the salvage operation had been completed. The firefighting water was not removed in order to avert or minimise loss of damage to the Vessel or the cargo. On the judge's findings it was removed in order to enable the Vessel to be repaired. That is not a mitigation cost under article 2.1(f); it is a repair cost.

150. If, however, it were correct to characterise the claim as being one for mitigation costs incurred for the purpose of averting or minimising loss to both the Vessel and cargo, and no apportionment as between ship and cargo was possible (which is how salvage liability was dealt with by the Court of Appeal in *The CMA Djakarta*), then I would agree with the Court of Appeal's conclusion in this case that it would only fall within article 2.1(f) if the main or dominant purpose of the measures taken was to avert or minimise a limitable loss. It is only in those circumstances that the claim is properly characterised as being one for "measures taken in order to avert or minimize loss for which the person liable may limit his liability". It cannot be so characterised if it was equally taken to avert a non-limitable loss. Further, if it were otherwise then a person would be entitled to limit for the whole of a cost, which was incurred substantially for the purpose of mitigating a potential loss which was not limitable. Part of a cost which was not limitable would thereby become limitable.

Article 2.1(e)

> "Claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship".

151. The Court of Appeal held that the claim for the costs of discharging sound and damaged cargo, and of decontaminating the cargo at Wilhelmshaven fell within article 2.1(e) and so was limitable. Males LJ stated as follows:

> "85. There is an issue whether discharging the cargo is within the concept of 'removal' in article 2.1(e). Clearly this paragraph is not concerned with discharge in the ordinary course of business at the contractual discharge port (which in any case would be unlikely ever to exceed the applicable limit), but is concerned with the consequences or aftermath of a maritime casualty. However, I see no reason why it should not be capable of applying to discharge of a contaminated cargo which needs

to be either destroyed or rendered harmless as a result of such a casualty.

86. Giving effect to the ordinary language of article 2.1(e), this is a claim in respect of the removal, destruction or the rendering harmless of the cargo. Those words describe precisely what was done at Wilhelmshaven. That is so even though, on the judge's findings, the claim is also in respect of damage to the ship because removal and rendering harmless of the cargo were necessary steps in order for the ship to be repaired and the costs were in fact incurred for that purpose. Accordingly the question arises whether a claim in respect of damage to the ship is necessarily incapable of falling within article 2.1(e). Mr Smith submits that it is. Mr Kenny submits that if a claim falls within the language of article 2.1(e), it is irrelevant that it can also be described as a claim in respect of damage to the ship.

87. I accept Mr Kenny's submission. On the (in my view wrong) assumption that claims against a charterer for losses suffered by an owner are subject to limitation, there is no reason not to give effect to the ordinary language of article 2.1(e). If a claim falls within that ordinary language, there is no reason to introduce an additional requirement that it must not also be a claim in respect of damage to the ship. Article 2.1(e) does not depend on the reason why it is necessary to remove the cargo or to render it harmless, although in practice the need to do so is often likely to be associated with damage suffered by the ship. Nor does it depend on the shipowner's purpose in incurring such costs. This would introduce an unnecessary complication— what would be the position, for example, if the shipowner intended (or said that it intended) to repair the ship, but later changed its mind? A charterer's right to limit under article 2.1(e) should not depend on the potentially fluctuating plans of the owner. Rather, the article is concerned simply with the nature of the claim."

152. I agree with Males LJ that what was done at Wilhelmshaven can properly be described as the "removal" and "rendering harmless" of the cargo.

153. I would also reject Conti's contention that article 2.1(e) only applies to claims by a party not involved in the operation of the ship, such as a harbour authority. Whilst that may be how such claims most commonly arise, the ordinary meaning of the words do not involve any such qualification or gloss. Article 2.1(e) makes no reference to who is doing

the removal, destruction or rendering harmless of the cargo. It would also lead to arbitrariness as it would mean a charterer's right to limit its liability for essentially the same costs should be dependent on whether it is the owner or a public authority who incurs the relevant costs in the first instance.

154. The key issue is what is the position if the costs in question are incurred in order to repair the vessel and, as in this case, are part of the costs of the repair of the vessel. Does the fact that the claim is one for damage to the vessel mean not only that article 2.1(a) has no application but also that none of the other paragraphs of article 2 apply, even if the costs claimed fall within their wording? For a number of reasons I consider that it does not have that further consequence.

155. First, the language of article 2.1(e), like many of the categories of claim which are limitable, focuses on the nature of the claim being made. It does not depend on what caused the claim to arise or the purpose of incurring the claimed cost or expense. If the claim is for the "removal, destruction or the rendering harmless of the cargo" then it falls within the terms of the article. As Males LJ observed: "If a claim falls within that ordinary language, there is no reason to introduce an additional requirement that it must not also be a claim in respect of damage to the ship".

156. Secondly, article 2.1 does not preclude the dual characterisation of claims. It will frequently be the case that a claim falls within more than one sub-paragraph – for example, cargo removal costs under article 2.1(e) which are also mitigation costs under article 2.1(f). The fact that a claim may be the consequence of damage to the ship should not therefore preclude its characterisation as a claim falling within a sub-paragraph other than article 2.1(a).

157. Thirdly, considering the issue more broadly, if a claim which is consequential on damage to the ship is never limitable then that would exclude many claims which would otherwise fall within the terms of article 2.1. Limitation generally arises after a marine casualty and there will be very many costs and expenses which as a matter of causation result from damage to the ship. So, for example, delay will frequently occur in consequence of a casualty and claims in respect of delay in the carriage of cargo are limitable under article 2.1(b). If, however, that article cannot be relied upon where the delay and resulting loss is a consequence of damage to the ship then that will significantly limit its application as well as making necessary a potentially complex and disputatious causal inquiry.

158. Fourthly, article 2.1 specifically contemplates there being limitable claims which result from damage to the ship. This is made clear by article 2.1(d) which makes wreck removal claims subject to limitation. If the wreck is the limiting ship then that claim will be a direct consequence of the damage to the ship. The fact that article 2.1(d) does not

have the force of law in this jurisdiction does not detract from the significance of this to the drafting of article 2.1 as a whole.

159. Fifthly, to conclude otherwise would effectively elevate the fact that loss or damage to the ship is not within article 2.1(a) into a general but unstated exception to the whole of article 2.1. But it is not even an exception in the context of article 2.1(a). It is simply a type of claim which does not fall within the terms of article 2.1(a).

160. Sixthly, the 1976 Convention expressly addresses what claims are to be excepted from limitation in article 3 which sets out five categories of excepted claims. If a further general exception had been intended then it would be expected to be specified in this article. Conti's case involves the creation of a sixth, unstated category of excepted claims.

161. Seventhly, an important purpose of the 1976 Convention was to provide a limit of liability which was effectively unbreakable. For there to be exceptions to the right to limit not set out in the Convention itself undermines that purpose.

162. Eighthly, it leads to what MSC described as a "twilight zone". If the right to limit depends on whether the ship is in fact repaired, it is unclear what happens in the inbetween period when nobody knows whether the ship will be repaired but an otherwise limitable expense has been incurred. So, for example, in this case the payments for national authorities were made within weeks of the casualty but the repairs were not completed until nearly two years later.

163. It is right to note that in *The CMA Djakarta* Longmore LJ held at para 29 that the claim for the sums paid to salvors was not limitable because "a claim for that consequential loss is still a claim in respect of damage to the ship and it cannot be brought within art. 2.l(a) or 2.l(f)". He did not, however, explain why it could not be brought within article 2.1(f) even if it otherwise fell within its terms, nor did he address any of the arguments raised in this case.

164. I therefore conclude that the Court of Appeal was correct to conclude that the claim for the costs of discharging sound and damaged cargo, and of decontaminating the cargo, was limitable under article 2.1(e). The fact that the claim may be consequential upon damage to the Vessel does not preclude reliance on the right to limit in respect of claims which fall within the terms of any of the sub-paragraphs of article 2 other than article 2.1(a).

165. This conclusion also means that the fact that the claim can be characterised as a single claim for damage to the Vessel does not preclude parts of that claim being subject to limitation because they fall within one or more of the article 2 paragraphs other than

article 2.1(a). In agreement with the Court of Appeal, I would therefore reject Conti's single claim case.

Conclusion

166. For all these reasons I would allow the appeal on Issue (1) and dismiss the appeal on Issue (2) but also reject both of the additional or alternative reasons relied on by Conti. In the result MSC is entitled to limit under article 2.1(e) of the 1976 Convention in respect of the claim for the costs of discharging sound and damaged cargo, and of decontaminating the cargo at Wilhelmshaven, but not otherwise.