



Neutral Citation Number: [2023] EWCA Civ 1007

Case No: CA-2022-002293

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
ADMIRALTY COURT
Mr Justice Andrew Baker
[2022] EWHC 2746 (Admlty)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/09/2023

Before:

LORD JUSTICE MALES
LADY JUSTICE FALK
and
SIR LAUNCELOT HENDERSON

Between:

MSC MEDITERRANEAN SHIPPING COMPANY S.A.

**Appellant/
Claimant**

- and -

- 1) **STOLT TANK CONTAINERS B.V.**
2) **STOLT NIELSEN USA INC.**
3) **CLAIMANTS IN ACTION CL-2017-000540 (except
the first and second defendants above)**
4) **CONTI 11. CONTAINER SCHIFFAHRTS – GmbH
& CO KG MS**

**Respondents/
Defendants**

“MSC FLAMINIA” (No. 2)

Julian Kenny KC & Michal Hain (instructed by Mills & Co Solicitors Ltd) for the Appellant
**Christopher Smith KC & David Walsh (instructed by HFW LLP) for the Fourth
Respondent**

The First to Third Defendants did not appear and were not represented

Hearing dates: 11 & 12 July 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 1 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. This is a case about tonnage limitation under the 1976 Convention on Limitation of Liability for Maritime Claims. The claimant/appellant (“MSC”), the time charterer of the ship “MSC Flaminia”, seeks an order that it is entitled to limit its liability to the 4th defendant/respondent (“Conti”), the owner of the ship, arising out of an explosion that took place in July 2012.
2. The Admiralty judge, Mr Justice Andrew Baker, held that MSC was not entitled to limit its liability because Conti’s claims are not within the scope of Article 2 of the Convention. MSC appeals, but only in relation to some of Conti’s claims. Conti supports the judge’s reasoning, but contends in addition, by a respondent’s notice, that a charterer (who falls within the extended definition of “shipowner” in Article 1 of the Convention) cannot limit its liability to the actual owner in respect of losses suffered by (and only by) the actual owner.

Background

3. The “MSC Flaminia” is a container ship. MSC is a large container transportation business which was the time charterer of the ship. Conti, the owner of the ship, is a one ship special purpose vehicle. MSC had chartered the ship from Conti under a time charter initially made in November 2000 and subsequently extended several times.
4. On 14th July 2012, while the ship was in mid-Atlantic *en route* from Charleston, South Carolina, to Antwerp, an explosion occurred in the no. 4 cargo hold which led to a large fire on board. Hundreds of containers were destroyed and extensive damage was caused to the ship. Three crew members lost their lives. The explosion was caused by the auto-polymerisation of the contents of one or more of three tank containers laden with a chemical known as DVB which had been shipped at New Orleans on 1st July 2012.
5. Conti engaged salvors, Smit Salvage BV, to bring the fire under control and to salvage the ship and cargo. The salvors did this by spraying seawater into the ship, one result of which was that about 30,000 mt of firefighting water, contaminated with dangerous and toxic residues, remained in the holds after the fire was brought under control. The salvors then towed the ship through the English Channel to Wilhelmshaven in Germany, which was the only available port of refuge, arriving on 9th September 2012. This passage required Conti to make payments totalling about €1.9 million to public authorities in the United Kingdom, France, Belgium and Germany to pay for the cost of measures taken to guard against the risk of pollution from bunkers leaking from the ship.
6. Because the ship was unable to complete the voyage to Antwerp, Conti arranged to discharge the cargo at Wilhelmshaven. This involved the discharge and decontamination of undamaged and salvageable cargo and the destruction of unsalvageable cargo. The discharge at Wilhelmshaven was completed on 18th December 2012, but the processes of decontaminating the cargo, releasing sound cargo to the cargo interests and destroying unsound cargo continued during and even after 2013. Conti paid for these operations, the total cost of which was about €38 million. Also at Wilhelmshaven, Conti engaged contractors to decontaminate and remove the firefighting water from the ship’s holds. By 28th February 2013 about 30,000 mt had

been removed into barges, from where it was taken to Denmark and destroyed. The cost of removing this firefighting water was about €7.1 million.

7. After the discharge of the majority of the firefighting water, there remained on board the ship approximately 30,500 mt of waste material, consisting of approximately 14,800 mt of fire-damaged solid cargo (i.e. 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 ship. All of this waste material was contaminated by dangerous and toxic residues which needed to be removed before repairs to the ship could be carried out. Conti arranged for this waste to be removed at facilities in Romania. On 15th March 2013 the ship left Wilhelmshaven, arriving on 30th March 2013 but only berthing on 17th May. Even then, discharge did not begin until 27th July. Between then and 16th October 2013 a total of 2,155 mt of steel scrap was removed from the ship, but progress was slow and unsatisfactory, as a result of which Conti decided that the ship should proceed to Denmark for the discharge of the remaining waste material. The ship arrived at Aarhus in Denmark on 22nd November 2013 and a total of approximately 28,400 mt of waste material was removed there and subsequently at Odense. This work was completed on 1st February 2014. The total cost of these operations was about €24.8 million.
8. After the waste removal was completed, the ship left Odense for Mangalia in Romania where repairs were carried out between 17th February and 12th July 2014 at a cost of approximately US \$21 million. The ship then returned to service under the time charter.
9. In addition Conti incurred various miscellaneous expenses while dealing with the consequences of the casualty, which totalled about €23 million.
10. The casualty gave rise to a number of cargo claims brought in the United States District Court for the Southern District of New York against MSC (the bills of lading being charterer’s bills), Conti and others, including Stolt-Nielsen USA Inc and Stolt Tank Containers BV (together “Stolt”), the shippers of the DVB, and Deltech Corp, its manufacturer. The District Court found that Stolt and Deltech alone 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 from Stolt and Deltech against any other claims by cargo claimants. An appeal by Stolt and Deltech was dismissed by the Court of Appeals for the Second Circuit in a judgment handed down on 30th June 2023.
11. The time charter between Conti and MSC contained an arbitration clause. Conti brought claims in arbitration to recover hire throughout the period while the ship was out of service under the charter and to recover its losses as a result of the casualty. The arbitrators determined that the ship remained on hire throughout and that MSC was liable to Conti in respect of the casualty. By an award dated 30th July 2021 and corrected on 1st September 2021, they awarded damages of approximately US \$200 million.

The limitation proceedings

12. By this limitation claim, MSC seeks to limit its liability for claims arising from the casualty pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims, as amended by the Amending Protocol of 1996 and now given the force of law in the United Kingdom by section 185 of the Merchant Shipping Act 1995. This limitation action is not concerned with claims for loss of life or personal injury, which

are subject to a separate limit, although in the event those claims were within the limit for which the Convention provides. The principal claims for which MSC seeks to limit its liability, and perhaps the only claims as a result of the dismissal of the cargo claims in the United States proceedings, are the claims by Conti to recover the sums awarded against MSC in the arbitration. The applicable tonnage limitation figure, if MSC is entitled to limit its liability, is 25,318,000 SDRs¹, equivalent at the date of the judgment to about £28.2 million.

13. Conti accepts that there are some claims or potential claims in respect of which MSC is or would be entitled to limit its liability. For example, if Conti had been held liable to cargo claimants in the United States proceedings, Conti accepts that its claims to be indemnified against such liability by MSC would be subject to limitation. Conversely, MSC now accepts that there are some claims by Conti in respect of which it is not entitled to limit its liability, as to which there is no appeal from the judge’s decision – for example, the cost of repairing the ship. The only claims with which we are now concerned are Conti’s claims for (a) the costs of discharging and decontaminating the cargo at Wilhelmshaven, (b) the costs of removing firefighting water from the ship’s holds; (c) the payments made to national authorities; and (d) the cost of removing the burnt waste material from the ship.

The 1976 Limitation Convention

14. We are concerned with the 1976 Limitation Convention, but in order to put this Convention in its context it is necessary to trace something of the history of limitation, which became tonnage limitation in 1862. For a detailed exposition of this history, from 1733 to the present day, I can do no better than to refer to the judgment of Mr Justice David Steel in *The CMA Djakarta* [2003] EWHC 641 (Comm), [2003] 2 Lloyd’s Rep 50 at [14] to [27]. For present purposes, however, I begin with 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

15. The 1924 Convention (which the United Kingdom signed, but did not enact) was the first international Convention dealing with tonnage limitation. It provided in Article 1 that “the owner of a seagoing vessel” could limit its liability in respect of the matters specified. Article 10 extended the right to limit as follows:

“Where a 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.”

The 1957 Convention

16. The 1924 Convention was superseded by the 1957 International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, which was the immediate predecessor of the 1976 Convention.

¹ Special drawing rights as defined by the International Monetary Fund, which have to be converted into the national currency of the state in which limitation is sought: see Article 8 of the 1976 Convention.

17. Article 1(1) of the 1957 Convention entitled the owner of a sea-going ship to limit its liability in respect of claims arising from:

“(a) Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;

(b) Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible ...

(c) Any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbour works, basins and navigable waterways.”

18. The right to limit did not apply, however, if the occurrence giving rise to the claim “resulted from the actual fault or privity of the owner”.

19. Article 6(2) extended the provisions of the Convention to (among others) the charterer of a ship:

“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.”

20. Thus the right conferred on a charterer was to limit “in the same way” as a shipowner could limit its liability.

The 1976 Convention

21. The 1976 Convention extended the right to limit to salvors as well as shipowners, and contained an extended definition of “shipowner” for the purpose of the Convention. Thus 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.

(3) Salvor shall mean any person rendering services in direct connexion with salvage operations. Salvage operations shall also include operations referred to in Article 2, paragraph 1 (d), (e) and (f).”

22. The claims which are subject to limitation are set out in Article 2:

“1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) Claims in respect of loss of life or personal injury or loss of or damage to property (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.

2. 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.”

23. It should be noted that 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). However, for the purpose of interpreting Article 2 of the Convention, the Article (including paragraph 1(d)) must be considered as a whole.
24. Article 4 provides that:
- “A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.”
25. It is considerably more difficult to “break” limitation under the 1976 Convention than was the case under the 1957 Convention.
26. Article 6 sets out how the limit applicable to claims other than claims by passengers for loss of life or personal injury should be calculated. The calculation depends on the tonnage of the ship, and a higher limit applies to claims for loss of life or personal injury.
27. Article 9(1) of the 1976 Convention provides for a single limit of liability to apply to all non-passenger claims arising on a single occasion:
- “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 person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; or
- (b) Against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or
- (c) Against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to, or in respect of which, the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.”
28. Articles 11 and 12 provide for the constitution and distribution of a limitation fund. Any person alleged to be liable may constitute a fund, and a fund constituted by any one of the persons mentioned in Article 9 (which itself refers back to Article 1.2) or his insurer is deemed to have been constituted by all such persons. Thus a fund constituted by the owner is deemed also to have been constituted by the charterer, and *vice versa*. The fund is then to be distributed among claimants in proportion to their established claims against the fund.

The case law

29. It is convenient at this point to consider the relevant case law on the 1976 Convention.

The Aegean Sea

30. In *The Aegean Sea* [1998] 2 Lloyd’s Rep 39 a ship carrying a cargo of crude oil grounded on rocks while proceeding to berth at La Coruña in Spain, broke in two and exploded. The shipowner contended that the charterer was responsible for the casualty and brought claims for (1) the value of the ship, (2) the value of bunkers on board, (3) freight which had been earned or alternatively the same amount in damages if the freight had not been earned, (4) an indemnity against liabilities incurred under Spanish legislation giving effect to the Civil Liability Convention on Oil Pollution Damage 1969 in respect of property damage, clean up costs, loss of use and loss of profits claims by fishermen and other businesses, and claims by local and national authorities, and (5) an indemnity against potential liability to Cristal Ltd, a company formed by oil companies to provide additional compensation for oil pollution. The charterer sought to limit its liability pursuant to the 1976 Convention and the question arose whether it was entitled to do so.

31. Mr Justice Thomas held that the charterer was not entitled to limit. He reasoned, in summary, as follows:

(1) It was clear from the terms of the 1957 Convention that a charterer had no right to limit in the event of claims by the shipowner against the charterer:

“The terms of the 1957 Convention and in particular the single limits of liability and the constitution of one fund make it difficult to see how the provisions of that Convention were meant to provide to charterers (or the other interests listed in art 6) a right to limit their liability in the event of claims by shipowners against them. If this had been contemplated, there would have had to have been provision for more than one limit of liability and more than one fund.” (page 45, col 1)

(2) The 1976 Convention introduced three significant changes to the position established in 1957 (an increase in the amount of the limit, a provision which made it harder to break the limit, and the extension of the benefit of limitation to salvors not working on board a ship), but nothing had happened to point to any need for change in relation to the position of the charterer and there was nothing in the *travaux préparatoires* for the 1976 Convention to indicate that any such change was under consideration.

(3) Charterers, managers and operators are categorised together and treated as shipowners for the purpose of the 1976 Convention, just as they were under the 1957 Convention. There was no change to the position of the charterer which was evident from the language of the 1976 Convention:

“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. ... the usual circumstance in which the charterer, manager or operator will be entitled to limit is when they perform an act normally performed by the shipowner.” (page 48 col 1)

- (4) It was significant that Article 9.1(a) provides for the aggregation of all the claims against those categorised as “shipowner” and that Article 11 provides 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 categorized 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.” (page 49 col 1)

- (5) The provisions for distribution of the fund in Article 12 were also significant. If claims by the owner against the charterer were subject to limitation, they would compete with other claims against the fund by third parties.

- (6) In conclusion, therefore:

“It follows from the development of limitation prior to the 1976 Convention and the way in which the 1976 Convention is structured and its language that, in my view, it does not provide (and is not intended to provide) an entitlement to charterers to limit where the shipowner brings the type of claim I am concerned with against the charterers. Such claims cannot in principle, in my view, be reasonably brought within its language.
...

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. ...

Whatever the reason, the 1976 Convention did not, in my view, alter the position as it had existed prior to the Convention or provide for limitation by charterers in claims of the type raised in these proceedings and brought by shipowners against them.” (pages 49 col 2 to 50 col 2)

32. While this was sufficient to defeat the charterer’s claim to be entitled to limit its liability, Mr Justice Thomas went on to consider the various claims on the assumption (contrary to what he had just decided) that the 1976 Convention does cover claims by

a shipowner against a charterer. As to this, he held (among other things) that a claim for the loss of the ship is not a claim within the scope of Article 2.1(a):

“In a claim brought by those within the category of shipowners, the loss of the ship is not the loss of ‘property’ ‘in connection with the operation of the ship’ 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.” (page 51 cols 1 and 2)

The CMA Djakarta at first instance

33. In *The CMA Djakarta* [2003] EWHC 641 (Comm), [2003] 2 Lloyd’s Rep 50, as in the present case, there was an explosion on board 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 its exposure to cargo claims and general average contributions. The charterer claimed to be entitled to limit its liability. The owner argued that entitlement to limit under the Convention was restricted to those persons identified in Article 1.2 whose liability for the qualifying claim arose in the capacity of an owner and not otherwise, and that limitation was therefore not available to the charterer as its liability arose in its capacity as a charterer (i.e. breach of its obligations as a charterer for having shipped dangerous cargo) and not an owner.

34. Mr Justice David Steel accepted this argument, holding at [31] that “the term ‘shipowner’ only includes those who, if they have no beneficial or possessory interest in a vessel, are nonetheless in a real sense directly concerned in the operation of the vessel and have incurred liability as such”. Like Mr Justice Thomas in *The Aegean Sea*, Mr Justice David Steel had regard to the 1957 Convention and also thought it significant that the 1976 Convention provided for a single fund, 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:

“47. ... 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.”

35. Because the charterer’s liability arose from its conduct in its capacity as a charterer and not an owner, Mr Justice David Steel held that the charterer was not entitled to limit at all, even in respect of claims by the owner to be indemnified against cargo claims by third parties. This went further than the decision of Mr Justice Thomas in *The Aegean Sea*.

The CMA Djakarta in the Court of Appeal

36. The judgment of the Court of Appeal was given by Lord Justice Longmore, with whom Lord Justices Waller and Neuberger agreed. Lord Justice Longmore held at [9] that “the

task of any Court is to construe the Convention as it stands without any English law preconceptions ... by reference to broad and generally acceptable principles of construction”. After setting out Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, he continued:

“10. ... As I read these provisions, the duty of a Court is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the convention. The Court may then, in order to confirm that ordinary meaning, have recourse to what may be called the *travaux préparatoires* and the circumstances of the conclusion of the convention. I would, for my part, regard the existence and terms of a previous international convention (even if not made between all the same parties) as one of the circumstances which are part of a conclusion of a new convention but recourse to such earlier convention can only be made once the ordinary meaning has been ascertained. Such recourse may confirm that ordinary meaning. It may also sometimes determine that meaning but only when the ordinary meaning makes the convention ambiguous or obscure or when such ordinary meaning leads to a manifestly absurd or unreasonable result.”

37. Lord Justice Longmore described the object and purpose of the 1976 Convention as follows:

“11. Neither owners nor charterers relied on any special context. 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, although the somewhat broader views of the Judge, expressed when he was Mr David Steel QC are, as always, well worth reading in this context (‘Ships are different’, [1995] LMCLQ 490). It is then necessary to ascertain the ordinary meaning of the words used.”

38. Importantly, Lord Justice Longmore disagreed with the view expressed by both Mr Justice Thomas and Mr Justice David Steel that the charterer’s right to limit applied only when the charterer was acting “as if he were a shipowner”, i.e. only if he was acting in the management or operation of the ship. He said that this would be to introduce a gloss on the meaning of the word “charterer” and would “impose a requirement the ambit of which will often be difficult to ascertain”, for example because there were some acts (such as stowage of the cargo) which might equally be carried out by the owner or the charterer, depending on the contractual arrangements between them. Moreover, the main purpose of according charterers the right to limit had been to enable them to limit their liability to cargo owners under the contract of carriage, but the making of a contract of carriage was not an act in the management or operation of the ship and was very often done in the capacity of a charterer. Thus to accept this qualification of a charterer’s right to limit would defeat the purpose of allowing charterers to limit in the first place.
39. Lord Justice Longmore did not derive assistance from the phrase “in the same way as they apply to an owner himself” in the 1957 Convention, pointing out at [19] that this phrase had not been used in the Merchant Shipping Act 1958 by which the United Kingdom enacted the 1957 Convention (see section 3) – although, with respect, it is hard to see how the fact that the phrase was not used in the enacting legislation in one contracting state can cast light on the meaning and effect of the Convention itself.
40. Having rejected this overriding objection to the charterer’s right to limit its liability, Lord Justice Longmore went on to consider whether the owner’s claim for damage to the ship fell within of Article 2 of the Convention. In agreement with Mr Justice Thomas and Mr Justice David Steel, he held at [26] that it did not come within Article 2.1(a) because the ordinary meaning of this paragraph “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”. It is of interest that his reasoning, at [25], included that Articles 9 to 11 provided for the constitution of a single fund, as Mr Justice Thomas had pointed out in *The Aegean Sea*, although Lord Justice Longmore thought that such 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”.
41. One element of the owner’s claim was to recover the amount paid to salvors for salvage services rendered to the ship. This item was claimed under Article 2.1(a), alternatively Article 2.1(f). The claim under Article 2.1(a) was rejected on the basis that if a claim for loss of or damage to the ship is not itself a claim within this paragraph, a claim for

amounts paid to save the ship could not be within the paragraph either. The claim under Article 2.1(f) was dealt with only briefly, as follows:

“29. ... It may be that a claim to recover the cost incurred of salvaging 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 2.1(a) or art 2.1(f).”

42. Finally, Lord Justice Longmore held at [32] that the charterer was entitled to limit its liability for cargo claims pursuant to Article 2.1(a), regardless of whether those claims were made directly against the charterer or were made against the owner in the first instance and passed on to the charterer. To that limited extent only, the appeal was allowed. Lord Justice Longmore summed up the effect of this decision as follows:

“34. This decision will mean that a charterer’s ability to limit will depend on the type of claim that is brought against him rather than the capacity in which he was acting when his liability was incurred. It may be said this construction of the 1976 Convention is less certain and less straightforward than trying to ascertain the capacity in which the charterer is acting. I do not think, however, that that would be right. To analyse a claim is primarily a legal task and is a familiar one to charterers, their insurers and advisers. The capacity in which a charterer acts is primarily a factual matter which may require evidence as well as analysis of a somewhat esoteric legal concept. It is doubtless inaccurate to say that of all the claims that could be brought by an owner against a charterer, it will only be liability to indemnify the shipowner in respect of cargo claims that he will be able to limit. But I cannot at the moment easily think of any other category where limitation is likely to apply.”

The Ocean Victory

43. The decision of the Court of Appeal in *The CMA Djakarta* was approved, albeit *obiter*, by the Supreme Court in *The Ocean Victory* [2017] UKSC 35, [2017] 1 WLR 1793. In this case the charterer ordered the ship to discharge at Kashima in Japan, where the ship grounded and became a total loss while attempting to leave port during a severe gale. The owner claimed damages on the basis that Kashima was an unsafe port, but the claim failed because the combination of weather conditions leading to the casualty was “an abnormal and unexpected occurrence”. However, Lord Clarke (with whom all the other Justices agreed on this issue) went on to consider whether, if the charterer had been in breach of its safe port obligation, it would have been entitled to limit its liability pursuant to the 1976 Convention. This depended largely on whether *The CMA Djakarta* was correctly decided. Lord Clarke held that it was, and accordingly that the charterer would not have been entitled to limit its liability.
44. After summarising the history of tonnage limitation, Lord Clarke approved the rejection by Lord Justice Longmore of the argument “that, in order to succeed in limiting their liability, it was necessary for charterers’ claims to arise from their role *qua* owners”. He said simply:

“71. ... I agree that Longmore LJ’s conclusions in that regard were correct for the reasons he gave and do not need to revisit them.”

45. He then approved Lord Justice Longmore’s approach to the interpretation of the Convention, including as to the circumstances in which recourse may be had to the 1957 and earlier Conventions:

“75. Like Longmore LJ in para 10, I would regard the existence and terms of a previous international Convention (even if not made between all the same parties) as one of the circumstances which are part of a conclusion of a new Convention but recourse to such earlier Convention can only be made once the ordinary meaning has been ascertained. It may also sometimes determine that meaning but only when the ordinary meaning makes the Convention ambiguous or obscure or when such ordinary meaning leads to a manifestly absurd or unreasonable result.”

46. He then referred with apparent approval at [76] to what Lord Justice Longmore had said at [11] about the object and purpose of the 1976 Convention.
47. Finally, Lord Clarke agreed at [84] that, as held by all three previous judges, “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”. He also agreed (see [82]) that Articles 9 to 11 were important in reaching this conclusion.

The judgment of Mr Justice Andrew Baker

48. Although there was a great deal of common ground, the judge made some important factual findings. These findings are to be found in various places throughout his judgment and in an Appendix thereto, but for the purpose of this appeal can be briefly summarised as follows.
49. The fire which followed the explosion caused such extensive damage that there were serious concerns regarding the integrity of what remained of the ship. As a result of the casualty, the ship was so damaged that she could not complete her voyage to Antwerp. However, the ship was not a total loss. Conti made an early decision to repair the ship and return her to full operation under the charter, as it was contractually obliged to do, and the ship remained on hire throughout. Although Conti engaged the salvors in order to mitigate loss of and damage to the cargo, it did so “at least equally” in order to avoid the loss of, and minimise damage to, the ship itself. Repair plans were being made even before ship arrived at Wilhemshaven and, once she did arrive, all of the discussions with the German authorities were predicated on the understanding that the ship was going to be repaired.
50. The ship could not be repaired without discharging the cargo and removing the contaminated firefighting water, so that the costs of these operations can fairly be described as costs that were in fact ancillary to the repair of the ship – albeit that discharge of the cargo and removal of the firefighting water would have had to occur in some way even if the ship was not going to be repaired. Moreover, it was not possible

in practice for Conti to have the cargo discharged at Wilhelmshaven without also accepting responsibility for the post-discharge costs of handling the cargo. Similarly, removal of the firefighting water and the damaged solid waste in order to enable repairs to the ship to be undertaken necessarily involved acceptance of responsibility for the cost of disposing of these materials.

51. Given these findings, all of the costs which remain in issue can be seen as costs incurred in connection with, and for the purpose of, repairing the ship and returning her to service under the charterparty. It may well be that, in some respects, broadly similar costs would have had to be incurred even if Conti was not going to repair the ship – unless, perhaps, Conti had simply abandoned the ship and walked away, although (despite a threat made at one point) that was never its intention, even assuming that it would have been a practical possibility. For example, even if the ship was not going to be repaired, something would have had to be done to dispose safely of the contaminated firefighting water, but this might have been dealt with in a different way or at a different cost if it had not been dealt with as part of Conti's repair preparations. In the circumstances the judge's finding, for example at [108], was that the costs actually incurred by Conti not only needed to be incurred if the ship was to be repaired, but were in fact incurred to enable Conti to have the ship repaired or as part of the repairs themselves.
52. On these facts the judge held that MSC was not entitled to limit its liability because Conti's claims are not within the scope of any of the paragraphs of Article 2. At the risk of over-simplifying a lengthy and intricately reasoned judgment, the judge's essential reasoning appears to me to have been as follows.
53. First, the judge rejected Conti's submission that tonnage limitation under Article 2.1 only applies to claims in respect of losses suffered in the first instance by someone who is not within the extended definition of "shipowner" in Article 1.2 of the 1976 Convention, referred to by the judge as an "outsider"². The effect of this submission was that if an "insider" suffers its own loss as a result of a marine incident, tonnage limitation does not apply to the "insider's" claim against another "insider" in respect of that loss; and that the only claims by one "insider" against another to which tonnage limitation applies are claims to pass on liability in respect of claims by an "outsider". The judge had no difficulty in rejecting this broad submission, not least as it would have prevented an owner from limiting its liability for damage to cargo which was owned by a charterer. Conti has not repeated this submission in this court. As I shall explain, its respondent's notice advances a narrower submission than the one made to the judge, namely that a *charterer* is only entitled to limit in respect of claims originating with an "outsider" and is not entitled to limit in respect of claims for losses originally suffered by the owner itself.
54. Second, although there were many individual items of expenditure incurred by Conti, its claim against MSC was a single claim for breach of the charterparty, for which as a matter of law the measure of damages was the diminution in value of the ship together with losses consequential on the damage suffered; it was a complete answer to MSC's claim to limit that Conti's claim against it was properly characterised as a single claim for damage to the ship; but in accordance with *The CMA Djakarta* such a claim cannot

² The judge used the term "insider" to refer to those within the extended definition of "shipowner" in Article 1.2 of the 1976 Convention, referring to any other person as an "outsider". Thus, adopting this terminology, Conti as the owner and MSC as the charterer were both "insiders".

be subject to tonnage limitation by reference to the tonnage of the damaged ship in question.

55. The judge explained this point in these terms:

“100. In *The CMA Djakarta* at [21], Longmore LJ noted that the rejection of the argument that a charterer could only limit in respect of liabilities incurred *qua* owner did not conclude the inquiry in that case, ‘because it is still necessary to ascertain whether a claim for damage to the ship by reference to which a charterer seeks to limit his liability is a claim which falls within art.2 ... [and] whether the charterers can limit their liability for any of the other claims brought by the shipowners ...’. Likewise here, the rejection of Mr Smith KC’s overarching submission that Article 2 only applies to claims in respect of loss suffered originally by an outsider does not conclude the inquiry; and I have already explained why Conti’s claim against MSC does not fall within Article 2.1(a).

101. MSC did not rely only on Article 2.1(a), however. It relied also on Articles 2.1(e) and 2.1(f). In that regard, the technique deployed was to treat Conti as having made a series of claims, by reference to losses said by MSC to be of different types, and to subject each to scrutiny against the language of Article 2.1(e) and/or 2.1(f) (as the case may be). I do not regard that as an appropriate technique in the present case.

102. Conti’s claim against MSC was that dangerous cargo had been shipped in breach of charter resulting in massive damage to the ship. In calculating their award of damages, the arbitrators included the amounts of many items of expenditure incurred by Conti, duly scrutinised by the arbitrators to the extent that points arose on whether those amounts should be included. (Conti put before the arbitrators around 3,000 individual invoices to evidence the costs it said it had incurred as a result of the casualty.) That means, as will often be the case with damaged ships, that damages have been assessed by reference to actual costs incurred (scrutinised for causal connection and reasonableness, to the extent points on that arose) rather than by reference to either a more abstract assessment of the reasonable cost required to restore an undamaged ship to Conti or evidence of the ship’s pre-casualty and damaged sale values. However, the nature of the exercise, in law, was still that of putting a (negative) value on the damage to the ship (inclusive of losses consequential upon that damage) in respect of which Conti made its claim, and awarding that amount as damages.

103. I consider that to be a complete answer to MSC’s reliance on tonnage limitation in this case. That is to say, I think 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. Although the primary focus of the reasoning in *The CMA Djakarta* (and in *The Aegean Sea* to the extent not disapproved in *The CMA Djakarta*) was on Article 2.1(a) in particular, in my view it supports my reading of Article 2.1, and my conclusion, that 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. ...

115. For the reasons given above, in my judgment Conti’s claim against MSC, as pursued and made good in the arbitration, is not subject to tonnage limitation under any part of Article 2.1 of the Amended 1976 Convention. It was a claim in respect of damage to the ship (including consequential loss resulting therefrom); and that is not a limitable claim.”

56. Next, however, in case he was wrong about that, the judge addressed and rejected MSC’s submissions made by reference to the individual paragraphs of Article 2.1 of the Convention. As to these, I can quote the judge’s own summary of his conclusions:

“164. If ... it is necessary to consider MSC’s reliance upon Article 2.1(e)/(f) in relation to the groups of expenses incurred by Conti that were allowed for in the arbitrator’s assessment of quantum, then:

(i) Conti’s claim in respect of cargo handling costs at Wilhelmshaven would not be within Article 2.1(e), because Article 2.1(e) concerns only claims by a party not involved in the operation of the ship for having had to deal with cargo that needed to be removed, destroyed or rendered harmless, and does not cover a claim between an owner and a time charterer in respect of the cost of cargo handling undertaken pursuant to the charter (whether by reference to the clauses concerning responsibility for cargo operations or as part of a claim for damages for breach of the charter);

(ii) Conti’s claim in respect of firefighting water removal and disposal costs would not be within Article 2.1(e), because that would require the costs to be characterised, in substance, as cargo handling costs, which is questionable but in any event (i) above would then apply, and would not be within Article 2.1(f), because, upon the proper construction of Article 2.1(f), that would require the sole purpose of the firefighting effort to have been mitigation of cargo loss or damage and that is not the position on the facts;

(iii) Conti’s claim in respect of burnt waste removal and disposal costs would not be within Article 2.1(e), because (as

with the cost of dealing with the firefighting water) that would require, in substance, that the costs be characterised as cargo handling costs, which is questionable but in any event (i) above would then apply; and

(iv) Conti’s claim in respect of the payments it made to national authorities, to ensure lawful passage for the ship to Wilhelmshaven as a port of refuge, would not be within Article 2.1(f), because that would require the sole purpose of making for Wilhelmshaven to have been to mitigate cargo loss or damage, and that is not the position on the facts.”

The grounds of appeal and respondent’s notice

57. On behalf of MSC, Mr Julian Kenny KC advanced four grounds of appeal, as follows:

- (1) The judge was wrong to hold that claims as between owner and charterer regarding responsibility *inter se* for the cost of removing cargo from the ship do not fall within Article 2.1(e) of the Convention; he should have held that the cost of removing the cargo from the ship and decontaminating it at Wilhelmshaven fell within Article 2.1(e).
- (2) The judge was wrong to interpret Article 2.1(f) as encompassing only “claims ... in respect of measures *solely* taken in order to avert or minimise loss for which the person liable may limit his liability in accordance with this Convention”; he should have held that the payments to national authorities and the costs of removing firefighting water from the holds were incurred in part in order to avert or minimise loss of or damage to the cargo and therefore fell within Article 2.1(f).
- (3) The judge was wrong to hold that MSC’s liability to Conti was a single claim in respect of damage to the ship, as opposed to a group of claims, some of which were limitable and some of which were not; the correct approach is to consider whether each particular head of loss does or does not come within one of the paragraphs of Article 2.1.
- (4) The judge was wrong to hold that none of Conti’s claims were in respect of consequential loss resulting from loss of or damage to property occurring on board the ship for the purpose of Article 2.1(a); he should have held that each of Conti’s claims for (a) the payments to national authorities, (b) the cost of discharging the cargo, (c) the removal and disposal of the firefighting water, and (d) the removal of the cargo waste, was a claim for losses “consequential” on damage to the cargo on board.

58. On behalf of Conti, Mr Christopher Smith KC submitted, by a respondent’s notice, 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 of the Convention; thus a charterer, an “insider” in the judge’s terminology, 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”.

The approach to interpretation of the Convention

59. The correct approach to the interpretation of an international Convention is now well established. It must be interpreted by reference to broad and generally accepted principles of interpretation, in particular as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. These 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 the 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 agreements 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.”

60. In the case of the 1976 Limitation Convention, the statements by Lord Justice Longmore in *The CMA Djakarta* at [9] and [10] which I have set out at [36] above, and which were approved by the Supreme Court in *The Ocean Victory*, can be regarded as authoritative. For a recent summary of the applicable principles, I would refer to the judgment of Lord Hamblen (with whom the other Justices agreed) in *JTI Polska Sp Z.o.o. v Jakubowski* [2023] UKSC 19, [2023] 3 WLR 50 at [22] to [36], a case concerned with the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road 1956) in which Lord Justice Longmore’s statement was referred to with approval. In that judgment Lord Hamblen clarified the use which may be made of supplementary means of interpretation, including *travaux préparatoires*:

“32. The appellants do not suggest that the *travaux préparatoires* disclose a ‘bull’s eye’ but Mr John Kimbell KC for the appellants submitted that this was only required where they are used to ‘determine’ rather than to ‘confirm’ the meaning resulting from the application of article 31. I accept that submission. The use of supplementary material to confirm a meaning is not subject to the restrictions set out in article 32(a) and (b). They only apply when the material is relied upon to determine the meaning. Moreover, confirmation may consist of finding support for a given meaning. It does not necessitate the identification of a ‘definite legislative intention’. It may, for example, include material which helps to identify the object and purpose of the treaty or provisions within the treaty. That will be a useful aid to interpretation but it is unlikely to disclose a definite legislative intention.”

61. Thus the court’s task, as set out in Article 31 of the Vienna Convention, is to ascertain the ordinary meaning of the terms used in their context and in the light of the Convention’s object and purpose, with recourse to supplementary means of interpretation either to confirm the meaning thus ascertained or, in the strictly limited cases identified in Article 32(a) and (b), to determine the meaning.

The object and purpose of the 1976 Convention

62. The object and purpose of the 1976 Limitation Convention were explained by Lord Justice Longmore in the passage which I have set out at [37] above. He identified three points. The first was that the general purpose of conferring a right to limit was to encourage the provision of international trade by way of sea-carriage. Lord Reid in *The*

Toju Maru [1972] AC 242 (referring to the 1957 Convention) and Mr Justice Thomas in *The Aegean Sea* (referring to the 1976 Convention) considered that this meant that the provisions of the relevant Convention should be applied, if possible, to all cases which can reasonably be brought within the language of the Convention. I would accept that approach, but it only takes matters so far. It remains necessary to interpret the language of each Convention in the light of its object and purpose and to remember that conferring a right to limit means that the party which has suffered loss and damage will not obtain full compensation if its losses exceed the limitation amount.

63. It is not difficult to see why conferring a right to limit on shipowners will serve the objective of encouraging international trade. It encourages investment by shipowners secure in the knowledge that they will not face potentially crippling unlimited liability, and enables them to obtain insurance which is not prohibitively expensive. As Mr Justice David Steel pointed out in *The CMA Djakarta*, this objective goes right back to the Responsibility of Shipowners Act 1733, which first introduced the concept of limitation into English law. The preamble to the Act recorded 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."
64. Extending the right to limit to charterers provides similar encouragement, at any rate so far as claims by third parties (i.e. "outsiders") are concerned. But that logic does not apply, or at any rate applies with much less force, to claims by shipowners against charterers for (as in this case) a straightforward breach by a charterer of its contractual obligations, causing loss and damage to the shipowner. To prevent recovery in full by the owner in such a case, leaving it with substantial uncompensated losses, might be thought to have the opposite effect, even allowing for the possibility of insurance.
65. The main object and purpose of the 1976 Convention identified by Lord Justice Longmore was to provide for a higher limit of liability than applied under the 1957 Convention while making it more difficult to "break" the limit. Another object was to extend the right to limit to salvors. Lord Justice Longmore thought it impossible to ascertain with certainty any object or purpose beyond these matters. It follows from this formulation that it is legitimate, in ascertaining the object and purpose of a treaty, to have regard to the existing law. That existing law, whether contained in a previous treaty covering the same subject matter or derived from customary international law, forms an essential part of the context in which the treaty has to be interpreted. It follows also that Lord Justice Longmore did not consider that it was the object or purpose of the 1976 Convention to extend a charterer's right to limit beyond the right already conferred under the 1957 Convention.

The respondent's notice

66. As already mentioned, Mr Smith submitted 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 of the Convention. I propose to take this submission first because, if it is right, it provides a complete answer to the appeal.
67. Mr Smith submitted that this interpretation of the 1976 Convention is to be derived from the combination of Articles 1, 2 and 9 to 11. Article 1 adopts the drafting technique

of including a charterer within the definition of "shipowner", while Article 2 lists the claims which are subject to limitation in terms which, at least primarily, refer to claims by "outsiders". Critically, however, Article 9 provides for a single limit of liability applicable to the aggregate of all claims arising on any distinct occasion against the persons within the definition of "shipowner", while Article 11 provides for the constitution of a fund by any of those persons, which fund, once constituted, is deemed to have been constituted by all such "insiders", and against which any claimant may claim. Article 10 provides that limitation may be invoked, where applicable, notwithstanding that a limitation fund has not been constituted; but provides the important qualification that national law may provide that the right to invoke limitation arises only if a fund is constituted.

68. If a charterer is entitled to limit its liability for a claim made by an owner to recover losses which the owner itself has suffered, as distinct from the owner passing on to the charterer a liability incurred to a third party, the consequences would be remarkable. It would mean that an owner's own claim may have to be paid out of a fund constituted by the owner itself. That would by itself be a surprising result, but it would also mean that the fund would be diminished to the prejudice of third-party claimants ("outsiders") for whose benefit the fund is primarily constituted. This cannot be what was intended by the parties to the Convention.
69. Accordingly, Mr Smith submitted that the claims referred to in Article 2 must be interpreted to exclude claims by an owner against a charterer to recover losses suffered by the owner itself.
70. I accept this submission. As noted above, 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 Mr Justice Thomas in *The Aegean Sea* at 49 col 1 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 Mr Justice David Steel's observations in *The CMA Djakarta* at [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."

71. While it is true that this reasoning led Mr Justice Thomas and Mr Justice David Steel to a conclusion (no doubt reflecting the submissions made to them) which has been held to be mistaken, namely that a charterer's right to limit arises only when the charterer is acting in the capacity of an owner, that does not detract from the basic point that the Convention is not intended to apply to claims by an owner against a charterer to recover loss suffered by the owner itself. Indeed, Lord Justice Longmore in *The CMA Djakarta* also recognised the force of this reasoning, as did Lord Clarke in *The Ocean Victory*. It is striking, in my view, that Lord Justice Longmore could not easily think of any circumstance in which a charterer would be entitled to limit its liability to an owner

other than in respect of cargo claims. Lord Justice Longmore will no doubt have had well in mind that an owner may have a whole variety of potential claims against a charterer for breach of obligations arising under the charterparty, but did not consider that these would be subject to a right to limit liability.

72. A major reason why the conclusion reached by Mr Justice Thomas and Mr Justice David Steel has been held to be mistaken was that it required an assessment of the capacity in which a charterer was acting, thereby imposing “a requirement the ambit of which will often be difficult to ascertain”, bearing in mind the various responsibilities which a charterer may undertake. Their conclusion was therefore held to introduce an unacceptable gloss on the meaning of the term “charterer”. But the interpretation proposed by Mr Smith, which I would accept, does not involve any such difficult evaluation. When a claim falling within Article 2 is made by an owner against a charterer, the charterer’s right to limit does not depend upon the capacity in which the charterer was acting so as to give rise to the claim, but simply on whether the owner is claiming for a loss which it has suffered itself (no right for charterer to limit) or to pass on liability for a claim made against the owner by a third party (charterer entitled to limit). This is consistent with Article 2 of the 1976 Convention, according to which the right to limit depends upon the characterisation of the claim – or as Lord Justice Longmore put it in *The CMA Djakarta* at [34], “a charterer’s ability to limit will depend on the type of claim that is brought against him”.
73. This view of the intended operation of the 1976 Convention, derived from the provisions of the Convention itself, is reinforced when the Convention is considered in the context of the previously existing law. It is in my judgment entirely clear that under the 1957 Convention a charterer had no right to limit in respect of claims by an owner to recover losses suffered by the owner itself. As Mr Justice David Steel put it in *The CMA Djakarta*:
- “41. ... Article 6 of the 1957 Convention applied its provisions to charterers ‘in the same way as they apply to an owner himself’. This phraseology 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.”
74. The same idea can be expressed another way by saying 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.
75. There is nothing in the 1976 Convention to suggest that it was intended either to bring about a radical extension of the circumstances in which a charterer has a right to limit or that, in doing so, it was intended to produce the remarkable consequences referred to in [68] above. Rather, the object and purpose of the 1976 Convention was limited as explained above.
76. Reference to the *travaux préparatoires* leading to the 1976 Convention confirms the interpretation which I would reach from the terms of the Convention, considered in their context and in the light of the object and purpose of the Convention. The *travaux* explain what changes were intended to be introduced, i.e. to increase the limitation amount, to make it much harder to break the limit and to extend to salvors the right to

limit, but there is nothing to suggest any intention to extend the claims in respect of which a charterer had the right to limit.

77. Mr Kenny challenged this interpretation of the 1976 Convention on two bases. First, he submitted that it requires wording to be read into the text of the Convention which is not there. I do not accept this. The interpretation which I favour means only that the Convention on its true construction, and when considered as a whole, does not confer a right to limit on a charterer in respect of claims by an owner for losses suffered by the owner itself. To hold otherwise would undermine what was plainly intended to be the proper working of the Convention.
78. Mr Kenny’s second basis of challenge was that it is unnecessary to interpret the Convention in this way because, if the owner constitutes a limitation fund in circumstances where the charterer has responsibility for the casualty, the owner’s claim against the charterer (assuming it falls within one of the paragraphs of Article 2) will be subject to limitation, but the owner will also have a non-limitable claim against the charterer to be reimbursed the value of the fund. The judge accepted this argument:

“85. Where under the terms applicable to the contractual or other legal relationship between two insiders, one bears towards the other legal liability for a casualty (here, MSC’s liability to Conti for this casualty, as determined by the arbitrators), the burden of establishing a limitation fund for the benefit of them both (and all other insiders) must fall on the former. Self-evidently a claim by the latter, if they constitute the fund, for the value of the fund thus constituted, is not itself limitable. Anything else would be absurd. If in this case Conti had established the limitation fund, then on the arbitrators’ findings as to liability under the time charter, Conti would have been entitled to be compensated by MSC for the cost of having done so.”

79. I respectfully disagree. To my mind it is not a “self-evident truth” that a charterer who ships a dangerous cargo is liable for the cost of establishing a limitation fund (by which I think it is clear that the judge was referring to liability for the value of the fund). Such a claim, if it is viable, would necessarily be an arbitrable claim for damages for breach of charter, the measure of damages being the value of a limitation fund, but no such claim was made in the arbitration in this case and I am not aware of any case in which such a claim has been made. As the judge himself said in a different context, issues of limitation typically arise *after* issues of liability have been determined. In any event, however, the (with respect) somewhat convoluted concept of a claim by the owner for the value of the fund cannot negate what I consider to be the clear interpretation of the Convention in its context, arrived at in the light of the ordinary meaning of its terms considered as a whole, together with its legislative history.
80. Accordingly I would dismiss the appeal by reference to the respondent’s notice. This conclusion means that it is unnecessary to address MSC’s grounds of appeal. However, as we heard full argument on them, I will do so briefly, on the assumption that a claim by an owner against a charterer to recover losses suffered by the owner itself is subject to limitation.

Ground 3 – a single claim?

81. The judge’s principal reason for concluding that MSC was not entitled to limit its liability was that Conti’s claim against MSC was, and had to be, a single claim for breach of the charterparty causing damage to the ship, for which as a matter of law the measure of damages was the diminution in value of the ship together with losses consequential on the damage suffered, and that such a claim cannot be subject to limitation (see the passage which I have set out at [55] above). Mr Kenny for MSC submitted that the judge was in error: the claim pleaded by Conti in the arbitration was not in fact a single claim for damage to the ship; as a matter of English law, there was no reason why the claim was required to be characterised in this way; and in any event the characterisation of the claim as a matter of English law should not affect the application of an international Convention, where the straightforward question was whether a claim fell within the language of one of the paragraphs of Article 2.1, regardless of the way in which claims might have to be formulated as a matter of domestic law.
82. Mr Smith for Conti contended that MSC had mischaracterised the judge’s analysis. He pointed out that MSC had always accepted that certain losses within the c.US \$200 million awarded to Conti by the arbitrators were not subject to limitation; and that Conti had always accepted that MSC would have been entitled to limit in respect of payments by Conti to relatives of the deceased crew members if these payments had exceeded the relevant limit, and would likewise have been entitled to limit in respect of any cargo claims passed on by Conti to MSC if Conti had been held liable to cargo claimants. He submitted, therefore, that the judge’s reference to “a claim (singular) in respect of damage to the ship (including consequential loss resulting from having a damaged ship)” at [102] and [103] referred only to those losses in respect of which limitation is in dispute.
83. With some hesitation I am prepared to assume that Mr Smith is right about this, but in my judgment the judge’s analysis does not provide a complete answer to MSC’s claim to be entitled to limit its liability. I would accept that, as a matter of English law, Conti was making a claim for a single breach of charter, namely shipment of a dangerous cargo, but that claim comprised a number of distinct heads of loss. It is 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. That is the approach which has been adopted in previous cases such as *The Aegean Sea* and *The CMA Djakarta*. The real question is whether Conti’s losses do fall within Article 2.1.

Ground 1 – the cost of removing and decontaminating the cargo at Wilhelmshaven (Article 2.1(e))

84. Mr Kenny submitted that Conti’s claim to recover the cost of removing the cargo from the ship at Wilhelmshaven, handling it ashore and decontaminating it fell within Article 2.1(e), that is to say that it was a claim “in respect of the removal, destruction or the rendering harmless of the cargo of the ship”. He submitted that this conclusion is supported by *The Aegean Sea*, where a claim for dealing with pollution caused by cargo leaking from the ship was held to fall within Article 2.1(e) (see 52 col 2). Mr Smith, however, relied on the judge’s findings of fact which I have summarised at [49] to [51] above and submitted that this was a claim for costs incurred in connection with, and for the purpose of, repairing the ship, which is not subject to limitation. He submitted that it would be contrary to the decision in *The CMA Djakarta* for such a claim to be limitable.

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.
88. Although not in issue in the present case, it is notable that Article 2.1(d) (“Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked or stranded ...”) presupposes that there is damage to the ship. A claim falling within Article 2.1(d) is therefore almost inevitably a claim in respect of damage to the ship. But that does not prevent such a claim from being subject to limitation. If that is so under Article 2.1(d), there is no reason to impose a requirement that Article 2.1(e) applies only to claims which are not in respect of damage to the ship.
89. I do not accept that we are bound by the decision of this court in *The CMA Djakarta* to hold that such an additional requirement must be read into Article 2.1(e). *The CMA Djakarta* was concerned with Article 2.1(a) and 2.1(f). As already explained, it decided that a claim for damage to the ship itself does not fall within Article 2.1(a) because “the ordinary meaning of art 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” (see at [26]). It decided also that claims for losses consequential on such damage to the ship (for example, the cost of salvage, or to recover a general average contribution) “is still a claim in respect of damage to the ship and it cannot be brought within art 2.1(a) or

2.1(f)” (see at [29]). But this tells us nothing about whether such a claim is capable of falling within Article 2.1(e). That was not an issue in the case.

Ground 2 – the claims for removing and disposing of the firefighting water and the payments to national authorities (Article 2.1(f))

90. Mr Kenny submitted that Conti’s claims to recover the cost of removing the firefighting water from the ship and the payments made to national authorities to permit the ship to be towed to Wilhelmshaven were subject to limitation under Article 2.1(f). He submitted that the engagement of the salvors and bringing the ship to a safe port of refuge were measures taken by Conti (i.e. by a person other than the person liable) in order to avert or minimise loss or damage for which the person liable (i.e. MSC) may limit its liability, and that the cost of removing the firefighting water was a “further loss caused by such measures”.
91. On the judge’s findings these measures were taken primarily in order to enable the repair of the ship, which is not a loss for which MSC may limit its liability (*The CMA Djakarta*), although they were also necessary steps if the cargo was to be saved. The judge held that the application of Article 2.1(f) was limited to a case where the *sole* purpose of the measures taken was to mitigate loss for which the person liable may limit liability. Mr Kenny challenged that interpretation of the paragraph, contending that it introduced a concept (the sole purpose) which was not there.
92. I agree with the judge that Article 2.1(f), in contrast with Article 2.1(e), requires consideration of the purpose for which the measures in question were taken. That is inherent in the words “in order to avert or minimize loss”. But to insist that the avoidance of loss for which the person liable may limit liability is the sole purpose for which the measures were taken is probably too demanding a test. Many, if not most, human actions have more than one purpose. A test of “sole purpose” risks depriving a party of the ability to limit liability in circumstances where the object and purpose of the Convention suggest that limitation should be available, for example in circumstances where the main purpose of engaging salvors was to avert loss of the cargo, but an incidental purpose was to save the ship. In my judgment it is sufficient that the main or dominant purpose of the measures in question should be to avert or minimise loss for which the person liable may limit liability. That is a test which is familiar in maritime law. But it will not avail MSC in the present case, given the judge’s finding at [149] that it was at least an equal purpose of engaging the salvors, and they extinguished the fire, in order to avoid the loss of, and minimise damage to, the ship. For the same reason the claim to recover the payments to national authorities does not come within Article 2.1(f).

Ground 4 – consequential losses (Article 2.1(a))

93. Mr Kenny submitted that Conti’s claims for (a) the payments to national authorities, (b) the cost of discharging the cargo, (c) the removal and disposal of the firefighting water, and (d) the removal of the cargo waste, were claims for losses “consequential” on damage to the cargo on board, and were therefore subject to limitation under Article 2.1(a). I agree with Mr Smith, however, that in the light of the judge’s findings and the decision in *The CMA Djakarta*, this submission must be rejected.

94. The words “and consequential loss resulting therefrom” in Article 2.1(a) introduce a test of causation. The “consequential loss” must result from loss or damage to property which gives rise to a claim which is subject to limitation under this paragraph. In the present case, however, although the claims listed in [93] above would not have occurred if the cargo had not been damaged, on the judge’s findings they were primarily caused by the damage to the ship. Damage to the ship does not give rise to a claim which is subject to limitation, as held in *The CMA Djakarta*. Accordingly MSC is not entitled to limit under Article 2.1(a).

Disposal

95. For the reasons which I have given, I would dismiss the appeal. MSC is not entitled to limit its liability.

Lady Justice Falk:

96. I agree.

Sir Launcelot Henderson:

97. I also agree.