Neutral Citation Number: [2014] EWCA Civ 217

Case No: A3/2013/1927

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION,
ADMIRALTY COURT
THE HONOURABLE MR JUSTICE SIMON
CLAIM 2013 FOLIO 668

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2014

Before :

LORD JUSTICE RIMER
LORD JUSTICE BEATSON
and
LADY JUSTICE GLOSTER

- -

Between :

KAIROS SHIPPING LIMITED **THE STANDARD CLUB LIMITED**	**Appellants/ Claimants**
- and -	
(1) ENKA & CO LLC **(2) ALL OTHER PERSONS CLAIMING OR BEING ENTITLED TO CLAIM DAMAGES BY REASON OF THE FIRE ONBOARD THE M/V "ATLANTIK CONFIDENCE" ON OR AROUND 30 MARCH 2013 AND/OR THE SUBSEQUENT LOSS OF THE M/V "ATLANTIK CONFIDENCE" OFF MASIRAH ISLAND, ON OR AROUND 3 APRIL 2013**	**Respondents/ Defendants**

- -
- -

Mr Robert Thomas QC and Mr Thomas Macey-Dare (instructed by **Clyde & Co**) for the **Appellants/Claimants**
Mr Mark Jones (instructed by **Jackson Parton & Co**) for the **Respondent/Defendant, Cosmotrade SA**

Hearing dates: Wednesday 4th December 2013

- -

Approved Judgment

Lady Justice Gloster :

Introduction

1. This appeal raises the interesting question as to whether it is in principle possible to constitute a limitation fund under the International Convention on Limitation of Liability for Maritime Claims 1976 ("the 1976 Convention"), which is scheduled to the Merchant Shipping Act 1995 ("the 1995 Act"), by means of a guarantee in the form of a letter of undertaking ("LOU") provided by a protection and indemnity club ("P&I Club") ("a Club Lou").

2. In a judgment dated 21 June 2013 ("the judgment"), Simon J refused to grant a declaration to the effect that the First Appellant, Kairos Shipping Limited ("Owners"), owners of the MV "ATLANTIK CONFIDENCE" ("the Vessel"), and the Second Appellant, Owners' P&I Club, The Standard Club Europe Limited, were entitled to constitute a limitation fund under the 1976 Convention, by means of a guarantee in the form of a Club LOU.

3. The issue is one of considerable importance to the shipping industry, including P&I Clubs and others who provide insurance and reinsurance in respect of maritime claims. Because of concerns that had arisen in shipping circles about the consequences of the judgment, this court was provided with a helpful letter from the International Group of P & I Clubs, dated 8 November 2013. This letter explained the financial and practical benefits both for P&I Clubs, and for those who need to constitute limitation funds, of the use of guarantees, as opposed to cash deposits paid into court. The letter also informed the court that numerous countries throughout the world, including states which are parties to the 1976 Convention, and states which are not, readily accept Club LOUs as an acceptable method of constituting limitation funds. The judge did not have the advantage of this additional material at the date of the hearing before him.

4. The basis of the judge's decision was that, as a matter of law, a limitation fund can only be constituted in England and Wales by means of a payment into court. In coming to his conclusion, the judge found support in the views expressed in the relevant specialist practitioners' textbooks, which almost uniformly appeared to adopt this approach. However the judge expressed some misgivings about this result, as appears from the following passages from his judgment:

> "9. … It might seem surprising in today's world that it could be argued that a suitably framed guarantee in an appropriate amount from a creditworthy provider is not effective security, and therefore suitable to constitute a Limitation Fund, and none of the cargo parties has argued that it would not be. Nevertheless it seems to me that the Court must approach this as a question of principle.
>
> …
>
> 17. I hope from what I have said that I have made clear that consideration should be given to effecting a

> change in the law; and, in any event, since there is likely to be more than one view of the matter, I have decided to give permission to appeal."

5. The Appellants appeal against that decision, with the permission of the judge. They contend that, as a matter of law, a limitation fund may indeed be constituted in England and Wales by the production of a guarantee, provided only that the particular guarantee proffered is not unacceptable under UK legislation, and provided also that the guarantee is considered adequate by the English Court. They contend that these requirements are all satisfied here.

Background

6. The Vessel was a Handysize bulk carrier built in 1996. Early on the morning of 30 March 2013, she was on passage from Turkey to Oman carrying a cargo of steel products, when a fire broke out in her engine room. The crew were unable to control it and the Master ordered them to abandon ship. Fortunately, no-one was injured. As a consequence of the fire and/or explosions, the Vessel took on water and began to sink. Salvors were engaged to assist her but, before steps could be taken, she sank in deep water. Preliminary investigations suggest that the likely cause of the fire was a leak of lubricating or diesel oil igniting off a hot exhaust on a generator; and that the resulting ingress of water may have been caused by thermal stresses in the shell plating or damage to seawater pipes in the engine room.

8. Between 24 April and 10 May 2013, various parties obtained worldwide freezing injunctions against Owners under section 44 of the Arbitration Act 1996, in support of claims arising out of the loss of cargo on board the Vessel ("the claiming parties").

9. On 13 May 2013, Owners issued an Admiralty limitation claim in the Admiralty Court, seeking to limit their liability, if any, arising from the fire and loss of the Vessel in accordance with the 1996 Protocol to the Convention. The claiming parties were made defendants to that action. On the same day, Owners' solicitors wrote to the Admiralty judge, Teare J, asking for permission to constitute a limitation fund by provision of a Club LOU, as Teare J had previously ordered in *Daina Shipping Co v Mediterranean Shipping Co SA (The "Rena")* [2012] Folio 255, as noted at 2D-76.1 in Volume 2 of Civil Procedure 2012 ("the White Book"), p. 556.

10. However Teare J directed an oral hearing. That was apparently because the editorial comment in the White Book referred to above could be read as suggesting some inconsistency between treating a limitation fund as being constituted by a guarantee given by means of a Club LOU, and the terms of CPR 61.11(8). The application was listed to be heard before Simon J, at the same time as the return dates for the freezing injunctions. The Club applied for, and obtained, permission to be joined as a party at the hearing. Various claiming parties appeared at the hearing.

The 1976 Convention as enacted into UK law

11. A right for a shipowner to limit his liability in respect of certain claims according to the tonnage of his ship has been granted by United Kingdom statute for a long time, although the matter has increasingly been dealt with by international convention. Both the United Kingdom statutory history and the history of the international conventions

which preceded the 1976 Convention (namely the 1957 Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Ships ("the 1957 Convention") and the 1924 Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Ships ("the 1924 Convention")) were set out in detail by David Steel J in *CMA CGM S.A. Classic Shipping Co. Ltd* [2003] 2 Lloyd's Rep. 50. So far as the United Kingdom is concerned, the current United Kingdom statute which enacts that the provisions of the 1976 Convention shall have the force of law in the United Kingdom, is the 1995 Act. Section 185(1) of that Act provides as follows:

> "The provisions of the Convention on Limitation of Liability for Maritime Claims 1976 as set out in Part I of Schedule 7 (in this section and Part II of that Schedule referred to as "the Convention") shall have the force of law in the United Kingdom."

13. Chapter I of the Convention is entitled "The Right of Limitation". Article 1 provides that:

> "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."

14. Chapter III of the Convention is entitled "The Limitation Fund". The first article, Article 11, is entitled "Constitution of the fund". It provides as follows:

> "1. Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.
>
> 2. A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.
>
> 3. A fund constituted by one of the persons mentioned in paragraph (1)(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph (1)(a), (b) or (c) or paragraph 2, respectively.

15. Article 14, in the same chapter, provides:

> "*Governing law* Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted."

The relevant provisions of the CPR

16. The domestic English "rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith" contemplated by Article 14, include CPR 61.11 and paragraph 10 of the accompanying practice direction, Practice Direction 61 ("PD61"). These contain a number of provisions relating to the constitution of a limitation fund by means of a payment into court, but they contain no express reference to constituting a fund by producing a guarantee. Limitation claims are governed by CPR Part 61.11 and paragraph 10 of PD 61.

17. The relevant provisions of CPR 61.11 are the following:

> "(13) When a limitation decree is granted the court-
>
> (a) **may** –
>
> (ii) order the claimant to **establish** a limitation fund if one has not been **established** or make **such other arrangements for payment of claims** against which liability is limited.
>
> (18) The claimant **may constitute** a limitation fund by making a payment into court.
>
> (19) A limitation fund may be **established** before or after a limitation claim has been started.
>
> (20) If a limitation claim is not commenced within 75 days after the date the fund was **established**-
>
> (a) the fund will lapse; and
>
> (b) all money in court (including interest) will be repaid to the person who made the payment into court.
>
> (21) Money paid into court under paragraph (18) will not be paid out except under an order of the court." [Emphasis added.]

18. Paragraph 10 of PD61 provides as follows:

> "10.9 The fact that a limitation fund has lapsed under rule 61.11(20(a) does not prevent the **establishment** of a new fund.
>
> 10.10 Where a limitation fund is **established**, it must be-

> (1) the sterling equivalent of the number of special drawing rights to which the claimant claims to be entitled to limit his liability under the Merchant Shipping Act 1995; together with
>
> (2) interest from the date of the occurrence giving rise to his liability to the date of the payment.
>
> 10.11 Where the claimant does not know the sterling equivalent referred to in paragraph 10.10(1) on the date of payment into court he may-
>
> (1) calculate it on the basis of the latest available published sterling equivalent of a special drawing right as fixed by the International Monetary Fund; and
>
> (2) in the event of the sterling equivalent of a special drawing right on the date of payment into court being different from that used for calculating the amount of that payment into court the claimant may-
>
> (a) make up any deficiency by making a further payment into court …; or
>
> (b) apply to the court for payment out of any excess amount (together with any interest accrued) paid into court.
>
> 10.13 The claimant must give notice in writing to every named defendant of –
>
> (1) any payment into court specifying –
>
> (a) the date of the payment in;
>
> (b) the amount paid in;
>
> (c) the amount and rate of interest included; and
>
> (d) the period to which it relates; and
>
> (2) any excess amount (and interest) paid out to him under paragraph 10.11.2(b)." [Emphasis added]

The judge's approach

19. The judge's approach was to ask himself whether the incorporation of the 1976 Convention into UK law had changed the position under English law prior to the adoption of that convention. In paragraph 10 of his judgment he referred to the fact that, under the old law, limitation had been governed by section 503 of the Merchant Shipping Act 1894, as amended to reflect the 1957 Convention. He then went on to say:

> "That convention contained no guidance as to how and where a limitation fund was to be constituted, but left it entirely up to the domestic courts of each country: see Griggs, Williams & Farr, Limitation of Liability for Maritime Claims, 4th Ed (2005), pages 65-6. In England, the courts required a party wishing to constitute a Limitation Fund to make a payment into court: The question is whether the position has been changed by the 1976 Convention."

20. In paragraph 11 of his judgment he referred to three sources which he said were contrary to Owners' contention that a limitation fund could be constituted by a LOU:

> "In his skeleton argument Mr. Macey-Dare [counsel for Owners] has very properly drawn the court's attention to three pieces of material which are contrary to his argument: first, a passage in Griggs at p.69:
>
> "There is nothing in the MSA to indicate that this situation has changed."
>
> Second, a short passage in Fogarty, Merchant Shipping Legislation, second ed., 2004, para.15.183:
>
> "A guarantee not acceptable in the United Kingdom for purpose of constitution of fund. United Kingdom legislation does not provide for the acceptance of guarantee or other security in lieu of a cash payment into court for the purposes of constitution of a Limitation Fund."
>
> Thirdly, a decision in the Federal Court of Australia, *Barde A.S. v. Abb Power Systems* [1995] FCA 1602, where Sheppard J observed, at para.10:
>
> "I should say in passing that it is to be noted that the fund may be constituted either by deposit or by the production of a guarantee 'acceptable under the legislation of the State Party'. There is no such legislation in force in Australia and it would appear that the fund must be constituted by deposit."
>
> Mr. Macey-Dare might have added that other text books by other distinguished authors also cast doubt on the proposition that the fund can presently be constituted by a guarantee: see Jackson, The Enforcement of Maritime Claims, 4th ed., para.24.84, and Meeson & Kimbell, Admiralty Jurisdiction and Practice, 4th ed., para.8.1.40. However, he submits that these observations should not dissuade the court from adopting the course he advocates".

21. Having referred to counsel's arguments, he concluded at paragraphs 15 and 16 of his judgment as follows:

"15. Leaving aside whether a P&I Club guarantee should normally be considered adequate security, the real question is whether any guarantee is "acceptable under the legislation" of this country. It seems to me that Mr. Macey-Dare is driven to relying on three possible ways in which a guarantee could be "acceptable under the legislation". (1) It is acceptable under the legislation which enacted the 1976 Convention into English law, in other words the Merchant Shipping Act 1995. The difficulty with this argument is that it is circular. The 1995 Act gives the force of law to Article 11, but Article 11.2 is clearly looking at legislation which applies specifically to guarantees. (2) It is acceptable according to "rules relating to the constitution and distribution of a Limitation Fund and all rules and procedure in connection with therewith" within the meaning of Article 14 of the Convention, including the CPR. I am not persuaded that Article 14 assists since it does no more than make clear that the procedural matters, such as the form of the security, are for the laws of the state party, nor, and despite the skilful advocacy of Mr. Macey-Dare, am I persuaded that the CPR enables the court to direct that the fund can be constituted other than by payment into court. The CPR only contemplates that, if the owner decides to constitute a Limitation Fund and thereby obtains the protection of Article 13, this must be done by a payment into court. Furthermore, the Practice Direction PD 10.10.10 to 13 are entirely directed to the constitution of the fund by payment into court. (3) It is acceptable under the general body of English statute law affecting guarantees such as the Statute of Frauds. This might seem a more promising avenue. However, the words of Article 11.2 do not say "enforceable under the legislation" but "acceptable under the legislation". If such a change to the long-established previous practice were to be made then one would expect clear words. As Mr. Jacobs observed in para.11(ii) of his skeleton argument, there is nothing in the 1995 Act or CPR Part 61 to justify reversing the previous well established practice. I would add that there is nothing that makes the provision of a guarantee "acceptable under the legislation" of this country.

16. I have therefore come to the conclusion that without a specific statutory provision that a guarantee is acceptable the rule remains that a fund may only be constituted by making a payment into court. In coming to this conclusion I have had in mind the further objections in paras.8 to 11 of Mr. Jacobs's skeleton argument and the difficulties identified in making an interim declaration that they are entitled to constitute a Limitation Fund by the provision of a P&I Club guarantee which have been identified by Mr. Jones in para.13 of his skeleton argument."

The Appellants' case in summary

22. Before this Court, Mr Robert Thomas QC and Mr Thomas Macey-Dare, leading and junior counsel on behalf of the Appellants, in summary submitted follows:

i) The 1976 Convention was to be construed on its own terms, by reference to broad and generally acceptable principles of construction, and not by reference to pre-existing domestic rules of practice in the English courts prior to the incorporation of the convention into UK law: see *CMA CGM SA v Classica Shipping Co Ltd (The "CMA Djakarta")* [2004] EWCA Civ 114, [2004] 1 Lloyd's Rep 460, per Longmore LJ at paragraph 9 and the cases cited therein.

ii) On the proper construction of Article 11.2:

a) A person who was entitled to constitute a limitation fund in the territory of a State Party under Article 11(1) had a right to do so by producing a guarantee.

b) A State Party was entitled to enact domestic legislation which limited that right, by restricting the types of guarantee which were acceptable for that purpose; but it was not entitled to extinguish that right altogether by legislating that no guarantees were acceptable. Nor was it permitted to achieve the same result passively, by failing to legislate.

c) "Legislation" was not restricted to primary legislation.

d) "Acceptable" encompassed "enforceable".

iii) Article 14 gave a State Party the power to make and apply domestic "rules relating to the constitution and distribution of a limitation fund" and "rules of procedure in connection therewith", but that power was expressly "subject to the provisions of this Chapter" (i.e. Chapter III), including Article 11.2. On the proper construction of Article 14, therefore, a State Party was not entitled to make and apply domestic rules whose effect was to create a blanket ban on guarantees.

iv) The 1976 Convention, including Articles 11 and 14, had the force of law in England. Accordingly:

a) The Appellants' right under Article 11.2 to constitute a limitation fund in England by producing a guarantee could not be affected by the absence of specific primary legislation, of the type contemplated by the judge.

b) The same applied to the absence of specific subordinate legislation, including any provision of the CPR / practice direction, expressly permitting a fund to be constituted by means of a guarantee.

c) Any subordinate legislation, and any provision of the CPR / practice direction or rule of practice, which purported to have the effect of producing a blanket exclusion on guarantees, must be read, if possible,

as not having that effect; and if it could not be so read, it should be struck down as *ultra vires*.

v) In any event, CPR 61.11 and the accompanying practice direction, properly construed, did allow a party to constitute a limitation fund by producing a guarantee.

vi) Further or alternatively, the guarantee proffered by the Club in this case was acceptable, within the meaning of Article 11.2, under primary UK legislation applying specifically to guarantees, namely the Statute of Frauds.

vii) So far as the form of relief was concerned, all relevant parties had agreed that if the appeal was allowed the precise wording of the guarantee would be settled by the Admiralty judge.

The Respondents' case

23. The claiming parties are nominally Respondents to the appeal. Although Mr Mark Jones, counsel on behalf of one claiming party, Cosmotrade SA ("Cosmotrade"), served a written skeleton argument dated 21 November 2013 in respect of the appeal and appeared at the hearing, Cosmotrade did not oppose the appeal. Indeed it endorsed the Appellants' view that it would likely be to the benefit of the shipping industry as a whole were it to be possible, under English law, to constitute a limitation fund by the provision of an LOU. Mr Jones' submissions were directed at the form of the guarantee and the form of relief.

24. None of the other Respondents appeared or were represented at the appeal hearing.

Discussion and determination

25. In my judgment the judge was wrong to reach the conclusion which he did and to hold that a limitation fund could not be constituted by means of a guarantee, and in particular a Club LOU. The error in his analysis was to take as his starting point the proposition that he would have expected to find clear wording permitting the provision of a guarantee "if such a change to the long-standing previous practice were to be made", rather than focusing on the meaning and effect of Article 11.2. The judge's approach appears to have reflected the structure of the arguments before him.

26. In my view the correct starting point of the analysis is the construction of Article 11.2 - as incorporated into United Kingdom law by the 1995 Act - in its proper context.

27. The principles of construction, or interpretation, applicable to an international convention were summarised by Lord Hope in *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628, 656 at paragraphs 75-82. At paragraphs 76-79 he said:

> "76 We are concerned in this case with the meaning of words used in an international convention. The Convention must be considered as a whole, and it should receive a purposive construction: *Grein v Imperial Airways Ltd* [1937] 1 KB 50, 74-76 per Greene LJ; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279 per Lord Diplock. The ordinary and natural meaning of the words used in the English text in Part I of the

> Schedule provides the starting point. But these words must also be compared with their equivalents in the French text in Part II of the Schedule, as section 1(2) of the 1961 Act tells us that if there is any inconsistency the text in French shall prevail.
>
> 77 As the language was not chosen by English draftsmen and was not designed to be construed exclusively by English judges, it should not be interpreted according to the idiom of English law. What one is looking for is a meaning which can be taken to be consistent with the common intention of the states which were represented at the international conference. The exercise is not to be controlled by technical rules of English law or domestic precedent. It would not be right to search for the legal meaning of the words used, as the Convention was not based on the legal system of any of the contracting states. It was intended to be applicable in a uniform way across legal boundaries.
>
> 78 In situations of this kind the language used should be construed on broad principles leading to a result that is generally acceptable: see *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350 per Lord Macmillan; James *Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 152 per Lord Wilberforce. But this does not mean that a broad construction has to be given to the words used in the Convention. As Lord Phillips of Worth Matravers MR said in Miss Morris's case [2002] QB 100, 125, para 90, it is not axiomatic that the broad principle of "general acceptation" described in these cases militates in favour of a broad rather than a narrow interpretation of the phrase "any other bodily injury".
>
> 79 It is legitimate to have regard to the travaux préparatoires in order to resolve ambiguities or obscurities: *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 278 per Lord Wilberforce. But caution is needed in the use of this material, as the delegates may not have shared a common view. An expression by one of them as to his own view is likely be of little value if it was met simply by silence on the part of the other delegates. It will only be helpful if, after proper analysis, the travaux clearly and indisputably point to a definite intention on the part of the delegates as to how the point at issue should be resolved".

29. In *The CMA Djakarta, supra,* a case on the 1976 Convention, Longmore LJ also emphasised that, when construing the provisions of an international convention incorporated into English law, the court should adopt a broad, purposive approach. At paragraphs 9-12 he said:

> "General Approach

9. With due respect to David Steel J and Thomas J, who are both extremely well versed in this area of law, I venture to think that they have started from the wrong point. Now that Merchant Shipping Act limitation is governed by an international convention which is, in its own words, incorporated into United Kingdom law, **the task of any court is to construe the Convention as it stands without any English law preconceptions.** It has been said on many occasions, in reliance on the dicta of Lord Macmillan relating to the Hague Rules in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350, that **the interpretation of international conventions must not be controlled by domestic principles but by reference to broad and generally acceptable principles of construction,** see *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 D-E, *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 272E, 282A and 293C, and *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628, 656 para. 78.

10. It may be difficult to know in any given case what are broad and generally acceptable principles, but some such principles are undoubtedly enshrined in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which was ratified by the United Kingdom on 25th June 1971 and came into force on 27th January 1980 on ratification by the required number of signatories. It provides:-

"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 connexion with the conclusion of the treaty;

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

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."

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.

Context, object and purpose

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…..

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.

Ordinary meaning

> 12. It is important not to compartmentalise the approach to the Convention; it must be interpreted as a whole but one inevitably has to start at the beginning." [My emphasis.]

30. The words of Article 11.2, incorporated into United Kingdom law, expressly provide that:

> "a fund may be constituted, **either** by depositing the sum, **or** by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority." [My emphasis.]"

31. The ordinary meaning of the words could not be clearer. The "either … or" structure of this provision indicates that the party constituting the fund has a choice, i.e. whether to deposit the sum or to produce a guarantee. The choice of which method to employ is that of the party constituting the fund. As Mr Thomas submitted, a State Party would not be entitled to impose a blanket exclusion on all guarantees, since the 1976 Convention expressly provides for the party constituting the fund to have a choice. Moreover, whilst Article 14 provides that:

> "the rules relating to the Constitution and distribution of the limitation fund, and all the rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted"

that provision is "Subject to the provisions of this Chapter", which of course includes Article 11.2, which expressly confers a right to constitute a fund by production of a guarantee.

32. The provision imposes two conditions on the right to constitute a fund by producing a guarantee: the guarantee must be: (i) "acceptable under the legislation of the State Party"; and (ii) "considered to be adequate by the Court or other competent authority".

33. In relation to the first requirement, the judge appears to have taken the view (see paragraph 15 of his judgment) that there had to be primary legislation, or a provision in the CPR derived from primary legislation, specifically, or expressly, providing that a guarantee was "acceptable" *for the purposes of the 1995 Act*. He also concluded that the fact that the guarantee offered by the Appellants complied with the requirements of the Statute of Frauds, did not mean that it was "acceptable" under the legislation of the United Kingdom for the purposes of Article 11.2 of the 1976 Convention; that was because, in his view, the Statute of Frauds was concerned with whether a guarantee was "enforceable" which, he concluded, was different.

34. I disagree with both these conclusions. I do not consider that there is any ambiguity about the effect of the wording used in Article 11.2 in this respect. There is no additional requirement that there should be specific legislation expressly defining what is "acceptable" for the purposes of the 1995 Act.

35. The ordinary meaning of the phrase "acceptable under the legislation of the State Party" does not predicate, or require, specific additional enabling legislation, expressly defining what is "acceptable" for the purposes of the 1995 Act. It simply means that the guarantee must be regarded as "acceptable" under any relevant United Kingdom legislation. “Acceptable” in this context does not need to be construed as having any technical meaning. It could equally mean a guarantee which was not regarded as “unacceptable” under any United Kingdom legislation; in other words, simply a guarantee that did not contravene any relevant statutory provision. A guarantee which satisfied the requirements of the Statute of Frauds - because the guarantee itself, or some note or memorandum of it, was in writing and signed by the guarantor or his authorised agent - would be likely to be regarded as "acceptable" as a guarantee for the purposes of the 1995 Act (at least, under English and Welsh legislation), because it was enforceable. Conversely, an oral guarantee, which did not satisfy the requirements of the Statute, and was therefore not enforceable, clearly would not be "acceptable" for the purposes of the 1995 Act.

36. In particular circumstances, in order to qualify as "acceptable", a guarantee might also have to satisfy other requirements of United Kingdom legislation. For example, if the guarantee were one given by an institution in the course of carrying on insurance business, then, in order to be "acceptable", the guarantee would also have to be provided by a person who was duly authorised by The Prudential Regulation Authority under the relevant provisions of the Financial Services and Markets Act 2000 to carry on insurance business of that type in the United Kingdom (as indeed Owners’ P&I Club is in the present case). But the fact that the Statute of Frauds is directed at the circumstances in which a court action can be brought to enforce a guarantee, does not in my judgment preclude the statutory provision from being used as a reference point for “acceptability”.

37. Indeed, in my judgment, even on the hypothesis that there were no statutory provisions in English and Welsh legislation expressly governing the form of guarantees, restricting their enforceability or imposing restrictions as to who was able to issue them, a guarantee would nonetheless be "acceptable" for the purpose of the 1995 Act, provided it did not contravene the provisions of any statute.

38. In drawing a distinction between “acceptable” and “enforceable”, the judge, in my view, adopted too narrow and technical and approach to the construction of a word of wide and general application, which, as the authorities referred to above demonstrate, has to be construed purposively in the context of the aim and intention of the 1976 Convention. Conversely, the construction which I conclude is the correct one gives effect to the general purpose and intention of the 1976 Convention; namely that the provision of international trade by way of sea-carriage should be encouraged by facilitating the ability of owners, charterers, managers and operators to limit their liability by the provision of either a deposit of a particular sum or by producing a guarantee.

39. In this context it is also relevant to note that, under the 1957 Convention (the immediate precursor to the 1976 Convention), whilst provision was made that, when the aggregate of claims exceeded the limits of liability, the total sum representing such limits might be constituted as one distinct limitation fund, the 1957 Convention gave no guidance as to how and where the fund was to be constituted. This was all left to the domestic law of each country. In contrast, the 1976 Convention, as already

stated, expressly provides in Article 11.2 that a fund may be constituted by producing a guarantee, and indeed that Article, and Article 12, set out detailed guidelines in relation to the constitution and distribution of the fund. Again, in my judgment, that deliberate change supports what I regard as the correct construction of Article 11.2.

40. So far as the second condition of adequacy is concerned, the wording of the provision presents no problem in this context. It simply contemplates that a guarantee constituting a limitation fund will need to be "considered to be adequate" by the court or other competent authority. In the absence of any defined criteria in the CPR, this merely means that a court approving the constitution of the limitation fund will need to be satisfied that the guarantee provides "adequate" security for the fund. Thus the court will need to be satisfied as to the financial standing of the guarantor, the practicality of enforcement and as to the terms of the guarantee instrument itself. That is the type of question which judges of the Admiralty Court or the Commercial Court consider every day when deciding issues such as the adequacy of a cross-undertaking in damages.

41. In my judgment, the relevant cases and passages from specialist text books, to which Mr Thomas referred the court, on proper analysis provide no, or at best very limited, support for the judge's conclusion. I am of course conscious that this court has not had the benefit of oral argument from any party supporting the judge's conclusion, although the court did have the benefit of a written skeleton argument prepared for the first instance hearing by Mr Nigel Jacobs QC, leading counsel who appeared at that stage on behalf of Enka & Co LLC, one of the claiming parties, in which he argued in support of the proposition that, in the absence of express statutory provision in legislation or in the CPR, it was not possible to constitute a limitation fund by the provision of a guarantee. However, as Mr Thomas submitted, an analysis of the relevant cases and textbooks shows that in fact they do not give adequate consideration to relevant issues of construction under the 1976 Convention.

42. The authorities and specialist text books to which we were referred were the following:

i) *Barde AS v Abb Power Systems* [1995] FCA 1602 (Federal Court of Australia) was a limitation action under the Australian Limitation of Liability for Maritime Claims Act 1989, which incorporated the 1976 Convention, save for Articles 2(1)(d) and (e), and gave the Convention the force of law in Australia. In that case, Sheppard J expressed the view, *obiter* and apparently without argument to the contrary, that a fund could not be constituted in Australia by means of a guarantee:

> "I should say in passing that it is to be noted that the fund may be constituted either by deposit or by the production of a guarantee "acceptable under the legislation of the State Party". There is no such legislation in force in Australia and it would appear that the fund must be constituted by deposit. There was at one stage some question about this but, as I understand the final position taken by counsel for the applicant, there is no issue about his client's being obliged, if a fund is to be constituted, to deposit money in order to establish it."

In the absence of full argument on the issue, the authority is of little assistance. Nor is the fact that counsel took the pragmatic view that his client would in the event constitute the fund by paying the relevant sum into court.

ii) In *Schiffahrtsgesellschaft MS "Merkur Sky" mbH & Co KG v MS Leerort NTH Schiffahrts GmbH & Co KG (The "Leerort")* [2001] EWCA Civ 1055, [2001] 2 Lloyd's Rep 291, Lord Phillips MR summarised the procedure in a limitation action under the old RSC Order 75 in terms which assumed that the fund would be constituted by a payment into court. At paragraph 41 he said:

> "The effect of these rules can be summarized as follows: … (iii) All known claimants on the fund, i.e. named defendants and those described generically, had to be given notice of the payment into Court of the limitation fund. …"

RSC Order 75 r 35A was entitled "Limitation action: payment into court" and provided:

> "The plaintiff may constitute a limitation fund by paying into court the sterling equivalent of the number of special drawing rights to which he claims to be entitled to limit his liability under the Merchant Shipping Act 1979 [the original statute incorporating the 1976 Convention into UK law] together with interest thereon from the date of the occurrence giving rise to his liability to the date of payment into court."

Like CPR Part 61, RSC Order 75 contained no express reference to constituting a fund by producing a guarantee. However, the relevant point did not arise as an issue in the case, and there does not appear to have been any argument on the matter.

iii) *Newcastle Port Corp v Pevitt (The "Robert Whitmore")* [2004] 2 Lloyd's Rep 47 (Supreme Court of New South Wales) was another case under the Australian 1989 Act. In that case, Palmer J granted an unopposed application that the limitation fund should be constituted by means of a guarantee. He said:

> "48. During the course of the hearing, Mr McHugh gave on behalf of the Plaintiff a guarantee for the purpose of constituting a limitation fund under Article 11.2. Mr Roberts did not dispute that that guarantee was sufficient and the parties then agreed that the calculation of the fund would be determined under Article 8 by reference to the exchange rates fixed by the Reserve Bank as at 4.00pm on that day, that is, 29 August 2003.
>
> 51. The orders which I propose to make are as follows:
>
> - there will be a declaration that the Plaintiff is entitled to limit its liability arising out of the collision, in accordance with paragraph 1 of the Summons;

- there will be an order that a limitation fund be constituted by the guarantee given by the Plaintiff on 29 August 2003; …"

Again, there appears to have been no argument on the point and it does not appear that the previous decision in *Barde* was cited.

iv) In Griggs, Limitation of Liability for Maritime Claims (*op.cit.*) there are two relevant passages. The first is the commentary on Article 14 at page 65 which is in the following terms:

"Article 2 of the 1957 Convention provided that when the aggregate of claims exceeded the limits of liability the total sum representing such limits might be constituted as one distinct limitation fund. However the 1957 Convention gave no guidance as to how and where the fund was to be constituted. This was all left to the domestic law of each country. The 1976 Convention, on the other hand, provides in Articles 11 and 12 detailed guidelines of the constitution and distribution of the fund and it is only whether guidelines are not specific to certain situations that reference is to be made to the national law of the State Party where the fund is constituted …"

The second relevant passage is the commentary on Article 11 (2) at page 69, which is in the following terms:

"Prior to the coming into force of the 1976 Convention, the law of England and Wales did not allow for constitution of a fund other than by a cash deposit and there is nothing in the 1995 MSA to indicate that this situation has changed."

The editors of Griggs cite *Barde* and *The Robert Whitmore* elsewhere in their work, at pages 174 and 176 respectively, without commenting on the inconsistency between them. Again, no reasoning is provided by the editors in support of the latter view, and there is no discussion of the effect, if any, of the changes referred to at page 65.

v) Other textbooks contain similar statements, but again without any analysis of the issue. Fogarty, Merchant Shipping Legislation, 2nd Ed (2004) §15.183 states:

"Guarantee not acceptable in United Kingdom for purpose of constitution of fund. United Kingdom legislation does not provide for the acceptance of guarantee or other security in lieu of a cash payment into court for the purposes of constitution of a limitation fund."

Likewise, Jackson, The Enforcement of Maritime Claims, 4th Ed (2005) §24.84, in a section headed "Procedure and practice in English law 'Limitation actions'" does not address the question of guarantees, but simply states:

> "The fund is established by paying into court the amount of the liability as limited and interest at the set rate running from the date of the occurrence giving use to the liability to the date of payment in."

Meeson & Kimbell, Admiralty Jurisdiction and Practice, 4th Ed (2011), §8.140, in a section headed "The mechanics of constituting the fund", states, again without addressing the guarantee issue:

> "In order to constitute a limitation fund in England, the claimant has to pay into court the sterling equivalent of the number of S.D.R. to which he claims to be entitled to limit his liability, together with interest at the prescribed rate on that amount from the date of the occurrence to the date of the payment into court."

vi) In *Daina Shipping Co. v MSC Mediterranean Shipping Company S.A. ("The Rena")* [2012] Fo. 255 unreported, Teare J granted an unopposed application permitting a Club, The Swedish Club, to establish a limitation fund by the issue of a LOU in an approved form. The judge granted the application on paper, without hearing oral argument, and he did not give a reasoned judgment.

vii) Note 2D-76.1 in the White Book 2013, Vol. 2, page 556, headed "Constituting a limitation fund" states:

> "Although CPR 4.61.11(18) states that a claimant may constitute a fund by making a payment into court the Admiralty Judge, Teare J., has recently held that a limitation fund could be constituted by a guarantee contained in a letter of undertaking to the court provided by a well-known foreign-based Protection and Indemnity Insurer, see *Dania [sic] Shipping Co. v MSC Mediterranean Shipping Company S.A.* [2012] Fo. 255 unrep."

This note led Teare J to express doubts about the correctness of his decision in *The Rena* and to refer the present application into court.

43. As Mr Thomas submitted, none of these authorities or textbooks contains any real analysis of the guarantee issue. *Barde*, Griggs and Fogarty all suggest that "legislation" in Article 11.2 of the 1976 Convention means specific (primary) legislation enacted in order to make guarantees acceptable as a means of constituting a limitation fund. Griggs approaches the issue by asking whether the 1995 Act contains anything to alter the position under the old law, rather than by focusing on the meaning and effect of Article 11.2. As I have already explained, I consider that such an approach to the construction of Article 11.2 is wrong.

44. Nor, contrary to the judge's view, do I consider that it is necessary to find something in CPR Part 61 or in PD61 expressly reversing "the previous well-established practice". The change has been brought about by the express words of Article 11.2 which confer the right to constitute a limitation fund by way of a guarantee.

45. Moreover, although CPR Part 61 and PD61 only expressly contemplate the provision of a limitation fund by means of a payment into court, there is nothing in either the rules or the Practice Direction which precludes the constitution of a limitation fund by means of the production of a guarantee. Indeed, if and in so far as they purported to do so, they would in my view be *ultra vires* as contrary to the provisions of primary legislation. They could not operate to override section 185 of the 1995 Act and Article 11.2 of the 1976 Convention.

46. Thus, for example, CPR 61.11 Rules (1) to (17) and (19) are perfectly consistent with a fund being established by means of a guarantee as well as by payment into court. Although CPR 61.11 (18) provides "The claimant *may* constitute a limitation fund by making a payment into court…", the use of the word "may" clearly does not exclude the guarantee method.

47. Again, whilst the machinery stipulated in PD61 paragraphs 10.1 – 10.18 is to a large extent based on the premise that the fund will be constituted by means of a payment into court – see for example the provisions of 10.11, 10.12 and 10.13 - there is nothing which prohibits constitution of a limitation fund by means of a guarantee. The note at 2D-115 that "any person wishing to constitute a limitation fund *must* pay into court of fund constituted in accordance with section 185 and Schedule 7 to the Merchant Shipping Act 1995, together with interest thereon…" is in my view simply wrong.

48. Mr Thomas made certain submissions by reference to the use of the words "constitute" and "establish" respectively in CPR 61.11. He pointed out that sub-rule (18) is the only provision in CPR 61.11 or the practice direction that uses the word “constitute” – the term which appears in Article 11 of the 1976 Convention; and that a number of provisions in CPR 61.11 and PD61 refer to a fund being “established” – a term that was not to be found in Article 11. He submitted that all of these provisions could be read consistently with Article 11.2 and with each other, if “establish” was read as meaning “constitute by payment into court”, and “constitute” was given the wider meaning that it has in Article 11.2, so that it covered both payment into court and provision of a guarantee. I myself was not persuaded by this linguistic analysis. In any event, I do not consider that it is a necessary building block for the purposes of reaching my conclusion as to the correct construction of article 11.2.

49. Finally I should mention that some support (if needed) for the proposition that Article 11.2 is indeed intended to give persons the choice of constituting a limitation fund by means of the production of a guarantee is to be found in the *Travaux Préparatoires* of the 1976 Convention. These reveal that the draughtsmen of the 1976 Convention clearly contemplated that guarantees would be a possible, and indeed the normal, way to constitute a fund. For example:

    i) The commentary to the Article 11 of the Hamburg Draft Convention, which was in materially similar terms to the final version in the 1976 Convention, states (page 290):

        “The purpose of the rule is to induce the person liable to put up security at an early date in cases where it is anticipated that limitation of liability will have to be invoked by the

> constitution of a fund. **Normally the security which is being put up (guarantees) does not carry interest**, and the actual interest payable from the constitution of the fund until payment is made must be determined by national law." [My emphasis.]

ii) The Swedish written proposals for the 15th Meeting of the Diplomatic Conference on 10 November 1976 included a proposed new paragraph 3 to be included in Article 11, dealing with interest. The Swedish delegation explained the working of the proposed new paragraph 3 as follows (pages 292-3):

> "… The question of interest should be dealt with in the Convention. It is submitted that it should be done in the following manner. If the Fund is constituted in cash, the competent authority would presumably be - or should at least be - under an obligation to deposit the money in such a way that interest on the sum accrued until the Fund is being distributed. **Consequently, if the fund instead constitutes a guarantee (which normally is the case)**, this guarantee should also cover interest from the day of the constitution of the fund until it has been distributed".

iii) The British delegation apparently shared the view that guarantees were to be an acceptable and usual way to constitute a limitation fund under the 1976 Convention. At the meeting on 10 November 1976, the UK's representative, Mr Mallinson, said that his delegation would have supported the Swedish delegation's proposed new paragraph 3, but would not press the matter (page 295). There was no suggestion that the UK delegation considered that guarantees would not be a permissible method of constituting a fund in England.

50. However, since in my view there is no ambiguity in the wording of either Article 11.2 or section 185, recourse to the provisions of the *Travaux Préparatoires* is no more than confirmatory.

Disposition

51. For the above reasons, I would allow this appeal and declare that, as a matter of law, Owners are entitled to constitute a limitation fund under the 1976 Convention, by means of the production of a guarantee. As agreed prior to the hearing by all relevant parties, if and so far as is necessary, detailed consideration of the adequacy of the LOU offered by The Standard Club Europe Limited, will be dealt with by the Admiralty Court.

52. I see no reason to grant merely an interim declaration. The declaration is a final declaration in relation to a party's entitlement at law.

Beatson LJ:

53. I agree.

Rimer LJ:

54. I also agree.