Neutral Citation Number: [2008] EWHC 3002 (Admlty)

Case No: 2007 FOLIO 185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2008

Before :

MR.JUSTICE TEARE

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Between :

(1) METVALE LIMITED — **Claimants**

(2) METVALE LIMITED PARTNERSHIP

- and -

(1) MONSANTO INTERNATIONAL SARL — **Defendants**

(2) ALL PERSONS CLAIMING AND/OR BEING ENTITLED TO CLAIM DAMAGES IN RESPECT OF LOSS DAMAGE OR EXPENSE RESULTING FROM OR ARISING OUT OF THE STRUCTURAL DAMAGE SUSTAINED BY AND/OR WATER INGRESS INTO AND/OR THE INTENTIONAL BEACHING OF THE "MSC NAPOLI" DURING SEVERE WEATHER ON AND AFTER 18 JANUARY 2007, HER INTENTIONAL BEACHING TAKING PLACE ON 20 JANUARY 2007

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Nigel Jacobs QC (instructed by **Fishers**) for **Hapag-Lloyd A-G**
Peter Ferrer (instructed by **Jackson Parton**) for **H. Stinnes Linien GmbH**

Hearing dates: 5 November 2008

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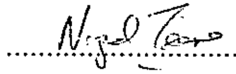
Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



MR.JUSTICE TEARE

Mr. Justice Teare:

1. In January 2007 the MSC NAPOLI, a large container vessel, suffered damage in heavy weather and was beached on the south coast of England. That casualty has given rise to considerable claims against the owners of MSC NAPOLI ("the Claimants") in excess of £100m. On 27 February 2007 the Claimants constituted a limitation fund ("the fund") under the 1976 Limitation Convention ("the convention") in the sum of £14,710,000. On 31 July the court made a General Limitation Decree.

2. On 13 March 2008 the Admiralty Registrar ordered the trial of two preliminary issues:

   i) Whether Hapag-Lloyd AG ("HPL") and Stinnes Linien GmbH ("Stinnes") are shipowners for the purposes of Article 1 of the Convention on Limitation of Liability for Maritime Claims 1976 ("The Convention") and are entitled to limit their liability under the Convention and under the Merchant Shipping Act 1995.

   ii) Whether, if the answer to (i) is yes, the limitation fund constituted in this action is deemed to be constituted by HPL under and for the purpose of the Convention and under the Merchant Shipping Act 1995.

3. This is the trial of those preliminary issues. The second issue does not mention Stinnes but I assume that the question raised also applies to them.

4. HPL were slot charterers of the vessel from Mediterranean Shipping Co. ("MSC") under a slot charter agreement dated 29 August 2006. HPL issued its own bills of lading or seaway bills in respect of 172 laden containers. The bills provided for German law and jurisdiction. Stinnes were also slot charterers of the vessel from MSC pursuant to a slot charter agreement dated 15 October 2006. Stinnes issued 24 bills of lading which also provided for German law and jurisdiction.

5. Claims have been notified against HPL and Stinnes by the holders of the bills issued by HPL and Stinnes. HPL and Stinnes have lodged claims against the fund (by way of ADM20 forms) in respect of their claims for an indemnity in respect of cargo claims brought against them, the loss and damage of their own containers, general average and salvage claims and certain transhipment claims.

6. Most of the holders of bills issued by HPL and Stinnes have lodged claims against the fund by way of ADM20 forms. A very small number of claimants have instructed German lawyers but none has issued proceedings in Germany. Extensions of time have been granted by HPL until 20 January 2009.

7. No party has sought to challenge HPL's and Stinnes' right to limit. However, in the event that HPL and Stinnes are entitled to limit their liability and the fund is deemed to have been constituted by them then the German courts will be asked to direct enforcement of any claims brought in Germany against HPL and Stinnes to the fund. It is therefore necessary that this court give careful consideration to the claims of HPL and Stinnes to limit their liability because its decision will or may affect claimants in the German courts.

The Convention

8. The most material provisions of the convention are as follows:

> **"Article 1: Persons entitled to limit liability"**
>
> 1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.
>
> 2. The term "shipowner" shall mean the owner, charterer, manager or operator of a seagoing ship.
>
> ....
>
> **Article 2: Claims subject to limitation**
>
> 1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
>
> > (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
>
> ....
>
> **Article 9: Aggregation of claims**
>
> 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.
>
> 2. The limits of liability determined in accordance with Article 7 shall apply to the aggregate of all claims subject thereto

which may arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Article 1 in respect of the ship referred to in Article 7 and any person for whose act, neglect or default he or they are responsible.

....

Article 11: Constitution of the Fund

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.

Article 13: Bar to other actions

1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such a claim against any other assets of a person by or on behalf of whom the fund has been constituted."

The first preliminary issue

9. The first issue to be determined is whether HPL and Stinnes are shipowners within the meaning of Article 1(2) of the Convention. The definition of shipowner includes charterer. HPL and Stinnes are slot charterers and therefore claim to be shipowners within the meaning of article 1(2).

10. It appears from *Legal Issues Relating to Time Charterparties, Chapter 14 on Containerisation, slot charters and the law* by Christopher Hancock QC, that the concept of a slot charter was developed in the late 1960s. They are now very common. HPL, for example, has slot charter agreements with most of the world's largest container ship operators and owners.

11. BIMCO (the Baltic and International Maritime Council) has described a slot charter in these terms:

> "The feature of a slot charterpary as a contract of carriage is unique in the sense that, whereas the slot charterparty is neither a time charterparty not a voyage charterparty, it bears some similarity to both types of contract. As such, a slot charterparty can be said to be a hybrid type of contract. It may be mentioned that, as distinct from a time charterparty when the entire vessel is being chartered, the slot charterers are only hiring space on a vessel and they are therefore not acting as operators as under a time charterparty and usually have no control over the operation of the vessel."

12. HPL's slot charter agreement with MSC is contained in an Implementing Agreement dated 29 August 2006. It describes MSC as the slot provider or vessel provider and HPL as the slot charterer. A slot is defined as the space on any vessel for the stowage of containers. Clause 2, Geographic Scope, and clause 3, The Service, provide that the agreement applies to MSC's service between certain ports in North West Europe and the UK on the one hand and certain ports in South Africa on the other hand. Clause 4.1 provides that MSC shall charter to the Slot Charterer a total slot allocation of 300 slots or 4,200 tonnes per vessel voyage leg, whichever is used first. Clause 7.1 provides that the slot charterer will pay "slot charter hire" in respect of all slots used or not used. The rate is fixed for 36 months. Clause 25 provides that the agreement is governed by English law. A form of slot charterparty is annexed to the Implementing Agreement. Clause 13.1 provides for the charterers to issue bills of lading for goods occupying the slots.

13. Stinnes' slot charter agreement with MSC is in the same form though some details (for example duration) are different.

14. Thus it appears that HPL's and Stinnes' slot charter agreements with MSC have some features in common with a time charter. They last for a period of time and hire is paid for the use of cargo carrying capacity. It is not however comparable to a time charter in that the charterer does not direct the vessel where to go. Clause 5.1 of the Implementing Agreement provides that the itinerary of each voyage shall be as mutually agreed. In this respect it is more akin to a voyage charter or consecutive voyage charter.

15. The manner in which the convention should be interpreted has been described by the Court of Appeal in *CMA CGM v Classica Shipping* [2004] 1 Lloyd's Rep. 460 at paragraph 10 per Longmore LJ.

> "..........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 preparatoires and the circumstances of the conclusion of the convention. ....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."

16. Article 1(2) defines shipowner as including charterer. It is easy to see why. The object or purpose of the convention is to encourage the provision of international trade by way of sea carriage; see *CGM v Classica Shipping* at paragraph 11. The convention encourages such trade by limiting the liabilities which arise on a distinct occasion. Such liabilities obviously include cargo claims. If charterers who had issued bills of lading as carriers were not within the definition of shipowner cargo claimants could direct their claims at the charterers and so avoid the limit on a shipowner's liability. The charterers would have a claim against the shipowner but he would be able to limit his liability, thus leaving the charterers to bear the excess of the cargo claim over the limit. The inclusion of charterers within the definition of shipowners ensures that this does not happen. Thus in *CGM v Classica Shipping* it was said (at paragraph 16) that "the main (if not the sole) purpose of according a charterer the right to limit his liability must have been to enable him to limit his liability to a cargo owner in just the same way as a shipowner had previously been able to limit his liability".

17. It is clear from *CGM v Classica Shipping* that charterer in Article 1(2) includes a time charterer. Indeed, the ordinary meaning of the word charterer is apt to include any type of charterer, whether demise, time or voyage charterer. There is no reason why it should not also include a slot charterer. Standard text books refer to slot charters when discussing types of charters; see *Voyage Charters* 3rd.ed. para.1.1 and *Scrutton on Charterparties* 21st.ed. Article 30. There is good reason for a slot charterer being within the definition. Were slot charterers not within the definition, slot chartering, which is an established and, to judge from its growth, an efficient way of organising the carriage of goods, would or might fall into disuse. A slot charterer's inability to limit liability would not encourage the provision of international trade by way of sea carriage, which was the object and purpose of the convention.

18. The Court of Appeal in *CGM v Classica Shipping* expressly left open the question whether "charterer" included a slot charterer; see paragraph 18. It was suggested by counsel in that case that it cannot have been intended that a slot charterer could limit his liability since "it would be absurd that his limit would have to be calculated by reference to the whole tonnage of the vessel when he had never been contracted to have that tonnage available to him". In *The Law and Practice of Admiralty Matters* by Derrington and Turner attention is drawn at paragraph 10.44, though with no enthusiasm, to a literal reading of the phrase "charterer of a ...ship" which might suggest that the definition did not include the charterer of a part of a ship.

19. I do not regard either of these points as compelling. As to the first point the limit of liability is a limit in respect of the aggregate of all the liabilities of those within the definition of shipowner arising on a distinct occasion. There may thus be several persons seeking the benefit of that single limit; eg the registered owner, the time charterer and several slot charterers. There is therefore nothing absurd in a slot charterer being able to limit by reference to a limit calculated by reference to the whole tonnage of the vessel. As to the second point a literal meaning must give way to a purposive construction; and the latter construction, for the reasons already given, points to a slot charterer being within the definition of charterer. In any event, it was held in *The Tychy* [1999] 2 Lloyd's Rep. 11 that a slot charterer was within the phrase

"charterer of......the ship" in the Supreme Court Act 1981, section 21(4)(b), relating to the arrest of ships. Clarke LJ saw no difficulty in describing a charterer of part of a ship as the charterer of the ship; see p.22 col.2.

20. Both of the above points are mentioned in *Limitation of Liability for Maritime Claims* by Griggs, Williams and Farr 4th.ed. at p.11. The authors prefer the view that a slot charterer is able to limit as being within the definition of shipowner. However, they say that the *travaux preparatoires* to the convention suggest that those who drafted the convention intended to restrict the right to limit to those who controlled the whole of the ship. In the light of that suggestion *The Travaux Preparatoires of the LLMC Convention 1976 and of the Protocol of 1996* published by the Comite Maritime International in November 2000 and edited by Francesco Berlingieri was studied by counsel. Charterers had been given the benefit of the right to limit in the 1957 Convention. At that time slot charterers were probably not known but by 1976 they probably were known. But no discussion of the meaning of charterers was found in the *travaux preparatoires*. The discussion centred on persons not included in the 1957 Convention. Those persons were "contractors", such as owners, shippers and receivers of cargo, persons rendering services in the loading, stowing or discharging of the ship and salvors; see pp.33-34. It was agreed that only salvors be added to the list of persons entitled to limit. At a later stage in the discussions the Polish and Irish delegates proposed that any person rendering services in direct connection with the navigation and management of the ship be entitled to limit. These proposals were rejected; see pp.40-41. No support for the suggestion made in *Limitation of Liability for Maritime Claims* by Griggs, Williams and Farr 4th.ed. at p.11 was found.

21. I have therefore concluded that, in accordance with the ordinary meaning of the word charterer and in the light of the evident object and purpose of the convention, a slot charterer is within the definition of shipowner and therefore entitled to limit his liability.

<u>The second preliminary issue</u>

22. The second issue is whether the fund is deemed to be constituted by HPL and Stinnes.

23. Pursuant to Article 11(3) of the convention a fund constituted by one of the persons mentioned in Article 9 or his insurer shall be deemed constituted by all persons mentioned in Article 9. The fund was constituted by the Claimant. The Claimant is the owner of a seagoing ship, MSC NAPOLI, and is therefore a person mentioned in Article 1(2) and accordingly a person mentioned in Article 9. HPL and Stinnes, being the charterers of MSC NAPOLI, are persons mentioned in Article 1(2) and accordingly persons mentioned in Article 9. It follows that the fund is deemed to be constituted by HPL and Stinnes.

24. Whilst that is clear, there is no clarity as to whether the person who has put up the fund is entitled to any form of contribution from those who take the benefit of the fund as "shipowners". The convention does not deal with that matter, at any rate expressly. Whether there is any right to contribution or restitution may have to depend on the general law.

<u>Conclusion</u>

25. My answer to both preliminary issues is yes.