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**IN THE SUPREME COURT OF TONGA  
ADMIRALTY JURISDICTION  
NUKU'ALOFA REGISTRY**

CV 68 of 2019

BETWEEN:

**DS VENTURE LIMITED**

A duly registered Company in Malta having its registered office at 171 Old Bakery Street, Valletta, Malta, carrying on business as a shipowner

Plaintiff

AND

**TONGA CABLE LIMITED**

A company listed as a Public Enterprise under the Public Enterprises Act having its registered office at Vuna Road, Nuku'alofa, Tongatapu, Tonga

Defendant

AND

All persons claiming, or being entitled to claim, for any loss and/or damage arising in any way from damage to the Tongan- Fiji and Tongan domestic cables alleged to have been caused by the anchor of the DUZGIT VENTURE on its entry into the port of Nuku'alofa, Tonga on 20 January 2019.

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**PLAINTIFF'S APPLICATION FOR LIMITATION OF LIABILITY DECREE**

***WHICH LIMITATION CONVENTION APPLIES?***

**RULING**

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**Before:** LORD CHIEF JUSTICE WHITTEN

**To:** Mr W. Edwards for the Plaintiff.  
Mr P. Bloomfield for the Defendant.

**Date of ruling:** 21 February 2020

**Background**

1. The Plaintiff is the owner of the 'Duzgit Venture', a tanker vessel of 2,166 tons which delivers oil and gasoline to Tonga ("Vessel"). On 20 January 2019, as the Vessel approached the Port of Nuku'alofa, the starboard anchor and chain were prematurely

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released from their housing. As the anchor and chain were being winched back in, a cable was observed caught in the anchor (“incident”). The cable was one of two undersea communications cables owned by the Defendant connecting Nuku'alofa, Ha'apai and Vava'u within Tonga with Suva in Fiji. Ropes were used to remove the cable from the anchor.

2. The Defendant is the owner of the cables. It alleges the incident caused damage to the cables for which it claims damages in the sum of US\$1,237,890.06. No other persons or entities are said to have yet made any claims on the Plaintiff.

### **This proceeding**

3. On 20 December 2019, the Plaintiff commenced this proceeding by Writ and Statement of Claim by which it alleges that the Defendant's claim and any other claims for loss and damage arising from the incident are subject to limitation under s.2 of the *Shipping (Limitation of Liability) Act 1980* (“SLLA”), which provides:

#### **Limitation of liability of ship owners**

The owners of a ship, Tongan, Commonwealth or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say)

(a) where any loss of life or personal injury is caused to any person being carried in the ship;

(b) where any damage or loss is caused to any goods, merchandise or other things whatsoever on board the ship;

(c) where any loss of life or personal injury is caused to any person not carried in the ship through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship or in the loading, carriage or discharge of its cargo, or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship;

(d) where any loss or damage is caused to any property (other than any property mentioned in paragraph (b) of this section) or any rights are infringed through the act or

omission of any person (whether on board the ship or not) in the navigation or management of the ship or in the loading, carriage or discharge of its cargo, or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship,

be liable to damages beyond the amounts set forth in the Schedule to this Act.

4. The above provision and the Schedule to the SSLA reflect the terms of the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, and Protocol of Signature (Brussels, 10 October 1957).
5. The Schedule provides formulae by which to calculate a ship owner's maximum liability for property and personal claims by reference to the tonnage of the ship multiplied by various amounts of francs. The Plaintiff alleges that by application of the relevant formula here, the limit of its liability for the incident is T\$859,403.82. It is unclear whether that figure pertains to claims for property damage, personal claims or both.
6. The other legislation which is relevant in this case is the *Shipping Act* which commenced on 28 February 1973. Section 3 of the 2016 revised edition (CAP 48:18) provides, relevantly:<sup>1</sup>

### 3 Application

(1) This Act shall apply to all vessels registered and licensed under this Act or regulations on any voyage and in any waters and to every ship in Tongan Territorial waters or in a Tongan port or harbour, and to any ship on which Tongan seamen are employed, but does not apply to any vessel which is less than 8 metres in length or to a ship belonging to the Tongan Defence Services or the defence forces of any other country, including but not limited to, warships, naval auxiliaries, patrol vessels and similar vessels.

(2) Subject to any such reservation as Tonga may make, the following conventions are approved and have the force of law in Tonga, from and after the date, that Tonga deposits instruments of accession with the Secretary General of the International Maritime Organizations -

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<sup>1</sup> Section 3 was inserted by amendments in 1999. Subsection (2)(g) was added by amendments in 2001.

...

(g) Convention on Limitation of Liability for Maritime Claims, (LLMC) 1976 and Protocol of 1996 as amended from time to time;

...

(3) In the event of an inconsistency between any convention referred to in sub-section (2) and this Act or regulations made thereunder, the convention prevails to the extent of the inconsistency.

(4) Notwithstanding sub-section (2) of this section, a convention referred to in paragraphs (a) to (m) inclusive, shall not become the law of Tonga until the Minister has given notice to that effect in the Gazette and the Minister may, give such notice at different times in respect of different conventions.

7. The Plaintiff has pleaded, in the alternative, that if the Convention on Limitation of Liability for Maritime Claims 1976 and Protocol of 1996 (“LLMC”) is in force in Tonga, then by the application of the relevant formulae in that Convention, its maximum liability for all claims here will be TOP\$3,348,496.
8. Accordingly, the Plaintiff seeks a declaration that its liability for the incident is limited to the lower amount calculated by reference to the SLLA; alternatively, the higher amount by reference to the LLMC (“**limitation decree**”). It also seeks all necessary directions for the purposes of determining the persons who have valid claims for loss and damage, the amount of the Plaintiff’s liability and the rateable distribution of the limitation amount between those persons who can establish valid claims. It also seeks a stay of any other proceedings in relation to the incident in the court or any other. The latter forms of relief appear to find their provenance in s.158 of the *Shipping Act* and s.6 and s.7 of the SLLA (referred to further below).
9. By its Statement of Defence filed 20 January 2020, the Defendant raises two substantive issues. It says the incident was caused by the Plaintiff’s negligence or ‘actual fault’, and therefore, the Plaintiff is not entitled to the limitation of liability provided by s.2 of the

SLLA. It also pleads that the LLMC does not apply in Tonga, which would mean that if the Plaintiff is entitled to limit its liability, the lower limit prescribed by the SLLA will apply.

### **Limitation Fund**

10. The Plaintiff also applied for orders entitling it, in short, to establish a limitation fund in respect of all claims for loss and damage arising from the incident, in the event that the limitation decree is made. The application was consistent with ss 6 and 7 of the SLLA which provide:

#### **6 Court may distribute among claimants**

Where any liability is alleged to arise to which this Act applies and several claims are made in respect of that liability, the owner may apply to the Supreme Court to determine the amount of his liability and the Court may distribute that amount rateably among the claimants.

#### **7 Liability fund**

(1) Where any international convention to which Tonga is a party makes provisions for a liability fund the Supreme Court shall supervise such a fund and distribute it in accordance with the provisions of such a convention to be incorporated by Order of Cabinet in the Schedule to this Act.<sup>2</sup>

(2) The owner may, whether there is an international convention to which Tonga is a party or not, establish a liability fund in Court which the Supreme Court shall administer and distribute in accordance with law and upon terms that it may direct.

(3) The Supreme Court may postpone the distribution of such part of the amount to be distributed as it deems appropriate having regard to any claims that may later be established before a court outside Tonga.

(4) No lien or other right in respect of any ship or property shall affect the proportions in which any amount is distributed among several claimants.

11. During the first directions hearing in this matter conducted on 3 February 2020, at which the Plaintiff was also represented by Mr P. David QC instructed by Mr M. McCarthy (with

leave to appear) by telephone from Auckland, I acceded to the unopposed application by the Plaintiff to establish the limitation fund.

12. On 14 February 2020, the limitation fund was established by the filing of a letter of undertaking on behalf of the Plaintiff's insurer, The Britannia Steam Ship Insurance Association Ltd, by which, the said insurer undertakes to pay the aggregate of all claims arising from the incident up to the limit of liability whether calculated in accordance with the SLLA or the LMMC.
13. Mr David QC also submitted that if the limitation decree is made, the applicable rules for the future conduct of this proceeding in Admiralty<sup>2</sup> will include orders for advertising of the decree and informing other potential claimants of their right to make a claim.

#### **If liability is limited, which Convention applies?**

14. It will be recalled that s.3(4) of the SLLA provides, relevantly, that the LLMC shall not become the law of Tonga until the Minister has given notice to that effect in the Gazette.
15. Further, s.8 of the SLLA provides:

#### **8 Other international conventions on limits of liability**

(1) Should Tonga become a party to an international convention which prescribes different rules for liability than those in this Act, there shall be substituted for the provisions of this Act and the Schedule thereto such different rules in the cases to which such an international convention applies.

(2) Such substitution shall be effected by Order of Cabinet.

(3) If the Minister of Marine certifies that a State is a contracting party to such an international convention the certificate shall be conclusive evidence of the matters certified, and the convention shall be applied accordingly pursuant to this section.

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<sup>2</sup> Order 42 of the Supreme Court Rules – Proceedings in Admiralty – essentially adopts the procedure and forms provided under the English Supreme Court Rules which are in accordance with Order 75 of the UK White Book.

16. The Plaintiff stated its position on this issue by memorandum filed with the Statement of Claim. It says that although the LLMC has been adopted in Tonga by the amendments to the *Shipping Act* referred to above, the LLMC has “not been brought into Tongan law because the Gazette notice required under s 3(4) of the *Shipping Act* has not been given”. Therefore, it says that the regime under the SLLA (or the 1957 Convention) remains in effect. During the directions hearing, Mr Edwards said that the above proposition was a result of his researches and enquiry of Crown Law (the AGO), to which he was yet to receive a response.
17. During the said directions hearing, on this issue, Mr Bloomfield indicated that, notwithstanding his client having pleaded that the LLMC does not apply in Tonga, he required further time to consider that matter.
18. I therefore directed, inter alia, the Defendant to file and serve a memorandum stating its position on whether, if the Plaintiff is entitled to a limitation of its liability, either the SLLA or the LLMC applies. It was also noted that in the event there is a dispute between the parties on this issue, further directions would be made for a separate trial.<sup>3</sup>
19. On 14 February 2020, the defendant filed a memorandum on this issue. Relevantly, the defendant's position may be summarised as follows:
  - (a) Tonga acceded to the LLMC on 18 September 2003;
  - (b) the LLMC entered into force on 1 January 2004;
  - (c) Tonga acceded to the Protocol on 18 September 2003;
  - (d) the Protocol entered into force on 13 May 2004;
  - (e) the requirement of section 3(2)(g) of the *Shipping Act*, namely and relevantly here, that the LLMC would not become the law of Tonga until the Minister had given notice to that effect in the Gazette, has not been complied with, i.e. "(t)here are no

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<sup>3</sup> Pursuant to 0.25 Rule 4 of the Supreme Court Rules.



Gazette notices which give effect to the LLMC and the Protocol becoming the law in Tonga";

- (f) in relation to s.8 of the SLLA, "(t)here is no Order of Cabinet which gives effect to the substitution of the SLLA and its Schedule with the LLMC and/or the Protocol;
- (g) accordingly, the LLMC and the Protocol have not become the law of Tonga for the purpose of these proceedings; and
- (h) therefore, if the plaintiff is entitled to a limitation of its liability, the SLLA applies.

## Result

- 20. As the parties are now *ad idem* about this issue, there is no controversy between them left for the court to determine. There is also no other material or submission before the Court which could give rise to a different determination.
- 21. However, as this is a matter both rare in occurrence in Tonga and of some national importance, and as Mr Edwards said that he made enquiries of Crown Law which, at the time of the directions hearing, had not yet been answered, I will direct that this ruling be served on the Attorney General and reserve liberty to the Attorney General to apply to intervene to be heard on this issue.
- 22. Any such application is to be filed and served on or before 20 March 2020.
- 23. In the event the Attorney General concurs with the parties on this issue, she is kindly requested to file a memorandum to that effect.
- 24. In that event, or if no application is filed by the date stated above, this ruling, giving effect to the parties' agreed position on the issue, will become final.



NUKU'ALOFA  
21 February 2020

M. H. Whitten QC  
LORD CHIEF JUSTICE