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

CV 68 of 2019

BETWEEN:

DS VENTURE LIMITED

Plaintiff

-and-

TONGA CABLE LIMITED

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.

Plaintiff's application for limitation of liability decree

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC

To: Messrs P. David QC, M. McCarthy and W. Edwards for the Plaintiff.
Messrs J. McBride and P. Bloomfield for the Defendant.

Date of ruling: 22 December 2020

Introduction

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 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 alleges that the incident caused damage the cables to the value of US\$1,237,890.06. At the time, internet services throughout Tonga were

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disrupted for approximately two weeks. No other persons or entities have yet made any claims on the Plaintiff.

Procedural history

3. On 20 December 2019, the Plaintiff commenced this proceeding by Writ and Statement of Claim. The Plaintiff seeks a declaration that its liability for the incident is subject to limitation pursuant s.2 of the *Shipping (Limitation of Liability) Act* 1980, 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 Schedule to the Act reflects the terms of the 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, and Protocol of Signature (“the 1957 Convention”). 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. By application of the relevant formula here, the limit of liability under that Convention is TOP\$859,403.82 plus interest.

5. The Plaintiff pleaded in the alternative that if the 1957 Convention did not apply, then its liability would be limited pursuant to s.3 of the *Shipping Act*¹ which incorporates the Convention on Limitation of Liability for Maritime Claims 1976 and Protocol of 1996. By application of the relevant formulae in that Convention, the maximum liability for all claims here would be TOP\$3,348,496.
6. After a number of interlocutory processes, the parties agreed that if the Plaintiff's liability is to be limited, then the 1957 Convention, with its lower maximum liability, applied. On 21 February 2020, orders were made to that effect.
7. On 14 February 2020, and in accordance with s.7 of the *Shipping (Limitation of Liability) Act* 1980, the Plaintiff established a limitation fund by filing 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. On 21 October 2020, and following the determination on the applicable Convention, the Plaintiff filed an updated Letter of Undertaking by which the said insurer Association undertakes to the Court to pay any sum which is finally ordered by the Court (or the Court of Appeal) to be paid by way of distribution from the limitation fund to any person bringing a claim arising from the incident up to a total liability not exceeding TOP\$952,407.70, inclusive of interest.
8. Where a limitation decree is issued, ss 6 and 7 of the *Shipping (Limitation of Liability) Act* 1980, require the Court to then determine any claims by persons alleged to have suffered loss or damage as a result of the incident and to administer and distribute the limitation fund ratably among the claimants, in accordance with law and upon such terms as the Court may direct.
9. Pursuant to the same provisions, and the applicable procedural Rules, the Defendant's claim was stayed pending determination of the application for a limitation decree.

¹ 2016 revised edition (CAP 48:18). Section 3 was inserted by amendments in 1999. Subsection (2)(g) was added by amendments in 2001.

Applicable rules of procedure

10. Order 2 rule 3 of the Tonga Supreme Court Rules incorporates by reference the White Book wherever the Tongan procedural rules are silent. Strictly speaking, they are not silent in respect of admiralty proceedings. Order 42 rule 2 provides that the procedure and forms provided under the English Supreme Court Rules shall, with any necessary and appropriate modification and subject to the Supreme Court Rules, continue to apply.
11. Throughout the proceeding, the Plaintiff has made reference to the relevant procedure under the English Supreme Court Rules as being Order 75, Admiralty Proceedings, as appears in the 1988 version of the UK White Book.
12. The reference in Order 42 to the English Supreme Court Rules is, for some reason, expressed differently to that of the White Book in Order 2. Order 42 may therefore be interpreted as adopting the current UK rules for Admiralty Claims, being Rule 61, rather than the White Book of last century. For present purposes, the differences are not material.
13. Relevantly, Order 75 rule 37 requires the Plaintiff to make one of the persons, with a claim against him in respect of the casualty, the Defendant to the action.
14. Rule 38 (5) provides that on the hearing of a summons (for a limitation decree) the registrar, if it appears to him that it is not disputed that the Plaintiff has a right to limit his liability, the registrar (here, the Court) shall make a decree limiting the Plaintiff's liability and fix the amount to which the liability is to be limited.
15. Sub rule (8) provides that any Defendant who, after the registrar has given directions under paragraph (7) ceases to dispute the Plaintiff's right to limit his liability must forthwith file a notice to that effect in the registry and serve a copy on the Plaintiff and on any other Defendant who has acknowledged issue or service of the writ.
16. Rule 39(2) provides that a decree limiting the Plaintiff's liability shall be advertised by the Plaintiff in such manner and within such time as may be provided by the decree, and shall fix a time within which persons with claims against the Plaintiff in respect of the casualty to which the action relates may file their claims, and, in

cases to which rule 40 applies, take out a summons if they think fit, to set the order aside.

17. Subrule (3) provides that the advertisement shall, unless for special reasons the judge thinks fit otherwise to provide, be a single advertisement in each of three newspapers specified in the decree, identifying the action, the casualty and the relation of the Plaintiff thereto (whether as owner of the ship involved in the casualty or otherwise as the case may be), stating that the decree has been made and specifying the amounts fixed thereby as the limits of the Plaintiff's liability and the time allowed thereby for the filing of claims and the taking out of summonses to set the decree aside.
18. Rule 40 provides a procedure for any person with a claim against the Plaintiff who was not named as a Defendant to the Writ to take out a summons asking that the decree be set aside.
19. Rule 61.11 of the current UK Rules of Civil Procedure deals with limitation claims in Admiralty proceedings. Sub rule 13 provides that when a limitation decree is granted,² the court may order, inter alia, that any proceedings relating to any claim arising out of the occurrence be stayed; order the claimant to establish a limitation fund if one has not been established; if the decree is a restricted limitation decree, distribute the limitation fund; if the decree is a general limitation decree, give directions as to advertisement of the decree and set a time within which notice of claims against the fund must be filed or an application made to set aside the decree and require the claimant to file a declaration that the decree has been so advertised with copies of the advertisements. Sub rule 15 prescribes the procedure for making claims on the fund. Sub rule 16 provides that any person, other than a Defendant to the limitation proceedings, may apply to the court within the time fixed in the decree, to have a general limitation decree set aside.

² Form ADM19: General limitation decree.

Is the Plaintiff entitled to a limitation decree?

20. In order for its liability to be limited, the Plaintiff must demonstrate that the incident was not caused by any 'actual fault or privity' on the part of the owners of the vessel. In that regard, the Plaintiff pleads, relevantly, that:³

- (a) on 20 January 2019, as the vessel approached the port of Nuku'alofa, the Master was requested by the pilot to proceed to anchor at the inner anchorage in the port so that the vessel could be moved to berth on the opening of the port, early on Monday, 21 January 2019;
- (b) as the vessel approached the anchorage, the crewmembers making up the anchor team were instructed to move forward to make the starboard anchor ready;
- (c) as the crewmembers approached the starboard anchor housing, they heard banging on the side of the ship;
- (d) from the bow, the crew saw that the banging was being caused by the anchor chain hitting the ship's hull; and
- (e) the starboard anchor and chain had released from its housing.

21. By its Statement of Defence, the Defendant denied the Plaintiff's entitlement to a limitation of liability and positively alleged that the damage to the cables was caused by the Plaintiff's actual fault and negligence.⁴ Particulars of those allegations were not provided. However, by its counterclaim, the Defendant particularised its allegation of negligence as:⁵

- (a) permitting or causing an anchor to be dropped in the vicinity of (the cables);
- (b) failing to properly secure the anchor on the vessel;
- (c) failing to take any or any proper or effective measures to ensure that the vessel's anchor was secured;

³ Paragraphs 5 to 8.

⁴ Paragraphs 10 and 11.

⁵ Paragraph 8.

- (d) failing to implement procedures to positively confirm that the vessel's anchor was secured for sea with mechanical devices for that purpose carried by the vessel; and
- (e) failing to ensure that the vessel was not dragging its anchor within the location of the cables.

22. The orders made on 31 January 2020 included directions for the filing of affidavit material upon which the parties intend to rely at a hearing on the limitation issue. Originally, the Defendant was required to file its affidavits in response by 19 June 2020. On 6 April 2020, the directions timetable was adjusted upon application by the Plaintiff for an extension of two months for the filing of its evidence due to difficulties associated with the current Coronavirus pandemic. The commensurate adjustment to the timetable required the Defendant to file its affidavits in response by 14 August 2020.

Plaintiff's evidence

23. Between 5 and 9 June 2020, in support of its application for limitation, the Plaintiff filed affidavits from:
- (a) Captain Tim Burfoot, an expert witness;
 - (b) Captain Rajiv Kumar Singhal, General Manager of MTM Ship Management Pte Limited ("MTM"), which was contracted by the Plaintiff to manage the crewing and all technical aspects of the vessel's operation;
 - (c) Jose Remo Librodo, President of Next Wave Maritime Management Inc, of the Philippines, which was appointed by MTM to recruit and train Philipino seafarers for MTM;
 - (d) Captain Neelamohan Padhi, Designated Person Ashore at MTM;
 - (e) Hariharan Sankaran, Deputy General Manager at MTM, Singapore; and
 - (f) Sanjeev Kumar Singh, Fleet Manager of MTM, Singapore.

Defendant discontinues its defence

24. On 28 August 2020, Mr McBride, lead counsel for the Defendant, filed a memorandum requesting a further extension to the extant directions timetable. In it, Mr McBride stated that prior to receiving the Plaintiff's affidavit material, the Defendant was unaware of the particular basis on which the claim was being brought. The Defendant had been examining the evidence and attempting to obtain a critique of it, to enable it to respond meaningfully with its own evidence. However, due to the ongoing impacts of the Coronavirus pandemic and consequent border closures, the Defendant had faced difficulties in preparing its evidence. It foreshadowed having to liaise with factual witnesses in Tonga as well as shipping experts in various jurisdictions. To that date, it had been unable to do so. Mr McBride therefore proposed a four-month extension for the filing of the Defendant's affidavit material in response.
25. The Plaintiff opposed the length of extension sought and proposed that it should not exceed two months. The matter was mentioned to resolve the impasse. During that appearance, Mr McBride apologised for the fact that his client's memorandum was filed some two weeks after its affidavits were due and for the lack of any supporting affidavit/s explaining the difficulties said to have been encountered or what, if any, work had been done to date on preparing the Defendant's affidavit material. In answer to a question from the bench, Mr McBride candidly stated that the Defendant had in fact not started any work on its affidavits. The date for the Defendant's affidavits was extended to 14 November 2020.
26. On 13 November 2020, the Defendant filed a further memorandum. In it, Mr McBride advised, relevantly, that the Defendant:
- (a) had determined not to file any evidence;
 - (b) discontinued its defence to the Statement of Claim;
 - (c) intended not to take any further steps in the proceeding except in relation to its Counterclaim (which is presently stayed) and as to costs;

- (d) "knew nothing, of course, as to the basis upon which the Plaintiff contended that the submarine cable had been damaged without actual fault or privity on the part of the owners. It knew nothing of the owners or the management structure, or indeed of the precise circumstances in which the cable was damaged by the ship";
- (e) observed that the Plaintiff's "affidavits also disclosed that the ship was managed by 'MTM Ship Management Pty Ltd', but it is difficult to identify exactly how and when the anchor and chain came loose, but that potentially it came loose in heavy seas as a result of the failure of the crew to carry out operator procedures properly";
- (f) urged the court "to give careful consideration to the Plaintiff's evidence, in the absence of any contradictor to the application, before determining whether the Plaintiff satisfies the relevant onus and should, or should not, be granted the relief it seeks".

27. By memorandum filed 27 November 2020, counsel for the Plaintiff submitted that now that the limitation decree was unopposed, the decree should be granted under the applicable rules, including directions for advertising of the decree.⁶ Further submissions were also made in relation to costs.

Conclusion on limitation of liability

- 28. Mr McBride described the Plaintiff's seven affidavits as containing "lay and expert evidence addressing complex factual issues such as anchoring procedures, maintenance regimes, ship management procedures, crew training and the suspected cause of the anchor release which caused the damage to the Defendant's submarine cables on or around 20 January 2019." I agree.
- 29. Of the affidavits provided to the independent expert, Captain Burfoot, and upon which his opinions were based, the affidavit of Pablo Aniag Tamayo Jr, Chief Mate of the vessel, was not filed in this proceeding. The Defendant has made no issue of it. I do not draw any inference, one way or the other, from the omission.

⁶ Order 42 of the Tonga Supreme Court Rules incorporating by reference, Order 75 of the UK Supreme Court Rules.

30. Having carefully considered the Plaintiff's, now unchallenged, affidavit evidence, I am satisfied on the balance of probabilities that:
- (a) the incident was likely caused by a failure in compliance by crew with the procedure for securing the anchor in question when the vessel departed Fiji;
 - (b) subsequent adverse weather, sea and swell conditions caused a pin in the chain stopper to dislodge and the chain stopper raised with the movement of the vessel;
 - (c) the forces caused the wire lashing or windless brake holding the anchor, to break;
 - (d) at some point during the voyage, most likely upon arrival at Nuku'alofa, the anchor securing wire failed, the winch brake could not hold, and the anchor released;
 - (e) the anchor systems were of a standard design;
 - (f) prior to the incident, the anchor systems had been properly maintained;
 - (g) the safety management system provided a good procedure for securing anchors;
 - (h) there was no record of any previous problem or issue with the relevant anchor system prior to the incident; and
 - (i) records of survey inspections and maintenance for the vessel were all in order.
31. It follows that I am satisfied, for the purposes of s.2 of the *Shipping (Limitation of Liability) Act* 1980, that the incident took place without any 'actual fault or privity' on the part of the Plaintiff as the registered owner of the vessel.
32. Accordingly, the Plaintiff is entitled to the limitation of liability provided for by the said Act and the 1957 Convention.
33. The Plaintiff's liability for all claims arising from the incident shall therefore not exceed TOP\$859,403.82 together with interest to the date of establishment of the limitation fund, of TOP\$93,003.98, making a total limit of liability in sum of TOP\$952,407.70.

Costs

34. In his memorandum filed 13 November 2020, Mr McBride submitted that in relation to costs of the limitation proceedings, in summary:

- (a) the Defendant is a true Plaintiff in the proceedings in the sense that it is the party that has suffered loss and damage as a result of the incident;
- (b) the Defendant was joined to the proceedings by the Plaintiff without being provided notice of the Plaintiff's intention to commence proceedings to seek a limitation decree;
- (c) the only active step taken by the Defendant in the proceedings was the filing and service of its defence and cross-claim by the required deadline of 17 January 2020 (effectively requiring the Plaintiff to put forward evidence to substantiate its position, being evidence that was unknown to the Defendant);
- (d) the Defendant has not taken any active role in the proceedings since 31 January 2020, other than appearing as required for mentions of the matter before the court and previously seeking an extension of time under the timetable;
- (e) while the court has a broad discretion regarding costs (order 13, rule 8), it has been an invariable rule of practice (in respect of applications for decrees under the law preceding the LLMC) for the court to exercise that discretion by requiring Plaintiffs to meet the costs of limitation decree proceedings: Roscoe's Admiralty Practice (5th Ed), p.249;
- (f) that rule of practice is subject only to an exception for costs incurred by reason of Defendants having raised unreasonable issues on which they have failed, or costs occasioned by a dispute between rival claimants to the fund in court (neither of which apply here);
- (g) that practice has developed because the Plaintiff is the wrongdoer, and should pay the ordinary costs of obtaining a limitation decree, if it seeks that indulgence from the Court;

- (h) the Court should not make any adverse costs orders against the Defendant in favour of the Plaintiff in circumstances where the Defendant has properly and responsibly not taken any active steps in the proceedings having received and reviewed the Plaintiff's evidence;
- (i) it would be unjust to make an adverse costs order against the Defendant when the Defendant is not a wrongdoer in any conventional sense and has been joined to the proceedings and the Defendant for the very reason that it have suffered loss and damage as a result of the conduct of the Plaintiff.

35. In their memorandum filed 27 November 2020, counsel for the Plaintiff submitted, in summary:

- (a) following the Defendant's withdrawal of its opposition, costs of the limitation proceedings can now properly be addressed;
- (b) a determination on the limitation decree application has been reached a much later point in the proceedings because the Defendant has not engaged properly with the proceedings. The position under the 1957 Convention is that limitation has always been very difficult to resist when damage is caused by the navigation and operation of a ship (i.e. shipboard fault), because only the existence of actual fault or privity on the part of the owner (in the sense of the directing mind of a company where the owner is a company) will remove the right. The speedy process for an application for a limitation decree under the rules reflects the way in which such proceedings usually operate;
- (c) the Defendant's defence and counterclaim asserted that the incident was caused by the Plaintiff's actual fault or negligence and that it was therefore not entitled to a limitation of its liability;
- (d) that position, followed by periods of delay, could not be properly described as "passive participation" for although the Defendant has done the bare minimum in attending directions hearings, it continued its opposition to the grant of the decree until 12 November 2020;

- (e) the Defendant has acted unreasonably in its conduct of the proceedings in maintaining opposition far beyond any time at which that was a reasonable position;
 - (f) that delay has prevented the making of a decree and the process of limitation reference under it, and has also increased the costs incurred by the Plaintiff in the proceedings and in maintaining the security constituting the limitation fund in court;
 - (g) the usual practice in limitation proceedings is that the Plaintiff plays the ordinary costs incurred in obtaining a decree, but a Defendant which opposes, and does not succeed, will pay costs in the usual way from the point in time from which it should have accepted the limitation decree: *The Alletta (No. 2)* [1972] 2 All ER 414;
 - (h) in the present case, the Plaintiff had a straightforward claim for limitation which should have been accepted;
 - (i) in all the circumstances, it would be appropriate for the court to order that the costs of the limitation proceedings should lie where they fall as between the Plaintiff and Defendant, save for the order made on 18 September 2020 in favour of the Plaintiff in relation to the costs occasioned by the Defendant's application for an extension of time.
36. I do not accept that the Defendant's participation in the proceedings can be accurately described as "passive".
37. The Defendant engaged in the issue of which Convention applied, where it initially (and seemingly) sought to establish that the higher limits under the 1996 applied, only to end up agreeing that the lower limits of the 1996 Protocol applied.
38. Further, and more importantly, when pleading its position to the Plaintiff's application for a limitation decree, it was open to the Defendant to simply not admit the relevant allegations by which the Plaintiff sought to base its entitlement to a limitation of liability, and thereby put the Plaintiff to its proof. Instead, however, the Defendant positively denied the Plaintiffs entitlement and alleged that the incident had been caused by the Plaintiff's actual fault or negligence. The particulars of negligence sub-joined to paragraph 8 of the Defendant's

Counterclaim suggested that it possessed evidence by which it would seek to establish that the incident was caused by the Plaintiff's actual fault or privity. It transpired, and notwithstanding earlier requests for an extension of time within which to adduce such evidence, that by 12 November 2020, when it withdrew its opposition, the Defendant necessarily did not have any such evidence to support its pleaded position in January 2020. It did not have a proper basis for its pleading. Ordinarily, such conduct will militate against any costs order favourable to the Defendant and falls within the exception to the usual rule governing costs orders on limitation proceedings.

39. However, the Defendant's conduct did not materially alter the Plaintiff's evidentiary burden of presenting evidence to establish that the incident was not caused by its actual fault or privity. The costs of doing so were always the Plaintiff's to bear. In that sense, it cannot be said that the Defendant raised unreasonable issues on which it has failed. While it can be said that the Defendant raised issues of fault and/or negligence on the part of the Plaintiff, the Defendant did not persist with those issues in any manner which added to or altered the Plaintiff's evidentiary burden.
40. In the ordinary course, therefore, the Defendant would be entitled to its reasonable costs of considering that evidence and in forming a view as to whether there was any legitimate basis for maintaining its opposition to the limitation decree. In my view, a reasonable period within which to reach that view was 28 days from the filing and service of the Plaintiff's affidavit material.
41. A further consideration is the delay which has been incurred due to the late determination by the Defendant of its inability to effectively oppose the Plaintiff's case. Whilst that could partly be attributable to the coronavirus pandemic this year, and its impact on the ability to communicate freely with persons abroad, Mr McBride's frank revelation at the last appearance that the Defendant had not even commenced work on trying to prepare affidavit material caused, in my view, unnecessary prolongation of the limitation proceedings.
42. Having weighed all those considerations, I consider it appropriate to order that the Plaintiff pay the Defendant's costs of and incidental to the proceeding up to

and including 10 July 2020 (the date by which the Defendant ought to have realised and declared that its opposition to the limitation decree was no longer warranted) and that thereafter each party bear its own costs. That order excludes the discrete costs order made against the Defendant on 18 September 2020.

Terms of the decree and further directions

43. By memorandum filed 9 December 2020, counsel for the Plaintiff provided a proposed form of Order limiting the Plaintiff's liability and a draft public notice to be advertised in accordance with the Rules. I am content to substantially adopt the terms of the proposed Order save for order 5 concerning the advertisement of the public notice. The Plaintiff's order only requires advertising in one newspaper. As noted above, the relevant rules require advertising in three newspapers.

Result

44. The Plaintiff's application for a decree of limitation of liability pursuant to s.2 of the *Shipping (Limitation of Liability) Act 1980* is granted.
45. The terms of the decree, requirements for advertising thereof and further directions are set out in a separate Order accompanying this Ruling.
46. The Plaintiff is to pay the Defendant's costs of and incidental to the limitation proceedings up to and including 10 July 2020. Thereafter, and with the exception of the costs order made on 18 September 2020, the parties shall each bear their own costs.

NUKU'ALOFA
22 December 2020



A handwritten signature in blue ink, reading "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE