IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0049 OF 2021
[Suva Admiralty Action: HBG 1 of 2017]

BETWEEN : **PDL INTERNATIONAL PTE LIMITED**

Appellant

AND : **1. CRUZ HOLDINGS LIMITED**

2. CCB ENVICO PTY LIMITED

Respondents

Coram : **Basnayake, JA**
Lecamwasam, JA
Jameel, JA

Counsel : **Mr. Paul David, KC, Mr. Nilesh Prasad & Ms. Preeti Verma for the Appellant**
: **Mr. V. Kapadia for the 1st Respondent**
2nd Respondent – Absent & unrepresented.

Date of Hearing : **8 February, 2023**

Date of Judgment : **24 February, 2023**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and the conclusions arrived at by Jameel, JA.

Lecamwasam, JA

[2] I agree with the reasons given and the conclusion arrived at by Jameel, JA.

Jameel, JA

Introduction

[3] This is an appeal from an interlocutory Judgement of the High Court, dated 8 May 2020, in the exercise of its Admiralty Jurisdiction, by which the learned High Court Judge refused to grant the Appellant's application that it be entitled to limit its liability, by reference to the Limitation Fund constituted by the 1st Respondent (***original Plaintiff***), as owner of a vessel that capsized in the Port of Suva. The Appellant urges this court to interpret the provisions of the Marine Transport Act ("***MTA***") by reading into the Act, the deeming provisions of Article 11(3), of the Convention on Limitation of Liability for Marine Claims, 1976 **("*the 1976 Convention*")**, although Fiji is not a signatory to the said Convention.

[4] On 3 May 2017, the **MV Southern Phoenix** ("***the vessel***") owned by Cruz holdings Limited ***("Cruz***") the original Plaintiff in the High Court, berthed at the King's Wharf in the Port of Suva. Cargo loading operations commenced on the same day, and were completed on 5 May 2017. During bunkering operations on 5 May 2017, the vessel developed a port list, and eventually sank ***("the casualty")*** on 6 May 2017.

[5] The MV Southern Phoenix, was a cargo ship built in Germany in 1986, and was registered and sailing under the Panamanian flag. PDL INTERNATIONAL PTE. LTD. ("***PDL"***), a company incorporated in Singapore and based in New Zealand was at the material time, under a time charter for a voyage from 3 May 2017 to 3 June 2017, to Tarawa, Kiritimati and Lautoka.

[6] Concrete Solutions (Fiji) Limited was a shipper of a container of cargo which was on board the vessel at the time of the casualty, and was one of the claimants that lodged its claim against the Fund constituted by the original Plaintiff, for damages arising on the sinking of the vessel.

[7] It is important to note that the substantive matter in regard to liability for the capsizing of the vessel has not yet been determined by the High Court. However, based on the affidavits filed on behalf of the 1st Respondent (the Plaintiff in the court below), the immediate cause of the casualty was the accidental ingress of seawater into the vessel which had caused her to heavily list into portside and sink, but the further causes are presently unknown.

The Application by Cruz

[8] Cruz as registered owner of the ship, in anticipation of claims that could be brought against it, arising from the casualty, instituted Admiralty proceedings in the High Court of Suva in Admiralty Action HBG 1 of 2017, seeking limitation of its liability arising out of the casualty, and named the likely claimants, as defendants. The named defendants were the Fiji Ports Corporation Limited, a cargo owner Concrete Solutions (Fiji) Limited ("***Concrete Solutions***"), PDL (as the charterer of the vessel), the Master and Crew of the vessel, and other cargo owners, and any other additional claimants. Cruz, sought a Decree of limitation of its liability, under section 79 of Part 5 of the Marine Transport Act 2013 (***the MTA***). The Summons filed by Cruz was supported by the affidavit, of its General Manager, Victor Fatiaki, and was dated 22 June 2017.

[9] Cruz claimed that the potential claims that are likely to arise against it, would be under sections 78(2) and 79 of Part V of the MTA, and that such claims are subject to automatic limitation of liability in terms thereof, unless the claimants prove that Cruz's conduct excludes it from the right to claim limitation of liability. Accordingly, Cruz claimed that it was entitled to limit its liability, to the Fijian Dollar equivalent of 603,371 Special Drawing Rights (***SDR's***), together with simple interest determined by Court, from 6 May 2017 (the date of the casualty), to the date of the constitution of the Limitation Fund.

[10] On 27 July 2017, the High Court considered the Summons filed by Cruz, and made orders in favour of Cruz, pursuant to section 79 of the MTA, and granted in its favour a Decree of Limitation, and ordered Cruz to constitute a Limitation Fund by requiring it to pay into court a sum of FJ$1, 711,690.78 inclusive of interest on 26 July 2017. Cruz later paid an additional sum of FJD 1,882.86 on 2nd August 2017, thereby bringing the aggregate of the fund to FJ$ 1713 57 3.64, and a sum of FJ$ 4812. 09, being simple interest calculated at the rate of 1.25% per annum for the period of 82 days from the date of the casualty to the date of the constitution of the Limitation Fund.

CCB's Application as Claimant

[11] On 9 October 2017, CCB ENVICO Pty. Ltd. ("***CCB***"), one of the cargo owners who suffered loss and damage as a result of the capsizing of the ship, filed its claim against the Limitation Fund that had been established by Cruz. It stated that it had no objection to PDL being added as a defendant in the Case filed by Cruz, but opposed PDL's application to limit its liability by reference to the Fund constituted by Cruz. In other words, CCB contended that if PDL wanted to limit its liability, it had to constitute its own limitation fund.

The Application for joinder by PDL: Summons filed on 11 October 2017

[12] As a sequel to the High Court entering Decree of Limitation in favour of Cruz, PDL the Appellant in this case, filed Summons on 12 October 2017, supported by the Affidavit of Rowan Brookes Moss ("***Moss"***), dated 11 October 2017, for an Order (similar to that sought by Cruz as the registered owner of the vessel), of limitation of liability, without prejudice to the terms of, its rights under the Liner Booking Note dated 2nd May 2017, (signifying the underlying contract between Cruz and PDL for the charter of the vessel), and to be added as a Plaintiff to the pending Admiralty action filed by the 1st Respondent, the original Plaintiff

[13] The supporting affidavit of Moss filed on 11 October 2017 on behalf of PDL, stated *inter alia* as follows:

> *"7. The evidence from Cruz is that the immediate cause of the casualty was the accidental ingress of seawater into the ship which caused her to heavily list into portside and sink. The further causes are presently unknown.* ***The condition of the ship is the responsibility of Cruz as owner.*** (emphasis ended)
>
> *10. At the time of the Casualty the Ship was under time charter from Cruz to the Plaintiff for a voyage from 3 May 201723 June 2017 to Tarawa, Kiritimati and Lautoka. I Annex a copy of the Liner Booking Note evidencing the charter marked RBM-2.*
>
> ***PDL INTERNATIONAL PTE LIMITED'S claim against the plaintiff***
>
> *12. As set out in paragraph 10 above the ship was time chartered from the Plaintiff by PDL INTERNATIONAL PTE LTD under the terms of a Liner Booking Note dated 3 May 2017.*
>
> *13. Pursuant to clause 33 of the Liner Booking Note, PDL INTERNATIONAL PTE LTD and the Plaintiff expressly agreed that the contract was to be governed by, and construed in accordance with English Law and that any dispute arising out of or in connection with this contract shall be referred to Arbitration in London in accordance with the Arbitration Act 1996.*
>
> *14. Consequently any claim or claims between PDL INTERNATIONAL PTE. LTD. and the Plaintiff fall outside of the jurisdiction of the High Court of Fiji and will be determined in accordance with the contractually agreed mechanism.*
>
> *15. The following orders are therefore sought without prejudice to PDL INTERNATIONAL PTE LIMITED'S right to claim under the Liner Booking Note subject to English law before an Arbitration Tribunal in London"*

The Orders sought by PDL

[14] In its Summons filed on 12 October 2017, PDL sought the following orders /prayers:

> *1.0 PDL INTERNATIONAL PTE LTD be granted leave to intervene in these proceedings and be joined as another Plaintiff.*

2.0 PDL INTERNATIONAL PTE LTD. is an "owner" for the purposes of limitation within the definition under section 77 of the Maritime Transport Act 2013;

*3.0 PDL INTERNATIONAL PTE LTD is entitled to limit their liability, if any, for any and all claims of any persons claiming or being entitled to claim damages arising from or in connection with the capsize of the MV SOUTHERN PHOENIX ("**the ship**") in Suva Harbour on 6 May 2017 ("**the Casualty**") in accordance with sections 79 and 81 of the Maritime Transport Act 2013;*

*4.0 PDL INTERNATIONAL PTE LTD are entitled to limit their liability by reference to the limitation fund constituted by the Plaintiff on 26 July 2017 in the sum of FJ$ 1,716,497. 58 ("**the Limitation Fund**").*

5.0 PDL INTERNATIONAL PTE LTD is not answerable, whatever the basis of liability may be, beyond the Limitation Fund in respect of the loss, damage and delay caused to any property or the infringement of any rights through its act or omission or through the act or omission of any person on board the ship in the navigation and management of the ship arising out of the Casualty;

6.0 Any claims by the owners of the cargo and or containers shipped on board the Ship, and/ any claims by PACIFIC INTERNATIONAL LINES PTE LIMITED, and/or other claims arising out of or in connection with the Casualty should be directed against the Limitation Fund constituted by the Plaintiff;

7.0 By virtue of the Limitation Fund having been constituted by the Plaintiff, that all further proceedings in any current or future action or arbitration arising out of the Casualty (other than any claim by PDDL international private limited against the plaintiff under the booking note which is subject to English law and London Arbitration) be stayed except for the purpose of taxation and payment of costs and that the Defendants and all or any other person or persons whatsoever interested in the Ship or other things on board or having any right, title or interest whatsoever with reference to or arising out of the Casualty be restrained from bringing any action or actions against PDL INTERNATIONAL PTE LIMITED or the Ship in respect of the same in any court other than the High Court of Fiji

8.0 That all proper directions be given by this court for ascertaining the persons who may have any just claim for loss or damage arising out or caused by the casualty.

9.0 That the Limitation Fund may be ratably distributed among the several persons who may make out their claims they are too and the proper

directions may be given to the exclusion of such claimants as shall fail in their claims within a certain time to be fixed for such purpose, and any remainder of the amount paid into court together with interest thereon be paid out to the plaintiff; and

10.0 Such further directions or orders as the court deems just an expedient.

Orders made on 18 September 2019 on the application of PDL

[15] On 18 September 2018, prayers 1.0, 2.0 and 3.0 contained in the Summons filed by Cruz, (on 11th October 2017), were granted by way of Consent Orders, in terms of which court granted leave to PDL to intervene in the proceedings and be joined as another Plaintiff, recognized PDL as an '*owner*' for the purposes of limitation within the definition of section 77 of the MTA, and made order that PDL is entitled, in terms of sections 79 and 81 of the MTA, to limit its liability if any, for any and all claims of any persons claiming or being entitled to claim damages arising in connection with the capsizing of the vessel. This order was in essence identical to the Order that had been made on the application filed by original Plaintiff, Cruz.

[16] On 30 July 2019, when the matter was taken up the court made a Consent Order granting the prayers contained in paragraphs 8.0 and 9.0 of the said Summons. Therefore, what remained for consideration were Orders 4.0 to 7.0. It is the refusal of the High Court to grant these Orders, that is the subject of this appeal.

[17] On behalf of PDL, Moss stated *inter alia* in his affidavit filed on 11 October 2017, that; the time charter agreement between Cruz and PDL was effected under the terms of a Liner Booking Note dated 3 May 2017, that in terms of clause 33 thereof, the parties had agreed that the contract was to be governed by, and construed in accordance with English law, and that any dispute arising out of, or in connection with this contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996. PDL anticipated claims against it from the several owners of the cargo, and or containers shipped on board or Waybills issued by PDL, and owners of cargo containers shipped on board the ship by PACIFIC INTERNATIONAL LINES PTE LTD.

The impugned Judgment of the High Court dated 8 May 2020.

[18] Having heard the parties, on 8 May 2020, the learned High Court Judge refused to grant the prayers contained in paragraphs 4.0 to 7.0 contained in the Appellant's Amended Summons filed on 18 September 2017. The salient findings of the High Court that are relevant to the grounds raised in appeal are reproduced below:

> *"[24] Schedule 1 of the Maritime Transport Act 2013 (the Act) lists the International Convention relating to the Limitation of Liability of Owners of Seagoing Ships and Protocol 1957 and future amendments to the Convention and Protocol, is one of the Conventions to which Fiji is a party.*
>
> *[25] The purpose of the Act is to implement Fiji's obligations under the IMO Conventions and to ensure that participants in the maritime transport system are responsible for the actions and to consolidate related maritime laws including the protection of the marine environment and for related matters.*
>
> *[26] Schedule 1 does not list the Convention on limitation of liability for maritime claims 1976 anywhere.*
>
> *[27] PDL relies on the provisions of Section (3) of Article 11 of the 1976 Convention to have the Limitation Fund established by Cruz Holdings treated as constituted by PDL as well as a fund constituted by one of the persons in paragraph one 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) in paragraph 2 respectively.*
>
> *[28] Neither the 1976 Convention nor the provisions of Section 3 of Article 2 of the 1976 Convention provisions have been incorporated into the Laws of Fiji. Schedule 1 of the Act shows that Fiji is not a party to the 1976 Convention. However Fiji is a party to the 1957 Convention which does not contain the provisions of Section 3 of Article 11.*
>
> *[29] PDL admits at paragraph 7.16 of the submissions that the Act does not include or incorporate the provisions of Article 11(3).*
>
> *[30] The Act contains no legal basis on which PDL can seek the entitlement to the benefit and/or protection of the Plaintiff's Limitation Fund. Therefore under Article 13 (3) a charter is entitled to rely on a Limitation Fund constituted by an owner.*

[31] PDL's apparent contention that it is entitled to the benefit and or protection of the Plaintiff's Limitation Fund is rather misconceived.

[32] However if PDL seeks the benefit and protection afforded by the limitation fund, then PDL must constitute the Limitation Fund itself.

[39] For the aforesaid reasons PDL is not entitled to benefit from and limit its liability by reference to the Plaintiff's Limitation Fund.

[40] In the result, the remaining order sought by PDL in his summons at 4.0 to 7.0 is enumerated at paragraph one of my judgment here in above is accordingly refused.

Grounds of Appeal

[19] Aggrieved by the judgement of the High Court dated 8 May 2020, refusing prayers 4.0 to 7.0 of the prayers, the Appellant has appealed on the following grounds:

1. The Learned Judge erred in law and in fact in finding that the Appellant as charterer of the Ship does not have the benefit of the Limitation Fund by the operation of Part 5 of the Maritime Transport Act 2003 (the "Act") after making the following orders by consent on or about 18 September 2018:

(a) The Appellant be given leave to intervene and joined as further Plaintiff;
(b) The Appellant is an "owner" pursuant to the Act; and
(c) The Appellant is entitled to limit its liability in accordance with sections 79 and 81 of the Act.

2. The Learned Judge erred in law and in fact by taking into consideration submissions and/or matters extraneous to the Appellant's application which were not pursued by parties by referring to and relying on:

(a) Clause 33 of the Booking Note;
(b) Discussing the relevance or otherwise of English law; and
(c) Determining claims between the Appellant and the First Respondent

3. The Learned Judge erred in law and in fact by finding that the Appellant relied on Section 3 of Article 11 of the Convention on Limitation of Liability for Maritime Claims 1976 ("1976 Convention") to have the Limitation Fund established by the First Respondent as constituted by Appellant when such a reference was used during submissions to draw distinction between the 1976

Convention and Part 5 of the Act in connection with interpretation of statute based on a treaty where treaty has not been implemented into domestic law.

4. *The Learned Judge erred in law and in fact by finding that the Act did not contain any "legal basis" for the Appellant's entitlement to benefit from the Limitation Fund constituted by the First Respondent without applying and/or analyzing the legal nature and effect of sections 76; 77(b); 78(1)(a) and (2); 79(1) and (2); 81(1); 82(1) and 82(3) of the Act.*

5. *The Learned Judge erred in law and in fact in failing to construe, analyse and/or make findings on the submissions advanced by the Appellant filed on or about 14 September 2018 in connection of relevant provisions of the Act namely sections 76; 77(b); 78(1)(a) and (2); 79(1) and (2); 81(1) and 82(3) which in totality imply that one limitation fund be constituted and/or give reasons why the said provisions did not apply in favour of the Appellant's application.*

6. *The Learned Judge erred in law in failing to consider that the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 does provide for establishment of limitation fund by an owner to be available to a charterer under Articles 2(2)(3), (4) and 6(2), which is applicable to the Appellant.*

7. *The Learned Judge erred in law in failing to consider that Part 5 of the Act should be considered and interpreted on the basis of international comity of legal principals since the regime and principles of limitation of liability for a ship are longstanding and apply internationally in many jurisdictions and allow a charterer to rely on a limitation fund established by an owner.*

Consideration of the grounds of appeal

[20] Although 7 grounds of appeal have been formulated, in view of the submissions made and the authorities relied upon by the Appellant, it is convenient to consider them collectively.

[21] In grounds 1, 2, 4 and 5, the Appellant argues that having given leave to the Appellant to intervene and be joined as a Plaintiff, and having recognized that the Appellant is an "*owner*" for the purposes of the MTA, and held that the Appellant is entitled to limit its liability in terms of sections 79 and 81 of the Act by reference to the Fund constituted by Cruz , the court erred in holding that the Appellant is not entitled to the benefit of that fund by virtue of the operation of Part 5 of the MTA, and that the learned Judge erred in not

considering the submissions of the Appellant in respect of sections 76, 77(b), 78(1)(a), (2)and (2), 79(1) and (2), 81(1), 82(1) and 82(3), which sections "*totally imply*" that one limitation fund be constituted.

[22] The Appellant contends that the learned Judge erred in finding that the Appellant relied on Section (3) of Article 11 of the 1976 Convention, when in fact the Appellant had used it only as a point of reference, to draw a distinction between the 1976 Convention and Part 5 of the MTA, in connection with the interpretation of statutes, where a treaty has not been implemented into domestic law. In ground 7 of the grounds of appeal, the Appellant contends that the learned judge erred in failing to consider that Part 5 of the Act should be interpreted on the basis of international comity, since the principles of limitation of liability for the shipper are longstanding, and apply internationally, and many jurisdictions allow a charterer to rely on a limitation fund established by an owner.

[23] The Appellant submits that the learned judge erred in taking into consideration matters extraneous to the application and which were not pursued by parties by referring to, and relying on clause 33 of the Liner Booking Note, discussing the relevance of English law and determining claims between the Appellant and the 1st Respondent.

[24] The written submissions of CCB state that it is a cargo owner that has suffered loss and damage due to the capsizing of the vessel, it has filed its Entry of Appearance and Claim against the limitation fund on 9 October 2017, that it does not oppose PDL being joined as a Plaintiff in the limitation action because PDL was as the charterer, and is entitled to claim limitation of liability under the MTA. Significantly, however, in regard to the constitution of a limitation fund, in its written submissions, CCB states *inter alia* as follows:

> *"5. However the claimant is strongly opposed to PDL limiting its liability by reference to the limitation fund established by the plaintiff cruise holdings, as Fiji law does not provide for this.*
>
> *7. Schedule 1 of the Act lists the International Convention Relating to the Limitation of the Lability of Owners of Seagoing Ships and Protocol 1957*

*and future amendments to the conventions and Protocol (the "**1957 Convention**") as one of the Conventions to which Fiji is a party.*

9. Section (3) of Article 11 of the 1976 Convention provides as follows;

> *'a fund constituted by one of the parties 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) of paragraph 2 respectively'*

10. It is this deeming provision found in Article 11 of the 1976 Convention that is relied on by PDL to have the limitation of the fund established by Cruz Holdings treated as constituted by PDL as well.

11. This is found in paragraphs 1.4 and 7.10 of PDLS submissions filed on 25 May 2018.

12. However, contrary to what PDL claims neither the 1976 Convention nor this deeming provision have been incorporated into Fiji law.

13. As shown by Schedule 1 of the Act, Fiji is not a party to the 1976 convention. It is a party to the 1957 Convention, a copy of which is attached and the 1957 Convention does not contain any such deeming provision.

14. The Act does not contain any such deeming provision either.

[25] In Victor Fatiaki's affidavit filed on in support of Cruz as Plaintiff, he states as follows;

> "*The defendant Concrete Solutions (Fiji) Limited, was the shipper of a container of concrete beams which was on board the plaintiff's vessel, MV Southern Phoenix" at the time of the casualty hereinafter referred to. The Defendant's cargo was lost as a result of the capsize of the MV Southern Phoenix and it has a claim against the Plaintiff for the said loss. I have obtained a copy of the cargo manifest from PDLIinternational Pte. limited for the cargo which was on board the vessel at the time of the casualty. I annex marked VF 3, a copy of the cargo manifest showing details of the defendant's cargo which was lost when the vessel capsized'*

The law relating to limitation of liability

[26] The law relating to shipowners' liability, was originally designed to protect and benefit shipowners. However, the protected category of persons has widened over time, and legal

regimes have expanded the definition to capture persons other than shipowners such as charterers, master, crew members, salvors and insurers.

[27] The need to limit liability was triggered by the public policy need to encourage shipping, and restore confidence in ship owners, who had previously been subjected to heavy damages, over and above even the value of the vessel. It is easy to imagine the sense of urgency and self- protection that triggered the creation of the rules of limitation, in a world when international transportation was predominantly confined to travel by sea. In **The Bramley Moore** (1963) 2 Lloyd's Rep.151, at .p.437, Lord Denning said limitation of liability is *not a matter of justice, it is a rule of public policy which has its origin in history and it's justification in convenience".* Thus, the principle of limitation of liability was designed to encourage shipping by protecting shipowners against having to bear heavy pecuniary damages flowing from the negligent navigation of their ships on the part of their servants and agents.

Limitation under the limitation Convention of 1924

[28] The 1924 Convention did not fulfil its aims and meet the needs of the shipping community, and it was eventually succeeded by the 1957 Convention, which Fiji has ratified, and remains the law in Fiji.

The 1957 Convention on Limitation of Liability for Marine Claims

[29] This was widely accepted among important maritime nations including UK and Canada. It provided one limit for property damage, and another for personal injuries and death, both limits being based on tonnage of the ship. The basis of liability is proof by the claimant of actual fault or privity of the owner. Fiji has ratified and adopted this Convention.

Fiji Legislation- past and present

[30] The Marine Act 1986 incorporated the 1957 Convention, which thus acquired the force of law in Fiji. Originally, limitation of liability was provided for in terms of Division 2 of Part 11 of the Marine Act 1986. In terms of this, liability could not be limited if the occurrence giving rise to the claims resulted from the actual fault or privity of the owner.

[31] The Marine Act 1986 was replaced by the Maritime Transport Act of 2013. Section 78 (contained in Part v of the Act) introduced a change in the conditions for applicability of limitation.

The Marine Transport Act 2013

[32] The Preamble to the Act provides as follows:

> *"An Act for the implementation of Fiji's obligations under the IMO Conventions and to ensure that participants in the maritime transport system are responsible for their actions and to consolidate related maritime laws including the protection of the marine environment and for related matters"*

[33] In Section 2 the interpretation section provides that:

> *"**Convention** or **Conventions** in relation to this act means such Conventions as listed under Schedule 1 and as may be declared for the purposes of this Act and includes the amendments to such Conventions, being amendments to which Fiji is a party that are declared in the same manner".*

[34] Schedule 1 of the Act includes the 1957 Convention. Section 2 makes it clear that only those Conventions that Fiji has ratified, are included therein.

[35] Part 5 of the Act is titled "*Liability of Ship Owners and others"*

[36] Section 76 provides as follows;

> *"This Part applies to every ship, whether registered or unregistered and whether a Fiji ship or not, in any circumstances in which the High Court has jurisdiction under section 18 (2A of the High Court Act 1875"*

[37] Section 77 provides as follows:

> *In this Part, unless the context otherwise requires-*
> *means limitation of the aggregate amount of liability of any <u>one or more persons</u> in accordance with this Part;*
>
> *the definition of owner, where a ship has been chartered, includes a charterer.*

[38] Section 77 provides as follows

> " ***Owner*** *in relation to a ship-*
>
> *(a) Means every person who owns a ship or has any interest in the ownership of the ship,*
> ***(b)*** *Where the ship has been chartered, includes the charterer.*
> ***(c)*** *Where the owner or charterer is not responsible for the navigation and management of the ship, includes every person who is responsible for the navigation and management of the ship."*

[39] An examination of the expanded definition of owner to include a charterer, provides that when the ship has been chartered, the charterer is treated as an owner, and the word "*means"* is used, instead of the word '*includes'* to provide that in a situation in which the ship is operated under a charter agreement, the charterer is, for the purposes of benefitting from the advantage of limiting its liability, entitled to be regarded as be as, entitled to this benefit, as an owner of a ship was, previously. One cannot lose sight of the fact that Part 5 of the Act is specifically dedicated to provide for liability of shipowners and others, and therefore an interpretation that results in selective applicability is not to be approved.

[40] The mode by which, or the basis on which the advantage of limitation of liability is accorded by the legislature is to set the liability to a specific limit so as to "*cap*" the quantum of liability that a shipowner (or other category of person who is, by law captured into that definition) would eventually have to contend with. That is the upper limit. The criteria for setting the limit is not relevant to the matter for determination by this court. What is relevant is whether, the benefit of limitation that a person seeks as shipowner, can be obtained without any financial commitment to provide for claimants whose rights are effectively capped by the limitation.

[41] Section 78 provides as follows;

> "*78(i) Subject to subsection (2), the following persons are not personally liable for an act done in good faith in accordance with the provisions of this Act-*
>
> *(a) owners of ships, and any master, seafarer, the person for whose act omission neglect or default the owner of the ship is responsible;*
> *(b) salvors and any employee of a salvor or other person whose act, omission, neglect, or default the salvor is responsible,*
> *(c) Insurers of liability for claims subject to limitation of liability to the extent that the person assured is entitled to such limitation,*
>
> *(2) No Person shall be entitled to limitation of liability in respect of claims for loss or injury or damage resulting from that person's personal laptop omission where the actor omission was committed or omitted, with intent to cross such loss or injury or damage, or recklessly and with knowledge that such loss or injury or damage would probably result".*

[42] Section 79(1) of the Act provides as follows:

> ***"Claims subject to limitation of liability***
>
> *79(i) Any person who is entitled to limitation of liability shall not be liable for an amount greater than the limit calculated in accordance with section 82 in respect of claims for loss or injury or damage arising on any occasion being in relation to any ship"*

[43] Section 81 provides as follows:

> *"81(i) The limitation of liability under this part-*
>
> *(a) applies to the **aggregate of relevant claims** arising on any distinct occasion against-*
>
> *(i) that owner of the ship and any seafarer or other person for whose act, omission, neglect, or default the owner is responsible.*
>
> *(ii) the owner of a ship rendering salvage services, and the salvor operating from that ship, and any employee of the salvor or the person for whose, act, omission, neglect, or default that owner or salvor is responsible ; or*
>
> *(iii) a salvor who is not operating from a ship, or is operating solely on the ship to or in respect of which the salvage services are rendered, and any employee of the salvor or other person for whose act, omission, neglect, or default the salvor is responsible; and*
>
> *(b) relates to all relevant claims for loss or injury or damage arising on any distinct occasion whether or not the loss or injury or damage is sustained by more than one person,*
>
> *(c) applies in respect of each distinct occasion without regard to any liability arising on any other distinct occasion and,*
>
> *(d) applies subject to subsection 4 whether the liability arises at common law or under other written law"*

The Appellant's case

[44] The Appellants submissions are as follows:

(a) The Appellant submits that the High Court erred in interpreting Part 5 of the MTA, that it reached an interpretation wholly at odds with the general principles that underpin maritime limitation regimes and the procedure under them, it failed to consider that the law of limitation is concerned with establishing one sum for the total liability of the aggregate of all claims falling within the claims listed arising from a particular occurrence calculated by reference to the tonnage of the

ship involved. The Appellant argues that the law seeks to provide for the calculation of the total monetary liability for all claims that may arise from "*a"* specific occurrence, it provides for a fund to be constituted in that the total sum by a party entitled to limit, will be available for all claims arising from the occurrence. The Appellant therefore argues that the basic concept underpinning limitation regimes is that they allow for "*one fund for all*".

(b) The Appellant contends that the central exercise for the High Court was one of interpreting Part 5 of the MTA and deciding how the High Court's procedural power relating to the administration of a limitation fund should be exercised consistently with Part 5, in order to make appropriate orders for the constitution and distribution of a fund. The Appellant submits that in interpreting Part 5 of the MTA, the object is to ascertain the intention of the lawmaker as expressed in the legislation by giving the words used in their natural and ordinary meaning, in the light of the context of the enactment.

(c) The Appellant also makes reference to the legislative context and states that this includes the previous state of the law in which the particular enactment was intended to operate, and that a court may have to trace the law in the area covered by the enactment arrive at its meaning. The Appellant submits that it is presumed that when legislation is intended to give effect to an international agreement, any doubt as to the meaning of the legislation should be resolved in favor of the interpretation which is consistent with the provisions of the agreement.

(d) The Appellant traces the history of the MTA 2013 and argues as follows: in "*broad terms"* in Fiji the statutory provisions relating to limitation would appear to start with the Merchant Shipping Act 1894 which contained a limitation regime, it applied to owners of ships and provided for ratable distribution among claims. The Shipowner's Liability Colonial Territories Order in Council 1963 made provision for the UK Merchant Shipping Act 1958 to be applicable in Fiji. This statutory provision extended the benefit of limitation to charterers and any person

interested in, or in possession of the ship and in particular any operator or manager. This statute enacted the extension of limitation rights in the 1957 Convention. The Marine Act 1986 gave force of law to the 1957 Convention, and provided for the court to make orders for assessment of claims, and the distribution of the limitation sums etc.

(e) Although the 1976 Convention is not listed in the MTA, the key provisions in Part 5, of the MTA are clearly drawn from the 1976 Convention and there can be no other source for them.

(f) The legislative history reflects an established approach to limitation, found in many jurisdictions which aims to produce certainty, harmony and security for those involved in maritime commerce.

(g) The learned Judge ignored the context of the statute, approached the question of interpretation narrowly, and wrongly concluded that because the 1976 Convention has not been ratified by Fiji, Part 5 of the MTA must be interpreted to mean that "*a*" fund of money in the limitation amount is not available to all those who have limitation rights.

(h) The High Court's approach to the application of Part 5 undermines the fundamental principles of this important area of maritime law, by approaching the extension of limitation rights in a way that changes the foundation of limitation,

(i) The law contemplates a single fund with the total liability of all claims from each specific occurrence that may be made against the parties operating the ship.

(j) Instead of reinforcing the principle of limitation, the judgment of the High Court undermines the *policy* of limitation completely because instead of allowing one fund to cover the aggregate of all claims the court orders that there should be two funds in this case, (emphasis added).

(k) Legislative context including the previous state of the law must be considered.

(l) When legislation is intended to give effect to an international agreement, ambiguity in the legislation must be resolved in favour of an interpretation that is consistent with the provisions of the international agreement.

(m) It is presumed that Parliament intends that statutes should not be inconsistent with the comity of nations, established rules of international law or international instruments.

(n) The intention of the Act would be defeated if an owner within the meaning of the Act is not limited by reference to a single limitation fund.

(o) The English courts under the 1976 Convention take the view that there may be various persons seeking the benefit of a single fund including owners and charterers.

(p) It is clear from the English cases that the total limit of all and any claims against any party meeting the definition of owner under section 77 of the Act should be subject to a single limit.

(q) Following the reasoning of the English courts, since the 1st Respondent (owner) had constituted a fund under section 83, there is no obligation for the Appellant to constitute its own fund, as that would be contrary to the intention of the Act and the 1976 Convention on which the Act is based, which intends for there to be only a single fund.

(r) The 1st Respondent has already constituted a fund so it is appropriate for the Appellant to rely on it and for all claims brought against "them" to be directed against this fund.

(s) The 1957 Convention was given the force of law in Fiji, and the provisions cannot be read as providing that a person entitled to limit in the same way as a ship owner has to pay his own limitation fund to assert the right to liability.

(t) The provisions of the 1957 Convention refer to the limitation sum calculated being the total sum representing the limits of liability for all those connected to limit for claims arising on any distinct occasion. The 1957 Convention is concerned with ascertaining one monetary sum which is the limit of liability for all claims for all parties who can claim in the same way as a ship owner.

(u) It is wrong to interpret Part 5 of the Act, by proceeding on the basis that the absence of an express provision deeming the fund to be constituted for all persons entitled to limit, means that each person entitled to limitation has to constitute its own fund, in order to assert limitation.

(v) The interpretation given by the High Court creates an unworkable limitation regime, which is out of step with other jurisdictions, and is not what the lawmakers intended in Part 5 of the MTA, and the inherent power of the High Court should not be exercised to produce such an outcome. Therefore, Part 5 should be interpreted in context.

(w) The court should extrapolate a provision from a Convention that has not been adopted and ratified by Fiji, and that the language of the MTA 2013 permits such a course of action.

(x) Although Fiji is not a party to the 1976 Convention the deeming provision in article 11(3) of the 1976 Convention must be brought in and applied to the Appellant.

Discussion

[45] The duty of the court is to proceed on the basis that the legislature's intention is reflected in the language expressed. The words in a statute are to be given the ordinary and literal meaning as understood from the words themselves. If there is no ambiguity or doubt in respect of the words used, there is no room for the court to engage in a voyage of discovery and try to ascertain its purpose. The rules of interpretation that the Appellant urges this court to adopt, with respect, does violence to the basic rules of interpretation of statutes.

[46] The intention of Parliament is to be deduced from the language used, **Capper v Baldwin** [1965]2 Q.B.53, per. Lord Parker at p.61; for it is well accepted that the beliefs and assumptions of those who frame acts of Parliament cannot make the law, **Davies Jenkins & Co. Ltd.v Davies** [1967]2 W.L.R. 1139, Lord Morris of Borthy-Gest at p. 1156; I.R.C. **v Dowdall O' Mahoney & Co.** [1952] A.C. 401, *per* Lord Reid.

[47] Before proceeding further it is important to note that the Appellant's argument that the court should interpret a statute on the basis of policy, rather than on the basis of the words used in the legislation, is certainly devoid of legal basis, and has therefore to be rejected. Further, the Appellant does not contend that there is any ambiguity in the MTA. Therefore, there is no need to ascertain the intention of the legislature.

[48] It is not tenable for the Appellant to submit that it did not rely on the 1976 Convention, when in fact it is using the words in Section 3 of article 11 of the 1976 Convention, to put forward the argument that, what is contemplated, and what must be taken to have been contemplated by the Fiji's legislature is that there is only one limitation fund, because limitation rises only in respect of one distinct occasion, and the argument to be entitled to the benefit of one fund emanates undoubtedly from Section (3) of Article 11 of the 1976 Convention. Article 11(3) of the 1976 Convention which provides as follows:

"*1.* *Any person alleged to be liable may constitute a fund with the court or the competent authority in any state party in which legal proceedings are instituted in respective claims subject to limitation. He fund shall be constituted in the sum of such amounts set out in Article 6 and seven as are applicable to claims for which that person may be liable, together with interest they are on 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 by depositing the sum all that producing a guarantee acceptable under the legislation of the state party we are the fund is constituted and considered to be adequate by the court or the competent authority.*

3. *A fund constituted by one of the persons mentioned in paragraphs 1(a), (b) or (c) of paragraph (20 of Article 9 or his insurer, shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or(c) of paragraph 2 respectively"*

[49] Assuming without conceding that the Appellant is entitled to rely on Article 11, it is difficult to see how the reference to a single fund can be based purely on the word "*a*", without reference to the very purpose for which a limitation fund was in principle regarded as necessary.

[50] It is important to note that limitation is not a limitation on the number of funds, but that limitation is only to limit the totality of damages that can be claimed by the several claimants against a person who comes within the definition of "*owner*", for the purpose of limiting liability.

[51] A consideration of the Appellant's submissions reveals that its key submissions are diametrically at variance with each other. On the one hand, the Appellant submits that the duty of the court is to ascertain the intention of the legislature as expressed in legislation. On the other hand, the Appellant submits that the court ought to take into account the legislative context and give effective presumptions of interpretation, in this particular case. The Appellant cannot approbate and reprobate.

Adoption of International Treaties/ conventions

[52] It is important to note at the outset that it is undisputed that the 1976 Convention has not been ratified by Fiji, and it is not part of the maritime regime of this country. The Appellant admits this but argues, with respect, rather circuitously, that limitation is a creature of statute and International Convention, Fiji like many other countries has provided for shipowners to limit the aggregate of their liability for all claims rising on a distinct occasion to a sum of money calculated with reference to the tonnage of the ship in relation to which the claims arose.

[53] In my view, the plain meaning of the words in section 77 (b) of the MTA, which provide that when a ship is chartered, the "*owner*" means the charterer, without doubt requires the charterer to do what an owner would have done if the ship had not been chartered, that is, constitute its own limitation fund, if it intended to seek the benefit of limitation of liability. It cannot possibly be contended as is done by the Appellant, that the legislature contemplated that the liability of a charterer, can be foisted on the registered owner

[54] Section 77 of the MTA provides that limitation of liability means limitation of the aggregate amount of liability *of any one or more* persons in accordance with this Part. The section then provides for the different categories of persons who, for the purposes of this Part of the Act, (i.e. liability of ship owners and others), includes three categories of persons. They are, (a) the owner of the ship or any person who has any interest in the ownership of the ship, (b) if the ship has been chartered, the charter, (c) every person who is responsible for the navigation and management of the ship, where the owner or charterer is not responsible for regulation and management. In my view, the words "*one or more persons* " does not mean that one person may constitute a limitation fund, and that the other persons who are captured under the definition of "*owner*" in section 77, can obtain the benefit of that commitment, for the purposes of claiming limitation, under Part 5 of the Act

[55] In other words, there can be a situation in which, when a ship is under a charter agreement, there could be separate claims against both an owner and a charterer, arising from the same casualty. In such a situation, those claims will be based on separate causes of action, and each person who comes under the definition of '*owner'* will necessarily have to seek to limit its own liability, independent of others who too may incur liability from the same casualty

[56] In this case, upon the casualty occurring, the registered owner of the ship instituted action to obtain the benefit of limitation of liability, and in that action added as parties the possible parties who would become claimants as a result of the casualty. However, the Appellant intervened and got itself added as a Plaintiff, and having done that, sought to claim limitation of liability by claiming that the protection of limitation can be obtained by it, by reference to another person's (in this case, the "*owners*") fund. It is important to note that Cruz the owner, has not admitted liability, and the High Court has not yet determined at whose door the fault lies for the casualty. That is a matter to which the learned High Court Judge correctly gave his mind.

[57] Since PDL is, in terms of section 77, also regarded as an "*owner*" for the purposes of Part 5 of the Act (liability of ship owners and others), it was open to PDL to have instituted action on its own and independently of Cruz because it had entered into contracts of carriage by issuing bills of lading to those whose cargo it carried. However, PDL chose not to institute action on its own in order to limit its liability in respect of potential claimants, and instead opted to become a joint plaintiff in an existing action. It did not stop there, it then went on to claim that it should have the right to limit its liability without the statutorily mandated financial commitment on its part, as is required by a plain reading of Part5 of the MTA.

[58] Section 79(1) of the Act, provides that any person who is entitled to limitation of liability shall not be liable for an amount greater than the limit calculated in accordance with section 82 in respect of claims for any loss or injury or damage arising on any occasion being in relation to any ship.

[59] My understanding of section 79 (1) is that an owner who constitutes a limitation fund, is not entitled to claim that one fund will be sufficient to cover different casualties or instances, that his ship may have been subjected to. In other words, a shipowner cannot set up one fund to cover multiple casualties from ships owned by him. If he seeks the benefit of limitation of liability, the Act, requires him to set up a different fund for loss, injury or damage arising from each distinct occasion. That is the context in which the word "*distinct*" is used in Section 79(1).

[60] Section 81 sets out what *types of claims* are entitled to be covered by the protection of the limitation of liability. My understanding of Section 81(1) is that it provides for the owner to obtain the benefit of limitation of liability, and the words, "*applies to the aggregate of relevant claims arising on any distinct occasion",* and means that each decree of limitation of liability will be confined to a specific or distinct occasion. In other words, it precludes an "*owner*" (or a person who in terms of the expanded definition is entitled to claim the benefit of limitation of liability), from setting up a single or general fund for himself so as to be able to take the protection of limitation irrespective of the number of distinct occasions, for which he may be sued. Put differently, section 81 precludes the possibility of an owner (whether as owner *simpliciter,* or as charterer), from setting up a single fund in respect of multiple casualties or occurrences. It does not contemplate one fund for multiple owners. In other words, this fund that Cruz has set up, will enure to its benefit only in respect of the casualty that arose 6 May 2017, by the sinking of MV Southern Phoenix. Cruz will not be able to limit its liability in respect of a different casualty, by reference to this fund.

[61] Section 81 of the Act provides that the limitation of liability under Part 5 applies to the *aggregate* of relevant claims arising on *any distinct* occasion against the owner of the ship and any seafarer or other person for whose act, omission neglect or default the owner is responsible. The Appellant seeks to use the word "*distinct*", in Section 81, to claim that it denotes a single occasion, and therefore a single fund irrespective of who constitutes it,

would satisfy the financial commitment that must be made in order for a decree of limitation of liability to be obtained. I am unable to agree with that submission.

[62] Thus, the fact that PDL decided to have itself joined as a plaintiff in an existing action instead of instituting its own independent action for a decree of limitation of liability, cannot be used as a basis on which to claim that a single fund constituted by an existing plaintiff, can also be utilized to its benefit, independent and irrespective of any financial commitment on its part.

[63] What is at issue here is not whether the principles of limitation of liability apply under Fiji law. There is no doubt that the statute law of Fiji has adopted the principle of limitation of liability. The question for determination is whether a deeming provision in a treaty that has not been ratified by Fiji, can inform the interpretation of unambiguous words in the Fiji legislation. In my view there is no legal basis for this court to legislate.

[64] This is not a case in which domestic legislation is in conflict with a treaty ratified by Fiji. In such a situation too, it would not be possible for the court to insert words that the legislature has thought fit to exclude. However, in a situation in which domestic legislation does not properly reflect a ratified international treaty, it would be open to the court to look at the purpose and object of the legislation, and be informed by the provisions of the treaty in order to resolve an ambiguity or lacuna in the domestic legislation. This is however not the case here, as the Appellant concedes that the 1976 Convention has not been ratified by Fiji.

[65] Further, it must be remembered that in this case, the Appellant is not relying on Customary International law, in respect of which English courts have sometimes adopted the doctrine of incorporation, provided that the Customary International Law relied upon, is not in conflict with domestic legislation. In this case, the Appellant urges the court to adopt the substance of a treaty that Fiji has not ratified. This is without any legal basis, and is rejected.

[66] The general rule that an English court may not take account of an unacted treaty has been confirmed by many decisions, one of which is **International Tin Council case** [1990] 2AC 418.

[67] The Appellant's argument in essence is that this court must read into the MTA, a deeming provision of an International Convention that Fiji has not ratified. If a State has ratified an International Convention it is expected to incorporate it in the form of domestic legislation. If a State has opted not to ratify a Convention, the courts are not bound to presume that Parliament would, in all probability have legislated in terms of the unratified Convention. In this case Schedule 1 of the MTA makes reference only to the 1957 Convention.

[68] In the **International Tin Council Case** [1990] 2 AC 418, the English courts had to consider the effect of an unacted treaty to establish liability or otherwise of member states of the International Tin Council. The rule was strictly interpreted in **Arab Monetary Fund v Hashim(No.3)**, where it held that the decision of the House of Lords in the **International Tin Council Case** (*supra*), precluded the court from having reference to and applying the provisions of a treaty establishing the Arab Monetary Fund, because UK was not a party to the Treaty of establishment of the said fund. The Court held that it was up to Parliament to legislate and not for the courts to legislate.

[69] If a State did not ratify an International Convention, a court it is not expected to interpret the law, as if the State had ratified the Convention.

[70] This court acknowledges the assistance of learned Counsel for the Appellant, who made available to this court, several authorities and material, on what appears to be a hitherto un-navigated subject in Fiji.

[71] I did give anxious consideration to them, and in my journey of arriving at the determination of this appeal, a passage in **The Ocean Victory** [2017] UKSC 35, attracted my attention. Although it considered the effect of the 1976 Convention, the court said this:

"*82. Longmore LJ treated these provisions as of some importance in reaching his conclusion. In my opinion he was correct to do so. In para 25 he noted that Thomas J set them out in detail in The Aegean Sea and summarised them broadly in this way. Article 9(1) provides for the claims against (a) the persons mentioned in article 1(2) (viz owner, charterer, manager or operator) to be aggregated if they arose on distinct occasions; likewise for claims against (b) the owner of a ship rendering salvage services and a salvor operating from that ship and (c) a salvor not operating from a ship. Article 9(2) then deals with passenger claims. Article 10 provides that liability can be limited without the creation of a fund. Article 11 then provides for the constitution of a limitation fund when that is, in fact, done; it provides for* ***separate funds*** *for the "****shipowner" category*** *of those entitled to limit and the "salvor" categories (and for passenger claims) by providing:*

"'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.' Thus through the references to article 9(1)(a) all those persons designated as shipowners in article 1(2) of the Convention are brought together as a single unit for the constitution of the fund. Thomas J said this (p 49):

'In my view the combined effect of these articles is important. As there is provision for ***a*** *fund for* ***those categorized as shipowners*** *and that fund is to* ***cover both charterers and owners, it is difficult to see how charterers can claim the benefit of limitation through that fund where a claim is brought against them by owners****. Owners are entitled to the benefit of limitation for a claim by charterers as that claim is being brought by charterers not when performing a role in the operations of the ship or when undertaking the responsibility of a shipowner, but in a different capacity, usually through their interest in the cargo being carried****.'***

While I entirely agree with this passage from The Aegean Sea, the considerations advanced by the judge to my mind more effectively support a conclusion that the claims in respect of which an owner or a charterer can limit do not include claims for loss or damage to the ship relied on to calculate the limit rather than a conclusion that a charterer can only limit in respect of operations he does qua owner."(Emphasis added).

[72] Whilst those authorities are relevant to the jurisdictions in which they were litigated, and whilst we have drawn from the general principles relating to the concept of limitation of liability, I am unable to agree that they can guide this court in the interpretation of and unacted treaty, and the matter for determination by this Court.

[73] For the reasons set out above, I dismiss all seven of the grounds of appeal urged by the Appellant. In the result, I see no reason to set aside the judgment of the High Court dated 8 May 2020. The judgment of the High Court is affirmed, and the appeal is dismissed. The High Court is directed to have the main/substantive matter set down for trial.

[74] If the Appellant intends to pursue its application in the High Court, it is directed to comply with the order of the High Court in regard to the constitution of the Limitation Fund.

Orders of the Court:

1. ***The Appeal is dismissed with costs of $5,000.00 payable by the Appellant to the First Respondent within 28 days of this Judgment.***
2. ***The High Court is directed to proceed with the Trial.***

.....
Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

.....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Justice Farzana Jameel
JUSTICE OF APPEAL

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