



Neutral Citation Number: [2021] EWCA CIV 1880

Case No: A4/2020/1327

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
MR JUSTICE TEARE

[2020] EWHC 1294 (Admlty)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 15 December 2021

Before:

LORD JUSTICE PHILLIPS

SIR DAVID RICHARDS

and

SIR LAUNCELOT HENDERSON

Between:

(1) SPLITT CHARTERING APS

(2) STEMA SHIPPING AS

(3) MIBAU BAUSTOFFHANDEL GMBH

(4) STEMA SHIPPING (UK) LIMITED

Claimant

Respondent

Fourth Claimant

- and -

(1) SAGA SHIPHOLDING NORWAY AS

First Defendant

(2) RTE, RÉSEAU DE TRANSPORT D'ÉLECTRICITÉ SA

Appellant

Second Defendant

**(3) ALL OTHER PERSONS CLAIMING OR BEING ENTITLED TO CLAIM
DAMAGES BY REASON OF THE DRIFTING AND/OR DRAGGING OF
ANCHOR
OF THE UNPOWERED BARGE “STEMA BARGE II” ON 20 NOVEMBER
2016
AND/OR ANY CONSEQUENT COLLISIONS OR ALLISIONS**

Third Defen

Chirag Karia QC (instructed by **HFW LLP**) for the **Appellant**

John Passmore QC (instructed by **Campbell Johnston Clark Limited**) for the **Respondent**

Hearing dates: 2 and 3 March 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be

Wednesday 15 December 2021 at 10:30

Lord Justice Phillips:

1.

The issue on this appeal is whether, on 20 November 2016, the respondent (“Stema UK”) was “the manager or operator” of the STEMA BARGE II (“the barge”) within the meaning of article 1(2) of the Limitation Convention ¹. Early that morning, whilst off Dover, the barge’s anchor dragged during a storm and damaged an underwater cable owned by the appellant (“RTE”). The issue arises because Stema UK was the receiver of the cargo on the unmanned barge and did not have any formal role in respect of the barge’s management or operation, but its personnel did operate the machinery of the barge whilst off Dover and were involved in monitoring the weather and in the decision to leave the barge at anchor during the storm.

2.

It is common ground that, if Stema UK was the manager or operator of the barge (and therefore fell within the definition of the term “shipowner” in article 1(2)), then RTE’s claim for the damage to the cable is subject to limitation under article 2 of the Limitation Convention, being “in respect of ... damage to property ... occurring ... in direct connection with the operation of the ship ...”. There is also no dispute that the limit of liability is 5,309,200 Special Drawing Rights, equating to approximately £5.5m.

3.

In these proceedings the first claimant (“Splitt”), the registered owner of the barge, the second claimant (“Stema A/S”), as charterer ², and Stema UK (the fourth claimant), each claimed a declaration that their liability was so limited. The third claimant did not, in the event, require any relief. RTE ultimately accepted that Splitt and Stema A/S’s roles fell within the term “shipowner” so that they were entitled to limit their liability, but disputed that Stema UK was entitled to do so. ³

4.

In a reserved judgment dated 22 May 2020 Teare J (“the Judge”) determined that Stema UK was indeed the operator of the barge at the relevant time (but not the manager), and accordingly, on 8 June 2020, made an order declaring that liability (if any) of each of Splitt, Stema A/S and Stema UK was limited to the sums referred to above.

5.

RTE appealed against the Judge’s decision that Stema UK was the operator of the barge, both as a matter of law and as to certain of the Judge’s findings of fact. Permission on all grounds was granted by Rose LJ.

6.

Stema UK maintained that it was correctly found to be the operator of the barge, but contended (by way of Respondent’s Notice), that if not the operator, Stema UK was the manager of the barge. The Respondent’s Notice also asserted that Stema UK is entitled to limit its liability under article 1(4) of the Limitation Convention on the grounds that the shipowner is liable for any act, neglect or default on its part, but that contention was withdrawn (for the purposes of these proceedings) during oral argument.

The background facts

7.

The Judge summarised the relevant events leading to the claims as follows:

“3. Around Christmas 2015 severe weather caused the railway line on the seafront above Shakespeare Beach between Dover and Folkestone to become weakened. The necessary repairs required the provision of rocks (rock armour) to support the line. Network Rail contracted with a consortium of contractors called the South-East Multi-Functional Framework (“SEMFF”) to undertake the necessary work. SEMFF included Costain Limited who acted as project manager and lead contractor.

4. SEMFF or Costain contracted with [Stema UK] for the provision of the rock armour. Stema UK purchased the rock armour from its associated company, [Stema A/S] a Danish company.

5. The third shipment of rock armour (like the first and second shipments) was transported from a quarry in Norway on [the barge]. The barge arrived off Dover under towage on 7 November 2016. The barge was anchored and the tug departed. Storm force winds of up to force 9 from Storm Angus were forecast for the morning of 20 [November] 2016. The decision was taken to let [the barge] ride out the storm.

6. [The barge] began to drag her anchor and at 0634 on 20 November 2016 an undersea cable (cable 12) supplying electricity from France to England registered a tripping. It is the case of the owners of the undersea cable, [RTE], that the cable had been damaged by the anchor of [the barge].

....

9. The damage to cable 12 is the subject of a claim for damages being brought by RTE against [Splitt], the registered owner of the barge, and Stema A/S in the Danish courts. Stema UK has sought a declaration of non-liability in this court, which action is currently stayed.”

The evidence as to the respective roles of Splitt, Stema A/S and Stema UK

8.

Splitt, Stema A/S and Stema UK (collectively “the claimants”) are all members of the Mibau group of companies, each with a role in the transport of rock armour to the UK as follows:

i)

Splitt provides vessels (either owned or chartered) to transport rocks from quarries in Northern Europe. At the relevant time Splitt was the registered owner of the barge (a dumb barge of 12,641 GT, built in China in 2007, 135m in length, 42m in beam with a draft of 5.8m and fitted out for the carriage of rocks) and a smaller barge named CHARLIE ROCK. Splitt is a Danish subsidiary of Stema A/S and has no employees of its own, being operated by personnel employed by Stema A/S.

ii)

Stema A/S buys material for sale as rock armour to the UK from an associated company and buys the freight services from Splitt, before selling the material to Stema UK off the coast of the UK.

iii)

Stema UK’s main role is to market the Mibau group’s products in the UK and then make local arrangements for delivery of the products. In the case of rock armour purchased from Stema A/S off the coast of the UK, Stema UK charters a barge from Splitt to tranship from the ocean-going barge and then lands the material on a beach.

9.

The central issue at the trial was the specific role played by each of the claimants, and in particular Stema UK, in relation to the barge when at anchor off Dover on 20 November 2016. The evidence was in the form of three witness statements served by Stema UK from (i) Martin Johansen, the Managing Director of Stema UK; (ii) Claus Boisen, the Chief Executive Manager of both Stema A/S and Splitt; and (iii) Jakob Grunfeld, an operator at Stema A/S. As RTE did not challenge any of that primary evidence, none of the witnesses was called for oral examination. However, because in this appeal RTE challenges two of the Judge’s findings of fact (being inferences the Judge drew from the unchallenged written evidence) it is necessary to set out the accounts in some detail.

10.

Mr Johansen’s evidence included the following:

i)

In March 2016 Mr Johansen sent a quotation to SEMFF, care of Costain, for the supply of rock armour. In April 2016, before being awarded the contract and at Costain’s request, he drafted and sent a Method Statement outlining how Stema UK could tranship and deliver the rock directly onto Shakespeare Beach. In this document Mr Johansen identified, by way of initial proposal, an anchorage/rock transhipment location area, to be agreed with the Marine Management Organisation (“the MMO”) and the Fisheries Liaison Officer, in consultation with other authorities. In the event Mr Johansen’s suggested anchorage location was approved in the licence granted by the MMO, as was a transhipment corridor to the beach (in relation to which Mr Johansen also drafted a Communications Protocol to be sent to channel swimming clubs and a Notice to Mariners). Mr Johansen also drafted a Safety Statement, primarily directed at the operation of CHARLIE ROCK, which would be chartered from Splitt by Stema UK, and the transhipment of the rock.

ii)

The rock was delivered from Norway in three loads aboard the barge, towed by a chartered tug, the first arriving on 12 July 2016. A different tug was used for each ocean voyage. Once the barge had arrived, Stema UK placed machines and crew on board and transhipped the rock to the smaller

CHARLIE ROCK, which was then towed by the tug AFON GOCH (chartered by Stema UK for the period of the discharge of the three loads).

iii)

The third load arrived off Dover on the barge on 7 November 2016, towed by the tug BREMEN FIGHTER. Stema UK provided a qualified Barge Master and a crewman, transferred to the barge by the Dover pilot boat, to drop the anchor in the approved location (although it subsequently transpired that, at the direction of Dover Port Control, the barge had on this occasion been anchored outside the approved "box").

iv)

Stema UK also provided a superintendent onshore, Andrew Upcraft. Under instructions from Stig Olsen of Stema A/S, Mr Upcraft put in place a roster for the Barge Masters and crewmembers.

v)

While the barge was anchored, to be left unmanned, the relevant Check List was followed, including ensuring the barge's navigation lights were on and that the emergency towing wire was ready to use. Whilst the barge was at anchor the Barge Masters and crewmembers provided by Stema UK attended to further matters (dealt with in additional Check Lists covering operation and maintenance) such as ballasting during discharge operations, maintaining the generators and ensuring the navigation lights were in order.

vi)

The Barge Masters also monitored the position of the barge, as did the AFON GOCH. The Barge Masters and Mr Upcraft were also able to see whether the barge remained in position from the shore.

vii)

Both Mr Upcraft and Mr Johansen checked the weather forecast twice a day, discussing whether precautions needed to be taken. But ultimately, Mr Johansen stated, "the decision of what to do with the barge remained with its owner, i.e. [Splitt], taking into account advice on site including from the superintendent and Barge Masters".

viii)

Mr Johansen further explained that, although the different parties within the Mibau group would frequently discuss all aspects of the operation, including weather conditions and the safety of the vessels and personnel, "a distinction was made between the vessels in terms of responsibility. Stema UK was responsible for decisions regarding the CHARLIE ROCK and the tug AFON GOCH. [Splitt] was responsible for [the barge]."

ix)

From 14 November onwards Mr Boisen, Mr Upcraft and Mr Johansen monitored the weather forecasts closely in view of an approaching gale. Mr Johansen discussed precautions with Mr Boisen, including the removal of the barge to Boulogne or an alternative anchorage off North Kent. In the end it was decided that CHARLIE ROCK and AFON GOCH should shelter in the port of Dover, but that the barge should remain at its anchorage. They were satisfied that her oversized anchor gear would enable her to maintain her position in the anchorage area, away from passing traffic.

x)

The first Mr Johansen was aware of movement of the barge or of any problem was at about 10am on 20 November 2016 when he was informed of the incident by Stema UK's crew in Dover on the AFON GOCH.

11.

Mr Boisen stated that the arrangement for deliveries to Shakespeare Beach aboard the barge was "akin to a voyage charterparty" from Splitt to Stema A/S, but that Splitt "remained responsible for [the barge], as agreed in a document signed by me and dated 28 June 2016". Mr Boisen then confirmed Mr Johansen's account of the preparation for anchorage off Dover and transshipment of the rock, stating that he had discussed the project with Mr Johansen in the planning phase. As for the events leading to and on 20 November 2016, his evidence was as follows:

i)

As regards safeguards for the barge when the forecast is for Force 7 winds or higher, the team, including Mr Boisen, his operations personnel, people on location, project managers and in some instances MDs of the sales companies, would confer, but "[u]ltimately, the decision is taken by employees of [Stema A/S] on behalf of [Splitt]."

ii)

After receiving each forecast between 14 and 18 November 2016 "we discussed the implications internally and with personnel at Stema UK. Discussions were by phone, text messages and on WhatsApp. Mr Johansen and Mr Grunfeld discussed matters with the team in the UK and reported the advice back to us....We decided that the barge should remain at anchor, and we were all sure that this was the safest course."

iii)

After the incident, Stig Olsen from Norsk Stein, acting as "our" technical barge expert, went to Dover to carry out an inspection.

12.

Mr Grunfeld stated that he had, amongst others, daily responsibility for the operation of barges owned by Splitt, reporting to Mr Boisen. He followed a Barge Operator Manual when operating the barge. A copy of the relevant edition of that manual was before the Court. It listed Mr Grunfeld as "Barge Operator", with a range of responsibilities as surveyor, for weather routing, daily reporting, emergency procedures and "other operational responsibilities." Mr Johansen was listed as a stakeholder, but no responsibilities were ascribed to him. The Manual also included extensive provisions concerning weather, stating that when the forecast showed wind force greater than or equal to 9 on the Beaufort Scale or waves greater than 4m, appropriate steps must be taken, stating that "Actions must be discussed and agreed with the steering committee", but not indicating its membership.

13.

Mr Grunfeld further stated that while the barge was at anchor off Dover, Stema UK "provided personnel to physically operate the barge on behalf of [Splitt] and to carry out the transshipment and delivery of the rock. We would discuss operational matters with the local personnel by telephone." He confirmed that, "before rough weather the Stema UK crew went through the barge to check that all manholes were shut, that the generator was running, and that the safety wire was out and afloat, and they also went through the main equipment". Further, there were Check Lists on board for when the barge was left unmanned and for the ongoing operation and maintenance of the barge.

14.

In relation to the decision to leave the barge at anchor during the gale on 20 November 2016, Mr Grunfeld stated that he spoke with Mr Upcraft on 17 November 2016 and they formed the view that the barge would continue to be safe at anchor, this also being agreed with Mr Johansen. There were further text exchanges on 18 November 2016, when Mr Upcraft advised there was no need to hire a tug to tow the barge away, something that was agreed by Mr Johansen and Mr Boisen. Nothing changed in the forecast thereafter to require this view to be revised and there was no further contact from Mr Upcraft until after the incident on 20 November 2016.

The relevant provisions and authorities

15.

The Limitation Convention provides, so far as material to this dispute, as follows:

“CHAPTER I

THE RIGHT OF LIMITATION

ARTICLE 1

Persons entitled to limit liability

1.

Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.

2.

The term “shipowner” shall mean the owner, charterer, manager, or operator of a seagoing ship.

3.

...

4.

If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.

...

ARTICLE 2

Claims subject to limitation

1.

Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

....”

16.

The travaux préparatoires of the Limitation Convention recorded proposals that limitation protection be extended beyond “operators (owners, charterers etc)” and their servants to include “all persons rendering services in direct connection with the navigation, management or the loading, stowing or discharging of the ship”, but that those proposals were rejected by majority vote of the contracting parties.

17.

There was also a proposal that the word “responsible” in article 1(4) be deleted and replaced by the phrase “legally liable at law in the absence of a contract” in order to prevent shipowners extending protection to other persons by contract, but that proposal was also rejected.

18.

In *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] EWCA Civ 114, [2004] 1 Lloyd’s Rep 460 Longmore LJ (with whom Waller and Neuberger LJJ agreed) emphasised at [9] that the task of the Court is to construe the Limitation Convention as it stands, without any English law preconceptions, but by reference to broad and generally acceptable principles of construction. Whilst it may be difficult to know in any given case what are broad and generally accepted principles, some such principles are undoubtedly enshrined in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Longmore LJ summarised the effect of those provisions at [10] as follows:

“... the duty of a Court is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the convention. The Court may then, in order to confirm that ordinary meaning, have recourse to what may be called the travaux préparatoires and the circumstances of the conclusion of the convention. I would, for my part, regard the existence and terms of a previous international convention (even if not made between all the same parties) as one of the circumstances which are part of a conclusion of a new convention but recourse to such earlier convention can only be made once the ordinary meaning has been ascertained. Such recourse may confirm that ordinary meaning. It may also sometimes determine that meaning but only when the ordinary meaning makes the convention ambiguous or obscure or when such ordinary meaning leads to a manifestly absurd or unreasonable result.”

19.

At [11] Longmore LJ set out what had been agreed between the owner and charterers in that case to be the object and purpose of the convention, namely (a) enabling owners, charterers, managers and operators to limit their liability so as to encourage the provision of international trade by way of sea-carriage; (b) providing higher limits of liability but making them more difficult to “break”; and (c) enabling salvors to limit their liability in the same way as owners. Having done so, Longmore LJ stated that, in his view, it was not possible to ascertain with certainty any object or purpose of the Limitation Convention beyond this common ground.

20.

In *CMA Djakarta* the issue was whether the term “the charterer” in article 1(2), being part of the definition of “shipowner”, was limited to charterers who were acting as though they were owners, that is to say, by managing or operating a ship under time charter, or whether it extended to cover a voyage charterer. The Court of Appeal rejected the contention that a charterer must be acting qua owner, Longmore LJ explaining at [13] that to so construe article 1(2) would be to place a gloss on the word “charterer”, whereas the ordinary meaning was a charterer acting in his capacity as such. ⁴

That approach was expressly approved by Lord Clarke in *Gard Marine & Energy Ltd. v China National Chartering Co Ltd (the Ocean Victory)* [2017] UKSC 35, [2017] 1 Lloyd's Rep 521 at [78].

21.

In *ASP Ship Management Pty Limited v Administrative Appeals Tribunal* [2006] FCAFC 23, the Federal Court of Australia considered the question of when a ship is "operated by" an Australian resident, firm or company within the meaning of section 10 of the Navigation Act 1912, the context being that the crew of such a ship would qualify for statutory compensation for injuries.

22.

At [90] the Federal Court stated that the question was whether an entity has sufficient management and control of a ship, as a chattel and as an operating enterprise, such that it can be said that the ship is operated by that entity, albeit in association with any other party. The Court then emphasised that an affirmative answer to the question as to whether a ship is operated by an entity in association with another is not provided by a conclusion that the entity merely assists in the operation of the ship by another. The ship must be "operated by" the entity for the purposes of section 10.

23.

The Federal Court explained at [94]:

"The words "operator" and "to operate" can be used at several levels of abstraction. Much depends on context. Here it is the ship which is to be operated by an Australian person firm or company whether alone or in association with others. Whilst one may speak of a machine being operated by a person who physically attends to its working, the level of abstraction required by the phrase ... "a ship which is operated by a person firm or company" assists one to conclude that it is not the master or crew individually and in association with one another who are operating the ship. They can certainly be seen to be working the ship, but the context here requires the notion of management and control of the ship."

24.

At [97] the Federal Court expressed the view that, to a degree, the conflation of owner and operator in the relevant Act pointed to the conclusion that the word "operator" is being used in a sense beyond merely working the mechanical parts of the ship and in a sense importing the notions of control and management of and dominion over the ship that one would associate with ownership. At [98] the Court emphasised that a ship is a working commercial enterprise and that such enterprise was related to the technical adequacy of the ship and its crewing. That tripartite division (commercial, technical and crewing) of what are practical operating responsibilities can be seen in the industry standard form agreement, the BIMCO Shipman 98.

25.

After considering the history of the use of the word "operator" in limitation conventions and statutes, including the history in England as set out and explained at first instance and in the Court of Appeal in *CMA Djakarta*, the Federal Court rejected the contention that "operator" relates only to the entity that has the commercial disposition of the ship or has the final authority on operational matters. Nor was it a matter of distinguishing between physical and commercial operations. The Court stated at [106] that:

"Rather, the question is whether, as a matter of English, in a recognised maritime context, the respective ships were operated by the Employers in association with others, having regard to the directness of the actual management and control by the Employers of the operation of the ships. The

phrase 'operated by' in s 10 encompasses the notions of a real, substantial and direct role in the management and control of the commercial, technical and crewing operations of the ship."

26.

The Federal Court concluded at [109-110] that:

"The concept of 'operation' may involve both elements relating to the physical operation of the ship and elements relating to its commercial operation, in the management and control of the vessel as we have described.

Merely providing the crew and being their employer is not, of itself, sufficient to make the employer an 'operator'. Control over the identity of the master and crew is also relevant, as is control over the qualifications of the crew..."

The Judgment below

Construction of the Limitation Convention

27.

In considering the meaning of "operator" in article 1(2) of the Limitation Convention, the Judge recognised that the term could be used at several levels of abstraction [68] and that (referring to the observations of the Federal Court of Australia in ASP) a ship is not merely a machine to be worked by a skilled operative, but a working commercial enterprise which, in order to be managed successfully, requires the discharge of inter-related operational responsibilities [69].

28.

The Judge rejected the contention that a bright line could be drawn between the role of operator and manager (Stema UK suggesting that the role of an operator was "more physical"), concluding at [74] that:

"the ordinary meaning of "the operator of a ship" includes "the manager of a ship". Indeed, in many cases involving a conventional merchant ship there may be little scope for operator to have any wider meaning than that of manager.

29.

However, the Judge pointed out, the present case does not involve a conventional merchant ship but a dumb barge, left laden with cargo at the discharge location and thereafter "attended" by a company which places men on board with instructions to operate the machinery of the barge. The question was whether in those circumstances the ordinary meaning of "the operator" could include those who physically operate the machinery of the ship and those who cause the machinery of the ship to be physically operated, or whether the ordinary meaning is limited to the manager of the ship [75].

30.

In answering that question the Judge first noted that the inclusion of article 1(4) in the Limitation Convention, limiting the liability of those for whom the shipowner is responsible, makes it clear that the master and crew of a vessel are not within the class of operator (or else that provision would not have been necessary). He concluded that article 1 as a whole therefore suggests that "operator" is used at a higher level of abstraction, one which has a notion of management and control over the operation of the ship [79].

31.

Notwithstanding that conclusion, the Judge went on to say at [81] that

“Those who cause an unmanned ship to be physically operated have some management and control over the ship. If, with the permission of the owner, they send their employees on board the ship with instructions to operate the ship’s machinery in the ordinary course of the ship’s business, they can, I think, be said to be the operator of the ship within the ordinary meaning of that phrase, though they may not be the manager of it.”

32.

The Judge further explained at [83] that including such persons within the term “operator” is consistent with and promotes the object and purpose of the Limitation Convention, namely, to encourage the provisions of international trade by sea-carriage, pointing out that:

“When the owner of a dumb barge arranges for the barge to carry a cargo by sea from one place to another the barge, on arrival at the destination, is unmanned. If it has to be anchored and secured so as to remain safely at anchor whilst waiting for the cargo to be discharged the owner has to arrange for the necessary work to be done, that is, for the barge’s equipment and machinery to be operated. If he arranges for an associated company to do that work and it is done negligently so that loss or damage is caused to others, it would not encourage the provision of international trade by sea carriage if the owner could limit its liability for the loss and damage but the associated company which operated the barge at the discharge location could not do so.”

33.

The Judge concluded at [99], after considering article 2 of the Limitation Convention, previous versions of that Convention and the decision in ASP:

“...that the ordinary meaning of “the operator of a ship” in article 1(2) of the 1976 Limitation Convention embraces not only the manager of the ship but also the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of the ship’s business.”

34.

In so concluding, the Judge rejected RTE’s submission that, in interpreting “the operator” as including “anyone who operated the ship or part of a ship” he was putting an impermissible functional gloss on the words of the Limitation Convention, contrary to the approach of the Court of Appeal in CMA Djakarta. The Judge considered that the interpretation he favoured gave the phrase its ordinary meaning [100].

35.

The Judge further rejected RTE’s contention that the use of the definite article in the expression “the operator” meant that there could only be one operator (RTE contending, and the Judge accepting, that Stema A/S continued to be an operator of the barge off Dover). The Judge pointed out that it was clear that there could be more than one owner and more than one charterer of a ship, notwithstanding the use of the definite article in those cases also. It must also be the case, he held, that there could be more than one operator [101].

Application of the law to the facts

36.

The Judge recorded that there was no real dispute during the trial that, at least until arrival off Dover, “the operator” of the barge was Stema A/S, expressing the view that there was no other realistic candidate for that role [105]. Further, he noted that until arrival at Dover, Stema UK had no

involvement with the operation of the barge, not being privy to the logistics of bringing the materials to the UK coastal area [106].

37.

As for the position at Dover, at [107] the Judge summarised the facts relied upon by Stema UK as follows:

“Upon arrival of the tug and barge off Dover on 7 November 2016 Stema UK placed a barge master and crewmember on board [the barge] (under a superintendent ashore). They dropped the barge’s anchor. It appears that they did so in the location advised by the tug. (It later transpired, on 5 December 2016, that the anchor had been dropped outside the anchorage area.) Thereafter, and before leaving [the barge], the barge master and crewman checked items such as navigation lights and the emergency towing wire. For this purpose they used a Check List provided by Splitt. Whilst the barge was at anchor and whilst cargo was being transhipped from [the barge] to CHARLIE ROCK they attended to various matters on [the barge] such as the ballasting of the barge (which was necessary as cargo was discharged and transhipped to CHARLIE ROCK), maintaining the generators and ensuring the navigation lights were in order. Again, further check lists provided by Splitt were used for this purpose. The position of the barge was also monitored. There was a roster of barge masters and crewmen put in place by the superintendent Mr. Upcraft upon the instructions of Mr. Olsen of Stema A/S. The weather forecasts were considered by Mr. Johansen and the superintendent twice a day. They were also considered by personnel of Stema A/S in Denmark. There were discussions between Mr. Boisen and Mr. Grunfeld of Stema A/S and Mr. Johansen and Mr. Upcraft of Stema UK. The decision to leave [the barge] at anchor on 20 November 2016 was taken by them. Both Mr. Boisen and Mr. Johansen said that the decision was taken on behalf of Splitt. (Whether that reflected the Barge Operating Manual paragraph 5.3 which refers to the Splitt Chartering Operator taking the “necessary actions” or the division of responsibility between Splitt and Stema A/S under the charter dated 28 June 2016 was not explained.)”

38.

The Judge then stated, at [109], that it seemed clear that Stema A/S retained a role as operator of the barge after its arrival because Stema A/S continued to monitor the weather forecasts and, moreover, Stig Olsen and Mr Grunfeld of Stema A/S were involved in post casualty inspections and surveys, there being no evidence that Stema UK had any involvement in such matters.

39.

However, the Judge noted at [110], from 7-20 November 2016 Stema UK had a real involvement with the barge, its employees not only anchoring her but preparing her for lying safely at anchor and, during discharge, operating the barge’s machinery to ensure that she was safely ballasted. No personnel of Stema A/S were on board, only personnel of Stema UK (though not permanently because there was no accommodation on board the barge).

40.

At [111] the Judge noted that there was no evidence of any contract between Splitt and Stema UK for the work the latter did on board the barge. It appeared that the work was done because that was the way in which the Mibau/Stema group organised its affairs.

41.

The Judge rejected RTE’s submission that Stema UK’s actions were by way of performing its obligations to take receipt of the cargo of rocks. Although anchoring and securing the barge were necessary for transhipment, those activities were the responsibility of the vessel, not the

responsibility of the purchaser of the goods ex barge. Those activities were performed by Stema UK for the benefit of the owner of the barge. But the Judge added that, even if Stema UK had been obliged on the facts of this case to anchor and secure the barge, that conduct amounted to operation of the barge.

42.

The Judge further rejected RTE's submission that what Stema did was to provide a service to the owner of the barge analogous to that of a berthing master, the provider of such third party services not being entitled to limit liability (as apparent from the travaux préparatoires of the Limitation Convention). The Judge held (at [116]) that, if it was right to regard what Stema UK did as the provision of a service, it was the service of operating the barge in circumstances where there was no one else to operate her. Another way of putting it, the Judge said, was that the service provided by a travelling ship repairer, tank cleaner, husbanding agent and others to a manned ship is not comparable to the operation of an unmanned barge by Stema UK.

43.

At [117] the Judge posed the remaining question: "can it fairly be said that Stema UK was the operator of [the barge] off Dover? Or did Stema UK merely assist Stema A/S to operate [the barge]".

44.

In answering that question, at [118] the Judge noted that the role of Stema UK was limited in both time and scope, but that it was nevertheless for a period of two weeks and that the scope of activities required to operate a dumb barge were necessarily limited. At [119] he further noted that, although Mr Johansen's name appeared in the Barge Operator Manual, he was not accorded any particular role. Further, Mr Johansen did not describe Stema UK as the operator of the barge, stating that Stema UK was responsible for decisions regarding CHARLIE ROCK and the tug AFON GOCH and that Splitt was responsible for the barge.

45.

However, at [120] the Judge explained why he concluded that Stema UK was not merely assisting Stema A/S:

"...Employees of Stema UK in fact operated the machinery of [the barge]. The question is whether such operation amounts to Stema UK in fact being the operator of [the barge] off Dover. Mr. Johansen did not himself describe Stema UK as the operator of [the barge] but Mr. Grunfeld described Stema UK as "providing the personnel to physically operate the barge on behalf of Splitt". I consider that he was right to say that. There was no-one present from Stema A/S to operate the barge off Dover. Although Stema A/S was the operator of the barge in the sense of being its manager I would not describe Stema UK as merely assisting Stema A/S to operate [the barge] off Dover in circumstances where Stema A/S had no personnel present able to operate [the barge] off Dover. The necessary operation of [the barge] was in fact performed by Stema UK alone, sending its personnel on board to do what was necessary. The importance of Stema UK's operation of the barge off Dover was demonstrated when storm force winds were forecast. Although the Barge Operator Manual did not give any function to Mr. Johansen or Stema UK by name, paragraph 6.2 envisaged that when winds in excess of force 9 were forecast the appropriate action to be taken was to be decided by "the steering committee". There was no direct evidence as to the members of that committee but what is known is that on 20 November 2016 the appropriate action was discussed and agreed by Mr. Boisen and Mr. Grunfeld of Stema A/S and by Mr. Johansen and Mr. Upcraft of Stema UK. It seems more probable than not that they were the steering committee for the period whilst the barge was at anchor off

Dover. (In this regard it is also to be noted that the “charter” between Splitt and Stema A/S dated 28 June 2016 provided that Splitt would monitor the barge at anchorage “in cooperation with the receiver”.) Whilst the decision to allow [the barge] to remain at anchor during the storm was ultimately that of Splitt, acting through Stema A/S, in practical terms the decision was taken by, and important advice given by, the steering committee of which Mr. Johansen and Mr. Upcraft, it seems, were members. That is consistent with Stema UK being the operator of the barge off Dover.

46.

The Judge therefore found, considering the evidence as a whole and in the round, that the nature of Stema UK’s operation of the barge off Dover was such as to make it appropriate to describe Stema UK as the operator of the barge [121].

The grounds of appeal

47.

RTE’s first ground of appeal was that the Judge was wrong in construing “the operator” of a ship in the Limitation Convention as including “any entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of the ship’s business” whether that ruling was limited to unmanned ships or not.

48.

The second ground was that the Judge was wrong in his application of the law to the facts in ruling that, despite its functionally and temporally limited activities on the barge, Stema UK was its operator.

49.

The third ground was that the Judge erred as matter of construction in ruling that there could be more than one operator of a ship.

50.

The fourth ground was that the Judge erred in fact in finding that:

i)

The decision to leave the barge at anchor on 20 November 2016 was taken by, inter alia, Stema UK’s Messrs Johansen and Upcraft; and

ii)

Stema UK’s Messrs Johansen and Upcraft were members of “the steering committee” mentioned in the Barge Operator Manual for the period whilst it was at anchor off Dover.

Ground 1: the meaning of “the operator” in article 1(2)

51.

As summarised above, at [99] of his judgment the Judge concluded that the ordinary meaning of “the operator of a ship” includes the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of business.

52.

On its face, such a conclusion appears circular, begging the question of what it means to operate a ship. It must be the case, to make sense of the conclusion, that the Judge intended to refer to “operate her machinery”, being the formulation he had earlier adopted in [81] and [83].

53.

It is also unclear (as highlighted in the ground of appeal) whether that conclusion is limited to unmanned ships or applies also to conventional merchant vessels. The Judge qualified his conclusion by reference to unmanned vessels in [81], [94] and [100], but expressed it in more general terms at the start of [83] and in [99]. Further, the rationale identified by the Judge in [83], namely, that an associated company of the owner that does the work should be protected in order to encourage international trade by sea carriage, would seem to apply whether or not the vessel was unmanned.

54.

Mr Karia criticised the Judge's process of reasoning in arriving at his conclusion, pointing out that:

i)

At [79] the Judge initially rejected Stema UK's submission that "the operator of a ship" covered those on board the vessel physically operating the vessel's machinery, recognising that such a reading was incompatible with the inclusion of article 1(4). The Judge accepted that "operator" was used at a higher level of abstraction, one which has a notion of management and control over the operation of the ship.

ii)

The Judge then introduced the question of an unmanned ship, saying that those who cause such a vessel to be physically operated have some management and control over the ship, with the result that they can be said to be the operator although they may not be the manager [81].

iii)

However, the Judge then appears to have generalised the proposition, finding that the ordinary meaning of "to operate the ship" includes those who, with the permission of the owner, send their employees on board with instructions to operate the machinery of the vessel [83].

iv)

In so doing, the Judge completed a circle, effectively arriving back at the proposition (that operator includes those who operate the machinery of the vessel) that he had earlier rejected, abandoning the approach of looking for a higher level of abstraction.

55.

In my judgment there is considerable force in that criticism. The Judge's conclusion, if applicable to all vessels, appears to bestow the benefit of limitation on those who provide crew to operate the machinery of those vessels, even if they have no other role in the broader operation of the vessel. That would be contrary to the view of the Federal Court in ASP and, in my judgment, cannot easily be reconciled with the Judge's own prior conclusion at [79]; it is difficult to see that a person who does no more than provide crew to operate the machinery of a vessel is any more "the operator" than the crew that person provides. It would also potentially expand the protection to large classes of analogous service providers notwithstanding that they were intended to be excluded from the protection of the Limitation Convention, as revealed in travaux préparatoires.

56.

That conclusion would be significantly reduced in scope and effect, and potentially explained, if it was indeed intended to be limited to unmanned vessels. However, the Judge did not explain in any detail why the position of those who physically operate the machinery of a ship is different in the case of unmanned vessels and I am not persuaded that it should be. Once it is accepted (as the Judge did) that operator must be considered at a higher level of abstraction than mere physical operation, involving an element of management or control, it is not clear why the full-time presence or otherwise

of Master and crew on the vessel is crucial. Management and control will almost certainly be found in those who direct the on-board personnel (not the Master and crew, as the Judge himself held), being legal persons who are highly unlikely to be on board the vessel. In this case it is common ground that Stema A/S managed and controlled the vessel as operator notwithstanding that the vessel was unmanned.

57.

Mr Passmore QC, for Stema UK, contended that:

i)

The Judge was right to find that the operator of a ship included those who physically operated the vessel or “worked” the ship: the protection was designed for those most obviously in the firing line for claims.

ii)

Article 1(2) distinguished between managers and operators and, applying the approach in CMA Djakarta, approved in the *Ocean Victory*, it was important to give each its full ordinary meaning and not restrict one category by reference to the other, just as the term the charterer included any type of charterer and was not restricted by the concept of ownership.

iii)

Whilst a ship did have both a commercial side and a physical side, that did not justify refusing to give the words manager and operator their ordinary meaning: the Federal Court in ASP was considering the term “operated by” in a different context, where there was no separate category of “managed by”.

iv)

Further, refusing parties in the position of Stema UK the protection of the Limitation Convention would create a trap of the type recognised by the Judge. The problem would perhaps be even more acute where services were provided by independent contractors, where no question of protection under article 1(4) would arise.

v)

The Limitation Convention was not to be read restrictively: limitation of liability was not exceptional.

58.

In my judgment the term “operator” must entail more than the mere operation of the machinery of the vessel (or providing personnel to operate that machinery), for the reasons initially accepted by the Judge. The term must relate to “operation” at a higher level of abstraction, involving management or control of the vessel, or else article 1(4) would be rendered otiose and categories of service providers would be included notwithstanding their express exclusion by the contracting parties as revealed in the *travaux préparatoires*. Whilst the decision in ASP was addressing the term “operated by” in a different statute employing different language, I consider the approach of the Federal Court (which had in mind the wording of the Limitation Convention) is instructive and accords with my reading of article 1(2). In particular, I would adopt, in the present context, the Federal Court’s view that the mere provision of the crew for a vessel does not mean the vessel is operated by the provider.

59.

I do not consider that the decision in CMA Djakarta requires a different conclusion. The charterer of a vessel is a well-defined and understood category and the Court of Appeal’s decision did no more than emphasise that the term should be applied in full and without a gloss. The terms “the manager” and

“the operator” are, in contrast, more open-textured and, as the Judge held, overlapping. I see no difficulty in construing the term “the operator” as requiring an element of management and control of the vessel. That is not to impose a gloss on the word operator, nor to read the Limitation Convention restrictively, but to give a sensible meaning to a term in the overall context of article 1, particularly in the light of the travaux préparatoires.

60.

I see no reason why the position should be different in relation to an unmanned vessel, nor why the physical operation of such a vessel necessarily involves an element of management and control so as to make the provider of the crew the operator of the vessel, regardless of whether they are supervised by an operator and manager from afar.

61.

I recognise, as did the Judge, that it may be unfortunate if the limitation afforded to a group of companies which comprises the owner, charterer and operator of a vessel is effectively lost because an associated company provided crew for certain mechanical operations of the vessel. However, such a group can take steps to bring all its associates within the umbrella of the protection by ensuring that crew are seconded to the owner or operator and/or ensuring that the owner or operator is responsible for the actions of the associate: given the importance of limitation of liability to the viability of the enterprise, ensuring such protection would seem to be an important business consideration for those engaged in international trade by sea and one which they might be expected to arrange with care. The approach of the Judge, in my respectful view, would effectively extend the protection given under article 1(4) to “associated companies” providing services to the vessel, even if the owner is not responsible for their actions. Whilst that might be seen to be a fair or reasonable result, it is not what the Limitation Convention currently provides and a revision to so provide is a matter for the contracting parties, not the courts.

62.

I therefore consider that ground 1 of the appeal is made out. However, there remains the question of whether the Judge was right to find that Stema UK was the operator of the vessel, applying what I consider to be the correct test.

Ground 2: application to the facts of this case

63.

The Judge appears to have had regard to two particular matters in finding that Stema UK was the operator of the barge off Dover, as opposed to merely assisting Stema A/S (the undoubted operator throughout) in its operation. The first was that Stema UK provided the personnel to operate the barge when there was no-one present from Stema A/S. The second was Stema UK’s role in determining what action to take when storm force winds were forecast, the Judge inferring that Mr Johansen and Mr Upcraft were part of the steering committee assigned responsibility for such actions in the Barge Operator Manual.

64.

However, I find difficulty in accepting that either aspect supports a finding that Stema UK had management or control of the vessel in any sense. As to the operation of the machinery of the vessel by crew supplied by Stema UK:

i)

It is clear that the crew were following Check Lists prepared and supplied by Stema A/S.

ii)

It is also clear that Stema A/S were exercising an ongoing and direct supervisory role throughout the time the vessel was at Dover. Mr Grunfeld of Stema A/S (the “operator” with responsibility for the barge) expressly stated that “We would discuss operational matters with the local personnel by telephone”.

iii)

Although the superintendent, Mr Upcraft, was engaged by Stema UK, it is clear that he was acting under instructions from Stema A/S, Mr Johansen stating that “under instructions given by Stig Olsen (of Stema Shipping A/S) the superintendent put in place a roster for the Barge Masters and crewmembers”.

iv)

All of Stema UK’s witnesses stated that the superintendent, Barge Masters and crewmembers were physically operating the barge on behalf of Splitt as owner.

v)

Mr Boisen confirmed that Splitt remained responsible for the barge. Mr Johansen made it even clearer, stating that a distinction was made between the vessels involved in terms of responsibility, Stema UK being responsible for CHARLIE ROCK and AFON GOCH, whereas Splitt was responsible for the barge.

65.

In my judgment it is clear from the above that Stema UK’s actions were for, on behalf of and supervised by Splitt and Stema A/S. To the extent that any of them amounted to operating the barge, I consider that those actions were plainly by way of assistance to Stema A/S in its role as operator, not by way of becoming a second or alternative operator or manager.

66.

As regards the decision to leave the barge at anchor during the storm, it is the case that each of the witnesses gave evidence as to the extensive involvement of Mr Upcraft and Mr Johansen in monitoring the weather forecasts and discussing the options for safeguarding the barge, a role which might be expected as they were the persons at the relevant location. However, both Mr Boisen and Mr Johansen emphasised that the decision as to what to do with the barge remained with the owner, Mr Boisen clarifying that the decision would be taken by employees of Stema A/S on behalf of Splitt. Neither gave any support to the view that Mr Johansen (or Mr Upcraft) was party to the actual decision. Given the clarity of that evidence from Stema UK’s own witnesses, I do not consider that the reference to the role of the steering committee in “discussing and agreeing” actions in the Barge Operator Manual is of any significance: even if Mr Johansen and Mr Upcraft were indeed members of such a committee, its role cannot have been more than advising the actual decision-maker, as identified by each of Stema UK’s witnesses. That decision-maker was not Stema UK.

67.

In my judgment Stema UK was, at most, assisting Stema A/S in the operation of the barge. Indeed, I find it somewhat remarkable that Stema UK could be described as the operator of the barge when its own Managing Director made no such suggestion (despite that being the issue in dispute) and, further, went out of his way to expressly state that Stema UK had responsibility for two other vessels, but not for the barge.

Ground 3: whether there can be more than one operator

68.

Mr Karia accepted during oral argument that this was not his strongest point and did not develop the point beyond that considered and dismissed by the Judge, namely, that the expression “the operator” in itself entails that there can be only one.

69.

In my judgment Mr Karia was right not to press the argument. The fact that the same definition refers to “the owner” and “the charterer”, yet there can undoubtedly be more than one owner and more than one charterer, demonstrates that the language used does not support the conclusion RTE sought to draw from it. No further basis for the argument was advanced.

70.

That is not to say, however, that a court should readily find that there is more than one operator of a vessel, being astute to establish that an alleged second operator is not in reality providing assistance to the undoubted operator. As discussed above, in the present case Stema A/S was undoubtedly the operator of the barge and the evidence supports the view that Stema UK did no more than provide assistance, important though it may have been in certain respects.

Ground 4: challenges to factual findings

71.

In view of my conclusions on the grounds above, it is not strictly necessary to consider this ground of appeal. Indeed, Mr Karia said during oral argument that he did not need to pursue these additional points in order to succeed, a view I share for the reasons set out above.

72.

For the sake of completeness:

i)

The Judge expressly accepted that the decision to allow the barge to remain at anchor was ultimately that of Splitt acting through Stema A/S, but he went to say that “in practical terms” the decision was taken by, and important advice given by, the steering committee, of which Mr Johansen and Mr Upcraft were members. Whilst it is plainly the case that Mr Johansen and Mr Upcraft provided information and possibly advice, all the witnesses were clear that the decision was taken by Stema A/S on behalf of Splitt. I agree with RTE that there was no basis for the Judge finding that Stema UK was party to making the decision “in practical terms” or otherwise. I consider that Mr Johansen was crystal clear that his role was advisory only. Mr Upcraft was acting on the instructions of and advising Stema A/S: he cannot have been making any decisions on behalf of Stema UK.

ii)

None of the witnesses referred to the steering committee, let alone suggested that they were members of it, but to the extent that the issue was relevant, it is not possible to say that the Judge was wrong to infer that its membership included Mr Johansen, at least whilst the barge was off Dover (I see no basis, however, for assuming that Mr Upcraft was such a member). However, as the witnesses were all agreed that the decision was ultimately for Stema A/S on behalf of Splitt, I see no relevance of the membership of the steering committee: it was a creation of Stema A/S, referred to only in its Barge Operator’s Manual, and was plainly ignored, disbanded or subsumed by Stema A/S on this occasion, as it was fully entitled to do.

The Respondent’s Notice: whether Stema UK was “the manager” of the barge

73.

The meaning of the term “the manager” did not feature greatly before Teare J and hardly at all in the argument on appeal. The Judge, at [64], found that the meaning of the phrase was as follows:

“...the person entrusted by the owner with sufficient of the tasks involved in ensuring that a vessel is safely operated, properly manned, properly maintained and profitably employed to justify describing that person as the manager of the ship. I put it that way because if a person is entrusted with just one limited task it may be inappropriate to describe that person as the manager of the ship. A person who is entrusted with one limited task of management may be described as assisting in the management of the ship, rather than being the manager of the ship...”

74.

Further, at [74] the Judge further held that the ordinary meaning of “the operator of a ship” includes “the manager of a ship”.

75.

As Stema UK has not challenged either of those findings, I do not see how it can succeed in its bare contention that, if not the operator of the barge, it was the manager. But in any event, given my view, expressed above, that Stema UK’s role was to provide assistance to the operator and manager of the barge (Stema A/S) in the limited respect of operating the barge’s machinery off Dover and monitoring the weather, I see no basis on which it could be described as the manager of the barge.

Conclusion

76.

For the above reasons I would allow this appeal and make an order dismissing Stema UK’s claim for a declaration that it is entitled to limit its liability.

77.

I am conscious that in so concluding I am disagreeing with the views of an Admiralty Judge of great experience and expertise in this field, expressed in a detailed and persuasive reserved judgment. In doing so, I draw some comfort from the fact that in CMA Djakarta the Court of Appeal overturned the decision of David Steel J on the meaning of “the charterer” in article 1(2) (and disapproved the decision of Thomas J on that issue in *The Aegean Sea* [1998] 2 Lloyd’s Rep 39), notwithstanding the recognition that they were extremely well versed in this area of the law.

Sir David Richards

78.

I agree.

Sir Launcelot Henderson

79.

I also agree.

¹ The Convention on Limitation of Liability for Maritime Claims 1976, given the force of law in the United Kingdom by [section 185](#) of the [Merchant Shipping Act 1995](#) and set out in Part 1 of Schedule 7 to [that Act](#).

² As referred to below, Splitt and Stema A/S had signed a document dated 28 June 2016, described by them as being “akin to a voyage charterparty”, for deliveries of rock armour to Dover, agreeing freight but not mentioning the barge by name.

³ RTE claimed that a second cable was damaged either by the anchor of the barge or by the anchor of a cargo vessel named SAGA SKY (owned by the first defendant) which had collided with the barge. A collision action was to have taken place at the same time as the limitation action, but liability for the collision and for the damage to the second cable was compromised shortly before the hearing.

⁴ At [18] Longmore LJ left open the question of whether a slot charterer fell within the definition of charterer. Subsequently, in the MSC Napoli[2008] EWHC 3002 (Admlty),[2009] 1 Lloyd’s Rep 246, Teare J held that a slot charterer did fall within that term.