OKIYO MARITIME CORP v THE STATE OF MAURITIUS & ORS

2026 SCJ 86

Record No.: 122426

THE SUPREME COURT OF MAURITIUS

In the matter of:

OKIYO MARITIME CORP

APPLICANT

v

THE STATE OF MAURITIUS

RESPONDENT

In the Presence of:

1. **FERNEY LTD**
2. **SEGA SAIL CHARTERS LTD**
3. **LOUIS JEAN JEROME DE CHASTEAUNEUF**
4. **GUY HAREL**
5. **CLUB NAUTIQUE DE POINTE D'ESNY**
6. **SANDY POINT LAND AND SEA PTY LTD**

INTERVENING PARTIES

JUDGMENT

1. This is an application for:

   a. an Order authorising the applicant to set up a limitation fund for the sum of Rs. 719,658,463.31 by way of a bank guarantee issued in favour of the respondent;

   b. an Order directing that the said limitation fund be jointly managed by the applicant and the respondent in order to settle claims admitted by the applicant and the respondent and/or as directed by a Court of Law; and

c. such other Order or Orders that the Supreme Court may deem fit and reasonable to make in the circumstances of the present matter.

2. During the hearing of the application, the applicant informed the Court that it is not insisting on prayer (b).

3. The respondent and intervening parties Nos. 1 to 5 (IP 1 to 5) are objecting to the setting up of the limitation fund. The Intervening Party No. 6 ("IP 6") is not objecting to the applicant's motion, subject to the Court agreeing with the applicant that the setting up of a limitation fund does not require, as a precondition to the setting up, the determination of the right of the applicant to limit its liability under section 195(d) of the Merchant Shipping Act 2007 ("the Act"). However, if the Court finds that the said issue is a prerequisite to the setting up of the limitation fund, it objects to the motion on the ground that the applicant is not entitled to limit its liability for oil pollution damage under section 195(d) of the Act.

Background facts

4. The background facts as per the application are as follows:

(a) The applicant is the registered owner of a Panamanian-flagged bulk carrier, MV WAKASHIO (the "Vessel") since she was built in Japan in 2007. The Vessel was chartered out to Mitsui O.S.K Lines Ltd in 2007.

(b) On 25 July 2020, while the Vessel was passing close to the southeast coast of Mauritius in ballast condition, when passing at Pointe d'Esny, she grounded at approximate position 20 26.65'S 057. 44.59' E''. To the knowledge of the applicant, the grounding was caused by the error in navigation or negligence of her master and/or other crew, who should have navigated the Vessel more carefully by maintaining a proper course.

(c) The applicant employed SMIT Salvage Pte Ltd. and the Nippon Salvage Corporation Ltd. (the "Salvors") to rescue the Vessel immediately after the Incident. Despite this attempt, the Vessel failed to be re-floated and its condition continued to deteriorate. Finally, her hull broke into two parts on or around 15 August 2020. The forward section of the hull was scuttled by the Salvors, on 24 August 2020, in compliance with the instructions given by the Ministry of Blue Economy, Marine Resources, Fishing and Shipping on 19 August 2020.

(d) When the Vessel ran aground, approximately 4,000 MT of bunker fuel ("bunker") was on board. Soon after the deterioration of the Vessel's hull following the grounding, the bunker began to leak from her tanks. While the Salvors extracted around 2,700 MT of bunker from the Vessel, the balance spilled into the sea. The applicant recognises that the bunker spilled from the Vessel caused damage to the environment.

(e) The removal of the wreck has already been completed.

5. The legal issues which arise in this application are:

    1. whether the applicant is entitled to set up the limitation fund; and

    2. whether the Court can grant the orders prayed for by the applicant.

6. A third issue also arose regarding the jurisdiction of the Court regarding the setting up of the limitation fund, but the parties all agreed that the Supreme Court must be seized prior to the setting up of a limitation fund.

7. We have duly considered both the written and oral submissions of all Counsel. Before addressing the points raised by the applicant in support of its application, we find it relevant to set out the statutory framework which governs the present application.

The statutory framework

8. Section 193 of the Act which is found under Part IX of the Act sets out who are the persons entitled to limit their liability. It reads as follows:

"***193. Persons entitled to limit liability***

(1) A shipowner and a salvor may limit their liabilities in accordance with this Part.

(2) An insurer of liability for claims subject to limitation under this Part shall be entitled to the benefit of limitation to the same extent as the assured.

(3) A person for whose act, neglect or default a shipowner or salvor is responsible may limit his liability under this Part."

9. Section 194 sets out the claims which are subject to limitation as follows:

> "***194. Claims subject to limitation***
>
> *(1)* ***Subject to section 195****, a claim shall be subject to limitation of liability regardless of the basis of liability where it is -*
>
> *(a) 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 a salvage operation, and any consequential loss****;*
>
> *(b) in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;*
>
> *(c) in respect of other loss resulting from an infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or a salvage operation;*
>
> *(d) in respect of the raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board the ship;*
>
> *(e) in respect of the removal, destruction or rendering harmless of the cargo of the ship; or*
>
> *(f) made by a person other than the person liable, in respect of measures taken in order to avert or minimise loss, for which the person liable may limit his liability in accordance with this Part, and further loss caused by those measures.*
>
> *…*
>
> …" [emphasis added]

10. Section 194 is a general provision which allows for limitation of liability regardless of the basis of liability in respect of, *inter alia*, **loss of or damage to property**, **in direct connection with the operation of the ship or with a salvage operation, and any consequential loss**. The use of the words "Subject to section 195" at the beginning of section 194 signals that section 195 modifies section 194, so that section 194 cannot be read as a standalone provision but must be read together with section 195.

11. Section 195 reads as follows:

> "***195. Claims excepted from limitation***
>
> ***Limitation of liability under this Part shall not apply to a claim*** –
>
> *(a) for salvage and corresponding claims under a contract;*
>
> *(b) for contribution in general average;*
>
> *(c) by an employee of a shipowner or salvor whose duties are connected with the ship or a salvage operation, including a claim by his heirs, dependants or other persons entitled to make such a claim, where, under the contract of service between the ship-owner or salvor and the employee, the shipowner or salvor is not entitled to limit his liability in respect of the claim, or he is under the contract only permitted to limit his liability to an amount greater than that provided for in section 197;*
>
> *(d)* ***for oil pollution damage in respect of any liability incurred****;*
>
> *(e) subject to any enactment governing or prohibiting limitation of liability for nuclear damage; or*
>
> *(f) against the shipowner of a nuclear ship for nuclear damage.*" [emphasis added]

12. Section 195 sets out in no uncertain terms that limitation of liability cannot apply to the claims listed in the said section. It is also amply clear when sections 194 and 195 are read together that while section 194 sets out what are the claims which are subject to liability, section 195 provides for an exception to limitation of liability in respect of claims which fall within its purview. Notably, section 195 (d) expressly provides that **claims for oil pollution damage in respect of any liability incurred** cannot be subject to limitation of liability.

13. Section 204 (so far as material) reads as follows:

> "***204. Constitution of limitation fund***
>
> *(1) Any person alleged to be liable and seeking to limit his liability under this Part may constitute a fund by depositing in the Registry of the Supreme Court an amount at least equivalent to the limit provided for in section 197, 198, 199 or 201, as appropriate, or by producing a guarantee acceptable*

> *to the Court, together with interest from the date of the occurrence giving rise to the liability until the date of the constitution of the fund, and* ***the fund so constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.***" [emphasis added]

14. The following propositions can be distilled from section 204:

    1. a person who is alleged to be liable and who seeks to limit his liability under Part IX of the Act may constitute a limitation fund;

    2. a limitation fund constituted under section 204 is **available only for payment of claims in respect of which limitation of liability can be invoked**.

15. We propose to first deal with the points raised by the applicant (in the alternative) regarding the effect of the international conventions to which Mauritius is a party on the interpretation of the provisions of the Act.

The interpretation of the term "oil pollution damage" in section 195 of the Act

16. Learned Counsel for the applicant argued that section 195(d) of the Act refers to "oil pollution damage", but the Act does not provide a definition for the said term whose definition should be sought in the Merchant Shipping (Civil Liability for Oil Pollution Damage and International Fund for Compensation for Oil Pollution Damage) Regulations 1996, GN No. 110 of 1996 (the 1996 Regulations). He underlined that the Regulations which were made by the Minister on 18 October 1996 under the Merchant Shipping Act 1986 were revoked more than three years after the Incident, on 09 July 2024, by section 34 of the Merchant Shipping (Liability and Compensation for Oil Pollution Damage) Act 2024.

17. In a gist, he argued that:

    (a) Regulation 3 of the 1996 Regulations provides that Articles I — XI of the "*Liability Convention*" shall apply to Mauritius;

    (b) Regulation 2 of the 1996 Regulations defines "*Liability Convention*" as "*the International Convention on Civil Liability for Oil Pollution Damage, adopted at Brussels on 29 November 1969, as amended by the 1976 Protocol thereto*" (the "CLC69");

(c) Article I of the CLC69 contains the following definitions:

"Ship" means any sea-going vessel and any seaborne craft of any type whatsoever, ***actually carrying oil in bulk as cargo***." [emphasis ours]
"Oil" means any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship".
"Pollution damage" means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures".

(d) The CLC69 is designed to make **solely the owners of ships carrying oil in bulk as cargo (i.e. owners of oil tankers) strictly liable for pollution damage** caused by the oil which has escaped from or been discharged from the ship as provided by Article III thereof, and also to enable the oil tanker owners to limit their liability in accordance with that convention as provided by Article V of CLC69.

(e) The interpretation to be given to the term 'oil pollution damage' in section 195(d) of the Act can be inferred from the Regulations as meaning "*loss or damage caused outside a sea-going vessel or any seaborne craft of any type whatsoever* ***actually carrying persistent oil in bulk as cargo****, by contamination resulting from the escape or discharge of persistent oil from the vessel or craft, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures"*

18. We do not agree with the above submissions which are incongruous to say the least. While the meaning of words which are not defined in regulations must be construed by reference to the definition of the said words in the Act under which the regulations are made, there is no rule of statutory interpretation according to which words in the parent Act have to be attributed the definition provided for in the regulations.

19. Further, where words in a statute are not defined by the Legislature, the court has to have recourse to the dictionary definition of the words to understand their scope (see: **Soniawear Ltd v. Registrar General** [2019 SCJ 69] and **Seegum v. The State of Mauritius** [2021 SCJ 162]). The ordinary dictionary definition of the words *"oil pollution damage for any liability incurred"* is wide enough to cover not only oil pollution damage from oil tankers, but also oil pollution damage arising from Vessels carrying oil as bunker.

20. In any event, the 1996 Regulations do not define the term "oil pollution damage". Moreover, the 1996 Regulations domesticated the CLC69 whose purport is to ensure that adequate **compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships** and applies to all seagoing vessels actually carrying **oil in bulk as cargo** while we are, here, dealing with oil pollution damage due to bunker fuel.

21. Before concluding on this point, it is also pertinent to note that the Act which was enacted by Act 26 of 2007 and which came into effect on 1 June 2009 repealed the Merchant Shipping Act 1986. Pursuant to section 31(1) of the Interpretation and General Clauses Act, on the coming into force of the Act, the 1996 Regulations only remained in force in so far as its provisions were not inconsistent with the Act.

The incorporation of provisions of the Convention on Limitation of Liability for Maritime Claims 1976 ("LLMC76") into our law

22. Learned Counsel for the applicant further submitted that the intention behind Part IX of the Act was to incorporate the main provisions on the limitation of liability under the LLMC76 into our domestic legislation.

23. He referred to Article 3 of the LLMC76 which provides as follows:

> *"Article 3*
>
> *Claims excepted from limitation*
> *'*
>
> *The rules of this Convention shall not apply to:*
>
> *a. Claims for salvage or contribution in general average;*
>
> *b.* ***Claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force****;*
>
> *c. Claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;*
>
> *d. Claims against the shipowner of a nuclear ship for nuclear damage;*

e. *…"* [Emphasis added]

24. He argued that the CLC69 applies to **pollution damage caused by oil tankers only** while the LLMC76 applies to pollution resulting from vessels **not** carrying oil in bulk as cargo. When the LLMC76 was domesticated through the Act, it was, therefore, appropriate and necessary in order to avoid a potential conflict within domestic legislation and to be entirely consistent with the above, that **solely claims falling within the ambit of CLC69 are excepted from limitation of liability under the Act**. He contended that this is the clear and sole purpose of section 195(d) of the Act.

25. He further submitted that when one takes into consideration the LLMC76, the Act, the Regulations and all the circumstances surrounding the implementation of the LLMC76 provisions into domestic legislation by way of the Act, it is clear that section 195(d) of the Act was included for the sole purpose of giving effect to Article 3(b) of the LLMC76. Section 195(d) of the Act does not and was never intended to except from limitation of liability **all** claims arising from any oil pollution incident.

26. Learned Counsel for the applicant laid much emphasis on the following statement made by the then Minister in the Hansard, in relation to the Merchant Shipping Act 2007 to support his contention:

> "*Limitation of liability – Part IX …**The main provisions of the Convention on the limitation of liability for maritime claims have been included in the Bill**. The importance of this Convention resides in the fact that it provides for limits and circumstances for ship owners to limit their liability. It allows the interested parties to constitute a fund to limit their liability. The limitation amounts are expressed in units of account, each unit of account being equivalent in value to the Special Drawing Rights as defined by the IMF*." [emphasis added]

27. He further submitted that the LLMC76 only allows a State Party to exclude claims under Article 2, paragraphs 1 (d) and (e) when the State Party made a proper reservation. Save this exception, the State Parties may not depart from the list of claims that are subject to or excepted from limitation of liability, such that the excepted claims listed under section 195 of the Act are intended to be those claims that are listed under Article 3 of the LLMC76.

28. It was his contention that owners of oil tankers are the only ones who cannot limit liability for oil pollution related claims under the LLMC76 and the Act since another limitation scheme under the CLC69 and the Regulations is applicable to such claims.

29. We do not agree with the above submissions.

30. Mauritius is a dualist State where international law must be transformed into national law before it can be applied by domestic courts. International treaties do not automatically become enforceable within our legal system. They need to be explicitly incorporated into domestic legislation. Although Mauritius has ratified the CLC69 and LLMC76, their provisions are not automatically applicable in Mauritius, but can only apply after they have been incorporated into our domestic law and only to the extent incorporated.

31. A perusal of the (now repealed) 1996 Regulations shows that the provisions of the CLC69 were specifically adopted by the Legislature through regulation 3 of the 1996 Regulations which provides that Articles I — XI of the "*Liability Convention*" shall apply to Mauritius. It can be gleaned from the wording of the 1996 Regulations that the Government adopted all the provisions of the CLC69, thus showing a clear intention to give effect to the whole of the said Convention. In other words, the CLC69 was adopted in toto by Mauritius through the 1996 Regulations.

32. However, in so far as the LLMC76 is concerned, although Mauritius ratified the LLMC76, there has been no wholesale incorporation of the provisions of the LLMC76 into our law, but the enactment of specific parts of the LLMC76 into our domestic law through the Act. While we agree with learned Counsel for the applicant that:

(a) Articles 1 and 4 of the LLMC76 and section 194 of the Act;

(b) Article 3 of the LLMC76 and section 195 of the Act;

(c) Article 5 of the LLMC76 and section 196 of the Act;

(d) Article 6 of the LLMC76 and section 197 of the Act;

(e) Article 7 of the LLMC76 and section 201 of the Act;

(f) Article 9 of the LLMC76 and section 203 of the Act;

(g) Articles 11 and 14 of the LLMC76 and section 204 of the Act;

(h) Article 12 of the LLMC76 and section 205 of the Act; and

(i) Article 13 of the LLMC76 and section 206 of the Act,

contain similar language, the provisions of Part IX of the Act are not identical to those of the LLMC76. We must, therefore, be careful in interpreting the provisions of the Act and strictly confine ourselves to the law as enacted in determining how it should be interpreted.

33. As stated above, international conventions are only applicable under our law to the extent that they have been domesticated. Further, when one reads the extract from Hansard carefully, it is clear that the Minister did not state that the whole of the LLMC76 was being adopted but only the main provisions. In any event, although many provisions of the LLMC76 have been domesticated under Part IX of the Act, the Legislature knowingly chose to legislate otherwise and contrary to the LLMC76 provisions in enacting section 195.

34. It is significant to note that section 195 of the Act expressly provides that limitation of liability under Part IX shall not apply to a claim for oil pollution damage **in respect of any liability incurred**.

35. We are alive to the fact that our domestic legislation should, if possible, be construed so as to conform to international instruments to which Mauritius is a State party. However, the interpretation and scope of application of section 195 does not present any difficulty. A plain reading of section 195 indicates that its purpose is to exclude any limitation of liability under Part IX in so far as claims relating to the matters listed under the said section are concerned. **Claims for any liability incurred for oil pollution damage** are specifically excluded from limitation of liability under paragraph 195(d).

36. If it had been the Legislature's intention to provide for limitation of liability in respect of oil pollution damage other than oil pollution damage from bunker fuel under the said section, it could have easily done so, but a reading of section 195(d) leaves no room for any doubt that the Legislature intended to exclude any limitation of liability in respect of oil pollution damage under the said section.

The application of the Bunker Convention

37. The third set of submissions of learned Counsel for the applicant concerned the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the "**Bunker Convention**").

38. He argued that the Bunker Convention came into force internationally on 21 November 2008 and it is undisputed that, as far as Mauritius is concerned, it came into force on 17 October 2013 as confirmed by the BUNKERS.1/Circ.64 23 July 2013 from the International Maritime Organization which reads as follows:

> "The *Secretary-General of the International Maritime Organization has the honour to refer to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, and to state that, in accordance with article 12, accession by the Republic of Mauritius was effected by the deposit of an instrument on 17 July 2013. The Convention will enter into force for Mauritius on 17 October 2013, in accordance with the provisions of Article 14*".

39. Learned Counsel for the applicant submitted that, on 4 April 2014, the Director of Shipping issued a *Notice to Mariners Ref: 1 of 2014* bearing the Title*: Civil Liability for Bunker Oil Pollution Damage, 2001, Certification Requirements* (the "Notice to Mariners").

40. The preamble of the Notice to Mariners provides as follows:

> "*The objectives of this Notice to Mariners is to advise all parties that the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the "Bunker Convention") entered into force internationally on 21 November 2008 and as far as the Republic of Mauritius is concerned, it came into force on 17 October 2013. The Bunker Convention requires the maintenance of compulsory insurance or financial security for all vessels of over 1000 gross tonnage and the proof of such coverage shall be through certification. The details for the application of which are herein provided.*"

41. Clauses 2.1 and 2.2 of the Notice to Mariners read as follows:

> "2.1 *The Convention applies to pollution damage caused in the territory, including the territorial sea, and in exclusive economic zones of State Parties and measures taken to prevent or minimise damage caused by any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship and any residues of such oil on board ships having a gross tonnage (GT) greater than 1000.*"
>
> 2.2 *It therefore applies to all ships of more than 1000 GT under the Mauritius Flag and all foreign vessels of more than 1000 GT navigating in our territorial sea and exclusive economic zones.*"

42. Learned Counsel for the applicant argued that the Vessel has a gross tonnage of 101,932 tonnes and therefore, considering the Notice referred to above issued by the Director of Shipping, the Bunker Convention applies to the Vessel. In a gist, he submitted that:

    (1) the Bunker Convention applies in Mauritius; and

    (2) a combined reading of Article 7(1) and 7(10) of the Bunker Convention inevitably leads to the conclusion that the applicant can limit its liability via a limitation fund by using the calculation provided in Article 6 of the LLMC76.

43. Article 7 (1) and (10) of the Bunker Convention are reproduced below:

> *"*7 (1) *The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party* ***shall be required to maintain insurance or other financial security****, such as the guarantee of a bank or similar financial institution,* ***to cover the liability of the registered owner for pollution damage in an amount*** *equal to the limits of liability under the applicable national or international limitation regime, but in all cases,* ***not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended***.
>
> …
>
> …
>
> …
>
> (10) *"Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage. In such a case* ***the defendant may invoke the defences*** *(other than bankruptcy or winding up of the shipowner) which the shipowner would have been entitled to invoke,* ***including limitation pursuant to article 6****. Furthermore, even if the shipowner is not entitled to limitation of liability according to article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the pollution damage resulted from the wilful misconduct of the shipowner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the shipowner against the defendant. The defendant shall in any event have the right to require the shipowner to be joined in the proceedings."* [emphasis added]

44. Article 6 of the LLMC76 provides as follows:

"The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:

(a) In respect of claims for loss of life or personal injury,

(i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons,

(ii) For a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

For each ton from 501 to 3,000 tons, 500 Units of Account;
For each ton from 3,001 to 30,000 tons, 333 Units of Account;
For each ton from 30,001 to 70,000 tons, 250 Units of Account; and
For each ton in excess of 70,000 tons, 167 Units of Account,

(b) In respect of any other claims,

(j) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons,

(ii) For a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):

For each ton from 501 to 30,000 tons, 167 Units of Account;

For each ton from 30,001 to 70,000 tons, 125 Units of Account; and

For each ton in excess of 70,000 tons, 83 Units of Account."

45. Learned Counsel for the applicant argued that liability for oil pollution damage caused in Mauritius by the bunkers on board any ship, other than an oil tanker, is dealt with under the Bunker Convention but limited by the LLMC76. He sought to buttress his submissions by referring to the fact that the limits of Article 6 of the LLMC76 adopted in the Bunker Convention are the same as those set out in section 197 of the Act.

46. He further argued that the respondent has itself rendered insurance mandatory and that such insurance is to be provided by a P&I Club by calculating the limits applicable in the LLMC76 which have been reproduced by section 197 of the Act. He submitted that the respondent cannot, on the one hand, require ships to subscribe to insurance, the coverage of which is determined on the assumption that claims for oil pollution damage are subject to the limitation

of liability provided under the Act, but on the other hand object to ship owners limiting their liability.

47. He argued that the intention of the Legislature in enacting section 195 was not to interfere with the existing right under Mauritian law for the owner of a vessel or craft not carrying oil as cargo, such as the MV Wakashio, to limit its liability in respect of pollution damage caused by the release of any oil.

48. Learned Counsel for the respondent confirmed that Mauritius has not yet incorporated the Bunker Convention into domestic law. Thus, although Mauritius acceded to the Bunker Convention and the Director of Shipping in the Notice to Mariners required "*all ships of more than 1000 GT under the Mauritius Flag and all foreign vessels of more than 1000 GT navigating in our territorial sea and exclusive economic zones*" to subscribe to insurance covers, the above cannot detract from the fact that the Bunker Convention has not yet been domesticated.

49. We reiterate that Mauritius is a dualist State where domestic courts can only apply treaty rules once the implementing legislation is in place. We are fully alive to the fact that Mauritius has acceded to the Bunker Convention on 17 July 2013 and, as stated above, it is a well-recognised canon of construction that domestic legislation should, if possible, be construed so as to conform to such international instruments. However, section 195(d) of the Act is clear and cannot be interpreted other than as providing that no limitation of liability applies to any claim for any liability incurred for oil pollution damage irrespective of whether the oil pollution damage arises from an oil tanker or from bunker fuel.

50. The Notice to Mariners issued by the Director of Shipping cannot negate the fact that, pursuant to section 195(d) of the Act, no limitation of liability applies to claims for any liability incurred for oil pollution damage irrespective of whether the oil pollution damage arises from an oil tanker or from bunker fuel.

51. Having dealt with the above, we shall now turn to the main submissions of learned Counsel for the applicant.

The purpose for which the applicant is seeking to set up the limitation fund

52. In the present case, it is apposite to note that the applicant is not purporting to create the limitation fund for the sum of Rs. 719,658,463.31 in a vacuum, but for the specific purpose of seeking to limit its liability in respect of claims arising from or in relation to "the Incident".

53. The following paragraphs of the applicant's affidavit shed light on what is the "Incident" in respect of which it is purporting to set up the limitation fund:

"***INCIDENT***

9. On 25 July 2020, the vessel was passing close to the south east coast of Mauritius…To my knowledge, the Grounding was caused by error in navigation or negligence of her master and/or other crew, …

. …

….

11. A substantial amount of coral reef was physically destroyed when the Vessel ran aground, as well as while her wreck removal operations were carried out. Furthermore, ***soon after the deterioration of the Vessel's hull following the Grounding, the bunker remained on the vessel began to leak from her tanks. Whilst approximately 4,000T of bunker was onboard the Vessel at the time of Grounding, the Salvors extracted around 2,700MT from the Vessel, the balance spilled into the sea, causing grave environmental damages. I am aware that the bunker spilt from the Vessel did serious damage to the clean seawater, beaches and coasts, coral reefs, mangroves and other wildlife, that not only the government of Mauritius but also a number of local residents and companies were engaged in the clean-up operations, and that local business including fishery and tourism was affected by the oil spill****. (All of the events mentioned in paragraphs 9 and 10 above and paragraph 11 herein and their related events are collectively referred to as the "****Incident****" hereinafter).*

…

…

13. Since the Vessel's gross tonnage is 101,932 and the Incident does not involve any loss of life or personal injury, the Applicant is entitled to limit its liability in relation to the Incident to 12,743,856 special drawing rights[*] which is equivalent to 719,658,463.31

Mauritius Rupee pursuant to section 197 paragraph (b)(ii) of the Act, which is almost identical to Article 6.1, paragraph (b)(ii) of the Convention.

…

14. To the best of my knowledge, it is certain that the Applicant will be held liable to the sums which well exceeds the Limit, having regard to the extent of the damages caused by the Incident:…

15. Therefore, ***I, on behalf of the Applicant, seek to limit*** *its liability to the limit determined under IX of the Act as for the claims arising from or* ***in relation to the Incident, whether such claims are related to oil pollution or not.***

…

17. I believe that the facts stated in this affidavit are true." [emphasis added]

54. As per the application, the applicant is seeking to constitute the limitation fund for the purpose of limiting its liability in respect of ***claims arising from or in relation to the Incident, whether such claims are related to oil pollution or not.***

55. We have already found that, in the light of the clear and unambiguous provisions of section 195, the applicant cannot set up a limitation fund for limiting its liability in respect of oil pollution damage.

56. However, we note that contrary to the averments in the applicant's affidavit referred to above, learned Counsel for the applicant argued that it is ready and willing **to make good payment of claims in respect of which limitation of liability can be invoked**, by way of the limitation fund to be set up.

57. He submitted that there is a significant difference between the question as to whether there is a general right to limit liability by setting up a limitation fund, and as to whether limitation of liability can be invoked against any specific claim or type of claim. He argued that once a limitation fund is constituted, there needs to be a determination made, at a later stage, in respect of each and every claim or type of claim as to whether limitation can be invoked in respect of that claim or type of claim or not.

58. He also argued that the only issue relating to section 195(d) of the Act which needs to be determined at this stage is whether it acts as a general bar to the applicant setting up the limitation fund as the respondent contends. As long as there exist claims (or arguably the realistic potential for claims) that clearly fall within section 194 of the Act and do not fall within section 195 of the Act (e.g., physical reef damage claims etc), then section 195(d) of the Act cannot prevent the setting up of the limitation fund.

59. He contended that the question of the applicability of section 195 of the Act (including section 195(d)) will only arise after the limitation fund has been constituted. Just because certain claims may not fall within the purview of sections 194 or 195, this should not affect the general right of the applicant to limit its liability for other claims and bar its right to set up a limitation fund. If it is subsequently determined that there are no claims brought against the applicant in respect of which it is capable of invoking limitation, then it will make no difference as to whether the limitation fund has been constituted or not. In such a scenario, no claims will be subject to limitation of liability and there would therefore be none dealt with under the limitation fund which would only be available to deal with claims subject to limitation of liability.
60. Learned Counsel for the applicant also submitted that **if the Court authorises the setting up of the limitation fund, this would in no way prejudice any claimant who has a claim arising from the Incident**, including the Mauritian Government. It does not follow from the setting up of a limitation fund that all claims are automatically subject to limitation. Any claim which is excepted from limitation under the Act could still be made against the applicant, irrespective of the limitation fund being set up.

61. It is clear from the above that although, in its application, the applicant is seeking to limit its liability in relation to the Incident, whether such claims are related to oil pollution or not, the applicant now seems to argue that the limitation fund will only be used to meet claims not related to oil pollution damage arising from the Incident.

Does the existence of oil pollution damage preclude the setting up of a limitation fund?

62. The Respondent's response to the present application is grounded mainly on the argument that the claims with respect to which the Applicant seeks to limit its liability are excepted from limitation under section 195(d) of the Act.

63. Learned Counsel for the respondent submitted that when sections 194, 195 and 204 of the Act are interpreted in accordance with the normal rules of statutory interpretation and the

principle that an enactment should be construed as a whole, one arrives at the following conclusions:

(a) where a person is alleged to be liable for claims falling under section 194(1) of the Act and seeks to limit liability, he may constitute a fund;

(b) where a person is alleged to be liable for claims falling under section 195 of the Act, he cannot limit his liability, and therefore, cannot constitute a fund.

64. While we agree that the respondent is correct as regards paragraph (a) and (b) above, we are unable to agree that it follows from the above that the applicant cannot set up a limitation fund.

65. We say so for the following reasons. Sections 194 and 195 of the Act refer to **claims** which are subject to limitation and those which are excepted from limitation, respectively. They do not preclude a person against whom the claims are being made from setting up a limitation fund where the claims do not pertain to oil pollution damage. Section 204 provides that a person seeking to limit his liability under part IX may do so **on the condition that the fund is used only for the payment of claims in respect of which limitation of liability can be invoked**.

66. Further, both claims which are subject to liability and those which are not subject to liability may be brought against the same person. The Act does not proscribe such a course of action, nor does it prevent a person in the above situation from constituting a limitation fund only for the payment of **claims in respect of which limitation of liability can be invoked**. If it had been the intention of the Legislature to preclude a person from constituting a limitation fund where both claims which are subject to limitation of liability and those which are not, are brought or likely to be brought against him, then the Legislature would have clearly stated so.

67. In the present case, learned Counsel for the applicant argued that it is inevitable that there will be non-oil pollution related claims brought against the applicant. Those claims may include claims for direct physical damage to the environment/reefs as a result of the initial grounding and the subsequent wreck removal operations, claims for direct losses/expenses incurred in respect of the raising, removal, destruction or rendering harmless the ship and would fall within the purview of section194(1)(d).

68. In any event it can be gathered from paragraph 15 of the affidavit in support of the application, to which we have referred above, that the applicant foresees that there will be claims which are not related to oil pollution damage against it.

Do the provisions of the Act prevail over the provisions of the Code Civil Mauricien?

69. In so far as the IP 1 to 5 are concerned, in essence, their case is that the applicant as owner and Mitsui O.S.K. Lines Ltd as charterer of the vessel, MV Wakashio, had the custody ("*garde*") of the Vessel as well as its bunker heavy oil. They relied on section 32(c) of the Environment Protection Act which provides that "the owner of a pollutant which is spilled shall always be deemed" to be the *gardien* of the pollutant to buttress their contention that the applicant, as owner, and Mitsui O.S.K. Lines Ltd, as charterer of the vessel, MV Wakashio, had the custody of the bunker fuel.

70. They argued that, pursuant to article 1384 of the Code Civil Mauricien (Civil Code) and section 32 of the Environment Protection Act, which provide for a strict liability regime, the applicant and Mitsui O.S.K. Lines Ltd are both liable as "*gardien*" for the prejudice suffered by the IP 1 to 5 and have the obligation to put them in the same situation in which they were prior to the damages or, alternatively, to indemnify them for the entire loss and prejudice suffered by them without any limitation of liability.

71. They contended that the applicant, Mitsui O.S.K. Lines Ltd and The Japan Shipowners' Mutual Protection & Indemnity Association, as insurer, are bound in law to make good all the loss and prejudice suffered by the IP 1 to 5 without limitation of liability and, therefore, this Court should not grant the application.

72. The IP 1 to 5 also averred that, even on the assumption that the setting up of a limitation fund is possible, which they deny, it will be "*inopposable aux tiers*", particularly against Mitsui O.S.K. Lines Ltd, the charterer of the Vessel and the custodian and owner of the bunker oil, as well as against The Japan Shipowners' Mutual Protection & Indemnity Association, the insurer of the Vessel.

73. In addition, they averred that "*the State cannot be part of, or accept, the limitation of liability of Mauritian citizens as this would infringe the fundamental property and civil rights afforded to Mauritian citizens as per the Constitution*", including those of the IP 1 to 5.

74. We must reiterate that we are not at this stage concerned with any specific claim against the applicant, Mitsui O.S.K. Lines Ltd or The Japan Shipowners' Mutual Protection & Indemnity Association, but are only concerned with the question as to whether the applicant can set up a limitation fund for the purpose of limiting its liability. The question as to whether any claim

which is lodged against the abovenamed will be subject to liability will have to be decided by the court which is seized with the determination of the claim.

75. We understand the submissions of learned Counsel for the IP 1 to 5 to be that it is the Civil Code which should apply to their claims and that the provisions of the Act cannot operate to create a limitation of liability in so far as their claims for damages are concerned.

76. Now, it is trite law that where the meaning of a general enactment covers a situation for which specific provision is made by some other enactment, it is presumed that the situation was intended to be dealt with by the specific provision **[Vinos v Marks & Spencer plc [2001] 3 All ER 784 at [27]].** The Judicial Committee of the Privy Council in **Fun World Co. Ltd v The Municipal Council of Quatre Bornes [2009] UKPC 8 at [59]** endorsed the following maxim of Lord Cooke of Thorndon expressed in **Effort Shipping Co Ltd v Linden Management SA, (The Giannis NK) [1998] 1 All ER 495 at [513]**:

> "*[This maxim] as its traditional expression in Latin indeed suggests, is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage [of language].*"

77. In so far as the present case is concerned, whilst Articles 1382 and 1384 are part of the Civil Code which is the general law regulating claims for damages, the provisions of Part IX of the Act have been specifically enacted in so far as limitation and division of liability for maritime claims are concerned. Therefore, any claim which falls within the purview of Part IX will have to be governed by the special statutory provisions found thereunder.

Infringement of rights which are protected under the Constitution

78. In so far as the contention of the IP 1 to 5 concerning the alleged unconstitutionality of the Act which was enacted by the State and which has the result of allegedly depriving them of their rights under the Civil Code is concerned, the simple answer is as follows. The provisions of the Act providing for limitation of liability have been enacted by the Legislature under the powers conferred upon it under the Constitution itself, and, as long as they have not been declared to be in breach of the Constitution, they must be given effect to by our Courts.

79. In the circumstances, we do not find any merit in the objections raised on behalf of the IP 1 to 5.

80. As stated above, the IP 6 is not objecting to the application subject to the Court agreeing with the applicant that the setting up of a limitation fund does not require first, as a precondition to the setting up, the determination of the right of the applicant to limit its liability under section 195(d) of Act.

81. We have already found that **claims for any liability incurred in relation to oil pollution damage** are specifically excluded from limitation of liability under paragraph 195(d). In the circumstances, the respondent and the IP 1 to 5 are perfectly right in objecting to the application since the applicant is seeking to set up a limitation fund in respect of "*the claims arising from or in relation to the Incident, whether such claims are related to oil pollution or not.*"

82. For all the reasons given above, the applicant cannot set up a limitation fund for claims related to oil pollution damage as opposed to non-oil pollution damage arising from or in relation to the Incident. We, therefore, decline to grant prayer (a) of the application.

83. However, there is nothing in our law which precludes a person against whom there are claims for both oil pollution damage and those not related to oil pollution damage from setting up a limitation fund only for the purposes of meeting claims not pertaining to oil pollution damage and in respect of which limitation of liability can be invoked.

84. The respondent and the IP 1 to 6 do not dispute the fact that the applicant is a shipowner or that it is *alleged to be liable and* [is] *seeking to limit his liability under* Part IX. Further it is not their contention that the limits of liability have not been calculated in line with the provisions of section 197 of the Act.

85. Taking into consideration all the above and the fact that the application contains a prayer "*for such other Order or Orders that the Supreme Court may deem fit and reasonable to make in the circumstances of the present matter*", we are of the view that we may authorise the applicant to set up a limitation fund which shall be available only for the payment of claims which do not pertain to oil pollution damage.

86. The next question that arises is what is the sum for which the applicant should set up the limitation fund.

Calculation of the Limitation Fund value

87. In its written submissions, the applicant agrees that although the prayer set out in its application is for an order to be issued authorising the applicant to set up a limitation fund for the sum of Rs.719,658,436.31, that figure will require revision, as the accurate value of the limitation fund can only be determined on the date the limitation fund is constituted.

88. Section 204*(1) of the Act entitled "Constitution of limitation fund" provides that:*

> "*Any person alleged to be liable and seeking to limit his liability under this Part may constitute a fund by depositing in the Registry of the Supreme Court an amount at least equivalent to the limit provided for in section 197, 198, 199 or 201 as appropriate, or by producing a guarantee acceptable to the Court, together with interest from the date of the occurrence giving rise to the liability until the date of the constitution of the fund… "*

89. It can be gleaned from section 204 that there are a number of steps which need to be followed in determining the amount for which the limitation fund is to be constituted. Firstly, it has to be ascertained under which of sections 197,198, 199 or 201, the limit is to be calculated.

90. We agree with the submissions of the applicant that, in the present case, the limit of liability of the Vessel is to be determined based on the formula provided in section 197 (b)(ii) of the Act which provides as follows:

> *"197. Limitation calculations*
>
> *The limits of liability for claims, other than those provided for in section 203, arising on any distinct occasion, shall be calculated as follows -*
>
> *…..*
>
> *(b) in respect of any other claim -*
>
> *(i) 167,000 special drawing rights for a ship with a tonnage not exceeding 500 tons;*
>
> *(ii) for a ship with a tonnage in excess of 500 tons, the following amounts in addition to that mentioned in subparagraph (i) -*
>
> *(A) for each ton from 501 to 30,000 tons, 167 special drawing rights;*
>
> *(B) for each ton from 30,001 to 70,000 tons, 125 special drawing rights; and*
>
> *(C) for each ton in excess of 70,000 tons, 83 special drawing rights."*

91. Secondly, the limit of liability for the Vessel is to be converted from special drawing rights into Rupees in accordance with the provisions of sections 202 and 182(2) of the Act, as at the date on which the limitation fund will be constituted.

92. The relevant extract of section 202 reads as follows:

> "***202. Conversion of special drawing rights***
>
> *(1) For the purpose of converting the amounts mentioned in sections 197, 198, 199 and 200 from special drawing rights into rupees, one special drawing right shall be treated as equal to such a sum in rupees as the International Monetary Fund has fixed as being the equivalent of one special drawing right for-*
>
> *(a) the date on which the limitation fund shall have been constituted and guarantee given under section 204; or*
>
> *….*
>
> *….*
>
> *(2) Section 182(2) shall apply to subsection (1)."*

93. Section 182 provides as follows:

> "***182. Conversion of special drawing rights***
>
> *(1) For the purpose of converting into rupees the amounts of special drawing rights mentioned in sections 180 and 181 in respect of which a judgment is given, one special drawing right shall be treated as equal to such a sum in rupees as determined by the Bank of Mauritius, being the rupee equivalent of the dollar amount fixed by the International Monetary Fund as being the equivalent of one special drawing right, for -*
>
> *(a) the day on which the judgment is given; or*
>
> *(b) if no sum has been so determined for that day, the last day before that day for which a sum has been so determined.*
>
> *(2) A certificate given by a Deputy Governor of the Bank of Mauritius stating-*
>
> *(a) that a particular sum in rupees has been determined for a particular day as mentioned in section 45B of the Bank of Mauritius Act; or*
>
> *(b) that no sum has been so determined for that day and a particular sum in rupees has been so determined for a day which is the last day for which a sum has been so determined before the particular day,*

shall be conclusive evidence of those matters for the purpose of sections 180 and 181, and a document purporting to be such a certificate shall, in any proceedings, be received in evidence and, unless the contrary is proved, be deemed to be such a certificate."

94. Finally, interest from the date of the occurrence giving rise to the liability until the date of the constitution of the limitation fund must be added to the above sum, in accordance with section 204 of the Act.

95. The applicable tonnage is a Vessel's gross tonnage, which the applicant submitted is 101,932 tons for the Vessel and this gives rise to a fixed limit of liability for the Vessel of 12,743,856 special drawing rights as averred by the applicant in its affidavit.

96. It was submitted on behalf of the applicant that, given that no limitation fund has ever been set up in Mauritius, it is relevant to take support from jurisdictions where limitation funds have been constituted in the past. For example, English law provides for interest on the principal amount at a rate of 1% above Bank of England base rate as per an English Statutory Instrument S.I. 1999 No. 1922. Learned Counsel for the applicant submitted that the Court may be guided by the aforementioned example in exercising its discretion to determine the rate of interest under section 204(3) of the Act.

97. We note that, in England, the law provides for a rate of interest above the Bank of England base rate. In Mauritius, the Civil Code provides as follows under Article 1907:

"***1907.*** *L'intérêt est légal ou conventionnel. L'intérêt légal est fixé par la loi. L'intérêt conventionnel peut excéder celui de la loi toutes les fois que la loi ne le prohibe pas.*

Le taux de l'intérêt conventionnel doit être fixé par écrit. "

98. It is clear that, in the present case, we are not concerned with an "*intérêt conventionnel*". Taking the above into consideration, we are of the view that the rate of interest to be applied in the present case should be the legal rate.

99. The question that finally arises is whether the applicant may provide a bank guarantee instead of providing the amount determined by carrying out the above exercise. As can be gleaned from section 204(1), the person constituting a limitation fund may provide a "*guarantee acceptable to the Court*".

100. The question for our determination is what would be a "*guarantee acceptable to the Court*"? In this respect, we may note that in applications for leave to appeal to the Judicial Committee of the Privy Council, the Supreme Court has, in the past, ordered that a bank guarantee be provided in favour of a respondent to meet any eventual costs order awarded against an applicant. In addition, in injunction applications, the Supreme Court has also granted orders directing an applicant to fortify its undertaking in damages by providing a bank guarantee to a respondent. In the Mauritian context, a bank guarantee is one of the safest mechanisms for securing the payment of the sum guaranteed where, if the applicant defaults, the bank issues an irrevocable undertaking on its behalf to pay the sum guaranteed. In the circumstances, we are of the view that the applicant may be allowed to provide a bank guarantee in favour of the respondent.

101. For all the reasons given above, we are of the view that the limitation fund to be constituted by the applicant is to be for the sum computed by using the method referred to above, together with interest at the legal rate from 25 July 2020 until the date of the constitution of the fund. Accordingly, the bank guarantee to be provided by the applicant is to be for the above sum.

Conclusion

102. To conclude, therefore, we authorise the applicant to set up a limitation fund which shall be available only for the payment of claims not related to oil pollution damage and to provide a bank guarantee for the sum computed by using the method referred to above, together with interest at the legal rate from 25 July 2020, the date on which the Vessel grounded, until the date of the constitution of the fund.

103. In the circumstances, we make no order as to costs.

S. B. A. Hamuth-Laulloo
Judge

K. D. Gunesh-Balaghee
Judge

23 February 2026

Judgment delivered by Hon K. D. Gunesh-Balaghee, Judge

For Applicant	**:**	**Me. J. Gujadhur, Senior Attorney** **Me. M. Hein, Senior Counsel** **Me. R. Ramanjooloo, of Counsel** **Me. I. Lecordier-Marie Joseph, of Counsel**
For Respondents	**:**	**Me. S. Angad, Deputy Chief State Attorney** **Me. O. G. Topsy-Sonoo, Parliamentary Counsel** **Me. A. M. O. Ombrasine, Ag. Assistant Parliamentary Counsel** **Me. K. Domah, Senior State Counsel**
For Intervening Parties Nos 1,2 & 3:		**Me. T. Koenig, Senior Attorney** **Me. M. Sauzier, Senior Counsel** **Me. A. Kimcurrun, of Counsel**
For Intervening Parties Nos 4 & 5	**:**	**Me. T. Koenig, Senior Attorney** **Me. P. Doger De Speville, Senior Counsel** **Me. E. Doger De Speville, of Counsel**
For Intervening Parties No 6	**:**	**Me. F. Hardy, Attorney at Law** **Me. A. Julienne, of Counsel**