Judgment 62/2003

Thompson and Le Noury v Masterton and Bourne
Royal Court
(Civil Action file 628)
14th October, 2003

Convention on Limitation of Liability for Maritime Claims, 1976 – whether the Convention limits liability for the costs of litigation

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 14th day of October, 2003 before Catherine Mary Newman, Q.C. Lieutenant Bailiff sitting alone.

JILLIAN THOMPSON

First Plaintiff

LEIGH LE NOURY

Second Plaintiff

And

MARK MASTERTON

First Defendant

ANTHONY ATLANTIS SOLOMON BOURNE

Second Defendant

WHEREAS on the 2nd July, 2003 the Lieutenant Bailiff considered an application by the Plaintiffs to determine whether the Plaintiffs' costs of proving their claims (both as to liability and quantum) are recoverable in principle and on ordinary principles, from the Defendants in addition to the limitation on amounts provided for by the Convention of Limitation on Liability for Maritime Claims 1976 and heard thereon Advocates G.S.K. Dawes, A.M. Merrien, and M.G. Ferbrache, Counsel for the First and Second Plaintiffs and First Defendant and Second Defendant, respectively and having found that the said Convention does not Limit Liability for the costs of litigation and awarded costs both jointly and severally against the First and Second Defendants on the Standard recoverable basis;

The Lieutenant Bailiff this day issued written judgment in the attached hereto.

S.M.D. ROSS
Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

BETWEEN

JULIAN THOMPSON

First Plaintiff

LEIGH LE NOURY

Second Plaintiff

AND

MARK MASTERSON

First Defendant

ANTHONY ATLANTIS SOLOMON BOURNE

Second Defendant

JUDGMENT ON CONVENTION COSTS ISSUE

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1. I have been asked to determine a short point of law which arises in this litigation.

2. The Plaintiffs were injured in a collision at sea. The collision took place in Guernsey territorial waters. The plaintiffs were passengers in a boat of which the Second Defendant was the helmsman. The First Defendant was the helmsman of the other boat. Each of the Defendants blamed the other. Neither admitted any liability to the Plaintiffs. There had to be a trial as to liability and as to quantum. They were held jointly and severally liable to the Plaintiffs. At the trial on liability, which concluded on 2nd August 2001, the jurats also apportioned liability between the Defendants inter se at 70% to the First Defendant and 30% to the Second Defendant.

3. Costs have not yet been dealt with.

The Power to Award Costs

4. The power of the Royal Court to award costs is undisputed. The power is discretionary and extends to all types of proceedings in the Royal Court. It is likewise undisputed that the

Royal Court of Guernsey, sitting as an Ordinary Court, exercises an admiralty jurisdiction which amply covered the claims made by the Plaintiffs in this case.

Limitation of Liability

5. The Convention on Limitation of Liability for Maritime Claims 1976 ("the 1976 Convention" generally known as the London Convention) was given force of law in England and Wales by Merchant Shipping Act 1979. The 1976 Convention was incorporated into English Law as Schedule 4 to the 1979 Act. By Section 17 of the 1979 Act Schedule 4 has force throughout the United Kingdom. By an Order in Council 1980 no. 569 entitled the Merchant Shipping Act 1979 (Guernsey) Order 1980 certain provisions of the 1979 Act, including Schedule 4, were extended to the Bailiwick of Guernsey. I should say, for completeness, in England and Wales the 1979 Act has been replaced by the Merchant Shipping Act 1995. It is common ground that the 1995 legislation has not been extended to Guernsey.

6. By virtue of the 1976 Convention the Defendants were entitled to limit their liability to the Plaintiffs. Each of the Defendants was entitled to limit his liability to a total of 166,667 units of account in respect of claims for personal injury and 83,333 units of account in respect of any other claims. The Second Defendant established a fund pursuant to Article 11 of the 1976 Convention. The First Defendant did not establish such a fund.

Article 2

7. Article 2 of the 1976 Convention, as set out in Schedule 4 to the Merchant Shipping Act 1979 provides:

> 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 connexion with the operation

of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;

(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

The Construction of Article 2

8. The ordinary meaning of the relevant words "claims in respect of… personal injury… and consequential loss resulting therefrom" (in Article 2 paragraph 1 (a)) is in my judgment a reference to claims under the substantive law relating to liability for damages for personal injury. These substantive claims are subject to limitation of liability. Where, as here, the

pleader of such a claim invites the Court to exercise its discretion to award costs in his favour should the matter proceed to a hearing, he does so because the traditions of pleading require a plaintiff to notify the Defendant that he intends to make an application for costs should circumstances arise where it is appropriate to do so. Contrary to the submission made by the First Defendant, the pleader does not include a reference to a claim for costs because it is part of his substantive claim for damages or consequential loss. It is not.

9. All Counsel informed me that there is no authority on this particular point. I was slightly surprised to hear this but it is often the case that the simplest of propositions are unsupported by clear authority. Instead assumptions lie under the surface of decisions in more complex cases. My attention was directed to a number of authorities, none of which are directly in point.

10. In Swiss Bank Corp v Brink's-MAT Limited [1986] 2 All ER 188 Bingham J (as he then was) construed the limits on the liability of a carrier of goods under the Warsaw-Hague Convention, as incorporated into the law of England, as encompassing every expense except costs to which an air carrier might be put as a result of a successful claim which equalled or exceeded the limits on liability imposed by Article 22(2) of the Convention. Thus interest could only be awarded by the Court if damages were less than the convention limit and could only be awarded up to the convention limit. Article 22(4) expressly allowed the Court to award costs on top of the sum limited. Bingham J indicated that had this not been expressly provided for he would have been of the view that the Convention did not permit the awarding of costs or legal fees on top of the sum limited. In reflecting on this construction he said, at p.191 a, that court costs and legal expenses are in no sense part of any award of damages. Whilst it is naturally reassuring to note Bingham J's view of the distinct nature of a costs award, it is to my mind hardly a surprising one for him to express. I do not derive any binding assistance from the views which he expressed about the construction of the Warsaw-Hague Convention. First of all, it would be inappropriate to adopt a construction of terms in one Convention as a rule for construction of a quite different Convention dealing with limitation of liability in a different context and in a different way. For example, the 1976

Convention does not offer the presumption of liability afforded by the Warsaw-Hague Convention. If liability is not admitted, as here it was not, it must be proved. Secondly, when his attention was drawn, by way of analogy, to certain aspects of English maritime practice (see p.192 d/e), Bingham J remarked that it was an entirely different field of no assistance to him. The reverse must also be true. Thirdly, I do not see anything in the judgment which I should or could find sufficiently relevant to the question which I have to deal with and which I should or could therefore follow. I am nevertheless reassured that nothing in Bingham J's reasoning or the result which he reaches on the proper construction of the Warsaw-Hague Convention indicates that the construction which I have adopted based on the plain meaning of the words of Article 2 is wrong.

11. The Second Defendant referred briefly to the Athens Convention in his skeleton argument. That expressly provides, in Article 10, for interest and costs to be dealt with separately from the claims for which liability may be limited. It was not suggested before me that the Athens Convention was any sort of guide to how I ought to construe Article 2 of the 1976 Convention. In my judgment it is not.

12. I was referred also to: Polish Steamship v Atlantic Maritime Co ("the Garden City") [1984] 3 All ER 59 CA. I note the observations of Griffiths LJ in particular at page 68h – 69b, but they do not give the answer to the question of construction. Although Hiscox v Outhwaite [1992] 1 AC 562 was in the Second Defendant's bundle of authorities and in his skeleton argument a brief reference is made to it, I was not referred to it in argument. Having looked at is briefly I do not think that it contains anything of relevance. Were the meaning of the words in Article 2 clearly as the Defendants contend, I would not bend them to achieve a result which might deter insurers from behaving oppressively. The construction which I have adopted has not been arrived at by that method and the principle for which Hiscox v Outhwaite has been cited is not in play.

13. The old practice of the High Court of Admiralty appears to have been to award costs. In The Dundee (1830) Hag. Adm. 137, which is a well known case on the topic of interest on an

account stated, Lord Stowell held that on the earlier statutory provision then in force costs could be awarded on top of the limited sum allowable for loss and damage. In Ex parte Rayne (1841) 1 QB 982, Lord Denman LJ held that owners were personally liable for the costs of recovering compensation even though they might exceed the value of the ship and freight.

14. However these old cases are not a guide to the proper construction of Article 2. They have a limited value in that they do support the views of leading text book writers as to settled practice in England, but are of no more value than that. I have adopted a view of the proper construction of Article 2 on what I perceive to be the plain meaning of the words used.

Text books

15. No direct guidance on the precise point raised by this application is to be found in Marsden on Collisions at Sea. I have been taken to the 12th and 13th Editions. Paras 19-21 to 19-23 proceed on the assumption that the party claiming limitation of liability is liable for costs but does not in terms state that the liability is in addition to the limitation fund. In Griggs & Williams' Limitation of Liability for Maritime Claims, 3rd Edition, it is stated at page 54 :

> *Costs*
>
> The Convention is silent on the question of legal costs incurred (i) in establishing the claim in respect of which a plea of limitation is made; and (ii) in contesting the right to limit.
>
> *Costs incurred in establishing the claim*
>
> Article 2 of the Convention lists the claims in respect of which there is a right to limit liability and Article 14 provides that the rules relating to the constitution and distribution of the limitation fund shall (except to the extent that express provision is made in Articles 11, 12 and 13) be governed by the law of the State Party in which the fund is constituted. If, as in England, no express provision has been made in

relation to costs, it is submitted that the question of whether or not costs of proving the claim are recoverable depends on whether, as a matter of law, (a) recoverable costs do or do not form part of the claim; and (b) if they do not form part of the claim, to what extent they are recoverable on collection from the fund.

Whilst there appears to be no relevant authority on this issue under the Convention, the traditional rule in England was that those seeking to limit their liability were liable for costs given or awarded against them, in addition to the full amount payable as damages under the statutory limitation. In the opinion of the authors, the same rule applies under the 1976 Convention. It would be an odd result if the recovery of legal costs incurred by a claimant in proving his claim against the fund could have the effect of reducing the recovery from the fund of a claimant who chose not to instruct a lawyer. Therefore, it is submitted that if costs are recoverable at all then they are recoverable not as part of the claim against the fund but in addition to the fund to the extent that a court, in exercising its inherent discretion in relation to costs, determines what costs shall be paid and by whom."

Meeson's Admiralty Jurisdiction and Practice is clearer on this point at para 8-105:

"Although both that case and this Act were concerned with the old law of limitation and are therefore of no direct application to limitation actions under the 1976 Convention, the position does not appear to have altered in that Article 11 of the 1976 Convention provides that the limitation fund shall be available "only for the payment of claims in respect of which limitation of liability can be invoked" and would therefore appear to rule out invoking limitation against an order for legal costs, which is not a claim mentioned in Article 2 of the Convention where the claims against which limitation may be invoked are specified.

(8-106) There are also reasons in principle why orders for costs in liability actions should not be included in the claims against the limitation fund. It would encourage

shipowners to contest liability safe in the knowledge that any award of costs made against them would simply form part of the claim against the limitation fund, so that the action was brought in effect at the defendant's expense. In a multi-party case, it could also potentially adversely affect other defendants by altering the relative proportions of the claims against the fund.

(8-107) Finally, the Convention is international in character and the recoverability of legal costs is not uniform across the various Contracting States, so that if costs were to be included in claims against the fund, the limitation fund would in effect vary in amount in different Contracting States which was not the intention of the framers of the Convention. In cases where limitation of liability is raised as a defence (as opposed to being raised in a limitation action) it is the practice to give judgment for the amount of the limit of liability *together with costs*."

16. Having considered all these views the question appears to be one which is not directly covered by authority. I am asked to determine whether the 1976 Convention limits liability for the costs of litigation. I have answered that question in the negative.

17. The Second Defendant's skeleton argument also drew my attention to Footnote 126 in Chapter III of Griggs & Williams on The Limitation of Liability for Maritime Claims, 3rd Edn. This note deals with Chapter 9 para 3 of the Finnish Maritime Code which extends Article 3 of the Convention to exclude from limitation claims for interest or compensation for legal costs. I made it clear at the outset, before the Second Defendant began his submissions, that since different countries regard matters of costs in different ways, absent a fuller understanding of how the law of Finland worked in this respect, I did not think that this reference was likely to be of assistance. Mr Ferbrache chose not to develop this argument any further.

18. Argument was also addressed on Articles 11 & 13. In the end my view is these are dependent upon Article 2 and not of any assistance in construing it.

