Neutral Citation Number: [2025] EWHC 73 (Admiralty)

Case No: AD-2022-000095
Case No: CL-2017-000186
Case No: CL-2022-000581

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
ADMIRALTY COURT

Monday 20 January 2025

Rolls Building
Fetter Lane
London
EC4A 1NL

Before:

MRS JUSTICE COCKERILL DBE

- -

Between:

RÉSEAU DE TRANSPORT D'ÉLECTRICITÉ

Claimant/Second Applicant ("RTE")

- and -

1) COSTAIN LIMITED
2) NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant/First Applicant ("NR/C")

- and -

STEMA SHIPPING (UK) LIMITED

Third Party/Respondent ("Stema UK")

STEMA SHIPPING

Fourth Party ("Stema A/S")

SPLITT CHARTERING APS

Fifth Party ("Splitt")

~~**MIBAU DEUTSCHLAND GMBH**~~

Sixth Party

AHT BREMEN FIGHTER GMBH & CO. KG
(in Liquidation)

Seventh Party

HALCROW GROUP LIMITED

Eighth Party

MARINE MANAGEMENT ORGANISATION

Ninth Party

MARITIME AND COASTGUARD AGENCY

Tenth Party

- -
- -

Chirag Karia KC and Jakob Reckhenrich (instructed by **HFW LLP)** for **Claimant/Second Applicant**
John A Kimbell KC (instructed by **Clyde & Co LLP**) for the **Defendants/First Applicant**
John Passmore KC and Robert Ward (instructed by **Campbell Johnston Clark Limited**) **for the Third to Fifth Parties**
Seventh to Tenth Parties were unrepresented

Hearing date: 6 November 2024

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APPROVED JUDGMENT

This judgment was handed down remotely and in private by the judge and circulated to the parties' representatives by email. The date and time for hand-down is deemed to be Monday 20 January 2025 at 09:30am.

Mrs Justice Cockerill:

INTRODUCTION

1. On 20 November 2016 in the English Channel two pairs of high voltage electricity cables, which connect England and France, were damaged. They are alleged to belong to the Claimant ("RTE"). In these proceedings it is alleged that this was caused by having an anchor dragged over them. The two vessels in the area at the time were the Stema Barge II, a dumb barge, ("the Barge") and the SAGA SKY, a general cargo vessel. These two vessels also collided with each other.

2. The Barge was carrying rock under a sale contract between the Third Party ("Stema UK") and the Defendants, Network Rail and Costain ("NR/C"). The rock was needed by NR/C to repair part of the railway line between Dover and Folkestone.

3. The Barge was chartered to the Fourth Party ("Stema A/S"). The Fifth Party ("Splitt") is the owner of the Barge. Splitt, Stema A/S and Stema UK (collectively known as "the Stema Interests") are all part of the same group of companies. The owner of the SAGA SKY is a Norwegian company ("Saga").

4. This incident has given rise to a multiplicity of legal proceedings in Denmark, France and England. That fact gives rise to this application, because Stema UK seeks to argue that it is entitled to limit its liability under Article 1(4) of the Convention on Limitation of Liability for Maritime Claims 1976 ("the Limitation Convention").

5. To this the Applicants respond that it is an abuse of process for Stema UK to seek to argue this Article 1(4) claim in these proceedings - because it could and should have been argued at the trial of the earlier limitation proceedings commenced by the Stema Interests which was heard by Mr Justice Teare in May 2020 ("the Limitation Proceedings"). It is said that the purpose of those proceedings was for Stema UK to secure a general limitation decree in respect of any maritime claims arising out of the incident and to avail itself of the benefits of the limitation fund established as part of those proceedings. The Applicants say that not only did Stema UK fail to plead or argue the Article 1(4) point at the limitation trial, but then Stema UK at least attempted to argue it and then actually explicitly withdrew that argument in the Court of Appeal (again seeking to revive it in the Supreme Court).

6. The Applicants thus say that:

    i. The matter is *res judicata* in that:

        a) The order made by the Court of Appeal in the Limitation Proceedings declared (without qualification) that Stema UK was not permitted to limit its liability under Article 1 of the Limitation Convention;

        b) The cause of action, alternatively the issue, which Stema UK seeks to invoke was determined against it;

        c) Even if there is no *res judicata* this is *Henderson v Henderson* abuse.

7. The Stema Interests say that there is no room for the operation of the doctrines of cause of action estoppel or issue estoppel in circumstances where Article 1(4) (and issues essential to it) were not previously decided and that there is similarly no abuse of process, primarily because at the time of the limitation claim, claims were not sufficiently formulated against Stema UK for a meaningful decision to be made on the substance of Article 1(4). A defence based on Article 1(4) is most appropriately considered in these proceedings and does not constitute harassment of the Applicants.

8. I should also note that the Stema Interests made an application at the beginning of the hearing for permission to rely on an expert report of Danish law. The Applicants submitted that the content of the report was not necessary for or relevant to their applications so permission ought not to be granted. In the event I did not rule on admissibility before the hearing commenced, and some features of the report were to some extent referred to *de bene esse*. Ultimately I have concluded that the substance of Danish Law is not relevant for present purposes and the features of Danish Law to which reference had to be made were not contentious and should have been capable of being agreed.

THE LIMITATION CONVENTION

9. Given the context of this case some explanation of the Limitation Convention and limitation proceedings is appropriate.

10. Section 185 of the Merchant Shipping Act 1995 (the "MSA") provides that the Limitation Convention should have the force of law in the United Kingdom. That is a development which to some extent reflects the historical development of limitation of liability outlined by the then Admiralty Judge David Steel in *CMA CGM SA v Classica Shipping Co Ltd* [2003] EWHC 641 (Comm); [2003] 2 All E.R. (Comm) 21 [2004] EWCA Civ 114 [2404] 1 CLC 468 at first instance: [14] –[27], subject to the reservation at [9] of the Court of Appeal's judgment.

11. Essentially the Limitation Convention encapsulates a scheme whereby a shipowner or other relevant person connected with a ship can be entitled to limit their liability in respect of certain maritime claims to a particular amount (calculated by reference to the tonnage of the particular ship), regardless of the total amount of the claims. In this case, for example, total claims of €30 million are advanced; and the limitation plea would result in a liability limit of approximately €6.5 million.

12. It is however widely accepted that in general terms the general purpose of the existence of a regime of limitation of liability was to encourage the provision of international trade by way of sea-carriage (see *CMA* at [11] of the Court of Appeal's judgment).

13. The text of the Limitation Convention as incorporated into English law appears in Schedule 7 to the MSA. The articles most relevant to the strike out applications are:

> "**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 and operator of a sea-going ship. …

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.

5. In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself. …

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; …

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

Chapter II – Limits of Liability

Article. 10. Limitation of liability without constitution of a limitation fund

1. Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or is constituted when the right to limit liability is invoked….

Chapter III. - The limitation fund

Article 11. Constitution of the fund

Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the Sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of

> the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked".

14. It follows that there are two possible approaches to limitation. Article 1(1) allows "shipowners" to limit. Article 1(4) gives a right to limit to *"any person for whose act, neglect or default the shipowner … is responsible"*. The first claim raises fairly limited issues – whether the thing owned by the limitation claimant is a "ship" and whether that claimant is a "shipowner".

15. The second is more complex in that Article 1(4) requires not only a claim (or contemplated claim) *"in respect of … loss of or damage to property … occurring on board or in direct connection with the operation of the ship"*, but it also requires that the claim is *"made against any person for whose act, neglect or default the shipowner … is responsible"*. That act, neglect or default must (logically) be a relevant, causative act neglect or default.

The process of limitation claims

16. As a matter of English procedure, a limitation claim is an Admiralty claim and the procedures to be followed are found within CPR 61 and PD61. It is common ground that there is no prescribed time for asserting a limitation claim; anyone who wishes to invoke the right to limit liability can either wait for a liability claim (usually a claim for damages) to be formally commenced against them and then plead the right to limit as a defence to that claim or they can take the initiative and commence limitation proceedings by issuing a limitation claim form seeking a declaration of the right to limit (often against both named parties and parties described by category – such as *"all other persons claiming to have suffered damage by reason of a collision between …."*).

17. It is a matter for the limitation claimant to decide where and when to commence a limitation claim. Limitation claimants do not have to wait until liability proceedings have been concluded or a liability claim has been formally begun by legal proceedings. They are very often started in the immediate aftermath of a maritime incident and often concluded before any liability proceedings begin. It is in the interests of all potential claimants to know how much money there is in the fund and who may claim the procedural protection afforded by the fund.

18. There is no presumption that it is more appropriate to have limitation claims heard in the same jurisdiction as any liability claim. The jurisdictional gateway in section 20(3)(c) of the Senior Courts Act 1981 is very broad. All that is necessary as a matter of English procedure is that the Limitation Claimants have a legitimate interest in commencing proceedings.

19. Under English law, limitation claims are regarded as free-standing independent proceedings. Limitation proceedings are usually accompanied by the constitution of a limitation fund under Article. 10. This is done by paying into court the sterling equivalent of the relevant number of SDR prescribed by the Convention, plus interest. The constitution of a fund gives protection to the assets of the parties constituting the

fund; it precludes any person having a claim against the fund from exercising any rights against any other assets of the parties constituting the fund.

20. Whether the right to limit arises under Article 1(2) or Article 1(4) the procedures and practice for pursuing the limitation claim are the same.

21. The proceedings will proceed differently depending upon whether the claimant wishes to obtain a restricted limitation decree good only against a named defendant, or whether they wish to obtain a general limitation decree good against all the world. If the latter, the case is referred to the Admiralty Registrar for a CMC at which directions are given for the further progress of the case. If a general decree is obtained the Admiralty judge will direct how the decree is to be advertised; once that is done the limitation claimant files copies of the advertisements so placed.

22. The limitation fund is ultimately distributed among claimants to it in proportion to their established claims against the fund.

BACKGROUND

The Incident

23. As already outlined, the incident involved alleged damage to undersea electrical cables between the UK and France which RTE claims that it owns and/or operates and owned and/or operated at the material time ("the Cables"). The wider background and details of the incident are as follows.

24. In December 2015, a storm damaged a sea wall running along a stretch of railway line at Shakespeare Beach between Dover and Folkestone. The owners of the railway line, Network Rail Infrastructure Limited ("NR"), retained Costain to carry out a project to repair the sea wall and reopen the railway line. On one level this project was a success, with the railway line repaired and re-opened ahead of time. But this dispute represents a significant area of collateral damage.

25. Costain and/or NR contracted with Stema UK to supply rock armour for the project. The delivery of rock armour to Shakespeare Beach is known in this litigation as the "Delivery Operations".

26. Stema UK prepared a method statement for the project in April 2016 (the "April Method Statement") (although the status of, and responsibility for, the contents of the April Method Statement, and the degree to which its contents materially affected what happened thereafter, is disputed) and sent it to Costain.

27. The April Method Statement was prepared using a chart (dated 21 March 1980) which was more than three decades out of date and did not show the Cables. The then current Admiralty Chart was dated 26 February 2015.

28. The April Method Statement was replaced in July 2016 with the "July Method Statement", which was either the same as or in material part unchanged from the April Method Statement. Critically, each Method Statement included a proposed box in which the Barge was to be anchored on arrival off Dover. The Cables ran close to the box.

29. On 7 November 2016 the Barge arrived off Dover on its third delivery of rock armour. It did not have GPS. The Barge ultimately anchored outside the box (though the precise coordinates are disputed).

30. During a storm in the Channel on 20 November 2016, the Barge dragged its anchor. RTE alleges that the anchor crossed the path of and damaged the Cables.

31. The extent to which Stema UK or the Stema Interests and/or NR/C should be liable for actions or omissions relating to the Barge is the principal liability issue in the case.

The Proceedings

32. It follows that the litigation history is significant.

French Proceedings

33. The French Proceedings were commenced in December 2016 before the Tribunal de commerce de Dunkerque. They are described as "French Survey Proceedings" in the witness evidence of Mr Kemp where he notes that the purpose of the action was for the appointment of a surveyor, Capt Everard, who would not apportion liability but would investigate matters of causation and quantum. The parties to those proceedings include all the Stema Interests, with Stema UK having been subject to a summons dated 8 March 2017.

34. On 31 January 2017 Capt Everard sent to the parties in the French Proceedings a letter with his preliminary determinations. He indicated that he considered that cable pair 11 and 12 was damaged by the anchor of the Barge and that cable pair 33 and 34 was damaged by the anchor of the Saga Sky. Further determinations and documents were submitted in May and September 2017.

Danish Proceedings

35. Also in December 2016, RTE commenced claims in Denmark against Splitt and then also against Stema A/S. The Danish Proceedings are still extant.

36. It was alleged in those proceedings by RTE that: "…*Splitt Chartering is liable as shipowner for damage caused through fault or negligence in their service by the master, crew members, pilot or others, who carry out work in the service of the ship, cf. The Danish Merchant Shipping Act, section 151.*" That rule provides for a rule of vicarious liability (albeit wider than the concept of vicarious liability in English Law): *"The shipowner shall be liable for damage caused through fault or negligence in their service by the master, crew members, pilot or others who carry out work in the service of the ship"*.

37. On 25 January 2018 RTE in its Reply pleaded that:

    i. Damage to cables 11/12 and 33/34 are two separate incidents and denied that Splitt is entitled to limit liability.

    ii. Splitt is "*liable for errors committed by others acting in service of the Barge*" and repeated reliance on section 151 of the Danish Merchant Shipping Act.

38. In other words, in the Danish proceedings a case was advanced by RTE that Stema Interests were liable not for their own actions but for the actions of others for whose acts or defaults they were responsible.

English Proceedings

39. On 13 January 2017, the SAGA SKY filed an *in rem* Admiralty claim against the Barge seeking damages arising from the collision between the two vessels. This claim was later consolidated with the Limitation Proceedings (see below).

40. On 21 March 2017, Stema UK commenced an action against RTE and the owners of the SAGA SKY for a declaration of non-liability in respect of the incident ("the 2017 Claim"). No Particulars of Claim were served, and the action was stayed while the Limitation Proceedings proceeded until late 2022. At that point RTE filed a Defence and Counterclaim. The 2017 Claim is part of the present consolidated proceedings and is the action in which RTE brings its Strike Out Application.

41. On 10 October 2018, the Stema Interests commenced the Limitation Proceedings. The claim was made in hybrid form, that is against both named defendants and *"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 and/or allisions."*

42. The named defendants were Saga Shipholding Norway AS and RTE. The details of the limitation claim were:

> "The First to Fourth Claimants, as Owners, Charterers, managers and operators (respectively) of the unpowered barge "STEMA BARGE II" (registered at San Lorenzo) claim to have their liability (if any) in respect of loss of or damage to property (including but not limited to m/v "SAGA SKY" and Interconnector France-Angleterre 1), and any consequent loss, resulting from the drifting and/or dragging of anchor of "STEMA BARGE II" on 20 November 2016 and/or any consequent collisions and/or allisions, limited pursuant to section 185 of the Merchant Shipping Act 1995, and claim a declaration to the same effect."

43. The declaration accompanying the Claim Form states:

> "The only parties who have indicated claims against the Claimants [in respect of the Incident] are the owners of the SAGA SKY and [RTE]…
>
> Pursuant to s.185 of the Merchant Shipping Act 1995, the Claimants are entitled to limit their liability by reason of the drifting and/or dragging of anchor of the unpowered barge SBII on 20 November 2016, and/or any consequent collisions and/or allisions, to 5,309,200 Special Drawing Rights based on the SBII's gross tonnage of 12,773 tons, as verified by the attached copy of the SBII's International Tonnage Certificate dated 21 April 2008…
>
> …. the Claimants seek:

> (1) to have their liability (if any) in respect of loss of or damage to property (including but not limited to SS and IFA1), and any consequent loss, resulting from the drifting and/or dragging of anchor of SBII on 20 November 2016 and/or any consequent collisions and/or allisions, limited pursuant to the Merchant Shipping Act 1995 to 5,309,200 Special Drawing Rights; and
>
> (2) a declaration to the above effect; …"

44. The trial of the Limitation Proceedings took place in May 2020. At trial Stema UK relied exclusively on Article 1(2) as the basis of limitation, on the basis that Stema UK was either the operator or manager of the Barge. RTE accepted that Splitt and Stema A/S were entitled to limit their liabilities within Article 1(2) of the Convention. The only issue was whether Stema UK could also limit its liability on the basis that it was a "manager" or "operator" within the meaning of that provision. There was no argument before Teare J that Stema UK could limit its liability under Article 1(4).

45. The judgment of Teare J was given very promptly on 22 May 2020 with neutral citation [2020] EWHC 1294 (Admlty). He held that Stema UK was the operator of the barge and could therefore limit its liability [121], having regard to the witness evidence put forward by the Stema Interests consisting of statements by Mr Boisen (chief executive manager of Splitt and Stema A/S), Mr Grunfeld (describing himself as having daily responsibility for operation of barges owned by Splitt), and Mr Johansen (managing director of Stema UK).

46. As Article 1(4) was not in issue, it was not directly addressed by Teare J in his judgment. The only reference to Article 1(4) of the Convention was in passing at paragraphs 78 and 79 of the judgment where it was said that it was clear from those terms that the master of a vessel was not intended to be within Article 1(2) of the Convention. At [99], he concluded that the ordinary meaning of the "operator" of a ship "*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.*"

47. In September 2020 Rose LJ granted permission to appeal. The following additional direction was given:

> "The judgment at [78] and [79] seems to assume that if Stema UK is not an operator or manager in its own right, it or its employees, would not be able to rely on Article 1(4) of the Limitation Convention if they are ultimately found to have caused the damage to the cable. Again, it might be useful for the Court considering the appeal to receive submissions on the application of Article 1(4) given the concern that if Stema UK is not an operator or manager, RTE will be able to pursue their claim for damages in full rather than subject to the Convention."

48. In the light of this, Stema UK filed a Respondent's Notice on 29 September 2020 which sought to uphold Teare J's decision on the further basis that Stema UK and its employees were persons for whose act, neglect or default (if any) the shipowner is responsible within the meaning of Article 1(4).

49. It then set out its case on Article 1(4) in paragraphs 41 – 43 of its skeleton for the Court of Appeal. The argument made was that if Stema UK's role was limited to providing services "*in direct connection with the operation*" of the Barge or "*in direct connection with the navigation and management of the Barge*" then RTE would presumably say that Splitt and/or Stema A/S were liable for that negligence. On that basis, Stema UK was entitled to limit its liability under Article 1(4). RTE served a supplementary skeleton argument submitting that Article 1(4) covered only situations of vicarious liability.

50. The hearing of the appeal took place on 2 and 3 March 2021. At that hearing the Court of Appeal heard some argument on Article 1(4) but expressed a number of concerns with this line of argument (the details of which will be addressed later in the judgment). In the light of those responses counsel for Stema UK withdrew the Article 1(4) case.

51. The Court of Appeal reversed the decision of Teare J in a judgment handed down on 15 December 2021 with neutral citation [2021] EWCA Civ 1880. The decision of the Court of Appeal was that Stema was not entitled to limit its liability. That determination was replicated in the Order:

> "IT IS DECLARED THAT:
>
> 1. The liability (if any) of the First and Second Claimants in respect of loss of or damage to property, and any consequential loss, resulting from the drifting and/or dragging of anchor of "STEMA BARGE II" on 20 November 2016 and/or any consequent collisions and/or allisions, is limited pursuant to section 185 of the Merchant Shipping Act 1995 and the Convention on Limitation of Liability for Maritime Claims 1976 in the amount of 5,309,200 Special Drawing Rights.
>
> 2. The First and Second Claimants are accordingly entitled to a general limitation decree in the form ADM19.
>
> 3. [Stema UK] is not entitled to limit its liability (if any) … pursuant to section 185 of the Merchant Shipping Act 1976…. and is not entitled to a general limitation decree in the form ADM19 or at all ".

52. Their key holding appears at [58]-[59] of the judgment to the effect that the term "operator" entails more than the mere operation of machinery of the vessel or provision of personnel to operate that machinery and must relate to operation at a higher level of abstraction, involving management and control of the vessel. At [65], Phillips LJ held that "*Stema UK's actions were for, on behalf of and supervised by Splitt and Stema A/S*" but that did not make Stema UK an operator.

53. The Court of Appeal noted (at [6]) that the Article 1(4) argument "*was withdrawn (for the purposes of these proceedings) during oral argument*".

54. Stema UK applied for permission to appeal to the Supreme Court; and the Article 1(4) argument was renewed in the proposed grounds of appeal: "*The effect of the Court of Appeal's decision is that none of Stema UK or the Master or Crew are entitled to limitation, whether directly under Article 1(2) or indirectly under Article 1(4)*". In September 2022 the Supreme Court refused permission to appeal.

55. On 4 November 2022, NR/C issued a claim against the Stema Interests and the Seventh Party, essentially to protect time pending Part 20 claims to be issued by NR/C against those parties in the event that RTE made claims against NR/C. No separate pleadings were ever served in this action, which was also consolidated with the 2017 Claim and the Admiralty Claim described below.

56. On 18 November 2022, RTE issued a claim against NR/C alleging liability in negligence for the incident ("the Admiralty Claim"). Within this claim NR/C brought Part 20 claims against the Stema Interests and the Seventh Party. This is the designated "lead claim" in the three consolidated actions. It is this action within which this Strike Out Application by NR/C is made.

Allegations in these Proceedings

57. In the 2017 Claim, RTE's Defence and Counterclaim was served on 17 November 2022. That defence advanced a case of negligence against Stema UK both on the basis of actions of Stema UK in its preparation of the method statement, but also in relation to failure to advise other Stema Interests inter alia as to risk assessment, presence of a stand-by tug for the Barge, and moving the Barge to a safe haven.

58. The next day RTE issued a claim against NR/C alleging negligence in planning the Barge's operations and failure to provide for a stand-by tug, or have the Barge moved.

59. This was followed by NR/C's Particulars of Additional Claim against the Stema Interests in the Admiralty Claim on 29 March 2023.

60. Further pleadings followed with the *res judicata* issues surfacing in July 2023, and NR/C seeking particulars of Stema Interests' limitation defence in June 2024.

THE ISSUES

61. There are a number of issues which arise.

62. RTE submits that the Court should strike out and/or give RTE summary judgment on the Article 1(4) plea because Stema UK is debarred from raising it for a variety of broadly *res judicata* reasons:

    i. Because the Court of Appeal's final declaration in its Order is final;

    ii. By the doctrine of cause of action estoppel;

    iii. By the doctrine of issue estoppel; and/or

    iv. By the rule in *Henderson v Henderson*.

    That application is supported, predominantly on *Henderson* grounds by NR/C.

63. The Stema Interests resist this. While engaging on each individual point, the thrust of their submission is that this is an unattractive attempt to avoid a contest on the merits. As to the substance of the arguments Stema UK contends the combination of the lack of requirement to raise limitation at any given point, plus the requirement for establishing

a causative act, neglect or default plus the particular requirements of that in this case means that the right time to raise this argument in this case is now, and there is no bar to that being done.

THE COURT OF APPEAL ORDER

64. The Applicants' first point was what they called "the short point" which relies on the finality of the Court of Appeal's declaration in the Order set out above. They submit that the Order declared (without qualification) that Stema UK was not permitted to limit its liability under Article 1 of the Limitation Convention and that Stema UK should be bound by that order.

65. The starting point for this argument is the proposition that a final declaration by a court is *res judicata* in respect of the rights and matters declared therein. That proposition is derived from *International General Electric Company of New York Ltd v Commissioners of Customs and Excise* [1962] Ch. 784 at 789-790 (CA), per Upjohn LJ:

> "an order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties for ever, subject only, of course, to a right of appeal. … [a final declaration] finally determines and declares the rights of the parties: it is not open to further review except on appeal."

66. Diplock LJ agreed with this in his one paragraph judgment at p 790. It was then approved by him in *Inland Revenue Commissioners v Rossminster Ltd* [1980] A.C. 952 at 1014F-G (HL).

67. The Applicants also pointed to the judgment of the Court of Appeal in *Gordon v Gonda* [1955] 1 W.L.R. 885. That case concerned a partnership action brought in respect of the sale of partnership assets following a dissolution of the partnership under the Trading with the Enemy Act 1939. This had by some obscure means (and in legal terms plainly wrongly and contrary to the pleaded case[1]) resulted in a declaration of trust. The Court held that where the wording of a declaration/order is clear, that order means what it says, and no argument by reference to the pleadings and arguments etc. leading to that order to the effect that it means something different is permissible. In particular Romer LJ remarked at 897:

> "Inasmuch as the defendant never appealed against the order of Danckwerts J. which was made on January 26, 1954, it is clear that he is bound by the provisions of that order, whatever those provisions might be. […] It is only if the order is open to some other construction, that it is ambiguous in its terms, that it appears to me to admit of the argument which Mr. Shelley addressed to us, […] In my

[1] The polite version is given in the judgment of Roxburgh J: *" I looked at a transcript of the judgment of Danckwerts J . . . . Having done so I am quite unable to ascertain the precise circumstances under which this partnership action became converted into something else, but converted into something else it certainly was, and the order [of Danckwerts J .] certainly is not such an order as would normally be made in a partnership action ."*

> opinion, there is no such ambiguity as to render that argument permissible."

68. Reliance was also placed on the decision of the Privy Council (Lords Phillips, Brown, Mance, Kerr & Dyson) in *Winston Gibson v Public Service Commission* [2011] UKPC 24. The Claimant in that case (Mr Gibson) had sought a judicial review of a decision to change the process by which applicants for civil service promotion were considered. He had been abroad when the rules were changed and had returned to find that he had missed the window for applying for promotion to Permanent Secretary status under the new process. He obtained a declaration from the High Court of Trinidad and Tobago that he was eligible to be considered for appointment to certain governmental posts. That declaration was based on the judge's misreading of a letter and was wrong in law (at [16]); but it was not appealed. Having been refused entry to the exercise he commenced another judicial review, relying on the declaration. In that second action, the High Court and the Court of Appeal ruled that, as a matter of law, the claimant was not eligible for those appointments and construed the previous High Court declaration as merely "*a direction to [the appointing body] to consider the appellant's eligibility in accordance with the relevant criteria that applied from time to time*".

69. The Privy Council reversed that decision, holding that a declaration that the claimant was eligible for appointment, albeit wrong in law, could not be interpreted as a direction that his eligibility for appointment be considered. Lord Kerr, delivering the Privy Council's advice, reasoned as follows:

> "28. The plain and unavoidable fact is, however, that the judge made a declaration in Mr Gibson's favour that he was eligible to be considered for appointment to both posts. One can understand the attraction of the solution suggested by the Court of Appeal to the conundrum presented by the making of a declaration which did not reflect the true situation. […] But the Board has concluded that this reconciliation is simply not legally possible. The judge's order decreed that the appellant was eligible to be appointed, not that his eligibility was to be determined according to the standards as to eligibility that prevailed from time to time.
>
> 29. The declaration that Mr Gibson was eligible for appointment imposed a legal obligation on PSC to treat him as such. It did not do so. Instead it proceeded to make appointments to both posts without considering the appellant. That was a course that simply was not open to PSC. Mr Gibson is therefore entitled to a declaration that he was entitled to be considered for appointment to both posts, not because he had any legitimate expectation of being considered eligible but because he had an order of a competent court which pronounced that he was eligible."

70. Stema UK resisted this argument contending that no such short-cut is available. Stema UK did not engage squarely with the authorities relied on by RTE but rather pointed to the decision in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, and in particular paragraph [13] of that decision. The case concerned a dispute arising out of an arbitration award dealing with questions of validity of termination and (if termination was lawful) recoverable damages. The tribunal had omitted to make a deduction for

unrecoverable expenses. That being the case, when a decision was reached by the Court of Appeal on the question of unrecoverable expenses, the matter was remitted to the Tribunal *"to determine the issue of damages only"* and one party sought to raise matters in relation to damages which went beyond the point in the appeal.

71. Stema UK submitted that that judgment indicated that the matter had to be one of construction against the broader background and that here, the Court of Appeal held that the Article 1(4) argument *"was withdrawn (for the purposes of these proceedings) during oral argument"* and that this does not cover a situation which requires the identification of the decided cause of action and issues as a matter of substance rather than as a matter of form.

Conclusions

72. Although the argument is one which at first blush has an unattractive formalism about it, I conclude that RTE is quite right about this.

73. The Court of Appeal's Order was very clear. It follows the form of the declaration sought in the Limitation Proceedings, which was drafted broadly, by reference to section 185 of the MSA and to the entirety of loss referable to the incident. It is also cast in terms of a general, rather than a restricted, limitation decree – i.e. one good against all the world.

74. The failure by Stema UK to engage with the authorities cited was significant. These are cases which remain good law, and they emphasise the conclusiveness of a clear order of the court. There is no escape for Stema UK via the *Sans Souci* case. Indeed Stema UK's arguments here rest on a very selective citation.

75. In that case Lord Sumption set out the principles of construction of a judicial order (relevant parts omitted by Stema UK **in bold** below):

> "13. …the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties. The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the court considered to be the issue which its order was supposed to resolve.
>
> 16. Of course, it does not follow from the fact that a judgment is admissible to construe an order, that it will necessarily be of much assistance. There is a world of difference between using a court's reasons to interpret the language of its order, and using it to contradict that language. **The point may be illustrated by the decision of the Court of Appeal in England in Gordon v. Gonda [1955] 1 WLR 885, where an attempt was made to contradict what the Court regarded as the inescapable meaning of an order,**

> **by arguing that the circumstances described in the judgment could not have justified an order which meant what it clearly said. Therefore, it was said, the judge must have meant something else. The answer to this was that any inconsistency between the circumstances of the case or the reasoning of the Court and the resultant order was properly a matter for appeal. A very similar argument was rejected by the Board for the same reason in Winston Gibson v Public Service Commission [2011] UKPC 24. Decisions such as these (and there are others) are not authority for the proposition that a Court's reasons are inadmissible to construe its order. They only show that the answer depends on the construction of the order and that the reasons given in the Judgment may or may not make any difference to that.**
>
> **17. These considerations apply generally to the construction of judicial orders**."

76. The problem for Stema UK is that the authorities are therefore clear that where an order is unambiguous, there is no room for construction; and this is a case where an order is not remotely ambiguous. The fact that the Court of Appeal held (at [6] of its judgment) that the Article 1(4) argument "*was withdrawn (for the purposes of these proceedings) during oral argument*" is not to the point. The Order which it made was the Order requested. It was broad, it was clear, it covered the whole of s. 185 of the MSA and declared the extent to which a general limitation decree was, and was not, available.

77. Therefore this case falls squarely within the ambit of the authorities relied upon by the Applicants. Indeed it is *a fortiori* those cases. The fact is that in the Limitation Proceedings, the Court of Appeal declared that Stema UK "*is not entitled to limit its liability (if any) in respect of the [damage to the Cables], and is not entitled to a general limitation decree in the form ADM19 or at all*". Those words mean what they say. Stema UK would by this attempt to revive limitation seek to "interpret" this order to mean that Stema UK "is entitled to limit". That is not interpretation or construction but contradiction.

78. This is indeed therefore the short answer to the case. Generally that might be said to be the case vis-à-vis only the parties to those proceedings. However given the nature of the decree sought and granted it would seem to follow that the point should apply at large. This approach is supported by Spencer Bower Res Judicata (6th ed.) paragraph 10.01-10.04 especially at paragraph 10.03 *"Since a decision in rem is available for and against persons generally, one is not concerned with parties or privies, but all other conditions for a valid res judicata estoppel must be satisfied."*

CAUSE OF ACTION ESTOPPEL

79. This argument therefore becomes contingent and can be dealt with relatively briefly.

80. There was some disagreement between the parties as to whether the limitation action, being as already noted, a procedural right, involved a cause of action at all, so as to be susceptible of being barred by cause of action estoppel.

81. Stema UK pointed to:

i. Spencer Bower at para 7.03-7.04: *"Cause of action estoppels can arise whenever a substantive claim is granted or refused even if the claimant has no cause of action in the traditional sense… Because the bar created by a cause of action estoppel is absolute, it is not to be given an expansive operation lest it occasion injustice ."*

ii. The judgment of Clarke J in *Caltex Singapore Pte and others v B.P. Shipping Ltd* [1996] 1 Lloyd's Rep 286 at 293-4 which describes the claim as a procedural one. That decision was endorsed thus by Longmore J in *The Happy Fellow* [1997] 1 Lloyd's Rep 130 at 133:

> "I respectfully agree with Mr Justice Clarke that a shipowner's right to limit (at any rate in a multiparty case) does not attach to or qualify the substantive right of the claimant but, rather, limits the extent to which that right can be enforced against a particular fund."

iii. *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2022] AC 1 where Lord Reed PSC and Lord Hodge DPSC held (and with whom, on this point, Lord Lloyd-Jones, Lord Hamblen, Lord Briggs, Lord Sales and Lord Carnwath JJSC agreed) held that: *"... it is clear that cause of action estoppel operates only to prevent the raising of points which were essential to the existence or non-existence of a cause of action"*. In that case (time bar) limitation had been conceded and the Supreme Court held that:

> "Those concessions relate to the defence of limitation. The effect of limitation is to render an otherwise valid claim unenforceable to the extent that the claim relates to periods beyond the period of limitation. The concessions had and have no bearing on the existence or non-existence of the cause of action which is a claim for restitution based on the payment of tax which was paid under a mistaken understanding of the relevant law. The revenue therefore are not barred from their challenge by cause of action estoppel."

82. On this basis it was submitted that a limitation decree is a declaration as to the availability of a procedural defence to a liability claim, and a procedural defence to a liability claim is not in itself a cause of action for the purposes of cause of action estoppel.

83. Although there is a logic to the submission, it is not ultimately persuasive. A limitation claim is not simply a procedural device. It is true that in *Caltex* and *The Happy Fellow* it was characterised as procedural; but that was in the context of considering issues of proper law. Elsewhere one can see it being treated as a substantive claim, albeit one of a particular nature. So it is established that it is different both to the cause(s) of action giving rise to that party's underlying liability to third parties such as cargo interests and to defences.

84. In *The Happy Fellow* itself Longmore J treated it as a cause of action at 135 col 1:

> "Once I have reached the conclusion that a shipowner's right to limit does not attach to or qualify the claimant's claim but operates to limit the extent to which an unqualified right can be enforced against the

> limitation fund, it must, to my mind, follow that the French [collision] proceedings do not 'involve' the same cause of action as the English [limitation] proceedings."

85. In *The Volvox Hollandia* [1988] 2 Lloyd's Rep. 361 at 363, col 2 (CA) Kerr LJ explained that:

> "It is settled law in this country, and under the 1957 Convention as well as the Judgments Convention, that the right of shipowners to claim that their liability is limited is a right which appertains to them and which they and they alone are entitled to invoke by proceedings, as discussed hereafter."

86. Sheen J made the same point in *The Falstria* [1988] 1 Lloyd's Rep 495 at 498, col 1:

> "It is necessary to stress that this limitation action is 'against' more than one defendant. The cause of action is not the same as that which gives rise to liability. If the limitation action were contested the only issues would be (1) whether the owners (which includes demise charterers) were guilty of actual fault or were privy to the negligence which caused the damage, and (2) the amount of the limitation fund."

87. The fullest consideration of the nature of the claim appears to be in the Australian case of *James Patrick & Co Ltd v Union Steamship Co. of New Zealand Limited* (1938) 60 CLR 650. In that case Dixon J said the following at 673:

> "But a failure to counterclaim. does not preclude a defendant from afterwards seeking by an independent action the relief which it was open to him to seek by way of counterclaim. The statute gives no defence; at best it limits damages. But the foundation of the relief, administered, first in Chancery and afterwards in admiralty, is the provision on the part of the shipowner of the fund representing his maximum liability. The court then administers the fund brought into court by the shipowner. The court ascertains the claims upon it, marshals them and distributes the fund ratably among the claimants. In principle the title to relief of such a nature is a substantive right enforceable by independent proceedings. It is more than one of the conditions affecting the amount of the loss or damage to be awarded in the collision action. A limitation decree operates upon claims that have passed into judgment as well as upon those that rest upon the original cause of action…"

88. The authorities therefore suggest that there is no bar to regarding a limitation claim as a substantive claim for the purposes of cause of action estoppel. There is nothing in the *FII Group* case which changes this. That case deals with an entirely separate concept, time bar limitation. That is a form of bar to remedy, and is purely a defence. Tonnage limitation is a very different beast, serving an entirely different purpose and capable of giving rise to an independent action.

89. Stema UK then contended that if cause of action estoppel were available in this context, it was not applicable in this case because on the authorities the required task is to identify the points "*which had to be and were decided in order to establish the existence or non-existence of a cause of action*". It is suggested that here looking at the substance of the Court of Appeal's refusal of a limitation decree, rather than simply the form of the Order made, the dismissed cause of action was limitation under Article 1(1) in respect of which the only point which had to be and was decided was whether Stema UK was a "shipowner" within the meaning of Article 1(2). The points which were essential to the existence or non-existence of limitation under Article 1(1), which were not decided because they were not raised, were whether the Barge was a "ship" within the meaning of the 1976 Convention and the 1995 Act and conduct barring limitation. Stema UK contends that Article 1(4) limitation was not decided and was not relevant (or essential) to the existence or non-existence of the right to limitation under Article 1(1). Stema also suggests that as noted by the Court of Appeal at [6], the contention regarding Article 1(4) "*was withdrawn (for the purposes of these proceedings) during oral argument*"; a deliberate acknowledgement by the Court of Appeal that the argument was not abandoned for all time.

90. The problem for Stema UK is that this argument looks beyond the cause of action to the elements of the arguments run. A cause of action is defined by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232as *"a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person"*. Further as Mr Karia KC pointed out, in *Meretz Investments NV v ACP Ltd* [2007] Ch 197 at [209-211] Lewison J stated:

> "The scope of cause of action estoppel is demonstrated by the decision of the House of Lords in Republic of India v India Steamship Co Ltd [1993] AC 410…. '…it is necessary to identify the relevant breach of contract; and if it transpires that the cause of action in the first action is a breach of contract which is the same breach of contract which constitutes the cause of action in the second, then the principle of res judicata applies, and the plaintiff cannot escape from the conclusion by pleading in the second action particulars of damage which were not pleaded in the first.' …
>
> It follows, therefore, in my judgment that where a single factual incident is alleged to amount to a breach of contract, and an action proceeds to judgment on that basis, it cannot be alleged in subsequent proceedings that the same incident amounted to a breach of a different obligation under the same contract. The judgment is res judicata as regards all causes of action for breach of the contract."

91. In this case, by its Limitation Claim Form in the Limitation Proceedings, Stema UK claimed to have a cause of action entitling it to limit its liability (against the world) for the damage to the Cables "*pursuant to section 185 of the Merchant Shipping Act 1995*." The Court of Appeal has held that Stema UK has no such cause of action, and instead declared that Stema UK "*is not entitled to limit its liability (if any) in respect of the [damage to the Cables] pursuant to section 185 of the Merchant Shipping Act 1995 or the Convention on Limitation of Liability for Maritime Claims 1976.*"

92. It follows that Stema UK is therefore now debarred by cause of action estoppel from trying again. The crucial point is that Stema UK claimed a declaration that it is entitled to limit "*pursuant to section 185 of the Merchant Shipping Act 1995*" and the Court of Appeal held that it is not entitled to limit at all. Thus Stema UK's cause of action was determined not to exist in the Limitation Proceedings.

93. That would be clear regardless of what had happened on appeal. But on the facts of this case, the matter becomes even clearer. That is because in fact Stema UK did formally claim a right to limit under Article 1(4) before both the Court of Appeal and the Supreme Court (when seeking permission to appeal). Thus a claim on that ground was also advanced, and dismissed.

ISSUE ESTOPPEL

94. This would only arise if cause of action estoppel were not established. It was not strongly pressed by the Applicants, and rightly so. The points which Stema UK seek to raise unsuccessfully in relation to cause of action estoppel become good ones in this context, where the precise issue argued is a key component of the analysis.

HENDERSON V HENDERSON

95. This issue is therefore doubly contingent.

The Law

96. There was no disagreement between the parties on the principles which apply here. They derive from *Henderson v Henderson* (1843) 3 Hare 100, 115. They have been more recently discussed and restated by:

    i. Bingham MR in *Barrow v Bankside Agency Ltd*. [1996] 1 WLR 257, 260;

    ii. Lord Bingham in *Johnson v Gore Wood* [2002] 2 AC 1, 31;

    iii. Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] AC 160 [24].

    iv. Judgment of the Court (authored by Lords Reed and Hodge) in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners (formerly Inland Revenue Commissioners)* [2021] UKSC 31 at [77].

97. In essence these cases tell us that just because a point could have been raised earlier does not make it abusive to raise it now; what is necessary is that it "could and should" have been raised earlier - such that that the later raising of the challenge is abusive. "Could" is not enough. "Could and should" will often be enough. But there must always be a consideration of whether in all the circumstances of the case the conduct is abusive.

98. There are however two further points of principle before consideration moves to the central issue of the application of the test.

99. The first is an issue vis-à-vis NR/C as to whether non-parties to the prior litigation can rely on the point. NR/C contends that it is not necessary for NR/C to have been a named party to the Limitation Proceedings, in order to be entitled to invoke the rule in *Henderson v Henderson* relying on the approach to *in rem* judgments outlined in Spencer Bower *Res Judicata* paragraph 10.03 and *White Book* 2024 at paragraph 3.4.6:

> "The rule in Henderson extends the res judicata principle in two respects: the rule applies, not to matters which were decided by a court, but to matters which might have been decided but were not; the rule applies not just to subsequent litigation between the same parties or their privies, but also to parties to the subsequent proceedings who were not joined as parties to the earlier proceedings."

The Stema Interests did not appear to dispute this approach.

100. The second is a minor point related to NR/C's reliance on what was termed the "*Aldi* Requirement" as to whether potential points for a particular piece of litigation need to be flagged to the court and the consequences if they do not. That derives from the following passage in *Aldi Stores Ltd v WSP Group Plc* [2008] 1 W.L.R. 748:

> "[30] Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often, no problem arises; in this case, Aldi, WSP and Aspinwall each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. … It may be that the court would have said that it was for Aldi to elect whether it wished to pursue its claim in the proceedings, but if it did not, that would be the end of the matter. It might have enquired whether the action against excess underwriters could have been expedited. Whatever might have happened in this case is a matter of speculation.
>
> [31] However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seized of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

101. That passage has been reflected in a number of subsequent cases:

i. *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466 at [59]- [66] where the Court of Appeal (Briggs LJ) agreed that the general principle is that parties should not hold potential claims back and that a failure to follow the *Aldi* guidelines was a relevant matter pointing to a conclusion that a later claim constituted an abuse of the process of civil litigation.

ii. *Stuart v Goldberg Linde (a firm) & Others* [2008] EWCA Civ 2; [2008] 1 WLR 823 where it was stated by Clarke MR that the approach of the CPR was to require cards to be put on the table in cases of this kind and, if that did not happen a claimant is at "high risk" of the second claim being struck out as an abuse.

102. On this there was ultimately not much between the parties, in that both agreed that the law was helpfully summarised in the recent case of *Outotec (USA) Inc v MW High Tech Projects UK Ltd* [2024] EWCA 844. There it was held by the Court of Appeal (Coulson LJ) at [53] that:

> "in ongoing litigation, a party who realises that he may have connected claims which are not currently pleaded must follow the Aldi guidelines, and at least raise with the court the existence of such new claims. A breach of those guidelines will give rise to a "high risk" that the second action will be found to be an abuse of process … and will always be a relevant factor to be taken into account in any application to strike out … However, a breach of the Aldi guidelines does not automatically mean that the second action is an abuse of process and will be struck out. The Aldi guidelines are simply one facet of the broad merits-based evaluation."

It follows that the *Aldi* case does not impose a requirement, but rather provides guidelines. As to the submission that those guidelines apply only in limited circumstances, that is not how the authorities have developed. *Outotec* suggests no such limitation, but does however warn against a rigid application different from the broad merits-based evaluation of whether conduct is abuse.

Could the Article 1(4) point have been taken earlier?

103. The essence of the point which the Stema Interests make is that the fact that Article 1(4) claims include the extra layer of the claim being "*made against any person for whose act, neglect or default the shipowner ... is responsible*" means that either it was not possible for the point to be taken in the earlier proceedings, or (at worst) that they do not fall foul of the "should" requirement.

104. Taking the first point first, the Stema Interests contend that until liability is determined it will not be possible for the Court to determine whether this further requirement is satisfied, and therefore whether Stema UK is entitled to limitation under Article 1(4) and could not lead to the formulation of any useful declaration as to Stema UK's entitlement or lack of entitlement to limitation under Article 1(4).

105. They point to the range of potential individuals involved (of whom they name six), ranging from the chief executive manager of Splitt and Stema A/S, via the person who proposed the "box" based on an out of date chart, down to a crewman involved in the anchoring process. They note that to the number of people involved are added complications as to employment status of some of these individuals in that some of them might be technically employed by one entity but in the service of another.

106. Then there are the eight separate pleaded bases for Stema UK falling within the definition. They are in summary:

i. Selection of and/or reliance upon Stema UK;

ii. Stema UK agent of Splitt/Stema A/S;

iii. Splitt/Stema A/S permitted source of danger;

iv. Implied contractual responsibility;

v. Responsibility for loaned chattel;

vi. Non-delegable duty;

vii. Responsibility for employees;

viii. Joint responsibility for employees.

107. Thus Stema Interests say that the question of whether Stema UK is a person for whose act, neglect or default Splitt and/or Stema A/S is responsible will depend upon which basis of liability is established, and the extent to which it is held to be applicable.

108. For NR/C Mr Kimbell KC was politely dismissive of this argument, noting its lack of support in the authorities and contending that if this argument were right it would turn the English law understanding on the nature of limitation proceedings on its head, because they, as noted earlier, are very often started and concluded well before proceedings of any underlying claims are concluded. The Defendants say that it would have been straightforward to plead (as Stema Interests now seek to do in these proceedings) that Stema UK was a "*person for whose act, neglect or default*" Splitt and/or Stema AS is liable because Stema UK was assisting Splitt with the operation of the Barge. Stema UK points out that it is not specified as to what such a claim would have looked like.

109. While the arguments have been clearly put for the Stema Interests, the reality is that the relevant limitation/liability issues certainly could have been raised earlier. Analytically to get to "could not" Stema Interests either had to say that as a matter of principle limitation cannot be decided until after liability has been decided (the broad submission) or that while in some cases it can, there is something special about this case which means that it cannot (the narrow submission).

110. As to the broad submission, Stema Interests did not really have an answer to the points made by the Applicants about the general approach in limitation claims. Indeed the case as put orally was fairly clear that this was not suggested, with Mr Passmore KC stating in terms:

> "this is all about practicality … it's not actually about the construction of 1(4), it's the practicality of how it works in this case in particular. It might work quite differently in other cases and probably does."

111. To the extent that the point was live, the Defendants' case that such an approach runs counter to the well-established practice and procedure for limitation claims was supported by evidence in Mr Lloyd-Lewis's Fourth witness statement and appears robust. Further that approach is consistent with:

i. The drafting of the Convention: the provision in the Limitation Convention stating that a claim to limit under Article 1 is not to be taken as an admission of liability would not be necessary if claims to limit had to wait until the conclusion of liability proceedings.

ii. The procedure of the Admiralty Court: Limitation Proceedings in England are not reliant upon and do not require a substantive claim to exist before they can be commenced. CPR Part 61 contains no such limitation. All that is necessary is that a liability claim or claims of the type falling within Article 2 are anticipated or asserted regardless of whether the basis of limitation is Article 1(2) or Article 1(4).

112. The broad submission can therefore be put aside. But it is then for the Stema Interests to explain why in this case, the usual approach is not possible ("could not") or not appropriate ("should not").

113. As regards possibility, the starting point is that in this case, the Stema Interests took a proactive route by commencing limitation proceedings in England and constituting a limitation fund here. In doing so they apparently deliberately couched their declaration in wide terms, invoking s. 185. The Defendants to the Limitation Proceedings were (named) Saga, RTE and (unnamed) "*all other persons claiming or being entitled to claim damages by reason of the drifting and/or dragging of anchor of [the Barge] on 20 November 2016*", thereby indicating an intention to seek a general declaration.

114. It was not the case that this was done against a background where there was no possible basis for thinking that liability issues or issues as to Article 1(4) would surface. The Limitation Proceedings were commenced:

i. Two years after RTE had started proceedings against Splitt in Denmark and after RTE had in those proceedings pleaded section 151 of the Danish Merchant Shipping Act;

ii. 18 months after the Stema Interests had themselves commenced negative declaratory proceedings against RTE;

iii. Shortly after RTE had successfully applied to have Stema UK added as a party to the French Proceedings. RTE had already pleaded in France in April 2017 (as part of the application to join Stema) that the Barge was responsible for the breakage of cables, that the place where it was anchored was *"clearly abnormal as was the anchoring itself"* and "*Stema UK is thus likely to be held liable*" for the damage to cables 11 and 12.

115. The accompanying declaration filed pursuant to CPR 61.11 paragraph 10.1(2) effectively acknowledged that: it stated that both Saga and RTE had *"indicated claims"* against Stema UK arising out of the Incident.

116. The reality is that while the Article 1(4) claim involved an extra issue and to achieve finality there would ultimately have to be a complex factual enquiry, it was certainly not impossible for it to have been included in the Limitation Proceedings either when commenced or in the run up to trial. Stema UK could have pleaded that Article 1(4) was engaged, as an alternative to its claim under Article 1(2) (as it then did in the Court of Appeal).

117. It was not necessary for liability to be fought out in full at this point in order to result in a declaration for Article 1(4) purposes. All that was required was for Stema UK to indicate the potential engagement of the relevant parts of Article 1(4), i.e. "Act, neglect, default" and "Responsible". In practice that meant that Stema UK needed to be able to say it had been notified of claims, and for it to identify a route to attribution of liability which it said made the ship owner potentially liable. This is what has now been sought to be done, with Stema Interests pleading in the alternative common law and the Danish Merchant Shipping Act; That would have been adequate to put the issues into play.

118. Nor can it be said that this could have gone nowhere in terms of relief. As Stema UK says at paragraph 45 of its skeleton:

> "If the Article 1(4) limitation issue were heard before the determination of liability, the most that it could produce in terms of declaratory relief would be a declaration that Stema UK is entitled to limit if the damage to the cables was caused by "x", but not entitled to limit if the damage to the cables was caused by "y". The task of deciding between "x" or "y", or choosing both, would necessarily be left to the judge at the trial of liability".

119. That relief is however far from meaningless. Such an approach is consistent with the position adopted by Stema UK in the Court of Appeal where it is positively sought to argue Article 1(4). The point was advanced in full in the Court of Appeal by way of a Respondent's Notice (and responded to in full by RTE with a separate skeleton) as well as in the application to the Supreme Court. The main issue dealt with in the skeletons was whether Article 1(4) covers independent contractors or not. Stema UK sought a declaration in hypothetical terms thus:

> "Stema Shipping (UK) Ltd, and its employed Managing Director, Superintendents, Barge Masters and crew-members, were persons for whose act, neglect or default (if any) the shipowner is responsible, within the meaning of Article 1(4) of the 1976 Convention."

120. All of this demonstrates that a perfectly sensible declaration or set of declarations could have been sought. That conclusion is also consistent with the Stema Interests submissions before me, which made clear that the core of the argument advanced was not one of impossibility but one of practicality, based on the evidence in this case. That tends to acknowledge that this is not really an argument about "could not", but more one of "should not".

121. So far as the case was put on the "could not" basis, it is not compelling. To the extent that some factual determinations were necessary (which is not at all clear) Stema Interests adduced detailed evidence at trial from multiple witnesses about the role and functions of the employees of Stema UK, Splitt and Stema A/S with respect to the operation of the Barge. This evidence was called in support of Stema UK's submission that it was either the manager or operator of the Barge so as to engage Article 1(2). That evidence, which of course went to the same incident as well as having overlapping aspects as to responsibilities of Stema UK employees, could have been supplemented as needed, without engaging with the full range of issues going to liability.

122. Counsel for Stema UK submitted before me that the claim to limit under Article 1(4) required expert evidence. But this does not appear to be justifiable. The Article 1(4)

point did not require expert evidence (either of Danish law or any other type) because all that was necessary was for Article 1(4) to be applied on the facts (as found by Teare J) as to who did what in relation to the Barge. Indeed what was said by Stema UK to the Court of Appeal was this[2]:

> "The construction of article 1(4) it is not about the Danish liability of owners for the defaults of others any more than it is about the English or the French. It is a submission that the article has to be read broadly enough to deal with any way in which a jurisdiction might say that one person is responsible for another and it is being said that Splitt is responsible for the defaults of Stema UK so far as can be made out".

123. It is noteworthy indeed that Stema UK's primary case remains one which is not based on Danish law at all but is said to be a matter of applying English law to the factual evidence about the division of responsibility between Splitt/Stema A/S and Stema UK for the operation of the Barge.

124. Nor is it correct, as Stema UK contends, that the Judges in the Court of Appeal all took the view that the matter could not be determined at this point. Those judges were certainly troubled by the emergence of the point.

    i. Sir David Richards queried whether the Court needed to understand the basis of Splitt and/or Stema A/S's liability for Stema UK;

    ii. Phillips LJ stated "*you would only be entitled to that relief if you established that there was liability*";

    iii. Sir David Richards thought that the matter might be raised as a defence because "*then there would be a proper sort of basis grounding, if you like, for considering the issue*";

    iv. He further stated "*I am not sure we have the material on which a declaration could sensibly be made*";

    v. Sir Launcelot Henderson stated "*For what it is worth, I mean I also agree, I do not think we have the material to enter upon an exercise of that nature…*".

125. It is not however fair to say that these exchanges can fairly be characterised as Stema Interests seek to do. The Court of Appeal was understandably doubtful about the appropriateness of dealing with a point on appeal which had not been argued below. The Court pressed counsel for Stema UK as to why he should be permitted to advance it for the first time on appeal. It appears that the issues which the Court of Appeal had related to the absence of any basis for determining the point at the stage of the appeal. Essentially they indicated that Stema UK had not at trial laid the groundwork which would enable the Court of Appeal to grapple with the point.

126. In the course of those exchanges, the topic of whether an attempt to revive it subsequently might be met with a *Henderson v Henderson* argument arose. The Court of Appeal declined to give Stema UK any comfort in that respect. It is noteworthy that counsel for Stema UK did not submit that Stema UK had been precluded legally or

[2] Transcript of Court of Appeal hearing p 36

otherwise from arguing the point at trial. Ultimately, counsel for Stema UK chose to withdraw the point but then ran it again in the application to the Supreme Court for permission to appeal.

127. Against this background the submission now made that "*The right to limit under Article 1(4) could not properly have been advanced at first instance or in the Court of Appeal*" strains credulity.

128. The issue which remains is whether, though technically possible, the complications (or other factors) of this particular case were such that Stema Interests should not be considered to fall foul of the "should" requirement in the *Henderson v Henderson* test.

The "should" requirement and abuse

129. The gravamen of Mr Passmore KC's submission was that although it may be that the Article 1(4) issue could have been taken earlier, the reality is that the difficulties would have been such that there could have been no meaningful resolution of it and the course taken is therefore not abusive.

130. In this regard the submissions were similar to the "could not" submissions as regards the three stages of the Article 1(4) approach, and I was taken to quite a level of detail about the different individuals' roles and the way they interact with the issues. This can probably best be illustrated by looking at the position of Mr Johansen in relation to the pleaded allegations in the case which encompass (*inter alia*):

    i. Failure properly to risk assess;

    ii. Failure to arrange for a stand-by tug;

    iii. Failure to ensure the Barge was anchored in a safe location;

    iv. Failure to take reasonable precautions against extreme weather.

131. Mr Johansen was the managing director of Stema UK, who prepared the method statement for the delivery of the rock armour. That method statement discusses the anchorage transshipment location and includes the chart which is said to have been prepared from an out-of-date chart (which did not show the undersea cables). He also monitored the weather forecast and discussed it with others and was involved in the decision to leave the Barge at anchor. He was employed at all material times solely by Stema UK. But the people with whom he discussed the weather and the question of the tug and the decision to remain at anchor are said to have been doing work for Splitt and/or for Stema A/S raising the possibilities (i) that Stema A/S/Splitt are directly liable for their negligence or that they are indirectly responsible via vicarious liability for acts of Stema UK.

132. The Stema Interests say that to decide whether the Article 1(4) requirement is satisfied, the court would have to decide which basis of responsibility is established in relation to which of these particulars of negligence and to what extent. Specifically it will have to decide (i) which basis of responsibility is apt to cover Mr Johansen's reliance on the out-of-date chart, and which to cover weather monitoring etc (ii) to what extent is there also responsibility on the part of the barge master or crew technically employed by

Stema UK but at the time acting for Splitt/Stema A/S and (iii) which of these was causative of damage.

133. It is contended that while some of the first two stages could have been done (and was done) at the Limitation trial, the critical third part (ascertaining whose acts were causative) cannot be decided before the liability trial. In those circumstances it is said that even if the point had been raised earlier (say at the CMC before Teare J) it could not have made a difference to the Limitation trial – at most the outcome in relation to Article 1(4) would have been a useless hypothetical declaration which approximates to "*Answer depends on the liability trial*"; and hence this is not a case of "could and should" have been raised in the earlier litigation.

134. Further it is said that the issue of what is causative is itself dependent on the particulars of negligence which were not in play until RTE's defence in the 2017 Claim came in in 2022, and NR/C's particulars of claim in the Admiralty Claim. The Stema Interests submit that taking these factors together with the undesirability of deciding the Article 1(4) point without it being argued, I should conclude that their approach is not abusive.

135. On this, despite all the detail, there seems to be no clear reason why "could and should" do not in this case march together.

136. One starts in the position where it is clear for the reasons already given that the point could have been raised. It is *prima facie* contrary to the overriding objective to have the two potential alternative legal bases for limitation argued in different proceedings and Stema Interests' submission that in this case it was appropriate requires careful consideration.

137. As noted above, of the three stages it was agreed that parts of the first two stages overlapped and that at least parts of these could have been determined in the Limitation Proceedings. While the level of detail seen in the pleadings is of relatively recent vintage, the potential for vicarious liability type issues arising out of exactly what was and was not done *inter alia* by those operating on behalf of Stema A/S/Splitt have been apparent since 2017.

138. The suggestion that this case is somehow unique in that some issues would have remained over is wrong. As was pointed out by Mr Kimbell KC there are always two stages in limitation proceedings: the first stage where there is a determination as to whether and in respect of what a party is entitled to a decree. The second is the determination of which claims fall within that decree – which is often done at the liability stage. So this case is not unique in requiring a two-stage process – and if the point had been raised earlier issues as to the ambit of the declarations which trigger access to the Limitation fund could have been determined in the Limitation Proceedings (for example as to independent contractors).

139. At this point, with some issues capable of falling into one trial and others apt to another, issues of case management arise, which both impact on the "should" question and form the underpinning for the *Aldi* guidelines. The Claimants submitted that the whole purpose of the Limitation Proceedings was to resolve the issue of whether Stema UK (and the other claimants in the Stema Group) were entitled to limit their liability (or not); that the approach taken undercuts this. They also submitted that had Stema UK said at the CMC in the Limitation Proceedings that it wished to hold back a potential

alternative ground for limitation until a later date, RTE would have strongly protested and I should conclude it is likely that Teare J would have ordered that the Article 1(4) claim be advanced in the existing proceedings, if it was to be advanced at all. Stema Interests say a different conclusion is right- that given the difficulties and the lack of any sensible outturn of an early consideration of the Article 1(4) points, Teare J would or might well have held these issues over on the basis that they could be more conveniently decided at the same time as liability.

140. It is regrettable that this argument proceeds by reference to this hypothetical of what Teare J might have done if the point had been raised – and that is one reason why the *Aldi* guidelines exist. This is precisely the kind of case where the court on a CMC should have been able to take a view about what components could sensibly fall within the limitation trial, and which would have to await liability.

141. However doing the best I can, I do not accept the submissions of the Stema Interests that a bifurcated approach not just to precise routes to liability but also to the availability of limitation would have been taken in this case.

142. In the first place, there is logic and the natural structure of the relevant provisions. Article 1(4) is within Article 1; it is an alternative method by which Stema UK might claim to be entitled to the protection of the Limitation Convention. It is because of that an issue which naturally presents itself as one which "belongs" in the Limitation Proceedings, as evidenced by the "in passing" reference to it by Teare J and the query raised by Rose LJ. This is evident too from Stema UK's own approach. In opting for the pro-active approach of seeking to constitute a fund and obtain a limitation declaration, particularly one in unrestricted terms, the Stema Interests approached limitation broadly. As to the drafting, Article 1(4) is within the section of the MSA which Stema invoked in framing its declaration, and the claim details given were also apt to cover both Article 1(2) and 1(4). The legally clean approach would be to define the ambit of limitation in those proceedings, with suitably drafted declarations – if that were possible.

143. Then there are the practicalities, which support the view that this clean approach was possible. As already noted, it is quite clear that a good part of the factual evidence underpinning both legal bases is the same or would require the same witnesses. It is also quite clear that (because of that overlap) declarations which would limit the scope of further factual evidence could have been reached at the limitation trial. It is not a case, as Mr Passmore KC suggested, of a declaration not being possible or not being capable of going beyond *"We all look forward to the liability trial"*.

144. Indeed an example of the kind of useful declaration which could have been given was given by Stema Interests in their skeleton:

> "a. Stema UK (and only Stema UK) is responsible for the actions of Mr Johansen in proposing an anchorage box for the operational convenience of Stema UK;
>
> b. Splitt/Stema A/S are responsible for the act, neglect or default of Stema UK to the extent that such act, neglect or default comes from the Superintendent, Barge Master and crewman in monitoring weather forecasts, not mobilising a stand-by tug, anchoring the

> Barge, and monitoring its position (in circumstances where it is alleged that the Barge dragged its anchor even prior to the storm)."

145. Then one comes to the *Aldi* guidelines themselves, because plainly here there was no "cards on the table" approach in the Limitation Proceedings. Those guidelines indicate that where a matter should have been raised and was not, the party at fault will be at high risk of being found to have acted abusively. This to some extent overlaps with the questions which have arisen in the cases about the extent to which the *Denton* criteria should be considered in this context. While that approach is not directly applicable, there is an overlap to this extent: in evaluating whether conduct falls the wrong side of the "should" line, or is abusive, a court may well be assisted to understand why the correct or conventional approach was not taken at an earlier stage. In the context of a *prima facie* case of a point which "could and should" have been raised, it might be possible for the would-be claimant to explain why that appearance of "could and should" is wrong or not abusive by reference to the reasons for that decision.

146. In this case the reasons why Article 1(4) surfaces now remain obscure, even at this stage. It was submitted for the Defendants that *"it appears simply to have been overlooked by those representing Stema UK until Lady Justice Rose raised it in the order granting RTE permission to appeal"*, or that *"they unilaterally made the case management decision that they weren't going to run Article 1(4). They've just said, "Well, we are going to decide for the Court, and for you, that we're going to do this in two bites""*. Logically one of these must be right, but which is not clear. The reality is that whether the omission was witting or unwitting has never been spoken to by Stema Interests. Analytically I do not accept the the Stema interests' submission that had they raised it the result would be where we are today, and moving on from there, because of this silence I do not have the benefit of an explanation to give further context to the "should"/abuse analysis.

147. All of this militates in favour of the application to strike out. I do not, however, neglect to bear in mind in weighing the factors that the burden rests on the Applicants to establish abuse of process and that this cannot be said to be a classic case of harassment or oppression. Overall however, the factors which I have considered above do indicate that:

    i. The approach taken contravenes the public interest in finality and prevention of parties being vexed twice;

    ii. Both parts of the "could and should" test are satisfied;

    iii. There has been or will be a waste of time and resources, both on the part of the parties and that of the court;

    iv. There has been a misuse of the Court's process in the failure to follow the *Aldi* guidelines;

    v. There were other reasons why earlier engagement with this issue would have been beneficial. One is that the declaration sought is binding on any potential claimant on the fund. Another is that these are not simple or cheap proceedings, so the course taken involves considerable increase of cost and delay: the Limitation Proceedings were completed in 2022 and the costs of those proceedings exceeded £1 million.

148. In all of these circumstances, had it been necessary to decide this case on the basis of *Henderson v Henderson* principles I would conclude that, although this is not a classic oppression case, it would be an abuse for Stema UK to seek to advance an alternative limitation case based on Article 1(4) at this point.

CONCLUSION

149. For the reasons give above, Stema UK should therefore not be permitted to advance its Article 1(4) case in these proceedings. The relevant paragraphs of the pleadings should be struck out.