Neutral Citation Number: [2021] EWCA Civ 1585

Appeal No. A4/2020/1475 & A4/2020/1603
Case No: AD-2019-000134

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ADMIRALTY COURT (QBD)
Mr Justice Teare
[2020] EWHC 1750 (Admlty)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 3/11/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE MALES
and
LORD JUSTICE STUART-SMITH

BETWEEN:

HOLYHEAD MARINA LTD
Claimant / Respondent

- AND -

MR PETER FARRER
AND ALL OTHER PERSONS CLAIMING OR BEING ENTITLED TO CLAIM DAMAGES IN CONNECTION WITH STORM "EMMA" STRIKING HOLYHEAD MARINA ON 1 AND 2 MARCH 2018
Defendants / Appellants

- -

Nigel Cooper QC and James Watthey (instructed by **Ince Gordon Dadds LLP**) appeared on behalf of the **Appellants** (the "Owners")

Robert Thomas QC and Benjamin Coffer (instructed by **Clyde & Co LLP**) appeared on behalf of the **Respondent** ("Holyhead")

Hearing date: 26 October 2021

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APPROVED JUDGMENT

"Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Wednesday 3 November 2021."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. On the night of 1 and 2 March 2018, Storm Emma hit Holyhead on the Isle of Anglesey from a North Easterly direction. The claimant (Holyhead) is the owner of the Holyhead Marina (the Marina), which is located at the Western end of the Holyhead outer harbour. Some 89 craft moored in the Marina and the pontoons making up the Marina itself were damaged. Holyhead brought these proceedings against the defendant owners of the damaged craft (the Owners), seeking a limitation of its liability pursuant to section 191 (section 191) of the Merchant Shipping Act 1995 (MSA 1995).

2. The question at the heart of this appeal is whether Holyhead is the owner of a "dock" within the meaning of that word as it is used in section 191(1). If the Marina is a dock, as Holyhead argued and Mr Justice Teare (the judge) held, Holyhead can limit its liability to 500,000 units of account, equating to some £550,000. If not, its unlimited liability could be as much as £5 million.

3. Section 191(9) provides that a dock includes "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places and jetties". The judge held that it was not correct to say that, in the context of section 191, the Marina was "a dock within the ordinary meaning of that word", but that the pontoons which made up the Marina were within the statutory definition of "dock", being landing places, jetties or stages. The issue in this case is whether he was right.

4. The Owners submit that the judge was wrong to take into account the fact that pleasure craft as well as commercial ships were entitled to limit their liability, when the Owners' point was that the types of structure listed in section 191(9) were all for use by commercial or passenger shipping and not, like marinas, for the mooring of pleasure craft. Marinas, pontoons and moorings were not structures that would have fallen within the definition of dock when the dock owners' right to limit liability was introduced in the predecessor of the MSA 1995, namely the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (the MSA 1900). The section 191(9) definition was not changed to include marinas, pontoons and moorings in 1995. The decision was in conflict with the judge's view that the limitation was aimed at facilitating trade, the ordinary meaning of the words, and the construction and use of the pontoons. The Marina as a whole could not be a landing place, jetty or stage, because it was a collection of pontoons rather than just one. If this were correct, there would anyway be multiple limits of liability, not just one.[1] Moreover, there were good commercial reasons to exclude marinas from the scope of section 191.

5. In his oral reply, Mr Nigel Cooper QC, leading counsel for the Owners, accepted, in answer to questions from the court, how his case might be encapsulated in a nutshell. In effect, the Owners argued that the Marina is not fairly described as either a dock or any of the terms used in the statutory definition of a dock without stretching the language. That is why the judge had to break down the structure of the Marina to decide that "the pontoons which made up the Marina" were landing places, stages or jetties,

[1] Holyhead objected to this argument being raised in the Appellants' Notice, it not having been pleaded or argued below.

rather than deciding that the Marina itself was a landing place, stage or jetty. This argument is supported by the fact that predominant purposes of a marina are (a) berthing rather than the landing of passengers or goods, and (b) leisure rather than commerce.

6. Holyhead submit that the judge was right, and alternatively that the Marina and its constituent parts did indeed constitute a dock or piers or wharves within section 191.

Relevant background

7. The judge described the location and construction of the Marina as follows at [3]:

> [Holyhead] is the lessee of an area of water within Holyhead harbour. That area of water is within the southwest corner of the harbour and provides berths for about 300 small leisure craft. The available depth of water is between 2.3 and 5 metres. It is known as a Marina. To the north is a breakwater and to the east, less than a nautical mile away, is the Irish Ferries Terminal. [T]he Marina may be described as an arrangement of floating pontoons for the mooring of small leisure craft which are linked to the land by a bridge. The pontoons (made of concrete and polystyrene) form the shape of a square (with one side open for access) together with smaller pontoons projecting inside the square. They are moored to the seabed using a system of chains and nylon rope connected to concrete weights placed on the seabed. The Marina was built in about 2000. It now appears to be accepted by the Claimant that floating breakwaters - of any size or design – would never survive the wave length or height experienced during Storm Emma.

8. The judge also described the origins of the MSA 1995 at [12] and [16] as follows:

> The owners of a dock, as defined in the MSA 1900, were afforded a right to limit their liability "for any loss or damage caused to any ship, or to any goods, merchandise or other things whatsoever on board any ship". There was common ground as to the reason why this right to limit was granted by Parliament. Prior to the MSA 1900 shipowners were entitled to limit their liability for damage to other ships (and the persons or property on board other ships) but not their liability for damage to other property, including that on land. Section 1 of the MSA 1900 extended the right of a shipowner to limit his liability for any loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship. Section 2 provided harbour and conservancy authorities and the owners of docks with a right to limit in respect of their liability in respect of any damage to a vessel. [T]his [was] a "reciprocal" right granted to harbour and conservatory authorities and to the owners of docks in return for shipowners having their liability to them limited.
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> … it is well known that the purpose or object of granting shipowners a right to limit their liability was, in 1733, to promote the increase in the number of ships (see *The CMA Djakarta* [2003] 2 Lloyd's Reports 50 at paragraph 14 per David Steel J.) and that the purpose of the modern Limitation Conventions was to promote international trade by sea-carriage (see *The CMA Djakarta* [2004] 1 Lloyd's Reports 460 at paragraph 11 per Longmore LJ.). Whilst it could be said that the grant of a right to limit to dock owners indirectly promoted international trade by sea-carriage (because it led to the shipowners' right to limit being

extended) that would not tell the whole story. Dock owners wanted a right to limit their own liability to shipowners if shipowners were to be able to limit their liability to them. Parliament gave both parties their wish.

The legislation

9. Section 191 provides for "Limitation of liability" as follows:

i) By section 191(1), the section applies in relation to a harbour authority, a conservancy authority and the owners of any dock or canal.

ii) By section 191(2), the liability of any authority or person to which the section applies for any loss or damage caused to any ship, goods, merchandise or other things whatsoever on board any ship shall be limited in accordance with subsection (5) by reference to the tonnage of the largest United Kingdom ship which, at the time of the loss or damage is, or within the preceding five years has been, within the area over which the authority or person discharges any functions.

iii) By section 191(3), the limitation of liability under this section relates to the whole of any losses and damages which may arise on any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or local or private Act, and notwithstanding anything contained in such an Act.

iv) By section 191(4), the section does not exclude the liability of an authority or person to which it applies for any loss or damage resulting from any such personal act or omission of the authority or person as is mentioned in Article 4 of the Convention [the Limitation Convention 1976] set out in Part I of Schedule 7.

v) By section 191(5), the limit of liability is ascertained by applying to the ship by reference to which the liability is to be determined the method of calculation specified in paragraph 1(b) of Article 6 of the Convention … read with paragraph 5(1) and (2) of Part II of that Schedule.

vi) By section 191(9), "dock" includes wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places and jetties, and "owners of any dock or canal" includes any authority or person having the control or management of any dock or canal, as the case may be.

10. Section 191(9) is in substantively the same form as sub-sections 2(4) and 2(5) of the MSA 1900.

The judge's reasoning

11. Professor Andrew Tettenborn described the judge's judgment in the blog of the Institute of International Shipping and Trade Law on 7 July 2020 as "erudite". I respectfully agree. The summary of that judgment that follows should not be regarded as a substitute for reading it in its entirety.

12. In relation to the definition of dock, the judge said at [18] that the definition was a generous definition of docks because "although it includes structures within the ordinary and natural meaning of a dock, it also includes structures which are not within the ordinary and natural meaning of a dock". In *The Humorist* (1946) 79 Lloyd's Reports 549, Willmer J had decided at page 553 that a river bed on which a concrete base had been constructed along the front of a warehouse was certainly not a dock in the ordinary sense of the term, but was "a landing place" within section 2(4) of the MSA 1900. A dock was "an enclosed space with gates to allow the admission and retention of water". The berth was a landing place being: "a place adjacent to the plaintiffs' warehouse, where craft in fact are invited to come and lie for the purpose of landing their goods". The judge agreed with Willmer J's definition of a dock at [26]-[28], concluding at [29], as I have said, that the Marina was not a dock in the ordinary meaning of that word. A marina was not a dock despite (i) the definition in the Oxford English Dictionary (OED) suggesting a marina was a "dock, harbour, or basin in which yachts and other small craft are moored (usually specially designed for the purpose)", and (ii) Lindblom LJ's *dictum* in *The Environment Agency v. Barras* [2017] EWHC 548 (Admin) at [35] saying that "a marina fits comfortably within the concept of a "dock" in section 4 of the [Thames Conservancy Act 1932]" (by which the judge thought he was not bound, it having been in a quite different context).

13. The judge explained at [19] his understanding of the terms used in the definition of a dock in section 191(9) as follows:

> The wide definition of a dock includes structures which typically assist a ship to be loaded or discharged or repaired. Thus wet docks and basins and tidal docks and basins are places where ships may be loaded or discharged or repaired. Dry docks, graving docks, gridirons and slips are places where ships may be inspected and repaired or supported whilst being inspected or repaired. Quays, wharves and piers are places where ships may be loaded or discharged or repaired. Piers, stages, landing places and jetties are places where passengers (or goods) may be landed. Locks, cuts and entrances enable ships to reach such places.

14. The judge then considered whether construing "dock" as extending to the Marina and so providing Holyhead with a right to limit was consistent with the purpose of section 191 and its predecessor section 2 of the MSA 1900. Lord Phillips MR had said in *R v. Goodwin* [2005] EWCA 3184 at [18] that the early Merchant Shipping Acts were concerned with commercial shipping, and that remained the predominant theme and the primary concern of the MSA 1995 (see also [32] where Lord Phillips suggested that an extension of the meaning of ship to vessels which were not employed in trade was possible, but "if this is taken too far the reduction can become absurd"). There were two reasons why there was a limit to which these comments could assist here: (i) Lord Phillips did not say that the Merchant Shipping Acts were exclusively aimed at shipping as a trade, and (ii) section 191 was concerned with limiting the liability of persons other than shipowners.

15. At [25], Teare J concluded his reasoning on the relevance of the Marina being used for leisure craft by saying that there was no reason for concluding that the reciprocal right granted to the owners of docks should be restricted to a right to limit for damage caused to commercial vessels, so that the extent of the reciprocal right could only be assessed by examining the ordinary and natural meaning of the structures included within the statutory meaning of dock. Dock owners had secured a right to limit in very wide terms in their own interests, not in the interests of shipowners or of international trade, and there were no words in the MSA 1995 which restricted the right to limit to dock owners to the extent that they assisted commercial shipping.[2]

16. The judge then concluded that "in ordinary usage the pontoons which make up the Marina are both mooring places and landing places", which was sufficient to bring them within the ordinary meaning of landing place. He relied on (i) the OED definition as "a place where passengers or goods can be landed or disembarked", (ii) Willmer J having held in *The Humorist* that a place where craft are invited to come and lie for the purpose of landing their goods was a landing place, and (iii) the fact that pontoons making up the Marina were places where small leisure craft moored. The length of time they were moored made no difference. The absence of a commercial context also made no difference, because it was consistent with the purpose of section 191 and its predecessor (as described above at [7]) to construe the definition of landing places as including the Marina. It would be odd if a marina made up of pontoons placed in a disused dock or excavated gravel pit (a basin) were within the statutory meaning of dock whilst the Marina was not.

17. The judge held that the Marina was not a pier, defined by *Brodie* as a "structure at which ships can berth, built at right angles to the shore", and by the OED (in part) as "a manmade structure of stone, earth, etc., reinforced with piles, extending into the sea or a tidal river to protect or partially enclose a harbour and form a landing place for vessels". A pier in ordinary usage connoted a structure rather more substantial than the pontoons making up the Marina.

18. The judge held that the pontoons making up the Marina could also be fairly described as jetties or finger jetties. A jetty was defined (i) by Brodie as a "structure, often of masonry, projecting out to sea, designed to protect a port from the force of the waves but also used to berth ships", and (ii) by the OED as including "a landing stage or small pier at which boats can dock or be moored".

19. The judge held that, just as the pontoons forming the Marina could be described as landing places, they were also stages "in the sense of a platform used as a landing place, notwithstanding that they are also used a mooring place". The OED definition of a stage was "a platform used as a gangway, landing place, support or stand for materials, etc".

20. Accordingly, the judge concluded at [44] that the pontoons making up the Marina were within the statutory definition of dock as landing places, jetties, and stages. This conclusion was in answer to the "remaining question" which the judge had posed at

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[2] They may have to be "used in navigation" or "intended for use in navigation": see section 331 of the MSA 1995 and Part II paragraph 12 of the Limitation Convention, but they need not be "seagoing": see Part II, paragraph 2 of the Limitation Convention.

[34] which was "whether the Marina [was] within the ordinary meaning of landing place, pier, jetty or stage".

21. Since it was accepted that Holyhead was the owner of the Marina (i.e. the pontoons of which it was composed), it was, in principle, entitled to the right to limit conferred by the MSA 1995. There would be no more evidence at trial than was before the judge, so the Owners had no real prospect of succeeding on the defence that the Marina was not a dock, and that part of their defence should be struck out.

Was the judge right that the pontoons making up the Marina was a dock?

22. I will deal with the Owner's arguments, which I have identified in [4] and [5] above, in the following order: (i) the judge ought to have held that the types of structure listed in section 191(9) were all for the use of commercial or passenger shipping and not, like marinas, for the mooring of pleasure craft, (ii) the judge's decision was in conflict with the ordinary meaning of the words in the definition of dock, (iii) the Marina as a whole could not be a landing place, jetty or stage, because it was a collection of pontoons rather than just one, (iv) marinas, pontoons and moorings were not structures that would have fallen within the definition of dock in the MSA 1900, and the definition was not changed to include them in 1995, (v) the decision was in conflict with the judge's view that the limitation was aimed at facilitating trade, and (vi) there are good commercial reasons to exclude marinas from the scope of section 191. I will bear in mind the overriding point made by the Owners that a marina as a whole is simply not fairly regarded as a landing place, stage or jetty.

1. Ought the judge to have held that the types of structure listed in section 191(9) were all used for commercial or passenger shipping and not, like marinas, for the mooring of pleasure craft?

23. The judge explained his understanding of the terms used in section 191(9) at [19]. It is obvious from that explanation and from simply looking at 191(9) itself that some of the terms could be taken to refer to structures used entirely for commercial or passenger shipping and some could be taken to refer partly to such structures and also to structures used for and by leisure craft. The latter category must surely include, at least, locks, cuts, entrances, dry docks, slips, quays, piers, stages, landing places and jetties.

24. I accept that the Owners are entitled to rely on the fact that leisure craft were in existence and use well before 1900 (as evidenced by the fact that the first yacht club was formed in about 1720 and the Royal Yacht Squadron was established in 1815, even if the term "marina" did not enter the language until the 1920s). But I do not accept that the terms used in the MSA 1900 concerned only commercial shipping. If I am right about that, it is irrelevant that the definition of dock in 191(9) was not amended in the MSA 1995 to include marinas, pontoons, moorings or similar terms expressly. It is simply wrong to say, as the Owners did, that any concepts relating to the mooring of pleasure craft were notably absent from the statutory list.

25. I have no doubt that the judge was right to take into account the fact that pleasure craft as well as commercial ships were entitled to limit their liability. The types of structure listed in section 191(9) were not all purely commercial or passenger structures.

2. Was the decision in conflict with the ordinary meaning of the words in the definition of dock?

26. As I have said, Mr Cooper explained this argument as being, in effect, that the Marina is not fairly described as either a dock or any of the terms used in the statutory definition of a dock without stretching the language. I agree with the judge, for the reasons he gave at [26]-[33], that the Marina is not a dock within the ordinary meaning of that term. I do, however, have more difficulty with the Owner's submission that the Marina is not a landing place, stage or jetty.

27. The judge asked himself at [34] whether the Marina was "within the ordinary meaning of landing place, pier, jetty or stage", and answered that question at [44] by saying that the pontoons which made up the Marina were "within the statutory definition of "dock", being landing places, jetties or stages". The judge's reasoning at [35]-[43] persuades me that he was right to hold that the pontoons making up the Marina properly fell within the wide meaning of the words "landing places", "stages" and "jetties" as those terms are used in section 191(9). But Mr Cooper says that the argument proves too much. Breaking the Marina down into its constituent pontoons impermissibly stretches the meaning of each of these terms. Moreover, the primary use of a marina is the berthing of pleasure craft rather than the landing of passengers. That, and the commercial purpose of the MSA 1900, point towards a restricted definition of the terms used in section 191(9).

28. The judge concluded, in relation to "landing places" at [35] that "in ordinary usage the pontoons which make up the Marina are both mooring places and landing places" and that that was sufficient to bring them within the ordinary meaning of landing place. I agree. But I think that the judge could have gone further and held that the Marina itself was a landing place for the same reasons. There is no warrant for the restricted meaning advocated by the Owners. They themselves accept that the definition is wide. If, as is accepted to be the case, the Marina is and was used by the Owners to land passengers and crew, it is a landing place. The fact that a marina is a berthing place as well as a landing place does not mean that it is not a landing place. As Mr Cooper ultimately accepted, the fact that the pontoons making up the Marina were accessed from the land by a movable bridge makes no difference to the nature of the structure.

29. The same reasoning applies, in my judgment, to the judge's approach to the question of whether the pontoons making up the Marina fell within the other terms, namely piers, stages and jetties. I agree that neither the pontoons nor the Marina were properly to be regarded as piers for the reasons the judge gave. But both the pontoons making up the Marina and the Marina itself were properly to be regarded as stages and jetties. The words are both of a very general character.

30. Ultimately, I conclude that terms as general as "landing place", "stage" or "jetty" should not be construed so narrowly as to exclude either a collection of pontoons joined together to form a marina or the Marina itself.

3. Was the judge wrong to think that the Marina as a whole could be a landing place, jetty or stage, when it is a collection of pontoons?

31. I have effectively already dealt with this argument. It is an undoubted fact that a collection of pontoons is plural and a marina is singular. It does not seem to me,

however, to follow that a marina made up of a collection of individual pontoons cannot form a single whole landing place, stage or jetty. As I have said both the pontoons themselves and the Marina as a whole fall within these terms in the definition.

32. The Owners argued also that the judge's conclusion that the pontoons making up the Marina were landing places, stages and jetties meant that Holyhead's liability could only be limited for each pontoon, rather than for the Marina as a whole. Whether or not that argument is available to the Owners, I think it is bad for the reasons I have given. The structure that is relevant for this purpose is the Marina as a whole, just as would be the case with all the other structures mentioned in the definition. The Marina as a whole is a landing place, even though the many constituent pontoons themselves making it up are also landing places. Section 191(3) makes clear that the limitation of liability "relates to the whole of any losses and damages which may arise on any one distinct occasion". It would be absurd to construe the limit as applying to the constituent parts of a structure simply because both parts and the whole can properly be described as, for example, a landing place.

4. Are marinas, pontoons and moorings structures that would not have fallen within the definition of dock in the MSA 1900?

33. It follows from what I have said above that, had marinas, pontoons and moorings existed in 1900, they would have fallen within the definition of dock in section 2(4) of the MSA 1900.

5. Was the decision in conflict with the judge's view that the limitation was aimed at facilitating trade?

34. The Owners argued that the Limitation Convention 1976, which is aimed at encouraging international trade (see *CMA CGM SA v. Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep 460), is relevant to the interpretation of section 191. But the MSA 1900 significantly pre-dated the Convention. In these circumstances, it is hard to see how the Convention can inform the interpretation of section 2(4), which was re-enacted without substantive change in section 191. Moreover, the Convention addressed shipowners and salvors so, whilst section 191 was a bargain implemented to facilitate the limitation of liability of shipowners, it was not required by the Convention.

35. I do not read the judge's judgment as saying that the **only** purpose of the limitation was to facilitate trade. Nor was that what Lord Phillips said in *R v. Goodwin*. Indeed, the two extracts that the judge cited from Hansard in 1900 made it clear that the legislation was a compromise between the two chief interests of dock owners and shipowners, with no suggestion that leisure craft owners were excluded from the latter category.

6. Are there good commercial reasons to exclude marinas from the scope of section 191?

36. This was not an argument raised before Teare J. It is now suggested that the insurance premiums of pleasure craft owners would rise if marinas were permitted to limit their liability. Moreover, the Owners say that the current market understanding is that marinas cannot limit, as demonstrated by the Marina's own liability insurance of £10 million, which is far in excess of the purported £550,000 limit.

37. In my view, however, even if the Marina in particular and other marinas in general have insurance greater than the perceived limit in this case, that does not bear upon the correctness of that limit. First, other situations in which section 191 operates have higher liability limits. Secondly, even if the market understanding were that section 191 did not apply to marinas, that understanding will be corrected once this case is determined.

Conclusion

38. In the circumstances, there is no need for me to consider whether, as Holyhead suggested in its Respondent's Notice, the Marina or its pontoons might also have been wharves. That point was not taken before the judge.

39. I would dismiss this appeal for the reasons I have given and for the reasons the judge gave in his excellent judgment.

Lord Justice Males:

40. I agree. I add only that in *The Humorist* [1946] P 198 at 201 Mr Justice Willmer said that the meaning of terms such as "landing place" in the extended statutory definition of a "dock" has to be arrived at "on common sense principles". These are not technical terms and there is a considerable overlap between them. In my judgment the judge reached a common sense conclusion which was clearly correct.

Lord Justice Stuart-Smith:

41. I agree with both judgments.