Neutral Citation Number: [2020] EWHC 1294 (Admlty)

Case No: AD 2018 000112

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before :

MR. JUSTICE TEARE

- -

Between :

(1) SPLITT CHARTERING APS **(2) STEMA SHIPPING A/S** **(3) MIBAU BAUSTOFFHANDEL GMBH** **(4) STEMA SHIPPING (UK) LIMITED**	**Claimants**
- and -	
(1) SAGA SHIPHOLDING NORWAY AS **(2) RTE RESEAU DE TRANSPORT D'ELECTRICITIE SA** **(3) ALL OTHER PERSONS CLAMAING OR BEING ENTITLD TO CLAIM DAMAGES BY REASON OF THE DRIFTING AND/OR DRAGGING OF THE ANCHOR OF THE UNPOWERED BARGE STEMA BARGE II ON 20 NOVEMBER 2016 AND/OR ANY CONSEQUENT COLLISIONS OR ALLISIONS**	**Defendants**

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John Passmore QC (instructed by **Campbell Johnston Clark Limited**) for the **Claimants**
Chirag Karia QC (instructed by **HFW LLP**) for the **Second Defendants**
Hearing dates: 12 and 13 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will

be deemed to be 10:30 AM on 22 May 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's Clerk"

Mr. Justice Teare:

1. This is the trial of a limitation action in which three related companies seek a decree limiting their alleged liability for damage caused by the anchor of the barge STEMA BARGE II to an underwater cable carrying electricity from France to England. It is accepted by the owners of the cable that Splitt Chartering APS, the registered owner of STEMA BARGE II, is entitled to limit its alleged liability. It is also accepted that Stema Shipping A/S, as charterer or operator of STEMA BARGE II, is entitled to limit its alleged liability. The only issue is whether Stema Shipping (UK) limited, a company said to be the operator of STEMA BARGE II whilst it was at anchor off Dover, is within the class of persons entitled to limit their alleged liability pursuant to the Limitation Convention 1976, which has the force of law pursuant to The Merchant Shipping Act 1995, section 185.

2. The events which have given rise to this novel dispute as to the scope of the right to limit under the Limitation Convention, and in particular as to the meaning of the phrase "the operator of the ship" in article 1(2), took place off Dover in November 2016. They may be summarised as follows.

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

4. SEMFF or Costain contracted with Stema Shipping (UK) Limited ("Stema UK") for the provision of the rock armour. Stema UK purchased the rock armour from its associated company, Stema Shipping A/S, ("Stema A/S") a Danish company.

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

6. STEMA BARGE II began to drag her anchor and at 0634 on 20 November 2016 an undersea cable (cable 12) supplying electricity from France to England registered a tripping. It is the case of the owners of the undersea cable, RTE Reseau de Transport d'Électricitié SA ("RTE"), that the cable had been damaged by the anchor of STEMA BARGE II.

7. At about the same time a cargo vessel, SAGA SKY, was in the course of a voyage off Dover and anchored at 0830. It is said that she too dragged her anchor and at 0847 collided with STEMA BARGE II. At 0920 another undersea cable (cable 34) owned by RTE registered a tripping. It is the case of RTE that the cable had been damaged by the anchor of either STEMA BARGE II or SAGA SKY.

8. A collision action between SAGA SKY and STEMA BARGE II was to have taken place at the same time as the hearing of this limitation action. But I have been

informed that liability for the collision and for the damage to cable 34 was compromised shortly before the hearing of this limitation action.

9. The damage to cable 12 is the subject of a claim for damages being brought by RTE against Splitt Chartering APS ("Splitt"), the registered owner of STEMA BARGE II, and Stema A/S in the Danish courts. Stema UK has sought a declaration of non-liability in this court, which action is currently stayed.

10. In this limitation action Splitt, Stema A/S and Stema UK seek to limit their liability to RTE. (The remaining claimant, Mibau Baustoffhandel GmbH, had no role in the events and no longer claims a right to limit.)

11. There is no dispute that the claim of RTE for the alleged damage to cable 12 is subject to limitation pursuant to article 2 of the Limitation Convention in that it is a claim "in respect of ….damage to property ….occurring ….in direct connection with the operation of the ship". There is also no dispute that the limit of liability provided by the Limitation Convention is 5,309,200 Special Drawing Rights (SDRs), the equivalent of approximately £5.5 million. That limit applies to the aggregate of all claims arising on a distinct occasion against those entitled to limit (see article 9 of the Limitation Convention). The damages sought by RTE are well in excess of this limit, about Euros 37 million in respect of the costs of repair and some Euros 17-18 million in respect of consequential loss.

12. RTE accepts that Splitt, as the registered owner of STEMA BARGE II, and Stema A/S, as the charterer or operator of STEMA BARGE II, are entitled to limit their liability but it is denied that Stema UK is entitled to limit its liability.

13. Although the dispute between the parties is now limited to Stema UK, it is necessary to examine the roles of each company in the events which led to the claims against them. None of the evidence in the witness statements of personnel from Stema A/S and Stema UK was challenged, though there was disagreement as to the inferences or conclusions to be drawn from it.

<u>The persons entitled to limit</u>

14. Before examining the roles of each company it is necessary to set out the provisions of the 1976 Limitation Convention which describe the persons entitled to limit and the claims which are subject to the limit.

> "CHAPTER I THE RIGHT OF LIMITATION
>
> ARTICLE 1
>
> Persons entitled to limit liability
>
> 1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.
>
> 2. The term "shipowner" shall mean the owner, charterer, manager or operator of a seagoing ship.

3. Salvor shall mean any person rendering services in direct connection with salvage operations. Salvage operations shall also include operations referred to in Article 2, paragraph 1(d), (e) and (f).

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.

6. An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.

7. The act of invoking limitation of liability shall not constitute an admission of liability.

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;

…"

Splitt

15. Splitt, a Danish company, is the owner of the barge STEMA BARGE II which is registered in Honduras. STEMA BARGE II is a dumb barge of 12,641 gt., built in China in 2007, 135 m. in length, 42 m. in beam with a draft of 5.8 m. and fitted out for the carriage of rocks.

16. Splitt and Stema A/S, another Danish company, are part of the Mibau Group. Splitt does not have any employees of its own and is operated by personnel employed by Stema A/S.

17. As of 20 November 2016, Splitt owned not only STEMA BARGE II but also a smaller barge, CHARLIE ROCK. Since it does not own any motor vessels it charters tugs to tow the barges to their required destinations.

Stema A/S

18. It is the evidence of Mr. Boisen, the chief executive manager of Splitt and Stema A/S, that for the deliveries to Shakespeare Beach there was an arrangement "akin to a voyage charterparty" of STEMA BARGE II from Splitt to Stema A/S. Mr. Boisen said that this was agreed in a document dated 28 June 2016 and signed by him.

19. That document is entitled "Special agreement between Splitt Chartering and Stema Shipping Denmark". It states that it was "valid for the project Dover" and concerned "72,000-96,000 mt rock armour". It referred to an agreed price of Euros 19.85 and was signed on behalf of Splitt. It then stated:

> "It is clearly agreed that Splitt Chartering is the responsible party for arranging transport between loading port and discharging site, including possible positioning in the designated anchorage area. It is also the responsibility of Splitt Chartering to monitor the barge or other transportation unit during its stay at the anchorage area in cooperation with the receiver."

20. It is not obvious that this special agreement was a charterparty of STEMA BARGE II between Splitt and Stema A/S. STEMA BARGE II is not mentioned. However, Mr. Boisen's evidence was not challenged and I accept that the vessel intended to be used for the transport of the rock armour to Dover must have been STEMA BARGE II. Thus the document appears to evidence an agreement between Splitt and Stema A/S for STEMA BARGE II to transport the rock armour to Dover. In that sense it appears to have been "akin to a voyage charterparty". The price payable by Stema A/S of Euros 19.85 must have been, I infer, the freight per mt. Splitt did not sell the rock armour to Stema A/S. The rock armour was bought by Stema A/S from Norsk Stein, another Stema company.

21. On 31 October 2016 Stema A/S sent a message to Splitt, Stema UK, Norsk Stein and the agents at the loading and discharging ports and asked them to pass it on to the "master" of STEMA BARGE II. (The barge was unmanned and so did not have a master. It is likely that this was a reference to the barge master at the loading port who, it appears, signed a bill of lading in respect of the cargo of rock dated 2 November 2016.) The message referred to the voyage to Dover, laycan dates, agents and the loading and discharging ports and said that the vessel "is fixed with ….Splitt". Thus it is consistent with Stema A/S having fixed the vessel with Splitt in a manner akin to that of being a voyage charterer. In any event there was no challenge to the suggestion that Stema A/S was a charterer of the barge.

22. There was evidence from Mr. Grunfeld who described himself as "an operator" at Stema A/S with "daily responsibility for the operation of barges owned by Splitt". He reported to Mr. Boisen. In discharging his responsibility Mr. Grunfeld followed a "Barge Operator Manual". That manual (issued by the "Mibau Stema Group") listed "the usual roles and responsibilities during a voyage involving barges". They commenced with the fixing of the tug and included such matters as insurance, surveys of the loading and discharging ports, weather routing and daily reporting. Mr. Grunfeld was assigned several of those roles and responsibilities. In the event Mr. Grunfeld was involved in considering and monitoring the weather forecasts from 14

November 2016 and in considering (with others, namely, Mr. Boisen of Stema A/S and Mr. Johansen and Mr. Upcraft of Stema UK) whether it was safe for STEMA BARGE II to remain at anchor or whether a tug should be engaged to stand by. It was decided that the barge should remain at anchor and that a tug would not be engaged.

Stema UK

23. Mr. Johansen, the managing director of Stema UK, gave evidence that the main role of Stema UK was to market the Mibau Group's products imported into the UK and then to make local arrangement for delivery of the products. "For the delivery made in Kent in summer/autumn 2016 the arrangements included surveying of the anchorage area, liaison with the Fisheries Liaison Officer ("FLO") and the client, transhipment from STEMA BARGE II to CHARLIE ROCK and carriage on board CHARLIE ROCK to the beach."

24. Mr. Johansen said that he was not privy to the arrangements made by Stema A/S for bringing the product "from the rock source to the UK coastal area".

25. Mr. Johansen provided a Method Statement dated 4 April 2016 at the request of Costain, SEMFF's project manager, outlining "the methods that will be adopted by Stema Shipping in handling, transporting and delivering armour stone from Larvik, Norway for coastal protection work at Dover, Kent." This document was to assist Costain to plan the operation and to apply for the necessary permission from the Marine Management Organisation ("MMO"). One of the matters discussed in the document was the anchorage/transhipment location. A position was proposed by Stema UK but it was to be agreed by Costain, the MMO and local interests. The cargo was to be transhipped onto CHARLIE ROCK using an excavator and loading shovel. CHARLIE ROCK would then be towed to the shore for discharge onto the beach.

26. Mr. Johansen also provided a Safety Statement, and other documents such as a Man Overboard Procedure Statement, in relation to the project. He did so with the assistance of Mr. McMaster, a master mariner and superintendent. These documents were aimed primarily at the transhipment operation involving CHARLIE ROCK and were provided to assist Costain in obtaining the necessary permission.

27. On 16 May 2016 Stema UK quoted for the supply of 130,000 tonnes of rock armour, which offer was accepted, subject to contract.

28. On 27 June 2016 Stema UK agreed to buy the rock armour from Stema A/S.

29. In early July 2016, once the anchorage location proposed by Stema UK had been approved by the MMO, Mr. Johansen discussed with the FLO the transhipment corridor between the anchored barge and the delivery point on the beach. Cross-channel swimmers who depart from Shakespeare Beach had to be considered. On 5 July 2016 Mr. Johansen drafted a Risk Assessment entitled Anchoring/Manoeuvring of Barge Offshore/Weather which was specifically in relation to CHARLIE ROCK.

30. On 5 and 6 July 2016 the proposed anchorage and pathway to the beach were surveyed.

31. Before the first shipment arrived on 13 July 2016 Mr. Johansen sent the approved co-ordinates of the anchorage position to Stema A/S.

32. On 13 July Costain provided a Work Package Plan which incorporated the documents Stema UK had provided.

33. The required licence from MMO was issued on 12 August 2016.

34. The first and second shipments of rock were delivered without incident.

35. The third shipment on STEMA BARGE II arrived off Dover on 7 November 2016.

36. Stema UK placed a barge master, Mr. Zeebroek, and crewmember, Mr. Hayman, on board STEMA BARGE II, under a superintendent ashore, Mr. Upcraft. It was suggested by counsel for RTE, based upon a passage in the method statement which contemplated that the trim of CHARLIE ROCK was to be determined by the barge master, that the term "barge master" referred to CHARLIE ROCK rather than to STEMA BARGE II, though this distinction was not expressed by either Mr. Johansen or Mr. Boisen in their evidence. But whether the term referred to STEMA BARGE II or to CHARLIE ROCK or, which I consider likely to be the case, to both barges does not matter. "Personnel" provided by Stema UK (to use Mr. Grunfeld's term) dropped STEMA BARGE II's anchor. They then followed a check list of items such as checking that the navigation lights were on, and ensuring that the emergency towing wire was out and ready for use. Whilst the barge was at anchor they were responsible for ballasting the barge, maintaining her generators and monitoring her position. For this purpose a detailed check list was used. It would appear that the same personnel were also responsible for the operation of CHARLIE ROCK and in particular for the maintenance of her trim.

37. After STEMA BARGE II had arrived with the third load of rock, Mr. Johansen and the superintendent monitored the weather forecasts and discussed the same with Mr. Boisen (and Mr. Grunfeld according to the evidence of Mr. Boisen and Mr. Grunfeld). Whilst they decided that CHARLIE ROCK and the tug AFON GOCH should shelter in the port of Dover it was decided that the safest course was for STEMA BARGE II to remain at anchor. The removal of STEMA BARGE II to Boulogne or North Kent was considered but rejected.

38. Mr. Johansen said that CHARLIE ROCK had been "chartered" to Stema UK, as had the tug AFON GOCH. He said that whilst Stema UK was responsible for decisions regarding CHARLIE ROCK and AFON GOCH, Splitt was responsible for STEMA BARGE II.

<u>The right to limit of Splitt and Stema A/S</u>

39. There was in the event no dispute that Splitt was entitled to limit as the registered owner of the barge or that Stema A/S was entitled to limit as the charterer and/or the operator of the barge.

<u>The right to limit of Stema UK</u>

40. The submission made by counsel on behalf of Stema UK was that Stema UK was the operator of the barge, and is therefore also entitled to limit its liability (if any) to RTE. If necessary he would also say that Stema UK was the manager of the barge.

41. As to the meaning of manager and operator in article 1 of the Limitation Convention, counsel for Stema UK made these submissions. "Manager" includes anyone who manages a ship, or part of a ship, or an aspect of the operation of a ship. A manager may deal with the full combination of commercial, physical ("technical") and crewing management, or just part of the overall management role. Similarly, "operator" includes anyone who operates a ship, or part of a ship, or an aspect of a ship. It includes anyone who operates the commercial or physical working of a ship.

42. In his oral submissions, counsel developed these written submissions. He said that the essence of operation was the physical operation of the ship, that is, the working of the ship. But he also said that operation could include the commercial operation of the ship, that is, running the ship as a commercial entity. By contrast he said that management did not involve physical operation but involved arranging for things to be done and telling people what to do.

43. Counsel accepted that it followed from his emphasis upon physical operation that the barge master and crewman who boarded the barge off Dover to drop its anchor and to carry out other necessary work were operators of the barge. But if that were wrong he said that Stema UK was an operator of the barge because it was Stema UK who placed those persons on board to drop the anchor and to carry out other necessary work. He accepted that management and operation may overlap or cover the same ground. On the facts of this case he said that the number of activities for which Stema UK was responsible off Dover could be said to be such as to amount to management and control such that Stema UK could properly be described as the manager of the barge off Dover.

44. The submission made by counsel on behalf of RTE was that the operator of a vessel is the person or entity which has "direct responsibility for the management and control of the ship" as regards "the commercial, technical and crewing operations of the ship." It was further submitted that that person was Stema A/S, not Stema UK.

45. In his oral submissions counsel developed these written submissions. He said that it was absurd to describe the barge master or crewman as the operator of the barge. Further, it was insufficient for Stema UK to say that it did things to operate the barge. It had to show that it had the status of the operator of the barge. It could not do that because, looked at in the round, it was in reality a purchaser of rocks who had to do certain things on board the barge in order to take delivery of the rocks. It was not the operator (or the manager) of the barge.

Construction of the 1976 Limitation Convention

46. There was no dispute as to the principles to be applied in construing the 1976 Limitation Convention.

47. The 1976 Convention, like other international conventions, is to be construed as it stands, without any English law preconceptions, but by reference to broad and generally acceptable principles of construction: *James Buchanan & Co Ltd v Babco*

Forwarding & Shipping (UK) Ltd [1978] AC 141, 152D-E, *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 272E, 282A, 293C.

48. In *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep 460 at paragraphs 9-10 it was said that assistance in identifying such principles was found in the 1969 Vienna Convention on the Law of Treaties which provides as follows:

> "ARTICLE 31
>
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> ARTICLE 32
>
> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

49. The effect of these provisions was described in the *CMA Djakarta* at paragraph 10 as follows;

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

> sometimes determine that meaning but only when the ordinary meaning makes the convention ambiguous or obscure or when such ordinary meaning leads to a manifestly absurd or unreasonable result."

50. The Court of Appeal held that the ordinary meaning of the word "charterer" connotes a charterer acting in his capacity as such, not a charterer acting as if he were an owner or, in other words, if he was acting in the management or operation of the vessel. The court should avoid placing a gloss on the words used in the Convention which is not apparent from the words used; see paragraph 13.

51. This approach was, I think, approved by the Supreme Court in *The Ocean Victory* [2017] 1 Lloyd's Law Reports 521 at paragraphs 71-78 and 87 and in particular at paragraphs 75, 78 and 87.

52. In the *CMA Djakarta* the parties agreed that the object and purpose of the 1976 Convention were as follows:

> "(a) that the general purpose of owners, charterers, managers and operators being able to limit their liability was to encourage the provision of international trade by way of sea-carriage;
>
> (b) that the main object and purpose of the 1976 Convention was to provide for limits which were higher than those previously available in return for making it more difficult to "break" the limit, to use the colloquial phrase. Before 1976, any person, arguing in the United Kingdom that the limit should not apply, only needed to show "actual fault or privity" on the part of the party relying on the limit. Under the 1976 Convention the (now higher) limit is to apply unless it can be shown that the loss resulted from the personal act or omission of the party relying on the limit "committed with intent to cause such loss or recklessly with the knowledge that such loss would probably result". It is thus particularly difficult to break the limit, but the amount available for compensation is higher than it was previously;
>
> (c) one of the other objects of the Convention was to enable salvors to claim that their liability could be limited in the same way as owners and charterers; this reverses *The Tojo Maru*, [1972] A.C. 242."

53. The Court of Appeal accepted this formula, and held that it was "not … possible to ascertain with certainty any object or purpose of the 1976 Convention beyond this common ground".

<u>The meaning of "manager" in article 1 of the Limitation Convention</u>

54. Although the principal debate in this action has been as to the meaning of "operator" it is difficult to discuss the meaning of operator without having some understanding of the meaning of manager, to which it must be closely related. Indeed both counsel accepted there was an "overlap" in their meanings. I therefore start with the meaning of manager.

55. Counsel did not refer me to any authority on the meaning of "manager". All the textbooks to which I was referred (*Limitation of Liability for Maritime Claims* by

Griggs, Williams and Farr, 4th edition, 2004, *Collisions at Sea* by Marsden and Gault, 14th edition, 2016 and *The Law and Practice of Admiralty Matters* by Derrington and Turner, 2nd edition, 2016) are agreed that there is no authority on the meaning of manager. Counsel also made reference to meanings suggested in certain specialised dictionaries (though these were more in relation to operation than management).

56. The older editions of *Scrutton on Charterparties*, up to and including the 17th. edition (1964), included a section on the "managing owner" and at Article 16, Note I, the editors stated that the management of a vessel included:

> "A. (1) Decisions as to the employment of the ship.
> (2) Equipment and repairs of ship, and payment of accounts.
> (3) Engagement and discharge of crew.
> (4) Navigation, loading, and discharge of vessel.
>
> B. (1) Chartering the vessel, and discharge of vessel.
> (2) Collection of freight.
> (3) Entry and clearance of ship, and Customs business."

57. In the latter half of the twentieth century the scope and reach of an owner's duties, and hence of the manager's duties, developed and expanded, as cases on limitation demonstrated. Thus in *Alize 1954 and CMA CGA SA v Alliance and others* [2019] EWHC 481 (Admlty) I noted that

> "The issue in *The England* [a case reported at [1973] 1 Lloyd's Rep. 373] was whether the owner could establish that a collision had occurred without his actual fault or privity for the purposes of section 503 of the Merchant Shipping Act 1894. That issue raised for decision the question whether an owner could leave all questions of navigation, including the question of what charts and regulations were on board, to the master, or whether the owner himself had a duty to take all reasonable steps to ensure that the master had at his disposal all necessary publications. Sir Gordon Willmer said that what the owner did in that case "might have passed muster 20 years ago" but that it was no longer permissible for owners to leave everything to the unassisted discretion of the master. *The England* established, as was noted in by Cresswell J. in *The Eurasian Dream* at paragraph 133, that an owner has his own duty which must be discharged if he wishes to have the benefit of the right of limitation under the Merchant Shipping Act 1894."

58. In the *Cape Bonny* [2018] 1 Lloyd's Rep. 356 at paragraph 30 I noted that:

> "It is well recognised and has been since 1984 (following developments in the law relating to the limitation of shipowners' liabilities between 1960 and 1984) that shipowners themselves owe a duty to ensure the safe and efficient management of their vessels; see, for example, *The Marion* [1984] 2 Lloyd's Reports 1 at p.4 per Lord Brandon. That duty

> cannot be discharged by relying upon the master or chief engineer to exercise their own duty to ensure the safe and efficient management of their vessel. The ISM Code, pursuant to which all shipowners must have an SMS, reflects the shipowners' own duty."

59. The International Safety Management Code ("ISM") was adopted by the International Maritime Organisation ("IMO") in 1993 and became mandatory for certain classes of vessel in 1998. Owners were required to have a Safety Management System ("SMS") for the safe management and operation of ships and for pollution prevention; see also the *Nancy* [2014] 1 Lloyd's Rep. 14 at paragraphs 191-193.

60. The 2009 Baltic International and Maritime Council ("BIMCO") form of ship management agreement (SHIPMAN), indicates at Part 2, Section 2, clauses 4-7, that the services of a ship manager may extend to technical management, crew management, commercial management and insurance arrangements.

61. My understanding of the present role of the manager of a ship, derived from these materials and perhaps too many years' involvement with the investigation of maritime casualties, is that the manager of a vessel is typically a person entrusted by the owner with the duty of devising and maintaining an SMS to ensure the safe operation of the vessel and the prevention of pollution, crewing the vessel with appropriately qualified and trained personnel, maintaining the vessel, finding employment for her and preparing her for trading. Some owners may entrust those tasks to one or more directors or senior personnel (perhaps less common today), others may entrust those tasks to a separate company within the same corporate group as the owner (see for example the *Nancy* [2014] 1 Lloyd's Reports 14 at paragraphs 14, 15 and 103 and the *Atlantik Confidence* [2016] 2 Lloyd's Rep 525 at paragraph 80) and yet others may entrust those tasks to independent third party companies which offer a management service (see for example the *Cape Bonny* [2018] 1 Lloyd's Reports 356 at paragraph 9 and the *Brillante Virtuoso* [2019] 2 Lloyd's Rep. 485 at paragraph 28).

62. Managers may be responsible for all safety, manning, technical and commercial tasks or only for some of them. In this regard it is to be noted that in *ISM Code: A Practical Guide to the Legal and Insurance Implications* by Anderson (1998), (quoted in *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23 at paragraph 101 to which it will be necessary to refer later in this judgment), the author stated:

> "However, it is not unusual for a shipowner to contract out only part or certain parts of the operation of the ship to ship managers, retaining certain parts of the operation to himself."

63. Thus SHIPMAN, the BIMCO standard form of ship management agreement, provides in Part 1 that the parties may select which of the manager's services described in Part 2, clauses 4-7, the manager is to perform.

64. The ordinary meaning of "manager" in article 1(2) of the 1976 Limitation Convention does not appear to have been discussed in any previous case (although the valuable discussion of ship "operation" in *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23, as will become apparent, is in

fact helpful with regard to the scope of ship management). In my judgment the ordinary meaning of "manager" in the Limitation Convention must reflect the role of manager which I have described above. I therefore consider that "the manager of the ship" is the person entrusted by the owner with sufficient of the tasks involved in ensuring that a vessel is safely operated, properly manned, properly maintained and profitably employed to justify describing that person as the manager of the ship. I put it that way because if a person is entrusted with just one limited task it may be inappropriate to describe that person as the manager of the ship. A person who is entrusted with one limited task of management may be described as assisting in the management of the ship, rather than as being the manager of the ship; cf *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23 at paragraph 90 and *the Nancy* [2014] 1 Lloyd's Reports 14 which involved a company, Blue Fleet, assisting the manager, Swedish Management, see paragraphs 88-92 and 106.

The meaning of operator in article I of the Limitation Convention 1976

65. The Limitation Convention confers the right to limit not only on the manager but also on the operator.

66. At its simplest the argument of counsel for Stema UK was that the ordinary meaning of the operator of a ship was that it included those who operated the machinery of the vessel (in the present case, the barge master and crewman who went on board STEMA BARGE II off Dover) and those who sent those persons on board to operate the machinery of the ship (Stema UK).

67. This was not accepted by counsel for RTE. He submitted that the ordinary meaning of the operator of a ship was the person or entity which has direct responsibility for the management and control of the ship as regards the commercial, technical and crewing operations of the ship. This submission was based upon the decision of the Federal Court of Australia in *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23. On that test it was said that only Stema A/S was the operator.

68. This range in the meaning of "the operator of a ship" as expressed in counsel's submissions is reflected in an observation by the Federal Court in *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23 (at paragraph 94) that "the words 'operator' and 'to operate' can be used at several levels of abstraction. Much depends on context." The different levels of abstraction were reflected in two definitions of "to operate" considered by the tribunal whose decision was under appeal which were said to highlight the competing possible meanings. "Does the phrase refer to the physical operation of the ship or does it refer to the operation of the enterprise in which the ship is engaged?" (see paragraph 70).

69. A ship is not merely a machine to be worked by a skilled operative. It is, as the Federal Court of Australia observed (at paragraph 98), a working commercial enterprise which, in order to be managed successfully, requires the discharge of inter-related operational responsibilities.

> "The ship is engaged in activity that has inherent danger to those on board, and is a potential source of environmental and

> other danger to her physical and human surroundings. For those reasons, those having the management and control of the ship have responsibilities concerning the deployment of the ship, the technical safety and adequacy of the ship as a complex integrated working entity, and the choice, supervision, care and discipline of the master and crew on board the ship. All these activities, indeed operational responsibilities, have a relationship with one another. The commercial enterprise undertaken (the types of cargoes lifted, the ports visited and routes taken on voyages) is not unrelated to the maintenance of an appropriate standard of technical adequacy of the ship for the tasks involved in carrying out that enterprise. The skill and competence of the chief engineer and those under him or her will be vital in the assessment of the day to day adequacy of performance of the ship from a commercial and technical point of view. The skill, competence, discipline and working conditions of the crew will also, in a real and practical way, be related to the efficient and safe working of the ship, productively from a commercial point of view of human and environmental safety. This tripartite division (commercial, technical and crewing) of what are practical operating responsibilities can be seen in the industry standard form agreement: BIMCO Shipman 98. ”

70. There is therefore a cogent argument that in ordinary usage the terms manager and operator are used interchangeably. The Federal Court referred to the activities of those having the management and control of the ship as “operational responsibilities”. Similarly, it is stated in the preamble to the ISM Code that the purpose of the code is:

> “To provide an international standard for the safe management and operation of ships and for pollution prevention.”

71. I was referred to a Dictionary of Shipping Terms 6th.ed. (2013) by Brodie which defines “to operate a ship” as to “run a ship” and to include the technical operation (crewing, supplies, maintenance and stowage) and the commercial operation (booking cargoes, negotiating freight rates and bunker prices, and appointing ship’s agents at ports of call). A person who runs those technical and commercial operations would ordinarily be described as the vessel’s manager. Another Dictionary of Shipping Terms by Branch and Branch defines “managing owner” as “the person or company appointed by the shipowner to be responsible for ship operation, manning levels, maintenance of vessels and so on.”

72. Counsel for Stema UK suggested that the role of the operator was “more physical” than that of a manager and that it was involved in “the business of doing” rather than that of “telling people what to do”. There is, I accept, a sense in which managing and operating can be distinguished in this way. Indeed, when reflecting on the issues in this case I asked myself whether it could be said that management is concerned with standards, procedures and monitoring systems to ensure the safe operation of a ship whereas operation is the actual working of the ship on a day to day basis.

73. However, it is very difficult to separate management from operation in either of those ways. The two activities are very closely related and connected as the illuminating passage in *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23 which I have quoted above shows. Any attempt to draw a bright line between management and operation would be fraught with difficulty. Ship management requires, as inquiries into maritime casualties and cases on limitation considering the question of "actual fault or privity" under the 1894 Merchant Shipping Act have shown, an intense focus on the day to day operation of the ship.

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

75. The present case does not involve a conventional merchant ship but a dumb barge, laden with cargo, which is towed from the loading port to the discharge location, left there by the tug and thereafter "attended" (to use a neutral word) by a company which places men on board with instructions to operate the machinery of the dumb barge. The question which arises in these circumstances is whether the ordinary meaning of "the operator of a ship" in article 1(2) can include those who physically operate the machinery of the ship and those who cause the machinery of the ship to be physically operated, or whether the ordinary meaning of "the operator of a ship" is limited to the manager of the ship. Even if the answer to this question is that "the operator of a ship" is not so limited there will remain to be decided the important question of fact, namely, whether, looked at in the round, it can fairly be said that Stema UK was "the operator of the ship" or was merely assisting Stema A/S to operate STEMA BARGE II.

76. Although a ship is a working commercial enterprise it is also a vessel which contains machinery to be operated by skilled operatives. The ordinary meaning of the verb "to operate" when applied to a ship can extend to the physical operation of the vessel's machinery. The question, however, is whether the ordinary meaning of the phrase "the operator of the ship" in the context of the 1976 Limitation Convention can include those who physically operate the ship or those who cause the ship to be physically operated.

77. It is necessary to consider whether the master and crew of a vessel could be the operator within the meaning of article 2(1). Counsel for Stema UK suggested, when asked, that where a vessel had been involved in a collision with another ship the navigating officer was the operator because he was operating the ship at the relevant time.

78. Article 1(4) of the Limitation Convention provides:

> "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."

79. This makes it clear that, although the master can be said to operate or work the ship individually or in association with the other officers and crew, it cannot have been

intended that he was within the class of operator referred to in article 1(2). For if he was, article 1(4) would have been unnecessary. For this reason I was unable to accept the submission made by counsel for Stema UK that, for the purposes of article 1(2), "the operator of a ship" was intended to cover those on board the vessel physically operating the vessel's machinery. Reading article 1 as a whole therefore suggests that "operator" is used at a higher level of abstraction, one which has a notion of management and control over the operation of the ship.

80. It is to be noted that under the 1958 Limitation Convention the right to limit was available to "the charterer, manager and operator of the ship, and to the master, members of the crew……" (see article 6(2) quoted by David Steel J. in the *CMA Djakarta* at first instance [2003] 2 Lloyd's Rep. 50 at paragraph 21).Thus under that Convention also "operator" did not include the master and crew because they were specifically referred to in addition to the operator.

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

82. That the operator of a ship can include those who would not qualify as the manager of the ship is also suggested by the use of the word "operator" in addition to the word "manager" in article 1(2).

83. The ordinary meaning of "the operator of the ship" is to be understood in the light of the object and purpose of the Limitation Convention. The purpose of owners, charterers, managers and operators being able to limit their liability is to encourage the provision of international trade by way of sea-carriage. The meaning which I consider to be the ordinary meaning of that phrase, that is one which includes those who, with the permission of the owner, send their employees on board with instructions to operate the vessel's machinery in the ordinary course of the ship's business, is consistent with and promotes that purpose. When the owner of a dumb barge arranges for the barge to carry a cargo by sea from one place to another the barge, on arrival at the destination, is unmanned. If it has to be anchored and secured so as to remain safely at anchor whilst waiting for the cargo to be discharged the owner has to arrange for the necessary work to be done, that is, for the barge's equipment and machinery to be operated. If he arranges for an associated company to do that work and it is done negligently so that loss or damage is caused to others, it would not encourage the provision of international trade by sea carriage if the owner could limit its liability for the loss and damage but the associated company which operated the barge at the discharge location could not do so.

84. I should also mention Article 2 of the Limitation Convention, which defines the claims subject to the right to limit and includes claims for loss or damage to property occurring in direct connection with "the operation of the ship". The operation there referred to must be the physical operation of the ship on a particular day. It is the operation of the ship which must cause the loss or damage; the ship must be the perpetrator of the loss or damage; see *The CMA Djakarta* at paragraph 26 of the judgment of the Court of Appeal. Thus article 1 refers to "the operator of a ship" and

article 2 refers to "the operation of the ship". Since "the operator of a ship" in article 1 must be understood in the context of the Convention as a whole, it would be right in principle to take into account the use of the phrase "the operation of the ship" in article 2. Since the latter must refer to the physical operation of the ship it might be said to be consistent with it to construe the former as encompassing those who send their employees on board the ship to operate the ship's machinery in the ordinary course of its business, though they may not be the manager of it. However, since article 2 refers to the physical operation of the ship, reference to that article would tend to narrow the meaning of "the operator of the ship" to those who physically operate it and so exclude those acting as manager. In my judgment the ordinary meaning of "the operator of the ship" clearly can include the manager and so reference to article 2 serves only to confuse. Accordingly, having taken article 2 into account I do not consider that it can assist in elucidating the meaning of those entitled to limit pursuant to article 1. It only defines the claims subject to the right to limit. I therefore do not rely upon it.

85. Counsel for RTE submitted, based upon the decision of the Federal Court of Australia in *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23, that the ordinary meaning of "the operator of a ship" was restricted to the person or entity which has direct responsibility for the management and control of the ship as regards the commercial, technical and crewing operations of the ship.

86. The decision of the Federal Court of Australia in *ASP Ship Management PTY Limited v The Administrative Appeals Tribunal* [2006] FCAFC 23 concerned the question whether a company which provided the crew of an oil tanker and a company which provided the crew of a pipe laying vessel were operators of the ships in the sense required by section 10 of the Australian Navigation Act. That section defined a ship as including not only a ship registered in Australia but also a ship of which the majority of her crew were residents of Australia and which is "operated" by an Australian resident, firm or company. Upon that issue depended the jurisdiction of a tribunal to review decisions in relation to claims for compensation by seamen.

87. In its Conclusion at paragraph 109 the Federal Court said

> "It [the Tribunal] embarked upon its task however by asking, as a fundamental question, whether to "operate" a ship meant to cause or direct the working of the ship in the sense of its physical operation or whether, on the other hand, it meant the ship as a commercial enterprise. We are persuaded that, in so doing, the Tribunal was in error. As we have sought to show, the relevant concept is wider than such a division would allow. The concept of "operation" may involve both elements relating to its commercial operation, in the management and control of the vessel as we have described."

88. In the event the Federal Court was unable to reach a decision on the question before it because the necessary findings of fact had not been found by the tribunal below. For example, at paragraph 111:

> "The extent to which the employer of the crew of a ship is entitled to direct and does in fact direct the crew in the

> management and control of the ship, namely her navigation, state and working operations is also a relevant factor. The Tribunal made no findings as to the power, right or practice of the Employers to direct the activities of the crew in relation to the running and operation of the respective ships."

89. The Tribunal was thus ordered not to enter upon a consideration of the merits of the applications unless and until it found, according to law, that the respective ships were being operated by the respective Employers at the time of the respective injuries to the crewmen; see paragraph 115.

90. It would thus appear that the approach I have taken to the meaning of "the operator of the ship" in concluding that it encompasses not only the management of the ship but also the physical operation of the ship is not alien to the approach adopted by the Federal Court to the meaning of the "operation" of the ship. It is also, I think, consistent with what the Federal Court described as "the intensely practical nature of the inter-related responsibilities involved in the management and control of a ship" (see paragraph 105).

91. I do not however consider that the decision of the Federal Court can be regarded as determining the meaning of "the operator of the ship" in the 1976 Limitation Convention. The context of the question before the Federal Court was different from the context of the question before this court. The Limitation Convention has a different purpose from that of the Australian statute which was construed by the Federal Court. Also, the Australian statute used different language and did not include both a reference to the manager and to the operator. The Federal Court held (see paragraphs 105 and 106) that the phrase "operated by" in section 10 of the Navigation Act "involved direct responsibility for the management and control of the ship" and "encompasses the notion of a real, substantial and direct role in the management and control of the commercial, technical and crewing operations of the ship." But because the context is different in the present case caution is required before applying the meaning given by the Australian Court to the meaning of operator in that different context. That is especially so given that it is clear from the judgment of the Federal Court that the requirement for "direct responsibility" for the management and control of the ship came from a study of "the legislative history and relevant secondary material" (see paragraphs 99 and 105). That legislative history was extensive (see paragraphs 14-46) and the secondary materials included parliamentary materials (see paragraphs 24-26).

92. Counsel for RTE submitted that the Australian Court ascertained the ordinary meaning of "operated by" as a matter of English and that therefore it was of considerable assistance to this court. It is true that the Australian Court had regard to the ordinary meaning in English of "operated by" (see paragraphs 104-106) but it also had regard to the legislative history of section 10 (see paragraphs 105-106) and so I am not able simply to adopt the conclusion of the Australian Court and apply it in a different statutory context where there is a different statutory purpose.

93. Although the Australian Court noted the use of "the operator" in the 1976 Limitation Convention (see paragraph 104), as did the tribunal (see paragraph 73) the meaning of that phrase in that context was not the subject of the Court's decision.

94. For the reasons I have given the ordinary meaning of "the operator of a ship" in article 1(2) of the Limitation Convention can, I think, extend beyond the manager of the ship and include the entity which, with the permission of the owner, directs its employees to board an unmanned ship and operate her in the ordinary course of the ship's business.

95. Before reaching a conclusion as to the ordinary meaning of "the operator of a ship" in article 1(2) it is necessary to refer to the terms of previous Limitation Conventions, to which it is legitimate to have regard. The account of the history of limitation given by David Steel J. in *The CMA Djakarta* at first instance, [2003] 2 Lloyd's Law Reports 50 at paragraphs 14-27 shows that the first reference to "a person who operates a vessel" in a limitation convention was in the 1924 Limitation Convention. Article 10 thereof provided that "where a person who operates the vessel without owning it ……..is liable under one of the heads enumerated in article 1, the provisions of this convention are applicable to him." It is difficult to understand the reference to "a person who operates the vessel without owning it" as being to anyone other than the professional manager appointed by an owner to manage his vessel. Before the rise of the professional manager ship management in the late nineteenth century management was carried out by the "ship's husband" who was initially one of the ship's owners (see *Chitty's Commercial and General Lawyer* Part 1 (1834) at p.263) and later by the managing owner (see *Scrutton on Charterparties* 17th.ed. at article 16 fn (u)). Section 59 of the Merchant Shipping Act 1894 reflected the development of the professional ship manager by referring to "the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner".

96. The first reference to manager and operator was in the 1957 Limitation Convention which, by article 6(2), applied its provisions to the "charterer, manager and operator of the ship ……..in the same way as they apply to the owner himself." The next and final reference was in the 1976 Convention, article 1(2).

97. No argument was advanced on this "convention history" but it could be suggested that the juxtaposition of the manager and operator in the 1957 and 1976 Conventions, coupled with the likely use of operator in the 1924 Convention to mean manager, indicates that the terms are being used interchangeably. On the other hand it could be said that manager was first used in 1957 to reflect the fact that manager was the word used in the industry more often than operator but that it was nevertheless thought appropriate to add the word operator as well. David Steel J. noted at paragraph 21 of his judgment in the *CMA Djakarta* that the range of those entitled to limit was enlarged by article 6(2) of the 1957 Limitation Convention. The same observation had been made in *Temperley's Merchant Shipping Acts*, Vol.11 of the British Shipping Law (1976), at paragraph 1214 fn.2, where the editors, Michael Thomas and David Steel, noted that section 3 of the 1958 Merchant Shipping Act which sought to give effect to article 6(2) of the 1958 Limitation Convention "extends the class of persons entitled to exclude or limit their liability under Part VIII of the MSA 1894 in accordance with Article 6(2) of the Convention." Article 6(2) certainly extended the range of those entitled to limit by including "the charterer of the ship". The range may also have been extended by including "the manager and the operator of the ship". Whether it did so can only be decided by understanding the ordinary meaning of operator when used in addition to manager. On balance therefore I do not consider that the convention history materially assists.

98. I should add that the *travaux préparatoires* to the 1976 Convention reveal no discussion as to the meaning of manager or operator, though there was a discussion as to whether the class of persons entitled to limit should extend to those who render a service in direct connection with the navigation or management of the ship. I shall refer to that discussion later in this judgment.

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

100. Before leaving this topic I should mention an argument pressed by counsel for RTE in his written and oral submissions. It was suggested that to interpret "the operator of the ship" as including "anyone who operates the ship or part of a ship" is to put on the words of the Convention an impermissible functional gloss which was contrary to the approach of the Court of Appeal in *CMA Djakarta.* I do not accept that submission. The Court of Appeal in that case had to interpret "the charterer of the ship" and held that it was wrong to interpret that as referring to the charterer when he was acting in the management or operation of the ship. To do so placed an impermissible gloss on the words of the Convention. But in the present case the court is required to construe "the operator of the ship". The ordinary meaning of that phrase can include the person who operates the ship in the sense of placing on board an unmanned ship, with the consent of the owner, personnel to operate the ship. That is not to place an unjustified functional gloss on the words used. Rather, it is to give "the operator of the ship" its ordinary meaning.

101. Counsel for RTE further submitted that the use of the definite article "the" and the singular form of "operator" means that there can be only one "operator". Article 1(2) therefore has no room for more than one "operator" and, if that is correct, then it was submitted that Stema UK's claim to limit must fail because Stema A/S was the operator of the barge. I do not consider that this is correct. Although the definite article is used it would not, in this context, be correct to conclude that there cannot be more than one operator. The definite article is also used in relation to owner and charterer; yet there can be more than one owner, because there can be co-owners, and there can be more than one charterer, because there can be a time charterer and a voyage charterer (or indeed a slot charterer). If there can be more than one owner or charterer it must also be the case that there can be more than one operator. Of course, the facts must show that it is appropriate to describe the person as "the operator of the ship" at the relevant time. To that question I must now turn.

Application to the facts

102. STEMA BARGE II is a dumb barge rather than a conventional merchant vessel. The duties in fact required of a manger or operator of such a vessel are therefore likely to be different from, or at least not as extensive as, those required of a manager or operator of a conventional merchant vessel. Indeed, I was informed by counsel for Stema UK that there was no requirement for STEMA BARGE II to have a Safety Management System pursuant to the ISM Code. There are however "company procedures" produced by the Mibau Stema Group, such as the Barge Operator Manual, which set out the required procedures for safe operation of the barge, and the Barge Towing Manual for the benefit of the tug master which set out "the process and

guidelines" from Stema A/S and Splitt. It provided particulars of the STEMA BARGE II, towage requirements (including IMO guidelines), weather routing and reporting. I was told that there was no document which identified any person or entity as the manager of the barge.

103. In the case of the voyage charter of a conventional merchant vessel the voyage charterer would not ordinarily be described as the operator of the vessel; see the comment of David Steel J. in the *CMA Djakarta* at paragraph 32. But STEMA BARGE II was not a conventional merchant vessel. It was an unmanned barge, the operation of which was governed by a document described as the Barge Operator Manual. In that manual Mr. Grunfeld is described as the "barge operator" and in his witness statement he states that he has "daily responsibility for the operation of barges owned by Splitt". In circumstances where he, an employee of Stema A/S, has such a duty it seems arguable that Stema A/S, albeit a charterer of the barge, was in fact the operator of the barge during the voyage from the loadport. This is not, however, crystal clear. The Barge Operator Manual refers in paragraph 5.3 to the "Splitt Chartering Operator" being responsible during the voyage for following reports from the tug master and taking necessary actions when needed. (The "Splitt Chartering Operator" is to be distinguished from the "Stema Shipping Operator" in paragraph 5.1). That suggests that Mr. Grunfeld acted during the voyage on behalf of Splitt. Of course, because Splitt had no employees the Splitt Chartering Operator and the Stema Shipping Operator were one and the same, namely, Mr. Grunfeld. It appears that the tug reported its position to Mr. Grunfeld throughout the voyage. The number for the tug master to ring in an emergency was that of Mr. Grunfeld.

104. The language of the Barge Operator Manual is unclear in other respects also. For example in another paragraph it refers simply to the "operator" (see paragraph 5.5) and in a later paragraph it refers to actions being "discussed and agreed with the steering committee" without identifying who the steering committee was (see paragraph 6.2).

105. However, there did not appear to be any real dispute during the trial that at least until arrival off Dover "the operator" of STEMA BARGE II was Stema A/S. Indeed, it is not realistically possible to suggest that anyone else was the operator.

106. Until the arrival of the barge off Dover, Stema UK had no involvement with the operation of the barge. As Mr. Johansen said: "The logistics of bringing the materials from the rock source to UK coastal area (prior to the transhipment) i.e. the loading and towing to the UK of STEMA BARGE II, are arranged by Stema A/S. Stema UK is not privy to these arrangements."

107. Upon arrival of the tug and barge off Dover on 7 November 2016 Stema UK placed a barge master and crewmember on board STEMA BARGE II (under a superintendent ashore). They dropped the barge's anchor. It appears that they did so in the location advised by the tug. (It later transpired, on 5 December 2016, that the anchor had been dropped outside the anchorage area.) Thereafter, and before leaving STEMA BARGE II, the barge master and crewman checked items such as navigation lights and the emergency towing wire. For this purpose they used a Check List provided by Splitt. Whilst the barge was at anchor and whilst cargo was being transhipped from STEMA BARGE II to CHARLIE ROCK they attended to various matters on STEMA BARGE II such as the ballasting of the barge (which was necessary as cargo was discharged

and transhipped to CHARLIE ROCK), maintaining the generators and ensuring the navigation lights were in order. Again, further check lists provided by Splitt were used for this purpose. The position of the barge was also monitored. There was a roster of barge masters and crewmen put in place by the superintendent Mr. Upcraft upon the instructions of Mr. Olsen of Stema A/S. The weather forecasts were considered by Mr. Johansen and the superintendent twice a day. They were also considered by personnel of Stema A/S in Denmark. There were discussions between Mr. Boisen and Mr. Grunfeld of Stema A/S and Mr. Johansen and Mr. Upcraft of Stema UK. The decision to leave STEMA BARGE II at anchor on 20 November 2016 was taken by them. Both Mr. Boisen and Mr. Johansen said that the decision was taken on behalf of Splitt. (Whether that reflected the Barge Operating Manual paragraph 5.3 which refers to the Splitt Chartering Operator taking the "necessary actions" or the division of responsibility between Splitt and Stema A/S under the charter dated 28 June 2016 was not explained.)

108. Those in essence are the facts relied upon by Stema UK to say that whilst STEMA BARGE II was off Dover Stema UK was the operator of the barge.

109. It seems clear that Stema UK was not the operator of the barge before it arrived under tow off Dover. It also seems clear that Stema A/S retained a role as operator of the barge after its arrival because Stema A/S continued to monitor the weather forecasts after it had arrived. Moreover, after the collision damage had been sustained on 20 November 2016 Mr. Stig Olsen was sent by Stema A/S to carry out an inspection. In the event a preliminary damage inspection was carried out by TMC Marine on or about 28 November 2016 and the barge was towed to Newcastle for repairs on 10 December 2016. Further surveys including Class surveys took place on 13 December 2016, 11 January 2017 and 30 January 2017. That on 11 January 2017 was attended by Mr. Olsen and Mr. Grunfeld who were described in a document recording the survey as "Owners' technical and operations managers". There is no evidence that Stema UK had any involvement in these post casualty events.

110. However, from 7-20 November 2016 Stema UK had a real involvement with STEMA BARGE II. Not only did its employees anchor her but they prepared the barge for lying safely at anchor. During the discharge operations they operated the barge's machinery so as to ensure that she was safely ballasted. No personnel of Stema A/S were on board; only personnel of Stema UK (though not permanently because there was no accommodation on board the barge). Mr. Grunfeld said in his evidence that Stema UK "provided personnel to physically operate the barge on behalf of Splitt, and to carry out the transhipment and delivery of the rock".

111. There is no evidence of any contract between Splitt and Stema UK for this work on board STEMA BARGE II. It appears to have been done because that was the way in which the Mibau/Stema group organised its affairs.

112. It was submitted by counsel for RTE that the actions taken by Stema UK in anchoring and securing STEMA BARGE II at the discharge anchorage off Dover were taken in order to enable it to perform its obligation under the Stema A/S/Stema UK sale contract to discharge the cargo from STEMA BARGE II onto the "CHARLIE ROCK". Being a dumb barge, the barge had no crew, so the receiver/buyer of the cargo (Stema UK) had of necessity to secure it in order to be able to discharge and take delivery of the cargo it had purchased from Stema A/S. The operation carried out

by Stema UK was said to be akin to a receiver appointing stevedores when receiving cargo free out. The additional work of anchoring and securing the barge was incidental to the discharge operation, having been necessitated by the fact that the barge had no crew of its own.

113. I accept that Stema UK had an obligation as the purchaser to take delivery of the rocks from STEMA BARGE II. Thus the chartering of CHARLIE ROCK and the tug AFON GOCH and the provision of the excavator and shovel to enable transhipment to CHARLIE ROCK to take place were the responsibility of Stema UK. But although the anchoring and securing of the barge were of course necessary such activities were the responsibility of the vessel in which the cargo had been carried to the anchorage off Dover. They were not the responsibility of the purchaser of the goods ex barge. Those activities were performed by Stema UK for the benefit of the owner of the barge. They were not part and parcel of Stema UK's obligations as purchaser. The work done by Stema UK was not akin to the appointment of stevedores by a receiver of goods free out. Stevedores do not drop a vessel's anchor or ensure that she remains safely at anchor. But even if Stema UK were obliged on the facts of this case to anchor and secure STEMA BARGE II that conduct amounted to operation of Stema Barge II.

114. Counsel for RTE next submitted that what Stema UK did was to provide a service to the owner of STEMA BARGE II, analogous to that of a berthing master and that the provider of such third party services were not entitled to limit as the *travaux préparatoires* of the Limitation Convention made clear. The *travaux préparatoires* show that there was discussion as to including within the class of persons entitled to limit "any persons rendering service in direct connection with the navigation or management of the ship". That proposal, which was made by the Polish and Irish delegations, was rejected. The observer from the CMI noted that the proposal had been included in the original CMI draft but had been rejected by the Legal Committee. It had been regarded as a "radical change" and had been rejected at the Plenary Session. "Travelling ship repairers, tank cleaners, husbanding agents and others who might be involved in some aspects of "management" fell into a vague category which should not, in the general view of the Committee, be embraced in the term "shipowner" for limitation purposes."

115. Counsel for Stema UK submitted that Stema UK was not a person rendering a service in connection with the navigation or management of the barge but was the operator of the barge off Dover.

116. There was no formal contract between Stema UK and either Splitt or Stema A/S requiring Stema UK to anchor the barge, make her safe to lie at the anchorage and operate her machinery (ballast tanks and generators) as may be necessary during the course of transhipment. But all three companies were part of the Mibau/ Stema Group and were used to working together in this way. It is plain that Stema UK acted in the way it did with the permission of Splitt. The barge master and crewman were sent on board by Stema UK to operate the machinery of STEMA BARGE II. There was no other person present from Splitt or Stema A/S to do so. The employees of Stema UK were the only persons operating the machinery of STEMA BARGE II. If it is right to regard what they did as the provision of a service it was the service of operating STEMA BARGE II in circumstances where there was no-one else to operate her. Another way of putting the same point is that the service provided by a travelling ship

repairer, tank cleaner, husbanding agent and others to a manned ship is not comparable to the operation of an unmanned barge by Stema UK.

117. There remains the question: Can it fairly be said that Stema UK was the operator of STEMA BARGE II off Dover? Or did Stema UK merely assist Stema A/S to operate STEMA BARGE II?

118. The role of Stema UK was limited both in time and in the scope of its activities. It was limited to the time from when the barge arrived off Dover until it was towed away, but nevertheless that was a period of two weeks. Its activities were limited but then the scope of the activities required to operate a dumb barge are necessarily limited.

119. It is to be noted that although Mr. Johansen's name appears in the Barge Operator Manual he is not accorded any particular role. On the other hand the Manual did not list the anchoring and care of the barge at anchorage as one of the necessary tasks. It is also to be noted that Mr. Johansen in his witness statement did not describe Stema UK as the operator of STEMA BARGE II. He said that Stema UK's main roles were to market the Mibau Group's products imported into the UK and then to make local arrangements for delivery of the products. He also said that Stema UK was responsible for decisions regarding CHARLIE ROCK and the tug AFON GOCH. He said that Splitt was responsible for STEMA BARGE II.

120. However, there is no dispute as to what Stema UK in fact did with regard to STEMA BARGE II. Employees of Stema UK in fact operated the machinery of STEMA BARGE II. The question is whether such operation amounts to Stema UK in fact being the operator of STEMA BARGE II off Dover. Mr. Johansen did not himself describe Stema UK as the operator of STEMA BARGE II but Mr. Grunfeld described Stema UK as "providing the personnel to physically operate the barge on behalf of Splitt". I consider that he was right to say that. There was no-one present from Stema A/S to operate the barge off Dover. Although Stema A/S was the operator of the barge in the sense of being its manager I would not describe Stema UK as merely assisting Stema A/S to operate STEMA BARGE II off Dover in circumstances where Stema A/S had no personnel present able to operate STEMA BARGE II of Dover. The necessary operation of STEMA BARGE II was in fact performed by Stema UK alone, sending its personnel on board to do what was necessary. The importance of Stema UK's operation of the barge off Dover was demonstrated when storm force winds were forecast. Although the Barge Operator Manual did not give any function to Mr. Johansen or Stema UK by name, paragraph 6.2 envisaged that when winds in excess of force 9 were forecast the appropriate action to be taken was to be decided by "the steering committee". There was no direct evidence as to the members of that committee but what is known is that on 20 November 2016 the appropriate action was discussed and agreed by Mr. Boisen and Mr. Grunfeld of Stema A/S and by Mr. Johansen and Mr. Upcraft of Stema UK. It seems more probable than not that they were the steering committee for the period whilst the barge was at anchor off Dover. (In this regard it is also to be noted that the "charter" between Splitt and Stema A/S dated 28 June 2016 provided that Splitt would monitor the barge at anchorage "in cooperation with the receiver".) Whilst the decision to allow STEMA BARGE II to remain at anchor during the storm was ultimately that of Splitt, acting through Stema A/S, in practical terms the decision was taken by, and important advice given by, the

steering committee of which Mr. Johansen and Mr. Upcraft, it seems, were members. That is consistent with Stema UK being the operator of the barge off Dover.

121. Having considered the evidence as a whole and in the round I consider that the nature of Stema UK's operation of STEMA BARGE II off Dover was such as to make it appropriate to describe Stema UK as the operator of the barge off Dover.

Conclusion

122. For the reasons which I have endeavoured to express I have concluded that Stema UK is entitled to limit its alleged liability.