Neutral Citation Number: [2020] EWHC 1750 (Admlty)

Case No: AD-2019-000134

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2020

Before :

MR. JUSTICE TEARE

- -

Between :

HOLYHEAD MARINA LIMITED	**Claimant**
- 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**

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- -

Benjamin Coffer (instructed by **Clyde & Co LLP**) for the **Claimant**
James Watthey (instructed by **Keoghs LLP**) for the **Defendants**

Hearing dates: 4 June 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.

....

MR JUSTICE TEARE

"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 10:00 AM on 02 July 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. In March 2018 Storm Emma hit Holyhead from the North East. The last comparable event was in 1936. A meteorologist has expressed the opinion that "the wind event of 1st/2nd March 2018 was a very infrequent event in the area but was not without precedent. It probably has an average return period of somewhere around once in 50-years." The Marina in Holyhead harbour was damaged in that the pontoons forming the Marina broke up or became detached. What happened has been described as "the catastrophic breakdown of the entire Marina". In consequence many craft moored in the Marina were damaged. There is evidence that 89 craft were damaged. It is said, based upon expert evidence, that the design, construction and maintenance of the Marina were defective. In particular, there is no shelter from the North East. Many claims are anticipated and so the Claimant, Holyhead Marina Limited, has issued proceedings seeking a limitation of its liability pursuant to section 191 of the Merchant Shipping Act 1995. The Defendants to that limitation action are the owners of the damaged craft. The claims are said to total some £5 million whereas, according to the Claimant, the limit of its liability is some £550,000. The Defendants resist the claim to limit.

2. The right to limit liability pursuant to the Merchant Shipping Act 1995 now rarely gives rise to dispute, essentially because the right to limit is "almost indisputable"; see, for example, *The Cape Bari* [2016] UKPC 20, [2016] 2 Lloyd's Reports 469 at paragraph 14 per Lord Clarke. The right to limit was barred in *The Atlantik Confidence* [2016] EWHC 2412 (Admlty) but that was a case where the loss was caused by the personal act of the owner with intent to cause such loss by scuttling his ship, see paragraph 317. Perhaps because of the difficulty of barring the right to limit questions now arise as to whether there is, in principle, a right to limit. *The Stema Barge II* [2020] EWHC 1294 (Admlty) concerned the question whether a company which attended a dumb barge off Dover was "the operator of a ship" and so entitled to limit. This case concerns the question whether the lessee of the marina in Holyhead harbour is the owner of a "dock" and so entitled to limit.

3. The Claimant, Holyhead Marina Limited, 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. The parties are agreed that the 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.

4. The Defendants have denied that the Claimant has a right to limit its liability. They say that the Claimant is not the owner of a "dock" within the meaning of section 191 of the MSA 1995. They also say that the Claimant's right to limit, if any, has been lost because the loss and damage resulted from a personal act or omission of the Claimant

committed recklessly and with knowledge that such damage would probably result; see Article 4 of the Limitation Convention set out in the MSA 1995 at Part 1 of Schedule 7. Finally they dispute the amount of the alleged right to limit. They say that it in fact exceeds the amount of the anticipated claims.

5. The Claimant has issued an application seeking to strike out these allegations and/or for summary judgment on their claim for a limitation decree.

The meaning of "dock"

6. Section 191 provides as follows:

> 191 Limitation of liability.
>
> (1) This section applies in relation to the following authorities and persons, that is to say, a harbour authority, a conservancy authority and the owners of any dock or canal.
>
> (2) The liability of any authority or person to which this section applies for any loss or damage caused to any ship, or to any goods, merchandise or other things whatsoever on board any ship shall be limited in accordance with subsection (5) below 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.
>
> (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.
>
> (4) This 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 set out in Part 1 of Schedule 7.
>
> (5) The limit of liability shall be 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 set out in Part I of Schedule 7 read with paragraph 5(1) and (2) of Part II of that Schedule.
>
> (6) Articles 11 and 12 of that Convention and paragraphs 8 and 9 of Part II of that Schedule shall apply for the purposes of this section.

(7) For the purposes of subsection (2) above a ship shall not be treated as having been within the area over which a harbour authority or conservancy authority discharges any functions by reason only that it has been built or fitted out within the area, or that it has taken shelter within or passed through the area on a voyage between two places both situated outside that area, or that it has loaded or unloaded mails or passengers with the area.

(8) Nothing in this section imposes any liability for any loss or damage where no liability exists apart from this section.

(9) In this section –

"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.

7. There is no dispute that the Claimant was the owner of the Marina within the meaning of section 191, either because it owned a leasehold interest in the Marina or because it had control and management of the Marina.

8. The crucial question is whether the Marina is a "dock" within the meaning of the section. It is to be noted that neither a marina nor pontoons are mentioned as included within the meaning of dock. But the statutory definition is not exclusive. It states that dock "includes" the structures then listed. Thus structures not specifically listed could be within the ordinary meaning of dock as used in section 191 or within the ordinary meaning of the listed structures.

9. The Claimant's case is that the Marina is a "dock" within the meaning of section 191(1), and/or that the floating pontoons alongside which craft lie in the Marina can properly be described as "slips", "quays", "wharves", "piers", "stages", "landing places" or "jetties" for the purposes of section 191(9). In oral submissions the second way of putting the case was said to be the primary case. Particular reliance was placed on "landing place", "pier", "jetty" and "stage".

10. The Defendants' case is that the natural and ordinary meaning of "dock" is something of a different nature entirely from the Marina. The usual meaning of "dock" is, it is said, an enclosed body of water used for the loading and unloading of ships, and possibly their repairs. It is submitted that no version of the natural meaning of "dock" or of the structures referred to as being within the statutory meaning of dock can sensibly apply to a marina consisting solely of floating pontoons (as opposed to solid structures and/or structures permanently affixed to the seabed or land, which might arguably constitute a "pier") or to a pontoon or arrangement of pontoons (especially floating ones) used for the semi-permanent mooring of small and mostly leisure craft. In oral submissions the latter point was emphasised. A marina is a place where small

leisure craft are moored on a long term basis. By contrast none of the structures within the statutory definition of dock is used for long term mooring.

11. Section 191 must be construed in a manner consistent with its object or purpose. It is therefore necessary to consider its object or purpose. Section 191 in effect re-enacts section 2 of the Merchant Shipping Act (Liability of Shipowners and Others) 1900.

12. 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. Counsel for the Claimant, the Marina, described this is as 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.

13. Counsel for the Defendants, the owners of the damaged craft, drew my attention to passages in Hansard which supported the submission made by counsel for the Marina. I refer to these passages because they lead to no different conclusion from that which flows from a consideration of the context and the language of the Act relied upon by counsel for the Marina. The MSA 1900 was, it appears, the product of discussions between the shipowners on the one hand and the dock owners and others on the other hand.

14. Thus Lord Heneage said during the passage of the bill in Parliament:

> "The object of the Bill is to limit the excessive amount of liability to which shipowners and dock-owners and others are subject under the present law. It has been under the consideration of all those who are interested for a considerable period, and the outcome of a conference between all the parties practically and financially interested is the present agreement, which has been carefully considered, and has been embodied in the Bill. The Bill has not only been before a Standing Committee of the House of Commons, but it has been thoroughly thrashed out in that House, with the assistance of the Solicitor General and the Board of Trade. The whole question, therefore, comes before your Lordships with very good credentials. It has the unanimous approval of the House of Commons and of the whole body of shipowners and dock-owners, harbour authorities, and other conservancy bodies throughout the United Kingdom".

15. Lord Balfour of Burleigh noted a cross-industry agreement between shipowners and dockowners, approved by the Board of Trade as supervisor of the shipping industry, that there should be reciprocity between them. He said:

> "It is an agreement between the two chief interests principally concerned—the dock owners and the shipowners. It is a matter of compromise between them, a matter with which, as I have said, not only are they satisfied, but apparently, from the communications which have reached the Board of Trade, they are clearly desirous of seeing passed into law."

16. Now 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.

17. The right to limit given to the owners of "docks" was wide because of the generous definition of a dock. The language used to define dock was and is as follows:

> "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

18. This is 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. This point was made in the only decision to which I was referred on section 2 of the MSA 1900, the *Humorist* (1949) 79 Lloyd's Reports 549. That case concerned the question whether the river bed on which a concrete base had been constructed along the front of a warehouse was "a landing place" within the meaning of section 2 of the MSA 1900. Willmer J., who had considerable knowledge of maritime matters and was the foremost Admiralty lawyer and judge of his generation, was of the view (see page 552 r.h.c.) that the statutory definition included "a number of things which nobody in his senses would call 'docks' ". The judge said (see page 553 l.h.c.) that the berth was certainly not a "dock" in the ordinary sense of that term, which he considered was "an enclosed space with gates to allow the admission and retention of water". Applying "common-sense principles" he held (at page 553 l.h.c.) that the berth in question was a landing place. "This is a place adjacent to the plaintiffs' warehouse, where craft in fact are invited to come and lie for the purpose of landing their goods. I therefore hold that this is a "landing place"."

19. 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.

20. Counsel for the Marina submitted that the unifying feature of the list is that the structures in it are man-made structures linked to the shore which could conceivably cause damage to a vessel. There is justification for that submission. The list manifests an intention on the part of the parliamentary draftsman to cast a very wide net of limitation protection. However, whether it extends to the owner of a marina depends upon the ordinary meaning of the words used in the definition having regard to their context.

21. Loading, discharge, ship repairs and the landing of passengers are activities typically associated with shipping as a business. The owner of a marina is not engaged in international trade by sea-carriage or with shipping as a business but is engaged in a different business, the marine leisure industry. It is agreed that the Marina at Holyhead is used for the mooring of small leisure craft. I have therefore considered whether construing the statutory definition of "dock" as extending to the Marina at Holyhead and so providing its owners with a right to limit is consistent with the purpose of section 191 of the MSA 1995 and its predecessor section 2 of the MSA 1900.

22. There is authority for the proposition that the early Merchant Shipping Acts were concerned with commercial shipping. Thus in *R v Goodwin* [2005] EWCA 3184 Lord Phillips MR said at paragraph 18:

> "The early Merchant Shipping Acts were concerned with commercial shipping, and this concern remains the predominant theme of the 1995 Act. The primary concern of this legislation is shipping carried on as a business."

23. Lord Phillips further stated at paragraph 32:

> "Whilst, as we have observed, there may be reasons for giving "ship" a wide meaning for the purposes of Part I which deals with registration, one must not adopt a meaning that makes a nonsense of other provisions which govern the use and operation of ships. Those provisions, as the title 'Merchant Shipping' suggests, are primarily aimed at shipping as a trade or business. While it may be possible to extend the meaning of ship to vessels which are not employed in trade or business or which are smaller than those which would normally be so employed, if this is taken too far the reduction can become absurd."

24. However, there is a limit to the extent to which this observation can assist in the present context. First, Lord Phillips did not say that the Merchant Shipping Acts were exclusively aimed at shipping as a trade or business. Second, section 191 is concerned

with limiting the liability of persons other than shipowners, in particular the owners of docks.

25. Dock owners secured a right to limit in their own interests, not in the interests of shipowners or of international trade. The right they secured was expressed in very wide terms. There are no words in the Act which seek to restrict the right to limit to dock owners (or harbour or conservatory authorities who are also given a right to limit) only so long as or to the extent that they assist commercial shipping. The usage of docks may change over time and certainly did change between 1900 and 1995. The usage of docks by commercial shipping has declined in some ports whilst the usage of such docks by the marine leisure industry has increased. Docks (and the structures included within the wide statutory definition) remain vulnerable to damage by vessels whether they are commercial or leisure craft. Leisure craft, like commercial vessels, may limit their liability. (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.) There is therefore 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. That being so the extent of the reciprocal right to limit can only be assessed by examining the statutory definition of "dock" and in particular, the ordinary and natural meaning of the structures included within that statutory meaning.

26. I therefore start with the ordinary and natural meaning of dock. If a judge as experienced in maritime matters as Willmer J. considered that a dock was an enclosed space with gates to allow the admission and retention of water then I cannot have any hesitation in accepting that working definition. It is consistent with two dictionary definitions to which I was referred in this case.

27. The *OED* definition is

> "An artificial basin excavated, built round with masonry, and fitted with flood-gates, into which ships are received for purposes of loading and unloading or for repair"

28. The definition in *Brodie's Dictionary of Shipping Terms* is

> "Enclosed basin almost surrounded by quays used for loading and discharging ships"

29. Having regard to Willmer J.'s definition (and indeed the two dictionary definitions) it seems clear that the Marina at Holyhead is not a dock in the ordinary meaning of that word.

30. I was however referred to a definition of a marina in the *OED* in these terms:

> "A dock, harbour, or basin in which yachts and other small craft are moored (usually specially designed for the purpose)"

31. Whilst I accept that a marina might well be located in a dock I have difficulty in accepting that a marina is a dock. It is not within Willmer J.'s understanding of a dock.

32. I was also referred to the decision of the Divisional Court in *The Environment Agency v Barras* [2017] EWHC 548 (Admin) where the court considered two marinas which were constructed in former gravel pits. The question was whether they were part of the River Thames within the meaning of The Thames Conservancy Act 1932. If they were, then craft moored in the marinas had to be registered. The context was therefore very different. In the course of his judgment Lindblom LJ referred to the *OED* definition of marina (or an earlier variant of it) and said at paragraph 35:

> "Thus defined, a marina fits comfortably within the concept of a "dock" in section 4 of the 1932 Act….."

33. I am not bound by that observation which was made in a quite different context. I was urged to follow it but I am not persuaded that it would be correct to say that, in the context of section 191 of the MSA 1995, the Marina at Holyhead is a dock within the ordinary meaning of that word.

34. The remaining question is whether the Marina at Holyhead is within the ordinary meaning of landing place, pier, jetty or stage.

35. The *OED* defines "landing place" as a place where passengers or goods can be landed or disembarked. Willmer J. in the *Humorist* held that a place where craft are invited to come and lie for the purpose of landing their goods was a landing place. The pontoons which make up the Marina at Holyhead are places where the owners of small leisure craft moor their craft. They are also places where those on board the small leisure craft, when they return from sea to the Marina, step ashore or "land". In that sense they are a landing place, though that is not their sole purpose. Counsel for the owners of the damaged craft submitted that the pontoons making up the Marina were not a landing place because they were in reality places where the small craft were moored for substantial periods, and not just for the purpose of "landing" those on board. Moorings, it was observed, are not to be found in the extended definition of "docks". In my judgment in ordinary usage the pontoons which make up the Marina are both mooring places and landing places. That is sufficient to bring them within the ordinary meaning of landing place.

36. I accept that they are not landing places used in the course of the business of merchant ships or passenger liners which is no doubt the typical example of a landing place in the context of commercial shipping. However, the right to limit was given to the owners of "docks" (as widely defined in the statute) as a reciprocal right to that of the shipowner to limit its liability to that of the owners of a "dock". The owners of the craft which moor at the pontoons making up the Marina and there land those on board can limit their liability for damage done to the Marina. It is thus consistent with the object or purpose of section 191 of the MSA 1995 (and its predecessor) to construe the definition of landing places as including the Marina so that the owners of the Marina have a reciprocal right to limit their liability to the owners of the craft using the Marina.

37. Counsel for the owners of the damaged craft submitted that in 1995, when marinas were in existence (compared with 1900 when they were not) neither they nor pontoons had been added to the list of structures included within the wide statutory meaning of "dock". But the wide statutory meaning includes a landing place which, for the reasons I have given, includes the pontoons where those on board craft may be landed.

38. I add this. It would, I think, be odd if a marina made up of pontoons placed in a large disused dock or excavated gravel pit (a basin) were within the statutory meaning of dock whilst those in Holyhead harbour were not.

39. For all these reasons I consider that the pontoons which make up the Marina are landing places and so are within the extended statutory definition of dock.

40. Reliance was also placed on "pier". *Brodie* defines a pier as a "structure at which ships can berth, built at right angles to the shore". The *OED* defines a pier as "a man-made 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 breakwater, a mole. Also: a landing stage in the sea or a river or lake, consisting of a platform supported on pillars and open beneath; (in later use) *esp.* a similar platform extending out to sea and used as a promenade or as a venue for entertainments."

41. Thus piers are structures at which vessels can berth and on which goods or passengers may be landed. Counsel for the owners of the damaged craft emphasised that the structure requires reinforcing piles or supporting pillars, none of which were found in connection with the pontoons in the Marina at Holyhead. In my judgment a "pier" in ordinary usage connotes a structure rather more substantial than the pontoons in Holyhead harbour. I was not persuaded that the ordinary meaning of pier could fairly extend to floating pontoons notwithstanding that the pontoons are used for berthing and for landing those on board the craft.

42. Reliance was also paced on "jetty". *Brodie* defines a jetty 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". The *OED* defines a jetty as including both "a breakwater, pier, etc., constructed to protect or defend a harbour, stretch of coast, or riverbank" and "a landing stage or small pier at which boats can dock or be moored". Thus a jetty can be a structure similar to a pier, usually a small pier, but it can also describe a landing stage, as suggested by the *OED*. I consider that the pontoons making up the Marina at Holyhead can fairly be described as landing stages and so, as the *OED* suggests, as jetties or, as counsel described them in opening, "finger jetties".

43. Finally, reliance was placed on "stage" which is listed as one of the structures within the statutory meaning of "dock". The OED defines a stage as "a platform used as a gangway, landing place, support or stand for materials, etc." Thus, just as the pontoons forming the Marina may be described as landing places, so they may be fairly described as stages, in the sense of a platform used as a landing place, notwithstanding that they are also used a mooring place.

44. I have therefore reached the conclusion that the pontoons which make up the Marina at Holyhead are within the statutory definition of "dock", being landing places, jetties

or stages. The Claimants are, it is accepted, the owners of the Marina, that is, of the pontoons which make up the Marina and so are, in principle, entitled to the right to limit conferred by the 1995 MSA. At trial there will be no more evidence than I now have concerning the Marina and so the Defendants have no real prospect of succeeding on this particular defence at trial. That part of their defence should therefore be struck out.

Loss of the right to limit

45. The Claimants also seek to strike out that part of the Defence which alleges that "in the premises the design construction and maintenance of the Marina constituted or comprised personal acts or omissions of the Claimant done recklessly and with knowledge that the damage suffered would probably result". The "premises" included allegations that the Claimant was "ultimately responsible for the design construction and maintenance of the Marina" and that the design construction and maintenance of the Marina was "woefully and obviously inadequate" by reason of several matters including the allegation that "the Marina was obviously vulnerable" to wind and swell from the North East.

46. Section 191(4) of the 1995 MSA incorporates article 4 of the Limitation Convention which provides that:

> "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."

47. There is no dispute that the burden lies upon the Defendants to allege and prove conduct which bars the right to limit.

48. Although the witness statement of Mr. Crockford served in support of the Defendants' case concentrates on recklessness it is accepted by counsel for the Defendants that it is not enough to allege and prove recklessness. There must also be alleged and proved actual knowledge that the loss which occurred would probably result. These principles are stated unambiguously by David Steel J. in *The MSC ROSA M* [2000] 2 Lloyd's Rep. 399 at paragraphs 12-17 and 23. In that case the *alter ego* of the shipowner was identified in the pleading but the pleading failed to alleged actual knowledge that the damage in question would probably result. Instead it was alleged that the relevant person knew or ought to have known that the damage in question would probably result. That was not a sufficient plea; see paragraph 27(i) and (vi). There must be actual knowledge of the very damage which was caused. In *The Leerort* [2001] 1 Lloyd's Reports 291 Lord Phillips emphasised at paragraph 13:

> "It is only conduct committed with intent to cause such loss or recklessly with knowledge that such loss would probably result that defeats the right to limit. It seems to me that this requires foresight of the very loss that actually occurs, not merely of the type of loss that occurs."

49. In contrast with the position with regard to carriage by air (see *The Leerort* at paragraphs 11-13) conduct barring the right to limit must be the "personal" act or

omission of the shipowner or other person seeking to limit his liability. It is not enough that a servant or agent of the shipowner or other person seeking to limit his liability has been guilty of the requisite conduct. Thus what must be shown is that the *alter ego* or directing will and mind of the shipowner, or in this case the dock owner, has been guilty of conduct which bars the right to limit.

50. In the present case the *alter ego* or directing will and mind of the Claimants is not identified in the (unamended) Defence. Whether the Defendants are relying upon the state of mind of the servants or agents of the Claimants at the time of the design, construction and maintenance or the state of mind of the *alter ego* of the Claimants is not stated. The former would not be a sufficient plea. The latter must be alleged. The allegation that the Claimants were "ultimately responsible" for the design, construction and maintenance of the Marina is of uncertain meaning. It suggests that attention is being given to vicarious liability which is not relevant in the present context and does not suggest that attention was being directed at the state of mind of the natural person who is the *alter ego* of the Claimants.

51. This is the principal difficulty with the Defendants' pleading. It does not identify the *alter ego* or directing will and mind of the Claimants, that is, the natural person whose act or omission would amount to the personal act or omission of the Claimant committed recklessly and with knowledge that the damage which occurred would probably result. In my judgment a pleading which fails to identify that natural person is defective. To plead simply that there were "personal acts or omissions of the Claimant done recklessly and with knowledge that the damage suffered would probably result" is inadequate. The charge of "recklessness with knowledge that the damage suffered would probably result" is a grave and serious charge to make. It ought to be made with particularity so that the Defendants know the natural person or persons whose conduct and state of mind is under attack.

52. Counsel for the Defendants informed me that the allegation was made against Mr. Hughes and Mr. Garrod. They, it is said, were directors of the Claimants in 2000 when the Marina was designed and built and remained directors in the years thereafter when the Marina was used and required to be maintained. Counsel sought time to serve an amended pleading making that clear and identifying the facts and matters upon which reliance was placed.

53. In view of the importance of this issue to the Defendants I decided to allow this, whilst permitting counsel for the Claimants to make written submissions on the adequacy of the amended pleading.

54. It was also said by counsel for the Claimant that the pleading was defective because there is no pleaded allegation that the Claimant caused the damage to the craft by any act or omission committed with actual knowledge that such damage would probably result

55. That amended pleading was served on 10 June 2020 (and written submissions concerning the adequacy of this pleading were exchanged on 12 and 19 June 2020).

56. The particular defect to which I referred has been cured. Mr. Hughes and Mr. Garrod, as directors of the Claimant, are identified as "the controlling minds" of the Claimant. But in addition the pleading has been amended to identify the acts or omissions of Mr.

Hughes and Mr. Garrod which are relied upon as personal acts or omissions of the Claimant. Thus paragraph 13.4.11 alleges:

> "Despite this knowledge of past damage and risk of future damage, the Claimant (and specifically Mr Hughes and/or Mr Garrod) chose to take no action to prevent or mitigate future damage including in particular and without prejudice to the generality of the foregoing:
>
> 13.4.11.1. strengthening the connections between pontoons;
>
> 13.4.11.2. building a solid breakwater, which Mr Garrod and/or Mr Hughes knew was important to prevent both direct wave and reflective wave energy. As Mr Garrod says in the Scoping Report a solid breakwater would:
>
> > "…help to dissipate wave energy and protect elements of the historic outer breakwater";
>
> and the use of floating breakwaters were unsuitable and gave insufficient protection, as Mr Garrod and/or Mr Hughes must already have known by the time of the casualty, given the history of damage and failures at the Marina;
>
> 13.4.11.3. building any other form of adequate protection that would have withstood E-NE gales;
>
> 13.4.11.4. ceasing operations unless and until proper protection could be put in place;
>
> 13.4.11.5. informing vessel owners of the risks that were known to Mr Hughes and/or Mr Garrod; and
>
> 13.4.11.6. removing or requiring the removal of the Defendants' vessels when Storm Emma was forecast."

57. It is then alleged:

> "In the premises:
>
> 13.5.1. It was reckless to:
>
> > 13.5.1.1. maintain the Marina in the ways set out above;
> >
> > 13.5.1.2. continue to operate the Marina up to and including the date of the casualty when the shortcomings in its design (in particular the lack of shelter) and maintenance had become manifest by the occurrence of damage in less severe conditions than Storm Emma; and

> 13.5.1.3. take no preventative measures to prevent the damages arising despite the clear forecasting of Storm Emma.
>
> 13.5.2. The said reckless acts and omissions and constituted the personal acts and omissions of the Claimant, being the acts and omissions of Mr Hughes and/or Mr Garrod.
>
> 13.5.3. The damage to the Marina and to the Defendants' vessels resulted from the combined effects of the said reckless acts and omissions.
>
> 13.5.4. It is inconceivable that Mr Hughes and/or Mr Garrod did not know that the damage would probably result from their acts and omissions and it is to be inferred that they did.
>
> 13.5.5. Thus the ~~design, construction and maintenance of the Marina constituted or comprised~~ damage resulted from personal acts and omissions of the Claimant, namely [by] reason of the conduct of Mr Hughes and/or Mr Garrod, done recklessly and with knowledge that the damage suffered would probably result."

58. Counsel for the Claimant has submitted that permission to amend should not be given for this amendment because there is still, as with the unamended pleading, an inadequate plea of the required knowledge. Counsel made these submissions:

> "13. ….the essence of the Defendants' proposed amendments is that the Court can infer that Mr Hughes and Mr Garrod must have been aware of the possibility that a north easterly storm might cause damage to the Marina: see, e.g., paragraphs 13.4.4, 13.4.8.4, 13.4.10 and 13.4.11.
>
> 14. On that basis, Mr Hughes and Mr Garrod are said to have had knowledge of "[the] risk of future damage" (paragraph 13.4.11). Similarly, at paragraph 13.4.4, Mr. Hughes and Mr Garrod are said to have known that the marina would "probably suffer damage in north-easterly to easterly gales".
>
> 15. However, knowledge that the Marina might suffer some damage from a north-easterly storm is not enough to bring the case within Article 4. The required actual knowledge is knowledge that the very loss which gives rise to the claim would probably result. The loss in this case is damage to yachts in the Marina as a result of the catastrophic failure and break-up of the Marina.
>
> 16. Even now, the Defendants do not allege that Mr Hughes or Mr Garrod foresaw the destruction of the Marina itself and consequential damage to yachts within the Marina. The most they can allege is that Mr Hughes and/or Mr Garrod

> appreciated that there was the risk of some damage resulting from a storm."

59. Notwithstanding the force and clarity with which this criticism is advanced I have concluded that paragraph 13.5 of the amended pleading makes the requisite allegation. The damage caused is described as "damage to the Marina and to the Defendants' vessels" (see paragraph 13.5.3) and that damage (fairly read) is the damage of which Mr. Hughes and Mr. Garrod are said to have knowledge would probably result (see paragraphs 13.5.4 and 13.5.5). I consider that "the premises" (in particular paragraphs 13.4.4, 13.4.8 and 13.4.10) can support the allegations made.

60. Counsel's further submission is that permission to amend should be refused because there is no realistic prospect of the Defendants successfully establishing that Mr. Hughes and Mr. Garrod knowingly brought about the destruction of the Marina by any act or omission in circumstances where the Marina was their livelihood. It has to be said that the Defendants' case appears to be implausible. Negligence is plausible. Perhaps even recklessness in the sense of a disregard of obvious risks to craft in the Marina is plausible. But such conduct with knowledge that the destruction of the Marina managed and controlled by Mr. Hughes and Mr. Garrod and the resulting damage to 89 craft would probably result is implausible. It involves saying that Mr. Hughes and Mr. Garrod actually knew that their acts and omissions would probably cause serious damage to the Marina which was their livelihood with consequential damage to 89 craft.

61. I was not referred to any evidence that Mr. Hughes and Mr. Garrod had such knowledge. The allegation is that "it is inconceivable that Mr. Hughes and Mr. Garrod did not know that the damage would probably result from their acts or omissions." The necessary knowledge will have to be inferred from the facts which can be established. What has to be inferred is "actual knowledge" that the damage which in fact occurred would probably result; see the *MSC ROSA M* at paragraph 23 per David Steel J. What this involves was discussed in the context of air carriage in *Nugent and Killk v Michael Goss Aviation* [2000] 2 Lloyd's Reports 222 at, for example, p.229, "appreciation or awareness", per Auld LJ, and p.232 "actual conscious knowledge" per Dyson J. These are high hurdles.

62. In the case of a collision between ships such knowledge on the part of the owner is implausible because it involves the owner having actual knowledge that his own ship will probably be involved in a collision; see the *Leerort* [2001] 2 Lloyd's Reports 291 at paragraph 18 per Lord Phillips. In the case of an air accident such knowledge is implausible because it involves the pilot having actual knowledge that his own death will probably be caused; see *Nugent and Killk v Michael Goss Aviation* at p.229 per Auld LJ. In the present case it is implausible because it involves Mr. Hughes and Mr. Garrod at the time of their alleged act or omissions having actual knowledge that "their" Marina would be damaged (or destroyed) with damage to as many as 89 craft.

63. The Defendants have pleaded an awareness on the part of Mr. Hughes and Mr. Garrod of storms causing minor damage. Thus it is said (see paragraph 13.4.8.1 of the Amended Defence):

> "Mr Hughes advised that in February 2017 a storm from the west caused some damage, although gave the impression that

> the damage was relatively minor, however repairs to one aspect of the damage had only recently been completed when Storm Emma passed in March 2018".

64. It is also alleged (see paragraph 13.4.8.4 of the Amended Defence) that Mr. Garrod said:

> "The marina was always vulnerable to north easterly storms but operated successfully with very little damage to vessels or pontoons until March 2nd 2018"

65. These statements by Mr. Hughes and Mr. Garrod suggest that any knowledge they might have had of probable damage to the Marina was minor damage, not the serious damage to the Marina which caused some 89 craft to sustain damage.

66. There is the further difficulty that it will be necessary for the Defendants to establish that Mr. Hughes and Mr. Garrod had the necessary actual knowledge at the time they committed an act or omission which caused the damage. Given that the winds generated by storm Emma were an infrequent event, albeit (it is said) foreseeable, this is likely to be difficult.

67. However, an application to strike out an allegation is not an occasion for a mini-trial. It is to be noted that there is at least one case where the claim of a shipowner to limit his liability for collision damage was allowed to proceed to trial in circumstances where the shipowner was alleged to have committed personal acts or omissions recklessly with knowledge that damage by collision would probably result; see the *Saint Jacques II* [2003] 1 Lloyd's Reports 203. In that case there was a powerful case of recklessness and Gross J. noted the observations in *Nugent and Killik v Michael Goss Aviation* to the effect that, depending how obvious the risk is, recklessness and knowledge will often stand or fall together; see paragraph 16 at p.208 and paragraph 21 at p. 209. Gross J. considered (see paragraph 21 at p.210) that the case before him was an example of that.

> "…..on the facts of the appalling navigational practice here (admittedly) conducted under the personal direction of the first claimant, coupled with the obviousness of the risk of collision, it would be permissible and open to the court at trial to infer that the first claimant had, at the time in question, the relevant actual knowledge that a collision would probably result".

68. In the present case much of the pleading (and the evidence relied upon) concerns alleged acts or omissions committed recklessly. The matter is put very high; see paragraph 13.4.2 of the Amended Defence which refers to a "cavalier disregard for safety". Whilst counsel for the Marina submitted, with force, that "disregard" is not "knowledge", there is perhaps the glimmer of an argument, though perhaps not as real as in the *Saint Jacques II*, that the risk of serious damage to the Marina and the craft moored within it was so obvious that the required actual knowledge might be inferred. In this regard I have noted the matters set out in the Appendix to the written submissions of counsel for the Defendants, in particular the passages relating to knowledge of damage by "reflective waves". Although it remains, in my judgment, most improbable that the requisite actual knowledge will be established I do not feel able to strike out the defence prior to trial. It has, just, a real prospect of success.

69. I therefore do not strike out this part of the Defence.

The quantum of the limit

70. The quantum of the limit is assessed "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" (see section 191(2) of the MSA 1995). The method of calculation is that provided by the Limitation Convention.

71. There is a dispute as to "the area over which the authority or person discharges any functions". The Claimant says that area is the area of the Marina because that is the only area over which it has any control, by reason of its lease of the Marina. The Defendants say that it is the entire harbour, including the Outer Harbour to the east, as limited by pecked magenta lines on the chart. Alternatively, they say it is the area of the harbour which includes the fairway to the Inner Harbour and the harbour to the west of that. In either case the area includes the pier used by the ferries which operate between Holyhead and Dublin. I shall therefore refer to the "harbour" as being the relevant area of water on the Defendants' case. They say that the Claimant discharges a function over the harbour because under the lease of the Marina, clause 3.29 the Claimant is obliged to

> "ensure that the control of the Marina and all port movements in and in connection with the Marina comply with the directions of the Harbour Port Authority at Holyhead and all byelaws regulating the Port of Holyhead."

72. This is an important question because the Defendants say that the largest vessel in the harbour in the preceding 5 years was one of the vessels providing the ferry service to Dublin, the *Stena Adventurer*. The limit calculated by her tonnage (43,532 grt) would exceed the claims of the Defendants. However, the Claimant says that the largest craft in the marina in the preceding 5 years was less than 300 grt (in fact 140 grt) and so the limit of liability is 500,000 units of account, approximately £550,000.

73. A "function" in the present context appears to be an activity or action. It may or may not be carried out pursuant to a duty. In this regard the language of the 1995 Act is to be contrasted with that of the 1900 Act which referred to the area over which the dock owner "performs any duty or exercises any power". But to "discharge" a function suggests doing that which is necessary to fulfil a responsibility or a duty. It was submitted by counsel on behalf of the Claimant that owing a duty to do something is different from discharging a function which involves "doing something". I agree. But discharging a function implies that there is some underlying responsibility or duty to fulfil. That is the ordinary meaning of the phrase but it also appears to be the sense in which it is used in other sections of the MSA 1995 which refer to the discharge of the responsibilities of lighthouse authorities, the Receiver of Wreck, the Secretary of State and the Chief Inspector of Marine Accidents, see sections 195-7, 231, 248-9 and 267 of the MSA 1995.

74. Thus there are two matters to consider. First, does the Claimant have any responsibility or duty to fulfil in respect of an area outside the boundaries of the

Marina but including the area of the harbour in which the ferries navigate? Second, does the Claimant in fact discharge such a responsibility or duty ?

75. There can be no doubt that the Claimant discharges certain functions over the area of the Marina for it has control or management of that area.

76. Counsel for the Defendants made these submissions in his skeleton argument with regard to the relevant area being the harbour:

> As a marina operator, the Claimant by definition exercises functions over a wider area, including in particular the approaches to the Marina via the channel and other parts of Holyhead Harbour. Among other things:
>
> Mr Crockford is instructed by one of the Defendants (Mr Dennis) that the Marina communicates by VHF to approaching vessels to advise on berthing and related matters.
>
> The Claimant was required to ensure that users of the Marina complied with the Bye-laws, whether by operation of law and/or expressly under the lease…………..
>
> The Claimant's own website even records as follows, including a warning to obey the harbour regulations:
>
> "***Speed Limits and Harbour Bye-Laws***
>
> *The Harbour Bye-Laws are displayed in reception. We would ask all visitors and berth holders to familiarise themselves with these rules and obey them at all times.*
>
> *In particular please observe the speed limits. In the outer harbour well away from berths and moorings your speed should never exceed 12 knots. In the vicinity of the moorings and berths your speed should be dead slow and just sufficient to keep the vessel under proper control.*
>
> *Anyone causing swell or wake irresponsibly will have their berthing licence terminated immediately*".
>
> Finally, the Claimant's mooring conditions provide:
>
> "*15.3 Advisory note: Owners, their guests and crew are advised that their conduct and that of their vessel is likely to be regulated and governed at various times by statutory, local authority and harbour regulations which may be more extensive than those of the Company and the breach of which may involve criminal penalties*".

77. There does not appear to be any material dispute as to the facts underlying these submissions.

78. The Claimant owes a contractual duty to the lessor of the Marina to "ensure that the control of the Marina and all port movements in and in connection with the Marina comply with the directions of the Harbour Port Authority at Holyhead and all byelaws regulating the Port of Holyhead." This obliges the Claimant to take steps to ensure that the movements of craft "in and in connection with the Marina" comply with the directions of the harbour authority and with the byelaws. This must oblige the Claimant, at the least, to advise craft who plan to use the Marina and will of necessity proceed through the harbour to the Marina to obey the applicable speed limits. It appears that the Claimant seeks to discharge this duty by putting an appropriate notice on its website and in its terms and conditions. The Claimant's terms and conditions enable the Claimant to terminate the licence of a craft to use the Marina if it breaches the directions of the harbour authority or the byelaws. In that way the directions of the harbour authority or the byelaws can be "enforced" by the Claimant but of course it has no power to impose any regulatory or criminal penalty.

79. It is also accepted that the Claimant communicates with craft approaching the Marina by vhf. The Claimant does so on vhf channel 37 with regard to matters affecting the Marina, such as available berthing positions. Navigational matters such as speed are not discussed. Such matters are for those navigating the craft. There was no evidence from the Defendants that vhf instructions with regard to navigational matters were given by vhf.

80. The crucial question is whether the discharge of the Claimant's contractual duty pursuant to clause 3.29 of the lease or the vhf conversations with craft approaching the Marina amounts to discharging a function over the area of the harbour.

81. Counsel for the Claimant submitted that the duty of the Claimant was contractual, not statutory (unlike for example lighthouse authorities which have statutory functions). That is true but I do not consider that the discharge of functions in section 191 is restricted to the discharge of statutory functions. There are no words which have that effect. The owners of docks do not appear to have statutory functions (or at any rate I was not referred to any) and yet they are entitled to limit their liability by reference to the tonnage of the largest vessel in the area over which they discharge their functions. That being so I consider that the functions referred to in section 191 can be non-statutory and so may arise from the lease of the Marina which entitled them to manage and control the Marina.

82. The byelaws regulating the use of the harbour are enforced by the harbour authority. There is no suggestion that the Claimant enforces them save by the ability of the Claimant to terminate the berthing license of an offending craft. The Claimant does however discharge a function with regard to those owners of craft who wish to use the Marina. It is obliged to ensure that those owners comply with the regulations of the harbour authority and the byelaws and the Claimant appears to discharge that function. But is that discharging a function over the area of the harbour beyond the boundaries of the Marina ? I do not consider that it is because the only area of water over which it can exercise control or authority is that of the Marina. It cannot exclude a craft from the harbour but it can exclude a craft from the Marina. Whilst it can fairly be said that the Claimant discharges a function over the Marina I do not consider that it can fairly be said that it discharges a function over the area of the harbour beyond the boundaries of the Marina. Rather, it discharges a function over the craft which proceed to and use the Marina.

83. Whilst there is logic or reason in limiting the liability of the Marina to the tonnage of the largest craft using the Marina there is no logic or reason in limiting the liability of the Marina to a passenger ferry which uses the harbour but over which the owners of the Marina exercise no function and which does not (and almost certainly cannot) use the Marina.

84. For these reasons I have concluded that the Defendants have no real prospect of establishing that the limit of the Claimant's liability exceeded the total sum claimed of some £5 million. There was no suggestion that evidence would or might be available at trial which suggested that craft of greater tonnage than 140 tons had visited the marina in the preceding 5 years. The relevant part of the defence should therefore be struck out.

Conclusion

85. The allegation that the Claimant is not the owner of a dock within the meaning of section 191 of the MSA 1995 and the allegation that the limit of the Claimants' liability should be assessed by reference to the tonnage of a passenger ferry must be struck out because they have no real prospect of success. However, the allegation that the Claimant has lost the right to limit cannot be struck out because it has, just, a real prospect of success. The Claimant is therefore not entitled to summary judgment.

86. However, it was submitted by counsel for the Marina that if the Court is minded to permit the amendments to the Defence (as it is), it should do so only on condition that, within 14 days of the Court's order:

(1) the Defendants pay the Claimant's costs of the applications on the indemnity basis; and,

(2) the Defendants make a payment into Court in respect of the Claimant's anticipated costs of the Article 4 defence.

87. In response it was submitted by counsel for the Defendants that the Defendants should not be liable for the costs of the whole application unless the Claimants obtain summary judgment (which they have not) in which case costs should be assessed on the standard basis. With regard to the submission that the amendment should only be permitted on condition that there be a payment into court in respect of the Claimants' costs of the Article 4 defence this was opposed on the grounds that the reasons advanced in support of it were "circular, tendentious and irrelevant".

88. So far as costs are concerned my provisional view, subject to argument after judgment has been handed down, is that the Claimant should have two thirds of their costs of the applications because they succeeded on two out of the three points which were argued. Those costs should be assessed on the standard basis. The costs of the remaining one-third should be the Claimant's costs in the limitation action, that is, if the Claimant obtains a limitation decree it will receive the remaining one-third of the costs but if the Defendants establish their case and so the Claimant fails to obtain a limitation decree the Claimant will not have pay any costs of these applications to the Defendants. That reflects the fact that the court would have struck out the Defence had it not been amended. The

basis of assessment (standard or indemnity) should be reserved to the judge determining the right to limit.

89. With regard to the making of a conditional order, namely, that if security for the Claimant's costs of a contested limitation action is not provided within a certain period of time, the Defence shall be struck out, I have had regard to the principles underlying such an order as explained in *Abbotts Investment Limited v Nestoil Limited* [2017] EWHC 119 (Comm) at paragraphs 20-23. The Claimant has been described by counsel for the Defendants as "a small company with two controlling minds and very few staff". Its right to limit has been described by high authority as "almost indisputable". The Practice Direction to CPR 24, paragraph 4, provides for a conditional order where a defence is "improbable". The Defendants' case that the Claimant has lost its right to limit is, on the issue of "actual knowledge", weak and implausible. It will very probably fail. In those circumstances it appears to me to be fair and just that security for the costs of the Claimant's limitation action (excluding those which would be incurred in any event) should be provided. The purpose of such an order is to provide the Claimant with security for the payment of its costs to be incurred in resisting a defence which will very probably fail. A conditional order appears to me to be a proportionate and effective means of achieving that purpose. There has been no suggestion by counsel for the Defendants that the making of such an order will or may stifle the Defendants' defence. What has been suggested is that it is "fundamentally unfair" to make the Defendants give security for their potential liability in costs but not the Claimant for the Defendants' costs of the "underlying substantive claims". However, I have not been referred to the proceedings in which those claims are being advanced and the question whether the claimants in those proceedings are entitled to security for their costs will or may raise other considerations. I will therefore make the requested conditional order. I ask the parties to seek to agree the amount and form of the security, and the period of time in which it should be provided, failing which the Defence shall be struck out.

90. The Defendants have made an application for disclosure. The Claimant will, I have no doubt, consider that application in the light of this judgment. The court will consider the appropriate directions to be given for the further conduct of this limitation action at a "consequentials" hearing which I request the parties to fix.