Trinity Term
[2016] UKPC 20
Privy Council Appeal No 0114 of 2014

JUDGMENT

Bahamas Oil Refining Company International Limited (Appellant) *v* The Owners of the Cape Bari Tankschiffahrts GMBH & Co KG (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

19 July 2016

Heard on 23 February 2016

Appellant	*Respondents*
Peter MacDonald Eggers QC	Luke Parsons QC
Oscar Johnson	Paul Henton
Tara A Archer	Kenra Parris-Whittaker
(Instructed by Clyde & Co LLP)	(Instructed by Reed Smith LLP)

LORD CLARKE:

Introduction and essential facts

1. On 25 May 2012, during a berthing operation, the respondents' vessel *Cape Bari* ("the vessel") collided with Sea Berth no 10 at Freeport in Grand Bahama. Sea Berth no 10 was the property of the appellant ("BORCO") and was part of its storage facility. As a result of the damage caused by the collision, BORCO initially claimed damages in the amount of about US$26.8m, plus interest, against the respondents ("the owners"). It later reduced its claim to some US$22m. The owners say that they are entitled to limit their liability (if any) to 11,012,433 Special Drawing Rights (calculated by reference to the vessel's gross tonnage), being approximately US$16.9m plus interest, under the Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989 of the Bahamas ("the 1989 Act"), which incorporated into Bahamian Law the Convention on Limitation of Liability for Maritime Claims 1976 ("the 1976 Convention"). BORCO denies that the owners are entitled to limit their liability, on the ground that they had waived their right to do so under a contract which it was agreed that the parties had made immediately before the berthing operation. The contract is contained in or evidenced by a document referred to hereafter as "Conditions of Use" which was signed by the master.

2. On 20 September 2012, upon the owners' *ex parte* application, the court made an order for the constitution of a limitation fund in the amount of US$16,995,487.84. By a summons dated 16 October 2012, BORCO applied to the court for an order setting aside that order. At first instance, in a judgment dated 9 August 2013, Senior Justice Hartman Longley ("the judge") held that the owners were not entitled to limit their liability because, on the true construction of the contract, they had contracted out of their right to limit. It was common ground before the judge that, under both the 1989 Act and the 1976 Convention, it was permissible for the owners to contract out of their right to limit.

3. On 22 May 2014 the Court of Appeal (Allen P and Blackman and Adderley JJA) reversed the decision of the judge, not on the ground that he erred in his construction of the Conditions of Use, but on the different ground that, under articles 2.1 and/or 2.2 of the 1976 Convention it was not permissible to contract out of the right to limit, even by entering into a contract of indemnity. However it is not in dispute that this issue was not argued before the Court of Appeal because it then remained common ground that it was permissible for parties to contract out of the 1989 Act and the 1976 Convention.

4. It is submitted on behalf of BORCO that the Court of Appeal was wrong to reverse the decision of the judge because (1) on the true interpretation of the 1989 Act

and the 1976 Convention it was permissible for the owners to contract out of the right to limit (as both parties had acknowledged) and (2) on the true construction of the Conditions of Use, the owners had done so. BORCO also complains that the Court of Appeal acted unfairly in disposing of the appeal on a ground which had not been argued by either party and which the court gave neither party an opportunity to address in argument.

5. So far as relevant to this appeal, the facts are not in dispute. The vessel arrived at Freeport at about 1318 hours on 25 May 2012 with a view to berthing in order to load a cargo of crude oil at BORCO's terminal. At or soon after 1330 hours, two pilots boarded the vessel. It was a requirement at the terminal that the vessel would berth using tugs and a pilot provided by BORCO, although they were in fact supplied through BORCO's affiliate company, BORCO Towing Company Ltd ("BORTOW"). At about 1336 hours, the master and the pilots exchanged information and the master, as agent for the owners, signed two agreements as presented to him. The first was a Pilotage/Towage Agreement relating to the provision of pilotage and tug services. The second was an agreement headed "Conditions of Use of Jetties, Sea Berth and Inner Harbour Berth at Freeport, Grand Bahama" relating to the owners' use of BORCO's facilities, which the Board will call the "Conditions of Use". Shortly after the agreements were signed, at about 1348 hours on the same day, 25 May 2012, two tugs arrived and towing lines were secured to the vessel and at or soon after 1350 hours, the vessel proceeded towards Sea Berth no 10. Very shortly thereafter, at about 1401 hours, the vessel collided with Sea Berth no 10, causing substantial damage.

6. Both of the agreements were expressed to be governed by the law of the Bahamas. Clause 2 of the Pilotage/Towage Agreement provided:

> "2. Whilst towing and/or piloting the vessel, the Pilot and the Master and the crew of the tug shall be deemed the servants of the Owner of the vessel (the 'Owner') and/or servants or agents and shall be under the control of and identified with the Owner and/or his servants or agents, and anyone on board the vessel who may be employed and/or paid by BORTOW shall be considered the servant of the Owner."

Clauses 1, 4 and 6 of the Conditions of Use provided, so far as material

> 1. … In all circumstances the Master of any vessel shall remain solely responsible on behalf of his owners for the safety and proper navigation of his vessel …

> 4. If in connection with, or by reason of, the use or intended use by any vessel of the terminal facilities or any part thereof, any damage is caused to the terminal facilities or any part thereof from whatsoever cause such damage may arise, and irrespective of weather [sic] or not such damage has been caused or contributed to by the negligence of BORCO or its servants, and irrespective of whether there has been any neglect or default on the part of the vessel or the Owner, in any such event the vessel and the Owner shall hold BORCO harmless from and indemnified against all and any loss, damages, costs and expenses incurred by BORCO in connection therewith. Further, the vessel and her Owner shall hold BORCO harmless and indemnified against all and any claims, damages, cost and expenses arising out of any loss, damage or delay caused to any third party arising directly or indirectly from the use of the terminal facilities or of any part thereof by the vessel ...
>
> 6. These Conditions of Use are the [sic] be interpreted and construed in accordance with the Laws of the Bahamas.

The issues

7. In the agreed statement of facts and issues the parties agreed that the principal issues which arise in this appeal are these. (1) Is it permissible for the owners of a vessel to contract out of or waive their statutory right of limitation under the 1989 Act and the 1976 Convention? (2) On the true construction of the agreement contained in or evidenced by the Conditions of Use, did the owners and BORCO agree to exclude the owners' right to limit their liability under the 1989 Act and the 1976 Convention? (3) Accordingly, are the owners entitled to a declaration that their liability in respect of damages caused as a result of the Collision shall be no more than $16,995,487.84 plus interest thereon in the amount of $342,695.90? In addition the Board is asked to consider whether the Court of Appeal acted unfairly in holding that it was not permissible for the owners of a vessel to contract out of or waive its statutory right of limitation under the 1989 Act and the 1976 Convention because the Court of Appeal (a) determined the appeal from the decision of the judge on a basis not put forward by either party and not raised by the Court of Appeal during the hearing and (b) failed to give BORCO a reasonable opportunity to argue before the Court of Appeal that any such conclusion was wrong as a matter of law.

8. The agreed statement of facts and issues also contains a further question which seems to the Board to be encompassed in the issues set out above. It also says that there are in addition consequential issues relating to procedural matters, including BORCO's application for an order setting aside the order dated 20 September 2012 relating to the constitution of a limitation fund. The Board will return to this, so far as necessary, below. It is convenient first to discuss the first two questions set out in para 7 above in

the order set out in the statement of facts and issues. However, before doing so, it is appropriate to refer briefly to the statutory limitation regime set in its international and historical context.

The right to limit set in context

9. The 1976 Convention superseded the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships of 1957 ("the 1957 Convention"), to which the Bahamas was a party by accession. The earlier UK legislation of particular relevance, prior to international harmonisation, was section 503 of the Merchant Shipping Act 1894, and prior to that section 54 of the Merchant Shipping Act Amendment Act 1862, which was the statutory regime in operation when *Clarke v Earl of Dunraven and Mount-Earl (The Satanita)* [1897] AC 59 was decided. In order to limit its liability at that time it was necessary for the owner to show that the damage had been caused without its actual fault or privity.

10. The 1976 Convention radically altered the position. It introduced a harmonised and uniform set of rules in relation to limitation of liability for maritime claims around the world, including the Bahamas. Chapter 1 is entitled "THE RIGHT OF LIMITATION" and contains articles 1 to 4. Article 1.1 provides:

> "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."

The remainder of article 1 is not relevant for present purposes.

11. Article 2, which is entitled "Claims subject to limitation" provides, so far as relevant:

> "1. Subject to articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
>
> > (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom ...

> 2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise ..."

12. Article 2 is expressly subject to articles 3 and 4. Article 3 lists certain claims which are excepted from article 2 and which are not relevant here. Article 4, which is entitled "Conduct barring limitation" and which is the sole provision to that effect, provides:

> "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."

13. There are critical differences between the 1976 Convention and its predecessor, the 1957 Convention. In particular, article 1.1 confers on "shipowners" and "salvors" (as defined) a statutory entitlement to limit their liability in respect of claims falling within the categories listed in article 2, which provides by article 2.1 that the claims listed "whatever the basis of liability may be, shall be subject to limitation of liability", which makes clear that the right to limit now exists whether the claim is brought in contract, tort, or otherwise. The 1957 Convention and preceding regimes contained no equivalent provision. Thus prior to the 1976 Convention, owners were unable to limit their liability where the claim was based on a contractual liability to indemnify (as opposed to a damages claim within a listed category - typically a claim in negligence).

14. It can thus be seen that the limitation regime in the 1976 Convention is less favourable to owners than it was previously in that the financial limit is significantly higher but, importantly, that a claimant can only break the limit if it proves either intention or recklessness with knowledge that damage will probably result. This is a high hurdle to jump and is very rarely jumped with success. So, for example in *Schiffahrtsgesellschaft MS Merkur Sky mbH & Co KG v MS Leerort Nth Schiffahrts GmbH & Co KG* (*The Leerort)* [2001] EWCA Civ 1055; [2001] 2 Lloyd's Rep 291, Lord Phillips MR (with whom Henry and Brooke LJJ agreed) said in the Court of Appeal at para 9 that he could do no better that adopt some passages from the judgment of Sheen J in *The Bowbelle* [1990] 1 WLR 1330. They included the following: that the 1976 Convention had brought about "a profound change" (p 1332) or a "dramatic change" (p 1334) in the law of limitation. In para 10 Lord Phillips quoted this passage from the judgment of Sheen J at p 1335:

> "I return to consider the Convention of 1976, under which shipowners agreed to a higher limit of liability in exchange for an almost indisputable right to limit their liability. The effect of

> articles 2 and 4 is that the claims mentioned in article 2 are subject to limitation of liability unless the person making the claim proves (and the burden of proof is now upon him) that the loss resulted from the personal act or omission of the shipowner committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This imposes upon the claimant a very heavy burden."

The Board turns to the specific questions identified by the parties.

(1) Is it permissible for the owners of a vessel to contract out of or waive their statutory right of limitation under the 1989 Act and the 1976 Convention?

15. As stated above, it was common ground before the judge that the answer to that question was yes. The Court of Appeal answered the question no and, moreover, did so without the point being taken and without giving the parties the opportunity to make submissions on it. The Board wishes to make it clear at the outset that the Court of Appeal ought not to have decided the point without giving the parties such an opportunity. In very many cases, such an approach will lead to an appeal against the decision being allowed. However, both parties have now had the opportunity of putting their argument on the substance of the point to the Board. In the course of his oral submissions on behalf of the owners the Board asked Mr Luke Parsons QC whether the owners intended to maintain their stance on the question raised by issue one. He replied that they did, although he said that he did not intend to add oral submissions to those set out in the owners' written case. In the event the Board is satisfied that it has sufficiently detailed submissions on both sides on this issue and that the ends of justice will served by the Board considering the question on its merits, especially since it raises an issue of some general importance.

16. The general approach in accordance with which the 1976 Convention should be construed was considered by the Court of Appeal in *CMA CGM SA v Classica Shipping Co Ltd* [2004] 1 Lloyd's Rep 460; [2014] EWCA Civ 114, in a judgment given by Longmore LJ, with whom Neuberger and Waller LJJ agreed, at paras 9-11.

17. First, the interpretation of international conventions must not be controlled by domestic principles but by reference to broad and generally acceptable principles of construction. The task of the court is therefore to construe the 1976 Convention as it stands without any English law preconceptions. Secondly, some particular broad and generally acceptable principles of construction are set out in articles 31-32 of the 1969 Vienna Convention on the Law of Treaties, which provide:

> "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."

18. The Board adopts the following conclusions of Longmore LJ in his para 10 based on those provisions:

> "As I read these provisions, 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 preparatoires 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."

In the opinion of the Board Longmore LJ correctly had regard to the contrast between the 1976 Convention and its predecessor, as the Court of Appeal had done in *The Leerort*.

19. Applying those principles of construction, the Board is of the clear opinion that it is open to parties, here shipowners, to agree to waive their right to limit their liability under the 1976 Convention or the 1989 Act. Simply as a matter of language, the Board concludes that there is nothing in the language of the Convention or the Act to prohibit them from doing so.

20. The 1989 Act throws no light on the point distinct from the 1976 Convention. It simply provides in section 3(1) that the provisions of the 1976 Convention "shall have the force of law in The Bahamas". It follows that all turns on the construction of the Convention. The language of the Convention strongly supports the conclusion that there is nothing to prevent shipowners agreeing to waive their right to limit. Chapter 1 expressly refers to the *right of limitation*. Article 1.1 provides that they *may limit their liability … for claims set out in article 2.* The Board emphasises those provisions because they show that the Convention confers rights on shipowners and not duties. There is no linguistic support for the conclusion that shipowners cannot agree to pay more than the limit or, more accurately, cannot agree to pay a particular claimant more than the limit provided for in the Convention. They have a right to limit, which they can choose to exercise, or not, as they please.

21. Some reliance was placed on behalf of BORCO on the *travaux préparatoires.* However, the Board does not attach significance to it. There is certainly nothing in the *travaux* to support the owners' case that it is impermissible to contract out.

22. The authorities decided under the previous regime show that nobody suggested that it was not possible to contract out. The whole of the debate in the House of Lords in *The Satanita* was as to the construction of the relevant contractual arrangement, to which the Board will return when considering issue (2). The Board was also referred to *Virginia Carolina Chemical Co v Norfolk and North American Steam Shipping Co* [1912] 1 KB 229, where the point was common ground. At first instance, Bray J said (p 236) that it was conceded that it was open to the parties to exclude the section by their contract, adding that *The Satanita* was sufficient authority on that point. On appeal, Kennedy LJ said (p 246):

> "In *The Satanita* the question was whether a contract to pay for all damage excluded the provisions of the Merchant Shipping Act, 1894, as to limitation of liability, and it was held that if the language of the contract was sufficiently clear it had that effect."

23. The conclusion which the Board has reached is consistent with the general principle that "a man may by his conduct waive a provision of an Act of Parliament intended for his benefit": *Wilson v McIntosh* [1894] AC 129, 133-134 (PC).

24. In this case the Court of Appeal, which (as stated above) was unassisted by argument on the point, reached the opposite conclusion, essentially for the reasons given by Allen P in paras 34-40 of her judgment. She recognised that under the previous regimes in the Merchant Shipping Amendment Act 1862 and the Merchant Shipping Act 1894, the position had been held to be different but she noted that there were no provisions in those statutes which compared with article 2.2 of the 1976 Convention. In para 34 she set out clauses 1 and 4 of the Conditions of Use (quoted in para 6 above) and said that it could not be denied that the contract clearly had as to its intent and purpose to indemnify BORCO against "all and any loss resulting from the collision". She then said in para 35 (somewhat enigmatically):

> "Undoubtedly, prior to the Convention becoming a part of Bahamian law in 1989, such a contract of indemnity could have been construed as excluding the appellants' right to limit their liability. However, article 2(1) must be read with article 2(2) which specifically and clearly excludes the contracting out of the right to limit liability even by means of contracts of indemnity."

25. The essence of Allen P's reasoning is in her paras 36-40, where she relies in particular upon the reasoning of Lord Phillips in *The Leerort*, namely (as she put it in para 36)

> "that there is only one way a shipowner may lose his right to limit his liability, and that is where it is proven by the claimant that the loss claimed, resulted from the owner's personal act or omission committed with the intent to cause such loss, or recklessly, and with knowledge that such loss would probably result."

Having referred in para 38 to a statement of Lord Denning MR in *The Bramley Moore* [1964] P 200, 220; [1963] 2 Lloyd's Rep 429, 437, where he said that "limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience", Allen P set out these extracts from paras 16 and 19 of Lord Phillips MR's judgment in *The Leerort*:

> "16. It seems to me that where the loss in respect of which a claim is made resulted from a collision between ship A and ship B, the owners of ship A, or cargo in ship A, will only defeat the right to limit liability on the owner of ship B if they can prove that the owner of ship B intended that it should collide with ship A, or acted recklessly with the knowledge that it was likely to do so ...
>
> 19. These considerations demonstrate that when a claim is made for damage resulting from a collision, it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability ..."

26. As was submitted on behalf of the BORCO, the problem with reliance upon *The Leerort* is that in that case the Court of Appeal was not considering the question which arises in this appeal, which is whether on the true construction of the 1976 Convention, it is permissible to contract out of the right to limit liability. Moreover there is nothing in the Convention, and in particular in articles 2.1 and 2.2, which prohibits the right to contract out of the right to limit liability by means of contracts of indemnity or otherwise.

27. For all these reasons the Board answers the question posed by issue (1), namely whether it is permissible for the owners of a vessel to contract out of or waive their statutory right of limitation under the 1989 Act and the 1976 Convention, in the affirmative.

(2) On the true construction of the agreement contained in or evidenced by the Conditions of Use, did the owners and BORCO agree to exclude the owners' right to limit liability under the 1989 Act and the 1976 Convention?

28. The judge answered this question in the affirmative. In the light of the Board's view that the first sentence of the quotation from para 35 of Allen P's judgment is enigmatic, it is not quite clear to the Board what view the Court of Appeal took of the question of construction raised by this issue. On balance it appears to the Board that the Court of Appeal thought that, if the matter had arisen under the old law, the court could have construed the agreement as excluding the owners' right to limit their liability but that the point did not arise under the new law for the reasons discussed above. The Board will reach its own conclusions without reference to para 35 of the judgment in the Court of Appeal.

29. BORCO's case depends primarily on clause 4 of the Conditions of Use which is set out in full in para 6 above. For present purposes the critical part is as follows:

> "If in connection with, or by reason of, the use or intended use by any vessel of the terminal facilities or any part thereof, any damage is caused to the terminal facilities or any part thereof from whatsoever cause such damage may arise, and irrespective of [whether] or not such damage has been caused or contributed to by the negligence of BORCO or its servants, and irrespective of whether there has been any neglect or default on the part of the vessel or the Owner, in any such event the vessel and the Owner shall hold BORCO harmless from and indemnified against all and any loss, damages, costs and expenses incurred by BORCO in connection therewith. Further, the vessel and her Owner shall hold BORCO harmless and indemnified against all and any claims, damages, cost and expenses arising out of any loss, damage or delay caused to any third party arising directly or indirectly from the use of the terminal facilities or of any part thereof by the vessel ..."

30. The question is essentially one of construction of that clause. There is no dispute as to the relevant principles. As it is put in BORCO's case, the object of construing a contract is to identify the parties' objective intention by reference to the language used, the factual background which was known or ought to have been known to both parties and the commercial purpose of the contract. As submitted on behalf of the owners, the overarching question is what is the meaning that the words of the agreement, especially clause 4, would convey to a reasonable person having the background knowledge which would reasonably have been available to the parties in the position they were in when the contract was made.

31. The principles which are principally relevant in a case of this kind are those which are applicable where it is alleged that the agreement excludes a legal right, including a legal right under a statute. The Board accepts the submission that, for a party to be held to have abandoned or contracted out of valuable rights arising by operation of law, the provision relied upon must make it clear that that is what was intended.

32. This principle has been applied in very many contexts. For example, in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, where it was said that the parties to a building contract had agreed to exclude, or contracted out of, the contractors' common law and statutory entitlement, under section 53(1)(a) of the Sale of Goods Act 1893, to set off breach of warranty claims in diminution for the price. Thus the right allegedly excluded was one which would go to diminish the value of the claim otherwise maintainable against the contractor. It was in this respect not unlike a right to limit. Lord Diplock put the principle in this way at pp 717-718:

> "It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law. … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption … one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract …"

33. Reliance was also placed on similar principles in the House of Lords in *Trafalgar House Construction (Regions) Ltd v General Survey & Guarantee Co Ltd* [1996] 1 AC 199, per Lord Jauncey at 208C (alleged contracting out of incidents of suretyship); in *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, per Lord Goff at 585C (shipyard's rights to recover purchase price instalments); and in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61; [2003] UKHL 6, per Lord Bingham at para 11 (legal remedies for negligent misrepresentation). See also two similar statements by Moore-Bick LJ in the Court of Appeal: in *Stocznia Gdynia v Gearbulk Holdings Ltd* [2009] 1 Lloyd's Rep 461; [2009] EWCA Civ 691, para 23 and in *Seadrill Management Services Ltd v OAO Gazprom* [2010] 1 CLC 934, para 29. In the first of those cases he said:

> "The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be."

The Board agrees.

34. There is also authority to the same effect in a class of case which is similar to this. Section 502 of the Merchant Shipping Act 1894 provided that "the owner of a British sea-going ship" shall not be liable for "any loss or damage happening without his actual fault or privity" where goods were lost or damaged by reason of fire on board the ship. In *Ingram & Royle Ltd v Services Maritimes du Trėport Ltd* [1914] 1 KB 541 Vaughan Williams LJ said at p 553:

> "Shortly my judgment is this, that prima facie there is included in the bill of lading the statutory protection of the shipowners under section 502. If the protection is not expressly or impliedly excluded, it follows that one starts with the proposition that the conditions in this bill of lading are accompanied by the provision contained in section 502 for the protection of the shipowners. I have therefore to see if I can find anything in the words of this bill of lading which excludes the operation of that protection. I can find nothing."

Buckley LJ said much the same at p 557.

35. The decision in *Ingram & Royle* was upheld by the House of Lords in *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726 at 733-734 and 741, where Lord Warrington of Clyffe said that the statutory provision was as much written out in the contract as if the parties had written it out in the contract itself.

36. In *Alsey Steam Fishing Co Ltd v Hillman (The Kirknes)* [1957] P 51, after reviewing the authorities, including *The Satanita*, Willmer J said at p 62, that the relevant statute (there section 503 of the 1894 Act) "applies unless quite clearly it is expressly or impliedly excluded by the terms of the contract". The Board accepts that it might be possible to exclude the right to limit without express reference to the statute, but concludes that the right must be clearly excluded, whether expressly or by necessary implication.

37. Absent *The Satanita*, the Board would be in no doubt that the application of the principles identified above leads to the clear conclusion that the effect of clause 4 of the Conditions of Use is not that the parties agreed that the owners could not rely upon their right to rely upon the 1976 Convention. The 1976 Convention is an important part of the factual matrix against which clause 4 must be construed. As Willmer J put it in *The Kirknes* [1957] P 51, p 62, section 503 of the Merchant Shipping Act 1894 applied unless it was expressly or impliedly excluded by the terms of the contract and that "the parties should be assumed to be contracting in accordance with the known state of the law". See also, to the same effect, in the context of the 1976 Convention a recent decision of Reyes J in Hong Kong: *Sun Wai Wah Transportation Ltd v Cheung Kee Marine Services Co Ltd* [2010] 1 HKLRD 833, para 11.

38. It is noteworthy that, notwithstanding the provision in section 3(1) of the 1989 Act that the provisions of the 1976 Convention "shall have the force of law in The Bahamas", there is no reference in clause 4 or any other part of the Conditions of Use to any part of those provisions. In particular there is no reference to articles 1, 2.1 or 2.2 of the Convention. In the opinion of the Board, if the parties had intended to agree that the owners should not be entitled to exercise their right to limit their liability in accordance with article 1 they would have so provided. Construed in the way most favourable to BORCO, the property claims (including claims for an indemnity) which were to be "subject to limitation of liability" were those set out in article 2.1(a) and 2.2. Provided the claims were claims so defined, it appears to the Board that the owners were entitled to limit their liability under the Act. There is nothing in clause 4 which contains even a hint that the owners were agreeing to waive their right to limit their liability under the Convention.

39. On the contrary, clauses 1 to 3 contain provisions entirely for the protection of BORCO and impose liability on the shipowners whether or not BORCO, its servants or agents were responsible. In short, there are three exclusion clauses which expressly identify with precision that which they purport to exclude. It is said on behalf of BORCO that clause 4 has the effect of excluding the owners' rights to limit under the 1976 Convention and the 1989 Act. Yet it contains no reference to the Convention or the owners' right to limit. The first sentence of clause 4 purports to impose a form of strict liability on the owners in respect of damage to the terminal facilities. Liability is said to attach irrespective of whether the owners were negligent and even if the relevant loss was caused by the negligence of BORCO or their servants. In addition clause 4 imposes an obligation to indemnify BORCO in connection with damage to the terminal facilities and in respect of third party claims. As the owners observe, it is this liability to hold harmless and indemnify BORCO which triggers the owners' need to limit their liability.

40. BORCO's case depends in large part upon its reliance upon the reasoning and decision of the House of Lords in *The Satanita*. It appears to the Board that, if the principles identified above are applied, there is nothing in the Conditions of Use which,

on its true construction, excludes the owners' rights under the 1976 Convention. Although (as stated above) the Board accepts that it would not be necessary to provide expressly for such a conclusion, it would have to be clear from the language of the clause construed in its context that the parties intended to exclude the right to limit.

41. BORCO relies in particular on two aspects of the decision and reasoning of the House of Lords in *The Satanita*. The facts were simple. Two yachts took part in a regatta. Each owner signed a letter to the secretary of the Mudhook Yacht Club undertaking that while sailing in the regatta he would obey and be bound by the rules of the Yacht Club Association Those rules included rule 18, which corresponded to article 14 of the Regulations for Preventing Collisions at Sea and also included rules 24 and 32, which provided, so far as relevant:

> "24. … If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht, or compel other yachts to foul, she shall forfeit all claim to the prize, and shall pay all damages
>
> ...
>
> 32. Any yacht disobeying or infringing any of these rules … shall be disqualified from receiving any prize she would otherwise have won, and her owner shall be liable for all damages arising therefrom."

The parties to the action were the owners of two of the yachts, the *Satanita* and the *Valkyrie*. During the regatta the *Satanita*, without the actual fault or privity of the owner, in breach of rule 18, ran into and sank the *Valkyrie*.

42. The owner of the *Valkyrie* brought an action for damages against the owner of the *Satanita*. The owner of the *Satanita* paid into court a sum as the amount of damages for which he was answerable under section 54(1) of the Merchant Shipping Act Amendment Act 1862, which was the forerunner of the Merchant Shipping Act 1894. The limitation fund was calculated at the rate of £8 per registered ton. Bruce J held that, even assuming that there was a special contract binding the owners, including the owner of the *Satanita*, the words "all damages" in the rules were not so express as to override the statutory limitation. The Court of Appeal reversed his decision and an appeal to the House of Lords failed.

43. All members of the House agreed that there was a binding contract between the parties on the terms of the rules and the case is indeed a case well known to students on that point. The two points relied upon by BORCO in this appeal are however the

approach to the construction of the contract and the meaning of "all damages". It is said that the expression in clause 4 that the owners

> "shall hold BORCO harmless from and indemnified against all and any loss, damages, costs and expenses incurred by BORCO in connection [with the facilities]."

has the same meaning as "all damages" in *The Satanita*.

44. On the approach to construction, Lord Halsbury LC said at p 62:

> "That being so [ie that the parties were contractually bound by the rules], the whole question turns upon what is the contract. It has been urged upon us that unless the parties used very clear language they must be supposed to be contracting according to the known state of the law with regard to ships coming into collision. I do not deny that considerations of that sort are intelligible and reasonable. On the other hand, I think it cannot be denied that the case of yachts is different from that of merchant vessels."

Lord Halsbury then gave number of reasons why yachts competing in a yacht race are significantly different from merchant vessels. He continued thus:

> "I do not say that such a consideration would be conclusive; but remember that these are competing vessels, and where you are speaking of these first-class yachts competing in a yacht-race you might as well value a race-horse by its weight, so many pounds of flesh, as speak of the value of a yacht according to its tonnage. Of course, it may be said in respect to merchant ships also, that that is a very rough test of the value of the ship, and that the object of it is to limit the risk. That is true also; but the conditions under which merchant ships sail and yachts sail are different. Merchant ships must be on the seas at all times and in all weathers, both by day and by night, and it may well be that the considerations that would induce people, so to say, to diminish the stakes upon which they were running their vessels would not be applicable to the case of yachts, which presumably are intended to race in conditions of light and of weather in which they are not exposed to the same risks."

45. In the opinion of the Board Lord Halsbury treated the position of yachts engaged in a regatta as significantly different from the position of a merchant vessel. He then said that all depended upon the language the parties had used, that the words in the contract were popular words and that the expression "all damages" did not mean damages as limited by the Merchant Shipping Act. He accepted, at p 63, that, as he put it, this was not

> "one of those cases which you can pronounce to be absolutely clear (I can quite understand a different view being taken for the reasons I have pointed out) - to my mind the intention of the contract is that the parties are not to be bound by the limitation of the Merchant Shipping Act, but that all damages are to be paid by the person disobeying the rules."

It appears to the Board that in this section of his speech he also drew a distinction between the two classes of vessel.

46. Lord Herschell also drew a distinction between the classes of vessel concerned. He said, for example at p 65:

> "My Lords, it has been said that a contract such as the court below have held to exist is a very unlikely contract for the parties to have entered into. I confess I am not satisfied of that either. The parties here are yacht-owners who are entering their yachts for a race in which other yachts will be engaged. I do not think there is anything extraordinary in their entering for that race upon the terms that they shall be liable for all damage, because the contract gives of course the correlative right of being entitled to all damage. The question to whom that contract would be an advantage would depend on the size of the injured vessel and the injuring vessel in the particular case, which could not be foreseen; therefore it does not seem to me extraordinary that a contract of this sort should be entered into. And again, whilst it is a most uncommon thing for merchant vessels engaged in an adventure to be actually navigated by the owner, that is not at all an uncommon thing in the case of yachts."

Further, on p 66 Lord Herschell suggested that the words "All damages" were clear and that if an owner wished to impose a limitation on those general words then he "must make it manifest that it is a contract which there could be no reasonable ground for the parties to have entered into". Lord Macnaghten said much the same at p 67.

47. It is clear from the passage quoted above that Lord Herschell attached particular significance to the fact that every competitor accepted full liability for any damage which he might cause to any other yacht in exchange for "the correlative right of being entitled to all damage". Lord Halsbury made the same or a similar point when he spoke about "competing vessels" and described the case of yachts as different from merchant vessels. The nature of such competitions is that they involve a particular risk of collision if competitors are over aggressive, against which the yacht club rules provided mutual protection. The House was not concerned with the more usual type of exclusion or limitation clause inserted into a contract predominantly for the benefit of one party.

48. In the opinion of the Board that part of the reasoning of the House is to be distinguished from that applicable in the instant case. The correct analysis of cases of this kind has developed significantly since the decision in *The Satanita*. The cases cited above show that the words of the particular contract must be construed in the light of the default position, namely that the statutory rights of the owners were known to and understood by the parties to apply (*The Kirknes*) and were treated as being written into the Conditions of Use (*Ingram & Royle*). It follows that that remains the position unless there is some provision which clearly and unequivocally excludes the right such that the two provisions cannot be read together and the statutory right must have been excluded.

49. In short, in the light of the later jurisprudence, in the opinion of the Board *The Satanita* should not be treated as authority of general application. It was in any event only concerned with the proper construction of a yacht racing contract and, moreover, at a time when the relevant principles of construction were much less developed than they are today.

50. The Board accepts the owners' submission that clause 4 of the Conditions of Use and article 2.2 of the 1976 Convention can readily be read together as a coherent scheme. BORCO is entitled to an indemnity in respect of "all and any loss" up to the maximum recoverable pursuant to the Convention. The expression "all and any loss" is simply generic indemnity clause wording which makes no reference to the statutory wording. In short, there is nothing in the language of the agreement which suggests that the owners were agreeing to waive their right to limit. Indeed, viewed objectively, it seems to the Board to be inconceivable that the owners intended to waive their right to limit. Moreover, if BORCO had intended that they should do so, it could reasonably have been expected for BORCO to include such a clause in the Conditions of Use.

51. Finally, the Board reverts to the reasoning of Reyes J in the *Sun Wai Wah Transportation* case referred to in para 37 above. It does so because (albeit at first instance) he was considering a very similar case on the facts. The Board agrees with the owners' submission that his analysis cannot be faulted. He said this at paras 10-12:

> "10. Mr Tsui (appearing for Sun Wai) notes that, since THE 'SATANITA' was decided, limitation legislation has changed. For instance, in 1897 the relevant legislation required that claims sound in damages in order to qualify for limitation. Claims for an indemnity pursuant to a contract to indemnify would not have qualified for limitation. Now, however, by article 2(2) of the Convention, except for certain specific types of claims identified in articles 2(1)(d)-(f), claims 'shall be subject to limitation of liability even if brought ... for indemnity under a contract'.
>
> 11. Thus, I should construe the Indemnity Agreement in the context of article 2(2) of the Convention. The existence of the Convention is part of the factual matrix. There is no evidence that Sun Wai or Cheung Kee (both experienced in the business of carrying goods by sea) would have been unaware of the provisions of the Convention.
>
> 12. When the parties entered into the Indemnity Agreement, they must be taken to have done so in the context of a shipowner (such as Sun Wai) being able to apply for limitation under the Convention even in respect of a liability to indemnify. In the absence of clear words to the contrary, I do not think that I can read the references to full indemnification in the Indemnity Agreement as meaning other than a full indemnity within the terms of what the Convention permits."

52. For these reasons the Board answers question (2), namely whether on the true construction of the agreement contained in or evidenced by the Conditions of Use, the owners and BORCO agreed to exclude the owners' right to limit liability under the 1989 Act and the 1976 Convention, in the negative.

Conclusion

53. For these reasons the Board will humbly advise Her Majesty that the relevant questions should be answered as follows: question (1) by holding that it is permissible for owners of a vessel to contract out of or waive their statutory right of limitation under the 1989 Act and the 1976 Convention and question (2), namely whether on the true construction of the Conditions of Use they agreed to do so, by answering in the negative. So far as the Board is aware the only remaining question is whether the order of 20 September 2012 (referred to in para 2 above) for the constitution of a limitation fund in the sum of US$16,995,487.84 should stand and, if not, what order should be made. The

Board naturally hopes that the parties will be able to agree all consequential matters arising out of this judgment.

54. The owners should serve written submissions on costs and any remaining issues within 21 days of the handing down of this judgment and BORCO should serve submissions on those issues within 14 days thereafter.