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The Constitution of Limitation Funds: towards certainty and coherence?

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Introduction

1. This short paper outlines recent developments in one important aspect of the law of limitation – the constitution of a limitation fund. While the constitution of a limitation fund has long been recognised as a fundamental part of the limitation process, the relative infrequency of incidents where limitation issues arise has meant that there have been few instances where the New Zealand courts have considered the provisions of our law in this area.

2. Although amendments to the statutory provisions in the Maritime Transport Act 1994 ("**MTA**") relating to limitation were made in October 2013[1] simplifying the implementation of the LLMC Convention (as amended by the LLMC Protocol) by giving the Convention and Protocol force of law in New Zealand, I would suggest that the law relating to the constitution of a limitation fund may need some further consideration, particularly as regards procedural provisions, in order to promote clarity and certainty in its operation.

The role of the fund

3. A limitation fund has always been an essential feature of the statutory limitation scheme in the United Kingdom and the Commonwealth. Nearly 75 years ago, in *James Patrick & Co Ltd v Union Steamship Co of New Zealand*, the High Court of Australia, in considering a case under the limitation legislation then in force in Australia and New Zealand, described the provision of a fund in this way:[2]

> "*But the foundation of the relief, administered first in Chancery and afterwards in admiralty, is the provision on the part of the shipowner of the fund representing his maximum liability. The court then administers the fund brought into court by the shipowner. The court ascertains the claims upon it, marshals them and distributes the fund rateably among the claimants. In principle the title to relief of such a nature is a substantive right enforceable by independent proceedings.*"

Statutory history

4. The right to limit under English law has always been statutory in nature. As with many Commonwealth countries, New Zealand law was found in or based on these English statutes. In the UK the earliest statute referred to the owner not being liable beyond the value of the ship and freight, and provided for a process in which the owner paid into court

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[1] *Maritime Transport Amendment Act 2013* which amended the MTA by inserting various provisions on 23 October 2013

[2] *James Patrick & Co Ltd v Union Steamship Co of New Zealand* (1938) 60 CLR 651 (HCA), at p.673 (Dixon J)
This case concerned consideration of limitation under the Imperial Merchant Shipping Act 1894. This was the statutory forerunner in New Zealand of the various Shipping and Seamen Acts, which preceded Part 7 MTA 1994.

the value of the ship and freight so that the court could direct the payment of the sum to those "freighters" who had suffered losses in proportion to their losses or damages according to the rules of equity[3]. The legislation which applied in New Zealand in the nineteenth and twentieth centuries consistently contained a provision (which can be traced back to the UK *Responsibility of Shipowners Act 1813*) which provided for the conduct of proceedings where several claims were made against the Owner of a ship, and gave the Owner the right to apply to a competent court to determine the amount of its liability and for the court to determine the amount of that liability, distribute the amount rateably between claimants, stop all actions or suits in any other Court in relation to the same subject matter, and make such orders as the Court saw fit for in relation to the time for bringing claims and as to requiring security from the Owner for the amount of its liability[4]. The provision changed little over the years and although it was "modernised" in later legislation its origins remained obvious.

Implementing the 1976 Convention

5. The Shipping and Seamen Amendment Act 1987 sought to implement the provisions of the LLMC Convention, 1976. Section 464 of the Act contained the procedural provision from the earlier legislation with its various components split into sub-sections. In seeking to paraphrase the important provisions of the LLMC Convention and bring them within the existing statutory framework, the draftsperson cross - referred the power to consolidate claims, determine the amount of the Owner's liability, distribute the amount rateably, stay other proceedings and proceed in a manner as the Court saw fit on such matters as the giving of security. The cross – reference was not to the newly added section 461(1) setting out the claims drawn from Article 2 of the LLMC Convention which are subject to limitation but to the claims in section 461(2) – the claims which are expressly not subject to the Owner's right to limit its liability. In simple terms, the procedural powers which had throughout their legislative history been referable to the conduct of limitation proceedings and claims which were subject to limitation in those proceedings were now linked to claims which fell outside limitation.

6. The "paraphrase and transplant" approach taken to the implementation of the Convention was described as "peculiar and unsatisfactory" by one New Zealand commentator. [5] The end of the process saw the amendments made by the SSA 1987 moved into Part 7 MTA with changed section numbering but without amendment to the provisions outlined above.

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[3] See, *Responsibility of Shipowners Act 1734*. Subsequent English statutes were the *Merchant Shipping Act 1786* and the *Responsibility of Shipowners Act 1813*. All contained provisions for the court to direct the payment of the sum which amounted to the value of the ship and freight. The last Act provided specifically for the money amounting to the value of the ship and vessel to be paid into court as security.

[4] See, section 514 *Merchant Shipping Act 1854 (Imp)*; section 504 *Merchant Shipping Act 1894 (Imp)*; section 293 *NZ Shipping and Seamen Act 1903*; section 297 *NZ Shipping and Seamen Act 1908*; section 461 *NZ Shipping and Seamen Act 1952;*

[5] See New Zealand commentary by Tom Broadmore in *Limitation of Liability for Maritime Claims* by Griggs, Williams and Farr at page 327.

The question which arose in litigation concerning a claim by a shipowner to limit its liability after a casualty was whether there was a drafting error in linking the procedural provisions in s89 MTA by the reference to s 86(2) to claims which were not subject to limitation, which the Court was able to correct so that it could apply the s 89 provisions, including the power to require the provision of security in the amount of the Owner's liability under the limitation proceedings, to limitation proceedings involving the claims under s 86(1) MTA which were subject to limitation,

Drafting error or not?

7. In *The Tasman Pioneer* [6] the shipowner sought and obtained a declaration that it was entitled to rely on the 1976 Convention limits, then argued that there was no jurisdiction to order it to constitute a limitation fund giving security for claims in the limitation sum, whether under Part 7 MTA or under the HCR. The Court held that there was no obvious drafting error in the provisions of Part 7 MTA which would allow the Court to apply the provisions in s89 (1) and (2) MTA to claims which were subject to limitation under s86(1) MTA and order the provision of security by the constitution of a limitation fund.

8. The result of the decision was to create uncertainty about the jurisdiction to order the constitution of a fund, whether this was requested by a shipowner or resisted by it. The decision could be read as saying that there was no jurisdiction to order or allow a fund to be constituted under the MTA or HCR. Unfortunately neither the MTA nor the HCR were amended to clarify the position.

9. In High Court litigation which arose from the grounding of the Rena[7], the Court expressed the view that the Court had fallen into error in *The Tasman Pioneer* in not finding that there was a drafting error which could be corrected. The Court found that the legislative history of the provisions in s 89 MTA and the history of the related provisions of the HCR, the important role of a fund in limitation proceedings generally and under the LLMC Convention, the provisions in Part 7 MTA which referred to the constitution of a limitation fund[8], and the fact that the provisions in s 89 (in particular the provision for rateable distribution) only made sense in the context of the procedure required in limitation proceedings, pointed clearly to a drafting error. The substance of the provision which Parliament would have made if not for the error was clear – it would have included words saying that s 89 applied to claims which were subject to limitation. This part of the decision was ultimately *obiter*. The Court held that *The Tasman Pioneer* could be distinguished

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[6] [2004] 1 NZLR 650
[7] *Daina Shipping Co vTe Runanga o Ngati Awa* [2013] 2 NZLR 799.
[8] Sections 88 (1) (a) MTA which expressly referred to the constitution of a limitation fund and section 91 which provided for release on provision of security for the maximum amount available to a claimant in the limitation process. The Court also referred to the references to calculation of limitation amounts in ss86 and 87. Section 91 was applied in *Sea Tow Ltd v The Ship "Katsuei Maru no 8 KXN"* (High Court Auckland, AD 736/96 8 May 1996 Salmon J).

because it involved an owner which resisted the making of an order that it set up a limitation fund while in the case before the Court the owner wanted to establish a fund. The Court considered that it did have jurisdiction to allow a willing owner to constitute a fund given the terms of the MTA (and the Convention which it implemented) and the general ability to apply for directions under the HCR where there was no prescribed procedure.

Current position

10. Perhaps unsurprisingly, after the Rena grounding consideration did not centre on the need for clarity over the constitution of funds and related procedural powers, but on the need to increase the sums available as limitation amounts under Part 7 MTA/ the 1976 LLMC Convention. No doubt mindful of the criticism of the earlier "paraphrasing" of the LLMC Convention, Parliament amended the MTA (this included the repeal of the provisions which implemented the LLMC Convention in Part 7 MTA including the provisions which produced the problems outlined above) to give both the LLMC Convention and its 1996 Protocol force of law in New Zealand[9]. That approach makes the provisions of the Convention in Articles 11- 14 concerning the constitution of a fund, its distribution and its effect as a bar to other actions directly part of New Zealand law.

Some work needed?

11. One possible problem which remains after this relatively speedy legislative process is that the law lies now entirely in the Convention as a schedule to the MTA. The provisions of the HCR do not contain any procedural provisions concerning the constitution of a fund and the related matters which were the subject of the previous legislative provisions. While the Courts might be left to apply the Convention provisions (and fill in procedural gaps by using the general powers under the HCR), it is submitted that the efficient operation of the substantive law in this area would be assisted if there were clear procedural provisions in Part 25 HCR relating to the constitution of a fund and possibly its distribution. Such procedural provisions are contemplated by Article 14 of the LLMC Convention provided they are consistent with Articles 11 -13. Certainty of substantive and procedural law is of great importance in an area where all parties need to know and act on their rights often in circumstances of urgency. This consideration of possible amendments to the HCR to provide for the constitution of a fund and related issues might be undertaken as part of a wider review of the procedure relating to limitation actions in Part 25 Subpart 4 HCR, or, indeed, of Part 25 Admiralty HCR generally, which MLAANZ might offer to lead.

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[9] Section 84 A Maritime Transport Amendment Act 2013 – the LLMC Convention and Protocol are now Schedules 8 and 9 of the MTA.