Neutral Citation Number: [2024] EWHC 3174 (Admlty)

Case No: AD-2021-000165

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**ADMIRALTY COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/12/2024

**Before** :

**MR JUSTICE ANDREW BAKER**

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**Between :**

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| **SEA CONSORTIUM PTE. LTD (trading as X-PRESS FEEDERS) and others** | **Claimants** |
| **- and -** | |
| **BENGAL TIGER LINE PTE. LTD and others** | **Defendants** |

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**Simon Rainey KC, Natalie Moore, Andrew Leung and Joseph Gourgey** (instructed by **Campbell Johnston Clark Ltd**) for the **Claimants**
**Benjamin Coffer** (instructed by **Mays Brown Solicitors**) for **Bengal Tiger Line Pte. Ltd**
**Ralph Morley** (instructed by **Mills & Co Solicitors Ltd**) for **MSC Mediterranean Shipping Company S.A.**
**Tom Bird** (instructed by **Stephenson Harwood LLP**) for **Maersk A/S**

Hearing date: 6 December 2024

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# Approved Judgment

This judgment was handed down remotely at 9.30am on 12 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ANDREW BAKER

## Mr Justice Andrew Baker :

## Introduction

1. This tonnage limitation claim arises out of a fire on the container ship *X-Press Pearl*, which started on 20 May 2021 and culminated in the sinking of the ship and her cargo on 2 June 2021 off Colombo, Sri Lanka, resulting in the total loss of both.

2. The ship was owned by the fourth claimant, EOS RO Pte. Ltd, bareboat chartered to the fifth claimant, Killiney Shipping Pte Ltd, and time chartered to the first claimant, Sea Consortium Pte. Ltd (t/a X-Press Feeders). The second and third claimants are related companies, X-Press Container Line (UK) Ltd and X-Press Container Line (Singapore) Pte. Ltd, that were also involved in the commercial arrangements for the ship.

3. At the time of the casualty, the ship was carrying containers under a variety of contractual arrangements. They included:

   i) a written Agreement for Transport Services dated 1 July 2020 between the first to third claimants and Maersk A/S ('Maersk');

   ii) a Fixed Slots Contract contained in or evidenced by an unsigned term sheet headed "*SMX BTL (1 Mar – 31st May 2021)*" between the first claimant and Bengal Tiger Line Pte. Ltd ('BTL'); and

   iii) a written Connecting Carrier Agreement dated 1 May 2015 between the first claimant and MSC Mediterranean Shipping Company S.A. ('MSC').

4. On 21 February 2022, the claimants were granted permission to constitute a Limitation Fund by letter of undertaking for claims arising out of the casualty. The limitation amount was calculated to be SDR19,159,937, then equivalent to £19,990,325.57, and a letter of undertaking in that amount issued by the London Steam-Ship Owners' Mutual Insurance Association Ltd was lodged, dated 22 February 2022.

5. On 3 July 2023, the Admiralty Registrar granted to the claimants a limitation decree limiting their liability in respect of any loss or damage arising out of or in connection with the casualty pursuant to Article 6 of the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the 1996 Protocol (as amended in 2012) (the 'Convention').

6. The limitation decree was advertised in various newspapers and trade journals on 25 August 2023 and 27 October 2023, and claims have been lodged against the Limitation Fund using Admiralty Form ADM20, as now summarised in a Schedule attached to the Second CMC Order in the proceedings dated 1 March 2024.

7. The Democratic Socialist Republic of Sri Lanka ('Sri Lanka') has commenced proceedings against the claimants in Singapore for loss and damage alleged to have been caused by the casualty. By application dated 26 January 2024, Sri Lanka disputes the claimants' entitlement to limit liability, invoking Article 4 of the Convention (the 'Article 4 Application'). Sri Lanka seeks the setting aside of the limitation decree in

favour of the claimants. Case management directions have been made that will lead to a determination of that dispute.

8. There was also a case management direction requiring any application for a declaration of entitlement to limit liability in respect of the casualty as a 'shipowner' under Article 1(2) of the Convention (an 'Article 1 Application') to be filed and served by 26 April 2024, with directions for evidence to be served in support of and in response to any such application.

9. Article 1 Applications were issued by MSC, BTL and Maersk respectively dated 11 April, 22 April and 25 April 2024.

10. No party has opposed any of those Applications. Only the claimants served evidence in response, and that evidence consisted of a very short witness statement confirming that the claimants were neutral on the basis that any issue over what should happen to the Limitation Fund established by them, or over whether other parties should contribute to it, if the Article 4 Application succeeds, can be left over for consideration at a later stage.

11. MSC's and Maersk's Article 1 Applications each sought orders:

    i) that they are a shipowner under Article 1(2) of the Convention;

    ii) that they are entitled to limit liability in respect of the *X-Press Pearl* casualty under the Convention; and

    iii) that the Limitation Fund constituted by the claimants is also deemed constituted by them.

12. BTL's Article 1 Application only sought an order equivalent to the first of those, but it is obviously appropriate to grant materially identical relief on any of the Applications that succeed.

13. Immediately following a Third CMC hearing on 6 December 2024 that dealt with a number of case management matters, I heard submissions from counsel on behalf of Maersk, BTL, MSC and the claimants on the merits of the Article 1 Applications. In line with the claimants' responsive evidence, Mr Rainey KC's submissions were limited to observations on the precise form of relief to be granted if the court were persuaded to grant the Applications, with a view to ensuring that there was no prejudice to any application affecting the Limitation Fund that the claimants might wish to make following determination of the Article 4 Application, if that Application succeeds.

14. Although there was no active opposition to the Article 1 Applications, they sought declaratory relief that will bind all parties in this court. It was therefore appropriate to require each applicant to establish to the court's satisfaction that it fell within the Article 1(2) definition of 'shipowner'. This judgment now sets out my reasons for concluding that each of the applicants did so.

### *The MSC Napoli*

15. In *The MSC Napoli* [2008] EWHC 3002 (Admlty), [2009] 1 Lloyd's Rep 246, both Hapag-Lloyd AG ('HPL') and H Stinnes Linien GmbH ('Stinnes') had contracts with

MSC by which MSC as slot provider or vessel provider allocated a number of TEU container slots per voyage leg on a defined MSC container service route to HPL, respectively Stinnes, as slot charterer. These slot charters provided for containers carried under them to be covered by bills of lading issued by the slot charterers. The consideration payable to MSC was described as "*slot charter hire*" and was payable for the slot allocation, used or unused.

16. Teare J decided that HPL and Stinnes were 'shipowners' as defined by Article 1(2) of the Convention. Each was a "*... charterer ... of a seagoing ship*", which did not require that they had a right to use or direct the use of the entire cargo carrying capacity of the ship. Teare J noted that there were features of the slot charters in that case that bore similarity to a time charter and features that bore similarity to a voyage charter (*ibid* at [14]), a point also made by BIMCO in a description it had given of slot chartering on which Teare J relied (*ibid* at [11]). As part of giving the Article 1(2) definition a proper, purposive construction, in its context within the Convention, Teare J noted (*ibid* at [16]), that:

> "*The convention encourages [international trade by way of sea carriage] by limiting the liabilities which arise on a distinct occasion. Such liabilities obviously include cargo claims. If charterers who had issued bills of lading as carriers were not within the definition of shipowner cargo claimants could direct their claims at the charterers and so avoid the limit ... . The charterers would have a claim against the shipowner but he would be able to limit his liability, thus leaving the charterers to bear the excess of the cargo claim over the limit. The inclusion of charterers within the definition of shipowners ensures that this does not happen.*"

17. He concluded (*ibid* at [17]) that as a matter of ordinary language there was no reason to say that 'charterer' in Article 1(2) did not include a slot charterer; and that treating slot charterers as outsiders in that regard would discourage the use of slot chartering, which has become a well-established and efficient way to organise the carriage of goods.

18. In those circumstances, Mr Bird for Maersk and Mr Morley for MSC submitted, and I agree, that it was not essential to Teare J's reasoning in *The MSC Napoli* that the charter slot hire in that case was given that title or that it was payable for the allocated slots, 'used or not used'. That said, *The MSC Napoli* strictly decided only that HPL and Stinnes were 'charterers' within the meaning of Article 1(2), given the terms of their contractual arrangements with MSC in that case. The particular contractual arrangements under which a putative Article 1(2) 'charterer' enjoyed the services of the ship in question will always need to be examined before a decision can be reached on whether they are indeed within that definition.

19. I agree with Mr Bird's further submission, supported by the reasoning in *The MSC Napoli*, that it should normally be sufficient for a party to be considered an Article 1(2) 'charterer' that its relevant contract obliges an owner or disponent owner to make part of the carrying capacity of a ship available to that party for the carriage of goods which that party will have contracted, or will be obliged to contract, to undertake as carrier. A party to whom space on a ship is contracted for the performance by it, delegated to the ship, of its contractual obligations as carrier, will generally be an Article 1(2) 'charterer', given the ordinary connotation of that word and the purpose of the Convention.

20. As Mr Coffer for BTL submitted, that may mean that businesses that would describe themselves, in the modern jargon, as NVOCCs (non-vessel operating common carriers) rather than as (slot or any other kind of) charterers, will also be Article 1(2) 'charterers', subject always to reviewing the precise terms of their contractual arrangements with the ships whose services they use. I do not need to express any final view about that, however, to determine these Article 1 Applications.

**BTL**

21. BTL is a container line based in Singapore. Its business focuses on feeder services to and from main hubs, using time charters and slot charters. BTL issues its own house bills of lading for the cargoes it contracts to carry.

22. The Fixed Slots Contract, as I have called it, under which containers BTL had contracted to carry were on *X-Press Pearl* at the time of the casualty, was concluded by exchange of emails on 15 and 16 March 2021 and confirmed in the unsigned term sheet produced by the first claimant. It was a contract for the provision by the first claimant of 250 TEU slots for US$445 per TEU per round voyage, subject to certain adjustments, on the first claimant's 'SMX' (Singapore Middle East) Service. That was payable for the committed slots, used or not used.

23. The SMX route for that purpose was identified as 'PKG-SIN-JEA-HMD-HZR (PTE CALL)-CMB-PKG', that is to say Port Klang to Singapore to Jebel Ali to Hamad to Hazira (a private call not for use by BTL) to Colombo to Port Klang. It made provision for the use of and payment for excess slots, if requested and approved, subject to availability. In a provision for interest on late payments, BTL was referred to as the "*slot purchaser/partner*" and the first claimant as the "*slot provider*".

24. I agree with Mr Coffer's submission that the Fixed Slots Contract was materially identical to the slot charters considered by Teare J in *The MSC Napoli* and that BTL was straightforwardly an Article 1(2) 'charterer', like HPL and Stinnes in that case.

**MSC**

25. MSC is currently the largest container shipping line in the world. The primary basis of its operations is its own fleet of ships and containers to provide liner services on regular schedules. Its liner services include lots of sailings from the Indian sub-continent to the Middle East, calling at major hub ports, such as Colombo. MSC uses a network of feeder services to connect its liner routes to smaller or more remote ports. The first claimant is one of the providers of feeder services used by MSC, as for that matter is BTL. So far as is material to the *X-Press Pearl* casualty, MSC was using the first claimant for a feeder service from Hamad to Colombo.

26. The Connecting Carrier Agreement referred to above ('the CCA') governed that feeder service. The Hamad-Colombo route was added to the Agreement through an email exchange in late September 2020. The CCA made express provision, by Clause 6(g) introduced by a written Amendment 1, for such email additions.

27. By the CCA, as it applied to the Hamad-Colombo feeder service, the first claimant committed to making space available to MSC for 50 TEU slots per week. By Clause 5(a) of the CCA, the first claimant committed to operate "*the Service*", defined as "*the*

*route, port rotation and frequency of calls at those ports listed in Appendix 1*". The effect of operating Clause 6(g) to add a route was to amend Appendix 1 to include that new route. Clause 6(a) provided that MSC had "*the right to use up to the minimum slot allocation per sailing as specified in Appendix 1*". The price (which for the Hamad-Colombo feeder service was agreed at US$175 per TEU) was to be paid "*for each slot used*" (Clause 6(e)).

28. The CCA did not stipulate that MSC was to issue its own bills of lading or otherwise to contract as carrier with cargo interests; but it did provide, at Clause 9(a), that MSC would handle all cargo claims in respect of a container or goods carried pursuant to the CCA concerning loss or damage occurring while the container or goods was or were in the custody, possession or control of the first claimant, "*irrespective of against which of the Parties to this Agreement the claim is brought*". So it plainly expected, as is hardly a surprise given who MSC is, that MSC would or might be a contracting carrier.

29. I agree with Mr Morley's submission that the only point of difference of any possible substance between the CCA as it applied to the Hamad-Colombo feeder route, and the slot charters considered in *The MSC Napoli*, is the lack of any obligation upon MSC to pay for unused slots. In my judgment, that did not take MSC outside the scope of Article 1(2). The CCA is still properly described as a slot charter of the type considered by Teare J. MSC was an Article 1(2) 'charterer'.

**Maersk**

30. Maersk is one of the largest container shipping lines in the world. It was using the first claimant's services in a similar way to MSC. In Maersk's case, that was pursuant to the Agreement for Transport Services referred to above ('the ATS').

31. The terms of, or at all events the terminology used in, the ATS is somewhat further removed from that of typical time or voyage charters. By Clause 2.1, Maersk appointed the first to third claimants (collectively referred to as 'the Contractor') to provide 'Transport Services' to Maersk, defined to mean "*the transportation of Containers between the places set out in APPENDIX 4 – Billing and Payment*". By Clause 2.3, Maersk expressly did not undertake or warrant that it would tender any minimum quantity of goods or containers to the Contractor. The Contractor warranted at Clause 4.12 that it "*at all times has sufficient capacity to provide the Transport Services ordered by Maersk provided such orders are expressly stipulated herein or are given with reasonable notice*". Clause 5.1 contained a promise by the Contractor to "*treat Maersk as a priority client. If the Contractor must decide between some or all of its clients as to which clients' containers will be transported, then Contractor will use best endeavours to accommodate Maersk's requests of [sic.] the transportation of their containers.*"

32. Clause 8.1 of the ATS required Maersk to pay the Contractor the 'Charges' specified by Appendix 4. Paragraph 2.1 of Appendix 4 stated that the Contractor would charge Maersk "*for its Transport Services rendered*", and paragraph 2.2 stated *inter alia* that Maersk would not be liable to pay for anything except services as ordered. The agreed rates were container freight rates, set out in a table stipulating different rates for a large number of load port / discharge port pairs, in each case giving separate rates for 20' and 40' containers, empty, dry, refrigerated or dangerous cargo.

33. Though no doubt the general nature of Maersk's worldwide business can be taken to have been common knowledge, the terms of the ATS to which I have referred so far might seem rather to treat Maersk as 'cargo' more than as 'carrier', a regular shipper for X-Press Feeders services rather than a charterer. Mr Bird referred me also to Appendix 3 to the ATS, a Service Level Agreement intended to apply to and operate alongside the ATS in relation to Transport Services. It confirmed (at Clause 3(a)) that there was no volume commitment from Maersk, but committed Maersk to keeping the Contractor informed about volume fluctuations for the Contractor's capacity planning. I do not consider that term, or Appendix 3 generally, added materially to the analysis.

34. However, for the purpose of Article 1(2) of the Convention, the ATS gave Mr Bird's argument a trump card in its provisions concerning bills of lading and liabilities. Thus:

    i) Clause 9.1 of the ATS stipulated that individual shipments under the ATS were "*deemed to be governed by the Maersk Line Bill of Lading between Maersk and Merchant or shipper/consignee*", a specimen of which was appended, where 'Merchant' was defined by the ATS to mean "*any shipper, consignee, receiver of the Goods [etc.] for whom Maersk agrees from time to time to provide or arrange transport services or other, similar services*";

    ii) Clauses 9.2 to 9.4 contained additional provisions, the detail of which does not matter, but the importance of which is that they treated any carriage pursuant to the ATS as a carriage that Maersk would be undertaking as carrier, the Transport Service under the ATS thus being the means by which it would be performing such a commitment;

    iii) Clauses 10.1 to 10.5 included terms dealing with liability *inter se* between Maersk and the Contractor in relation to cargo claims, but also provided for claims co-operation in relation to such claims;

    iv) by Clause 10.9, Maersk undertook to use reasonable endeavours "*to ensure that their shipper(s) are in compliance with Verified Gross Mass (VGM) requirements as stipulated by SOLAS Chapter VI, Regulation 2, …*"; and

    v) Clauses 10.11 and 10.12 included provisions designed to enable the Contractor and those for whom the Contractor would be responsible to take advantage of Maersk bill of lading exceptions, exemptions or limitations of liability.

35. Reading the ATS as a whole, therefore, I accept Mr Bird's submission that it is a contract to make cargo carrying space available to Maersk for its effective use in order to perform its contractual commitments as carrier. Although Maersk did not promise to pay for slots, used or not used, but only for container transport actually undertaken, on balance I agree with Mr Bird that the ATS can fairly be characterised as a contract to hire slots on the first claimant's (chartered) ships from time to time, including, in the event, on the *X-Press Pearl* for the casualty voyage. (The evidence I have indicates that she was carrying as many as 541 laden and 102 empty Maersk containers.)

36. Like BTL and MSC, therefore, I conclude that Maersk was an Article 1(2) 'charterer'.

## Conclusions

37. For the reasons I have given above, I conclude that each of BTL, MSC and Maersk was a 'shipowner' within Article 1(2) of the Convention in relation to the casualty voyage of the *X-Press Pearl*, because each was a 'charterer' of the ship within the meaning of that term as it appears in the Article 1(2) definition of 'shipowner'.

38. During the discussion of the relief to be granted if I was persuaded to that conclusion, I was reminded that, in the normal way, the Admiralty Registrar's Order dated 21 February 2022 permitting the claimants to constitute the Limitation Fund by providing a letter of undertaking provides (at paragraph 3) that: "*Under Article 11(3), Chapter III of Schedule 7 of the Act [i.e. the Merchant Shipping Act 1995] the Limitation Fund shall be deemed constituted by all persons referred to in Article 9 of Schedule 7 of [that] Act ...*". It would be otiose and possibly confusing, therefore, now to issue an overlapping declaration specifically concerning BTL, MSC and Maersk, and none of them pressed for such a further, specific declaration.

39. I agree with Mr Rainey KC that, for the avoidance of doubt, it would be better to make clear that the declarations that will be granted to the effect that each of BTL, MSC and Maersk is an Article 1(2) 'shipowner' entitled to limit liability under the Convention in respect of the *X-Press Pearl* casualty do not affect any question as to the impact, if any, of a determination of the Article 4 Application in due course upon the Limitation Fund or claims, if any, the claimants may have for indemnity or contributions in relation to the funding of it.