



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 94

A266/24

OPINION OF LORD LAKE

In the cause

DALES MARINE SERVICES LIMITED

Pursuer

against

THE UNITED STATES OF AMERICA AND OTHERS

Defenders

Pursuer: Howie KC, Anderson; Brodies LLP

First Defender: MacColl KC; Pinsent Masons LLP

Second Defender: Bowie KC, Reid; Burness Paull LLP

Third Defender: Young KC; Anderson Strathern LLP

29 September 2026

[1] On 22 March 2023 the R.V. Petrel was in the Imperial Dock in Leith undergoing works by the pursuer. On that date the dock was dry and the Petrel was sitting on keel blocks with shores between her port and starboard sides and the sides of the dock. The pursuer avers that at 8.22am, shores gave way and the Petrel toppled onto her starboard side. It is averred that this resulted in damage to the vessel, items on board her, and the dock. In addition, another vessel, the MRV Scotia, which was in the dry dock behind the Petrel, could not be moved until the dock could be re-flooded.

[2] The pursuer avers that on the date of the incident, it was carrying out works to the Petrel and that the dock was under its management and control. It contends that it is entitled to limit its liability resulting from the incident in terms of the Merchant Shipping Act 1995, section 191. The relevant parts of this are in the following terms:

- “(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 I 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.
- ...
- (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 and management of any dock or canal, as the case may be”.

The convention referred to in that section and reproduced in Schedule 7 of the 1995 Act is the Convention on Limitation of Liability for Maritime Claims 1976.

[3] These proceedings have been instituted by summons as an ordinary action. The conclusions seek, (1) declarator that the pursuer is entitled under section 191 to limit its liability for floor damages to any ship, or to any goods, merchandise or other things that arose out of the incident, (2) authority to constitute a limitation fund for the purposes of Article 11 of the convention and orders addressing the mechanics of doing so, including the lodging by the pursuer of a bond of caution, (3) declarator of the total sum to which the pursuer is entitled to limit liability in terms of section 191, (4) orders that once the fund is established all parties claiming an interest in it should lodge condescendence and claims and an order staying any actions then in dependence against the pursuer which relate to the incident wherever they have been raised, and (5) decree ranking the claims on the fund, finding the pursuer liable in a single payment of the fund and, on the making of the payment, authorising distribution of the fund to those ranked on it and discharging the pursuer from the claims against them in respect of the incident. It was not disputed that the conclusions are in the form generally used in actions seeking to invoke shipowners' limitation and to establish a limitation fund for that purpose.

[4] The first defender is The United States of America as owners of the Petrel. After some initial procedure, it was determined that this is the correct designation for the first defender. The second defender is Oceaneering International Incorporated. They were the party with whom the pursuer had contracted to carry out works on the Petrel. The third defenders are the Scottish Ministers. They are owners of the MRV Scotia which was in effect

trapped in the dry dock as a result of the incident. Their position arising out of the incident is considered in more detail below.

[5] The defenders have pleas of no jurisdiction and to the relevancy of the action. There is some overlap between the arguments in support of these two matters. The case came before me on the procedure role for a debate on those pleas at which the defenders all sought dismissal of the action.

[6] In compliance with the requirement in RCS 13.2(4)(b) to plead the ground of jurisdiction for the court, the pursuer has made averments that in respect of the third defenders, the Scottish Ministers, the basis of jurisdiction is the Civil Jurisdiction and Judgments Act 1982, Schedule 8, paragraph 1 – domicile - and also paragraph 2, subparagraph (c) – place where the harmful event occurred. In relation to the first and second defenders, they are domiciled elsewhere so jurisdiction under paragraph 1 is not available. In respect of these parties, the basis for jurisdiction is again paragraph 2(c) and, in addition, paragraph 2(o)(i) – the place where one of multiple defenders is domiciled. When the action was first raised, jurisdiction was sought under paragraph 2(q) – “as regards a claim for limitation of liability arising from use or operation of a ship, the court having jurisdiction in the action relating to such liability”. That, however, would not have availed the pursuer as it does not apply to the issue of dock owners’ limitation which underlies the present action. Those averments were removed by adjustment and need not be considered further.

[7] All three defenders challenge the reliance on subparagraph 2(c) and the first and second defender also challenge reliance on subparagraph 2(o). However, the third defenders argue also that Schedule 8 of the 1982 Act does not apply at all. The first and

second defenders adopted those submissions, and I consider that it is appropriate to consider that issue first.

First jurisdiction issue – does Schedule 2 of the 1982 Act apply?

[8] Counsel for the third defenders drew my attention to section 21(1) of the Act which states that Schedule 8 does not affect the jurisdiction of any court in relation to any matter mentioned in Schedule 9. He then noted that paragraph 13 of Schedule 9 of the 1982 Act refers to, “Proceedings which are not in substance proceedings in which a decree against any person is sought”. It was submitted that the proper view of the action is that the pursuer is not making a claim against the defenders and is in reality seeking to make an application under statute to invoke the provisions in relation to limitation and that it fell within paragraph 13. It was contended that, absent any special provision, an application such as this should be brought by way of petition and that Schedule 8 of the 1982 Act does not apply. As authority for the proposition that the action was of the nature of a statutory application which should have been brought by petition and was not seeking decree against a person, I was referred to Dunedin (Edition), *Encyclopaedia of the Law of Scotland*, Volume 1, paragraph 388, *Miller v Powell* (1875) 2 R 976, *Rankine v Raschen* (1877) 4 R 725, *CA van Eijck & Zoon v Sommerville (the “Olga” and the “Anglia”)* (1906) 8 F (HL) 22, (1905) 7 F 739 and *Hay v Jackson* 1911 SC 876.

[9] For the pursuer, it was submitted that it was no longer necessary to bring an action such as this by petition and that the authorities cited were of no assistance. Under previous rules, in order to establish a right to limit liability it was necessary for the party claiming it to demonstrate that the loss had not occurred through their fault or privity. Now, however, it was a right subject only to being lost in very narrow circumstances. It was submitted that it

was no objection to the use of a summons that the action had to be brought to the attention of any parties who might have an interest in the limitation and that it would be open to the pursuer to seek an order for advertisement at a later stage. I was told that the limitation action which has proceeded in respect of the “Braer” had been initiated in this way.

[10] It was submitted that the incorporation of Article 11 by section 191(6) indicates an intention that a dock owner should be able constitute a fund equivalent to the sum to which liability is limited and from which claimants may be paid. It was submitted also that it ought to be possible to obtain declarator of the limit of liability. As this was the intention of Parliament it was necessary to find a procedural means by which it could be achieved and the present action was such means. It was submitted that the action is one in which decree against a person is sought and it did not therefore fall under paragraph 13 of Schedule 9.

In this regard, there was emphasis on the declarators sought in the first and third conclusions, the parts of the fourth conclusion dealing with the ranking procedure which requires parties to lodge claims and which seeks to stay other proceedings and the element of the fifth conclusion in which the court is asked to rank such claims as are made. My attention was drawn also to the fact that, as noted above, paragraph 2(q) in Schedule 8 makes specific provision for jurisdiction for actions relating to claims for limitation of shipowners’ liability. It was submitted that this indicates that an action to constitute a fund for the purposes of shipowners’ liability does not fall within paragraph 13 of Schedule 9 so as to be excluded from Schedule 8. As the conclusions in the present action mirror those for such an action, it was submitted that this indicates that the current action also does not fall within paragraph 13. It was submitted that if Schedule 8 applies and it is possible to raise proceedings where the harmful event occurred, this will ameliorate the difficulties envisaged of proceedings being brought in a number of jurisdictions.

[11] In response the defenders indicated that they were not arguing that the action was vitiated merely because it was not raised as a petition but the decision to frame it as a summons should not obscure the nature of the action and the fact that it is not covered by Schedule 8. In response to the argument concerning the effect of the inclusion of paragraph 2(q) within Schedule 8, the third defenders submitted that on their approach it would still have purpose. It would apply to an action raised by a shipowner against a single potential claimant seeking to establish an entitlement to invoke limitation against that party. This had been said to be the purpose of Article 6A of the Brussels Convention which underlies it in *Saipem SpA v Dredging VO2 BV and Geosite Surveys Ltd ("The Volvox Hollandia")*(No.1) [1988] 2 Lloyd's Rep 361. It is noted there that in the Schlosser report, which may be used as an aid to the convention, there is a statement that Article 6A does not apply to collective proceedings for creating or allocating a liability fund. The third defender argues that the pursuer's argument that if jurisdiction was to be found on the basis of where the harmful event occurred it would always be clear where the action to constitute a fund could be raised and did not take account of the differing basis on which the liabilities to be limited might arise. The place where the harmful event occurred arises only in relation to actions relating to delict or quasi delict and it would not apply if the only liabilities were statutory or in contract.

[12] For the first defender, in relation to the issue of whether the action sought decree against a party, my attention was drawn to the fact that the conclusions seek authority to constitute the fund and not to establish liability on the part of the pursuer, still less the defender.

[13] The issue of whether Schedule 2 of the 1982 Act applies turns entirely on whether the action falls within paragraph 13 of Schedule 9. Issues of the procedural form the pursuer

has elected to use or past practice are not determinative. The cases cited to me appeared only to indicate past practice rather than to establish legal requirements and do not assist. Nor is it of assistance to consider how in future the action may require to be brought to the attention of parties whose interests may be affected by it. Schedules 8 and 9 constitute a statutory code for jurisdiction and the issue of their scope depends on their terms. So, although the pursuer contended that the court of the place where the incident happened was the one with the closest connection with the facts, was the “most appropriate” and met the requirements of the interests of justice, none of these are the test that must be applied. The issue raised by the pursuer of an entitlement in terms of Article 11 and section 191 to constitute a limitation fund is quite distinct from the issue of in which court any such action may be raised. The issue I have to decide is only whether the pursuer has made averments relevantly invoking the jurisdiction of the Court of Session. The only averments made in this regard by the pursuer are that there is jurisdiction under Schedule 8 and that will only apply if the action does not fall under paragraph 13 of Schedule 9.

[14] The words “in substance” in paragraph 19 are important in relation to this issue. The “substance” of the action here is that the pursuer seeks protection from claims which it has averred may be brought by the other parties. They are seeking to establish an immunity rather than a right or an entitlement. Although pursuit of this limited immunity may entail that they obtain orders against third parties (including the defenders), those orders are not the substance of the action. They are procedural steps which have to be taken as the means by which the pursuer may attain the goal that motivates them to raise proceedings – statutory protection. In light of this, I agree with the submissions for the third defender that this action is intended to invoke a statutory procedure and does not seek decree against any person. As such, it does fall within paragraph 13 of Schedule 9 and, for

that reason, Schedule 8 does not apply. The arguments advanced for the pursuer focus unduly on the form of the conclusions of the summons rather than the substance of the action. The effect of the orders sought is ultimately to achieve resolution of claims *against* the pursuer in the context of limitation of their liability rather than seeking a decree against any of the defenders. The result of this is that the averments as to jurisdiction founded on Schedule 8 are irrelevant.

[15] I consider that the apparent tension between Schedule 9 paragraph 13 and the inclusion of paragraph 2(q) in Schedule 8 does not affect this result. No change was made to paragraph 13 of Schedule 9 when paragraph 2(q) was introduced and the inference is that Parliament intended that they should both take effect. This is possible if the scope of paragraph 2(q) is read in the manner suggested in *The Volvox Hollandia*. Paragraph 2(q) provides an additional basis of jurisdiction so that a person may be sued, “as regards a claim for limitation of liability arising from the use or operation of a ship, in the court having jurisdiction in *the* action relating to such liability” (emphasis added). The use of the definite article is more consistent with the approach of the Court of Appeal in *The Volvox Hollandia* of invoking the entitlement against a single claimant in order to obtain a decree establishing a right to limitation than with the approach of the pursuer here to constitute a limitation fund.

[16] Other than noting that Articles 10 and 11 of the convention contain no rules as to jurisdiction, no submissions were made to me as to the basis on which jurisdiction might be established for proceedings contemplated, in particular, in Article 11. In that situation, I do not think it is appropriate that I express views as to where an action might be raised or on what basis. It will suffice to say that I do not accept the submissions for the pursuer that they will be placed in a position in which they are unable to invoke the opportunity of limitation conferred by the 1995 Act as a matter of public policy.

[17] The result of the above is that all the averments as to Schedule 2 of the 1982 Act are irrelevant and fall to be deleted. If that is done, the result is that there are no averments remaining as to the basis of jurisdiction.

Second jurisdiction issue – applicability of Schedule 8, paragraph 2(c)

[18] On the basis that Schedule 2 does apply, while domicile would be sufficient to establish personal jurisdiction against the third defender, as both the first and second defenders are domiciled elsewhere, another basis for jurisdiction is required. The pursuer seeks to establish jurisdiction against both on the basis of Schedule 8, paragraphs 2(c) and 2(o). Both these defenders deny both bases of jurisdiction apply to them. Although the logical consequence of my decision on the first issue is that it is not necessary to consider whether either or both of these bases of jurisdiction can be relied upon, in case this decision is considered further and a view is taken that Schedule 2 does apply, I consider these issues briefly.

[19] Read with the introductory words of paragraph 2, subparagraph (c) states, “a person may also be sued ... (c) in matters relating to delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”. There is no dispute that the harmful event – the incident – occurred in Scotland but the defenders dispute that the action is one relating to delict or quasi delict. For the first defender it was submitted that jurisdiction on this ground was to be interpreted restrictively and that the expression “delict or quasi delict” should be construed narrowly and did not extend to the subject matter of the current action. In similar vein, the second defender submitted that this ground referred to actions seeking to establish the liability of the defender which is not related to contract. The present action did not fall within this category. In reply, the pursuer submitted that the place where

the harmful event occurred is the most appropriate jurisdictional rule for dockyard limitation.

[20] It has been stated repeatedly in the Court of Justice of the European Union (CJEU), the Supreme Court and the Inner House (see, for instance, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2007] I L Pr 10, *Aspen Underwriting Limited v Credit Europe Bank NV* [2021] UKSC 11, [2021] AC 493, and *Davenport v Corinthian Motor Policies at Lloyds* 1991 SC 372) that, as one of the special rules of jurisdiction derogating from the general rule that an action must be raised in the courts of the place of the defender's domicile, this ground of jurisdiction is to be given a strict interpretation and may not go beyond the cases expressly envisaged. As submitted by the second defender, it is also established in the jurisprudence concerning the Brussels Convention on which it is based that a "matter relating to delict or quasi-delict" covers actions which raise an issue of the defender's liability and does not concern matters relating to a contract (see *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst und Co* [1989] ECC 407 (at [16] - [19])). Again, as submitted for the second defender, in *Davenport*, the Inner House was of the view that the words "*matters related to*" were virtually synonymous with the words "*in proceedings based upon*" (p 384).

[21] The submissions for the pursuer in reply were to the effect that a jurisdictional rule is required to give effect the policy inherent in section 191 and that the one focussing on the place where the harm occurred is the most appropriate. This appeared to be a submission as to what it was considered the law ought to be rather than what it is. I agree that there must be a rule of jurisdiction to enable a party to raise an action but, for the reasons given above, I consider that the pursuer is wrong to assume that the rule must be found in Schedule 8 and then to alight on paragraph 2(c) as the "best fit". Wide as the test in *Kalfelis* is, I consider that the defender is correct that, if paragraph 2(c) is construed restrictively, a claim under

section 191 of the 1995 Act to limit claims made on any basis is not one “relating to delict or quasi delict”. While some of the liabilities underlying the claim for limitation may arise in delict, others may arise in contract or be statutory liabilities as is expressly recognised in section 191(3) and to include them would expand the scope of this ground contrary to the position stated in *Reisch Montage* and *Davenport*.

Third jurisdiction issue – applicability of Schedule 8, paragraph 2(o)

[22] Read with its introductory words, paragraph 2(o) of Schedule 8 states:

“a person may also be sued. ... (o) (i) where he is one of a number of defenders, in the courts for the place where anyone of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;”

There is, naturally, no dispute that the Scottish Ministers are domiciled in Scotland and, as they have been called as a defender to the action, the pursuer contends that it can rely on this provision to establish jurisdiction against the first and second defenders. The first defender argues that there is no proper basis for the pursuer to convene the third defender to the action. It was noted that in their pleadings the third defender disavowed any claim against the pursuer and there was adequate explanation in the adjusted summons as to the basis on which the third defender had been brought in as a party. In addition, it was argued that the claims that it is averred might be made by the third defender were not ones in respect of which limitation of liability was open to the pursuer. The second defender adopted the submissions for the first defender and submitted that if the claim against the third defender fell there would be no jurisdictional underpinning for the action. It was submitted also that, following lines of authority from England, in determining whether the ground could be relied on to found jurisdiction it was necessary to consider whether the

claim against the defender domiciled in the jurisdiction of the court (referred to as the anchor defender) was sustainable. This requires an evaluation of whether it had any reasonable prospect of success or raised an issue to be tried.

[23] For the pursuer it was submitted that this was an issue of relevancy and, on the basis of the averments they had made, it cannot be said that they must inevitably fail even if they prove them. They argued that in the circumstances of a claim to invoke limitation, it is clearly the case that it is expedient to hear the claims together so the condition for application of paragraph 2(o) is met. There are averments of damage to property of the third defender and there is no requirement for the claim to be of any size for paragraph 2(o) to apply. It was argued that the line of authority from England to the effect that before applying this it is necessary to consider whether the claim against the party being used to found jurisdiction is sustainable is not part of convention jurisprudence and not part of Scots law. It was submitted that even if the claim against the third defender was found to be irrelevant and dismissed or was abandoned, the jurisdiction having been established at the outset would remain.

[24] The test imposed by paragraph (o) is that the claims must be so closely related that it is expedient to hear them together. Once again, this requires some consideration of what is meant by “claim” for this purpose. The pursuer in this action is not seeking to make any claim against any of the defenders in the ordinary sense of the word. The defenders are the parties who have or may have claims and the pursuer seeks limited immunity from them. The inclusion of the parties as defenders reflects only the pursuer’s determination of who might or might not have an interest in the limitation of their liability rather than making a claim against them. In this situation, considering whether the “claims” are closely

connected appears to require consideration of the rights which the defenders may wish to vindicate against the pursuer.

[25] During the debate, the English authorities concerning whether there was a requirement to consider whether the anchor claim was sustainable were not dealt with in any detail. There was little more than bare reference to the cases by the pursuer and the second defender in their note of arguments and hardly more in the oral hearing. The latter inviting me to follow the English authorities and the pursuer inviting me instead to adopt the reasoning in the dissenting view set out by Gloster LJ in *Sabbagh v Khoury* [2017] EWCA Civ 1120 rather than the majority view of Patten LJ and Beatson LJ to the effect that it was necessary to consider the merits of a claim before it may be an anchor claim for the purposes of paragraph (o). The judgments - particularly in *Sabbagh* – are complex with reasoning that is substantial and detailed. In the absence of any examination of this and submissions as to why I should follow either the majority or the dissenting opinion, I decline expressly to do either. However, this point may be academic as I consider that the issue of the applicability of paragraph (o) does not turn on it.

[26] Before looking at any requirements as to applicability of paragraph 2(o) to be found in national law, it is useful to consider what has been said about it by the CJEU. The following points can be taken from the case law:

- (a) As noted in para [20] above, as this is an exception to the general rule that jurisdiction is found in the place of the defender's domicile, it must be construed restrictively.
- (b) Whether or not the requirements of paragraph 2(o) are met is to be determined by reference to the position at the time that the action was raised (*Stewart v Trafalgar House Steamship Co Ltd* 2013 SLT 834, *Cartel Damage Claims (CDC)*

Hydrogen Peroxide SA v Akzo Nobel NV EU:C:2015 335, [2015] QB 906), paragraph 28 to 31).

- (c) If the requirements for jurisdiction on this basis are met at the outset of the action, jurisdiction will remain even if the anchor claim is regarded as inadmissible under the national law of the place where it has been raised (*Reisch Montage*, paragraph 31), could never have succeeded (*Stewart*, para [20]) or is settled (*Cartel Damage Claims*, paragraph 33).

It follows that if the claims are not closely connected at the time the action is raised, the claim against a defender in the jurisdiction of the court cannot serve as an anchor for the other claim.

[27] Applying that to the present facts, once again, it is an unusual position in that the pursuer seeking to found jurisdiction is not claiming that they have a claim against a defender in the jurisdiction – albeit a small one – but that the defender may have a claim against them which should be subject to limitation. The defender, on the other hand, pleads that they have no claim at all. If there is no claim, can it be closely connected with the other claims to be an anchor? It is understandable that the rejection of an anchor claim by a court does not of itself mean that the court loses jurisdiction. The very fact that the claim was considered illustrates that the matter was before the court. The position is different, however, where it is not that the party raising the action is asserting that they have a right against the defender which is rejected but only that they have an entitlement under statute to limit their liability to the defender. The defenders are selected only on the basis that they may have a claim that gives them an interest in the matter. If, however, one of the defenders denies they have a claim to be limited, that of itself means that they have no interest in the

issue of whether liability should be limited still less any claim. As they are not making a claim, it cannot be that it is closely connected with any other claim that is being made.

[28] A further reason that it may be said that the third defender has no place in an action to constitute a limitation fund is that none of the claims they might have on the basis of the pursuer's averments are subject to the same limitation as those that might be made by the first defender and second defender. I agree with the submissions for the first and second defenders that any claims by the third defender arising from late redelivery of the Scotia would be claims in reparation for breach of contract. As such they would not fall under section 191(2) of the 1995 Act and therefore could not therefore be the subject of limitation. I agree also that on the basis of the pursuer's averments, the claims for spoiled foodstuffs and for damage to batteries arose from the discontinuation of a power supply to the Petrel and that the decision to do this was made some time after the Petrel toppled. Section 191(3) states that the limitation applies to "the whole of any losses and damages which may arise on any one distinct occasion". On the basis of the pursuer's averments, the losses arising from the cessation of power arose on a different occasion from the damage to the Petrel and therefore the resulting losses could not be the subject of limitation along with the losses caused by the toppling itself.

[29] It is useful to consider also the principles that underlie the rule that one defender may be sued in the courts of the place of domicile of another defender in order to determine whether paragraph 2(o) can be applied in the way contended for by the pursuer. In *Athenian Brewery SA v Macedonian Thrace Brewery SA* [2025] IL Pr 9, the CJEU was required to consider Article 8(1) of Regulation EC 1215/2012 (Brussels Recast). This is the equivalent of Article 6(1) of Regulation EC 44/2001 (Brussels I) and Article 6 of the Brussels Convention from which Schedule 8 paragraph 2(o) is derived. The court noted that the principle of legal

certainty which underlies the rules of jurisdiction required that a well-informed defender is able to foresee before which courts, in addition to the court of their domicile, they may be sued (paragraph 34). So, in both that case and in the *Cartel Damage Claims*, defenders who had entered into an unlawful cartel would have been able to foresee being sued in the courts of the domicile of the other parties with whom they were liable. The same would be true of parties who had committed a delict for which they were jointly and severally liable. That element is not present in this case. The matter common to the defenders which has resulted in the action being raised against them is that they are alleged to have suffered loss as a result of an incident which was not brought about by their acts. The range of parties who could suffer that loss and therefore the domiciles of jurisdiction that could apply is not something which any individual defender could foresee. Therefore, if they could be brought before the courts of any country in which any possible claimant was domiciled, certainty would be undermined. The court should not adopt an interpretation which has this effect and for that reason and the others identified above, jurisdiction is not available against the first and second defenders on the basis of Schedule 8, paragraph 2(o).

Relevancy issue

[30] The second defender argued that the action is irrelevant as the pursuer does not aver to provide facts necessary for it to be entitled to constitute a limitation fund. Article 11 of Convention on Limitation of Liability for Maritime Claims as given effect by section 191(6) of the 1995 Act, states:

“Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the

occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.”

Article 12, which is also given force of law by that subsection, addresses distribution of the fund. It is correct that there is no averment of the existence of any proceedings such are referred to in the first sentence of Article 11. The issue is whether such proceedings are a necessary pre-requisite for an action to constitute a limitation fund. The second defender submitted that the position in England was that they are. In that regard they referred me to *ICL Shipping Ltd v Chin Tai Steel Enterprise Co Ltd (The ICL Vikraman)* [2004] 1 WLR 2254 at §§43-57 and *Seismic Shipping Inc v Total E & P UK plc (The Western Regent)* [2005] EWCA Civ 985, [2005] 2 All ER (Comm) 515 and [2005] EWHC 460 (Admlty), [2005] 2 All ER (Comm) 51). It was acknowledged that the decision in the *ICL Vikraman* was distinguished in *Vessel SA v CP Ships Ltd (The Denise)* [2004] EWHC 3305 (Admlty), [2005] 2 All ER (Comm) 47, but only as regards Article 10, not Article 11.

[31] As noted above, whereas limitation of shipowners’ liability arises from International Convention, the ability of dock owners to limit their liability does not. It arose from agreement between shipowners and dock owners as to how their liabilities should be addressed. The history is set out in the decision of Teare J in *Holyhead Marina Ltd v Farrer* [2021] 2 Lloyd’s Rep 221, paragraphs 12 – 25 – a passage that was quoted in the subsequent decision of the Court of Appeal ([2022] 1 Lloyd’s Rep 463, paragraph 8). When considering shipowners’ liability therefore, the “State Parties” can readily be understood as referring to the signatories to the convention but it cannot have that meaning in relation to dock owners’ liability. In *Holyhead Marina*, Teare J noted that section 191 must be construed in a manner consistent with its object or purpose (paragraph 11). This must be just as true of subsection (6) incorporating Article 11 as it is of the remainder. Yet, if Article 11 is applied

literally, the absence of State Parties would prevent an action to constitute a limitation fund ever being raised. In order to give effect to the clear intention of Parliament that a dock owner should be able to constitute a fund equivalent to the limit of their liability and thereby free themselves from the requirement to contest further actions (see section 191(6) and paragraph 8(3) Part II of Schedule 7 of the Act), Article 11 must be construed differently. Subsection (6) says that the subsection is to “have effect for the purpose of this subsection”. I consider that this must be read as applying it *mutatis mutandis*, making such changes as are necessary to allow it to take effect. This would mean that the entitlement under Article 11 arises when any proceedings have been raised. A further issue might arise as to whether the proceedings need to have been raised in the United Kingdom but that issue does not arise here as it is apparent that no proceedings have been raised at all.

[32] The pursuer responded to this ground of challenge by arguing that the terms of Article 11 are permissive in that it does not say that a party may *only* constitute a fund in the specified circumstances. While the inclusion of “may” in the opening words - “A person alleged to be liable *may* constitute a fund” – is permissive, I do not consider that this taken with the absence of “only” means that there is no requirement for prior proceedings. There is no obligation on a dock owners to set up such a fund and they are entitled simply to invoke their right to limit liability in response to a claim against them. It is therefore not surprising that Article 11 is expressed in permissive terms. Read naturally, however, what is permitted is to constitute a fund where legal proceedings have been commenced and it contains no wording entitling a dock owner to constitute a fund without proceedings having been commenced. For the avoidance of doubt, it should be noted however that this applies only to the entitlement to constitute a fund and that the entitlement to limit is not so restricted (*The Western Regent*, first instance – para [20], Court of Appeal – para [21]).

Conclusion

[33] In view of the conclusion I have reached in relation to the first issue above, I sustain the defenders' pleas to the relevancy of the action – the second plea-in-law for each of the first and second defenders and the third plea-in-law for the third defenders. As this matter has been determined on the basis of the absence of relevant averments, I consider that this disposal is more appropriate than dismissing on the basis that the court does not have jurisdiction.