



## SUPREME COURT OF NORWAY

On 28 June 2018, the Supreme Court gave judgment in

**HR-2018-1260-A, (case no. 2017/2118), civil case, appeal against judgment**

The London Steam-Ship Owners Mutual  
Insurance Association Ltd.

The Roc Maritime Inc. c/o Franco &  
Franco

Cosco (H.K) Shipping Co Ltd.

(Counsel Gaute Gjelsten)

v.

The state represented by the Ministry of  
Transport and Communication

(The Attorney General represented by  
Ole Kristian Rigland)

- (1) Justice **Kallerud**: The case concerns the scope and distribution of a limitation fund constituted under section 177 of the Maritime Code after an oil spill incident. The question is whether the dividends to creditors are only to be calculated from the amount allocated under section 232 subsection 1 (a) of the Maritime Code – the "liability amount" – or whether also the "interest component" should be included in the distribution base.
- (2) The bulk carrier Full City ran aground outside of Langesund on 31 July 2009. The ship's proprietor was The Roc Maritime Inc. Managing owner of the ship was Cosco (H.K) Shipping Co Ltd. Liability insurer was The London Steam-Ship Owners Mutual Insurance Association Ltd. These parties will be collectively referred to as the "owner".
- (3) The accident resulted in a leak of bunker oil, polluting a shoreline of 57 kilometres from Stavern to Lillesand. The state's claim for approximately NOK 240 million for the clean-up operation that was immediately initiated is not disputed. The state also claims interest of approximately NOK 21 million calculated based on the court of appeal's judgment, which

gives a total claim of approximately NOK 261 million. The owner has filed a claim against the fund in excess of NOK 32 million. Thus, the total claim in the case is approximately NOK 293 million.

- (4) On 2 November 2012 Oslo District Court constituted, upon the owner's request, a limitation fund under section 177 of the Maritime Code, cf. section 231 et seq.
- (5) As set out in the district court's ruling, the parties agreed that the liability amount under section 232 of the Maritime Code subsection 1 (a) was 22 936 500 Special Drawing Rights – so-called SDRs – calculated under section 175 (a). On 20 November 2012, the appointed fund manager received an amount in excess of NOK 200 million, which corresponded to the SDRs with the exchange rate applicable at that date. The parties also agreed to allocate NOK 62 million for payment of interest, and security was given for this. The security was to cover the amount mentioned in section 232 subsection 1 (b) of the Maritime Code and the amount mentioned in section 234 subsection 2. The interest calculated under section 232 subsection 1 (b) constitutes in excess of NOK 58 million. The total amount under section 232 subsection 1 (a) and b is thus roughly NOK 259 million, which means that the coverage for the claims against the fund is inadequate. As agreed by the parties, the fund manager paid NOK 170 million on account to the state in December 2012.
- (6) The dispute revolves around the calculation of the dividends. The state contends that this amount must be calculated from the total amount allocated under section 232 subsection 1; that is, NOK 259 million. The owner contends that the dividends can only be calculated from the amount allocated under section 232 subsection 1 (a); that is, NOK 200 million. In the owner's view, the interest component of NOK 62 million is to cover interest only before any excess amount is reallocated.
- (7) The fund manager concluded that the amount allocated under section 232 subsection 1 (b) only served as security for payment of interest, and that the excess was to be released. The state disagreed and filed an action to Oslo District Court.
- (8) On 25 August 2015, Oslo District Court concluded as follows:
  - "1. The amount allocated in the global fund under section 232 subsection 1 (a) of the Maritime Code (the capital amount), is to be distributed on proven claims, while the amount allocated in the fund under section 232 subsection 1 (b) of the Maritime Code is to cover default interest accrued from the incident until the constitution of the fund, on the proven claims to the extent they are covered by the capital amount.
  2. The state represented by the Ministry of Transport and Communication is not entitled to interest on loss-of-use damages [*avsvnsrenter*] on proven claims covered by the global fund.
  3. The costs of the state represented by the Ministry of Transport and Communication of NOK 2 164 200 for the outdoor life survey is not covered by the fund.
  4. Each of the parties covers its own costs."
- (9) Both parties appealed to Borgarting Court of Appeal, which on 15 August 2017 concluded as follows:
  - "1. The limitation fund for distribution among the fund's creditors is NOK 259 044 123.
  2. Legitimate interest claims from the incident until the fund's constitution is covered without

**limitation of assets added to the fund under section 232 subsection 1 (b) of the Maritime Code. Assets added to the fund under section 232 subsection 1 (a) of the Maritime Code and funds remaining under section 232 subsection 1 (b) after legitimate interest is covered, are distributed proportionately on the claims subject to limitation.**

3. **Interest on the loss-of-use damages is added to the claim of the state represented by the Ministry of Transport and Communications against the limitation fund until the date of payment until 12 July 2012 with an interest rate of 2.5 percent p.a.**
4. **Each of the parties covers its own costs in the district court and in the court of appeal."**

- (10) The court of appeal found that the entire amount allocated under section 232 subsection 1 of the Maritime Code had to be distributed among the creditors. But in the court of appeal's view, legitimate interest claims until the constitution of the fund were to be covered in full by the amount allocated under (b) before any distribution of the excess to other creditors together with the liability amount.
- (11) The owner has appealed to the Supreme Court against the distribution of the limitation fund; that is, items 1 and 2 in the court of appeal's conclusion, and against the state being awarded interest on the loss-of-use damages, see item 3 of the conclusion. The appeal concerns the application of the law. The state has submitted a derivative appeal in terms of the interest rate applied in terms of the loss-of-use damages.
- (12) On 5 January 2018, the Supreme Court's Appeal Selection Committee granted leave to appeal as to the distribution of the limitation fund under section 232 subsections 1 (a) and (b) of the Maritime Code. All other aspects of the appeal, as well as the derivative appeal, were rejected. The state's right to interest on the loss-of-use damages is thus final and enforceable.
- (13) The appellants – *The London Steam-Ship Owners Mutual Insurance Association Ltd., The Roc Maritime Inc. c/o Franco & Franco and Cosco (H.K) Shipping Co Ltd.* – contend:
- (14) At the outset, the owner is entitled to limitation of liability, see the substantive provisions in chapter 9 of the Maritime Code. This right cannot be diluted by unclear procedural rules in chapter 12, as the court of appeal has assumed.
- (15) The interest component in the limitation fund must be reserved for payment of interest on the limited claims. The central provision is section 244 of the Maritime Code, establishing that the fund is to be distributed according to the provisions in section 176. This implies that the basis for the distribution lies in the general substantive provision in section 176, stating that only the liability amount is to be distributed.
- (16) The Norwegian preparatory works do not fully support the result of the court of appeal, as they emphasise the fact that the interest component is part of the fund, which is not disputed. Thus, the preparatory works say nothing as to the very distribution of the fund. Interest is expressly excluded from limitation and is not to be distributed to the creditors in the form of dividends.
- (17) In connection with previous ship accidents, the practice of the owner has been followed. The state has accepted this and has expressed varying views also in the case at hand.
- (18) The interest issue is governed by national law, and no guidance is found in international conventions, preparatory works or in foreign legal literature. Nor is Nordic law particularly useful. Swedish law, on the other hand, relies on the solution asserted by the owner.

(19) The appellants have submitted this prayer for relief:

- "1. **Security for interest in the fund only serves as security for payment of interest on the limited claims. Any excess security is to be released.**
2. **The London Steam-Ship Owners Mutual Insurance Association Ltd., The Roc Maritime Inc. and Cosco (H.K) Shipping Co Ltd. are to be awarded costs in all instances."**

(20) The respondent – *the state represented by the Ministry of Transport and Communication* – contends:

- (21) The starting point is that the polluter is liable and that the injured party is entitled to full compensation. The Maritime Code's provisions on limitation of liability deviate only to some extent from this in the form of a special, convention-based exemption rule. This is essential for the interpretation of the provisions, both those concerning limitation of liability and those concerning the limitation fund.
- (22) The provisions on limitation of liability do not give the owner adequate protection. The provisions must be read in context, with none prevailing over the others. There is no basis for drawing a sharp line between substantive and procedural rules, at least not in a way that may affect how the case is resolved.
- (23) The size of the limitation fund is the sum of the limitation amount plus the interest component. The consequence of the owner constituting a fund is that the fund must be distributed proportionately.
- (24) The distribution of the entire fund has its legal basis in the convention rules, the Maritime Code's provisions and system, and Norwegian and international preparatory works.
- (25) According to Article 12 No. 1 of the London Convention, the fund; that is, the entire fund, is to be distributed. The reference in Article 12 No. 1 to Articles 6 and 7 cannot be read as any form of limitation. The purpose is only to refer to the rules on different priority, and that this must be considered in connection with the distribution. This is also how the Norwegian equivalent – section 244 of the Maritime Code – must be interpreted.
- (26) There is consensus in maritime law theory that the entire fund must be distributed proportionately. English literature stands out in this regard, as the Convention's wording has been incorporated into the laws of England and Wales. Nordic uniformity of the law is also emphasised, and Swedish and Danish sources of law support the view of the state.
- (27) The central provision is section 232 subsection 1 of the Maritime Code, specifying that the fund consists of two parts – the liability amount and interest accrued thereon. There is nothing to suggest, neither in this provision nor in the Code in general, that the entire fund cannot be used for coverage of the creditors' claims.
- (28) The provision in section 234 subsection 2 on security illustrates the system of the law. When – as in our case – a global fund is constituted, security is only required for the period after the constitution of the fund, see the last sentence in section 234 subsection 2. For the pre-constitution period, the security is the inclusion of the interest amount in the fund. When, on the other hand, it concerns an oil spill fund constituted under section 195 of the Maritime Code, no interest is included. Therefore, in these cases the security must comprise the entire interest liability, see section 234 subsection 2 first sentence. The preparatory works emphasise

this distinction, see in particular Norwegian Official Report 1980: 55 page 51 where the Maritime Law Committee holds that the interest amount for global funds "is integrated in the fund", and that this "amount must be distinguished from the additional amount referred to in section 353 subsection 2 [the current section 234 subsection 2] of the Committee's proposed text".

- (29) The respondent has submitted this prayer for relief:

**"Principally:**

**The limitation fund to be distributed proportionately among the fund's creditors is NOK 259 044 123.**

**Alternatively:**

**The appeal by The Roc Maritime Inc., Cosco (H.K.) Shipping Co Ltd. and London Steam-Ship Owners Mutual Insurance Association Ltd. is to be dismissed.**

**In both cases:**

**The state represented by the Ministry of Transport and Communication, is to be awarded costs in the district court, the court of appeal and the Supreme Court."**

- (30) *My view on the case:*
- (31) As a starting point, the state is entitled to be compensated in full for its outlays in connection with the oil spill operation following the shipwreck, see e.g. section 76 of the Pollution Act. However, *the provisions on the right to limitation of liability in chapter 9 of the Maritime Code* change this starting point materially.
- (32) Section 171 establishes that the shipowner "can limit his or her liability according to the provisions of this chapter". Further conditions for limitation of liability are presented in the subsequent provisions of the same chapter. Here, specific amounts to which the liability can be limited are mentioned.
- (33) It is undisputed that the owner is entitled to limitation of liability for the claims submitted. The invoked – and accepted – legal basis for this in the case at hand is section 172a. The liability is limited according to section 175a and is, as I have already mentioned, some NOK 200 million.
- (34) Section 173 lists which claims are excepted from limitation, including claims relating to "interest and legal costs", see section 173 (6). This is the only place where interest is mentioned in the substantial provisions. The Code contains no other exceptions from the right to limitation than those in section 173.
- (35) The right to limitation applies irrespective of whether a limitation fund is constituted under section 180 subsection 1. According to section 176, the limitation amount is to be "distributed among the claims to which limitation applies in proportion to the amounts of the proven claims". This provision, too, applies irrespective of whether a limitation fund has been constituted. What is distributable according to the provision is thus the limitation amount, nothing else.
- (36) The starting point of the Code is, hence, that the owner has an unconditional right to limitation of liability for the submitted claims if the conditions – as in our case – are met. The natural

interpretation based on the provisions to which I have referred, is that it is a question of maximum liability: The owner's liability must not exceed the fixed limitation amount of, in the case at hand, approximately NOK 200 million.

- (37) The question is whether *the constitution of a limitation fund* can change this starting point.
- (38) According to the legal basis for the constitution of a limitation fund – section 177 of the Maritime Code – such a fund "may be constituted" if an action is brought or arrest is applied for. According to the final subsection, "[m]ore detailed provisions relating to limitation funds and limitation actions are laid down in chapter 12".
- (39) Chapter 12 – section 231 – starts by stating that the provisions apply to "limitation funds constituted according to section 177 (global funds)", i.e. a fund like in the case at hand.
- (40) Section 232 subsections 1 and 2, headed "Amounts of funds", read:

**"The global fund shall correspond to**

**a) the total of the amounts which according to section 175 or section 175a are the limits of the liability for the claims for which limitation of liability is being invoked and which arose from one and the same event, and**

**b) interest on the amounts mentioned under letter a for the time from the event to the constitution of the fund, calculated at the rate laid down according to section 3 of Act of 17 December, 1976, No. 100 Relating to Interest on Overdue Payments.**

**A fund constituted according to section 175a shall equal the full amount of liability there, unless the fund is constituted as a supplementary fund according to section 178a subsection 2.**

- (41) Hence, the limitation fund consists of two different parts: the liability amount according to (a) – here around NOK 200 million – and the interest component according to (b). The interest included in the fund is to be calculated from the incident – the accident – until the fund's constitution – here 20 November 2012. Because the interest is calculated already from the date of the incident with a high interest rate, and more than three years passed before the limitation fund was constituted, interest accrues of around NOK 58. The economic effect will therefore substantial also if this amount is to cover the creditors' claims, as the state contends, or if it is only to serve as security for payment of interest, as the owner contends.
- (42) According to section 244, "the court will by judgment distribute the fund according to the provisions of section 176 or 195". The term "the fund" in itself suggests that the entire amount is to be distributed. The reference to section 176 in section 244, on the other hand, suggests the opposite. As I have already mentioned, section 176 only deals with distribution of "liability amounts". However, much indicates that the reference – as the state contends – is meant to concern other parts of the provision dealing with the priority of the claims etc. In my opinion, the provision is unclear.
- (43) Also, section 232 subsection 2 creates uncertainty in my opinion. It states that "[a] fund constituted according to section 175 (a) shall equal the full amount of liability there...". The "full amount" under section 175 (a) is, in the case at hand, around NOK 200 million. If the interest is also included, the amount will exceed the liability amount.
- (44) According to section 234 subsection 2, security must be given for interest, among other things. However, subsection 2 states in its final sentence that "[w]hen a global fund is

constituted, this only applies to interest for the period after constitution of the fund". This exception must be read in conjunction with section 232 subsection 1 (b), which includes an interest component for the period until the constitution of the fund. A limitation fund for oil spill constituted in accordance with section 195 does not have a separate interest component, as opposed to the global fund in the case at hand. Thus, for such funds security must be given for the entire interest amount, not just interest accrued after the fund was constituted. It may be that these dissimilar systems suggest that the interest component must also be part of ordinary distribution, as the state argues. But I have problems drawing any conclusion of significance to our question based on the security provisions in section 234 subsection 2.

- (45) It may seem natural that once a fund has been constituted, the entire fund must be used to cover the legitimate claims made against it. But as I have demonstrated, the provisions on limitation funds do not clearly regulate this. The provisions on limitation of liability, on the other hand, are clear and incompatible with the inclusion of the interest component in the distribution base. If the interest component is also distributed proportionately on the creditors, the owner may systematically become liable for a higher amount than the fixed limitation of liability in cases where a limitation fund is constituted.
- (46) My conclusion thus far – based on statutory rules and systematism – is that the provisions on limitation funds in chapter 12 do not change the right to limitation in such a way that the owner becomes liable for a higher amount than that set out in chapter 9.
- (47) I will then consider whether *sources of law other* than the wording of the Code and systematism may give a different result than mine thus far.
- (48) Limitation of liability has a long history in maritime law, and has long been based on international and Nordic cooperation. Before an amendment in 1983, the Maritime Code 1893 had provisions on limitation of liability and distribution of liability amounts that are rather similar to the current provisions, see sections 234 et seq. The provision in the then section 237 stipulated that arrest could be avoided if the owner gave "joint security" for the entire liability amount "plus an amount estimated by the court for coverage of interest". I cannot see that this previous regulation gives guidance in our case.
- (49) With *amendment 27 May 1983 no. 30*, provisions on limitation funds were implemented in section 240. The provisions are continued in the current section 177. In the then section 351, a provision was added with the same structure as the current section 232. Section 636 also contained "distributing the fund" as I have quoted from the current section 244.
- (50) The provisions adopted in 1982 – which have been continued in the current Code – implemented the *London Convention of 1976* on limitation of liability for maritime law claims in Norwegian legislation.
- (51) Article 11 of the Convention is headed "Constitution of the fund". The provision's no. 1 reads:
 

**"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."**
- (52) As it appears, section 232 subsection 1 of the Maritime Code is largely a reproduction of the

second sentence in Article 11 no. 1. The mentioned Articles 6 and 7 concern the limits of liability. These are found in sections 175 and 175a of the Maritime Code. This part of Article 11 throws no new light on how the fund is to be distributed, considered against the provisions on limitation of liability. On the other hand, the last sentence of Article 11 no. 1 stating that the fund "shall be available only for the payment of claims for which the limitation of liability can be invoked", may indicate that the interest component was not meant for payment of ordinary claims subject to limitation.

(53) Article 12 is headed "Distribution of the fund". No. 1 reads:

**"Subject to the provisions of paragraphs 1, 2 and 3 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund."**

(54) The current section 244 absorbs this provision. The wording of the Article does not contribute to clarifying the ambiguity I have previously pointed out in the Norwegian text. Here too, much suggests that the idea is to refer to the provisions on priority etc., not to clarify whether the entire, or just parts of, the fund is to be distributed.

(55) There exists no Norwegian *case law* of relevance to this case. The parties have also not presented any foreign case law that may shed light on the interpretation of the Convention in the disputed matter.

(56) Extensive *preparatory works to the provisions in the Convention* exist. However, I cannot see how they contribute to resolving the dispute in our case. Much indicates that the ambiguity that has emerged had been identified during the drafting of the Convention, but that the solution had to be governed by national legislation according to Article 14:

**"Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connexion therewith, shall be governed by the law of the State Party in which the fund is constituted."**

(57) Our case concerns exactly "distribution of a limitation fund", which – as I read the Convention – is not comprised by its provisions.

(58) Nor *Norwegian preparatory works* give a clear answer to the question raised in our case. It is primarily the report from the Maritime Law Committee – Norwegian Official Report 1980: 55 – that is interesting. The state has singled out one statement from the special motives to support its view. In the comments to the section that is now section 232, the Committee stated on page 50 that the provisions "corresponds to the 1976 Convention's Article 11 no. 1...". Then it is stated that subsection 1 "indicates the size of the global fund", and that the fund is primarily to consist of the sum of the amounts constituting the limitation. The following is stated on page 51:

**"S e c o n d l y, interest must be added to the abovementioned amount, accrued on the amount for the period from the accident to the fund's constitution and calculated based on an interest rate stipulated according to section 3 of the Interest Act. This provision is new and entails that the liable party will not obtain an interest advantage by delaying the fund's constitution. This interest amount is, as mentioned, a part of the fund, and the amount must be kept apart from the additional amount mentioned in section 353 subsection 2 [now section 234 subsection 2] of the Committee's proposed text. The additional amount under section 353 constitutes, among other things, security for the liability according to general legal provisions on interest accrued on each individual claim for the period from the fund's constitution to payment is made; this interest is calculated based on the amount paid to the individual creditor after the fund has been distributed on all claims."**



- (59) What is primarily confirmed here is the same as wording of the Code expresses: The limitation fund consists of two components. The Code is vague as to whether the fund's two parts are to be merged when calculating the creditors' dividends. The consideration stressed – that the liable party otherwise will obtain an interest advantage by delaying the fund's constitution – is probably best taken if interest is added to the distributable amount. But to which extent the interest rule will be an incentive to constitute a fund rapidly will depend on a number of circumstances, including the linkage between market interest and default interest and the currency risk related to SDR rate fluctuations. In any case, the consideration stressed in the preparatory works cannot prevail over the statutory rules on the right to limitation.
- (60) In my view, there are also no clear answers to our question in other statements in the preparatory works, including in the Ministry's follow-up of the Maritime Committee's recommendation in Proposition to the Odelsting No. 32 (1982-83) and the hearing in the Storting, Recommendation to the Odelsting No. 58 (1982-83). Nor subsequent preparatory works – on issues such as support of the so-called 1996 protocol to the London Convention and increased liability amounts – suggest other solutions than the one I have concluded on. I refer to Norwegian Official Report 2002: 15 on liability for oil spill operations after shipping accidents, Propositions to the Odelsting No. 79 (2004–2005) and No. 16 (2008–2009).
- (61) The international basis for limitation of liability and limitation funds in maritime law, and the close Nordic cooperation in this field make *jurisprudence* in other countries highly interesting. The material presented, however, does not give a clear image as I read it. I will therefore leave it here. Nor legal theory – Norwegian as well as foreign – gives any relevant contributions to the dispute in the case at hand.
- (62) I therefore *conclude*:
- (63) The provisions on limitation funds in chapter 12 of the Maritime Code must be interpreted to mean that when the fund is not sufficient to cover all claims, the creditors' dividends are only to be calculated from the amount allocated under section 232 subsection 1 (a) of the Maritime Code – the "liability amount". Amounts allocated for payment of interest under (b) – are not included in the distribution base. This amount is exclusively allocated for payment of interest.
- (64) The owner's view is hereby supported, and the appeal must succeed. The way the appeal has been structured and litigated before the Supreme Court, I find it appropriate that the conclusion of judgment is worded in accordance with the conclusion I have just presented.
- (65) As the case has given rise to doubt, I find that the parties should carry their own costs, see section 20-2 subsection 3 of the Dispute Act.
- (66) I vote for this

#### J U D G M E N T :

1. The creditors' claim for dividends in the limitation fund is limited to the amount allocated under section 232 subsection 1 (a) of the Maritime Code.
2. Costs are not awarded in any instance.

(67) Acting Justice **Sverdrup**:

I agree with the justice delivering the

leading opinion in all material respects  
and with his conclusion.

(68) Justice **Bergsjø**: Likewise.

(69) Justice **Noer**: Likewise.

(70) Justice **Matningsdal**: Likewise.

(71) Following the voting, the Supreme Court gave this

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