FEDERAL COURT OF AUSTRALIA

Offshore Marine Services Alliance Pty Ltd v Leighton Contractors Pty Ltd [2017] FCA 333

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judge: | **MCKERRACHER J** |
|  |  |
| Date of judgment: | 30 March 2017 |
|  |  |
| Catchwords: | **ADMIRALTY** – general average – whether respondents are owners for the purpose of s 72(3) of the *Marine Insurance Act 1909* (Cth) – whether the respondents otherwise have a relevant interest in property to attract liability for the purpose of s 72(3) of the *Marine Insurance Act 1909* (Cth) by virtue of contractual obligations or otherwise |
|  |  |
| Legislation: | *Admiralty Act 1988* (Cth) ss 17, 19  *Marine Insurance Act 1909* (Cth) s 1, 3, 4, 5, 6, 9(2), 11, 20(3), 72, 72(3), 72(7)  *Navigation Act 2012* (Cth) s 14(1)  *Shipping Registration Act 1981* (Cth) s 62  *Western Australian Marine Act 1982* (WA) s 3(1) |
|  |  |
| Cases cited: | *Anderson v Morice* (1876) 1 App Cas 713  *Andre Toulemonde Wool Co Pty Ltd v Knutsen Offshore (Panama)* *SA* (unreported, WASC, Anderson J, 26 June 1998)  *Austin Friars Steamship Co Ltd v Spillers & Bakers Ltd* [1915] KB 833  *Australian Coastal Shipping v Green* [1971] 1 QB 456  *Birkley v Presgrave* (1801) 1 East 220  *Burton & Co v English & Co* (1883) 12 QBD 218  *Cargo ex Galam* (1863) 15 ER 883  *Castle v Playford* (1871-72) LR 7 Ex 98  *Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd* [1984] 1 AC 226  *Cummings v Lewis* (1993) 41 FCR 559  *Freeman v Birch* (1833) 1 Nev 8 MKB 420  *Friend v Brooker* (2009) 239 CLR 129  *Hain Steamship Co Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597  *Hallett v Wigram* (1850) 137 ER 1018  *Hingston v Wendt* (1876) 1 QBD 367  *Keith and Wylie v Burrows and Perks* (1877) 2 App Cas 636  *Kemp v Halliday* (1866) 122 ER 1361  *Reeves v Barlow* (1884) 12 QBD 436  *Scaife v Tobin* (1832) 110 ER 189  *Ship Hako Endeavour v Programmed Total Marine Services Pty Ltd* (2013) 211 FCR 369  *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601  *The ‘Hellenic Glory’* [1979] 1 Lloyd’s Rep 425  *Tisand Pty Ltd v Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43  *Walford De Baerdemaecker & Co v Galindez Brothers* (1897) 2 Com Cas 137  *Walthew v Mavrojani* (1869-70) LR 5 Ex 116 |
|  |  |
| Date of hearing: | 7 December 2016 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 86 |
|  |  |
| Counsel for the Applicant: | Mr PA Hopwood |
|  |  |
| Solicitor for the Applicant: | Cocks Macnish |
|  |  |
| Counsel for the Third and Fourth Respondents: | Mr AM Stewart SC |
|  |  |
| Solicitor for the Third and Fourth Respondents: | HWL Ebsworth Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | WAD 596 of 2015 |
|  | | |
| BETWEEN: | OFFSHORE MARINE SERVICES ALLIANCE PTY LTD  Applicant | |
| AND: | LEIGHTON CONTRACTORS PTY LTD  Third Respondent  **THIESS PTY LTD**  Fourth Respondent | |

|  |  |
| --- | --- |
| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 30 MARCH 2017 |

THE COURT ORDERS THAT:

1. The answer to preliminary question ‘A’ is No.
2. Preliminary question ‘B’ does not arise.
3. The applicant do pay the costs of the respondents, to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

# LIMITS TO THE LAW OF GENERAL AVERAGE

1. The parties who remain in this dispute have posed a novel preliminary question concerning the law of general average in maritime law. The participants to the preliminary question are the applicant, **Offshore Marine** Services Alliance Pty Ltd; the third respondent, **Leighton** Contractors Pty Ltd; and the fourth respondent, **Thiess** Pty Ltd.

# RELEVANT BACKGROUND

1. Offshore Marine was the disponent owner and operator for the ballastable flat top deck **barge** ‘JMC 2822’ and the time charterer of the ocean going **tug** ‘Miclyn Venture’. In late November 2012, the tug and barge were in the Australian marine complex in Henderson, Western Australia in preparation for a **voyage** to Barrow Island, Western Australia pursuant to a contract to carry cargo between Offshore Marine and **Chevron** Australia Pty Ltd. Offshore Marine also owned various items of equipment including miscellaneous drill equipment. This was loaded onto the barge at the Australian marine complex in Henderson for the Voyage. The value of Offshore Marine’s equipment was about $1.4 million. CBI Constructors Pty Ltd (the first respondent not presently a participant to this debate) owned the various items of equipment including construction equipment, scaffolding tools and consumables to the value of about $370,000.
2. Leighton’s cargo included ‘Contractor Materials’ which were to form part of what was to be constructed on Barrow Island. Leighton denies it was the owner of the equipment. Thiess, likewise, denies it was the owner of similar cargo (also contractor materials) being supplied to Chevron to form part of the plant at Barrow Island.
3. Leighton and Thiess supplied the goods and services under contractual terms which are for present purposes substantially to the same effect. Specifically they are:

a) clause 17.1.1 of Leighton’s contract (Tender Document 1) provides:

*Title to those parts of the Work which are to be handed over to Owner upon the achievement of Initial Acceptance and all Contractor Material intended for incorporation into the Work shall pass to and vest with the Owner either:*

*(a) when the Work, Contractor Material or part thereof are first identifiable as being appropriated to the Work; or*

*(b) when payment of 80% of the price for the Work, Contractor Material or part thereof has occurred; or*

*(c) in respect parts of the Work or of Contractor Materials that are procured outside of Australia, Free On Board (FOB)*;

*whichever occurs the earliest. Title to all Non-Contractor Materials shall remain with Owner.*

b) clause 17.1.1 of Thiess’ contract (Tender Document 2) provides:

*Title to the Work and all Contractor Material intended for incorporation into the Work shall pass to and vest with Owner from the earliest moment of identification to the Work. Title to all Non-Contractor Materials shall remain with the Owner.*

c) clause 17.1.2 of each of Leighton and Thiess' contracts provides:

*Notwithstanding Article 17.1.1, Contractor shall be responsible for the care, custody, control and safekeeping and preservation of all Contractor Equipment, and Contractor Material at all times, and the Work, including all Non-Contractor Material and Non-Contractor Equipment (when in Contractor's care, custody and control), from Effective Date until Initial Acceptance of the Work or in respect of a Separable Portion of the Work, Initial Acceptance of the Separable Portion of the Work*;

d) 'Contractor Equipment' is defined at clause 1.18 of Leighton and Thiess’ contracts to mean:

*... any equipment … leased, borrowed, utilised, chartered, hired, or provided by Contractor Group to perform the Work that will not be permanently incorporated into the Work*.

e) 'Contractor Material' is defined at clause 1.20 of Leighton and Thiess’ contracts to mean:

*… any items, parts, components, raw materials, consumable or other tangible or intangible goods, materials or other items furnished by Contractor Group and intended for incorporation into the Work*.

f) 'Initial Acceptance' is defined in both contracts to mean:

*… initial acceptance of the Work or a Separable Portion of the Work pursuant to Article 5.9, which shall occur on the date Company issues a Certificate of Initial Acceptance*; and

g) Clause 5.9 of each contract sets out a procedure by which:

i) the Contractor is obliged to notify the Company when it has completed the Work or a separable portion thereof (*5.9.2*);

ii) the Company then has time to inspect the Work and request rectification of defects (*5.9.2*);

iii) the Contractor is obliged to take steps to remedy any defects (*5.9.3*) and

iv) once the Company is satisfied with the Work, the Company issues a Certificate of Initial Acceptance (5.9.4). Neither Leighton or Thiess has discovered a Certificate of Initial Acceptance, nor has either alleged that the Company had issued such a certificate before the grounding.

1. I pause to observe that the respondents say (and I agree) that the passages above referred to in f) and g) are not relevant to determination of the dispute. I also add as clarification that the ‘Company’ was Kellogg, but Kellogg (referred to below at [6]) was the agent for Chevron.
2. Offshore Marine says that Leighton was either:
   1. the owner of; and/or
   2. under cl 17 (referred to in [4]) of the general terms and conditions of the Deed to Restructure the Civil and Underground, Contract No. 78500046, dated 31 October 2012 between Chevron, **Kellogg** Joint Venture-Gorgon and Leighton, the identity which was either:
      1. on risk in respect of; and/or
      2. responsible for the care, custody, control, safekeeping and preservation of;

and therefore having the relevant interest in, various items of equipment loaded onto the barge (**Leighton’s cargo**), the total value of which was some $953,000.

1. Offshore Marine also submits that Thiess was in a similar position concerning other items of equipment valued at about $414,000 (**Thiess’ cargo**).
2. The tug and barge departed the Australian marine complex bound for Barrow Island on 27 November 2012 with the total value of the cargo on board the barge, including the cargo of the various respondents, being a little under $3.5 million. On 29 November 2012, in the course of the voyage, the towline parted at the tug’s towline pennant chain and the barge grounded on Ronsard Rocks, about three nautical miles west of Cervantes off the coast of Western Australia. As a result of this **casualty,** the barge and the respondents’ cargo were, on Offshore Marine’s case, in a position ‘of immediate peril’. It contends there was a real and imminent possibility that the barge could break up and/or sink and that the cargo could be lost over board.
3. In November and December 2012, Offshore Marine incurred expenses and costs in securing the common safety of the barge and the cargo, including costs associated with stabilising the damaged hull of the barge, re-floating it and towing it back to the Australian marine complex with the cargo intact and undamaged. The costs incurred exceeded $4 million. Offshore Marine says that these **expenses** were extraordinary, voluntary and reasonable in the sense that it would not have ordinarily incurred expenses in the nature, or to the extent, of the expenses in the course of the ordinary voyage from Henderson to Barrow Island, yet the expenses were a reasonable amount. The barge itself also suffered significant damage as a result of the casualty. Offshore Marine says it was a constructive total loss, although equipment worth about $410,000 was removed from it. The removal of equipment was a process which in itself involved expense.
4. In those circumstances, Offshore Marine has claimed, at common law and/or pursuant to s 72(3) of the ***Marine Insurance Act*** *1909* (Cth), an entitlement to a general average contribution towards the expenses from each of the respondents, in proportion to the value of each respondent’s cargo.

# PRELIMINARY QUESTION

1. The preliminary question put by the parties is in two parts:

A If, in respect of any cargo referred to as Leighton’s cargo or Thiess’ cargo in the amended statement of claim and with reference to the time of any general average sacrifice or expense that is ultimately established:

1. it is not proven that Leighton or Thiess was the **owner** thereof by reason of cl 17.1.1 of the agreements referred to in the particulars of paragraph 9 of the defence of Leighton and paragraph 11 of the defence of Thiess respectively (**Agreements**), or otherwise; and

2. it is proven that Leighton and Thiess were ‘*responsible* for the care, custody, control and safekeeping and preservation’ thereof under cl 17.1.2 of the Agreements;

does that interest (in 2 above) in the cargo attract liability to contribute to such general average sacrifice or expense either at common law or pursuant to s 72(3) of the *Marine Insurance Act*?

B If the answer to question A is ‘yes’, is that interest equivalent to the value of the relevant cargo or is it to be assessed on some other basis and, if so, what basis?

1. Leighton and Thiess reject Offshore Marine’s argument that the circumstances can give rise to a general average claim. The parties have raised this issue as the preliminary question determination.
2. The preliminary question is to be determined on the assumption of the correctness of the facts outlined above, even though some of them may be at issue if the matter proceeds.
3. For the reasons which follow, the answer to ‘A’ is ‘No’ and the answer to ‘B’ does not arise.

# THE STATUTORY PROVISIONS

1. General average is defined in s 72 of the *Marine Insurance Act* in the following terms:

**72 General average loss**

(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled **in the common adventure**.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution **from the other parties interested**, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he or she may recover from the insurer in respect of the proportion of the loss which falls upon him or her; and, in the case of a general average sacrifice, he or she may recover from the insurer in respect of the whole loss without having enforced his or her right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured he or she may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

(emphasis added)

1. Section 72 of the *Marine Insurance Act* is based on s 66 of the *Marine Insurance Act 1906* (UK), which is in identical terms. In *Australian Coastal Shipping v Green* [1971] 1 QB 456 (at 478), Lord Denning suggested that the *Marine Insurance Act 1906* (UK) had effectively codified the principles of general average as they had then been known under common law. Similarly, in *Austin Friars Steamship Co Ltd v Spillers & Bakers Ltd* [1915] KB 833 (at 835) Justice Bailhache suggested that the statutory definition ‘must now prevail’ over that given in *Birkley v Presgrave* (1801) 1 East 220, in which Lawrence J stated (at 228):

A loss which arises in consequence of extraordinary sacrifices made or expences [sic] incurred for the preservation of the ship and cargo come within general average and must be borne proportionably by all who are interested.

# OFFSHORE MARINE’S CONTENTIONS

1. Offshore Marine stresses that under s 72(3) of the *Marine Insurance Act* the obligation to contribute is not limited to cargo owners. Rather it falls on ‘parties interested’. Offshore Marine relies on the following cases in asserting that, similarly, it has long been recognised at common law that the basis for the obligation to contribute in general average was on the shared risk of the maritime adventure:

a) In *Kemp v Halliday* (1866) 122 ER 1361 at 1370 Lord Blackburn described a 'charge' as being in general average if there was a voluntary sacrifice or an extraordinary expenditure incurred 'to preserve more subjects than one exposed to a common jeopardy'. Such expenditure is 'chargeable against all the subjects in jeopardy.' Thus the emphasis is on the common exposure to the hazards incident on a maritime adventure;

b) As discussed by Wilde CJ in *Hallet v Wigram* (1850) 137 ER 1018 (at 1027-1028), loss, being incurred for the common benefit of all concerned, shall not be sustained by the owner of the ship alone, but by a general contribution from all. Williams J (at 1029) drew attention to the basis of general average on the principle that it would be unjust for one alone to suffer for the common benefit of all. The touchstone of general average, on this formulation, is common exposure to risk. In this case the plaintiffs were described only as the 'shippers' of cargo, a proportion of which was sacrificed for the common benefit. The case does not identify the plaintiffs as owners of that cargo.

c) Similarly, in *Cargo ex Galam* (1863) 15 ER 883 at 890 Lord Kingsdown described the right to receive a contribution in general average as arising from ‘… a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute ratably.'

d) The same point was made by Bovill CJ in *Walthew v Mavrojani* (1869-70) LR 5 Ex 116 at 119:

If, however, loss or expense is occasioned by reason of some extraordinary course taken, or risk incurred, for the benefit of all concerned, then those who, by reason of their being exposed to a common danger, are interested in that course being taken or that risk incurred, must contribute their share.

1. Offshore Marine contends that more recent Australian decisions also support the proposition that the right to contribute in general average arises because of an exposure to a common risk. Offshore Marine points to a non-general average case, *Cummings v Lewis* (1993) 41 FCR 559, where Cooper J described general average in these terms (at 594):

The right to contribution in general average arises because the property of one co-adventurer to a maritime adventure has been sacrificed in order to preserve the property **of all other co-adventurers**. The property of all co-adventurers to the maritime venture is **at risk** throughout the voyage depending upon the necessitous circumstances which may arise. The principle exemplifies the equitable *maxim qui sentit commodum sentire debet et onus* (he who enjoys the benefit ought also to bear the burden) which the authorities show is the principle which gives rise to the equity to contribute between co-sureties, co-insurers, and different parties interested in realty. Coincidentally, in each of these relationships there is a common obligation, co-ordinate liability, or, an exposure to a common risk.

(emphasis added)

1. Subsequently, these remarks of Cooper J were referred to with apparent approval by the plurality of the High Court in *Friend v Brooker* (2009) 239 CLR 129 (at [70]) where the plurality said (footnotes omitted):

The second matter is that Cooper J saw the equitable doctrine as an application of the same underlying principle as that of general average contribution in maritime law. This was that he who enjoys the benefit ought also to bear the burden; the property of one co-adventurer to a maritime adventure had, in the necessitous circumstances that arose on the voyage, been sacrificed to preserve the property of the other co-adventurers. However, as pointed out earlier in these reasons, that sacrifice was an exercise of the power and authority of the master, to which the co-adventurers were subjected by maritime law. There was in these cases common liability to compulsion of law.

1. Although, *prima facie*, risk passes with property, parties to a contract are free to stipulate other arrangements. Offshore Marine submits this is the case between Chevron and Leighton and Thiess respectively. Normally owners will be responsible for risk. Conversely, Offshore Marine would say, where risk is assumed contractually, this is relevantly commensurate with ownership. Specifically, it is open to parties to agree that property may pass at one time and risk will pass at another: see, for example, *Castle v Playford* (1871-72) LR 7 Ex 98 and *Reeves v Barlow* (1884) 12 QBD 436.
2. Offshore Marine contends that cl 17.1.1 and cl 17.1.2 of each of the respective contracts have the effect of varying the usual position of risk passing with property. By reason of being ‘responsible for the care, custody, control, and safekeeping and preservation’ of the Contractor Materials being supplied, Offshore Marine says Leighton and Thiess bore the risk of damage or destruction of those materials prior to ‘Initial Acceptance’ by Chevron.
3. Offshore Marine points out that if the Contractor Materials on the barge had been damaged or lost, Chevron would have been entitled, pursuant to its contracts with Leighton and Thiess, to insist that Leighton and/or Thiess supply undamaged materials or replace the materials lost at a cost to be borne by Leighton and/or Thiess. Chevron would not have suffered the loss or damage and, unlike Leighton and Thiess, was therefore not at risk in the maritime adventure.
4. Offshore Marine relies on the following extracts from Bridge M (ed), *Benjamin's Sale of Goods* (8th ed, Sweet & Maxwell, 2010) as to the effect of the seller being on risk:

a) at [6-001]:

… If the risk lies on the seller and the goods are lost or damaged, so that he is no longer able to deliver goods in accordance with the contract or at all, he will not be entitled to recover the price from the buyer and must refund any part of the price paid in advance. But the contract is not discharged. If he cannot replace the goods with other goods which comply with the contract, he may be liable in damages for non-delivery since he will not be released from his obligation to deliver. …

b) at [6-051] the learned authors observe that 'the loss or destruction of the goods, or damage to them, is normally dealt with as a question of risk'. Thus, loss or destruction of goods supplied before risk passes will not discharge the contract: *Appleby v Myers* (1867) L.R 2 C.P. 651 at 660 cf *Fibrosa Spolka Ackyjna v Fairbairn, Lawson, Combe Barbour Ltd* [1943] AC 32 at 83; and

c) at [18-001] in relation to overseas sales:

…The physical risks [of overseas sales] arise from the possibility that the goods may be lost or damaged, or may deteriorate, in transit. The legal responsibility for such loss may lie on the buyer or on the seller or on some third person, such as the carrier. As between buyer and seller, the allocation of this responsibility depends partly on the rules relating to risk, and partly on the obligations undertaken by the parties ...

1. Similarly, when goods are at the risk of a party it has an insurable interest, even if property in those goods is not passed: *Anderson v Morice* (1876) 1 App Cas 713 (at 724).
2. Accordingly, in broad terms, Offshore Marine say then that Pt A of the preliminary question goes to whether (all other considerations aside), Leighton and Thiess may be obliged to contribute in general average with respect to cargo the title in which may have passed to Chevron, but for which they remained ‘on risk’ in the manner provided for in each of their contracts with Chevron.
3. In *Andre Toulemonde Wool Co Pty Ltd v Knutsen Offshore (Panama)* *SA* (unreported, WASC, Anderson J, 26 June 1998) Anderson J adopted the formulation of general average as expressed by Broderick DJ in *The ‘Hellenic Glory’* [1979] 1 Lloyd’s Rep 425 (at 426) where the following was said:

General average is a principle long recognized by the general maritime law and embodies the concept that a sacrifice made for the common benefit which is incurred by one who partakes in a maritime venture **should be shared proportionately by all who participate in the venture and benefit as a result of the sacrifice**.

…

(emphasis added)

1. A similar notion was expressed in the York-Antwerp Rules, originally introduced as r B to the 1924 version of the York-Antwerp Rules (following the 1890 version) and subsequently incorporated into r A since the 1994 version, which states that ‘general average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter mentioned’. Once again, Offshore Marine relies on the fact that, to the extent that the York-Antwerp Rules represent a codification of common law practice, they also impose the obligation to contribute on parties ‘interested’ rather than specifically on owners of cargo.
2. At the root of Offshore Marine’s submission is the contention that the fundamental driving philosophy, whether it be under common law, pursuant to the Australian statute or as codified in the York-Antwerp Rules, is a principle that all those sharing the risks of a maritime adventure should contribute ratably to any extraordinary sacrifice or expenditure necessary to ensure its success.
3. Against that contention, as a matter of fact, Offshore Marine acknowledges that in almost every case it has been the owner that is exposed to risk. Offshore Marine says, however, that there may well be other circumstances in which non-owning parties on risk in respect of cargo or vessel might be obliged to contribute. For example, a person in possession of plant or equipment under a hire purchase agreement may ship that equipment on a vessel. Offshore Marine contend that although that person may not be the owner, subject to the terms of the agreement, he or she will be on risk in respect of the cargo and it would seem commercially realistic for that person to be obliged to contribute to general average in the event that the equipment is saved by reason of an extraordinary sacrifice or expenditure.
4. Offshore Marine makes the point that:

a) *First*, the fact that so many cases refer to ownership does not mean that it is ownership *per se* that gives rise to the obligation to contribute. On the contrary, it is precisely because, in most cases, risk follows or is an incident of ownership that the latter is so often referred to as the critical relationship giving rise to the obligation to contribute in general average; and

b) *Second*, it does not follow as a matter of logic from the fact that so many cases refer to actions against or by a cargo owners that it is *only* cargo owners that are so liable.

Rather, the underlying principle is those who proportionately share the risks and those who participate in the venture and benefit as a result of any sacrifice should bear the burden.

1. In the context of this case, Offshore Marine says that by virtue of the terms of the contract with Chevron, the exposure of Leighton and Thiess to the risk of the maritime adventure with respect to the Contractor Materials was the same as if it was the owner. There is no good reason, therefore, that the liability to contribute in general average, with respect to the Contractor Materials, should be any different from that of an owner as Leighton and Thiess were on risk in the sense that each was obliged to bear the financial consequences of loss of or damage to that cargo, if such loss and/or damage occurred before Chevron issued the Certificate of Initial Acceptance. Because each of Leighton and Thiess shared the risks of the maritime adventure, the ordinary principles of general average require them also to bear a proportionate share of the burden, that is, all other things aside to be liable to contribute to general average.
2. On that basis, Offshore Marine contends that the answer to the preliminary question Pt A should be ‘Yes’.
3. As to Pt B, Offshore Marine’s position is that ordinarily the amount of general average contribution payable by any individual cargo interest is calculated by reference to the actual or assumed landed market value on the last day of discharge at the destination or other place where the adventure ends. In the case of manufactured goods, for which there may not be a substantial market, it was the custom in respect of goods delivered at their destination to calculate contributory value by reference to the CIF invoice value of the goods plus say 10% for assumed profit. The 10% assumed profit is inapplicable in the present circumstances and, accordingly, Offshore Marine argues that the appropriate price should be the assumed landed market value at the day of discharge.

# LEIGHTON AND THIESS’ CONTENTIONS

1. Leighton and Thiess correctly point out that there appears not to be a single case in which a non-owner who bears some contractual risk in cargo, *vis a vis*, its owner, and who does not have any contract with the general average claimant, has been found liable to contribute in general average. Leighton and Thiess argue that the reason for this may be that the answer to a Pt A is universally accepted, namely, that no liability to contribute in general average can arise merely from being at risk with respect to property. Rather the liability to contribute in general average can arise from only one of two sources, namely:
   1. ownership of the ‘property’ (ship, freight or cargo) that benefited from the general average sacrifice or expense; or
   2. contractual obligation to the general average claimant, that is, the party that made the general average sacrifice or incurred the general average expense. The contractual obligation usually arises from a bill of lading provision making a party to the bill of lading, whether owner of the cargo or not, liable to contribute in general average or perhaps from a general average bond furnished to secure release of the cargo from the general average lien.
2. On the present facts, there is a complex allocation of property and risk between the ‘contractors’ in each case and the ‘owner’, Chevron, and the company, Kellogg, together with their respective affiliates referred to as the ‘Indemnitees’ and other contractors. The risks vary in relation to different types of property, namely, the Contractor Materials, non-contractor materials, contractor equipment and non-contractor equipment as variously defined. Further, there is an upper limit on the liability of the contractors under the contract.
3. As Leighton and Thiess observe, Offshore Marine was also in a contractual relationship with Chevron and Kellogg on substantially the same general terms and conditions, although with respect to a different scope of work. Offshore Marine’s contract was a contract in which Offshore Marine represented that it possessed the same attributes as the respondents represent they possess, save that in Offshore Marine’s case, those attributes are with regard to ‘the supply and operation of tugs and barges’ for, amongst other things, transportation of construction materials. Under Offshore Marine’s contract there was an allocation of property and risk on essentially the same terms as that in respect of Leighton and Thiess, such that Offshore Marine, as a result, bore much of the same risk in the goods that it transported (obviously including the goods in respect of which it claims against Leighton and Thiess), as the respondents themselves bore. Accordingly, Leighton and Thiess argue that if their interest in the cargo was sufficient to attract liability to contribute in general average, Offshore Marine’s interest would also attract that liability. As a result:
   1. such an outcome demonstrates why an interest which is less than ownership does not attract liability to contribute in general average because many parties can have variable interest in the same cargo, including for example, actual and contractual carriers, freight forwarders, insurers, financiers and subsequent purchasers, whereas the ownership interest in property is uniform and indivisible; and
   2. Offshore Marine’s claim for general average falters on its own circularity in the sense that its own obligation to contribute would be an obstacle, or at least a significant complication, in any claim for contribution from others.
4. Moreover, Leighton and Thiess stress that the obvious claim for contribution is not from them, but rather should be from the owner of the cargo in question, namely, Chevron. They say it might be inferred that the reason the claim is pursued against Leighton and Thiess is that Offshore Marine ‘waived and released’ Chevron from any such claim by cl 7.14 of its contract. It is for that reason it now pursues a novel claim, Leighton and Thiess contend, against them.
5. The fact that Leighton and Thiess ‘bore the risk’, as Offshore Marine contends, is not to the point as the actual relationships arising from the contracts are far more complex.
6. While some of the formulations of the rule of general average may describe the parties liable to contribute as those ‘who are interested’, this is merely a compendious expression and does not precisely indicate the source of liability, Leighton and Thiess contend. So, for example, the passage in *Birkley* (at 228) (discussed above at [16]), which is cited by Offshore Marine as being the ‘classic expression’ of the principle underlying general average, must give way to the precise legislative expression to be found in s 72(7) of the *Marine Insurance Act*, which specifically and expressly deals with ownership where it says:

Where ship, freight, and cargo, or any two of those **interests**, are **owned** by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were **owned** by different persons.

(emphasis added)

1. From that subsection, Leighton and Thiess argue that the word ‘interests’ is simply compendious shorthand for the ‘interests’ in the ship, freight and cargo and the nature of the relevant interest in each instance is expressly, in terms, ownership. Leighton and Thiess submit that this is the concept which is well established on the authorities. Furthermore, they argue, there is no authority going the other way, which would support the position of Offshore Marine.
2. Leighton and Thiess also refer to cases which point to the opposite conclusion contended for by Offshore Marine.
3. In *Scaife v Tobin* 110 ER 189 (at 191), Lord Tenterden CJ held as follows:

A consignee, who is the absolute owner of the goods, is liable to pay general average, because the law throws upon him that liability. There is no other person to pay it. But **a mere consignee, who is not the owner, is not liable**, unless before he receives them he is informed by the shipowner, or the master, that if he takes them he must pay it.

(emphasis added)

1. In the same case, Littledale J, also (at 192), held as follows:

There is no doubt that an absolute owner of goods is liable to pay general average. But a mere consignee, **who has a special property in the goods**, is not so chargeable.

(Emphasis added)

1. Parke J (at 192), held similarly.
2. Under the assumptions underlying Pt A, Leighton and Thiessmight be said by their contracts with Chevron to have had ‘a special property in the goods’: see *Freeman v Birch* (1833) 1 Nev 8 MKB 420; and *Halsbury’s Laws of Australia* (as at 20 July 2015) 70 ‘Carriers’ at [70-1020]. The Court of Appeal in *Scaife* said that that interest does not attract a liability in general average. There is no reason why that authority should not be followed in Australia.
3. In *Hingston v Wendt* (1876) 1 QBD 367 (at 370), Blackburn and Lush JJ in an appeal from the County Court held that:

… had the expenditure [in that case] been for the purpose of saving the whole venture, ship as well as cargo, it would have constituted a general average, to which the **owners** of each part of the property saved must have contributed rateably….

(emphasis added)

1. In favouring the view that general average arises from the general mercantile law and not from any implied contract, Brett MR in *Burton & Co v English & Co* (1883) 12 QBD 218 (at 220) said for the Court of Appeal that in theory general average:

… arises from an act done by the master of the ship, not as the servant of the ship-owner, **but as the servant of the cargo-owner,** a relation which is imposed on him by the necessity of the case. It arises by reason of a voluntary sacrifice by the **cargo-owner** for the benefit of the ship and cargo, and not from any act done by the ship-owner at all. …

(emphasis added)

1. Bowen LJ in the same case, also dealing with the origins of general average, said (at 223):

This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done by the captain **as agent** not for the shipowner alone, **but also for the cargo-owner**, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo.

(emphasis added)

1. From that reasoning it is apparent that the Court of Appeal regarded ownership of the cargo to be the basis for general average contribution.
2. The Privy Council in *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601, an appeal from the Court of the Recorder of Rangoon, held that it is the owner of cargo that has a claim for a general average sacrifice, and that that claim is against each of the owners of the ship and the other cargo (per Lord Watson (at 606)). As will be seen below, the Privy Council returned to the subject nearly 100 years later and expressed itself even more clearly with regard to ownership of cargo being the basis for general average contribution.
3. Mathew J in *Walford De Baerdemaecker & Co v Galindez Brothers* (1897) 2 Com Cas 137 (at 143) decided that the shippers of the cargo in question who were not the owners of the cargo were liable in general average, but only because they expressly accepted such liability in the bill of lading to which they were a party.
4. In *Hain Steamship Co Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597, Lord Atkin in the House of Lords (at 602) said:

… I think it clear that on principle the contribution falls due from the persons who were **owners** at the time of the sacrifice: though no doubt it may be passed on to subsequent assignees of the goods by appropriate contractual stipulations.

(emphasis added)

1. Lord Denning in the Court of Appeal in *Green* (at 478) said that the general average claimant ‘is entitled to contribution from the cargo **owners** for the loss or expenditure to which he has been put’ (emphasis added).
2. In *Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd* [1984] 1 AC 226 (at 233-234), Lord Diplock for the Privy Council, in an appeal from a judgment of the Court of Appeal of Hong Kong, explained that liability to contribute in general average rests on ownership or contract, with the contract arising either from the bill of lading or an average bond given for the release of the cargo from the shipowner’s general average lien. That is a possessory lien and it is the shipowner’s protection against not knowing who the owner of the cargo is. In respect of the general rule his Lordship explained as follows (at 233-234):

Under that branch of English common law into which the *lex mercatoria* has long ago become absorbed, the personal liability to pay the general average contribution due in respect of any particular consignment of cargo that had been preserved in consequence of a general average sacrifice or expenditure lies, in legal theory, upon the person who **was owner** of the consignment at the time when the sacrifice was made or the liability for expenditure incurred.

(emphasis added)

1. Lord Diplock in the same appeal further emphasised that it is the owner of the cargo that attracts liability in general average (at 235).

# CONSIDERATION

1. The cases discussed above, including *Scaife*, *Walford*, *Hain Steamship* and *Castle Insurance Co*,do not appear to raise any suggestion that the basis for contribution is some interest in the cargo, other than or less than ownership, such as there being contractual risk. Writers such as the authors of Lowndes & Rudolf: *The Law of General Average and The York-Antwerp Rules* (14th ed, Thomson Reuters, 2013) (at [30.58]) state that the ship owner is entitled to sue to recover contributions from the owners of surviving cargo. Furthermore, in dealing with change of ownership during the voyage, the authors describe liability as resting with the person who is the owner of the cargo at the time of the sacrifice or expenditure. Further (at [30.64]), they suggest that in the absence of any agreement to the contrary, a charterer is not liable to pay cargo’s contribution upon cargo not owned by him. In Benson P, “The basis and limits of tort recovery for general average contribution economic loss” (2008) 16 TLJ 1 (at 4), the liability to contribute in general average is discussed in terms of ‘an owner of goods and a ship owner’. In Cremean D, “Admiralty and Maritime: General Average” (2014) 88 ALJ 703, the author adopts the reasoning of Brett MR in *Burton* in which he states (at 220) that a general average loss ‘arises by reason of a voluntary sacrifice by the cargo owner for the benefit of the ship and owner’. Similarly, in M White, *Australian Maritime Law* (3rd ed, 2014) (at [6.9.1]) the description of liability to contribute is said to rest with the owner of the cargo.
2. In *Birkley*, although the first sentence of the judgment by Lawrence J refers to ‘all who are interested’, Gross J in the immediately preceding judgment puts the liability on a narrower or more specific basis, referring in two places to ‘the owners of the cargo’ saying (at 228):

This action is brought to recover a rateable proportion of a certain loss and damage and expenses which have been incurred by the plaintiffs as ship owners in preventing **the owner of cargo** from incurring a loss.

(emphasis added)

1. Further, the language used in *Scaife* (discussed above at [42]) would appear to be absolute. The case was dealing with an enquiry as to whether a mere consignee who was not the owner would be liable. Admittedly, it was an enquiry in relation to contractual liability, rather than whether there may be some other interest beyond ownership. Littledale J said (at 192) ‘but a mere consignee who has a special property in the goods is not so chargeable’. Parke J said (at 192) ‘[t]o render the defendant liable there must be a contract either expressed or implied between him and the plaintiff for the payment of general average’. This, in circumstances where the defendant was not the owner of the goods.
2. In *Hingston*, the defendant held a bill of lading and was entitled to possession, but not being the owner would not have been liable and was liable only because the cargo was lien and he obtained possession against an implied promise to pay. The case did not enquire into whether he bore the risk or who bore the risk. Blackburn J said (at 370):

… had the expenditure been for the purpose of saving the whole venture, ship as well as cargo, it would have constituted a general average to which the owners of each part of the property saved must have contributed rateably. …

1. The concept of ownership was repeated on that page where his Honour said:

And the question, the answer to which will decide this appeal, is whether the captain and the plaintiff, as his agent, had a right to detain the whole cargo, if it belonged to **one owner**, till the whole was paid or secured, or if the cargo belonged to **several owners**, to detain each part of the goods so saved till the contribution in respect of that part was paid or secured.

(emphasis added)

1. It was held (at 371):

…. [t]he defendant was **not the owner** of any part of the cargo at the time when the expenditure was made, and cannot therefore be made liable as having his credit pledged by the captain as his agent of necessity. He appears to have been a mercantile agent to, whom the owner of the cargo had transmitted the bill of lading to enable him to obtain the cargo on his behalf, and he did so to obtain the whole of it.

(emphasis added)

1. Liability was also put on the basis of ownership in *Burton* (as discussed above at [47]). This case, again, referred to liability on the basis of ownership, but also dealt with a question of the nature or origin of general average. As set out in that judgment, it was described as an action:

by shippers of a cargo of iron and wood on a steamer they had chartered from the defendants, the shipowners, on a voyage from a Baltic port to London, to recover a general average contribution from the shipowners for the jettison of a deck cargo of timber. By the charterparty it was stipulated that the “steamer shall be provided with a deck load if required at full freight, but at merchant’s risk”, and it was admitted that such cargo was properly and necessarily jettisoned to save the ship and the rest of the cargo, and also that by reason of a custom to carry deck cargoes of timber on similar voyages, the shipowners were liable unless protected by the above stipulation in the charterparty.

1. It was held, both in the Queen’s Bench Division and in the Court of Appeal, that the words ‘at merchant’s risk’ excluded the right of the plaintiffs in general average. In considering how a claim for general average arose, the Master of the Rolls said (at 220):

… In theory it arises from an act **done by the master of the ship**, not as the servant of the shipowner, **but as the servant of the cargo owner**, a relation which is imposed on him by the necessity of the case. It arises by reason of a **voluntary sacrifice by the cargo owner for the benefit of the ship and cargo**, and not from any act done by the shipowner at all. …

(emphasis added)

1. It was also explained (at 221) that the obligation did not arise:

from any contract at all, but from the old Rhodian laws and has become incorporated into the law of England as the law of the ocean. It is not, as a matter of contract, but in consequence of a common danger where natural justice requires that all should contribute to indemnify the loss of property which is sacrificed by one in order that the whole of the adventure may be saved.

1. It was explained that the difficulty as to the meaning of the words in the charterparty ‘carried at merchant’s risk’ did not arise:

because the acts of the captain with reference to properly or improperly jettisoning part of the cargo are not both done by him in the same capacity, one is done by him as the agent of the cargo owner, and the other as the servant of the shipowner.

1. In that case, Bowen LJ also said (at 223), as noted above (at [48]), ‘general average contribution is a principle which comes down to us from an anterior period of our history, and from the law of commerce and the sea’, describing it as arising in consequence of an act done by the captain as agent not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of the cargo.
2. In describing the nature of general average, the reasoning in these judgments put it on the basis of ownership. The statement of principle also follows from the House of Lords decision in *Hain Steamship* referred to above (at [52]), where Lord Atkin, having determined that charterers appeared to have been the owners of the goods, stated (at 602):

I think it clear that on principle to contribution falls due from the persons who were the owners at the time of the sacrifice: though no doubt it may be passed onto subsequent assignees of the goods by appropriate contractual stipulations.

1. This decision suggests that ownership is the foundation for liability under general average unless there is a contract. (What the House of Lords was examining essentially was the terms and effect of the contractual relationship.)
2. In the advice of the Privy Council in *Castle Insurance Co Ltd* (at 235) reference was made to Lord Atkin’s judgment in *Hain Steamship*. These remarks, in my view, were part of the *ratio decidendi* in determining who was liable.
3. As noted in *Green* (at [53]) in the Court of Appeal, Lord Denning set out the general position concerning general average on the basis of ownership of cargo.
4. The discussion in *Cummings* as to the nature of the foundation for liability, if read as extending beyond ownership (which is doubtful given the reference to ‘property’ at 594), was disapproved of in the High Court in *Friend* (at [70]) (as discussed above at [19]).
5. *Cummings* does not support a theory of common risk and necessity but rather the power and and authority of the master as an agent or servant of the cargo owner, which in turn had been discussed in *Friend* (at [49]) where the High Court said (footnotes omitted):

The eighteenth century decision most frequently cited in cases dealing with contribution is that on the equity side of the Court of Exchequer in *Dering v Earl of Winchelsea*. There, by way of illustration of the proposition that there need be no contract or privity between sureties. Eyre LCB referred to the “case of average of cargo” where the requirement to contribute was “the result of general justice from the equality of burthen and benefit”. The burden, at least as then understood in maritime law, lay in the exercise of the power and authority given by maritime law to the master of the ship for the protection and care of the cargo, a matter explained by Lord Stowell (then Sir William Scott) in *The Gratitudine*. That authority, with many others, was cited by Gray J when delivering the decision of the Supreme Court of the United States in *Ralli v Troop*. Judge Learned Hand later spoke of the sacrifice being made for the joint venture and directed by the person then in control of that venture. Thus, and contrary to what was suggested in oral submissions for Mr Brooker, the law respecting general average was not prayed in aid in *Dering* in any fashion which provides an exception to the requirement of a common burden imposed by the law.

1. In *The ‘Hellenic Glory’* (cited above at [26]), Broderick DJ in the Southern District of New York was expressly dealing with the owners or underwriters of certain cargos loaded on board the freighter, Hellenic Glory. His Honour’s summary of general average in full read as follows (at 426):

General average is a principle long recognized by the general maritime law and embodies the concept that a sacrifice made for the common benefit which is incurred by one who partakes in a maritime venture should be shared proportionately by all who participate in the venture and benefit as a result of the sacrifice. See generally: Buglass, Maritime Insurance and General Average in the U.S., 12022 (1973); Gilmour and Black, The Law of Admiralty, 2nd ed. 244-71 (1975). Initially the sacrifice incurred for the common benefit of vessel and cargo is paid by the vessel owner, who must save his vessel if the cargo on board is also to be saved. Thereafter the vessel owner arranges for a general average statement to be drawn up and prepared.

Pending determination and insurance of the final general average adjustment, the ship has:-

… a lien upon the cargo for such contributory share as, under the facts of this case, the cargo owners might be bound to pay … [*Agathe*, 71 Fed. 528, 530 (S.D. Ala. 1895].

As a practical matter, the carrier is usually satisfied to accept upon delivery of the cargo an undertaking given by one who might be liable to pay such contribution as might be found owed by him. Alternatively, a cash deposit may be collected by the carrier’s agent as a condition precedent to release of the cargo, and held in trust pending resolution of challenges to the general average. Such deposits were collected in this case.

1. Whether the interpretation of general average under United States jurisprudence extends beyond that in English and Australian jurisprudence may be one question, but it is clear that in the case under consideration, despite the broader terminology to which Offshore Marine points, Broderick DJ was dealing specifically with owners of cargo (or their insurers under subrogation).
2. It is true, as Offshore Marine argues, the expression ‘owner’ as used in maritime commerce is a flexible term covering a range of relationships. As the authors of Davies M, Dickey A, *Shipping Law* (4th ed, Thomson Reuters, 2016) observe (at [5.40] to [5.120]) the meaning of 'owner' depends on the context in which it is used, and can in some circumstances include a demise charterer (*Ship Hako Endeavour v Programmed Total Marine Services Pty Ltd* (2013) 211 FCR 369) or a mortgagee in possession (*Keith and Wylie v Burrows and Perks* (1877) 2 App Cas 636 (at 645-646)). Further, the word 'owner' has different meanings under various Commonwealth and State acts, in some cases relatively restricted, and in others relatively expansive. The learned authors of *Shipping Law* point to the following:
   1. s 3(1) of the *Shipping Registration Act 1981* (Cth), in which 'owner' means the person registered as the owner;
   2. s 62 of the Shipping *Registration Act 1981* (Cth) which provides that for the purposes of Pt VI of that Act the 'owner' of a ship on demise charterer to an Australian based operator is the ship's registered agent;
   3. s 17 and s 19 of the *Admiralty Act 1988* (Cth), in respect of which 'owner' does not include a demise charterer, but which does include the person who has the right to possess and dispose of the ship, regardless of foreign registration: *Tisand Pty Ltd v Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43;
   4. s 14(1) of the *Navigation Act 2012* (Cth), which provides that the owner is either the person who has legal or beneficial interest in the vessel other than as mortgagee, or a person who has general control and management of the vessel; and
   5. s 3(1) of the *Western Australian Marine Act 1982* (WA) which includes in the definition of 'owner':

any person exercising, or discharging or claiming the right or accepting the obligation to exercise or discharge, any of the powers or duties of an owner whether on his own behalf or on behalf of another and includes a person who is the owner jointly with any other person or persons and the manager or secretary of a ‘body corporate or company.

1. Where ‘owner’ is used in s 72 of the *Marine Insurance Act*, while the statutory provision prevails, in the absence of any clear indication, it codifies or embraces the common law understanding of general average and where it uses the terms ‘owner’, that term would reflect either the definition under the *Marine Insurance Act*, if any, or in the absence of any clear language to the contrary, ‘owner’ where that term was used in the concepts of general average at common law.
2. There is no obvious reason why Australia would not follow the English position in this area. The *Marine Insurance Act* does not entirely replicate the *Marine Insurance Act 1906* (UK) legislation in the United Kingdom, although I think little turns on this observation in the present analysis. The first six sections of the *Marine Insurance Act* are not in the *Marine Insurance Act 1906* (UK). Those first six sections of the *Marine Insurance Act* provide:

**An Act relating to Marine Insurance**

**Part I - Preliminary**

**1 Short title and commencement [*see* Note 1]**

This Act may be cited as the *Marine Insurance Act 1909* and shall commence on a day to be fixed by proclamation.

**3 Interpretation**

In this Act, unless the contrary intention appears.

***Action*** includes counterclaim and set-off.

***Freight*** includes the profit derivable by a ship-owner from the employment of his or her ship to carry his or her own goods or movables, as well as freight payable by a third party, but does not include passage money.

***Movables*** means any movable tangible property, other than the ship, and includes money, valuable securities, and other documents.

***Policy*** means a marine policy.

**4 Saving of rules of common law**

The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to contracts of marine insurance.

**5 Application of certain Imperial and State Acts**

The Imperial Acts and State Acts set out in the First Schedule shall not to the extent therein specified apply to any contract or policy of marine insurance to which this Act applies.

**6 Application of Act**

(1) This Act shall apply to marine insurance other than State marine insurance and to State marine insurance extending beyond the limits of the State concerned.

(2) This Act does not apply to contracts of marine insurance made before the commencement of this Act.

1. The fact that certain other statutes ascribe a variety of meanings to what owner may be does not assist, in my view, in ascertaining the correct meaning of ‘owner’ under this statute. Within the *Marine Insurance Act* itself, the impression is that where ‘owner’ is used, ‘owner’ is meant. Where other interests are intended, those interests are either described or expressions such as ‘some other interest’ are used. An obvious example is s 11, which provides as follows:

**11 Insurable interest defined**

(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular, a person is interested in a marine adventure where he or she stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he or she may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

1. Section 9(2) provides as follows:

**9 Marine adventure and maritime perils defined**

…

(2) In particular there is a marine adventure where:

(a) any ship, goods, or other movables are exposed to maritime perils. Such property is in this Act referred to as ***insurable property***;

(b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

***Maritime perils*** means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.

1. Section 20(3) provides as follows:

**20 Quantum of interest**

…

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him or her in case of loss.

1. In looking at this particular situation, there were various qualifications to the nature of the risk Leighton and Thiess bore. For example, there is a provision under the contract dealing with *force majeure*. There is a provision under the contract dealing with the limitation of liability to $250,000. It is not a strict liability risk and not a risk analogous to that which a bailee may have to care for someone else’s property. These complications add another layer of complexity to determining whether there was sufficient risk for ‘general average’, if ‘risk’ were to be the test.
2. Although Offshore Marine say that there is no case on point, I think the better perspective is that every case indicates that liability will attach only to an owner or someone contractually liable. There is no case in which a party who bears some contractual risk in cargo in relationship to its owner, but which is not the owner and does not have any contract with a general average claimant, has been held liable to contribute to general average.
3. In my view, the liability to contribute in general average attaches to one who is the owner of the relevant freight or cargo that benefited from the general average, sacrifice and expense or contractual obligation to the general average claimant in circumstances governed either by a bill of lading or by a general salvage bond.
4. While the cases may at times describe the consequences of ownership in various ways, it is not apparent that any of the cases have suggested that the rationale for liability should extend beyond actual ownership.
5. There may well be good reason for this as:
6. it is possible, as indicated in this case, that there may be a number of parties who have an ‘interest’ of different sorts in the cargo, which makes the issue of liability and, in the event that parties are liable, the proportion of contribution, particularly complex to determine in contrast to straightforward ownership. Questions would arise as to how different types of interests should be valued and whether each interest should be given equal value, although the nature of the interest may be quite different. Such difficulty may not be a complete answer to the question arising, but it is perhaps even more complex where the shipowner or charterer itself, as in this case, may also have an ‘interest’ in the cargo and bear some ‘risk’ in relation to it. This would add a further layer of complexity in circumstances where the shipowner’s liability may be in bailment or tort or by a bill of lading or charterparty. That, in turn, may be influenced by statutory provisions and further, the compulsory applications of international rules; and
7. on the argument advanced for Offshore Marine, it may have to contribute in general average in respect of the cargo in its own care and its obligation to do so would then have to be evaluated as against all other forms of exposure for liability.
8. Two matters may be put to one side. The question in this particular case of whether or not, as a matter of fact and construction, Offshore Marine bore the same risk with respect to cargo as Leighton and Thiess is, again, not of particular significance in answering the question of principle. Rather, it is merely an arguable illustration, whether it applies in this case or not, of the difficulty in applying general average in circumstances where the cargo carrier does bear a risk. Similarly, the question of whether or not Offshore Marine did in fact waive liability for Chevron from a claim for contribution is of no assistance in deciding the point of principle.

# CONCLUSION

1. The answer to preliminary question 'A' is No.
2. Preliminary question 'B' does not arise.
3. The applicant do pay the costs of the respondents, to be assessed if not agreed.

|  |
| --- |
| I certify that the preceding eighty-six (86) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 30 March 2017