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The "Ocean Victory"

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The Court of Appeal has restated and re-affirmed the rules in relation to safe port warranties established in *The Eastern City* case and has provided detailed guidance as to the approach that should be adopted in ascertaining whether a particular event is an "abnormal occurrence".

It also commented on the effect of co-insurance taken out by demise charterers in the joint names of both owners and demise charterers and the effect this has on whether demise charterers will have suffered a loss to pass down to sub-charterers.

When is a port unsafe?

When chartering a vessel, charterers routinely warrant that they will only order a vessel to ports that are safe.

But what does *"safe"* mean? The classic test was set down by the Court of Appeal in *The Eastern City* (1959) and is as follows:

"... a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship."

So a danger posed by "some abnormal occurrence" would not, of itself, render the port unsafe. But how do we evaluate whether a particular *"occurrence"* is *"abnormal"*, or whether it is a normal characteristic of the port?

The facts of The Ocean Victory

The *Ocean Victory* was a Capesize bulk carrier and had been let by Owners on an amended Barecon 89 to Demise Charterers, who had in turn let the vessel down the line on a series of largely back-to-back time charters. There was a safe port warranty contained within each charterparty.

The vessel was ordered by Charterers (at the bottom of the charterparty chain) to discharge at Kashima, Japan. Before discharge was completed, swell caused by "long waves" endangered the vessel's mooring. When the master decided to leave the port, the vessel was subject to winds of up to Beaufort Scale 9 while exiting the port along the Kashima Fairway. The vessel had limited room to manoeuvre in the Fairway, foundered on the breakwater and eventually broke up and became a total loss.

It was found that the vessel had been subject to a rare combination of events: (a) swell generated from the "long waves" (a phenomenon affecting ports around the Pacific rim) and (b) very severe northerly gale force winds. The difficulty faced by the vessel, was that the swell made it potentially unsafe for the vessel to remain at berth, whereas the gale force winds made the Kashima Fairway (the only way in or out of the port) unsafe to navigate safely.

The port itself is a modern port. It is one of the largest in Japan and has an impeccable safety record. While it is sometimes exposed to swell from "long waves" and while severe northerly winds could affect the navigability of the Fairway, this was the only time such an incident had occurred in the port's 40 year history.

The claim

Claims were brought by hull underwriters as assignees of Owners' and Demise Charterers' claims in the total sum of USD137.8m, made up of the market value of the vessel, salvage costs, wreck removal and loss of earnings. The claims were brought on the basis that Charterers had ordered the vessel to an unsafe port, in breach of the safe port obligations contained in the charterparty.

The first instance decision

At first instance, Teare J held that the danger experienced by the vessel in question was caused by the combination of the swell due to "long waves" and the severe northerly gale force winds (the "Combination of Events").

Teare J first considered these two sea and weather conditions on an individual basis, holding that these were both characteristics and attributes of the port and that they were both foreseeable.

Teare J went on to hold that the Combination of Events, which had endangered the vessel and caused the loss was a rare occurrence. However, because (in his view) it was *foreseeable* and because this Combination of Events flowed from the characteristics and features of the port, he held that this was not an *"abnormal occurrence"* for the purposes of the *Eastern City* test, that it was not out of the ordinary and that the port was therefore unsafe.

Charterers were held to be liable for an exposure of some USD138m, which caused ripples among chartering companies and their liability underwriters. There was much concern as to whether charterers' liability policies would provide adequate limits of cover in a *"worst case scenario"*.

The Court of Appeal's decision

The Court of Appeal has now reversed Teare J's decision and has held that the Combination of Events was an *"abnormal occurrence"* and that the port was therefore safe.

The Court of Appeal held that Teare J *'failed to formulate the critical... question which he had to answer: namely, whether the simultaneous coincidence of the two critical features, viz (a) such severe swell from long waves that it was dangerous for a vessel to remain at her berth at the Raw Materials Quay... and (b) conditions in the Kashima Fairway being so severe because of gale force winds... , as to make navigation of the Fairway dangerous or impossible... , was an abnormal occurrence or a normal characteristic of the port?'*

Instead, Teare J had considered each event separately (as set out in more detail above) and had focussed on the Combination of Events being foreseeable.

The Court of Appeal gave the foreseeability argument fairly short shrift, holding that mere foreseeability is *per se* clearly not sufficient to turn what Teare J had himself described as *"a rare event in the history of the port"*, into a normal characteristic or attribute of the port. The Court went on to state that one has to look at the reality of the particular situation in the context of all the evidence, to work out whether the particular event was likely to have become an attribute of the port, otherwise the consequences of a mere foreseeability test might lead to impractical results. The examples given included it being foreseeable that San Francisco might suffer from earthquakes, or that there might be volcanic explosions near Syracuse, beneath Mount Etna. Surely, such events should not be considered normal characteristics of those ports, rendering them unsafe?

The Court of Appeal also held that Teare J should have considered the evidence relating to the past frequency of such an event occurring and the likelihood of it happening again and, that he should have taken into account evidence regarding the exceptional nature of the storm in terms of its rapid development, it duration and its severity.

In the circumstances, the Court of Appeal held that the Combination of Events was an *"abnormal occurrence"* and that there was no breach by Charterers of the safe port warranty.

The implications

The Court of Appeal judgment in *The Ocean Victory* case has important implications for just about every operator in the business.

Safe port warranty – *"abnormal occurrence"* exclusion

Chartering companies will be breathing a sigh of relief. The judgment from Teare J was very pro-Owner and had considerably contracted the *"abnormal occurrence"* exclusion on which Charterers had sought to rely. Teare J's approach meant that, if a danger was foreseeable and attributable to the characteristics of the port, then an incident arising from it would be for charterers' account in any event – even if such a danger was rare, or had never arisen before.

The Court of Appeal has said that that approach is wrong. Moving forward, if a particular danger is foreseeable, but in fact never arises, it will be hard for an owner to prove that such danger is *"normal"* for that port.

Frequency of risk was key in this case – as mentioned above, this was the only time such an incident had occurred in the port's 40 year history.

Owners could seek leave to appeal, although whether this will happen remains to be seen.

The effect of joint insurance on the recoverability of loss

The Court of Appeal also dealt with the important question as to whether Demise Charterers would actually have suffered any loss, in the event that Charterers had been in breach of the safe port warranty. This question arose in connection with the insurance provisions contained in clause 12 of the amended Barecon 89 between Owners and Demise Charterers.

Clause 12 is a standard, albeit optional, clause. It provides that Demise Charterers shall take out marine and war risks insurance (as well as P&I) and that such policies shall be in the joint names of Owners and Demise Charterers.

Charterers had argued that clause 12 contained a complete code for the treatment of insured losses as between the parties

in the event of a total loss. According to Charterers, this meant that Owners and Demise Charterers could not have intended that the Demise Charterers would have been liable to Owners for breach of the safe port warranty in respect of losses covered by the hull insurance. (This would not have covered the salvage and wreck removal costs.)

The Court of Appeal examined the case law on this point and considered that where insurance was held in joint names, this was likely to be construed as being an agreement to insure for the parties' joint benefit, in which case this will normally mean that the parties have agreed on an insurance solution without any rights of subrogation.

It construing clause 12, the Court concluded that the parties had intended there to be an insurance funded result in the event of loss or damage caused by marine risks, ie that clause 12 provides a complete code for what is to happen in such an event.

This meant that had Demise Charterers been in breach of the safe port warranty, they were not liable to Owners, as Owners had agreed to look to the insurance proceeds for compensation. As a result, Demise Charterers would not have had any loss to pass down.

Owners routinely structure their ownership operations through bareboat charters and it is not uncommon for the demise charterer to insure the vessel jointly in its name and that of the registered owner. Furthermore, clause 12 of the Barecon 89 is a standard clause, which is often used. As a result, this situation will arise frequently. Further questions will no doubt arise as to what will happen when the demise charterer has taken out adequate insurance under clause 12, but the insurer does not pay. While this was discussed in the case, it is an area which will no doubt generate further case law.

This case serves as an important warning to vessel owners, insurers and banks. Bareboat charter structures deemed to exclude claims between co-assureds may have the undesired side-effect of precluding downward claims against sub-charterers. This can result in serious exposure for underwriters. Anyone with bareboat structures in place (including banks and insurers) will wish to double-check their documents to evaluate their exposure on this point.

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