Gard's appeal to the English Supreme Court is decided

The decision of the UK Supreme Court in the OCEAN VICTORY will assist the shipping community in future disputes involving safe port warranties. The decision also firmly establishes that a charterer cannot limit liability in the same manner as an owner for loss or damage to a chartered ship under English law.

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As a leading P&I, Marine and Energy insurer, Gard is prepared to support its Members and clients in litigation when there is a need to clarify points of law of general importance. Indeed, commercial dealings between owners and charterers are helped by having certainty in how risks are to be allocated between them. And, legal clarity also aids the various insurers' risk assessments. Moreover, legal certainty should, in time, reduce the frequency of disputes serving to save litigation costs for all concerned.

In November 2016 the English Supreme Court heard Gard's appeal - *Gard Marine & Energy v. China National Chartering Company Limited and others (the OCEAN VICTORY)* . The Supreme Court handed down its judgment on 10 May 2017.

Gard insured the capesize OCEAN VICTORY for Hull and Machinery risks when she grounded in a storm while attempting to leave Kashima Port in Japan in October 2006. Following attempts to salvage the vessel, which failed, the vessel broke in two and became a total loss. Significant salvage and wreck removal costs were incurred. Gard as assignee of both owners and demise charterers claimed against the time charterers for breach of the safe port warranty in the time charterparty.

The Commercial Court ruled in Gard's favour. The Court of Appeal overturned that decision and the Supreme Court has now affirmed the Court of Appeal. The Supreme Court agreed with the Court of Appeal that the phrase 'abnormal occurrence' in the context of a safe port undertaking means an event that was something well removed from the normal, out of the ordinary course and unexpected: "It is something which the notional charterer or owner would not have in mind".

The Supreme Court, by a majority of 3:2, also found that, had there been a breach of the safe port undertaking, the provisions for joint insurance in clause 12 of the BARECON 89 form precluded rights of subrogation of hull insurers and the right of owners to recover in respect of losses covered by hull insurers against the demise charterers for breach of an express safe port undertaking. BIMCO will be circulating a consultation document this summer with proposed revisions to BARECON 2001 which has similar insurance clauses as were discussed in the Supreme Court judgment. We expect that the problems encountered with the existing wording which led to the decision will be addressed in order to preserve rights of subrogation.

Finally, the Supreme Court unanimously dismissed the charterers' cross-appeal challenging the 2004 decision of the Court of Appeal in *The CMA DJAKARTA* in relation to limitation of liability. If there had been a breach of the safe port warranty, the time charterers would not have been entitled to limit their liability.

The decision will likely make it more difficult for owners and their subrogated insurers to recover from time charterers for breach of a safe port warranty under similar facts. Charterers remain exposed to significant liability towards owners for breach of a safe port warranty, since they cannot limit their liability for the loss of or damage to the chartered vessel and for consequential losses.

The judgment runs to some 60 pages so we are grateful for the assistance of Ince & Co LLP in providing the following summary.

The background facts

At the time of the casualty, on 24 October 2006, the OCEAN VICTORY, a capesize bulk carrier, was on demise charter on the BARECON 89 form, from the owners to a related company. The demise charterers had in turn time chartered the vessel and time charterers had sub-chartered her for a time charter trip.

The sub-charterers had given the vessel instructions to load a cargo of iron ore at Saldanha Bay in South Africa and to discharge at Kashima port, Japan. Kashima port is entered from the sea through the North facing Kashima Fairway (a specially constructed channel), which is the only route in and out of the port. The Kashima Fairway is bounded on one side by the South Breakwater and on the other by land.

After discharging operations had been partly completed but had stopped due to bad weather, the sub-time charterers' representative at Kashima advised the Master of OCEAN VICTORY on 24 October 2006 to leave port – advice that he expected the Master to follow. Similar advice to leave was given the same day to another capesize vessel, the ELLIDA ACE, in an adjacent berth. The OCEAN VICTORY and the ELLIDA ACE both unsuccessfully attempted to leave port that day, in a storm. The OCEAN VICTORY allided with the northern end of the South Breakwater and grounded, whilst the ELLIDA ACE grounded before reaching the end of the Kashima Fairway. Salvors were engaged to assist both vessels, but the OCEAN VICTORY could not be refloated and eventually broke in two. Subsequently, the OCEAN VICTORY's hull insurers, in their capacity as assignees of the rights of the owners and demise charterers in respect of the grounding and total loss of the vessel, sought to recover damages from the time charterers for breach of the charterers' undertaking to trade only between safe ports. The time charterers sought to pass any liability down the chain to the sub-charterers.

The classic test for an unsafe port

All three charterparties contained an undertaking on materially identical terms to trade the vessel between safe ports.

In *The EASTERN CITY* , Sellers LJ stated as follows:

"If it were said that 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, it would probably meet all circumstances as a broad statement of the law."

The Commercial Court decision

The Commercial Court held that the casualty was caused by the unsafety of the port in breach of the safe port undertaking in the time charters and awarded the hull insurers substantial damages.

The charterers' case before the Commercial Court was fought by them on several bases, principally by criticising the navigation and decisions of the Master.

Teare J found that the OCEAN VICTORY could not have remained safely alongside her berth on 24 October. The Master's decision to follow the sub-time charterers' local representative's advice to leave port was not negligent. Furthermore, the Kashima Fairway lacked sufficient searoom to manoeuvre a capesize ship safely in the weather conditions. Ordinary seamanship and navigation could not ensure a safe exit on 24 October 2006 - good luck was also required. He held that the port had no system to ensure that capesize vessels, if they had to leave the berth, only left in weather conditions with which they could cope. No risk assessment had been carried out by the port as to the limiting conditions for vessels to remain alongside the berth. The port should have carried out such an assessment and introduced appropriate systems.

The port was thus unsafe. Dismissing the time charterers' contention that this accident was due to an 'abnormal occurrence' (so not within the scope of the safe port warranty), the Judge found that the danger facing the vessel flowed from two characteristics of the port: the vulnerability of the Raw Materials Quay to long swell and the vulnerability of the Kashima Fairway to northerly gales caused by a local depression. While, as submitted by the time charterers, it might be a rare event for these two events to occur at the same time, the Judge considered there was no meteorological reason why they should not do so. The Judge found that long waves were clearly a feature of the port. Low pressure systems could not, in his view, be regarded as abnormal and gale force winds from the North were a feature of the port. The Judge commented that the storm that affected the port on the relevant day may have been one of the most severe storms experienced at Kashima, but he held that neither long waves nor northerly gales could be described as rare and: " *Even if the concurrent occurrence of those events is a rare event in the history of the port such an event flows from characteristics or features of the port".* The Judge held that no one at the port could be surprised if the two events occurred at the same time.

The Court of Appeal decision

The Court of Appeal overturned this decision, finding that the conditions that affected Kashima were an 'abnormal occurrence' and that there was no breach of the safe port undertaking on the part of the charterers. The Court of Appeal concluded that Teare J had taken the wrong approach in considering the two components of the danger threatening the vessel separately and deciding that, viewed on their own, they could not be said to be rare and that both were attributes or characteristics of the port. It was incorrect to hold that, even if the critical combination was rare, it was nonetheless a characteristic of the port.

Rather, what mattered was not the nature of the individual component dangers that gave rise to the grounding, but the nature of the event, namely the critical combination of the dangers, that gave rise to the vessel being effectively trapped in port. The fact that an event was theoretically foreseeable as possibly occurring at the relevant port, because of the port's location, was not enough to qualify a rare event in the history of the port as a characteristic or attribute of the port. A rare event could not be an attribute of a port. An abnormal occurrence was out of the ordinary course of things and unexpected and so outside the safe port undertaking. The Court of Appeal also held that, even if there had been a breach of the undertaking, in the light of the insurance provisions in the demise charterparty, the claimants would not have been entitled to claim in respect of losses covered by the hull insurers.

The Supreme Court decision

The Supreme Court (Lords Mance, Clarke, Sumption, Hodge and Toulson) addressed three principal issues:

Was there a breach of the safe port undertaking?

The Court considered whether the port was unsafe within the meaning of the safe port undertaking, so that the charterers were in breach. Alternatively, was there an abnormal occurrence within the context of the safe port undertaking, so that there was no breach?

The Supreme Court endorsed the Court of Appeal's findings. Lord Clarke, giving the lead judgment, stated that:

"safe port disputes should be reasonably straightforward. Was the danger alleged an abnormal occurrence, that is something rare and unexpected, or was it something which was normal for the particular port for the particular ship's visit at the particular time of the year?

...The owners are responsible for loss caused by a danger which is avoidable by ordinary good navigation and seamanship by their master and crew. The charterers are responsible for loss caused by a danger which was or should have been predictable as normal for the particular ship at the particular time when the ship would be at the nominated port and was not avoidable by ordinary good seamanship. The owners (and ultimately their hull insurers) are responsible for loss caused by a danger due to 'an abnormal occurrence' ".

His Lordship confirmed that the date for judging breach of the safe port undertaking was the date of nomination of the port. It was not a continuing warranty. The undertaking was effectively a prediction about safety when the ship arrives in the future. The undertaking necessarily assumed normality: given all of the characteristics, features, systems and states of affairs which are normal at the port at the particular time when the vessel should arrive. Lord Clarke cited with approval Robert Goff J's words in *The EVIA (No 2)* [1981] Lloyd's Rep 613 that " *the formulation of a test whether the port is unsafe must assume normality, and must therefore exclude danger caused by some abnormal occurrence* ".

Lord Clarke held that the test is not whether the events which caused the loss were reasonably foreseeable; an examination of the past history of the port is necessary and of whether, in that evidential context, the event was unexpected.

Were subrogated hull insurers precluded from recovering against demise charterers?

This issue was decided by a majority of 3:2 (Lords Clarke and Sumption dissenting). It was strictly unnecessary to decide this point because of the finding that there had been no breach of the safe port undertaking. Nonetheless, this was a question of general importance because the BARECON 89 is a commonly used standard form.

In summary, the time charterers contended that the demise charterers could not sue the time charterers for loss of a ship caused by breach of a safe port warranty in the time charter, as a result of the co-insurance provisions in the demise charter (to which insurance arrangements the time charterers were not a party).

The relevant clause in the BARECON 89 is clause 12 which requires the demise charterers to take out insurance in their name and the name of owners. Clause 13 is an alternative provision, which applies in place of clause 12 if the parties so choose. Clause 13 differs from clause 12 in relation to marine and war risks, because it puts the responsibility for maintaining cover on the owners. In clause 12, that obligation is on the demise charterers. Clause 13 (similarly to clause 12) provides for such insurance cover to be in the joint names of the owners and the demise charterers, but expressly excludes owners and/or insurers' rights of recovery or subrogation against the demise charterers in respect of the liabilities covered by the insurance. Clause 12 does not contain any equivalent express exclusion of the owners' right of recovery, or the insurers' right of subrogation, against the demise charterers.

In this case, the parties had opted not to use clause 13 (which was deleted), and clause 12 applied. Furthermore, the BARECON 89 demise charterparty contained an additional rider clause (clause 29), by which the vessel was only to be employed between safe ports: a safe port warranty.

Lords Clarke and Sumption agreed with Teare J at first instance that clause 12 did not expressly remove the right to damages for breach of the express safe port warranty. It merely gave the demise charterer certain rights with regard to proceeds of the insurance policy for which they had paid. In deleting clause 13, the parties had chosen not to be bound by it and its express provision excluding rights of recovery.

Lord Sumption referred to the well-established rule that where insurance inures to the benefit of both parties to a contract, they cannot claim against each other for an insured loss. This case was different to other reported cases as:

"In all of the English cases before this one the question arose between the co-insureds and their insurer. None of them raised the question how the principle about co-insurance affects claims against a third party wrongdoer who is not himself a co-insured and is not party to the arrangements between them. There is no necessity to exclude a claim against him and indeed no reason why either of the co-insureds or their insurer should wish to do so. It is impossible to identify any contract whose business efficacy depends on that result being achieved."

The majority, however, agreed with the Court of Appeal that the introduction of the safe port undertaking in rider clause 29 did not alter the way in which clause 12 was to operate. On its proper construction, the clause provided for an insurance funded result in the event of loss or damage to the vessel by marine risks. If the demise charterers had been in breach of the safe port clause, they would have been under no liability to the owners for the amount of the insured loss because they had made provision for looking to the insurance proceeds for compensation. In the words of Lord Toulson:

"The risk existed that the vessel might be directed to an unsafe port, not necessarily by negligence on anyone's part, so causing peril to the vessel, but the risk of consequential damage to the vessel was catered for by the insurance required to be maintained by the demise charterer in the joint names of itself and the owners. The commercial purpose of maintaining joint insurance in such circumstances is not only to provide a fund to make good the loss but to avoid litigation between them, or the bringing of a subrogation claim in the name of one against the other."

Their Lordships indicated that the demise charterers or their subrogated insurers might have sought to pursue the claim on two alternative bases: bailment or 'transferred loss'. As they had heard no argument, the Supreme Court did not express any view as to the likelihood of success, or otherwise, of these possible alternatives.

Could charterers limit their liability if they had breached the safe port warranty?

The Supreme Court found unanimously in favour of the hull insurers on this point. Although the issue did not arise in the light of the decision on the safe port issue, it raised a point of importance. The lower courts had not consider it because they were bound by the Court of Appeal decision in *The CMA DJAKARTA* [2004] 1 Lloyd's Rep 460.

The Supreme Court confirmed the decision in *The CMA DJAKARTA* and held that, if there were a breach of the safe port warranty, the charterers would not be entitled to limit their liability under the Convention on Limitation of Liability for Maritime Claims 1976. The expression in the 1976 Convention " *loss of or damage to property...in direct connection with the operation of the ship* " was not intended to include loss of or damage to the very vessel on the basis of whose tonnage limitation was calculated.

Gard's concluding comments

Gard appealed to the Supreme Court because we agreed with the decision of the Commercial Court and disagreed with the Court of Appeal in overturning that decision. The Supreme Court considered the legal issues to be of sufficient importance to grant leave to appeal. The Supreme Court's decision will assist the shipping community in future disputes involving a safe port warranty. The Supreme Court's majority view on the subrogation and recoverability issue will require a revisit to certain BIMCO standard charterparty forms and clauses. Finally, it is now clear that under English law a charterer cannot limit liability in the same manner as an owner for loss or damage to a chartered ship.

While Gard would have wished for a different outcome, the process was necessary to reach the legal clarity and authority that we now have.

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