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Update

The "OCEAN VICTORY" – Court of Appeal clarifies "*abnormal occurrence*" in a safe port warranty

The Court of Appeal overturned the first instance decision in the matter of the "OCEAN VICTORY" and found that time charterers had not directed the vessel to an unsafe port. In the process, the Court clarified what constitutes an "*abnormal occurrence*" in the context of a safe port warranty.

Facts

In October 2006, The "OCEAN VICTORY", a Capesize vessel carrying iron ore, attempted to leave the port of Kashima, Japan, in a gale. Whilst sailing from the port, the vessel ran aground and later broke apart. The vessel was on a ten year bareboat charter from Ocean Victory Maritime Inc. (OVM) to Ocean Line Holdings Ltd (OLH). The charterparty contained a warranty that the vessel would be employed "*only between good and safe ports*". OLH , in turn, chartered the vessel to China National Chartering Corp. (CNCC), on a time charter, and CNCC then sub-chartered it to Daiichi on a time charter trip. The former charterparty included a warranty in respect of "*safe anchorage(s), safe berth(s), safe port(s)*" whereas the latter related to "*safe port(s), safe anchorage(s)*".

First instance

As a result of the casualty, hull underwriters as assignees of the owners under the bareboat charter, brought a claim against the time charterers for over USD 137 million in respect of the total loss of the vessel (USD 88.5 million), loss of earnings (USD 2.68 million), salvage (USD 12 million) and wreck removal costs (USD 35 million). The claimants' case rested on their assertion that Kashima port was unsafe.

The claimants' safe port case was based on the fact that, they argued, the cause of the casualty was a combination of severe northerly gales and a swell caused by long waves both of which were known to be a problem at the port. At first instance, the judge found that the casualty was caused by a characteristic of the port. It could not have been avoided by the exercise of good navigation and seamanship, and did not constitute an "*abnormal occurrence*". As a result, owners succeeded in their claim and were awarded USD 137.7 million.

Court of Appeal

The matter was, however, appealed to the Court of Appeal in London who handed down their decision on 22 January 2015.

Whilst the court looked at three key issues, the most important was whether, as a matter of law, in the circumstances, there had been a breach of the safe port warranty. Both parties accepted that if the loss of the

vessel was caused by an "*abnormal occurrence*" then the charterers would not be in breach of the safe port warranty (see the "*EASTERN CITY*" [1958] 2LLR 127 at 131: "*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 a danger which cannot be avoided by good seamanship and navigation*").

The court therefore had to decide in this case:

1. What was the correct test for an "*abnormal occurrence*"
2. Whether a combination of two weather conditions (swell from "*long waves*" and a severe northerly gale) was to be characterised as an "*abnormal occurrence*" even though it was rare for the two conditions to be experienced at the same time (the "*unitary question*")
3. Whether, on the facts, the casualty resulted from an "*abnormal occurrence*"

What is the correct test for an "*abnormal occurrence*"?

The Court of Appeal was of the view the first instance judge had taken an excessively theoretical approach of what constituted an "*abnormal occurrence*". His interpretation meant that, provided an event was theoretically foreseeable because of the port's location, this would mean the event was a characteristic of the port and not an "*abnormal occurrence*".

The Court of Appeal made it clear that the fact a danger to a port was merely "*foreseeable*" was not sufficient to make it a "*characteristic or attribute*" of the port, which a danger would need to be, to render the port unsafe as a matter of law. Instead, it said, an event would have to be sufficiently likely to occur to be a characteristic or attribute of the port, and this would be established by examining the frequency with which the event in question had taken place in the past.

Charterers highlighted the worrying and uncertain position which the first instance decision could create by making well know ports which are widely regarded to be safe, unsafe. He used the examples of earthquake risk in California being considered to be a characteristic of San Francisco, and Syracuse's proximity to Mount Etna making the risk of a volcanic eruption a characteristic of Syracuse.

The unitary question

The Court of Appeal was of the view that the trial judge was wrong simply to examine and take into account the likelihood of swell caused by long waves and northerly gales individually. Instead he should have looked at the frequency with which the two occurred at the same time as this coincidence of two factors was the cause of the loss.

Decision

Although swells resulting from long waves and severe northerly gales each occurred sufficiently frequently to constitute characteristics of the port, the first instance judge did not consider whether the rarity of the combination of these two well-known risks could render it an abnormal occurrence. The Court of Appeal looked more closely into the coincidence of these two occurrences and found although neither northerly gales nor the swell resulting from long waves were individually unusual, the combination of the two simultaneously was extremely unusual and, as such, constituted an abnormal occurrence.

The charterers' appeal therefore succeeded and the insurers'/owners' claim failed.

Comment

This judgment clarifies what constitutes an "*abnormal occurrence*" in the context of a safe port warranty, and will allay some fears of charterers and their insurers, following the first instance decision, which risked rendering many well-used ports considered safe, such as Kashima, unsafe as a matter of law.

Further information

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