

SOUNDINGS

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The value of charterer's liability cover – the OCEAN VICTORY

The “classic” description of an unsafe port was given by Sellers LJ in The Eastern City

Many charterparties, particularly time charters intended for general trading purposes, include express provisions in which the charterers warrant the safety of the ports and berths to which they will order the ship. In practice it can prove difficult to establish a breach of such warranties.

The “classic” description of an unsafe port was given by Sellers LJ in *The Eastern City* [1958] 2 Lloyd's Rep 127:

“... 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...”

The standards which are set are those to be expected of an “ordinarily prudent and skilful master”. These are treated as high standards. As Sellers LJ went on to say:

“Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from, tides, currents, swells, banks, bars or revetments. Such dangers ... can normally be met and overcome by proper navigation.”

Thus it can be concluded that unsafe ports and berths maybe those which are unsuitable for the particular ship or which are otherwise safe but for outstanding repairs.

Teare J's judgement in *The Vine* [2010] 1 Lloyd's Reports 301 involved a berth used for iron ore export from Brazil. The berth had a number of damaged dolphins with outstanding repairs. The berth was found to be unsafe.

In *The Ocean Victory* [2013] EWHC 2199 Teare J found that the port of Kashima was unsafe and said:

“This was a remarkable casualty. Although OCEAN VICTORY had the full use of her engines she lost steerage way when leaving a modern, purpose-built port and

navigating a fairway which had been used by many ships without incident”.

The ship, a capesize bulk carrier, was required to discharge iron ore at the Raw Material Quay, Kashima under a head charter and sub charters which contained safe port warranties.

The berth was susceptible to long waves. This was not unusual or unexpected given that Kashima faces the Pacific Ocean. Previously ships had to depart from the berth before completion of loading operations to avoid ranging damage or the parting of mooring lines. Such incidents did not of themselves render the berth unsafe.

Teare J stressed that:

“...the fact that a vessel may have to interrupt discharge and leave the port of Kashima on account of a typhoon does not make the port unsafe”.

However, other factors also came into play in this case with severe consequences for all parties. Long wave conditions were experienced together with very poor weather conditions which led to flooding at the berth and interruptions to the cargo operations.

The ship was required to leave the berth but this coincided with a local depression resulting in gale force winds. The conditions were truly appalling. The ship grounded and was abandoned by the crew. Salvage attempts failed, the ship eventually broke apart and a wreck removal was undertaken. Overall the casualty resulted in claims of approximately \$137.6 million.

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continued

“If, despite the taking of such precautions, the vessel remains exposed to a danger which cannot be avoided by good navigation and seamanship then the port is unsafe.”

Teare J found that it was the combination of factors which rendered the port unsafe and said:

“I have therefore concluded that when the Charterers ordered the vessel to discharge her cargo at Kashima that the port was prospectively unsafe for OCEAN VICTORY. There was a risk that the vessel might have to leave, or be advised to leave, the port on account of long waves or bad weather....at a time when the wind and sea conditions in the channel were such that more than ordinary seamanship and navigation were required to enable the vessel to leave the port safely. There was no system to ensure that when any such departure was necessary or advised the vessel could leave safely”.

It was accepted that this combination of circumstances would be very rare and, indeed, this was the first occasion on which they had arisen.

In defending the claim, charterers argued that the emphasis should be on reasonable safety and reasonable precautions to guard against risks. They said that a port should not be considered unsafe because its systems did not guard against every conceivable risk however unlikely. This reasoning derives from comments made by Lord Denning in the Court of Appeal in the *Evia* No.2 [1982] 1 Lloyd's Reports 334. Here he said:

“What are the characteristics of a “safe port”? ... To my mind it must be reasonably safe for the vessel to enter, to remain, and to depart without suffering damage so long as she is well and carefully handled.”

Lord Denning's view was that provided the port had taken reasonable precautions to avoid or warn of its natural or intrinsic hazards then it should be considered safe.

When charterers argued that Lord Denning's view should be regarded as the “classic” definition, Teare J was surprised. He looked at the question of whether there is a qualification of “reasonableness” to the question of safety in some detail and roundly rejected this contention. Essentially, either a port is safe for the particular ship at the time it is ordered there or it is not.

The enquiry, therefore, must be objectively aimed at the characteristics of the port and the ship. The question becomes whether the hazards which will inevitably be thrown at any port or berth can be avoided by the exercise of good navigation and seamanship. If they can then it will not be unsafe. To include a concept of “reasonable safety” would “introduce an unwelcome and inappropriate measure of uncertainty”. Teare J went on to say:

“A port is not saved from being unsafe where, although the vessel will be exposed to a danger which cannot be avoided by good navigation and seamanship, the port has taken precautions designed to protect vessels against that danger but which in fact do not protect the vessel from danger. If, despite the taking of such precautions, the vessel remains exposed to a danger which cannot be avoided by good navigation and seamanship then the port is unsafe”.

This case has made a significant contribution to the present understanding of the legal concept of safe ports and berths. It remains to be seen whether Teare J's views will be considered further on appeal or in future cases.

Although Kashima had in place a system by which ships could be advised to leave port in poor weather conditions, it did not have a system whereby if capesize ships needed to leave berths because of long waves they only did so in suitable weather conditions.

Charterers will have to make careful enquiries before ordering a ship to a particular port or berth. This case could, however, be said to reinforce a line already drawn in the sand in the earlier cases. Either the port or berth is safe or it is not safe. There is no middle ground and the warranties given are not diluted by considerations of reasonableness. The importance of charterer's liability insurance for this type of risk cannot be underestimated.

THE UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web: www.ukdefence.com