UK DEFENCE CLUB

SOUNDINGS

The Supreme Court affirms OCEAN VICTORY ruling

The Supreme Court has clarified the law in relation to unsafe ports and has confirmed the Court of Appeal's decision limiting a charterer's potential liability for breach of safe port warranty.

Unsafe port

The OCEAN VICTORY was rendered a total loss at the port of Kashima on 24th October, 2006, resulting in liabilities of approximately $138 million. Whilst leaving the port the ship grounded and broke apart. The owners pursued a claim against the charterers for breach of the safe port warranty.

Two factors combined to cause the loss: (i) the meteorological phenomenon of long waves, which forced the ship to leave her berth; and (ii) a severe northerly gale, which meant that the ship could not safely exit the port via the narrow Kashima fairway. At first instance, the court looked at each factor separately and decided that neither could be said to be rare and both were attributes or characteristics of the port. Mr Justice Teare concluded that the port was unsafe and that therefore the charterers were liable for the consequences of the casualty.

The charterers appealed to the Court of Appeal which found that the port was safe. The Court of Appeal held that whilst long waves and northerly gales, individually, were characteristics of the port, the critical combination of these two factors were key. Following the EASTERN CITY [1958] 2 Lloyd's Rep 127, under English law it is settled that an abnormal occurrence will not render a port unsafe. The Court of Appeal emphasised that the combination of long waves and a northerly gale was an abnormal occurrence and that this combination was not a characteristic of the port. Therefore, the charterers were not in breach of the safe port warranty.

The owners appealed to the Supreme Court which has now unanimously confirmed that the Court of Appeal had reached the correct conclusion. There was no breach of the safe port warranty and the consequences of the loss rested with the owners.

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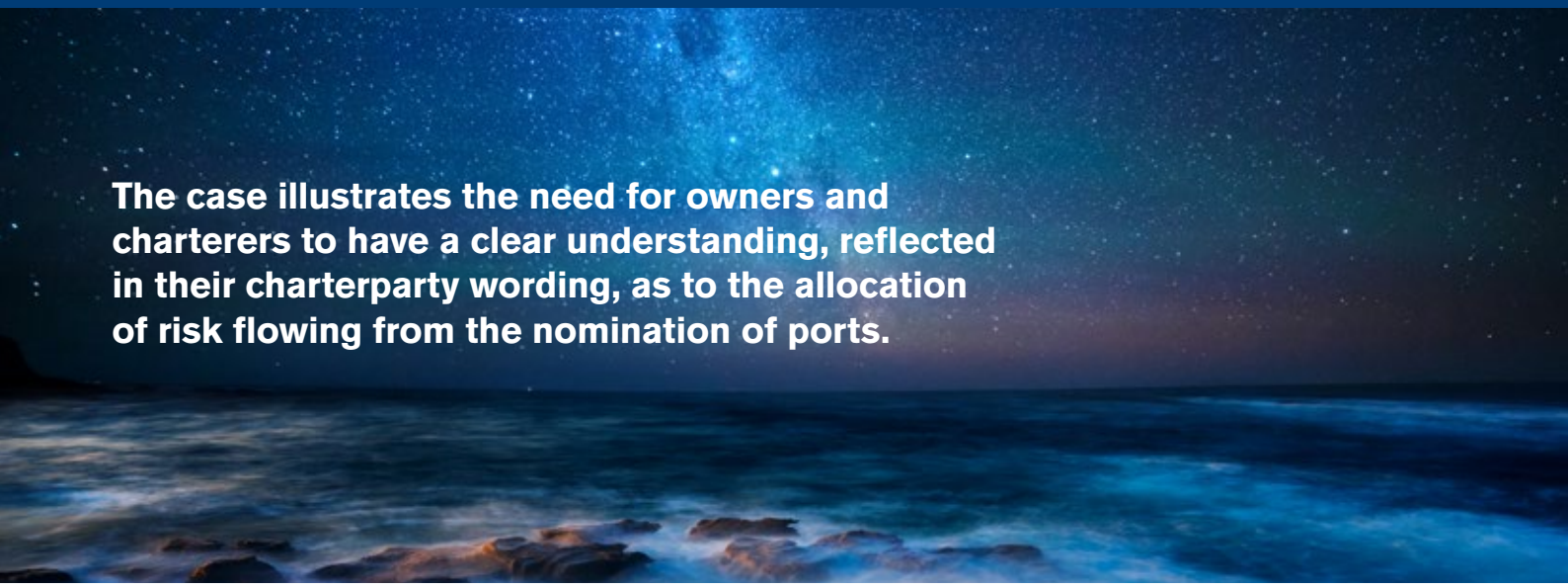

The case illustrates the need for owners and charterers to have a clear understanding, reflected in their charterparty wording, as to the allocation of risk flowing from the nomination of ports.

The Supreme Court found that the relevant test was not whether the events which caused the loss were reasonably foreseeable. The charterer's safe port warranty was not a continuing warranty but was merely a prospective warranty given at the time of nomination that the port was safe unless there was an abnormal occurrence. The court noted that a realistic approach was needed when considering whether such an abnormal occurrence has happened. An abnormal occurrence was something out of the ordinary course, unexpected and was "something which the notional charterer or owner would not have in mind". The Supreme Court agreed with the Court of Appeal that the frequency of the combination of long waves and a northerly gale at the port was critical. On 24th October, 2006 these two port characteristics combined. That combination was an abnormal occurrence and there was no breach by the charterers of the safe port obligation.

This long-running unsafe port case has been watched with keen interest by owners and charterers alike. The Supreme Court noted that cases where there is a successful defence of "abnormal occurrence" are rare. The court has not changed the law relating safe port warranties but the case illustrates the need for owners and charterers to have a clear understanding, reflected in their charterparty wording, as to the allocation of risk flowing from the nomination of ports.

The Supreme Court also considered two further issues in relation to limitation and the ramifications of joint insurance for ship owner interests.

Limitation

The 1976 Convention on Limitation of Liability for Marine Claims made it clear that charterers were entitled to limit their liability following marine casualties. The Supreme Court considered whether the convention was applicable as between owners and charterers such that a charterer could limit its liability to an owner for loss of or damage to the ship itself. The Supreme Court unanimously agreed with the Court of Appeal's decision in a 2004 case, THE CMA DJAKARTA [2004] 1 Lloyd's Rep 460, that charterers would not be entitled to limit their liability to owners under the convention for such loss or damage. Therefore, if a charterer were to be in breach of a safe port warranty then it is now clear that it would not be able to limit its liability for damage to the ship itself.

Joint insurance

The OCEAN VICTORY was demise chartered on the widely used Barecon 89 form which provided for joint insurance and distribution of insurance proceeds as between the owner and bareboat charterer. The Supreme Court also considered whether the terms of the bareboat charter precluded a claim between the owner and demise charterer. By a majority, the court concluded that the terms of the bareboat charter did preclude such a claim and that the charter provided for a comprehensive scheme for an insurance funded result in the event of the loss of the ship by a marine risk. That scheme was not altered by the safe port warranty which also appeared in the bareboat charter. Therefore the court concluded that, if there had been a breach of the safe port warranty, as the owner could not pursue a claim against the demise charterer, the demise charterer in turn could not pursue a similar claim against the ship's time charterer for such a breach of warranty.

This finding is significant for all parties involved in a chain of charters where there is a bareboat charter with a joint insurance provision. Members are advised to consider any such charters and associated insurance arrangements.

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