UK DEFENCE CLUB

SOUNDINGS

The Court of Appeal overturns OCEAN VICTORY ruling

The Court of Appeal has recently overturned the first instance decision in the high value unsafe port case involving the grounding and total loss of the OCEAN VICTORY in Kashima, Japan. The appeal decision reigns back the extent of a charterer's potential liability under a safe port warranty, and provides some reassurance to charterers and their insurers.

Unsafe port

In 2013, the Association reported on the Commercial Court decision in the case of the OCEAN VICTORY. Mr Justice Teare found that the port of Kashima was unsafe and thus made the charterer liable for damages in the region of $137.6 million. The charterer appealed that decision and the Court of Appeal has now issued a judgment which overturns the findings of the Admiralty Judge.

The cause of the incident was the result of a combination of two factors:

(i) the phenomenon of swell from "long waves," which forced the ship to leave the berth, and

(ii) a very severe northerly gale, which meant that the ship could not safely exit the port via the Kashima Fairway.

Having been forced to leave the berth, the ship grounded and eventually broke apart.

If the damage sustained by the ship at Kashima was caused by an "abnormal occurrence" then the charterer would not have been in breach of their safe port warranty. This principle arises from the classic dictum of Sellers LJ in The Eastern City [1958] 2 Lloyd's Rep. 127 at 131 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 seamanship and navigation".*

continued overleaf

Clearly, there is scope for controversy and it will be interesting to see whether the point is reconsidered by the Supreme Court.

The critical issue as to whether Kashima was a safe port therefore depended on whether or not the conditions encountered by the ship at Kashima in October, 2006, could be characterised as an "abnormal occurrence".

High Court Decision

At first instance, the judge had acknowledged that neither of the two meteorological events taken on its own was considered to be particularly abnormal. Kashima, like many other Japanese and other ports bordering the Pacific, is occasionally subject to the impact of "long waves". Also, it is not abnormal for the port to be affected by typhoons which necessitate ships to leave the berth. Although he acknowledged that the concurrent occurrence of those conditions at the port was rare, the fact that the situation experienced by the OCEAN VICTORY flowed from events that could be termed as characteristics or features of the port meant that it must be 'at least foreseeable' that at some stage "such a critical combination would occur and nobody could be surprised if it did".

Court of Appeal Decision

However, on appeal, [2015]EWCA Civ 16 Lord Justice Longmore criticised this reasoning. He viewed the key question to be whether the critical combination of the two events, meaning that a ship might be in danger at her berth but at the same time unable to leave safely because of gale force winds, was an abnormal occurrence, rather than taking the two events separately. He felt that it was not sufficient that the event should be "at least foreseeable" without also examining whether the event was a characteristic of the port, having regard to evidence relating to the past history of the port, the frequency of such an event occurring and the likelihood of it occurring again. Expert evidence showed that the storm which affected Kashima that day was exceptional in terms of its rapid development, its duration and its severity. No ship in the port's 35 year history had experienced a situation quite like it. Taking such evidence into account, Lord Justice Longmore felt that only one conclusion could be drawn: that the situation experienced by the OCEAN VICTORY was in fact an "abnormal occurrence" and the port was, therefore, safe.

By way of illustration, Lord Justice Longmore favoured the analogies given by the charterer: the mere fact that it is "foreseeable" from the location of San Francisco that earthquakes may occur in its vicinity, or from the location of Syracuse, beneath Mount Etna, that there may be volcanic explosions in its vicinity, should not necessarily mean that any damage caused to ships in those ports from such events, were they to occur in the future, would flow from the normal characteristics of those ports, and therefore involve a breach of a safe port warranty.

This decision will mean that it might be easier for a charterer to rely on the "abnormal occurrence" exception. The first instance decision resulted in the conclusion that the port of Kashima, one of the largest ports in Japan and a modern port with a first-class safety record, was unsafe in 2006 and had been unsafe for many years previously, notwithstanding that there had been no previous casualty of a similar nature and indeed none since.

It is clear that a charterer is not expected to assume responsibility for "abnormal" events. However, this decision may be seen to dilute the effect of safe port warranties to something closer to a due diligence obligation. The purpose of a safe port warranty is to reassure an owner that its charterer will shoulder the risk of unsafety at any particular port, given that it is the charterer who decides where the ship is to go (within certain limits). However, following this ruling, an owner may be concerned that such a warranty may not provide the complete protection it expects.

It remains to be seen whether the case is reconsidered by the Supreme Court but in the meantime if Members have any questions please contact your local Managers' office.

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