BRICK COURT CHAMBERS

BARRISTERS

Ocean Victory in the Supreme Court

10/05/2017 *(Commercial)*

Gard Marine and Energy Limited v. China National Chartering Company Limited and others (Ocean Victory) [2017] UKSC 35

The *Ocean Victory* was a capesize bulk carrier which grounded whilst attempting to leave the Japanese port of Kashima during a storm in October 2006. She eventually broke in two and became a wreck. Litigation ensued between those in the charterparty chain. One of the hull insurers, Gard, took an assignment of the rights of the vessel's owners and demise charterers (both companies in the same group) in a claim against the time charterers (Sinochart and their sub-charterers, Daiichi) that the vessel had been ordered by the time charterers to an unsafe port in breach of charter. Although that claim succeeded before Teare J, the Court of Appeal overturned the decision. The Supreme Court handed down its judgment on 10 May 2017, dealing with three important issues.

1. Safe port: was Kashima prospectively unsafe for this vessel at the time the order to proceed there was given, or did the casualty result from an "abnormal occurrence"? The Court (in the judgment of Lord Clarke, with which the rest of the Court agreed on this issue) confirmed the approach of the House of Lords in *The Evia (No.2)* and explained its application to a situation where the casualty resulted from the combination of two factors: here the presence of "long waves" in the port (which made it unsafe for the vessel to stay at the berth) at the same time as a northerly gale was blowing down the vessel's only exit route (causing it to be unsafe for the vessel to leave the port), in circumstances where the port had carried out no risk assessment of that combination occurring. The Court held that the key was whether that "critical combination" was abnormal, even if both its constituent elements were separately characteristics of the port. The failure of the port to conduct a risk assessment and put in place a proper safety system to deal with the risk of that combination did not affect the answer to that question. As a result, there was no breach of the safe port undertaking.
2. Joint insurance: did the provisions of the Barecon 89 form of bareboat charter preclude Gard's claim (as assignee of the demise charterer) against the time charterers? The Court was split 3-2 on the answer to this question. The majority (Lords Mance, Hodge and Toulson) held that the provisions in clause 12 of the Barecon 89 had the result that, even if the time charterers had been in breach of the safe port undertaking in the time charter, they would not have been liable to the demise charterers for that breach because demise charterers had not suffered any loss by way of contractual liability to the head owners. Clause 12, which provided for the demise charterers to take out hull insurance in the joint names of themselves and the owners, operated as a complete code dealing with the consequences of loss of the vessel, and precluded any liability arising from it for breach of the demise charter. In a dissenting judgment, Lord Sumption (with whom Lord Clarke agreed) held that the provisions of clause 12 did not preclude liability for breach of the demise charter arising, but rather provided a mechanism for the discharge of that liability via insurance proceeds (such discharge being *res inter alios acta* with regards to third parties), with the result that the demise charterer had suffered a loss capable of being passed on down the charter chain.
3. Limitation: were the time charterers entitled to limit their liability under the Convention on Limitation of Liability for Maritime Claims 1976 (given the force of law under the Merchant Shipping Act 1995)? The Court, upholding the Court of Appeal's decision in *The CMA Djakarta*, held they were not. Lord Clarke (with whom the rest of the Court agreed on this issue) gave an account of the history of limitation and the approach to be adopted in interpreting an international convention, and confirmed that loss of or damage to the vessel itself (i.e. the vessel

by reference to the tonnage of which limitation is calculated) did not fall within article 2 of the 1976 Convention. If, therefore, Gard's claim had succeeded, there would have been no reduction of liability by reason of limitation.

The judgment is here.

Mark Howard QC and Simon Birt QC were instructed by Gard for the appeal in the Supreme Court (not having appeared below), instructed by Ince & Co.

RELATED BARRISTERS

- Mark Howard QC
- Simon Birt QC