10 May 2017

PRESS SUMMARY

Gard Marine and Energy Limited (Appellant) v China National Chartering Company Limited and another (Respondents)
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Daiichi Chuo Kisen Kaisha (Appellant) v Gard Marine and Energy Limited and another (Respondents) [2017] UKSC 35
On appeal from [2015] EWCA Civ 16

JUSTICES: Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge and Lord Toulson

BACKGROUND TO THE APPEAL

This appeal arises out of the grounding of the Ocean Victory ("the vessel"). By a demise charterparty the vessel's owners, Ocean Victory Maritime Inc. ("the owners") chartered the vessel to Ocean Line Holdings Ltd ("the demise charterer") on the widely used Barecon 89 form, as amended **[1]**. It provided for the demise charterers to procure insurance for the vessel at their expense against marine, war and protection and indemnity risks for the joint interest of themselves and the owners **[93]**. The demise charterer time chartered the vessel to China National Chartering Co Ltd ("Sinochart"), who sub-chartered the vessel to Daiichi Chuo Kisen Kaisha ("Daiichi"). The demise charter and both time charters contained the same undertaking to trade the vessel between safe ports **[1-2]**.

In September 2006, Daiichi gave the vessel instructions to load at Saldanha Bay in South Africa and discharge at the port of Kashima in Japan **[3]**. The quay at Kashima was vulnerable to long waves which can result in a vessel being required to leave the port. The only route in and out of Kashima is by a narrow channel, the Kashima Fairway, which is vulnerable to northerly gales **[3, 9]**. There is no meteorological reason why these two events should occur at the same time **[9]**. However, on 24 October 2006, the vessel sought to leave the port due to long waves but, due to a severe northerly gale, was unable to safely navigate the fairway and was grounded, becoming a total loss **[1, 4]**. Gard Marine & Energy Ltd ("Gard"), one of the vessel's hull insurers, took assignments of the rights of the owners and the demise charterer in respect of the grounding and total loss. It brought a claim against Sinochart (which Sinochart passed on to Daiichi) for damages for breach of the charterers' undertaking to trade only between safe ports **[5]**.

In the High Court, Teare J held that there had been a breach of the safe port undertaking. The combination of the two weather conditions was not an abnormal occurrence, even though the coincidence of the conditions was rare, because both conditions were physical characteristics of the port. The Court of Appeal allowed Daiichi's appeal on this issue (issue 1). The Court of Appeal also held that, due to the joint insurance provisions, the owners were not entitled to claim against the demise charterparty in respect of insured losses (issue 2), reversing Teare J's finding on this issue. Gard appealed on both these issues **[7]**. In addition, the Supreme Court considered whether Daiichi would be entitled to limit its liability for loss of the ship pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims ("the Convention") enacted into English law by the Merchant Shipping Act 1995. This issue was not considered by the courts below as it was accepted that they were bound by the decision of the Court of Appeal in *The CMA Djakarta* [2004] 1 Lloyd's Rep 460 which had held that such limitation was not possible (issue 3) **[58-59]**.

JUDGMENT

The Supreme Court unanimously dismisses the appeal on the ground that there was no breach of the safe port undertaking. Lord Clarke gives the lead judgment, with which all the justices agree on issue 1 and on issue 3; if there had been a breach of the safe port undertaking Daiichi would not have been entitled to limit its liability under the Convention. In respect of issue 2, Lord Toulson and Lord Mance, in judgments with which Lord Hodge concurs, agree with the Court of Appeal, that the joint insurance would have precluded any claim by owners against the demise charterer, or therefore by the latter down the line. Lord Clarke and Lord Sumption take the opposite view.

REASONS FOR THE JUDGMENT

It was common ground that the test for breach of the safe port undertaking is whether the damage sustained by the vessel was caused by an "abnormal occurrence" **[10]**, that the date for judging the breach of the safe port promise is the date of nomination of the port and the promise is a prediction about the safety of the port when the ship arrives in the future. **[13, 24]**. 'Abnormal occurrence' should be given its ordinary meaning; something rare and unexpected that the notional charterer would not have in mind **[16, 25, 27]**. The test is not whether the events which caused the loss are reasonably foreseeable. The fact that the combination of long waves and northerly gales was theoretically foreseeable does not make it a "normal characteristic" of the port. Regard must be had to the reality of the situation in the context of all the evidence to ascertain whether the particular event was sufficiently likely to occur to have become an attribute of the port **[14, 32, 37-40]**. Teare J erred in failing to answer the unitary question of whether the simultaneous coincidence of the long waves and gales was an abnormal occurrence **[34]**. No vessel in the port's history had risked damage in the quay due to long waves at the same time the Kashima Fairway was unnavigable because of gale force winds. There was also evidence regarding the exceptional nature of the rapid development, duration and severity of the storm. On the basis of this evidence the conditions in question were an abnormal occurrence and there was therefore no breach by Daiichi of the safe port undertaking **[41-45]**.

Assuming there *had* been a breach of the safe port warranty, Gard claims to be able to recover the insured value of the vessel from the time charterers as the demise charterer's assignee on the basis that the demise charterer is liable to the owners for breach of its safe port undertaking, and is therefore entitled to recover the same sum from the time charterer **[93, 138]**. Lord Toulson, Lord Mance and Lord Hodge conclude that the provisions of clause 12 of the demise charter, which provide for joint insurance and a distribution of insurance proceeds, preclude such a claim. It is well established that co-insureds cannot claim against each other in respect of an insured loss. Clause 12 provides a comprehensive scheme for an insurance funded result in the event of loss of the vessel by marine risks. The safe port undertaking does not alter this scheme. **[139-146, 114-122]**. Lord Sumption agrees that co-insureds cannot claim against each other in respect of an insured loss. Whether this is because liability to pay damages is excluded by the terms of the contract, or because as between the co-insureds the insurer's payment makes good any loss and satisfies any liability to pay damages will depend on the terms of the contract **[99-100]**. In this case clause 12 of the demise charter envisages the latter **[101-105]**. Lord Clarke agrees with Lord Sumption on this issue **[48-57]**.

Had there been a breach of the safe port warranty, Daiichi would not have been entitled to limit its liability under the Convention. Article 2(1)(a) of the Convention allows owners or charterers to limit liability for loss or damage to property "occurring on board the ship" or "in direct connexion with the operation of the ship" **[61]**. The court agrees with the Court of Appeal in *The CMA Djakarta* that giving the words their ordinary meaning, this category of claim does not include loss or damage to the ship itself **[79-81]**. This interpretation is supported by Articles 9 to 11 of the Convention **[82-84]** and there is nothing in the *travaux préparatoires* which supports another conclusion **[86]**.

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: http://supremecourt.uk/decided-cases/index.html