The safe port warranty challenged

By Russell Harling

The Ocean Victory [2013] EWHC 2199 (Comm)

This was a High Court claim against time charterers under a charterparty on the NYPE form for breach of the safe port warranty. Interesting arguments of law, fact and expertise were advanced; and the case also contains an important decision as to the availability of subrogation between co-assureds which will be of interest to underwriters and assureds generally.

The Facts

The vessel was a Capesize of 174,148 mt deadweight, 289 metres in length and just over a year old at the time of the casualty in October 2006.

The vessel entered Kashima to discharge and berthed, but before discharge could be completed an oceanographic phenomenon known as "long waves" developed and affected the berth. Long waves tend to cause more ranging or surging of a vessel alongside than swell waves. Conditions at the berth were such that the vessel broke one, possibly two, mooring lines and required tug assistance to hold her in place. At the same time, the port was affected by a north westerly low pressure system with winds of Beaufort force 9 or 10 and associated sea and swell conditions. On account of the danger of damage at the berth the vessel was advised by the Charterer's representative (who was a master mariner with local experience) to leave the port and anchor outside until conditions improved.

In order to get out of the port the vessel had to proceed from south to north along the Kashima fairway, which consists of a dredged channel of between 2 and 3.5 cables (370 to 650 metres) in width. In attempting to transit the fairway into Beaufort Force 9 winds, the vessel lost steerage and was set down onto the breakwater; went aground; was abandoned by the crew; and subsequently broke up, despite the efforts of salvors. The ensuing claim was enormous: $88.5m for the vessel; loss of hire of $2.7m; SCOPIC costs of $12m; and wreck removal of $34.4m: in all, $137.6m.

The Decision

The judge fundamentally accepted the Owners' case that Kashima was unsafe because there was a risk that vessels moored in port might be advised to leave port on account of long waves and yet there was no system in the port to ensure either that vessels left in good time and in conditions which did not pose a threat to safe navigation or that vessels did not attempt to depart in conditions which did pose a threat.

Does the warranty require "safety" or only "reasonable safety"?

In attempting to counter these points, the Charterers argued that the safe port warranty is a warranty of "reasonable safety", not absolute safety. The warranty required, according to the Charterers, only that the port take "reasonable precautions". They relied on the use of the expressions "reasonably safe" and "reasonable precautions" by Lord Denning in The Evia No 2. [1982] 1 Lloyd's Reports 334 at 338, although the particular distinction argued for by the Charterers was not in issue in The Evia No.2.

In rejecting this submission, the judge's principal reasoning was that the qualification of "reasonable" safety does not appear in the classic definition of a safe port in the judgment of Sellers LJ in The Eastern City [1958] 2 Lloyd's Reports 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 judge added that it would introduce unwelcome uncertainty into the above definition if "safety" were to be understood as "reasonable safety". He also pointed out that, as it stands in the above definition, safety is not absolute, but the measure of safety is whether any dangers can be avoided by good navigation and seamanship.

Was the casualty an "abnormal occurrence"?

The Charterers also argued, relying now on the terms of the classic definition, that the events giving rise to the casualty were an "abnormal occurrence". The starting point, accepted indeed by both parties, was the statement in Time Charters (6th Edn. paras. 10.39 and 10.41) that an abnormal occurrence is one "which is unrelated to the prevailing characteristics of the port" and further that "a port will be unsafe only if the danger flows from its own qualities or attributes". From this the judge reasoned that (1) both the danger of long waves and the danger of northerly gales were characteristics of the port; (2) there was no meteorological reason why they should not occur together and nobody at the port could be surprised if they did; (3) therefore the danger flowed from these two characteristics of the port, even though their conjunction might be a "rare event". He also held that the conjunction of these events was "at least foreseeable".

Was the decision to leave the berth at the particular time a decision as to the navigation of the vessel and hence outside the Charterers' responsibility?

The Charterers' next argument was that the decision as to when to leave the berth was a decision as to the navigation of the vessel and hence outside the Charterers' sphere of responsibility. They supported this by references to cases concerning charterparty rights of indemnity for the consequence of following charterers' orders, in particular Larrinaga Steamship Co. Ltd. v The King [1945] AC 246 (House of Lords), in which context a distinction is drawn between orders as to employment (which the Charterer is entitled to give and to which the indemnity applies) and orders as to navigation (which remain within the prerogative of the master). But the judge did not accept that the navigation/employment distinction could be applied to a claim under the safe port warranty. The safe port warranty includes a warranty that the vessel may safely leave port. The Charterers cannot escape liability merely by pointing out that the decision to leave is one of navigation.

Was the navigation of the vessel negligent?

The Charterers mounted a detailed challenge to the master's navigation of the vessel. The focus was ultimately on two contested helm orders. In both cases, the vessel was in danger of being set towards one side of the channel or the other by the forces of winds and waves. The master applied large helm orders to avoid the danger of being forced out of the channel, but in doing so courted the further danger that the application of helm would reduce the speed of the vessel that the ability to steer would be lost – as in fact happened. The judge declined to find that the master had been negligent, as he considered that the decision as to how long to apply helm was a difficult one: if it was taken off too early, the set of the vessel might continue. Further, even if the judge had found that the master was negligent, he would have held that the unsafety of the port, rather than the negligence, was the real and effective cause of the casualty on the ground that any negligence of the master was in a real sense the product of the unsafety of the port.

Expert mariners were called on both sides, moving the judge to remark that it might save time and costs to revive the practice of appointing an Elder Brethren of Trinity House to sit with the court as an Assessor in unsafe port cases.

Did the Demise Charterers have title to sue?

The vessel was on demise charter at the time of the casualty on the BARECON 89 form. Clause 5 of the form warrants that the vessel will only be traded between safe ports. Under clause 12 of the demise charter, the Demise Charterers were obliged to arrange and pay for marine hull insurance in the joint names of Owners and (Demise) Charterers and to effect insured repairs.

In the event, the Owners recovered US$ 70 million from their hull underwriters in respect of the loss of the vessel. The hull underwriters sought to pass this loss onto the head Time Charterers under the time charter safe port warranty. In order to succeed against the time Charterers, the hull insurers had to demonstrate that they would be entitled, having reimbursed the registered Owners for a total loss, to make a subrogated claim under the demise charter for an indemnity for that loss against their own assured, the Demise Charterer: because if there was no such right, then the Demise Charterers would not have suffered a loss which they could claim against the Time Charterers.

In line with recent decisions the judge approached this issue purely as a matter of construction of the demise charter. Clause 12 did not expressly bar the right of subrogation. In the face of an express unsafe port warranty, the liability of Demise Charterers under the warranty could only therefore be ousted by "necessary implication", and in this connection the judge referred to the rule of construction that clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies. The right of subrogation would only be ousted, the judge considered, if clause 12 constituted a "complete code" in relation to insured risks generally, or in relation to the rights and liabilities of the parties with regard to the unsafe port warranty; and as he considered that clause 12 did not amount to a complete code, he held that the insurer's claim against the Time Charterers was entitled to succeed.

In reaching this result, the judge distinguished The Evia (no.2) [1983] 2 AC 736, a time charter case in which Owners claimed under a safe port warranty for damage caused to the ship by a war risk. The case was distinguished on the rather tenuous basis that the clause in The Evia (no.2) was intended to be "a complete code" because it also dealt with the Owners' right to refuse to proceed to a war risk area, and with the owner's right to hire notwithstanding the off hire clause.

This result is significant for underwriters and assureds generally. The present state of the law in this area is unsettled, but there has been a clear movement away from a rule of law preventing an underwriter from exercising subrogated rights against its own assured, towards a position in which the availability of such rights is purely a matter of construction of the contract between the co-assureds themselves. The present case arguably takes that evolution a stage further by affirming that the existence of a joint insurance provision in the contract between the assureds does not give rise to any prima facie presumption that subrogation is excluded, but that, on the contrary, if the contract creates a right, it is presumed that the right is available to be exercised unless its exercise is precluded by clear words. At the very least, parties contracting on the BARECON 89 form and adopting the insurance scheme in clause 12 may wish to consider whether the result in this case requires an amendment to their contract or their insurance arrangements.

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