

The CMA CGM LIBRA - the buck stops with the owners when a vessel is rendered unseaworthy due to a defective passage plan

Published 18 November 2021

The Supreme Court has recently handed down its judgment on appeal in Alize 1954 v. Allianz Elementar Versicherungs AG¹, which considered the scope of a shipowner's obligation to exercise due diligence to make a vessel seaworthy under the Hague Visby Rules. The Supreme Court upheld the Court of Appeal judgment in affirming that a vessel's owner can be liable for the vessel being unseaworthy due to a defective passage plan and in such circumstances the owners are liable for the master's failure to draw up a sufficient passage plan.

Facts

The underlying claim concerns an incident in May 2011 when a container ship, the CMA CGM LIBRA (the "Vessel"), grounded whilst leaving the port of Xiamen, China for a voyage to Hong Kong. The grounding of the Vessel occurred for reasons that were never fully explained.

The grounding led to a salvage cost of USD \$9.5m and the Owners claimed a contribution in general average of USD \$13m from the Cargo Interests.

The Cargo Interests alleged the cause of the grounding was due to the Owners' "actionable fault" for failure to exercise due diligence to make the ship seaworthy due to a defective passage plan. A carrier's primary responsibility pursuant to Article III of the Hague Visby Rules is to exercise due diligence before or at the beginning of the voyage to ensure the Vessel is seaworthy to properly care for the goods.

The Owners' claim was advanced on the basis that a defective passage plan did not render the Vessel unseaworthy and r.(2) (a) Article IV of the Hague Visby Rules exempted Owners from liability for negligent navigational decisions on the part of the masters and crew.

The passage plan comprised a passage plan document and the Vessel's working chart. During the passage planning the crew failed to properly annotate the chart or refer to it with the information that was provided to them by the Owners, which emphasised the passage plan should include "areas to be avoided" and "navigation dangers... such as shallow waters". Instead, the master departed from the passage plan route which the judge decided was negligent.

The judge at first instance found that the Vessel's defective passage plan and the relevant working chart was the cause of the grounding and that this involved a breach of the carrier's seaworthiness obligation under r.1 Article III of the Hague Visby Rules.

This decision was upheld by the Court of Appeal in March 2020.

Appeal to the Supreme Court

On appeal to the Supreme Court, the Owners submitted that the Hague Visby Rules distinguished between the carrier's duty under r.1 Article III to make the Vessel seaworthy, which concerned the Vessel's navigable state (i.e. that the defect must be an attribute of the vessel) and the "nautical fault" exception in r.2(a) Article IV which concerns the navigation of the Vessel by the master and crew.

They argued that they had completed their due diligence under Article III for making the Vessel seaworthy and sought to rely on the exception in r.2(a) Article IV that the negligence of the master or servants of the carrier in the navigation of the ship resulted in the damage.

Additionally, the Owners sought to rely on Lord Radcliffe's concept from *The Muncaster Castle* [1961] AC 807 that the carrier's responsibility begins when the ship comes into their "orbit", therefore the matter of navigation was for the master and crew only.

The Supreme Court Decision

The Supreme Court handed down the judgment last Wednesday 10 November 2021 and dismissed the appeal, upholding the Court of Appeal's decision and that of Mr Justice Teare.

It was held that where a loss is caused due to the carrier failing to carry out due diligence under r.1 Article III then the exceptions under r.2 Article IV cannot be relied upon.

Therefore, whilst the crew's failure to annotate the passage plan and working chart could be regarded as an "act, neglect, or default" in the navigation of the ship within the exception of r.2(a) the exceptions did not apply to a causative breach of the seaworthiness obligation, which occurred prior to departure. What mattered was the fact the Vessel was unseaworthy.

The Court held that seaworthiness is not limited to physical defects but includes documentary parts such as updated charts. The prudent owner test was applied to establish that the Owners would have been reasonably expected to correct a defective passage plan prior to departure and before a hazard occurs. This is particularly owing to the "essential importance" of a passage plan to ensure safe navigation. The Court found that "*the prudent owner would have required the defective passage plan to be made good before the vessel set to sea, and indeed that it was "inconceivable" that the prudent owner would have acted otherwise.*"

The passage plan was defective before the commencement of the contractual voyage and this constitutes a breach of r.1 Article III. Consequently, the Owners are liable for the failure on the part of the master to exercise due diligence in the drawing up of the passage plan.

Moreover, the Owner's argument that the defect was outside of their "orbit" was quashed because r.1 Article III sets out a non-delegable duty to carry out due diligence. Therefore, if a defect that would be reasonably discoverable once the ship or cargo has come within a carrier's control is not diligently remedied, it will lead to the carrier being liable for any causative loss and damage.

Commentary

Cargo Insurers will welcome the outcome of this case, with the Supreme Court distinguishing between the master and crew's navigation of the vessel during the voyage being separate and distinct from the owner's causative breach of the seaworthiness obligation under the Hague Visby Rules prior to departure.

However, the judgment is far from cut and dry because not all defects in passage plans will always render a ship unseaworthy. The defect in the passage plan must be sufficiently serious under the "prudent owner" test to establish that a prudent owner would not have let the vessel go to sea with those defects in the place. On this point, the Supreme Court recognised the reality that formulating a passage plan is not an exact science and typically there will always be room for improvement with the benefit of hindsight.

Issues of causation may also arise with regard to whether the incident was caused by the defects in the passage plan in existence prior to departure or navigation decisions made by the master and crew during the voyage.

[1] [2021] UKSC 51

Authors



Toby Vallance

London - Walbrook
+44 (0)20 7894 6257
tvallance@dacbeachcroft.com



Elliot Black

London - Walbrook
+44 (0) 207 894 6847
eblack@dacbeachcroft.com



Jagtar Boparai

London - Walbrook
+44 (0) 207 894 6401
jboparai@dacbeachcroft.com

