Shelter from the Storm

The UK Supreme Court on the safe port obligation

Paul David QC
BA (Hons) LLM (Cantab)
Eldon Chambers
paul@pauldavid.co.nz

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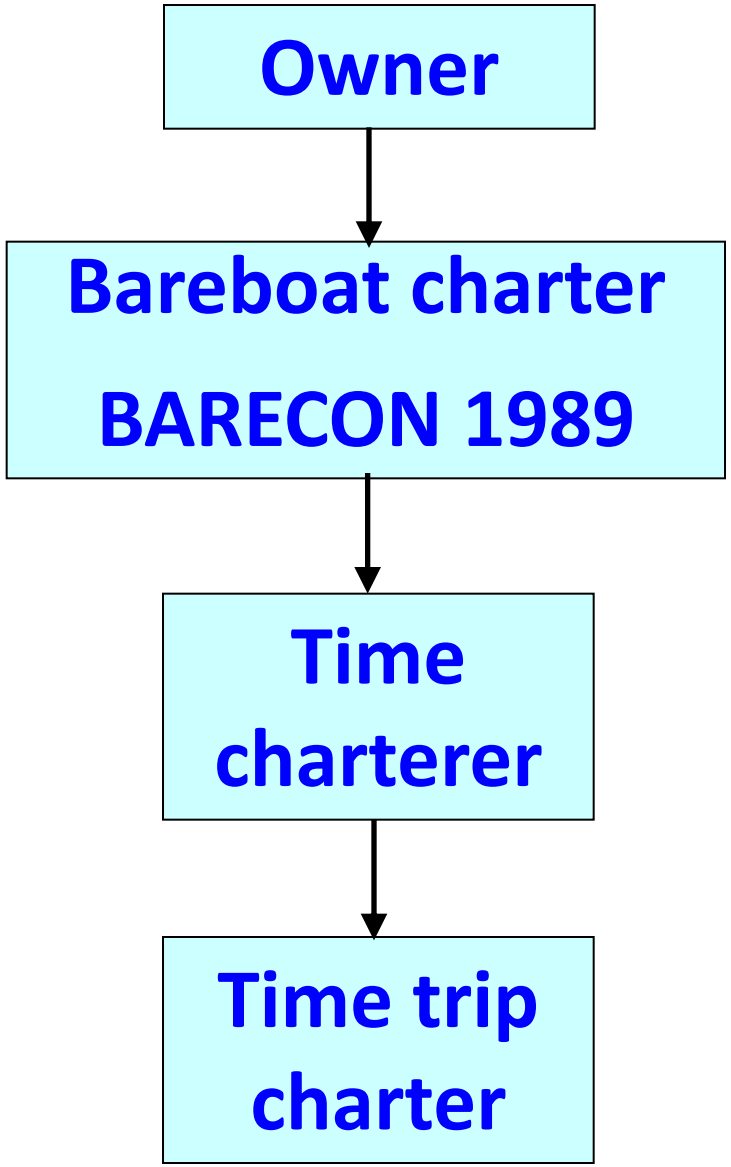
Recent decision

- *Gard Marine and Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35.


OCEAN VICTORY


Kashima Port
Japan



Common obligation to trade vessel between safe ports in all charterparties

Basic facts

- Demise charter party and time charter party – obligation to trade the vessel between safe ports
- Time charterer instructions to load Saldanha Bay South Africa and discharge Kashima Japan – 170000 tonnes iron ore
- During discharge vessel sought to leave port because of swell. In doing so hit breakwater in fairway. Broke in two and very expensive wreck removal
- Vessel hull insurers took assignments of owner and bareboat charterer, rights to claim in relation to loss of vessel and loss from grounding – brought claims against charterers for breach of safe port obligation.

Issues in Supreme Court

- Safe port issue
  - Whether the charterers – in effect bareboat charterers – were in breach of safe port warranty in clause 29 of the BARECON 1989.
- Insurance issue
  - Whether the provisions of Clause 12 BARECON on insurance precluded a claim for breach of safeport warranty because a code as between the owner and charterers.
- Limitation issue
  - If there was a breach of the charter party and owner could claim, could the charterer limit liability in respect of claim by owner under the 1976 Convention?

What is an unsafe port?

- Classic case law formulation is Sellers LJ in *The Eastern City:*

  "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…"

- Accepted test

Safe port

- Key question: was there a breach or were the events within the exception for “abnormal occurrence”, so no breach?
  - Evidence was that Kashima had dangerous “characteristics” – vulnerability of quay to long swell and vulnerability of the Fairway to northerly gales.
  - The two had combined to cause the loss, in a way not previously experienced.

High Court decision

- Held, in summary, that because both events were foreseeable events arising from characteristics of port, and because combined operation of both was a foreseeable possibility, could not be described as “abnormal” so there had been a breach of the obligation.
- Awarded damages – agreed value vessel, liability for SCOPIC wreck removal expenses – damages for loss of hire.
- Held no recovery by owner/insurer for losses covered by hull insurer because of insurance provisions in BARECON.

CA decision

- Reversed HC decision on the ground that the judge had taken the wrong approach in referring to “foreseeablity” instead of asking whether all the evidence showed that the event which caused the loss was an “abnormal occurrence”.
- Also held that the insurance provisions in the BARECON 1989 meant that Owner could not claim for loss of vessel against charterer – insurance paid by charterer – co-insureds.

Questions in the Supreme Court

- Was there a breach of the safe port obligation?
- Did the insurance provisions of the CP provide a complete code which prevented a claim for breach of the safe port warranty by the charterer?
- Could the Charterer limit its liability under the 1976 Limitation Convention?

Supreme Court Judgments

- All judges agreed with Court of Appeal on the safe port issue
- Leading judgment Lord Clarke
- Obligation was to nominate a prospectively safe port – and obligation had to be assessed at time of nomination – important that prospective and not absolute.
- If given all characteristics, features, systems which are normal for the port at the time when the vessel should arrive, the answer to the question whether the port is safe for this particular ship is “yes unless there is an abnormal occurrence”, the promise is fulfilled.

Supreme Court Judgments (continued)

- Judge in High Court had erred in his approach to the critical combination of events by saying that because the two characteristics were part of character of the port and their combination could be described as theoretically foreseeable they could not be an abnormal occurrence.
  - Agreed with CA. If the event was examined properly in context – it was an abnormal occurrence – rare and abnormal – no breach in nominating the port.

Supreme Court Judgments (continued)

- Fact that event “foreseeable” not the test to apply – court had to evaluate the critical combination by reference to past frequency of the event and its likelihood and ask whether the event was an abnormal occurrence – given evidence of rarity of the combination of events only one proper conclusion – event which occurred was abnormal occurrence.
- Court of Appeal was correct. Lord Clarke observed that decisions on port safety should be reasonably straightforward involving factual determination. Also said that he had initially questioned whether the CA should have interfered with the decision of the High Court, which had made a factual finding on the evidence. However, in this particular case on submission accepeted error in approach to evidence identified in CA.

Further question – Insurance provisions

- Court split 3:2 on whether the insurance provisions in BARECON meant that there could be no claim by the Owner against the bareboat charterer for the loss of the ship.
- Question of interpreting the clauses in the contract. Did this form a scheme which meant that a term should be implied that the Owner could not sue the charterer for breach of the safe port obligation?
- Majority favoured the view that the contract provisions had this effect. Minority Lord Sumption and Lord Clarke.

Further question – Limitation claim

- On limitation the courts below had followed *CMA Djakarta*, where UKCA had held limitation could not be claimed in relation to damage to ship by reference to which limitation sum was calculated.
  - Point not necessary because of finding of not breach of safe port warranty, but fully argued, important.
- Supreme Court upheld this on the natural meaning of the Convention and in the light of its purpose.
- While clear that charterers could avail themselves of limitation generally, but that could not be in relation to damage to the ship by reference to which limitation was assessed on the proper interpretation of the Convention, Articles 1, 2.1(a), 9, 10.

Practical points

- Safe port decisions factual – warranty not absolute and prospective – realistic assessment required.
- Do not use “foreseeability” – but start with the *The Eastern City*
- Ask simple question on facts – given all the normal features of port at time of nomination, is the port prospectively safe for the ship?
  - “If yes, unless there is an abnormal occurrence”, then warranty fulfilled
- Consider any insurance scheme in C/P carefully
  - It may well prevent claim for breach of safe port obligation for losses covered by insurance.

Questions?