On 10 May 2017 the Supreme Court issued their judgment on the OCEAN VICTORY case.

The case concerned the proper test for the breach of a safe port warranty clause following the total loss of a bulk carrier at the port of Kashima, Japan in October 2006.

The outcome of the case has generated significant interest in the maritime community following the initial finding by English High Court that the modern port of Kashima which, prior to the incident, had an impeccable safety record was unsafe.

The case has provided welcome further guidance in respect of the legal test the courts will apply when determining whether a port is safe. Specifically, it has provided further clarification on the approach the courts will take when determining whether an event is an “abnormal occurrence” in the context of a safe port warranty. It has also dealt with some important issues relating to the recoverability when parties allocate responsibility for arranging insurance between themselves.

**Facts**

In October 2006, the “OCEAN VICTORY” berthed at the Raw Materials Quay, Kashima. She began discharging her cargo of iron ore but was forced to stop due to strong winds and heavy rain.

Shortly after this the berth was affected by severe swell from long waves. In the exit fairway there were severe gale force winds up to Force 9 on the Beaufort scale from a north/north easterly direction.

With the Vessel being buffeted by long waves the Master made the decision to leave the berth for the open sea. However, as the vessel left the port, control of the vessel was lost and it was driven onto the breakwater wall. The vessel became a total loss.

A claim of over US$135 Million for breach of the safe port warranty was brought by subrogated hull insurers of the vessel (Gard Marine & Energy Ltd.) against time charterers (China National Chartering Co., Ltd.) which was in turn passed down the Charterparty chain to Sub Charterers (Daiichi Chuo Kisen Kaisha).

**The Previous Judgments of the English Courts**

At the first instance the Judge, Teare J, held that there was a breach of the safe port warranty. He ruled that the combination of the two weather conditions on the casualty date, specifically the swell from long waves and an extremely severe northerly gale was not to be characterized as an abnormal occurrence. He reasoned that although the coincidence of the two conditions was rare both were
physical characteristics or attributes of the port and that as a consequence the port was unsafe. 
Teare J also ruled that the cause of the casualty was the breach of the safe port warranty and not 
the Master’s navigational decision to leave the berth in extreme weather conditions. On the issue of 
recoverability he ruled that the fact that a clause in the Demise Charter provided for joint 
insurance did not mean that demise Charterers had no liability to Owners. There was such a 
liability which in turn could be passed down the chain to Sub Charterers.

Charterers were given permission to appeal the decision of the High Court. In respect of the safe 
port warranty issue the Court of Appeal allowed Charterers appeal. As a consequence it was not 
necessary for them to make a judgement on the issue of causation.

The Court of Appeal also found that on a true construction of the terms of the Charter party, the 
Demise Charterers who had insured the vessel at their expense (in accordance with the terms of the 
Demise Charter) did not have any liability to the Owners in respect of insured losses, 
notwithstanding that such losses may have been caused by a breach of the safe port warranty.

The Supreme Court

The decision of the Court of Appeal was appealed to the Supreme Court on the three issues.

On the first the Supreme Court found unanimously that there was no breach of the safe port 
undertaking. The parties agreed that the test for a breach of a safe port undertaking was whether 
the damage sustained by the vessel was caused by an abnormal occurrence.
The Supreme Court heard evidence that the storm was highly unusual in terms of how it had 
developed, how long it lasted and its severity. They found that the combination of long waves at the 
berth and severe gale force winds at the exit fairway was not a regular or even an occasional 
ocurrence and that such conditions did not constitute a characteristic of the port.

They found that Teare J had erred in failing to answer the “unitary” question. That is, he had failed 
to consider whether the existence of the simultaneous coincidence of long waves and gales was an 
abnormal occurrence at Kashima port. Although both events occurred by themselves relatively 
frequently their simultaneous occurrence was extremely rare.

In the Judgment it was noted that no vessel in the port’s history had experienced damage in the quay due to 
long waves at the same time the Kashima Fairway was impossible to navigate due to gale force winds.

On the issue of recoverability the Supreme Court found in Charterer’s favor by a majority of 3-2. 
The majority found that, as the Demise Charter contained a comprehensive scheme for an 
insurance funded result in the event of the loss of the vessel, Owners and Demise Charterers could 
not claim against each other.
The Charter party allocated responsibility for the purchase of insurance to Demise Charterers. The court found that as this arrangement was for the parties’ joint benefit that they were taken to have agreed to look to the insurers for indemnification rather than each other. The effect of this was that once the insurers settled the claim neither Owners nor Demise Charterers had valid claim going up or down the Charter party chain.

A further issue was raised in the Supreme Court Appeal concerning the application of the 1976 Limitation Act. The Court found that Time Charterers would not have been able to limit their liability for the total loss under the Act had the port of Kashima been found to be unsafe. This confirmed decision in the Court of Appeal case *The CMA Djakarta [2004]*.

**Impact**

The Judgment will come as a relief to Charterers and their insurers. Had it been upheld then the judgment of Teare J in the first instance would have represented a considerable narrowing of the scope of the term “safe port”. Many ports around the world previously considered safe including Kashima would have arguably become unsafe under standard safe port warranties. Given the widespread use of safe port clauses similar to those in this case the effect on maritime industry would have been significant.

The judgment will also have significant relevance to the insurance industry generally and will certainly give Owners and Demise Charterers cause to carefully consider how they structure their insurance arrangements in the future.

Finally the case highlights the unexpected liabilities that Charterers may face specifically relating to the issue of safe port warranties and the importance of ensuring, in so far as possible, they have adequate insurance in place.

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