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CMA CGM LIBRA – STOP PRESS! UK'S HIGHEST COURT AGREES SHE WAS UNSEAWORTHY

The Supreme Court has affirmed the lower Courts' judgments that a defective passage plan can render a vessel unseaworthy.

It is incredible to think that the momentary decision of a Master to pass Xiamen channel buoy 14-1 to port, the circumstances that led up to that decision and consequences that followed, are still being debated some 10 ½ years later and yet, here we are, having waited with bated breath for the Supreme Court to hand down one of the industry's most hotly anticipated judgments of recent times.

This unsuccessful appeal represents the most sought-after judgment concerning the legal test for seaworthiness, against the backdrop of an increasingly litigious environment in which General Average contributions are routinely challenged and the burden on Owners to live and breathe ISM values intrinsically between their shore side and shipboard operations is arguably tipping the balance of what is practically achievable.

The repercussions of the preceding judgments have already been felt in scores of seaworthiness related disputes. We can now expect the upward trend of unseaworthiness allegations to continue and more cases to proceed to a hearing. Whilst this latest decision will be viewed as another blow to Owners and shot in the arm for Cargo, it is important to remember that it does not displace the requirement for careful, fact specific, examination to identify such distinguishing features as may exist in other cases.

BACKGROUND

In May 2011, the container vessel CMA CGM LIBRA (**Vessel**) departed the port of Xiamen, China bound for Hong Kong. The Master departed from the passage plan and grounded on a shoal whilst transiting outside of the buoyed fairway to open sea.

Around eight per cent of the Cargo Interests refused to pay for Owners' claim for general average contributions alleging actionable fault. Owners commenced legal proceedings to recover the remaining contribution of around USD 800,000.

HIGH COURT

After pausing to consider that the burden of proof had not changed post Volcafe v CSAV [2018] UKSC 71, the then Admiralty Judge Mr. Justice Teare found that the passage plan was defective because it did not include an old Notice to Mariners (**NTM**) warning of depths less than those charted. The defective passage plan was **causative** of the grounding (the Master admitting during cross examination that had he known of the NTM contents, he would not have left the channel) and rendered the Vessel unseaworthy following the McFadden v Blue Star Line [1905] 1 KB 697 precedent that a prudent owner would have required the **defective passage plan** to be made good before the commencement of the voyage.

Causative unseaworthiness having been established, the burden of proof passed to the Owners, in the traditional way, and they were found to have failed to exercise their non-delegable duty to exercise due diligence under Article III Rule 1 of the Hague/Hague-Visby Rules before and at the commencement of the voyage to make the Vessel seaworthy, the mere installation of a Safety Management System (**SMS**) not being sufficient to satisfy this requirement.

Although possibly more interesting for legal practitioners, Mr. Justice Teare's comments on the **role of experts** and their relevant expertise/ability to answer precisely and maintain objectivity are a salutary lesson.

(Mr. Justice Teare)

COURT OF APPEAL

Owners appealed on two grounds. Firstly, that a one-off defective passage plan did not render the Vessel unseaworthy under the Hague/Hague-Visby Rules. Secondly, the actions of the Master/Crew were ***qua navigator*** which could not be treated as the carrier's duty ***qua carrier*** to exercise due diligence.

On 4 March 2020, the Court of Appeal handed down judgment and unanimously upheld the Admiralty Court's decision.

Regarding the first ground, the first instance decision was endorsed, in that errors in navigation (including a defective passage plan) can render a vessel **unseaworthy** if they occur prior to the commencement of the voyage. Furthermore, the purported distinction between *qua navigator* and *qua carrier* was misconceived, as by assuming responsibility as carriers, then all acts of the Master in preparing for the voyage, including acts of navigation before and at the commencement of the voyage, were performed *qua carrier*.

Regarding the second ground, the Court confirmed that the obligation to exercise due diligence to make the Vessel seaworthy before and at the commencement of the voyage is **non-delegable**. This maintained the intention of the Hague/Hague-Visby Rules in respect of the division of time and responsibility, where Owners cease to be liable for loss or damage caused by the Master/Crew after the commencement of the voyage. Owners' appeal was therefore dismissed.

(Lord Justice Flaux, Lord Justice Haddon-Cave and Lord Justice Males)

SUPREME COURT

On 10 November 2021, the Supreme Court handed down judgment and unanimously dismissed Owners' appeal.[1]

The Supreme Court considered two issues: (i) whether the defective passage plan rendered the vessel unseaworthy for the purposes of Article III Rule 1 of the Hague/Hague Visby Rules; and (ii) whether the failure of the Master and second officer to exercise **reasonable skill and care** when preparing the passage plan constituted want of due diligence on the part of the carrier for the purposes of Article III Rule 2 of the Hague/Hague Visby Rules.

The Supreme Court found that negligent navigation/management of a vessel may cause unseaworthiness. Furthermore, unseaworthiness does not require the defect of only a physical attribute of the vessel but can also relate to documentation; knowledge and skill of the crew; systems; and possibly the vessel's history, and a vessel with a defective passage plan which endangers the safety of the vessel is likely to be unseaworthy. The **'nautical fault' exception** under Article IV Rule 2 of the Hague/Hague Visby Rules cannot be relied upon in relation to a causative breach of the carrier's obligation to exercise due diligence to make the vessel seaworthy.

They also held that the carrier has an obligation to exercise due diligence to render the vessel seaworthy when the vessel and cargo are under its responsibility, and this cannot be contracted out of by delegation. The carrier is therefore liable in respect of a Master and their deck officers' preparation of the passage plan. The due diligence obligation is not limited to providing a proper system and it makes no difference that the Master and deck officers employ their specifically acquired **skill and judgment** in doing so.

The International Group of P&I Clubs (**IG**) supported Owners' appeal as an Intervening Party. The judgment being of particular interest due to their Member's exposure to liability in respect of navigational errors and the IG's corresponding exposure to unrecoverable General Average.

(Lord Reed, Lord Briggs, Lady Arden, Lord Hamblen, Lord Leggatt)

CONCLUSION

The distinction between what is negligent and what goes so far as being causatively unseaworthy is often misunderstood. However, to suggest that the function of a passage plan is merely to act as a navigational record indicates a lack of appreciation that passage planning is a process rather than a document. The **four stages of passage planning**: appraisal, planning, execution and monitoring are required for a Master (or watch keeper of any rank) to make informed **navigational decisions**. It follows that in the judiciary's analysis of whether an SMS and the documents it generates are effective, they are increasingly concerned with how these can be practically interpreted; the extent to which they support (or undermine) navigational decisions; and what the **established practice** is on board.

Since the ISM Code became mandatory to all large sea going vessels and with improving connectivity in all corners of the world, the judiciary's treatment of Owners' **due diligence** requirements has undoubtedly hardened. Akin to the recent erosion of the 'beyond the seas' excuse for witnesses, an Owner can no longer rely on the physical distance between them and their vessels and/or a generically drafted SMS to satisfy their due diligence obligations.

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[1] Alize 1954 & another v. Allianz Elementar Versicherung AG & Others (The CMA CGM LIBRA) [2021] UKSC 51

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The Supreme Court has put the issue of whether there can be a category-based distinction between the seaworthiness and the navigation/management of the ship to bed, confirming that it matters not whether the latter was the cause or itself the unseaworthiness. They have affirmed that the **prudent owner** test remains intact and can adapt to new standards of ship operation, as legislative requirements and industry standards advance. They have also re-affirmed that simply providing the vessel with the tools to navigate safely, including a competent crew, does not discharge an Owners' due diligence obligations.

When it comes to causative unseaworthiness there can be no doubt that the goal posts have widened, based on the increasing menu of options for a party alleging it. Coupled with the now forensic scrutiny of the exercise of Owners' due diligence, it places them in an unenviable position. This latest judgment cements the position of a defective passage plan being amongst those options and generates a challenging due diligence burden for Owners to satisfy. However, as ever, it must be remembered that each case will still turn on its facts and proving causative unseaworthiness on a well-run vessel with suitably qualified and experienced Master and Crew is still the **exception rather than the rule**.

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