Unseaworthiness in the Supreme Court: The CMA CGM Libra

John Russell QC & Benjamin Coffer

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The Supreme Court handed down judgment today in ***The CMA CGM Libra*** [2021] UKSC 51, its much-awaited analysis of seaworthiness and the due diligence obligation under the Hague and Hague-Visby Rules. The Court dismissed the appeal, upholding the decisions of Mr Justice Teare and the Court of Appeal. John Russell QC and Benjamin Coffer appeared for the successful respondents, instructed by Jai Sharma, John Reed and Jessica Cook of Clyde & Co LLP.

In rejecting the appeal, the Court took the opportunity to conduct a wide-ranging review of the authorities on Article III.1 and to resolve a number of long-standing controversies in this area of law. The judgment is essential reading for practitioners who have any dealings with cargo claims, and should now be the starting point in any case concerning seaworthiness under the Rules or 'fitness' in a charterparty.

The appeal arose out of the grounding of the container ship CMA CGM LIBRA while leaving the port of Xiamen, China in May 2011. The owners claimed general average contributions from the cargo interests. At first instance, Teare J held that the passage plan was defective because it failed to record a warning that depths shown on the chart outside the fairway were unreliable and waters were shallower than recorded on the chart. On that basis, Teare J held that the vessel was unseaworthy at the commencement of the voyage: the defects in the vessel's passage plan and the relevant working chart rendered the vessel unseaworthy. The defects were causative, because if the warning had been on the chart, the Master would not have left the fairway. A strong Court of Appeal comprising three experienced shipping judges (Haddon-Cave, Flaux and Males LLJ) upheld his judgment in robust terms.

The owners appealed to the Supreme Court. The owners' primary argument was that passage planning could not render a vessel unseaworthy because it involved no more than the recording of a navigational decision. The owners argued that a ship could only be unseaworthy if there was a defect affecting an "attribute" of the ship. The owners accepted that the attribute would not need to be physical, so for example, inadequate systems could constitute one of the ship's attributes. However, they argued that the passage plan and working chart were not attributes of the vessel but merely records of navigational decisions taken by the crew. Although it was incumbent on the owner to have on board everything necessary for the crew to carry out proper passage planning, such as a competent crew, up to date charts and proper systems and instructions, the crew's use of that equipment was a matter of navigation or seamanship.

The owners also argued that even if the ship was unseaworthy, there was no relevant failure to exercise due diligence. Relying on the references in cases such as ***The Happy Ranger*** [2006] 1 Lloyd's Rep 649 to the carrier's "orbit" of responsibility, the owners argued that navigation was outside their "orbit" because it was a matter solely for the Master and crew.

Giving the leading judgment, Lord Hamblen confirmed that the exceptions in Article IV.2 cannot be relied upon in relation to a causative breach of Article III.1. If a vessel is unseaworthy it therefore makes no difference whether negligent navigation or management is the cause of the unseaworthiness or is itself the unseaworthiness.

The Court agreed with the Respondent, and the tentative view expressed by Flaux LJ in the Court of Appeal, that the concept of unseaworthiness is not subject to an "attribute" threshold requiring there to be an "attribute" of the vessel which threatens the safety of the vessel or her cargo. In most cases, the relevant question will simply be whether a prudent owner would have sent the ship to sea with the relevant defect without requiring it to be remedied, had he known of it – the so-called 'prudent owner' test.

By that conclusion, the Court settled the long-standing controversy as to whether dangerous cargo can make a ship unseaworthy: the Court accepted that the presence of dangerous cargo can cause or constitute unseaworthiness, so that the carrier may be liable where it cannot show that it exercised due diligence (preferring the approach taken by the Court of Appeal in ***The Kapitan Sakharov*** [2000] 2 Lloyd's Rep.255 to the inconsistent decision of the same Court in ***The Apostolis*** [1997] 2 Lloyd's Rep 241).

Given the "essential importance" of passage planning for safe navigation, Lord Hamblen pointed out that a vessel is likely

to be unseaworthy applying the prudent owner test if she begins her voyage without a passage plan or if she does so with a defective passage plan which endangers the safety of the vessel.

The Court rejected the suggestion, which appears in several of the leading commentaries, that remediable defects cannot make a ship unseaworthy: whether or not the defect renders the vessel unseaworthy will simply depend on whether the prudent owner would reasonably expect it to be put right before the beginning of the voyage. It was therefore irrelevant that the passage plan recorded a navigational decision which was (in the Owners' words) "ephemeral" or transitory. A prudent owner would have required a proper passage plan before the ship put to sea.

The owners' arguments on due diligence also failed. The Court reaffirmed the non-delegable nature of the carrier's obligation under Article III.1: the obligation on the carrier to exercise due diligence to make the vessel seaworthy requires that due diligence be exercised in the work of making the vessel seaworthy, regardless of who is engaged to carry out that task. It makes no difference that the task may have a navigational element to it.

The carrier may not be liable for lack of due diligence which occurs before he has responsibility for the vessel or for lack of due diligence which occurs before he has responsibility for the cargo (although he may nevertheless be liable if the defect or danger would be reasonably discoverable by the exercise of due diligence once the vessel or cargo has come within his control). However, the Court rejected the owners' attempt to extend that principle to navigational acts or omissions of the Master or crew.

The carrier is therefore liable for a failure to exercise due diligence by the master and deck officers of his vessel in the preparation of a passage plan for the vessel's voyage. The fact that navigation is the responsibility of the master and involves the exercise by the master and deck officers of their specialist skill and judgment makes no difference. The carrier's obligation requires the carrier to ensure that a proper passage plan is prepared; not merely to provide a proper system to enable the crew to carry out the required planning exercise.

Obviously the Supreme Court decision will be warmly welcomed by cargo interests and their insurers. But, is the decision all bad news for shipowners, and their lawyers? Not necessarily. First, the facts of the LIBRA case were unusual, in that there was effectively an admission in evidence by the Master as to the causative potency of the defect in the working Chart. In many cases, even if cargo claimants are able to establish defects in a passage plan, there may be considerably difficulty in proving causation. Secondly, while the Court has ruled that remediable defects in the passage plan may constitute unseaworthiness, it does not follow that they always will do so. The defects will have to be sufficiently serious to satisfy the prudent owner test. Again, the facts of the LIRBA were unusual, in that the missing warning was so critical to the safety of the vessel. Finally, the decision recognises that there may be "exceptional cases at the boundaries of seaworthiness" where the prudent owner test does not apply because the defect does not affect the safety of the ship. In such cases "it may be necessary to address a prior question of whether the defect or state of affairs relied upon sufficiently affects the fitness of the vessel to carry the goods safely on the contractual voyage as to engage the doctrine of seaworthiness". How to tell when one is approaching the boundaries of unseaworthiness is not spelled out in the judgment, and we anticipate that the proviso will therefore prove a fecund source of disagreement in the future.

John Russell QC

"Very straightforward and persuasive, he is a fantastic advocate with great style, who is calm and very capable on his feet." (Legal 500, 2022)

John is an experienced and determined commercial advocate and has acted as lead Counsel in numerous Commercial Court trials, international and marine arbitrations and appellate cases, including two successful appearances in the Supreme Court, including the landmark shipping decision in ***Volcafe v CSAV.*** He has also appeared as counsel in inquests and public enquiries.

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Benjamin Coffer

"One of the best advocates I have seen." (Legal 500, 2022)

Ben was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards and was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020.

He is described by the directories as "a rising star", "a standout shipping and commodities junior" and "a star of the future". He is also recognised as a leading junior in the Legal 500 Asia Pacific Guide.

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