No loss in the "OCEAN VICTORY" – a *black hole* for recourse claims?

Underwriters like to preserve recourse claims – particularly if they have paid for a total loss of a nearly new vessel. This case demonstrates the danger that, where the vessel is subject to a charterparty chain, the wording of the charters may prevent the loss being passed down the chain, and thereby in effect bar the recourse action. In the future, underwriters would do well to require the wording of such charters to avoid inadvertent loss of valuable recourse rights.

In the "OCEAN VICTORY" ([2017] UKSC 35) the Supreme Court simply applied the "EASTERN CITY" in ruling that the nominated port was safe. A very rare overlap of wave and storm phenomena was unanimously held to be an "abnormal occurrence". That meant there was no recovery for the loss of the vessel, and this article considers the 3:2 majority on the joint insurance point, which would have produced the same result even if the safe port decision had been different.

The demise charterparty was in the widely used Barecon 89 form, but with the standard clause 5 trading limits replaced by additional clause 29, a custom-made but familiar safe port provision, and materially the same as those in the two fixtures beneath. It is probable that the parties agreed this simply to spell out charterers' liability for losses occasioned at an unsafe port, and very unlikely that they did so uselessly because they thought that other terms would counteract it.

Under standard clause 12, which the parties had chosen rather than clause 13, the charterers had arranged for the stipulated insurance, including in respect of the vessel, in their name and also in owners' name. They argued, under the rule or an implied term that co-insureds cannot pursue each other, and on proper construction of the charterparty, that there was no additional liability for the matters jointly insured like this. Thus the owners had no further claim for the loss of the vessel, and therefore none could be passed down the charterparty chain.

In reasoned opinions Lords Clarke and Sumption differed from Lords Mance and Toulson, and in favouring the latter pair Lord Hodge simply cast the deciding vote. Construing clause 12 within the charterparty as a whole, the insurance provisions were an exhaustive code. For the matters covered, the policy was the sole recovery medium, and there was no other possible claim.

This followed despite the fact that clause 12 does not contain a waiver of subrogation, but in contrast the deleted clause 13 makes that deliberate choice. Thus the Supreme Court rejected the argument that the parties must have intended additional claim rights, because they had deleted an express bar to the right to claim in clause 13.

Nor did it matter that by clause 29 the parties had put in a specific provision setting out liability in the very circumstances that arose. Lord Mance went further in suggesting that, for all insured matters, the parties would have intended this same result whatever the nature of the claim.

Similarly, the majority seemed to think it insignificant that all the cases that were said to support the charterers' argument concerned action only between the joint insured. So, according to Lord Sumption, either and maybe both could still pursue a *third party*, and (subrogated to the demise charterers' rights) underwriters here could have claimed down the chain.

The Supreme Court identified (but did not rule on) two other ways in which such a claim might have been put, namely a claim by the bareboat charterer as bailee, and a claim based on the bareboat charterer's performance interest. Both of these routes are uncertain and are beyond the scope of this article. However, underwriters had confined their case to the conventional route of subrogation based on contractual liability, probably reflecting confidence in their interpretation. At least in charterparty chains, the two alternatives are not routinely pleaded, but they might now be deployed whenever possible in future recoveries where clause 12 of Barecon 89 is involved.

However, rather than risk relying on less familiar devices, which anyway might not always arise, owners seeking to charter out under Barecon 89, and also their underwriters, will first want to examine the working of clause 12 alongside any other draft provisions.

All may now want to consider terms which might preserve a recovery action, in view of standard wording whose effect in the "OCEAN VICTORY was to bar that for all insured matters. That was so even though a separate provision had been inserted to highlight liability, and the decision here protected a third party whose original nomination might (in other circumstances) have been the cause of the damage, but who on these terms could still successfully have argued no loss.

Campbell Johnston Clark
59 Mansell Street
London
E1 8AN

www.cjclaw.com