Weighing in the balance: The CMA CMG Libra.

Henry VI part II, act II scene II,

"Tomorrow toward London back again,

To look into this business thoroughly

And call these foul offenders to their answers

And poise the cause in justice' equal scales.

Whose beam stands sure, whose rightful cause prevails."

We do not suggest that the parties to a recent Court of Appeal case are "foul offenders" but rather that the business of the case has been looked into thoroughly. In this case the court has considered two views of how the law should stand and how it should apply. These are that there should be:

a) a straightforward application of well established principles that in the carriage of goods by sea a vessel must be seaworthy
and
b) a straightforward application of well established principles that in the carriage of goods by sea matters of navigation fall to the carrier and the ship's master.

The facts:

Alize 1954 & Another v. Allianz Elementar VersicherungsAG & Others [2020] EWCA Civ 293- heard before Flaux, Haddon-Cave and Males LJJ with judgment delivered on 4th of March 2020

The owners of CMA CGM Libra appealed the judgment of Teare J of the 8th of March 2019.

This case has caught the attention of both those who carry cargo by sea and those that have an interest in that cargo, since it raises the question of responsibility and, inevitably, of the financial consequences. P and I clubs in particular may have wondered whether in the circumstance of the case added risk was to pass from charterers to shipowners and thereafter to themselves as insurers. The Court of Appeal used the facts as they were set out in the High Court.

The case concerned the grounding near the port of Xiamen, China of the CMA CGM Libra on the 17th of May 2011. She was fully laden at the time and was described as being a modern container vessel. The grounding resulted in damage and danger to the vessel and her cargo and consequently arrangements were made for her salvage. This cost approximately US$ 9.5 million but other costs increased the claim made by the vessel's owners in General Average against the cargo interests to a total of approximately US$ 13 million. Most paid their contribution but approximately 8% did not and the claim against these in the case was for about US$800,000.

Cargo interest refused to contribute on the basis that there were failures by the shipowners of obligations of seaworthiness, due diligence, negligent navigation and an issue of causation.

In the High Court:

Mr. Justice Teare encapsulated the issues:

> "In broad terms the Owners say that the cause of the casualty was an uncharted shoal on which the vessel grounded. The Cargo Interests say that the cause of the casualty was the unseaworthiness of the vessel which led to the master's negligent navigation of the vessel. In particular it was said that that the vessel was unseaworthy by reason of the fact that she had an inadequate passage plan, that that inadequacy was a cause of the casualty and that due diligence was not exercised to make the vessel seaworthy. The casualty was thus caused by the Owner's actionable fault (a breach of Article III rule1 of the Hague Rules) and so the Cargo Interests are not liable to contribute in General Average pursuant to the York Antwerp Rules."

The case was heard in the High Court with judgment given on the 8th of March 2013. Teare J said that there are established principles to be used when considering the seaworthiness of a vessel and the case before him raised the question of how these principles were to be applied to two, relatively recent, developments in navigational safety.

Firstly, the International Maritime Organisation, (the IMO), in 1999 had said that voyage or passage planning should be used by all ships sailing on ocean voyages. This is contained in IMO Resolution A.893 (21), which was adopted on 25th November 1991. The annex to the Resolution contains guidelines for voyage planning, at 1.1 it states:

> " The development of a plan for voyage or passage, as well as the close and continuous monitoring of the vessel's progress during the execution of such a plan, are of essential importance for safety of life at sea, safety and efficient navigation and protection of the marine environment."

Further at 1.3

> " Voyage and passage planning includes appraisal i.e. gathering all information relevant to the contemplated voyage or passage, detailed planning of the whole voyage or passage from berth to berth…".

Secondly, this concerned the status of electronic charts displayed via an Electronic Chart Display and Information System, (ECDIS). Since 2016 these are compulsory but at the time of the incident in this case there was a transition period in effect so that vessels could use either the new electronic charts or Standard Nautical Charts i.e. paper charts. The CMA CGM Libra was using Standard Nautical Charts.

The established principles come from *McFadden v. Blue Star Line*[1] where Channel J. noted with approval the statement found in *Carver on Carriage of Goods by Sea* that a vessel:

> *"…must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen, undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, Would a prudent owner have required that it should be made good before sending his ship to see had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking*."[2]

Older cases such as *Lyon v. Mells*[3] referred to the physical aspects of the vessel; the "mechanical" attributes of the vessel. Per Lord Ellenborough CJ in that case:

> *"…it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public…"*

The judicial consideration of seaworthiness has continued since those times and indeed Teare J himself has been recently involved in the case of *The Cape Bonny* [4]where he reaffirmed the McFadden test and said:

> *" The usual test of unseaworthiness is whether a prudent owner would have required that the defect in question should be made good before sending his ship to sea. If he would then the ship is not seaworthy."*

As well as the integrity of the hull of the vessel the nature of seaworthiness has been held to include the equipment used on the vessel,[5] the need for there to be a competent crew[6] and the requirement that the vessel is "cargo worthy"[7]

In the CMA CGM Libra he sought to continue the development by examining passage planning and the use of charts.

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[1] McFadden v. Blue Star Line [1905] 1 KB 697, 706

[2] The indication from this quotation of the existence of an absolute obligation represents the pre- Hague Rules position.

[3] Lyon v. Mells (1804) 5 East 428

[4] The Cape Bonny [2018] 1 Lloyd's Rep 356

[5] For example the ship's compass; Patterson Steamships Ltd v Robin Hood Mills (1937) 58 Lloyd's Rep33

[6] Standard Oil v. Clan Line [1924] AC 100 where per Lord Atkinson, "….a ship may be rendered unseaworthy by the inefficiency of the master who commands her… there cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy."

[7] Tattersall v National Steamship Co (1884) 12 QBD 297

He concluded that they were relevant to the seaworthiness of the CMA CGM Libra:

> *"The vessel was unseaworthy before and at the beginning of the voyage from Xiamen because it carried a defective passage plan. That defective passage plan was causative of the grounding of the vessel. Due diligence to make the vessel seaworthy was not exercised by the Owners because the master and second officer failed to exercise reasonable skill and care when preparing the passage plan."*

The Court of Appeal:

In the Court of Appeal Flaux LJ (at paragraph2) set out the essential issues:

> *"The appeal raises issues as to the scope of the obligation imposed upon a shipowner by Article III rule 1 of the Hague/Hague Visby Rules to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage.[8] The central issue in the appeal is whether defects in the vessel's passage plan and the relevant working chart rendered the vessel unseaworthy because neither recorded the necessary warning derived from the Notice to Mariners 6274(P)/10[9] that depths shown on the chart outside the fairway on the approach to the relevant port, Xiamen in China, were unreliable and waters were shallower than recorded on the chart. The judge found that these defects did render the vessel unseaworthy, that the Owners had failed to exercise due diligence, so that they were in breach of Article III rule 1, that that breach was causative of the grounding of the vessel and the claim in general average failed."*

Lord Justice Flaux says that grounds of the appeal were that the judge in the High Court was wrong to hold that a "one off" defective passage plan rendered the vessel unseaworthy for Art III rule I of the Hague Rules and further that he had not properly distinguished between matters of seaworthiness and matters of navigation, the two "well established principles".

The appeal grounds also argued that the judge had confused the nature of actions of the master and crew in the role of navigator with their part in fulfilling

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[8] Art III rule (1), "The Carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

a) make the ship seaworthy
b) b) properly man, equip and supply the ship…"

[9] A Preliminary Notice to Mariners issued months earlier by the UK Hydrographic Office.

the attempts by the carrier to fulfil its duty of due diligence to make the vessel seaworthy under Art III rule 1.

Lord Justice Flaux dismissed the appeal on both grounds.
On the question of seaworthiness and its need for connection with "attributes" of the vessel he says:

> *"there are any number of cases (to some of which I have referred at [44][10] and [50] to [52] above) where it has been decided that the acts of those for whom the owners are responsible, which have rendered the vessel unseaworthy, have involved the exercise of judgment and seamanship."*

Counsel for the appellants had sought to rely on the words of Lord Hobhouse in *The Hill Harmony*[11]:

> *" The character of the decision cannot be determined by where the decision is made. A master, whilst his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to execute a manoeuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners' obligation to execute the coming voyage with the utmost dispatch. The former come within the exception [of "act, neglect or default of the master...in the navigation or the management of the ship" under Article IV rule 2(a) of the Hague Rules]; the latter does not. Where the decision is made does not alter either conclusion."*

However, this was distinguished on the basis that that case concerned the analysis of an "employment" clause contained in a time charter and that this limited its relevance.

All three Justices were in agreement that the appeal be rejected and Lord Males added:

> *"I do not think it matters whether this is viewed as a case of a defective chart or a defective passage plan. Either way, at the commencement of the voyage, the failure to mark the warning on the chart meant that it was not safe for the vessel to proceed to sea."*

He went on to say:

> *"The conclusion that the vessel was unseaworthy due to having a defective passage plan appears to have been novel, but was in my judgment no more than the application of well-established principles.*

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[10] Robin Hood Mills v. Paterson Steamships (1937) 58 LL L Rep 33, (where there was negligent adjustment of the ship's compass).
The Evje (No2) [1978] 1 Lloyd's Rep 35, (where there was a miscalculation of the amount of bunker fuel needed for a voyage).
The Muncaster Castle [1961]AC 807, (where there had been a failure to securely tighten nuts on an inspection cover).
The Friso [1980] 1 Lloyd's Rep 469, (where there had been a failure to "press up" the slack on double bottom tanks).
[11] Whistler International v. Kawasaki Kisen Kaisha, The Hill Harmony [2001] 1 AC 638, 657.

> *The Guidelines for Voyage Planning adopted by IMO Resolution A.893(21) on 25th November 1999 state that passage planning is "of essential importance for safety of life at sea, safety and efficiency of navigation and protection of the marine environment"…account should be taken of "appropriate scale, accurate and up-to-date charts to be used for the intended voyage or passage, as well as any relevant permanent or temporary notices to mariners and existing radio navigational warnings". The passage plan should then be prepared "on the basis of the fullest possible appraisal"; the intended route should be plotted on "appropriate scale charts" with an indication of "all areas of danger"; and the plan should be "approved by the ship's master prior to the commencement of the voyage or passage". It is clear, therefore, that a properly prepared passage plan is an essential document which the vessel must carry at the beginning of any voyage. There is no reason why the absence of such a document should not render a vessel unseaworthy, just as in the case of any other essential document."*

Lord Justice Males also addressed directly the suggestion that the difference between actions of the master as navigator and those as a representative of the owner meant that errors by the master might provide a defence to owners under the Hague Rules.

> *"It is well established that the duty to exercise due diligence under Article III rule 1 of The Hague and Hague-Visby Rules is non-delegable: see e.g. The Muncaster Castle [1961] AC 807. This means that the shipowner will be liable for a failure of due diligence by whomever the relevant work of making the vessel seaworthy may be done. In the present case, the relevant work, ensuring that the chart had been updated and preparing the passage plan, was to be done by the master and deck officers."*

Counsel had submitted that the principle of non-delegability only applied to work performed by the master and officers "*qua* carrier" and not "*qua* navigators" and that consequently a failure by the master or officers as to matters of navigation was not the owner's responsibility. However, Lord Justice Males rejected this argument:

> *"I do not accept this submission. Once again The Evje (No 2) demonstrates that it is untenable. The errors in that case were by the master and were beyond the shipowner's practical control, but the shipowner was nevertheless liable as a result of the master's failure to exercise due diligence. In any event, the supposed distinction between work undertaken "qua carrier" and "qua navigators" to make the vessel seaworthy is illusory. If the vessel is not seaworthy, for whatever reason, there is a danger that the cargo will not be carried safely to its destination, as in this case."*

Conclusion.

The Appeal Court Justices wholeheartedly approved Teare J's analysis of attributes of a vessel for the purpose of seaworthiness. Either as a statement of

existing authority or as a development as to what can be seen to be an "attribute" of the vessel, it is clearly set out. It seems that the shipowners may be minded to seek leave to appeal to the Supreme Court. If so, then this will be because of the possible commercial implications of this decision; Shipowners will be concerned that since as the law now stands the ship must give a "berth to berth" passage plan before the commencement of each voyage then defects in the passage plan might form the basis of unseaworthiness claims by cargo interests. Shipowners will naturally wish to avoid this possibility but will be concerned that the "office" i.e. the operations department of the shipowning company will have insufficient time to deal with this substantial increase in work and the company will therefore be exposed to error by the master and officers. Old hands and their sympathisers may welcome the court's decision and see it as some reversal of an otherwise continual erosion of the authority of the shipmaster. That aside, the Supreme Court may yet have the opportunity to "weigh the scales" associated and see "...whose rightful cause prevails".

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