ALIZE 1954 AND CMA CGM SA v ALLIANZ ELEMENTARY VERSICHERUNGS AG & ORS [2021] UKSC 51

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On 10 November 2021, more than ten years after the *CMA CGM Libra* grounded outside the port of Xiamen and incurred many millions of dollars in loss and damage, the Supreme Court of the United Kingdom delivered judgment in *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2021] UKSC 51. The decision of the Supreme Court both clarifies and reinforces the existing historical and international understanding of the extent of the obligation on a carrier to exercise due diligence to make a vessel seaworthy under the Hague Rules, and reflects existing (albeit not recent) Australian jurisprudence on the same point.

At common law, the carrier is under an absolute obligation to make the vessel seaworthy at the beginning of the voyage.[1] The strictness of this obligation was modified by the Hague Rules,[2] which by middle of the twentieth century had gained wide international acceptance.[3]

Article III(1) of the Hague Rules states:

> The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
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> (a) Make the ship seaworthy.
>
> (b) Properly man, equip and supply the ship.
>
> (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article III(2) places an obligation on the carrier to 'properly and carefully load, handle, stow, carry, keep, care for, and discharge' cargo.

Article IV(1) makes clear again that the duty of seaworthiness is not absolute, and provides that:

> Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.
>
> Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

Exceptions to the carrier and vessel's liability are set out in art IV(2), and include 'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship'.[4]

Facts

On 18 May 2011, while leaving the port of Xiamen, China, the container vessel *CMA CGM Libra* became grounded on a shoal outside the buoyed fairway of the port.[5]

The passage plan on the *CMA CGM Libra* was contained across a pro-forma 'passage plan document' and the vessel's hard copy working chart.[6] On board the vessel was also a Notice to Mariners published by the UK Hydrographic Office with respect to the Xiamen port, which stated that 'numerous depths less than the charted exist within, and in the approaches to [the port]' and also advised that the depth within the buoyed fairway of the port was sufficiently

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[1] See *McFadden Brothers & Co v Blue Start Line Ltd* [1905] KB 697, 703.
[2] *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, 1924 ('Hague Rules').
[3] *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* ('*MV Bunga Seroja*') (1998) 196 CLR 161 [15].
[4] Hague Rules art IV(2)(a).
[5] *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2021] UKSC 51 [15].
[6] Ibid [11].

deep for the vessel (referred to as 'the uncharted depths warning' in the judgment).[7] The first instance judge found that, given this advice, 'an ordinarily prudent mariner would consider that it was safe to navigate within the fairway … but not outside the fairway'.[8]

Despite this, during the passage planning process, the crew of the vessel did not annotate the hard copy charts to include a reference to this warning. This meant that the passage plan of the *CMA CGM Libra* was 'defective or inadequate', because a 'source of danger when leaving Xiamen was not clearly marked as it ought to have been'.[9] The defective passage plan was found at first instance to have been causative of the vessel's grounding, and this finding was not challenged on appeal.[10]

The grounding of the vessel gave rise to a salvage cost of USD9.5M and a total claim of general average by the vessel owners against the cargo owners of approximately USD13M.[11]

Although most cargo owners paid their general average contribution, the respondents – who made up approximately 8% of the cargo owners – failed to do so. Accordingly, the appellants commenced action to recover the respondents' contribution (which amounted to approximately USD800,000).[12]

The respondents argued that they were not liable for the general average contribution because there was 'actionable fault' on the part of the appellants,[13] being the appellants' failure to exercise due diligence to make the *CMA CGM Libra* seaworthy as required by art III(1) of the Hague Rules (which were incorporated by the contracts of carriage).[14] This was the primary issue at first instance and on appeal.

Throughout the entire proceeding, the appellants argued that they were not so liable because art IV(2)(a) applied to except them from liability under art III(1) and, in the alternative, they had exercised due diligence as required by art III(1) by appointing a competent crew and delegating responsibility to that crew to prepare an appropriate passage plan.

The decision at first instance and in the Court of Appeal

The dispute was heard by Teare J in the Admiralty Court at first instance.[15] Justice Teare made a number of factual findings which do not appear to have been disputed in the later appeals, including that the *CMA CGM Libra*'s passage plan was defective[16] and that the defective passage plan was a 'real and effective cause of the grounding'.[17]

Justice Teare applied the 'usual test of seaworthiness' – being 'whether a prudent owner would have required the relevant defect, had he known of it, to be made good before sending his ship to sea' –[18] and found that the defective passage plan onboard the *CMA CGM Libra* made the vessel unseaworthy. As to the owners' argument that art IV(2)(a) excepted them from liability, Teare J found that if there was a causative breach of art III(1) 'the fact that a cause of the subsequent casualty is also negligent navigation will not protect the carrier from liability'.[19]

Justice Teare also rejected the owners' argument that they had exercised due diligence:

> [I]t has long been recognised … that in order to comply with art III(1) it is not sufficient that the owner has itself exercised due diligence to make the ship seaworthy. It must be shown that those servants or agents relied upon by the owner to make the ship seaworthy before and at the beginning of the voyage have exercised due diligence. That is because the duty is non-delegable.[20]

It followed that the grounding of the *CMA CGM Libra* was caused by actionable fault of the owners and the respondents were not liable to contribute in general average.[21]

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[7] Ibid [12].
[8] *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2019] EWHC 481 (Admlty) [53]; *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2021] UKSC 51 [13].
[9] *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2019] EWHC 481 (Admlty) [73].
[10] *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2019] EWHC 481 (Admlty) [89]; *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2021] UKSC 51 [18].
[11] *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2021] UKSC 51 [19].
[12] Ibid [20].
[13] Under Rule D of the *York Antwerp Rules* (Comite Maritime International, 2004).
[14] *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2021] UKSC 51 [28].
[15] [2019] EWHC 481 (Admlty).
[16] Ibid [73].
[17] Ibid [92].
[18] Ibid [75]. Justice Teare relied on *The Cape Bonny* [2018] 1 Lloyd's Reports 356 [118].
[19] Ibid [81].
[20] Ibid [113].
[21] Ibid [129].

The Court of Appeal (composed of Flaux, Haddon-Cave, and Males LJJ) unanimously upheld the decision of Teare J,[22] finding that there were 'a number of fallacies' in the appellants' case.[23] In particular, the Court of Appeal found that the obligation to exercise due diligence to make the ship seaworthy in art III(1) was an 'overriding obligation, to which none of the exceptions in art IV(2) is a defence'[24] and that the task of making the vessel seaworthy by preparing an appropriate passage plan was 'nobody else's responsibility' but the appellants', as owners.[25]

The decision of the Supreme Court

The appeal was unanimously dismissed by Lords Reed, Briggs, Ardern, Hamblen and Leggat.

The Supreme Court identified 2 issues for determination:

1. whether the defective passage plan rendered the vessel unseaworthy for the purposes of art III(1) of the Hague Rules; and

2. whether the failure of the Master and Second Officer to exercise reasonable skill and care when preparing the passage plan constituted a want of due diligence on the part of the carrier for the purposes of art III(2) of the Hague Rules.

Interpretation of the Hague Rules

The Supreme Court approached interpretation of the Hague Rules by reference to treaty interpretation rules set out in the *Vienna Convention on the Law of Treaties*,[26] and on this basis considered both the English and French texts of the *travaux preparatoire* to the Hague Rules.[27] The Court reiterated that international instruments such as the Hague Rules should be 'interpreted in a uniform manner and regard should be had to how they have been interpreted by the courts of different countries'.[28]

Unseaworthiness arising from the defective passage plan

The appellants argued that the defective passage plan could not render the *CMA CGM Libra* unseaworthy because

> the seaworthiness obligation is concerned with whether the vessel is fit in herself for the purpose of safe navigation. It is concerned with the state of the vessel and defects which are intrinsic to the vessel, rather than extrinsic or ephemeral matters. To render the vessel unseaworthy the defect must be an attribute of the vessel.

It followed, the appellants argued, that because passage planning was part of navigating a vessel and a navigational decision was not an attribute of the vessel, a defective passage plan fell under the nautical fault exception in art IV(2)(a) and could not render the vessel unseaworthy.[29]

Ultimately, however, the Supreme Court rejected the appellants' category-based interpretation of the Hague Rules and found that the art IV(2) exception 'cannot be relied upon in relation to a causative breach of the carrier's obligation to exercise due diligence to make the vessel seaworthy'.[30] Accordingly, despite the Supreme Court accepting the appellant's argument that the preparation of a deficient passage plan was part of the navigation of a ship,[31] the appellants could not rely on the art IV(2)(a) exception to excuse liability for failing to exercise due diligence to make the vessel seaworthy.

The Court explained that '[t]he entirely different regimes' governing responsibility under arts IV(1) and (2) of the Hague Rules indicate that the former 'sets out the relevant rights and immunity for the carrier's responsibilities and liabilities under [art III(1)]' while the latter 'sets out the relevant rights and immunities for the carrier's responsibilities and liabilities under [art III(2)]'.[32] This textual interpretation of the Hague Rules means that where loss or damage was caused by a breach of the carrier's obligation under art III(1), the art IV(2) exceptions cannot be relied on, even

[22] [2020] EWCA Civ 293.
[23] Ibid [48].
[24] Ibid.
[25] Ibid [98].
[26] *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331.
[27] *Alize 1954 and CMA CGM SA v Allianz Elementary Versicherungs AG & ors* [2021] UKSC 51 [34]-[42].
[28] Ibid [42], citing *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2021] UKSC 6 [42].
[29] Ibid [58].
[30] Ibid [145].
[31] Ibid [89]
[32] Ibid [65].

where the cause of the seaworthiness was an excepted matter under that article (as defaults in navigation were in this case).[33] This established principle, according to the Supreme Court:

> [U]ndermines the owners' argument that there is a category-based distinction between seaworthiness and navigation or management of the ship. They are not mutually exclusive. Negligent navigation or management of the ship may cause unseaworthiness. If it does so, then that negligence is likely to amount to a failure to exercise due diligence and the carrier will be liable for any resulting loss and damage.[34]

The Supreme Court noted that this interpretation was not inconsistent with the *travaux preparatoire* to the Hague Rules.[35]

In any case, the Supreme Court identified multiple English authorities where it was found that a vessel was rendered unseaworthy by negligent management,[36] and these authorities did not reveal a 'principled distinction' between circumstances where the act of management or navigation caused the unseaworthiness and circumstances where the act of management or navigation was itself the unseaworthiness.[37]

As to whether the deficient passage plan in fact rendered the *CMA CGM Libra* unseaworthy, the Supreme Court noted that 'this is not a case at the boundaries of unseaworthiness' and the trial judge's conclusion that a prudent owner would not allow the vessel to depart with a deficient passage plan was 'unassailable'.[38] However, the Supreme Court did accept the appellant's argument that the 'prudent owner' test – that a vessel must have the degree of fitness 'which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage' –[39] would not apply at the 'boundaries of seaworthiness', where it might be necessary to first address the question of 'whether the defect of state of affair relied upon sufficiently attracts the fitness of the vessel to carry the goods safely on the contractual voyage'.[40]

Unseaworthiness arising from the defective passage plan

Alternatively, the appellants argued that they had satisfied their obligation to exercise due diligence under art III(1) of the Hague Rules because they had equipped the *CMA CGM Libra* 'with all that was necessary for her to be safely navigated, including a competent crew', and it could not give rise to liability of the part of the appellants if this competent crew acted negligently.[41]

The Supreme Court agreed that the exercise of due diligence by the carrier encompasses an obligation on the carrier to appoint a generally competent crew,[42] and that there were limits of the responsibility of the carrier under art III(1) (including, for example, where the failure to exercise due diligence occurred before the carrier had responsibility for the vessel).[43] However, such limits did not apply where the vessel was, at all material times, within the carrier's 'orbit'.[44]

The Court found that:

> The work of preparing a proper passage plan so as to make the vessel seaworthy for the voyage was entrusted to the master and deck officers, who are the owners' servants … In the present case, the vessel was at all times under the carrier's control and the failure to exercise due diligence was that of the carrier's servants in the preparation of the vessel for her voyage.[45]

The provision of a competent crew was an 'important part' of the carrier's obligation under art III(1), but was not determinative of it.[46] Ultimately, the Supreme Court found the appellants' argument on this point to be 'novel and unsound'.[47]

Conclusion

[33] Ibid [70].
[34] Ibid [71].
[35] Ibid [77].
[36] Ibid [83]. See, e.g., *Steel v State Line Steamship Co* (1877) 3 App Cas 72; *Gilroy Sons & Co v W R Price & Co* [1893] AC 56; *G E Dobell & Co v Steamship Rossmore CO Lted* [1895] 2 QB 408' *The Friso* [1980] 1 Lloyd's Rep 469.
[37] Ibid [85].
[38] Ibid [128].
[39] Carver, *A Treatise on the Law relating to the Carriage of Goods by Sea* (Thomas Gilbert, 3rd ed, 1900), 20-21.
[40] Ibid [101].
[41] Ibid [129].
[42] Ibid. See further *The Eurasian Dream* [2002] 1 Lloyd's Rep 719 [132].
[43] Ibid [135]. See further *The Muncaster Castle* [1961] AC 807, 867.
[44] Ibid [137].
[45] Ibid [137]-[138].
[46] Ibid [141].
[47] Ibid [144].

The Supreme Court decision in *Alize 1954 and the CMA CGM Libra v Allianz Elementar Versicherungs AG and ors* [2021] UKSC 51 provides welcome clarity on the scope of the duty under English law to exercise due diligence to make a vessel seaworthy under art III(1) of the Hague Rules. As the relevant articles do not materially differ under the Hague-Visby Rules,[48] the Supreme Court's analysis will also be relevant for contracts of carriage and bills of lading incorporating, or subject to, those rules.

The Court's findings with respect to the inapplicability of the exceptions under art IV(1) to excuse a breach of art III(1) reflect the settled position under Australian law, stated by McHugh J in the *MV Bunga Seroja* (although the Supreme Court did not refer to the *MV Bunga Seroja* in its decision):

> Article III imposes a positive obligation on the carrier to exercise due diligence to make the ship seaworthy. This obligation is an overriding obligation which is not subject to the exceptions to liability listed in art IV(2). This interpretation is consistent with the omission to make art III(1) subject to art IV(2), in contrast with art III(2), which deals with the proper care of goods carried …
>
> If the carrier breaches that obligation and, as a result, the goods of the owner are lost, it is not to the point that a concurrent cause of the loss was a peril of the sea or one of the other matters enumerated in paras (a)-(q) of Art IV r 2. Of course, it is possible that one of the matters referred to in those paragraphs may be the sole cause of the loss or damage even though the ship is unseaworthy. In that event, the cargo owner's claim will fail — not because the carrier comes within the immunities identified in Art IV r 2, but because the owner has failed to prove that the loss or damage has resulted from unseaworthiness.[49]

Similarly, the findings of the Supreme Court with respect to the non-delegable nature of the obligation to exercise due diligence merely reinforce what has always been known as an 'inescapable personal' obligation on the part of the owner / carrier.[50]

The decision also underlines the need for cargo interests to carefully consider claims for contribution of general average made by shipowners: it is noteworthy that 92% of the cargo owners with cargo onboard the *CMA CGM Libra* at the time of her grounding had already settled their general average claims prior to the decision of Teare J,[51] at between 98.5% and 100% of the amount claimed by the vessel's owners.[52]

[48] *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 1968, 1412 UNTS 73 ('Hague-Visby Rules').
[49] *MV Bunga Seroja* [85], [88] (McHugh J).
[50] *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807, 871.
[51] Ibid [20].
[52] Clyde & Co, 'Supreme Court Decision on the "CMA CGM LIBRA" – GA Defence' (Online, 10 November 2021) <https://www.clydeco.com/en/insights/2021/11/supreme-court-decision-on-the-cma-cgm-libra-ga-def >.