

Rob Shearer: Update on unseaworthiness — The CMA CGM LIBRA

The recent Admiralty Court decision of *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM LIBRA)* [2019] EWHC 481 (Admlty) (8 March 2019) provides ship owners with a further warning with regards to their duties in relation to seaworthiness and further strengthens the position of cargo interests.

The facts

On 17 May 2011 the *CMA CGM LIBRA*, a modern container vessel, grounded whilst leaving the port of Xiamen in China. The vessel had left a buoyed fairway, and subsequently ran aground on an uncharted shallow area. While uncharted, recent notices to mariners had warned that many of the depths noted on charts were in fact much shallower than recorded.

Owners declared general average (GA); 92% of the cargo interests paid their contribution but 8% refused to do so.

The decision

Owners brought a claim for the outstanding GA. In response the remaining cargo interests submitted there was an actionable fault that prevented owners from making a successful claim (a breach of Article III rule 1 of The Hague Rules).

The case was heard in the Admiralty Court before the Admiralty Judge, Mr Justice Teare, who found for cargo interests on the following basis:

1. **The vessel's passage plan was defective** as it made no reference to uncharted shallow areas and did not clearly mark "no go" areas. It was therefore not capable of ensuring the safe navigation of the vessel or of preventing ad-hoc bad decision making.
2. **The defective passage plan rendered the vessel unseaworthy.** This was following the well-established test in *McFadden v Blue Star Line* [1905] which asks: 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. Teare J. was confident the answer to this question was "yes". Owners had argued passage planning was part of navigation and NOT part of seaworthiness; but this was not accepted.
3. **The unseaworthiness was causative of the grounding.** As the uncharted shallows

were not in the passage plan, they were not in the master's mind when he made the decision to leave the fairway, which thus led to the grounding.

4. **The owner failed to exercise due diligence at the commencement of the voyage to ensure the vessel was seaworthy.** While the owner had exercised due diligence by having an SMS; it must also be shown that servants or agents relied upon by the owners to make a ship seaworthy at the commencement of the voyage also exercised due diligence. This is because the duty is non-delegable. In their preparation of the passage plan the master and second officer did not exercise due diligence.

What this means

The decision in this case does not represent a change in the law; but it does serve as a useful reminder to vessel owners of their onerous and non-delegable duties in relation to seaworthiness.

Following the McFadden test, a non-exhaustive list of examples of unseaworthiness includes:

1. Physical defects of the vessel. Including:

- a. Structural defects (including hatches)
- b. Defects in engines and machinery
- c. A lack of relevant spare parts
- d.

2. A failure to have proper navigational documents. Including:

- a. Failure to update charts
- b. Failure to update Electronic Chart Display and Information System (ECDIS)
- c. Failure to carry relevant notices to mariners

3. Issues with crew:

- a. Under-qualified or Inadequately trained crew
- b. Over-worked/under-rested crew
- c. Poor living conditions and vibrations
- d. Physical or mental incapacity

4. Lack of maintenance.

5. Poor loading/cargo storage leading to stability issues.

6. Cargoworthiness with regards the particular cargo in question (including infestations, inadequate pumping systems etc.)

7. Left over cargo/poorly cleaned holds.

8. Lack of certificates.

9. Lack of sufficient bunkers.

The above is just a sample of the many issues that may render a vessel unseaworthy.

However, whenever an owner/operator puts a vessel to sea, they must remember the duty is on them to ensure they **exercise due diligence** with regards to the safety of the crew, vessel, cargo and environment. Due to the non-delegable nature of this duty, an owner should also ensure that seaworthiness is at the forefront of their servants', agents' and crews' minds at the commencement of any voyage.