

ESSEX COURT CHAMBERS  
BARRISTERS

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***“OCEAN VICTORY”***

***JOINT INSURANCE, SUBROGATION AND  
LIABILITY***

**JEFFREY GRUDER QC**

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- Vessel demise chartered to demise charterers, time-chartered and then sub-chartered. Each charterparty contained a safe port warranty.
  - Vessel destroyed leaving Kashima, Japan because of the combination of extreme swell and severe winds. Both conditions were known attributes of that port, but it was rare for the two to coincide.
  - Demise charterers claimed that the port was unsafe and liable to owners.
  - The T/C argued that the weather conditions amounted to an "abnormal occurrence" and port safe. Also argued cl.12 of the demise charter provided for joint insurance without any separate right of recovery by the owners against the demise charterers, who had not suffered any loss and had no liability to pass down to them.

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- *Whether the insurance provisions in clause 12 of the demise CP meant that D/C was never liable (and could never be liable) for a breach of the express safe port warranty contained in the rider clause 29.*
  - **Clause 12:**
  - *a) During the Charter period the Vessel **shall be kept insured by the Charterers at their expense** against marine, war and Protection and Indemnity risks in such form as the Owners shall in writing approve, which approval shall not be unreasonably withheld. **Such marine war and P. and I. insurances shall be arranged by the Charterers to protect the interests of both the Owners and the Charterers and mortgagees (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.***

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- **Clause 13**
  - ***(Optional, only to apply if expressly agreed and stated in Box 27, in which event Clause 12 shall be considered deleted).***
  - ***(a) During the Charter period the Vessel shall be kept insured by the Owners at their expense against marine and war risks under the form of policy or policies attached hereto. The Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the vessel or her machinery or appurtenances covered by such insurance, or on account of payments made to discharge claims against or liabilities of the Vessel or the Owners covered by such insurance. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.***

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- CA “...*It was necessary to construe the underlying contract between the parties in order to see if there was truly an intention that the insurance was for the joint benefit of the parties, in which case that would normally mean that the parties had agreed on an insurance solution without any rights of subrogation...*”
  - “...*Clause 12 did not expressly exclude the right of subrogation but it would be nonsensical, in a case in which it was agreed that the parties were to be insured ‘in joint names as their interest may appear’ ....., that they envisaged that either party could sue the other for breach of contract.....*”
  - Explanation of express waiver of right of subrogation in clause 13 but not clause 12.

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- Was decision so obvious?
  - Difference between *Ocean Victory* and early Cases
  - The question in earlier cases was whether despite payment by insurer to one joint insured, there remained a surviving or subsisting underlying legal liability between the joint assureds to which the insurer subrogated
  - It was irrelevant in those cases whether there was an underlying legal liability between the joint insureds before the insurer paid one of the parties what was due under the insurance policy.
  - But where liability of 3<sup>rd</sup> party involved distinction crucial

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- Demise charterer has possession of the vessel. analogous to a lessee or bailee of the owner's property.
  - Well established that, not only can a bailee insure in respect of his own limited interest and liability to owner but for the full value of the bailed property. Bailee liable to account to the owner in respect of any monies received by him which was in excess of that needed to compensate the bailee for his actual loss
  - When the bailee insures the bailed property for its full value and accounts to the owner for the excess above that needed to compensate the bailee for his actual loss, payment by the bailee to the bailor of the insured proceeds discharges the bailee of any liability he may have in respect of the loss of, or damage to the bailed property to the extent of the payment

- So in this case, the payment of the insurance proceeds in respect of the total loss of the vessel discharges the demise charterer (to the extent of the payment) from its liability to the owner for breach of the safe port warranty in the demise charter.
- Additionally D/C were in breach of clause 29 (a typewritten clause). In these circumstances, H/O would be entitled to damages for such breach from D/C computed on the basis of normal principles, unless it was clear, on the proper construction of the demise charterparty, that H/O were not entitled to make such a claim. Clause 12 did not clearly exclude such a claim.
- In Supreme Court, Lord Clarke decided the case on the basis of argument that clause 12 did not clearly exclude liability for breach of clause 29.

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- Lord Sumption accepted that well established that where it is agreed that the insurance shall inure to the benefit of both parties to the contract, they cannot claim against each other in respect of an insured loss.
  - **Absurd for the insurer to bring a subrogated claim against a co-insured whom he would be liable to indemnify against having to meet it.**
  - **But said reasoning is relevant only to the position as between the co-insureds**
  - ***“...As between a co-insured (or his insurer) and a third party wrongdoer, a different question arises which none of the existing English authorities purports to answer. The question is this: when we say that one co-insured cannot claim damages against another for an insured loss, is that because the liability to pay damages is excluded by the terms of the contract, or is it because as between the co-insureds the insurer's payment makes good any loss and thereby satisfies any liability to pay damages?.....”***

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- Conclusion
  - ***“...the insurer's payment to the head owner makes good the head owner's loss not just as between the insurer and the head owner but as between both of them and the demise charterer. The demise charterer's liability under the demise charter for the loss of the ship has not been excluded. It has been satisfied. It follows that the demise charterer may claim over against a time charterer who is not party to the insurance or any of the contractual arrangements connected with it.”***
  - Also referred to clauses 29 and 13
  - Majority disagreed

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- Lord Mance
  - The express exclusion of a right of recovery or subrogation in clause 13 was simply belt and braces in the context of insurances taken out by owners, and that the reason why no such express term appears in clause 12 was that it never occurred that there could be such claims in the context of insurances arranged by charterers to cover their own as well as owners interests.
  - Inconceivable that the parties intended fundamentally to alter the incidence of risk by permitting or excluding breach-based claims as between themselves in respect of a hull loss, depending upon whether it happened to be convenient to continue to use hull insurances taken out by owners or to rely on fresh insurances taken out by charterers.

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- Most unlikely that the safe port provision in clause 29 can have been meant to give rise to a system of recourse for loss of the hull, by way of damages for breach of contract, separate from and potentially counteracting the no fault scheme of responsibility and insurance recovery for a hull loss introduced by clause 12.
  - The reason why owners have no claim against charterers for damages for loss of the hull is not that such a claim exists under clause 29 but is at some point discharged. It is that, under a co-insurance scheme like the present, it is understood implicitly that there will be no such claim. This understanding applies, in my opinion, whether or not the insurance moneys have yet been paid.

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- Lord Toulson
  - *“...The commercial purpose of maintaining joint insurance in such circumstances is not only to provide a fund to make good the loss but to avoid litigation between them, or the bringing of a subrogation claim in the name of one against the other. I do not accept that by substituting clause 29 for clause 5 the parties intended to subvert that purpose.....”*
  - *In the present case, if one were to ask whether it would have accorded with the parties’ intentions that on the morning after the loss the owners would have been entitled to demand immediate payment from the demise charterers, rather than make a claim on the insurers and wait for it to be settled, my answer would be that they intended no such thing. The insurance arrangements under clause 12 provided not only a fund but the avoidance of commercially unnecessary and undesirable disputes between the co-insured*

- Other grounds which might have been argued
- The Winkfield [1902] P 42 but principle bailee may bring against stranger an action which is based on the immediate right to possession, such as conversion. Safe port warranty contractual claim
- Circumstances in contract where a contracting party can claim substantial damages for loss of or damage to property, when another person has actually borne such loss or damage: Dunlop v Lambert (1839) 6 Cl & Fin 600; Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero) [1977] AC 774, 846G—847F. Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd [1994] 1 AC 85; Alfred McAlpine Construction Ltd v Panatown Ltd (Panatown) [2001] 1 AC 518