LA Marine

Duty to warn berth holders on the suitability of moorings

November 2009

The recent case of *George v Coastal Marine 2004 Ltd ("Bon Ami") [2009] EWHC 816 (Admiralty)* raises issues concerning the duty of a wharfinger (keeper of the wharf or quay) to take reasonable steps to ensure that the given berth is safe.

If the wharfinger is unable to guarantee the safety and suitability of the berth, then it must warn the user of any foreseeable dangers. The case considers the extent of this duty and whether or not the wharfinger is liable as an occupier of the area pursuant the Occupiers Liability Act 1957 notwithstanding the fact that the berth is positioned within an area which it has little or no control over.

Bon Ami was a former fishing vessel owned by Mr George. He had entered into an oral agreement in April 2005 to berth the vessel in Coastal Marine's quay. The vessel was originally to be moored in an area known as 'layerage 1', which was a berth that had previously been occupied by Mr George. However, that mooring became unavailable and Mr George was given the option to come back at a later date or to relocate to an alternative berth known as 'layerage 3', which was located on tidal foreshore and seabed. Mr George was advised that that particular mooring was less suitable, but for all intents and purposes would remain safe so long as the vessel was placed sufficiently to seaward. Mr George agreed to berth *Bon Ami* at layerage 3 but ignored the berth owner's advice by placing the vessel to the landward end of the berth. Subsequently, the vessel sustained damaged due to its keel being unsupported as it grounded hollow. Mr George issued court proceedings in the sum of £87,949 in damages for, *inter alia*, past and ongoing repairs, fuel costs and loss of charter income or loss of use.

It was averred by the claimant that the mooring contract contained an implied warranty of safety, and that the defendant was under a duty of care in common law and/or pursuant to the Occupier's Liability Act 1957 (the "Act") that the berth would be suitable and safe for the vessel to lie upon. The claimant submitted that the defendant had acted in breach of contract and/or duty of care by failing to supply a safe berth, thereby causing damage to the vessel. By placing the vessel on layerage 3, it was unsupported when grounded on the uneven sea bed as a result of the increased gradient of the beach.

The defendant argued that the berth was safe so long as the vessel was placed to seaward. Its staff had given clear warnings and instructions to the claimant to place the vessel 12 ft astern from its original position, to avoid the hollow grounding, but such advice was ignored by the claimant. The defendant also argued that it could not give any warranty of safety since the berthing area was on tidal foreshore and seabed and therefore was not owned or controlled by it. To imply such a warranty was therefore ludicrous. As such, it was argued that the defendant could not be an 'occupier' under the Act.

The court agreed with the defendant's submission that where there was no control over the tidal foreshore and seabed, and there was a presumption that the area was owned by the Crown. However, the court held that it was an implied term of the mooring contract that, as the defendant let out berths over this area, it must take reasonable care to ensure that the berths were safe and in proper condition. If, however, the berth was unsafe and/or the defendant could not take reasonable steps to ensure that the berth was safe then its obligation is to warn users of the dangers. As such, no warranty of safety was implied. The classic case of 'The Moorcock' (1889) 14 PD 64 was therefore applied in respect of the limitations of the wharfinger's implied duty towards the user. It was held in that case that the wharfinger only had to exercise reasonable care to ensure that the mooring does not injure the vessel. Since the defendant had warned the claimant, it was not liable for the losses suffered by the claimant.

As to whether or not the defendant was an occupier for the purposes of the Act, the court held that it was. Pursuant to section 2(2) of the Act, the occupier must 'take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited'. Even if it could be construed that the defendant was not an occupier, it nevertheless owed a duty of care to ensure the safety of the berth by taking reasonable steps as above. The defendant's liability could not therefore be extended to the defects that existed at the quay to include an absolute duty of care since there was no actual fault. The court also considered the defences that where available under the Act, namely that the damage caused to the vessel was forewarned and that the claimant he had nevertheless willingly accepted the risk.

Whilst the court found in favour of the defendant, it was held *obiter* that judgment may have been awarded in favour of the claimant had evidence substantiated the position that layerage 3 was unsuitable and unsafe. The credibility of the claimant's claim was also questioned in court for being over-inflated. Most of the heads of damage could have been easily mitigated and the loss of charter income was unsustainable as being merely speculative. A prospective claimant should therefore ensure that any losses claimed are reasonable and proportionate.

The case demonstrates that there is no absolute obligation on a wharfinger to ensure that a berth is safe so long as it has taken reasonable steps to make the berth safe or to warn the user of any dangers. Its duty is to provide a berth that is of 'proper condition'. In this case, the court accepted the verbal warnings given by the defendant's staff, but wharfingers should consider protecting their position by clearly displaying signs in case such warnings are not properly communicated or understood by the berth user and/or by incorporating the same into their mooring contracts by way of exclusion clauses. Wharfingers will need to ensure, if the latter is adopted, that such clauses are sufficiently drafted so as to avoid arguments pursuant to the Unfair Contract Terms Act 1977 for unreasonably excluding liability, particularly when dealing with consumers rather than business to business transactions.

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