continued from page 1

nonetheless we are making good progress. We have recently recruited two new lawyers to the claims team in London and Capt Kavinit Uberoi has joined the Dubai office as deputy regional manager for the Middle East and Indian Sub-Continent, reporting to Gavin Ritchie. Ashley Xu has been appointed as the Manager of the Shanghai hub. Further recruitment is planned shortly in each of the three hubs and full details will be reported in future editions of the Charterer.

In these competitive times differentiation and specialisation is the key to success – you need to stand out from the crowd and the Charterers P&I Club has never been afraid to invest in order to offer a superior product in terms of specialisation, professionalism, integrity and service combined with the security of a rating of S&P AA-. It's a winning formula for our clients, as witnessed by our solid growth over the last 12 months.

CASE SUMMARY: THE "OCEAN VICTORY"[1]

In our May 2014 issue of "The Charterer" we provided readers with a detailed analysis of the landmark decision reached by the London High Court in the OCEAN VICTORY case and the key implications to Charterers when facing an unsafe port allegation by Owners. In this article London law firm Jackson Parton examines Charterers' successful appeal to the superior Court on areas of the law of such importance as those associated with the concept of "abnormal occurrence".

Overview

This article summarises the decision of the Court of Appeal in reversing the first instance decision of Mr Justice Teare which drew much criticism at first instance when he found that the loss of the vessel (The OCEAN VICTORY) on the 24 October 2006 was caused by the Charterers nomination of an unsafe port. It should be noted that with the Claimant's application for permission to appeal to the Supreme Court still pending, it is possible that the decision will be further clarified and even modified. Before considering the decision further it is useful to remind the reader of the well-established legal definition of a safe port (set out Sellers LJ's classic statement) in the Eastern City:

"*A port will not be safe unless, in the relevant period of time, a particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship*"

The Facts

On or around the 12 September 2006, the sub-charterers ordered the vessel to proceed to Saldanah Bay, South Africa, to load a cargo of iron ore before proceeding to discharge at the port of Kashima, Japan. Kashima is a large modern port with over 9 miles of wharves serving an industrial zone. On the 23rd October 2006 the vessel encountered heavy weather while discharging her cargo of iron ore at the Raw Material Quay C. Cargo operations were suspended. The following day the weather rapidly deteriorated which prompted discussion between the Master and the Charterer's representative and resulted in a decision by the Master (although apparently he thought he was being instructed) to leave the berth.

Whilst proceeding towards the open sea along the Kashima fairway (the main access to and from the various berths in the port, protected by a man-made and extensive breakwater to the South of the port) and after the pilot had departed, the Master lost control of the vessel which subsequently allided with the end of the breakwater. Two months later after attempts at salvage were underway, and during a further storm, the vessel broke up and became a total loss.

The Claimant, Gard, claimed a total of USD 137.70 million consisting of: USD 88.50 million, being the value of the vessel as a total loss; USD 2.70 million for loss of hire; USD 12.00 million SCOPIC costs pursuant to an LOF 200 and wreck removal costs in the sum of USD 34.50 million.

Judgement at First instance

At first instance the Claimant argued that the port was unsafe at the time of Charterers' nomination because there was a known risk that long period swell waves and strong winds from the North East would combine to create a situation where the vessel could not safely remain alongside the berth yet could not safely depart,

continued on page 3

[1] Gard Marine & Energy Ltd V China National Chartering Co Ltd & (1) Daiichi Chuo Kisen Kaisha (2) Ocean Line Holdings (Interested Parties) (The Ocean Victory) 2013 Ewhc 2199 (Comm)
In The Court Of Appeal (Civil Division) A3/2013/2960 & A3/2013/3011]

continued from page 2

and that the port system in place at the time was inadequate to warn vessels of that risk and to enable the vessel to take shelter at open sea before it became too dangerous to remain alongside.

The Defendants argued that:

a) The port was safe as the vessel could have remained safely alongside the berth at the material time.

b) That the cause of the loss was the Master's negligence in his navigation of the vessel out of the port; alternatively his navigational decision to leave the port at a time and in conditions when his own (admitted) preference was to stay alongside.

c) The conditions on the day in question, particularly the combination of long period wave swell at the berth and a very severe storm from the northern quadrant that made departure difficult amounted to an abnormal occurrence.

d) The Charterers ran a further ancillary argument that the demise charter provisions for joint insurance precluded any right of recovery by the Owners against the demise charterers as the clause contained a complete code for the treatment of insured losses as between the parties in the event of a total loss.

"...Teare J at first instance found that the berth was unsafe and that the Master was not negligent in his decision to leave the berth as he was following advice given by Charterers' representatives..."

Jonathan Clyne

Teare J at first instance found that the berth was unsafe and that the Master was not negligent in his decision to leave the berth as he was following advice given by Charterers' representatives at the port, which charterers '*expected to be followed*' and that further he was not negligent in his navigation of the vessel out of the fairway.

The Judge rejected the Defendants/Charterers' alternative argument that the conditions experienced by the vessel (i.e. the coincidence of long period swell waves at the berth and a severe, rapidly developing northerly gale) amounted to an abnormal occurrence. Instead he found that the port was unsafe because, as Kashima fairway and the Raw Materials Quay were acknowledged to have been susceptible to northerly gale force winds and subject to long waves, (although these rarely occurred simultaneously) individually, these attributes could not be considered unforeseeable, and thus their simultaneous occurrence and combination, even though rare (there had been no record of their simultaneous occurrence in the previous 40 years), was insufficient to create an abnormal event, as envisaged in the Sellers LJ definition in The Eastern City, and could therefore be considered to flow from the natural characteristics of the port.

Issues with the first instance Judgement

The first instance Judgement had far reaching implications for the shipping industry and in particular for vessels trading to Japanese ports and others along the Pacific Rim (and indeed to other ports exposed to similar phenomena). The perhaps unforeseen consequences of the judgement was to potentially make all ports, which are known to be susceptible to long period swell, unsafe as well as creating confusion in the minds of those assessing the risks of trading with these areas, ordering vessels to them and providing assistance whilst at the port.

Particular confusion in this case arose because the Master, for whatever reason, said he thought he had been "ordered" to leave by the port authorities and communicated to him by charterers. The effect of the decision at first instance was that the Charterers representative, in attempting to advise and assist the vessel by providing local weather information, had inadvertently exposed the Charterers to precisely the liability they were intending to avoid. The decision thus potentially blurs the accepted distinction between decisions in the navigation of a vessel (solely the responsibility of the Master) and decisions relating to the employment of the vessel (the responsibility of Charterers). .

Another perhaps unforeseen implication concerns the seaworthiness of all Capesize bulk carriers. The Claimant's experts argued, and the judge accepted, such vessels could not steer and maintain a specific course in the conditions experienced, requiring instead considerable searoom to enable the vessel to experiment and find by trial and error a course which it could maintain, something which was not possible in the circumstances. A vessel that cannot steer and maintain a course is, arguably, unseaworthy.

The Appeal-

Aikens LJ refused permission to appeal in respect of the factual findings of Teare J relating to the Master's navigation but permission was granted as to:

Whether as a matter of law in the circumstances there had been a breach of the safe port warranty (the safe port issue);

continued on page 4

continued from page 3

Whether, even on the assumption that there had been a breach of the safe port warranty, the cause of the casualty was not the breach, but rather the Master's navigational decision to put to sea in extreme conditions, rather than to stay at the berth ("the causation issue") and;

Whether on the true construction of the terms of the demise charterparty, the demise charterers, who had insured the vessel at their expense, had any liability to owners in respect of insured losses, notwithstanding that such losses may have been caused by a breach of the safe port warranty ("the recoverability issue").

"...The effect of the decision at first instance was that the Charterers representative...had inadvertently exposed the Charterers to precisely the liability they were intending to avoid. The decision thus potentially blurs the accepted distinction between decisions in the navigation of a vessel (solely the responsibility of the Master) and decisions relating to the employment of the vessel (the responsibility of Charterers)..."

The Court of Appeal's decision

The Court of Appeal overturned the decision of Teare J in finding that the port was prospectively safe. The combination of long period swell waves and northerly gales experienced by the vessel was an "abnormal occurrence".

The Abnormal occurrence Issue

In overturning the decision of Teare J, the Court of Appeal were highly critical of his analysis in respect of what constitutes an abnormal occurrence. In their view he failed to ask a unitary question: whether the simultaneous coincidence of: a) long period swell waves and b) conditions in the Kashima fairway being so severe due to gale force winds from the north easterly quadrant as to make navigation dangerous or impossible, was an abnormal occurrence or a normal characteristic of the port.

William Jackson

Teare J had wrongly considered each event separately and concluded that as neither event could be classified or considered as rare they were both attributes or characteristics of the port. The Court of Appeal concluded that the correct approach was to consider the nature of the simultaneous combination of the two events and not the nature of each individual danger.

The Court of Appeal in making their decision expressed the view that the fact that an event was theoretically foreseeable did not make it a normal characteristic of the port. Teare J's reasoning that both the wind and the swell conditions were known to the port authorities and were foreseeable and therefore they should not have been surprised when they occurred together, were dismissed by the Court of Appeal judges as "fallacious".

The frequency of the concurrence of the events was therefore important before the Court of Appeal. The evidence before the court was that long period swell waves affected the quay two to three times a year and that storms caused by low pressure systems (as opposed to tropical storms) could produce gale force winds from the north/easterly quadrant but such storms caused navigation issues in the fairway only about 22 times in the period 1986-2010.

This therefore raises an interesting potential evidential challenge to Owners seeking to prove abnormal occurrence. Kashima is a modern port with a sophisticated system for recording extreme conditions that affect the port. The Charterers were thus able to take the Court of Appeal through the history of the port in detail and demonstrate the rarity and infrequency of the combination of events that made conditions experienced an abnormal occurrence. Less sophisticated ports may not have such detailed records, which might make it even more difficult for Charterers to prove the dangers encountered were, in the history of the port, an abnormal occurrence.

The Causation Issue

In light of the findings in regards to abnormal occurrence, the Court of Appeal felt that they did not need to consider the causation issue. This is unfortunate as it might have clarified the discussion on how port operators and charterers should interact and advise visiting vessels in challenging conditions.

continued on page 5

continued from page 4

The Recoverability Issue

On the third issue the Charterers submitted that clause 12 of the Demise charter (a Barecon 89 CP) contained a complete code for the treatment of insured losses between the parties. The Court of Appeal therefore had to consider whether the Demise Charterers would actually have suffered loss in the event that Charterers were in breach of their safe port warranty. Clause 12 of the Barecon 89 provided that the Demise Charterers shall take out and pay for Marine and War Risks on behalf of Owners and Demise Charterers, jointly.

"...The Court of Appeal overturned the decision of Teare J in finding that the port was prospectively safe. The combination of long period swell waves and northerly gales experienced by the vessel was an "abnormal occurrence"..."

The Court of Appeal agreed with the Charterers' argument that the provisions of Clause 12 were an "insurance funded solution" (i.e. were a complete code for the treatment of insured losses). They concluded that a contractual claim down a chain of charters requires a good contractual claim at the first stage. As such, the claim that was made by Gard following the assignment of the claim to them by Owners failed because the claim disappeared once the insurance proceeds had been paid out. There was therefore nothing to assign. If the Demise Charterers were found liable for a breach of the safe port warranty, they would be under no liability to the Registered Owners as they had agreed to look to the insurance contract for recovery of their losses and not to a party further down the contractual chain. Thus, the terms of the bareboat charterparty provided a complete code for an "insurance funded solution" to the loss of the vessel.

Finality in the Japanese Proceedings

As many may be aware there have been simultaneous proceedings in Japan brought by the Japanese Government against the Owners of the Ocean Victory for damages to the breakwater. The Tokyo District Court found against Owners in that the Master had been negligent in navigating the vessel's exit through the Kashima fairway and that that was the effective cause of the casualty. Teare J, considered the decision after his judgement was written, but before it was handed down. However, he was not persuaded to revise his initial views or decision.

The Owner's of the Vessel, attempted to appeal to the Japanese Supreme Court but the application was dismissed on the 6 March 2015. Therefore the Judgment of the Tokyo District Court, as substantially approved by the Tokyo High Court, stands in its decision that the casualty was caused by the negligent navigation of the Master.

Comment

If the first instance decision caused ripples in the shipping community, the Court of Appeal judgement will most certainly cause further discussion, especially over the style in which the Court of Appeal overturned the judgement of Teare J. The decision will come as a relief to Charterers or those who consistently order their vessels to ports in the Pacific Rim or worldwide which are prone to potential hazards or events that if found to be foreseeable and a characteristic of the port might result in a defence of abnormal occurrence being unsuccessful.

The Court of Appeal has conducted a detailed analysis of the case law on abnormal occurrences, which is helpful, and in rowing back from Teare J's findings has restored some common sense and commercial reality into a decision that potentially had wide, but perhaps unintended, consequences.

It is unfortunate that the causation issue has not been decided, but if the decision is remitted back to the Court of Appeal by the Supreme Court, it will be interesting to see how they address the issue.

If insurers are considering taking an assignment of any claims arising out of a demise charter, great care should be taken to ensure a recoverable claim is in fact being assigned.

The authors of the article are William Jackson, assistant solicitor, and Jonathan Clyne, Partner, at Jackson Parton. Jackson Parton are a niche shipping law firm specialising in particular in charterparty disputes and regularly act for clients with disputes concerning the safety of ports. For more information please see their website at www.jacksonparton.com