Ashfords Solicitors

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Quarterly Newsletter - Summer 2011

Marine

Welcome to this edition of the Ashfords Marine Newsletter.

We are a growing team and welcome Brian Taylor who recently joined us from his own practice in Bournemouth. The aim of this newsletter is to keep you, our clients updated on legal developments. If you have any feedback or wish us to comment on any developing area of law please do contact any of the team on the numbers below.

Ashfords' Marine Team specialises in all aspects of marine legal advice to a national and international client base. We are experienced in both contentious and non-contentious work and routinely operate in foreign jurisdictions. We are committed to the provision of prompt, commercial advice to clients in a cost effective manner. The department includes three ex-mariners and, in addition to its bases in our Exeter, London and Plymouth offices, service clients from Ashfords' other offices in Bristol and Taunton.

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Mortgages - Do I get paid first?

A ship mortgage can provide good security to a lender, but just because you have a mortgage over the vessel does not mean that you will get all of your money back if the owner defaults, or that you will get paid first.

In order to protect the lender as much as possible, the mortgage must be in the statutory form, which means using the form provided by the MCA. The mortgage must also be registered on the UK Ship Register against the vessel.

If the mortgage is not registered at the MCA it is an unregistered mortgage and will rank in priority behind other mortgages that are registered. Also, if the mortgage is not registered at the MCA you do not have the power to sell the vessel under the Merchant Shipping Act and would instead have to apply to the Court for an order to sell.

It is also worth noting that where the owner is a UK company, the mortgage must also be registered at Companies House within 21 days of the date of the mortgage.

If the lender enforces the mortgage and takes possession of the vessel, this does not mean the lender will be repaid his debt first. The proceeds of sale will be paid in the following order:

- Admiralty Marshal's fees and expenses;
- Holders of maritime liens. A maritime lien arises against a vessel in respect of a claim for damage done by a ship, salvage and seamen's wages;
- Holders of a possessory lien, e.g. a ship repairer's lien, even if the lien has not been exercised at the time the lender took possession;
- Any claim secured by the issue of an Admiralty Claim form in rem (against the ship) that was issued prior to the date of the mortgage; and
- Registered Mortgages and then Unregistered Mortgages.

Where there is more than one mortgage registered at the MCA, the priority of mortgages is determined by the order of registration of the mortgages, unless a priority notice has been filed with the MCA.

In most instances, a mortgage over a vessel will provide a lender with good security for his loan. Issues only arise where there are a number of claims against the vessel and its value is less than the total value of the claims. However, in order to ensure that your mortgage offers the best possible security you should insist that the vessel is registered before you lend. If it is not, register a Notice of Intent as soon as possible and thereafter the Mortgage at the MCA and, where the owner is a company, at the Company Registry.

Written by: Jonathan Hadley-Piggin / Rachel Stebbing

Offshore Windfarms

The department has become increasingly involved in advising in offshore windfarm developments and, in particular, is acting for a number of interested parties in the "Atlantic Array" £4.5billion investment in the Bristol Channel.

One of the issues the team is concentrating on is the support required for these windfarms. ABP - who control 21 ports dotted around the United Kingdom - believe that over the next five years it will be investing £300million in investments around the country. This is vital in light of the UK's legally binding commitments to ensure that 15% of the nation's energy supply comes from renewable sources by 2020, compared with the 2.3% today.

Currently, the UK generates 1.8GW of its energy from offshore windfarms, but the target is to increase this figure to just under 40GW within the same time scale. Clearly, these are ambitious and steep targets that according to the industry are achievable. There has been particular activity on the north east coast, but there has been a move to create Hull as the capital for renewable energy. Indeed, the Green Port Hull Project involves a £100million redevelopment of Alexandra Dock under an existing Harbour Revision Order, which means the development is fully consented and this will provide a base for three of the largest round three windfarm projects announced by the Government.

Ports need to seize the initiative to establish the manufacturing plants and ports to service these enormous windfarms. However, the manufacturing for them is carried out primarily by Siemens, General Electric and Mitsubishi in Germany, Denmark and Japan. Indeed, at the end of 2010 Mitsubishi pledged to invest £100million over five years and plans to turn Edinburgh and the Lothians into a green energy hub - in much the same way as ABP are investing in Hull.

In order to meet the very stiff Government renewable energy deadlines, these turbine factories need to be ready for production by 2014, which means that planning consent issues need to be resolved well before that date. In the case of the "Atlantic Array", the necessary survey investigations and

reports are well under way and are being prepared by, amongst others, RWE N Power Limited. However, although British manufacturing has lost out on the first two rounds of the mushrooming in windfarms, there is a determination to ensure that the UK gets its fair share of the super turbine cake when it comes to round three developments. This includes ensuring that the large scale turbines have a dock-side production line for assembly and all appropriate servicing facilities are also provided.

This will mean that there needs to be enterprise as well as substantial financial investment by all parties involved, particularly if the deadlines of 2020 are to be met. With regards to the "Atlantic Array" there's certainly no going back now, and all parties involved in this major commercial activity are setting out their positions to do all they can to optimise potential and actual opportunities.

Written by: Charles Hattersley

Total loss or a bribe

Does piracy constitute a total loss under a marine insurance policy?

This was the question which the Court of Appeal was recently asked to rule upon in the case of Masefield AG v Amlin Corporate Member Ltd [2011] EWCA 24.

It concerned the "Bunga Melati Dua", which was captured by Somali pirates in the well known piracy area of the Gulf of Aden. The vessel was carrying a cargo of bio-diesel.

The Claimant issued a claim against the vessel's insurer for £8.9 million, arguing that the cargo was an actual total loss under section 57 of the Marine Insurance Act 1906, or in the alternative was a constructive total loss under section 60(1) because the vessel and cargo had been abandoned. The Claimant argued that it was irretrievably deprived of the cargo by virtue of the piracy, or that it was unlikely to be recovered.

Mr Justice David Steel held that there was no abandonment of the vessel and cargo as the owners had every intention of retrieving the cargo and returning it to the Claimant. This was in fact the case and, on payment of a ransom of approximately $2 million, the vessel and cargo were released by the pirates and continued the journey to Rotterdam. The Court therefore held that there was no total loss, either actual or constructive.

On appeal, the Claimant argued that ransom payments were against English public policy and should not have been considered when deciding whether the cargo was a total loss.

The Court of Appeal upheld the judgment, with Rix LJ providing the leading judgment and stating "piratical seizure in the circumstances of this case where there was not only a chance, but a strong likelihood, that payment of a comparatively small sum, relative to the value of the vessel and cargo, would secure recovery of both, was not an actual total loss. It was not an irretrievable deprivation of property. It was a typical 'wait and see' situation".

The Court of Appeal further held that ransom payments were not against public policy and were therefore legal. Rix LJ stated that each case of piracy will turn on its own facts.

Those involved in the shipping and insurance industry will welcome the judgment of the Court of Appeal that payment of a ransom in these circumstances is reasonable, legal and not against public policy.

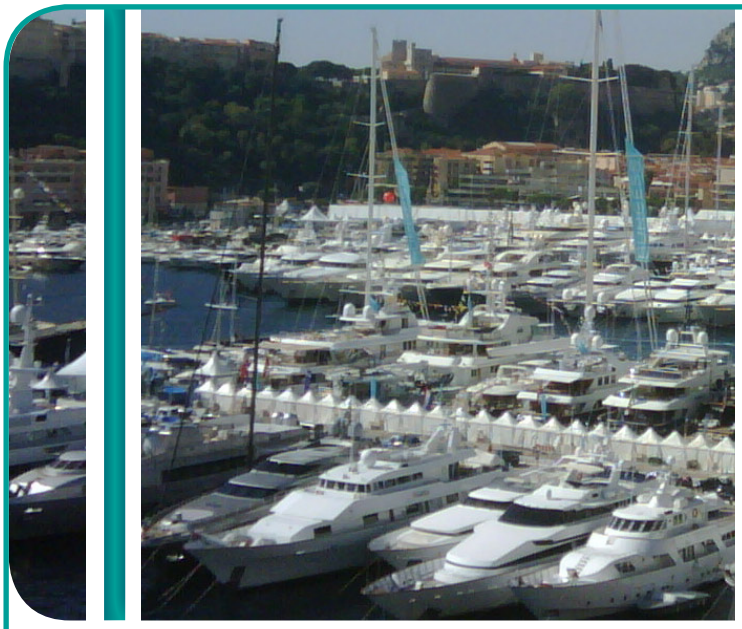
Piracy has a direct economic impact in terms of fraud, stolen cargos and delayed trips, and in these increasingly dangerous times, cargo owners and ship owners have sought to mitigate the risks of piracy by obtaining Marine Kidnap and Ransom insurance when their cargo or vessels travel in key piracy areas such as the Gulf of Aden, Nigeria and the Philippines. The terms of some policies do allow ransom payments to be recoverable, as opposed to the traditional hull insurance policies.

The payment of a ransom also raises additional questions in light of the Bribery Act coming into force in the United Kingdom in 2011. Although the Court was not directly required to consider whether the ransom payment in this case would be a bribe under the Act because the Act is not currently in force, the judgment implies that such a payment does not come within the definition of a bribe because "it was not for the purpose of obtaining improper advantage." As such, the payment is unlikely to be illegal under the Act.

Written by: Melissa Paul

"Seasoned shipping lawyer Charles Hattersley is noted for his strong personality..." "Charles Hattersley is "tenacious and shrewd - a good man to have in your corner."
Chambers Guide to the Legal Profession

Jonathan Hadley-Piggin *"completes work quickly and at short order"*
Legal 500



Is a radioactive port an unsafe port?

The earthquake and tsunami in Japan has caused terrible disruption and loss of life. Japanese ports have been closed or restricted, and the infrastructure in this developed nation will take years to recover. The fact that there is radiation in the air, ground and water around Fukushima means that it is likely that vessels will not enter this area, and indeed how much of Japan is considered safe?

This raises legal issues such as force majeure or frustration of charterparty contracts and, over the coming months, may also give rise to serious argument as to who is responsible for the costs and delay, deviation, transhipment of cargo and decontamination of vessels.

Of legal significance is the question of whether an owner or charterer will be able to claim that a particular port is unsafe and therefore be relieved of the obligation to enter that port. Whilst this is easier to answer if the port is physically damaged, radiation cannot be seen by the average mariner and the decision on what to do is much tougher and wider. This raises issues of natural concern - which ports are unsafe, what levels of radiation are unsafe, will my cargo be contaminated and will my vessel be boycotted at its next port?

Typical charterparties impose a specific duty on the charter to nominate a safe port and/or a safe berth. A safe port or berth is one where the ship can reach it, use it and return from it without being exposed to unavoidable danger. Good seamanship must be exercised, but the port could be unsafe where there is a danger due to physical factors that would cause it to be dangerous to reach the port, enter it or leave it. A separate question arises as to whether vessels that are on the high seas and have already nominated a Japanese port had nominated an unsafe port? The general rule is that if the unsafe circumstance arises from causes that could not be seen at the time of nomination, the port is considered to have been safe. The charterer would not, therefore, be in breach of the charter by nominating Japan prior to the earthquake.

As to whether a port is unsafe because of a specific risk of radiation, this is an extremely technical question and it is easy to see that a master may quickly refuse to enter a port on the grounds that there is, or will be, a real risk to his crew. The risk he runs in choosing the "safe" option is that if the area does not prove to be a radiation risk, there was no justification for his refusal to enter port and his owner may be responsible for large losses. Owners are quite rightly entitled to be concerned about the safety of their crew but there are other factors that have to be considered. For example, if your vessel should enter a port that has suffered minor radiation contamination will it then be allowed to call at ports in, say, Europe or the United States of America? The answer to this question is simply that we do not know - there are no cases as yet because, so far, this situation has not arisen. Indeed, if vessels are allowed to call at other worldwide ports after having called at a Japanese port it may be that the owners and/or the charters will be subject to large decontamination bills. Further, the holds and cargo may be subject to scrutiny, and shippers will simply refuse to load or book elsewhere. In summary, the question of whether the vessel entered the "contaminated area" is both a legal and a commercial factor.

Because this is no more than a series of questions, it is likely that some answers will come from the Courts and tribunals. The losses, delays, claims for breach of contract and the technical expenses, will all no doubt be aired in detail.

Written by: Brian Taylor

Events/Seminars

- Charles Hattersley attended the Sea Works Commercial Marine Forum at Southampton 14 - 16 June 2011.
- Brian Taylor and Charles Hattersley attended the Eighth Meeting of Shiparrested.com in Athens, Greece where Brian presented a paper in the mock arbitration. The event was attended by over 70 maritime lawyers and was hosted by Vardikos & Vardikos Law Offices. We will be attending the Ninth Meeting in New York next year to be hosted by George Chalos of Chalos & Co.
- Jonathan Hadley Piggin recently lectured to the International Institute of Marine Surveyors at their 20th Annual Conference in London. He has been invited to speak at Dubai and India next year.