

Safety reforms dominate the courts

As domestic and international lawmakers step up the amount of legislation on the statute books, Chris Hobbs, managing partner of Norton Rose in Greece, takes a closer look at two key cases heard in through the English courts during 2002 that are helping set the agenda

Last year did not produce a wealth of notable cases for the tanker operator; the loss of the Prestige, however, has shed new light on some of the seemingly less important cases heard in English courts that are also worth a closer look in the current flurry of maritime safety reforms.

Veba Oil

Veba Oil Supply & Trading v Petrotrade ("The Robin") [2001] EWCA CIV 1832; [2002] 1 Lloyd's Rep 295.

Inspector's determination will not be binding if he deviates from instructions.

The Court of Appeal decision in Veba narrows the scope of "mistake" as a legal doctrine, but more importantly it has consequences for all those who rely on expert determinations in a contract, as well as for the experts themselves. The Court held that, if an independent expert deviates from his instructions in a material way, his determination would not be binding, notwithstanding words to the contrary in the contract.

The Court regarded "material" in this context as meaning anything other than a trivial or de minimis deviation. Simon Brown LJ set out the test for triviality as: "being obvious that it could make no possible difference to either party". The materiality or otherwise of a departure from instructions will be determined irrespective of the effect the expert's deviation might or might not have had on the ultimate result.

The facts that gave rise to this dispute centre on an expert's determination of quality in a contract for the sale of gas oil. Veba were claiming damages for the 25,000 tonne cargo that had failed to meet contractual specifications. An independent inspector had been called upon to determine the quality and quantity of the cargo at load port by using test method D1298 to analyse the cargo's density. Instead of following instructions, the inspector used test method D4052, which showed the cargo met the contractual specifications. Veba then sold the cargo to a third party on similar terms as to quality and the cargo failed to meet specification.

The argument between the parties turned on whether the original inspector's determination was binding as to quality. Despite a clause in the contract stating that the inspector's decision would be binding save for fraud or manifest error, the Court held the determination was not binding as the expert had deviated from his instructions in a material way. This was despite the fact that the parties agreed that, had the inspectors used the correct test method, they would have inevitably still have found the density test satisfied in respect of the actual samples tested.

In his judgment Simon Brown LJ clearly distinguishes a "departure from instructions" from a "mistake". When an expert goes wrong in the course of carrying out his instructions, this is a "mistake" and the parties will be bound by it because they have agreed to be bound by the expert's determinations. Where the expert deviates from his instructions, the position is very different. In those circumstances the parties have not agreed to be bound.

Castor

Salvage award cut because risk was not sufficient to justify an uplift under Article 14 of the Salvage Convention

This recent award, although not formally reported, highlights the particular difficulties faced by stricken vessels with potentially polluting or dangerous cargo. The recent plight of the Prestige and the resulting environmental tragedy has revived the argument over the creation of designated ports of refuge. In this context the decision in Castor is particularly poignant.

The facts of the case will be familiar to many. In December 2001 the product carrier Castor was on passage from Constanza to Lagos carrying a full cargo of unleaded petrol. As a result of heavy weather in the Mediterranean Sea she developed a crack in her main deck, which eventually grew to 26 metres in length. LOF was signed with Tsavlis, the well known salvage contractor. There was a real danger of the cargo igniting and causing what would have been a catastrophic explosion, to the extent that, when Castor and her salvors sought refuge from a number of coastal states in the Mediterranean, Spain, Gibraltar, Morocco, Algeria, Tunisia and Greece all refused to provide a berth, citing the risk to life, property and environment that would ensue from an explosion. Only Cyprus agreed to take her, but this was considered too far away. It was eventually six weeks before the tanker was forced to tranship her cargo in open sea conditions, following which she was eventually towed to Greece for repairs.

On appeal against the initial award, Tsavlis's salvage award was cut from US\$8 million to US\$2.4 million. The appeal arbitrator ruled that the salvor was not entitled to an increment in respect of special compensation for protecting the environment under Article 14 of the Salvage Convention. Lloyd's appeal arbitrator Nigel Teare QC found the tanker and its cargo had represented "a risk" but not a substantial "threat" to the environment. Leave to appeal to the court has been refused. When such a high profile risk to the environment does not amount to a substantial threat, it is hard to imagine circumstances where Article 14 will apply. Understandably this has caused considerable concern in the salvage industry. Tsavlis claimed that it would barely be able to cover its expenses based on the award, which would act as a deterrent to salvors. The ruling also means that it is now more likely that there will be an increase in salvors wanting to use the security of the Scopic clause in salvage cases.

Alegrete Shipping Co Inc (Owners of the ship Sea Empress) and anr v. the International Oil Pollution Compensation Fund 1971 and ors. [citation]

Secondary loss not recoverable under Article 170 of the Merchant Shipping Act 1995

Another first instance case, the Sea Empress, looks at the sensitive area of compensation for oil pollution. The court ruled on the interpretation of section 170 of the Merchant Shipping Act it seems that, under English law at least, "secondary" loss suffered in relation to a disaster such as the Sea Empress or the Prestige will not be covered by the International Oil Pollution Fund 1971 (the Fund).

The facts related to an unsuccessful claim against the Fund for loss of profits by processors of whelks whose business suffered as a result of the grounding of, and subsequent oil spill from, the Sea Empress off Milford Haven in February 1996. Pursuant to section 175 of the Merchant Shipping Act 1995, the Fund was responsible for all claims above the vessel's limit.

The claimant contended that a sum was recoverable for the loss and that proof of default was not necessary as section 153(1) (a) of schedule 4 to the Merchant Shipping Act 1995 provided:

“Where, as a result of any occurrence...any persistent oil...is discharged or escapes from a ship, to which this section applies, then the owner of the ship shall be liable -

(a) for any damage caused in the territory of the United Kingdom by contamination resulting from the discharge or escape....”

The claimant argued that section 170(1) of the Act should be construed so that "damage" included "loss". Economic loss caused by contamination resulting from the escape of oil was recoverable in principle because, but for the escape of oil, no fishing ban would have been imposed. Further, it was argued that the escape of oil was the effective cause of the loss of profit, and the loss was not too remote since it was foreseeable.

The Fund accepted that the loss was foreseeable, but argued that loss was not sufficiently proximate to render economic loss recoverable. The Court agreed and held that, although the 1995 Act provided for strict liability in compensation, the Act referred to damage and loss in conjunction with causation without any further explanation. By implication this indicated an intention that the loss must be directly caused by the contamination. Since the claimant's loss flowed from the interruption of a business relationship with the primary victims of the contamination, namely the fishermen, the claimant's loss was "secondary" or "relational". That lack of proximity rendered the claim too remote and was accordingly not recoverable as a matter of law.

Norton Rose is an international law firm offering clients service from offices in Athens, Bahrain, Bangkok, Beijing, Brussels, Cologne, Frankfurt, London, Milan, Moscow, Munich, Paris, Piraeus, Singapore, Warsaw, and associate offices in Jakarta and Prague. The firm has over 200 partners, 1000 fee-earners and more than 1900 staff. Detailed information on the Norton Rose shipping group is available on the firm's website at: www.nortonrose.com.