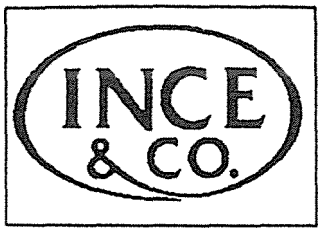

NEGLIGENT MAINTENANCE AND THE MAINTENANCE OF NEGLIGENCE

In introducing the new Institute Time Clauses - Hulls 1/11/95 to the Market London Underwriters made specific reference to the dramatic changes in the practice of ship operating since 1983 with a significant increase in the management of vessels by ship management companies which do not own the vessels they manage. This commentary goes on to state the following:-

> "Recently there has been a tendency for certain owners to use the flexibility of recent practices to cut costs by effectively having underwriters pay for the maintenance of vessels. It is quite improper for the ITC to provide cover which effectively allows an assured to allow the engine to deteriorate to such an extent that it causes damage which is covered by the policy. Not only does this lead to the majority of operators who do not engage in such practices subsidising the claims of the poorer owners, but it also leads to delays to cargo and danger to the crew and the environment. To remove this inappropriate incentive, the due diligence proviso to Clause 6.2 has been amended to encompass superintendents and onshore management. This should prevent claims being made which result from persistent poor maintenance while retaining cover for the one-off act of negligence."

Hence the title to this paper - Negligent Maintenance and the Maintenance of Negligence. However. can it really be said, on a practical level, that underwriters maintain negligence? It is well accepted of course that maritime casualties which are proximately caused by a peril insured against are recoverable under the policy even though the loss would not have happened but for the misconduct or negligence of the master or crew. This is expressly stated in s.55(2)(a) Marine Insurance Act 1906. Such casualties are covered by the Institute Time Clauses - Hulls and will continue to be so covered under the 1/11/95 Clauses. The problems for underwriters arise however where the proximate cause of damage to the vessel is itself the negligence of the master or crew. The functions of the master and crew include the carrying out of routine maintenance and in many instances much more than the "routine". If damage can be said to be due to a lack of maintenance, it follows that in many, and probably most, cases it can also be said to be due to the negligence of the master or crew and prima facie covered under the policy. Payment of such claims therefore encourages the cutting of corners by the poor shipowner, rewards bad maintenance to the disadvantage of good and can truly be said to maintain negligence.

The Changes to the Clauses

The commentary quoted above specifically refers to the change to Clause 6.2. There are however two changes which impact on bad maintenance claims. A Classification Clause has been introduced for the first time. This states as follows

> "4.1 It is the duty of the Assured, Owners and Managers at the inception of and throughout the period of this insurance to ensure that

4.1.1 the Vessel is classed with a Classification Society agreed by the Underwriters and that her class within that Society is maintained

4.1.2 any recommendations requirements or restrictions imposed by the Vessel's Classification Society which relate to the Vessel's seaworthiness or to her maintenance in a seaworthy condition are complied with by the dates required by that Society.

4.2 In the event of any breach of the duties set out in Clause 4.1 above, unless Underwriters agree to the contrary in writing, they will be discharged from liability under this insurance as from the date of the breach provided that if the Vessel is at sea at such date Underwriters discharge from liability is deferred until arrival at her next port.

4.3 Any incident condition or damage in respect of which the Vessel's Classification Society might make recommendations as to repairs or other action to be taken by the Assured, Owners or Managers must be promptly reported to the Classification Society.

4.4 Should the Underwriters wish to approach the Classification Society directly for information and/or documents, the Assured will provide the necessary authorisation."

It is to be noted that whereas Clause 4.1 will in effect operate as a promissory warranty, breach of which will discharge Underwriters from liability, Clauses 4.3 and 4.4 are not and a breach of these terms will only be able to be relied on by underwriters in the event and to the extent of any prejudice to them.

The other relevant change is, as mentioned above, in the due diligence proviso to Clause 6.2 which will now read

> "provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners, Managers or Superintendents or any of their onshore management."

It is worth noting that "accidents in loading, discharging or shifting cargo or fuel" has been moved out of Clause 6.2 so that it is no longer subject to the due diligence proviso. whereas "contact with aircraft, helicopters or similar objects, or objects falling therefrom" is brought within Clause 6.2 and thus made subject to the proviso. The former was moved because such claims may well involve one off acts of negligence by, for example, superintendents which underwriters wish to cover; the latter was brought within Clause 6.2 because of the new liberty given in Clause 1.3 to use helicopters and Underwriters wish to monitor the effects of giving such an express liberty within the standard clauses and to ensure that it was recognised by those responsible that safe practices must be followed.

What is the legal background to these changes?

(a) **Seaworthiness**

Starting in the middle of the last century a series of cases decided that in English law no warranty of seaworthiness was to be implied into a time policy in contradiction to the situation under a voyage policy where such a warranty is to be implied at the commencement of the voyage. Probably the best known of these cases is that of Dudgeon v. Pembroke (1876-77) 2 App. Cas. 284. In that case Lord Penzance confirmed that there was no implied warranty of seaworthiness in a time policy but went on to refuse to sanction an argument from underwriters that a loss proximately caused by the sea but more remotely and substantially brought about by the condition of the ship was not covered as a loss by perils of the seas. He found "that any loss caused immediately by perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it". The only exception then recognised was where the shipowner himself knowingly and wilfully sent the ship to sea in an unseaworthy state, and it was lost in consequence. One of Lord Penzance's arguments in not going further was as follows:-

> "For instance, the assured has hitherto always been held protected from loss through the perils insured against, though that loss was brought about through the negligence of his captain or crew. Now the captain has the entire control of the vessel in respect of repair in foreign ports, as of everything else, and if the 6th plea in this case *(that the loss was caused by the unseaworthiness)* (my italics)

> were held to be sufficient without proof of the shipowner's knowledge and wilfulness, the result would be that whenever the captain failed in his duty in fitly repairing the vessel in a foreign port, and the loss, though caused by perils of the sea, could be traced to the ship's defective condition, the assured would lose the benefit of his policy."

Clearly the doctrine of proximate cause has changed since 1877 and so has an owner's or manager's control over and communication with a vessel so that the captain does not have the entire control of the vessel in respect of repair. Despite however today's dramatically changed conditions in respect of vessel operation the law as expressed by Lord Penzance in 1877 has not changed substantially. This is aptly demonstrated by the case of the Miss Jay Jay (1987) 1 Lloyd's Rep. 32.

Putting aside issues of disclosure at the time of placement of the policy, a time policy covers the named vessel insured, warts and all. The assured's burden is still to prove that the loss or damage to that vessel was proximately caused by a peril insured against. Once he had done this - and it does not matter if the peril concerned is a peril of the sea or negligence of the master or crew - he will prima facie be entitled to recover and subject to what is said below it will be of no avail for underwriters to prove that the unseaworthiness or defective condition or lack of maintenance was also a proximate cause.

Following cases such as Dudgeon v. Pembroke the Marine Insurance Act was enacted in 1906. As you will know in the Act the position concerning seaworthiness in time

policies was confirmed in s.39(5) which states

> "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

Atkin J (as he then was) explained this section in Thomas v. Tyne and Wear Insurance Association (1917) 1 KB 938 as follows:-

> "In the case of insurance under a time policy the intention was that the assured should be unable to recover in respect of a loss occasioned by his own fault. That was the rule under the law as it existed before the Act. It was always necessary to show that the loss was the result of some misconduct. Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured."

A further gloss put on the section by the cases has been that the underwriters will only be relieved from liability if the assured is privy to the unseaworthiness causing the loss or damage. It is not sufficient if there was privity to unseaworthiness in some other respects.

It is perhaps also worth pointing out that in the United States where, of course, there is no Marine Insurance Act, the cases in the last century took a different turn so that,

as I understand matters, time policies subject to their law are today subject to a warranty of seaworthiness at inception in the same way as voyage policies. The only gloss on this is whether or not the vessel must be in port at the time. Breach of such a warranty does not depend on privity of the alter ego of the assured and if available under English law in respect of London policies such a warranty would have had a significant effect on bad maintenance claims.

In more modern times the Court of Appeal considered s.39(5) in The Eurysthenes (1976) 2 Lloyd's Rep. 171. This was an unusual case in that it concerned P & I cover. Michael Mustill QC argued on the basis of the pre-Act cases that "privity" in s.39(5) was to be equated with "wilful misconduct" in s.55(2)(a). The Court rejected this argument and was not prepared to look behind the Act. Lord Denning MR defined "privity" as follows:-

> "If a ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness that is, to unseaworthiness of which he knew and in which he concurred.
>
> To disentitle the shipowner, he must, I think have knowledge not only of the facts constituting the unseaworthiness but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase

"turning a blind eye"....."

> The knowledge must also be the knowledge of the shipowner personally, or his alter ego, or, in the case of a company, its head men or whichever may be considered their alter ego ..... But if the shipowner satisfies the Court that he did not know the facts or did not realise that they rendered the ship unseaworthy, then he ought not to be held privy to it, even though he was negligent in not knowing."

It can readily be seen that s.39(5) has operated within a very limited ambit and has been of little value to London underwriters in dealing with claims where the vessel is unseaworthy due to poor or non-existent maintenance over a period of time. This problem for underwriters has been compounded by the advent of large fleets of vessels which are all owned by separate one ship companies and which have outside management. Superintendence or technical advice for such vessels may well also be provided through yet more separate companies.

There are some recent authorities which may affect these conclusions, if upheld. The first is a decision of Mr Justice Tuckey in Manifest Shipping & Co Ltd v. Uni-Polaris Insurance Co Ltd and La Réunion Européene (1995). The case involved the constructive total loss by fire of the "Star Sea". The Court found a catalogue of items of bad maintenance affecting the vessel's fire fighting abilities, some of which were causative of the ship's inability to fight the fire effectively, others which were not. Thus, for example, it was not possible to effectively seal the engine room

because of long standing defects. The Master was unaware of the need to use the CO_2 system as soon as he realised the fire could not be fought in any other way. There was no evidence that he had ever undergone any fire training (it was not necessary when he was first certificated). The Judge found that his lack of knowledge of when and how the CO_2 system should be used could only be characterised as incompetence, which rendered the vessel unseaworthy.

The assured owner of the "Star Sea" was a one ship Cypriot company. In answering the question of whether the assured was privy to the unseaworthiness the Judge asked - "Who had full discretion or authority in relation to the acts or omissions in question?" He identified the two beneficial owners of the owning company and its sole director as coming within this test. He rejected the idea that the knowledge of a superintendent engineer or port captain could be regarded as the knowledge of the assured. It wasn't enough that they enjoyed considerable autonomy in what they did or didn't do whilst the vessel was at sea.

In considering whether the relevant people had the relevant knowledge concerning the unseaworthiness of the "Star Sea" underwriters argued that two earlier fires in other vessels beneficially owned and managed by them should have made these people conscious of the need to ensure that all their crews knew how to use the CO_2 systems effectively and that the ship's safety equipment was maintained to ensure that this could be done. The fact that this was not the case on "Star Sea", in underwriters' submission, demonstrated at the very least, that these people turned a blind eye to these matters. The Judge interestingly was prepared to follow this line. He found

that there was no system in place for checking that safety equipment was in order and that the response to the earlier casualties was completely inadequate. This inadequate response to casualties on the other vessels was sufficient in his judgment to demonstrate that the assured had the facts about the state of the "Star Sea" staring them in the face but did not want to know, that is they had blind eye knowledge. The reason was not difficult for the Judge to find: money. It was an elderly vessel for which there was a tight budget for repairs. This was spent on the reefer machinery, which was, of course, essential to the ship's revenue earning ability.

The second series of cases turns on a recent decision of the Privy Council in a case that emanated from New Zealand, Meridian Global Funds Management Asia Ltd v. The Securities Commission (1995) which has recently been applied by the Court of Appeal in considering s.18 Marine Insurance Act, 1906 in Group Josi Re v. Walbrook Insurance Co Ltd (1995) and The PCW Syndicates v. the PCW Reinsurers (1995). These cases are concerned with whose acts or knowledge are to be considered as the acts or knowledge of a company. Their purport is that there is "no automatic formula to be applied to answer this sort of question. The answer depends on the circumstances, ie upon the interpretation or construction of the relevant substantive rule". There is therefore no set rule that one is looking for the directing mind or the head men. The implication of Staughton L J's decision in the PCW Syndicates case and of Saville L J's judgment in the Group Josi Re decision is that for the purposes of s.18 Marine Insurance Act the knowledge of an agent may be imputed to a company which was the reassured but there would be no such attribution where, because of the agent's fraud or other breach of duty, it would be contrary to

justice and common sense to draw such inference. It would seem that the same position could apply to s.39(5). This would result in a position that where an individual at a management company is carrying out the functions that a personal ship owner would carry out with regard to maintenance and there is no one at the shipowning company who has that function or oversees it, then the knowledge of that person may be attributed to the shipowning company for the purposes of s.39(5). However what if the management company is charging the shipowner but not doing the maintenance?

(b) **The Inchmaree Clause**

It can be seen from my comments about s.39(5) that it only operates in cases where the assured has actual or blind eye knowledge of the unseaworthiness causing the loss. Negligence is not sufficient so that a loss by a peril insured which is also attributable to unseaworthiness resulting from bad maintenance will be covered where this is due to negligence on the part of the assured in either not knowing the facts or not appreciating that they rendered the vessel unseaworthy.

Under the clause in the 1983 version of the Institute Time Clauses, Hulls the coverage for loss or damage proximately caused by negligence is as follows:-

"6.2 This insurance covers loss of or damage to the subject matter insured caused by

6.3 negligence of Master, Officers, Crew or Pilots

6.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder

provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers."

It is important to note that this coverage and the proviso will not be relevant where the loss or damage is proximately caused by a peril covered within Clause 6.1 of the Clauses even though it would not have happened but for the negligence of the crew. This will not however be the case where the claim is for example one brought about by a failure of maintenance over an extended period leading to engine failure. Examples would be failure to change the lub oil or to repair the lub oil purifiers. There is clearly negligence of the crew in such cases causing the damage. There is likely also to be negligence of the vessel's superintendent. It is most unlikely, as seen above, that s.39(5) will apply and so the question in all these types of cases is whether underwriters can rely on the proviso.

There are no English decisions bearing on the construction of the proviso or on who has to prove what. The practice has however been to view the proviso through s.39(5) spectacles. By this I mean that there is a construction question of whose lack of due diligence is to be attributed to the company which is the Assured, Owners or Managers of the insured ship. This has been answered in practice by limiting the

proviso to the acts or omissions of the alter ego or head men of the companies concerned. There has also been a problem over who are Managers for this purpose. Suppose a ship has a managing company appointed but a separate company is then appointed as "technical advisers". It is these advisers who oversee the maintenance and what needs to be done. It is not normally possible to bring a lack of due diligence of the alter ego of such advisers within the proviso.

The result has been that although for cases of bad maintenance leading to damage it can be said that the proviso to the present Inchmaree Clause will catch those cases which escape s.39(5) because the assured is not privy to the vessel being unseaworthy due to his negligence and will similarly extend to managers there have in practice been few cases of bad maintenance to which it can be applied. In many ways the proviso may be said to encourage those in control who are minded to cut corners not to get involved so as not to acquire the relevant knowledge or to be found at fault.

Class Warranties etc

The lack of any seaworthiness warranty in a time policy under English law has for many years led underwriters to try and fill the gap in other ways. The most common of these has been the imposition of a class maintenance warranty in the policy. Often this was merely the words "warranted class maintained". Such warranties are however strictly construed against underwriters and the past laxity of Classification Societies in giving leeway to owners largely nullified their usefulness. The result has been more onerous wordings, especially for what underwriters have considered as bad risks, complaints to Classification Societies about

standards and in some cases refusal to accept particular Classification Societies whose standards have been viewed as inadequate.

In addition losses of, in particular, bulkers in the late 1980s led to the introduction of the Structural Condition Survey Warranty into some policies. The wording of the clause is as follows:-

> "Warranted The Salvage Association's Structural Condition Survey to be carried out within 30 days from ..... (as required by Underwriters) or at the next port or place at which the vessel's cargo is completely discharged, whichever shall first occur, and all recommendations to be complied with by the date specified by The Salvage Association. Compliance with their recommendations must be certified by The Salvage Association, otherwise this insurance shall not attach, or, if it has already attached, Underwriters shall be discharged from liability from the date specified by The Salvage Association for compliance with their recommendations.
>
> "The survey to be on the Assured's instructions and on their behalf but Underwriters shall be entitled to receive a copy of any recommendations and/or reports direct from The Salvage Association."

<u>The Institute Time Clauses Hulls 1/11/95</u>

It is in essence this same lack of an adequate seaworthiness warranty which underwriters first

argued about in the last century when coupled with changes in the ways that ships are operated which are behind the two changes to the Institute Time Clauses to which I have referred, namely the new Clause 4 Classification and the widening of the proviso to Clause 6.2, the Inchmaree Clause. Neither change should affect the good owner but will put pressure on the bad to amend their ways and introduce proper systems.

The introduction of the Classification Clause will oblige Underwriters and Owners to agree the Vessel's class at the time of placing and places a promissory obligation on Owners to maintain that Class. In addition the Assured, Owners and Managers are obliged to ensure that recommendations, requirements or restrictions imposed by the Vessel's Classification Society which relate to the Vessel's seaworthiness or her maintenance in a seaworthy condition are carried out. There is here a reliance by Underwriters that in the present climate class will do its job. Subject to this point the clause seeks to redress some of the problems highlighted above in the discussion of s.39(5). Compliance with this clause is a duty and issues of whose knowledge or whose acts are those of the relevant company will not arise.

It should perhaps be noted that the Clause is by no means as onerous as some currently in use in London and elsewhere. Owners are also fully cognisant with such clauses through their inclusion in P&I Club Rules.

Turning to the new Clause 6.2 a strongly held view among some underwriters has been that no crew negligence cover at all should be given. This view has been taken account of in a new set of Restricted Perils Clauses. In the Institute Time Clauses - Hulls however the

approach has been to seek to eliminate cover for those damages where there is double negligence, that is the proximate causes of the damage is not only crew negligence so that the claim is brought under that head but also shoreside negligence. Secondly the relevant shoreside negligence is to be at a management level and not to be purely at alter ego level nor at the level of a mere employee such as the clerk or messenger. This is why the words "superintendents or any of their onshore management have been added'.

The hope is that this will prove effective in eliminating cases of bad maintenance over an extended period. By exerting this pressure the cost advantage for bad owners in having no system for ensuring maintenance is carried out and inadequate superintendence, thereby relying on hull insurers to pay for the inevitable repairs that result, will hopefully be removed. The ageing of the world fleet and losses over recent years of, in particular, bulk carriers certainly show the need for action of this kind.

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