"IEVOLI SUN": HISTORY OF THE STANDARD P&I CLUB CLAIM

DLA SOLICITORS

11 February 2004

PREPARED IN CONTEMPLATION OF LITIGATION

On 31 October 2000 the 7,308 dwt chemical tanker MV "IEVOLI SUN" foundered in the English Channel approximately nine miles North West of the Island of Alderney. At the time, she was carrying approximately 4,000 mt of styrene monomer, 1,000 mt of isopropyl alcohol (IPA), 1,000 mt of methyl ethyl ketone (MEK), 50 mt of marine diesel oil and 180 mt of IFO 180 cst fuel oil. Upon sinking, evidence of both fuel oil and styrene leakage was noted during aerial reconnaissance sorties. The MCA, French and Channel Island Authorities responded to the pollution threat. The MCA response included attendance at various meetings with the Owners and representatives from their P&I Club, the Standard Steamship Owner's Protection and Indemnity Association, in Paris together with the French Authorities (who it was agreed would take the lead in the operation under the MANCHEPLAN) as well as attendance in the Channel Islands in order to monitor airborne pollution from the styrene leakage. After protracted negotiations, the Club and Owners eventually agreed to remove all of the pollutants from the wreck, save for a small quantity of MDO which was difficult to reach and was not considered to represent a significant pollution threat. The agreement provided for the presence of and monitoring by the authorities throughout the operation. It was finally completed and the MCA staff stood down on or about 5 June 2001. The total cost incurred by the MCA was **£129,358.52**.

On 7 May 2002, pursuant to the Convention on Limitation of Liability for Maritime Claims 1976 ("LLMC") as enacted by the Merchant Shipping Act 1995, the Owners and bareboat charterers were granted, on application, a decree by the High Court limiting their liability for the incident to **783,063** special drawing rights (SDR's). At the time the Fund was constituted,

a further **71,017.38 SDR's** had accrued in interest making the Fund a total of **854,080.38 SDR's**. At the then current exchange rate this equated to **£746,329.55**. Interest accrues on this sum in court at the rate of 1% above base rate. The total Fund plus accrued interest is, as at today's date calculated to be approximately **£793,000**.

Pursuant to the limitation process, an advertisement was placed in maritime journals in England and France identifying the action and specifying a deadline of the **21 August 2002** for the filing of claims against the Fund for the English publications and **31 August 2002** for the French publications. Five claims were subsequently filed against the Fund within the time period stipulated. The Club, subsequently filed a claim on 30 August 2002. Although out of time for an "English" claimant, on leading Counsel's advice, no point was taken against the Club because it was considered highly unlikely that the Admiralty Registrar would deny the claim on this basis. Taking the point would simply have added to the costs of the action. The late lodging of the claim lends credence to the suggestion that it may have been an afterthought on the part of the Club's lawyers, Messrs Richards Butler.

The six claims eventually lodged are set out in Table I below. This shows the percentage of the Fund which they represent and the consequential recovery from the Fund if the claims prove at the amounts as filed with the court[1]. The States of Alderney, French Government and the MCA all brought claims for pollution response. Mr Rick Mitchelemore, a local fisherman, brought a claim for lost revenues arising out of the pollution impact on his lobster fishing business. Exxon Oil Corporation brought a claim in respect of it's lost cargo and the Standard P&I Club brought a claim in the sum of **£4,959,726.30** under section 154(2) of The Merchant Shipping Act in respect of the costs that had occurred in assisting with the pollution response. This claim represented **61.67%** of the Limitation Fund, giving the Club a potential recovery of **£460,262** against the total Fund of **£746,329**.

Table I - Recoveries against the Fund including the Club's claim

No.	Party	Amount	Exchange Rate	£	%	Amount	Interest	Total
1	French State	€ 3,088,788.37	0.69211	£2,137,781.32	26.58%	£198,385.89	£11,023.33	£209,409.22
2	**M.C.A.**	**£129,358.52**	**1**	**£129,358.52**	**1.61%**	**£12,004.46**	**£667.03**	**£12,671.49**
3	State of Alderney	£88,299.51	1	£88,299.51	1.10%	£8,194.19	£455.31	£8,649.50
4	Exxon	$1,134,574.91	0.54818	£621,951.27	7.73%	£57,717.02	£3,207.05	£60,924.07
5	Mr Mitchelmore	£105,236.00	1	£105,236.00	1.31%	£9,765.89	£542.64	£10,308.53
6	Club	£4,959,726.30	1	£4,959,726.30	61.67%	£460,262.11	£25,574.51	£485,836.61
				£8,042,352.92	**100.00%**	**£746,329.55**	**£41,469.87**	**£787,799.42**

[1] *Table I is calculated on the basis of interest accrued up to and including 1 December 2003*

If the Club's claim is removed, the impact on the smaller claimants is significant. As Table II below illustrates, the MCA's claim would increase by **£20,387** as a consequence.

Table II - Recoveries against the Fund excluding the Club's claim

No.	Party	Amount	Exchange Rate	£	%	Amount	Interest	Total
1	French State	€ 3,088,788.37	0.69211	£2,137,781.32	69.349%	£517,574.64	£28,759.08	£546,333.72
2	**M.C.A.**	**£129,358.52**	**1**	**£129,358.52**	**4.196%**	**£31,318.77**	**£1,740.23**	**£33,059.00**
3	State of Alderney	£88,299.51	1	£88,299.51	2.864%	£21,378.05	£1,187.87	£22,565.92
4	Exxon	$1,134,574.91	0.54818	£621,951.27	20.176%	£150,579.58	£8,366.97	£158,946.55
5	Mr Mitchelmore	£105,236.00	1	£105,236.00	3.414%	£25,478.51	£1,415.72	£26,894.23
6	Club	£0.00	1	£0.00	0.000%	£0.00	£0.00	£0.00
				£3,082,626.62	**100.00%**	**£746,329.55**	**£41,469.87**	**£787,799.42**

The initial reaction upon being notified of the Club's claim was one of considerable surprise. Neither DLA nor Counsel could identify any precedent where a Club (which is after all an owner's mutual insurer) had claimed against a limitation fund which had been constituted on behalf of it's member. To do so would run contrary to the LLMC which stipulates that an owner cannot claim against it's own fund.[2] The claim also ran contrary to the principle of "*polluter pays*". If the Club succeeded the end result would be "*polluter recovers at the expense of legitimate claimants*". The MCA was in the vanguard of those challenging the Club's claim and was, eventually, able to persuade the French Government to contest it. Significant information sharing was involved in this process.

Given the novelty of the point[3] and the general importance of the principle to the MCA for future section 154 claims which may involve limitation funds, it was decided that it was appropriate to appoint a Queen's Counsel to argue MCA's case. Mr Simon Rainey Q.C. of 4 Essex Court, Temple was instructed to settle the MCA's Defence against the Club's claim. A decision was made not to challenge the other claims either for political reasons or because the potential benefit of doing so would be outweighed by the cost.

[2] *Save in the event that it has paid an extant claim against the fund, in which case the owner can exercise a subrogated right against the fund (See Article 12(2). This was not the situation in this case.*

[3] *Whichever way it had been decided, this case would have made new law had it proceeded to judgment.*

The Club's claim was formally challenged by the MCA and others by way of Defence on the following grounds:

1. The Club incurred and paid the costs on behalf of the Owners and on the basis that an owner is not entitled to claim against his own Limitation Fund, the claim of the Standard Club must fail; and

2. If the costs were paid by the Standard Club notwithstanding the pay to be paid clause in their contract with the Owners and the Club was entitled to recover those costs from the Owners by way of a recovery against the Fund, then upon the recovery by the Club of any sum from the Fund, the Owners would have paid the Standard Club or otherwise have discharged their obligation to pay the Standard Club. In that event, the pay to be paid clause condition would be satisfied and the Owners would then be entitled to reimbursement of the sums paid out to the Club, such sums to return to the Limitation Fund and any claim by the Club to retain the same would fail for circuity; and

3. Finally, if, which was denied, the Club were entitled to claim against the Limitation Fund, the claim was defended on the basis that the vast majority of the costs incurred were in respect of the removal of styrene, rather than IFO (as a persistent hydrocarbon) and accordingly were not recoverable under section 154(1) or 154(2) of The Merchant Shipping Act 1995.

It was also argued that any claim for the costs incurred in respect of the cargo onboard the vessel were claims in respect of the raising, removal, destruction or the rendering harmless of a thing that is or has been onboard a ship "*which is sunk, wrecked, stranded or abandoned*" as defined by article 2(1)(d) of the LLMC. Such claims are presently not subject to limitation proceedings pursuant to paragraph 3(1) of schedule 7, Part II of The Merchant Shipping Act 1995 and fall to be pursued, if at all, against the Owners and not against the Limitation Fund.

In response to these Defences, the Club denied that they were agents of the Owners and that the costs incurred were incurred by the Owners themselves through the agency of the Club. The other defences were denied without further detailed particularisation. The Club and owners also challenged the claim of the MCA and others on the basis that an agreement had been reached on the payment for the operation and that the MCA/French were now estopped from claiming further sums. The MCA's claim was also challenged on the basis that there was no pollution after 29 November 2000 and, accordingly, no claim under section 154 was recoverable after that date.

Following the lodging of Replies to the Defences, a CMC was convened to be heard before the Admiralty Registrar. Prior to the hearing of the CMC, it was necessary to draft and agree with Counsel a List of Issues, a Case Memorandum and an Information Sheet and to peruse the Information Sheets lodged on behalf of the other parties. At the CMC the pre-trial timetable was set. For convenience sake, it was agreed to split the matter in two clearly defined phases, the first being consideration of whether the Club were entitled to bring their claim against the Fund and second being an analysis of various claims, focussing first on whether the MCA and others were estopped from bringing a claim against the claimant shipowners and had waived the right of recovery and secondly whether the claims fell within section 154(2) of The Merchant Shipping Act 1995. This procedure was adopted because it was considered likely that, if a ruling was made in respect of the first matter, the second would probably settle. At the CMC, the French authorities also reserved their right to bring their claim in France, outside the limitation fund. This was also reflected in the Order.

The Order provided for standard disclosure to be provided by the **31 July 2003**, with inspection seven days thereafter. In the event, as a consequence of absences during the holiday period, it was agreed by consent that Lists of Documents would be exchanged in **September 2003**. A trial date for "Phase 1" was also fixed for **19 January 2004**.

The disclosure exercise involved a detailed examination of all the MCA's files on the matter. There was concern that disclosure of papers relevant to "Phase 2" of the matter could prejudice the prospect of settlement in "Phase 1" (in particular, we were sensitive to comments made about the jurisdiction of the waters concerned which may have ruled out a section 154 claim completely). Accordingly, every document had to be examined with care. The disclosure process also involved a trip to Alderney to examine the files of Mr Mike Harrisson of Carey Olsen who was instructed by the States of Alderney. Whilst there, the opportunity was taken to take a statement from him as he had attended all the meetings at which the agreement with owners to undertake the discharge of the pollutants had been negotiated. What was said at these meetings was therefore critical to the rebuttal of the Club's defence to the MCA claim which relied on the estoppel argument.

The MCA's List of Documents was duly served and a request made to inspect the Club's documents made shortly thereafter. This request was, however, ignored. By way of explanation, the Club's lawyers stated, *without prejudice*, that there was "*something in the pipeline*" and that they expected settlement to be reached with the French Government shortly. This would result in the Club's claim being withdrawn together with the owner's and Club's objections to the other parties' claims. Rather than incur further costs which may not have been 100% recoverable, it was decided to await the results of the negotiations. The Club

and Owner's solicitors, Richards Butler were, however, pressed on a weekly basis for information as to substantive developments on settlement. We were constantly advised that agreement had been reached orally and that the Owners simply awaited a signed confirmation from the French Government. The London lawyers instructed by the French appeared to have been cut out of the loop and all parties were without information on developments, save for advice that settlement would be concluded "*shortly*" and that, the Club and Owners would then withdraw their claim and their objections to others. Richards Butler were put on notice that the MCA was reserving it's position on costs should their continued delay place the trial date at risk.

After numerous further reminders, and no substantive developments, DLA took out an Application calling for the service of the List of Documents to be served by Friday 12 December 2003. In response, Richards Butler wrote by return advising that the Club would be withdrawing their claim against the Fund and would not be contesting the remaining claims. They requested that we withdraw the application which, given that it would serve no useful purpose, we agreed to do. A draft Consent Order was subsequently circulated. It was hoped that the terms of this Order could be agreed in short order, however, a dispute over the basis of the appropriate costs order has meant that the terms of the Order have still to be finalised.

It is hoped that payment out of the MCA's proportion of the Fund will be achieved within the next 2 weeks. Out of a total expenditure of **£129,358.52,** the expected recovery is approximately **£33,000**, or **25.5%** of the loss. This recovery has taken in excess of 2 ½ years to recover at a cost of over **£75,000** in legal expenses. The principal reason for the delay has been the behaviour of the Owners and Club in bringing a claim which it appears that they had no real intention of pursuing and defending the claims of others, seemingly simply on the basis that we had had the temerity to challenge theirs. Latterly, it appeared that this stance was only being pursued to act as a bargaining chip to persuade the French Authorities to drop their claim in France. The Club had no intention of serving it's documents, nor pursuing the MCA's disclosure which would have been necessary in order to prevail with their various defences. Ultimately, we are confident that a significant contribution toward the MCA's costs will be recovered from the Owners and Club (hopefully in excess of 60%).

How can such a situation be avoided in the future? The bottom line is that, whilst Section 154 claims are subject to limitation, in the absence of the HNS convention being in force and applying, such claims will be at the mercy of any party who wishes to challenge it either on the merits or on quantum, or who wishes, perhaps as a bargaining tool to lodge a claim of

doubtful merit. In these situations, the costs incurred in recovering the contributions due to the MCA may frequently be disproportionate.

The percentage of claims recovered will undoubtedly improve when the 1996 Protocol to the LLMC 1976 comes into force. By way of illustration, had the Protocol applied to the "IEVOLI SUN" casualty, the MCA's recovery would have doubled to in excess of **£62,000** plus interest. Obviously, however, if the Club took the same stance, the time and expense of recovering such an amount is unlikely to differ from the present circumstance.

The implementation of the HNS Convention would, in the particular circumstances of the "IEVOLI SUN" casualty, have resulted in a 100% payout for the all the claimants (even if the Club's claim had prevailed). The first "tier" of compensation represented by the HNS Owner's limitation fund is for 10,000,000 Units of Account (SDR's) for a vessel up to 2,000 MT and another 1,500 SDR's for every additional MT up to 50,000 MT. At today's exchange rates, the HNS fund for the "IEVOLI SUN" would have amounted to approximately **£10,500,000**. Undoubtedly, payment out of the amounts due to the claimants would have been faster had the HNS applied to the casualty, because there would have been no need to contest any of the claims in order to maximise the MCA's recovery.

Unfortunately, however, until the implementation of HNS, the spectre of long delays in the field of cost recovery at disproportionate expense remains.

Alex Davis
DLA
20 February 2004