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IUA MARKET BRIEFING

with the Association of Average Adjusters

"Still Totally Lost"

Keith Jones – Fellow of the AAA
Richard Cornah – Fellow of the AAA

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The passage plan:

Keith Jones will help us to find our bearings with some comforting certainties.

Richard Cornah will then enter more unchartered waters, navigating with the help of two recent cases.

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KNOWN KNOWNS

- Where there is a CTL the assured can treat the loss as partial or abandon the vessel to the insurer and treat it as an ATL (MIA61).

- Where the assured opts for a CTL he **must** give notice of abandonment (NOA) to insurers. If he does not the loss can only be treated as partial (MIA62).

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KNOWN KNOWNS

There is a CTL when:

- The vessel is so damaged by insured perils that the cost of repairing the damage would exceed the value of the ship when repaired (MIA60).

- When the cost of recovery and / or repair of the vessel relating to a single accident exceeds the insured value (ITCH 1.10.83).

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KNOWN KNOWNS

- General average and salvage charges are partial losses subject to the overall limit of the insured value (MIA).

- ITCH Clause 11.1 refers to salvage, salvage charges and / or G.A. The insured value limit applies so they cannot be claimed in an addition to a CTL.

BUT……

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KNOWN KNOWNS

BUT.....

- GA / Salvage attaching to the vessel can be deducted from the proceeds of sale of that vessel before the proceeds are passed to the insurer after payment of a CTL.

- Clause 13.5 says H&M will pay a **proportion** of expenses (in excess of proceeds) reasonably incurred in saving or attempting to save the vessel and other property.

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KNOWN KNOWNS

Sue & Labour (MIA 78 version)

- Supplementary agreement so S&L expenses can be paid in addition to a CTL or ATL.
- GA and salvage charges are not recoverable as S&L.
- Potential loss must be covered by the policy.
- Assured has a duty to take reasonable measures to avert or minimise the loss.

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KNOWN KNOWNS

Sue & Labour (ITCH version)

- Clause 13.1 and 13.2 : as MIA.
- Clause 13.4 : introduces under-insurance to be applied.
- Clause 13.5 : big difference : pays a proportion of GA type expenses as if they were S&L.

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POSSIBLE UNKNOWNS

MIA60 also says:

"In estimating the cost of repairs, no deduction is to be made in respect of general average to those repairs payable by other interests, but account is to be taken of the expense of ***future*** *salvage operations and of any* ***future*** *general average contributions to which the ship would be liable if repaired"*

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POSSIBLE UNKNOWNS

"Future" - to casualty or NOA?

If there is still any doubt it provides an incentive to tender NOA before starting salvage operations.

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KNOWN UNKNOWNS

- When does the right to recover S&L expenses stop?

- If the cut-off point is reached, and costs continued to be incurred regarding the vessel, who pays?

- If there is cargo involved and ITCH Clause 13.5 therefore applies, how do you decide the proportion of expenses that attach to the ship?

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KNOWN UNKNOWNS

- What expenses can you recover as S&L:
  - Only "extra-ordinary" ones?
  - Operational costs (crew wages?)
  - Management costs and overheads?
  - Legal costs?

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DISCLAIMER

- Cases may be subject to Appeal or further related actions

- Comments based on contents of judgements

- Possible effects of the “dead zone”

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"B ATLANTIC" (2014 EWHC 4133)

August 2007	While loading coal in Venezuela, drugs were found attached to the hull. Vessel detained and crew arrested.
October 2007	Master sent for trial; detention of vessel confirmed.
June 2008	Notice of Abandonment (NOA) + writ clause.
November 2008	Second NOA.
August 2010	Master convicted and court ordered final confiscation of vessel.

CTL on basis of 6 month detainment clause (April 2008).

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"B ATLANTIC"

"NOA declined, underwriters agree to place the assured in the same position as if a writ has been issued at today's date."

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"B ATLANTIC"

Sue and labour expenses (US$5.8m)

- Legal expenses attempting to release the vessel and crew.

- Crew wages and other vessel running expenses.

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"B ATLANTIC"

Insurers' primary objection:

Right to recover S&L expenses ceased on 18 June 2008 (first NOA) when insurers agreed to put owners in the same position as it a writ had been issued on that date.

Position crystallised, no ademption of loss (Pollurrian v. Young, 1915) from NOA so nothing to S&L for.

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Arnould: *"...it is common practice when a notice of abandonment is given for the insurers to agree a writ or claim form as having been issued. In such a case, assuming the claim for constructive total loss is ultimately admitted or succeeds at trial, it would seem to follow from the reasoning of Rix J in Kuwait Airways that any expenses incurred after the deemed date of commencement of the action will not be recoverable as sue and labour."*

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Kuwait Airways v Kuwait Insurance (1995)

Non-marine case, but policy contained a Marine S&L Clause.

Choice between:

a) Date claim for total loss made (no NOA involved).

b) Date legal action started.

Rix J. rejected (a)

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"B ATLANTIC" (2014 EWHC 4133)

Flaux J.

"The commercial reality is that, in many cases at the time of the writ agreement, the vessel is still in the grip of the relevant insured peril and it is in the interests of both parties that expense continues to be incurred in mitigating the loss. The writ agreement protects the insured from prejudice in the event of change of circumstances and obviates the need to issue proceedings at the time a notice of abandonment is rejected but in my judgement, it does not have the wider effect for which insurers contend. The position is different once proceedings are actually issued: the dispute is now regulated by the Civil Procedure Rules and in those circumstances it may well be that Rix J is right that the entitlement to sue and labour ceases on issue of proceedings. However, in my judgement, it does not cease at the earlier stage of a writ agreement."

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"B ATLANTIC"

Sue and Labour cut-off:

"Agreed" writ date	-	NO
Actual writ date	-	YES

Quantum:

Legal costs?

Manning / technical management?

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"B ATLANTIC"

Legal costs.

Insurers argued not S&L because incurred for a dual purpose. i.e. release of vessel and defence of crew.

Flaux J disagreed on the basis of:

- The authority of Royal Boskalis v. Mountain (1997)
- The facts, because release of crew would have facilitated release of the vessel.

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"B ATLANTIC"

Manning / Management costs.

- Held that:

  Clause 16 Wages exclusion

  Clause 17 Agency exclusion

  are provisions dealing with cases of partial loss or particular average and <u>not</u> the supplementary agreement regarding S&L

  (Clause 16:

  "No claim shall be allowed other than in general average.....")

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"B ATLANTIC"

Manning costs

Vessel was under charter until April 2009 when declared frustrated. How could wages be allowed as S&L if Assured was under a contractual obligation to man the vessel?

Held : cost of full manning allowed (because that was necessary to have vessel ready to depart if suddenly released), after deducting cost of a skeleton crew.

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"BRILLANTE VIRTUOSO" (2015 EWHC 42)

- 2011 Voyage Ukraine to Qingdao with fuel oil cargo.
- During call at Aden to collect guards, attacked by pirates, ordered to sail to Somalia.
- Explosion and fire in engine room, pirates left.
- Rescued by US navy.

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"BRILLANTE VIRTUOSO"

6 July / 7 October 2011	LOF salvage operations, extinguishing fire, de-watering engine room, tow to Khor Fakkan
7 October / 15 March 2012	Two tugs on standby until sold for scrap
7 December 2011	NOA tendered, declined.
8 February 2012	Claim form (writ) issued.

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"BRILLANTE VIRTUOSO"

"NOA declined. In rejecting this NOA, underwriters agree that the question of whether the vessel is a CTL shall be determined as of this date and that no account shall be taken of any subsequent ademption of loss."

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"BRILLANTE VIRTUOSO"

- Detailed analysis of costs
- "Prudent uninsured", "large margin"
- Claim for LOH on unrepaired damage basis?
- Did owners lose right to claim a CTL by selling vessel?

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"BRILLANTE VIRTUOSO"

Sue and labour claim.

Ship's ppn of salvage, say US$2.3m.

Standby tugs at Khor Fakkan

from termination of LOF

(7 October 2011) to sale (March 2012) – US$7.5m

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"BRILLANTE VIRTUOSO"

Sue and labour claim

- Was the peril still operating after termination of LOF on 7 October?

- Was there a cut-off point for S&L when:
  - NOA was issued (7 December 2011)
  - Claim form was issued (8 February 2012)

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"BRILLANTE VIRTUOSO"

Continuation of peril

Leyland Shipping v. Norwich Union (1918) - (The "Ikaria")

Lohre v. Aitchison (1878) – "very probably"

Integrated Containers v. British Traders (1984)

"the assured should be entitled to recover all extraordinary expenses reasonably incurred by him where he can demonstrate that a prudent assured person, mindful of an obligation to prevent a loss, would incur expenses of an unusual kind."

(Eveleigh L. J)

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"BRILLANTE VIRTUOSO"

Was there a cut-off point when:

NOA given 7/12/11 – No, on same basis as the "B Atlantic".

Proceedings commenced – Yes, right to claim for S&L ceased on 8/2/12. Once claim form is served parties are governed by Civil Procedure Rules rather than the policy.

Therefore no S&L expenses allowed after 8/2/12.

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TIMING IS NOT EVERYTHING

Whenever incurred, allowable S&L expenses must be:

- Reasonably incurred to avert or minimise a loss that would fall on underwriters.

Example from the "Brillante Virtuoso":-

Additional standby tug costs due to delay in selling the vessel while Assured gathered evidence - not for benefit of underwriters and not S&L.

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THREE PHASES

1) Attempting to prevent a CTL = S&L

2) Attempting to preserve value = ?

3) Wreck removal = Owners/P&I

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ATTEMPTING TO PRESERVE VALUE

Assuming there is now nothing to be done to avert a CTL, are expenses incurred to preserve the remains of the ship:

- S&L expenses?

- Allowable on the basis that the Owners / Master is acting as underwriters' Agent?

- Something else?

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ATTEMPTING TO PRESERVE VALUE

In the "B Atlantic":-

"Mr Schaff QC submitted that, as at 18 June 2008, the date of the first notice of abandonment, both parties had an interest in expense being incurred to avoid or minimise the loss, whether expenses of maintaining and manning the vessel of the expense or continuing efforts to procure her release. The owners had an interest in mitigating the loss in case their constructive total loss claim proved invalid, but the insurers equally had such an interest in mitigating the loss in the event that claim was upheld since there would be obvious benefit to them if the vessel was eventually released from detainment and was in a seaworthy condition."

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ATTEMPTING TO PRESERVE VALUE

Flaux J endorsed this argument adding:

"That interest of the insurers was normally reflected in an express requirement in the writ clause or agreement that the insured carry on acting as a prudent uninsured and even where that requirement was not express (as it was in the responses by the insurers in this case to the second notice of abandonment) Mr Schaff QC submitted it was necessarily implicit because that is what the insurers would expect of the insured."

(By reason of the detention clause (subject to coverage issues) the vessel was already a CTL by April 2008.)

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ATTEMPTING TO PRESERVE VALUE

In the "Brillante Virtuoso" Flaux J said:-

"As for the insurers' submission that the employment of the standby tugs was only for the benefit of the owners, not the benefit of the insurers, that seems to me to be a false point. On the basis that the vessel remained in the grip of the insured peril, some further incident after the redelivery by the salvors, such as the vessel running aground, could have led to a breach of her structural integrity which could either lead to her becoming an actual total loss or sustaining even further structural damage which would have diminished her residual value even in a damaged condition or could have exposed the insurers to a larger claim. Either way, the cost of the standby tugs and the associated agency expenses were incurred not only for the benefit of the owners, but for the benefit of the insurers, so that they should be recoverable as sue and labour expenses."

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ATTEMPTING TO PRESERVE VALUE

- These cases support the view that S&L can extend to preserving residual value in the vessel if this is to the benefit of insurers.

- Such expenses can be dealt with as a charge on proceeds.

- S&L aspect is important if the measures are unsuccessful.

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"MORE QUESTIONS THAN ANSWERS?"

What can qualify as a S&L expense?

Any expense that is reasonably incurred to avert or minimise a loss that would fall on underwriters.

Nothing excluded per se

- Wages/running costs } Detention cases
- Legal costs } only?

But there must be potential benefit to insurers.

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"MORE QUESTIONS THAN ANSWERS?"

When can S&L expense be incurred?

- Prior to and after NOA.
- Not after actual legal action has commenced (i.e. writ/claim from issued).
- Once a 'dead duck' the Assured can still S&L to safeguard residual value.

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REMAINING UNKNOWNS

- The transition point between safeguarding residual value and a wreck removal operation – underwriters need an exit strategy.

- On what basis are underwriters entitled to net proceeds if they do not exercise right to title?

  - Assumed in both these cases.

  - Practioners would say it is simply a case of avoiding over-indemnity.

  - The “W.D. Fairway” says otherwise.

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