MARINE INSURANCE COVERAGE FOR MACHINERY DAMAGE CLAIMS

Mariner Life October 2005

While the vast majority of marine insurance claims by vessel owners are settled without difficulty, more often than not when there are problems, those problems arise out of machinery damage claims. This article will provide an overview of the nature of marine insurance coverage provided for machinery damage and discuss briefly some of the difficulties faced by a vessel owner in establishing a claim arising from such damage.

INSURANCE LIMITATIONS AND THE LAW

The scope of marine insurance coverage available for machinery claims is governed by both the *Marine Insurance Act* of Canada and the contract of marine insurance entered into between the underwriter and vessel owner. With respect to the *Marine Insurance Act*, s. 53(2) of the *Act* excludes liability for "any loss or damage to machinery not proximately caused by maritime perils" unless the policy otherwise provides. Accordingly, under this section, an underwriter will not be liable to pay for damage to machinery unless either: (a) the machinery damage was proximately caused by a maritime peril or (b) the insurance policy otherwise provides for coverage.

With respect to item (b) above, fortunately most marine insurance policies extend coverage for damage to machinery in a clause that is often referred to as the "Inchmaree" clause after the name of the ship whose rejected insurance claim led to the creation of this provision. Under this clause, "insurance includes loss of or damage to the Vessel directly caused by . . . breakage of shafts or any latent defect in the machinery or hull . . . negligence of master . . .officers . . . crew . . . repairers . . . provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers". Some policies of insurance issued to fish boats in British Columbia exclude Inchmaree coverage for negligence of repairers.

Since the extended coverage included in the Inchmaree clause contains the proviso that the damage must not have resulted from want of due diligence by the assured, before

advancing a claim under the Inchmaree clause the vessel owner should ensure that the loss is not covered under the maritime perils clause. If it cannot be established that the machinery damage was caused by a maritime peril, then one must establish that the damage was caused by one of the named perils in the Inchmaree clause such as a shaft breakage, negligence of a repairer, negligence of crew or a latent defect. Since the underwriters can deny under this clause for want of due diligence, it is useful to support such a claim with any available evidence that due diligence was exercised such as repair and maintenance records.

Another limitation of making a claim under the Inchmaree clause is that the cost of replacing the defective part itself is not covered. However, this limitation has been mitigated for some low risk vessel owners who have been able to obtain extended coverage under a liner negligence clause, which clause covers the cost of repairing the defective item itself so long as it is not discovered during an inspection.

THE QUEEN OF OAK BAY – AN INSURANCE STUDY

A number of these issues can be illustrated by example of the widely publicized grounding of the BC Ferry, "Queen of Oak Bay" on June 30, 2005. According to a press release issued by BC Ferry Services Inc., a control arm connecting the speed governor to the engine fuel rack disconnected when a nut came off the attachment bolt. A cotter pin that is normally in place to prevent the nut from coming off the bolt was missing. As a result, the propulsion system over speeded and was eventually shut down by a protective devise known as an "over-speed trip". As a result of this propulsion system shut down, the ferry collided with a marina in Horseshoe Bay and grounded. In addition to the extensive damage to the marina and vessels moored at the marina, the ferry suffered machinery damage including a damaged propeller.

With respect to the damaged propeller, since the grounding of a ship is clearly a marine peril, BC Ferries would be able to make an insurance claim for this damage without relying upon the Inchmaree clause. Similarly, if the gearbox had been damaged as a

result of the propeller touching the bottom, this damage would also be covered without resort to the Inchmaree clause.

On the other hand, if the main engine of the ferry had been damaged as a result of over-speeding, this damage would not be considered a peril of the sea. Therefore in order to claim for the costs of repairing the engine, BC Ferries would have to make a claim under the Inchmaree clause. Based upon the information contained in the BC Ferryies press release, this claim would likely be made under the repairer's negligence part of the clause. Depending upon the circumstances, under this section of the Inchmaree clause the underwriter might argue that BC Ferries did not exercise due diligence in inspecting the control arm linkage after the completion of the repair job. If the facts had been different and a broken cotter pin had been found and a metallurgical examination of the broken parts revealed that there had been a pre-existing crack in the metal of the pin, BC Ferries might also have made a claim under the latent defect section of the Inchmaree clause. In response, the underwriter might argue that BC Ferries did not exercise due diligence in inspecting the linkage prior to putting the vessel back into service to ensure that the cotter pin was not defective. Although there has been no indication that any of the officers or crew of the "Queen of Oak Bay" were negligent, if in fact that were the case, BC Ferries could still make a claim under the negligence of crew portion of the Inchmaree clause. Depending upon the circumstances, the underwriters might argue in response that BC Ferries did not exercise due diligence in the way it trained its engineering staff to both avoid and respond to this type of problem.

Assuming that BC Ferries is able to establish that it exercised due diligence in inspecting the linkage and the claim is to be paid, the next issue is what losses would be covered. Unless BC Ferries has a liner negligence type clause, the cost of repairing the defective linkage would not be covered.

Unfortunately, the question of what type of defect is latent as opposed to ordinary wear and tear is not always easy to resolve. Similarly, it is not uncommon for vessel owners and underwriters to have a different view of what amounts to the proper amount of due

diligence when it comes to inspecting one's vessel for defects or training one's crew. In order to resolve these issues it is not uncommon for both the vessel owner and the underwriters to retain the services of marine surveyors, marine engineers and metallurgists. One source of contention in the fishing industry is created by the part of the Inchmaree clause that only excludes liability for want of diligence on the part of the owner or assured, but not for negligence of the master. Since many small commercial marine vessels are owner operated, a common question is whether any lack of diligence was conduct by the owner/master in his or her capacity as owner or as master. For example, in *Holm v. Underwriters Through T.W. Rice & Co. Inc.* (1981), 124 D.L.R. (3d) 463, an owner/master negligently removed a hose from an exhaust port of his vessel and left it at a dock for two weeks without inspecting it. After the vessel sank, the British Columbia Supreme Court rejected the owner's insurance claim on the grounds that he was acting in the capacity of owner of the vessel, not master, when he left the boat at the dock for two weeks without inspecting it.

MAINTAIN YOUR VESSEL – MAINTAIN YOUR RECORDS

As can be seen by the foregoing, even when you have a valid policy of insurance, it does not necessarily follow that you are going to be covered for every machinery damage loss. Particularly in the case of losses that do not involve damage caused by maritime perils such as groundings and collisions, you will be in a much stronger position to establish a claim if you can demonstrate that you exercised due diligence by regularly inspecting your vessel and its equipment for defects and by properly training your crew. In this regard, well kept records of repairs, maintenance and crew training can be invaluable.

Brad Caldwell *is lawyer with the firm of Caldwell & Co. in Vancouver, B.C. His practice is primarily devoted to fisheries, maritime and insurance matters. He can be contacted at 604 689 8894. Previous articles written by Mr. Caldwell can be viewed on his web page at http//admiraltylaw.com/fisheries/bradcv.htm*