

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
SEA CONTAINERS LTD., <i>et al.</i> , <sup>1</sup>	:	Case No. 06-11156(KJC)
	:	(Jointly Administered)
	:	
Debtors.	:	Objection Deadline: October 31, 2008
	:	Hearing Date: December 9, 2008 at 1:30 p.m.

**MOTION OF HEYSHAM PORT LIMITED  
TO ALLOW LATE-FILED CLAIM**

Heysham Port Limited ("Heysham"), a creditor and party-in-interest in these chapter 11 cases ("Cases"), hereby submits this Motion seeking entry of an order allowing Heysham to file its proof of claim after expiration of the general bar date entered in these Cases. In support of this Motion, Heysham represents as follows:

**Jurisdiction and Venue**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O).
2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for the relief requested herein are Rules 3003(c)(3) and 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules").

**Background**

4. Sea Containers Ltd. ("SCL") is a Bermuda corporation with U.K. operations and is the ultimate parent of a group of affiliated companies that includes the other

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<sup>1</sup> The Debtors in these cases are Sea Containers Caribbean Inc., Sea Containers Ltd. and Sea Containers Services Ltd.

Debtors, as well as certain foreign and U.S. non-debtor subsidiaries (collectively, the “Companies”).

5. The Companies have historically operated primarily as providers of marine container ships and cargo containers to ocean carriers and shippers worldwide.

6. Prior to the filing of these Cases, the Companies began to exit from certain underperforming and/or non-core businesses.

#### **The Heysham Acquisition**

7. As of February 7, 2001, SCL owned, directly or indirectly, all of the outstanding and issued capital shares of Orient-Express Holdings 3 Limited (“Orient Express”), a company then registered in Hong Kong, which itself owned all of the then-issued and outstanding capital shares of Heysham.

8. On February 7, 2001, Merlin Ports Limited, a company registered in England (“Merlin Ports”), Orient-Express, SCL and The Mersey Docks and Harbour Company, a company incorporated by statute and registered in England (“MDHC”), entered into a Purchase Agreement (the “Purchase Agreement”), pursuant to which Merlin Ports purchased and Orient-Express sold, all of the issued and outstanding capital stock of Heysham.

#### **The Bankruptcy Cases**

9. On October 15, 2006, SCL and certain of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). On October 17, 2006, this Court entered an Order directing the joint administration and procedural consolidation of the Cases.

10. The Debtors continue in possession of their respective properties and have continued to operate and maintain their businesses as debtors-in-possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

**The Bar Dates**

11. On May 18, 2007, the Bankruptcy Court entered an Order fixing July 16, 2007 as the general bar date (the “General Bar Date”) (with certain exceptions) for filing proofs of claim in these Cases (Docket No. 653).

12. On July 9, 2008, the Bankruptcy Court entered an Order fixing August 25, 2008 as a supplemental bar date (the “Supplemental Bar Date”) for claims of current and former employees of the Debtors (Docket No. 1985).

**The Debtors’ Plan**

13. On September 16, 2008, the Debtors filed a First Amended Joint Chapter 11 Plan (Docket No. 2168) (the “Plan”) and a Disclosure Statement for the Debtors First Amended Joint Plan pursuant to Chapter 11 of the United States Bankruptcy Code (Docket No. 2169) (the “Disclosure Statement”). The Plan has not yet been confirmed.

**The Bermuda Proceeding And The Bermuda Scheme Bar Date**

14. On October 16, 2006, SCL, in furtherance of its proposed reorganization, obtained an Order from the Supreme Court of Bermuda for the appointment of Joint Provisional Liquidators.

15. On September 18, 2008, SCL filed in these Cases a Notice of its Proposal in Relation to a Scheme of Arrangement (Pursuant to Section 99 of the Companies Act of 1981 of Bermuda) Between Sea Containers Ltd. and Its Scheme Creditors (the “Bermuda Scheme”) (Docket No. 2181).

16. Pursuant to the proposed Bermuda Scheme, creditors of SCL may, under certain circumstances, be allowed to submit claims against SCL up through December 22, 2008 (the “Bermuda Scheme Bar Date”), notwithstanding the creditors’ failure to file a claim in these Cases on or prior to the General Bar Date.

**The Pension Deficiency Claim**

17. Prior to the Petition Date, the Companies funded contributions to various pension schemes on behalf of their employees, including the Sea Container 1990 Pension Scheme (the “1990 Scheme”).

18. The 1990 Scheme is regulated by U.K. law, in particular the Pensions Act of 1995 (the “1995 Act”) and the Pensions Act of 2004 (the “2004 Act”), and is subject to regulation and oversight by the U.K. Pensions Regulator (“TPR”).

19. Pursuant to § 75 of the 1995 Act, an employer participating in a pension scheme incurs a statutory debt to the trustee of the scheme on the occurrence of certain triggering events if the value of the assets of the scheme at the date of the triggering event is less than the amount of liabilities of the scheme.

20. “Triggering events” include, in the case of a multiemployer scheme, withdrawal of participation in the scheme by an employer. *See, e.g.*, § 75 of the 1995 Act.

21. By letter dated May 28, 2008 (the “Deficiency Notice”), the trustees of the 1990 Pension Scheme notified Heysham that a statutory debt on the employer is due from Heysham to the trustees under Section 75 of the Pensions Act of 1995 and the Occupational Pension Schemes (Deficiency on Winding Up, etc.) Regulation 1996, as a result of Heysham ceasing to be a participating employer as of May 31, 2002, as a result of the Purchase Agreement pursuant to which Merlin Ports purchased the stock of Heysham from Orient Express (the “Deficiency Claim”).

22. The Deficiency Notice also enclosed an Actuarial Certificate pursuant to which the amount of scheme liabilities claimed due from Heysham was calculated and asserted of £2,148,000 (which amount translates to US \$4,250,204 as of May 28, 2008, the date of the Deficiency Notice).

23. On September 18, 2008, a supplemental Actuarial Certificate was issued reducing the principal amount of the Deficiency Claim against Heysham to £1,692,000 (which amount translates to US \$3,347,926.50 as of May 28, 2008).

24. On or about September 23, 2008, Trustees of the 1990 Scheme filed Particulars of Claims initiating a proceeding against Heysham, before the High Court of Justice, Chancery Division (Claim No. HC08CO 1392), seeking recovery of £1,692,000, plus interest of £563,100.11 through May 27, 2008, and interest continuing thereafter, and costs. Accordingly, the aggregate amount of the Deficiency Claim as of May 28, 2008 was £2,255,100 (US \$4,462,121.40), and the Trustee claim entitlement to continuing interest on that amount.

25. Heysham was not aware of, and had no notice of, the Deficiency Claim prior to the receipt of the Deficiency Notice on or about May 28, 2008, after the General Bar Date in these Cases.

### **The Indemnification Claim**

26. Under Schedule 5, Clause 3.1(E) of the Purchase Agreement, Orient-Express agreed to indemnify and hold harmless Heysham against any and all liabilities “to make any payment to or in connection with the Pension Scheme (including, but without limitation, the amount (if any)), the Actuary to the Pension Scheme certifies pursuant to Sub-Paragraph 3.4) other than to pay contribution pursuant to Sub-Paragraph 3.2(a). . .” (the “Pension Indemnification Obligations”).

27. Under Clause 8.12 of the Purchase Agreement, SCL irrevocably and unconditionally guaranteed the performance of all obligations of Orient-Express under the Purchase Agreement, including without limitation the payment of all Pension Indemnification Obligations.

**Heysham's Notice to Orient Express**

28. By letter dated June 19, 2008, Heysham advised Orient-Express of its claim for indemnification with respect to the Deficiency Claim asserted by the Trustees of the 1990 Scheme.

**Heysham's Notice to SCL**

29. By letter dated June 19, 2008, Merlin Ports and Heysham notified SCL of the Deficiency claim asserted by the Trustees of the 1990 Scheme, the indemnification obligations of Orient-Express, and the related guarantee obligations of SCL.

**The SCL/1990 Scheme Connection**

30. On information and belief, for a significant period of time prior to the Petition Date, at least through December, 2004, an officer of SCL and/or Orient Express also served as a Trustee on the 1990 Scheme.

31. On information and belief, on March 1, 2004, Orient Express resolved to voluntarily wind up and dissolve, and on or about September 24, 2004 it distributed \$1,586,628.34 to its contributories (both non-debtor affiliates of SCL), without paying or making provision for the Deficiency Claim.

32. On information and belief, the certification of the Deficiency Claim was delayed by the 1990 Scheme with the knowledge, and possibly the influence, of the SCL officers, and for the benefit of the Companies.

**No Notice of General Bar Date**

33. Heysham received no notices of any kind relating to these Cases prior to August, 2008.

34. Heysham has never received any notices regarding the General Bar Date.

35. The Affidavit/Declaration of Service (filed by the Debtors' Claims Agent (BMC Group, Inc.)) regarding the General Bar Date Notice (Docket No. 689) evidence that service of the notice was not made to Heysham.

36. Heysham was not aware of the General Bar Date until August 2008, after the expiration of the General Bar Date.

**Heysham Filed Its Proof of Claim**

37. On August 25, 2008, Heysham filed a proof of claim in these Cases, asserting its claim against SCL as guarantor of the Pension Indemnification Obligations (Claim No. 172).

**ARGUMENT**

**Cause Exists To Allow The Late Filed Claim**

38. For the reasons stated more fully below, cause exists to allow Heysham's late filed claim.

39. Bankruptcy Rule 3003(c)(3) provides that a court may extend the time within which an entity files a proof of claim "for cause shown." Bankruptcy Rule 9006(b) permits a court to enlarge a specified time period to permit an act to be done when "failure to act was the result of excusable neglect." Bankruptcy Rule 3003(c) must be read in conjunction with Bankruptcy Rule 9006(c). *See, e.g., In re Trump Taj Mahal Assocs.*, 156 B.R. 928, 936 (Bankr. D. N.J. 1993). Accordingly, the Bankruptcy Rules permit the filing of an untimely proof of claim after the establishment of a bar date where failure to timely file the proof of claim was due to "excusable neglect." *See, e.g., Agribank v. Green*, 188 B.R. 982 (Bankr. C.D. Ill. 1995) (observing that excusable neglect in Bankruptcy Rule 9006(b) defines the "for cause shown" language in Rule 3003(c)(3)).

40. The United States Supreme Court, in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993), established the requirements necessary to evaluate the “excusable neglect” standard. There, the Supreme Court held that the “excusable neglect” standard of Bankruptcy Rule 9006(b)(1) contemplates that courts may in their discretion accept late filings where the failure to timely file is caused by inadvertence, mistake or carelessness, as well as by circumstances beyond the party’s control. *Pioneer*, 507 U.S. at 393-95; *see, also, In re O’Brien Environmental Energy, Inc.*, 188 F.3d 116, 125 (3d Cir. 1999).

41. The concept of excusable neglect is elastic, and the Court’s discretionary determination under the standard is, “at bottom, an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer*, 507 U.S. at 395.

42. The Supreme Court held in *Pioneer* that a court’s determination of whether a creditors’ failure to file a proof of claim rises to the level of “excusable neglect” must take into account the following non-exhaustive factors.

- a. The danger of prejudice to the debtors;
- b. The length of the delay and its potential impact on judicial proceedings;
- c. The reason for the delay, including whether it was within the reasonable control of the creditor and the creditor’s sophistication; and
- d. Whether the movant acted in good faith.

*Pioneer*, 507 U.S. at 395; *In re Keene Corp.*, 188 B.R. 903, 908 (Bankr. S.D. N.Y. 1995).

43. A creditor seeking the extension of the bar date has the burden of proving “excusable neglect.” *Keene*, 188 B.R. at 907 n.2. A court should consider all of the relevant factors when it applies “excusable neglect” to the facts of a particular case, but the creditor need not demonstrate the existence of all of the factors in order to prove “excusable neglect.” *Id.* at

909 (“We . . . conclude that an approach that considers all the relevant factors, but recognizes that they need not point in the same direction, is the correct one.”) Some of these factors can be grouped together. *See id.* at 912 (“This leaves us to consider the related factors of prejudice to the debtor and the adverse impact of the delay on the case – collectively prejudice – if we allow [the creditor] to file its claim.”). No single circumstance controls, nor is a court to simply proceed down a checklist of traits; instead, courts are to look for a synergy of the several factors that push the analysis one way or the other. *See In re 50-Off Stores, Inc.*, 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998).

**The “Delay” In Filing The Heysham Proof of Claim Was Not Material.**

44. The Heysham Proof of Claim was filed on August 25, 2008, only weeks after Heysham first learned of the 1990 Scheme’s Deficiency Claim against it, and, therefore, of its indemnification claim against SCL. Heysham had no knowledge of the 1990 Pension Scheme’s Deficiency Claim against it prior to May 28, 2008, the date of Deficiency Notice. Indeed, as noted below, Heysham’s “right to payment” against SCL did not arise, as a matter of U.K. law, any earlier than May 23, 2008, the date on which the Actuary certified the pension deficiency. Promptly upon learning of its claim, Heysham took steps to notify SCL. First, it advised SCL of the Pension Indemnification Obligations by letter dated June 19, 2008. In response to its notice, Heysham was advised of SCL’s bankruptcy Case. Heysham then promptly engaged U.S. counsel and filed its Proof of Claim. The Proof of Claim was filed on August 25, 2008 before the expiration of the Supplemental Bar Date, before the Bermuda Scheme Bar Date, and as promptly as possible under the circumstances presented.

**There Is Good Reason For The Delay.**

45. The delay in the filing of Heysham’s claim against SCL resulted from a confluence of several factors that make this case most unique.

46. First, Heysham did not receive actual or formal notice of the General Bar Date prior to its expiration. Heysham was a known creditor and therefore entitled to actual notice of the bar date. Due process requires that known creditors be provided “actual written notice” of a bar date. *Chemtron Corp. v. Joner*, 72 F.3d 341, 346 (3d Cir. 1995). A “known creditor” is one whose identity is either known or “reasonable ascertainable by the debtor.” *Id.* at 346. “A creditor’s identity is ‘reasonably ascertainable’ if that creditor can be identified through ‘reasonably diligent efforts’.” *Id.* (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n. 4 (1983)). In this case, Heysham was clearly known to SCL as they were contract parties prior to the petition date.

47. Second, Heysham’s claim did not arise until after the General Bar Date. It has long been the law of this circuit that a bankruptcy court must look to independent non-bankruptcy law to determine when a claim arises. *In re Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir. 1985). The “threshold question” is “when a right to payment arises. . .” *Frenville*, 744 F.2d at 337. Under the laws of the United Kingdom, applicable law regarding the Heysham claim, Heysham’s “right to payment” under its indemnity claim arose no earlier than May 23, 2008, the date that the Actuary issued his certificate of deficiency liability. In other words, Heysham had no claim regarding the Pension Indemnity Obligation until May 23, 2008, after the close of the General Bar Date.

48. Third, on information and belief, the delay in the Actuary’s Certification and issuance of the Deficiency Notice by the 1990 Scheme was influenced in part by SCL or its affiliates, for their own benefit

49. Heysham had no control over the timing of its claim and under the circumstances could not have filed a claim materially earlier than it did.

**There Is No Danger Of Prejudice To The Debtor's Estates.**

50. In deciding whether or not a creditor's failure to timely file a proof of claim is due to excusable neglect, the central inquiry is whether the debtor will be prejudiced. *See Greyhound Lines, Inc. v. Rogers (In re Eagle Bus. Mfg., Inc.)*, 62 F.3d 730, 737 (5<sup>th</sup> Cir. 1995); *In re Sacred Heart Hospital of Norristown*, 186 B.R. 891, 895 (Bankr. E.D. Pa. 1995) (“[T]he danger of prejudice to the debtor and potential adverse impact of allowing a later claim on the debtor's reorganization process, are the polestars”); *In re Herman's Sporting Goods, Inc.*, 166 B.R. 581, 585 (Bankr. D. N.J.) (the findings of lack of prejudice and impact on judicial proceedings weigh strongly on the side of finding movant's neglect “excusable”).

51. In this regard, it is important to note that the depletion of resources otherwise available for distribution to timely filed claims is not prejudice. *In re O'Brien*, 188 F.3d 116, 126 (3d Cir. 1999) (citing *Manousoff v. Macy's Northeast (In re R.H. Macy & Co.)*, 166 B.R. 799, 802 (S.D. N.Y. 1994)). Otherwise, virtually all late filed claims would be condemned by this factor alone. *See also In re Sacred Heart Hospital of Norristown*, 186 B.R. 891, 897 (Bankr. E.D. Pa. 1995) (“Exactly how the debtor's assets are distributed is ultimately of little consequence to the debtor, so long as the claim is not filed so late as to disrupt the distribution process.”).

52. The court in *Keene* noted that while *Pioneer* did not define “prejudice,” subsequent cases have weighed a number of considerations in determining prejudice, including (a) the size of the late claim in relation to the estate and whether its allowance would open the floodgates to other similar (late) claims, (b) whether a disclosure statement or plan [of reorganization] has been filed or confirmed with knowledge of the existence of the claim, and (c)

the disruptive effect that the late filing would have on a plan close to completion or upon the economic model upon which the plan was formulated and negotiated. *Keene*, 188 B.R. at 903.

**A. Given The Relative Size Of Heysham's Claim, The "Delay" In Its Filing Will Have No Detrimental Impact On The Judicial Administration Of These Cases.**

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53. Allowing the claims of Heysham against SCL as timely filed will have no measurable impact on the judicial administration of the case. Significant to this determination are the size of the claim in relation to the estate, and whether the plan proponents had the opportunity to account for the claim in formulating the model and structure for their plan. *See Weiner v. Passeretti (In re Eeleasco, Inc.)*, 219 B.R. 649, 652 (N.D. N.Y. 1998); *Manousoff v. Macy's Northeast (In re R.H. Macy & Co.)*, 166 B.R. 799, 802 (S.D. N.Y. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002, 1007-08 (S.D. N.Y. 1993) (also noting the late claim at issue would account for approximately 20% of the remaining claims against the estate); *In re PT-1 Com., Inc.*, 292 B.R. 482, 489-90 (Bankr. E.D. N.Y. 2003) (prejudice and the potential disruption of the bankruptcy proceedings were not compelling where the debtor was still in the claims objection process and had previously disclosed the possible need to revisit and amend its plan).

54. The Debtors' Disclosure Statement indicates that, as of June 30, 2008, the total general unsecured claims filed against them was approximately \$4.6 billion in the aggregate. The Debtors estimate that "the Allowed Unsecured Claim against SCL will be approximately \$630 million." *See* Disclosure Statement at Article III.I. Heysham's claim is in the amount of approximately US \$4,462,121.40. Accordingly, Heysham's claim constitutes a negligible .097% of the general unsecured claims asserted against the Debtors' estates, and less than .708% of the Debtors' estimate of claims that will ultimately be allowed. Such a small proportion could hardly be considered significant in the context of the Debtors' Plan.

**B. The “Delay” Will Have No Detrimental Impact On Plan Confirmation Or The Success Of The Debtors’ Reorganization Effort.**

55. Deeming Heysham’s claim as timely filed will not have a significant impact on the Debtors’ reorganization and confirmation efforts. Heysham first notified SCL of its claim on June 19, 2008. The Heysham Proof of Claim was filed before the Debtors’ final form of Disclosure Statement; before the currently proposed form of Plan; before voting on the Plan; before confirmation of the Plan; before completion of the claims resolution process; before any distributions to general unsecured creditors.

56. Feasibility of the Plan will not be affected by allowing the Heysham claim. The Debtors’ Plan provides for a *pro rata* distribution of a defined group of assets (*i.e.*, the SCL Unsecured Distribution) to general unsecured creditors.

**C. There Is No Prejudice Because Heysham Seeks What The Bermuda Scheme Contemplates.**

57. This case presents the unusual circumstance of a parallel Bermuda Scheme, which itself contemplates and provides for the possibility of allowance of claims filed after the General Bar Date in the U.S. Cases. Therefore, there is no prejudice to the Debtors by reason of Heysham’s late-filed claim.

**Heysham Acted In Good Faith.**

58. Heysham lacked notice and awareness of the General Bar Date until after it had already expired. Heysham first became aware of the Pension Scheme’s claim against it on or about May 28, 2008. And, Heysham then acted promptly to advise SCL of its claim and to file a proof of claim as soon as possible under the circumstances. It cannot be disputed that Heysham acted in good faith. No colorable claim of bad faith can realistically be made in this instance.

**Conclusion**

59. It is clear from the foregoing analysis of the *Pioneer* factors that Heysham's requested relief should be granted. As the District Court held in *In re Inacom Corp.*, 2004 U.S. Dist. LEXIS 20822 (D. Del., Oct. 4, 2004), it would be an abuse of discretion for the Bankruptcy Court to deny a claim where "the lack of any prejudice to the debtor or the interests of judicial administration combined with . . . good faith. . . weigh strongly in favor of permitting the tardy claim." *Id.* at \*25, citing *Pioneer*, 507 U.S. at 398. In sum, the equities of this case as set forth above dictate that Heysham's claim should be deemed timely filed.

WHEREFORE, Heysham respectfully requests that Proof of Claim No. 172 filed by Heysham be deemed allowed as filed, together with such other and further relief as to the Court is just under the circumstances.

Dated: October 7, 2008

SCHNADER HARRISON SEGAL  
& LEWIS LLP

By: /s/ Michael J. Barrie  
Richard A. Barkasy (#4683)  
Michael J. Barrie (#4684)  
824 N. Market Street, Suite 1001  
Wilmington, DE 19801  
(302) 888-4554 (telephone)  
(302) 888-1696 (facsimile)  
mbarrie@schnader.com

AND

Nicholas J. LePore, III  
1600 Market Street, Suite 3600  
Philadelphia, PA 19103-7286  
(215) 751-2000 (telephone)  
(215) 751-2205 (facsimile)  
nlepore@schnader.com

Attorney for Heysham Port Limited