Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd and Another [2005] SGHC 238

Case Number : Suit 970/2004

Decision Date : 30 December 2005

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Haridass Ajaib, Augustine Liew and Subashini Narayanasamy (Haridass Ho and Partners) for the plaintiff; Lim Tean, Shem Khoo and Marcus Lee (Rajah and Tann) for the defendants

Parties : Marina Offshore Pte Ltd — China Insurance Co (Singapore) Pte Ltd; AXA Insurance Singapore Pte Ltd

Admiralty and Shipping – Insurance – Shipowner seeking indemnity from assurers for loss of vessel during sea voyage – Whether vessel lost as result of perils of sea – Section 39(4) Marine Insurance Act (Cap 387, 1994 Rev Ed)

Admiralty and Shipping – Insurance – Whether marine insurance policies time policies or mixed policies – Whether vessel sent to sea in unseaworthy state with privity of shipowner – Whether assurers entitled to avoid liability for loss of vessel at sea – Sections 39(1), 39(5) Marine Insurance Act (Cap 387, 1994 Rev Ed)

Admiralty and Shipping – Insurance – Whether terms of marine insurance policy requiring compliance with warranty surveyor's recommended voyage route constituting insurance warranty – Whether shipowner complying with recommended route and entitled to indemnity for loss of vessel at sea

30 December 2005 *Judgment reserved.*

Tan Lee Meng J:

1 The plaintiff, Marina Offshore Pte Ltd ("MOPL"), whose steel-hulled coastal tug, the *Marina Iris*, sank some 50 miles off Kobe, Japan, while on a voyage from that port to Singapore, sued its assurers, the first defendant, China Insurance Co (Singapore) Pte Ltd ("CIC"), and the second defendant, AXA Insurance Singapore Pte Ltd ("AXA"), to recover an indemnity for the loss. CIC and AXA denied liability on, *inter alia*, the grounds that the terms of the policy were not complied with and that MOPL did not establish that the cause of the loss of the *Marina Iris* was within the ambit of the policies.

Background

2 In November 2003, MOPL purchased the *Marina Iris*, formerly the *Gion Maru No 2*, a tug constructed in Japan in 1982 in accordance with "JG Coastal Class" rules and not rules for ocean-going vessels as she was intended to operate in Japanese coastal waters. The tug's overall length was 26.5m, her breadth was only 8.5m, her depth was 3.89m, her gross tonnage was 139 tons and her deadweight was 231 tons. She had been laid up for about nine months before MOPL took delivery on 25 December 2003.

3 Prior to the finalisation of the purchase, MOPL instructed Capt Tony Goh of TG Marine Services Pte Ltd ("TG") to conduct a pre-purchase condition survey in October 2003 while the *Marina*

Iris was moored at a local shipyard in Kobe. In his report, Capt Goh stated that, "Considering the age of the vessel, additional repairs and modification may have to be done for entry into International Classification Society." He also listed a fairly comprehensive list of matters that required MOPL's attention before the *Marina Iris* could begin trading operations in Singapore or within South-East Asia. Satisfied with the potential of the tug, MOPL proceeded with its plans to acquire her.

4 Although some of the repair work recommended by Capt Goh was undertaken in Kobe, MOPL decided to have a large part of the repair work done in Singapore before the *Marina Iris* could be classed by Bureau Veritas and registered as a Singapore ship. Pending such classification and registration in Singapore, MOPL registered the *Marina Iris* as a Panamanian vessel. Although it might have been more prudent to have had the *Marina Iris* shipped to Singapore on board a large carrier, MOPL decided that she should sail on her own propulsion from Kobe across the Pacific Ocean to Singapore. The result was that the *Marina Iris*, which was still unclassed, would proceed on her most dangerous voyage to date, one that would take the tug, which was constructed for coastal trade, across the Pacific Ocean to Singapore during the December monsoon.

5 MOPL insured the *Marina Iris* for a period of one year, for $800,000, with an excess of $100,000. CIC provided cover for up to 60% of the insured sum and AXA afforded cover for up to 40% of the insured sum. The cover afforded by them included the delivery voyage from Kobe to Singapore. MOPL contended that the policies were time policies whereas CIC and AXA asserted that they had issued mixed policies to MOPL.

6 Both CIC and AXA required a condition survey to be carried out before the *Marina Iris* sailed from Kobe. Both parties also accepted that a seaworthiness survey was called for. Without disclosing to the assurers that TG had already done a pre-purchase survey of the tug, MOPL's broker, Ms Vinna Yeung of LCH (S) Pte Ltd, persuaded the assurers to allow TG to conduct the requisite survey. What was disconcerting was that she saw no reason why she should have disclosed the pre-purchase survey by TG to the assurers. This non-disclosure must be frowned upon as CIC would not have allowed TG to conduct the warranty survey had it known that the latter had already furnished a pre-purchase survey that was satisfactory enough to persuade MOPL to proceed with the purchase of the *Marina Iris*.

7 Capt Goh, who gave a rather guarded report to the assurers, specifically pointed out that his survey report was only for "the purpose of examining and reporting on the general condition of the vessel in order to proceed on its own propulsion, on one single Delivery Voyage from Kobe, Japan to Singapore ... in fair weather condition". He made six recommendations in relation to the proposed voyage and stated that all his recommendations, one of which concerned the voyage route from Kobe to Singapore, must be complied with, failing which his report would be void. In view of this, the policies issued by CIC and AXA required MOPL to comply with all the warranty surveyor's recommendations.

8 Although gale warnings had been given by the Kobe Meteorological Department at the material time, the *Marina Iris* left Kobe on the evening of 26 December 2003 with six Indonesian crew members on board. The tug did not get very far as she sank while she was only about 50 miles from Kobe. She was then heading for the Kii Suido Strait towards the northern part of the Pacific Ocean. The assurers asserted that this was not the voyage route recommended by the warranty surveyor. They also alleged that the tug was woefully unseaworthy when she left Kobe in that she was not properly manned or equipped for the voyage and should not have sailed from Kobe on 26 December in the face of the gale warnings which had been issued for the Kobe area. Sadly, all six crew members perished when the *Marina Iris* sank.

9 MOPL made a claim under the policies on the ground that the *Marina Iris* was lost as a result of perils of the sea, a cause of loss covered by the policies. When the assurers denied liability for the loss of the tug, MOPL instituted the present action against them.

The issues

10 Although the assurers relied on several defences to avoid liability to MOPL, the main issues before the court may be summarised as follows:

(a) Did MOPL comply with the warranty surveyor's recommendations before the *Marina Iris* sailed from Kobe, as was required by the policies?

(b) Did MOPL prove that the loss of the *Marina Iris* was caused by an insured peril?

(c) Was the *Marina Iris* seaworthy when she left Kobe and if not, what is the effect of this on the policies?

Compliance with the warranty surveyor's recommendations

11 As has been mentioned, Capt Goh made it clear that his survey report was void if his six recommendations, including the voyage route to be followed by the *Marina Iris*, were not complied with. The assurers asserted that the warranty surveyor's recommended route for the voyage from Kobe to Singapore was not followed.

12 Considering that the assurers were affording cover to an unclassed tug, which was built for operations in coastal waters, to undertake a voyage across the Pacific Ocean and that both policies expressly required the warranty surveyor's recommendations to be complied with before the tug sailed from Kobe, the recommended route for the delivery voyage from Kobe to Singapore must be regarded as an insurance warranty, which "imports that a particular state of facts in the present or in the future is a term of the contract, and further, that if the warranty is not made good the contract of insurance is void" (*per* Viscount Finlay in *Dawsons, Limited v Bonnin* [1922] 2 AC 413 at 428). An insurance warranty thus differs from a warranty, as understood in the law of contract, for if it is breached, "no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point" (*per* Lord Watson in *Thomson v Weems* (1884) 9 App Cas 671 at 689). It follows that Capt Goh's recommended voyage route must be strictly complied with, failing which no cover is afforded by the assurers either because the survey report is rendered void or because of a breach of warranty with respect to non-compliance with the surveyor's recommendations.

13 In Capt Goh's certificate of inspection, the recommended voyage route was worded as follows:

> Route to follow to be tracking along nearest coast of Japan, Philippines, Sabah unless weather permitted, and to seek shelter if weather is bad.

14 The reference in the certificate of inspection to the voyage route was rather brief but even so, I agree with the assurers' expert witness, Capt Christopher Noel Phelan ("Capt Phelan"), the managing director of Navspec Marine Consultants Pte Ltd, that a direction that the *Marina Iris* track along the nearest coast of Japan while on a voyage from Kobe, which is situated at the north-eastern end of the Seto Naikai or the Inland Sea, to Singapore is one that required her to sail along a large stretch of the Inland Sea towards Kyushu. By no means can it be interpreted as a direction to head

for the Pacific Ocean via Kii Suido, which was what the *Marina Iris* did. In any case, the certificate of inspection specifically stated that a more detailed report would follow.

15 In his detailed report on 26 December 2003, Capt Goh furnished more details on his recommended route when he stated as follows:

> The proposed sea route from Kobe, Japan to Singapore was discussed with the 3 masters, with Rudy as the Lead Master and has been generally agreed upon.
>
> The vessel will steam and navigate *along the nearest coasts, inside of Japan, tracking along the islands towards Okinawa* passing East of Taiwan.
>
> [emphasis added]

16 The recommended route was again highlighted at p 10 of Capt Goh's report of 26 December 2003 in the following terms:

> A Certificate of Inspection was subsequently issued and explained to the 3 Masters and the Leading Chief Engineer of the tugboat and signed, listing out our voyage recommendations particularly to navigate *along the inside coasts of Japan which must be complied with in order to validate our survey*. [emphasis added]

17 To require the *Marina Iris* to "navigate along the inside coasts of Japan" makes it even clearer that she was to sail across a large stretch of the Inland Sea. In a letter dated 23 December 2003 to CIC, MOPL and the insurance broker, Capt Goh stated that he would be on board the tug on 24 and 25 December 2003 "to ensure all in order until departure of vessel on one single voyage to Singapore, *tracking along the coast*". This again confirms that the recommended route involves sailing across a large stretch of the Inland Sea.

18 Reference must also be made to a report dated 7 January 2004 by Mr Michael Thompson ("Mr Thompson") of The Salvage Association, who was instructed by CIC to ascertain and report on the circumstances surrounding the sinking of the *Marina Iris*. On 5 Janaury 2004, Mr Thompson had a meeting with MOPL's senior staff, including its managing director, Mr Lim Boh Tee, its operations manager, Mr Peter Koh ("Mr Koh"), its assistant operations manager, Mr Lem Kean Su (Mr Lem"), and its maintenance superintendent, Mr Lee Kok Meng ("Mr Lee"). Capt Goh was also present at that meeting. In his report, Mr Thompson stated that he was informed by MOPL that the proposed route for the *Marina Iris* was from Kobe to Moji via the Inland Sea and his finding was that:

> The location of the sinking indicates that the tug was exiting the Inland Sea via Kii Suido Strait towards North Pacific Ocean, which was *not the proposed route as discussed with Owners representative and warranty surveyor*. … We suspect [the Master] probably did not [intend] to take the Inland Sea route. A voyage plan should have been prepared by the Master indicating the route to be taken. [emphasis added]

19 Until after the trial had commenced, none of MOPL's staff who attended the meeting on 5 January 2004 questioned Mr Thompson's assertion that he had been informed that the proposed route was via the Inland Sea. Despite this, two of them insinuated that Capt Goh had authorised the voyage route taken by the *Marina Iris*. For a start, MOPL's assistant operations manager, Mr Lem, said at para 23 of his Affidavit of Evidence-in-Chief ("AEIC"):

> Whilst Capt Tony Goh was at the Plaintiffs' office from about 15th December 2003 to

16th December 2003, I was present when he … discussed with them the westward route through the Inland Sea, and the south route via Kii Suido, using navigational charts.

20 Apart from the question of hearsay evidence, to discuss different routes for a voyage is totally different from recommending a route. Besides, Mr Lem really knew nothing about the recommended voyage route for when cross-examined, he said:

> Yes. I heard about the west route and south route as well, and I do not know what is the west route and what is the south route they are discussing. … I had no idea.

21 MOPL's maintenance superintendent, Mr Lee, went further than Mr Lem because he claimed to have understood from the discussions that Capt Goh had agreed with the crew of the *Marina Iris* that there were two options for the voyage route, one through the Inland Sea and the other via Kii Suido. However, he could not explain why The Salvage Association's Mr Thompson was informed by MOPL's senior staff at the meeting of 5 January 2004 that the proposed route was across the Inland Sea. Instead, he went so far as to claim that although he attended the said meeting, the discussion on the voyage route took place while he was not present. This was most unconvincing.

22 When cross-examined as to what he meant by his statement in his fax to Mr Thompson that "the Master might have made an erroneous decision in the course of events, leading to the casualty", MOPL's operations manager, Mr Koh, stated as follows:

> Q. When you said that the master might have made an erroneous decision, what were you referring to?
>
> A. *Routing*.
>
> [emphasis added]

23 Subsequently, Mr Koh denied that he believed that the master had taken the wrong route. However, when queried as to what was on his mind when he referred to the master's "erroneous decision", he said that he could not recall. Undoubtedly, his earlier evidence that the master had taken the wrong route is much closer to the truth.

24 MOPL's expert witness, Mr Jonathan Mark Walker ("Mr Walker"), also tried to shore up MOPL's case that the route taken by the *Marina Iris* was an authorised route. However, when it suited him, he conceded that Capt Goh's recommended route was across the Inland Sea. For instance, when denying that the important charts required for a voyage across the Inland Sea had not been supplied to the crew of the *Marina Iris*, he said:

> I referred to the survey report by Tony Goh, where he says that they had charts on board for the vessel for the voyage from Kobe to Singapore, *and he does indicate that the route was through the Inland Sea*. [emphasis added]

25 Furthermore, the following question and answer during cross-examination also confirms that Mr Walker accepted that the recommended route was across the Inland Sea:

> Q. You agree in your report that it had been generally agreed by Tony Goh with the crew that this vessel would steam …along the nearest coast inside of Japan … This would mean travelling along the Inland Seas of Japan; am I right?

A. That is what is written here. That is what I would assume is written here.

26 MOPL also asserted that the following paragraph in the conclusion of Capt Goh's survey report gave the master a leeway to decide on the voyage route:

> Any customary precaution, voyage recommendations and final route followed and any points not referred to in the present report being left to the decision of the competent Port authorities, Owners and the initiative of the Master ....

27 Capt Goh's language leaves much to be desired. All the same, it is evident from the second "and" in the above paragraph and from his entire report that the master's initiative relates only to points not referred to in his report. Any other construction would make nonsense of an earlier paragraph in the same report, which stated that "our voyage recommendations particularly to navigate along the inside coasts of Japan … must be complied with in order to validate our survey".

28 MOPL must have known that the only person who could possibly support their case on the recommended voyage route is Capt Goh himself. However, MOPL took the position that as the assurers had to prove a breach of warranty, it was their task to call Capt Goh as a witness. The assurers suggested that the only reason why Capt Goh was not called as a witness by MOPL is that his evidence would destroy the latter's case altogether. In the face of the overwhelming evidence that the recommended voyage route was across the Inland Sea, the absence of Capt Goh from the witness box cannot but be most unhelpful to MOPL's attempt to prove that that he had approved of alternative routes for the delivery voyage from Kobe to Singapore.

29 Having provided in the policies that all the warranty surveyor's recommendations must be complied with before the *Marina Iris* sailed from Kobe, CIC and AXA are entitled to say that they were only covering the risk if the recommended voyage route across the Inland Sea was followed. As the *Marina Iris* did not follow the warranty surveyor's recommended route across the Inland Sea, MOPL is not entitled to an indemnity under the policies.

Whether the Marina Iriswas lost as a result of perils of the sea?

30 MOPL contended that the *Marina Iris* was lost as a result of perils of the sea, a cause of loss within the ambit of the policy. It is for a claimant to establish that he has suffered a loss that falls within the ambit of the policy.

31 In *Thomas Wilson, Sons & Co v The Owners of the Cargo per The "Xantho"* (1887) 12 App Cas 503 at 509, Lord Herschell explained the ambit of the term "perils of the sea" in the following terms, which were endorsed by L P Thean JA, who delivered the judgment of the Court of Appeal in *The Benoi VI* [1986] SLR 138 at 143–144, [9]:

> I think it is clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. *There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure.* [emphasis added]

32 In its Statement of Claim, MOPL provided the following as particulars of the loss by perils of the sea:

1. Upon the completion of her survey and sea trial, the vessel departed Kobe, Japan, for Singapore at 1400 hours on 26th December 200[3].

2. Unfortunately, the vessel encountered heavy weather later on the same day and at 0200hours on 27th December 200[3], the Japanese Coast Guard received the vessel's EPIRB distress signal.

3. The Japanese Coast Guard conducted an air search by helicopter after they failed to despatch their rescue boat due to the heavy prevailing weather.

4. The vessel was subsequently reported to have sunk …

33 Unfortunately, MOPL did not prove the pleaded material particulars of the loss. No satisfactory evidence of the alleged heavy weather or of an air search by the Japanese coast guard was furnished. When rebutting the assurers' allegation that the *Marina Iris* should not have sailed in the face of gale warnings in the Kobe area at the material time, MOPL asserted that it is the actual weather encountered by the tug and not the weather forecast that is relevant. Both MOPL's expert witnesses, Mr Walker and Mr Takayuki Akiba, a marine counsel from Tokyo, who has had experience navigating ships, downplayed the gale warnings and went so far as to say that the master acted correctly in leaving Kobe at the material time. Furthermore, MOPL pointed out that the tug was lost close to Kobe and not in the Pacific Ocean. In these circumstances, some acceptable evidence of the heavy weather, and not mere hearsay, should have been tendered.

34 In truth, no one knows for certain how the *Marina Iris* was lost as she is now under the sea and all her crew members are dead. Even MOPL's expert witness, Mr Walker, who put forward a theory of rapid ingress of water into the engine room, which was not pleaded, accepted in para 4.1 of his AEIC that there "is no conclusive proof how the "MARINA IRIS" sank". During cross-examination, he reiterated that "nobody knows actually what happened to this vessel".

35 The cause of the loss of the *Marina Iris* is thus a subject of intense speculation. In view of this, whether it may be concluded that the *Marina Iris* was lost as a result of perils of the sea depends on presumptions that may be made by a court with respect to the cause of an unexplained loss. As such presumptions depend to some extent on whether the *Marina Iris* was seaworthy when she sailed from Kobe, the question of her seaworthiness must next be considered.

Whether the* Marina Iris *was seaworthy

36 Section 39(4) of the Marine Insurance Act (Cap 387, 1994 Rev Ed) provides that:

> A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

"Seaworthiness", as Diplock LJ (as he then was) explained in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 71, is one of the most complex of contractual undertakings. In *Malayan Motor & General Underwriter (Pte) Ltd v MH Almojil ("The Al-Jubail IV")* [1982–83] SLR 52, Lai Kew Chai J, who delivered the judgment of the Court of Appeal, said that seaworthiness refers not to a fixed standard but to a relative standard varying according to the ship and the exigencies of each voyage.

37 While the required standard of fitness of a ship depends on the nature of the agreed voyage, no ship can be seaworthy if she is not fit in design and structure and is not properly manned or

equipped. On several counts, the condition of the *Marina Iris* was clearly wanting when she sailed from Kobe.

38 The most glaring aspect of her unseaworthiness concerns manning. A vessel must have a competent master as well as a sufficient number of competent crew members (see, for instance, *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*). There is some confusion as to the roles of three of the senior crew members, namely Mr Danus Gay Nau ("Mr Danus"), Mr Rudy and Mr Anthonius Pasampang ("Mr Anthonius"). The warranty surveyor, Capt Goh, referred to all of them as "Masters" in his report and noted that Mr Rudy was the "Lead Master". MOPL's expert witness, Mr Walker, also referred to the trio as the "three masters" during cross-examination. However, MOPL insisted that the master was Mr Danus.

39 Regrettably, all the "three masters" lacked the necessary qualifications to be the master of the *Marina Iris* for the delivery voyage from Kobe to Singapore. As they were Indonesians and MOPL did not assert that they held Panamanian certificates, their Indonesian certificates were scrutinised. Mr I G Shangameswar, Assistant Director (Training Standards) Training Division, Maritime and Port Authority of Singapore, pointed out that Mr Rudy, who was regarded by Capt Goh as the "Lead Master", was hired by MOPL merely as an able-bodied seaman. He added that Mr Rudy had no recognised qualifications and was not even qualified to sail on board the tug as a deck officer.

40 As for Mr Danus, Mr Shangameswar testified that his competence was limited to "Near Coastal Voyages", which extends to South Vietnam and South Philippines, and does not cover the waters surrounding Taiwan and Japan. As such, he should not have been appointed the master of the *Marina Iris* for the delivery voyage from Kobe to Singapore.

41 Finally, while Mr Anthonius was qualified to be a deck officer, he had no qualifications to be the master of the *Marina Iris*.

42 When cross-examined, MOPL's assistant operations manager, Mr Lem, who was in charge of short-listing the crew for his manager's approval, admitted that he knew that the crew were only qualified for near coastal voyages. The relevant questions and answers are as follows:

> Q. You knew that Danus and Anthonius had only certificates for near coastal voyages from the Indonesian authorities; am I right?
>
> A. Yes. Yes.
>
> Q. Do you know the geographical region to which they are restricted in sailing under the certificates they have?
>
> A. Yes, of course….

43 Even MOPL's expert witness, Mr Walker, conceded that the crew were not qualified for the voyage in question. The relevant question and answer are as follows:

> Q. I am putting it to you that there was no diligence exercised by the plaintiffs … because … they put out a crew that was not qualified to perform this voyage.
>
> A. *The crew were not qualified* but they sought exemption from the flag state, …
>
> [emphasis added]

44 There was no proof that the required exemption was sought or granted. Mr Walker testified that he had asked MOPL to produce the exemption certificates but none were shown to him. MOPL's assistant operations manager, Mr Lem, admitted that he did not know whether any exemption had been sought or granted and passed the buck to his boss, Mr Koh, who was in charge of this matter. When Mr Koh was questioned on the qualifications of Mr Danus, he evaded the question by saying that he left everything to the warranty surveyor. Why he thought that MOPL could abdicate its responsibility for the proper manning of its vessel by leaving matters to a warranty surveyor , who was not an employee of MOPL, cannot be fathomed.

45 Capt Phelan, the defendants' expert witness, minced no words when he stated as follows in para 78 of his AEIC:

> I find that [MOPL's] manning of the Vessel for the delivery voyage from Kobe to Singapore was, to say the least, completely unsatisfactory. It was irresponsible of [MOPL] to have sent this crew to perform the delivery voyage, especially when one considers that the voyage was to be performed in the NE Monsoon. … [The crew members] were not qualified and not competent to undertake the intended voyage. In the premises, the Vessel was, in my opinion, unseaworthy to perform the voyage from Kobe to Singapore.

46 I thus have no hesitation whatsoever in finding that the *Marina Iris* was improperly manned and thus unseaworthy when she left Kobe for Singapore.

47 Improper manning was not the only ground of unseaworthiness in this case. The tug's stability for an ocean voyage was also an issue. The assurers' expert witness, Capt Hamamoto, conducted a condition survey of this tug, which was then known as "*Gion Maru 2*", on behalf of a Japanese shipbroker in November 2003. While he made no contemporaneous notes of the survey, he remembered that what struck him most when he inspected the tug was her unusual height. The navigation bridge was very high while the tug was not very long. This meant that her centre of gravity was very high and her stability was a problem. In para 12 of his AEIC, Capt Hamamoto elaborated:

> I would accordingly expect the tug to pitch and roll quite strongly when out at sea. In view of my observations, I warned [my client] and queried whether she could handle a voyage from Kobe to Singapore on her own steam. This was especially since I learnt … during the survey that she has previously been used as a coastal pusher tug for mainly pushing bottom open-close type barges engaged in land reclamation works…

48 Capt Hamamoto's view of the stablility problem faced by the *Marina Iris* was endorsed by the assurers' other expert witness, Capt Phelan, who pointed out that while the height of the superstructure of the tug was about 13.5m, its underwater depth was only 3.75m. With a height/depth ratio of 3.6:1 and a ballasting capacity of only 73mt, there is inadequate positive stability for operating in an open seaway. A wave height of 4m would be greater than the total depth of the tug and in such weather, the tug would be continually swamped by waves, a dangerous occurrence that affects both the vertical and lateral stability of the tug and exposes it to the danger of capsizing. Capt Phelan further explained as follows:

> The tug had a freeboard of only 30 cm. That is its reserve buoyancy. … If it was heeled over, after 5° of heel, the deck edge would immerse in the water and this would result in a loss of stability. This 5° of heel is far below the recommended minimum deck edge immersion contained in [the UK Marine Authority's Notice M1153]. That says that tugs should have a minimum deck edge immersion of 10°. … I think we next come to the stability, the centre of gravity. A look at the

photographs shows quite clearly that it has got a very high superstructure. … Now, when you take into consideration that after degrees of heel, you get deck edge immersion and therefore you will lose more stability, you will have … there were five slack tanks on board and they may well increase, and all of those will reduce the stability.

And then finally, as you burn fuel and use water, you could use up to 73mt of liquids, which represents 20% of the ship's weight. And that will further reduce the stability.

So all in all, with a minimum stability and then three aspects that will reduce the stability even further, you are in for a pretty difficult situation, which could be catastrophic.

49 In these circumstances, information on the vessel's stability is crucial. It is significant that in his pre-purchase report in October 2003, Capt Goh noted:

Stability information or hydrostatic curve was not sighted and not available at the time of our inspection.

50 In the conclusion of his pre-purchase condition survey report, Capt Goh made it a point to note that "stability information and hydrostatic curve to be provided".

51 MOPL's expert witness. Mr Walker, conceded during cross-examination that information on a vessel's stability is critical for all voyages and not just deep sea voyages. He testified as follows:

[Stability] is relevant. Every ship should have stability booklets and be able to do a stability calculation on board.

52 It was suggested that since nothing else was subsequently said by Capt Goh about the stability information, everything must be in order. However, it appears that no one was really concerned with the stability information after the pre-inspection report. No one testified that the master was informed about possible problems relating to her stability or that the stability booklet was on board the *Marina Iris* for stability calculations to be made while she was at sea. MOPL's operations manager, Mr Koh, acknowledged that he was aware of Capt Goh's comment regarding the unavailability of information on the tug's stability and he knew that such information was very important. His excuse for not having done anything about the ship's stability after receiving Capt Goh's pre-purchase report was that this matter was to be investigated when it was time for the vessel to be classed. As she was to be classed only after reaching Singapore, this meant that Mr Koh was content to let the *Marina Iris* sail across the Pacific Ocean without careful consideration of her stability problems.

53 Other MOPL witnesses were less than candid about the position of the stability information. When cross-examined as to whether he had obtained the stability information of the *Marina Iris*, the replies of MOPL's managing director, Mr Lim, were astonishing. The relevant portion of his evidence is as follows:

Q. Mr Lim, before the vessel left Kobe, did you obtain the stability information of this vessel?

A. Everything was handled by Tony Goh.

Q. My question, Mr Lim, did you ---

A. *I do not want to answer your question.*

[emphasis added]

54 Mr Lim subsequently claimed most unconvincingly to have obtained the information about stability before the vessel left Kobe.

55 The evidence of MOPL's maintenance superintendent, Mr Lee, on the stability of the vessel was equally unacceptable. He knew the stability booklet was an important document and that Capt Goh was looking for this booklet and he claimed to have sighted the document. When asked why he did not inform Capt Goh that he had the book, he said that he had not been asked to produce the information. Finally, he blamed everything on "confusion" during his meetings with Capt Goh.

56 It is plain that higher standards of skill and knowledge may be required of a master whose vessel has to be handled in a special way because of its construction. The stability of the *Marina Iris* was such that the master should have been given the requisite information of the stability of the vessel so as to be able to better manage the vessel while at sea. In this regard, *Standard Oil Co of New York v Clan Line Steamers, Limited* [1924] AC 100 is instructive. In that case, a turret vessel turned turtle and capsized after the master ordered water to be pumped out of water ballast tanks for the purpose of trimming the vessel more by the stern. The vessel's sister ship had been involved in a similar accident several years ago and the builders of the vessel, who knew that there was a greater risk that this type of vessel would turn turtle if a specified angle of inclination or list is exceeded, gave general instructions for loading the vessel but these were not brought to the attention of the master. It was held by the House of Lords that the vessel was unseaworthy. Lord Atkinson said that the principle that a ship may be rendered unseaworthy by the inefficiency of the master applies whether the master's incompetence is due to a disabling want of skill or a disabling want of knowledge with respect to how his ship may, owing to the peculiarities of its structure, behave when proceeding on her voyage.

57 What is rather surprising is that MOPL's expert witness, Mr Walker, claimed that the *Marina Iris* was a stable vessel and that he had done some calculations on her stability on the basis of information that he received from MOPL. No document on stability data was disclosed in the List of Documents and none of MOPL's other witnesses gave evidence on any such data. As such, his evidence cannot be taken seriously.

58 I find that the *Marina Iris* was also unseaworthy because the master was not provided with the requisite information on the stability of the tug for the long voyage from Kobe to Singapore across the Pacific Ocean and the stability booklet was not on board the tug.

59 Other aspects of the *Marina Iris*'s unseaworthiness need not be discussed in detail. All that needs to be mentioned is that she lacked the necessary pilot books and possibly important charts to sail across the Inland Sea. MOPL's expert witness, Mr Walker, accepted that pilot books are very important documents to have on board ships sailing across the Inland Sea. In this context, the following question and his answer merit attention:

Q. And there has been no indication anywhere in this case so far that pilot books were actually procured for this voyage; am I right?

A. That is correct.

60 As for charts, the list of charts for which the crew acknowledged receipt did not include important charts required for a ship to sail across the Inland Sea. Mr Koh, whose responsibilities included ensuring that the tug was properly equipped, admitted that there was no one in MOPL to

update charts. When it was pointed out to him that the crew of the *Marina Iris* lacked two critical charts to be able to safely sail across the Inland Sea, he confessed that he was not aware of this and if the crew needed the charts, they should have asked. When pressed further, he adopted what had become a fairly routine excuse for MOPL's staff for not having done what was required by replying, "Then what is warranty surveyor for?"

61 Apart from pilot books and charts, even the safety equipment required on board the *Marina Iris* was not adequately checked. Capt Goh had pointed out in his pre-purchase survey report that an additional life raft was needed. Mr Koh admitted that this was not provided. As for the single life raft on the tug, no steps were taken to service it. Again, instead of taking responsibility, Mr Koh once again passed the buck to the warranty surveyor, saying that had he insisted on it, MOPL would have done what he had wanted.

62 There is also controversy as to whether the tug had proper equipment to receive weather reports and forecasts. In his survey report of 26 December 2003, Capt Goh stated that there was a Furuno NAVTEX receiver on board that only received weather reports in Japanese. Obviously, a NAVTEX receiver that transmitted in English was needed for the voyage in question. In the The Salvage Association report, Mr Thompson stated that MOPL's staff informed him that they had purchased a new English NAVTEX receiver but it could not be located at the time of departure and was thus not installed on the *Marina Iris*. MOPL's case was that this did not matter because one of the "three masters", Mr Rudy, could read and understand Japanese because he was Chinese. There is no proof of this. The assurers' expert, Capt Phelan, pointed out that if Mr Rudy could read Japanese and had understood the NAVTEX warnings in Japanese, he would not have attempted to sail in the face of the gale warnings at the material time. A new radio was on board and MOPL intended to relay weather reports to the tug after her departure but its reception was poor. The assurers' expert witness, Capt Phelan, concluded that it was irresponsible of MOPL to have sent the *Marina Iris* to sea in the north-east monsoon season without there being a NAVTEX receiver that could receive weather information in a language that the crew could understand.

63 The decision of the Court of Appeal in *The Al-Jubail IV* ([36] supra) is worth noting at this juncture. In that case, a small vessel, which was certainly in much better shape than the *Marina Iris* as it had been completely refitted in Singapore, embarked on a delivery voyage from Singapore across the Indian Ocean to the Persian Gulf, at a time when the Indian Ocean was especially turbulent. Like the *Marina Iris*, the *Al-Jubail IV* was only intended for use in coastal waters as she was to be used as a ferry when she reached her destination. Unlike the *Marina Iris*, which sank only 50 miles from Kobe, the *Al-Jubail IV* managed to cross the Indian Ocean and reach the Iranian coast, where she capsized in stormy weather and rough seas. It was held by the Court of Appeal that she was unseaworthy because of her size and description and the fact that she was required to sail while the south-west monsoon was in the Indian Ocean.

64 In contrast to the *Al-Jubail IV*, the *Marina Iris*, an unclassed tug requiring repairs, was improperly manned and equipped and nothing was done about assessing her stability before she sailed from Kobe during the northern monsoon. MOPL knew from Capt Goh's pre-purchase report that the *Marina Iris* was not fit to pass a class survey. Of the 17 items listed by Capt Goh in his pre-purchase report as items to note for operations in Singapore or within the South-East Asian region, Mr Koh admitted that only six were attended to. If all the circumstances of the case are taken into account, the inescapable conclusion must be that the *Marina Iris* was woefully unseaworthy for its voyage from Kobe to Singapore.

Effect of unseaworthiness on presumptions on loss by perils of the sea

65 Where, as in the present case, the cause of the loss of a vessel is unknown, there may be situations where it might be appropriate to assume that she was lost as a result of perils of the sea. However, different considerations arise where a vessel is unseaworthy. In *Lamb Head Shipping Co Ltd v Jennings (The "Marrel")* [1994] 1 Lloyd's Rep 624 at 629, Dillon LJ, with whom Mann and Hirst LJJ agreed, said:

> As I see it, the presumption is really founded on the balance of probabilities. If it is known that a ship was seaworthy when she set out, and she has never been seen since and nothing has been heard of her crew, then on the balance of probabilities she must have sunk and, on the balance of probabilities, the sinking must have been due to "perils of the sea" because she was seaworthy when she set out. …
>
> But if it is not shown that the ship was seaworthy when she left on her last voyage, the presumption does not apply since it cannot be held on the balance of probabilities that her presumed sinking was due to perils of the sea rather than to her unseaworthy condition.

66 The *Marina Iris* was lost while she was only 50 miles away from Kobe and had not even reached the Pacific Ocean, where her greatest danger awaited her. In view of the fact that she was improperly manned and insufficient attention was paid to her stability for the delivery voyage, it would take much more to persuade a court that she was lost by perils of the sea. It cannot be said that it is more probable than not that the *Marina Iris* was lost as a result of perils of the sea. This means that MOPL did not establish that the loss fell within the scope of the policies. For this reason, its claim should be dismissed.

Section 39(1) of the Marine Insurance Act

67 The assurers also relied on ss 39(1) and 39(5) of the Marine Insurance Act to avoid liability to MOPL. Section 39(1) of the said Act provides that:

> In a voyage policy, there is an implied warranty that, at the commencement of the voyage, the ship shall be seaworthy for the purpose of the particular adventure insured.

If s 39(1) applies, MOPL is not entitled to an indemnity because the *Marina Iris* was, for reasons already stated, unseaworthy at the commencement of her voyage from Kobe.

68 MOPL claimed that s 39(1) of the Marine Insurance Act does not apply because the policies in question are time policies. However, the assurers claimed to have issued mixed policies to MOPL, which means that the policies covered the risks and incidence of both a voyage policy, which has relevance to the voyage from Kobe to Singapore, and a time policy, which covers the *Marina Iris* when she begins trading activities after she has reached Singapore.

69 Two decisions of the Court of Appeal may be contrasted at this juncture. In the first case, *The Al-Jubail IV* ([36] *supra*) , where a question arose as to whether mixed policies or time policies had been issued, Lai Kew Chai J, who delivered the judgment of the Court of Appeal, said that while the whole policy and the terms therein must be considered, the surrounding circumstances known to the parties at the time the contract of insurance was made are also relevant. Referring to the facts in that case, the judge added as follows at 56, [15]–[16]:

> The commercial context is briefly this. The respondent had the vessel just refitted in Singapore. It was a vessel intended for work in protected waters. It had to sail the Indian Ocean for its delivery to the Persian Gulf. … If the vessel had reached Damman it was intended for use to ferry

passengers or workers within protected waters in the Persian Gulf. Seeing the size and type of the vessel, the 'delivery' voyage over the Indian Ocean at this particular period of the year in which weather was turbulent would be a factor of crucial importance to both owner and underwriters.

We are accordingly of the opinion that the policy here in question is not a time policy simpliciter but is a 'mixed policy' affording a cover of 12 months and attaching as from and on the voyage from Singapore to the Persian Gulf.

70 In the second case, *Lombard Insurance Co Ltd v Kin Yuen Co Pte Ltd* [1995] 1 SLR 643 ("the Kin *Yuen* case"), which was relied on by MOPL, the respondents purchased a vessel, then lying afloat off Montevideo, Uruguay, to transport a cargo of pig-iron from Vitoria, Brazil, to Bangladesh. The appellant's policy, which incorporated the Institute Time Clauses, would not have covered the vessel on her voyage from Montevideo to Vitoria because her trading area was limited to the "Far East and Pacific not West of Capetown". To overcome this, the words "including one delivery voyage from Montevideo to trading area" was added to the policy. The vessel was totally lost at sea during the currency of the policy. The assurers contended that the policy was a mixed policy and claimed that the warranty of seaworthiness under ss 39(1) to 39(4) of the Marine Insurance Act were implied into the policy. As the vessel was unseaworthy when she left Vitoria, it was asserted that the assured was not entitled to an indemnity under the policy. This contention was rejected by the Court of Appeal, which pointed out that it was nonsensical to suggest that there was a delivery voyage as the vessel had begun her trading activities the minute she arrived at Vitoria to take on the cargo of pig-iron. Karthigesu JA, who delivered the judgment of the court, approved of Lai Kew Chai J's view that one must have regard to "all the surrounding circumstances known to the parties at the time the contract of insurance was made" and added that one must take a commonsense approach in characterising the policy. He pointed out that the only sensible consideration that one can give to the words "including one delivery voyage from Montevideo to trading area" is that the geographical trading area limited in the policy was extended to cover the journey from Montevideo to Vitoria. As such, the policy remained a time policy from the date it attached and The *Al-Jubail IV* had no application.

71 MOPL asserted that the fact that the policies contained a notation with respect to the Institute Time Clauses showed that the policies were time policies. However, I believe CIC's manager, Ms Jeannie Sim Beng Choo, who testified that her discussions with MOPL's broker, Ms Vinna Yeung, were on the basis of a voyage policy for the delivery voyage and a time policy for the coastal trade after the tug had reached Singapore. Admittedly, the assurers did not use the words "at and from" in their policies, which are words usually used for a voyage policy, and they could have worded their policies more carefully to reflect the type of cover that was being offered. Notwithstanding this, the facts in the *Kin Yuen* case are distinguishable from those in the present case, which are akin to those in *The Al-Jubail IV*. CIC was initially not keen to afford cover for the tug because of her age but agreed to do so only because of its business relationship with MOPL. It cannot be overlooked that the trading limits of the *Marina Iris* were described in the policy as:

Singapore home trade including Indonesian waters, and inclusion of one *voyage risk* from Kobe to Singapore. [emphasis added]

72 The words "voyage risk" are significant. In the *Kin Yuen* case, there was no delivery voyage because the vessel began trading activities when she reached Vitoria. However, the *Marina Iris* was not trading when she left Kobe for Singapore. She was on a delivery voyage from Kobe to be repaired and classed in Singapore. The policies included a warranty that the tug would be "BV classed and class maintained" before she started trading in a limited area, referred to in the policy as "Singapore

home trade including Indonesian waters".

73 It is pertinent to note that the assurers specifically quoted different rates to MOPL for the two phases of insurance cover, namely 0.58% for the voyage risk and 1.48% for the time cover. In addition, there were different deductible amounts in the event of a loss as the policies provided as follows:

(i) $100,000 for the *voyage risk*.

(ii) $55,000 for hull & machinery risk.

[emphasis added]

74 To adopt Karthigesu JA's words in the *Kin Yuen* case, there were "two separate and distinct phases to the insurance of" the *Marina Iris*. First, there was a voyage from Kobe to Singapore, which was a "voyage risk". Secondly, after being repaired and classed in Singapore, insurance cover was afforded for trading activities within the limits of the "Singapore home trade including Indonesian waters", which was a risk covered by the time policies. I thus find that the policies are mixed policies. As such, on the basis of the decision in *The Al-Jubail IV*, a warranty of seaworthiness is implied under s 39(1)of the Marine Insurance Act for the voyage from Kobe to Singapore. As the *Marina Iris* was clearly unseaworthy when she left Kobe, the assurers are entitled to avoid liability.

Section 39(5) of the Marine Insurance Act

75 The assurers contended that even if the policies in question are time policies, they are entitled to avoid liability under s 39(5) of the Marine Insurance Act, which absolves an assurer under a time policy from liability if the vessel is, with the privity of the shipowner, sent to sea in an unseaworthy state, and is lost as a result of the unseaworthiness.

76 In *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] 1 QB 49 at 68, Lord Denning MR explained what is meant by "privity" when he said as follows:

> 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". If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry — so that he should not know it for certain — then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence.

77 Whether due to actual knowledge or Nelsonian blindness, there can be no doubt from the earlier discussion of the unseaworthiness of the *Marina Iris* that MOPL was privy to her improper manning and to many other aspects of her unseaworthiness. On far too many occasions, MOPL's witnesses expected the warranty surveyor to cover their shortcomings in the hiring of adequately qualified crew members and in the providing of proper equipment for the crew.

78 As for whether the loss of the tug may be attributable to unseaworthiness, I find that it is more probable than not that the *Marina Iris* was lost as a result of her unseaworthiness. The assurers' expert witness, Capt Phelan, summed up the position when he said that the cause of the loss of the *Marina Iris* is "unseaworthiness, particularly with regard to the stability, and [exacerbated], I

suppose, by the incompetence of the crew". The assurers are thus also entitled to rely on s 39(5) of the Marine Insurance Act to avoid liability to MOPL.

Other grounds for repudiation of liability

79 The assurers also declined to indemnify MOPL on the grounds that the *Marina Iris* should not have left Kobe in the face of the gale warnings that were in place at the material time and that MOPL failed to comply with the warranty that the tug be subject a seaworthiness survey. The latter ground raises a question as to whether Capt Goh's warranty survey report is sufficient to comply with the requirement of a seaworthiness survey. As several substantial grounds on which MOPL's claim may be rejected have already been discussed, these assertions will not be considered.

Conclusion

80 MOPL's claim is dismissed with costs.