Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd and Another [2006] SGCA 28

Case Number : CA 6/2006

Decision Date : 11 September 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Judith Prakash J

Counsel Name(s) : Haridass Ajaib, Augustine Liew and Subashini N (Haridass Ho & Partners) for the appellant; Lim Tean, Shem Khoo and Marcus Lee (Rajah & Tann) for the respondents

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

Admiralty and Shipping – Insurance – Whether loss of vessel caused by unseaworthiness of vessel or perils of the sea covered by marine insurance policies – Whether shipowner privy to sending vessel to sea in unseaworthy state – Whether insurers entitled to avoid liability for loss of vessel at sea – Sections 39(5), 55(1), The Schedule r 7 Marine Insurance Act (Cap 387, 1994 Rev Ed)

Admiralty and Shipping – Insurance – Whether marine insurance policies subject to implied routing warranty – Whether policies containing implied warranty of seaworthiness at commencement of voyage – Whether marine insurance policies time policies or mixed policies – Sections 25, 39(1) Marine Insurance Act (Cap 387, 1994 Rev Ed)

11 September 2006 *Judgment reserved.*

Judith Prakash J (delivering the judgment of the court):

Introduction

1 On the night of 26/27 December 2003, a few hours into her voyage from Kobe to Singapore, the *Marina Iris*, a tugboat, sank. All her crew members perished. Some managed to leave the vessel before she capsized but, rescue efforts proving futile, even they unfortunately drowned subsequently.

2 The appellant, Marina Offshore Pte Ltd ("MOPL"), the owner of the tug, brought this action against her insurers, China Insurance Co (Singapore) Pte Ltd ("CIC") and AXA Insurance Singapore Pte Ltd ("AXA") (collectively "the insurers") to recover the sums insured under the respective policies. Tan Lee Meng J ("the judge") dismissed MOPL's claim with costs. MOPL has appealed.

Background

3 The story of the loss really starts in October 2003 when MOPL was investigating the possibility of purchasing the vessel to add to its existing fleet. For this purpose, it sent one Capt Tony Goh of TG Marine Service Pte Ltd ("TG Marine") to the shipyard in Kobe, where the vessel had been laid up for some ten months, to examine and report on her general condition. Capt Goh found the vessel to be a small tugboat constructed in Japan in 1982, basically for coastal operations. She was 26.5m long, 8.5m wide and 3.89m deep. Her gross tonnage was 139 tons and her deadweight tonnage was 231 tons. According to Capt Goh, the vessel was in a fair condition but he stated that, considering her age, additional repairs and modifications might have to be carried out in order to enable the vessel to be entered with an international classification society. He also advised that certain equipment be supplied in order to equip the vessel for her intended operations.

4 MOPL went on to purchase the vessel. Its intention was to have the vessel classed with

Bureau Veritas, register her as a Singapore flag vessel and then operate her within Singapore home trade limits (including Indonesian waters). Whilst some of the repair work recommended by Capt Goh was undertaken in Kobe, not enough was done for class or Singapore-flag registration purposes. MOPL decided that the vessel should come to Singapore for the rest of the work. In the meantime, in order to enable the vessel to sail on her own steam from Kobe to Singapore, MOPL procured her registration as a Panamanian vessel.

5 Concurrently, negotiations were going on between MOPL's insurance brokers and brokers representing the insurers in relation to the terms of insurance of the vessel. Whilst the insurers were initially reluctant to cover the vessel in view of her age, it was eventually agreed that the vessel would be insured for $800,000 for a period of one year from 24 December 2003 to 23 December 2004 (both dates inclusive) and that CIC would cover up to 60% of the insured sum while AXA would cover the remaining 40%. The insurance policies themselves were actually issued after the loss of the vessel but nothing turns on this.

6 Each of the policies contained a warranty stating:

> Warranted satisfactory vessel seaworthiness/condition survey for her safe voyage to Singapore by appointed surveyor – TG Marine and all recommendations to be complied [*sic*] at owner's expenses [*sic*] before her sailing from Kobe to Singapore.

Accordingly, a further survey was required. The insurers were persuaded by MOPL's broker to appoint Capt Goh for this purpose.

7 Capt Goh attended on the vessel on 19 December 2003 and other subsequent dates, according to his certificate of inspection dated 25 December 2003, "for the purpose of examining and reporting on the general condition [of the vessel] in order to proceed on a single voyage from Kobe, Japan to Singapore … in fair weather condition". At this time, the vessel was no longer laid up. She was examined at the Kobe dockyard and during a sea trial in waters outside the port of Kobe. The full report of the survey was released on 31 December 2003. The contents and effect of this survey were a matter of contention during the trial. The vessel with six crew members on board, three being deck crew and three being engine crew, departed from Kobe at about 2.00pm on 26 December 2003. The exact time that the vessel sank is not known but it was sometime in the early hours of 27 December 2003.

The action

8 The suit was commenced in December 2004. In its statement of claim, MOPL alleged that the vessel was totally lost by reason of perils of the sea. The particulars given of this assertion were brief. They were first, that upon the completion of her survey and sea trial, the vessel had departed Kobe for Singapore at 1400hrs on 26 December 2003. The second particular was that she had encountered heavy weather later the same day and at 0200hrs on 27 December 2003, the Japanese coastguard had received the vessel's distress signal. The third allegation was that the Japanese coastguard had conducted an air search by helicopter after they failed to despatch their rescue boat due to the prevailing heavy weather. The final and fourth particular was that the vessel was subsequently reported to have sunk at about the position 33º 53' N, 134º 57.5' E and that the bodies of five of the crew were eventually retrieved but the sixth body could not be found.

9 The insurers denied liability under the policies on several grounds. First, they contended that MOPL had breached express and implied warranties under the policies, thereby discharging them from all liability. Second, they argued that the loss of the vessel had not been due to perils of the sea but

had been due to unseaworthiness of the vessel for which they were not liable. Third, they were not liable because of want of due diligence on the part of MOPL in failing to ensure that the vessel complied with the voyage recommendations of Capt Goh.

10 In his judgment [2005] SGHC 238 at [10], the judge stated that the main issues before the court were 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?

11 In relation to the first issue, the judge held that a recommendation made by Capt Goh as to the route to be followed by the vessel on her voyage to Singapore was a warranty that had to be strictly complied with, failing which no cover was afforded by the policies. On the evidence he then held that the vessel did not follow the surveyor's recommended route across the Inland Sea and therefore MOPL was not entitled to an indemnity under the policies.

12 On the cause of the loss, the judge noted that, as the claimant, MOPL had to establish that the vessel was lost as a result of perils of the sea, a cause of loss within the ambit of the policies. Having considered the evidence, the judge held that MOPL had not proved the pleaded material particulars of the loss as set out in [8] above. No satisfactory evidence of the alleged heavy weather or of an air search by the Japanese coastguard was furnished. The judge considered that no one knew for certain how the vessel was lost and, in view of this, whether it might be concluded that the vessel was lost as a result of perils of the sea depended on presumptions that might be made by a court with respect to the cause of an unexplained loss. As such presumptions depended to some extent on whether the vessel was seaworthy when she sailed from Kobe, the judge went on to consider the question of the vessel's seaworthiness.

13 The judge held that the vessel was not seaworthy when she sailed from Kobe. There were several reasons for this. First, the judge found that the vessel did not have a competent master. Second, the judge considered that the vessel's stability for an ocean voyage was also an issue. He found that the vessel was not seaworthy because the master was not provided with the requisite information on the stability of the vessel for the long voyage from Kobe to Singapore across the Pacific Ocean and the stability booklet was not on board the vessel when she departed Kobe. He also noted that the vessel lacked the necessary pilot books and, possibly, important charts to sail across the Inland Sea. As the vessel was unseaworthy, the judge considered that it could not be said that it was more probable than not that she was lost as a result of perils of the sea. MOPL had not established that the loss fell within the scope of the policies and therefore its claim had to be dismissed.

14 The judge also considered the nature of the insurance policies issued in order to determine whether the implied warranty under s 39(1) of the Marine Insurance Act (Cap 387, 1994 Rev Ed) ("the Act") (*ie*, that the vessel was seaworthy at the commencement of the voyage) applied to this case. MOPL had submitted that this warranty was irrelevant because the policies in question were time policies. The insurers claimed, however, that they had issued mixed policies, *ie*, that the policies covered the risks of both the voyage policy, which had relevance to the voyage from Kobe to Singapore, and a time policy that covered the vessel when she began trading activities after reaching

Singapore. The court held that the policies were mixed policies and therefore the warranty of seaworthiness had been implied under s 39(1) of the Act for the voyage from Kobe to Singapore. As the vessel was clearly unseaworthy when she left Kobe, the insurers were entitled to avoid liability.

15 The judge also considered what the position would have been under s 39(5) of the Act, the section that would have applied had the policies been found to be time policies. In that connection, the judge held that the vessel had been sent to sea in an unseaworthy state with the privity of MOPL, and therefore the insurers were entitled to rely on s 39(5) to avoid liability to MOPL.

The appeal

16 On the appeal, counsel for MOPL canvassed all the issues that had been decided against it. MOPL did not accept any of the findings of the judge. In response, naturally, the respondents supported the judge's findings. They also referred to other pleaded defences that the judge had not needed to consider in view of his main findings.

17 The issues that arise in the appeal fall under three main heads. The first head relates to the warranties imposed by the policies, the second head relates to the cause of the loss and the third head involves whether, at this stage, the insurers can rely on the other defences that they had put forward to the claim but which were not considered by the judge. Under the first head, the points to be considered are whether the policies were subject to a routing warranty and if, on their true construction, the policies were mixed policies or time policies. Under the second head, we will consider whether MOPL was able to establish that the loss was caused by a peril insured against or whether unseaworthiness caused or contributed to the loss. In relation to the issue of unseaworthiness, we also have to deal with MOPL's responsibility and knowledge of the vessel's condition. Finally, if the holdings on the foregoing issues do not dispose of the appeal, we will consider whether the insurers made out the other defences pleaded.

The nature of the policies and the warranty issues

18 It is necessary, because of the findings below and the detailed arguments addressed to us on these issues, to set out the terms of the policies at some length. For this purpose we will use, mainly, the policy issued by CIC as it was the lead insurer and the essential terms of both policies were the same. Where there are differences, we will indicate them.

19 Both policies are in the modern form and, accordingly, each comes in several parts. The first part is a schedule that sets out the main terms of the policy and states the various clauses that apply to it. The schedule is signed for and on behalf of the relevant insurer and it is the document that has been specifically prepared for the particular policy. The schedule is followed by all the relevant clauses. In the case of the CIC policy, after the schedule, there is a printed set of "Institute Time Clauses Hulls" (sometimes referred to as "the ITC"). Then, there are some seven additional pages containing the various other clauses, express warranties and endorsements that apply to the policy.

20 For present purposes, the material provisions are in the schedule. Taking the CIC policy as a sample, the schedule is divided into sections. The top section contains various identifying information including the policy number, the agency reference, the class of policy (in this case "Marine Hull") and the issue date of the policy (in this case "31/12/2003"). The second section is brief. It contains only the following important words, "Period of Insurance from 24/12/2003 to 23/12/2004, both dates inclusive". The next few sections contain the names and details of the insured and these are followed by a section describing the risk that contains the name of the vessel, her description and the amount

that has been insured. Below this is a sentence stating "The following clauses and conditions apply to this policy" and that is followed by a long list of clauses and conditions. The relevant ones are:

> Institute Time Clause – Hulls 1.10.83 with clause 8 and clause 1.2 deleted.
>
> …
>
> Warranted satisfactory vessel seaworthiness/condition survey for her safe voyage to Singapore by appointed surveyor-TG Marine and all recommendations to be complied at owner's expenses before her sailing from Kobe to Singapore.
>
> …
>
> Warranted vessel BV classed & class maintained before vessel start trading.
>
> …

Then come two further important clauses that read:

> DEDUCTIBLE: (1) As per clause 12 – (I) S$100,000.00 for the voyage risk.
>
> (II) S$55,000.00 for hull & machinery risk
>
> Applicable on any one claim including total &/or constructive total loss.
>
> …
>
> TRADING: Singapore home trade including Indonesian waters and inclusion of one voyage risk from Kobe to Singapore.

21 The schedule of the AXA policy follows the same general pattern as that of the CIC policy. In the third section, the words that appear are "Period of insurance: from 24/12/2003 to 06/08/2004 both dates inclusive". In the fourth section after the description of the risk, the insured value is stated to be $320,000 and the deductibles are set out including the phrase "S$100,000 – clause 12 for delivery voyage risk". Then appears the following statement: "Trading limit: Singapore home trade including Indonesia waters, including one delivery voyage from Kobe to Singapore and/or held covered". The schedule also refers to the clauses, warranties and endorsements that are applicable to the insurance and are attached to the policy. Among the warranties specifically mentioned in the schedule are the same warranties relating to the seaworthiness survey and the vessel's classification status as appear in the CIC policy.

Was there a routing warranty?

22 As the judge pointed out, if a warranty contained in a policy of insurance is not exactly complied with, the contract of insurance is void and no cover is provided by the insurers even though the breach of the warranty was not causative of the loss. This is provided for under s 33(3) of the Act. As seen from the wording above, the express warranty in the schedule called, *inter alia*, "for all recommendations" made by the surveyor to be "complied [with] … before [the vessel's] sailing from

Kobe to Singapore". In Capt Goh's certificate of inspection issued on 25 December 2003, there was a section entitled "Voyage Recommendations" containing six recommendations for the conduct of the voyage including things like bunkering and ballasting requirements, daily reports and keeping a lookout. His third recommendation read 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 …

The judge held that as both policies expressly required the surveyor's recommendations to be complied with before the vessel sailed from Kobe, the recommended route for the voyage to Singapore must be regarded as a warranty. In MOPL's submission, this holding could not be sustained as the policies did not contain any express statement requiring a particular route to be followed and it was not open to imply a warranty of that nature into the policies.

23 To illustrate a situation in which the assured had to comply with a routing warranty, MOPL's counsel, Mr Haridass, cited three examples of previous policies issued by CIC that had contained such express warranties. Each of these had involved voyages from Japan to Singapore. Going by the examples given, the typical wording of such a warranty would be as follows:

> Warranted condition and crew competency survey and tug/tow, towage and routing survey to be conducted … prior to sailing from … and all recommendations to be complied with at insured's expense.

In the present case, however, the warranty only stated "satisfactory vessel seaworthiness/condition survey … by … TG Marine … before her sailing". A seaworthiness survey, argued Mr Haridass, would include crew competency but would not deal with the route. If the insurers had required a routing survey for the *Marina Iris* voyage, they should have specifically stated so in the warranty clause. Additionally, the warranty in the policies stated that the surveyor's recommendations were to be complied with *before* sailing. Obviously, a routing warranty was not one that could be complied with prior to sailing and therefore the warranty had not been intended to cover routing.

24 MOPL's arguments relating to the proper construction of the warranty provision in this case are compelling. As has been pointed out, the consequences of not complying with an express warranty are draconian. Further, by s 33(1), the Act makes clear that in marine insurance terms, a warranty is a "promissory warranty … by which the assured undertakes that some particular thing shall or shall not be done". There is therefore a positive obligation on the insured to fulfil a warranty. Given that warranties are to be complied with exactly and the serious consequences of breach, such warranties must be express, specific and clear so that there is no doubt in the mind of the insured as to what he has to comply with. The Act states (in s 35(2)) that express warranties must be written on the policy or contained in a document incorporated by reference into the policy. We are not able to find an express warranty on the route of the vessel. Firstly, the written warranty did not expressly mention the route or contain any language relating or referring to the course of the voyage. Secondly, its terms, by providing that the surveyor's recommendations had to be complied with before the vessel left Kobe, made it clear that any recommendations that the surveyor had as to what had to be done once the vessel was en route would not be part of the warranty requirements. This was in contrast with the wording of the sample clauses that mandated the survey to be carried out before the vessel concerned departed port but did not impose any such time limit in relation to the requirement to comply with the surveyor's recommendations. Thus, we could not, here, incorporate the recommendation by reference.

25 We do not find it possible either to imply into the policies a warranty that any particular route

would be followed simply because Capt Goh had made a routing recommendation. This is because the Act makes it clear (in ss 33 to 41) that implied promissory warranties are only those warranties implied by law through the various sections of the Act that impose them (see also *Halsbury's Laws of England* vol 25 (LexisNexis UK, 4th Ed, 2003 Reissue) ("*Halsbury's Laws*") at para 235). For the purposes of marine insurance, the court cannot find that an implied warranty is contained in a policy simply because the circumstances might make it important or reasonable that certain conditions be followed to reduce the risk. The normal contractual test relating to the implication of terms does not apply to a marine policy. In this case, had the insurers wanted to impose the condition that the vessel should follow the particular route, if any, recommended by the surveyor, they should have stated so in clear words as part of the language of the express warranty in the schedules. They did not do so. Consequently we must, with respect, differ with the judge's finding on this ground.

Nature of the policies – did they contain an implied warranty of seaworthiness at the commencement of the voyage?

26 Under s 39(1) of the Act, there is an implied warranty in a voyage policy that at the commencement of the voyage, the vessel shall be seaworthy for the purpose of the particular adventure insured. No such warranty is implied into the terms of a time policy. Thus, in order to determine whether the policies concerned contained an implied warranty of seaworthiness, it is necessary to first determine whether they were time or voyage policies.

27 The Act provides the following definitions of voyage and time policies by s 25:

> **Voyage and time policies.**
>
> **25.**—(1) Where the contract is to insure the subject-matter "at and from", or from one place to another or others, the policy is called a "voyage policy", and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy".
>
> (2) A contract for both voyage and time may be included in the same policy.

28 In the court below, the insurers claimed to have issued mixed policies. The expression "mixed policy" is not used in the Act. The Court of Appeal in *Lombard Insurance Co Ltd v Kin Yuen Co Pte Ltd* [1995] 1 SLR 643 ("*Kin Yuen*") used the term to mean a policy in which a vessel is insured in the same policy for a voyage "at and from" or from one place to another or others and also for a definite period of time. We shall adopt the same terminology.

29 The insurers asserted that the cover provided for the voyage from Kobe to Singapore was by way of a voyage policy whereas a time policy applied to the vessel when she began trading activities after reaching Singapore. The judge considered this argument in the light of two previous decisions of this court, *Malayan Motor & General Underwriter (Pte) Ltd v MH Almojil* [1982–1983] SLR 52 ("*The Al-Jubail IV*") and *Kin Yuen*. In *The Al-Jubail IV*, the relevant policy was held to be a mixed policy whereas in *Kin Yuen*, the policy was construed to be a time policy. The court below considered that the facts in *Kin Yuen* were distinguishable from those in the present case which were more akin to those in *The Al-Jubail IV*. Additionally, the use of the words "voyage risk" in the policies in relation to the voyage from Kobe to Singapore and the differing rates of premium and deductibles quoted by the insurers were deemed significant indicators of the nature of the policies.

30 The rules of construction that apply to any commercial contract apply also to the construction of a policy of marine insurance. This means that the court's task is to give effect to the parties' intentions as expressed in the contract by construing it according to its sense and meaning

as objectively understood from the language of the contract. The terms of the contract are to be understood in their plain, ordinary and popular sense unless by reason of usage of the trade they have a particular meaning or the context indicates a special meaning in any particular case (see *Halsbury's Laws* ([25] *supra*) at para 226). The circumstances surrounding the making of the contract must also be looked at to establish the meaning of the contract but it is only where the words of the contract are ambiguous that the acts, conduct and course of dealing of the parties before and at the time they entered into it may and should be considered in order to discover the parties' intentions (see *Halsbury's Laws* at para 228). In the present case, in this task of construction, we are also aided by s 25 of the Act which indicates the general nature of time and voyage policies.

31 If s 25 of the Act were to be determinative of the nature of the policies concerned, they would both be construed as time policies *simpliciter*. This is because both policies provide for the duration of the risk to be determined by a period of time which begins and ends on specified dates. There is no indication next to the dates provided that the policies are issued in respect of any specific voyage so as to make the policies mixed or hybrid policies. In *Halsbury's Laws*, at para 305, examples are given of policy language which usually indicates that the policies concerned are mixed policies. Wording such as "at and from London to Cadiz for six months" or "from 1 January 1994 to 1 June 1994, at and from Bristol to Marseilles etc", indicate the issue of a mixed policy. Such language contains descriptions of both a time period and a voyage in immediate juxtaposition to each other. This did not happen in the present case. The essential words "at and from" or the indication that the risk is "from" a particular place to another do not appear in the relevant section of the schedule of either policy. This section is the section where the coverage of the risk is generally indicated and where it would be appropriate to mention the voyage concerned if the policy is intended to be either a voyage policy *simpliciter* or a mixed policy. Instead, in this case, no mention of any voyage is made until further down in the schedules and such mention is within a clause dealing with the trading area of the vessel.

32 That, however, is not all. Any policy must be looked at as a whole in order for its meaning to be understood. In this case, the initial impression given by the period of insurance stated in the policies is followed and reinforced by the specific incorporation of the ITC as essential terms of the policy. Significantly, not even one of the Institute Voyage Clauses is incorporated as part of the terms of the policies let alone the whole set of such clauses. Further, there is the warranty that a satisfactory seaworthiness or condition survey of the vessel will be provided before the sailing of the vessel from Kobe to Singapore. Such a warranty would not be required if the policies were not pure time policies but were voyage policies in respect of the journey from Kobe as, in that case, the law would imply a warranty that the vessel would, at the commencement of the voyage from Kobe, be seaworthy for the purpose of the voyage to Singapore. It bears repeating that in the CIC policy, the warranty expressly provides that the purpose of the seaworthiness survey was "for her safe voyage to Singapore". That wording indicates beyond doubt that the insurers were concerned that the vessel be or be made seaworthy for the voyage to Singapore and knew that if they did not impose such an express warranty, there would be no such obligation on MOPL under this policy. That each policy also contains a clause entitled "trading limits" or "trading" is also an indication that it is a time policy. This is because "trading limits" are a feature of time policies and not of voyage policies since the latter spell out from the very beginning the geographical route that cover is being provided for.

33 In *Kin Yuen* ([28] *supra*), the court was faced with a policy which was for the period from 30 May 1985 to 28 December 1985 and was also subject to the ITC. The policy, however, contained a warranty reading "warranted trading Far East and Pacific not West of Capetown, not North of Vladivostok, not East of Japan and not South of Australia, but excluding Iran, Iraq, Vietnam and Kampuchea including one delivery voyage from Montevideo to trading area". There was no specific clause entitled "trading limits" and it was the warranty that performed the function of delineating the

geographical area within which the vessel was permitted to ply. It was contended that this was a mixed policy. G P Selvam J, in the court of first instance (see *Kin Yuen Co Pte Ltd v Lombard Insurance Co Ltd* [1994] 2 SLR 887), noted that the words "at and from" did not appear in the policy and that it was in the modern simple form used for a time policy, rather than the Lloyd's Ship and Goods ("SG") form of policy, and that the ITC were incorporated into it. In his view, that was conclusive of the matter and the delivery voyage was included in the policy to modify the trading limit and not the nature of the policy as a time policy. His decision was upheld by the Court of Appeal which also went on to examine the circumstances of the policy before holding that one must take a common-sense approach in characterising the policy and, using such an approach, the only sensible construction that one could give to the words of the warranty in the policy "including one delivery voyage from Montevideo to trading area" was that the geographical trading area limited in the policy was being extended to cover the vessel's voyage from Montevideo to Vitoria into the trading area (*per* Karthigesu JA, delivering the judgment of the Court of Appeal, at 651, [19]).

34 Here, what the insurers relied on to argue that the policies are mixed policies was the wording that appears against the rubric "trading" in the CIC policy and the rubric "trading limits" in the AXA policy. Because the description of the trading limits includes the phrase "inclusion of one voyage risk from Kobe to Singapore" in the CIC policy and the phrase "including one delivery voyage from Kobe to Singapore and/or held covered" in the AXA policy, the argument was made that the policies covered both a period of time and a voyage and were therefore mixed policies. On the face of the policies, it appears to us that this is a strained interpretation of the language. The phrases concerned indicate that while generally the policies would only answer for incidents occurring while the vessel plied within Singapore home trade waters, the policies would also cover the vessel whilst she was on one trip from Kobe to Singapore during the period of the insurance. In our judgment, as in the *Kin Yuen* case, the words relied on modified or extended the trading limit so that the vessel would be covered on her voyage to Singapore but did not alter the nature of the policy as a time policy. No doubt the facts of this case are somewhat different from those in *Kin Yuen* in that the first voyage of the vessel was supposed to be from one port to another rather than, as in *Kin Yuen*, from one port to a trading area. That distinction does not, however, in our view, mean that we should throw out the common-sense interpretation of a clause relating to trading limits and find that simply because it refers to a voyage from port A to port B, the whole policy becomes a mixed policy.

35 The insurers submitted that the facts of this case were more akin to those of *The Al-Jubail IV* than they were to those of the *Kin Yuen* case. *The Al-Jubail IV* was, until the decision below, the only case in Singapore where a mixed policy had been found. The facts of that case were that the owner of the vessel concerned had had her refitted in Singapore. She was a vessel intended for work in protected waters and the owner wanted to employ her as a ferry in the Persian Gulf. The vessel sailed on her own steam from Singapore for Damman on what was referred to as a delivery voyage. She ran aground some 15 miles off the coast of Iran. The court commented that in view of the size and type of the vessel, the delivery voyage over the Indian Ocean during a period of the year in which turbulent weather could be expected, was a factor of crucial importance to owners and underwriters. The court was of the view that the policy was not a time policy *simpliciter* but was a mixed policy affording a cover of 12 months and attaching as from and on the voyage from Singapore to the Persian Gulf.

36 The policy in *The Al-Jubail IV* was, however, a very different one from those that are before us. That policy, effected in 1975, was in the Lloyds SG form, a multi-purpose form, which was used for many years but is no longer popular. In F D Rose, *Marine Insurance: Law and Practice* (LLP, 2004), the author comments (at para 10.5) that a question of interpretation as to whether a policy is a time policy or a voyage policy was more likely to have arisen in days when parties used and adapted a multi-purpose form such as the Lloyd's SG policy whereas "[i]n modern times, once the slip is properly

completed, the appropriate standard form clauses adopted and the policy drawn up accordingly, there is unlikely to be any doubt whether the policy is either a voyage or time policy, though it may still need to be resolved whether it is a mixed policy". The wording of the *The Al-Jubail IV* policy itself shows why the Lloyd's SG form gave rise to difficulties of interpretation. As regards the period of cover, the material words were "at and from or for the period: From 21 April 1975 to 20 April 1976 (both days inclusive)". In addition, it contained the "touch and stay at any ports or place" clause which is a clause that is used in voyage policies rather than in time policies. The policy also contained what the court described as a crucial warranty that read:

> Warranted:
>
> (a) Trading within Persian Gulf but including one delivery from Singapore to Persian Gulf on its own steam sailing on or about 21 April 1975.
>
> (b) Panamanian Loadline and Maintained.
>
> (c) Subject to satisfactory condition survey by approved surveyors.

Significantly, the warranty in *The Al-Jubail IV* required a condition survey and not a seaworthiness survey. That underwriters regard a condition survey and a seaworthiness survey as two completely different things was made plain by the insurers in this case when they put forward the argument that the survey done by Capt Goh was a condition survey and not a seaworthiness survey.

37 The court in *The Al-Jubail IV* determined the issue of whether the policy was a mixed policy by construing the policy and ascertaining the intention of the parties from, *inter alia*, all the surrounding circumstances known to the parties at the time the contract of insurance was made. Reference to the circumstances was particularly necessary in view of the ambiguity of the policy. The policy contained both "at and from" and a definite period of time for the insurance cover but did not in that same sentence indicate the starting and ending termini of the voyage to which it referred. It also contained a clause that applied to voyage policies. It was only in the warranty which dealt with the trading limit of the vessel that there was reference to the delivery voyage from Singapore to the Persian Gulf and thus an indication of a voyage component. The court's decision that the policy was a mixed policy came under criticism from the counsel who appeared in *Kin Yuen*. Those criticisms were rejected by this court on the basis that in *The Al-Jubail IV*, there clearly were two separate and distinct phases *to the insurance* of the vessel namely, the delivery voyage and thereafter, the time policy for restricted trading limits (Persian Gulf). Karthigesu JA stated (at 650, [15]) that while the decision in *The Al-Jubail IV* was correct on the facts and circumstances of that case, it had to be confined to those facts and circumstances and was not of universal application.

38 As counsel for MOPL submitted, this was a warning. The Lloyd's SG form was originally a voyage form only as it catered for the merchant adventurer and the same form of policy was available to cover both the ship and the goods to be carried (see N Geoffrey Hudson, *The Institute Clauses* (LLP, 2nd Ed, 1995) at p 79). Subsequently, with the expansion of commerce, it became used for time policies as well. In *The Al-Jubail IV* case, the use of the words "at and from" indicated that the basic policy was a voyage policy and a time cover was then included thereon by the insertion of the words "or for the period: From 21 April 1975 to 20 April 1976" after the words "at and from". In this light, there were two separate and distinct phases to the insurance of *The Al-Jubail IV*. The court in that case was, therefore, concerned with two separate and distinct phases to the insurance of the vessel. Every voyage is a separate and distinct phase, but that is not a reason to find that a voyage policy has been provided for (and that hence the policy is a mixed policy). The voyage may be covered by the time policy and, if so, the policy remains a time policy *simpliciter*. In *The Al-Jubail IV*, the voyage

was covered by a separate voyage policy when the phrase "at and from" was used and a definite period of time was also provided to indicate that the vessel would be covered on a time basis after that voyage concluded.

39 The judge considered that there were "two and distinct phases to the insurance of" the vessel in this case. He said at [74]:

> 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.

With respect, we do not agree. The interpretation given by the judge would mean that there would be a period of time when the vessel was in Singapore being repaired and classed during which she would have, on this interpretation, no insurance cover. That would not, in our view, be the way that the policies worked. The insurers issued a time policy which attached on 24 December 2003 (the date of the attachment was chosen as it was the intended date of departure from Kobe and was required as this was a time policy since a voyage policy would have started on departure without the need for a specific date to be specified) and which covered the vessel until 23 December 2004 (in the case of CIC) and until 6 August 2004 (in the case of AXA). During that period, the vessel was "on risk" as long as she was within the trading limits and that would include being in Singapore during the period required for repair work and classification surveys. It was contemplated that there would be various voyages during the period of cover but there was no separate phase of insurance.

40 We now turn to other matters relied on by the judge in his finding that the policies were mixed. These were the use of the words "voyage risk" in the trading limits clause of the CIC policy, the differing deductibles that the policies imposed for various risks and the judge's finding that the insurers quoted different rates to MOPL for the two phases of insurance cover. In our judgment, with respect, these matters do not affect the nature of the policies as time policies.

41 First, the words "voyage risk" do not indicate a separate phase of insurance as had been argued below. According to the definition given in Eric Sullivan, *The Marine Encyclopaedic Dictionary* (LLP, 3rd Ed, 1992), the word "risks" is widely used in the insurance industry to mean "the hazards or losses to which a venture may be unexpectedly exposed. Formerly known as Perils". The word "risks" therefore does not refer to the type of cover or the phase of insurance. It refers to perils. The perils of the voyage may be covered by a voyage policy or a time policy. A time policy covers a series of voyages or voyage risks within the stipulated time. In the present case, as the first voyage was outside the trading limits, it was specially covered by an extension of the trading limits to include this "voyage risk". Hence, the use of that phrase cannot lead to the conclusion that the policy is a mixed policy. Additionally, if the words "voyage risk" were intended to change the nature of the policy from a time policy to a mixed policy, they would have been used by both insurers. Yet, they do not appear in the AXA trading limits clause. There the phrase used is "including one delivery voyage" and the word "risk" is omitted. This must have been because the insurers were aware that the words "voyage risk" read literally do not alter the nature of the policy. At this point, it may also be relevant to mention that the words "and/or held covered" that appear after "one delivery voyage from Kobe to Singapore" in the AXA trading clause also indicate that the policy was a time policy. Had the policy been a voyage policy as well and subject to the Institute Voyage Clauses, a "held covered" clause would have been included automatically and there would have been no need for the express reference to "held covered".

42 Secondly, in our opinion, the employment of various deductibles and the indication given by

the insurers to MOPL as to how the premium rate had been arrived at did not indicate that the insurers were covering the trip from Kobe to Singapore by way of a voyage policy. The breakdown in the premium rate does not appear in either policy. AXA did issue a payment plan in respect of the premium but whilst that specifies that the premium is to be paid in three instalments and gives the date and amount of each payment, it does not allocate any part of the premium to any phase of insurance. This was consistent with what was in fact quoted by CIC to MOPL in its letter of 2 December 2003, *ie*, a single composite rate of 2.060% although within parenthesis CIC had indicated how that composite rate had been calculated. The letter stated "Premium rate: 2.060% (H&M – 1.48% and Voyage – 0.58%)". That a composite rate was given was consistent with the intended issue of a time policy. As far as the differing deductibles are concerned, we accept the submission of MOPL that these did not indicate the issue of a voyage policy. They merely reflected the reality that the risks were different when the vessel operated outside the trading area.

43 For the reasons given above, we must, with respect, differ from the court below on the true nature of the policies issued. Accordingly, we also conclude that there was no implied warranty at the time the vessel left Kobe that she was seaworthy. If the vessel was unseaworthy at the time of departure, that would not prevent the policies from attaching and the insurers from being at risk. Unseaworthiness of the vessel would only absolve them from liability if they could show that the vessel was sent to sea in an unseaworthy state with the privity of the insured and that the loss for which the insured claimed was attributable to that unseaworthiness (see s 39(5) of the Act).

Cause of the loss: Was it attributable to perils of the sea or unseaworthiness?

44 Before we consider the arguments and evidence in relation to the cause of the loss, a brief account of the applicable principles of law in relation to a claim for a loss arising out of alleged perils of the sea may be helpful. Some of the principles are set out in the Act itself. The relevant provisions are r 7 of the Construction Rules in the Schedule to the Act and s 55(1) of the Act. By r 7, we are told that the term "perils of the seas" refers to fortuitous accidents or casualties of the seas and does not include the ordinary action of the winds and waves. By s 55(1) of the Act, unless the policy otherwise provides, the insurer is liable for any loss *proximately caused* by a peril insured against. Thus, in this case, MOPL, having claimed that the loss was due to perils of the sea, had the burden of proving that that was the proximate cause of the loss.

45 The authorities relating to the above provisions and the question of proof of perils of the sea generally were examined in some detail by Selvam J at first instance in *Kin Yuen* (see generally [1994] 2 SLR 887 at 897–902, [37]–[54]). That was a case in which the loss was alleged to have arisen from perils of the sea but it was common ground that the vessel concerned was unseaworthy and therefore one of the most important points in the case was the impact that the unseaworthiness could have had on the claim. The judgment drew the following principles from the authorities:

(a) Whilst ordinary action of the winds and waves is excluded from the definition of "perils of the seas", just because the weather was such as might be reasonably anticipated, it cannot be concluded that there was no peril of the sea as long as there was some element of the fortuitous or the unexpected in the facts causing the loss.

(b) The proximate cause of the loss would be that which was proximate in efficiency and not simply that which was proximate in time.

(c) The determination of the proximate cause may not be plain and simple for it is very rarely that a loss is caused by a simple predominant cause and often two or more circumstances which are not insured perils are at play in combination with an insured peril. If the loss arises from

two causes effectively operating at the same time and one is expressly excluded from the policy, the insurer does not pay.

(d) Where, however, there is no express exemption of a cause, then if there are two or more equally or almost equally dominant causes, each of which can be considered to be the proximate cause of the loss, and one comes within the terms of the policy and the other does not, the insurer must pay. The reason is that loss due to unseaworthiness not being excluded from a time policy, the only way of giving effect to the inclusion of the perils of the sea is to make the policy pay.

(e) The applicable rule of causation was that stated by Mustill J in *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1985] 1 Lloyd's Rep 264 at 271, approved on appeal by the English Court of Appeal (see [1987] 1 Lloyd's Rep 32), *ie*:

> [I]t is clearly established that a chain of causation running –(i) initial unseaworthiness; (ii) adverse weather; (iii) loss of watertight integrity of the vessel; (iv) damage to the subject-matter insured – is treated as a loss by perils of the seas, not by unseaworthiness …

46 Selvam J summed up the above principles as follows at 901, [48]:

> The mere fact of unseaworthiness is not by itself a defence to a claim under a time as opposed to a voyage policy. Where adverse weather is shown as an essential step in the sequence of events that lead to the loss the policy must pay. For adverse weather or adverse sea conditions to constitute a peril of the sea there must be something more than calm weather or sea conditions, something which men in the field commonly understand and accept as such even though such conditions could reasonably have been anticipated during the voyage.

It should also be noted, however, that in a case like the present, if the insurers were able to show that unseaworthiness *to which the assured was privy* was the sole or concurrent (with perils of the sea) cause of the loss, then the policies would not pay (see *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd and La Réunion Europèene (The Star Sea)* [1995] 1 Lloyd's Rep 651.

Perils of the sea

47 Below, the judge held that none of the particulars of the cause of the loss provided by MOPL (repeated in [8] above) had been proved at trial. He considered that no satisfactory evidence of the alleged heavy weather or of an air search by the Japanese coastguard was furnished. He noted that although there had been gale warnings in the Kobe area at the material time, both MOPL's expert witnesses had downplayed those warnings and said that the master had acted correctly in leaving Kobe at the material time. Further, the vessel was lost close to Kobe and not in the Pacific Ocean. In the judge's opinion, some acceptable evidence of the heavy weather and not mere hearsay should have been tendered. In our judgment, that finding was against the weight of the evidence.

48 Adequate and acceptable evidence of heavy weather had been presented. First, there was the affidavit of evidence-in-chief of Hiroshi Hamamoto, a Japanese marine surveyor, who appeared as an expert witness for the insurers. This witness stated that from the co-ordinates of the wreck, the vessel had sunk in the middle of the Kii Suido Strait. Based on this position, his opinion was that upon departing Kobe, the vessel had passed through the Tomogashima Strait and was intending to pass through the Kii Suido Strait out into the open sea. According to weather reports made by the Tomogashima Observatory (copies were attached to the affidavit) from 1400hrs on 26 December 2003 to 0200hrs on 27 December 2003, the wind speed ranged from 8–15m/s (metres per second) with the

wind speed hitting its highest at around 0200hrs on 27 December 2003. According to the witness, winds of 14 m/s would be equivalent to 28 knots and this would be considered a Force 7 gale. Capt Hamamoto had, therefore, produced credible evidence of bad weather in the area where the vessel was likely to have been immediately prior to sinking.

49 The witness also gave evidence on weather conditions in the Kobe area generally from 26 to 28 December 2003 based on weather reports or forecasts for the period and on weather warnings released by the Kobe Meteorological Observatory. These data showed that from the evening of 25 December until almost midnight on 27 December 2003, based on contemporaneous observations, gale warnings for the area were issued regularly. For example, at 1130hrs on 26 December 2003, there was a gale warning for the northern part of the sea off Shikoku Island with wind speed up to 18m/s, whilst in the southern part of the sea, winds of up to 15m/s were forecast. At 1735hrs the same day, there was another gale warning for the same area and the wind speed in the northern part of the sea off Shikoku Island was forecast to be up to 20m/s. At 2335hrs the same day, there was still a gale warning for the sea off Shikoku Island with wind speed up to 18m/s in the southern part and up to 20m/s in the northern part. Then, based on observations made at 0300hrs on 27 December 2003, the forecast issued at 0535hrs that day was for gale with wind speeds still at 18m/s in the south and 20m/s in the north. Whilst the purpose of the insurers in adducing such evidence was to indicate that the weather conditions were not fair at the time the vessel left Kobe (1400hrs on 26 December 2003), the same evidence also showed that the general weather conditions in the area around Kobe were adverse throughout 26 December 2003 and the morning of 27 December 2003.

50 It was also through Capt Hamamoto that evidence of contemporaneous newspaper and Internet reports containing information released by the Japanese coastguards to the press on the actual sinking of the vessel in December 2003 was adduced in court. The witness used this material to point out that the Japanese press had criticised what it saw to be the bad practice of foreigners purchasing domestic Japanese vessels and sailing them back under their own steam to the purchaser's country. The material indicated that a distress call from the vessel was received by the Japanese coastguard at about 1.39am on 27 December 2003. The coastguard deployed four patrol boats and two aircraft in a search and rescue operation and at about 7.30am, they spotted two crew members in a rubber boat. About 30 minutes later, the coastguard picked up one of the crew members but during the rescue attempt, due to the rough sea, the other man fell into the sea and went missing. An hour later, another patrol boat picked up a man wearing a life jacket and floating in the sea. A few hours later, two other victims were found. According to the coastguard, the sea in the area was turbulent around 5.00pm with wind speed of 20m/s and high waves of 5m/s. In one report that MOPL emphasised, an official from the coastguard was reported as having said that the sea was turbulent with violent winds and high waves when the rescue boats arrived at the site. Again, while the purpose for which these newspaper reports were introduced was not to establish the conditions of the sea at the time of the casualty, the witness must have found them to be fairly reliable as he used them without any critical comment as to accuracy. We do, however, recognise the limitation of evidence of this type which in its nature is hearsay.

51 Additional evidence on the weather conditions was, however, adduced through MOPL's expert witness, Capt Jonathan Mark Walker, a master mariner and marine surveyor. He obtained information on the weather provided by weather observers in the vicinity of Kii Suido and instructed an organisation called Weathernews Inc to prepare a hindcast of the weather experienced in Kii Suido on the night of 26 December 2003. A copy of this hindcast was annexed to his affidavit. It indicated that west-north-west winds of Force 6 to Force 7 on the Beaufort scale were experienced at the sinking location at about 2100hrs that night. According to Capt Walker, winds of such strength in the open sea would probably mean a wave height of 4m to 5m. However, the area concerned was fairly close to land and therefore the significant wave height would only have been between 1.5m and 2m.

Capt Walker was of the opinion that if the vessel had been proceeding in a southerly direction, these waves would have generated an uncomfortable roll and pitching motion and the aft deck would be almost continually awash with water as the midship freeboard was only about 30cm in height. He also opined from the wave and wind data that he had collected that in the area of Kii Suido, there was a short period of stronger winds before and after midnight on 26 December 2003 that generated increased wave heights at the recording stations. This was close to the approximate time at which the vessel sank.

52 MOPL also relied on the evidence of Michael Thompson, a casualty surveyor appointed by the insurers to investigate the loss, and who then testified for the insurers. Mr Thompson's evidence was interesting. In his report, he had stated in conclusion that the loss was primarily due to the adverse sea conditions encountered. Under cross-examination, he changed his position somewhat in that he stated that there were other things that were not right with the vessel. He also stated that his conclusion that the loss was due to adverse sea conditions had been based on reports to him that the waves in the area where the vessel sank were about 5m to 6m in height and it was a possibility that she could have sunk if she had encountered such conditions. Mr Thompson qualified that she would not have sunk if the significant wave height encountered was only 1.5m to 2m. Under further questioning, however, he agreed that winds of Force 6 to Force 7 on the Beaufort scale were near gale force and that he knew the vessel had encountered bad weather and that if it had not been for the bad weather, then she would not have sunk. He was aware from his investigations that at the time when the emergency beacon (the distress call) went off, the Japanese coastguard could not get to the vessel because of the weather conditions. MOPL's Mr Lim had told him that an air search by helicopter had been conducted instead. Finally, Mr Thompson agreed that his conclusion after his investigations was that the loss was *primarily* due to adverse sea conditions encountered.

53 In their response to MOPL's arguments, the insurers contended that the evidence given by Capt Hamamoto was in relation to the gale warnings "that were widely published and transmitted to all vessels in the Kobe region" and that he was simply concluding that in the light of these forecasts, a competent master would not have set sail from Kobe and attempted a voyage to Singapore. He was not giving evidence that the vessel actually encountered adverse sea and weather conditions at the time of the sinking. Further, the Japanese newspaper report on the sinking, stating that the vessel was believed to have foundered in rough seas and that the sea was turbulent with violent winds and high waves when the rescue boats arrived, was hearsay and shed no light on actual conditions at the time of sinking. As for Mr Thompson, he had no personal knowledge of the weather and sea conditions and only reported on what was told to him by members of MOPL's office.

54 In our opinion, there was ample evidence supporting a finding that the vessel had faced adverse weather conditions prior to her becoming a casualty. Whatever may have been Capt Hamamoto's purpose in adducing them, the weather data that he produced supported MOPL's contentions on this point. These also supported the reports in the newspaper. There was also the data produced by Capt Walker and the conclusion reached by Mr Thompson after investigating the loss for the insurers, not for MOPL. Mr Thompson was not restricted to MOPL's personnel as a source of information and although he did qualify his initial conclusion somewhat, in the end he accepted that the primary cause of the loss was the bad weather conditions.

55 The judge noted that no one knew for certain how the vessel was lost as she was under the sea and all her crew members had died. Additionally, Capt Walker had stated that there was no conclusive proof of how the vessel sank. What the court is concerned with is, however, the balance of probabilities. That the vessel had sunk was not a point that was disputed by anyone. As Capt Walker pointed out in his report, for a vessel to sink she has to have a loss of buoyancy and this would have occurred if there had been ingress of water into the vessel either from a breach in the

underwater hull or through openings in the above water structure. In the court below, MOPL had put forward a theory by Capt Walker that the engine room had been flooded and this had led to the loss of buoyancy. The insurers did not accept that and pointed out that the theory was never pleaded. Whilst that was so, it was also plain from the pleadings that MOPL was asserting that the vessel had been overcome by the weather conditions she had encountered and these had caused her to sink. Necessarily implied in that pleading was that the vessel had lost buoyancy by reason of water ingress. MOPL could not state or establish exactly what caused the water to enter the vessel as the witnesses of the event had all perished but that does not mean it did not prove the cause of the loss on the balance of probabilities. Mr Thompson for one had no difficulty accepting that a vessel could be overcome by adverse weather and founder even though he too did not know how and where the water had entered the vessel. He theorised that "downflooding" due to heavy seas caused the vessel to be immobilised and subsequently founder. Echoing, perhaps unconsciously, the views of Capt Walker, he said in his report that the engine room access doors were located at the main deck level and water could have entered the engine room in heavy seas if these doors were not closed.

56 The insurers then argued that even if the vessel had faced rough seas and weather around the time of her sinking and these conditions caused the sinking, that loss was not caused by perils of sea because there was no element of fortuity. The element of fortuity was missing because MOPL knew that the vessel was sailing from Kobe to Singapore in the midst of the north-east monsoon, there were numerous gale warnings and forecasts issued on 25 and 26 December 2003 covering the period in which the vessel was to sail and a reasonable shipowner would have known or expected to face rough seas and weather when sailing at the material time. These arguments are not persuasive. As we have noted above, the fact that bad weather may be anticipated does not mean that there is no element of fortuity when it actually occurs and has a devastating effect on the vessel. When the vessel left port, despite the gale warnings, the weather seemed fair and the vessel had been cleared to sail in fair weather. It was not the contention of the insurers that the vessel was in such a state of general debility that the ordinary action of the winds and waves in any type of sea was bound to cause her damage. What they had contended as an alternative was that the vessel sank because she had poor stability and could not maintain her buoyancy in the adverse conditions encountered. During cross-examination, Mr Lim, counsel for the insurers, spoke of the vessel progressively losing her stability when winds of 30 knots continued to pound on her superstructure and posited the position that once she had heeled over beyond about 30º, the vessel would have capsized and once she capsized, water would have gone into all the openings of the vessel and that would have been how the vessel was flooded and sank. If the vessel sank because the bad weather acted on her alleged poor stability and allowed the ingress of water, that would be a peril of the sea.

57 It is clear from the authorities that incursion of seawater is a peril of a marine character. Seawater is not expected to enter a vessel either through her deck openings or her hull and if it enters the vessel, it generally enters by accident or casualty. In *Canada Rice Mills, Limited v Union Marine and General Insurance Company, Limited* [1941] AC 55, the point was put in this way by Lord Wright at 68–69:

> Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act … or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without the stress of weather, by the vessel heeling over owing to some accident … These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. … There are many deck openings in a vessel through which the seawater is not

> expected or intended to enter and, if it enters, only enters by accident or casualty. … If they were not closed at the proper time to prevent seawater coming into the hold, and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection.

58 In the light of the evidence and the authorities, we must therefore hold that perils of the sea were, at least, one of the proximate causes of the loss. What we have to go on to consider is whether another cause of the loss was unseaworthiness of the vessel to which MOPL was privy.

Unseaworthiness

59 The judge found that the vessel was unseaworthy when she left Kobe for Singapore. There were three grounds on which he considered her to be unseaworthy. The first was that she was improperly manned. The second was that the master was not provided with the requisite information on the stability of the vessel for her voyage and the stability booklet was not on board the tug. Thirdly, he found that she lacked the necessary pilot books and, possibly, important charts needed to sail across the Inland Sea. On appeal, MOPL submitted that the first ground was not supported by the evidence and that the findings on the second and third grounds should not have been made as these were not issues raised by the insurers' pleadings.

60 Dealing with the latter two points first, the relevant pleading is in para 10 of the amended defence. This states:

> Further and in the alternative, the Defendants aver that even if the Plaintiff's warranty of seaworthiness of the Vessel is not implied into the Policies of Insurance, the Defendants aver that the vessel was sent to sea in an unseaworthy condition with the privity of the Plaintiffs and that the alleged loss of the Vessel was attributable and/or proximately caused by such unseaworthiness, which the Plaintiff had expressly warranted in the Policies of Insurance.
>
> **PARTICULARS**
>
> (i) The designated lead Master Captain Rudy, and the other two (2) officers Captain Danus Gainau and Captain Anthonius Pasampang held only Indonesian crew certificates to serve on Near Coastal Voyages and were therefore not properly certified to serve on board a vessel making a voyage from Kobe to Singapore;
>
> (ii) The Vessel was suitable for use only in coastal waters and was not equipped for ocean-going voyages. Alternatively, the Plaintiffs and/or their managers allowed the Master and/or crew of the Vessel to adopt a route from Kobe to Japan in contravention of the route recommended by appointed surveyors, TG Marine Pte Ltd (hereinafter "TG Marine") in its condition survey report of the Vessel dated 26 December 2003.

61 It can be clearly seen from the above pleading that the insurers did not plead either that the vessel was inherently unstable or insufficiently stable or that the crew had not been provided with information on the stability of the vessel for the voyage to Singapore. Nor did they plead that necessary pilot books and charts to sail across the Inland Sea had not been provided by MOPL. A pleading that a vessel is suitable for use only in coastal waters and not equipped for ocean-going voyages is a very general pleading and does not allow an argument on lack of stability or the lack of specific pilot books or charts. The insurers had the onus of proving that the vessel was unseaworthy since the policies were time policies and they therefore also had the burden of setting out precisely

the grounds on which the allegation of unseaworthiness was made. Since the insurers failed to make their stance clear in their pleading, the issues of stability and lack of pilot books or charts were not before the court for consideration.

62 Turning to the other ground of unseaworthiness, *ie*, the incompetence of the crew, the judge, having noted that a vessel must have a competent master as well as a sufficient number of competent crew members, examined the qualifications of the three deck officers, Mr Danus Gay Nau, Mr Rudy and Mr Anthonius Pasampang. He said that there was some confusion as to their roles as each of them had been referred to as a master in Capt Goh's report but that Mr Danus was regarded as *the* master of the vessel by MOPL. The judge found, however, that all three lacked the necessary qualifications to be the master of the vessel for the voyage to Singapore. Mr Rudy had been hired by MOPL as an able-bodied seaman and had no recognised qualifications and was not qualified to sail on board the vessel as a deck officer. Mr Danus was competent to sail on "Near Coastal Voyages" which extended to South Vietnam and South Philippines but not to Taiwan and Japan. As such, the judge found that he should not have been appointed the master of the vessel for the voyage from Japan to Singapore. The third member of the deck crew, Mr Anthonious, was qualified to be a deck officer but had no qualifications to be the master of the vessel.

63 On the appeal, MOPL submitted that the crew were not insufficiently certified as the vessel was a Panamanian-flag vessel and Panamanian law did not require specific qualifications for the crew for the voyage in question. That submission, however, did not have a strong evidential base. The only evidence given on the Panamanian law requirements was that of Mr Koh Peck Song, the operations manager of MOPL, who said that he had asked an agent of the Panamanian registry to make enquiries on the crew requirements for the voyage from Kobe to Singapore and was informed that all he needed to do was to engage a crew of four. At best, this evidence was hearsay. It did not establish that no certification was required.

64 MOPL also argued that insufficient certification of the crew would not render a vessel unseaworthy, only incompetence would do so. It relied on the holding in *The Empire Jamaica* [1955] 1 Lloyd's Rep 50 that insufficient certification did not necessarily translate into incompetence. Instead, the crew's competence must be examined in the light of both the certification and actual seagoing experience. It was argued that here the crew were not incompetent in view of their previous experience. None of them, however, had previously been master of a tugboat for a voyage of this nature in the seas between Japan and Singapore. Overall, on the evidence adduced, we are not able to find that the judge's holding that there was no competent master of the vessel was against the weight of the evidence. The vessel was, accordingly, unseaworthy on her departure from Kobe. That, however, is not the end of the matter.

65 In order to avoid liability, the insurers had to show not only that unseaworthiness was a cause of the loss but that MOPL was privy to sending the vessel to sea in an unseaworthy state. As far as the first requirement is concerned, whilst the judge found that it was more probable than not that the vessel was lost as a result of her unseaworthiness, he did not find in terms that it was the crew's incompetence that caused the loss. Instead, he stated that the insurers' expert witness, Capt Phelan, had summed up the position when he stated in evidence that the cause of the loss was "unseaworthiness, particularly with regard to stability, and [exacerbated], I suppose, by the incompetence of the crew". That statement placed a great deal of emphasis on the alleged lack of stability of the vessel, a matter that was not in issue and could not be determinative of the question. There was significantly, however, no finding as to how the crew's incompetence had on its own operated as a proximate cause of the loss. Accordingly, the insurers had some difficulty in meeting this requirement. Their position in relation to the next requirement was, in our view, even more difficult.

66 In the first instance decision of *Kin Yuen* ([33] *supra*), the concept of "privity of the assured" was discussed by Selvam J at 916, [117]–[118] in the following terms:

> The concept of 'privity of the assured' was explained in '*The Eurysthenes*' [[1977] QB 49] …
>
> Roskill LJ [at 76] added this further elucidation:
>
> > … That must mean that he is privy to the unseaworthiness and not merely that he has knowledge of facts which may ultimately be proved to amount to unseaworthiness. In other words, if the ship is sent to sea in an unseaworthy state with his knowledge and concurrence and that unseaworthiness is causative of the loss, the time policy does not pay. There must be causative unseaworthiness of which he knew and in which he concurred. …

67 In this case, MOPL, whilst knowing about the lack of certification of the crew, believed that they would be competent to bring the vessel to Singapore. It had employed Mr Rudy on other vessels and he had sailed previously on tugboats from Japan and China in November and December. Mr Anthonius had been on one delivery voyage from Japan to Singapore as chief officer and had also served on ships trading in the Southeast Asia region. Mr Danus had worked for MOPL for six years and had acted as master of tugboats since 1993 though his experience was limited to Southeast Asian waters. It also considered that the lack of certification was not fatal based on enquiries Mr Koh had made with the agent of the Panamanian registry of ships and with the Kobe port authorities. Most importantly, MOPL had relied on the opinion of Capt Goh as the surveyor. He had found the crew to be adequate for the voyage. The evidence was that Capt Goh had questioned the crew for five to six hours and had examined their certificates before coming to this conclusion. He had told Mr Koh that he had no objections to the crew sailing the vessel to Singapore. Capt Goh in his survey report gave details of the crew's experience and certificates as gleaned from his interviews. In court, Mr Lim Boh Tee, the managing director of MOPL, stated that if Capt Goh had not approved the crew for the voyage, he would have changed all the personnel.

68 On the above evidence, with respect, we are not able to agree with the view taken below that whether due to actual knowledge or Nelsonian blindness, MOPL was privy to the improper manning of the vessel. While Capt Goh's opinion was not binding on the court and the court was entitled to form its own judgment on the competence of the crew, the situation *vis-à-vis* MOPL was somewhat different. The insurance warranty required MOPL to satisfy Capt Goh as to the seaworthiness of the vessel. In order to be satisfied as to the vessel's seaworthiness, Capt Goh had to be satisfied with the ability of the crew to sail the vessel to Singapore at that time of year. Capt Goh was, as his certificate made clear, so satisfied. MOPL relied on such satisfaction and did not make any changes in the crew. Since MOPL acted on the basis of the expert's opinion and the expert considered the crew acceptable, we cannot hold that MOPL *knowingly* concurred in sending the vessel out to sea in an unseaworthy state or that it *recklessly* closed its eyes to a condition of which it should have been well aware. One further complication is that in order to fix MOPL with knowledge, we would have to identify the particular person who had the requisite knowledge of the unseaworthiness of the vessel and who could be regarded as MOPL's alter ego since MOPL as a company had no mind of its own. No finding on this point was made below and no submissions on it were addressed to us.

69 On the basis of the foregoing discussion, it is clear that the insurers could not establish that unseaworthiness to which MOPL was privy was a cause of the loss. Perils of the sea therefore remain the sole operative cause of the loss in terms of the policies.

Other issues

70 We have found for MOPL on the main issues raised in the appeal. The appeal must therefore be allowed with costs. This, however, may not be the end of the matter. In the Respondents' Case, the insurers raised certain matters which had been in issue in the trial and in respect of which the judge, in view of the other decisions that he came to, found it unnecessary to make any ruling. The insurers asked in their Case that these matters be remitted back to the judge in order that he might make findings on them. We now turn to consider whether such an order should be made and, if so, whether it should be made in respect of both or only one of the issues raised. In undertaking this exercise we bear in mind that the trial judge is the primary trier of fact and, therefore, issues of fact should be determined by him in the first instance.

71 The first issue we have to consider for this purpose was that raised by para 14 of the amended defence where the insurers averred that MOPL had breached a further warranty under the policies of insurance by not complying, *inter alia*, with the recommendation of the surveyor that the vessel proceed on her delivery voyage from Kobe to Singapore in fair weather conditions. They asserted that the weather conditions on 26 and 27 December 2003 were not fair weather conditions in which the vessel should have been allowed to depart from Kobe. Although a great deal of evidence was adduced on the weather conditions around Kobe on the relevant dates, the judge made no finding on this issue.

72 This matter need only be reconsidered by the judge, however, if in the first place there was an express warranty in the policies that the vessel would proceed only in fair weather conditions. As the express warranty called for all recommendations of the surveyor to be complied with before the vessel sailed from Kobe (see [22] above), the question becomes whether Capt Goh recommended that the vessel should only proceed in fair weather conditions. In the certificate of inspection issued on 25 December 2003, the reference to fair weather conditions was not made in one of the six specific "Voyage Recommendations". Instead this phrase appears at the beginning of the certificate where Capt Goh stated:

> This is to report that the undersigned marine surveyor did … attend on board the motor tugboat "Marina Iris" … for the purpose of examining and reporting on the general condition in order to proceed on a single voyage from Kobe, Japan to Singapore, a distance of approximately 2700 [nautical] miles in fair weather condition.

It is possible to argue that the certificate is ambiguous because the foregoing passage gives rise to two alternative interpretations. The first is that the certificate was issued on the basis or understanding that the vessel would proceed in fair weather conditions. The second interpretation is that it was issued on the basis that the vessel was fit to proceed in fair weather conditions. If the first interpretation is the correct one, then there is some basis to conclude that the vessel only proceeding in such conditions was part of Capt Goh's recommendation.

73 Having considered all the facts including the wording of the detailed survey report that Capt Goh sent to the insurers on 31 December 2003 after the loss of the vessel (although the report itself was dated 26 December 2003), we have concluded that the second interpretation must be the correct one. This is because that report, which set out the full details of the inspection and crew interviews and everything done in relation to the vessel while Capt Goh was in Kobe as well as eight paragraphs under the heading "Recommendations", did not contain any recommendation that the vessel could only depart Kobe or proceed in fair weather conditions. Instead, the references to "fair weather condition" came once at the very beginning where Capt Goh stated the purpose of his attending on board the vessel in December 2003 in words very similar to those in the certificate of inspection quoted above and then a second and final time at the end where under the heading "Conclusion" the surveyor said:

> [W]e are of the opinion that the Motor Tugboat "MARINA IRIS" is in a satisfactory condition to proceed on its own power in free running condition without towing, on one single Delivery Voyage from Kobe, Japan to Singapore in fair weather condition.

This final paragraph makes it plain that Capt Goh considered that the vessel was fit to proceed in fair weather conditions and was not giving any instruction as to how she should proceed. Thus, there was no recommendation in the terms pleaded by the insurers that could be part of the express warranty in the policies that MOPL had to comply with before the vessel left Kobe.

74 The next issue is also an issue relating to an alleged breach of the express warranty which we have quoted in [21] above. In para 13 of the amended defence, the insurers pleaded that MOPL was in breach of the warranty because Capt Goh did not perform a seaworthiness survey on the vessel between 19 and 26 December 2003. Further, any survey carried out by Capt Goh during that period was not a satisfactory seaworthiness survey. Thirdly, they averred that neither the survey report dated 26 December 2003 nor the certificate of inspection dated 25 December 2003 could be considered to be a report on seaworthiness or a satisfactory report on seaworthiness. Having considered these averments and the arguments in the Respondents' Case in support of them, we do not think it necessary to remit these matters to the judge for reconsideration. This is because their resolution depends mainly on the interpretation of documents.

75 The first argument that the insurers made in support of their contention as to the nature of the survey undertaken, was that it was clear from the first paragraph of the survey report that Capt Goh was only reporting on the general condition of the vessel and not dealing with the vessel's seaworthiness. The language that the insurers emphasised was Capt Goh's statement in his report that he attended on board the vessel "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". To us, the insurers' interpretation of that statement is unnecessarily restrictive. No doubt Capt Goh did say that he was examining the condition of the vessel but he immediately qualified and explained that statement by setting out the purpose of the examination as being to ascertain if the vessel could "proceed on its own propulsion" from Kobe to Singapore. Obviously, Capt Goh was not looking at the general condition of the vessel for general purposes but was looking at her condition for the specific purpose of ascertaining whether she could make a particular voyage. In effect, he was saying that his purpose was to assess the seaworthiness of the vessel for that voyage. This purpose became even clearer at the end of the report when Capt Goh concluded that the vessel was "in a satisfactory condition to proceed on its own power in free running condition without towing" from Kobe to Singapore.

76 Next, the insurers quoted Capt Goh's description of his scope of work, to wit:

> The scope of our survey is limited to the parts sighted with due reservations to the condition of parts which could not be examined, unexposed, covered or inaccessible to us especially on the machinery parts or the underwater portion of the hull.
>
> Our survey was carried out "without prejudice" to Underwriters terms and conditions and Port and Flag State requirement.

They submitted that this language showed that the survey was not a seaworthiness survey because it did not cover the inaccessible parts of the vessel, especially the machinery parts and the hull. They argued that there was no basis to suggest that a survey that did not include an examination of those parts could be considered a seaworthiness survey. We find this argument unconvincing. The insurers had the burden of proof on this issue. They did not point to any evidence that indicated that a

seaworthiness survey must include an examination of those parts even when at the time the requirement for such a survey is imposed all parties are, or should be, aware that the vessel is afloat and therefore some parts will be inaccessible to the surveyor. Further, given Capt Goh's recognition that the purpose of his survey was to determine whether the vessel was fit to undertake a particular voyage, it was for him as the surveyor to decide whether a survey of the portions of the vessel that were accessible to him was sufficient for him to form his opinion on her seaworthiness. Capt Goh had, apparently, no difficulty in coming to his conclusion on the basis of what he was able to see. He stated in his report that he had examined the shell plating of the hull above the waterline and noted that it was painted and in apparent good condition. The portion of the hull below the waterline was noted to be clean, as far as could be seen, and newly painted. He also observed that the vessel had been docked for inspection, cleaning and painting of the bottom hull at the end of November 2003. His final conclusion on the vessel's seaworthiness was based on these observations.

77 Next, the insurers cited Capt Goh's statement that his findings were without prejudice to port and flag state requirements. They quoted Capt Phelan's testimony that the determination of a vessel's seaworthiness was within the "acknowledged purview" and the responsibility of classification societies acting on behalf of flag states. Therefore, said the insurers, a surveyor such as Capt Goh, who was not acting on behalf of a classification society or flag state, was not qualified to determine the vessel's seaworthiness. This argument is not acceptable within the context of this case. The warranty asked for a satisfactory seaworthiness survey to be provided by TG Marine. Capt Goh was the TG Marine surveyor and the insurers, or at least their brokers, were aware of this when they inserted the requirement that TG Marine carry out the survey. The warranty did not call for the survey to be conducted by a classification society surveyor or someone representing the flag state. By phrasing the warranty in the way that they did, the insurers were saying that the survey had to be provided by a surveyor from TG Marine. It is not open to them now to reject that survey because the TG Marine surveyor did not also represent a classification society or the Panamanian authorities.

78 The insurers also attempted to argue that Capt Goh was not able to conduct a satisfactory seaworthiness survey because, according to Capt Phelan, Capt Goh only had a home trade master's certificate and therefore did not have the knowledge or the competence to decide if the vessel was seaworthy for an international voyage. This argument was another one that, in our view, was not available to the insurers. If they had wanted to assert that Capt Goh was not competent to carry out the survey, they should have pleaded that assertion. They did not do so.

79 The reference to the requirements of the port and flag states was also misleading. Whilst port authorities may require a vessel to be in class before they will issue her a port clearance certificate, in this case, the evidence was that the Kobe port authorities only required a certificate of registration for this purpose. It was not in dispute that port clearance was duly issued. A copy of the port clearance was adduced in evidence. Thus, the Kobe port authorities did not require the vessel to be classed in order to leave port.

80 The final argument made by the insurers related to the non-classification of the vessel. They pointed out that when Capt Goh issued his pre-purchase report, he had noted 17 deficiencies in the vessel that had to be rectified before she could be classed. In court, MOPL's operation manager had given evidence that only six of these items had been attended to before the vessel left Kobe as MOPL intended to rectify the other 11 after the vessel arrived in Singapore. They contended that as MOPL knew that the vessel could only go into class when she was seaworthy, therefore it knew that the vessel was not seaworthy at Kobe. Accordingly, it knew that Capt Goh could not be conducting a seaworthiness survey. There are two objections to this argument.

81 First of all, the insurers knew that the vessel would not be classed before she arrived at

Singapore. That was why they wanted a seaworthiness survey prior to her undertaking the voyage home. If we were to accept the argument put forward we would also have to accept that the insurers were acting in bad faith, cynically asking for a seaworthiness survey which they knew could never be carried out. There is no evidential basis for such a finding. Next, while a vessel must meet the requirements specified by a classification society in order to be classed with that society, classification in itself does not equate to seaworthiness or unseaworthiness. Seaworthiness has to be judged in relation to a particular voyage and the fact that a vessel is not classed does not mean that she is *ipso facto* unseaworthy for the purposes of the voyage. Capt Goh was able to come to his conclusion on the vessel's fitness to travel to Singapore despite his knowledge that the vessel had been previously classed with JG Coastal Japan and was only to be re-classed with Bureau Veritas after her arrival in Singapore.

82 For the reasons given above, we hold that there was no breach of the warranty requiring a satisfactory seaworthiness survey for the vessel's voyage to be carried out by TG Marine.

Conclusion

83 Accordingly, we allow the appellants' appeal and set aside the judgment below. There will be judgment for MOPL in the sum of $420,000 against CIC and in the sum of $280,000 against AXA. Each insurer shall pay MOPL interest on its respective judgment sum at the rate of 6% per annum from the date of the writ until the date of the judgment. The insurers shall also bear MOPL's costs here and below.