Royal & Sun Alliance Insurance (Singapore) Ltd v Metico Marine Pte Ltd and Another [2006] SGHC 97

Case Number : Suit 233/2004

Decision Date : 06 June 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Chan Leng Sun and Gho Sze Kee (Ang & Partners) for the plaintiff; Winston Kwek and Derek Tan (Rajah & Tann) for the defendants

Parties : Royal & Sun Alliance Insurance (Singapore) Ltd — Metico Marine Pte Ltd; Wecoy Maritime Pte Ltd

Insurance – Marine insurance – Insurers paying expenses for salvage of vessels owned by assured covered under marine insurance policy – Insurers claiming assured breaching warranty in policy such that assured not entitled to cover under policy – Whether warranty part of policy of marine insurance – Whether warranty breached – Whether insurers entitled to reimbursement of salvage expenses from assured

6 June 2006 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This is a claim arising out of a policy of marine insurance issued by the plaintiff insurers, Royal & Sun Alliance Insurance (Singapore) Limited ("the insurers"). The first defendant, Metico Marine Pte Ltd ("Metico"), is the owner of the Singapore registered tugboat "WECOY 7", and the second defendant, Wecoy Maritime Pte Ltd ("Wecoy"), is the owner of the Singapore registered dumb barges, *Bintang 9* and *Bintang 10*. I shall from time to time hereafter refer to Metico and Wecoy collectively as "the owners" and to the tugboat and barges collectively as "the vessels".

2 The vessels were built in Shanghai and delivered to the owners there. They were intended for employment in Singapore home trade waters and the policy issued by the insurers covered the maiden voyage from Shanghai to Singapore. This commenced in December 2003 with the tugboat towing both barges in a double tow. On 21 December 2003, in the course of the said voyage, the towrope connecting the barges to the tugboat parted and the barges drifted off. Salvors were employed by the insurers and the barges were eventually found and successfully recovered. The insurers paid the salvage expenses whilst the owners paid repair charges for the barges.

3 Claiming that the owners were in breach of a warranty contained in the policy, the insurers commenced the present action for reimbursement of the salvage expenses that they had paid. The owners then made a counterclaim for loss and expenses incurred as a result of the parting of the towrope. They also sought a declaration that no further premium was payable to the insurers under the policy.

The policy

4 The policy of insurance in question, Marine Hull and Machinery Insurance Policy No BHHMSB0013080300 ("the policy"), was issued by the insurers on 23 December 2003 after inception of the risk. It covered the vessels against the insured perils, including perils of the sea, from

5 December 2003 to 15 December 2004. It contained, *inter alia*, the following clause:

> MEMORANDUM 2
>
> Including delivery voyage in respect of vessels "Wecoy 7", "Bintang 9 and "Bintang 10" from Shanghai to either policy trading limits or Singapore. Warranted towage approval survey by China Classification Society at the insured's expenses *(sic)*, with all recommendations, if any, fully complied with, prior to sailing.

5 Prior to the issue of the policy, the owners' insurance brokers Newstate Stenhouse (SIMCO) Pte Ltd ("Newstate") had prepared a signing slip and sent it to the insurers for approval. They had also prepared a cover note. Both the signing slip and the cover note contained the following clause against the rubric "Warranties":

> Warranted pre-towage survey to be carried out by China Class Society and all recommendations to be complied with prior to sailing. Survey fees/expenses are for owner's account. This warranty is applicable for the delivery voyage from China to policy trading limit or Singapore in respect of tugboat "Wecoy 7" and barges "Bintang 9" and "Bintang 10".

6 The pre-towage survey required by the insurers had in fact been carried out by the China Classification Society ("CCS") on 30 November 2003. Thereafter, CCS issued its Certificate of Fitness dated 30 November 2003 in which it made certain recommendations regarding the voyage from Shanghai to Singapore.

The pleadings and the issues

7 In their statement of claim, the insurers averred that by reason of the matters stated in the policy and the recommendations made by CCS, the owners had warranted that:

> (a) The tugboat *Wecoy 7* with the barges *Bintang 9* and *Bintang 10* in tow, would only depart from the port of Shanghai, China, on receipt of a favourable weather forecast for the local area within 48 hours of the forecast and on the basis that the wind force at the time of departure would be less than force six on the Beaufort scale; and
>
> (b) If during the voyage from Shanghai, China, to Singapore, the wind force was more than six on the Beaufort scale, the tugboat, with the barges in tow, would seek refuge.

8 The statement of claim then recited that on 17 December 2003 at about 1700hrs, the vessels had left Shanghai for Singapore. On 22 December 2003, the owners informed the insurers that the tugboat had lost the barges in the Straits of Taiwan and that the tow wire connection between the tugboat and barges had parted under bad weather conditions. The tugboat had then taken refuge in Peng-Hu.

9 In para 12 of the statement of claim, the insurers stated that they, acting on the owners' representations, had engaged Guangzhou Salvage ("the salvors") to locate and recover the barges. On 24 December 2003, the salvors had located the barge *Bintang 9*. They delivered it to Hong Kong on 28 December 2003. The tugboat *Wecoy 7* had itself located the barge *Bintang 10* and delivered it to Hong Kong on 26 December 2003.

10 The insurers then pleaded that they had incurred the sum of US$215,029.34 in salvage charges for the salvage of the barge *Bintang 9* and a further sum of HK$58,610.11 for tug charges in

Hong Kong. They had settled these charges on 29 December 2003.

11 Paragraph 15 of the statement of claim contained the heart of the claim. The insurers asserted that unknown to them at the time that they engaged the salvors and at the time they settled the expenses, the owners' representation as to the cause of the loss was false because the owners had failed and neglected to disclose to the insurers that the owners were in breach of the warranties in that:

(a) The owners and/or their agents or servants did not obtain a favourable weather forecast for the local area for the relevant 48-hour period and that the wind force at the time of departure was more than Force 6 on the Beaufort scale.

(b) The owners and/or their agents or servants did not cause the tugboat with the barges in tow to seek refuge during the voyage from Shanghai to Singapore and the wind force was over Force 6 on the Beaufort scale.

The insurers asserted that they were, accordingly, discharged from liability under the policy as from the date of the breach of the warranties. They then reclaimed the moneys that they had paid for the recovery of *Bintang 9*.

12 In the defence and counterclaim, the owners pleaded that Newstate had assisted them in placing the cover for the vessels. On 11 December 2003, Newstate sent the owners an e-mail containing the insurers' offer of insurance and the main terms of cover. By an e-mail dated 13 December 2003 from Newstate to the insurers, Newstate communicated the owners' acceptance of the cover and this acceptance concluded a contract of insurance on the terms set out in the e-mail of 11 December 2003 which included insurance for the delivery voyage of the vessels from Shanghai to Singapore.

13 In para 4 of the defence and counterclaim, it was pleaded that the insurers had, by an e-mail dated 15 December 2003, requested a towage approval survey to be conducted at the owners' expense. There was no express mention of or demand for any warranty. On the same date, the owners advised the insurers that the survey had been arranged. It was further pleaded (in para 5) that by a letter dated 16 March 2004, CCS had advised that if there was a different interpretation between the Chinese text and the English version of the certificate, then the Chinese text was to prevail.

14 Paragraphs 6 and 7 of the defence and counterclaim set out the circumstances in which the vessels had left Shanghai on 17 December 2003 and the circumstances on 21 December 2003 in which the towrope had given way.

15 Paragraphs 8 to 11 of the defence and counterclaim set out the owners' version of how the towage warranty had come to be part of the contract of insurance. It was asserted that on 23 December 2003, the insurers had asked Newstate if the policy was subject to a warranty and Newstate had mistakenly affirmed that it was, although the earlier agreement between the insurers and Newstate did not contain a warranty clause. The insurers thereafter requested that Newstate issued a signing slip. By an oversight common to both parties and without consulting the owners, Newstate issued a signing slip which contained a purported warranty clause (the terms of which are as set out in [5] above). The owners averred that this warranty clause was the result of an inadvertent error by Newstate and was inserted without their knowledge and consent. The owners then contended that the alleged warranty was not part of the contract of insurance, the terms of which were contained in the exchange of e-mails on or before 13 December 2003. Further or in the

alternative, the owners averred that Newstate had inserted the alleged warranty as a result of a mistake and that the policy should be rectified by deleting the warranty to reflect the true intentions of the parties.

16 In para 12 of the defence and counterclaim, the owners averred that if the warranty was adjudged to be a term of the contract, they had complied with the same in that all recommendations had been complied with prior to sailing.

17 In para 15 of the defence and counterclaim, the owners averred that the insurers had made payment of the salvor's charges and tug charges with full knowledge of all circumstances and had either waived compliance with the purported warranty clause or were estopped from claiming the said sums.

18 The counterclaim included a claim for rectification of the policy by deletion of the warranty and a claim for indemnification against losses and expenses incurred by the owners arising out of the incident. Additionally, the owners wanted a declaration that no further premiums were payable by them to the insurers in view of the insurers' wrongful repudiation of the policy.

19 In their reply and defence to counterclaim, the insurers denied that the contract of insurance was concluded on 13 December 2003. They averred that the exchange of e-mails did not constitute a contract of insurance and referred to s 22 of the Marine Insurance Act (Cap 387, 1994 Rev Ed) ("the Act") which stated that a contract of marine insurance was inadmissible in evidence unless it was embodied in a marine policy in accordance with the Act. They pleaded that the insurers and Newstate had discussed the terms to be included in the signing slip and the policy and agreed that the warranty in the signing slip was part of these terms. They also contended that Newstate had actual and/or implied and/or apparent authority on the owners' behalf to agree on the terms of insurance, including the inclusion of the warranty in the signing slip and the policy.

20 Arising out of the above pleadings, the main issues would be whether the warranty was part of the policy and, if so, whether there was a breach of the warranty so as to relieve the insurers from liability. As the owners pointed out in their closing submissions, if the main issues were decided in their favour, then I would have to decide the further issue of whether the owners' claims arose from an insured peril under the policy. A further subsidiary issue that would arise whether I found in favour of the owners or the insurers is what would be the correct quantum of damages to be awarded to the successful party.

Was the warranty part of the contract of insurance?

21 As I have noted above, the formal policy document issued by the insurers contained the warranty. The warranty also appeared in the cover note and signing slip both of which were prepared by Newstate. On the face of the contract therefore, the warranty was very much a part of the contract of insurance. As it is the owners who say that, appearances to the contrary, the warranty was not a term of the contract, they have the onus of establishing that assertion.

22 The following is a summary of the submissions that the owners made in support of their case on this issue:

(a) Apart from the signing slip and the documents produced after the signing slip, there is no mention of the warranty in any of the documents produced by either party and in particular it was not mentioned in the letters or e-mails that passed between the parties when they were negotiating the contract of insurance.

(b) The omission of any mention of the warranty in the other documents supports the owners' case that there was no discussion or agreement on the warranty at any time prior to the conversation on 22 December 2003 between Mr Lim Yew Chye, Bobby ("Mr Lim"), a senior manager with the insurers, who handled the negotiations on the insurers' behalf and Ms Tan Chay Hua, Pauline ("Ms Tan"), an insurance broker with Newstate, who handled the negotiations on the owners' behalf.

(c) The documents show that where the parties had agreed to subject the contract of insurance to a warranty, their correspondence expressly recorded such an agreement by the use of the word "warranty" and this point is supported by the evidence of Ms Emmeline Tsai ("Ms Tsai"), an insurer, who testified that where a warranty is intended to be imposed, the underwriters would make it very clear in their wording to avoid ambiguity.

(d) The evidence of Ms Tan was that there was never an agreement to include the warranty in the contract of insurance. Instead, on 22 December 2003, during a telephone conversation with Mr Lim, she mistakenly affirmed that the warranty was part of the agreement that had been reached previously. Thereafter, the parties had proceeded to record the terms of the policy on that mistaken assumption. Ms Tan was a truthful and reliable witness who had honestly made a mistake on 22 December 2003 and who had since come forward and admitted her mistake. Her evidence should be accepted.

(e) The evidence of Mr Lim also supports the owners' case. It establishes that no agreement was reached on 22 December 2003 to include the warranty in the contract of insurance and that there was never any discussion on the warranty prior to that date.

(f) The insurers' pleaded case was that on or about 23 December 2003, the insurers and Newstate discussed the terms to be included in the signing slip and the policy and Newstate agreed to the inclusion of the warranty. In their closing submission, the insurers had taken the position that the agreement to include the warranty had occurred before the vessel sailed on 17 December 2003 and that the owners and Newstate had led Mr Lim to believe that they had agreed to the warranty and that it had been included into the signing slip. This assertion is a departure from the owners' pleaded case and demonstrates the weakness of their case. The insurers are unable to plead and prove the agreement to include the warranty in the contract of insurance as there was no such agreement.

23 I have considered the owners' arguments and their submissions on this point very carefully. I am, however, unable to accept the argument that the warranty was not a part of the policy.

24 First, dealing with the point that the warranty was not mentioned in the written correspondence between the parties during their negotiations, this is irrelevant. The e-mail exchanges were, as the insurers submitted, merely on-going negotiations and were not admissible to contradict the terms of the policy. Section 22 of the Act states that a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with the Act. Thus it was the policy that *prima facie* contained the terms of the contract. Even in the ordinary case of a contract whose terms are reduced to writing, evidence of previous drafts and negotiations are not admissible to vary or add to the terms of the written document. All the more, this must be the case in relation to a policy of insurance which can only be adduced in court if it is in accordance with the Act. The argument that the contract was concluded on 13 December 2003 is not acceptable either in law (because accepting that the e-mail exchanges constituted better evidence of the terms of the policy than the actual document itself would be allowing parol evidence to contradict the terms of the policy) or, in this case, in fact because the facts of the case do not support that assertion.

25 Correspondence from 13 December 2003 to 19 December 2003 showed that after 13 December 2003 Newstate and the insurers were still discussing and amending the expiry date of the insurance. The expiry date of 15 December 2004 which was agreed after 13 December 2003 was reflected in the signing slip prepared on 23 December 2003. Ms Tan admitted in court that after 13 December 2003, parties were still free to agree to terms which would be binding. She maintained that a contract had been concluded on 13 December 2003 but added that any addendum to the original contract would be allowed and would be binding. She further agreed that, in this case, if there had been negotiations and an agreement on a towage survey warranty had been agreed after 13 December 2003, such agreement would be considered an addendum and would be binding. Thus, it was clear from her testimony that 13 December 2003 was not a cut-off date and parties were still free to negotiate terms. She admitted as such when she said that she considered the extended expiry date to be part of the insurance contract even though it was agreed after 13 December 2003 and also said that there was no problem negotiating and agreeing on terms of the policy after that date.

26 It is also relevant that both Mr Lim and Ms Tan were of the view that the terms of the policy would only be finalised and recorded in the signing slip. Mr Lim said that the terms were finalised when Newstate sent him the signing slip on 23 December 2003 subject to the mistakes on the signing slip that he had corrected. Ms Tan agreed that when there was a signing slip, the terms would be discussed and finalised on the signing slip. She agreed, too, that more often than not, parties would have a signing slip.

27 The fact that the exchange of correspondence did not mention the warranty did not support the owners' case that there was no discussion or agreement on the warranty prior to 22 December 2003. Ms Tan sent an e-mail to the owners on 15 December 2003 in which she told them that Mr Lim had mentioned that in view of the double tow from China, high insured value and the prevailing weather conditions, the insurers would require a towage approval survey to be carried out at the owners' expense by an approved surveyor. From the evidence that she gave on this conversation with Mr Lim and the ensuing e-mail that she sent to the owners, it was clear that she was fully aware that the towage survey requirement was material to minimise the risk covered by the policy and that it was intended for the purpose of the policy. Whilst at the same time she asserted that Mr Lim had only mentioned that he wanted a pre-towage survey and did not tell her or insist that he wanted this survey to be a warranty, that protestation did not ring true as the following exchange from the evidence shows:

> Q: When Bobby Lim told you on 15/12/2003 that the towage survey was a requirement, you knew that it was a material requirement to minimize the risk covered by the policy.
>
> A: Mr Bobby Lim only mentioned that he would want a pre-towage survey. He did not tell me or insist that he wants this to be warranty.
>
> Q: Answer the question. When Bobby Lim told you that the towage survey was required you knew that it was important to minimize the risk covered by the policy.
>
> A: Yes.
>
> Q: PCB11, your e-mail sent on 15/12/03 at 11.03 hours to Metico *[Reads]*. Agree that you had informed Metico that the requirement was important for the purpose of the policy.
>
> A: I did inform Metico of the importance of the requirement of the survey to ensure a safe passage.

Q: That must be for the purpose of the policy.

A: Yes.

Q: That was why one week later when you discussed the terms to be recorded on the signing slip, you agreed that the requirement is to be claused as a warranty.

A: Mr Bobby Lim did talk to me about whether the tow was subject to a warranty. As I explained earlier I have mistaken that the tow was subject to a warranty, at that time without checking my file. So it is a mistake on my part that I have not checked my records before I answer him.

Q: You did not answer the question. Question was in view of the fact that on 15/12/03 you knew that the towage survey was important to minimize the risk covered by the policy and you have also told Metico why it was important for the purpose of the policy, you agreed to clause it as a warranty in the signing slip.

A: Yes I agree.

28 Mr Lim agreed that he had not mentioned the word "warranty" in his conversation with Ms Tan on 15 December 2003. He was, however, adamant that when he told her that he wanted a towage survey that both he and she understood that that meant that he wanted a warranty in relation to the towage survey and that such a requirement was market practice. This evidence that the towage survey warranty was standard in the industry was corroborated by both Ms Tsai and Ms Tan herself. It is also relevant that Ms Tan knew how to draft the towage survey warranty as it was a standard clause. She testified that she inserted the warranty from samples of standard clauses that she had in her possession from her long experience as a broker. I noted Ms Tsai's evidence that if she wanted to impose a warranty, she would mention specifically to the broker she was speaking to that it was a warranty that she required. While she did say that if the broker was an experienced broker who had had previous dealings with her company and who was familiar with her company's standard warranty clause, she would not elaborate that the clause required was a warranty, she also said that if she was dealing with a new broker she would emphasise that the clause was a warranty clause which required strict compliance. Whilst the owners made much of such evidence, I do not think that it throws light on the understanding between Mr Lim and Ms Tan. That can only be gleaned from an analysis of their evidence.

29 I do not accept the evidence of Ms Tan that there was never an agreement to include the warranty in the contract of insurance. I do not find her story that on 22 December 2003, during her conversation with Mr Lim, she had mistakenly affirmed the warranty to be part of the agreement because she did not check her file at the time, to be a believable story. When I asked her what she would have seen in her file, had she checked it, she only said that before the contract was concluded on 13 December 2003, there was no indication by e-mail or fax from Mr Lim about the warranty. In my judgment, whilst the word "warranty" would not have been found in her file, she would have seen the correspondence to the owners in which she informed them of the importance of the towage survey. There was no other correspondence stating that the towage survey was only a minor condition. Nothing in her file, therefore, would have led her to believe that the towage survey requirement was anything other than a warranty. She had admitted that she knew all along that it was important for the purpose of the policy and that was the reason that she claused it as a warranty. That she did not, as she said, check her file during her conversation with Mr Lim indicates that she had no doubt at that time that a warranty was required.

30 Ms Tan was also asked why she had put the warranty into the signing slip. She responded that she had prepared the signing slip in a hurry. That cannot have been true. She said that she spoke to Mr Lim shortly after giving the insurers notice of the casualty. That was on the morning of 22 December 2003. Ms Tan, however, only sent the signing slip to Mr Lim on the afternoon of 23 December 2003. Ms Tan would definitely have referred to her file when preparing the signing slip. Newstate had scrutinised the signing slip because Ms Tan's colleague, Mr Michael Chan, wrote to Mr Lim on 23 December 2003 to correct a deductible item stated on the slip. Although Ms Tan initially denied looking at her file at all, whether during her conversation with Mr Lim on 22 December 2003 or later when she prepared the signing slip shortly thereafter, her responses during cross-examination showed that she did look at the file. When she had to admit this, she then tried to excuse herself by saying that she had only looked at the file for the rates and figures and did not go through all the correspondence. This cannot have been true.

31 The terms that Ms Tan discussed with Mr Lim were scattered in correspondence between her and Mr Lim from 5 December 2003 to 23 December 2003. The correspondence was not voluminous. It is difficult to accept that she would have missed something when she looked at the file. She definitely saw the extended expiry date in the file (correspondence from 15 December 2003 onwards) as this was reflected in her signing slip. She could not have missed the correspondence on the towage survey.

32 Ms Tan did not make a good witness. She often asked for questions to be repeated. At times there were long pauses between the posing of a question and her answering it. In my judgment, she was not telling the truth in relation to the warranty and how it came to be part of the policy.

33 The owners' best case is that the word "warranty" was not mentioned until the telephone conversation on 22 December 2003 before the signing slip was prepared. This is not disputed by Mr Lim. He maintained, however, that although he had not used "the 'W' word" prior to 22 December 2003, from the time he first mentioned on 15 December 2003 that he required a pre-towage survey, Ms Tan understood the underlying requirement for a warranty. I accept the insurers' submission that the failure to use the word itself before 22 December 2003 was not proof that the parties intended to omit the word "warranty" from the policy. In fact, the telephone conversation manifested and confirmed the parties' intention. Ms Tan and Mr Lim expressly discussed the warranty and agreed to insert it into the signing slip and the policy so there is no realistic argument that they had agreed not to have a warranty and, by common mistake, inserted it into the signing slip and the policy.

34 In *Frederick E Rose (London) Ld v William H Pim Jnr & Co Ld* [1953] 2 QB 450, in an oft-cited passage (at 461), Denning LJ said:

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they say or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you can rectify the document; but nothing less will suffice.

In this case, looking at the outward acts of the parties, what they said to each other in coming to their agreement was first, that there had to be a towage survey and secondly, that there had to be a warranty. In this situation, it is not possible to show that parties were in complete agreement that

there should not be a warranty in the policy but by a mistake wrongly inserted the warranty. The owners have no case for rectification of the policy.

Was there a breach of the warranty?

35 There are various sub-issues that have to be decided in order to determine whether there was a breach of the warranty.

36 It would be recalled (see [4] above) that the warranty reads as follows:

> Warranted towage approval survey by China Classification Society at the insured's expenses, with all recommendations, if any, fully complied with, **prior to sailing**. [emphasis added]

The recommendations contained in the towage survey were both in respect of matters that could be accomplished before the vessels sailed and in respect of matters that had to be adhered to after sailing. The first sub-issue that arises is therefore whether the warranty applied to both types of recommendations or only to the first.

37 The owners submitted that it was evident from the plain words of the warranty that it only required the recommendations of the pre-towage survey to be complied with prior to sailing. The warranty did not require the recommendations of the survey to be complied with both prior to and during sailing. They pointed out that it is established principle that warranties are to be strictly construed. In Baris Soyer, *Warranties in Marine Insurance* (Cavendish Publishing Limited) at p 21, it is stated that the court's starting point when considering the meaning or extent of an express warranty is to interpret the intention of the parties by looking at what they have said in their contract and "[t]o this end the words used in a warranty are construed in their plain, ordinary and popular sense, that is to say in accordance with their dictionary meaning". Therefore, the owners submitted, the words "prior to sailing" as used here meant that the owners were only obliged to comply with the recommendations made which pertained to the situation encountered prior to the vessels' sailing and were not obliged to comply with the recommendations that pertained to the vessels' situation after departure. Even if there was some ambiguity in the phrase "prior to sailing", since the warranty was a term inserted into the policy for the benefit of the insurers, any ambiguity should be construed in favour of the owners.

38 The insurers responded to this argument by stating that it was not expressly pleaded by the owners that the words "prior to sailing" meant that they only had to comply with those recommendations pertaining to the situation prior to the vessels' departure. Paragraph 12 of the amended defence merely asserted that "the Defendants contend that they had complied with the [warranty] in that all recommendations had been complied with prior to sailing". Further, if the owners were permitted to run this argument, it meant that the owners could disregard recommendations that operated during the voyage. The insurers considered that to be an absurd interpretation that was totally at variance with common sense and defeated the purpose of the recommendations and warranty itself. The purpose of the survey had been to ensure a safe passage for the vessels and the recommendation that the vessels seek shelter in bad weather was an important recommendation for this purpose as recognised by the owners themselves. In the view of the insurers, the "prior to sailing" reference only emphasised that the tug had to comply with the recommendations relating to preparations for sailing before it set out. It did not mean that important safety recommendations after sailing could be disregarded.

39 On this point, I cannot accept the insurers' submissions. As an express warranty in an insurance policy is a clause that must be complied with strictly by the insured in order that cover is

maintained, it is, as well, a clause that has to be read equally strictly when its meaning is in issue. The insured should be able to take the words of the warranty at their face value and comply with the literal meaning of the warranty (unless of course this would lead to absurdity) without being at risk of finding that the insurance cover has been lifted by reason of breach of the warranty. In this case, there is no inherent absurdity in having a warranty that requires the recommendations of a surveyor to be complied with "prior to sailing". The literal meaning of the words makes perfect sense and is capable of being understood and being complied with by the insured. As a matter of construction, therefore, I think that the meaning given to the warranty by the owners is correct. If the insurers had wanted the warranty to apply not only before the vessels sailed but also throughout their voyage to Singapore, they could have provided for the situation very easily either by deleting the words "prior to sailing" from the clause or by adding thereto "and throughout the voyage". It is significant too that the warranty in this form was, as Ms Tan testified, a standard form which she had taken out from her collection of standard clauses. On the signing slip, the wording of the warranty was:

> Warranted pre-towage survey to be carried out by China Class Society and all recommendations to be complied with prior to sailing.

Mr Lim did not make any corrections to this wording, although he corrected other mistakes he found on the signing slip. When he issued the policy, he changed the wording of the warranty but only very slightly so that it read:

> Warranted towage approval survey by China Classification Society at the insured's expenses, with all recommendations, if any, fully complied with prior to sailing.

He did not take out the words "prior to sailing" and the additional words that he added between "recommendations" and the phrase "prior to sailing" were only "if any" and "fully". Thus, there was no change in the substantive meaning of the warranty which was that whatever recommendations were made by the surveyor, the classification society, these recommendations had to be complied with before the vessels sailed.

40 I should also state that I consider that the owners are entitled to argue that they have complied with the warranty in that they have complied with all recommendations that could be complied with prior to sailing. I think that the pleading in para 12 of the defence and counterclaim was adequate, though perhaps not as thorough as it could have been, to permit them to present the case that the warranty related to recommendations that could be complied with prior to sailing and did not extend to recommendations that covered the period after the vessels departed from Shanghai. In any case, it was for the insurers to plead and prove the extent of the warranty.

41 The second sub-issue that arises in connection with the warranty is which version of the certificate issued by CCS is to be used for purposes of determining what the surveyor exactly recommended. CCS issued two certificates, one in Chinese and the other in English. The owners contended that the governing certificate was that issued in Chinese whilst the insurers argued that the English version was the correct and governing version for the purpose of the warranty.

42 One of the witnesses called by the owners was Mr Sheng Guo Rong ("Mr Sheng"). Mr Sheng is the managing director of Shanghai Shengda Ship & Engineering Services Co., Ltd, the owners' shipping agents in Shanghai. He testified that when a newly-built barge is to be towed from Shanghai, the agents of the vessel have to submit various documents to the Marine Safety Administration of Shanghai in order to get permission for the tug and tow to set sail. One of the required documents is a pre-towage survey from CCS. After the survey has been completed, CCS will issue a Certificate for Fitness for Towage and a Report of Survey. These two documents are vital for all tugs and barges

that intend to depart from Shanghai.

43 Mr Sheng stated that on 27 November 2003, his company arranged for CCS to conduct a pre-towage survey of the vessels. On 30 November 2003, the Certificate of Fitness for Towage and the Report of Survey were issued. Both documents were in Chinese. Mr Sheng then sent copies of the documents to the owners. Shortly after receiving these copies, the owners informed Mr Sheng that they required English translations of the documents. Mr Sheng then obtained English translations of the original Chinese documents and sent them to the owners in early December 2003. It should be noted here that although Mr Sheng referred to the latter set of documents as English translations, the documents in English carry the letterhead of CCS and bear not only the stamp of CCS but also were signed, or were purported to be signed, by one Lu Yao, a surveyor of CCS. The English version of the recommendations in the Certificate of Fitness reads:

> Note:
>
> The towing vessel is to depart from any port during voyage in day time on receipt of a favourable weather forecast for local area in 48 hours and under VI wind force of Beaufort scale. If the wind force of Beaufort scale is more than VI, the towing vessel shall seek refuge.

44 Annexed to Mr Sheng's affidavit as an exhibit was a copy of the Chinese Certificate of Fitness. The owners also adduced an English translation of this certificate which was done by a sworn interpreter of the Supreme Court. In that translation, the recommendation reads:

> Note:
>
> Sailing is allowed if good weather forecast for 48 hours with wind force not stronger than Beaufort Scale 6 and to seek shelter if the wind force goes beyond scale 6.

The insurers were not happy with the translation produced by the owners and submitted the Chinese Certificate of Fitness to another court interpreter for translation. This second translation was also adduced in evidence. In it, the note reads:

> Note:
>
> To weigh anchor only upon receiving a good weather forecast for the next 48 hours and when the wind speed measures not more than six on the Beaufort Scale; to take shelter when the wind speed measures six and above on the Beaufort Scale.

45 The owners submitted that I should, on the basis of Mr Sheng's evidence, accept the Chinese version of the CCS certificate as the original and governing version and hold the English version of the CCS certificate to be a translation. They also wanted me to accept Mr Sheng's evidence that he had been to see one Mr Zhang Rong Qiang, the managing operator of CCS who had told him that the words "under VI wind force" in the English version meant "including and less than VI wind force" and that, in case of any doubt, the Chinese version of the CCS Certificate of Fitness was to prevail over the English version. The insurers, on the other hand, argued that the Chinese version produced by the owners was not authentic because it was signed by a different surveyor. The Chinese version of the Certificate of Fitness was signed by Mr Zhang Rong Qiang whereas the English Certificate of Fitness and Report of Survey were signed by one Lu Yao. The Chinese version of the Report of Survey produced by the owners was also signed by Lu Yao. Thus, they say, the logical conclusion was that if there was an original Chinese Certificate of Fitness it would have been signed by Lu Yao. As this was not produced what was produced was not authentic.

46 The insurers' argument on this point is weak. Mr Sheng gave credible evidence that the Chinese version was issued first and, since he was the person who received it from CCS, he was able to identify the Chinese version produced in court as the one given to him by CCS. The insurers could not put up a positive case to challenge the authenticity of the Chinese certificate. Having said that, I must also say that I accept the English versions of the documents as being authentic and original documents issued by CCS as well. They are not merely translations such as the ones done by the interpreters of the Supreme Court but are original documents issued by CCS since they bear the signature of a genuine CCS surveyor. Mr Sheng received the English versions from CCS and he certainly did not testify that Mr Lu Yao who signed them was not authorised to do so on behalf of CCS. I should also say that I cannot accept the evidence that Mr Sheng gave on how the English version of the note was to be interpreted and how the inconsistencies between the English version and the Mandarin version were to be reconciled. This evidence was hearsay.

47 The question that remains therefore is which version I should look at for the purposes of this case. It is clear to me that the Chinese version can be, as shown from the quotations above, translated in various ways, each slightly different from the other. In such a situation, how am I to judge which translation is the most accurate one? The owners did not call anyone from CCS to give evidence to assist me in this regard. On the other hand, the English version bears the signature of the CCS surveyor and therefore must be regarded as the "approved" translation issued by CCS itself, alternatively, as conveying the message that CCS wanted to give in English. Further, as far as the parties were concerned, the documents that they worked on were the English versions. The owners were the ones who asked for the English versions. This is not surprising as the tug was crewed by Indonesians who most probably were unable to read Chinese. The owners themselves therefore must have been using the English versions of the documents when giving instructions to the crew in order to ensure that all recommendations were complied with. They also used the English versions for the purpose of satisfying the insurers that the necessary survey had been carried out. In these circumstances, the English versions supplied by CCS are the documents I must have reference to when deciding whether or not the surveyor's recommendations were complied with prior to sailing.

48 The third sub-issue is whether the warranty was breached. Here, it would be recalled that the first part of the warranty stated that the vessel was to depart from any port "in day time on receipt of a favourable weather forecast for local area in 48 hours and under VI wind force of Beaufort Scale". As far as the words "prior to sailing" are concerned, these would apply to the requirement to obtain a favourable weather forecast and to the wind conditions specified in the warranty. This is because the favourable weather forecast for 48 hours is something that can be obtained before sailing and, obviously, the prevailing wind condition is also something that can be ascertained before the vessel departs from the port. The insurers submitted that the facts disclosed that this warranty had not been complied with. This assertion was denied by the owners.

49 First, I will deal with the weather forecast. The evidence given by Mr Sheng was that in Shanghai, weather reports are issued daily by the National Ocean Bureau Shanghai Forecast Centre ("the forecast centre"). In preparation for the vessels' intended departure, Mr Sheng's company obtained weather forecast reports from the forecast centre at shortly after 0830hrs every day from 14 December 2003 to 16 December 2003. These reports were sent to the owners on a daily basis. On 15 December 2003, the owners, on receipt of favourable weather forecast reports and after confirmation from the master of the tug that the vessels were ready for departure, instructed Mr Sheng to clear the vessels out of Shanghai for Singapore. The vessels weighed anchor at 1400hrs on 17 December 2003. Although there was time for the owners to get a weather forecast on the morning of the vessels' departure, since the forecasts were issued at 8000hrs each morning, the owners said that they did not obtain any weather forecast at all that day.

50 The insurers argued that it was strange that the owners would have obtained forecasts for three days in a row, even before the vessels were ready to depart, and then decide not to obtain any on the day of departure itself. They also considered it suspicious that the owners had steadfastly refused to produce Navtex daily forecasts, which their expert, Captain Christopher Phelan ("Capt Phelan"), had testified would have been generated on the vessel because the Navtex machine could not be turned off. The insurers rejected the owners' allegation that those forecasts had been taken off the tug at Hong Kong by the insurers' surveyor, Mr Andre Jones. The insurers submitted that as no forecast at all was obtained for 17 December 2003, it would not be necessary to determine if the forecast would have been good or bad but the indications were that the forecast would not have been favourable. This was because the logbook revealed that the wind force was above Force 6 and even up to Force 8 by the evening of 17 December 2003. Therefore, the insurers argued, the owners would not have obtained any favourable or good weather forecast for the area covering the 48 hours from departure. This argument they said was substantiated by their expert witness, Mr Rob Cowle ("Mr Cowle") who works for a company called Fugro GEOS ("Fugro") which provides marine weather services to over 500 clients worldwide. A sample forecast produced by Fugro for the 48-hour period from 0800hrs on 17 December 2003, based on data available as at 0800hrs that day, warned of gale force winds along the intended route, *ie*, from Shanghai to Taiwan. This forecast was not challenged when Mr Cowle was cross-examined by the owners' counsel.

51 The insurers argued that the forecast issued at 0800hrs on 16 December 2003 which was a 72-hour forecast did not comply with the warranty. First, it did not cover the period of 48 hours from sailing. If the position taken is that departure was when the vessel weighed anchor at 1400hrs on 17 December 2003, the 48 hour period would mean the period between then and up to 1400hrs on 19 December 2003. The forecast obtained at 0800hrs on 16 December 2003 would, at best, cover the period up to 0800hrs on 19 December 2003.

52 Secondly, noting that the warranty stated that the vessel was "to depart … on receipt of a favourable weather forecast", the insurers contended that this wording contemplated some degree of immediacy. Capt Phelan had stated that on the wording of this clause, what was intended was a recent forecast. The insurers submitted that even if some leeway in obtaining the forecast was permitted, such leeway must only be of a few hours duration so that the safety feature intended by the requirement would not be undermined. A forecast issued at 0800hrs on 16 December 2003, 30 hours before departure, was not a forecast that anyone could safely rely on without an update. As weather was continually changing and developing the latest forecast should always be obtained prior to sailing.

53 The owners took the position that they had complied with the warranty as regards the obtaining of the weather forecast. They pointed out that Mr Sheng's evidence was that the recommendations on the CCS Certificate of Fitness had been considered standard recommendations since 2002. In order to comply with such recommendations, a 48-hour favourable forecast should be obtained and, Mr Sheng said, the "48 hour favourable weather forecast" referred to a particular type of weather forecast issued by the forecast centre and not to a forecast issued 48 hours before the vessel set sail. Once such a weather forecast was obtained, the vessel could take the necessary steps to obtain port clearance and leave port. In this case, the owners had obtained weather forecasts including both 48- and 72-hour forecasts on 16 December 2003. These forecasts complied with the recommendations of the CCS certificate. The insurers had taken the position that the recommendations in the CCS certificate provided that:

(a) the vessels should have departed from Shanghai shortly after the weather forecast was obtained, and in any event, on the same day as it was obtained; and

(b) the weather forecast obtained must cover the period of 48 hours from the time of sailing.

The owners argued that no evidence in support of this position had been adduced by the insurers and the latter had not made any effort to obtain clarification from CCS as to what the recommendations meant. In any case, the testimony of the insurers' witnesses showed that there was no consensus as to what the certificate required. The owners relied on a portion of Capt Phelan's evidence in which he stated that the weather forecast must be obtained within 48 hours prior to departure and later added that the weather forecast would be a forecast for the next 48 hours. In other words, the departing tug was to obtain a 48-hour weather forecast and depart within 48 hours of that forecast. This was precisely what the owners had done. They had obtained a favourable 48-hour weather forecast just after 0800hrs on 16 December 2003 and had departed 48 hours later. The insurers' other witness on this point, Mr Richard Tan Soon Huat ("Mr Tan"), had given varying evidence. Mr Tan who was an assistant general manager with the insurers had first said that the recommendation required the vessels to obtain a 48-hour report and to leave immediately upon receipt of the report. When pressed, he changed his answer and said that a delay of half an hour would not be a breach. Subsequently, he changed his answer again and testified that it would be a breach if the delay was long enough to "be a situation where the weather pattern might change".

54 Having heard the arguments, I consider that the views of the various witnesses on what the recommendations made by the survey required cannot be determinative of the issue. Even if the insurers' witnesses were not united in what the words meant, this is besides the point. The recommendations have to be construed by the court in an objective manner according to the plain meaning of the words. I agree with the submission made by the insurers that the court is entitled to read the survey requirements in the ordinary manner, having regard to the context and the purpose for which the recommendations were issued. In this case, the survey was specifically required for the safety of the tow during the vessels' voyage south in the monsoon season. The persons who made the recommendations may of course give evidence that they used the words in a particular way and that that way would be understood because of a particular practice in force in Shanghai. In this case, however, the surveyors did not give evidence on this point or on any point relating to the recommendations and therefore it is up to the court to construe the recommendations in the normal way.

55 Here, the recommendation relating to the weather forecast read: "… depart … on receipt of a favourable weather forecast for local area in 48 hours". To understand it, this recommendation has to be broken up into its various components. It comprises four elements. The first element is the requirement to depart on receipt of a particular forecast. The second element is that the forecast must be a favourable one. The third element is that the forecast should cover the "local area" and the fourth is that the forecast should be for 48 hours.

56 Taking each element in turn, the words "depart … on receipt" to me mean that the tug should depart within a reasonable time of the issue and receipt of the weather forecast. It does not mean that the vessels had to depart immediately but bearing in mind that weather forecasts in Shanghai were issued at 0800hrs every day and picked up by Mr Sheng's company at about 0830hrs, and that the warranty also required the vessels to leave port during the day (and therefore not at night), the requirement to depart on receipt would mean really leaving within say six to eight hours of the issue of the weather forecast since eight hours after a forecast issued at 0800hrs would take you up to 1600hrs which would be only shortly before dusk would fall. At the most, I would say the vessels would have to depart by 1800hrs on the day of issue and receipt of the weather forecast. They could not wait till the next morning to depart as that would be almost 24 hours from the receipt of the weather forecast, much less wait until 1400hrs the next afternoon.

57 Looking at the second element which is that the forecast should be a favourable one, bearing in mind the other requirements of the recommendation, *ie*, that the departure from port should be when the wind force was under Force 6 on the Beaufort Scale and that during the voyage the vessels were to take shelter whenever they encountered winds that were over Force 6, I read this element as meaning that the forecast should show that the expected wind forces would be less than Force 6. Any forecast that indicated that winds would be at greater levels would not be favourable. Whether this element was met or not is impossible to say for sure in the absence of a forecast from the forecast centre on 17 December 2003. However, the other evidence adduced by the insurers in the form of Mr Cowle's testimony showed that it was unlikely that such a favourable forecast would have been issued. In this respect I should state that I accept Mr Cowle's evidence on the weather conditions in preference to that given by Mr Tan as Mr Cowle had more detailed charts obtained from more sources of information and gave credible and coherent evidence in support of those charts and his analyses.

58 As far as the third and fourth elements are concerned, I think that they mean that the weather forecast must be for the local area generally covered by the forecast centre since the vessels would be starting their voyage from Shanghai and that the forecast must cover the 48-hour period commencing from the time of its issue. The fourth element did not mean that the forecast had to be obtained within 48 hours prior to the departure of the vessels. To interpret the fourth element in this way would be to nullify the purpose of the recommendation that a 48-hour forecast be obtained because it would mean that a forecast obtained 40 hours before departure would be acceptable even though this meant that the master of the vessel would have no idea of what weather to expect after the vessel had been sailing for eight hours. The purpose of the weather forecast was to enable the master to know whether it was safe to set sail and whether within the 48 hours after departure there would be times when he would need to seek shelter and therefore to allow him to plot his course accordingly.

59 In the present case, the forecast obtained by the owners at 0830hrs on 16 December 2003 was not a forecast that complied with the recommendation in view of the fact that the vessels sailed at 1400hrs the next day. If the vessels had sailed at 1400hrs on 16 December 2003 itself, then they would have sailed upon receipt of that forecast. Sailing at 1400hrs on 17 December 2003 can by no stretch of the imagination be considered as departing on receipt of a forecast obtained at 0830hrs on the previous day. As no relevant forecast was obtained on 17 December 2003, the owners were also in breach of the recommendation that required a favourable forecast for the next 48 hours.

60 The other part of the warranty that had to be complied with prior to sailing related to the weather on departure. The master's report dated 17 December 2003 stated that the wind speed at the time was 25 knots (this is Force 6). The English version of the CCS Certificate of Fitness stated in relation to the wind condition upon departure that it should be "under VI wind force of Beaufort Scale". Thus, it would appear that this condition was not met at the time of sailing and therefore that the owners were in breach of this recommendation as well.

61 I would add here that the insurers were entitled to rely upon the master's report and the logbooks without calling the master as a witness. Whilst generally the statements in these documents would be hearsay and not admissible without the presence of the maker, in this case these were documents belonging to the owners and not to the insurers. The documents were included in the owners' list of documents and produced as part of their bundles of documents. The owners had relied on them in summary judgment proceedings and had obtained adjournments and extensions of time on the ground that they were trying to get the master but could not find him. It was only later that the owners said that they would call the chief officer instead. From the perspective of the insurers, the contents of these documents would be considered as admissions on the part of the owners especially

when it became clear that the owners were trying through the chief officer to discredit the logbook entries on wind speed and that those entries were against the interests of the owners. For the owners to argue that the insurers should have called the master to verify the contents of the owners' own documents was very odd since the insurers had no way of contacting the master except through the owners and, in any case, the owners had indicated that they would be calling him as a witness. It was the owners who had chosen at the last minute not to continue looking for the master and it was only when the chief officer testified on the stand that there was any indication that they were challenging the contents of their own logbooks. In addition, I did not find the chief officer to be a reliable witness. There is no need to go into detail at this point but there were many points on which his evidence was not believable.

Quantum

62 The policy contained a towage warranty. The owners were not able to discharge the onus of showing that this warranty was inserted by mistake. Their claim for rectification must therefore fail. The insurers, on the other hand, have established to my satisfaction that the owners were in breach of that warranty in that conditions that had to be met prior to sailing were not complied with. Accordingly, the insurers were not at risk under the policy from the time of that breach. They therefore did not have any obligation to assist the owners after the incident by engaging salvors and paying for their services. The insurers are entitled to recover the amounts paid and the counterclaim by the owners for the repair costs incurred cannot succeed.

63 The insurers adduced evidence from one Lee Peck Luang ("Ms Lee"), one of their claims executives, on this point. Ms Lee gave evidence that the insurers had appointed Charles Taylor Consulting Services to locate the missing barges and this resulted in the appointment of Guangzhou Salvage to carry out a physical search. On 24 December 2003, Guangzhou Salvage managed to recover the barge *Bintang 9* which was thereafter delivered to another tug company, Yew Kee Hong, at "outer Hong Kong" on 26 December 2003. The latter then towed the *Bintang 9* into Hong Kong harbour and delivered it to the owners there. On 29 December 2003, an agreement was reached between the insurers (acting through Mr Tan) and Guangzhou Salvage to pay the latter US$215,000 for delivery of the *Bintang 9* to "outer Hong Kong" on 26 December 2003. The insurers also made payment of HK$58,500 to Yew Kee Hong. Ms Lee produced documents supporting the payments made and documents showing the bank charges relating to these payments.

64 The owners argued that the insurers had not proved the quantum of their claims because they had not called the makers of the invoices on which their claims were based. Instead, the insurers had taken the position that evidence from their employees to the effect that the sums had been paid was sufficient to prove the quantum of the claim. This argument was specious. The insurers produced all relevant documents evidencing the payments made by them. They also had the evidence of Mr Richard Tan who was the person who had made the agreement with Guangzhou Salvage on the amount and mode of payment for the latter's services.

Conclusion

65 In the result, the insurers' claim succeeds. The counterclaim fails and must be dismissed. The insurers are entitled to judgment for the sums claimed with interest at the rate of 6% per annum from the date of the writ until judgment. As for costs, they should follow the event with the owners paying the insurers the costs of their claim and of defending the counterclaim though there should only be one set of costs since the claim and counterclaim were intertwined. If the parties so require, I will hear them on any other costs order that may need to be made.