Hub Warrior Sdn Bhd v QBE Insurance (Malaysia) Bhd
[2004] SGHC 279

Case Number : Suit 1260/2002

Decision Date : 28 December 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Kenneth Tan SC, Joseph Tan and Tan Hong Liang (Kenneth Tan Partnership) for plaintiff; Lim Tean, Shem Khoo and Probin Dass (Rajah and Tann) for defendant

Parties : Hub Warrior Sdn Bhd — QBE Insurance (Malaysia) Bhd

Civil Procedure – Pleadings – Argument advanced in closing submissions not previously pleaded and argued – Whether court could make finding or give decision on material facts which were not pleaded

Contract – Mistake – Rectification of formal document – Whether parties made antecedent agreement that conflicted with term of written contract

Tort – Negligence – Causation – Whether damage to crankpin was caused by negligence of chief engineer – Whether negligence of chief engineer or wear and tear was proximate cause of loss or damage – Marine Insurance Act s 55 (2)(c) (Cap 387, 1994 Rev Ed)

28 December 2004

Belinda Ang Saw Ean J:

1 This action is brought against QBE Insurance (Malaysia) Bhd ("QBE") for failing to hold the plaintiff, Hub Warrior Sdn Bhd ("Hub Warrior") harmless for its liability to pay, *inter alia*, for a replacement crankshaft that had to be fitted after irreparable damage to the no 5 crankpin was discovered in July 2001. The plaintiff is the registered owner of the vessel, the *Saipan Leader*. At the relevant time, the *Saipan Leader* was insured with QBE under a policy of marine insurance on her hull and machinery subject, *inter alia*, to the terms of the Institute Time Clauses (Hulls) dated 1 October 1983 ("ITC").

2 The claim here under the ITC policy is for RM4,911,418.94 or alternatively, for damages to be assessed. Hub Warrior maintains that damage to the no 5 crankpin was caused by acts or acts of negligence of the chief engineer and therefore it has a claim under cl 6.2.3 of the ITC which provides:

> This insurance covers loss of or damage to the subject-matter insured caused by negligence of Master Officers Crew or Pilots provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

3 Furthermore, there is a dispute as to the amount of the deduction agreed upon under cl 12 of the policy. Clause 12 of the policy stipulated that all claims are subject to a deductible of RM150,000 in respect of each accident. The cover included the Institute Machinery Damage Additional Deductible Clause. The deductible thereunder is RM100,000.

4 Hub Warrior contends that the amount of the deduction orally agreed upon under cl 12 was RM100,000 and not the amount of RM150,000 as stated in the policy. The plaintiff has asked for this mistake to be rectified.

5 QBE has denied that the damage to the no 5 crankpin was a result of the insured peril

identified by Hub Warrior. At the same time as putting the plaintiff to strict proof that the loss or damage comes within the terms of cl 6.2.3 of the ITC, QBE advances an alternative case, contending that there can be no claim as the proximate cause of the loss or damage was wear and tear: see s 55(2)(c) of the Marine Insurance Act (Cap 387, 1994 Rev Ed). Alternatively, if (which the insurer denies) the damage was proximately caused by the negligence of the chief engineer, QBE argues that the damage was due to want of due diligence on the part of Hub Warrior or the manager of the vessel, Hub Marine Pte Ltd ("Hub Marine"). QBE has also alleged that the claim is fraudulent and must fail, as false documents were presented in support of the claim.

The first two incidents

6 The course of events that led to the discovery of the serious damage to the no 5 crankpin is uncontroversial. It is common ground that serious damage was discovered when testing the Brinell hardness of the no 5 crankpin. The steel had hardened to an unacceptable level and it was not possible to restore the crankpin. In the result, the crankshaft was condemned and thereby precluded from use. A new crankshaft had to be fitted.

7 The container vessel *Saipan Leader* sailed from India in the month of July 2001 on a voyage to Port Klang, Malaysia, laden with cargo for discharge at Port Klang. The *Saipan Leader* was built in 1982 and is powered by a single MaK marine diesel engine model 6M601AK, having output of 8,000hp at 425rpm. The MaK diesel engine works on a four-stroke cycle. It operates on heavy fuel oil at full power rating and marine diesel oil for manoeuvring.

8 The main engine has six cylinders, six pistons and a crankshaft with six cranks. The piston is connected to the crank by means of a connecting rod. The joint where the connecting rod connects to the crank at the crankpin, sometimes called the "big end", is called a bearing which is in two halves and fitted into the connecting rod big end and clamped round the crankpin. The crankpin bearing shell comprises of three different types of metal bonded together, the steel shell (the outermost layer) housing the white-metal bearing layer with a bronze inlay between.

9 As the *Saipan Leader* approached the Port Klang pilot station on 24 July 2001, she experienced low lubricating oil ("luboil") pressure, at which point the luboil low pressure alarm sounded at about 1636 hours (at 2.3bar) and automatic shutdown of the main engine occurred. The parties have referred to this shutdown as "the first incident".

10 Following the shutdown, the crankcase was opened for inspection of the crankshaft and bearings. The no 5 crankpin bearing (also known as the big end connecting rod bearing) had failed and the bearing shells were found to be mechanically distorted and to have rotated in the connecting rod. Scattered around nos 4, 5 and 6 crankpins was white metal debris from the seized bearing. The chief engineer, Mr Khin Maung Aye ("Khin") reported the incident to Hub Marine. Thereafter, he directed the vessel's engineers to dismantle the connecting rod bearing. Some scoring marks were seen on the surface of the no 5 crankpin after the damaged bearing shells were removed. Also seen were bits of white metal that had adhered to its surface. The vessel's engineers used oilstone and emery paper to clean and polish the surface of the crankpin before fitting bearing shells from spares on board.

11 Thereafter, Khin started the standby luboil pump to check the flow of lubricating oil. The standby luboil pump is used to circulate luboil through the main engine luboil system. This was reported to be normal. The engine was restarted at 0142 hours on 25 July 2001 to run at the normal idling speed of 300rpm. About two minutes later, Khin noted that the luboil pressure dropping and to rectify this, the engine speed was increased to the normal operating speed of 425rpm to bring the attached luboil pump into action. Some two minutes later, a knocking sound was heard coming from

the engine in the area of the no 5 unit of the main engine. There was a reported drop of the luboil pressure whereupon the chief engineer stopped the engine manually. This second stoppage was referred to as "the second incident".

12 On this second occasion, the replacement bearing also failed just as in the first incident. Crankshaft deflection readings showed that the deflection readings for nos 4 and 5 cranks had changed. The no 5 crankpin was found with five heat-related cracks on the piston crown and the fuel injector, when tested, was found to be dripping slightly. Operating pressure had only dropped to 290bar compared to the set value of 300bar. The alignment of the adjacent crankshaft main bearing pins was checked. Those on board found the crankshaft to be slightly bent.

13 On 28 July 2001, technicians from Goltens Singapore Pte Ltd ("Goltens") and a representative of the engine manufacturers attended on board the vessel. The crankpin was found with heat cracks and deep pits. Depending on the seriousness of the damage, heat cracks and pits can be removed by *in-situ* grinding. Measurement of the crankpin was taken and the reading indicated that the surface had ovality to the order of 0.7mm. When testing the Brinell hardness of the crankpin, the hardness was in the range of between 250HB and 700HB, the normal allowable maximum reading being 350HB. Goltens reported an area of approximately 140mm by 175mm at the bottom of the crankpin had very high hardness readings. In an attempt to restore the crankpin, the diameter was reduced by 2mm by grinding. After grinding, Goltens found that one of the heat cracks was still visible. The surface pitting was also still visible and the hardness of the steel material still exceeded the manufacturer's allowable tolerance, thereby resulting in the crankshaft being condemned. The *Saipan Leader* was towed to Singapore where she underwent permanent repairs.

The chief engineer's negligence and the due diligence proviso

14 The contested issues are:

(a) Whether the damage to the crankpin that led to the crankshaft being condemned was caused by negligence of the chief engineer within cl 6.2.3;

(b) If so, whether that negligence was the proximate cause of the loss;

(c) Again if so, whether the loss resulted from want of due diligence within the proviso to cl 6.2.3. In this regard, the following questions require consideration:

(i) whether the lack of proper supervision or action by shore personnel amounts to "want of due diligence";

(ii) whether the loss or damage was a result of want of due diligence; and

(iii) whether those who could be blamed for want of due diligence might be identified with the "Assured, Owners or Managers".

If the answers to all these questions are in the affirmative, there is no claim.

Clause 6.2.3: negligence and proximate cause

15 It is convenient to deal with questions (a) and (b) together. Besides various witnesses of fact, both sides called an expert marine engineer (Mr Ronald M Pereira for the plaintiff and Mr Peter Thomas Nation for the defendant). No expert metallurgist was called.

16 It is also convenient to summarise the principles to be applied in determining this part of the case. There was little, if any, difference between the parties concerning these principles.

17 First, Hub Warrior has the task of proving on a balance of probabilities that the loss or damage was caused by negligence within cl 6.2.3 during the currency of the policy: see *The Popi M* [1985] 2 Lloyd's Rep 1. The defendant is entitled by way of defence to require the assured to prove its case and to call evidence to challenge the assured on each point: see *per* Cairns LJ in *Palamisto General Enterprises SA v Ocean Insurance Co Ltd* [1972] 2 QB 625 at 647; *Templeman on Marine Insurance* (6th Ed, 1986) at p 207. If "an examination of all the evidence and probabilities leaves the Court doubtful what is the real cause of the loss [or damage], the assured has failed to prove his case": *La Compania Martiartu v The Corporation of the Royal Exchange Assurance* [1923] 1 KB 650 at 657, *per* Scrutton LJ and approved by the House of Lords in *The Popi M.* However, if Hub Warrior succeeds on that issue, QBE has to bring the case within the want of due diligence proviso.

18 Second, unless the policy of insurance otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against: see s 55(i) Marine Insurance Act. Both sides accept that the term "caused by" in the opening words of cl 6.2 of the ITC is to be read as if the word "proximately" was inserted before it. Thus, the word "caused by" in cl 6.2.3 means that that clause can only be invoked when the negligence of the master, officer, crew or pilot is *the* or *a* proximate cause of loss or damage.

19 Whilst the concept of proximate cause is long established in insurance law, its application can be difficult. Proximate cause need not be the sole cause and it need not be the cause closest in time to the suffering of the loss. As Lord Shaw of Dunfermline stated in *Leyland Shipping Company, Limited v Norwich Union Fire Insurance Society, Limited* [1918] AC 350 at 370:

> In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the quality of realities, predominance, efficiency. Fortunately, this much would appear to be in accordance with the principles of a plain business transaction, and it is not at all foreign to the law.

20 The other passage where the principle is applicable to the case in hand begins at 371:

> The true efficient cause never loses its hold. The result is produced, a result attributable in common language to the casualty as a cause, and this result, proximate as well as continuous in its efficiency, properly meets, whether under contract or under the statute, the language of the expression "proximately caused."

21 With these principles in mind, I turn to the present case.

22 The pleaded case on negligence is in the manner in which Khin and the vessel's engineers repaired the no 5 crankpin. The on-board repairs were said to be deficient and grossly inadequate in the way particularised in para 10 of the Re-Amended Statement of Claim:

> e. The Plaintiffs aver that the Chief Engineer was negligent in ordering the polishing of No 5 crankpin with oil stone and emery cloth which resulted in the grinding down of the crankpin from 410mm in diameter to 409.26mm.
>
> f. The Plaintiffs further aver that the usage of oil stone and emery cloth to polish the

crankpin resulted in the crankpin developing ovality which contributed to the occurrence of the 2nd Incident.

23 In support of the pleaded case, Mr Pereira's view was that the ovality in the crankpin was the direct result of the negligent method of repair used by the chief engineer. According to Mr Pereira, in their attempt to dress up and polish the no 5 crankpin after the first incident, the chief engineer and vessel's engineers caused severe ovality of 0.7mm in the crankpin. The repairs were improper in that oilstone and emery cloth (with a rough surface which is akin to sandpaper being used on wood by carpenters) would have the effect of grinding down the surface of the crankpin. Mr Pereira in his written testimony categorically stated that the second incident was due to ovality in the no 5 crankpin. He opined that the high hardness found in the steel crankpin, which resulted in the crankshaft being condemned, was likely to be due to the negligent repairs carried out by the chief engineer on 24 July 2001.

24 He stated that when the main engine was being tested at 300 rpm after repairs, the unsatisfactory lubrication of the no 5 crankpin bearing (due to ovality of the no 5 crankpin created by the polishing with emery cloth) caused rapid overheating of the crankpin bearing due to the metal-to-metal contact with the steel crankpin. This led to the melting of the white-metal bearing layer, and when the main engine speed was increased to 425rpm, the bronze inlay also melted. Consequently, there was direct metal-to-metal contact between the steel crankpin and the steel bearing shell and micro-seizure occurred between these components of similar material. During the micro-seizure, small sections of the no 5 crankpin would be stuck to the bearing shell. During the changes of direction from the downward strokes to the upward strokes of the piston, the no 5 crankpin would momentarily become unstuck in way of its bottom segment, and the almost instantaneous freeing of the crankpin and re-contact with the steel shell as the piston moved upwards produced the knocking force. There would have been one knock during the change of direction at each upstroke of the no 5 piston. As such, with the main engine operating at 425rpm, the steel bearing shell (with the upward momentum of the piston and connecting rod) would have imparted a knocking force on the bottom of the crankpin at a rate of 425 times per minute (or seven times per second).

25 Mr Pereira explained that to obtain optimum lubrication efficiency, the crankpin surface must be absolutely smooth and free of ovality. This is to enable luboil under pressure to form an oil wedge and prevent metal-to-metal contact between the steel crankpin and the white-metal bearing surface. The oil wedge will be significantly affected by ovality and crankpin roughness. With ovality of 0.7mm, there would be segments where there would be large clearances occurring between the crankpin and bearing surface, while other segments would have smaller clearances. What this means is that with a large difference in the clearance at the various segments of the crankpin, the luboil wedge would be affected and unsatisfactory lubrication would occur. In the event, some metal-to-metal contact between parts of the crankpin and the bearing surface would occur. A crankpin with an ovality of 0.7mm would have failed almost immediately when the main engine was run at full power rating. In the present case, the ovality was severe enough to cause the bearing failure, and the knocking of the crankpin before the drop in the luboil pressure activated the alarm and automatic shutdown function during the second incident. In his opinion, the chief engineer should not have attempted repairs as he was already in a port with proper repair facilities. I have noted that this latter comment must be understood in the light of his opinion that the rudimentary repairs caused the ovality to develop.

26 Mr Nation's views differ. He disagrees that the ovality in the no 5 crankpin was due to negligent repairs by the vessel's engineers. It was a condition that was in existence prior to the first incident through wear and tear, which was further aggravated by deep pitting in the crankpin. Bearing failure arose out of the defective condition of the surface of the no 5 crankpin. Goltens found the no 5 crankpin to be in an oval rather than a perfectly cylindrical shape. This problem had to be

repaired before the ship could return to service, *ie*, there was a need to eliminate or reduce to within acceptable tolerances the ovality in the crankpin. The measurement provided by Goltens indicated that the ovality in the crankpin of 0.7mm was bad. The chief engineer did not improperly repair the crankpin because the repairs did not cause ovality in the crankpin. Mr Nation said that the majority of the hardness to the crankpin would have been sustained on the first incident. The mechanical defect that caused the first incident also caused the second incident.

27 As it happened, it was unnecessary to decide on the differing views of experts on this aspect of the case. Unfortunately for the plaintiff, during cross-examination of Mr Pereira, his opinion on the negligent repairs causing the crankshaft to be condemned came under attack and the plaintiff's pleaded case took a disastrous turn. The plaintiff found that its own expert did not support the matters pleaded in para 10 of the Re-Amended Statement of claim.

28 Mr Pereira under cross-examination conceded that ovality in the no 5 crankpin could not have been caused by the crew's polishing of the crankpin with oilstone and emery cloth with a smooth surface (and not one with a rough surface as he had initially thought) for two hours. In the circumstances, I accordingly find that the chief engineer and the vessel's engineer were not negligent in the manner in which the on-board repairs were carried out.

29 I should mention that as an alternative fall-back argument, the plaintiff pleaded in para 11 of the Re-Amended Statement of Claim that if the no 5 crankpin was damaged beyond repair after the first incident, the first incident was caused by the negligence of the chief engineer and crew who, *inter alia*, failed to properly maintain the luboil filtration; failed to take appropriate measures to prevent entry of foreign particles into the luboil and to remove sludge build-up in the crankshaft luboil passage. The build-up of sludge in the crankshaft luboil passage resulted in the localised luboil starvation to the no 5 crankpin and the automatic shutdown of the engine on 24 July 2001. That fall-back argument also collapsed. Mr Pereira conceded in cross-examination that there was no sludge formation leading to luboil starvation as pleaded in para 11 of the Re-Amended Statement of Claim. In addition, there was no negligence on the part of the crew in failing to removing water contamination in the luboil.

30 In the circumstances, Hub Warrior has not demonstrated, on a balance of probabilities, that the high hardness in the no 5 crankpin was caused by the negligence of the chief engineer. That should have been the end of the matter. However, since Mr Pereira's evidence took the turn it did at the trial, the plaintiff in its Closing Submissions now tried to present its case on a new footing. The broad structure of the revised argument on the claim under cl 6.2.3 in the plaintiff's Closing Submissions is as follows: that damage to the no 5 crankpin, which led to the crankshaft being condemned, was due to the negligence of the chief engineer. The chief engineer was said to have been negligent in three respects.

31 First, he failed to seek the assistance of specialist repairers after the vessel's main engine automatically shut down. Second, the chief engineer's attempts at on-board repairs by "merely cleaning" to remove the white metal streaks using oilstone and emery cloth were inadequate. Third, after repairs, the chief engineer restarted the engine at about 0142 hours on 25 July 2001. On this occasion, the luboil pressure again dropped and the engine was manually shut down. The complaint is that the chief engineer restarted the engine without ensuring that the proper repairs and checks were conducted and that resulted in hardness to the no 5 crankpin that eventually led to the condemnation of the crankshaft.

32 In the Closing Submissions, counsel for the plaintiff, Mr Joseph Tan, submits that the proximate cause of the loss or damage to the crankshaft was the negligence of the chief engineer in

ordering the repairs to be done instead of calling for specialist repairers. In another paragraph, he submits that the proximate cause of the loss was the negligence of the chief engineer in deciding to carry out on-board repairs on 24 July 2001 and the inadequate repairs carried out by the chief engineer. There is now the further complaint that the chief engineer restarted the engine without ensuring that the proper repairs and checks were conducted and that resulted in hardness to the no 5 crankpin that eventually led to the condemnation of the crankshaft. Finally, in the concluding paragraphs of the Closing Submissions, he argues:

> 201. On the facts ..., but for the [chief engineer's] negligence in failing to realize the seriousness of the problem and ordering the repairs to the No 5 crankpin and subsequently re-starting the engine, the 2nd Incident occurred.
>
> 202. If the [chief engineer] had called for specialist repairers after the 1st Incident, there would not have been any knocking between the crankpin and the bearings. And as shown by the evidence, it was the knocking which caused the excessive hardness to arise.

33 There are a number of things to be said about the case being put on the new footing in the Closing Submissions. My observations are as follows.

34 First, the case as brought to trial by the plaintiff was entirely based on the negligent manner in which the repairs were carried out, *ie*, the repairs created the ovality in the crankpin that led to the crankshaft being condemned. The new footing it now advances in its Closing Submissions is fundamentally different. The plaintiff is in effect now saying that the on-board repairs were not good enough to rectify the serious problem that existed. The difficulty with that revised argument, besides departing from the pleaded case, is that the court is not told what exactly was the existing problem the on-board repairs did not rectify. Nor has counsel identified the alleged serious problem with the main engine the chief engineer is accused of being negligent in having failed to recognise. Counsel acknowledges that work knocking occurred because of excessive bearing clearance such that the luboil film was compromised. In other words, there was severe ovality in the no 5 crankpin. It is the plaintiff's case that hardness to the no 5 crankpin was sustained in the second incident. What is unclear is the plaintiff's case on when and how the ovality in the no 5 crankpin developed. On the one hand, the plaintiff does not accept the defendant's contention that there was ovality of 0.7mm in the no 5 crankpin before the first incident. On the other hand, the plaintiff's pleaded case that ovality of 0.7mm was caused by the on-board repairs had all but collapsed. It also did not pursue Mr Pereira's other theory which he came up with during cross-examination.

35 In cross-examination, Mr Pereira came up with another theory which he had not mentioned in his affidavit of evidence-in-chief as he had not thought of it previously. In the witness box, Mr Pereira explained that on reflection, in his opinion, the ovality at the bottom of the crankpin was to a fairly large degree contributed to by hammering of the crankpin in its heated condition during the second incident. He said that the crankpin was heated and the hammering would be similar to the forging method where it would compact the outer layer of the material on the crankpin and that could have caused the "top/bottom ovality". Mr Pereira did not, however, explain how lack of lubrication to the bearing came about in the first place and the resultant heated condition during the second incident. This new theory was not relied upon by the plaintiff and quite rightly so. Indeed, counsel for the defendant, Mr Lim Tean, objected to this second theory being given consideration on grounds that this theory had not been pleaded. Neither was an amendment to the pleadings sought. Further, the theory was not put to Mr Nation by counsel for the plaintiff. The objections raised by Mr Lim are valid.

36 Second, the new footing the plaintiff now advances in its Closing Submissions introduced a new issue that is not pleaded and not argued previously. On the pleaded basis, the contest was

centred on causation and the damage complained of. The point I believe the plaintiff is now trying to make in the Closing Submissions is that the chief engineer should not have carried out on-board repairs with the vessel's engineers. The second incident would then have been avoided, and the irreparable damage to the crankpin too. Now the standard of care expected of a person holding the rank of a chief engineer and whether Khin had in the particular circumstances discharged this standard of care are put in issue whereas previously they were not. Consequently, particulars of facts relevant to the standard of care should be pleaded and proper particulars given for where Khin has fallen short of the standard to be expected of a reasonably competent chief engineer. The standard of care expected of Khin in a case of this sort is that of a person holding the rank of chief engineer rather than Khin's training and experience: see *Wilsher v Essex Area Health Authority* [1987] QB 730 (reversed by the House of Lords on a different point). Counsel for the defendant relied on *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793 as authority for the proposition that a court is not allowed to make a finding or give a decision on material facts which have not been pleaded.

37 The plaintiff contends that Khin should have recognised the seriousness of the breakdown. Yet, the plaintiff did not point to anything to indicate beforehand that the failure experienced was imminent. According to Allan Pang, the vessel's superintendent, the vessel's monthly performance records indicate that the main engine was operating normally and within its operating parameters from the time the plaintiff bought the vessel. On the evidence, Khin did not assess the bearing failure to be a major breakdown of the main engine. He was confident of putting the vessel back to service after the repairs. In his e-mail to the managers at 1822 hours on 24 July 2001, he reported the damage to the no 5 unit connecting rod bearing and said that he had started to dismantle the bearing for renewal and would be informing the managers of the status after he had dismantled and replaced the bearing.

38 Khin attended Yangon University between 1968 and 1970. He then joined the Institute of Marine Technology for the next five years. Khin started sailing as a junior engineer in 1975. He obtained his engineer first class in 1986. In 1987, he was promoted to chief engineer on board foreign-going vessels. At the relevant time, Khin has had a total of 26 years of seagoing experience as an engineer and then chief engineer. He was conscientious and well regarded by his employees. He signed off the *Saipan Leader* on 24 October 2001. Even then, the plaintiff and Hub Marine did not blame him for inadequate repairs. They still considered him, as can be seen from his discharge certificate, to be a very good chief engineer in terms of his ability and conduct during the time he served on board the *Saipan Leader* as chief engineer.

39 Mr Pereira acknowledged that it is not possible to check for ovality in the crankpin without disassembling the unit. Furthermore, the diameter of the crankpin has to be measured with a micrometer without which any ovality in the crankpin will not be evident. The crankshaft is primarily made up of component parts called crankpins and journals which must be perfectly round within extremely small tolerances measured in fractions of millimetres.

40 Mr Pereira's statement in his written testimony, that repairs on medium-speed engines are something which the chief engineer should not have contemplated doing especially if the vessel was in a safe port where assistance of specialist repairers could be secured, was made in the context of his opinion that it was the repairs carried out by the chief engineer and the vessel's engineers that caused ovality to develop. During cross-examination, he gave as the reason for the second incident the chief engineer's attempts at repairs which he said should not have been done. Apart from the pleading point mentioned earlier, the testimony does not respond adequately to the standard of care issue. There are Mr Nation's comments which are not critical of the chief officer's repairs but are directed at the plaintiff and Hub Marine when he was discussing the want of due diligence proviso.

41 In the present case, the question is whether there was "negligence of Master Officers [or] Crew" for the purposes of cl 6.2.3. The plaintiff led no evidence that a reasonably competent chief engineer in the position of Khin would fault Khin's views and decision. The plaintiff did not point to or lead evidence of a general and prudent practice to establish that the particular circumstances and condition in which the chief engineer found the crankpin to be in called for the attention of specialist repairers. In short, had Khin fallen short of the standard expected of a reasonably competent chief engineer? The court is unable in the circumstances to determine the appropriate standard of care and to hold the chief engineer responsible in negligence for the vessel breakdown on 25 July 2001.

42 Third, pleadings aside, I cannot see how each of the three strands relied upon as the alleged act or acts of negligence in the Closing Submissions in itself or the strands collectively constitute negligence or proof of negligence on the part of the chief engineer. The fact of the matter is that, on the evidence, the repairs by the chief engineer and the vessel's engineers did not cause ovality to develop from 410mm to 409.26mm. It follows that no blame for the damage to the crankpin can be attributed to the chief engineer even though the repairs were undertaken, for in effect they have no causal link with the damage based on the expert evidence. In my view the plaintiff has not established on the evidence that if it had not been for the repairs carried out by the vessel's engineers, the state of the crankpin would have been such that it would have been capable of being restored to within manufacturer's recommendation after the first incident. At any rate, any criticism of the chief engineer is a matter of hindsight.

43 Fourth, the other argument, that the negligence was in restarting the engine, also cannot be acknowledged. It was also not asserted in pleadings that by restarting the engine the chief engineer was negligent. I am sceptical and am not moved by any submissions based on what the chief engineer should not have done. In so dealing with the breakdown, the polishing with emery cloth and oilstone did little to aggravate or possibly precipitate the result. On the evidence, the repairs and restarting of the engine were circumstances which would not, and did not in all probability, have mattered. The plaintiff did not lead evidence that the engine should not be restarted before the reason for overheating was identified and corrected. In this case, the chief engineer was confident that the engine would be put back to service after cleaning the crankpin and replacing the failed bearing with spares on board. If anything, the decision to carry out the on-board repairs, the order given, the repair effort itself and restarting the main engine and finally shutting it down were all part and parcel of one activity, namely the on-board repairs, and it is artificial to view each strand of the allegation of negligence as distinct and in isolation. The chief engineer was not asked whether he was aware that in restarting the engine, the replacement bearing would fail and cause the engine to knock. There was no evidence that a reasonable person in the position of the chief engineer would not have restarted the engine after completion of on-board repairs. There is no evidence that restarting the engine was in the circumstances negligent.

44 Furthermore, in my judgment, none of the three strands alleging negligence on the part of the chief engineer in the plaintiff's Closing Submissions has any causative relevance. Any criticism that might be made was in any event non-causative in that the repairs did not result in the ovality as previously thought by Mr Pereira.

45 The experts accept that high hardness discovered after the second incident was attributable to ovality in the crankpin. Mr Pereira said that a correctly assembled crankpin bearing would have a 0.2mm clearance between the steel crankpin surface and the white metal-bearing surface. However, Mr Nation and Mr Pereira do not dispute that there was excessive bearing clearance that had affected the lubrication conditions between the crankpin and the bearing. In the result, friction between the crankpin and bearing led to heat damage. In the final analysis, the ovality in the no 5 crankpin resulting in excessive bearing clearance between the crankpin and bearing was the primary cause of

the damage to the crankpin. In my judgment, there is no need to decide on the differing views on the precise mechanism of the hardening of the crankpin – whether it was "work hardening" (or "knocking") or "quenching" that produced the hardness located at the bottom of the crankpin. Even on the plaintiff's contention that the hardness was due to "knocking", the real efficient cause operating throughout was excessive ovality in the circumference of the no 5 crankpin that produced the knocking between the crankpin and the bearing shell.

46 The debate is when and what caused the ovality. In that regard, the evidence is that the chief engineer in carrying out repairs to the no 5 crankpin did not cause ovality of 0.7mm to develop. So any criticisms that might be made as regards inadequate repairs were in any event non-causative.

47 Accordingly, in the present case, the questions whether there was "negligence of Master Officers" or "Crew" and whether such negligence caused the loss or damage for the purposes of cl 6.2.3 were not answered by the plaintiff. When things turned the way they did at the trial, the new footing advanced in the Closing Submissions only served to highlight the paucity of the plaintiff's evidence and hence its negative effect on the plaintiff's claim under cl 6.2.3.

48 The defendant offered an explanation for the bearing failure in the first incident. As stated, it is not necessary in the circumstances for the defendant to succeed on this point to carry the day.

49 Mr Nation's testimony was that ovality of 0.7mm was due to wear and tear and the rate of development to 0.7mm since 1997 was due to the pitting corrosion found on the surface of the crankpin. In this disagreement between the experts on ordinary wear and tear, I prefer the evidence of Mr Nation, supported as it was by the publication *Diesel Engine Reference Book* (Butterworths). Besides, in cross-examination, Mr Pereira was shown an extract from the *Diesel Engine Reference Book* and he agreed that the crankpin is a component that is subject to normal wear and tear. Alan Pang, the superintendent of the vessel, concurred on this point after he, too, was shown the same extract.

50 The plaintiff argues that it is not possible to have a sudden increase in ovality in the crankpin between 1997 and 2001. The defendant's explanation is that the presence of pitting corrosion on the crankpin would have accelerated the development of ovality of the crankpin. Mr Nation admits during cross-examination by Mr Kenneth Tan SC that absent pitting corrosion, the ordinary wear and tear on its own would not produce ovality of 0.7mm over a period of four years from the time the bed plate was renewed in 1997.

51 Mr Pereira explained that in 1997, the bed plate was replaced and the crankpins and bearings were passed as reusable by the manufacturer's representative and class surveyor who was in attendance. Mr Pereira's view is that any water droplets that had got onto the crankpin would have been cleansed. Mr Nation does not think it would have been detected. Mr Nation testified that in a shipyard environment, the crankpin could have been exposed to "water leakage, condensation dripping from air conditioners, somebody spilling a cup of coffee over it, even somebody using it in place of sanitary facilities". That, he said, is "a very shipyard possibility". It is to be noted that the bed plate replacement was done in the United Arab Emirates and not in a Singapore shipyard where the experts' experience lay.

52 Crucially, the chief engineer did not note any pitting on the crankpin when he examined it after the first incident. Although the chief engineer admitted that he was not looking out for pitting, the crankpin was nonetheless examined after the first incident. On the evidence, the defendant's theory on pitting is not entirely supportable. Even so, the outcome of the case is not affected. The fact remains that it is always for the plaintiff to establish that the damage comes within the peril

insured against, and the burden is not arrogated to the defendant to prove the truth of an alternative cause. Consequently, as the plaintiff has not proved its pleaded case on a balance of probabilities, the action must fail.

53 In the light of the findings and conclusions reached above, there is no need to deal with the issue of want of due diligence and breach of s 17 of the Marine Insurance Act. Although not strictly necessary for this case, I should however say something about the relief of rectification sought by the plaintiff.

Rectification

The requirements for rectification

54 The plaintiff must show what was the intention of both Chee Keng Koon ("Chee"), the general manager of QBE Marine Underwriting Agency Pte Ltd who are the Singapore agents of the defendant, and Lui Yuen Kheng ("Lui"), the general manageress of Hub Marine, as to the applicable deductible, and that they also gave outward expression of this common intent in a manner which made plain, applying an objective test, that this was what they wished to achieve by the policy. In *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep 301 at 307, Lord Diplock stated, in the context of a claim to rectify a policy of aviation insurance:

> Rectification is a remedy which is available where parties to a contract, intending to reproduce in a more formal document the terms of an agreement upon which they are already ad idem, use in that document words which are inapt to record the true agreement reached between them. The formal document may then be rectified so as to conform with the true agreement which it was intended to reproduce, and enforced in its rectified form.

55 Lord Phillips of Worth Matravers MR in *The Demetra K* [2002] 2 Lloyd's Rep 581 helpfully sets out the requirements for rectification. Lord Phillips MR said at [23] and [24]:

> The antecedent agreement need not amount to a binding contract but there must be a common accord as to what the parties' mutual rights and obligations are to be, to which they fail to give effect in their subsequent written contract ...
>
> Where the parties have recorded their agreement in a written contract, convincing evidence is necessary to discharge the burden of proving that they made a common mistake in so doing, albeit that the standard of proof is the civil standard.
>
> > But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself.
>
> (Per Lord Justice Brightman in *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at p 521, and see per Lord Justice Buckley at p 514.)

Alleged oral agreement

56 Was there an antecedent agreement as alleged between the plaintiff and the defendant that conflicted with the amount of the deductible? It is the plaintiff's pleaded case that such an oral agreement was reached between Lui and Chee over luncheon on or about 15 June 2001. According to Chee's testimony, the luncheon was on 12 June 2001 as indicated in his diary. Chee also disputes the

conclusion of any agreement over lunch as he had to reconsider whether it was possible to substantially reduce the premium for the fleet. The original quotation for the fleet of 12 vessels was RM984,042 and the request was for QBE to reduce premium to about RM777,000 as the next available quotation was RM728,841.20. Even though Chee, as Lui said, was keen to underwrite this risk, it was not plausible that he would have straight away given the substantial reduction requested without further consideration. As a matter of business sense, he would have to see whether this request could be met unconditionally or on terms. In any case, the subsequent confirmation slip dated 19 June 2001 sent, advising total loss cover for two vessels (the *Lotus* and the *Giwin*), shows the absence of a common intention, let alone the existence of a binding oral agreement as pleaded. At that stage, it was possible to keep to the cl 12 deductible of RM100,000 for each vessel, given the total loss cover for the *Lotus* and the *Giwin*. Hoh Lai Fun ("Hoh") of Steady Concept Sdn Bhd corroborated Chee's testimony. Hoh is an associate director of LCH (S) Pte Ltd, insurance brokers. Steady Concept is associated with LCH (S) Pte Ltd. At the relevant time, Steady Concept was the plaintiff's broker. Hoh said that on Lui's instructions, she asked Chee on 19 June 2001 to cover the *Lotus* and the *Giwin* on full cover. Chee indicated to her that he would be agreeable to the request but he indicated some adjustments. Initially he said he might have to revise the premium for the two vessels. Furthermore, Hoh's evidence is that she did receive Chee's handwritten note where an adjustment was eventually made to the deductible and is not disputing what was said there. Hoh's testimony is that she then prepared a fax which she said was transmitted to Lui. Lui's contention that she did not receive Hoh's fax dated 22 June 2001 does not help the plaintiff. That issue is entirely a matter between Hoh and the plaintiff and does not alter the fact that the plaintiff is impressed with the knowledge of its broker. Chee's conversation with Hoh on 19 June 2001 and his handwritten note to Hoh all contradicted the alleged common intention or antecedent agreement.

57 In the end, the plaintiff, in my view, has failed to make out a case that there was an antecedent agreement that conflicted with the deductible clause in the policy. For this reason, the rectification sought by the plaintiff fails.

Result

58 For all these reasons, the plaintiff's claim is dismissed with costs.