IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 263

Suit 3308/1983

Between

Pac Asian Services Pte Ltd

… *Plaintiff*

And

The Nanyang Insurance Company Limited

… *Defendant*

GROUNDS OF DECISION

Version No 1: 11 Sep 2026 (01:05 hrs)

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Pac Asian Services Pte Ltd v The Nanyang Insurance Company Limited

[1993] SGHC 263

Suit 3308/1983
Lai Siu Chiu JC
03 November 1993

1 **Judgment:**

2 Coram: Lai Siu Chiu, JC

3 **Cur Adv Vult**

4 JUDGMENT

5 The facts

6 The plaintiffs were at the material time the owners of a steel crane dumb barge known as SR 2081 (the barge) which was licensed by the Port of Singapore Authority (PSA) as a harbour craft under the PSA Harbour Craft Regulations 1974 (the 1974 regulations). The defendants were the insurers of the barge under a marine hull policy no. 81110D0117 (the policy) for the period 15 March 1981 to 14 March 1982 in the sum of $200,000 (the insured sum).

7 On 2 August 1981 whilst the barge was deployed by her charterer Ballast Nedam (FE) Pte Ltd (Ballast) at the West Jurong Anchorage (grid reference 3816A), she collided with another vessel and together with the tug Kalibone (the tug) which was then on her deck, sank. The plaintiffs duly gave notice to the defendants of the sinking through the insurance brokers Suntek Private Limited (Suntek) and pursuant to PSA's notice to remove obstruction (1AB26), engaged the services of Smit International S E A (Pte) Ltd (Smit) by an agreement dated 7 August 1981 (1AB34-35) to refloat the barge for a lump sum of $50,000. The plaintiffs' barge supervisor Norman Yeo Sing Watt reported the sinking to the marine police on 4 August 1981 (2AB11).

8 After Smit had refloated the barge she was towed to the yard of Chiyoichi-Sep (FE) Pte Ltd (the yard) at Pulau Samulun. There she was surveyed by the defendants' surveyors J B Boda & Associates (S) Pte Ltd (Boda) in particular by Captain Palocarran (Palocarran) after which with Boda's permission she was cut up. Before the barge was refloated and towed to Chiyoda's yard, Boda arranged for Marine Survey Associates Pte Ltd (Marine Survey) to carry out ultrasonic tests as well as an underwater survey of the barge. Marine Survey subcontracted the underwater survey to Singapore Salvage Enginners (SSE) whose Anthony Dhanakody did the dive. On their part the plaintiffs appointed Gellantly Hankey Marine Services International Pte Ltd (Gellantly Hankey) as their adjusters.

9 The plaintiffs through Suntek on 4 September 1982 (2AB46-47) submitted their claim with supporting documentation to the defendants for the insured sum and Smit's salvage fees. On 7 October 1982 (2AB56) the defendants informed Suntek that their investigations revealed that the barge was

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10 unseaworthy and she was in an excessively corroded condition with signs of wear and tear and the shell plating appeared to have thinned. Corrosion holes were found all over the hull and deck plating. The < vessel > was unseaworthy when put to sea and sinking was not caused by insured peril.

11 The defendants therefore denied liability.

12 Suntek in their reply dated 8 October 1982 (2AB57-58) pointed out to the defendants that

13 1. according to her time sheet the barge on 2 August 1981 was deployed in her normal operations by Ballast commencing from 8 am. At about 4.45 pm water was found leaking through a crack on her portside. At 5.45 pm a wooden tug No 32 towed her portside alongside the Sea Camel with which vessel she collided. At 7.30 pm a big crack was found on her portside and she was listing to starboard. She was listing very heavily at 9 pm with water coming in fast and she eventually sank at 10 pm; 2. the proximate cause of her sinking was therefore collision with other vessels; 3. s. 39(5) of the Marine Insurance Act (the Act) states that in a time policy there is no implied warranty of seaworthiness, the insurer is not liable only where the vessel is sent to sea in an unseaworthy condition with the privity of the assured which onus of proof lies on the insurers.

14 Suntek requested the defendants to reconsider their decision.

15 In their response dated 11 October 1982 (2AB59) the defendants maintained that the barge was in such a corroded state that they were convinced the plaintiffs were privy to the unseaworthiness and the loss was not payable. The plaintiffs appointed solicitors in March 1983 who in April 1983 wrote to

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the defendants and demanded payment of the sum of $250,000. The defendants maintained their stand and forwarded to the plaintiffs' solicitors photographs (35) said to be taken by Marine Survey showing holes in the barge's shell plating, but not the survey report itself. Neither was Boda's report extended to the plaintiffs. Their solicitors' efforts came to nought and eventually in July 1983 the plaintiffs commenced the above suit.

16 The claim

17 In the statement of claim the plaintiffs alleged that the barge sank and was totally lost by perils insured against and that they incurred expenses amounting to $50,000 pursuant to the sue and labour clause in the policy. The plaintiffs claimed the insured sum as well as $50,000 under the sue and labour clause under the policy. At the defendants' request further and better particulars of the statement of claim were rendered by the plaintiffs in particular of the allegation in para 4 that the barge was totally lost by perils insured against.

18 In the defence, the defendants

19 1. admitted that the barge sank but denied that it sank due to an insured peril; 2. relying on s 39(5) of the Act contended that the barge was sent to sea in an unseaworthy state with the privity of the plaintiffs and that the alleged loss was due to unseaworthiness.

20 The evidence

21 The plaintiffs called as a witness Tan Chak Keow (Tan) who was their operations executive between 1976-1984. Tan testified that

22 1. he was inter alia in charge of the loading and discharging and allocation of jobs for the plaintiffs' then 20-30 vessels;

23 2. at the time of the sinking the barge had a PSA licence valid until 1982. Prior thereto on 1 April 1981 PSA had inspected the barge;

24 3. the barge had been chartered out for one month to a company called Altec Construction Co Pte Ltd (Altec) on 1 April 1981 for $20,000 (1AB69-70). Altec had inspected the barge before the charter commenced and had not raised any objections to her condition;

25 4. by a charterparty dated 24 July 1981 (1AB23) the barge was chartered to Ballast for 30 days commencing 15 July 1981 at a daily hire of $2,000 and for a total sum of $55,000 up to the date she sank. Ballast inspected the barge before commencement of the charterparty and the barge was still on hire to Ballast at the time she sank;

26 5. the barge was not in the condition shown in the photographs taken by Marine Survey; otherwise she would not been able to travel 4 to 5 miles for the Altec charter and 5 to 15 miles for the Ballast charter;

27 6. there was no on-hire or off-hire surveys done for either charterparties but a survey of the barge was done after she had been salvaged by Smit.

28 Yeo Wee Hou (PW2) the manager of Altec confirmed that his company hired the barge for the month of April 1981 for a project at the East Coast and he inspected the same before commencement of the hire. The barge was used to lift equipment and materials to the site jetty. It was not in the condition shown in the 35 photographs, otherwise his engineer would have complained. Neither

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was the barge returned to the plaintiffs in the condition shown in the photographs. There was some rust on the barge but it was not so severe as that shown in the photographs, there were no holes.

29 A director of the plaintiffs Lai Nai Yain (Lai) testified that

30 1. he was not involved in the day to day operations of the company's vessels;

31 2. after the sinking he invited the defendants to salvage the barge but they refused to do so. Because of PSA's notice the plaintiffs were obliged to remove the sunk barge using Smit's services after he had first notified Boda and obtained their permission. Neither the defendants nor Boda contacted him to say they wanted to survey the barge;

32 3. PSA gave a deadline to cut up the barge within 6 weeks of 9 September 1981 (1AB52) which he conveyed to Boda who on 21 September (1AB58) confirmed they had no objections to the cutting up. The plaintiffs received no payment for her scrap because it cost money to cut the barge up so he verbally agreed with Ong a scrap dealer that the latter could have the scrap provided Ong cut it up within a certain time frame, disposed of the scrap and paid for all charges including jetty and yard charges. Similarly the crane on board was also cut up as it had buckled and it was not worth repairing. He decided to cut up the barge instead of repairing her as repairs would have cost three (3) times that of building a new barge and a reasonably good barge after sitting on the sea bed and being subjected to various stresses would have weakened to the point it is not worth repairing;

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33 4. when the barge was refloated on 28 August 1981 he did not engage a surveyor to carry out a survey as he believed the defendants were going to do the same. Tan's evidence that a survey was carried out was incorrect. The defendants' survey report was not given to him; 5. the plaintiffs were put into provisional liquidation sometime in 1991-1992 but the order was subsequently set aside.

34 Under cross examination Lai could not explain the state of the barge as shown in the photographs but said she was not in that condition when he saw her after she had been refloated. Neither could he comment on the statement (2AB65-66) of the diver Anthony Dhanakody (Dhanakody) that the barge had numerous holes on her sides and deck some of which were stuffed with rags to keep the water out. Lai however questioned Dhanakody's report pointing out that it was dated 15 June 1984 some 34 months after he had allegedly made the dive. Further if Dhanakody was, as he stated, then an employee of SSE, why did he and not the company make a report? Had he known that the defendants intended to contest the plaintiffs' claim he would have conducted his own survey and obtained expert advice on the ultrasonic report of Marine Survey before the barge was cut up on 12 September 1981.

35 When re-examined by counsel for the plaintiffs, Lai said that he had several conversations with Palocarran over the claim particularly in September 1981 but he was never told that the claim would not be paid nor was he told that Palocorran had conducted a survey on 2 September 1981; neither had he seen Palocarran during his visits to the yard.

36 The plaintiffs called as a witness a marine officer of PSA Ng Yang Chee (Ng) who confirmed that the licence for the barge had been last renewed by the

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department on 2 April 1981 valid until 14 March 1982 (exh P1). Ng (PW3) testified that under the 1974 regulation (see reg 5 < 4 >) for the purposes of issuance and renewal of licences the department required

37 1. a craft to be inspected by a PSA inspector who will check that its fire fighting and life saving appliances and other necessary equipment/ apparatus are on board;

38 2. that a craft be seaworthy for its intended use.

39 Since the barge was registered with the PSA on 16 March 1977 her licence had always been renewed upon its expiry, the licence was cancelled with effect from 5 November 1981 by PSA's letter to the plaintiffs dated 13 November 1981 (1AB59). It is to be noted from exh P1 that the barge was built in Japan in 1962.

40 Upon her recall to the witness stand, Ng informed the court that Ng See Fong (NSF) who inspected the barge on 1 April 1981 (1AB8) had left PSA's services and she did not have his last known address. The PSA did not require special qualifications for an inspector but in NSF's case he had commencing from 1972, passed a steersman examination, attended fire fighting, handling of dangerous cargo, radio communication, radar appreciation/interpretation, investigation techniques and preparation of prosecution charges, courses. NSF had also undergone a refresher course in port inspection and in 1988 he obtained a power leisure craft driving licence.

41 At the further hearing of the case, NSF (PW7) confirmed Ng's evidence on his resum and said

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42 1. he was a PSA port inspector between 1970-1990;

43 2. he inspected the barge visually on 1 April 1981 and she passed the inspection.

44 If she had been in the condition shown in the photographs he would have failed her and not recommended the renewal of her licence.

45 Under cross examination, NSF clarified that while his inspection did not involve the hull integrity of the barge, he nevertheless checked for corrosion externally. Like Lai he could not explain how the barge came to be in the condition shown in the photographs 5 months after his inspection but he opined that it could be due to wear and tear, her lying on the sea bed for a period of time and to the oxidation process.

46 The plaintiffs also called as a witness Sam Choo Chin Lye (Choo) a marine engineer who at the material time worked for Gellatly Hankey. Choo (PW8) testified that he wrote to the defendants on the plaintiffs' behalf for the survey reports on the barge but his request was denied on the ground that the same were confidential. Choo felt that the survey reports were inappropriately withheld as it is a normal practice for an assured and the insurer to exchange survey reports. The defendants' survey reports were only made available some ten (10) years after the sinking by which time the plaintiffs as the assured were clearly disadvantaged as the barge had been cut up by then.

47 Choo had in January 1983 (see 1AB65) when he was with Maritime Adjusters & Surveyors Pte Ltd given his views to the plaintiffs' then solicitors on Marine Survey's ultrasonic report. He disagreed with Marine Survey's findings on the alleged corrosion of the barge because

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48 1. their report did not indicate which were the pre-existing holes prior to the sinking, which were the contact holes resulting from the collision and which were the holes due to the salvage operation;

49 2. the 16 days of exposure with the attendant oxidation process and the subsequent rusting were sufficient to give the impression of corrosion holes;

50 3. the holes may not have existed prior to the sinking but may be the result of the wasted plates having been subjected to excessive stress causing the thick scales to be shed and the numerous holes shown in the diagram (2AB32) attached to Marine Survey's report to appear;

51 4. if the barge was in the condition shown in the photographs no charterer would hire her let alone pay a monthly sum of $20,000 for her use. Further the barge would have sunk very fast as the big holes were below her load line.

52 In Choo's opinion the proximate cause of the sinking was the contact with the tug and the Sea Camel resulting in the barge being squeezed between these other vessels and the large holes on her port and starboard sides. He extracted this information from the marine report (2AB47A-B) of the plaintiffs.

53 As for Boda's report, Choo had the following to say:-

54 1. he thought their comment that the barge was unseaworthy at the time of the sinking very irresponsible unless there were sufficient facts to substantiate the allegation;

55 2. he did not think there were sufficient facts to support Boda's allegation. The report said that Boda was not furnished with copies of the accident record statement, marine report and the PSA permit to break up vessel. If so, how could Boda come to the conclusion that the barge was unseaworthy without knowing the background?

56 3. from the time he wrote to the defendants for the survey reports (23 April 1982) until the time and even after, he issued his report (3 January 1983) he had neither seen nor heard from Palocarran although he recalled speaking to him once on the plaintiffs' claim.

57 When cross-examined Choo said he had never inspected the barge nor could he recall whether he had seen the survey report of the barge done by Asian Survey Associates referred to in his letter to the plaintiffs dated 5 May 1982 (2AB42); he did not interview the crew of the barge or the Sea Camel either. He thought that as a general rule 10mm would be the expected thickness of the side plates of the barge when she was new but he did not think that the fact her plates had wasted to 1-3mm thickness meant that the barge was unseaworthy. Whilst he agreed that sinking per se would not have caused the barge to be in the condition shown in the photographs, Choo opined that resting on the seabed would have been the cause because the seabed not being flat the barge would have been subjected to varying degrees of stress. Rusting takes place after some time for any vessel. In normal circumstances rust scales would assist a vessel to maintain its hull integrity but in the case of the barge, after she sank, her rust scales broke off due to hydrostatic pressure resulting in the thinning of her plates and eventually corrosion holes formed. The condition of the barge as shown in the photographs was therefore due to a combination of factors namely, collision, sinking, salvage and sitting out in the open for 16 days.

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58 Under re-examination Choo said it would have taken the barge less than five (5) hours to sink if she had had the large gaping holes just below the waterline as shown in the photographs. He noted that there was no indication from Marine Survey's report when the photographs were taken.

59 As defence counsel declined to call any representative of the defendants as a witness the plaintiffs served a subpoena on the defendants who sent to court their senior manager (Low Hung Wah) for handling claims in compliance thereof. I will not dwell on Low Hung Wah's evidence as it touched on the reinsurance aspect on which I am satisfied that there was no basis for the plaintiffs' contention that the defendants had been paid by their reinsurers and therefore the defendants cannot in turn deny liability for the plaintiffs' claim.

60 I now turn to the evidence of the defendants' three (3) witnesses. Dealing first with the evidence of Dhanakody (DW2), his testimony can be summarised as follows:

61 1. Between 1980-81 he worked for SSE which was owned by his brother. He recalled doing a diving job for Boda with another person to look at a sunk barge off Jurong in July - August 1981.

62 2. When he went down to the barge which was lying in about 20 feet of water she was on her starboard side and the boom of her crane was partly buried by mud. He saw that the barge had a lot of holes at its foreward end stuffed with rags and there seemed to be a cracked hole. Further when he used a steel scraper on 2 or 3 of the holes and applied pressure the scraper could go through the plates which were very thin. He could not see any signs that the barge had been

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hit. The visibility was quite clear being about 2 feet, and he was underwater for about + hour.

63 3. After the dive he reported to his brother so that the latter could prepare a quotation for the salvage operation but he did not know whether his brother did.

64 4. Some time in June 1984 he was requested by Palocarran to give a statement which he did at the defendants' solicitors' office but he was not certain whether it was on 15 June 1991; he did not know the reason for his statement and he did not have notes to refresh his memory of what happened three (3) years earlier.

65 5. He felt he had been tricked by Palocarran into giving the statement as if he had known that he would have to attend court he would have refused to obliged.

66 Next there is the evidence of Vincent Sibert (Sibert) one of the two co-signatories of the report of Marine Survey. Sibert (DW2) had this to say:

67 1. he had been employed by Marine Survey since 1981. He carried out the ultrasonic tests over three (3) days namely 10, 11 and 14 September 1981 to determine the thickness of the barge's metal plates on the instructions of David Ho of Admet Associates Pte Ltd. He only measured the thickness of the plates not the rust scales or the paint. Before taking the readings from the outside of the barge he would scrap off the rust scales and the paintwork;

68 2. he did not have the original thickness of the plates nor the ship's drawings;

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69 3. the barge was in a very bad condition with some parts reduced to 1-3mm thickness; he did not know how long the wasting had taken place but he doubted that it could have happened overnight;

70 4. the diagrams attached to his report (2AB31-32) do not indicate whether the holes existed prior to the sinking. As he did not have the original ship's drawings his measurements were not precise;

71 5. the request for the photographs came from Boda and they were taken at the time he carried out the tests but he did not take the photographs nor did he know who took them; the photographs did not form part of his report;

72 6. his superior who was the co-signatory of his report, Chris Chong, had left his company's services;

73 7. he is not a marine surveyor.

74 Finally, there is the evidence of Palocarran (DW3) who said:

75 1. when the plaintiffs' claim came up, he requested the assistance of a free-lance engineer David Ho to find someone to do ultrasonic testing for him on the barge and David Ho appointed Marine Survey on his behalf;

76 2. he saw the barge in the yard on 2 September 1981 after she had been refloated and a couple of times subsequently; prior thereto he had visited the spot at Jurong anchorage where she had sunk;

77 3. he asked Francis Dhanakody of SSE to give a quotation for salvage of the barge but (presumably after the brother had made the dive) the former

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declined because the barge was in such poor condition the normal salvage method could not be used;

78 4. when he saw the barge she was lying in the position shown in the photographs;

79 5. after the barge was salvaged the plaintiffs did not inform him what repairs they intended to carry out to put her back into service but instead they immediately wanted to cut her up. He agreed to the cutting up only after a visual inspection of the barge, the ultrasonic tests and the taking of the photographs had been completed;

80 6. he compiled the information and subsequently rendered his report dated 13 September 1982 (2AB50-54) to the defendants;

81 7. he had asked for further information like drawings, old class records, survey reports and repair bills from the plaintiffs but none were furnished;

82 8. to his knowledge in 1981 it was not mandatory for PSA to do an inspection of a vessel before renewing its licence. If an inspection is done PSA has a general look, checking perhaps the fire fighting equipment and the navigation lights. A PSA inspection cannot in any way be compared to a hull survey and the issuance of a harbour craft licence is not the same as a certificate of seaworthiness;

83 9. he disagreed with Choo's opinion that the holes in the side plates were caused by collision contact as a collision would result in a dent or a direct hole and not such severe damage as seen in the photographs;

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84 10. in his examination of the barge he found no evidence of damage having been caused by a collision, only normal wear and tear;

85 11. a barge like the plaintiffs' usually has watertight compartments and if there are only two holes of the type shown in the photographs with the rest of the barge in good condition then it will not sink as it has adequate buoyancy;

86 12. if a barge was hit on its portside and holed then if it starts listing it should list to portside and not to starboard as in this case;

87 13. a sunk barge resting on the seabed should not have corrosion holes and there will be no sagging and hogging even if there is mud so long as she is on a flat base; there has to be wave action before a vessel will sag and hog;

88 14. contrary to Choo's assertion, rust scales cannot strengthen steel plates. Neither can salvage action cause corrosion holes although it can cause the plates to buckle or bend or be broken. Further, oxidation will not take place when a vessel is lying on the seabed as there is no oxygen;

89 15. it is absurd if anyone said that corrosion took place in the 16 day interval between the time the barge was refloated and when the ultrasonic tests were carried out. The corrosion holes had been there for a considerable period developing slowly obviously due to lack of maintenance;

90 16. if collision as a possible cause is taken away, the reason the barge sank was because she was floating with big holes just above the water line and some holes below the water line were plugged with cloth -- she sank because of her bad condition and debility;

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91 17. if the alleged collision had resulted in a hole below the water line the person in charge of the barge should have ceased all loading operations and pumped out the incoming water, tried to patch up the hole(s) temporarily and then taken her to shore for repairs. If the leaks could not be contained then the barge which had a tug beside her should have been towed to safety. In this instance none of the necessary measures had been taken.

92 Under cross-examination Palocarran:

93 1. said he did not take any statements from either Altec or Ballast after the sinking was reported to him; neither did he take statements from the operators of the Sea Camel or the hopper barge 10003 (which collided with the barge) because 'the condition of the barge was so evident there was no need for taking statements from these people';

94 2. could not recall whether he wrote to the plaintiffs to ask for the documents he had identified in court

95 3. could not say whether PSA will renew a harbour craft licence if a vessel was unseaworthy; he had never been present for a PSA inspection but he was aware that harbour crafts do not require classification;

96 4. said he did not give a copy of his report to the plaintiffs but disagreed that they had to have a copy in order to know why their claim had been rejected -- it was for the plaintiffs to prove their claim;

97 5. said he had the records of his inspections of the barge including a pocket book but they were no longer available as it 'was many years ago'. He shifted his office twice but he could not recall when;

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98 6. said that his report was based on Marine Survey's ultrasonic tests, the photographs, his visual inspection and his telephone inquiries of Smit and PSA (although his inquiries of PSA were not mentioned in his report). He could not recall who the employees in Smit were that he spoke to and he did not take statements from them;

99 7. explained that he produced his report on 13 September 1982 even though he had the available information to write it in September 1981 because 'it was very clear that the ultrasonic report and the photographs are the most relevant proof of the condition of the barge' which two (2) documents he had given to the defendants and which in his opinion 'proves the case beyond doubt'. However he wanted to get more details such as the accident report statement made by the barge supervisor and that made to the PSA and he waited for the information; there was a difference between a report made to PSA and that made to the marine police. In fact he thought the plaintiffs were not interested in making a claim and finally when the defendants told him to submit his report irrespective of whether the plaintiffs gave the documents, he did so. He did not take photographs on the days he inspected the barge because he did not have a good camera to enable close-up pictures to be taken. The way the photographs were taken he knew it was with a good camera;

100 8. denied that he had tricked Dhanakody into giving a statement; the man was a simpleton. He could not recall whether Dhanakody was given a copy of his statement after it had been prepared;

101 9. could not remember the time on 2 September 1981 when he inspected the barge but no one was with him and he did not see any representative of the

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plaintiffs present although there were people on the barge; the inspection took about 1-2 hours;

102 10. said that at the second inspection of the barge which was a couple of days after the first, he did not see any representative of the plaintiffs. This second inspection maybe took 1 or + hour. He could not recall when he made the third inspection as it took place 10 years back. When he mentioned 'we the undersigned' in his report he meant 'I' as he alone did the inspection;

103 11. if he did not have his notebook when he prepared his report dated 13 September 1982 then he relied on the photographs, ultrasonic report and his memory to write it. He did not know who took and when, the photographs were taken nor was he present when they were taken;

104 12. said that as at 2 September 1981 he had had a licence from the Singapore authorities for about 3 - 4 years;

105 13. he could not say why his affidavit filed on the defendants' behalf on 28 November 1983 did not mention or exhibit his report. He could not remember whether by then he had given to the defendants' counsel a copy of his report although he would have given a copy to the defendants a few days after it was prepared;

106 14. said he was not certain what instructions David Ho of Admet Associates gave to Marine Survey but his own instructions to David Ho were oral. He could not recall whether David Ho went to the yard to inspect the barge but it was possible that David Ho was present on at least one occasion when he inspected the barge;

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107 15. said that if he had an urgent need for a crane of the particular capacity he would hire a vessel in the condition of the barge for $20,000 or even $55,000 a month;

108 16. declined to speculate how long it would have taken the barge to sink with her numerous holes but the reason the barge did not sink earlier than 2 August 1981 was probably because the holes had been plugged but he did not check with the 2 charterers whether the holes were indeed plugged. Unless he knew her draft at the time of the collision it was difficult to say whether the holes were above or below the water line;

109 17. denied that he never inspected the barge at all, that he never wrote to the plaintiffs to ask for the documents he allegedly requested and that it was David Ho who carried out the inspection instead. He could not recall what the yard looked like nor could he describe its buildings as when he arrived he proceeded straight to the barge which was lying in the water as shown in the photographs;

110 18. agreed that although his report did not say the plaintiffs' claim should not be paid he could have told the defendants not to pay but he was unable to recall whether he did. As a surveyor it was not his business to tell the defendants to pay or not to pay a claim as sometimes underwriters settle claims for commercial reasons even if the claims are not payable.

111 Upon being re-examined by counsel for the defendants Palocarran clarified

112 a. that his investigations were mainly on the condition of the barge and not on the cause of the sinking. After seeing the barge and the ultrasonic test

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results he formed his conclusion on the cause of the sinking. The condition of the barge as he saw it was due to normal wear and tear and lack of maintenance; b. if he were acting for the shipowner instead of for the underwriter, he would have taken statements from persons who witnessed the collision in particular from the person who made the police report and from the tug master; c. it was more than likely that the holes in the barge were covered by rust and therefore not visible to the naked eye prior to the sinking. That could be the reason why other people did not see the many holes; d. the water line of a vessel changes depending on varying factors such as the density of the seawater and the weight placed on her deck so that there could be a hole in her side plate which could be above the water line at one time and be under her water line at another time. Therefore with heavy objects like a crane and a tug on her deck, the barge would have sunk more deeply into the water causing holes above the water line to be submerged.

113 I have dealt with Palocarran's evidence at some length because the defendants' denial of liability hinged very much on his testimony and the particulars in para 5 of the defence are directly extracted from item 11 (2AB53) of his/Boda's survey report.

114 Counsel for the defendants had argued that the plaintiffs' claim is fraudulent. He submitted

115 1. as the plaintiffs had made a positive assertion that the sinking was due to a collision they had but failed to, discharge that burden of proof and none of the people whose evidence was vital were called as witnesses in particular the barge supervisor Norman Yeo and the tug master. Further even in Norman Yeo's police report there was no mention of a collision, only of a sinking. Apart from

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the marine report (2AB47A-B) which was hearsay the maker not having been called, there was not a shred of evidence of a collision. The plaintiffs must have realized the difficulty of proving an unexplained loss (The Popi M < 1985 > 2 Lloyd's Rep) and therefore they formed a theory which was a lie, that the barge sank due to not one but two collisions. Even if there was a collision the plaintiffs must still prove that it was the collision and not the condition of the barge that was the proximate cause of her sinking (s 55(2)(c) of the Act);

116 2. after the sinking a prudent shipowner would have taken certain measures such as towing the barge 1-1+ miles to shore, not plugged her holes with cloth as the plaintiffs did. The plaintiffs should have but failed to, remove the tug on her deck to alleviate her distress;

117 3. Choo's evidence was highly suspect. In any event he had in his survey report dated 3 January 1983 advised the plaintiffs to defend the 'due diligence clause' in the policy as they had allowed the plate thickness to deteriorate to 1-3mm. As for Lai, he was the alter ego of the plaintiffs. Being an experienced tug and barge operator he should have realized that without regular maintenance the barge would suffer. Lai's evidence revealed that the barge had never been slipped since she was purchased, he turned a blind eye to her condition. As for NSF's evidence, it should be disregarded as it was wholly inadequate -- walking round a barge does not amount to an inspection for seaworthiness, neither does checking fire-fighting and life saving appliances;

118 4. it was the ultrasonic test not the photographs that showed the poor condition of the barge.

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119 Counsel for the plaintiffs countered his opponent's arguments with the following points:

120 1. the burden of proof is on the defendants under s 39(5) of the Act;

121 2. to determine what happened at sea on 2 August 1981 the court should look at the totality of the evidence and apply commonsense standards;

122 3. contrary to the defence contention it was clear from Ng's and NSF's evidence that PSA will not renew a harbour craft licence unless the vessel was seaworthy. In any event Tan's evidence that the defendants had inspected the barge before they issued the policy was not challenged. Even if the defendants had not surveyed the barge, they insured her at their own risk. The defendants accepted a risk of loss from unascertainable causes (see Ajum Goolam Hossen v Union Marine Insurance Company Ltd < 1901 > AC 362). Where a vessel sinks in calm waters from unknown causes an assured can recover for loss by perils of the sea if it is known that she was seaworthy at the time of sailing;

123 4. Lai believed that the barge was seaworthy, he never said that she lacked maintenance but that she was always in proper condition. His view was reinforced by PSA's inspection and the fact that two charterers had paid substantial sums to hire the barge. Palocarran had never approached Lai to take a statement from him as to what Lai knew of the condition of the barge. Therefore the privity requirement under s 39(5) of the Act was not satisfied by the defendants. Privity has been defined in The Eurysthenes < 1976 > 2 Lloyd's Rep as concurrence in something of which the shipowner had actual positive knowledge or to which he had turned a blind eye;

124 5. if the plaintiffs can satisfy the court that the barge was seaworthy throughout from 1 April 1981 (date of PSA's last inspection) then going on the commonsense approach that she sank through some unexplained reason, the presumption of unseaworthiness is then rebutted and the burden of proof shifts to the defendants. Even if it cannot be proved that the holes in the sides of the barge resulted from the collision they must necessarily be caused by a fortuitous event as it cannot be said that the same existed all the while. If such holes had been present shortly or long before the collision, they would have been noticed by the plaintiffs' employees or the barge would have sunk well before 2 August 1981;

125 6. Palocarran was thoroughly discredited under cross-examination on no less than 45 points itemised in the plaintiffs' submissions.

126 The findings

127 For the reasons set out below I find that the defendants have not discharged the burden of proving the barge was unseaworthy let alone that the plaintiffs were privy to that fact, when she was sent to sea on 2 August 1981. I am therefore awarding judgment to the plaintiffs on their claim.

128 The first issue the court has to decide is whether the plaintiffs' claim for the sinking of the barge is or is not an insured peril within the ambit of the all risks policy. The further issue to be considered if the sinking is an insured peril is, was the barge sent to sea in an unseaworthy condition with the privity of the plaintiffs within the meaning of s 39 (5) of the Act so as to preclude the plaintiffs from recovery.

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129 It is not disputed that under s 39(5) of the Act as contended by the plaintiffs, there is no implied warranty of seaworthiness in a time policy unlike a voyage policy.

130 Before considering whether the plaintiffs knew the barge was unseaworthy when she set out to sea on 2 August 1981, the court would first have to determine whether the probable cause of her sinking that day was due to perils of the sea as contended by the plaintiffs. A peril of the sea is a danger arising from the action of the sea which cannot be expressly guarded against, such as storms, or leakage of the sea, whether caused by agencies working from without or from within (Hamilton Fraser & Co v Pandorf & Co (1887) 12 AC 518). The term refers only to fortuitious accidents or casualties of the seas, it does not include the ordinary action of the winds and waves (Rule 7 of the Rules for Construction of Policy in the First Schedule to the Act). While there is no conclusive evidence on why the barge sank and it cannot be said that she was in a pristine condition either before or on, the day of the sinking, her condition was acceptable to her then charterer Ballast who were prepared to pay a daily hire of $2,000 for her use. This would be highly unlikely if she was unseaworthy and corroded and holed to the extent alleged by the defendants' witnesses. Therefore it is more probable than not that the barge came into contact with another vessel as the plaintiffs contended, causing her to leak and due to the unsuccessful attempts of her crew to stop/contain the leaks by plugging her holes with cloth, the barge sank.

131 It is noteworthy that the only evidence of the alleged extensive corrosion of the barge is in the photographs which photographs were not admitted as the maker whose identity was never established was not called as a witness. It was also Sibert's evidence that the photographs did not form part of his report and

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he did not know who took them. Further the ultrasonic report itself has limited probative value because Sibert did not have the original ship's drawings for the barge so as to know what was the original thickness of her plates.

132 The only other evidence to support the defendants' case is Boda's report. I am of the view that very little reliance should or can be placed on the report or on Palocarran's evidence relating thereto because:

133 a. it is more than probable that Palocarran never saw the barge after she had been refloated let alone that he inspected her 2-3 times as he claimed he did, commencing from 2 September 1981. One would expect any surveyor in making such a survey to have stated the actual dates that he inspected a vessel. The report merely stated that 'we did .... attend on various dates at Pulau Samulun and Chiyochi-Sep (FE) Pte Ltd yard in order to carry out an investigation/inspection regarding ...';

134 b. even if he had, as he claimed, thrown away his notebook by the time he prepared the report, one would expect Palocarran to recall and to be able to describe certain features about the yard and its location. This he could not do under cross-examination and I suspect the reason is because he had never visited the yard and he relied wholly on the various documents given to him (in particular on the plaintiffs' marine report and the ultrasonic survey) as well as on the photographs to prepare the report. Alternatively, as was suggested to him by counsel for the plaintiffs, he relied on what David Ho reported to him after the latter's visit to the yard. This is obvious from the contents of the report where

135 (i) the details of the policy came from the defendants;

136 (ii) the details of background came from the plaintiffs' marine report even though counsel for the defendants criticised the same as hearsay the maker not having been called as a witness;

137 (iii) there was nothing new over and above what was extracted from the other documentation given to him to indicate Palocarran's own observations/views after he had inspected the barge;

138 (iv) no interviews were conducted of any persons/parties involved with the barge or with the sinking to ascertain what actually happened (save for some telephone calls Palocarran claimed to have made to the PSA), an omission which seems to me to indicate lack of professionalism in a surveyor.

139 c. the report was not a contemporaneous document but was done a year after his alleged inspections and by his own admission Palocarran said he relied on his memory, the ultrasonic survey and the photographs to prepare the same. It is therefore unsafe to accept the report.

140 The above comments would equally apply to Dhanakody's statement. While I would not be so unkind as to describe him a simpleton as Palocarran had done, I would say that it is equally unsafe to rely on Dhanakody's statement which was again not a contemporaneous document but made some 3 years after he made the dive, without the benefit of notes to refresh his memory.

141 I accept the plaintiffs' contention that once the barge is proved prima facie to have been seaworthy at or before the sinking (which it was because of the Ballast charter and earlier PSA inspection), then the onus shifts to the defendants to prove that she was not seaworthy and that she had been sent to sea in an unseaworthy state with the privity of the plaintiffs in particular with

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the privity of their alter ego Lai (see The Lady Gwendolen < 1965 > 1 Lloyd's Rep 335). I find that the defendants have failed to discharge that burden of proof.

142 Accordingly there will be judgment for the plaintiffs in the total sum of $250,000 with interest at 6% from the date of the writ (8 July 1983) until judgment and costs to be taxed. The security for costs furnished by the plaintiffs to the defendants in the sum of $20,000 by order of court dated 22 July 1992 shall be returned forthwith to the plaintiffs.

Lai Siu Chiu JC

Manjit Singh & Arivanantham (Manjit & Partners) for the plaintiffs
C Arul (C Arul & Partners) for the defendants

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