Everbright Commercial Pte Ltd and Another v AXA Insurance S`pore Pte Ltd [2000] SGHC 119

Case Number : Suit 470/1999

Decision Date : 28 June 2000

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Brij Raj Rai and Gavin Khoo (Rajah & Tann) for the plaintiffs; Richard Kuek and R Govintharasah (Gurbani & Co) for the defendants

Parties : Everbright Commercial Pte Ltd; Another — AXA Insurance S`pore Pte Ltd

Insurance – Marine insurance – Cover note – Institute Classification Clause (ICC) – Chartered ship turning out to be unclassified phantom ship – Cover note including the words "approved vessel" – Whether contract of insurance valid and effective – Whether ship an approved vessel

Insurance – Marine insurance – Cover note – Institute Classification Clause (ICC) – Construction of "held covered" clause – Requirements before "held covered" clause can be invoked – Reasonable notice – Possibility of obtaining reasonable commercial rate of premium for insurance coverage – Whether "held covered" clause covers chartered vessels – Whether requirements for invoking 'held covered' clause met

Insurance – Marine insurance – Estoppel – Assured informing insurers of class of ship and insurers not objecting – Insurers informing assured that cover note applicable – Whether insurers estopped from denying contract valid and effective

: ***Background***

The first plaintiffs are a company trading in round logs and other wood products purchased from South East Asian and Pacific countries and sold to buyers in India and other South Asian countries. This action involves a consignment of logs purchased from a seller in the Solomon Islands and sold to buyers in India. The transaction was partially financed by the second plaintiffs, a bank carrying on business in Singapore.

From 1993 onwards, the first plaintiffs insured the marine transit of their cargo with the defendants through Wilcom Underwriting Agency Pte Ltd (`Wilcom`) who were the defendants` insurance broker.

In about 1997, the first plaintiffs discovered the commercial possibilities inherent in the trade of vitex round logs produced in the Solomon Islands. Their managing director, Mr Tadjoudine, made numerous trips to the Solomon Islands to investigate the possibilities of purchasing these logs from suppliers there and selling them on to buyers in India who use vitex logs (known locally as Pacific teak) in conjunction with the more expensive and famous Burmese teak, in their production of furniture.

One such supplier of vitex logs in the Solomon Islands was a company called Mbaeroko Timber Co Ltd (`Mbaeroko`). In August and September 1997, Mr Tadjoudine met and negotiated with Dr Ziru, Mbaeroko`s managing director, a contract for the purchase of 10,000 cubic metres of vitex logs by way of two shipments of 5,000 cubic metres each from the Solomon Islands in the months of October and November 1997 respectively. The first plaintiffs intended to resell this cargo to buyers in Tuticorin, India. The actual contract between the first plaintiffs and Mbaeroko was dated 9 September 1997.

In anticipation of shipping timber from the Solomon Islands to India, the first plaintiffs had obtained Cargo Cover Note No 03019 from Wilcom on 9 May 1997. This cover note was stated to cover about

6,000 cubic metres of vitex round logs on a voyage from the Solomon Islands to Tuticorin. On 10 September 1997, after concluding their contract with Mbaeroko, the first plaintiffs procured a second Cargo Cover Note No 00515 from Wilcom to cover the shipment of 5,000 cubic metres of vitex logs from the Solomon Islands to Tuticorin.

To finance the purchase, the first plaintiffs relied on a credit facility extended to them by the second plaintiffs. In September 1997, the second plaintiffs established a letter of credit for US$500,000 in favour of Mbaeroko to cover the first shipment. The letter of credit contained a red clause providing for an advance payment of US$50,000 to Mbaeroko. This was drawn down by the latter to help them finance the harvesting of the timber. According to Mr Tadjoudine, the estimated purchase price of 5,000 cubic metres of logs was US$625,000 and the first plaintiffs intended to enhance the letter of credit by a further US$125,000 in due course.

As it transpired, Mbaeroko was unable to fulfil its contractual obligations to make available cargo for the first shipment by October 1997 because of bad weather and slow harvesting. Mbaeroko asked for more financing and, in November 1997, the first plaintiffs sent it a further sum of US$30,000. There was further delay by Mbaeroko. In February 1998, it told the first plaintiffs that it could only provide about 3,600 cubic metres of cargo for the first shipment.

In about March 1998, the first plaintiffs started looking for a vessel that they could charter to carry the vitex logs to India. Through their brokers, they were offered a vessel named Sirena 1 in April 1998 but they declined it as Mbaeroko was not keeping them informed of the cargo availability and was apparently trying to sell the harvested logs to some other party.

In May 1998, when it became more certain that the shipment would take place, the first plaintiffs resumed their search for a vessel. These efforts were at all times conducted through professional shipbrokers. Mr Tadjoudine was informed by these brokers that the vessel Sirena 1 ex `Hal Falcon` of Belize Registry, built in 1983 in Japan, deadweight 9980 tons, was still available. The brokers having recommended that the vessel was suitable for the first plaintiffs` purposes, the latter entered into a charterparty agreement with a company called Nova Shipping Corp Ltd, as owners of the vessel, on 4 June 1998.

The Sirena 1 arrived in the capital of the Solomon Islands, Honiara, on 13 June 1998 and thereafter proceeded to Dhora Island on 30 June to load the cargo. Loading commenced on 2 July but was hampered by bad weather and problems with the vessel`s winches. Loading was eventually completed on 21 July 1998 and the vessel then returned to Honiara for customs clearance. Clearance at Honiara was delayed as the vessel was arrested due to a claim made by the first plaintiffs` agent for commission in respect of an earlier shipment on board another vessel.

The arrest was lifted on 2 August 1998 but customs clearance did not take place until 11 August and the vessel departed Solomon Islands the next day. Its estimated date of arrival at Tuticorin was 2 September 1998.

In the meantime, in order to complete their insurance arrangements, the first plaintiffs had on 2 July 1998, sent a fax to Wilcom to notify them about the loading of the cargo and give them details of carrying vessel. This fax read as follows:

Re: Cargo Cover Note - C No 00515 dated 10.09.97

Interest	:	About 5,000 Cbm Solomon Island Vitex Round Logs
Voyage	:	From Solomon Islands To Tuticorin, India
Sum Insured	:	USD 1,683,000.00
Please be informed that loading of the above cargoes have (sic) commenced this morning. Completion of loading is expected in about five days from today.		
Detail of vessel		
Name	:	mv Sirena 1
Type	:	Single decker
For	:	Belize, built 1983
Material	:	steel hull
Class	:	HSR-100A1
Please treat this as an official advice on the status of the above cargo cover note.		

Wilcom did not forward this message to the defendants at that time.

On 17 August 1998, 27 days after loading was completed and five days after the Sirena 1 had departed the Solomon Islands, the first plaintiffs sent another fax to Wilcom in the following terms:

Re: Cargo Cover Note - C No 00515 dated 10.09.97		
We refer to our fax ref No `ECB/FAX-0181//07/98` dated 02 July 1998. Please be informed that the following cargoes have been shipped on MV Sirena 1.		
Cargoes	:	Solomon Islands Vitex round logs
Destination	:	Tuticorin, India
Quantity	:	4 100 CBM
ETA	:	05 September 1998
Value	:	USD 1.3 million
Please be advised accordingly.		

As with the first message on the shipment, Wilcom did not communicate this one to the defendants contemporaneously with its receipt.

Wilcom responded to the first plaintiffs` correspondence on 3 September 1998 in the following terms:

Further to our morning phone conversation, we wish to put on record that for the shipment by vessel `Sirena 1` as given in your fax dated 17-8-98, it should be effected under B 03019 and not C 00515 which had been used partially for the previous vessel `Golden Harvest`.

Please inform your bankers accordingly and we further confirm that there is no other valid outstanding cover notes other than B 03019.

We await your declarations in due course.

Instead of sailing the Sirena 1 to Tuticorin, the owners informed the first plaintiffs that they had taken the vessel to an undisclosed location in Indonesian waters. They threatened that unless the first plaintiffs paid them advance freight and demurrage they would not sail the vessel to its appointed destination. The first plaintiffs tried to resolve the matter by paying the owners what they demanded but this was to no avail. The Sirena 1 never arrived at its destination. Instead, it disappeared with the cargo on board. The belief of all parties is that the Sirena 1 was a phantom ship and from the very beginning those who were operating it had intended to make away with the cargo and as much freight as they could collect. A phantom ship is a vessel with no valid classification and trading certificates and which is either not registered with any recognised ship registry or which bears a flag of convenience. It is operated by criminals who use it to steal the cargo of unwary shippers.

On 21 September 1998, the first plaintiffs notified Wilcom that there was a dispute between the actual owners and the disponent owners of Sirena 1 and that the vessel was claimed to be in Jakarta and would not continue its voyage until the dispute had been resolved. They also informed Wilcom that they had settled about 75% of the freight and were trying to help resolve the dispute amicably in the best interest of all parties. Wilcom did not forward this message to the defendants.

On 24 September 1998, the first plaintiffs notified Wilcom in writing that the Sirena 1 could not be located in spite of their efforts and those of their shipbrokers and agents. The first plaintiffs stated that they feared that the vessel laden with their cargo and insured under cover note B03019 may be lost.

Wilcom was finally propelled into action. Mr William Wong, its managing director, telephoned the defendants on 25 September 1998 and reported the receipt of the notice of probable loss of the cargo. The defendants then asked Wilcom for information and documents regarding the cargo and the vessel. They also appointed investigators, namely, the International Maritime Bureau (`IMB`) and Integral Marine Consultants Pte Ltd to investigate the alleged loss. On 28 September 1998, IMB reported to the defendants that they could not trace any current record of a vessel by the name of Sirena 1 and that no casualty report had been received in respect of such vessel. IMB indicated that there was a strong possibility that she was a phantom ship.

Having been made aware of the vessel, the defendants did their own searches but could not locate the Sirena 1 in the Lloyds Register of Ships. On 2 October 1998, the defendants informed the first plaintiffs through Wilcom that the first plaintiffs should act as a prudent uninsured would. Four days later, the defendants instructed Wilcom not to issue a policy in respect of this cargo as Sirena 1 could not be located in the Lloyds Register of Ships.

On 7 October, the defendants informed Wilcom that their insurance cover was subject to the

Institute Classification Clause (`ICC`) and that the Sirena 1 did not conform to the requirements of that clause. The defendants stated that they were reserving their rights. This message was relayed on the same day by Wilcom to the first plaintiffs. There followed an exchange of correspondence between the first plaintiffs and the defendants through Wilcom. The defendants held fast to their stand and, on 26 October 1998, reiterated their position that there was no cover.

The action

The statement of claim

The first plaintiffs started this action in March 1999. They pleaded that the defendants had insured the cargo of vitex logs shipped on board the Sirena 1 for the voyage from the Solomon Islands to Tuticorin. They relied on the following as evidence of the contract of insurance:

(i) the Cargo Cover Notes Nos 03019 and 00515 issued by Wilcom on behalf of the defendants;

(ii) the letters dated 2 July 1998 and 17 August 1998 from the first plaintiffs to Wilcom whereby they declared the shipment of cargo on board the Sirena 1 to Wilcom as the defendants` agent under Cargo Cover Note No 00515;

(iii) the letter dated 3 September 1998 from Wilcom stating that the declarations had been made under the wrong cover note and that the first plaintiffs should declare the shipment under cover note 03019.

The plaintiffs further pleaded that the first plaintiffs had an insurable interest in the cargo as the purchaser of the cargo whilst the second plaintiffs claimed an insurable interest on the basis of having financed the first plaintiffs` purchase of the cargo. The insurance covered both plaintiffs for their respective rights and interests in the cargo.

The plaintiffs averred that the insurance cover provided by the defendants incorporated the Institute Cargo Clause (A) 1.9.82 which is an `all risks` cover and as the Sirena 1 never arrived at Tuticorin to deliver the cargo, the cargo was a total loss within the ambit of the all risks cover. The plaintiffs went on to claim a declaration that they were entitled to receive the policies of insurance and that they be paid the sum of US$1.3m as the insured value of the cargo.

The defence

In their closing submissions, the defendants accepted that Wilcom acted as their agents in issuing the Cargo Cover Notes. They accepted that the insured persons under the cover notes were the first and second plaintiffs. They also accepted that the first plaintiffs` faxes of 2 July and 17 August 1998 were received by Wilcom as agents of the defendants and that Wilcom had in the same capacity sent its fax of 3 September 1998 to the first plaintiffs.

The defendants denied, however, that the relevant cover note read with the correspondence amounted to an insurance of the cargo. The basis of their denial was as follows:

(i) They admitted that Cover Note 03019 included the Institute Cargo Clauses (A) 1.1.82 and went on

to aver that this note provided cover only in respect of goods which were shipped from Solomon Islands to Tuticorin:

> *Per any approved vessel or vessels (excluding Landing Craft and/or Wooden Vessel) subject to Institute Classification Clause printed overleaf.*

(ii) On a true construction of Cover Note 03019 together with the relevant ICC clause, they submitted that cargo carried on a bulk or combination carrier chartered by the first plaintiffs only became insured under that cover note if the vessel was classed by a Classification Society listed in the clause.

(iii) The defendants maintained that there was no cover in this case because Sirena 1 was chartered by the first plaintiffs but was not classed by any one of the Classification Societies listed in the clause.

It should be noted that whilst the defendants had originally raised the age of the vessel as a further reason why the cargo was not covered by the Cover Note, they dropped this argument in their closing submissions.

The second defence pleaded by the defendants was that even if a contract of insurance existed, that contract was not enforceable by the plaintiffs by reason of illegality. The basis of this plea was:

(i) pursuant to s 41 of the Marine Insurance Act the insurance contained an implied warranty that the adventure insured was a lawful one and that so far as the assured could control the matter the adventure would be carried out in a lawful way;

(ii) in breach of the implied warranty, the adventure was not a lawful one and/or the first plaintiffs failed to ensure, in so far as they could control the matter, that the adventure was carried out in a lawful way;

(iii) the cargo of logs was exported from the Solomon Islands without a valid specific authority contrary to regulations passed under the Solomon Islands` exchange control legislation;

(iv) contrary to the laws of the place of shipment of the goods, namely, the Solomon Islands, following shipment of the cargo the first plaintiffs knowingly procured a bill of lading and other shipping documents in respect of the cargo which falsely stated the quantity of cargo shipped as 3240.013 cubic metres when the true quantity shipped was 4078.5524 cubic metres;

(v) further, contrary to the laws of Solomon Islands the first plaintiffs then used the shipping documents to make a false declaration to the Solomon Islands authorities on the volume of logs exported;

(vi) customs duties on the export of the cargo of logs which were due and payable to the Solomon Islands customs authority were evaded in breach of the relevant legislation by an under-declaration of the volume of cargo exported as well as by an under-declaration of its price;

(vii) in breach of the exchange control legislation of the Solomon Islands, the first plaintiffs paid Mbaeroko the difference between the actual price and the declared price outside of the Solomon Islands banking system; and

(viii) the export of logs from the Solomon Islands in this manner was prohibited under the laws of the

Solomon Islands.

The reply

The plaintiffs in their reply asserted that although the Sirena 1 was not classed by any of the Classification Societies listed in the ICC, they were held covered under the final paragraph of the clause subject to a premium and conditions to be agreed. They also pleaded that the defendants were precluded or estopped from requesting the payment of additional premium or from imposing additional conditions as they had not done so by the date of the reply.

The plaintiffs contended in the alternative that the defendants were estopped from raising the classification of the Sirena 1 as a defence to the plaintiffs` claim because the defendants did not object to its class `HSR-100A1` as disclosed in the first plaintiffs` fax of 2 July 1998 but instead that the defendants had via Wilcom`s fax of 3 September 1998 informed the first plaintiffs that the cargo was covered under Cover Note 03019.

The plaintiffs also denied that the marine adventure was tainted by illegality. First, they said that all export documents for the cargo were obtained and all duties were paid by the supplier, Mbaeroko, in accordance with cl 4 of the sales contract that put this obligation on the shoulders of the supplier. The plaintiffs said that they did not make any false declaration to the Solomon Islands authorities and did not make payment of the sum of US$190,695.16 to Mbaeroko outside of the Solomon Islands banking system.

In relation to the volume of the cargo, they stated that this had been ascertained by Mbaeroko`s contractors in accordance with the requirements of the Timber Control Unit of the Solomon Islands` government and that the volume of cargo so ascertained was found to be 3240.13 cubic metres and declared accordingly. The export documentation of the cargo was based on this volume. The first plaintiffs did, however, sub-sell the cargo to their buyers at 4078 cubic metres in accordance with a different method of measurement of the cargo, which method of measurement was acceptable to their buyers.

Issues

There are two main issues arising from the pleadings and the evidence. The first issue is whether there was in place a valid and effective contract of insurance between the plaintiffs and the defendants in respect of this shipment of vitex logs on the Sirena 1. If the first issue is answered in the affirmative, then the second issue is whether that contract has been rendered unenforceable by reason of illegality.

First issue

In deciding the first issue, a number of sub-issues have to be considered. These are:

(a) the scope and effect of a cover note;

(b) whether on its true construction, the cover note in this case was apt to cover a vessel having the characteristics of the Sirena 1 and the essence of this issue is whether the `held covered` clause in the cover note could, as a matter of legal construction, be invoked for the benefit of the plaintiffs;

(c) assuming the `held covered` clause is applicable as a matter of construction, whether the first plaintiffs can invoke the `held covered` clause; and

(d) whether the defendants were estopped from denying that the conditions of the cover note had been met.

Relevant provisions of Cargo Cover Note 03019 (`the Cover Note`)

The Cover Note bore the defendants` name and address and was entitled `Cargo Cover Note`. It was numbered 03019 and dated 9 May 1997. The beginning of the note read:

We confirm acceptance of the following Marine Insurance subject otherwise to the usual clauses and conditions of the Company`s standard form of Marine Policy:		
ASSURED	:	SUM INSURED: (So Valued)
Everbright Commercial Enterprises Pte Ltd and/or The HongKong and Shanghai Banking CorporationLtd ftrr & i.		US$1,700,000.00
INTEREST	:	About 6,000 CBMSolomon Islands (Vitex round logs)
Voyage	:	From Solomon Islands to Tuticorin trans-shipped at
Per any approved vessel or vessels (excluding Landing Craft and/or Wooden Vessel) Subject to Institute Classification Clause printed overleaf		
Immediate advice should be given to the company on completion of loading on board the carrying vessel at the port of shipment		
Conditions of insurance: ...		

The provisions of the ICC are set out in full hereunder:

13/4/92
Institute Classification Clause

1	The Marine Transit rates agreed for this insurance apply only to cargoes and/or interests carried by mechanically self-propelled vessels of steel construction. Classed as below by one of the following classification societies.							
	Lloyd`s Register	..	100A1	or	BS		)	
	American Bureau of Shipping	....	A1		)		)	
	Bureau Veritas	....	1 3/3 E[lowbar]				)	
	Germanischer Lloyd	..	100 A4		)			
	Korean Register of Shipping	..	KRS 1				)	Class without
	Nippon Kaiji Kyokai	..	NS				)	any
	Nippon Kaiji Kyokai	..	NS				)	any
	Registro Italiano	..	100A1.1.Nav L			)		
	Register of Shipping of The U.S.S.R	...	KM				)	
	Polish Register of Shipping	..	KM				)	
	PROVIDED SUCH VESSELS ARE							
	a)	(i)	not bulk and/or combination carriers over 10 years of age.					

		(ii)	over 15 years of age but not over 25 years of age and have established and maintained a regular pattern of trading on an advertised schedule to load and unload at specified ports.
	b)	(i)	not over 15 years of age, or
		(ii)	over 15 years of age but not over 25 years of age and have established and maintained a regular pattern of trading on an advertised schedule to load and unload at specified ports.
2	Chartered vessels and also vessels under 1000 grt which are mechanically self-propelled and of steel construction must be classed as above and not over the age limitations specified above.		

3	The requirements of the Institute Classification Clause do not apply to any craft, raft or lighter used to load or unload the vessel whilst they are within the port area.
4	Cargoes and/or interests carried by mechanically self-propelled vessels not falling within the scope of the above are held covered subject to a premium and on conditions to be agreed.

Nature and effect of the Cover Note

The first plaintiffs insured shipments of logs with the defendants, through their agents Wilcom, from 1993 onwards. The procedure followed in instances where chartered vessels were intended to be used was explained by Mr Tadjoudine in his affidavit. He said that in cases where the vessel`s name was not known, usually in relation to shipments from the Solomon Islands, the first plaintiffs would provide the description of the goods, the estimate of value and the ports of loading and discharge to Wilcom who would then issue a cover note to insure the proposed shipment. Later, the first plaintiffs would furnish the vessel`s name and other relevant particulars to Wilcom. During or after the loading of the cargo, they would declare the quantity of cargo and the amount to be insured to Wilcom. Later, when the vessel was on its way to the port of discharge or even thereafter, they would provide Wilcom with what they called `the standard form of declaration` so that they could collect the insurance policies. The number of policies to be issued for the shipment would depend on the number of buyers to whom portions of the shipment had been sold.

From the above description, it can be seen that the first plaintiffs` view was that a cover note once issued provided insurance for a prospective shipment and would attach to the shipment at the time the cargo was being loaded and the vessel`s name and other particulars were furnished to the insurer. The defendants` understanding of the effect of a cover note differs in that they do not accept an automatic attachment of the note to the cargo but consider that certain conditions had to be complied with for the note to take effect. Ms Florence Chew, who at the material time was a marine underwriting manager with the defendants, explained that a cover note is an undertaking by insurers to insure shipments declared under the cover note by the proposed insured provided that all the relevant particulars of the shipment had been declared by the proposed insured and the terms of the cover note had been fully complied with. This definition was accepted by the plaintiffs` witness, Mr Collin Lincoln, a qualified chartered insurer and a marine manager with a well-known insurance company.

The independent nature of a cover note as a contract of insurance is also indicated by various academic authorities including 25 ***Halsbury`s Laws of England*** (4th Ed) para 386 which states:

> *Cover Notes. The usual method in which interim insurance is granted is by a cover note which is, in practice, printed in common form. Normally a cover note incorporates the terms and conditions of the insurers` standard form of policy, either by express reference or by reference to a signed proposal which incorporates the standard form; if the proposer is to be bound by the standard terms and conditions, it must be shown that in some other way he has agreed to accept them. Subject to such an incorporation of the standard terms and conditions, a cover note is a contract of insurance distinct from the contract comprised in the policy, even where a policy is issued. The cover note is superseded by the subsequent issue of a policy, but the parties` rights and liabilities in respect of any loss which happens during the currency of the cover note normally fall to be determined by reference to the terms of the cover note, not to the terms of the subsequent policy.*

In the case of a marine cargo cover note such as the present it is necessary to remember that it is usually issued some time before the particulars of the shipment have been finalised. Thus, the insurers when agreeing to insure the shipment do not have all pertinent details in hand which would enable them to assess the risk to be undertaken. It is in those circumstances that Ms Chew`s proviso on the validity of the insurance must be considered ie her statement that the insurers would be bound ***only*** if all conditions of the cover note have been complied with.

Meaning of `approved vessel`

In this case, by the Cover Note, the defendants confirmed acceptance of the marine insurance of about 6,000 cubic metres of Solomon Islands vitex logs for the sum insured of US$1.7m during its carriage from Solomon Islands to Tuticorin `per any approved vessel or vessels (excluding landing craft and/or wooden vessel) subject to Institute Classification Clause printed overleaf`. It was clear that the defendants` acceptance was limited to the cargo being shipped on board an `approved vessel`. The question is what would qualify as an `approved vessel`. There is no express definition in the Cover Note itself and the only indication of what this term might mean is the reference to the ICC though that does not use the term `approved vessel` at all. Paragraph 1 of the ICC instead refers to the agreed premium rates and states that these apply to cargoes carried by steel mechanically self-propelled vessels which meet the classification specifications listed in the clause.

The defendants submit that the reference to `per approved vessel ... subject to Institute Classification Clause` should be given its ordinary and natural meaning bearing in mind the context in which it appears. They say there is no ambiguity in the term which plainly refers to a vessel falling within the parameters of the ICC. The ICC delimits the type of vessel the assured may elect to use, that is, a vessel classed by one of the classification societies listed in the clause and of an age as specified in the clause and so on.

The plaintiffs, on the other hand, argue that the phrase `approved vessel` was intended to allow the defendants to decide whether to accept the vessel or not and that the defendants` contention that it was for the plaintiffs to comply with this condition cannot be right. The plaintiffs submitted that there was no definition of `approved vessel` in either the Cover Note or the ICC and therefore, on a plain reading of the phrase, it was for the defendants to undertake the task of approving or disapproving a particular vessel that had been declared for shipment under the Cover Note by the first plaintiffs. They went on to say that the meaning of `approved vessel` required some form of active

rejection by the defendants if they did not wish to insure the shipment declared by their insured.

I cannot accept the plaintiffs` submission. I have to construe the provision in question as a whole and not take out particular words and find the meaning of the provision from those words alone. The definition given by the plaintiffs does not take into account the fact that the description `approved vessel` is qualified by the subsequent reference to the ICC clause and the ICC itself is a list of qualifications that vessels must have for agreed freight rates to apply. If the insurers had intended the description `approved vessel` to have the meaning ascribed by the plaintiffs, they would have ended the proviso after the words in parenthesis referring to landing craft and wooden vessels. There would have been no need whatsoever to refer to the ICC or to attach it. Obviously, the insurers wanted to import the provisions of the ICC into their use of the phrase `approved vessel` and that is why they appended that reference to the provision. I agree with the defendants` submission that the natural and ordinary meaning of `approved vessel` is a vessel falling within the parameters of the ICC. I should also say that if I had adopted the plaintiffs` contention and held that it was up to the insurer in each case to approve a ship, then I would have held that the insurance could not take effect until the insurer had actively indicated its approval of a particular ship rather than holding that the insurance took effect until the insurer disapproved of the ship.

I hold therefore that in the first instance in order to avail themselves of the insurance coverage provided by the Cover Note, the plaintiffs had to ensure that for the shipment they chose a vessel that qualified to be considered an approved vessel because it met the requirements of para 1 of the ICC. I am fortified in this conclusion by the fact that the Cover Note does not require the plaintiffs to give the defendants notice of the intended vessel or details of its particulars before loading commences. Instead the Cover Note provides `Immediate notice should be given to the Company on ***completion*** of loading ...`. The Note thus envisages that the assured will load the cargo upon a vessel that qualifies as an `approved vessel` since by the time details of the vessel are furnished to the underwriter it will be too late to change the carrying vessel if it is not an approved one.

Held covered provision

That is not the end of this issue. Plainly the Sirena 1 could not qualify as an `approved vessel` if only para 1 of the ICC were considered since it was not classed with any of the classification societies listed there. The Cover Note did however provide a safety net to help shippers in difficulties. Paragraph 4 of the ICC is what is known as a `held covered` provision and it allows an assured to obtain the benefit of the cover even though the ship it is using is not an approved one subject to the insurer being able to impose additional conditions to be complied with and to charge an increased rate of premium from that which would apply to a shipment on an approved ship.

The defendants` position is that this held covered clause covers only cargoes and/or interests carried by mechanically self-propelled vessels ***not falling within the scope of*** paras 1, 2 or 3 of the ICC. Paragraph 2 of the ICC makes reference to `chartered vessels and vessels under 1,000 GRT which are mechanically self-propelled and of steel construction`. They say that since the Sirena 1 was a chartered vessel, she did fall within the scope of para 2 of the ICC, so that she was not within the scope of the held covered clause in para 4.

The plaintiffs do not agree with the defendants` construction of para 4. They reason that the word `above` in the phrase `not falling within the scope of the above` clearly meant that all the stipulations stated in the preceding paragraphs (including chartered vessels) if not complied with would still be held covered subject to premiums and conditions to be agreed. That would be the ordinary and natural interpretation of the held covered provision. The purpose of that provision is to ensure that a shipment of cargo continues to be insured even if the vessel chosen does not conform

strictly to the ICC. As the plaintiffs emphasised, their view of para 4 was also that taken by Mr Wong of Wilcom.

Just looking at the four paragraphs of the ICC, it appears to me that the defendants` interpretation of para 4 flows more logically from the language and intention of the paragraphs than does that given by the plaintiffs. As I stated earlier, a cargo cover note containing the ICC is issued some time in advance of shipment taking place and at a stage when material particulars have not been finalised. The defendants as insurers while willing to take on certain risks are not willing to take on all risks and that is why they do not simply insure the proposed shipment but indicate by the incorporation of the ICC in the Cover Note that there are limits to what they are prepared to cover sight unseen. The main risk of course when any carriage of cargo by sea is contemplated, is that the carrying vessel will meet with a mishap because she is inadequately equipped to meet the normal incidents of a sea voyage and this is the risk which para 1 of the ICC is intended to deal with.

The significance of classification of a vessel by one of the major classification societies is described in the following passage from the 1993 book ***Classification Societies*** , edited by Jonathan Lux (at p 29):

> *In general, classification societies exist to lay down and update regularly standards of safety in terms of hull structure and essential machinery, and to implement these standards consistently and without prejudice world-wide. The standards for other physical aspects of ship safety such as flotational stability, loadline, safety equipment and radiotelegraphy have been laid down in detail by international convention. The great majority of flag states delegate the implementation of these standards to the major classification societies because the latter are, for the most part, uniquely equipped to deal effectively with them throughout the world.*
>
> *...*
>
> *When it comes to classification requirements, the society`s own rules are used. The knowledge that a ship is designed, built and maintained in accordance with the rules of a major classification society should give the owner and the shipping community confidence that it meets proper standards of quality, safety and reliability in all matters affecting class. The principal concern of classification is safety: this is the core of so many transactions in the shipping industry: for example insurance, sale and purchase, chartering and finance.*
>
> *Classification requires integrity, a relationship of honesty and mutual trust between owner, classification society and maritime authority. It also calls for a high level of competence on all sides. ...*
>
> *How have the classification societies fulfilled their obligation to apply their class rules and statutory requirements consistently in this new climate? Certainly their responsibilities are now greater than ever before. As technical considerations become more complex, and fewer and fewer shipowners maintain an extensive technical capability, the importance of the service provided by the major societies is increased.*
>
> *Here it is important to differentiate between the majority of classification societies, which quite clearly do not have the capacity to undertake the proper responsibilities of classification, with the major ones which do.*

In this context, insurers who issue cargo cover notes incorporating the ICC know that the vessels on which the shipments will take place will satisfy the minimum safety requirements imposed by the major, reliable and reputable classification societies listed in para 1 of the clause. The insurer therefore has some comfort as to the level of risk that will be borne by him. Ms Chew testified that where a cargo owner has chartered a vessel for the purpose of carrying his cargo alone, a situation commonly referred to in the insurance trade as a `chartered shipment`, there is a higher risk involved bearing in mind the size and value of the cargo to be insured. It is therefore especially important that such a ship meets the minimum safety standards prescribed by the major classification societies listed in para 1 of the ICC and that is why para 2 states that a chartered vessel must be classed in accordance with para 1.

The construction that the words `not falling within the scope of the above` in para 4 refers to all vessels not falling within the scope of any of paras 1 to 3 of the ICC is consistent with the construction of para 2 itself by which chartered vessels and low tonnage vessels are singled out as the only vessels which must be classed under para 1 and within the age limitations set by the provisos in para 1 if they are to be recognised as approved vessels. If the phrase `not falling within the scope of the above` in para 4 was only meant to refer to vessels not falling within para 1 of the clause, it would have been drafted to specifically state that. Furthermore, the effect of the construction contended for by the plaintiffs would be to deprive para 2 of the clause of any meaning at all. That is, there would be no point in having a paragraph providing that chartered vessels and small vessels ***must*** be classed according to para 1 if, in any case, all vessels not falling within the scope of para 1 (ie all differently classed vessels whether chartered or not) were held covered under para 4.

The defendants submitted, and I agree, that para 4 is directed at the situation where a vessel is not within the class and age requirements of para 1 for a voyage on the previously agreed rates of premium and is also not a chartered vessel or one whose gross tonnage is less than 1,000 tons. Such vessels would be the ones capable of being held covered but subject to the individually negotiated premiums and conditions to be agreed under para 4.

I have therefore come to the conclusion that the Sirena 1 as a chartered vessel could not in any event be `held covered` under para 4 of the ICC. Accordingly, the Cover Note was not apt to cover the carriage of the plaintiffs` cargo on Sirena 1 and there is no contract of insurance between the plaintiffs and the defendants on which the plaintiffs can rely in this action.

In the event, however, that my construction of the ICC is not the correct construction of that provision and the Sirena 1 shipment could have come within the held covered clause, I go on to consider whether the plaintiffs are entitled to invoke that clause in the circumstances of the case.

Was the held covered clause properly invoked?

In order for an assured to be protected by a held covered clause the following requirements must be satisfied:

(a) once the assured comes to know of material facts which take the insured interest outside the scope of the terms of the insurance contract, the assured must give reasonable notice to the underwriter of these facts. The underwriter will then know that the held covered clause is being relied upon; and

(b) it must still be possible, despite an increase in the risk of loss, to obtain a reasonable commercial rate of premium for the insurance coverage.

The obligation on an assured to give the underwriter reasonable notice of facts that take the insured interest out of the scope of the insurance cover is an obligation which the law implies into each contract of insurance. See **Thames and Mersey Marine Insurance Co Ltd v HT Van Laun & Co** [1917] 2 KB 48. This obligation exists so that the underwriter has time to consider what additional conditions he should impose and what additional premium he should charge for the invocation of the held covered clause. The issue here is whether such reasonable notice was given to the defendants by the plaintiffs.

The first plaintiffs did not at any time tell the defendants in so many words that they were invoking the held covered clause. On 2 July 1998, however, they sent Wilcom a fax giving the latter the name and other particulars of the carrying vessel, Sirena 1. Among the particulars so given was the vessel`s class which was said to be `HSR-100A1` and its year of construction. From this message, it was clear that the vessel was over ten years of age and that it was not classed within para 1 of the ICC, since the class `HSR-100A1` was not within the list of approved classes in that paragraph. It was also obvious that the plaintiffs were sending this message in compliance with their obligation to inform the defendants of the details of the carrying vessel and on the basis that shipment on the vessel would be insured under the Cover Note. The contents of this message were thus sufficient to constitute notice from the first plaintiffs that they were relying on the held covered clause. The fact that the defendants did not realise this because Mr Wong did not pass the message on to them since he thought all was in order, is irrelevant. Wilcom was the defendants` agent and notice to Wilcom was as good as notice to the defendants themselves.

There is, however, also a requirement that the requisite notice must be given to the underwriter promptly. The defendants argued that they were not given prompt notice but this argument was based on their contention that notice was given by Wilcom`s message of 28 October 1998 which was the first time that the held covered clause was specifically raised. As I have held above, notice was given by the first plaintiffs` fax of 2 July 1998 but was this notice prompt notice given that the vessel had first been chartered on 4 June 1998?

In this context, promptly means within a reasonable time. As Donaldson J stated in **Liberian Insurance Agency Inc v Mosse** [1977] 2 Lloyd`s Rep 560:

> *What time is reasonable will depend on all the circumstances. Thus if the assured learns the true facts while the risk is still current, a reasonable time will usually be a shorter period than if this occurs when the adventure has already ended. If the assured learns the true facts when the assured property is in the grip of a peril, which is likely to cause loss or damage, a reasonable time will be very short indeed.*

In the present case, at the time that the details of the Sirena 1 were furnished to the defendants loading of the cargo was taking place. Loading was not completed until 18 days later, ie on 20 July 1998 and because of various circumstances the vessel left the Solomon Islands only on 12 August 1998. Even if one considers that the logs were lost from the time the vessel sailed from Honiara (on the basis that that was when the owners of the vessel took the cargo completely out of the control of the first plaintiffs), the notice in the present case was given long before the cargo was in the `grip of peril`. Furthermore, the Cover Note itself stated that immediate advice should be given to the insurers on completion of the loading. Here, advice of the vessel`s details were given more than two

weeks before completion of loading. In my judgment, the notice was given promptly.

The second requirement which has to be complied with is that in the light of the new facts disclosed it must be possible to obtain a reasonable commercial rate of premium for the insurance cover. This requirement was also explained in the ***Liberian Insurance*** case where Donaldson J stated (at p 568):

> *What then is the limitation which must be implied? In my judgment, the clause only applies if the assured, on the basis of an accurate declaration of all the facts affecting the risk but excluding knowledge of what was to happen in the event, could have obtained a quotation in the market at a premium which could properly be described as `a reasonable commercial rate`.*

The evidence of Mr Noel Chong, the regional manager of the IMB`s Far East office, was that the Sirena 1 had no records and was not registered with any known shipping registry. Nor was it clear from the evidence by which classification society exactly the Sirena 1 was purportedly classified. Thirdly, according to information given to the defendants by the first plaintiffs who obtained the same from their brokers, the Sirena 1 was said to be entered in the Anglo-American Marine Mutual Protection and Indemnity Club. Ms Chew`s evidence, based on her knowledge and experience as a marine underwriter, was that there was no such protection and indemnity association as the Anglo-American Marine Mutual Protection and Indemnity Club. This name had been used as their purported protection and indemnity association by other ships which had subsequently turned out to be phantom ships. Additionally, after the Sirena 1 left Honiara there was no further corroborated news of her location or that of the cargo. It appears that the Sirena 1 was a phantom ship and this is not something which the plaintiffs have seriously contested.

As the vessel was a phantom ship, no underwriter would have been willing to insure cargo carried on it. Accordingly, it would not have been able to establish a reasonable commercial rate of premium for goods shipped on board the Sirena 1. Thus, prima facie, the plaintiffs would not be able to rely on the held covered clause in any event since they were not able to meet the second requirement for its invocation.

Estoppel

The plaintiffs` response to the defendants` contentions that Sirena 1 was not an approved vessel covered and that in any case no cover would have been available due to the inability to fix a commercial rate of premium, is that the defendants are estopped from relying on either point. The plaintiffs pleaded that this estoppel arose from two matters:

(i) on 2 July 1998 they had officially informed the plaintiffs that the vessel was classed `HSR-100A1` and the defendants did not at any material time object to that classification; and

(ii) on 3 September 1998 Wilcom sent the plaintiffs a fax stating that the applicable cover note was Note 03019 not Note 00515 and that the plaintiffs should get the insurance policies from them.

The second matter said to constitute estoppel is incapable, as a matter of law, of having that effect. This is because it is essential for a plaintiff who seeks to invoke estoppel to show that he relied on a representation made by the defendant and thereby suffered a detriment. No such reliance can be proved by the plaintiffs in respect of the fax of 3 September 1998 because by the time it was sent out the vessel had sailed off with all the cargo on board and was beyond the plaintiffs` control. The

fax did not, and could not, cause the plaintiffs to make, or forbear to make, any change in their position at all.

Accordingly, the only matter which the plaintiffs can use to support their estoppel plea is the defendants` failure to respond positively to the plaintiffs` fax of 2 July 1998 notifying them of the vessel`s class and other particulars. This was sent while loading was underway. The plaintiffs argue that had the defendants replied to tell them the vessel was probably a phantom ship and/or that it did not fall within the parameters of the ICC, the plaintiffs could possibly have stopped loading or taken some other action to secure their position. Instead, the defendants were silent and the plaintiffs believing all was in order, went blithely on with the loading.

The plaintiffs` difficulty is that silence is generally insufficient to constitute the kind of representation that is necessary for a plea of estoppel to succeed. Silence only founds estoppel when there is a duty to speak. See **Greenwood v Martins Bank** [1933] AC 51 and **Spiro v Lintern** [1973] 3 All ER 319. In the latter case, the defendant`s wife purported to sell the defendant`s house to the plaintiff. The plaintiff sued the defendant for specific performance of the contract and it was held that the defendant was estopped from proving that the contract had been made without his authority because he had known that the plaintiff had effected repairs on the house in the mistaken belief that there was a legal obligation on the defendant to sell the house to the plaintiff. In those circumstances, the defendant had been under a duty to disclose to the plaintiff that his wife had acted without his authority and his failure to do so amounted to a representation by conduct that she had his authority. The principle to be drawn from these cases is that a duty to speak will arise where silence would create an erroneous impression which leads the prospective representee to alter his position for the worse.

The facts of ***Spiro v Lintern*** are very far removed from those before me. In the present case there was, in my judgment, no duty on the part of the defendants to advise the plaintiffs that the Sirena 1 was not an approved ship or one capable of being considered an approved ship by reason of the held covered clause. As I have held, it was the plaintiffs` responsibility as the assured, if they wanted to invoke the cover note, to comply with the conditions of the insurance by shipping the cargo on board an approved ship. The choice of vessel was left entirely to the plaintiffs. The defendants not only had no part in the choice, they did not even have a right to be notified about it prior to the conclusion of the charter.

Mr Tadjoudine was aware of this. As he testified, for previous shipments there had been occasions on which he told the defendants of the carrying vessel`s particulars after loading had been completed. This was perfectly in order since the Cover Note itself required notice only on completion of loading by which time nothing the defendants could say about the ship could alter the situation or allow the shipper to easily extricate itself from its legal liability to the shipowner/operator. Since the Cover Note did not require advance notice of the vessel concerned and since the responsibility of shipping on an approved vessel lay squarely on the plaintiffs` shoulders, the defendants could not have any duty to tell the plaintiffs that the chosen vessel was not approved. In the circumstances of a marine cargo cover note incorporating the ICC which is issued prior to the shipment and prior to the selection of the ship (in this case more than a year prior to those events) it would be far too onerous to cast any such duty upon the shoulders of the insurers concerned.

In my judgment, the defendants are, accordingly, not estopped from contending that the cover note never attached to the plaintiffs` cargo shipped on board Sirena 1. Thus, their defence succeeds and the plaintiffs` claim must be dismissed.

Second issue: illegality

Although, strictly, it is not necessary for me to do so, I go on to consider the issue of illegality. This would only become relevant if I were wrong in the construction I have given to the ICC and/or in my conclusion on the applicability of estoppel.

Section 41 of the Marine Insurance Act 1906 states:

> *Warranty of Legality*
>
> *41 There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.*

In their closing submissions, the defendants maintained that the marine adventure in this case was unlawful and illegal by the laws of Solomon Islands from where the cargo was shipped. They submitted that the first plaintiffs had colluded with Mbaeroko in shipping the cargo out of the Solomon Islands in breach of the Solomon Islands` Customs and Excise Act and The Exchange Control (Foreign Exchange) Regulations.

The proper approach to this question of alleged illegality is first to ask whether any illegality was involved in the sale or export of the logs. If the answer to that question is in the affirmative, then the next step involves ascertaining what the effect of that illegality is in the light of s 41 of the Marine Insurance Act.

Was there illegality involved in the export of the logs?

I have set out at [para] 26 above the various instances of alleged illegality pleaded by the defendants. When it came to their final submissions, however, the defendants condensed their accusations into the following categories:

(a) that the true agreed price paid to Mbaeroko for the cargo was US$550,530 instead of US$359,835.84 which was the invoiced price and that the difference between the two had been paid outside the normal banking channels without the approval of the Central Bank of the Solomon Islands;

(b) the declaration to the Solomon Islands` authorities that the volume of the logs exported was 3240.013 cbm was wrong in that the true volume of the cargo was 4078.5524 and this wrongful declaration was made with the intention of evading the export duty payable;

(c) the under-declarations to the authorities in relation to the price and volume of the cargo exported were deliberately made in order to evade tax.

True price of the logs

The commercial invoice issued by Mbaeroko dated 12 August 1998 was for 1,662 vitex logs having a volume of 3240.013 cubic metres and stated the price payable for the same as being US$359,835.84 on the basis of the contractual rate of US$135 per cubic metre. The defendants` submission that the true purchase price of this cargo was US$550,530 was based on a statement which Mr Tadjoudine made to their local investigator Captain Lee Fook Choon. In that statement, Mr Tadjoudine said that

the price of US$359,835.84 was not the actual amount and that the actual price was US$550,530. He further explained to Captain Lee that for commercial reasons the first plaintiffs had a mutual arrangement with the sellers.

In court, Mr Tadjoudine maintained that the price at which he had bought the logs from Mbaeroko was indeed US$359,835.84. He explained that he had not wanted to admit this to Captain Lee as that would mean disclosing his trade secret (ie the fact that in reselling the logs to his Indian buyers he employed a more generous method of calculating the volume of the logs than that adopted in the Solomon Islands). He said the only payments that were made to Mbaeroko by the first plaintiffs were those made legally through the banking system, evidence of which was in court.

The defendants having made the allegations of transfer pricing and payments outside the legal banking channel had the burden of proving these allegations. They were not, however, able to produce any direct proof of the same. In trying to establish them they could only rely on Mr Tadjoudine`s statement to Captain Lee for which he had an explanation, on certain ambiguous statements in correspondence between Mr Tadjoudine and Dr Ziru of Mbaeroko (it should be noted that this correspondence had been voluntarily disclosed by the plaintiffs), and on the fact that although Mr Tadjoudine had said he was willing to produce Dr Ziru as a witness in court he did not do so.

In my view, the defendants have not discharged their onus of proof. Their expert had flown to the Solomon Islands to investigate the loss of the cargo and they had solicitors from the Solomon Islands assisting them in the case. Yet they were not able to adduce any evidence of the alleged additional payment. Dr Ziru is a third party and is no more the plaintiffs` witness than the defendants`. The defendants, however, did not call him and preferred to ask me to draw an adverse inference from the fact that the plaintiffs did not call him. I am unable to draw such an adverse inference. Dr Ziru is not a person whose attendance the plaintiffs could have compelled. All in all, it appears to me that the defendants` allegations are merely speculative based on Mr Tadjoudine`s unfortunate statement to Captain Lee. It should be pointed out that Captain Lee himself was impressed by Mr Tadjoudine as an honest person, a genuine victim. I accept Mr Tadjoudine`s explanation of his statement to Captain Lee. He thought that due to the difference in the ways the volume of vitex logs could be measured because of the configuration of the logs, he had found a way of making money from this trade and did not want competitors to learn about the advantages of dealing in vitex logs.

Wrongful declaration of volume of logs exported?

The allegation that there was an under-declaration of the volume of the logs exported to the Solomon Islands authorities is based on the fact that the first plaintiffs calculated the volume of the cargo in two different ways and in two different documents. In a document called the specification list which was prepared by Mbaeroko and which gave details of the length, diameter and volume of each and every log sold to the first plaintiffs, the aggregate volume of logs sold was stated to be 3240.013 cubic metres. This was the volume of logs sold declared to the Solomon Islands authorities. The first plaintiffs, however, subsequently produced what they called a distribution details report. Although this dealt with the same logs as comprised in the specification list, certain measurements were different and the total volume turned out to be 4078.5524 cubic metres. This distribution report was prepared for the Indian buyers. The defendants` contention was that the distribution report showed the true volume of the logs and that the specification list had been used for the purpose of under-declaring the volume in the Solomon Islands and thereby evading full payment of customs duty.

For the purposes of declaring the volume of exported logs to the Solomon Islands authorities, the volume has to be ascertained by the Brereton Scaling Method. The formula used for ascertaining the

volume of the log under this method is V [equals] 0.7854 x D[lowbar] x L/10,000 (V being the volume of the log, D its average diameter and L its length). Under the Brereton Scaling Method, D is derived by taking several measurements of the internal diameter of the logs. This was the formula used for obtaining the volume shown in the specification list. The same formula (but with a different method of deriving diameter) was used in calculating volume for the distribution report. The reason why the specification list showed a lower volume was because the raw dimensions of the logs in the distribution report were greater than those shown in the specification list.

During cross-examination, Mr Tadjoudine explained that the values of D given in the specification list were smaller because the diameters in the specification list were measured using the Brereton Scaling Method. According to this method, the value of D is arrived at by finding the average of the internal diameter of the logs, with the outer flutes being ignored. In the case of vitex logs which are heavily fluted, this method results in an under-estimation of the actual volume of the logs. He said that the method of measuring the diameter for the distribution report had, on the other hand, taken account of the flutes, ie the external diameters of the logs rather than the average internal diameters, thus arriving at a greater diameter. Although this might explain why the average diameters of the logs were greater in the distribution report, it did not explain why the distribution report attributed greater lengths to some logs than attributed to them in the specification list.

It is not enough, however, for the defendants to simply show that the dimensions in the specification list are different from those stated in the distribution report. The difference in the dimensions would advance the defendants` case only if the defendants were also able to show that the figures in the distribution report reflected the true dimension of the logs as calculated by the statutorily prescribed (in the Solomon Islands) Brereton Scaling Method. The defendants were not able to show this. Although the defendants sent an investigator to the Solomon Islands he was not able to establish any irregularity on the part of Mbaeroko or the first plaintiffs. Neither did he bring back any information on what the true dimensions of the logs sold to the first plaintiffs had been.

Although there is nothing to show that the distribution report reflected the true volume of the cargo, there is some evidence which indicates that the measurements in the specification list were not effected strictly in accordance with the Brereton Scaling Method. According to Mr Tadjoudine, after he was informed by Mbaeroko that the logs had been cut and were ready for shipment, he sent his checker to the Solomon Islands to check their dimensions. The checker gave evidence to the effect that the logs on inspection were found to have hollows, splits and other defects as a result of which their aggregate volume was less than the 3,600 cubic metres which appeared on the first specification list which Mbaeroko had sent to the first plaintiffs. After discussion, Mbaeroko agreed to discount the volume of the logs by ten per cent ie from 3,600 cubic metres to 3240 cubic metre. A new specification list was drawn up by Mbaeroko showing this volume and this volume was also reflected in the shipping bill and customs entry issued in respect of the shipment. It was this second specification list which was adduced in court.

As a commercial matter, there was nothing to stop Mbaeroko from giving the first plaintiffs a discount to reflect measurement errors and defects in the logs. The problem was that this volume was subsequently reflected in the shipping bill and the customs entry. The experts on both sides appeared to agree that under the Brereton Scaling Method, allowances could be made for splits, hollows and other defects in the logs, but there is nothing in the method that allows for a discount to be applied across the board to all the logs. Thus, the volume of the logs declared to the Solomon Islands authorities may not have been the volume that would have been arrived at by application of the Brereton Scaling Method. There is, however, no proof that if each log had been re-measured and proper allowance given for each hollow, split and other defect, the total volume thus arrived at would have been more than 3240 cubic metres. The resulting volume could very well have been a lower

volume. Equally, however, it could have been a higher volume. It is probable, however, that even if the actual volume was more than 3240 cubic metres it was not substantially higher as if so Mbaeroko would not have given a 10% discount.

There is a possibility therefore that a false statement was made to the Solomon Islands customs department in contravention of s 212 of the Solomon Islands Customs and Excise Act. Even if they were false, however, neither the statements in the shipping bill nor the statement in the customs entry can be attributed to the first plaintiffs. The false declaration in the customs entry, if any, was made by the master of the ship and the false declaration in the shipping bill, if any, was made by Mbaeroko. Further, under the terms of the contract between Mbaeroko and the first plaintiffs, it was Mbaeroko`s responsibility to deal with the authorities and to handle all necessary export declarations. There is no evidence that the first plaintiffs conspired with Mbaeroko to make the declarations in the way that they were made nor was there any evidence that the first plaintiffs were able to control what Mbaeroko did in relation to those declarations. It was also Mbaeroko`s responsibility under the contract to bear all customs duty and since payment of these duties did not fall on the first plaintiffs, it is difficult to infer that they would have knowingly been involved in a mis-declaration to the customs authorities. They did not stand to gain any benefit from such a breach of the law.

As regards the volume of the logs, the defendants were not able to adduce any hard evidence that the actual volume was as stated in the distribution report rather than as stated in the specification list. They called a log expert, Mr Tay Jin Huat, to try to establish the actual volume of the logs. Mr Tay was, however, compelled to concede during cross-examination that he had not carried out any personal investigation into this matter and that he had not gone to the Solomon Islands to investigate whether there was anything wrong with the specification list. In his affidavit, Mr Tay had been highly critical about the first plaintiffs` actions in using different measuring methods for the sellers and for the buyers of the logs. During cross-examination, however, when he was asked whether there was anything wrong with the first plaintiffs buying the logs based on the Brereton Scaling Method and selling them based on a bigger volume, his reply was that it was a matter between buyers and sellers.

Further, in court Mr Tay retracted the positive assertions contained in his affidavit about under-declaration. He agreed that his conclusions in his affidavit had been based on comparisons between the specification list and the distribution report. He also admitted that his reasoning that there was an under-declaration had been based on his assumption that if there was difference between the volume declared at the load port and the volume sold to the buyer at the discharge port, the volume at the load port would have been under-declared. Mr Tay went on to agree that he was not in a position to dispute the volume stated in the specification list and that the distribution report had been prepared by uplifting that volume by about ten per cent to take into account the flutes. Finally, he conceded that given how the specification list and the distribution report had been prepared, he was not in a position to conclude that the specification list was an under-declaration and his conclusions in his affidavit had been speculative rather than based on evidence.

In the final analysis, despite the presence of much smoke, the defendants were not able to establish that the volume of the logs exported was greater than the volume declared in the specification list. Given the defects noticed in the logs which prevailed upon the sellers to give the first plaintiffs a ten per cent discount overall, it may even have been that the volume declared in the specification list was greater than the actual volume of the shipment. The defendants have not established, on the balance of probability, that any customs duty was evaded by reason of the volume of the logs having been declared as being 3240.013 cubic metres.

Section 41 of the Marine Insurance Act

On the assumption that there was a breach of the law of the Solomon Islands in that Mbaeroko knowingly mis-stated the volume of the logs and did so so as to evade tax, would such breaches have tainted the marine adventure with illegality? The defendants submit that there was such a tainting of the marine adventure and that the first plaintiffs were in breach of the warranty implied by s 41 of the Marine Insurance Act that the adventure insured was a lawful one to be carried out in a lawful manner. The result of such a breach of warranty would be to discharge the defendants from liability for the loss pursuant to s 32 (3) of the Act.

The defendants` submission was that the laws of the Solomon Islands which had been circumvented were not mere revenue laws but laws enacted for the purposes of protecting the state and its people against unfair exploitation of the state`s natural resources. They submitted that a party having colluded to breach foreign laws should not be permitted to enforce a claim based on such a contract or on a collateral contract of insurance founded upon it.

The first issue that the defendants` submission raises is which country`s laws have to be contravened in order for the adventure to be deemed unlawful under s 41. The section of 25 ***Halsbury`s Laws of England*** (4th Ed) dealing with the topic of marine insurance states (at p 60):

> *A contract for the performance of an adventure which involves contravention of the laws of a foreign and friendly state may be unenforceable under English law. However, unless the adventure is illegal under English law, an insurance on it will, it seems, be enforceable, although the fact of contravention may be a material circumstance to be disclosed to the insurer.*

The above statement was based on the 1957 decision of ***Regazzoni v KC Sethia*** (1944) Ltd [1958] AC 301; [1957] 3 All ER 286 but it has also been supported by remarks in more recent cases.

In **Euro-Diam v Bathhurst** [1990] 1 QB 1, Staughton J expressed considerable doubt as to whether the term to be implied by s 41 of the Marine Insurance Act should embrace foreign illegality as well as illegality by English law. This was commented on by Rix J in **Royal Boskalis Westminster NV v Mountain** [1997] LRLR 523 when he said (at p 590):

> *Moreover, the warranty contained in s 41, if it applied to foreign law would be extremely wide. Suppose that, unknown to an assured, some ingredient in a cargo which he was exporting to a foreign country could not by reason of a law of that country of which he was also unaware lawfully be present in that cargo. The adventure would be unlawful. Suppose that, in ignorance of some foreign law, an assured directs that a vessel does something which turns out to be illegal. He would be in breach of warranty and lose from that moment the protection of his policy. In the latter case no principle of common law would, I think, render a claim unenforceable, unless it be the **Beresford** principle: but that would require the commission of a crime (and thus in most, albeit not all, cases the existence of mens rea) and a (direct) causative connection between crime and claim under the policy. In such a case, however, there would be no need of a warranty. The point of a warranty is that it reflects the definition of the risk undertaken by the insurer, so that there need be no causative link between breach and loss. The statutory warranty is nevertheless implied by law. It seems to me to be odd to imply by way a term with the strength of a warranty to a situation not reflected in cases before the Act or even to the common law relating to foreign illegality as it has now developed. In sum, I think that Mr Justice Staughton`s considerable doubt was well founded and hold that `unlawful` in s 41 (and thus in s 3(1) as well) is a reference to lawfulness under English law. The consequences for a policy of marine insurance of unlawfulness under foreign law are therefore a matter for the common law.*

When the ***Royal Boskalis Westminster*** case went on appeal, Rix J`s judgment was reversed on a ground unrelated to s 41. His comments on that section were not criticised though, and Philips LJ expressed the view that the warranty that the adventure shall be lawful and carried out in a lawful manner probably refers to English law, not foreign law. See [1999] QB 674 at p 736.

The weight of authority in England therefore appears to be that the implied warranty given under s 41 by the assured is that the adventure shall be lawful under English law and that the assured will do its best to ensure the adventure is carried out in a manner which is lawful under English law. As far as Singapore is concerned, this would mean that where a marine insurance contract is governed by the law of Singapore, s 41 would require legality under Singapore law and lawful performance by the standards of Singapore law. The law of Singapore would be the proper law of the contract of insurance in this case since the Cover Note was issued by a Singapore insurer to a Singapore assured to cover, basically, the risk of loss which the Singapore assured was undertaking in relation to the voyage from Solomon Islands to Tuticorin. The law of the Solomon Islands was not expressly made applicable to the insurance contract nor is there any basis to deem it the proper law of that contract. As such, even if it is accepted that the export of the logs contravened Solomon Islands` law, there would still be no breach of the warranty implied by s 41.

Another important point is that the warranty requires the adventure to be lawful so far as the assured can control the matter. Here, as pointed out, it was Mbaeroko`s duty to comply with the customs laws of the Solomon Islands so that there could be `trouble free export shipment of the logs` as required by the contract of sale. The defendants` expert witness, John Sullivan, a lawyer practising in the Solomon Islands, agreed that it was Mbaeroko who was contractually responsible for paying the export duty out of the price. The shipping bill was also prepared entirely by Mbaeroko. Once the first plaintiffs paid the price, the export duty was left entirely in the hands of Mbaeroko and thus how much was paid to the authorities was out of the first plaintiffs` control. Accordingly, even if Mbaeroko had made a false declaration of the volume of the logs to evade full payment of duty, the first plaintiffs could not be said to have breached the term implied by s 41.

The defendants therefore have not proved their pleaded allegation that the shipment and carriage of the goods on board the Sirena 1 was an unlawful adventure and/or a lawful adventure performed in an unlawful way within the first plaintiffs` control so as to render the insurance unenforceable by the plaintiffs. Since the defendants relied for their plea of illegality on a breach of the implied warranty contained in s 41, there is no need to discuss the issue of illegality at common law.

Conclusion

In the result, the plaintiffs` claim fails since the Cover Note could not cover shipments on board a chartered vessel that was not classed in accordance with ICC. As for costs, however, I do not think it correct to award the defendants the entire costs of the action as they succeeded on only one of the two distinct defences which they raised. The two defences proceeded on different factual bases and the trial was substantially prolonged by the necessity of dealing with witnesses called to establish or rebut the allegations of illegality. Accordingly, I order that the defendants shall bear the plaintiffs` costs of dealing with the issue of illegality and that the defendants shall only be entitled to recover their costs of the action from the plaintiffs insofar as these do not relate to the issue of illegality.

Outcome:

Plaintiffs` claim dismissed.