Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd
[2006] SGHC 65

Case Number : Suit 563/2004

Decision Date : 20 April 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Michael Lai and Wendy Tan (Haq & Selvam) for the plaintiff; Richard Kuek and Stephanie Wong (Gurbani & Co) for the defendant

Parties : Sumpiles Investments Pte Ltd — AXA Insurance Singapore Pte Ltd

Insurance – General principles – Claims – Plaintiff seeking recovery for repairs for damage caused to insured vessel under marine insurance policy covering acts of negligence of vessel's master, crew or pilots provided such loss or damage not resulting from want of due diligence by plaintiff – Whether damage due to want of due diligence by plaintiff or ordinary wear and tear and therefore not covered by policy

Insurance – General principles – Claims – Plaintiff seeking recovery for repairs for damage caused to insured vessel under marine insurance policy – Whether plaintiff breaching duty of utmost good faith by causing or pressurising crew of vessel into making false statements to surveyor investigating casualty and therefore precluded from making claim under policy

Insurance – General principles – Claims – Plaintiff seeking recovery for repairs for damage caused to insured vessel under marine insurance policy – Whether plaintiff breaching express warranty under policy as to vessel being classed and class maintained and therefore precluded from making claim under policy

20 April 2006 *Judgment reserved.*

Belinda Ang Saw Ean J:

1 In this action the plaintiff, Sumpiles Investments Private Limited, seeks recovery from the defendant, AXA Insurance Singapore Pte Ltd, under a marine insurance policy which incorporated the Institute Time Clauses (Hulls) of 1 October 1983 ("ITC"). By that policy, the defendant agreed to insure the floating crane barge *Sumpile 28* in respect of her hull and machinery including the sheer leg crane ("the crane") for the period of insurance from 1 July 2001 to 30 June 2002 at a sum insured of $1.1m.

2 At the material time, the *Sumpile 28* was moored alongside a wharf at 45 Gul Road, Singapore. The crane was not working but on 4 February 2002, the 45m-length boom dropped in an uncontrolled manner resulting in considerable damage when it made contact with the ground. The two luffing winches also sustained significant damage. The repairs came up to $1.147m. It is common ground between the parties that the mechanical safety locking pawls of the luffing winches ("the pawls") were disengaged at the time of the incident. The plaintiff's case is that the boom fell by reason of the negligence of the barge master (who was the crane driver) in failing to re-engage the pawls of the port and starboard luffing winches after the crane's last lifting operation. The other strand of negligence is that the assistant mechanic of the *Sumpile 28* had opened the wrong valve. If he had wanted to test the pressure switch, the assistant mechanic ought to have opened the drain valve. Instead, he mistakenly opened the isolating/stop valve. Compressed air from the air receiver was fed to the brake air cylinders and that resulted in the release of the band brakes on the luffing winch drums.

3 The relevant terms of the ITC are as follows:

> 6.2 This insurance covers loss of or damage to the subject-matter insured caused by …
>
> 6.2.3 negligence of Master Officers Crew or Pilots
>
> …
>
> provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

4 An issue at the trial was whether there was negligence within cl 6.2.3 as alleged. If so, whether negligence or ordinary wear and tear, an alternative case advanced by the defendant, was the proximate cause of the loss. Loss due to ordinary wear and tear is not covered under the policy. In which case, the defendant argues that under s 55(2)(*c*) of the Marine Insurance Act (Cap 387, 1994 Rev Ed) ("the Act") it is not liable for ordinary wear and tear.

5 The defendant also advances three other defences. The first is that even if negligence was the proximate cause of the loss, the loss resulted from want of due diligence on the part of the plaintiff or its managers so that it was not covered by the policy because of the wording of the proviso to cl 6.2.3 of ITC.

6 The other two defences are entirely separate and independent grounds. They are: (a) breach of express warranty as to class and class maintained; and (b) breach of duty of utmost good faith by the plaintiff. Counsel for the defendant, Mr Richard Kuek, submits that on either ground, the defendant is not liable under the policy. Logically, the stand-alone defences should be dealt with first. If the defendant succeeds on either ground, the claim under cl 6.2.3 of ITC falls away. I begin with the breach of warranty defence which was at the forefront of Mr Kuek's closing submissions.

Warranty as to NKK classed and class maintained

7 The defendant raised two points. First, the crane on board *Sumpile 28* was not classed by the classification society, Nippon Kaiji Kyokai ("NKK"). According to Mr Kuek, the word "vessel" in the class warranty includes the crane on board. Second, the *Sumpile 28* was not in class for a short period of time between 3 and 19 September 2001. That, the defendant maintains, puts the plaintiff in breach of the class warranty in the policy, which was in the terms:

> Warranted vessel NKK classed and class maintained throughout the duration of the policy.

Consequently, the defendant is not liable under the policy. A breach of warranty under s 33(3) of the Act discharges the insurer from liability for the loss in question whether or not the breach causes the loss. Section 33(3) reads:

> A warranty, as defined, is a condition which must be exactly complied with, whether it be material to the risk or not; and if it is not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

8 Separately, cl 4 of ITC provides:

> Unless the [defendant] agree[s] to the contrary in writing, this insurance shall terminate

automatically at the time of

4.1 … suspension, discontinuance, withdrawal or expiry of her Class therein …

9 From the plaintiff's standpoint, this breach of warranty argument is unpromising. Counsel for the plaintiff, Mr Michael Lai, argues that regardless of the interests covered in the policy, namely hull, materials, machinery, outfits connected with the crane barge, the class warranty was limited in its terms to the barge itself and did not apply to non-mandatory class items such as the crane on board the *Sumpile 28*. The crane cannot be "classed" as such under the rules and regulations of NKK. This, he argues, is self-evident from the two different types of certificates issued by NKK. There is the Certificate of Classification and Certificate of Installations Registration which is issued for installations registered in the Installations Register. At the option of the shipowner (and this is not disputed), the crane may be registered with NKK in the Installations Register.

10 Counsel for both sides accept that for a warranty to be given its proper effect, its true meaning must be determined as a matter of construction. The class warranty here is a promissory warranty. Section 33(1) of the Act defines a promissory warranty as one:

> by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

11 Besides the scope of the class warranty which is determined from the words used in the warranty, the true nature of the class warranty must not be forgotten. Commonly, an assured under a hull policy will contract to ensure that on commencement and throughout the period of insurance, the vessel is classed with a classification society, that the vessel's class within the society is maintained and that any recommendations or requirements of the society in relation to seaworthiness are complied with. The effect of loss of class or change of classification society is often expressly stated to be that the underwriter is discharged from liability. Clause 4.1 is an example of such a provision. In the present case, the plaintiff's promise was no different. From the documents disclosed, the class surveys by NKK were in respect of the *Sumpile 28*'s safety construction as a floating crane barge and her loadline. If the defendant had intended or wanted the crane itself to be separately registered in the Installations Register of NKK (and since this was optional and not routinely or ordinarily done as the crane is not a mandatory class item) the defendant should have made that intention clear. It did not do or say so.

12 Mr Kuek's focus on the word "vessel" alone ignores the words "NKK classed" in the warranty. Class means the character assigned to a vessel by the classification society, NKK, based on its rules for each particular type of vessel (as to which see para 2.1.1, Chapter 2 on "Classification of Ships" in the 2001 edition of the NKK Regulations for the Classification and Registry of Ships, ("the Regulations")). The classification certificate states the class granted to a particular vessel. *Sumpile 28* was assigned the character "NS (Home Trade Limit Service) (Floating Crane)". The term "Floating Crane" was used as *Sumpile 28* was a purpose-built barge with a crane installed on board. Classed vessels are surveyed periodically in order to ensure that the condition and seaworthiness of classed vessels are maintained, and continuance of class is dependent on the results of the surveys and shipowner's attendance to the conditions of class.

13 Chapter 3 of the Regulations is on "Registration of Installations". This is a separate register for installations on board vessels like this subject crane. Installations will be assigned characters and registered in the Installations Register when the installations have been surveyed for *registration* (as distinct from survey for *classification* under Chapter 2 of the Regulations) in accordance with the rules

for survey and construction of installations provided separately in Chapter 3.

14 Low Yip Nam ("Low") was called as the defendant's expert to support its stance that the omission to register the crane in the Installations Register is contrary to the warranty requiring the crane on board the *Sumpile 28* to be NKK classed. Low is someone who had worked in NKK as a marine surveyor for 21 years and is supposedly well-versed in the classification society's rules and regulations. Mr Lai did not challenge Low's qualifications as an expert. In Low's view, a crane registered in the Installations Registration is considered "classed" with or by NKK. However, no particular reason was proffered for the view taken. It seems to me that Low had conflated the notions of *classification* and *registration*. The word "classed" used in its plain, ordinary and proper sense has the meaning explained above and is meant to be distinct from the registration of installations covered under Chapter 3 of the Regulations. A submission that the warranty in its present wording as a matter of construction included a promise that the crane was classed by NKK at the time of the policy seems to me both commercially unrealistic and legally unfounded.

15 I turn now to Mr Kuek's additional argument that the *Sumpile 28* was out of class from 3 to 19 September 2001. Counsel relies on the Class Maintenance Certificate dated 17 April 2002. Low explained that to maintain a vessel's class with NKK, all scheduled surveys (including dry docking survey) must be carried out as and when they fall due. The dry docking survey of the *Sumpile 28* was carried out well after the time extension granted by NKK. In the result, the *Sumpile 28* was not classed at the time of the incident. After the defendant denied liability on the ground that the class maintained warranty was breached, NKK issued a Class Maintenance Certificate on 19 April 2003 ("second CMC") covering the period from 1 July 2001 to 30 June 2002.

16 Mr Kuek's submission that this second CMC was "procured as a result of the influence", presumably exerted by the plaintiff on NKK, is definitely not supported by any evidence. The plaintiff applied to NKK on 27 February 2003 to issue a Class Maintenance Certificate for the period from 1 July 2001 to 30 June 2002. In the application form, the plaintiff gave brief details of the insurance claim and the date of the incident. On 15 April 2003, the plaintiff explained to NKK that whilst there was no dry docking survey on or before 2 September 2001, the *Sumpile 28* was actually waiting at a Batam shipyard for that purpose. The plaintiff wrote:

> Please refer to our Application for issuance of Class Maintenance Certificate dated 27 February 2003.
>
> We noted that in the period of September 2001, there were a number of days, vessel was waiting for drydocking at Batam shipyard and also another period during the vessel was being drydocked in the shipyard, both periods were not indicated in the Class Maintenance Certificate.

17 NKK accepted the plaintiff's explanation. M Sakamoto ("Sakamoto"), the general manager of NKK, Singapore confirmed issuing, on 19 April 2003, the second CMC on instructions from his head office in Japan.

18 The documents reviewed by Low included the plaintiff's explanation to NKK and NKK's head office's fax dated 17 April 2003 to A Uotanl, the manager of the Singapore office, which requested the latter to issue a new certificate which was to supersede the earlier certificate dated 17 April 2002. Low's conclusion that the second CMC was issued in breach of the NKK rules was based on his understanding that there were no provisions in the rules that allowed NKK to rectify a withdrawal or suspension of the vessel's class. In my judgment, Low's testimony has little or no weight as the status of the vessel's class for the purpose of the class warranty was left to NKK. This is self-evident from the terms of the warranty. Besides, I prefer Sakamoto's evidence. Low left NKK some ten years

ago and had not represented NKK in any capacity. Sakamoto is from NKK. He confirmed that "both certificates are correct". In other words, the second CMC was a valid certificate. NKK, he explained, retained some discretion in the matter of a vessel's class despite untimely dry docking survey. Low, who testified after Sakamoto, was not asked to comment on NKK's discretion.

19 Reverting to the point that the status of the vessel's class for the purpose of the class warranty was left to the classification society concerned, NKK upon request would confirm or verify the classed and class maintained status of the insured vessel and thereafter issue a Class Maintenance Certificate (see para 2.6 of the Regulations, Chapter 2). As G P Selvam J in *Kin Yuen Co Pte Ltd v Lombard Insurance Co Ltd* [1994] 2 SLR 887 at 914, [109] rightly observed, "There can be no question that underwriters [who imposed classed and class maintained warranty] wanted the class authority to perform that function." In that case, the court considered whether there was an alleged breach of a classed and class maintained warranty in a marine policy. Justice Selvam held that a vessel is said to comply with a "class maintained" warranty where the vessel was in formal class. After referring to the observations of Wright J and the Court of Appeal in *United Shipping Co Ltd v Assicurazioni Generali* (1929) 33 Ll L Rep 15; (1929) 34 Ll L Rep 323 (CA), he continued at 914, [107]:

> [I]t is the class authority that decides whether a vessel on its register is in class. In the absence of mistake, fraud, or collusion or, if according to the records of the authority of the class has not been withdrawn, the class is maintained. Class maintained status of a vessel, in other words, relates to the documents and not the physical state of the vessel. To comply with a 'class maintained' warranty it does not matter that the vessel ought not to have been maintained in class and that the class ought to have been withdrawn. What matters is 'formal' and not 'material' class.

20 In this case, NKK decided to and did issue a fresh Class Maintenance Certificate on 19 April 2003 certifying the *Sumpile 28* to be in class throughout the period of insurance. I find that the objective was to replace the earlier certificate dated 17 April 2002. Mistake, fraud and collusion were not issues before me. In my judgment, the defendant fails on this ground for the various reasons stated.

Fraud in the presentation of the claim

21 A short narration of the development of the proceedings is necessary to make this defence more intelligible since breach of duty of utmost good faith was pleaded quite late in the history of the claim. In brief, the contention here is that the plaintiff had caused or pressurised the crew into making false statements to the surveyor investigating the casualty so as to promote the insurance claim.

22 After the incident, the defendant appointed surveyors, Integral Marine Consultants Pte Ltd, as a result of which in the course of investigations into the circumstances leading to the collapse of the boom, the barge master, Mahmud bin Abdul Majid ("Mahmud"), the chief mechanic, Agustinus Kakiay ("Agus"), and the rigger, Sazaly bin Ali ("Sazaly"), each gave statements to the attending engineer surveyor, Sio Beng Huat ("Sio"). Both Agus and Sazaly confirmed that the main engine was started and running when the casualty happened. Based on Mahmud's statement to him, Sio wrote to the defendant:

> On 4 February 2002 at around 0830 hours, the main engine was started to run the hydraulic pumps to provide hydraulic power for the crane winches. The barge master intended to re-adjust the cargo slings for lifting of the bridge. About 15 minutes later, the barge master activated the local control lever in the luffing winch room to top up the sheer leg boom to release locking pawls

of the luffing winch drums (port and starboard). After the locking pawls were released or disengaged, the master left the winch room. The moment he stepped out of the winch room, he heard abnormal noises and immediately re-entered the room and noted the winch drums were turning at quite a high speed. Knowing that he could not re-engage the locking pawls, he immediately rushed to the engine room entrance and ordered the mechanic to stop the main engine. This however did not prevent the ... boom from falling downwards. Consequently, the shear head landed on the wharf side and the slipway floor with a very loud impact noise.

The barge master attempted to re-enter the winch room again but the room was engulfed with smoke. 20 minutes later, he managed to enter the winch room and noted [the] hydraulic motors were smashed to pieces and the driving shafts were bent among other damages. The ends of the wires of both the luffing winch drums had slipped off the wire clamps.

23 A claim under the policy was presented based on the three statements. The blame was put on Mahmud for not checking the brakes on both luffing winches to ensure that they were properly engaged before he disengaged the pawls.

24 The defendant rejected the claim on 21 March 2003 for breach of class warranty. It also maintained that the loss was due to wear and tear. The brake air control valve was dismantled after the casualty and Sio found the spool (piston) in the brake air control valve seized in its sleeve (liner) as a result of which compressed air was allowed into the brake air cylinders. The air pipe immediately after the lubricator was also disconnected and rust formation was noted in the pipe. The seizure of the spool was attributed to the accumulation of sludge and corrosion-like deposits in the brake air control valve. That was characterised as wear and tear by the defendant. Want of due diligence on the part of the assured, owners and managers was also relied upon in the alternative. Sio in his report advised:

On 4 February 2002, during preparation to operate the crane, the barge master had activated the local control lever to operate the luffing winch drums in the direction of topping up the boom to release the mechanical locking pawls of the drums. The air control valve would have [been] activated to admit air into the air brake cylinders to open the brake linings of the luffing winch drums. However, when the control lever returned to neutral position, the spool of the brake air control valve could have seized in its sleeve and remained in the brake opening position. Hence, the air had remained in the brake air cylinder and maintaining the brake linings in the open position.

We are of the view that the cause of the incident is the seizure of the spool of the brake air control valve in brake opening position as a result of the accumulation of sludge and corrosion like deposits that were found in the valve.

There was neither record nor information of when the brake air control was last serviced or renewed. The control air system was not provided with any air drier but only water separator/filter and oil lubricator that would not keep the air sufficiently dry. Over years of operation, accumulation of oily sludge and corrosion deposits could result in the failure of air control valves or components. In our opinion, even if air drier is provided in the system, it is still necessary to maintain and service the brake air control valve.

A notice of general operation and emergency procedure and a load chart were displayed in the control room. However, except for load chart with caution of operation stating that "never operate sheers up or down while it keep load on" in the control room, there was neither operation instruction nor checklist provided in respect of the operation of the crane.

25 The writ in this action was issued on 6 July 2004. The statement of claim endorsed on the writ was amended on 14 March 2005 to plead in para 8 that the casualty was caused by the negligence of the master who had failed to re-engage the mechanical safety locking pawls of the port and starboard luffing winches after the *Sumpile 28*'s last lifting operations and the boom had collapsed without the restraints of the pawls. The plaintiff asserted that negligence of the master was the proximate cause of the loss.

26 A few months later, on 25 July 2005, the plaintiff again amended para 8 of the statement of claim after learning that Mahmud had given a false account of the incident to Sio. It transpired that Mahmud was asked to provide an affidavit of evidence-in-chief and it was then disclosed in February 2005 that his earlier statement was untrue. Not only was he not on board the *Sumpile 28*, there was no crane in operation at the time of the incident. Apparently, Mahmud was told to lie by his superior, David Lim.

27 The new pleaded version was to this effect. The pawls were left unlocked after the vessel's last operation. On 4 February 2002, the assistant mechanic opened the isolating /stop valve which caused compressed air from the air receiver to be fed to the brake air cylinders. This led to and/or resulted in the release of the band brake on the luffing winch drums. The boom collapsed without the restraints of the pawls.

28 The last and final amendment was made during the trial. The amendment on 1 September 2005 related to the date of the last crane operation, which was pleaded in the alternative as "picking up of wire slings on or about 30 January 2002".

29 According to the defendant, the plaintiff knew of the false statements at the very outset. This led to Mr Kuek's submission that the false statements were procured as part of a conspiracy to deceive the defendant into believing that Mahmud was on board and the main engine was running, and that all that was designed to get the defendant to be more sympathetic towards the settlement of the plaintiff's claim. There was, he argues, a breach of the duty of utmost good faith under the common law rule or s 17 of the Act which is *in pari materia* to s 17 of the Marine Insurance Act 1906 (c 41) (UK).

30 It is convenient to consider first the scope of the duty of utmost good faith under s 17 of the Act and then the common law rule. After examining a number of authorities, the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 ("*The Star Sea*") at 493 concluded that the assured's duty of utmost good faith under s 17 of the Marine Insurance Act 1906 (UK) encompassed a duty not to put forward a fraudulent claim. That case concerned a claim on a policy following a fire on a ship. The assured had failed to disclose to the insurers certain expert reports relevant to the cause of the fire. The fraudulent scenario put forward by insurers was that the assured had realised that disclosure of the reports would not assist them in their claim, because it would reveal the systemic weakness that the head-men were aware of, and how little they had done to remedy them. So it was said that the shipowners' strategy was to keep the contents of those reports secret for as long as possible, in the hope of negotiating a favourable settlement before their inevitable disclosure in the course of the action. The House of Lords decided that the duty no longer applied after proceedings had begun. The relationship of the parties was then subject to the rules of court on discovery of documents. Whilst the law lords were satisfied that the withholding of the reports was not fraudulent, they nevertheless went on to consider whether it amounted to a breach of the duty of good faith. Concerned that unfairness may arise where a fraudulent claim is made by the assured which, on the basis of s 17, would permit a complete avoidance of the policy notwithstanding the existence of other legitimate claims, the law lords' approach was to distinguish pre-contractual breaches of the duty of utmost good faith and post-contractual breaches such as

the making of a fraudulent claim. In the latter case the breach constitutes a fundamental breach of the contract permitting avoidance in the future in accordance with the general principles of contract law. As Lord Scott of Foscote at [110] explained:

> The presentation of a dishonest or fraudulent claim constitutes a breach of duty that entitles the insurer to repudiate any liability for the claim and prospectively at least, to avoid any liability under the policy. Whether the presentation of such a claim should be regarded as a breach of a continuing duty under section 17 that entitles the insurer to avoid the policy with retrospective effect, enabling any payments made in satisfaction of previous impeacheable claims to be recovered by the insurer, is more debatable. It is not necessary in this case to decide this point.

31 The common law rule relating to fraudulent insurance claims is that if the assured presents a fraudulent claim, the underwriter can deny liability even if the other claims are otherwise good. This also means that any interim payment made on that claim is recoverable (see *per* Mance LJ in *Axa General Insurance Limited v Clara Gottlieb and Joseph Meyer Gottlieb* [2005] EWCA Civ 112 at [32]). Lord Hobhouse explained the rationale of this special rule relating to fraudulent claims in *The Star Sea* at [62]:

> The law is that the insured who has made a fraudulent claim may not recover the claim which could have been honestly made. … This result is not dependent upon the inclusion in the contract of a term having that effect or the type of insurance; it is the consequence of a rule of law. Just as the law will not allow an insured to commit a crime and then use it as a basis for recovering an indemnity (*Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197), so it will not allow an insured who has made a fraudulent claim to recover. The logic is simple. The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.

32 It is now clear that the common law rule about fraudulent claims extends to the use of fraudulent means or devices associated with making the claim. Mance LJ in *Agapitos v Agnew* [2003] QB 556 ("*The Aegeon*"), distinguished a fraudulent claim from the use of a fraudulent device in connection with a claim as follows (at [30]):

> A fraudulent claim exists where the insured claims, knowing that he has suffered no loss, or only a lesser loss than that which he claims (or is reckless as to whether this is the case.) A fraudulent device is used if the insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim by some lie. There may however be intermediate factual situations where the lies become so significant, that they may be viewed as changing the nature of the claim being advanced.

33 In that case a fire on board caused the loss of the assured's vessel. The policy incorporated a warranty that, whilst the vessel was undergoing maintenance in port, there would be no "hot work" undertaken. Initially, liability was denied on the grounds of breach of a different warranty in the policy. Proceedings were commenced and at the disclosure stage, it emerged that "hot work" had indeed taken place on the vessel. Leave to amend the defence to include a pleading that the insured had fraudulently misrepresented that no hot work had been carried out at the relevant time was refused. The appellate court however went through the different types of frauds in claims, in particular, the situation where an assured promotes its claim by fraudulent means or devices (*eg*, by withholding from the insurer information which would provide the insurer with a defence to the claim). It concluded that where fraudulent devices or means were used, the assured cannot recover in respect of that claim provided the information withheld is "directly related to the claim to which the fraudulent device relates [;] … is intended to improve the insured's prospects of obtaining a

settlement or winning the case, and …would, if believed, tend objectively, prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the insured's prospects" (at [45]).

34 The common law rule applies also to fraudulent device used during the course of an insurer's investigation of a claim: see *Eagle Star Insurance Co Ltd v Games Video Co (GVC) SA* (*The Game Boy*) [2004] 1 Lloyd's Rep 238. I shall elaborate on this case below since Mr Kuek submits that the present case is quite similar to *The Game Boy*.

35 It is not disputed that the defendant bore the burden of proof that the plaintiff had used fraudulent devices in the presentation of the insurance claim to promote it. The defendant needs to establish two things under this common law rule. The first issue or question is "who the assured" is for the purposes of performance of that duty, namely the proper conduct of the claim. Second, the defendant has to objectively establish that the assured intended to secure an illicit advantage by improving the assured's prospects by the use of false statements to support its claim under the policy and, separately, by concealing the involvement of the assistant mechanic in this episode. Mance LJ in *The Aegeon* suggested at [38], the following test where a fraudulent device was deployed:

> [T]he Courts should only apply the fraudulent claim rule to the use of fraudulent devices or means which would, if believed, have tended, objectively but prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the insured's prospects — whether they be prospects of obtaining a settlement, or a better settlement, or of winning at trial.

Who is the assured?

3 6 I shall consider this question as a matter of principle leaving the actual issue of whether there has been a fraud to later examination. In the case of a corporate assured, the test is "[w]hose act [*ie*, in the proper conduct or handling of the insurance claim] was *for this purpose* intended to count as the act … of the company" [emphasis in original]. See Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 *("Meridian Global")* at 507.

37 In most companies of any size there will be a chain of command and delegation of authority. The question is who had authority in the plaintiff to deal with the insurers in respect of the insurance claim. That requires a consideration of all the circumstances surrounding the presentation of the claim. As highlighted by Lord Hoffmann, the rules of attribution can vary depending on the context, from rules as broad as the general principles of agency or vicarious liability (*ie*, general rules of attribution), the articles of a company, the requirements of a resolution of the board or shareholders agreement (*ie*, a company's primary rules of attribution) to the special rule of attribution for the particular substantive rule. This is always a matter of interpretation. If it is a statute, the answer to the question, "Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company?" ([36] *supra*), is gathered by taking into account the language of the statutory provision and policy. To illustrate, in the leading case of *Lennard's Carrying Co, Ltd v Asiatic Petroluem Co, Ltd* [1915] AC 705, the substantive rule was that of s 502 of the Merchant Shipping Act, 1894 (c 60) and its reference to the "actual fault or privity" of the shipowner. It was held that the substantive rule excluded both vicarious liability and the primary rules of attribution as being irrelevant and instead focused attention on the person in the company who was responsible for monitoring the condition of the ship. That person therefore became, for that purpose, the "directing mind and will" of the company: see *Meridian Global* at 509.

38 Lord Hoffmann was careful to point out that the law lords were not saying that whenever a

servant of a company has authority to act on its behalf, knowledge of that act would for *all* purposes be attributed to the company (see [36] *supra* at 511). The decision was very much the result of their lordships' construction of the statutory provision under consideration. On its true construction, the company in that case was obliged to give notice that it has become a substantial security holder when that is known to the person who, with the authority of the company to do the deal, had acquired the relevant interest. The fact that the chief investment officer did the deal for a corrupt purpose and did not give notice because he did not want his employers to find out did not on the construction of the statutory provision affect the attribution of knowledge and the consequent duty to notify.

39 With this guidance in mind, which rule of attribution is applicable here? The answer to the question "whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company?" is gathered by taking into account the language and content of the policy. Leggatt LJ, delivering the judgment of the Court of Appeal in *The Star Sea* [1997] 1 Lloyd's Law Rep 360 at 367, said that the dishonesty must lie in the mind of the assured making the claim. He explained at 366:

> [T]he head-men with personal involvement in sending a ship to sea knowing her to be unseaworthy may be quite different from those responsible for mounting a fraudulent insurance claim. Those who are the assured in the former case will not necessarily be the assured in the latter case: operational people are more likely to figure in the former, people with a financial interest in the latter.

In that case, "the assured" for the purposes of presenting and compromising the insurance claim were the Kollakis brothers who had a beneficial interest in the companies and effectively ran them. There was nothing in the evidence to suggest that the overall conduct of the litigation was out of their hands.

40 Justice Simon in *The Game Boy* used the same approach to identify "the assured" for the purposes of presenting the insurance. In that case the defendants were the named assureds under a marine policy of insurance in respect of a vessel bought by the first defendant company (GVC) for conversion into a floating casino. The second defendant was a shareholder in GVC and was to manage the vessel. The third defendant company signed a bareboat charterparty to charter the vessel from GVC and was to contribute to the cost of converting the vessel. The vessel was insured for US$1.8m. By the policy, the defendants warranted that all recommendations of the Salvage Association were "to be complied with prior to attachment". After the vessel was damaged by an explosion the defendants claimed that the insurers were liable to indemnify them. The insurers submitted that they were not liable because the defendants (a) had knowingly and fraudulently overstated the value of the vessel; (b) had breached two Salvage Association recommendations; and (c) certain documents relating chiefly to the valuation and purchase of the vessel had been knowingly and fraudulently presented by the defendants in support of the insurance claim.

41 Documents whose contents were deceitful were handed to the investigator appointed by the insurers to investigate the claim. The second defendant involved in the creation of false documents was a shareholder of GVC for and on whose behalf he was acting and he was found to have been improving or embellishing the claim. He was clearly seen as someone with a beneficial and financial interest in the outcome of the claim. Significantly, the defendants had no genuine belief that the value of the vessel was US$1.8m. The documents said to form the basis for their stated belief were, to their knowledge, not genuine. They were created because the defendants knew that the valuation of US$1.8m could not be justified without them. The defendants knew that the true value of the vessel at the time of the insurance contract was US$100,000 – US$150,000. The court had no

difficulty concluding that the defendants had used fraudulent devices in order to advance the claim with the intention that the insurer would accept the documents at face value, be reassured and promptly pay on the claim.

42 Turning to the present case, it is necessary, in my judgment, for the defendant to identify (and this was not done) the individual or group of people that formed part of the corporate assured that was (a) aware of the false statements, (b) had a beneficial and financial interest in the claim and (c) with a power or influence to determine how the claim should be presented. The knowledge of directors or senior employees, who were not engaged in pursuing the claim, will not necessarily be attributed to the assured in the context of claims. See *The Star Sea per* Leggatt LJ ([39] *supra*) at 366–367; Peter Macdonald Eggers, Simon Picken & Patrick Foss, *Good Faith and Insurance Contract*, (LLP, 2nd Ed, 2004) at para 11.74.

43 Mr Lai argues that attribution to the plaintiff of the employees' misconduct cannot be made in the circumstances of the case. Lawrence Wong Puck Tuck ("Wong"), Assistant Manager, Insurance, and the plaintiff's board of directors had no knowledge that Mahmud, Agus and Sazaly had lied in their statements to Sio. For the purpose of making the insurance claim, the person concerned was Wong. Attribution of the fraudulent activities of other named employees, David Lim and Teh Theam Song ("Teh"), could only be made if those activities, in addition, had been conducted with the knowledge or approval of the directors of the plaintiff company and there is no evidence of that before the court. Mr Kuek disagrees and his submission is that the plaintiff was aware of the false statements from the very beginning and not only on or after 22 February 2005 as claimed.

44 I pause here to make the following observations. At all material times, Sum Cheong Machinery Pte Ltd was the manager of the *Sumpile 28*. It is common ground that the plaintiff, Sum Cheong Piling Pte Ltd and Sum Cheong Machinery Pte Ltd, were wholly-owned subsidiaries of Sum Cheong Corporation Pte Ltd. From the respective affidavits of evidence-in-chief, Mahmud and Wong were employed by Sum Cheong Piling Pte Ltd. Teh was the marine manager of Sum Cheong Machinery Pte Ltd. Teh had also signed off on the plaintiff's letterhead as the plaintiff's "manager". David Lim was either the operations manager or marketing manager of Sum Cheong Machinery Pte Ltd. Sazaly in his affidavit of evidence-in-chief considered himself as employed at the material time by "Sum Cheong group (which [included] the plaintiff)". I noted that counsel for both sides have not argued that the people involved in the false statements were employees of other subsidiary companies and not the plaintiff. In fact, this aspect appeared to be a non-issue between them and I shall not say more about it. For completeness, I should mention that the plaintiff's executive director, Adam Lim Song Chai ("Adam Lim"), David Lim, Teh, Agus, and Asfendiar, the assistant mechanic, did not testify at the trial.

45 As I have alluded in [43] above, Mr Kuek's argument is that everyone, including the directing mind and will of the company, *ie*, the board of directors, was aware that Mahmud was not on board at the material time. The facts or premises upon which the defendant seeks to draw inference of knowledge on the part of the plaintiff are neither obvious nor inescapable. It is not implausible for there to be a different perspective or interpretation of the facts or premises. At times, the inference made by the defendant is *non sequitur*. To illustrate, Mahmud said he spoke to Sunny Wu Chong Sun ("Wu"). Even though the latter was informed of Mahmud's absence and that the pawls were opened, there is no evidence that Wu saw the statements recorded by Sio or knew that Mahmud and his other two colleagues had given an untruthful account of the events to Sio. Furthermore, the fact that the plaintiff did not cause an investigation to be undertaken after the lies came to light in February 2005 is at best a neutral point. The people concerned had by then left the Sum Cheong group. Information that the statements were false was passed to the defendant and Mahmud came forward to explain the lie. Mahmud also clarified during cross-examination that he understood, the words "under pressure

by Mr Lim" in his written testimony as meaning "told to" lie and he had simply followed instructions. He confirmed that David Lim did not threaten him with the sack.

46 Apart from David Lim, Mahmud did not finger anyone else in the organisation whereas Sazaly identified Teh. Teh was the marine manager and the company's authorised representative in dealing with Sio who was instructed by the defendant to investigate and assess the claim. Teh acted as interpreter during the interview of the chief mechanic. He also liaised with the plaintiff's insurance brokers, Willis (Singapore) Pte Ltd, on the technical aspects of the insurance claim. Teh wrote to the insurance brokers and NKK on the plaintiff's letterhead and signed off as the plaintiff's manager. Teh also represented the plaintiff on the damage repairs carried out on the *Sumpile 28* by Singapore Technologies Marine Ltd. It was Teh who had told Sazaly to lie that the main engine was running before the boom fell. Teh certainly committed a wrongdoing while acting as the authorised representative of the plaintiff in dealing with Sio, a third party.

47 Adopting the approach of the Court of Appeal in *The Star Sea*, the focus is not on Mahmud, Agus, Sazaly and David Lim. From the evidence and documentation disclosed, David Lim was not involved in handling the insurance claim. As for Teh, the wrongdoing of the marine manager in principle cannot be attributed to the plaintiff. Teh had no apparent financial interest in deceiving Sio. He may have been intimately acquainted with the operation of the barge but with no power or influence in determining the manner in which the claim was presented under the policy, he would not be considered the "assured" for the purpose of the presentation of the claim.

48 Wong in his affidavit of evidence-in-chief explained that as Assistant Manager, Insurance, he was the person in charge of handling the plaintiff's claim in this action and he reported directly to the plaintiff's executive director, Adam Lim. Wong testified that he did not speak to Mahmud about the incident. Teh as the technical man was to keep Wong closely informed of developments. Albert Hong Hin Kay, a director and chairman of the board of directors of the plaintiff, confirmed that Adam Lim was the director in charge of handling and overseeing all general business and insurance matters of the plaintiff. Adam Lim in turn reported to his board of directors. The decision to sue the defendant was that of the board of directors.

49 In my judgment, there is no evidence suggesting that Wong or the directors had sought to persuade anyone to put forward a false case on the company's behalf. Neither has the defendant established on the evidence that the plaintiff had deliberately concealed the fact that Asfendiar and Sis Hlaing, the electrical engineer, were in the engine room at the time of the incident.

Intention to secure an illicit advantage by use of fraudulent means or devices

50 I now turn to the question of whether the defendant has established that, objectively, the false statements would improve the plaintiff's prospects. For the reasons below, I find that the defendant had not satisfied Mance LJ's test in [35].

51 First, Teh's wrongdoing of itself does not necessarily prove the defendant's case. I have also rejected in [45] the defendant's arguments that the plaintiff's board of directors was aware of Mahmud's lie. The evidence falls seriously short of Mr Kuek's submission that the false statements were procured as part of a conspiracy to deceive the insurers into believing that Mahmud was on board and the main engine was running and all that was designed to get the insurers to be more sympathetic towards the settlement of the plaintiff's claim.

52 Second, it is not the defendant's case that the misrepresentation covered up, so to speak, a potential defence to the claim. As Mr Lai rightly pointed out, the same two grounds relied on in March

2003 to reject the claim were relied upon at trial. The defendant's Chua Keok Wah, Vice President (Claims), testified that "he would be more resilient to a settlement" on account of the statements. His testimony is self-serving and lacks credibility. There was no sign or hint of any overtures to settle the claim amicably prior to February 2005.

53 Third, Sio was at the outset of his investigations able to discover and conclude that there was "wear and tear" in the brake air control valve. I am mindful that an assertion could have been made (but it was not) that the false account of the incident was to overcome the evidential difficulties faced by the plaintiff in explaining how operating air got into the brake air control valve when all control levers were in neutral. Apart from putting the plaintiff to prove its case, the main defences from the outset and throughout the proceedings were breach of the class warranty and wear and tear.

54 The upshot is that the defence that the plaintiff had used fraudulent devices or means to present its claim and to promote it fails.

Clause 6.2.3

55 The other three contested issues at the trial are as follows:

(a) Whether the collapse of the boom was caused by negligence of the barge master and/or assistant mechanic within cl 6.2.3 of ITC.

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

(c) Again if so, whether the loss resulted from want of due diligence within the proviso to cl 6.2.3.

The casualty

56 The incident happened on 4 February 2002. At the material time, the main engine was not running. There was no lifting operation. The crane was last used to lift wire slings on or about 30 January 2002. The pawls were disengaged. The boom was placed to rest at an angle of approximately 52° to the horizontal deck. It was held up by the band brakes.

57 The *Sumpile 28* was fitted with a static sheer leg crane with a boom safe working load ("SWL") of 350 tonnes. There were two luffing winches for the boom, two hoisting winches for the main lifting hook and one winch for the auxiliary-lifting hook. The boom is luffed to the requisite angle by paying out or reeling in luffing wires which are wound round the luffing winch drum. The two luffing winches on the *Sumpile 28* were powered by hydraulic motors. At the end of each winch wire drum is a brake drum around which a brake band is wrapped. The brake band is a steel of flat sheet bar. One end of the brake band is fixed to the winch structure and the other end is attached to a pivoted lever secured by a hinged joint to a brake cylinder. The brake band uses friction to retard or stop motion. The band brake is normally closed onto the brake drum and held in position by a static spring. It releases its hold on the brake drum only when the brake cylinder is activated by compressed air. Air pressure applied to the brake cylinder will overcome the force of the static spring. The brake cylinder extends causing the band brake to open and release the clamping effect on the brake drum allowing the winch drum to rotate.

58 The luffing winch drum is fitted with an additional safety feature in the form of a luffing pawl. The luffing pawl is also known as a mechanical safety locking pawl. This is a spring applied, hydraulic

released pawl which engages with a toothed wheel (ratchet) on the drum barrel and prevents the lowering rotation of the drum.

59 Choo Choong Khin ("Choo"), the expert instructed by the plaintiff, is a naval architect. His work experience principally lies in the design of commercial ships. He is said to have designed cranes and is involved in the repair design of existing ships and shipboard equipment such as winches and cranes. The defendant's expert, Brian Hiney ("Hiney"), is a qualified marine engineer and is the senior marine engineer consultant and a director of London Offshore Consultants Limited. He has acted as a marine engineering consultant and surveyor in matters concerning fixed objects (quays and cranes) failure including crane damage. He has also investigated and evaluated damage to cranes in various countries including Singapore, Malaysia, Thailand, Philippines, China and the United Kingdom.

60 Choo explains that in normal operations, the band brake is released in either one of two ways: (a) by remote control by means of two pilot valves on the wheelhouse control console or (b) by local control at the luffing winch room using one of three control levers inter-connected by a steel shaft. The use of one control lever causes the others to move in tandem to effect simultaneous release of the band brake and turning of the luffing winch drums. Upon release of the control lever, it returns to neutral position automatically. The hydraulic motors stop turning and the band brakes close simultaneously. I should mention that Sio and Hiney in their respective reports only alluded to the presence of two levers on the common shaft, one port and one starboard. They agree that any one of these levers would operate the air pilot valve and the hydraulic control units.

61 Choo further states that in the local control mode, instead of pilot air pressure, mechanical linkage to the spring-loaded control cylinder causes it to activate the three-port valve with roller plunger which in turn directs pilot air to slide a spool within a sleeve in the brake air control valve. This causes its supply air port to be uncovered (*ie*, opened) thus admitting compressed air through the second supply line to the brake air cylinders. This causes each air cylinder's piston to move against the spring holding the band brake, and hence loosens its hold on the brake drum. In other words, the band brake releases to permit turning of the luffing wire drum.

62 Turning to the remote control, Choo explains that when the remote control from the wheelhouse is used, pilot air pressure activates a spring-loaded control cylinder which mechanically opens a three-way valve with roller plunger. This roller plunger valve then opens to allow pilot air in a second pressured line to open a three-way air pilot operated brake air control valve to admit pilot air to the brake air cylinders through holes in the sleeve aligning with the supply groove in the spool and supply port in the body of the brake air control valve.

63 Hiney adds that as with all winches, the brakes are considered fail safe in that they are normally engaged with the brake band in contact with the brake drum. Under normal circumstances, all control winches at the respective winches will be in their neutral position, restricting control of airflow for activation of winch operation. Hiney accepts that the operating air system can be operated without the need for any machinery to be run provided there is sufficient compressed air in the air receiver.

Negligence

64 It is clear that negligence of the master, officer or crew has to be established for purposes of cl 6.2.3. Two strands of negligence have been pleaded as coming within cl 6.2.3 (see [27] above). The defendant denies that there was negligence in these respects.

Asfendiar opening the isolating/stop valve

65 What Asfendiar allegedly did only came to light some three years later in 2005. This means that Sio had previously investigated the claim based on a different story. Asfendiar was not called as a witness. There was no prior statement from him. Sis Hlaing testified at the trial. His affidavit of evidence-in-chief was affirmed on 2 August 2005, some 42 months after the incident.

66 According to Sis Hlaing, Asfendiar manually opened the valve located at the top of the air receiver (*ie*, the isolating/stop valve) and within moments of that, he heard a loud noise. He rushed out of the engine room and saw the boom fall. Sazaly said that he heard "the starboard side drum and/or spool of the 5-tonner (*ie*, 5 tonnes SWL) runner wire turning and/or slipping" not long after he started work. He boarded the *Sumpile 28* around 0800 hours.

67 Sis Hlaing claimed to have told U Tint Lwin ("UTL") about Asfendiar opening the isolating/stop valve. UTL confirmed the conversation but did not pass on the information because he did not appreciate its significance. Besides, his superiors were already talking about the air system. UTL's explanation is unconvincing. At one point in cross-examination, UTL claimed that he did not know what his superiors were talking about. Later on, he asserted that after the accident, all three of them (*ie*, Lim, Lee and Teh) knew about Asfendiar opening the isolating/stop valve and that was why they were talking about the air system. Interestingly, he admitted to not being able to recall the conversation he had with Sis Hlaing some three and half years ago and he was only reminded of it by Sis Hlaing when they started to talk about the case in the course of preparing their evidence for this trial. So, a fair amount of his testimony was likely to have been based on Sis Hlaing's recollection rather than his own memory. In these circumstances, I do not find his testimony reliable and of much use. Similarly, Mahmud's testimony that he would have expected Asfendiar to report the incident in the engine room to him (and this was not done) is also not helpful. It is, at best, a neutral point.

68 The defendant submits that Sis Hlaing's testimony should be rejected for various reasons. First, although Sazaly corroborates only Sis Hlaing's evidence that he and Asfendiar were in the engine room from about 0800 hours on 4 February 2002, what they were doing there is another matter and is not corroborated. Second, the incident in the engine room never happened. Sis Hlaing's reason for going into the engine room to check whether the automatic cut-in-cut-out switch of the air compressor that charged the air receiver bottle which supplied air to the pneumatic system on board the barge ("the air pressure sensor switch") was working cannot be believed. The air pressure sensor switch would normally cause the air compressor to start automatically (cut-in) and recharge the air receiver when the air receiver falls below a preset low limit, and to automatically stop (cut-out) the air compressor when the pressure in the air receiver reaches its preset high limit. Sis Hlaing stated that the power generators were switched off and the electrical supply was from shore only. The evidence arguably bears out Mr Kuek's submission that the incident in the engine room never happened. At the material time, the main engine on board the *Sumpile 28* was switched off and as the plaintiff's own witness Lee Siew Hai ("Lee") and Hiney both confirmed, the shore power that was supplied to *Sumpile 28* was not sufficient for any test of that sort to be carried out. In addition, no oral or documentary evidence was adduced which would have indicated that there were earlier complaints regarding malfunction of the air pressure sensor switch on board *Sumpile 28* that needed to be fixed. The other witnesses of fact for the plaintiff, namely, UTL, Mahmud or Lee could not or did not throw light on the alleged malfunction of the air pressure sensor switch. However, there are other objective facts which militate against these contentions.

69 After the casualty, Sio tested the control air system. He was able to introduce compressed air for the air receiver into the control air system without running the generators or main engine. This establishes that before the casualty there was compressed air in the air receiver. There is Hiney's confirmation that the operating air system could be operated without the need for any machinery to be running provided there was sufficient compressed air in the air receiver. Sio dismantled the brake

air control valve and (he was the only eye witness before the court) confirmed that he found the shuttle piston seized in its sleeve. Neither of the experts who appeared in court actually saw the damage to the crane. The experts accept that the shuttle piston must have been in a closed position before the incident as the band brakes held up the boom since 30 January 2002. After the casualty, the shuttle piston in the brake air control valve was found in an opened position. The apparent slide from a closed to an open position is indicative of the presence of compressed air in the air control system. For present purposes, in the light of all these factors, I accept that Sis Hlaing's testimony is plausible and I accordingly find on a balance of probabilities that Asfendiar opened the isolating/ stop valve on the morning of 4 February 2002.

70 Notwithstanding this finding, I am unable to reach the legal conclusion that Asfendiar, in opening the wrong valve, was negligent. The mistake of opening the isolating/stop valve was limited in context to the testing of the air pressure switch and no more. Asfendair has to be judged by the degree of care and skill required of the activity in which Asfendair was engaged. Here, the opening of the isolating/stop valve of itself, with or without the main engine running, would not cause the boom to collapse. Choo concedes that the boom should not fall just because compressed air was introduced into the air control system; Hiney was of the same opinion. He confirmed that opening of the air system of itself would not activate the fail-safe brakes. It is Hiney's evidence (and Choo does not in principle disagree) that the opening of the air system prior to any operation with the crane is a normal procedure and would not activate the fail-safe brakes. In a closed position, the brake air control valve prevents air from entering the brake cylinder and at the same time drains off the air from the brake air cylinder. This is thus not the case where as a matter of commonsense the risk of the boom falling if the isolating/ stop valve was opened can be understood and reasonably foreseeable. It cannot be said that in opening the isolating/ stop valve, Asfendiar was in breach of his duty of care. Accordingly, the negligence of Asfendiar has not been established for the purposes of cl 6.2.3.

Negligence of Mahmud

71 The plaintiff's contention is that if the brakes were released for the reasons pleaded, the boom would not collapse had the pawls been engaged. According to Mahmud, he would normally lock the pawls after crane operation but he did not do so on this occasion. Mahmud was an experienced crane driver of sixteen years' standing. Prior to the casualty, he was assistant barge master of *Sumpile 28* for six years from 1992 to 1998 and was barge master for about two years. Nothing was proffered by way of explanation as to how the omission could have occurred. No evidence was led to explain what caused him to forget to lock the pawls when it was supposed to have been a routine task which he undertook often enough in his years as crane driver and as part and parcel of his responsibilities. I find his statement – that he left the pawls unlocked after the last operation of the *Sumpile 28* – too cursory. The countervailing evidence from, *inter alia*, Sazaly was that it was not the practice on the barge to close the pawls after operations and the only time the locking devices were closed was when the *Sumpile 28* was being towed to from one location to another. Sazaly accepted that there were a few occasions when the pawls were engaged after operations but most of the time the pawls were unlocked. The two doors of the luffing winch room were usually opened and his access to the toilet was normally through the luffing winch room. The disengaged pawls were noticeable as they were about two feet off the floor level. Of the two, I find Sazaly to be a more credible witness.

72 Mahmud was not a satisfactory witness. Oftentimes, he either could not remember or could not answer the easy questions. It was strange that he could not even remember the colour of the pawls and winch drum at the material time. At times, some of his answers were noncommittal or equivocal even when the questions in cross-examination required a "yes" or "no" answer. For a long time, he persisted in his unfounded claim that he did not know that it was the band brakes that held

up the boom when the pawls were unlocked. Eventually, after a lengthy cross-examination he conceded the point. Mahmud said that the barge's last operation was on 30 January 2002 and he had unlocked the pawls then which meant that they were closed on 17 January. Yet, in his written statement he claimed that he had forgotten to lock the pawls on 17 January 2002. When asked to explain the discrepancies in his testimony, his response was that he could not remember. In the end, Mahmud agreed with counsel that he was no longer sure as to when exactly he had omitted to lock the pawls. Mahmud came across as being deliberately selective in his answers. I do not consider Mahmud a reliable witness.

73 I am persuaded by Mr Kuek, and I so find that, the practice was not to lock the pawls after operations. The pawls were coloured red and the drums were painted yellow. UTL confirmed that the pawls were easily noticeable when they were disengaged. Yet no one appeared to have noticed that they were unlocked even though maintenance work on deck was ongoing from 17 January 2002 right up to 1 February 2002. The pawls were also unlocked when Falconer Bryan & Associates Pte Ltd attended on board the *Sumpile 28* for a survey on 13 July 2001. The crane was not working but the pawls were unlocked as can be seen from the photographs taken by the attending surveyor. Mahmud was not able to offer an explanation but persisted in maintaining that he "always" locked the pawls. When pressed by counsel, he finally conceded that he might have forgotten to do so that day.

74 Even with my finding that the practice was to leave the pawls unlocked after operations, I nonetheless hold that negligence of Mahmud has not been established for the purposes of cl 6.2.3. Since Mahmud kept to the aforesaid practice, it could not be said that Mahmud was forgetful. Besides, there is no evidence that that was or was not the appropriate standard of care required of a reasonable competent crane driver in the position of Mahmud. In any case, leaving the pawls unlocked for the relatively short duration in question was according to Hiney acceptable. I accept Hiney's testimony that the crane's primary braking system was the band brake and the pawls were its locking devices. The winch brakes on the *Sumpile 28* were located at the drive shaft and they are known as "input brakes" and for single drum winches, the input brakes could serve as the primary brake. Mahmud was aware that it was the band brakes that held up the boom even when the power was shut off and the pawls were opened. The fail-safe brakes would have no problem holding up the boom's weight for the duration in question. The weight of the boom was 80 tonnes compared to its safe working load of 350 tonnes. Going by the latest test lift certificate dated 23 June 2001, the crane was able to safely hold a load of about 125% over the safe working load of 350 tonnes. Hiney admitted that it would be prudent to engage the pawls if the crane was not to be used for a fairly long period. However, the duration in question was short and Hiney confirmed that the use of band brakes was fine.

Proximate cause

75 Even if I had held that Asfendiar and/or Mahmud were negligent, it would not have assisted the plaintiff's cause. The plaintiff still faced difficulties in discharging the legal and evidential burden of proving that their negligence caused the loss or damage. This is not the sort of case where the court is left with a collapse which with ordinary care, should not have occurred and could draw no legitimate inference other than one thing – it was the crew's fault. These two factors either alone or in combination would not cause the boom to collapse. There is a third factor. The shuttle piston in the brake air valve would have to slide to an open position. Hiney confirmed that the brakes would not open without "physical movement of the lever operated air pilot valve allowing air to move the shuttle piston in the brake air control valve and thus opening the air operated brake". He accepted that the brake air control valve was closed after the last operation and for even the piston in the brake air control valve to seize in its sleeve, the brake air control valve must have been opened sometime during the interval between the last operation and whatever time it became seized. In other

words, it must be opened first before seizure. Hiney could not tell when the brake air control valve seized in an open position. Similarly, Choo opined that, "Without any extraneous event, the spool [or piston] could not have moved on its own ... the spool in the brake air control valve is always acted on by a spring that always caused it to self-centre so that its supply port is always closed until pilot air is sent in via the 3-port valve with roller plunger, either by remote control from the wheelhouse or by local control lever ...". In my judgment, the plaintiff has not explained how and why compressed air got through the brake air control valve when the main engine was off and the control levers were in neutral.

76 Mr Lai foreshadowed the difficulties about all the explanations put forward by the plaintiff on how air could have got into the brake air cylinders to release the band brakes by taking the position that it was not necessary for the plaintiff to prove precisely how the casualty occurred. Mr Lai argues that it is immaterial that the plaintiff could not prove how the air introduced into the system got through the brake air control valve and into the brake air cylinders to release the band brakes. He cited in support of his argument, Phillips J's *dicta* in *Phillips Petroleum Co v Cabaneli Naviera SA (The Theodegmon)* [1990] 1 Lloyd's Rep 52 where the learned judge said (at 71) that it did not matter that "the precise details of what went wrong remain in doubt". On the facts of that case, Phillips J felt that it was not proper to adopt the approach which the court was entitled to take, namely that the plaintiff had failed to discharge the burden of proof as the evidence left him in doubt as to the cause of the loss given the "fundamental conflict of fact" in that case. The plaintiff there contended that *The Theodegmon* erred from her correct course because the steering system broke down. The defendant denies that there was any failure of the steering system and attributed the grounding to a failure on the part of the pilot to give the proper helm orders. The plaintiff's contended that the failure of the steering gear was *prima facie* evidence of unseaworthiness. Investigations into the nature of the defects were hindered by the refusals and obstructiveness of the defendant's servants or agents to inspect the steering gear and then perform working tests upon the steering gear until ordered to do so by the court.

77 Mr Lai's reliance on the statement of Phillips J is misplaced. The situation here is completely different for the reasons explained in [75]. There is no evidence (as opposed to conflicting evidence) on what caused the shuttle piston to slide from a closed to an open position in the brake air valve. It is thus not possible to reach a conclusion as to what probably happened.

78 As stated, under normal circumstances, the movement of the control levers from neutral to hoist/lower is an operating factor upon the result, without which the experts opined the brakes would not be released. There would be no airflow for activation of the band brakes with the control levers in their neutral position.

79 On the evidence, I find that all control levers were in neutral position. After the casualty, the control levers in the control bridge were found to be in a locked position. As for the local control levers, they would by design be automatically in their neutral position. There is no evidence before the court that from 30 January 2002 to just before the accident, the control lever was operated or manually moved. Neither was the plaintiff inviting the court to draw an inference that someone moved the control lever. In fact, the plaintiff through Choo suggested that something outside the norm could have happened to the brake air control valve or the braking system. During cross-examination, Choo came up with new theories. Furthermore, in closing submissions the plaintiff argues that the levers may have been misaligned and that would explain how compressed air got through the brake air control valve. I shall come to this later.

80 The new theories were about the possible effect of impact loading on the brake air control valve and on brake slip. These theories were never pleaded and objections were made by Mr Kuek.

Even so, Mr Kuek challenged the theories squarely in his cross-examination and again voiced his objections and views in the defendant's closing submissions. The new theories must have been dropped as they were left out in the plaintiff's closing submissions.

81 I pause here to make some observations. First, other than a passing reference to brake slip, Choo's report did not deal with the new theories that came up during cross-examination. An expert who intends to raise new theories should make them known to the other expert early enough and not spring them upon the other thereby leaving them with little or no time to study or consider the theories. Second, regrettably, a conscious or unconscious instinct of self-preservation in the face of strong and robust challenge made against his report may have resulted in Choo becoming rather identified with the party calling him and his evidence had been thereby affected. Third, there were attempts by the plaintiff to enlarge or stray from Choo's new theories through cross-examination of the other expert. The court should be astute to ensure that the plaintiff who has not pleaded its case in this manner does not attempt to establish one in cross-examination or by other evidence.

82 The defendant's closing submissions were filed first and in there Mr Kuek commented on the new theories in some detail to demonstrate that they were completely speculative. On the effect of impact loading, Choo explained that by introducing compressed air, there would be a "sudden rush of air" or "impact loading" which would have caused the brake air control valve to open thereby leading to the release of the brakes. The difficulty with this theory, as Choo acknowledged, is that the brake air control valve was made of cast metal. The defendant's expert discounted the theory for another reason. The regulating valve was adjusted to reduce the air pressure to operating air pressure requirements which was 8kg cm^2.

83 Mr Lai sought to establish a different theory in cross-examination of Hiney. Mr Lai cross-examined Hiney on the effect of impact loading forcing the roller plunger valve to open whereas Choo was theorising on the effect of impact loading on the brake air control valve. I agree with Mr Kuek that this is illustrative of an attempt to improperly advance another theory that was not pleaded or supported by facts or evidence since the regulating valve was located before the roller plunger.

84 As for the brake slip theory, brake slip occurs when the friction torque is less than the torque. A constant holding capacity of the brake is assured because of spring-applied brakes. The spring compensates for any stretching of the band brake. Hiney confirmed that some maintenance and adjustments of the brakes appeared to have attended to. Choo conceded that if the brakes were properly maintained, brake slip should not occur. Hiney also explained that given the last load test, the brakes should be capable of holding without slipping. Any brake slip ought to have been detected during earlier lifting operations involving loads of approximately 260 tonnes.

85 The only theory that was left in the plaintiff's closing submissions to explain how compressed air got through the brake air control/stop valve is the misalignment theory. The argument is that as Sio only checked the port local lever, he only noted that particular lever to be in neutral thus leaving open the possibility that the centre lever may not be properly aligned. The centre lever which controls the opening and closing of the roller plunger valve may not be properly aligned in that it was not in fact in neutral. This meant that the roller plunger valve was opened and once operating air was introduced into the system, the air could reach the brake air control valve (to push the spool to an open position thereby opening the brake air cylinders) through the roller plunger valve. This egregious submission is seriously misleading. It was raised with Mr Lai during cross-examination of Hiney that misalignment of the local control levers was not brought up by Choo in his affidavit of evidence-in-chief or oral testimony. It is clear from the transcripts that Choo's reference to possible lack of synchronisation of the levers was in connection with the valves in the remote control room that do not spring back to neutral automatically, so it may not be exactly in a 100% neutral position and air

could leak through. This theory was discounted after Mr Kuek pointed out to Choo that UTL in his written testimony confirmed that after the casualty, he opened the control bridge door and saw all the control levers were in locked position. Mr Lai persisted in cross-examining Hiney on the local control levers in the luffing winch room whereas Choo was talking about remote control valves in the control bridge. In any case, Hiney disagreed with Mr Lai's suggestion that the brake air control valve could have opened at the time of the casualty due to the imperfect synchronisation of the control lever with the two hydraulic levers in the luffing winch room. The reason is obvious. Choo said in his written testimony that all three local control levers move in tandem and this is due to the common connecting rod. If one of the local control levers were released, all the levers would automatically spring back to neutral position.

86 In these circumstances, the defendant has rightly put the plaintiff to proof without undertaking anything more that an evidential burden of displacing the plaintiff's *prima facie* case. For the reasons stated above, I therefore conclude the plaintiff has not proved its case.

87 Having regard to the conclusions reached that a claim under cl 6.2.3 is not established, it is not necessary to discuss the defendant's alternative case which is that the loss was due to wear and tear. Suffice it to say that there are difficulties about all the explanations put forward by the plaintiff, and likewise the defendant's allegation of wear and tear.

Want of due diligence and burden of proof

88 Whilst it is no longer necessary to discuss the proviso, I should clarify the onus of proving want of due diligence as the parties each take the opposite view on the onus of proof. The plaintiff asserts that the underwriter has to prove want of due diligence and cites Donald O'May, *Marine Insurance Law and Policy* (Sweet & Maxwell, 1993) at pp 136–137. The defendant relies on *Coast Ferries Ltd v Century Insurance Co of Canada* [1973] 2 Lloyd's Law Rep 232 ("*The Brentwood* ") as authority for the proposition that the burden of proof is on the assured.

89 A question as to the onus of proving due diligence was raised in *Jetopay Pty Ltd v Ocean Marine Mutual Insurance Association (Europe) OV* [1999] FCA 1773, 17 December 1999. One of the specific questions which Tamberlin J had to consider was cl 6.2.4 of the Institute Fishing Vessel Clauses dated 20 July 1987 with amendments. Clause 6.2.4 refers to loss or damage to the subject matter insured caused by the negligence of repairers, "provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers". Tamberlin J held that this question as to the onus of proving due diligence depended on whether the proviso is considered to be an element in establishing liability of the insurer or whether it is an exception. If it was the former, the onus would be on Jetopay to negative lack of due diligence. In the converse situation, the onus would be on the insurer citing *Avel Proprietary Limited v Multicoin Amusements Proprietary Limited* (1990) 171 CLR 88 at 119–120 *per* McHugh J; *Vines v Djordjevitch* (1955) 91 CLR 512 at 519 and *Banque Commerciale SA v Akhil Holdings Limited* (1990) 169 CLR 279 at 285.

90 Referring to the decision of Ruttan J in the British Columbia Supreme Court in *Coast Ferries Ltd v The Coast Underwriters Ltd* (1971) 23 DLR (3d) 226 at 232–233, Tamberlin J commented that no authority was cited by Ruttan J in support of his conclusion that the burden of proof was on the insured to show that he has not been guilty of undue diligence leading to the accident which occurred. The case went on appeal to the Court of Appeal of British Columbia and then to the Supreme court of Canada. The Court of Appeal stated that it was not necessary to express an opinion on the question of burden of proof in relation to the proviso, because it was fully satisfied on the evidence that the owner was wanting in due diligence in seeing that the vessel was properly loaded: *The Brentwood* ([88] *supra*) at 233. The Supreme Court of Canada also expressed no view on

this point: see [1975] 2 SCR 477 at 483. Tamberlin J rightly found the first instance decision as an unsatisfactory basis from which to derive a general principle as to onus of proof where such a view is contrary to accepted practice. Tamberlin J said ([89] *supra* at [61]) that:

> [T]he better view as to the operation of the due diligence proviso is that the onus rests on the insurer to establish want of due diligence in accordance with the accepted practice of insurers.

91 In para 7.25 on *Insurance Disputes* (2003, 2nd Ed, LLP), the authors, Lord Justice Mance, Iain Goldrein & Robert Merkin, set out the general rules distinguishing cases where the general cover is limited and cases where there are exceptions to the general cover. They are:

> (1) The insured must prove such facts as bring him within the terms of the general cover provided.
>
> (2) If the general cover is subject to exceptions which simply exclude from the general cover certain particular classes of case which but for the exception would fall within it, leaving some part of the general cover unqualified, then the burden of showing that any one of those exceptions applies is on the insurer.
>
> (3) On the other had, if the general cover is qualified by an exception which applies to its whole scope, then it is for the insured to show that the facts are such as fall within the general cover as qualified. "There is *ex hypothesi* no unqualified part of the promise for the sole of his (the insured's) foot to stand upon." An example is a particular average franchise or an excess. To bring himself within the cover at all the insured must show that he has suffered a loss of more than the excess.
>
> (4) Whether there is general cover qualified by exceptions or limited as to its entire scope is a question of construction of the policy as a whole.
>
> (5) In construing the policy it must be borne in mind that a promise with exceptions can generally be turned by an alteration in phraseology into a qualified promise. The precise terms of the policy are thus of the utmost importance.

92 The authors added a sixth rule (see para 7.26):

> [I]f an exception contains an exception to itself, more limited in scope than the primary exception, then if the insurer has shown that the principal exception is applicable, the burden is on the insured to prove that the case falls within the exception to that exception.

93 As a matter of construction, the proviso is used to express an excuse, qualification or exclusion by reason of the existence of additional or special facts described as a justification for not complying with the insurance obligation. It is only loss or damage caused by the negligence of the master, officers or crew that is covered under cl 6.2.3. Coverage is denied or excused if the damage results from want of due diligence by the assured, owner or managers. In that case, the onus of proof lies on the insurer as the party alleging that it falls within the excuse or exclusion.

94 By way of illustration, I refer to *Munro, Brice & Co v War Risks Association, Limited* [1918] 2 KB 78. The court was concerned with the question of burden of proof under a contract of insurance and Justice Bailhache at 87 quoted from an earlier judgment of Chief Baron Palles where the Chief Baron said:

> [T]he contract is that the defendants shall be liable for loss by fire, provided it be not the act of an incendiary. When, therefore, it is once shown that the loss resulted from fire, the plaintiff has established a prima facie case, and the onus is thrown upon the defendants to prove that the act which caused the fire was within the proviso. The defence is not in any sense a traverse of an allegation comprised within the general way averments of the plaint; it is a plea in confession and avoidance, and the proof of its is upon the defendants.

95 The due diligence proviso is raised normally as a defence to a plea of negligence as an insured peril (as to which see *Martin Maritime Ltd v Provident Capital Indemnity Fund Ltd (The Lydia Flag)* [1998] 2 Lloyd's Rep 652). The plaintiff in the present case has to establish a *prima facie* case that the loss was caused by the negligence of the master, officers or crew and the defendant has to prove want of due diligence.

Overall conclusions/Result

96 In summary my conclusions are:

(a) The plaintiff was not in breach of the NKK classed and class maintained warranty.

(b) The defendant has failed to establish that the fraudulent devices or means were used in the presentation of the plaintiff's claim.

(c) The loss was not due to a peril insured under cl 6.2.3 of ITC.

In the result, by reason of para (c), the plaintiff's claim fails and the action is dismissed with costs.

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