IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC 82

Suit No 814 of 2021

Between

Oversea-Chinese Banking Corporation Limited

… *Plaintiff*

And

(1) Argoglobal Underwriting Asia Pacific Pte Ltd
(2) China Taiping Insurance (Singapore) Pte Ltd
(3) Great American Insurance Company
(4) MS First Capital Insurance Limited (formerly known as First Capital Insurance Limited)
(5) QBE Insurance (Singapore) Pte Ltd

… *Defendants*

JUDGMENT

[Insurance — Marine insurance — Whether vessel was a constructive total loss — Clause 6.1.1 Institute Time Clauses (Hulls) 1.10.83 CL 280]

[Evidence — Admissibility of evidence — Hearsay — Requirement to give notice of reliance on hearsay evidence — Whether prejudice caused by curing non-compliance with notice requirement — Section 32(4)(*b*) Evidence Act 1893]
[Insurance — Marine insurance — Whether loss caused by perils of the seas — Whether vessel was a decrepitude or debility — Clause 6.1.1 Institute Time Clauses (Hulls) 1.10.83 CL 280]
[Insurance — Marine insurance — Duty of fair presentation — Sections 3, 7 UK Insurance Act 2015]
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v
Argoglobal Underwriting Asia Pacific Pte Ltd and others

[2025] SGHC 82

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30 April 2025 Judgment reserved.

Kwek Mean Luck J:

Introduction

1 This is a claim by the Plaintiff ("OCBC") against the Defendants (the insurers) for US$70m, pursuant to a marine insurance policy for the loss of a vessel. The Defendants raised a wide variety of defences, including that OCBC has not proven that the vessel was a constructive total loss, that the loss was not caused by an insured peril under the marine insurance, that OCBC has not proven that it had disbursed the loan, that OCBC was in breach of its duty of fair presentation, that OCBC was in breach of warranties of the marine insurance and that part of the marine insurance is void as gaming or wagering contract.

Facts

2 OCBC was the mortgagee of the vessel "TERAS LYZA" (the "Vessel"). OCBC was co-assured under a hull and machinery marine insurance policy (the "MI") issued by the Defendants in respect of the Vessel, alongside vessel owner Teras Lyza Pte Ltd ("TLPL" or the "Vessel Owner") and vessel manager Teras Offshore Pte Ltd ("TOPL" or the "Vessel Manager"). Collectively, TLPL and TOPL will be referred to as the "Teras Entities".

The Marine Insurance Policy

3 The MI contains a "Cover Note" issued by marine insurance broker LCH Lockton Pte Ltd ("LCH") to TLPL on 13 June 2017.[1] Two sections of the Cover Note are material to OCBC's claim:[2]

(a) under "Section [A]", the Defendants undertook to insure the hull and machinery of the Vessel up to an insured value of US$56m ("Section [A]"); and

(b) under "Section [B]", the Defendants undertook to insure the Vessel for increased value and/or excess liabilities up to a value of US$14m ("Section [B]").

In other words, and in the event of a total loss of the Vessel, any payout under Section [A] of the MI would be capped at US$56m while any payout under Section [B] would be capped at US$14m.

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1 Affidavit of Evidence-in-Chief ("AEIC") of Mr Vikas Shukla dated 27 August 2024 at para 11 and Tab 1.

2 AEIC of Mr Vikas Shukla dated 27 August 2024 at para 11; Plaintiff's Opening Statement dated 22 October 2024 ("POS") at para 23(c).

4 The Cover Note also sets out the Defendants' respective interests in Sections [A] and [B] of the MI, as follows:[3]

Argoglobal Underwriting Asia Pacific Pte Ltd ("1st Defendant")	2.50%
China Taiping Insurance (Singapore) Pte Ltd ("2nd Defendant")	2.50%
Great American Insurance Company ("3rd Defendant")	7.50%
MS First Capital Insurance Limited ("4th Defendant")	77.50%
QBE Insurance (Singapore) Pte Ltd ("5th Defendant")	10.00%

The 4th Defendant, "MS First", holds the largest share of coverage under the MI and is the lead insurer under the MI.

5 LCH also issued an "Addendum No. 1" to the Cover Note on 13 June 2017.[4] This Addendum arose from two Deeds of Assignment and Charge ("DOACs") entered into between each respective Teras Entity and OCBC on 12 June 2017. By way of cl 3.1 of the DOACs, each Teras Entity assigned its rights, title and interest in the MI to OCBC.[5] OCBC was further named as "sole loss payee" in respect of the Vessel's Insurances at cl 6.1.1 of the DOACs.[6] To

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3 AEIC of Mr Vikas Shukla dated 27 August 2024 at p 23.

4 POS at paras 24–25.

5 Agreed Bundle of Documents ("ABOD") Volume 12 at pp 6234–6235 and 6259–6260.

6 ABOD Volume 12 at pp 6238 and 6263.

give effect to the DOACs, Addendum No. 1 incorporated the relevant notice of assignment and loss payable clause into the MI.[7]

6 On 29 August 2017, the 4th Defendant issued a renewal certificate to the parent company of the Teras Entities (the "Renewal Certificate Policy"). This confirmed the marine insurance for the period of 1 August 2017 to 31 July 2018 (both dates inclusive).[8] Collectively, the Cover Note and Renewal Certificate Policy set out the conditions and warranties operative in the MI.[9]

7 As will be detailed further, the Vessel was subsequently prepared to embark on a tow voyage. On 22 May 2018, LCH informed TLPL that the Defendants had agreed to insure the Vessel for this tow voyage, for an additional premium of US$18,200 and on a set of agreed terms. This agreement was formalised in the following manner: (a) an "Addendum No. 3" was issued to the Cover Note on 6 June 2018; and (b) an Endorsement No. 18183166/7 was issued to the Renewal Certificate Policy on 20 June 2018. Collectively, these additional terms are the "Towage Addendum".[10]

Preparation for the Tow Voyage

8 In early May 2018, a set of charterers informed TOPL of their intention to award a contract for charter of the Vessel, together with the towing tug "TERAS EDEN" (the "Tug").[11] At that point, the Vessel was laid-up in Vung

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7 AEIC of Mr Vikas Shukla dated 27 August 2024 at Tab 1.

8 AEIC of Mr Vikas Shukla dated 27 August 2024 at Tab 2.

9 AEIC of Mr Vikas Shukla dated 27 August 2024 at para 15.

10 Statement of Claim (Amendment No. 1) dated 18 June 2024 ("SOC-A1") at para 16.

11 ABOD Volume 12 at pp 6362–6363.

Tau, Vietnam. It would have to be towed to Taichung, Taiwan for delivery to the charterers (the "Tow Voyage").[12]

9 In light of this, the Teras Entities undertook an internal feasibility study to consider whether a wet tow of the Vessel would be feasible.[13] This survey was conducted by then-Deputy Director of Fleet Operations of TOPL, Captain Bjarke Norby Pedersen ("Cpt Pedersen"). His initial feasibility study concluded that a wet tow was feasible, subject to the flag state and other approvals as required.[14] On this basis, a representative of the Teras Entities wrote to the Vietnam office of the American Bureau of Shipping ("ABS") to seek advice on the intended wet tow of the Vessel, including the steps that would need to be taken to obtain approval from the Maritime and Port Authority of Singapore ("MPA").[15]

10 On 12 May 2018, the ABS informed the Teras Entities that the MPA had "no objection to the unit tow voyage", subject to a set of conditions being verified to the satisfaction of ABS (the "12 May Email"):[16]

> Please see below authorization from MPA for ABS to carry the survey and issue the Short Term of Load Line Certificate valid for thirty (30) days from date of issuance, or, upon arrival Taichung City, Taiwan, whichever occurs earlier. I will send you with the Survey instructions from ABS Survey Department (Offshore) for further discussion on next Monday and assign surveyor accordingly.
>
> *Quote*

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12 POS at para 30.

13 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at paras 10–11.

14 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at para 11.

15 ABOD Volume 12 at pp 6407–6415.

16 ABOD Volume 12 at p 6410.

> We refer to your email regarding the self-elevating unit, TERAS LYZA (IMO No. 9738480).
>
> 2. We note the owner intends to tow the unit from Vung Tau, Vietnam to Taichung City, Taiwan for reactivation, on/around end May 2018.
>
> 3. We have no objection to the unit tow voyage, subject to the following conditions to be verified to the satisfaction of ABS:
>
> - An ***occasional survey to ascertain the unit is fit for tow, as proposed in ABS's email dated 11 May 2018 to be carried out prior to the tow and verified to the satisfaction of the attending ABS surveyor***.
> - The tow is planned and executed in compliance with the international and national requirements, taking into account the IMO guidelines for Safe Ocean Towing in MSC/Circ.884 for normal and emergency conditions.
> - No cargo and personnel shall be on board during the tow.
> - The tow should be carried out in fair weather.
> - The ***fitness of the towing vessel, towing arrangement and procedures shall be surveyed to the satisfaction of a competent organisation, which is acceptable to the vessel's underwriter***.
>
> *Unquote*
>
> [emphasis in original; emphasis added in bold italics]

11 To satisfy the first condition at para 3 of the 12 May Email, an ABS surveyor attended the Vessel on 25 May 2018. On the same day, TOPL was issued a Certificate of Fitness to Proceed under Tow ("ABS Fit-for-Tow Certificate"),[17] a Short-Term International Load Line Certificate ("ABS Load

[17] ABOD Volume 12 at p 6793.

Line Certificate"),[18] a Class Survey Report ("ABS Class Survey Report"),[19] and a Statutory Survey Report ("ABS Statutory Survey Report").[20]

The Marine Warranty Survey

12 The last condition at para 3 of the 12 May Email required the Vessel to be surveyed to the satisfaction of a competent marine warranty surveyor ("MWS"). Prior to receiving the MPA's directions on 12 May, the Teras Entities were in contact with one MWS, that being Braemar Technical Services (Offshore) Pte Ltd ("Braemar"). The Teras Entities initially intended to engage Braemar as MWS. Its engagement was also pre-approved by the Defendants.[21]

13 However, a series of events ensued, leading to Techwise Offshore Consultancy Pte Ltd ("Techwise") being hired as MWS instead of Braemar:

(a) On 8 May 2018, TOPL wrote to Braemer's Head of Geotechnical Department Mr Budiawan Paulus Handidjaja ("Mr Paulus"), requesting a meeting to discuss the Tow Voyage.[22] Mr Paulus replied on the same day, requesting for a proposed plan for towing.[23] This was sent over to Mr Paulus on 10 May 2018.[24] On 11 May 2018, there were two meetings

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18 ABOD Volume 12 at p 6794.

19 ABOD Volume 13 at pp 6964–6966.

20 ABOD Volume 13 at pp 6967–6968.

21 POS at para 38; AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at para 22.

22 AEIC of Mr Budiawan Paulus Handidjaja dated 23 July 2024 at para 8.

23 AEIC of Mr Budiawan Paulus Handidjaja dated 23 July 2024 at para 8; AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at para 24.

24 AEIC of Mr Budiawan Paulus Handidjaja dated 23 July 2024 at para 9.

between: (i) Mr Paulus and Cpt Pedersen, and (ii) Mr Paulus and TOPL's then-Chief Executive Officer Mr Peter Lee.

(b) In the evening of 11 May 2018, and subsequent to these two meetings, TOPL wrote to Braemar to request a quotation for its service. On 14 May 2018, Mr Paulus replied stating that there were several issues that needed to be resolved. He suggested a further meeting to discuss and resolve these issues. As the scope of work was likely to increase after the discussion, he suggested quoting thereafter.[25]

(c) On 16 May 2018, Cpt Pedersen arrived in Vietnam to prepare for sail away of the Vessel and the Tug. He met with Braemar's personnel on the same day. According to Cpt Pedersen, he started to grow concerned with several of Braemar's suggestions for the Tow Voyage, such as that it should adopt a coastal route and that it should be manned. Neither had Braemar provided its quotation by that meeting.[26] Given that the Vessel's initial intended departure date of 23 May 2018 was drawing close, Cpt Pederson decided to contact a potential alternative MWS – Techwise – to discuss the Tow Voyage.

(d) On 18 May 2018, Cpt Pedersen obtained documents from Techwise, stating its qualification to act as MWS. Cpt Pedersen sent these documents to LCH and the Defendants via Ms Sharleen Cheng ("Ms Cheng"), who was LCH's administrative point of contact for the MI.[27] Ms Cheng emailed Cpt Pedersen on the same day to say that she

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25 AEIC of Mr Budiawan Paulus Handidjaja dated 23 July 2024 at paras 12–16.

26 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at paras 30–34.

27 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at paras 30–34.

had spoken offline with LCH, with the initial feedback being that there would be no issue approving Techwise as MWS.[28]

(e) On 20 May 2018, Cpt Pederson emailed Mr Peter Lee, providing his comments on both proposed MWS. On the same day, Cpt Pederson also received an email from Braemar, where Braemar set out further comments on the proposed Tow Voyage. The 20 May Emails will be further particularised at [195] below.[29]

(f) Mr Peter Lee sent an email to LCH and the Defendants via Ms Cheng on 22 May 2018, seeking confirmation of the Defendants' acceptance of Techwise's hire as MWS.[30]

14 Following these events, Techwise was officially hired as MWS. Between 26 and 31 May 2018, Techwise issued a Certificate of Fitness for Towage ("MWS Fit-for-Tow Certificate"),[31] a Certificate of Approval for the Tow Voyage ("MWS Certificate of Approval"),[32] a Suitability Survey Report ("MWS Suitability Survey Report"),[33] and a Sailaway Attendance Report ("MWS Sailaway Attendance Report").[34]

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28 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at para 46.

29 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at para 51.

30 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at para 57 and p 333.

31 ABOD Volume 12 at p 6857.

32 ABOD Volume 13 at p 7125.

33 ABOD Volume 13 at p 7127.

34 ABOD Volume 13 at p 7201.

The Tow Voyage

15 On 30 May 2018, the Vessel sailed away from Vung Tau, Vietnam under tow of the Tug. On 5 June 2018 at about 3.45pm, the Vessel developed a list to port and trimming by the stern. At 5.50pm on 5 June 2018, the Vessel capsized.[35]

Events after the capsize of the Vessel

16 The following events ensued subsequent to the Vessel's capsize:

(a) On 15 June 2018, salvors were contracted to salvage the Vessel..[36]

(b) Between 23 and 27 July 2018, an underwater inspection of the Vessel was carried out. On 25 July 2018, the Vessel Owner tendered a Notice of Abandonment under the MI on the basis that the Vessel was a constructive total loss ("CTL").[37]

(c) The Defendants rejected the Notice of Abandonment on 26 July 2018.[38]

(d) On 18 August 2018, the Vessel Owner informed the Defendants that no scrap buyers were interested. The Vessel could only be disposed of.[39] The Vessel was then disposed of and submerged by salvors in deep waters off Philippines on 20 August 2018.[40]

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35 Plaintiff's Closing Submissions dated 24 January 2025 ("PCS") at para 6.

36 PCS at para 34.

37 PCS at paras 34–35.

38 PCS at para 35.

39 PCS at para 36.

40 PCS at para 37.

(e) On 6 November 2020, the assureds formally presented a claim against the Defendants under the MI. No payment was made.[41]

(f) The present suit was commenced by the Teras Entities and OCBC as co-plaintiffs on 30 September 2021.[42]

17 The Teras Entities went into liquidation in 2022. The liquidators of the Teras Entities did not wish to continue their participation in this action and they were struck out as parties. This action continued with OCBC as the sole plaintiff.

OCBC's Case

18 OCBC claims that the capsize and/or loss of the Vessel was caused by "perils of the seas" pursuant to cl 6.1.1 of the Institute Time Clauses (Hulls) 1.10.83 CL 280 ("ITC"). The MI incorporates the ITC, subject to specified amendments which are not presently relevant.[43] OCBC's primary claim is that there was a CTL of the Vessel quantified at US$56m and US$14m, being the respective insured values under Section [A] and Section [B] of the MI (see [3] above).[44] Alternatively, OCBC seeks payment for unrepaired damage to the Vessel in a sum to be assessed by the court,[45] or for damages for breach of the MI.[46]

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41 PCS at para 38.

42 PCS at para 38.

43 AEIC of Mr Vikas Shukla dated 27 August 2024 at p 24 and 41.

44 SOC-A1 at para 38A(i).

45 SOC-A1 at para 38A(ii).

46 SOC-A1 at para 38A(iv).

Defendants' Case

19 The Defendants adopted what appeared to be an evolving kitchen sink approach, raising a wide range of defences, dropping some and then raising new ones along the way. This occurred even after the end of trial. I set out the Defendants' case as was eventually presented in their Closing Submissions dated 24 January 2025:

(a) OCBC has not proven that the Vessel was a CTL;

(b) the loss was not caused by an insured peril under the MI;

(c) OCBC has not proven that it disbursed the loans or the interest and late charges due;

(d) OCBC was in breach of its duty of fair presentation under s 3 of the United Kingdom's ("UK") Insurance Act 2015 ("UK IA 2015");

(e) OCBC was in breach of Warranties 1, 2 and 4 of the MI and that the Defendants are in any event not liable for loss as the Vessel was sent to sea in an unseaworthy state per s 39(5) of the UK's Marine Insurance Act 1906 ("UK MIA 1906"); and

(f) section [B] of the MI is void as a gaming or wagering contract under s 4 of the UK MIA 1906.

Issues to be Determined

20 The following main issues arise for determination:

(a) First, whether OCBC has proven that the Vessel was a CTL.

(b) Second, whether the loss of the Vessel is covered by the MI, in particular, whether the loss of the Vessel was caused by perils of the seas.

(c) Third, whether OCBC has proven the quantum of its loss.

(d) Fourth, whether OCBC was in breach of its duty of fair presentation under s 3 of the UK IA 2015.

(e) Fifth, whether OCBC was in breach of Warranties 1, 2 and 4 of the MI and whether the Defendants may rely on s 39(5) of the UK MIA 1906 to avoid liability for payment.

(f) Sixth, whether Section [B] of the MI is void as a gaming or wagering contract under s 4 of the UK MIA 1906.

Constructive Total Loss

21 The first main issue is whether OCBC has proven CTL. Clause 6.1.1 of the ITC, upon which OCBC relies, states as follows:

> **6. PERILS**
>
> 6.1 This insurance covers *loss* of or damage to the subject-matter insured caused by
>
> 6.1.1 perils of the seas rivers lakes or other navigable waters
>
> …
>
> [emphasis added]

22 OCBC submits that there was "loss" of the Vessel under cl 6.1.1 as the Vessel was a CTL.[47] In order to prove that the capsize of the Vessel constituted

[47] PCS at paras 140–169.

a CTL under s 60(2)(ii) of the UK MIA 1906 and cl 19 of the ITC, parties agree that OCBC would have to show that the cost of recovery and/or repair would exceed the insured value of the Vessel.[48]

OCBC's Case

23 OCBC relies on a series of documents, which are in the Agreed Bundle of Documents, as proof that the cost of recovery and/or repair would exceed the insured value of the vessel. OCBC's case, based on these documents, is set out below.

24 As of 6 June 2018, the day after the capsize, the Vessel was completely submerged, with the bottom of its hull just barely visible above the water surface:[49]

25 On 10 July 2018, the Vessel Owner wrote to the Defendants ("10 July Letter"), stating that "[t]he Vessel … sustained material damage to various

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48 PCS at para 140; Defendants' Closing Submissions dated 24 January 2025 ("DCS") at para 26.

49 ABOD Volume 24 at B-507.

structures and especially to the various electronics and electrical equipment onboard and the various critical equipment and machinery onboard. In [the Vessel] Owners' view, the Vessel is, in all likelihood, a constructive total loss".[50] They provided an estimate of the total claim, which including repair and salvage costs, was in the quantum of about US$76.3m to US$82.6m.

26 On 11 July 2018, Ms G Neelamalar (acting on behalf of the Defendants), emailed Vessel Owner ("11 July Email"), stating:[51]

> … As you also know we have retained LOC for investigation as to cause, extent of loss etc. LOC have reviewed the documents enclosed with your email letter and believe some of the figures which the [Vessel Owner has] put forward in support of their claim that the vessel is now a [constructive total loss] are too high, based upon what is presently known about the Vessel and her current condition…
>
> Repairs – [Vessel Owner's] figure: US$50-56 million
>
> LOC have been advised that the new building of a similar vessel today is in the region of US$40 million. Presently, it appears there may be no structural damage to the Vessel and LOC believe there has been very little internal flooding given the Vessel's current condition. *As such, LOC believe it may not be necessary to replace all of the machinery, and that an allowance of even US$25 million for repairs could be very generous if this proves to be the case.*
>
> Salvage – [Vessel Owner's] figure: $24 million
>
> LOC understand that during a recent meeting between all parties, the Salvors, when pressed by the Club's appointed lawyers, *estimated the total SCOPIC costs of the salvage operation to be in the region of US$17–20 million.* We have noted from the SCR's reports that the Salvors will be undertaking comprehensive underwater inspection of the Vessel in the coming days, and that their calculations and strength analyses for the parbuckling operation are currently under review. *In the*

[50] ABOD Volume 14 at pp 7762–7763.

[51] ABOD Volume 14 at p 7782.

> *light of our comments above and the present circumstances therefore, it is premature for us to conclude at this time, that the Vessel is a CTL.*
>
> [emphasis added]

27 On 16 July 2018, and at the Vessel Owner's request, Ms Neelamalar provided a Certificate of Valuation for the Vessel dated 22 June 2018 (the "Certificate of Valuation"). The Certificate of Valuation provided details as to why the value of a new build of a similar vessel was estimated to be about US$40m.[52]

28 On 22 July 2018, the Vessel Owner sent an email to the Special Casualty Representative ("SCR") and the Defendants (the "22 July Email"). The Vessel Owner narrated the state of "impasse" between the Protection and Indemnity Club (the "Club"), the Vessel Owner and the Defendants in relation to whether the Vessel was a CTL. In this email, the Vessel Owner restated its position, which was supported by the Club, that the casualty was a CTL.[53]

29 From 23 to 25 July 2018, there were SCR Situational Reports ("SCRS Reports") issued by Solis Marine Consultants ("Solis") and sent to the Teras Entities and the Defendants. These SCRS Reports set out various observations about the extent of damage suffered by the Vessel, including cracks, breaks, and shearing in the Vessel's legs.[54]

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52 ABOD Volume 14 at p 7820.

53 ABOD Volume 14 at B-238, p 7870.

54 PCS at para 150; ABOD Volume 14 at B-245, pp 7927–7936.

30 On 25 July 2018, the Vessel Owner tendered a Notice of Abandonment ("Notice of Abandonment") under the MI on the basis that the Vessel was a CTL. The Vessel Owner stated that:[55]

> … The Underwater Inspections have now also identified that the port forward leg has sheered (*sic*) off and that there is significant damage visually identifiable to other legs and the jacking systems. As the other legs have been subjected to similar stresses, Owners consider that it [is] almost certain that the fatigue life of all of the legs will have been exceeded and that all of the legs (and the jacking systems) will need to be replaced.

31 The Notice of Abandonment also stated that the Vessel Owner had received various quotations in respect of the costs to bring the Vessel to a shipyard (if possible), the cost of salvage operations, and the costs to repair / refurbish / replace the Vessel. The Vessel Owner provided the following costs estimates:[56]

(a) initial sue and labour costs of US$522,001.24;

(b) salvage costs of US$26m;

(c) heavy lift transport costs of between US$740,000 and $1m;

(d) repair and refurbishment costs of between US$50,039,552.93 and $56,100,000; and

(e) costs of inspection/testing by Class of between US$1.5m and $2m.

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55 ABOD Volume 14 at p 7956.

56 ABOD Volume 14 at pp 7956–7957.

32 The Notice of Abandonment concluded that "the total costs to recover and/or repair/refurbish the Vessel will exceed the Vessel's value when repaired such that the Vessel is a constructive total loss".[57]

33 On 26 July 2018, Ms Neelamalar replied on behalf of the Defendants to decline the Notice of Abandonment ("26 July Email"). She did not provide a reason. Her email did not respond to the estimates provided by the Teras Entities, nor did it address the results of the underwater inspection. Ms Neelamalar agreed, however, that the question of whether the Vessel was a CTL, was to be determined as of that date, *ie*, 26 July 2018.[58]

34 On 4 August 2018, the salvors, Resolve Salvage & Fire (Asia) Pte Ltd (the "Salvors"), issued a dive inspection report ("Dive Inspection Report"). This set out a more extensive list of findings concerning the damage to the Vessel, including:[59]

(a) One hydraulic line to the jacking system was found to be damaged and broken.

(b) The structural condition of the port stern leg was very poor, cracks and complete breaks were found at multiple locations on all chords of the leg. The inboard chord at the second X-bracing location from the spud can had been completed sheared.

(c) Two hydraulic pipelines were completely sheared and found to be hanging free.

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57 ABOD Volume 14 at p 7957.

58 ABOD Volume 14 at p 7960.

59 ABOD Volume 14 at B-259, pp 8194–8197 and 8211–8214.

(d) The machinery house of the pedestal crane appeared to have completely detached from its foundation, falling into the gantry above it. The hydraulic lines were observed to be pulled apart and damaged.

(e) The hydraulic power units had the top-mounted heat exchanges fall, ripping the manifolds away from the top hydraulic tanks. The tanks were also observed to have shifted.

(f) The boom of the port bow crane appeared to have fallen out of the rest and was hanging vertically.

35 On or about 4 August 2018, the Vessel Owner began making enquiries about the Vessel with various shipping brokers. Their replies showed no potential buyers for the Vessel, even as scrap ("Ship Brokers' Replies"). The main reasons given for the lack of interest were the condition of the Vessel then and the difficulty in moving the Vessel to a shipyard, which was regarded as costly and risky.[60] OCBC referred to the following extract of an email from Offshore Shipbrokers Limited to Mr Peter Lee on 6 August 2018, as illustration:[61]

> … A salvage group would be the most appropriate group to handle the situation. Anyone taking over the rig is going to be highly unsure whether the hull integrity will keep the unit afloat and would be reliant on the quick release mechanism on the towing hook being able to release the tow instantly that there was a problem with the rig (or risk the lives of the people on board the tug). Also though a minor loss in comparison to the rig, any loss of the rig would also involve the loss of the towing gear which would then need to be replaced by the tug owner and the constant stress of not knowing if the jackup was going to sink on the line would make any long distance tow extremely difficult …

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60 ABOD Volume 14 at p 8254; ABOD Volume 15 at pp 8272–8274 and 8306–8310.

61 ABOD Volume 15 at p 8308.

36 On 18 August 2018, the Vessel Owner informed the Defendants by letter that there were "no parties interested in purchasing the [Vessel] in her current condition, even as scrap". The Vessel Owner also stated that they were "left with no viable alternative but to scuttle the [Vessel]", and that this would occur on or about 20 August 2018 (the "18 August Letter").[62]

37 OCBC submits that by virtue of the evidence in the above documents, they have demonstrated that the repair costs of the Vessel would have exceeded her insured value and *prima facie*, the Vessel had become a CTL. The evidentiary burden would have shifted to the Defendants if they considered it necessary to call any other person to refute OCBC's case, but they failed to do so.

Defendants' case

38 The Defendants submit that the documents relied on by OCBC are inadmissible. They were not adduced through any witnesses and are hearsay. They cite *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("*Jet Holdings*") at [76], where the Court of Appeal held that it is "trite law that even where there is an agreed bundle of documents, the truth of the contents of the [d]ocuments nevertheless remains at issue and is subject to, inter alia, objections centring on the doctrine of hearsay".

39 In *Keimfarben GmbH & Co KG v Soo Nam Yuen* [2004] 3 SLR(R) 534 ("*Keimfarben*"), the High Court at [13] held that a letter from a Malaysian company offering to buy paint at certain prices the company was agreeable to,

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62 ABOD Volume 14 at p 8312.

was hearsay and inadmissible. The maker of the offer was not in court to confirm that the written offer was made in those terms, that it was a genuine offer from the company Sui Hup or that the prices indicated were what Sui Hup was prepared to pay. The Defendants also rely on *English Exporters v Eldonwall Ltd* [1978] 1 Ch 415 ("*English Exporters*"), in which the court drew a distinction between an expert's opinion on one hand and the factual evidence led by the expert on the other. In so far as an expert purports to provide factual evidence to the court which he or she has no first-hand knowledge of, this will be equally subject to a hearsay objection: *English Exporters* at 421.

40 In *Kastor Navigation Co. Ltd v AGF MAT* [2004] 2 Lloyds Rep 119 ("*Kastor*"), at [101], the English Court of Appeal held that there was evidence of constructive total loss before the court, which came from both the parties' experts. In stark contrast to *Kastor*, there is no evidence in the present case from any party on the quantum of the costs of repairs of the Vessel. No experts assessed whether the Vessel was a CTL, or even a partial loss. No witnesses of fact adduced documentary evidence on this question and testified on it. OCBC has not discharged its burden of proof. The claim for CTL must fail for this reason.

41 In their further reply submissions dated 24 March 2025, the Defendants expanded on their hearsay objection by arguing that the notice requirement in s 32(4)(*b*) of the Evidence Act 1893 (2020 Rev Ed) ("EA") was not fulfilled. The Defendants argued that OCBC had made no mention of the documents on which it relied to prove that the Vessel was a constructive total loss, in any of its witness statements, in its opening statement, or even at trial. It was only in closing submissions that OCBC first made reference to these documents. As a

result, the Defendants were denied of a fair opportunity to challenge the veracity and/or reliability of these documents.

Decision

42 The English law experts agree that the test for constructive total loss, is whether the cost of recovery and/or repair would exceed the insured value of the Vessel. Parties agree that the burden of proving this is on OCBC.[63] The Defendants also cite *Kastor Navigation,* which held that the burden of proving a constructive total loss is on the owner of the vessel (OCBC in this case). However, in so far as the insurers in *Kastor Navigation* pleaded that the vessel was not a constructive total loss because it was already doomed to be an actual loss by sinking (instead of the fire that took place on the vessel), the burden of proving this fact lay with them (at [101]).

43 Preliminarily, I note that the question of whether the Vessel was a CTL, was considered by the English law experts. On the premise that there were no scrap dealers or brokers who were interested in purchasing the Vessel in her state after the capsize, OCBC's English law expert, Mr Andrew Guy Blackwood KC ("Mr Blackwood KC"), considered the Vessel to be a constructive total loss.[64] The Defendants' English law expert, Mr Steven John Berry KC ("Mr Berry KC"), disagreed with this. His view was that the resale value of the Vessel as scrap was irrelevant to the question of whether the Vessel was a CTL under

63 Scott Schedule – English Law Experts at p 5, S/N 10.

64 1st Expert Report of Andrew Guy Blackwood KC dated 21 August 2024 at para 156.

s 60(1) of the UK MIA 1906. The sole test was whether the cost of recovery and/or repair of the Vessel would exceed its insured value.[65]

44 Between the two, I am inclined to Mr Berry KC's view. Clause 19.1 of the ITC states expressly that "in ascertaining whether the vessel is a constructive total loss, … *nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account*" [emphasis added]. In any event, OCBC also does not appear to contend that it would suffice to show that the Vessel had no resale value in order to demonstrate that it was a constructive total loss. Instead, OCBC relies on various documents containing evidence about the extent of damage suffered by the Vessel and costs estimates of repairing and/or recovering the Vessel, to argue that it is a constructive total loss. It is these documents that I now turn to consider.

Admissibility of the CTL Documents

45 To summarise, OCBC relies on the following documents to demonstrate that the Vessel was a CTL ("the CTL Documents"):

(a) the 10 July Letter sent by the Vessel Owner to the Defendants, setting out the initial estimated cost of repair and/or recovery of the Vessel (between US$76m and US$82m) and enclosing documents to support the costs estimates (see [25] above);

(b) the 11 July Email from the Defendants to the Vessel Owner, stating that there appears to be no structural damage to and no internal

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[65] 2nd Expert Report of Steven John Berry KC dated 20 September 2024 at paras 114–115.

flooding of the Vessel, and putting forth figures of US$25m for repairs and US$17m–20m for salvage operations (see [26] above);

(c) the 22 July Email from the Vessel Owner to the Defendants, stating the Vessel Owner's position that the Vessel was a CTL (see [28] above);

(d) the SCRS Reports sent between 23 July 2018 and 25 July 2018 from Solis to the Vessel Owner and the Defendants, setting out Solis' observations regarding the extent of damage suffered by the Vessel (see [29] above);

(e) the Notice of Abandonment from the Vessel Owner dated 25 July 2018 to the Defendants, stating that the Vessel was a CTL, and providing costs estimates of around US$76m to US$85m, taking into account repair and salvage costs (see [30] above);

(f) the 26 July Email reply from the Defendants to the Vessel Owner rejecting the Notice of Abandonment, without responding to the Vessel Owner's costs estimates or the observations made in the SCRS Reports (see [33] above);

(g) the Dive Inspection Report issued on 4 August 2018 by the Salvors, setting out a more extensive list of findings concerning the damage to the Vessel (see [34] above);

(h) the 18 August Letter sent by the Vessel Owner to the Defendants stating that there were no buyers interested in purchasing the Vessel, even as scrap (see [36] above); and

(i) the Ship Brokers' Replies, compiled by the Vessel Owner, and which indicate that there were no potential buyers for the Vessel in her current condition. One shipbroker stated that he had no interest in the Vessel given the "general concern about the state of the unit, and what the Philippine Coastguard are willing to consider".[66] A shipbroker also stated that "no scrap cash buyers will take delivery of the vessel at present location and condition" (see [35] above).[67]

In its further reply submissions dated 17 March 2025, OCBC placed particular emphasis on the documents listed at (c), (e) and (g)–(i) above to establish that the Vessel was a CTL.

46 The CTL Documents are in the Agreed Bundle of Documents. There is no dispute over the authenticity of these documents. However, the documents were not adduced by any witnesses. The Court of Appeal has held in *Jet Holdings* that even where there is an agreed bundle of documents, the truth of the contents of the documents nevertheless remains at issue and is subject to objections centring on the doctrine of hearsay (at [44] and [76]).

47 OCBC submits that the hearsay exception found in EA s 32(1)(*b*)(iv) applies (hereinafter referred to as the "business records exception"). *Keimfarben* and *English Exporters*, which the Defendants cite, pre-dates the amendments made to s 32 of the EA, including the introduction of the hearsay exceptions therein.

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66 ABOD Volume 15 at p 8306.

67 ABOD Volume 15 at p 8273.

48 The exception in s 32(1)(*b*)(iv) of the EA provides that the following evidence may be admissible notwithstanding that it is hearsay evidence:

> a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation, and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons …

49 In *Management Corporation Strata Title Plan No 3556 (suing on behalf of itself and all subsidiary proprietors of Northstar @ AMK) v Orion-One Development Pte Ltd (in liquidation) and another* [2020] 3 SLR 373 ("*Orion-One*"), the High Court held at [22] that the rationale for the business records exception is that a statement made in the ordinary course of business is a record of historical fact made from a disinterested standpoint, and which may thereby be presumed to be true. In *Banque de Commerce et de Placements SA, DIFC Branch and another v China Aviation Oil (Singapore) Corp Ltd (Shandong Energy International (Singapore) Pte Ltd, third party; Golden Base Energy Pte Ltd, fourth party)* [2024] SGHC 145, the High Court held at [121] that in order for this exception to be engaged, the statements in question must have been made contemporaneously with the facts which have occurred, or as soon as the exigencies of the situation will permit.

50 In *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 ("*Gimpex*"), the Court of Appeal approached the inquiry in three steps. For the first step, the Court of Appeal considered if the evidence was hearsay. For the second step, it considered if the hearsay evidence was admissible pursuant to the exception in s 32(1)(*b*)(iv) of the EA. With

respect to this provision, the court cited (at [94]), Prof Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) ("*Pinsler*") at para 6.008 which states:

> The term 'record' is not defined in the EA. It may consist of a single document which includes information or two or more documents which contain information. In any event, it must be compiled by a person in the ordinary course of his trade, business, profession or other occupation. *There is no express requirement that the compiler and the persons who supplied the information included in the record must have personal knowledge of that information.*
>
> [emphasis in original]

51 For the third step, if it is found that the hearsay exception in s 32(1)(*b*)(iv) of the EA applies, the court is to consider if it should exercise its discretion to exclude the evidence in the interest of justice. This is pursuant to s 32(3) of the EA, which states:

> A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

52 At this stage, the court would balance the significance of the evidence (*ie*, its probative value) against any factors that militate against its admission (*eg*, the danger of unreliability or other harm which might compromise fair adjudication): *Gimpex* at [106] and [108]. The court should *not* normally exercise its discretion to exclude evidence that is declared to be admissible by the EA: *Gimpex* at [109]. The court should carefully consider whether the evidence is so deficient that it should be excluded under s 32(3) of the EA, or whether it should be admitted under s 32(5) of the EA but accorded less weight in light of its potential unreliability: *Gimpex* at [108] and [130].

53 With the above principles in mind, I consider if the CTL Documents should be admitted into evidence in this case. As a starting point, OCBC does not dispute that the CTL Documents are hearsay evidence. No witnesses were called to testify to the truth of the contents of the Documents at trial.

54 I note that the Defendants' hearsay objection only surfaced in its reply submissions dated 27 February 2025, which was some months after the close of trial. Our Court of Appeal has frowned upon belated hearsay objections which come after the close of trial and which relate to evidence that was in fact marked and admitted: see *Brian Ihaea Toki and others v Betty Lena Rewi and another* [2021] SGCA 37 ("*Brian Toki*") at [13]. In this case, however, the Defendants' belated objection was arguably caused by the fact that OCBC had only made clear reference to the CTL Documents in its first set of closing submissions dated 24 January 2025. I thus turn to consider the merits of the Defendants' objection on the basis of hearsay.

(1) Section 32(1)(*b*)(iv) of the EA

55 The first question is whether the hearsay exception in s 32(1)(*b*)(iv) of the EA is engaged, *viz*, whether the CTL Documents satisfy the business records exception. I reiterate that Defendants did not dispute, throughout the course their written submissions, that the CTL Documents are authentic (see [46] above). In addition, almost all of the CTL Documents were sent contemporaneously to the Defendants (see the documents listed at [45(a)]–[45(h)] above). Only the Ship Brokers' Replies were not sent directly to the Defendants (see [45(i)] above); and even then, the 18 August Letter set out a summary of the Vessel Owner's findings as derived from the Ship Brokers' Replies. In the circumstances, the Defendants would have been in the best position to dispute the authenticity of the CTL Documents. The Defendants have not made any such argument against

the authenticity of these documents, over the course of the trial and in their subsequent written submissions.

56 The 10 July and 18 August Letters, the 22 July Email and the Notice of Abandonment were prepared by the Vessel Owner in the ordinary course of their trade or business, as a follow up to the capsize of the Vessel. The 11 and 26 July Emails from Ms Neelamalar on behalf of the Defendants, were also made in the ordinary course of their trade or business, in response to the Vessel Owner's 10 July Letter and Notice of Abandonment. The SCRS Reports and the Dive Inspection Reports were prepared by the Salvors in the ordinary course of their business. The Ship Brokers' Replies were received and compiled by the Vessel Owner in their ordinary course of business, *ie*, in searching for potential buyers for the Vessel subsequent to her capsize. It is also clear from *Gimpex* at [94] and from the statutory wording of the EA, that there is no express requirement in s 32(1)(*b*)(iv) that the compiler and the persons who supplied the information included in the record, must have personal knowledge of that information.

57 The Defendants argue that the statements and information contained in the CTL Documents are "unilateral and self-serving" assertions that the Vessel was a constructive total loss.[68] Arguably, admission of such documents would cut against the rationale underlying the business records exception (*ie*, that a statement made in the course of business is a record of historical fact made from a disinterested standpoint: *Orion-One* at [22]).

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68 Defendants' Further Reply Submissions on Hearsay dated 7 April 2025 at para 9.

58 I do not accept this submission. In my judgment, the numerous reports stating the extent of damage to the Vessel (*ie*, the Dive Inspection Report, the SCRS Reports and the report appended to the 10 July Letter to support the Teras Entities' cost estimates) were prepared by *third party entities* who would have no interest in the claim under the MI. The assertions made by the Teras Entities in the CTL Documents that the Vessel was a constructive total loss, appear to be made on the basis of the findings and/or recommendations contained in these reports. To this extent, I find that the CTL Documents are records of fact made from a disinterested standpoint.

59 All things considered, I find that the CTL Documents are *prima facie* admissible as they fulfil the business records exception set out in s 32(1)(*b*)(iv) of the EA.

(2) Sections 32(3), 32(4)(*b*) and 32(5) of the EA

60 The next question is whether the court should exercise its discretion to exclude the evidence in the interest of justice, as is permitted under s 32(3) of the EA. There is also the related question of whether OCBC had sufficiently complied with the requirement to give notice of its reliance on the CTL Documents under s 32(4)(*b*) of the EA, and if not, the consequences of such a failure. As observed by the Court of Appeal in *Gimpex*, and more recently by Giles IJ in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2021] 3 SLR 215 ("*Kiri Industries*"), the considerations underlying both inquiries often overlap to a substantial degree: see *Gimpex* at [139]; *Kiri Industries* at [122].

61 I start by finding that there is probative value in the CTL Documents. They show that the Vessel Owners had provided to the Defendants: (a) costs

estimates that were over US$70m in total, with supporting documents on quotes received for such costs; (b) reports from Salvors on the extent of damage to the vessel; and (c) replies from ship brokers showing a lack of interest in the Vessel. The CTL Documents also show that the Defendants did not provide any substantive response to the cost estimates provided by the Vessel Owner or to the reports on damage to the Vessel. On the other hand, there do not appear to be factors militating against admission of the Documents – in contrast to *Gimpex* at [119]–[120], there are no well-substantiated allegations of unreliability levelled against any of the Documents. I also bear in mind that it was held in *Gimpex* (at [109]) that the court should *not* normally exercise its discretion to exclude evidence that is declared to be admissible by the EA. Having considered the circumstances in totality, I do not exercise my discretion to exclude the CTL Documents.

62 Turning to the requirement of notice, s 32(4)(*b*) of the EA prescribes that "evidence may not be given under [s 32(1)] … unless [there is compliance with] such notice requirements … as may be prescribed in the Rules of Court". This section is to be read in conjunction with O 38 r 4 of the Rules of Court (2014 Rev Ed) (the "ROC") which sets out the procedure and the prescribed form for the notice to be served: *Gimpex* at [136].

63 It would have been more prudent for OCBC to have given notice to the Defendants of its reliance on the CTL Documents. Nevertheless, and as stated in *Gimpex* at [137], it remains open to this court to exercise its discretion under O 2 of the ROC to cure the non-compliance. The question is whether such a discretion should be exercised in the present case.

64 The purpose of notice is to "enable the opposing party to carry out his own investigation prior to the trial in order to ascertain its significance and veracity and to secure information which may refute it or reduce its weight": *Pinsler* at para 6.042, cited with approval in *Gimpex* at [138]. Hence, whether or not such discretion should be exercised is "ultimately … much dependant on the extent to which the non-compliance causes prejudice to the opposing party which would render it unfair for the hearsay evidence to be admitted": *Gimpex* at [138]–[140]; see also *Kiri Industries* at [121].

65 In *Gimpex*, the plaintiff had not provided notice of its intention to rely on a report which was an instance of hearsay evidence. Nevertheless, the Court of Appeal found it appropriate to exercise its discretion under O 2 of the ROC to cure this non-compliance. It was difficult to see how the defendants in *Gimpex* were prejudiced by the lack of notice, especially given that they had taken full advantage of the opportunity to discredit the reliability of the report and that they had been allowed to cross examine several relevant witnesses: at [141].

66 Relying on *Gimpex*, the Defendants argue that the court's discretion to cure a non-compliance with the notice requirement, may only be exercised where there is "sufficient … opportunity being given to the opposing party to question the witness and challenge the hearsay evidence during the trial".[69] I do not accept this argument. In *Kiri Industries*, Giles IJ was satisfied that the non-compliance with the notice requirement should be cured, notwithstanding that the makers of the hearsay statements in that case were not available for cross examination: at [80(a)]. In that case, Giles IJ observed that the defendant "could

[69] Defendants' Further Reply Submissions on Hearsay dated 7 April 2025 at para 5.

have been in no doubt" that the relevant hearsay evidence would be relied on by the plaintiff in making its case and of its significance: at [123]. It was also relevant to consider the logistical difficulty in calling all the relevant statement makers to testify at trial. On balance, Giles IJ was of the view that there would be no real prejudice caused to the defendants in curing the plaintiff's failure to give notice: at [124]. For completeness, the majority in *Kiri Industries* were of the view that the evidence only constituted general hearsay; the rule against hearsay thus did not apply with full rigour: at [87], [100]–[101].

67 As a broader observation, it will often be an inevitable consequence of admitting hearsay evidence, that the maker of that statement will be unavailable for cross examination at trial: *Tan Hui Meng v Public Prosecutor and another appeal* [2025] SGHC 2 at [32]. Although this may cause a degree of prejudice to the opposing party, this prejudice "comes inherent with the admission of any hearsay evidence": *Jiangsu New Huaming International Trading Co Ltd v PT Musim Mas and another* [2024] SGHC 81 at [56]. The amendments made to the EA in 2012 make clear that the unavailability of the statement maker at trial, is no longer a condition for admissibility of hearsay evidence under s 32(1) of the EA: *Pinsler* at para 6.002. In other words, the hearsay exceptions in s 32 of the EA do not – and indeed, logically, cannot – fail to operate simply because the relevant statement makers were not called to trial. With that said, any party's decision not to call the relevant witnesses to trial, will necessarily expose it to the risk of a potential hearsay objection and an argument on prejudice. This is a risk that the party (like OCBC) will have to bear.

68 Having considered all factors, I exercise my discretion under O 2 of the ROC to cure OCBC's non-compliance with the notice requirement in s 32(4)(*b*) of the EA, read with O 38 r 4 of the ROC, as was requested by OCBC. On

balance, I find that there is no prejudice caused to the Defendants in curing the non-compliance.

69 Following from the observations made by Giles IJ in *Kiri Industries* (see [66] above) and keeping in mind the rationale for the notice requirement in s 32(4) of the EA (see [64] above), one key consideration regarding cure of lack of notice and prejudice, is whether the Defendants would have been aware of the CTL Documents and their significance, and further that OCBC would in all likelihood rely on them to make its case that the Vessel was a CTL.

70 I find that the Defendants would have been aware of the CTL Documents and their significance, and further, that OCBC would rely on them to prove that the Vessel was a CTL. As earlier noted, the CTL Documents are mainly comprised of Documents that were *contemporaneously sent to the Defendants* in 2018 (see [55] above). These Documents contain multiple statements of the Vessel Owner's position that the Vessel was a CTL: see, *eg*, the 22 July Email and Notice of Abandonment. Whether the Vessel was a CTL, was also identified by both the Defendants[70] and OCBC[71] as a live issue. In the circumstances, I find that the Defendants would have known that the CTL Documents were sent to the Defendants by the Vessel Owner, in order to make the case that the Vessel was a CTL. Moreover, the Defendants have had possession of these CTL Documents for about six years prior to the hearing of this suit.

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70 Defendants' List of Issues at S/N 2(a).

71 Plaintiff's List of Issues at para 4(b).

71 While the Defendants initially filed a notice of non-admission to various documents sought to be adduced by OCBC, which included all the CTL Documents, this objection was subsequently withdrawn. While the withdrawal goes towards the issue of authenticity rather than hearsay, the filing and withdrawal of such notice further reinforces that the Defendants were *fully aware* of such documents and of their contents. The CTL Documents were therefore marked and formed part of the Agreed Bundle of Documents for trial.

72 As further highlighted by OCBC, some of the CTL Documents (*viz*, the 10 July Letter and the SCRS Report dated 23 July) were in fact disclosed by the Defendants through their List of Documents.[72] Other CTL Documents (*viz*, the Dive Inspection Report and the Notice of Abandonment) were referred to in the affidavits filed by the Defendants' factual and expert witnesses.[73] In *Brian Toki*, the Court of Appeal dismissed a party's hearsay objection after considering that the objecting party had itself introduced an email into evidence by including it in its witness affidavit: at [13].

73 The Defendants argue that although some of the Documents above were introduced by the Defendants' expert witnesses, that this cannot be taken as an admission to the truth of their contents. This is because experts can, and do, produce their opinion based on certain assumptions of fact which must then be admissible and proven separately: see, *eg*, *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [30]; *Pinsler* at paras 8.044–8.049. In my judgment, this

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[72] Defendants' List of Documents dated 20 October 2022 at S/N 36 (10 July Letter) and S/N 37–38 (SCRS Report dated 23 July 2018).

[73] AEIC of Captain Nicolas James Allan White dated 23 October 2024 at p 122, para 5.6.9 and Tab 54; AEIC of Mr Hu Zhigong (Leon) dated 20 September 2024 at p 21, para 4.4.11; AEIC of Mr Vikas Shukla dated 27 August 2024 at p 13, para 34 and Tab 8.

argument misses the point. The material issue here is not whether the Defendants' experts were giving opinion evidence or otherwise. Ultimately, the question of whether the CTL Documents are admissible, is governed by the hearsay regime and the provisions of the EA. The CTL Documents are not admitted solely because the Defendants' witnesses introduced such documents. The fact that the Defendants' witnesses had referred to certain CTL Documents is nevertheless relevant to considering whether there is *prejudice* caused by curing the non-compliance with the notice requirement. It goes towards suggesting that the Defendants had been well aware of the CTL Documents all along in spite of OCBC's failure to provide notice of its reliance on the same.

74 The Defendants have also not levelled any substantive objection throughout the course of the written submissions, to raise any doubt that the opinions stated in the CTL Documents were indeed made by their makers, or that the makers of such opinions had no personal knowledge of what is contained within, whether it be the Vessel Owner's correspondence setting out their estimation of the costs of repair and salvage, the findings in the SCRS reports or the findings in the Dive Inspection Reports. All that the Defendants have made is a bare denial that the Vessel was not a CTL (see [79] below).

75 For these reasons, I do not find that OCBC's failure to give notice would have affected the Defendants' right to carry out their own investigations in relation to the significance and veracity of the CTL Documents and I do not find that the Defendants would be prejudiced by the admission of the CTL Documents. I thus exercise my discretion under O 2 of the ROC to cure the non-compliance with the notice requirement in s 32(4)(*b*) of the EA read with O 38 r 4 of the ROC. For the reasons provided here and above, I also find that the CTL Documents should be accorded full weight: s 32(5) of the EA.

Whether the Documents prove that the Vessel was a CTL

76 I now assess the effect of allowing the CTL Documents. In my judgment, the evidence in the CTL Documents establish a *prima facie* case that there was constructive total loss of the Vessel, in that the cost of recovery and/or repair would exceed the insured value. The Vessel Owner had initially provided London Offshore Consultants Pte Ltd ("LOC") and the Defendants with costs estimates of US$50–56m for repairs and US$24m for salvage. Even taking the estimated repair costs to be at the lowest end of this range, the total cost of recovery (*ie*, US$74m) would have by that point exceeded the insured value of the Vessel (*ie*, US$70m). For completeness, caselaw confirms that all reasonable costs of salvaging and safeguarding the vessel from the time of casualty onwards are to be considered in calculation, together with the prospective cost of repairing the vessel; see *Connect Shipping Inc and another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and others; The Renos* [2019] 4 All ER 885 ("*The Renos*") at [10]–[19].

77 The basis for the Defendants' initial rejection of the Vessel Owner's estimates, in the 11 July Email, is that there might not have been any structural damage of the Vessel (see [26] above). However, the Defendants themselves also noted in that email, that Salvors would be undertaking a comprehensive inspection of the Vessel in the coming days, and that it would be premature to conclude at that point of time that the Vessel was a CTL. The Defendants' initial view that there was no structural damage was undermined by the findings later made in the Dive Inspection Report. While the Defendants now point to the

Report having observed no damage to the *hull* of the Vessel,[74] the Report did cite multiple other forms of extensive damage to the Vessel.

78 The Notice of Abandonment also contained the Vessel Owner's updated estimates of the costs of recovery and repair, to which the Defendants provided no response, either then or at the trial. The Ship Brokers' Replies show the concerns of ship brokers with the condition and location of the Vessel.

79 In light of the above *prima facie* evidence, I find that the *evidential* burden shifts to the Defendants to demonstrate why the Vessel was not a CTL, either by demonstrating that the Vessel Owner's costs estimates were incorrect or for any other reason.

80 All that is on record before the court is LOC's initial objections to the Vessel Owner's estimates of repair costs on the grounds that there appears to be "no structural damage". However, the Defendants have not provided any explanation as to why this would still be valid, given the findings of extensive damage in the later issued Dive Inspection Report. Nor have the Defendants made any suggestion that there are other reasons why these estimates would be wrong. Instead, their defence is solely anchored on OCBC not having provided any witnesses who testified to the costs of recovery and/or repair.[75] This is far from sufficient to discharge the Defendants' evidential burden, in light of the documentary evidence that is before the court.

81 In any event, and even if a discount is to be applied to the estimated costs of repair and/or recovery as set out in the CTL Documents on the basis that these

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74 DCS at para 34; ABOD Volume 14 at p 8213.

75 DCS at paras 23–35.

numbers have not been tested by experts, I note that the proper test to apply to determine whether a vessel is a CTL, is the prudent uninsured test: *Suez Fortune Investments Ltd v Talbot Underwriting Ltd; The M/V Brillante Virtuoso* [2015] 1 Lloyd's Rep 651 ("*Brillante Virtuoso*") at [88] and [90]; *The Renos* at [26]; *Arnould: Law of Marine Insurance and Average* (Sweet & Maxwell, 20th Ed, 2021) ("*Arnould*") at paras 29-27–29-30. Parties accept this.[76] As explained in *Venetico Marine SA v International General Insurance Co Ltd and Nineteen others* [2013] EWHC 3644 (Comm) ("*Irene EM*") at [438]:

> … The proper approach to the question of what was the cost of repairs is, as I understand the law, *what would be their cost to a prudent uninsured shipowner*. In *Roux v Salvador* (1836) 3 Bing NC 266, 286, 7 LJ Ex 328, 4 Scott 1, 132 ER 413 (cited in Arnould (loc cit) para 28-020,) Lord Abinger CJ put it in terms of whether "*. . . a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished*".
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> [emphasis added]

82 As further developed in *Brillante Virtuoso*, the application of the prudent uninsured test means that in relation to matters which cannot be determined with precision, such as the extent of damage to items of machinery and equipment which were not opened up and tested, the court has to apply to any repair estimate, a "large margin" of error. This is by no means reversing the burden of proof. It instead recognises that a margin of error must be applied in estimating the cost of repair and/or recovery of a damaged good in a case where it is not possible to investigate or assess the extent of damage to the good with precision: at [92].

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[76] Defendants' Final Submission dated 2 April 2025 at para 2; Plaintiff's 2nd Further Reply Submissions dated 2 April 2025 at para 21.

83 In the present case, I observe that the Vessel suffered a significant loss of buoyancy on 20 August 2018, and that the Vessel was scuttled as a result.[77] In light of her scuttling, it would have been impossible for OCBC to conduct any further study into the condition of the Vessel beyond what was contained in the CTL Documents. Applying the "large margin of error" as set out in *Brillante Virtuoso* thus further supports my earlier conclusion that there is *prima facie* evidence, that the Vessel was a CTL. As stated, the evidential burden shifts to the Defendants to demonstrate why the Vessel was not a CTL. As I have earlier explained, the Defendants' submissions do not go towards discharging this burden (see [79] above).

84 The Defendants do not dispute the principle in *Brillante Virtuoso*, but seek to distinguish its application here, on the basis that there was extensive evidence presented in court there by factual and expert witnesses. This is in contrast to the situation here, where there is no evidence to assist the court on the costs of repairs. For example, the Defendants submit that the Dive Inspection Report does not support any conclusion of CTL.[78] However, as I have explained above at [76]–[79], the CTL documents present a *prima facie* case of CTL. This shifts the evidential burden to the Defendants, a burden which the Defendants have not discharged.

85 On a related note, I reject the Defendants' argument that the scuttling of the Vessel was "deliberate" and that this had "removed any opportunity for determining the extent of the loss, whether CTL or Partial Loss".[79] In the 18

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77 Plaintiff's Reply Closing Submissions dated 27 February 2025 at para 30(b).

78 Defendants' Submissions on s 32 Evidence Act dated 24 March 2025 at para 7.

79 DCS at para 34.

August Letter, OCBC first informed the Defendants that the Vessel may have to be scuttled due to her poor condition and the lack of interested parties in purchasing her (see [36] above). By way of a report dated 20 August 2018, the Vessel was observed, with the salvage team on-site, to have suffered a "[v]ery noticeable change in [her] buoyancy status / condition" (at 8:15am), and to have "[l]ost buoyancy on aft and midship section" (at 8:18am). The decision to release the Vessel was made shortly after at 8:30am.[80] It did not appear, based on the contemporaneous evidence available to the court, that the decision to scuttle the Vessel was deliberately made to conceal evidence on the state of the Vessel. As OCBC point out, it would not have made sense for the Teras Entities to pay to carry out extensive studies on the state of the Vessel in July 2018 and/or to contact ship brokers in relation to sale or disposal of the Vessel, if it had been their intention to scuttle the Vessel all along.[81]

86 For the foregoing reasons, I find that OCBC has satisfied its legal burden of proving that the Vessel was a CTL under s 60(2)(ii) of the UK MIA 1906 and cl 19 of the ITC.

Whether the loss of the Vessel is covered by the Marine Insurance

87 The second main issue is whether the loss of the Vessel is covered by the MI. As reproduced at [21] above, cl 6.1.1 of the ITC provides that the MI "covers loss of or damage to the subject-matter insured caused by… *perils of the seas* rivers lakes or other navigable waters" [emphasis added].

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80 ABOD Volume 15 at B-269 and p 8313.

81 Plaintiff's Reply Closing Submissions dated 27 February 2025 at para 30(e).

88 As the MI is governed by English law, the term "perils of the seas" is to be interpreted by reference to English law.

89 In this regard, OCBC's English law expert, Mr Blackwood KC, opined that the term "perils of the seas" means:[82]

> (a) Where there is an accidental unexpected ingress of seawater into a vessel causing loss or damage, *prima facie* there is a loss by perils of the seas; see decision of the Privy Council in *Canada Rice Mills v Union Marine and General Insurance* [1941] AC 55 ("*Canada Rice Mills*") at [1826]–[1827].
>
> (b) It is only if the loss could be said to be due to uneventful decrepitude of a vessel in the prevailing conditions or to inherent characteristics of the vessel not involving any fortuitous external accident or casualty, that the Defendants would have a defence based on ordinary action of wind and waves.
>
> (c) The burden of proving that some fortuity occurred would be on OCBC and the burden of proving loss by way of an inherent vice, here decrepitude, would be on the Defendants. However, if OCBC can prove any fortuity the Defendants' defence based on ordinary action of wind and waves would fail."

90 The Defendants' English law expert, Mr Berry KC, agrees with Mr Blackwood regarding the meaning of "perils of the seas".[83]

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82 1st Expert Report of Andrew Guy Blackwood KC dated 21 August 2024 at para 150.

83 2nd Expert Report of Steven John Berry KC dated 20 September 2024 at para 112.

91 With this in mind, I turn to address the specific arguments raised by the Defendants which relate to whether the loss of the Vessel was covered by the MI.

Burden of Proof

92 The parties do not dispute that the burden of proving that the loss of the Vessel was due to "perils of the seas" is on OCBC as the assured and that the burden of providing decrepitude is on the Defendants.[84] This also coheres with the opinion of both English law experts.[85]

93 After the close of trial, the Defendants raised the argument that if OCBC cannot explain how the Vessel capsized, it fails to prove that the loss was due to "perils of the seas". I directed the Defendants to flesh out this new argument, so that parties could properly respond to it in their closing submissions. When the Defendants did so, they cited *Rhesa Shipping Co. S.A. v Herbert David Edmunds, The Popi M* [1985] 1 WLR 948 ("*The Popi M*"), for the proposition that if on the evidence, OCBC cannot explain how the vessel capsized, it fails to prove fortuitous accident or casualty.

94 In their closing submissions, the Defendants took this argument a step further. They submitted that OCBC must not only show that water entered the ship, but also that there was an aperture that permitted water to enter the ship in the first place, and what created it.[86]

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84 PCS at p 18, para 22(d).

85 1st Expert Report of Andrew Guy Blackwood KC dated 21 August 2024 at para 150; 2nd Expert Report of Steven John Berry KC dated 20 September 2024 at para 112.

86 DCS at para 46.

95 This submission of the Defendants relates to the burden of proof regarding "perils of the seas", which parties have agreed is an English law matter. Hence, the Defendants should have raised this to the English law experts when they were preparing their reports and/or during their experts' conference during the trial. However, the Defendants did not do so. Nevertheless, I note that OCBC did not object to the Defendants' *The Popi M* argument, on this ground, but submitted on the merits.

96 Having considered the parties' submissions and the relevant authorities, I find that *The Popi M* does not support the Defendants' case. The Defendants cite Lord Brandon at 953–954:

> … It seems to me, however, that once it was shown that the water which sank the ship had entered through an aperture in her shell plating, the burden of proof was on the shipowners to show what peril of the sea, if any, could be shown, on a balance of probabilities, to have created that aperture. *The shipowners could not, in my view, rely on a ritual incantation of the generic expression "perils of the sea", but were bound, if they were to discharge successfully the burden of proof to which I have referred, to condescend to particularity in the matter.*
>
> …
>
> In my opinion Mr Justice Bingham adopted an erroneous approach to this case by regarding himself as compelled to choose between two theories, both of which he regarded as improbable and the other of which he regarded as virtually impossible. He should have borne in mind, and considered carefully in his judgment, the third alternative which was open to him, namely, that *the evidence left him in doubt as to the cause of the aperture in the ship's hull, and that, in these circumstances, the shipowners had failed to discharge the burden of proof which was on them.*
>
> [emphasis added]

97 With respect, the Defendants' submission is based on a misreading of *The Popi M*. As can be seen from the passage relied on by the Defendants, the reasoning was fact-centric. Lord Brandon did not state that test in *Canada Rice*

Mills was to be changed. Nor did Lord Brandon state the general proposition which the Defendants submit, namely that if a shipowner cannot explain how the Vessel capsized, it fails to prove that the loss was due to "perils of the seas".

98 Instead, Lord Brandon started by acknowledging that the shipowners sought to rely on the established principle that "if a seaworthy ship sinks in unexplained circumstances in good weather and calm seas, there is a rebuttable presumption that she was lost by perils of the sea" (at p 4). However, this did not apply for two reasons. First, "Mr. Justice Bingham felt unable to make a finding one way or the other on the question whether the ship was seaworthy" (at p 4). Second, "the loss did not occur in unexplained circumstances" (at p 4). The reasons why the vessel in *The Popi M* sank were clear. Lord Brandon took into account the fact that it was shown on the evidence in that case, that the water which sank the 26-year-old ship had entered through an aperture in her shell plating. Lord Brandon also noted that Mr Justice Bingham had found that the ship's shell plating "were still in a generally wasted condition" (at p 3). In the circumstances, the burden was on the shipowners to show on a balance of probabilities what created that aperture, in order to discharge their burden of proof that the loss was due to "perils of the seas".

99 The above reading is fortified by the analysis of *The Popi M* by Colman J in *Glowrange Ltd v CGU Insurance plc* [2001] All ER (D) 339 ("*Glowrange*"), at [26]:

> The passage in Lord Brandon's speech at the foot of page 953 in which he observed:
>
> > "that once it was shown that the water which sank the ship had entered through an aperture in her shell plating, *the burden of proof was on the shipowners*"
>
> *has to be read against the background that the judge was left in doubt whether the vessel was seaworthy* and that there was

> evidence which established precisely where the water entered the hull. *That passage is, in my judgment, to be understood as stating no more than that on the facts before the court the assured could only discharge the burden of proof of a loss by perils of the seas if it put forward an explanation for that water entry which was both not attributable to the general debility of the vessel and which was intrinsically sufficiently probable.* Had there been a finding that the vessel was seaworthy, that is to say, not so debilitated that it could not withstand the ordinary action of the wind and waves in the favourable conditions experienced, *the assured would have established that it was to be inferred that the sea water entry must on the balance of probabilities have been due to perils of the seas, without the need to advance any particular explanation, such as collision with a submarine*. In this connection I agree with the observations of Toulson J. in *The S/Y Delphine* (Unrep 30.4.01) at para 20 of his judgment that Lord Brandon's remarks as to *the need for the assured to "condescend to particulars" was to be understood in the context of the unusual facts in The POPI M.* Where the assured is able to eliminate unseaworthiness amounting to general debility at the start of the voyage, as well as other uninsured perils, such as scuttling, but *yet is unable to adduce evidence which explains precisely how water entered the vessel and caused it to sink, the inference may ordinarily properly be drawn that the loss was caused by perils of the sea.* In my judgment, nothing in the speech of Lord Brandon in *The POPI M* has disturbed the well-established approach to unexplained losses exemplified by *Anderson v. Morice* (1874) LR 10 CP 58 and *Ajum Goolam Hossen & Co v. Union Marine Insurance Co Ltd* [1901] AC 362, both of which cases were cited in the *Popi M*.
>
> [emphasis added]

100 Colman J's reading of *The Popi M* is consistent with the long-established line of authorities on this issue, which were cited in *The Popi M*. In *Goolam Hossen & Co v Union Marine Insurance Co Ltd* [1900-03] All ER Rep Ext 1506 ("*Goolam*"), it was held that the defence of unseaworthiness cannot be established unless "the balance of evidence warrants the conclusion that the ship was unseaworthy when she sailed", even in a case where the assured is unable to prove the proximate cause of the loss; at 1509. In other words, a plaintiff's

failure to establish the cause of capsize does *not* warrant a finding that the ship was unseaworthy. The court held at 1511:

> … The real cause of the loss is unknown, and cannot be ascertained from the evidence adduced in this action. But underwriters take the risk of loss from unascertainable causes; and, after carefully weighing all the evidence and bearing in mind the presumption of unseaworthiness on which the underwriters rely, their Lordships have come to the conclusion that unseaworthiness at the time of sailing is not proved.

101 In *Anderson v Morice* [1874] LR 10 CP 58 ("*Anderson*"), the court considered the burden of proof to be as follows (at 67–68)

> Dealing, first, with the question raised as to *seaworthiness and loss by a peril insured against*, we think that, *where the only evidence of fact as to either of those questions is, that the ship sank in smooth water very soon after the attaching of the policy, the significance of such a fact cannot be displaced by mere opinion founded on mere conjecture*. We think that the true significance of such evidence is to be termed a presumption, and a shifting of the burden of proof; and that, where such a fact is the only fact in evidence, there being no other evidence as to the condition of the ship, or as to a cause of loss, it is evidence on which a jury ought to find, and should therefore be directed to find, if they believe the evidence, that the ship was unseaworthy at the inception of the risk. But, where there is other evidence of the condition of the ship, or of a cause of the loss, then the fact of the ship sinking in smooth water becomes one of several facts which must all be left to the jury. *If from other facts - such as a large amount of repairs recently done, careful surveys recently made, excellent conduct of the ship up to a time immediately preceding the loss, or otherwise - a jury conclude that the ship was seaworthy at the inception of the risk, then the jury may further find that the loss was occasioned by a peril insured against, though they are unable to ascertain or safely conjecture what it was which caused the ship to sink*.
>
> [emphasis added]

102 The position in *Goolam* and *Anderson,* is consistent with *Canada Rice Mills* and as explained above, *The Popi M*. In addition, it was also recently observed by our Court of Appeal in *Re Fullerton Capital Ltd (in liquidation*)

[2025] SGCA 11 ("*Re Fullerton*") at [78] that the balance of probabilities test does not entail the court choosing between two alternatives advanced by the parties. Instead, *The Popi M* stands for a more general proposition, *viz*, that it is open to a court to find that "neither party's theory is more probable than not and [to] decide the issue based on the incidence of the burden of proof".

103 *Goolam*, *Andreson* and *Glowrange* were brought to the attention of the Defendants by the court. The Defendants did not contend that these authorities were wrong; they instead submitted that the scenario that Colman J was considering in *Glowrange* is far from this case, as there cannot be an assumption that the Vessel was seaworthy.[87]

104 In summary, and contrary to the Defendants' submission, I find that there is no burden on OCBC to show that there was an aperture that permitted water to enter the ship in the first place, and what created it. The burden of proof regarding "perils of the seas" and "decrepitude" is as set out and agreed to by both English law experts (see [42] above). In other words, where there is an accidental unexpected ingress of seawater into a vessel causing loss or damage, *prima facie* there is a loss by perils of the seas. It is only if the loss could be said to be due to uneventful decrepitude of a vessel in the prevailing conditions or to inherent characteristics of the vessel not involving any fortuitous external accident or casualty, that the Defendants would have any defence based on ordinary action of wind and waves.

Evidence on the state of the Vessel

105 With that, I turn to consider the evidence on the state of the Vessel.

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87 Defendants' Reply Submission ("DRS") at para 18.

OCBC's case

106 OCBC highlight that the Vessel was a newbuild at the time of the capsize and that the Tow Voyage was the Vessel's maiden voyage.[88] Prior to departure, the Vessel obtained all relevant certifications from the MWS and the ABS. In addition, the Defendants acknowledged that the hull remained intact, and that "no damage to the hull structure was observed" based on the underwater dive inspection.

Defendants' case

107 The Defendants submit that the Vessel was a debility or a decrepitude,[89] based on the following:

(a) The Vessel failed to comply with the Operations Manual ("OM") requirement that it lower the legs by 18.4m as soon as the water depth permitted. This resulted in it being in a configuration that would fail to meet a minimum wind velocity of 70 knot. As the Vessel failed its intact stability criteria with the legs fully retracted, it was unseaworthy at the commencement of the voyage.[90]

(b) The Vessel failed to comply with the OM which mandated the Vessel to be dry towed if it involved an ocean passage.[91]

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88 PCS at p 18, para 39.

89 Defence (Amendment No. 5) ("Defence-A5") at para 36.

90 DRS at para 29(a).

91 DRS at para 29(b)

(c) The Vessel's low freeboard of 0.9m would have and was exposed to shipping seas. Such shipping of green water on deck is a clear violation of the OM.[92]

(d) The fitting of the securing appliances, at least some of which were in the locked position, to the freeing ports was a clear breach of the International Convention on Load Lines ("ICLL").[93]

Following from the above, there is a probability – or at the very least, the probability could not be eliminated – that the Vessel was inherently unstable, and accordingly unseaworthy (based on the Defendants' expert evidence).[94]

Decision

108 As agreed to by both English law experts, the Defendants would only have a defence based on the ordinary action of the wind and waves if they are able to demonstrate that the Vessel was a "decrepitude" (see [89(b)] above).

109 Popplewell J identified in *Versloot Dredging BV and another company v HDI Gerling Industrie Versicherung AG and other companies* [2013] EWHC 1666 (Comm) ("*The DC Merwestone*") at [56]–[57], two themes in the authorities where "debility" as a form of unseaworthiness defeats a time policy. The first is debility associated with *normal wear and tear*, whether caused by the sea or otherwise. The second is associated with cases where there has been no more than the ordinary action of wind and waves, as contrasted with some external fortuitous event which has allowed the ingress of seawater. The

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92 DRS at para 29(c).

93 DRS at para 29(d).

94 DRS at para 32.

debility here is sometimes paraphrased as inherent weakness, the distinction being between a deficiency that is inherent and that which arises from an external event.[95] As observed by the learned authors of *Arnould*, the distinction is to be drawn between damage caused by any external occurrence, and damage resulting solely from the nature of the thing itself: at para 22-41; see also *Global Process Systems Inc and another v Syarikat Takaful Malaysia Bhd* [2011] UKSC 5 ("*Cendor MOPU*") at [113].

110 One clear example of a loss caused by the decrepitude or debility of a vessel, is where the ingress of water into a vessel is caused "wholly due to the rotten condition of [the vessel's] hulk" and "not in any sense due to sea peril": see *Sassoon (E D) & Co v Western Assurance Co* [1912] AC 561 at 563–564. On the other hand, a loss caused by the negligence of the vessel crew is properly classified as loss by an external fortuitous event, not by an inherent weakness of the vessel. The facts of *The DC Merwestone* are illustrative. Prior to the departure of the vessel in that case, the crew used the vessel's emergency fire pump and lines to blast away chipped ice on the vessel's hatch covers. After this was completed, the crew negligently failed to drain the seawater from the emergency fire pump or close the sea inlet valve to the pump before the vessel departed port. This eventually led to an ingress of seawater into the vessel's engine room, causing the vessel's main engine to be damaged beyond repair: *The DC Merwestone* at [21]. The underwriters submitted that this loss was caused by an inherent vice of the vessel, *viz*, that the damage to the emergency fire pump and the filter lid had already occurred before the vessel's departure; the ingress of seawater was thus "bound to occur … even in the most benign

[95] While *The DC Merwestone* was not cited by either of the English Law experts, parties agreed with the principle set out therein.

conditions" of the sea. Popplewell J rejected this argument, finding that the ingress of water was proximately caused by an external fortuitous event, *viz*, the crew's negligence in relation to the emergency fire pumping system. It was *not* caused by any inherent weakness to the vessel that was a result of ordinary wear and tear. In the circumstances, it would have been a "*false analogy*" [emphasis added] to treat the lack of watertightness of the vessel as falling within the particular kind of debilitative unseaworthiness that would render a casualty other than fortuitous: *The DC Merwestone* at [60]–[61].

111 Returning to the present case, it can be seen from the Defendants' submissions, that they do not argue that there is any inherent defect or weakness with the structure of the Vessel itself. Rather, the thrust of their submission is that the Vessel did not comply with aspects of the OM or the ICLL, which raised the possibility that it was inherently unstable and consequently unseaworthy. None of these allegations, even if they are made out, go towards demonstrating that the Vessel was a decrepitude. In other words, even if the Defendants are able to demonstrate that the capsize of the Vessel was caused by the various alleged instances of non-compliance with the OM or the ICLL, these would still constitute external fortuitous events; the loss would still be one properly caused by the "perils of the seas".

112 Even in the case of *Glowrange* cited by the Defendants,[96] the court made clear that only *general debility* of the Vessel may give the Defendants a defence based on the ordinary action of wind and waves (at [26] and [33]):

> … Where the assured is able to eliminate unseaworthiness amounting to *general debility* at the start of the voyage, as well as other uninsured perils, such as scuttling, but yet is unable

[96] Defendants' Further Reply Submissions at para 10.

> to adduce evidence which explains precisely how water entered the vessel and caused it to sink, the inference may ordinarily properly be drawn that the loss was caused by perils of the sea.
>
> …
> I have referred to the position where the loss cannot be specifically explained, but yet there may be an inference that it was nonetheless caused by perils of the seas, that inference being drawn from the whole of the evidence, including the condition of the vessel when she sailed. In this connection, it is to be observed that the relevant condition of the vessel for the purposes of this inference is that it was sufficiently seaworthy to withstand the ordinary action of the wind and waves, *that is to say that it was in all relevant respects in a condition better than that of general debility, and not that it was in such a condition as to be able to withstand adverse but unexceptional sea conditions. Obviously, however, the better the condition of a vessel over and above general debility, the more ready the court will be to infer that a loss which cannot be precisely explained was caused by perils of the seas, as distinct from scuttling.*
>
> [emphasis added]

113 I thus do not find that OCBC's claim under the MI can be defeated on this basis. Nevertheless, and for completeness, I briefly consider the arguments on lack of seaworthiness raised by the Defendants. In my judgment, there is insufficient evidence to demonstrate that the Vessel was inherently unstable or unseaworthy.

114 As a starting point, the Vessel was a newbuild at the time of the capsize and that the Tow Voyage was the Vessel's maiden voyage. Prior to the Tow Voyage, both the ABS and the MWS performed further surveys on the Vessel. Thereafter, the following eight certificates were issued in respect of the Vessel:

> (a) By the ABS: (i) the ABS Fit-for-Tow Certificate; (ii) the ABS Class Survey Report; (iii) the ABS Load Line Certificate; and (iv) ABS the Statutory Survey Report (see [11] above);

(b) By the MWS: (i) the MWS Fit-for-Tow Certificate; (ii) the MWS Certificate of Approval; (iii) the MWS Suitability Survey Report; and (iv) the MWS Sailaway Attendance Report (see [14] above).

115 In addition, prior to departure, the Vessel obtained all relevant certifications from ABS (her classification society). These certificates included (i) the Mobile Offshore Drilling Units ("MODU") Safety Certificate dated 1 October 2016; (ii) the ABS International Load Line Certificate dated 1 October 2016; and (iii) the ABS Certificate of Classification dated 20 October 2016.[97]

116 In *Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR(R) 689 ("*Marina Offshore*"), Justice Prakash (delivering the judgment of the Court of Appeal) observed at [81] that:

> … while a vessel must meet the requirements specified by a classification society in order to be classed with that society, *classification in itself does not equate to seaworthiness or unseaworthiness*. Seaworthiness has to be judged in relation to a particular voyage and the fact that a vessel is not classed does not mean that she is *ipso facto* unseaworthy for the purposes of the voyage. …
>
> [emphasis added]

The court went on to find that the vessel in question was seaworthy despite it being reclassed after her voyage (at [81]).

117 Following *Marina Offshore*, I do not find that the ABS classifications in themselves equate to seaworthiness of the Vessel, although they form part of the consideration. In this case, besides the ABS classifications, the MWS had

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97 PCS at para 42.

also conducted surveys and considered the vessel safe for undertaking the voyage. At trial, I asked both master mariner experts if there would be matters not surveyed by the ABS and the MWS in respect of the preparations and planning for the Tow Voyage. OCBC's master mariner expert, Captain John Simpson ("Cpt Simpson") testified that in his view, the ABS and the MWS would between them provide a holistic assessment. The Defendants' master mariner expert, Captain Nicolas James Allan White ("Cpt White") then stated that he would not disagree with that.[98]

118 After the capsize, the underwater dive inspection found that "no damage to the hull structure was observed". This was a point which the Defendants have acknowledged.[99]

119 A further consideration is that the Vessel did not capsize for six days after starting the Tow Voyage and there were no clear signs that it would capsize, before it did so on the afternoon of 5 June 2018. The Vessel capsized quickly, around two hours after it was first was observed to list to port at 3.45pm on 5 June 2018. As pointed out in *Anderson,* the "*conduct of the ship up to a time immediately preceding the loss*" [emphasis added], is a relevant fact.

120 At this juncture, it suffices for me to state that I do not find any evidence of the alleged breaches of the OM and/or the ICLL. Neither do I find that there is sufficient evidence that these alleged breaches contributed to the inherently instability of the vessel, not to mention lack of seaworthiness. As these are points which arise in more detail in the Defendants' submissions on the cause

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98 Notes of Evidence ("NE") 13 November 2024 Hearing at p 136 line 24–p 138 line 2, p 138 line 3–p 139 line 6 and p 139 lines 9–13.

99 DCS at paras 40 and 42.

of capsize and breach of warranties, I will provide my analysis of them in more detail below.

Evidence on capsize

121 Following from the above analysis, the issue of whether the loss of the Vessel was caused by perils of the seas, turns on the expert evidence regarding the capsize of the Vessel.

122 The Vessel showed no signs of distress and/or irregular taking on of water during the first six days of the Tow Voyage, when she faced weather conditions rougher than those at the time of the capsize. The Vessel was observed to list to port at 3.45pm on 5 June 2018 and capsized shortly after at 5.50pm.

OCBC's case

123 OCBC relies on the evidence of its naval architecture expert, Ms Rosalind Blazejczyk ("Ms Blazejczyk") regarding the capsize. She started her analysis using photographic evidence of the Vessel immediately before the capsize. The photograph set out below was taken from the Tug positioned at the port side of the Vessel, at approximately 4.25pm on 5 June 2018 ("the Photograph").[100] Ms Blazejczyk then performed calculations through the General Hydrostatics ("GHS") Model, to estimate how the Vessel could have taken on the list and trim as shown in the Photograph.

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100 Expert Report of Ms Rosalind Blazejczyk dated 21 August 2024 at para 6.6.5.

124 Ms Blazejczyk testified to the following.

125 First, wind and waves alone could not have caused the capsize, and green water on deck was unlikely as the time of the capsize. Hence, the most likely cause of the capsize must have been water ingress to the hull of the Vessel resulting in loss of buoyancy.[101]

126 Second, based on the Vessel's condition seen from the Photograph, "the Vessel had taken on a large trim by the stern by that time". Ms Blazejczyk opined that such an occurrence could only be explained by "added weight or lost buoyancy in the aft part of a vessel, or alternatively, lost weight or added buoyancy in the forward part of a vessel". However, because "there is no feasible means by which any significant weights could have been added to or removed from the vessel, and it cannot have gained buoyancy forward", Ms Blazejczyk was of the opinion that "*the only possible explanation for such*

101 Expert Report of Ms Rosalind Blazejczyk dated 21 August 2024 at para 6.6.1.

a change in trim is a loss of buoyancy due to water ingress in the aft compartments of the hull" [emphasis added].[102]

127 Third, Ms Blazejczyk created a model to replicate the estimated condition of the Vessel based on the Photograph. The results of the model indicate that "for the Vessel to assume the condition shown in [the Photograph], there would have been around *450 tonnes of water ingress at this time*" [emphasis added], although this is qualified as an estimate.[103]

128 Fourth, Ms Blazejczyk used the model to "investigate many possible flooding scenarios with various combinations of compartments flooded. Those that showed a reasonable correlation with the photographic evidence, that is a significant stern down trim, were then analysed in greater detail". From that, she concluded that there were two flooding scenarios which was most supported by the photographic evidence.[104]

129 OCBC submits that while Ms Blazejczyk could not eventually pinpoint the precise cause of initial water ingress, the question of how water had entered the hull of the Vessel is ultimately irrelevant to the analysis of whether the capsize was fortuitous. What needs to be established is that water ingress was *accidental* and *unexpected*, and it caused the Vessel to lose buoyancy and stability, eventually resulting in the capsize. In UK Supreme Court decision of *The Cendor MOPU* [2011] UKSC 5, Lord Mance states at [81] that:

> … it would only be if the loss or damage could be said to be due either to uneventful wear and tear (or "debility") in the

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102 Expert Report of Ms Rosalind Blazejczyk dated 21 August 2024 at para 6.6.3.

103 Expert Report of Ms Rosalind Blazejczyk dated 21 August 2024 at para 6.6.4.

104 Expert Report of Ms Rosalind Blazejczyk dated 21 August 2024 at paras 6.6.5–6.9.8.

> prevailing weather conditions or to inherent characteristics of the hull or cargo not involving any fortuitous external accident or casualty that insurers would have a defence …

130 In relation to the Defendants' case for capsize, OCBC notes that a key submission of the Defendants is that there must have been a "significant" amount of green water trapped on deck, and that this accumulation of green water caused the capsize. The Defendants support this by pointing to "copious amounts of water" seen coming off the port side of the Vessel. However, the fact that "copious amounts" of water was coming off the Vessel must mean that green water was not trapped on deck, or at least, the extent to which green water was trapped is in question. The Defendants' naval architecture expert, Mr Hu Zhigong ("Mr Hu"), conceded that he was not in a position to calculate how fast the water was egressing from the Vessel. Mr Hu admitted in cross-examination that there were no actual calculations done to support these theories.

131 OCBC also point out that Cpt White's testimony that the Vessel had taken on a port list and significant stern trim then, is based on the 4 June 2018 video. However, in one of the screen captures, the slanted horizon in the background clearly suggests that the screen capture was tilted and therefore cannot possibly be indicative of a list. Neither do the screen captures indicate any stern trim beyond the normal pitching motion of the Vessel.[105]

Defendants' case

132 The Defendants submit that capsize was not caused by the "perils of the seas".

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105 PRS at paras 27–28.

133 At the start of the trial, the Defendants took the position that it was for OCBC to prove that the capsize was so caused. Although the Defendants did not have evidence advancing the position that the capsize was inevitable, it was still an open question as to whether Ms Blazejczyk's evidence pointed in that direction. This was something the Defendants would revisit after the experts had given evidence.[106]

134 The Defendants took a different stance when their naval architecture expert, Mr Hu, took the stand. In his presentation slides, Mr Hu advanced a theory that deck edge immersion contributed to or was a likely cause of the capsize. This was not in his two expert reports or in the Scott Schedule – Technical Experts which was filed by parties on 18 October 2024 (after the experts had met in an experts' caucus on 16 and 18 October 2024, prior to the trial). Mr Hu stated that he had come up with his theory of deck edge immersion when he prepared his presentation slides for the trial.[107]

135 Mr Hu theorised that:

(a) When the Vessel departed, it was inherently unstable because the Vessel did not comply with the 70-knot wind speed heeling moments as required under the International Maritime Organisation's ("IMO") Code for the Construction and Equipment of Mobile Offshore Drilling Units, 2009 (the "IMO MODU Code"), Intact Stability Code (the "IS Code") and ABS Rules for Building and Classing Mobile Offshore Drilling Units 2016 (the "ABS MODU Rules").

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106 NE 29 October 2024 Hearing at p 120 lines 9–15.

107 NE 8 November 2024 Hearing at p 149 line 15–p 150 line 3.

(b) Seawater was trapped on the deck open well and reduced stability. This was based on what Mr Hu could see from certain videos. The bulwarks entrapped green water, which may not have drained out quickly enough. In the Defendants' written submissions, they emphasize that the Vessel had only freeboard of 0.9 metres in a situation where the waves encountered were beyond the maximum permitted by the Operations Manual (*ie*, 2m). Green water was shipped on deck, which is a breach of warranty as the OM prohibits shipping of green water on deck.[108]

(c) As the legs of the Vessel were not lowered, excessive waves may overstress and damage the structure supporting the leg and causing water ingress. Water ingress into the hull from a damaged leg guide structure can begin with a small leak. As more water enters, the Vessel's freeboard decreases, potentially submerging down-flooding points and accelerating the flooding rate.

136 The Defendants also relied on Cpt White's expert evidence, which came after Mr Hu had testified. In Cpt White's presentation slides, which he referred to during his testimony in court, he highlighted the following as factors contributing to the capsize, amongst which the dominant factor is the first listed factor below:[109]

(a) the Vessel was inherently unstable on departure because the Vessel did not meet the requirement for wind speed heeling moments of 70 knots;

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108 DRS at para 9(b).

109 NE 13 November 2024 Hearing at p 84 line 15–19.

(b) the Vessel could not transition to the severe storm/survival condition;

(c) the Vessel encountered maximum waves of 3–4.5m between 2 June and 5 June;

(d) green water was shipped over the deck between 2 June and 5 June;

(e) water trapped within the well caused by the installation of the bulwarks would create a free surface effect further reducing the stability of the Vessel;

(f) the Vessel suffered a progressive ingress of water into the hull;

(g) deck edge immersion caused by the pitching of the Vessel would further reduce the stability of the Vessel; and

(h) deck edge immersion at the stern would not only reduce the stability, but the watertight integrity of the Vessel would also be compromised.

Decision

137 The legal principles applicable to assessing experts' evidence are well established. In choosing between conflicting expert testimony, the court will have regard to their logic, common sense, coherence, as well as the objective evidence before the court (*Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 at [105]; *Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the*

dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals [2020] 1 SLR 133 at [92]).

138 Although both experts of the Defendants, Mr Hu and Cpt White, presented an alternative theory for the capsize during the trial, the Defendants did not make an explicit case in their closing submissions that their experts' evidence provided a viable alternative theory for the capsize. I will nevertheless, for completeness, assess their evidence on whether they do so.

139 Preliminarily, Mr Hu accepted that he only came up with his theory for the purposes of the slide presentation in court and that he had not done any calculations for it.[110] He also accepted that his theory that there was deck edge immersion was based on videos taken on 4 and 6 June 2018 of the Vessel, where Mr Hu said he observed the bow of the Vessel dipping to the sea.

140 I found Mr Hu's theory of capsize to be much less credible than that of Ms Blazejczyk. There were several unexplained inconsistencies in his theory.

141 First, Mr Hu testified through his slides that there was deck edge immersion at the bow (i.e. the front of the Vessel) which contributed to the capsize. This is based on what he observed of videos of the Vessel on 2 and 4 June 2018. However, he was not able to satisfactorily explain how the deck edge immersion at the bow a few days prior to the capsize, led to the trimming by the stern (*ie*, the back of the Vessel) on 5 June 2018.[111]

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110 NE 8 November 2024 Hearing at p 147 lines 6–11.

111 NE 8 November 2024 Hearing at p 147 line 22–p 149 line 14.

142 Second, Mr Hu claimed that the Vessel was unstable, by comparing the Vessel's *actual* vertical centre of gravity ("VCG") at the *time of departure (with legs fully elevated)* with its *allowable* VCG *in 70 knot winds (with legs lowered by 18.4m)*. In other words, he was comparing the actual VCG in one scenario with the allowable VCG in a different scenario. When the same scenario was applied, the Vessel met the stability criteria. On Mr Hu's calculations and slides, the Vessel's actual VCG in 70 knot winds (with legs lowered by 18.4m) was 10.077. This is lower than the maximum allowable VCG in the same condition, which is 10.890. The Defendants provided no response to this point over the course of the written submissions.

143 Third, Mr Hu's case is that the Vessel was required to lower its legs by 18.4m as soon as the water depth allowed after departure, but failed to do so. However, section "12.0 Spud Cans Effect on Stability" of the Operations Manual warns that spud cans must not be lowered in normal conditions just to increase the stability of the Vessel. The section states that for winds between 61–70 knots and a water depth greater than 19m, "lower the legs to 18.40m", but when "wind conditions abate, elevate all the legs fully with the spud cans in the proper transit position". Mr Hu accepted in cross-examination that the Vessel's legs cannot be lowered without lowering the spud cans, which are constructed with the legs of the Vessel.[112]

144 Fourth, on Mr Hu's theory, there was deck edge immersion, and the green water trapped on the deck of the Vessel contributed to the capsize. Mr Hu's case was that the temporary bulwarks on deck trapped water of 7.5cm in height. Ms Blazejczyk's evidence was that as the Vessel would be moving in all

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112 NE 8 November 2024 Hearing at p 118 lines 11–25.

six degrees of freedom whilst under tow, there would never be a "static condition" where 7.5cm of water accumulates. Her GHS calculations also showed that if wind load is applied to such a scenario, even with a small list, the water weight reduces to less than 1 tonne, as water would drain even further.[113] When asked about Ms Blazejczyk's GHS calculations, Mr Hu agreed with them for static conditions. He maintained that in dynamic condition there should be more water as the waves would ship water on board.[114] However, this did not address Ms Blazejczyk's point that in dynamic condition, the movement of the Vessel would affect the accumulation of water. In addition, Mr Hu did not have any detailed reasons why Ms Blazejczyk's GHS calculations were wrong, nor did he have any calculations to refute them.

145 Fifth, on Mr Hu's theory, there would have been gradual ingress of water into the Vessel. Ms Blazejczyk testified that had something happened earlier than 5 June 2018, the crew would probably have noticed either the speed reducing because the resistance was increasing from extra weight, or they would have noticed a difference in the list and trim of the Vessel.[115]

146 There is no evidence that the speed of the Vessel was reducing. Mr Hu was also not able to satisfactorily explain why, if there was gradual accumulation of water into the Vessel, there were no observable signs of the Vessel listing significantly from the gradual ingress in the lead up to the capsize, which could have been picked up by the crew on the tugboat.

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113 Ms Blazejczyk's Second Report at paras 2.6.2–2.6.3.

114 NE 8 November 2024 Hearing at p 156 lines 16–21.

115 NE 8 November 2024 Hearing at p 163 lines 1–21.

147 Sixth, Mr Hu was not able to satisfactorily explain at all, why based on his theory, the capsize would have been so sudden. The Vessel started the Tow Voyage on 30 May 2018. There were no observable warning signs in the six days prior to its capsize on 5 June 2018 afternoon. The capsize took place quickly, at 5:50pm after it was observed to list to port at 3:45pm. Mr Hu's response was to only reiterate his thesis that there were three factors that contributed to the capsize, that it is unstable, there is water on the deck and there is water ingress to the hull.[116]

148 Cpt White's evidence on the capsize largely built on Mr Hu's thesis. The concerns with Mr Hu's thesis highlighted above, thus similarly affects Cpt White's thesis. Just as Mr Hu accepted that his theory was not based on any calculations, Cpt White accepted that he did not do any calculations or technical analysis as to what caused the list and trim of the Vessel, and that his views were based only on his observations of the videos.[117]

149 In contrast, Ms Blazejczyk's evidence was supported by her calculations and models. Mr Hu had the opportunity over a lengthy period to examine them and engage Ms Blazejczyk on them. After such examination and engagement, he was not able to land any substantive concern with the robustness of Ms Blazejczyk's calculations and models. One example of this, is their views on whether the temporary bulwarks on deck trapped water of 7.5cm in height; see [144] above.

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116 NE 8 November 2024 Hearing at p 161 line 15–p 163 line 10.

117 NE 13 November 2024 Hearing at p 72 lines 6–10.

150 I also found Ms Blazejczyk to be more objective as an expert witness. For example, she acknowledged that despite her calculations and models, she could not firmly hypothesize why the Vessel capsized so suddenly.

151 In contrast, I found Cpt White to be much more defensive and far less objective. He chose not to directly answer a question on whether in respect of the stability of the Vessel, other design criteria, for example the structural and construction aspect of the vessel, would be equally relevant.[118] It is quite clear that it would be relevant. He also chose initially not to directly answer a straightforward question about whether in the six days preceding the collapse, there was any observed wind speed beyond 25 knots.[119] On evidence, there was not. Cpt White came across as a factual witness seeking to bolster the Defendants' case rather than as an independent court expert.

152 On the whole, I find that Ms Blazejczyk's evidence sufficiently establishes that there was unexpected flooding / water ingress in the hull compartments. I find that on the balance of probabilities, the capsize of the Vessel was caused by perils of the seas.

OCBC's mortgage

153 The third main issue is whether OCBC had discharged its burden to show that it had been owed at least US$70m (the total insured value of the MI), such that OCBC would be entitled to the maximum amount allowable under the MI. This issue arises as OCBC pleaded that it has two separate interests in the

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118 NE 13 November 2024 Hearing at p 69 line 8–p 70 line 2.

119 NE 13 November 2024 Hearing at p 76 line 16–p 78 line 6.

MI. First, it has an interest in the capacity of a co-assured under the MI. Second, OCBC is also an assignee and loss payee under the MI (see [5] above).[120]

154 In relation to OCBC's first interest as co-assured, Mr Berry KC's view was that OCBC is only entitled to indemnity for loss to its insurable interest, which is the amount outstanding under the mortgage.[121] Mr Blackwood KC's opinion was that a co-assured with limited interest in the subject matter can recover the full insured value of the subject matter insured from the Defendants.[122] Parties did not submit on which opinion is correct. This was regarded as "academic" since OCBC's position was that it was owed in excess of US$75m under the mortgage.[123] What the Defendants did dispute in their pleadings, was whether OCBC has interests in the capacity of a co-assured as a mortgage under the MI.

155 In particular, the Defendants pleaded in their defence that OCBC is[124]:

> put to strict proof that OCBC *has its interests in the capacity of a co-assured as mortgagee* under the Marine Insurance because it had simultaneously procured a Mortgagees Interest Insurance ("MII") from Great Eastern Insurance as separate additional insurance to cover its mortgagee's interest since it has no involvement in the running of the Vessel and is therefore unable to act in the event of any negligence or breach on the part of the Teras Entities. It is not admitted that OCBC is an assignee and loss payee under the Marine Insurance and is put to strict proof thereof.
>
> [emphasis added]

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120 SOC-A1 at para 4B.

121 1st Expert Report of Mr Steven John Berry KC dated 28 August 2024 at para 215.

122 1st Expert Report of Andrew Guy Blackwood KC dated 21 August 2024 at para 166.

123 DCS at para 279.

124 Defence-A5 at para 9.

156 At the opening of trial, OCBC pointed to various documents as proof that it is a mortgagee of the Vessel and that it had been insured as a co-insured.[125] Counsel for the Defendants submitted that as OCBC had not called any witness to say what interest it has to separate from the interest of the other co-assured, then there is no evidence before the court on what their interest is.[126] OCBC then called Mr Martin Chua ("Mr Chua"), the Global Head of the Special Asset Management Department of OCBC, to provide evidence of OCBC's status as a mortgagee. Mr Chua filed an AEIC in support and also took the stand.

157 After the trial had closed, the Defendants informed the court that it was no longer disputing the existence of the mortgage (and hence OCBC's status as mortgagee), but it was now disputing the loan amount.[127] However, the Defendants were not able at that time, to indicate specifically what particular aspects of the loan amount it was questioning.[128] It was only after about two-and-a-half weeks after the close of the trial, that the Defendants informed OCBC and the court what those particulars were ("2 December Letter"). This was after the court had directed the Defendants to particularise its arguments on this issue.

158 In the 2 December Letter, the Defendants took the position that OCBC had not provided evidence of how much (if any) of the loan was disbursed, that there was insufficient evidence to back up the interest and late charges, and that there was a discrepancy between the principal sum of US$59,909.059.63 and the loan amount of US$59,500,000 in the Loan Facility Agreement dated

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125 POS at para 73.

126 NE 26 October 2024 Hearing p 86 lines 7–10 and 21–24 and p 87 line 3–8.

127 NE 19 November 2024 Hearing at p 2 lines 1–3; DCS at paras 281(a) and 282.

128 NE 19 November 2024 Hearing at p 2 lines 13–20.

12 June 2017 ("Facility Agreement"). The Defendants contended that a sum of US$441,456.88 arose by way of an overdraft facility outside of the Facility Agreement. As there is no basis for this item of indebtedness to be secured under the mortgage under the Facility Agreement, the Defendants argue that they are not liable to indemnify the Plaintiff in respect of this item.

159 In respect of the sum of US$441,456.88, OCBC explains that the Facility Agreement defines "Total Indebtedness" as including *all* liabilities arising out of the "Facility Documents". That in turn, is defined as any document made in connection with any banking facility granted by OCBC, which would include the overdraft facility.[129] I accept this explanation, noting that in any event, this sum is immaterial to whether OCBC's exposure exceeds the total insured value of US$70m.

160 The Defendants' main contentions on this issue, as it evolved, relate to the sufficiency of evidence for disbursement of the loan and breakdown for interest and late charges.

161 However, these objections were never pleaded by the Defendants. Instead, what was disputed by the Defendants in their Defence, was the status of OCBC as a mortgagee, and as stated during their opening at trial, in particular, the lack of a witness testifying to this. OCBC has provided proof of this through the evidence of Mr Chua. It does not behove the Defendants to then shift the goalpost, weeks after the close of the trial, to say that there was a lack of evidence on other matters. Notably, the Defendants had not raised any contentions regarding the loan quantum disbursed or the breakdown for interest

[129] PCS at paras 130–131.

and late charges, in their pleadings, in their opening statement, in the Scott Schedule of Issues or in the Defendants' witness AEICs. Neither did the Defendants put these issues to Mr Chua during his cross-examination. Counsel for the Defendants could not even state what the other specific issues were at the end of trial.

162 When the above were raised to the Defendants, they pointed to their Defence at para 38, which contains the line "[t]he losses and quantum alleged by OCBC are not admitted either".[130] However, this line follows from the Defendants' specific denial of paras 33–36 of the SOC, which relate to the actual loss, CTL and partial loss of the Vessel and OCBC's entitlement to indemnity for such losses. It is plainly not related to the issues which the Defendants raised in their 2 December Letter.

163 In view of the considerations above, I find that the Defendants are barred from pursuing these unpleaded arguments at such a late stage.

164 In any event, even if the Defendants were allowed to pursue these arguments, I find that OCBC would still have, on the evidence before the court, discharged its burden to show that it had been owed at least US$70m (*ie*, the total insured value of the MI).

165 First, cl 21.2 of the Facility Agreement states that entries made in the accounts maintained by OCBC would constitute *prima facie* evidence of the existence and amounts owed by the Vessel:

> **21. CALCULATIONS AND EVIDENCE**
>
> …

130 NE 21 April 2025 Hearing on HC/Summons 961/2025 at p 1–2.

> 21.2 **Loan Accounts**: The entries made in the accounts maintained by [OCBC] in accordance with its usual practice shall be prima facie evidence of the existence and amounts of the obligations of the Borrower recorded in them.

166 Being a contractual clause set out in the Facility Agreement between OCBC and TLPL, cl 21.2 is not binding on the Defendants. However, OCBC would have been able to rely on cl 21.2 and Mr Chua's evidence on the entries in the accounts maintained by OCBC, to assert the existence and amounts of the loan against TLPL (the borrower). They would therefore serve as evidence in supporting OCBC's case that it was owed at least US$70m. While the Defendants object to the sufficiency of OCBC's evidence on the quantum of the loan owed, in that there is no evidence of the loans having been disbursed,[131] the Defendants have not provided any cogent explanation as to why the evidence of the loan amount owing, as set out in the entries made in the accounts managed by OCBC, are incorrect.

167 In addition, OCBC has also successfully applied to adduce further evidence of a proof of debt filed with the liquidators of TLPL (the "Liquidator") on 8 March 2024.[132] By way of an adjudication result dated 13 March 2025, the Liquidator "adjudicated and admitted [OCBC's] claims for the outstanding facilities, interest and late charges as at 16 February 2024 totalling US$75,438,549.94".[133] While the Defendants raise various objections against OCBC's reliance on the Liquidator's adjudication result, such as that they were not privy to that exercise and that there was no evidence of how the Liquidator

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131 DCS at paras 286 and 290.

132 AEIC of Mr Chua Tiong Nam Martin dated 5 November 2024 at para 16.

133 4th AEIC of Mr Tan Meng Howe dated 8 April 2025 at p 8.

came to his decision, they are, again, unable to advance any cogent explanation as to why the adjudication result is flawed or erroneous.

168 To the contrary, our caselaw suggests that a liquidator's assessment of a proof of debt, is made in a quasi-judicial capacity. In *ERPIMA SA v Chee Yoh Chuang and another* [1997] 1 SLR(R) 923 ("*ERPIMA*"), the court observed that since a *judicial manager* acts in a quasi-judicial capacity, his "attitude and approach must be entirely as if he is sitting in judgment like a judicial officer … he cannot act unjudicially, capriciously or arbitrarily" (at [4]). In *Fustar Chemicals Ltd v Ong Soo Hwa (liquidator of Fustar Chemicals Pte Ltd)* [2009] 1 SLR(R) 844, the court found that these principles apply equally to a *liquidator* who is tasked to adjudicate on a proof of debt (at [26]). This was also recently affirmed in the decision of *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 (at [152]). In this light, I find that there is a quasi-judicial assessment from an independent third party, that supports OCBC's case that it is owed in excess of US$70m (*ie*, the full insured value of the Vessel).

169 The Defendants' argument on this third issue is thus rejected, for all the reasons above.

Breach of duties of fair presentation

170 The fourth main issue relates to the Defendants' allegation that there were four breaches of duty of fair presentation.

171 The duty of fair presentation of risk is found in s 3 of the UK IA 2015:

(a) Section 3(1) obliges the insured to "make to the insurer a fair presentation of the risk".

(b) Section 3(2) provides that "A fair presentation of the risk is one … which makes the disclosure required by subsection (4)".

(c) Section 3(4) states that an insured must disclose "every material circumstance which the insured knows or ought to know, or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances".

Section 7(3) of the UK IA 2015 in turn provides that "[a] circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms".

172 It is agreed between the parties, that the elements the Defendants need to satisfy in order to establish that there had been any breach of the duty of fair presentation are the following:

(a) First, the Defendants must prove that the circumstances it complains of were *material*, in the meaning prescribed by s 7(3) of the UK IA 2015.

(b) Second, the Defendants must prove that OCBC had *knowledge of or ought to have known* of those material circumstances.

(c) Third, the Defendants must prove that OCBC had not disclosed the material circumstances or had not provided sufficient information to

place the Defendants on notice to ask further questions to uncover the material circumstances.

(d) Lastly, the Defendants must show that but for the non-disclosure, the Defendants would not have underwritten the risk or would only have done so on different terms.

Attribution

173 A preliminary issue is that of attribution, that is, whether the alleged breaches of the duty of fair presentation by TLPL and TOPL, can be attributed to OCBC.

Defendants' case

174 The Defendants submit that there can be attribution on the basis of agency. This is because TLPL and TOPL, as the Vessel Owner and Manager respectively, were agents of OCBC for the purposes of procuring the insurance. Therefore, the Teras Entities had actual authority to act on OCBC's behalf in procuring the MI.[134]

175 The Defendants' case is premised on cl 6.1.1(a) of the DOACs, which states that the Teras Entities are to "*effect and maintain*" [emphasis added] hull and machinery and war risks insurances in respect of the Vessel, with OCBC as additional named assured and as sole loss payee.[135] As noted at [5] above, this clause was incorporated into the MI by way of Addendum No. 1. On this basis,

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134 Defendant's Opening Statement dated 22 October 2024 ("DOS") at para 36; DCS at para 203.

135 ABOD Volume 12 at p 6238.

the Defendants plead that OCBC had "expressly or impliedly authorised the [Teras Entities] to effect and maintain hull insurance on its behalf".[136]

176 Although the Defendants submitted at the start[137] and close[138] of the trial that there was also apparent authority, they do not pursue this in their Closing Submissions.[139]

OCBC's case

177 OCBC submits that cl 6.1.1(a) of the DOACs was not meant to create a principal-agent relationship, but instead was intended to ensure that the security granted to OCBC would be protected in the event that something unfortunate (such as the capsize) were to occur. The clause does not contain the words "*agent*", "*principal*" or "*authority*". Unlike an actual insurance broker, the Teras Entities did not function as the conduit between the insurers and OCBC; this is in contrast to the Teras Entities' relationship with LCH. In addition, an insurance broker does not make payment of the insurance premium for the principal (insured); it is instead the insured that bears the obligation of making payment. In this case, it was the Teras Entities (and not OCBC) that bore the obligation to, and eventually did, make payment of the insurance premium. If it is found that the Teras Entities were acting as OCBC's agents, this would amount to a finding that an agent is bearing the cost of insurance premiums on behalf of the principal. OCBC suggests that this cannot be correct.[140]

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136 Defence-A5 at para 39.6.

137 DOS at para 37.

138 NE 19 November 2024 Hearing at p 22 lines 7–11.

139 DCS at para 203.

140 PCS at paras 264–270.

178 Even if an agency relationship was to be found, OCBC further submits that, first, such a relationship would have ceased at the point in time when the MI was issued. In other words, it would not have carried on until the time of the alleged breaches of the duty of fair presentation. Second, cll 6.1.3 and 6.1.4 of the DOACs would have limited the scope of any such authority to exclude any breaches of the duty of fair presentation – these clauses are clear that the Teras Entities are not authorised to commit such breaches and/or any act or omission which would enable cancellation of any insurance or render any insurance void. Clauses 6.1.3 and 6.1.4 of the DOACs read, as follows:[141]

> **6. OBLIGATORY INSURANCES**
>
> 6.1 The assignor covenants that it will at all times during the continuance of this Deed:-
>
> …
>
> 6.1.3 not make any alternation in any obligatory insurance without the prior written consent of the Assignee (provided that the Assignor may increase the sum or sums insured without such consent) nor make, do or agree to any act or omission which would enable cancellation of any obligatory Insurance or render any obligatory insurance invalid, void, voidable or unenforceable or render any sum paid out under any obligatory insurance repayable in whole or in part;
>
> 6.1.4 not cause or permit the Vessel to be operated in any way inconsistent with the provisions or warranties of or implied in, or outside the coverage provided by, the obligatory Insurances or to be engaged in any voyage or to carry any cargo not permitted by the obligatory Insurances without first obtaining the consent to such operation or engagement of the Insurers concerned and complying with such requirements as to extra premium or otherwise as the Insurers may prescribe; …

Third, while an agent's acts may bind a principal, the Defendants still have not shown how an agent's purported knowledge could be attributed to the principal. The Defendants cannot maintain that the knowledge of employees and agents

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141 ABOD Volume 12 at p 6238.

who were responsible for OCBC's insurance should have been attributed to OCBC. Nor are the Defendants able to show that OCBC has constructive knowledge of the alleged breaches, as they are not able to indicate what reasonable searches could have been done by OCBC.[142]

Decision

179 Both English law experts agree that there was explicit authority given to the Teras Entities to procure the MI on OCBC's behalf. OCBC submits that this is not determinative, given that the question of whether there was agency is a matter of Singapore law and not English law. While the Defendants agree that this is a matter of Singapore law, they submit that there is no substantial difference between the applicable principles in both jurisdictions.

180 I agree with the Defendants that there is no substantial difference between English and Singapore law on this. I find myself in agreement with both English law experts that there was explicit authority on the part of the Teras Entities.

181 It is well-settled in Singapore law that an agency relationship may arise where actual or apparent authority is conferred upon the agent. As the Defendants have not pursued their argument on apparent authority in closing submissions, only the former is relevant.

182 Actual authority is established by the consent of both principal and agent. Such consent may either be given expressly or by implication from parties' words and conduct: *Alwie Handoyo v Tjong Very Sumito & another*

142 PRS at para 110.

[2013] 4 SLR 308 at [148]. In relation to the former, *express* actual authority may arise, for instance, where a board of directors passes a resolution that expressly authorises two of their members to sign off on cheques (see *B High House International Pte Ltd v MCDP Phoenix Services Pte Ltd and another* [2023] SGHC 12 ("*B High House*") at [139]), or where a power of attorney is executed (see Tan Cheng Han SC, *The Law of Agency* (Academy Publishing, 2nd Edition, 2017) ("*Law of Agency*") at para 03.014). In these cases, there is generally no difficulty in establishing that an agency relationship was intended, and the scope of authority is clearly ascertainable: *Law of Agency* at para 03.027.

183 On the other hand, *implied* actual authority is inferred from the conduct of the parties and the circumstances of the case: *B High House* at [139]. Such authority has been described as arising where an agent does something incidental to the ordinary conduct of such trade or business, or of matters of that nature [and which are] necessary for the proper and effective performance of [the agent's] duties": *Jiangsu New Huaming International Trading Co Ltd v Pt Musim Mas and another* [2024] SGHC 81 at [63], citing with approval *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 ("*Skandinaviska*") (at [30]). An example of this, is where a board of directors appoints one of their members as managing director. In so doing, they impliedly authorise him to do all such things that fall within the usual scope of that office: *B High House* at [139].

184 In this case, by way of cl 6.1.1 of the DOACs, the Teras Entities had covenanted with OCBC to effect / maintain hull and machinery insurance in respect of the Vessel: this was the precise scope of the MI. The Cover Note was later issued by LCH to the Vessel Owner care of Vessel Manager. There is no

evidence of any communication relating to the MI between OCBC and LCH. In the circumstances, I agree that the Teras Entities had *express* actual authority to procure the MI on OCBC's behalf.

185 Even if I am wrong on the above, it may at least be said that the procurement of the MI was necessary for the proper and effective performance of TLPL and TOPL's duties under cl 6.1.1 of the DOACs, thus conferring *implied* actual authority to act as OCBC's agent.

186 The fact that OCBC bore no obligation to make payment of the insurance premium is not material, as that does not affect whether the Teras Entities had authority to act on behalf of OCBC to procure the benefits of the insurance for OCBC. The fact that the Teras Entities made payment of the insurance premium, also does not change whether the Teras Entities had authority to act on OCBC's behalf. That payment arose as it was in the Teras Entities own interest, to pay the insurance premium. The Teras Entities and OCBC's interest in securing the insurance were aligned.

187 I am also not persuaded by OCBC's argument that any such agency relationship would have ceased at the point in time when the MI was issued, and not continued till the time of the alleged breaches of duties of fair presentation. Under cl 6.1.1 of the DOACs, the Teras Entities covenanted with OCBC to "effect and maintain" the insurance relating to the Vessel. The covenant to *maintain* the MI would necessarily mean that the Teras Entities' obligations extend to the time where the alleged duties of fair presentation took place.

188 OCBC further submits that even if there was actual authority, the scope of this authority would have been limited by cl 6.1.3 of the DOACs (see [178]

above). This clause essentially states the Teras Entities are not to make any act or omission which might enable the cancellation of the insurance or render the insurance invalid. OCBC submits that this ought to be apparent to the Defendants as the insurers.

189 I note that this was not pleaded by OCBC. In any event, and as will become clear later, I find that the Teras Entities had not acted in any manner which might enable cancellation of the MI and/or render it invalid. In the circumstances, I consider that the issue of whether the Teras Entities had acted beyond the scope of its actual authority in effecting or maintaining the MI, does not arise. Given my finding that the Teras Entities had acted within the scope of their authority, it also "uncontroversial" that the knowledge acquired by the Teras Entities may be attributed to OCBC: *Capital Asia Pte Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another and other appeals* [2021] 1 SLR 1337 at [109], citing with approval *Bowstead & Reynolds on Agency* (Peter G Watts gen ed) (Sweet & Maxwell, 22nd Ed, 2021) at para 8-208.

190 I therefore find that on the facts, TLPL and TOPL did have actual authority to procure the insurance on behalf of OCBC, and that their actions in relation to the duties of fair presentation, can be attributed to OCBC.

191 I will next consider each of the four duties of fair presentation, in turn.

First duty of fair presentation

Defendants' case

192 The Defendants first allege that TLPL and TOPL deliberately or recklessly failed to disclose that they "abandoned" Braemar as MWS, because

they were concerned that Braemar: (a) would not have approved of the proposed Tow Voyage; and/or (b) would not have issued the "*warranty certificate*" that was necessary for insurance cover for the proposed Tow Voyage without certain conditions that TLPL and TOPL were unwilling to comply with. Instead, TLPL and TOPL represented to the 4th Defendant that they did not proceed with Braemar because it was not available. The Defendants would not have agreed to enter into the Towage Addendum (see [7] above) if they had known that Braemar was "abandoned" because of these concerns. If the Defendants were aware of this, they would have doubted whether the Vessel was fit for the Tow Voyage.

OCBC's case

193 OCBC submit that there is no evidence that: (a) the Teras Entities "abandoned Braemar" because of the reasons cited by the Defendants; (b) Braemar would not have approved of the proposed Tow Voyage; or (c) Braemar would not have issued the "warranty certificate" without imposing conditions that Teras Entities were unwilling to comply with. The Teras Entities' decision to appoint Techwise instead of Braemar is not a material circumstance. The Defendants decided to approve the use of Techwise without asking any further questions. They were prepared at all times to accept Techwise as MWS.

Decision

194 The Defendants submit that Braemar's comments indicate that Braemar would not have approved of the proposed Tow Voyage without imposing conditions that the Teras Entities were unwilling to comply with. They rely in the main on an email from Cpt Pedersen to TOPL's Mr Peter Lee dated 20 May

2018 and timestamped at 9.21am ("Pedersen 20 May Email"),[143] and an email from Braemar to the Teras Entities dated 20 May 2018 and timestamped at 12.01pm ("Braemar 20 May Email") to support their case.[144]

195 In the Pedersen 20 May Email, Cpt Pedersen makes two points to Mr Lee about Braemar.

(a) First, Braemar had commented that "a remote monitoring motion system shall be installed and monitored from the tow vessel. Motion on the vessel is not the same as the lift boat". Cpt Pedersen comments that in this respect, Braemar was "taking [the Teras Entities] hostage" towards the vessel's MOM and using AK Suda Ltd ("AK Suda", the Vessel's designer) as their "bargaining chip in respect of the motion study". He updates Mr Lee that AK Suda has not responded to any of their requests due to outstanding payments owing.

(b) Second, Braemar "want[s] the [Teras Entities] to do … inside coastal towing … along the Vietnam coast, inside Hainan island", and then for the Vessel to transit across the territorial waters of China to Taiwan.

196 Cpt Pedersen notes in his email that Techwise's comments on the tow voyage are comments that they can deal with themselves without involving AK Suda.

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143 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at p 120–122.

144 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at p 18.

197 In the Braemar 20 May Email, Paulus states that Braemar have various comments which require TOPL and TLPL's clarification.

198 After examining the above correspondence, I find that while Braemar did present several comments for clarification, they do not go further to show that Braemar would not have approved of the proposed Tow Voyage and/or that they would only do so by imposing conditions that the Teras Entities were unwilling to comply with. Notably, what is in the Braemar 20 May Email were presented by Braemar as only "comments for clarification".

199 There is also no oral testimony from Mr Paulus that takes such comments further into the realm of conditions without which Braemar would not agree to serve as MWS. Despite the witness schedule being firmed up ahead of the trial, the Defendants informed the court and OCBC the evening before Mr Paulus was due to give evidence in court, that he was out of the country. The Defendants could not give any indication that he could be back in time to give evidence as a factual witness before the experts gave their evidence. Parties agreed to dispense with his attendance in court and to accept the documents tendered in his AEIC, on the face of what the AEIC presented.

200 Neither does the Pederson 20 May Email suggest that Cpt Pederson did not want Braemar because they would not approve the Tow Voyage and/or that they would only do so by imposing conditions that TOPL and TLPL were unwilling to comply with:

(a) Techwise[145] had in fact raised similar comments to Braemar,[146] which TOPL and TLPL would have also had to address. For example, the need for ports of refugee to be nominated and an emergency response plan to be included, the bollard pull calculation, the need for systems including the leg jacking system and generators to be operational.

(b) Cpt Pedersen also testified as to the reasons why a coastal route would not, in his view, be viable. He had also conveyed his concerns in an email to Mr Peter Lee, namely exposure to weather from the east and "having a tow passing through Chinese territorial waters with a unit heading to Taiwan (remember the army tanks arrested in Hong Kong)".[147] There is no suggestion that he thought that the coastal route was viable, but that he was seeking to avoid it for any other reason. It would appear that this was a credible assessment, as Cpt Pedersen's view is supported by both parties' master mariner experts. They agreed that it would have been impractical for the Vessel to take a coastal route.[148]

201 I also find it material that Braemar was never appointed as MWS. While TLPL and TOPL had the intention to engage Braemar initially, they did not eventually appoint Braemar. They also did not reach the stage where they received a quote from Braemar. Both insurance practice experts, Mr Alan Jervis ("Mr Jervis") and Mr Peter Townsend ("Mr Townsend"), were of the view that

145 ABOD Volume 12 at p 6675.

146 ABOD Volume 12 at p 6678.

147 ABOD Volume 12 at pp 6673–6674.

148 Scott Schedule – Technical Experts item 2(i).

the disclosure burden on the Teras Entities would have been higher if Braemar was officially appointed and there was subsequently a change of MWS.[149]

202 In summary, I find that the comments from Braemar as set out in the correspondence, are more in the nature of comments posed by a potential MWS, made in the course of seeking further clarifications. They are not cast as imposition of conditions upon which their approval of the Tow Voyage is contingent. Neither is there evidence that Braemar had such disagreement with the Teras Entities, such that the latter could be seen as hiding the disagreements or Braemar's concerns from the Defendants.

203 Thus, it could not be said from the correspondence that the Defendants rely on, that the Teras Entities were seeking to hide from the Defendants the reason for appointing Techwise instead of Braemar.

204 The Defendants sought to bolster their case by alleging that TOPL, through LCH, falsely represented to the Defendants that Braemar was not appointed because they were not available. The Defendants submit that this concealed that the true reason for the change in MWS was the comments of Braemar.

205 The false representation in question was allegedly made by an LCH agent ("Ms Serina Tan") to the former Chief Executive Officer ("CEO") of the 4th Defendant ("Mr Athappan") on 21 May 2018.[150] Mr Athappan has since passed away and thus did not testify to this.

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149 NE 7 November 2024 Hearing at p 209 line 4–p 210 line 4.

150 AEIC of Mr Vikas Shukla dated 27 August 2024 at para 25(b).

206 In my judgment, the evidence led by the Defendants does not prove that such a representation was made.

207 The Defendants first rely on an email sent on 10 November 2021 by the current CEO of the 4th Defendant, Mr Vikas Shukla ("Mr Shukla"), to the Defendants' solicitors ("10 November Email"). Mr Shukla states in this email that:[151]

> We were informed by the brokers (LCH Lockton) that Braemer were not available for the survey hence the insured had requested for approval of Techwise as the warranty surveyor. In our view this is non-disclosure and mis-representation of information which would have influenced our decision on acceptance of the tow voyage.

Mr Shukla testified that he had a discussion with Mr Athappan on 10 November prior to sending this email. In this discussion, Mr Athappan confirmed that he was told by Ms Serina Tan that Braemar was not available for the MWS Survey.[152] The Defendants seek to admit the contents of this discussion, as evidenced in the email, as an exception to the rule against hearsay.[153]

208 Section 32(1)(*j*)(i) of the EA provides that statements of relevant facts made by a dead person may be admitted notwithstanding that it is hearsay evidence. Where such a statement is admitted, s 32(5) of the EA empowers a court to "assign such weight as it deems fit to the statement".

209 I agree with the Defendants that Mr Shukla's rehearsal of his discussion with Mr Athappan may be admitted pursuant to s 32(1)(*j*)(i) of the EA,

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151 DCS at para 238.

152 NE 30 October 2024 Hearing at p 95 lines 11–18.

153 DCS at para 239.

notwithstanding that Mr Athappan has not been able to testify to this fact. However, and pursuant to the power conferred by EA s 32(5), I place very little weight on this instance of hearsay evidence.

210 First, there is no contemporaneous evidence suggesting that such a representation had been made by Ms Serina Tan to Mr Athappan, or of any discussion where such a representation could be made. In the context of determining whether a contract exists, our Court of Appeal observed in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 that the "first port of call" must be the relevant documentary evidence. In such situations, contemporaneous written records are "obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired", given that "[s]uch evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties" (at [41]). In cross-examination, Mr Shukla conceded that there were no contemporaneous documents to evidence Ms Serina Tan's meeting with Mr Athappan on 21 May 2018 where the alleged false representation was made.[154]

211 Second, I observe that the 10 November Email was sent by Mr Shukla and not personally by Mr Athappan, although he was copied. However, the fact that Mr Athappan was copied, does not go to show that he had made the alleged statement. Notably, the email was sent after the present action had already been commenced.

212 Third, Mr Shukla testified that he had spoken to Ms Serina Tan, who said that she did not recall what she told Mr Athappan. Mr Shukla said on the

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154 NE 30 October 2024 Hearing at p 142 lines 3–10.

stand, that the Defendants did not subpoena Ms Serina Tan as they did not think that her evidence would be useful, since she is TOPL's agent, and that she was allegedly unwilling to testify as she could not recall the exact words used in her conversation with Mr Athappan. Mr Shukla recognised that the Defendants could still have called Ms Tan to testify notwithstanding her unwillingness, but they did not do so[155]. However, her evidence as such would nevertheless have been relevant, had she been called to testify.

213 In light of the above, I place very little weight on Mr Shukla's account of the false representation allegedly made to Mr Athappan. This could have, but was not, corroborated by LCH's Ms Serina Tan; neither do any of contemporaneous documentary evidence available to the court incline towards this. Accordingly, I also find that the Defendants have not proven that TOPL through LCH, falsely represented to the Defendants that Braemar was not appointed because they were not available.

214 In summary, I find that there is no breach of the first duty of fair presentation.

Second duty of fair presentation

Defendants' case

215 The second alleged breach of duty of fair presentation is that the Teras Entities did not disclose that the Vessel and/or the proposed Tow Voyage did not comply with the OM. This includes the fact that the OM mandates a dry tow. If it had been disclosed to the Defendants that the Vessel and the tow

155 NE 30 October 2024 Hearing at p 145 line 24–p 148 line 4.

voyage would disregard the requirements in the OM, including the fact that it mandates a dry tow, the Defendants would not have agreed to the Towage Addendum.

OCBC's case

216 OCBC submits that there were no departures from the Vessel's OM. It is clear from the OM that a wet tow is permitted. Mr Hu also conceded to this point in cross-examination.[156] In any event, any departure was not a "material circumstance" as defined under the UK IA 2015. The specific deviations did not increase the risk profile for the Vessel or the Tow Voyage, and/or the departures were known to and approved by ABS and/or the MWS. In addition, the Defendants were not induced to enter into Addendum No. 3 by virtue of this non-disclosure. The Defendants' focus in deciding whether to enter into Addendum No. 3 was on having the MWS conduct the necessary surveys, with all of the MWS's recommendations being complied with. Thus, the fact that there were departures from the Vessel's OM would not have been of issue to the Defendants. The Defendants are not technical experts and would have been reliant on the MWS for technical issues in any event. Further, the MWS whom the Defendants had vetted and approved, had known of and approved these departures from the OM.

156 PRS at para 61.

Decision

217 The main alleged deviation from the OM is the fact that the Tow Voyage took place as a wet tow instead of a dry tow. The Defendants cite Part 1 Section 3.0 of the OM to support their case. The relevant part of this states:[157]

> All wet towing, as well as self propelled operation should be performed under the supervision of qualified individuals. The vessel shall be dry-towed on trans-ocean sea voyages.

218 Since the Voyage involved a trans-ocean voyage, the Defendants submit that the OM mandates a dry tow. OCBC cite the same section, submitting that it also contemplates a wet tow. In addition, Part 1 Section 3.4 of the OM provides that "For open ocean voyages, the vessel is to be prepared to be able to meet the Survival Condition".[158] OCBC submit that as the "Survival Condition" requires the legs to be lowered, and the legs can only be lowered when in a wet tow, Part 1 Section 3.4 also contemplates the possibility of a wet tow.

219 I note that there are parts of the OM, such as Part 1 Section 3.4, which contemplates the possibility of a wet tow "on open ocean voyages", even though Part 1 Section 3.0 states otherwise. The Defendants' expert, Mr Hu, also accepted during cross-examination that the OM contemplates both dry tow and wet tow, and that in an ocean voyage, it is possible to do a wet tow as well.[159]

220 I find that contrary to the Defendants' submission, the OM is not clear as to whether a wet tow is precluded entirely.

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157 ABOD Volume 11 at p 5831.

158 ABOD Volume 11 at p 5832.

159 NE 8 November 2024 Hearing at p 140 line 20–p 142 line 13.

221 Even if a wet tow is precluded by the OM, it is also not clear from the Defendants' evidence that such departure was a "material circumstance" as defined under the UK IA 2015. For example, it is not clear whether or how such a breach in and of itself renders the vessel unseaworthy. The Defendants' main thrust of attack on the wet tow that was eventually carried out, was that the legs of the vessel were not lowered as soon as the water depth allowed for it. As I have explained in my analysis above at [137]–[152] relating to the experts' evidence on the capsize, this was not a material factor to the sinking of the vessel.

222 Cpt Simpson also testified that dead ship wet tows are carried out on many occasions, in the same way that unmanned cargo barges, vessels proceeding to scrap, or for repair, are towed between various countries. The Vessel could not be considered to be unseaworthy because of the decision to conduct a wet tow, provided that necessary preparations were taken, which in his view, they were.[160] Cpt White maintained that the OM mandated a dry tow. There is little to differentiate between the two experts on this issue in terms of the consistency of their arguments. However, as I have set out above, it is not clear from the OM that it does preclude wet tows. The OM inclines against Cpt White's view. I am also mindful that Cpt White had shown a proclivity to over-reach as an expert to advocate for the Defendants (see [151] above), whereas there was no indication of Cpt Simpson doing so. From that perspective, I considered Cpt Simpson to be a more credible expert compared to Cpt White.

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160 1st AEIC of Captain John Simpson dated 22 August 2024 at pp 27–28.

223 In addition, there is the fact that the ABS and the MWS, Techwise, had considered and approved the wet tow. OCBC also highlights that the Defendants had vetted and approved of Techwise as the MWS.

224 The key question regarding ABS' and MWS' approval of the wet tow is this. The Defendants are not technical experts. Would they rely on the ABS and MWS certifications? Or would they expect to be updated on other technical information, such as whether the Tow Voyage was intended to be a wet tow as opposed to a dry tow, considering such issues as a "material circumstance".

225 OCBC's insurance practice expert, Mr Jervis, testified that an insurer relies on a certificate of approval as the insurer generally does not have the requisite technical knowledge to decide otherwise.[161] The Defendants' insurance practice expert, Mr Townsend, stated that as an underwriter, he would read every survey, even though he may not know necessarily know what he was looking for. The "catch-all" for him was the warranty that all surveyors' recommendations be complied with prior to the attachment of the insurance policy.[162] Additionally, Mr Jervis could not recall any situations where the underwriter agreed to certification and then looked elsewhere to other experts for advice.[163] Mr Townsend was of the view that the underwriting would have approved the surveyor being used, so the underwriter is unlikely to question the certification as a result of that.[164]

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161 NE 7 November 2024 Hearing at p 154 lines 15–20, p 155 lines 6–10; p 216 lines 1–12.

162 NE 7 November 2024 Hearing at p 216 line 13 – p 217 line 19.

163 NE 7 November 2024 Hearing at p 217 lines 21–24, p 218 lines 4–10.

164 NE 7 November 2024 Hearing at p 217 line 25 – p 218 line 3.

226 The common thrust of both insurance experts' views on this issue, is that underwriters are generally not sufficiently technically apprised to make technical assessments; they thereby rely on the MWS certification. Both experts also do not recall situations where having approved the surveyor and received the certification from the surveyor, the underwriter would look elsewhere for expert advice.

227 The Defendants rely on Mr Shukla's testimony made during re-examination, that if Techwise said not to worry about the concerns raised by Braemar, he would make a judgment call on whether these concerns were relevant to the risk they were undertaking and if the insurers were still not convinced, they may consult another expert in this regard.[165] I do not find that this aspect of Mr Shukla's testimony holds much weight. First, Mr Shukla had affirmed during cross-examination that when technical issues arise, insurers (including the Defendants) would not have the skill or expertise to assess their implications on risk; they would instead be wholly reliant on the MWS.[166] Second, it was apparent during the hearing (and borne out from the transcript) that Mr Shukla's evidence above came after prodding by counsel for the Defendants during re-examination. At the very least, Mr Shukla's evidence during re-examination is inconsistent with what he testified to during cross-examination.

228 Section 7(3) of the UK IA 2015 provides that "[a] circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms". On

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165 DRS at paragraph 46.

166 NE 30 October 2024 Hearing at p 171 line 11–p 172 line 2.

the whole, in light of the common position of both the insurance experts, I find that on a balance of probabilities, the Defendants would not have expected to be updated on technical information, such as whether the tow voyage took place as a wet tow instead of a dry tow. Hence, such information is not likely to influence the judgment of a prudent insurer in determining whether to take the risk and if so on what terms. The prudent insurer would instead be looking towards the certificate of approval from the MWS, which the Defendants did receive in this case. Thus, even if the wet tow was a departure from what the OM mandated, on the evidence, such departure would not have been "a material circumstance" for the purposes of the UK IA 2015.

229 I hence find that there is no breach of the second duty of fair presentation.

Third duty of fair presentation

Defendants' case

230 The Defendants' third alleged breach of duty of fair presentation is that the Teras Entities "deliberately or recklessly (or alternatively otherwise), did not disclose the locking arrangement of the freeing ports bolted through the bulwarks… [the Defendants] would not have agreed to enter into the Towage Addendum if they had known that the locking arrangement of the freeing ports bolted through the bulwarks did not comply with the ICLL…".[167]

231 Freeing ports come in two forms, either (a) with locking arrangements leading to the capability of being locked; or (b) without locking arrangements.

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167 Defence-A5 at paragraph 53.3

The ICLL prohibits the former. The existence of the capability of being locked increases the risk of the freeing ports being locked during the voyage, thereby adding risk of water being trapped on deck.

232 In their reply submissions, the Defendants submit that the effect of Mr Saju Ponnissery's ("Mr Ponnissery") AEIC,[168] which was unchallenged, is that the ICLL prohibition equally applies to "temporary" bulwarks, because the ICLL makes no distinction between the manner in which the bulwarks are connected to the deck. Mr Ponnissery is the Area Operations Manager, South Pacific Region for ABS.

233 The Defendants also make the new argument in their reply submissions, that there is a breach of duty of fair presentation in the Teras Entities failing to highlight that the configuration of the freeing ports (with locking arrangements fitted thereon) was different to the freeing ports in the "as built" design drawings that were approved by ABS Houston in May 2016. In making this argument, they rely on the AEIC of Mr Ponnissery, where he quoted a reply from ABS to LOC. The reply included a statement that "the drawing reviewed by ABS on 5 May 2016 does not show the securing clips".[169] The Defendants also cite *Tonny Permana v One Tree Capital Management* [2021] 5 SLR 447 ("*Tonny Permana*") at [205]–[206] for the proposition that it suffices to plead the essence of one's case and a party cannot be expected to plead every single fact in detail, especially where the other party has opportunity to cross-examine on that issue.

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168 AEIC of Mr Saju Youseph Ponnissery dated 17 October 2024 at paras 17–18.

169 DRS at paras 69 and 73.

OCBC's case

234 OCBC submits that the locking arrangement of the freeing ports was not a "material circumstance". The unchallenged evidence of Cpt Pedersen is that the freeing ports were not locked during the Tow Voyage. Further, the locking arrangements were not a non-compliance, because they were affixed to temporary bulwarks that are not subject to the ICLL. The locking arrangements did not increase the risk profile as there were sufficient openings on deck to prevent substantial accumulation of green water. In any event, the locking arrangements of the freeing ports were and/or would have been observed by ABS and/or the MWS. Moreover, in a response from the ABS to a query from Cpt White dated 14 January 2019, the ABS had stated the ICLL deals with a vessel's permanent fittings, and not temporary arrangements / temporary bulwarks (which were on the Vessel).[170]

Decision

235 I note that the Defendants' initial case at the start of the trial, appeared to be premised on the fact that the freeing ports were locked. However, Cpt Pedersen testified during the trial that the bolts for the bulwarks were not locked prior to the departure of the Vessel. There is no evidence suggesting otherwise.

236 The Defendants then submitted that the *existence* of a locking capability in the freeing ports increased the risk that they would be locked. They brought an application to amend their Defence, to make this clear. I allowed this

[170] ABOD Volume 15 at B-276 at pp 8359 and 8361.

amendment as there was no prejudice to OCBC caused by this amendment that could not be compensated by costs.

237 The Defendants submit that the existence of the locking capability creates a risk, because if the freeing port is locked, it would increase the risk of entrapment of water on the deck.

238 Whether there was such a risk and the extent of such a risk, is a technical matter, as there are also openings on the deck to allow for green water to flow out from the deck. The MWS was aware of the existence of such locking capability and had checked the weathertightness of the freeing ports. They had provided their certification of approval for the tow voyage. As highlighted above, the views of both insurance experts is that underwriters would generally not be technically competent and would instead look towards the certificate of approval from the MWS (see [225]–[228] above).

239 The Defendants' other allegation, which only became more apparent at the time of their reply submissions, is that there was a breach of duty of fair presentation because the Teras Entities did not inform that there were temporary bulwarks, when this is prohibited by the ICLL. In my judgment, the exchange between LOC and ABS cited by the Defendants (see [233] above) does not readily demonstrate that the ICLL prohibition applies equally to temporary bulwarks. LOC had asked ABS whether securing clips on the shutters were "equally unacceptable for any bulwark that is in position when the vessel is at sea". ABS did not affirm this. Their reply was that "[s]ecuring clips on shutters fitted to freeing ports are not acceptable under the [ICLL]. The [ICLL] does not address the connection to the deck for bulwarks or guard rails." This is consistent with the response from the ABS to a query from Cpt White dated

14 January 2019, where the ABS had stated that the ICLL deals with a vessel's *permanent* fittings, and not temporary arrangements or bulwarks.[171]

240 I also do not accept the Defendants' very late submission that there was a breach of duty of fair presentation relating to the configuration of the freeing ports being different from the freeing ports on the "as built" design drawings approved by ABS Houston in May 2016. The Defendants themselves acknowledge that this was not pleaded by them. Neither was this part of their case until their reply submissions. *Tonny Permana* at [205]–[206], which the Defendants rely on, does not assist them. The High Court had stated clearly in that case, that while not every detail needs to be pleaded, the *essence* of the case has to be encapsulated in the pleadings. Moreover, there was no prejudice in that case since the plaintiff had the opportunity to and did cross-examine on the issue. In this case, what is alleged goes to the substance of what was not fairly presented. It is the *essence* of the Defendants' late case, and not just a detail. OCBC would not have been aware of this or the need to cross-examine on it. Mr Ponnissery did not appear in court to be cross-examined. OCBC would be prejudiced if the Defendants are allowed to make this part of their case now.

241 Consequently, I find that first, the Defendants have not shown that the ICLL prohibitions apply to the temporary bulwarks on the Vessel. Second, the Defendants would not have expected to be informed of a technical matter such as the existence of a locking capability for the freeing port. Such information would not be construed as "*material circumstance*" for the purpose of s 3 of the UK IA 2015. I hence find that there is no breach of the third duty of fair presentation.

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171 ABOD Volume 15 at B-276, pp 8359 and 8361.

Fourth duty of fair presentation

Defendants' case

242 The fourth alleged breach of duty of fair presentation is that the Teras Entities falsely represented to ABS that the bulwarks fitted on the Vessel would either not be in position during the Tow Voyage or were part of the cargo fittings and not part of the Vessel. ABS was told that the bulwarks were temporary fixtures that would be removed prior to the tow voyage or that they were part of the cargo. This was a false representation to ABS, which in turn misled the Defendants because the Defendants relied on ABS to conduct the class survey.

OCBC's case

243 OCBC submits that the Teras Entities did not make any such representations to ABS. This is evidenced by ABS's letter to London Offshore Consultants dated 14 January 2019 ("ABS 14 Jan Letter"), where ABS stated that "[the Vessel Owner] did not advise anything about the condition of the bulwarks for the voyage".[172] In addition, the status of the temporary bulwarks during the Tow Voyage and/or whether they were part of the cargo fittings was not a "material circumstance" because, amongst other things, the temporary bulwarks have no impact on the Vessel's stability, and both ABS and the MWS were aware of the temporary bulwarks but had no issues with the same.

Decision

244 The nub of the Defendants' case is that the Teras Entities made such a false representation. However, ABS confirmed in the ABS 14 Jan Letter that

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172 ABOD Volume 15 at p 8359, C.3.

the Vessel Owner "did not advise anything" about the condition of the bulwarks for the voyage. I hence find that there is no breach of the fourth duty of fair presentation.

Breach of warranties

245 The fifth main issue relates to the Defendants' allegations that the Teras Entities had breached various warranties in the MI. At the start of trial, the Defendants withdrew their defence on the breach of one of the four warranties and proceeded on the basis of the other three warranties. The Defendants also argue that they should not be liable for loss attributable to the unseaworthiness of the Vessel on the basis of s 39(5) of the UK MIA 1906. Four broad sub-issues arise from the above:

(a) First, whether on the evidence, any of the three warranties were breached.

(b) Second, if there is non-compliance with the three warranties, whether these warranties are such that they define "risk as whole" pursuant to s 11(1) of the UK IA 2015 under English law. If the warranties do not define "risk as a whole", and if OCBC is able to demonstrate that non-compliance with the warranties could not have increased the risk of the loss in the circumstances in which they actually occurred, the Defendants may not rely on the non-compliance to exclude, limit or discharge their liability: ss 11(2) and (3) of the UK IA 2015.

(c) Third, whether the operation of the held covered clause without notice, requires good faith, and if there is such a good faith requirement, the extent of disclosure requirement arising from it.

(d) Fourth, whether the Defendants are exempt from liability on the basis of s 39(5) of the UK MIA 1906.

246 I will deal first with whether the three warranties were breached, on the evidence before the court.

247 As a preliminary note, both English law experts agreed that the three warranties merely require a state of affairs to exist. Consequently, there is no need to prove that the actions of the Teras Entities in relation to the warranties could be attributed to OCBC.[173]

248 OCBC nevertheless submitted that there was a need to prove such attribution. OCBC relies on the English case of *FNCB v Barnett Devanney* [1999] Lloyd's Rep 459 ("*Barnett*") to say that the breaches of warranty made by one co-assured (*ie*, the Teras Entities) do not affect the rights of another co-assured (*ie*, OCBC). OCBC submits that the Defendants' expert, Mr Berry KC, was wrong in his analysis when he sought to distinguish *Barnett* from the present case. Mr Berry KC had testified in his report that *Barnett* only applies where the conditions in each separate insurance are different or mean something materially different.[174] However, OCBC did not put this argument to Mr Berry KC before or during the experts' conference. Moreover, this is a matter for English law, and both experts, including OCBC's English law expert, agree that there is no issue of attribution, as the warranties only require a state of affairs to exist.[175] Following from this, I find that OCBC can be liable for the breaches of such warranties, if any.

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173 English Law Experts' Joint Memorandum at paras 21–23.

174 DRS at p 48-49.

175 English Law Experts' Joint Memorandum at paras 21–23.

Warranty No 1

Defendants' case

249 First, the Defendants allege that the express warranty that "all statutory or regulatory requirements whether arising before or during the period covered by this insurance shall be complied with insofar as they relate to the seaworthiness of the vessel" ("Warranty No 1"), was breached. In particular, the following statutory and/or regulatory requirements, insofar as they relate to seaworthiness of the Vessel, were breached:

(a) The MPA's Guidelines Shipping Circular No. 6 of 2005 ("MPA Circular No 6"): As this was disseminated by MPA under the MPA Act, it is a regulation to be complied with under the Merchant Shipping Act ("MSA").

(b) The conditions as set out in MPA's email to the Vessel Manager dated 12 May 2018 and time-stamped 7.37am (see [10] above, referred to as the "MPA Conditions"): This is a regulatory requirement because it was issued by MPA, which is described under s 7 of the MPA Act as being a body "to exercise regulatory functions in respect of merchant shipping and particularly in respect of safety at sea".

(c) The ABS MODU Rules: This is required in the International Safety Management Code ("ISM Code"), which is mandatory under the MPA website. The website is disseminated by the MPA under the MPA Act. It is a regulatory requirement to be complied with under the MSA.

(d) The IMO MODU Code: This is required in MPA Circular No 6, which was disseminated by MPA.

(e) The Vessel's OM: The OM is required under the IMO IS Code, which is mandatory under the MPA website. The OM is also required under the ABS MODU Rules.

(f) The IMO's Guidelines for Safe Ocean Towing in MSC/Circ.884 ("IMO Guidelines"): The IMO Guidelines are required under the ISM Code, which is mandatory under the MPA website. The IMO Guidelines are also required under MPA Conditions No 2.

(g) The ICLL: The ICLL is required under the IS Code; it is also required under the MPA Conditions No 1 and 2. Singapore has acceded to the ICLL and promulgated the Merchant Shipping (Load Line) Regulations ("MS(LL)R") that incorporate and give effect to this very convention. The ICLL is reproduced in full at Annex 1 of the MS(LL)R.

250 The phrase "all statutory or regulatory requirements" is governed by English law. OCBC's expert, Mr Blackwood KC, did not argue that he would limit the interpretation of "statutory or regulatory requirements" to only Singapore statutory requirements. There are other such regulatory requirements, such as class requirements, IMO and other international regulations for the safety at sea, that would regulate the safety of the Vessel; *PT Adidaya Energy Mandiri v MS First Capital Insurance Ltd* [2022] SGHC(I) 14 ("*PT Adidaya*") at [153].

251 Relying on the expert opinion of Mr Berry KC,[176] the Defendants submit that the phrase "all statutory or regulatory requirements" should be construed from the perspective of a reasonable person with the relevant background

[176] 1st Expert Report of Mr Steven John Berry KC dated 28 August 2024 at para 92.

knowledge. Cpt White falls within the class of a "reasonable person with the relevant background knowledge" – his views should thus be taken into account in construing the scope of Warranty No 1. In Cpt White's view, the various instruments set out at [249] above are "important regulations" that master mariners must be familiar with for the purpose of safety at sea. Indeed, the Standards of Training, Certification and Watchkeeping for Seafarers ("STCW") expressly requires such master mariners to have knowledge of international law embodied in various international agreements and conventions.[177]

OCBC's Case

252 OCBC submits that the Defendants have not identified the applicable law under which the above seven instruments are to be considered "statutory or regulatory requirements". The Defendant rely on the flow from statutes such as the Maritime and Port Authority Act 1996 and the Merchant Shipping Act 1995. However, it would be erroneous to clothe the seven instruments with statutory or regulatory character, merely because they are referred to in some aspect by the MPA. In any event, the Tow Voyage was approved by ABS and the MWS, which is *prima facie* evidence that Vessel was in compliance with all necessary requirements and was seaworthy for the Tow Voyage.

Decision

253 Under English law, as held in *ABC Electrification Limited v Network Rail Infrastructure Limited* [2020] EWCA Civ 1645 at [18], the interpretation of the contractual term "statutory or regulatory requirements" is to be made by considering the language used and ascertaining what a reasonable person, with

177 DCS at para 100.

the relevant background knowledge, would have understood the parties to have meant. That meaning must be assessed, amongst other things, in light of the natural and ordinary meaning of the clause. Mr Berry KC states that if there were two possible interpretations, the court was entitled to prefer the conclusion that was consistent with common business sense and to reject the other.[178] Mr Blackwood KC agrees with this.[179]

254 In my judgment, a reasonable person, with the relevant background knowledge, would have understood the term "statutory or regulatory requirements", based on its meaning in plain language. That is, a reasonable person would have understood it to mean *statutes* or *regulations* (which are subsidiary legislation promulgated by statutes). While the Defendants submit for a wider interpretation, namely, that regulatory requirements "[relate] to the control of an activity or process",[180] that is not the plain meaning of the term. Nor have the Defendants provided any authority that suggests this. I note that on the Defendants' interpretation, even a loose set of guidelines may constitute "regulatory requirements". This would lead to far more uncertainty about which guidelines are applicable, and the standards that the insured would have to comply with as "requirements" under the warranty. Indeed, if the contractual intent was to cover such a wide berth, it is questionable why the language used was specifically "*statutory* or *regulatory* requirements" [emphasis added]. The above interpretation, would in my view, cohere more with the "common business sense" that the English law experts spoke of.

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178 1st Expert Report of Andrew Guy Blackwood KC dated 21 August 2024at para 92.

179 2nd Expert Report of Mr Andrew Guy Blackwood KC dated 24 September 2024 at para 85.

180 DCS at para 101.

255 While I accept the Defendants' submission that the phrase need not be confined strictly to Singapore statutory or regulatory requirements, it is the Defendants themselves who make their case that the seven instruments are statutory or regulatory requirements because they flow from either a Singapore authority, namely the MPA, or Singapore law.

256 I find that none of the seven instruments relied on by the Defendants fall under "statutory or regulatory requirements". They are neither statutes nor regulations:

(a) A circular issued by a statutory board, in itself, does not have the force of regulations. MPA Circular No 6 is hence not a regulatory requirement. Consequently, the IMO MODU Code, which MPA Circular No 6 requires, is also not a regulatory requirement. Furthermore, the IMO MODU Code itself states that its purpose is only to *recommend* design criteria, construction standards and other safety measures.[181]

(b) Conditions stated in an email from an officer of a statutory body do not have the force of subsidiary legislation. The MPA Conditions are hence not a regulatory requirement. The fact that MPA Conditions refers to the ICLL is hence not material.

(c) Directives on a statutory board's website do not have the force of law. Hence, the mere fact that the ABS MODU Rules, the IS Code or IMO Guidelines are on the MPA website, do not make them a regulatory requirement. Furthermore, the IMO Guidelines themselves state that

[181] ABOD Volume 19 at p 10426.

their status is advisory.[182] Consequently, the fact that the OM is mentioned in the ABS MODU Rules or that the ICLL is mentioned in the IS Code, are not material. In addition, the OM itself makes clear that that it is merely a general outline of practices and procedures and not intended as a substitute for statutory laws, regulations or marine practices applicable to the operations involved, and that if there is conflict, the applicable laws, rules and regulations shall be followed.[183]

(d) While the ICLL is mentioned in the MS(LL)R, that relates in the main to the requirement that an International Load Line Certificate be issued before a vessel proceeds to sea. It is not alleged that such a Certificate was not issued in this case (see [115] above). The MS(LL)R does not convert the ICLL into the force of law, such that the ICLL becomes a "statutory or regulatory requirement".

257 In my judgment, the Defendants' reliance on *PT Adidaya* at [153] also does not bring their case very far. The warranty in question in *PT Adidaya* prescribed that "*suitable precautions* and *preservation/maintenance measures*" [emphasis added] were to be adopted while handling the Insured Equipment: at [47]. It was in the context of discussing whether there was a breach of this warranty, that the court referred to the ISM Code, the International Convention for the Safety of Life at Sea and the International Convention on STCW as "statutory regulations: at [153]. In other words, the question of construction of the term "statutory regulations" was not put before the court in *PT Adidaya*, nor did any party appear to make submissions on this. In addition, the warranty in

182 ABOD Volume 19 at p 10407.

183 ABOD Volume 11 at p 5817.

that case was framed far more broadly as including all "suitable precautions and preservation/maintenance measures" – in such a case, the various instruments cited, including the ISM Code, may be relevant. Warranty No 1 on the other hand, is far more confined, requiring compliance with "all statutory or regulatory requirements". To this extent, I did not consider the case of *PT Adidaya* to be useful in determining the scope of cover of Warranty No 1.

258 I am also guided by the recent case of *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] 3 WLR 659 ("*UniCredit Bank*"), where the UK Supreme Court cautioned against referring to sentences or phrases in a judgment "as if they had textual authority in the same way as an Act of Parliament" (cited with approval in *Re Fullerton* at [51]). The better approach is instead to "look to what was being discussed by the judge as well as to the words used" (*UniCredit Bank* at [38], citing with approval *Hood v Newby* [1882] 21 Ch D 605 at 608).

259 In so far as the Defendants rely on Cpt White's opinion that the various instruments are "important regulations" that a master mariner should be familiar with, I do not find that this argument tips the scale in the Defendants' favour. The court in *PT Adidaya* expressly noted that questions of construction cannot be resolved solely by reference to expert evidence:

> 136 Since the meaning of cll 1 and 8 of the Warranties raises questions of construction, *albeit questions which are to be considered against the background knowledge of the parties to the insurance, the expert evidence can only assist in relation to how the SPM is "handled" or "operated" in practice*, what qualifications or training are necessary for the persons who carry out those functions, once the functions have been identified and what suitable precautions and preservation/maintenance measures should be adopted in relation to those functions.
>
> [emphasis added]

260 For the reasons provided above, I find that the seven instruments relied on by the Defendants are not "statutory or regulatory requirements". The issue of whether Warranty No 1 is in breach of the particulars arising under these alleged statutory or regulatory requirements, thus does not arise.

Warranty No 2

Defendants' case

261 Second, the Defendants allege that the express warranty that "*all arrangements for moves shall be in accordance with standard operational procedures*" ("Warranty No. 2") was breached. The Defendants submit that since the Teras Entities did not comply with the statutory or regulatory requirements as alleged in relation to Warranty No 1, the proposed Tow Voyage was not in accordance with the IMO Guidelines and the OM, and hence there were non-compliances with the Vessel's standard operational procedures.

262 In addition, section 4.2 of the Towing Procedure required weather forecasts to be provided by "*two independent reputable sources*" prior to departure of the Vessel. Only one pre-departure weather forecast was obtained, according to the MWS Sailaway Attendance Report. This recorded that "[a] 48 hours weather outlook was received by the attending surveyor (see Appendix IV). The forecasted weather was considered suitable for departure of the tow from Vung Tau."[184]

184 ABOD Volume 13 at p 7209.

OCBC's case

263 OCBC submit that the Tow Voyage was performed in accordance with standard operational procedures. In addition, Techwise, as the approved MWS, had reviewed the procedures and inspected the preparations for the Tow Voyage. They also rely on the evidence of Cpt Simpson, who testified that the operational procedures were complied with. The MWS Certificate of Approval expressly states that Techwise "reviewed the procedures and inspected the preparations for [the Tow Voyage]" and that "[t]he procedures are satisfactory and all on-site recommendations made by [the MWS] have been complied with". Therefore, "[t]he preparations for the towage of [the Vessel] by [the Tug] are hereby approved".[185]

264 The Techwise certificate of approval requires only one favourable 48-hour weather forecast be obtained before departure. In contrast, the Towing manual requires two independent weather forecasts to be provided throughout the tow.

Decision

265 In so far as the Defendants rely on the breach of Warranty No 1 to support their case that there is a breach of Warranty No 2, it follows from the above analysis on Warranty No 1, that there is no breach of Warranty No 2 on this basis.

266 I turn next to the Defendants' narrower submission that there was non-compliance with the requirement for two independent weather forecasts to be

185 ABOD Volume 13 at p 7125.

conducted prior to departure. The Defendants had in their pleadings, pleaded that there was a breach of a warranty that the departure shall take place after a favourable 48-hour weather forecast has been received ("Warranty No 3").[186] Prior to trial, the Defendants informed that they would no longer be pursuing Warranty No 3. However, they maintained that there was non-compliance in relation to the requirement for two independent weather forecasts *prior* to departure for the purposes of Warranty No 2.

267 Section 4.2 of the Tow Procedure, which the Defendants rely on, states that "Two independent weather forecast will be provided for throughout the tow and will provide route specific forecasting and look ahead".[187] On its plain language, this requirement only applies "*throughout the tow*" and not prior to the tow. It is clear that there is no breach of this requirement.

268 I hence find that there was no breach of Warranty No 2.

Warranty No 4

Defendants' case

269 Third, the Defendants allege that the warranty in Addendum No. 3 of the Cover Note ("Warranty No 4") was not complied with. Warranty No 4 provides that:

> Warranty tug, tow, stowage, towage arrangements, crew competency, voyage and weather routing to be carried out by Techwise Offshore Consultancy Pte Ltd, and all recommendations to be complied with prior to sailing and during the sailing

186 Defence-A5 at para 49.

187 AEIC of Captain Bjarke Norby Pedersen dated 27 August 2024 at p 353.

This warrants that Techwise will carry out, amongst other things, a survey of crew competency. This was not done. The MWS Sailaway Attendance Report referred to by OCBC is still insufficient as the competency must relate to the voyage and there is nothing that shows experience with wet tow across the South China Sea.

OCBC's case

270 OCBC point out that the Defendants pleaded that OCBC breached Warranty No 4 "because Techwise failed to conduct a survey on crew competency". OCBC submits that the evidence shows that such a survey was done. OCBC relies on the MWS Sailaway Attendance Report. This confirmed that Techwise as the MWS had inspected the crew certification and experience.[188] Cpt Simpson also testified that "[t]he [MWS] Sailaway Attendance Report confirms that the surveyor inspected both the crew certification and their experience, which was found to be satisfactory".[189] In addition, the MWS Suitability Survey Report also listed key crew members' certificates and experience.[190]

Decision

271 Warranty 4 requires that crew competency be carried out by Techwise, which the Defendants submit means that Techwise is to carry out a survey of competency. The Defendants pleaded that "[n]one of the abovementioned

188 ABOD Volume 13 at pp 7207 and 7228.

189 1st AEIC of Captain John Simpson dated 22 August 2024 at p 38.

190 ABOD Volume 13 at p 7152.

Techwise certificates and report noted any scrutiny or examination of documents relating to the competence of the crew".[191]

272 OCBC has addressed this concern raised in the Defendants' pleading, by highlighting the MWS Sailaway Attendance Report and the MWS Suitability Survey Report, which sets out the rank of each crew member, their certificate number and years of experience.

273 I note that it was never the Defendants' pleaded case that the information in the MWS Suitability Survey Report on the crew's experience and qualifications was insufficient. Warranty 4 also does not set out any requirement as to how the survey results are to be presented, such as requiring the inclusion of details regarding specific competencies, which the Defendants now submit are missing. I find that OCBC has demonstrated that Techwise complied with the requirements of Warranty No 4.

Summary on Breach of Warranty

274 In summary, I find that on the evidence, there is no breach of Warranty No 1, Warranty No 2 and Warranty No 4.

275 In view of the above evidential findings, the other sub-issues relating to whether the warranties define "risk as whole" pursuant to s 11(1) of the UK IA 2015 under English law and whether the operation of the held covered clause without notice requires good faith, do not arise. Consequently, I will only address them briefly.

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191 Defence-A5 at para 50.5.

Effect of Breach of Warranty

276 In the event that there is a breach of the warranties, the question arises as to whether they "define risk as a whole" under s 11(1) of the UK IA 2015 (see [245(b)] above). This forms part of a broader inquiry, that being whether s 11 of the UK IA 2015 applies to govern the effect of a breach of the warranties identified above.

277 The English law experts agree that the effect of a breach of warranty in English Law is governed by ss 10 and 11 of the UK IA 2015.[192] These sections read as follows:

> **10 Breach of warranty**
>
> (1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.
>
> (2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.
>
> …
>
> **11 Terms not relevant to the actual loss**
>
> (1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—
>
> (a) loss of a particular kind,
>
> (b) loss at a particular location,
>
> (c) loss at a particular time.
>
> (2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

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192 Scott Schedule – English Law Experts at p 12, para 24.

> (3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

278 The English law experts opine that by operation of s 10 of the UK IA 2015, the effect of a breach of warranty is suspensory in nature. In other words, an insurer's liability is generally suspended between the date of breach of warranty, and the date on which the breach is remedied.[193]

279 Section 11 of the UK IA 2015 operates as an exception to s 10 of the UK IA 2015. It provides for a specific type of warranty for which a breach will *not* suspend the insurer's liability: s 11(2) of the UK IA 2015. Section 11 is engaged where:

(a) the warranty does not define risk as a whole (s 11(1) of the UK IA 2015);

(b) the warranty is of such nature that compliance with it would tend to reduce the risk of loss of a particular kind, a particular location and/or at a particular time (s 11(1) of the UK IA 2015); and

(c) the insured (OCBC, in this case) is able to demonstrate that non-compliance with the warranty could not have increased the risk of loss which actually occurred, in the circumstances in which it occurred (s 11(3) of the UK IA 2015).

280 In relation to the inquiry at [279(a)] above, *ie*, whether the warranties "define risk as a whole", the English law experts agree that this term has yet to

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193 Scott Schedule – English Law Experts at p 12, para 25.

be interpreted in English caselaw.[194] They provided the court with helpful but opposing interpretations of this term.

281 Mr Berry KC was of the view that insurance terms defining the "risk as a whole" are those which would affect the insurers' overall assessment of the risk (*eg*, in assessing the appropriate premium and other terms such as insured value).[195] The purpose of s 11 of the UK IA 2015, according to Mr Berry KC, is to deal with a totally and utterly irrelevant breach of warranty, such as a warranty to install sprinkler systems in a factory which is eventually destroyed by a typhoon.[196] Given that the warranties relied on by the Defendants would affect their overall assessment of risk, they sufficiently "define risk as a whole".[197]

282 Mr Blackwood KC's view was that the focus of the statutory test is whether the term delimits the nature and scope of the insurance contract generally.[198] He refers to geographical and usage restrictions as examples of a term defining risk as a whole.[199] Mr Blackwood KC opines that the legislative intention behind s 11(1) of the UK IA 2015 was to carve out warranties which are so fundamental and extensive that they delimit the very risk that the insurer is underwriting, and to exempt these warranties from the tests set out at ss 11(2) and (3) of the UK IA 2015.[200] In other words, and in relation to a breach of these

194 Scott Schedule – English Law Experts at p 13, para 26.

195 NE 14 November 2024 Hearing at p 42 lines 13–14, p 98 at lines 19–22.

196 NE 14 November 2024 Hearing at p 97 lines 14–21.

197 Scott Schedule – English Law Experts at p 13, para 27.

198 NE 14 November 2024 Hearing at p 16 lines 23–24.

199 NE 14 November 2024 Hearing at p 17 lines 15–17.

200 NE 14 November 2024 Hearing at p 94 lines 15–22.

fundamental warranties, the insurer's liability should generally be suspended by operation of s 10 of the UK IA 2015.

283 Both experts referred the court to the Law Commission Report No. 353 ("LCR 353"). As explained by Mr Berry KC, the LCR 353 is persuasive as it presents opinions of the commissioners to Parliament and sets out the purpose of the UK IA 2015.[201] The relevant portions of LCR 353 state:

> 18.7 *The real mischief we are trying to address is reliance by insurers on breaches of irrelevant warranties*. We do not think it is fair that an insurer can refuse a claim on the basis of the policyholder's breach of warranty or other condition in circumstances where those terms are clearly irrelevant to the loss – that is, *where the type of loss which occurred is not one which compliance with the warranty or condition could have had any chance of preventing*. The insurer might seek to rely on this type of "technical" get-out in order, for instance, to avoid having to prove a suspected fraudulent claim. …
>
> 18.18 … They will have to determine whether a term concerns loss of a particular kind or loss at a particular time or location, or whether it is designed to delimit the scope of the insurance contract more generally. …
>
> 18.20 *The real mischief this recommendation is designed to address is reliance on breach of blatantly irrelevant warranties in order to escape liability for an unconnected loss*. We accept that there are many terms which do not go to the risk at all (such as terms relating to payment of the premium).
>
> 18.21 Others have a more general effect of defining the scope of the policy. Insurance is based on the insurer's ability to decide what risk to accept, and on what terms. The insurer must be in a position to calculate risks and to charge higher premiums on "riskier" risks, therefore keeping the premiums down in relation to low risk policies.
>
> 18.22 Taking vehicle insurance as an example, commercial vehicle policies will generally be subject to a higher premium than domestic use and this is widely accepted. In *Murray v Scottish Automobile and General Insurance Co*, a vehicle insured for pleasure use but regularly used commercially was damaged

[201] NE 14 November 2024 Hearing at p 42 lines 7–20.

> while parked overnight in the garage, between days of hire. The court found that the overnight parking was incidental to the commercial use and therefore there could be no liability.
>
> 18.23 It would frustrate the insurer's risk assessment process if a policyholder in this position could still recover for any loss not directly related to the commercial use. *The use to which a vehicle is put goes more generally to the risk the insurer was prepared to take, rather than targeting particular types of loss which might occur.*
>
> 18.24 *Another example is a requirement in marine insurance relating to the ship's class, as this will have an impact on the insurer's overall assessment of the risk.* The *Murray* case indicates that the courts are already considering these issues and by and large they are reaching the right decision with some manipulation. Under clause 11, they would address the issue more directly.
>
> [emphasis added]

284 The Explanatory Notes to the UK IA 2015 ("Explanatory Notes") at para 94 provides an example of a clause which defines risk as whole, being "a requirement that a property or vehicle is not to be used commercially".

285 What is clear from the above texts is that example of terms which would be regarded as going to the "risk as a whole" are cast fairly broadly. For example, that the loss covers pleasure use but does not cover commercial use of a vehicle, or that the insurance is only in relation to the ship's class.

286 Mr Blackwood KC expressed the view that in relation to the Tow Voyage, terms defining the "risk as a whole" "would be a geographical or usage restriction". For example, if the Vessel were to be towed outside of its intended place of arrival, or if the tow voyage was stopped midway through the tow such that the rig performed drilling operations (when it was only supposed to be towed), then such changes would fundamentally alter the nature of the risk that an insurer may be willing to accept.

287 It is clear from the LCR 353 that "blatantly irrelevant warranties" do not define "risk as a whole" (at para 18.20). Mr Berry KC's position is that other than such blatantly irrelevant warranties, all other warranties define "risk as a whole". Mr Blackwood KC takes a narrower view, that it is only warranties that are fundamental and extensive, that define "risk as a whole".

288 On balance, strictly on the basis of the views presented by the two English law experts, I incline towards Mr Blackwood KC's view. I find it to be more consistent with the examples cited in LCR 353, and as an indication of what "risk as a whole" could mean under English law.

289 In contrast, Mr Berry KC's view that it covers terms which would affect the insurers' overall assessment of the risk and hence all the warranties (other than blatantly irrelevant ones) go to "risk as a whole", appears to me, to be more remote from the LRC 353 explanation of the mischief that s 11(1) of the UK IA 2015 is aimed at.

290 In light of the above, I observe in *obiter* that Warranties 1, 2 and 4 *as presented* in this case do not appear to be so fundamental or extensive such that they may define "risk as a whole". With that said, there is the further issue of whether OCBC could demonstrate that non-compliance with the warranty could not have increased the risk of loss which actually occurred; s 11(3) of the UK IA 2015. As such analysis is largely dependent on the nature of non-compliance, and I have found above that there was compliance with the warranties, it would not be fruitful to delve further into this.

Held Covered Clause

291 OCBC submit that even where the express warranties have been breached, the existence of the term "Clause 3 held covered with or without notice" within the Cover Note of the MI (the "Held Covered Clause") entitles OCBC to coverage under the MI. As I have found that none of the alleged warranties have been breached, my views set out below are in *obiter*.

292 Both English law experts agree that the Held Covered Clause applies on payment of reasonable premium and on additional terms. Their disagreement is over whether the assured must exercise utmost good faith when exercising a Held Covered Clause without notice. Mr Blackwood KC's view is that the duty of utmost good faith does not spring up because it is retained only as an interpretive principle (Explanatory Notes at para 116) post UK IA 2015. Mr Berry KC is of the view that compliance with the duty of utmost good faith is a condition precedent to the invocation of the Held Covered Clause.

293 In my view, the duty to act in utmost good faith is retained under English law, even where the Held Covered Clause applies without notice.

294 Mr Blackwood KC relies in part on *Arnould* at para 18B-51 to say that the doctrine of utmost good faith is merely an interpretive principle.[202] However, I note that these observations at para 18B-51 were made in the context of Part II of the UK IA 2015, which sets out provisions relating to the duty of fair presentation. The more relevant part of the UK IA 2015, and which discusses the effect of a breach of warranty, is Part III of the UK IA 2015. *Arnould*

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202 2nd Expert Report of Mr Andrew Guy Blackwood KC dated 24 September 2024 at para 100(b).

discusses the duty of utmost good faith in the specific context of held covered clauses, at para 19-74:

> 19-74 … *Although the assured must observe the utmost good faith* when seeking to take advantage of a held covered clause, *it appears that clauses of this type* (depending of course on their precise wording) *may be invoked even in circumstances where there had been misrepresentation or non-disclosure in respect of the maters for which the clause was subsequently invoked*, at an earlier stage when the policy was taken out … By agreeing to hold the assured covered in respect of such matters, the underwriters can be said in effect to be affording the assured a second chance to rectify inadvertent breaches of utmost good faith at the time of placing, and to obtain cover for the risk on amended terms reflecting its real character …
>
> [emphasis added]

295 It appears to me, on the authority of *Arnould* and on which Mr Blackwood KC relies, that the duty of utmost good faith applies in English law to a held covered clause which operates without notice.

296 This interpretation is fortified by reference to s 17 of the UK MIA 1906, amended by s 14 of the UK IA 2015, to state that "[a] contract of marine insurance is a contract based upon the utmost good faith". English caselaw similarly supports the imposition of such a duty. In *Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others* [2017] AC 1, the court stated that a "contract for insurance must be conducted on both sides in the utmost good faith" (at [54]).

297 In light of the above, had this been in issue, I would have been inclined to accept Mr Berry KC's position that the duty to act in utmost good faith is retained when parties seek to exercise a held covered clause without notice. Whether this would have been material if there was a breach of warranty, would have depended on the factual finding regarding the particular breach.

Section 39 Marine Insurance Act

298 The Defendants' last argument on this issue can be dismissed of quickly. They rely on s 39 of the UK MIA 1906, which states:

> **39 Warranty of seaworthiness of ship**
>
> (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
>
> …
>
> (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
>
> (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

299 In their pleadings, the Defendants rely on the implied warranty of seaworthiness contained in s 39(1) of the UK MIA 1906. However, Mr Blackwood KC and Mr Berry KC suggest that the MI is a time policy and that the implied warranty in s 39(1) of the UK MIA 1906, which governs only voyage policies, does not apply to the present case.[203] It appears that the Defendants have since abandoned their argument on s 39(1) of the UK MIA 1906 and now proceed on the basis of s 39(5) of the UK MIA 1906. In gist, their argument is that the Vessel was sent to sea in an unseaworthy state with the privity of the assured, and which state resulted in the capsize of the Vessel. As a result, the Defendants should not be liable for the loss arising from the capsize.

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[203] 1st Expert Report of Mr Steven John Berry KC dated 28 August 2024 at para 193; 2nd Expert Report of Mr Andrew Guy Blackwood KC dated 24 September 2024 at paras 134–135.

300 In its Defence, the Defendants argued that the Vessel was unseaworthy for the purposes of s 39(5) of the UK MIA 1906, for the following two reasons: (a) the installation of the bulwarks contributed to the loss of stability of the Vessel, resulting in her capsize; and (b) the Vessel was wet towed via an ocean route instead of being dry towed via a coastal route, with access to sheltered locations.[204] However, I earlier accepted Ms Blazejczyk's theory on the capsize of the Vessel and found that there was insufficient evidence to demonstrate that the Vessel was sent to sea in an unseaworthy state (see [108]–[120] and [137]–[152] above). I have also explained above why the bulwarks and wet tow do not constitute a breach of warranties. For this reason, I reject the Defendants' reliance on the exclusion of liability clause contained in s 39(5) of the UK MIA 1906.

Section 4 Marine Insurance Act

301 The Defendants submit that the MI is void as a gaming or wagering contract under s 4 of the UK MIA 1906. Both English law experts agree that by s 4 of the UK MIA 1906, section [A] of the MI, hull and machinery, is not deemed to be a gaming or wagering contract and is not void. However, they agree that section [B] of the MI, increased value, is deemed to be a gaming or wagering contract and is void.[205]

302 At the close of trial, both parties indicated that they accept the opinions of the English law experts as set out above in relation to s 4 of the UK MIA 1906 and sections [A] and [B] of the MI. OCBC, however, submit that it is both question of law and fact whether the parties *intended* for the contract to be

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204 Defence-A5 at para 60.

205 English Law Experts' Joint Memorandum at para 37(b).

subject to the Proof of Policy Interest ("PPI") clause, notwithstanding the presence of those words in the addendum.

303 In their closing submissions, OCBC made submissions relating to the legislative history of the UK MIA 1906 and submitted that with OCBC having a valid interest in the MI, it was evidently not made subject to "policy proof of interest". In their reply submissions, OCBC also submit that: (a) there is ambiguity in the interpretation of the MI, and that *contra proferentum* should apply and resolve the ambiguity in favour of the party that did not draft the contract; and (b) there exist policy considerations against such an interpretation.

304 However, as this is a matter of English law, arguments such as the UK MIA 1906's legislative history and their impact on the legal analysis, as well as the other legal arguments raised by OCBC against the application of s 4 of the UK MIA 1906, should have been brought before the English law experts, who took a common position on this. Indeed, OCBC itself make the submission that foreign law must be specifically pleaded and proved in evidence.[206] OCBC did not do so here and hence do not have foundation for raising this legal argument at this stage.

305 In addition, I also find that OCBC's factual foundation for this submission is not made out. OCBC's factual argument relies in the main on Mr Shukla's response to the question of whether the Defendants would generally issue a policy that is a gaming and wagering contract, where he said

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206 PRS at paragraph 104(d).

that generally "following the principles of insurance, a gaming contract could be a no".[207]

306 OCBC's reliance on Mr Shukla's statement does not take its case very far. The question posed to him was in general terms and did not relate to the MI in question here. Mr Shukla's answer was similar couched in general terms.

307 Furthermore, OCBC has not pleaded that there was a common mistake in including the PPI clause. There is in any event, no evidence to support such a claim.

308 I therefore find that section [B] of the MI, under which the Defendants undertook to insure the Vessel for increased value and/or excess liabilities up to a value of US$14m, is deemed to be a gaming or wagering contract and is void. Consequently, OCBC is only entitled to claim in respect of section [A] of the MI, which is capped at US$56m.

Damage for late payment

309 Finally, OCBC submit that they should be entitled to damages for late payment pursuant to s 13A of the UK IA 2015. This provides that it is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time: s 13(1) of the UK IA 2015. The Defendants correctly point out that this allegation was not pleaded. While OCBC points to it giving voluntary

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[207] NE 30 October 2024 Hearing at p 190 line 19–p 191 line 2.

particulars regarding s 13A of the UK IA 2015 (the "Voluntary F&BP"),[208] it did not however, make any application to amend its Statement of Claim.

310 There is an established difference between the purpose of pleadings and particulars. While pleadings are intended to define the issues in general terms, particulars are intended to control the generality of the pleadings, to restrict the evidence to be led by parties at trial and to give the other party such information as may enable him to know what case he will be met with: *Pilato v Metropolitan Water Sewerage and Drainage Board* (1959) 76 WN (NSW) 364 at 364, cited in *Singapore Civil Procedure* 2021 vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at 18/12/2 ("*Singapore Civil Procedure*"); see also *Access Medical Pte Ltd and others v MHC Medical Network Pte Ltd* [2023] SGHCR 19 at [19].

311 The paragraph of OCBC's Statement of Claim which the Voluntary F&BP sought to particularise reads as follows:

> 38A. By reason of the Defendants' breach of the Marine Insurance, OCBC has suffered loss and damage in a like amount or in such other sum or sums as the Court may determine.
>
> And OCBC claims:
>
> [*list of heads of claim pursued by OCBC*]

312 By seeking to introduce an argument premised on s 13A of the UK IA 2015 in the Voluntary F&BP, OCBC is essentially seeking to bring forth a new claim. I also observe that the Voluntary F&BP was filed late in the day, and only on the eve of commencement of trial. In my judgment, what OCBC sought

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208 Further and Better Particulars to the Statement of Claim (Amendment No. 1) filed on 28 October 2024.

to introduce is clearly in the nature of pleadings rather than particulars to a claim. It is not the function of particulars to take the place of necessary averments in the pleading, nor "to state the material facts omitted … in order by filling the gaps, to make good an inherently bad pleading"; *per* Scott LJ in *Pinson v. Lloyds, etc., Bank* [1941] 2 K.B. 72 at 75, cited in *Singapore Civil Procedure* at 18/12/2. I also did not consider that there was any ambiguity in the scope of para 38A of the Statement of Claim that required OCBC's clarification through the Voluntary F&BP. If OCBC intended to rely on this new claim, it should have filed an application to amend its pleadings pursuant to O 20 r 5 of the Rules of Court (2014 Rev Ed).

313 Indeed, it was not even part of OCBC's case, as introduced through its Scott Schedule and Opening Statement, that it would be making a claim on the basis of s 13A of the UK IA 2015. This was not even flagged at the end of trial, when parties were going through the issues to deal with in their closing submissions.

314 In light of the above, I find it insufficient for OCBC to have introduced this new claim via the Voluntary F&BP. OCBC is disallowed from pursuing the argument on this basis.

315 Even if OCBC is not barred for want of pleading, the application of this provision is a matter of English law. However, this was not brought to the attention of the English law experts, who did not opine on it in their reports or during the trial. There is therefore no legal foundation for this claim.

316 Moreover, OCBC has not adduced evidence to show that the elements of s 13A of the UK IA 2015 are made out: for example, in respect of s 13A(4)

of the UK IA 2015, OCBC has not proven that there were "no reasonable grounds for [the Defendants to dispute] the claim" (in which case there would be no breach of the implied term in s 13A(1) of the UK IA 2015). For these reasons, OCBC's argument is rejected.

Conclusion

317 In conclusion, I allow OCBC's claim for payment under Section [A] of the MI and for an insured value of US$56m, on the basis that the Vessel was lost to perils of the seas and is thereby covered by the MI. If parties are unable to agree on costs, they are to file written submissions on costs, of not more than ten pages, within two weeks of this judgment.

Kwek Mean Luck
Judge of the High Court

Tan Chee Meng SC, Tan Kai Yun, Deya Dubey, Teo Jen Min, Jayakumar Suryanarayanan, Jerrick Lim and Alexis Loy (WongPartnership LLP) for the plaintiff;
Chan Leng Sun SC (instructed), Loh Wai Yue, John Seow, Prakash Nair, Glenn Tennyson Ong and Martin Lee (Incisive Law LLC) for the defendants.