IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2026] SGCA 14

Court of Appeal / Civil Appeal No 18 of 2025

Between

(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

… *Appellants*

And

Oversea-Chinese Banking Corporation Limited

… *Respondent*

In the matter of 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

[Evidence — Admissibility of evidence — Hearsay]
[Insurance — Marine insurance — Whether loss caused by perils of the seas]
[Insurance — Marine insurance — Whether vessel was a constructive total loss]

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Argoglobal Underwriting Asia Pacific Pte Ltd and others
v
Oversea-Chinese Banking Corp Ltd

[2026] SGCA 14

Court of Appeal — Civil Appeal No 18 of 2025
Sundaresh Menon CJ, Steven Chong JCA and Hri Kumar Nair JCA
21 January 2026

19 March 2026 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 Not infrequently, ships in the course of their voyages are lost at sea. Such incidents call for investigations to determine the cause especially in the context of a claim under a marine insurance policy. How can a shipowner be expected to prove the cause of the loss where the vessel has sunk? Is there room to invoke Sherlock Holmes's celebrated investigation theory that "when you have eliminated the impossible, whatever remains, however improbable, must be the truth"? While there might be a certain attraction in its logic, the House of Lords in *Rhesa Shipping Co SA v Herbert David Edmunds* [1985] 1 WLR 948 ("*The Popi M*") observed that it "does not accord with common sense" to find that an event is more likely to have occurred even if it is "extremely improbable" (at 956C). It remains the task of the court to undertake its fact-finding process in order to determine whether the burden of proof has been discharged.

2 Instead, the law has developed a rebuttable presumption that the loss of a vessel was caused by perils of the sea if the shipowner is able to prove that *the vessel was seaworthy* and that the *loss occurred in "wholly unexplained" circumstances*. This would typically arise where a vessel has sunk, and the law recognises the enormous difficulty for the shipowner to establish the cause of the sinking, hence the "wholly unexplained" condition needs to be fulfilled.

3 It is important to bear in mind that the rebuttable presumption is not intended to operate as an evidential tool of convenience. Therefore, where the casualty is *capable of being explained* and the shipowner elects not to take steps to investigate the cause, it would not be entitled to invoke the presumption simply because it would have failed to satisfy the "wholly unexplained" condition.

4 This crucial distinction was brought to fore on the facts of this appeal. In this case, the vessel did not sink. It capsized and remained afloat for a number of weeks. During that period, the vessel was inspected but no step was taken to investigate the cause of the capsize and no evidence was adduced at the trial that the cause could not have been ascertained. The vessel was eventually scuttled by the shipowner after it had served a notice of abandonment on the insurers based on its claim that the vessel was a constructive total loss ("CTL") and no offer for its scrap value was reportedly forthcoming.

5 There are two pivotal issues in this appeal. First, has the insured proved that the loss was caused by perils of the sea? A related question is whether there is any room for the presumption to apply in such circumstances. Second, proof of an insured peril would only mean that the marine insurance policy is engaged. The insured would still need to prove that the vessel was a CTL. In the

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proceedings below, the High Court judge ("Judge") found in favour of the insured on both issues even though no witness was called to prove the CTL. After having carefully considered the parties' submissions, we disagree with the Judge on both findings though a reversal of either of them would have sufficed to allow the appeal.

Background facts

The Tow Voyage

6 Oversea-Chinese Banking Corp Ltd ("OCBC") was the mortgagee of the vessel, "TERAS LYZA" ("Vessel"). The Vessel was a jackup rig built sometime before 2018. Under a hull and machinery marine insurance policy ("MI") issued by the five appellant insurance companies ("Insurers") in respect of the Vessel, OCBC was the co-assured alongside the vessel owner Teras Lyza Pte Ltd ("TLPL") and the vessel manager Teras Offshore Pte Ltd ("TOPL"). TLPL and TOPL will collectively be referred to as the "Teras Entities". Their parent company was Ezion Holdings Ltd ("Ezion"). For convenience, where a distinction does not need to be drawn between the Teras Entities and Ezion, we will refer to them collectively as the "Owners".

7 The MI contained a "Cover Note" issued by marine insurance broker LCH Lockton Pte Ltd ("LCH") to TLPL on 13 June 2017. Under Section [A], the hull and machinery of the Vessel was insured up to an insured value of US$56m and, under Section [B], for an "increased value and/or excess liabilities up to a value of US$14m". The Judge found that Section [B] was void as a gaming or wagering contract. This finding is not challenged in this appeal and hence, only Section [A] is relevant.

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8 LCH issued an "Addendum No 1" to the Cover Note on 13 June 2017 under which each Teras Entity assigned their rights, title and interest in the MI to OCBC, which was named as the "sole loss payee". Addendum No 1 incorporated the relevant notice of assignment and loss payable clause into the MI. On 29 August 2017, a renewal certificate was issued to Ezion confirming the insurance of the Vessel for the period of 1 August 2017 to 31 July 2018 ("Renewal Certificate Policy").

9 The Vessel was subsequently prepared to embark on a tow voyage from Vung Tau, Vietnam to Taichung, Taiwan ("Tow Voyage") for delivery to a set of charterers. This was to be its maiden voyage. The Insurers agreed to insure the Vessel for the Tow Voyage, and this agreement was formalised in an "Addendum No 3" issued to the Cover Note on 6 June 2018 and an Endorsement No. 18183166/7 issued to the Renewal Certificate Policy on 20 June 2018.

10 The Teras Entities undertook an internal feasibility study to assess the feasibility of a wet tow of the Vessel. Conducted by then-Deputy Director of Fleet Operations of TOPL, Captain Bjarke Norby Pedersen ("Cpt Pedersen"), the study concluded that a wet tow was feasible, subject to the flag state and other approvals as required. A surveyor from the American Bureau of Shipping ("ABS") attended the Vessel on 25 May 2018. Thereafter, ABS issued TOPL a Certificate of Fitness to Proceed under Tow, a Short-Term International Load Line Certificate, a Class Survey Report, and a Statutory Survey Report.

11 The Teras Entities first contacted and intended to engage Braemar Technical Services (Offshore) Pte Ltd ("Braemar"), a competent marine warranty surveyor ("MWS") for the wet tow. This engagement was pre-approved by the Insurers. However, for reasons disputed by the parties,

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Techwise Offshore Consultancy Pte Ltd ("Techwise") was eventually appointed as the MWS instead. Between 26 and 31 May 2018, Techwise issued a Certificate of Fitness for Towage, a Certificate of Approval for the Tow Voyage, a Suitability Survey Report and a Sailaway Attendance Report.

12 On 30 May 2018, the Vessel, under the tow of the Teras Eden ("Tug"), sailed away from Vung Tau, Vietnam. On 5 June 2018 at 3.45pm, the Vessel developed a list to port and trimming by the stern and at 5.50pm the same day, the Vessel capsized.

Events after the Vessel's capsize

13 Salvors from Resolve Salvage & Fire (Asia) Pte Ltd ("Salvors") were contracted to salvage the Vessel on 15 June 2018 by invoking the Special Compensation, Protection and Indemnity Club ("SCOPIC") clause of Lloyd's Standard Form of Salvage Agreement. The Vessel was towed to Batangas Bay, Philippines while in a capsized state.

14 On 10 July 2018, the Owners wrote to the Insurers, asserting a claim under the MI for loss and damage of the Vessel in the range of US$76.3m to US$82.6m ("10 July Letter") in support of its claim that the Vessel was a CTL. Quotations from Triyards Marine Services Pte Ltd ("Triyards"), Offshore Heavy Transport ("Offshore") and Marco Polo Shipyard Pte Ltd ("Marco Polo") (collectively, the "Cost Estimates") were enclosed to support the Owners' estimates of the costs of repair and/or recovery of the Vessel.

15 The Insurers responded on 11 July 2018, disputing the claimed figures for being too high and stating that it was premature to conclude that the Vessel was a CTL ("11 July Email").

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16 By an email dated 22 July 2018, the Owners recorded an impasse between the Protection and Indemnity Club ("P&I Club"), Owners and the Insurers over a number of issues ("22 July Email"). The Owners tabled their strong views, supported by the P&I Club, that the casualty was a CTL, although there was a general consensus that a proper diving inspection should be done to inspect the structural condition of the Vessel. The Insurers maintained their view that the Vessel was not a CTL.

17 Between 23 and 25 July 2018, an underwater inspection of the Vessel was carried out by Solis Marine Consultants ("Solis"). Pursuant to the underwater inspection, Special Casualty Representative Situation Reports ("SCRS Reports") were produced and sent to the Owners and the Insurers. The SCRS Reports set out various observations on the extent of damage suffered by the Vessel.

18 On 25 July 2018, the Owners issued a Notice of Abandonment ("NOA"). The Owners repeated their views as to the Vessel's condition and provided an updated estimate as to the total costs to recover and repair the Vessel, asserting that the Vessel was a CTL. The following day, the Insurers rejected the NOA in an email ("26 July Email").

19 The Salvors issued a report ("Dive Inspection Report") on 4 August 2018, following several inspections between 23 July and 27 July 2018. The Dive Inspection Report detailed the damage suffered by the Vessel.

20 On or around 4 August 2018, the Owners started making enquiries and received responses from various shipping brokers ("Ship Brokers' Replies") with respect to the scrap sale of the Vessel. However, there were no potential

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buyers for the Vessel as scrap. On 18 August 2018, the Owners informed the Insurers that no scrap buyers were interested and that the Vessel could only be disposed of ("18 August Letter"). The Vessel was then disposed of and submerged by the Salvors in deep water off the Philippines on 20 August 2018.

21 Subsequently, OCBC and the Teras Entities mounted a claim under the MI. The MI incorporates the Institute Time Clauses (Hulls) 1.10.83 CL 280 ("ITC"), which provides that the insurance is subject to English law and practice. Clause 6.1.1 of the ITC, on which OCBC and the Teras Entities rely, 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
>
> …

22 The Teras Entities were subsequently struck out as parties as the Teras Entities went into liquidation, and the liquidator did not wish to continue participating in the action.

The decision below

23 In the proceedings below, the Judge considered five broad issues in finding for OCBC. We briefly summarise the Judge's decision.

24 First, the Judge was satisfied that OCBC had proved that the loss was caused by a peril of the seas. OCBC did not bear a burden of showing that there was an aperture that permitted water to enter the Vessel in the first place, and what created it (Judgment at [104]). The Insurers would only have a defence if

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they were able to demonstrate that the Vessel was a decrepitude (Judgment at [108]). The Judge also found that there was insufficient evidence to demonstrate that the Vessel was inherently unstable or unseaworthy (Judgment at [113]). The Judge preferred the expert evidence of OCBC's expert, Ms Rosalind Blazejczyk ("Ms Blazejczyk"), that the capsize resulted from an estimated ingress of 450 tonnes of water, although Ms Blazejczyk could not pinpoint the cause of the initial seawater ingress (Judgment at [127]–[129]). Having been satisfied that there was unexpected flooding/seawater ingress in the hull compartments, the Judge found on a balance of probabilities that the capsize was caused by perils of the seas (Judgment at [152]).

25 Second, the Judge was satisfied that OCBC had proven that the Vessel was a CTL. To discharge its burden of proof, OCBC relied on a number of documents, including correspondence between the Owners and the Insurers, quotations and emails from third parties, and reports on the Vessel's condition ("CTL Documents") (see Judgment at [45]). The Insurers objected to the reliance on these documents on the basis of hearsay as the maker of the documents did not testify in court. The Judge was satisfied that the CTL Documents were admissible under s 32(1)(*b*)(iv) of the Evidence Act 1893 (2020 Rev Ed) ("EA"), also known as the "business records exception" (Judgment at [55]–[59]). Thereafter, the Judge exercised his discretion to cure OCBC's non-compliance with s 32(4) of the EA in failing to file a notice to admit hearsay evidence, and declined to exercise his discretion under s 32(3) of the EA to exclude the evidence in the interest of justice (Judgment at [60]–[75]). Finally, the Judge found the evidence sufficient to make out a *prima facie* case of a CTL, and that the Insurers failed to adduce evidence to rebut this *prima facie* case (Judgment at [76]–[86]).

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26 Third, the Judge found that OCBC did not breach any warranty in the MI. Of relevance to this appeal are two warranties alleged by the Insurers to have been breached:

> (a) "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"); and
>
> (b) "all arrangements for moves shall be in accordance with standard operational procedures" ("Warranty No 2").

For Warranty No 1, the Judge interpreted "statutory or regulatory requirements" as "statutes or regulations (which are subsidiary legislation promulgated by statutes)" (Judgment at [254]). No breach was found on the basis that the instruments raised by the Insurers were neither statutes nor subsidiary legislation (Judgment at [256]). As regards Warranty No 2, the Judge found that it followed from the analysis on Warranty No 1 that there was no breach of Warranty No 2 (Judgment at [265]).

27 Fourth, the Judge found that there was no breach of the duty of fair presentation. He rejected the Insurers' allegation that the Teras Entities deliberately failed to disclose that they had "abandoned" Braemar as the MWS because Braemar would not have approved the proposed Tow Voyage and/or that they would only have done so by imposing conditions that the Teras Entities were unwilling to comply with. The evidence merely showed that Braemar presented several "comments for clarification" (Judgment at [198]–[203]). Contrary to the Insurers' case, the Teras Entities' failure to disclose the existence of a locking capability in the freeing ports was also not a violation of

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the prohibition under the International Convention on Load Lines, 1966 and Protocol of 1988, as amended in 2003 (Consolidated Edition, 2005) ("ICLL"). Moreover, the Insurers would not have expected to be informed of a technical matter such as the existence of a locking capability for the freeing ports. The Insurers' argument concerning the configuration of the freeing ports being different from the "as built" design drawings approved by ABS Houston in May 2016 was dismissed on the basis that it was not pleaded (Judgment at [240]–[241]).

28 Finally, the Judge rejected the Insurers' contentions relating to the sufficiency of evidence for the disbursement of the loan from OCBC to TLPL (the borrower) and the breakdown for interest and late charges, which go towards establishing OCBC's entitlement under the MI. This was because the objections were not pleaded and, in any event, OCBC had discharged its burden of proving the debt of at least US$70m (Judgment at [160]–[169]).

The parties' cases on appeal

29 In sum, the Insurers say that the Judge erred because:

(a) OCBC had not discharged its burden to prove that the loss and/or damage to the Vessel was caused by a peril of the seas.

(b) OCBC had not established that the Vessel was a CTL.

(c) OCBC had breached Warranty No 1 and Warranty No 2 under the MI.

(d) OCBC had breached its duty of fair presentation by failing to disclose material circumstances affecting the stability of the Vessel and the feasibility of the envisaged voyage.

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(e) OCBC had not proven the indebtedness under the mortgage.

30 OCBC's case is that the Judge did not err in his reasoning and the appeal should be dismissed in its entirety.

Issues to be determined

31 Arising from the above, the issues to be determined are:

(a) whether the Judge erred in finding that OCBC had discharged its burden to prove that the loss was caused by a peril of the seas;

(b) whether the Judge erred in finding that OCBC had established that the Vessel was a CTL;

(c) whether the Judge erred in finding that there had been no breach of warranties and/or the Teras Entities' duty of fair presentation; and

(d) whether the Judge erred in finding that OCBC had proved its indebtedness under the mortgage.

OCBC did not discharge its burden to prove that the loss was caused by a peril of the seas

Applicable framework to prove loss by perils of the seas

32 In establishing a claim under an insurance policy, an insured bears the burden of proof to establish loss by an insured peril. Where the insured claims that the loss was occasioned by perils of the seas, the insured must *prove* so on a balance of probabilities. It is in this context that we consider the available methods of proof.

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33 To set the stage, we begin by briefly considering the scope of "peril of the seas". Rule 7 of the Rules for Construction of Policy scheduled to the UK's Marine Insurance Act 1906 ("UK MIA 1906") stipulates: "The term 'peril of the seas' refers only to fortuitous accidents and casualties of the seas. It does not include the ordinary action of winds and waves". As stated in *Arnould: Law of Marine Insurance and Average* (Sweet & Maxwell, 21st Ed, 2024) ("*Arnould*") at para 23-11, "[i]n order to come within this definition, it is sufficient that the event was in some way fortuitous, it does not have to be shown that it was brought about by extreme weather or any violent action of winds and waves". There are thus two elements as to what constitutes a peril of the seas: first, *it must be a fortuity* and not something that is bound to happen, and second, *the peril which gives rise to the marine casualty must be "of the seas"* (*Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] 2 All ER (Comm) 465 ("*The DC Merwestone*") at [31] and [34]). The latter element is most commonly satisfied by establishing seawater ingress, but the former element still has to be proved (Howard Bennett, *Law of Marine Insurance* (Oxford University Press, 2nd Ed, 2006) ("*Bennett*") at para 10.26).

34 In *Arnould*, the learned authors note that a presumption of loss by perils of the seas may apply, where the vessel is lost without a trace and nothing is known about the prevailing circumstances at the time of her loss, and the vessel is shown to be seaworthy on sailing. However, where there is evidence of an incursion of seawater in a particular part of the vessel the cause of which is uncertain, there is no room for the presumption to apply (at para 20-35):

> … It is always for the assured to *prove loss by a peril insured against, and if at the conclusion of the evidence the court is left in doubt as to the true reason for the loss, he cannot succeed in his claim.* When the *vessel is lost without trace and nothing is known about the circumstances prevailing at the time of her loss, a presumption of loss by perils of the sea can be made if she is*

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> *shown to have been seaworthy on sailing*; the onus will then switch to the underwriter to rebut that presumption by evidence of her unseaworthiness. *When it is known that the vessel sank in calm waters as a result of an incursion of seawater in a particular part of the vessel, the cause of which is uncertain, there is no room for any presumption of a fortuitous loss.* Typically, in cases of this type, the underwriter will seek to establish a positive cause of unseaworthiness as the likely cause of loss, but he need not do so; the assured has to prove loss by a peril insured against. …
>
> [emphasis added]

35 This is consistent with the framework described in *Bennett*. Prof Howard Bennett explains that an insured may seek to discharge the burden of proving fortuity *either directly* or by *inference* from circumstantial evidence by way of a presumption (*Bennett* at para 10.26).

(a) First, an insured may *directly* prove fortuity by establishing, on a balance of probabilities, the precise cause of the seawater ingress and its fortuitous nature. An insured may also prove, on a balance of probabilities, that the cause of the ingress was one of a number of identified possibilities *all of which* are maritime and fortuitous in nature (*Bennett* at para 10.27).

(b) Second, an insured may prove fortuity by *circumstantial evidence*, where the burden of proof cannot be discharged by direct evidence. An insured is entitled to recover for loss by perils of the seas, where a vessel is seaworthy at the time of departure and subsequently sinks in unexplained circumstances (*Bennett* at para 10.28). Prof Bennett also notes that the question of proof by circumstantial evidence has been raised in circumstances where the presumption cannot arise as the conditions to the presumption are not made out. This is where seaworthiness of the vessel is not proven or where evidence is available

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as to the circumstances surrounding the sinking of the vessel (at para 10.32).

36 From the above, we discern two conventional ways in which an insured may prove loss by a peril of the seas on a balance of probabilities.

(a) First, an insured may directly prove that the loss of the vessel was caused by a peril of the seas by putting forward a cause for the loss of the vessel which is attributable to perils of the seas. An insured would have to prove this cause on a balance of probabilities.

(b) Second, an insured may resort to circumstantial proof and rely on a rebuttable presumption that the vessel was lost by perils of the seas, if it can prove that the vessel was seaworthy and that it was lost in wholly unexplained circumstances. In doing so, an insured need not propound a cause for the loss of the vessel.

37 Where the conditions to the presumption are not made out and the presumption cannot be relied on, an insured may still rely on inferential reasoning and the elimination of possibilities to bolster its case. However, in this situation, an insured must propound an explanation for the loss of the vessel which is attributable to a peril of the seas. The court must be satisfied that this explanation, in light of the elimination of uninsured losses, is rendered more likely than not (or in other words, proven on a balance of probabilities) to be the cause of the loss (see *Bennett* at para 10.42). This, in our view, constitutes *direct proof* of a peril of the seas on a balance of probabilities (*ie*, falling under [36(a)] above). It is strictly not a third method of proving loss by a peril of the seas.

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38 This sets the context against which we analyse the Judge's decision and the parties' cases. We note that the above framework is consistent with other English cases, including *Lamb Head Shipping Co Ltd v Jennings* [1994] 1 Lloyd's Law Rep 624 ("*The Marel*") and *The Popi M*. At an appropriate juncture, we will elaborate on those cases, and the various conditions applicable to each method of proof.

39 While the insured strives to establish either methods of proof, the insurer may seek to demonstrate that the loss was due to an uninsured peril such as an uneventful decrepitude of the vessel or inherent characteristics of the vessel. If it is able to do so, it would follow that the loss was not caused by an insured peril or that the presumption has been successfully rebutted. In short, the insurer is entitled to put forward an alternative case theory to explain the cause of the casualty. However, it must not be overlooked that the insurer has no burden to prove the alternative theory (*Arnould* at para 20-35, *The Popi M* at 951B–951C). Rejection of the insurer's alternative theory does not mean that the presumption therefore applies or that the fortuity has been proved.

OCBC's case below and the Judge's reasoning

40 It is important to bear in mind OCBC's pleaded case that the capsize was caused by a combination of: (a) the flooding of the Vessel's port aft thruster room and adjacent machinery space; and (b) the effect of wind and waves. OCBC's own expert, Ms Blazejczyk, explained in her report that "[h]aving established above that wind and waves alone could not have caused the capsize, and that green water on deck was unlikely at the time of the capsize, the most likely cause of the capsize must have been water ingress to the hull of the [Vessel] resulting in loss of buoyancy". On the stand, she testified that the prevailing wind and waves did not cause the capsize. On this basis, OCBC failed

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to prove (b) since that was effectively ruled out by its own expert. That would only leave (a) as the propounded cause of the capsize. However, there was no pleading as to the cause of the flooding.

41 The Judge referred to case law relating to the presumption, *viz*, *The Popi M* and *Glowrange Ltd v CGU Insurance plc* [2001] All ER (D) 339 (Jun) ("*Glowrange*") (Judgment at [96]–[99]). However, it is not clear which method of proof the Judge eventually adopted when he concluded that "on a balance of probabilities, the capsize of the Vessel was caused by perils of the seas" (Judgment at [152]). The Judge, after canvassing the authorities, concluded that there was 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 (Judgment at [104]).

42 The Judge began by addressing the Insurers' defence that the Vessel was a "decrepitude" (Judgment at [108]–[120]). But that issue only arises for consideration *after* OCBC has established the fortuity. In so doing, the Judge had reversed the burden of proof which lies on the insured to first prove its case *ie*, the fortuity. The Judge erred by equating his rejection of the Insurers' alternative theory (*ie*, the Vessel was a "decrepitude") as an affirmation of OCBC's primary case. The Judge undertook a comparison between the parties' experts and preferred the evidence of OCBC's expert because he found several unexplained inconsistencies in the Insurers' expert's evidence (Judgment at [121]–[152]). The fact that the Judge preferred the evidence of OCBC's expert over that of the Insurers' expert does not mean that OCBC has therefore proved that the capsize was caused by perils of the sea, as the Judge appeared to have reasoned (see Judgment at [152]). OCBC's case must be sufficient on its own to make out its claim.

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43 The Judge's analysis did not appear to draw a distinction between direct proof of a peril of the seas and circumstantial proof in reliance on the presumption. During the hearing of the appeal, counsel for OCBC, Mr Tan Chee Meng SC ("Mr Tan"), acknowledged that the Judge did not appear to have grounded his decision on the presumption, even though Mr Tan at the close of the hearing clarified that OCBC is nonetheless relying on the presumption and that it could be inferred from the Judge's reasoning that he had implicitly applied the presumption. Counsel for the Insurers, Mr Chan Leng Sun SC, accepted that the Judge might have implicitly applied the presumption even though he contended that the Judge did not have the correct principles in mind. We therefore turn to examine the two established methods of proof in detail, before assessing OCBC's case on perils of the seas.

A cause to the seawater ingress must be propounded to directly prove fortuity

44 We first consider direct proof of peril of the seas. It is common ground that the *physical cause* of the capsize was seawater ingress. This only goes to establish that the peril was of a maritime nature (see [33] above). However, the fortuitous nature of that peril must still be proved. OCBC contends that "[w]here a vessel has been lost by the ingress or entry of seawater, there is no requirement on the insured to prove what occasioned the ingress", as long as OCBC can demonstrate fortuity. In contrast, the Insurers contend that as a starting point, the search for the proximate cause requires an inquiry as to what had occasioned the entry of seawater. We agree with the Insurers. In our view, case law pertaining to *direct proof* of perils of the seas requires the insured to propound a cause of the seawater ingress to prove the fortuity.

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45 As highlighted above, the learned authors of *Arnould* observe at para 20-35 that an assured must prove loss by a peril insured against, and that "if at the conclusion of the evidence the court is left in doubt as to the true reason of the loss, he cannot succeed in his claim" (see [34] above). At para 23-15, the learned authors emphasise that an incursion of seawater does not *ipso facto* constitute a peril of the seas as it must be shown that the event was fortuitous:

> … a loss due to the incursion of sea water into the vessel *does not necessarily* amount to loss by perils of the seas: it must be shown that the event was fortuitous. This may be shown either by pointing to *some adverse or unusual conditions of the weather or the seas as having caused the entry of sea water*, or by pointing to *some fortuitous occurrence* happening on board the vessel during the period of cover which allowed the water to enter. …
>
> [emphasis added]

46 Furthermore, *Glowrange* emphasised (at [26]) that *as a starting point*, for a claimant to discharge its burden of proof, a claimant must put forward an explanation for the seawater entry which was intrinsically sufficiently probable and not attributable to the general debility of the vessel.

47 OCBC disagrees with this proposition and relies on the Privy Council's decision of *Canada Rice Mills, Ltd v Union Marine and General Insurance Company, Ltd* [1941] AC 55 ("*Canada Rice Mills*"), *viz*, that "[w]here there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the sea" (at 68). Read in context, this passage does not assist OCBC's case. The Privy Council in the very same paragraph went on to detail what may constitute an accidental unexpected ingress of seawater: "some negligent act, such as improper opening of a valve, or a hole made in a pipe by

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mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings" (at 68–69).

48 In this light, we do not think that the Privy Council was suggesting that a cause for the seawater ingress need not be propounded. The Privy Council was merely noting that a loss occasioned by an accidental unexpected ingress of seawater would *prima facie* be loss by perils of the sea, giving examples of such accidental, fortuitous entry. The premise of the proposition, *ie*, that the seawater ingress was accidental, would still need to be proved by establishing the cause of the seawater ingress.

49 Next, OCBC cites Popplewell J's holding in *The DC Merwestone* at [42] that "[w]here there is a fortuitous ingress of water, it is often the ingress itself, rather than that which renders it fortuitous, which is to be regarded as the proximate cause of the loss, or at least a proximate cause of the loss". In the same vein, we do not think that Popplewell J was suggesting that no cause for seawater ingress had to be propounded. Instead, Popplewell J merely held that as a matter of *causation*, provided the cause of the seawater ingress is fortuitous, the loss would *prima facie* be by perils of the seas. Taking reference to *Canada Rice Mills*, Popplewell J concluded that the ingress of seawater during a voyage, fortuitously caused by crew negligence, would constitute a peril of the seas (*The DC Merwestone* at [36]). On the facts, after noting that "a proximate cause of the loss and damage was the ingress of seawater", Popplewell J found that "the ingress was fortuitous, having been caused by crew negligence at the loading port" (*The DC Merwestone* at [40]).

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50 This, however, does not detract from the need to prove that the ingress of seawater was "fortuitous". Earlier in the judgment, Popplewell J held that "[t]he mere fact of ingress of seawater into a vessel is not itself a peril of the seas", and that "[w]here, therefore, a loss arises by reason of ingress of seawater through the vessel's hull, the search for proximate cause involves an inquiry into that which occasions the entry of the seawater" (*The DC Merwestone* at [35]), bearing in mind his earlier observation at [33] that "[t]he fortuity may lie in what causes the hole, or what causes the seawater to reach or enter the hole, or a combination of both". This is consistent with our reading of *Canada Rice Mills*, that to prove a peril of the seas, a claimant would still have to establish the fortuitous nature of the seawater ingress by propounding a cause of the ingress.

51 Lastly, OCBC relies on *Venetico Marine SA v International General Insurance Co Ltd* [2013] EWHC 3644 (Comm) ("*Venetico Marine*"). In that case, Andrew Smith J rejected the insurers' argument that to establish a loss of perils of the seas, the insured "[had] to show on a balance of probabilities 'that the alleged grounding probably occurred how, when and where they say it did'" (at [289]–[290]). Again, this has to be read in context. The relevant issues of fact in that case were "whether the grounding was fortuitous (and so a peril of the seas) and whether it was a proximate cause of the damage to the vessel" (at [290]). The insured had advanced a primary submission on the circumstances of the grounding, being that the grounding had occurred by about 10am before the vessel used her engine or tried to do so. Smith J held that even on the insurers' case that the vessel might have been grounded later, the insured would not have failed to discharge its burden if the insured could show *in that alternative scenario* the grounding was nonetheless fortuitous and a proximate cause of the damage. Smith J concluded in the 10am scenario that the vessel

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was grounded by operation of the current (at [281]) and that this was a fortuity as it was not an inevitable event (at [283] and [285]). Further, even in the alternative scenario, that the grounding had occurred later and the vessel had unsuccessfully attempted to use its engine (at [286]), the fortuity was that the current carried the vessel aground before repairs were done (at [291]).

52 In our view, *Venetico Marine* merely stands for the proposition that where *alternative factual scenarios* have been advanced, and the court may be left in doubt as to which factual scenario had actually materialised, the insured may still point to the fortuity within the insurer's alternative factual scenario and prove that even if the insurer's case were accepted, the loss would still be occasioned by a peril of the seas. It does not purport to dispense with the requirement that a cause has to be advanced to prove the fortuity. This is consistent with Prof Bennett's observation that an insured need not establish one particular cause, if it proves that the cause of the ingress was one of a number of identified possibilities *all of which* are maritime and fortuitous in nature (see [35(a)] above, *Bennett* at para 10.27).

53 Therefore, having carefully reviewed the authorities relied upon by OCBC, we are satisfied that OCBC was required to put forward a cause for the seawater ingress to directly prove its case of peril of the seas. At the very least, it has to advance a number of identified possibilities all of which were maritime and fortuitous in nature.

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The rebuttable presumption of loss by perils of the seas may only be invoked where the vessel is seaworthy on sailing and it is lost in wholly unexplained circumstances

54 In the alternative, a claimant may establish that the loss was caused by a peril of the seas by circumstantial proof. In this regard, OCBC has relied on the rebuttable presumption that the loss was caused by a peril of the seas even though it is unclear whether the Judge had applied the presumption. OCBC frames its formulation of this rebuttable presumption as such: "[w]here the insured vessel is seaworthy and has been lost by the entry of seawater in circumstances where seawater is not expected to enter in the ordinary course of things, there is a presumption of fact that the vessel has been fortuitously lost by perils of the seas".

55 Having examined the cases, we do not agree with OCBC's formulation. The presumption may only be invoked where the vessel is seaworthy on sailing, *and* it is lost in wholly unexplained circumstances. While OCBC appears to accept at other parts of its submissions that the rebuttable presumption only arises where there is an "unexplained loss" of a seaworthy vessel, OCBC's conception of "unexplained loss" appears to encompass situations where the insured simply *fails to put forward a plausible explanation*, as opposed to cases where the insured is *realistically incapable of providing an explanation* (due to, for instance, the loss of the vessel at sea). In our view, the latter conception of "unexplained loss" is more consistent with case law. We explain.

The genesis and rationale of the rebuttable presumption

56 The rebuttable presumption has its genesis in cases where no direct evidence of the loss of the vessel could be adduced. The case of *Green v Brown* (1743) 93 ER 1126 ("*Green v Brown*") is regarded as the progenitor of this

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presumption (see *Bennett* at para 10.29). There, a vessel, after setting sail, was never heard of again. The policy excluded loss by capture and seizure, and the underwriters contended that the assured should have adduced direct evidence of the loss in the particular manner declared. The jury was directed that "it would be unreasonable to expect certain evidence of such a loss, as where [everybody] on board is presumed to have drowned; and all that can be required is the best proof the nature of the case admits of". Seen in this light, the rebuttable presumption was (at least initially) designed to be an evidential crutch for shipowners in an era where ship disappearances were more commonplace and evidence as to the circumstances in which a vessel was lost may not be readily available. Lacking any evidence as to what had occurred to the vessel, it would not be possible for a shipowner to mount a claim on a marine insurance policy. The presumption could, perhaps, be seen as a "risk allocation device that places the risk of loss from unascertainable causes on the insurers" (*Bennett* at para 10.28).

57 This rebuttable presumption has been described to be "merely shorthand for the normal inferential conclusion of accidental maritime loss that flows from proof of initial seaworthiness coupled with an absence of further information and the civil law standard of proof on the balance of probabilities" (*Bennett* at para 10.31). It is made possible by the extensive concept of peril of the seas (*Skandia Insurance Co Ltd v Skoljarev* (1979) 26 ALR 1 ("*Skandia*") at 15). In *The DC Merwestone*, Popplewell J held at [32] that fortuity may be most easily defined by its antithesis – the cause of the loss should not have been intentional, as where the ship is scuttled, or inevitable, as where there is a rotten hulk or "debilitated" vessel. By rendering the latter unlikely through a finding of seaworthiness and given the improbable nature of the former when nothing has been heard of the crew, the inference to be drawn is that on a balance of

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probabilities, the ship was lost to a peril of the seas. As the English Court of Appeal in *The Marel* put it (at 629):

> … the presumption is really founded on the balance of probabilities. If it is known that *a ship was seaworthy when she set out*, and *she has never been seen since and nothing has been heard of her crew*, then on the balance of probabilities she must have sunk and, on the balance of probabilities, the sinking must have been due to 'perils of the sea' because she was seaworthy when she set out. The only alternative would be that she was scuttled, but members of a ship's company who scuttle their ship do not normally intend to commit suicide. They expect to be rescued.
>
> [emphasis added]

58 Prof Bennett, with reference to *Green v Brown* and *The Marel*, offered a similar analysis as to the true nature of the so-called "presumption", which we broadly agree with (*Bennett* at para 10.31):

> …. Vessels are most likely to be lost by scuttling, by barratry, because they are unfit for the voyage, by reason of a piratical or other hostile attack, or because they encounter a maritime accident. Where a vessel proved to have been seaworthy is lost without a trace or, alternatively, in waters where physical access is impossible and the master and crew must be presumed dead, the logical inference by elimination is that the vessel met with a maritime accident. First, the unlikelihood of crew suicide renders scuttling and barratry impossible. It is possible that a scuttling or barratrous sinking went wrong, resulting in the death of all on board, or that the master or crew, having sunk the vessel, have been paid to disappear and have done so. It is, however, unlikely. Secondly, a seaworthy vessel by definition is reasonably fit for the insured adventure. Although it remains possible that a seaworthy vessel might be lost by reason of a lack of fitness that it was not reasonable to expect, this eventuality is again unlikely. Thirdly, a piratical or other hostile attack is unlikely to occur without news leaking out. …

59 We thus turn to consider in detail the conditions upon which the presumption of loss by a peril of the seas may be invoked.

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The vessel must be proved to be seaworthy on sailing

60 First, for the presumption to be relied upon, the vessel must be proven to be seaworthy. Seaworthiness is not an absolute concept and should be assessed relative to the nature of the ship, to the particular voyage and even to the particular stage of the voyage (*Ever Lucky Shipping Co Ltd v Sunlight Mercantile Ptd Ltd* [2003] SGHC 80 at [40]).

61 One should bear in mind that in this analysis, the "seaworthy" condition is meant to effectively rule out unseaworthiness as the *sole proximate* cause of the casualty. In other words, if the vessel was proven to be seaworthy, by an elimination of probabilities, it is more likely than not that she had been lost as a result of a peril of the seas. In this light, we agree with the formulation in *Glowrange* as to the requisite extent of seaworthiness to be proven, "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" (at [33]).

The vessel must have been lost in wholly unexplained circumstances

62 Second, the vessel must have been lost in unexplained circumstances. There is an issue, however, as to what constitutes unexplained circumstances, and whether circumstantial proof by inferential reasoning is available where there is evidence as to the circumstances of the loss of the vessel, *eg*, that the vessel was lost by seawater ingress, but no cause as to the seawater ingress could be identified by direct evidence on a balance of probabilities.

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(1) The content of "unexplained circumstances"

63 To begin, the rebuttable presumption has been successfully invoked in a number of cases where the ship was lost at sea or the crew has perished, was lost or was otherwise unavailable.

(a) In *Green v Brown*, the vessel was lost after setting sail and never found again (see [56] above).

(b) In *Koster v Reed* (1826) 6 B & C 19 359, the ship sailed on a voyage insured with goods on board but did not arrive at her port of destination. A few days after departure, a report was heard that the ship had foundered at sea, but the crew were saved. The defendant contended that given the crew's apparent survival, it was incumbent on the plaintiff to call them as witnesses (at [20]). The issue was whether there was sufficient evidence to be left to the jury as evidence of a loss by perils of the sea or by barratry. Abbott CJ held that it was not incumbent on the plaintiff to search for the crew, who were assumed to be foreigners, all over Europe (at [22]). In the same vein, Bayley J held that a ship has not been heard of when "no intelligence has been received from persons capable of giving an authentic account; and not that mere rumours have never been heard", and that it was fair to presume that the ship perished at sea (at [22]).

(c) In *Yeung Kong Yung v The Young Shing Investment Co Ltd* [1921] HKCU 5, a vessel, the "Luen On", embarked on a voyage from Hong Kong to Manila in 1917. After departure, she was not heard of again. She was insured against sinking caused by running on rocks or reefs or by damage due to winds or waves. The Hong Kong Full Court

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noted that "the fact that she has never been heard of raises the well-known presumption of insurance law that she foundered at sea: in other words that she was lost owing to a peril of the seas" (at 25). That said, the court was satisfied, on the meteorological evidence, that the "Luen On" encountered a gale, as described by the captain of another ship operating in the region, which would be particularly dangerous to her (at 27). Therefore, it might not have been necessary for the claimant to rely on the presumption.

64 By contrast, in three more recent cases, the English courts have held that the presumption could not apply because, at least in part, the loss did not occur in wholly unexplained circumstances.

65 In *The Popi M,* the crew survived, and the trial judge could make clear and positive findings as to how the seawater had entered the ship, *viz*, through a large aperture in the shell plating on the vessel's port side in way of the engine room, and the manner in which the seawater had flooded other compartments making it inevitable that the ship should sink. Lord Brandon of Oakbrook, delivering the judgment of the House of Lords, noted that the case was "not a case of a ship being lost with all her crew in circumstances when the immediate cause of entry into her of sufficient water to make her sink is unexplained" (at 953A–953B). Therefore, "[i]n the state of knowledge which existed it [was] not surprising to find that the shipowners were strenuously pressed … to specify the perils of the sea on what they relied as having been the proximate cause of creating the aperture in the ship's shell plating which led to her loss" (at 953B–953C). Accordingly, the shipowners could not rely on the rebuttable presumption of loss by perils of the seas for two reasons. First, there was no finding that the ship was seaworthy. Second, "the loss did not occur in

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unexplained circumstances: on the contrary, the reasons why she sank, apart from the cause of the fatal aperture itself, were as clear as they could possibly have been" (at 953D–953E).

66 In *The Marel*, a bump was felt on board the ship sufficient to throw the crew off balance, and immediately afterwards, large volumes of seawater flooded the engine room on the floor plate level in the vicinity of the high sea chest (at 624). On the known facts, the trial judge had found it wholly improbable that the entry of seawater into the engine room was due to a collision with a container, rejecting the plaintiff's primary case (at 628). The trial judge therefore was not satisfied on a balance of probabilities that the sinking of the ship in *The Marel* was caused by perils of the sea. On appeal to the English Court of Appeal, the plaintiff relied on "the presumption or inference that the Court makes when a ship has disappeared at sea and it is shown that she was seaworthy when she set out on her last voyage, that her loss was by 'perils of the sea'." The plaintiff submitted that even though "the *Marel* did not simply vanish without a trace, and there is a certain amount of evidence as to the circumstances of her sinking, nonetheless the presumption applies insofar as the evidence available does not provide a complete explanation of how she came to sink" (at 629). Dillon LJ did not accept the submission, holding that it was inconsistent with previous propositions as to the onus of proof, because the plaintiff's stance would mean that if a ship was seaworthy when she set out and is lost, the loss must be held to have been due to the perils of the seas, unless it was affirmatively established by the underwriters otherwise. Dillon LJ was also not persuaded that the presumption could apply as the known circumstances of the sinking eliminated a number of possible perils of the seas, such that there was "no room for the presumption". It was for the plaintiffs to prove their case (at 629).

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67 In *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd* [2000] 2 All ER (Comm) 803, Aikens J held at [18] that "the presumption only operates when the loss of the vessel is unexplained", explaining with reference to *The Marel* that the presumption did not operate in favour of the claimants "when they have not been able to put forward a plausible explanation for the loss or their explanations have been rejected by the court as too improbable for belief, so that the loss is 'unexplained' in that sense". Instead, the presumption only applies where a seaworthy ship disappears in "wholly unexplained circumstances". On the facts, the presumption was not applicable as "the crew were rescued and have told their story in evidence".

68 This view appears to be shared by commentators. The learned authors of *Arnould* express the view that "[i]t is only where the loss is 'wholly unexplained' that such presumptions may be invoked. If there is direct evidence from those on board regarding the casualty, the loss is not wholly unexplained" (*Arnould* at para 22-52, fn 388). Likewise, Professor Bennett notes that the vessel must be proven seaworthy and is lost without trace, or alternatively, in waters where physical access is impossible and the master and crew must be presumed dead (*Bennett* at para 10.31).

(2) Availability of inferential reasoning where the loss did not happen in wholly unexplained circumstances

69 We, however, note that a more permissive approach in relation to *proof by inferential reasoning* by elimination appears to have been articulated in several cases. This is such that a claimant may be able to eliminate unseaworthiness and scuttling as causes and therein establish perils of the seas, *even where* the loss did not happen in wholly unexplained circumstances, *eg*, where there is direct evidence of the circumstances surrounding the loss of a

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ship. While OCBC's case was framed as a "presumption of fact" and not as a matter of proof by inferential reasoning, the central thrust of its submission, *ie*, a seaworthy ship which capsized by entry of seawater should be found to be fortuitously lost by perils of the seas, engages with this broader issue of inferential reasoning. We therefore consider this question for completeness.

70 In *Glowrange*, the English High Court had the opportunity to consider the question of proof of loss in light of *The Popi M* and *The Marel*. The court held that while there may be evidence as to how the vessel came to sink, such as the failure of the hull at a particular place and in particular sea conditions, the loss might still be established to be caused by perils of the seas if the assured can prove that the vessel's condition was not so debilitated that it could not withstand the ordinary action of wind and waves in calm conditions (at [18]). The court observed that proof of loss by perils of the seas did not fall into some special category of forensic exercise, and set out two propositions.

> 21. Failure of the assured to explain precisely what caused seawater to enter a vessel and thereby caused it to sink *does not necessarily mean that it is not open to the court to conclude on the whole of the evidence that it has been established that the loss was proximately caused by perils of the seas*. In particular it is not in such circumstances incumbent on the court to conclude that it is left in doubt as to the proximate cause of the loss if *it can properly be inferred from the whole of the primary facts that it is more probable than not that perils of the seas caused the loss.*
>
> 22. Secondly, there is no *general principle in such cases that it is impermissible to reach a conclusion based on inference by the process of elimination of competing explanations for the loss. If the evidence is such as to enable the court to rule out all suggested uninsured causes, as intrinsically impossible, the court will generally be able to conclude that it is more probable than not that entry of seawater and consequent sinking was a loss by perils of the seas.* There may, however be exceptional cases where it is not possible to draw this inference and the court is left in doubt as to whether the uneliminated

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> explanation or some other unknown but uninsured peril is the proximate cause of the loss.
>
> [emphasis added]

71 It would thus appear that the court in *Glowrange* was of the view that even if the vessel *was not lost in wholly unexplained circumstances,* proof by inferential reasoning by elimination may still be available to a claimant*,* as an insured may *eliminate all suggested uninsured causes* to make out its case that the loss was occasioned by perils of the seas.

72 At [26], the court in *Glowrange* construed Lord Brandon's judgment in *The Popi M.* There, the House of Lords held that it was impermissible for the court to accept a wholly improbable reason as proven on a balance of probabilities simply by a method of elimination. The House of Lords rejected Sherlock Holmes' celebrated investigation theory, that once "[y]ou have eliminated the impossible, whatever remains, however improbable, must be the truth", on three grounds (at 955H–956E). First, the judge was not bound to make a finding one way or the other and it was open to find a third alternative that the burden of proof has not been discharged. Second, the *dictum* can only apply when all relevant facts are known and all possible explanations except a single extremely improbable one can properly be eliminated. Third, a finding that an extremely improbable event is nonetheless more likely to have occurred than not, does not accord with common sense. The House of Lords held that the trial judge should not have accepted the shipowners' wholly improbable case of perils of the sea simply because the underwriters' theory was ruled as impossible (at 955D–955H). The court was left in doubt as to the true cause of the loss, as "[t]he shipowners failed to establish the ship was seaworthy, and they only put forward an extremely improbable cause of the loss" (at 956F–956G).

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73 In this light, the court in *Glowrange* opined that in *The Popi M*, had the vessel been found seaworthy, the insured would have established that it was to be inferred that the seawater entry must on a balance of probabilities have been due to perils of the seas without the need to advance any particular explanation (at [26]).

74 The court in *Glowrange* at [31] also considered *The Marel*, and its reference (at 632) to a passage from *The Gloria* (1936) 54 Ll L Rep 35 which stated that "[i]f, however, the evidence is such that the court giving full weight to the consideration that scuttling is a crime is not satisfied that the ship was scuttled but finds that the probability she was is equal to the probability that her loss was fortuitous the plaintiffs will fail". This was taken to indicate that if there is "neither a specific and cogent explanation for a loss by perils of the seas nor any possibility of real substance that the vessel could have been scuttled", the court is "entitled to infer that the loss happened in a way that is unknown, but by perils of the seas, by looking at the whole of the evidence before it, including in particular, evidence that the vessel was in all relevant respects seaworthy at the start of the voyage" (*Glowrange* at [32]).

75 However, the court accepted that there may be cases in which primary evidence is available to suggest from where seawater entered a vessel but does not indicate why the entry occurred. In those cases, the insured will have to advance a cogent explanation for the seawater entry that is strong enough to displace all other uneliminated but uninsured perils. The court construed *The Popi M* and *The Marel* as cases in which the omission to do so had left the court in such doubt that it was unable to infer that the loss was more probably caused by perils of the seas than an uninsured peril (*Glowrange* at [34]).

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76 The court was also of the view that *The Popi M* did not disturb the well-established approach to unexplained losses exemplified by *Anderson v Morice* (1874) LR 10 CP 58 ("*Anderson v Morice*") and *Ajum Goolam Hossen v Union Marine Insurance Co Ltd* [1901] AC 362 ("*Ajum Goolam*") (*Glowrange* at [26]) though we should add that both cases did not strictly deal with the issue as to whether the loss of the *vessels* were caused by a peril of the seas. Instead, both cases concerned claims for loss of *insured cargo*. In *Anderson v Morice*, the main issue was whether the plaintiff had an insurable interest in the cargo since the vessel sank prior to the completion of the loading operation whereas in *Ajum Goolam*, the dispute was whether the vessel was seaworthy given that she had developed an unusual list before she left the harbour. In both cases, there appeared to be some evidence available as to the circumstances of the loss.

77 We also note that OCBC has relied on *Skandia*. In *Skandia*, the High Court of Australia appeared to have engaged in inferential reasoning, where the loss was "unexplained" in that the plaintiffs did not propound a cause of the seawater ingress. The ship sank a few hours after leaving port due to the rapid entry of seawater into the engine room, and notably, the crew survived to give evidence as to the circumstances of the sinking (at 5–6). The plaintiffs' case was that the ship was seaworthy and that the sinking was due to some unknown but fortuitous cause, relying on the presumption or inference that the cause of the sinking was a peril of the seas (at 6).

78 The trial judge was unable to make a finding as to the cause of the seawater ingress and did not accept the evidence of a marine surveyor called by the plaintiffs, that the seawater ingress was caused by a burst pipe. Instead, the trial judge applied the presumption that if a ship which is seaworthy sinks in smooth water and there is no other evidence as to the cause of the loss, the

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casualty is attributable to a peril of the seas (at 7). The High Court of Australia was satisfied that the trial judge's finding did not depend upon the onus of proof, as it amounted to "a positive rejection of the appellant's case and a finding that the [ship] was seaworthy when she left port" (at 17). On this premise, the High Court held that "unseaworthiness was excluded as the cause of the loss and the court, quite correctly, inferred that the loss was attributable to a peril of the sea, though it was unable to identify that peril" (at 17). The High Court was satisfied that "[i]t was not a case in which the evidence as to competing causes of loss was evenly balanced, leaving the court in doubt upon the issue whether the loss was attributable to a peril of the sea or to some other cause such as the unseaworthiness of the vessel" (at 17).

79 Tying the strands of case law together, in our view, the presumption, which *dispenses with a need for the claimant to propound any reason at all for the loss of the vessel*, should only be invoked where the vessel is lost in "wholly unexplained circumstances". This requires that the claimant *must not be in a position* to investigate or determine the cause of the loss. In other words, the claimant must be *unable* to identify the actual cause of the loss due to a deficit of direct evidence. As a corollary, where there is sufficient direct evidence which may suggest how the vessel was lost, or where the claimant could investigate the cause of the incident but did not do so, the claimant is not entitled to invoke the presumption. The claimant may nonetheless rely on inferential reasoning by elimination to directly prove a fortuity insofar as the claimant propounds a cause and relies on circumstantial evidence as support to prove the cause on a balance of probabilities.

80 To begin, we note that *Glowrange* suggested that the need to condescend to particulars should be understood in the context of the unusual facts in *The*

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Popi M and that had seaworthiness been found, there would not have been a need to advance any particular explanation (at [26]). In other words, *The Popi M* did not truly rule out all possible explanations as the vessel was not found to be seaworthy. However, this very argument was raised in *The Marel* and rejected. The plaintiffs in *The Marel* submitted that two possible alternative causes of casualty were open to the court in *The Popi M*; in contrast, in *The Marel,* unseaworthiness was ruled out as a cause of the incursion of seawater into the engine room, and scuttling was not put forward as an affirmative case (*The Marel* at 629–631). The plaintiffs thus contended that the judge was bound to accept the one possibility open to him – loss by perils of the seas (*The Marel* at 632). This was rejected by the English Court of Appeal in *The Marel*, which held that the third reason articulated in *The Popi M* – that it did not accord with common sense to find that an extremely improbable event was nonetheless more likely to have occurred than not – squarely applied.

81 The position in *The Marel* comports with the Appellate Division of the High Court's understanding of *The Popi M* as articulated in *Chubb Insurance Singapore Ltd v Sizer Metals Pte Ltd* [2023] 1 SLR 1553. The court held (at [70]):

> … In other words, the court *cannot* simply accept a state of affairs as having been proven on a balance of probabilities, where the plaintiff's case was the *least improbable* of the various possibilities, *ie*, allowing an improbable possibility to form the basis of a finding of fact only because it was less improbable than other possibilities put forward by the parties, and where the evidence 'leaves [the judge] in doubt whether the event occurred or not'. In our view, the prohibition in *The Popi M* was thus not against a 'method of eliminating possibilities to determine the true state of affairs' *per se*, but rather with employing this method of factual analysis without due regard paid to whether: (a) the full spectrum of facts that could explain the occurrence is before the court; and (b) whether the occurrence of an event, on the evidence and on the application

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> of common sense, can be said to be proved on a balance of probabilities.
>
> [emphasis in original]

82 In this light, we think that the inquiry on the availability of direct evidence as to the *actual circumstances* of the loss is directed to ascertain whether a case of perils of the sea can be said to be improbable. The available evidence may rule out potential causes relating to a peril of the seas. For instance, in *The Marel*, the available evidence ruled out a number of perils of the seas – the ship was not overwhelmed by exceptionally bad weather or run down and sunk by another vessel. The possibility of collision with an unidentified object was shown to be wholly improbable and very nearly impossible (at 629). The case of loss by perils of the sea was thus shown to have been "wholly improbable and very nearly impossible" (at 633). In contrast, where a vessel is lost in wholly unexplained circumstances, there would be no basis to rule out possible causes of perils of the seas to render a case on perils of the seas improbable. Thus, the presumption properly comes into play.

83 The same proscription in *The Popi M* and *The Marel* against the acceptance of a wholly improbable cause should, in the same vein, apply where a claimant omits to advance a cause in relation to perils of the sea, despite known circumstances enabling the claimant to do so. Such an omission leaves the court unable to assess the probability of the claimant's case of loss by a peril of the seas. It may even suggest that any theory put forward by the claimant is improbable.

84 Further, we bear in mind that a finding of seaworthiness *does not fully exclude* the possibility that the vessel could have been a debility and that the loss was inevitable due to the vessel's condition. A finding of seaworthiness is

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made on a balance of probabilities, premised on the available evidence. The inferential value arising from a finding of seaworthiness may vary from case to case depending on the strength of the evidence (see *Glowrange* at [33]). But even where there is strong evidence supporting a finding of seaworthiness, it merely renders inevitable loss by debility improbable as it "remains possible that a seaworthy vessel might be lost by reason of a lack of fitness that it was not reasonable to expect" (*Bennett* at para 10.31). There would not be a basis to prefer one improbable explanation (of perils of the sea) over another improbable one (of inevitable loss by debility).

85 In this light, we emphasise that it must be incumbent on a claimant to advance a cause where there is sufficient evidence on the actual circumstances of the loss. This is broadly consistent with the acceptance in *Glowrange*, that where there may be primary evidence which suggests from where seawater entered a vessel, a cogent explanation for the seawater entry would have to be propounded (at [34]), even though we would phrase it differently and require an explanation so long as *sufficient direct evidence* is available as to the actual circumstances of the loss. The failure to advance a cause despite sufficient direct evidence being available may leave the court in such doubt that it is unable to make a finding by elimination that the loss was caused by perils of the sea. This would mean that inferential reasoning is available to the extent that it supports *direct proof* of loss by perils of the seas, by supporting a finding that a particular cause is proven on a balance of probabilities.

86 Further, it must be borne in mind that the presumption is to assist an insured shipowner who is *unable* to identify the actual cause of the loss to discharge its burden of proof. Where a vessel is lost at sea without a trace, the shipowner would not have the means to prove the cause of the loss. In such a

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situation, the law allows the shipowner to rely on the presumption that the loss was due to "perils of the sea" provided the vessel is otherwise seaworthy, thus dispensing with any need to advance a cause as to the seawater ingress. However, where the *loss is capable of being explained*, the presumption cannot be invoked, and it is plainly insufficient for the shipowner to claim that the cause of the seawater ingress is unknown.

87 A comparison can perhaps be drawn to the maxim of *res ipsa loquitor* in the tort of negligence. This maxim has been construed to be a "convenient label to apply to a set of circumstances in which the claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant" (Andrew Tettenborn *et al*, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 24th Ed, 2023) ("*Clerk & Lindsell*") at para 7-208). *Res ipsa loquitor* applies where: (a) the occurrence is such that it would not have happened without negligence; and (b) the thing that inflicted damage was under the sole management and control of the defendant. However, there is a *third* requirement, that the cause of the occurrence is *unknown* to a claimant (see *Clerk & Lindsell* at paras 7-208 and 7-211; see *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 ("*Grace Electrical"*) at [39]). As Lord Nomand in *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392 described, the maxim is "no more than a rule of evidence affecting *onus*. It is based on commonsense, and its purpose is to *enable justice to be done* when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant" [emphasis added] (at 399).

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88 This third requirement, that the cause of the occurrence is unknown to the claimant, is met where the precise cause of an incident had not been established on a balance of probabilities, even where there is some evidence available as to the circumstances of the incident (*Grace Electrical* at [73]–[83]). Despite this formulation, *res ipsa loquitor* applies only in cases where "there is genuine difficulty with establishing the cause of the incident and not in cases where, merely by reason of the way the case was run, there was no evidence on the relevant issues before the court" (*Grace Electrical* at [84]). In other words, "the rule is a practical outworking of the burden of proof in cases where there are real difficulties in establishing what in fact happened, and not a means by which to overcome the shortcomings in the evidence arising only from the failure of the plaintiff to prove his case in the appropriate way" (*Grace Electrical* at [84]).

89 In our view, the same consideration should apply to the availability of the presumption. The presumption should not be used to overcome shortcomings in the evidence arising from the manner in which a claimant has chosen to prove his case. Instead, the claimant must genuinely be unable to establish the cause of the incident, due to a deficit of direct evidence. This would ensure that the burden of proof is squarely on the claimant where the claimant is in a position to establish what had in fact happened, while fairly enabling justice to be done when the circumstances are unknown to the parties.

90 Finally, we note the UK Supreme Court had in *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd* [2012] 1 All ER (Comm) 111 casted some doubt on *Skandia.* The court observed at [73], in relation to the finding in *Skandia* that there was an inference of some unidentified accident or fortuitous event, that "since *The Popi M*, more attention might have been given, in this

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jurisdiction at all events, to a finding that no cause had been shown to be more probable than not". In our respectful view, this observation is consistent with our elucidation of the law. In *Skandia*, given the existence and availability of significant direct evidence on the circumstances of the loss, *eg* the survival of crew, surrounding weather conditions, rapid entry of seawater into the engine room, it could be said that the presumption ought to have been unavailable and if inferential reasoning was to be engaged, it was perhaps incumbent on the plaintiffs to advance a cause for the loss of perils of the sea and prove that cause on a balance of probabilities.

91 In the same vein, we note that to the extent that *Anderson v Morice* and *Ajum Goolam* may stand for the proposition that the court may, on inferential reasoning, conclude that the loss of a ship (as opposed to cargo, which was the subject of the claims in those cases) could have been caused by "some extraordinary though invisible and unascertained accident of the seas" (*Anderson v Morice* at 68), this proposition is in conflict with the salutary caution in *The Popi M* and *The Marel* against finding that an improbable cause is nonetheless proven by elimination on a balance of probabilities. To reiterate our view, a cause should be propounded such that the court can conclude that *that cause* is proven on a balance of probabilities.

Summary of the applicable law

92 To recapitulate, when a ship which is *otherwise seaworthy* is lost at sea in circumstances which are *wholly unexplained*, the law presumes that the loss was caused by an insured peril, *ie*, the perils of the sea. The italicised words form the two conditions to invoke the presumption. The "seaworthy" condition if satisfied would effectively rule out unseaworthiness as the sole proximate cause of the casualty. The "wholly unexplained" condition applies when the

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shipowner is not in a position to investigate or determine the cause of the incident, in this case, the cause of the seawater ingress.

93 It must be borne in mind that the presumption is to assist an insured shipowner who is *unable* to identify the actual cause of the loss to discharge its burden of proof. Where a vessel is lost at sea, the shipowner would not have the means to prove the cause of the loss. In such a situation, the law allows the shipowner to rely on the presumption that the loss was due to "perils of the sea" provided the vessel is otherwise seaworthy. However, where the *loss is capable of being explained* as there is sufficient direct evidence, the presumption cannot be invoked, and it is plainly insufficient for the shipowner to claim that the cause of the seawater ingress is unknown. It is then incumbent on the shipowner to directly prove perils of the seas by advancing a cause as to the seawater ingress and proving the cause on a balance of probabilities, with the available evidence.

On the facts, OCBC has not proved that the Vessel was lost by a peril of the seas

OCBC did not propound a cause of the seawater ingress

94 As a matter of direct proof of loss by a peril of the seas, OCBC must propound a cause of the seawater ingress to prove the fortuity (see [44]–[53] above). We are of the respectful view that the Judge could not have concluded solely from OCBC's expert evidence that the capsize was caused by a peril of the seas. This is because OCBC did not advance a positive cause of the seawater ingress, which is necessary to prove the element of fortuity.

95 The Judge preferred the evidence of OCBC's expert, Ms Blazejczyk, who testified that there was unexpected flooding or seawater ingress in the hull compartments (Judgment at [152]). Ms Blazejczyk estimated that for the Vessel

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to have attained the position it did at 4.25pm on 5 June 2018 as exhibited in a photograph, there would have been around *450 tonnes of seawater ingress* at that time (Judgment at [127]). However, Ms Blazejczyk *did not purport to offer an opinion of which route of seawater ingress is more probable than others*. She did not testify as to the likely causes of seawater ingress based on the actual condition of the Vessel as surveyed in the Dive Inspection Report; instead, she merely purported to *theorise three feasible routes of seawater ingress*.

96 Conversely, the Insurers had contended, on the evidence of their experts, Mr Hu Zhigong ("Mr Hu") and Cpt Nicolas James Allan White ("Cpt White"), that (Judgment at [135]–[136]):

(a) The Vessel was inherently unstable as it did not comply with the 70-knot wind speed heeling moments.

(b) Green water was shipped over deck as caused by the bulwarks which trapped seawater.

(c) The legs of the Vessel were not lowered. Excessive waves may have overstressed and damaged the structure supporting the leg and caused seawater ingress.

(d) Deck edge immersion, being that the deck of the ship would dip into the sea at points, would further reduce the stability and the watertight integrity of the Vessel.

97 The Judge rejected the evidence of the Insurers' expert, Mr Hu, as flawed due to several unexplained inconsistencies in his theory (Judgment at [140]). As Cpt White's evidence on the capsize was largely built on Mr Hu's thesis, the Judge likewise rejected Cpt White's evidence (Judgment at [148]).

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Having accepted Ms Blazejczyk's evidence and rejected the evidence of the Insurers' experts, the Judge found on a balance of probabilities that the capsize of the Vessel was caused by perils of the sea (Judgment at [152]).

98 In our judgment, the Judge could not have concluded from Ms Blazejczyk's evidence as to seawater ingress that the Vessel's capsize was caused by perils of the seas. The Judge was entitled to conclude that the seawater ingress was *unexpected* and *sudden*, since there were no observable warning signs in the first six days prior to the Vessel's capsize on 5 June 2018 (Judgment at [145]–[147]). However, given that Ms Blazejczyk did not provide an opinion as to the likely cause of the ingress, the Judge could not have concluded from Ms Blazejczyk's evidence that the seawater ingress was *caused by a fortuity*. While the Judge was entitled to reject the Insurers' positive account as to how the capsize occurred and may have been satisfied that the seawater ingress was to a particular compartment of the Vessel, this does not mean, *ipso facto*, that the seawater ingress must have been caused by a fortuity. It could, for instance, have been a case of "inevitable admission of seawater due to debility of the vessel" which would not constitute perils of the sea (*The DC Merwestone* at [36]).

OCBC was not entitled to rely on the presumption of loss by perils of the seas

99 Given that OCBC has not discharged its case as a matter of direct proof, we turn to consider whether OCBC would be entitled to rely on the presumption of loss by perils of the sea, given that OCBC has also sought to rely on the presumption. To rely on the presumption, OCBC must prove that the Vessel was seaworthy at the commencement of the voyage and that the Vessel sank in wholly unexplained circumstances.

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(1) The Vessel was seaworthy at the commencement of the voyage

100 In this regard, the Judge did not specifically make a finding that the Vessel was seaworthy, as the Judge had considered it on a footing of whether the Insurers could demonstrate that the Vessel was a decrepitude (Judgment at [108]–[120]). The Judge was not satisfied that the various instances of non-compliance alleged by the Insurers would raise the possibility that the Vessel was inherently unstable and consequently unseaworthy as they did not demonstrate that the Vessel was a decrepitude (Judgment at [111]). Further, the Judge did not find any evidence of the alleged breaches of the Operations Manual prepared by A K Suda Ltd ("OM") and/or the ICLL, or that these alleged breaches contributed to the lack of seaworthiness of the Vessel (Judgment at [120]). While no specific finding of seaworthiness was made, it could be inferred that in finding that the Insurers had failed to prove that the Vessel was unseaworthy, the Judge may have implicitly accepted that the Vessel was seaworthy. To reiterate, it would have been necessary for the Judge to be satisfied that the Vessel was seaworthy if a rebuttable presumption of loss by perils of the seas was to be applied.

101 Notwithstanding the lack of a specific finding of seaworthiness, we are satisfied on the evidence that the Vessel was seaworthy at the commencement of the towage. There is *prima facie* evidence that the Vessel was seaworthy for the purpose of the voyage: (a) certificates of approval issued by ABS and Techwise, which the experts accepted as providing for a holistic assessment of the preparation and planning of the Tow Voyage (Judgment at [117]); (b) it was a new build; and (c) it had been towed without incident for five to six days and it had gone through worse weather conditions in the days before.

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102 The Insurers contended, however, that the Vessel was not seaworthy as it was not capable of being towed in the conditions that were to be expected and were in fact encountered. This contention was premised on alleged breaches of the OM, the more pertinent of which included:

(a) The Vessel was only suited for a dry tow and not a wet tow as the OM stated that "[t]he vessel shall be dry-towed on trans-ocean sea voyages".

(b) The Vessel had a low freeboard. The OM stated that the maximum wave to be encountered is 2m, and maximum waves experienced should not result in shipping of green water on deck. Further, the Vessel should be towed in as calm weather as possible, and the captain should study the weather forecast and determine a safe weather window. A forecast indicated that the maximum waves encountered would be more than 2m. That in fact happened, and green water was shipped on deck.

(c) The legs of the Vessel were not lowered to ensure the Vessel's stability. Although the OM (and the emails between Techwise and TOPL) referred to the need to lower the legs upon wind speeds greater than 50 knots, this properly referred to the *wind heel speed* (which had been exceeded) as opposed to wind speed *per se*.

103 We are not persuaded by the Insurers' arguments. First, the Judge correctly recognised that the OM appears to contemplate the possibility of a trans-ocean wet tow (see Judgment at [217]–[220]). Second, even accepting that the wind speed refers to wind heel speeds, the Tow Voyage was approved on the premise that the Vessel was to depart without her legs lowered. Whether the

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legs were to be properly lowered upon encountering certain wind heel speeds pertain to the dynamic conditions during the voyage and not seaworthiness at the inception of the voyage. At its core, the Insurers' argument is that the Vessel was simply not fit for a wet tow in the circumstances. However, Techwise had approved the wet tow, having inspected the liftboat and having sight of the Vessel's characteristics (including the freeboard), the OM, and the proposed tow journey. Techwise also had sight of the 48-hour weather forecast issued on 30 May 2018 and deemed the forecasted weather to be suitable for departure in the Sailaway Attendance Report.

104 The Insurers seek to undermine the certification by contending that Braemar had unaddressed concerns and Techwise was lied to, pointing towards TOPL's representations to Techwise that the crew could be transferred to the Vessel to perform leg-lowering operation (which could not have been done in the circumstances actually encountered during the Tow Voyage) and that ports of refuge were readily available in case of emergency (but there was no port of refuge for seven days). However, we do not think it is sufficient on the face of the record to draw such conclusions. Mr Budiawan Paulus Handidjaja ("Mr Paulus"), a representative from Braemar, filed an affidavit but did not show up to testify, while no representative from Techwise was called as a witness by the Insurers to attest to the impact of the Owners' representations.

105 On this basis, once Techwise had given the approval for wet tow, the burden was not on the Owners to look for other options. We accept on a balance of probabilities that the Vessel was seaworthy at the commencement of the voyage.

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(2) The Vessel did not sink in wholly unexplained circumstances

106 The Judge did not consider whether the Vessel had sunk in wholly unexplained circumstances. In our view, this condition was not made out on the evidence.

107 It is important to bear in mind that in the present case, *the Vessel only capsized* and did not sink until sometime later when it was scuttled. The Vessel capsized on 5 June 2018, at which point the Tug had to release the Vessel from the tow. The Vessel came to rest with the bottom of the hull barely visible on the surface. The Vessel drifted until the Salvors were contracted on 15 June 2018 to salvage the Vessel and to tow the capsized Vessel to Batangas Bay, Philippines. An underwater dive inspection was performed by the Salvors from 23 to 27 July 2018 at Batangas Bay, producing the Dive Inspection Report. This report was produced some 48 days after the Vessel capsized and had been towed in the inverted position under inclement weather conditions.

108 The Vessel was only scuttled by the Salvors in deep water off the coast of the Philippines on 20 August 2018, by releasing the residual buoyancy of the Vessel. In the intervening period, from 5 June 2018 to 20 August 2018, the Vessel remained afloat in a capsized state at sea for *around 76 days*.

109 In our judgment, given the apparent availability of the Vessel for inspection, we are not satisfied that the cause of the seawater ingress was not capable of being explained. It cannot be denied that there was some delay between the date the Vessel capsized and the underwater inspection. According to Ms Blazejczyk, the six-week delay (between the capsize and the underwater inspection) rendered the Dive Inspection Report unhelpful in ascertaining the flooding scenario considerations as "it [was] not possible to discern how the

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condition of the relevant spaces may have changed because of the capsize or during the subsequent tow whilst inverted". She also testified that she could not rely on the Dive Inspection Report fully as evidence of any particular route of seawater ingress as it was done weeks after the incident happened. Ms Blazejczyk explained in her expert report that she was "unable to comment on the exact cause of the damage that led to water ingress as [she had] not seen any evidence to indicate how it may have occurred".

110 That being said, it did not appear that any effort was made by the Owners to appoint an investigator to determine the cause of the seawater ingress. On the face of the Dive Inspection Report, it appeared that the inspection was merely meant to record the Vessel's condition, as opposed to investigating the cause of the seawater ingress. When questioned at the hearing, Mr Tan was unable to point us to any evidence that the divers were tasked to investigate the cause of the seawater ingress. Mr Tan further accepted that OCBC does not know what could have been found, had investigators been appointed and a dive report commissioned for the purpose of ascertaining the cause of the seawater ingress. While Mr Tan submitted that it would almost be an impossible task to ascertain the possible cause of seawater ingress given the almost immediate capsize and submergence of the Vessel, OCBC did not furnish any expert evidence to say that given the state of the Vessel post-capsize, it would have been impossible to determine the cause of seawater ingress. There was likewise no expert evidence attesting that in light of the necessary salvage procedures, *eg,* towage of the Vessel to a safe harbour, a dive inspection for the purpose of ascertaining the cause would have been futile.

111 Mr Tan also submitted that OCBC was the mortgagee and was not the shipowner. The suggestion is that OCBC as the mortgagee was not in a position

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to undertake the investigation. However, as pointed out to Mr Tan during the hearing, the mortgagee stands in the shoes of the shipowner in its claim under the marine insurance policy. There is no basis to apply a different standard to OCBC simply because it was the mortgagee.

112 Furthermore, there was significant direct evidence available as to the circumstances of the loss. Although the Vessel was an unmanned jackup rig, she was towed by the Tug for the Tow Voyage. The crew of the Tug survived the incident, and Cpt Pedersen, who was on board the Tug as a passenger, testified at the trial. The circumstances surrounding the loss (save for the cause of the seawater ingress) were documented. OCBC's marine expert, Cpt John Simpson ("Cpt Simpson"), testified on the available evidence that he was not aware of any collision which might have caused damage to the hull, and that the weather was moderate. The Dive Inspection Report also offered evidence as to the Vessel's condition, *eg*, there was no observable damage to the hull structure.

113 As a result of the aforementioned considerations, we are not satisfied that OCBC has established that the Vessel was lost in wholly unexplained circumstances. Therefore, the presumption cannot apply.

114 We turn to consider whether the court could, by inferential reasoning and a process of elimination, find a loss by perils of the seas despite the known circumstances, which may have been the Judge's reasoning process. We think that on the facts, the court is left in genuine doubt as to whether the loss was occasioned by perils of the seas. As noted above at [94]–[97], OCBC did not advance a reason on which it could directly prove a loss by perils of the seas. Cpt Simpson testified that he had scratched his head, lost sleep over it but was unable to offer a definitive explanation of why it happened. Neither did

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Ms Blazejczyk offer a possible cause. This is despite the available evidence as to the circumstances of the loss and the Vessel's condition. The failure to advance a positive case in light of the known circumstances would suggest that OCBC's case of loss by perils of the sea was improbable, which the court ought not to accept simply by way of elimination. It was incumbent on OCBC to advance a cause as to the seawater ingress and prove it on a balance of probabilities.

115 Hence, we are not satisfied that OCBC had discharged its burden of proof to show that the loss was occasioned by an insured peril, *ie*, a peril of the seas. On this ground alone, the appeal must be allowed.

OCBC did not establish that the Vessel was a constructive total loss

116 Under cl 6.1.1 of the ITC, OCBC must prove the "loss" of the Vessel. OCBC's case is that there was a "loss" of the Vessel as it was a CTL. Parties are in agreement that the Vessel would only constitute a CTL if the cost of recovery and/or repair exceeds the Vessel's insured value, pursuant to s 60(2)(ii) of the UK MIA 1906 and cl 19 of the ITC.

117 Since it is OCBC's case that the Vessel was a CTL, the burden rests on OCBC to prove that the cost of recovery and/or repair exceeds the insured value of the Vessel. OCBC's claim is not for damages to be assessed. It is for a specific remedy which, by definition, requires OCBC to plead and prove. However, OCBC merely asserted in its pleadings that the Vessel was "a constructive total loss … in that the cost of the recovery and repair of the Vessel would have exceeded her insured value, namely US$56,000,000 as at 26 July 2018" without providing any factual basis to show that the cost of recovery and/or repair exceeds the insured value. This was despite the Vessel having been buoyant (as

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opposed to having completely sunk) for over two months after its capsize on 5 June 2018, giving the Owners sufficient opportunity to assess its actual recovery and/or repair costs.

118 When the suit commenced, OCBC's claim was for a total insured value of US$70m under two sections of the MI. The Judge found that the "increased value" section of the MI (*ie*, Section [B]) for US$14m was void as a gaming or wagering contract. However, on the face of the pleadings, irrespective of whether the insured value was US$70m or US$56m, there was no indication as to the actual cost of recovery and/or repair and hence no basis to show that the Vessel was a CTL.

119 Even if a bare pleading of CTL was sufficient, OCBC would still need to *prove* that the Vessel was a CTL by adducing evidence through a witness who would be subject to cross-examination. This was also not done by OCBC. Instead, OCBC sought to "prove" its CTL claim in its first set of closing submissions by relying on the CTL Documents which have also not been proved in the sense that the makers were not called to testify. The Judge, however, allowed OCBC to rely on the CTL Documents (which were indisputably hearsay evidence) as admissible business records and ultimately found on the basis of the CTL Documents that the Vessel was a CTL. Even though these CTL Documents were included in the Agreed Bundle of Documents in the trial below, they were not adduced through any witness. The hearsay exceptions under s 32(1) of the EA are typically invoked when a witness includes documents in an affidavit, but the witness is not the maker of such documents and the maker is not called to testify. We observe that this is an exceptional case of a party who purports to rely on documents adduced belatedly *after the trial*

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and during the closing submissions stage in an effort to prove the "loss" of the Vessel in order to claim the insured value under the MI.

120 Notwithstanding the issues identified above, we proceed to analyse whether the CTL Documents ought to have been admitted under any hearsay exceptions and whether the court should exercise its discretion to exclude the evidence in the interest of justice pursuant to s 32(3) of the EA. Related to the latter question is whether OCBC's failure to comply with the notice requirement under s 32(4)(*b*) of the EA ought to have been cured by the Judge. These two inquiries overlap substantially as they concern the issue of prejudice to the opposing party (*Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 ("*Gimpex*") at [139]). Finally, we address whether the CTL Documents, even if admitted, would have been sufficient to show that the Vessel was a CTL.

The CTL Documents, save for the Dive Inspection Report and SCRS Reports, were not business records

The applicable law

121 Section 32(1)(*b*)(iv) of the EA states the following:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> 32.—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> **or is made in course of trade, business, profession or other occupation;**
>
> (*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —

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> (iv) 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 …

122 The rationale behind the business records exception is that statements or entries made in the ordinary course or routine of business or duty may be presumed to have been made from disinterested motive and is therefore more likely to be true (*Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [138]). For an entry or statement to come within this exception, it must have been made in the way of business. This is defined to mean "a course of transactions performed in one's habitual relations with others and as a material part of one's mode of obtaining a livelihood" (*Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd* [2015] 5 SLR 1322 at [105], citing M C Sarkar *et al, Sarkar's Law of Evidence* vol I (LexisNexis, 17th Ed Reprint, 2011) at p 973).

123 In *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9, the High Court clarified at [468] that the court's observations in relation to a "disinterested motive" were intended to explain the *rationale* of the hearsay exception, as opposed to laying down a general rule that evidence sought to be adduced *via* the business records exception had to be made with a disinterested motive.

124 Moreover, as noted in *Halsbury's Laws of Singapore – Evidence* vol 10 and 10(2) (LexisNexis Singapore, 2024) at para 120.137, the term "ordinary

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course of business" requires the statements to have been made with some degree of regularity.

> The term 'ordinary course of business' refers to commercial business based on profit making (a trade) but also includes an activity not of a profit making nature but carried on *regularly* and in *an organised fashion*. … Under the section the *ordinary course of business is intended.* Therefore, *if a company ordinarily carries on the business of a hotel, the statements made by the company in relation to a one-off sale of its used furniture would not be made in the ordinary course of business and would not be a statement within the section.* But statements made in its books of the identity of persons who had contracted *inter praesente*s for the occupation of a room and the location and description of the room to be occupied, and statements contained in a credit card voucher signed in respect of the occupation of the room, would be statements within the section.
>
> [emphasis added]

125 Conversely, statements and documents specifically prepared for the purpose of litigation are not admissible under the business records exception. A party would not be able to rely on s 32(1)(*b*) of the EA to admit a document as evidence of its content if that document was prepared specifically for trial (see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 8th Ed, 2024) ("*Pinsler*") at para 6.006A).

The CTL Documents (apart from the SCRS Reports and Dive Inspection Report) were not made in the ordinary course of trade or business

126 The burden is on OCBC to show that all the CTL Documents fall within the business records exception. Having reviewed the evidence, we find that only the Dive Inspection Report and SCRS Reports fall within the business records exception.

127 For convenience, we adopt the Insurers' categorisation of the CTL Documents.

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(a) Category (a) comprises the correspondence between the Owners and Insurers on 10 July, 11 July and 22 July 2018. The 10 July Letter includes the Cost Estimates, purportedly corroborating the Owners' estimates on repair and salvage costs. The 11 July Email is the Insurers' acknowledgement of the 10 July Letter. The Insurers stated that they had retained London Offshore Consultants Pte Ltd ("LOC") to investigate the loss and LOC believed that some figures put forward in support of the Owners' claim of a CTL were too high. In the 22 July Email, the Owners wrote to note an impasse between the P&I Club, Owners and the Insurers on a number of issues.

(b) Category (b) relates to the SCRS Reports setting out Solis's observations regarding the extent of damage suffered by the Vessel between 23 July and 25 July 2018.

(c) Category (c) concerns the NOA issued by the Owners to the Insurers on 25 July 2018 and an email from the Insurers rejecting the NOA.

(d) Category (d) relates to the Dive Inspection Report issued by the Salvors on 4 August 2018, setting out, *inter alia*, the extent of damage suffered by the Vessel observed between 23 July and 27 July 2018.

(e) Category (e) relates to a letter from the Owners to the Insurers on the lack of interest in purchasing the Vessel as scrap. Attached to this letter are the Ship Brokers' Replies, being emails between the Owners and various shipping brokers purportedly evincing the lack of interest.

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128 We have difficulty accepting that Categories (a) and (e) constitute business records admissible under s 32(1)(*b*)(iv) of the EA. They were not made in the *ordinary course* of the Owners' trade or business. The core of the business records exception relates to business records made with *some degree of routinary*. The correspondence between the Owners and the Insurers was not routine. It was exchanged in contemplation of litigation as the parties had already taken adversarial positions in light of a potential insurance claim.

129 The attached supporting documents cannot be considered business records either. Although the Cost Estimates as well as the Ship Brokers' Replies were prepared by presumably disinterested third parties, these documents were clearly obtained by the Owners for the purposes of establishing their CTL case. For the Cost Estimates, there is also no evidence as to the provenance of these documents, particularly, how exactly these quotations were obtained, what instructions were given to the makers of the proposals and the scope of these proposals. In fact, the quotes related to different subject matters. The Triyards quote was issued in relation to a query as to the cost of building a new jackup rig, while the Marco Polo quote was premised on full replacement of a number of equipment. In our view, there was a clear commercial motive to establish the insurance claim and Categories (a) and (e) cannot constitute business records. Likewise, the NOA under Category (c) was not issued in the ordinary course of the Owners' trade or business. It was clearly made for the purpose of establishing an insurance claim.

130 We can only accept that Categories (b) and (d) (*ie*, the Dive Inspection Report and the SCRS Reports) were relevant statements or entries made in the ordinary course of business. Although the Dive Inspection Report and the SCRS Reports were also commissioned by the Owners, it might reasonably be

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contemplated that such documents would be routinely generated in the usual and ordinary course of business where a capsize has occurred and salvors are contracted. They would likely have been commissioned, regardless of whether an insurance claim was to be mounted.

131 In addition, we note that several of the CTL Documents which pertain to costs and quotes (*ie*, the Cost Estimates) may be construed as out-of-court statements of opinion. The term "opinion" is not defined in the EA, but Prof Jeffrey Pinsler SC has made some helpful observations in *Pinsler* at paras 8.004 and 8.005:

> 8.004 … The term 'opinion' necessarily involves a subjective assessment or a personal perspective resulting from a fact or set of facts. …
>
> 8.005 Nevertheless, the law takes a pragmatic approach by classifying direct perception of something that can be seen or heard (or directly perceived by some other sense) as evidence of a fact. Hence, a 'fact' is defined to include 'any thing, state of things, or relation of things, capable of being received by the senses'. The witness gives evidence of a fact if he merely testifies to the information he passively received. If he goes beyond this by stating his inference, or offers an interpretation based on this information, he is giving opinion evidence. …

The Cost Estimates, by virtue of being quotations provided by third party companies, were subjective assessments based on information provided by the Owners and would fall within the realm of opinion evidence.

132 Section 32B(2) of the EA provides that "[a] statement of opinion is only admissible under section 32(1) if that statement would be admissible in those proceedings if made through direct oral evidence". This means that the maker of the statement would have to testify as a witness concerning that opinion. This requirement would be fulfilled if the maker is a competent witness and could have given evidence of his opinion in specific circumstances set out in s 32B(3)

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and ss 47 to 53 of the EA (see *Pinsler* at para 8.074). There is no evidence as to who the makers of the Cost Estimates were and thus there is no basis to conclude that the makers had scientific, technical or other specialised knowledge to properly qualify as an expert. Therefore, the Cost Estimates, being out-of-court statements of opinion, should not be admissible *via* s 32(1) of the EA in situations not envisaged by these sections. Accordingly, only the Dive Inspection Report and SCRS Reports fall within the business records exception which in any event, do not assist OCBC as they do not provide for any cost estimates.

OCBC's lack of notice pursuant to s 32(4)(b) of the EA should not have been cured by the Judge

133 In any event, we find that all the CTL Documents should have been excluded in the interest of justice pursuant to s 32(3) of the EA. Even if we accept that the CTL Documents have *some* probative value, this is limited as none of them directly address the question of the cost of recovery and/or repair of the Vessel *based on the actual damage suffered by the Vessel* (see [139]–[146] below).

134 Crucially, OCBC failed to fulfil the notice requirement in s 32(4)(*b*) of the EA, read with O 38 r 4 of the Rules of Court (2014 Rev Ed) ("ROC 2014"). Section 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 ROC 2014, under which the procedure and prescribed form for the notice to be served are set out (*Gimpex* at [136]). The details of the notice are not material in this appeal as it is not disputed that OCBC did not fulfil the notice requirement.

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135 The court has the discretion to cure this non-compliance under O 2 of the ROC 2014 (*Gimpex* at [137]). As the purpose of the notice is to "enable the opposing party to carry out his own investigation prior to trial in order to ascertain its significance and veracity and to secure information which may refute it or reduce its weight", whether the discretion is to be exercised much depends on "the extent to which non-compliance causes prejudice to the opposing party which would render it unfair for the hearsay evidence to be admitted" (*Gimpex* at [138]–[140]). In this case, the Judge exercised his discretion on the basis that there was no prejudice caused to the Insurers in curing the non-compliance. The Judge had broadly observed that it would be an inevitable consequence of admitting hearsay evidence that the maker of the statement will be unavailable for trial, and such prejudice is inherent with the admission of any hearsay evidence. We find that the Judge erred in this regard.

136 As alluded to earlier at [119], OCBC cannot seek to rely on documents adduced at the point of closing submissions. At the very least, a witness should have to testify as to the provenance of the CTL Documents and seek to adduce these documents by way of affidavit. As it stands, there is no evidence as to the identity of the makers of the CTL Documents and the circumstances in which they were made, such that the court would be able to properly assess the probative value to be accorded to the CTL Documents.

137 In the same vein, significant weight was placed on the fact that the authenticity of the CTL Documents was not disputed, the Insurers had possession of the CTL Documents (many of which were contemporaneously sent to them) and CTL was identified to be a live issue. However, none of these factors detract from the prejudice caused to the Insurers by OCBC's belated efforts to admit the CTL Documents. OCBC, as the plaintiff in the suit, bears

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the burden of proving that the vessel was a CTL. The Insurers' burden in this regard is an *evidential* one – to disprove OCBC's case that the Vessel was a CTL. Whether the Insurers were aware of the existence of the CTL Documents is beside the point. The Insurers were entitled to assess OCBC's case and thereafter determine what evidence they needed to lead in their defence. Because OCBC relied on the CTL Documents only after the trial and failed to file a notice to adduce hearsay evidence, the Insurers were deprived of an opportunity to cross-examine the Owners and/or any of their representatives on the CTL Documents. The Insurers were also no longer in a position to adduce evidence to challenge the contents of the CTL Documents. In other words, assuming OCBC had proven a *prima facie* case based on the CTL Documents (which was the view taken by the Judge and which we disagree with), the Insurers would not been able to adduce evidence to discharge its evidential burden of proof. This resulted in real prejudice to the Insurers' case.

138 Therefore, notwithstanding our view that the CTL Documents (save for the Dive Inspection Report and SCRS Reports) do not fall within s 32(1) of the EA, the Judge should not, in any event, have exercised his discretion to cure OCBC's non-compliance with the notice requirement in s 32(4)(*b*) of the EA given the prejudice caused to the Insurers. It also stands to reason that the Judge should have exercised his discretion to exclude the CTL Documents in the interest of justice under s 32(3) of the EA.

The CTL Documents do not prove that the cost of recovery and/or repair exceeded the insured value of the Vessel

139 In any event, even if the CTL Documents are admitted wholesale and taken at face value, they do not prove that the costs of repair and/or recovery exceeded the insured value of the Vessel.

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140 First, the Cost Estimates do not assist OCBC's case. The Offshore Heavy Transport quote merely states prices ranging from US$740,000 to US$1m for the "potential transport" of the Vessel from Batangas, Philippines to Nantong or Vung Tau or Singapore. The utility of this quote is limited in that it only relates to the cost of transport. The commercial proposal from Triyards is merely an indicative price offer of US$56.1m for the design, building and delivery of a new jackup rig. There is no explanation as to why a wholesale replacement, as opposed to repair, was necessary. The Marco Polo commercial proposal suggests that the costs of repair and replacement would amount to S$46,196,500. However, as the Insurers point out, the Marco Polo quote entailed the wholesale replacement of a list of equipment. It was also premised on a set of assumptions as to the Vessel's condition of which there is no evidence. It should also be pointed out that the Marco Polo quote was issued *prior* to the Dive Inspection Report and the SCRS Reports and as such the proposed replacement of equipment did not take into account the actual damage to the Vessel.

141 Second, both the SCRS Reports and the Dive Inspection Report provided evidence as to the Vessel's condition but there is no expert evidence drawing a connection between the Vessel's condition and the *actual* repair and recovery costs. In particular, the SCRS Reports set out the Salvors' observations of the damage caused to the Vessel, including cracks, breaks, and shearing in the Vessel's legs, based on an inspection on 23 July 2018. On 4 August 2018, the Salvors issued the Dive Inspection Report which comprises a more extensive list of findings concerning the damage to the Vessel. Neither report informs the court as to the cost of recovery and/or repair of the Vessel.

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142 Third, the Ship Brokers' Replies, relied on for the proposition that there were no buyers to purchase the Vessel even for scrap, are not relevant to establish that the Vessel was a CTL. They do not show that the cost of recovery and/or repair exceeded the insured value of the Vessel. The inquiries for scrap buyers were made after the NOA. Even if the Vessel had been successfully sold for scrap value, all it means is that some scrap value would have to be credited to the Insurers to be deducted from the insured value. Consequently, whatever scrap value the Vessel might or might not have fetched is irrelevant to prove the CTL. In any event, it is not readily discernible why there was no interest in the Vessel as scrap.

143 Finally, the contemporaneous email exchanges between the Owners and the Insurers likewise do not assist OCBC's case. At the oral hearing, Mr Tan argued that OCBC could "rely on the figures that the [Insurers] themselves have put forward" as proof of the Insurers' admission of the CTL. He then referred to the fact that the Insurers had estimated, even on a "no-damage basis", that the repair and salvage costs were "40 to 45". In particular, the Insurers stated the following in the 11 July Email:

> …
>
> Repairs – Owners figure: US$50–56 million
>
> LOC have been advised that the new building cost 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 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 – Owners figure: US$24 million
>
> LOC understand that during a recent meeting between all parties, the Salvors, when pressed by the Club's appointed

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> lawyers, estimated *the total SCOPIC costs of the salvage operation to be in the region of US$17–20 million.*
>
> …
>
> [emphasis added]

Based on Mr Tan's oral arguments, it may be surmised that OCBC is relying on this email to show that the Insurers had admitted to a quantification of US$40m to US$45m for repair and salvage costs on the basis of "no structural damage" to the Vessel. On this premise, OCBC contends that given the damage actually suffered by the Vessel, one could extrapolate and apply an uplift to the figures put forward by the Insurers.

144 We do not agree. In the 11 July Email itself, the Insurers noted that the Salvors would be undertaking a comprehensive underwater inspection and that it would be premature to conclude that it was a CTL. At no point did they admit to any of the figures put forth by the Owners. Neither did they unequivocally confirm that the total cost of repair and salvage was US$40m to US$45m on a "no-damage basis". There is in fact no clear statement as to what the Insurers had assessed the costs to be. Their statement that "an allowance of even US$25m for repairs could be very generous" does not mean that the Insurers accept that it would be at least US$25m even if there is no structural damage. Additionally, OCBC's argument is speculative as at that point, the Insurers (and their representatives) had not seen the Dive Inspection Report and SCRS Reports and therefore, their estimates (which they had expressly qualified) would not have been premised on the actual damage suffered by the Vessel. It remains speculative even now to attach a value to the actual costs of repair given that there is ultimately no expert evidence to that effect. In any event, even if the 11 July Email can be construed as an admission (which we disagree with), we note that OCBC did not specifically plead the Insurers' alleged admission to

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the figures proposed by the Owners. This would have been necessary as the failure to plead the alleged admission deprived the Insurers of the opportunity to explain the proper context behind their response and what they meant in the 11 July Email. The lack of pleading contravenes O 18 r 8(1)(*b*) of the ROC 2014 which requires a party to plead specifically any matter which, if not specifically pleaded, might take the opposite party by surprise (see *Mycitydeal Ltd v Villas International Property Pte Ltd* [2014] 4 SLR 1077 at [73]–[74]).

145 Additionally, we have doubt as to whether SCOPIC costs (estimated by the Owners to be US$24m) should even be included in the calculation of the cost of repair and/or recovery of the Vessel for the purposes of establishing the CTL. The Salvors were contracted with the invocation of the SCOPIC clause. In *Connect Shipping Inc v Sveriges Angfartygs Assurans Forening (The Swedish Club)* [2019] 4 All ER 885, the UK Supreme Court held that "[t]he objective purpose of SCOPIC charges … [is] not to enable the ship to be repaired, but to protect an entirely distinct interest of the shipowner, namely his potential liability for environmental pollution. That purpose has nothing to do with the subject-matter insured, namely the hull. It was no part of the measure of the damage to the ship and had nothing to do with the possibility of repairing her" (at [25]). Consequently, it was held that SCOPIC costs do not fall within the ambit of "cost of recovery and/or repair" under cl 19 of the ITC since their purpose is "unconnected with the damage to the hull or its hypothetical reinstatement" (at [27]).

146 Accordingly, we are of the view that OCBC has failed to establish that the Vessel was a CTL.

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OCBC did not breach the warranties nor its duty of fair presentation

147 Given that we allow the appeal on the first two issues, there is no need for us to delve into a detailed discussion on the remaining three issues. In any event, we see no reason to disturb the Judge's findings with respect to these three issues.

148 We broadly agree that OCBC did not breach its warranties. The Insurers' arguments in respect of the alleged breaches of the OM, were briefly summarised at [102] above. As discussed earlier at [103]–[104], we disagree. For the avoidance of doubt, we also do not think that there was a breach of any instrument other than the OM. Hence, even if we accept the Insurers' argument that the instruments may constitute "standard operational procedures" under Warranty No 2, there was no breach of any warranty.

149 Neither did OCBC breach its duty of fair presentation. At the outset, Mr Paulus, with whom TOPL communicated for the purposes of discussing the Tow Voyage, was not called as witness. Neither was Ms Serina Tan (the insurance broker from LCH), whom the Insurers claim had falsely represented to the late Mr Athappan (former Chief Executive Officer of MS First Capital Insurance Limited) that Braemar was "unavailable", called as a witness. It is thus unclear why Braemar's negotiations with the Owners eventually fell through, and what was conveyed by the Owners to the Insurers. After having compared the responses received from Braemar and Techwise, Cpt Pedersen found that the Owners could address Techwise's comments without involving A K Suda or other third-party companies. Cpt Pedersen further explained his potential political and safety concerns regarding a coastal route through Chinese territorial waters and his opinion was supported by both parties' master mariner experts. We are of the view that the Insurers have not proven the materiality of

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the non-disclosure of the Teras Entities' initial contact with and subsequent disengagement from Braemar. For the avoidance of doubt, we make no observation on the correctness of the Judge's findings on the interpretation of the phrase "defin[e] risk as a whole" under s 11 of the UK's Insurance Act 2015 ("UK IA 2015").

150 As regards the installation of securing appliances on the bulwarks of the Vessel, reg 24(1) of the ICLL provides that "[w]here bulwarks on the weather portions of freeboard or superstructure decks form wells, ample provision shall be made for rapidly freeing the decks of water and for draining them". There is no evidence that the *existence* of the locking capability (as opposed to the *actual locking* of the freeing port) increased the risk of entrapment of water on deck. Cpt Pedersen testified that he had checked with the crew as to whether they had unlocked the locking devices which they confirmed they had, and thus to his understanding the freeing ports were not locked at any time during the Tow Voyage. This is not controverted. Consequently, it has not been proved that the Teras Entities failed to make ample provision for rapidly freeing the decks of water and for draining them. In respect of the freeing ports being different from the approved drawings, notwithstanding the Judge's observations on the deficiency of pleading which we agree with, there is no evidence to show that this was a "material circumstance" for the purpose of s 3 of the UK IA 2015.

OCBC had proven indebtedness under the mortgage

151 Finally, the Judge did not err in finding that OCBC had proven indebtedness under the mortgage. To prove indebtedness, OCBC adduced evidence in the form of the adjudication of proof of debt by the liquidator of TLPL dated 13 March 2025 ("Adjudication Result"), cl 21.2 of the facility agreement between TLPL and OCBC dated 12 June 2017 ("Facility

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Agreement"), and the testimony of Mr Martin Chua (Global Head of the Special Asset Management Department of OCBC). The Adjudication Result states that 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". The Facility Agreement provides that "[t]he 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 [TLPL] recorded in them". Mr Martin Chua also gave evidence on OCBC's status and interest in the Vessel as a mortgagee. The evidential burden shifted to the Insurers to adduce evidence disputing the claims. However, the Insurers did not do so. They have not produced any evidence to show why the documents adduced by OCBC ought not to be relied upon.

Conclusion

152 For the reasons given above, we allow the appeal. Given that the Insurers have succeeded on some but not all the issues, we fix the costs of the appeal at $100,000 inclusive of disbursements, payable by OCBC to the Insurers. Parties are to file written submissions (limited to ten pages) within three weeks hereof to address the costs for the proceedings below.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

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Hri Kumar Nair
Justice of the Court of Appeal

Chan Leng Sun SC (Chan Leng Sun LLC) (instructed), Tan Jun Hong (Tan Jun Hong LLC) (instructed), Loh Wai Yue, Seow Hwang Seng John, Prakash Nair, Glenn Tennyson Ong and Martin Lee Wey Vern (Incisive Law LLC) for the appellants;
Tan Chee Meng SC, Tan Kai Yun, Deya Shankar Dubey, Teo Jen Min, Jayakumar Suryanarayanan, Lim Jingzhen Jerrick and Alexis Loy (WongPartnership LLP) for the respondent.

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