Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd
[2005] SGHC 185

Case Number : Suit 1220/2003

Decision Date : 29 September 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Ramesh Appoo and Brij Raj Rai (Just Law LLC) for the plaintiff; Leonard Chia and David Gan (CCH Leo and Co) for the defendant

Parties : Bayswater Carriers Pte Ltd — QBE Insurance (International) Pte Ltd

Insurance – Marine insurance – General principles – Claims – Whether loss suffered by assured covered under marine hull policy – Whether piracy or violent theft by persons from outside assured's vessel proximate cause of assured's loss – Whether negligence of master of vessel and lack of due diligence by assured proximate cause of loss – Whether assured taking reasonable measures to avert or minimise loss

29 September 2005

Belinda Ang Saw Ean J:

1 The plaintiff, Bayswater Carriers Pte Ltd ("Bayswater"), as registered owner and named assured, claims against the defendant, QBE Insurance (International) Limited ("QBE"), as hull and machinery underwriter for the loss of its Singapore registered tug, the *BW Wisdom*, to armed intruders. The area in which the events took place on 28 January 2003 was said to be within the port limits of Batu Ampar, Batam.

2 By marine hull policy No ZH1001235 dated 2 January 2003 ("the Policy"), which was largely subject to the Institute Time Clauses, Hulls (1.10.83) ("ITC"), the *BW Wisdom* was insured for $730,000 against, *inter alia*, loss by piracy or violent theft by persons from outside the tug (hereinafter referred to as "theft by violence"). Risk of piracy and theft by violence are marine perils in the ITC. Clause 6.1 covers loss or damage to the *BW Wisdom* caused by:

> 6.1.3 violent theft by persons from outside the Vessel
>
> …
>
> 6.1.5 piracy

3 By an amendment at the start of the hearing, as a further and alternative claim, Bayswater pleaded that the loss of the *BW Wisdom* was caused by the negligence of the master or crew, an insured peril under cl 6.2.3 of ITC, provided such loss or damage was not the result of want of due diligence on the part of the assured, owners or managers. Plainly, cl 6.2.3 is framed as Bayswater's fallback position in the event it is adjudged that the master or crew were negligent as alleged in the Re-Amended Statement of Claim. Clause 6.1.1 of ITC on perils of the seas was not pursued in Bayswater's closing submissions.

4 Section 55(2)(*a*) of the Marine Insurance Act (Cap 387, 1994 Rev Ed) ("the Act") provides that:

> [T]he insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured

against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

5 As the Policy does not state otherwise to the contrary, no difficulty is experienced in the application of s 55(2)(*a*) of the Act together with either of the two marine risks identified in [2] above or the alternative claim made under cl 6.2.3. Pertinent to recovery under the Policy is the notion that the insured peril must be the proximate cause of the loss. That is a causation question. Courts have ruled that proximate cause is to be determined by applying common-sense standards to find the cause predominant in efficiency. The Policy pays where piracy or theft by violence is the proximate cause of the loss despite the negligence of the master or crew. In this situation, the negligence of the master or crew is a remote cause of the casualty. The converse situation is where negligence is an insured peril and it results in a loss by an uninsured peril. The loss may be indemnified as having been proximately caused by the insured peril of negligence and provided the loss did not result from want of due diligence on the part of the assured, owners or managers: see F D Rose, *Marine Insurance: Law and Practice* (LLP, 2004) paras 15.17 to 15.19.

6 A principal question for determination is whether the incident on 28 January 2003, which was during the currency of the Policy, was a loss by piracy or theft by violence. There are two stages of the enquiry. First, the court has to construe the Policy. Next, it has to consider causation, and in that connection, the alleged failure of the crew to keep watch whilst at anchorage as a result of which the intruders boarded the tug undetected.

7 QBE denies liability. It contends that the loss of the *BW Wisdom* was not covered by the Policy. Counsel for QBE, Mr Leonard Chia, who is assisted by Mr David Gan, submits that in order to come within the Policy meaning of piracy, the *BW Wisdom* must be "at sea" and she was not given her location at the material time. Furthermore, no force was used to steal the tug as she was already under the control and possession of the intruders before they sought to apprehend the crew. Similarly, theft by violence was not on the same facts established. QBE took the position that the predominant cause of the loss was the negligence of the master, but there is no liability under the Policy as the loss resulted from want of due diligence on the part of the assured.

8 The *BW Wisdom* is a steel pusher tug with an overall length of 21.76m and moulded depth and breadth of 3.20m and 7.32m respectively. Built in 2000 by Tuong Aik (Sarawak) Sdn Bhd, a Sibu shipyard, it is powered by two Caterpillar diesel engines and has an estimated speed of 10 knots. Bayswater is in the tug and barge business since 1985. Its tugs and barges operate between Singapore and Batam. The hijacking of the *BW Wisdom* was the first of its kind experienced by the assured. Bayswater and its associated companies had employed the Indonesian master of the *BW Wisdom* for the past 15 years. He was appointed master of the *BW Wisdom* on 4 October 2001.

9 On 28 January 2003, the tug with the barge *Bayswater 228* laden with cargo in tow was on a voyage from Jurong port, Singapore, to Batu Ampar, Batam. Typically, the tug and barge would return to Singapore with cargo either on the same day or the following day. It was not unusual that on this occasion, after completion of discharge of some containers and general cargo, the tug waited at anchorage with the barge *Bayswater 228* for loading of outbound cargo scheduled for the following day. On board the tug at the material time were the master (Karno Muchyani), the second engineer (Tubgatisiladias Nursusandi), and two able-bodied seamen (Burhannudin and Suardi). Earlier on, the chief engineer (Hatta) and chief officer (Akmad Nurun) had left the tug on shore leave. They were to return to the tug the next morning. At the material time, the tug was moored to the starboard side of *Bayswater 228* and was secured by the fore and aft mooring ropes of the tug to the bollards of the barge.

10 About 1900 hours (local time), armed men with hoods over their faces boarded the tug. The intruders were armed with *parangs*. Earlier on, a stranger had suddenly appeared at the port entrance to the mess room where the master and second engineer were resting. The stranger had asked for the chief engineer, under pretext of wanting to buy fuel. The second engineer followed after the stranger when he moved away from the main port entrance as if to leave. Some three minutes later, the master heard the second engineer outside shouting "*rampok*" ("pirates" in *Bahasa Indonesia*). Through the entrance, the master saw the second engineer running away from two of the intruders towards the mess room. As he tried to shut the door, it was pushed opened on the other side by one of the intruders. In the commotion, the master started to head for the bridge to raise the alarm but was stopped halfway up the stairs leading to the bridge from the mess room by one of the intruders who held his *parang* to the master's neck. He was ordered not to move. The master was escorted to the eight-man cabin below deck. The second engineer and Burhannudin were already there in the cabin with three other armed men. All three had their hands tied and "were forced to lie [on the floor of the cabin] face down on their stomachs". In his written statement, the master recounted that they were "all threatened with the parang, which had been put to our necks and we were told not to make any noise or resist or retaliate in any way". The engine started and the tug moved away. The master reckoned that the tug was full ahead for a long time.

11 Chay Choon Chong ("Chay"), a marine surveyor and director of CC Chay Associates Pte Ltd ("CCCA"), was appointed by QBE to investigate the incident. At the trial, Chay also testified as QBE's expert. Chay's colleague Gan Kee Giap interviewed the crew at Batam on 14 February 2003. CCCA's report of 17 February 2003 which was signed by Chay stated:

> As soon as [the master and crew] were captured, they could hear the mooring ropes being hacked by the parangs. Engines were also started. Once the ropes were cut loose, the tug moved forward. … The tug surged ahead at full power …

The second engineer, Burhannudin, and Gan Kee Giap did not testify at the trial. Nevertheless, the report of 17 February 2003 and the crewmembers' joint statements dated 12 February 2003 were by conduct of the parties accepted in evidence. That must be so as Chay's expert report of 31 August 2004 containing his assessment and evaluation of the evidence and his conclusions were based on a review of the 17 February 2003 report and the joint statements amongst others. QBE also relied on the joint statements in its closing submissions. A converse reading of the situation would mean allowing QBE to cherry-pick the evidence. The sole consideration is the weight to be given to such evidence.

12 The crew was abducted and held captive in a cabin guarded by armed intruders for two nights. They were not allowed to leave the cabin to go to the toilet. On one occasion, the engine broke down and the second engineer left the cabin escorted by one of the intruders to repair the engine. After the engine trouble had been remedied, the second engineer returned to the cabin with his hands bound again.

13 The captives were eventually freed on 30 January 2003. The tug stopped about 50m from the uninhabited island of Pulau Penggegar near Natuna Islands, Indonesia. With life jackets on, they were ordered to jump into the sea. Life buoys were thrown overboard. Fortunately for the crew, the Indonesian Navy rescued them from the island the next day.

14 Meanwhile, Suardi was spotted and rescued. He had earlier escaped from the intruders through the access hatch leading directly from the cabin to the forward winch deck from where he jumped overboard. He hid below the bow fender until the tug moved away. He later reported the incident to the tug's Batam agent PT Yasa Tirta Perdana. Kelvin Tan Keng Hock ("Tan"), a director of

Bayswater, confirmed receiving a call from his staff based in Batam informing him of the incident at about 2300 hours on 28 January 2003.

1 5 Adopting and applying the principles set out below as applicable to the present case, based on the evidence before me, I find that the loss of the *BW Wisdom* was from piracy within the meaning of cl 6.1.5 of ITC. My reasons are these.

16 First, to constitute a piratical act under the Policy, there must be force or threat of force. Force or threat of force is the essence of this peril and it can be directed at the person or property. In *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Andreas Lemos)* [1982] 2 Lloyd's Rep 483, six or seven men armed with knives boarded a vessel during the night intending and expecting to steal without violence but anticipated the possibility of some resistance or interference. They intended to use force or threat of force if that possibility materialised. They had stealthily removed some of the mooring ropes and some equipment by throwing them overboard before being discovered by a sailor on watch. They threatened him as he was running to fetch assistance, and when more of the officers and crew arrived, threatened to stop them from advancing, before making their escape by jumping into the sea and boarding their craft. Staughton J held that there was no loss by piracy in regard to the ship's equipment. The loss was due to clandestine theft. In the present case, the theft of the tug was, in my judgment, obtained forcibly. I shall elaborate on this finding in a little while.

17 Second, I am satisfied that the tug was obtained for the personal gain of the perpetrators. The second element of the peril is that the purpose of piracy is for personal gain. This is where piracy differs from maritime terrorism which is unlikely to be for "private ends". In *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited* [1909] 1 KB 785 ("*Republic of Bolivia*"), a cargo of stores and provisions was sent by the Bolivian Government up the Amazon River on a vessel for their troops in the neighbourhood of El Acre. The vessel was intercepted and the cargo was seized by certain Brazilian malcontents whose purpose was to resist the Bolivian troops and establish an independent republic. A claim was made under the policy on the ground that the loss had been caused by pirates. The English Court of Appeal held that the word "pirates" meant persons plundering indiscriminately for their own ends, and not persons simply operating, albeit illegally and criminally, against the property of a particular State for a political end. There was therefore no loss through "pirates" under the policy. Clause 6.1.5 of ITC uses the word "piracy". There is no difference in meaning of the insured peril by the use of the word "piracy" in the ITC or "pirates" in the Lloyd's SG form.

18 Third, it is not necessary that the piratical act takes place on the high seas. It may occur within territorial waters or on the high seas. In *The Andreas Lemos*, the vessel was anchored in the Chittagong roads 2.8 miles from land, within the port limits, and within the 12-nautical-mile breadth of the territorial sea claimed by Bangladesh. Staughton J (as he then was) considered her at her anchored position to be "at sea" within the ordinary meaning of that phrase, and thus in a place where piracy could be committed. For the purposes of a policy of marine insurance there was in his view no reason why piracy needed to be limited to acts outside territorial waters. He said *obiter* at 490:

> … I see no reason to limit piracy to acts outside territorial waters. In the context of an insurance policy, if a ship is, in the ordinary meaning of the phrase, "at sea" (per Lord Justice Kennedy), or if the attack upon her can be described as a "maritime offence" (per Lord Justice Vaughan Williams), then for the business purposes of a policy of insurance she is, in my judgment, in a place where piracy can be committed.

19 I shall be discussing later on the contrary position taken by QBE which is that piracy must be committed on the high seas. Suffice it to say, the question whether there should be a geographical limit to what is piracy is governed by the proper construction of the word "piracy" in the policy in issue. That is an important consideration for shipowners and marine underwriters doing business in this region where piracy is a real and serious menace to shipping in the Straits of Malacca and Singapore. Littoral states are genuinely concerned about maritime security as can be seen from a recent announcement on anti-piratical monitoring, *Eyes in the Sky*, which is a joint-air-patrols initiative by three littoral states, Singapore, Malaysia and Indonesia together with Thailand to conduct air patrols along the Straits of Malacca and Singapore.

20 Staughton J's observations at 488 are still apposite in today's context where piracy is notorious in this region:

> A shipowner whose property is taken by robbers is not much concerned whether that takes place in or outside territorial waters. Nor should I have thought that the precise location was of much concern to insurers, save to the extent that robbery is a good deal more likely on board a ship in a port or estuary, than it is 12 miles out or more.

21 Returning to the evidence which demonstrates that the tug was forcibly stolen, I begin with the master's testimony. I accept his testimony that the intruders threatened them with *parangs* and their hands were tied together. It is not unreasonable to infer that in tying their hands together tightly some force would have been applied. A reasonable fear of danger (and I find that the crew did fear for their lives) would naturally induce the crew to surrender the tug for their personal safety and that is sufficient to make the taking of the tug against the will of the crew. The master in his Supplementary Affidavit of Evidence-in-Chief stated:

> 11. … The unknown persons were armed. They moved fast and took over our tugboat and put us under handcuff. There was no chance for us to make use of the handphone and/or SSB [High Frequency Radio] or the VHF [to communicate with Batam Port Authority] and [communicate] with our local agent.
>
> 12. I would also like to point out that even though two of the crew were on shore leave, that did not mean that the remaining crew and myself could not look after our tugboat. We were put into fear by the way in which the unknown persons took over control of the tugboat. We do not have any means of defending or challenging the unknown armed assailants. It would be fool hardy for me to challenge armed unknown persons and risk the lives of my crew and my own life.

22 Significantly, the master's evidence that they had "locked up the bridge" was unchallenged. Therefore, the means of access to the bridge, by logical deduction, would have been broken into or otherwise forcibly opened to reach the wheel to get underway once the engines were started. The tug was at the material time moored to the barge. Chay recognised that the mooring ropes were either severed or slipped. There is some evidence that the mooring ropes were severed. The evidence here is analogous to the thieves breaking into the warehouse in *La Fabrique de Produits Chimiques Societe Anonyme v F N Large* (1922) 13 Ll L Rep 269. In my judgment, the intruders took possession of the tug after the crew were captured and taken captives and not the other way around as suggested by QBE. Unlike the others, Suardi was never caught and his escape somewhat contradicts QBE's contention that the intruders had completely secured the tug before apprehending the crew. With Suardi's escape, the intruders would have been anxious to get underway as quickly as possible.

23 On the evidence, I find that there was a direct causal connection between the use of force or threat of force and the dispossession of the tug out of the control of the master and afterwards

forcibly making away with the tug. The intruders forcibly took possession of the tug and appropriated it for their own use. Whilst in the sea 50m from the uninhabited island, the master noticed that the name *BW Wisdom* had been blacked out, leaving the letters "WIS" as its new name. The blue funnel and logo of Bayswater were painted black. The word "Singapore", the port of registry, was also blacked out completely. From where the crew was abandoned, Chay reckoned that the tug was heading towards the north-west of Kalimantan, possibly to Pontianak. The tug was never recovered. Anwar bin Saaden ("Anwar"), QBE's risk manager in the marine department, in cross-examination conceded that Chay's investigations had failed to locate the tug.

2 4 A question raised in *Republic of Bolivia* was whether territorial location played a part in defining "piracy" in a marine policy. No ruling was made as it was unnecessary for the outcome of the case. The difference of opinion in the English Court of Appeal as to whether piracy could be committed except upon the high seas was *obiter*. So was Staughton J's opinion on the matter in *The Andreas Lemos.*

25 Mr Chia submits that the tug, moored at anchorage 0.9 nautical miles from Batu Ampar, Batam, is not a vessel "at sea". Mr Chia contends that it is a characteristic of piracy that it should be committed on the high seas or should start from the high seas. A vessel is "at sea" when she is on the "high seas", and she is not "at sea" when in harbour. His argument is that the events in this case which were said to constitute piracy had all taken place in the harbour and thus the tug could not be at "sea". Hence, Staughton J's view that piracy could be committed within territorial waters is out of sync with the United Nations Convention on the Law of the Sea 1982 ("UNCLOS").

26 Donald O'May, *Marine Insurance Law and Policy* (Sweet & Maxwell, 1993) at p 126 appears to support Mr Chia's contention. The authors explain that *The Andreas Lemos* was lying in the Chittagong roads about two miles offshore, and was treated as being "at sea". But had she been in harbour, or alongside, she could not have been "pirated". That view, even if, for the sake of argument, correct, does not on the evidence before me assist QBE. Was the tug "in harbour"? Chay argues that the location of the attack was within port limits. Where exactly the tug was moored (and no co-ordinates fixing the tug's position were available) with reference to the designated port limits of Batu Ampar was unknown. The expression "port limits" in the present case is at best ambiguous. Significantly, there is no evidence that the *BW Wisdom* was moored inside the harbour or that in this case, the port limits of Batu Ampar in a legal and geographical sense is coterminous with the boundary of the harbour according to the dictionary meaning of the word. The master's evidence is that she was moored "about 0.9 nautical miles *from* the harbour". The anchorage was supposed to be somewhere between Batu Ampar and Tanjung Uma. Police reports lodged by Bayswater referred to the location of the anchorage to be "outside Batu Ampar Port". Tan described that anchorage as being "outside Batu Ampar".

27 "Piracy" as defined in UNCLOS is essentially any illegal act of violence or depredation, which is committed for private ends on the high seas or without the territorial control of any State. Article 101 of UNCLOS defines it as follows:

> Piracy consists of any of the following acts:
>
> > (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> >
> > > (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or subparagraph (b).

28 According to that definition, piracy requires two ships to be involved and any "private ends" are sufficient. Piracy must also occur on the high seas and be committed by the crew or passengers. Piratical acts within territorial waters are outside the definition. To remedy this limitation, the International Maritime Organisation ("IMO") has divided acts of piracy into piracy on the high seas as defined by UNCLOS whilst acts of piracy in ports or national waters (internal waters and territorial sea) are defined as armed robbery against ships. Separately, municipal laws like s 130B of the Penal Code (Cap 224, 1985 Rev Ed) provide that a person commits piracy when that person does any act that, by the law of nations, is piracy. By s 130C(*a*), a piratical act is committed by "whoever, while in or out of Singapore steals a Singapore ship" and the offence carries a punishment with imprisonment for a term not exceeding ten years and caning.

2 9 Notably, the word "piracy" has not acquired in the context of marine policy a technical meaning. A marine policy like any commercial contract must be construed so as to give effect to the parties' intention as expressed in the written contract. As a general rule of construction, the contract is construed according to its sense and meaning as derived in the first place from the terms used in it, and the terms must be understood in their plain, ordinary and popular sense. Clause 6.1.5 of ITC simply uses the word "piracy". A definition of piracy which appears to limit the insured peril to robbery on board a vessel on the high seas (a term in contradistinction to "territorial waters") is justifiable only if that arises from a proper construction of the marine policy. Pickford J in the court of first instance and the Court of Appeal in *Republic of Bolivia* unanimously concurred that the word "piracy" when used in a marine policy does not normally follow the meaning ascribed to the word in international or municipal law. Pickford J looked at the word "pirates" in the Lloyd's SG form and said that the word as used there meant piracy in a popular or business sense, and then stated what he considered that to be at 791. It is helpful to set out his speech at 791 which Vaughan Willams LJ in the Court of Appeal adopted:

> I have to look at the more popular or business meaning of the word "piracy," and I do not think that can be better expressed than it is in Hall's International Law, 5th ed. p.259, where it is said: "Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only the enemy of the human race, but he is the enemy solely of a particular State." That I think, expresses what I have called the popular or business meaning of the word "pirate"; and I find that several though not all, of the definitions cited in the note on p. 260 of the same work bear out that idea. No doubt there are definitions which do not embody that idea, but that I think is the common and ordinary meaning; a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society which is, to use the expression in Hall on International Law, politically organized. Such an act may be piracy

by international law, but is not, I think, piracy within the meaning of a policy of insurance; because, as I have already said, I think you have to attach to piracy a popular or business meaning, and I do not think, therefore, that this was a loss by piracy.

30 Kennedy LJ said at 803:

In my opinion Pickford J. was right in holding that, so far as the matter is one of legal construction, the term "piracy" must be regarded as having been used in a business document like this policy of insurance in the sense in which business men would generally understand it; and I think that, from that point of view, he was right in defining "pirates" as being those who plunder indiscriminately for their own gain, not persons who operate solely against the property of a particular Government for such objects as those for which the persons who seized the goods insured were operating against the Government of Bolivia in the present case.

31 Earlier, Kennedy LJ had observed at 802:

The authorities shew that the word "piracy" is one capable of various shades of meaning, and that, even when used strictly as a legal term, it may be held to cover different subject-matters according as it is considered from the point of view of international or that of municipal lawyers. It seems to me that in the case of a policy like this it ought, if possible, to be construed in the sense which would give it a meaning applicable to the insurance effected by the policy. I do not doubt the general correctness, according to the existing authorities, of the definition given by the late Mr. Carver in s. 94 of his valuable works on Carriage of Goods by Sea, 4th ed. p. 117, where he says: "Piracy is forcible robbery at sea, whether committed by marauders from outside the ship or by mariners or passengers within it. The essential element is that they violently dispossess the master, and afterwards carry away the ship itself or any of the goods, with a felonious intent."

3 2 Vaughan Williams LJ (at 798–799) was of the opinion that piracy was a "maritime offence", but the robbery took place on a tributary running into another tributary of the Amazon, far up country which was under the jurisdiction of either Brazil or Bolivia, and "did not take place on the ocean at all". In his Lorship's view, as regards the question of territorial location, "piracy" in the marine policy was to be construed as analogous to piracy *jure gentium* and therefore did not include robbery on a river. Kennedy LJ (at 802), on the other hand, although disposed to accept that in general terms, piracy was robbery "at sea", in this particular case, the voyage was wholly by river and had been insured on that basis. The parties could not have intended "piracy" to be confined to the open sea because that meaning would be inapplicable to the specific voyage, *ie*, a river transit. On a proper construction of the policy, piracy could have been committed at the location of the attack on the vessel. Farwell LJ declined to express an opinion on this point.

33 Some 73 years on, the question of providing a geographical limit to what is piracy came before Staughton J in *The Andreas Lemos* who saw no reason to impose a geographical limit to what is piracy to acts committed on the high seas. *The Andreas Lemos* concerned a claim under the Lloyd's SG Policy and the previous Institute Clauses. The insured peril of piracy under the previous Institute Clauses is the same as cl 6.1.5 of ITC.

34 Like Kennedy LJ, the question to Staughton J was governed by the proper construction of the word "piracy" in the policy in issue. He found support for the broad definition of "at sea" which he adopted from r 8 of the Rules for Construction of Policy in the First Schedule to the UK Marine Insurance Act 1906 (c 41) where reference is made to rioters who attack a ship from the shore. That by implication means that the vessel is at or close to shore for the rioters to attack. Rule 8 states:

> The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

35 Staughton J also referred to three American cases that supported his broad definition of "at sea". In his opinion, the case of *US v Furlong* 18 US 184 (1820) provided direct support for his broad definition. In that case, it was argued that piracy could not be committed because the vessel was at anchor in a road near the shore of two islands and such a vessel was not a vessel on the high seas. Johnson J delivering the judgment of the US Supreme Court said at 200:

> [W]e are of the opinion, that a vessel in an open road may well be found by a jury to be on the seas. ... Being at anchor is immaterial, for this might happen in a thousand places in the open ocean, as on the Banks of Newfoundland. Nor can it be objected that it was within the jurisdictional limits of a foreign State; for those limits, though neutral to war, are not neutral to crimes.

36 In international law, the distinction between "high seas" and "territorial waters" is a matter of jurisdiction. The significance of the contention that piracy can only be committed on the high seas and not in territorial waters is a matter of jurisdiction. I agree and adopt the reasoning of Lord Wheatley in *Cameron v HM Advocate* 1971 JC 50 at 61:

> There is but one further point with which I should deal. It was argued that piracy could take place only on the high seas, and that the actions in this case which were said to constitute piracy had all taken place within territorial waters. While, in the view which I have taken, it may not be necessary to decide this, I feel constrained to express the view that in effect the difference relates simply to the basis of jurisdiction and nothing else. The same acts are involved and the same consequences. The same offence has been committed. If it is committed within territorial waters, there is automatic jurisdiction. If it takes place on the high seas, then jurisdiction is assumed if the qualifying conditions are satisfied.

37 Under customary international law, the crime of piracy has long been recognised as one over which all States may exercise jurisdiction provided that the alleged offender was apprehended either on the high seas or within the territory of the State exercising jurisdiction. The arresting State may also legitimately punish the pirates. This rule of customary international law is reaffirmed in Art 105 of UNCLOS which provides that "every State may seize a pirate ship ... or a ship … taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."

38 Under UNCLOS the definition of high seas has been extended with the advent of the Exclusive Economic Zone ("EEZ") and the archipelagic waters. Waters not included in the EEZ, the waters of an archipelagic State (such as Indonesia), and the territorial waters (internal waters and territorial sea) of a State, constitute the high seas. It cannot be right that piracy as an insured peril is intended to be limited to piracy committed in the high seas given the extended definition in UNCLOS. This is because the concept of the peril under review has to be understood in the sense in which ordinary commercial men would understand the term in its context. That in turn involves considering the aim and purpose of the clause objectively ascertained from the language of the standard wording of the policy read together with role of the special conditions imposed by the underwriter. The Policy here contained an express warranty of the tug's trading limits, namely, "Warranted trading within Singapore home trade principally between Singapore, Batam Island, Pasir Gudang and Tanjong Pelepas and/or held covered at additional premium to be agreed". The tug trading pattern was mainly between Singapore and Batam Island and the tug was insured on that basis. The "maritime peril" that the tug was exposed to in the marine adventure included piracy which is a peril consequent on, or incidental to, the navigation of the sea: see s 3(3) of the Act. Thus QBE could not contend that the insured

peril "piracy" is confined to the high seas because that meaning would be inapplicable to the maritime adventure covered by the Policy. In the final analysis, it is the scope and construction of the Policy that determines the question of geographical location.

39 The distinction, which Mr Chia made, between a vessel that is "at sea" as compared to a vessel "in port" or "in harbour" is distracting and of no merit or consequence. In my judgment, in the context of the Policy, the relevant enquiry is whether or not the particular stretch of water where the piratical attack occurred could properly be referred to in its ordinary sense as "the sea". All that has to be established is that the act of piracy was committed on the sea and it is immaterial that the insured vessel as a physical proposition was lying at anchor or moored as in this case. I find that in the circumstances of the present case, the tug was in a place where piracy under cl 6.1.5 of ITC could be committed.

4 0 I shall now turn to the alternative peril under cl 6.1.3 of ITC. It is right to say that if a different view were to be taken that the loss was not due to piracy within cl 6.1.5 of ITC as the attack was not committed "at sea", the loss would nonetheless be recoverable under cl 6.1.3. If it is not a loss by piracy, it is violent theft by persons outside the tug under cl 6.1.3. Both are marine perils and they overlap. The distinction between the two perils in the past was necessary when piracy was excluded as a marine peril and was insured by the war risk underwriter under a war risk cover.

41 Therefore, alternatively, on the same facts there was violent theft by persons outside the tug. The risk of violence or threats of violence under cl 6.1.3 of ITC is to address risk to persons on board where outsiders inflict or threaten violence against those on board to steal property which they own or have under control and hand over as a result. That was what happened in the present case. For the reasons given, this case is distinguishable from the facts in *The Andreas Lemos*.

42 QBE contends that the loss of the tug was due to the negligence of the crew in that there was no watchkeeping at the relevant time and that Bayswater, by allowing two key members of the crew to take shore leave, had contributed to the inability of the crew to keep a proper watch over the tug. In addition, Anwar contends (despite not being the pleaded defence) that the plaintiff's failure to ensure adequate manning levels rendered the tug technically unseaworthy which would entitle the defendant to repudiate liability in any event.

43 The tug was at anchorage at 1715 hours (local time). The second engineer together with Suardi spent some time repairing the bollard before dinner. Between 1800 and 1900 hours, the crew was winding down the day's activities and getting ready for the evening meal. The tug was only in anchorage for some two hours before the intruders came on board. It is not disputed that there was no particular person on watch duty on deck or in the bridge between 1800 and 1900 hours. It is also not disputed that Bayswater was aware of the IMO circular referenced "MSC/Circ.623/Rev.3" dated 29 May 2002 which was notified by the Maritime and Port Authority of Singapore ("MPA") to local shipowners in MPA circular No 23 of 2002 and dated 20 December 2002 as a guide to shipowners, operators, master and crew on preventing and suppressing acts of piracy and armed robbery against ships. The circular aims at bringing to the attention of the shipping community the precautions to be taken to reduce the risks of piracy on the high seas and armed robbery against ships at anchor, off ports or when underway through a coastal State's territorial waters. The circular also recognises that smaller crew numbers favour the attacker. A small crew will have the onerous task of maintaining a high level of security surveillance for prolonged periods. Shipowners will wish to consider providing appropriate surveillance and detection equipment to aid their crew and protect their ships. The circular advises that early detection of a possible attack is the most effective deterrent. Maintaining vigilance is essential. Advance warning of a possible attack will give the opportunity to sound alarms, alert other ships and the coastal authorities, illuminate the suspect craft, undertake evasive

manoeuvring or initiate other response procedures. Signs that the ship is aware it is being approached can deter attackers. Aggressive response once attackers have boarded the ship can significantly increase the risk to the ship and those on board. Indications to attackers that the ship has alert and trained crew implementing a ship security plan will help to deter them from attacking the ship.

44 The master was somewhat blasé about security on board as he had been to Batam countless times and he had never once encountered pirates. There were other vessels anchored in the same area; the nearest vessel was about 500m away. There was also an Indonesian naval base in the vicinity. It was to him a safe place to moor his tug and barge. Nonetheless, the duty of the master is to look after the tug and he did not do so. But did the omission have a bearing upon the casualty that actually occurred so that the casualty was caused or contributed to by the master's fault? Mr Chia submits that the failure to keep watch was the effective cause of the loss but there is no evidence as to what might have happened if the alarm was activated. Would the intruders have been deterred from attacking? Would there have been a response to the alarm and would help have turned up? In the present case, the attack was reported as soon as Suardi was rescued. In my judgment, the failure to keep watch was not a cause of the loss but merely part of the surrounding circumstances that brought about the events that followed. The omission may be regarded as a combination of circumstances that fell short of being the proximate cause of the loss. As stated earlier, negligence of the master is not a bar against liability under s 55(2)(*a*) of the Act as I have found on a balance of probabilities that the loss of the tug was by piracy being the cause predominant in efficiency or, in the alternative, violent theft by persons outside the tug. Consequently, the fallback alternative claim based on cl 6.2.2 including its proviso does not merit further consideration which incidentally dispenses at the same time with the need to deal with the evidence of Chay, and Capt Dhanvinder Singh, managing director of Redstar Marine Consultants Pte Ltd. However, I feel constrained to comment that the objections taken by counsel for Bayswater, Mr Ramesh Appoo, assisted by Mr Brij Rai, as to the qualifications of Chay and Capt Singh as expert witnesses are warranted. I do not regard Chay, who had investigated 12 cases of piracy, an authority on the subject. Capt Singh also does not qualify as an expert to comment on the duties of the shipowner and crew with reference to the security and safety of the tug from risks of attacks by pirates. Capt Singh's familiarity with the International Shipping and Port Facilities Security ("ISPS") Code was only as recent as 2004.

4 5 I now turn to consider the counterclaim brought by QBE to set off or extinguish the insured sum of $730,000 payable under the Policy on the ground that Bayswater had breached cl 13.1 of ITC and/or its sue and labour obligations under s 78(4) of the Act. A breach of s 78(4) or cl 13.1, as the case may be, sounds in damages, giving the underwriter a counterclaim rather than a defence. Clause 13.1 reads:

> In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

Section 78(4) provides:

> It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

46 QBE in its closing submissions pointed to various breaches on the part of Bayswater. They are: failure to offer rewards; failure to subscribe to the IMB Special Alert, a service which gives a wider broadcast of the loss to individual law enforcement agencies, ports and shipyards; and failure to act generally as a prudent uninsured in not actively pursuing the tug through Bayswater's own contacts and relevant authorities. Had it not been for these failures, Bayswater would have increased the

chances for recovery of the tug thereby minimising or averting the loss. It is convenient to group these complaints as pre-action failures. In so far as the failure to respond positively to Noel Choong's notification on 9 April 2004, the allegation against Bayswater is that the failure had caused the window of opportunity for recovery of the tug to close soon thereafter. Notably, Noel Choong, who is head of ICC International Maritime Bureau, Far East Regional Office, Piracy Reporting Centre ("IMB"), conceded that the credibility of the information was uncertain. All these contentions are easy to make but difficult to prove and without evidence the complaint is entirely speculative.

47 It is patently factitious, if not disingenuous, when judged against the setting gathered from the exchanges of correspondence which I shall narrate and explain, to complain of a breach of cl 13.1 and s 78(4) of the Act. I agree with Mr Appoo that before the Defence was filed on 15 January 2004, QBE did not take issue with Bayswater on either matter: absence of a reward of $50,000 or failure to subscribe to the IMB Special Alert. Interestingly, on 13 January 2004, Chay had informed QBE that the whereabouts of the tug was unknown as it was proving more difficult to locate the person holding the tug. Chay requested another six to eight weeks to pursue the matter. Two days later, QBE filed a holding Defence. Besides pleading clandestine theft, the position QBE resorted to and did robustly take was that the tug was not a total loss and QBE was negotiating for its release. The Further and Better Particulars filed on 11 February 2004 provided some details of the negotiations. QBE pleaded that "the price acceptable to all parties would be the main purport of such negotiations". The position taken there in the Defence and Further and Better Particulars reinforced my view that QBE had intervened and taken over the responsibility of finding and securing the release of the tug. It was against this setting that IMB's information in April 2004 about a possible lead on the tug was received by Bayswater who referred IMB to QBE. It is to be noted that QBE did not fully keep Bayswater in the picture as to the status of Chay's recovery efforts. QBE did not amend its Defence until 27 September 2004 and in that latest round of amendments dropped its stance that the tug was not a total loss and deleted reference to negotiations for the release of the tug. To pursue a counterclaim for failure to sue and labour in these circumstances and on a claim which QBE acknowledges as genuine is, to say the least, farcical. In fact, until the Defence was filed, QBE had not formally rejected the claim.

48 Anwar explained at the hearing that QBE wanted to satisfy itself that all possible avenues in locating the tug had been met and that the chance of recovery no longer existed within a reasonable time before considering the claim proper. Hence, time was needed for investigations. Supported by Quek Keng Seng of AXA Insurance Singapore Pte Ltd, Anwar claimed that actual loss of a missing vessel would be presumed under s 58 of the Act after a lapse of 13 to 18 months from the casualty. Section 88 provides that reference to reasonable time in any of the provisions of the Act is a question of fact. QBE has relied at the hearing on this 13 to 18 months' window to deflect criticism that it was delaying the payment of the claim. There was no explanation for the basis of this period of 13 to 18 months which seems arbitrary to me on the present facts.

49 I begin with the alleged pre-action failures. On 27 February 2003 through its broker, Newstate Stenhouse (SIMCO) Pte Ltd ("Newstate"), Bayswater attempted to give notice of abandonment of its interest in the tug to QBE. In rejecting the abandonment as improper, QBE on 3 March 2003 reminded Bayswater through its broker that Bayswater should act as a prudent uninsured and take active steps to recover the hijacked tug. The next day, Newstate informed QBE that Bayswater had done all it could possibly have done to find the tug and that searching aimlessly was not a solution. There was no response from the underwriter. Two months later, Bayswater wrote to the Monetary Authority of Singapore on 31 May 2004 to complain about the non-payment of a straightforward claim. As directed, QBE responded directly to Bayswater on 12 June 2003. QBE stated that the loss was still being investigated. It was too early to consider the claim. From its experience, missing ships tended to turn up about a year after the date of the reported loss. Until such time, the tug could not be considered an actual total loss. QBE mildly rebuked Bayswater for not making efforts to independently

ascertain the current whereabouts of the tug and noting at the same time that Bayswater was content to leave the entire investigations in the hands of QBE's surveyors. Bayswater was asked somewhat casually to take a more proactive role "to assist our surveyors" in their investigations. QBE went on to assure Bayswater that it was in constant communication with the surveyors and expressed confidence in its surveyors. Its pitch was for patience and time in that if the tug could be located, the surveyors would find the tug but the surveyors had to be given sufficient time to carry out their task. The letter ended with a promise from QBE to keep Bayswater informed of developments. At that stage, on 10 June 2003, Chay had written to QBE that whatever information they had received did not match the tug. Clearly, QBE required more time.

50 Bayswater replied on 7 July 2003 pointing out that it had taken whatever steps it could within its means to look for the tug. The helicopter search covered the area proposed by Chay. Searches were carried out in speedboats for the hijacked tug in the vicinity of Batam. Reports of the incident were lodged with various authorities like the MPA, Batam police, the Indonesian Embassy, Ibu Pejabat Laut (Marine Department Headquarters) at Klang and the Singapore police and coast guards. MPA's Port of Operation Control Centre was informed of the incident on 28 January 2003. Noel Choong confirmed that the MPAhad on 29 January 2003 informed his office of the incident. His office informed MPA that IMB would notify all relevant authorities about the incident, which it did. IMB notified authorities like the Philippines Coast Guard Headquarters, search and rescue agency Basarnas Jakarta, and Maritime Rescue Co-ordinating Centre Port Klang. In its letters to the director of Sea Traffic and Transportation at the Indonesian Embassy and Ibu Pejabat Laut, Bayswater requested the addressee to disseminate the news of the incident with a view to tracing the whereabouts of the tug. Bayswater also sent an e-mail to a contact to watch out for any possible news of the tug in Thailand. The assured had equally co-operated with the surveyors. QBE was queried as to what more it wanted Bayswater to do. It sought guidance from QBE and the surveyors. Plainly, Bayswater was willing to co-operate with QBE but it was not willing to throw good money after bad. In other words, Tan was prepared to do anything the underwriter wished provided the underwriter paid. There was no reply to this letter.

51 Behind the scene, so to speak, QBE continued to work with Chay without keeping Bayswater in the loop. To illustrate, in a fax dated 3 September 2003, Chay informed QBE of a lead but he was undecided as to whether or not to share the information with Bayswater. The assured was not told about the lead. At the end of October 2003, Chay requested QBE to give a letter of authorisation, which it did on 30 October 2003, to one Marthin Luther Micky Duwiry ("Duwiry") appointing him to recover the tug for a reward of 25–30% of the market value of the tug. Only a copy of this letter of authorisation was extended to Bayswater. Bayswater was not consulted beforehand. Quek testified that the decision to appoint Duwiry ought to have been done in consultation with the assured.

52 Tired of waiting, Bayswater instructed Just Law LLC who sent a demand letter on 5 November 2003. QBE adopted its letter of 12 June 2003. QBE reiterated that Bayswater made little effort to locate the tug and was content to leave the investigation and search in the hands of QBE's surveyors. Interestingly, there was no insistence that the assured observe its duty to sue and labour. Instead, what QBE put across was plainly optional. QBE's fax of 11 November 2003 to Just Law LLC was to the effect that the investigation by the surveyors was still actively in progress and in these terms:

> If your clients would like to offer some assistance in the search for their tug "BW Wisdom", they are required to contact our surveyors accordingly.
>
> We shall not fail to revert to your clients on the progress of the continuing search.

53 A breach of cl 13 (and not s 78(4) of the Act) was raised for the first time in the Defence filed on 15 January 2004. QBE's attitude until then towards the assured was assuaging. QBE was dealing with the consequences of the incident. QBE was in a position where it was capable of intervening and it did intervene and went ahead to assume responsibility by appointing Chay and supporting him in his efforts to recover the tug. QBEgave the impression that it had taken over the responsibility of finding the tug and wanted the assured to bear with the underwriter as the surveyors needed time to locate the tug. In these circumstances, Tan not only waited but provided information and documents about the tug as and when required of him by the surveyors. One such occasion was in August 2003 when Chay contacted Tan for the serial number of the tug's engine. On 13 August 2003, Tan learnt from Chay that the lead to a Mahakam log camp drew a blank. The serial number of the engine of the vessel at the log camp was different from the *BW Wisdom*'s engine number given to Chay on 7 August 2003. Chay's leads which apparently held out some promise turned out to be incorrect.

5 4 The true view is that up to now the tug has not surfaced. Chay's efforts have been unfruitful. As stated, the assured was dispossessed of the tug on 28 January 2003. Time passed and nothing was heard of the tug. Chay was at one time in October 2003 reporting to QBE that the tug had been "sold" and the "buyer" had yet to pay the "seller" who had taken the tug back to be used in log camps in Kalimantan. Above all, there has not yet been verification that the tug Chay was talking about was in fact the *BW Wisdom*. That position persisted until the action was brought. By the time the writ was issued on the facts as they existed at that material time, I am satisfied and find on a balance of probabilities that Bayswater was at that date irretrievably deprived of its tug. In any event, the tug was never restored to Bayswater. Section 57(1) of the Act provides that there is a total loss where the assured is "irretrievably deprived" of the subject matter of the insurance. Chay's faxes to QBE dated 3 September and 11 October 2003 and confirmation on 13 January 2004, all indicated to me that the chances of non-recovery were greater than the chances of recovery even if for the sake of argument it is assumed that the tug mentioned in the faxes was *BW Wisdom*. For the sake of completeness, I should add that I do not consider s 58 of the Act to be of assistance to QBE on the facts.

55 By 15 December 2003 (the date of the writ), the tug was no longer registered as a Singapore-flagged tug. The register was closed on 18 August 2003 as it was not in the public interest to keep the vessel on the register under s 43(2) of the Merchant Shipping Act (Cap 179, 1996 Rev Ed) ("MSA"). Bayswater, at the request of MPA, returned the certificate of registration for cancellation. Section 43(2) of the MSA provides that the registry of a Singapore ship may be closed and the certificate of registry cancelled if the MPA is satisfied that it is not in the public interest for the ship to continue to be registered as a Singapore ship.

56 It is clear that by the time Bayswater filed this action, there were no real leads left to pursue. It was only in April 2004 that IMB contacted Bayswater about a tug fitting the description of the *BW Wisdom*. Bayswater asked Noel Choong to refer the matter to QBE. QBE decided to pursue the lead but by the time the reward and funds requested by IMB were remitted, the suspect vessel had moved away from its reported location. IMB's fax dated 21 April 2004 to QBE which I note was not marked "urgent" announced that it had received from an informant information on two tugs named *Bina Ocean* and *Beachwater Wisdom* both from the port of Singapore and both vessels were hijacked somewhere in Batam in February 2003. The suspicion was that *Beachwater Wisdom* could be the *BW Wisdom*. IMB on 28 April 2004 wrote:

> Based on the above information received, the informant may have the information for the missing tugs TB "*Bina Ocean 2*" and "*BW Wisdom*". We are unable to confirm the credibility of the information unless negotiations commenced.

5 7 It is unclear whether IMB's lead in April 2004 was different or the same as Chay's previous leads in October 2003 which also related to *Bina Ocean* and *BW Wisdom*. IMB's information was undeniably vague and indefinite. IMB too was unsure as to the credibility of the information. The information was too mired in uncertainties for anything concrete to materialise. A reasonable shipowner in the position of Bayswater would have been understandably chary of parting with any money on a hope and a prayer and would have regarded further actions as lengthy and fruitless. At that stage, the Defence raised by QBE was that the claim was not payable under the Policy as the loss was not by an insured peril. The tug was also not a total loss and QBE was negotiating the tug's return. It was not unreasonable to refer IMB to QBE. It is equally not unreasonable for Tan to think that any outlay by him would not be reimbursed by QBE. Section 78(3) of the Act provides:

> Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

58 Moving on to a separate point, the assured is only obliged to act reasonably both under cl 13.1 of the Policy and s 78(4) of the Act. What evidence was there presented to court that a reasonable prudent uninsured in the position of Bayswater would have acted differently? Evidence of what a prudent insurer expects of its assured is irrelevant. To that extent I did not find Quek's testimony helpful.

59 Eveleigh LJ with whom Griffiths LJ agreed said in *Integrated Container Service Inc v British Traders Insurance Co Ltd* [1984] 1 Lloyd's Rep 154 at 158:

> Those words seem to me to impose a duty to act in circumstances where a reasonable man intent upon preserving his property, as opposed to claiming upon insurers, would act. Whether or not the assured can recover should depend upon the reasonableness of his assessment of the situation and the action taken by him. It should not be possible for insurers to be able to contend that, upon an ultimate investigation and analysis of the facts, a loss, while possible or even probable, was not "very probable."

60 Hobhouse J in *Noble Resources Ltd and Unirise Development Ltd v George Albert Greenwood (The Vasso)* [1993] 2 Lloyd's Rep 309 at 313 said

> On the correct construction of the clause more has to be shown than merely that some step was not taken. Underwriters have to show that the step was a proper one which a reasonable assured, having regard to the interests of himself and the insurers and to the provisions of the policy, should have taken.

6 1 An example of a loss for breach of the duty to sue and labour is where the insured fails to protect a claim against a third-party tortfeasor from being time-barred, thereby affecting the insurer's subrogation claim, and the loss to the insurer is equivalent to the value of the lost right against the third party. In other cases, the breach of duty to sue and labour must be so significant that the loss was caused, not by the insured peril but by a breach of the duty to sue and labour. It is in very clear cases that such a claim can succeed. Such a claim is akin to a case of *novus actus interveniens*.

62 I am not persuaded that the failure to respond in a positive manner in April 2004 was a breach of the contractual or statutory duty. QBE had also not made out a case that the alleged pre-action failures constituted a failure to avert or minimise the consequence of an insured peril that had already occurred. QBE's complaints are rejected, which even if valid, could not be arguably categorised as the proximate cause of the loss.

63 For these reasons, I give judgment to the plaintiff in the sum of $730,000 with interest thereon at the rate of 6% per annum from the date of the Writ of Summons and costs. As a corollary to my decision, the counterclaim is dismissed with costs.

Copyright © Government of Singapore.