SINGAPORE
THE YEAR IN REVIEW

Singapore is a major maritime hub and every year, the Singapore Courts deal with a large number of cases covering a broad spectrum of issues relating to the marine and transportation industries. The following is a selection of some of the judicial decisions in the past year:

A. Admiralty

Setting aside a re-arrest on, *inter alia*, ground of issue estoppel: *The "Vasiliy Golovin"* [2007] SGHC 116

Invoking the admiralty jurisdiction of the High Court – *in rem* v *in personam*: *The "Global 1" [*2006] SGHC 30

B. Carriage of goods

Misdelivery of cargo against non-production of bill of lading and the doctrine of election: *The "Pacific Vigorous"* [2006] 3 SLR 374

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C. Arbitration

No power to grant Mareva relief in support of foreign arbitrations under the International Arbitration Act: *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629

Concurrent arbitration and court proceedings – which to stay: *Mitsui OSK Lines Ltd v Samudera Shipping Line Ltd* [2007] SGHC 41

D. Marine Insurance

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Breach of warranty, breach of duty of good faith, the Inchmaree clause and want of due diligence provision: *The "Sumpile 28"* [2006] 3 SLR 12

Construction of warranty: *Royal & Sun Alliance Insurance (Singapore) Ltd v Metico Marine Pte Ltd and Anor* [2006] 3 SLR 333

(1) <u>Setting aside a re-arrest on, *inter alia*, ground of issue estoppel</u>

The "Vasiliy Golovnin" [2007] SGHC 116

This is the latest admiralty decision from the Singapore High Court and makes for interesting reading.

The 2nd and 3rd Plaintiffs, Credit Agricole (Suisse) SA and Banque Cantonale De Geneve SA respectively (collectively "the Banks") financed a cargo of rice loaded onto the vessel "*Chelyabinsk*". They arrested the "*Chelyabinsk*" in Lome in Togo on 21 February 2006 for alleged breach of the contract of carriage contained in or evidenced by the bills of lading, of which the Banks claimed to be the lawful holders. The vessel was at the material time owned by Far Eastern Shipping Co. PLC ("FESCO").

The arrest in Lome was set aside by the Togolese Court on 24 February 2006 on the basis that the Banks did not have any valid claim against FESCO, and accordingly had no right to arrest the vessel. The Banks did not appeal to the Lome Court of Appeal against the release order (the "Lome Release Order"). The time allowed for an appeal expired on 17 March 2006.

On 18 March 2006, the Banks proceeded to arrest "*Chelyabinsk*"'s sister vessel, the "*Vasiliy Golovin*", in Singapore in respect of the same claims. FESCO applied to set aside the warrant of arrest of "*Vasiliy Golovin*" and strike out the Banks' *in rem* writ.

The Assistant Registrar granted FESCO's application to set aside the arrest and struck out the Banks' *in rem* writ. She did not award FESCO damages for wrongful arrest of the "*Vasiliy Golovin*". This decision was affirmed on appeal to the High Court judge.

The arrest in Singapore was set aside on 3 grounds: -

(i) material non-disclosure at the *ex-parte* hearing of the application for a warrant of arrest;
(ii) issue estoppel; and
(iii) there was no sustainable cause of action by the Banks against FESCO, which resulted in the striking out of the *in rem* writ.

<u>Material Non-Disclosure</u>

This decision highlights, once again, the need for the arresting party to make full and frank disclosure of all material facts to the court in an *ex parte* application for a warrant of arrest.

The High Court found that the Banks had failed to disclose 3 material facts at the *ex-parte* hearing, one of which is the fact that the "*Chelyabinsk*" was released from arrest in Lome following a contested hearing where the Lome Court had considered and dismissed the Banks' arguments as to whether they could arrest the "*Chelyabinsk*".

The Banks contended that while they had not specifically mentioned the contested hearing in Lome, the fact that there had been a contested hearing at Lome may be gleaned from the exhibits in the affidavit filed leading the application for arrest and the Assistant Registrar hearing the *ex-parte* application had intimated that he had read the arrest papers.

The entire affidavit, including all the exhibits contained therein, occupied around 400 pages. The Court found that there was room for doubt as to whether the Assistant Registrar granting the application for arrest had read the entire affidavit. The material fact should be fairly stated in the affidavit, and not in the exhibits. Also, the judge hearing the *ex-parte* application should not be made to go through voluminous pages of material unless he is firmly and carefully guided through the material.

Issue estoppel

The arrest in Singapore of a vessel which was previously released from arrest in another jurisdiction by a court order is, without more, not an abuse of process. All will depend on the circumstances of the case. The test is whether allowing the re-arrest would be oppressive and vexatious to the shipowner, and thus an abuse of process.

There will be an abuse of process if a vessel is arrested on grounds in respect of which there is issue estoppel. The Court held that there was issue estoppel in this case which prevents it from considering whether the Banks have a right to arrest the "*Vasiliy Golovnin*".

In the Court's view, the 3 requirements for issue estoppel to arise with respect to the arrest of the "*Vasiliy Golovnin*" were satisfied: -

(i) The Lome Court is one of competent jurisdiction and its judgment is final and conclusive and on the merits of the case.

The Lome Court had considered the merits of the case for an arrest of the "*Chelyabsink*" and took note of the same arguments that were advanced by the parties in the Singapore action before deciding to release the "*Chelyabinsk*" from arrest. The Lome Release Order is final and conclusive as the Banks did not lodge an appeal against it.

(ii) The parties to the action in Lome are the same as those in the Singapore action

(iii) The issues before the Singapore Court are identical to those considered by the Lome Court.

No damages for wrongful arrest

For FESCO to be entitled to damages for wrongful arrest, it must be established that there was mala fides or *crassa negligentia* on the part of the Banks. The Court was of the view that there was neither. The Court found that the Banks had honestly believed that they had valid claims against FESCO that had not been protected at Lome and their non-disclosure of material facts was neither deliberate nor calculated at misleading or distorting the truth.

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(2) Invoking the admiralty jurisdiction of the High Court – *in rem v in personam*

The "Global 1" [2006] SGHC 30

This case highlights the different modes of service of an *in rem* writ and the consequences thereof.

The Defendants were the owners of the vessel "*Global 1*" at the time the cause of action arose. However, they ceased to be the owners of the vessel at the time when the *in rem* writ was issued. Parties did not realise that there was a change of ownership until more than a year after the Defendants entered appearance in the action. This was explained by the defence being conducted by the Defendants' P&I Club.

Having realised the change of ownership, the Defendants applied for leave to withdraw their appearance. Their main contention was that this was an *in rem* action and that although the Defendants were the owners of the vessel "*Global 1*" at the time the cause of action arose, they were no longer the owners at the time of issuance of the *in rem* writ.

There are three possible scenarios for service of an *in rem* writ:-

(a) The *in rem* writ is served on the ship and the shipowners do not enter an appearance;
(b) The *in rem* writ is served on the ship and the shipowners proceed to enter an appearance; and
(c) The *in rem* writ is not served on the ship but the shipowners' solicitors accept service or they enter an appearance thereby waiving service.

In scenario (a) where the *in rem* writ is served on the ship and the shipowners do not enter an appearance, the claimant can only look to the ship for satisfaction of his claim.

In situation (b) where the *in rem* writ is served on the ship and the ship owners proceed to enter an appearance, both *in rem* and *in personam* components of the writ are invoked and the claimant can look to both ship and shipowners for satisfaction of his claim.

In situation (c) where the *in rem* writ is not served on the ship but the ship owners' solicitors accept service or they enter an appearance thereby waiving service, the *in rem* jurisdiction is not invoked but the in *personam* jurisdiction is.

In the present case, the writ was an *in rem* writ taken out on the basis of a statutory lien or statutory right of action *in rem*. That being the case, the Plaintiffs had to fulfil the statutory requirements of section 4(4) of the High Court (Admiralty Jurisdiction) Act. The Defendants were the owners of the ship at the time the cause of action arose, but by the time the writ was issued, the ship had changed ownership. As such, the statutory requirements were not satisfied and the Plaintiffs could not properly invoke admiralty jurisdiction *in rem*.

However, while the Plaintiffs took out an *in rem* writ, the writ was not served on the ship nor was the ship arrested. Service of the writ was on the Defendants' solicitors and an appearance was duly entered. The acceptance of service by the Defendants' solicitors on their behalf and the entry of an appearance by the Defendants resulted in invoking the *in personam* admiralty jurisdiction of the High Court. By not serving the writ on the ship or arresting the ship, the Plaintiffs elected not to invoke the *in rem* admiralty jurisdiction of the High Court.

The present action was thus in substance an *in personam* action although commenced as an *in rem* action. The Defendants' application for leave to withdraw their appearance was dismissed and leave was granted for the Plaintiffs to amend their writ from the *in rem* form to the *in personam* form.

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(3) <u>Misdelivery of cargo against non-production of bill of lading and the doctrine of election</u>

The "Pacific Vigorous" [2006] 3 SLR 374

In this case, the Plaintiffs ("Agritrade") sold a cargo of coal to Bhatia International Limited ("Bhatia"), the sub-charterers of the vessel "*Pacific Vigorous*" from the head charterers, Eitzen Bulk A/S ("Eitzen").

Bhatia issued letters of indemnity to Eitzen to enable delivery of the cargo to be made without the relevant bills of lading for the cargo being produced. Eitzen in turn gave back-to-back letters of indemnity to the Defendants as owners of "*Pacific Vigorous*". Bhatia disputed the quality of the goods but despite its complaints, it delivered the cargo

to its end users and unilaterally deducted a sum for breach of the sale contract from the total sum due to Agritrade.

Agritrade remained the holder of the bills of lading. It accepted the reduced price as part payment and then commenced action against the shipowners for the loss suffered in consequence of the misdelivery of cargo to Bhatia.

The shipowners argued that delivery to Bhatia was with Agritrade's consent. Alternatively, they contended that Agritrade's acceptance of part payment of the sale proceeds from Bhatia amounted to an election that precluded Agritrade from suing the shipowners for misdelivery.

The High Court was of the view that the shipowners did not make out a triable issue on either defence and allowed Agritrade's application for summary judgment.

Defence of consent

On the defence that the cargo was released to Bhatia with the consent of Agritrade, the judge found it unsustainable. The release was against letters of indemnity, not on the basis of any prior consent by Agritrade.

Defence of election

Election at common law occurs where a person has two inconsistent rights or courses of action and only one of which can be exercised. In such a case, his choice by overt act communicated to the other party that he is relying on one such right precludes him from later claiming the benefit of another.

Election in equity means that a party cannot both accept an instrument or judgment and reject it.

There was no common law election in this case as Agritrade did not have two inconsistent rights – Agritrade's claims fell under two contracts which gave rise to separate and independent causes of action against two different persons. Agritrade's remedies as between Bhatia on the one hand and the shipowners on the other were cumulative and not alternative remedies, so much so that it was not required to choose between remedies.

Even if there were alternative and inconsistent remedies, the common law doctrine of election takes effect only where a stage is reached where some choice has finally to be made. In this case, Agritrade had not commenced arbitration proceedings against Bhatia under the sale contract for the balance of the purchase price and the acceptance of part payment was not an unequivocal act which outwardly signified election.

Furthermore, one element common to both doctrines of election in common law and in equity is that in order for a party to make an election, he must have known of his right to elect. In this case, the judge found that the shipowners had not demonstrated Agritrade's requisite knowledge of the existence of choice.

Note: The shipowners' appeal to the Court of Appeal was dismissed.

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(4) <u>Unseaworthiness and incorporation of bill of lading clauses</u>

The "Limin XIX" [2007] SGHC 121

This is the most recent carriage of goods decision of the High Court.

There were three parties involved. The Plaintiffs were the cargo interests whose cargo of 300 bundles of deformed steel bars was lost overboard the carrying barge "*Limin XIX*" during a voyage from Singapore to Batam, Indonesia. The Defendants were the contractual carriers who issued the bill of lading in respect of the cargo. The Third Party were the charterers of the "*Limin XIX*" who supplied the barge to the Defendants pursuant to a joint operations agreement – under this agreement, the Third Party and the Defendants took turns in providing a set of tug and barge for the carriage of their respective customers' cargo between Singapore and Batam where each party would be entitled to 50% carrying capacity of the barge.

The Plaintiffs claimed against the Defendants damages for non-delivery of the cargo. The Defendants in turn made a claim against the Third Party to be indemnified against the Plaintiffs' claim on the ground, *inter alia*, that the "*Limin XIX*" which the Third Party provided was unseaworthy.

A seaworthy vessel was one that was "*fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage*". Further, when one considers the circumstances of the voyage embarked on, a very relevant factor is whether the vessel is going to be carrying cargo or not, and if she was, whether she is fit to carry such cargo safely.

There was no first hand account of the loss. None of the crew members of the tug came forward to testify as to what happened during the voyage. Exactly how the loss occurred could not be determined in the absence of evidence from the crew and the fact that the "*Limin XIX*" was not made available for a full inspection.

The learned judge found on the evidence that the "*Limin XIX*" was unseaworthy and was satisfied on a balance of probabilities that the loss of the cargo was due to her unseaworthiness.

In defending the Plaintiffs' claim, the Defendants contended that the contract of carriage between them and the Plaintiffs was contained in and/or evidenced by the quotation signed by the Plaintiffs' agent (the shipper in Singapore) and the terms and conditions of the Defendants' bill of lading. One of the terms in the signed quotation reads "*Our rates exclude the insurance coverage of cargo & the carriage of goods is subjected to the terms and conditions as stipulated in our Bill of Lading*".

The Defendants sought to rely on the exemption and limitation clauses in the bill of lading. The Defendants relied on four clauses, two of which were found on the face of the bill of lading and other two on its reverse page. One of the clauses on the reverse page exempts the Defendants' liability for loss caused by unseaworthiness: -

> *"Deck cargo to be handled and carried on deck and is so carried at the sole risk of the shipper. The carrier will be exempted from liability for any loss, damage or expense connected with deck cargo howsoever caused and whether due to negligence, unseaworthiness or otherwise."*

In this case, it was common ground that the Plaintiffs never received or saw an original bill of lading. What happened on each of the ten or so occasions on which the Defendants had carried the Plaintiffs' goods from Singapore to Batam was that the Defendants issued one original bill of lading for the goods so carried and some non-negotiable copies thereof. The Defendants kept the original bill of lading at all times and only sent the Plaintiffs' agent (the shipper in Singapore) one of the non-negotiable copies in order to show that shipment had taken place. The non-negotiable copy that was sent to the Plaintiffs' agent was identical on its face with the original bill of lading but no clauses at all appeared on its reverse which was completely blank. The evidence was that the Plaintiffs actually never paid much attention to the bill of lading it was given, and did not realise that whilst there was a reference on the front to terms on the reverse side, there were actually no terms on the reverse side.

In the learned judge's view, the question which arises is whether the terms of the bill of lading that were incorporated were the terms that appeared on the face and reverse side of the original bill of lading or the terms that appeared on the face of the copy of the bill of lading only.

It was held that the words in the quotation "*subjected to the terms and conditions as stipulated in our Bill of Lading*" must be interpreted as referring to the bill of lading that was made available to third parties, which was the non-negotiable copy of the bill of lading. As such, the only clauses of the bill of lading that were incorporated were the clauses on the face of the bill of lading.

The Defendants could not rely on the exemption clause on the reverse page of the bill of lading but were allowed to rely on the limitation clause on the face of the bill limiting their liability for the loss of the cargo to £100 per package.

The learned judge also held that since the Third Party had provided an unseaworthy barge to the Defendants, and the Third Party had not been able to establish knowledge of, or acquiescence in, the unseaworthy condition of the barge on the part of the Defendants, the Third Party was liable to indemnify the Defendant in respect of their liability to the Plaintiffs.

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(5) No power to grant Mareva relief in support of foreign arbitrations under the International Arbitration Act (Cap 143A)

Swift-Fortune Ltd v Magnifica Marine SA [2007] 1 SLR 629, Court of Appeal

High Court decision

In the High Court, the learned judge held that the Court had no power to grant Mareva relief in support of a London arbitration between the Panamanian sellers and the Liberian purchasers of a vessel.

Briefly the facts are as follows. The purchasers, shortly before the scheduled date for delivery of the ship, applied for and obtained an *ex-parte* injunction against the sellers preventing the sellers from removing or disposing in any way their assets in Singapore up to the value of US$2.5 million. It essentially prevented the sellers from removing the deposit held here by a Singapore bank. The purchasers had claims for delay in the completion of the sale and intended to purse the claims in arbitration as provided for in the contract by English law in London.

Prakash J set aside the *ex-parte* injunction. She held that the powers of the High Court to grant interim measures, including injunctions, in support of arbitration under section 12(7) of the International Arbitration Act (Cap 143A) (the "IAA") applies only to arbitrations having their seat in Singapore.

In her view, Article 9 of the UNCITRAL Model Law on International Commercial Arbitration (which is given the force of law under the IAA) was a permissive article that allowed parties to international arbitrations to apply to domestic courts for protection where the domestic law already had provisions making such protection available to the parties. Article 9 reads "*Arbitration agreement and interim measures by court - It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure"*.

The purchasers, Swift-Fortune, appealed against the decision of the High Court.

Before the appeal was heard, the case of *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 ("*Front Carriers*") was decided by another High Court judge, Ang J. She disagreed with Prakash J on the effect of section 12(7) of the International Arbitration Act, holding that the section conferred power on the court to grant interim orders, including a Mareva injunction, in aid of foreign arbitrations. Ang J also noted that under section 4(10) of the Civil Law Act (Cap 43), the court would have power to grant Mareva relief only where it had personal jurisdiction over the defendant and where "there is a recognisable justiciable right between the parties" under Singapore law.

Swift-Fortune, urging the Court of Appeal to accept the decision in *Front Carriers* in preference to that of Prakash J's, argued that the appeal should be allowed.

Court of Appeal decision

After an in-depth examination of the legislative history, language and context of section 12(7) of the IAA, the Court of Appeal affirmed Prakash J's decision below that the High Court has no jurisdiction under section 12(7) of the IAA to grant Mareva relief in aid of foreign arbitration proceedings.

Section 12(7) of the IAA was enacted as part of section 12 and not as an independent provision. Section 12(1) read with section 12(7) of the IAA gives the High Court a whole range of powers enabling it (concurrently with the arbitral tribunal) to make interim orders, specifically, orders for security for costs; discovery of documents; interrogatories; giving of evidence by affidavit; preservation, interim custody or sale of any property forming the subject matter in dispute; taking of samples; preservation and interim custody of evidence for the purposes of the proceedings; securing the amount in dispute; and interim injunctions or other interim measures.

The Court of Appeal was of the view that if section 12(7) was construed as applying to foreign arbitrations, the measures in section 12(1) would become statutorily implied terms in all foreign arbitrations. These measures included the ordering of discovery or interrogatories or security for costs, which may be antithetical to the chosen law of the foreign arbitration. As such, it was held that Parliament could not have intended section 12(7) to apply the powers in section 12(1) to foreign arbitrations.

Further, section 12(7) did not independently confer any power on the Court. This power was instead derived from section 4(10) of the Civil Law Act (Cap 43) (read with section 18(1) of the Supreme Court of Judicature Act). While s 4(10) of the Civil Law Act had been invoked as the statutory source of power to grant Mareva injunctions in *court* proceedings, the court would have no power to grant Mareva interlocutory relief unless the defendant was "amenable to the jurisdiction of the court" in respect of a substantive cause of action.

The finding in *Front Carriers* that there was a cause of action justiciable in a Singapore court differentiated it from the present case where Swift Fortune did not have such a justiciable right against Magnifica when it obtained the *ex parte* Mareva injunction, and would never have it at any time.

However, the Court of Appeal left unanswered the question whether section 4(10) of the Civil Law Act itself conferred jurisdiction on the court to grant Mareva relief in aid of foreign arbitration proceedings where the plaintiff had a recognisable cause of action under Singapore law and the court had personal jurisdiction over the defendant. The Court of Appeal emphasised that as it was not sitting in an appeal against the *Front Carriers* decision, it was thus not expressing any approval or disapproval of that decision with respect to section 4(10) of the Civil Law Act.

The Court of Appeal also observed that there were arguments for and against construing section 4(10) of the Civil Law Act to restrict or broaden the type of cases in which the court could or could not grant Mareva interlocutory relief to assist foreign court proceedings or foreign arbitral proceedings, and in ascertaining whether section 4(10) of the Civil Law Act could have a broader area of application than section 12(7) of the IAA.

Note: While the High Court has no power under section 12(7) of the International Arbitration Act to grant Mareva relief in aid of foreign arbitrations, the Court of Appeal confirmed that the court has the power under section 7(1) of the Act to make a stay of the court action (in favour of arbitration) conditional upon the security furnished to avert an arrest or to procure a release of the arrested vessel in Singapore being retained in satisfaction of any award that may be made in the arbitration proceedings. This is regardless whether the arbitration has its seat in Singapore or in another jurisdiction. It was also observed by Ang J in *Front Carriers* that the right to security under the High Court (Admiralty Jurisdiction) Act can be invoked notwithstanding the presence of an arbitration agreement.

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(6) Concurrent arbitration and court proceedings– which to stay?

Mitsui OSK Lines Ltd v Samudera Shipping Line Ltd [2007] SGHC 41

The Plaintiffs, together with another company, Mitsui OSK Lines (SEA) Pte Ltd ("Mitsui Singapore"), commenced arbitration proceedings in Singapore against the Defendants, claiming damages for breach of contract and the tort of negligence.

In the contract of carriage in question, Mitsui Singapore purported to have executed the agreement "on behalf of the Plaintiffs". When the Defendants denied this, and consequently denied any liability to the Plaintiffs on the ground that the Defendants did not have any contractual relationship with the Plaintiffs, the Plaintiffs commenced the

court action in tort against the Defendants. The Plaintiffs' fear was that should the arbitrator find that the Defendants was right, then the Plaintiffs would have no standing to make its claim in tort in the arbitration proceedings.

Commencement of the court action meant that the Defendants had to defend the claim in two forums at the same time concerning the same subject matter and the same facts. The Defendants would only be liable for one set of damages, either in contract or in tort, and only to either the Plaintiffs or Mitsui Singapore. Thus, one of the two proceedings had to be stayed pending the outcome of the other.

The Defendants therefore applied for an order that the Plaintiffs "be restrained and an injunction be granted restraining the Plaintiffs from prosecuting the arbitration or other proceedings against the Defendants in respect of claims made in (the court) action".

The Defendants argued after filing the protective writ, the Plaintiff could have applied for a stay of the court proceedings pursuant to section 6 of the Arbitration Act (Cap 10) pending the outcome of the arbitration proceedings. The Defendants sought to rely on section 6 in support of their argument for a stay of the arbitration proceedings.

The High Court dismissed the Defendants' application. It held that section 6 of the Arbitration Act only applies to cases in which the party instituting a court action was "a party to an arbitration agreement". In this case, the Defendants had objected to the Plaintiffs' standing in the arbitration proceedings precisely because they took the position that the Plaintiffs were not a party to the arbitration agreement. The issue of whether the Plaintiffs were a party to the arbitration agreement was a matter to be decided by the arbitral tribunal.

The High Court further held that since an order to stay the arbitration proceedings would affect a third party, Mitsui Singapore, it would be more equitable to stay the court proceedings. The court proceedings were therefore stayed pending the result of the arbitration or further court order.

Note: The Defendants have filed an appeal to the Court of Appeal.

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(7) <u>Marine insurance – hull policy: time, voyage or mixed?</u>

Marina Offshore Pte Ltd v. China Insurance Co (Singapore) Pte Ltd & Anor; The "Marina Iris" [2006] 4 SLR 689, Court of Appeal

This decision demonstrates the importance in marine insurance to determine if the marine adventure being insured is a time policy or a voyage policy and how, when faced with an unseaworthy vessel, the construction of the policy can lead to different results.

For a voyage policy, there is an implied warranty that the ship shall be seaworthy for the particular adventure insured at the commencement of the voyage (section 39(1) of the Marine Insurance Act). For a time policy, there is no such implied warranty. The insurer is not liable under a time policy only if the vessel is sent out to sea in an unseaworthy state with the privity of the shipowner and the vessel is lost as a result of such unseaworthiness (section 39(5) of the Marine Insurance Act).

In this case, the Plaintiffs ("Marina Offshore") wanted to purchase a tug, the "*Marina Iris*" to add to its existing fleet. The tug was then laid up in a shipyard in Kobe, Japan. They sent a surveyor, a Capt Goh, to Kobe to examine and report on her general condition. They decided to purchase the vessel and bring her to Singapore to carry out some of the repair work recommended by Capt Goh to enable her to be entered with an international classification society and be registered as a Singapore flag vessel.

To insure the vessel, Marina Offshore took up two hull insurance policies with China Insurance and AXA Insurance. Each of the policies required a further survey of the vessel be conducted by Capt Goh, and that all his recommendations be complied with before the vessel sailed from Kobe to Singapore.

The "*Marina Iris*", with six crew members on board, departed from Kobe on 26 December 2003. Unfortunately, she had only gone 50 miles when she sank and all her crew members perished.

Marina Offshore brought an action against both insurers for an indemnity under the hull policies on the basis that the vessel was lost due to perils of the sea. The trial judge dismissed the claim. On appeal by Marina Offshore, the Court of Appeal reversed the trial judge's decision.

One of the issues before the Court of Appeal was whether the hull policies were voyage or time policies.

The trial judge took the view that the policies were mixed policies with two distinct phases to the insurance cover – the first being the delivery voyage from Kobe to Singapore (the voyage policy) and the second being the use of the vessel for trading activities within Singapore and Indonesia waters (the time policy). He further held that the vessel was unseaworthy at the commencement of her voyage from Kobe and Marina Offshore was thus in breach of the implied warranty of seaworthiness.

The Court of Appeal disagreed with the trial judge's finding that the policies were mixed policies. In their view, the words that made reference to a voyage from Kobe to Singapore merely modified or extended the trading limit so that the vessel would be covered on her voyage to Singapore but did not alter the nature of the policy as a time policy. Thus, there was no implied warranty of seaworthiness to be complied with by Marina Offshore.

Being time policies, the insurers would be released from liability only if (a) Marina Offshore were privy to the unseaworthiness of the vessel when they sent her to sea and (b) the loss was proximately caused by such unseaworthiness.

The Court of Appeal accepted the trial judge's finding that there was no competent master on board and the vessel was therefore unseaworthy on sailing from Kobe. However, Marina Offshore, in spite of their knowledge of the lack of certification of the crew, had acted on the basis of the surveyor's opinion that the crew was capable of sailing the vessel to Singapore at that time of year. Even though this opinion was not binding on the Court, the Court was of the view that the insured who accepted this expert's opinion could not be said to have knowingly or recklessly sent an unseaworthy vessel out to sea. Furthermore, the insurers did not establish that such unseaworthiness was a proximate cause of the loss.

On the facts of the case, the Court of Appeal accepted there was sufficient evidence of adverse weather conditions and perils of the sea was thus one of the proximate causes of the loss. The fact that bad weather may have been anticipated did not mean that there was no element of fortuity when it actually occurred and had a devastating effect on the vessel.

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(8) <u>Marine Insurance – breach of warranty, breach of duty of good faith, the Inchmaree clause and want of due diligence proviso</u>

Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd; The "Sumpile 28" [2006] 3 SLR 12

The Plaintiffs were the owners of the "*Sumpile 28*", a floating crane barge insured under a marine hull policy with the Defendants. The hull policy incorporated the Institute Time Clauses (Hulls) of 1 October 1983.

While the "*Sumpile 28"* was moored in Singapore and the sheer leg crane onboard was not working, the boom of the crane dropped in an uncontrolled manner resulting in considerable damage. The Plaintiffs sought to be indemnified by the Defendants for the costs of repairs under the hull policy. The Plaintiffs relied on clause 6.2.3 of the Institute Time Clauses (Hulls) which covered loss or damage to the "*Sumpile 28"* caused by "negligence of Master Officers Crew or Pilots" provided such loss or damage did not result from the want of due diligence by the assured, owners or managers.

The Defendants sought to defend the claim on various grounds. Mainly, the defences were that (i) there was a breach of warranty that the vessel would be classed and classed maintained; (ii) the Plaintiffs breached the duty of good faith by causing or pressurising

the crew into giving false statements to the Defendants' appointed surveyor investigating the incident; (iii) the cause of the loss was not the negligence of the master, officers or crew but if it were, there was want of due diligence by the Plaintiffs or the managers of the vessel.

Issue of breach of class warranty

The Defendants argued that the Plaintiffs had breached the express warranty as to the vessel being NKK classed and class maintained because the word "vessel" in the class warranty included the crane on board. It was common ground that the crane was not "classed".

The learned judge rejected the Defendants' argument. Class meant the character assigned to a vessel by the classification society based on its rules for each particular type of vessel and was meant to be distinct from the registration of installations. The class surveys by NKK were in respect of the "*Sumpile 28"*"s safety construction as a floating crane barge and her loadline. The crane was not a mandatory class item. It could, however, be separately registered in the Installations Register of NKK. If the Defendants had intended or wanted the crane itself to be separately registered, the Defendant should have made that intention clear, but they did not.

Issue of breach of duty of good faith

The assured's duty of utmost good faith encompassed a duty not to put forward a fraudulent claim. The common law rule relating to fraudulent insurance claims extended to the use of fraudulent means or devices associated with making the claim as well as during the course of an insurer's investigation of a claim.

The Defendants bore the burden of proof that the Plaintiffs had used fraudulent devices in the presentation of the insurance claim to promote it. The Defendants had to establish: -

(i) who the assured was for the purposes of the proper conduct of the claim and,

(ii) that the assured intended to secure an illicit advantage by improving the assured's prospects by the use of false statements to support its claim under the policy.

In the case of a corporate assured under the policy, the test was whose act (in the proper conduct or handling of the insurance claim) was for this purpose intended to count as the act of the company. In this regard, the insurers had to identify the individual or group of people that formed part of the corporate assured that was: -

(a) aware of the false statements;

(b) had a beneficial and financial interest in the claim; and

(c) had power or influence to determine how the claim should be presented.

The learned judge held that on the evidence, the Defendants' allegations that the Plaintiffs had breached their duty of good faith could not be supported.

Issue of cause of loss

The Plaintiffs bore the burden of proving that the damage was caused by the negligence of the crew involved in the operation of the crane. Once a *prima facie* case is established, the burden then shifted to the Defendants to prove want of due diligence.

The learned judge held that the Plaintiffs failed to discharge their burden of proof that the master and/or the assistant mechanic were negligent and that their negligence caused the boom to collapse. The Plaintiffs' claim was dismissed on this ground.

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(9) Marine Insurance – construction of warranty

Royal & Sun Alliance Insurance (Singapore) Ltd v Metico Marine Pte Ltd and Another [2006] 3 SLR 333

In this case, the Plaintiffs were the insurers of a tug and 2 barges under a time hull policy covering the maiden voyage of the vessels from Shanghai to Singapore.

In the course of the voyage, the towrope connecting the barges to the tug parted and the barges drifted off. Salvors were employed by the insurers and the barges were eventually found, and successfully recovered. The insurers paid the salvage expenses whilst the owners (the Defendants) paid repair charges for the barges.

Claiming that the owners were in breach of a warranty contained in the policy, the insurers commenced an action for reimbursement of the salvage expenses that they had paid. The owners counterclaimed for loss and expenses incurred as a result of the parting of the towrope and sought a declaration that no further premium was payable to the insurers under the policy.

The policy contained a warranty which reads as follows:

> "*Warranted towage approval survey by China Classification Society (CCS) at the insured's expenses, with all recommendations, if any, fully complied with prior to sailing.*"

CCS carried out a pre-towage survey. The towage survey certificate issued by CCS contained the following recommendation:

> "*The towing vessel is to depart from any port during voyage in day time on receipt of a favourable weather forecast for local area in 48 hours and under VI wind force of Beaufort scale. If the wind force of Beaufort scale is more than VI, the towing vessel shall seek refuge.*"

The owners obtained weather forecasts in the days before departure from Shanghai, but the last forecast was obtained 30 hours before departure (i.e. at 0800 hours on 16 December 2003). The vessels departed at 1400 hours the next day. No forecast was obtained on the day of the departure. In the early hours of 21 December 2003, the towline parted and the barges were lost.

Subsequent to the recovery of the barges by the salvors, the insurers discovered that:-

(i) The owners had not obtained any forecast at all, much less a favourable forecast, on the day of departure;
(ii) The vessels departed in wind of Force 6 and above; and
(iii) The vessels did not seek shelter during the voyage even though they encountered wind force above 6 for several days before the towing rope broke.

The insurers therefore claimed that the owners were in breach of the warranty in the above 3 ways.

The recommendations contained in the towage survey were both in respect of matters that could be accomplished *before* the vessels sailed and in respect of matters that had to be adhered to *after* sailing. The Court held that the wording of the warranty was to be read strictly and any ambiguity was construed against the insurers. Compliance with recommendations "prior to sailing" meant that the recommendations that pertained to post-departure, like seeking shelter in bad weather, were not part of the warranty.

Nonetheless, the Court was of the view that the owners had breached the warranty in the first two ways. First, in not departing on receipt of a favourable weather forecast for local area in 48 hours. The learned judge reduced this recommendation to four elements:-

(a) To depart on receipt of a particular forecast;
(b) The forecast must be favourable;
(c) The forecast should cover the local area; and
(d) The forecast should be for 48 hours.

The survey was specifically required for the safety of the tow during the voyage south in the monsoon season and this recommendation meant the tug should depart within a reasonable time of a weather forecast. Given that weather forecasts were available every morning at 0800 hours and the vessels were required to sail in daylight, the vessels would have to depart by 1800 hours on the day of issue and receipt of the weather forecast. This

meant within daylight hours of the same day and not 30 hours later.

On the second element, there was no forecast obtained on the day of departure, but the judge accepted evidence from the insurers' expert that it was unlikely a favourable forecast would have been issued on that day.

The third and fourth elements meant that the forecast should cover the local area for the 48 hours from departure. The owners' contention that the forecast had to be obtained within 48 hours prior to departure did not make sense because that would not give the Master the benefit of knowing what weather to expect on the voyage.

The Court also found the owners in breach of the warranty in not complying with CCS' recommendation that the vessel was only to depart in wind force below 6. The learned judge accepted evidence in the Master's report on the day of departure that the wind speed was 25 knots (Force 6).

Note: The owners' appeal to the Court of Appeal was dismissed.

Wendy Tan
KhattarWong, Singapore