THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(Tobago Sub-Registry)

Claim No.: CV 2012-05214

Between

EXCELLENT CHOICES LIMITED

Claimant

AND

GULF INSURANCE LIMITED

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances

1. Ms Samantha Lawson and Mrs. Afiya Mottley for the Claimant.
2. Mr. Roger- Mark Kawalsingh for the Defendant.

Date of Delivery: 13th July, 2015

DECISION

1. By claim form and statement of case filed on the 31st December, 2012 the Claimant sought the following reliefs against the Defendant:

    (a) The sum of $1,916,670.70 for the total actual loss of the Claimant's vessel, "Chief" which sank in the vicinity of Rockley Bay, Tobago on the 11th January, 2009 and labour expenses incurred by the Claimant;

    (b) Alternatively, damages arising out of the Defendant's breach of a policy of marine insurance dated the 21st August,2008 of the ship "Chief" for failing and or refusing to indemnify the Claimant for a total loss of the said ship on the 11th January, 2009;

    (c) Interest;

    (d) Costs; and

    (e) Such further relief as the Court may deem just.

Claimant's Case

2. The Claimant's case arose out of policy of marine insurance numbered GHA-8360 and dated the 21st August, 2008, which the Defendant issued to insure the Claimant's vessel ("the Chief") against total loss for the period 22nd July, 2008 to the 21st July, 2009 and against all perils specified in clause 6 of the policy.

3. The chronology of events that led to the unfortunate total loss of the vessel "the Chief" began on the 2nd January, 2009. On that day the Claimant's vessel was proceeding to Scarborough for refuelling, when the engine cut off within 5 to 10 minutes of its departure, and all efforts to restart the vessel were unsuccessful. The anchor was dropped

and the coast guard was contacted. They rendered assistance and facilitated the tying of the vessel to a pile located on the outskirts of the channel.

4. On the 3rd January, 2009 the rope attached to the pile broke and the Claimant's vessel became stranded on the beach at Rockley bay with its four crew members aboard the vessel. The vessel could not be repaired where it was stranded, and in an attempt to minimise any further loss, the captain of the vessel and its crew made attempts to source a tug boat to tow the vessel to a safer port.

5. On the 10th January, 2009 the tug "Espirito" arrived from Trinidad to tow the vessel to safety. On the 11th January, 2009 the vessel was towed from its stranded position into deeper waters and moored alongside the barge the "Caribbean Princess". Some time during this process a hole was detected in the hull of the "Chief", and the ship's Captain ordered the crew to plug the hole, which they did, by attempting to wedge a piece of wood into the hole. This action caused the hole to widen. The Captain and crew attempted to pump out the water that accumulated within the vessel by employing 3 pumps and the ships generator, however despite all efforts the vessel continued to take in water and sank.

6. The Claimant engaged the services of a dredging contractor to carry out salvage efforts and attempted to refloat the vessel on the 14th January, 2009, however this attempt proved unsuccessful and the Claimant's vessel was deemed a total loss by the Defendant's adjuster.

7. The Claimant contended that the vessel was lost by virtue of the perils of the sea, since the hull's damage which was consequent to the stranding of the vessel on the beach, led to the subsequent incursion of seawater which caused the "Chief" to sink.

8. The Claimant relied on clause 6 of the said policy and asserted that it is entitled to be indemnified for the total loss of its vessel in accordance with the provisions of the said policy which provided as follows:

> ***"6. Perils***
>
> *6.1 This insurance covers total loss (actual or constructive) of the subject-matter insured caused by:*
>
> *6.1.1**perils of the seas, rivers, lakes or other navigable waters....***
>
> *6.2 This insurance covers total loss (actual or constructive) or the subject - matter insured caused by:*
>
> *6.2.1 accidents in loading, discharging or shifting cargo or fuel*
>
> *6.2.2 **bursting of boilers breakage of shafts or any latent defect in the machinery or hull***
>
> *6.2.3 **negligence of Master Officers Crew or Pilots***
>
> *6.2.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder*
>
> *6.2.5 barratry of Master Officers or Crew*
>
> ***provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers**.*
>
> *6.3 Master Officers Crew or Pilots not to be considered Owners within the meaning of this Clause 6 should they hold shares in the Vessel.*

The Defendant's Case

9. The Defendant contended that the damage caused to the ship was as a result of negligence and want of due diligence by the owner. In support of this contention, the Defendant alleged that the crew onboard the vessel was not skilled and competent to deal with any emergencies that may have arisen and pointed to the fact that, there were no diesel mechanics or engineers on board the vessel and also contended that the anchor which was used was inadequate to hold or secure the vessel from drifting. The Defendant also advanced that the "Chief" had no proper ropes on board at the material time

10. The Defendant further alleged that the Claimant caused the vessel to be towed improperly in an uncustomary manner by its stern thereby causing the vessel to take in water and sink. The Defendant posited that it was the duty of the Claimant to ensure that the hull of the vessel was safe secure and sea worthy before any attempt was made to tow it into deeper waters. Further the Defence stated that it was the duty of the Claimant to exercise due diligence to ensure that the captain was sufficiently skilled to tow the vessel and that the Claimant had to ensure that the vessel was efficiently manned with all the proper and appropriate mooring equipment whilst being towed into deeper waters.

11. The Defendant stated that the Claimant had knowledge that a claim could not be made for damage to the hull of the vessel whilst it was stranded at Rockley beach and that the vessel was deliberately towed into deeper waters with knowledge that the hull may have been compromised in order to make a claim against it under the policy of insurance. In addition the Defendant said that the Claimant's attempt to salvage the vessel was not reasonable for the purpose of minimising the loss.

12. The Defendant's case pointed to the fact that the policy of insurance did not extend to damage which resulted from want of due diligence by the assured, owners or Managers and also relied on the fact that the Claimant warranted in the said policy, that the vessel would not be towed except as is customary. Moreover, the Defendant submitted that the policy of insurance was a total loss policy and said interalia that, the loss of the vessel was not caused by any of the Perils of the sea set out in paragraph 6 of the policy and the Defendant also relied on section 55 (2) of the Marine Insurance Act.

Evidence

The following persons gave evidence on behalf of the Claimant:

13. (I) **Ms. Marilyn Duke**: The Owner/Manager of the vessel "The Chief". She swore to a witness statement on the 14th October, 2014. Her testimony was based on information she received by the captain, and from a report she gave surrounding the sinking of the ship on the 12th January, 2009.

14. According to the evidence of Ms. Duke as contained in her report of the 12th January, 2009, *"after the vessel's engine cut off, the anchor was dropped , but because of the ground sea current which was present at the time, the vessel kept on pulling the anchor and drifted approximately 100 yards from the shore at Rockley Bay. The Coast Guard was notified and came with a pirogue to give assistance but all the assistance that could have been rendered was to tie a 3" nylon rope on a pile which existed on the outskirts of the channel . The ground sea caused the rope to burst and the boat pulled the anchor and continued to drift into shore on Sunday 3rd January, 2009…We never located an available tug until the 9th January, 2009. The tug sailed to Tobago on Saturday 10th January, 2009 and arrived at 3pm while the tide was going down. It was decided by the Captain of the hired tug that he will do the job until Sunday 11th January, while the tide is coming up. Because of the full moon on that very night the water was very rough and the Captain of the Chief called to say the boat was banging a lot. The vessel was listed on the Port side as the water receded. While on the beach there was no sign of water in the boat. However as it was being pulled out to sea on that fateful evening water began to flow into the engine room? Three 2" pumps were sent to pump out water, but the electric one shut down when the sea water shut down the generator".*

15. The Defendant contended that there were several inconsistencies between the evidence given by Ms. Duke in her witness statement and the statement of case when compared to her report of the 12th January 2009 and her responses in cross examination. One such inconsistency related to the ropes that were on board.

16. The Defendant submitted that in both the witness statement and the statement of case, Ms. Duke said the coast guard assisted by the "*provision of ropes"* but in her cross examination, Ms. Duke stated that what was in her witness statement was an error. Ms. Duke also stated in cross examination that given the weight of the rope that was used there was no way that the Coast Guard pirogue could have transported the rope and she maintained that no rope was provided by them.

17. The Defendant also submitted that, another inconsistency in her evidence, related to when the hole was discovered. According to the witness statement and the statement of case, Ms. Duke said the hole and the water in the engine room were discovered when the vessel was moored alongside the barge Caribbean Princess. In cross examination however she accepted that this was not correct. The relevant portion of the cross examination was as follows. (Counsel for the Defendant began by reading the relevant portion of Ms Duke's report to her).

> *Q: "However, as it was being pulled out to sea..." Now, I don't mean it in technical sense, so there is no need to object to that. "As being pulled out to sea" your words, on that fateful day, water began to flow into the engine room." So it is not — which is correct, when it reached out into deeper water or when it was moored? Which is, in this document, you say is true and correct or the contemporaneous document which you have signed on the 12th January which suggests that as it was being pulled out to sea, water started to pour into the engine room. Which one is correct?*
>
> *A: Well, the only way they could have seen the water that was coming into the engine room is after it left the shore.*
>
> *Q: Right, so the statement — am I right in interpreting that to mean the January 12th statement is correct, "As it was being pulled out to sea"?*
>
> *A: Yes.*
>
> *Q: So at that time, it was not moored alongside the Caribbean Princess and it was not in deeper waters?*
>
> *A: No.*

18. Counsel for the Defendant also noted that nowhere in Ms. Duke's witness statement or in her statement of case did she mention that the seas were rough. In her witness statement and statement of case, she indicated that the tide was low and efforts to refloat the vessel were unsuccessful and that further attempts had to be taken when the tide had risen.

19. During cross examination, Ms. Duke however gave evidence that the sea was very rough and that it was difficult to get persons aboard the vessel to assist with refuelling the engine because of the rough sea conditions.

20. In her report dated the 12th January, 2009 Ms. Duke also said: *"Because of the full moon on that night the water was very rough and the Captain of the Chief called me to say that the boat was banging alot. The vessel was listed on the Port side as the water receded. Whilst on the beach there was no sign of water in the boat. However, as it was being pulled out to sea on that fateful evening water began to flow into the engine room."*

21. In response to a question posed by the Court, Ms. Duke accepted that the statements as contained in her report of January 12th 2009 were correct and that the water started to enter the vessel while it was being towed.

22. This Court is of the view that despite the inconsistencies as between the pleadings and her responses her cross examination, this witness was a witness of truth. The Court was impressed by Ms Duke in the witness box, her responses were direct and the Court formed the unshakeable view that she was a honest and forthright and found that her responses in cross examination was consistent with the contemporaneous record that was given by her in the report of January, 12th 2009.

23. Based on her evidence the Court found as a fact that the "Chief" was equipped with a 3" nylon rope. The Court also found that the vessel had an adequate anchor since Ms. Duke's evidence was that the anchor that was present on board the boat on the 2nd January, 2009 was the same anchor with which she bought the vessel. This would have been the anchor that was observed for the preparation of the Tsunami report which guided the Defendant's position to offer insurance coverage over the vessel for period of one year. Accordingly, the Defendant was of the view that both the rope and the anchor were sufficiently adequate otherwise they would not have affected a policy of insurance.

24. The Court also found as a fact that while on the beach there was no sign of water in the boat and that water began to flow into the engine room while the vessel was being pulled

out to sea. The Court also accepted Ms. Duke's evidence that the water was rough and that the Captain of the "Chief" called her and informed her that the boat was banging a lot and found that there was no evidence before it to suggest that there was a deliberate and/or fraudulent attempt to cause the vessel to sink.

25. **(ii) Mr. Alexis Mc Clean**: Mr. Mc Clean was the Captain of the Claimant's Vessel and swore to a witness statement on the 14th October, 2014. In summary, his witness statement was to the effect that after efforts to restart the vessel were unsuccessful, the anchor was dropped, the coast guard was contacted and attempted to render assistance. The following day the rope attached to the pile broke and the vessel began to drift and became stranded on Rockley Bay. After the tug " Espirito " arrived, they waited until the following day since the tide was low and the vessel was then towed into deeper waters and moored alongside the barge Caribbean Princess. After reaching deeper waters a hole was discovered in the hull of the vessel and as a result the vessel began to take in water. He instructed the crew to plug the hole with a piece of wood and they attempted to pump out the water by using 3 pumps and the ship's generator, however, all efforts proved unsuccessful and the boat continued to take in water and eventually sank.

26. On the date of the trial, Mr. Mc Clean could not verify the contents of his witness statement and he said that his eyes were deteriorating and he could not see the document clearly. He also stated that at the time of the preparation of his witness statement questions were asked of him and they were written down. The Defendant's Attorney submitted that in the circumstances the evidence of Mr. Mc Clean should be rejected and he did not cross examine Mr. Mc Clean.

27. This Court had no evidence that at the time the witness statement was executed that the witness was unable to see the words that were written. The witness maintained that although he could not see at the time of the trial, he could recollect what instructions were given to the attorney in preparation of his witness statement. This Court found that the majority of the information contained in his witness statement was consistent with what was stated in the other reports of the Claimant as well as the previous

contemporaneous statements that he gave to Ms. Duke, Mr. Ferreira and Mr. Roebuck. In the circumstances the Court found that his witness statement could be relied upon and considered the uncontested information contained therein.

28. **(iii)Mr. David H. Roebuck:** This witness was the Claimant's Expert Witness. His evidence was contained in a report dated the 3rd August, 2009, which was prepared so as to give an expert view as to whether or not the Claimant had a claim under the policy of insurance. In his report he concluded inter alia, that there was reasonable and ordinary care exercised by the owner and the Assured. He opined that the increased size of the hole in the hull was not as a result of the porous nature of the hull caused by ordinary wear and tear but was the result of the negligent approach and method used by the crew in effecting the plugging of the hole under the Captain's instructions.

29. Mr. Roebuck concluded that the sinking of the chief was proximately caused by perils of the sea, and that there was nothing in the vessel's condition (based on the Tsunami valuation report which was given to the assured before they took the policy with the Defendant), to show that the vessel was unseaworthy and unfit for service before she was employed. He also stated that the Defendant accepted the Tsunami report unconditionally, without reservation, and effected insurance coverage to the Claimant.

30. At the trial, Mr. Roebuck admitted that in preparing his report he did not make enquiries as to whether there were any ropes on board.

31. The issue of customary towage was also raised with this witness. The Court intervened and questioned whether apart from towing, if any other measures could have been taken. Mr. Roebuck responded that he could not think of any other option given the situation.

32. When asked what customary towage was, Mr. Roebuck replied "by the bow and not the stern, the bow is higher and the stern is lower." When asked how he would describe towing by the stern, Mr. Roebuck then replied that "any measure that is reasonable to get the vessel to safety must be used."

33. Mr. Roebuck concluded that the vessel needed to be towed by any means necessary as there were benefits to towing same. He said that work could be done on the vessel to rectify any damage in deeper waters as this would allow for sufficient draft (distance between the water line and bottom keel). He also said that if the work was done where the vessel was closer to the shore, there may have been draft limitations.

34. The Defendant submitted that Mr Roebuck's evidence and demeanour while giving viva voce testimony suggested that his intention was not to fulfil his duty to the Court as an expert witness but rather to support the Claimant's claim. The Defendant further submitted that the Court should not rely upon Mr. Roebuck's evidence.

35. The Court, having accepted Ms. Duke's evidence and having found as a fact that the vessel did have a 3" nylon rope, had no regard to Mr. Roebuck's report or to his cross examination in relation to the presence or absence of adequate ropes. In any event Mr. Roebuck never undertook a physical examination of the vessel at any time and all his information was derived from various written or oral reports and or statements that were given to him.

36. The Court also found Mr. Roebuck had no actual knowledge of any of the material events that occurred. Although the Court found Mr. Roebuck to be a truthful witness and formed the view that he was very knowledgeable in matters of maritime affairs, his evidence provided little assistance to the Court in the resolution of the issues that the Court had to determine.

The following persons gave Evidence on behalf of The Defendant:

37. **(i) Mr. Robert Ferreira** : The Defendant's relied on the evidence of Mr. Ferreira who swore to an affidavit on the 9th October, 2014 , and prepared two reports dated the 4th March, 2009 (initial report) and 16th April, 2009 (final report). He stated in summary that the Claimant was responsible for the loss of the vessel the "Chief".

38. The Court was not impressed by this witness and formed the view that Mr. Ferreira's intention from the onset was to justify non-payment under the policy. His conclusions were based, like Mr. Roebuck's, on information that he had received and he never undertook any physical examination of the vessel prior to the sailing on the 2nd January, 2009. In his report he said he relied on documents and emails which were forwarded to him yet these documents were not annexed. Having accepted Ms Duke's evidence in relation to the presence of 3" nylon ropes on the vessel and the adequacy of the anchor the Court rejected his evidence in relation to the ropes and the anchor.

39. The Court also found that there was no evidence to support his conclusion that there was ordinary wear and tear which led to the thinning of the hull plate and also found that there was no evidence to suggest that the vessel was towed in a manner that was not customary having regard to its beached condition and the circumstances that prevailed.

40. **(ii)Mr.Oswin Hosang**: This witness represented the Defendant insurance Company, and swore to an affidavit on the 9th October, 2014. Mr. Hosang's evidence was that he was contacted by Ms. Marilyn Duke who identified herself as the owner of the vessel and that Ms. Duke indicated that the vessel sank and that pursuant to the terms of the insurance policy that she was making a total loss claim. The witness also stated that he had never seen or spoken to Ms. Duke prior to this alleged phone conversation.

41. During her cross examination, Ms. Duke was adamant that she never spoke with anyone for the Defendant Company and that her contact was with Maibrol Insurance Brokers who acted on her behalf, so there was no need for her to speak with the Defendant insurance company. The Court accepted Ms. Duke's evidence and found as a fact that she never spoke with Mr. Hosang as he alleged.

42. Another aspect of Mr. Hosang's evidence which came out in cross examination was the fact that the insurance company, though not being fully satisfied with the surveyor's report went ahead and accepted the risk. Mr. Hosang stated that the procedure for insuring a vessel usually entails receiving a surveyor's report, looking at same, and then

making judgment as to whether or not to accept the risk. He accepted that the Defendant accepted the risk based on the condition of the vessel at that time.

43. The Court found that the fundamental issues that needed to be resolved were as follows:

    i. Whether or not, at the time the vessel sailed on the 2nd January 2009, it was improperly manned, improperly equipped and in an unseaworthy condition?

    ii. Whether or not the loss of the vessel was caused by want of due diligence by the Claimant or its Manager by failing to ensure that the vessel was seaworthy and capable of being towed into open waters?

    iii. Whether or not the loss of the vessel "Chief" was caused by perils of the sea as set out in Paragraph 6 of the policy.

    iv. Whether the Claimant, if it is found that the defendant is liable under the policy, can recover the sums for labour expenses that were incurred, if the receipts evidencing same were not in the Claimant's name and in the absence of any pleadings that sought to explain the said differences.

44. The areas of law that had to be considered having regard to the issues outlined were the law in relation to: (1) Due diligence, (2) Seaworthiness, (3) Perils of the Sea and Proximate cause.

Due Diligence

45. **In HAMILDOC" (1950) A.M.C. 1973 at p.185 the Quebec Court of Appeals,** defined due diligence as follows:

"Due diligence means doing everything reasonable, but not everything possible. The terms are practically synonymous with reasonable or ordinary care."

46. The onus is on the assured to show that they did exercise due diligence in carrying out their duties in the management of the vessel and the underwriter only needs to adduce sufficient evidence to cast doubt upon the case of the assured.

47. The obligation of an owner in relation to due diligence is both a statutory obligation and a common law obligation and it must be ensured that the vessel is sea worthy before embarking on any journey at sea.

48. Article 3 of the Carriage of Goods by Sea Act intituled "Responsibilities and Liabilities" provides:

"The carrier shall be bound, before and at the beginning of every journey to exercise due diligence to-

a. Make the ship seaworthy;
b. Properly man, equip and supply the ship;
c. ...

49. In the case of **Riverstone Meat Co. Pty Ltd. v Lancashire Shipping Co. Ltd. [1960] 1 All E.R. 193**, the term "due diligence" was examined to determine its meaning and effect. Viscount Simmonds propounded at page 504 as follows: *"Is it relevant that the ship owner might have done the work by his own servants but preferred to have it done by a reputable shipyard? These and many other questions that will occur to your Lordships show that no other solution is possible than to say that the shipowners' obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done."*

50. Viscount Simmonds went on to quote the words of MacKinnon LJ in ***Smith, Hogg & Co Ltd v Black Sea & Baltic General Insuance Co Ltd ([1939] 2 All ER at p 857)***:*"The limitation and qualification of the implied warranty of seaworthiness, by cutting it down to use 'due diligence on the part of the ship owner to make the ship seaworthy' are a limitation and qualification more apparent than real, because the exercise of due diligence involves, not merely that the ship owner personally shall exercise due diligence, but also that all his servants and agents shall exercise due diligence, as is pointed out in a note in SCRUTTON ON CHARTERPARTIES (14th Edn.), pp. 110, 111, which says that this variation will not be: '... of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness, but of so latent a nature that due diligence could not have discovered it) are not likely to occur often.'"*

51. In **Dobell & Co v S S Rossmore Co [1895] 2 Q.B. 408**, the Court of Appeal was concerned with a bill of lading which incorporated s 3 of the Charter Act, which had been passed by Congress in 1893. By that clause, it was enacted that, if the owner of any vessel shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held to be responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel; or from other perils, to which it is unnecessary to refer. Lord Esher MR said of this section: *"It is obvious to my mind, from a consideration of the facts of this case, that the words of the 3rd section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port."*

52. This Due Diligence proviso places a corporate and legal responsibility upon the Assured, Owner or Manager to ensure that the loss or damage does not occur as a result of want of due diligence on their part. Further, such responsibility ought not to be delegated to the master, captain or crew of the vessel. In addition, the burden of proving that the owner was not guilty of want of due diligence, was upon the Owner, Assured or Manager. This position was clearly illustrated in the case of **Coast Ferries Ltd v Century Insurance Co of Canada and Others "The Brentwood" [1973] 2 Lloyd's Rep 232, CA** where Davey J succinctly stated at page 233 as follows:

"The learned trial judge held that the improper loading was not due to want of due diligence by the owner. It had employed a competent and fully qualified master, and left the entire operation of loading to him, as it was entitled to do, and had not retained in its own hands any responsibility for the operation. He also held that the Owner was not privy to the negligence of the master. The learned Judge also held that the onus of proving that the owner was not guilty of want of due diligence, or privy to the negligence of the master, was upon the owner, but the owner had discharged the onus. I do not need to express my opinion in whom the burden of proving those matters rested, since I am, with respect, fully satisfied on the evidence that the owner was wanting in due diligence in seeing that the vessel was properly loaded.

...But when the owner left full responsibility for the loading to the master it became its duty to furnish the master with sufficient information about minimum freeboard and trim for the vessel (among other data) to enable the master to exercise sound judgment in loading in the light of his skill and experience. The owner did not do so. Therein lay it's want of due diligence."

Sea Worthiness

53. In **Halsbury Laws of England Volume 60 (2011)** the law as it relates to sea-worthiness was set out at paragraph 257 as follows**:**

"The vessel must be reasonably fit. 'Seaworthiness' is a relative term, and may vary with the class of the ship insured. Thus, a river steamer insured for a sea voyage need not be made as fit for the voyage as an ocean-going vessel. She need only be made as seaworthy

as is reasonably practicable by ordinary available means. Moreover, the standard of seaworthiness varies with the nature of the voyage insured; the vessel may be seaworthy for one voyage but not for another, or for a voyage at one season of the year and not for a voyage at another season; she may be seaworthy when laden with one kind of cargo and not so when laden with another kind." The ship must be reasonably fit in all respects. She must be competent in hull to encounter the ordinary perils of the seas and properly equipped with the necessary tackle, stores, supplies, provisions, medicines and other things requisite for the safety of the voyage and those on board her, and she must have her engines and boilers in sound and proper condition, and also an adequate supply of fuel for the voyage.

54. According to section 39 (4) of the Marine Insurance Act, "A ship is deemed to be sea worthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured. Since the ship is prima facie deemed to be sea worthy, it lies with the insurer to prove the contrary."

55. In the case of **Pickup v The Thames and Mersey Marine Insurance Company Limited (1878) L.R. Vol. 3 p.594**, Brett L.J. said:

> "The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the Defendant, and so far as the pleadings go it never shifts, it always remains upon him".

56. In the case of **Gilroy, Sons & Co. v W.R. Price & Co [1893] A.C. 56,** Lord Herschell LC, at page 63 quoted Lord Cairns in the case of ***Steel and Craig v. State Line Steamship Company* 3 App. Cas. 72** in which he defined Seaworthiness as *"That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," or in performing whatever is the voyage to be performed.*

57. In the case of **Smith, Hogg and Co. v Black Sea and Baltic General Insurance Co. [1940] AC 997,** it was held that a ship-owner is responsible for loss of the ship, however

caused, if his ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen but for that unseaworthiness. Lord Wright at page 1004 stated, “But when the practice of having express exceptions limiting that obligation became common, it was laid down that there were fundamental obligations, which were not affected by the specific exceptions, unless that was made clear by express words. Thus an exception of perils of the sea does not qualify the duty to furnish a seaworthy ship or to carry the goods without negligence: see *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd*. From the nature of the contract, the relevant cause of the loss is held to be the unseaworthiness or the negligence as the case may be, not the peril of the sea, where both the breach of the fundamental obligation and the objective peril are co-operating causes. The contractual exception of perils of the seas does not affect the fundamental obligation, unless the contract qualifies the latter in express terms.” At page 1005, the Court went on to state “The law is, I think, correctly stated by the late Judge Carver in Carriage of Goods by Sea, s. 17…. The words of the section are: "And further the ship-owner remains responsible for loss or damage to the goods, however caused, if the ship was not in a seaworthy condition … and if the loss could not have arisen *but for* that unseaworthiness .... If her unfitness becomes a real cause of loss or damage to the cargo, the ship-owner is responsible, although other causes from whose effect he is excused either at common law or express contract have contributed to cause the loss." The author relied for that proposition not only on *Kopitoff v. Wilson*, cited by MacKinnon L.J., but on *The Glenfruin, Steel v. State Line Steamship Co*. In truth, unseaworthiness, which may assume according to the circumstances an almost infinite variety, can never be the sole cause of the loss. At least I have not thought of a case where it can be the sole cause. It must, I think, always be only one of several co-operating causes. The importance to my mind of Carver's statement is that it uses the indefinite article, "'a' cause," not the definite article, "'the' cause."... A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case, it is, would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, even though the disaster could not have happened if there had not also been the specific peril or action.”

58. In the aforesaid case, the Court relied upon the case of **The Christel Vinnen [1924] P 208**. where Scrutton L.J., found in a case where damages were caused by leakage through a leaky rivet; that "*The damage might have been checked but for the negligence of the master in not detecting the water in the hold and pumping it out. It was held (notwithstanding an exception of negligence) that the ship-owners were responsible for the whole of the damage, not merely for such proportion as must have been incurred before the inflow of water could have been checked. No distinction was drawn between damage due to perils of the seas alone and that due to perils of the seas and to negligence combined*." Scrutton L.J. also said: *"The water which entered and did the damage entered through unseaworthiness; its effects when in the ship might have been partially remedied by due diligence, which the ship owner's servant did not take. But in my view the cause of the resulting damage is still unseaworthiness. ...* Here the man who has by his original breach of contract caused the opportunity for damage has by the negligence of his servants increased it. He cannot show any exception to protect him, and cannot show that the dominant cause of the damage was not the unseaworthiness which admitted the water into the ship." I think this can be as truly said of negligence in acting as in omitting to act."

59. Lord Porter in his opinion in the said *Smith Hogg* case stated at page 1012 as follows:

> *"But the appellants say that they are protected by the exception of perils of the sea and that even though the ship was unseaworthy the unseaworthiness did not cause the loss. To this argument the learned judge acceded, but his view was reversed by the Court of Appeal. The argument was put thus: that the ultimate cause of the loss was the act or acts of the master either in pumping out the tank or in shipping the coal on the port side or both".*
>
> *No doubt those who are either defending themselves or putting forward a counterclaim based upon an allegation of unseaworthiness must prove that the loss was so caused.*
>
> *But here the loss was, I think, incontestably due to the inability of the ship to take in bunkers by a method which would have been both safe and usual in the case of*

a seaworthy ship. It was not the coaling that was at fault nor the method adopted: it was the fact that that coaling took place and that method was adopted in a tender ship. If a vessel is to proceed on her voyage, bunkers must be shipped, and though in one sense the change of balance caused by taking in bunkers was responsible for the accident to the Lilburn, it was not the dominant cause even if it be necessary to show what the dominant cause was…. In such circumstances it is unnecessary to decide what would be the result if the loss were attributable partly to the coaling and partly to the unseaworthiness, or to determine whether the fact that the unseaworthiness was a substantial cause even though some other matter relied upon were a substantial cause also, would be enough to make the owners liable for failure to use due care to make the vessel seaworthy."

60. The Court also had to consider what is meant by the terms proximate cause and perils of the sea.

Proximate Cause and Perils of the Sea

61. Section 55 (1) of the Marine Insurance Act 1906, provides as follows:

> " Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as foresaid, he is not liable for any loss which is not proximately caused by a peril insured against."

62. An authoritative statement on the principle of proximate cause was given by the Court in the case of **Leyland Shipping Co. Norwich Union Fire Insurance Society Limited [1918]] A.C. 350 H.L** where Lord Shaw said at pages 369-71:

> "To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but - if this metaphysical topic has to be referred to - it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation

from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause. What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

..... In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency."

63. In the text **Law of Marine Insurance by Susan Hodges**, at page 246 the author said "As a general rule, the claimant has to prove to the satisfaction of the court, that the loss was caused by a Peril insured against. Where perils of the seas are asserted as the proximate cause of loss, they would have to show a prima facie case of an accidental or fortuitous loss."

64. The burden is on the insured to prove that a loss was due to the perils of the sea. The Claimant must in order to discharge this burden, show on a balance of probabilities, that the loss was attributable to a fortuitous accident or casualty of the seas rather than to some other cause. The Claimant must also prove that the loss was proximately caused by a peril of the seas.

65. Rule 7 of the rules for construction of the Marine Insurance Act 1906 gives a statutory definition of the term Perils of the seas as 'only those fortuitous accidents or casualties of the seas and does not include the ordinary action of the winds and waves."

66. In the House of Lords decision of the case of **Mountain .v. Whittle [1921] AC 615 HL** the aforesaid position was adopted and in that case damage sustained as a result of an influx of water into the ship caused by a wave of extraordinary size and dimension, which was created by the tug employed to tow the insured vessel and it was held that the loss was one which occurred through the peril of the seas.

67. Lord Viscount Finlay in the **Mountain** case at page 626 said: "*It is, however, necessary for the assured to establish that the loss was due to a peril of the seas. If the water was in a normal condition and got into the houseboat simply owing to the defective condition of the seams there would be no loss by peril of the seas- the loss would have been by the defective condition of the vessel. A loss caused by the entrance of sea water is not necessarily a loss by perils of the seas. There must be some special circumstance such as heavy waves causing the entrance of the sea water to make it a peril of the seas……The breast wave so occasioned amounted to a peril of the seas just as much as if it had been occasioned by high winds".*

68. In the case of **Samuel .v. Dumas (1924) 18 LI L Rep 211** it was established that the mere entry or incursion of sea water is not in itself sufficient proof of a loss by perils of the seas, the insured must adduce evidence to prove that the loss was accidental or fortuitous.

69. In the recent case of **CCR Fishing Ltd and Others .v. Tomenson Inc and Others, the La Pointe [1991] 1 Lloyd's Rep 89**,. The Court pointed out that there are two elements to the term 'perils of the seas': the cause of the loss must be 'fortuitous' and it must be 'of the seas'.

70. The word fortuitous clearly excludes any loss which has been intentionally caused by any person, and any loss resulting from inevitable deterioration generated by the ordinary action of the winds and waves.

71. In the Canadian case of *La Pointe* (supra) the ship sank as a result of the ingress of sea water into the ship, the accident was held to be one of a peril of the seas. The fact that the accident would not have occurred but for the negligent act of the crew in leaving a valve open, did not detract the loss from being caused by a peril of the seas.

72. The authorities suggest that the meaning of the words 'perils of the seas' as contemplated in the marine insurance policies refer to extraordinary, unforeseen or fortuitous circumstances or some such event that cannot be guarded against by ordinary care and skill.

73. In the case of **Canadian Rice Mills Ltd.v Union Marine &General Insurance Company. [1940] A.C.55** Lord Wright said at pages 68 and 69 :

> "Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter and, if it enters, only enters by accident or casualty."

74. A loss proximately caused by a peril of the seas could in some instances be precipitated by the negligence of the master, crew, ship-owner, repairer or any person, provided that the loss is proximately caused by a peril insured against. An assured may recover for the loss even though the loss would not have happened but for the misconduct or negligence of the master or crew. Attention must also be drawn to the fact that it is only the conduct of the master or crew, and not that of the assured, that is expressly excused and secondly, the first limb prevents recovery for any loss 'attributable to the wilful misconduct of the assured' but it is silent on a loss attributable to the negligence of the assured.

Analysis/Conclusions

75. The Defendant in its amended defence, pleaded that:

> "... ***the loss of the vessel was caused by the want of due diligence by its owners and or Managers, by amongst other things, their failure to ensure that the Vessel was sea worthy and or properly manned before sailing ..."***

76. At paragraphs 9 and 10 of the amended defence the Defendant also pleaded as follows:

9. In further answer to paragraph 7 of the statement of case if, which is not admitted, the hole in the hull of the vessel was only discovered when it was in deeper waters the defendant will contend that it was the duty of owners and or captain of the tug "Espirito" to ensure that the hull of the vessel was in a safe and sea worthy manner before towing same into deeper waters. The defendant will further contend that the claimant and or its managers in the exercise of due diligence ought to have ensured that vessel was seaworthy and capable of being towed in to open waters and/or that the owners and or captain of the Tug were sufficiently skilled and or experienced in towing vessels that were stranded.

10. By reason of the matters aforesaid the defendant will contend that the vessel sank as a result of the want of due diligence by the claimant and it managers

PARTICULARS OF WANT OF DUE DILIGENCE

(a) Failing to have the vessel properly manned;

(b) Failing to ensure that the vessel was in a seaworthy condition before sailing;

(c) Failing to ensure that the crew that was on the vessel at the time of sailing was skilled and competent;

(d) Failing to ensure that the crew that was on onboard the vessel at the time that it was being towed into deeper waters was sufficiently skilled and competent to deal with any emergency that may have arisen;

(e) Failing to carry out any work to re-start the engines whilst same was left tied to the channel pile;

(f) Failing to ensure that the vessel was properly equipped with sufficient anchors and or proper mooring equipment to ensure that same was properly secured whilst anchored and or moored.

(g) Failing to ensure that the Tug and the crew that it hired attempt to remove the vessel was properly skilled and knowledgeable in the removal of stranded vessels; and

(h) Failing to ensure that the hull of the vessel was safe and seaworthy before allowing it to be towed into deeper waters.

77. The Defendant's position was that the policy of insurance was for a total loss (actual/constructive) and the thrust of the defence was that the loss was incurred by the want of due diligence of the assured, owner or manager.

78. The Claimant's case was that the tug was fit and seaworthy. She had sailed successfully from Port of Spain to Tobago and it was submitted that this was tangible evidence, by performance, of her fitness and seaworthiness. Therefore the Claimant submitted that the "Chief" met and satisfied the provision of s.39 (4) of the Act relating to the seaworthiness of the ship.

79. Prior to the issuing of an insurance policy by the Defendant, a valuation and survey report of the vessel the "Chief" was undertaken and prepared on the 23rd May, 2008 by the

Tsunami Marine Limited (Tsunami Report) and that report found that the vessel was in a satisfactory condition. The report also made some recommendations, among them, was that the vessel's water tight integrity be improved, and that the safety equipment be upgraded. This report was submitted to the Defendant who accepted the report and proceeded to issue the policy of insurance to the Claimant.

80. The Court had to consider sea-worthiness at two stages. Firstly whether the vessel was seaworthy prior to its sailing for the purpose of refuelling on the 2nd January, 2009 and secondly if it was sea-worthy, whether it became unseaworthy prior to being towed into deeper waters on the 11th January, 2009.

81. In relation to the vessel's seaworthiness when it set sail on the 2nd January, 2009 the main issues raised by the Defendant were as follows:

(1) The inadequacy of the ropes on board.

(2) The inadequacy of the anchor; and

(3) The fact that the vessel was not properly manned.

82. This Court is of the view that there is no evidence to suggest that the vessel was unseaworthy prior to its departure for refuelling on the 2nd January, 2009. The Court as stated earlier accepted Ms. Duke's evidence and found as a fact that the vessel was adequately equipped with a 3"nylon rope and that it was also equipped with an adequate anchor. On the 2nd January, 2009 the "Chief" embarked upon a journey to Scarborough to refuel and the Court had no evidence to lead it to conclude that the vessel was improperly manned for the purpose of this exercise. There was also no evidence that the vessel was improperly towed or that there was any deliberate or fraudulent attempt to sink the vessel.

83. The Court accepted the evidence that the vessel had successfully sailed from Port of Spain to Scarborough and accepted the information contained in Ms. Duke's report on the 12th January, 2009 that the vessel was being prepared for a sailing to Grenada and that the

engine started when the vessel was loosed from its moorings. In the circumstances, the Court found as a fact that the vessel was in a seaworthy condition prior to its departure for refuelling on the 2nd January, 2009.

84. The next issue to be determined was whether the vessel subsequent to the sailing remained in a seaworthy condition prior to its being towed out into deeper waters. In the report dated the 12th January, 2009 Ms. Duke said:

> *"Because of the full moon on that night the water was very rough and the Captain of the chief called me to say that the boat was banging alot. The vessel was listed on the Port side as the water receded. While on the beach there was no sign of water in the boat. However, as it was being pulled out to sea on that fateful evening water began to flow into the engine room."*

85. In cross examination Ms. Duke said as follows:

Ms. Duke:

Q: *In fact, that hole came about as a result of the vessel being beached, yes?*

A: *Yes.*

Q: *And it is this hole that caused water to come into the boat? The incursion, your word is, the incursion of water, salt water in the boat, yes?*

A: *Yes.*

Q: *And it is this hole which permitted the water to come into the boat that caused the vessel to sink. Yes?*

A: *Yes.*

86. The Claimant's witness Mr. Roebuck during the course of his cross examination said as follows:

Mr. Roebuck:

Q: But isn't it -- what caused the sinking of this vessel, wasn't it the inclusion of water through the hole that was developed on the hull?

A: That's a peril of the sea, yes.

Q: No, no, I didn't ask you if it was a peril of the sea; I asked you what caused the sinking of the vessel?

A: Yes the incursion of sea water into the vessel.

Q: And the hole, yes it came in through a hole?

A: Yes.

87. Having regard to the aforementioned aspects of evidence, the Court found as a fact that a hole was created in the hull as a result of the vessel banging due to the rough water conditions that prevailed and continued on the night of the 10th January, 2009. This situation was a cause of concern to the Captain and he communicated his concern to Ms Duke. Ms. Duke's evidence on this issue was as follows:

Q: "During this conversation, am I correct in saying that he informed you that the seas were extremely rough and the vessel was banging?

A. Yes, he did.

Q: Good. Let's take, the vessel banging — am I correct in saying this, the vessel — the hull was hitting the bottom of the sea...

A: On the stones.

Q: ...on the shore hitting. That is the banging?

A: Yes.

THE COURT: Hitting the bottom of the sea on the?

MARILYN DUKE: On the stones on Rockley Bay.

BY MR. KAWALSINGH:

Q: Are the stones on Rockley Bay so called because it's a rocky beach?

A: That's right.

Q: Correct.

Q: And this would of course have caused you great concern?

A: Yes, it did.

Q: Why would it have caused you great concern?

A: Why?

Q: Okay let me — would it have caused you great concern because the hull of the vessel could have been severely damaged on the rocks?

A: Well, that's part of the concern, yes.

Q: Right. And because of the hull being banged against the rocks and it could be damaged, that could cause the inclusion of sea water into the boat –– to the vessel, yes?

A: Say it again.

Q: If the hull is compromised and damaged because it's banging against the rocks in Rockley Bay...

A: Yes.

Q: ...it could cause, it is reasonable to see that water can get into the vessel?

A: Yes.

88. It is evident that due to the rough waters there was concern as to the effects of the banging of the hull. Ms. Duke was cognizant of the said concern. The circumstances that caused the damage to the hull were fortuitous and beyond anyone's control and the damage to the hull was as a result of a peril of the sea. However, given the legitimate concerns about the banging that occurred steps should have been taken to have the hull examined before the vessel was towed into deeper waters. Such an examination would have determined whether or not the hull of the boat was compromised as a result of the banging. Having accepted that the seas were rough, the Court is of the view that the hole in the hull must have been occasioned prior to the vessel being towed into deeper waters as it is not plausible to conclude that a hole in the hull just appeared while the "Chief" was being towed especially as there is no evidence that during the towing process further banging occurred. At the point when the vessel was in its beached position at Rockley Bay, notwithstanding the condition of the hull, no water entered the vessel through the hole and the Court accepted the Claimant's evidence that no water was seen in the vessel

before it was towed. Consequently, the Court concluded that even when the tide was high while the vessel was in its beached position, given that no water entered the "Chief", the hole must have been above the waterline. Water started to enter the engine room as the vessel was being towed into deeper water and as the area of the hull which had the hole, became submerged below the waterline.

89. The disaster which befell the "Chief" may not have occurred if the hull had been inspected prior to it being towed. Such an inspection would have established the unseaworthiness of the vessel and no attempts to tow the vessel into deeper water ought then to have been made, without first restoring the vessel to a state of seaworthiness by repairing the said hole in the hull. The evidence established that the dominant cause of the damage i.e. the sinking of the vessel was the unseaworthiness which caused the admission of sea water into the engine room and but for the Claimant's lack of due diligence in ensuring that an examination of the hull was done so as to identify and abate any damage to the vessel's hull before it was pulled out to sea, the vessel may not have sank. The Claimant failed to exercise due care and diligence and failed to ascertain that the vessel was seaworthy before it was towed.

90. Notwithstanding the hole in the hull no water entered the vessel prior to it being towed, and it is the towing of the vessel into deeper water that resulted in the entry of water through the said hole in the hull.

91. There is also no evidence to suggest that an assessment of the hull could not have been undertaken given the position in which the vessel had been beached and or having regard to the prevailing sea conditions.

92. The Court has significant empathy for the Claimant but in the circumstances, the Court finds that due to the Claimant's lack of due diligence in ensuring that the vessel 'the Chief' was in a seaworthy state, prior to it being towed into deeper waters, the said vessel sank. There was a failure to take reasonable steps so as to ensure that the "Chief" was seaworthy before it was towed and the loss was occasioned through the lack of due diligence by the assured.

93. The Defendant in this matter pleaded and relied on almost every possible defence that could have been mounted. A calculated clinical and callous approach which is usually employed by insurance companies once they have collected substantial premiums and the time has arrived for payment under the policy. Too often persons are not made aware of the full effect and purport of the policy effected and several riders and exemptions are not brought to the attention of the assured prior to the effecting of same. It may be that legislative intervention is needed so as to impose a statutory obligation on insurers to properly explain and advise on the various aspects and exemptions that operate in relation to the policy so as to ensure that unsuspecting citizens are not lured into false sense of security. While it is recognised that it is a contractual relationship, in most cases the parties are not on an equal footing at the time the contract is entered into.

94. For the reasons outlined in this judgment the Claimant cannot recover under the policy and the Court is constrained to dismiss the Claimant's claim. The Claimant must also pay to the Defendant costs calculated on a prescribed costs basis having regard to the quantum of the Claim.

.....

FRANK SEEPERSAD

JUDGE