Newfield Peninsula Malaysia Inc v The Owners of the Ship or Vessel 'Tanjung Pinang 1'

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO 27–23 OF 2011
NALLINI PATHMANATHAN J
15 OCTOBER 2012

Civil Procedure — Locus standi — Vessel anchor snagged underwater pipeline connecting two platforms — Crew unable to dislodge anchor from pipeline — Repeatedly winch and maneuver vessel to free anchor which entangled with pipeline — Pipeline ruptured — Claim made by sister ship — Whether correct party to bring action — Whether there was necessary legal capacity or interest to bring action on behalf of parties who suffered loss — Whether vessel owner owed duty of care to platform

Tort — Damages — Negligence — Vessel anchor snagged underwater pipeline connecting two platforms — Crew unable to dislodge anchor from pipeline — Repeatedly winch and maneuver vessel to free anchor which was entangled with pipeline — Pipeline ruptured — Vessel master cut anchor chain and cast off anchor — Actions not reported to management — Platform recommenced export of crude oil until instructions to stop such export received — Claim for losses and damages — Whether vessel owner entitled to rely on statutory limitation under s 360 of the Merchant Shipping Ordinance 1952 — Extent of losses

The plaintiff had entered into a Petroleum Sharing Contract ('PSC') with Petronas to carry out oil and gas exploration and production activities for a term of 30 years. The plaintiff also signed another contract known as joint operating agreement ('JOA') with Petronas Carigali Sdn Bhd ('Carigali') to regulate and govern the relationship between the plaintiff and Carigali. Under the JOA, the plaintiff became the designated operator of PM323 while Carigali was termed as the 'passive' operator or partner. The plaintiff constructed and installed the East Belumut A ('EBA') platform with a ten inch underwater pipeline connected to the Tinggi-A ('TGA') platform which fell within a different oilfield, PM-9. When the Tanjung Puteri 1 was within the location of the PM323 oilfield, she dropped. The anchor then snagged the underwater pipeline connecting the EBA and the TGA platforms. The crew was unable to dislodge the anchor from the pipeline and proceeded to repeatedly winch and maneuver the vessel to free the anchor which had become entangled with the pipeline. This ruptured the pipeline. Unable to retrieve the anchor after several hours, the Master of Tanjung Puteri 1 reportedly decided to cut the anchor chain and to cast off the anchor. The Tanjung Puteri 1 departed from its

location having cut off the anchor, without reporting its actions to Tanjung Kapal Services or Carigali management. Without any report of the damage to the main oil line, the EBA platform recommenced export of crude oil through that main oil line and continued to do so until instructions to stop such export were received. Other damages to property included a buckle at the leak point and the deformation of the pipeline riser at the TGA platform. As a consequence of the incident, the plaintiff claimed that it had suffered considerable losses and damages and claimed against the defendant by way of an action founded in tort. This action was brought against the Tanjung Pinang 1 which was a sister ship of Tanjung Puteri 1. The issues that arose for the court's determination were, inter alia, whether the plaintiff was the correct party to bring this action; whether the plaintiff had the necessary legal capacity or interest to bring this action on behalf of parties who might have suffered a loss; whether the damage to the pipeline was caused by the negligence of the defendants; whether the defendant entitled to rely on the statutory limitation under s 360 of the Merchant Shipping Ordinance 1952 ('the Ordinance'); whether the plaintiff suffered a loss in fact and in law and the extent of such losses; and whether the defendant owed a duty of care to the plaintiff.

Held, allowing the claim:

(1) As the plaintiff enjoyed a clear right of possession to the oil field PM323 as well as the facilities developed by it, which included the oil pipeline which was ruptured as well as the oil lost, not to mention the deferred production, this in itself accorded the plaintiff a right and entitlement to bring this action without Petronas and Carigali. The fact that it also enjoyed beneficial interest or equitable ownership of the facilities of PM323 which it developed, and which included the ruptured pipeline as well as the oil so produced and lost, accorded it with further basis to bring the action. Because of the possessory right which was coupled with beneficial ownership, the plaintiff invested in the design construction and installation of the facilities including the pipeline. The entire costs, as set out above were borne by the plaintiff. The plaintiff was the sole active operator of PM323. As such it is the plaintiff that was accorded exclusive control and management of the operations at PM323. This necessarily included the control and management of the facilities. This in itself entitled the plaintiff to bring this action (see paras 49 & 56).

(2) Where an insurer had paid for the loss and damage under an insurance policy, under the principles of subrogation, it was entitled to the benefit of any recovery from the cause of action relating to the loss or damage. The equitable doctrine of subrogation required the insured to pursue the recovery. It was a matter between the insurer and insured and in no way encompassed the third party wrongdoer. The insured invoked his own cause of action against the wrongdoer, albeit in tort, contract or such

other suitable cause of action. The insurer himself had no cause of action against the wrongdoer (see para 61).

(3) The plaintiff's claim was not premised on a contractual right but instead on a direct, equitable or beneficial and possessory right. The losses arose as a consequence of the breach of these rights, not as a consequence of an agreement to grant such rights to the plaintiff. The plaintiff had suffered directly some pecuniary losses arising from the rupture. This was not a remote claim premised on contractual rights that could be categorised as irrecoverable economic loss. The plaintiff's claim ought not to be dismissed on the basis of the irrecoverability of the heads of losses as submitted. These matters do not disentitle the plaintiff to bring this action against the tortfeasor. The issue of precisely how much might actually be recovered and issues of remoteness and categorisation, if any, of certain items as amounting to economic loss and the recoverability thereof were matters properly considered at the assessment stage. The plaintiff's cause of action and right to bring this action was well founded and entirely correct (see para 73).

(4) The defendant had not produced any evidence to rebut the evidential presumption of negligence that arose from a consideration of the factual matrix surrounding the case. Such evidence as had been adduced goes towards explaining the possible cause of the incident. Again there had been no evidence to refute the chronology of events by the defendant. It would therefore appear that the plaintiff had successfully established that the rupture of the oil pipe and ancillary structures as well as other damages sustained arose directly as a consequence of the defendant's negligence (see para 83).

(5) There was a clear failure to ensure the existence and implementation of safe navigational and operational practices which could only be attributed to the directing mind and will of the defendant, namely the owners. In these circumstances, it could not be concluded that the defendant had discharged the burden of establishing that the incident occurred without its fault and privity. On the evidence, it appeared to be clear case where the defendant simply shut their eyes to the obvious risk of a casualty arising from a defective anchor operation in the vicinity of an oil pipeline. It was not open to the defendant to simply wash its hands of the entirety of the incident by laying blame (see paras 143–144).

[Bahasa Malaysia summary

Plaintif telah memeterai Kontrak Perkongsian Petroleum ('KPP') bersama Petronas untuk menjalani penerokaan minyak dan gas dan aktiviti produksi untuk tempoh 30 tahun. Plaintif juga telah menandatangani lagi satu kontrak yang dikenali sebagai perjanjian operasi bersama ('POB') dengan Petronas Carigali Sdn Bhd ('Carigali') untuk mengawal selia hubungan di antara plaintif

dan Carigali. Di bawah POB, plaintif menjadi pengendali yang ditugaskan bagi PM323 manakala Carigali dinyatakan sebagai pengendali 'passive' atau rakan kongsi. Plaintif telah membina dan memasang platform East Belumut A ('EBA') dengan saluran paip di bawah permukaan air sepanjang 10 inci yang disambungkan kepada platform Tinggi-A yang mana tertakluk di bawah medan minyak yang berbeza, PM-9. Apabila Tanjung Puteri 1 berada di dalam lokasi medan minyak PM323, ia telah karam. Sauhnya telah merentap saluran paip di bawah permukaan air yang menyambungkan platform EBA dan TGA. Krew tidak dapat menanggalkan sauh daripada saluran paip dan dengan berulang kali terus mengangkat dengan win dan mengendali kapal layar untuk melepaskan sauh yang mana telah tersimpul dengan saluran paip. Ini telah memecahkan saluran paip. Gagal untuk menanggalkan sauh selepas beberapa jam, Nakhoda Tanjung Puteri 1 dilaporkan telah memutuskan untuk memotong rantai sauh dan membiarkan sauh tersebut. Tanjung Puteri 1 telah bertolak daripada lokasi setelah memotong sauh, tanpa melaporkan tindakannya kepada Perkhidmatan Tanjung Kapal atau pengurusan Carigali. Tanpa melaporkan sebarang kerosakan kepada saluran minyak utama, platform EBA terus mengeluarkan minyak mentah melalui saluran minyak utama dan terus melakukan sedemikian sehingga menerima arahan untuk berhenti membuat pengeluaran. Kerosakan yang lain terhadap hartanah termasuk kancing dititik kebocoran dan kecacatan kepada penaik saluran paip di platform TGA. Akibat kejadian tersebut, plaintif mendakwa bahawa ia telah mengalami kerugian dan kerosakan dan membuat tuntutan terhadap defendan melalui tindakan tort. Tindakan ini telah dilakukan terhadap Tanjung Pinang 1 yang mana merupakan kapal sepemunya Tanjung Puteri 1. Isu yang timbul untuk penentuan mahkamah adalah, antara lain, sama ada plaintif merupakan pihak yang betul untuk membuat tindakan ini; sama ada plaintif mempunyai kapasiti perundangan atau kepentingan yang memadai untuk mengambil tindakan bagi pihak-pihak yang mengalami kerugian; sama ada kerosakan kepada saluran paip telah disebabkan oleh kecuaian defendan-defendan; sama ada defendan berhak untuk bergantung kepada batasan statutori di bawah s 360 Ordinan Pedagang Perkapalan 1952 ('Ordinan'); sama ada plaintif telah mengalami kerugian dalam fakta dan undang-undang dan setakat mana kerosakan tersebut; dan sama ada defendan mempunyai kewajipan berhati-hati kepada plaintif.

Diputuskan, membenarkan tuntutan:

(1) Memandangkan plaintif menikmati hak milikan jelas medan minyak PM323 dan juga kemudahan yang dimajukan olehnya, yang mana termasuk saluran paip minyak yang telah pecah dan juga kehilangan minyak, dan juga produksi tertangguh, ini secara tersendiri memberikan plaintif hak untuk mengambil tindakan tanpa Petronas dan Carigali. Fakta bahawa ia juga menikmati kepentingan benefisial atau milikan ekuiti terhadap kemudahan PM323 yang mana dimajukan olehnya, dan

yang mana termasuk saluran paip yang pecah dan juga minyak yang dihasilkan dan yang telah hilang, memberikannya asas selanjutnya untuk membuat tindakan ini. Disebabkan hak pemilikan bersama milikan benefisial, plaintif telah membuat pelaburan terhadap reka bentuk binaan dan pemasangan kemudahan termasuk saluran paip. Kos keseluruhan seperti yang dinyatakan di atas telah ditanggung oleh plaintif. Plaintif merupakan pengendali aktif utama PM323. Oleh itu plaintif mempunyai kawalan dan pengurusan eksklusif operasi-operasi PM323. Ini juga termasuk kawalan dan pengurusan kemudahan-kemudahan. Ini secara tersendirinya memberikan hak kepada plaintif untuk membuat tindakan (lihat perenggan 49 & 56).

(2) Apabila syarikat insurans telah membayar kerugian dan kerosakan di bawah polisi insurans, di bawah prinsip subrogasi, ia berhak terhadap faedah terhadap apa-apa penebusan daripada kausa tindakan berkenaan dengan kerugian atau kerosakan. Doktrin subrogasi yang berasaskan ekuiti memerlukan pengambil insurans untuk membuat penebusan tersebut. Ia adalah perkara di antara syarikat insurans dan pengambil insurans dan tidak melibatkan pesalah laku pihak ketiga. Syarikat insurans menggunakan kausa tindakannya sendiri terhadap pesalah laku, melalui tort, kontrak atau kausa tindakan bersesuaian yang lain. Syarikat insurans sendiri tidak mempunyai kausa tindakan terhadap pesalah laku (lihat perenggan 61).

(3) Tuntutan plaintif tidak berpremiskan hak kontraktual sebaliknya berdasarkan hak jelas, berunsurkan ekuiti atau benefisial dan pemilikan. Kerugian timbul akibat percanggahan hak-hak ini, dan bukan disebabkan perjanjian untuk memberikan hak-hak tersebut kepada plaintif. Plaintif telah mengalami beberapa kerugian wang secara terus disebabkan kepecahan tersebut. Ini bukanlah tuntutan terpencil yang berpremiskan hak kontraktual yang mana boleh dikategorikan sebagai kerugian ekonomi yang tidak dapat ditebus. Tuntutan plaintif tidak seharusnya diketepikan berdasarkan kerugian utama yang tidak dapat ditebus seperti dikemukakan. Perkara-perkara ini tidak melupuskan hak plaintif untuk membuat tindakan terhadap pelaku tort. Isu tentang secara spesifik berapa banyak yang boleh ditebus dan isu keterpencilan dan kategori, jika ada, bagi beberapa item yang membawa kepada kerugian ekonomi dan apa yang boleh ditebus adalah perkara yang dipertimbangkan dengan sewajarnya pada peringkat penilaian. Kausa tindakan plaintif dan hak untuk membuat tindakan mempunyai asas yang kukuh dan adalah betul secara keseluruhannya (lihat perenggan 73).

(4) Defendan tidak mengemukakan apa-apa keterangan untuk menangkis anggapan kecuaian keterangan yang timbul daripada pertimbangan fakta matriks yang merangkumi kes ini. Keterangan sedemikian seperti yang

telah dikemukakan menjelaskan apa yang mungkin telah menyebabkan kejadian tersebut. Sekali lagi tidak terdapat sebarang keterangan untuk menyangkal kronologi kejadian defendan. Justeru adalah kelihatan bahawa plaintif telah berjaya membuktikan bahawa paip minyak dan struktur sampingan yang pecah dan juga kerosakan lain yang dialami timbul akibat kecuaian defendan (lihat perenggan 83).

(5) Terdapat kegagalan jelas untuk memastikan kewujudan dan pelaksanaan pelayaran yang selamat dan latihan operasi yang mana hanya boleh disebabkan oleh minda dan kehendak defendan, yakni pemilik-pemilik. Dalam kejadian ini, tidak dapat disimpulkan bahawa defendan telah memenuhi beban untuk membuktikan bahawa kejadian terjadi tanpa kesilapannya dan priviti. Berdasarkan keterangan, adalah kelihatan bahawa ini merupakan kes yang jelas di mana defendan telah menutup mata mereka terhadap risiko yang jelas tentang kemalangan yang timbul daripada operasi sauh yang defektif sekitar saluran paip minyak. Defendan tidak boleh dengan mudah melepaskan tanggungjawab terhadap keseluruhan kejadian dengan menuding jari (lihat perenggan 143–144).]

Notes

For cases on party, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–207.

For cases on negligence, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 250–275.

Cases referred to

Antara Koh Pte Ltd v Eng Tou Offshore Pte Ltd [2005] 4 SLR 521, HC (refd)

Bank Muamalat Malaysia Berhad v Sophisticated Pipe Industry Production Sdn Bhd [2011] 9 CLJ 748, HC (refd)

Bolton (HL) (Engineering Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159, CA (refd)

Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd [1986] AC 1, PC (refd)

Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes [1976] 2 Lloyd's Rep 171, CA (refd)

Grand Champion Tankers Ltd v Norpipe a/s (The Marion) [1984] 2 WLR 942, HL (refd)

Hamburg Star, The [1994] 1 Lloyd's Rep 399 (refd)

Kepong Prospecting Ltd v Schmidt [1968] 1 MLJ 170, PC (refd)

Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd; The Aliakmon [1986] AC 785, HL (refd)

Nacap Ltd v Moffat Plant Ltd [1986] SLT 326 (refd)

SIME UEP Properties Bhd v Woon Nyoke Lin [2002] 3 CLJ 719, CA (refd)

Sabah Shell Petroleum Co Ltd Anor v The Owners of and/or any other persons interested in the ship or vessel the 'Borcos Takdir' [2012] 5 MLJ 515, HC (refd)
Sato Kogyo (S) Pte Ltd and another v Socomec SA [2012] 2 SLR 1057, HC (refd)
Scott v London and St Katherine Docks Co (1865) 3 H&C 596, Ex Ch (refd)
Shell UK Ltd v Total UK Ltd [2011] 1 QB 86, CA (refd)
Sunrise Crane, The [2004] 4 SLR 715, CA (refd)
Teoh Kim Kien & Ors v Lai Sen & Anor [1980] 2 MLJ 125, FC (refd)
Winkfield, The [1902] 1 P 42, CA (refd)

Legislation referred to

Merchant Shipping Ordinance 1952 s 360
Petroleum Development Act 1974

Liew Teck Huat (Lim Qi Si and Divya Nair with him) (TH Liew & Partners) for the plaintiff.
James David (Felix Raj and CN Selvapandian with him) (Shaikh David Raj) for the defendant.

Nallini Pathmanathan J:

[1] On 27 June 2010 at about 7am a vessel known as the Tanjung Puteri 1, an anchor handling tug supply vessel, ruptured an underwater pipeline connecting what is known as the East Belumut A platform ('EBA') and the Tinggi-A platform ('TGA'), which are platforms located in oilfields designated as PM323 and PM9. This rupture necessarily caused a major disruption to the plaintiff's exploring and producing operations. The background facts relating to this incident are comprehensively set out in the submissions of learned counsel for the plaintiff and the investigation reports undertaken by the plaintiff and the defendant, which I adopt below.

[2] In 2005, the plaintiff entered into a petroleum sharing contract ('PSC') with Petronas. This gave the plaintiff the right to carry out oil and gas exploration and production activities in a designated location. The location is designated as PM323 and is in the East Coast of Peninsular Malaysia. The plaintiff constructed and installed the development facilities, primarily offshore platforms and underwater pipelines with ancillary parts and equipment. These facilities were constructed and installed in what is known as the East Belumut and Chermingat Oil Fields which are within block PM323. In doing so the plaintiff undertook and expended a considerable financial commitment, the minimum sum being USD72m. The plaintiff estimates that it has presently expended USD437m in capital expenditure in PM323 of which approximately USD180m is related to facility costs. In consideration of the expending of such sums, the plaintiff is entitled under the petroleum sharing contract to undertake exploration and production activities for a term of 30 years.

[3] On the date of the signing of the petroleum sharing contract with Petronas, the plaintiff also signed another contract with Petronas Carigali Sdn Bhd ('Carigali'), known as the joint operating agreement. The joint operating agreement was put in place to regulate and govern the relationship between the plaintiff and Carigali in all matters concerning the joint operation of the petroleum sharing contract. Under the joint operating agreement the plaintiff, Newfield is the designated operator of PM323 while Carigali is termed as the 'passive' operator or partner. The plaintiff's functions and duties as an operator are set out in the joint operating agreement.

[4] As required under the petroleum sharing contract, the plaintiff constructed and installed the East Belumut A platform with a ten inch underwater pipeline connected to the Tinggi-A platform which falls within a different oilfield, PM-9. The rupture and damage in the instant case was caused to this 10 inch pipeline constructed by the plaintiff under the terms of the petroleum sharing contract. The pipeline extended from the PM323 oilfield through the PM9 and other oilfields underwater to the shore where the crude oil pipeline would transport the crude oil to Trengganu Crude Oil Terminal or TCOT.

[5] The vessel known as the Tanjung Puteri 1, owned by the defendant, is an anchor handling tug supply vessel which was at all material times under contract to Carigali (under a contract other than the joint operating agreement). It was at the Tinggi-A location as a standby or support vessel to the operations of the moored workover barge Crest Station 1. On 26 June 2010 at about 11pm when the Tanjung Puteri 1, was within the location of the PM323 oilfield, she dropped anchor at approximately 1.5–2 nautical miles east of the Tinggi-A platform. (The plaintiff contends that such anchoring activities of the vessel were unauthorised by reason of Carigali's instructions not to deploy an anchor at the Tinggi-A location).

[6] On the morning of 27 June 2010 between 7am and 10am the vessel commenced heaving the anchor. Soon after this heaving operation commenced, the anchor snagged the underwater pipeline connecting the East Belumut A and the Tinggi A platforms. The crew were unable to dislodge the anchor from the pipeline. In the course of seeking to retrieve their anchor by repeatedly winching and maneuvering the vessel to free the anchor which had become entangled with the pipeline, the pipeline was ruptured. Being unable to retrieve the anchor after several hours, the Master of Tanjung Puteri 1 reportedly decided to cut the anchor chain and to cast off the anchor at about 11am. An acetylene torch was used to cut the chain under tension with two shackle lengths in the water. About 50 metres of the chain was cast off with the anchor.

[7] The Tanjung Puteri 1 departed from its location having cut off the anchor, without reporting its actions to Tanjung Kapal Services or Carigali management. In fact the crew were ordered to utilise the spare anchor to replace the lost anchor. The Master signed off from the vessel on 30 June 2010 at the Kemaman base without having informed any party of the incident.

[8] Without any report of the damage to the East Belumut A — Tinggi A main oil line, the East Belumut A platform recommenced export of crude oil through that main oil line at 1500 hours on 3 July 2010 and continued to do so until instructions to stop such export were received on 6 July 2010. The plaintiff's investigation report estimates that the East Belumut A platform exported 59.2 kbbls of crude oil. Approximately 30.7 +/-Ikbbls of crude oil, it is estimated, was released through the leak from the ruptured oil pipeline during this period. Other damage to property included a buckle at the leak point and the deformation of the pipeline riser at the Tinggi A platform. No property or other damage occurred during the incident.

[9] On 6 July 2010, after noticing anomalies in the crude oil inventory figures for the period of 3–5 July, enquiries were made as to the possibility of a pipeline leak in the area. The East Belumut platform was shut down on 6 July 2010. A sheen was spotted again that day in the vicinity of other platforms. Export of oil from the East Belumut A platform was stopped at 1630 hours on 6 July 2010.

[10] On 7 July 2010 ExxonMobil despatched a Hercules C130 aircraft to carry out oil spill dispersant measures. At the same time a remotely operated vehicle survey was conducted and it was reported that lily pad oil bubbles above the East Belumut pipeline about 2–2.5 miles from the Tinggi A platform were noted. On 8 July 2010 the plaintiff despatched the MV Vanessa 7 to the location of the oil bubbles. It also sent a chartered helicopter to conduct an aerial surveillance of the location from which a sketch of the oil sheen was prepared. The plaintiff also commenced pressure testing of the East Belumut A platform whereupon the pressure was found to have dropped. On 9 July 2010 the plaintiff took over the oil spill response activities from ExxonMobil when it realised that the oil sheen was in its area of operations.

[11] At 0830 hours on 10 July 2010, a remotely operated vehicle that had been deployed confirmed the ten inch main oil pipeline from East Belumut A to Tinggi A platform as damaged at 25.6km from East Belumut A and approximately 2km from Tinggi A. The water depth was 68.5 metres. The location of the damage was Lat 05 Deg 28.5 Min N; Long 105 Deg 27.2 Min E. The damage was in the form of a rupture on the bent section of the pipeline which had been displaced laterally about 25 metres from its original position.

[12] In the course of carrying out pipeline repair operations on the night of 16 July 2010, divers came upon a length of anchor chain in the vicinity of the ruptured section of the pipeline. Two days later, on 18 July 2010 the plaintiff retrieved the anchor. It was identified as a type AC-14 weighing 1,590kg with the chain running into about 50 metres in length. The lat link on the chain indicated that it was cut clean through. The anchor was duly traced to Tanjung Puteri 1.

[13] Subsequently investigations were carried out, inter alia, by the plaintiff and the defendant, giving rise to the information as set out above. Interviews were conducted with the crew of Tanjung Puteri 1 as a consequence of which it emerged vide admissions from the crew that they did drop anchor, unsuccessfully try to heave anchor, and failing to do so, had cut and cast off the anchor with the chain, and then replaced the lost anchor with the spare. The deck logs revealed that the event of the vessel dropping anchor was not recorded and the entries for the relevant period were incorrectly logged so as to reflect that the vessel was steaming in the vicinity and awaiting instructions, when in fact it was not. The log book was falsified to avoid detection. The foregoing facts are not in dispute.

[14] As a consequence of the incident above the plaintiff claims that it has suffered considerable loss and damage in respect of which it now makes claim against the defendant by way of an action founded in tort. This action is brought against the Tanjung Pinang 1 which is a sister ship of Tanjung Puteri 1. This is not disputed. The trial proceeded on 12–16 March 2012 as well as 4 May 2012 on the issue of liability only.

ISSUES

[15] The issues that arise for determination are as follows:

(a) is the plaintiff the correct party to bring this action? Does the plaintiff have the necessary legal capacity or interest to bring this action on behalf of parties who may have suffered a loss?

(b) if yes, was the damage to the pipeline caused by the negligence of the defendants?

(c) is the defendant entitled to the benefit of the contractual limitation contained in the Contract No CHO/C2/2007/DDR/388 dated 20 August 2008 between the defendant and Carigali?

(d) is the defendant entitled to rely on the statutory limitation under s 360 of the Merchant Shipping Ordinance 1952? and

(e) whether the plaintiff has suffered a loss in fact and in law and the extent

of such loss? Does the defendant owe a duty of care to the plaintiff such that the plaintiff is entitled to recover damages for the defendant's breach of duty.

[16] Issue (a) and (e) will be considered together as the are to some extent inter-related.

Issue (a): Is the plaintiff the correct party to bring this action? Does the plaintiff have the necessary legal capacity or interest to bring this action on behalf of parties who may have suffered a loss? And issue (e): Whether the plaintiff has suffered a loss in fact and in law and the extent of such loss? Does the defendant owe a duty of care to the plaintiff such that the plaintiff is entitled to recover damages for the defendant's breach of duty

The defendant contends that the plaintiff is not the proper or correct party to institute this action. While not stating with clarity precisely how this action ought to be brought, the defendant submits that the plaintiff is not authorised to bring this action on behalf of Carigali or Petronas. Petronas, it complains, is not named as a plaintiff in the suit and neither has any of its interests in this action been pleaded. In so far as Carigali is concerned, the defendant contends that there is no legal basis allowing the plaintiff, Newfield, to bring this action on its behalf. In this context the reference to article 4.8 of the joint operating agreement (which will be examined below) it is contended, is inoperative, or fails to allow the plaintiff to bring this action on behalf of Carigali. In short therefore, it appears that the defendant's complaint is that the plaintiff does not possess the requisite legal capacity to bring this action in its own right. Neither, the defendant contends, does the plaintiff have such capacity to bring the action on behalf of Petronas and Carigali.

[17] The plaintiff through its first witness tendered evidence to the effect that it made claim from its insurers respect of the losses suffered. The defendant contends that it is unclear if the plaintiff is authorised to represent their insurers who paid an amount of approximately USD11m to the plaintiff in respect of losses claimed in the suit. In other words, the defendant questions whether the claim is in fact a subrogated claim. While the defendant accepts that subrogation need not be pleaded where an insurer pursues its rights of subrogation and steps into the shoes of the insured, it maintains that in the instant case there is no evidence before this court with regard to whether the insurers had in fact authorised this recovery on their behalf. The defendant contends that this lack of particularity in the pleadings prejudices its position in that the defendant has no knowledge of the number of insurance policies in place and the quantum paid out in respect of such policies; secondly they contend that it is not known whether such insurance monies were paid to Petronas, Carigali or the plaintiff. If indeed the insurance proceeds were paid to

A Petronas, the defendant maintains that the claim here is 'unsustainable' as the plaintiff is not authorised to represent Petronas. Similarly with Carigali the defendant maintains that as it is not a named party and if monies have been paid out to it, there is a possibility of a future claim against the defendants. In summary the defendant contends that full particulars of the insurance position
B ought to have been pleaded. They further contend that the plaintiff is precluded from recovering the sum of USD11m which it has recovered from its insurer because there is no evidence before this court that the insurer has stepped into the plaintiff's shoes making it a subrogated claim.

C

[18] The second prong of the defendant's argument to the effect that the wrong party has sued, or that the plaintiff does not possess the legal capacity to bring this action is premised on a more convoluted argument, namely that as the nature of the losses suffered by the plaintiff here as a consequence of the
D incident amounts, in essence, to economic loss, the plaintiff is precluded from bringing the claim altogether. This is because as a matter of policy, economic loss is not generally readily recoverable as consequential loss arising from a tortious incident. This issue of economic loss will be considered subsequently.

E

[19] The major thrust of the defendants' case is that on the basis of the contractual matrix contained in the petroleum sharing contract (PSC) and the joint operating agreement (JOA) involving the plaintiff, Petronas and Carigali, the plaintiff has suffered no direct loss and therefore it has no legal capacity to
F bring or maintain this action. The defendant contends that as all capital and operational expenditure is recoverable from what is known as 'cost oil' which belongs to Petronas, all loss is suffered by Petronas, rather than the plaintiff. Consequently it is maintained that the plaintiff suffered no loss whatsoever.

G

[20] The plaintiff, on the other hand, contends to the contrary maintaining that the defendants' propositions above are based on a fallacy. The plaintiff maintains that the defendants' understanding of the division of costs oil is incorrect and that it is entitled to claim and has an interest in 'costs oil'. The
H plaintiff also maintains that as the operator of the facilities it is responsible for the maintenance of the facilities including the underwater pipelines in respect of which the plaintiff procured insurance coverage. The plaintiff also points out that it bears the contractual obligation of recovering the loss due to damage to the facilities.

I

[21] In order to comprehend the nature of the defendant's objection and the plaintiff's response it is necessary to consider first the nature of the relationship between the parties. The nature of the contractual matrix between Petronas, Carigali and the plaintiff may be gleaned, inter alia, from the petroleum

sharing contract, the joint operating agreement and the evidence of PW1, Kevin Martin Robinson, the country/general manager of the plaintiff ('Robinson'). A

[22] Robinson testified, inter alia, that in 2003 the plaintiff entered into negotiations with Petronas to secure the right to carry out exploration and production of oil in Malaysia. Petronas is the corporation legally vested with exclusive rights, powers and privileges of exploring, exploiting and obtaining petroleum lying onshore or offshore of Malaysia. Eventually this led to the signing of several production sharing contracts. In 2005 the plaintiff entered into a production sharing contract (PSC) with Petronas in respect of PM323, the oilfield in issue here (as the oil pipeline that was damaged was constructed by the plaintiff for the purposes of exploring and producing oil from this field). B C

[23] Under the petroleum sharing contract or PSC between the plaintiff and Petronas, Petronas is the owner of the existing as well as potential oil fields (East Belumut, West Belumut, Chermingat Oil Fields for example). The three parties, ie Petronas, Carigali and the plaintiff agreed to enter into the PSC to develop and produce petroleum resources in the existing oil fields specified above, as well as undertake the exploration for, exploitation and obtaining of petroleum in exploration areas as defined in the agreement. To this end, Petronas accorded to the two 'contractors', namely the plaintiff and Carigali, the right to explore for and procure petroleum and gas for a term of 29 years in respect of exploration areas and a term of 23 years for existing oil fields. A production period for the exploration area and the existing oil fields of 20 years each is also specified in the PSC commencing from 2008. In consideration of the grant of the rights above, namely to explore and procure oil from existing and exploratory oil fields, the plaintiff gave an initial financial commitment of USD146m to carry out the works and activities stipulated in the PSC. This involved essentially the acquiring and processing of 3D seismic data, interpreting the data, drilling development and appraisal wells, constructing and installing development facilities and undertaking the development and appraisal of existing oil fields. Such facilities were installed in the East Belumut and Chermingat Oil Fields within Block PM323. These development facilities comprised largely offshore platforms and underwater pipe lines with all their ancillary parts. The PSC specifies that the costs of undertaking the design construction and installation of development facilities on the East Belumut and Chermingat Oil Fields alone as comprising a sum of USD72,000,000. Apart from this minimum financial commitment, which included the costs of the development facilities, the plaintiff also had to pay a signature bonus to Petronas in the form of a non-recoverable sum of RM26m as provided in the PSC. An additional USD13.5m was expended on an exploration work program whereby the plaintiff committed to drill three wild cat wells or exploration wells and acquire additional 3D seismic. D E F G H I

[24] Robinson testified that the plaintiff had expended USD437m in capital expenditure as of the date of his testimony in the PM323 Block of which USD180m related to facilities costs.

[25] The PSC provides in article 12.6 that Petronas has the legal title to any equipment and assets purchased by the contractors, ie the plaintiff. However the contractors, ie Newfield and Carigali have the sole use of such equipment assets for petroleum operations for the duration of the contract.

[26] The PSC also provides that the contractors, namely the plaintiff and Carigali are to be solely responsible for the provision of all funds required directly or indirectly for the implementation of the work programme for the exploration of oil. The right of possession or occupation of PM323 lies with the contractors, namely the plaintiff and Carigali.

[27] A salient part of the PSC sets out how the gross production of crude oil is divided. It provides that a maximum of 10% shall be taken by Petronas in kind to be disposed of in any manner it sees fit; a maximum percentage of what is defined as 'Cost Oil Ceiling' (see article 5.2) is applied for the purpose of recovery by the contractors of all costs in relation to petroleum operations. This means that the plaintiff and Carigali are entitled to take crude oil in kind in such quantity to meet the quantum of costs expended in relation to petroleum operations in the manner set out there. After this, the remaining portion of the crude oil, known as 'Profit Oil' is divisible between the parties as stipulated in the agreement.

[28] Separately the PSC also allows the plaintiff and Carigali to market, lift and export their portion of the 'Cost Oil' and 'Profit Oil'. Article 5.4 specifies that title to such oil shall pass to the plaintiff and Carigali upon delivery at the 'Point of Export'. The 'Point of Export' is defined as the last outlet flange of the loading facility from which contractors lift contractors' portion of profit oil and cost oil either at shore terminal or storage facility or otherwise as agreed between Petronas and contractors from time to time.

[29] This then sets out the nature of the relationship between Petronas and the plaintiff, Newfield. The PSC stipulates that the plaintiff and Carigali are independent contractors while Petronas is the principal. The PSC evidences the undisputed fact that the plaintiff injected considerably large sums of monies towards facilitating the development of facilities for oil exploration. In return, it is accorded the right as contractor, to explore, exploit and obtain petroleum for a term of no less than 30 years in that block of oilfield known as PM323. Such oil as is produced is divisible between the parties and in the portions as described below. In short therefore, the PSC comprises a tripartite agreement that provides for the plaintiff to expend capital and maintenance

costs in return for the right to explore and obtain oil which is divisible between itself, the owner and a second contractor.

[30] However the legal owner of the facilities, notwithstanding that the plaintiff expended its monies in building and installing the same, is Petronas. Under cl 12.6 of the petroleum sharing contract all oil and gas exploration production facilities in Malaysia are legally owned by Petronas. Such is the scheme of the legal framework for the exploration and production of oil and gas in Malaysia under the Petroleum Development Act 1974.

[31] Robinson further explained that typically the oil company and its non-operating partner, Carigali are given the right to carry out exploration and production activities, in consideration for which they are required to pay for the construction and installation of the facility and the drilling of the production wells. In other words, in return for exclusive rights to possess and operate the facilities for a term of 29 years, the oil company and its non-operating company are required to build the facilities and maintain them. Robinson maintained that by reason of the foregoing, the plaintiff enjoyed a beneficial interest in the facilities. In summary therefore the plaintiff acquired exclusive possessory rights for oil exploration and production together with Carigali as the non-operating partner, in consideration of which it expended significant sums of money. Additionally given the extensive quantum of monies expended in constructing and developing the facilities the full costs of which were borne by the plaintiff, the plaintiff contends that it enjoys a beneficial interest in the same, notwithstanding that Petronas is the legal owner. This is not in dispute.

[32] Robinson also explained that in view of the contractual relationship between the parties the primary right of possession lay with the plaintiff. Petronas has to obtain the plaintiff's permission to enter upon the facilities to carry out any inspection or for any other reason. In further support of the nature of its beneficial interest, the plaintiff points to the fact that it has insurable interests in the facilities and to this end procures insurance coverage for itself.

[33] As for Carigali, Robinson explained that it is a Petronas company set up to participate in exploration and production activities jointly with other oil companies which had acquired the right from Petronas to carry out such activities. It participates on a routine basis with all major oil companies including Shell, ExxonMobil, etc so as to participate in the oil exploration activities as a 'non-operating' partner. This means in essence that the active work in respect of exploration and production is left entirely to the 'operating' partner.

[34] In PM323, under the provisions of the joint operating agreement between the plaintiff and itself, Carigali assumed the role of a 40% non- operating partner. This meant that it was required to pay its share, namely 40% of the development costs for the existing oil fields. In practice, the plaintiff, Newfield as the operator, would cash call Carigali on a monthly basis for its share of the development costs. However for exploration the plaintiff pays 100% of the costs as provided for in the joint operating agreement.

(It should be noted however that Carigali in other instances also operates in its own right as an active operator with ExxonMobil for example as the non-operating partner in oil field PM9. In other words, Carigali is not always a passive non-operating partner.)

[35] The joint operating agreement regulates and governs the relationship between the plaintiff and Carigali in all matters concerning the joint operation, in accordance with the petroleum sharing contract. It designates the plaintiff as the 'operator' of PM323 and outlines the duties and functions of the operator. It requires the plaintiff to bear 100% of the costs, expenses and liabilities in relation to exploration activities until the fulfilment of the drilling of three wildcat wells. To this end the plaintiff paid for the design, construction and installation of the facilities in respect of PM323 which included the East Belumut platform with a 10 inch underwater pipeline connected to the Tinggi A platform, the subject matter of the incident here.

[36] Robinson also testified that under cl 4.3.4 of the joint operating agreement the plaintiff was obliged to represent contracting parties in any proceedings before the court. This is disputed by the defendants. In the instant case, after the incident resulting in the rupture of the oil pipeline caused by the anchor of the Tanjung Puteri 1 snagging and rupturing it, the plaintiff paid for the entire costs of repairs and rectification work. It then cash called Carigali for 40% of such costs. In summary therefore the plaintiff paid 60% and Carigali paid 40% for the cost of the repairs, clean up costs and rectification of the damaged pipeline.

[37] Robinson testified that as a result of the damage to the pipeline from the anchor snagging incident, the plaintiff, Newfield, suffered loss in the form of a considerable quantity of oil being lost in the sea. Additionally the plaintiff suffered losses arising from what it called 'deferred production'. This 'deferred production', the defendants contend, the plaintiff is precluded from claiming as it falls within the definition of economic loss. Further the defendant maintains that such loss is not in fact a claim for a loss but is a claim for a potential profit which may or may not have been made. Accordingly the defendant submits it is too speculative and remote to be allowed under the law.

[38] In the course of cross-examination learned counsel for the defendant

sought to put it to Robinson that notwithstanding the quantum of monies expended on the construction and development of the facilities in oil field PM323, such costs were recoverable from the oil extracted and produced from this field, or 'cost oil'. As stated earlier, the first 10% of oil produced goes to Petronas. The second part is used to recover all costs in relation to petroleum operations as split between the operators, namely the plaintiff and Carigali in a ratio of 60% to 40%. The third part thereafter is what is known as 'profit oil'. On this basis it was put to Robinson that the plaintiff would recover its operational costs after which it would recover profit costs. He agreed pointing out that the distribution of such profits was set out in the JOA. However he stated that the costs of repair of the pipeline would not fall within recoverable expenditure as the rupture was due to negligence. He explained that such costs were covered by insurance. He further explained that the costs of repair of the rupture were recovered from insurance save for the deductible. Robinson was unable however to explain whether the current claim was a subrogation claim.

[39] It was put to him that the plaintiff and Carigali were merely independent contractors reporting to Petronas under the terms of the petroleum sharing contract, whereby Petronas owns the oil and facilities but accords use of those facilities to the plaintiff and Carigali in order to produce oil. Robinson agreed but pointed out that the oil that was produced was not merely for the benefit of Petronas, but was also for the benefit of itself and Carigali as well. In other words he maintained that the plaintiff enjoyed a proprietary interest in the oil that was so produced. It was put to him that the plaintiff was an independent contractor of Petronas for all petrol operations and the plaintiff's interest in the crude oil and title in such oil only arises at the point of export. These contentions were put to Robinson by the defendant with a view to establishing that the plaintiff has no locus nor enjoys any standing to bring the foregoing action. It would appear that the defendant seems to be suggesting that as the oil belongs to Petronas as does the oil field, Petronas is the party that ought to have brought the current claim. The defendant did not however specify precisely which party ought to have brought the action, merely maintaining by implication that Petronas and/or Carigali should also have been parties to this action.

[40] Robinson refuted this suggestion. Next he was questioned on the issue of possession and he explained that under the PSC and JOA, the plaintiff had sole possession of the facilities such that permission would have to be procured from it if either party wanted to come onto the platform.

[41] Robinson was also asked about the plaintiff's entitlement to bring the suit on behalf of Carigali. Reference was made to cl 4.8 of the JOA and it was put to him that under this clause there is no right accorded to the plaintiff to bring or commence a suit. Robinson disagreed and maintained that the

plaintiff was entitled to represent the parties.

Does the plaintiff have the locus standi to bring this action to recover losses from the defendant for the incident?

[42] Having reviewed summarily the evidence and issues raised by learned counsel in relation to this issue, it appears to this court that the primary question that arises for consideration is whether the plaintiff has a right to claim for losses suffered as a result of the tortious act of the defendant's vessel, Tanjung Puteri 1. This requires an analysis of the type of interest that the plaintiff enjoys in:

(a) the damaged subject goods, namely the ruptured oil pipeline and ancillary damaged structures; and

(b) the production and ownership of oil produced in PM323 in the existing and exploratory oil fields, as such production was disrupted resulting in both loss of oil for a limited period, as well as deferred production.

[43] Here the defendant's vessel as the tortfeasor committed what I will assume for the purposes of this issue is a negligent act, inflicting damage on property, as a consequence of which loss has been suffered by, inter alia, the plaintiff, Petronas and Carigali. Each of these parties has an interest in the oil pipeline as well as the production of oil under the PSC and JOA. Each party will be affected by the damage caused, in line with the interest it enjoys in the property, namely the oil pipeline and oil production. In point of fact, a perusal of the PSC and JOA discloses that these three parties enjoy interests of a legal, beneficial, proprietary and possessory kind concurrently in the oil and the oil pipeline structure, apart from the right to explore and produce oil. What then are the principles to be applied in determining whether the plaintiff has or enjoys a sufficient interest in the oil production in PM323, and damaged pipeline structure oil, to bring this action against the defendant in respect of the 'negligent' act committed by the Tanjung Puteri 1?

[44] To my mind, this will depend on the nature of the interest which the plaintiff enjoys in the subject matter of the dispute, namely in the oil pipeline itself as well as the oil produced from PM323, as the production of the latter too, was disrupted by the injurious act of the defendant's vessel. In determining whether the plaintiff has the requisite locus standi therefore, it is necessary to consider whether the plaintiff has the requisite interest not only in the pipeline in question which was ruptured, but also the oil produced or rather lost, and further the deferred production of oil as a consequence of the tortious/negligent act.

[45] If the plaintiff's interest in the foregoing is found to be sufficient to

establish an interest in the property/chattel/goods damaged, namely the oil pipeline and damaged ancillary structures, as well as the actual crude oil produced, namely the oil that was lost and deferred, then and only then can the plaintiff bring this action. If otherwise, ie if the plaintiff's interest is not found to be sufficient to establish an interest in the property, for example, if its interest is purely contractual, then it may not possess the locus standi to bring this action.

[46] The rationale behind the latter is to exclude the plaintiffs who can show no interest at all in the goods. In *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 'some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage'. As such, a time charterer with only a contractual interest in a vessel could not succeed in a negligence claim for damage done to the vessel by a third party.

[47] The law requires that a claimant in an action for negligence ought to have certain possessory interests in the affected chattel or goods. The proprietary interest of the owner of the goods is not itself protected by these torts. An owner of goods who is in possession of the goods may claim against the tortfeasor, but that is because the owner also has the requisite possessory interest. Ownership without possession or a right to it is not sufficient title for claims in the tort of negligence, (see *The Hamburg Star* [1994] 1 Lloyd's Rep 399). A possessory title may be established by proving either de facto possession or the immediate right to possession. De facto possession means effective physical control as evidenced by some outward act, which is a question of fact. Provided it is coupled with the manifest intention of sole and exclusive dominion over the chattel in question, it always constitutes possession in law. Such possessory title is as good as ownership against all the world except for the true owner. Thus a person who has actual, de facto possession or the immediate right to possession of goods is entitled to bring an action in, inter alia, negligence. Because it is possession and not ownership which is protected, it is not necessary to show ownership to establish a right to sue, although of course an owner with possession has such a right. The right however is not a consequence of ownership but of possession, which is a right included in an unrestricted ownership.

[48] In the earlier part of the judgment where I have set out the factual background pertaining to the relationship between the parties, it is evident from a construction of the PSC, JOA and the evidence of Robinson that the plaintiff enjoys the following interests in the subject matter of this incident:

(a) Under the provisions of the PSC, Petronas enjoys legal title to the oil field, the facilities constructed and developed by the contractors, and the oil produced. However in so far as the development facilities are concerned,

it is equally apparent that as all costs for such facilities and equipment are initially borne by the plaintiff, the plaintiff enjoys a beneficial or equitable interest in such facilities, at least until such time as it has recovered fully its development costs. It can therefore be said that the plaintiff enjoys a beneficial or equitable interest with a clear proprietary element in the facilities, as it has solely expended a sum of RM437m including no less than RM72m for the development of the facilities on the East Belumut and Chermingat Oil Fields, which encompasses the ruptured oil pipeline and damaged ancillary structures. It follows that while Petronas enjoys the bare legal title to these assets, the equitable or beneficial ownership of PM323 vests with the plaintiff. To that extent therefore the plaintiff enjoys a direct, proprietary, beneficial interest in the facilities or equitable ownership of the facilities.

(b) ln further accordance with the PSC and the JOA the plaintiff enjoys the right to possession of the oilfield known as PM323 for the purposes of exploration and production of oil. Such a right of possession was acquired in return for the considerable financial input invested by the plaintiff, coupled with a sharing of the oil so exploited or produced from oilfield PM323. By virtue of this right of possession as a contractor, the plaintiff as the active operator or operating partner, acquired exclusive possession to PM323 for the purposes of exploring and producing oil. The plaintiff therefore enjoys rights of possession or possessory rights in relation to both the oil pipeline and ancillary structures as well as the production of oil.

(c) The oil that is so produced is divisible between Petronas and Carigali as well as the plaintiff. As such all three parties therefore have a direct interest in the crude oil produced in PM323 under the provisions of the PSC and JOA. Carigali as the passive non operating partner enjoys the profits that emanate from such production, while bearing 40% of the costs of producing such oil. It follows from this that the plaintiff enjoys a possessory right in relation to PM323, the facilities and equipment built by it under the PSC and JOA, as well as the actual crude oil produced. As the operator under the JOA, the plaintiff enjoys de facto possession of PM323 which encompasses the ruptured pipeline and the oil produced or lost and deferred. Where therefore such crude oil is lost or its production ceases or is deferred as a consequence of a negligent act by a third party, is the plaintiff not entitled to make claim for such loss given the subsistence of a direct interest in the oil produced, not to mention the beneficial or equitable interest with proprietary features enjoyed in respect of the facilities?

(d) ln summary therefore it follows from a consideration of the factual matrix surrounding the relationship between the three parties, Petronas, Carigali and the plaintiff, that the latter enjoys a beneficial ownership coupled with possessory rights in relation to, inter alia, PM323, its facilities and equipment as well as the production of oil.

[49] As the plaintiff enjoys a clear right of possession to the oil field PM323 as well as the facilities developed by it, which includes the oil pipeline which

was ruptured as well as the oil lost, not to mention the deferred production, this in itself accords the plaintiff a right and entitlement to bring this action without Petronas and CARIGALI. The fact that it also enjoys beneficial interest or equitable ownership of the facilities of PM323 which it developed, and which includes the ruptured pipeline as well as the oil so produced and lost, accords it with further basis to bring the action. The position is clear because of the possessory right which is coupled with beneficial ownership.

[50] My conclusion is borne out by a consideration of a recent decision of the Court of Appeal in the United Kingdom in *Shell UK Ltd v Total UK Ltd* [2011] 1 QB 86. In that case, the rather vexed question of whether an equitable owner or beneficial owner of chattel without possessory rights or rights of immediate possession can bring an action for losses sustained in consequence of negligent damage to property, was considered. In essence the status of an equitable title in relation to a negligence claim was considered by the United Kingdom Court of Appeal. In *Shell UK Ltd v Total UK Ltd*, explosions and fires occurred in an oil storage depot in England in 2005 as a result of the negligent overfilling of a fuel storage tank for which Total UK Ltd ('Total') was responsible. Shell UK Ltd ('Shell') stored and transported its fuel in tanks and pipelines at the said depot or facility. The legal title to the tanks and pipelines was held by two non-trading service companies, and Shell, together with other companies, was a beneficiary of this trust. The tanks and pipelines were destroyed in the fires, as was fuel, owned by Shell inside them. In consequence Shell suffered economic losses from its inability to comply with its customers' demands and orders for the supply of fuel, which had to be transported through these tanks and pipelines.

[51] Total compensated Shell for the damage that Shell suffered to its own fuel, but denied liability in negligence for Shell's economic losses resulting from the damage to the tanks and pipelines. At trial at first instance, it was held that Shell could not recover for such loss of profits because Shell, having neither legal title nor a right to immediate possession of the tanks and pipelines had no title on which to base its claim. In support of this conclusion, the learned judge cited *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd; The Aliakmon* [1986] AC 785 and *Candlewood Navigation Corp v Mitsui OSK Lines Ltd* for the proposition that such an interest was necessary to initiate an action. (These two cases are authority for the proposition that a mere contractual right to acquire interest in goods at some future time (as in an agreement to sell) does not confer a title to claim in negligence. However if property in the goods had already passed to the purchaser, as in a completed sale of goods, then legal title having passed, the purchaser was indeed entitled to sue a third party in negligence).

[52] The Court of Appeal in *Shell* then considered whether the decision of the High Court in *Shell UK Ltd v Total UK Ltd* was justified on the authorities

it had considered, and held that it was not. The Court of Appeal concluded that Shell's beneficial ownership was itself sufficient and there was no binding authority to the contrary. The court added as a proviso to this that a plaintiff with only a beneficial interest would nevertheless be required to join the party with the legal title to the action. This was in accordance with Lord Brandon's observation in *The Aliakmon* where His Lordship had observed, obiter, that although a person with a possessory title could sue without joining the owner of goods, this was not so in the case of a plaintiff who was a beneficial owner with no possessory interest. A beneficial owner with no possessory interest was required to join the legal owner either as a co-plaintiff if he was willing or a co-defendant if he is not.

[53] The English Court of Appeal went on to consider the nature of Shell's interest under the arrangements between the trading companies and its other partners. It concluded that Shell as a beneficial owner was not a stranger in relation to the tanks and pipelines but had the right to make use of them. The legal owner was only a bare trustee and Shell could be regarded as, in reality, the 'owner'. Shell's relationship to the property was closer than that of the legal owner, and went beyond a mere contractual dependence on it. Thus it would be 'legalistic' to hold that Shell had no interest to protect. Given these circumstances it was held that Shell could not be regarded as equivalent to a purchaser of goods, as in *Candlewood* or *The Aliakmon*, and the floodgates arguments were of little force. The Court of Appeal also considered that Shell had neither actual possession of the pipelines (as Shell did not control their use) nor a right to immediate possession of them as other companies used them to transfer their fuel as well. The decision in Shell is that a beneficial interest is sufficient to sue in negligence and that it is unnecessary for a beneficiary to establish a concurrent possessory right.

[54] Applying the reasoning in *Shell UK Ltd v Total UK Ltd* to the facts of the present case several matters become immediately apparent:

(a) the tortfeasor in that case, Total UK Ltd, did in fact compensate Shell for damage that Shell had suffered to its own fuel, ie its own property. It denied liability for economic losses arising from the damage to the tanks and pipelines not the tanks and pipelines themselves. In the context of our case it would follow that the tortfeasor would be liable to compensate the plaintiff for the ruptured pipeline and ancillary structures as well as all oil lost while deferred production might arguably be in issue; and

(b) in the English case, Shell was held to have no right to recover loss of profits arising from damage to the tanks and pipelines which delayed supplies to Shell's customers and therefore caused it loss, on the grounds that Shell had no legal title nor a right to possession of the tanks and pipelines on which to base its claim. This is in contradistinction to the

present case where although the plaintiff does not enjoy legal title to the oil pipelines and damaged structures comprising a part of the facility, it does enjoy rights of exclusive possession to the same as well as a direct beneficial interest in the same as it is the plaintiff that expended monies in building and developing the facilities. The plaintiff is moreover responsible for the maintenance of the same. Given the nature of the plaintiff's right or interest in this case which is possessory and beneficial with a direct proprietary interest it follows that the plaintiff does possess the requisite right to make a claim for losses sustained, arguably, inter alia, even deferred production. The current case is distinguishable in that the plaintiff does not merely have a beneficial interest per se, with no possessory rights. However even if the plaintiff here merely had a beneficial or equitable interest with no rights of possession, then on the reasoning of the Shell UK case, it follows that the plaintiff would still be able to bring an action provided it joined the legal owner as co-plaintiff or co-defendant. That is not necessary in the instant case where it is evident that the plaintiff enjoys possessory rights which enable it to initiate the current action.

[55] In summary given the subsistence of a beneficial interest or equitable ownership as borne out by monies expended by the plaintiff in acquiring such interest, coupled with the right of possession as evidenced by the term of the PSC which accords the plaintiff exploratory rights for a term of 29 years, and thereby possessory rights to the oil field, this action is, to my mind, correctly brought by the plaintiff. It is not fatal to the plaintiff's claim that Petronas and/or Carigali are not parties to this action.

[56] I am further fortified in arriving at this conclusion by a consideration of this matter from a different perspective. As submitted by learned counsel for the plaintiff, the plaintiff invested in the design construction and installation of the facilities including the pipeline. The entire costs, as set out above were borne by the plaintiff. The plaintiff is the sole active operator of PM323. As such it is the plaintiff that is accorded exclusive control and management of the operations at PM323. This necessarily includes the control and management of the facilities. That in turn will include the obligation to repair and keep the facilities in good working condition. The plaintiff is the equitable or beneficial owner having paid for the costs of the entire facility with a right to explore and produce oil for a term of 29 years. As such with exclusive possession the plaintiff's position is akin to a bailee of goods. This in itself entitles the plaintiff to bring this action. This position has been established in *The Winkfield* [1902] 1 P 42. In that case the *Winkfield* carried a cargo of postal parcels and mails in the possession of the postmaster. As a result of the collision the parcels and mail

were lost and the postmaster brought the action for damages for the loss. The court held that the possession of the postmaster of the parcels and mail gave him the right of action:

> It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall show presently, a long series of authorities establishes this in actions of tort and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor. Per Collins MR

[57] In the Singapore case of *Sato Kogyo (S) Pte Ltd and another v Socomec SA* [2012] 2 SLR 1057 Judith Prakash J applied the same principle. In *Sato Kogyo*, one SKS, the first plaintiff was appointed by Singtel as main contractor to carry out construction, maintenance and fit out work in premises leased by Singtel. The defendant was the manufacturer of certain electronic items which installed as part of the work. These electronic items supplied by the defendant were alleged to be defective and the cause of a fire at the premises. As a consequence various installations carried out by the first plaintiff, SKS as part of the work sustained damage, more particularly to that part described as the UPS system. SKS brought the action although it was not the owner of the UPS system. A similar objection was raised in that case to the effect that SKS could not do so as it was not the owner and that as such the claim amounted to one for pure economic loss. This is what the court held:

> SKS submitted that its claim was not a claim for pure economic loss. Its claim arose out of physical damage to property of which it was a bailee and therefore it had a legal right to sue in tort for such damage. SKS emphasised that under the main contract with SingTel it was solely responsible for the Works until the Works were completed to the satisfaction of the architect.

[58] The defendant contended that as KS had no legal or possessory interest in the goods that were damaged including the UPS system it had no locus to sue, similarly to the situation here. The defendant cited *The Aliakmon* [1986] AC 785 and *Nacap Ltd v Moffat Plant Ltd* [1986] SLT 326. The learned judge distinguished those cases and stated as follows:

> The facts of the present case are not quite akin to those of *Nacap* much less *The Aliakmon* where the plaintiffs had no possession of any sort. In *Nacap*, the court said that the possession given to the plaintiffs there was a limited possession. This was not the situation here. Clauses … provided that from the commencement date of the

works, SKS would be entitled to 'free and uninterrupted possession of the whole … of the Site' in which the works were to be conducted. That could not be limited possession … whilst SKS might not have had possessory title to the site itself, it was definitely the bailee in possession of all moveable goods within the site until possession was handed back to SingTel.

It cannot be disputed that a substantial proportion of the damage caused by the fires was caused to the goods forming part of the UPS system. SKS was in sole and exclusive possession of these goods for the purpose of carrying out the works. I note that the defendant argued that there was no evidence that the damaged items repaired by SKS were all goods as opposed to premises. However, the fact that some of the loss was not directly related to the damage sustained by the goods would not change SKS's entitlement to sue as bailee of damaged goods. Whether it could also recover economic loss as a consequence of having to undertake the repairs to real property of which it was not (and could not be) a bailee would be a question of remoteness of damage to be decided when the damages come to be quantified. Such question could not affect SKS' title to sue as bailee when the goods bailed had been physically damaged.

I accept the submission made by SKS that as the main contractor and as bailee in possession of the works, until the works were completed and handed over to SingTel, SKS retained possession and had the right to claim against any third party who negligently damaged the property in the works. The law on the right of a bailee to sue in such circumstances is well settled.

[59] In like manner therefore it follows that the plaintiff as the operator having exclusive possession and control of operations and being responsible for repairs and maintenance had the right as bailee to sue in respect of the damaged pipeline, ancillary structures and for other consequential damage.

SUBROGATION

[60] The defendant contends that as insurers have paid out on the claim for the repairs, containment costs etc are not recoverable under subrogation. They query the particulars pertaining to such insurance which have not been disclosed contending, inter alia, that there might be more than one type of insurance policy in place, that it is not known whether monies were paid to the plaintiff, Carigali or Petronas. They query whether the plaintiff is in fact authorised by Petronas and whether there is a possibility of a future claim against the defendant if part of the insurance proceeds have been paid out.

[61] I agree with learned counsel for the plaintiff that where an insurer has paid for the loss and damage under an insurance policy, under the principles of subrogation, it is entitled to the benefit of any recovery from the cause of action relating to the loss or damage. The equitable doctrine of subrogation requires the insured to pursue the recovery. It is a matter between the insurer and insured and in no way encompasses the third party wrongdoer. The insured

invokes his own cause of action against the wrongdoer, albeit in tort, contract or such other suitable cause of action. The insurer himself has no cause of action against the wrongdoer, (see Chang Min Tat FJ in *Teoh Kim Kien & Ors v Lai Sen & Anor* [1980] 2 MLJ 125:

> This case clearly is concerned with the doctrine of subrogation under which an insured must bring an action against the wrongdoer if he is called upon by his insurers to do so and is indemnified against the costs, but it is his own cause of action, not that of his insurer that he sues on; as against the wrongdoer, the insurer has no cause of action of his own; per Lord Diplock in *Hobbs v Marlowe* (1978) AC 16 at p 3.

The defendant's concern with regards to the insurers and lack of particularisation is therefore without basis.

Heads of losses

[62] The defendant further contends that the plaintiff's claim for several heads of losses, are irrecoverable for a variety of reasons. The defendant goes on to set forth detailed reasons why the plaintiff's claims for losses some of which have been particularised, ought to be rejected outright. It appears to this court that this is primarily a matter to be considered if and when issues of liability and limitation of liability have been determined, at the stage of assessment of damages and not at the outset of the claim. Be that as it may I shall go on to consider the issues raised by the defendant in this context.

The first head of loss

[63] With respect to what is termed as the '1st Head of Loss', namely the plaintiff's claim for containment, clean-up of the oil spill, construction and rectification work in the sum of USD11,529,917, the defendant contends that this is an expense incurred by the contractors, ie the plaintiff and Carigali which is recoverable against cost oil. As such it is contended that the plaintiff did not suffer a loss as the expenses incurred were in fact reimbursed to the plaintiff from cost oil which belongs to Petronas. However the plaintiff contends in response that the resultant damage to the pipeline and containment costs caused the cost oil quantum to increase or go up. As a consequence, as the cost of production increases, the plaintiff (and the other parties') profits must necessarily go down, as the costs of repair would, but for the negligent incident have been avoided. If avoided, the costs of repair and containment would have contributed towards profit oil. In short the plaintiff maintains that by virtue of the incident, direct losses were in fact suffered by it. At this juncture it appears to this court that prima facie, losses appear to have ensued as a result of the incident to the plaintiff. The issue of the precise quantum of loss so suffered and issues arising therefore in relation to such

computation, must remain a matter for consideration at the assessment of damages stage and not here, where liability alone is being considered. I am therefore satisfied that the plaintiff appears to have suffered loss directly as a consequence of the incident under this the first head of loss and therefore decline to dismiss the plaintiff's claim entirely at this juncture on this point.

Second head of loss

[64] This head of loss pertains to the loss of oil due to the leak arising from the rupture of the pipeline. The quantum claimed by the plaintiff amounts to USD1,715,198. The defendant contends that at the stage where the loss was incurred, the title to the oil belonged solely to Petronas rather than the plaintiff or Carigali under the provisions of the JSC and JOA. The defendant relies on article 5.4 of the PSC which stipulates that title to profit oil only passes to the plaintiff upon delivery at the point of export. As such the defendant contends that title to the oil which was lost at sea as a result of the incident belonged to Petronas rather than the plaintiff and accordingly it is Petronas that is entitled to claim for such loss and not the plaintiff.

[65] A perusal of cl 5.4 will disclose indeed that title is stated to pass to the contractors upon delivery at the point of export. However 'point of export' is defined as 'the last outlet flange of the loading facililty from which Contractors lift Contractors' Portion of Profit Oil and Cost Oil either at shore terminal or at storage facility or otherwise as agreed between Petronas and Contractors from time to time'. This clause therefore envisages that it is a matter of contract as to when property in the oil passes from Petronas to the contractors. Notwithstanding Robinson's testimony, there is no clear evidence before this court as to when property in the subject oil was contracted to pass to the contractors, whether upon extraction or subsequently at the last outlet flange of the loading facility. Therefore it is not possible to conclude with certainty that the oil that was lost due to the leak belonged to Petronas until the precise arrangement between the parties is ascertained.

[66] Further Robinson's evidence on this point is also pertinent:

> Q: Well Petronas have the exclusive rights and power to explore and obtain the crude oil from PM323. Now, you can be asked to be a sub-contractor or contractor to Petronas to explore and produce the oil?
>
> A: And paid in kind. And we were paid in oil. That's what we do. And we take a risk to get paid in oil.
>
> Q: Yes, you are paid in oil?
>
> A: So we have the beneficial interest as an oil producer. Otherwise we won't be doing it just to help Petronas.

Q: At which stage do you get paid in oil?

A: We get paid in oil, we are entitled to sell our own crude oil but when the oil gas goes to TCOT (terminal), Newfield sells that oil that it owns. And the money that we sell the oil comes directly to us.

Q: Do you own the oil only when it reaches TCOT?

A: No we already own it at the base of the platform which means at the platform we determine how much of the oil we produce and we own the oil at the platform.

[67] From the foregoing therefore the evidence before the court at this stage suggests that ownership of the oil might well vest in the contractors at the platform and not TCOT and accordingly it follows that if that is the case then the title to the oil attributable as the plaintiff's share that was lost at sea might well have passed to, or did pass to the plaintiff as it was lost as a consequence of the rupture. In such event the plaintiff is the rightful party to sue for loss it has directly incurred.

[68] More significantly however the PSC and JOA appear to provide for the plaintiff to undertake the contractual obligation or responsibility for the recovery of losses arising from damage to the facilities. This is borne out, inter alia, by cll 4.3.1, 4.3.4 and 4.3.23 of the JOA. More particularly cl 4.3.4 specifies that the plaintiff is to 'represent the parties before any and all Courts in Malaysia in matters related to the Operations'. This clause appears to my mind, quite conclusively, to provide contractually for the plaintiff to undertake the obligation of representing Petronas and Carigali in any and all courts. That would include the initiation of this action.

[69] The defendant points in turn to cl 4.8 which deals with claims and litigation and maintains that this clause appears to authorise the plaintiff to represent the parties solely to defend or oppose a claim or suit but not to initiate or prosecute a suit on their behalf. Such a restricted and/or rigid construction of the said clause does not appear to this court to be the appropriate construction to adopt. Such a construction would arguably result in the plaintiff being able to defend the claim on behalf of the parties but be precluded from filing a counterclaim in any action brought against the parties. This does not accord with a harmonious or constructive approach to the construction of the contract.

[70] It appears to my mind that on a consideration of cll 4.3 and 4.8, that the plaintiff is indeed tasked with undertaking the responsibility of prosecuting and defending claims on behalf of the parties under the JOA and PSC. The right of each of the parties to be represented is also provided for, but such representation is to be borne by that party. I therefore conclude again that it is

not possible to stipulate conclusively at this juncture that the plaintiff has no right to make claim for the loss of oil arising from the leakage as a consequence of the rupture. On the contrary it appears to this court that the plaintiff is the correct party to bring these proceedings under the provisions of the PSC and JOA. For this reason the defendant's contention of a dismissal of this head of loss is also untenable.

Third head of loss

[71] Similarly the plaintiff makes claim for additional fixed costs incurred of USD3,675,231. The same argument as set out for the first head of loss is repeated here. For the reasons I have cited in relation to the first head of loss I conclude that as this head of loss would necessarily affect the quantum of the cost oil recoverable, the plaintiff's profit would necessarily be reduced. As such its profitability would accordingly also be reduced, entitling it to maintain that it has suffered loss for which it seeks to make claim.

Fourth head of loss

[72] This is a claim for losses allegedly suffered as a consequence of deferred production of oil for 29 days at 25,000 barrels per day in the sum of USD22,329,721. This the defendant claims is in essence a claim for a loss of profit which was not actually incurred. The defendant further contends that this head of loss is speculative and being, at best, economic loss, is not recoverable or recoverable in very limited circumstances. In support of this contention the defendant points to the cases of, inter alia, *SIME UEP Properties Bhd v Woon Nyoke Lin* [2002] 3 CLJ 719 where the court having considered the basis of the claim and the relevant evidence concluded that the respondent had failed to establish the losses as a result of the breach. And in *Bank Muamalat Malaysia Berhad v Sophisticated Pipe Industry Production Sdn Bhd* [2011] 9 CLJ 748 the court held that speculation, conjecture, or projection was insufficient to prove loss of profit. However at this juncture this court has not had an opportunity to examine or consider the evidence or the claim in any detail. Liability and the various issues arising therefrom is the primary focus of this stage of the proceedings. The assessment of damages will follow if liability is established and tonnage limitation and limitation of liability fails. At that juncture the court will hear and be appraised of the detailed basis of the claim and can then conclude from the evidence before it whether the plaintiff is entitled to the losses claimed including this claim for deferred production. It is premature for the court to conclusively rule that such a loss is either wholly claimable or not. This must be a matter for full consideration at the assessment stage.

[73] A further point in relation to the contention that the deferred

production comprises economic loss which is irrecoverable must be made. Here the plaintiff makes claim for losses it suffered directly as a consequence of delays occasioned by the need to stop production pending repairs due to a rupture caused by (what is assumed at this stage to be) the 'negligent' act of the defendant. The plaintiff as the operator, having possession and control of the oil exploration activities suffered such a loss. This is to be distinguished from a loss arising as a consequence of a contractual right as was the case in *The Aliakmon* above. Here the plaintiff's claim is not premised on a contractual right but instead on a direct, equitable or beneficial and possessory right. The losses arise as a consequence of the breach of these rights, not as a consequence of an agreement to grant such rights to the plaintiff. Accordingly it seems clear to this court that the plaintiff has suffered directly some pecuniary losses arising from the rupture. Whether this claim succeeds must be an issue to be tried at the assessment stage. What is clear however is that it is not a remote claim premised on contractual rights that can be categorised as irrecoverable economic loss at this stage. Accordingly I am unable to agree with learned counsel for the defendant that the plaintiff's claim ought to be dismissed on the basis of the irrecoverability of the heads of losses as submitted. These matters do not disentitle the plaintiff to bring this action against the tortfeasor. The issue of precisely how much may actually be recovered and issues of remoteness and categorisation, if any, of certain items as amounting to economic loss and the recoverability thereof are matters properly considered at the assessment stage. At this stage suffice to say that the plaintiff's cause of action and right to bring this action is well founded and entirely correct.

Issue (b): Was the damage to the pipeline caused by the negligence of the defendants?

[74] As stated at the outset the facts relating to the incident are not in dispute. It is not in dispute that the master and crew of the TPU-1 dropped anchor on the night of 26 June 2010 and commenced heaving operations the morning after, in the course of which the anchor snagged a pipeline. It is also not in dispute that when the master and crew realised that they could not release the anchor, they cut the anchor chain and cast off the anchor along with the length of chain that had been cut. Log books were falsified and the lost anchor was replaced with the spare anchor in an effort to avoid detection. As a consequence of the incident, namely the dropping of the anchor on 26 June 2010 coupled with the unsuccessful attempts to heave it out on the morning of 27 June 2010, the oil pipe ruptured and considerable damage was sustained.

[75] The issue that arises for consideration is whether such damage resulting from the rupture can be said to have been caused by a negligent act or omission on the part of the defendant. It is evident from the agreed facts set out at the outset that but for the dropping of anchor where the master chose to do so, the incident would not have arisen, as the anchor would not have been positioned

on or close to an oil pipeline such that upon retrieval it could snag and rupture the pipeline. The facts appear to speak for themselves. Such an incident could not have occurred, in the ordinary course of good seamanship and this amounts to prima facie evidence of negligence on the part of the master and/or the defendant.

[76] In the case of *Sabah Shell Petroleum Co Ltd Anor v The Owners of and/or any other persons interested in the ship or vessel the 'Borcos Takdir'* [2012] 5 MLJ 515 (Admiralty Action in Rem No D3–27–18 of 2006) ('the Borcos Takdir'), this court had occasion to consider a similar situation where an anchor had snagged and ruptured an oil pipeline in an oilfield. On the issue of liability the court had to consider whether the plaintiffs in that action were entitled to rely on the doctrine of *res ipsa loquitur* such that the onus shifts to the defendant to disprove liability for the incident. This evidential rule allows a court to infer carelessness or negligence on the part of a defendant where the claimant can show that the nature of the accident suggests both negligence and the defendant's responsibility.

[77] In the case of *Scott v London and St Katherine Docks Co* (1865) 3 H&C 596, the three prong test was set out which determines when this evidential rule may be applied. The three conditions required to establish *res ipsa loquitur* include:

(a) That the occurrence is such that it would not have happened without negligence. Here an anchor was dropped near to or on to a stationary oil pipe which was snagged when it was attempted to retrieve the anchor. The fact that the anchor could not be retrieved and was left 'snagged', as it were, on the oil pipeline together with a rupture, clearly evidences the fact that negligence has been established. This is because an anchor that is dropped in an oil field is not expected to damage or rupture pipelines, this requirement is therefore satisfied.

(b) It is necessary that the thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right of control. The starboard anchor and the dropping as well as retrieval of such anchor was under the sole control and management of the master over whom the defendant enjoys a right of control. To this extent it is clear that the anchor was under the control of the defendant and the second requirement is accordingly also met.

(c) The third negative condition that needs to be met is that there must be no evidence as to how or why the occurrence took place. This begs the question of how or why the anchor was dropped at or near an oil pipe line giving rise to the snagging and subsequent rupture. The defendant contends that the reason or cause of the accident is clear, namely that the chart correction for this region was incorrectly carried out by DW1. In

fact the defendant submits that the causative negligent act occurred approximately 4–5 months prior to the date of the incident when DW1 made a mistake in correcting the British Admiralty Chart 3543 pursuant to British Admiralty Notice to Mariners 0476/2010 issued in week 04 of 2010.

[78] Apart from this and the agreed sequence of events set out at the outset, there is no evidence before this court of precisely how or why the master chose to drop anchor where he did, whether he did in fact plot his position prior to dropping anchor or of any steps taken or strategy adopted in determining to drop the anchor where he did. In other words this court is unable to determine with certainty that the cause of the rupture occasioned by dropping the anchor on the oil pipe arose as a direct consequence of the failure to correct the BA Chart above.

[79] This is primarily because there is no evidence from the master or other crew members as to the steps taken immediately prior to dropping anchor. The fact that the log book was falsified precludes any reliance on this document. Ultimately there is therefore no direct or primary account of the events immediately preceding the dropping of the anchor. While therefore the failure to correct the BA Chart appears to be one 'cause' for the eventual rupture of the pipeline, it is not possible, in the absence of direct evidence from the master or another crew member to ascertain or establish precisely what the actual or dominant cause of the incident was. As such the third negative condition is also met and this is therefore a suitable case for the application of *res ipsa loquitur*.

[80] By invoking this evidential presumption, it follows that the facts by themselves giving rise to the rupture of the oil pipe justify an inference of negligence on the part of the defendant, without the plaintiff having to prove the same. In the instant case it means that the plaintiff having set out the facts summarised at the outset, has succeeded in establishing that the incident arose as a consequence of the defendant's negligence. It then becomes incumbent upon the defendant to rebut this inference of negligence, providing a plausible reason or explanation. While the burden of proof does not shift to the defendant, the onus does. If the defendant succeeds in rebutting the inference of negligence by showing that the incident arose by reason of the omissions or fault of the plaintiff, or by providing some other plausible explanation, then this will redress the balance of probability, leaving the burden on the plaintiff to establish its case by positive evidence. It is therefore incumbent upon the defendant to provide some positive evidence to rebut the inference of negligence against it.

[81] In the current case the defendant has not produced any evidence to rebut the evidential presumption of negligence that arises from a consideration

of the factual matrix surrounding the case. Such evidence as has been adduced goes towards explaining the possible cause of the incident, namely the failure to correct the BA Admiralty Chart, by DW1. However such evidence fails to rebut the presumption of negligence that arises. As such the charge of negligence is not rebutted. It follows from this that the damage sustained by the plaintiff, namely the damage to the pipeline and ancillary structures as well as the oil and oil revenue that was adversely affected arose as a consequence of the incident which was directly caused by the defendant's negligence.

[82] Even if I am wrong in concluding that *res ipsa loquitur* applies on the facts of this case and the burden of proof remains with the plaintiff to establish negligence on the part of the defendant, it follows prima facie that the plaintiff has to establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of such a duty of care and finally loss or damage arising or suffered as a consequence of such a breach.

[83] Such negligence is established, it appears to my mind, by the following evidence:

(a) the first stage of the test to establish negligence is the existence of a duty of care. While there is no direct contractual nexus between the plaintiff, Newfield here and the defendant's vessel, the Tanjung Puteri 1, it follows that the defendant owed a duty of care to Newfield to ensure that its vessel, the Tanjung Puteri 1, traversed the oilfield, PM323 with due care and without causing damage to the plaintiff's property while it transported goods and personnel in that area. Such care included the duty not to rupture stationary sub-sea oil pipes comprising a part of the plaintiff's operations structures in the production of oil and gas. Such a duty arises between the plaintiff and the defendant notwithstanding that the Tanjung Puteri 1 was contracted or under charter or hire by Carigali under a separate contract for the provision of transport and services. It appears to this court that there was a sufficient degree of proximity arising between the plaintiff and the defendant whereby it was foreseeable that the defendant's vessels in traversing the various oil fields including the plaintiff's, was bound to take sufficient care not to cause damage to the plaintiff's sub-sea oil pipes which are routinely found in all oilfields. I am therefore satisfied that given the nature of the defendant's vessels duties, it owed a duty of care to the plaintiff to avoid or preclude any possibility of damage;

(b) on 27 June 2010 when attempting unsuccessfully to retrieve the starboard anchor which had been dropped the previous night, it snagged and ruptured the stationary submerged oil pipeline. As the vessel was entirely within the care and control of the master, prima facie and in the absence of any explanation whatsoever, the snagging and rupture of the

oil pipe amounts to a breach of the duty of care owed by the defendant or its vessel to the plaintiff. This therefore establishes the second stage of the test, namely that a breach of the duty of care; and

(c) as a consequence of the anchor snagging on the oil pipeline and the subsequent rupture, oil leaked and spilled and considerable damage was occasioned to the oil pipeline as well as other ancillary structures not to mention losses and damage arising from the oil that was lost and production reduced or deferred. It is therefore equally clear that as a consequence of the breach of the defendant's or its vessel's duty of care to the plaintiff, damage was sustained thereby completing the third stage of the test for negligence.

[84] Again there has been no evidence to refute the chronology of events above by the defendant. It would therefore appear that the plaintiff has successfully established that the rupture of the oil pipe and ancillary structures as well as other damage sustained arose directly as a consequence of the defendant's negligence.

Issue (c): Is the defendant entitled to the benefit of the contractual limitation contained in the Contract No CHO/C2/2007/DDR/388 dated 20 August 2008 between the defendant and Carigali?

[85] The defendant contends that the claim brought by the plaintiff is subject to a contractual limit as provided in the contract between Tanjung Offshore Services Sdn Bhd and Carigali for the provision of the Tanjung Puteri 1 dated 29 July 2008. The defendant contends that the contract is entered into by Tanjung Offshore Services Sdn Bhd for and on behalf of Tanjung Kapal Services Sdn Bhd as owners of the Tanjung Puteri 1. This is premised on the evidence of Ahmad bin Khalid, DW6 ('DW6') who testified that Tanjung Offshore Services Sdn Bhd entered into the contract with Carigali instead of Tanjung Kapal Services Sdn Bhd because Tanjung Offshore Services Sdn Bhd holds the Petronas license and therefore only it can enter into a contract with Petronas. Tanjung Kapal Services Sdn Bhd has no such license. As such the contract it is contended binds Tanjung Kapal Services Sdn Bhd as the owner of the vessel Tanjung Puteri 1 and Carigali. Carigali is the active operator who instructs the defendant's vessel on the transportation of goods and other duties under the contract. The contract, designated as Contract No CHO/C2/2007/DDR is for the provision of marine services by the defendants to Carigali on the terms set out.

[86] In the current suit, the evidence, as may be gleaned from the JOA, discloses that Carigali is the passive partner, or non-operating partner for the exploration and production of oil in PM323.

[87] Under the contract referred to by the defendant, namely the contract between Tanjung Offshore Services Sdn Bhd and Carigali, article 11 is cited as being relevant. It provides, inter alia, as follows:

> Article 11 Liabilities and Indemnities
>
> 11.3 Third Party
>
> CONTRACTOR shall, up to the amount of Ringgit Malaysia Six Million (RM6,000) for any one occurrence, be responsible for and shall protect, defend, indemnify and hold harmless CARIGALI from and against any and all claims, liabilities costs, damages and expenses of every kind and nature, with respect to injury, illness or death of, or damage to or loss of property of any third party, howsoever caused and arising during and/or as a result of the performance of this CONTRACT. However CONTRACTOR shall not be held responsible for nor be liable to indemnify and hold CARIGALI harmless for injury, death or property damage caused by the sole negligence or wilful act of CARIGALI. Notwithstanding the above, the respective liabilities to any third party arising out of claims, liabilities, costs, damages and expense in excess of Ringgit Malaysia Six Million (RM6,000,000) for any one occurrence shall be determined according by law.
>
> 11.4 Carigali Equipment and Property
>
> CONTRACTOR shall be liable for and shall indemnify CARIGALI, PETRONAS, CO-venturer or their Affiliates against any damage to or destruction or loss of property owned by CARIGALI, PETRONAS, Co-venturer or their Affiliates arsing during, and/or as a result of the performance of this CONTRACT, without regard to whether any act or omission of Cangali contributed to the loss. CONTRACTOR'S indemnity hereunder shall be Ringgit Malaysia Six Million (RM6,000,000) for any one occurrence.

[88] The defendant relies on article 11 of the contract above which sets out specific limitation provisions for loss or damage due, inter alia, to property in 11.4. In essence the defendant contends that the word 'co-venturer' in that article refers to the plaintiff. The term 'co-venturer' is defined in the contract as 'any parties having a legal interest in the operation of Carigali to which the Services or part thereof relates including but not limited to ExxonMobil Exploration and Production Malaysia Inc, and Sarawak Shell Berhad'. By virtue of that interpretation of the word 'co-venturer' the defendant submits that the effect of this contract, more particularly the limitation clause, become binding on the plaintiff.

[89] The defendant further argues that as the plaintiff claims to have a beneficial or possessory interest to bring this claim, then the plaintiff must surely fall within the definition of a co-venturer being any party having a legal interest in the operation of Carigali. It also points to the fact that there is no restriction in the scope of services to be provided by the Tanjung Puteri 1 under the contract. On this basis the defendant submits that the vessel could have

A been operated in any field in which Carigali had instructed it to provide the requisite services, including PM323. The defendant finally maintains that as the vessel traverses through different oil fields operated by different operators in the course of performing its duties under the contract, it follows that the terms of the contract are applicable even when it passes through a field operated by an B active operator other than Carigali.

[90] The rationale the defendant puts forward is that if damage is caused by the vessel as it passes through a field operated by a different operator, the vessel C would still be performing a service within the terms of the contract and Carigali would still have an interest in that oilfield, although not as operator. Accordingly it is submitted by the defendant in effect that the contract of 20 August 2008 between Carigali and the TOS on behalf of the defendant for the provision of services by the Tanjung Puteri 1 is all encompassing, and binds D all parties who have an interest in any of the oil fields. This it is submitted, follows from the fact that Carigali is always involved or enjoys an interest in all of the oil fields in Malaysia, either as an active operator or a passive non-operating partner. The rationale for so concluding is the use of the word 'co-venturer' in article 11.4 above.

E

[91] The plaintiff meets this contention by submitting in reply that:

(a) there is a complete lack of privity between the plaintiff and the defendants as far as the contract of 20 August 2008 is concerned and F therefore cannot possibly bind the plaintiff; and

(b) the contract is not applicable on the facts of this case.

[92] The plaintiff points out that neither the plaintiff nor the defendant are G parties to the contract sought to be relied upon by the defendant. The contracting parties there are Tanjung Offshore Services Sdn Bhd and Carigali. Even if TOS is an agent for the defendant, privity is still lacking because the plaintiff is not party to the agreement. Accordingly the terms of the contract cannot bind a third party that is not privy to the contract, (see *Kepong* H *Prospecting Ltd v Schmidt* [1968] 1 MLJ 170 per Lord Wilberforce). Neither does this case fall within the narrow category of exceptions to the rule on privity. This is not a case where the contract was made with an undisclosed principal, namely the plaintiff. In other words, Carigali did not enter into the contract with the defendant as the plaintiff's agent, such that the plaintiff is I entitled to enforce the contract as against the defendant in its capacity as undisclosed principal. This is further expressly set out in cl 3.1.1 of the JOA where it is stated that it is not the intention of the JOA to authorise any party to act as an agent, servant or employee for any other party for any purpose.

Neither has privity been dispensed with by statute.

[93] In so far as the facts of this particular case are concerned, the plaintiff points to the fact that it is not in dispute that the contract of 20 August 2008 was entered into by the defendants with Carigali to provide marine services to Carigali for its operations, not the plaintiff. The plaintiff has in fact produced evidence to show that it had entered into a charterparty contract with one Cakara Maritime Sdn Bhd for the provision of a utility vessel for the East Belumut-A and Chermingat-A operations on 22 July 2008.

[94] The evidence of Robinson, PW1, on behalf of the plaintiff is relevant in this context. He testified that for every block that Petronas grants to the oil companies to enable the carrying out of exploration and production activities, Carigali is involved as a partner. Carigali will be either the operator or a passive operating partner in each and every block. Where Carigali is the active operator, it enters into contracts with service providers for the provision of services to support its operations. Where Carigali is the passive or non active partner, the other active operator, such as the plaintiff in the instant case, enters into contracts with service providers. This explains why Carigali entered into a contract with TOS on behalf of the defendant. This was because it was in relation to oilfields or blocks where it is the operator. Robinson therefore clarified that for block PM323, as Carigali is not the active operating partner, the contract of 20 August 2008 is not applicable to this block. He stated as follows with regards to the contract of 20 August 2008:

> A: It is a contract for the provision of marine services to support the exploration and production activies. This is a contract entered into by Carigali for the provision of marine services for all the areas in which Carigali is the active operating partner. The contract certainly does not apply to the locations where Carigali is the passive non operating partner such as PM323. As such, the contract does not extend to PM323 but only to those areas where Carigali is the active operating partner and it applies also to Carigali's passive non operative partners in these areas.

[95] Based on this factual matrix therefore the plaintiff further submits that the contract of 20 August 2008 between TOS and Carigali is not binding on it. In any event it is clear from Robinson's evidence that the plaintiff was not even aware of the existence of the 20 August 2008 contract. To then conclude that its terms are binding on the plaintiff is implausible.

[96] Taking the defendant's contention further it follows that if indeed the plaintiff is bound by a contract to which it is not privy, then all oil companies would be automatically bound by the contract between the defendant and Carigali as the latter is a joint operating partner, albeit active or passive in every oilfield or block throughout Malaysia. This would give rise to a result that is illogical, apart from tearing asunder the principle of privity.

[97] Having considered the competing arguments it appears clear to this

court that the contract of 20 August 2008 cannot be read so widely and broadly as to warrant the interpretation that the term 'co-adventurer' there can extend to a non party to that contract, such as the plaintiff. Clause 11.4 of the contract must be read sensibly and harmoniously so as to render the contract enforceable and tenable. The term 'co-adventurer' in that clause clearly refers to the passive operating partner or partners in any other capacity in the joint operation between Carigali and its partner/s. It may well be applicable to all oilfields where Carigali is the operator and other third parties or oil companies are the passive non operating partners. However it is inapplicable in the instant case where Newfield, the plaintiff, is the active operator and Carigali is the passive non operating partner under the JOA.

[98] It seems equally clear from an application of the doctrine of privity that the contract of 20 August 2008 has simply no binding effect on the plaintiff because as stated earlier this would give rise to an illogical result. Accordingly it would, to my mind, be a perverse interpretation of cl 11.4 to read it such that the defendant is bound to indemnify the plaintiff up to maximum sum of RM6m for damage to equipment and property when the entire contract has no application to the plaintiff in the context of PM323, where it is the active operator. For this reason I conclude that the defendant is not entitled to rely on the contractual limitation set out in cl 11.4 of the contract between TOS on behalf of the defendant and Carigali.

Issue (d): Is the defendant entitled to rely on the statutory limitation under s 360 of the Merchant Shipping Ordinance 1952?

[99] The defendant relies on s 360 of the Merchant Shipping Ordinance 1952 to contend that it is entitled to a statutory limitation. The section provides as follows:

> The owner of a Malaysian or foreign ship shall not, where all or any of the following occurrences take place without his actual fault or privity, namely:-
>
> (a) …
>
> (d)Where any loss or damage is caused to any property, other than any property mentioned in paragraph (b), or any rights are infringed through the act of any person, whether on board the ship or not, in the navigation or management of the ship, or in the loading, carnage or discharge of her cargo, or in the embarkation, carriage or disembarkation of her passengers, or through any other act of any person on board the ship, be liable to damages beyond the following amounts:
>
> (bb) in respect of such loss, damage or infringement as is mentioned in paragraph (b) or (d), whether there is in addition loss of life or personal injury or not, an aggregate amount not exceeding an amount equivalent to one thousand gold francs for each ton of the ship's tonnage.

[100] In the recent decision of this court in 'The Borcos Takdir' (referred to earlier) I had occasion to consider in considerable detail the law pertaining to tonnage limitation. I adopt the legal reasoning I have set out in that case here. In order to enjoy the benefit of tonnage limitation granted under the provisions above, a shipowner, namely the defendant, needs to establish that the incident occurred without the shipowner's 'actual fault or privity'. The burden lies on the defendant to establish that the incident occurred without its actual fault or privity, (see *Antara Koh Pte Ltd v Eng Tou Offshore Pte Ltd* [2005] 4 SLR 521; and *The Sunrise Crane* [2004] 4 SLR 715). Actual fault or privity refers to some form of fault or blameworthy conduct which was personal to the owners of the ship or to which they consented or of which they had knowledge (see *Admiralty Law and Practice*, (2nd Ed), Toh Kian Sing, SC at p 4540). Such fault or privity has to be contrasted with the constructive fault or privity of the shipowner's servants or agents for which he is not precluded from making claim for limitation, notwithstanding that he is vicariously responsible for the acts of his agents and servants. In *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association, The Eurysthenes* [1976] 2 Lloyd's Rep 171 Lord Denning MR set out a historical survey of the origin of the word 'privity' and concluded that it referred to both actual and constructive (turning blind eye) knowledge. He stated, inter alia:

> … The knowledge must also be the knowledge of the shipowner personally, or his alter ego, or in the case of a company, its head men or whoever may be considered as the alter ego. It may be inferred from evidence that a reasonably prudent owner in his place would have known the facts and have realised that the ship was not reasonably fit to be sent to sea. But, if the shipowner satisfies the court that he did not know the facts or did not realise that they rendered the ship unseaworthy, then he ought not to be held privy to it even though he was negligent in not knowing.

[101] While the foregoing case speaks of 'unseaworthiness' of a vessel in relation to its physical fitness to encounter the ordinary perils of the sea, the extension of this notion which is relevant in the present context of our case is the safety management and operation of a vessel. A ship which is not safely managed or operated can be as unsafe and as dangerous as one which is not physically fit. If there are insufficient procedures or unsafe procedures adopted in the course of management or navigation of a vessel, that in itself may be sufficient to deprive the shipowner of the benefit of limitation. As stated at the outset, to obtain the benefit of tonnage limitation under s 360, the onus lies on the defendant to establish that the incident here took place without any actual fault or knowledge on the part of the defendant, namely without the actual fault or knowledge of those persons who can reasonably be considered as representing the directing mind and will of the defendant and who control what it does, (see *Bolton (HL) (Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 per Denning LJ).

[102] It is clear from the foregoing that if the incident occurred as a consequence of the negligent act or omission of an employee of the defendant but without any actual knowledge or privity which can be attributed to the defendant, then limitation of liability is available to the defendant. If however the negligent act or incident giving rise to the damage arose as a consequence of matters which were within the knowledge or attributable to a failure on the part of the defendant's senior management to implement a safe system of operation or navigation or management of the vessel, then limitation is broken and the defendant will not be entitled to the benefit of the same.

[103] It therefore follows that in order to determine whether the defendant is entitled to the benefit of tonnage limitation, the issue of causation in the present factual matrix first needs to be considered, after which the issue of whether or not the ship owners had actual knowledge or were privy to the cause of the incident needs to be considered. This is because it is not possible to determine the issue of actual fault and privity without knowing in the first place what caused the incident giving rise to the damage. In other words a two tier test or analysis has to be undertaken by considering the following questions:

(a) within the factual matrix of the present case, what was the proximate or dominant cause of the incident giving rise to the damage, ie what was the proximate or dominant cause of the rupture of the oil pipeline giving rise to the damage? and

(b) can the defendant — ship owner, on the particular facts of this case, be said to be privy to, or have actual knowledge of the events or omissions giving rise to the cause of the incident? Put another way, can it be said that the negligent act or omission of navigation and operation is attributable to the defendant ship owner because the defendant failed to establish or implement a sufficiently secure and efficient system of navigation, operation and management.

[104] The first question, by focussing on the actual cause of the incident giving rise to the damage, narrows the scope of discussion to the particular facts of each case. It is only with this clear factual basis for the cause of the incident that an assessment can be made of whether the ship owner has in fact implemented safe operational practices and systems which in the ordinary course of events would have precluded or reduced the opportunity for the incident to occur. If the ship owner can be said to have done so, or put another way, if it is clear that the error is entirely attributable to the act or omission of an employee or agent who is not the directing mind and will of the defendant, then the ship owner is entitled to the benefit of tonnage limitation. If however this is not the case, and it can be said that the ship owner failed to implement

sufficiently safe practices and procedures or audits to ensure the safe management and operation of the vessel, then the defendant is not entitled to the benefit of tonnage limitation.

[105] I turn now to answer the two questions set out above in the two tier test that has been set out:

(a) with respect to the dominant or proximate cause of the incident, it is necessary to consider the chronology of events giving rise to the incident in order to ascertain causation. In the course of their submissions, the defendant has set out the following factual and agreed circumstances:

(i) on the evening of 26 June 2010 and acting on the instructions of the master, the anchor of the 'Tanjung Puteri 1' was dropped approximately 1.5–2 nautical miles east of the Tinggi A platform;

(ii) on the morning of 27 June 2010 the crew of the 'Tanjung Puteri 1' attempted to heave the vessel's anchor and caused damage to a 10 inch underwater pipeline connected to the Tinggi A platform;

(iii) the crew of the 'Tanjung Puteri 1' thereafter cut the anchor chain abandoning the anchor and replaced it with the spare anchor carried on board; and

(iv) the crew of the 'Tanjung Puteri 1' failed to report the incident to the defendants and to record the relevant events in the deck log book.

[106] Further in their defence the defendants concede that the master gave orders to drop anchor overnight on 26 June 2010 while awaiting further operations at the platform the following morning. On the morning of 27 June 2010, in preparation to steam to the Tinggi-A platform the master gave orders to heave the said anchor. However the crew were unable to do so. After several attempts were made to heave anchor the master gave orders to cut the anchor chain and the said anchor was abandoned. In attempting to heave the anchor, damage to the pipeline was caused. The defendant further expressly pleaded that the crew of the Tanjung Puteri 1 failed to report that the anchor had been cut and abandoned; they also failed to report the replacement of the abandoned anchor with the spare anchor and failed to record the events in the deck log book.

[107] The defendant then sought to explain the cause of the incident as arising from a negligent mistake made by the then second officer in correcting and updating British Admiralty Chart 3543. While maintaining that the vessel had at all material times carried on board proper and up to date nautical or navigational charts, the said second officer, Sharizal bin Shahbudin, DW1 had made a chart correction mistake whereby he had failed to make the requisite correction pursuant to British Admiralty notice to Mariners 0476/2010 which

marked the underwater pipeline in BA Chart 3543 at the location where the anchor was dropped on 26 June 2010. The defendant contends that but for this single act of negligence on the part of DW1, the previous second officer, the vessel would not have anchored where it did. In short the defendant attributes the proximate cause of the incident as arising solely or wholly due to the chart correction mistake made by DW1. The defendant further contends that as this was a negligent error or mistake on the part of an employee, this mistake or error per se is not attributable to the defendant shipowner who was not actually privy to, or had knowledge of such a negligent error, namely failing to update or effect the correction indicating the existence of an oil pipeline on BA Chart 3543.

[108] In the case of *Grand Champion Tankers Ltd v Norpipe a/s (The Marion)* [1984] 2 WLR 942 the House of Lords in the United Kingdom had occasion to consider this issue of actual fault and privity on somewhat similar facts. This case concerned the failure on the part of the owners to provide the vessel with updated and correct charts. As a result the vessel dropped anchor in a location where a proper updated chart would have indicated the presence of a pipeline. The anchor dragged and damaged a subsea pipeline. It was held in that case that there was a lack of supervision and safety management on the part of the ship owners. Judith Prakash J in relying on this case to illustrate a lack of proper supervision and safe management stated as follows in *The Sunrise Crane* [2004] 4 SLR 715:

> An owner may be in actual fault because he has not taken some measures to ensure that his servants perform the duties delegated to them or he does not define sufficiently what is to be done by them: see *James Patrick Company Limited v The Union Steamship Company of New Zealand Limited* (1938) 60 CLR 650 at p 672. An illustration is *The Marion* [1984] AC 563. In that case the ship owner allowed the Master to navigate with an obsolete chart on which the position of an oil pipeline was not marked. The high standard of care on the ship owner to ensure adequate and up to date charts was not met. The law lords held that the mere delegation of that function to the Master did not absolve the ship owner of being personally at fault.

[109] On the facts of the present case as stated above the defendant seeks to lay the blame for the incident entirely on the act and/or omission of the then second officer serving on the Tanjung Puteri 1, DW1, namely Sharizal bin Shahbuddin. The defendant therefore submits that in order to determine this issue of actual fault and privity the court need only consider whether the defendants acted diligently in employing and training and supervising Sharizal and in providing proper navigation charts and updates. They also submit that the court should consider whether the defendant acted diligently in employing training and supervising the crew that served on board the Tanjung Puteri 1 at the time of the incident.

[110] Given the two tier test I have postulated above I am unable to agree with learned counsel for the defendant that: A

(a) the cause of the accident is entirely attributable to the negligent omission or act on the part of DW1, the second officer at the material time; and

(b) therefore that the scope of the court's review or assessment is confined to the issue of training and supervision of DW1 and the provision of charts. B

[111] It appears to me that in order to ascertain the proximate or dominant cause of the rupture of the pipeline caused by the dropping of the anchor at that point, it is necessary to have before this court evidence pertaining to how or why the master chose to drop anchor there and the steps he took prior to doing so. However neither the master nor any other crew member was called to testify as to the contemporaneous events immediately preceding the decision taken to drop anchor on 26 June 2010 and subsequently on the morning of 27 June 2010 when attempts were made to heave the anchor resulting in the rupture and subsequent abandonment of the anchor. C D

[112] There is simply a lacuna or vacuum in relation to the precise evidence on this point. In the absence of such evidence it is not possible for this court to postulate or ascertain whether the master and/or his crew took proper steps or followed accepted protocol to plot their position and then make a decision to drop anchor. The court is simply asked to assume that this was done when as a matter of fact there is no evidence before the court to prove what happened on either 26 June 2010 or 27 June 2010. The defendant by conceding the bare events of those two days, without providing any evidence of probative value, seeks to then lay blame on DW1. E F

[113] While DW1 can be said to have caused or contributed to the incident it cannot be concluded in the face of the lack of evidence produced by the defendant, that the rupture of the oil pipe is entirely due to the act or omission of DW1. While that may well produce a convenient result for the defendant, this does not reflect what actually happened on that day, as a consequence of which it is not possible to conclude what the actual or proximate cause of the incident was. This may well have been possible if the master or a member of the crew who was actively involved in the events of the day had testified. As matters stand from the evidence before the court some of which it is admitted is falsified after the event, the court is unable to ascertain the true purpose behind anchoring and dropping anchor where the vessel did. Given the inability to explain these significant evidential matters it is difficult for the defendant to discharge its burden of establishing that the damage was not due to the defendant's actual fault or privity. G H I

[114] I am also unable to accept that the court's scrutiny of this issue is

limited to the three questions put forward by the defendant. On the contrary the evidence led by the defendant in relation to tonnage limitation was extensive.

[115] Apart from Sharizal bin Shahbudin, the second officer, DW1, DW2, one Abdul Razak bin Alias who held the position of general manager in Tanjung Kapal Services SdnBhd, DW2, and Suhardi bin Alimin, DW3 the marine superintendant testified. The defendant also called an expert on this issue as did the plaintiff. A consideration of their evidence is necessary to ascertain whether or not the defendant has discharged the burden of showing that the incident occurred without the actual fault and privity of the ship owner.

THE ADMIRALTY CHARTS AND SUPERVISION OF CORRECTION OF SUCH CHARTS

[116] DW1, the second officer at the material time who was properly certified was in charge of chart corrections. He agreed readily that the requirement to equip the vessel with proper and updated charts was essential for vessels operating in oil fields so as to warn mariners to avoid sub-sea structures.

> Q: En Shahrizal, we have touched on this very quickly but can I just ask you again. Do you agree with me that when you are navigating in the oil field, the pipeline corridor, it is very important to have corrected and updated the charts, at all times?
>
> A: Yes
>
> Q: And you would also not agree with me that especially when you are doing anchoring then a proper updated chart and corrected chart would be critically important. Would you agree with me?
>
> A: Yes

[117] It cannot therefore be disputed that the ship owner has a responsibility to ensure that the vessel is equipped with proper and updated charts (see *The Marion*). I agree with learned counsel for the plaintiff that this includes the responsibility of ensuring that there is a proper system of chart maintenance and correction. It falls to be considered whether the defendant did in fact have a proper system of maintenance and chart correction in place at the material time.

[118] In the course of cross-examination DW1 testified as follows in relation to chart correction:

> Q: So until the time you left, you were not familiar with the ISM Code. Would I be correct to say that?

A: Yes sir

Q: Now in this briefing was there any discussion or briefing on proper chart maintenance, chart correction?

A: No sir

Q: So when you were employed by Tanjung Kapal Services as a 2nd officer, you were just left on your own to do the chart maintenance work and no one briefed you or trained you on that?

A: Yes sir

Q: And even the master did not train you on chart maintenance, chart updating, chart correction. Is that correct?

A: Yes sir.

[119] DW3 the marine superintendent confirmed that the defendant had no system in place to ensure proper and updated chart maintenance and correction:

Q: Could I ask you to turn to page 28 of this Bundle. It says at MP 133A, Section 12 'Chart Correction Log. This publication may be purchased from any appointed Admiralty Chart etc.' At No. 2 sorry not No. 2, if we can continue reading you just go through with me. 'It is recommended that when the Admiralty NTM are received you should identify those charts which are affected and record the relevant NM number against the chart number in MP133A. You can correct your charts later in ink and cross the appropriate number through in pencil against MPP133A as you completely update. So this is just the procedure that I have put it to you just now. You record the correction number first and after you have done the correction you strike it out.

A: That's right

Q: Now En Suhardi would you agree with me that it is because in the chart correction log you can have sometimes many NM numbers in that chart correction log for one chart for example. Sometimes you can have many NM numbers (interjected by DW-1)

A: Many correction numbers

Q: Okay many correction numbers for one chart. So, in order for a 2nd Officer or mainly for the incoming 2nd officer not to be confused which one has been done and which one has not been done, you strike out those that you have done the corrections. That is what is meant by the recommendation in MP294. Is that correct?

A: Yes

Q: Now if you look at TPU-1 chart correction log, let's go straight to the

particular chart you are talking about. This is at Vol. 9 at page 2446, Chart 3543. This is the chart correction log for chart no. 3542 and 3543. Can you see that?

A: Yes

Q: Now you can see a series of numbers entered into the correction log but there is no striking out of any of these numbers although quite obviously the correction has been done for those numbers. Do you agree with me?

A: Yes that's right.

Q: So will you now agree with me also that the procedure or system that was employed on board the vessel to do chart correction was wrong and improper because it did not follow the recommendation that all Mariners would follow as set out in MP294. Do you agree with me?

A: Because it is just a recommendation. So the 2nd officer may have his own way of doing the chart correction because this publication is only recommending the way you should do the chart correction but I am sure the 2nd Officer has his own way of doing the chart corrections which he is more comfortable with.

Q: I see. So there is no structured system that is applied to all 2nd officers to do chart corrections. Each one can do what they like.

A: That is comfortable to them

Q: For each individual 2nd Officer?

A: Yes

Q: So you can employ a different system, it does not matter. Is that what you are saying?

A: As long as they can do it correctly.

[120] It follows from the foregoing that the defendant employed no system or procedure or audit system to check on chart corrections and maintenance. Significantly each second officer was allowed to employ such method as he chose to effect corrections. There was no single method or series of methods that was required to be followed by the defendant that would have lent to consistency and certainty. For example, as in the exchange above, it became clear that some of numbers reflecting corrections were not struck out, such that it would not be possible for anyone viewing the log to tell whether the chart had been corrected or not.

[121] It subsequently transpired in the course of DW3's evidence that each individual second officer employed a system that he chose so that disparate systems operated simultaneously. This made it difficult for anyone to tell whether a chart has been corrected or not:

Q: Let me now ask you. Now assuming you come up board the vesse and you

look at this entry in page 2446, would you be able to say which correction has been done and which has not been done by looking at this correction log.

A: All the correction has been done here.

Q: Would you be able to say that as a fact.

A: Because the way I see it, from this log entry is that whenever they have received the correction they will do it first and then they will make an entry in this log book as well as the bottom left hand corner of the chart.

Q: The left corner of the bottom of the chart?

A: Yes

Q: If that is what you say, can I ask you to look at page 2435. You can see that for chart 1844 there were certain entries done earlier but were deleted. Can you see that?

A: Yes

Q: Would that have been the correction that they have done and then deleted it.

A: No, no it is because a new edition of chart has been released. So all the correction on the striking out has been applied on this new released chart.

Q: Then what about 2442? As against chart 2468, can you see the deletion for 3 correction numbers there?

A: Yes

Q: So another officer employed the system of deleting the chart that he has corrected. Do you agree with me?

A: Yes

Q: Now if you look at this particular page, can you tell us which chart has been corrected and which has not been corrected?

A: No I cannot

[122] It was therefore evident from DW3's evidence that given the lack of a cohesive or comprehensive system of chart correction, each second officer was at liberty to adopt the method he chose which meant in turn that it was difficult to tell when a chart has been corrected and when it hasn't, as some officers would follow the recommended method of deletion of corrections, while others opted not to. This would necessarily give rise to confusion when the chart was read. This was put to DW3:

Q: So, this means En Suhardi that there is no uniform system employed for proper chart maintenance work because some officers use some methods while another officer may use an entirely different method. It is up to them how they feel about it. If they feel comfortable they will use one method

and if they feel comfortable in using another method they will do so. That is the system, the so-called system that Tanjung had for chart maintenance. Is that correct?

A: There is a system in the way we do the correction. It's just that if they are comfortable in doing this they will go with it.

Q: Sorry I could not hear you.

A: There is a system that we use for chart correction.

Q: What is the system.

A: This chart correction system that we have now. It is just that if they are comfortable in doing the correction this way they will do this way.

Q: So if they are comfortable in doing it another way, they will do it the other way

A: Yes

Q: And as a Marine Superintendent you don't pick up on these to tell them to follow one system, do you?

A: No

[123] This bears out the fact that there was no single system implemented or monitored by the defendant in relation to chart correction. DW3 in the course of his evidence conceded that he could not remember ever having sat down with Sharizal to discuss his chart maintenance work.

[124] The defendants' expert, DW5 corroborated that each second officer had his own system based on his preference. DW5 did not however view this as a problem:

Q: You see some correction numbers have been deleted.

A: Yes

Q: Do you know what that means?

A: No

Q: When you inspected this, did you see?

A: Yes

Q: That is interesting. So what did the 2nd Officer tell you about this?

A: This was done by the previous 2nd mate, so he can't comment on that.

Q: So therefore does it strike you that the previous 2nd mate had a different system from what you see, from the 2nd officer who spoke to you?

A: Yes

[125] It is therefore clear from the evidence of the second officer at the material time, DW1, the marine superintendant, DW3 and the defendant's expert, DW5 that there was at no material time any system put in place to ascertain that the chart correction system utilised for chart corrections was consistent or even comprehensible to anyone taking over duty. This is a clear example of a failure to provide a system of safe navigation. This is particularly so given that there is an established system of chart correction as set out in the Mariner's handbook. Such a system could and should have been implemented and monitored form time to time. There was clearly a lack of supervision and management of the defendant's crew in this significant aspect, giving rise to the incident.

THE MISTAKE IN THE CHART CORRECTION FOR BA CHART 3543

[126] The nature and extent of the correction made by DW1 on BA Chart 3543 shows that it was not merely a negligent error but a deliberate insertion of structures that were not there. In other words it required an active act of 'making up' or insertion of a non-existent object onto the map. This takes DW1's action outside of a negligent error and into the realms of deliberate act of deception. When DW1 plotted the positions to do the correction according to the notice to mariners, he was required to insert the pipeline to join from one platform to another. However, because he did the plotting wrongly, his plotted pipeline ended up in the open sea. This ought to have alerted DW1 of the mistake. However instead of correcting the insertion, he drew instead a platform at the end of the pipeline. He in effect created the fiction of a platform:

> Q: So when you plotted the position, when you did the correction and when you started from the East Belimut platform, when you started the correction according to the coordinator here your pipeline would join to the Tinggi platform. Is that correct?
>
> A: Supposed to be.
>
> Q: When you did the correction, it is a general principle that you just plot the position but you don't insert anything that is not on the chart. Is that correct?
>
> A: Yes
>
> Q: En Sharizal so when you did the correction on this particular chart on that occasion after plotting the border which is the East Belimut chart/position down to where you eventually stopped there was no platform there. Is that correct?
>
> A: Yes sir
>
> Q: And when you saw that there was no platform there essentially the pipeline, according to your correction, the pipeline just went into the sea and ended nowhere. Will that be correct?

A: Yes sir.

Q: You said you were competent 2nd Officer and you were responsible for doing documentation work including chart work and chart correction. Now that would have told you it was clearly incorrect. Do you agree with me?

A: Yes it was incorrect

Q: Even at the time when you were doing the correction you would have known that it was incorrect, isn't it?

A: At that time I was not notice the thing was a mistake Sir.

Q: Yes En Sharizal even at that time when you did the correction in this particular plot you would have seen that the pipeline led to nowhere and couldn't do your plotting. Is that correct?

A: Sepatutnya memang macam itu Tuan tetapi mungkin say a tak sedar Tuan

Q: Tak sedar

A: Ya

Q: But you had the presence of mind to then draw a platform symbol at the end of that plotting. Correct? Look at this particular plotting. After you have done the plotting from the border inwards and at the end of it when you saw nothing was there, you drew a platform there.

A: That is correct, Sir

Q: And you just said to us that your role was supposed to be confined to doing the plotting and the correction and you don't insert anything on the chart. Is that correct, you just said that?

A: Yes sir

Q: So En Sharizal by inserting this platform symbol in the chart is a fundamental error in chart correction. Do you agree with me?

A: Yes sir

Q: Now were you even given a briefing by Tanjung audit team or by management about chart correction like this and particularly not to insert anything that is in the chart.

A: Do you mean that during my interview

Q: Not interview, at any time when you were employed by Tanjung as a 2nd Officer.

A: No Sir

Q: No one ever briefed you to do a chart correction and particularly not to include any symbol that is on the chart.

A: Yes

[127] There was therefore no system of audit in place to ensure that the

second officers carried out chart corrections properly or even to ascertain or determine that they did know how to carry out chart corrections. This is a fundamental and significant aspect of navigation and safety and the lack of any audit or risk management system highlights the fact that the defendant failed to ensure that its vessel was operated safely.

[128] In point of fact the chart corrections which were issued in the form of notices to mariners were circulated centrally by the defendant to, inter alia, the vessel in question, Tanjung Puteri 1. However the evidence revealed that documents which according to the defendant's transmittal record had been sent to the ship had no corresponding record to show receipt by the ship subsequently. In fact in some instances on the ship side the record stated 'nil'. DW1 who was in charge was unable to explain the foregoing. This again signals the absence of a system to ensure that all chart corrections were duly issued and received by the defendant's vessels and that these corrections were in fact effected on the requisite charts.

[129] DW3, the marine superintendant who is responsible for the documentation and crew was unable to explain the discrepancies in the documentation. He alleged that he made checks but never came across any discrepancies. When he was showed the obvious flaws he conceded that the documentation for chart maintenance was flawed.

> Q: If you look at all these records the document transmittal sheet and the receiving sheet and compare that to 2430 do you agree with me that the documentation for the chart maintenance system kept by Tanjung is clearly flawed, was clearly wrong or inaccurate. Do you agree with me?
>
> A: Yes
>
> Q: And the system has all these loopholes where you have missed all these discrepancies. So there is no proper system. Do you agree?
>
> A: Yes

DISHONEST CONDUCT OF THE MASTER AND CREW ON BOARD THE TANJUNG PUTERI 1

[130] The conduct of the absent master and crew in failing to disclose/report the incident and seeking to actively deceive the defendant, the falsification of the logbook with the false entry of 'steaming around' and the replacement of the starboard anchor with the spare anchor all point towards the lack of a system of control or management of the crew of their vessels by the defendant. Despite such dishonest behaviour the defendant continued to employ this 'rogue' crew save for the chief officer who was dismissed for falsifying the log

book. By condoning the acts of these employees the defendant is signalling again that it has failed to take seriously the need for a safe system of operation and navigation.

[131] Even in its internal shipboard audit which required the defendant to disclose whether there had been any 'serious technical incident' the defendant failed to disclose the rupture of the oil pipe by the dropping of the anchor. This too is a material non-disclosure which suggests that the defendant does not take seriously or implement the safety measures and disclosure requirements of the present day international safety systems practised by other ship owners' organisations.

FAILURE TO UTILISE MALAYSIAN ADMIRALTY CHARTS

[132] A further example of the failure of navigational management by the defendant shipowner is evident from the failure or refusal to use Malaysian admiralty charts. The defendant's safety management system requires that the master and crew should rely on Malaysian Notices to Mariners. The defendant in fact subscribes to these notices as alluded to earlier. The safety management system stipulates that the largest scale charts ought to be used with these notices. The use of large scale charts is also stated in the mariners' handbook.

[133] These notices to mariners serve the important function of providing information to mariners of the changes in the condition of a particular location. For example if a new pipeline is laid the relevant notice would be relevant to mariners travelling in that particular area. It would be necessary to update the particular chart relating to that location to incorporate the information about the new pipeline. The Malaysian Notices to Mariners necessarily correlates best with the Malaysian Admiralty Charts. However on board the defendant's vessels Malaysian Admiralty Charts are not used. Only British Admiralty Charts, which are significantly smaller in terms of scale, are utilised. Without the Malaysian charts therefore the notices to mariners are of virtually no use. DW3, the marine superintendant agreed that without the Malaysian Charts the notices were of no use but insisted that the defendant did not utilise Malaysian Admiralty Charts. Accordingly there was confusion about how the notices were or could be used. This is what DW3 said:

Q: Do you know what the crew did when they received the Malaysian NTM?

A: No I have no idea. I do not know.

Q: You said you have seen the Malaysian NTM on board the Tanjung vessels.

A: Yes

Q: And you said you know your colleague downloads the Malaysian NTM and send to the ship.

A: yes

Q: And En Suhardi your evidence is that why the NTM was sent to the ship? You do not know what the crew does with the NTM?

A: Yes

Q: Were these notices sent on a regular basis, every month?

Q: Yes. Every month.

…

Q: Now the thing I would like to know En Suhardi is this. Is there any reason why the Malaysian NTM which you say you saw on board the Tanjung vessel was not captured in the transmittal and receiving sheet?

A: A: I don't know about that.

Q: So they apparently have a system that every month the y send the Malaysian NTM to the vessel and it is not recorded and we don't know why. Is that what you are telling us?

A: Ya. It is sent to the ship every month and I have no idea why it is not recorded.

Q: And you also do not know how the crew used these charts or these notices? That is the sum total of your evidence right?

A: Yes

[134] The defendants therefore used the British Admiralty Charts for passage planning and plotting positions and also relied on the British NTMs to do chart corrections. However they also received the Malaysian NTMs but the marine superintendant is unable to explain why they subscribed to the same or what the crew did with the same. This shows a complete lack of a cohesive system once again. The fact that the defendant's safety management system required that the Malaysian NTMs be used meant that they served a particular function. In fact as the plaintiff's expert witness, PW2 stated the great advantage of using the Malaysian Admiralty Charts is that they are on a much larger scale and therefore particularly useful for safe anchoring procedure which requires plotting to be done:

> The vessel had on board the British Admiralty Chart 3543 (edition 17 June 2005). The scale of this chart is 1:500,000. On this scale the chart 81 will be too small for proper plotting to be done particularly for subsea structures. This is clearly not appropriate and in fact dangerous for the purpose of navigating or anchor procedure in the oil fields. In fact the British Admiralty Chart is suitable only for navigational purposes such as planning the passage way., There is a chart with a larger scale i.e. 1:250,000 and this is the Malaysian Hydrographic Centre Chart (MAL655) but this was not on board the vessel. For safe anchoring procedure which requires plotting to be done, either MAL655, or a topographical chart, if available, for that area should be used.

[135] The defendant's expert witness, DW5, Captain Rajandran Kuppusamy, a marine advisor disagreed with the plaintiff's expert on the use of BA Charts, maintaining that it was acceptable to utilise the same. However in the course of cross-examination even he was forced to concede that the Malaysian charts showed details more clearly than the BA charts. He agreed that the details were bigger. He also agreed that when navigating in congested waters it is better to have large scale charts as recommended by the mariner's handbook.

[136] Notwithstanding these concessions, DW5 maintained that the defendant's use of smaller scale BA Charts together with the Malaysian NTMs was acceptable practice is less than tenable. I found PW2 to be considerably more logical and credible in his testimony than DW5. A reading of DW5's evidence will disclose that he sought to defend the practices adopted by the defendant as being efficient and ordered notwithstanding that accepted practices pertaining to charts and chart correction showed otherwise. Further it transpired that his evidence related essentially to the state of the Tanjung Puteri 1 and the manner in which it was operated and managed, in February 2012 not 2010 at the time of the incident. The persons he met on board the vessel and the practices he noted were relevant for this latter period of February 2012. To that extent it is wholly irrelevant for the purposes of establishing the manner in which the vessel was operated and navigated and the practices adopted by the then crew and master of the vessel in June 2010. A perusal of DW5's evidence also discloses that he did not investigate the issue of chart correction and maintenance generally.

[137] DW5's evidence is to be contrasted with that of PW2 who gave a comprehensive account of management practices. More significantly, PW2 was part of the investigation team inquiring into the incident on 26–27 June 2010. PW2 was able to give a detailed account of the investigation. Having done so his opinion was as follows:

> … The consequence of this failure was that they had a rogue crew on board the vessel which acted recklessly and committed wilful misconduct. They blatantly flouted the well established rule against dropping anchor in the vicinity of offshore facilities which is also expressly stipulated in the Charterer's Instructions. They then blatantly falsified the vessel's documents to cover their tracks. They even used the spare anchor as part of their cover up antics. If there was a proper system of supervision, such reckless conduct or wilful misconduct would not have been possible. As an example of the poor supervision by the owners, the missing spare anchor which should have been glaringly visible attached to the forward bulkhead of the accommodation block, was not detected or reported by the owner's superintendent despite the vessel having called into the Kemaman Supply Base at least once since the incident. It also revealed a clear case that the owners had failed to properly train the crew members to meet the required standards of competencies and to ensure that the crew was properly incentivised and motivated to discharge their task honestly and diligently.

[138] I accept and adopt PW2's expert opinion which summarises succinctly the failure of the defendant to train its crew or to have in place a safe system of navigation albeit in terms of charts, chart corrections or anchoring procedures. This was exacerbated by a failure to inculcate a safe system of work and more worryingly, an honest reliability and integrity that is central to the safety system of any vessel going to sea.

[139] The issue that arises for consideration is whether such aberrations in the management of the ship are attributable to the directing mind of the defendant. The facts of the instant case are so extreme as to warrant the answer immediately that as a matter of certainty such matters were or ought to be within the knowledge of the owners. Put another way, the circumstances of the incident are sufficiently serious to warrant the inference that the owners exhibited deliberate 'blindness' or ignored the various warning signals giving rise to the incident. This would include the failure to implement any form of reasonable system of checking in relation to:

(a) the use of charts;

(b) the optimal use of large scale charts;

(c) the failure to establish a recommended or mandatory system of chart correction;

(d) a failure to ensure that charts on vessels were in fact corrected and audited for correction;

(e) a failure to have in place a system for safe anchoring for vessels traversing oilfields with sub sea structures;

(f) a failure to audit safe anchoring procedures by masters and vessels;

(g) a failure to ascertain whether proper procedures for plotting are routinely carried out by masters prior to anchoring;

(h) there was no system of education or express stipulation of a stop work policy upon a vessel coming across an obstruction within the vicinity of oil pipes in an oilfield; neither there was in place any briefing on the dangers of applying force on the anchor when it snagging an underwater obstruction; and

(i) a failure to inculcate in the crew and master the importance and significance of the sanctity of the log book as reflecting a true record of events on board the vessel.

[140] Notwithstanding these grave failures, the majority of the crew on board the vessel of Tanjung Puteri 1 continue to be engaged by the defendant to date. There was no evidence before this court of any disciplinary action having been taken against them for the foregoing conduct.

[141] In summary it is clear to this court that there was a clear failure to ensure the existence and implementation of safe navigational and operational practices which can only be attributed to the directing mind and will of the defendant in this case, namely the owners. There was no general manager of operations in place who can be tasked with the responsibility of overseeing these matters. The marine superintendant who was effectively charged with overseeing to these practices, clearly failed to do so. DW2, the general manager of the Technical Department decried all responsibility for these matters. In short there is a lacuna in the system of management as there is no single senior person or body who undertook the overseeing of the safety of the navigational practices and operations of the Tanjung Puteri 1 in 2010. Such a lacuna in a significant aspect of ship management and navigation can only be attributed to the owners of the defendant. In these circumstances, I am unable to conclude that the defendant has discharged the burden of establishing that the incident occurred without its fault and privity. On the evidence before this court this appears to be clear case where the defendant simply shut their eyes to the obvious risk of a casualty arising from a defective anchor operation in the vicinity of an oil pipeline.

[142] It is not open to the defendant to simply wash its hands of the entirety of the incident by laying blame for the same entirely on the second officer, DW1 or on the absent master. The matters I have alluded to above in terms of systems for safe anchoring, the lack of a stop work procedure etc comprise an integral and indivisible part of the cause of the incident. As such I am constrained to conclude that the defendant is not entitled to tonnage limitation. The importance of a ship owner such as the defendant putting in place stringent and safe practices and procedures in terms of both navigation and management cannot be over emphasised. Tonnage limitation is therefore not allowed.

CONCLUSION

[143] Having considered all the issues that arise in this case pertaining to liability I conclude that the plaintiff is entitled to judgment on liability in terms of its statement of claim. I further order that damages be referred for assessment.

Claim allowed.

Reported by Afiq Mohamad Noor