

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC 516
CA 05/2019
(Arising in CS 7/2017)

In the matter between:

MUA Seychelles
(rep. by Rajasundaram)

Appellant

and

Nenport Investment Pty Ltd
Rep. by Mr. Rodin Larose
(rep. by)

Respondent

Neutral Citation: *MUA Seychelles v Nenport Investment Pty Ltd* [CA 05/2017] [2020] SCSC 516 (31st July 2020)

Before: Pillay J

Summary:

Heard:

Delivered:

ORDER

Appeal is allowed.

JUDGMENT

PILLAY J

[1] The Respondent in this case sued the Appellant for the sum of SCR 300, 000.00 with interest and cost on the basis of an insurance policy agreement between the parties dated 11th December 2015.

- [2] The Appellant insured the Respondent's vessel known as "Nenport", together with its engine make Isuzu, Model 6BDI, 6 cylinders, 130HP for the sum of SCR 1, 411, 000, under an insurance policy agreement dated 11th December 2015. The insurance policy was to expire on 10th December 2016.
- [3] On 16th September 2016 while the vessel was out on a fishing trip the engine sustained a breakdown. On being informed of the incident Robin Larosse, the Respondent's representative, arranged for the vessel to be towed to shore. The vessel arrived at shore on 17th September 2016. Subsequently on 25th September 2016 the Respondent submitted a claim to the Appellant for loss and damage due to "engine right off". By letter dated 4th October 2016 the Appellant refused the claim on the basis that "the engine failure was caused by technical damage of the lubricating oil pump, and not damage by the above perils (meaning "malicious act") as per the terms and conditions" of the insurance policy.
- [4] Following a trial the Learned Magistrate gave judgment in favour of the Respondent on the basis that "the defendant in the instant case, cannot avoid the claim by relying on the breach of the two warranties because they were put in the insurance policy cover to reduce the risk of a different loss as opposed to the damage to the vessel's engine." The Learned Magistrate further found that the Appellant's rejection of the claim "for the reason that the engine failure was caused by a technical damage of the lubricating oil pump not covered by the peril of a "malicious act" covered by the [Respondent's] insurance policy cover, is without evidential support".
- [5] The Appellant being dissatisfied with the decision of the Learned Magistrate appealed the said decision.
- [6] Learned counsel for the Appellant summarized the grounds of appeal as follows:
- (1) Whether the Respondent has not breached certain conditions and warranties that would prompt the insurer to render the insurance policy invalid and to refuse to entertain the claim [grounds 1 and 2].*
- (2) Whether the issue of "malicious act", a condition/term of the policy has been proven by the Respondent.*

- [7] Learned counsel for the Appellant submitted that the learned Magistrate conclusively decided that the Respondent was in breach of the warranty that the vessel was not operated by the licensed skipper and the Vessel sailed beyond the coral belt. It was his submission that vide paragraph 29 of the Judgment the Learned Magistrate unambiguously decided that the Respondent was in breach of two of the warranties. Learned counsel for the Appellant submitted that the Learned Magistrate was wrong to conclude that the breach of warranty is not fundamental to the performance of the contract.
- [8] Learned Counsel for the Appellant submitted that “if certain warranties being part of the contract/policy are breached it would give rise to the other party namely the Appellant in the instant matter, to reject the claim.” Learned Counsel further submitted that “the Learned Magistrate is wrong to conclude that a breach of warranty has the effect of suspension of liability instead of automatic discharge of liability.”
- [9] With regards to the issue of the “malicious act” Learned Counsel for the Appellant submitted that the Respondent “should prove the commission of a malicious act” which it has not done and the Learned Magistrate erroneously concluded that “Respondent” ought to prove the commission of the malicious act.
- [10] The Respondent relied on the submissions made in the Magistrates’ Court and added that Article 1964 of the Civil Code makes the English law of Marine Insurance the law of Seychelles because there is no special legislation in Seychelles governing marine insurance whereas there is special legislation governing motor insurance which is the Motor Insurance (Third Party Risks) Act (Cap 225).

- [11] Learned Counsel for the Respondent further added on behalf of the Respondent that the concept of incorporating English Law into our law is not limited to Marine Insurance matters. As an example counsel referred to Article 1383 (3) which provides that the civil law of defamation shall be governed by English Law.
- [12] Learned Counsel relied on the case of **West v National Motor and Accident Insurance Union Ltd All. L. R 1955** and the findings of the Court of Appeal that “they [the insurance company] did not endeavour to repudiate the policy and it remained in force... It may be that the insurance company does not wish it to be said that they repudiated the policy because of an under-statement of the value of the goods in the house; but if they do not wish that to be said and so accept the policy as good, they cannot be heard to say that the claim made under the agreement contained in the policy is bad for a reason which would have enabled them to repudiate the policy.”
- [13] Learned Counsel for the Respondent also mentioned the case of **Didon v Provincial Insurance Co. Limited (1980) SLR 90** though he did not elaborate further as to its relevance to the case.

First Issue

Whether the Respondent has not breached certain conditions and warranties that would prompt the insurer to render the insurance policy invalid and to refuse to entertain the claim [grounds 1 and 2].

- [14] It is clear on the evidence that the Respondent was in breach of the two warranties:
- (1) Operating under geographical limit of 60 miles from inhabited shores within Seychelles waters*
 - (2) Licensed skipper to be on board operating the vessel whenever sailing beyond coral reef*
- [15] The Learned Magistrate found at paragraph 26 of the Judgment that the Respondent was in breach of the first warranty, sailing beyond the 60 miles limit.
- [16] At paragraph 28 the Learned Magistrate found that the vessel was sailing without a licensed skipper in breach of the warranty on the Respondent’s failure to prove the contrary.

- [17] The Appellant takes issue with the Learned Magistrate relying on English law to, as he says, “get over the breach of warranties in order to allow the claim of the Respondent [Plaintiff].” It was Learned counsel’s submission that “our jurisdiction has got its own set of laws under which the insurance policies including the Insurance policy in question are to be dealt with, thus the breach of warranties cannot be excluded by the context of English Law.”
- [18] Learned counsel however did not cite any such local laws which he submitted was applicable.
- [19] In contrast counsel for the Respondent referenced the case of **Didon**. In the case of **Marc Didon v Provincial Insurance Company Limited (1980) SLR 93** the Plaintiff had insured his vehicle with the Defendant under a comprehensive insurance policy. The Plaintiff’s vehicle whilst driven by him, went off the road and was damaged. The Defendant repudiated liability to indemnify the plaintiff on the ground that the Plaintiff was in breach of a condition of the policy which required him to take all reasonable steps to safeguard the vehicle from loss and damage and to maintain the vehicle in efficient condition. The Court found that the cause of the accident was the Plaintiff being under the influence of alcohol to such an extent as to be unfit to drive in addition to a defective and as such was in breach of the conditions of his policy.
- [20] In the said case Sauzier J found that “[t]he Insurer only has to prove the breach and he escapes liability” on the basis that “under the new Article 1964 of the Civil Code of Seychelles it is provided that contracts of insurance shall be governed by special legislation and that in the absence of such legislation the rules relating to marine insurance shall apply. No special legislation has been enacted with regard to insurance generally or motor vehicle insurance, except in relation to third party risks (Chapter 225). Marine insurance has not be legislated for specifically. By virtue of the provisions of Article 190 of the Commercial Code of Seychelles it is the English law which applies mutatis mutandis to marine insurance by virtue of Article 1964 of the Civil Code of Seychelles it is those English law rules relating to marine insurance which apply to motor

vehicle insurance or to any kind of insurance except for the special provisions of Chapter 225.”

[21] He added further that *“subject to any rules of English law of marine insurance, it will be the contract of insurance itself which will have the force of law as between the parties. The first paragraph of Article 1134 of the Civil Code of Seychelles provides that:-*

“Agreements lawfully concluded shall have the force of law for those who have entered into them.”

[22] It was a condition of the policy between the parties in the case at hand that:

Every warranty to which the interest insured or any item thereof is or may be made subject shall, from the time the warranty attaches, apply and continue to be in force during the whole currency of this policy and non-compliance with any such warranty whether it increases the risk or not shall be a bar to any claim in respect of such interest or item.

[23] In light of the above, the finding of the Learned Magistrate that:

Section 11 [of the newly enacted English Insurance Act 2015] provides, that if a term tends to reduce a particular risk, that is to say, loss of a particular kind or at a particular time or place, a breach of that term should not release the insurer from liability for the loss caused by the other type of risk. Therefore, in principle, the warranty should relate to the risk which resulted in the loss. Thus, the rule that terms designed to reduce the risk of loss of a particular type should not affect losses of a different kind, means that the defendant in the instant case, cannot avoid the claim by relying in the breach of the two warranties because they were put in the insurance policy cover to reduce the risk of a different loss as opposed to the damage to the vessel’s engine.

cannot stand in that the breach of the warranty not to navigate outside a geographical limit and to have a licensed skipper on board is a bar to any claim under the policy since The condition makes clear that non-compliance with a warranty, whether or not it increases the risk, is a bar to any claim.

[24] In any event even if one was to rely on section 11 of the English Insurance Act the findings of the Learned Magistrate is problematic.

[25] Section 10 of the Insurance Act provides:

“(1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.

(2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.

(3) But subsection (2) does not apply if—

(a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,

(b) compliance with the warranty is rendered unlawful by any subsequent law, or

(c) the insurer waives the breach of warranty.

(4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening—

(a) before the breach of warranty, or

(b) if the breach can be remedied, after it has been remedied.

(5) For the purposes of this section, a breach of warranty is to be taken as remedied—

(a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,

(b) in any other case, if the insured ceases to be in breach of the warranty.

(6) A case falls within this subsection if—

(a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and

(b) that requirement is not complied with.

(7) In the Marine Insurance Act 1906—

(a) in section 33 (nature of warranty), in subsection (3), the second sentence is omitted,

(b) section 34 (when breach of warranty excused) is omitted.”

[26] Section 10(7) also amends definition of the warranty by removing the provision regarding automatic discharge of the liability. Section 33 of the MIA states:

“(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall

be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.”

[27] The second sentence that was removed stated that, *“if it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that.”* Nevertheless, the section still states that a warranty must be exactly complied with, thus not removing responsibility upon the insured to comply.

[28] As rightly stated by the Learned Magistrate the effect of section 10 amendments is that when a breach of warranty occurs, the liability of insurer is suspended and not automatically discharged so that an insurer will be not liable for any damage or loss occurring after a warranty has been breached, but will be liable after a breach of warranty has been remedied, provided that it is possible to remedy the breach. For example, if a vessel steams in to a geographic area excluded by the warranty, she may be without a cover for that period of a voyage and should be covered again once she is back to covered waters. If the damage or loss occurs while the vessel is in excluded area, potentially, the insurers can claim the breach of warranty and not be liable to pay, however, if damage occurs in the covered area later, the insurer cannot avoid liability relying on earlier breach of vessel being in excluded area for some time.

[29] Section 11 provides:

“11 Terms not relevant to the actual loss

(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—

(a) loss of a particular kind,

(b) loss at a particular location,

(c) loss at a particular time.

(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

(4) This section may apply in addition to section 10”

[30] Section 11 of the Insurance Act, therefore, provides that breaches of warranty that are irrelevant to the loss that occurs will not discharge insurers from liability. Warranties that are covered by section 11 can be described as “risk mitigation clause”, which tend to reduce the risk of loss of a particular type, or occurring at a particular time or place. Warranties that can be considered as “*a term defining the risk as a whole*” should not be covered by section 11.

[31] Therefore, the first step is to identify whether the warranty relates to specific risk or risk as a whole. If a warranty is “*a term defining the risk as a whole*”, then section 11 does not apply and, as per section 10, liability of the insurer is not automatically discharged but suspended until breach is remedied by the insured. In other words, insurer is not liable for loss that occurred after warranty has been breached but before the breach has been remedied. If a breach cannot be remedied, arguably, the insurer can avoid the liability. If the term does not define risk as a whole, the next step is to consider whether compliance with the term would reduce the risk of loss of particular kind, at particular location or at particular time. If the answer is affirmative, then the insured need to satisfy section 11(3) and, if successful, the insurer may not rely on the breach of warranty to discharge the liability.

[32] The Law Commission has noted that the effect of section 11 should be that “*insurer should pay the claim when the breach of a specific risk mitigation term is totally irrelevant to the loss that has taken place*”. To make it more clear, subsection (3) was introduced to require the insured to prove the “*breach of the term could not have increased the risk of the loss*”

which actually occurred in the circumstances in which it occurred” (emphasis added). The circumstances in which the loss occurred is therefore relevant and reference to it is intended to look at the issue in a broad way. It is also pointed out that the causal test is less important here:

“Neither the insured nor the insurer would have to prove what actually caused the loss, or what would have happened if the term had been complied with, so evidential matters are far less important than they would be under a causal test. Even if an insured can show that compliance with the warranty would not have actually made a difference to the loss (thus satisfying a causation test), the fact that it could have made a difference means that an insurer does not have to pay. Instead, there would be a more objective assessment of whether it is obvious that the breach could not have made any difference—and the onus is explicitly on the insured to show this”. (emphasis added)

[33] The passage still leaves uncertainty as to practical application. The Law Commission, therefore, offers some examples to assist:

[34] Example 1

There is a clause in the policy requiring the insured factory to install five- lever mortise locks on all door. This is breached because the lock on one door (door A) only has three levers. Thieves break in through door A. The lock might have made a difference given the circumstances of the loss (which are that the door did not have the requisite lock, and the thieves broke in through it), so the insurer does not have to pay. The policyholder cannot argue that the thieves would have just found another way in, or that the crow-bar they used would have shattered the wood even with the right lock.

Note: The “way” in which the loss occurred might be that the thieves battered the door down rather than picked the lock, which raises questions about whether the five lever lock would have stopped them. We think this question strays too far into questions of causation and evidence.

Same warranty; same breach. Thieves break in through a window, or a different door (B) which does have the required lock. In these circumstances, it would not have made any difference if door A had had a different lock. The insurer should not escape liability based on the breach.

Example 2

The insured warrants that the insured vehicle will be roadworthy. This is breached because the left front headlight is defective. The vehicle skids on black

ice in the dark. Although the faulty headlight did not cause the accident, it is possible that it could have contributed, given the circumstances of the loss (that is, that it was dark, and a headlight was defective). The insurer does not have to pay.

Note: The “way” it happened might be more to do with the way the car hit black ice, and therefore could raise questions about whether having a working headlight would have made any difference. Again, we think this would be a “causation” type debate, which we do not want.

Same warranty; same breach. The vehicle collides with a truck in broad daylight. There is no possibility that the defective headlight contributed to the accident given the circumstances in which it happened (it was daylight and the headlights would not have needed to be on even if they were working properly). The insurer should not escape liability based on the breach.

- [35] These examples, make things a bit clear as to the purpose of the clause and what the insured need to show: that their breach of warranty could not have increased the risk and warranty is quite irrelevant to circumstances in which damage actually occurred.

Application to current case

- [36] Firstly, it should be determined whether warranties regarding licenced skipper and geographical limit are terms defining risk as a whole or risk mitigating warranties.

- [37] The Law Commission in “Stakeholder Note: Terms Not Relevant to the Actual Loss” is of the view that the wording of section 11 are intended to exclude terms, which set out:

*“(1)the use to which insured property can be put (eg commercial/personal);
(2) the geographical limits of the policy;
(3) the class of ship being insured; or
(4) the minimum age/qualifications/characteristics of a person insured.”*

- [38] [It was further commented that, “for example, if one was insuring a ship, terms relating to its class, the qualifications of the captain and the commercial use made of the ship would tend to affect either the whole risk, or a significant part of the risk” (emphasis added). A skipper is responsible for the safety of a vessel and crew, he/she is more or less equivalent to a captain and usually have wide variety of duties.

[39] Thus, according to the reasoning of the Law Commission, both warranties (licenced skipper and geographical limit) in the present case can potentially relate to risk as a whole, thus, section 11 should not apply. In such case, we should then turn to section 10, under which the liability of the insurer would be suspended until the breach is remedied, meaning that while the vessel was operating with the unlicenced skipper, it could be said that for that period insurance cover was suspended and insurer is not liable to the damage to the engine that had occurred.

[40] On the other hand, it is unclear when the damage to the engine actually occurred or to be precise started to occur: was it when the engine has failed at sea or was it when alleged malicious act was done, which then led to the engine failure? Position of section 10 is less clear regarding such situation. The exact time when the malicious act occurred is unknown, the situation with the breach of warranties at that time is also unknown. The survey indicates heavy scratching to engine parts. What would have been useful is an indication as to how long could have it taken to scratch the parts to such state with the substance found in the engine. Perhaps, if the malicious act was done some time prior to engine failure, it could have been detected at early stage by scheduled engine inspections and therefore reduce the later loss. In the absence of such evidence, perhaps, section 10 should be strictly interpreted, and as damage under insurance claim was for engine right off, complete failure of the engine and total sum of its replacement plus towage, the damage that actually occurred should be the total failure one that happened at sea when the insured was in breach of warranty. Therefore, suspension of liability apply to that period and insurer is not liable to pay for the damage that occurred.

[41] It should be noted again that the purpose of amendments was to change the position that enabled insurers to rely on technicalities and breach of warranties unrelated to the loss in order to avoid liability. It is unlikely that section 10 intended to mean that breach of material warranties can be completely “excused” and insured can still make successful claims disregarding their continuous breach of warranties. Sections 86-87 of the Explanatory Note regarding section 10 of the IA, emphasizes that definition part of

warranty, that it shall be strictly complied with, has not changed and the effect of suspended liability is that, “*the insurer will have no liability for anything which occurs, or which is attributable to something occurring, during the period of suspension*”. Furthermore, in Kerr LJ stated in *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd’s Rep. 277, 287 that, the cover ceases to be applicable unless insurer waives the breach. By being in breach of warranty insured takes himself outside the cover agreed to with the insurer as insurer only agreed to cover the risk provided the warranty was performed.

[42] Therefore, in the present case, without evidence to the contrary, strict application of section 10 should be that at the time of total engine failure, the insured was not covered as there was a breach of warranty. For instance, if a fish farm is insured by a policy with a warranty that there should be 24-hour watch at the farm and the farm is destroyed by a severe storm, in case the warranty was breached, the insurer should not be liable for the loss irrespective of the cause for the reason that the warranty was breached at that time. That would be situation provided section 11 did not apply. Under section 11, the position would be in favour of the assured if he/she can satisfy section 11 (3) and show that non-compliance could not have increased the risk of the loss in the circumstances in which it occurred (in this example circumstances being the storm that caused the actual damage).

[43] The Learned Magistrates was of the view that section 11 applies to circumstances of this case and has concluded that the Appellant could not avoid the liability due to the breach of warranties by the Respondent as two warranties that were breached were put into the insurance policy “*to reduce the risk of a different loss as opposed to the damage to the vessel’s engine*”.

[44] However, under section 11 it is the insured that needs to show that failure to comply with a particular warranty in the contract could not have increased the risk of the damage that actually occurred in the circumstances in which it occurred. It is not clear whether the Learned Magistrate has considered this point.

- [45] With regards to vessel being 4 nautical miles beyond warranty requirement, re-examination of Mr. Nigel Vidot, who towed the vessel when it broke, suggests that the boat could have drifted once engine shut down (Magistrate Court Transcript, 17.8.18, page 18). The drift distance could have potentially been calculated by an expert to show with more certainty that the boat has indeed drifted. Nevertheless, even without expert evidence it could be plausible that it indeed drifted as distance was not too large. As per letter of Mr. Larose and insurance claim the engine damage occurred at 61 nautical miles, which is already over the limit, but again not by too far.
- [46] Potentially more serious breach in the circumstance of the case is that the boat was operated by unlicensed skipper. It does not appear that the insured has presented enough evidence to show that boat being operated by unlicensed skipper could not have increased the risk of the damage to the engine in the circumstances in which it occurred. Skipper's duties may for example include duty to "*maintain a regular maintenance schedule for engines ...*", which could potentially cover many things such as oil checks or regular change of oil, or particular checks before departure. The insured have not provided any evidence to show which duties skipper had, whether he had any duties regarding engine and whether he performed such duties. Hypothetically, regular checks could have detected the malfunction prior to complete breakdown. Although, this is not known and not certain. Nevertheless, the insured could have shown that the fact that the skipper did not have licence could not have increased risk to the engine as, for instance, he performed all his duties and checks with regards to engine or that he did not have such duty and his licence are irrelevant to engine damage.
- [47] Furthermore, as per Mr. Larose's statements in cross-examination (Magistrate Court Transcript, 4.5.18, page 9) there are no security arrangement when the vessel is on shore, and "*the boat is moved at the port*". It is thus also not clear who is responsible for the security of the boat, in particular, access to the engine and thus who could have contributed to damage by allowing the alleged sabotage to happen.

[48] The insured showed the probability of the malicious act through the survey report, however, failed to show that skipper being not licenced could not have increased the risk of the damage. For instance, in *Allianz Australia Insurance Ltd v Smeaton* [2016] ACTCA 59, a case from Australia, where section 54 of the Insurance Contracts Act 1984 is similar in scope to section 11 of the IA, insurer was not allowed to avoid the liability where the jet ski driver did not have prescribed licence. The court, however, considered various factors affecting the driving and necessary qualifications, difficulty of the test to obtain licence as well as driver's expertise in driving the jet ski and concluded that the manner of his driving and behavior would not have changed even if he has required licence, thus the accident would have still occurred whether he had licence or not. It is an interesting decision as one would assume that such an important condition should not be breached. Also, a skipper in comparison to jet ski driver, arguably, has a wider range of duties than just navigating, therefore, the Australian case should be distinguished from the present case. Nevertheless, it shows the length of the analysis of the details and evidence. The insured in the present case did not go to such extent of showing that the skipper having licence was not relevant to engine failure and most importantly that the skipper being unlicenced could not have increased the risk of the damage which actually occurred in the circumstances in which it occurred.

[49] Furthermore, section 39(5) of the MIA provides:

“(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.”

[50] Policy in the current case is a time policy as it is issued for a year. Potentially, if a vessel, which has an unlicenced skipper can be considered as unseaworthy and/or if there were some signs of engine malfunction prior to voyage, but nothing was done about it, and insured, being aware of these factors, still sent the vessel to sea; the insurer may be not liable for loss attributable to unseaworthiness. It should be noted, it is not enough for the vessel to be unseaworthy, the loss must be attributable to that unseaworthy state and

regardless of that state, the vessel was still sent to sea with the privity of insured. It can be quite difficult to prove, though, and it is not often used by hull insurers as they may be dealing with large companies, where privity of insured can mean privity of the top management of assured. In the present case, if any of such elements were present, it would be for the insurer to prove it.

[51] In the present case, if the two warranties (licenced skipper and geographical limit) are considered to be a term defining risk as whole, then section 11 of the IA does not apply, and under section 10 insurer's liability is suspended for the period when insured was in breach of warranty, therefore, the insurer should not be liable for engine loss at sea while the vessel was operated by an unlicenced skipper and exceeded geographical distance limit.

[52] However, if the two warranties are considered to be risk mitigating clauses, the purpose of which is to reduce the risk of loss of a particular kind, at a particular location or at particular time, then insurer may be held liable to pay the claim, if the insured can prove that skipper having no licence and vessel being one or four nautical miles beyond warranty geographical limit could not have increased risk of damage to the engine in the circumstance in which the damage occurred. The insured showed the probability of the sabotage, however, it is not enough in terms of section 11 to show that their breach of warranties could not have increased the risk.

[53] As regards the issue of "malicious damage", the Learned Magistrate accepted the marine surveyor's opinion that "the engine of the vessel suffered a possible sabotage by possible introduction of foreign substance of abrasive nature into the engine's lubricating oil to cause it to seize up." The Learned Magistrate further found that the claim form and letter dated 30th September 2016 described the damage caused to the engine as opposed to the cause of the damage whereas it was the surveyor by his report dated 6th October 2016 who concluded that the cause of the engine failure was the "possible introduction of foreign substance of abrasive nature into the engine's lubricating oil to cause it to seize up."

- [54] The Learned Magistrate cannot be faulted for accepting the surveyor's report as expert evidence and finding that the Appellant should have sought a second opinion if the Appellant was not satisfied with the surveyor's conclusions.
- [55] In fact the report was requested by the Appellant and was produced as exhibit by the Appellant. Furthermore the Appellant's witness Mr. Ghevin Chuneg testified that the term "malicious act" means "any harm full attack done by third parties" (sic). According to his testimony "sabotage" "means more or less the same meaning as malicious act".
- [56] The Learned Magistrate made clear that there was no evidence led as to whether there was a requirement of an obligation on the Respondent to inform the Police of the alleged "malicious act" and found that the Respondent's "failure to inform the Police...cannot be held as a good reason to refuse to pay the claim."
- [57] Once again the Learned Magistrate cannot be faulted on his finding. The claim was one for payment under an insurance policy. There was no issue of a Police investigation or report. As the Learned Magistrate rightly noted, as a matter of course the Respondent would have been expected to inform the Police but it is not a requirement. The policy of insurance is between the parties and is not contingent on a report to the Police.
- [58] In as much as I agree with the reasoning of the Learned Magistrate with regards to the findings with regards to proof of the "malicious act", in view of my findings with regards to the breach of warranty the appeal succeeds.
- [59] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on 31 July 2020

Pillay J