The "Patraikos 2"
[2002] SGHC 103

Case Number : Adm in Rem 81/1996

Decision Date : 09 May 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Leong Kah Wah, Navinder Singh and Aileen Boey (Joseph Tan Jude Benny) for the plaintiffs; Haridass Ajaib, Augustine Liew and Kueh Ping Yang (Haridass Ho & Partners) for the defendants

Parties : —

Admiralty and Shipping – Carriage of goods by sea – Carriage of goods by sea – Manning requirement – Defendants' obligation to exercise due diligence to "properly man" the vessel – Nature of such obligation – Whether defendants can rely on exception to liability under art IV of Hague Rules – Sch art III para 1 & art IV para 2 Carriage of Goods by Sea Act (Cap 33, 1998 Ed)

Admiralty and Shipping – Carriage of goods by sea – Seaworthiness of vessel – Proper care of cargo – Grounding of vessel and flooding of cargo holds – Claim against defendants for damage to cargo – Burden on plaintiffs to prove unseaworthiness – Exception to defendants' liability under Hague Rules – Burden on defendants to prove exercise of due diligence – Sch art III paras 1 & 2 & art IV para 2 Carriage of Goods by Sea Act (Cap 33, 1998 Ed)

Admiralty and Shipping – Carriage of goods by sea – Title to sue – Whether plaintiffs holders of bills of lading or consignees of cargo – Whether plaintiffs own or have or possessory title to cargo at time of grounding – ss2(1) & 5(2) Bills of Lading Act (Cap 384, 1994 Ed)

Cur Adv Vult

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Background

The plaintiffs (numbering 42) were shippers of cargo loaded on board the ship Patraikos 2 (`the vessel`) formerly named MSC Carla, from various European ports. The vessel`s owners are Chester Shipping Co Ltd (the defendants) while her managers (since 1989) are Dioryx Maritime Corp of Athens, Greece (`the managers`). At the material time, the vessel was manned by a crew of 27 whose principal officers were Greek, including the Master Efstathious Katsoulis (`the master`) and the chief officer (Sporidis Aristotelis), while her second officer was a Filipino by the name of Ben Gallardo Orlanda (`Orlanda`). The rest of her crew was mainly Filipino and Egyptian. The vessel is a general cargo ship built in Belgium in 1979, with four (4) cargo holds fitted `tween decks; she has a deadweight capacity of 19,863 tonnes and a service speed of about 19 knots; she is registered at the port of Limassol, Cyprus.

At the material time, the vessel was time-chartered to Rickmers-Line GMBH (`the charterers`) for about 50 days, by a charterparty dated 21 November 1995. Just prior thereto, the vessel was dry-docked at Rotterdam for extensive maintenance and repairs works, carried out at a total cost of DFl 409,210. Thereafter, the vessel loaded cargo (about 13,066.13mt consisting of containers, steel products and assorted machinery) at Immingham, Antwerp, Hamburg and Genoa. She sailed from Genoa on 19 December 1996, first to Port Said and then to Penang.

After discharging some cargo at Penang, the vessel left on 6 January 1996 heading south for Map Ta Phut (Thailand). On the afternoon of 7 January 1996, while she was sailing in the Singapore Straits after crossing the Phillip Channel, the vessel ran aground on the rocks of Horsburgh Lighthouse. At the material time the crew keeping watch on the bridge was Orlanda and able-bodied seaman (`ABS`) Abdelmoneim Moustafa Ibrahim Mohamed (`Mohd`) from Egypt; the master had left the bridge at about noon.

The owners declared general average as a result of the casualty. The plaintiffs and their underwriters executed Lloyd`s Average Bonds or Average Guarantees in favour of the defendants, and surrendered their bills of lading in exchange for their cargo. The vessel was refloated on or about 7 April 1996, 103 days after the grounding, the salvage operation being carried out by Smit International (`the salvors`) who managed to retrieve the cargo particularly that stored in holds Nos 1 and 4. The salvors discharged approximately 11,566mt of cargo (including containers) into barges which were towed to Singapore`s Jurong Commercial Wharf between 25 January and 21 April 1996. The remaining steel cargo (approximately 1,500mt) in the No 2 lower hold was discharged and landed at Sembawang Shipyard on 19 April 1996.

After refloating, the vessel was delivered to Sembawang Shipyard on or about 18 April 1996 and drydocked. She remained there for some three (3) months, undergoing repairs (at a cost of about S$6.5m) until 20 July 1996. On or about 30 July 1996, the plaintiffs arrested the vessel. She was released from arrest after which the vessel left Singapore for Manila on 1 August 1996.

Claim

In the statement of claim, the plaintiffs pleaded they were the owners of the cargo and or endorsees of the bills of lading for the same, to whom property in the cargo passed upon or by reason of the endorsement. They alleged that the defendants were under a duty as bailees and/or carriers for reward to take reasonable care of their cargo and to deliver the same in the same good order and condition as shipped. They alleged that the defendants breached that duty as, by reason of the grounding, their cargo was damaged by seawater.

The plaintiffs alleged that the defendants breached art III paras 1 and 2 of the Hague Rules in that, the defendants failed to exercise due diligence to make the vessel seaworthy and that they failed to properly store, carry and discharge the cargo.

In the defence, the defendants admitted they were parties to the contract of carriage (although the bills of lading were issued by the charterers) by reason of cl 4(2) of the document; they claimed the benefit of the clause which states:

> *The Merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage or any part of the carriage is performed or undertaken (other than the Carrier) ...*
>
> *Without prejudice to the foregoing every [such] person shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for his benefit; and in entering into this contract, the Carrier, to the extent of these provisions, does so not only on his own behalf, but also as agent and trustee for such person.*

The defendants, however, put the plaintiffs to strict proof of their right to sue. If the plaintiffs indeed had a right to sue, the defendants pleaded that the relationship between themselves and the plaintiffs would then be governed exclusively by the Hague Rules, by virtue of cl 4(2) of the bills of lading, in the alternative, by reason of the sub-bailment of such cargo by the charterers to the defendants, on the terms of the bills of lading. Whilst they admitted the grounding, the defendants denied that they had breached their duties as carriers of the cargo or that they failed to exercise due diligence to make the ship seaworthy.

The defendants blamed the grounding solely on the negligence of the second officer, Orlanda. They particularised how Orlanda had plotted the course for the voyage prior to the grounding, in particular for the Traffic Separation Scheme of the Singapore Straits. They alleged that Orlanda had failed to alter course at the waypoint as instructed by the master and, when he realised he was off-course, he had steered the vessel hard to port at the last minute. By then it was too late and nothing could be done to avoid the grounding; the defendants relied on art IV of the Hague Rules as their defence.

The defendants contended that they were entitled to general average loss and expenditure (including salvage charges) based on the General Average Report of Clancey, Sons & Stacey dated 30 September 1999 as well as the Addendum dated 24 March 2000. In the alternative, the defendants alleged that by Lloyd`s Average Bonds, the plaintiffs undertook to pay the defendants their proportion of salvage and/or general average and/or particular and/or other charges in consideration for the release of the cargo by the defendants to the plaintiffs. They counterclaimed for general average contributions, relying on cl 22(2) of the bills of lading.

According to Stephen Foster (`Foster`), the plaintiffs had been paid by their respective underwriters for their damage/loss and this action is subrogated to the pool of underwriters who paid the cargo-owners. Foster (PW1) is a director of PT Radita Hutama Internusa (`Radita`) who were the casualty managers engaged in the recovery action of each cargo interest. The parent company of Radita is Richards Hogg International, London average adjusters. Foster said Radita was tasked with obtaining all the necessary documents to support the plaintiffs` claims herein, duly authorised in writing by the pool of underwriters.

Counsel for the defendants questioned the plaintiffs` entitlement to sue - had the plaintiffs ***either*** bought the cargo ***or*** paid for it? Foster was able in some instances to produce original bills of lading from the consignees, together with invoices showing the terms of sale, letters of credit and proof of payment. Despite his best efforts, however, he was unable to obtain ***all*** the original bills of lading from the individual plaintiffs. Neither did he personally deliver the original bills of lading to the carriers/the charterers, that was done by his colleague, albeit under his direction. However, without production of the bills of lading for the cargo, he said the carrier would not have released the cargo from the vessel to the individual plaintiffs, which they did. Foster was closely involved in the salvage sale in Singapore for some of the cargo which was badly damaged. In those instances, Foster said the consignees endorsed the reverse of the bills of lading to enable him to obtain the release of the cargo. Whilst he had no personal knowledge of payment having been made by the individual cargo-owners, Foster was also not aware of any adverse claims to-date, against the interests of the parties stated on the bills of lading.

Cargo that could be, was transhipped with the assistance of the charterers. Some of the consignees arranged transhipment themselves, in order to get the cargo to Indonesia as quickly as possible. In those instances, Foster understood that original bills of lading had to be surrendered to enable the cargo to be released for transhipment. Some of the bills of lading were not `straight` but multi-modal

bills of lading. When it came to payment, however, underwriters paid not the forwarding companies under those bills of lading but the actual consignee.

Foster had no personal knowledge of when or if, payment was made by the named consignees, for the goods shipped under the individual bills of lading. It was noted that some of the bills of lading produced before the court (PCB1-322) were not originals, those had been surrendered in exchange for cargo released from the vessel.

The plaintiffs did call two (2) consignees to testify, the first was PT Semen Gresik Persero (`Gresik`), which had ordered cement-making machinery from a Danish, a German and an American company. The German order was shipped under the charterers` bill of lading (No 3) while for the Danish and American orders, the bills of lading were multi-modal transport bills of lading issued by DanTransport A/S followed by those issued by the charterers. The head of their insurance section (Oggy Sedyobasuki) testified that his company paid the sellers (in full) by means of letters (3) of credit issued by PT Bank Dagang Negara as which result the bills of lading were consigned to the order of the said bank.

Oggy Sedyobasuki`s testimony was reinforced by Zoebairi Salim (`Salim`), Gresik`s (then) head of warehousing and logistics. After the grounding, Gresik and their underwriters Asuransi Jasindo (`Jasindo`) arranged for average bonds to be issued and they engaged Radita as recovery agents.

The second consignee was PT Perum Percetakan Uang (`Perum`), holder of bill of lading No 501 issued by the charterers, as well as a multi-modal transport bill of lading issued by NAVIS of Germany. In his written testimony, the company`s head of purchasing Tulus Widayat (PW4) deposed that Perum had bought printing and related machinery as well as spare parts, from a Swiss company (De La Rue Giori SA). The consignee stated in the multi-modal bill of lading was PT Dagang Negara as it had issued the letter of credit which Perum utilised to pay the purchase price to the seller. However, Perum was named the consignee under bill of lading No 501; Perum`s insurers were also Jasindo.

In the course of the lengthy trial, the parties called twelve (12) other witnesses to address the key issue of who/what caused the grounding. There was no lack of experts from either side. Apart from Orlanda and ABS Mohd, no one could say with certainty what actually transpired on 7 January 1996 and which resulted in the grounding. Orlanda testified for the defendants but not ABS Mohd. The defendants did not offer any explanation for the latter`s absence from court save that their counsel, in the course of Orlanda`s cross-examination, pointed out (V/N 1013) that the plaintiffs had not alleged negligence against ABS Mohd, when their counsel questioned what the ABS was doing while on the bridge. On the part of the plaintiffs, their evidence to support their case of breach of the Hague Rules on the part of the defendants was based on reconstructing (through their expert Christopher N Phelan) what could have or did happen prior to the grounding and, drawing their conclusions on the state of the vessel before her fateful voyage to the Far East.

Plaintiffs` case

I start my review of the plaintiffs` case with the testimony of JW Findlay (`Findlay`), a consultant marine engineer formerly with TR Little & Co. Findlay (PW6) was appointed by The Salvage Association on behalf of the plaintiffs to investigate into the circumstances surrounding the stranding of the vessel. Findlay visited Singapore in the course of his investigations and inspected the vessel, accompanied by Captain Frederick Oostra who had been appointed by the Antwerp Commercial Court

to investigate the casualty. Prior thereto, Findlay called at the offices of the managers in Athens, to inspect and obtain copies of documents.

Findlay visited the stranded vessel (in March 1996) and took photographs. By then, salvors had commenced their operation to refloat the vessel. Following his investigations, Findlay prepared a report wherein he concluded (para 26), based on the extent of the corrosion in the `tween deck bulkheads, that no maintenance had been carried out on the vessel for years, if at all. Findlay opined that the defendants did not make the holds fit and safe for the carriage of cargo, during the drydocking prior to the voyage. Consequently, he was of the opinion that the vessel was not seaworthy, at the time of the grounding.

Findlay`s findings were attacked by the defendants; they called their own expert William Cameron Finnie (`Finnie`) to counter Findlay`s allegation of corrosion. Finnie opined that the corrosion on board the vessel was caused by grooving (which gradually thinned the plates). Findlay disagreed (V/N 276) pointing out that when corrosion is caused by grooving, necking occurs - the plate wastes away into a neck and it becomes very thin until the piece eventually cracked. The vessel`s corrosion was localised with other parts remaining intact; what he saw was wasted and flattened. He had taken from the vessel`s starboard side (`tween deck between Nos 1 and 4) a sample (which peeled off easily) of the severely rusted scale and had it tested by metallurgists (Atlantic Engineering Ltd) whose report (dated 28 March 1996) confirmed the scale was consistent with gradual corrosion of steel in seawater. Findlay asserted that if indeed there had been routine maintenance of the vessel, the corrosion would have been noted and attended to. Findlay also disagreed with Finnie`s opinion that the door (on the portside main deck leading to the No 1 hold) need not be watertight when submerged (as was the case here) but only weather-tight.

Findlay was referred to the pre-charter survey which contained no adverse comments concerning any wastage of the structure. He pointed out that the surveyor concerned did not have full access to the areas in the `tween decks so as to be in a position to say whether there was corrosion in the side-shells and bulkheads.

Findlay had inspected the vessel`s interior; he found Nos 1 and 4 holds flooded (but empty). He said the flooding in No 4 hold did not result from the grounding but flooded subsequently through the severely wasted and corroded transverse bulkhead with the No 3 cargo hold. He had also seen steel encased cement boxes in the space of the `tween deck level on the portside space and had ascertained they had been fitted by the salvors to stop excessive leakage. Apparently, the salvors had first attempted to stem the leak from the No 4 hold by wedges but, due to the state of the corrosion, the hole became bigger when wedges were driven in. The vessel`s log indicated that the No 4 hold was pumped continuously from 11 January (before discharge of cargo commenced) until 5 February 1996. Were it not for the corrosion, Findlay said a large quantity of the cargo would not have been damaged by the entry of seawater.

Findlay`s testimony was corroborated by Francis Low (`Low`) the salvage master. Low (PW5) confirmed his divers had found leakage (resulting from corrosion) between bulkheads Nos 3 and 4 on the `tween deck level and had stemmed it with cement boxes; No 4 hold was not breached but the granite rocks had penetrated Nos 2 and 3 holds on the starboard side and severely damaged her tank tops Nos 2 and 3. He agreed that the salvors had unsuccessfully attempted to stem the leak by wedges; the wedges went through the bulkheads easily indicating a fair bit of corrosion and, the wasted steel caused the holes to become bigger.

Findlay went further to suggest that the defendants knew of the vessel`s severe corrosion. When she was dry-docked at Rotterdam in November 1995, the Dutch shipyard had removed 12 tonnes of

loose rust and dirt from the cargo holds which presumably came from Nos 3 and 4 as those were the only cargo holds where work was done during the drydocking.

After the vessel was refloated and was at the Sembawang shipyard for repairs, Findlay visited her again. His photographs of the vessel`s No 3 hold showed the porosity of the bulkhead between the No 3 and No 4 holds.

In the course of his investigations, Findlay had checked the maintenance and class history of the vessel. He believed that the vessel may have had its steel plating thickness gauged at its April 1993 dry-docking at Hamburg. The thickness gauging then carried out was credited towards the special survey which was done on 22-23 April 1994 at Durban. According to the report (No 400170), the surveyor concerned conducted a comprehensive examination of the entire vessel which included her bridges superstructures, upper and main decks, Nos 3 and 4 cargo holds, Nos 1, 2, 3 and 4 `tween deck spaces, fore and aft peak as well as 21 other tanks (including bunker tanks), engine room cofferdam and three crane pedestals. Findlay questioned how the surveyor could have accomplished all these inspections within 48 hours and if the surveys were indeed carried out, they would have been very superficial.

Findlay`s suspicions were hotly denied by the defendants. Their counsel took him through the vessel`s interim certificates issued at Valencia and Leghorn to show that the special surveys done on 10 and 13 May 1994 respectively (when the Nos 1 and 2 holds were apparently surveyed) were indeed thorough. Although Findlay acknowledged that the vessel`s classification papers were in order and her records were good, he insisted that the vessel was not properly inspected notwithstanding that surveys were carried out over several days at various ports by different surveyors - otherwise the rust on the bulkhead (which had been there for sometime) would have been noticed. In any case, whatever surveys carried out 12 months before a special survey (including thickness tests) would not be valid and cannot be credited to the special survey. I note that Lloyds` interim class certificate issued on 29 June 1994 showed that the vessel`s hull special survey was completed in ***April*** 1994 when the vessel was at Mauritius (see 2DB1617). However, another interim class certificate issued at Durban on 17 June 1994 stated that the hull special survey was completed in ***June*** 1994; there appears to be a discrepancy.

Findlay`s other findings were also attacked by the defendants. Questioned why he had not tested the steel plates at the No 1 cargo hold, Findlay said it was because the state of the plates was similar to the (leaking) sample he took away to be tested. On the quantities of loose rust and dirt taken out from the vessel at Rotterdam, it was put to Findlay that he had no personal knowledge of the ***nature*** of repairs the vessel underwent; it involved substantial cutting of rusted parts/plates, removal of eye-locks, renewal of zinc-anodes, small pipes, etc.

16-11-1995	2 tonnes
20-11-1995	3 tonnes
23-11-1995	2 tonnes
24-11-1995	5 tonnes

Findlay`s calculations that 12 tonnes of rust were removed from the vessel was based on the invoice of Niehuis & Vandenberg BV (the Dutch shipyard) which contained the following item (see 2DB1652):

A container put available in cargo hold for your crew and loose rust and dirt

disposed of:

which Findlay estimated would amount to 4-5cuÃ¿m. He disagreed with counsel`s suggestion that the crew would use the container for anything/everything they discarded, in the process of `spring cleaning`. Findlay opined that removal of ship`s parts cropped off and renewed would be done separately and specially priced by the Dutch shipyard, such waste would not go into a container; in any event they would not be classified as loose rust and dirt. I should point out that the defendants` witness Fotios Manetos clarified subsequently that the ***container*** was actually a skip and one skip was put into each hold.

When he was cross-examined (V/N 433) on this subject, the plaintiffs` other expert Christopher Phelan (`Phelan`) agreed with Findlay and opined that it was illogical for the yard to use the container to dispose of ship-repair waste. Indeed, if it was suggested that the defendants were then gritblasting the vessel from outside the hull, Phelan was of the view that the grit would have fallen into the drydock from where it would have been removed by cranes; similarly, damaged steel plates would have been lowered into the drydock. Neither could Phelan see how the crew would bring debris from their cabins and drop it down the hold, an unsafe practice which would have resulted in the crew being banned by a shipyard. He said debris from a vessel is either left in a receptacle or taken ashore down the gangway while waste from the main deck would be taken directly to shore, without charge by the yard.

Findlay explained he did not make personal inquiries with the Dutch shipyard because he thought there was sufficient evidence in the repair bills. In any event, his experience told him inquiries from strangers on someone else`s accounts would not have been entertained by any shipyard. Findlay`s view was echoed by Phelan, who opined (V/N 431) that shipyards have high degrees of confidentiality and will not disclose invoices or work lists to anybody else other than owners. Findlay had also placed reliance on Lloyd`s survey (No DRB 400170) done at Durban in April 1994 where reference was made to the hull narrative in which the master was said to have commented that maintenance would be required in the way of paint coating breakdown, in order to prevent corrosion from taking place. There was disagreement between Findlay and counsel for the defendants on whether the master was referring only to the paint coating at the aft peak (as the defendants contended) or to the `tween deck spaces (as Findlay contended).

Findlay was also challenged on the photograph he took showing running water coming from a hole; it did not show the starboard side of the bulkheads as being severely corroded and leaking. On counsel`s suggestion that the salvors would have used the portside door for access, Findlay opined it would not have been possible as the door was submerged and hence inaccessible. In fact the salvors tried to seal that door from the inside. Indeed, the bilge had been sealed by the salvors with a plate, suggesting that water had been coming in previously; Findlay had also seen a pump on board.

To rebut his allegation on the vessel`s lack of maintenance, Findlay was referred to the affidavit filed by Fotios Manetos (`Manetos`), the managers` representative. Manetos had exhibited voluminous records detailing the vessel`s previous maintenance schedule, her drydocking, and correspondence exchanged between the managers and the vessel`s various masters. Essentially, Manetos deposed to good management practice on the part of his company.

I should point out that Low had testified that the salvors feared the vessel`s back may break during the salvage operation as, it was under considerable stress. This fear appeared to be unfounded as,

according to the first report dated 10 July 1997 (see DB509 para 6.4) of Brookes Bell & Co (the defendants` experts in the salvage arbitration), there was no indication that the deck or side shell plating were affected by fatigue. The report concluded (para 6.6) that without the intervention of salvors, the vessel could have lain aground for some months without a significant change in the condition of the damaged hull.

Low`s report on the salvage operation indicated that submersible pumps (2) were placed in the No 4 lower hold to pump out the water while cargo was being discharged therefrom. The pumps were also used in the `tween deck to stop water from overflowing through the hatch covers into the lower hold. His company`s divers had also noticed leakage on 18 January 1996 in the No 1 hold starboard bilge side; Low surmised this could have been the result of a fractured pipe. He opined that the much disputed door, being on the main deck level (leading to the upper `tween deck), should be more or less watertight or weather-tight so as to be able to withstand certain pressures; Low`s view was endorsed by Phelan (V/N 427).

Captain Oostra (`Oostra`) testified he had been appointed to act as court assessor in an admiralty suit taken out by Dutch cargo interests (3) against the charterers. He was tasked with advising the Antwerp court on the causes and circumstances of the stranding. He revealed that the charterers did not institute proceedings against the defendants nor join them as a party to the Dutch action.

Besides calling at the Athens office of the managers, Oostra (PW7) had also interviewed the master. He corroborated Findlay`s observation of the vessel`s condition save that he (correctly) identified the (double) watertight/weathertight door as being located on the main deck leading to the `tween deck portside whereas Findlay had (mistakenly) reported that the door was in the upper `tween deck bulkhead.

Oostra`s report of his findings was filed with the Dutch court. Oostra confirmed there was leakage from the lower `tween deck between bulkheads Nos 1 and 2. He also confirmed that the corrosion on board was ordinary not grooving, corrosion; it was due to wastage of material and had been present for a number of years. He produced photographs showing severe corrosion in: (1) the bulkhead between the Nos 1 and 2 holds above the lower `tween decks; (2) No 4 hold; and (3) the bulkhead between Nos 3 and 4 holds (starboard side). The port fore-side of lower hold No 4 was also heavily discoloured due to rust. On 15 March 1996, Oostra (and Findlay) used electronic equipment to measure the thickness of the bulkhead between holds Nos 3 and 4 (starboard side); all measurements were taken about 2m from the ship`s side. The thickness of the area 800mm above the `tween deck level was 7mm, that about 50mm above the `tween deck level was 5mm thick while the area level with the weld of the `tween deck was 0mm thick. Oostra confirmed he was present when Findlay easily removed a piece of plate for testing; it was not chipped off as the defendants alleged. The removal of the corroded piece by Findlay resulted in two (2) holes appearing in the bulkhead of Nos 3 and 4 (starboard side). Oostra also noted that the engine-room/safety equipment were in good condition. He doubted the echo-sounder was working as he had not seen any printouts from the echograph; Orlanda later said the echo-sounder was switched off.

It was Oostra`s opinion that Orlanda (whom he asked to but did not, interview) had made grievous misjudgements in changing course. Oostra concluded that the accident happened due to three (3) possibilities involving Orlanda, namely:

(1) he failed to call the master (as he was instructed to do) at a certain change of course;

(2) he neglected to alter course from 081 to 049 at 1341 hours;

(3) he changed course abruptly from portside instead of to starboard side a short distance from

the rocks.

Indeed, had Orlanda altered course to starboard at the material time, Oostra ventured to say that the vessel would probably have passed clear and avoided the rocks and thereby, the grounding.

In his letter dated 5 August 1997 addressed to Dutch solicitors Huybrechts, Engels, Craen & Partners (responding to their inquiry on Orlanda`s percentage of responsibility for the accident), Oostra had stated that Orlanda should be held fully responsible; he went on to state:

> *A second officer who is unable to perform a simple navigation task during clear weather conditions, is not qualified to act as a second officer. The accident is caused only by neglect in navigation by the second officer, Mr Orlanda, though he apparently holds the required qualifications (Refer to attached documents).*

Oostra did not look into Orlanda`s previous employment history and, as he was not able to interview Orlanda, he quite rightly said he was not in a position to determine the man`s capabilities or conduct.

Another expert witness for the plaintiffs was Phelan a casualty investigator who is a director of Navspec Marine Consultants Pte Ltd. Phelan (PW9) a qualified master mariner who captained (until 1987) ocean-going vessels (with particular experience in traffic-separation schemes in European waters and the Baltic) was appointed to look into the circumstances surrounding the grounding. In arriving at his conclusion that the vessel was unseaworthy at the time of the grounding because

(1) the vessel was not properly manned due to Orlanda`s incompetence;

(2) the defendants did not exercise due diligence to satisfy themselves as to the competence of Orlanda to sail as second officer;

(3) there was no bridge management system and/or lack of adequate bridge procedures;

Phelan looked at a comprehensive list of documents, including the ship`s papers, the Dutch shipyard`s repair bill, documents pertaining to general average adjusting and the salvage arbitration award in England, as well as the letter from Sinclair Roche & Temperley (`SRT`) dated 1 May 1997 addressed to Clyde & Co (solicitors for cargo interests who had commenced separate proceedings in England against the defendants). Phelan further visited the Philippines in May 1999 to verify Orlanda`s qualifications and interviewed him in Singapore on 30 November 1999. It was obvious from his lengthy report dated 21 August 2001 (see P6) that Phelan had taken great pains with his investigations. I should also point out that Phelan never saw or inspected the vessel itself in the course of his investigations.

after Phelan produced seven (7) chartlets (exh P2) numbered A to G in which he reconstructed the positions of the vessel on 7 January 1996 at intervals of one minute, commencing from 1300 hours until the grounding (estimated at 1352 hours). For his purpose, Phelan relied on the ship`s records as well as his (and other people`s) interview(s) of Orlanda. His chartlets were based on the actual chart (No 3831) which was in use by the vessel at the material time. Based on Phelan`s chartlets, the significant time markers/positions were as follows:

(1) the master was on the bridge when, at about 1230 hours, he instructed Orlanda to fix the vessel`s position; he checked that the vessel was on course;

(2) before he went for lunch, the master returned to the bridge for a few minutes and instructed Orlanda to call him about 6 miles from the alter course position (ie at 1319-1320 hours) by circling the tentative position and marking it with an `X` as well as adding the words `PLEASE CALL CAPTAIN` on the chart;

(3) Orlanda only realised at 1333 hours that he had omitted to call the master on the latter`s instructions; even then he did not call the master;

(4) there were no navigational marks/workings whatsoever 1333 hours save for a small `R` marked between 1334 and 1335 hours (presumably referring to radar distance) although the routine which was followed earlier, was to plot every 15 minutes (as required in coastal waters);

(5) the racon at Horsburgh Lighthouse would have been picked up by the vessel`s radar (due to its 12-mile range) from about 1316 hours onwards and appeared constantly on the radar thereafter, had it been functioning;

(6) although Orlanda said he set a course at 076 gyro, the course he in fact made good between 1315 and 1333 hours was 081, apparently there was 5 compass error;

(7) after he had plotted the 1315 hour position, Orlanda said he saw ships on the westbound lane; the position as at 1320 hours would have put the vessel 7 miles from her position at 1315 hours, based on a speed of 14 knots; Horsburgh Lighthouse was about 11 miles away at 1320 hours;

(8) the vessel would have altered course at 1324 hours at which point she would have turned into the main Straits coming down to Singapore;

(9) when the vessel turned, Orlanda said he saw another ship about 4 miles away, putting the time at about 1323 hours;

(10) around 1331 hours, the vessel and passing ships would have been end-on or nearly end-on with no cause for worry particularly at 1335 hours;

(11) at 1335 hours Orlanda said he took a radar position and went outside the bridge to instruct (presumably) ABS Mohd to keep an eye on traffic coming down the westbound lane;

(12) based on what the master and Orlanda had said, that there was a GPS (global positioning system) set with the alter course position and a guard ring of 1.5 miles around that position, alarms would/should have sounded at 1336 hours; if not, it meant the GPS was not working;

(13) instead of altering (or asking ABS Mohd to alter) course when the rocks were plainly visible, Orlanda altered course from 081 to 026, 55" (5 points) to port and struck the rocks.

It would appear (from SRT`s letter dated 8 December 1999 (see 2DB2011) to the managers and others) that the instruction in (2) above was concocted, the words `PLEASE CALL CAPTAIN` were written on the chart ***after*** the grounding by agreement between the master and Orlanda, as a cover-up. Hence, they allegedly gave a false statement to the Maritime and Port Authority (`MPA`) of Singapore investigating the grounding. Phelan opined that such an act confirmed that there was a complete lack of proper bridge procedures on the vessel.

Phelan surmised that the lack of navigation after 1333 hours could be due to any of the following possibilities:

(1) equipment failure;

(2) the vessel was not in the position it was said to be;

(3) no one was on the bridge;

(4) maybe an intent to carry out an act.

Phelan visited the Philippines in the course of his investigations and made inquiries between 26-28 May 1999 of:

(1) the Professional Regulation Commission (`PRC`);

(2) Philippine Overseas Employment Administration (`POEA`);

(3) Philippine Maritime Institute (`PMI`);

(4) Philippine Seafarers` Training and Review Center (`the centre`);

(5) the Maritime Industry Authority;

(6) Fame Maritime Foundation Inc (`Fame`);

(7) a crewing agency called Adamsons (Philippines) Inc (`Adamsons`).

Phelan obtained the following information from the PRC:

(1) their records showed that a Ben Orlanda sat and passed the third mate`s examination on 29 May 1977 and was registered as a third mate on 15 September 1977. A candidate by the name of Ben Orlanda sat and passed the second mate`s examination in Cebu City between 24-26 September 1982 and a certificate was issued to him on 27 September 1983. A year later, on 27 January 1984, a duplicate certificate was issued;

(2) the person who registered for the third mate`s examination appeared to have different features, handwriting and signature, from the candidate who registered for the second mate`s examination.

From the records of the POEA, Phelan obtained the following information on Orlanda:

(1) he graduated from PMI in October 1970;

(2) he obtained a second mate`s licence No 8070 valid until 31 August 1997;

(3) his certificate (SSRB) No 046187 was valid until 19 April 1996;

(4) he served on the vessel Sea Macedonia from 12 June 1993 to 1 October 1994.

The information obtained from the PMI did not accord with Orlanda`s testimony or the documents he subsequently showed to Phelan.

Phelan reported that he was unimpressed by the standards and facilities of the PMI (based on his own experience as a principal of a large nautical college for 14 years); he took photographs to substantiate his opinion. The institute was/is a private institution which catered to 12,000 students including 5,000 deck cadets undergoing a three (3) year course in Maritime Transportation (for which Phelan could not obtain any written outline). In 1975, the previous two (2) year course was superseded by the three (3) year course. In 1970-72, a student of the two-year course was required to spend two years` sea-time as a cadet under supervised training, before returning to PMI to be awarded a BSc degree, as a pre-requisite to taking a third mate`s examination. The management of PMI appeared to Phelan to be evasive to questions he raised and, there was a shortage of teaching staff. His inquiries about Orlanda drew a blank - they claimed they knew nothing about him and all their records were destroyed by a fire in 1990. Phelan was referred to the Commission on Higher Education (`CHE`) and when he inquired of the latter, he was told that CHE had in fact furnished all relevant documents to PMI. Hence, there were no records to confirm Orlanda`s attendance at PMI or his sea-time or his BSc degree.

Phelan ascertained that the centre runs short-term courses (with practical training facilities) under the provisions of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (`STCW`). Their records showed that Orlanda attended a six-day basic safety course in January 1990 covering fire-fighting, personal survival, first aid and survival craft. The centre issued certificates which are valid for five (5) years and can be revalidated by retaking the course. The centre had no records which showed Orlanda attended any further courses

after January 1990.

At the offices of Maritime Industry Authority (`MARINA`), Phelan ascertained that since 1988, MARINA had been tasked with the issuance of endorsements of certificates under the provisions of the STCW. MARINA`s records showed that Orlanda had been issued an interim certificate for the period 4 January 1994 to 30 June 1994 even though he was then serving on board the Sea Macedonia. The endorsement was followed by a break of six months after which Orlanda was issued a five (5) year certificate endorsement for the period 12 December 1994 to 11 December 1999.

At Fame`s office, Phelan was told that a Ben Orlanda attended a radar observer course on 23 January 1990 (pure theory) without use of an actual radar. The records of Orlanda with Adamsons that Phelan saw indicated that Orlanda was employed continuously through Adamsons from 29 November 1986 up to the grounding.

Phelan`s interview of Orlanda took place at the Golden Landmark Hotel in Singapore on 30 November 1999; henceforth, I shall refer to it as `the Landmark interview`. It was held in the presence of counsel (Navinder Singh) for the plaintiffs. Phelan`s version of what transpired was diametrically opposite to Orlanda`s. When he was interviewed by Phelan, Orlanda had just been discharged from the ship Global Ace on which he had been working since 23 May 1999. Orlanda showed Phelan his second mate`s certificate No D3-0003718 issued on 27 January 1983 (`the second certificate`). At the time of the incident, Orlanda held second mate`s certificate No 8070 (`the replacement certificate`) issued by the PRC on 27 January 1984 (in lieu of the original). The MPA had by its letter dated 23 January 1997 (DB258) to Orlanda given notice it intended to cease recognition of the replacement certificate for service on Singapore ships and, had given Orlanda 30 days in which to show cause why the same should not cease to be recognised; Orlanda never responded to the letter. Phelan quite rightly pointed out that the effect of the second certificate was to circumvent the ban on Orlanda by the MPA; he pointed out that there it was also factually incorrect for the second certificate to state it was issued on 27 January 1983, when that was the date of the actual original certificate which Orlanda never produced.

Orlanda also showed Phelan a diploma in nautical science issued by the PMI dated 26 November 1972, which Phelan understood can only be awarded after two years` sea-time. However, Orlanda himself told Phelan that he did not undergo two years` sea-time as an apprentice but sailed as a rating. Even then, Orlanda did not complete his training on the PMI ship, a prerequisite for a BSc degree. If that was the case, it meant that Orlanda was not eligible to sit for the third mate`s examination (which he claimed to have done on 29 May 1977). Phelan noted from Orlanda`s seaman`s record book that he signed off from the Vesta on 22 September 1978, presumably after 12 months` service, which would have begun on 22 September 1977. Orlanda said he then attended a short refresher course at PMI before taking the third mate`s examination, which timeframe would have been about November 1978. Yet, the records of PMI showed a Ben Orlanda purportedly sat and passed the examination 1[half] years earlier but there were no records of him having attended a refresher course. Questioned on the various discrepancies in dates, Phelan reported Orlanda was evasive.

In fact, the discrepancies even extended to different blood groups being attributed to Orlanda in different seaman`s discharge books. In his first seaman`s discharge book (issued on 30 January 1973), Orlanda was said to have blood group `O`. In his second discharge book (issued on 9 July 1976) his blood group was said to be `AB`. When a new service record book was issued to him on 5 October 1986, his blood group was `A` while his medical examination on 1 December 1994 recorded that he had blood group `AB`.

Phelan concluded, based on the records he had seen at the PRC, that Orlanda was ***not*** the person who sat for the third mate`s examination on 29 May 1977. Indeed, he thought that the signature on the application form for third mate`s certificate was not Orlanda`s, neither was the photograph. Consequently, Orlanda did not hold a third mate`s certificate when he served on board the vessel.

Phelan also questioned Orlanda`s certification as a second mate. Orlanda claimed to have sat for the second mate`s examination at the Philippine National Institute (`PNI`) which institute Phelan said he was unable to identify. Indeed, when Phelan interviewed him, Orlanda himself said he had never heard of the institute and presumed it referred to the PMI. PRC`s records showed that a Ben Orlanda took the papers for the second mate`s certificate between 24 and 26 September 1982 (in Cebu City), and

the certificate was issued on 27 January 1983. Yet, Orlanda said he served as second mate only from 27 March 1984, despite having secured the certificate a year earlier. During his interview by Phelan, however, Orlanda said he sailed as third mate on the Sunbird (from which he signed off on 26 November 1983) ***before*** sitting for the second mate`s examination. In any event, Phelan thought Orlanda was a bit old (44 years) to be a second mate, after spending 24 years at sea. Phelan opined that any reasonably competent seaman would have risen to the rank of master at 44 years of age, based on his experience of employing Filipino crew when he was in ship-management; (he was the vice-chairman of a manning company in Manila).

Phelan made inquiries at MARINA, which department is under the charge of the Department of Transportation and Communication responsible for issuing endorsements of certificates since 1988. Duplicates of certificates issued to seamen are kept by MARINA. Phelan said the director Romero could not explain why/how an interim six months certificate was issued to Orlanda for the period 4 January to 30 June 1994 when he was serving on board the Sea Macedonia, followed by a break of six months before the subsequent issue to him of a five-year `Certificate Endorsement`, which was valid for the period 12 December 1994 to 11 December 1999. Phelan was advised by Romero to formally apply for a review of Orlanda`s certificates.

Although he was not able to interview the crewing manager of Adamsons, Phelan was shown a statement which she, Mabel Gameng (`Gameng`), had given at Manila on 17 September 1996 in which she had set out the recruitment procedure her company adopted for seamen like Orlanda; I shall return to her statement when I come to her evidence. Phelan roundly criticised the steps outlined by Gameng in her statement. He further questioned her competence as a crewing manager when she had no formal training for the job, no formal education in nautical engineering subjects and no sea experience at all and ***after*** she had served for two (2) years as a personal assistant to the port captain. Phelan concluded that as the agents of the defendants, Adamsons did not exercise due diligence when they employed Orlanda, his qualifications being highly questionable.

Based on his investigations, Phelan swore a statutory declaration in Singapore on 21 July 1999 and lodged it with the PRC for his complaint against Orlanda, requesting a full investigation into Orlanda`s qualifications, whom he alleged was negligent and incompetent. Acting on Phelan`s complaint, the PRC forwarded a copy to Orlanda on 6 August 1999 and requested him to submit a counter-affidavit within ten (10) days, with a copy to Phelan. Orlanda (through his counsel Del Rosario (`Rosario`) appointed by the managers) applied (on 9 December 1999) for an extension of ten days to submit the counter-affidavit, namely, by 20 December 1999.

Rosario changed tack subsequently. He did not file Orlanda`s counter-affidavit; instead he filed a motion for reconsideration (on 7 February 2000) before the PRC contending that Phelan as the complainant, had no locus standi not being connected in any way howsoever with the previous employer of Orlanda and, alleging that Phelan may have maliciously represented himself to be a representative of Orlanda`s previous employer. The board of the PRC dismissed Orlanda`s motion on 29 June 2000 (see 2DB2092-2093). That, however, was not the end of the saga.

On 3 August 2000, Rosario applied for an extension of time up to 18 August 2000 to make his submissions. Then on 18 August 2000 itself, Rosario filed a fresh motion before the PRC, this time to expunge Phelan`s complaint, alleging his statutory declaration was hearsay, not based on personal knowledge and hence was inadmissible as evidence. This motion was heard by the PRC on 23 March 2001 and denied. Rosario then filed a fresh motion for reconsideration on 10 April 2001, of the PRC`s order dated 23 March 2001; the motion was opposed by Phelan`s counsel. The board of the PRC dismissed this motion on 2 August 2001 and Orlanda was given a further and final extension of 15 days in which to submit his answer to Phelan`s complaint. Rosario, however, did not file Orlanda`s answer. Instead, on the deadline of 18 August 2001, he filed a petition on Orlanda`s behalf with the Philippines Court of Appeal, for a certiorari to quash the decision of the PRC dated 2 August 2001. The grounds for the petition (filed on 3 September 2001) are to be found in the defendants` documents at DB2049-2061. The petition was resisted by Phelan`s counsel (see grounds at 2DB2101-2106). In a written decision dated 23 November 2001, the Philippines appellate court dismissed Orlanda`s petition as unmeritorious.

When Rosario (DW5) testified for the defendants, he said the requirement of two years` sea-time as cadet under s 16 of Presidential Decree No 97 (see PB2982) for third mates took effect from 13

January 1973 whereas Orlanda had obtained his Diploma in Associate in Nautical Science on 26 November 1972; hence it did not apply to Orlanda. He added that the academic qualification applicable to Orlanda at the material time was the Administrative Code of 1917 which required only two (2) years of high school or equivalent. In his affidavit, Rosario made no reference whatsoever to the on-going proceedings before the PRC. In re-examination (see V/N 1227) he did not give a satisfactory explanation as to why, instead of filing a counter-affidavit to answer Phelan`s complaint on the merits, he attempted to strike it out on technicalities. When the same question was asked of Orlanda (see V/N 896), he said it was because he did not admit to the allegations! Pressed further, Orlanda said he left the proceedings to Rosario to handle.

I should add that in cross-examination, counsel for the defendants drew Phelan`s attention to r 20 of Presidential Decree No 97 (see PB2984) which he contended Orlanda could rely on; it states:

> *The provisions of subsection (d) Section 16 and subsection (d) Section 17 of this Act shall not prejudice all students already enrolled in their respective courses to qualify them for their Third Mate and Fourth Engineer licence examinations respectively, after the required shipboard apprenticeship.* ***Provided however****, that after five (5) years from the approval of this Act, examinees for the Fourth Marine Engineers must be a graduate of the Marine Engineering School or its equivalent degree and has served for at least two (2) years as apprentice engineer, oiler or machinist after graduation.*

Phelan disagreed, pointing out that the rule is a limitation. Those who held marine licences prior to the enactment of the decree could retain them; Orlanda did not get his third mate`s licence until ***after*** the date of the decree (11 June 1978).

Counsel for the defendants (V/N 549-550) sought to explain the discrepancy in Orlanda`s certificates - he said Orlanda`s second mate`s certificate No D3-0003718 was issued on 7 May 1999 as a certified true copy although it bore the date (27 January 1983) of the original certificate. That was because Orlanda had apparently found the original certificate as which result, he requested the PRC to cancel the replacement certificate (No 8070) issued to him on 27 January 1984. Counsel also suggested to Phelan (who disagreed) that Orlanda did not show cause on the letter from MPA dated 23 January 1997 purely because he had never sailed on a Singapore ship nor did he intend to.

Besides Orlanda`s certificates, Phelan also questioned the qualification of the Chief Officer Sporidis Aristotelis whose diploma, issued by the Greek Republic restricted him to cargo ships not exceeding 1,000grt, whereas the vessel`s gross tonnage was 13.998. Phelan also took issue with the qualification of the vessel`s Second Engineer Ioannis Poumbouris, pointing out that the endorsement of certificate issued by the Greek Merchantile Marine Ministry on 22 May 1995 restricted him to act as second engineer on ships propulsed by internal combustion engines or steam engines up to 2,000hp or 1,472kw; the engine capacity of the vessel was 9,121kw. Phelan`s views were echoed by Kjell Sundberg, another expert witness of the plaintiffs. I am, however, mindful of the fact that, unless the under-qualifications of these two officers was a causative factor in the grounding, I should not take it into consideration.

In the course of adducing evidence from the master, it was revealed that the vessel had undergone a turnover of one hundred crew over three (3) years which feature Phelan criticised as excessive as it would have resulted in a lack of continuity which would be detrimental to manning.

On the vessel`s drydocking at Rotterdam, Phelan calculated (see P3) that the total quantity of her steel work renewal (in holds Nos 3 and 4) approximated 956kg. Phelan opined (V/N 441) that a large amount of the 12 tonnes of ***loose dirt and rust*** removed from those holds constituted rust, but it did

not necessarily mean that the vessel was rust-free thereafter - there could be another 18 tonnes of rust left behind. Drawing on his extensive experience in ship management, Phelan pointed out that vessels which were poorly maintained or which had not been drydocked regularly would have a residue of rust. He dismissed dunnage as another possible source for the amount of ***loose rust and dirt*** removed from the vessel; dunnage would normally be taken out by wire slings. Neither would the crew be allowed to take their rubbish down into the cargo hold; it would be much easier for them to take it ashore. Phelan also noted that the last date for removal of the ***loose rust and dirt*** was two (2) weeks ***after*** the vessels` drydocking dates (2-12 November 1995). If indeed it was ***loose rust and dirt*** , he would have expected the same to be removed ***before*** the work on the vessel started.

Phelan further dismissed counsel`s suggestion that the skips were used to hold mud removed from the ballast tanks because it could not be pumped out. Recalled to the witness stand, Phelan explained that it would be exceedingly difficult if not totally impractical, for a man to get into a manhole attached to every double-bottom tank, to remove 10-11 tonnes of mud therefrom. The height of the double-bottom tank itself of 1.2 to 2m would require a person to stoop. Further, ventilation would have to be provided as otherwise there was a danger of suffocation. He had checked the invoices of the Dutch shipyard and could find no such ventilation having been provided. What a shipyard would normally do is to use a high-pressure hose to jet spray the tank and wash out the mud through the plug at the bottom of the tank.

Phelan was shown Manetos`s calculations (D1) of the amount of steel replaced during the vessel`s drydocking, which showed a considerably higher figure of 3,812kg, comprising of two (2) items: pipes and steel plates. For the former item, the quantity was 3 tonnes from cargo holds Nos 2, 3 and 4. Phelan re-calculated (based on the dimensions for the pipes in the drawing given to the yard) and arrived at a figure which was 2 tonnes less than Manetos`s.

When the master testified, he said the rust which was removed from the vessel approximated 150kg. Even if the testimony of the master and Manetos was accepted, it still meant that about one (1) tonne of mud was hand-carried out of the vessel`s double-bottom tanks which scenario Phelan said defies belief.

Phelan observed (from her repair bill at Rotterdam) that the vessel had been refitted with contained sockets apparently because there was a weakening of the tank top-plating underneath, which necessitated further steel plates being inserted. He said such work was indicative of corrosion on the vessel, that there was a thinning of the steel and a reduction in the structural strength of the vessel. If there was corrosion on the tank top, intuition told Phelan there would be corrosion on the bulkheads. He shared Findlay`s opinion that if indeed the surveyor at Durban had carried out all the surveys enumerated in the report No 400170 over two (2) days in April 1994, the inspection must have been very superficial. Phelan`s attention was drawn to a special survey conducted at Rotterdam in November 1995 (2DB1649), just after the vessel had been drydocked. He pointed out that it was only a docking survey, for the external part of the hull, not the cargo holds.

Phelan disagreed with the suggestion that the logbook entries of the vessel showed that the defendants were attending to the repair and/or maintenance of the vessel at all times. Indeed, he said he came to the contrary conclusion from his perusal of the documents. There appeared to be a history of navigational failure/equipment including the gyro (on five occasions), the GPS (on 29 April 1995) and the ARPA radar (on three occasions the last being on 16 November 1995). If as Orlanda said, he did not hear the GPS alarm going off, Phelan surmised one reason could be that there was an error in the GPS. The fact that Orlanda was off-course could also be due to a compass error. I repeat, it was Orlanda`s testimony that the echo-sounder was not switched on that day, if it was working at all.

Phelan`s attention was also drawn to a fax dated 24 December 1999 from Naviteco Ltd (Japanese shipowners) addressed to SRT confirming that Orlanda`s services on board their vessel Global Ace `had been of the standard as Filipino crew and satisfactory`. Phelan noted that the fax was sent four (4) years ***after*** the incident, during which interval Orlanda should/would have gained an enormous amount of training. I note from the Landmark interview that he (Orlanda) only served six months (23 May to 30 November 1999) on the Global Ace in any case, hardly sufficient time to properly appraise his performance. Granted, there was nothing in the discharge books of Orlanda covering the period 1973-1999 to show anything untoward or, that Orlanda was not capable of performing his job as an able-bodied seaman, third or second mate. Phelan, however, said discharge books are not the usual documents one relies on to assess a seaman`s ability but only as a reference for sea-time. In any case, none of the discharge books produced by Orlanda showed any entry relating to his signing-on or discharge from, the vessel.

In so far as navigation was concerned, Orlanda took no steps after 1333 hours even though he should have altered course seven (7) minutes later and put the vessel onto hand-steering. Orlanda had also failed to chart subsequent positions at 15-minute intervals. Consequently, there was a multitude of acts that were not carried out which, according to Phelan, can only be described as deliberate omissions. What is pertinent is the fact that neither the defendants nor their counsel offered any explanation (through any of their witnesses) when Phelan raised the following relevant questions (at V/N 573-574) under cross-examination:

Phelan:	It is not as though you put a man on the helm, you know, to have a man steering and tell him to do it. He actually did the final act himself. And one of the things that strikes me throughout all this, which I have grave difficulty with, these two people on the bridge there. There`s an able seaman somewhere around.
Court:	Yes, there was.
Phelan:	What did he do? Did he not see the rocks? Did he not say to the second mate "Hey, there`s rocks ahead"? I have a lot of difficulty with what went on that bridge from 1333 onwards. Was the AB there? The Captain said that when he got there, I believe somewhere, he didn`t actually see where the AB was. Who was on the bridge, your Honour? Who was doing what? Who saw the rocks? Because the rocks are visible, they were 1.8 or whatever above the surface. The lighthouse is an enormous lighthouse and you`re only 2 miles away from it. So I have a lot of difficulty. There was no AB at the wheels. His job up there is to go on the helm before an alter course position. So the final act, whatever that was, and however you interpret it, was indeed carried out by Orlanda. Whether it was intentional or not, that was carried out by Orlanda and not by the AB. I cannot believe, your Honour, that an AB-somebody can be on the bridge and see the rocks and ahead and not say to the second mate "You know there`s rocks ahead, we`re going to run aground".
Q:	Mr Phelan, do you know where the AB was?

Court:	We don`t. That`s why we asked him.
...	
Q:	From all the records , do you know where the AB was?
...	
A:	There seems to be two or three suggestions, your Honour. It depends whose affidavit you read. If you read the Captain`s, I believe he says that when he went up, he couldn`t see the AB ...
	You have a second mate that said he spoke to him when he was on the port wing. I`m not sure where the AB was, your Honour. What I do know is, if the AB was not on helm and therefore, by inference keeping a lookout, surely he would have seen rocks, five cables ahead of him, less that half a mile ahead of him.

There was some initial suggestion by counsel for the defendants that Orlanda had been tricked into being interviewed by the plaintiffs under the mistaken belief that Phelan was the vessel`s marine consultant; this was denied on affidavit by Phelan (as well as by plaintiffs` counsel Navinder Singh). Phelan pointed out that in his statutory declaration (para 3), which accompanied his complaint to the PRC, he had clearly stated that he was appointed as an expert witness by the underwriters` solicitors. On his part, Orlanda accused Phelan (who denied it) of putting undue pressure on him to admit to wrongdoing; more will be said of this when I consider Orlanda`s testimony.

Paints used on the vessel for maintenance purposes were another area of disagreement between the parties. Manetos had claimed that the paints (supplied by Sigma Coatings BV) used to coat the cargo holds were suitable. Indeed, the supplier`s sister company in Singapore (Sigmacoatings Pte Ltd) had, in its fax dated 9 September 2001 (D5) confirmed that the products supplied `are suitable for use in vessel`s cargo hold, provided that the cargo holds are not immersed in seawater`. Phelan on the other hand opined that those marine paints were alkyd or `soft` paints meant for general purposes as, they do not dry with a hard finish, unlike surface/epoxy tolerant paints. It was noted that the on-hire survey done on 29 November 1995 stated that the cargo holds were coated with aluminium-based paints which (according to Phelan), do not have anti-rust/anti-corrosion qualities.

The last important aspect of Phelan`s testimony related to navigation by a system known as parallel indexing. Parallel indexing was included in the managers` Guidelines to the Master issued under the heading `Navigation` (see DB156) which extract states:

> *A.3 Parallel indexing*
>
> *This method is always applied during coastal navigation and the Master and the officers should be well aware of its technique. When using this method special attention should be paid so that the line to be plotted on the radar and to be followed in order for the ship to pass at a safe distance from the specific point is valid for only one Radar scale. When changing scale, a new line of parallel indexing is to be plotted. `Parallel indexing` is only plotted from shore targets and exceptionally from lightships, but never from buoys. Attention must be paid while on southern courses with the `North Stabilizer` in use, because the heading line appears on the lower semi-circle of the PPI screen and targets appear on the opposite side from where they really are. In this case an error may take place when counteracting or altering course.*

Phelan referred to a textbook (***Parallel Indexing Techniques***) which contained the following caution in its extracts from Merchant Shipping Notice No M 860:

> *(iv) It should be borne in mind that Parallel Indexing is an aid to safe navigation and does not supersede the requirement for position fixing at regular intervals using all methods available to the navigator.*

However, when he testified, Manetos opined that this navigational aid was not something he himself would recommend; it was ***not safe hundred percent*** (V/N 750). He left it to the masters` discretion some of whom had indicated to him that the system was useless/dangerous. When he testified, Orlanda said he did not use parallel indexing on the day of the grounding. If he needed to, Manetos preferred to check the logbooks to make sure proper procedures were carried out for passage planning.

Manetos`s comments surprised Phelan who said parallel indexing is a recognised system for ensuring that a vessel is safe especially when navigating in coastal waters where hazards are in close proximity. He said the system is used extensively and is an objective means of making sure a vessel stays on its course, as opposed to the historical method of taking the vessel`s positions periodically.

Using parallel indexing, Phelan plotted the course of the vessel that day and showed that the vessel would have safely passed Horsburgh Lighthouse. Orlanda`s passage plan through the Straits of Singapore also came in for heavy criticism from Phelan; he described the steps Orlanda took as far short of international regulations especially in restricted waters governed by a traffic separation scheme. Orlanda did not even follow the checklist prescribed by the managers themselves but merely put tracks and course lines on the chart.

To reinforce Phelan`s opinion that Orlanda received inadequate/substandard training at the PMI, the plaintiffs called Kjell Sundberg (`Sundberg`) as a witness. Sundberg is the president/chief operating officer of two (2) Filipino companies (Spectral Technologies Inc and Scanocean Services Inc). Although Spectral and Scanocean are not in the crewing business, Sundberg`s previous employment (1982 to 1999) was with recruitment companies including one based in Manila; he had 17 years` experience dealing with Filipino crew.

After reviewing the documentation pertaining to Orlanda`s initial screening by Adamsons, Sundberg (PW8) opined that Gameng was not qualified to interview any applicant for a deck officer`s position. She had no formal education/training in nautical/engineering subjects and she had no practical shipboard experience to enable her to assess the actual competency of a deck officer. Her only means of assessing a candidate was through sea-time and notes recorded in a seaman`s discharge book which was inadequate. There were no performance records on Orlanda in Adamsons`s documents.

Sundberg identified another factor which would have made a properly qualified recruitment officer hesitant in hiring Orlanda; the man graduated from PMI which private school is known for its sub-standards and mass-production of graduates in nautical and marine engineering. Sundberg had visited the school in 1982 and had interviewed many of their fresh graduates for the apprenticeship training scheme on his employer`s ships. He said he was stunned by the graduates` total lack of even basic professional knowledge as compared with the much higher standards of graduates from the

government-run Philippines Merchant Marine Academy (`PMMA`). Sundberg re-visited PMI in 1999 and found that the facilities had not improved much since 1982. He recalled that teaching aids such as mock bridges were non-existent when he walked through the school with a senior official and, he had noted that on-going classes had about 60 students each while books which were in use were old/outdated and some classes had no teachers in attendance. Sundberg further observed that Orlanda passed the PRC board examination with the lowest possible grades at a time when there was rampant abuse of process by candidates.

Sundberg reviewed the assessment forms which the managers used for their crew. He doubted it was a good method of assessment as the form did not carry the names of the seamen being assessed but only the number allocated to them; indeed some forms did not carry the names of the crew at all (see p 38 of Manetos`s affidavit exh FM1). In any case, he found it strange that Orlanda only had two such reports (see pp 57 and 76), relating to his services on the vessel and no others. As for individual appraisement forms, there were none on Orlanda, despite the fact that immediately before the grounding, Orlanda had been employed only on vessels managed by the managers. Consequently, one would have expected to see at least two (2) appraisal forms on Orlanda (for his services on the vessels Corinthiakos and Sea Macedonia) before the vessel. I shall revert to this issue with regard to the subsequent explanation from Manetos that, it was due to the fact that the managers maintained records for three (3) years only and had no records ***before*** 1993. Sundberg surmised there were two (2) possibilities for the omission:

(1) the managers did not follow their own system of having appraisement exercises;

(2) there were appraisals on Orlanda which reports were sub-standard.

Sundberg also cast doubts on the refresher courses which Orlanda claimed he took before sitting for the third mate`s examination. He testified that the duration of such courses is a few months, not a few days. He concluded that Orlanda most likely never had the competence/capability to handle the work of a navigation officer.

Nor surprisingly, Sundberg`s views were subjected to vigorous cross-examination. Counsel questioned Sundberg`s expertise extracting his confirmation that Sundberg had never served as a deck officer and had no experience in navigation, save as an electrical engineer. However, Sundberg pointed out that as a ship`s electrical engineer, he was familiar with engines and what was required for their maintenance. As a crewing manager, he had also been exposed to shipowners and managers from many countries.

Counsel for the defendants questioned Sundberg`s basis to express opinions on Orlanda`s competence when Sundberg had never interviewed Orlanda. In this regard, I observed that Orlanda passed his subject Principles of Navigation with 78% against a pass-mark of 75%. I do not believe one needs to interview Orlanda to be able to say that his performance was mediocre. Indeed, I noted (V/N 357) that Orlanda averaged 76.35% for five (5) subjects with 80% for Seamanship knowledge, being his highest score. Counsel attempted to justify the poor facilities Sundberg saw at the PMI in 1982 by the fact that Philippines is a poor country. Sundberg disagreed that what he saw was representative of the standard in the Philippines, although there could be other schools with the same facilities. He pointed out that he was comparing the standards at the PMI ***with other standards in the Philippines*** (such as PMMA) and not with those in his home country.

Defendants` case

I begin my review of the defendants` evidence with the testimony of Manetos (DW1), who was a

master mariner himself (1964-1972) before he assumed his present position of port captain. He testified that the managers take charge of eight (8) vessels all of which have excellent safety records save that one (the Saronikos II) grounded off Finland in June 1989, due to no fault of the vessel.

Manetos testified that he attended the vessel during her Rotterdam drydocking and hence could verify the actual repairs carried out by the yard. He explained that the vessel had a lot of garbage/sweepings as she was on charter for a long time; hence skips were provided in four (4) holds to collect the same. The sweepings included hard mud which otherwise would have to be put into containers and discharged at other ports; soft mud was pumped out. The vessel`s tanks also had to be cleaned to provide for easy access to the holds for those working there. Manetos said he took the opportunity while the vessel was drydocked to have the tanks painted. Consequently, he arranged for special paints to be supplied and the crew scraped and physically removed from the tanks whatever scrapings they could. Hence, it was not surprising that 12 tonnes of loose rust and dirt were removed from the vessel. As stated earlier, Phelan disagreed with Manetos`s calculations and had criticised the quality of the paints used.

When Manetos visited the vessel (on 10 January 1996) after her grounding, he alleged someone had opened the portside door and failed to close it properly thereafter resulting in leakage (after the cargo was discharged). When he boarded the vessel, he had checked and found hold No 1 dry; this indicated that the portside door was weathertight. He (with Low from the salvors) had closed the portside door properly using pipes as a lever and, the hold remained dry for ten days until discharge of the cargo. He did not meet Oostra or Findlay during his visit to Singapore, and no one raised the issue that the leakage from the hold was due to corrosion. He denied the allegations of corrosion made by the plaintiffs` experts.

In his affidavit, Manetos set out at length the procedures in his company`s crewing department relating to recruitment, retention and monitoring of seamen (through an appraisal system and masters` checklists). Recruitment of ratings was from two (2) sources, a Filipino agency (Adamsons) and an Egyptian company while officers were generally Greek.

Manetos also detailed the managers` practice for ships` maintenance and repair; he said there were no pre-set limits on his mandate to authorise repairs and his management had never been known to refuse any repair expenditure which he recommended. Vessels were repaired and drydocked whenever required by classification societies or where necessary. The managers practised preventive maintenance well before problems arose. Manetos specifically addressed the issue of his company`s maintenance system for the `tween decks. He also referred to the vessel`s drydocking history between 1993-1995. However, Manetos said the vessels managed by his company did not keep maintenance records; he felt that such logs were not reliable, they only recorded what works people said were done without any certainty that the works were indeed done; he preferred to rely on his own visual inspections.

Port captains/engineering superintendents would visit every vessel at least twice (if not more times) a year. In the course of such visits himself, Manetos said he would review the master`s checklists and hold discussions with the master and the chief/other officers. He would also conduct physical inspections (lasting one to two days) of the vessel, paying particular attention to cargo holds and problem areas, making notes in the process, which notes he would dispose off after he had compiled his report. To support his testimony, Manetos exhibited in his affidavit correspondence he had exchanged with the various masters of the vessel and the invoices relating to the drydocking at Rotterdam. In this regard, Manetos`s last visit to the vessel before the grounding was in March 1995, on which occasion he found the condition of the holds to be satisfactory. He relied on the charterers` on-hire survey as further evidence of the vessel`s good condition. However, both Phelan and Findlay

had questioned the findings of that survey (pp 431-439 of Manetos`s affidavit) conducted on 29 November 1995 by Liverpool & Glasgow Salvage Association at Immingham, for the reason that `access to the tween-deck spaces was restricted at the time of survey, however, no major defects were sighted` (see p 5 of the report). Questioned on this issue, Manetos said that all the hatch covers would have to be opened, otherwise the surveyors would not have been able to inspect the holds; they could see easily the forward and aft bulkheads. Access to the `tween decks was not denied but, it would have been difficult for the surveyors to inspect the starboard and portside because of limited walking space. As Manetos admitted he was not present at the time of the on-hire survey, his explanation is at best speculative although the log entry of the vessel for 29 November 1995 (2DB1830) supported his statement that all the hatch covers were indeed opened for purposes of loading.

all loose rust and dirt Evidence adduced from Manetos in the course of cross-examination included the following:

(1) it is very common on Greek vessels for officers to assume higher positions than their qualification (second officer to chief officer, second engineer to chief officer). In his own case, he commanded a vessel at 28 years of age (in 1964) even though he only had a chief officer`s certificate then;

(2) he disagreed with Phelan that a turnover of one hundred (100) crew over three (3) years for the vessel was high. This was common as it was the managers` practice to put more crew on board than was necessary, for purposes of maintenance, especially for the engine room. Consequently, the vessel had 26 crew on board at the time of the grounding when the manning requirement was 15-16 crew. In any case, of the 100 persons who served, 72 were `repeat` crew who had served his company`s vessels for periods ranging from 5 to 25 years;

(3) his status report in May 1994 (p 187 of his affidavit) suggested that the vessel had rust in its side and double-bottom tanks and its plates (mostly in the upper parts of the tanks) were wasted when the rust was removed. His report stated (and gave the impression) that temporary repairs were effected to the tanks in order to make them watertight for testing, for purposes of Lloyds` special survey. He confirmed no ultrasonic tests on the bulkheads were done on the vessel at that time, although the vessel was then 15 years old;

(4) the vessel traded heavily in all kinds of weather conditions which sometimes precluded proper maintenance from being carried out;

(5) there was no documentary evidence to substantiate his claim that paints were used for maintenance although an invoice was produced (see D2) to prove that paint supplies were delivered to the vessel in December 1995. Manetos pointed out that painting could be carried out at any time, weather permitting, and not only when the vessel was in drydock; it was an on-going process. However, as the vessel was in drydock in November 1995, he seized the opportunity to arrange for the holds and tank tops to be painted; in further cross-examination (V/N 756) Manetos corrected himself to say he did not mean the holds were painted but only where necessary, as well as other parts of the vessel. For the double bottom tanks, the vessel applied epoxy paints or `hard`, not `soft` or conventional paints; before epoxy paints can be applied, the area needs to be sandblasted. For that reason, for purposes of ordinary maintenance, the crew would apply conventional paints;

(6) the 12 tonnes of came mainly from the double-bottom tank No 4 which had to be scraped as a prelude to painting with special paint; by then the vessel had traded continuously for 605 days. The Dutch shipyard did not weigh either the empty or filled skip, the rust removed from the vessel would be no more than 50-100kilos. However, as the removal cost was not much (the shipyard`s figure of 3,900 NLG was reduced to 2,500) he did not quarrel over the shipyard`s charge, which was purely estimated;

(7) although the vessel was docked and undocked on 2 and 12 November 1995 respectively, her repairs were carried out from 2 to 26 November 1995 (see p 387 of his affidavit);

(8) he disagreed that the condition of the vessel before the grounding was reflected in the photographs taken by Low and Oostra;

(9) he disagreed with Findlay`s findings of severe wastage and corrosion claiming it was only surface corrosion arising from the grounding of the vessel. If indeed there was severe corrosion in Nos 3 and 4 `tween deck bulkheads which caused the leakage Findlay had detected, he would have done something or, Lloyd`s surveyors would have requested some action to be taken. When he visited the vessel at the time of the grounding, he found her bow sitting on the rocks and contended that was the cause of the leak.

Some independent evidence to support the vessel`s condition as photographed at the time of the grounding but which was not a result of the grounding is to be found in Lloyd`s survey (at p 411 of Manetos`s affidavit) based on a first visit by the surveyor on 13 April and a last visit on 31 July 1996. Counsel for the plaintiffs had highlighted certain repairs (at p 6 of the report) which were not attributable to the grounding; these included repair of doors (not specified) which were not watertight or could not close properly/tightly and air pipes which Findlay had found to be corroded. I should add that there were no corresponding photographs taken by Manetos of the grounded vessel, to refute the state of corrosion Findlay found in the bulkheads (V/N 1206) save that there was one (No 59 in D6) of the `tween deck, taken (on 20 April 1996) after the vessel had been delivered to Sembawang Shipyard.

However, in the course of re-examination, Manetos was able to prove that at the vessel`s drydocking in Rotterdam, steelworks were done on cargo holds 2 and 3 while Nos 3 and 4 had their tank top bulkheads cropped, renewed and welded (2DB1747), so too the bulkhead of the cargo hold `tween deck (2DB1758A).

As for appraisal of Orlanda`s performance, Manetos said the managers relied on Adamsons to check on the credentials of the crew supplied by the company to his and other shipping companies. Neither he nor others with the managers checked Orlanda`s seaman discharge books as, Orlanda went direct to the vessel, after his recruitment. Manetos was also not aware of the experience/background of Gameng, who actually recruited Orlanda. As far as he was aware, Orlanda had a certificate in Automatic Radar Plotting Aid (ARPA). Questioned on the lack of crew appraisal reports on Orlanda (V/N 656), Manetos explained that it could ***either*** mean that (1) he was not on board during the period, or (2) he had not been signed off, or (3) he was on the vessel but no appraisal report was necessary because Orlanda was familiar to the managers and it served no purpose for the master to repeat his appraisal year after year. However, Manetos stopped short of saying that there were no appraisal reports on Orlanda prior to his service on the vessel, due to the third factor.

I turn next to Orlanda`s evidence. His contract of employment (DB395) with the managers dated 12 December 1994 was for twelve (12) months` service. As he had signed on the vessel at Capetown on 7 January 1995 (DB249), his last day of service would coincidentally have been on the day of the grounding. At the time of the grounding, Orlanda was 43[half] years old; he turned 44 on 31 August 1996.

In his affidavit, Orlanda exhibited a copy of the earlier statement he had given to SRT on 30/31 January 1996 (`the earlier statement`) but which he signed at Auckland on 3 August 1996. I shall now refer to that earlier statement and where necessary, I shall compare it with what he said to Phelan at the Landmark interview.

In the earlier statement, Orlanda stated he could not remember when he sat for ***either*** the third or second mates` certificates although to Phelan, he recalled it was about a month ***before*** the certificate was issued to him. Phelan had identified the period for the third mate`s examination as May 1977 while that for the second mate`s was September 1983. However, in the Landmark interview, Orlanda stated he sat for the third mate`s examination in November 1998.

When he was recruited by Adamsons, Orlanda said he was interviewed (for about an hour) by Gameng who asked him about his experience and for his certificates. Since 27 March 1984, he had served as second mate on ten (10) vessels of which six (6) were under the managers` charge. Orlanda claimed that none of the masters he served (including three (3) on the vessel) had complaints about his

conduct or ability. Indeed, one of them (master of the Corinthiakos) had described his conduct as `excellent`. Apart from a minor collision with a barge when he was with the Saronikos II, he had not been involved in any accident in his employment with the managers. Orlanda knew the master very well from their service on the Johnny Two and Laconikos II (not Saronikos II) where the master was the chief officer. At the Landmark interview, Orlanda alleged that the master had changed since taking command - there was even a hint that the master was a racist.

In the earlier statement, Orlanda claimed that the master, knowing that his contract on the vessel would end in January 1996, had requested him to extend his contract. He claimed he had agreed with the master he would leave the vessel after it arrived in Indonesia. However, in the Landmark interview, Orlanda alleged the master did not want him to continue. Orlanda`s vivid recollection of this conversation is to be contrasted with his inability to recall significant events - the dates of his examinations, at what age he took them and the refresher courses he underwent prior thereto.

In the Landmark interview, Orlanda said the master had asked him (in the presence of ABS Mohd and another dark skinned ABS) when he was on watch that day, whether Orlanda wanted to be put ashore at Singapore, thereby insinuating that he did not particularly want Orlanda on board. This rankled Orlanda (who could still remember the incident after four (4) years) so much so that Orlanda could not bring himself to call the master as instructed. Although Orlanda claimed to have used radar to plot the positions on the chart (aided by visual navigation), this was not done. Prior to the grounding, Orlanda said he was primarily monitoring ships using ARPA; there were ships on his portside and behind him. However, he had no qualifications in nor had he attended courses in, ARPA, even 3[half] years after the grounding.

In the Landmark interview, Orlanda challenged the earlier statement. He claimed it was prepared by SRT based on documentation (even though SRT`s letter dated 8 December 1999 (2DB2011) to the managers and the defendants` solicitors stated that they had interviewed him that day in Manila). Neither did Orlanda complain to SRT that Phelan had attempted to coerce him to admit to wrongdoing, although SRT`s interview of him was just eight (8) days after the Landmark interview and, any undue pressure exerted on him would have been fresh in Orlanda`s mind. The lack of complaint is all the more significant as para 10 of SRT`s aforesaid letter referred to the Landmark interview and recorded what Orlanda reported had transpired between him and Phelan/Navinder Singh.

It is noteworthy that when he talked to Phelan, Orlanda said he was surprised that the master left the bridge while the vessel was still in the TSS. He said he did not want the master to leave after the latter had shattered his confidence with the insinuation of wanting him to leave the vessel.

I turn now to Orlanda`s cross-examination. I had considerable difficulty in understanding his evidence as his (disjointed, rambling and convoluted) answers were oftentimes incoherent, in part due to his poor command of English. Further, he often prefaced his answers with the phrase `I don`t exactly remember ...`. At other times, his stock answer was `I don`t remember`. Questioned why he did not lodge a cross-complaint against Phelan with the PRC, for applying pressure on him by the use of loud and foul language (V/N 813-6) at the Landmark interview, Orlanda did not/could not give any/any satisfactory, explanation.

When told Phelan`s comment that he had appeared evasive in relation to the timing of the dates for his examinations, Orlanda explained he was `upset`, `still in shock` at the time, as he had no supporting papers to show to Phelan. Counsel then took Orlanda through Phelan`s notes of the Landmark interview. Orlanda confirmed he had indeed made the statements which Phelan had recorded save that, he denied he had challenged the earlier statement and he denied:

> (1) the review centre which he attended at Manila before taking the third mate`s examination was a means whereby candidates bribed certain examiners in the PRC to facilitate the award of a certificate;
>
> (2) that he had told Phelan the chief officer was not capable or that he had told Phelan the master had changed since being promoted from chief officer. He had only told Phelan some Greek officers were okay while others were not but he had no problems with those serving on the vessel;
>
> (3) that he had told Phelan the master had insinuated he should be put ashore at Singapore in

the presence of ABS Mohd and another ABS;

(4) that he had told Phelan he had no training or qualification in ARPA;

(5) that he had told Phelan that he was waiting for the GPS alarm to sound to confirm that he was at the waypoint alter course position;

(6) that he told Phelan that no new posting came from the managers after the grounding (as indicated to him there would be), and he therefore sought employment elsewhere. However, he revealed he rejoined the managers` services in March 2000 on the MSC Sarah.

Although it was not stated in his affidavit or in the earlier statement, it emerged that at the material time (see SRT`s letter dated 8 December 1999) Orlanda was beset with personal problems - his wife was a drug addict while his eldest daughter was disruptive at school. According to Orlanda, these problems apparently affected his concentration; indeed he said his mind was a ***blank*** just before the vessel hit the rocks.

As a follow-up to Orlanda`s evidence, I turn to the testimony of the master (DW3); he holds a Greek Class A captain`s diploma (obtained in 1993) which he said is the equivalent of a master`s foreign-going certificate of competency (unrestricted). The master had started his seafaring career in 1965 as a youth and first assumed command of a vessel (not with the managers) in August 1994, when he was 47 years of age. He joined the vessel as its captain in August 1995 when she was on time-charter to other charterers. The master described Orlanda as a competent and good deck-officer from the days when they served together on the Johnny II and the Laconikos II, who never gave him cause to complain. He considered Orlanda a careful navigator whose voyage planning was always accurate and who had previously not been known to miss an alteration of course position or failing to call him to the bridge when required.

Prior to his affidavit, the master had given four (4) statements on the grounding, including one to the MPA and another to SRT. He deposed he was particularly concerned about piracy in the Straits of Malacca; hence, he doubled the watch until after the vessel had passed Singapore. As was his practice, he remained continuously on the bridge during the vessel`s passage through the Singapore (main) Straits, commencing at approximately 0400 hours on 7 January 1996; he was present when Orlanda took over the 1200 hours watch that day; ABS Mohd and another ABS were also on duty. As the TSS covered a relatively long distance before the next waypoint was reached (which he calculated would be at about 1345 hours), the master decided to leave the bridge to have a shower and a meal. After his shower, he returned briefly to the bridge, checked the vessel`s position (fixed at 1246 hours) before proceeding to lunch.; he did not speak to Orlanda who was then looking at the ARPA while ABS Mohd was on the port bridge wing; the other ABS had left the bridge. It is noted that the master is familiar with the Singapore Straits as, he had sailed through it many times previously as chief officer and once, as captain.

Contrary to Orlanda`s claim that there were many ships in the TSS, the master deposed there was only one ship ahead of the vessel`s portside (about 8 miles or so away) when he left the bridge to take his lunch. After lunch, the master went to his cabin (between 1306-1308 hours) and fell asleep in his chair only to be woken up about 20 minutes later by a strong vibration, when the vessel grounded.

The master rushed to the bridge and saw Orlanda in front of the ARPA leaning against and banging his head, on one of the forward bridge windows. After sounding the general alarm, the master requested the chief officer to transmit a Mayday message to Singapore radio and requested Orlanda to record what had happened in the rough deck log. The master inspected and found all holds to be dry save for No 2 hold which was flooded up to the level of the `tween deck. The master noted it was 1405 hours when he took the vessel`s position on GPS and found she was sitting on the rocks of South Ledge at Horsburgh Lighthouse.

loose rust and dirt Cross-examination elicited the following information from the master:

(1) the removed from the cargo holds referred to the crew`s sweepings (mud and rust)

approximating 150kgs from the hatches, cargo holds Nos 1 to 4 and bulkhead;

(2) one of the pre-sailing procedures required him to check the vessel to ensure its seaworthiness. Although it was not recorded in the vessel`s deck log entries, the master insisted he had checked, inter alia, the condition of the cargo holds before the vessel left Immingham;

(3) it was his practice to write on the relevant chart(s) the words `Call Me` if he felt he could not rely on his officers to alter course in coastal waters;

(4) although he would not allow Orlanda to alter course in coastal waters (hence he personally altered course to 081[ordm] at 1220 hours) and had requested Orlanda to call him 6 miles before the next alteration point (at about 1545 hours), it did not mean he had no confidence in Orlanda`s navigation;

(5) the grounding was a result of human error, not because Orlanda was incompetent;

(6) there were two (2) ABS on the bridge until about 1210 hours when (according to Orlanda) only ABS Mohd remained;

(7) he denied his motive for stating in his affidavit that the sliding door giving access to the port bridge wing was open, was to buttress Orlanda`s evidence that the crew could not hear the GPS alarm going off. This fact was inadvertently omitted in the first statement he wrote (in the tugboat which took him to shore after the grounding) due to his being in a state of shock;

(8) he denied what Phelan recorded at the Landmark interview as having been said by Orlanda - that he wanted to put Orlanda ashore at Singapore; Orlanda had requested at Penang (to which he agreed) to sign off the vessel either at Bangkok or Indonesia. However, had he known that Orlanda had personal problems, he would have arranged for Orlanda to be sent home immediately.

Now for Gameng`s evidence; she had joined Adamsons at 19 years of age (in 1982) as personal assistant to Captain Hanel Castuciano (the port captain), whilst she was a third year student in business administration. In 1984, she took charge of crew recruitment responsibilities when the port captain left the company; she reported/reports directly to Milton Adamsons, the president. He had established the company in 1968 and it provides crew for about 110 vessels belonging to 13 foreign shipowners. Gameng confirmed she had not attended any courses in nautical subjects or technical matters although she had attended some seminars (see certificates in D4) organised by the POEA. In 1985, Gameng had attended an orientation seminar organised by the Welfare Fund for Overseas Workers, another on passport procedures organised by POEA as well as a third seminar organised by the Filipino Association for the Mariners` Employment Inc on their new rules and regulations. She had also attended seminars in 1995 and 1996.

Gameng said Orlanda was first interviewed in November 1986 for his employment by Guise Shipping Enterprise Corp (`Guise`) on the Leontari. The first interview (there were others) was conducted in her presence by Captain George Katsimpiris (`Captain Katsimpiris`) of Prometheus Shipping Co (the predecessor to Guise), who happened to be at Adamsons`s office at the time. Captain Katsimpiris questioned Orlanda on how he would react to different navigational situations; his assessment of Orlanda was favourable. Captain Katsimpiris was not mentioned in the statement Gameng gave at Manila on 17 September 1996. Cross-examined on the omission, she explained it was because she had to be sure who the captain at the time was. I found her answer perplexing - her recollection of 1986 events would surely be better in September 1996 (when she made her statement) than in August 2001 (when she swore her affidavit), bearing in mind her claim that her company`s records of 1986 were destroyed. Further, SRT had in their fax dated 3 September 1996, given the managers notice of the need for information/documents from the time of Orlanda`s initial recruitment up to the time of the casualty. Adamsons had received an earlier fax (in August 1996) from the managers, saying the defendants would have to prove that they had taken all necessary measures to satisfy themselves on Orlanda`s competence. Surely, Gameng would have started looking for documents relating to Orlanda in August 1996, not five (5) years later.

Gameng said new recruits are scrutinised carefully, taking into account their past sea-going experience and qualifications. She exhibited to her affidavit the Seaman Information Sheet every

potential recruit has to submit to her company together with, his seaman`s discharge book(s), marine certificates and certificates issued by MARINA and POEA. She would verify with the issuing authorities the certificates submitted and check the applicant`s character by contacting his previous recruitment agencies/employers to discuss his abilities and conduct. In Orlanda`s case, he produced two (2) seaman`s books and his seaman`s registration card issued by POEA which contained a notation of his rank and licence. His seaman`s books would give information on his manning agents.

Although she was aware that Orlanda did not have an ARPA certificate, Gameng asserted it was not a mandatory requirement under the STCW 1978, although she agreed that under the documentary requirements for application of endorsement of certificates under circular 88 (issued by the Department of Transportation and Communications of MARINA), an ARPA certificate was required. She further maintained that Orlanda`s Radar Observer Certificate (dated 24 January 1990) need not be renewed every five (5) years, since it did not have an expiry date. She denied Orlanda had told her (when he signed on), that his certificate was about to expire, let alone that she had assured him that `it was no problem`. Faced with the fact that Orlanda`s certificate of proficiency in radar simulator course stated that it expired on 29 June 1990, Gameng could only say that she had submitted the originals of his certificates to MARINA. In her oral testimony, she added that it was standard operating procedure for Adamsons to present to the PRC, the original and a photocopy of the licence of every officer employee.

Gameng had exhibited to her affidavit (p 65) a letter (dated 11 September 1996) from Guise which confirmed that Orlanda had served as second mate on the Leontari November 1986 to November 1987 ***with the highest degree of professionalism and skill*** . This was ***after*** the grounding and almost ten (10) years ***after*** Orlanda had left the Leontari. Cross-examined on this late testimonial, Gameng denied it was a (belated) attempt to prove she had obtained a reference for Orlanda ***before*** Adamsons ***first*** placed him on a ship operated by the managers - it was because the company no longer had its old records on Orlanda.

Next, there is the defendants` first expert Finnie (DW6) whose testimony was mentioned earlier in relation to Findlay`s testimony. Finnie, a naval architect by training, is a director of TMC (Marine Consultants) Pte Ltd; he was specifically instructed by SRT to address the plaintiffs` allegation on pre-voyage corrosion in the bulkheads. He had been retained by the salvors in the London arbitration proceedings (for which he had prepared a report dated 23 May 1997) which proceedings were eventually settled. In his report to SRT dated 15 August 2001, Finnie opined that he had seen no evidence to substantiate the plaintiffs` allegation that bulkheads other than Nos 3 and 4 `tween deck were corroded whilst corrosion in the latter was clearly caused by flooding through the double-bottom tanks resulting from rock penetration. Finnie inspected the vessel on 27 April 2000 at Hamburg, a year after the grounding. He asserted that if there was a hole in the bulkheads as Findlay testified, he would have expected the crew to have seen it during routine maintenance and reported it to the master. Finnie concluded his report with the following comment:

> *9.1 Although there is no evidence of it prior to the voyage, and only limited evidence following the grounding, on balance, in my opinion, there probably was corrosion in the nos. 1/2 and the nos. 3/4 `tween deck transverse bulkheads at their connection to the `tween deck plating. If this is correct, it pre-existed the voyage. However, since none of the many surveys and inspections of these areas revealed any defects such corrosion as may well have been present, must have been not so easy to detect or so obvious as to necessitate further investigation.*

Referred to Phelan`s testimony on removing mud from the vessel`s ballast tanks, Finnie said the simplest (albeit labour intensive) way was to shovel the mud/sand into the access hold on the tank top, even if the mud at the bottom of a ballast tank was only one inch deep. On the other hand, hosing out the mud through numerous small `rat` holes at the bottom of a tank would be almost physically impossible; the process was also time-consuming and may result in flooding of the drydock. In fact, where there is a huge build-up of mud, the easiest way is to cut a circular opening at the bottom of the tank and drop the mud through.

Drawing on his previous experience (as an in-house surveyor for BP Petroleum), Finnie said that a classification society surveyor (surveying a cargo-hold or `tween deck bulkhead amongst other structural items) will ask for specific ultrasonic readings to be taken of certain areas only if the surveyor is concerned about what he has seen. Otherwise, there is no mandatory requirement for taking ultrasonic thickness measurements of the `tween deck bulkheads or other internal structures during any classification or special, surveys of a ship.

Finnie speculated that the corrosion which Findlay and Oostra saw on the starboard side of the bulkhead was caused by a distorted beam beneath the transverse bulkhead, probably due to some cargo being dropped on it. The stress of the load placed on the beam distorted and caused it to move towards the `tween deck and the bulkhead to fail. Finnie maintained grooving not ordinary, corrosion was the more likely cause of the rust/wasted plating seen by Findlay and Oostra. He added that the type of bulkhead failure seen on the vessel is most common with grooving corrosion.

Shown the photographs taken by Findlay, Finnie said he could not see the source of leakage which Findlay had alleged nor water flowing therefrom. As for the steel encased cement boxes which the salvors had installed over three (3) stiffeners on the portside, Finnie said these were typical of normal salvage operations. The salvors` attempts to fit a wedge through the bulkhead was prone to failure because the original segments of the bulkhead were thin. With regard to the rust sample analysed by Atlantic Engineering Laboratory, Finnie agreed it may not have been a result of grooving corrosion on the starboard side (because Oostra had described it as a circular opening) but, there was obvious grooving corrosion on the portside. Grooving corrosion sometimes does not affect the entire bulkhead while sometimes the same bulkhead would suffer both forms of corrosion. At other times, there could be an isolated spot of corrosion on a bulkhead. Finnie disagreed that a proper visual inspection before the vessel sailed would have detected the corrosion, regardless of the type. He opined that sometimes it is difficult to see some areas, an example would be when hatches are only half-opened.

Finally, there was the evidence of the defendants` second expert Richard Thomas Gregory (`Gregory`) who gave his opinion on the navigational aspects of the vessel, at the time of her grounding. Gregory (DW7) served six (6) years as a chief officer (until 1981) before coming ashore as a marine superintendent. Gregory reconstructed the vessel`s course on 7 January 1996 as prepared by Orlanda (diagrams A to C) between 1315 to 1333 hours but unlike Phelan, he did not think that Orlanda had failed to navigate the vessel properly or, that he was poorly trained and/or was incompetent. Noting that Orlanda had served twelve (12) years as a second officer without incident, Gregory opined that Orlanda was competent to take charge of a navigational watch. Gregory dismissed the psychological examination tests of Orlanda (done by Adamsons) as irrelevant in assessing Orlanda`s competence since, the conclusion of the test was, that Orlanda was recommended for service as a second officer without reservation; I shall return to these tests later.

Gregory was also of the view that there was sufficient detailed pre-planning to allow the vessel to safely navigate through the middle channel Traffic Separation Scheme to pass the Horsburgh Lighthouse. He found the bridge management team sufficient for the intended sector of the vessel`s passage, in the prevailing conditions of good weather, clear visibility and no crossing traffic. He found that the GPS receiver did not give anomalous data that day and accepted without question, Orlanda`s explanation that he did not hear the alarm when the vessel was approaching the position where course was to be altered to 049 as not unusual, due to extraneous noise on the bridge of a ship.

Gregory went on to make the following comments in his report:

> *3.3.2 The Master`s decision to tell Mr Orlanda to call him to the bridge is not surprising and does not indicate any lack of confidence in the officer. The planned alteration of course from 081 to 049 was not a difficult manoeuvre for an experienced navigating officer such as Mr Orlanda and did not require the presence of the Master on the bridge. However, within the bounds of good practice, Masters vary in the extent to which they like to be "hands-on". Therefore, because he had been instructed to do so, Mr Orlanda was wrong not to have called the Master. He was also wrong not to have altered course at the pre-planned position. Finally, he made a gross error of judgment at the last moment by altering course to port causing the ship to run aground. In my view this is a case of human error, not one of incompetence. My reading of Captain Oostra`s report is that he reached the same conclusion. There is no conclusion in his report that Mr Orlanda was incompetent. Similarly, there is no conclusion that Mr Orlanda was incompetent in the TR Little & Co. report [Findlay`s report].*

and arrived at the following conclusion:

> *8(e) ... The bridge was manned by a navigating officer and an AB. This is normal and acceptable. Although not strictly necessary, the Master had issued clear instructions for him to be called to the bridge. These instructions were not complied with and the additional back-up of the GPS alteration of course alarm was not heard. In my opinion, the procedures which were in place for the voyage were perfectly acceptable and no fault in these procedures caused the ship to run aground. I have seen nothing to suggest that the management of the bridge team was anything other than normal and acceptable and in accordance with good practice.*

There are certain shortcomings in Gregory`s report; his findings were based on documents he had sighted and which he accepted at face value, including Orlanda`s certificates (V/N 1443). These also included the master`s report and the master`s statement to the MPA, the statements of Gameng, Orlanda, the master and Manetos given to SRT and, the Landmark interview of Orlanda. Indeed, Gregory stated that he had not seen any grounds to support Phelan`s allegation that Orlanda`s qualifications were discrepant. I note that Gregory did not interview Orlanda or any of the other persons whose statements he relied on; he did not inspect the vessel either. He had also assumed without question, that the words `PLEASE CALL MASTER` were written on the chart at the material time when SRT had stated, that those words were written ***after*** the grounding, as a cover-up by the master and Orlanda.

Cross-examination of Gregory revealed that he was aware of the ***existence*** but was not familiar with, the regulations governing STCW certificates. Neither was he aware that radar observers` certificate had a life span of five (5) years. As he did not hear the testimony of the master, Gregory could not comment on the absence of a discharge given for Orlanda`s service on the vessel; neither could he comment on the lack of appraisal forms (CRI) for Orlanda`s service on board vessels operated by the managers. However, he agreed that Orlanda should have seen the racon of Horsburgh Lighthouse when it was picked up by the vessel`s radar on its 12-mile radius.

The law

THE HAGUE RULES

The defendants` defence to the plaintiffs` claim was based on art IV of the Hague Rules which states:

> *2 Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -*
>
> *(a) Act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.*
>
> *(c) Perils, dangers and accidents of the sea or other navigable waters.*

while the plaintiffs relied on art III para 1 which states:

> *The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to -*
>
> *(a) Make the ship seaworthy.*
>
> *(b) Properly man, equip and supply the ship.*
>
> *(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*

The law requires the plaintiffs to prove that the vessel was unseaworthy prior to and at the commencement of the voyage, that the unseaworthiness caused loss and damage to the plaintiffs` cargo ***before*** the burden shifts to the defendants to prove that they had exercised due diligence. Only then can the defendants avail themselves of the exceptions under art IV para 2. This is clear from art IV para 1 which states:

> *Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness* ***unless caused by want of due diligence on the part of the carrier*** *to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.* ***Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article****. [Emphasis is added.]*

TITLE TO SUE

The defendants had questioned the plaintiffs` title to sue (save for Gresik and Perum, holders of bills

of lading Nos 3, 10, 11 and 501 respectively). The plaintiffs relied on the Bills of Lading Act (Cap 384, 1994 Ed) (`the Act`) in particular ss 2(1) and 5(2) for their claims; the sections state:

> *2(1) Subject to the following provisions of this section, a person who becomes -*
>
> *(a) the lawful holder of a bill of lading;*
>
> *(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with the contract; or*
>
> *(c) the person to whom delivery of the goods to which a ship`s delivery order relates is to be made in accordance with the undertaking contained in the order,*
>
> *shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.*
>
> *5(2) References in this Act to the holder of a bill of lading are references to any of the following persons:*
>
> *(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;*
>
> *(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;*
>
> *(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates,*
>
> *and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.*

The Act (in effect since 1993) replaced the Carriage of Goods by Sea Act 1992.

In their final submissions, the plaintiffs submitted that they claimed either under

(1) straight consigned bills of lading; and/or

(2) as holders and/or indorsees who had taken delivery of the cargo from the defendants in Singapore, after surrender of their original bills of lading.

Gresik and Perum were examples of (2) with Perum also coming under (1) for bill of lading 501. Both consignees also held multi-modal bills of lading or combined transport bills of lading; these are issued by forwarding companies/shipping lines that wish to provide an all-round service to their customers under which the issuer would assume contractual responsibilities for the whole period of carriage. However, the Hague or Hague-Visby Rules would only apply to the sea portion of the transportation by the carrier (see ***Bills of Lading: Law and Contracts*** by Nicholas Gaskell pp 13-14 and ***Carver on Bills of Lading*** (1st Ed, 2001) p 402 para 8-065).

It bears remembering that the defendants have a counterclaim for general average, pursuant to the York-Antwerp Rules 1974 (as amended in 1990); they had based their claim on cl 22(2) of the charterers` bills of lading. Under common law, a shipowner has a lien on the cargo while in his possession or in that of his servants as a carrier, not only for the freight, but also for the cargo`s share of general average. The enforcement of this lien is made the more necessary for a shipowner from the circumstance that a mere consignee of cargo, not being the owner at the time of the sacrifice or expenditure, is not liable for general average in the absence of agreement. The shipowner is entitled to sue to recover contribution from the owners of surviving cargo. If the ownership of the cargo remains unchanged throughout the voyage there is no difficulty in identifying the proper defendant. If, however, there is a change in ownership, the person liable is the owner of the cargo at the time of the sacrifice or expenditure, although the liability may be retained by the shipper, or passed on to subsequent assignees of the goods by appropriate contractual stipulations (see Lowndes & Rudolf`s ***The Law of General Average and The York-Antwerp Rules*** (12th Ed) p 629 para 30.36 and p 640 para 30.54).

Who could be the owners of the cargo in this case? There were three (3) possibilities:

(1) the bank stated on the bill of lading to be the consignee;

(2) the various shippers of the goods who sometimes appeared in the consignee column by the remark `to shipper`s order`;

(3) the plaintiffs who were identified as the notify party on the bills of lading.

The plaintiffs cited **The Shravan** [1999] 4 SLR 197 for their submission that they had title to sue. Unless the plaintiffs had legal ownership of, or possessory title to the cargo at the time of the loss or damage, they cannot sue for negligence (**The Aliakmon** [1986] 2 Lloyd`s Rep 1). Granted, there was no direct evidence from the cargo-owners (other than Gresik and Perum) on their title/ownership of the cargo; Foster was their representative for the purpose. According to Foster, despite the effluxion of time (some five (5) years), no one else apart from the plaintiffs had come forward to lodge a claim on the cargo. Further, the defendants must have been satisfied with the title of the plaintiffs as otherwise, they would not have delivered up the cargo to the plaintiffs/their recovery agents in exchange for the bills of lading presented by the plaintiffs. I am of the view that the only inference one can draw therefrom is, that no one had better title to the cargo than the plaintiffs.

It is also significant that the plaintiffs had furnished to the defendants Lloyd`s Average Bonds in exchange for the defendants` surrender of their lien on the cargo. The standard bond issued in favour of the defendants (see the affidavit of Neil Buckland from Clancey, Sons & Stacey) states:

> *In consideration of the delivery to us or to our order on payment of the freight due, of the goods noted above we agree to pay the proper proportion of any salvage and/or general average and/or special charges which may hereafter be ascertained to be due from the goods or the shippers or owners thereof under an adjustment prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended and which is payable in respect of the goods by the shippers or owners thereof.*

Why would the plaintiffs (or their underwriters) furnish the bonds unless they were certain they owned the cargo relating thereto? Conversely, why would the defendants demand average bonds from the plaintiffs unless they were certain the latter were the owners of the cargo in question? In this regard, I reject the ambivalent stand adopted by the defendants in their pleadings. They cannot, in one and the same breath, question the plaintiffs` right to sue but yet counterclaim general average contribution from the latter.

Accordingly, I am of the view that the plaintiffs had title to sue; they come within the ambit of s 2(1) as well as s 5(2)(a) and (b) of the Act. Having disposed of this preliminary issue, I turn to consider the testimony relevant to the determination of the various aspects of unseaworthiness and the defences thereof, under the Hague Rules.

Findings

MANNING REQUIREMENT UNDER ARTICLE III PARAGRAPH 1(B) OF THE HAGUE RULES

I start by reviewing Orlanda`s testimony. Unlike the defendants` experts (2) and Oostra, I had the benefit of assessing Orlanda while he was in the witness stand for three days (5-7 September 2001). During that time, his testimony shifted like the sands when washed by the tides, depending on his moods (V/N 842). He not only denied what he had said at the Landmark interview but even what he had told the solicitor from SRT (Apostolis) in Manila on 8 December 1998 (whose interview took a whole day), that the words `Please Call Captain` were inserted on the chart after the grounding as a cover-up.

It was naïve of Orlanda to expect the court would believe his claim that Phelan had applied undue pressure on him at the Landmark interview. Even without Phelan`s denial (coupled with Navinder Singh`s), I am convinced there is not one iota of truth in that allegation. Phelan is not capable of the profanities which Orlanda attributed to him. It bears mentioning that at no time during or after, the Landmark interview (confirmed by the man himself), was Orlanda left alone with Phelan. The allegation of undue pressure was clearly an afterthought concocted by Orlanda in a vain attempt to explain the inconsistencies in his testimony and Phelan`s negative assessment of him. As was pointed out earlier, Orlanda could have raised the complaint at the very first opportunity he had on 8 December 1999 to SRT but he never did. He did not even complain to Rosario (DW5) later, when Rosario resorted to all manner of technical objections in his attempts to strike out Phelan`s complaint to the PRC. In this regard, it is significant that Orlanda had, in answer to my repeated questions (V/N 910), confirmed that he had instructed Rosario to challenge Phelan`s complaint on his certificates but this was never done.

Orlanda`s answers were highly unsatisfactory on the discrepant dates of the original and replacement certificates issued to him as second mate. However dull of intellect he may be, I am certain Orlanda`s motive in obtaining the second certificate (with a different number) was to circumvent the MPA`s withdrawal of recognition of his replacement certificate. His explanation that he thought he had lost (in a fire) and then found (in a taxi) his replacement certificate defies belief. His claim that he took the second mate`s examination at the PMI in September or December 1982 is equally suspect because he was then serving on the MV Sunbird (November 1982 to November 1983). Even some of the dates in his several discharge books were discrepant while dates for discharge from some ships including this vessel (as well as the Verbena) were missing, for which Orlanda`s explanations were unsatisfactory. Neither Orlanda nor counsel for the defendants could explain why his original certificate for STCW 1978, valid until 11 December 1999, could not be produced.

Orlanda and Gameng did not give any satisfactory explanation why they had omitted mention (before their affidavits) of his having been interviewed by Captain Katsimpiris at the time he was recruited by

Adamsons. If indeed that interview did take place (which I doubt), nothing that was said by that captain to Orlanda was relevant to Orlanda`s background in navigation, so as to reassure Adamsons of his competence.

Orlanda also had a propensity to embellish his testimony, as can be seen from the several instances I have highlighted. He struck me as someone who is slow of intellect (reflected in the fact that he is still a second officer at age 44, when seamen of his age should have moved up the ranks to be masters). He was poorly trained at the PMI whether in seamanship or in radar observation. Without contrary evidence from the defendants, I accept the testimony of Sundberg that the institute provides sub-standard education in marine and nautical engineering and, produce inferior graduates.

I believe on a balance of probabilities, that the person who sat for the third mate`s examination on 29 May 1977 was not Orlanda. The examinations covered five (5) subjects. If indeed Orlanda came off the Verbena on Friday 22 May 1977, he could not possibly have had the time to do a refresher course (4-5 days) and sit for the papers in a span of one (1) week. His subsequent testimony that he took the examination not in May but in September 1977 is also not credible. Even if he took the crash/refresher course, I very much doubt it would have helped him to pass.

Although the standards at the PMI were inferior, Orlanda still only managed to scrape through whatever subjects he took, a clear sign of his poor calibre. His answers to questions from plaintiffs` counsel, on how he had plotted the passage through the Singapore Straits did not inspire confidence in his navigational abilities; he could not even remember when the grounding occurred although I do not believe his excuse it was because his mind had gone `blank` (V/N 995) at 1330 hours. I will elaborate later on the probable cause why he did not hear the GPS alarm, even though he claimed to be on the bridge at the material time. I agree with Phelan`s comment (V/N 1272) that his memory loss was selective; Orlanda could remember the following:

(1) that he maintained a course of 076[ordm] to keep a proper distance from other vessels in the TSS;

(2) that he took a radar range and bearing of the nearest point on the Johore coastline;

(3) calling ABS Mohd and instructing him to watch the ships in the westbound lane;

(4) returning to the ARPA and after some minutes seeing the westbound traffic turning onto a westerly direction;

(5) realising the relative positions of Horsburgh Lighthouse were incorrect and adjusting the course using the autopilot to regain the intended course;

(6) that the autopilot alarm sounded whereupon he disengaged the autopilot;

(7) that he put the helm hard to port, saw the rocks about 5 cables ahead, that he looked at the GPS and saw a registered speed of 16 knots.

Yet, he could not remember why he had not fixed a position on the chart after 1333 hours. Phelan had testified that Orlanda would have passed the precautionary areas (when crossing traffic may be encountered) at 1323 hours and there was no reason to worry about passing ships thereafter.

Orlanda did not serve two (2) years` sea-time as a rating. Hence, even if I accept Rosario`s interpretation of Presidential Decree 97 (which I do not), that resolution 15 only requires applicants for third mate`s examination to have two years` sea-time as an apprentice/ABS, Orlanda did not fulfil that requirement; he only served two months due to ill-health. His radar observers` certificate of competency had expired in 1995 and was not renewed; he did not have training in, nor an, ARPA certificate at the material time; he had no practical training in radar at all. Even if I believe his claim

that he had informed Gameng beforehand and she had assured him such a certificate was not a requirement (which was what she wrongly maintained), it behoved the managers/the defendants to put a qualified person in charge of radar. Had Orlanda been trained in ARPA, he would not have been distracted (according to him) by the westbound traffic in the TSS because the purpose of ARPA is for a ship`s alarm to go off if vessels approach too closely.

I find it strange that Orlanda would obtain a third mate`s certificate (dated 15 February 1989) from Panama when six (6) years earlier (on 27 January 1983), he had supposedly obtained his second mate`s certificate from the Philippines. Could it be he did not in fact sit for the second mate`s examination at Cebu in September 1982? Further, it made no sense for him to sail on the Sunbird as third mate (15 March to 26 November 1983) if indeed he had already qualified as a second mate by then.

Orlanda did not hear the GPS alarm going off at about 1336 hours (by Phelan`s calculation in chartlet G in P2) which alarm the master corroborated, only gave two beeps and then stopped. Phelan, however, had asserted that the alarm is a continuous beep until someone responds by switching it off. Phelan`s contention appears to be supported by the instruction manual for the Valsat GPS alarm installed on the vessel (2DB2137). Even if I accept what Gregory said - that the alarm would continue to sound only if the person in charge had selected the continuous alarm signal, the question arises why it was not selected; prudence would have dictated that an alarm should continue to sound until it is switched off, thus ensuring that it is heard. Orlanda claimed he had asked ABS Mohd to watch for ships coming down the port bow of the vessel, after he had fixed her position at about 1333 hours. He had also confirmed that ABS Mohd never left the bridge; yet, the latter did not warn him of the approaching rocks (V/N 1010-1012) although they were clearly visible because it was low tide. He had also said his (garbled) log entry at 1342 hours (2DB1868) was his estimate of the time when he made the ***mistake*** of failing to mark the vessel`s position on the chart; there was no reason why he would make such an unnecessary entry unless it was a fabrication.

Granted, Orlanda had a valid certificate in STCW covering the period 12 December 1994 to 11 December 1999. However, possession of that certificate (which was not produced) did not/does not amount to an automatic indorsement of Orlanda`s competency in watch-keeping. It was undisputed that he did not have an ARPA certificate at the time, unlike the other Second Mate Paulino Silleza.

Despite Gameng`s denial to the contrary, I note that circular 88 issued by the Department of Transportation and Communications under MARINA clearly spells out that STCW certificates have a limited life span (PB2655):

> *XI Validity*
>
> *All STCW certificates shall have five (5) year validity period. The MARINA may issue a provisional certificate with a validity period of not more than one (1) year on cases such as:-*
>
> *1. insufficient sea service ...*

As for Gameng, her career with Adamsons started in 1982 when she was a mere student, in an entirely unrelated discipline. It was her own testimony that she had no training or expertise in navigational matters and the seminars she attended in 1985 did not improve her in that regard. Yet by age 21 (in 1984), she had assumed the responsibilities for crew recruitment from a master mariner. Gameng`s lack of experience is apparent from the fact that, despite his poor showing in a psychological evaluation test administered by Adamsons prior to Orlanda`s employment, with the following results:

Practically minded	low
Adaptable	low

Realistic	low

Characteristic Evaluation Gameng nonetheless recruited him; his profile should have forewarned anyone with any seafaring experience that Orlanda was a poor employment prospect. In this regard, I cannot accept Gregory`s opinion that, the fact Adamsons recruited Orlanda meant that the tests should be ignored; logically, the opposite should have been the case.

Although she was alerted soon after the grounding by both the managers and SRT, Gameng would appear not to have preserved documents pertaining to Orlanda`s recruitment. Could it be that the reports if produced, would have shown up Orlanda`s inadequacies? Not only were his certificates discrepant, Orlanda`s discharge books did not even show when he had signed on and off, the vessel. Further, he did not have properly documented appraisal records from the various masters he had served, previous to the vessel. I note in this regard that the defendants (para 50 of their closing submissions) claimed that Orlanda had an `unimpeachable record` of service, based on the remarks in his seaman`s discharge books. I would have been surprised if there had been any adverse comments, recalling Phelan`s remark that seamen discharge books are references for sea-time only.

The preponderance of evidence leads me to conclude that Orlanda was not competent to be and should not have been appointed as, second officer on the vessel. I cannot overlook the fact that even at the eleventh hour, had Orlanda slowed/stopped the engines and/or steered the vessel hard to starboard instead of to port, ***he would still have avoided the rocks*** (according to Oostra`s testimony). I regard such action not as indicative of casual negligence but, of sheer incompetence. His second and third mates` certificates are highly suspect. My belief is reinforced by Rosario`s inexplicable omission to contest Phelan`s complaint on its merits by proving Orlanda`s qualifications are genuine. In their closing submissions (para 21), the defendants had described Rosario as `an eminent shipping lawyer from the Philippines`. With his wealth of experience/expertise which included a three (3) year stint with SRT in their London office, it is all the more curious why Rosario did not take up the cudgels on Orlanda`s behalf to challenge Phelan`s complaint on Orlanda`s lack of qualifications particularly when, in his own affidavit, Rosario had deposed (in para 11) that he was satisfied that Orlanda had adequate qualifications and sufficient sea-time to qualify for the third mate`s examinations. Rosario`s stance is all the more surprising when viewed in the light of the managers` reply dated 26 February 1997 (DB259) to MPA (on their letter dated 23 January 1997); the managers had detailed Orlanda`s qualifications and sea-time and described him as `a very experienced and highly regarded deck officer who had an extremely good and uneventful seagoing career prior to the grounding in question`. The managers` reply is also at variance with the suggestion put to Phelan by counsel for the defendants, that the reason Orlanda did not show cause to MPA why his replacement certificate should be given recognition was due to his disinterest in serving on Singapore registered ships.

Orlanda`s navigational skills were also woefully inadequate; it emerged from his cross-examination that the plots he made on the chart were all based on GPS although he claimed to use visual bearings as his primary means of fixing. I very much doubt he is capable of using parallel indexing as an aid to coastal navigation; in any case, he had admitted he did not use parallel indexing that day. Even though parallel indexing was included in the managers` navigation guide for the vessel and was recommended for coastal navigation. Manetos had said (echoed by the master) that he himself would not recommend it. I find his statement a contradiction in terms and I can only conjecture that it was to explain away Orlanda`s omission to use parallel indexing that day. In this regard, I note too that using parallel indexing as a guide to plot the vessel`s course that day, Phelan produced a chart which showed that she would have safely navigated Horsburgh Lighthouse and the rocks.

Responsibility for Orlanda`s recruitment rests solely with Adamsons and in particular on Gameng; her professed claims of having checked Orlanda`s credentials were not borne out by the evidence. Had she been half as diligent as Phelan, she would have found out soon enough that Orlanda`s certificates were not in order. If indeed she had interviewed him properly when he was hired for the Leontari, with or without Captain Katsimpiris (let alone for an hour as Orlanda claimed) and, had she had any experience at all of navigational matters and nautical subjects, Gameng would not have hired Orlanda - his inadequacies would have been all too apparent. It did not help that according to Manetos, his company left it entirely to Adamsons to recruit Filipino crew for the various ships under the managers` charge. Due diligence on the part of Adamsons and the managers was certainly wanting in this regard. I accept the plaintiffs` submission that the obligation to exercise due diligence under art III para 1 is personal to the defendants and they cannot delegate that duty to Adamsons and/or the managers (**The Muncaster Castle** [1959] 2 Lloyd`s Rep 553). Consequently, they will be liable for the negligent actions of their crewing agents in recruiting sub-standard officers/crew and also for the failure of the managers to monitor and supervise personnel after they are recruited.

I now address the vexed question - what actually happened that day on the bridge? Needless to say, I reject Orlanda`s version as his evidence has been discredited. The only other person who could have told the court what did take place was ABS Mohd; he had signed on at Rotterdam on 8 November 1995 (DB249) but his signing off the vessel is nowhere documented by the defendants, save that in the master`s statement given at Athens on 12 and 13 February 1997 (DB23-66), it would appear that along with other crew, ABS Mohd was repatriated soon after the grounding. I note that the defendants did not obtain any statement from Mohd of what happened that day, even though ***he was on watch and was with Orlanda on the bridge*** ; neither did the defendants produce him (or for that matter Orlanda) to the MPA for their investigations into the incident. Earlier, I had mentioned that counsel for the defendants attempted to explain the absence of the witness by the fact that no negligence was alleged against ABS Mohd. I reject this submission; the plaintiffs had pleaded there was no proper bridge management system (para 3(c) of the reply and defence to counterclaim) and that must include, as Phelan stated in his report, all personnel on the bridge including the ABS who acted as lookout. I would agree with the plaintiffs` submission that an adverse inference should be drawn against the defendants under s 116 illustration (g) of the Evidence Act (Cap 97, 1997 Ed) for their failure to produce ABS Mohd as a witness and for failing to provide ***any*** explanation for his absence. No attempt was made by the defendants to answer the pertinent questions Phelan had posed as to the whereabouts of ABS Mohd and what he was doing at the material time.

I am of the view that this is a case where only the defendants can explain how the grounding came about (see s 108 of the Evidence Act) but the defendants and their managers have not been forthcoming with the explanation. I am therefore left to draw my own conclusions. The absence of ABS Mohd from court, the inconsistent and incomprehensible testimony of Orlanda as to what he did/did not do on 7 January 1996 from about 1333 hours onwards, leads me to believe that there was a fight between ABS Mohd and Orlanda on the bridge that afternoon. A brawl between them would explain Orlanda`s inability to explain why he did not realise he was on the wrong course, why he did not see the racon of Horsburgh Lighthouse on the 12-mile radius of the vessel`s radar, why he did not even hear the GPS alarm and why ABS Mohd did not see the vessel heading straight for the rocks of the South Ledge and/or alert Orlanda to the same. There can be no other plausible explanation. I should add that, if not for the fact that Orlanda`s incompetence had been specifically pleaded in the plaintiffs` case and the defendants needed him as a witness to rebut the same (albeit they failed), I doubt that the managers would have offered him employment on the MSC Sarah in March 2000.

Although it was denied by the master, I am certain he wanted to get rid of Orlanda at Singapore because he knew what a poor second officer Orlanda was, the hint so rankled Orlanda that he could

remember it four (4) years later and not other far more important matters touching on navigation. The master`s lack of confidence in his second officer is reflected in the fact that he would not allow Orlanda to alter course in coastal waters although in the same breath he said it was not because he did not trust Orlanda; what else could it be? This is revealing when contrasted with what the defendants` own expert Gregory said - that the intended alteration of course from 081 to 049 was not a difficult manoeuvre and should be within the capability of a second officer.

An analogy to this case can be drawn from the facts of **The Farrandoc** [1967] 2 Lloyd`s Rep 276 where the Canadian court found the shipowners had failed to exercise due diligence in not checking that the second engineer was inexperienced; hence, the vessel was unseaworthy for the voyage in question. The plaintiffs had also cited **The Makedonia** [1962] 1 Lloyd`s Rep 316 where the allegation of unseaworthiness against the vessel was, inter alia, grounded on the carrier`s appointment of incompetent and/or inexperienced chief and other engineers. Indeed, a parallel can be drawn between Gameng`s omissions when Orlanda was interviewed and those which the court found against the port captain when the latter hired the chief engineer. This is what Justice Hewson had to say (at p 337):

> *In my view, the least that should be done is to ensure a careful inspection of the seaman`s book, to study the history of the applicant and to question him about it and the reasons why he left his former ships; if, for example, he appears to have sailed one voyage, one owner. The certificate ought to be sighted - the certificate might have been suspended. Inquiry should be made of previous owners and, if the report says `nothing against him`, to press for fuller information. I cannot imagine anything more damning than a report from a previous owner that he had `nothing against him`. If nothing confidential is forthcoming, the man should be interviewed until the interviewer is reasonably satisfied about him and, if he is not satisfied, he should reject him. Such important appointments to such responsible positions call for a proper interviewing and a proper inquiry. I am left completely unsatisfied that the necessary steps were taken and the necessary inquiries made to discover the record and competence of this chief engineer.*

In their submissions, the defendants placed great emphasis on Oostra`s letter to Dutch solicitors dated 5 August 1997 ([para ]42 supra) arguing that he had clearly stated the grounding was caused by Orlanda`s negligence in navigation. It seems to me the defendants have made a quantum leap in their argument as, they have obviously overlooked the first sentence of Oostra`s letter where he said `a second officer who is unable to perform a simple navigation task ... is not qualified to act as a second officer`; the words suggest incompetence. In any case, Oostra himself had testified he formed no opinion on Orlanda`s capabilities or conduct. The defendants` reliance on Findlay`s report dated 26 March 1996 for the same argument is misconceived; Findlay had clearly stated that his report was preliminary and in order to complete his investigations and render a full report, he needed more information/documents. Equally, the defendants` contention (para 53) in their submissions that the plaintiffs did not put to their witnesses the case of incompetence of Orlanda smacks of desperation on their part. I would have thought that was the whole tenor of the cross-examination of Orlanda, Gameng and the master.

As it is my finding that Orlanda was incompetent and that the defendants failed to exercise due diligence in checking on his background, training and qualifications, they are not entitled to claim the exception to liability provided under art IV of the Hague Rules for damage to the plaintiffs` cargo, resulting from the grounding.

WAS THE VESSEL SEAWORTHY UNDER ARTICLE III PARAGRAPH 1(A) OF THE HAGUE RULES?

Although my finding of incompetence against Orlanda suffices to hold the defendants liable to the plaintiffs for breach of art III para 1(b), I shall nevertheless proceed to make a finding under para 1(a) thereof, in view of the substantial evidence adduced from the various experts on the vessel`s pre-voyage condition.

The plaintiffs` experts Findlay and Phelan had asserted that the vessel was unseaworthy at the time she commenced her voyage because of severe corrosion, particularly in her bulkheads. The defendants` expert (Finnie) held a contrary view asserting that it was grooving corrosion, although he did concede there was probably ordinary corrosion in the transverse bulkheads `tween decks, which may not have been easily detectable. It bears remembering that Phelan never saw the vessel, Findlay (with Oostra) saw her two (2) months after she grounded, while Finnie saw her more than four (4) years later in April 2000. In fact, the persons who were the first to inspect the vessel after she grounded were Manetos and Low from the salvors. Manetos had resolutely refused to accept that the vessel was in less than pristine condition, as reflected in the photographs taken by Findlay and Oostra. There were therefore four (4) witnesses of fact on the ***actual state*** of the vessel soon after her grounding.

Having reviewed the conflicting evidence from all the witnesses as well as the various reports of class surveyors, I make the following findings. First, I do not doubt that Manetos was/is a conscientious port captain (as reflected in his correspondence with them) constantly exhorting masters of the vessel not to let up on preventive maintenance of the vessel. However, I do not see corresponding compliance by the various masters of the vessel with his instructions; I suppose not all were/would be as diligent as Manetos. I highlight as an example the pre-sailing requirement for masters to check the condition of the cargo holds before commencement of a voyage. The master professed he did check before the vessel left Immingham; I doubt he did as there was no entry in the deck log to support his claim. It is all very well for the defendants/the managers to have commendable rules and regulations for maintenance and navigation of the vessel but, they would be futile if the crew and masters only paid lip service to the same.

I had in the course of proceedings pointed out to their counsel that the defendants` documents relating to maintenance were not incorporated into the agreed bundles; the documents were either in their own bundles or, exhibited in Manetos`s affidavit, usually in the Greek language accompanied by free, not official translations. Therein lay my difficulty - one, there is no certainty that the translations accurately reflected the Greek texts and more importantly, there were no independent documents to rebut the corroded condition of the vessel, as shown in the photographs of Findlay and Oostra; no corresponding photographs were taken by Manetos of the bulkheads; essentially his photographs showed the exterior of the vessel. As the saying goes, a picture is worth a thousand words; Findlay`s photographs showed heavy discoloration due to rust and wasted plating. Even if it can be said that Findlay is not an independent witness, I have no reason to disbelieve Oostra`s testimony or Low`s, bearing in mind also Low was with Manetos when the latter boarded the grounded vessel. I recall Oostra and Low said they had seen the wasting/thinning of the vessel`s `tween deck bulkheads for holds Nos 3 and 4, which resulted in seawater ingress and the necessity to install cement boxes (when wooden wedges used to stem the leak worsened the condition), as well as pumps to remove the seawater.

The defendants had made much of the fact that Findlay did not photograph the exact location where he saw the leaking bulkhead and that he had wrongly identified the location of the main deck door. In their submission they complained that their representatives were not invited to be present when he removed the piece of plating which was later analysed by Atlantic Engineering Ltd; they further

submitted that the latter`s report was inadmissible as evidence because the maker was not called. I find the defendants` complaint frivolous; Findlay did not act surreptitiously but informed the salvors of what he had done after the removal. I have ignored the analysis report because of lack of proper proof but, I certainly took into account the fact that Oostra had confirmed that he saw Findlay removing the corroded piece leaving behind a circular hole. It is to be borne in mind that the vessel had been drydocked just before she was delivered to the charterers. According to the defendants, substantial cutting/replacement and cropping of rusted parts/plates took place during that drydocking. If so, there should not have been signs of such severe corrosion on the vessel, which went far beyond the surface corrosion Manetos contended was usual of ships which traded continuously. If the aforementioned work was indeed done to cargo holds Nos 3 and 4 by the Dutch shipyard as the defendants claimed, it was not properly done and Manetos should have noted the omissions during his inspection after the drydocking. I am not convinced that two (2) months of being stranded on the rocks with the vessel listing 012 to port would result in the plating of the vessel deteriorating to the extent captured in the photographs taken by Findlay and Oostra, which Manetos was unable to rebut with his own photographs.

It is noteworthy that the defendants did not adduce any evidence to counter the results of the ultrasonic thickness measurements carried out by Oostra and Findlay on the bulkheads, which showed how thin the plating was (down to 0mm) in some areas of the `tween deck. Finnie`s testimony that surveyors do not as a rule, call for ultrasonic thickness tests unless they have reason to be concerned, does not help to advance the defendants` case that there was no ordinary corrosion on the vessel.

I have ignored Phelan`s testimony on what he thought was the poor condition of the vessel prior to the commencement of her voyage as he did not see the vessel at all in the course of his investigations. However, that does not mean that I will disregard his entire testimony; I find the defendants` criticisms in that regard wholly unjustified. Of all the experts before me, Phelan`s testimony was the most helpful and, his investigations were carried out most painstakingly. I have also ignored Finnie`s views on the state of the vessel since his visit was four (4) years after the event.

I am also prepared to give the defendants the benefit of the doubt that not ***all*** of the 12 tonnes ***of loose rust and dirt*** removed from the cargo holds during dry-docking comprised of rust. However, taking into account the calculations of Manetos of the amount of steel replacement and adjusting that estimate to take into account Phelan`s views, I still come up with a figure of at least 8-9 tonnes for rust, after making due allowance for the quantity which could be sweepings, according to the master`s testimony. I am not convinced Finnie`s suggestion of how hardened mud is removed from ballast tanks/holds is the method practised by shipowners rather than the less tedious option recommended by Phelan.

I turn my attention next to some of the survey reports of the vessel. I refer firstly to the survey done at Durban by Lloyd`s in April 1994 (report No DRB 400170). If indeed the surveyor carried out the comprehensive survey reported therein, he could not have accomplished the feat within 48 hours; if he did complete the job within 48 hours, it must mean that the survey done was very superficial. Consequently, I am not prepared to accept the survey report at its face value without the surveyor being called to testify. As for the on-hire survey, I agree with Findlay and Phelan that it is of little assistance as the surveyor did not have ***full*** access to the areas in the `tween deck levels where corrosion was found, for whatever reasons. The special survey carried out after the drydocking at Rotterdam is not helpful either as it centred on the hull of the vessel, not the cargo holds.

The defendants have not explained to my satisfaction the extent of corrosion found on the vessel by

Findlay, Oostra and Low and reflected in the salvors` report (see para 36). Finnie`s evidence that the corrosion on board was grooving, not ordinary corrosion was not only not substantiated but goes against the weight of the evidence adduced; the same can be said of Manetos`s claim that the vessel only suffered from surface corrosion. I am satisfied on a balance of probabilities therefore, that the plaintiffs have proved that the vessel was unseaworthy under art III para 1(a). It is my view that, had the bulkhead between Nos 3 and 4 cargo holds been sound, the No 4 hold would not have been flooded by seawater after the grounding, bearing in mind that holds Nos 1 and 4 were not breached by the grounding, only holds Nos 2 and 3.

As for the painting of the cargo holds and other parts of the vessel, the claim of Manetos that he had arranged for the vessel to be painted during her drydocking has not been proven by the invoice he produced from Sigmacoatings BV; if indeed the cargo holds were painted, the wrong quality of paints may well have been applied.

The obligation on the defendants under art III para 2 of the Hague Rules is to `properly and carefully load, handle, stow, keep, care for, and discharge the goods carried`. As was rightly pointed out by the plaintiffs in their closing submissions, this is a continuing obligation throughout the voyage and is not restricted to the time when the voyage commenced, unlike the obligation under art III para 1. The defendants breached this duty as the proximate cause of the damage to the plaintiffs` cargo in holds Nos 1 and 4 was not a peril of the sea (the grounding) but seawater ingress due to corroded and leaking bulkheads. Had the bulkheads been intact and the portside door on the main deck been watertight (as the plaintiffs contended) and not only weathertight (as the defendants contended), the cargo stored in the Nos 1 and 4 holds should have been preserved up to the time it was discharged. Common sense dictates that the main deck portside door should not only be able to withstand seawater/heavy rain but should also be able to prevent the ingress of any water. Otherwise, any water ingress would continue into the cargo holds below. I have ruled out Manetos`s claim that this particular door was opened at some point in time during the salvage operation and not properly closed thereafter; the evidence doe not support this possibility. Similarly, the defendants` submission that seawater seepage into the cargo-holds could have been caused by a leaky bilge pipe fracture is not proven, being purely based on Low`s answer under cross-examination, that it was a `possibility`. The facts here are a far cry from those in **The MV Kantang** [1971] 1 MLJ 183 which case the defendants relied on.

Expert testimony

Before I move on to the defendants` counterclaim, I have some observations to make on the expert testimony, starting with the plaintiffs`. I do not understand the defendants` criticism that Phelan was not a percipient witness. Phelan was not and I did not regard him as, a witness of fact. He was an expert who gave his views based on his sea-going experience; he made his findings based on his own investigations which were thorough and well documented. As for Sundberg, it was wrong of the defendants to compare him with Gameng and say he similarly did not have navigational experience. The defendants glossed over the fact that Sundberg has had 17 years` of experience in Filipino crew recruitment and, he spent six (6) years at sea as an engineer. Unlike the inexperienced Gameng who first interviewed Orlanda when she was only 23 years of age and had never been to sea, Sundberg would know the qualities and experience required before he hired officers; he was/is in a position to express an opinion on PMI because he had actually visited the institute, not once but twice over an interval of seven (7) years, and he resides in the Philippines. Findlay was attacked by the defendants for his mistake in identifying the location of the watertight door and unfairly criticised for not

approaching the Dutch shipyard for clarification on the composition of the 12 tonnes of ***loose rust and dirt*** removed from the holds. The Dutch shipyard, as with any shipyard, is unlikely to entertain requests for information from complete strangers. The shiprepair bills were the defendants` own documents. If, as they contended, the 12 tonnes of ***loose rust and dirt*** meant dirt or sweepings or debris ***other than rust*** , the burden was on the defendants, not the plaintiffs, to prove it. Findlay`s evidence on the state of the vessel was an important consideration in my findings. I assessed him to be an objective witness, despite the defendants` contention to the contrary; his testimony was corroborated by the salvors` report, Low`s evidence and Oostra`s. These two (2) latter persons had no reasons to testify other than to the truth.

Now for the defendants` experts. Earlier, I had commented on the shortcomings in Gregory`s testimony. While I have no doubt he is qualified to give an expert opinion, I found his report superficial and lacking in independent analysis. I have reservations on Finnie`s high opinion of the state of the vessel ([para]172 supra), so too on his theory (which is how I regard it), that the corrosion on the starboard side of the bulkhead was caused by the stress from a load falling on the beam beneath the transverse bulkhead. Finnie had, however, indicated that it was possible to have both grooving and ordinary corrosion on one and the same bulkhead, or an isolated spot of corrosion. I am sceptical of his comment that a proper visual inspection before the vessel sailed may not have detected the corrosion which showed up so clearly in the photographs taken by Findlay and Oostra; a person would have to be blind to miss it.

Counterclaim

The defendants` counterclaim for general average loss and salvage expenses was disputed by the plaintiffs. In the light of my findings, I agree with the plaintiffs that the defendants are not entitled to their counterclaim. The rule to found a claim for general average requires that property was sacrificed or money expended in order to avert a danger which was common to the adventure (see ***The Law in Singapore on Carriage of Goods by Sea*** by Tan Lee Meng at p 558). Here, I had found that the defendants did not act with due diligence in making the vessel cargo-worthy and in their appointment of Orlanda as second officer. It is even arguable that the vessel`s equipment was faulty (the echo-sounder). Since they cannot rely on the excepted perils under art IV of the Hague Rules, the defendants cannot claim general average for an actionable wrong.

Accordingly, there will be interlocutory judgment for the plaintiffs on their claim, with costs on a standard basis. The registrar is directed to assess the plaintiffs` claim with the costs of such assessment to be reserved to the registrar. The defendants` counterclaim is dismissed with costs. The Lloyd`s Average Bonds/Guarantees furnished by the plaintiffs/their underwriters shall be returned by the defendants together with whatever security for costs previously given by the former.

Outcome:

Claim allowed; counterclaim dismissed.