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Case Comment

BURDEN OF PROOF IN CARGO INSURANCE CLAIMS: WHAT HAPPENS WHEN THE TIME OF LOSS IS UNKNOWN?

Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd [2022] SGHC 51

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I. Introduction

1 The central issue which the court was required to consider in *Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd*[1] ("*Sizer v Chubb*") was how far an assured would have to go to discharge its burden of proof when claiming a loss under a marine cargo insurance policy, in circumstances where there was no direct evidence of when or where the loss had occurred.

1 [2022] SGHC 51.

2 In this article, the authors examine the court's decision in *Sizer v Chubb* and, in particular, the court's approach to determining whether an assured has discharged its burden of proof when claiming under a marine cargo insurance policy in circumstances where it is clear that there has been a cargo loss; and where there are alternative case theories as to when and where the loss could have occurred – but no actual direct evidence.

II. *Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd*

A. Background facts

3 The plaintiff was a company engaged in the business of trading base metals and the defendant was a marine insurer.

4 In the course of its business, the plaintiff entered into a marine cargo insurance policy (the "Policy") with the defendant under which the defendant was to indemnify the plaintiff against any loss, damage or expense arising out of the transit of tin concentrate (the "Cargo") from Kigali, Rwanda to the port at Dar Es Salaam, Tanzania and thereafter to Penang, Malaysia.

5 The Policy provided that the plaintiff's Cargo would be insured only for the period after the commencement of the transit (the "Transit Period"). The relevant clauses in the Policy, which were consistent with the terms of the Institute Cargo Clauses (A) 1/1/82, were as follows:

> 8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit …
>
> …
>
> 11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

6 In or around September 2017 to May 2018, the plaintiff entered into sale and purchase contracts with Excellent Mining (the "Seller") for purchase of nine shipments of the Cargo.

7 Under the aforesaid sale and purchase contracts, the plaintiff was to take delivery of the Cargo:

(a) in respect of the first to sixth shipments: at the Seller's bonded warehouse; and

(b) in respect of the seventh to ninth shipments: at the Seller's bonded warehouse upon clearance of customs.

8 In or around July to September 2018, upon the arrival of the sixth to ninth shipments at the place of delivery, Penang, the plaintiff discovered upon inspection that the entire Cargo (which should have been tin concentrate) had been stolen and instead replaced with iron oxide. Upon the plaintiff's discovery of the theft of the Cargo in the sixth to ninth shipments, the plaintiff sent notices of claim to its insurers, the defendant.

B. Plaintiff's and defendant's competing theories

9 The plaintiff's case was that the theft of the Cargo in the sixth to ninth shipments had occurred during the Transit Period from Rwanda to Malaysia, *ie*, after the Cargo left the Seller's premises. The plaintiff relied on two key pieces of evidence:

(a) The fact that up till the point of customs clearance at the Seller's bonded warehouse, none of the representatives who had checked the tin concentrate and the sealed drums had noticed any tampering with the sealed drums.

(b) The National Public Prosecution Authority of Rwanda had investigated the theft and had concluded that it did not take place in Rwanda.

10 The defendant rejected the plaintiff's claims on the ground that the theft had not occurred during the Transit Period. The defendant's case was instead that the Cargo theft had occurred at the Seller's premises, before the Cargo had begun its journey. Therefore, as the Policy only covered losses occurring during the Transit Period, the loss was not covered under the Policy. The defendant relied on, amongst others, forensic evidence and the fact that Cargo had been stored at the Seller's premises for

a period of four to eight days prior to the Transit Period. The defendant further asserted that based on its own investigations, it was unlikely that the theft had occurred during the Transit Period as the plaintiff had claimed.

11 It was not in dispute that the plaintiff had suffered a loss due to theft of the Cargo, and that the theft had taken place at some point between the time the Cargo was stored at the Seller's premises in Rwanda and the time the Cargo arrived in Penang. The key dispute between the parties was whether the theft had occurred before or during the Transit Period.

12 While it was also undisputed that the burden of proof lay with the plaintiff to show, on a balance of probabilities, that the loss had occurred during the Transit Period, the plaintiff and defendant had differing views as to how exactly the burden of proof was to be discharged.

13 The defendant's position was that it was not required to prove on a balance of probabilities that the theft had in fact occurred at the Seller's premises prior to the Transit Period. This was because the court was not compelled to choose between the plaintiff's and the defendant's competing accounts as to how the loss had occurred and could instead hold that the plaintiff had failed to prove on a balance of probabilities that the theft had occurred after the commencement of the Transit Period.

14 The defendant relied on the authority of *Rhesa Shipping Company SA v Edmunds*[2] ("*The Popi M*"), which had been affirmed locally in *Clarke Beryl Claire v SilkAir (Singapore) Pte Ltd*[3] ("*Clarke Beryl Claire*"), *Surender Singh s/o Jagdish Singh v Li Man Kay*[4] ("*Surender Singh*") and *Wartsila Singapore Pte Ltd v Lau Yew Choong*[5] ("*Wartsila*").

15 These cases are discussed briefly below.

2 [1985] 1 WLR 948.
3 [2002] 1 SLR(R) 1136 at [63].
4 [2010] 1 SLR 428 at [121].
5 [2017] 5 SLR 268 at [87].

C. Rhesa Shipping Company SA v Edmunds

16 In the *Popi M*, a ship sank in the Mediterranean Sea, and the owners of the ship brought a claim against the marine hull and machinery underwriters for the total loss of the ship. The claim was brought under the coverage clause "perils of the sea" and so it was for owners to prove that the loss was caused by such a "peril". The owners claimed that the loss had been caused by a collision with a submerged submarine which caused the aperture in the ship's hull to open, resulting in water entering the ship ("Owners' Theory"). To the contrary, the insurers denied that the loss had been caused by a peril of the sea but that it was instead due to the defective, deteriorated and decayed condition of the ship ("Insurers' Theory"). The trial judge rejected Insurers' Theory as being impossible and although he regarded Owners' Theory as improbable, he applied the "Sherlock Holmes Approach", *ie*, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. In doing so, the trial judge allowed the owners' claim under the policy.

17 The matter went on appeal to the House of Lords, which held that it was clear that the burden of proof was on the owners to show on a balance of probabilities what peril of the sea could have created the aperture in the ship's hull.[6] While it was open to the insurers to put forward a competing theory or theories, there was no obligation on the insurers to identify, on a balance of probabilities, the cause of the aperture.

18 Lord Brandon then laid down the following principle in *The Popi M*: the court is not "compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible".[7] Instead, the court should bear in mind that it was open to the court to decide "that the evidence left him in doubt as to the cause of the aperture in

6 *Rhesa Shipping Company SA v Edmunds* [1985] 1 WLR 948 at 953–954.
7 *Rhesa Shipping Company SA v Edmunds* [1985] 1 WLR 948 at 956E.

the ship's hull, and that, in these circumstances, the shipowners had failed to discharge the burden of proof which was on them".[8]

19 On that basis, the House of Lords allowed the insurers' appeal and dismissed the owners' claim. In doing so, the House of Lords disapproved of the Sherlock Holmes Approach of eliminating possibilities to determine the true state of affairs.[9]

D. Clarke Beryl Claire v SilkAir (Singapore) Pte Ltd

20 In *Clarke Beryl Claire*, the appellants were the personal representatives of persons who had died in the crash of an aircraft operated by the respondent ("SilkAir"). The cause of the crash was never conclusively revealed by the technical evidence. The appellants, however, claimed damages against SilkAir and asserted that SilkAir could not limit its liability for the passengers' deaths under Art 25 of the Warsaw Convention as the deaths had been caused by the wilful misconduct of SilkAir's pilot. SilkAir contended that there was no evidence of such wilful misconduct and therefore the limits under the Warsaw Convention applied.

21 The Singapore Court of Appeal found in SilkAir's favour and held that the appellants had failed to show that SilkAir could not limit its liability under the Warsaw Convention.[10]

22 In reaching its decision, the Court of Appeal held that the burden of proof always remained on the appellants to prove their own case on the balance of probabilities, and it would not suffice for the appellants to only prove that their explanations as to the cause of the crash were more probable than SilkAir's.[11] This was in line with the Court of Appeal's adoption of the principle laid down in *The Popi M*.[12]

8 *Rhesa Shipping Company SA v Edmunds* [1985] 1 WLR 948 at 956E.
9 *Rhesa Shipping Company SA v Edmunds* [1985] 1 WLR 948 at 956B.
10 *Clarke Beryl Claire v SilkAir (Singapore) Pte Ltd* [2002] 1 SLR(R) 1136 at 1137, headnote (3).
11 *Clarke Beryl Claire v SilkAir (Singapore) Pte Ltd* [2002] 1 SLR(R) 1136 at [58].
12 *Clarke Beryl Claire v SilkAir (Singapore) Pte Ltd* [2002] 1 SLR(R) 1136 at [63]

E. Surender Singh s/o Jagdish Singh v Li Man Kay

23 The case of *Surender Singh* concerned medical negligence claims brought by the personal representatives of the deceased against the defendant doctors and the National University Hospital of Singapore on the basis that the defendants' failure to adequately monitor the condition of the deceased in the ward had led and/or contributed to her death. The cause of death was in dispute. While the plaintiffs contended that the cause of death was blood loss, the defendants' position was that the extent of blood loss was not so overwhelming as to have been sufficient to cause death.[13]

24 The Singapore High Court, in deciding the issue of cause of death, applied the principle as laid down in *The Popi M*, summarising it succinctly as follows:[14]

> … it would not matter whether the plaintiffs' or the defendants' explanation was the more probable. *The test is not whether the plaintiffs' case is more probable than the defendants' but whether it is more true than not on a balance of probabilities.* [emphasis added]

The High Court highlighted that the burden was still on the plaintiffs to show on a balance of probabilities that the deceased had died from bleeding – and this did not entail the plaintiffs having to rule out all possibilities and prove beyond doubt that the death was caused by blood loss.[15]

F. Wartsila Singapore Pte Ltd v Lau Yew Choong

25 In *Wartsila*, the plaintiffs brought claims against the defendant, Wartsila Singapore Pte Ltd, for losses suffered due to the vessel's engine breakdown. The cause of the vessel's engine breakdown was disputed. While the plaintiffs maintained that the engine breakdown was due to the defendant's poor workmanship and/or negligence in carrying out repairs to the vessel's main engine, the defendant asserted that the engine breakdown was

13 *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428 at [120]–[122].
14 *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428 at [121].
15 *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428 at [127].

caused by the vessel's operation and the crew's maintenance of the main engine and/or supply and use of defective equipment and parts in the operation of the main engine.

26 In deciding the aforesaid issue, the High Court applied the principle in *The Popi M* whereby:[16]

> The causation inquiry … is not whether the plaintiffs' theory was more probable than [the defendant's], but whether their theory was more likely than not on the balance of probabilities. Where the cause of a past event is in issue and two or more competing causes are advanced, the burden of proving his case on causation remains on the claimant throughout, and though the defendant can advance a competing cause, there is no obligation on the defendant to prove his case…

27 The High Court also went on to explain that the process of elimination would fall foul of the principle as laid down in *The Popi M*[17] and reiterated that the elimination of possible causes of loss did not mean that the remaining possible causes of loss would automatically become the most probable cause of loss.

G. High Court's decision in Sizer v Chubb

28 Upon considering the aforesaid authorities, the Singapore High Court held that the facts of *Sizer v Chubb* differ materially from those in the cases that had been cited, in that the cause of the loss suffered by the plaintiffs in those cases had been unknown. In *Clarke Beryl Claire*, the cause of the airplane crash was not conclusive; in *Surender Singh*, the cause of the victim's death was disputed; and in *Wartsila*, the cause of the vessel's engine breakdown was disputed. In *Sizer v Chubb*, however, the cause of the plaintiff's loss was known and undisputed and the *modus operandi* of the theft was agreed, *ie*, the theft occurred by swapping the Cargo consisting of tin concentrate with iron oxide.

29 The issue in dispute in *Sizer v Chubb* was instead limited to when the theft had occurred, and a resolution of this issue involved an almost binary choice for the court's consideration:

16 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [87].
17 *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268 at [89].

either the theft took place at the Seller's premises prior to the Transit Period or elsewhere during the Transit Period. If the theft could not have occurred at the Seller's premises, then it must have occurred during the Transit Period.[18]

30 As there was no direct evidence as to when the theft had occurred, the plaintiff had adduced indirect, circumstantial and forensic evidence supporting its position that:

(a) it was unlikely that the theft had occurred at the Seller's premises and the immediate journey after, *ie*, the "Defendant's Theory"; and

(b) it was probable that the theft had occurred during the Transit Period, *ie*, the "Plaintiff's Theory".

31 The plaintiff's evidence showed that it was highly unlikely for the theft to have occurred at the Seller's premises given that: (a) the National Public Prosecution Authority of Rwanda's investigation report had concluded that the theft did not happen in Rwanda (*ie*, prior to the Transit Period); and (b) there had been tight and layered security in place at the Seller's premises.

32 As the issue in dispute involved an almost binary choice for the court's consideration (*ie*, either the theft took place at the Seller's premises prior to the Transit Period or elsewhere during the Transit Period), the plaintiff's evidence in respect of disproving or eliminating the Defendant's Theory also went towards discharging its burden to prove the Plaintiff's Theory on a balance of probabilities at the same time.

33 Consequently, the court was satisfied that the plaintiff had discharged its burden of proving that the theft took place during the Transit Period and hence the loss was covered under the Policy.

18 *Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd* [2022] SGHC 51 at [39].

III. Key takeaways

A. Burden of proof lies on the assured

34 The principle that the burden of proof is on the assured, and not insurers, to prove its case on a balance of probabilities where a loss is being claimed by an assured under an insurance policy, was re-stated and affirmed by the High Court in *Sizer v Chubb*. This is simply a matter of trite law as he who asserts must prove.

35 While this principle may seem straightforward, its application may not be so straightforward in cases where the cause of the loss being claimed under the policy is unknown or disputed. Examples of such cases are *The Popi M*, where it was not known how the ship had sunk; and in *Wartsila*, where it was not known how and why the vessel's engine had broken down.

36 This is especially so in cases where the assured and insurers may put forward competing theories on the cause of the loss and the court must examine the parties' competing theories and supporting evidence in arriving at a decision on whether the policy is engaged.

37 Even where there are competing theories at play, what is clear, and as has been recognised in *Sizer v Chubb*, is that the burden of proof will always remain on the assured, not insurers, to prove on a balance of probabilities that the loss fell within the policy, including but not limited to whether a loss had occurred or what the cause of the loss was.

B. No departure from The Popi M *principle*

38 The decision in *Sizer v Chubb* also recognised and applied the principle as laid down in *The Popi M*, *ie*, the court is not "compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as

virtually impossible".[19] Instead, there is a third option available to the court which was to decide that the evidence before it left it in doubt and accordingly the assured had failed to discharge its burden of proof.

39 The decision in *The Popi M* makes clear that it is not for insurers to prove an alternative case theory to disprove or diminish the assured's case theory where there are competing theories as to the cause of the loss. Neither would it be for the assured to have to disprove or diminish the insurers' case theory. Instead, it is for the assured to prove its case theory on a balance of probabilities. If it is unable to do so, then it would not be able to discharge its burden of proof to bring a claim under the policy – and its claim will fail.

40 The court had in *Sizer v Chubb* held that its decision was in line with Lord Brandon's principle as laid down in *The Popi M* and confirmed that there was no departure from the principle.[20] While applying *The Popi M* principle in *Sizer v Chubb*, however, the court also took the view that, due to the unique factual circumstances (which differed from *The Popi M*), the plaintiff's evidence tendered in respect of disproving and eliminating the Defendant's Theory also went towards discharging the plaintiff's burden of proving its own case theory on a balance of probabilities.

41 The factual circumstances in *Sizer v Chubb* were unique in that the theft causing the plaintiff's loss must have occurred at some point within the circumscribed period – at the Seller's premises or subsequently during the Transit Period. The various stages in the journey starting from the Seller's premises at Rwanda to the consignee's premises in Penang as agreed between the parties represented a self-contained set of possibilities.

42 The facts of *Sizer v Chubb* were also unique in that, unlike cases where there is no direct evidence as to the cause of the loss, there was no dispute here that the loss had been caused by theft

19 *Rhesa Shipping Company SA v Edmunds* [1985] 1 WLR 948 at 956E.
20 *Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd* [2022] SGHC 51 at [40]–[45] and [49].

involving the swapping of the tin concentrate Cargo with iron oxide. As such, *Sizer v Chubb* did not involve evidence which left the court in doubt as to "whether the event occurred or not".[21] It was clear that theft had occurred. This was unlike the situation in *The Popi M* where the evidence available left the court in doubt as to the true cause of the aperture in the ship's hull, which in turn led to the court deciding that the owners had failed to discharge their burden of proof under the policy. It remained possible in *The Popi M* that the loss could have been due to causes other than what had been postulated by the owners and insurers.

43 It can therefore be concluded from *Sizer v Chubb* that the principle in *The Popi M* still applies under Singapore law. The position under Singapore law remains that the assured cannot seek to argue the insurers' case theory is improbable and so by default the assured's case theory is consequently the more probable one (however improbable the assured's theory may be). Neither can insurers seek to disprove the assured's case theory by putting forward an alternative case theory. It is for the assured in every case to prove on a balance of probabilities that its case theory is more probable than not. The court in *Sizer v Chubb* however decided, based on the specific facts of the case as explained above, that the plaintiff's evidence tendered in respect of disproving and eliminating the Defendant's Theory also went towards discharging the plaintiff's burden of proving the Plaintiff's Theory.

C. Process of elimination not the default but may apply in certain circumstances

44 A further and final takeaway from the decision in *Sizer v Chubb* is that the process of elimination (also known as the Sherlock Holmes Approach), which was adopted by the first instance judge in *The Popi M* (but rejected on appeal), could possibly still apply in very specific situations where all other relevant facts are known and the court is left with only a binary

21 *Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd* [2022] SGHC 51 at [44].

choice – *ie*, the loss could only have been caused by either A or B, so if B is impossible, then A must be the cause.

45 There was no such binary choice in *The Popi M* where not all relevant facts were known. Due to the ship sinking in deep waters, it was not possible in *The Popi M* for divers to carry out an underwater examination of the aperture in the ship's hull which may have shed light on the cause of the aperture. Apart from the theories put forward by the owners and insurers on the cause of the aperture in the ship's hull, the court considered that there could have been further unknown causes beyond what parties had postulated, such as, for example, sabotage.[22] Effectively, the cause of the loss was indeterminate, and the court had rightly rejected the application of the process of elimination.

46 The process of elimination was also not possible in *Wartsila* where the court held that the elimination of possible causes of loss did not mean that the remaining possible causes of loss would automatically become the most probable cause of loss. As with *The Popi M*, there could have been further unknown causes beyond what parties had postulated in respect of the cause of the vessel's engine breakdown in *Wartsila*.

47 The process of elimination was, however, possible in *Sizer v Chubb*[23] because all relevant facts (other than whether the theft had occurred during the Transit Period) were known such that all possible explanations, except an *extremely* improbable one, could properly be eliminated. The cause of the loss and the *modus operandi* of the theft had been agreed between the parties. The only issue in dispute was where and when the theft had occurred. As such, where evidence was provided by the plaintiff to prove that the theft did not occur at the Seller's premises, the likelihood of the theft occurring during the Transit Period, which was the converse, had to increase correspondingly.

48 Accordingly, an assured should not be allowed to rely on the process of elimination where there may be possible

22 *Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd* [2022] SGHC 51 at [42].
23 *Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd* [2022] SGHC 51 at [46]–[49].

unexplored explanations for the cause of loss and in particular where the cause of the loss is indeterminate in nature. If this were not so, it would effectively mean that the standard of proof required of the assured would be significantly altered from being one of a balance of probabilities to a balance of improbabilities[24] and this would arrogate the burden to insurers to prove the truth of an alternative cause.[25] This would go against the legal principles as laid down in *The Popi M*, which are recognised in the Singapore courts.

49 Where, however, all relevant facts are known such that *all* possible explanations could properly be eliminated, and in particular in circumstances where the decision to be made is binary in nature, it may yet be possible for an assured to rely on the process of elimination in discharging its burden of proof.

IV. Conclusion

50 In conclusion, the decision in *Sizer v Chubb* affirms that the principles as laid down in *The Popi M*, which have been relied on and applied by the Singapore courts in past cases, remain good law in Singapore. At the same time, given the unique nature of the factual circumstances in *Sizer v Chubb*, the decision provides a fresh perspective as to how far an assured must go to prove its loss on a balance of probabilities under a marine cargo insurance policy. Unlike the past cases which had also applied the principles in *The Popi M*, the issue in dispute in *Sizer v Chubb* involved an almost binary choice for the court's consideration. The decision effectively opens possible doors for assureds, albeit on a very narrow ground, to sufficiently discharge their burden of proof under marine cargo insurance policies where all relevant facts are known such that the cause of the assureds' loss is not indeterminate. Given the nature of most marine cargo insurance policy claims, however, where the cause of the loss may be indeterminate and/or disputed, it might yet be an uphill task for assureds to prove their claim on a balance of probabilities.

24 *Hua Seng Sawmill Co Bhd v QBE Insurance (Malaysia) Bhd* [2003] 4 SLR(R) 449 at [68].

25 *Hub Warrior Sdn Bhd v QBE Insurance (Malaysia) Bhd* [2004] SGHC 279 at [52].