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2. ADMIRALTY AND SHIPPING LAW

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ADMIRALTY LAW

2.1 Two decisions pertaining to admiralty law and practice were handed down by the Singapore courts in 2017.

Security arrest in aid of foreign court proceedings

2.2 The decision in *The Eurohope*[1] raises an important question in admiralty practice, which is whether a party can arrest a vessel in Singapore to obtain security in aid of foreign court proceedings (as opposed to arbitration).

2.3 The facts of the case are unremarkable. The plaintiffs, charterers of the "Eurohope", brought a claim against her owners for breach of a charterparty in the English courts. They then issued an admiralty writ in Singapore and arrested her, making clear in the affidavit filed for the application for warrant of arrest that it has no intention of bringing the claim in Singapore and the sole purpose of the arrest is to obtain security in aid of proceedings commenced before the High Court of London, on account of an exclusive jurisdiction clause in favour of the latter.

2.4 Chua Lee Ming J observed that while it was not disputed that the arrest fell within the scope of ss 3(1)(*h*) and 4(4) of the High Court (Admiralty Jurisdiction) Act[2] ("HCAJA"), the issue was whether arresting the vessel for security in aid of foreign court proceedings amounted to an abuse of process which warranted the striking out of the writ and the setting aside of the arrest.

2.5 This issue is surprisingly not covered by any reported authority. (An earlier decision, *Avin International Bunkers Supply SA v The Owners*

1 [2017] 5 SLR 934.
2 Cap 123, 2001 Rev Ed.

of the Ship or Vessel "United Endurance"[3] suggests this is permissible but no grounds of decision were given in that case.) *Dicta* (referred to below)[4] indicate it is not possible. In contrast, there are decisions (such as *The Cap Bon*,[5] *The Vasso*[6] and *The ICL Raja Mahendra*)[7] which have dealt with this issue in the context of foreign arbitration proceedings. The latter is, in any event, settled as a matter of legislation. Section 6, read with s 7, of the International Arbitration Act[8] ("IAA") permit the detention of security or the furnishing of alternative security if an admiralty action is stayed in favour of arbitration. Arresting a vessel for security in aid of foreign arbitration followed by a stay of the admiralty action under which the vessel is arrested is a well-established aspect of admiralty practice.

2.6 Chua J decided the issue in favour of the owners holding that:[9]

> [The] power of arrest in an action *in rem* should not be exercised in aid of legal proceedings in a foreign court …

2.7 In arriving at this conclusion, his Honour aligned himself with *dicta* in *The Vasso* and *The ICL Raja Mahendra* (the latter citing *The Vasso* on the point), to the effect that the purpose of the arrest is to provide security in respect of the action *in rem*. This position is reinforced by the statutory language of s 3(1) of the HCAJA (that is, jurisdiction "to bring and determine" a claim) and, perhaps more tangentially, the prescribed language of a bail bond in Form 168 of the Rules of Court.[10] More importantly, in contrast with s 7 of the IAA, there is no statutory provision empowering the Singapore courts to order that property arrested in an admiralty action in Singapore be retained for the purposes of foreign court proceedings. Accordingly, legislative intervention is necessary if the courts in Singapore are to allow arrest to be effected for the latter.

2.8 Accordingly, the admiralty writ was struck out and the arrest set aside because the action amounted to an abuse of process. The striking out of the admiralty action also disposed of the plaintiffs' application to stay the action in favour of the English proceedings on condition that security be retained for the English court proceedings.

3 Admiralty in Rem No 108 of 2007.
4 See para 2.7 below.
5 [1967] 1 Lloyd's Rep 543.
6 [1984] QB 477.
7 [1998] 2 SLR(R) 922.
8 Cap 143A, 1995 Rev Ed.
9 *The Eurohope* [2017] 5 SLR 934 at [25].
10 Cap 322, R 5, 2014 Rev Ed.

2.9 This decision is to be welcomed as it settles an important aspect of admiralty practice in Singapore. The resulting dichotomy between security arrest for foreign arbitration and foreign court proceedings is a matter for which reform conferring the Singapore courts with legislative powers for the latter (like s 26(1) of the UK Civil Jurisdiction and Judgments Act 1982)[11] may be useful.

2.10 For completeness, it should also be noted that the shipowner's claim for wrongful arrest was rejected by the court. This is not altogether surprising considering that prior to this decision, there was a dearth of clear authority as to whether a vessel can be arrested for security in aid of foreign court proceedings.

Priorities in distribution of sale proceeds of vessel

2.11 The factual matrix behind *The Posidon*[12] is, in recent years, a distressingly familiar one: two vessels of an insolvent shipowner were arrested in Singapore and judicially sold but the proceeds of sale were inadequate to satisfy the claims of competing claimants, leading to an attempt by a claimant ranking lower in priority to alter the established, *prima facie* order of priorities so as to leapfrog ahead of a claim by an otherwise superior creditor.

2.12 The two competing claimants in that case were the mortgagee bank and an unpaid bunker supplier. In the established order of priorities, it is trite law that a mortgagee – even a second ranking mortgage, as in the case at hand – ranks higher than a necessaries supplier. The bunker supplier therefore had to persuade the court that on the equities of the case, there was sufficient justification to alter the *prima facie* order of priorities between them, a task which requires the demonstration of exceptional circumstances.

2.13 Before dwelling into the facts, Belinda Ang Saw Ean J took the opportunity to restate the relevant principles on this area of admiralty law.

2.14 The order of priorities and distribution of the proceeds of sale of the vessel in an admiralty action between competing claimants is the question governed by *lex fori*. While it is not disputed that a mortgagee's claim enjoys superior priority over a necessaries claim in an established order of priorities, this is not immutable. Where the equities of the case, having regard to the underlying facts, justify an alteration of the

11 c 27.
12 [2018] 3 SLR 372.

established order of priorities, the court has a discretion to do so if the demand of justice warrants a departure from the usual order of priorities. However, this established order of priorities should only be disturbed if there is a powerful reason to do so,[13] which calls for truly exceptional or special circumstances.

2.15 In the specific context of an attempt to subordinate the priority of the mortgagee, an example of special circumstances would be where a mortgagee, knowing the mortgagor to be insolvent, stands by and allows for the supply of necessaries that would directly accrue to his benefit and/or his security in the ship. In this regard, the court would take into account three factors: first, the mortgagee's knowledge that the mortgagor was insolvent; second, the mortgagee must be fully aware, in advance, of the nature and extent of the expenditure incurred by the necessaries supplier; and finally, any such expenditure must bring about some benefit to the mortgagee. So far as the latter element of benefit is concerned in the specific context of a competing bunker supply, that benefit goes beyond merely providing the vessel with motive power to carry on trading. As for the element of knowledge, the requirement to be met is a fairly stringent one. It must be shown that mortgagee was fully aware, in advance, of the necessaries to be supplied. A non-specific type of knowledge that since all ships require bunker fuel to operate, a mortgagee must be taken to know of the fuel supplies being procured is clearly inadequate.

2.16 In deciding whether exceptional circumstances have been shown to justify a departure from the established order of priorities, Ang J stated that the inquiry will usually focus on the conduct of the party whose priority is sought to be disturbed in relation to the other competing claimants (making it inequitable to allow the former's claim to take precedence over the latter).[14]

2.17 With this principle in mind, her Honour then examined the evidence in a detailed judgment before arriving at the conclusion that on the facts, there was no basis for the priority of the bank to be subordinated to that of the bunker supplier.

2.18 Ang J rejected the argument that the bunkers supplied provided motive power to the vessel, thereby ensuring the physical safety of the bank's security as well as enabling the bank to trade and generate profits to the benefit of the bank. This "simplistic" argument ignores the point that a trading vessel is exposed to a wider spectrum of risk and any

13 *The Posidon* [2018] 3 SLR 372 at [24].
14 *The Posidon* [2018] 3 SLR 372 at [36].

earnings generated by the trading vessel would be a true benefit to the shipowner and operators as opposed to the bank.

2.19 The judge also rejected, on the evidence, an argument that the bunkers were supplied for the purposes of the vessel's arrest voyage to Singapore.

2.20 So far as the knowledge of the borrower's insolvency is concerned, the judge concluded that in fact the shipowners were not insolvent at the material time. The bank was prepared to provide financial support to the shipowners and allowed the shipowners to capitalise instalments of interest which fell due. The availability of such capitalisation was a commercial decision which the bank was entitled to take given the volatile nature of the shipping market. The judge also rejected the bunker suppliers' allegation that the bank effectively controlled the shipowners' finances at the material time and through such control became aware of the shipowners' insolvency, dismissing it as a bare allegation. Whilst the bank was monitoring the activities of the shipowners, it did not in fact interfere with the latter's operational or management decision. Likewise, the judge also rejected the argument that the bank subsequently became engaged in the shipowners' business operation when the latter's financial circumstances declined. The judge was satisfied that the bank was providing facility to a customer who was facing a short term cash flow problem pending receipt of freight or hire from the latter's charterers.

2.21 Turning finally to the element of the bank's knowledge of the bunker supply, the learned judge rejected the argument that "general knowledge" that bunkers were being supplied would suffice. Instead, it must be shown by the bunker suppliers that the mortgagee was fully aware in advance of the arrangements for the necessaries supply, which on the evidence, the former was unable to satisfy the court.

SHIPPING LAW

Charterparty – Effect of "SUB REVIEW" proviso

2.22 In 2017, the Court of Appeal handed down one judgment relating to shipping law. This was the case of *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd*,[15] which was an appeal from the decision of the High Court in *Toptip Holding Pte Ltd v Mercuria Energy*

15 [2018] 1 SLR 50.

Trading Pte Ltd.[16] This decision was considered in a previous review[17] and concerned, *inter alia*, whether or not a valid charterparty had been concluded where the terms exchanged between the parties contained a "SUB REVIEW" proviso.

Brief facts

2.23 Toptip Holding Pte Ltd ("Toptip") is a Singapore company trading in bulk commodities. Mercuria Energy Trading Pte Ltd ("Mercuria") is a Singapore subsidiary of a global energy and commodity trading group engaged, *inter alia*, in the chartering out of vessels to carry dry cargo. Sometime in October 2014, Toptip entered into a contract with Samarco Mineracao SA ("Samarco") to buy iron ore pellets ("cargo"). The cargo had to be shipped from Ponta Ubu in Brazil to ports in China.[18] Toptip had to arrange for a vessel to transport the cargo but Samarco had the right to reject Toptip's nominated vessel if it was not suitable. Toptip contacted a ship chartering broker, Mr Shu, to find a vessel for it. Mr Shu acted throughout on Toptip's behalf in its negotiations with Mercuria for the charter of a vessel. Toptip never corresponded directly with Mercuria.

2.24 Toptip set out its requirements in its e-mail of 13 October 2014 ("Enquiry") to the broker, who in turn sent it to Mercuria. Mercuria did not own any vessel and negotiated with Toptip on the basis that it would be the disponent owner of the vessel if a charterparty was concluded. The Enquiry contained the details of the cargo and Toptip's requirements for the charter. The clauses pertaining to freight and demurrage rates were left blank to be filled in by the prospective shipowner. The last clause of the Enquiry read, "OTHERWISE AS PER VALE CP AS ATTACHED WITH LOGICAL AMENDMENT". This clause was a proposal by Toptip that the detailed terms of the charterparty be based on the *pro forma* charterparty of Vale SA, a large iron ore producer ("Vale CP").[19]

2.25 Mr Shu forwarded the Enquiry to Mercuria, on the same day, stating at the end of his e-mail, "[invite] owners best freight for fixing and asking for a response by 5pm on 14 October 2014".[20]

16 [2016] 5 SLR 243.
17 See (2016) 17 SAL Ann Rev 51 at 65–69, paras 2.42–2.54.
18 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [3]–[4].
19 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [5].
20 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [6].

2.26 Shortly before 6pm on 14 October 2014, Mercuria replied in an e-mail ("Bid") beginning with the following words: "[Mercuria] would like to offer firm bss following terms".[21] In chartering language "firm bss" means "firm basis". The Bid substantially repeated the terms set out in the Enquiry. Both the freight rate and demurrage rate were specified with the freight rate being stipulated at US$18.40 per metric tonne.[22] The only real difference between the Bid and the Enquiry was in the last clause. Mercuria amended the clause to state the following: "OTHERWISE SUB REVIEW OF CHTRS PFMA CP WITH LOGICAL AMENDMENT" ("Subject Review clause").[23] The Bid did not nominate any specific vessel for consideration as the conveying vessel.

2.27 Mr Shu immediately forwarded the Bid to Mr Liu of Toptip and shortly afterwards Mr Liu responded to Mr Shu, "[we] confirm to accept your bid".[24]

2.28 Mr Shu then contacted Mercuria, stating, "[we] confirm the acceptance of your offer. Thanks for your business".[25]

2.29 Thereafter, the broker, Mr Shu and Mercuria corresponded via e-mails regarding the nomination of the vessel and to work out the precise terms of the charterparty.[26] During the course of their discussions, Mercuria proposed that a previous charterparty entered into by Mercuria and Toptip ("Australian CP") be used as a base for the current charterparty.

2.30 On 16 October 2014, Mercuria sent Mr Shu a copy of the Australian CP. Mr Shu then prepared a draft charterparty using the Australian CP as a base and amended it to reflect the main terms in the Bid ("Draft CP"). The Draft CP was first sent to Toptip and Mercuria on 24 October 2014 for their comments.[27]

2.31 During this period, Mercuria also nominated *The Pan Gold* but difficulties arose as the shippers initially objected to *The Pan Gold* due to concerns regarding the financial health of the vessel's head-owner as identified, which were eventually resolved on 29 October 2014.[28]

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21 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [7].
22 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [7].
23 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [7].
24 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [8].
25 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [8].
26 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [11].
27 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [10].
28 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [12] and [13].

2.32 Later that day, however, Mercuria replied Mr Shu, stating, "Owrs cannot accept chtrs cp after review, so subject failed on cp review. Owrs cannot accept chtrs cp for this trade".[29]

2.33 Toptip accepted this rejection on 5 November 2014 and sent a message stating it was terminating the charterparty.[30]

2.34 Toptip then entered into a substitute charterparty with another shipping company for the same vessel, but at a higher rate of US$25.25 per metric tonne ("Substitute Charter"). Toptip also commenced proceedings against Mercuria to recover the difference between the freight it would have paid Mercuria and the freight that it actually had to pay under the Substitute Charter.[31]

Decision below

2.35 In the proceedings below, Toptip's claims were dismissed. Steven Chong J found that the Subject Review clause indicated that Mercuria did not have the unequivocal intention to be immediately bound by the terms of the Bid and Mercuria's subsequent conduct did not impact his finding that no charterparty was concluded between the parties.[32]

2.36 Although not necessary, the judge went on to consider and rejected Mercuria's alternative submission that the charterparty, even if it was concluded, was void for uncertainty.[33]

2.37 The judge also considered and rejected Toptip's argument that Mercuria was in repudiatory breach of the charterparty but was prepared to accept its evidence as to damages notwithstanding the evidential gaps, if Toptip had prevailed on liability.[34]

Decision on appeal

2.38 Both Toptip and Mercuria appealed. The Court of Appeal allowed Toptip's appeal and dismissed Mercuria's appeal.[35]

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29 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [13].
30 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [13].
31 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [14].
32 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [15] and [16].
33 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [21].
34 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [22] and [23].
35 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [82]–[83].

Issues

2.39 The key issues arising on the appeal and cross appeal taken together were as follows:[36]

(a) Was there a contract between the parties?

(b) If a contract was concluded, did it contain uncertain terms so as to render it unenforceable?

(c) If the contract was enforceable, had Mercuria repudiated the same?

(d) If so, has Toptip proved its losses so as to be entitled to an award of damages?

(e) If Toptip fails in its appeal, was the order for costs made in Mercuria's favour correct?

Was there a contract between the parties?

2.40 The applicable legal principles that the Court of Appeal had to apply were not in dispute. A contract may be formed despite the fact that some terms have not yet been finalised. This occurs when an objective appraisal of the conduct and language of the negotiating parties leads to the conclusion that, having agreed on the essential terms, though not all the terms, they nevertheless intended to be bound immediately. In determining whether the parties intended to be bound immediately, the court must look at all the circumstances of the case, not just the correspondence that passed between the parties but also their conduct.[37]

2.41 The key issue that the Court of Appeal had to consider was, therefore, whether there was a clear offer capable of acceptance so as to constitute an immediately binding contract.

2.42 Disagreeing with Chong J, the Court of Appeal found that, notwithstanding the presence of the Subject Review clause, there was in fact a concluded contract between the parties.

2.43 It found that the Bid was a complete and certain offer capable on acceptance of constituting an immediately binding contract notwithstanding the presence of the Subject Review clause.[38]

36 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [39].
37 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [40].
38 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [53].

2.44 First, the Bid expressly stated that it was an offer and not only that but that it was an offer on a "firm basis".[39]

2.45 Second, the Bid, in reproducing the Enquiry, contained all the essential terms necessary for a workable charterparty contract.[40]

2.46 Third, Mercuria did not respond to say the Bid was not an offer and should instead be regarded as an invitation to negotiate further when the broker purported to accept the Bid on Toptip's behalf.[41]

2.47 Fourth, the background facts did not indicate any reason for a reservation to be made by Mercuria.[42] The Court of Appeal rejected Mercuria's assertion that Toptip was offered a rate below market rate and therefore the detailed terms were important to it. It would have made no commercial sense for Mercuria to have offered Toptip a freight rate that was below the market rate applicable at the relevant time, especially when Mercuria would itself have to charter in a vessel to charter out to Toptip. Further, had there been any particular term that could have been expected to have an impact on Mercuria's profitability, such price-affecting term would surely have been included in the Bid itself and not been left to be sorted out in the charterparty details.[43]

2.48 Fifth, the parties' subsequent conduct was consistent with a concluded contract. In particular, Mercuria did not simply nominate the Vessel. Among other things, it also asked Toptip what documents in relation to the Vessel were required by Samarco and sent over the specified documents (all the certificates relating to the Vessel) so that Samarco could approve the Vessel's nomination. After Samarco's initial rejection of the Vessel, Mercuria forwarded various information in a bid to change Samarco's mind and after that followed up by asking for the name of the shipper and their contact details.[44] The Court of Appeal took the view that all these actions displayed an urgency in obtaining approval of the Vessel which would likely not have existed if Mercuria actually thought that the charterparty had yet to be concluded.[45]

2.49 Having decided that a concluded contract existed between the parties, the Court of Appeal then examined the nature of the Subject

39 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [51].
40 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [46] and [48].
41 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [47] and [51].
42 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [52].
43 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [52].
44 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [55].
45 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [56].

Review clause. In this regard, it held that a typical "subject to" clause could be construed either as a condition precedent to the formation of the contract or as a condition subsequent which has to be met in the course of the contract and if not satisfied, the contract will end.[46] It considered the case of the *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The Pacific Champ)*[47] and accepted that a subject-to-review clause could be regarded as a condition subsequent that did not prevent the formation of a binding contract.[48]

2.50 The Court of Appeal noted that there was nothing in the Subject Review clause or the Bid to indicate that negotiations were intended to be prolonged until the review or that the said clause was intended to negate the "firm basis" of the offer. Furthermore, no time limit was given for the review.[49]

2.51 The Court of Appeal also interpreted the scope of review under the Subject Review clause as being limited to the document which the charterers would present as being their *pro forma* charterparty incorporating the logical amendments required to reflect the Bid. An alternative interpretation would be that Mercuria would be entitled to review both the *pro forma* charterparty itself and the logical amendments made to it.[50]

2.52 The Court of Appeal then went on to find that the Subject Review clause merely gave Mercuria a right to review the Draft CP based on the format it had supplied to ascertain whether the amendments made to the format were "logical", that is, consistent with the main terms in the Bid. This right so described was limited in scope. Accordingly, Mercuria could not reject the Draft CP unless its review disclosed, from an objective perspective, that the "logical" amendments made to the Australian CP could not be regarded as such.[51]

Were the terms of the contract uncertain?

2.53 The Court of Appeal rejected Mercuria's argument that the contract, although validly concluded, was rendered void for uncertainty and, therefore, unenforceable due to the uncertainty introduced by the Subject Review clause.[52]

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46 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [59].
47 [2013] 2 Lloyd's Rep 320.
48 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [59] and [60].
49 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [61].
50 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [62].
51 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [65].
52 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [66].

2.54 First, the Court of Appeal agreed with Chong J that the defence of uncertainty cannot be considered because it had not been sufficiently pleaded. In this regard, Mercuria's fatal mistake was the failure to plead what was in fact lacking in the Subject Review clause so as to render it uncertain.[53]

2.55 Second, the phrase "logical amendment" is capable of an objective interpretation indicating that the amendments to be made must be such that the *pro forma* charterparty would be consistent with the terms contained in the Bid.[54]

2.56 Third, Mercuria's mere failure to re-attach certain subsidiary terms in the Bid did not mean that the main terms of the Bid were inadequate because they did not include the shipping and loading terms. This was because these terms had been attached to the Enquiry, Mercuria was aware that Toptip already had a copy of the Samarco terms, the clause incorporating the Samarco terms was repeated verbatim in the Bid and if Mercuria did not wish to be bound by those terms, it wold have stated so in the Bid.[55]

Was the contract repudiated by Mercuria?

2.57 The Court of Appeal concluded that Mercuria had, by its conduct, unlawfully repudiated the charterparty. Mercuria had made no effort to challenge any of the clauses in the Draft CP after review and the lack of any reasoned objection indicated that Mercuria was taking the view that it was free to reject the document for no reason at all 15 days after the Bid was accepted on 14 October 2014. As the Court of Appeal had found that the parties were already contractually bound at that time by rejecting the Draft CP, Mercuria was stating that it had no intention of performing the charterparty with Toptip. The contract was thereby repudiated and Toptip was entitled to accept this repudiation and look for another charter contract.[56]

Has Toptip proved its damages?

2.58 Finally, the Court of Appeal held that there was sufficient evidence of the actual freight rate under the Substitute Charter and that this freight rate was reasonable in view of the prevailing market

53 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [67] and [69].
54 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [70].
55 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [71].
56 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [73].

conditions at the material time.[57] Consequently, Toptip had successfully proven its damages such that it was entitled to US$1,151,546.65 in damages, being the difference in the freight rate under the repudiated charterparty and that which was actually paid under the Substitute Charter.[58]

Costs

2.59 For the reasons above, the Court of Appeal allowed Toptip's appeal and set aside the decision below including the costs order made by Chong J. As a result, it was not necessary to deal with Mercuria's arguments on costs.[59]

Conclusion

2.60 Although "subject to" clauses are a popular means by which contracting parties can avoid being contractually bound until a further date, this case serves as a salutary reminder that this technique may not always work. As such, if shipowners or charterers do not wish to be bound immediately, they should ensure that very clear wording is employed to that effect in the contract and that their subsequent conduct is consistent with that intent.

57 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [77] and [78].
58 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [81].
59 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2018] 1 SLR 50 at [82].