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WHEN EXPERTS COLLIDE

Resolving Conflicting Experts' Opinions in Collision Cases

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I. Introduction

1 Reported collision cases in Singapore are few and far between, but there have been two very recent decisions in *The Dream Star*[1] and *The Tian E Zuo*[2] where the Singapore court had to grapple with not only the issues relating to the collision between the vessels but also with the conflicting opinions of the parties' experts involved. This article seeks to examine how the court dealt with the conflicting evidence and whether the current proposals for civil procedure reforms will ameliorate the difficulties that arose in these two cases.

II. *The Dream Star*

A. Brief facts

2 This case concerned a collision between two bulk carriers, the *Meghna Princess* and the *Dream Star*, on 16 May 2014 in the waters south of Singapore near the Eastern Boarding Ground B.

3 The plaintiff, the owner of the *Meghna Princess*, commenced proceedings against the defendant, the owner of the *Dream Star*, alleging that the *Dream Star* was solely to blame for the collision. The plaintiffs claimed that the vessels were on a *crossing* path and that the *Dream Star*, being the give-way vessel, had failed

1 [2018] 4 SLR 473.
2 [2018] SGHC 93.

to take action in ample time to keep out of the way of the *Meghna Princess* in breach of r 15 of the International Regulations for Preventing Collisions at Sea 1972[3] (the "COLREGS").

4 The *Dream Star* took a diametrically opposed view, asserting that the *Meghna Princess* should shoulder more of the blame as the *Meghna Princess*, as the *overtaking* vessel, did not keep out of the way of the *Dream Star* under r 13 of the COLREGS.

5 The learned judge, Belinda Ang Saw Ean J ("Ang J"), noted at the very outset of her judgment that the first issue as to whether the *Dream Star* was solely to blame was "complicated by the experts' contention on the situation encountered by the two vessels – the expert for the *Dream Star* saw the encounter between the vessels as an overtaking situation, but the expert for the *Meghna Princess* saw the encounter as a crossing situation".[4]

B. Court's approach to resolving conflicting views of experts' evidence

6 In dealing with her approach to conflicting evidence, Ang J stressed the importance of the independence and impartiality of an expert witness as the expert's duty is to assist the court in coming to a decision. She reiterated that under s 47(4) of the Evidence Act,[5] the court has discretion to exclude the expert's evidence in circumstances where the expert's opinion would have a confusing and misleading effect as when there are doubts about the expert's good faith. Even if not excluded, she highlighted that the expert's lack of independence and impartiality could go towards reducing the weight of the expert's opinion.[6]

3 20 October 1972; entry into force 15 July 1977.
4 *The Dream Star* [2018] 4 SLR 473 at [4].
5 Cap 97, 1997 Rev Ed.
6 *The Dream Star* [2018] 4 SLR 473 at [37].

7 Ang J also identified the following relevant principles:[7]

(a) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(b) An expert's opinion must be objective and unbiased. He should neither attempt nor be seen to be an advocate of or for a party's cause.

(c) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion.

8 To resolve conflicting opinions, Ang J said that generally:[8]

> [T]he court will evaluate the views by taking into account honest errors, adversarial bias stemming from the possibility that the experts may be influenced by their clients' interests, an evaluation of the expert's opinion in light of the overall evidence, and the quality of the experts' reasoning itself – *ie*, whether his opinion is sustainable, credible, reasonable and fair. The paper credentials of an expert may be relevant for determining the weight to be accorded to a piece of expert evidence since it is indicative of his familiarity with the subject. But credentials are not solely determinative. It is often more productive to look at other considerations such as the methodology by which an expert reached his conclusions, or his demeanour: see generally *Tan Mui Teck v PP* [2003] 3 SLR(R) 139 at [11] on the court's approach to resolving conflicting expert evidence.

9 With the above principles in mind, Ang J dealt with the following criticisms raised of the experts as follows:

7 *The Dream Star* [2018] 4 SLR 473 at [35].

8 *The Dream Star* [2018] 4 SLR 473 at [38].

(1) Expertise and experience of expert witness

10 The plaintiff's counsel for the *Meghna Princess* contended that the evidence of its expert witness, Captain Phelan, should be preferred simply because his credentials were more impressive than that of the defendant's expert witness Captain White, whose qualifications and experience were limited.[9]

11 The defendant's counsel for the *Dream Star* pointed to Captain Phelan's limited merchant sailing experience.

12 Ang J, however, was of the view that the debate in this collision related to the navigational situations encountered by both vessels in Singapore waters and were matters well within the competence of both experts.[10]

(2) Vessel Traffic Information System ("VTIS") and Voyage Data Recorder ("VDR") data

13 The plaintiff contended that the audio recordings from the VTIS and VDR data that Captain White had transcribed had limited or no probative value because Captain White had accepted at trial that he had not personally listened to all of the recording clips while preparing the supplementary report – instead, he had obtained assistance from a colleague.[11]

14 On the other hand, Captain Phelan's transcript was objected to as it did not contain the portion of the VHF conversation where the *Meghna Princess* told the *Dream Star* to pass at her bow.[12]

15 Ang J dismissed the plaintiff's contentions as the accuracy of Captain White's transcripts was accepted by the bridge team who testified at the trial.

9 *The Dream Star* [2018] 4 SLR 473 at [30].
10 *The Dream Star* [2018] 4 SLR 473 at [30].
11 *The Dream Star* [2018] 4 SLR 473 at [28].
12 *The Dream Star* [2018] 4 SLR 473 at [29].

16 However, Ang J found that Captain Phelan's transcripts were incomplete; he had doggedly refused to accept the full contents of the VHF conversation between the *Dream Star* and the *Meghna Princess* even after the audio recordings were played twice in court and the transcripts of the oral testimony of the master and second officer were read to him.[13]

17 Captain Phelan therefore failed to come across as acting independently and impartially, which reduced the weight placed on his evidence.[14]

(3) Expert's previous investigation into casualty

18 Captain Phelan had previously investigated the collision on behalf of the plaintiff, whereas Captain White was not involved in the casualty investigations at all.

19 Ang J observed that whilst the person who investigated the casualty is oftentimes subsequently called as an expert witness to save time and costs, the party calling the expert as a witness should disclose the expert's earlier role as an investigator even though there is generally no bar to the appointment of such a person as an expert witness. Consequently, persons involved in the investigation of a marine casualty are best deployed as witnesses of fact only.[15] This would obviate the danger of expert witnesses basing their opinion on information that has not been put into evidence. Reference was made to the duties and responsibilities of an expert witness as set out in *The Ikarian Reefer*[16] and *Pacific Recreation Pte Ltd v SY Technology Inc*[17] ("*Pacific Recreation*").

20 In this case, Ang J found that Captain Phelan had wrongly referred to interviews he had conducted with crew members during his investigations as though they were facts that had been

13 *The Dream Star* [2018] 4 SLR 473 at [36].
14 *The Dream Star* [2018] 4 SLR 473 at [36]–[37].
15 *The Dream Star* [2018] 4 SLR 473 at [32].
16 [1993] 2 Lloyd's Rep 68 at 81.
17 [2008] 2 SLR(R) 491 at [70].

put into evidence. She therefore found that he had blurred his two separate roles and inappropriately made use of hearsay information as a factual basis for an expert opinion.[18]

(4) Defendant's failure to call any factual witness and reliance on expert evidence alone

21 The defendant in this case opted not to call any of the crew of the *Dream Star* to testify, preferring instead to rely on expert evidence alone.

22 Ang J held that this approach was not objectionable in principle if the expert opinion relied upon was solely premised on digital or electronic records that were not in dispute. In this case both parties' expert witnesses were able to agree to a common set of data although they were in disagreement over the interpretation of the data.[19]

23 However, Ang J recognised that the defendant's decision not to have the crew testify carried some risk, especially where the crew's evidence was needed to establish compliance with the COLREGS. The defendant's decision also meant that it could not seriously challenge the plaintiff's assertion that the defendant had, *inter alia*, not complied with r 5 of the COLREGS, which required the crew to maintain a proper visual lookout, and r 7 which was to use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists.[20]

24 Notwithstanding the above, Ang J refused to draw adverse inferences under s 116(*g*) of the Evidence Act[21] as to, *inter alia*, the crew's understanding of the COLREGS and practices of good seamanship.

18 *The Dream Star* [2018] 4 SLR 473 at [34].
19 *The Dream Star* [2018] 4 SLR 473 at [39].
20 *The Dream Star* [2018] 4 SLR 473 at [40].
21 Cap 97, 1997 Rev Ed.

25 Ang J found that, broadly speaking, depending on the circumstances, the issue of whether there has been a breach of r 16 of the COLREGS and good seamanship involved an objective test that could be resolved with reference to technical data such as the speed, heading, position and relative bearing of the vessels without having to rely on oral evidence from any factual witnesses.[22]

26 Ang J also found that the plaintiff's submission for adverse inferences to be drawn was misplaced. She cited *Sudha Natrajan v The Bank of East Asia*,[23] where the Singapore Court of Appeal held that the court, in deciding whether to draw an adverse inference, must "put its mind to the manner in which the evidence that is not produced is said to be unfavourable".

27 Ang J concluded that the defendant's decision not to call any factual witness did create an evidentiary gap pertaining to a prerequisite for the crossing and overtaking rule to be engaged.[24] However, she noted the inaccuracies and inconsistences in the evidence given by the plaintiff's factual witnesses (the bridge team of the *Meghna Princess*), which did not square with the electronic data recorded on board the vessels. This had a bearing on their veracity and credibility as factual witnesses, which ironically left the plaintiff relying on expert evidence in the same way as the defendant in the end.[25]

III. *The Tian E Zuo*

A. Brief facts

28 This case also came before Ang J. It concerned two related collisions that occurred on 12 June 2014 in the Western Petroleum Anchorage B. The first involved the plaintiff's vessel, the *Arctic Bridge*, and a vessel owned by a third party, the *Stena*

22 See, for instance, *The Samco Europe and MSC Prestige* [2011] 2 Lloyd's Rep 579.
23 [2017] 1 SLR 141 at [23]. See also *The Dream Star* [2018] 4 SLR 473 at [42].
24 *The Dream Star* [2018] 4 SLR 473 at [43].
25 *The Dream Star* [2018] 4 SLR 473 at [44]–[45].

Provence. The second involved the *Stena Provence* and the defendant's vessel, the *Tian E Zuo*.

29 The plaintiffs contended that the defendant was wholly to blame for the related collisions, whereas the defendants counterclaimed on the basis that it was the plaintiffs who were wholly responsible.

30 As was the case in *The Dream Star*, in *The Tian E Zuo* there was a divergence in the opinions of the parties' respective experts.

B. Court's approach to resolving conflicting views of experts' evidence

31 Ang J's approach was to consider whether the nature of the issue in question falls within the expert's particular area of expertise and to assign weight to the opinion of the expert where his familiarity with a subject is a relevant (though not sole) consideration. The expert's opinion will be assessed in the round, taking into account the independence of the expert and the underlying factual matrix of the case.

(1) Differences in expertise between expert witnesses

32 The plaintiffs urged the court to prefer the opinion of their expert witness, Captain Jonathan Walker, over the opinion of the defendant's expert witness, Mr Hakirat Singh. The plaintiffs argued that, unlike Mr Singh, Captain Walker was an experienced mariner of 18 years who had had the opportunity to command a ship as master, and his voice of experience should be given greater weight as a result.

33 Despite the comparison, the plaintiffs did not object to Mr Singh being an expert witness and the court found that the plaintiffs, in accepting Mr Singh as an expert to testify, were satisfied that the requirements of s 47(2) of the Evidence Act

were met, *ie*, that he had "scientific, technical or other specialised knowledge based on training, study or experience".[26]

34 Ang J also found that the differences of opinion in this case did not have any material influence on the outcome of the action.

(2) Involvement of defendant's expert in casualty investigation

35 The plaintiffs asserted that little or no weight should be ascribed to the defendant's expert's evidence as he had a "clear conflict of interest" and was criticised for failing to disclose his prior involvement in conducting casualty investigations on behalf of the defendant.

36 Ang J, however, held that there was no merit in the plaintiffs' assertions as Mr Singh had disclosed his involvement in the casualty investigations on at least two occasions and, unlike the situation in *The Dream Star*, Mr Singh had not improperly supplemented the factual evidence of the crew in his testimony.[27]

(3) Plaintiffs' video

37 The plaintiffs had introduced a video containing a reconstruction of the collision based on information gleaned from the vessels' voyage data recorders ("VDRs"). The defendants identified discrepancies between the video and the VDRs and wished to cross-examine the maker of the video, Dr Baines. The plaintiffs submitted that the video was the "best objective and most accurate description of what happened" and that the objections taken by the defendant were unreasonable.

38 Ang J disagreed. She distinguished real evidence (which had independent probative force) from demonstrative or illustrative evidence (which did not). When demonstrative

26 *The Tian E Zuo* [2018] SGHC 93 at [20].
27 *The Tian E Zuo* [2018] SGHC 93 at [22].

evidence was sought to be admitted, the person who prepared such evidence must be available for cross-examination to vouchsafe its accuracy or fidelity. On the facts, cross-examination was permitted as the video was considered demonstrative evidence.[28]

IV. Concluding observations

A. Practical pointers

39 The two cases raise a number of helpful practical pointers. Firstly, as demonstrated by *The Dream Star*, litigants should be careful when appointing an expert who has investigated a casualty as there exists the risk of the expert basing his testimony on information obtained during his investigations that has not been put into evidence.

40 Secondly, *The Dream Star* also demonstrates that care should be taken to ensure that expert witnesses remain impartial and independent at all times. Reference is made to the principles identified in *The Dream Star*,[29] the detailed guidelines for adducing expert evidence laid down by the Singapore Court of Appeal in *Pacific Recreation* and the Court of Appeal's reminder that experts are bound by O 40A r 3(2)(*e*) of the Rules of Court[30] to consider opposing opinions.[31]

41 Thirdly, *The Tian E Zuo* demonstrates that if the expertise of a witness is in doubt, it might be better to challenge the appointment of an expert under s 47(2) of the Evidence Act

28 No definition of "demonstrative evidence" was given in *The Tian E Zuo* [2018] SGHC 93. However, Vinodh Coomaraswamy SC had described such demonstrative evidence as "evidence which is a representation or illustration of some relevant aspect of the case". See Vinodh Coomaraswamy SC, "Evidence and Admissibility" in *Modern Advocacy – Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming & Vinodh Coomaraswamy gen eds) (Academy Publishing, 2008) at para 09.101.

29 See para 8 above.

30 Cap 322, R 5, 2014 Rev Ed.

31 *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 3 SLR(R) 491 at [87].

rather than merely contest the weight to be placed on an expert's evidence by questioning the expert's credentials. This is because a successful challenge under s 47(2) would exclude the expert's evidence, whereas a subsequent challenge as to weight does not have the same effect.

B. "Hot-tubbing" as a cost-saving measure

42 Conflicts over expert opinion are both expensive and time-consuming and more resort is now being made to the process of "hot-tubbing".[32] Time and costs may be saved by having parties' expert witnesses give concurrent expert evidence pursuant to O 40A r 6 of the Rules of Court. Under this provision, experts testify as a panel, with all experts giving evidence concurrently. Experts may comment on each other's views and each expert has the opportunity to respond to any such comment immediately. Both the court and counsel can pose questions to the experts throughout the process.

43 It has been said that "hot-tubbing" is intended to "make the process of expert evidence more of a conversation and less of a quarrel", thereby "[leading] more readily to experts finding common ground through a reasoned and reasonable discussion".[33] However, it has been observed that "hot-tubbing" may lead to counsel losing control of the trial process, with parties' experts taking on the role of their respective clients' advocate.[34]

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32 For recent Singaporean cases where "hot-tubbing" has been employed, see *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545, in which foreign law experts were put through the "hot-tubbing" procedure, as well as *Swiss Butchery Pte Ltd v Huber Ernst* [2013] 4 SLR 381, in which accounting experts were put through the same.

33 Sundaresh Menon CJ, "Evolving Paradigms for Medical Litigation in Singapore", speech at the Annual Oration of the Obstetrical & Gynaecological Society of Singapore (28 October 2014) at para 58.

34 Ronald J J Wong, "Judging Between Conflicting Expert Evidence: Understanding the Scientific Method and Its Impact on Apprehending Expert Evidence" (2014) 26 SAcLJ 169 at 188.

C. Impact of coming civil procedure reforms

44 The two cases illustrate the difficulties involved when experts appointed have diametrically opposed views.

45 To help ameliorate the aforementioned difficulties, the Civil Justice Review Committee suggested in 2018 that the default position should be for a single court expert to be appointed in cases where expert evidence is necessary, although parties may also apply to court for leave to appoint their own expert witnesses.[35] The Civil Justice Commission likewise came to the conclusion that a general rule of using one common expert should be prescribed.[36]

46 Whilst a court-appointed expert has its benefits, it is unclear whether it will resolve the issues highlighted by the two abovementioned cases, where:[37]

(a) there is a lack of certainty whether a court-appointed expert will always act in an objective fashion;

(b) the presence of a court expert may not necessarily reduce parties' desire to call their own experts;[38] and

(c) the role of the judge might be usurped if the expert effectively decides the case.[39]

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35 Civil Justice Review Committee, Ministry of Law, *Report of the Civil Justice Review Committee* at paras 94–99 (Chairman: Indranee Rajah SC).

36 Civil Justice Commission, Supreme Court, *Civil Justice Commission Report* (29 December 2017) at pp 21–22 (Chairman: Judge of Appeal Tay Yong Kwang).

37 See, for instance, New South Wales Law Reform Commission, *Report 109: Expert Witnesses* (June 2005) at para 3.35 (Head of Division: Prof Richard Chisholm).

38 As Lord Denning observed in *Re Saxton (deceased)* [1962] 1 WLR 968 at 972, where a court expert's report goes against one side, it is likely that that party will wish to call its own expert to contradict the court expert. This might also incentivise the other party to call its own expert to contradict the first party's expert.

39 The Singaporean courts have emphasised that an expert witness should not decide on questions of law or fact placed before a court. See, *inter alia*, the Singapore Court of Appeal's observations In *Eu Lim Hoklai v Public Prosecutor*

(*cont'd on the next page*)

D. Conclusion

47 It remains to be seen if the proposed reforms will help resolve the difficulties illustrated in the two cases. However, it is not inconceivable that in complex collision cases, or in cases where there is genuine missing data or genuine disagreement over the interpretation of the data available, or the interpretation of the COLREGS, different experts may genuinely come to different conclusions. Having a court-appointed expert may therefore not be a solution.

48 Nonetheless, on a positive note, it is hoped that with increasing use of and reliance on modern technology, it will eventually be possible to reconstruct the events leading up to the collision more accurately, whereby differences of opinion and areas of conflict between experts may be reduced or even eliminated altogether.

[2011] 3 SLR 167 at [44], as well as the Singapore High Court's recent observations in *Cheong Soh Chin v Eng Chiet Shoong* [2018] SGHC 131 at [35].