

2. ADMIRALTY LAW

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2.1 Three decisions pertaining to admiralty law and practice were handed down by the Singapore courts in 2018.

Forfeiture of deposit in Sheriff sale of vessel

2.2 *The Swiber Concorde*¹ presented Pang Kang Chau JC with an opportunity to consider an interesting question of admiralty practice – whether the forfeited deposit from an earlier abortive sale of a vessel should be paid out together with the proceeds of sale to the parties interested in the vessel, or whether the forfeited deposit should be retained by the Sheriff or, perhaps, the State.

2.3 The vessel *Swiber Concorde* was arrested by the mortgagee plaintiff pursuant to its mortgage claim. The plaintiff obtained judgment in default of appearance, which was followed by an order for appraisal and sale of the vessel. The vessel was then sold to the highest bidder (Valentine Maritime Ltd) on the Sheriff’s terms and conditions of sale, who then paid a deposit of US\$50,000.

2.4 Subsequently, Valentine Maritime Ltd declined to proceed with the purchase and its deposit of US\$50,000 was forfeited by the Sheriff pursuant to the terms and conditions of sale. The vessel was then sold in its third round of bidding and the mortgagee plaintiff applied for payment out of the proceeds of sale paid into court.²

2.5 As the Sheriff’s final statement of account distinguished between “proceeds of sale” and the forfeited deposit, his Honour had to consider whether the forfeited deposit should be paid out together with the proceeds of sale.³ Curiously, there was one case⁴ which treated the forfeited deposit from an aborted sale as part of the proceeds of sale.

2.6 Pang JC noted that while the starting point would be to look to the Sheriff’s conditions of sale to determine how the forfeited deposit

1 [2018] 5 SLR 1283.

2 *The Swiber Concorde* [2018] 5 SLR 1283 at [5].

3 *The Swiber Concorde* [2018] 5 SLR 1283 at [6].

4 *The LCT Maadhooni* Admiralty in Rem No 111 of 2015 (23 November 2015).

should be dealt with, there are no express provisions in the conditions of sale dealing with this issue.⁵

2.7 In any event, the deposit forfeited by the Sheriff is for the benefit of the parties interested in the vessel because while the Sheriff contracts on behalf of the State in respect of the contract for sale of the vessel, the title to the arrested vessel does not vest in the State but remains with the owner of the vessel.⁶ Further, as the Sheriff is acting under the court's commission for appraisal and sale, the Sheriff is selling the vessel for the benefit of *all parties interested* in the vessel. Accordingly, the forfeited deposit should be paid out together with the proceeds of sale to the interested parties.⁷

2.8 For completeness, as there were no other claimants before the court than the plaintiff, and the plaintiff's judgment sum exceeded the total sum of the proceeds of sale and forfeited deposit, Pang JC ordered the forfeited deposit to be paid out to the plaintiffs.⁸ As a matter of principle, the decision is, with respect, correct. The vessel represents the arresting party's security; when sold, that security is converted into monetary form. There is no reason to draw a distinction between the sale proceeds and forfeited deposit.

Right to stop judicial sale of vessel and obtaining release of vessel

2.9 *The Long Bright*⁹ concerns the plaintiff's application to discharge the sale order and release of the arrested vessel *Long Bright* after the Sheriff proceeded with the commission for appraisal and sale of the vessel. Crucially, the court had to consider whether a plaintiff is entitled as of right to have the vessel released and to have the judicial sale stopped.

2.10 The factual matrix leading to the plaintiff's application to discharge the sale order are as follows. The plaintiff arrested the vessel for wharfage and related charges incurred by the vessel at the plaintiff's shipyard. Besides the plaintiff, the mortgagee and crew (the first intervener and second to 11th interveners respectively), as well as two caveators had claims against the vessel.

5 *The Swiber Concorde* [2018] 5 SLR 1283 at [11].

6 *Elinoil-Hellenic Co SA v Wee Ramayah & Partners* [1999] 1 SLR(R) 977 at [41]-[44].

7 *The Swiber Concorde* [2018] 5 SLR 1283 at [14].

8 *The Swiber Concorde* [2018] 5 SLR 1283 at [16]-[17].

9 [2018] 5 SLR 1397.

2.11 Following the arrest of the vessel, the plaintiff applied for judgment in default and obtained an order for the appraisal and sale of the vessel. However, the plaintiff subsequently filed an application for the discharge of the sale order and release of the vessel because it had reached a settlement with the first intervener, and that the first intervener intended to commence a separate *in rem* claim to arrest the vessel for its claim.¹⁰

2.12 In support of its application for the discharge of the sale order, the plaintiff and first intervener (relying on *The Sahand*)¹¹ argued that as the plaintiff had settled its claim with the first intervener, the plaintiff no longer had any claim against the vessel; therefore, the vessel *had to* be released as of right. Accordingly, so the argument went, the sale order also had to be discharged as the plaintiff no longer had a valid *in rem* claim against the vessel.

2.13 This was opposed by the second to 11th interveners, who argued that *The Sahand* was distinguishable and did not apply on the present facts because the first intervener had only settled the plaintiff's claim. In that connection, the second to 11th interveners submitted that the present case was more akin to *The Acrux*¹² where an application to discharge the sale order was declined because the security offered by the defendant could only meet the claims of some (but not all) claimants. Accordingly, the settlement between the plaintiff and first intervener did *not* extinguish the plaintiff's claim against the defendant.

2.14 While not making any judicial pronouncements on whether the plaintiff's claim had been extinguished (because the terms of the settlement agreement were not before the court),¹³ Pang JC did not agree that the settlement between the plaintiff and first intervener extinguished the plaintiff's claim against the defendant. Crucially, Pang JC agreed that *The Sahand* was distinguishable because a settlement between the plaintiff and first intervener in the present case did not bind the plaintiff and the defendant.¹⁴ If the defendant could not enforce the terms of the settlement, it did not follow that the settlement could extinguish the plaintiff's claim against the defendant.

2.15 Next, Pang JC disagreed that the plaintiff was entitled as of right to obtain a release of the vessel. This was because the arrest of a vessel affects the rights of all parties who have an *in rem* claim against the

10 *The Long Bright* [2018] 5 SLR 1397 at [6].

11 [2011] 2 SLR 1093.

12 [1961] 1 Lloyd's Rep 471.

13 *The Long Bright* [2018] 5 SLR 1397 at [23].

14 *The Long Bright* [2018] 5 SLR 1397 at [18].

vessel. Since O 70 r 12 of the Rules of Court¹⁵ provides for a system of caveats against release, and a release would affect the interests of the caveators, the court must consider these interests before allowing the vessel to be released.¹⁶

2.16 In that connection, Pang JC considered whether an existing order for judicial sale has to be discharged before the vessel could be released. As the court retains entire control over the sale process to protect the interests of all *in rem* claimants and the defendant shipowner, Pang JC held that an order for the discharge of the sale order must be obtained before the vessel could be released. A notice of discontinuance does not have the effect of causing the sale order to lapse.¹⁷

2.17 Lastly, in deciding whether to discharge the sale order, Pang JC considered that while the delay and costs involved in re-starting the sale process would be relevant, the prejudice caused to the claimants by this delay would be mitigated if the claimants were able to claim pre-judgment interest. Further, as the vessel was relatively new, it was unlikely that her condition and value would deteriorate during the intervening period of delay.¹⁸

2.18 Additionally, there was also no evidence that the other interveners or caveators would be prejudiced if the sale process was restarted. In fact, there was evidence before the court that restarting the sale process could result in a higher price being fetched for the vessel as the first intervener had obtained several potential buyers and was conducting a cost-benefit analysis of putting the vessel back in class.¹⁹ Accordingly, taking into account the above circumstances, Pang JC discharged the sale order and allowed the release of the vessel.

Collision and use of the defence of “agony of the moment”

2.19 In 2018, the High Court handed down a decision involving collisions between vessels in Singapore waters, *The Tian E Zuo*.²⁰

2.20 The decision arose out of an unusual set of circumstances, which had resulted in a number of collisions. The facts can be summarised as follows:

15 Cap 322, R 5, 2014 Rev Ed.

16 *The Long Bright* [2018] 5 SLR 1397 at [24]–[25].

17 *The Long Bright* [2018] 5 SLR 1397 at [27]–[28].

18 *The Long Bright* [2018] 5 SLR 1397 at [33]–[35].

19 *The Long Bright* [2018] 5 SLR 1397 at [36]–[40].

20 [2018] SGHC 93.

(a) Sometime in the early hours of 12 June 2014, the defendants' tanker, *Tian E Zuo*, was anchored at the Western Petroleum B Anchorage at Singapore. At the time, the bunker barge *Marine Liberty* was moored alongside her. Due to the prevailing squall, *Tian E Zuo's* anchor dragged, resulting in both vessels drifting and eventually colliding into a third vessel, *DL Navig8*.

(b) Due to the collision, none of the three vessels could manoeuvre and break free. These vessels then drifted towards the plaintiffs' vessel, *Arctic Bridge*. In response, *Arctic Bridge* sought to heave her port anchor and move away. The attempts to heave the port anchor were eventually abandoned as there was insufficient time. Consequently, three shackles of anchor cable remained in the water when the *Arctic Bridge* began moving clear by 3.33am. Meanwhile, *Tian E Zuo* had stopped drifting and had come to a stop by 3.30am.

(c) *Arctic Bridge* intended to pass north of a nearby vessel, *Kingfisher*, but she could not do so and found herself moving towards *Kingfisher* instead. To avoid a collision with *Kingfisher*, the master of *Arctic Bridge* ordered slow ahead and hard to port. However, the movement of *Arctic Bridge* was hampered by the dredging port anchor, and she was set astern back towards *Tian E Zuo*.

(d) At about 3.43am, *Arctic Bridge* crossed the bow of *Tian E Zuo* for the first time. At about 3.46am, the engines of *Arctic Bridge* were put to slow ahead, and she passed the bow of *Tian E Zuo* a second time. Unfortunately, at 3.50am, the anchor chains of *Arctic Bridge* and *Tian E Zuo* became entangled. The entanglement resulted in *Tian E Zuo* being effectively towed by *Arctic Bridge* towards an anchored vessel, *Stena Provence*.

(e) At 4.10am, *Tian E Zuo* collided with *Stena Provence*. At about 4.11am, *Arctic Bridge* also made contact with *Stena Provence*. At 4.27am, a second collision occurred between *Tian E Zuo* and *Stena Provence*.

2.21 The court was not asked to determine liability in respect of the first collision between *Tian E Zuo*, *Marine Liberty*, and *DL Navig8*. As for the collisions with *Stena Provence*, both *Tian E Zuo* and *Arctic Bridge* settled with her, having accepted between themselves that *Stena Provence* was not at fault for the collisions.

2.22 As between *Tian E Zuo* and *Arctic Bridge*, each party alleged that the other was wholly to blame for the collisions, thus resulting in these proceedings.

2.23 This decision raised the following primary issues:

- (a) As regards evidence, the court's approach towards conflicting expert opinions, effect of an expert witness's involvement in casualty investigations and treatment of demonstrative evidence.
- (b) The application of the test of causation in the context of a collision.
- (c) The application of the defence of "agony of the moment".
- (d) The apportionment of liability between *Tian E Zuo* and *Arctic Bridge* in respect of the collisions with *Stena Provence* (collectively, "the Collisions").

Evidence

2.24 Both the plaintiffs and defendants called expert evidence on matters of seamanship, who provided conflicting evidence. The plaintiffs urged the court to prefer the evidence of their expert over the defendants' expert due to the sailing experience of the former.²¹

2.25 Belinda Ang Saw Ean J stated that, when dealing with conflicting expert opinion, one approach is to consider whether the nature of the issue in question falls within the expert's particular area of expertise. While the differences in expert opinion in this case did not materially influence the outcome, the court opined that when an opinion on navigation is firmly within the realms of navigational judgment, the plaintiffs' expert might have an advantage.²²

2.26 Next, the plaintiffs argued that the court should give little weight to the evidence of the defendants' expert because he was involved in the casualty investigations. The court held that the defendants' expert was not prevented from acting because he had fully disclosed his involvement in the casualty investigations and had not improperly supplemented the factual evidence of the crew.²³

2.27 As regards the use of demonstrative evidence, the plaintiffs sought to introduce, at trial, a video replay compilation purportedly based on voyage data recorder ("VDR") data from the two vessels. The defendant sought to cross-examine the maker of the video, one Dr Neil Baines. The plaintiff claimed that the defendants' position was

21 *The Tian E Zuo* [2018] SGHC 93 at [19].

22 *The Tian E Zuo* [2018] SGHC 93 at [21].

23 *The Tian E Zuo* [2018] SGHC 93 at [22].

unreasonable and asked for the costs of bringing Dr Baines for cross-examination.²⁴

2.28 The court disagreed with the plaintiffs. Ang J held that the defendants' position was reasonable because it had identified discrepancies in the video and the video was not based entirely on VDR evidence. Further, the court held that as the video was demonstrative evidence, the rule was that the person who prepared it had to be available for cross-examination to vouch for its accuracy and test the common assumptions made in its preparation.²⁵

Causation

2.29 In submitting that the defendants were solely to blame, the plaintiffs argued that “but for” *Tian E Zuo* dragging anchor and coming close to *Arctic Bridge*, the latter would not have been forced to manoeuvre from her safely anchored position, which ultimately resulted in the Collisions. This argument was rejected.

2.30 Ang J highlighted that there were two limitations to the “but for” test: first, the “but for” test was insufficient where there were multiple causes arising from the faults of the plaintiffs and defendants;²⁶ and in any event, the critical condition of legal causation also had to be satisfied.²⁷

2.31 The court held that even if *Tian E Zuo* had presented an initial danger, this would have ceased after 3.30am when she had stopped drifting.²⁸ Hence, the subsequent actions of *Arctic Bridge* could not have operated under the same circumstances as when *Tian E Zuo* was initially dragging. Further, such actions in fact brought *Arctic Bridge* and *Tian E Zuo* closer than when *Arctic Bridge* had initially moved away from *Tian E Zuo*. These resulted in the entanglement of the anchor or anchor chains of both vessels. The *Arctic Bridge*, having failed to appreciate the entanglement, then ended up towing *Tian E Zuo* into the *Stena Provence*. In the circumstances, the court held that, factually, new causal events had arisen after the initial dragging, which contributed to the Collisions. In other words, the initial dragging of *Tian E Zuo* was not the sole cause of the Collisions.

24 *The Tian E Zuo* [2018] SGHC 93 at [23].

25 *The Tian E Zuo* [2018] SGHC 93 at [24]–[27].

26 *The Tian E Zuo* [2018] SGHC 93 at [41].

27 *The Tian E Zuo* [2018] SGHC 93 at [47].

28 *The Tian E Zuo* [2018] SGHC 93 at [46].

2.32 The court also held that in any event, legal causation was not made out. It noted that the plaintiffs had unduly focused on one single event (that is, the dragging of *Tian E Zuo's* anchor) and had wrongly downplayed other significant events (highlighted above) which demonstrated that this was a case involving multiple faults, each capable of contributing to the Collisions.²⁹

Agony of the moment

2.33 The plaintiffs argued that the faults of *Arctic Bridge* could be excused as they were made in the agony of the moment. This argument was also rejected.

2.34 First, the court emphasised that the agony of the moment was a relational concept. As noted in *The Bywell Castle*,³⁰ “a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the default or negligence of another vessel”. On that basis, the principle of agony of the moment did not apply to the faults of *Arctic Bridge* between 3.37am and 3.51am because by that time, *Tian E Zuo* had stopped drifting and was therefore an anchored vessel that could not be faulted.³¹

2.35 Second, as for the faults of *Arctic Bridge* after 3.51am, an agony of the moment situation never arose because there was no emergency during the involuntary towage of *Tian E Zuo*. *Arctic Bridge* had sufficient time to react to the developing close quarters situation with *Stena Provence* but failed to do so.³²

Apportionment of liability

2.36 In coming to its decision on apportionment, the court reiterated the principles set out in *The Samco Europe and MSC Prestige*³³ and *The Nordlake and the Sea Eagle*,³⁴ that apportionment of liability depends upon an assessment of the blameworthiness and causative potency of both vessels. In relation to the relative blameworthiness of the vessels, this was a qualitative, as opposed to a quantitative, assessment; and in relation to causative potency, the court was concerned with the causative

29 *The Tian E Zuo* [2018] SGHC 93 at [49].

30 (1897) 4 PD 219.

31 *The Tian E Zuo* [2018] SGHC 93 at [132].

32 *The Tian E Zuo* [2018] SGHC 93 at [136].

33 [2011] 2 Lloyd's Rep 579.

34 [2016] 1 Lloyd's Rep 656.

impact each fault had on the eventual collision and loss. Such principles had previously been adopted in Singapore in *The Dream Star*.³⁵

2.37 In terms of causative potency of the faults of *Arctic Bridge*, the court found that her faults in crossing the bow of *Tian E Zuo* at an unsafe distance (resulting in the entanglement) and thereafter proceeding full ahead in the direction of *Stena Provence* without stopping and without keeping a good visual lookout and monitoring *Tian E Zuo* at her stern were linked with the damage sustained in the first collision between *Tian E Zuo* and *Stena Provence*. Thereafter, *Arctic Bridge* continued to navigate full ahead, thereby dragging *Tian E Zuo* into a second collision. The causal link to the further damage to *Stena Provence* was *Arctic Bridge's* failure to take actions to prevent the second collision.

2.38 As for the causative potency of the faults of *Tian E Zuo*, her failure to keep proper lookout for *Arctic Bridge* and *Stena Provence* contributed to the Collisions. In taking advantage of the involuntary towage, *Tian E Zuo's* attention was focused on disengaging herself from *DL Navig8* and *Marine Liberty* instead of appreciating the presence and proximity of *Stena Provence*. Accordingly, her delayed action to avert a collision with *Stena Provence* reflected her contribution to the Collisions. Additionally, the stopping of her engines at 4.18am when *Arctic Bridge* continued to sail full ahead (thereby towing *Tian E Zuo*) was a fault that was causatively potent as this contributed to the second collision between *Tian E Zuo* and *Stena Provence*.

2.39 In terms of relative blameworthiness, both vessels were guilty of serious fault. Taking causative potency and blameworthiness into consideration, the court held that a fair apportionment of liability was in fact 50:50.

35 [2018] 4 SLR 473.