2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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2.1 2014 saw one admiralty decision handed down by the Court of Appeal, and two by the High Court. The Court of Appeal's decision clarifies the availability of the defendant's right to appeal a High Court judge's decision to refuse to set aside an arrest and/or allow a claim for damages for wrongful arrest, while one of the High Court decisions is of particular importance with respect to the availability of a direct sale in an application for judicial sale *pendente lite*.

The Nasco Gem [2014] 2 SLR 63 ("*The Nasco Gem*")

2.2 The Court of Appeal's decision of *The Nasco Gem* arose out of an application for an extension of time to file a notice of appeal against a High Court judge's refusal to set aside the writ and warrant of arrest, as well as to award damages for wrongful arrest. Before considering the merits of the application for an extension of time, the Court of Appeal first considered whether or not an order refusing to set aside a warrant of arrest and service of an admiralty writ, and refusal to award damages for wrongful arrest, amounts to "an order at the hearing of any interlocutory application" requiring leave to appeal under s 34(2)(*d*) read with para (*e*) of the Fifth Sched to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the Act"). If so, leave would be required to appeal against the decision of the High Court dismissing the application to set aside a warrant of arrest and service of an admiralty writ, as well as damages arising from wrongful arrest of a vessel.

Revisiting three previous decisions: OpenNet, Dorsey *and* Maldives Airport

2.3 Section 34(*d*) has come before the Court of Appeal on more than one occasion since its introduction in 2010. Not surprisingly, therefore, in coming to its decision, the Court of Appeal first reviewed its earlier decisions in *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 ("*OpenNet*"), and *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey*"). In *OpenNet*, the question of whether or not leave to appeal to the Court of Appeal was considered in the context of the High Court's

refusal to grant leave to commence judicial review, where the leave application had been made by way of an originating summons: *The Nasco Gem* at [9]. In *OpenNet*, the Court of Appeal had declined to strike out the notice of appeal on the basis that the very relief which had been sought by the originating summons was leave to commence proceedings for judicial review. Once that application had been determined, the substantive issue in the originating process had been "absolutely determined" by the first instance judge, such that there was "nothing more to proceed on": see *OpenNet* at [21]. Taking a purposive interpretation of the provisions in the Act governing the right to appeal to the Court of Appeal, the court held that an appeal to the Court of Appeal would generally be as of right if the effect of the order was to finally dispose of the parties' substantive rights: *The Nasco Gem* at [9(c)]. For those reasons, the Court of Appeal in *OpenNet* held that an application for leave to commence judicial review, made by way of an originating summons, is not an "interlocutory application for the purposes of [the Act]": *The Nasco Gem* at [9].

2.4 The question of whether or not an application was "interlocutory" in nature next arose for consideration in *Dorsey*. That case involved an appeal against an order of the High Court giving leave to serve pre-action interrogatories, where leave had been sought by way of an originating summons: *The Nasco Gem* at [10]. In *Dorsey*, the respondent applied to strike out the notice of appeal on the basis that an order giving or refusing interrogatories was non-appealable under s 34(1)(*a*) read with para (*i*) of the Fourth Sched to the Act.

2.5 The Court of Appeal dismissed the respondent's application to strike out the notice of appeal in *Dorsey* on the basis that an application for leave to serve pre-action interrogatories commenced by way of an originating summons was not an interlocutory application since it was not an application made in a pending action between the time when the action was filed in court and when the action was finally disposed of: *The Nasco Gem* at [10(e)]. The test of whether an "order" was an "interlocutory order", which the Court of Appeal adopted in *Dorsey* and *OpenNet*, as restated in *The Nasco Gem*, was whether or not it effectively disposed of a party's substantive claim to relief such that once the application had been determined, the entire subject matter of the proceedings would be spent: *The Nasco Gem* at [11]–[12]. If not, the relevant order would be an "interlocutory order". This was consistent with the test adopted by the Court of Appeal in *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449, and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525. The focus of the enquiry is the cause of the pending proceedings in which the application is brought, and not the specific purpose of the application: *The Nasco Gem* at [16].

Leave to appeal against refusal to set aside warrant of arrest

2.6 Applying the above-mentioned test, the Court of Appeal held that an application for a warrant of arrest does not determine the parties' substantive rights or the relief claimed in the originating process, that is, the admiralty writ of summons: *The Nasco Gem* at [16]. Accordingly, leave is still required to appeal against an order refusing to set aside a warrant of arrest: *The Nasco Gem* at [16].

2.7 In coming to the above decision, the Court of Appeal held that the invocation of the court's admiralty jurisdiction may, notwithstanding the initial refusal to set aside the warrant of arrest and/or service of the writ of arrest, be revisited again at trial: *The Nasco Gem* at [19] and [21]. However, the Court of Appeal did not go further to elaborate on the modality and potential grounds of any such challenge at the trial of the action, including any possible defence of issue estoppel arising out of the initial refusal to set aside the arrest.

2.8 In response to the applicant's argument that the issue of arrest, including the right to pre-judgment security, would never feature again in the proceedings, such that the High Court's decision on a setting aside application would, in effect, be final (as opposed to interlocutory), the Court of Appeal also held there was no reason to find that the validity of the warrant of arrest entitling a plaintiff to pre-judgment security should be treated as a separate or "carve-out" issue in the proceedings: *The Nasco Gem* at [25]. Furthermore, the application to set aside service of the writ of summons and warrant of arrest had been made during the course of proceedings, and did not have the effect of either finally disposing of the parties' substantive rights in the admiralty action, or affecting the final outcome of the proceedings: *The Nasco Gem* at [25].

2.9 As a final point, the Court of Appeal also did not consider a claim for damages for wrongful arrest to be a substantive right determined in the proceedings. In this regard, the Court of Appeal recognised that a claim for damages for wrongful arrest only arises as a consequence of an order setting aside the warrant of arrest: *The Nasco Gem* at [27]; *Treasure Valley Group Ltd v Saputra Teddy* [2006] 1 SLR(R) 358 at [32]. In the premises, the Court of Appeal dismissed the application: *The Nasco Gem* at [28].

2.10 The upshot of the Court of Appeal's judgment is that an application to set aside a warrant of arrest and service of an admiralty writ of summons will be treated as an interlocutory application, and any order made thereon an interlocutory order which requires leave to appeal under s 34(2)(*d*) of the Act: *The Nasco Gem* at [25].

***The STX Mumbai* [2014] 3 SLR 1116 ("*The STX Mumbai*")**

2.11 *The STX Mumbai* featured an application to strike out the plaintiff's claim, as well as the usual prayer to set aside the warrant of arrest. In that case, the plaintiff bunker supplier had arrested the vessel, *STX Mumbai*, to obtain security for its claim arising from a claim for unpaid invoice for the supply of bunkers. The plaintiff alleged that an entity, STX Corp, had entered into a bunker supply contract as agent for the defendant, the registered owner of the *STX Mumbai*.

2.12 The plaintiff supplied the bunkers to the *STX Mumbai* on 18 May 2013. Even though payment for the bunkers was due on 16 June 2013, the plaintiff issued the writ of summons and arrested the *STX Mumbai* on 14 June 2013, that is, two days earlier: at [4]. The plaintiff argued that the insolvency of STX Pan Ocean Pte Ltd ("STX Pan Ocean") and the financial difficulties of the STX Group of Companies, of which STX Corp was part, led the plaintiff to believe that the defendant would not be able to pay for the price of the bunkers, and was therefore in repudiatory breach of the bunker supply agreement: at [5]. The plaintiff's alternative argument was that the insolvency of STX Pan Ocean gave rise to an anticipatory breach of the payment obligation under the bunker supply agreement, thereby entitling the plaintiff to treat the bunker supply agreement as discharged: at [5].

2.13 The defendant argued that it had no contractual relationship with the plaintiff as the bunkers had been ordered through a chain of bunker supply contracts with various parties: at [16]. The defendant further argued that no valid cause of action existed at the time the writ of summons was issued and the *STX Mumbai* arrested on 14 March 2013: at [16]. Furthermore, as a matter of law, insolvency could not amount to anticipatory breach: at [17].

Legal unsustainability as ground for striking out

2.14 In considering whether or not to strike out the plaintiff's claim, Belinda Ang Saw Ean J applied the test for legal unsustainability as applied by the Court of Appeal in *The Bunga Melati 5* [2012] 4 SLR 546 at [39]: *The STX Mumbai* at [24]–[25]. Ang J thus went on to consider, assuming that all the facts which the plaintiff sought to prove at trial had been made out, whether or not the plaintiff would still be entitled to the remedy sought.

2.15 In determining whether or not the defendant had committed a repudiatory breach of the bunker supply agreement, Ang J applied the framework set out by the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC Concrete*") and *Man*

Financial (S) Pte Ltd v Wong Bark Chuan David [2008] 1 SLR(R) 663 ("*Man Financial*"). In so doing, she held that the plaintiff's claim fell within "Situation 2", described in *RDC Concrete* and *Man Financial*, *viz* where it was alleged that the defendant had renounced the contract inasmuch as it had clearly conveyed to the plaintiff that it would not perform its contractual obligations at all: *The STX Mumbai* at [28]. Ang J also observed that a further basis for repudiatory breach was the impossibility of performing one's contractual obligations: *The STX Mumbai* at [29]. An anticipatory breach on either ground could amount to a repudiatory breach.

Whether or not the defendant had renounced the contract

2.16 In determining whether or not the plaintiff's claim was legally unsustainable, Ang J first considered whether or not the defendant had, by its words or conduct, repudiated the bunker supply agreement. In this regard, Ang J observed that the plaintiff had not, at any material time, communicated with the defendant: *The STX Mumbai* at [33]. In particular, the plaintiff's letter of demand had been sent to STX Corp.

2.17 Furthermore, the plaintiff's reliance on the insolvency of STX Pan Ocean was misguided given that the plaintiff had not sought to lift the corporate veil against the defendant; the plaintiff had argued that the defendant, a separate legal entity from STX Pan Ocean, was the party who was responsible for its indebtedness to the plaintiff, that is, the person liable on an action *in personam* for the purposes of s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed): *The STX Mumbai* at [35].

Whether it was impossible for the defendant to perform

2.18 Her Honour proceeded to consider whether or not the insolvency of STX Pan Ocean gave rise to a set of circumstances such that it was impossible for the defendant to perform its contractual obligations. In coming to her decision, Ang J applied a long-running line of authorities, including *Jennings' Trustee v King* [1952] Ch 899, *In re Agra Bank, ex parte Tondeur* (1867) LR 5 Eq 160 and *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 111 ALR 649, which stand for the proposition that an act of bankruptcy does not, *ipso facto*, amount to an anticipatory breach given that it is open to the liquidator or trustee in bankruptcy to adopt, and thereafter, perform, a contract: *The STX Mumbai* at [46]–[49]. In the circumstances, the insolvency of STX Pan Ocean (putting aside the question of separate legal entities) did not suffice to show that the defendant had committed an anticipatory breach of the bunker supply agreement: *The STX Mumbai* at [53].

Executed contracts and the doctrine of anticipatory breach

2.19 Ang J's decision in *The STX Mumbai* also includes a consideration of the question of whether or not the doctrine of anticipatory breach applies to an executed contract, that is, where the innocent party had fully performed all its obligations under the contract and the only remaining contractual obligation was for the other party to make payment at a future date: *The STX Mumbai* at [56]. In coming to her decision, Ang J had regard to the position in the US, England, Australia and Canada: *The STX Mumbai* at [57]–[68].

2.20 Having surveyed the various authorities from different common law jurisdictions, including England, Australia, Canada and the US, Ang J expressed, in *obiter*, the view that there is a "strong case" for the recognition of executed contracts being an exception to the doctrine of anticipatory breach: *The STX Mumbai* at [74]. Having said that, the learned judge did not express a conclusive ruling on the issue.

Imputation of bad faith to commence an action without valid cause of action

2.21 In light of the finding that there had been no valid cause of action at the time the writ of summons had been issued and the vessel arrested, Ang J went on to consider the defendant's claim for damages for wrongful arrest. In so doing, Ang J applied the familiar test for wrongful arrest as articulated by Right Honourable T Perberton Leigh in *The Evangelismos* (1858) 12 Moo PC 352, and interpreted by the Court of Appeal in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994: *The STX Mumbai* at [76]–[77]. The modern formulation of the *The Evangelismos* test, as laid out by Colman J in *The Kommunar (No 3)* [1997] 1 Lloyd's Rep 22, which was cited with approval by the Court of Appeal in *The Kiku Pacific* [1999] 2 SLR(R) 91 and *The Vasiliy Golovnin*, involved the consideration of two situations (*The STX Mumbai* at [78]):

> (a) first, cases of *mala fides*, where it was clear that the arresting party had had no honest belief in his entitlement to arrest the vessel; and
>
> (b) second, where, objectively, there was so little basis for the arrest that it may be inferred or implied that the arresting party did not believe in his entitlement to arrest the vessel. This second situation requires an inquiry into the circumstances prevailing and the evidence available at the time of the arrest so as to determine if the action and arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply that they were brought with malice or gross negligence.

2.22 In considering the facts and chronology of events leading up to the arrest, Ang J observed that the plaintiff had demanded payment via an e-mail on 13 June 2013, just one day before the *STX Mumbai*'s scheduled call at Singapore on 14 June 2013: *The STX Mumbai* at [79]. The honourable judge further held that the demand for immediate payment had been deliberate and "appeared perfunctory" in light of the vessel's scheduled call at Singapore the day after the demand had been sent: *The STX Mumbai* at [79]. Furthermore, even though the plaintiff had purported to rely on the arrest of two other vessels owned by companies in the STX group of companies, those arrests had been possible by virtue of the acceleration of payment clauses in the respective contracts, which the plaintiff knew to be absent in its bunker supply agreement: *The STX Mumbai* at [80]. STX Pan Ocean's insolvency was also "not connected" with the plaintiff's' claim: *The STX Mumbai* at [80]. In the circumstances, Ang J held that both tests for wrongful arrest had been satisfied: *The STX Mumbai* at [81].

2.23 Her Honour also found that the defendant's post-arrest conduct, that is, the non-payment of the sums as demanded by the plaintiff, was irrelevant to the question of whether or not there had been a wrongful arrest: *The STX Mumbai* at [82]. Such conduct merely concerned the parties' respective rights after the "premature arrest" of the vessel: *The STX Mumbai* at [82]. Furthermore, the fact that the plaintiff had continued to maintain the arrest even after being informed by the defendant's solicitors that there had been no legal basis to arrest the vessel, and the defendant's allegation of dilatory conduct on the plaintiff's part in providing its security demand, led the honourable judge to find that there had been a wrongful continuance of arrest: *The STX Mumbai* at [83].

Setting aside an arrest "in consequence" of a successful striking out application

2.24 Even though the defendant in *The STX Mumbai* also applied to set aside the warrant of arrest, Ang J did not expressly consider the merits of that setting aside application. In that regard, Ang J merely stated that the setting aside application would be allowed "[a]s a consequence of the striking out of the *in rem* writ": *The STX Mumbai* at [2].

2.25 The appeal against the High Court's decision in *The STX Mumbai* is fixed for hearing before the Court of Appeal during the week commencing 12 January 2015.

***The Sea Urchin* [2014] 2 SLR 646 ("*The Sea Urchin*")**

2.26 *The Sea Urchin* builds on the recent decision in *The Turtle Bay* [2013] 4 SLR 615 ("*The Turtle Bay*"), which was reviewed in last year's Ann Rev: see (2013) 14 SAL Ann Rev 56 at 56–61, paras 2.2–2.17, regarding applications for the judicial sale of arrested vessels *pendente lite* by way of a direct sale as opposed to a public auction or private treaty. In that case, Belinda Ang Saw Ean J held, *inter alia*, that it would require "cogent evidence" of "powerful special features" or "special circumstances" before a court would sanction a direct sale of a vessel under arrest to a named buyer: *The Turtle Bay* at [29] and [32]. *The Sea Urchin* also featured an application for judicial sale *pendente lite* by the plaintiff mortgagee direct to a named buyer at a specified price: *The Sea Urchin* at [2]. Alternatively, the plaintiff prayed that the vessel be sold *pendente lite* by the sheriff in the usual way by public auction or private treaty.

2.27 The application for a direct sale of the vessel *pendente lite* was supported by all the interested parties, *viz* the defendant, owners of the cargo laden on board the vessel (who had intervened in the action), owners of the bunkers on board the vessel and the sub-charterer (who had undertaken to also intervene in the action).

2.28 In support of its application, the plaintiff argued that the offer price was higher than what the plaintiff claimed to be the value of the vessel: *The Sea Urchin* at [12] and [15]. Furthermore, the intending buyer was willing to carry the cargo of soya beans loaded on board the vessel to the intended discharge port for delivery to the intervener; this willingness extended to signing on the existing crew members for the prospective voyage: *The Sea Urchin* at [12].

2.29 On its part, the intervener argued that the cargo on board was steadily losing its value by reason of the delay in the carriage caused by the arrest: *The Sea Urchin* at [13]. Other circumstances which were put forward to support the application included (*The Sea Urchin* at [13]):

> (a) There were no discharge/storage facilities in Singapore to receive such a large quantity of cargo of soya beans.
>
> (b) There had been difficulties in finding a substitute vessel to tranship the cargo.
>
> (c) The costs of transhipment were estimated to be significant, falling in the region of US$700,000.
>
> (d) The costs of discharge were estimated to amount to some S$2.28m, which would eat into the sale proceeds and erode the pool of sale proceeds available for distribution to *in rem* judgment creditors.

2.30 In considering the merits of an application for the judicial sale of the vessel by way of a direct sale, Ang J applied the test for a direct sale set out in *The Turtle Bay*, that is, the requirement for cogent evidence of special circumstances (*The Turtle Bay* at [29] and [32]): see *The Sea Urchin* at [7]–[10]. Notwithstanding the rather compelling circumstances supporting the application, Ang J refused the application. In arriving at such a conclusion, the learned judge took particular issue with the valuation certificate issued by a shipbroker which stated that the vessel's value of US$16m was specifically for 10 December 2013, and not any other date: *The Sea Urchin* at [16].

2.31 Furthermore, there was nothing in writing from the prospective buyer to confirm its willingness or readiness to purchase the vessel at the stated price, and on the sheriff's terms and conditions: *The Sea Urchin* at [19]. In particular, there was no evidence as to whom the prospective buyer's offer had been made: *The Sea Urchin* at [19].

2.32 Additionally, there was no evidence that the plaintiff had cast a wider net to search for more interested parties to attract the best price for the vessel: *The Sea Urchin* at [20]. This was consistent with her Honour's previous decision in *The Turtle Bay* at [35]–[38], where she had refused an application for the judicial sale of an arrested vessel by way of a direct sale on, *inter alia*, the basis that the plaintiff's evidence on the steps it had taken to advertise the prospective sale to the market at large was wanting.

2.33 Ang J also considered misplaced the parties' reliance on the Canadian case of *Bank of Scotland v "Nel" (The)* (1997) 140 FTR 271 as authority for the proposition that high costs of discharging cargo laded on board an arrested vessel could be a factor in support of a direct sale: *The Sea Urchin* at [21]–[32]. In this regard, the honourable judge observed that the cargo was not under arrest; accordingly, an intervener asserting rights over the cargo would, in the normal course, have to discharge the cargo at its own costs, and not the sheriff's expense: *The Sea Urchin* at [30].

2.34 The honourable judge also paid short shrift to the other factors relied on by the parties in support of the plaintiff's application. In particular, she held that the high costs of discharging the cargo, and potential deterioration of the same, were, in reality, nothing more than "a typical consequence of an arrest of a cargo-laden vessel": *The Sea Urchin* at [34]. The mere fact that a party was prepared to buy the vessel was also not a factor in favour of a direct sale given that, unlike the English case in *Bank of Scotland plc v The Owners of the M/V "Union Gold"* [2013] EWHC 1696 (relied upon by the plaintiff), the instant case did not feature a very old vessel, such that there was no urgency to recoup the remaining value in the vessel: *The Sea Urchin* at [35].

2.35 The decision in *The Sea Urchin* has wider significance for parties who intend to apply for a judicial sale of an arrested vessel *pendente lite*, even via the usual route of public auction or private treaty. It is trite that one of the grounds for a judicial sale *pendente lite* is to stem the progressive diminution of the vessel's value: see, for example, *The Myrto* [1977] 2 Lloyd's Rep 234. In this regard, Ang J held that an applicant must not only adduce evidence of maintaining a vessel under arrest, but also the value of the vessel by way of a "proper valuation": *The Sea Urchin* at [18] and [36].

2.36 As aforesaid, the honourable judge held that the shipbroker's valuation certificate was inadequate evidence of the value of the vessel, given that it was expressed to reflect the market value as at 10 December 2013, "and not … any other date": *The Sea Urchin* at [16]. This led Ang J to rule that there was no clear evidence of the progressive diminution of the vessel's value. In the premises, the plaintiff's alternative prayer for a judicial sale of the vessel *pendente lite* by way of public auction or private treaty was also dismissed: *The Sea Urchin* at [36]. Had the evidence of the vessel's value and the diminution of the same been more convincing, one wonders whether, on the facts of the case, the requirements for a direct sale would have been satisfied.

SHIPPING LAW

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Paragon Shipping Pte Ltd v Freight Connect (S) Pte Ltd **[2014] 4 SLR 574 ("*Paragon Shipping*")**

2.37 Shipping contracts are often formed and terminated in a series of communications that leave room for interpretation. Some of these communications are not even written, and one has to fill in the gaps between written messages with disputed accounts of oral conversations. This was what the High Court faced in *Paragon Shipping*. In that case, the plaintiff and the defendant were both transport intermediaries who did not own or operate vessels themselves. The dispute arose over the charter of a vessel by the plaintiff to the defendant and the events that followed the substitution of the intended vessel.

Brief facts

2.38 The plaintiff and defendant entered into a voyage charter party by which the plaintiff agreed to provide a vessel, "MV *Dahua*" ("*Dahua*"), to carry cargo for the defendant from Nanwei, China to Singapore, with a laycan of 10 to 20 August 2012. The fixture incorporated the Baltic and International Maritime Council Uniform General Charter (1994 Rev Ed) ("GENCON 1994") terms. For various reasons, the *Dahua* was delayed and it became apparent that she would not be able to make the laycan. By 16 August alternative options were put to the defendant, including an extension to the laycan. The defendant did not agree to this extension.

2.39 Eventually, an alternative vessel, "MV *AAL Dampier*" ("*AAL Dampier*"), was proposed. The parties disagreed whether there was a second fixture by which the defendant had accepted this vessel. The second vessel arrived at Nanwei port on 20 August 2012 and tendered a Notice of Readiness ("NOR") on 20 August 2012 when it had not berthed. The defendant did not provide the necessary documents for it to berth. The next tentative available berthing slot was on 27 or 28 August 2012. On 23 August 2012, the defendant informed the plaintiff that it was loading the cargo on to a different vessel.

2.40 The plaintiff brought proceedings for losses it had suffered due to the defendant failing to load on to the *AAL Dampier*. The defendant brought a counterclaim for the extra costs it had incurred in having to engage the third vessel to ultimately ship the cargo.

Was the first fixture terminated?

2.41 Clause 9 of GENCON 1994 requires the owners to exercise due diligence in getting the vessel to load by the cancelling date, and if the owners anticipate that the vessel will be late, they shall inform the charterers. Clause 9 reads as follows:

> (b) Should the Owners anticipate that, *despite the exercise of due diligence*, the Vessel will not be ready to load by the cancelling date, they shall notify the Charterers thereof without delay stating the expected date of the Vessel's readiness to load and asking whether the Charterers will exercise the option of cancelling the Charter Party, or agree to a new cancelling date. [emphasis added]

2.42 The High Court found that the plaintiff had breached its obligation to exercise due diligence because the vessel was sent to other ports when it should have proceeded on its original schedule which would have enabled it to arrive in Nanwei on time. The fact that the plaintiff had given notice under cl 9(b) and requested a new laycan was

not enough, because the plaintiff were also obliged to exercise due diligence, which they had not done.

2.43 Consequently, as cl 9(b) had not been satisfied, the situation was one of anticipatory breach by the plaintiff. The defendant then had a choice to either affirm the contract or accept the breach and terminate. The defendant claimed it had affirmed the contract but, on the facts, Prakash J found that the defendant's conduct demonstrated that it had in fact elected to terminate, despite it never expressly having stated this intention. The defendant had not accepted the new laycan requested by the plaintiff, had stopped considering the *Dahua* as the loading vessel thereafter and had started to explore the suitability of the *AAL Dampier* as the loading vessel.

2.44 The question of damages for the plaintiff's breach of the first fixture (for the *Dahua*) could not be answered without taking into account what happened after termination of the first fixture. This is addressed after the subsequent events were considered.

Was a second fixture concluded?

2.45 The High Court went on to consider whether there was a second fixture concluded for the *AAL Dampier*. The plaintiff maintained that a second fixture was concluded, whereas the defendant denied that a further contract was ever agreed on.

2.46 Prakash J reaffirmed the test in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332, where "the courts look at the whole course of the negotiations between both parties in order to ascertain if an agreement is reached at any given point in time": *Paragon Shipping* at [49], citing *Gay Choon Ing* at [53].

2.47 Prakash J pointed out that the parties were actively looking for a replacement vessel by 17 August 2012. Terms for a second fixture were sent to the defendant by e-mail, including a "time of shipment", and initially the defendant requested additional information. Later that day, the plaintiff posed a number of outstanding issues to the defendant by e-mail, and the defendant responded and confirmed the outstanding points. The High Court held that this was an unconditional acceptance. This was confirmed by the fact that the defendant had referred to this second contract in an e-mail to a third party.

2.48 The defendant also sought to argue that any contract would have been void for uncertainty because the laycan had not been agreed to. Prakash J rejected this argument, finding that the phrase "time of shipment" on 19 to 20 August 2012 meant the laycan.

Was a valid NOR provided by the alternative vessel?

2.49 The defendant argued that the NOR tendered on 20 August 2012 by the *AAL Dampier* was invalid because it had not yet berthed and thus was not ready to load. A valid NOR can only be given when a vessel: (a) has arrived at its specified destination; (b) is in a state of readiness to load or discharge; and (c) has fulfilled any other requirements contained in a charter.

2.50 Prakash J distinguished between berth and port charters, the former requiring a vessel to proceed to a named berth, and the latter merely requiring it to proceed for loading to a named port. In this case, the second fixture was a port charter, as the contractual destination was Nanwei port and not a named berth. This was in contrast to the first fixture which did name a specific berth. Therefore, the NOR was validly tendered. From that time, the liability for delay transferred to the defendant; thus, the defendant was liable for detention costs.

2.51 Had the charter been a berth charter, the defendant's failure to secure the relevant shipping and customs documents for the cargo would have made it responsible for the second vessel's failure to berth. Therefore, it would have been responsible for the detention charges in any event.

Damages

2.52 Prakash J found that although the plaintiff had breached the first fixture, the additional costs and expenses claimed by the defendant which were in relation to the alternative shipment by the third vessel were not recoverable from the plaintiff because they arose out of the defendant's own inability to load the cargo on board the *AAL Dampier* and its repudiation of the second fixture.

2.53 The learned judge concluded that the defendant had repudiated the second fixture by loading the cargo on to a third vessel, instead of the *AAL Dampier*. The plaintiff was entitled to its loss of profit and to an indemnity for any liability it owed to the party from which it had chartered the *AAL Dampier*.

AVIATION LAW

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2.54 In 2014, no cases on aviation law were reported in the Singapore Law Reports.