2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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2.1 The Singapore High Court and Court of Appeal handed down a total of four judgments on admiralty law in 2015.

The STX Mumbai [2015] 5 SLR 1

2.2 The Court of Appeal's decision in *The STX Mumbai* [2015] 5 SLR 1 ("*The STX Mumbai (CA)*") arose out of the plaintiff's appeal against Belinda Ang J's decision in *The STX Mumbai* [2014] 3 SLR 1116 ("*The STX Mumbai (HC)*") to strike out the claim on the grounds of legal unsustainability, to set aside the arrest and, further, for an inquiry into damages for wrongful arrest: *The STX Mumbai (CA)* at [23] and [26]. This part of the chapter only covers the admiralty law aspects of the Court of Appeal's decision.

2.3 The plaintiff bunker supplier had arrested the vessel, the STX Mumbai, to obtain security for its claim arising from a claim for an unpaid invoice for the supply of bunkers. The plaintiff alleged that an entity, STX Corporation, had entered into a bunker supply contract as agent for the defendant, the registered owner of the STX Mumbai. At the appeal, the defendant maintained that Ang J had been correct to strike out the plaintiff's claim notwithstanding the fact that it had taken the plaintiff's claim on agency at its highest, *ie*, that STX Corporation had acted as the defendant's agent in relation to the bunkers stemmed to the STX Mumbai, and that the defendant was also the person liable *in personam* for the price of those bunkers: *The STX Mumbai (CA)* at [8].

2.4 The plaintiff supplied the bunkers to the STX Mumbai on 18 May 2013: *The STX Mumbai (CA)* at [10]. 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, *ie*, two days earlier: *The STX Mumbai (CA)* at [18]. 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 Corporation, STX Pan Ocean and the defendant were all a part) ("STX Group of Companies") had led the plaintiff to believe that the

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defendant would not be able to pay for the price of the bunkers, and was therefore in repudiatory breach of the bunker supply agreement: *The STX Mumbai (CA)* at [16] and [17].

2.5 In essence, the plaintiff claimed at the hearing below that the defendant's repudiatory breach could be established on two alternate grounds:

> (a) first, that the defendant, having failed to make immediate repayment for the price of the bunkers following the plaintiff's letter of demand dated 13 June 2013, had renounced the bunker supply agreement; and
>
> (b) alternatively, that it would have, in any event, been impossible for the defendant to make payment given the financial difficulties afflicting the STX Group of Companies: *The STX Mumbai (CA)* at [18].

2.6 On appeal, the plaintiff's arguments focused on the latter argument described above, *ie*, that it was impossible for the defendant to make payment for the bunkers stemmed: *The STX Mumbai (CA)* at [28]. The Court of Appeal proceeded to consider four issues, namely:

> (a) Whether or not the plaintiff could rely on the doctrine of anticipatory breach notwithstanding that the bunker supply agreement was an executed contract.
>
> (b) If so, whether or not the plaintiff's claim was still legally unsustainable, given that it was premised on the insolvency of STX Pan Ocean, *ie*, whether or not insolvency can *never* amount to an anticipatory breach.
>
> (c) If the plaintiff succeeded in overturning Ang J's decision to strike out the claim, whether or not the arrest should nonetheless be set aside on the ground of material non-disclosure.
>
> (d) Whether or not Ang J's finding of wrongful arrest, and her Honour's order for an inquiry into damages, should also be set aside: *The STX Mumbai (CA)* at [39].

As this section concerns the admiralty law aspects of *The STX Mumbai (CA)*, the Court of Appeal's consideration of the first and second issues will be reviewed in ch 12.

No failure to make full and frank disclosure

2.7 As the sole premise of the court below to set aside the arrest was the striking out of the claim (see *The STX Mumbai (HC)* at [2], which

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the Court of Appeal overturned), the Court of Appeal held that the arrest would be upheld unless the defendant could show, as an *independent ground* for setting aside the arrest, that the plaintiff had failed to make full and frank disclosure of all material facts in the application for arrest: *The STX Mumbai (CA)* at [91]. In that regard, the defendant alleged that while the plaintiff had sought to rely on STX Corporation's failure to pay for bunkers stemmed to four other vessels, the plaintiff had failed to disclose at the arrest application that three of those vessels were, in fact, not owned by the defendant: *The STX Mumbai (CA)* at [92].

2.8 The Court of Appeal gave short shrift to the defendant's allegation. In so doing, the Court of Appeal considered that the arrest affidavit clearly demonstrated the plaintiff's belief that *all the vessels* to which it had supplied bunkers through STX Corporation were part of the STX Group of Companies, and that the latter's financial difficulties formed the basis for the plaintiff's belief that payment for the bunkers stemmed to STX Mumbai would not be forthcoming: *The STX Mumbai (CA)* at [92]. In any event, the Court of Appeal considered that the arrest affidavit had, in fact, disclosed that the defendant was indeed not the registered owner of the other three vessels: *The STX Mumbai (CA)* at [93] and [94].

When damages for wrongful arrest may be awarded

2.9 The fourth issue which the Court of Appeal considered was whether or not damages for wrongful arrest could be excluded by the mere fact that the *in rem* claim had not been struck out: *The STX Mumbai (CA)* at [95]. The Court of Appeal rejected the plaintiff's contention that the mere fact that the *in rem* claim had not been struck out meant that it "followed as a matter of course" that the arrest was not wrongful: *The STX Mumbai (CA)* at [95]. The Court of Appeal was of the view that evidence could emerge at trial which could point towards a finding that the arrest of the vessel had been "so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence": *The STX Mumbai (CA)* at [95].

2.10 This is the familiar test for wrongful arrest as set out in *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945 ("*The Evangelismos*"), as reinterpreted by the Court of Appeal in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin*") at [137]. The same test for wrongful arrest was affirmed and applied by Steven Chong J in *The Xin Chang Shu* [2016] 1 SLR 1096, which is reviewed below.

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The Chem Orchid [2015] 2 SLR 1020

2.11 The High Court's decision in *The Chem Orchid* [2015] 2 SLR 1020 ("*The Chem Orchid*") arose out of the purported termination of a bareboat charterparty. In particular, the decision considers the question of whether or not, as a matter of Singapore law, physical redelivery of the vessel is required to bring a bareboat charter to an end, giving rise to the question of who would be the person liable *in personam* under s 4(4)(*b*)(i) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act") if the writ is issued prior to physical redelivery under a bareboat charterparty. Section 4(4)(*b*)(i) of the Act provides:

> (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where —
>
> (*a*) the claim arises in connection with a ship; and
>
> (*b*) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise[.]

2.12 As with *The STX Mumbai (CA)*, this part of the chapter will consider only the admiralty law aspects of *The Chem Orchid*.

2.13 The defendant, Han Kook Capital Co Ltd ("HKC"), the registered owner of the Chem Orchid, agreed to bareboat charter the Chem Orchid to Sejin Maritime Co Ltd ("Sejin") for a period of 108 months: *The Chem Orchid* at [7]. The bareboat charterparty, which was entered into on 1 February 2010, provided that in the event of any disagreement as to its interpretation, Korean law would apply. In December 2010, the defendant established a company, HK AMC Co Ltd ("HKA"), to recover bad debts owed to the defendant. The defendant and HKA subsequently executed an asset transfer agreement ("ATA"), pursuant to which the defendant agreed to sell credits (including but not limited to the credits under the bareboat charterparty) which it had obtained in the course of its business to HKA, at a fair price: *The Chem Orchid* at [10]. Pursuant to a notice of credit transfer ("NCT"), HKC informed Sejin of its arrangement with HKA: *The Chem Orchid* at [12].

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2.14 Sejin subsequently failed to make hire payment under the bareboat charter for six consecutive months, which led HKA (and not HKC) to give Sejin notice of early termination of the bareboat charter on account of HKA's concerns about Sejin's ability to perform its obligations under the bareboat charterparty ("Early Termination Notice"): *The Chem Orchid* at [14]. Pursuant to the terms of the Early Termination Notice, HKC demanded, *inter alia*, that Sejin make immediate payment of the outstanding sums under the bareboat charterparty, failing which HKA would "retrieve" the Chem Orchid: *The Chem Orchid* at [15].

2.15 Even though HKC took the view that the Early Termination Notice had terminated the bareboat charterparty, Sejin failed to physically redeliver the Chem Orchid to HKC and/or to HKA, and continued trading her. In fact, Sejin entered into a voyage charterparty with Frumentarius Ltd ("Frumentarius"), and, in a letter dated 23 May 2011, promised to pay HKA the freight earned under that voyage charterparty: see [19]. Sejin, as bareboat charterers, arranged for Winplus Corporation Co Ltd ("Winplus") to stem bunkers to her: *The Chem Orchid* at [19].

2.16 More than two months after the Early Termination Notice, and some two weeks after Sejin's update on 23 May 2011, HKA responded by stating a number of demands which had to be fulfilled before the bareboat charterparty could be "revive[d]": *The Chem Orchid* at [22]. Notwithstanding this latest development, Sejin continued to trade the vessel, and did not redeliver her to HKA and/or HKC.

2.17 Winplus eventually arrested the Chem Orchid on account of Sejin's failure, as bareboat charterers of the vessel, to make payment for the bunkers which it had stemmed to the vessel: *The Chem Orchid* at [24]. Three further *in rem* writs were issued against the Chem Orchid, by Frumentarious, the vessel's subcharterers ("KRC"), and the owners of the cargo laded on board the Chem Orchid, Mercuria Energy Trading SA ("Mercuria").

2.18 While Sejin did not enter appearance in any of the four actions, HKC entered appearance in all four *in rem* actions as the registered owner of the Chem Orchid, and sought to set aside all four writs on the basis that the court's *in rem* jurisdiction had not been properly invoked: *The Chem Orchid* at [28]. HKC's argument was that the bareboat charterparty had been terminated by virtue of the Early Termination Notice, such that Sejin was not the bareboat charterer of the Chem Orchid at the time the writs had been issued: *The Chem Orchid* at [29]. On this analysis, Sejin was not the relevant person under s 4(4)(*b*)(i) at the time the four actions had been brought.

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Whether or not the early termination notice was valid

2.19 In delivering the judgment of the High Court, Steven Chong J reiterated the five-step requirement elucidated by the Court of Appeal in *The Bunga Melati 5* [2012] 4 SLR 546 at [112]. In that regard, the parties were in agreement that the dispute centred on the fifth step, *ie*, whether or not, on the balance of probabilities, Sejin had been the demise charterer of the Chem Orchid at the time the four *in rem* actions had been brought: *The Chem Orchid* at [37].

2.20 As a preliminary point, Chong J considered that it was open to the plaintiffs in the four *in rem* actions to challenge the validity of HKC's purported termination of the bareboat charterparties, notwithstanding the fact that the plaintiffs were strangers to the Early Termination Notice – and the fact that Sejin itself had not brought a similar challenge: *The Chem Orchid* at [42]. This was due to the fact that the issue in question was not one of contract, but one which went to the root of the court's admiralty jurisdiction: *The Chem Orchid* at [42]. In this regard, Chong J considered the Australian decisions of *Ships "Hakao Endeavour", "Hako Excel", "Hako Esteem" and "Hako Fortress" v Programmed Total Marine Services Pty Ltd* (2013) 296 ALR 265 and *ASP Holdings Ltd v Pan Australia Shipping Pte Ltd* (2006) 235 ALR 554, where the Australian courts had proceeded to consider the validity of purported termination notices issued pursuant to bareboat charterparties, notwithstanding the fact that the respective bareboat charterers in those cases had not challenged the said notices: *The Chem Orchid* at [43].

2.21 Chong J agreed with the assistant registrar that the ATA merely transferred to HKA credits payable to HKC under the bareboat charterparty; the right to terminate the bareboat charterparty had not been transferred: *The Chem Orchid* at [44]. More fundamentally, the bareboat charterparty required HKC to, *inter alia*, form the opinion that Sejin was facing difficulties in continuing normal business activities, before the bareboat charterparty could be prematurely terminated. There was no evidence that the above-mentioned requirement could be satisfied by HKA (and not HKC) forming the requisite opinion: *The Chem Orchid* at [46] and [49].

2.22 Chong J further held that the Early Termination Notice was defective also for the reason that delay in making payment was an express event listed in Art 24(1) of the bareboat charterparty, such that HKC merely had the right to issue a rectification notice to Sejin before the right to termination accrued: *The Chem Orchid* at [55] and [56]. In the circumstances, the Early Termination Notice was invalid, such that the plaintiffs' respective appeals against the assistant registrar's decision to set aside the four *in rem* writs were allowed.

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Requirement for physical redelivery under a bareboat charterparty

2.23 Having considered and disposed of the appeals before him, Chong J proceeded to consider the question of whether or not a mere notice given under a bareboat charterparty (as opposed to physical redelivery) was sufficient as a matter of common law to terminate a bareboat charterparty. Agreeing with the assistant registrar below, Chong J held that the requirement of physical redelivery is "intrinsically tied" to the distinctive nature of a bareboat charter, *viz*, a lease of the vessel to the charterer, and in particular, *the transfer of possession and control* of the vessel from her owner to the charterer as the hallmark thereof: *The Chem Orchid* at [65] and [66].

2.24 Having considered various Australian, New Zealand and Hong Kong decisions on this issue, Chong J agreed with the approach adopted by Tamberlin J in the Australian decision of *The Turakina* (1998) 154 ALR 666, namely, that in the light of the requirement for delivery or transfer of possession to the charterer at the commencement of the charterparty, where the vessel is withdrawn from the charterer's service, an obligation to physically redeliver possession arises because possession has been delivered at the commencement of the charterparty: *The Chem Orchid* at [69].

2.25 Given the critical importance of the requirements for the transfer of possession and control under a bareboat charterparty, Chong J declined to follow the approach taken by Giles J in *The Rangiora, Ranginui and Takitimu* [2000] 1 Lloyd's Rep 36 that parties may contract out of the requirement of physical delivery: *The Chem Orchid* at [76]. Chong J held that such a restriction would give effect to the balance struck by the legislative scheme under the Act, which provides that third parties dealing with the vessel, unaware that she is on bareboat charter, may arrest the vessel as security for their maritime claims regardless of whether the party with whom they directly transact is the owner or bareboat charterer: *The Chem Orchid* at [78] and [79].

2.26 Conversely, allowing parties to contract out of the requirement for physical delivery could upset the above-mentioned balance, as third parties would no longer find it safe to assume that they have contracted with either the owner or bareboat charterer of a vessel in all circumstances: *The Chem Orchid* at [79]. Chong J reasoned that the risk ought to fall on the shipowner, as the latter party would be *fully aware* that, by executing a bareboat charter, he would be vesting complete possession and control of the vessel in the charterer, who can incur liabilities in respect of the vessel's use. In contrast, a third party would have little (or no) way of knowing whether the vessel he is dealing with is on bareboat charter: *The Chem Orchid* at [82]. It is respectfully submitted that this reasoning is to be preferred to the other approach

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allowing for redelivery to the owners without the transfer of physical possession, which, though being strictly contractual, fails to take into account the interests of third parties who may contract with the bareboat charterer or the owner in ignorance of the latter two parties' private arrangement. The need for physical redelivery is heightened by the fact that there is no general practice and/or established requirement that bareboat charterparties be registered with the flag state (see Chong J's observations on the lack of any public registry to check whether a vessel is on bareboat charter: *The Chem Orchid* at [125]).

2.27 The court also rejected the suggestion that there could be constructive redelivery of a vessel to terminate a bareboat charterparty for broadly the same reasons as the requirement for insisting on physical redelivery: *The Chem Orchid* at [105]. In any event, there had been no overt act on Sejin's part which could be capable of representing redelivery of the vessel: *The Chem Orchid* at [110].

The Vinalines Pioneer [2016] 1 SLR 448

2.28 The High Court's decision in *The Vinalines Pioneer* [2016] 1 SLR 448 ("*The Vinalines Pioneer*") arose out of a claim for damage to and/or loss of some 111 containers on board the defendant's vessel, Phu Tan, which capsized and sank on 16 December 2010. The plaintiff commenced *in rem* proceedings in Singapore on 9 June 2013 and arrested the Phu Tan's sister ship, the Vinalines Pioneer, alleging that its claim for loss of the said containers fell within s 3(1)(*d*) of the Act, which provides:

> 3.—(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> …
>
> (*d*) any claim for damage done by a ship[.]

Whether or not damage must have been sustained by person or property external to ship

2.29 The first basis on which the defendant applied to set aside the writ was founded on Clarke J's decision in *The Rama* [1996] 2 Lloyd's Rep 281. In that case, Clarke J held that, in order to bring a claim within the English equivalent of s 3(1)(*d*) of the Act, the claimant had to show, *inter alia*:

> (a) that the damage had been caused by something done by those engaged in the navigation or management of the ship in a physical sense;

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(b) the ship must be the actual or noxious instrument by which the damage had been done, *ie*, the "instrumentality criterion"; and

(c) the damage must have been sustained by a person or property external to the ship, *ie*, the "externality criterion": *The Vinalines Pioneer* at [6].

2.30 The defendant contended that as the plaintiff had brought a claim for damage to and loss of containers *carried on board the Phu Tan*, the above-mentioned third requirement had not been satisfied: *The Vinalines Pioneer* at [6]. Agreeing with the defendant, Belinda Ang J traced the historical roots of s 3(1)(*d*) of the Act to the UK Admiralty Court Act 1861 (c 10) ("1861 Act"), and observed that there is no jurisdiction *in rem* under English law if the property or person is on board the offending vessel: *The Vinalines Pioneer* at [37] and [38]. In so doing, Ang J observed that the genesis of the jurisdictional basis for damage done by a ship had been established by the old English decisions of *The Pieve Superiore* (1864) LR 5 PC 482 and *The Victoria* (1887) 12 PD 96: *The Vinalines Pioneer* at [46], [47] and [63]. The above-mentioned English authorities had, *inter alia*, recognised the court's *in rem* jurisdiction in respect of damage *to property external to the ship in question*. The externality criterion had also been accepted and adopted by the Hong Kong Court of Appeal in *Re Asian Atlas* [2008] 3 HKC 169.

2.31 Ang J declined to follow the Australian decisions of *The Regis* (1939) 61 CLR 688 and *The Union Steamship* (1969) 119 CLR 191, and the New Zealand position as set out in *The Margaret Z* [1999] 3 NZLR 111, which respectively held that damage to *a person* may fall within the statutory equivalent of s 3(1)(*d*) of the Act: *The Vinalines Pioneer* at [63] and [64]. In so doing, her Honour observed that the above-mentioned cases did not provide "the legal basis" to extend the jurisdictional ambit of s 3(1)(*d*) of the Act to property carried on board the offending vessel: *The Vinalines Pioneer* at [46], [55], [57], [58], [60] and [61].

2.32 Bearing in mind the requirement for damage to be sustained by a person or property external to the ship, Ang J held that there was no *in rem* jurisdiction under s 3(1)(*d*) of the Act: *The Vinalines Pioneer* at [65]. This was particularly since no other vessel or object had been involved in the casualty: *The Vinalines Pioneer* at [66]. Put another way, the damage in this case had been done *to* the vessel, not *by* the vessel: *The Vinalines Pioneer* at [66]. In the circumstances, Ang J held that the plaintiff's claim did not satisfy the legal character of a claim for "damage done by a ship": *The Vinalines Pioneer* at [76].

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Distinction between a damage maritime lien and in rem *jurisdiction*

2.33 Ang J also observed in passing that the mere fact that the Act confers statutory *in rem* jurisdiction on the courts does give rise to the inference that Parliament intended for the statutory lien in question to assume the nature of a maritime lien: *The Vinalines Pioneer* at [13]. Simply put, if a maritime lien exists, *in rem* jurisdiction *and* a statutory lien are also available; however, the converse is not necessarily true, *viz*, if *in rem* jurisdiction and a statutory lien are made out, it does not necessarily follow that a maritime lien can be inferred: *The Vinalines Pioneer* at [13].

2.34 In this regard, Ang J upheld the distinction between a damage lien and *in rem* jurisdiction: *The Vinalines Pioneer* at [22]. In coming to this conclusion, Ang J followed the decision of Allsop J in *The Global Peace* [2006] FCA 954, where he clarified the distinction and difference in approach between a claim premised on the existence of a maritime lien, and a claim *dependent* on its nature and legal character to found admiralty jurisdiction: *The Vinalines Pioneer* at [23]. Thus, in cases involving a maritime lien (such as the damage lien in s 3(1)(*d*) of the Act), the court will consider the existence of the maritime lien, whereas in cases involving a statutory lien, the court will consider whether or not the nature of the claim is such as to fit the legal character needed to found *in rem* jurisdiction: *The Vinalines Pioneer* at [23].

Proof of jurisdictional facts

2.35 In her Honour's judgment, Ang J also addressed the defendant's objection to the admissibility of an investigation report as to the cause of the casualty on the ground that the report was hearsay. Following the Court of Appeal's decision in *The Nasco Gem* [2014] 2 SLR 63, Ang J held that an application to set aside a warrant of arrest was an interlocutory application, such that hearsay evidence contained in affidavits was admissible: *The Vinalines Pioneer* at [70].

2.36 Ang J also referred to the fact that the defendant had chosen to have its jurisdictional challenge determined on affidavits and documents, suggesting that, had the defendant elected to do so, it could have sought a full "pre-trial" of a factual dispute as to jurisdictional facts, as suggested by Chan Sek Keong CJ (as he then was) in *The Bunga Melati 5* [2012] 4 SLR 546 at [129]–[130]: *The Vinalines Pioneer* at [72].

Material non-disclosure

2.37 The defendant also sought to set aside the writ and arrest on the basis that the plaintiff had allegedly concocted a case to fall

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within s 3(1)(*l*) of the Act by introducing false documents and misleading statements in the arrest affidavit, and that the plaintiff had sought to arrest the Vinalines Pioneer despite knowing that the subject matter of its claim did not fall within the various limbs in s 3(1) of the Act: *The Vinalines Pioneer* at [87]. Ang J held that the defendant's allegation of dishonesty was not an accusation which the court was able to summarily resolve on contested facts, particularly since the materiality of the alleged facts, and purposes of disclosure, were, in the instant case, inextricably linked with the merits of the claim: *The Vinalines Pioneer* at [88].

2.38 Furthermore, even if the plaintiff had advanced an unsustainable legal proposition to contend that the court has admiralty jurisdiction, the "materiality" of the correct legal position did not fall within the plaintiff's duty to make full and frank disclosure of all material facts, but rather, counsel's duty to act as an officer of the court: *The Vinalines Pioneer* at [107]. In that regard, even though the plaintiff had failed to convince the court to adopt the Australian and New Zealand view on the externality criterion, above, it was nevertheless open to the plaintiff to attempt to persuade the court to do likewise: *The Vinalines Pioneer* at [107].

2.39 In any event, Ang J held that the various facts which the defendant alleged ought to have been disclosed in the arrest affidavit were not material: *The Vinalines Pioneer* at [89]. These included:

> (a) The plaintiff's failure to include two missing containers in the extract of the container loading list exhibited to the arrest affidavit: *The Vinalines Pioneer* at [90].
>
> (b) The date the plaintiff had supplied the lost containers to the defendant: *The Vinalines Pioneer* at [93].
>
> (c) The allegation that the jurisdictional clause in the container leasing agreement had not been brought to the attention of the assistant registrar: *The Vinalines Pioneer* at [104].

Striking out: Alleged time bar

2.40 The defendant also sought to strike out the claim on the basis that it was time barred, as the writ had been filed more than two years after the Phu Tan had sunk: *The Vinalines Pioneer* at [77]. As the vessel had sunk in Vietnamese waters, the parties agreed that the substantive claims and defences were subject to Vietnamese law, and sought to prove the alleged time bar by way of Vietnamese law experts: *The Vinalines Pioneer* at [79].

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2.41 Ang J held that it was not possible to decide, at the summary stage, in favour of one expert's interpretation and opinion over the other: *The Vinalines Pioneer* at [82]. Her Honour went on to find that it was not open to the defendant to call the plaintiff's expert's competency into question at the striking out stage: *The Vinalines Pioneer* at [82].

The Xin Chang Shu [2016] 1 SLR 1096

2.42 The decision in *The Xin Chang Shu* [2016] 1 SLR 1096 ("*The Xin Chang Shu*") arose out of the collapse of the OW Bunker group of companies in November 2014. The plaintiff, who had stemmed bunkers on board the Xin Chang Shu, alleged that OW Bunker Far East (Singapore) Pte Ltd ("OW Singapore") had agreed to buy the bunkers from the plaintiff as the agent for the defendant owners of the Xin Chang Shu, thereby establishing contractual privity between themselves and the ship owners.

2.43 After the collapse of OW Singapore's Danish parent entity on or about 7 November 2014, the plaintiff sent a letter of demand dated 12 November 2014 to the defendant, demanding payment for the bunkers. In that letter, the plaintiff alleged that it had a lien on the Xin Chang Shu, "amongst other grounds", which were unspecified: *The Xin Chang Shu* at [62]. What was notably absent from that letter of demand was any express allegation that OW Singapore had ordered the bunkers from the plaintiff in its capacity as the defendant owners' agent.

2.44 After unsuccessful negotiations on the provision of security, the plaintiff arrested the Xin Chang Shu, which was only released after the defendant had paid the sum of US$2.6m into court: *The Xin Chang Shu* at [8]. The plaintiff applied for a stay of proceedings in favour of arbitration; the defendant applied to strike out the proceedings, set aside the warrant of arrest, and for damages for wrongful arrest: *The Xin Chang Shu* at [9].

No alleged agency

2.45 The plaintiff relied on two primary facts in the arrest affidavit to support its allegation of agency:

> (a) that the plaintiff's general terms and conditions (which had been incorporated into the bunker supply agreement) asserted that OW Singapore was contracting as agent on behalf of the defendant; and
>
> (b) OW Singapore had allegedly supplied commercial details, which had purportedly given the plaintiff the appearance that OW Singapore was fully authorised to conclude

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the bunker supply agreement on the defendant's behalf: *The Xin Chang Shu* at [14] and [59].

2.46 In dismissing the plaintiff's appeals against the assistant registrar's decision to strike out the proceedings and refusal to stay the action, Chong J held that the plaintiff's claim, which was premised on OW Singapore's alleged agency, was both legally and factually unsustainable: *The Xin Chang Shu* at [13]. Applying the Court of Appeal decision of *Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35, Chong J held that for estoppel by representation to be made out, the defendant had to be aware of the plaintiff's mistaken belief for acquiescence on the defendant's part which was absent on the facts: *The Xin Chang Shu* at [13(a)]. Furthermore, no representation could be inferred from the defendant's silence unless the defendant had been aware of the plaintiff's mistaken beliefs and had a duty to disclose facts: *The Xin Chang Shu* at [13(b)]. In the instant case, the defendant's uncontroverted evidence was that there had been no direct communication between the plaintiff and defendant until the plaintiff had sent its letter of demand dated 12 November 2014 to the defendant: *The Xin Chang Shu* at [13(c)]. Simply put, there was no evidence to show that the defendant had even been aware of the plaintiff's and OW Singapore's respective involvement in the supply of bunkers, since the defendant had in fact entered into a separate contract with OW Bunker China Limited ("OW China"): *The Xin Chang Shu* at [13(d)] and [13(e)].

2.47 OW Singapore could not have been the defendant's agent given the chain of back-to-back contracts for the supply of bunkers: the defendant had entered into a contract with OW China, who had then contracted with OW Singapore, who finally entered into a contract with the plaintiff. The respective dates and prices of the respective back-to-back contracts were different: *The Xin Chang Shu* at [13(e)].

2.48 There was no evidence that the plaintiff's documentation (which consisted of the plaintiff's general terms and conditions on which it relied to allege that OW Singapore had contracted with the plaintiff as the defendant's agent) had ever been sent to the defendant before the plaintiff's letter of demand dated 12 November 2014: *The Xin Chang Shu* at [13(e)]. Even taking the plaintiff's case at its highest, the plaintiff's general terms and conditions, at best, proved that OW Singapore had held itself out to be the defendant's agent: *The Xin Chang Shu* at [16]. Applying the Court of Appeal decision of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540, Chong J held that the law does not recognise the notion of a "self-authorising" agent: *The Xin Chang Shu* at [16]. There was also no evidence that the defendant had held out OW Singapore as having authority to make representations

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relating to the bunker supply agreement on behalf of the defendant to justify any reliance on the doctrine of apparent authority: *The Xin Chang Shu* at [17]. The plaintiff's claim was thus legally unsustainable.

2.49 As regards the second primary fact of alleged agency, the commercial details which the plaintiff alleged had been supplied by OW Singapore had, in fact, emanated from the plaintiff itself: *The Xin Chang Shu* at [15]. This was therefore a factually unsustainable claim.

2.50 In the light of the foregoing findings, Chong J upheld the assistant registrar's decision to strike out the claim, and held that the plaintiff's claim, which was premised on the alleged agency of OW Singapore, was both legally and factually unsustainable: *The Xin Chang Shu* at [13].

Availability of remedy of damages for wrongful arrest

2.51 Chong J also clarified that while damages for wrongful arrest are *typically* awarded in cases where the warrant of arrest has been set aside (such as in *The Dilmun Fulmar* [2004] 1 SLR(R) 140 and *The Vasiliy Golovnin* (above, para 2.10)), the latter is not a prerequisite to the award of damages for wrongful arrest: *The Xin Chang Shu* at [20] and [25]. It is always open to the defendant to pursue a claim for wrongful arrest as a counterclaim in the action: *The Xin Chang Shu* at [23]. Thus, in *The Trade Resolve* [1999] 2 SLR(R) 107 ("*The Trade Resolve*") and *The Kiku Pacific* [1998] SGHC 370 ("*The Kiku Pacific*"), the High Court considered the remedy of damages for wrongful arrest even though the respective warrants of arrest in both cases had not been set aside.

2.52 In the light of the foregoing, Chong J held that there are *at least* three ways in which damages for wrongful arrest may be pursued:

(a) Typically and most commonly (as was the case in *The Xin Chang Shu*), it is brought in conjunction with an interlocutory application to strike out the writ and, as a consequence of the successful striking out, the warrant of arrest is set aside. In adopting this course of action, the defendant ship owner seeks to convince the court that, arising from the striking out, the claim is so lacking in merit that an inference of malice can and should be drawn.

(b) Second, the ship owner may seek to set aside the warrant of arrest on the basis of non-disclosure of material facts, as was the case in *The Eagle Prestige* [2010] 3 SLR 294. If the warrant of arrest is set aside in such circumstances, the plaintiff is at liberty to proceed with the claim without security.

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(c) Third, the defendant ship owner may seek to defend the claim at trial, and seek damages for wrongful arrest as a counterclaim following the dismissal of the claim: see, for example, *The Trade Resolve* and *The Kiku Pacific*: *The Xin Chang Shu* at [24]. While this avenue of potential redress is not new given the cases which the court cited, it is a useful reminder, particularly if the issue of wrongful arrest is not a matter which can be properly dealt with on affidavit evidence alone.

Award of damages for wrongful arrest

2.53 In considering the defendant's application for damages for wrongful arrest, Chong J applied the test set out in *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945, as reinterpreted by the Court of Appeal in *The Vasiliy Golovnin* (above, para 2.10), *viz*, that there has been either *mala fides*, or *crassa negligentia*, which implies malice, such that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it implies either malice, or gross negligence equivalent to malice: *The Xin Chang Shu* at [27] and [28]. In doing so, Chong J held that malice may be found on the basis of direct evidence of the plaintiff's state of mind at the time of the arrest, or that it may be inferred if the claim is so unmeritorious that the arresting party could not have honestly believed that he had an entitlement to arrest the vessel (or at least recklessly disregarded whether he had grounds to do so): *The Xin Chang Shu* at [30]. The courts will pay particular attention to what the arresting party knew, or must have known, at the time of the arrest: *The Xin Chang Shu* at [37] and [39]. This, as Chong J observed, is a fact-sensitive question: *The Xin Chang Shu* at [38].

2.54 Chong J also proceeded to consider whether or not the arrest in the instant case had been brought unwarrantably, or with so little colour or foundation, in the light of the material non-disclosure alleged by the defendant, as well as the defendant's allegation that the writ of summons did not disclose a reasonable cause of action: *The Xin Chang Shu* at [31]. Applying the Court of Appeal's decision of *The Kiku Pacific*, Chong J held that malice should not be inferred on the sole ground that there is no reasonable or probable cause for the arrest, as doing so would dilute the threshold required for a claim for wrongful arrest: *The Xin Chang Shu* at [32].

2.55 In considering the facts at hand, Chong J held that the correspondence exchanged between the parties was critical in demonstrating that the plaintiff must have known that it neither had a factual nor legal basis to assert that OW Singapore had acted as the defendant's agent in respect of the supply of bunkers: *The Xin Chang Shu* at [61]. The *first correspondence* exchanged between the parties was the

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plaintiff's letter of demand dated 12 November 2014, where the plaintiff's alleged legal basis for its claim was stated to be a lien on the Xin Chang Shu as a result of the operation of the plaintiff's terms and conditions: *The Xin Chang Shu* at [62]. Notably, while the plaintiff's letter of demand alluded to "other grounds", OW Singapore's alleged agency was not specifically mentioned. Chong J held that if, in fact, OW Singapore's alleged agency was the plaintiff's belief and understanding all along, he would have expected the plaintiff to specifically highlight that particular ground: *The Xin Chang Shu* at [62].

2.56 The plaintiff's allegation of agency was only raised for the first time by its Singapore solicitors in their letter dated 17 November 2014: *The Xin Chang Shu* at [65]. In that letter, the plaintiff alleged that (unspecified) communication between the defendant and OW Singapore showed that the defendant had authorised OW Singapore to conclude the sale of bunkers on its behalf: *The Xin Chang Shu* at [65]. Chong J held that the plaintiff's allegations were patently false given that:

(a) there was never any communication between the defendant and OW Singapore prior to the bunker supply: *The Xin Chang Shu* at [66]; and

(b) the plaintiff knew that its invoice had never been delivered to the defendant prior to its letter of demand dated 12 November 2014: *The Xin Chang Shu* at [66].

2.57 Furthermore, prior to the arrest of the vessel, the defendant's solicitors had furnished the plaintiff's solicitors with a copy of the defendant's contract with OW China: *The Xin Chang Shu* at [68]. That contract would have revealed significant differences in the terms, in particular, price, payment terms and default interest, which would have put paid to the plaintiff's allegation of any contract formed with the defendant through the alleged agency of OW Singapore: *The Xin Chang Shu* at [68].

2.58 Chong J further held the allegation in the arrest affidavit that OW Singapore had furnished the plaintiff with commercial details of the bunker supply, such as the place of delivery, quantity and quality, nomination of a local agent, delivery date, mode of delivery, and payment terms, to be "patently false", and presented to the court in "a most misleading manner": *The Xin Chang Shu* at [74] and [77]. Those commercial details had, in fact, emanated from the plaintiff itself: *The Xin Chang Shu* at [77]. Simply put, there was no evidence before the court to suggest that the defendant was even aware of OW Singapore's involvement in the bunker transaction: *The Xin Chang Shu* at [78].

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2.59 At the hearing of the application for the warrant of arrest, the plaintiff alleged that there had been a course of past dealings between the plaintiff and defendant: *The Xin Chang Shu* at [80]. Chong J found any such allegation to be "misleading or cavalier", since the defendant never had any prior dealings with the plaintiff either directly or through OW Singapore: *The Xin Chang Shu* at [80].

2.60 In the premises, Chong J held that the plaintiff's case was one which it knew, or ought to have known, was based on a *false foundation*: *The Xin Chang Shu* at [83]. In the premises, Chong J held that the plaintiff's case had so little foundation so as to imply malice, *and* that there had been reckless disclosure of material facts (as elaborated below): *The Xin Chang Shu* at [84] and [89].

Material non-disclosure

2.61 With respect to matters that must be disclosed in the arrest affidavit, Chong J followed the decision of Belinda Ang J in *The Eagle Prestige* [2010] 3 SLR 294 and the Court of Appeal in *The Bunga Melati 5* [2012] 4 SLR 546 (reviewed in (2012) 13 SAL Ann Rev 46) in holding that insofar as potential defences are concerned, the arresting party is not obliged to disclose all defences which a defendant may reasonably raise at trial, but only those which are of such weight as to deliver a "knock-out blow" to the claim: *The Xin Chang Shu* at [48]–[50].

2.62 Chong J reiterated the established position that there is no duty on an arresting party to disclose an arbitration clause: *The Xin Chang Shu* at [52] and [57]. In so doing, Chong J followed the decision of *The Evmar* [1989] 1 SLR(R) 433, where Chao Hick Tin JC (as his Honour then was) held that the omission to disclose the arbitration clause in the bill of lading and the arresting party's failure to depose that the defendants were not able to satisfy the arbitration clause did not constitute material non-disclosure: *The Xin Chang Shu* at [51].

2.63 Chong J held that Chao JC's holding applies with even more force now that s 7 of the International Arbitration Act (Cap 143A, 2002 Rev Ed), *inter alia*, allows the Singapore courts to order that any property arrested be retained as security for the satisfaction of any award made in the arbitration: *The Xin Chang Shu* at [52]. In other words, the court's jurisdiction to arrest a ship is no longer confined to providing security in respect of an action *in rem*. In so doing, Chong J opined that the Court of Appeal in *The Vasiliy Golovnin* (above, para 2.10) did not intend to lay down any rule that the failure to disclose an intention to rely on an arbitration agreement would always constitute material non-disclosure, particularly since the Court of Appeal's observation on such disclosure was not made in the context of setting

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aside the warrant of arrest on the ground of material non-disclosure: *The Xin Chang Shu* at [53] and [54].

2.64 Chong J held that, in the light of the lack of any agency relationship between the defendant and OW Singapore, the defendant's position on agency constituted a "knock-out blow" which was fatal to the plaintiff's claim: *The Xin Chang Shu* at [82]. The defendant's position ought to have been disclosed to the assistant registrar hearing the arrest application, rather than dismissed as "irrelevant to the [plaintiff's] contractual claim": *The Xin Chang Shu* at [81].

2.65 Moreover, given the plaintiff's knowledge that the defendant had purchased the same bunkers from OW China on different terms, and, most significantly, at a higher price, it had been "plainly inadequate" for the plaintiff's counsel to simply inform the assistant registrar at the hearing for the application for the warrant of arrest that the defendant's position was that it was contractually obliged to pay OW China under a separate contract: *The Xin Chang Shu* at [83]. The different terms of the contract between the defendant and OW China ought to have been disclosed to the assistant registrar, since it "effectively [demolished the plaintiff's] agency case theory": *The Xin Chang Shu* at [83] and [89].

2.66 The decision in *The Xin Chang Shu* serves as a salutary reminder of both the parties' and counsel's duty of disclosure in applying for a warrant of arrest. It also demonstrates the extent to which the court will scrutinise all the available evidence in considering an application for damages for wrongful arrest. This extends not only to the affidavits filed in support of the arrest application, but also the notes of evidence recorded during the hearing for the application of the warrant of arrest.

SHIPPING LAW

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2.67 In 2015, a number of cases came before the courts that resulted in judicial guidance on shipping matters. Some of these are covered in the "Admiralty Law" section. This section discusses the decisions relating to a voyage charter (*Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178) and principles of agency in the context of bunker trade (*The Bunga Melati 5* [2015] SGHC 190).

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Terms of voyage charter

2.68 In *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178 ("*Paragon Shipping*"), the Court of Appeal heard and allowed an appeal in part from the earlier High Court decision of *Paragon Shipping Pte Ltd v Freight Connect (S) Pte Ltd* [2014] 4 SLR 574. The facts and decision of the High Court case were reported in (2014) 15 SAL Ann Rev 25 at 34–37, paras 2.37–2.53.

2.69 In brief, the parties entered into a voyage charter party by which Paragon Shipping (the plaintiff) agreed to provide a vessel, "MV *Dahua*" ("*Dahua*"), to carry cargo for Freight Connect (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. As the *Dahua* was delayed, the plaintiff proposed an alternative vessel, "MV *AAL Dampier*" ("*AAL Dampier*"). The defendant denied that it had accepted this vessel under a second fixture.

2.70 The *AAL Dampier* 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. On 23 August 2012, the defendant informed the plaintiff that it was loading the cargo on to a different vessel.

2.71 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. The High Court found that, although the plaintiff had breached the first fixture, the parties had entered into a second fixture. The defendant had repudiated the second fixture by loading the cargo on the third vessel instead of the *AAL Dampier*. The plaintiff was awarded damages, including an indemnity for any liability to the party from whom it had chartered the *AAL Dampier*. The counterclaim was dismissed.

2.72 The defendant appealed. The Court of Appeal dismissed the appeal in relation to whether there was a second fixture but allowed the appeal against the indemnity order in favour of the plaintiff.

2.73 The main issues on appeal in *Paragon Shipping* were whether: (a) oral and written communications were sufficient to establish that the second fixture was concluded; (b) the second fixture was a *port* or *berth* charterparty; and (c) the court could order the appellant to indemnify the respondent in the absence of a claim by a third party against the respondent.

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Are oral and written communications sufficient to establish a concluded fixture?

2.74 The Court of Appeal found that it had no reason to disturb the High Court's finding that the second fixture had been validly entered into by the contracting parties. It rejected the defendant's contention that the High Court was wrong to rely on the oral and written communications, such as the e-mail correspondence, in establishing the validity of the second fixture. Instead, it took the view that "[t]he law does not require a charterparty to be reduced into a single written document that is signed by both parties in order for it to be upheld as a valid agreement": *Paragon Shipping* at [22]. It also accepted that such an agreement may be made "in the course of written exchanges, or during conversations or meetings, and may be even inferred from conduct, so long as the inference to be drawn is clear": *Paragon Shipping* at [22].

Was the second fixture a port or berth charterparty?

2.75 Based on the construction of the second fixture, the Court of Appeal accepted the plaintiff's arguments that it was a *port* charterparty as opposed to a *berth* charterparty. It found that the omission of any reference to the word "berth" in the port of loading for the second fixture was indicative of the parties' intention to create a *port* charterparty, especially when explicit reference was made to the "Owners Berth" in the earlier fixture. It also reasoned, from a commercial perspective, that it was unlikely for the owner of the *AAL Dampier* to have agreed to assume responsibilities for berthing the vessel, given the tight deadlines that the second fixture was concluded upon: *Paragon Shipping* at [32]. As the second fixture was a port charterparty, the vessel was an "arrived ship" when she arrived in Nanwei and the NOR was validly tendered within the laycan period of the second fixture.

Can indemnity order be ordered in absence of claim?

2.76 Finally, the Court of Appeal allowed the appeal on the indemnity order. This was because no claim had been made by the head charterer of the *AAL Dampier*: *Paragon Shipping* at [50]. Citing the Federal Court decision of *Eastern Oceanic Corp Ltd v Orchard Furnishing House Building Co* [1965–1967] SLR(R) 25 ("*Eastern Oceanic*"), the Court of Appeal held that no order of declaration of indemnity should be made in respect of a possible claim by a third party who had not at that juncture made a claim: *Paragon Shipping* at [54]. If and when the head charterer brings an action against the plaintiff, it would no doubt join the defendant as a third party: *Paragon Shipping* at [55].

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Agency in bunker trade

2.77 In *The Bunga Melati 5* [2015] SGHC 190 ("*The Bunga Melati*"), the High Court had to determine whether the defendant, a shipowner and operator, was liable to pay the plaintiff, a marine fuel supplier, for bunkers supplied through an intermediary bunker trader called MAL. The High Court found that MAL was acting on its own account as purchaser when dealing with the plaintiff. It rejected the plaintiff's arguments based on actual authority, apparent authority and agency by estoppel, and found that the plaintiff had failed to show that MAL was trading as the agent of the defendant. The claim against the defendant was accordingly dismissed.

Brief facts

2.78 Equatorial Marine Fuel Management Services Pte Ltd (the plaintiff) engages in the business of procuring, selling and supplying bunkers to ocean-going vessels. MISC Berhad (the defendant) owns and operates commercial vessels and offshore floating facilities. The defendant is known to be one of the largest shipowners in the world.

2.79 In 2005, the defendant approved Market Asia Link Sdn Bhd ("MAL") as a registered vendor of bunkers. For the next three years, the defendant purchased bunker fuels from MAL pursuant to numerous fixed price and spot contracts. Around the same period, the plaintiff delivered approximately 198,000mt of fuel to the defendant's vessels pursuant to bunker supply contracts brokered through a couple of bunker broking companies. These companies dealt with the plaintiff and MAL directly without direct dealings with the defendant.

2.80 In view of non-payment, the plaintiff sought to claim a sum of more than US$21,000,000 plus contractual interest against the defendant for fuel delivered to vessels owned and operated by the defendant. The claim was based on three bunker contracts ("Disputed Contracts"), consisting of two fixed price contracts ("Fixed Price Contracts") and one spot contract, concluded between the plaintiff and MAL.

2.81 The defendant argued that it was not liable for payment, given that it was not a party to the Disputed Contracts. On the other hand, the plaintiff alleged, among other things, that MAL was holding itself out as the bunker broker for the defendant; that the defendant had knowledge that MAL was contracting in its name; and that one of MAL's employees had represented itself as the defendant's bunker broker. As such, the plaintiff asserted that MAL had acted as the agent of the defendant when it entered into the Disputed Contracts with the plaintiff through the

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bunker brokers, and that the defendant should therefore be held liable for the sums due under the Disputed Contracts.

Key issues

2.82 The crux of *The Bunga Melati* was therefore whether MAL had acted on its own account as a purchaser or as the agent of the defendant when dealing with the plaintiff. If the latter were proven to be true, the defendant would be held liable for the debts claimed. In considering the liability of the defendant, the court considered the circumstances of the case and addressed, *inter alia*, the issues of whether: (a) the defendant had granted actual authority to MAL to act as its agent in respect of the Disputed Contracts; (b) the defendant had clothed MAL with apparent authority to act as its agent in respect of the Fixed Price Contracts; and (c) the defendant was estopped from denying that MAL was authorised to act as its agent in respect of the Disputed Contracts.

Did defendant grant actual authority to MAL to act as its agent?

2.83 The High Court held that actual authority can be defined as "a legal relationship between principal and agent created by a consensual agreement to which they alone are parties": *The Bunga Melati* at [24], citing *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman*") at 502. It confirmed that an agreement to confer actual authority can arise expressly from the conduct and words of the principal and agent, or may be implied under ordinary contractual principles. It also accepted that an agreement can arise even if the parties do not recognise it themselves, insofar as they have agreed to what amounts in law to an agency relationship: *The Bunga Melati* at [25], citing *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [148].

2.84 Having reviewed the facts of the case, the High Court conceded that the circumstances may reflect a lack of good governance on the defendant's end and a preference for MAL over other vendors. However, it was not persuaded that there was any agreement between the defendant and MAL. It rejected the plaintiff's assertion that actual authority could be inferred from the defendant's approval of MAL as their registered bunker vendor, and their subsequent assignment of numerous bunker contracts to MAL: *The Bunga Melati* at [76]. The High Court cautioned against conflation of the notions of apparent authority or agency by estoppel with an implied grant of actual authority. The former relates to whether a third party can assume from the conduct of the principal that the agent had authority. The latter relates to whether it is reasonable for the agent and the principal

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themselves to think that one was authorised or appointed by the other: *The Bunga Melati* at [79].

Did defendant clothe MAL with apparent authority?

2.85 The principles of apparent authority, on the other hand, are not based on contractual principles but on the theory of estoppel: *The Bunga Melati* at [26]. At [27], the court accepted the elements of apparent authority summarised by Lord Diplock LJ in *Freeman* (at 506):

> (a) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
>
> (b) such a representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
>
> (c) the contractor was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
>
> (d) under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

2.86 The court added that reliance on any representation must be reasonable, such that a claim based on apparent authority would fail if the contractor failed to make necessary inquiries about the purported agent's authority when they were put on inquiry: *The Bunga Melati* at [28], citing *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788 at [173].

2.87 The High Court found that the plaintiff's case on apparent authority hinged on the evidence of a purported representation made by an unidentified employee in the defendant's bunker unit that MAL had authority to contract on behalf of the defendant. The court found that the plaintiff's witness was unreliable, and that the allegations of any representations made would not stand. The case on apparent authority thus failed.

Was defendant estopped from denying that MAL was authorised to act as its agent?

2.88 The plaintiff had also argued that the defendant was estopped from denying the agency of MAL by virtue of its silence. While noting that neither party explained how the doctrine of agency by estoppel differed from apparent authority, and that the Court of Appeal in *The*

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Bunga Melati 5 [2012] 4 SLR 546 did not recognise a category of agency by estoppel that was separate from apparent authority, the learned judge considered the distinction that was made by Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) ("*Bowstead*") at para 2-099 as follows (*The Bunga Melati* at [30]):

> A person may be held liable as principal where it cannot be said that he has made a manifestation or representation as to the authority of another to that other or to a third party as required [for establishing apparent authority], but he is affected in an agency context by the operation of the doctrine of estoppel.

In the context of this case, the distinction was significant because the plaintiff argued that there was estoppel arising from the silence of the defendant, even if the defendant had made no representation. The court acknowledged the two subsets of agency by estoppel expounded by *Bowstead*: first, where the principal makes no manifestation of authority but, by conduct, intentionally or carelessly causes the belief that the agent is authorised; and second, where the principal, having notice of such a belief and that it might induce others to change their position, failed to take reasonable steps to notify those others of the facts: *The Bunga Melati* at [32]–[33], citing *Bowstead* at para 2-101.

2.89 Insofar as the issue of silence is concerned within the second subset, the High Court found that a duty to speak can only arise where there is a pre-existing relationship or dealings between MAL and the plaintiff: *The Bunga Melati* at [37]. It focused on the facts concerning the dealings between MAL and the plaintiff, and in particular whether the defendant had any knowledge of any representations made by MAL. Having reviewed the facts, the court found a lack of evidence showing signs of communication or actual dealings between the plaintiff and the defendant. It also found nothing to show that the defendant was aware that MAL had made any general representations to the plaintiff. In this regard, it held that there was no evidence supporting the existence of a legal or other relationship between the two parties: *The Bunga Melati* at [105]. There was therefore no duty which required the defendant to take reasonable steps to notify the plaintiff that MAL was not acting as its agent. The High Court thus held that the defendant was not estopped from denying that MAL was its agent.

Conclusion

2.90 As the plaintiff had failed to show that MAL was acting as the defendant's agent, or that the defendant was estopped from denying the agency of MAL, the High Court dismissed the plaintiff's claim.

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AVIATION LAW

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2.91 In 2015, no cases on aviation law were reported in the Singapore Law Reports.

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