2. ADMIRALTY AND SHIPPING LAW

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ADMIRALTY LAW

2.1 The year 2016 saw a total of six mostly lengthy admiralty decisions handed down by the Singapore courts – two by the Court of Appeal, and four by the High Court. These decisions are reviewed below.

Jurisdictional challenge on the basis of affidavit evidence or trial

2.2 In *The Chem Orchid*,[1] the Court of Appeal affirmed the decision of Steven Chong J in *The Chem Orchid*[2] ("*The Chem Orchid (HC)*"), primarily on procedural grounds.

2.3 In this case, Han Kook Capital Co Ltd ("HKC"), the owners of the Chem Orchid, had applied to set aside the writs on the basis that the court's admiralty jurisdiction had not been validly invoked. HKC contended that at the time the writs had been issued, the party who was liable on the claims, that is, the bareboat charterer, Sejin Maritime Co Ltd ("Sejin"), was no longer the demise charterer of the vessel and as such, the requirements of s 4(4)(i) of the High Court (Admiralty Jurisdiction) Act[3] ("HCAJA") were not satisfied.[4] This section of the review only covers the admiralty law aspects of the Court of Appeal's decision.

1 [2016] 2 SLR 50.
2 [2015] 2 SLR 1020; see also (2015) 16 SAL Ann Rev 62 at 65–69.
3 Cap 123, 2001 Rev Ed.
4 See *The Chem Orchid* [2016] 2 SLR 50 at [2].

2.4 The underlying facts leading up to the decision in *The Chem Orchid (HC)* are more fully set out in a previous review.[5] Like the hearing at first instance, the issue facing the Court of Appeal was whether or not, on the balance of probabilities, the relevant person (that is, Sejin) for the purposes of s 4(4)(*i*) of the HCAJA was, at the time the action was brought, the demise charterer of that ship.[6]

2.5 The appeal was dismissed on two alternative grounds. First, the court ruled that the setting-aside applications were, *in substance*, similar to a striking out application under O 18 r 19 of the Rules of Court[7] ("RoC"). Under s 34(1)(*e*) of the Supreme Court Judicature Act[8] ("SCJA") read with para (*e*) of the Fourth Schedule, there will be no avenue of appeal to the Court of Appeal if the striking out application is not allowed. Alternatively, assuming that this was an interlocutory decision in respect of which leave of court to appeal to the Court of Appeal, the court observed that no leave of court was sought from Chong J under s 34(2)(*d*) of the SCJA read with para (*e*) of the Fifth Schedule. The court was not prepared to grant such leave.

2.6 Apart from dismissing the appeal, the Court of Appeal also took the opportunity to endorse the observations of Chan Sek Keong CJ in *The Bunga Melati 5*.[9] In essence, Chan CJ's view, which the Court of Appeal reiterated, was that a shipowner who challenges the admiralty jurisdiction of the court on a factual issue has a choice of whether to mount that challenge by relying on affidavit evidence alone or to put forward the testimony of witnesses with cross-examination of such witnesses. If he elects the former, any finding by the court that it has admiralty jurisdiction will only be on a preliminary and interlocutory basis; there is no conclusive finding on affidavit evidence alone. The Court of Appeal reasoned that "[t]he issue of jurisdiction will then merge with the plaintiff's substantive claim at the trial, which will have to be proved by the plaintiff on the balance of probabilities".[10] If, however, the defendant chooses the latter, that is, to have a conclusive finding on jurisdiction and to have a full hearing on the jurisdiction issue, the court can decide the issue conclusively.

2.7 The Court of Appeal noted that in its earlier decision of *The Jarguh Sawit*,[11] it had held, *inter alia*, that the question of the court's

5 See (2015) 16 SAL Ann Rev 62 at 65–69.
6 See *The Chem Orchid* [2016] 2 SLR 50 at [30]–[31].
7 Cap 322, R 5, 2014 Rev Ed.
8 Cap 322, 2007 Rev Ed.
9 [2012] 4 SLR 546 at [129]–[130].
10 *The Chem Orchid* [2016] 2 SLR 50 at [48].
11 [1997] 3 SLR(R) 829.

jurisdiction is a procedural (as opposed to substantive) issue,[12] and that once the question of the court's jurisdiction is determined at the interlocutory stage, "the question of jurisdiction cannot be tried again".[13] The unqualified nature of this proposition, clearly, cannot stand with the court's adoption of Chan CJ's approach. The Court of Appeal, therefore, took the opportunity to clarify that its comments in *The Jarguh Sawit* ought to be read in context, that is, where there is an interlocutory challenge to the court's exercise of admiralty jurisdiction.[14] Thus, once an applicant's interlocutory challenge to the court's exercise of admiralty jurisdiction has been dismissed *with finality*, the applicant cannot, at trial, mount a further jurisdictional challenge since, at trial, the court will not be deciding whether or not there is good cause to assume jurisdiction, but rather, will be deciding whether there is good cause for judgment to be rendered in the plaintiff's favour.[15]

2.8 On the facts of *The Chem Orchid*, the Court of Appeal observed that the question of the disputed jurisdictional fact (*viz*, whether or not Sejin was still the demise charterer of the vessel at the time the writ was issued) involved the application of foreign law (that is, Korean law) and could not be proven conclusively on the balance of probabilities at the interlocutory stage.[16] This was because the applicant, in seeking to set aside the writs, relied solely on affidavit evidence and did not apply to court to have the relevant witnesses examined orally, by way of a "mini-trial", as suggested by Chan CJ in *The Bunga Melati 5*.[17] In the circumstances, by relying solely on affidavit evidence, Chong J could only have decided the disputed jurisdictional fact on a *prima facie* basis, which would be non-conclusive of the jurisdictional issue in question,[18] leaving the possibility that the issue be conclusively determined at trial. His Honour's decision that Sejin was still the relevant person did not affect the substantive right of the parties and was, therefore, an interlocutory (as opposed to final) decision. The upshot is that (on the court's alternative reasoning) leave to appeal is required under s 32(2)(*d*) read with para (*e*) of the Fifth Schedule of the SCJA.

2.9 *The Chem Orchid* builds on the Court of Appeal's previous decision in *The Bunga Melati 5* in terms of the conclusiveness of a finding on a jurisdictional issue. The defendant now has a choice as to whether he wants a conclusive finding on the issue. If he does, he may

12 *The Jarguh Sawit* [1997] 3 SLR(R) 829 at [33]–[37].
13 *The Jarguh Sawit* [1997] 3 SLR(R) 829 at [32].
14 *The Chem Orchid* [2016] 2 SLR 50 at [38].
15 *The Chem Orchid* [2016] 2 SLR 50 at [38].
16 *The Chem Orchid* [2016] 2 SLR 50 at [41].
17 *The Bunga Melati 5* [2012] 4 SLR 546 at [129]; see also *The Chem Orchid* [2016] 2 SLR 50 at [41].
18 *The Chem Orchid* [2016] 2 SLR 50 at [41].

have to consider a "mini-trial" of the issue, if it is in fact centric, by way of oral testimony of witnesses, rather than merely relying on affidavit evidence, which is the more conventional route.

Whether an agreement to procure an agreement relating to the use or hire of a ship itself falls within s 3(1)(*h*) of the HCAJA

2.10 In *Likpin International Ltd v Swiber Holdings Ltd*,[19] the appellant, Likpin International Ltd ("Likpin"), appealed against the High Court's decision to strike out the writ. Likpin contended that it had entered into a procurement agreement with the first respondent, Swiber Holdings Limited ("Swiber"), in respect of the intended charter of a pipe-laying vessel ("Procurement Agreement").[20] The appellant further contended that the second respondent had procured or induced a breach of or unlawfully interfered with the Procurement Agreement.[21]

2.11 The Court of Appeal, in a brief judgment, affirmed the High Court's decision in finding that the claim was legally and factually unsustainable.[22] In so far as the appellant's case on the court's admiralty jurisdiction was concerned, the appellant contended that its claim in respect of the Procurement Agreement comes within s 3(1)(*h*) of the HCAJA, *viz*, a claim "arising out of any *agreement relating to the carriage of goods in a ship or to the use or hire of a ship*" [emphasis in original].[23] In particular, the appellant's case was that the Procurement Agreement was not a charterparty in itself, but rather, an agreement between the appellant and Swiber for the latter to procure the second respondent to enter into a charterparty with the appellant on terms.[24] In other words, the appellant's case was that the Procurement Agreement, as an agreement to procure a charterparty, was in the nature of an agreement to procure an agreement relating to the use of hire of a ship, and as such, it comes within the scope of s 3(1)(*h*).

2.12 The Court of Appeal considered and agreed with the previous High Court decision of *The Catur Samudra*,[25] where the High Court considered the expression, "relating to", in s 3(1)(*h*) of the HCAJA imposes the requirement that the agreement in question is to have some "reasonably direct connection with [the use or hire of a ship]".[26] Given

19 [2016] 4 SLR 1079.
20 *Likpin International Ltd v Swiber Holdings Ltd* [2016] 4 SLR 1079 at [2].
21 *Likpin International Ltd v Swiber Holdings Ltd* [2016] 4 SLR 1079 at [2].
22 *Likpin International Ltd v Swiber Holdings Ltd* [2016] 4 SLR 1079 at [3] and [11].
23 *Likpin International Ltd v Swiber Holdings Ltd* [2016] 4 SLR 1079 at [4].
24 *Likpin International Ltd v Swiber Holdings Ltd* [2016] 4 SLR 1079 at [5].
25 [2010] 2 SLR 518.
26 *The Catur Samudra* [2010] 2 SLR 518 at [33].

that the words, "relating to", in s 3(1)(*h*) of the HCAJA ought to be read narrowly, the court held, albeit provisionally, that it excludes a collateral or separate agreement independent of a charterparty or bill of lading, unless it is "intrinsically related to the use or hire of a vessel".[27]

Appealing against a court order awarding damages for the wrongful arrest of a vessel

2.13 The High Court's decision in *The Xin Chang Shu*[28] ("*The Xin Chang Shu (No 2)*") arose out of the plaintiff's attempt to overturn the High Court's decision to, *inter alia*, award damages for wrongful arrest with such damages to be assessed ("Wrongful Arrest Order"). The High Court's decision in respect of the Wrongful Arrest Order is set out in *The Xin Chang Shu*.[29]

An application for leave to appeal the wrongful arrest order

2.14 In so far as the plaintiff's attempt to overturn the Wrongful Arrest Order is concerned, the key issue which the High Court considered was whether or not the said order is an "interlocutory order" for the purposes of para (*e*) of the Fifth Schedule to the SCJA,[30] for which leave to appeal is required.[31] Following the framework established by the Court of Appeal in *Dorsey James Michael v World Sport Group Pte Ltd*,[32] the High Court held that the structure of s 34 of the SCJA, in determining matters that are non-appealable or appealable only with leave, is clear.[33] Section 34(1)(*c*) of the SCJA provides that orders specified in the Fourth Schedule of the SCJA are non-appealable, save as provided in that Schedule, and s 34(2)(*d*) provides, *inter alia*, that orders specified in the Fifth Schedule are appealable only with leave, except as provided in that Schedule; any other orders are appealable as of right.[34]

2.15 Before Chong J, it was common ground that the Wrongful Arrest Order was outside the ambit of the Fourth Schedule of the SCJA.[35] The High Court considered that the reference to "any interlocutory application" in para (*e*) of the Fifth Schedule of the SCJA is a "catch-all" provision requiring leave to appeal unless otherwise

27 See *Likpin International Ltd v Swiber Holdings Ltd* [2016] 4 SLR 1079 at [10].
28 [2016] 3 SLR 1195.
29 [2016] 1 SLR 1096; see also (2015) 16 SAL Ann Rev 62 at 73–79.
30 Cap 322, 2007 Rev Ed.
31 *The Xin Chang Shu* [2016] 3 SLR 1195 at [13(a)].
32 [2013] 3 SLR 354.
33 *The Xin Chang Shu* [2016] 3 SLR 1195 at [14].
34 *The Xin Chang Shu* [2016] 3 SLR 1195 at [14].
35 *The Xin Chang Shu* [2016] 3 SLR 1195 at [16].

specifically stated in sub-para (*e*)(i) to (*e*)(x) of the Fifth Schedule of the SCJA.[36] Applying the principles set out by the Court of Appeal in *OpenNet Pte Ltd v Info-communications Development Authority of Singapore*[37] and *The Nasco Gem*,[38] the High Court held that the Wrongful Arrest Order is made at the hearing of an interlocutory application (that is, an application which relates to a matter, namely, damages for wrongful arrest) which arises in the course of the proceedings and which does not concern the eventual outcome of those proceedings.[39]

2.16 The High Court also held that the Wrongful Arrest Order is an "interlocutory order" for the purposes of para (*e*) of the Fifth Schedule of the SCJA, and rejected the plaintiff's contention that the said order is a final order.[40] In so doing, the High Court re-visited and applied the test in *Bozson v Altrincham Urban District Council*,[41] namely, whether or not the order finally disposed of the rights of that parties in that action.[42] In its reasoning, the High Court drew an analogy between the Wrongful Arrest Order and an interlocutory judgment with damages to be assessed.[43]

2.17 Having found that the Wrongful Arrest Order is an interlocutory order against which leave to appeal is required, Chong J proceeded to consider whether or not the plaintiff ought to be granted an extension of time for leave to appeal.[44] In so doing, the High Court applied the test for extensions of time set out by the Court of Appeal in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo*,[45] namely: the length of delay; the reason for the delay; the chances of success on appeal; and prejudice to the would-be respondent.[46]

2.18 The High Court held that the length of delay of almost three months was substantial, and that the plaintiff's reasons for the delay were self-serving and plainly unsatisfactory.[47] The High Court further found that the plaintiff's chances of succeeding on appeal were low.[48]

36 *The Xin Chang Shu* [2016] 3 SLR 1195 at [17].
37 [2013] 2 SLR 880.
38 [2014] 2 SLR 63.
39 *The Xin Chang Shu* [2016] 3 SLR 1195 at [19].
40 *The Xin Chang Shu* [2016] 3 SLR 1195 at [31].
41 [1903] 1 KB 547; see also *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525.
42 *The Xin Chang Shu* [2016] 3 SLR 1195 at [24] and [27].
43 *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525.
44 *The Xin Chang Shu* [2016] 3 SLR 1195 at [34].
45 [2011] 2 SLR 196.
46 *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [29].
47 *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [36]–[38].
48 *The Xin Chang Shu* [2016] 3 SLR 1195 at [39]–[43].

Thus, notwithstanding the High Court's finding that there was no tangible evidence that the defendant would suffer prejudice if an extension of time for leave to appeal was granted,[49] the plaintiff's application for an extension of time for leave to appeal against the Wrongful Arrest Order was refused.[50]

Appealing against a court's refusal to grant leave

2.19 *The Xin Chang Shu (No 2)* features a postscript in the form of the plaintiff's further application to the High Court for a declaration that no leave is required to appeal against the High Court's refusal to grant leave to appeal the Wrongful Arrest Order.[51] In so far as that further application was concerned, the High Court held the same to be "ill advised [*sic*]".[52] The High Court further held that the proper procedure for an applicant seeking to overturn the High Court's refusal to grant leave to appeal is to bring a subsequent application to the Court of Appeal for leave to appeal, as set out in O 57 r 2A of the RoC.[53]

Whether book-keeping, administrative, and management fees fall within the ambit of s 3(1)(*o*) of the HCAJA

2.20 The plaintiff in *The PWM Supply Ex Crest Supply 1*[54] ("*Crest Supply*") commenced proceedings against the vessel to recover the cost of services rendered and expenses incurred as the vessel's manager and/or agent. The defendant had owned the vessel before she was judicially sold. The defendant had admitted liability for a major part of the plaintiff's claim; as such, the only outstanding claims were the plaintiff's claim for book-keeping and administrative fees as well as management fees.[55] The plaintiff further argued that if it was not entitled to include management fees in its *in rem* claim, the sum it paid to a third party to whom it had subcontracted management of the vessel should be regarded as disbursements paid on account of a ship by an agent under s 3(1)(*o*) of the HCAJA, which pertains to a claim "by a master, shipper, charterer or agent in respect of disbursements made on account of a ship".

2.21 The plaintiff contended that the book-keeping and administrative fees had been incurred to, properly, account for the vessel's income and

49 *The Xin Chang Shu* [2016] 3 SLR 1195 at [44].
50 *The Xin Chang Shu* [2016] 3 SLR 1195 at [45].
51 *The Xin Chang Shu* [2016] 3 SLR 1195 at [48]–[52].
52 *The Xin Chang Shu* [2016] 3 SLR 1195 at [48].
53 *The Xin Chang Shu* [2016] 3 SLR 1195 at [49].
54 [2016] 4 SLR 407.
55 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [59]–[60].

expenses and, further, that the defendant had not sought a refund of such fees for previous years. The High Court rejected the plaintiff's claim on account of the oral testimony of the defendant's witness, whose evidence was that the said fees were charged to the defendant and, hence, not for the account of the vessel.[56] As such, the High Court held that the plaintiff's claim for book-keeping and administrative fees fell outside the ambit of s 3(1)(*o*) of the HCAJA in that they were not incurred "on account of a ship".

2.22 This leaves the claim for management fees. The plaintiff charged the defendant a sum of US$9,200 each month and paid the party to whom it subcontracted the management of the vessel the sum of US$8,000. There are, therefore, two elements to the claim, which the plaintiff paid to the subcontractor and the plaintiff's commission or fees in the management of the ship. In so far as the question of whether or not the plaintiff's claim for management fees (bearing in mind the two elements) falls within the ambit of s 3(1)(*o*) of the HCAJA is concerned, Tan Lee Meng SJ preferred the Australian approach set out in *Patrick Stevedores No 2 Pty Ltd v The proceeds of the sale of the vessel MV Skulptor Konenkov*[57] ("*The Skulptor Konenkov*") to the English approach in *The Westport (No 3)*.[58] His Honour observed that the latter case was a judgment given in default of appearance, briefly reasoned, and without any consideration of earlier English decisions that discussed the notion of master's disbursements.[59] In contrast, in *The Skulptor Konenkov*, the Federal Court of Australia held, in a better-reasoned decision, that an agent's commission in arranging a third party to provide goods and services to the vessel cannot be regarded as a "disbursement" falling within the Australian-equivalent provision of s 3(1)(*o*) of the HCAJA. An agent who procures a third party to supply goods or services to a ship renders services to the shipowner in doing so. His commission was, therefore, not for services to the ship for her operation and maintenance.[60] In the circumstances, the High Court held that the plaintiff's claim for agent's commission fell outside the scope of s 3(1)(*o*) of the HCAJA.[61]

2.23 The court also ruled that the claim of the plaintiff for fees made to the third party to whom it had subcontracted the management of the vessel as falling outside the court's admiralty jurisdiction.[62] A payment

56 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [64].
57 [1997] FCA 1634; [1997] FCA 1424.
58 [1966] 1 Lloyd's Rep 342.
59 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [72].
60 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [73].
61 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [77].
62 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [78].

for such sub-management services "cannot be regarded as a payment for services to the vessel itself".[63]

2.24 Notwithstanding the fact that the plaintiff's claims fell outside the ambit of the court's *in rem* jurisdiction, the High Court held that the plaintiff was entitled to judgment *in personam* for its non-*in rem* claims.[64] The High Court, following the earlier decisions of *The Ohm Mariana ex Peony*[65] and *The Trade Resolve*,[66] held that once a defendant shipowner enters an appearance, the action continues as an action *in rem* as well as an action *in personam*.[67] In the instant case, as the defendant had entered unconditional appearance and the merits of the plaintiff's claims were clear, a judgment *in personam* was entered against the defendant.[68]

Counterclaims in personam *in an* in rem *action*

2.25 The defendant in *Crest Supply* brought a counterclaim, seeking damages against the plaintiff and alleging, *inter alia*, that the plaintiff had failed to supervise the sale and purchase of the vessel to an intended buyer in lieu of the judicial sale process.[69] The defendant quantified its counterclaim as, *inter alia*, the difference in price under the contract to its intended buyer, and the price at which the vessel was judicially sold.

2.26 The High Court, applying the English Court of Appeal decision in *The Cheapside*,[70] held that it had jurisdiction to consider the defendant's counterclaim *in personam*, notwithstanding the fact that the action had been brought as an *in rem* action.[71] In so doing, the High Court observed that such an approach was a "practical" one, which obviated the need for the court to hear the counterclaim on another occasion in a separate suit.[72] On the facts of the case, the High Court held that the plaintiff had been entitled to maintain its action against the vessel, and dismissed the defendant's counterclaim.[73]

63 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [78].
64 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [84].
65 [1993] 2 SLR(R) 113.
66 [1999] 2 SLR(R) 107.
67 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [82]–[83].
68 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [84].
69 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [86].
70 [1904] P 339.
71 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [90].
72 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [90].
73 *The PWM Supply Ex Crest Supply 1* [2016] 4 SLR 407 at [98] and [106].

Beneficial ownership of a vessel

2.27 In *The Min Rui*,[74] the defendant brought a jurisdictional challenge, contending that it was not the beneficial owner as respect all the shares in the vessel as of 16 December 2014, which was the date the plaintiff issued the writ *in rem*.[75] In support of its position, the defendant contended that it had sold the vessel in October 2014, and that the purchaser had yet to be registered as the legal owner of the vessel.[76] In support of its position, the defendant relied on, *inter alia*, the following evidence:

> (a) a Memorandum of Agreement ("MOA") dated 13 October 2014;
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> (b) a provisional registration licence issued by the directorate general of Merchant Marine Panama;
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> (c) a bill of sale dated 9 December 2014, in which the defendant expressly acknowledged receipt of the purchase price;
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> (d) a protocol of delivery and acceptance dated 12 December 2014;
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> (e) a declaration from the vessel's classification society, Bureau Veritas, stating that the vessel's name, flag, and owner had been changed;
>
> (f) a notice of intention to close the vessel's registration in the Hong Kong Shipping Register dated 16 December 2014;
>
> (g) a certificate of deletion stating that the vessel had been closed in the Hong Kong Shipping Register as of 7 January 2015;
>
> (h) a continuous synopsis record issued on 8 January 2015 stating that the vessel had ceased to be registered in Hong Kong on 7 January 2015; and
>
> (i) a public deed of title for permanent recordation of the Public Registry of the Maritime Authority of Panama filed on 24 February 2015.[77]

2.28 The plaintiff contended that the alleged sale was a sham.[78] The plaintiff relied on a Lloyd's List Intelligence report dated 12 December 2014 showing, *inter alia*, that the defendant was the

74 [2016] 5 SLR 667.
75 *The Min Rui* [2016] 5 SLR 667 at [2].
76 *The Min Rui* [2016] 5 SLR 667 at [8] and [10].
77 *The Min Rui* [2016] 5 SLR 667 at [13]–[21].
78 *The Min Rui* [2016] 5 SLR 667 at [12].

beneficial owner of the vessel before 2 December 2014, and that the beneficial owner of the vessel before 3 December 2014 was "unknown".[79] It also relied on a transcript obtained from the Hong Kong Shipping Register on 12 December 2014, showing the defendant to be the registered owner of the vessel.[80] The plaintiff contended that it was entitled to rely on the vessel's registration in the Hong Kong Shipping Register until the vessel's transfer to the Panamanian shipping register on 7 January 2015.[81]

2.29 Belinda Ang Saw Ean J held that the question of whether or not the defendant was, in fact, the beneficial owner of the vessel as respects all the shares in her was to be determined in accordance with the *lex fori*.[82] The approach taken by Ang J on this issue is consistent with the previous decision of *The Makassar Caraka Jaya Niaga III-39*,[83] where the High Court determined the question of beneficial ownership in accordance with Singapore law, and not Indonesian law, the law of the flag in that case. In so far as the governing law of the MOA was English law, the latter was only relevant to determining the nature and extent of the contractual rights created or recognised by the sale and delivery of the vessel and the executed bill of sale.[84]

2.30 On the question of whether or not the plaintiff was entitled to rely on the vessel's registration as evidence of beneficial ownership, the High Court held that it is not "a rule of law" that fraud or, similarly, compelling circumstances have to be proved in order to go behind the registration of a ship for the purpose of identifying the beneficial owner in the context of s 4(4)(i) of the HCAJA.[85] It followed the previous decisions on *The Opal 3 ex Kuchino*[86] and *The Temasek Eagle*,[87] where the High Court had previously held that entries in the ship's register are "useful starting points" but "not conclusive proof" of beneficial ownership.[88]

2.31 The High Court further held that a certificate of registration is not a certificate of title; the ship's register merely serves as a record upon which a *prima facie* inference of ownership is made – an inference which may be displaced by evidence that another party is the beneficial

79 *The Min Rui* [2016] 5 SLR 667 at [23].
80 *The Min Rui* [2016] 5 SLR 667 at [24].
81 *The Min Rui* [2016] 5 SLR 667 at [26].
82 *The Min Rui* [2016] 5 SLR 667 at [11], [12] and [54]–[60].
83 [2011] 1 SLR 982; see also (2012) 13 SAL Ann Rev 46 at 50–52.
84 *The Min Rui* [2016] 5 SLR 667 at [57] and [64].
85 *The Min Rui* [2016] 5 SLR 667 at [27] and [32].
86 [1992] 2 SLR(R) 231.
87 [1999] 2 SLR(R) 647.
88 *The Min Rui* [2016] 5 SLR 667 at [28]–[29].

owner.[89] The manner in which beneficial ownership is to be investigated depends on the circumstances of the particular case.[90]

2.32 On the facts of the case, the High Court observed that the permanent deletion of the vessel from the Hong Kong Shipping Register was pending following the defendant's notice of intention to close the vessel's registration.[91] There was no evidential basis for the plaintiff to allege that the defendant's said notice was an afterthought intended to defeat the *in rem* proceedings.[92] In particular, the mere coincidence that the date of the defendant's notice of intention was the date of the *in rem* writ was merely that there was no suggestion that the defendant had known of the plaintiff's decision to file the *in rem* writ before the defendant had filed its notice.[93]

2.33 Ang J further held that the contemporaneous documentation, as a whole, supported the existence of a genuine contract for the sale and purchase of the vessel.[94] The High Court observed that the documentation of the transfer and sale of the vessel (as described above) was comprehensive.[95] Apart from the documents listed above, the defendant had also included a customised list of delivery documentation, a contemporaneous board resolution passed by the purchaser's board of directors, and a letter of undertaking from the defendant to the buyer to, *inter alia*, physically deliver all original continuous synopsis records on board the vessel to the latter.[96] Interestingly, the court reached the finding that there was a genuine sale, notwithstanding the lack of evidence of payment receipts and the fact that the defendant and buyer shared a company secretary as well as the same registered address.[97]

2.34 The High Court held that beneficial ownership had not passed to the buyer *pursuant to the MOA alone*.[98] In coming to that finding, the High Court observed that the buyer could have cancelled the agreement, and that the terms of the MOA envisaged the *future* sale of the vessel, rather than at the date of the contract.[99] Instead, title to the vessel passed

89 *The Min Rui* [2016] 5 SLR 667 at [33].
90 *The Min Rui* [2016] 5 SLR 667 at [34].
91 *The Min Rui* [2016] 5 SLR 667 at [35].
92 *The Min Rui* [2016] 5 SLR 667 at [35].
93 *The Min Rui* [2016] 5 SLR 667 at [35].
94 *The Min Rui* [2016] 5 SLR 667 at [37].
95 *The Min Rui* [2016] 5 SLR 667 at [37].
96 *The Min Rui* [2016] 5 SLR 667 at [40]–[42].
97 *The Min Rui* [2016] 5 SLR 667 at [44]–[45].
98 *The Min Rui* [2016] 5 SLR 667 at [72].
99 *The Min Rui* [2016] 5 SLR 667 at [72].

only at the closing of the transaction.[100] Beneficial ownership only passed to the buyer on receipt of the protocol of delivery and acceptance, which served as a "written record of the time and [date] at which ownership and risk in the ship moved from the seller to the buyer".[101] Since this change of beneficial ownership took place before the writ was issued, s 4(4) of the HCAJA was not satisfied and accordingly, the arrest was set aside.

Whether a court should recognise foreign rehabilitation proceedings and grant restraint and stay orders in aid of such proceedings

2.35 In *Re Taisoo Suk*,[102] the applicant was the appointed custodian of Hanjin Shipping Co Ltd ("Hanjin"), a container-shipping company incorporated in the Republic of Korea. Hanjin had filed an application for rehabilitation proceedings to the Korean Bankruptcy Court under the Korean Debtor Rehabilitation and Bankruptcy Act, which was granted on 1 September 2016. The applicant then applied to the High Court under the court's inherent jurisdiction seeking interim orders for, *inter alia*, a restraint of all pending, contingent, or fresh proceedings against Hanjin and its two wholly-owned subsidiaries in Singapore or any enforcement or execution against any of their assets. This section of the annual review will consider only the admiralty law aspects of the decision in *Re Taisoo Suk*.

2.36 Aedit Abdullah JC, in a brief judgment, granted the application on an *ex parte* basis, including the restraint and stay of proceedings sought, "even to the extent of preventing arrest of ships of the Hanjin fleet".[103] In coming to its decision, the High Court was influenced by "the need for the orderly resolution and satisfaction of claims, as well as the possible benefit to all interested parties of [Hanjin's] rehabilitation".[104] Abdullah JC held that there is "nothing apparent" on the face of the HCAJA or the RoC which excludes admiralty matters from the exercise of the court's inherent powers.[105] His Honour disagreed with the previous decision in *Re TPC Korea Co Ltd*,[106] where the High Court had previously dismissed an application for a pre-emptive moratorium against the arrest of vessels owned by a Korean-incorporated company which had also applied for rehabilitation in Korea.[107]

100 *The Min Rui* [2016] 5 SLR 667 at [73].
101 *The Min Rui* [2016] 5 SLR 667 at [74].
102 [2016] 5 SLR 787.
103 *Re Taisoo Suk* [2016] 5 SLR 787 at [12] and [23].
104 *Re Taisoo Suk* [2016] 5 SLR 787 at [13].
105 *Re Taisoo Suk* [2016] 5 SLR 787 at [25].
106 [2010] 2 SLR 617.
107 *Re Taisoo Suk* [2016] 5 SLR 787 at [26].

2.37 Implicit in the judgment of *Re Taisoo Suk* is that a restraining order such as the one granted in that case may extend to service of an admiralty writ that has already been issued before any rehabilitation or restraining order is obtained in a foreign jurisdiction (or an arrest that could otherwise be applied for on the basis of any such writ). Likewise, the restraint may cover a mortgagee who may have a mortgage over any vessel(s) owned by a cash-strapped borrower who has applied for rehabilitation proceedings in a foreign jurisdiction. In this regard, *Re Taisoo Suk* may, in fact, have gone further than authorities decided under the UNCITRAL Model Law on Cross Border Insolvency[108] ("Model Law"), such as the decision of the Australian Federal Court in *Kim v Daebo International Shipping Co Ltd*.[109] In the latter case, Rares J, *inter alia*, considered it "unlikely" that the Model Law:[110]

> … was understood or intended by either its creators or by the Parliament when giving it the force of law in Australia … to supervene or impliedly repeal the domestic statutory remedies provided in States Parties, including those in Australia's *Admiralty Act* [the Australian equivalent of the High Court (Admiralty Jurisdiction) Act], in respect of maritime creditors' rights to proceed *in rem* on a secured or proprietary claim that pre-existed any interim or final orders recognising a foreign proceeding under … the Model Law.

Likewise, in the New Zealand High Court decision of *Kim and Yu v STX Pan Ocean Co Ltd*,[111] Gilbert J held, *inter alia*, that an admiralty action would be stayed if, *inter alia*, the defendant shipowner had commenced foreign rehabilitation proceedings before the issuance of the *in rem* writ, but if the *in rem* writ was issued prior to the rehabilitation process, the court would generally grant leave for the admiralty action to continue.

2.38 In fact, Art 20(2) of the Model Law makes reference to provisions in the company insolvency legislation of the enacting state which allows for actions to continue despite the company being subject to insolvency proceedings. In other words, the Model Law preserves the operation of insolvency legislation of the signatory state which accords recognition of the foreign main proceedings, as defined in the Model Law (in the instant case, Singapore). Any recognition of foreign main proceedings under the Model Law is, thus, subject to any discretion conferred under insolvency-related legislation of the signatory state on the courts before which the admiralty action is commenced, to allow the plaintiff to commence or continue such proceedings.

108 20 May 1997.
109 [2015] FCA 684.
110 *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684 at [14].
111 [2014] NZHC 845.

2.39 Furthermore, in *Yu v STX Pan Ocean Co Ltd*,[112] the Australian Federal Court held, *inter alia*, that an admiralty action brought to enforce a maritime lien should not be prevented from proceeding by recognition of foreign main proceedings under the Model Law.

2.40 These authorities may not have been cited to the court given that the judgment was handed down by an *ex parte* application. It, therefore, remains to be seen whether as a matter of common law (which applies until the Model Law comes into effect in Singapore), the Singapore courts will be prepared to grant admiralty claimants (particularly mortgagees, maritime lienees, and/or admiralty claimants who have issued an *in rem* writ prior to the commencement of foreign rehabilitation or insolvency proceedings) leave to commence or continue such proceedings notwithstanding any restraint order granted in aid of recognition of a foreign rehabilitation order.

SHIPPING LAW

2.41 In 2016, the Singapore High Court and Court of Appeal handed down three judgments relating to shipping law. These judgments concerned, primarily, the conclusion of charterparties,[113] delivery of bunkers without production of bills of lading,[114] and the principles of agency by estoppel in shipping law.[115] These cases will be discussed in turn.

Validity of a charterparty

2.42 In *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd*,[116] the High Court considered whether a charterparty had been concluded when the terms exchanged between parties contained a "SUB REVIEW" proviso.[117] When the owner rejected the draft charterparty and decided not to proceed with the charter, the intended charterer sued the owner for breach of charterparty. Steven Chong J held that the charterparty had never been concluded. Hence, the action was dismissed.

112 [2013] FCA 680.
113 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2016] 5 SLR 243.
114 *The Star Quest* [2016] 3 SLR 1280.
115 *The Bunga Melati 5* [2016] 2 SLR 1114.
116 [2016] 5 SLR 243.
117 See ch 12.

Brief facts

2.43 The plaintiff, Toptip Holding Pte Ltd, entered into a free on board contract for the purchase of iron ore pellets. The goods were to be shipped from Brazil to China, with a laycan of 21 November to 30 November 2014. The plaintiff contacted a ship chartering broker ("Mr Shu"), who passed on the enquiry to the defendant, Mercuria Energy Trading Pte Ltd. The defendant was a disponent shipowner which secured vessels to be chartered.

2.44 The enquiry sent out by the plaintiff included their requirements for the charter, along with a proviso for the subsidiary terms of the charterparty to be based on the *pro forma* charterparty of Vale SA ("Toptip Enquiry"). After a review, the defendant sent back a bid ("Me[r]curia Bid") which repeated the main terms of the Toptip Enquiry; however, the defendant had changed the Vale SA proviso to a clause which purported to allow the defendant to review the details of the draft charterparty before finalising the contract ("Subject Review clause"). At the same time, the defendant also provided Mr Shu, on his request, with a previous charterparty between the plaintiff and the defendant. Mr Shu then prepared the draft charterparty based the charterparty provided, and sent it to the defendant for review.

2.45 During the review period, the defendant nominated *The Pan Gold* for the shipment, and requested an extension for the cancelling date. The plaintiff's shippers initially objected to this nomination due to some legitimate concerns regarding the financial health of the vessel's head owner. However, this issue was eventually resolved. Nevertheless, the defendant e-mailed Mr Shu to reject the draft charterparty after review. The plaintiff took this to be a repudiation, and sent out a notice to the defendant purporting to accept the breach. The plaintiff then entered into a substitute charterparty at a higher freight rate than in the Mercuria Bid.

2.46 The plaintiff sued for the difference between the higher freight rate and the freight rate in the Mercuria Bid as the loss suffered by them due to the defendant's alleged repudiation of the contract.

Key issues

2.47 The crux of the dispute was whether there was a valid charterparty between the parties. The following issues were, therefore, considered:

(a) whether a valid charterparty was concluded from the Mercuria Bid, in light of the Subject Review clause and the parties' subsequent conduct;

(b) whether the charterparty was void for uncertainty even if it had been concluded; and

(c) whether the defendant committed repudiatory breach by rejecting the draft charterparty and, if so, whether the plaintiff suffered any losses as a result.

Was a valid charterparty concluded from the Mercuria Bid?

2.48 For this issue, the High Court considered three points: first, the nature of the Subject Review clause; second, whether the defendant lifted or waived the Subject Review clause; and third, the relevance of the defendant's subsequent conduct.

2.49 On the nature of the Subject Review clause, the High Court reiterated the general principles relating to "subject to contract" clauses, treating these as equally applicable to "subject to details" clauses such as the Subject Review clause.[118] Reviewing a number of cases on "subject to contract", Chong J affirmed that the question as to whether there is a binding contract should be determined by considering all the circumstances, and not just the inclusion of the phrase "subject to contract".[119] The question in the present case was whether the Subject Review clause indicated that the parties intended to defer legal relations until full details were agreed or whether they intended to be immediately bound to perform the main terms in the Mercuria Bid. Considering the evidence before him, in particular the defendant's rejection of an incorporation of the Vale *pro forma* charterparty ("CP") and the defendant's request to review a charterer's *pro forma* CP to be provided by the plaintiff, Chong J found that the defendant did not have the unequivocal intention to be immediately bound by the main terms in the Mercuria Bid. The subsidiary terms to be agreed were an important part of the commercial bargain between the parties. It was not necessary that these terms were so fundamental that the agreement would be unworkable by their absence. Hence, the High Court found that no charterparty had been validly concluded.

2.50 The High Court then went on to consider whether the defendant had lifted or waived the Subject Review clause by providing the previous charterparty to Mr Shu for the purposes of assisting in drafting the current charterparty. Although the language of "lifted" (as in lifting a condition subsequent) and the doctrine of waiver were applied as alternatives, the legal analysis remained the same. On this

118 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2016] 5 SLR 243 at [27].

119 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2016] 5 SLR 243 at [25], citing *Norwest Holdings Pte Ltd v Newport Mining Ltd* [2011] 4 SLR 617 at [24].

point, the High Court held that the Subject Review clause could only be lifted or waived by clear and unequivocal words of conduct, and the plaintiff had failed to discharge its burden of proving that the clause had been lifted or waived.[120]

2.51 With regard to the subsequent conduct of the defendant in nominating *The Pan Gold*, and in requesting from the plaintiff an extension of the cancellation date, Chong J found that such conduct could be consistent with the parties either performing a charterparty that had been concluded or the parties taking steps in anticipation of a contract to be concluded. Therefore, it did not change his finding that there was no charterparty concluded.

Was the charterparty void for uncertainty?

2.52 The defendant had submitted, in the alternative, that the contract was void for uncertainty. As the court had found that there was no valid charterparty, it did not have to decide this defence. Nonetheless, Chong J made three observations on this point. First, the defendant did not plead the defence of uncertainty. It raised issues of facts not pleaded, namely, what terms are essential to the existence of a workable charterparty. Second, although the defendant had omitted to attach some terms sent by the plaintiff to the Mercuria Bid, this omission was not especially significant due to a clause in the Mercuria Bid, which stated that the owners had to comply with all shipping or loading terms "as attached". Third, the High Court held that the phrase "with logical amendments" would not, on its own, preclude a contract from being formed because such amendments could be determined objectively. Hence, if the High Court had found that a valid charterparty was present, the argument of uncertainty would unlikely invalidate it.

Was the defendant in repudiatory breach of the charterparty?

2.53 The plaintiff argued that the defendant's right of review must be exercised reasonably and in good faith. It was in repudiatory breach by rejecting the draft charterparty. Chong J reaffirmed the position that there must, generally, be a clear and express agreement for a duty to negotiate in good faith to be imposed. Chong J also rejected the plaintiff's case that there was an implied term that the defendant was obliged to identify the terms it found unacceptable and that the parties would co-operate in carrying out the review for two reasons: first, the implied term was not pleaded; and second, the submission presupposed

120 *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2016] 5 SLR 243 at [43].

that there was a concluded charterparty, but there was no contract in which the term could be implied.

2.54 The final point regarding the damages claimed by the plaintiff did not have to be decided. Chong J indicated that, while the plaintiff's calculation of damages was problematic, it did not mean that he would have rejected the plaintiff's evidence entirely, but he did not have to make any findings on the damages since the plaintiff's claim was dismissed.

When is a bill of lading not a bill of lading?

2.55 In *The Star Quest*,[121] Chong J considered the nature of a bill of lading that contained unusual terms. The appellant sued the respondent for breaches of contracts, breaches of bailment, and conversion for delivery several cargoes of bunkers without production of the bills of lading. The appellant applied for summary judgment. The High Court considered the defences raised by the respondent and granted unconditional leave to defend. It should be noted that this was not the final decision on the merits. An unconditional leave to defend merely meant that the defence had raised triable issues to counter the plaintiff's application for summary judgment.

Brief facts

2.56 The appellant sold the bunkers to the Buyers, subsidiaries of OW Bunker A/S, pursuant to three materially identical contracts for the sale of bunkers. The bunkers were loaded onto six bunker barges ("Vessels") at the terminal of Vopak Terminals Singapore Pte Ltd ("Vopak Terminal"). The respondents were the owners and/or demise charters of the Vessels. The Vessels were, at that time, acting under the instructions of third parties who had contractual arrangements with the Buyers. Once the bunkers were loaded onto the Vessels, the Vopak Terminal furnished various bills of lading ("Vopak bills of lading") to the appellant, which had been signed on behalf of the respondents. The Vopak bills of lading were unusual in that they did not state an express port of discharge, and contemplated delivery to multiple "OCEAN GOING VESSELS" in each single set of bills of lading. They did, however, contain several regular clauses such as the notation, "one of which being accomplished, the others to stand void".

2.57 Sometime later, the appellant invoiced the Buyers for the price of the bunkers. At that time, the Vessels had already supplied the

121 [2016] 3 SLR 1280.

bunkers to other third-party vessels, which had expended them for their own consumption without the production of the original Vopak bills of lading. Shortly after the collapse of the OW Bunker A/S, and having failed to receive payment from the Buyers, the appellant demanded delivery of the bunkers from the respondents on the ground that it possessed the Vopak bills of lading. It argued that the Vopak bills of lading should be given full force as contractual documents and documents of title, such that the delivery of the bunkers by the respondents without production of the Vopak bills of lading constituted breaches of contract, breaches of bailment, and conversion. The appellant applied for summary judgment. In response, the respondents raised five discrete defences to justify an order for unconditional leave to defend. The High Court allowed the order.

Key issues

2.58 The five defences raised by the respondents were:

(a) the nature of the Vopak bills of lading precluded a contractual claim;

(b) title and possession of the cargo had passed to the Buyers upon loading under the terms of the underlying sales contract, such that the appellant's claims in bailment and conversion were untenable;

(c) the customs of the local bunking industry permitted delivery without production of bills of lading;

(d) in relation to certain actions, the appellant could be estopped from denying that the respondents were permitted the deliver the bunkers without production of the bills of lading based on a previous course of dealings; and

(e) in relation to certain actions, the Vopak bills of lading could be invalidated because the chief officers of the respective vessels had no authority to sign them.

As this was an application for summary judgment, the respondent only had to show that it had triable defences.

The nature of the Vopak bills of lading

2.59 The crux of the case related to the nature of the Vopak bills of lading. The respondents contended that the Vopak bills of lading were merely acknowledgments of the receipt of the bunkers, but not

contractual documents or documents of title. On this issue, the High Court reiterated the three functions of bills of lading:[122]

> … The principal characteristics of the modern bill of lading are threefold. It operates as: (a) a receipt by the carrier acknowledging the shipment of the goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage, which will usually have been concluded before the signing of the document; [and] (c) a document of title to the goods which enables the consignee to take delivery of the goods at their destination or to dispose of them by the endorsement and delivery of the bill of lading …

2.60 Chong J held that it is not a strict requirement for a bill of lading to have a "destination port".[123] However, a bill of lading must provide a destination for the bunkers. If no destination is provided, the contract evidenced by the bill of lading will be "too uncertain to be enforceable".[124] In this case, the stipulation "OCEAN GOING VESSELS" was far too vague and wide.[125] Hence, the High Court found it arguable that the Vopak bills of lading could not be relied upon as contractual documents.

2.61 Even if the Vopak bills of lading were contractual documents, the High Court found that it would be arguable that the Vopak bills of lading did not have to be produced against delivery of goods. While they had the standard notation, "one of which is accomplished, the others to stand void", they specifically contemplated delivery of the bunkers to multiple ocean going vessels. It was, therefore, unworkable for delivery of each sub-parcel to be accomplished only against the production of a bill of lading.

2.62 The court also considered whether it was permissible to take cognisance of the sale contracts in construing the bills of lading. While general contractual principles of objectively ascertaining the parties' intentions apply to bills of lading, Chong J recognised that there are unique considerations to keep in mind given the status of a bill of lading as a negotiable instrument. Chong J accepted the view of Lord Hoffmann in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)*[126] that "[a]s it is common general knowledge that a bill of lading is addressed to merchants and bankers as well as lawyers, the meaning which it would be given by such persons will usually also determine the meaning it would be given by any other reasonable person, including the court".[127]

122 See *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 2 AC 423 at [38], *per* Lord Steyn.
123 *The Star Quest* [2016] 3 SLR 1280 at [22].
124 *The Star Quest* [2016] 3 SLR 1280 at [22].
125 *The Star Quest* [2016] 3 SLR 1280 at [23].
126 [2004] 1 AC 715 at [73]–[76].
127 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at [76].

With this in mind, the terms of the underlying sales contracts can be taken into account as long as they form part of the background knowledge which is reasonably available to the parties at the time of the contract. Chong J found that the appellant, respondents, and the Buyers were all active operators in the local bunker industry who would have been aware of the essential features of such bargains. The credit period and the contemplation that the cargoes were to be delivered to ocean going vessels for consumption as bunkers suggested that the appellant had known and permitted the bunkers to be dealt with by the Buyers without reference to the Vopak bills of lading. This was buttressed by the lack of any reference to the bills of lading in the underlying sale contracts. The High Court, therefore, found the respondents' contention that the Vopak bills of lading were merely receipts and not contractual documents to be plausible. Chong J decided that, in the circumstances, the true purpose of the issuance of the Vopak bills of lading should be fully examined at the trial.

2.63 The High Court also dismissed the appellant's alternative submission that the "Responsibility on Cargo" clause contained in the charterparties evinced the respondents' recognition that delivery of the bunkers without production of the Vopak bills of lading would attract liability. The High Court found that this clause only covered the charterers' overall responsibility for the handling of cargo by their cargo officers. It did not imply an obligation to deliver the bunkers only against the Vopak bills of lading.

2.64 The High Court concluded that there was an arguable defence that the Vopak bills of lading were neither contractual documents nor documents of title.

Whether there was a breach of bailment and conversion

2.65 It was submitted by the appellant that even if their contractual claims failed, they would still have a case of a breach of bailment and/or conversion. The High Court noted that ordinarily, the appellant would be able to assert that it retained title to the cargoes by way of their possession of the bills of lading, which served as documents of title. However, the learned judge found this submission to be doubtful given his analysis of the nature of the bills of lading as above. Even considering that the appellant's claim to conversion and breach of bailment was premised upon their immediate right to possession of the bunkers, this claim would still be thrown in doubt as a result of the uncertain nature of the Vopak bills of lading. In examining the terms of the underlying sale contracts, the High Court found that there was a possibility that possessory interest had passed to the Buyers upon loading. Hence, the

respondents were allowed unconditional leave to defend against the appellant's claims for breaches of bailment and conversion.

Other defences – Customs of the industry, lack of authority, and estoppel

2.66 The High Court noted that the other defences would only be raised if the initial defences failed. Therefore, the observations on the alternative defences were *obiter*. Chong J disagreed with the respondents' argument that the customs of the local bunker industry could override the terms in the Vopak bills of lading, since it would change the intrinsic nature of a bill of lading as a document of title.

2.67 The learned judge also disagreed that the chief officers who had signed the Vopak bills of lading had no authority to do so, based on the facts. The chief officers who had signed the Vopak bills of lading, evidently, had either the express or implied authority to sign these documents. Furthermore, in the previous course of dealings involving similar bills of lading, the chief officers had always signed the bills to no objection from either party. Hence, the respondents' argument on these points were dismissed.

2.68 However, the High Court was of the opinion that the *bona fide* defence of estoppel should be canvassed at trial. The parties were in agreement that:[128]

> (a) there were previous dealings between the appellant and respondents in which similar Vopak bills of lading were issued;
>
> (b) on those occasions, the bunkers were delivered onwards by the respondents without production of any bills of lading; and
>
> (c) the appellant had not protested against these alleged misdeliveries. In light of the appellant's silence and inactivity in previous course of dealings, the High Court opined that the defence of estoppel was arguable based on the factual circumstances.

Principles of agency by estoppel in shipping law

2.69 *The Bunga Melati 5*[129] in the Court of Appeal arose out of an appeal on the point of agency by estoppel from the High Court decision

128 *The Star Quest* [2016] 3 SLR 1280 at [62].
129 [2016] 2 SLR 1114.

of *The Bunga Melati 5*.[130] The facts and decision of the High Court case were summarised in a previous review.[131]

Brief facts

2.70 The appellant, Equatorial Marine Fuel Management Services Pte Ltd, was a marine fuel supplier, whose bunkers were supplied to vessels owned or operated by the respondent, MISC Berhad.

Key issue

2.71 The sole issue brought on this appeal was whether the respondent was estopped from denying that Market Asia Link Sdn Bhd ("MAL"), who had concluded the contracts in dispute with the appellant, had been acting as the respondent's agent. The appellant argued that the respondent had known that MAL was conducting all of its transactions with its bunker suppliers on the basis that it was the respondent's agent. The appellant further contended that the respondent failed to correct the appellant's mistaken belief that MAL was entering into the contracts on this basis, and not of its own right. The Court of Appeal considered the principles of agency by estoppel and, eventually, concluded that no such agency could be found here on the facts. The appeal was dismissed.

Agency by estoppel

2.72 Sundaresh Menon CJ, who delivered the judgment of the Court of Appeal, considered whether there was a distinction between agency by estoppel and apparent authority, noting that there is a view that an agency by estoppel can exist even where the putative principal has not made a representation, whereas a representation is required to establish apparent authority. However, his Honour observed that the circumstances in which the doctrine of agency by estoppel operates is uncertain and it was unnecessary to decide if there is a real difference between the two types of agency in this case. It is settled law that unconscionability underpins equity's intervention to make a putative principle liable even in the absence of actual authority. Menon CJ added that the inquiry as to whether there is unconscionability falls within the traditional framework of estoppel, and includes the three elements of representation, reliance, and detriment, as per *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd*.[132]

130 [2015] SGHC 190.
131 (2015) 16 SAL Ann Rev 62 at 82–85, paras 2.77–2.90.
132 [2007] 1 SLR(R) 292.

2.73 In examining the elements, Menon CJ rejected the argument of the appellant's counsel that the conduct of the putative principal taken as a whole might be sufficient to found the estoppel, because it was too general to be useful. He preferred to find estoppel based on:

(a) affirmative representations;

(b) the holding-out of the agent as authorised; or

(c) a principal who, with the knowledge that a third party is operating on a certain misapprehension, failed to correct that misapprehension in circumstances where one would reasonably regard him as bound to correct it.

Hence, silence or inaction will only count as a representation where there is a legal or equitable duty owed by the silent party to the party seeking to raise the estoppel to make a disclosure. Menon CJ acknowledged that when such a duty arises is not easy to answer. The court had the discretion to decide the onus and ambit of the responsibility of the silent party by reference to whether a mistaken party could reasonably have expected to be corrected, and on the precise circumstances of the case. He cautioned against "[drawing] neat circles delineating precisely when a duty to speak may arise",[133] given the desirability of maintaining flexibility in the doctrine of estoppel. Menon CJ emphasised, however, that it must at least be shown that the silent party knows that the party seeking to raise the estoppel is, in fact, acting or proceeding with its course of conduct on the basis of the mistaken belief which the former is said to have acquiesced in.[134]

2.74 On the facts, Menon CJ held that agency of estoppel could not apply here. The appellant argued that from the e-mail exchange between themselves and the respondent, it could be inferred that the respondent knew of the appellant's misunderstanding over MAL's position. This inference was rejected soundly by the Court of Appeal, which noted the well-established principle that "an inference may only be drawn if it is the *sole inference* that flows from the facts proved" [emphasis in original].[135] Having regard to the facts, Menon CJ found it impossible to conclude that the respondent knew that MAL was conducting all of its transactions on the basis that it was the respondent's agent. Hence, there was no need for the Court of Appeal to even consider whether the respondent had a duty to communicate to the appellant that MAL was not its agent. Therefore, the appellant's agency by estoppel argument failed and the appeal was dismissed accordingly.

133 *The Bunga Melati 5* [2016] 2 SLR 1114 at [16].
134 *The Bunga Melati 5* [2016] 2 SLR 1114 at [17].
135 *The Bunga Melati 5* [2016] 2 SLR 1114 at [38].