2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

TOH Kian Sing SC
LLB (Hons) (National University of Singapore), BCL (Oxford); Advocate and Solicitor (Singapore).

2.1 In 2009, no cases on admiralty law were reported in the Singapore Law Reports.

SHIPPING LAW

CHAN Leng Sun
LLB (Malaya), LLM (Cambridge); Advocate and Solicitor (Malaya), Advocate and Solicitor (Singapore), Advocate and Solicitor (England and Wales).

2.2 There were two shipping cases of note in 2009. One culminated in an award of damages arising from a long running charter party dispute. The other case arose from the sale and purchase of a ship under the commonly used Norwegian saleform, which seldom attracts judicial interpretation in Singapore.

Damages for breach of charter party

2.3 *The Asia Star* [2009] SGHC 91 was a hard-fought case on a Vegoilvoy charterparty. The decisions of the High Court and the Court of Appeal on the liability issue were summarised in [2006] 7 SAL Ann Rev 39 at 45–46, paras 2.24–2.31 and [2007] 8 SAL Ann Rev 23 at 35, para 2.42. The defendant shipowner was found to be in breach of its obligation to provide epoxy-coated tanks under an express term of the Vegoilvoy charterparty, thereby entitling the plaintiff charterer to reject the vessel. In 2009, both parties appealed from the decision of the assistant registrar on the assessment of the damages payable by the defendant for the breach. The plaintiff claimed loss of profits on the cancellation of some of its contracts, and damages it paid to its buyer for breach of sale contracts. The plaintiff also incurred some extra expenses for delay in the shipment of cargoes from its suppliers.

2.4 In her judgment on the appeal, Judith Prakash J restated the law on damages (*The Asia Star* [2009] SGHC 91 at [81]). The usual measure of damages applicable when a shipowner fails to carry out a contract to

carry a cargo is either the difference between the market and charter rates of freight or relates to the value of the goods at the port of discharge. In the case of a contract for the carriage of goods by sea, the natural and obvious consequence of the shipowner's failure to load and carry the cargo is that the owner of the goods is deprived of the benefit of having them at the agreed destination when they ought to have arrived. *Prima facie*, therefore, the loss he suffers is represented by the market value of the goods at that time and place. This is subject to the charterers being able to arrange alternative shipping or obtain substitute goods at the port of destination. Where a claim against a carrier is concerned, the law does not generally allow the shipper to claim loss of profit as an item of damage unless he is able to show that the carrier had knowledge, actual or imputed, of something that made the ordinary measure of damages inadequate.

2.5 On the facts, Prakash J found that the plaintiff had not proved any special knowledge on the part of the defendant of the loss of profits from the cancellation of some contracts and the damages it had to pay on other contracts. The judge applied the ordinary measure of damages, which was the difference between the market value of the cargo at its destination in Turkey at the time it ought to have arrived less the value of the cargo to the plaintiff at the agreed time and place, less expenses saved, such as freight and cargo insurance premium. The judge also allowed some of the expenses that the suppliers could justifiably claim from the plaintiff as a result of delay in shipment.

2.6 The defendant argued that the plaintiff had not acted reasonably in mitigation as there was an alternative vessel, the *Puma* which was available for charter when the plaintiff rejected the *Asia Star.* The judge found that although the plaintiff had a duty to mitigate after it accepted the defendant's repudiation, it had acted reasonably in attempting to mitigate its loss. The terms offered by the owners of the *Puma* were not favourable and the plaintiff was not obliged to accept the terms of the *Puma* without negotiation. Mitigation principles do not require the injured party to incur extraordinary expenditure or act otherwise than in the ordinary course of business (*The Asia Star* [2009] SGHC 91 at [59]). The plaintiff was in an extremely difficult position because the charter of the *Puma* was a risky and expensive venture in the circumstances the plaintiff was facing, where the plaintiff's supplier and buyer had not yet agreed to further extensions of time. (Postscript: The Court of Appeal has allowed the defendant's appeal and reversed the High Court decision: [2010] SGCA 12.)

Sale and purchase of ship

2.7 The other case had a narrower focus, namely, on whether it was the seller or the buyer of the ship that had failed to comply with the terms for delivery. In *Swissco Offshore Pte Ltd v Seadbed Offshore Pte Ltd* [2009] SGHC 30, the plaintiff seller agreed to sell the vessel, Swissco Surf, to the defendant buyer at the price of US$2.25m under a memorandum of agreement ("MOA") dated 27 August 2007 on the Norwegian Sale Form 1993.

2.8 The plaintiff was approached in respect of the proposed sale by one RS Platou (Asia) Pte Ltd ("Platou"). The plaintiff was initially of the impression that the potential buyer of the vessel was one Pacmar Offshore Pte Ltd ("Pacmar"). It subsequently transpired that the defendant was in fact the buyer of the vessel. The plaintiff and Platou subsequently entered into a commission agreement whereby the plaintiff agreed to pay Platou commission in the sum of US$250,000.

2.9 The buyer placed 10% of the purchase price as a deposit with Platou as provided in the agreement but did not take delivery of the vessel against payment of the balance. The plaintiff alleged that the defendant had repudiated the MOA and sought in the action to forfeit the deposit paid by the defendant together with interest thereon.

2.10 The defendant counterclaimed for the return of the deposit alleging that the plaintiff had failed to furnish five documents as required under the MOA, being the cargo ship safety equipment certificate under cl 8(g) of the MOA, the stability booklet under cl 8(h) of the MOA, the manufacturer's load test certificate under cl 8(i) of the MOA, the class maintenance certificate and the notice of readiness.

2.11 Tay Yong Kwang J dismissed the plaintiff's claim and allowed the defendant's counterclaim with 80% of the total costs.

2.12 In coming to his decision, Tay J found for the plaintiff in respect of the first two issues raised in the defendant's defence and counterclaim, namely, in respect of the cargo ship safety equipment certificate and the stability booklet on two grounds. The judge found that the terms of the MOA clearly envisaged that such documents which were awaiting class approval could be produced by the plaintiff after the completion date.

2.13 The plaintiff was, however, found to be in breach of its obligation under cl 8(i) of the MOA to furnish the defendant with: "Copy of load test certificate by manufacturer confirmed by Class to be provided as soon as possible, the original to be provided at closing." The plaintiff contended that the words "confirmed by Class" were inserted by

Platou as the defendant's agent without the plaintiff's consent and Platou had assured the plaintiff that the plaintiff's documents were acceptable to the defendant. This issue turned mainly on whether Platou was the agent for the defendant or the plaintiff. If the latter, whatever Platou said did not bind the defendant. The role of Platou was not clearly defined in correspondence. The judge found that the existence of the commission agreement, and the payment by the plaintiff to Platou of commission amounting to more than 10% of the purchase price, were strong indications that Platou was agent for the plaintiff.

2.14 Given that the plaintiff failed to fulfil cl 8(i), it followed that the plaintiff was in no position to give notice of readiness to complete the sale. Thus, Tay J found for the defendant in respect of the remaining issues raised in the defendant's defence and counterclaim. The defendant did not get full costs because it failed on a number of issues that it had raised against the plaintiff.

AVIATION LAW

Jack **TEO** Cheng Chuah
LLB (National University of Singapore),
LLM (National University of Singapore),
PGDipTHE (National Institute of Education, Nanyang Technological University); Advocate and Solicitor (Singapore);
Retired Associate Professor, Nanyang Business School, Nanyang Technological University.

2.15 In 2009, no cases on aviation law were reported in the Singapore Law Reports.