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2. ADMIRALTY AND SHIPPING LAW

ADMIRALTY

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2.1 The Singapore courts handed down four admiralty judgments in 2020, including two decisions concerning rather esoteric parts pertaining to limitation of liability. These four decisions are reviewed below.

I. *AS Fortuna Opco BV v Sea Consortium Pte Ltd*

A. Material facts

2.2 In *AS Fortuna Opco BV v Sea Consortium Pte Ltd*,[1] after *AS Fortuna* ran aground at Ecuador, her owners commenced limitation proceedings in Singapore, proposing that the limitation fund be constituted by way of a letter of undertaking ("LOU") issued by a Protection & Indemnity Club ("P&I Club"). The claimants sought discovery from the owners, who furnished the same. The claimants then decided not to contest the owners' application, and the parties agreed that the limitation fund should include interest calculated at the rate of 5.33% per annum from the date of the incident to the date of constitution of the limitation fund.

2.3 However, the parties disagreed on the applicable post-constitution interest rate. The owners proposed a post-constitution interest rate of 2% per annum on the basis that the aforesaid rate represented a "good approximation" of interest that would be earned by moneys paid into court to constitute a limitation fund. One of the claimants took the view that such a rate of 2% per annum was an "underestimation", and since the owners would retain the use of the moneys and would "likely" generate a higher return for themselves compared to interest earned on moneys paid into court, the post-constitution interest rate should be higher – in the region of 5.33% per annum.

2.4 The claimants also argued that the owners ought to bear the claimants' legal costs, notwithstanding that they were not contesting the limitation proceedings, while the owners contended that they ought only

1 [2020] 4 SLR 1304.

to be liable for costs incurred in establishing matters for which they bore the burden of proof.

B. Post-constitution interest

2.5 As regards the first issue, Pang Khang Chau J observed that the Convention on Limitation of Liability for Maritime Claims[2] ("the 1976 Convention") was silent as to whether or not a limitation fund constituted by producing a guarantee or letter of undertaking should provide for post-constitution interest. Article 11(2) of the 1976 Convention merely provides that the guarantee or letter of undertaking should be "acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority". Order 70 r 36A(1)(*b*) of the Rules of Court[3] is similarly silent on the issue, providing, *inter alia*, that the limitation fund may be constituted by a letter of undertaking "acceptable to the Court".

2.6 Pang J held that in order for the LOU to be adequate or acceptable, it should place the claimants in a position no worse than if the limitation fund had been constituted by payment into court.[4] Pang J went on to find that an LOU ought to make provision for post-constitution interest at a rate which approximates the interest which could be earned on a limitation fund paid into court during the period that the fund remains in court.[5]

2.7 In that regard, Pang J rejected the claimants' contention that there was no need to go beyond the aforesaid principle, and take into account any higher returns which the shipowner could have been able to generate for itself by retaining the use of moneys representing the limitation fund.[6] The court's role in this regard should be focused on ensuring that the claimants are not made worse off by the shipowner's decision to constitute the limitation fund by way of a letter of undertaking.[7]

2.8 Pang J also observed that previous limitations funds paid into court had not earned any interest.[8] That was because such orders for payment into court did not contain any direction pursuant to O 90 r 12(4) of the Rules of Court to deposit moneys into an interest-bearing

2 1456 UNTS 221 (19 November 1976; entry into force 1 December 1986).
3 Cap 322, R 5, 2014 Rev Ed.
4 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [18].
5 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [18].
6 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [19].
7 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [19].
8 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [20].

bank account.[9] Had such a deposit taken place, Pang J observed that the interest rate earned on moneys paid into court pursuant to other types of applications featuring a direction pursuant to O 90 r 12(4) of the Rules of Court had been as high as 2.27% per annum.[10]

2.9 In light of the foregoing, Pang J held that the rate of 2.5% per annum would be an appropriate post-constitution rate as it approximated the actual interest rate obtainable on moneys paid into court with a slight buffer built in so that the claimants were not made to bear the risk of interest rate fluctuations while the LOU remained in force.[11]

2.10 It is submitted that Pang J's approach to determining a post-constitution interest rate is both sound in principle, as well as pragmatic. In particular, there is no rational reason for owners to be unfairly prejudiced as regards a post-constitution interest rate merely because they find it more expedient to constitute the limitation fund by way of a P&I Club LOU, as opposed to payment of cash into court. Pang J's judgment also contains a salutary reminder for prospective applicants of any limitation action to include in their application a direction for any moneys paid into court for the purposes of constituting a limitation fund to be placed into an interest-bearing account pursuant to O 90 r 12(4) of the Rules of Court.

C. Owners' liability for claimants' costs in uncontested limitation action

2.11 As regards the second issue, Pang J held that the 1976 Convention does not place on the shipowner the burden of proof for liability and/or the amount of the likely claim; accordingly, there was no reason why a shipowner, in commencing a limitation action, should bear the claimant's costs for looking into such matters.[12] Pang J further declined to make a claimant liable for a shipowner's costs in (voluntarily) responding to requests for information to enable a claimant to decide whether or not to contest limitation proceedings, as imposing such liability would hamper legitimate requests for such information.[13]

9 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [20].
10 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [21].
11 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [22].
12 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [32].
13 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [35].

2.12 Pang J proceeded to lay down the following principles with respect to costs of uncontested limitation decrees, subject always to the discretion of the court:[14]

> (a) A shipowner should pay the claimants' costs in relation to matters for which the burden of proof lies on the shipowner. This would include establishing the shipowner's *prima facie* right to limit liability pursuant to Arts 1, 2, and 3 of the 1976 Convention [as well as] determining the limitation amount pursuant to Arts 6 and 7 of the 1976 Convention. Where an LOU is used to constitute the limitation fund [such costs would] also include establishing the LOU's adequacy and acceptability.
>
> (b) In respect of matters for which the burden of proof lies on the claimant (*eg*, facts required to break limitation pursuant to Art 4 of the 1976 Convention), while the claimant is entitled to seek and be given such information as to enable it to decide whether or not to dispute the shipowner's right to limit liability, each party should bear its own costs in this regard.
>
> (c) Where an application for discovery is made pursuant to O 70 r 37(6), the costs of such an application should follow the event.

2.13 Applying the above-mentioned principles, Pang J ordered the owners to pay the claimants' costs in relation to:[15]

> (a) The establishment of the Owners' *prima facie* right to limit liability pursuant to Arts 1, 2, and 3 of the 1976 Convention;
>
> (b) The calculation of the size of the limitation fund; and
>
> (c) The consideration of the adequacy and acceptability of the draft LOU.

2.14 Each party was ordered to bear its own costs in relation to investigative work done in connection with the claimants' decision whether or not to invoke Art 4 of the 1976 Convention, that is, whether or not to apply to break limitation.

D. Replacement of letter of undertaking as limitation fund

2.15 Following the deposit of the executed LOU into court, the owners filed an application for leave to replace the LOU. Pang J proceeded to consider the applicable conversion rate from special drawing rights into Singapore dollars under Art 8 of the 1976 Convention. In that regard, Pang J found "no objection" with the usual practice for the shipowner to first produce an initial LOU using an estimated conversion rate before

14 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [36].
15 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [37].

replacing the initial LOU with another LOU using the correct conversion rate.[16]

2.16 Having said that, Pang J advised future applicants of limitation decrees to include a prayer for leave to replace the initial LOU in the manner described above, in order to obviate the costs and trouble of depositing the initial LOU in court.[17]

E. Pre-constitution interest

2.17 In the interests of completeness, Pang J also considered whether or not the pre-constitution agreed interest rate of 5.33% per annum was appropriate. In that regard, Pang J observed that as Art 11(1) of the 1976 Convention was silent on the interest rate to be applied in computing pre-constitution interest, the latter rate would be determined by the law of the State in which the fund is constituted pursuant to Art 14 of the 1976 Convention.

2.18 Pang J went on to observe that while s 139(1) of the Merchant Shipping Act[18] provides that the Maritime and Port Authority of Singapore may, from time to time, by order prescribe such a rate of interest, to date, no such order has been made. Pang J went on to find that Singapore courts, in the exercise of their discretion pursuant to s 12 of the Civil Law Act,[19] generally award pre-judgment interest at the same rate as the statutory interest rate on judgment debts, that is, 5.33% per annum.[20] In light of the foregoing, Pang J also found that the parties' agreed rate of 5.33% for pre-constitution interest was appropriate.

II. *Thoresen Shipping Singapore Pte Ltd v Global Symphony SA*

2.19 The second admiralty judgment handed down in 2020, *Thoresen Shipping Singapore Pte Ltd v Global Symphony SA*,[21] regarding limitation decrees, arose out of a limitation fund constituted by depositing a letter of undertaking into court. The quantum of the limitation fund amounted to (a) a principal component of S$10,501,983.71; (b) the interest on principal at the rate of 5.33% per annum from 8 March 2017 to 15 August 2017; and

16 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [40].
17 *AS Fortuna Opco BV v Sea Consortium Pte Ltd* [2020] 4 SLR 1304 at [41].
18 Cap 179, 1996 Rev Ed.
19 Cap 43, 1999 Rev Ed.
20 See O 42 r 12(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) read with para 77(5) of the Supreme Court Practice Directions (2006 Ed).
21 [2020] 5 SLR 843.

the interest on the aggregate of the amounts in (a) and (b) at the rate of 2% per annum from 16 August 2017 (that is, post-constitution interest).

2.20 Four claimants brought claims against the limitation fund within the prescribed period and subsequently entered into a settlement agreement with the plaintiffs' shipowner. The settlement agreement provided for payments totalling S$11,260,124.48, being the size of the limitation fund as of 31 December 2019. After payments were made to the claimants on 30 January 2020, the plaintiffs proceeded to file an application for (a) a declaration that the limitation fund be deemed exhausted and that no further claims be brought against the plaintiffs in the action and/or against the limitation fund; (b) the LOU to be returned to the plaintiffs' solicitors for cancellation; and (c) leave to be granted to the plaintiffs to discontinue the limitation action with no order as to costs.

2.21 Pang Khang Chau J held that the payments pursuant to the settlement agreement on 30 January 2020 did not exhaust the limitation fund.[22] That was because notwithstanding parties' agreement that payment was to be made based on the value of the limitation fund as of 30 December 2019, post-constitution interest continued to accrue until the date of payment, in accordance with the terms of the LOU.[23]

2.22 Nevertheless, as the time limit for bringing claims against the limitation fund had expired more than two and a half years before the judgment and no claimants had sought an extension of time to bring a claim against the limitation fund, Pang J considered that no other claimants had an interest in the limitation fund. By agreeing to accept payment based on the constitution of the limitation fund as of 30 December 2019, the claimants had in effect forgone any claim to post-constitution interest between 30 December 2019 until the date of payment, that is, 30 January 2020. Accordingly, Pang J discharged the LOU.[24]

2.23 Pang J also held that it was not appropriate to declare that the limitation fund "be deemed exhausted": such a declaration would amount to a concrete finding that the limit of liability under the LOU had been reached, and that no further liability existed under the LOU.[25]

22 *Thoresen Shipping Singapore Pte Ltd v Global Symphony SA* [2020] 5 SLR 843 at [10] and [11].
23 *Thoresen Shipping Singapore Pte Ltd v Global Symphony SA* [2020] 5 SLR 843 at [11].
24 *Thoresen Shipping Singapore Pte Ltd v Global Symphony SA* [2020] 5 SLR 843 at [15].
25 *Thoresen Shipping Singapore Pte Ltd v Global Symphony SA* [2020] 5 SLR 843 at [14].

III. *The Songa Venus*

2.24 *The Songa Venus*[26] concerned an application for the court to determine the question of priorities concerning the costs incurred by a claimant in enforcing a possessory lien over an arrested ship which, but for the possessory lien, would be but a statutory lien. The key issue which the court considered in this case was whether or not such costs should be accorded the same priority as the possessory lien, or the statutory lien.

A. Material facts

2.25 The plaintiff shipyard ("Keppel"), having provided various services to the vessel, *Songa Venus*, proceeded to arrest and obtain judgment in default of appearance against the vessel for the costs of such services, amounting to US$328,723, plus costs fixed at S$10,000 in addition to reasonable disbursements ("the Costs of the Action"). Keppel also obtained an order for the vessel to be appraised and sold *pendente lite* "without prejudice to [its] possessory lien over the Vessel, if any".[27] The vessel was sold for US$3,749,463.14.

2.26 The mortgagee of the vessel, Songa Offshore ("the Mortgagee"), intervened in the proceedings, having obtained final judgment in default of appearance for the sum of US$34,200,000.

2.27 It was not disputed that the Mortgagee's claim ranked in priority to that of Keppel. However, Keppel submitted that the *Costs* of the Action attributable to the portion of its claim for which it enjoyed a possessory lien should be accorded a higher priority than the Mortgagee, that is, the same priority as its judgment for the portion of its claim for which it had a possessory lien. The Mortgagee's position was that such costs should be accorded the same priority as that of Keppel's claim for which it had no possessory lien, and merely a statutory lien.

2.28 In coming to his decision, Pang J considered Butt J's decision in *The Immacolata Concezione*,[28] where ship repairers asserting a possessory lien for costs of repairs to the vessel were accorded costs which "must rank with the claim".[29] The court considered that had the ship repairer in *The Immacolata Concezione* successfully established its entitlement to

26 [2020] 4 SLR 1317.
27 *The Songa Venus* [2020] 4 SLR 1317 at [2].
28 (1883) 9 PD 37.
29 *The Songa Venus* [2020] 4 SLR 1317 at [25].

a possessory lien, its costs would be accorded the priority of a possessory lien, and not merely a statutory lien.[30]

2.29 Pang J also considered the general principle that the determination of priorities was an equitable jurisdiction and that, consequently, the court had adopted a broad discretionary approach by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which was just in the circumstances of the case.[31] Where a possessory lien holder surrenders possession of the arrested *res* to the admiralty court, he would have to commence an action *in rem* to obtain judgment for a claim which he would otherwise had been entitled to retain possession of the *res*. For the court to make good its undertaking to put the holder of a possessory lien "exactly in the same position as if he had not surrendered the ship", it was only just that the court ought to protect the possessory lien holder's costs incurred in the *in rem* action to the same extent as the possessory lien itself.[32]

2.30 Finally, Pang J also observed that pursuant to O 29 r 6 of the Rules of Court, the court may order a possessory lien holder to surrender the property in question to its owner, upon the owner paying into court the sum claimed by the possessory lien holder together with interest and costs.[33] Such a situation would be similar to one where a possessory lien holder surrenders possession of the *res* to the admiralty court in exchange for the court's aforesaid undertaking.

2.31 Applying the above reasoning to the facts, Pang J held that Keppel's Costs of the Action attributable to the portion of its claim for which it had a possessory lien should be accorded the same priority as its judgment for the portion of its claim for which it had a possessory lien. It is submitted that this decision is sound both as a matter of authority, as well as first principles. To arrive at a different conclusion would unfairly prejudice holders of a possessory lien when they surrender possession of an arrested *res* to the Sheriff.

30 *The Songa Venus* [2020] 4 SLR 1317 at [26].
31 *The Songa Venus* [2020] 4 SLR 1317 at [27].
32 *The Songa Venus* [2020] 4 SLR 1317 at [29].
33 *The Songa Venus* [2020] 4 SLR 1317 at [33].

IV. *The "Echo Star" ex "Gas Infinity"*

A. Material facts

2.32 In *The "Echo Star" ex "Gas Infinity"*[34] ("*The Echo Star*"), following a collision between the vessels, *Royal Arsenal* and *Echo Star* (then known as *Gas Infinity*), in the Straits of Hormuz on 7 April 2019, the owners of the *Echo Star* (Sea Dolphin Co Ltd ("Sea Dolphin")) sold and transferred ownership of the vessel to Cepheus Ltd ("Cepheus"). Some seven months later, by way of an admiralty *in rem* writ issued in the Singapore courts on 6 November 2019, the owners of the *Royal Arsenal* commenced *in rem* proceedings against the vessel *Echo Star* (*ex-Gas Infinity*) and named the defendant in the writ as the "Owner and/or Demise Charterer of the vessel 'ECHO STAR' (ex-'GAS INFINITY')".[35] The vessel was arrested at Singapore the same day.

2.33 On 15 November 2019, Cepheus entered appearance as the defendant. More than two months later, on 20 January 2020, Sea Dolphin, the previous owner, *also* entered appearance as the defendant.

2.34 On 31 January 2020, Cepheus's lawyers wrote to the plaintiff's lawyers seeking consent for Cepheus to be granted leave to withdraw appearance as defendant, and instead for Cepheus to be granted leave to enter appearance as an intervener. After the plaintiff declined to provide such consent, Cepheus applied for leave to withdraw its appearance as defendant and sought leave to intervene in the action instead.

2.35 The plaintiff argued that Cepheus, as the owner of the vessel at the time the writ was issued on 6 November 2019, had correctly entered appearance as the defendant. The plaintiff's position was based on the fact that (a) Cepheus was correctly described as the defendant when the writ was issued; (b) the understanding of who the relevant owner was "in line with industry practice as reflected in standard ship sale and purchase documents" bearing in mind the seller's usual obligation to indemnify the buyer in respect of claims arising from maritime liens that may have accrued under the seller's ownership; and (c) a maritime lien is enforceable even against a *bona fide* purchaser.[36] After the assistant registrar allowed Cepheus's application, the plaintiff filed an appeal to a judge in chambers.

34 [2020] 5 SLR 1025.
35 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [10].
36 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [22].

B. Various aspects of a damage maritime lien

2.36 In dismissing the plaintiff's appeal, S Mohan JC observed that the question of whether or not the proper defendant in a claim arising from a maritime lien was the previous owner at the time the maritime lien accrued, or the owner at the time the writ was issued, was a novel one.[37] That was because the proposition that the relevant owner (that is, the defendant) was the defendant at the time of the issuance of the writ had been established in the specific context of claims giving rise to *statutory liens* under s 4(4) of the High Court (Admiralty Jurisdiction) Act[38] ("the Act"), or its English equivalent.[39]

2.37 Mohan JC held that the above distinction was significant as the wording of s 4(4) of the Act makes it clear that a statutory lien only accrues and crystallises at the time the *in rem* action is commenced, that is, upon the issuance of the writ.[40] However, that is not the case for a maritime lien, which accrues simultaneously with the cause of action, travels secretively and unconditionally with the *res*, and survives any change of ownership.[41] In that regard, Mohan JC observed that a maritime lien has a "Procedural Aspect" in the sense that the offending ship may be validly arrested by an injured claimant to obtain security to enforce a claim despite a change in ownership, and to compel appearance by the wrongdoers.[42] In such a situation, the new owners would not be able to set aside the *in rem* writ or the arrest simply on account of the change in ownership.

2.38 Mohan JC further held that a maritime lien has a "Crystallisation Aspect", as it accrues simultaneously with the cause of action and lies inchoate until an *in rem* action is commenced, at which time the maritime lien crystallises and relates back to the time when it first arose.[43] In so far as the damage maritime lien is concerned, it is based on, or arises as a result of, the fault or negligence of the servants of the offending ship which are attributable to its owner or demise charterer.[44] In other words, the personal liability of the owner is a necessary requirement of the accrual of the damage maritime lien, and in that sense it has a further "Fault Aspect".

37 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [24].
38 Cap 123. 2001 Rev Ed.
39 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [24].
40 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [25].
41 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [28].
42 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [28(a)].
43 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [28(b)].
44 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [29].

2.39 Having regard to the Procedural Aspect, Crystallisation Aspect, as well as the Fault Aspect of the damage maritime lien, Mohan JC held that it was "logical" that an action *in rem* in respect of a claim for collision damage was addressed to the owner (or demise charterer, as the case may be) of the offending vessel at the time of the collision, even where ownership of the offending ship had changed between the date of the collision and the issuance of the writ.[45]

2.40 In particular, in so far as the Fault Aspect was concerned, Mohan JC agreed with Cepheus, and held that it was "intuitively wrong" that the damage lien could have the effect of making the subsequent *bona fide* purchaser of the offending ship liable *in personam* for a collision that was neither its fault, nor that of its servants.[46] This is particularly so since, on entry of appearance, the defendant submits himself personally to the jurisdiction of the court, and so renders himself liable *in personam* to any judgment obtained by the plaintiff.[47] Mohan JC held that the above applied *mutatis mutandis* to a claim subject to a damage maritime lien.[48]

2.41 With respect to the Procedural Aspect of a damage maritime lien, Mohan JC held that the wrongdoer was compelled to appear to answer a claim based on a damage maritime lien.[49] This resulted in what Mohan JC held was "the neat confluence of the Procedural Aspect and the Fault Aspect.[50] If the plaintiff's contention was right, Cepheus as the new owner of the vessel would be compelled to enter appearance as the defendant and potentially assume *in personam* liability for a claim that had accrued through no fault on its part; such a contention, Mohan JC held, "cannot be right".[51] Mohan JC further held that the plaintiff's argument based on an indemnity found in ship sale and purchase agreements was an entirely separate matter dependent on the terms of the agreement between the former and new owners.[52]

2.42 With respect to the Crystallisation Aspect, Mohan JC held that since the maritime lien crystallises on the issuance of an *in rem* writ, it related back to the moment in time when it was first created, that is, at the time of the collision.[53] Given that the damage lien is premised on fault,

45 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [30].
46 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [30].
47 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [32].
48 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [32] and [40].
49 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [34].
50 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [34].
51 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [34].
52 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [35].
53 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [36].

the only party who should bear personal liability for a claim based on a damage maritime lien is the owner at the time of the collision.[54]

2.43 Bearing in mind all of the above, Mohan JC held that the relevant point in time for the identification of the proper *in personam* defendant (and by extension, the proper defendant for the purposes of *in rem* proceedings commenced after a change in ownership of the offending ship) was the time the collision occurred.[55] In the circumstances, where a prospective claimant seeks to commence *in rem* proceedings to enforce a claim arising out of a damage maritime line, the defendant should be described on the writ as "The Owners on the (date of collision) of the ship 'Y'", where "Y" was the name of the vessel on the date of the collision.[56] Where the vessel had changed her name after the collision, the *in rem* writ should describe the action as being an action *in rem* against the ship under its current name on the date the writ was filed.[57]

C. Threshold to grant leave to withdraw appearance

2.44 Having held that the proper defendant was the owner at the time of the collision (that is, Sea Dolphin), Mohan JC went on to consider whether or not Cepheus should be granted leave to withdraw its memorandum of appearance, and instead obtain leave to intervene in the action. In that regard, Mohan JC agreed with Cepheus that the court has complete discretion to grant a party leave to withdraw appearance – though that discretion must be exercised judicially.[58]

2.45 On the facts of the case before him, Mohan JC agreed with the assistant registrar's decision to grant Cepheus leave to withdraw its memorandum of appearance, as well as to intervene in the action.[59] To begin with, the plaintiff failed to provide any evidence that Cepheus's entry of appearance as defendant was anything other than an inadvertent mistake, as opposed to a deliberate move.[60] Second, in so far as Cepheus had taken a step in the proceedings by filing an application for payment into court and to release the vessel, such an application in the form of a summons had been required as a matter of ordinary procedure.[61]

54 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [36].
55 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [37].
56 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [37]–[39].
57 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [39].
58 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [46].
59 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [47].
60 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [48].
61 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [49].

2.46 Third, there had been no undue delay as contended by the plaintiff: Cepheus had written to the plaintiff seeking the latter's consent to the withdrawal of appearance on 31 January 2020, after it had filed its memorandum of appearance on 15 November 2019.[62] The intervening period until the application was filed had been taken up by correspondence and without prejudice negotiations.[63]

2.47 Fourth, in so far as any alleged prejudice in the form of a potential counterclaim from Sea Dolphin was concerned, such prejudice presupposed that Cepheus was the correct defendant in the first place.[64] Sea Dolphin had also entered appearance as a defendant and had taken steps in the proceedings.[65] By invoking such a line of argument premised on alleged prejudice, the plaintiff was seeking to take advantage of Cepheus's incorrect entry of appearance as defendant in an attempt to prosecute its claim without the spectre of a counterclaim; such a position did not sit well with the court.[66]

2.48 The plaintiff's final contention was the allegation that Sea Dolphin had commenced proceedings against the plaintiff in another jurisdiction.[67] Mohan JC held that the presence of such proceedings was irrelevant to the present application.[68]

2.49 Bearing in mind the above, Mohan JC upheld the assistant registrar's decision and granted Cepheus leave to withdraw its appearance.[69] Given that Cepheus were the current owners of the vessel and had furnished security to secure the release of the vessel from arrest, Mohan JC also agreed with the assistant registrar that Cepheus was plainly a party with an interest in the vessel as contemplated by O 70 r 16(1) of the Rules of Court, and granted Cepheus leave to intervene in the proceedings.[70]

2.50 The decision in *The Echo Star* provides useful clarification to parties involved in a collision, following which one of the vessels involved changes ownership. Prospective claimants seeking to enforce claims arising out of a maritime lien should pay heed to Mohan JC's observation to describe the defendant in the writ as "The Owners on

62 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [50].
63 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [50].
64 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [52].
65 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [53].
66 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [52].
67 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [54].
68 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [54].
69 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [55].
70 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [56].

the (date of collision) of the ship 'Y'".[71] The decision in *The Echo Star* is also a cautionary reminder for *bona fide* purchasers of vessels previously involved in a collision action, to seek leave to intervene rather than enter appearance.

SHIPPING LAW

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2.51 In 2020, the Court of Appeal and High Court handed down one judgment each relating to shipping law. They are *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd*[72] ("*SAR Maritime*") and *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Ltd*[73] ("*NSL Oilchem*") respectively.

V. Entitlement to commission – Whether shipbroker was effective cause of transaction

2.52 The circumstances under which a shipbroker would be entitled to commission in relation to transport agreements which the shipbroker claimed to have brokered pursuant to a brokerage agreement were considered in *SAR Maritime*.

A. The facts

2.53 On 2 December 2013, Ceylon Shipping Corporation Limited ("CSCL"), a company owned by the Government of Sri Lanka, published an advertisement inviting shipowners to express their interest in entering into long-term contracts of affreightment for the shipment of coal to Sri Lanka ("CSCL Contracts"). The respondent shipowner, PCL (Shipping) Pte Ltd, allegedly with the help of the appellant shipbroker, SAR Maritime Agencies (Pvt) Ltd, was invited by CSCL to tender an offer, which the respondent did. On 28 February 2014, CSCL held a meeting

71 *The "Echo Star" ex "Gas Infinity"* [2020] 5 SLR 1025 at [37] and [38].
72 [2020] 1 SLR 896.
73 [2020] SGHC 204.

to open offers from nine shipowners, including the respondent, but no agreement was reached with any shipowner during that time.[74]

2.54 On 8 May 2014, while negotiations with CSCL were still underway, the appellant and the respondent entered into a "brokerage agreement ("the Brokerage Agreement").[75] The single-page Brokerage Agreement briefly provided that if the appellant successfully brokered the CSCL Contracts, it would be entitled to commission as follows:[76]

> 1.00% on freight of each cargo under the said proposed [CSCL Contracts].
>
> The parties agree that a final brokerage agreement confirming the above will be signed upon formal execution of the [CSCL Contracts].

2.55 Shortly after the Brokerage Agreement was concluded, the parties discussed the possibility of an advance of the commission as well as the clawback of such an advance. However, before they could come to a further agreement on these issues, the respondent wrote to the appellant on 21 May 2014, advising the appellant that its "services in lobbying and representing [the respondent were] no longer required for this particular Coal tender with CSCL as of immediate effect".[77] The appellant replied on 5 June 2014 to confirm that it would "suspend [its] lobbying".[78]

2.56 Subsequently, the respondent appointed one Sathak to represent it in its negotiations with CSCL. Following Sathak's appointment, the respondent finally entered into the CSCL Contracts with CSCL. Pursuant to the CSCL Contracts, the respondent earned some US$98m in freight from CSCL over the period between November 2014 and May 2019.[79]

2.57 In the High Court, the judge dismissed the appellant's claim for commission under the Brokerage Agreement. In her unreported judgment, the judge held that (a) the Brokerage Agreement was not a binding agreement; (b) even if the Brokerage Agreement was binding, it had been terminated on 21 May 2014; and (c) in any event, the appellant was not entitled to the commission as it had not been the effective cause of the CSCL Contracts.[80] Dissatisfied, the appellant took the matter on appeal.

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74 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [5]–[6].
75 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [7].
76 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [16].
77 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [8].
78 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [22].
79 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [9]–[11].
80 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [13].

B. Key issues

2.58 On appeal, the key issues before the Court of Appeal were:

(a) whether the Brokerage Agreement was a binding agreement;

(b) if so, whether the Brokerage Agreement had been terminated; and

(c) whether the appellant was the effective cause of the CSCL Contracts.

2.59 In an *ex tempore* judgment, Steven Chong JA (on behalf of the Court of Appeal) dismissed the appeal. The Court of Appeal held that although the Brokerage Agreement constituted a binding contract which had been terminated, the appellant was ultimately not entitled to the commission as it had not been the effective cause of the CSCL Contracts.[81] The court dealt with the issues in turn.

C. Analysis

(1) Whether the Brokerage Agreement was a binding agreement

2.60 The appellant argued that contrary to the judge's finding, the Brokerage Agreement was a binding agreement as the Brokerage Agreement and prior discussions between the parties evidenced all the elements of a binding contract. The Court of Appeal agreed with the appellant and reaffirmed well-established contractual principles that contractual formation merely required (a) an identifiable agreement that was complete and certain; (b) consideration; and (c) an intention to create legal relations, all of which were satisfied in the present case.[82]

2.61 The Brokerage Agreement was a certain agreement complete with consideration from both sides because it provided in "unequivocal terms" that if the appellant brokered the conclusion of the CSCL Contracts, it would be entitled to claim the commission from the respondent. The court opined that the post-contractual discussions relating to the advance of the commission and the clawback of the same were merely negotiations on when and how the commission would be disbursed, but did not change the fact that the parties had agreed to the appellant being paid the commission if the CSCL Contracts materialised. Further,

81 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [38].
82 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [15]. See *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [46].

commercial parties such as the parties in this case were presumed to have the intention to create legal relations and no reasons were given by the respondent as to why this should not be the case.[83]

(2) Whether the Brokerage Agreement had been terminated

2.62 The respondent argued that even if the Brokerage Agreement was a binding agreement, it had been mutually terminated by the parties when the appellant accepted the respondent's termination of the same by stating unequivocally that it would "suspend [its] lobbying" with CSCL.[84]

2.63 In response, the appellant contended that although it had agreed to *suspend* its lobbying services for the respondent, it had not agreed to *terminate* the Brokerage Agreement.[85] The Court of Appeal rejected this argument and found that the Brokerage Agreement had been mutually terminated. Amongst the reasons given by the court was that the correspondences between the parties after the alleged termination demonstrated that the appellant had understood that its services in relation to the brokering of the contract with CSCL had been terminated and it had been effectively replaced by Sathak as the respondent's broker. This was why the appellant had sought gratuitous reimbursement for the expenditure it had incurred prior to the termination of its services.[86]

2.64 However, the Court of Appeal held that such a finding was insufficient to dispose of the appeal because the fact "that the Brokerage Agreement was terminated would not *ipso facto* deprive [the appellant] of its brokerage commission".[87] The Court of Appeal was of the view that although the CSCL Contracts were eventually entered into *after* the Brokerage Agreement had been terminated, the appellant would still be entitled to its commission if it could prove that its initial efforts prior to the termination of the Brokerage Agreement had been the *effective cause* of the CSCL Contracts.[88] The Court of Appeal therefore had to consider whether the appellant had been the effective cause of the CSCL Contracts.

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83 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [16]–[21].

84 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [22].

85 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [23].

86 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [22]–[27].

87 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [28].

88 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [28]. See *Goh Lay Khim v Isabel Redrup Agency Pte Ltd* [2017] 1 SLR 546 at [33].

(3) Whether the appellant was the effective cause of the CSCL Contracts

2.65 In this respect, the appellant submitted that because it was the party who first *introduced* the respondent to CSCL, it was the effective cause of the CSCL Contracts. In support of this proposition, the appellant relied on certain passages from *Carver's Carriage by Sea*.[89]

2.66 The Court of Appeal rejected this argument and held that Singapore law did not consider a broker to be the effective cause of a transaction simply because it had introduced the contracting parties.[90] The Court of Appeal found its earlier observations in *Goh Lay Khim v Isabel Redrup Agency Pte Ltd*,[91] which concerned a real estate agent's right to commission, applicable to the chartering context:[92]

> No precise definition of 'effective cause' has been attempted in case law given that the inquiry is fact specific … *No one factor is determinative* and the inquiry entails a holistic assessment of all the relevant facts of each case. It is insufficient for the agent to show that it was one of the causes of the sale; it would have to show that it was the critical cause. [emphasis added by the Court of Appeal]

2.67 The Court of Appeal distinguished the present case from the "ordinary" chartering cases which concerned "one-off" charterparties where the introduction of the contracting parties by the broker was "crucial", without which, the shipowners would not have known the identity, needs and requirements of the charterers. In such cases, if a charterparty had been concluded, there was no doubt that the broker, in introducing the parties, had been the effective cause of that charterparty.[93]

2.68 However, the present case involved long-term contracts of affreightment that spanned several years and several shipowners had submitted offers at the public tender conducted by CSCL. Contrary to the appellant's submissions that its efforts had placed the respondent in a "strong position", by the time it was replaced by Sathak, the evidence showed that respondent was no closer to securing the CSCL Contracts than its competitors at that point. Instead, it was only after Sathak had taken over as broker that the respondent managed to send multiple revised proposals to CSCL and have extended meetings with CSCL which

89 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [29]. Raoul Colinvaux, *Carver's Carriage by Sea* vol 1 (London: Steven & Sons, 13th Ed, 1982) at para 595.

90 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [30].

91 [2017] 1 SLR 546.

92 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [30], citing *Goh Lay Khim v Isabel Redrup Agency Pte Ltd* [2017] 1 SLR 546 at [37].

93 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [31].

ultimately culminated in the first CSCL Contract, some six months after the appellant had been replaced. The terms of the first CSCL Contract were also quite different from the terms set out in the initial offer which the respondent had submitted with the appellant's assistance, in that it included freight rates for nine additional ports of loading and did not include certain provisions which the appellant had asserted to be a key consideration for CSCL.

2.69 The Court of Appeal agreed with the view of the judge below that "the matter took a wholly new trajectory" after Sathak's entry, with the latter playing a "pivotal role" in brokering the contract between CSCL and the respondent.[94] The appellant therefore could not possibly have been the effective cause of the first CSCL contract and the appeal was dismissed.[95]

D. Comment

2.70 *SAR Maritime* is a significant decision for shipbrokers in the chartering business because the apex court has clarified, first, that absent clear words which define when commission was earned, a broker would only be entitled to its commission if it was the effective cause of the eventual transaction. Second, if a broker was the effective cause of a transaction, it would remain entitled to its commission even if the transaction was concluded after the brokerage contract had been terminated. Third, determining whether a broker was the effective cause of a transaction entailed a holistic assessment of all the relevant facts of each case, with no one factor being determinative. An introducing broker would not necessarily be the effective cause of a concluded transaction. Furthermore, it was insufficient for a broker to show that it was merely one of the causes of the eventual transaction, it would have to prove that it was the *critical* cause. In practice, while this may lead to some uncertainty as to whether a broker has done enough to have earned its commission, it is open to (and suggested for) brokers to carefully define the circumstances under which its commission will be *deemed* to be earned in their brokering contracts.

94 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [37].
95 *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 at [32]–[37].

VI. BARECON 2001 charterparty – Liability for loss, damage and expense incurred

2.71 A bareboat charterer's liability for outstanding hire and damages for breaches of a bareboat charterparty in the BARECON 2001[96] form were considered in *NSL Oilchem*.[97] The case concerned several claims for debts owed by the defendant, Prosper Marine Pte Ltd, to the plaintiff, NSL Oilchem Waste Management Pte Ltd, under a number of different contracts, one of which was a bareboat charterparty for the oil tanker, *Prosper 9*, which had been chartered by the plaintiff to the defendant on the BARECON 2001 form ("the Charterparty"). This review will only consider the claim under the Charterparty which raised some interesting issues.

A. Facts relevant to the Charterparty claim

2.72 The plaintiff was a company in the business of treating marine and land-based "slop", a liquid mixture of water, hydrocarbon and solids. The defendant was a provider of various maritime services including the collection, transport and disposal of slop in Singapore. Prior to this dispute, the parties were in a long-term commercial relationship whereby the defendant used its tankers, including the vessel *Prosper 9* (which it had initially owned), to collect and transport slop to the plaintiff's plant. Once there, the slop was treated within reactor tanks that would separate the sediment, oil and water in the slop by a chemical process. The plaintiff then sold some of the recycled fuel oil extracted from the slop back to the defendant.

2.73 The early years of the parties' relationship were smooth sailing. However, a fire that broke out at the plaintiff's plant in 2007 changed things. The plaintiff was suspended from receiving marine slop for a year and two of its reactor tanks were damaged, compromising the plant's overall slop processing capacity. The defendant requested that the reactor tanks be refurbished and the plaintiff agreed on the condition that it would receive a minimum monthly revenue of S$54,000 for slop discharge over two years to defray its costs. The defendant guaranteed this figure by offering to deliver 18,000m^3 of slop for treatment at the plaintiff's plant every month at the rate of S$3 per m^3 of slop, and also agreed to pay liquidated damages of S$3 per m^3 of shortfall. However, the defendant was unable to keep up with the monthly payments and manage its debt notwithstanding that the plaintiff had extended multiple lines

96 The Baltic and International Maritime Council Standard Bareboat Charter (Revised 2001) (hereinafter "BARECON 2001").

97 See para 2.51 above.

of credit. This, amongst other reasons, led the defendant to accumulate a large amount of debt over the years which eventually spiralled beyond its control.

2.74 In an attempt to reduce its debts to the plaintiff, the defendant executed the sale and leaseback of the vessel. The defendant sold the vessel to the plaintiff by deed with part of the sale proceeds applied to set off its debts to the plaintiff. The plaintiff then bareboat chartered the vessel back to the defendant under the charterparty at a monthly hire of $120,000 per month for a period of 36 months for the latter to continue its slop operations.[98] A survey report produced shortly before the sale and leaseback of the vessel showed that apart from some minor issues, the vessel had been in good condition at the time ("the Encee Report").[99]

2.75 During the charter period, the Charterparty provided that the defendant was to maintain the vessel in (a) a good state of repair; (b) efficient operation condition; and (c) in accordance with good commercial maintenance practice. The defendant was also obliged to keep the vessel's class fully up to date with the classification society specified in the Charterparty, as well as maintain the necessary certificates.[100]

2.76 Further, upon expiration or termination of the Charterparty, the defendant was to redeliver the vessel "in the same state and condition as she was delivered … at the commencement of the [charter], ordinary fair wear and tear excepted". This included "all outfit, equipment and appliances" on board the vessel.[101]

2.77 Just over a year later, the defendant defaulted in paying hire under the Charterparty which ultimately led to the plaintiff's termination of the Charterparty and repossession of the vessel.[102] The plaintiff arranged for a class condition survey and underwater inspection of the Vessel ("the Off-hire Inspections") and discovered 37 class issues, approximately 90% marine growth on all inspected areas, and that four of her cargo tanks were contaminated with solidified oil or sludge.[103] The plaintiff

98 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [28].
99 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [179].
100 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [29].
101 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [30].
102 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [39].
103 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [40]–[41].

bore all the costs of the Off-hire Inspections, necessary repairs, cleaning of underwater parts and removal of the solidified sludge in the tanks to restore the vessel to being fit for use.

2.78 In the High Court, the plaintiff claimed against the defendant the outstanding charter hire and damages for breaches of the Charterparty. The defendant counterclaimed on the basis that it was induced, by way of fraudulent misrepresentation, to enter into the Charterparty and had as a result suffered loss and damages which could be set off against the plaintiff's claim for outstanding charter hire.[104] The defendant's defence to the claim for damages was that the plaintiff had not proven that the defendant was responsible for the damage caused to the condition of the vessel as at its repossession and that the plaintiff had failed to mitigate its losses for its claim for loss of hire.

B. Key issues

2.79 The two main issues which arose for consideration were:

(a) whether the plaintiff was entitled to the unpaid monthly hire fees under the charterparty; and

(b) whether the defendant was liable for the loss, damage and expense incurred by the plaintiff as a result of breaches of the Charterparty and if so, what consequences should flow thereon.[105]

C. Analysis

(1) Outstanding charter hire fees

2.80 The defendant accepted that it had failed to pay charter hire from 27 May 2016 to the date of repossession on 16 September 2016. Its sole defence against payment of hire was that it was induced to enter into the sale and leaseback of the vessel by way of the plaintiff's fraudulent misrepresentation and the loss and damages which it had suffered as a result could be set off against the unpaid hire. The crux of the defendant's misrepresentation claim was that the plaintiff had allegedly represented in an earlier e-mail that in consideration for the defendant's entering into the sale and leaseback transaction, the plaintiff would resolve certain

104 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [52].

105 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [161].

"tank top"[106] issues with its reactor tanks that would allegedly have allowed the defendant to utilise the vessel for marine slop collection in a way that generated sufficient revenue for it to pay for the hire under the Charterparty.

2.81 The defendant relied in particular on two phrases in an e-mail sent by the plaintiff to the defendant prior to the sale and leaseback of the vessel:[107]

> [The plaintiff] sincerely urge and hope that you would follow and meet our expectation this time so that we can *revert back to business as usual*.
>
> Please be assured that [the defendant] will *continue to have the support of [the plaintiff] so that our partnership will grow from strength to strength after this gust of headwind* …
>
> [emphasis in original]

2.82 Lee Seiu Kin J disagreed with the defendant. Upon careful review of the wording of the plaintiff's e-mail, his Honour noted that the material phrases which the defendant relied upon were made in *future* tense and concluded that they could not amount to actionable representations because they were mere projections about the future and not statements which related to a past or present fact.[108] He noted as well that the words used by the plaintiff in its e-mail were merely "aspirational pleasantries" which the defendant itself accepted at trial would not have expected to have held legal significance.[109]

2.83 His Honour further found, upon examining the e-mails in the lead-up to the sale and lease-back agreement, that it was made clear that the purpose of these transactions was to facilitate the resumption of trading on credit terms and not the resolution of tank-top problems at the plaintiff's plant, as the defendant had suggested.[110] Accordingly, since the representations had been made in relation to something unconnected with the sale and leaseback of the vessel, it followed that the

106 The "tank top" issues in this case referred to a situation where the build-up of marine slop in plaintiff's reactor tanks compromised the plaintiff's ability to receive fresh slop at its plant. See *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [116].

107 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [164].

108 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [166].

109 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [167].

110 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [168].

representations did not induce or prompt the defendant to enter into the Charterparty.[111]

2.84 The defendant's counterclaim in misrepresentation was therefore dismissed and the plaintiff was entitled to the hire due under the Charterparty together with the contractual late payment interest of 1% per month.[112]

(2) Breaches of the Charterparty

2.85 The plaintiff also claimed damages for the defendant's several breaches of the Charterparty which included its failure to maintain the vessel in a good state of repair, keep her classification fully up to date, and to redeliver her with her outfit, machinery and appliances in the same good order and condition as she was delivered with her hull, clean and free of marine growth.[113] As a result of the alleged breaches, the plaintiff claimed that it had suffered loss and damage and incurred significant expenses and had lost the use of the vessel whilst the issues were being rectified.

2.86 The defendant's primary defence was that the plaintiff had not proven that the defendant was responsible for the loss, damages or expenses incurred and the plaintiff was precluded from seeking the relief for loss of use/ hire of the vessel because it had failed to mitigate this loss.

(a) Proof of repair and replacement costs

2.87 The defendant objected to these costs on three grounds. The first ground was that the plaintiff had failed to prove that the damage to the vessel was caused by the defendant because there was no accurate comparison between the state of the vessel at the time it was chartered and at its repossession. Specifically, the defendant challenged the weight of the findings of the Encee Report as evidence of the vessel's state pre-delivery because the Encee Report was "comparatively vague" and lacked an exhaustive list of the items on-board the vessel.[114]

111 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [169].

112 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [170].

113 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [171].

114 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [181].

2.88 Lee J rejected this argument and found that the Encee Report was useful in ascertaining the condition of the vessel. The Encee Report found that the onboard equipment was operational and free of defects and no mention was made of missing or worn out items, which suggested that the vessel had no significant damage before commencement of the Charterparty. These findings were corroborated by the vessel's class certificate at that time which was free from any conditions.[115]

2.89 In contrast, the Off-hire Inspections highlighted many issues which the vessel faced before it could maintain her class certification.[116] Further, even if certain issues were pre-existing issues, the defendant was still under an obligation to maintain the vessel in accordance with good commercial practice and to keep the vessel's class fully up to date with her classification society. It was therefore the defendant's responsibility to replace items on board the vessel so far as they affected her class certification.[117] On that basis, the defendant was held liable for all the damage set out in the Off-hire Inspections as well as the costs of the inspections, as they had been necessary to establish the plaintiff's damage.[118]

2.90 Second, the defendant raised the point that owing to the lack of a joint survey at the first Off-hire Inspection that took place on the day of the vessel's repossession, it could not verify the vessel's state and condition at that time.[119] The defendant raised the possibility that the damage done to the vessel could have taken place between the first inspection and the next, which took place just three days later. In response, the plaintiff argued that it was not obliged under the Charterparty to carry out a joint survey at the point of her repossession.

2.91 Lee J considered the wording of cl 7 of the Charterparty, which provided that parties were to "each appoint surveyors for the purpose of determining and agreeing in writing the condition of the Vessel at the time of delivery and *redelivery* hereunder" [emphasis added by the High Court].[120] Lee J took the view that as the term "redelivery" was associated

115 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [182].
116 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [182].
117 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [183].
118 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [183].
119 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [184].
120 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [185]. See cl 7 of BARECON 2001.

with "the *expiration* of the Charter Period" [emphasis added by the High Court] under cl 15 of the Charterparty, it did not apply in the instant case where the Charterparty had been terminated prematurely.[121] In any event, however, the defendant had been given the opportunity to inspect the vessel just three days later. Furthermore, since the vessel had remained in port during this period, his Honour found it implausible that she had suffered the damage during this time; it was more likely that the damage had occurred while the vessel had been on charter with the defendant.[122]

2.92 Third, the defendant argued that even if it was liable for the expenses incurred by the plaintiff to repair the vessel, the costs for the repairs were neither fair nor reasonable because the plaintiff had allegedly taken the opportunity to refurbish the vessel completely and failed to mitigate its costs. Furthermore, some of the repair works were conducted more than a year after the vessel's repossession.

2.93 Lee J rejected the argument on mitigation as it had not been pleaded by the defendant. In any case, his Honour found that the plaintiff had approached a few vendors before settling on the cheapest and most reliable option for the repairs, and while some of the repair works had taken place sometime after the vessel's repossession, the repairs were for damage sustained by the vessel before the repossession.[123]

(b) Loss of use or hire, and operational costs

2.94 Under this head of claim, the plaintiff's claim for loss of use/hire was sub-divided into two periods, namely, (a) from 17 September 2016 to 14 October 2016 (being the period of repair after the vessel was repossessed) ("the First Period"); and (b) from 15 October 2016 to 26 August 2018 (being the remainder of the 36-month Charterparty after completion of repairs) ("the Second Period").

2.95 In addition to the claim for loss of use/hire, the plaintiff claimed for operational expenses which were the out-of-pocket operational running expenses it had to pay and other expenses which should otherwise have been borne by the defendant under the Charterparty.

121 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [185]. See cl 15 of BARECON 2001; *cf* cl 29 of BARECON 2001.

122 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [186].

123 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [188].

2.96 Lee J held that the plaintiff had clearly proven its damage in respect of these two categories of expenses as they arose directly out of the defendant's repudiatory breach of the Charterparty.[124]

2.97 In respect of the First Period relating to the loss of use, the defendant submitted without any elaboration that the claim for loss of use for this period overlapped with the claim for operational costs and was therefore an attempt at double recovery.

2.98 Lee J disagreed. His Honour held that the plaintiff's claims concerned two distinct types of loss. The first was its inability to generate revenue from the vessel after the termination of the Charterparty, whilst the second was its absorption of operational costs that would otherwise have been borne by the defendant.[125]

2.99 In respect of the Second Period, the defendant relied on *The Asia Star*[126] and contended that the plaintiff should be precluded from making this claim as it had not provided any evidence of the steps taken to mitigate its loss as there was seemingly no effort made to charter the vessel out to third parties for a reasonable fee.

2.100 Lee J considered the defendant's reliance on *The Asia Star* misplaced. His Honour considered it trite that the failure by an innocent party to mitigate its loss would not preclude it from claiming for its loss entirely but only from claiming that part of its loss which could have been avoided by reasonable mitigation.[127] On the facts, the plaintiff was merely claiming the difference between the hire it would have earned under the Charterparty and the hire it could have earned on the market.[128] The plaintiff was therefore entitled to its claim for loss of use/hire for both periods.

D. Comment

2.101 *NSL Oilchem* presented the High Court with a rare opportunity to hear a substantive claim arising out of a BARECON 2001 charterparty, where the majority of such charterparty claims are referred to arbitration.

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124 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [191].

125 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [196].

126 [2010] 2 SLR 1154.

127 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [193]. See *The Asia Star* [2010] 2 SLR 1154 at [23].

128 *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd* [2020] SGHC 204 at [194].

The case demonstrates some evidential problems that parties commonly face whenever a dispute arises as to the condition of the vessel at delivery and redelivery. Where on-hire or off-hire reports do not capture the full details of the vessel's condition, the court can rely on whatever circumstantial evidence available to draw an inference as to the vessel's condition at both points in time, as it did in the present case. To minimise such factual disputes, shipowners and charterers should, as far as possible, jointly document the condition of the vessel at the time of delivery and redelivery of a vessel, whether such redelivery be upon expiry of the charter period or earlier termination.