2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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Introduction

2.1 The year 2012 saw one decision handed down by the Court of Appeal of considerable clarificatory importance, and three by the High Court (two of which arose out of the same facts and raised the same issues).

The Bunga Melati 5 [2012] 4 SLR 546

2.2 In *The Bunga Melati 5* [2011] 4 SLR 1017, the Court of Appeal heard and allowed the appeal from the decision of Belinda Ang Saw Ean J, which was reported in the (2011) 12 SAL Ann Rev 26 at 31–41, paras 2.24–2.61. The Court of Appeal took the opportunity to clarify various principles relating to the invocation and subsequent challenge of the admiralty jurisdiction of the court, following the earlier seminal decision of the same court in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin*"). This review only touches on the admiralty aspects of the decision and leaves out aspects of the decision that deal with the application to strike out the action (save as is necessary to explain the procedural background).

Facts and proceedings below

2.3 The appellant in *The Bunga Melati 5* [2012] 4 SLR 546 ("*The Bunga Melati 5*") served an admiralty writ *in rem* on the respondent's vessel, but did not arrest her. The crux of the appellant's claim was that it had entered into a contractual relationship with the respondent, under which the appellant would supply bunkers to a number of the respondent's vessels. Alternatively, the appellant contended that the respondent had been unjustly enriched by its use of the bunkers supplied by the appellant.

2.4 The respondent, however, alleged that the only contractual relationship it had in relation to the said bunkers was with Market Asia Link Sdn Bhd ("MAL"): see *The Bunga Melati 5* at [8]. In response, the appellant's position was that MAL had at all material times acted as

the respondent's broker or agent; the respondent was therefore contractually liable to the appellant for the bunkers supplied: see *The Bunga Melati 5* at [5] and [13]. The appellant hinged its contractual claim solely on the doctrine of agency by estoppel, namely, that it had relied on the respondent's representations that MAL was clothed with ostensible authority to contract with the appellant on the respondent's behalf.

2.5 Prior to commencing proceedings in Singapore, the appellant had commenced proceedings against the respondent in the United States District Court for the Central District of California ("the California District Court") to obtain an attachment order against the respondent's assets in California (the popular but now defunct Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("the Rule B Attachment Order")). Whilst the Rule B Attachment Order itself was vacated, the appellant's action was not. The appellant later withdrew its action in California: see *Bunga Melati 5* at [11] and [13].

2.6 After the service of the writ on the respondent's vessel, the respondent applied to set aside and/or strike out the writ on the ground that the appellant's claim was plainly unsustainable on the merits: see *The Bunga Melati 5* at [20]. The respondent also alleged that it was not "the person who would be liable on the claim in an action *in personam*" under s 4(4)(*b*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act"). As a further arrow to its quiver, the respondent also relied on the doctrine of issue estoppel with respect to the appellant's previous proceedings in California.

Invoking the admiralty jurisdiction of the High Court

2.7 The court took the opportunity to clarify an issue that had been raised in the earlier Court of Appeal decision of *The Vasiliy Golovnin*. The court clarified that when a plaintiff seeks to invoke the admiralty jurisdiction of the court, *there is no requirement to show a good arguable case on the merits*: see *The Bunga Melati 5* at [94] and [96]. Rather, it is only when the plaintiff's claim is challenged, *and a defendant applies to strike out the plaintiff's action under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("RoC") or the inherent jurisdiction of the court* that the plaintiff will then have to show a good arguable case on the merits: see *The Bunga Melati 5* at [96] and [104]. In doing so, the court thereby affirmed the decision of Ang J on this point: see [2011] 4 SLR 1017 at [142] and [157].

2.8 The court also took the opportunity to clarify the five steps involved in invoking the admiralty jurisdiction of the court under s 4(4) of the Act, namely:

(a) showing that the plaintiff has a claim under ss 3(1)(*d*) to 3(1)(*q*) of the Act ("Step 1");

(b) showing that the claim arises in connection with a ship ("Step 2");

(c) identifying the person who *would be* (as opposed to "is") liable on the claim in an action *in personam* ("Step 3");

(d) showing that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ("Step 4"); and

(e) showing that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it ("Step 5").

2.9 In respect of the above-mentioned five steps, the court also endorsed (at [107]) Ang J's lexicon of:

(a) a "*jurisdictional fact*";

(b) a "*jurisdictional question of law*"; and

(c) a "*non-jurisdictional matter of fact or law*".

2.10 The court held that, in so far as Step 1 was concerned, the plaintiff need only prove an *arguable case* (which is not meaningfully different from "*good arguable case*", the expression preferred by Ang J: see *The Bunga Melati 5* at [111]) with respect to jurisdictional questions of law. However, the court agreed (at [112]) with Ang J's analysis as to the standards of proof required under the other steps, namely:

(a) Step 1: prove, on the balance of probabilities, that the jurisdictional facts under the limb the plaintiff is relying on in ss 3(1)(*d*) to 3(1)(*q*) exist, and show (this being in the nature of a legal question) *an arguable case* that its claim is of the type or nature required by the relevant statutory provision;

(b) Step 2: prove, on the balance of probabilities, that the claim arises in connection with a ship;

(c) Step 3: identify, without having to show in argument, the person who would be liable on the claim in an action *in personam*;

(d) Step 4: prove, on the balance of probabilities, that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship; and

(e) Step 5: prove, on the balance of probabilities, that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it.

2.11 Of the five steps outlined above, the most significant pronouncement relates to Step 3, the *in personam* element. This marks a clear departure from a series of Court of Appeal and High Court decisions, in which arrests have been set aside because this element was found to be wanting in the evidence (see, *eg*, *The Rainbow Spring* [2003] 3 SLR(R) 362 ("*The Rainbow Spring*"); *The Thorlina* [1985–1986] SLR(R) 258 ("*The Thorlina*"); see also the detailed analysis on this issue in *The Eagle Prestige* [2010] 3 SLR 294 ("*The Eagle Prestige*") by Belinda Ang Saw Ean J). Identity of contractual parties, which is where this element frequently features in the setting aside of an arrest application, will henceforth have to be dealt with as a matter going to the merits of the claim, either in a striking out application *or* at trial. Agreeing with Ang J in the court below (see [2011] 4 SLR 1017 at [138]), the court rationalised previous cases which *appear* to state that the plaintiff *must* show that the *in personam* liability requirement is satisfied on a good arguable case (such as *The Rainbow Spring*, *The Opal 3 ex Kuchino* [1992] 2 SLR(R) 231 and *The Thorlina*) as cases where actions were struck out pursuant to the exercise of the court's inherent jurisdiction instead: see *The Bunga Melati 5* at [99]. The court, however, took pains to express the view that such an approach would *not result in any practical difference or injustice to an admiralty claim*: see *The Bunga Melati 5* at [103]. This is because the court could rely on its inherent jurisdiction to strike out a claim that is legally or factually unsustainable. There is some conceptual symmetry in such a position and that adopted in *The Eagle Prestige* which, clarifying *The Vasiliy Golovnin*, made it clear that save for matters which potentially warrant a striking out of the claim, defendants to a claim need not be disclosed when a warrant of arrest is applied for.

2.12 It must be noted that the court took pains to warn potential plaintiffs seeking to invoke the admiralty jurisdiction of the court that they would *not* be granted a *carte blanche* right to arrest vessels without having to show a shred of evidence justifying the connection between the "relevant person" for the purposes of s 4(4) of the Act, and the alleged defendant: see *The Bunga Melati 5* at [115]. In this respect, the court took the (hypothetical) view that an assistant registrar hearing an application for a warrant of arrest could exercise his or her discretion not to grant the application if there was "*obviously insufficient or contradictory documentary evidence*" as to who the "relevant person" was under s 4(4) of the Act: see *The Bunga Melati 5* at [114]. If so, the

defendant could then apply to strike out the plaintiff's claim under either O 18 r 19 or the inherent jurisdiction of the court: see *The Bunga Melati 5* at [103].

Full and frank disclosure

2.13 The court also took the opportunity to reiterate the importance of the obligation of full and frank disclosure on a plaintiff seeking to invoke the admiralty jurisdiction of the court: see [113]–[117] of *The Bunga Melati 5*. With respect to that important requirement, the court reiterated that a plaintiff who fails to disclose all material facts supporting its claim would run the risk of not being granted a warrant of arrest, or, if granted initially, could subsequently have its arrest set aside: see *The Bunga Melati 5* at [113].

2.14 That said, the court endorsed Ang J's view in the court below as well as in *The Eagle Prestige* that the strength of the plaintiff's claim *on the merits* did not go to jurisdiction; rather, the same is a matter for a striking out application under either O 18 r 19 of the RoC or the court's inherent jurisdiction: see *The Bunga Melati 5* at [97]. Accordingly, the court appears to have also endorsed Ang J's observation in the court below as well as in *The Eagle Prestige* that a plaintiff is not required to disclose defences to the claim at the stage of applying for a warrant of arrest, unless those defence are of a nature that may potentially result in the action being struck out: see *The Eagle Prestige* at [73].

2.15 The judgment in *The Bunga Melati 5* is also remarkable, in that it features a *separate* coda by Chan Sek Keong CJ. Chan CJ outlined the steps and standards of proof involved when a defendant brings a *factual challenge* to the invocation of the court's admiralty jurisdiction under Step 1 described above. In that regard, Chan CJ expressed the view that there are occasions when the court would only be able to make a determination on the balance of probabilities when it has before it all the evidence relating to the disputed facts (and not merely affidavit evidence). In that regard, Chan CJ indicated that the court has a broad-ranging power to determine the procedure involved where a defendant to an admiralty action brings a factual challenge under Step 1 described above. This may include, in appropriate cases, a hearing of witnesses in the setting of a trial of preliminary issues, which is unconventional but not unheard of, in the context of a jurisdictional challenge.

The Makassar Caraka Jaya Niaga III-39 [2012] SGHC 175 and *The Pontianak Caraka Jaya Niaga III-34* [2012] SGHC 176

2.16 These were two High Court decisions handed down in 2012 which arose out of the similar facts and considered the same issues,

save that the quantum of claims in both cases, and evidence, differed: see *The Pontianak Caraka Jaya Niaga III-34* [2012] SGHC 176 ("*The Pontianak*") at [5]. Both these cases concerned the circumstances in which the court will grant leave for a party's costs and expenses incurred to be considered as sheriff's expenses. The issues considered in these two cases arose after the High Court had, in an earlier 2011 decision, allowed the plaintiff's appeal against the defendant's application to set aside the writ of summons and warrant of arrest against the vessel, the *Makassar Caraka Jaya Niaga III-39*: see *The Makassar Caraka Jaya Niaga III-39* [2011] 1 SLR 982, reviewed in (2010) 11 SAL Ann Rev 44 at 53–57, paras 2.40–2.56.

2.17 The facts of the underlying disputes in both cases are as follows. By way of an agency agreement between one PT Djarkarta Lloyd (Persero) ("DJL") and the third interveners, Megastar Shipping Pte Ltd ("Megastar"), Megastar agreed to provide agency services to DJL in Singapore in respect of vessels which were owned, operated, chartered and/or otherwise managed by DJL: see *The Makassar Caraka Jaya Niaga III-39* [2012] SGHC 175 ("*The Makassar*") at [5]. Megastar was, in other words, the local agent of the vessels which were the subject-matter of the suits in *The Makassar* and *The Pontianak* ("the Vessels").

2.18 Both Vessels were arrested in Singapore by the plaintiff, who claimed sums due to it under a slot charterparty. DJL intervened in both actions, but its application to set aside both arrests was eventually dismissed in 2010: see *The Makassar* at [7] and [9]. The sheriff later replaced Megastar with his own appointed agents: see *The Makassar* at [8].

2.19 After the Vessels were sold, Megastar claimed that it had expended some US$497,081.23 for the maintenance and preservation of the Vessels while they were still under arrest, and should be reimbursed that amount in priority to the plaintiff's claims as such expenses were in the nature of sheriff's expenses: see *The Makassar* at [11]. That sum was allegedly incurred under various categories, including crew transport and medical expenses, bunkers and other necessaries supplied to the Vessels, crew wages, and Megastar's own fees. Megastar's position in contending that these constituted sheriff's expenses was that its expenses incurred were "necessary" to keep the Vessel and crew safe during the arrests, and that the sheriff would have incurred such expenses in any event: see *The Makassar* at [14].

2.20 The plaintiff resisted Megastar's application as the proceeds of sale of the Vessels were insufficient to reimburse Megastar *and* satisfy the plaintiff's claims in full: see *The Makassar* at [11]. The plaintiff contended, *inter alia*, that:

(a) Megastar's conduct was more consistent with a shipowner's, rather than the sheriff's, agent.

(b) The equities of the case did not lie with Megastar given that the proceeds of the respective sales would be seriously depleted if Megastar's applications were allowed, the respective shipowners were not insolvent nor had they abandoned the Vessels, and Megastar had kept silent about its claims for a very significant period of time. In fact, Megastar sought leave to intervene *two months* after the respective orders for sale had been granted.

(c) Megastar's expenses were neither necessary, reasonable, nor proper expenses to be incurred by the sheriff.

(d) Megastar's claim was questionable given that Megastar's claim for wages and disbursements appeared to be in the nature of loans to DJL; there was evidence that a third party was putting Megastar into funds to bear the expenses, and that Megastar had been reimbursing a third party for payment of the crew's wages.

Non-adoption of Megastar's expenses by the sheriff

2.21 Judith Prakash J observed that there was no evidence that the sheriff had adopted or approved Megastar's expenses: see *The Makassar* at [21]. In fact, with respect to Megastar's claims for reimbursement for launch services, Prakash J noted that the sheriff had stated that he had no objection to the crew coming ashore; that position had been conditioned on the crew bearing all costs of coming ashore themselves: see *The Makassar* at [21]. More generally, when Megastar subsequently sent the sheriff its documentation for expenses incurred for the Vessels, asking for confirmation that the same would form part of the sheriff's expenses, the sheriff had responded that a court order would be required for the same: see *The Makassar* at [21]. That was contrary to the position set out in *The Aquarius III* [2002] 2 SLR(R) 347 ("*The Aquarius III*"), where the court in that case held that the sheriff could adopt, as his own, expenses which had been incurred without prior authorisation: see *The Makassar* at [19].

Whether Megastar's expenses were necessary and proper

2.22 Following the Court of Appeal decision in *Keppel Corp Ltd v Chemical Bank* [1994] 1 SLR(R) 54, Prakash J also had regard to whether or not the categories of expenses which Megastar had incurred were, in fact, "necessary and proper expenses to which the Sheriff would incur when carrying out his duties in connection with the arrested vessel": see *The Makassar* at [23]. In that regard, Prakash J considered

that crew wages, crew medical expenses, bunker and water supplies were arguably so necessary and proper, although these were not allowed for the reasons explained below. However, Prakash J also considered that the quantum of any such necessary and proper expenses incurred could still be reduced depending on circumstances: see *The Makassar* at [23].

2.23 In contrast, Prakash J held that the other categories of Megastar's expenses, *viz*, crew transport services, launch services and Megastar's fees, were not necessary and proper: see *The Makassar* at [29]. Prakash J held that launch services could only have been a necessary and proper expense connected with the arrest if such services had been used to provide the crew with provisions and medical treatment, and to supply the Vessels with materials necessary for their maintenance. Moreover, Megastar's charges for services in relation to provide the crew with shore leave were rejected as, contrary to Megastar's assertion, there had been no evidence (as Megastar alleged) that the crew would have mutinied or that their health would have been adversely affected without such leave. Prakash J further noted that following the appointment of the sheriff's agents, there also had been no evidence that the crew had required frequent shore leave: see *The Makassar* at [29].

The equities of the case

2.24 Notwithstanding Prakash J's decision that, in principle, Megastar's expenses for crew wages, crew medical expenses and bunker and water supplies had been necessary and proper expenses incurred during the arrest, the equities of the case were not with Megastar: see *The Makassar* at [34]. Prakash J found that Megastar had initially incurred those expenses in the (mistaken) belief that the respective arrests would eventually be set aside and that it would be able to recover those expenses from DJL: see *The Makassar* at [34]. In so incurring those expenses, it was not acting for the sheriff.

2.25 Further, there was evidence that DJL had, in fact, put Megastar into funds for expenses related to the Vessels: see *The Makassar* at [36]. In so far as the evidence suggested that Megastar had reimbursed a third party, Bintang Mas Shipping Pte Ltd ("BMS"), for the latter's payment of part of the crew wages, Prakash J held that there were inconsistencies in the various documents; it was therefore difficult to determine the exact relationship between DJL, Megastar, and BMS. However, what was crucial was that Megastar's actions exuded confidence in obtaining reimbursement from DJL: see *The Makassar* at [42] and [43]. Moreover, as the crew had been employed by DJL, Megastar's payment of the crew's wages was, in fact, consistent with the fact that Megastar did so in its capacity as DJL's agent: see *The Makassar* at [45] and [46].

2.26 Prakash J also had regard to Megastar's dilatoriness in notifying the sheriff of the expenses it had incurred in the maintenance and upkeep of the Vessels: see *The Makassar* at [47]–[49]. That was a further indication that Megastar was relying on DJL's credit and incurring expenses on the latter's account: see *The Makassar* at [47].

2.27 Finally, Prakash J considered that there was no evidence that DJL was insolvent. This was therefore unlike the situation in cases such as *The Nagasaki Spirit* [1994] 2 SLR(R) 165 and *The Aquarius III*, where the respective owners in those cases had virtually abandoned the vessels. On the contrary, the fact that Megastar had continued to maintain and pay the full complement of crew without repatriating the crew down to a skeletal crew, indicated that DJL continued to maintain an interest in the vessels: see *The Makassar* at [50]. Prakash J therefore held that Megastar would still be able to seek redress from DJL: see *The Makassar* at [49].

2.28 Cases concerning sheriff's expenses do not regularly come before the courts. These decisions are a salutary reminder that courts will closely scrutinise claims for sheriff's expenses where a party incurs expenses in connection with an arrested vessel without any prior order of court or permission from the sheriff.

The Reecon Wolf [2012] 2 SLR 289

2.29 The facts of *The Reecon Wolf* [2012] 2 SLR 289 ("*The Reecon Wolf*") are relatively uncomplicated. The case features a collision between the defendant's vessel, the *Reecon Wolf*, and the plaintiff's vessel, the *Capt Stefanos*, in the Straits of Malacca. As will be elaborated below, it is a striking example of how parties to a collision engaged in extensive forum shopping in an attempt to improve their respective positions, particularly on the issue of limitation of liabilities.

2.30 In the aftermath of the collision, the plaintiff arrested the *Reecon Wolf* in Singapore. The judgment of Belinda Ang Saw Ean J concerned the defendant's appeal from the decision of the assistant registrar, who had refused the defendant's application for a stay of proceedings in Singapore.

2.31 In the meantime, the defendant had also arrested the *Capt Stefanos* in Malaysia. The plaintiff (unsuccessfully) applied for a stay of the Malaysian proceedings, a decision which (the court was informed) the plaintiff would appeal, regardless of the outcome of the decision in *The Reecon Wolf*.

2.32 In allowing the respondent's appeal and granting a stay of the Singapore proceedings, Ang J considered and applied the trite two-stage test as set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). With respect to stage one of the *Spiliada* test, Ang J was of the view that Malaysia was the more appropriate forum, given that Malaysia was the natural forum, in light of the fact that the collision had occurred in Malaysian waters: see *The Reecon Wolf* at [48]. The finding is in some ways to be expected given that there are a number of cases which held that the place of the tort is, *prima facie*, the natural forum (see, for instance, *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457). However, it may be argued that the strength of this presumption that the place where the tort is committed (the *locus delicti*) is the natural forum should not, in some instances where there are no difficulties or extraordinary costs in moving witnesses or other evidence to another jurisdiction, be too difficult to overcome. This was, in fact, one of the factors recognised by Ang J in *The Reecon Wolf* (at [41] and [42]), when her Honour considered that there was no "balance of advantage" for witnesses to give evidence in either Singapore or Malaysia.

2.33 The reliance placed on the *locus delicti* as the *prima facie* natural forum is, in some respects, somewhat inconsistent with the court's finding that the governing law was a neutral factor under stage one of the *Spiliada* test: see *The Reecon Wolf* at [44]. In particular, Ang J held that there was no balance of convenience with respect to witnesses in so far as giving evidence in Singapore or Malaysia was concerned: see *The Reecon Wolf* at [41]. If the governing law and (on the facts of *The Reecon Wolf*) availability and compellability of witnesses are both considered neutral factors, it may be wondered why else the *locus delicti* would be the most appropriate forum.

2.34 Further, in light of the fact that the Malaysian proceedings would continue (at least, in the form of the plaintiff's appeal against the dismissal of its application to stay the Malaysian proceedings) regardless of the outcome of the instant appeal, Ang J held that in the interests of comity and to avoid the inconvenience and expense of two trials and the risk of conflicting judgments, Malaysia was the more appropriate forum for the resolution of the dispute: see *The Reecon Wolf* at [52].

2.35 Ang J also took the opportunity to clarify the effect of different limitation of liability regimes under stage two of the *Spiliada* test. The plaintiff had argued that the dichotomy between the International Convention relating to Limitation of Liability of Owners of Sea-going Ships 1957 ("the 1957 Convention") and the Convention on Limitation of Liability for Maritime Claims, 1976 ("the 1976 Convention") was a factor which would leave the plaintiff disadvantaged if the Singapore proceedings were stayed: see *The Reecon Wolf* at [54]. This was because

Singapore law gave effect to the 1976 Convention (and the accompanying higher limit of liability), whilst Malaysia law (at the time of the decision) gave effect to the 1957 Convention.

2.36 Ang J, however, gave short shrift to the plaintiff's arguments. In particular, she declined to make comparisons between the merit of the different statutory limits of liability in Singapore and Malaysia: see *The Reecon Wolf* at [54]. Further, Ang J considered that the mere fact that the law in the alternative forum may be less favourable to the plaintiff was insufficient to justify a dismissal of an application to stay proceedings on grounds of *forum non conveniens*. The existence of different limitation regimes was not a factor which the judge considered to be a personal or juridical advantage under stage two of the *Spiliada* test. In this regard, Ang J placed significant emphasis in refusing to compare the different laws of Singapore and Malaysia: see *The Reecon Wolf* at [54]. Her Honour's emphasis on comity and the desirability in avoiding potentially conflicting decisions issued by courts of different jurisdictions is perhaps not surprising, given that it mirrors the approach taken by the English Court of Appeal in *The Herceg Novi and The Ming Galaxy* [1998] 2 Lloyd's Rep 454, and the first instance decision of Waung J in *The Kapitan Shvetsov* [1996] HKCFI 718.

2.37 In conclusion, Ang J was of the view that the plaintiff had failed to show any reason why the Singapore proceedings should not be stayed in favour of Malaysia. The defendant's appeal was therefore allowed and the plaintiff's action in Singapore stayed.

2.38 It is respectfully submitted that in the context of limitation forum shopping (which is in essence what the parties were seeking to do), Ang J's emphasis on international comity in *The Reecon Wolf* is eminently sensible. If differences in limitation regimes, in and of themselves, constitute a sufficient ground to refuse a stay of proceedings in a jurisdiction that is *not* the *locus delicti*, it will simply encourage more instances of the undesirable practice of limitation forum shopping.

SHIPPING LAW

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2.39 In 2012, no cases on shipping law were reported in the Singapore Law Reports.

AVIATION LAW

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2.40 In 2012, no cases on aviation law were reported in the Singapore Law Reports.