2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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Introduction

2.1 The year 2011 saw three admiralty decisions handed down by the High Court. These decisions are discussed as follows.

The Sahand [2011] 2 SLR 1093 ("*The Sahand*")

2.2 The primary contention in this case relates to the treatment by the Singapore courts of sanctions imposed on Iranian entities by the United Nations and European Union. It does, however, raise several interesting issues relating to admiralty practice.

2.3 The material facts of the case are relatively straightforward. The plaintiff provided a syndicated loan to the defendants, who were wholly-owned entities of the Islamic Republic of Iran Shipping Lines ("IRISL") for the construction of three vessels ("Vessels"). To secure this loan and other financial transactions, the respective defendants each executed a German mortgage over the respective Vessels in favour of the plaintiff. Each of the respective defendants also executed a German law instrument, under which the respective defendants declared that the plaintiff had an immediately enforceable claim (based on a proportion of the full debt) in order to facilitate summary enforcement of the respective mortgages in Germany.

2.4 Following the execution of the agreements, the plaintiff alleged that the defendants had defaulted on their repayment obligations under the respective loans. The plaintiff further alleged that the respective defendants had, in breach of the loan agreements, failed to renew the various hull and machinery and protection and indemnity policies over the respective vessels. The plaintiff subsequently arrested all three Vessels in Singapore.

2.5 While the IRISL was a sanctioned entity under United Nations Security Council Resolution No 1929 ("UNSCR 1929"), none of the defendants were expressly listed as a sanctioned entity under UNSCR 1929. All the defendants were, however, subject to European Union

sanctions against Iran. The defendants were unable to offer satisfactory security in exchange for release of the arrested Vessels. Accordingly, the plaintiff applied and obtained an order for the sale of the Vessels *pendent lite*.

The defendants' applications to postpone the sales pendente lite

2.6 The sheriff proceeded to advertise the sale of the Vessels. The defendants' solicitors wrote to the sheriff requesting, *inter alia*, the court's bank account information to make payment into court (in order to procure release of the Vessels), and postponement of the sale of the Vessels. The sheriff (in a course of action with which Quentin Loh J agreed), replied that an order of court was required for making payment into court and for any postponement of any sale *pendent lite*.

2.7 The defendants then formally applied to postpone the sales of the Vessels. The ground of each application was to allow each of the defendants' time to raise security, due, apparently, to an increase in the sum claimed. Loh J heard and dismissed the defendants' application for postponement of sale *pendente lite* of the Vessels on the following grounds (*The Sahand* at [16]):

> (a) applying the rule in *The Acrux* [1961] 1 Lloyd's Rep 471, Loh J held that an order for the sale of arrested Vessels should, as a general rule, only be postponed in "exceptional circumstances";
>
> (b) the defendants had defaulted on their repayment obligations under the loan agreement. In this regard, Loh J recognised that the defendants were having difficulty obtaining access to financing due to the European Union and United Nations Security Council sanctions against Iran;
>
> (c) even though the defendants had known of their difficulties in obtaining access to financing for over three months since the Vessels had been arrested, the defendants were still unable to make any significant payment or offer security to obtain the release of the Vessels. Loh J interpreted this to mean that the defendants had the funds, but could not arrange for the transfer of such funds, which a postponement of the sale would not improve;
>
> (d) whilst the increase in the sum demanded was attributable to a calculation mistake by the plaintiff's solicitors, the defendants ought to have known of their actual indebtedness, and the fact remained that the defendants had been unable to effect payment or effect any security to any meaningful degree from the time of the Vessels' arrest;

(e) Loh J also considered the fact that the sheriff had not provided for a postponement of sale in his advertisements and that a postponement of a sheriff's sale had never happened before; and

(f) at least ten parties had expressed an interest in buying the Vessels, and had incurred costs in commissioning underwater hull surveys. In this regard, Loh J considered that any prospective buyer would want to rely on a survey which was as current as possible.

2.8 Accordingly, Loh J dismissed the applications to postpone the sales of the vessels *pendent lite*.

The defendants' applications to discharge the order to sell the Vessels, and for the Vessels to be released

2.9 The defendants subsequently took out a separate set of applications to discharge the order of court to sell the Vessels, and for the Vessels to be released from arrest. The ground of the defendants' applications was that the defendants had transferred certain funds in Europe, in alleged satisfaction of the plaintiff's claims against the defendants.

2.10 The issue before Loh J was whether the payment of security in Europe, outside of Singapore, could be tantamount to meeting the plaintiff's claims, or whether security had been provided in respect of such claims: *The Sahand* at [73]. In this regard, Loh J noted (*The Sahand* at [74]), that the said transfer of funds had been frozen by virtue of the European Union legislation and regulations, and would therefore not comply with the specific requirement under the loan agreements that the payment of any funds be "legally compliant".

2.11 Loh J, however, accepted the uncontroverted evidence given by the plaintiff's English solicitors that the parties had obtained most of the requisite authorisations from the European Union authorities for such transfers to be effected: *The Sahand* at [76]. With respect to one last outstanding authorisation for the payment of €155m, solicitors for both sides accepted that there was no reason why such authorisation would be forthcoming in light of the prior authorisations granted: *The Sahand* at [79]. Notably, this last outstanding authorisation was indeed granted subsequent to Loh J's decision: *The Sahand* at [92].

2.12 In light of the foregoing, Loh J rescinded the orders to judicially sell the Vessels and ordered them to be released, on the condition that the defendants undertake to pay the sheriff's expenses: *The Sahand* at [80] and [81]. Loh J also ordered the sheriff to return the sealed bids

unopened, along with all cheques deposited with him: *The Sahand* at [81].

Bidder's request for compensation

2.13 In a somewhat unexpected twist, one of the bidders (whose identity was not known because the bids had remained sealed throughout the course of the proceedings), asked that the defendants compensate it for expenses incurred in relation to its bid after the order for judicial sale was rescinded: *The Sahand* at [84]. Loh J dismissed this request on the basis that any defendant in an admiralty action *in rem* is entitled to compel the release of the arrested *res* before the sale of the same, by paying the amount claimed or by providing satisfactory security for the plaintiff's claim: *The Sahand* at [84].

2.14 Loh J also referred to the fact that the bidder had merely lost a *speculative chance* to purchase the Vessels, particularly since the sheriff's notice of sale had expressly reserved his right not to sell the Vessels to the highest bidder, or at all: *The Sahand* at [84]. In the circumstances, Loh J held that an order to compensate the said bidder for its expenses incurred in relation to its bid would set "an altogether wrong precedent": *The Sahand* at [84].

The Oriental Baltic [2011] 3 SLR 487 ("*The Oriental Baltic*")

2.15 This decision raises a short but potentially important point in light of the difficult times faced by the shipping industry in recent years. In *The Oriental Baltic*, the subject vessel ("Vessel") was arrested in Singapore, after which, the plaintiff filed a *caveat* against her release. The plaintiff however, only commenced its *in rem* action against the Vessel's registered owners hours *after* the liquidation of the said registered owners (by way of a voluntary winding up) had commenced on the same day. The plaintiff applied under s 299 of the Companies Act (Cap 50, 2006 Rev Ed) for leave to continue with its action against the registered owners after the commencement of winding up proceedings. Section 299 of the Companies Act reads:

> **Property and proceedings**
>
> (1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding up shall be void.
>
> (2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

2.16 The plaintiff's claim in its *in rem* action was for damages and contractual interest pursuant to the Vessel's registered owners' breach of a contract for the supply of marine gas oil. As a matter of priorities, the plaintiff's claim potentially competed with that of a third party, Posh Maritime Pte Ltd ("PMP"), which had previously obtained a judgment against the Vessel's registered owners in a separate admiralty action *in rem*. Not surprisingly, PMP intervened in the plaintiff's action and objected to the application for leave to continue with the action despite the commencement of winding up.

2.17 The Vessel was eventually sold by the sheriff, and the proceeds of sale amounting to S$403,000 were paid into court. PMP intervened in the action and applied for the determination of priorities and payment out of the proceeds of sale, having obtained judgment against the owners of the Vessel in a separate admiralty action *in rem*.

2.18 The issue before Tan Lee Meng J was therefore whether the plaintiff should be granted leave to continue with its action *in rem* against the owners, notwithstanding the fact that the owners had commenced a voluntary winding up via a director's resolution.

2.19 Tan J considered that leave to continue in admiralty *in rem* proceedings after the registered owners of a vessel have gone into liquidation "must be considered very carefully because of the effect of such proceedings on other creditors of the company": *The Oriental Baltic* at [12]. This is a salutary reminder that leave to proceed with an admiralty action after commencement of winding up against the defendant shipowner is not to be routinely granted.

2.20 Tan J considered that there were two possible approaches which the court may take when considering whether to grant leave under s 299 of the Companies Act. Under the first approach, the court would focus on whether the applicant is a secured creditor immediately before the presentation of the winding up petition: *The Oriental Baltic* at [13]. Applying the test in *In re Aro Co Ltd* [1980] Ch 196 which was in turn applied in *The Hull 308* [1991] 2 SLR(R) 643 ("*The Hull 308*"), Tan J considered that the proper test for whether an applicant was a secured creditor was to ask "immediately before the presentation of the winding-up petition, [it] could assert against all the world that the vessel was security for [its] claim": *The Oriental Baltic* at [13]. Though *The Hull 308* is a case involving s 262(3) of the Companies Act, *ie*, an application for leave to continue court proceedings against a company subject to *compulsory* winding up, Tan J considered that s 262(3) was *in pari materia* with s 299(2) of the Companies Act, which applies to cases of *voluntary* winding up.

2.21 On the facts, the plaintiff had not instituted *in rem* proceedings against the owners before the commencement of winding-up proceedings: *The Oriental Baltic* at [13]. Accordingly, the plaintiff would not be in a position at the material time *to assert against* the whole world that the vessel had been security for its claim prior to the commencement of such winding up proceedings: *The Oriental Baltic* at [13]. Leave was accordingly refused on this analysis.

2.22 As an alternative to the approach set out above, Tan J also considered whether it would be "right and fair in the circumstances" to grant the plaintiff leave to continue its action against the owners: *The Oriental Baltic* at [14]. In this regard, Tan J considered that the fact that the plaintiff had commenced its *in rem* action only *after* the commencement of liquidation to be material to the court's decision: *The Oriental Baltic* at [15]. In this regard, Tan J followed the reasoning of L P Thean JA in *The Hull 308*: to grant the plaintiff's application would be akin to confer on it a security on an asset which the plaintiff otherwise did not have, and could not have to the obvious prejudice of the other unsecured creditors of the owners: *The Oriental Baltic* at [15]. Leave was similarly denied on this alternative basis of reasoning.

2.23 Tan J also dismissed the plaintiff's argument that the fact that it had filed a *caveat* against release before the commencement of liquidation proceedings should be a material factor: *The Oriental Baltic* at [16]. Tan J reasoned that a *caveat* against release does not establish the *caveator's* status *vis-à-vis* a vessel in the same manner as the issuance of a writ *in rem*: *The Oriental Baltic* at [16]. This conclusion is, with respect, clearly right: a *caveat*, unlike timeous issuance of an admiralty writ, does not have the effect of conferring on a plaintiff the status of a statutory lien holder.

***The Bunga Melati 5* [2011] 4 SLR 1017 ("*The Bunga Melati 5*")**

2.24 Like *The Vasiliy Golovnin* [2008] 4 SLR 994 and *The Eagle Prestige* [2010] 3 SLR 294, respectively reviewed in the SAL Ann Rev for 2008 and 2010, this decision, which runs in excess of 60 pages, touches on important issues in admiralty law such as the standard of proof that must be met for the various requirements under s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HC(AJ)A") and the relationship between setting aside of an arrest of a vessel and striking out of a claim commenced by way of an admiralty writ. It also contains an extensive review of the case law relating to the various requirements in s 4(4) of the HC(AJ)A.

2.25 First, the facts of *The Bunga Melati 5*. The plaintiff had served the admiralty writ on a sister vessel ("Vessel") (but did not arrest her)

under s 4(4)(*b*)(ii) of the HC(AJ)A for unpaid bunkers pursuant to several contracts ("Contracts"). The plaintiff claimed that the Contracts had been brokered through an agency, Market Asia Link Sdn Bhd ("MAL"). The defendant applied to strike out the plaintiff's action under O 18 r 19 of the Rules of Court (Cap 322, R 5), or the court's inherent jurisdiction, on the basis that the defendant was not a party to the Contracts. Rather, the defendant asserted that the plaintiff had contracted with MAL directly, which had in turn contracted with the defendant in its capacity as a principal (as opposed to an agent). The defendant therefore contended that the plaintiff's claim in contract and unjust enrichment was plainly unsustainable and had to be struck out as frivolous and vexatious or an abuse of process. For substantially the same reason, the defendant applied to set aside the plaintiff's writ *in rem* under O 12 r 7 of the Rules of Court, arguing that since it was not liable to the plaintiff in either contract or unjust enrichment, it was not the "relevant person" under s 4(4)(*b*) of the HC(AJ)A. The defendant therefore asserted that the plaintiff had invalidly invoked the High Court's admiralty *in rem* jurisdiction by service of the writ on the Vessel.

2.26 Prior to the Singapore proceedings, the plaintiff had commenced attachment proceedings against another sister ship in the United States ("US"), in respect of its claims under two of the Contracts. However, the attachment order was eventually vacated by the US courts, and the plaintiff subsequently discontinued the US proceedings. The defendant argued in the alternative that these US proceedings operated as an issue estoppel and that the plaintiff's action *in rem* ought to be struck out on the ground that it was frivolous and vexatious or an abuse of process.

2.27 Additionally, the defendant also claimed that the plaintiff did not have the necessary *locus standi* to bring the action, since it had assigned its receivables to another entity, *ie*, BNP Paribas.

The existence and exercise of admiralty jurisdiction

2.28 As a preliminary matter (*Bunga Melati 5* at [23]), Belinda Ang Saw Ean J considered the implications of a defendant challenging a plaintiff's claim in an admiralty action *in rem*, as a matter of jurisdiction and on the merits. Ang J first clarified that where a defendant seeks to challenge the admiralty jurisdiction of the court under O 12 r 7 of the Rules of Court, the defendant ought to "set aside" the service of the writ. In contrast, where the defendant sought the court's relief under O 18 r 19 of the Rules of Court or pursuant to the court's inherent jurisdiction, the correct terminology to employ was to "strike out" the plaintiff's claim: *The Bunga Melati 5* at [25]. This distinction, however, goes beyond terminology: it reflects the difference between existence and exercise of the court's admiralty jurisdiction, as explained below.

2.29 Ang J also considered (rightly, it is respectfully submitted) that any arguments under O 12 r 7 and O 18 r 19 of the Rules of Court are conceptually distinct: *The Bunga Melati 5* at [28]. Under the former, the defendant is effectively arguing that the court has no jurisdiction to determine the matter. In contrast, a summary disposal of a plaintiff's claim under O 18 r 19 of the Rules of Court is the exercise of the court's jurisdiction to prevent an abuse of its process by allowing a completely hopeless or unsustainable claim to continue: *The Bunga Melati 5* at [28]. This distinction between setting aside of an admiralty action for want of admiralty jurisdiction and the striking out of the same is repeatedly emphasised throughout the judgment.

2.30 Ang J proceeded to consider under what circumstances the court would consider an application as coming under O 12 r 7, as opposed to O 18 r 19 if the defendant chooses to apply under both provisions, albeit in the alternative. This depends on whether the court could limit its inquiry to purely *jurisdictional* matters of fact or law: if so, an application under O 12 r 7 is the correct procedural route. Where the court is required to delve into *non-jurisdictional matters of fact or law*, *ie*, delve into the merits of the dispute, O 18 r 19 (if a defendant is minded to take a pre-emptory stab at defeating the claim) would be the correct procedural route.

2.31 With respect to the former categorisation, this involves the establishment of *jurisdictional facts*, *ie*, facts which have to be established as conditions precedent to the existence of the court's jurisdiction or the resolution of disputes over the correct answer to a jurisdictional question of law: *The Bunga Melati 5* at [31], [32] and [82]. The early resolution of such jurisdictional disputes, *prior to the determination of the merits*, is imperative. In contrast, non-jurisdictional matters, *eg*, the existence or veracity of non-jurisdictional facts, should not be resolved by the court under an application to set aside a writ under O 12 r 7 of the Rules of Court. The existence of these non-jurisdictional facts at this stage in the proceedings (*ie*, the determination of the court's jurisdiction) is instead to be assumed: *The Bunga Melati 5* at [32]. In other words, in an action to set aside a writ under O 12 r 7 of the Rules of Court, the court *should generally not proceed with an inquiry into the merits of the case*: *The Bunga Melati 5* at [82]. It is, however, conceivable that certain disputes may straddle both jurisdiction and merit. For instance, a claim for salvage or towage (potentially coming within ss 3(1)(*i*) and 3(1)(*j*) of the HC(AJ)A respectively) may be met by a response that the plaintiff had not rendered any such services. Presumably, in such cases, a court will still characterise the dispute as one going to the existence of jurisdictional fact and deal with it under O 12 r 7.

The decision on the merits of the case: By striking out application of the claim

2.32 On the facts of *The Bunga Melati 5*, the defendant had applied to strike out the plaintiff's claim on the basis that it was frivolous, vexatious and an abuse of process. This required, in effect, a consideration of the plaintiff's claim *on the merits*: *The Bunga Melati 5* at [36].

2.33 Ang J first considered the defendant's argument that the plaintiff did not have the requisite *locus standi* to bring its present action. The defendant's argument on this point centred on the fact that the invoices which the plaintiff had issued under the Contracts stated that "[a]ll proceeds hereunder are assigned to BNP Paribas". Ang J, however, made short shrift of this argument.

2.34 Ang J held that there had been no absolute assignment of the plaintiff's receivables to BNP Paribas: *The Bunga Melati 5* at [38]. In particular, Ang J did not consider the terminology of an assignment to be decisive and that the said invoices had directed the defendant to make payment into the plaintiff's account with BNP Paribas. If there had indeed been an assignment of receivables, as claimed by the defendant, such payment should instead have been made to BNP Paribas' account. Rather, Ang J accepted that the notice in the said invoices was merely confirmation of the fact that the plaintiff had granted BNP Paribas a floating charge over the sums standing to the credit of the plaintiff's account with BNP Paribas: *The Bunga Melati 5* at [38] and [39].

Striking out the plaintiff's claim in contract

2.35 Ang J proceeded to consider whether the evidence suggested that there had been a contractual relationship between the parties, via the agency of MAL. On the face of the pleadings, Ang J upheld the learned assistant registrar's decision to strike out the plaintiff's claim under O 18 r 19 of the Rules of Court.

2.36 Ang J considered that the plaintiff's pleadings had made reference to two e-mails as alleged evidence of two fixed price contracts between the parties. However, while these e-mails had contained a clause stating "[s]ellers/Suppliers General Terms and conditions of sale to apply", MAL's fax confirmations had stated the supply of bunkers to be governed by the "general terms and conditions contained in 'BIMCO STANDARD BUNKER CONTRACT'": *The Bunga Melati 5* at [47]. While MAL's managing director had filed an affidavit in support of the plaintiff's claim, this affidavit made no mention, *inter alia*, of any of the aforesaid fixed price contracts: *The Bunga Melati 5* at [48].

2.37 Furthermore, Ang J held that the plaintiff did not have an answer to the "clear and cogent evidence" from the defendant establishing the existence of a six-month Bunker Fixed Price Agreement ("BFPA") as well as nine other spot contracts between MAL and the defendant. Pursuant to the BFPA and the nine spot contracts with MAL, MAL was to supply bunkers to 13 vessels owned or operated by the defendant. Ang J reasoned that these contracts demonstrated "beyond doubt" that MAL had not been the defendant's agent *vis-à-vis* the plaintiff: *The Bunga Melati 5* at [45] and [49].

2.38 The plaintiff's alternative claim against the defendant had been founded on the basis that there was an agency by estoppel. To succeed, the plaintiff had to prove the existence of the following:

> (a) a representation made to the plaintiff that MAL had had the requisite authority to enter into the Contracts on the defendant's behalf;
>
> (b) that such a representation had been made by a person or persons who had "actual" authority to manage the defendant's business either generally, or with respect to the Contracts in particular; and
>
> (c) that the plaintiff had been induced by, *ie*, relied on, such a representation to enter into the Contracts with the defendant: *The Bunga Melati 5* at [51].

2.39 Ang J noted that there was no conclusive evidence of any such express representation having been made: *The Bunga Melati 5* at [54]–[59]. Her Honour placed particular emphasis on the plaintiff's failure to explain a letter from MAL to the defendant which had made reference to "a new fixed term supply contract" and reasoned that this letter as well as the contract referred therein was evidence of a contractual relationship between MAL and the defendant, as opposed to an agency relationship: *The Bunga Melati 5* at [56]. Ang J also held that there had been no implied representation from the defendant that MAL had in fact been the defendant's broker or agent: *The Bunga Melati 5* at [60].

2.40 Ang J further held that the evidence had failed to establish that there had been any representation made by a person with "actual" authority. In this regard, Ang J noted that the only alleged representation had been made by MAL itself, and that it is trite law that an agent cannot clothe itself with the requisite authority by virtue of its own representations: *The Bunga Melati 5* at [61].

2.41 With respect to the last element of reliance, Ang J held that the same was also absent, as the alleged matters relied upon by the plaintiff

all post-dated the conclusion and performance of the Contracts: *The Bunga Melati 5* at [62].

2.42 On the basis of the foregoing, Ang J struck out the plaintiff's claim in contract pursuant to O 18 r 19 of the Rules of Court.

2.43 Ang J also summarily dismissed the plaintiff's further claim in unjust enrichment. In this regard, Ang J held (following her finding of a contract between MAL and the defendant) that there had been no "unjust factor", given that the bunkers had been supplied to the defendant not by the plaintiff, but by MAL: *The Bunga Melati 5* at [65]. Second, by contracting with MAL, the plaintiff had borne all the risks that that had entailed, including the risk that MAL would not fully pay the plaintiff. In this regard, Ang J gave effect to the rule that the law of unjust enrichment could not be used to re-distribute risk expressly allocated under the contract in order to impose liability on a third party: *The Bunga Melati 5* at [65]. In addition, Ang J held that the defendant had changed its position *bona fide* by expending the bunkers, and paying MAL in settlement of its liability to MAL under the BFPA: *The Bunga Melati 5* at [66]. This therefore afforded the defendant an additional defence against the plaintiff's claim in unjust enrichment.

Issue estoppel

2.44 With respect to the defendant's plea of issue estoppel by virtue of the fact that the US Courts had vacated the attachment order, the issue which confronted Ang J was whether such vacation amounted to a final and conclusive judgment on the merits: *The Bunga Melati 5* at [70]. Ang J held that there had been no such final and conclusive judgment, as the US Courts had expressly recognised that the vacation of the attachment order "was not for a final determination of the merits of [the plaintiff's] underlying claim, and the Court did not purport to make such a final determination": *The Bunga Melati 5* at [73]. Accordingly, Ang J upheld the learned assistant registrar's refusal to strike out the plaintiff's claim under O 18 r 19 of the Rules of Court on the basis of issue estoppel.

Ang J's decision on jurisdiction under O 12 r 7 of the Rules of Court

2.45 Having struck out the claim under O 18 r 19, Ang J proceeded to consider the defendant's application to set aside the writ *in rem* under O 12 r 7 of the Rules of Court. Disagreeing with the decision of the learned assistant registrar below, she did not set aside the service of the writ under O 12 r 7. In arriving at this conclusion, her Honour undertook an extensive analysis of the case law pertaining to the various

elements (or "steps", the word used in the judgment) within s 4(4) of the HC(AJ)A.

2.46 At the outset of her Honour's analysis on the setting aside aspect of the matter, Ang J first considered the requirements for establishing the *existence* of the court's admiralty *in rem* jurisdiction under s 4(4) of the HC(AJ)A.

2.47 Her Honour held that the burden is on a plaintiff to establish the admiralty jurisdiction of the High Court: *The Bunga Melati 5* at [80]. Ang J further held that a plaintiff would have to satisfy five steps under s 4(4) of the HC(AJ)A:

> (a) show that he has a claim falling within s 3(1)(*d*)–(*q*) of the HC(AJ)A ("Step 1");
>
> (b) show that the claim arises in connection with a ship ("Step 2");
>
> (c) identify the relevant person, *ie*, the person who would be liable on the claim in an action *in personam* ("Step 3");
>
> (d) show 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) show that the relevant person was, at the time when the action was brought, either:
>
> > (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 a sister ship as respects all the shares in it ("Step 5").

2.48 Ang J took the opportunity to clarify that *jurisdictional facts* have to be proved by the plaintiff *on a balance of probabilities, and not on the standard of a good arguable case*: *The Bunga Melati 5* at [83]–[86], whether the jurisdictional fact relates to s 3(1) or s 4(4) of the HC(AJ)A. Insofar as the standard of proof applicable in the context of s 3(1) is concerned, her Honour's decision appears at first blush to be inconsistent with a dicta from *The Jarguh Sawit* [1997] 3 SLR(R) 829 in which the Court of Appeal observed that:

> … a plaintiff need only to show that he has a good arguable case that his cause of action falls within one of the categories of section 3(1) of the HC(AJ)A, in this case, ground (c).

2.49 Whilst accepting that the point is not entirely free from doubt, Ang J confined this observation to a situation where the matter in dispute is a jurisdictional question of law (as opposed to a jurisdictional fact). It may, however, be wondered how this rationalisation can be

squared with the Court of Appeal statement which follows immediately after that reproduced above, which suggests that the query may in fact straddle questions of law and fact:

> His objective is to persuade the court that there is *sufficient evidence* that a claim of the type specified in s 3(1)(*c*) exists. [emphasis added]

2.50 It may be that where the issue raised under Step 1 of s 4(4) of the HC(AJ)A concerns only a "pure" *jurisdictional question of law*, *eg*, where the plaintiff is required to demonstrate that his claim under s 3(1) of the HC(AJ)A is of a particular legal character (as opposed to one that straddles questions of law and fact), then the requisite standard is only that of a *good arguable case*: *The Bunga Melati 5* at [87].

2.51 Under Steps 2, 4, and 5 in Ang J's lexicon as described above, Ang J held that these concern the existence of jurisdictional facts: *The Bunga Melati 5* at [99] and [104]. Accordingly, the requisite standard of proof which a plaintiff has to satisfy under these Steps is that of a balance of probabilities: *The Bunga Melati 5* at [99].

2.52 Ang J considered Step 3 to be "the most troublesome limb of s 4(4)", because while it appears to concern a jurisdictional matter (being located amongst the other jurisdictional provisions of s 4(4)), it also concerns a matter of a non-jurisdictional character, *ie*, the issue of *in personam* liability of the relevant person. In this regard, Ang J noted that questions of liability would normally be a matter for trial or an application under O 18 r 19 of the Rules of Court: *The Bunga Melati 5* at [110]. In her Honour's view, *in personam* liability of the relevant person is not a jurisdictional fact within s 4(4) that entitles a shipowner to mount a challenge to the existence of admiralty jurisdiction via O 12 r 7. As her Honour recognised, such a position, however, runs counter to various decisions, such as *The Rainbow Spring* [2003] 2 SLR(R) 117, affirmed on appeal, [2003] 3 SLR(R) 362 ("*The Rainbow Spring*"), *The AAV* [1999] 3 SLR(R) 664, *The Thorlina* [1985-86] SLR(R) 258 ("*The Thorlina*"), *The Interippu* [1990] SGHC 131, which treated the question of *in personam* liability of the relevant person as a jurisdictional fact that can be dealt with under O 12 r 7.

2.53 In arriving at this conclusion, Ang J relied primarily on a number of UK, Australian and Singapore decisions. The *locus classicus* on the point is the decision of Willmer J in *The St Elefterio* [1957] P 179 ("*The St Elefterio*") (which was applied in an earlier decision: *The Wigwam* [1981-82] SLR(R) 689 ("*The Wigwam*"), affirmed on appeal [1984] SGCA 24). In *The St Elefterio*, the defendants had attempted to set aside the plaintiffs' action *in rem* on the ground that the court's admiralty jurisdiction had been improperly invoked. The defendants in that case had raised various defences to the plaintiffs' claim (but not, significantly, the absence of any contractual party between the plaintiff

and defendant shipowner), and argued that they therefore could not be liable on any claim *in personam*. However, Willmer J refused to consider the validity of the defendants' putative defences, and refused to set aside the arrest of the defendants' vessel. Were the claim utterly lacking in merit, his Lordship considered striking out to be the proper procedural route.

2.54 Her Honour also relied on *The Moschanthy* [1971] 1 Lloyd's Rep 37 at 42 ("*The Moschanthy*"), in which (perhaps more pertinently to the issue at hand), the defence that there was no contract of carriage entered into between the shipowner and the plaintiff cargo interest was raised. Brandon J, applying the approach in *The St Elefterio*, did not consider this issue as going towards jurisdiction. It should, however, be noted that Brandon J did not make this observation in the *specific* context of *in personam* liability of the relevant person and in fact, appeared to have applied *The Elefterio*'s approach in the context of the English equivalent of s 3(1) of the HC(AJ)A. *The Elefterio* and *The Moschanthy* were applied in *The Yuta Bondarovskaya* [1998] 1 Lloyd's Rep 357 at 359–361, which concerns the arrest of a demise chartered vessel for unpaid bunkers. The demise charterer's position was that the bunkers were in fact supplied to the time sub-charterers; in other words, absence of *in personam* liability on their part. Clarke J rejected the test of a "good arguable" case for the purposes of the *in personam* liability element in the English equivalent of s 4(4) of the HC(AJ)A. His Lordship's conclusion was in part buttressed by the fact that in the UK, a plaintiff is entitled to arrest a vessel as of right (in contra-distinction to the position in Singapore where the court has a discretion whether to issue a warrant of arrest or not).

2.55 Two other decisions were relied upon by her Honour. The Australian High Court decision of *The Iran Amanat* (1999) 196 CLR 130 (which involved an unpaid bunker claim supplied to a vessel whilst on a time charter) and which applied *The St Elefterio* and *The Moschanthy* approach and left the ultimate question of who were the contractual parties to the bunker supply agreement to the trial court. It was a case where the only relief was the setting aside of an arrest without an alternative striking out plea.

2.56 *The Wigwam*, a decision alluded to above, raises a similar factual issue: was a contract for the supply of goods and materials entered with the shipowner or its agent albeit in its own name? Numerous affidavits containing conflicting allegations were filed on the issue, which led F A Chua J and the Court of Appeal to decide that the matter could only be resolved at trial.

2.57 Ang J considered (*The Bunga Melati 5* at [133]), that an "unqualified" approach to Step 3 of s 4(4) "had much to commend it".

In other words, the court will simply assume the truth of the plaintiff's non-jurisdictional facts, and the success of the plaintiff's action as pleaded, and ask who *would be* liable in an action *in personam* if the plaintiff's claim succeeds. If the defendant seeks to challenge that assumption and summarily dispose of the plaintiff's action because he has an iron clad defence, the correct procedure would be to take out an application to strike out the plaintiff's action on the merits under O 18 r 19, *and not* O 12 r 7 of the Rules of Court: *The Bunga Melati 5* at [133] and [139]. He would then be challenging the exercise not existence of the court's admiralty jurisdiction. Nonetheless, Ang J also held that, if for any reason the defendant makes the wrong procedural choice and applies pursuant to O 12 r 7 (as opposed to O 18 r 19) to strike out the plaintiff's claim in an action *in rem* on the grounds that the defendant was not the relevant person under s 4(4), the court could still exercise its inherent jurisdiction to strike out the plaintiff's action. The rationale behind this is that the court would not allow its process to be abused by permitting the commencement of actions which are plainly lacking in *bona fides* or merit: *The Bunga Melati 5* at [133] and [138].

2.58 Case law aside, in coming to this decision, Ang J also considered that the phraseology of s 4(4), *ie*, "would be liable" (as opposed to "is liable"), lends credence to the argument that the court should simply *assume* the liability of the defendant in an *in personam* action. In contrast, conducting an investigation into whether the defendant would truly be liable in an action *in personam* would be tantamount to determining the defendant's liability at an early stage, *ie*, jurisdictional stage. This would have the effect of rendering a trial on the merits completely unnecessary: *The Bunga Melati 5* at [123]. Accordingly, where a defendant seeks to dispute his liability to the plaintiff in an action *in personam*, he would not be contesting the *existence* of the court's admiralty jurisdiction, but rather, the *exercise* of that jurisdiction, by placing the sustainability of the plaintiff's claim in issue: *The Bunga Melati 5* at [133]. It is for this reason that the setting aside application in the instant case, which was based on the lack of *personam* liability of the defendant shipowner's part, did not succeed.

2.59 Her Honour's discussion on the *in personam* element in s 4(4) of the HC(AJ)A is perhaps the most significant aspect of the decision. Having extensively analysed the two diverse lines of authorities, her Honour came down in favour of the *The St Elefterio* approach, backed in the process by one Court of Appeal (*The Wignam*), but having also to explain away two others (*The Rainbow Spring* and *The Thorlina*) as cases which, on the facts, would have warranted a striking out of the claim anyway: *The Bunga Melati 5* at [138]. This issue awaits further clarification from the Court of Appeal.

Ang J's comments on The Vasiliy Golovnin

2.60 Having addressed the issues of the case before her, Ang J proceeded to consider the argument that the Court of Appeal in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 which introduced a separate requirement of merits that a plaintiff has to satisfy in order to invoke the admiralty *in rem* jurisdiction of the court. Ang J rejected the defendant's argument (and overturned the decision of the learned assistant registrar) that any such requirement for the plaintiff to show a good arguable case on the merits is implicit in (and not independent of) the HC(AJ)A: *The Bunga Melati 5* at [142] and [149].

2.61 The plaintiff has appealed to the Court of Appeal against Ang J's decision to strike out its claim pursuant to O 18 r 19 of the Rules of Court. This appeal was heard by the Court of Appeal on 18 January 2012. A brief judgment ([2012] SGCA 11) was rendered, overturning the striking out aspect of the decision, with the Court of Appeal remarking that a full reasoning of the court would be released in due course.

SHIPPING LAW

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Introduction

2.62 In *The Dolphina* [2012] 1 SLR 992, the High Court was initially presented with a classic case for misdelivery of cargo without presentation of a bill of lading only to later uncover that such characterisation had oversimplified the dispute between the parties. Crucial evidence was later introduced after two tranches of evidential hearings and the plaintiff subsequently added a claim for conspiracy.

2.63 Belinda Ang Saw Ean J had to consider a wide range of legal issues in the course of reaching her decision. These included issues of title to sue on a bill of lading contract, conflict of laws, delivery of cargo against a letter of indemnity and civil conspiracy.

Background

2.64 The plaintiff, a Chinese bank, Bank of Communications Co Ltd ("BOC") commenced the action against the defendant owner of *Dolphina*, Universal Shipping Group Inc ("Universal") (who is the

owner of the vessel *Dolphina*) for misdelivery of cargo without the production of a bill of lading.

2.65 The underlying transaction was a sale of palm oil from a Malaysian company, Kwantas Oil Sdn Bhd ("KOSB") to a Chinese company, Zhejiang Zhongguang Industry Co Ltd ("Zhongguang") ("Transaction"). One of the shareholders and directors of KOSB, namely, Steve Kwan, was also a director of Universal and co-owner of *Dolphina*. Several other companies related to KOSB or to Steve Kwan through his common directorships ("Related Companies") had various roles in the Transaction.

2.66 The sale contract was made on or around 16 January 2008 and provided for shipment to be made during March 2008 and before 31 March 2008. Payment was to be made by draft at 90 days after sight by the buyer, Zhongguang, opening an irrevocable letter of credit in favour of the seller, KOSB. KOSB chartered *Dolphina* from Universal under a voyage charterparty dated 19 February 2008 on an amended Vegoilvoy form to carry the cargo from Kuantan, Malaysia to Huangpu, China.

2.67 KOSB bought the cargo from a Malaysian company, Felda, in March 2008 to fulfil the Zhongguang contract.

2.68 Despite Zhongguang's failure to open the letter of credit in accordance with the contract, the entire cargo was shipped on 23 March 2008 as part of a bulk. On 27 March 2008, KOSB issued a letter of indemnity to Universal for delivery of the cargo in Huangpu without production of the original bills of lading. The bulk of the cargo was discharged into shore tanks belonging to a company named Huanan Oils & Fats Industrial Co Ltd and released to various end-buyers in China between April and June 2008.

2.69 In June 2008, on the application of Zhongguang who provided it with a copy of the Zhongguang contract marked "Good Copy", BOC issued an irrevocable letter of credit in favour of KOSB for the cargo. The Good Copy was different from the original Zhongguang contract only in that the Good Copy provided for shipment during June 2008 and before 30 June 2008. KOSB drew a bill of exchange to the order of Maybank on BOC, who paid Maybank against documents presented through Maybank (whose role was not made clear in evidence). This included the bill of lading endorsed by KOSB to BOC. BOC was not paid by Zhongguang and found when it tried to demand delivery of the cargo that it had been released in April 2008 and dispersed.

2.70 BOC's action was originally mounted and tried on the basis of breach of contract due to misdelivery of cargo. At the conclusion

of trial, the judge had serious misgivings about some fundamental assumptions made by both parties and sought clarifications of her doubts. On further probing by the judge, and after presentation of further evidence and submissions, it eventually became evident that the case should not be characterised simply as one for delivery of cargo without production of bills of lading. BOC applied to amend its pleadings to include a claim in civil conspiracy. This was allowed, taking into account the late disclosure and unusual route by which relevant evidence was produced by Universal.

2.71 Eventually, two main causes of action were considered: breach of contract and the tort of conspiracy. Belinda Ang Saw Ean J's judgment dealt with the following issues:

(a) the proper law governing the bill of lading;

(b) whether Universal was in breach of the contract of carriage for delivery of cargo without the production of the original bill of lading;

(c) whether BOC was the lawful holder of the bill of lading such that it had title to sue Universal in contract; and

(d) whether BOC could succeed in its tortious claim for conspiracy against Universal.

Proper law of the bill of lading

2.72 BOC argued that the proper law governing the bill of lading was English law. Universal argued that the contract was governed by Malaysian law.

2.73 Although both parties tendered expert evidence, the judge held that opinions of expert witnesses were of little value as she had to apply Singapore's own conflict of law rules to the question of governing law. She followed the three-stage test explained in *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285. The first stage is to examine whether the contract expressly states what the governing law should be. In the absence of such express provision, one moves to the second stage to examine the intention of the parties. Where parties' intention as to the governing law is unascertainable, one proceeds to the third stage to determine which system of law the contract has its closest and real connection.

2.74 The bill of lading contained no choice of law clause. However, the bill of lading expressly incorporated "all conditions, liberties and exceptions whatsoever of [the February Charterparty]". Clause 32 of the

Charterparty reads as follows: "THIS CP TO BE GOVERNED BY ENGLISH LAW".

2.75 Belinda Ang Saw Ean J held that the incorporation clause in the bill of lading was sufficient to incorporate the choice of law clause under the charterparty, with the addition of the words "or bill of lading" after the word "CP" in the choice of law clause. As there was an express choice of law agreement, it was unnecessary to go to the other stages to determine the governing law.

Whether Universal was in breach of contract for delivery of cargo without production of bill of lading

2.76 Like most bills of lading, the bill of lading in question required delivery of the cargo to be effected upon presentation of the bill of lading (or any one of the original set of three bills of lading). Universal delivered the cargo without the presentation of the original bill of lading but did so against a letter of indemnity from KOSB.

2.77 Clause 19 of the Charterparty provided that: "IN THE ABSENCE OF ORIGINAL BL/S AT DISCHARGE PORT, OWNER TO DISCHARGE AND RELEASE ENTIRE CARGO TO RECEIVERS AGAINST PRESENTATION OF CHRTR'S LOI". The judge held that although this clause was incorporated into the bill of lading contract, it did not oblige the shipowner to discharge the cargo without production of the bill of lading. It permitted the shipowner to do so, if necessary, and to afford the shipowner the benefit of an indemnity from the charterer in case liability should befall the shipowner as a result of the discharge. Clause 19 was therefore no defence to a claim by the bill of lading holder for delivery of cargo without production of a bill of lading.

Whether BOC had title to sue Universal pursuant to section 5(2)(b) of the Carriage of Goods by Sea Act

2.78 Section 2 of the Carriage of Goods by Sea Act 1992 (c 50) (UK) ("COGSA") provides that a person who becomes the "lawful holder" of a bill of lading shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract. The term "lawful holder" is defined under s 5(2)(b) COGSA which states that the references to a "holder of a bill of lading are references to … a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill".

2.79 Section 2(2) COGSA provides further that a person who becomes the lawful holder when possession of the bill no longer gives a right to possession of the goods against the carrier will not have any rights transferred to him, subject to a couple of exceptions.

2.80 Evidence and explanation on the chain of endorsements and transfers of the bills of lading were incomplete. Universal issued the bill of lading to Felda, as the named shipper. The reverse side of the bill of lading carried three endorsements: an endorsement in blank by Felda, an endorsement by Maybank to KOSB, and an endorsement in blank by KOSB. The circumstances in which they were executed were unknown. It seemed that BOC obtained the bill of lading endorsed in blank by KOSB, amongst the documents presented to BOC by Maybank.

2.81 An interesting argument raised by Universal was that the bill of lading was "spent" as of the discharge of the cargo so that it no longer gave BOC any rights under s 2 COGSA by the time BOC came into possession of it. Belinda Ang Saw Ean J did not have to decide this issue because she found that both parties had assumed wrongly that KOSB's endorsement of the bill of lading in blank was valid.

2.82 The judge found that KOSB's endorsement of the bill of lading was fraudulent and ineffective to make its transferee a "holder" for the purpose of s 5(2)(b) COGSA. This was because KOSB had given a letter of indemnity to Universal for discharge of the cargo, the terms of which required KOSB to return the bill of lading to Universal as soon as it came into KOSB's possession. Yet, KOSB proceeded to endorse the bill of lading in blank, falsely representing that it still had legal effect, and intending that it be so treated, as part of a raft of measures to defraud third parties. Belinda Ang Saw Ean J held that s 5(2)(b) COGSA required a valid endorsement. A fraudulently endorsed bill of lading was as much a nullity as a forged bill of lading. In the circumstances, BOC never acquired any rights to sue Universal under the bill of lading.

2.83 BOC therefore failed in its claim under the bill of lading against Universal.

Conspiracy claim

2.84 BOC's alternative, amended claim is for conspiracy by Universal and the Related Companies in inducing BOC to, amongst other things, issue the letter of credit upon acceptance of the bill of lading and make payment to KOSB accordingly. It relied on both forms of conspiracy in the alternative: conspiracy by lawful means with the predominant purpose of causing injury to the plaintiff; and conspiracy by unlawful

means to commit an unlawful act with the intention of injuring the plaintiff.

2.85 Belinda Ang Saw Ean J agreed with counsel for Universal that the two forms of conspiracy are mutually inconsistent, in that BOC could not rely on lawful means conspiracy if it was asserting fraud or any other unlawful means and it could not rely on unlawful means conspiracy if it did not plead something unlawful like fraud. However, it was permissible to plead both in the alternative in abundance of caution.

2.86 Ang J found as a fact that the "Good Copy" (containing a false shipment due date) was executed for the express purpose of deceiving BOC into approving the opening of the June letter of credit. Therefore, the relevant conspiracy to consider must be conspiracy by unlawful means.

2.87 In order for a company to be fixed with the requisite intention or state of mind to commit fraud, it is necessary to pinpoint some human actor with that state of mind and to determine whether, as a matter of law, that state of mind also counts as the company's via a process known as *attribution*. Attribution can take place through the doctrine of vicarious liability, agency or identification. Vicarious liability was not relevant in this case because BOC's claim was that Universal was liable for its own tort of conspiracy rather than that of any of its servant's. That left either agency or identification.

2.88 Universal's witnesses who testified all denied personal knowledge of the Transaction. Notwithstanding this, there was evidence permitting the judge to infer that Steve Kwan, who was not one of the witnesses in the proceedings was aware of the details of the Transaction including the circumstances under which the bill of lading was endorsed to BOC when it should not have been so endorsed.

2.89 The judge then dealt with the issue of whether Steve Kwan's knowledge may be attributed to Universal. Steve Kwan was a shareholder and director of Universal and KOSB.

2.90 Under the doctrine of agency, the knowledge of an agent acquired outside the course of his agency cannot be attributed to his principal unless the principal is under a duty to inquire into the matters of which the agent is aware. The doctrine did not apply in this case. It was held that Steve Kwan's knowledge could not be attributed to Universal under the doctrine of agency because any knowledge by Steve Kwan in relation to the fraud was acquired by virtue of his directorship of KOSB and Universal was not under a duty to investigate the letter of credit transaction which was KOSB's affair.

2.91 Nonetheless, the judge held that Steve Kwan's knowledge may be attributed to Universal under the doctrine of identification, which is sometimes known as the *directing mind and will* or *alter ego* doctrines. Unlike the doctrines of agency and vicarious liability which treat the company and the individual concerned as two different legal persons, the doctrine of identification treats the company and the individual as the same legal person. The judge held that, in this case, Universal should be identified with the person or persons who could cause it to combine with others (such as KOSB) so as to harm BOC. These persons would be Universal's board of directors.

2.92 In addition to being a director of Universal and co-owner of the *Dolphina*, Steve Kwan was actively involved in the management of Universal's shipping business and affairs relating to the *Dolphina*. Ang J concluded that Steve Kwan's failure to testify meant that there was nothing to rebut the adverse inference drawn against Universal that, for the purposes of unlawful means conspiracy, Steve Kwan's knowledge and state of mind fell to be treated as those of Universal's. In addition, she found as a fact that Universal already knew, whether through Steve Kwan or otherwise, that the cargo had been discharged in April against the letter of indemnity and that the bill of lading was supposed to be returned to Universal once it was obtained by KOSB. Knowing this, Universal was in a position to prevent KOSB from effecting the fraud on BOC (which Universal knew about) by simply demanding the return of the bill of lading. Steve Kwan did not testify and Universal was unable to overcome the adverse inference drawn against him and attributed to Universal.

2.93 The judge therefore allowed BOC's claim against Universal in the tort of conspiracy.

AVIATION LAW

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2.94 In 2011, no cases on aviation law were reported in the Singapore Law Reports.