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Case Note

INTERPLEADING THE OW SAGA

Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd
[2015] 4 SLR 1229

Interpleader relief is typically offered to an applicant who faces adverse claims and is in a legal dilemma as to which competing claimants to pay. The scope and purpose of interpleader relief was recently tested in a bunker supply chain scenario. Under a supply chain, would interpleader relief save an end-buyer from the dilemma of facing claims from an intermediary supplier as well as claims from an end supplier? This article seeks to examine the decision in a recent case involving the above-mentioned scenario and, in particular, review and comment on the preconditions of interpleader relief.

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I. Introduction

1 The collapse of a major commodities supplier would usually spawn countless litigation proceedings worldwide.[1] The collapse of the OW conglomerate and its subsidiaries in various jurisdictions was no different. Almost immediately, a myriad of arbitration and litigation proceedings were commenced worldwide between various parties in the bunker supply chain.

2 In Singapore, the OW saga culminated in the case of *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd*[2] ("*Precious Shipping*") which was a colossal hearing involving multiple parties and applications for interpleader relief. This article seeks to examine the decision reached in *Precious Shipping* and, in particular, the second and third preconditions of interpleader relief: (a) the requirement that the adverse claims must cross a *prima facie* threshold;

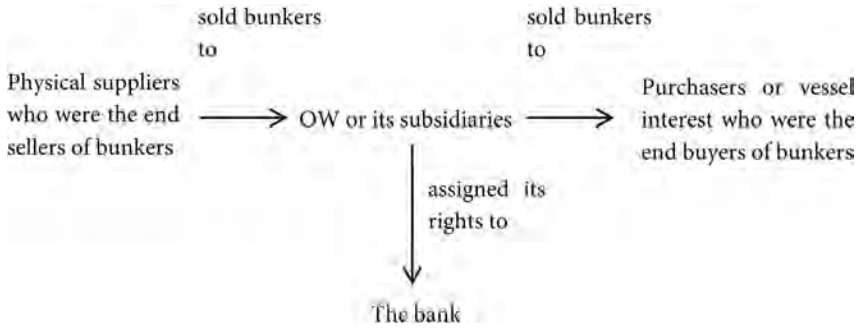
1 See the example of the collapse of Metro Trading International Inc and Metro Oil Corp in *Glencore International AG v Alpina Insurance Co Ltd (No 2)* [2004] 1 Lloyd's Rep 567.

2 [2015] 4 SLR 1229.

and (b) the requirement of symmetry for the adverse claims. This article seeks to argue that the *prima facie* threshold should not be a relevant requirement for interpleader relief. The article will also discuss the nature of symmetry needed in order for competing claims to be adverse.

II. The facts

3 The common denominator behind the relationship of the parties in most OW legal proceedings can be summarised in the following diagram:



4 As shown in the above diagram, physical suppliers ("the Suppliers") sold bunkers to OW or its subsidiaries ("OW"). OW, as contractual suppliers, then on sold the bunkers to purchasers who were more often than not vessel owners, charterers or agents ("the Purchasers"). The bunkers were usually delivered by the Suppliers directly to Purchasers' vessels.

5 OW entered into an omnibus security agreement with a syndicate of banks ("the Bank"). As part of the agreement, OW assigned its rights, title, and interest in its company's and its subsidiaries' receivables to the Bank. The Bank was therefore entitled to the sale proceeds of the bunkers payable to OW.

6 Under normal circumstances, OW will pay for the bunkers purchased from the Suppliers. The Purchasers will then pay for the bunkers purchased from OW, just like in every supply chain scenario. However, in the bunkering industry, it is very common for the Suppliers to deliver bunkers on board vessels even when the purchase price of the bunkers has not been paid to the Suppliers. To protect the Suppliers' position, a clause which retains title in favour of the Suppliers in the event the purchase price of the bunkers is not paid by OW to the Suppliers is usually included inside the contract of sale.

7 Around November 2014, OW became insolvent due to widespread fraud. The bunker supply chain was broken by reason of OW's inability to pay the Suppliers. All entities entitled to the sale proceeds of the bunkers, that is, the Suppliers, OW[3] and the Bank, contemplated commencing proceedings against the Purchasers for the recovery of the invoice price of the bunkers. The claims of OW and the Bank against the Purchasers would arise from the contract for sale of bunkers between OW and the Purchasers. The Suppliers would naturally not make a claim against OW as OW was in liquidation. As such, the Suppliers sought to recover the price of the unpaid bunkers from the Purchasers. The contemplation of the various parties eventually manifested in a variety of actions ranging from the arrest of vessels[4] to the sending of acrimonious letters threatening legal proceedings and prospective arrests.

8 The Purchasers, faced with a multitude of belligerent threats, commenced interpleader proceedings against the Suppliers, OW as well as the Bank. Within the Singapore jurisdiction, there were at least 15 originating summonses for interpleader relief filed in relation to the OW fallout. The Singapore High Court judiciously categorised and organised the various applications to be heard expeditiously. The bulk of the originating summonses was heard in *Precious Shipping*.[5]

III. Summary of *Precious Shipping*

9 In *Precious Shipping*, the dominant issue that arose was whether the Purchasers were entitled to interpleader relief. The stances adopted by the various parties drew themselves into two distinct camps. On one side, most of the Suppliers were allied with the Purchasers in support of interpleader relief. On the other side, OW and its subsidiaries aligned themselves with the Bank in opposition to interpleader relief.[6]

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3 As OW and its subsidiaries were insolvent and in liquidation, the decision to recover losses on behalf of OW would technically not stem from OW. Instead, such a decision would emanate from its liquidators. Indeed, one preliminary issue which arose in *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [26] was whether leave was required to commence interpleader proceedings against OW, which was in liquidation. The court found that leave was required and was of the view that the balance of convenience and demands of justice favoured the grant of leave.

4 *Hyundai Merchant Marine Co Ltd v OW Bunker Middle East DMCC (Korea Division)* (unreported) HC/OS 144/2015; *The Xin Chang Shu* [2016] 1 SLR 1096.

5 There were a total of 13 originating summonses heard in *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229.

6 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [13]–[16].

10 The preconditions of interpleader relief are as follows: (a) the applicant has to be under a liability for any debt, money, goods or chattels; (b) the applicant has to have an expectation that he would be sued by at least two persons; and (c) there has to be adverse claims for the debt, moneys, goods or chattels from the persons whom the applicant expected would bring suit.[7]

11 The first precondition was not disputed by all parties.[8] However, the parties disagreed on whether the second and third preconditions had been satisfied.

IV. *Prima facie* case required

12 In order to satisfy the second precondition, the Purchasers and majority of the Suppliers had to satisfy the court that the Purchasers had an expectation to be sued by at least two persons. The majority of the Suppliers agreed that the Purchasers had to show that the two adverse claimants (that is, the Bank/OW and the Suppliers) have a *prima facie* cause of action against the Purchasers[9] ("the *prima facie* test").

13 With regard to the *prima facie* causes of action, the Suppliers raised a multitude of potential causes of action which could allegedly be mounted against the Purchasers. These causes of action included the tort of conversion, bailment, breach of collateral contracts, breach of fiduciary agent/relationship, unjust enrichment and maritime liens.[10]

14 On the other hand, the Bank's and OW's causes of action were that of a simple contractual debt under an invoice. The Bank and OW further argued that the alleged causes of action raised by the Suppliers were legally and factually unsustainable and were not adverse to the Bank's and OW's claims against the Purchasers.

15 The court concluded that the Suppliers' causes of action were legally and factually unsustainable and did not disclose any *prima facie* case for relief.[11] The court relied on a host of authorities beginning with

7 See O 17 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

8 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [28].

9 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [29].

10 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [35]–[55].

11 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [37]–[55]. The scope of this article does not encompass the issue of whether the causes of action mounted by the Suppliers were factually or legally

(*cont'd on the next page*)

Watson v Park Royal (Caterers) Ltd[12] ("*Watson*") to a multitude of Hong Kong cases, which highlighted the need for the existence of a *prima facie* case before interpleader relief could be granted.[13]

16 The court explained that although there were various expressions used – "*prima facie*", "good cause of action", "real foundation" and "question to be tried", the essential questions can be couched as follows: Does the applicant face a genuine threat of multiple proceedings, and do the competing claims have an objective basis in fact and law[14] (that is, the *prima facie* test)?

17 The court further explained that the question as to whether there is a *prima facie* case is not a subjective apprehension that competing claims will be brought against him. Instead, the question is whether the competing claims have an objective basis in law and fact.[15] In particular, the court had strong words for would-be applicants of interpleader relief. The court cautioned that interpleader relief exists for the hapless and innocent but not the flighty and skittish. Nervous or overly cautious stakeholders cannot hide themselves behind the skirts of the courts at the slightest sign of controversy. The office of interpleader is neither a licence for applicants to abdicate their duty to conduct an independent legal assessment of the tenability of the potential claims they face nor an "insurance policy" against potential litigation.[16]

V. Is a *prima facie* test really required?

18 It is submitted that the *prima facie* test does not sit well with the second precondition of interpleader relief.

19 First, the reliance on the cases which advocate the *prima facie* test may have been misplaced. In *Watson*, Edmund Davies J (as he then was) held that "the discretionary relief of interpleader will not be granted unless there appears to be some real foundation for the

sustainable. Instead, the focus of the article is on the requirements and preconditions of interpleader relief.

12 [1961] 1 WLR 727.

13 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [30]–[32]. See also *Watson v Park Royal (Caterers) Ltd* [1961] 1 WLR 727 at 734; *Chan King Sheen v KC Tsang & Co* [2002] 3 HKC 209; and *DLA Piper Hong Kong v China Property Development (Holdings) Ltd* [2010] HKCU 154.

14 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [33].

15 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [33].

16 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [33].

expectation of a rival claim".[17] Curiously, there is no mention of the requirement of a *prima facie* case in *Watson*. The test as cited by *Watson* was instead a "real foundation for the expectation of a rival claim" ("the real foundation test").

20 Indeed, in the Hong Kong authorities which were cited in *Precious Shipping*, such as *Chan King Sheen v KC Tsang & Co*[18] ("*Chan King Sheen*") and *DLA Piper Hong Kong v China Property Development (Holdings) Ltd*[19] ("*DLA Piper*"), there was little discussion or elaboration as to how the expectation of being sued is linked to the *prima facie* test.

21 Surprisingly, the Hong Kong Court of Appeal in *Chan King Sheen* specifically highlighted the real foundation test in *Watson* as the axiomatic test for interpleader relief.[20] In doing so, reference was made to another Hong Kong Court of Appeal case, *NYK (Hong Kong) Ltd v Wilfond Ltd*[21] ("*NYK Ltd*"). It is worthwhile to note that in *NYK Ltd*, there was absolutely no reference to or discussion about the requirement for a *prima facie* case. Instead, in *NYK Ltd*, the Court of Appeal, when explaining the words "expects to be sued", relied on the holdings in *Watson* that interpleader relief will not be granted unless there appears to be some "real foundation for the expectation of a rival claim".[22] Despite the absence of any substantiation for the *prima facie* test, *Chan King Sheen* went on to conclude that "more importantly, there can be no real foundation for any expectation to be sued unless a *prima facie* case exists".[23] It is respectfully submitted that there was a leap of logic on the Hong Kong Court of Appeal's part to conclude that the relevant test is the *prima facie* test when the cases cited therein pointed to the real foundation test.

22 Likewise, in the case of *DLA Piper*, the Hong Kong Court of Appeal referred to the cases of *De La Rue v Henru, Peron & Stockwell Ltd*[24] ("*De La Rue*") and *Tsun Fat Finance Co Ltd v Commissioner for Police*[25] ("*Tsun Fat Finance*"), which are authorities that purportedly support the *prima facie* test.[26] However, in the case of *De La Rue*, the English court made no mention whatsoever of the requirement of a

17 *Watson v Park Royal (Caterers) Ltd* [1961] 1 WLR 727 at 734.
18 [2002] 3 HKC 209.
19 [2010] HKCU 154.
20 *Chan King Sheen v KC Tsang & Co* [2002] 3 HKC 209 at 221, [25].
21 [1997] 3 HKC 127 at 135H–136C.
22 See *NYK Ltd (Hong Kong) Ltd v Wilfond Ltd* [1997] 3 HKC 127 at 136A.
23 *Chan King Sheen v KC Tsang & Co* [2002] 3 HKC 209 at 221, [26].
24 [1936] 2 KB 164.
25 [2002] 3 HKC 232 at 246.
26 See *DLA Piper Hong Kong v China Property Development (Holdings) Ltd* [2010] HKCU 154 at [22].

prima facie case, much less any discussion of the same. Similarly, in the case of *Tsun Fat Finance*, the Hong Kong court did not hold that the *prima facie* test was a valid requirement for the second precondition of interpleader relief. Quite the contrary, one of the grounds for dismissing the interpleader relief in *Tsun Fat Finance* was that the defendant never received any threats or intimation of legal action.[27] It is submitted that this ground of dismissal bears a closer affinity to the real foundation test rather than the *prima facie* test. As such, a closer analysis of the above authorities relied on in *Precious Shipping* shows that the reliance on the above Hong Kong cases in support of the *prima facie* test may have been misplaced.

23 Second, it is not conclusive that the *prima facie* test was adopted by all jurisdictions across the Commonwealth. Quite the opposite, there are clear authorities which lean towards the real foundation test instead of the *prima facie* test. As highlighted above, *NYK Ltd* is one such example.[28] The Hong Kong Court of Appeal in *NYK Ltd* went on to endorse the words of Sir John Stuart V-C in *Diplock v Hammond*:[29]

> [T]he principle of interpleader relief is, that the holder of a fund in which he has no interest, but which is claimed by two parties, shall not be harassed by claims made upon him by the adverse parties, who threaten to sue him alone, instead of proceeding to litigate their rights between themselves.

Again, the absence of the *prima facie* case requirement is apparent. Instead, the words "threaten to sue" lend support towards the real foundation test.

24 Moving back to *Watson*, the English court cited several old cases such as *Issac v Spilsbury*,[30] *Harrison v Payne*[31] and *Sharpe v Redman*[32] as authorities supporting the real foundation test. These cases do not state that the *prima facie* test is the right test for the second precondition for interpleader relief. Instead, these old English cases all point towards the real foundation test as the appropriate test. The court in *Watson* went on to opine that "the fact that these are in the words of the district registrar, 'somewhat elderly authorities' I think adds to their weight rather than diminishes it".[33] This clearly shows a strong endorsement for such older authorities in support of the real foundation

27 See *Tsun Fat Finance Co Ltd v Commissioner for Police* [2002] 3 HKC 232 at [33] and [70].
28 See *NYK Ltd (Hong Kong) Ltd v Wilfond Ltd* [1997] 3 HKC 127 at 136A.
29 (1854) 23 LJ Ch 550.
30 (1833) 2 Dowl 211.
31 (1836) 2 Hodg 107.
32 (1837) Will Woll & Dav 375.
33 *Watson v Park Royal (Caterers) Ltd* [1961] 1 WLR 727 at 734.

test as the appropriate test for determining whether a person expects to be sued.

25 In *Alliance Bank Malaysia Bhd v Hapsah bt Md Nor*[34] ("*Alliance Bank*"), it can be inferred from the Malaysian court's words that, unlike the findings of *Precious Shipping*, a subjective apprehension that competing claims may be brought against an applicant would suffice to show an expectation to be sued. The Malaysian court held that the precondition of "expects to be sued" has been satisfied if the applicant *expects* the adverse parties to follow through with a formal demand in writing from their solicitors and legal action to be taken should an interpleader relief not be taken up.[35] So long as the applicant has an expectation of a legal action being taken against him, it is sufficient to meet the precondition of "expects to be sued".[36] The court emphasised that "an expectation of being sued would suffice rather than actually being sued".[37] In light of the above authorities cited, it is submitted that in the Commonwealth, there is still much support for the real foundation test as opposed to the *prima facie* test.

26 Third, the wording of O 17 r 1 of the Rules of Court[38] does not envisage a high objective threshold such as the *prima facie* test. In O 17 r 1, the words plainly provide that a person may apply to the court for interpleader relief if he, *inter alia*, "has been or expects to be sued by 2 or more parties". There are therefore two tiers which may be satisfied. The applicant either has been sued or expects to be sued. It is submitted that the word "expect"[39] implies that a subjective standard should be applied to the applicant's state of mind. Such a subjective standard can be inferred from not only the Malaysian courts[40] but also the Hong Kong courts. In *DLA Piper*, the Hong Kong Court of Appeal opined that Fung J had correctly stated that an applicant is entitled to interpleader relief when, *inter alia*, he is sued or *fears* that he may be sued by adverse parties.[41] Surely the expectation or fear of suit that one possesses must fall under his subjective state of mind.

27 The question should therefore be viewed purely from the applicant's perspective as to whether or not an adverse suit is a likely to

34 [2011] 7 MLJ 494.
35 See *Alliance Bank Malaysia Bhd v Hapsah bt Md Nor* [2011] 7 MLJ 494 at [10].
36 *Alliance Bank Malaysia Bhd v Hapsah bt Md Nor* [2011] 7 MLJ 494 at [10].
37 *Alliance Bank Malaysia Bhd v Hapsah bt Md Nor* [2011] 7 MLJ 494 at [10].
38 Cap 322, R 5, 2014 Rev Ed.
39 In *NYK Ltd (Hong Kong) Ltd v Wilfond Ltd* [1997] 3 HKC 127 at 135H, counsel correctly lay particular emphasis upon the words "expects to be sued".
40 As mentioned above, a subjective standard could also be inferred from the holdings of *Alliance Bank Malaysia Bhd v Hapsah bt Md Nor* [2011] 7 MLJ 494.
41 See *DLA Piper Hong Kong v China Property Development (Holdings) Ltd* [2010] HKCU 154 at [22].

occur. Of course, the qualifying factor is that there must be a real foundation that an adverse suit is likely to be made against the applicant. It is submitted that such a real foundation would be satisfied when an applicant receives letters of demand from adverse parties or written threats of suits from the adverse parties.[42] The inquiry to determine whether there is a real foundation is a factual one where the applicant would have to adduce affidavit evidence to show such written demands or threats from the adverse parties. This sits in line with the wording of O 17 r 1 where the precondition is satisfied when the applicant expects to be sued. It is therefore submitted that even written bellicose rhetoric threatening legal action would suffice to satisfy the second precondition of interpleader relief as long as evidence of such threats are disclosed to the court via affidavit evidence.

28 Fourth, it is submitted that the *prima facie* test falls outside of the scope of O 17 r 1. The *prima facie* test is a legal test and not a factual inquiry. It imposes a duty on the applicant to assess the merits of the adverse parties' claims. Applicants for interpleader relief should not be compelled to delve into the merits of the case and to assess whether adverse claims have crossed a *prima facie* threshold, especially when they have already received threats from opposing lawyers. Threats from opposing lawyers, especially regarding maritime disputes, may transform into drastic actions such as ship arrests or injunctions, which may result in grave commercial injuries to the applicant. Even if such arrests or injunctions are successfully set aside, damage would already have been done to the applicants. It is respectfully submitted that in considering the second precondition of interpleader relief, the learned judge in *Precious Shipping* had focused too closely on the merits of the Suppliers' case and had brushed across the real issue of whether there was evidence to show that the Purchasers faced a real threat of a suit. In *Precious Shipping*, the Purchasers had all received written legal threats from the Suppliers and the Bank.[43] For reasons explained above, it is submitted that the presence of such threats is sufficient to satisfy the second precondition of interpleader relief.

VI. Unsatisfactory nature of the *prima facie* test

29 An example of the unsatisfactory nature of the *prima facie* test can be gleaned from *Hyundai Merchant Marine Co Ltd v OW Bunker*

42 Threats of suit were held to satisfy the requirement of interpleader in *Tsun Fat Finance Co Ltd v Commissioner for Police* [2002] 3 HKC 232 at [33] and [70], and in *Alliance Bank Malaysia Bhd v Hapsah bt Md Nor* [2011] 7 MLJ 494 at [10].

43 See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [4].

Middle East DMCC (Korea Division)[44] ("*Hyundai*"), which was one of the applications for interpleader relief resulting from the OW fallout. The facts of *Hyundai* are largely similar to the factual matrix of *Precious Shipping*.[45] In applying the holdings of *Precious Shipping* to *Hyundai*, the causes of action of the Suppliers in *Hyundai* (which are similar to the causes of action of the Suppliers in *Precious Shipping*) would not cross the *prima facie* threshold as such causes of action are factually and legally unsustainable. However, in *Hyundai*, the Suppliers managed to arrest the Purchasers' vessel in China. In conducting an arrest of a vessel, the Suppliers as the arresting party must establish a *prima facie* case because an arrest application is made *ex parte* and would have a draconian effect on the vessel's owners. There is therefore a situation where on one hand, the Suppliers' causes of action are deemed unsustainable by reason of the holdings in *Precious Shipping*; yet on the other, the Suppliers' causes of action are deemed to have crossed the *prima facie* threshold which warrants the arrest of a vessel.

30 Although the arrest was subsequently set aside, the Purchasers had already suffered losses and damage by reason of their vessel being detained. Applying the holdings of *Precious Shipping* here would therefore yield an unjust result, that is, that despite the Purchasers facing adverse claims and their vessel being arrested by one of the claimants, the Purchasers would nonetheless not be entitled to interpleader relief because the Purchasers would be unable to satisfy the court that the Suppliers have a *prima facie* case against the Purchasers.

31 Similarly in *The Xin Chang Shu*,[46] which is a case in relation to the OW fallout, the Suppliers succeeded in arresting the Purchasers' vessel in Singapore. Although the arrest was successfully set aside and wrongful damages were awarded to the Purchasers,[47] it was too late as the Purchasers had already suffered the negative ramifications of an arrest. Pausing here, one must remember that the purpose of the office of interpleader is to extricate the applicant seeking relief from the embarrassment of being sued by more than one party in respect of the same subject matter.[48] The above two cases demonstrate the inappropriateness of the *prima facie* test when applied to the factual matrix of the OW fallout – that although the Suppliers do not have a *prima facie* case against the Purchasers, the Suppliers could very well have arrested the Purchasers' vessels anywhere in the world, even in Singapore. This, coupled with the claims from the Bank and OW, would

44 HC/OS 144/2015 (unreported).
45 As set out in paras 3–8 above.
46 [2016] 1 SLR 1096.
47 See *The Xin Chang Shu* [2016] 1 SLR 1096 at [81] and [89].
48 See Foo Chee Hock, *Singapore Civil Procedure 2016* (Sweet & Maxwell, 2016) at p 280, para 17/0/2.

have caused the Purchasers "embarrassment" from which the very office of interpleader was supposed to relieve. It is therefore submitted that the *prima facie* test is unsatisfactory and would hinder the office of interpleader in extricating applicants from two or more adverse claims.

32 In *Precious Shipping*, the Purchasers did put forth the argument that the possibility of the Suppliers arresting the Purchasers' vessels is sufficient to establish the existence of a claim in respect of which interpleader relief is available.[49] However, the court held that there was no evidence to show that the Purchasers' vessels faced any real threat of arrest.[50] In particular, the court laid down detailed matters which prospective interpleader applicants are to state in their supporting affidavit to show that a threat of arrest exists. Accordingly, applicants are to show: (a) the trading pattern of the vessels; (b) the fact that the law of the jurisdiction where the vessels regularly trade recognises the existence of the Suppliers' claim; (c) that the Suppliers have intimated or asserted a cause of action against the Purchasers' vessels in the relevant jurisdiction; and (d) an opinion on foreign law that the court of the relevant jurisdiction would exercise its power of arrest to enforce the Suppliers' cause of action in the circumstances of this case.[51]

33 It is respectfully submitted that the *prima facie* test and the above additional requirements fall far from the prescribed requirements of interpleader relief. Instead of merely showing a real foundation of an adverse suit (as endorsed by the elderly authorities), an applicant now has to seek legal advice to establish that the adverse claims cross the *prima facie* threshold. They also have to obtain, *inter alia*, a legal opinion that a foreign jurisdiction would allow an arrest for such an adverse claim. Having such requirements would clearly belabour an applicant with unnecessary getting up and preparation for the interpleader application. There are numerous ports in the world to which a claimant can choose to conduct an arrest against the applicant's vessels. The applicant would have to ascertain whether the claimants can effect an arrest in all ports within the vessel's trading pattern. This is an unfair burden imposed on the applicant and would indubitably result in the applicant facing delays in obtaining interpleader relief which may eventually have a profound impact on the applicant.[52]

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49 See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [50].

50 See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [54].

51 See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [54].

52 As *per* the facts of *Hyundai Merchant Marine Co Ltd v OW Bunker Middle East DMCC (Korea Division)* HC/OS 144/2015 (unreported) and *The Xin Chang Shu* [2016] 1 SLR 1096 where the vessel was arrested.

34 For the reasons stated above, it is submitted that the real foundation test should supplant the *prima facie* test as the appropriate test for the second precondition of interpleader relief.

VII. Whether the claims faced by the Purchasers are adverse

35 In respect of the third precondition of interpleader relief, the court in *Precious Shipping* emphasised that the competing claims had to be symmetrical, that is, the claims had to relate to the same subject matter. Further, the court also highlighted that the claims had to be mutually exclusive.[53] The court was of the view that the claims of the Suppliers and the Bank lacked symmetry. This was because the Bank's claims against the Purchasers were *in personam* claims for the recovery of contractual debts due under the contracts between OW and the Purchasers. On the other hand, the Suppliers did not have a contractual right to be paid the price of the bunkers under the contracts between OW and the Purchasers. There was therefore no symmetry. Furthermore, the extinction of the Suppliers' claims would not have any impact on the Bank's claims for the purchase price of the bunkers or *vice versa*. The requirement of mutual exclusivity was therefore also not satisfied.[54]

36 The court further explained that the subject matter of the interpleader is not, strictly speaking, the *res*, that is, the goods, chattel or the debt. The court reasoned that in certain situations, for example, in *Meynell v Angell*,[55] there was no *res* involved. Instead, it would be more accurate to describe the subject matter of the interpleader as the legal obligation which the applicant has admitted to.[56]

37 The court cited two cases which highlighted that interpleader relief was held to be inappropriate even if the subject matter of the competing claims was identical. In *Ingham v Walker*[57] ("*Ingham*"), the defendant, who was the owner of a horse repository, sold by auction two horses for the plaintiff to the buyer. The buyer returned the horses, complaining that the horses were not according to the description in the catalogue, and claimed damages for misrepresentation. The plaintiff also brought an action against the defendant to recover a sum as moneys had

53 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [65].

54 *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [81] and [83].

55 (1862) 32 LJQB 14.

56 See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [62].

57 (1887) 3 TLR 448.

and received to his use. The Court of Appeal rejected the application for interpleader relief because one was for a claim to a specific sum of money and the other was for a claim for unliquidated damages. The court in *Precious Shipping* went on to explain that the claims, though both referable to the same horse (subject matter), did not relate to the same legal liability. The first was a claim that the defendant was liable, *in the law of agency*, to account for the *purchase price of the horse* to his principal. The second was a claim that the defendant was liable *in contract* to the purchaser for *damages arising from misrepresentation*. Both reliefs of the claims were different and the element of symmetry was missing. In applying *Ingham*, the court in *Precious Shipping* was of the view that interpleader was not appropriate because the nature of the claims of both the Bank and the Suppliers were different. The Suppliers' claim was for unliquidated damages whilst the Bank's claim was for liquidated damages arising out a contractual debt. As such, it was inappropriate to grant interpleader relief.

38 In *Greatorex v Shackle*[58] ("*Greatorex*"), the defendant arranged for her house to be sold at an auction. Following that, she received competing claims from two auctioneers, both of whom claimed a commission for the sale of the house. The first claim was for 35*l* and 12*s* while the second was for 25*l*. The defendant argued that since commission was being claimed by two different parties in respect of the sale of the same house, the subject matter of the claims was the same. The English Court of Appeal disagreed. On the facts, it was clear that the claims asserted by the competing parties were founded on two separate contracts (generating *two different sets of contractual obligations*) and gave rise to two separate causes of action. Thus, the claims, though both referable to the same house, were "not adverse, in the sense of being claims to the same money, but were entirely different claims".[59]

39 It is respectfully submitted that it is imprecise to label the centrepiece of an interpleader application as merely the legal obligation which the applicant has admitted to. Instead, the centrepiece is the applicant's liability to pay moneys or damages which represent the subject matter or the *res*, or the applicant's liability to return the subject matter or the *res* to the rightful claimant. More often than not, the applicant's liability is a liability to pay moneys or damages. The liability of the applicant to pay moneys or damages must always be in relation to a subject matter. This is clearly intended because O 17 r 1 states "[the applicant's] liability for any debt, money or goods or chattels [that is, the subject matter]". The symmetry of the adverse claims therefore

58 [1895] 2 QB 249.
59 See *Greatorex v Shackle* [1895] 2 QB 249 at 252.

has to relate to a same liability to pay moneys or damages which represent the subject matter. Put in another way, if the applicants are exposed to a double liability in relation to the same subject matter by paying off both adverse claimants, there must then be an element of symmetry in the claimants' claim.

40 Using the above analysis, the following points are humbly made. First, in *Meynell v Angell*, it is submitted that there was a *res* involved. In fact, it is further submitted that contrary to the holdings in *Precious Shipping*, in any interpleader relief, a *res* or subject matter would invariably exist. In *Meynell v Angell*, a plaintiff contracted in his own name with the defendant to do certain work. The plaintiff completed the work and was paid part of the price by the defendant. The defendant then received a notice from a third party stating that the plaintiff was the third party's agent in making the contract and that any further payment to the plaintiff would be at the defendant's peril. The court allowed interpleader relief. Under such circumstances, it is submitted that the *res* is the work done by the plaintiff. The centrepiece of the interpleader would be the defendant's liability to pay the cost of the work done. It is also respectfully submitted that it is incongruous that an interpleader can be granted without a *res* or a subject matter. This is because O 17 r 1 specifically refers to certain subject matters such as "debt, money, goods or chattels". Further, O 17 r 3(3) states that in an application for interpleader relief, the applicant has to state that he (a) has no claim in the subject matter; (b) does not collude with the adverse claimants on the subject matter; and (c) is willing to pay or transfer the subject matter into court. There must therefore be a subject matter involved in an interpleader.

41 Second, *Ingham* and *Greatorex* can be distinguished from *Precious Shipping*. With regard to *Greatorex*, the English Court of Appeal rightfully held that no interpleader was applicable because the claimants' reliefs were for damages arising out of the breach of their respective contracts. Although there was a similar subject matter (that is, the house), the two sets of damages for breach of contracts did not relate to or represent the price of the subject matter or the subject matter itself. Instead, the defendant's liability was merely for damages arising out of a breach of contract. The defendant's liability to pay damages for breach of contract does not represent the price of the subject matter or the subject matter itself. The defendant is therefore not under a liability for any debt, money, goods or chattels and interpleader was rightly refused.

42 Turning to *Ingham*, the defendant's liability for damages due to misrepresentation clearly does not represent the price of the subject matter (that is, the horse) or the subject matter itself. These damages are for misrepresentation due to breach of contract. Similar to *Greatorex*, the defendant is therefore not under a liability for any debt, money,

goods or chattels to the buyer of the horse and interpleader relief was also rightly refused.

43 The symmetry of the applicant's liability to pay moneys or damages which represent the subject matter or the *res* can also be gleaned from the holdings of the Court of Appeal in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)*[60] ("*Pertamina*"). In *Pertamina*, the Court of Appeal held that to succeed in interpleader proceedings, the claimant had to be entitled to the moneys in dispute. This entitlement must be founded on some title or proprietary interest in the moneys in dispute.[61] It is important to note that the Court of Appeal did not hold that for interpleader to succeed, both the adverse claims must be proprietary *per se*.[62] This is because the words "*some* title or proprietary interest" [emphasis added] were used.[63] Instead, what the Court of Appeal was perhaps alluding to was that the damages or the relief which the adverse claimants were entitled to must be in relation to the same moneys in dispute, that is, the same subject matter or the *res*. Conversely, the liability of the applicant must similarly be in relation to the same moneys in dispute, that is, the same subject matter or the *res*. The relation between the adverse claims and the applicant's liability therein with the subject matter can also be gleaned from the holdings of *Tay Yok Swee v United Overseas Bank Ltd*[64] where the Court of Appeal held that the adverse claims must *relate specifically* to the fund. It is submitted that this makes eminent sense as the purpose of interpleader is to avail a person from suffering a potential double liability from two claimants regarding the same subject matter. As such, the centrepiece of an interpleader is really the symmetry of the applicant's liability to pay moneys or damages which represent the subject matter.

44 Coming back to the facts of the OW saga, it is submitted that such an element of symmetry exists in both the Suppliers' and the Bank's claims. Both the Suppliers' and the Bank's claims are for damages representing the price of the bunkers supplied. In fact, these damages which are sought by both parties, whether liquidated or unliquidated, directly represent the bunkers itself. The claims of both parties also relate specifically to the price for the bunkers. This is because both the Suppliers and the Bank or OW are claiming for the purchase price of the

60 [1994] 3 SLR(R) 312.

61 See *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 at [14].

62 This was also clarified in *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [60]–[80].

63 *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 at [14].

64 [1994] 2 SLR(R) 36 at [12].

bunkers which they supplied to their respective buyers. It is therefore clear that the Purchasers are potentially under a double liability for the bunkers as a chattel delivered on board their vessels and interpleader relief should be granted.

45 It would also be manifestly unjust if interpleader relief was not granted. It is undeniably clear that the entire pickle began because OW failed to pay the Suppliers the price of the bunkers which were sold as *per* the contract between the Suppliers and OW. The Purchasers were then drawn into the quagmire because OW became insolvent and the Suppliers directed their claims against the Purchasers. If interpleader relief is not granted, the Purchasers would be faced with actions from at least the Suppliers and the Bank or OW. It is submitted that the principles of fairness and justice dictate that in a supply chain, the end buyer (that is, the Purchasers) cannot be concurrently liable to the intermediate seller (that is, OW and the Bank) and the end seller (that is, the Suppliers).

VIII. Whether the outcome of *Precious Shipping* causes any prejudice to the Purchasers

46 Assuming for a moment that the court in *Precious Shipping* erred in relation to the preconditions of interpleader relief, would this have resulted in prejudice to the Purchasers? After some consideration, it is submitted that the answer is in the negative.

47 Although the outcome of *Precious Shipping* is that the Purchasers are left to fend for themselves against potential worldwide arrests by the Bank and the Suppliers, the saving grace is that the holdings of *Precious Shipping* were essentially akin to an interpleader relief being granted and the court deciding that the disputed sum should be paid to the Bank/OW and not the Suppliers.

48 Under the scheme of O 17, applications for interpleader relief would proceed in two stages. The issue at the first stage is whether the preconditions of the interpleader relief have been satisfied. In the event the first stage is satisfied, the court would then move on to the second stage to either try the adverse claims or determine the claims summarily.[65] In *Precious Shipping*, although the Purchasers failed to cross the first stage, the court, in determining whether or not the claimants had a *prima facie* case, had perused the various purported causes of actions by the Suppliers and concluded that such causes of

65 See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [20].

action were all legally and factually unsustainable and did not disclose a *prima facie* case.[66] For all intents and purposes, this is akin to summarily determining the claims under the second stage with the result being in favour of the Bank/OW instead of the Suppliers.[67] The judgment of *Precious Shipping* coupled with the recent English decisions[68] relating to the OW fallout would arguably be a nail in the coffin for the Suppliers' claims against the Purchasers. To a certain extent, this has derailed any recovery efforts by the Suppliers against the Purchasers in Singapore or the UK.[69] Indeed, this would naturally result in the Purchasers gravitating towards a decision to make payment of the disputed sums to the Bank/OW instead of the Suppliers. As such, although the analysis of the preconditions of interpleader relief may have been incorrect, it is submitted that the consequence of the decision in *Precious Shipping* would nonetheless bring certainty to the industry and pave a way for parties to navigate out of the OW fallout.[70]

66 See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [37]–[55].

67 However, there is clearly no *res judicata*, and the Suppliers, the Bank and OW are free to commence action against the Purchasers.

68 See *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2015] EWHC 2022 ("*Res Cogitans (HC)*") and *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2015] EWCA Civ 1058 ("*Res Cogitans (CA)*") where the English High Court and Court of Appeal held that the transfer of property in bunkers to the Purchasers' vessels was not the essential subject matter of the contract between the Purchasers and OW, and that a failure to transfer property in the bunkers (by reason of OW's insolvency and failure to pay the Suppliers) and the fact that the bunkers had been consumed within the credit period for payment did not relieve the Purchasers of their obligation to pay the Bank/OW. See *Res Cogitans (CA)* at [33] and [34]. See also *Res Cogitans (HC)* at [49]–[51] where the English court held that the Suppliers' cause of action in conversion was bound to fail.

69 It is noted that several jurisdictions such as Canada and the US have held that interpleader relief is appropriate for the factual matrix arising out of the OW fallout. See *Canpotex Shipping Services Ltd v Marine Petrolbulk Ltd* [2015] FC 1108 and *UPT Pool Ltd v Dynamic Oil Trading (Singapore) Pte Ltd* 14-CV-9262 (VEC) (SDNY, 2015) ("*UPT*"). However, the requirements for interpleader relief in such jurisdictions differ from Singapore. Further, the laws in such jurisdictions tend to favour bunker suppliers in allowing a maritime lien over vessels for unpaid bunkers. See *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 at [53], where the court distinguished *UPT*.

70 None of the Purchasers appealed against the decision of *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229 ("*Precious Shipping*"). However, one of the Suppliers (who was a party to a number of originating summonses) appealed and the appeals were heard in CA/CA 159/2015 to CA/CA 162/2015. These appeals were eventually dismissed on a preliminary issue that the Suppliers did not have the necessary *locus standi* to seek interpleader relief through an appeal. The decision in *Precious Shipping* is therefore final and binding.

IX. Conclusion

49 In conclusion, the author respectfully disagrees that the *prima facie* test is the applicable test for the second precondition for interpleader relief. In order for the second precondition to be satisfied, all that is required is for the applicant to have a real foundation of rival claims. As for the third precondition, whilst the author agrees that a symmetry must be established for the adverse claims, one must remember that the centrepiece of the third precondition is the applicant's liability to pay moneys or damages which represent the subject matter or the *res*. The symmetry of the adverse claims therefore has to relate to a same liability to pay moneys or damages which represent the subject matter or the *res*.

50 That said, although the author has differing views regarding the preconditions of interpleader relief, it is submitted that the outcome of *Precious Shipping* nonetheless brings certainty to the bunkering industry – that in the event an intermediary supplier fails to pay an end supplier the purchase price of bunkers, the end supplier who (a) does not have a contractual relationship with the vessel; and (b) supplies bunkers to a vessel wherein the bunkers would be immediately consumed for the propulsion of the vessel cannot maintain a cause of action against the vessel.