Published on e-First 23 September 2020

2. ADMIRALTY AND SHIPPING LAW

ADMIRALTY LAW

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2.1 In 2019, the High Court in *The Mount Apo*[1] handed down yet another important decision involving collisions between vessels in Singapore waters. The decision provides some guidance on the obligations of a vessel crossing traffic lanes in a Traffic Separation Scheme under the International Regulations for Preventing Collisions at Sea 1972 ("COLREGS"), as well as the proper use of very high frequency ("VHF") radio communications between vessels. It is an important addition to a growing number of collision cases which Singapore courts have decided in recent years.

I. The facts

2.2 The decision in *The Mount Apo* arose out of a collision between a capesize bulk carrier, *Mount Apo* ("*Mt Apo*"), and a liquefied natural gas carrier, *Hanjin Ras Laffan*, within the westbound lane of the Traffic Separation Scheme ("TSS") in the Singapore Strait on 8 August 2015 at 9.59am. The facts of the case can be summarised as follows:

> (a) *Hanjin Ras Laffan* was transiting in the Singapore Strait from east to west, in an attempt to overtake another vessel, *Dalian Venture*, while *Mt Apo* had just left the port of Singapore and was attempting to cross the westbound lane of the TSS into the eastbound lane.
>
> (b) Before disembarking at 9.40am, the pilot had advised the captain of the *Mt Apo*, a Captain Rajesh, to follow *Ocean Sapphire*'s course, the latter vessel being directly ahead of *Mt Apo* and also on an eastwards course, and to proceed eastwards outside the TSS's northern boundary to cross the westbound lane near Pilot Eastern Boarding Ground "C".
>
> (c) At 9.43am, *Frontier Leader*, which had been travelling eastwards along the eastbound lane of the TSS began turning to

1 [2019] 4 SLR 909.

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port to commence crossing the westbound lane of the TSS to head into the port.

(d) Up to 9.50am, *Mt Apo* had been following *Ocean Sapphire* in turning gradually to port, with its heading changing from 140 degrees at 9:42am to 100 degrees at 9:50am. At 9:50am, *Mt Apo* was about 0.5 nautical miles from the northern boundary of the westbound lane of the TSS. It was at this point that Captain Rajesh decided it was no longer possible to continue following *Ocean Sapphire*, as *Mt Apo* was in a crossing situation with another vessel, *Frontier Leader*, and had to keep clear of *Frontier Leader* since *Mt Apo* was the give-way vessel in this crossing situation. However, Captain Rajesh decided to maintain *Mt Apo*'s heading.

(e) Meanwhile, the captain of the *Hanjin Ras Laffan*, a Captain Kim, observed that the *Mt Apo* turning to port and concluded that the *Mt Apo* would not cross the TSS ahead of the *Hanjin Ras Laffan*, he therefore put *Hanjin Ras Laffan* from full ahead to full navigation.

(f) At 9.52am, when *Frontier Leader* was about 0.7nm from *Mt Apo*, Captain Rajesh decided to alter course to starboard to keep clear of *Frontier Leader*. Immediately thereafter, Captain Rajesh noticed that the *Frontier Leader* had made a substantial alteration of course to starboard and decided to put the helm amidships to maintain course.

(g) The *Mt Apo* crossed into the westbound lane of the TSS at 9.54am at a shallow angle of 32 degrees. The *Mt Apo* was advised by the Singapore Maritime Port Authority's Vessel Traffic Information Service ("VTIS") over VHF to maintain a good lookout and to cross safely. The VTIS then advised the *Hanjin Ras Laffan* that the *Mt Apo* was going eastbound and to keep a good lookout for the *Mt Apo*. At 9.55am, the *Hanjin Ras Laffan* contacted the *Mt Apo* over VHF and sought clarification of the *Mt Apo*'s intentions as well as to request for a green-to-green (starboard-to-starboard) passing ("the 9.55 Conversation"). The *Mt Apo* replied to say that she had stopped her engines to "make you pass our bow".

(h) Both the *Mt Apo* and *Hanjin Ras Laffan* reduced their speeds incrementally, and by 9.55am the distance between the two vessels was less than 1.2nm. The *Mt Apo* then radioed the *Hanjin Ras Laffan* at 9.57am for a port-to-port passing, which was rejected, and eventually mutually agreed on a green-to-green passing after negotiating over the VHF. The *Hanjin Ras*

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Laffan moved from slow to dead slow and altered its course to port whilst the *Mt Apo* stopped its engines.

(i) Shortly before 9.58am, upon observing that *Hanjin Ras Laffan*'s alteration of course to port had caused her stern to swing towards *Mt Apo*, Captain Rajesh ordered hard to port to try to avoid *Hanjin Ras Laffan*. Approximately 20 seconds before the collision, at 9.58.57am, the *Mt Apo* called *Hanjin Ras Laffan* on VHF to request that *Hanjin Ras Laffan* go hard on starboard in order to swing her stern away from the *Mt Apo* to minimise collision impact. This was not done, and the *Mt Apo* collided with the *Hanjin Ras Laffan* at 9.59.15am within Singapore territorial waters.

2.3 As a result of the collision, the owner of *Mt Apo* brought an action against the owner and/or demise charterer of *Hanjin Ras Laffan*. A related action was brought by both the owner and the demise charterer of the *Hanjin Ras Laffan* against the owner and/or demise charterer of *Mt Apo* in respect of the same collision. Both actions were subsequently consolidated, with the owner and the demise charterer of the *Hanjin Ras Laffan* treated as counterclaiming defendants in the consolidated action. The trial before Pang Khang Chau JC (as his Honour then was) was confined solely to the apportionment of liability between the parties. Although there was a preliminary issue concerning the demise charterer of *Hanjin Ras Laffan*'s title to sue, that is not relevant for the purpose of this note.

2.4 Before embarking on an analysis of the parties' conduct leading to the collision, Pang JC helpfully considered the law relating to the apportionment of liability. Pang JC noted that the apportionment of liability under s 1 of the Maritime Conventions Act 1911[2] depended on causative fault.[3] The court reiterated the principles on apportionment of liability set out in *The NordLake*[4] as approved and applied in *The Dream Star*,[5] that is, the apportionment of liability involves a broad, commonsensical and qualitative assessment of the *culpability* and *causative potency* of both vessels.[6]

2 Cap IA3, 2004 Rev Ed.
3 *The Mount Apo* [2019] 4 SLR 909 at [95].
4 [2016] 1 Lloyd's Rep 656.
5 [2018] 4 SLR 473.
6 *The Mount Apo* [2019] 4 SLR 909 at [96].

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II. *Mt Apo*'s decision to cross the Traffic Separation Scheme

2.5 The first issue that Pang JC considered was whether *Mt Apo* was at fault for crossing the TSS at the time and in the manner she did. This gave rise to two sub-issues: (a) whether it was safe for *Mt Apo* to cross the TSS at the time Captain Rajesh made the decision to cross; and (b) whether *Mt Apo* was at fault to cross the TSS at the shallow angle of 32 degrees.

2.6 On the first sub-issue, in considering r 10(*c*) of the COLREGS which concerns vessels crossing traffic lanes in a TSS, Pang JC applied the observations of Hirst LJ in *The Century Dawn*[7] that the question whether it was safe for a vessel to cross should be answered by reference to the conditions prevailing at the time the decision to cross was made and not the conditions prevailing at the time when the vessel entered the TSS.[8] Pang JC held that the inquiry into whether it was unsafe to cross centred on what the traffic condition was in the TSS, as opposed to whether there were any other options open to the vessel. An unsafe crossing cannot be considered to be safe just because there are no other options open to the vessel at that time. The lack of safer options merely goes towards the issue of culpability.[9]

2.7 Pang JC also clarified the obligations of a stand-on vessel in a crossing situation under r 17 of the COLREGS. After considering the principles set out in *The Taunton*[10] and *The Topaz*,[11] Pang JC held that there is a distinction between alterations of course and speed by a stand-on vessel to *avoid collision* (which is precluded by r 17(*a*)(i) of the COLREGS) and alterations of course and speed by a stand-on vessel *in the ordinary course of navigation for the object she had in view* (which is not precluded by r 17(*a*)(i) of the COLREGS).[12]

2.8 On the facts, Pang JC held that it was unsafe for Captain Rajesh to have decided at 9.50am to cross the TSS given that Captain Rajesh himself had admitted that it was not prudent to cross at 9.50am when there were several vessels approaching in the westbound lane at that point in time, and that there were at least two safer options available to *Mt Apo* to pursue.[13] The first option was for the *Mt Apo* to go westwards and then

7 [1996] 1 Lloyd's Rep 125.
8 *The Mount Apo* [2019] 4 SLR 909 at [108].
9 *The Mount Apo* [2019] 4 SLR 909 at [124].
10 (1928) 31 Ll L Rep 119.
11 [2003] 2 Lloyd's Rep 19.
12 *The Mount Apo* [2019] 4 SLR 909 at [119].
13 *The Mount Apo* [2019] 4 SLR 909 at [125].

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U-turn into the eastbound lane upon being safe to do so.[14] The other available option was for *Mt Apo* to reduce its speed to give more time for the situation with *Frontier Leader* to develop. Doing so would have been consistent with r 6 of the COLREGS and provided more reaction time for *Mt Apo* to react to the unfolding situation in accordance with principles of good seamanship.[15]

2.9 In respect of the second sub-issue, Pang JC noted at the outset that r 10(*c*) of the COLREGS was applicable to vessels crossing only one lane of a TSS to join the other lane as well as vessels crossing the entire TSS to reach the opposite coast. Pang JC held that, as a matter of good seamanship, the master of a vessel should, where possible, ensure that the vessel follows a heading at 90 degrees to the general direction of traffic flow when crossing a TSS, except where safety of navigation or other good reasons required otherwise.[16] On the facts, Pang JC found that *Mt Apo* was in breach of r 10(*c*) of the COLREGS by crossing the TSS at an angle of 32 degrees when it was practicable for *Mt Apo* to cross at right angles instead.[17] Pang JC also disagreed with the Plaintiff's expert that a turn to starboard to cross at right angles would be inconsistent with a stand-on vessel's duty to keep her course and speed, whose views were based on a misapprehension of r 17(*a*)(i) of the COLREGS. Since a vessel intending to cross a TSS would, in the ordinary course of navigation, line herself up at right angles, r 17(*a*)(i) of the COLREGS does not preclude such a manoeuvre by a stand-on vessel.[18]

2.10 In the circumstances, Pang JC found that this was a fault of causative potency on the part of *Mt Apo* as it generated confusion, which could have manifested itself in at least two ways:[19] (a) crossing at a shallow angle meant that the *Mt Apo* would be travelling within the westbound lane in an easterly direction (against the flow of traffic) for a considerable period of time; and (b) failure to present a broad aspect before crossing into the westbound lane meant that the vessels in the westbound lane did not receive an early warning of *Mt Apo*'s intention to cross and were therefore deprived of valuable reaction time; the latter probably contributed to the *Hanjin Ras Laffan*'s decision to initiate the 9.55 Conversation.

14 *The Mount Apo* [2019] 4 SLR 909 at [111].
15 *The Mount Apo* [2019] 4 SLR 909 at [123].
16 *The Mount Apo* [2019] 4 SLR 909 at [131].
17 *The Mount Apo* [2019] 4 SLR 909 at [138].
18 *The Mount Apo* [2019] 4 SLR 909 at [135].
19 *The Mount Apo* [2019] 4 SLR 909 at [139].

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A. Crossing situation

2.11 Rule 15 of the COLREGS applies when "two power-driven vessels are crossing so as to involve risk of collision". This invites a discussion as to when a crossing situation is said to arise. Pang JC followed the two conditions set out in *The Alcoa Rambler*[20] ("*Alcoa Rambler*") that for a crossing situation to arise, the vessels must be crossing vessels, and the vessels must be crossing so as to involve a risk of collision.

2.12 On the first condition, vessels are regarded as crossing vessels if they are on a "crossing course". Pang JC applied the following principles as to the meaning of a "crossing course" enunciated in the *Alcoa Rambler*:

> (a) The purpose of the crossing rules is to impose a duty on the give-way vessel to keep clear. In order to do so, the putative give-way vessel must be in a position to appreciate what the other vessel is doing, including whether it is on a course at all and, if so, what course.
>
> (b) Whether two vessels are crossing vessels depend on the purpose of the putative stand-on vessel's manoeuvres, so far as that purpose could be discerned from reasonable inferences to be drawn by the putative give-way vessel as to the putative stand-on vessel's future course. Such inference is deduced from observation of the putative stand-on vessel's movement, making due allowance for the nature of the locality.
>
> (c) The test: Was what was being done open and notorious to the seamen on the other ship in the ordinary course of navigation?

2.13 Pang JC also considered the distinction between r 7 and r 15 of the COLREGS, and noted that whilst r 7 provides the criteria for determining whether a risk of collision exists, r 15 goes towards the involvement of a risk of collision as opposed to the existence of a risk of collision.[21] Applying the reasoning of the Court of Appeal in *Ng Keng Yong v Public Prosecutor*,[22] Pang JC held that in a situation involving vessels *already* on a crossing course, r 15 will apply shortly before the risk of collision comes into existence.

2.14 On the evidence, Pang JC found that notwithstanding *Mt Apo*'s steady course from 9.53am onwards, the two vessels were not crossing vessels until the crew of *Hanjin Ras Laffan* was aware or ought to have

20 [1949] 1 AC 236.
21 *The Mount Apo* [2019] 4 SLR 909 at [148].
22 [2004] 4 SLR(R) 89.

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been aware that *Mt Apo*'s purpose was to cross the TSS.[23] The *Hanjin Ras Laffan* only became aware of the *Mt Apo*'s purpose to cross the TSS when the *Mt Apo* crossed the northern boundary of the westbound lane at 9.54am. It was at the point in time that *Hanjin Ras Laffan* was aware or ought to have been aware of *Mt Apo*'s purpose that the two vessels were crossing vessels.[24]

2.15 As regards the applicability of r 15 of the COLREGS and its relationship to the other rules, his Honour observed that even though r 15 is said to apply from 9.54am onwards, that did not mean that both vessels owed no duty to each other prior to that time. Even when r 15 is not applicable, both vessels were still under a duty to keep a proper look-out, to proceed at a safe speed and to generally take such precautions as may be required by good seamanship. However, both vessels would not be subject to the obligation to give way or stand on in accordance with rr 16 and 17 of the COLREGS.[25]

2.16 Additionally, Pang JC noted that r 15 applied notwithstanding that the crossing vessel was at fault for crossing at a dangerous angle. A vessel crossing at a wrong angle is still a stand-on vessel to the vessels coming down her port side and is not acting in breach of r 10(*a*) of the COLREGS.[26]

2.17 Finally, there is no inconsistency between the *Alcoa Rambler*[27] and the *The Dream Star*[28] in respect of when a crossing situation is said to arise. In the *Alcoa Rambler*, a crossing situation is said to have arisen when the two-step approach above[29] is satisfied. On the other hand, the inquiry as to when a crossing situation comes into being in *The Dream Star* focuses on when the risk of collision materialised. Pang JC clarified that the vessels were clearly on a crossing course in *The Dream Star* as the stand-on vessel had been on a steady course for quite some time and there was no uncertainty as to her intention.[30]

B. Proper use of very high frequency

2.18 The court reiterated the principles on the proper use of VHF communication by vessels which are passing each other or approaching

23 *The Mount Apo* [2019] 4 SLR 909 at [154].
24 *The Mount Apo* [2019] 4 SLR 909 at [160].
25 *The Mount Apo* [2019] 4 SLR 909 at [164].
26 *The Mount Apo* [2019] 4 SLR 909 at [165].
27 See para 2.11 above.
28 See para 2.4 above.
29 See at para 2.11 above.
30 *The Mount Apo* [2019] 4 SLR 909 at [166].

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a close quarters situation as set out in *The Dream Star*.[31] These principles may be stated as follows:

(a) Vessels should navigate in accordance with the COLREGS and not make arrangements over the VHF that are contrary to the scheme of the regulations.

(b) Use of VHF to agree on manner of passing is fraught with the danger of misunderstanding and may distract mariners from paying attention to their radars.

(c) Misuse of VHF is a factor that goes towards the degree of culpability of the respective vessels.

(d) Good seamanship does not mandate an embargo on all VHF communications as VHF communications remain helpful for information dissemination in some circumstances.

2.19 In considering the above principles, Pang JC noted that the use of VHF does not deserve criticism if the course of action contemplated in the VHF conversation is consistent with the COLREGS. Thus, where a navigational fault results from a VHF conversation, the *direct cause* of the collision is that navigational fault and not the use of VHF.[32] However, his Honour made clear that compliance with the COLREGS should remain the primary means for averting collision, and any misuse of VHF may affect the relative culpability of one side or the other for subsequent navigational faults causing the collision. The use of VHF to agree on a course of action contrary to COLREGS remains blameworthy.[33]

(1) Whether Hanjin Ras Laffan's 9.55 Conversation was an improper use of very high frequency

2.20 In light of the above principles, Pang JC found that the 9.55 Conversation by Captain Kim was a misuse of VHF.

2.21 Pang JC did not accept the Defendant's submission that the purpose of the 9.55 Conversation was simply to seek information about *Mt Apo*'s intention in light of the confusion arising from the shallow angle at which *Mt Apo* approached the TSS. Instead, the 9.55 Conversation was initiated by Captain Kim to arrange an agreement with *Mt Apo* for a green-to-green passing and Captain Kim had ended the 9.55 Conversation without verifying that each side had understood what the other side was planning to do. This was found to be contrary to principles of good seamanship

31 *The Mount Apo* [2019] 4 SLR 909 at [170].
32 *The Mount Apo* [2019] 4 SLR 909 at [179].
33 *The Mount Apo* [2019] 4 SLR 909 at [181].

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on the part of Captain Kim. However, *Mt Apo* was also blameworthy in that the cause of Captain Kim's initiation of the 9.55 Conversation was *Mt Apo*'s failure to signal her intention to cross the TSS properly as well as her failure to respond in a manner consistent with her obligations as a stand-on vessel under r 17 of the COLREGS.

C. Causative potency and culpability

2.22 In coming to his decision to apportion liability 60:40 in favour of the defendant, Pang JC held that the event of significant causative potency was *Mt Apo*'s decision to cross the TSS at a shallow angle in breach of r 10(*c*) of the COLREGS, which also contributed significantly to *Hanjin Ras Laffan*'s decision to initiate the 9.55 Conversation.[34]

2.23 His Honour also considered that *Hanjin Ras Laffan*'s inappropriate suggestion of a green-to-green passing in the 9.55 Conversation led to *Mt Apo*'s ambiguous reply and the ensuing confusion over what actions each vessel ought to take. Nevertheless, Pang JC accepted that the direct cause of the collision was *Mt Apo*'s failure to reduce speed decisively in order to give effect to her stated intention to let *Hanjin Ras Laffan* pass her bow. Although the collision was partly due to *Hanjin Ras Laffan*'s misinterpretation of *Mt Apo*'s reply and incremental alterations of course and speed thereafter, the causative potency of *Mt Apo*'s failure to reduce speed decisively was higher.

2.24 As regards the respective culpability, Pang JC held that *Mt Apo*'s breach of r 10(*c*) of the COLREGS when she crossed into the TSS at a shallow angle was highly culpable, which was exacerbated by her failure to reduce speed decisively to give effect to her stated intention to let *Hanjin Ras Laffan* pass her bow. *Hanjin Ras Laffan*'s initiation of the 9.55 Conversation was, in the circumstances, less culpable as it was a reaction to the difficult situation created by *Mt Apo*'s crossing at a shallow angle.

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34 *The Mount Apo* [2019] 4 SLR 909 at [208].

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SHIPPING LAW

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2.25 In 2019, the High Court handed down two judgments relating to shipping law. They were *The Yue You 902*[35] and *Wilmar Trading Pte Ltd v Heroic Warrior Inc*.[36]

I. *The Yue You 902*

2.26 *The Yue You 902* concerned the rights of a plaintiff bank who had obtained bills of lading as security for a loan granted to its customer only after the goods had been discharged and delivered without production of the original bills of lading.

2.27 The case presented Pang Khang Chau JC with the opportunity to consider whether in such a situation, s 2 of the Bills of Lading Act[37] ("BLA") would operate to transfer and vest rights of suit in the plaintiff bank to claim against the defendant shipowner.

A. *Brief facts*

2.28 Several years before the incident, the plaintiff bank, Overseas-Chinese Banking Corporation Ltd ("OCBC"), had entered into a facility agreement ("the Facility Agreement") with Aavanti Industries Pte Ltd ("Aavanti").

2.29 On 11 March 2016, FGV Trading Sdn Bhd ("FGV") entered into a voyage charter party with the defendant, Jiang Xin Shipping Co Ltd, the owner of the vessel *Yue You 902*, for two voyages.

2.30 On 4 April 2016, Aavanti contracted with Ruchi Soya Industries Ltd ("Ruchi") to sell to Ruchi 10,000 metric tons of refined, bleached and deodorised palm oil ("the Cargo") and on 5 April 2016, Aavanti contracted with FGV to purchase the Cargo from FGV on "Incoterms CNF Mangalore, India".

35 [2020] 3 SLR 573.
36 [2019] SGHC 143.
37 Cap 384, 1994 Rev Ed.

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2.31 On 15 April 2016, the Cargo was loaded onto the *Yue You 902* at Lubuk Guang Indonesia for shipment to New Mangalore, India and 14 blank endorsed bills of lading ("the Bills of Lading") were issued on behalf of the defendants. The Bills of Lading identified the shipper as PT Intibenua Perksatama and the consignee as "To Order". They also named Ruchi as the notify party. The Bills of Lading were released to FGV on 19 April 2016 upon payment of freight to the defendant.

2.32 On 22 April 2016, FGV issued a Letter of Indemnity ("LOI") to the defendant, requesting the defendant to deliver the Cargo to Ruchi, without production of the original Bills of Lading. On the same day, Aavanti issued a back-to-back LOI to FGV requesting FGV to deliver the cargo to Ruchi without production of the original Bills of Lading, Ruchi had, on 19 April 2016, also issued a back-to-back LOI to Aavanti requesting Aavanti to deliver the Cargo to Ruchi without production of the original Bills of Lading. There was thus a chain of back-to-back LOIs from the ultimate buyer, Ruchi, to the sub-seller, Aavanti, and then to the ultimate seller, FGC, and finally to the defendant shipowner.

2.33 On 24 April 2016, the *Yue You 902* arrived at New Mangalore and began discharging the Cargo on 27 April 2016 at 5.05pm local time. The Cargo was completely discharged on 29 April 2016 at 8.55am local time.

2.34 Sometime on 26 April 2016, the plaintiff bank received the Bills of Lading from FGV under cover of a documents against payment collection schedule and informed Aavanti of the same. Aavanti replied requesting financing of the entire purchase price of US$7,454,973.16 by way of a trust receipt loan made pursuant to the Facility Agreement ("the Loan").[38] The plaintiff only effected payment of the Loan on 29 April 2016 at 8.32pm, *after* the Cargo had been completely discharged.

2.35 Aavanti defaulted on the Loan. The plaintiff then claimed against the defendant for breach of contract of carriage, breach of contract of bailment, conversion and detinue and thereafter applied for summary judgment.

2.36 On 11 September 2017, the plaintiffs obtained summary judgment against the defendant for US$3,727,500 and US$3,7272,473.16 with interest at 55.33% per annum. The defendants appealed. Pang JC dismissed the appeal and upheld the judgment obtained below. Pang JC found that the plaintiff had made out a *prima facie* case for summary judgment that the defendant had breached its duty to deliver the Cargo to the plaintiff upon presentation of the Bills of Lading.

38 *The Yue You 902* [2020] 3 SLR 573 at [94].

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2.37 The defendant raised the following six separate defences, *viz*, that:

(a) the plaintiff had not acquired any right of suit under s 2 of the BLA as the Cargo had been discharged *prior* to the plaintiff becoming the holder of the Bills of Lading;

(b) the plaintiff was not a holder of the Bills of Lading in good faith under s 5(2) of the BLA as the plaintiff had obtained the Bills of Lading for a mere right of suit;

(c) the plaintiff had consented, authorised or otherwise ratified the discharge of the Cargo without production of the original Bills of Lading;

(d) estoppel by convention or acquiescence prevented the plaintiff from asserting the claim for wrongful discharge;

(e) the plaintiff had no right to sue in conversion as it did not become the holder of the Bills of Lading until after the Cargo had been discharged; and

(f) the plaintiff had no claim in bailment as it was not in a bailor–bailee relationship with the defendant.

B. Key issues

2.38 These gave rise to the six issues below.

(1) Issue 1 – Did the Plaintiff acquire a right of suit under section 2 of the Bills of Lading Act?

2.39 Section 2(1) of the BLA provides, so far as material, as follows:

> **2.**—(1) Subject to the following provisions of this section, a person who becomes —
>
> (*a*) the lawful holder of a bill of lading;
>
> …
>
> shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) 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.
>
> (2) Where when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) unless he becomes the holder of the bill —

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> (*a*) By virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
>
> (*b*) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

2.40 Section 2(1) of the BLA provides for the transfer of rights of suit to the lawful holder of a bill of lading "by *virtue of [him] becoming the holder of the bill*" [emphasis added]. Section 2(2) then carves out an exception for cases where "*possession of the bill no longer gives a right as against the carrier to possession of the goods to which the bill relates*" (namely, "spent bills") [emphasis added].

2.41 In such situations, transfer of a spent bill does not transfer any rights of suit unless s 2(2)(*a*) or 2(2)(*b*) applies. Section 2(2)(*a*), in particular, allows the transfer of a spent bill to have the effect of transferring rights of suit if the transfer of the bill was pursuant to "contractual or other arrangements" made before the bill became spent.[39]

2.42 Section 2(2)(*b*) concerns rejection of goods or documents by a buyer which was not relevant to the facts of the case.

2.43 The defendant adopted a two-step submission in arguing that the plaintiff had not acquired a right of suit under s 2 of the BLA. In the first step, the defendant argued that the plaintiff became the holder of the Bills of Lading *after* the defendant had completed delivery of the Cargo to Ruchi and therefore the Bills of Lading had become spent before the plaintiff became their holder. Consequently, s 2(2) applied. No rights of suit could be transferred to the plaintiff unless the plaintiff could bring itself within s 2(2)(*a*). In the second step, the defendant argued that the plaintiff did not fall within s 2(2)(*a*) because the relevant "contractual or other [arrangement]" was the granting of the Loan. Since this took place after the defendant had completed delivery of the Cargo to Ruchi, it was not a contractual or other arrangement made before the Bills of Lading became spent.

2.44 Pang JC accordingly dealt with the two-step submissions as follows:[40]

> (a) Step 1 – whether the Bills of Lading had become spent by the time the plaintiff became the holders; and

39 *The Yue You 902* [2020] 3 SLR 573 at [36].
40 *The Yue You 902* [2020] 3 SLR 573 at [37].

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(b) Step 2 – assuming the Bills of Lading were spent, whether the plaintiff came within s 2(2)(*a*).

(a) Step 1 – Whether the Bills of Lading had become spent by the time the plaintiff became the holders

2.45 As regards the first step, the defendant advanced two arguments in support of its argument that the Bills of Lading had become spent:[41]

(a) First, the court should adopt a wider interpretation of s 2(2) of the BLA and hold that s 2(2) applies once the carrier has parted with possession of the Cargo irrespective of whether delivery was made to a person entitled or not.

(b) Alternatively, even if the court disagreed with the wider interpretation advanced above, the Bills of Lading should still be regarded as spent as delivery had been made to a person entitled to delivery. This was because FGV was a person so entitled because it was still the holder of the Bills of Lading at the time the Cargo was being discharged. Therefore, delivery of the Cargo to Ruchi on FGV's instructions constituted delivery to a person entitled.[42]

2.46 Pang JC dismissed both arguments.

2.47 In relation to the first argument, Pang JC considered the meaning of the phrase "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" in s 2(2). He concluded that irrespective of whether the phrase is understood as referring to the transfer of contractual right to possession or to the transfer of constructive possession, the phrase ought to be interpreted as covering the situation where a bill of lading would at common law be regarded as spent.[43]

2.48 He therefore moved on to consider whether a bill of lading is spent by delivery to a person *not* entitled to delivery under the bill.[44]

2.49 After considering and analysing the relevant authorities, Pang JC held that delivery to a buyer against a seller's LOI does not have the effect of bringing the matter within the ambit of s 2(2)[45] and that the position

41 *The Yue You 902* [2020] 3 SLR 573 at [38].
42 *The Yue You 902* [2020] 3 SLR 573 at [39] and [75].
43 *The Yue You 902* [2020] 3 SLR 573 at [57].
44 *The Yue You 902* [2020] 3 SLR 573 at [57].
45 *The Yue You 902* [2020] 3 SLR 573 at [60].

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in Singapore is that delivery to a person not entitled does not cause the bill of lading to be spent.[46] This position had already been "clearly and definitively" articulated in *BNP Paribas v Bandung Shipping Pte Ltd*,[47] where Belinda Ang Saw Ean J held that the contract of carriage generally continues, and the bill of lading remains effective, until the goods are delivered to the person entitled under the bill of lading. Reference was also made to *The Future Express*,[48] where it was held that the bill of lading was not spent or exhausted when delivery had been effected against an indemnity to a person who did not have a right to delivery under the bill of lading.[49]

2.50 Pang JC concluded, therefore, in respect of the first argument that (a) s 2(2) of the BLA applies to a bill of lading that is regarded at common law as spent; and (b) delivery against a LOI to a person who is not entitled to delivery under the bill of lading does not cause the bill to be spent.[50] In this case, the Bills of Lading were not spent as the Cargo had been delivered against a letter of indemnity to a person who did not have a right to delivery under the Bills of Lading.

2.51 Pang JC then moved on to consider the defendant's second argument, which was also its primary case. The defendant submitted that FGV was a person entitled to delivery under the bill of lading and not the plaintiff because:

(a) at the time the Cargo was being discharged, the Bills of Lading were in the plaintiff's custody but as the purchase price had not yet been paid, neither the plaintiff nor Aavanti could be regarded as the holder of the Bills of Lading;

(b) therefore FGV remained the holder of the Bills of Lading at the time the Cargo was being discharged; and

(c) since delivery to Ruchi at FGV's instructions amounts to delivery to FGV, the delivery was made to a person entitled to delivery under the Bills of Lading.

2.52 With respect to this second argument, Pang JC noted that FGV had blank endorsed the Bills of Lading and delivered them to the buyer through banking channels. The Bills of Lading were received by the

46 *The Yue You 902* [2020] 3 SLR 573 at [51].
47 [2003] 3 SLR(R) 611.
48 [1992] 2 Lloyd's Rep 79.
49 *The Yue You 902* [2020] 3 SLR 573 at [44] and [65].
50 *The Yue You 902* [2020] 3 SLR 573 at [74].

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plaintiff and presented to the buyer for acceptance on 26 April 2016, one day before the discharge of the Cargo commenced.[51]

2.53 The Bills of Lading were accepted by the buyer (when the buyer requested the trust receipt loan) and paid for by the plaintiff three days later, within hours after completion of the discharge operation.

2.54 Pang JC was of the view that a seller who has parted possession with a blank endorsed bill of lading for the purposes of obtaining payment would be in no position to present the bill of lading to the carrier in exchange for delivery of the Cargo; as such, it was not possible to consider FGV to be the lawful holder of the bill of lading.[52]

2.55 Further, FGV had itself recognised, through the provision of a LOI to indemnify the defendant against delivery without presentation of the Bills of Lading, that it was not a person entitled to delivery under the Bills of Lading.[53]

2.56 The defendant had therefore failed to make out Step 1 of its submissions that the Bills of Lading had become spent by the time the plaintiff became the holders. Nevertheless, Pang JC proceeded to consider Step 2 on the assumption that the Bills of Lading had in fact become spent.

(b) Step 2 – Assuming the Bills of Lading were spent, whether the plaintiff came within section 2(2)(*a*) of the Bills of Lading Act

2.57 Assuming he was wrong on the question whether the Bills of Lading were spent when the Cargo was discharged and assuming therefore that s 2(2) applied, Pang JC went on to consider whether the plaintiffs had become holder of the bills "by virtue of a transaction effected in pursuance of any contractual or other arrangements" made before the time when the bills had become spent.[54]

2.58 Pang JC, endorsing the broad approach to causal connection set out in *The Erin Schulte*,[55] held that a transaction would be "effected in pursuance of [a] contractual or other [arrangement]" so long as the contractual or other arrangement was "a cause or reason" for the transfer. In so doing, Pang JC rejected the narrower approach taken in several older

51 *The Yue You 902* [2020] 3 SLR 573 at [76]–[77].
52 *The Yue You 902* [2020] 3 SLR 573 at [78].
53 *The Yue You 902* [2020] 3 SLR 573 at [81].
54 Bills of Lading Act (Cap 384, 1994 Rev Ed) s 2(2)(*a*). See *The Yue You 902* [2020] 3 SLR 573 at [87].
55 [2013] 2 Lloyd's Rep 338.

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authorities, which had required the contractual or other arrangement to be the "immediate reason", "proximate cause" or "real and effective cause" of the transfer.[56]

2.59 The defendant submitted that s 2(2)(*a*) did not apply because the relevant "contractual or other arrangements" was the granting of the Loan. Since this took place after the defendant had completed delivery of the Cargo to Ruchi, it was not a contractual or other arrangement made before the Bills of Lading became spent.

2.60 Applying the broad approach to the facts, Pang JC accepted the plaintiff's submission that it was the Facility Agreement (and not the granting of the Loan itself) which constituted the relevant "contractual or other [arrangement]". Given that the Facility Agreement had been issued several years prior to the discharge of the Cargo, the plaintiff would still have been able to avail themselves of s 2(2)(*a*) of the BLA even if the Bills of Lading had become spent.[57] Step 2 of the defendant's submissions was therefore not made out.

2.61 Pang JC further added that the same result would have obtained even if there had been no Facility Agreement in that the sale contract between Aavanti and FGV ("the Sale Contract") itself would have constituted the relevant "contractual or other [arrangement]". It sufficed for that contract to constitute a cause or reason for the Loan since Aavanti requested the trust receipt loan from the plaintiff in order to carry out and fulfil the Sale Contract and since the plaintiff's grant of the trust receipt loan was to enable Aavanti to obtain the Bills of Lading and the underlying Cargo pursuant to the Sale Contract, Pang JC saw no difficulty holding that the trust receipt loan was a transaction "in pursuance of" the Sale Contract. The trust receipt loan served a legitimate and commercial purpose (of trade financing) which flowed from the Sale Contract.[58]

2.62 The defendant therefore failed to raise a triable issue on whether the plaintiff had acquired rights of suit in respect of the Bills of Lading pursuant to s 2(1) of the BLA.

(2) Issue 2 – Was the plaintiff a holder of the Bills of Lading in good faith?

2.63 Alternatively, the defendant argued that the plaintiff was not a "lawful holder of a bill of lading" within the meaning of s 2(1)(*a*) of

56 *The Yue You 902* [2020] 3 SLR 573 at [95]. See also [88]–[91].
57 *The Yue You 902* [2020] 3 SLR 573 at [94].
58 *The Yue You 902* [2020] 3 SLR 573 at [95].

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the BLA because the plaintiff knew that the Cargo had already been discharged against a LOI by the time it became holder of the Bills of Lading.[59] The plaintiff thus could not be considered a "holder of the bill in good faith" as required by s 5(2) as it had taken possession of the Bills of Lading for a mere right of suit.[60] Consequently the rights under the BLA could not be transferred to the plaintiff.

2.64 Pang JC disagreed and noted that the Court of Appeal in *UCO Bank v Golden Shore Transportation Pte Ltd*[61] had already held that "good faith" within the meaning of s 5 simply connoted "honest conduct". For various reasons (including the need to ensure that the term be clear and capable of unambiguous application in the commercial context of bills of lading),[62] Pang JC also did not accept the defendants' argument that the scope of the term "good faith" should be incrementally expanded to address situations where the holder of a bill of lading had taken possession of bills of lading to obtain a bare right of suit against a carrier without any real interest in the relevant goods.[63]

2.65 On the facts, Pang JC found that there was no evidence that the plaintiff knew that the Cargo had been discharged before it agreed to extend the Loan.[64] Further, even if the plaintiff had knowledge of the same, such knowledge did not necessarily mean that the plaintiff had not acted in good faith. The inquiry was focused on whether there was dishonest conduct, and in that regard, the defendant had failed to produce any evidence that the plaintiff had acted dishonestly.[65]

(3) Issue 3 – Did the plaintiff consent to the carrier discharging the Cargo without presentation of the original Bills of Lading?

2.66 Pang JC also did not consider this to be a triable issue. For one, the defendant was unable to point to anything said or done by the plaintiff which could have induced the defendant to conclude that the plaintiff had consented to the delivery of the Cargo without presentation of the original Bills of Lading. In fact, the defendant accepted that there were no communications between the plaintiff and defendant prior to the discharge of the Cargo. More importantly, given that the defendant's submission was that the plaintiff's consent was expressed through the grant of the loan, and the loan was only granted after the Cargo was

59 *The Yue You 902* [2020] 3 SLR 573 at [28].
60 *The Yue You 902* [2020] 3 SLR 573 at [103].
61 [2006] 1 SLR(R) 1.
62 *The Yue You 902* [2020] 3 SLR 573 at [104]–[107].
63 *The Yue You 902* [2020] 3 SLR 573 at [103].
64 *The Yue You 902* [2020] 3 SLR 573 at [110]–[113].
65 *The Yue You 902* [2020] 3 SLR 573 at [114]–[117].

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discharged, there could have been no prior consent by the plaintiff to the discharge of the Cargo.[66] Pang JC further found that the plaintiff's decision to grant a trust receipt loan (as opposed to other types of loan) and take the Bills of Lading as security was clearly inconsistent with any intention to waive its contractual right of suit against the defendant under the Bills of Lading.[67]

(4) Issue 4 – Was the plaintiff estopped from asserting a misdelivery claim?

2.67 Pang JC held that neither the requirements for estoppel by acquiescence nor the requirements for estoppel by convention had been made out.[68]

(5) Issues 5 and 6 – Conversion, detinue and bailment

2.68 Given his findings on issues 1 to 4 above, Pang JC did not consider it necessary to consider the plaintiff's claims in conversion, detinue and bailment.[69]

2.69 Pang JC found no other reasons why the matter should go to trial.

2.70 The defendant was thus held liable for the sum of US$7,454,973.16, being the invoice value of the Cargo in the Sale Contract.[70]

II. *Wilmar Trading Pte Ltd v Heroic Warrior Inc*

2.71 In *Wilmar Trading Pte Ltd v Heroic Warrior Inc*,[71] Belinda Ang Saw Ean J considered how a Free on Board ("FOB") buyer might bring a claim against a shipowner for damage to goods loaded onto a ship in a situation where no bill of lading had been issued and where no direct contractual relationship existed between the buyer and the shipowner.

A. Brief facts

2.72 Pursuant to three sale and purchase contracts, the plaintiff purchased four different types of palm oil in varying quantities on FOB

66 *The Yue You 902* [2020] 3 SLR 573 at [122].
67 *The Yue You 902* [2020] 3 SLR 573 at [123].
68 *The Yue You 902* [2020] 3 SLR 573 at [124]–[134].
69 *The Yue You 902* [2020] 3 SLR 573 at [124]–[135].
70 *The Yue You 902* [2020] 3 SLR 573 at [142].
71 See para 2.1 above.

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terms from PT Multimas Nabati Asahan ("MNA"), an Indonesian seller. The plaintiff then chartered the *Bum Chin* to load the cargo. This voyage charter party ("the NHL Charter") was made between the plaintiff and the sub-time charterer, an entity named NHL-Development Ltd ("NHL"). NHL had chartered the *Bum Chin* from an entity named STX Pan Ocean, which had in turned chartered the *Bum Chin* from the defendant shipowner.

2.73 One of the *Bum Chin*'s tanks ("tank 4S") fractured halfway through the loading process ("the Incident"). This resulted in the contamination of the cargo of ROL IV 64 (a type of palm oil) stored in the tank by seawater as well as the loss of use of the *Bum Chin*. The plaintiff thereafter chartered a substitute vessel, the *Ping An*, to transport the cargo.

2.74 No bills of lading were ever issued for the cargo as the contemplated voyage was never carried out. The plaintiff nevertheless proceeded to bring claims against the defendant in contract and tort. The defendant counterclaimed for, *inter alia*, the cost of repairs to the *Bum Chin*.

B. Key issues

2.75 Broadly speaking, the key issues in the judgment were as follows:[72]

(a) whether the plaintiff could bring a claim founded on an express or implied contract derived from an intention in the relevant charter parties to issue original bills of lading that incorporated the Hague-Visby Rules ("Visby Rules");

(b) if not, whether the plaintiff could bring an alternative cause of action in negligence;

(c) whether the defendant could bring its counterclaim against the plaintiff; and

(d) the quantum of damages the plaintiff could recover.

72 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [5].

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(1) Issue 1 – Whether *the plaintiff could bring a claim founded on an express or implied contract that incorporated the Hague-Visby Rules*

2.76 The plaintiff's claim that there existed an express contract was readily disposed of. It was unclear from the facts how a direct contract of carriage could arise between the plaintiff and the defendant.

2.77 More interesting was the plaintiff's claim that although no bill of lading had been issued, there still existed an implied contract of carriage between the parties. In this regard, the plaintiff relied *Pyrene Co Ltd v Scindia Navigation Co Ltd*[73] ("*Pyrene*") for the proposition that there is no need for bills of lading to be actually issued for there to be a contract of carriage since the bill of lading is only evidence of an antecedent contract; so long as bills of lading were contemplated to be issued, a contract of carriage incorporating the Visby Rules would arise between the parties. In the present case, the plaintiff averred that the fact that the NHL Charter evinced an intention to issue original bills of lading meant that there existed an implied contract of carriage between the parties.[74]

2.78 Ang J disagreed with the plaintiff and held that *Pyrene* was distinguishable. Crucially, the contract of carriage in that case was between the seller and the shipowner. In the present case, the evidence indicated that the NHL Charter contemplated the issue by NHL of the *charterer's* bills of lading. It followed that the defendant was not (and was never intended to be) the contractual carrier and therefore could not be held liable in contract.[75]

(2) Issue 2 – Whether the plaintiff could bring a claim in negligence

2.79 Ang J then turned to address the plaintiff's claim in negligence. As a preliminary point, it was necessary to determine whether the plaintiff had a proprietary interest in the cargo at the time of the Incident, and, if not, whether the plaintiff nevertheless possessed title to sue the defendant in negligence.

2.80 Ang J found that property had not passed to the plaintiff. For one, Ang J observed that under a classic FOB contract, unless expressly contracted otherwise, property passed upon payment.[76] On the facts, the

73 [1954] 2 QB 402.
74 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [14].
75 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [18].
76 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [27].

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plaintiff had not proved that it had paid for the cargo. Accordingly, title in these goods could not have passed to it.[77]

2.81 The plaintiff further sought to argue that property in the cargo had passed to it once the goods had been loaded onto the *Bum Chin*. In this regard, the plaintiff relied on a passage from *The International Sale of Goods*[78] for the proposition that where an FOB seller delivers goods to a carrier but does not reserve the right of disposal, property passes when the goods are put on board the vessel. However, Ang J noted that under s 19(2) of the Sale of Goods Act,[79] evidence of such a reservation of rights may be found where the bill of lading is made out to the seller as shipper or the shipper's order. On the facts, the non-negotiable bills of lading (which had been issued for the purposes of clearing customs only)[80] named MNA (the seller) as the shipper. Ang J took this to be a clear indication that MNA intended to reserve its title to the cargo.[81]

2.82 Ang J proceeded to consider whether the plaintiff could sue the defendant in negligence notwithstanding the lack of a proprietary interest in the cargo. The defendant, relying on *The Aliakmon*,[82] attempted to argue that the plaintiff could not.[83] Ang J disagreed, observing that the Singapore Court of Appeal had recently held in *NTUC Foodfare Co-Operative Ltd v SIA Engineering Co Ltd*[84] that the exclusionary rule against recovery for pure economic loss had been rejected, and that it was thus no longer necessary for a plaintiff to prove a proprietary interest in the relevant goods to have title to sue in respect of the loss it has suffered. As such, *The Aliakmon* no longer represented the position under Singapore law and the plaintiff was not barred from suing in negligence.[85]

2.83 Ang J then found, on the facts, that the defendant owed the plaintiff a duty to take reasonable care of the cargo loaded on board the *Bum Chin*.[86] In arriving at this view, Ang J placed considerable weight on the fact the cargo was purchased on FOB terms. Since risk in these goods passed from the seller to the plaintiff from the moment the goods were

77 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [30].
78 Michael G Bridge, *The International Sale of Goods* (Oxford University Press, 4th Ed, 2018).
79 Cap 393, 1999 Rev Ed.
80 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [21].
81 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [33].
82 [1986] AC 785.
83 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [35].
84 [2018] 2 SLR 588.
85 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [36]–[37].
86 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [43].

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put on board the defendant's vessel, the relationship between the plaintiff and defendant was sufficiently proximate to give rise to such a duty.[87]

2.84 The central issue, therefore, was whether the defendant had breached its duty of care. Ang J embarked on a lengthy examination of the evidence[88] and concluded that the plaintiff's loss had been caused by the defendant's negligence. In particular, the Incident was found to have been caused by structural weaknesses in tank 4S combined with over-pressurisation arising from the defendant's failure to control air pressure at the manifold valve.[89] A breach was thus made out.

(3) Issue 3 – Whether the defendant could bring a counterclaim against the plaintiff

2.85 The defendant's main counterclaim was premised on the allegation that MNA and its personnel involved in the cargo operations were agents of the plaintiff, and that the fault of any of these individuals could give rise to liability on the part of the plaintiff as regards the defendant's loss arising from damage to the *Bum Chin*.[90]

2.86 Ang J disagreed with the defendant's submission and held that no agency relationship existed between MNA and the plaintiff. In arriving at this view, Ang J was persuaded (amongst other things) by the allocation of risk in an FOB contract. Given that risk remained with MNA while the cargo was being delivered onto the *Bum Chin*, it followed that the relationship between the terminal's personnel (through MNA) and the plaintiff could not be considered one of agency.[91]

(4) Issue 4 – Quantum of damages

2.87 Given that the plaintiff's claim in negligence had been allowed and the defendant's counterclaim dismissed, it remained for Ang J to assess the quantum of damages payable by the defendant. The plaintiff put forward seven different heads of damages for a total claim sum of US$547,942.52.[92] However, only three of the seven heads of damages were properly substantiated. No proof of payment was adduced for the remaining four heads of damage.[93] As such, Ang J awarded the plaintiff

87 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [41].
88 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [52]–[221].
89 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [222].
90 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [45].
91 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [46].
92 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [223].
93 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [247]–[259].

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US$206,706.98 in damages, this being the sum claimed under the three properly substantiated heads of damage.[94]

94 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [260].

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