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The "Chem Orchid" and another matter

[2016] SGCA 04

Court of Appeal — Originating Summons No 21 of 2015 and Civil Appeals Nos 58, 59, 60 and 62 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash J and Quentin Loh J
26 October 2015

Admiralty and shipping — Practice and procedure of action *in rem* — Writ *in rem*

Civil procedure — Striking out

20 January 2016

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 The *Chem Orchid* ("the Vessel") is a vessel built to carry oil and chemicals. It was leased by Han Kook Capital Co, Ltd ("HKC") to Sejin Maritime Co Ltd ("Sejin") on a demise charter. Due to certain unpaid debts owed by Sejin to the four respondents in the present proceedings (collectively, "the Creditors"), the Vessel was arrested in Singapore. The Creditors then filed four separate *in rem* writs against the Vessel. By way of separate summonses, HKC sought to set aside the Creditors' *in rem* writs on the basis that the court's admiralty jurisdiction under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the HCAJA") had not been properly invoked; in the

alternative, it sought to have the *in rem* writs struck out pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") and/or under the court's inherent jurisdiction.

2 HKC contended that the court's admiralty jurisdiction had not been properly invoked because at the time the Creditors' *in rem* writs were issued ("the Relevant Time"), Sejin, the party who would be liable on the Creditors' claims in an action *in personam*, was no longer the demise charterer of the Vessel, and thus, the condition specified in s 4(4)(i) of the HCAJA was not satisfied. In support of this argument, HKC relied on a notice issued by its subsidiary, HK AMC Co Ltd ("HKA"), to Sejin on 4 April 2011 ("the 4 April 2011 Notice") terminating Sejin's demise charter of the Vessel. HKC submitted that in view of that notice, there was no basis for the Creditors to invoke the court's admiralty jurisdiction under any of the grounds in s 3(1) of the HCAJA.

3 In the court below, the assistant registrar ("the AR") set aside the Creditors' *in rem* writs (see *The Chem Orchid* [2014] SGHCR 1), but the High Court judge ("the Judge") allowed the Creditors' appeals and reversed the AR's decision (see *The Chem Orchid* [2015] 2 SLR 1020 ("the HC Judgment")). As four different *in rem* writs were involved, four separate appeals were filed by HKC against the Judge's decision. Two of the Creditors – namely, Mercuria Energy Trading SA ("Mercuria"), the respondent in Civil Appeal No 59 of 2015 ("CA 59/2015"), and Winplus Corporation Co, Ltd ("Winplus"), the respondent in Civil Appeal No 62 of 2015 ("CA 62/2015") – objected to HKC's appeals on the grounds that HKC needed leave from the Judge before it could appeal, but had not obtained such leave. HKC then applied to this court via Originating Summons No 21 of 2015 ("OS 21/2015") for either: (a) a declaration that it did not need leave of court to appeal against the Judge's decision; or (b) in the event

Version No 1: 16 Dec 2021 (20:13 hrs)

that leave of court was needed, an extension of time to apply for leave and the grant of such leave retrospectively.

4 We heard OS 21/2015 together with the four appeals by HKC against the Judge's decision. At the conclusion of the hearing, we dismissed OS 21/2015 and, as a corollary, also dismissed all four of HKC's appeals. In our view, given the way in which the case was presented, HKC's appeals against the Judge's decision were in substance akin to appeals against the dismissal of an application to strike out a writ action. Therefore, the appeals fell within s 34(1)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") read with para (*e*) of the Fourth Schedule thereto. These two provisions entail that no appeal can be brought to the Court of Appeal where (*inter alia*) a judge makes an order refusing to strike out "an action or a matter commenced by a writ of summons or by any other originating process". In these grounds, we explain our decision in greater detail.

The facts

5 HKC was the owner of the Vessel. On 1 February 2010, it entered into an agreement to lease the Vessel to Sejin on a demise charter for a period of 108 months ("the Lease Agreement").[1] The Lease Agreement was governed by South Korean law. Pursuant to the Lease Agreement, Sejin was obliged to pay HKC monthly rental on the third day of each month.[2] All was well until

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1 CA 59/2015 Appellant's Core Bundle ("ACB") vol 2 at pp 24–50.

2 CA 59/2015 ACB vol 2 at p 49.

Version No 1: 16 Dec 2021 (20:13 hrs)

4 October 2010, when Sejin made its last payment to HKC.[3] Thereafter, no further rental payments were received by HKC from Sejin.[4]

6 In December 2010, HKA was incorporated by HKC specifically to deal with the recovery of bad debts owed to HKC. HKC issued a Notice of Credit Transfer ("the NCT") to Sejin, in which Sejin was informed of the following arrangement:[5]

> …
>
> 2. We hereby give a notice that we transfer following credit (hereinafter referred to as the "Transfer Credit", the amount as of November 30, 2010, applicable exchange rate of 1,157.30 won/US$) in full to HK AMC Co., Ltd (hereinafter referred to as the "Transferee") as of December 29, 2010.
>
> - Obligor: Sejin Maritime Co., Ltd,
> - Principal sum of credit: ₩15,504,035,200
> - Interest (Including delay interest): ₩68,671,492
> - Occurrence date: February 3, 2010
> - Expiry date: February 3, 2019
>
> 3. In addition to the Transfer Credit, we transferred the right or status in our possession or management out of personal or physical security, right to profit or the other rights incidental to the Transfer Credit.
>
> 4. In spite of the above transfer of Credit, the right, obligation or status of yours based on the relating contract, agreement, security agreement or the other contract shall remain unchanged and the right, obligation or the other status of ours based on the above contracts shall be succeeded by the Transferee to the extent of the transfer.
>
> 5. We, as the creditor of the Transfer Credit, hereby give a notice to you on the transfer of the Transfer Credit.

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3 CA 59/2015 Record of Appeal ("ROA") vol 3A at p 142, para 10.

4 *Ibid.*

5 CA 59/2015 ACB vol 2 at pp 150–151.

Version No 1: 16 Dec 2021 (20:13 hrs)

…

7 Subsequently, on 27 December 2010, HKC and HKA signed an Asset Transfer Agreement ("the ATA") under which HKC agreed to sell HKA, for a consideration of ₩143,489,658,294 (*per* Art 5(1) of the ATA), certain credits which HKC had obtained in the course of its business.[6] The credits owed by Sejin to HKC under the Lease Agreement were included in the sale.[7]

8 By early April 2011, Sejin had failed to make any rental payments under the Lease Agreement for a period of six consecutive months. According to the affidavit filed on 6 March 2012 by Mr Sejun Kim ("Mr SJ Kim"), HKC's representative, there was no sign that Sejin would be able to make further payments as the value of the Vessel had depreciated significantly and the prevailing market conditions were very poor.[8] Mr SJ Kim stated in his affidavit that HKC had grave concerns about Sejin's ability to perform its obligations under the Lease Agreement, and thought that it was entitled to terminate that agreement by giving Sejin notice in accordance with Art 24(2) of the agreement.

9 HKA thus sent the 4 April 2011 Notice to Sejin informing it that it had "lost all the benefit of time"[9] for repaying its outstanding debts. The relevant parts of the notice read as follows:[10]

…

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6 CA 59/2015 ACB vol 2 at pp 132–147.

7 CA 59/2015 ACB vol 2 at p 143.

8 CA 59/2015 ROA vol 3A at p 143, para 14.

9 CA 59/2015 ACB vol 2 at p 52.

10 *Ibid*.

Version No 1: 16 Dec 2021 (20:13 hrs)

> 2. This is about the facility rent (lease) contract … between your company and [HKC], the credit of which was assigned to us on Dec. 29, 2010.
>
> 3. According to paragraph 2 of article 24 of the above lease contract, your company lost all the benefit of time of debt against our company. Therefore, please pay immediately all outstanding principal, period interest, overdue principal and interest, delayed compensation.
>
> 4. If the above point 3 is not implemented, in order to secure the remaining credit, our company will do the following:
>
> (a) Demand an immediate repayment of the full amount of the credit
>
> (b) Retrieve the leased object, consider an auction and register the information about the overdue payment according to the regulation of credit information management
>
> (c) Take legal actions such as placing the collateral and other assets under distraint attachment and request for auctioning them. And we also let you know that you are responsible for enforcement cost when we do the above.
>
> …
>
> [underlining in original]

10 The overdue lease payments as at 4 April 2011 amounted to ₩289,460,562, and the total sum that was to be paid for the remainder of the lease was ₩16,934,476,554, or approximately US$15,019,200.[11] The parties disagreed on whether or not the NCT conferred on HKA, who was not a party to the Lease Agreement, the right to terminate that agreement.

11 Sejin did not give any formal reply to the 4 April 2011 Notice.[12] According to Mr SJ Kim's affidavit of 6 March 2012, sometime around mid-April 2011, he (Mr SJ Kim) received a call from Mr Keunhyuk Park

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11 CA 59/2015 ACB vol 2 at p 52; CA 59/2015 ROA vol 3A at p 144, para 16.

12 CA 59/2015 ROA vol 3A at p 146, para 25.

Version No 1: 16 Dec 2021 (20:13 hrs)

("Mr Park"), Sejin's chief executive officer, asking for a meeting. During the meeting, Mr Park asked whether the termination of the Lease Agreement could be revoked and the Lease Agreement revived. Mr SJ Kim informed him that the Lease Agreement had been terminated and its termination could not be revoked with just a mere promise to pay the outstanding sums.[13] Instead, HKC would only consider revoking the termination of the Lease Agreement with an actual payment of those sums.[14]

12 After the meeting, Mr Park asked HKA to send Sejin a notice of the overdue payments which it owed HKC.[15] Following that request, a list of overdue payments as at 25 April 2011 was emailed to Sejin.[16] The amounts due were stated to comprise ₩135,853,436 and US$149,015,17.[17]

13 On 9 May 2011, HKA issued a further formal notice to Sejin emphasising that Sejin had "lost all the benefit of time" for paying the rental arrears. HKA continued to demand the immediate payment of the full amount which was outstanding, but indicated that it was prepared to desist from taking steps to secure the amount owed if payment was made by 13 May 2011.[18]

14 On 23 May 2011, Sejin responded to HKA's 9 May 2011 notice. It explained that it had been unable to fulfil its monthly payment obligations as

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13 CA 59/2015 ROA vol 3A at p 146, para 23.

14 CA 59/2015 ROA vol 3A at p 145, para 23.

15 CA 59/2015 ROA vol 3A at p 145, para 24.

16 CA 59/2015 ACB vol 2 at pp 55–56.

17 CA 59/2015 ROA vol 3A at p 145, para 24.

18 CA 59/2015 ROA vol 3A at p 146, para 29.

Version No 1: 16 Dec 2021 (20:13 hrs)

the Vessel had broken down frequently.[19] It also informed HKA that freight earnings from a charter dated 13 May 2011 with Frumentarius Ltd ("Frumentarius"), the respondent in Civil Appeal No 58 of 2015 ("CA 58/2015"), for a voyage from Belawan, Indonesia to Taman, Russia would generate revenue of about US$1,700,000, and it would ensure that Frumentarius deposited the charter payment due directly into HKA's account.[20] However, Sejin stated, it needed time to make the necessary arrangements, and requested HKA to grant it an extension of the lease payment deadline to 17 June 2011.[21] Sejin further stated:[22]

> … If our company cannot keep the above payment promise, we promise that our company will agree to all the actions your company will take, and will implement all the instructions related to the ship retrieval.

15 No response was given by either HKC or HKA until 14 June 2011. In the meantime, Sejin continued using the Vessel to trade. Mr SJ Kim stated that during this period, HKA was very upset by Sejin's refusal to return the Vessel. On 25 May 2011, Sejin sent HKA an email stating that Mr Park would notarise a promissory note in favour of HKA if the Lease Agreement was revived,[23] so that Sejin's interest burden on the overdue lease payments could be minimised.[24]

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19 CA 59/2015 ACB vol 2 at p 58.

20 CA 59/2015 ACB vol 2 at p 58, para 4.

21 CA 59/2015 ACB vol 2 at p 58.

22 *Ibid*.

23 CA 59/2015 ROA vol 3A at p 147, para 35.

24 *Ibid*.

Version No 1: 16 Dec 2021 (20:13 hrs)

16 On 31 May 2011, Sejin provided HKA with a written update that the Vessel had entered Belawan, Indonesia and was in the process of loading palm oil cargo.[25] Sejin also stated that there was an opportunity for the Vessel to ship sunflower oil, and that it intended to enter into long-term charters after three to five spot transactions shipping sunflower oil on behalf of its major trading partners.[26]

17 HKA was not convinced by Sejin's plans and continued to press Sejin for the return of the Vessel. On 14 June 2011, HKA wrote to Sejin in these terms:[27]

> …
>
> 2. This is a reply to the official document that your company sent to our company about "Chem Orchid – lease payment (sent day: May 23, 2011)" and "Chem Orchid – COA contract (sent day: May 31, 2011)."
>
> 3. Although our company gave notice of the lease termination and demanded that you should return the leased ship and pay the liquidated amount of loss through "Lease termination notice (document number: Hankook (Asset) No. 11-12, sent day: April 4, 2011)" and "Demand for liquidated amount of loss and claims for return of the leased ship (document number: Hankook (Asset) No. 11-29, sent day: May 9, 2011)["], your company did not respond to them, and this is an embezzlement and subject to criminal penalty.
>
> 4. After reviewing your request through the document that you sent on the lease payment deadline (June 17, 2011) and COA contract conclusion deadline (6 months from the date of sending the document), we cannot fully accept your company's request and we urge you to implement a) among the followings by June 17, b) to e) among the followings by June 31, and f) when the lease contract is normalized in the future.

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25 CA 59/2015 ROA vol 3A at p 232, para 2.

26 CA 59/2015 ROA vol 3A at pp 232–233, para 4.

27 CA 59/2015 ROA vol 3A at p 237.

Version No 1: 16 Dec 2021 (20:13 hrs)

> Following
>
> (a) Pay already occurred overdue lease amount, 190,000,000 won and 210,000 USD to our company
>
> (b) Pay all kinds of unpaid money including bunker C oil cost, repair cost, sailors' salary and maintenance fee
>
> (c) Submit to our company your company's detailed statement of cash flow
>
> (d) Submit the long-term charter and documents to prove it
>
> (e) Notarize a promissory note and submit it to our company
>
> (f) Entrust your company's future money management to our company
>
> [5.] If all the items written above are implemented, our company will consider normalization of the already terminated lease contract with your company. If not, our company will take all the necessary measures (including civil and criminal legal actions) to retrieve Chem Orchid, the leased ship, and the amount of credit.
>
> [underlining in original]

Sejin neither returned the Vessel to HKC nor paid the arrears due under the Lease Agreement. Instead, the Vessel sailed from Dumai, Indonesia to Singapore, where it arrived on 16 June 2011.

18 Upon learning of the Vessel's presence in Singapore through Mr SJ Kim on 29 June 2011, HKA sent Sejin a final notice for the Vessel's redelivery. On 30 June 2011, the Vessel took on more bunkers, which were supplied by Winplus, the respondent in CA 62/2015 (see [3] above). Sejin replied to HKA's final notice on 4 July 2011 stating that it was not intentionally delaying the return of the Vessel; instead, it wanted to return the Vessel safely through its normal sailing route.

Version No 1: 16 Dec 2021 (20:13 hrs)

19 On 15 July 2011, Sejin sent a further letter to Mr SJ Kim informing him that it would do its best to return the Vessel to South Korea as soon as possible. This did not, however, come to pass because on 28 July 2011, Winplus filed Admiralty in Rem No 184 of 2011 ("ADM 184/2011") against the Vessel and arrested it in Singapore. Subsequently, three further *in rem* writs – namely, Admiralty in Rem No 197 of 2011 ("ADM 197/2011"), Admiralty in Rem No 198 of 2011 ("ADM 198/2011") and Admiralty in Rem No 201 of 2011 ("ADM 201/2011") – were filed against the Vessel by, respectively: (a) Frumentarius, the respondent in CA 58/2015; (b) KRC Efko-Kaskad LLC ("KRC"), the respondent in Civil Appeal No 60 of 2015; and (c) Mercuria, the respondent in CA 59/2015.

20 In brief, the claims made in the *in rem* writs were as follows:

(a) In ADM 184/2011, Winplus claimed for unpaid bunkers which were supplied to the Vessel in Dumai, Indonesia and Singapore.

(b) In ADM 197/2011, Frumentarius claimed for loss or damage arising from the breach of the charterparty dated 13 May 2011 which it had entered into with Sejin (see [14] above).

(c) In ADM 198/2011, KRC claimed for non-delivery of cargo which it had shipped to Taman, Russia on board the Vessel.

(d) In ADM 201/2011, Mercuria claimed for non-delivery of cargo which it had shipped to Huelva, Spain on board the Vessel.

21 HKC entered an appearance in all four *in rem* actions as the Vessel's registered owner. Sejin did not enter an appearance at all. With the court's approval, the Vessel was sold on 23 December 2011 below its appraised value.

Version No 1: 16 Dec 2021 (20:13 hrs)

As mentioned earlier, HKC subsequently filed applications in all four admiralty actions seeking, in the main, to set aside the *in rem* writs and all subsequent proceedings that had been instituted (referred to hereafter as "the Setting-Aside Applications") on the grounds that the court's *in rem* jurisdiction had not been properly invoked because at the Relevant Time, the Vessel was no longer leased to Sejin on a demise charter.

The Judge's decision

22 As mentioned at [3] above, the Setting-Aside Applications first came before the AR, who allowed the applications. However, on appeal, the Judge reversed the AR's decision for four reasons.

23 First, the Judge held that the 4 April 2011 Notice was invalid since neither the ATA nor the NCT had transferred to HKA the right to terminate the Lease Agreement. Instead, the ATA had only transferred to HKA the credits payable by Sejin to HKC under the Lease Agreement, while the NCT had merely served as "a notice to Sejin of the intended credit transfer and could not transfer *more* rights than [the rights] transferred under the ATA" [emphasis in original] (see the HC Judgment at [44]). As such, the Judge held, only HKC could have issued a notice to terminate the Lease Agreement. The Judge further ruled that even if HKA were authorised to terminate the Lease Agreement on HKC's behalf, the 4 April 2011 Notice would still have been ineffective to effect such termination. This was because according to Art 24(2) of the Lease Agreement, a condition precedent to the right of termination was that *HKC* must have formed an opinion that Sejin was "facing difficulties in continuing its normal business activities", and there was no evidence to this effect. Furthermore, the "cause" for termination had to bear some relation to Sejin's inability to operate as a going concern. In this regard, the Judge considered that

Version No 1: 16 Dec 2021 (20:13 hrs)

Sejin's mere inability to keep up with the monthly rental payments due under the Lease Agreement could not, on its own, amount to such "cause". In any case, the Judge pointed out, the issue of a notice of termination had to be preceded by a rectification notice, and there was no evidence that Sejin had been issued with such a notice (see the HC Judgment at [46]–[48], [55] and [58]).

24 Second, the Judge held that physical redelivery of the Vessel was necessary to terminate the Lease Agreement since the defining feature of a demise charter was the complete transfer of possession and control of the vessel concerned from the shipowner to the charterer (see the HC Judgment at [72]). Accordingly, the parties to a demise charter could not contract out of that requirement – until physical redelivery was effected, the demise charterer continued to enjoy full rights of control and possession over the vessel, and third parties would be entitled to continue to deal with the demise charterer based on the latter's actual control and physical possession of the vessel. In the Judge's view, allowing a shipowner to contract out of the general requirement of physical redelivery would be unfair to third parties because in the absence of such redelivery, the change in the legal status of a vessel upon the termination of a demise charter would not be known to third parties (see the HC Judgment at [72]–[76] and [82]).

25 Third, the Judge held that even if it were in theory possible to contract out of the general requirement of physical redelivery to terminate a demise charter, there was in effect no such contracting out and no attempt to contract out in this case. This was because Art 26(3) of the Lease Agreement provided that hire continued to be payable by Sejin until the Vessel was redelivered, and thus "*reinforced* the general requirement of physical redelivery at common law" [emphasis in original] (see the HC Judgment at [98]). Therefore, Sejin continued

Version No 1: 16 Dec 2021 (20:13 hrs)

to be the demise charterer of the Vessel at the Relevant Time (see, likewise, [98] of the HC Judgment).

26 Fourth, the Judge held that there was no need for the creation or acceptance in Singapore law of the doctrine of constructive redelivery *vis-à-vis* the termination of demise charters. More importantly, he stated, such a doctrine would result in significant injustice to third parties, who would have no way of knowing whether the demise charterer with whom they were transacting had lost that status on account of a constructive redelivery. The Judge added that even if the doctrine of constructive redelivery were applicable in Singapore, such redelivery had not been made out on the facts of this case as the 4 April 2011 Notice and Sejin's letters of 4 July 2011 and 15 July 2011 were all insufficient to evince "a clear intention to redeliver the Vessel" (see the HC Judgment at [104] and [111]–[112]).

OS 21/2015

27 As mentioned earlier, HKC appealed against the entirety of the Judge's decision. However, Mercuria and Winplus objected to HKC's appeals, contending that HKC needed leave from the Judge before it could appeal, but had not obtained such leave. HKC then filed OS 21/2015 on 14 September 2015 seeking, in the main:

(a) a declaration that it did not need leave of court to appeal against the Judge's decision; or

(b) alternatively, in the event that leave to appeal was needed: (i) an extension of time to apply for such leave; (ii) the grant of such leave retrospectively or otherwise; and (iii) an order that the documents already filed in the respective appeals were to stand in the appeals.

Version No 1: 16 Dec 2021 (20:13 hrs)

The parties' arguments on the issue of leave to appeal

28 Mercuria submitted that HKC required leave from the High Court before it could appeal to the Court of Appeal against the Judge's decision as the Setting-Aside Applications were interlocutory in nature. It explained that pursuant to s 34(2)(*d*) of the SCJA read with para (*e*) of the Fifth Schedule thereto, leave of court was required to appeal against an order made on an interlocutory application refusing to set aside an *in rem* writ, and the failure to obtain such leave went to the Court of Appeal's jurisdiction. Such an omission could not be waived by the parties.[28] Mercuria further contended that since HKC had *deliberately* chosen not to obtain leave from the Judge to appeal against his decision,[29] the Court of Appeal was not seized with jurisdiction and so could not hear CA 59/2015 (as well as, for that matter, the other three appeals before us). It asked for CA 59/2015 to be dismissed with costs on this basis.[30] Winplus took a similar position *vis-à-vis* the appeal against it (*viz*, CA 62/2015).[31] It also contended that if leave to appeal was required from the High Court, the Court of Appeal could not grant the extension of time sought under HKC's alternative prayer in OS 21/2015 without HKC first making an application for an extension of time to the High Court.[32]

29 HKC did not address the issue of leave to appeal in its Appellant's Case in any of its four appeals. It appeared from the documents disclosed by Mercuria

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28 CA 62/2015 Respondent's Case ("RC") at para 14; CA 59/2015 Respondent's skeletal submissions at para 11.

29 CA 59/2015 RC at para 1.

30 CA 59/2015 RC at para 1; OS 21/2015 Respondent's skeletal submissions at para 26.

31 CA 62/2015 RC at paras 10, 11 and 13.

32 OS 21/2015 Respondent's skeletal submissions at para 14.

Version No 1: 16 Dec 2021 (20:13 hrs)

in its Supplemental Core Bundle for CA 59/2015 that HKC took the view that it did not need leave of court to appeal against the Judge's decision. HKC's position seemed to be that the Setting-Aside applications, being applications to set aside the Creditors' *in rem* writs due to the wrongful invocation of the court's admiralty jurisdiction under s 4(4) of the HCAJA, were *not* interlocutory applications as they had the effect of making a final disposal of the parties' substantive rights; hence, no leave of court to appeal was required.[33] In this regard, this court had held in *The Nasco Gem* [2014] 2 SLR 63 (at [16]) that an application for a warrant of arrest fell within para (*e*) of the Fifth Schedule to the SCJA, such that leave of court was needed to appeal against an order refusing to set aside a warrant of arrest. From the documents, it appeared that HKC's position was that *The Nasco Gem* could be distinguished as it concerned an application to set aside a warrant of arrest, as opposed to an *in rem* writ; furthermore, the setting-aside application in that case was based on an alleged abuse of process (specifically, non-disclosure of material facts on the part of the arresting party).[34] HKC submitted that the present case was different since the Setting-Aside Applications turned on "a crucial jurisdictional fact in the entire proceeding[s]",[35] *viz*, whether Sejin was the demise charterer of the Vessel at the Relevant Time.[36] A ruling on this jurisdictional fact, HKC contended, would be determinative of the parties' substantive rights because if the court determined that Sejin was not the demise charterer of the Vessel at the Relevant Time, the admiralty proceedings could not be sustained and the court would

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33 CA 59/2015 Respondent's Supplemental Core Bundle ("RSCB") at p 4.

34 CA 59/2015 RSCB at p 10.

35 *Ibid*.

36 CA 59/2015 RSCB at pp 10–11.

Version No 1: 16 Dec 2021 (20:13 hrs)

have to dismiss all four *in rem* actions.[37] On this basis, HKC submitted that it did not need leave to appeal as this court had also stated in *The Nasco Gem* (at [11]) that "an appeal to the Court of Appeal should remain *as of right* in respect of *an order made in an interlocutory application that could affect the final outcome of the action*" [emphasis added].

Our decision

The jurisdictional requirements in admiralty proceedings

30 In *The Bunga Melati 5* [2012] 4 SLR 546 ("*The Bunga Melati (CA)*"), this court, in the main judgment delivered by V K Rajah JA, held (at [106]; see also [112]) that in order to invoke the court's admiralty jurisdiction under s 4(4) of the HCAJA, the plaintiff had to satisfy the following five requirements:

> (a) first, prove on the balance of probabilities that the jurisdictional facts under the particular limb of ss 3(1)(*d*) to 3(1)(*q*) which it was relying on existed, as well as show an arguable case that its claim was of the type or nature required by the relevant statutory provision;
>
> (b) second, prove on the balance of probabilities that its claim arose in connection with a ship;
>
> (c) third, identify, without having to show in argument, the person who would be liable on the claim in an *in personam* action ("the relevant person");

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[37] CA 59/2015 RSCB at p 11.

Version No 1: 16 Dec 2021 (20:13 hrs)

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

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

31 The present appeals concerned the fifth of the requirements laid down in *The Bunga Melati (CA)* (referred to hereafter as "Step 5"). The parties' diametrically opposed positions bring into sharp focus the debate on how rules of civil procedure should apply in relation to admiralty proceedings which operate *in rem*. In the present case, the question of whether the Creditors' *in rem* writs, as well as the arrest of the Vessel, should be set aside was dependent on the core factual issue of whether Sejin was the demise charterer of the Vessel at the Relevant Time. How should this factual issue be determined? What would be the standard of proof if the issue were to be decided purely on the basis of affidavit evidence? Should the defendant in such a situation be entitled to take up the issue on appeal if the issue were decided against it wholly on the basis of conflicting *affidavit evidence*? If the defendant is not so entitled, will it be permitted to revisit the same factual issue at the trial of the substantive claim?

32 We begin by observing that in *The Bunga Melati (CA)*, this court in effect endorsed Belinda Ang Saw Ean J's ruling in the court below that disputed jurisdictional facts had to be proved on "a balance of probabilities" (see *The Bunga Melati 5* [2011] 4 SLR 1017 ("*The Bunga Melati (HC)*") at [108]–[109]). Notwithstanding this endorsement, we note that concerns were in fact raised by

Version No 1: 16 Dec 2021 (20:13 hrs)

Belinda Ang J as to whether it was appropriate to use the standard of "a balance of probabilities" in the case of an interlocutory application to set aside an *in rem* writ on the basis of affidavit evidence. At [86] and [98] of *The Bunga Melati (HC)*, Belinda Ang J observed:

> *Step (1) of section 4(4): jurisdictional facts to be proved on a balance of probabilities, and jurisdictional questions of law to be shown on a good arguable case*
>
> …
>
> 86 Step (1) of s 4(4) of the HCAJA [*viz*, showing that the plaintiff had a claim under ss 3(1)(*d*) to 3(1)(*q*) of the HCAJA] contained no language similar to that of O 11 r 2(2) [of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)], and in the absence of such language, there seemed to me no good reason not to hold a plaintiff to the normal civil standard of proof as far as proving jurisdictional facts was concerned. Incidentally, in *Empire Shipping Co Inc v Owners of the Ship "Shin Kobe Maru"* (1991) 104 ALR 489, Gummow J, like the learned [assistant registrar] in this case, drew an analogy with the cases on service out of jurisdiction … in deciding (at 493–494), on a defendant's challenge to the court's jurisdiction *in rem* under s 4(2) of the Admiralty Act 1988 [(Cth)] (the Australian equivalent of s 3(1) of the HCAJA), that the plaintiff was only required to show a "strong argument" that the court had jurisdiction, but it was in my view significant that Gummow J's approach was ultimately not endorsed by the High Court of Australia in [*The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404]; instead, the High Court [of Australia] affirmed that, for the purposes of s 4(2) of the Admiralty Act 1988 (corresponding to s 3(1) of the HCAJA and therefore step (1) of s 4(4)), jurisdictional facts had to be proved on a balance of probabilities. *As a practical matter, it could of course be said (as it was by the learned [assistant registrar] in his grounds of decision) that at such a preliminary stage of the action, in the absence of discovery and cross-examination of witnesses, it would be inappropriate to insist on a standard of proof normally applicable to full trials. However, that was not a principled way of dealing with the point that when the court's entire jurisdiction to adjudicate the action rested upon a disputed question of (jurisdictional) fact, that question of fact had to be resolved once and for all, using a standard of proof that was consistent with that used for proof of facts in general (in the absence of statutory language stating otherwise). Further, such pragmatic objections have not convinced courts in admiralty*

Version No 1: 16 Dec 2021 (20:13 hrs)

> *cases to abandon the standard of a balance of probabilities where proving* ***jurisdictional facts*** *was concerned …*
>
> …
>
> 98 If … the plaintiff disputed the defendant's factual assertion (that the bunkers had been supplied as a tradable commodity), then the court was obliged to find, *on a balance of probabilities*, as a precondition to deciding whether the plaintiff's claim fell within s 3(1)(*l*) of the HCAJA, whether the bunkers had in fact been supplied as a consumable or as a commodity. This fact was simply a condition precedent to jurisdiction under s 3(1)(*l*), *ie*, it was a jurisdictional fact which had to be found at the outset. *That fact-finding might be rendered difficult as a result of the preliminary nature or urgency of the action, or the evidence being in affidavit form, did not detract from the task of the court …*
>
> [original emphasis in bold italics; emphasis added in italics]

33 Similar concerns were expressed in *The Bunga Melati (CA)* by Chan Sek Keong CJ, who delivered a separate judgment of his own even though he agreed with the court's main judgment (delivered by Rajah JA) in that appeal. Chan CJ expressed his concerns at [127] of *The Bunga Melati (CA)* while commenting on *The Jarguh Sawit* [1997] 3 SLR(R) 829. The facts of *The Jarguh Sawit* are as follows. The respondent in that case, Navigation Maritime Bulgare ("NMB"), agreed under a memorandum of agreement ("the MOA") to sell a ship to Oxford Jay International Pte Ltd ("OJ") as a Lloyd's Register Class vessel. OJ paid NMB 10% of the purchase price as a deposit, and NMB advanced a loan for the remaining 90% of the purchase price, which loan was repayable in six monthly instalments commencing six months after the date of drawdown at an interest rate of 6% per annum. The loan from NMB was secured by a mortgage over the ship to be sold.

34 NMB subsequently failed to deliver the ship as a Lloyd's Register Class vessel because it had not been upgraded to comply with certain specified requirements. As a result, OJ was unable to register the ship under the Merchant

Version No 1: 16 Dec 2021 (20:13 hrs)

Shipping Act (Cap 179, 1985 Rev Ed) as a Singapore vessel, and the mortgage in turn could not be registered as the law at that time only permitted the registration of mortgages over Singapore-registered ships. OJ and NMB then decided to modify the vessel to re-class it in accordance with the classification specifications of Germanischer Lloyd's as opposed to those of Lloyd's, with the cost of the modifications to be borne by OJ and NMB in agreed proportions. Disputes, however, arose regarding payment for the modifications. In the meantime, ownership of the ship was transferred by OJ to the appellant, Jarguh Harimau Sdn Bhd ("JH").

35 NMB commenced legal proceedings and arrested the ship on 6 October 1994. JH applied to set aside the writ and the warrant of arrest on the basis that it was a *bona fide* purchaser of the ship without notice of the mortgage, which had never been registered. It failed before the assistant registrar. JH appealed to the High Court based on a different ground, namely, that the court's admiralty jurisdiction had been wrongly invoked as JH was not the party who would be liable *in personam* on NMB's claim. JH failed before both the High Court and the Court of Appeal.

36 Thereafter, NMB applied for summary judgment; it also sought to strike out those paragraphs in JH's defence and counterclaim which alleged that the court lacked jurisdiction. The applications were granted by an assistant registrar, after which OJ assigned all its rights, title and interest under the MOA to JH on 5 August 1996. JH took the view that as a result of the assignment, it was entitled to raise against NMB all the defences which would have been available to OJ in an *in personam* action against OJ. JH appealed to the High Court against the assistant registrar's decision on this basis, but the High Court affirmed the assistant registrar's decision to strike out the said paragraphs alleging the court's lack of jurisdiction.

Version No 1: 16 Dec 2021 (20:13 hrs)

37 JH then appealed to the Court of Appeal, arguing that it should not be precluded from pleading a defence of no jurisdiction at the trial even though it had already been decided at the interlocutory stage that the court had jurisdiction. This was because the question of jurisdiction was a substantive one. JH contended that the burden at the interlocutory stage was simply for NMB to prove that there was an arguable case that the court had jurisdiction as the question of jurisdiction would be re-tried at the final hearing, where NMB would have to prove its case on the balance of probabilities; in other words, it was "implicitly understood that in addition to the hearing on jurisdiction at the interlocutory stage, there would be a second hearing on the issue at the trial stage" (see *The Jarguh Sawit* at [28]). For these reasons, JH submitted, those paragraphs of its pleadings alleging the court's lack of jurisdiction had been wrongly struck out. The Court of Appeal disagreed and held (at [29]–[32]):

> 29 Dealing first with the suggestion that the question of jurisdiction is not procedural but substantive, we find ourselves unable to accept it for two reasons.
>
> 30 Firstly, whether or not a court has jurisdiction is, of necessity, a question logically prior to the substantive dispute of the parties. Unless and until a court is properly seized, it cannot adjudicate on the matter. If the appellants were right to characterise a dispute over jurisdiction as a substantive issue, and that they were entitled to raise it as a substantive defence, then they would in effect be arguing this at trial: "Our case is that this court has no jurisdiction to decide substantive issues; could you then please give a ruling on a substantive issue?" The defect in logic is self-apparent. Thus, our law provides that a party disputing jurisdiction may appear before the court to argue the question of jurisdiction (which we hold to be a procedural issue) without thereby submitting to the court's jurisdiction to determine substantive issues. This is particularly so when the court's admiralty jurisdiction *in rem* is invoked as such jurisdiction is founded on [the then equivalent of the HCAJA], s 3(1). See also s 16(3) of [the then equivalent of the SCJA].
>
> …
>
> 32 In view of our finding that jurisdiction is a procedural issue, the analogy with *Kelsey v Doune* [[1912] 2 KB 482] is

Version No 1: 16 Dec 2021 (20:13 hrs)

> inapt and *we accordingly hold that insofar as this argument is concerned, the position is that the question of jurisdiction cannot be tried again.*
>
> [emphasis added]

38 The paragraphs cited above may give the impression that all jurisdictional questions are settled with finality at the interlocutory stage. However, that is not necessarily so in every case. In our view, the paragraphs quoted above have to be read in their proper context and together with the subsequent paragraphs, *ie*, [40]–[44] of *The Jarguh Sawit*. It is apparent that the Court of Appeal's remarks were made in the context of interlocutory challenges to the court's exercise of admiralty jurisdiction. The Court of Appeal took pains to distinguish "the issues of jurisdiction and substantive liability" in the context of "the peculiar nature of admiralty actions *in rem*" (at [40]), while acknowledging at the same time that "for some of the grounds [in s 3(1) of the then equivalent of the HCAJA], … there is some similarity in the questions posed to determine jurisdiction and substantive liability"' (at [41]). As we see it, what this means is that once an applicant's interlocutory challenge to jurisdiction has been dismissed with finality, the applicant cannot, at the trial, mount another challenge to jurisdiction based on the same standard of proof as that applicable to its interlocutory challenge to jurisdiction since, at the trial stage, the court would not be deciding whether there was good cause to assume jurisdiction, but rather, would be deciding whether there was good cause for judgment to be given to the plaintiff. We set out below the relevant paragraphs from *The Jarguh Sawit* (*viz*, [40]–[44]) for good measure:

> 40 Turning to the third argument raised by the appellants [*ie*, the argument that the question of jurisdiction would be re-tried at the trial (see [37] above)], we believe that counsel confused the issues of jurisdiction and substantive liability because of the peculiar nature of admiralty actions *in rem*. Unlike actions *in personam*, in which the court's jurisdiction is founded on the presence of the defendant within the jurisdiction, admiralty jurisdiction *in rem* is founded whenever

Version No 1: 16 Dec 2021 (20:13 hrs)

> one of the requirements of s 3(1) of [the then equivalent of the HCAJA] … [is] satisfied. The particular ground relied on in this case was ground (c): "any claim in respect of a mortgage of or a charge on a ship or any share therein".
>
> 41 We acknowledge that for some of the grounds, including ground (c), there is some similarity in the questions posed to determine jurisdiction and substantive liability. When deciding whether it has jurisdiction, the question the court must ask itself is whether there is [a] good arguable case based on a ship's mortgage. When deciding at trial whether a defendant is liable, the question the court must ask itself is whether the claim based on a ship's mortgage is proved on a balance of probabilities.
>
> 42 Counsel considered that as the question asked in both cases is the same, and it is only the standard of proof that varies, he was entitled to argue "jurisdiction" twice, with his chances on the second try being better because the plaintiff had a higher burden. The point, however, that counsel missed, was that the standard of proof varies because the nature of the legal examination is different depending on whether one is asserting jurisdiction or liability.
>
> 43 *In a hearing of an application to dispute jurisdiction, the plaintiff need only show that he has a good arguable case that his cause of action falls within one of the categories of s 3(1) …* His objective is to persuade the court that there is sufficient evidence that a claim of the type specified … exists. …
>
> 44 Once the suit reaches the trial stage, however, the nature of the legal examination changes. The court is not deciding if there is a good cause for it to assume jurisdiction – it is deciding if there is good cause for it to give judgment for the plaintiff. ***The same facts cited to establish jurisdiction must then be proved by the plaintiff in the context of the substantive dispute proper and not [in] the context of a jurisdictional dispute. These facts must be proved beyond the standard of a good arguable case. They must be proved to the civil standard of proof, that is, on a balance of probabilities.***
>
> [emphasis added in italics and bold italics]

39 It is therefore *not* the case that the question of jurisdiction will never arise subsequently at the trial. Instead, it is clear from the above paragraphs from *The Jarguh Sawit* that the issue of jurisdiction can arise again at the trial, but would fall to be determined based on a different standard of proof due to the

Version No 1: 16 Dec 2021 (20:13 hrs)

different nature of the subsequent inquiry at the trial. Instead of being a procedural matter to be decided on the basis of a good arguable case, the issue of jurisdiction would, at the trial, be a substantive one to be decided on the balance of probabilities. In any event, we note that the Court of Appeal's observations in *The Jarguh Sawit* were made in the context of JH (the appellant in that case) having already submitted to the court's jurisdiction. Besides having filed a defence and counterclaim, JH had also failed to apply for leave to withdraw its appearance. This meant that pursuant to O 12 r 7(6) of the then equivalent of the ROC, it had consented to the Singapore courts' jurisdiction to decide the matter (see [37]–[38] of *The Jarguh Sawit*). That being the case, JH could no longer raise the issue of lack of jurisdiction at the substantive trial of the action. It was therefore correct for those paragraphs in JH's pleadings alleging the court's lack of jurisdiction to be struck out since any contention at the trial that the Singapore courts lacked jurisdiction over the dispute would have been doomed to fail.

40 Chan CJ's *dicta* in *The Bunga Melati (CA)* lends further weight to our analysis of *The Jarguh Sawit*. He was of the view that the Court of Appeal's comments at [40]–[44] of *The Jarguh Sawit* (cited at [38] above) constituted a piece of "somewhat elliptical dicta" which partly resulted in the procedural problems concerning jurisdictional challenges to ship arrests involving factual disputes at the interlocutory stage (see *The Bunga Melati (CA)* at [126]). He commented (at [127]):

> The court's observations [at [40]–[44] of *The Jarguh Sawit*] are not self-explanatory. The statement at [41] that "[w]hen deciding whether it has jurisdiction, the question the court must ask itself is whether there is [a] good arguable case based on a ship's mortgage", is unhelpful because it is not clear whether the court was referring to a factual or a legal challenge, or one involving an issue of mixed fact and law. The [High Court judge] interpreted the test of a good arguable case in these

Version No 1: 16 Dec 2021 (20:13 hrs)

> passages in [*The Jarguh Sawit*] as being referable to a question of law, and not to a question of fact, because whether the claim "'falls within one of the categories of s 3(1)' is a question of characterisation and categorisation, and therefore a question of law" … However, this was not what the court in [*The Jarguh Sawit*] actually said. At [43] of its judgment, the court said that "[the plaintiff's] objective is to persuade the court that *there is sufficient evidence* that a claim of the type specified in s 3(1)(*c*) exists" [emphasis added], words which are clearly apt as referring to an issue of fact rather than purely an issue of law. In [*The Jarguh Sawit*], the disputed issue was whether a mortgage of the ship had been executed – one which could be construed as a question of fact indeed. However, it was not clear whether there was a clearly framed *factual challenge* on jurisdiction in [*The Jarguh Sawit*] at the interlocutory stage of the proceedings, and the comments by the court at [41] that "[w]hen deciding at trial whether a defendant is liable, the question the court must ask itself is whether the claim based on a ship's mortgage is proved on a balance of probabilities" referred to the liability stage rather than the interlocutory stage. [emphasis in original]

41 The problem with the present case was precisely this – how could a disputed jurisdictional fact (*viz*, whether Sejin was still the demise charterer of the Vessel at the Relevant Time), which also involved the application of foreign law (namely, South Korean law), be proved *conclusively on the balance of probabilities* at the interlocutory stage when HKC (the applicant seeking to set aside the Creditors' *in rem* writs, and, in turn, the arrest of the Vessel) did not apply to the court to have the relevant witnesses examined orally? In our view, by relying wholly on affidavit evidence to decide the point on jurisdiction, the Judge could only have determined the disputed jurisdictional fact on a *prima facie* basis, and this would be *non-conclusive* of the jurisdiction issue. Indeed, given the manner in which HKC made the Setting-Aside Applications (*viz*, with striking out being the alternative relief to setting aside and without any oral evidence being adduced), the disputed jurisdictional fact could only be conclusively determined at the trial itself after cross-examination of the witnesses, especially the experts on South Korean law. In this regard, the *dicta* of Chan CJ in *The Bunga Melati (CA)* is helpful. He placed importance on how

Version No 1: 16 Dec 2021 (20:13 hrs)

the parties ran the proceedings, and referred to the decision of the New Zealand Court of Appeal in *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 ("*Vostok Shipping*") as a case in point.

42 In *Vostok Shipping*, the vessel concerned was arrested in New Zealand waters by the appellant, Vostok Shipping Co Ltd ("Vostok"), based on an *in personam* claim against a Russian company, Primorskaya Rybopromyshlennaya Kompaniya "Orka" ("Orka"). Confederation Ltd ("Confederation"), the respondent, sought to set aside the arrest on the ground that it had acquired ownership of the vessel by the time the *in rem* action was brought, and thus, the New Zealand High Court had no jurisdiction over the action under s 5(2)(*b*)(i) of the Admiralty Act 1973 (No 119) (NZ) ("the New Zealand Admiralty Act"), which is *in pari materia* with s 4(4) of the HCAJA.

43 Counsel for Vostok submitted that where there was a challenge to the court's jurisdiction before the trial, the challenge should be dealt with "on the same footing as any other peremptory attack on the plaintiff's case" (at [16]). He analogised such a challenge to a striking-out application (likewise at [16]), and submitted that Confederation had to show that Vostok did not have any arguable case on the jurisdictional issue. As such, counsel contended, the issues of: (a) whether the person who would be liable on the claim in an *in personam* action was the owner of the ship at the time the cause of action arose; and (b) whether that person was the beneficial owner of the ship at the time the writ was issued should be determined at the interlocutory stage by asking whether Vostok had no arguable case, with the onus on Confederation to show this (at [16]). This position, Vostok's counsel asserted, made sense as (at [17]):

> … [I]t is burdensome for a plaintiff to have to deal with objections to jurisdiction on an urgent basis. Evidence, including expert evidence on foreign law perhaps not available from anyone in this country, has to be assembled under

Version No 1: 16 Dec 2021 (20:13 hrs)

> pressure of time and when the facts are not clear. A plaintiff is not in a position to know about the ownership arrangements for a vessel other than as disclosed by a ship register, whereas an applicant in the position of Confederation in this case does have that knowledge. The decision on jurisdiction will often be decisive of the case overall when the maintaining of an arrest in a "satisfactory forum" may be an unpaid creditor's only prospect of securing payment. [Counsel for Vostok] accepted that an early decision on ownership may save much time and expense but argued that it can best be done by trial of the point as a preliminary issue under R 418 of the [New Zealand] High Court Rules, when the plaintiff will have had *a fair opportunity through discovery, interrogatories, cross-examination and marshalling of foreign and domestic law to test the other side's assertions as to ownership.* [emphasis added]

44 Counsel for Confederation, on the other hand, urged the court to follow the approach laid down in an earlier case, *Baltic Shipping Co Ltd v Pegasus Lines SA* [1996] 3 NZLR 641, which adopted the same approach as that taken in England, Australia and Singapore – namely, that the plaintiff needed to prove on the balance of probabilities that the proceedings were within the *in rem* jurisdiction of the court. He pointed out that the effect of establishing jurisdiction *in rem* was to allow the plaintiff to arrest and detain a vessel without any undertaking for damages, and there was no real protection for the shipowner and the party who would be liable on the claim in an *in personam* action against a claim which later proved to be ill-founded, considering, especially, that urgency was required in ship arrests (see *Vostok Shipping* at [18]). Moreover, counsel submitted, as the factual issues arising under s 5(2) of the New Zealand Admiralty Act went to jurisdiction only and had no relevance to the substance of the claim, they were not defences and should be decided at the outset (see *Vostok Shipping* at [18]).

45 The New Zealand Court of Appeal accepted Confederation's arguments and held that:

Version No 1: 16 Dec 2021 (20:13 hrs)

(a) It was well-established practice in England, Australia and Singapore that when faced with an application to set aside a ship arrest, the plaintiff had to prove on the balance of probabilities that the proceedings were within the *in rem* jurisdiction of the court (at [19]).

(b) Even allowing for considerations of urgency, the court should, in appropriate circumstances, adjourn an application to set aside a ship arrest so that there would be sufficient time for the parties to adduce the necessary evidence, and for the court to determine important questions of ownership or facts establishing jurisdiction without undue haste and consequent prejudice to a party which might not have immediate access to all the relevant factual materials (at [21]).

(c) Vostok had to establish, on the balance of probabilities based on the evidence placed before the court by the parties, that its claim was within the New Zealand High Court's jurisdiction, and that Orka was both the legal and the beneficial owner of the vessel at the time legal proceedings were commenced (at [23]).

46 It is pertinent to note that in *Vostok Shipping*, the New Zealand Court of Appeal cited the following holding of Robert Goff J (as he then was) in *I Congreso del Partido* [1978] QB 500 (at 535–536):

> … [A]s a matter of principle … any question of jurisdiction … must be dealt with on [interlocutory] motions and cannot be dealt with as an issue in the actions. Of course, on the hearing of such a motion, evidence will be admitted. *Usually that evidence will be in the form of affidavits, though in theory oral evidence, for example, by cross-examination of deponents of affidavits, might be allowed. … On the evidence so admitted, which in the present case is purely affidavit evidence, the question of jurisdiction has to be decided, and it cannot be right for the decision on that question to be allowed to depend on the decision of some issue to be tried in the actions.* If there is no jurisdiction as against [the defendant, it] should not be troubled

Version No 1: 16 Dec 2021 (20:13 hrs)

> with the actions at all; indeed, it cannot be decided whether the actions can be allowed to proceed until the question of jurisdiction has been determined. [emphasis added]

47 Returning to Chan CJ's *dicta* in *The Bunga Melati (CA)* at [126]–[127] (see [40] above), Chan CJ went on to approve the holding in *Vostok Shipping* (see *The Bunga Melati (CA)* at [128]). He expressed the view that the New Zealand Court of Appeal's approach met the requirements of procedural justice in determining factual challenges under the first step of the five-step process laid down in *The Bunga Melati (CA)* (at [129]–[130]):

> 129 In my view, the court's approach as described in the italicised words in [*Vostok Shipping* at [19]–[21]] meets the requirements of procedural justice in determining factual challenges under step 1 in an admiralty action. *The court must conduct a trial of the issue at the interlocutory/jurisdictional stage, if the defendant seeks a conclusive finding of fact from the court.* ***However, if the defendant is only prepared to rely on its affidavits, the court will only be able to determine the disputed issue on a preliminary basis. Consistent with the nature of the hearing, there can be no finding of fact on the balance of probabilities, but only on a*** **prima facie** ***basis that, on the facts, the court has jurisdiction.*** Although there will be no conclusive finding towards the disputed jurisdictional fact(s) under step 1 at the *interlocutory* stage, the issue of jurisdiction will merge at the *liability* stage with the issue of whether the plaintiff has proved its claim on the facts on the balance of probabilities, and the court at the liability stage would be entitled to come to a differing opinion from the court at the interlocutory stage based on evidence beyond contested affidavits which might surface at trial. … *It does not matter how the standard of proof (at the interlocutory/jurisdictional stage) is labelled provided it is understood that a factual dispute cannot be* ***conclusively*** *decided on contested affidavit evidence alone.*
>
> 130 In my view, *in the case of a factual challenge to jurisdiction,* ***whether the question of fact would be determined on the balance of probabilities depends on how a defendant wishes to make good its challenge by way of evidence****. It is not in every case that the court is required to decide the dispute of fact on the balance of probabilities.* ***This is only possible, consistent with the requirements of procedural justice, where all the evidence relating to disputed facts are before the court. Each case must depend on what the defendant is prepared to agree to in***

Version No 1: 16 Dec 2021 (20:13 hrs)

> ***relation to how the jurisdictional issue is to be determined or tried.*** *It is not for the court to compel the defendant to undergo a full pre-trial of the factual dispute if it only wishes to rely on affidavit evidence.* In this regard, I am of the view that there is no justification from the perspective of procedural justice for an admiralty action to be treated differently from any other civil action. The court is the master of its own procedure, subject of course, to [the then equivalent of the ROC], but there is nothing in [the then equivalent of the ROC] which compels the court to deal with factual or legal challenges in admiralty actions in any particular way. There is nothing to prevent the court to prescribe its own procedure, depending on the needs of the parties, and in particular, the needs of the party who wishes to set aside the admiralty action or the consequential arrest of its vessel.
>
> [original emphasis omitted; emphasis added in italics and bold italics]

48 We agree with the views of Chan CJ, which make eminent sense in the context of a ship arrest. A ship arrest can sometimes (and, indeed, may often) take place under urgent conditions, with the ship spending only a fleeting moment within the waters of Singapore – in such a situation, the arresting party may often be able to obtain only a limited amount of information which sufficiently supports the grant of an *in rem* writ and the issue of a warrant of arrest. The defendant may wish to set aside the *in rem* writ and the warrant of arrest, and it can choose to do so relying only on affidavit evidence. If it so chooses, findings made by the court on disputed facts based only on affidavit evidence at an interlocutory hearing, which facts impinge on the court's admiralty jurisdiction, will necessarily be *prima facie* non-conclusive as the requirements of procedural justice would not have been fully complied with. The issue of jurisdiction will then merge with the plaintiff's substantive claim at the trial, which will have to be proved by the plaintiff on the balance of probabilities. This, in our view, is consistent with *The Jarguh Sawit*, which (at [43]–[44]) made the very same distinction (see [38] above). This element of choice was also alluded to by Steven Chong JC (as he then was) in *The Catur*

Version No 1: 16 Dec 2021 (20:13 hrs)

Samudra [2010] 2 SLR 518 at [23], where he cited the same passage by Goff J in *I Congreso del Partido* (at 535–536) that we referred to earlier (see [46] above). On the other hand, if the defendant seeks a conclusive finding on jurisdiction and opts to have a full hearing on the jurisdictional issue replete with all the requirements of procedural justice, the court can decide the jurisdictional issue conclusively based on the standard of proof enunciated in *The Bunga Melati (CA)*, which we have set out at [30] above.

Section 34(1)(a) of the SCJA read with para (e) of the Fourth Schedule thereto

49 The present case would appear to be one where the defendant seeks to set aside an *in rem* writ based solely on affidavit evidence. The Creditors instituted the four *in rem* writs on the basis that Sejin, the party who would be liable on their claims in an *in personam* action, was at the Relevant Time the demise charterer of the Vessel. This was a necessary jurisdictional fact for the invocation of the court's admiralty jurisdiction. There was also the question, which was very much in dispute, of whether the communications which took place between HKC/HKA and Sejin (see [9]–[18] above) sufficed to terminate the demise charter under South Korean law. It was undisputed that at the Relevant Time, HKA had communicated the termination of the Lease Agreement to Sejin, but the Vessel was still in Sejin's physical possession. Thus, the critical question was whether Sejin was still the demise charterer of the Vessel at the Relevant Time, and the answer to this question would have a bearing on Step 5 of the analysis set out in *The Bunga Melati (CA).* Also directly relevant to the question of jurisdiction is the concept of constructive redelivery in relation to the termination of demise charters, which concept has yet to be accepted in our law.

Version No 1: 16 Dec 2021 (20:13 hrs)

50 If HKC had succeeded on its jurisdictional challenge, the four *in rem* writs filed by the Creditors would have had to be set aside. But, on the basis of how the case was run before the AR and the Judge, there was no way in which a conclusive finding on disputed facts going to the court's admiralty jurisdiction could be made until the full trial of the admiralty actions, with cross-examination of the witnesses. In the circumstances, HKC's jurisdictional challenge could only be determined on a non-conclusive *prima facie* basis, *ie*, based on affidavit evidence alone.

51 To recapitulate, before the AR and the Judge, the Setting-Aside Applications were dealt with in chambers based solely on affidavit evidence. There was no cross-examination of the parties' factual witnesses or the expert witnesses testifying on the content of South Korean law, which governed the Lease Agreement. This meant that HKC had *chosen* to take a course of action under which the court could only make a finding on jurisdiction on a non-conclusive *prima facie* basis. Such a finding would *not* be conclusive on the jurisdictional issue, and clearly, HKC should not be precluded from subsequently addressing this issue again at the liability stage.

52 Before us, HKC argued that it was entitled to lodge these appeals because the Singapore courts had no *in rem* jurisdiction over the Vessel. It contended that the Vessel was no longer leased to Sejin on a demise charter at the Relevant Time as the demise charter had earlier been brought to an end by either express termination of the Lease Agreement or the constructive redelivery of the Vessel. Mr Heng Gwee Nam Henry, counsel for HKC, contended that since the entire proceedings would come to an end if the Creditors' *in rem* writs were set aside, the issue of jurisdiction was a substantive one as it could have a substantive impact on the rights of the parties. While we agreed with Mr Heng to the extent that the entire admiralty proceedings could have ended had the

Version No 1: 16 Dec 2021 (20:13 hrs)

Judge determined that Sejin was not the demise charterer of the Vessel at the Relevant Time and, consequently, set aside both the *in rem* writs and the warrant of arrest, the fact of the matter was that the Judge did *not* in fact rule that way. Had the Judge done so, we would have had no hesitation in holding that the Creditors would have a right of appeal against that decision, which would effectively have brought the proceedings to an end; and no leave of court would have been required for the Creditors to appeal against that decision. But, given that the Judge's decision was the converse, *ie*, that Sejin was still the demise charterer of the Vessel at the Relevant Time, no substantive rights of either HKC or the Creditors were affected. The consequence of the Judge's ruling, although he also proffered his view on a number of legal issues, was that the jurisdictional issue was to be deferred and decided definitively at the trial.

53 We would reiterate that before us, HKC was appealing against the Judge's refusal to set aside the Creditors' *in rem* writs. In view of the fact that there were factual disputes which related to the court's jurisdiction, and given that no application was made to the court to hear oral evidence and subject witnesses to cross-examination, there was no way in which those factual disputes could be resolved *definitively*. In our view, the Setting-Aside Applications were in substance a request to the court to strike out the *in rem* actions on a basis similar to that which underlies O 18 r 19 of the ROC. We also note that the grounds relied on by HKC to challenge the court's jurisdiction were the same as the grounds which could defeat the Creditors' substantive claims in the *in rem* writs. As the Judge declined to set aside the *in rem* writs on the basis of the affidavit evidence before him, the present admiralty proceedings continue to be afoot, with no conclusive finding made yet on the jurisdictional point. HKC can therefore raise the jurisdictional issue again at the trial; and the trial judge would be entitled, at that stage, to rule on jurisdiction based on all

Version No 1: 16 Dec 2021 (20:13 hrs)

the evidence, including oral evidence, and the arguments placed before him. Nothing said by the Judge or by us in the present proceedings would have a bearing on how the trial judge should decide the jurisdictional issue at the trial. And whatever the trial judge's ruling on jurisdiction may be, any party who is dissatisfied would have an automatic right to appeal against that decision. For these reasons, we held that s 34(1)(*a*) of the SCJA read with para (*e*) of the Fourth Schedule thereto precluded HKC from appealing against the Judge's decision, and this court in turn had no jurisdiction to hear the present appeals.

*Section 34(2)(*d*) of the SCJA read with para (*e*) of the Fifth Schedule thereto*

54 At this juncture, we turn to s 34(2)(*d*) of the SCJA read with para (*e*) of the Fifth Schedule thereto, which were relied on by Mercuria and Winplus in arguing that HKC had no right to appeal against the Judge's decision without first seeking the court's leave (see [28] above). They contended that pursuant to these provisions, HKC had to *first* obtain leave of court before it could appeal against the Judge's decision. This was because the Setting-Aside Applications were interlocutory applications, and no appeal could be brought against any order made on an interlocutory application unless leave of court was first obtained, with such leave to be sought from the High Court first. This was, Mercuria and Winplus submitted, by virtue of s 35 of the SCJA, which provides that where an application "may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court". Therefore, Mercuria and Winplus argued, a leave application had to be made by HKC to the High Court first, and it was only if the High Court refused to grant leave to appeal that HKC could apply for leave from the Court of Appeal.

55 Given our decision that HKC had no right of appeal to begin with by virtue of s 34(1)(*a*) of the SCJA read with para (*e*) of the Fourth Schedule

Version No 1: 16 Dec 2021 (20:13 hrs)

thereto (see [53] above), it is not necessary for us to deal with the submissions of Mercuria and Winplus on the issue of leave to appeal. Be that as it may, *assuming* HKC could have appealed against the Judge's decision with the court's leave (in other words, *if*, as Mercuria and Winplus submitted, s 34(2)(*d*) of the SCJA read with para (*e*) of the Fifth Schedule thereto were applicable), we agree with Mercuria and Winplus that HKC should have sought leave to appeal from the Judge first. As HKC did not do so, *even if* it could have brought the present appeals with the court's leave, it would be out of turn for us to grant HKC such leave. This was a second reason why we dismissed OS 21/2015 and why, as a result, HKC's appeals (*assuming* s 34(2)(*d*) of the SCJA read with para (*e*) of the Fifth Schedule thereto applied) could not be allowed to proceed.

Order 57 r 16(4) of the ROC

56 HKC also made an argument that O 57 r 16(4) of the ROC entitled the Court of Appeal to grant it leave to appeal despite its failure to obtain leave from the Judge if there were "special circumstances" which made it "impossible or impracticable" for HKC to seek leave to appeal from the Judge. It submitted that such "special circumstances" had been established on the facts as the issue of leave to appeal was raised only after the Notices of Appeal and the various Appellant's and Respondent's Cases had been filed. Furthermore, none of the Creditors had applied to strike out the Notices of Appeal, and thus, there was no *prior* opportunity for the issue to be determined by the High Court.[38]

57 In our view, this contention was unmeritorious. The correspondence between HKC's solicitors and the respective solicitors for Mercuria and Winplus showed that HKC's solicitors had been informed of their client's

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[38] Appellant's Skeletal Arguments in OS 21/2015 at para 19.

Version No 1: 16 Dec 2021 (20:13 hrs)

failure to seek leave from the Judge before filing its appeals. HKC's solicitors were, however, adamant in their position that HKC did not need leave of court to appeal.[39] That being the case, the proper approach for HKC to take (assuming HKC had a right of appeal to begin with) would have been to seek a declaration from the Judge that it did not need leave of court to appeal; alternatively, in the event that the Judge ruled that leave to appeal was needed, HKC should have sought leave from the Judge before lodging its appeals. We did not think that HKC's failure to take these measures could constitute "special circumstances" so as to bring them within the scope of O 57 r 16(4) of the ROC.

Conclusion

58 For the above reasons, we dismissed OS 21/2015. Consequently, we also dismissed all four of HKC's appeals on the grounds that pursuant to s 34(1)(*a*) of the SCJA read with para (*e*) of the Fourth Schedule thereto, HKC had no right of appeal as it was, in substance, attempting to appeal against an order refusing to strike out a writ action. Considering that the work done in relation to these appeals would not entirely go to waste, we fixed costs at $25,000 (inclusive of disbursements) to be paid by HKC to each of the respondents in CA 59/2015 and CA 62/2015 (*ie*, Mercuria and Winplus respectively), with the usual consequential orders.

Closing observations: O 12 r 7 and O 14 r 12 of the ROC

59 In closing, we wish to refer to two sets of provisions in the ROC. First, pursuant to O 12 rr 7(1) and 7(4), a defendant who wishes to dispute the court's jurisdiction may apply to set aside the writ issued against it; and the court is

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[39] CA 59/2015 RSCB at pp 4, 10 and 13.

Version No 1: 16 Dec 2021 (20:13 hrs)

empowered, on such an application, to make such orders as it thinks fit or give such directions as may be appropriate, including directions for the trial of the jurisdictional dispute as a preliminary issue. Second, O 14 rr 12(1) and 12(2) provide that the court may determine "any question of law or construction of any document arising in any cause or matter" if it appears that: (a) the question is "suitable for determination without a full trial of the action"; and (b) such determination will "fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein". On determining such a question, the court can "dismiss the cause or matter or make such order or judgment as it thinks just".

60 At the conclusion of the oral hearing before us, we indicated to the parties that they were free to bring an application under O 14 r 12 for a ruling on: (a) any points of law which could be determinative of the issues in the *in rem* actions and which did not require any evidence; or (b) any points of law which could be determined on the basis of agreed or undisputed facts. A ruling by the High Court pursuant to such an application could then, if any of the parties was dissatisfied, be brought before us on appeal. We underscored the fact that the process under O 14 r 12 could only be invoked if there were no factual disputes relating to the point of law in question.

61 We further indicated that should any of the parties decide to make an application under O 14 r 12, the application and any appeal therefrom could be heard on an expedited basis. To save costs, in the event of such an application being made, we also granted leave to the parties to use the materials that have already been filed in relation to OS 21/2015 and the present appeals.

Version No 1: 16 Dec 2021 (20:13 hrs)

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal

Judith Prakash Judge	Quentin Loh Judge

Heng Gwee Nam Henry, Poh Ying Ying Joanna and Lee Zhen Ying Darius (Li Zhenying) (Legal Solutions LLC) for the applicant in Originating Summons No 21 of 2015 and the appellant in Civil Appeals Nos 58, 59, 60 and 62 of 2015;
Yogarajah Yoga Sharmini, Subashini Narayanasamy and Lai Kwan Wei (Haridass Ho & Partners) for the first respondent in Originating Summons No 21 of 2015 and the respondent in Civil Appeal No 62 of 2015;
Tay Twan Lip Philip and Yip Li Ming (Rajah & Tann Singapore LLP) for the fourth respondent in Originating Summons No 21 of 2015 and the respondent in Civil Appeal No 59 of 2015;
The second respondent in Originating Summons No 21 of 2015 and the respondent in Civil Appeal No 58 of 2015, as well as the third respondent in Originating Summons No 21 of 2015 and the respondent in Civil Appeal No 60 of 2015 absent.

Version No 1: 16 Dec 2021 (20:13 hrs)