IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 183

ADM No 271 of 2014
(RA No 342 of 2015)

Admiralty Action in Rem against the vessel "MIN RUI"
(IMO No 9161194)

Between

1. CONSORCIO MGT

2. DM CONSTRUTORA DE OBRAS LTDA

… *Plaintiffs*

And

Owner and/or Demise Charterer of the vessel "MIN RUI"

… *Defendant*

GROUNDS OF DECISION

[Admiralty and Shipping] — [Admiralty jurisdiction and arrest] — [Ownership of vessels]
[Conflict of Laws] — [Jurisdiction] — [*in rem*]
[Personal Property] — [Ownership] — [Beneficial]

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Belinda Ang Saw Ean J:

Introduction

1 In this action, the defendant, Min Rui Shipping Co Limited, was sued as the party liable on the plaintiffs' claim for loss and damage to a consignment of steel structures that was described as 98 packages of "steel structure FPSO – Floating Production, Storage Offloading NCM 7308 90.10" and shipped on board the Hong Kong registered vessel, *Min Rui,* on 24 June 2014 at Humen, China for carriage to and delivery at Itajai, Brazil. The consignment of steel structures was damaged in the course of the carriage, and the plaintiffs sued as the owners, consignees and/or bill of lading holders.

2 At the hearing of this Registrar's Appeal No 342 of 2015 ("RA 342"), the defendant dropped its appeal against the Assistant Registrar's rejection of the defendant's allegation that the plaintiffs had not discharged their duty of

full and frank disclosure in obtaining the warrant of arrest of the *Min Rui*. The remaining issue in RA 342 was the defendant's jurisdictional challenge that was limited to the question of whether the defendant was the beneficial owner as respect all the shares in the vessel *Min Rui* on 16 December 2014, which was the date the plaintiffs issued the *in rem* writ in ADM No 271 of 2014 ("ADM 271").

3 The *in rem* writ in ADM 271 was not amended to cater for the new name of the *Min Rui*. At the time of the arrest, the *Min Rui* was already renamed *Qi Dong* and even though the warrant of arrest and the affidavit leading the warrant of arrest did not mention the *Qi Dong,* it was the *Qi Dong* that was arrested on 11 February 2015. The arrest was lifted after security was furnished on behalf of the defendant in the form of a P&I Club's letter of undertaking. Despite this procedural irregularity in the cause papers, for convenience and to avoid confusion, I will continue to refer to the subject vessel by her former name "*Min Rui*".

4 I allowed the defendant's appeal in RA 342 because the *Min Rui* was not, on 16 December 2014, beneficially owned by the defendant and as such, the statutory requirement under s 4(4)(*b*)(i) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the HCAJA") was not satisfied. The plaintiffs have appealed against my decision. I now publish the reasons for my decision.

Overview

5 It was common ground that the plaintiffs' claim came within the scope of ss 3(1)(*g*) and (*h*) of the HCAJA. It was also common ground that the

plaintiffs' claim was in connection with a ship, the *Min Rui*, and that the defendant was the party who would be liable on such a claim in an action *in personam*, since when the cause of action arose the defendant was the owner of the *Min Rui* within the meaning of s 4(4)(*b*) of the HCAJA. It follows that under s 4(4)(*b*)(i), an action *in rem* may be brought against the *Min Rui* if, at the time of issuing the *in rem* writ on 16 December 2014, the defendant was the beneficial owner as respects all the shares in the *Min Rui*.

6 For easy of reference, s 4(4) of the HCAJA reads as follows:

> (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where —
>
> (*a*) the claim arises in connection with a ship; and
>
> (*b*) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —
>
> (i) that ship, if at the time when the action is brought the relevant person is either the *beneficial owner of that ship as respects all the shares in it* or the charterer of that ship under a charter by demise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.
>
> [emphasis added]

7 The consignment of steel structures was shipped on board the *Min Rui* on 24 June 2014. Bad weather was apparently encountered en route and the *Min Rui* arrived at Itajai on or around 24–25 August 2014. Thus, the plaintiffs'

claim would have arisen sometime between June and August 2014, and *in rem* proceedings against the *Min Rui* were filed on 16 December 2014.

8 The defendant, on the other hand, said that whilst it was the person who would be liable on the cargo claim in an action *in personam* and was the owner of the *Min Rui* at the time the cause of action arose, before the *in rem* writ was issued, it had sold the *Min Rui* in October 2014 to a *bona fide* purchaser for value such that it was no longer the owner even though it still remained on the Hong Kong Shipping Register as the named registered owner on 16 December 2014.

9 The plaintiffs' action *in rem* brought under s 4(4) of the HCAJA would be defeated if the beneficial ownership of the *Min Rui* had changed before 16 December 2014. So, the question in RA 342 was whether, on 16 December 2014, the defendant was the beneficial owner as respect all the shares in the *Min Rui*.

10 The state of affairs, on 16 December 2014, was that the purchaser of the vessel had yet to be registered as the legal owner and its interest in the vessel was equitable only. A point of consideration would be the legal consequences following the concluded sale transaction, and before deregistration of the *Min Rui* from the Hong Kong Shipping Register. Would the legal consequences of the situation as described depend in the first instance upon ascertaining the relevance, if any, of Hong Kong law as the place of register, or would the legal consequences be left to be decided under Singapore law as the *lex fori* since the overall inquiry concerned this court's *in rem* jurisdiction under s 4(4) of the HCAJA? On the question of what recognition the law of the place of register would give to the rights created by

the concluded sale transaction before deregistration, there was no argument on the point in the absence of Hong Kong law on the matter. I was also not asked to decide as a matter of Singapore law the correctness of the position concerning a merchant ship that the *lex situs* is the law of the place of registration. The issue outlined here fell to be decided applying the *lex fori.*

11 In this jurisdictional challenge, the court looked at the application of the *lex fori* to a case scenario where the purchaser of the vessel had yet to be registered as legal owner and its interest in the vessel was equitable only. The correctness of the *in rem* remedy sought by the plaintiffs against the *Min Rui* and the need to satisfy the statutory requirement of beneficial ownership for the purpose of establishing jurisdiction *in rem* would have to be decided applying Singapore law as the *lex fori* having regard to the proper law of the sale contract and the legal effect of the transfer of property so that in a situation before deregistration of the vessel, the seller would hold the registered title in the vessel on trust for the purchaser.

12 On the issue of who was the beneficial owner for the purposes of s 4(4)(*b*)(i) of the HCAJA at the date of filing of the *in rem* writ, it was appropriate to first consider the plaintiffs' allegation that the sale of the *Min Rui* was not genuine. This allegation of a sham transaction brought into focus and examination matters such as the existence of the sale, nature and extent of the contractual rights created or recognised by the sale and the delivery of the *Min Rui* to the buyer. Evidence before this court on the matters pertaining to the contractual rights of the defendant and its buyer on the transfer of property in the *Min Rui* would also serve as evidence needed to decide on the beneficial ownership issue as that was intertwined with the sale. Foreign law, if relevant,

would be considered as facts in evidence. In the absence of proof of foreign law, the operation of the so-called presumption that foreign law was the same as the law of the forum would arise. In the context of a jurisdictional challenge, the court evaluates the evidence on the footing of the *lex fori's* definition of beneficial ownership in *The Pangkalan Susu*/*Permina 3001* [1977-1978] SLR(R) 105 ("*The Permina 3001*") and this means assessing the evidence to decide whether or not, on 16 December 2014, the defendant still had any right to alienate and to dispose of the vessel such as by way of a re-sale of all the shares in the *Min Rui* and to keep the proceeds of a disposition of second sale of the vessel.

Sale of the *Min Rui* and change of her name and flag

13 On 13 October 2014, the defendant entered into a Memorandum of Agreement on the terms of an amended Norwegian Saleform 1993 ("the MOA") to sell the *Min Rui* to Chellona Investment Inc and/or its nominee. This was supplemented by a first addendum on 16 October 2014, setting out the agreed list of delivery documents to be exchanged by the parties to the MOA. On 24 November 2014, a second addendum nominated Qidong Shipping Limited ("the Buyer") as the ultimate buyer of the vessel under the MOA.

14 On 24 November 2014, a Patente Provisional De Navegacion (or Navigation Provisional Registry) Licence No 46650 ("the Provisional Patente") was also issued to the Buyer in respect of the vessel by the Directorate General of Merchant Marine Panama ("DGMM"). According to Cajigas & Co, a firm of Panamanian lawyers appointed by the plaintiffs, the Provisional Patente is a temporary document issued by the DGMM while an

application for an official Navigational Licence is being processed. The temporary licence allows a vessel to sail under the Panamanian flag prior to the official Navigational Licence being issued. It can be applied for in advance and issued in contemplation of a change of ownership or change of title of a vessel. I will come to the legal opinion on the question of registration of ownership of a vessel in the Public Registry of the Maritime Authority of Panama ("PRMAP") in due course.

15 On 9 December 2014, a bill of sale was executed by the defendant in favour of the Buyer of the *Min Rui* ("the Bill of Sale"). The defendant in the Bill of Sale expressly acknowledged receipt of the purchase consideration of US$3,750,000.00.

16 Delivery of possession of the *Min Rui* took place on 12 December 2014 at Qingdao, China. On that same day, the defendant and the Buyer also signed a Protocol of Delivery and Acceptance, whereby the Buyer accepted delivery of the *Min Rui*. In the same document, the Buyer's authorised representative certified that the *Min Rui* was delivered in accordance with the provisions of the MOA and the addenda thereto.

17 The executed Bill of Sale was handed over to the Buyer, who signed the Acceptance of Sale on 12 December 2014. I pause to note that the Acceptance of Sale referred to a Bill of Sale dated "12th Dec 2014". This anomaly was obviously a typographical mistake, seeing that the signed Acceptance of Sale tracked the same language in the Bill of Sale form and the date of the Bill of Sale was 9 December 2014. More to the point, it is normal to prepare and date the Bill of Sale before the completion date of the sale.

18 The Buyer requested that the *Min Rui's* new name and intended port of registry be painted on the vessel whilst she was in dry dock for permanent repairs. That request was acceded to and it was carried out under the supervision of the vessel's classification society's on-site surveyor from Bureau Veritas. In an Attestation for Change of Ship's Name, Flag and Ownership dated 14 December 2014, the Bureau Veritas declared for the purposes of the classification society's records that:[1]

(a) the vessel's name was changed from "MIN RUI" to "QI DONG";

(b) the vessel's flag was changed from "HONG KONG" to "PANAMA"; and

(c) the vessel's owner was changed from the defendant to the Buyer.

19 A Notice of Intention to Close a Ship's Registration by Owner dated 16 December 2014 and signed by the defendant was submitted to the Hong Kong Shipping Register. On 8 January 2015, two documents were issued by the Hong Kong Registrar of Ships. First, a Certificate of Deletion certified that the registration of the *Min Rui* had been closed in the Hong Kong Shipping Register as of 7 January 2015. Second, a Continuous Synopsis Record issued on 8 January 2015 stated that the *Min Rui* ceased to be registered with the flag state, Hong Kong, on 7 January 2015.

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[1] Zhang Zu Liang's 1st Affidavit filed on 8 April 2015 ("Zhang") at p76.

20 On 20 January 2015, a Notarial Certificate of Bill of Sale was issued by the Consul General of Panama in Vietnam, certifying that the signature at the foot of the Bill of Sale dated 9 December 2014 was the director's and that he had the power to sign the Bill of Sale on behalf of the defendant. The notary also attested to the following:[2]

> Sufficient proof has been produced to me that: The vendors were immediately prior to the execution of the said Bill of Sale the owners of the vessel, and that the vessel was free from any encumbrances and maritime liens.

21 On 24 February 2015, the Public Deed of Title for Permanent Recordation at the PRMAP (see [14] above) was filed.

The plaintiffs' searches prior to issuance of ADM 271 on 16 December 2014 and prior to the arrest of the *Min Rui* on 11 February 2015

22 On 4 December 2014, the plaintiffs obtained a report on the *Min Rui* from Lloyd's List Intelligence ("the 4 December Lloyd's Report"). This 4 December Lloyd's Report showed the defendant as the registered and beneficial owner of the *Min Rui*.

23 On 12 December 2014, the plaintiffs obtained a report on the vessel *Qi Dong* from Lloyd's List Intelligence ("the 12 December Lloyd's Report"). This 12 December Lloyd's Report showed that, *inter alia*:[3]

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[2] Zhang's 1st Affidavit at p82.

[3] Giovano Conrado Fantin's Affidavit sworn on 5 February 2015 at p194.

(a) that "before 03 November 2014" the vessel was named "MIN RUI" and the name was changed to "QI DONG" "[b]efore 03 December 2014";

(b) that "before 01 August 2010" the vessel's flag was Hong Kong and the flag changed from Hong Kong to Panama "[b]efore 03 December 2014";

(c) that "before 03 Nov 2013 until before 02 Dec 2014", Min Rui Shipping Company Limited was the registered owner of the vessel and the registered owner changed to the Buyer "[b]efore 03 December 2014"; and

(d) that the beneficial owner "before 03 Nov 2013 until before 02 Dec 2014" was Min Rui Shipping Company Limited and the beneficial owner was unknown "[b]efore 03 December 2014".

24 The plaintiffs also obtained a Transcript of the Hong Kong Shipping Register on 12 December 2014. This Transcript of 12 December 2014 showed the defendant as the registered owner of the *Min Rui*. On 15 December 2014, Cajigas & Co advised the plaintiffs that there was no record of a change of ownership of the *Min Rui* in PRMAP. As stated, the plaintiffs filed the *in rem* writ on 16 December 2014.

25 On 9 January 2015, the plaintiffs conducted a search at the Hong Kong Shipping Register. This search revealed that the *Min Rui* was no longer registered as a Hong Kong registered vessel. As stated, earlier on 15 December 2014, Cajigas & Co had advised that there was no change of ownership of the *Min Rui*. Again, on 7 January 2014, Cajigas & Co advised

that there was no application to register the *Min Rui* in PRMAP. On 6 February 2015, Cajigas & Co confirmed that the vessel was not registered in PRMAP. On 11 February 2015, the *Min Rui* was arrested in Singapore. As stated, the critical date for the purposes of s 4(4)(*b*)(i) of the HCAJA was 16 December 2014, the date of filing of the *in rem writ* and not the date of the arrest.

Was the defendant the beneficial owner on 16 December 2014?

Reliance on the Min Rui's registration in the Hong Kong Shipping Register

26 The plaintiffs alleged that the defendant as the person liable in an action *in personam* was, on 16 December 2014, the beneficial owner of the *Min Rui*, and as such, the arrest of the *Min Rui* was not wrongful. First, the defendant was entered in the Hong Kong Shipping Register as the registered owner of the *Min Rui* and based on the Certificate of Deletion and the Continuous Synopsis Record (see [19] above), the defendant only ceased to be the registered owner of the *Min Rui* on 7 January 2015. Second, the 12 December Lloyd's Report, which suggested changes of flag, name and ownership, was not accurate on the issue of beneficial ownership of the vessel. Simply put, the vessel was still registered in the Hong Kong Shipping Register and it had yet to be registered in Panama. The Provisional Patente issued on 24 November 2014 to the Buyer of the *Min Rui* in the vessel's new name *Qi Dong* was a provisional registration with the DGMM, which was not the same as a registration of the vessel with PRMAP. The registration of the vessel renamed *Qi Dong* in the PRMAP was on 24 February 2015. For these reasons, the plaintiffs argued that prior to deregistration on 7 January 2015, they were entitled to rely on the vessel's registration in the Hong Kong Shipping

Register and to take the vessel's registered owner as her legal and beneficial owner. It was further argued that the evidential burden was on the defendant to prove otherwise, citing *The Kapitan Temkin* [1998] 2 SLR (R) 537 at [7] and, in particular, the plaintiffs in their written submissions highlighted in bold and underlined a sentence from [7] of the report that reads:

> …In other words the person who is stated as the owner and the State which issued the certificate would generally be estopped from asserting a contrary proposition unless the register is rectified before third parties act on it.

27 I begin with the reference to estoppel in the quotation above which, in my view, has to be understood in its context. In that case, the registered owner, Black Sea Shipping Co, and the Republic of Ukraine sought to repudiate the statement in the certificate of register and a corresponding entry in the register. Estoppel comes to mind in such a situation because ordinarily registration of a ship would be done by her owner. In most jurisdictional challenges on beneficial ownership, the party who desires to go behind the register would be the claimant and not the registered owner. In this case, the plaintiffs were not looking to go behind the Hong Kong Shipping Register and the defendant had not refuted the entries in the same register. Ultimately, it was a question of looking at the facts and drawing proper conclusions since there is no rule of law that fraud or similarly compelling circumstances must be proved in order to go behind the registration of a ship for the purpose of identifying the beneficial owner in the context of s 4(4)(*b*)(i) of the HCAJA.

28 In *The Opal 3* ex *Kuchino* [1992] 2 SLR (R) 231, the High Court explained at [8] that registration of a ship and the papers issued following registration afforded *prima facie* but not conclusive evidence of the true ownership of the ship for the purpose of s 4(4) of the HCAJA. This general

rule was affirmed by the Court of Appeal in *The Ohm Mariana* ex *Poeny* [1993] 2 SLR (R) 113. In that case, the Court of Appeal said that registration of a ship would not determine, and was not conclusive proof of, true ownership, although in most instances it would be. In short, depending on the facts, the entity registered as the owner of a ship is not necessarily the beneficial owner of the ship. The Court of Appeal rightly observed (at [36]) that "quite often the court has to look behind the register" to ascertain if someone other than the registered or legal owner is the beneficial owner.

29 The High Court in *The Temasek Eagle* [1999] 2 SLR(R) 647 (at [16]) treated entries in Lloyd's Register of Shipping and the ship's register as "useful starting points" and "not conclusive proof" of beneficial ownership. Put simply, the *prima facie* inference of ownership (legal and equitable) arising from the registration as owner of the vessel can be displaced by evidence that someone else is the beneficial owner for the purpose of s 4(4)(*b*)(i) of the HCAJA.

30 On the matter of evidence, GP Selvam J said in *The Kapitam Temkin* at [5] that it is the *lex fori* that decides on the admissibility of evidence adduced to determine whether a claim is within s 4(4) of the HCAJA. The Court of Appeal in *The Andres Bonifacio* [1993] 3 SLR (R) 71 accepted that the court may trace the history of ownership to ascertain who the beneficial owner of a vessel was. In addition, expert evidence on relevant foreign law as facts for consideration by the court may be adduced. Tan Lee Meng J in *The Makassar Caraka Jaya Niaga 111-39* [2011] 1 SLR 982 found on the evidence that the vessel was not state-owned after preferring the evidence of the

appellant/plaintiff's expert on Indonesian law. As regards foreign law introduced by expert witnesses, Tan J said (at [9]):

> The ascertainment of beneficial ownership of a vessel is a matter of Singapore law as it relates to the admiralty jurisdiction of the Singapore courts. While the court will, in the case of foreign ships, take into account relevant aspects of the relevant foreign law for a better picture of how ships may be owned or transferred in order to determine who has the beneficial ownership under that foreign law, Singapore law, being the *lex fori* cannot be supplanted.

31 Tan J cited *The Tian Sheng No 8* [2000] 2 Lloyd's Rep 430 where the Hong Kong Court of Final Appeal held that it would not be easy to prove that the registered owner of a vessel was not its beneficial owner. In that case, the *in rem* writ was against the vessel "Tian Sheng No 8" and Tiansheng Shipping Inc ("TSI") was the registered owner. The relevant bills of lading were issued by the contracting carrier, Tiansheng Ocean Shipping Inc ("Ocean"). The vessel was sold and renamed "Resource 1" after the date of the *in rem* writ. The issue there was whether the "owner" in s 12B(4)(*b*) of the High Court Ordinance (Cap 4) (HK) meant something other than "registered owner". It was argued by the cargo claimants that Ocean was the person liable *in personam* on their claim for damages at the time the cause of action arose and at the date when the writ was issued. TSI argued that it, and not Ocean, was the owner of the vessel. The Hong Kong Court of Final Appeal commented (at p 433):

> It is possible that registration is, as a matter of law, not conclusive on the issue of ownership; conceivably, there are circumstances where it might be shown that the registered owner was in fact *not* the legal and beneficial owner of all the shares in the ship: The fraudulent procurement of registration would be an example. But, in the general run of things, registration would be virtually conclusive, and it would take a

> wholly exceptional case for it to be otherwise. [emphasis in original].

32 Recently, the Hong Kong Court of Appeal in *The Almojil 61* [2015] 3 HKLRD 598 in an *obiter* observation suggested that the passage quoted in [31] above should be confined to the definition of "owner" under the first part of s 12B(4) of the High Court Ordinance of Hong Kong (which is the equivalent of our s 4(4)(*b*) of the HCAJA) and that when the legislation used "beneficial ownership" instead of simply "owner" in the same section, there must be a presumption that the two expressions had different meanings. Consequently, the mere fact that one was the registered owner should not trigger a presumption that the registered owner was a beneficial owner. I make three points. First, the definition of "owner" in the first part of s 4(4)(*b*) of the HCAJA was defined by the Singapore Court of Appeal in *The Ohm Mariana* to include a "beneficial owner", departing from the English position in *The Evpo Agnic* [1988] 2 Lloyd's Rep 411. Bokhary J in *The Tian Sheng No 8* preferred the view taken in *The Evpo Agnic* and not that as expressed in *The Ohm Mariana.* On the facts, the vessel "Ohm Mariana" was, at the time of the cause of action, registered in the name of company A, but was beneficially owned by company B. The appellate court held that company B was the "owner" at the relevant time for the purpose of s 4(4)(*b*). It is thus not accurate to adopt the view taken in *The Tian Sheng No* 8 that registration is virtually conclusive save for a wholly exceptional case. Second, I agreed with the Hong Kong Court of Appeal in *The Almojil 61* that the words "beneficial owner" in ss 12B(4)(i) and (ii) of the High Court Ordinance of Hong Kong (the equivalent of our ss 4(4)(*b*)(i) and (ii) of the HCAJA) should not be construed in the manner for the benefit of plaintiffs and may not be used by defendants to defeat the arrest of a ship. As Kwan JA explained at [60], the section on

beneficial ownership "operates both ways, it can confer rights on a plaintiff and there is also protection for the defendant." The provision could take into account the possibility of a trust, as was the case argued before the Hong Kong Court of Appeal. Third, proper weight has to be attached to the registration of ownership in ascertaining beneficial ownership for the purpose of s 4(4)(*b*)(i) because there is no rule that registered ownership is always coextensive with beneficial ownership.

33 It is thus clear that under Singapore law, for the purposes of s 4(4)(*b*)(i) of the HCAJA, the certificate of registration is not a certificate of title; the ship's register serves as a record upon which a *prima facie* inference of ownership is made. The *prima facie* inference of ownership arising from the registration as owner of the vessel can be displaced by evidence that someone else is the beneficial owner for the purpose of s 4(4). As the High Court put it in *The Opal 3* ex *Kuchino* (at [11]), s 4(4) "admits of proof that someone other than the legal or registered owner is the beneficial owner."

34 Turning to the manner in which the issue of beneficial ownership ought to be investigated, much depends on the circumstances of the particular case. The nature and type of evidence needed to determine the question of beneficial ownership is likely to concern principles of equity and trust, the principles relating to avoiding fraudulent conveyances to delay or defeat creditors, the principles relating to piercing the corporate veil, the principles relating to transfer of title to goods and the principles of estoppel (see *The Opal 3* ex *Kuchino* at [11]). Thus, proof of beneficial ownership is admitted where there are allegations such as fraud, trust, nominee holding and legal effect of a sale of the vessel to name a few types of allegations that were raised

in past decided cases. The outcome of the challenge depends on the quality and weight to be given to the evidence adduced.

35 On the facts of this jurisdictional challenge, the deletion of the *Min Rui* from the Hong Kong Shipping Register was pending following the defendant's Notice of Intention to Close a Ship's Registration by Owner dated 16 December 2014 in the following terms:[4]

> I/We, being the registered owner(s) of the abovenamed ship, hereby give notice that I/we wish the above ship's registration to be closed under section 59(1) of the Merchant Shipping (Registration) Ordinance.

The defendant's notice to close the ship's register was a post-delivery obligation of the defendant to arrange for the vessel to be permanently deleted from her previous registry and to deliver a certificate of permanent deletion. In my view, there was no evidential basis for the plaintiffs' allegation that the defendant's notice to close the ship's register and deregistration was an afterthought that was intended to defeat the *in rem* proceedings and not for the genuine registration of the vessel in Panama. The plaintiffs pointed to the date of the Notice of Intention to Close a Ship's Registration by Owner (signed by the defendant and sent to the Hong Kong Shipping Registry) which was coincidentally the date of the *in rem* writ. There was no credence to this contention at all. It was not suggested anywhere that the defendant had known anything about the plaintiffs' decision to file the *in rem* writ before the notice to close the ship' register was submitted. If there was any substance in the contention, the notice to close the ship's register would not have been dated 16

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[4] Zhang's 1st Affidavit at p77.

December 2014 ─ one would logically expect to see the document backdated to a date before 16 December 2014.

36 Factually, the Buyer of the *Min Rui* had yet to be registered as a legal owner in Panama with the PRMAP, and its interest in the vessel was equitable only. If the plaintiffs wanted to argue, as they have done in their submissions, that the registration of the *Min Rui* with the Hong Kong Shipping Registry would nonetheless prevail in the sense that there could not be any "completion of sale" as at 12 December 2014, they ought to do have done more than simply rely on the entry in the ship's register. The submissions beg the question as to what the legal consequences of registration under Hong Kong law as the place of register was in the first instance.

Allegation that the sale transaction was not genuine

37 For the defendant, the events which demonstrated that the *Min Rui* was transferred into the beneficial ownership of the Buyer were the MOA of 13 October 2014 and the performance of the MOA as amended, on 12 December 2014. The documentation of the transfer and sale of the *Min Rui* from the defendant to the Buyer was comprehensive. Apart from the MOA (dated 13 October 2014) with its two addenda, there was also evidence of a signed Bill of Sale and Acceptance of Sale, board of directors' meeting minutes and resolutions, powers of attorney authorising closing, commercial invoices, a Protocol of Delivery and Acceptance, as well as a certificate from the Bureau Veritas for the change of ship's name, flag and ownership. The contemporaneous documentary evidence as a whole supported the existence of a genuine contract for sale and purchase of the *Min Rui*, the delivery of the executed Bill of Sale as well as delivery of possession of the *Min Rui* to the

Buyer at Qingdao, China on 12 December 2014. Ian Goldrein, Matt Hannaford and Paul Turner, *Ship Sale and Purchase* (Informa, 6th Ed, 2012) commented on the function of the bill of sale in the following terms (at 161):

> In the context of ship contracts, a bill of sale is the document used to evidence and effect the transfer of ownership (also called "property" or "title") in the ship from seller to buyer. In the vast majority of such contracts, the parties intend that delivery and payment of all sums due from the buyer under the sale will operate so as to transfer ownership of the ship from the seller to the buyer.

38 The plaintiffs invited this court to draw an adverse inference against the defendant and to conclude that the sale of the vessel was not genuine; and that there was no intention to sell the *Min Rui* was to be inferred from the following matters: (a) cl 8(e) of the MOA was deleted and the illogicality of deleting the standard provision in the MOA that required the Certificate of Deletion of the vessel from the vessel's registry to be provided at delivery of the vessel meant that the new owner would not be able to register the vessel in Panama without deregistration from the Hong Kong Ship Registry; and (b) the fact there was no evidence of receipt of payment of the purchase price.

39 On point (a), the plaintiffs elaborated that given the non-deletion of the *Min Rui* from the Hong Kong Shipping Register, there was no "completion of sale" as at 12 December 2014. As I have explained in [35]–[36] above, the plaintiffs' argument in the proceedings below that relied on the same date of notice to close the ship's register and the *in rem* writ as evidence pointing to an afterthought intended to defeat the arrest was a bald allegation that was misconceived.

40 On 13 October 2014 when the MOA was signed, the standard list of delivery documentation in cl 8 was deleted. However, a customised list was provided three days later in the first addendum on 16 October 2014. It was thus on 16 October 2014 in Addendum No 1 that a legal Bill of Sale in Panamanian form for the vessel was required to be executed by the defendant for closing, a clear sign that the vessel was not intended to remain on the Hong Kong Shipping Register and was to be registered post-sale in Panama instead. Even though the standard cl 8(e) on delivery of a deletion certificate or a deletion undertaking was cancelled from the Saleform standard terms, it was clear from the MOA's Addendum No 1 dated 16 October 2014 that the intention of the Buyer was to register the vessel in Panama:[5]

> The [defendant] shall provide [Chellona Investment Inc or its nominee] with [the] following delivery documents for the purpose of purchase, delivery of the [*Min Rui*], and *registration to new flag after delivery* of the [*Min Rui*]. [emphasis added]

41 There was also a contemporaneous board resolution passed by the board of the Buyer on 25 November 2014 for the vessel "upon its purchase … [to be] registered in the ownership of the [Buyer] under the Panamanian flag" (under clause (ii) of the board resolution), and a power of attorney issued the same day which authorised the Buyer's attorneys to "do all acts, matters and things in connection with effecting the registration of the [*Min Rui*] at the Panamanian Registry" (under cl 5 of the power of attorney).[6]

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[5] Zhang's 1st Affidavit at p27.

[6] Zhang's 1st Affidavit at pp69 &73.

42 In addition, a letter of undertaking dated 9 December 2014 pursuant to item (v) of Addendum No 1 was given by the defendant to the Buyer during completion. Item (v) of Addendum No 1 required:[7]

> One (1) original letter of undertaking duly signed by the [defendant] undertaking:
>
> (a) to physically deliver to [Chellona Investment Inc or its nominee] the [Min Rui] and all original continuous synopsis records on board the [Min Rui].

43 Continuous Synopsis Records for the *Min Rui* would be issued by the Hong Kong Shipping Register and those records already issued and on board the vessel were to be handed over. More importantly, post-completion, the Continuous Synopsis Records for the *Min Rui* would be updated as was the case here as shown in the copy of the Continuous Synopsis Records issued on 8 January 2015. That document stated that the *Min Rui* ceased to be a Hong Kong registered vessel on 7 January 2015. Notably, the Continuous Synopsis Record issued on 8 January 2015 was a document issued after the defendant's post-completion notice to close the ship's register dated 16 December 2014 and the deregistration of the *Min Rui* from the Hong Kong Shipping Registry was on 7 January 2015.

44 As for the contention that the evidence of payment receipts were lacking, I found this argument to be a non-starter. Commercial invoices were adduced and the executed Bill of Sale contained the defendant's clear acknowledgment of receipt of the purchase price of US$3,750,000. Correspondingly, the executed Bill of Sale was recognised and accepted by the Buyer, as evidenced by the executed Acceptance of Sale.

[7] Zhang's 1st Affidavit at p27.

45 Initially, the plaintiffs alluded to the use of a common company secretary and the same registered address of the defendant and the Buyer. However, that sort of evidence was not enough to support a claim that the sale transaction was not genuine. Notably, the plaintiffs neither asserted nor adduced evidence that the defendant and the Buyer had common directors or common shareholders. In the absence of evidence that the defendant and the Buyers were related companies, there was no difficulty in concluding that the sale was between unrelated parties.

46 The High Court of Australia observed in *Raftland Pty Ltd v Federal Commissioner of Taxation* [2008] HCA 21 (at [36]) that there is a need for caution in adopting the description "sham" as the finding of sham requires a finding of deceit. Cogent evidence must be adduced to satisfy the court that a sale or transfer in question is a sham and not genuine. To illustrate, sale transactions that have been found to be shams involved the following facts:

(a) The close relationship between the transferor and transferee (the directors in both companies were friends in *The Ocean Enterprise* [1997] 1 Lloyd's Rep 449; relevant parties were children of the Arabian businessman in *The Saudi Prince* [1982] 2 Lloyd's Rep 255 who had no good reason to invest capital in the vessel; the relevant parties controlling both transferor and transferee were the family members in *The Enfield* [1981-1982] SLR(R) 527 (at [7]));

(b) The lack of authority of person(s) executing relevant documents (*The Tjaskemolen* [1997] 2 Lloyd's Rep 465 at 472; *The Ocean Enterprise* at 468);

(c) The suspicious method and documentation used to effect the transfer and payment (*The Ocean Enterprise* at 478–480, where a series of sham sales and registration transactions were revealed to cover the perpetuator's tracks; *The Enfield* at [7], where there were two bills of sale; the first bill of sale which was neither notarised nor legalised was later replaced and substituted by a second bill of sale that was executed after the vessel sank);

(d) The lack of documentation or accounts from the buyer to show that it owns or deals with ships (*The Saudi Prince* at 258–259);

(e) The lack of any evidence of delivery of the vessel (*The Enfield* at [7]);

(f) The lack of any evidence of intention or fact of payment from buyer to seller (*The Tjaskemolen* at 473–474; *The Saudi Prince* at 260); and

(g) Having a non-existent entity or an entity not yet capable of holding property at the time of the purported memorandum of sale as a buyer (*The Tjaskemolen* at 472; *The Saudi Prince* at 259–260; *The Skaw Prince* [1994] 3 SLR(R) 146 at [27]).

47 Even if the sale was genuine, so the plaintiffs' argument developed, the change of beneficial ownership was not on 12 December 2014 but after 16 December 2014 for the following reasons: (a) the defendant was still registered as the owner of the *Min Rui* on 16 December 2014; and (b) the executed Bill of Sale that was handed over to the Buyer was not notarised by the Panamanian Consul, contrary to the contractual requirement under the

MOA. The notarial certificate was only issued on 20 January 2015, *after* the *in rem* writ in ADM 271 was filed on 16 December 2014. Thus, the beneficial ownership of the *Min Rui* still remained with the defendant on 16 December 2014, fulfilling the requirement of s 4(4) of the HCAJA.

48 As for reason (a) stated in [47] above, this has been explained in [35] and [36] above. Turning to the late notarisation of the Bill of Sale, the plaintiffs submitted that there was no transfer of beneficial ownership on 12 December 2014 as the Bill of Sale that was part of the delivery documents exchanged that day was not notarised by the Panamanian consul, as required in Addendum No 1 to the MOA:[8]

> i) One(1) original of legal "Bill of Sale" in Panamanian form for the Vessel in favor of the Buyers duly executed by the Sellers, notarized by Panamanian consul stating that the Vessel is free from all encumbrances, debts, mortgages and maritime liens;

49 The executed Bill of Sale was notarised on 20 January 2015, which was after the *in rem* writ was filed. Notarisation for purposes of registration subsequently after the physical delivery of the ship does not post-date any transfer of beneficial interest. As the Court of Appeal in *The Andres Bonifacio* observed (at [42]), the courts would "prefer substance to form and would not permit formal defects to undermine the substance of a transaction". Further, as the plaintiffs pointed out, this Bill of Sale was a deliverable under the defendant and Buyer's *contract*. When parties themselves had accepted the delivery of documents as they were on 12 December 2014 and had proceeded to sign (a) the Acceptance of the Sale; and (b) the Protocol of Delivery and

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[8] Zhang's 1st Affidavit at p82.

Acceptance there and then, an outsider had no legal basis to argue such a point when a contractual requirement had essentially been varied or waived by the contracting parties' conduct.

50 Further, it would seem that the contractual purpose of the notarisation was stated to be expressly for the sake of confirming and assuring the Buyer that the vessel was "free from all encumbrances, debts, mortgages and maritime liens" (see above at [48]). It would not have made a material difference to the parties of the sale whether notarisation of the Bill of Sale had been done by the time of closing when the defendant had already warranted under cl 9 of the MOA that the vessel was, at the time of delivery, "free from all charters, export taxes, encumbrances, mortgages and maritime liens or any debts whatsoever" and had actually indemnified the Buyer against all consequences of claims made against the vessel incurred prior to delivery. Eventually, after notarisation was carried out on 20 January 2015, the notary did attest that he was satisfied that the vessel was free from any encumbrances and maritime liens (see above at [20]). The absence of notarisation thus did not affect the substantive rights vis-à-vis the parties at the point of closing, and was only a procedural requirement for the subsequent intended registration of the vessel with PRMAP in Panama.

51 The plaintiffs also took issue with the fact that the "Acceptance of Sale" portion at the bottom of the one-page Bill of Sale was not signed by the Buyers and that only the signature of the defendant was contained in the document. There was nothing in this allegation because there was a separately-executed Acceptance of Sale dated 12 December 2014.[9] For the reasons stated,

[9] Zhang's 1st Affidavit at p60.

I was not persuaded that late notarisation meant that there could be "no completion of the sale" on 12 December 2014.

Meaning of beneficial ownership

52 For the purposes of s 4(4)(*b*)(i) of the HCAJA, a beneficial owner is a person who has the right to sell, dispose of or alienate all the shares in that ship. In *The Permina 3001*, the Court of Appeal (at [9]) stated that:

> The question is what do the words "beneficially owned as respects all the shares therein" mean in the context of the Act. These words are not defined in the Act. Apart from authority, we would construe them to refer only to *such ownership of a ship as is vested in* ***a person who has the right to sell, dispose of or alienate all the shares in that ship***. Our construction would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein.
>
> [emphasis added in italics and bold italics]

53 The phrase "beneficial owner" in s 4(4)(*b*)(i) essentially embraces the concept of equitable title and allows for the institution of the trust (*The Permina 3001* at [9]; *The Temasek Eagle* at [12]; *The Opal 3* ex *Kuchino* at [11]; *The Andres Bonifacio* at [16]). The legal burden of proof is on the party who seeks to invoke the *in rem* jurisdiction of the court to show that beneficial ownership of all the shares in the offending vessel was with the relevant party liable *in personam*.

Application of the lex fori to ascertain beneficial ownership as defined

54 The Court of Appeal in *The Andres Bonifacio* held that "the determination by the court of its own jurisdiction *in rem* depended on Singapore law as the *lex fori*" (at [35]), relying on and citing the cases of *The*

Halycyon Isle [1979-1980] SLR(R) 538 and *The TS Havprins* [1983] 2 Lloyd's Rep 356. This *lexi fori* approach was later confirmed again in *The Jarguh Sawit* [1997] 3 SLR(R) 829 where the Court of Appeal confirmed (at [29]–[32]) that jurisdiction is a procedural issue and hence must be determined by the *lex fori*:

> …we are of the view that the question of jurisdiction must always be determined by the *lex fori*. To classify a jurisdictional dispute as a substantive issue is to accept the possibility that the law governing a jurisdictional dispute is the *lex causae* and not the *lex fori*, a proposition which merely begs the question as to what would be the connecting factor in such a case. Clearly, the scope of judicial power must be determined by the law of the state which confers the power, *ie* the *lex fori*, and cannot be determined by reference to the laws of another state. This was also the view of this court in *The Andres Bonifacio* [1993] 3 SLR(R) 71 in which Lai Kew Chai J stated (at [35]):
>
> > … the learned judge had in our view correctly treated the question of jurisdiction as one governed by Singapore law as the lex fori. Counsel quite rightly objected to the raising of the issue of the applicability of Filipino law on the basis that it was neither raised below nor in the appellants' case. In our view the determination by the court of its own jurisdiction in rem depended on Singapore law as the lex fori.

55 This approach that the issue of beneficial ownership is a jurisdictional question for the *lex fori* was applied in subsequent High Court decisions. The Singapore courts would also consider evidence of relevant foreign law as facts in evidence in determining the beneficial ownership issue under Singapore law. As Tan J explained in *The Makassar Caraka Jaya Niaga III-39* (at [9]), the Singapore court would "in the case of foreign ships, take into account relevant aspects of the relevant foreign law for a better picture of how ships may be owned or transferred in order to determine who has the beneficial ownership under that foreign law". Ultimately though, Singapore law, being

the *lex fori*, "cannot be supplanted". Thus, in *The Makassar Caraka Jaya Niaga III-39*, Indonesian law was relevant to the proceedings and was taken into account to determine whether the ship was a state asset and was actually owned by Indonesia despite being registered in the respondent/intervener's name. Tan J preferred the evidence of the appellant/plaintiff's expert on Indonesian law and held that the respondent/intervener failed to displace the presumption of ownership arising from the registration of the vessel in its name.

56 Similarly, in *The Sangwon* [1999] 3 SLR(R) 919, Chao Hick Tin JA (delivering the grounds of decision of the Court of Appeal) also took into account North Korean law to determine if the registered owner of a vessel could hold property as co-operative organisations established under the laws of North Korea or it was in fact a state enterprise and all North Korean-flagged vessels could only be beneficially owned by the Democratic People's Republic of Korea ("DPRK"). The latter case was held (at [24]) to be incomplete as the expert had failed to take into account other provisions of the DPRK Constitution and Civil Law, as well as the DPRK Cooperative Organisations Law. Consequently, the respondents failed to show that the relevant vessels were beneficially owned by the State of DPRK. To summarise, foreign law was considered to examine the ownership rights that the relevant parties had over the vessel, but the beneficial ownership issue was ultimately determined by Singapore law as the *lex fori* with the foreign legal context characterised and analysed within the "yardstick of the *lex fori*". In *The Makassar Caraka Jaya Niaga III-39* and *The Sangwon* "as the relevant vessels" were registered in Jakarta and DPRK respectively, the relevant foreign law and the legal

effects of foreign registration (Jakarta and DPRK respectively) had been accorded some role as an element in the framework to be considered.

57 A point of consideration in this case to satisfy the statutory requirement of beneficial ownership for the purpose of establishing jurisdiction *in rem* would be to apply Singapore law as the *lex fori* having regard to the proper law of the sale contract (in this case English law according to cl 16 of the MOA) and the legal effect of the transfer of property to the Buyer before deregistration of the vessel. As stated, the plaintiffs argued that there was "no completion of the sale" on 12 December 2014 as the *Min Rui* was still a Hong Kong registered vessel and the defendant was the registered owner. There was no evidence before this court on what recognition the law of the place of register would or would not give to rights created by the concluded sale transaction before deregistration from the Hong Kong Shipping Register. The issue here fell to be decided applying the *lex fori.* In other words, whilst inference of ownership may be drawn from the register, the court will take into consideration admissible evidence that the beneficial ownership lies elsewhere with another entity. The jurisdictional fact required to establish s 4(4)(*b*)(i) of the HCAJA should be drawn from the substance of the evidence rather than just upon the fact of registration.

58 If the defendant could sustain the argument that beneficial ownership in the *Min Rui* had passed to the Buyer on 12 December 2014, there was no statutory basis to commence the *in rem* proceedings or to arrest the *Min Rui*. A similar situation was before the Federal Court of Australia in *Tisand (Pty) Ltd and Others v The Owners of the Ship M.V "Cape Moreton" (Ex "Freya")* [2005] FCAFC 68 ("*The Cape Moreton*"). In that case, the seller was still

entered in the Liberian register as the registered owner despite the delivery of a bill of sale and delivery of possession to the purchaser. The sale in that case was pursuant to a Norwegian Saleform 1993 agreement. At the time of the arrest, the vessel was provisionally registered in Hong Kong and not yet deleted from the Liberian register. The issue before the Full Court was whether the seller was the owner of the ship at the time of the proceedings, given that it was the registered owner, or whether the purchaser was the owner, albeit an equitable owner. The Admiralty Act 1988 (Cth), s 17 (on arrest for owner's liabilities) and s 19 (on arrest of sister ships) both refer to the term "owner". The Full Court held that the term "owner" covers a registered owner, but nothing in ss 17 and 19 excludes a "beneficial owner". They found that for a ship to be subject to *in rem* jurisdiction, it must be the property of the "presumptively liable relevant person" (at [103]). This notion of proprietary ownership has its roots in the 1952 Arrest Convention and thus supports the view that the statutory action *in rem* action requires a proprietary connection of ownership between the debtor and the ship at the time of the institution of the action *in rem*.

59 Ryan and Allsop JJ (at [140]) favoured the approach taken by the English Court of Appeal in *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362, and interpreted the application of the law of the *lex fori* to include also the "law of the forum's rules of private international law making foreign law relevant", *ie* the *lex fori*'s municipal/domestic laws *and* conflict of laws rules. As for the connecting factor that determines "the law to which [the relevant party] is subject", the Full Court opined (at [141]) that "there appears to be reasonable foundation … that the law governing the transfer of property rights is the lex situs". After exploring the difficulties in identifying the *situs* of a

merchant ship, it was expressed that there were powerful reasons for giving effect to the law of the country of register as the *lex situs*. No evidence of foreign law was adduced in that case and the Full Court was not able to comment (at [148]) on the question of choice between potential sources of law in the factual matrix of a sale transaction of the ship. Although *The Cape Moreton* does go further than *The Nazym Khikmet* and the other cases in exploring the conflicts analysis by advocating a conflicts characterisation of the issue as that of transfer of property rights which pointed to *lex situs* as the applicable law, Ryan and Allsop JJ's analysis still treated Australian law as the *lex fori* as the starting point and lens through which foreign law was considered in a specific instance of factual investigation of beneficial ownership. Arguably, they may not have advocated for a full *lex causae* conflicts approach where the issue would essentially be determined by the foreign law selected by the *lex fori*'s conflict of laws rules. After all, their analysis is purportedly built on the approach adopted in *The Nazym Khikmet*. What is clear is that beneficial ownership denotes the right or power to dispose of dominion, possession or enjoyment of the ship. This right or power is essentially a matter of private law and arises from the dealings between the parties concerning the ship and not in statute. The Full Court followed the approach in *The Nazym Khikmet* which found that the law of the forum governs the characterisation of the rights. This approach reinforces the view that the fact of registration of a vessel is at best *prima facie* evidence of ownership.

60 The Full Court also examined the legal consequences of registration. The attribution of the national character of a ship is determined by the entry into the public record of the place of registration. These are sometimes

referred to as the "public law" consequences of registration which are to be distinguished from the private law consequences when dealing with the title of the registered owner.

The transfer of property under the MOA

61 In the present case, the *Min Rui* was registered in Hong Kong and sold pursuant to an agreement expressly stated to be governed by English law. On 24 November 2014, the Provisional Patente was issued by the DGMM to the Buyer and in the vessel's new name, *Qi Dong*.

62 As for the legal consequences of registration *per se*, if any, following the concluded sale transaction and before deregistration of the *Min Rui* from the Hong Kong Shipping Register, Hong Kong law on registration would be relevant. Such information would be considered as a factual circumstance in the *lex fori*'s determination of beneficial ownership for the purposes of determining admiralty jurisdiction. I have already commented on this aspect earlier in this Grounds of Decision.

63 As for the relevance of Panamanian law, the defendant submitted that Panamanian law was relevant as to the legal effects of the Provisional Patente issued by the DGMM and the subsequent registration with the PRMAP, *ie* how registration of ownership on vessels was done in Panama and interpreted by the Panamanian courts. On the other hand, the plaintiffs' submission was that the Singapore courts apply a *lex fori* approach. Both the defendant and plaintiffs adduced expert opinions on Panamanian law. To the extent that both parties had agreed that the Provisional Patente was only provisional and "temporary", and that the Buyer had become the registered owner of the *Min*

Rui after permanent registration with the PRMAP on 24 February 2015, I was of the view that the dispute between the parties as to whether Panamanian law recognised a presumptive beneficial ownership on the basis of a Provisional Patente issued by the DGMM and the alternative interpretations of Panamanian case law on this issue were irrelevant. Singapore law as the *lex fori* strictly applied to determine this issue of beneficial ownership under the HCAJA. Panamanian law was relevant only as to whether the Provisional Patente was evidence of registered (and not beneficial) ownership – an issue that was actually not in dispute as neither party had submitted on this basis. I thus found that the expert evidence adduced on Panamanian law was largely not relevant to the present case.

64 English law was the proper law of the MOA. Thus, it was relevant to examine the nature and extent of the contractual rights created or recognised by the sale and the delivery of the *Min Rui* and the executed Bill of Sale to the Buyer. To illustrate, in *The Almojil 61*, Saudi Arabian law would have been referred to (if not for the presumption of similarity that it was no different from Hong Kong law) as the governing law of the contract to interpret the nature of the rights and obligations of the contracting parties and whether the substance of the transaction was in fact a loan or an acquisition of partial interest in the vessel pending its sale (*ie* a contractual interpretation issue). As Kwan JA noted (at [43]), "how the Agreement is characterised would affect the right of arrest conferred by statute in s 12B(4)(ii)" of Hong Kong's High Court Ordinance. Her observations on s 12B(4)(ii) would also apply to s 12B(4)(i) of Hong Kong's High Court Ordinance, which is the equivalent of s 4(4)(*b*)(i) of HCAJA.

65 As mentioned, the transfer of ownership of a ship is usually by way of a bill of sale. The comments (at para 10.16) of Nigel Meeson and John A Kimbell in *Admiralty Jurisdiction and Practice* (Informa, 4th Ed, 2011) are instructive:

> Where a ship is a registered vessel, although it is possible that property in the ship may pass under section 18(1) of the Sale of Goods Act 1979 upon signing a Memorandum of Agreement and payment of the deposit, before formal title is transferred by the execution of the bill of sale, the *normal rule is that the parties intend property to pass upon execution of the bill of sale, payment of the balance of the price and physical delivery of the ship*. [emphasis added]

66 Similarly, the proposition that title of a vessel is transferred in a sale and purchase transaction at the point of delivery of the bill of sale, exchange of closing documents and physical delivery of the vessel can be found in *Ship Sale and Purchase* at p 161, where the authors were commenting on cl 8 of the Norwegian Saleform 2012 (the successor to Saleform 1993 which was what the MOA was based on in the present case). I have already set out the relevant passage at p 161 in [37] above.

67 Sale and transfer agreements based on the Norwegian Saleforms contemplate risk remaining with the seller until delivery of the vessel. Clause 11 of the MOA, which stipulated that the risk and expense of loss, deterioration or damage of the *Min Rui* remained with the defendant until the *Min Rui* was delivered to the Buyer, was also *prima facie* consistent with this interpretation of when title was intended to pass.

68 Notably, title in a ship is to pass to the buyer at some point *after* the contract is signed, as there is a distinction between a "sale" and an "agreement to sell" (under the Sale of Goods Act which ships as chattels are governed by)

which would determine the time in which title in the goods will pass from the seller to the buyer: *Naamlooze Vennootschap Stoomvaart Maatschappij Vredobert v European Shipping Co, Ltd* [1926] 25 Lloyd's Rep 210; see also *Ship Sale and Purchase* at pp 80–81 and *Admiralty Jurisdiction and Practice* at para 10.17. In the present case, the Buyer and the defendant had in cl 5 of the MOA agreed on a later date of delivery somewhere in the "P.R. China" with a range of dates agreed upon as the expected time of delivery. Notwithstanding the initial reference to Shanghai as the place of closing in cl 8 (majority of which was supplemented by the first addendum regarding the delivery documentation), closing and delivery of the *Min Rui* took place on 12 December 2014 at Qingdao, China with the exchange of the relevant documentation and the signing of the Protocol of Delivery and Acceptance, whereby the Buyer had accepted delivery of the *Min Rui*.

69 This case was unlike the situation in *The Permina 3001* where the Court of Appeal held (at [19]) that a hire-purchase type of financing arrangement with the possibility of the seller rescinding was a "conditional sale agreement", despite being titled as a "Purchase Contract". The court found that the seller had, until payment of the full purchase price, the right to rescind the agreement and retake possession of the ship in the event of failure to pay any instalments on their due dates. Thus, the court was of the opinion that the alleged buyer would not be regarded as the equitable owner of the ship.

70 On the other hand, in *The Temasek Eagle*, it was held (at [18]) that there was "ample evidence of a contract" between the defendant purchaser and Maritime Malaysia for the sale and purchase of ship, with the passing of

property and beneficial ownership prior to the arrest of the vessel. The ship was thus no longer beneficially owned by Maritime Malaysia. The "ample evidence" before the court then were (at [5]–[10]), *inter alia*, a signed agreement to purchase the vessel for RM$2,000,000, a bill of sale, a letter from Maritime Malaysia stating that they had received the purchase price in full, as well as a Protocol of Deliveries and Acceptance. Hence, beneficial ownership of the ship was no longer with Maritime Malaysia, but with the defendant purchaser.

71 Similarly in *The Opal 3* ex *Kuchino*, the High Court drew a "inevitable inference" (at [13]) that Leninets had clearly "transferred the nominal and beneficial ownership to Emerald" based on a bill of sale, acceptance of sale, an agreement that conferred a right on Emerald to sell the vessels in the world market and that also stated that Leninets would furnish deletion certificates from Russia. Thus, although the deletion certificates had not been granted and Leninets had still remained the registered owners of the ship on the Russian register, beneficial ownership of the ship was held to have been passed to Emerald by the time the action was instituted.

72 In the present case, I did not consider that beneficial ownership of the *Min Rui* to have been transferred from the defendant to the Buyer pursuant to the MOA (with its addenda) that was signed *before* the closing on 12 December 2014. Arguably, the Buyer could still cancel the agreement in accordance with cl 14 of the MOA if the defendant had proposed a new cancelling date when the *Min Rui* was not ready for delivery by the cancelling date (cl 5(c)) or if the defendant had failed to give a Notice of Readiness. Given the terms of the MOA and the addenda thereto, the parties had intended

to transfer the title in the *Min Rui* by delivery of the Bill of Sale and physical delivery of possession of the *Min Rui* to the Buyer during closing. Further, it was clear from lines 1 and 2 of the MOA that the MOA was worded to make it clear that it was only an agreement to sell and buy the ship at some future time, rather than at the date of the contract (see also *Ship Sale and Purchase* at p 82 on a similar comment on the analogous lines 2 and 3 of Saleform 2012).

73 Thus, the agreement between the defendant and the Buyer envisaged title in the *Min Rui* passing to the Buyer only at closing, which was after the contract was signed and after a number of steps were to be performed (such as payment of deposit in cl 2, possible drydocking/divers inspection under cl 6, and miscellaneous notices given etc.) prior to delivery and closing at a later date.

74 In this case, there was acknowledgment of receipt of the purchase price, delivery of the executed Bill of Sale and physical delivery of the vessel on 12 December 2014. As bills of sale are usually dated before the delivery date (as was the case here where the Bill of Sale was dated 9 December 2014), the Protocol of Delivery and Acceptance served as a "written record of the time and day at which ownership and risk in the ship moved from the seller to the buyer" (*Ship Sale and Purchase* at p 168), which was 1218 hours on 12 December 2014 at Qingdao, China. In my view, beneficial ownership of the *Min Rui* passed to the Buyer then. On 12 December 2014, the defendant was clearly no longer the person who had the "right to sell, dispose of or alienate all the shares in that ship", according to the definition adopted by the Court of Appeal in *The Permina 3001*. It was the Buyer that had these rights of ownership by then. After the closing on 12 December 2014, the defendant

retained no beneficial interest and was essentially holding the registered title over the *Min Rui* on trust for the Buyer until deletion from the Hong Kong Shipping Register (and subsequently registration of the vessel under its new name in Panama with the PRMAP).

75 For completeness, I should mention that English law draws a distinction between contractual and proprietary effects of a transfer of a chattel. Not only was this court not invited to decide on this distinction, the parties also did not touch on the question of which is the applicable *lex situs* to determine the existence of proprietary interests short of registered legal title as well. I therefore say no more about this matter.

Conclusion

76 For all the reasons stated above, I allowed the appeal in RA 342. The beneficial ownership as respects all shares in the *Min Rui* had passed to the Buyer on 12 December 2014. Accordingly, I ordered the *in rem* writ and the warrant of arrest to be set aside. I also ordered the security provided by the defendant to be returned to the defendant by 3 May 2016.

77 The plaintiffs were ordered to pay the defendant: (a) the costs below of S$8,000.00 plus reasonable disbursements to be agreed or taxed (including any Panamanian lawyer fees and disbursements in respect of SUM 1621 of 2015); and (b) costs of RA 342 fixed at a lump sum of S$6,500.00.

Belinda Ang Saw Ean
Judge

Prakash Nair and Nazirah d/o Kairo Din (Clasis LLC) for the plaintiffs;
Chua Kok Wah and Yeo Wen Yi Brenna (Joseph Tan Jude Benny LLP) for the defendant.
