The "STX Mumbai"
[2014] SGHC 122

Case Number	: Admiralty in Rem No 204 of 2013 (Registrar's Appeal No 297 and 298 of 2013)
Decision Date	: 27 June 2014
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Navinder Singh and Amirul Hairi (Navin & Co LLP) for the plaintiff; Moses Lin and Jeremy Leow (Clasis LLC) for the defendant.
Parties	: The "STX Mumbai"

Civil Procedure – Striking out of action in rem *under O 18 r 19 Rules of Court or court's inherent jurisdiction – Whether there was a reasonable cause of action*

Contract – Discharge – Anticipatory breach – Whether insolvency amounts to anticipatory breach

Contract – Discharge – Anticipatory breach – Contract fully performed by plaintiff and unilateral obligation is for defendant to pay on fixed date – Whether anticipatory breach applies to executed contracts

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 80 of 2014 and Summons No 4235 of 2014 was allowed by the Court of Appeal on 15 January 2015. See [2015] SGCA 35.]

27 June 2014

Belinda Ang Saw Ean J:

Introduction

1 In this *in rem* action, the plaintiff, Transocean Oil Pte Ltd, based its case on an anticipatory breach of a unilateral obligation to pay money at a fixed date. The question in Registrar's Appeal No 297 of 2013 ("RA 297") was whether the ingredients of a repudiatory breach were present so that the plaintiff was right to treat the contract as repudiated as a result of an anticipatory breach of contract. As the competing arguments unfolded, the circumstances relied upon by the plaintiff did not give rise to a repudiatory breach by the defendant, POS Maritime VX SA and, hence, the doctrine of anticipatory breach was not triggered. Accordingly, the defendant succeeded in striking out this *in rem* action on the ground that there was no valid cause of action at the time the *in rem* Writ was filed on 14 June 2013. For these reasons, the plaintiff's appeal in RA 297 against the Assistant Registrar's striking out order was dismissed on 19 May 2014.

2 As a consequence of the striking out of the *in rem* Writ, the defendant's cross-appeal in Registrar's Appeal No 298 of 2013 ("RA 298") that sought to set aside the warrant of arrest was allowed. Furthermore, an inquiry as to damages for wrongful arrest was ordered on appeal.

The plaintiff's basis of the defendant's anticipatory breach

3 In this *in rem* action against the defendant as the registered owner of the vessel, *STX Mumbai*, the plaintiff claimed the price of bunkers supplied to the vessel on 18 May 2013 pursuant to a Bunker

Supply Agreement concluded on 16 May 2013 by STX Corporation, an entity that had placed the order for the bunkers acting as agent for the defendant.

4 By the terms of the sale, the price of the bunkers in the total sum of US$571,451.68 was payable on 16 June 2013. However, the plaintiff issued *in rem* proceedings two days earlier on 14 June 2013 and arrested the *STX Mumbai* on the same day.

5 It is noteworthy that the Bunker Supply Agreement did not provide for prescribed events of default designed to trigger early termination or an acceleration of the defendant's unilateral obligation to pay before the fixed date of 16 June 2013. The plaintiff's approach taken in argument was that the fixed payment date was overridden by a set of circumstances sufficient to create or give rise to a semblance of refusal to pay as amounting to a repudiatory breach. The alternative ground was that the insolvency of STX Pan Ocean Pte Ltd ("STX Pan Ocean") rendered or made it impossible for the defendant to make payment on 16 June 2013, and as an anticipatory breach of the payment obligation had occurred, the plaintiff was allowed to and did treat the Bunker Supply Agreement as discharged. In support of this "impossibility of performance" ground, it relied on Ship and Bunker's news report of 12 June 2013 as well as STX Corporation's failure to make payment in relation to *STX Alpha* on 10 June 2013.

6 The plaintiff argued that the doctrine of anticipatory breach was triggered on either ground to establish a valid cause of action on 14 June 2013. It was thus entitled to arrest *STX Mumbai* even though the fixed payment date of 16 June 2013 had not expired.

7 I now come to the set of circumstances that the plaintiff said formed the basis of repudiation by anticipatory breach on the part of the defendant – they concerned the financial difficulties of STX Pan Ocean and the STX Group of Companies ("STX Group") that led the plaintiff to believe that the defendant would not pay on 16 June 2013. It is the plaintiff's pleaded case that the defendant, STX Pan Ocean and STX Corporation were all part of the STX Group. At the relevant time, STX Pan Ocean was insolvent.

8 Besides the *STX Mumbai*, STX Corporation also contracted for the supply of bunkers on behalf of the registered owners of four other vessels, namely, *STX Alpha*, *STX Delicata*, *Asita Sun* and *Cape Race*. In relation to *STX Alpha*, the plaintiff did not receive payment of the bunker price totalling US$250,353.58 on the due date of 10 June 2013. On 11 June 2013, the plaintiff sent an e-mail to STX Corporation demanding prompt payment of the price of bunkers supplied to *STX Alpha*. STX Corporation was notified that the plaintiff was prepared to arrest the *STX Alpha* if payment was not received by 14 June 2013.

9 The plaintiff subsequently learnt from Ship & Bunker's news report dated 12 June 2013 that STX Pan Ocean's financial difficulties caused it to file for bankruptcy protection in South Korea on or about 10 June 2013. The same news report covered the arrest of the vessel *New Ambition* in Seattle for unpaid bunkers in excess of US$1m; that the particular bunker supplier's arrest of *New Ambition* was made possible because of a contractual "acceleration of payment" clause that made all invoices immediately payable in the event of "a change in the financial circumstances of the buyer that might reasonably jeopardise their ability to pay." [note: 1] As stated, there was no similar acceleration of payment clause in the Bunker Supply Agreement.

10 On 13 June 2013, the plaintiff demanded immediate payment of bunker invoices (before their fixed due dates) in respect of the invoices relating to bunkers supplied to the *STX Mumbai*, *STX Delicata*, *Asita Sun* and *Cape Race.* Collectively, the plaintiff sought global payment of US$2,845,987.78 by 13 June 2013, failing which it would accept the registered owners' non-payment

of the respective invoice sums as repudiation of the contracts arising from the registered owners' "anticipatory breaches". [note: 2]

11 Notably, the e-mail of 13 June 2013 attaching the plaintiff's letter of demand to STX Corporation in relation to the *STX Mumbai* was sent at 5.36 pm (which was 6.36 pm in Seoul, South Korea). The demand for payment in respect of the *STX Mumbai* was addressed to STX Corporation and the defendant. However, the e-mail was only sent to STX Corporation in Seoul and not to the defendant.

12 In the demand letters, the plaintiff highlighted the failure to promptly make payment on 10 June 2013 for the bunkers supplied to *STX Alpha* and STX Pan Ocean's purported financial difficulties (see [9] above) as grounds for claiming anticipatory breach, thereby allowing them to override the fixed payment dates to call for immediate payment. As a reminder, apart from *STX Alpha*, no other payments were contractually due: the fixed payment date under the Bunker Supply Agreement in relation to *STX Mumbai* was 16 June 2013 and the fixed payment date was 23 June 2013 in respect of the *Cape Race*, *STX Delicata* and *Asita Sun*.

13 No payment was received on 13 June 2013 from the defendant. It was not surprising seeing that the e-mail was despatched to the offices of STX Corporation after 6.36pm Seoul time. On the morning of 14 June 2013, the plaintiff issued *in rem* proceedings and arrested *STX Mumbai* in the afternoon. On 22 July 2013, *STX Mumbai* was released after the defendant provided security for the plaintiff's claim.

14 I pause here to mention that only *STX Delicata* was owned by the defendant and STX Pan Ocean was listed as "group owner" of *STX Delicata*. Not only was STX Pan Ocean not listed as "group owner" of *STX Alpha*, *Cape Race* and *Asita Sun*, the defendant was also not the owner of these three vessels.

15 According to the plaintiff, its Sea-web ship search results listed STX Pan Ocean as "group owner" of *STX Mumbai*. The significance of STX Pan Ocean's status as "group owner" was not entirely developed in argument seeing that the arrest affidavit singled out the defendant as the person liable *in personam* and the beneficial owner of the *STX Mumbai*. Its Statement of Claim simply averred that the "*STX Mumbai* is related to STX Pan Ocean". If anything, the "group owner" structure without more was, at best, a parent company with its subsidiaries carrying on their businesses as separate legal personalities to the parent company and hence can sue and be sued in their own right. This view is reinforced by the plaintiff's case against the defendant as the registered owner of *STX Mumbai* and person liable *in personam* to pay for the bunkers supplied to *STX Mumbai*. There was no attempt to lift the corporate veil to legally implicate STX Pan Ocean in any way.

The basis of the defendant's striking out application

16 The defendant took issue with some of the factual assertions. For instance, STX Corporation was not its agent and that the *STX Mumbai* was, at all relevant times, demised chartered to STX Pan Ocean. The bunkers were ordered through a chain of bunker supply contracts between STX Pan Ocean, STX Corporation and the plaintiff. As such, there was arguably no contractual relationship between the plaintiff and the defendant. Furthermore, the defendant never received notice demanding payment of bunkers on 13 June 2103. Above all, there was no valid cause of action on 14 June 2013.

17 Nonetheless, the defendant sought to strike out this *in rem* action on the footing that even if the factual background had the legal consequences alleged by the plaintiff, the claim was still bound

to fail because insolvency as a matter of law could not amount to anticipatory breach and the plaintiff had no valid cause of action on 14 June 2013 to seek early payment or to recover damages equivalent to the invoice sum. Put another way, the defendant contended that that the plaintiff's claim of anticipatory breach was legally unsustainable even assuming that STX Pan Ocean was insolvent as at 14 June 2013. Accordingly, the *in rem* action being legally unsustainable was bound to fail.

18 For the purposes of the striking out application, the defendant submitted that payment for the bunker supplied to *STX Mumbai* was not due and owing on 14 June 2013. Thus, the *in rem* action was wrongly constituted. In addition, the plaintiff had acted in bad faith when it arrested the *STX Mumbai*.

19 It is important to bear in mind the assumptions that were to be made for the striking out application that was confined to the legal unsustainability of a cause of action that was premature. The defendant argued that even allowing the assumptions below (which will be contested if the action is fought in full), the ingredients of a repudiatory breach were not present to engage the doctrine of anticipatory breach. In short, the plaintiff had no legal basis to sue immediately on 14 June 2013.

20 The assumptions derived from the plaintiff's case are as follows:

(a) The defendant was the person liable *in personam* for the bunkers supplied to the *STX Mumbai*.

(b) STX Pan Ocean was listed as group owner of *STX Mumbai*.

(c) STX Corporation acted as the defendant's agent in relation to the bunkers stemmed by *STX Mumbai.*

(d) The e-mail of 13 June 2013 with the plaintiff's demand letter was sent to STX Corporation.

(e) STX Pan Ocean was insolvent having filed for bankruptcy protection in South Korea on 10 June 2013.

(f) *New Ambition* was arrested in Seattle for unpaid bunkers.

(g) STX Pan Ocean and STX Corporation and the defendant were all part of the STX Group.

For the sake of completeness, I should add to the plaintiff's set of circumstances the following: *STX Alpha* was arrested in Singapore on 1 July 2013. *STX Alpha* was released from arrest on payment of the bunker price on 5 July 2013. [note: 3]

21 The defendant's striking out application was made pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)("the ROC") or the inherent jurisdiction of the court. In its striking out application the defendant sought the following prayers:

(a) The plaintiff's writ and statement of claim be struck out on the grounds that it did not disclose any reasonable cause of action and/or the action is vexatious/oppressive and/or an abuse of process pursuant to O 18 r 19 and/or O 12 r 7 of the ROC or the inherent jurisdiction of the court; [note: 4]

(b) the warrant of arrest be set aside on the grounds that the arrest was vexatious/oppressive and/or an abuse of process or that there was non-disclosure of material facts in the *ex parte* application for the warrant;

(c) damages to be paid by the plaintiff to the defendant for wrongful arrest; and

(d) the security paid into court on 22 July 2013 be returned to the defendant.

22 In relation to the non-disclosure argument, the complaint was that the plaintiff omitted to disclose that not all the vessels that had allegedly defaulted in payment were owned by the defendant.

23 To summarise, the focus of the appeal in RA 297 was on whether the plaintiff had a valid cause of action against the defendant on 14 June 2013. This question depended on whether, at that stage, the plaintiff was able to claim that there had been an anticipatory breach. If the plaintiff's claim of anticipatory breach was "plainly and obviously unsustainable", the Writ *in rem* would be struck out under O 18 r 19 of the ROC or the inherent jurisdiction of the court, and with the setting aside of the *in rem* Writ, the legal basis for the warrant of arrest was removed and the setting aside of the warrant of arrest would automatically follow (*Shanti Kant Jinghan v Owners of the vessel, Indera Pertama* [1989] 3 MLJ 56, at 64). In the light of the foregoing, it was not necessary to deal with the matter of non-disclosure of material facts.

Principles governing a striking out application

24 The principles governing a striking out application as set out in *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*Bunga Melati 5*") are not controversial. A claim or an action would be struck out on grounds of either (a) legal unsustainability or (b) factual unsustainability (see *Bunga Melati 5*, at [32], [38] and [39]). A claim or action would be *legally unsustainable* if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks." A claim or action would be *factually unsustainable* if "it is possible to say with confidence before the trial that the factual basis for the claim is fanciful because it is entirely without substance."

25 The appeal in RA 297 was concerned with only the "legally unsustainable" ground.

The law on repudiation

26 I begin with a brief outline of the law on repudiation. A breach of contract only becomes repudiatory when it is serious enough. Only a repudiatory breach gives the innocent party a right to elect by either accepting or rejecting the breach. In the context of the present case, the plaintiff would only have had a proper cause of action at the relevant time if it could prove an arguable case that the defendant committed a repudiatory breach, thereby granting it the power to terminate the Bunker Supply Agreement immediately instead of waiting until the fixed date (*ie* 16 June 2013).

27 The Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") instructively laid down a framework for examining repudiatory breach of contract in four situations. As succinctly summarised by the Court of Appeal in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663), they are as follows:

153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party (here,

the appellant) to elect to treat the contract as discharged as a result of the other party's (here, the respondent's) breach.

154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).

155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).

156 The *third* ("Situation 3(a)") is where the term breached (here, Clause C.1) is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.

157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.

28 The plaintiff's contentions related to Situation 2 above. Situation 2 can occur before or at the time performance is due. Situation 2 is thus capable of amounting to an anticipatory breach.

29 In addition to Situation 2, the impossibility of performing one's obligations is another recognised form of repudiatory breach. The learned authors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 17.010, observed that in addition to cases of renunciation ("Situation 2"), it is "too well settled" in English law (and perhaps even Singapore law) that a repudiatory breach may also be committed when *one party acts in such a way as to make it impossible for it to perform its contractual obligations* (at 17.058). Indeed, Australian courts have also recognised this form of repudiatory breach (for instance, see *Foran v Wight* (1989) 168 CLR 385 at [30]–[47]; *Rawson v Hobbs* (1961) 107 CLR 466; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245; *Sharjade Pty Ltd v Commonwealth of Australia* [2009] NSWCA 373 at [46]–[50]). In short, there are numerous authorities (and academic literature) approving impossibility of performance as a ground for finding repudiatory breach and it may be "assumed that *RDC Concrete* leaves this category untouched" (*The Law of Contract in Singapore* at para 17.058).

30 Like Situation 2, impossibility of performance as a ground of repudiatory breach can occur before or at the time performance is due, and is thus capable of amounting to an anticipatory breach. The doctrine is labelled as "anticipatory breach" because the innocent party is allowed to *anticipate* the occurrence of an inevitable breach that would take place in the future (*Universal Cargo Carriers v Pedro Citati* [1957] 2 QB 401 at 438 ("*Universal Cargo Carriers*").

Was there a valid cause of action on 14 June 2013?

31 To answer this principal question, the following issues must be resolved:

(a) Did the defendant by its words or conduct repudiate the Bunker Supply Agreement, thereby entitling the plaintiff to accept that repudiatory breach as termination of the contract?

(b) If there was no repudiation in issue (a) above, could the termination nonetheless be justified on the basis that by the date of termination performance of the Bunker Supply Agreement was impossible?

If the answer to both the first two issues is no, then it necessarily follows that the plaintiff was itself in repudiatory breach of the Bunker Supply Agreement.

Issue (a): Did the defendant commit a repudiatory breach?

32 As explained earlier, in certain circumstances, and provided the ingredients of a repudiatory breach are present, an innocent party may treat the contract as repudiated as a result of an anticipatory breach of contract. A party is said to have renounced its obligations under a contract where the party in breach no longer intended to perform its contractual obligation. Such intention may arise out of either "words or conduct". We are here concerned with the conduct of the defendant.

33 It must be remembered that the plaintiff had not communicated with the defendant. Its communications were with STX Corporation. As for the conduct of the defendant, the most obvious basis of repudiation for the plaintiff was non-payment on 13 June 2013 and, as the argument ran, the non-payment created a semblance of refusal to pay as amounting to repudiation. The point here is whether upon taking into consideration all of the circumstances at the time to the termination – including the question whether there was any legal basis for the letter of demand sent with the e-mail of 13 June 2013 – the so-called semblance of refusal was clearly the defendant's absolute refusal to perform so as to evince an intention not to be bound by the contract to pay on the due date. Intertwined with the allegation of non-payment was reliance on the insolvency of STX Pan Ocean. Counsel for the plaintiff, Mr Navinder Singh ("Mr Singh"), referred to them as part of the overall set of circumstances that the plaintiff had relied upon as giving rise to a repudiatory breach by the defendant. I have in [20] above listed the set of circumstances relied upon by the plaintiff as giving rise to a repudiatory breach by the defendant.

34 The "conduct" that was heavily relied upon was the status of insolvency of a third party, STX Pan Ocean, and the non-payment of bunkers in relation to the *STX Alpha.* It is significant that the *STX Alpha* was not owned by the defendant nor was STX Pan Ocean listed as "group owner". The arrest of the *New Ambition* was in circumstances easily distinguishable from the facts of the present case. Hence, what was left of the "set of circumstances" were (i) STX Pan Ocean's insolvency and (ii) the defendant as the legal entity that was obligated to pay for the bunkers.

35 In my view, reliance on STX Pan Ocean's insolvency was misguided for several reasons. Firstly, the plaintiff did not seek to lift the corporate veil and that it was the plaintiff's own case that the defendant, a separate legal entity, was responsible for its indebtedness to the plaintiff. I repeat that it is noteworthy that the allegation of insolvency was confined to STX Pan Ocean. It was not the plaintiff's case that the defendant was insolvent.

36 Secondly, the plaintiff's contention that STX Pan Ocean's insolvency would render it impossible for the defendant to meet its obligation to pay on the fixed payment date was ill-founded. STX Pan Ocean's insolvency is without more irrelevant for the simple reason that insolvency *per se* is not

automatically considered a breach of contract at common law.

37 In well thought-out commercial contracts, one would usually find provisions for early termination or immediate payment in the event of the promisor's insolvency. An acceleration of payment clause serves to alter the existing obligations under the contract. Suffice to say for present purposes that an acceleration of payment clause usually provides that a party's obligation to pay a debt at a future date would be accelerated to take place immediately upon the party's insolvency. It is envisaged that the insolvent party's failure to make prompt payment would amount to a breach of the acceleration of payment clause and for remedial action to be taken immediately. In the absence of an early termination or acceleration of payment in the Bunker Supply Agreement, it can be said with some force that, *a fortiori*, a promisor's insolvency is usually not considered as a type of anticipatory repudiation that allows the innocent party to sue immediately for breach.

38 Specifically, it has been said that a promisor's act of insolvency by itself cannot amount to an intention not to perform the contract. It is one thing to say that a party is insolvent, but it is quite another to say the insolvent party does not intend to be bound by the contract. The former goes to the ability of the party to complete its performance due, while the latter goes towards its willingness to carry out its obligations. They are two separate concepts and should not be conflated.

39 The relationship between insolvency and renunciation of a contract was discussed long ago in *Morgan v Bain* (1874) L.R. 10 C.P. 15, where the court held that the status of being insolvent does not by itself amount to a renunciation; clear words or conduct manifesting an intention not to adopt the contract is required.

40 In *Morgan v Bain*, the defendant-vendor entered into a contract to supply iron to the plaintiff-purchaser on a monthly basis. Shortly after the completion of the contract, the plaintiff became insolvent and gave notice of the fact to the defendant. It proceeded to file a petition of bankruptcy to liquidate the company. Having been notified of the defendant's insolvency, the defendant did not make deliveries at the stipulated time for two consecutive months. But during this period the plaintiff did not claim delivery either. No step was taken in relation to the contract until more than two months have passed since the first delivery became due, when the market for iron had risen and the plaintiff claimed delivery of iron. The defendant refused and the plaintiff brought an action.

41 The court held that the defendant was entitled to withhold delivery on the basis that the plaintiff had abandoned the contract. In determining whether there was repudiatory intent, the court examined the conduct of the plaintiff at the creditors' meeting that took place after the first delivery became due, where no mention whatsoever was made of this contract. As Lord Coleridge CJ held, "the omission of all reference to it must moreover be taken to have been intentional, not through inadvertence or ignorance". Similarly, Keating J held that the plaintiff's conduct at the creditors' meeting manifested their intention to repudiate the contract (*Morgan v Bain*, at 24):

> If they considered this contract as a beneficial and valuable contract and intended to insist on it in the future, they were bound, in my opinion, to introduce it into their statement of affairs. The fact of its existence would be a material element for the creditors to consider with reference to the amount of the composition to be paid. The fact of its not being introduced into the statement of affairs seems to me most material, and leaves no doubt on my mind that the plaintiffs did not at that time contemplate going on with the contract.

42 Not only was there no mention of the contract, the plaintiff equally made no demand for iron to be delivered for two months. The court inferred from those factors that the plaintiff had abandoned the contract. According to Coleridge CJ, part of the repudiatory intent could be inferred from the

issuance of a notice of insolvency, followed by the absence of a notice to adopt the contract within reasonable time. On the facts, the plaintiff's adoption came too late – more than two months after it notified the defendant of its insolvency – and in the meantime the plaintiff did nothing to show its intention to stand by the contract (at 23). Given the long delay, Brett J held that the defendant was right to assume that the plaintiff intended to abandon the contract (at 26). Both Coleridge CJ and Brett J applied *Ex p Chalmers, re Edwards* (1873) L.R. 8 Ch. App. 289 which was authority for the proposition that an insolvent party who wishes to adopt the contract must act promptly. The longer he waited the stronger would the inference that the notice of insolvency issued by him was an indication that he did not wish to make future payments due under the contract.

43 Unlike *Morgan v Bain*, the defendant in the present case was solvent. The letter of demand sent with the e-mail of 13 June 2013 for immediate payment was without any legal basis, and the non-receipt of payment on 13 June 2013 could not be construed as an absolute refusal to perform its obligations. There was no repudiation by anticipatory breach that was capable of acceptance by the plaintiff.

Issue (b): Could the termination nonetheless be justified on the basis that by the date of termination performance of the Bunker Supply Agreement was impossible?

44 The plaintiff's case on impossibility of performance rested on STX Pan Ocean's insolvency – the latter's insolvency would render it impossible for the defendant to meet its obligation to pay on the fixed payment date. I repeat here that it is trite law that insolvency of a company by itself is not a breach of contract nor does it automatically terminate the contract. The question is whether the set of circumstances relied upon by the plaintiff was sufficient to support its claim of impossibility of performance. I repeat here the analysis in [33] and [37] above.

45 Both sides cited *Universal Cargo Carriers*. In that case, Citati chartered a ship from the plaintiff. Citati was to make certain nominations by a stipulated date whereupon it was obliged to complete loading at the nominated berth. Three days before the stipulated date for nomination, Citati had yet to make the nominations. The plaintiff owner sought to terminate the contract on the ground of anticipatory breach. Devlin J held that anticipatory breach arose because Citati's delay had the effect of rendering the obligation to complete loading of the cargo before the stipulated date to be impossible. Likewise, as Mr Singh's argument developed, STX Pan Ocean's insolvency made it impossible for the defendant to make payment on 16 June 2013 even if it had wanted to pay.

46 In contrast, Counsel for the defendant, Mr Moses Lin ("Mr Lin") correctly submitted, relying on *Jennings' Trust v King* [1952] Ch 899 ("*Jennings*"), that "a [party] ought not to be allowed to treat an act of bankruptcy before the date of completion as an anticipatory breach entitling him immediately to repudiate …" (at 912). In *Jennings*, the vendor sought to repudiate a contract for sale of land, arguing that the purchaser would not be capable within reasonable time, if at all, of completing the contract by payment the remaining purchase money (at 900). The repudiation came shortly after an announcement made by the purchaser to his creditors that he "was unable to meet his liabilities" and that "he intended to suspend payment" (at 899). Harman J rejected the vendor's argument and held that the vendor cannot simply assume the purchaser was not going to complete the contract merely because he was bankrupt. He should be given the opportunity to let the liquidator or trustee decide whether to the contract should be adopted. If they decide to adopt the contract, "the vendor would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract" (at 910).

4 7 *Jennings* demonstrates that a party, despite his "bankruptcy" may still be capable of completing a contract. No inference can be drawn from the status of a party's insolvency or

bankruptcy that the latter would not be able to raise funds from creditors or third parties and get the requisite authority to complete the contract.

48 The principle in *Jennings* is a longstanding principle traceable to the 19th century where in *Re Agra Bank ex p Tondeur* (1867-68) LR 5 Eq 160, Sir W Page Wood VC held that insolvency cannot by itself give rise to an inference of inability to perform obligations under a contract at a future date. Pagewood VC gave the example of a promisor who after having entered into a contract for the delivery of goods, before the time of completion assigned all his goods to trustee in bankruptcy for distribution to the creditors. Even in such a case, there was no anticipatory breach because "it was not at all impossible that the trustees might still choose to perform the contract; and it might be beneficial to the estate that they should do so" (at 165). *Re Agra Bank ex p Tondeur* was cited with approval thereafter by Bacon CJ in *Re Barber & Co ex p Agra Bank* (1869-1870) LR 9 Eq 725 at 733. The trustee's ability to continue with the contract was similarly recognised by Jessel M.R. in *Ex parte Stapleton, In re Nathan* (1879) 10 Ch.D. 586 at 590.

49 Similar remarks were made in the next century by the Federal Court of Australia in *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 111 ALR 649 at 663. Hill J held that to have been able lawfully to terminate the building contract for anticipatory breach, the applicant would have had to prove that the promisor was wholly and finally disabled from performing through insolvency. On the facts, the applicant did not discharge the burden of proof. Hill J's comments are instructive on the difficulty in establishing impossibility of performance as a ground to repudiate the contract:

> It is not surprising that the question of a right to repudiate in circumstances where a promisor is in fact insolvent, seldom, if in fact, at all, arises. There are obviously two difficulties. First, if a promisor is insolvent, the problem may, in a practical sense, disappear through bankruptcy. *The second, more relevant here, is the problem of proof. If a promisee, claiming to have terminated a contract, must prove that the promisor was wholly and disabled through insolvency from performing, that will be somewhat difficult to prove.* The present case is an example.
>
> [emphasis added]

50 Mr Singh cited two cases to support his argument that insolvency by itself amounts to impossibility of performance leading to anticipatory breach. The first case is *Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 Ch.D. 216. [note: 5] On the specific facts the court held that there was anticipatory breach by way of impossibility of performance because of the special facts of the case. The company was in liquidation and the contract in question was a *running contract* under which the company was obligated to pave a street for fifteen years. On the facts, the company would in all likelihood have been wound up way before it could fully completed its obligations under the contract and therefore it was impossible for the company to follow through the contract to its completion. This case is not inconsistent with the general principle that insolvency by itself cannot amount to impossibility of performance; it was the long duration of the running contract that made it impossible for the company to perform its obligations. In any case, it is clearly distinguishable from the present facts as the unilateral obligation to pay would be completed once the plaintiff received payment on 16 June 2013.

51 The next case is *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23 ("*Goh Hooi Yin*"), a decision by the High Court of Penang, which the plaintiff asked for leave to tender at the hearing on 19 May 2014. The basic facts were as follows. The purchaser entered into a contract for sale of land with a vendor. When the date for payment of the balance purchase price arrived and the vendor did not receive proper payment, it purported to forfeit the deposit via a notice to repudiate the contract. The question was whether the vendor was entitled to repudiate the contract and forfeit the deposit.

The court held that the notice was invalid on several grounds, but notwithstanding a lack of a proper notice, in view of the plaintiff's "lack of financial resources", he "would not have been able to comply with a valid notice to complete if it had been given and so the plaintiff was in anticipatory breach by reason of impossibility of performance."

5 2 *Goh Hooi Yin* is distinguishable from the present dispute. The holding in *Goh Hooi Yin* did not extend to a situation where a party was insolvent or bankrupt; the court made a finding on the specific facts that the purchaser did not have the requisite funds to complete the contract.

53 As stated, the general rule is that insolvency does not by itself amount to a breach. The exception is where the parties had included an express clause providing for an event of default like insolvency which was not the case here. For these reasons, the plaintiff could not upon insolvency attempt to discharge the contract through anticipatory breach either.

Other matters: executed contracts – an exception to the doctrine of anticipatory breach?

54 In his attempt to distinguish *Jennings*, Mr Singh argued that the contract in *Jennings* was executory whereas in the present case, the contract had been executed in the sense that the plaintiff had fully performed its obligation leaving only the defendant's unilateral obligation to pay money on a fixed date. [note: 6] Mr Singh's submission was not developed in the context of executed contracts being a possible exception to the doctrine of anticipatory breach. Mr Lin also did not specifically take up the point on the applicability of the doctrine to executed contracts.

55 Firstly, I must make clear that the plaintiff was hard pressed to distinguish the present case from *Jennings*. The case stands for the broader proposition that insolvency does not by itself render performance impossible. Secondly, on a different and separate point that does not affect the first, the dichotomy between a contract that is executory and one that is executed appears to be a valid one. There is jurisprudence outside Singapore to the effect that the doctrine of anticipatory breach does not apply to contracts that have been executed in the sense that the innocent party has no performance left to discharge at the time of repudiation and that the only obligation to be performed by the promisor was to pay money on a fixed date. As the parties have not submitted on this specific point, my observations on this interesting point – the first time a Singapore court appears to be directly looking at this exception – are entirely provisional in nature. It must be left to another forum to specifically rule on the point.

56 The present case concerned an executed contract where the plaintiff had fully performed all his obligations under the contract and the only obligation was for the defendant to make payment at a future date. In such a situation, even if the promisor had renounced his obligation to pay or is incapable of paying, there remains an issue of whether the innocent party can properly invoke the doctrine of anticipatory breach or should the innocent party have to wait until the time of performance as stipulated in the contract before taking action.

The position in the United States

57 It is widely recognised in the United States that anticipatory breach may not be invoked where the innocent party of the breach is under no outstanding obligation at the time of the anticipatory breach. The innocent party must await the time for performance to sue for damages (refer to authorities cited in *The Law of Contract in Singapore* at 1193-4). The various states that do not recognise the exception appears to be in the minority, with the Texan and New Hampshire courts having expressly departed from the predominant position adopted in most other states (*Pitts v Wetzel* 498 S W 2d 27 (Tex Civ App Austin, 1973); *LeTarte v W Side Dev* 855 A 2d 505 (N H, 2004); D A

Wiesner & J Klotchman, "*Anticipatory Breach and the Unilateral Contract: A Decade of the Status Quo?"* (1982) 8 U Dayton L Rev 61).

58 In *Brown Paper Mill Co v Irvin* 146 F 2d 232 (8th Cir 1944), a plaintiff-broker who had fully completed his obligations under the contract was expecting to receive payment in instalments for his brokerage commission from the defendant-buyer (at 237). When the defendant repudiated the agreement by denying the existence of any contractual obligation owed to the plaintiff for his services, the plaintiff sued. The US Court of Appeal for the 8th Circuit dismissed the action holding that anticipatory breach may not arise in executed contracts where the only contractual obligation left was the defendant's promise to make payment in instalments at a future date.

59 The impetus for the exception appears to stem from the rationale of the doctrine itself as found in *Hochster v De la Tour* (1853) 2 El & Bl 678, 118 ER 922 ("*Hochster v De la Tour*"), the *locus classicus* on anticipatory breach. The case involved a bilateral contract in which there were mutually interdependent promises which remained unperformed at the date of the anticipatory breach. The holding there was that the innocent party should be given an immediate action for if this was not done he would have had to perform all the conditions precedent to the party-in-breach's duty in order to preserve his right to sue. A case could therefore be made that if the victim has already performed all his obligations under the contract, the rationale of the doctrine no longer exists.

The English position

60 As pointed out by the learned authors of *The Law of Contract in Singapore* (pp 1193-1194), the predominant position in the U.S. may be contrasted with that taken by the House of Lords in *Moschi v Lep Air Services Ltd* [1973] AC 331 ("*Moschi*"). In *Moschi*, the debtor defaulted in paying instalments of a loan to a creditor who had completed its obligation under a contract by releasing the goods previously held under a lien. Once the creditor had released the goods the contract became partially executed since only the debtor and the guarantor of the loan were subject to outstanding obligations. Accepting the debtor's repudiation, the creditor sued the guarantor for damages for breach of the guarantee. The House of Lords unanimously held that the creditor was entitled to terminate the contract with the debtor and allowed his claim against the guarantor. There was no suggestion that partial execution of the contract raised any difficulty so far as the creditor's right to terminate the contract was concerned.

61 Notably, Lord Simon rejected the guarantor's argument that it "had guaranteed the later payments, not the immediate damages" (*Moschi*, at 355). Lord Simon held that the guarantor's argument was impossible to reconcile with *Hochster v De la Tour*, that if a promisor under a contract, even before the time for its performance evinces an intention not to perform it, the promisee may treat this intention as an immediate breach of contract and bring his action accordingly. He explained, at 356:

> In the instant case, therefore, it was accepted that the respondents could, on 22 December, treat the company's conduct as a refusal to perform the executory part of the contract, and sue the company at once for damages for breach of contract, notwithstanding that the company might notionally have changed its mind before the time for performance had arrived and decided to comply with its executory obligations. The measure of damages in such an action would be the totality of the outstanding debt with a discount for accelerated payment: cf *Frost v Knight*. *It would be very strange and hardly workable if the promisee had to wait until the time for the promisor's performance had arrived before having his remedy against the surety.*
>
> [emphasis added]

62 According to Lord Simon, while the action for immediate damages would succeed, the proper measure of damages "would be such net sum with an appropriate discount for accelerated payment". Such a discount was necessary to prevent the plaintiff from receiving more than what he was entitled to under the contract by discounting the award of damages.

The Australian position

63 I now turn to examine how other Commonwealth jurisdictions have approached this issue. This issue was canvassed in Australia on two occasions. In *Mackenzie v Rees* (1941) 65 CLR 1 at 15, the High Court of Australia held that the doctrine of anticipatory breach would not apply to executed contracts. Dixon J held that it was not easy to understand how a promissory note or bill of exchange that is still current can be treated as dishonoured before the date of maturity. In support of the proposition, he elaborated that there was (as of then) no English decision which applied the doctrine of anticipatory breach to contracts completely executed on one side, still less to promissory notes and bills of exchange. He then went on to cite with approval the American position of not applying the doctrine to unilateral obligations to pay money.

64 Dixon J's holding engendered a robust discussion by Brennan J in a subsequent decision by the High Court of Australia suggesting that the law in this area may still be in a state of flux (*Progressive Mailing House v Tabali* (1985) 57 ALR 609 at 628–630; J W Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 3rd ed, 2011) at 7-82 ("*Carter's Breach of Contract*") argued that the Australian position "remains uncertain").

65 Brennan J expounded on the arguments both for and against the exception. Three arguments were made against the validity of the exception. First, the position in the United States cited by Dixon J "commands substantial though no uniform support in the United States" (at 628). Secondly, he commented that having this exception may not be consistent with the doctrinal basis of anticipatory breach which, in his view, gives "both a shield and a sword" to the innocent party. "His shield is the ending of his executory obligations; his sword is an immediate right to damages." Where the contract has been fully completed by him, he has "no need for a shield", but "he may wish to brandish a sword". Thirdly, there is a certain artificiality in the distinction between executory and executed contracts:

> … anomalies would occur if there were an unqualified rule that damages for repudiation by anticipatory breach should be refused where the innocent party has fully performed his obligations, but granted where he has not. *Whether the contract be executed or executory, it can be said that repudiation causes the innocent party loss of the benefit of the contract. Indeed, where the innocent party has fully performed his obligations, a repudiation by the other party deprives him not only of the profit to which his bargain entitled him but also of compensation for the cost incurred in performing his obligations.*
>
> [emphasis added]

66 In his balanced analysis, Brennan J then went on to make a strong case in support of the exception. The main argument against allowing anticipatory breaches from operating in executed contracts is that it has the effect of enlarging the promisor's contractual obligations. An immediate award of damages gives the innocent party more than the benefit of his bargain.

67 Given that Brennan J did not appear to have taken a firm position on this issue, it could also be said that the Australian position remains that in *Mackenzie v Rees*, which is in support of the

exception.

The Canadian position

68 The Canadian position appears to follow that of the United States as well. In *Melanson v Dominion of Canada General Insurance Co* [1934] 2 D.L.R. 459, at 464, the New Brunswick Supreme Court held that there could be no actionable repudiation of a contract that is fully executed on the plaintiff's side. The court reasoned as follows at 463:

> … Now in the present case the plaintiff had nothing left to perform. Before the refusal to pay the proof of loss was in. There was nothing to be done under the whole contract except to pay the sum assured. The contract, therefore, was an executed one, not executory. The distinction is a reasonable one. In all the cases of executory contract cited the plaintiff might be put to great hardship if he had to wait until the day of performance should arrive or if he had to do the things which, on his part, the contract bound him to do in the face of an imperative declaration on the part of the defendant that under no circumstances would he perform his portion of the contract. But in the case of an executed contract where the defendant simply says that he will not, under any circumstances pay a sum of money when it falls due there is no possible reason for accelerating the payment and no hardship upon the plaintiff in not doing so … [applying *Hatton v. Provincial Ins. Co.* (1858), 7 U.C.C.P. 555)] …

Academic commentary

69 The exception has received widespread criticism from academics. In the United States, the leading critic is the learned authors of Sarah H. Jenkins, *Corbin on Contracts, vol 13* (LexisNexis, 2003), who have made some forceful criticisms of the exception. It was argued that the exception is "counterintuitive": having fully performed, the aggrieved party runs the risk of not only the loss of its expectation because of the repudiation, but also a dissipation of the benefit it has bestowed on the repudiating party through full performance. From a more theoretical perspective, the learned authors argued, at 213, that "the doctrine of anticipatory repudiation is often justified by the need to prevent one who has not performed from maintaining a state of readiness after the other party's disavowal of its obligation. This rationale fails to address the primary goal of the doctrine of prospective inability – that of protecting an aggrieved party's expectation of and reliance on receiving the promised performance. This expectation is impaired by the other's unequivocal disavowal of its obligation. Surely, one who has fully performed is entitled, if not more so, to 'a continuing sense of reliance and security that the promised performance will be forthcoming when due.'" The same view was shared by an article in the Duke Law Journal (*Anticipatory Repudiation: Anachronistic Limitations* Duke Law Journal 165 (1959) at 169).

70 Amongst other academics, George Brody argued that "it is in this type of case that the plaintiff really needs the prompt aid of the courts" (44 Mich L Rev 163 (1945) at 164). Similarly, John Ulman argued that there is no justification for the exception on a doctrinal level since the best reasons for allowing an immediate action for an anticipatory repudiation – repudiation causes immediate loss in property values, and disturbs the serenity of the promise, and that to allow the action makes for an early settlement of the dispute and a timely payment of damages – apply equally to contracts fully executed on the part of the innocent party (37 Mich L Rev (1939) 1138 at 1139).

71 In Canada, S.M. Waddams has made a forceful case for the abolition of the exception. He argued that the position is "contrary to the entire notion of an action for anticipatory repudiation" and that it leads to "an unjust and inconvenient result where the defendant's obligation is to make periodic payments" (S.M. Waddams, *The Law of Contracts* (Canada Law Book Inc., 6th ed, 2010), at

463). Waddams further cited the case of *Zdan v Hruden (No. 2)* (1912) 4 D.L.R. 255 to make a point that the Canadian decisions do not speak with the same conviction on this issue. In that case, the Manitoba Court of Appeal permitted the plaintiff to recover once and for all for repudiation of an obligation. The alternative would be to leave the plaintiff to bring multiple actions.

72 In Australia, the exception has been criticised by J W Carter in the seminal book of *Carter's Breach of Contract*. He argued that a "promisee's concern about any conduct which materially increases the risk of non-receipt of the agreed return for its performance is, if anything, more acute where the promisee has already provided that performance" (at 7-80). In response to Brennan J's concern that allowing anticipatory breach would enlarge the scope of obligations owed to the plaintiff, he suggested that a discount made to the damages awarded taking into account premature recovery would sufficiently address such criticisms. In addition, he also sought to demonstrate that there are a number of US cases that applied the doctrine to executed contracts (at p 358).

The present case

73 There has been some suggestion by the learned authors of *The Law of Contract in Singapore*, at p 1194, that the Singaporean position would appear to track the English position as it was accepted in *Tan Hock Keng v L & M Group* [2002] 1 SLR(R) 672 ("*Tan Hock Keng*") that damages are payable for an anticipatory breach of an obligation to make payments over a period of time, albeit in relation to a claim against guarantor who had contracted to ensure that such payments would be made. Be that as it may, the exception in question was not specifically examined there. In any case, *Tan Hock Keng* is distinguishable. That case concerned an obligation to make payment by instalments whereas the present case concerned a unilateral obligation to make a one payment at a fixed date. Indeed, as the learned authors of *The Law of Contract in Singapore* pointed out (at 1192-1193), there is a strong case for parties to have recourse to the doctrine of anticipatory breach and efficient judicial proceedings where a long-term contract involving multiple payments by one party has been renounced by the payor. The payee, by recovering damages for all the sums payable in the future, would save on the needless legal expense in bringing legal proceedings for every payment as they fall due (at pp 1192-1194).

74 Having considered the jurisprudence and academic arguments both for and against the validity of the exception, on balance, there is a strong case for the exception to fully apply in the present case based on the facts assumed. The application of the exception here would mean that an anticipatory repudiation of a unilateral obligation to pay money at a fixed time would not on the assumed facts of the present case had given rise to a claim for breach until that fixed time had expired.

Overall conclusion

75 In conclusion, the plaintiff did not have a proper and valid cause of action or claim when the *in rem* Writ was filed on 14 June 2013. No debt was due and owing on 14 June 2013. Accordingly, the claim in the *in rem* action was legally unsustainable and the *in rem* Writ and action were properly struck out under O 18 r 19 by the Assistant Registrar.

Wrongful arrest

76 The defendant asserted that the arrest was wrongful in that the plaintiff acted with *mala fides* and/or *crassa negligentia* in obtaining a warrant of arrest when it had no valid cause of action on 14 June 2013. The Court of Appeal in *Vasiliy Golovnin* [2008] 4 SLR(R) 994 traced the history and the development of the *Evangelismos* test (*The Evangelismos* (1858) 12 Moo PC 352) – the *locus*

classicus of this area of law – Rajah JA came to the conclusion that even though the *Evangelismos* test is not without its difficulties and criticisms, it remains a long-standing test and "should not be departed from lightly, without good reasons and due consideration" (at [134]).

77 Given the continuing relevance of the *Evangelismos* test, it is only fitting to reproduce the hallowed passage delivered by Rt Hon T Perberton Leigh that has been cited numerous times for more than 150 years in its original terms (*The Evangelismos* at 359):

> Undoubtedly there may be cases in which there is ***either*** *mala fides*, ***or*** that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. …
>
> The *real question* in this case … comes to this: is there or is there not, reason to say, that the action was *so unwarrantably brought, or brought with so little colour, or so little foundation*, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?
>
> [emphasis in italics and bold italics added]

78 Two situations were envisaged in the *Evangelismos* test, as it was later on succinctly laid out by Colman J's modern formulation in *The Kommunar (No 3)* [1997] 1 Lloyd's Rep 22 (at 30, cited with approval by the Singapore Court of Appeal in *The "Kiku Pacific"* [1999] 2 SLR(R) 91 at [17] and in *Vasiliy Golovnin* at [115]). The first refers to cases of *mala fides*, where it is clear that the arresting party has no honest belief in his entitlement to arrest the vessel (the "first test"). The second refers to cases where objectively there is so little basis for the arrest that it may be *inferred or implied* that the arresting party did not believe in his entitlement to arrest the vessel (the "second test"). The first test would apply in favour of the shipowner in clear-cut cases where there is clear and unequivocal evidence of *mala fides* on the part of the arresting party. In more difficult cases where it would be difficult to tell whether there was *mala fides* or *crassa negligentia* on the part of the plaintiff, the second test, according to Rajah JA, could prove determinative (at [137]). The second test requires an inquiry into "the circumstances prevailing and the evidence available at the time of the arrest", so as to determine if the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply that they were brought with malice or gross negligence. In other words, where it is difficult to determine whether the unwarranted arrest was deliberately or intentionally brought about by the plaintiff due to the insufficiency of evidence, the court could nevertheless make an "objective finding of the subjective intention of the plaintiff" based on the surrounding circumstances to award damages to the shipowner (at [137]).

79 I was satisfied that the e-mail of 13 June 2013 sent after office hours in South Korea and letter of demand that called for immediate payment on the same day were designed to set the stage for an imminent arrest the next day. The e-mail of 13 June 2013 appeared perfunctory given its timing and the short notice period was deliberate in light of the *STX Mumbai's* scheduled call at Singapore on 14 June 2013. The tight deadline was designed to achieve and create a semblance of refusal to pay as amounting to repudiation that was clearly artificial.

80 The decision to arrest *STX Mumbai* was occasioned by news of the arrest of STX Pan Ocean's *New Ambition* and the non-payment of the bunkers supplied to *STX Alpha.* The plaintiff would have known from the Ship and Bunker's news report that the arrest of the *New Ambition* in Seattle was possible because of the acceleration of payment clause in that particular contract, and that there was no similar clause in the Bunker Supply Agreement. The non-payment on 10 June 2013 by *STX Alpha* and STX Pan Ocean's insolvency were not connected seeing that the group owner of *STX Alpha*

was not *STX Pan Ocean* but a different entity.

81 For these reasons on the evidence, the first and second tests were satisfied.

82 I did not see how after the arrest the defendant's subsequent non-payment on the fixed date (*ie* 16 June 2013) was a relevant fact that could be taken into account. The non-payment on the fixed date had nothing to do with the ability of the defendant to pay. It had to do with the respective legal rights of the parties after the premature arrest of the vessel. The fact that the defendant was able to put up security for the claim to secure the release of the vessel militated against the plaintiff's assertion of impossibility to make payment.

83 I also find that there was wrongful continuance of arrest (*The "Evmar"* [1989] 1 SLR(R) 433 at [29]). After the arrest, the defendant on 18 June 2013 informed Mr Singh's firm that there was no legal basis to arrest the vessel: there was no cause of action on 14 June 2013 since no payment was due and owing. The plaintiff however continued to maintain the arrest even after Mr Lin's firm demanded the release of *STX Mumbai*. In addition, Mr Lin complained that the plaintiff delayed in the providing information on the amount of security required for the release of the vessel, and it was on account that delay that the defendant paid into court security for release of the vessel on 22 July 2013.

84 For these reasons, the arrest was wrongful and it opened the way to an inquiry as to the damages for wrongful arrest which was accordingly ordered.

Other orders made

85 I ordered the return of the cash security paid into court on 22 July 2013 within one week of 19 May 2014 and that the plaintiff was to apply for payment out by 26 May 2014.

86 I further ordered the plaintiffs to pay costs of both RA 297 and RA298 fixed at $10,000 plus reasonable disbursements.

[note: 1] Sherman Yeo's 1st Affidavit, page 19.

[note: 2] Sherman Yeo's 1st Affidavit, pages 22-23.

[note: 3] Plaintiff's Statement of Claim dated 18 July 2013, para 11.

[note: 4] Summons No 3613 of 2013, prayer 8.

[note: 5] Plaintiff's Further Submissions, para 45.

[note: 6] Plaintiff's Further Submissions, paras 16-18.