The “Vinalines Pioneer”
[2015] SGHC 278

Case Number	: ADM No 163 of 2013 (Registrar's Appeal No 402 of 2014)
Decision Date	: 26 October 2015
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Vivian Ang and Ho Pey Yann (Allen & Gledhill LLP) for the Plaintiff; Philip Tay (Rajah & Tann Singapore LLP) for the Defendant.
Parties	: HUNG DAO, CONTAINER JOINT STOCK COMPANY — OWNER AND/OR DEMISE CHARTERER OF THE VESSEL(S) "VINALINES PIONEER"

Admiralty and Shipping – Admiralty Jurisdiction and Arrest – Meaning of "damage done by a ship" under s 3(1)(d) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)

26 October 2015

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Hung Dao Container Joint Stock Company ("Hung Dao"), is a company incorporated in Vietnam. On 4 June 2013, Hung Dao commenced *in rem* proceedings in Singapore *vide* Adm No 153 of 2013 and arrested the vessel, *Vinalines Pioneer*, on 9 June 2013, for the loss of 111 containers that were on board the *Phu Tan* that capsized and sank in the Gulf of Tonkin in heavy seas on 16 December 2010. At all material times, the defendant, Vietnam National Shipping Lines, was the owner of the *Phu Tan* and the *Vinalines Pioneer*.

2 This is the defendant's appeal in Registrar's Appeal No 402 of 2014 ("RA 402") which was filed in the wake of the Assistant Registrar's decision in *The Vinalines Pioneer* [2015] SGHCR 01 ("the AR's decision") dismissing the defendant's application in Summons No 4029 of 2013 to set aside the *in rem* writ under O 12 r 7 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") or, in the alternative, under O 18 r 19(*b*), (*c*) and/or (*d*) of the ROC.

3 The facts and arguments are comprehensively stated in the AR's decision and it is only necessary to give a short summary of them in the course of this judgment. For the purpose of this appeal, the defendant accepted that the contract to lease the bulk of the containers was between Hung Dao and the defendant.

4 There are three main issues to be resolved in RA 402. The first is the jurisdictional issue, namely, whether Hung Dao's claim has the legal character described in s 3(1)(*d*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the HCAJA"). The second is the striking out issue, namely, whether Hung Dao's claim is time barred under Vietnamese law. The third issue is on non-disclosure of facts that would materially affect the issue of jurisdiction as well as the overall merits of the case.

Jurisdictional issue: damage done by a ship

5 The jurisdictional issue in RA 402 is centred on whether Hung Dao's claim has the legal character described in s 3(1)(*d*) of the HCAJA. Counsel for Hung Dao, Ms Vivian Ang ("Ms Ang"), argued that the damage which Hung Dao had suffered from the total loss of the 111 containers and the financial consequences arising therefrom was a claim for "damage done by a ship" within the meaning of those words in that paragraph. The Assistant Registrar ("AR") agreed with Ms Ang that the facts and circumstances giving rise to Hung Dao's claim for damage done by a ship satisfied the legal character described in s 3(1)(*d*) of the HCAJA. Preferring *Nagrint v The Ship Regis* (1939) 61 CLR 688 ("*The Regis*") over *Berliner Bank AG v C Czarnikow Sugar Ltd ("The Rama")* [1996] 2 Lloyd's Rep 281 ("*The Rama*"), the AR opined that a ship which capsized and caused damage to property on board could be considered to be the instrument of damage and that the ship was not to be treated as merely a passive environment where the incident occurred.

6 Counsel for the defendant, Mr Philip Tay ("Mr Tay"), contended that damage done by a ship in s 3(1)(*d*) did not extend to loss of all containers on board the carrying vessel, *Phu Tan*. The AR was wrong to conclude that Clarke J's externality criterion in *The Rama* was not needed to satisfy the legal character of s 3(1)(*d*). Clarke J opined as follows (at 293):

> In my judgment, the cases show that to be "damage done by a ship" and thus to qualify as giving rise to a maritime lien three criteria must be satisfied: 1. the damage must be caused by something done by those engaged in the navigation or management of the ship in a physical sense; 2. the ship must be the actual or noxious instrument by which the damage is done; and 3. the damage must be sustained by a person or property external to the ship.

7 In response, Ms Ang contended that *The Rama* should not be followed. According to Ms Ang, Clarke J's third requirement – that "damage done by a ship" applied only to damage done to something external to the ship (*ie*, the carrying ship) – was not a legal element in the absence of express words in Lord Diplock's test in *The "Eschersheim"* [1976] 2 Lloyd's Rep 1 ("*The Eschersheim*") at 8. Ms Ang cited several cases to illustrate her point that the externality criterion was not needed for a maritime claim to fall within the legal character described in s 3(1)(*d*). The main cases were *The Regis*, *Union Steamship Company of New Zealand v Ferguson* (1969) 119 CLR 191 ("*Union Steamship*") and *Fournier v The Ship "Margaret Z"* [1999] 3 NZLR 111 ("*The Margaret Z*").

8 The number of cases cited in argument was not entirely in harmony on Clarke J's externality criterion. Apart from the cases cited to me, I have looked at, for myself, a number of authorities in a case of this kind. In my view, the weight of authority favours the statement of principle that there is no jurisdiction *in rem* if the carrying ship (*ie*, the offending vessel) caused damage to property on board. Clarke J's third requirement of externality, which is a reflection of English law, should be followed in Singapore. I disagree with the AR's view that the externality criterion would restrict the ambit of s 3(1)(*d*) of the HCAJA. He saw no reason why *in rem* jurisdiction could not attach just because damage occurred on the ship when the latter was the instrument of damage. A point to note is that the AR's view of s 3(1)(*d*) serves to extend the ambit of the court's jurisdiction *in rem* and the established category of damage lien beyond legal bounds. Let me elaborate on this.

Observations

9 It is necessary to approach the arguments advanced before me with the following observations in mind. The words "damage done by a ship" were first taken from s 7 of the Admiralty Court Act, 1861 (24 & 25 Vict, c 10) ("the 1861 Act") which reads:

> The High Court of Admiralty shall have jurisdiction over any Claim for Damage done by any Ship.

10 The same phraseology was repeated in later legislation and then in s 1(1)(*d*) of the Administration of Justice Act, 1956 (c 46) (UK) ("AJA 1956") and currently in s 20(2)(*e*) of the Senior Courts Act 1981 (c 54) (UK) ("SCA") (formerly known as the UK Supreme Court Act 1981). The AJA 1956 enacted (in part) the 1952 Arrest Convention (*ie*, *International Convention for the Unification of Certain Rules Relating to Arrest of Sea-Going Ships* 1952) into English law.

11 Historically, an action *in rem* is linked with maritime liens. The long held view was that the right *in rem* was based on the existence of a maritime lien. Thus, proceedings *in rem* are available whenever there is a maritime lien attaching to a vessel. *The Bold Buccleugh* (1852) 7 Moo PC 267 ("*The Bold Buccleugh*") articulated the theory of the maritime lien for damage in cases of collision as it existed in England at the time. Claims for collision damage were recognised as giving rise to a maritime lien for damage (also referred to as a "damage lien"). This damage lien was recognised as a claim for injury caused by the ship.

12 Professor D C Jackson, *Enforcement of Maritime Claims* (Informa Law, 4th Ed, 2005) at para 2.63 observed that the admiralty jurisdiction based on the occurrence of "damage" is not necessarily equated with existence of a damage lien, and that the courts are not likely to construe the court's statutory jurisdiction *in rem* any wider in scope if the subject matter of the claim could also have attracted a damage lien.

13 Plainly, it cannot be inferred from the court's statutory jurisdiction *in rem* that the legislature intended for the statutory lien in question to assume the nature of a maritime lien. The confusion may have been the result of the long held view of *The Bold Buccleugh* that jurisdiction *in rem* and maritime liens went hand in hand. This view was later regarded as inaccurate. Put simply, if a maritime lien exists, a statutory lien and jurisdiction *in rem* is available. However, the converse is not necessarily true. If a statutory lien and jurisdiction *in rem* are made out, it is not the case that a maritime lien can be inferred (see also D R Thomas, *Maritime Liens* (Stevens & Sons, 1980) ("*Thomas*") at para 43).

14 I digress to briefly state the legislative history of Singapore's admiralty jurisdiction. Notably, the 1861 Act was applicable in Singapore prior to 15 January 1962. A V Winslow J in *The "Simba"* [1968-1970] SLR(R) 555 ("*The Simba*") explained the admiralty landscape as follows:

> 8 [T]he admiralty jurisdiction of the High Court in Singapore arose by virtue of s 17(c) of the Courts Ordinance (Cap 3) which provided it with the jurisdiction and authority of a Colonial Court of Admiralty conferred upon it by the Colonial Courts of Admiralty Act 1890. That jurisdiction and that authority still exist by virtue of s 8(2) of the [Courts (Admiralty Jurisdiction) Ordinance 1961].
>
> 9 By virtue of ss 23 and 24 of the Courts of Judicature Act 1964 the High Court in Singapore was invested with the same jurisdiction as was vested in it by any written law immediately prior to Malaysia Day and such jurisdiction includes the jurisdiction and authority in relation to admiralty matters conferred on the High Court of Justice in England under the Administration of Justice Act 1956 …

15 Therefore, prior to 15 January 1962, the admiralty jurisdiction of the High Court in Singapore was limited to the admiralty jurisdiction which the High Court in England had in 1890 with the enactment of the Colonial Courts Admiralty Act, 1890 (53 & 54 Vict. c 27). The jurisdiction of the High Court of Singapore over claims for damage was to be found: (a) in s 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c 65) ("the 1840 Act") where the court's jurisdiction *in rem* was over damage "received by any ship or seagoing vessel", and (b) in s 7 of the 1861 Act which gave jurisdiction *in*

rem over "any claim for "damage done by a ship". Both the 1840 and 1861 Acts existed concurrently.

16 The Courts (Admiralty Jurisdiction) Ordinance 1961 ("the Ordinance") was renamed to the High Court (Admiralty Jurisdiction) Act pursuant to the commencement of the Supreme Court of Judicature Act 1969 (which came into force on 9 January 1970). The material provisions in the Ordinance were adopted from the AJA 1956. Also, the HCAJA is in effect a re-enactment of the AJA 1956 (see generally *The "Trade Fair"* [1994] 3 SLR(R) 641 at [13]).

17 This brief historical account is useful as the parties cited cases decided under the 1861 Act. As stated, the words "damage done by a ship" came from s 7 of the 1861 Act, and these decisions would be followed in Singapore as they formed part of Singapore law (see [14]–[16] above). Whilst the larger part of modern admiralty law of Singapore consists of judicial interpretation of statutory provisions, for present purposes, modern admiralty law is a natural development of the principles derived from English cases. The same "sweeping up clause" (as the provision is often called) that Winslow J referred to in *The Simba* at [8] is retained in s 3(1) of the HCAJA. After the list of claims set out in s 3(1) are the words "together with any other jurisdiction connection with ships … which may be vested in the Court apart from this section."

18 Speaking generally, and as it happened, claims secured by maritime liens under English law are found in the list set out in s 20(2) of the SCA. This is largely the same as the list of maritime claims contained in Article 1 of the 1952 Arrest Convention. Thus, in the context of a maritime lien and admiralty jurisdiction based on a statutory lien, the two types of lien (maritime lien and statutory lien) overlap in the sense that claims which attract a maritime lien are included in the list of claims set out is s 20(2) of the SCA as being claims enforceable by an action *in rem*.

19 Likewise in Singapore, the maritime lien for damage corresponds with the claim for damage done by a ship in s 3(1)(*d*), the maritime lien for salvage corresponds with the claim for salvage in s 3(1)(*i*), the maritime lien for wages of the master and crew corresponds with the claim for wages in s 3(1)(*n*), the maritime lien for master's disbursements corresponds with s 3(1)(*o*), and the maritime line for bottomry corresponds to the claim for bottomry in s 3(1)(*q*). Thus such claims that fall within s 3(1)(*d*) to (*q*) and are enforceable by an action in rem as maritime liens under s 4(3) of the HCAJA or by an action in rem under s 4(4) of the HCAJA. The action *in rem* enforcing a claim as a maritime lien under s 4(3) is against the ship involved in the claim (*ie*, the offending ship). As the cases acknowledged, a maritime lien is confined to the ship involved in the claim whereas the statutory lien is enforced against a sister ship. If the ship in respect of which the maritime lien arises is lost, it is still possible for a plaintiff to assert a claim but only as a statutory *in rem* claim against the sister ship. In such a case, the claim does not take effect as a maritime lien claim.

20 All this considered, and simply put, since the maritime lien for damage done by a ship overlaps with the claim for damage done by a ship in s 20(2)(*e*) of the SCA (the equivalent of our s 3(1)(*d*) of HCAJA), it is not surprising that the English courts in considering a statutory claim for damage done by a ship in s 20(2)(*e*) of the SCA have turned to cases on damage done by a ship in the context of a damage lien and s 7 of the 1861 Act for precedent and guidance.

21 Indeed, it can be gleaned from the English cases that, in the interpretation of the phraseology "damage done by a ship" in the 1861 Act and now in the context of s 20(2)(*e*) of SCA, and the occurrence of "damage" caused by a ship that gave rise to a maritime lien, guidance was taken from the statutory and common law cases to give meaning and application to the words.

22 Yet, the distinction between a damage lien and jurisdiction *in rem* is real and should not be conflated. They are plainly separate issues. As the author of *Thomas* put it (at para 217):

> The decision of the House of Lords in *Currie v M'Knight* is identical in its approach with that of the earlier decision of the Court of Appeal in *The Vera Cruz (No 2)*. The two cases are however concerned with distinct and separate issues. Whereas *Currie v M'Knight* is concerned with a pre-condition appertaining to the creation of a damage maritime lien, *The Vera Cruz (No 2)* is solely concerned with the ambit of the Admiralty Court's jurisdiction under the phrase "damage done by a ship". Nonetheless in both cases the need to show a ship to have been the "actual instrument of damage" is emphasised. The instrumentality thesis would therefore appear to represent a doctrine common both to the assumption of jurisdiction under the "damage done by a ship" provision and to the accrual of the damage lien, and such a view of the law appears to be implicit in the decision of the House of Lords in *The Eschersheim*. In the result, in all cases where it can be shown that a jurisdiction exists under [s 1(1)(*d*) of the AJA 1956], there will probably exists a maritime lien.

23 Allsop J in *Elbe Shipping SA v The Ship Global Peace* [2006] FAC 954 ("*The Global Peace*") also clarified the distinction and difference in approach between a claim that is premised on the existence of the maritime lien and a claim that is dependent on its nature and legal character to found admiralty jurisdiction. It is one thing for a court to have jurisdiction to deal with a maritime claim which may or may not be a maritime lien and another to consider if proceedings are invoked in respect of a maritime lien. Allsop J held that in proceedings on a maritime lien, the court considers the existence of the maritime lien whereas, in the case of a statutory lien, the court considers the nature of the claim to see whether it fits the legal character needed to found jurisdiction *in rem*.

The Rama

24 In that case, the defendants as charterers of the *Rama* claimed damages for deceit and/or negligent misrepresentation on the grounds that the owners knew that they were not in a financial position to complete the voyage at the time when they: (a) entered into the charter, and (b) persuaded the defendants to advance funds for bunkers, agency expenses and replacement parts. The defendants also claimed damages for conversion and for breach of charter in that the vessel failed to complete the contractual voyage and failed to deliver the cargo to its destination. At all material times, the *Rama* was mortgaged to the plaintiff bank who gave notice of default after the owners defaulted on the loan, and caused the vessel to be arrested during the charter.

25 The question before Clarke J was whether the defendants' claims give rise to a maritime lien. It was common ground in *The Rama* (at 291) that a person had a damage lien if his claim was a claim for damage done by a ship within the meaning of s 20(2)(*e*) of the SCA. Clarke J considered the authorities, discussed *The Eschersheim*, and concluded that for the claim to come within the meaning of "damage done by a ship" in s 20(2)(*e*), three criteria must be satisfied (see [6] above). Notably, Clarke J prefaced the test in [6] above with these words which I repeat here:

> In my judgment, the cases show that to be "damage done by a ship" and *thus to qualify as giving rise to a maritime lien* three criteria must be satisfied.
>
> [emphasis added]

26 It seems to me that Clarke J's statement that the jurisdiction *in rem* is co-extensive with the existence of the damage lien must be understood in the context of the common ground as described in [25] above. According to Clarke J, the authorities including *The Eschersheim* established three criteria for the damage lien. As Clarke J put it (at 292):

> That conclusion [*ie*, the three criteria] is supported by both the authorities and the text books. I

have already referred to *The Eschersheim*. The damage in that case satisfied all three of the above tests.

27 As for secondary source material that supported the three criteria, Clarke J said (at 295):

> In my judgment the reasoning in those cases support the three propositions which I set out earlier. So too, in the main, do the text books (see Thomas on Maritime Liens, at par 175 and 176, Jackson on the Nature of Liens at p. 20. Tetley on Maritime Liens at pp. 318-320 and subject to the provisos stated above, Meeson at pp 28-29).

28 The key point in *The Eschersheim* is that, on the facts, the salvage tug *Rotesand* physically caused the alleged loss by casting off her tow, the *Erkowit*, and beaching her. No damage to the *Erkowit* or her cargo was caused by the beaching. However, due to the wind and waves, pollution damage later occurred to the surrounding areas from oil in the *Erkowit*, and her cargo and the crew's personal possessions were damaged or lost. Their Lordships held that the damage was the direct result of acts done by those engaged in the navigation of the salvage tug. For the purposes of the appeal, it was assumed that the chain of causation was not broken between the beaching of the *Erkowit* and her subsequent breaking up by wind and waves. The *Rotesand* remained the actual instrument by which the damage subsequent to the beaching was done.

29 Lord Diplock in *The Eschersheim* first talked about damage done by the ship as the instrument of mischief ("the instrumentality criterion"). His lordship talked about damage by a ship in a collision where one vessel strikes another ship or object like a floating buoy due to something done by those engaged in the navigation of the ship. One ship is active and the other ship or object is passive, but still in one sense they each strike the other. Where there is physical contact with the other ship, the property that sustained damage was plainly external to the offending vessel ("the externality criterion"). Damage done by a ship is not limited to collision. Lord Diplock expressly referred to *The Vera Cruz (No 2)* (1884) 9 PD 96 ("*The Vera Cruz*") where the occurrence of "damage done by a ship" within the meaning of s 7 of the 1861 Act was contemplated to be external to the offending ship. In *The Vera Cruz*, Brett MR said (at 99):

> The section indeed seems to me to intend by the words "jurisdiction over any claim", to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. *I do not say that damage need be confined to damage to property, it may be damage to person, as if the man were injured by the bowsprit of the ship.* But the section does not apply to a case where physical injury is not done by a ship.
>
> [emphasis added]

30 In Brett MR's example, the externality criterion is obvious. The bowsprit was the part of the ship that was the noxious instrument in a real physical sense, and the person injured was envisaged to be external to the offending ship. In addition, Lord Diplock explained that the ship could still be the instrument by which damage was done without physical contact. Damage caused by one ship to another ship or property onshore without physical contact could be either by wash or by creating a situation of danger through a negligent or hazardous manoeuvre, etc. Lord Diplock specifically referred to property that was onshore and not on board the offending vessel in the context of damage that was caused without physical contact.

31 Lastly, the damage lien is founded upon the fault of or breach of duty by those in control of the ship. It is their negligence in the navigation or management of the ship ("the navigation criterion")

which results directly or consequentially in the damage, thereby creating the damage lien which attached immediately to the offending ship.

32 Lord Diplock in *The Eschersheim* was not required to consider the precise meaning of the navigation criterion, but it appears that the test would be satisfied if the damage was caused as a result of the navigation or management of the ship, provided that the expression navigation or management is understood in a physical sense. As Clarke J put it (at 295):

> In short, the physical navigation or management of the vessel must cause the alleged loss or damage and the vessel or part of her must in the physical sense be … the active cause, the noxious instrument or the instrument of mischief.

33 Clarke J opined (at 293) that the damage to the *Erkowit* in the case of *The Eschersheim* satisfied all three criteria. In contrast, the facts of *The Rama* were different as none of the loss suffered by the defendants was done or caused by the *Rama* as a physical object nor was it done by those engaged in the navigation or management of the ship in the physical sense. Clarke J was keen to point out that despite his conclusion that the defendants' claims did not give rise to a damage lien or satisfy the requirements of s 20(2)(*e*), the defendants' claims could give rise to a statutory lien under s 20(2)(*h*) of SCA.

The legal position in Singapore

34 I now turn to the question of law in RA 402: Whether the externality criterion in *The Rama* should be followed and adopted as a matter of Singapore law for the purposes of *in rem* jurisdiction under s 3(1)(*d*) of HCAJA. It is clear that the legal approach in England and Hong Kong, on the one hand, and that of Australia and New Zealand, on the other, is different on this point. In my view, Singapore's jurisprudence on this point is probably in line with the laws of England and Hong Kong. Case law from Australia and New Zealand has applied a wider test to claims for "damage done by a ship" in respect of "damage" sustained by a person. Let me elaborate.

35 The distinction between "damage" and "damage done by a ship" was noted in both *The Zeta* [1893] AC 468 ("*The Zeta*") and *The Theta* [1894] P280 ("*The Theta*"). In the latter case, the word "damage" was construed to include damage to property and personal injury. *The Vera Cruz* made clear that "damage" need not be confined to damage to property; it may be damage to person. However, this conclusion that s 7 of the 1861 Act applied to damage to persons and things other than ships would not answer the jurisdiction question as to whether Clarke J's externality criterion is required to satisfy the legal character of a claim for damage done by a ship under s 3(1)(*d*) of the HCAJA.

36 Ms Ang's objection to the externality criterion was that it was not supported by principle and authority in that Lord Diplock in *The Eschersheim* did not actually state that the occurrence of damage must be sustained by a person or property external to the ship. Ms Ang urged this court to follow and adopt the proposition enunciated in *The Regis*, *Union Steamship* and *The Margaret Z*, namely, that damage to property or person does not have to be external to the ship to satisfy the legal character of damage done by a ship.

37 It is helpful to refer to *Thomas* for a snapshot of the English position. *Thomas* (at para 176) identified the categories of "damage" that is within the phrase "damage done by ship" which were, amongst others, (a) damage done by a ship to a person on board another ship and resulting in personal injury (citing in the footnote cases like *The Zeta* and *The Theta*); and (b) damage done by a ship to cargo and property carried on board another ship (citing in the footnote *The Eschersheim* and

The Franconia (1877) 2 PD 163).

38 Simply put, there is no jurisdiction *in rem* under English law if property or person is on board the offending vessel under s 20(2)(*e*) of the SCA. This is where the threshold inquiry of the externality criterion begins and, on the undisputed facts, the point is easily disposed of as a question of law.

3 9 *The Rama's* externality criterion was accepted and adopted in *Re Asian Atlas* [2008] 3 HKC 169, a decision of Hong Kong Court of Appeal. In that case, the plaintiff claimed that it be indemnified in the event it was held liable in the US District Court to the then owners of the *Asian Atlas* in respect of the negligence of the compulsory pilots in respect of a collision between the *Asian Atlas* and a submarine launchway in the Mississippi as a result of which the *Asian Atlas* was damaged. The submarine launchway was owned by the plaintiff. The appellate court was asked to consider whether the indemnity claim was a claim for damage done by a ship within the meaning of s 12A(2)(*e*) of the Hong Kong High Court Ordinance (Cap 4) (HK). It held that the loss to the plaintiff in such a situation would have been caused by, and directly attributable to, the negligence or fault of the pilots alone. The *Asian Atlas* would not have caused loss or damage; the loss or damage suffered by the plaintiff would have originated from the damage to the ship herself. As such, Ma CJHC, who delivered the judgment of the Court of Appeal, concluded that the indemnity claim did not come within the ambit of s 12A(2)(*e*).

40 Ma CJHC explained (at [18]):

> Of course, a ship can only cause damage through the wrongful acts or omissions of persons (such as her master and crew), but nevertheless the essence of the type of claim here is that the relevant damage must be caused by something done physically or directly by the ship herself in the course of her navigation or management. *By definition*, *such damage must be caused to persons or objects external to the* [*Asian Atlas*]. In this context, assistance can be gained from the wording in art 1(1)(a) of [the 1952 Arrest Convention]: "damage caused by a ship either in collision or otherwise".
>
> [emphasis added]

41 Although the AJA 1956 was enacted to enable England to ratify the 1952 Arrest Convention, the words "or otherwise" in Article 1(1)(*a*) of the 1952 Arrest Convention was omitted and the wording used s1(1)(*d*) of the AJA 1956 is "any claim for damage done by a ship". The wording is identical in s 20(2)(*e*) of the SCA and s 3(1)(*d*) of the HCAJA. *Berlingieri on Arrest of Ships, A commentary on the 1952 and 1999 Arrest Conventions* (Informa, 5th Ed, 2011) at para 3.38 noted that the words "or otherwise" were seen by the British Association (in its comments on the preliminary draft of the 1952 Arrest Convention) as designed to cover all those situations where damage is caused by one ship to another without physical contact, either by wash or by creating a situation of danger though negligent navigation. Subsequently, Lord Diplock in *The Eschersheim* opined that damage done by a ship may occur without physical contact and in his Lordship's opinion damage done by a ship can occur without physical contact and that a ship may negligently cause a wash by which some other vessel or property on shore is damaged.

42 Lord Diplock's speech focussed on how damage done by a ship must occur. His Lordship followed *Currie v M'Knight* [1897] AC 97 ("*Currie v M'Knight*") and said (at 8–9):

> The figurative phrase '"damage done by a ship" is a term of art in maritime law whose meaning is well established by authority: *The Vera Cruz* (1884) 9 PD 96; *Currie v M'Knight* [1897] AC 97. To fall within the phrase not only must the damage be the direct result or natural consequence of

something done by those engaged in the *navigation of the ship* but the ship itself must be the *actual instrument* by which the damage was done. The commonest case is that of collision which is specifically mentioned in [the 1952 Arrest Convention]: but physical contact between the ship and whatever object sustains the damage is not essential, a ship may negligently cause a wash by which some other vessel or some property on shore is damaged.

[emphasis added]

43 In *Currie v M'Knight*, the crew of the *Dunlossit*, in order to enable that ship to put to sea, cut the cables of another vessel, the *Easdale* with the result that the *Easdale* became unmoored and ran aground and sustained damage. Lord Halsbury LC summarised his opinion as follows (at 101):

> But there seems to be to be no connection between the damage to the *Easdale* and any act or thing done by the crew of the *Dunlossit*. That the act done was done in order to enable the *Dunlossit* to start did not make it an act of the *Dunlossit*. That it was done by the crew of the *Dunlossit* does not make it an act of the *Dunlossit*, and the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports in my opinion that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

4 4 *Thomas* cited (at footnote 30 on p 106) *The Eshersheim* and *The Victoria* (1887) 12 PD 96 ("*The Victoria*") in support of the proposition that damage done by a ship does not include damage or loss to cargo or other property carried on board the offending vessel. It also does not include claims for loss of life or personal injury suffered by a person on board the offending vessel. *The Igor* [1956] 2 Lloyd's Rep 271 ("*The Igor*") was also cited by *Thomas* (at p 17) for the proposition that no maritime lien exists in respect of cargo damage in the carrying vessel. In that case the plaintiff claimed damage to cargo on board the *Igor*. The vessel was sold before the writ was issued. Hence, the plaintiff no longer had a statutory right to proceed in rem against the *Igor*. Justice Wilmer explained that "as a matter of law" a claim for damage to cargo lately laden on board the *Igor* was not a claim that gave rise to a maritime lien so as to overcome the change of ownership problem faced by the plaintiff in that case.

45 It was made clear in two cases —*The Pieve Superiore* (1874) LR 5 PC 482 ("*The Pieve Superiore*") and *The Victoria*— that the admiralty court's jurisdiction to entertain cargo claims is under s 6 and not s 7 of the 1861 Act. Section 6 of the 1861 Act states:

> The High Court of Admiralty shall have Jurisdiction over any Claim by the Owner or Consignee or Assignee of any Bill of Lading of any Goods carried into any Port in *England* or *Wales* in any Ship, for Damage done to the Goods or any Part thereof by the Negligence or Misconduct of or for any Breach of Duty or Breach of Contract on the Part of the Owner, Master, or Crew of the Ship, unless it is shown to the Satisfaction of the Court that at the Time of the Institution of the Cause any Owner or Part Owner of the Ship is domiciled in *England* or *Wales*: Provided always, that if any such Cause the Plaintiff do not recover Twenty Pounds he shall not be entitled to any Costs, Charges, or Expenses incurred by him therein, unless the Judge shall certify that the Cause was a fit one to be tried in the said Court.

46 In *The Pieve Superiore*, the plaintiff arrested the vessel, *Pieve Superiore*, for damage to a cargo of rice under s 6 of the 1861 Act. It was alleged that the cargo sustained damage in the vessel. The Lordships opined that cases of damage done to goods come within the meaning of s 6 but s 6 did not give the plaintiff a maritime lien against the ship in respect of such a claim. The object of s 6 was to

found a jurisdiction against the owner who was liable for the damage, and to give security of the ship from the time of the arrest.

47 I now come to *The Victoria.* The plaintiff in that case was the owner of cargo on board the *Victoria*. There was a collision between the *Victoria* and another vessel the *Cervin*. The *Victoria* was solely to blame for the collision. The plaintiff arrested the *Victoria* for damage to cargo. Counsel for the plaintiff argued that the jurisdiction of the court was invoked under s 6 and that the damage to cargo was done by a ship within the meaning of s 6. It was argued that the collision was the cause of the damage and so the damage was done by the ship. In contrast, counsel for the defendant argued that actions for damage to cargo were governed by s 6, and that s 7 did not apply to cargo on board the offending vessel. Butt J agreed with counsel for the defendant that s 7 applied to damage done by a ship to something with which it could come into contact, and not to cargo on board. In Butt J's view, the wording of s 7 or the intention of the legislature did not extend the court's jurisdiction *in rem* to such a claim. By the same reasoning, s 7 of the 1861 Act would not apply to property on board the offending vessel.

48 For completeness, I should mention that Clarke J noted that the decisions in *The Zeta* and *The Theta* were consistent with the reasoning in *The Victoria* that damage to cargo on board a ship is not damage done by the carrying ship, a point which was treated as self-evident in *The Igor*. Clarke J relied on these cases to conclude that the externality criterion was necessary to bring the claim for damage done by a ship within the meaning of s 20(2)(*e*) of the SCA. Furthermore, Clarke J noted the position on the damage lien was a long held view that was well established and too entrenched in admiralty jurisprudence to be now questioned. He said (at 298):

> If the defendants have a maritime lien here, it is difficult to see why in the ordinary unseaworthiness case, damage to cargo should not be held to have been "done" by the carrying ship, yet that has never been held to be the case even where the damage is caused in a collision. Equally, if the defendants were right, a charterer would have a maritime lien whenever the owners deviated from the contractual voyage or failed to deliver the cargo properly, whether they failed to do so on time, or at all, or did so damaged. Yet such a claim has never been treated as giving rise to a maritime lien.

49 I now come to the cases on damage to person. As stated, Ms Ang sought to rely on Australian cases like *The Regis* and the *Union Steamship* and the New Zealand case of *The Margaret Z*. None of these cases deal with damage to property. They were all personal injury cases based on an interpretation of s 7 of the 1861 Act which did not provide for a claim for personal injury or fatal accident.

50 I propose to deal with the English case on personal injury first. In *The Theta*, the chief officer fell down into a hold because the hatchway was negligently covered only with a tarpaulin, and suffered injury. On the facts, there was occurrence of "damage" but it was not "damage done by a ship" because the ship was not the active cause of the damage, nor was the damage done by those in charge of the ship with the ship as the instrument of the mischief. As Clarke J in *The Rama* observed, Bruce J had said (at 284) that the damage was done on board the ship, but it was not done by the ship within the meaning of the expression "damage done by a ship" in s 7 of the 1861 Act.

51 A different position has been taken in Australia and New Zealand. The plaintiff in *The Regis* was a passenger on the offending ship and she fell into the sea because of negligent navigation of those in control. In that case, the *Regis* sailed too close to a cruiser and the *Regis* was forced to take evasive action by altering course to avoid colliding into the cruiser. In so doing, the plaintiff fell into

the sea. The *Regis* capsized subsequently after taking such evasive measures. According to the statement of claim, the passenger sustained personal injuries and having been in the water, she was ill for a long time. On the facts alleged in the statement of claim, Dixon J in the High Court of Australia held that the court had *in rem* jurisdiction in that the plaintiff's claim was for damage done by a ship. It is clear that the vessel was the direct cause of the harm and the instrument of the mischief.

52 In the *Union Steamship*, the injury to the crew member occurred when he fell into the hold of a ship while assisting the removal of the hatch cover. The High Court of Australia held that the injury was damage done by a ship within the meaning of s 7 of the 1861 Act.

5 3 *The Margaret Z* (a decision of the High Court, Auckland) also concerned personal injury to crew members on board the offending ship. Fisher J held, amongst other things, that (a) the damage in question can be suffered in or on the ship; and (b) that the activity is not confined to the navigation of the ship in the usual sense but must involve the active use of the ship or its gear for one of the purposes for which they were designed or installed. Thus damage caused by the action of one or more individuals on the ship does not qualify unless it was effected through the active operation of the ship or its gear (at 124).

54 Both the courts in *Union Steamship* and *The Margaret Z* relied on *The Minerva* [1933] P 224, an English case that involved damage to property (and not personal injury) during cargo operation. In that case, a wire on a derrick of the *Minerva* broke causing the elevator it was lifting to fall onto a barge damaging it. Bateson J held that the damage to the barge was damage done by a ship because the ship or part of it was the active cause of the damage. I should point out that *The Minerva* was queried as persuasive authority for several reasons:

(a) The decision was doubted in Griffith Price, *The Law on Maritime Liens* (Sweet & Maxwell, 1940). The author stated at p 42 that in view of the House of Lords' decision in *Currie v M'Knight*: "[i]t does not … seem possible to arrest a ship if the damage was not done by the vessel as 'the instrument of mischief', and was not the 'direct and natural consequence of a wrongful act or manoeuvre' of the ship" and as such the decision in *The Minerva* was doubtful.

(b) Professor William Tetley, *Maritime Liens and Claims* (International Shipping Publications, 2nd Ed, 1998) observed in a footnote at p 402 that *The Minerva* "ignored" the navigation criterion.

(c) To the extent that the court in *The Minerva* relied on *The Clara Killam* (1870) L R 3 A&E 161, the latter case has also been doubted in *The Rama* as being inconsistent with *Currie v M'Knight* (at 294—295).

(d) Finally, Bateson J in *The Minerva* held that if he was wrong that the damage involved "damage done by a ship" under s 7 of the 1861 Act, the damage would still constitute "damage received by a ship" under s 6 of the 1840 Act.

55 Dixon J in *The Regis* reckoned that the distinction between damage inflicted by a ship as a thing and damage occurring on or in connection with the ship and attributable to the negligence of the master or crew as not damage done by a ship was "artificial" and "unreal" but noted that such a distinction was nevertheless the turning point of a number of cases (at 698). However, he viewed the "distinction" as no more than illustrations of the manner in which the test or "criterion" – damage done by those in charge of a ship with the ship as the noxious instrument – had been applied. Dixon J explained (at 700):

> But [the cases] show that when the injury arises from some defect in the condition of the ship considered as premises or as a structure upon which the person injured is standing, walking or moving, the ship is treated as no more than a potential danger of a passive kind, a danger to the user, whose use is the active cause of the injury. But where the injury is the result of the management or navigation of the ship as a moving object or of the working of the gear or of some other operation, then the damage is to be regarded as done by the ship as an active agent or as the "noxious instrument".

56 The High Court of Australia held in *The Regis* that it had jurisdiction to hear a claim by a passenger following the capsizing of the vessel due to an alleged failure to properly navigate the vessel. On the facts, the passenger fell overboard because of the evasive action taken by the *Regis* to avoid colliding into the cruiser.

57 I make four other points. First, given my comments in [46] and [47] above, Dixon J's observation in *The Regis* that Butt J's decision in *The Victoria* was based on an assumption that s 7 of the 1861 Act did not apply to cargo on board the carrying vessel was incorrect. Dixon J's attention was not drawn to *The Pieve Superiore* and s 6 of the 1861 Act. In this sense, the distinction noted by Dixon J was not, with respect, "artificial" and "unreal".

58 Second, in both *The Regis* and *The Margaret Z*, the instrumentality criterion — damage done by those in charge of a ship as the noxious instrument — was extended to apply to other activity of the ship. In these cases, the activity of the ship as noxious instrument was extended beyond navigation and management of the ship as a moving object to other activity on board like cargo operations that involved working of the ship's gear independently of the navigation of the ship. The ship's activity in *The Eschersheim* and *The Rama* in the context of damage to property was confined to damage caused as a consequence of negligent navigation. This view would be consistent with the comment in *Thomas* at para 176(vi) citing *The Eschersheim*, that damage done by the "management" of the ship referred to those aspects of the management of a ship that touch upon a ship's efficient and safe navigation.

59 In the context of "navigation" of the ship and the ship as "the instrument of mischief" in the physical sense, Allsop J in *The Global Peace* found Dixon J's differentiation between the active and passive role of the ship as helpful in considering a claim for damage to property. In that case, the *Global Peace* was attempting to berth with the assistance of a tug. The tug came into contact with the hull of the *Global Peace* and caused it to sustain damage. Oil escaped from the *Global Peace* and the oil fouled the *Medi Vitoria* and the *Nord Stream* which were berthed nearby. Allsop J agreed that the claim as put forward answered the description of "damage done by a ship (whether by collision or otherwise)" within the meaning of s 4(3)(*a*) of the Australian Admiralty Act 1988 (Cth). Those in charge of the *Global Peace*, the pilot and master, failed in their duties in the navigation or management of the ship in manoeuvring the ship in berthing operations. Although Allsop J recited the three criteria in *The Rama*, he found Dixon J's legal proposition helpful and applied it to the facts of the case, that is to say, the damage to the other vessel, *Medi Vitoria*, was the result of the navigation or management of the *Global Peace* as a moving object in her berthing or some other operation in her berthing (see [88]). The jurisdiction *in rem* was simply attracted by the claim answering the description in s 4(3)(*a*). Allsop J was concerned with the navigation criterion and not the extension of the ship's activity to other non-navigational matters.

60 Third, Windeyer J in *Union Steamship* found himself (in the court below) bound by the principles in *The Regis*. If it was not the case, he would have come to a different conclusion on the point. I have to say that I do agree with his remarks (at 202):

> I must say that the validity of the proposition that anyone who is in any way hurt by the negligent operation of some part of a ship's equipment has a cause of action in the Admiralty jurisdiction of this Court is to me surprising and seriously far-reaching if it means that all industrial accidents occurring by the negligent use of any of a ship's equipment in the loading or unloading of cargo in Australian ports are within the original jurisdiction of this Court. I still have some doubts whether all such accidents are properly described as "damage done by the ship".

61 Fourth, there appears to be no case in New Zealand that followed *The Margaret Z.* Mr Paul Myburgh, now Deputy Director of the NUS Law's Centre of Maritime Law, commenting on *The Margaret Z* in an article in the New Zealand Law Review (see Paul Myburgh, Shipping Law [1999] NZLR 387) said (and I agree with Mr Myburgh's observations) that Fisher J's findings that the injured person or damaged object need not be "external to the ship" to attract a damage lien are controversial and went on to caution extending the ambit of damage lien beyond existing precedents. Mr Myburgh said (at 400):

> … Fisher J seems to have opened up the possibility of an entirely new category of maritime lien, which could turn established expectations, interests and priorities on their heads. Cargo claims have traditionally occupied a humble place in the rank and file of statutory rights of actions in rem. If they were to meet Fisher J's criteria and attract damage lien status, they would enjoy a very high priority, displacing all statutory rights of action in rem, ship mortgages and prior maritime liens.

62 Contrary to Ms Ang's contention, I do not regard *The Northern Challenger (No 2)*, an unreported judgment of Williams J dated 17 September 2001, AD7-SW2000 (High Court of New Zealand, Auckland Registry) ("*The Northern Challenger*"), as a case that followed *The Margaret Z*. The decision in *The Northern Challenger* turned on fault of the independent contractor for whose negligence or wrongful act the owner of the *Northern Challenger* could not be made liable and was not damage "done by" a ship. In that case, debris from cutting and grinding of guard-rails on the *Northern Challenger* was blown over and across the wharf onto the *Ultimate Lady* berthed there causing damage to her paintwork.

63 The better view is that the personal injury cases from Australia and New Zealand do not provide the legal basis to extend the jurisdictional ambit of s 3(1)(*d*) to loss or damage to property that was carried on board the offending vessel. Nothing in the modern admiralty law of Singapore has changed existing English legal precedents on the ambit of a damage lien as well as the jurisdictional ambit of a claim for damage done by a ship that was founded by case law on s 6 and s 7 of the 1861 Act (see [46] and [47] above), at least in the context of damage to cargo or property on board the offending ship. Hence, the phrase "damage done by a ship" does not include damage or loss to cargo or other property carried on board the offending vessel.

64 For the reasons stated above, the externality criterion pronounced by Clarke J in *The Rama* is supported by principle and authority. As a matter of Singapore law, I hold that the externality criterion, along with the other two criteria set out in *The Rama*, is a consideration to be taken into account in establishing jurisdiction *in rem* under s 3(1)(*d*) of HCAJA.

Sinking of Phu Tan on 16 December 2010

65 The *Phu Tan* sank on 16 December 2010 with all containers on board. On these undisputed facts, there is no jurisdiction *in rem* under s 3(1)(*d*) in that the externality criterion of *The Rama* test was absent in this case.

66 Furthermore, on the facts alleged to support the jurisdiction issue, no other vessel or object was involved. The *Phu Tan* sank as a result of the negligent management of the *Phu Tan* by those in charge of the *Phu Tan's* safe navigation in bad weather that was not unexpected. Those on board and in charge of the *Phu Tan* were unable to prevent damage *to* the *Phu Tan* (and not damage done *by* the *Phu Tan*). The sinking of the *Phu Tan* was damage sustained by the ship; the loss of the containers on board the *Phu Tan* as carrying ship was not something with which the *Phu Tan* could have come in contact directly in a physical sense, or indirectly by reason of the unseaworthiness of the carrying vessel. Unseaworthiness of the carrying vessel of itself would not clear the threshold test of damage done by a ship for the purpose of jurisdiction *in rem*. The total loss of the containers was the result of damage done *to* the *Phu Tan*.

67 A related issue that arose at the hearing was the admissibility of the Investigation Conclusion No 256/BCDT-CVHHP dated 15 March 2011 ("the Investigation Conclusion"). Mr Tay argued that the jurisdictional facts needed for s 3(1)(*d*) was not proved to the requisite standard of proof so as to cross the jurisdictional fact threshold. It was contended that Hung Dao had not met the standard of proof in that jurisdictional facts had to be established on a balance of probability, and the Investigation Conclusion was hearsay evidence which was not admissible and hence there is no evidence before the court to prove the relevant jurisdiction facts. The defendant raised this issue in order to stop Hung Dao from relying on the Investigation Conclusion that attributed the sinking of the *Phu Tan* with loss of lives and property to negligent navigation and management of the *Phu Tan* in bad weather that was expected enroute.

68 Ms Ang pointed out that the AR admitted in evidence the Investigation Conclusion on 31 October 2013 after hearing arguments and there was no appeal against that decision. The AR's Notes of Arguments dated 31 October 2013 read:

> I will allow [Plaintiff's Counsel] to submit on the report. I see no difference in the manner in which Defendants seek to rely on the 9 May 2011 letter issued by the Port Authority and Plaintiffs' reliance on the report. [Plaintiff's Counsel] will however not be allowed to give interpretation on the technical/engineering aspects of the report.

69 I agree with Ms Ang that Mr Tay cannot be allowed to "blow hot and cold". He should not be allowed to object to Ms Ang's reliance on the Investigation Conclusion that was produced by the defendant in its expert's affidavit seeing that the defendant was relying heavily on hearsay evidence in the form of the letter of 9 May 2011 ("the 9 May Letter"), and on this hearsay issue, what is sauce for the goose is sauce for the gander. Notably, the summons proceeded before the AR without either side seeking to cross-examine witnesses on disputed jurisdictional facts contained in documents exhibited in affidavits. It seems to me that the parties were prepared to rely on their affidavits for this challenge under O 12 r 7. At this stage, the court is concerned with jurisdictional matters (whether of fact or of law) and not with the strength of Hung Dao's claim on the merits, *ie*, non-jurisdictional matters of fact or law such as defences to the claim which are substantive matters for trial.

70 Ms Ang cites *The "Nasco Gem"* [2014] 2 SLR 63 where the Court of Appeal clarified that an application to set aside a warrant of arrest was an interlocutory application within the meaning of para (*e*) of the Fifth Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). She argued that it follows that it was permissible under O 41 r 5(2) to rely on hearsay evidence contained in affidavits used in interlocutory proceedings. This proposition does not detract from or alter the standard of proof required in an application made under O 12 r 7 of the ROC.

71 Before moving on, I want to first mention the general observations of Brandon J in *The Myrto*

[1977] 2 Lloyd's Rep 243 at 245 which are instructive even though Brandon J was not dealing with a jurisdictional challenge. In that case, the charterers applied for an order to release the ship from arrest on the ground that the arrest of the ship by the bank was and continued to be an unlawful interference with the contractual rights of the charterers. The application was resisted by the bank. Brandon J remarked (at 245–256):

> The charterer's application raises questions of fact and law. In these circumstances it might in theory have been desirable, in order to enable such application to be decided as justly as possible, and despite its interlocutory nature, to have directed issues to be tried in it, with pleadings and discovery, and to have oral evidence in relation to such issues. In practice, however, because of the need to have the application decided as quickly as reasonably possible, it has been necessary, with agreement of all parties concerned, for it to be heard and determined in a summary manner on affidavits and limited to documentary evidence only.
>
> Even so the hearing of the applications occupied the best part of eight days between Feb.10 and 25. The great length of time so spent was attributable in part to the fact that it was necessary for additional affidavit and documentary evidence to be put in piecemeal throughout the hearing as the points of conflict between the parties became more clearly defined…
>
> …
>
> While it is necessary for me, in the course of this judgment, to make numerous findings of fact with regard to the past history of the case and to the recent and present state of affairs with regard to it, it is important to stress that these findings are based only on the affidavit and documentary evidence to which I have referred, are made solely for the purpose of these interlocutory applications, and will not accordingly be in any way binding or final for the purposes of any trial of this or any other action between the parties which may take place later.

72 The Investigation Conclusion was introduced in evidence by the defendant in its expert's affidavit. It is not disputed that the same document was relied upon in its defence in Vietnamese proceedings. Given what had transpired before the AR, it was clear that the parties were willing to have the challenge under O 12 r 7 determined on affidavits and documents. I accept Ms Ang's submissions that the defendant in choosing to deal with the jurisdictional fact via affidavit evidence, cannot complain that the evidence to prove the jurisdictional fact has been adduced by way of affidavit evidence that complied with O 41 r 5(2). The real question now in this case is whether the weight of such evidence will cross the jurisdictional fact threshold.

73 Ms Ang relied on the defendant's own reading of the Investigation Conclusion based on the defence (known as a Letter of Explanation) it had filed in the Vietnamese proceedings at para 2.4: [note: 1]

> Furthermore, according to the Investigation Conclusion No 256, the proximate cause of the sinking incident of *M/V "Phu Tan"* is determined and concluded as follows:
>
> *"M.V. "Phu Tan"* navigating in the very bad weather condition in combination with the inaccurate calculation of the vessel stability condition by the crewmembers in not determining the actual cargo quantity carried on board and water quantity in the ballast tank, *M.V. "Phu Tan"* was listed. *M.V. "Phu Tan"* was further affected by the moment of FSE from the ballast tanks on board, impact of more and more increasing wave and wind. This caused the vessel continue to list and the cargo shifting." (Page 23 of the Investigation Conclusion No 256) A copy of the Investigation Conclusion No 256 is attached herewith in Addendum 1.

[emphasis in italics in original removed]

74 I do not propose to set out the specific matters in the Investigation Conclusion that are relied on by Ms Ang in entirety. The defendant's reading of the Investigation Conclusion is good enough (see [73] above). Suffice to say that I agree with Ms Ang that the 9 May Letter did not reject the Investigation Conclusion. What the 9 May Letter did was to attribute the proximate cause of the loss of the *Phu Tan* to the bad weather, and the defendant's reliance on the 9 May Letter in the proceedings here was a stand that was inconsistent in the Letter of Explanation. Be that as it may, in my view, the proximate cause of the loss (whether the sinking was due to unseaworthiness of the ship based on the contents of the Investigation Conclusion or unexpected bad weather encountered enroute) was a non-jurisdictional matter. For the sake of argument, even if the matters in the Investigation Conclusion can be considered as "within jurisdiction" in the sense that they can answer the description of s 3(1)(*d*), it does not matter at this stage that allegation of the ship's unseaworthiness as the proximate cause is weak for that is another separate issue on the merits that is left to trial. A useful and apposite reminder is the observation of Brandon J in *The Moschanthy* [1971] 1 Lloyd's Rep 37 (at 42):

> [The question as to whether the court has jurisdiction to entertain the claim in rem] must … be answered by reference to the nature of the plaintiff's claim as put forward, without reference to the further point whether it is likely to succeed or not.

75 Brandon J's view was equally shared by Allsop J in *The Global Peace* at [89]. On the jurisdiction issue, I have already explained earlier why this case does not satisfy the test for a claim for damage done by a ship.

Conclusion on jurisdiction issue

76 For the reasons stated, Hung Dao's claim does not satisfy the legal character as described in s 3 (1)(*d*) of the HCAJA for the purpose of the *in rem* jurisdiction of this court.

Striking out issue: Defence of time bar

77 The defendant raised the defence of time bar as a basis to strike out the action. It was argued that the claim was time barred since the writ was filed more than two years after the ship sank.

78 Ms Ang explained that Hung Dao's claim has been widely framed and includes a claim for loss, damage and/or expenses arising out or relating to the loss of 111 containers caused by, *inter alia*, the negligent navigation and/or management of the *Phu Tan* resulting in the containers being lost when the Phu Tan sank on or around 16 December 2010. Hung Dao therefore disputes that: (a) the claim was subject to a two-year time bar; and (b) there is a two-year time bar from the date of the sinking.

79 It was common ground that the substantive claims and defences raised were subject to Vietnamese law. The defendant's expert on Vietnamese law was Mr Ly Quang Long ("Mr Ly") and Hung Dao's expert on Vietnamese law was Mr Luu Tien Dzung ("Mr Dzung").

80 According to Hung Dao's expert, Mr Dzung, there is no limitation period under Vietnamese law for Hung Dao's claim which is for the return of the containers or for compensation in lieu. Even if Hung Dao's claim is based on contract, the claim was not time barred in that the limitation period of two years only ran from the date the rights were infringed and not from the date of the sinking of the *Phu Tan*. Mr Dzung opined that Hung Dao's contractual rights were infringed on 3 April 2012 and the claim

in contract would only be time barred on 3 April 2014, which is a date well after the writ in this case was issued on 4 June 2013. In the case of a non-contractual claim, Mr Dzung opined that whilst on its own the two years in respect of such a claim would run from the date of the sinking, where such a claim is brought together with a claim in contract, the non-contractual claim will be based on the same computation of time as the claim in contract. As such, the claim was not time barred on 4 June 2013.

81 Mr Tay submitted that based on Mr Ly's opinion, the defendant has a complete defence of time bar in relation to the action in Singapore. Moreover, Mr Ly's expert opinion should be preferred since Mr Dzung's expert opinion may be viewed as subjective, inconsistent, unreliable and even wrong.

82 The AR characterised the question as whether it is plain and obvious that Hung Dao's claim commenced on 4 June 2013 is legally unsustainable because as a matter of fact it is already time-barred under Vietnamese law. I agree with the AR that the experts had: (a) based their opinion on the facts advised to them not only by the parties but gathered from documents and correspondence between the parties; and (b) provided opposing views based on their respective interpretation of various articles in the Vietnamese Civil Code (Articles 427, 490.1 and 303.1), Commercial law (Article 271.2), Supplemental Civil Procedure Code (Article 159.3), and Article 23.3(b) of the Resolution 3 of the Resolution of the Justices' Council of the Supreme People's Court no. 03/2012/NQ-HDTP. In addition, each expert arrived at a different viewpoint of the nature of Hung Dao's claim and the relief that it sought. I agree with the AR that it was not possible to decide, at this summary stage, in favour of one expert's interpretation and opinion over the other. Notably, the defendant continued to pay hire for the containers even after the containers were lost and what effect the payments would have on the time bar point would have to be decided in light of the defendant's assertion that the payments were honest mistakes which Hung Dao seriously doubted. Equally, relevant to the time bar point is the related question as to whether the subject payments were in the nature of hire or compensation for the containers that were lost. Attempts by Mr Tay to question Mr Dzung's competency at this stage would not improve the defendant's case for a summary striking out of the action. The alleged credibility of the expert witness is to be tested under cross-examination. For all these reasons, the defendant has not shown that Hung Dao's claim is time barred and, hence, it cannot be said that the action is plainly and obviously unsustainable.

Non-disclosure of material facts to justify setting aside of the warrant of arrest

83 The AR dealt with the complaints of non-disclosure raised by the defendants and dismissed all of them. I should mention that Hung Dao's Registrar's Appeal No 403 of 2014 ("RA 403") was adjourned pending the determination of RA 402. Ms Ang had informed the court that Hung Dao would make a decision as to whether to proceed with RA 403 after RA 402 is decided. The non-disclosure complaints appear to overlap in RA 402 and RA 403. However, counsel confirmed that the defendant's complaints of material non-disclosure in RA 402 were directed at the claim brought under s 3(1)(*l*) alone. Ms Ang helpfully confirmed in her letter of 5 October 2015 that no issue of material non-disclosure arises in RA 403.

84 The law on non-disclosure of material facts in the context of an *ex-parte* application for a warrant of arrest is now settled. It has been comprehensively set out in the AR's decision at [94] to [100] and it is not necessary to repeat the duty of full and frank disclosure in this judgment.

85 Having concluded that the defence of time bar cannot be viewed as a "knockout blow" on the merits in the context of an abuse of the arrest process (see *The "Eagle Prestige"* [2010] 3 SLR 294), the complaint – that there was non-disclosure of the time bar defence to Assistant Registrar Teo Guan Kee ("AR Teo") who heard the application for leave to issue the warrant of arrest – is a non-

starter.

86 Mr Tay confirmed that the defendant is no longer raising the defence of *force majeure*. Consequently, the complaint of non-disclosure in relation to this defence falls away.

87 As the AR pointed out, underpinning the defendant's broad complaint of non-disclosure was its case theory that since Hung Dao could not bring itself within test in *The "River Rima"* [1988] 2 Lloyd's Rep 193 ("*The River Rima*") for a claim under s 3(1)(*l*) of the HCAJA, it concocted a case to meet the requirements of *The River Rima* by introducing false documents and misleading statements in the arrest affidavit. Furthermore, the defendant argued that Hung Dao proceeded under subsections (*d*) and (*g*) of s 3(1) of the HCAJA knowing that there was no basis to arrest the *Vinalines Pioneer* under these limbs. Ms Ang rejected Mr Tay's submissions. She saw the defendant as embarking on what it insisted was Hung Dao's case and then arguing that based on such a claim (as envisaged by the defendant) Hung Dao had failed to give full and frank disclosure. She argued that there was no need for Hung Dao to "falsify documents or concoct facts to bring [the claim] within *The River Rima* or to avoid reference to *The River Rima*". [note: 2] She pointed out that *The River Rima* was not applicable based on the facts of the present case and as such there was no reason for Hung Dao to bring itself within *The River Rima*. Hung Dao's case (whether rightly or wrongly) was premised on *The "Bass Reefer"* [1992] FCA 378 ("*The Bass Reefer*").

88 Despite the controversy, I do not think that this so called case theory should be realistically and rightly pursued as a non-disclosure issue. Notably, the defendant had chosen to pitch its arguments from the viewpoint that Hung Dao had formulated a dishonest basis upon which to cause an arrest of the *Vinalines Pioneer*. This was a very serious accusation that required cogent evidence of dishonesty and it is not something that the court is able to summarily resolve on contested facts because whether a particular fact is material or not for purposes of the duty to disclose is arguably so bound up with the merits of the claim that are in issue in the action. As explained in *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 358 at [35]:

> … Here, a finding of bad faith or material non-disclosure depends upon proof of facts that are themselves in issue in the action and inextricably connected. Correspondingly, to establish whether a fact is material and hence ought to be disclosed, those particular contested facts would have to be resolved.

89 I now come to examine the nature of the defendant's allegations of material facts that were not disclosed to AR Teo. For the reasons set out, the complaints of non-disclosure were without merit.

90 Initially, two affidavits affirmed by Mr Tran Van Hung ("Mr Tran") were filed in support of the arrest. The first affidavit contained the details of the claim and the grounds for arrest. The second affidavit exhibited the affidavit of Mr Vo Nhat Thang, Hung Dao's first Vietnamese law expert, relating to s 4(4) of the HCAJA and the *locus standi* of Hung Dao to bring the claim. It has since transpired that the defendant accepted that, for the purposes of the hearing below and RA 402, the defendant was the contracting party of the Container Lease Agreement dated 1 June 2010 ("the 2010 CLC"). I refer to Ms Ang's submissions of 20 January 2015 explaining the circumstances leading to Mr Tran's third affidavit for the arrest. Ms Ang wrote (at [266]):

> Mr Tran Van Hung's 3rd affidavit — It transpired during the hearing that there was an error in the extract of the Container Loading List as the container numbers highlighted in red did not add up to the 111 Containers as the Plaintiff had omitted to highlight two of the container numbers in

red. AR Teo requested that this be rectified. This was done and attached to Mr Tran's 3rd affidavit (**VH's 3rd**). In the course of preparing this affidavit, however, the Plaintiff noticed that there were a few missing pages in the 2010 CLC document exhibited to Mr Tran's first affidavit. Accordingly, he took the opportunity to annex the complete document with the complete certified translation as well to his 3rd affidavit

91 As Ms Ang highlighted in her submissions, the oversight was not material and AR Teo granted the warrant of arrest on Hung Dao's undertaking to file a further affidavit to highlight the two containers in the list which formed part of the 111 containers. [note: 3] This was Mr Tran's third affidavit.

Paragraph 20 of Mr Tran's first affidavit and the Container Loading List therein referred to

92 Paragraph 20 of Mr Tran's first affidavit reads:

> Some time in December 2010, the Plaintiffs supplied 111 containers to the Defendants pursuant to the Container Lease Contract for carriage on board to the Defendants' vessel "PHU TAN" (the "Vessel") at Ho Chi Minh for carriage to Hai Phong. A copy of the Container Loading List provided by the Tan Thuan Port record database evidencing the shipment of the 111 containers on board the Vessel is annexed hereto at [Tab 10]. [emphasis in bold in original removed]

93 The defendant claimed that paragraph 20 of Mr Tran's first arrest affidavit was false for the following reasons:

(a) 111 containers had been supplied to the defendant before December 2010 and not sometime in December 2010;

(b) The bulk of the 111 containers were supplied to the defendant under an earlier container leasing agreement in 2006;

(c) There was no written agreement between the parties from 2008 up to the execution of the 2010 CLC.

94 Ms Ang explained that the only contract that was in force for the hire of the 111 containers was the 2010 CLC and that the 2006 Agreement to which the defendant referred to had expired in 2007. Furthermore, the defendant had acknowledged in its letter of 10 March 2011 that the 111 containers were leased under the 2010 CLC and the 111 containers were on board the *Phu Tan*. That same letter of 10 March 2011 was drawn to AR Teo's attention as recorded in his Notes of Arguments.

95 I find the defendant's complaint to be trivial and there was nothing reasonably lacking in materiality to the issue of the warrant of arrest. Of significance to the claim under s 3(1)(*d*) was the fact that all 111 containers were on board the *Phu Tan* when she sank in December 2010 and that the containers were leased to the defendant. It was not necessary for AR Teo to know the date of the lease and date when the hire started, whether it was under an earlier or later contract or that the containers were taken by the defendant at Hung Dao's container depot and thereafter deployed on their ships.

96 As for the Container Loading List, it was alleged that the document was false. For this assertion, the defendant produced a letter from one Mr Mai Van Cu who said that he did not supply the Container Loading List on the *Phu Tan* to Hung Dao. Mr Mai Van Cu was purportedly a director of

the Tan Thuan port authorities. In contrast, Mr Tran's first affidavit showed that Hung Dao's operation manager received the Container Loading List from the Tan Thuan Port Container Operation Department. Hung Dao had relied on this document to show that the 111 containers were on board the *Phu Tan* when she sank on 16 December 2010. I do not see where the defendant's authenticity allegation would take its argument seeing that it was not a disputed fact that the *Phu Tan* sank with the same 111 containers on board. The defendant's own letter of 10 March 2011 in which it mentioned that 111 containers were lost in the sinking of *Phu Tan* corresponded to the list in the Container Loading List.

Paragraph 64 of Mr Tran's first affidavit

97 Paragraph 64 of Mr Tran's first affidavit reads:

> On 21 February 2013 at 9.59pm, the Plaintiffs responded to state that the proof is in the "Leasing Container Agreement and the Equipment Interchange Receipt (EIR)" [Tab 35]. I attach by way of example a copy of one of many EIRs together with the booking order from VCSC requesting us to supply containers for loading on "PHU TAN" for carriage from Tan Thuan, Ho Chi Minh to Hai Phong [Tab 35(l)]. This shows that we supplied the containers and that the Defendants received it. [emphasis in bold in original removed]

98 The defendant's argument on the statements in paragraph 64 of Mr Tran's first affidavit was simply that they were false statements designed to advance Hung Dao's argument that the EIRs referred to the *Phu Tan* and the containers were specifically supplied to the *Phu Tan*. In reality, so the argument was developed, the booking order would match the corresponding EIR by the name of the ship in question, and booking orders and other EIRs that were subsequently produced showed that there were seven different ships mentioned in these documents. In other words, the *Phu Tan* was not the only ship that the defendant had sent the containers to.

99 Ms Ang pointed out that Mr Tay's contention was the product of a skewed reading of paragraph 64 around which he developed his allegation of non-disclosure. The AR was right to accept Ms Ang's explanation that paragraph 64 must be read together with paragraphs 63 and 65 of the same affidavit and the purpose of paragraph 64 was to respond to an e-mail sent from Hung Dao to the defendant's earlier e-mail query for proof of ownership of the containers. The last sentence of paragraph 64 confirmed Hung Dao's position: "This shows that we supplied the container and that the Defendants received it." I do not doubt the AR's comment that Mr Tay's contention was far-fetched.

False translation of the 2010 CLC

100 Hung Dao's translation of the 2010 CLC was disputed by the defendant. The defendant's contention of "false translation" related to Article 1.1. It was contended that the phrase "In Party A's possession" should have been translated as "owned by Party A" and the phrase "Party B's ships" should have been translated as either "by sea mode by Party B" or "on sea routes of Party B".

101 Once again, the defendant accused Hung Dao of falsehood, and this time of "false translation" of Article 1.1 of the 2010 CLC that appeared in the affidavit leading the arrest. The AR observed that underpinning the defendant's contention of "false translation" was the suspicion that that Hung Dao had deliberately procured a false translation of Article 1.1 of the 2010 CLC to mislead the court into allowing an arrest under s 3(1)(*l*) of the HCAJA. I agree that there was no basis for this barefaced accusation. It seems to me that the defendant has no qualms using the word "false" regardless of context, circumstance and proof. On this matter, translators were involved and who would the defendant be accusing? The translator, Hung Dao or both of them? I agree with the AR that there

was nothing before him to doubt the reliability of any of the three official certified translations. Hung Dao's translation in English and the defendant's two translations in English were all, on the face of it, official certified translation produced by the Justice Office of Binh Hanh District. Variations in the English translations are plausible and can occur and as the AR rightly observed (at [56] of the AR's decision), the differences in translations was a reflection of the absence of exactitude inherent in the process of translating different languages. The AR concluded that the phrases that the containers were to be use "by sea mode by Party B" or "on sea routes of Party B" could conceivably express and support the idea that the containers were to be supplied for use on party B's ships. There was no objective evidence before the AR that the containers were used for the carriage of goods on containers overland or put on vessels that belonged to others especially since the documentary evidence before the AR showed that the containers were used on the defendant's ships.

Jurisdiction clause in the 2010 CLC

102 The defendant argued that the jurisdiction clause in the 2010 CLC and the defendant's letter dated 10 March 2011 to Hung Dao (identified in arguments as p 137 of Mr Tran's first affidavit) were not disclosed to AR Teo. Firstly, there was no factual basis for this complaint as AR Teo's Notes of Arguments recorded:

> PC: … Pg 137 of 1st affidavit is a document showing that 111 containers belonging to the [Plaintiff] were lost.
>
> [Goes through paragraphs 4 to 99 of 1st affidavit and exhibits]

103 The text of Mr Tran's first affidavit at paragraph 12 sets out the jurisdiction clause in the 2010 CLC. As can be seen from AR Teo's Notes of Arguments, paragraph 12 would have been raised to AR Teo.

104 More to the point, the defendant did not explain why the jurisdiction clause was a material fact that should be brought to AR Teo's attention and how it would affect his decision whether or not to grant the warrant of arrest.

Non-disclosure of matters relating to the plaintiff's claims under s 3(1)(d), (g) and (l) of the HCAJA and deliberately avoiding The River Rima

105 The defendant's complaint under this heading is that the legal authorities on the specific limbs of s 3(1) that Hung Dao intended to rely on were not brought to AR Teo's attention. The defendant's written submissions of 19 January 2015 said that cases like *The River Rima and The Bass Reefer* ought to have been cited to AR Teo but instead *The "Alexandrea"* [2002] 1 SLR(R) 812, which was an irrelevant case, was raised. [note: 4] From the AR's decision, the defendant appeared to have expanded on the complaints beyond the written submissions. The additional allegations related to the claim brought under subsections (*d*) and (*g*) of s 3(1). It was alleged that AR Teo was not informed that s 3(1)(*d*) did not cover claims against the carrying vessel and that s 3(1)(*g*) was for claims in relation to cargo and that the containers were not cargo but equipment.

106 It is worth noting that the duty to disclose relates to facts that are material to the application to issue the warrant of arrest. The arrest affidavits should contain material facts and the exhibits provide supporting evidence. Disclosure of facts that are material has to be contrasted with the citation of authorities for legal propositions. At the *ex-parte* hearing, a plaintiff has to show an arguable case on the law that it is entitled to invoke the court's admiralty jurisdiction (see *The*

"Bunga Melati 5" [2012] 4 SLR 546 ("*The Bunga Melati* (CA)") at [111] on the legal standard of an arguable case). VK Rajah JA in *The Bunga Melati* (CA) clarified (at [94]) that the appellate court in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [50]—[52] did not intend to lay down an additional merits requirement to the test prescribed in *St Elefterio* [1957] P 179 when applying for a warrant of arrest.

107 Ms Ang accepted that if an unsustainable legal proposition is used to contend that the court has admiralty jurisdiction, it would be "material" to inform the court of that legal position. [note: 5] I would characterise this latter obligation to inform as an obligation that is part and parcel of counsel's duty as an officer of the court and it would be a serious matter for counsel to deliberately mislead the court. It seems to me that the defendant has conflated the duty of full and frank disclosure that is required of the applicant in an *ex- parte* application with counsel's duty as an officer of the court. I need not say more about the defendant's misapplication of the duty of full and frank disclosure of material facts except that with little or no evidence of bad faith, the defendant unleashed a baseless attack which amounted to accusing opposing counsel of overstating Hung Dao's case to deliberately mislead the court. The defendant characterised its case as "iron clad" with nothing to be said for the other side. Even though I did not rule in Hung Dao's favour on the claim for damage done by a ship under s 3(1)(*d*), the legal position in England and Australia were not in step and it was open to Ms Ang to adopt the Australian view and to seek to persuade the court to do likewise.

Conclusion

108 In summary, I find as follows:

(a) the claim for damage done by a ship under s 3(1)(*d*) of the HCAJA is not made out;

(b) the defence of limitation is not factually and legally unsustainable so as to warrant a striking out of the writ and action summarily; and

(c) there was no breach of duty to disclose material facts as alleged by the defendant.

109 There are two remaining issues left in RA 402: damages for wrongful arrest and costs. It is sensible to defer these issues until RA 403 is disposed of. Counsel for the Hung Dao is to write to the Registry to restore RA 403 for hearing.

[note: 1] Ly Quang Long's Affidavit dated 16 July 2013, at p 92.

[note: 2] Plaintiff's submissions dated 20 January 2015, para 277.

[note: 3] Plaintiff's written submissions dated 20 January 2015, para 273.

[note: 4] Defendant's written submissions dated 19 January 2015, paras 193 to 194.

[note: 5] Plaintiff's submissions dated 20 January 2015, paras 327 and 329.