The “Bunga Melati 5”
[2011] SGHC 195

Case Number : Admiralty in Rem No 21 of 2010 (Registrar's Appeal No 252 of 2010)

Decision Date : 23 August 2011

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Leong Kah Wah, Teo Ke-Wei Ian and Koh See Bin (Rajah & Tann LLP) for the plaintiff; Prem Gurbani, s Mohan and Adrian Aw (Gurbani & Co) for the defendant.

Parties : The "Bunga Melati 5"

Admiralty and Shipping

Civil Procedure

23 August 2011

Belinda Ang Saw Ean J:

Introduction

1 This was an appeal by the plaintiff from the decision of the Assistant Registrar (“AR”) in *Equatorial Marine Fuel Management Services Pte Ltd v The Owners of the Ship or Vessel “Bunga Melati 5”* [2010] SGHC 193, granting the defendant’s application to strike out and/or set aside the plaintiff’s admiralty writ *in rem* and statement of claim pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (the “ROC”) or the court’s inherent jurisdiction, and/or for want of admiralty jurisdiction *in rem* under s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) (the “HCAJA”).

2 After hearing the parties, I dismissed the appeal and upheld the decision of the learned AR, ordering that the plaintiff’s action be struck out under O 18 r 19 of the ROC. However, as I did not agree with all the views expressed by him (particularly those which related to the invocation of admiralty jurisdiction *in rem*), which I believe raise matters of practical significance to the Admiralty Bar, and as the plaintiff has appealed against my judgment (*vide* Civil Appeal No 193 of 2010), I set out the grounds of my decision below.

3 I should add that the defendant had, in Registrar’s Appeal (“RA”) No 256 of 2010, also cross-appealed against part of the learned AR’s decision. However, as I had already ruled in the defendant’s favour in the present action, RA No 256 of 2010 was adjourned pending the outcome of Civil Appeal No 193 of 2010.

4 In these grounds, references to O 18 r 19 of the ROC should be understood as including a reference to the court’s inherent jurisdiction to strike out an action as being frivolous, vexatious or an abuse of process (on which see *Singapore Civil Procedure 2007* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2007) at para 18/19/16). As some cases cited in these grounds make reference to different editions of the HCAJA, I should also make clear that the abbreviation “HCAJA” should be understood as including all editions of the High Court (Admiralty Jurisdiction) Act, since they are substantially the same in terms of content. In addition, since I will be referring to ss 3(1) and 4(4) of

the HCAJA frequently throughout these grounds, it is convenient to set out these provisions *in extenso*:

Admiralty jurisdiction of High Court

3. —(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for damage done by a ship;

(e) any claim for damage received by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

(i) subject to section 168 of the Merchant Shipping Act (Cap. 179) (which requires salvage disputes to be determined summarily by a District Court in certain cases), any claim in the nature of salvage (including any claim arising under section 11 of the Air Navigation Act (Cap. 6) relating to salvage to aircraft and their apparel and cargo);

(j) any claim in the nature of towage in respect of a ship or an aircraft;

(k) any claim in the nature of pilotage in respect of a ship or an aircraft;

(l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(m) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;

(n) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under any of the provisions of the Merchant Shipping Act (Cap. 179) is recoverable as wages or in

the Court and in the manner in which wages may be recovered;

(o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(p) any claim arising out of an act which is or is claimed to be a general average act;

(q) any claim arising out of bottomry;

(r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of admiralty,

together with any other jurisdiction connected with ships or aircraft which may be vested in the Court apart from this section.

…

Mode of exercise of admiralty jurisdiction

4. — …

(4) In the case of any such claim as is mentioned in section 3 (1) (*d*) to (*q*), where —

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Overview

The plaintiff's case

5 The plaintiff, Equatorial Marine Fuel Management Services Pte Ltd, was a Singapore company in the business of supplying marine fuels ("bunkers"). The defendant, MISC Berhad, was a Malaysian shipping company and the registered owner of a number of vessels, including the *Bunga Melati 5*.

6 In its statement of claim, the plaintiff alleged that the parties had, on or about 3 July 2008, entered into two fixed price contracts, under which it agreed to supply 35,000 metric tonnes of bunkers (per contract) to a number of vessels owned or operated by the defendant in August and September 2008 at the price of US$744 and US$750 per metric tonne respectively (the "Fixed Price

Contracts"). In addition, the plaintiff alleged that the parties had, on or about 18 September 2008, entered into a separate contract for the supply of 1,000 metric tonnes of bunkers, on a "spot" basis, to the defendant's vessel the *MT Navig8 Faith* (the "Navig8 Faith Contract"). According to the plaintiff, a Malaysian company, Market Asia Link Sdn Bhd ("MAL"), at all material times acted as the broker or buying agent of the defendant in respect of the Fixed Price Contracts and the Navig8 Faith Contract. I should say that the defendant contested these allegations with a different version of events, which I will come to at [45] below.

7 The plaintiff did not receive full payment in respect of the supplied bunkers, and, according to the plaintiff's statement of claim, a rather substantial sum of US$21,703,059.39 (plus contractual interest) remained outstanding.

8 Consequently, the plaintiff commenced the present action *in rem* and served the writ *in rem* on the *Bunga Melati 5*; however, no warrant of arrest was issued and the vessel was not arrested. In all likelihood, security for the claim was furnished voluntarily in lieu of an arrest. It was common ground that the *Bunga Melati 5* was not one of the vessels which had received the bunkers supplied. As such, this was what is commonly known as a "sister ship action" under s 4(4)(*b*)(ii) of the HCAJA.

9 The plaintiff's case was essentially that the defendant was a party to the Fixed Price Contracts and the Navig8 Faith Contract via the agency of the defendant's alleged agent, MAL, and that the defendant was therefore contractually liable to the plaintiff for the bunkers supplied. As an alternative to its claim in contract, the plaintiff also argued that, if there were no valid and binding contracts for the sale and supply of the bunkers between the parties, the defendant was liable to it in unjust enrichment, since the defendant had enjoyed the use of the plaintiff's bunkers without paying for them. In addition, the plaintiff contended that the offer of a corporate guarantee by the defendant, in the context of earlier court proceedings in the United States in respect of the same dispute (the "US proceedings"), amounted to an admission of liability by the defendant.

The US proceedings

10 Prior to the start of the present action, the plaintiff had commenced another set of proceedings in the United States District Court for the Central District of California (the "California District Court"), based on essentially the same claims as the present action (albeit the issue of agency was apparently not pleaded). The plaintiff filed a "Verified Complaint" to obtain an attachment order under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure (the "Rule B attachment order"). The Rule B attachment order was executed against one of the defendant's vessels, the *Bunga Kasturi Lima*, at Long Beach, California.

11 As alluded to above (at [9]), the offer of a corporate guarantee was made to the plaintiff by the defendant. It was made a day after the Rule B attachment order was executed against the *Bunga Kasturi Lima* and was to the effect that the defendant would pay to the plaintiff the sum of US$22.4 million, on condition that the plaintiff withdrew all suits against the defendant in the United States and not commence any further actions *in rem* against the defendant's vessels. The plaintiff, however, did not accept this offer.

12 The defendant filed a motion to vacate the Rule B attachment order and to dismiss the Verified Complaint for failure to state a claim. The California District Court vacated the Rule B attachment order, a decision which was upheld on appeal by the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit Court of Appeals"), though the motion to dismiss the Verified Complaint was not considered, and was scheduled for further hearing. However, the further hearing never took place, as the plaintiff voluntarily withdrew the Verified Complaint.

The defendant's application

13 As stated (see [1] above), before the learned AR, the defendant applied (*vide* Summons No 919 of 2010) for, *inter alia*, the following orders:

(a) that the plaintiff's writ and statement of claim be struck out pursuant to O 18 r 19 of the ROC and/or the inherent jurisdiction of the court;

(b) that the plaintiff's writ be struck out and/or set aside on the basis that the admiralty jurisdiction *in rem* of the court under the HCAJA had been improperly or invalidly invoked against the *Bunga Melati 5*; and

(c) a declaration that the plaintiff was not entitled to invoke the admiralty jurisdiction *in rem* of the court against the *Bunga Melati 5* or any other vessel owned by the defendant in relation to the plaintiff's alleged claim.

14 The defendant's primary submission in support of its application was a straightforward denial of any agency relationship between it and MAL, and therefore also a denial that it had directly contracted with the plaintiff for the supply of bunkers. The defendant asserted that at all material times, it had procured the sale and supply of bunkers for its vessels from MAL as its contractual sellers (with MAL in turn procuring bunkers from suppliers such as the plaintiff), and that there was therefore no contractual relationship between the defendant and the plaintiff. Consequently, the defendant submitted that the plaintiff's claim should be struck out for being plainly unsustainable on the merits, and that, for the same reasons, the defendant was not "the person who would be liable on the claim in an action *in personam*" (the "relevant person") under s 4(4)(*b*) of the HCAJA and the plaintiff had therefore wrongly invoked the admiralty jurisdiction *in rem* of the court. The defendant also argued that these submissions applied with equal force to the plaintiff's claim in unjust enrichment. In addition, the defendant relied on the doctrine of issue estoppel, arguing that the US proceedings estopped the plaintiff from litigating the same issues before the Singapore court, and that the plaintiff's action should therefore be struck out as being frivolous, vexatious or an abuse of process. Finally, the defendant submitted that the plaintiff's action, following on the heels of the US proceedings, offended the "one claim, one ship" principle, and that the plaintiff was thereby prevented from invoking the admiralty jurisdiction *in rem* of the court or that the action should therefore be struck out.

The AR's decision

15 In a carefully considered decision, the learned AR granted the first two orders sought (*ie*, [13(a)] and [13(b)] above), but declined to grant the final order (which formed the subject matter of RA No 256 of 2010 and was not material to this appeal).

16 In his grounds of decision, the learned AR held that, although the relevant provisions of the HCAJA did not impose a threshold test of merits which the plaintiff had to discharge before it could invoke the admiralty jurisdiction *in rem* of the High Court, in light of the Court of Appeal's decision in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin (CA)*"), the common law required a plaintiff to show a good arguable case *on the merits* before the court's admiralty jurisdiction *in rem* could be invoked. He considered, however, that this view of the law did not sit easily with my decision in *The Eagle Prestige* [2010] 3 SLR 394, which he interpreted as holding that there was no

requirement (whether under the HCAJA or at common law) for a plaintiff to go into the merits of the claim when the invocation of the court's admiralty jurisdiction *in rem* was challenged by the defendant, unless there was also an application to strike out the action pursuant to O 18 r 19 of the ROC or the inherent jurisdiction of the court.

17 Applying this view of the law to the facts, the learned AR held that, on the evidence, the plaintiff had failed to establish a good arguable case that there was a contractual relationship between it and the defendant (via the agency of MAL). On the basis of his reading of *The Vasilily Golovnin (CA)*, the learned AR concluded that the admiralty jurisdiction *in rem* of the court had been improperly invoked as the plaintiff was unable to show that it had a good arguable case on the merits, and the writ was to be set aside. Alternatively, on the basis of *The Eagle Prestige*, the writ was to be struck out pursuant to O 18 r 19 of the ROC or pursuant to the inherent jurisdiction of the court because, on the same facts, the plaintiff's claim was obviously unsustainable and bound to fail.

18 The learned AR applied the same reasoning to the plaintiff's claim in unjust enrichment, and held that the plaintiff had again failed to show a good arguable case on the merits, which meant that the writ was to be set aside due to a lack of admiralty jurisdiction *in rem* (as *per* his understanding of *The Vasilily Golovnin (CA)*), or alternatively that the claim was to be struck out pursuant to O 18 r 19 of the ROC or the court's inherent jurisdiction as it was plainly unsustainable (as *per The Eagle Prestige*).

19 In view of his conclusions above, the learned AR was not therefore obliged to consider the defendant's other arguments based on issue estoppel and the "one ship, one claim" rule, but he nonetheless dealt with both submissions, concluding *obiter* that, in the circumstances, the plaintiff's writ ought not to be set aside or struck out on those grounds.

RA 252 of 2010

20 I should make it clear that, on appeal, a number of matters were either common ground or not in dispute, namely that:

(a) the plaintiff's claim for unpaid bunkers fell squarely within s 3(1)(*l*) of the HCAJA;

(b) the plaintiff had to satisfy the requirements of s 4(4) of the HCAJA in order for the court to have jurisdiction to entertain an action *in rem*;

(c) the defendant was the beneficial owner of the *Bunga Melati 5* when this action was brought;

(d) the plaintiff's claim arose in connection with the supply of bunkers to another ship or other ships; and

(e) when the alleged cause or causes of action arose the defendant was the owner or charterer or person in possession or control of that other ship or those other ships.

Thus, the dispute centred on whether the defendant could be said to be the "person who would be liable on the claim in an action *in personam*" within the meaning of s 4(4)(*b*) of the HCAJA. The thrust

of the plaintiff's case was that the defendant could indeed be said to be such a person, while the defendant's arguments were to the contrary. This simple summary of the respective positions, however, does not do justice to the complexity of the underlying issues as well as the extensive arguments canvassed by both parties before me.

21 The plaintiff, for instance, made the following submissions:

(a) where a defendant in an admiralty action *in rem* disputed his *in personam* liability, the applicable standard of proof under s 4(4)(*b*) of the HCAJA was that of a "good arguable case", and was similar to that under O 18 r 19 of the ROC;

(b) the learned AR had erred in holding that *The Vasiliy Golovnin (CA)* had introduced a merits test which was independent of the provisions of the HCAJA, and which had to be satisfied before a plaintiff could invoke the admiralty jurisdiction *in rem* of the High Court;

(c) the learned AR had erred in his decision as the plaintiff had adduced sufficient evidence that, under s 4(4)(*b*) of the HCAJA, the defendant was the person who would be liable on the claims in contract and in unjust enrichment in an action *in personam*;

(d) the learned AR had erred in his decision as, based on the evidence adduced, the plaintiff's case was not so obviously unsustainable or bound to fail as to be struck out pursuant to O 18 r 19 of the ROC or the court's inherent jurisdiction; and

(e) the plaintiff was not estopped from bringing the present action as the US proceedings were not final and conclusive on the merits, and in this respect the decision of the learned AR was correct.

22 The defendant did not meet all the plaintiff's submissions, as the defendant conceded at the outset of the hearing before me that the proper standard of proof to be applied under s 4(4)(*b*) of the HCAJA (see [21(a)] above) was indeed that of a "good arguable case", as opposed to that of a "balance of probabilities", as it had contended before the learned AR. However, the defendant's other submissions were as follows:

(a) the learned AR had erred in his interpretation of *The Vasiliy Golovnin (CA)*, as the Court of Appeal was not introducing a new merits requirement independent of the HCAJA, but was merely explaining the merits requirement which had always been inherent in the provisions of the HCAJA;

(b) the learned AR ought therefore to have held that, under s 4(4)(*b*) of the HCAJA, the plaintiff was required to (and had failed to) show a "good arguable case" on the merits that the defendant was the person who would be liable on the claims in contract and in unjust enrichment in an action *in personam*;

(c) the learned AR was correct in his decision insofar as, based on the evidence adduced, the plaintiff's case was so obviously unsustainable or bound to fail that it ought to be struck out pursuant to O 18 r 19 of the ROC or the court's inherent jurisdiction; and

(d) the learned AR had erred in holding that the plaintiff was not estopped from bringing the present action because, properly understood, the US proceedings were final and conclusive on the merits.

In addition, the defendant introduced a new submission, *viz*, that the plaintiff had no *locus standi* to bring the present action because, pursuant to a notice of assignment in the tax invoices in respect of the bunker transactions which formed the subject of the plaintiff's claims, it had assigned all proceeds thereunder to another entity, BNP Paribas (see [37] below).

Summary disposal of admiralty actions *in rem*

23 As a preliminary matter, it is vitally important to appreciate that the defendant in the present action was challenging the plaintiff's claim on two alternative bases: as a matter of *jurisdiction*, and also on the *merits*.

24 As I suggested in *The Eagle Prestige* (at [21] and [54]), when a plaintiff invoked the admiralty jurisdiction *in rem* of the High Court by serving an admiralty writ *in rem* on the vessel, or by arresting the vessel, there were essentially two routes open to the defendant to dispose of the plaintiff's action without troubling himself with a full trial:

(a) the defendant could apply under O 12 r 7 (read with O 70 r 2(3)) of the ROC to set aside the writ and warrant of arrest, if any, on the basis that the admiralty jurisdiction *in rem* of the High Court had been wrongly or invalidly invoked; or

(b) the defendant could apply under O 18 r 19 of the ROC or pursuant to the court's inherent jurisdiction to strike out the action (from which it followed that the warrant of arrest, if any, would also fall away), on the basis that the plaintiff's claim was certain to fail or obviously unsustainable and was thereby frivolous, vexatious, or lacking in *bona fides* so as to otherwise be an abuse of process (see generally *The Osprey* [1999] 3 SLR(R) 1099 at [8] and [9]).

I should add that the defendant may also apply to discharge the warrant of arrest on the basis of material non-disclosure by the plaintiff in the affidavit supporting the application for the warrant of arrest (*The Rainbow Spring* [2003] 3 SLR(R) 362 ("*The Rainbow Spring (CA)*") at [35]), as it was well-established that this was entirely independent of applications under O 12 r 7 and O 18 r 19 of the ROC (see *The Rainbow Spring (CA)* at [37] and *The Vasiliy Golovnin (CA)* at [84]), but as discharging the warrant of arrest on the basis of material non-disclosure generally does not otherwise affect the validity of the plaintiff's admiralty action (unlike applications under O 12 r 7 and O 18 r 19 of the ROC), and because the issue of non-disclosure was not relevant to this case, I will not discuss it further, and nothing in these grounds should be taken as being inconsistent with my views on the matter of non-disclosure in *The Eagle Prestige*.

25 For the avoidance of doubt, I have in these grounds endeavoured (except where I have quoted *verbatim* from the source material) to use the term "set aside" (and its various cognates) to describe

the relief sought by the defendant in challenging the court's jurisdiction pursuant to O 12 r 7 of the ROC, and "strike out" (and its various cognates) to describe the relief sought by the defendant pursuant to O 18 r 19 of the ROC or pursuant to the court's inherent jurisdiction.

26 The reason for such punctiliousness is that it was sometimes unclear from the cases which route a defendant was adopting, and consequently what relief the court was granting. The learned AR, for instance, although clearly granting relief in the nature of O 12 r 7 of the ROC by upholding the defendant's jurisdictional objections, expressed himself in terms of "striking out", which was language that was more appropriate to O 18 r 19. Notwithstanding this, in these grounds, I have treated the learned AR as basing his decision on both O 12 r 7 and O 18 r 19. Precision is important, because the relationship between relief under O 12 r 7 and O 18 r 19 of the ROC, in the context of the HCAJA, is complex, and they have sometimes been confused due to lack of clarity in the terminology used.

27 There have been cases where the defendant's application was based solely on the ground of lack of admiralty jurisdiction *in rem* (*eg*, *Schwarz & Co (Grain) Ltd v St Elefterio ex Arion (Owners) (The St Elefterio)* [1957] 1 P 179 ("*The St Elefterio*"); *The Wigwam* [1981-1982] SLR(R) 689 ("*The Wigwam (HC)*"); *The Owners of the Motor Vessel "Iran Amanat" v KMP Coastal Oil Pte Limited* (1999) 196 CLR 130 ("*Iran Amanat*")). There have also been cases where the application was based solely on O 18 r 19 of the ROC or the court's inherent jurisdiction (*eg*, *Sunly Petroleum Co Ltd v The Owners of the Ship or Vessel Lok Maheshwari* [1996] SGHC 212 ("*Lok Maheshwari*"); *The J Faster* [2000] 1 HKC 652). More often than not, however, the application was effectively based on both grounds (albeit drafted as alternative prayers in the application), with the defendant canvassing the same arguments in its applications under O 12 r 7 and O 18 r 19 of the ROC (as in the present action), or arguing that the plaintiff's claim, in addition to invalidly invoking jurisdiction under O 12 r 7, was bound to fail for some other reason under O 18 r 19 (*eg*, *The Moschanthy* [1971] 1 Lloyd's Rep 37; *The Hsing An* [1971-1973] SLR(R) 843; and the present action, as far as issue estoppel was concerned).

28 Strictly speaking, it should not be proper to deploy the same arguments in respect of O 12 r 7 and O 18 r 19 of the ROC, for when an action is struck out under the latter provision, that means the court is *exercising* its jurisdiction to prevent (broadly speaking) an abuse of its process; whereas if a writ is set aside under the former, that means the court has *no* jurisdiction (see *Astro Exito Navegacion SA v W T Hsu (The "Messiniaki Tolmi")* [1984] 1 Lloyd's Rep 266 and D C Jackson, *Enforcement of Maritime Claims* (LLP, 4th ed, 2005) at paras 9.60 and 10.67). In non-admiralty cases, for instance, where the court's jurisdiction depends on valid service of the writ of summons on the defendant, an argument that the court is not properly seised of jurisdiction due to a defect in service would be mounted under O 12 r 7 of the ROC, and not O 18 r 19. Yet, in admiralty actions (as this case illustrated), an unhealthy practice appears to have built up whereby both reliefs are often claimed on the same arguments (*viz*, that the defendant could not be said to be the "relevant person" within the meaning of s 4(4)(*b*) of the HCAJA), so that facts forming the basis of jurisdiction and those forming the substance of the underlying claim become mixed up (see [30] below), leading to confusion between the *existence* of jurisdiction and its *exercise*.

29 In *The Eagle Prestige*, I adverted (at [54]) to this undesirable state of affairs. The broad terminology I used there, *viz*, "Situation 1" and "Situation 2" cases, was intended, *inter alia*, to emphasise the distinction between a question of jurisdiction *in rem* under O 12 r 7 of the ROC and a question of merits under O 18 r 19. It was also a convenient way to explain that, typically, in the former case, the plaintiff in an action *in rem* is not required to disclose defences to the claim at the stage of applying for a warrant of arrest. Given its contextual purpose, that terminology would not have adequately captured the full breadth and complexity of the two approaches.

30 Distinguishing between applications under O 12 r 7 and O 18 r 19 of the ROC in this manner

raised the question of when the court should resort to O 12 r 7 of the ROC, and when to O 18 r 19, especially in instances where (as in the present case) it was faced with applications under both provisions, albeit framed in the alternative. The touchstone, in my opinion, was whether the court could limit its inquiry to purely *jurisdictional* matters of fact or law, in which case O 12 r 7 was the correct procedural tool; or whether it was required to delve into *non-jurisdictional* matters of fact or law (*ie*, the merits of the dispute), in which case O 18 r 19 was the correct means of proceeding.

31 The distinction between issues of jurisdiction and issues of liability or merits was one that was generally well-established in admiralty law. Jurisdictional disputes, as I understood the term, were disputes over the existence or veracity of jurisdictional facts (*ie*, facts which had to be found as a condition precedent to jurisdiction), or disputes over the correct answer to a jurisdictional question of law (*eg*, the proper interpretation of a statutory provision which conferred jurisdiction). Jurisdictional disputes were necessarily separate from, and logically prior to, the substantive, non-jurisdictional dispute between the parties over the issue of the defendant's liability (*ie*, the merits of the plaintiff's claim), and as such, the court was obliged to resolve jurisdictional disputes at the outset, once and for all (*I Congreso del Partido* [1978] 1 QB 500 at 535–536 (see [105] below) and *The Jarguh Sawit* [1997] 3 SLR(R) 829 at [30] (see [90] below)), after which the matter was *res judicata* (*The Jarguh Sawit* at [32] and [39]), and the action (assuming the court was seised of jurisdiction) proceeded to a trial of the merits.

32 The conclusive resolution of jurisdictional disputes in advance of the substantive trial of the merits was the proper province of O 12 r 7 of the ROC, from which it followed that non-jurisdictional matters (*eg*, the existence or veracity of non-jurisdictional facts, or the resolution of non-jurisdictional questions of law) relating to the merits of the dispute were not to be investigated by the court in an application to set aside the writ under O 12 r 7 (*The Indriani* [1996] 1 SLR(R) 5 at [17]), for at that stage the court was concerned exclusively with *jurisdictional matters* (whether of fact or of law). Order 12 r 7 of the ROC was not the proper means by which to deal with non-jurisdictional matters, because at the jurisdictional stage, the existence and veracity of non-jurisdictional facts pleaded by the plaintiff were to be assumed (David Chong Gek Sian, "In Personam Liability, Beneficial Ownership and the Action in Rem" (1994) 6 SAcLJ 272 ("Chong's article") at p 275, citing many of the authorities I will be dealing with later in these grounds), and non-jurisdictional questions of law ignored. In other words, non-jurisdictional questions of fact (or the application of the law to such facts), being matters which were appropriately concerned with liability or merits (*ie*, the strength of the plaintiff's claim), were to be separately dealt with at the substantive trial, or, if the plaintiff's claim was so unmeritorious as to be plainly unsustainable, under O 18 r 19 of the ROC.

My decision under O 18 r 19 of the ROC

33 At the hearing of the appeal the parties were contesting a large number of non-jurisdictional matters of fact and law. Indeed, from the outset, the defendant's General Manager, Corporate Procurement and Supply Management, Ms Noraini Binti Ibrahim, in her first affidavit claimed that the present proceedings were "frivolous, vexatious and an abuse of process". [note: 1] I therefore considered that the application was to be dealt with under O 18 r 19 of the ROC. As I have already indicated (see [2] above), I upheld the decision of the learned AR and struck out the plaintiff's action under O 18 r 19 of the ROC.

34 In the first part of these grounds ([35]–[75] below), I explain my ruling, while in the second part of these grounds ([76]–[157] below), I explain my reasons for rejecting the learned AR's primary basis for his decision under O 12 r 7 to "strike out" (*ie*, set aside (see [26] above)) the action, *viz*, that the plaintiff was required to satisfy the court that it had a good arguable case on the merits before it was entitled to invoke the court's admiralty jurisdiction *in rem*.

Introduction

35 As I said in *The Eagle Prestige* (at [57]), it is always open to a defendant to apply at an early stage of admiralty proceedings for the action to be struck out pursuant to O 18 r 19 of the ROC on the basis that it has no chance of success, and the burden on the issue of non-liability lies on the defendant to show that the plaintiff's case is wholly and clearly unarguable.

36 The question for the court, upon an application for a striking out of the action, would be the strength, sustainability or merits of the plaintiff's claim, *ie*, all the non-jurisdictional matters which are not generally germane on a challenge to jurisdiction under O 12 r 7 of the ROC (see [32] above). Counsel for the defendant, Mr Prem Gurbani, advanced a number of submissions calculated to demonstrate that the plaintiff's claim was plainly unsustainable on the merits.

The plaintiff's locus standi

37 Mr Gurbani took this as a threshold point at the appeal (see [22] above) even though it was not his strongest submission. He argued that the plaintiff lacked *locus standi* to bring the present action because the invoices (which were annexed to a letter of demand sent by the plaintiff's previous solicitors) issued by the plaintiff in respect of the unpaid bunkers plainly stated that "[a]ll proceeds hereunder are assigned to BNP Paribas…". [note: 2] Consequently, the defendant submitted, it was clear that the party entitled to those proceeds was BNP Paribas and not the plaintiff, and that the plaintiff therefore had no arguable case against the defendant, necessitating that the action be struck out as being obviously unsustainable. At the hearing, Mr Gurbani expanded on this submission, asserting that, as a result of the assignment, the action should have been brought by BNP Paribas, or BNP Paribas should at least have been joined as plaintiff.

38 I did not accept this argument, because it was clear from the relevant documents that there was no absolute assignment of the plaintiff's receivables to BNP Paribas; the notice in its tax invoices was merely confirmatory of a floating charge the plaintiff had granted to BNP Paribas over the sums standing to the credit of the plaintiff's account with it. Notably, the statement comprising the notice directed all payment of proceeds of tax invoices into the account of the plaintiff with BNP Paribas, and not to BNP Paribas' account – a strong sign that there was no assignment in place. It was therefore somewhat misleading for the invoices to have stated that the "proceeds" had been "assigned" to BNP Paribas, for the fact of the matter was that the security in question was a floating charge in favour of BNP Paribas over sums standing to the credit of the plaintiff's account with it.

39 As Mr Leong Kah Wah, counsel for the plaintiff, explained, at the material time, the plaintiff had in place trade facilities with BNP Paribas, which was governed by a "Letter Agreement" dated 29 July 2008. [note: 3] Clause 9(iii) of the Letter Agreement made reference to a "registered Fixed and Floating Charge in the name of [the plaintiff] dated 27 September 2002". [note: 4] Clause 15(iii) of the Letter Agreement [note: 5] and cl 3.1 of the Fixed and Floating Charge, [note: 6] setting out the assets included within the charge, were drafted in wide terms, and would certainly have included the monies due to the plaintiff under the invoices, although the uncontroverted evidence from the plaintiff's Managing Director, Mrs Choong-Ong Gek Hoon, was that, at all material times, there had been no default under the facilities and the floating charge had not crystallised. [note: 7] Mrs Choong-Ong further explained that the notice in the plaintiff's invoices was inserted because of clause 12(xii) of the Letter Agreement, which provided that the plaintiff undertook to "notify the legal assignment of proceeds in the invoice to all its buyers". [note: 8] In short, the statement in the invoices regarding the assignment of proceeds thereunder to BNP Paribas simply represented the plaintiff's compliance

with its contractual obligations to BNP Paribas, and nothing more.

40 I did not think that the Letter Agreement's reference to a "legal assignment" necessarily supported the defendant's case, as Mr Gurbani had argued. In the circumstances, the terminology was not decisive. There was an important distinction between an outright assignment and an assignment by way of security, and whether a particular transaction was one or the other depended on the real intention of the parties (see Greg Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2006) at paras [3.15] and [3.16]), and if, on a true construction of the relevant documents, the real intention of the parties was that of a charge, the fact that it had been labelled an assignment was irrelevant (*The Manchester, Sheffield and Lincolnshire Railway Company v The North Central Wagon Company* (1888) 13 App Cas 554 at 568 (*per* Lord Macnaghten) and *Helby v Matthews and others* [1895] 1 AC 471 at 475 (*per* Lord Herschell LC)). Here, it was clear from the Letter Agreement and the Fixed and Floating Charge that what had been intended was a charge, and not an assignment as such. There were important differences between a charge and an assignment (see *The Assignment of Contractual Rights* at para [3.17], especially pp 51–52), not least the fact that the chargor would lack an intention to assign, a *sine qua non* of all consensual assignments (see *The Assignment of Contractual Rights* at paras [3.14] and [7.03]).

41 Consequently, the *locus standi* point was without merit, and furnished no basis on which to strike out the plaintiff's action.

The plaintiff's claim in contract

42 The plaintiff's claim in contract was essentially that the defendant was a party to the Fixed Price Contracts and the Navig8 Faith Contract via the agency of its alleged agent, MAL, and that the defendant was therefore contractually liable to the plaintiff for the bunkers supplied.

43 The main argument raised by the defendant in response was that there was no contractual relationship between itself and the plaintiff (see [14] above), because at all material times, MAL was the defendant's contractual seller, issuing its invoices to the defendant based on the agreed unit price of the bunkers. It was common ground that the plaintiff's invoices had never been sent to the defendant.

44 The defendant's argument sought to demonstrate that the evidence did not support the existence of the Fixed Price Contracts and the Navig8 Faith Contract as between the plaintiff and defendant, nor did they establish an agency relationship between the defendant and MAL. As such, Mr Gurbani submitted, the plaintiff's claim in contract ought to be struck out under O 18 r 19 of the ROC.

Evidence of the Fixed Price Contracts and the Navig8 Faith Contract

45 As stated (see [6] above), contrary to the plaintiff's pleaded case that it (the plaintiff) was suing the defendant on two Fixed Price Contracts (*ie*, for the supply of 35,000 metric tonnes of bunkers in August 2008 for one month at the fixed price of US$744 per metric tonne, and 35,000 metric tonnes of bunkers in September 2008 for one month at the fixed price of US$750 per metric tonne), and the Navig8 Faith Contract, the defendant's position was that it had entered into a six-month Bunker Fixed Price Agreement ("BFPA"), pursuant to which MAL supplied 138,000 metric tonnes of bunkers at a fixed price of US$475 per metric tonne, from 24 March 2008 to 23 September 2008, to a total of 13 vessels owned or operated by the defendant. According to the defendant, the BFPA was the subject-matter of a tender and MAL was amongst eight companies (including established firms such as Petronas Dagangan Berhad, BP Singapore Pte Ltd and Shell Malaysia Trading Sdn Bhd) that

received bid documents. Six companies submitted bids to the defendant, and eventually MAL was successful in the tender, being awarded the BFPA on 14 March 2008. In addition to the BFPA, there were nine spot contracts (referred to by the defendant as the "Market Price Contracts") for the supply of bunkers to vessels owned or operated by the defendant at the prevailing market rates for bunkers. Mr Gurbani argued that the plaintiff's version of events (*viz*, that the plaintiff had contracted with the defendant, via the agency of MAL) was simply not credible in light of the clear evidence supporting the defendant's position.

46 I agreed with Mr Gurbani and was of the view that the plaintiff's case was indeed fraught with insurmountable evidential difficulties.

47 First, the plaintiff had pleaded that the two Fixed Price Contracts were evidenced by two e-mails from Compass Marine, both entitled "Bunker Confirmation" and dated 3 July 2008. The pleadings did not refer to MAL's fax confirmations dated 4 July 2008, although both the e-mails from Compass Marine and MAL's fax confirmations were referred to by Mr Darren-Middleton, Managing Director of Compass Marine, in an affidavit filed in support of the plaintiff's case. [note: 9] The first e-mail from Compass Marine confirmed the supply of bunkers in the month of August 2008 at the fixed price of US$744 per metric tonne, [note: 10] while the second e-mail confirmed the supply of bunkers in the month of September 2008 at the fixed price of US$750 per metric tonne. [note: 11] Both these e-mails contained a clause stating "Sellers/Suppliers General Terms and conditions of sale to apply". In its pleadings, the plaintiff referred to or relied on a number of clauses from these "terms and conditions". In contrast, MAL's fax confirmations of 4 July 2008 (confirming the supply of bunkers in August and September 2008 at the fixed price of US$744 per metric tonne and US$750 per metric tonne respectively) [note: 12] stated that the supply of bunkers was to be governed by "the general terms and conditions contained in "BIMCO STANDARD BUNKER CONTRACT"..." There was therefore a clear inconsistency in the terms and conditions under which the bunkers were to be supplied, which seemed to me to be a classic example of a "battle of forms" (see *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401). Thus, it might plausibly be suggested that there was no consensus *ad idem*, or at the very least, no Fixed Price Contracts on the plaintiff's pleaded terms.

48 Second, Mr Yahya bin Mohd Khalid, the Managing Director of MAL, had filed an affidavit in support of the plaintiff's claim, [note: 13] but curiously and rather tellingly, Mr Yahya did not mention the Fixed Price Contracts and the Navig8 Faith Contract in his affidavit.

49 Third, the plaintiff simply had no answer to the clear and cogent evidence from the defendant establishing the existence of the BFPA and the Market Price Contracts. Mr Gurbani submitted that the existence of the BFPA, and the due performance of their respective obligations thereunder by MAL and the defendant, completely undermined the plaintiff's claim in contract, for it demonstrated beyond doubt that MAL was not the defendant's agent. In this respect, Mr Gurbani pressed the point that it made no commercial sense for the defendant to obtain bunkers from MAL under the BFPA (in March 2008) at US$475 per metric tonne, and then "authorise" MAL (in July 2008) to contract, as the defendant's agent, with the plaintiff or its brokers at a price in excess of US$740 per metric tonne. Like the learned AR (see [51] of his grounds of decision), I was persuaded by these facts and contentions. The plaintiff sought to cast doubt on the genuineness of the BFPA, contending that it was "puzzling" that the defendant awarded the BFPA to MAL, notwithstanding that MAL had offered the lowest bid, over more established companies such as BP Singapore Pte Ltd and Shell Malaysia Trading Sdn Bhd, especially since, based on the prevailing market prices at the time, by offering a bid of US$475 per metric tonne, the BFPA was a loss-making transaction for MAL from the outset. As the learned AR pointedly noted (at [53] of his grounds of decision), however, one would have thought that it was precisely because MAL offered such a low bid that it was awarded the BFPA over the

other bidders.

50 In the face of these evidential problems, the plaintiff contended that the issue of whether or not the defendant would be liable to the plaintiff on the claim in contract was a matter that should properly be dealt with at trial and could not be disposed of under O 18 r 19 of the ROC. The defendant, however, argued that, even aside from these difficulties, the plaintiff's claim in contract was unarguable and bound to fail, because no agency relationship between the defendant and MAL was disclosed, and to this I now turn.

Agency by estoppel

51 The plaintiff's case was based on agency by estoppel (also known as ostensible authority), which required (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 (upheld on appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska (CA)*")) at [80]) that:

(a) a representation had been made to the plaintiff that MAL had authority to enter (on behalf of the defendant) into the Fixed Price Contracts and the Navig8 Faith Contract;

(b) such a representation had been made by a person or persons who had "actual" authority to manage the defendant's business either generally or in respect of those matters to which the Fixed Price Contracts and the Navig8 Faith Contract related; and

(c) the plaintiff had been induced by such representation to enter into the contract, *ie*, that the plaintiff in fact relied upon it.

Mr Gurbani for the defendant submitted that none of these requirements had been satisfied, while Mr Leong for the plaintiff sought to persuade me that they had.

(1) Representation

52 In relation to the first requirement, Mr Leong submitted that the requisite representation had been express and could also be implied from the defendant's conduct.

(A) Express representation

53 With regard to the submission that there had been express representation that MAL was the defendant's agent, Mr Leong relied on a number of affidavits in support of this contention:

(a) Mr Middleton deposed in his affidavit that on or about 22 May 2006, an employee from the defendant's Bunker Unit (whose name Mr Middleton could not recall) told him that MAL was the defendant's bunker broker, and directed him to contact MAL to discuss the defendant's bunker requirements. [note: 14] Mr Middleton did so and within three days Compass Marine and MAL successfully negotiated a bunker supply contract between the defendant and Compass Marine's customer. [note: 15] As a result of other such transactions concluded between MAL and Compass Marine since then, Compass Marine formed the belief that MAL must have been "very close to",

and "acted exclusively for", the defendant. [note: 16]

(b) Mr Yahya, in his affidavit dated 25 February 2010, confirmed that MAL had fixed bunker deals on behalf of the defendant, and that everyone in the bunker industry knew that MAL was acting "on behalf of" the defendant. [note: 17]

(c) Mr Lars Nielsen, the Managing Director of Brilliant Maritime Services ("BMS"), a firm of bunker traders and brokers, filed an affidavit deposing that, in or around September 2008, an employee in the defendant's Bunker Unit named "Khairul" told one of his staff that MAL was the defendant's bunker broker, and directed BMS to contact MAL to discuss the defendant's bunker requirements. [note: 18] Like Mr Middleton, Mr Nielsen understood this to mean that the defendant had appointed MAL as the defendant's broker or exclusive buying agent. [note: 19]

(d) Mr Grant Foulger, an employee of OceanConnect, filed an affidavit deposing that in or around November 2005, he was contacted by a representative of MAL, who advised him that MAL was acting as the defendant's broker, and asked OceanConnect to submit a quote for the supply of bunkers to one of the defendant's vessels. [note: 20] In respect of that transaction, OceanConnect and MAL shared a brokerage commission, [note: 21] and this arrangement continued up to December 2008, with OceanConnect and MAL sharing brokerage fees as co-brokers. [note: 22] It was not in dispute that OceanConnect and MAL shared a brokerage commission in respect of the supply of bunkers to the *MT Navig8 Faith*.

54 There were several fundamental problems with the allegations in these affidavits. First, Mr Middleton's affidavit was contradicted by an affidavit filed on behalf of the defendant by Mr Shahrol Azam Bin Shaharum, [note: 23] who was the defendant's Manager of Bunker Operations and Management. In his affidavit, Mr Shaharum stated that no one in the defendant's Bunker Section recalled having conversations of the sort alleged by Mr Middleton. [note: 24] There was some doubt, therefore, as to whether or not the alleged representations had been made at all. In this regard, it was noted (see [60] of the learned AR's grounds of decision) that Compass Marine might have had a vested interest in asserting that MAL was the defendant's agent, for, if the truth were otherwise, Compass Marine would potentially be liable to the plaintiff in negligence in having misrepresented that the plaintiff's contractual buyer was the defendant when it was in fact MAL.

55 Second, Mr Yahya's affidavit was not at all persuasive, and I placed little weight on it. For instance, there was a glaring omission in his affidavit that MAL acted as agent for the defendant specifically in respect of the *Fixed Price Contracts* and the *Navig8 Faith Contract*, which omission was clearly deliberate because MAL had confirmed elsewhere that it was the defendant's contractual seller. Firstly, in a previous Declaration, sworn on 5 December 2008 intended for the purposes of the US proceedings, [note: 25] Mr Yahya had clearly described the relationship between MAL and the defendant as that of contractual buyer and seller. Although the Declaration was not subsequently needed for the US Proceedings, the fact remained that Mr Yahya's signed statement acknowledged the six-month contract between MAL and the defendant for the supply of 138,000 metric tonnes of bunkers to the defendant (*ie*, the BFPA). Secondly, in legal proceedings which MAL had instituted against Affin Bank Berhad ("Affin Bank") (a Malaysian Bank) on 30 March 2009 in Malaysia for its failure to extend sufficient credit facilities to MAL (the "Malaysian proceedings"), the thrust of MAL's case was that it had contracted with the defendant, that the plaintiff was one of MAL's suppliers, and that it was on account of Affin Bank's failure to extend sufficient credit facilities that MAL could not pay its suppliers. MAL pleaded its business model in its statement of claim, stating that with the

promised credit facilities it would: [note: 26]

> … enter into a *short term periodic contract* for the sale of Bunkers to MISC [the defendant in the present action] at a certain and fixed price, before sourcing and securing the required quantity of Bunkers at a lower price from the open market in order to profit from the sale. [emphasis added]

Furthermore, MAL pleaded that Affin Bank had also agreed but failed to provide MAL with fresh and/or enhanced facilities to bridge price differences due to price fluctuations when bunkers were bought by MAL at prices higher than the fixed price MAL had agreed to sell to the defendant. Consequently, MAL was not able to meet its payment obligations to its suppliers. [note: 27] In other words, the position that MAL had taken in the Malaysian proceedings was entirely inconsistent with what Mr Yahya was now insinuating in his affidavit, as well as with the plaintiff's version of events (but, I might add, quite consistent with the defendant's allegations).

56 Thirdly, and in my view most importantly, Mr Yahya also did not explain a letter of 18 November 2008 from MAL to the defendant [note: 28] appealing to the latter to award MAL "a new *fixed term supply contract*" [emphasis added]. As the learned AR concluded, this was not a letter that would have been written by a party who took the view that it was only acting as an agent purchasing bunkers on behalf of its principal. Interestingly, MAL in this letter to the defendant actually referred to MAL having "secured a six (6) months supply of 138,000 MT… contract to [the defendant] at a fixed price USD475.00/MT at a total award price of USD 65,550,000.00 (**"the Contract"**)" [original emphasis]. [note: 29] Throughout the letter, MAL made repeated references to "the Contract", and from what MAL was saying to the defendant, there was never any doubt of a purely contractual relationship between MAL and the defendant (*ie*, the defendant's version of events) rather than an agency relationship (which was the plaintiff's submission).

57 Third, Mr Nielsen's affidavit evidence was irrelevant because, at the hearing, Mr Leong conceded that he was not relying on Mr Nielsen's affidavit, as it deposed to an incident which occurred *after* the Fixed Price Contracts and the Navig8 Faith Contract had allegedly been concluded. In any case, it was difficult to see how Mr Nielsen's evidence could be regarded as a representation *to the plaintiff* that MAL had authority from the defendant to enter the Fixed Price Contracts and the Navig8 Faith Contract, when BMS was not involved at all in those transactions.

58 Finally, none of the affidavits actually stated that there was a representation that MAL had authority to enter (on behalf of the defendant) into, specifically, the *Fixed Price Contracts* and the *Navig8 Faith Contract*, as opposed to some other transaction. It has already been noted that the alleged representation to Mr Nielsen took place in September 2008, after the Fixed Price Contracts had been concluded in July 2008 (see [57] above), but I should also point out that the alleged representations to Mr Middleton and Mr Foulger took place in 2006 and 2005 respectively, long before the Fixed Price Contracts and the Navig8 Faith Contract were allegedly concluded in July 2008 and September 2008. The plaintiff sought to meet this latter difficulty by submitting that the alleged representations, once made, were deemed to continue until retracted by the representor and the fact of retraction communicated to the representee. On this argument, the alleged representations in 2006 and 2005 therefore continued to remain operative in July and September 2008, because they had never been retracted by the defendant. Although Sean Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel* (Oxford University Press, 2nd Ed, 2002), para [9.57], was cited in support of this contention, the learned author of that work provided no authority for this broad proposition. The proposition was stated more narrowly (and, in my view, correctly) in K R Handley, *Spencer Bower, Turner and Handley: Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) at para 61:

A representation having been made *for the purpose of an intended transaction* will normally be regarded as continuing until the transaction is entered into or completed, unless varied or withdrawn in the meantime. [emphasis added]

The case of *Director of Public Prosecutions v Ray* [1974] 1 AC 370 was cited as authority for this proposition, and it was clear from that decision that the House of Lords, when referring to "continuing representations", meant only to refer to a representation made *for the purpose of a particular transaction*. It was impossible, therefore, to link the alleged representations in 2006 and 2005, which, even if made, would have related to completely different transactions, to the Fixed Price Contracts and Navig8 Faith Contract in 2008.

59 In the face of all these difficulties, the plaintiff's case in contract, insofar as it rested on ostensible authority based on an *express* representation, was bound to fail. It was therefore necessary to consider whether the necessary representation could be made out on the basis of an *implied* representation, in that the defendant knew or ought to have known that MAL had been representing itself to the bunker industry as the defendant's agent, but took no steps to correct this view and/or acquiesced in MAL's actions.

(B) Implied representation

60 In support of its contention that the defendant knew or ought to have known that bunker suppliers and traders (such as the plaintiff) were under the impression that MAL was the defendant's broker or agent, the plaintiff relied on a number of documents and allegations contained in various affidavits:

(a) It was alleged by Mr Yahya that MAL would not have been able to procure the supply of bunkers on such favourable credit terms if it was purchasing as contractual principal. [note: 30] However, that this allegation was contained in Mr Yahya's affidavit, in my opinion, seriously weakened its evidential value (see [55] above).

(b) According to Messrs Middleton and Nielsen, MAL had no reputation in the bunker industry and was a "nobody" if not for the fact that it was or was believed to be the defendant's bunker broker. [note: 31] In addition, according to Mr Yahya, about 90 to 95% of the defendant's bunker requirements were met through MAL, so much so that Mr Leong submitted that the defendant was the only "customer" of MAL. These assertions, however, foundered upon Mr Foulger's clear evidence that between February 2007 and December 2008, OceanConnect and MAL engaged in "more than 540 separate bunker transactions", and that, since the inception of OceanConnect's course of dealing with MAL (apparently in November 2005), "more than 120" bunker transactions involved the defendant. [note: 32] If so, then between February 2007 and December 2008 alone there were at least 420 transactions in which OceanConnect was prepared to deal with MAL when the defendant was not involved. It was hard to see how it could be said that MAL was a "nobody", or that the defendant was its only customer, in light of the plaintiff's own evidence.

(c) It was stated by Mrs Choong-Ong that when the plaintiff, pursuant to the Fixed Price Contracts and the Navig8 Faith Contract, supplied the bunkers in question to the defendant's vessels, the plaintiff would liaise directly with the defendant's local agents in Singapore, MISC (Singapore) Pte Ltd, to coordinate the bunkering operations, and that MAL was never involved in the bunkering operations. [note: 33] Mrs Choong-Ong considered this to be "consistent with [MAL's] role as a broker (as opposed to a contractual seller)". [note: 34] However, Mrs Choong-Ong's assertions concerned operational rather than transactional matters, and since the Fixed

Price Contracts and the Navig8 Faith Contract were to be performed in Singapore, it was not clear why the fact that the defendant's Singapore-based agent and subsidiary (rather than the Malaysia-based MAL) was coordinating the bunkering operations necessarily had to raise any eyebrows.

(d) The plaintiff also relied on the fact that, on 5 November 2008, when the plaintiff first sent a written demand for payment, the defendant did not deny liability but simply forwarded the demand to MAL. [note: 35] This was true, but what had actually happened was that, in forwarding the e-mail to MAL, the defendant had also added the terse message "[please] check whether this is [your] supplier", which was, as the learned AR held (at [75] of his grounds of decision):

> … perfectly consistent with [the defendant's] position that the plaintiff was MAL's contractual supplier, not the defendant's. If anything, the brevity of the defendant's response was indicative of its view that it clearly had nothing to do with the actual procurement of the bunker supplies, a matter solely between MAL and its contractual suppliers.

This was reinforced by MAL's equally brief reply to the defendant that "we [MAL] will check immediately".

(e) The plaintiff also pointed to the defendant's offer of a corporate guarantee on 2 December 2008, after the plaintiff had attached the defendant's vessel the *Bunga Kasturi Lima* in California (see [11] above), as an admission of liability, contending that there was no reason why a large, publicly-listed company like the defendant would offer to pay if it was not in fact liable for the outstanding amounts. The problem for the plaintiff, however, was that, as the learned AR noted (at [72] of his grounds of decision), inherent in the very notion of a guarantee was the provision of security for *another party's liability*, and that the wording of the corporate guarantee made it clear that it was to guarantee the outstanding sum due and owing to the plaintiff *from MAL*. [note: 36] In addition, the defendant explained that the corporate guarantee would have been much less costly for the defendant than the continued attachment of the *Bunga Kasturi Lima*, as the vessel was worth far more than the plaintiff's claim.

It was therefore hard to understand how any of the above points could convincingly be seen as some sort of implied representation from the defendant's conduct that MAL was the defendant's agent.

(2) Representation by person with "actual" authority

61 The plaintiff's claim based on agency by estoppel was unsustainable also because there was no real evidence that any representation, even assuming one had been made, emanated from a person with "actual" authority. The alleged representation to Mr Foulger was made by MAL, and not the defendant's authorised representative, and it was trite that an agent could not clothe himself with authority via his own representations (see *Skandinaviska (CA)* at [38]), while Mr Middleton could not remember the name of the defendant's employee he allegedly spoke to, much less whether that employee was authorised to make the alleged representations. Above all, Mr Yahya did not identify anyone from the defendant who had made the alleged representation.

(3) Inducement

62 Finally, the plaintiff relied on a number of matters dating from November and December 2008 (*eg*, the defendant's reaction to the plaintiff's demand and the defendant's offer of a corporate guarantee (see [60(d)] and [60(e)] above)) to buttress its case of an alleged "industry-wide belief"

that MAL was purchasing bunkers in the name of the defendant as the latter's broker or agent. However, all these matters post-dated the conclusion and performance of the Fixed Price Contracts and the Navig8 Faith Contract, so it was impossible for them to be indicative of any sort of implied representation by conduct which was relied upon by the plaintiff or which induced it to enter the transactions in question.

Conclusion on the plaintiff's claim in contract

63 On the evidence before me, the plaintiff's case that there was a contractual relationship between the plaintiff and the defendant (established through the agency of MAL) for the sale of the bunkers was therefore plainly unsustainable and ought not to be allowed to proceed to a full trial.

64 Consequently, I struck out the plaintiff's action (insofar as it was based on a claim or cause of action in contract) pursuant to O 18 r 19 of the ROC.

The plaintiff's claim in unjust enrichment

65 The plaintiff also framed its claim in unjust enrichment, as an alternative to its claim in contract (*ie*, assuming there was no contractual relationship between the plaintiff and the defendant), on the basis that the defendant had been unjustly enriched at the plaintiff's expense because the defendant had, with knowledge of and/or having induced the plaintiff's mistaken belief that there was a binding contract between the plaintiff and the defendant, accepted and used the bunkers but had not paid the plaintiff. It followed that once I accepted that the bunkers were supplied to the defendant by MAL under the BFPA and the Market Price Contracts (which I did), the plaintiff's claim in unjust enrichment was misconceived, since, even if the defendant could be said to have been enriched by its receipt of the bunkers at the expense of the plaintiff, it would not have been unjust for the defendant to retain the benefit of the bunkers (a necessary element in making out a claim in unjust enrichment (see Lord Goff of Chieveley and Gareth Jones, *Goff and Jones: The Law of Restitution* (Sweet & Maxwell, 7th ed, 2007) ("*Goff and Jones*") at para 1-016)). First of all, there was no "unjust factor" to speak of: the bunkers had not been supplied by the plaintiff under a failure of consideration, mistake *etc*. Second, by contracting with MAL, the plaintiff took on all the risks that that entailed, including the risk that it would not be paid (or paid fully) by MAL, and the law of unjust enrichment could not, save in the most exceptional of circumstances (which were not present here), be used to undermine the parties' contractual arrangements and redistribute the risk which had already been expressly allocated under the contract, so as to allow a party who had made a bad bargain (such as the plaintiff) to impose liability on a stranger to the contract (such as the defendant) (see *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 at 166 (*per* Lord Goff) and *Costello & Anor v MacDonald & Ors* [2011] EWCA Civ 930).

66 In addition, the defendant could also rely on the defence of change of position, in relation to which the learned AR concluded (see [81]–[86] of his grounds of decision) that the evidence clearly showed that the defendant had *bona fide* changed its position following its receipt of the bunkers. The defence of change of position was accepted by the Court of Appeal in *Seagate Technology Pte Ltd and another v Goh Han Kim* [1994] 3 SLR(R) 836 at [31] and confirmed in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [35], and it required that:

(a) the person enriched had changed his position;

(b) the change was *bona fide*; and

(c) it would be inequitable to require the person enriched to make restitution or to make restitution in full.

The defendant had changed its position by expending the bunkers, and paying a substantial sum of money to MAL in full settlement of the defendant's contractual obligation to MAL under the BFPA. All of this was done *bona fide*, and it would be inequitable to require the defendant to make restitution, for the defendant would otherwise be exposed to double liability: once to MAL and again to the plaintiff (see *Yaku Shin (JB) Sdn Bhd v Panasonic AVC Networks Singapore Pte Ltd and another* [2008] 4 SLR(R) 193 at [82]).

67 Further, insofar as the principle that restitution would not be ordered if *restitutio in integrum* was not possible was distinct from the defence of change of position (see *Goff and Jones* at para 1-084), that too stood in the way of the plaintiff's claim in unjust enrichment.

68 Consequently, the plaintiff's claim in unjust enrichment was doomed to suffer the same fate as its claim in contract, in that it had to be struck out pursuant to O 18 r 19 of the ROC as being completely unsustainable.

Issue estoppel

69 The defendant submitted that the plaintiff's claims in contract and unjust enrichment had been determined by the US proceedings, and that the plaintiff was therefore estopped from litigating the same issues before the Singapore courts, with the result that the plaintiff's action had to be struck out pursuant to O 18 r 19 of the ROC as being frivolous, vexatious or an abuse of process.

70 In order to establish issue estoppel, it was necessary that (see *The Vasiliy Golovnin* [2007] 4 SLR(R) 277 ("*The Vasiliy Golovnin (HC)*") at [38]; *D s V Silo-Und Verwaltungsgesellschaft mbH v Owners of The Sennar and 13 Other Ships* [1985] 1 WLR 490 ("*The Sennar (No 2)*") at 499 (*per* Lord Brandon of Oakbrook)):

(a) the judgment in the earlier proceedings being relied on as creating an estoppel must have been given by a foreign court of competent jurisdiction;

(b) the judgment must have been final and conclusive on the merits;

(c) there must have been identity of parties in the two sets of proceedings; and

(d) there must have been identity of subject matter, *ie*, the issue decided by the foreign court must have been the same as that arising in the proceedings at hand.

As the parties accepted that all the other requirements (*viz*, (a), (c) and (d)) were satisfied, the dispute before me was focused on whether or not the US proceedings resulted in a judgment that

was "final and conclusive on the merits". In *The Vasiliy Golovnin (HC)*, Tan Lee Meng J held (at [42]) that "[f]or a judgment to be conclusive and final, it must be one that cannot be reopened by the court that pronounced it", and endorsed (at [40]) the following comment by Lord Brandon in *The Sennar (No 2)* (at 499):

> Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively *a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned*. [emphasis added]

71 The defendant argued that the US proceedings had indeed resulted in a "final and conclusive" judgment "on the merits" because, in order to obtain a Rule B attachment order, a claimant would have to satisfy the court that it had a *prima facie* maritime claim against the defendant. Given that the California District Court had, after considering the evidence and arguments of both parties, held that the plaintiff had failed to establish such a *prima facie* case for breach of contract and unjust enrichment and vacated the Rule B attachment order (a decision which was upheld by the Ninth Circuit Court of Appeals (see [12] above)), the defendant submitted that those decisions were clearly judgments which were final and conclusive on the merits.

72 I did not accept this submission for the simple reason that the US proceedings were only concerned with whether or not the Rule B attachment order was to be vacated, and it was open to the courts in the United States to reach a different view on the same issues at the subsequent stage of considering the actual motion to dismiss the Verified Complaint (albeit the motion was subsequently withdrawn (see [12] above)). This was clear from the judgment of District Judge Valerie Baker Fairbank in the California District Court: [note: 37]

> After considering your arguments and the evidence filed today, the court's tentative [*sic*] will be the order of court. *At this time*, the court finds based upon the evidence before the court… that the plaintiff failed to meet its burden of showing a prima facie admiralty claim against the defendant. As I indicated in my tentative remarks, the -- neither the verified complaint nor the evidence before the court shows a contract between the plaintiff and the defendant and grounds for a breach of contract claim.
>
> …
>
> Similarly, the court finds that the plaintiff did not meet its burden with respect to the quantum meruit cause of action. *I recognize that* [the] *plaintiff is not required to prove its case at this time, and my rulings only pertain to this hearing*.
>
> [emphasis added]

73 In its appellate brief before the Ninth Circuit Court of Appeals, the defendant itself had accepted that the decision of the California District Court was not final and conclusive on the merits: [note: 38]

> … the District Court expressly recognised that the… hearing [to vacate the Rule B attachment order] was not for a final determination of the merits of [the plaintiff's] underlying claim, and the Court did not purport to make such a final determination…

74 Consequently, in my view, the US proceedings did not result in a judgment which was final and

conclusive on the merits, and as such were not capable of giving rise to an estoppel. I therefore upheld the learned AR's refusal to strike out the plaintiff's action under O 18 r 19 of the ROC on the basis of issue estoppel.

Conclusion on striking out

75 For the foregoing reasons, I upheld the AR's decision to strike out the plaintiff's claim under O 18 r 19 of the ROC on the basis that the plaintiff's action was plainly and obviously unsustainable.

My decision under O 12 r 7 of the ROC

76 I now turn to the jurisdictional aspect of the defendant's application, *viz*, a prayer that the action be set aside on the basis that the admiralty jurisdiction *in rem* of the court under the HCAJA had been improperly and/or invalidly invoked by the plaintiff (see [13(b)] above). Although the defendant did not specify which provision of the ROC it was relying on for this prayer, as a challenge to the court's jurisdiction, clearly it would have had to have been based on O 12 r 7 of the ROC. As I have stated (see [15] above), the learned AR granted an order in terms of this prayer as well, albeit using somewhat ambiguous language, being that of "striking out" rather than "setting aside" (see my discussion at [23]–[32] above regarding the difference between the two).

77 I did not agree with the learned AR's decision to set aside the writ *in rem* under O 12 r 7 of the ROC, which was based on the notion that, following some of the Court of Appeal's remarks in *The Vasiliy Golovnin (CA)*, in order to invoke admiralty jurisdiction *in rem*, apart from satisfying the relevant provisions of the HCAJA, there was also an *independent* requirement that a plaintiff show an appropriately strong case on the merits, to the standard of a "good arguable case", and that, as the plaintiff had failed to do so (for the very same reasons the learned AR struck out the plaintiff's action under O 18 r 19 of the ROC), the admiralty jurisdiction *in rem* of the court was not properly invoked.

78 I propose to structure this part of my grounds of decision as follows, by explaining:

(a) the requirements for establishing jurisdiction under s 4(4) of the HCAJA; and

(b) what I consider to be the proper interpretation of the Court of Appeal's comments in *The Vasiliy Golovnin (CA)*.

Requirements for establishing jurisdiction under s 4(4) of the HCAJA

Introduction

79 When a defendant challenges the admiralty jurisdiction *in rem* of the court pursuant to O 12 r 7 of the ROC, he is essentially arguing that the plaintiff's claim does not fall within the relevant provisions of the HCAJA, which, for the purposes of this case, I regarded as being s 4(4) (although I may refer more generally to ss 3 and 4 of the HCAJA for illustration purposes). The heading "[m]ode of exercise of admiralty jurisdiction" appears in s 4 of the HCAJA, but this should not be taken to mean that s 4 is merely about the *exercise* of jurisdiction, for it is well-established that the section also relates to the *existence* of jurisdiction (see *The Ocean Jade* [1991] 1 SLR(R) 354 at [19] and [20]).

80 In such a jurisdictional challenge by the defendant under O 12 r 7 of the ROC, the onus is on the plaintiff to establish jurisdiction (*The Aventicum* [1978] 1 Lloyd's Rep 184 at 186; *The Andres*

Bonifacio [1991] 1 SLR(R) 523 at [19] (appealed on a different point and upheld at [1993] 3 SLR(R) 71); *The Temasek Eagle* [1999] 2 SLR(R) 647 at [13] and [15]; *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 ("*Vostok Shipping*") at [19]; *The Catur Samudra* [2010] 2 SLR 518 at [23]), and he does so by demonstrating that his claim falls within s 4(4).

81 It is helpful to separate s 4(4) of the HCAJA into its constituent parts in order to ascertain what it requires of a plaintiff. Under s 4(4), the plaintiff must:

(1) show that he has a claim under s 3(1)(*d*) to (*q*);

(2) show that the claim arises in connection with a ship;

(3) identify the person who would be liable on the claim in an action *in personam* (*ie*, the "relevant person");

(4) show that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship; and

(5) show that the relevant person was, at the time when the action was brought, either:

(a) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or

(b) the beneficial owner of the sister ship as respects all the shares in it.

I will refer to these requirements as "step (1)" or "step (2)" *etc* of s 4(4) of the HCAJA.

82 At this juncture, I should reiterate my view (see [30]–[32] above) that, when a court is adjudicating a jurisdictional dispute under O 12 r 7 of the ROC, it is generally only concerned with *jurisdictional matters*, *ie*, jurisdictional facts or jurisdictional questions of law. Non-jurisdictional facts or questions of law are matters going towards the merits of the dispute (*ie*, the strength of the plaintiff's case, or, what amounts to the same thing, the defendant's liability), which are usually dealt with at trial or under O 18 r 19 of the ROC, with one ostensible anomaly which I discuss below (at [117]–[138]).

Step (1) of s 4(4): jurisdictional facts to be proved on a balance of probabilities, and jurisdictional questions of law to be shown on a good arguable case

83 As a matter of principle, in the absence of statutory language dictating otherwise, jurisdictional facts have to be proved by the plaintiff on the normal civil standard of proof, *ie*, on *a balance of probabilities*, and this was supported by a great deal of authority where steps (2), (4) and (5) of s 4(4) of the HCAJA were concerned, which I will come to in due course (see [99]–[107] below).

Insofar as step (1) of s 4(4) required jurisdictional facts to be established, the full bench of the High Court of Australia made it plain that the standard of proof was that of a balance of probabilities (see *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 ("*Shin Kobe Maru*")), as did the New Zealand Court of Appeal (see *Baltic Shipping Co Ltd v Pegasus Lines SA* [1996] 3 NZLR 641 ("*Baltic Shipping*") and *Vostok Shipping*). I should add that the relevant provisions of the Admiralty Act 1988 (Act No 34 of 1988) (Cth) (the "Admiralty Act 1988") and Admiralty Act 1973 (Public Act 1973 No 119) (NZ), which were the subject of consideration in those cases, were in all material respects identical to the corresponding provisions of the HCAJA.

84 The learned AR appeared to suggest (at [19] of his grounds of decision), however, that under s 3(1) of the HCAJA (which necessarily includes step (1) of s 4(4)), a plaintiff only had to show jurisdictional facts to the standard of a *good arguable case*. The learned AR drew an analogy with O 11 r 1 of the ROC, where it was well-established that the standard of proof to be discharged by a plaintiff, when proving his version of the facts, was that of a "good arguable case" (*Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 ("*Seaconsar*"); *Bradley Lomas Electrolok Ltd and another v Colt Ventilation East Asia Pte Ltd and others* [1999] 3 SLR(R) 1156).

85 However, I was of the view that the analogy was unsafe, because, as Robert Goff J (later Lord Goff of Chieveley) pointed out in *I Congreso del Partido* (at 536), the standard of proof required under Ord 11 of the Rules of the Supreme Court (SI 1965/1776) ("RSC") (the equivalent of O 11 of the ROC) was expressly provided for in RSC, Ord 11, r 4(2) (see also O 11 r 2(2) of the ROC), *ie*, it had to be "made *sufficiently to appear* to the Court that the case is a proper one for service out of [jurisdiction] under this Order" [emphasis added]. Indeed, that was the very basis on which the House of Lords in *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] 1 AC 869 ("*Vitkovice*") decided that a plaintiff was not required to satisfy the court on the normal civil standard of proof of jurisdictional facts (*ie*, on a balance of probabilities) under RSC, Ord 11, r 1(1) (*per* Lord Simonds at 879, Lord Radcliffe at 883 and Lord Tucker at 890), a decision which was confirmed in *Seaconsar* (where the House of Lords finally settled on the phrase "good arguable case" as expressive of the requisite standard) by none other than Lord Goff (at 453).

86 Step (1) of s 4(4) of the HCAJA contained no language similar to that of O 11 r 2(2), and in the absence of such language, there seemed to me no good reason not to hold a plaintiff to the normal civil standard of proof as far as proving jurisdictional facts was concerned. Incidentally, in *Empire Shipping Co Inc v Owners of the Ship "Shin Kobe Maru"* [1991] 104 ALR 489, Gummow J, like the learned AR in this case, drew an analogy with the cases on service out of jurisdiction (such as *Vitkovice*) in deciding (at 493–494), on a defendant's challenge to the court's jurisdiction *in rem* under s 4(2) of the Admiralty Act 1988 (the Australian equivalent of s 3(1) of the HCAJA), that the plaintiff was only required to show a "strong argument" that the court had jurisdiction, but it was in my view significant that Gummow J's approach was ultimately not endorsed by the High Court of Australia in *Shin Kobe Maru*; instead, the High Court affirmed that, for the purposes of s 4(2) of the Admiralty Act 1988 (corresponding to s 3(1) of the HCAJA and therefore step (1) of s 4(4)), jurisdictional facts had to be proved on a balance of probabilities. As a practical matter, it could of course be said (as it was by the learned AR in his grounds of decision) that at such a preliminary stage of the action, in the absence of discovery and cross-examination of witnesses, it would be inappropriate to insist on a standard of proof normally applicable to full trials. However, that was not a principled way of dealing with the point that when the court's entire jurisdiction to adjudicate the action rested upon a disputed question of (jurisdictional) fact, that question of fact had to be resolved once and for all, using a standard of proof that was consistent with that used for proof of facts in general (in the absence of statutory language stating otherwise). Further, such pragmatic objections have not convinced courts in admiralty cases to abandon the standard of a balance of probabilities where proving *jurisdictional facts* was concerned (*I Congreso del Partido* at 535–536; *The*

Aventicum at 186 and 190; and *Vostok Shipping* at [21]).

87 However, where the jurisdictional dispute concerned a *jurisdictional question of law*, it was inapposite to speak of a "balance of probabilities", since questions of law cannot be "proved" in any meaningful sense. Therefore, where the relevant limb of s 3(1) of the HCAJA (in step (1) of s 4(4)) does not require jurisdictional facts to be established, but only requires the plaintiff to demonstrate that his claim is of a particular legal character, then this is a pure question of law which cannot be proved on a balance of probabilities, but only has to be shown to the standard of a "good arguable case".

88 This was what I considered to be the true interpretation of the Court of Appeal's statements in *The Jarguh Sawit* (at [43]) and *The Vasiliy Golovnin (CA)* (at [52]) that, where the court's admiralty jurisdiction *in rem* was disputed by the defendant, all the plaintiff was required to show was a "good arguable case" that his claim fell within s 3(1) of the HCAJA.

89 In *The Jarguh Sawit*, pursuant to a memorandum of agreement, the respondent ("NMB") agreed to sell the vessel *Jarguh Sawit* to a buyer, OJI. The vessel was to be sold as a Lloyd's Register Class vessel, and NMB advanced a loan to OJI for 90% of the purchase price, secured by a mortgage over the vessel. NMB failed to deliver the vessel as a Lloyd's Register Class vessel, and as a result the mortgage could not be registered. After some developments, NMB considered the loan due and payable in full, but by then OJI had transferred ownership of the vessel to the appellant, JH. NMB then commenced an action *in rem* pursuant to ss 3(1)(*c*) and 4(2) of the HCAJA and arrested the vessel, which JH applied to set aside on the basis that jurisdiction had been wrongly invoked as JH was not liable *in personam* on NMB's claim, the mortgage having been agreed between NMB and OJI, not NMB and JH. Essentially, JH's submission on jurisdiction was that ss 3(1)(*c*) and 4(2) of the HCAJA had to be interpreted as conferring admiralty jurisdiction *in rem* on the court only when the owner of the ship referred to in those sections was the person who would be liable on the claim in an action *in personam*. Understandably, this novel argument was rejected by Rubin J (reported at [1995] 2 SLR(R) 913) in a decision upheld by the Court of Appeal in Civil Appeal No 122 of 1995. Subsequently, JH filed a defence and counterclaim utilising the same objections to jurisdiction which had been rejected by Rubin J, and NMB applied to strike out the offending paragraphs, which application was granted by the AR and the High Court (reported at [1997] 1 SLR(R) 213), and which was the subject of the appeal in *The Jarguh Sawit*.

90 M Karthigesu JA writing for the Court of Appeal drew a clear distinction between adjudication on questions of jurisdiction and on substantive questions of liability or merits. At [30], the Court of Appeal held that:

> … whether or not a court has jurisdiction is, of necessity, a question logically prior to the substantive dispute of the parties. Unless and until a court is properly seized, it cannot adjudicate on the matter.

As the question of jurisdiction had been settled in the earlier proceedings before Rubin J, the Court of Appeal held that the matter was *res judicata*, and that JH was not permitted to re-use its failed objections to jurisdiction as part of its substantive defence, for "the question of jurisdiction is a procedural issue, [and] it follows that it is not within the proper province of a hearing on substantive issues, *ie* at the trial stage" (at [33]).

91 Counsel for JH then advanced an argument to the effect that the question of jurisdiction was to be determined twice: once at the interlocutory stage, where the plaintiff had to prove an arguable case, and again at the merits stage (*ie*, the trial) where the plaintiff had to prove its case on a

balance of probabilities.

92 This was rejected by the Court of Appeal, on the ground that counsel had confused the issues of jurisdiction and substantive liability, and it was in this context that the Court of Appeal stated (at [43]) that:

> *In a hearing of an application to dispute jurisdiction, the plaintiff need only show that he has a good arguable case that his cause of action falls within one of the categories of s 3(1)*, in this case, ground (c). [emphasis added]

93 Strictly speaking, the Court of Appeal in *The Jarguh Sawit* was not called upon to decide the standard of proof applicable in a challenge to the court's jurisdiction under s 3(1) of the HCAJA; a jurisdictional challenge was not being mounted (unlike in the earlier proceedings before Rubin J) and the passage cited above merely represented the Court of Appeal's response to counsel's argument that the question of jurisdiction ought to be litigated twice. In addition, it was not entirely clear from the Court of Appeal's judgment what authority established the proposition that the standard of proof under s 3(1) was that of a "good arguable case". However, *The Jarguh Sawit* has long been understood as laying down the requisite standard of proof a plaintiff must satisfy under s 3(1) of the HCAJA (see for instance Toh Kian Sing, SC, *Admiralty Law and Practice* (LexisNexis, 2nd ed, 2007) ("*Admiralty Law and Practice*") at p 46), even when required to prove jurisdictional facts.

94 It seemed to me unlikely, however, that the Court of Appeal intended, in a judgment where the point was not really even in issue, to disrupt the settled approach throughout the Commonwealth (see [83] above) and in Singapore (see [99]–[103] below) in relation to the standard of proof of jurisdictional facts by substituting the standard of "good arguable case" for that of "balance of probabilities".

95 I considered, therefore, that the Court of Appeal's statements in *The Jarguh Sawit*, properly understood, only meant that where a defendant challenged (via O 12 r 7 of the ROC) the plaintiff's invocation of the court's admiralty jurisdiction *in rem* under one of the limbs of s 3(1) of the HCAJA, the plaintiff was only required to show a "good arguable case" that his claim, properly characterised and categorised, had the *legal character* required by the relevant limb of s 3(1) (see *The Indriani* at [15]–[17] where the Court of Appeal appears to have adopted such an approach). In other words, *The Jarguh Sawit* stood for the proposition that, under step (1) of s 4(4), the plaintiff was required to show a "good arguable case" as to *jurisdictional questions of law*. This interpretation was supported by the Court of Appeal's statement (at [41]) that, when deciding whether it had jurisdiction, the question the court had to ask itself was whether there was a "good arguable case *based on a ship's mortgage*" [emphasis added]. The Court of Appeal's statement (at [43]) (see [92] above) also lent itself to this view, for whether a cause of action "falls within one of the categories of s 3(1)" is a question of characterisation and categorisation, and therefore a question of law. This was also how *The Jarguh Sawit* has been understood in Dr Damien J Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (The Federation Press, 3rd ed, 2008) at p 126, although, as the learned author noted, the point was not entirely free from doubt, as there was some difficulty reconciling this with the idea that questions of law are not really amenable to proof (see [87] above), and hence standards of proof (*Shin Kobe Maru* and *Baltic Shipping*), even that of a "good arguable case" (*E F Hutton & Co (London) Ltd v Mofarrij* [1989] 1 WLR 488 at 495 (*per* Kerr LJ, albeit in the context of RSC, Ord 11)).

96 Therefore, if, on a jurisdictional dispute under O 12 r 7 of the ROC, step (1) of s 4(4) of the HCAJA was in issue, the plaintiff would be required to either prove a jurisdictional fact on a balance of probabilities, or show a good arguable case as to a jurisdictional question of law, depending on what it

was the defendant was challenging.

97 For instance, assuming that the plaintiff's claim was for non-payment by the defendant in respect of bunkers supplied to the defendant's vessels, the plaintiff would seek to invoke the court's admiralty jurisdiction *in rem* by relying on s 3(1)(*l*) of the HCAJA ("any claim in respect of goods or materials supplied to a ship for her operation or maintenance"). The defendant, if he wished to challenge the court's jurisdiction, could apply under O 12 r 7 of the ROC, arguing that step (1) of s 4(4) was not satisfied as the plaintiff's claim did not fall within s 3(1)(*l*) of the HCAJA because the bunkers had not been supplied to the vessel as a consumable resource, but had instead been supplied as a tradable commodity, and therefore were not "goods or materials supplied to a ship for her operation or maintenance". If the fact that the bunkers had been supplied as a tradable commodity was not disputed by the plaintiff, the only jurisdictional question for the court was one of law, *viz*, whether the plaintiff's claim (a claim for unpaid bunkers supplied to a ship as a tradable commodity), as pleaded, was within the ambit of s 3(1)(*l*) of the HCAJA. This was a question of the proper characterisation of the plaintiff's claim and the true construction of s 3(1)(*l*), and on the authority of *The Jarguh Sawit*, to succeed, the plaintiff would only have to show a "good arguable case" that his claim, as pleaded, fell within s 3(1)(*l*) of the HCAJA (see *The Golden Petroleum* [1993] 3 SLR(R) 209, where it was held that such a claim did not fall within s 3(1)(*l*) of the HCAJA).

98 If, on the other hand, the plaintiff disputed the defendant's factual assertion (that the bunkers had been supplied as a tradable commodity), then the court was obliged to find, on a balance of probabilities, as a precondition to deciding whether the plaintiff's claim fell within s 3(1)(*l*) of the HCAJA, whether the bunkers had in fact been supplied as a consumable or as a commodity. This fact was simply a condition precedent to jurisdiction under s 3(1)(*l*), *ie*, it was a jurisdictional fact which had to be found at the outset. That fact-finding might be rendered difficult as a result of the preliminary nature or urgency of the action, or the evidence being in affidavit form, did not detract from the task of the court (see [86] above).

Steps (2), (4) and (5) of s 4(4): jurisdictional facts to be proved on a balance of probabilities

99 Unlike step (1) of s 4(4), steps (2), (4) and (5) of s 4(4) were only concerned with jurisdictional facts (and not jurisdictional questions of law): the plaintiff had to show that the relevant person *was* the owner, charterer, beneficial owner *etc* in order for an action *in rem* to be brought in the High Court. It has been repeatedly held that, on a jurisdictional dispute under O 12 r 7 of the ROC, such jurisdictional facts must be proved by the plaintiff on a balance of probabilities.

100 In *The Alexandrea* [2002] 1 SLR(R) 812, the defendant challenged the court's admiralty jurisdiction *in rem* on the ground that the plaintiff's claim did not arise "in connection with a ship", *ie*, that the plaintiff did not satisfy step (2) of s 4(4) of the HCAJA. I stated (at [18]) that the arresting party (*ie*, the plaintiff) had to show on a balance of probabilities that the action was within the jurisdiction *in rem* of the court by proving that the "ship" referred to in step (2) of s 4(4) was the same ship that received the bunkers in a claim falling within s 3(1)(*l*) of the HCAJA (*ie*, that step (2) of s 4(4) was satisfied).

101 In *The Catur Samudra*, one of the grounds on which the defendant challenged the plaintiff's invocation of the court's admiralty jurisdiction *in rem* was that the defendant was not in possession or in control of the vessel (against which the plaintiff was proceeding *in rem*) at the time the cause of action arose, *ie*, that the plaintiff did not satisfy step (4) of s 4(4) of the HCAJA. In dealing with this argument, Steven Chong JC held (at [22] and [23]) that the plaintiff had to satisfy the burden of proving the jurisdictional requirements of s 4(4) (*ie*, step (4) of s 4(4)) on a "balance of probabilities".

102 Again, in *The Andres Bonifacio*, the issue confronting the court, on the defendant's action to set aside the plaintiff's writ *in rem*, was whether the defendant (POCI) was the beneficial owner of the vessel *Andres Bonifacio* on the date the actions were brought, as the defendant contended, or whether its parent company (PNOC) was the beneficial owner of the vessel at that time, as the plaintiff contended. In other words, the question was whether the plaintiff had satisfied *step (5)(a)* of s 4(4) of the HCAJA. The headnote to the case misleadingly states that "[t]he basis of POCI's applications [to set aside the writ] was that it was not liable *in personam* to the plaintiff when the cause of action arose for the purposes of s 4(4) of the [HCAJA]", suggesting that the defendant was arguing that the plaintiff had not satisfied *step (3)* of the HCAJA. That is plainly incorrect, for M Karthigesu J clearly stated (at [13]) that the issue was whether, on a "full investigation of all the facts", it had been shown that, when the action was brought, the vessel was beneficially owned by POCI. Karthigesu J concluded (at [47]) that on "the balance of probabilities", POCI was indeed the beneficial owner of the *Andres Bonifacio* when the action was brought. *The Andres Bonifacio*, therefore, was clear authority for the proposition that a plaintiff had to prove step (5)(a) of s 4(4) of the HCAJA on a balance of probabilities.

103 Similarly, in *In Re Dong My Ong* [1999] SGHC 248, the plaintiffs invoked the court's admiralty jurisdiction *in rem* and arrested the *Sangwon*, which was the alleged sister ship of the wrongdoing vessel, the *Dong Myong*. The defendants applied to set aside the plaintiffs' writ *in rem*, arguing that admiralty jurisdiction *in rem* had been wrongly invoked, because, contrary to the plaintiffs' case, the *Sangwon* and the *Dong Myong* were not in the common beneficial ownership of the State of North Korea. The issue before the court, therefore, was whether the plaintiffs had satisfied *step (5)(b)* of s 4(4) of the HCAJA. In the course of holding that they had, Tay Yong Kwang JC stated (at [7]) that "[i]t was *not sufficient* for the Plaintiffs to show that they had a *good arguable case* that both vessels were beneficially owned by the State at the time this action was brought" [emphasis added]. The clear implication, therefore, was that step (5)(b) of s 4(4) had to be proved on a balance of probabilities. Although Tay JC's decision was reversed on appeal (see *The Sangwon* [1999] 3 SLR(R) 919), this was because the Court of Appeal disagreed on the facts, and not, as far as I could tell, because it took a different view of the law.

104 It was important to understand these cases in their proper context: they decided only that *steps (2), (4) and (5)* of s 4(4) of the HCAJA had to be established on a balance of probabilities, and *not* that *every single step* of s 4(4) had to be so established.

105 The approach adopted by these cases was first articulated by Goff J in *I Congreso del Partido*, where the plaintiff attempted to argue that, for the purposes of satisfying the English forerunner of s 4(4)(*b*)(ii) of the HCAJA (*ie*, step (5)(b) of s 4(4)) in s 3(4) of the Administration of Justice Act 1956 (4 & 5 Eliz 2, c 46) (UK) (the "AJA 1956"), it was only incumbent on it to show a "reasonably arguable case" that the defendant was the owner of the vessel *I Congreso del Partido* at the time the action was brought. For this contention, reliance was placed on *The St Elefterio*, where Willmer J was traditionally understood to have held that the words "the person who would be liable on the claim in an action *in personam*" in s 3(4) of the AJA 1956 (the English equivalent of s 4(4)(*b*) of the HCAJA) did not require the plaintiff to prove his action on a balance of probabilities (see [112]–[116] below).

106 Rejecting this argument, Goff J explained (at 535 and 536) the rationale for requiring the plaintiff to prove the issue of ownership on a balance of probabilities, and drew a clear distinction between two components of s 3(4) of the AJA 1956 (*ie*, between what is now step (3) of s 4(4) of the HCAJA, which was in issue in *The St Elefterio*, and step (5)(b) of s 4(4), which was in issue in *I Congreso del Partido*):

> Jurisdiction in Admiralty actions is statutory, and is defined by the Administration of Justice Act

> 1956. Section 3 of the Act [the English equivalent of s 4 of the HCAJA] lays down the circumstances in which an action in rem may be brought; if the case is not within the section then the court has no jurisdiction in respect of an action in rem, and the writ and all subsequent proceedings should be set aside…
>
> It follows as a matter of principle that any question of jurisdiction, such as the question in the present motions, must be dealt with on the motions and cannot be dealt with as an issue in the actions. Of course, on the hearing of such a motion, evidence will be admitted. Usually that evidence will be in the form of affidavits… On the evidence so admitted… the question of jurisdiction has to be decided…
>
> The cases cited by [counsel for the plaintiff] do not, in my judgment, assist him. In *The St. Elefterio*… Willmer J. pointed out… that the words used [in s 3(4) of the AJA 1956 (the English equivalent of s 4(4)(*b*) of the HCAJA)] were "the person who would be liable," not "the person who is liable," and that they were intended to refer to the person who would be liable on the assumption that the action succeeded. In contrast, the subsection goes on also to require that, for the purposes of an action in rem against a ship, such ship *is* when the action is brought beneficially owned by that person as respects all the shares therein. This shows clearly, in my judgment, that the question of ownership of the res, if in issue, has to be decided on the motion to set aside the writ in an action in rem.

In other words, because jurisdiction had to be conclusively established as a threshold matter, where the court's admiralty jurisdiction *in rem* under s 4(4) of the HCAJA depended on the plaintiff establishing certain factual preconditions (as in steps (4) and (5) but *not* step (3)), such jurisdictional facts would have to be established on the normal civil standard of proof, *ie*, on a balance of probabilities.

107 Goff J's approach in *I Congreso del Partido*, in my respectful view, accorded entirely with principle insofar as proof of jurisdictional facts was concerned, and, to the best of my knowledge, has been universally followed in all Commonwealth jurisdictions which inherited the UK's statutory admiralty regime.

Step (3) of s 4(4): identity of the "relevant person" not a jurisdictional matter

(1) Introduction

108 It has been seen that step (1) of s 4(4) of the HCAJA requires the plaintiff to show a good arguable case on jurisdictional questions of law (*The Jarguh Sawit*) and to prove jurisdictional facts on a balance of probabilities (*Shin Kobe Maru*), while steps (2), (4) and (5) are jurisdictional facts which the plaintiff must prove on a balance of probabilities (*The Alexandrea*; *The Catur Samudra*; *The Andres Bonifacio*; *In Re Dong My Ong* and *I Congreso del Partido*). What of step (3) of s 4(4), *ie*, the identification of the "relevant person"?

109 Step (3) of s 4(4) was the main point of contention between the parties (see [20] above). Although the defendant had all along maintained that step (3) had not been satisfied by the plaintiff, the defendant's position on the standard to which step (3) had to be satisfied was not constant. Before the learned AR, Mr Gurbani had initially contended that the plaintiff had to satisfy step (3) of s 4(4) on "a balance of probabilities", but this argument was decisively rejected by the learned AR, and on appeal, Mr Gurbani did not seek to resuscitate it, being content to agree with Mr Leong's position that step (3) of s 4(4) merely required the standard of a "good arguable case" (see [22] above). However, I was of the opinion that that was not quite accurate either.

110 Step (3) was the most troublesome limb of s 4(4) of the HCAJA because, on the one hand, it appeared to concern a jurisdictional matter (located as it is amongst the other jurisdictional provisions of s 4(4)), but on the other, it appeared also to concern a non-jurisdictional matter, *viz*, the issue of liability, which was normally a matter for trial or an application under O 18 r 19 of the ROC.

111 If step (3) of s 4(4) truly concerned a jurisdictional matter, it then had to be asked whether that took the form of a jurisdictional question of law or a jurisdictional fact (or both). Identifying the "person who would be liable on the claim in an action *in personam*" could rarely be said to be a pure question of law, for, as my decision under O 18 r 19 of the ROC (at [35]–[75] above) demonstrates, it would quite plainly involve the determination of factual controversies, *eg*, whether contracts have been agreed, money has changed hands, services have been rendered *etc*. Could it then be said that the *in personam* liability (or more accurately, the likelihood thereof) of the relevant person was a jurisdictional fact which had to be proved by the plaintiff on a balance of probabilities when the defendant challenged the court's jurisdiction pursuant to O 12 r 7 of the ROC?

(2) *The St Elefterio*

112 To this question a negative answer was clearly given by Willmer J in *The St Elefterio*, the *locus classicus* in this area, where the defendants attempted to set aside the plaintiffs' action *in rem* (and consequent arrest of the defendants' vessel *St Elefterio*) on the ground that the court's admiralty jurisdiction *in rem* had been improperly invoked because, *inter alia*, the defendants had various defences to the plaintiffs' claim, and therefore could not be liable on the claim in an action *in personam* for the purposes of s 3(4) of the AJA 1956 (equivalent to s 4(4) of the HCAJA). Willmer J refused to consider the validity of the defendants' putative defences, holding (at 185–186):

> … *I do not propose to go into the merits [of the defendants' possible defences] now, or to decide whether the defendants are right or whether the plaintiffs are right*. It seems to me, having regard to the view I take of the construction of section 3 (4) of the Act, that this is not the moment to decide whether the defendants are right or whether they are wrong in their submissions on the points of law raised. *If they are right on all or any of these various points advanced, it may well be that in the end they will show a good defence to the action. But that*, in my judgment, *furnishes no good reason for setting these proceedings aside in limine*, and thereby depriving the plaintiffs of the right to have these issues tried.
>
> *It has not been suggested that the proceedings are frivolous or vexatious, so as to call for the exercise of the court's inherent jurisdiction to halt such proceedings in limine*. The defendants' argument is founded on the proposition that section 3 (4) of the Act of 1956 introduces a new restriction on the right to proceed in rem, and that a plaintiff cannot arrest a ship under that subsection unless he can prove - and prove at the outset - that he has a cause of action sustainable in law. In my judgment that proposition rests upon a misconception of the purpose and meaning of section 3 (4). As it appears to me, ***that subsection, so far from being a restrictive provision, is a subsection introduced for the purpose of enlarging the Admiralty jurisdiction of the court*** . As I view it, ***its purpose is to confer, and to confer for the first time in England, the right to arrest either the ship in respect of which the cause of action is alleged to have arisen or any other ship in the same ownership. That is an entirely new right so far as the law of England is concerned… and the reason for conferring that right now is for the purpose of bringing this country into line with other countries as a result of an international convention*** . In my judgment ***the purpose of the words… "the person who would be liable on the claim in an action in personam," is to identify the person or persons whose ship or ships may be arrested in relation to this new right… of arresting a sister ship*** . ***The words used, it will be observed, are "the person who would be liable" not "the***

person who is liable," and it seems to me , ***bearing in mind the purpose of the Act*** , ***that the natural construction of those quite simple words is that they mean the person who would be liable on the assumption that the action succeeds*** . This action might or might not succeed if it were brought in personam; that would depend upon the view which the court ultimately took of the various contentions raised… *But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship St. Elefeterio. In such circumstances, in the absence of any suggestion that the action is a frivolous or vexatious action, I am satisfied that the plaintiffs are entitled to bring it and to have it tried, and that, whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem*.

[emphasis added in italics, bold italics, and bold italics and underlined]

113 In other words, for the purposes of step (3) of s 4(4), it was immaterial whether the relevant person had a good defence to the plaintiff's claim. On Willmer J's approach, the question for the court was, on the assumption that the plaintiff's action, as pleaded, succeeded, against whom would it succeed? That person was the "relevant person". In effect, on Willmer J's approach, the words "the person who would be liable" created a *statutory assumption* of the relevant person's (hypothetical) liability for the purposes of step (3) of s 4(4). To appreciate why this must be so, it is necessary to examine step (3) of s 4(4) in greater detail.

114 As noted by Willmer J in the passage cited in [112] above, what eventually became step (3) of s 4(4) of the HCAJA was first introduced in s 3(4) of the AJA 1956, as part of the reforms designed to extend the availability of an action *in rem* to sister ships, thereby extending the court's admiralty jurisdiction *in rem*. In inserting the idea of "*in personam* liability", s 3(4) of the AJA 1956 (and hence step (3) of s 4(4)) clearly reflected the "procedural theory" that underpinned the AJA 1956. Under the procedural theory, the object of commencing an action *in rem* against the ship was to coerce the defendant shipowner as the person alleged to be liable to appear and defend the action, and meet or refute the liability alleged. Modern day admiralty jurisdiction *in rem*, particularly the new statutory rights of action *in rem* (*ie*, s 3(1)(*d*) to (*q*) of the HCAJA), was therefore predicated upon the relationship between the action *in rem* and the person who would incur liability *in personam* – which liability, however, could only ever be putative until a trial on the merits had been concluded. Hence the deliberate formulation of s 3(4) of the AJA 1956 (and now s 4(4) of the HCAJA), requiring a link between the ship to be proceeded against and the person alleged to be liable. The procedural theory was to be contrasted with the "personification theory", under which the action *in rem* was to be regarded as an action against the wrongdoing ship herself, independently of any liability *in personam* on the part of the owner. I cannot emphasise enough, however, that the reference to the "relevant person" as the "person who would be liable on the claim in an action *in personam*" in s 3(4) of the AJA 1956 (and now step (3) of s 4(4)) merely reflected the *theoretical* ascendancy of the procedural theory over the personification theory, and was never intended to interfere with the *conceptual* division between jurisdiction and merits by introducing a requirement that the court assess the defendant's liability in order to determine whether or not it possessed jurisdiction *in rem*. To do so would, as Willmer J recognised, restrict the court's admiralty jurisdiction *in rem*, when the purpose of the AJA 1956 in general, and s 3(4) in particular, was clearly to expand the availability of the *in rem* jurisdiction. With that purpose firmly in mind, Willmer J refused to accept that the merits of the plaintiff's claim had to be considered before the court's admiralty jurisdiction *in rem* could be invoked, and his Lordship did so by contrasting the words "would be" with "is", and reasoning that the deliberate use of the former meant that the Legislature intended to introduce a statutory assumption regarding the relevant person's (hypothetical) liability (see [113] above), but the same result could have been reached as a matter of logic by having regard to the difference between jurisdictional and non-jurisdictional matters: liability, involving as it did the existence or veracity of non-jurisdictional

facts alleged by the plaintiff (or the application of the law to those facts), was to be assumed or ignored when the court's jurisdiction was being challenged under O 12 r 7 of the ROC (see [32] above).

115 In addition, the construction adopted by Willmer J was broadly consistent with the 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships (Brussels, 10 May 1952) (439 UNTS 193) (the "1952 Arrest Convention"). As Willmer J noted in the passage quoted at [112] above, s 3(4) of the AJA 1956 was enacted to bring England in line with the 1952 Arrest Convention. As Francesco Berlingieri, *Berlingieri on Arrest of Ships* (Informa, 4th ed, 2006) states at para 52.294:

> In the context of the [1952] Arrest Convention "claim" is not used in the sense of an established right… It follows that… ***the court should not determine the merits of the claim or establish whether or not the claim exists*** … All this is made clear by the use, in the definition of *créance maritime*, in the French text of the [1952 Arrest] Convention, of the words "*allegation d'un droit ou d'une créance*": "*allegation d'un droit*" means that ***the claimant must assert that he has a claim, but not prove it*** . Further evidence of this may be found in the definition of claimant, in Article 1(4). " 'Claimant' means a person who alleges that a maritime claim exists in his favour." This definition is perfectly in line with the French definition of *créance maritime*… [emphasis added in bold italics]

In the extra-judicial words of James Allsop J of the Federal Court of Australia, in a paper entitled "Admiralty Jurisdiction – Some Basic Considerations and Some Recent Australian Cases", presented on 18 April 2007 to the University of Newcastle Maritime Interest Group, MLAANZ (NSW & ACT Branches) and University of Canberra (available at <http://www.fedcourt.gov.au/how/admiralty_papersandpublications04.html>), in dealing with the notion of the "relevant person" for the purposes of the Admiralty Act 1988, "[j]urisdiction does not rest upon the assertions being made good, but being made." As such, whether on the express words of the legislation, or as a matter of the logic and purpose underpinning them, it was not necessary or appropriate at the jurisdictional stage to embark upon an inquiry into the merits of the claim.

116 Of course, if the strength of the defendant's defence was plain, to the extent that the plaintiff's claim was bound to fail and therefore frivolous or vexatious, then, as Willmer J recognised, it was always open to the court to strike out the plaintiff's action pursuant to O 18 r 19 of the ROC or its inherent jurisdiction, but in such circumstances, the court would be *exercising* (or perhaps declining to exercise) jurisdiction, rather than being deprived of the *existence* of jurisdiction (see [28] above). The ever-present possibility of striking out the action means that it is sometimes said that the plaintiff only has to show an "arguable case" in making out the identity of the relevant person. For instance, G P Selvam J in *The Opal 3 ex Kuchino* [1992] 2 SLR(R) 231 at [10] stated that "[i]n applying the *in personam* test, all that is needed is an arguable case: see *The Elefterio*…" (see also *The Rainbow Spring (CA)* at [15] and [25]). Although I have, in the past, used such expressions (see my judgment in *The Rainbow Spring* [2003] 2 SLR(R) 117 ("*The Rainbow Spring (HC)*") at [8]), I was now of the respectful view that such statements could be somewhat misleading if they were used in the context of an application under O 12 r 7 to argue that where the plaintiff has no arguable case that the defendant would be liable on the claim in an action *in personam* under step (3) of s 4(4) the defendant would be entitled to set aside the writ *in rem* for lack of jurisdiction, for that would be inconsistent with Willmer J's approach of *assuming* the success of the plaintiff's action as a matter of statutory interpretation. Applying the "arguable case" formulation to step (3) of s 4(4) in an O 12 r 7 application might erroneously lead to a determination of the issue of liability at the jurisdictional stage when jurisdiction was a logically anterior question (see *The Jarguh Sawit* at [90] above). To reiterate, to identify the "relevant person", the court assumes the success of the plaintiff's action as pleaded

and asks who would be liable on it, and this was, in my view, quite different from saying that the plaintiff has to show an "arguable case" when identifying the person who would be liable on the claim in an action *in personam*. This is why I have been keen to emphasise the difference between O 12 r 7 and O 18 r 19 of the ROC in admiralty cases, for the language of "arguable case" was appropriate to the latter and not the former, as Brandon J's judgment in *The Moschanthy* demonstrated. After rejecting, on the authority of *The St Elefterio*, the defendant's attempt to set aside the writ *in rem* on the basis that it was not the "relevant person" (see further [125] below), his Lordship continued (at 42):

> I pass to the second main question raised by the motion, whether the action should be stayed on the ground that it is vexatious...
>
> Counsel for the defendants argued that there were so many difficulties in the plaintiff's case, both in fact and law, that it should be regarded as hopeless, or nearly so.
>
> *It is certainly open to a defendant to apply to the Court at an early stage of an action for a stay on the ground that the action has no chance of success and is therefore vexatious; and the Court certainly has power, in the exercise of its inherent jurisdiction, to grant a stay on that ground. This was recognized by Mr. Justice Willmer in… The St Elefterio….* The Court, however, should only stay an action on that ground when the hopelessness of the plaintiff's claim is beyond doubt. *If* it is not beyond doubt, but, on the contrary, *the plaintiff has an* ***arguable*** *, even though difficult*, ***case in fact and law*** *, the action should be allowed to proceed to trial*.
>
> [emphasis added in italics and bold italics]

(3) Where someone else apart from the defendant "would be liable on the claim in an action *in personam*"

117 As I pointed out in *The Eagle Prestige* (at [64]), there was no question in *The St Elefterio* but that the defendant was indeed the relevant person, *ie*, the defendant there was not suggesting that the plaintiff should have sued *someone else* because that latter person "would be liable on the claim in an action *in personam*". However, there have been cases where the plaintiff's admiralty action was sought to be set aside by the defendant pursuant to O 12 r 7 of the ROC on the ground that the court's admiralty jurisdiction *in rem* had been improperly invoked because some other entity, and not the defendant, was the relevant person. As in the present case, the defendant's argument in such cases was usually that the plaintiff had entered into a contract with another party, to which the defendant was not privy, and consequently, the relevant person (*ie*, the person who would be liable on the plaintiff's claim in an action *in personam*, assuming the action succeeded) was that other party and not the defendant. Put simply, the defendant's argument was that the plaintiff had sued the wrong person, and on this basis, the writs *in rem* in *The Thorlina* [1985-1986] SLR(R) 258, *Uni-France Offshore Engineering Pte Ltd v The Owners of the Ship or Vessel "Interippu"* [1990] SGHC 131 ("*The Interippu*"), *The AA V* [1999] 3 SLR(R) 664 and *The Rainbow Spring (CA)* were set aside for lack of jurisdiction under s 4(4) of the HCAJA.

118 This line of cases (*ie*, *The Thorlina*, *The Interippu*, *The AA V* and *The Rainbow Spring (CA)*) appeared to have had its origin in *Smith's Dock Co Ltd v The St Merriel (Owners) (The St Merriel)* [1963] 1 P 247 ("*The St Merriel*"), where Hewson J, on a motion by the defendant ship-owner to set aside the plaintiff ship-repairer's writ *in rem* for lack of jurisdiction, held (at 255), in *obiter dicta*, that:

> *I find as a fact that there was no contract express or implied between the owners and the*

> *repairers*… [Counsel for the defendant] has submitted throughout that the wrong person was sued in this case and that there was no liability upon the owners… I… hold that… there was no contract between the shipowner and the ship repairer. [emphasis added]

After referring to *The St Elefterio* with apparent approval, his Lordship continued (at 258):

> On the evidence, I am satisfied that there was no contract express or implied between the owners and the repairers. *I am satisfied that there was no liability on the owners when the cause of action arose*. [emphasis added]

As Judith Prakash J noted in *The AA V* (at [36]), these passages in *The St Merriel* were followed in Singapore by the Court of Appeal in *The Thorlina* (at [5]) (without comment as to their being *obiter dicta*). In *The AA V* (at [37]), Prakash J held that *The Thorlina* stood for the proposition that, where there was "clear evidence" before the court that the defendant sued was not liable *in personam* because it was not a party to the contract sued on, the admiralty jurisdiction *in rem* of the court could not be invoked under s 4(4) of the HCAJA (see also Chong's article at p 278). In reaching this conclusion Prakash J also referred to and apparently endorsed (at [38]) *Lok Maheshwari*, although I am constrained to point out that the bases for the two decisions were quite different (a point I revisit at [134]–[135] below): *The AA V* being decided under O 12 r 7 of the ROC, and *Lok Maheshwari* being decided under the court's inherent jurisdiction (approximating to O 18 r 19 of the ROC).

119 Nonetheless, Prakash J's interpretation of *The Thorlina* in *The AA V* was given the imprimatur of the Court of Appeal in *The Rainbow Spring (CA)*, where the Court of Appeal (upholding my decision at first instance in *The Rainbow Spring (HC)*) held (at [21]) that, on the facts, it was "clear" that the defendant had not been a party to the charterparty on which the plaintiff was suing (because it had been entered into between the plaintiff and some other person), and that therefore the defendant was not the "relevant person", causing the plaintiff's writ to be set aside for lack of jurisdiction under s 4(4)(*b*) of the HCAJA.

120 It appeared, therefore, that *The St Merriel*, *The Thorlina*, *The AA V* and *The Rainbow Spring (CA)*, in contrast to the approach adopted by Willmer J in *The St Elefterio*, treated the identification of the "relevant person" as a jurisdictional fact, and were prepared to find, on the defendant's application under O 12 r 7 of the ROC, that the defendant was not the relevant person if there was "clear evidence" that the defendant was not a party to the contract being sued upon by the plaintiff, and hence "would not be liable on the claim in an action *in personam*".

121 Although I did not have the occasion to comment upon this in *The Rainbow Spring (HC)*, this line of cases could be said to give rise to some difficulty.

122 First, in *The St Elefterio*, the actual *in personam* liability of the defendant was presumed for the purpose of deciding whether it was the relevant person, while the above cases declined to do so. The only difference was that, in the line of cases above, the defendant's *in personam* liability was being denied on the basis that it was the wrong party to be sued, rather than on the basis of a substantive defence. However, it could be said with some force (as it was by the learned AR at [37] of his grounds of decision, and in *Iran Amanat* at 139 (see [131] below)), that, as a matter of principle, a defendant's assertion that he was not the right party to be sued was just as much a defence as any other substantive defence on the merits, *eg*, that the plaintiff's claim was time-barred, that an exclusion clause operated in the defendant's favour *etc*. This was particularly so where the defendant's defence on the merits took the form of doctrines, such as common mistake or illegality, which had the effect of voiding a contract *ab initio*: such a defence, if well-founded, would mean a complete lack of a contractual relationship between plaintiff and defendant – the very same

effect achieved by the defendant's assertion that he was the wrong party sued because he was not a party to the contract with the plaintiff. Yet in the one case the defendant's *in personam* liability would be presumed in deciding if he was the "relevant person" (see, in relation to a defence of illegality, *Sin Hua Enterprise Co Ltd v The Owners of the Motor Ship "Harima"* [1987] HKLR 770 at 776), while in the other it would not.

123 A related problem was the standard of proof required to convince the court that some other party, and not the defendant, was the "relevant person", with the consequence that s 4(4) of the HCAJA was not satisfied and admiralty jurisdiction *in rem* improperly invoked. In *The AA V* (at [32]), Prakash J referred to Willmer J's construction of the words "the person who would be liable on the claim in an action *in personam*" in *The St Elefterio* as the "would be" test, and contrasted this with the "is" test, which Prakash J considered to have been applied in *The St Merriel* (see the passages quoted in [118] above) and *The Thorlina* (I should add that it was also applied in *The Interippu*). Subsequent Court of Appeal cases have not shed much light on the matter: although the Court of Appeal in *The Rainbow Spring (CA)* (at [13] and [25]) appeared to apply the "would be" test, the actual decision at [22] and [28] could arguably have been based on the "is" test. The difference between the two, it has been said (see *Admiralty Law and Practice* at p 109), in terms of the standard of proof, was that the "is" test connoted a finding of the relevant person's personal liability on a balance of probabilities, whereas the "would" test merely required the plaintiff to show an arguable case thereof (although, as I said at [116] above, in my view, this particular formulation was apt to mislead). The "is" test was problematic because the court would, at the jurisdictional stage, essentially be giving judgment for the plaintiff, thereby rendering a trial on the merits completely unnecessary (see Chong's article at pp 275–276). In addition, assuming that the "is" test applied, a disparity would be created between an application under O 12 r 7 and O 18 r 19 of the ROC. In the face of a defendant's application pursuant to O 12 r 7 to set aside the writ *in rem* for lack of jurisdiction under s 4(4)(*b*) of the HCAJA, the plaintiff would have to prove, on a balance of probabilities, that the defendant "was" liable on the claim in an action *in personam*. It would not be enough for the plaintiff merely to show an arguable case in relation to the defendant's personal liability. However, to avoid having the action struck out pursuant to O 18 r 19, it would be enough for the plaintiff to oppose the defendant's application by showing an arguable case as to that liability (see *The Eagle Prestige* at [57]), even if the facts on which the plaintiff was relying were exactly the same as those which failed under O 12 r 7. It seemed distinctly odd that the law required more of a plaintiff on a challenge to jurisdiction (*ie*, a balance of probabilities) than on an application to strike out.

124 Apart from these problems of principle, the line of cases represented by *The Thorlina, The Interippu*, *The AA V* and *The Rainbow Spring (CA)* also appeared to be at variance with other Commonwealth and local authorities dealing with this question (*viz*, the approach to be adopted in cases where the defendant's defence was that someone else was the "relevant person").

125 In *The Moschanthy*, one of the arguments by the defendant was that it was not a party to the contract on which the plaintiff was suing, *ie*, that some other entity was the "relevant person" under s 3(4) of the AJA 1956 (the English equivalent of s 4(4) of the HCAJA). Brandon J did not find it necessary to express any view on the defendant's *in personam* liability, but followed *The St Elefterio* and held (at 42) that:

> That question [whether the Court had jurisdiction to entertain the plaintiff's claim *in rem*] must, in my view, 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. That further point may be relevant… to the second main question raised by the motion, namely, whether the action should be stayed on the ground that it is vexatious. It does not, however, go to jurisdiction as

such. In this matter I respectfully follow the approach adopted by Mr Justice Willmer in *The St Elefterio*…

126 The same sort of argument (*ie*, that the plaintiff had contracted with some other entity, and was therefore not in a contractual relationship with the defendant, and as a result some entity other than the defendant was the "relevant person") was deployed by the defendant in an attempt to set aside the plaintiff's writ *in rem* in *The Wigwam (HC)*, but was rejected by F A Chua J, who endorsed *The St Elefterio* (at [11] and [12]), and noted (at [13]) that, as in *The St Elefterio*, the defendant in *The Wigwam (HC)* had not suggested that the proceedings were frivolous or vexatious so as to call for the exercise of the court's inherent jurisdiction to strike out the proceedings. On appeal (*The Wigwam; The Owners of the ship or vessel "Wigwam" v Inter Maritime shipping (Pte) Ltd* [1984] SGCA 24 ("*The Wigwam (CA)*"), the Court of Appeal (at [7]) agreed with Chua J and expressly approved of Willmer J's approach in *The St Elefterio*.

127 Similarly, in *Lim Bok Lai v Selco (Singapore) Pte Ltd* [1987] SLR(R) 466 ("*Lim Bok Lai*"), the plaintiff, like the plaintiff in the present case, was a bunker supplier suing to recover amounts outstanding in respect of bunkers it had supplied. As in the present case, admiralty writs *in rem* had been issued but no vessels had been arrested. The defendants attempted to argue (at [14]) that they were not the persons liable *in personam* to the plaintiff, as the vessels which had been supplied bunkers had been bareboat chartered to some other party (*ie*, that that party, and not the defendant, was the "relevant person"). However, this was rejected by Lai Kew Chai J (at [15]), who endorsed *The St Elefterio* and held that "at this threshold stage the defendants are not entitled to shut [the plaintiff] out of his claims against the defendants".

128 The Court of Appeal's decision in *"Avro International" (Owners) v Arabian Marine Bunkers Sales Co Ltd and another* [1987] SLR(R) 610 ("*Avro International*") also provided some assistance, albeit only in terms of *obiter dicta* as the Court of Appeal was concerned with a different question, *viz*, whether a defendant could apply to set aside the action for want of jurisdiction after an unconditional appearance had been entered. Nonetheless, the fact pattern was familiar: the respondents, as plaintiffs, had instituted actions *in rem* for unpaid bunkers against the appellant ship-owners (as defendants), who, five months after entering an unconditional appearance, eventually sought to "strike out" (*ie*, set aside (see [23]–[32] above)) the actions on the ground that another party, *viz*, the bareboat charterer at the time the bunkers had been supplied, was the party liable on the claim in an action *in personam* under s 4(4) of the HCAJA. In the course of deciding that the appellants had, by entering an unconditional appearance, waived any objections to jurisdiction, the Court of Appeal stated (at [12]):

> Learned counsel for the appellants in these appeals submitted that… the appellants were not "the person who would be liable on the claim in an action *in personam*" within the meaning of [s 4(4) of the HCAJA]. *This submission begs the very question whether the appellants were such a party, a question* which the appellants had assumed as proved but *which could only be resolved in a trial. On the face of the claims as asserted, the respondents had in our view, brought their claims within the admiralty jurisdiction of the High Court*. [emphasis added]

129 In *Kingstar Shipping Ltd v Owners of the Ship "Rolita"* [1989] 1 HKLR 394 ("*The Rolita*"), the Hong Kong Court of Appeal rejected (at 397 and 398) the defendant's attempt, in an action to set aside the plaintiff's writ *in rem*, to restrict the approach in *The St Elefterio* to allegations of breach and damages (*ie*, substantive defences), as opposed to the very existence of the cause of action itself.

130 Again, in *The Yuta Bondarovskaya* [1998] 2 Lloyd's Rep 357, as in the present case, the

plaintiffs were bunker suppliers claiming for money due under a contract for the supply of bunkers to the vessel *Yuta Bondarovskaya*. At the time the bunkers were supplied, the vessel had been demise chartered to the defendants, who had in turn time chartered it to another party ("EMEL"). The plaintiffs commenced an action *in rem* against the defendants, on the basis that the defendants were liable to pay for the bunkers bought by EMEL, as EMEL had allegedly contracted as the defendants' agent. The defendants applied to set aside the plaintiffs' writ *in rem* on the basis that the court's admiralty jurisdiction *in rem* had been wrongly invoked, as they (the defendants) were not in an agency relationship with EMEL, and therefore not contractually liable to the plaintiffs. Consequently, the defendants argued that they were not "the person who would be liable on the claim in an action *in personam*", *ie*, they were the wrong person to sue. Clarke J expressed full agreement with the judgments of Willmer J in *The St Elefterio* and Brandon J in *The Moschanthy*, and said (at 361):

> [Counsel for the defendants] suggests that in *The St. Elefterio* and *The Moschanthy* the Courts were considering defences on the merits and not defences which went to the jurisdiction. However, *I am unable to accept that submission. It appears to me that in both cases the Court was considering the very question which I have to consider, namely, what is the correct approach to the identity of "the person who would be liable in personam" within the meaning of the statute?* [emphasis added]

131 Likewise, in *Iran Amanat*, the plaintiff was a company in the business of supplying bunkers, and it commenced a sister ship action *in rem* against the defendant's vessel *Iran Amanat*, in respect of bunkers supplied to the defendant's vessels *Iran Chamran* and *Iran Adl*, for which the plaintiff was evidently not fully paid. On the defendant's application to set aside the writ for lack of jurisdiction, Tamberlin J at first instance found that, at the time of the supply of the bunkers, the *Iran Chamran* and *Iran Adl* were on time charter, and that the terms of the charter obliged the charterer to pay for all fuel, and that the defendant conferred no authority on the charterer to contract with the plaintiff on its behalf (*ie*, as with *The Yuta Bondarovskaya* and the present case, the defendant's argument appeared to be that it was not the "relevant person" because some other party (the charterer in those cases and MAL in the present case) was). Consequently, Tamberlin J held that the defendant was not the "relevant person" for the purposes of ss 3 and 19 of the Admiralty Act 1988 (the Australian equivalent of s 4(4) of the HCAJA), and set aside the writ. The Full Court of the Federal Court of Australia concluded that Tamberlin J had erred in his approach to the question of jurisdiction, because he treated the definition of "relevant person" ("a person who would be liable on the claim in a proceeding commenced as an action in personam") as though the words "would be liable" meant "is liable", thereby deciding the ultimate issue in the case, *ie*, whether the defendant was liable to pay for the fuel supplied to the two sister ships of the arrested vessel. On appeal to the High Court of Australia, the High Court agreed, holding (at 138):

> In some of the reported cases, the court has been dealing with two motions: one, a challenge to jurisdiction; the other, a claim to strike out proceedings on the ground that they were frivolous or vexatious. However, *no motion of the second kind being before Tamberlin J, he was concerned only with the question of jurisdiction, a question which, in relation to whether the appellants were relevant persons, turned upon the nature of the claim, not its strength*. [emphasis added]

The High Court (at 139) also roundly rejected the suggestion that the question of whether someone else (apart from the defendant) was the "relevant person" ought to be treated differently from any other question of the defendant's *in personam* liability:

> It is not apparent why a dispute as to whether the [defendant] were parties to the contracts for the supply of fuel, involving questions of actual or apparent authority, and evidence as to the conduct of those who arranged the supplies, is in a different category from a dispute… as to

whether any fuel was in fact supplied, or any other dispute concerning the alleged liability of the [defendant] to pay for the fuel.

132 The common approach in cases such as *The Moschanthy*, *The Wigwam (HC)*, *The Wigwam (CA)*, *Lim Bok Lai*, *Avro International*, *The Rolita*, *The Yuta Bondarovskaya* and *Iran Amanat*, therefore, was to take the reasoning of Willmer J in *The St Elefterio* to its logical conclusion: for the purposes of identifying the "relevant person" in s 4(4) of the HCAJA (or its English and Australian equivalents), it was assumed that the plaintiff's action would succeed *as against the defendant*, regardless of the defendant's possible defences, even if the defence amounted to an assertion that someone else ought to have been sued. Such matters were questions of liability involving non-jurisdictional matters of fact and law to be dealt with at trial, or by the defendant taking out a separate application pursuant to O 18 r 19 of the ROC to strike out the plaintiff's action. In other words, these cases treated any challenge based on step (3) of s 4(4) (including an allegation that the defendant was not a party to the relevant contract being sued upon by the plaintiff) as not amounting to a challenge to jurisdiction at all, but purely a matter of the defendant's liability. Indeed, this emerged clearly from *The Moschanthy*, where Brandon J held that such an argument "does not… go to jurisdiction as such" (see [125] above), and from *The Andres Bonifacio*, where, it will be remembered, the issue was as to step (5)(a) of s 4(4), which Karthigesu J held had to be proved on the balance of probabilities (see [102] above). Counsel had attempted to argue that based on, *inter alia*, *The St Elefterio*, *Lim Bok Lai* and *The Wigwam (HC)*, step (5)(a) of s 4(4) did not need to be proved on a balance of probabilities, but this submission was swiftly rejected by Karthigesu J (at [15]) in the following terms:

> I do not agree. These cases are not in point. *They did not deal with jurisdiction*… [emphasis added]

133 As a matter of principle, the unqualified approach to step (3) of s 4(4) represented by *The St Elefterio*, *The Moschanthy*, *The Wigwam (HC)*, *The Wigwam (CA)*, *Lim Bok Lai*, *Avro International*, *The Rolita*, *The Yuta Bondarovskaya* and *Iran Amanat* had, in my respectful view, much to commend it. The court would simply assume the truth of the plaintiff's non-jurisdictional facts, and the success of the plaintiff's action, as pleaded, and ask who would be liable in an action *in personam* on such an assumption. If the defendant wanted to challenge that assumption and dispose of the plaintiff's action summarily, whether because he had an ironclad substantive defence on the merits or because it was overwhelmingly clear on the evidence that some other party was the correct defendant, the proper course of action was for him to take out an application under O 18 r 19 and *not* O 12 r 7 of the ROC (see *The Eagle Prestige* at [60]). In doing so he would be contesting, not the *existence* of the court's admiralty jurisdiction *in rem* (because, on the construction placed on s 4(4)(*b*) of the HCAJA by Willmer J in *The St Elefterio*, the court would indeed have such jurisdiction) but rather, the *exercise* of that jurisdiction, by placing in issue the sustainability of the plaintiff's claim. Even if, for some reason, the defendant applied pursuant to O 12 r 7 rather than O 18 r 19 of the ROC, the court was not bound by the defendant's procedural choice; it could exercise its inherent jurisdiction to strike out the plaintiff's action, for the court would not allow its process to be abused by permitting the bringing of actions which were plainly lacking in *bona fides* or merit.

134 I found clear support for this approach in the unreported decision of *Lok Maheshwari*, where Choo Han Teck JC struck out the plaintiff's action (pursuant to the court's inherent jurisdiction) because there was no evidence of a contract between the plaintiff and defendant, and the plaintiff's action (based on such a contract) was therefore misconceived and unsustainable. Choo JC was not hampered by the fact that the defendant's application was made on the erroneous ground that the court had no jurisdiction over the defendant because the plaintiff's case did not fall within s 4(4) of the HCAJA; instead, he stated (at [19]):

> Counsel for the Defendants did not submit that the Plaintiffs' claim was frivolous or vexatious, but that is not fatal to their application to strike out if, on the affidavit evidence before the court, it is plain that the action is unsustainable on the ground that it is frivolous. The court is entitled to strike out the writ.

135 In *Lok Maheshwari*, Choo JC (at [11]) expressed his complete agreement with Chua J's endorsement, in *The Wigwam (HC)*, of the approach to step (3) of s 4(4) taken by Willmer J in *The St Elefterio*, but (at [12]) Choo JC did not accept that this construction would necessarily lead to the indiscriminate invocation of admiralty jurisdiction *in rem*, because such an abuse of process could always be controlled via *O* 18 r 19 of the ROC or the court's inherent jurisdiction:

> However, the judgment of Willmer J does not invariably open a door which cannot be shut until the matter has been ventilated in full at trial. Although the courts will not deny access to any party who is able to formulate a cause of action against a party identified as the person who would be liable in personam on that cause of action (whether the party suing succeeds or not is a matter for the trial judge), nonetheless, *if it is clear that the evidence relied upon by the Plaintiffs is obviously tenuous the courts will strike out the action. In other words, if the action appears to the court to be frivolous then it would not be permitted to proceed*. [emphasis added]

This was perfectly in accordance with my own decision, in this case, to strike out the present action under O 18 r 19 of the ROC.

136 Similarly, in *The Yuta Bondarovskaya*, after refusing to accept the defendants' challenge to jurisdiction on the basis that it was not the "relevant person", Clarke J nonetheless recognised that, on the approach taken in *The St Elefterio* and *The Moschanthy*, that was not the end of the matter, for it was still possible that the plaintiff's claim was so utterly hopeless on the merits that it ought to be struck out (at 359):

> It appears to me that on Mr. Justice Brandon's approach [in *The Moschanthy*], in order to be allowed to proceed the plaintiff's case must be arguable because otherwise it would be bound to fail, in which event it would be oppressive or vexatious to allow it to proceed.

Indeed, much like my decision under O 18 r 19 of the ROC in this case, Clarke J concluded (at 365):

> … I have reached the conclusion that it is *not arguable* that EMEL had [the defendant's] authority to make bunker contracts on its behalf, whether implied actual authority, apparent or ostensible authority, or any other kind of authority. *The plaintiff's claim was bound to fail* and the vessel should be released from arrest. [emphasis added]

As I have already observed (see [116] above), it is in this context of striking out under O 18 r 19 of the ROC (or the court's inherent jurisdiction) that the language of an "arguable case" of liability is appropriate.

137 What then of *The St Merriel*, *The Thorlina*, *The Interippu*, *The AA V* and *The Rainbow Spring (CA)*? I was in the rather invidious position of having to choose between the approach adopted by those cases, or that adopted by the Court of Appeal in *The Wigwam (CA)* and hinted at in *Avro International*. Notwithstanding the fact that I followed *The AA V* in *The Rainbow Spring (HC)* (at [10]) and that I was content to endorse the other cases in *The Eagle Prestige* (at [64]), I now considered that the better approach, consistent with both principle and international authority, was that represented by *The Wigwam (CA)*, and that the plaintiff's writ could not be set aside under O 12 r 7

of the ROC simply because it had been shown that the defendant was not in a contractual relationship with the plaintiff, and therefore was not the "relevant person". In preferring the unqualified approach adopted by *The St Elefterio* and approved of in *The Wigwam (CA)*, I was mindful of the words of the High Court of Australia in *Iran Amanat* (at 138):

> The Australian legislation having been enacted against the background of English legislation [*ie*, the AJA 1956] and authority [*ie*, *The St Elefterio* and *The Moschanthy*]…, the definition of "relevant person" should be understood as having the same meaning as the courts had given to the corresponding words in the English statute. When the Parliament has enacted legislation, affecting the subject of international shipping, and followed a statutory precedent from overseas which has by then received a settled construction, there is every reason to construe the statutory language in the same way in this country unless such construction is unreasonable or inapplicable to Australian circumstances.

Like the Australian Admiralty Act 1988, our HCAJA originated from and was based on the AJA 1956, and indeed was designed to bring Singapore's admiralty law into line with the AJA 1956 (see *The Trade Fair* [1994] 3 SLR(R) 641 at [13]). Given this, there was every reason to regard the construction of step (3) of s 4(4) as settled by *The St Elefterio* and *The Moschanthy*, especially when they had been endorsed by the Court of Appeal in *The Wigwam (CA)*.

138 I hasten to add, however, that I am not at all suggesting that *The St Merriel*, *The Thorlina*, *The Interippu*, *The AA V* or *The Rainbow Spring (CA)* were wrongly decided; on the facts, the refusal to permit the actions in those cases to proceed to trial was correct, but instead of setting aside the writs under O 12 r 7 of the ROC (or, in the case of *The St Merriel*, its English equivalent), the courts in those cases should have struck out the actions pursuant to their inherent jurisdiction, as was recognised by Brandon J in *The Moschanthy*, Clarke J in *The Yuta Bondarovskaya* and Chua J in *The Wigwam (HC)*, and as was done by Choo JC in *Lok Maheshwari*.

(4) Conclusion on step (3) of s 4(4)

139 To reiterate, any challenge by the defendant to the identity of the "relevant person" (*ie*, step (3) of s 4(4)) was not a jurisdictional matter (*ie*, it was not to be dealt with at the jurisdictional stage under O 12 r 7 of the ROC), but was properly a dispute pertaining to the defendant's liability on the merits of the claim, and was therefore to be dealt with at trial or, if the plaintiff's case was hopeless, under O 18 r 19 of the ROC (or the court's inherent jurisdiction), and *only* in the last-mentioned case would it be appropriate to investigate whether the plaintiff had an "arguable case".

Conclusion on the requirements of s 4(4) of the HCAJA

140 In summary, although the cases were in some confusion, a number of principles were eventually discernible:

(a) When a defendant applied pursuant to O 12 r 7 of the ROC to challenge the plaintiff's invocation of the court's admiralty jurisdiction *in rem*, the plaintiff had the onus of establishing jurisdiction (*The Aventicum*, *The Andres Bonifacio*, *The Temasek Eagle*, *Vostok Shipping* and *The Catur Samudra*) (see [80] above).

(b) Where the court's jurisdiction *in rem* depended on the establishment of a factual precondition or state of affairs, the plaintiff had to establish such jurisdictional facts on a balance of probabilities (*Shin Kobe Maru*, *Baltic Shipping*, *Vostok Shipping*, *The Alexandrea*, *The Catur Samudra*, *The Andres Bonifacio*, *In Re Dong My Ong* and *I Congreso del Partido*) (see [83],

[99]–[106] above).

(c) Where the court's jurisdiction *in rem* depended on the proper characterisation of the plaintiff's claim and/or construction of the words in the relevant statutory provision, the plaintiff only had to show a good arguable case that his claim was of the type or nature required by the relevant statutory provision (*The Jarguh Sawit*) (see [95] above).

(d) At the jurisdictional stage under O 12 r 7 of the ROC, the strength of the plaintiff's claim on the merits, *ie*, the accuracy or validity of any non-jurisdictional matters of fact or law (such as the defendant's possible defences to the claim), was not relevant to jurisdiction, but was a matter for trial or an application for striking out under O 18 r 19 of the ROC or the court's inherent jurisdiction, and this was so even where the defendant's defence was that some other person would be liable on the plaintiff's claim in an action *in personam* (*The St Elefterio*, *The Moschanthy*, *The Wigwam (HC)*, *The Wigwam (CA)*, *Lim Bok Lai*, *The Rolita*, *The Yuta Bondarovskaya*, *Lok Maheshwari* and *Iran Amanat*) (see [139] above).

I have dwelt on these matters at some length, as I was of the opinion that they were vital to correctly appreciating the true position when the defendant challenges the court's admiralty jurisdiction *in rem* under O 12 r 7 of the ROC, and also in order to understand the purport of some of the Court of Appeal's comments in *The Vasiliy Golovnin (CA)*.

The Court of Appeal's comments in The Vasiliy Golovnin (CA)

Introduction

141 In explaining his decision under O 12 r 7 of the ROC, the learned AR interpreted certain paragraphs of *The Vasiliy Golovnin (CA)* as establishing that, *independently* of the provisions of the HCAJA, there was a *separate* requirement of merits that a plaintiff had to satisfy in order to invoke the admiralty jurisdiction *in rem* of the court. On appeal, both parties submitted that the learned AR had erred on this point. The plaintiff contended that those paragraphs of *The Vasiliy Golovnin (CA)* were concerned with striking out under O 18 r 19 of the ROC and not jurisdictional disputes, while the defendant submitted that those paragraphs explained a merits requirement that was implicit in (and not independent of) the HCAJA.

142 It follows from all I have said that I did not agree with and hence rejected the defendant's argument that there was a merits requirement within the HCAJA with which the plaintiff had to comply before he could invoke the court's admiralty jurisdiction *in rem*.

Decision

143 I also did not agree with the learned AR's views of *The Vasiliy Golovnin (CA)*, and it is necessary to set out in some detail what those were. At [40] and [41] of his grounds of decision, the learned AR stated:

> 40 In *The Vasiliy Golovnin*, V K Rajah JA on behalf of the Court of Appeal stated the following (at [50]):
>
> > Satisfying the requirements of s 3(1) of the HCAJA cannot be said to be the end all and be all when assessing the sustainability of an admiralty action. Invoking the admiralty jurisdiction may be in one sense a procedural step but *it also plainly attracts substantive considerations*. There are two requirements that claimants in every admiralty action must satisfy: *first, the*

in rem *jurisdiction must be established, through*, inter alia*, ss 3 and 4 of the HCAJA. Second, the claim must, if challenged, also meet the requirement of being a good arguable case on the merits*.

[emphasis added]

41 The above pronouncement by the Court of Appeal clearly indicates that there is *a separate* requirement of merits that a claimant in an admiralty action has to satisfy in addition to the requirements under ss 3(1) and 4(4) of the Act.

[emphasis in original]

144 It was not quite apparent to me that V K Rajah JA's comments at [50] of *The Vasiliy Golovnin (CA)* "clearly" indicated that there was a separate requirement of merits outside of the HCAJA. Rather, it seemed to me that, in that passage, Rajah JA was underscoring the importance of O 18 r 19 of the ROC in controlling unmeritorious admiralty actions. First, Rajah JA stated that satisfying s 3(1) of the HCAJA was not exhaustive as to the sustainability of an admiralty action, which was plainly true: simply because a plaintiff could invoke the court's admiralty jurisdiction *in rem* under the HCAJA did not mean that the claim would eventually succeed at trial, or that it could not be struck out under O 18 r 19 of the ROC. Next, Rajah JA commented that an admiralty plaintiff had to satisfy two requirements: establishing jurisdiction *in rem* via ss 3 and 4 of the HCAJA, and the claim, if challenged, had to meet the requirement of being a good arguable case on the merits. It was true that the words "if challenged" could mean "if challenged at the jurisdictional stage", *ie*, under O 12 r 7 of the ROC, and if so this would have been at odds with the received wisdom of *The St Elefterio*, which established that, at the jurisdictional stage, the plaintiff's action was assumed to be successful, without regard to its strength. However, as I explained in *The Eagle Prestige* (at [58]), given that the Court of Appeal in *The Vasiliy Golovnin (CA)* endorsed (at [49]) passages from *Admiralty Law and Practice* which summarised the legal principles from *The St Elefterio*, and that the Court of Appeal clearly did not regard itself as departing from *The St Elefterio* (which has been followed and applied locally without question, including by the Court of Appeal itself in *The Wigwam (CA)*), it was far more likely that the words "if challenged" in [50] of *The Vasiliy Golovnin (CA)* meant "if challenged at an early stage of the action", *ie*, under O 18 r 19 of the ROC, for it was then entirely unexceptionable that the plaintiff would need to have an arguable case to avoid having his action struck out as being plainly and obviously unsustainable, frivolous and vexatious, or an abuse of process.

145 At [52] of *The Vasiliy Golovnin (CA)*, Rajah JA elaborated:

> The standard to be applied in Singapore at this early stage of the matter, if there is a challenge on the merits, is indeed the "good arguable case" yardstick (see also Karthigesu J's observations in *The Jarguh Sawit (CA)*, at [47] above). The plaintiff does not have to establish at this stage that he has a cause of action that might probably prevail in the final analysis. Karthigesu J had rightly pointed out in *The Jarguh Sawit (CA)* that the plaintiff need only show that he has a "good arguable case" that his cause of action falls within one of the categories provided for in s 3(1) of the HCAJA. The party invoking the arrest procedure must be prepared, when challenged, to justify that it was entitled right from the outset to invoke this remedy.

One possible interpretation of the first sentence was that Rajah JA viewed *The Jarguh Sawit* as authority for the proposition that an admiralty plaintiff was required to show a good arguable case on the merits in order to invoke jurisdiction *in rem*. However, in the penultimate sentence of the above passage, it was noted that *The Jarguh Sawit* pointed out that the plaintiff only had to show a "good

arguable case" that his cause of action fell within one of the limbs of s 3(1) of the HCAJA. As I have endeavoured to show (see [89]–[95] above), the best interpretation of this aspect of *The Jarguh Sawit* was that, at the jurisdictional stage, a plaintiff had to show a good arguable case that his claim, properly characterised, was of the nature required by the relevant limb of s 3(1), and determination of non-jurisdictional facts or the application of the law to those facts (*ie*, the merits of the plaintiff's claim) was to be deferred till the trial or dealt with under O 18 r 19 of the ROC, as jurisdiction was separate from, and prior to, the merits (see [90] above). Further, that *The Jarguh Sawit* had nothing to say about the merits of an admiralty plaintiff's claim appeared to have been accepted at [47] of *The Vasiliy Golovnin (CA)*, for *The Jarguh Sawit* received approval for the "trite" proposition that (see also *The Indriani* at [17]):

> … the issue of whether or not the jurisdictional requirements of s 3(1) of the HCAJA are satisfied is a procedural rather than a substantive one dealing with the merits of the claim.

It would be surprising if, having accepted that, the Court of Appeal in *The Vasiliy Golovnin (CA)* then considered that *The Jarguh Sawit* had something to say about the merits of an admiralty plaintiff's claim (for jurisdictional purposes) *outside* of the HCAJA, as the learned AR appeared to have thought. Therefore, notwithstanding the citation of *The Jarguh Sawit*, it seemed to me that [52] of *The Vasiliy Golovnin (CA)* was consistent with the idea that, to avoid the action being struck out as plainly and obviously unsustainable (and therefore frivolous and vexatious) or lacking in *bona fides* (and therefore an abuse of process) at an early stage under O 18 r 19 of the ROC or the court's inherent jurisdiction, the plaintiff had to be prepared to show that his claim, on the merits, was arguable (see [47] and [57] of *The Eagle Prestige*).

146 Assuming *arguendo*, however, that the learned AR's reading of *The Vasiliy Golovnin (CA)* was correct, and there was indeed a freestanding requirement (outside of the provisions of the HCAJA) that an admiralty plaintiff show a "good arguable case" as to the merits of his claim in order to invoke the court's admiralty jurisdiction *in rem*, from whence did such a requirement spring?

147 The learned AR was particularly persuaded by [51] of *The Vasiliy Golovnin (CA)*, and his reasoning (at [44] and [45] of his grounds of decision) was as follows:

> 44 … This view [that there was an independent jurisdictional requirement for the plaintiff to show a "good arguable case" on the merits] is further supported by Rajah JA's comment which immediately follows that paragraph [*ie*, [50] of *The Vasiliy Golovnin*], on specifically an arrest of a vessel (at [51]):
>
> > The arrest of a vessel is never a trifling matter. Arrest is a very powerful invasive remedy. An arrest of a ship can lead to tremendous inconvenience, financial distress and severe commercial embarrassment… Even the briefest of delays can sometimes cause significant losses. It can also in certain instances prejudice the livelihood of the ship's crew and the commercial fortunes of the shipowner. Maritime arrests can, when improperly executed, sometimes be as destructive as Anton Piller orders and even as potentially ruinous as Mareva injunctions, the two nuclear weapons of civil litigation. As such, a plaintiff must always remain cautious and rigorously ascertain the material facts before applying for a warrant of arrest. *While there is no need to establish a conclusive case at the outset, there is certainly a need to establish* a good arguable case, *before an arrest warrant can be issued. This determination plainly requires a preliminary assessment of the merits of the claim*. [emphasis added]
>
> 45 It therefore appears clear from the Court of Appeal's pronouncements that some preliminary

assessment of the merits of the case is required even at the jurisdictional stage, and that the standard to which such merits are to be established is that of a good arguable case. Rajah JA's reference to Mareva injunctions and Anton Piller orders is instructive. For both types of orders, an applicant is required to establish a certain degree of merits to his case before he can obtain the relief, even though the proceedings are only at an interlocutory stage. A good arguable case on the merits must be shown in order to obtain a Mareva injunction (see *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1991] 2 SLR(R) 713), whereas an Anton Piller order will only be granted if the applicant satisfies the court of an extremely strong *prima facie* case on the merits (see *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901). The imposition of such stringent conditions to show merits in the claim, at a usually early stage of the proceedings, is justified based on the draconian nature of the remedy. Since the arrest of a vessel is, as the Court of Appeal pointed out in *The Vasiliy Golovnin*, also a very powerful and invasive remedy, it can be said that there ought likewise to be some test of merits which must be satisfied. In this regard, a parallel can also be drawn where the court is asked to exercise its "long-arm" jurisdiction by permitting service of its process overseas. It is well established that a claimant who wishes to effect service out of jurisdiction requires leave of court under O 11, which would only be granted if the claimant can satisfy the court, *on the merits*, that there is a serious issue to be tried: *Seaconsar Far East Ltd. V Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438; *Goodwill Enterprise (Malaysia) v CT Nominees (in liquidation)* [1996] 2 SLR 404.

[emphasis in original]

148 I was of the view that, with respect, there had been an undue focus by the learned AR on the issue of the arrest of a vessel. It was well-established that admiralty jurisdiction *in rem* could be invoked by simply serving the writ *in rem* on the vessel, without any arrest warrant being issued or arrest taking place (as in this very case). If *The Vasiliy Golovnin (CA)* truly introduced a new jurisdictional merits test, independent of the provisions of the HCAJA, into Singapore's admiralty law, it must obviously have done so regardless of whether the exercise of admiralty jurisdiction *in rem* was accompanied by an arrest, for it would make little sense for the test of jurisdiction to differ depending on the exact manner in which the plaintiff chose to invoke it.

149 The essential question remained, however, whether *The Vasiliy Golovnin (CA)* was to be understood as having introduced such a test, and I considered that the answer to that question had to be in the negative for a number of reasons.

150 Primarily, as a matter of principle, the analogy between the arrest of a vessel and Mareva injunctions or Anton Piller orders was, with respect to the learned AR, doubly inaccurate. First, as I have explained (see [148] above), any analogy to be drawn had to be between such ancillary relief and admiralty jurisdiction *per se*, and not merely the arrest of a vessel. Second, the real question was not whether the invocation of admiralty jurisdiction *in rem* had consequences comparable to that of Mareva injunctions and Anton Piller orders, but whether the court's admiralty jurisdiction *in rem* and its jurisdiction to grant such injunctions or orders were governed by the same principles, and it was clear beyond peradventure that they were not.

151 As Goff J stated in *I Congreso del Partido* (see [106] above), jurisdiction in admiralty actions was statutory, and therefore defined by the four corners of the HCAJA, which has generally (*The St Merriel*, *The Thorlina*, *The Interippu*, *The AA V* and *The Rainbow Spring (CA)* aside) not been interpreted as requiring an examination of the merits of the plaintiff's claim for the purposes of deciding whether admiralty jurisdiction *in rem* exists.

152 In contrast, the jurisdiction to grant a Mareva injunction was based on s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo 5, c 49) (UK) (the "1925 Act") (*Nippon Yusen Kaisha v Karageorgis and another* [1975] 1 WLR 1093 at 1095; and *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509 at 510 (*per* Lord Denning MR in both cases)), which provided that "The High Court may grant… an injunction… in all cases in which *it appears to the court to be just or convenient* to do so" [emphasis added]. An equivalent jurisdiction was to be found in s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) (*Art Trend Ltd v Blue Dolphin (Pte) Ltd and others* [1981-1982] SLR(R) 633 at [27]; *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [65]), which was in essentially the same terms. In *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening)* [1978] 1 QB 644, where the jurisprudential basis of the Mareva injunction was clarified by the English Court of Appeal after hearing full argument, Orr LJ (at 664), in laying down the requirement that an applicant for a Mareva injunction had to show a "good arguable case" on the merits, thought that that was one factor which, in accordance with s 45(1) of the 1925 Act, would make it "just" to grant an injunction. Lord Denning MR (at 661), in addition to relying on the statutory language in s 45(1) of the 1925 Act of "just and convenient", reasoned by analogy from the test in *Vitkovice* which, as I have pointed out (at [85] above), was decided on the basis of the similarly expansive wording of RSC, Ord 11, r 4(2). In other words, the requirement of a "good arguable case" on the merits in cases of Mareva injunctions was grounded firmly in the express words of the empowering legislation. At the risk of stating the obvious, similar words were entirely absent from the provisions of the HCAJA.

153 As for Anton Piller orders, I was of the opinion that any comparison between such orders and an action *in rem* had to take into account the very different functions served by the former (*viz*, interim preservation of evidence) and the latter (*viz*, pre-trial security), and in any event the jurisdiction to grant an Anton Piller order was based on the inherent jurisdiction of the court to do justice between the parties (*Anton Piller KG v Manufacturing Processes Ltd and others* [1976] 2 WLR 162 at 166 (*per* Lord Denning MR)). The requirement for an applicant for an Anton Piller order to show an extremely strong *prima facie* case on the merits was inseparably tied up with the desire to do justice to the plaintiff (see for instance the judgment of Ormrod LJ in the same case at 167).

154 The Mareva and Anton Piller jurisdictions were therefore firmly in the discretion of the court, which could refuse to grant such relief if justice did not demand it. While I recognised, of course, that the granting of a warrant of arrest was also discretionary (*The Rainbow Spring (CA)* at [32]), the same, however, was not true of the admiralty jurisdiction *in rem*, which the plaintiff was entitled to invoke as of right by satisfying the requirements of the HCAJA. In such circumstances, there was neither room nor need to impose a requirement that the plaintiff show a "good arguable case" on the merits by analogy to the court's jurisdiction to grant ancillary relief.

155 Similar objection had to be taken to the learned AR's comparison of the court's admiralty jurisdiction *in rem* to O 11 of the ROC, which I have already cautioned against (see [85] above). Under the express terms of O 11, service out of jurisdiction is permissible only at the court's discretion (r 1), which will not be exercised in the plaintiff's favour unless an affidavit had been sworn deposing a belief that the plaintiff has a "good cause of action" (r 2(b)), and where it has been made "sufficiently to appear" to the court that the case is a proper one for service out of jurisdiction (r 2(2)). Given those express legislative requirements, it was hardly surprising that the plaintiff had to show a "serious issue to be tried" before he would be permitted to utilise O 11 (*Seaconsar* at 451 to 452). None of these considerations, however, applied to the invocation of admiralty jurisdiction *in rem* under the HCAJA. Significantly, O 70 r 3(3) expressly excludes the application of O 11 rr 2–8 to *in rem* actions. Instead, O 70 r 7(1) requires a writ *in rem* to be served directly on the *res*. There was, therefore, simply no parallel to be drawn between the invocation of the admiralty jurisdiction *in rem* and service out of jurisdiction under O 11 of the ROC. I was fortified in this conclusion by *The Yuta*

Bondarovskaya, which, it will be recalled (see [136] above), was a case where the defendants attempted to set aside the plaintiff's writ *in rem* on the basis that they were not "the person who would be liable on the claim in an action *in personam*", because some other party, as the contracting party, was liable instead. Counsel for the defendants argued that the same approach should be adopted to this question as that adopted under RSC, Ord 11 by the House of Lords in *Seaconsar* (*ie*, by asking whether there was a "good arguable case" of such liability). Clarke J rejected this submission, stating (at 360–361) that "… there [was] no support for such an approach in any of the cases in the 40 years or so since [the AJA 1956]".

156 Quite apart, therefore, from the objections of principle was the fact that introducing a merits test *dehors* the HCAJA would place Singapore out of step with the Commonwealth countries which have inherited England's statutory admiralty jurisdiction (*eg*, the UK, Australia, New Zealand and Hong Kong), none of which has seen fit to superimpose a jurisdictional merits requirement on its equivalent of the HCAJA by analogy with Mareva injunctions and Anton Piller orders. In this respect I was guided by the words of Scott LJ in *The Tolten* [1946] 1 P 135 at 142:

> The question is, however, one of far-reaching importance and calls for careful consideration of British admiralty law, and if there be doubt about that, then of the general law of the sea amongst Western nations, out of which our maritime law largely grew, and from which it is to the interest of maritime commerce that it should not unnecessarily diverge. *Judicial action cannot of course reverse a definite departure from the general law of the sea once definitely taken by our own maritime law and expressed in the judgment of a court which binds: but where there is doubt about some rule or principle of our national law, and one solution of the doubt would conform to the general law and the other would produce divergence, the traditional view of our admiralty judges is in favour of the solution which will promote uniformity. For this there are two good reasons, first, because that course will probably be the true reading of our legal development, and, secondly, because uniformity of sea law throughout the world is so important for the welfare of maritime commerce that to aim at it is a right judicial principle* – as many of our admiralty judges have said in the past. [emphasis added]

Although it was of course true that our admiralty laws were in some respects not the same as those of the rest of the Commonwealth, I have been at pains in these grounds to demonstrate that, insofar as invoking the jurisdiction *in rem* of the court was concerned, the Commonwealth authorities spoke with one voice, and if, as the learned AR thought, the Court of Appeal had truly intended in *The Vasiliy Golovnin (CA)* to depart from the established position and introduce a jurisdictional merits test into Singapore's admiralty law, I considered that it would have done so using language which left no room for doubt as to its intention.

Conclusion on The Vasiliy Golovnin (CA)

157 Consequently, I did not agree with the learned AR's views on *The Vasiliy Golovnin (CA)*, but remained of the opinion which I expressed in *The Eagle Prestige* (at [58]), *viz*, that [50]–[52] of *The Vasiliy Golovnin (CA)* were not concerned with invoking admiralty jurisdiction *in rem*, and were certainly not meant to introduce a new merits requirement before that jurisdiction could exist/be invoked; rather, they expressed the Court of Appeal's anxiety that the court's admiralty jurisdiction *in rem*, and in particular its power of arrest, not be abused. Read in that context they were simply references to striking out of the action under O 18 r 19 of the ROC or the inherent jurisdiction of the court, and/or discharging the warrant of arrest for material non-disclosure, as methods of disposing, at an early stage of the matter, unmeritorious admiralty actions (see [24] above). Setting aside the writ and all consequent proceedings for lack of jurisdiction under O 12 r 7 of the ROC were governed solely by compliance with the HCAJA, under which there was no enquiry into the merits of the

plaintiff's claim.

Conclusion

158 For all the foregoing reasons, I upheld the decision of the learned AR and struck out the plaintiff's action under O 18 r 19, but did not agree with his decision setting aside the plaintiff's writ *in rem* under O 12 r 7 of the ROC.

159 I also ordered that the costs of the appeal were to be awarded to the defendant, to be taxed if not agreed.

[note: 1] 1st affidavit of Noraini Binti Ibrahim dated 3 March 2010 at para 28.

[note: 2] 1st Affidavit of Choong-Ong Gek Hoon dated 5 April 2010 at pp 222 – 245.

[note: 3] 5th Affidavit of Choong-Ong Gek Hoon dated 6 October 2010 at para 5.

[note: 4] *Ibid* at p 11.

[note: 5] *Ibid* at p 17.

[note: 6] *Ibid* at pp 25 – 26.

[note: 7] *Ibid* at para 12.

[note: 8] *Ibid* at p 16.

[note: 9] 1st Affidavit of Darren Middleton dated 19 March 2010 at para 12.

[note: 10] 1st Affidavit of Choong-Ong Gek Hoon dated 5 April 2010 at pp 40 – 41.

[note: 11] *Ibid* at pp 42 – 43.

[note: 12] *Ibid* at pp 46 – 57 and 60 – 64.

[note: 13] 1st Affidavit of Yahya Bin Mohd Khalid dated 25 February 2010.

[note: 14] 1st Affidavit of Darren Middleton dated 19 March 2010 at para 6.

[note: 15] *Ibid* at para 8.

[note: 16] *Ibid* at paras 9 and 10.

[note: 17] 1st Affidavit of Yahya Bin Mohd Khalid dated 25 February 2010 at paras 6, 7, 8 and 11.

[note: 18] 1st Affidavit of Lars H Nielsen dated 19 March 2010 at para 5.

[note: 19] *Ibid* at para 6.

[note: 20] 1st Affidavit of Grant Foulger dated 24 August 2010 at para 4.

[note: 21] *Ibid*.

[note: 22] *Ibid* at para 5.

[note: 23] 1st Affidavit of Shahrol Azam Bin Shaharum dated 27 April 2010.

[note: 24] *Ibid* at para 7.

[note: 25] 2nd Affidavit of Noraini Binti Ibrahim dated 27 April 2010 at pp 172 – 174.

[note: 26] *Ibid* at pp 269 – 270.

[note: 27] *Ibid* at pp 273 – 277.

[note: 28] *Ibid* at pp 290 – 293.

[note: 29] *Ibid* at p 290.

[note: 30] 1st Affidavit of Yahya Bin Mohd Khalid dated 25 February 2010 at para 8.

[note: 31] 1st Affidavit of Darren Middleton dated 19 March 2010 at paras 18 and 19 and 1st Affidavit of Lars H Nielsen dated 19 March 2010 at paras 14 and 15.

[note: 32] 1st Affidavit of Grant Foulger dated 24 August 2010 at para 5.

[note: 33] 1st Affidavit of Choong-Ong Gek Hoon dated 5 April 2010 at para 39.

[note: 34] *Ibid*.

[note: 35] 1st Affidavit of Shahrol Azam Bin Shaharum dated 27 April 2010 at p 10.

[note: 36] 1st Affidavit of Choong-Ong Gek Hoon dated 5 April 2010 at p 462.

[note: 37] 1st Affidavit of Noraini Binti Ibrahim dated 3 March 2010 at pp 375 to 378.

[note: 38] 1st Affidavit of Noraini Binti Ibrahim dated 3 March 2010 at p 465.