Equatorial Marine Fuel Management Services Pte Ltd *v* The "Bunga Melati 5" [2010] SGHC 193

Case Number	: Admiralty in Rem No 21 of 2010
Decision Date	: 07 July 2010
Tribunal/Court	: High Court
Coram	: Teo Guan Siew AR
Counsel Name(s)	: Leong Kah Wah, Teo Ke-Wei Ian and Koh See Bin (Rajah & Tann LLP) for the plaintiffs; Prem Gurbani, S Mohan and Adrian Aw (Gurbani & Co) for the defendants.
Parties	: Equatorial Marine Fuel Management Services Pte Ltd — The "Bunga Melati 5"

Admiralty and Shipping

Agency

Civil Procedure

Restitution

7 July 2010

Teo Guan Siew AR:

Introduction

1 This application to strike out an admiralty suit raised a number of issues relating to the invocation of the admiralty jurisdiction of the High Court, including the applicable standard of proof under s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) and whether there is a threshold test of merits at the jurisdictional stage. It entailed a consideration of some recent decisions by our courts in this area, in particular the Court of Appeal decision in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 and the recent High Court case of *The Eagle Prestige* [2010] SGHC 93. As there were proceedings in the United States between the same parties preceding the present suit, cross-jurisdictional questions also arose, namely how the well-known "one claim, one ship" rule should apply when foreign proceedings are involved, and when a foreign court ruling is to be considered final and conclusive for the purpose of raising an issue estoppel. The way the substantive claim was pleaded by the plaintiff further brought into play issues of agency and the law on unjust enrichment.

2 I granted the defendant's application, and struck out the admiralty writ and statement of claim. The plaintiff has since appealed against my decision. The defendant has also filed a cross-appeal against my refusal to declare that the plaintiff is not entitled to invoke the admiralty jurisdiction of the court by reason of the operation of the "one claim, one ship" rule. The reasons for my decision are set out below.

Background

3 The plaintiff, Equatorial Marine Fuel Management Services Pte Ltd, brought the present action against the defendant, MISC Berhad, to recover payments for bunkers supplied to the defendant's

vessels. The admiralty writ was served on one of the defendant's ship, the "Bunga Melati 5", but the vessel was not arrested. The "Bunga Melati 5" was not one of the vessels which received the bunkers in question, and hence this is a "sister ship action" under s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act").

4 In the plaintiff's statement of claim, it was alleged that the parties had entered into two fixed price contracts whereby the plaintiff agreed to supply bunkers for the months of August and September 2008, at a price of US$744 per metric ton and US$750 per metric ton respectively, to vessels owned or operated by the defendant ("the Fixed Price contracts"). In addition, the plaintiff had allegedly entered into a further contract with the defendant on a "spot" basis for the supply of bunkers to the defendant's vessel the MT "Navig8 Faith" ("the Navig8 Faith contract"). An entity known as Compass Marine Fuels Ltd ("Compass Marine") was the broker acting for the plaintiff for the Fixed Price contracts, while another entity OceanConnect UK Ltd ("OceanConnect") was its broker for the Navig8 Faith contract. According to the plaintiff, a Malaysian company, Market Asia Link Sdn Bhd ("MAL"), had acted as the buying agent or broker of the defendant at all material times, and had procured bunkers on behalf and in the name of the defendant. The contracts for the supply of the bunkers were purportedly evidenced by emails sent by Compass Marine and OceanConnect to MAL, as well as other documents such as bunker confirmations and contract price confirmations which named the defendant as the contractual buyer for the bunkers.

5 The plaintiff further pleaded that the defendant had represented to the plaintiff and its brokers that MAL was acting on its behalf and had routinely directed third parties to deal with MAL as the defendant's agent. In the circumstances, the plaintiff contended that the defendant was estopped from denying that MAL was its agent.

6 In the alternative to its contractual claim, the plaintiff's case was that if there were no valid and binding contracts for the sale and supply of the bunkers between the parties, the defendant had been unjustly enriched by the plaintiff's action in supplying bunkers to the defendant's vessels. The plaintiff further contended that the offer of a corporate guarantee by the defendant, in the context of earlier US court proceedings in respect of the same dispute, amounted to an admission of liability by the defendant.

7 Prior to the start of this action, the plaintiff had commenced another set of proceedings in the United States District Court for the Central District of California, based on essentially the same claims as in the present proceedings. The plaintiff filed what is known as a "Verified Complaint" to obtain an attachment order under Rule B of the "Supplemental Rules for Certain Admiralty and Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure for the US District Courts". The Rule B attachment order was executed against one of the defendant's vessel, the "Bunga Kasturi Lima" in the port of Long Beach, California.

8 Shortly after the attachment of the vessel in the US, the defendant offered the plaintiff a corporate guarantee that the defendant would pay to the plaintiff the sum of US$22.4 million (which is equivalent to the plaintiff's claim amount in the US proceedings), on condition that the plaintiff would withdraw all suits against the defendant and not commence any further actions against the defendant's vessels. The plaintiff refused to accept the offer.

9 The defendant then filed a motion to vacate the Rule B attachment order, and to dismiss the Verified Complaint for failure to state a claim (which is akin to a striking out application). The California District Court vacated the Rule B order, on the basis that the plaintiff had failed to establish a valid *prima facie* case against the defendant for breach of contract or unjust enrichment. The plaintiff filed an appeal, which was dismissed by the United States Court of Appeals for the Ninth

Circuit. The motion to dismiss the Verified Complaint was however not considered, and was scheduled for further hearing. That did not take place eventually, because the plaintiff sought a voluntary dismissal of its substantive action.

The defendant's application

10 The defendant denied that it had contracted with the plaintiff, and averred that at all material times, it had procured the sale and supply of bunkers for its vessels from MAL as its contractual sellers. The defendant had made payment of the invoices issued by MAL, totalling more than US$17 million, for the supplies which form the subject matter of the plaintiff's claims. The defendant also asserted that it had never received, and had no knowledge at all of any of the emails or other documentation which allegedly evidenced the contracts between the plaintiff and defendant.

11 In the present application, the defendant prayed for *inter alia* the following orders:

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

Admiralty jurisdiction of the High Court

12 Section 4(4) of the Act states:

> 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.

13 It is well established, and was not in dispute, that to invoke the High Court's admiralty jurisdiction against a sister ship, the following requirements must be satisfied:

> (i) the claim falls within one of the limbs in s 3(1)(d) to (q) of the Act;
>
> (ii) the claim arises in connection with the offending ship – s 4(4)(a);
>
> (iii) the person who *would be* liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship – s 4(4)(b); and

(iv) the relevant person is, at the time the action is brought, the beneficial owner as respect all the shares in the sister ship.

It was further common ground between parties that the same principles apply whether the *in rem* jurisdiction is established by an arrest of a vessel, or by service of the *in rem* writ on a vessel: *The Fierbinti* [1994] 3 SLR(R) 574.

14 To show that the cause of action falls within one of the categories of s 3(1), the Court of Appeal in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin*"), adopting its earlier ruling in *The Jarguh Sawit* [1997] 3 SLR(R) 829, decided that the burden on the plaintiff is one of showing a good arguable case. In particular, the Court of Appeal (at [49]) endorsed the following description of the state of Singapore law by Toh Kian Sing SC in *Admiralty Law and Practice* (LexisNexis, 2nd ed., 2007) ("*Admiralty Law and Practice*") at 46:

> If the subject matter jurisdiction of the court is challenged, the plaintiff under the law of Singapore only has to show that he has a good arguable case that his claim comes within one of the limbs of section 3(1) of the [HCAJA], as opposed to the more onerous test of a balance of probabilities.

15 It should however be pointed out that the footnote to the learned author's commentary reproduced above goes on to state the qualification that there are certain cases, such as *The Alexandrea* [2002] 1 SLR(R) 812 and *The Andres Bonifacio* [1991] 1 SLR(R) 523, which held that the onus on the plaintiff is in fact to establish, on a balance of probabilities, that one of the limbs of s 3(1) apply.

16 Indeed, there are very recent High Court decisions which would appear to adopt a similar view that the threshold for subject matter jurisdiction under s 3(1) is the more onerous one of a balance of probabilities. In *The Eagle Prestige* [2010] SGHC 93 ("*The Eagle Prestige*"), although Belinda Ang J referred to the Court of Appeal's decision in *The Vasiliy Golovnin* that the standard of proof in the context of s 3(1) is the good arguable case yardstick, the learned judge however went on to make the observation (at [49]) that "the proper standard of proof on jurisdiction is on a balance of probabilities".

17 Ang J also referred to another recent High Court decision by Steven Chong JC (as he then was) in *The "Catur Samudra"* [2010] SGHC 18 ("*The Catur Samudra*"), where one of the issues was whether a claim under a guarantee for the liabilities of a related company under a charterparty constituted a claim arising out of an agreement relating to the use or hire of a vessel within the meaning of s 3(1)(h). The learned judicial commissioner appears, and indeed was interpreted by Ang J to have held that the plaintiff there failed to establish on a balance of probabilities that s 3(1)(h) was applicable. In addition, Ang J cited other cases such as *The Inai Selasih (ex "Geopotes X")* [2005] 4 SLR(R) 1, but these dealt with the standard of proof for jurisdictional questions not under s 3(1) but rather s 4(4) of the Act, an issue to be considered in more detail later in these grounds of decision.

18 With regard to the proper threshold that a claimant has to discharge to establish the court's subject matter jurisdiction under s 3(1), there therefore seems to be some degree of uncertainty. One possible rationalisation lies in the perhaps somewhat subtle distinction between the existence of certain underlying facts or a particular state of affairs which go towards establishing the jurisdictional connection in one of the limbs of s 3(1) on the one hand, and the test of whether the legal precondition under one of the limbs of s 3(1) is satisfied on the other. The former needs to be proved on a balance of probabilities (following cases such as *The Catur Samudra* and *The Eagle Prestige*), while the latter must be established to the standard of a good arguable case (following the Court of

Appeal decision in *The Vasiliy Golovnin*).

19 In considering the applicable standard of proof under s 3(1), it may also be worthwhile to recall the requirements that must be satisfied in order to effect service of an action out of jurisdiction. Although obtaining leave to serve process out of jurisdiction of course involves different considerations from invoking the admiralty jurisdiction of the court, it may be argued that the heads of O 11 r 1 of the Rules of Court serve a fairly similar purpose to the limbs under s 3(1) of the Act. The various heads under O 11 r 1 represent various possible connecting factors to Singapore before our courts are prepared to exercise long-arm jurisdiction outside of Singapore, whereas the limbs of s 3(1) spell out the various types of connection that a claim must have to a ship before the admiralty jurisdiction of the High Court can be exercised. It is uncontroversial that the standard to be discharged in relation to satisfying the heads of O 11 r 1 is that of a good arguable case: *Seaconsar Far East v Bank Markazi Jomhouri Islami Iran* [1993] 3 WLR 756; *Goodwill Enterprise (Malaysia) v CT Nominees (in liquidation)* [1996] 1 SLR(R) 330. The rationale clearly is that an O 11 application will be assessed at a very preliminary stage of the proceedings and based only on affidavit evidence, such that it would be premature and too onerous to require the plaintiff to show proof on a balance of probabilities of the application of one of the limbs under O 11 r 1. Similar considerations would probably apply at the stage of determining the applicability of s 3(1). It should also be noted that our courts have taken the view that the limbs of s 3(1) should be given a broad and liberal reading: *The "Mara"* [2000] 3 SLR(R) 31; *The "Trade Fair"* [1994] 3 SLR(R) 641.

20 There was no need, however, to reach a conclusive view as to whether the standard of proof under s 3(1) is that of a good arguable case or a balance of probabilities, for the purpose of determining the present application. This was because the defendant did not challenge the applicability of s 3(1) in the present case. The real crux of the dispute was as regards the application of s 4(4).

Jurisdictional requirements under s (4)(4)

21 The defendant's primary basis for contending that the plaintiff had invalidly invoked the admiralty jurisdiction of the High Court was that the plaintiff had failed to discharge its burden of establishing, *on a balance of probabilities*, that the defendant is the person liable *in personam* under s 4(4) of the Act. More specifically, the defendant contended that the plaintiff failed to show on a balance of probabilities that the defendant had contracted with the plaintiff, instead of MAL, for the supply of the bunkers in question.

22 In advancing the proposition that a party invoking the admiralty jurisdiction of the High Court has to establish the *in personam* liability of the defendant on a balance of probabilities, counsel for the defendant, Mr Gurbani, relied on the following paragraphs from the decision of Steven Chong JC (as he then was) in *The Catur Samudra* (at [22] and [23]):

> It is well settled and not in dispute that the burden of proof is on the plaintiff to satisfy all the jurisdictional requirements laid down in s 4(4) of the HCAJA [the Act] in order to successfully invoke the admiralty jurisdiction against the *Catur Samudra*…
>
> It is also trite that the plaintiff must satisfy the burden of proof on a balance of probabilities…

23 To buttress the defendant's position, Mr Gurbani cited the following passage from *Admiralty Law and Practice* (at 107):

> Questions relating to the existence of the court's jurisdiction, such as where it is alleged that one

of the above requirements relating to the arrest of the offending ship or sister ship may not have been satisfied, have to be dealt with at the interlocutory stage, rather than at the subsequent trial of the substantive issues since the action cannot be allowed to proceed until jurisdictional disputes are resolved. It is therefore not permissible that a mere arguable case on jurisdictional requirements be raised, leaving the door open for the matter to be resolved. The burden of proof on such jurisdictional matters lies with the plaintiff, who has to discharge it on a balance of probabilities.

24 Further, Mr Gurbani referred to Belinda Ang J's judgment in *The Eagle Prestige* at [49]:

> I digress here a little for a brief reminder on the proper standard of proof of jurisdictional questions under the HCAJA [the Act]. When jurisdiction *in rem* is challenged … the proper standard of proof on jurisdiction is on a balance of probabilities. It is clear that where jurisdiction *in rem* is *based on the existence of particular facts or a particular state of affairs*, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. In the event, *the particular facts or state of affairs must be established on the balance of probabilities* in the light of all the affidavit evidence before the court to determine whether there is jurisdiction *in rem* …A review of those cases will show that where, for instance, the nature of the claim requires, for example, the establishment of factual preconditions in s 3(1) or contemplates *a s 4(4) ownership question*, the *in rem* plaintiff was obliged to prove the existence of the *particular jurisdictional fact* and to show jurisdiction on a balance of probabilities. [emphasis added]

25 With respect, the defendant's argument was misconceived. The starting point is to appreciate what the learned judges and commentator were referring to which requires proof on a balance of probabilities. As is clear, particularly from the above extract of Ang J's decision in *The Eagle Prestige*, what needs to be proved on a balance of probabilities are the particular jurisdictional facts stipulated under s 4(4), such as the ownership of the offending ship and of the sister ship, as well as whether there was "possession or control" of the offending ship at the material time. These factual questions are obviously different from the issue of whether there is *in personam* liability, an issue pertaining to the merits of the claim. As counsel for the plaintiff, Mr Leong, also pointed out, the existence of such jurisdictional facts are required to be proved on a balance of probabilities because the matter of jurisdiction has to be determined once and for all at the interlocutory stage, but these requirements are clearly distinct from the question of the merits of the case. In *The Catur Samudra*, the court was concerned with the question of whether the defendant was in possession or in control of the offending vessel at the time when the cause of action arose (as it was clear that the defendant was not the owner of the vessel at that material time). The court further considered whether the corporate veil should be lifted so that the defendant was effectively the charterer. The plaintiff in that case failed on both counts, and it was in that context that Steven Chong JC (as he then was) held that the plaintiff had failed to discharge its burden of establishing the jurisdictional requirements under s 4(4). The learned judicial commissioner *did not* hold that the plaintiff had to, for the purpose of crossing the jurisdictional hurdle, also prove on a balance of probabilities that the defendant is liable *in personam* to the plaintiff.

26 The above view is supported by a study of the legislative purpose behind s 4(4), which is clearly to extend the court's exercise of *in rem* jurisdiction to not only the offending ship but sister ships as well, and not to impose a new requirement of showing merits in the claim. Section 4(4) of the Act can be traced back to s 4(4) of the Courts (Admiralty Jurisdiction) Ordinance 1961. The Ordinance adopted the provisions of the UK Administration of Justice Act, which *inter alia* implemented in the UK the sister ship arrest rule to give effect to the International Convention Relating to the Arrest of Seagoing Ships of 1952. In the second reading of the Courts (Admiralty Jurisdiction) Bill, the

Minister for Health and Law Mr K. M. Byrne explained the background, the material parts of which are reproduced below (Singapore Parliamentary Debates, Official Report (16 December 1961) vol 15 at col 2377 to 2383 (Mr K. M. Byrne, Minister for Health and Law)):

> In 1956 the Administration of Justice Act, 1956, was enacted in the United Kingdom in order to enable ratification of three international Conventions on maritime law signed at Brussels in 1952, to which the United Kingdom was a party. These Conventions were:-
>
> (1)…
>
> (2)…
>
> (3) The International Convention relating to the Arrest of Seagoing ships.
>
> …
>
> The third Convention relating to the Arrest of Seagoing ships seeks to produce international uniformity in the law relating to the arrest of a ship to secure a claim. This Convention calls for amendment of English law to permit not only the ship in respect of which the claims arose to be arrested but also any other ship which was under the same ownership.
>
> …
>
> This Bill accordingly is designed to bring the law in Singapore into line with the provisions of Part I of the United Kingdom Administration of Justice Act, 1956, in order to enable the extension of these Conventions to Singapore…
>
> …
>
> Clause 4 prescribes the manner in which Admiralty jurisdiction may be exercised and limits the action *in rem* to conform to the Arrest Convention. *Sub-clause (4) of this clause provides that in certain cases claims are enforceable against "sister ships", i.e., ships held under the same ownership as the ship in connection with which the claim arose. The sister ship principle will allow foreign "sister ships" to be arrested here in the same way as our ships can now be arrested in foreign ports*.
>
> [emphasis added]

27 The phrase "the person who would be liable on the claim in an action *in personam*" under s 4(4) is therefore meant to identify the person whose ships may be arrested. Section 4(4) is primarily a provision about identifying the ships that may be arrested by reference to the person who would be liable *in personam on the assumption that the action succeeds*. It is not a provision that seeks to impose a more stringent requirement of *merits* to be satisfied before the admiralty jurisdiction of the court can be invoked, which is the purport of the defendant's submission that there is in effect a need to establish *in personam liability* before s 4(4) is satisfied. The flaw in the defendant's reasoning is also evident from the decision of Belinda Ang J in *The Eagle Prestige* itself, wherein Ang J endorsed the following principles enunciated by Willmer J in the leading case of *The St Elefterio* [1957] 1 Lloyd's Rep 283 ("*The St Elefterio*")(at 287-288):

> The defendants' argument is founded on the proposition that section 3(4) of the Act of 1956 [our s 4(4) of the HCAJA] 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. …

In my judgment the purpose of the words relied on by Mr Roskill, that is to say, 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 (if I may so express it) 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 actions succeeds"*.

[emphasis in original]

28 In *Admiralty Law and Practice*, the learned author expressed a similar view and provided an excellent explanation for it (at 109 to 110):

The requirement of personal liability reflects the central tenet behind the procedural theory, that the ship is arrested to induce her owners to appear and answer for their personal liability. Accordingly, the purpose of this requirement is to identify the person or persons whose ship or ships may be arrested in connection with an offending or sister ship action and such identification is often a question of fact. It will be noticed that the reference is to a person who would be liable rather than who is liable. This has been construed to mean the person who would be liable on the assumption that the action succeeds. In the *The AA V*, Judith Prakash J after reviewing the case law, opined that the approach accepted by the Singapore decision of *The Thorlina* appears to favour the 'is' test rather than the "would be' test and suggested clarification from the Singapore Court of Appeal would be helpful as to whether the 'would be' test should be adopted instead of the 'is' test. It is submitted that if the opportunity arises for such a clarification, the 'would be' test should be accepted by the Singapore Court of Appeal. This test has received widespread endorsement in English, Australian, Malaysian, Hong Kong as well as a couple of Singapore first-instance decisions. *The 'is' test connotes a finding of personal liability on a balance of probabilities at an interlocutory stage of the proceedings, where the validity of the arrest is challenged. This would be premature as parties would not have had the benefit of discovery, interrogatories and cross-examination*. [emphasis added]

29 Indeed, imposing a requirement on the plaintiff in the present case to prove, on a balance of probabilities at this jurisdictional stage, that the defendant is the party liable *in personam* in respect of the bunkers supplied, would lead to an untenable result. The central dispute between parties was whether the contracts for bunkers were in fact entered into between the plaintiff and the defendant through the agency of MAL, or whether the defendant had contracted independently with MAL which in turn entered into another contract with the plaintiff. There was no question that the bunkers in issue were supplied to the defendant for its use, and that the defendant had not made any payment to the plaintiff. That being so, if the plaintiff manages to establish on a balance of probabilities that the contract was between the plaintiff and defendant and hence correspondingly that the defendant is the person liable *in personam*, the plaintiff would in fact be entitled to judgment. Effectively, the plaintiff would be required to show that he can obtain summary judgment under O 14 of the Rules of Court before he is entitled to invoke this court's admiralty jurisdiction. That would certainly be a

surprising conclusion.

30 Both parties referred to the oft-cited distinction laid down in the High Court decision of *The "Opal 3" ex "Kuchino"* [1992] 2 SLR(R) 231 between the *in rem* test and the *in personam* test under s 4(4). However, it is important to bear in mind that when reference is made to the *in personam* test, this does not mean a test on the merits of the *in personam* claim. G P Selvam JC (as he then was) stated (at [10]):

> A claimant invoking the admiralty jurisdiction of the High Court against a ship must first establish that he has a maritime claim under s 3 of the Act and that it arose in connection with a ship. Then if the maritime claim does not carry a maritime lien he must satisfy a two-step test: (a) identify the person who would be liable in an action *in personam* ("the *in personam* test") and (b) identify the ship that is to be proceeded against in the action *in rem* ("the *in rem* test"). *In applying the in personam test, all that is needed is an arguable case…The claimant must show that the in personam defendant was, at the time the claim arose, the owner of or in possession or control of the ship in connection with which the claim arose*…To satisfy the *in rem* test, the claimant must show that the ship in the *in rem* action was, at the time the writ was filed, beneficially owned by the *in personam* defendant as respects all shares in it. [emphasis added]

31 It is clear that when the learned judicial commissioner referred to the *in personam* test, he was concerned with the *identification* of the *in personam* defendant as the owner, or person in possession or control of the vessel, at the time the claim arose. The test is no different in nature from the *in rem* test, the latter of which deals with the identification of the beneficial owner of the ship at the time the action was started. Both tests therefore deal with the existence of jurisdictional facts, and not the question of merits. As such, the decision is consistent with the other cases analysed earlier (save that the standard of proof for the jurisdictional facts was stated by Selvam JC to be that of only an arguable case, as opposed to the more stringent standard of a balance of probabilities laid down in the more recent cases like *The Eagle Prestige* and *The Catur Samudra*).

32 Belinda Ang J in *The Eagle Prestige* explained the way that the issue of merits of the case may become relevant in the context of the jurisdictional inquiry, as follows:

> ***Unmeritorious substantive claim***
>
> 54 I now come to the other part of *The Vasiliy Golovnin (CA)* relating to the question of whether the banks' claims were unmeritorious or clearly unsustainable…On the facts of that case, a good starting point is the test of jurisdiction under s 4(4)(b) (*ie*, the *in personam* test). It is important to bear in mind the *in personam* test in two contexts. The first concerns what has been described as "the low threshold of the merits enquiry" ("Situation 1"), and the second is where the proceedings are frivolous or vexatious or otherwise an abuse of process so as to warrant halting such proceedings *in limine* by striking out the action under O 18 r 19 of ROC [Rules of Court] or under the court's inherent jurisdiction ("Situation 2"). Under Situation 2, the merits of the claim are examined as a summary disposal of the action is being sought…
>
> …
>
> 57 In short, it is open to a defendant to apply at an early stage of the proceedings for the writ *in rem* and action to be struck off on the ground that the action has no chance of success and is, therefore, vexatious. It is at this stage of striking out application that the court is asked to assess the sustainability of the action. It is at this stage of the striking out application that the validity or strength of the claim will be relevant, and the burden on the issue of non-liability

lies on the defendant to show that the case is wholly and clearly unarguable. If there is any arguable basis put up by the plaintiff that the action could succeed then the court should not order the striking out of the action…

60 The assumption under s 4(4)(*b*) of the HCAJA- that a party would be liable on the claim in an action *in personam* on the assumption that the action succeeded – is the default position so long as there is no suggestion that the claim is frivolous or vexatious or otherwise an abuse of process (*ie*, Situation 1 as in [54] above). *This default position is reflected in O70 r 4(7)(a) of the ROC [Rules of Court] which requires the affidavit leading the warrant of arrest to state the name of the person who would be liable on the claim in an action in personam*. Willmer J in *The St Elefterio* left open the possibility of striking out the action if the action on the evidence is frivolous or vexatious or otherwise an abuse of process (*ie*, Situation 2 as in [54] above)…

[emphasis added]

33 At first blush, it may appear that Ang J took a different approach from what has been advocated in the preceding paragraphs of these grounds of decision, since the learned judge dealt with the question of merits of the case in the context of s 4(4) of the Act, and appears to have treated what is known as the "*in personam* test" as a test on the merits. On closer examination though, it can be seen that the difference is more apparent than real. In what Ang J described as "Situation 1", it seems clear that any consideration of merits generally entails merely *procedural compliance*, specifically with the requirement under O70 r 4(7)(a) that the affidavit leading the warrant of arrest states the name of the person who would be liable on the claim in an action *in personam*. At the risk of repetition, there is an *assumption* that that person identified is the person who would be liable *in personam* if the claim succeeds. It is only in "Situation 2" that there is a real inquiry into the substantive merits of the case, for the purpose of determining whether the action should be struck out for being frivolous or vexatious or otherwise an abuse of process. "Situation 2" is therefore no different from any other non-admiralty action where an application is taken out under O 18 r 19 or under the inherent jurisdiction of the court to strike out an action or claim. In that sense, the approach taken by Ang J is hence in line with the view advocated here, namely that s 4(4) imposes no separate or additional requirement of showing merits in the case so as to establish the admiralty jurisdiction of the court.

34 However, it is necessary to consider a narrower argument raised by Mr Gurbani, which pertain to the specific situation where there is a dispute as to who the proper defendant is, such as when a defendant denies he is the contracting party. As the jurisdictional requirement under s 4(4) looks to the party who would be liable *in personam*, the argument was that the substantive merits of the underlying claim in such cases are so enmeshed or intertwined with the basis of jurisdiction that an examination of the merits becomes inevitable even in the context of a jurisdictional challenge. In this connection, Mr Gurbani relied principally on Belinda Ang J's decision in *The Eagle Prestige*, particularly the following passage (at [64]):

As I mentioned earlier, *The St Elefterio* is a case where the relevant agreement had in fact been made between the two parties to the action. In other words, there was no dispute on the proper defendant in an *in personam* action and there was no question that the plaintiff should have sued someone else *in personam* in respect of the claim arising under the bills of lading. There have been cases where the writ *in rem* is sought to be set aside under O 12 r 7 on the ground that the claim did not fall within s 4(4) because the plaintiff should have sued someone else *in personam*. In other words, there was *no subsisting* claim *in personam* against the person who was at that time the owner of the vessel, and there was no jurisdiction *in rem* because the basis of an action *in rem* arose from the personal liability of the owner of the vessel. The common

argument in the decisions of *The Thorlina* [1985-1986] SLR(R) 258, *The Lok Mashewari*, *The AA V* [1999] 3 SLR(R) 664 ("*The AA V*") and *The Rainbow Spring* [2003] 2 SLR(R) 117 ("*The Rainbow Spring (HC)*") and *The Rainbow Spring (CA*) reported in [2003] 3 SLR(R) 362 was that the plaintiff should have sued someone else *in personam*, and there was clear evidence of the absence of a subsisting claim against the defendant shipowner at the time the writ *in rem* was filed. There was want of jurisdiction in rem. *The substance of the underlying claim was factually inseparable from the basis of jurisdiction*. The jurisdictional fact in dispute could on the evidence be summarily disposed of. [emphasis added]

35 On behalf of the defendant, Mr Gurbani contended that the facts of the present case precisely involved such a situation where the basis for invoking the court's jurisdiction was factually inseparable from the substance of the underlying claim. As his argument went, the central substantive dispute on the merits was whether the plaintiff did in fact contract with the defendant through the agency of MAL, and this went equally towards the jurisdictional question of whether the defendant was properly the party who would be liable *in personam* under s 4(4). That being the case, following *The Eagle Prestige*, the plaintiff in this case would presumably have to discharge a higher burden in order to stave off a jurisdictional challenge, as compared to a claimant in a situation where there is no dispute that the defendant is the proper party to be sued and the only dispute relates to whether the defendant is in fact liable. Mr Gurbani's argument went so far as to say that the plaintiff in the present case therefore needs to prove the *in personam* liability on a balance of probabilities, a contention which for reasons already given earlier (principally at [29]), I did not accept. It should be noted that in *The Eagle Prestige* decision, Ang J said that the jurisdictional facts in dispute in such cases can be summarily disposed of, but did not expressly make clear what the standard of proof on the plaintiff is in a case where the defendant denies it is the proper party to be sued.

36 It is also not clear from the cases which Ang J referred to what the standard of proof on the claimant should be where there is a challenge as to the proper party to be sued. There is no clear indication that the standard in such a scenario is necessarily higher. In *The Thorlina* [1985-1986] SLR(R) 258, the court found that the defendant was not a party to the contract for the repair of the vessel in question and hence would not be liable *in personam*, but did not elaborate or make clear on what standard of proof that finding was made. As for *The AA V* [1999] 3 SLR(R) 664, that was a case where the evidence was so clear that the defendants were not a party to the contracts, such that Prakash J thought that it was unnecessary to determine what the proper threshold test under s 4(4) should be. Finally, in *The Rainbow Spring* [2003] 2 SLR(R) 117, Belinda Ang JC (as she then was) held, referring to *The St Elefterio* and *The Wigwam* [1981-1982] SLR(R) 689, that what a plaintiff needs to show is *an arguable* case that the defendant is the person likely to be liable *in personam*. It was held that "[i]f the plaintiff's case on jurisdiction is *plainly unarguable* in that it is bound to fail, the *in rem* writ would be set aside [emphasis added]". The test as enunciated resembles closely the usual principles of striking out under O 18 r 19 or pursuant to the inherent jurisdiction of the court. This, together with the reference to the decision in *The St Elefterio*, suggest that Ang JC in *The Rainbow Spring* was essentially considering the merits of the case in the same way as how a court would consider the merits in dealing with a striking out application under what the learned judge subsequently termed as "Situation 2" in *The Eagle Prestige*.

37 In my view, the cases do not support the narrower proposition advanced by Mr Gurbani. Indeed, one may query whether there ought to be a higher standard imposed on the plaintiff to discharge its jurisdictional burden simply because there is a dispute as to the identity of the proper party to be sued. When a defendant denies that it was the party who contracted with the plaintiff, it is possible to view the argument as just another defence to a contractual claim. It may be contended that there is no reason in principle why a plaintiff ought to be subject to a higher jurisdictional burden merely because the defendant is alleging that the plaintiff has sued the wrong party, as opposed to a

case where the defendant accepts that it is the contracting party but contends it is not liable for other reasons.

38 For the foregoing reasons, my interpretation of s 4(4), both from a consideration of its legislative purpose as well as the associated case law and academic commentary, is that the provision is not about imposing a threshold test of merits which a plaintiff has to discharge before it is able to invoke the admiralty jurisdiction of the High Court. Section 4(4) is merely a provision concerned with the identification of the defendant as the owner, or person in possession or control of the vessel, at the time the claim arose, *on the assumption that he would be liable*. This is so even in the case where there is a dispute as to whether the defendant is the proper party to sue. Any imposition of a burden on the plaintiff to show merits cannot be justified based on s 4(4).

Requirement to show merits

39 However quite apart from s 4(4), the question still arises as to whether the law should require some merits to be shown by a claimant before the court's admiralty jurisdiction can be invoked, and if so, to what extent.

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. A broadly similar argument was made by counsel in the case of *The Eagle Prestige*, but was rejected by Belinda Ang J. It is crucial to appreciate the way the defendant's counsel in *The Eagle Prestige* had framed the argument, which Ang J recounted in her grounds of decision as follows:

> [28]…Mr Tan argued that even though the plaintiff had satisfied the requirements of s 3(1)(*h*) and s 4(4)(*b*)(ii), the plaintiff must still demonstrate that it had a good arguable case on the merits. Mr Tan contended that the plaintiff's claim was premature, and went so far as to argue that *The Vasiliy Golovnin (CA) in effect changed the* in personam *test in s 4(4)(*b*) to a higher threshold*, and in doing so, departed from the legal principles enunciated in *The St Elefterio* [1957] 1 Lloyd's Rep 283 ("*The St Elefterio*").
>
> …
>
> [30] Mr Tan first raised two broad issues in his written submissions. They are paraphrased as follows:
>
> > (i) Whether the arresting party is required to show, at the stage when the warrant of arrest is being challenged ("the challenge stage") that it has a "good arguable case" on the merits

of the claim; and

(ii) Whether the duty of disclosure in applications for warrant of arrest extends to cover plausible defences on the merits of the claim.

In the course of argument, Mr Tan raised a third issue which is whether at the application for a warrant of arrest ("the application stage"), the arresting party is required to show that it has a "good arguable case" on the merits of the claim.

[emphasis added]

42 It was therefore in the context of s 4(4) that Belinda Ang J rejected the contention by the defendant's counsel in *The Eagle Prestige*. The learned judge was especially influenced by her view that the Court of Appeal in *The Vasiliy Golovnin* could not have intended to depart from the leading decision of *The St Elefftterio* (in relation to the interpretation of the equivalent provision to s 4(4) of the Act) without expressly saying so. Ang J said at [58]:

From the analysis of *The Vasiliy Golonvin (CA)* and explanation above, there is no substance and merit in Mr Tan's contentions on issue (i) and issue (iii). There was no basis or room for Mr Tan's contention that *The Vasiliy Golovnin (CA)* changed the position at law enunciated in *The St Elefterio* which was followed in *The Wigwam* [1981-1982] SLR(R) 689 ("*The Wigwam*"). If *The St Elefterio* is no longer good law in Singapore, the Court of Appeal would have explicitly said so. *The St Elefterio* was not even referred to by its case name in *The Vasiliy Golovnin (CA*). In fact, the Court of Appeal in [49] of the judgment quoted with approval *Admiralty Law and Practice* where the author had at pp 45-46 of the text summarised the legal principles from *The St Elefterio* which were followed in *The Wigwam*. *The St Elefterio* received approval for the propositions that

So long as the claim is not frivolous as to be dismissed *in limine*, the plaintiff does not have to establish at the outset that he has a cause of action substantial at law;

…

Neither would the existence of a good defence to a claim negate the court's admiralty jurisdiction.

43 To the extent that Belinda Ang J in *The Eagle Prestige* rejected the counsel's submission in that case on the basis that there is no requirement to show a good arguable case on the merits *under s 4(4)*, that is consistent with my interpretation that s 4(4) itself does not impose any threshold condition of establishing the merits of the case but is merely about identification of the defendant who would be liable *in personam* as the owner, or as the person in control or possession of the vessel, at the material time.

44 On the broader question of whether there is a need to show merits *per se* however, the Court of Appeal's decision in *The Vasiliy Golovnin*, and particularly the paragraph reproduced above at [40], would suggest an affirmative answer. This view is further supported by Rajah JA's comment which immediately follows that paragraph, 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. In principle, there is much to be said for the view that if a claimant in an admiralty action faces a challenge at the jurisdictional stage, he should have a more onerous burden to discharge than a claimant in an ordinary non-admiralty suit facing an application to strike out the action based on O 18 r 19 or the inherent jurisdiction of the court.

46 It must however be acknowledged that the above construction of the Court of Appeal's decision in *The Vasiliy Golovnin*, may not sit well with Belinda Ang J's ruling in *The Eagle Prestige* with regard to the non-disclosure of material facts in the arrest process. In Ang J's view, for a plaintiff to discharge its obligation to make full and frank disclosure, there is no need for the plaintiff to disclose substantive defences that the defendant could raise at the trial, unless the matters underlying the defences will show that the claim is obviously unsustainable such that the omission to mention them effectively amounts to misleading the court. Ang J explained (at [75]):

> In my view, the non-disclosure of defences that the defendant could raise at the trial in answer to the plaintiff's claim (as that pertains to the ultimate merits of the action and the question of who is likely to win), are *generally* not characterised as a failure to give full and frank disclosure *unless* (and this is the qualification (*ie* Situation 2) mentioned in *The St Elefterio* …) they *are matters that show up the claim as an abuse of process, or one that it is so obviously frivolous and vexatious as to be open to summary dismissal and, on any reasonable view, their omission, at the application stage, is tantamount to or constitutes an abuse of process*. From a broader perspective, failure to disclose matters showing that the claim or arrest should not have been brought at all, are material facts that constitute the abuse of process. Simply put, *they*

constitute matters of such weight that their omission is likely to or may mislead the court in the exercise of its discretionary power of arrest.

[emphasis in original]

47 Ang J's reason for holding the above view is that at the jurisdictional stage, there is no onus on the *in rem* plaintiff to show that the claim is likely to succeed. It would suffice that the claim is not an abuse of process or so obviously frivolous and vexatious as to be open to summary dismissal. In her view, the plaintiff is generally not required to go into the merits of the claim in "Situation 1" cases (or at any rate only to a very minimal degree), and it is only where there is an application to strike out the action under O 18 r 19 or pursuant to the inherent jurisdiction of the court (*ie* "Situation 2") that the merits of the case become relevant (see [74] of the learned judge's grounds of decision).

48 My decision in the present case is therefore justified on two separate bases. The defendant had applied for the following orders in the alternative, namely (a) that the admiralty writ be struck out and/or set aside on the basis that the admiralty jurisdiction of the court under the Act was improperly and/or invalidly invoked by the plaintiff against the vessel "Bunga Melati 5"; or (b) that the writ be struck out and/or set aside pursuant to O 18 r 19 and/or the inherent jurisdiction of the court. As will be elaborated below, the primary basis for my decision to strike out the admiralty writ is that the plaintiff failed to establish its case on the merits to the standard of a good arguable case. In particular, it failed to show a good arguable case that it had contracted with the defendant for the supply of the bunkers in question. Accordingly, the admiralty jurisdiction of the court was not properly invoked and the writ should therefore be struck out. In the alternative, if the true position is that there is no independent requirement on the plaintiff to show merits to its claim in order to invoke the court's admiralty jurisdiction, the result will still be the same, because my view based on the state of the evidence presented is that the defendant has successfully shown that the plaintiff's claim is plainly unsustainable and frivolous, and ought therefore to be struck out pursuant to O 18 r 19 or the inherent jurisdiction of the court.

Application to the Present Case

49 As already mentioned, the issue of whether the plaintiff's claim fell within s 3(1) of the Act did not arise. In relation to s 4(4), it was not disputed that the defendant, the person who *would be* liable in *personam* if the action succeeds, was the owner of the offending ships at the time the cause of action arose. It was also common ground that the defendant was the beneficial owner of the sister ship, *The Bunga Melati 5*, at the time this action was brought. To reiterate, the view taken here is that s 4(4) does not impose a threshold condition of merits. It however remains necessary to go further to examine the merits of the plaintiff's claim, as following *The Vasiliy Golovnin*, the plaintiff must establish its claim on the merits to the standard of a good arguable case. Even if that is not the proper interpretation of the Court of Appeal's decision, and that there is no additional requirement to show merits in the claim in order to establish jurisdiction, the defendant's alternative prayer to strike out the writ and action under the usual principles of O 18 r 19, or the inherent jurisdiction of the court, still necessitates an examination into the merits of the case.

The claim in contract

50 The plaintiff's claim was for payment of certain bunkers supplied under the alleged Fixed Price contracts and the Navig8 Faith contract. According to the plaintiff, the alleged Fixed Price contracts were evidenced by emails between MAL and the plaintiff's broker Compass Marine, while the Navig8 Faith contract was evidenced by emails between MAL and the plaintiff's other broker OceanConnect. In both instances, the submission made was that MAL was acting as the agent of the defendant.

Mr Leong on behalf of the plaintiff also placed reliance on documents such as bunker confirmations, some of which named the defendant as "Buyers" and the plaintiff as "Sellers". What is critical to note is that none of these emails or documents originated from the defendant, and nor is there any indication that these emails and documents were sent to the defendant. The defendant denied any knowledge of these documents, until they surfaced in the court proceedings. As Mr Gurbani pointed out, it is difficult to see how such documents – which were essentially correspondences between MAL and Compass Marine or OceanConnect, and between the plaintiff and Compass Marine or OceanConnect – can be said to bind the defendant to a contract with the plaintiff.

51 In contrast to the paucity of documentary support for the supply contracts as alleged by the plaintiff, the defendant adduced concrete evidence showing that the defendant had in fact procured the sale and supply of bunkers for its vessels from MAL directly as the contractual seller. There were contractual documents evidencing an open tender process which took place before the defendant awarded the fixed term 6-month contract to MAL. It was further not in dispute that, in accordance with the contracts which the defendant had with MAL, the defendant had paid a substantial sum of in excess of US$17 million to MAL for the bunkers sold and supplied by MAL to the defendant's vessels, which form the subject matter of the plaintiff's claim. Mr Gurbani made the very forceful point that it makes no logical sense for the defendant to first enter into a contract with MAL (in March 2008) where the price of the bunkers was fixed at US$475 per metric ton, and then to subsequently authorise MAL (in July 2008) to contract with the plaintiff or its brokers on the defendant's behalf for the same bunkers at a price in excess of US$740 per metric ton. The same argument applies in relation to the market price contracts concluded between the defendant and MAL, for which the agreed prices ranged from US$525 to US$649.

52 The plaintiff sought to cast doubts on whether the defendant had in fact dealt with MAL as an independent seller for the bunkers, and suggested that the alleged contracts between them may be in fact be shams, or at the very least the surrounding circumstances justify further investigation and examination through the trial process. The argument was mounted on several fronts. Mr Leong contended that it was unlikely for a substantial shipowner like the defendant to entrust almost all of its bunker requirements worldwide to a company like MAL, which was a relatively small set-up with no reputation in the bunker industry. In relation specifically to the tender contract, Mr Leong highlighted that MAL was the only party in the tendering process to accept the tender conditions without reservations and to offer a substantially lower price than the other bidders, suggesting that the contract was therefore not an arms-length transaction. In addition, Mr Leong alluded to the fact that MAL was never involved in the physical execution of the bunkering operations of the defendant's vessels. Instead, the plaintiff liaised directly with the defendant's local agents in Singapore to coordinate the bunkering operations. This, according to Mr Leong, suggested that MAL was clearly not the actual seller of the bunkers but merely a broker.

53 In considering the plaintiff's arguments above, one must bear in mind the clear evidence presented before the court of a transparent and rigorous tendering process conducted by the defendant. The process attracted bids from a number of established bunker traders and suppliers such as Petronas Dagangan Berhad, BP Singapore Pte Ltd, and Shell Malaysia Trading Sdn Bhd, all of whom were registered bidders for the defendant's bunker supply contracts. The terms and conditions of the fixed price contract with MAL were contained in a set of documents known as the "Bid Documents", which were circulated to the various registered bunker suppliers that were invited to participate in the tender exercise. A total of six bids were received, indicating that apart from MAL, there were other established suppliers wiling to agree to a fixed price contract at that time over the period in question. Against this backdrop, Mr Leong's suggestion that there may be something suspicious about the tender process was unpersuasive. Leaving aside whether MAL was indeed a small-time player in the industry (an issue which the defendant's counsel argued not unconvincingly to the contrary), the

mere fact that MAL was able to offer more favourable terms to the defendant than the other bidders should not, without more, raise eyebrows. After all, that must be precisely the reason why the tender was awarded to MAL eventually. While the price of US$475 per metric ton offered by MAL was indeed lower than the other bidders, the defendant pointed out that MAL itself managed to enter into a six month contract with another party OW Bunkers at an even lower price of US$467 per metric ton. This indicates that MAL knew how to hedge its position. In fact, MAL had been contracting with the defendant for a number of years prior to 2008, and had no difficulty fulfilling its contractual obligations until the present transactions which are before the court.

54 To prove that there has been a sham transaction, it is trite law that the parties must be shown to have entered into the contract with the common intention "to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create": *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, accepted locally in *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd* [2008] 1 SLR(R) 375 and *The Inai Selasih (ex Geopotes X)* [2006] 2 SLR(R) 181. In the present case, after the supply contracts were entered into between the defendant and MAL, it was undisputed that MAL supplied bunkers to the defendant's vessels pursuant to the terms of those contracts, with invoices being rendered by MAL to the defendant following each supply. As already mentioned, it was also common ground that the defendant then made payment for the bunkers supplied in accordance with the supply contracts. In the circumstances, my view is that any argument that the supply contracts between the defendant and MAL were sham transactions is bound to fail. Evidence that the tender process was other than *bona fide* were sorely lacking.

55 It is moreover pertinent to note that the documents, which were sent by MAL to the defendant in respect of the various bunker supplies, typically state as follows:

> "Buyer : MISC Berhad [the defendant]
>
> Supplier : Equatorial Marine Fuels Ltd (MF 380CST) & Peninsula (MGO, DMA)
>
> Trader : Market Asia Link Sdn Bhd [MAL]"

MAL was clearly referred to as a bunker trader, and not a broker or agent. Parties were in agreement that the term "bunker traders" typically refers to parties who do not physically supply the bunkers, but procure the bunkers from other suppliers. This would explain why the party which the defendant liaised with in relation to the physical operations of the bunker supply was the plaintiff and not MAL, since the latter did not have physical possession of the bunkers. This is in no way inconsistent with the defendant's case that MAL was the actual contracting party with the defendant and not a mere agent. Perhaps most detrimental to the plaintiff's case was its failure to explain why the defendant would make payment for the bunkers to MAL if the latter was merely a broker. There was no evidence of any brokerage commission being paid to MAL as remuneration, or any indication of the existence of a brokerage agreement at all. This was despite the fact that the managing director of MAL, Mr Yahya Bin Mohd Khalid ("Mr Khalid"), gave evidence on behalf of the plaintiff. If an agency relationship indeed existed, one would have expected Mr Khalid to refer to some brokerage agreement and provide details of its terms. Noticeably absent as well was any explanation by Mr Khalid for the payment of over US$17 million from the defendant to MAL.

Agency by estoppel

56 Faced with a lack of documentary evidence showing that MAL was appointed by the defendant

as the agent to broker the bunker transactions, the plaintiff sought to rely on the affidavit evidence of various third parties to build up an argument based on agency by estoppel. The plaintiff asserted that the defendant had held MAL out as its agent. Alternatively, the defendant knew or ought to have known that MAL was holding itself out as the defendant's agent and that bunker suppliers like the plaintiff would have supplied the bunkers only if they thought that the defendant was the principal and MAL its agent. It was argued that notwithstanding the above, the defendant did not take any steps to correct the plaintiff's erroneous belief, and the plaintiff had acted in reliance of such express or implied representation of MAL's authority to its detriment by supplying the bunkers to the defendant's vessels without obtaining payment. In these circumstances, the plaintiff submitted that the defendant was estopped from denying MAL's authority to enter into the bunker transactions on its behalf.

57 The plaintiff primarily relied on the affidavit of Mr Khalid, who deposed to the fact that the defendant knew that MAL was purchasing bunkers on behalf of the defendant. The plaintiff also procured an affidavit from the managing director of Compass Marine, Mr Darren Middleton. Mr Middleton gave evidence about how a representative from the defendant's bunker unit had informed him that MAL was the defendant's bunker broker, and provided him with MAL's contact details so that Compass Marine could liaise with MAL for the supply of bunkers to the defendant. Finally, Mr Lars Nielsen, the managing director from another firm in the bunker trade, Brilliant Maritime Services ("BMS"), swore an affidavit stating that one of the employees at the defendant's bunker unit, by the name of Khairul, had directed his staff in a phone conversation to contact MAL to discuss the defendant's bunker requirements. Mr Nielsen' evidence was that he understood this to mean that the defendant had appointed MAL as its broker to fix bunker contracts.

58 The concept of agency by estoppel was explained by the English court in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman & Lockyer*") in the following terms (at 503-504):

> An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

59 In the recent decision of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788, the High Court accepted (at [80]) the applicable principles laid down in *Freeman & Lockyer*. In particular, the following three conditions must be satisfied before an agency by estoppel can arise:

> (a) there must be a representation that the agent has authority to enter on behalf of the principal into a contract of the kind sought to be enforced;
>
> (b) such representation must be made by a person or persons who had "actual" authority to manage the business of the principal either generally or in respect of those matters to which the contract relates; and

(c) the contracting party must have been induced by such representation to enter into the contract, that is, that he in fact relied upon it.

The High Court (at [80]) specifically referred to the following passage by Diplock LJ in *Freeman & Lockyer* (at 505):

> It follows that where the agent upon whose "apparent" authority *the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority*. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates. [emphasis added]

60 Bearing in mind the above legal requirements for establishing an agency by estoppel, the evidence produced by the plaintiff fell far short. In relation to Mr Middleton's evidence, the first point to note is that the alleged representation made by the defendant's employee did not even relate to the transactions in question. The supposed telephone conversation took place in May 2006, but the Fixed Price contracts were concluded only more than two years later in July 2008. Second, the law is clear that to form an estoppel, the representation must emanate from a person with actual authority to manage the business of the principal. There was no indication whatsoever that the alleged employee in the bunker unit was such a person. Third, it was Mr Middleton's employee, and not Mr Middleton himself, who allegedly spoke to that employee of the defendant. Fourth, and this is important, any alleged representation was made to Compass Marine (of which Mr Middleton is the managing director), and not to the plaintiff itself. The plaintiff has adduced no evidence to show that it was induced by and had acted in reliance of that representation to its detriment. Mr Gurbani also highlighted that Compass Marine could have a vested interest in the outcome of these proceedings, even though it is not directly involved. This is because if this court were to hold that there was no contract between the defendant and the plaintiff, Compass Marine would potentially be liable to the plaintiff for breach of warranty of authority in misrepresenting that the plaintiff's contractual buyer was the defendant when it was in fact MAL.

61 As for Mr Nielsen, it must be noted that BMS was not even the broker of the plaintiff in respect of the material transactions. His evidence was therefore even more remote and of peripheral relevance. In any event, his evidence suffered from similar deficiencies as Mr Middleton's, in that there was no evidence at all that Khairul was an employee with actual authority, and there was nothing to indicate that the alleged representation was in fact conveyed to the plaintiff and relied upon. With regard to the Navig8 Faith contract, no representative from the plaintiff's broker OceanConnect gave evidence. There was no evidence whatsoever of any representation being made to either OceanConnect or to the plaintiff directly of MAL's authority to broker that particular deal.

62 Insofar as the plaintiff's case on agency by estoppel is based on express representations made by the defendant as to MAL's authority, my view based on the state of the evidence before me is that it is bound to fail. It remains to address the plaintiff's alternative case based on implied representation, the contention being that the defendant knew or ought to have known that MAL had been representing itself to the bunker industry that it was the defendant's agent, but took no steps to correct that mistaken view. It should be clarified at the outset that any representations that might have been made by MAL as to its own authority to transact on behalf of the defendant, without more, would not suffice, as the law is clear that the contracting party cannot rely on the agent's own representation as to its actual authority (see above at [59]). The key is therefore the defendant's knowledge that MAL was making such representations.

63 The plaintiff's contention was that the defendant had acquiesced in MAL's conduct of holding itself out as the defendant's agent. In this connection, the plaintiff relied substantially on the evidence of Mr Khalid, the managing director of MAL. Mr Khalid said in his affidavit that the defendant was aware that MAL had sourced for and purchased bunkers in the defendant's name, and that the defendant had authorised him to do so. He also said that "everyone in the bunker industry knew that MAL was acting on behalf of MISC [the defendant]". However, there were serious doubts as to the credibility of Mr Khalid's affidavit evidence, not least because his contentions were wholly inconsistent with a previous sworn Declaration which he had signed on 5 December 2008 in support of the defendant's motion to vacate the Rule B order in the US proceedings. In the Declaration, Mr Khalid clearly described the relationship between the defendant and MAL as that of contractual buyer and seller. This inconsistency was conceded by counsel for the plaintiff, Mr Leong (although he sought to persuade the court that Mr Khalid ought to be given a chance to explain at trial). Furthermore, the assertions in Mr Khalid's affidavit completely contradicted the position taken by MAL in legal proceedings which MAL had instituted against a Malaysian bank Affin Bank Berhad in the High Court of Selangor. MAL stated in its statement of claim in those proceedings in no uncertain terms that it "would enter into a short term periodic contract for the sale of Bunkers to MISC 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". Clearly, the position taken there was that MAL was purchasing bunkers in its own name in order to fulfil its contractual obligations as seller to the defendant.

64 In addition, Mr Khalid's evidence in the affidavit was at odds with the contemporaneous documentary evidence. A letter dated 18 November 2008 from MAL to the defendant appealing for future business deserves reproduction below:

> 1.1 As you are well aware pursuant to your Letter of Award dated 14th March 2008 and the Agreement for Supply of Bunkers dated 24th March 2008, we have secured a six (6) months supply of 138,000 MT (MFO380CST) contract to you at a fixed price of USD475.00/MT at a total award price of USD65,550,000.00 ("the Contract").
>
> 1.2 The price was based at USD475.00/MT which was representative of the then global bunker market price.
>
> 1.3 Pursuant to this, we have secured the supply from OW Bunker at USD467.00/MT for a period of six (6) months starting April 2008. Unfortunately, at the end of June 2008, OW Bunker has to abort the contract due to shortage of their own bunker fuel.
>
> 1.4 Compass Marine, our London analyst advised and sourced out bunker fuel from another physical supplier i.e. Equatorial Marine Fuel for the remaining three (3) months starting July 2008.
>
> 1.5 As you are well aware of, there was a drastic upward movement of worldwide bunker price since the months of July, August and September 2008 where the price ranges from USD600.00/MT for the month of July 2008 to USD750.00/MT for the months of August and September 2008.
>
> 1.6 It was impossible to lock the bunker price as there was no supplier willing to do so. This matter is beyond our control.
>
> 1 . 7 *We nonetheless continued to honour the Contract. As a result, the Company currently suffers approximately USD15 million losses as a result of compliance to the fixed price mechanism under the Contract*.

[emphasis added]

This was clearly not a letter that would have been written by a party who took the view that it was only acting as an agent and purchasing bunkers on behalf of its principal. If MAL were indeed under the impression that it was merely the defendant's broker, it would not have said that it was suffering from losses of "approximately US$15 million as a result of compliance to the fixed price mechanism under the Contract". MAL as a broker would be expected to only be entitled to remuneration in the form of a brokerage commission or agency fees. The letter clearly contradicted Mr Khalid's evidence and indicated quite unequivocally that this was a case where MAL was being paid the bunker purchase price by the defendant. Further, there was correspondence between the defendant and MAL in which MAL apologised for the "hassle caused pertaining to the outstanding payment notice from Equatorial Marine Fuel" and further assured the defendant that it would "take full responsibility to settle all outstanding payments to Equatorial".

65 The court is not required to treat every affidavit filed as true and at face value. The court may in appropriate circumstances reject the evidence contained therein, even in the context of an interlocutory application. In Paclantic v Moscow Narodny Bank [1983] 1 WLR 1063, the court considered when it would be appropriate to reject affidavit evidence (at 1067):

> I conclude, therefore, that I can reject Mr. Wong's affidavit, or any evidence contained in it, only *if the affidavit, or that evidence, is inherently unreliable because it is self-contradictory*, or if it is inadmissible, or if it is irrelevant. I conclude that I could reject a defendant's evidence *where there is affirmative evidence which is either admitted by the defendant or unchallengeable by him, and which is unequivocally inconsistent with his own evidence; and where no, or no plausible, explanation is given of the inconsistency*; because in such a case I could, but would not necessarily, conclude that on the evidence not even a faint possibility of a defence existed. [emphasis added]

66 Indeed, our court has accepted that just because an allegation is contained in a sworn affidavit, that does not mean that it should be accepted as true at the interlocutory stage. In the context of considering an application for summary judgment, the High Court in *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 endorsed (at [24]) the following principle from *Microsoft Corporation v Electro-Wide Limited* [1997] FSR 580 (at 594):

> [T]he mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief.

67 In the present case, in light of the obvious inconsistencies with contemporaneous evidence as well as his own sworn Declaration, Mr Khalid's affidavit evidence should be rejected, or at least be given very little weight as being highly unreliable.

68 Other than Mr Khalid's assertion that the defendant was aware that MAL was using the defendant's name to purchase bunkers on its behalf, all the plaintiff could rely on were the general allegations made by Mr Middleton, Mr Nielsen, as well as by its own director Mrs Chong, that MAL was a small setup with no reputation in the bunker industry except that it was known to be the defendant's bunker broker. Again, the defendant refuted this and adduced contrary evidence of MAL's financial viability prior to its present troubles. More importantly however, these assertions relied upon

by the plaintiff, even if true, did not address directly the issue of whether the defendant in fact knew about such a perception among the industry players. It must be remembered that the defendant provided documentary evidence of its practice of procuring bunkers directly through fixed price contracts and inviting tenders from its registered bunker suppliers, rather than arranging for such supplies through brokers. All the invoices which the defendant received for the transactions in question were MAL's invoices, issued on MAL's letterhead and based on the contract prices between the defendant and MAL. There was no evidence of MAL presenting to the defendant at any time any of the physical suppliers' invoices or other documentation which might have suggested that the contract for supply was in fact not with MAL.

69 Mr Gurbani submitted that silence is generally insufficient to constitute the kind of representation that is required for a plea of estoppel to succeed. He referred to Prakash J's decision in *Everbright Commercial Enterprises Pte Ltd and another v AXA Insurance Singapore Pte Ltd* [2000] 2 SLR(R) 287, in particular the following (at [66]):

> The plaintiffs' difficulty is that silence is generally insufficient to constitute the kind of representation that is necessary for a plea of estoppel to succeed. *Silence only founds estoppel when there is a duty to speak*. See *Greenwood v Martins Bank* [1933] AC 51 and *Spiro v Lintern* [1973] 3 All ER 319. In the latter case, the defendant's wife purported to sell the defendant's house to the plaintiff. The plaintiff sued the defendant for specific performance of the contract and it was held that the defendant was estopped from proving that the contract had been made without his authority because *he had known that the plaintiff had effected repairs on the house in the mistaken belief* that there was a legal obligation on the defendant to sell the house to the plaintiff. In those circumstances, the defendant had been under a duty to disclose to the plaintiff that his wife had acted without his authority and his failure to do so amounted to a representation by conduct that she had his authority. The principle to be drawn from these cases is that a duty to speak will arise where silence would create an erroneous impression which leads the prospective representee to alter his position for the worse.
>
> [emphasis added]

70 There is a similar observation made by the learned authors in *The Law Relating to Estoppel by Representation* (London: LexisNexis, 4th ed., 2004) at 55:

> There can be no duty to correct a mistake unless the mistake is proved and, further, the silent party knew or ought to have known of the mistake. Constructive knowledge is insufficient unless the silent party is under a duty to the mistaken party to ascertain the truth and inform him…the silent party need not speculate as to whether the alleged representee is mistaken nor point the matter out to him, unless their circumstances and relationship are such that the alleged representee is entitled to expect this.

71 In my view, plaintiff did not show any credible evidence that the defendant knew or ought to have known that MAL was representing to the bunker industry that it was acting as the agent of the defendant. There was no evidence whatsoever in the various affidavits filed on the plaintiff's behalf of any attempts by the plaintiff or its brokers to contact the defendant to verify the truth of any representations by MAL as to its own authority. The plaintiff was clearly content to commit itself to the transactions worth more than US$52 million without making any inquiries from a sufficiently senior member of the defendant with actual authority to manage the defendant's bunker business. I agree with Mr Gurbani's submission that the defendant could not, in the circumstances, come under any duty to correct any mistaken belief the bunker traders and suppliers (including the plaintiff) might have had that MAL was authorised to act as the defendant's broker. As such, the plaintiff's bid to

establish an agency by estoppel through implied representation is similarly unsustainable.

Admission of liability

72 I shall now deal with the plaintiff's submission that the defendant has admitted its contractual liability to the plaintiff by virtue of the corporate guarantee. The difficulty with such an argument is that the very notion of a guarantee, as Mr Gurbani pointed out, is that it is to guarantee *another party's liability*. Indeed, the corporate guarantee in question made it clear expressly that it was to guarantee that the defendant would make full payment of the outstanding sum due and owing to the plaintiff *from MAL*:

> "THIS CORPORATE GUARANTEE dated 2nd day of December, 2008 is made by MISC BERHAD … to certify and guarantee that MISC shall make full payment of the current outstanding sum of … *due and owing*, inclusive of interest, *to Equatorial Marine from MARKET ASIA LINK SDN BHD*…"
>
> [emphasis added]

73 In fact, the wording of the guarantee supported the defendant's case that there were two separate contracts, one between the defendant and MAL and another between MAL and the plaintiff. Mr Gurbani also highlighted the context in which the corporate guarantee was offered. The defendant's vessel the "Bunga Kasturi Lima", worth far more than the $22 million claim by the plaintiff and which was on charter and laden with cargo, had been attached by the plaintiff in California. The defendant was facing tremendous commercial pressure not only from the plaintiff but also other bunker suppliers, and its main objective was to quickly secure the release of the vessel. In the circumstances, the corporate guarantee could not constitute an admission of the defendant's liability to the plaintiff.

74 Counsel for the plaintiff Mr Leong also referred to the payments that the defendant made to other suppliers, whose bunkers had been supplied to the defendant's vessels. Presumably, this constituted an acceptance by the defendant of its liability under similar contracts for the sale of bunkers which it had directly entered into with these suppliers, through the agency of MAL. However, the defendant has explained the reasons behind such payments. The defendant paid not because it accepted that these suppliers were the contractual sellers. Rather, the payments were made because of the commercial pressure, and were necessary to avert arrests of the defendant's vessels and disruption to its business operations. This was supported by evidence that the defendant had first obtained MAL's consent before making such payments. MAL in particular had agreed that in respect of the supplies for which the defendant had already paid MAL, MAL would reimburse the defendant for the sums which the defendant had to pay to the bunker suppliers. In addition, the defendant produced letters sent to the suppliers wherein it was made clear that the payments were made under protest and purely to avoid the arrest of the defendant's vessels. It is also pertinent that the defendant has since commenced legal proceedings in Malaysia against MAL to recover the sums which the defendant had paid to the bunker suppliers on behalf of MAL. More fundamentally, the fact that the defendant made payment to other suppliers in respect of other transactions was not directly relevant to the present dispute.

75 Mr Leong also placed some emphasis on the fact that the defendant did not expressly deny liability when the plaintiff had sent demands for payment. He submitted that there was silence in the face of the plaintiff's demands, as apparently all that the defendant did was to forward the plaintiff's email (which demanded payment) to MAL, with a one-liner "Plse check whether this is yr supplier??". But one is hard pressed to see how this could be interpreted as some sort of indication that the defendant accepted its liability to the plaintiff. Albeit a one-liner, what the defendant said was

perfectly consistent with its present 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. Mr Leong further alluded to the defendant continuing to purchase bunkers from MAL despite the demands for payment from the various bunker suppliers. But there was again a perfectly sensible explanation. It obviously made commercial sense for the defendant to continue to buy bunkers from MAL simply because the US$475 million per metric ton price under the Fixed Term contract was far lower than the market price at the material time. There was no reason for the defendant to stop such purchases just because MAL appeared to have some difficulties paying off its suppliers. This was especially so since, as already mentioned above (at [64]), MAL had apologised and assured the defendant that it would take on the responsibility of settling all the outstanding claims with the plaintiff.

Conclusion on contractual claim

76 The state of the evidence points clearly to the conclusion that MAL had, as the bunker trader, entered into a contract to sell bunkers directly to the defendant. My view is that the plaintiff failed to establish a good arguable case that there was a contractual relationship between the plaintiff and the defendant (established through the agency of MAL) for the sale of bunkers. For this reason, based on my interpretation of the Court of Appeal decision in *The Vasiliy Golovnin* which requires a claimant to satisfy the court that it has a good arguable case on the merits, the plaintiff is not entitled to invoke the admiralty jurisdiction of the court and accordingly, the admiralty writ should therefore be struck out. Alternatively, if the correct view is that there is no such requirement of a good arguable case on the merits (as the decision in *The Eagle Prestige* would seem to suggest), the plaintiff's claim should also be struck out pursuant to O 18 r 19 or the inherent jurisdiction of the court. This is because the claim for payment of bunkers under the alleged contracts between the plaintiff and the defendant is obviously unsustainable and bound to fail: *The Osprey* [1999] 3 SLR(R) 1099.

The claim in unjust enrichment

77 In relation to the plaintiff's alternative claim in unjust enrichment, it was common ground that the elements necessary to establish such a cause of action are the following (see Goff & Jones, *The Law of Restitution* (London: Sweet & Maxwell, 7th ed., 2007) ("Goff & Jones") at para 1-016; *Chitty on Contracts* (London: Sweet & Maxwell, 30 ed., 2009) at 1845):

(a) The defendant must have been enriched by the receipt of a benefit;

(b) The benefit must have been gained at the expense of the plaintiff; and

(c) The benefit was gained in circumstances where it would be unjust for the defendant to retain it.

78 The plaintiff's submission, which one should bear in mind was presented in the alternative in the event that the contractual claim fails, was simple enough: first, the defendant had been enriched by the bunkers that were supplied to its vessels; second, such enrichment was clearly at the expense of the plaintiff who supplied the bunkers and was not paid; and third, the enrichment was unjust as the defendant had known of or had induced the plaintiff's mistaken belief that there were binding contracts between the plaintiff and the defendant for the sale of the bunkers.

79 Mr Gurbani on behalf of the defendant did not mount a vigorous challenge on whether the ingredients for the cause of action in unjust enrichment were satisfied, although it was submitted at

various junctures that the plaintiff had failed to show that the enrichment was "unjust". The primary line of attack by Mr Gurbani was concerned with what may be termed the limiting principles to a restitutionary claim, as well the defence of change of position. The first limiting principle relied upon by Mr Gurbani is that restitution will not be allowed where the claimant conferred the benefit on the defendant while performing an obligation (including a contractual obligation) which it owed to another. The reason for this is that the court will be slow "to cut across contractual boundaries and redistribute to a stranger, the owner, the risks which the plaintiff implicitly agreed to bear when he contracted with a third party" (see Goff & Jones at para 1-074). In *Pan Ocean Shipping Ltd v Credit Corp Ltd* [1994] 1 WLR 161, the House of Lords stated (at 166E-G):

> But, quite part from the fact that the existence of a remedy in restitution in such circumstances must still be regarded as a matter of debate, it is always recognised that *serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract*. [emphasis added]

80 Mr Gurbani pointed out that the plaintiff's claim based on unjust enrichment was predicated on its contractual claim against the defendant failing. That being the case, if the plaintiff has no contract with the defendant, he argued that this means that the plaintiff must have supplied the bunkers to the defendant's vessels pursuant to its contract with MAL. The operation of the abovementioned limiting principle, Mr Gurbani's argued, would hence bar the restitutionary claim, because the plaintiff cannot circumvent the contractual mechanism and specifically its allocation of risk by relying on a claim for unjust enrichment. The problem with Mr Gurbani's argument, however, lies in the assumption that if the court is of the view that there is no contract between the plaintiff and defendant for the supply of the bunkers, there must therefore be a contract for the supply of the bunkers between the plaintiff and MAL. As Mr Leong rightly pointed out, the latter outcome does not necessarily follow from the former conclusion. The position could well be that there was simply no properly formed contract at all for the supply of the bunkers in question. In particular, the plaintiff's case was that it had no intention to contract directly with MAL. Since it is not obvious that a contract for the supply of the bunkers existed between the plaintiff and MAL, this limiting principle based on the conferment of the benefit being the performance of a contractual obligation owed to another, cannot justify striking out the plaintiff's claim for unjust enrichment.

81 The other contention by Mr Gurbani, which pertains to another limit to a restitutionary claim, was more persuasive. This is the principle of *restitutio in integrum*, namely that restitution will not be ordered if the defendant cannot be restored to its original position. The underlying basis for this principle is very similar to that underpinning the defence of change of position. The learned authors in Goff & Jones commented thus (at para 1-084):

> The essence of the limiting principle that *restitutio in integrum* must be possible is that it would be inequitable to require the defendant to make restitution if he cannot be restored to his original position. Its application is not confined to the rescission of transactions or to actions for the recovery of money paid. Indeed, a similar principle underlies the defences of change of position…

82 The defendant's most forceful argument was that the plaintiff's claim in unjust enrichment is bound to fail as the evidence show clearly that the defendant had changed its position following the receipt of the bunkers. The defence of change of position, a relatively recent development of the law typically attributed to the decision of the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, has been accepted by our Court of Appeal in *MCST Plan No. 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ("*De Beers*") (at [35]):

> This was one of the defences overtly accepted in *Kleinwort Benson Ltd. Lord Goff* said

([18] *supra* at 538):

> I recognise that the law of restitution must embody specific defences which are concerned to protect the stability of closed transactions. The defence of *change of position* is one such defence; the defences of *compromise*, and *settlement of an honest claim* (the scope of which is a matter of debate), are others. It is possible that others may be developed ... [emphasis added]

The defence of change of position was recognised - some say, created - in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548. Lord Goff held that "a *bona fide* change of position should of itself be a good defence". He elaborated (at 580):

> At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. [emphasis added]

In Seagate Technology Pte Ltd v Goh Han Kim [1994] 3 SLR(R) 836 , the court noted that this defence was also available in Singapore. It would seem that there are three elements to the defence:

(a) The payee has changed his position.

(b) The change is bona fide.

(c) It would be inequitable to require him to make restitution or to make restitution in full.

83 Mr Gurbani submitted that the defendant had clearly changed its position following the receipt of the bunkers, having expended the bunkers received by the various vessels concerned, and having paid out a substantial sum of money to MAL in full settlement of what the defendant all along believed was its only contractual obligation. Such change of position was *bona fide* and it would be inequitable to require the defendant to make restitution. The defendant's submission was that it was patently clear, even at this interlocutory stage, that all three ingredients of the defence, as laid down by the Court of Appeal in *De Beers*, are satisfied such that the plaintiff's claim can have no chance of success. In addition, the defendant submitted that it was equally evident that, having made payment to MAL which became insolvent, it would not be able to recover the monies paid. As such, the defendant would not be able to be restored to its original position, and thus the plaintiff's claim would also fail because of the principle of *restitutio in integrum*.

84 In response to these submissions, the only rebuttal from the plaintiff was to question the *bona fides* of the defendant's payment to MAL, an issue which in the plaintiff's counsel submission was one that ought to be tried. With respect, this argument was misconceived. It must be remembered that the unjust enrichment claim was pleaded in the alternative, meaning it will be considered only in the event that the contractual claim was unsuccessful. If the contractual claim (in particular that aspect of it based on agency by estoppel) has failed, it would necessarily mean that the court has reached the finding that the defendant did not know that MAL was misrepresenting to the bunker industry as to its authority as an agent of the defendant. It ought to follow that there can be no issue that the defendant had therefore paid MAL in good faith.

85 Related to the above points is that if this court were to hold the defendant liable in unjust enrichment to the plaintiff, even though the defendant had already paid another party MAL for the

bunkers, the result is that the defendant would effectively be exposed to double liability. In *Yaku Shin (JB) Sdn Bhd v Panasonic AVC Networks Singapore Pte Ltd* [2008] 4 SLR(R) 193, which involved a claim for quantum meruit, Woo Bih Li JC (as he then was) held (at [82]):

> Nevertheless, I agree that YKJB's claim on a quantum meruit must fail for the simple reason that this is not a case where PS is unjustly enriched. I have found that PS's liability for the disputed transactions is to YKM. Furthermore, if PS is also liable to YKJB on a quantum meruit, then it has double liabilities, one to YKM and one to YKJB, which cannot be right. YKJB's recourse is against YKM whether on an express or implied contract or some other basis.

86 In my view, the plaintiff's alternative claim for unjust enrichment has no chance of success, because the defendant had in good faith expended the bunkers for its vessels and paid MAL the full contractual price for them. In the circumstances, I accept the submissions by the defendant's counsel that the limiting principle of *restitutio in integrum* as well as the defence of change of position are applicable in the present case, such that the claim is doomed to fail. Accordingly, the plaintiff has failed to discharge its burden of showing a good arguable case on the merits for its unjust enrichment claim, which means that the admiralty jurisdiction of the court has not been validly invoked. Further and in the alternative, the claim in unjust enrichment should be struck out under O 18 r 19 or the inherent jurisdiction of the court as being plainly unsustainable.

87 Having reached the above conclusion that both the plaintiff's contractual claim and its alternative unjust enrichment claim should be struck out for lack of admiralty jurisdiction as well as being plainly unsustainable under O 18 r 19 or the inherent jurisdiction of the court, it is strictly unnecessary to consider the other arguments by the defendant based on the "one claim one ship" rule and issue estoppel. However, the defendant did seek a specific declaration that the plaintiff is not entitled to invoke the admiralty jurisdiction of the court against the defendant's vessels, by virtue of the "one claim one ship" principle. Also, comprehensive submissions were made by both parties on these two issues. I shall therefore address them as well.

"One claim one ship" rule

88 The defendant contended that the plaintiff had invoked the admiralty jurisdiction once in the US Rule B proceedings against one of the defendant's vessels, the "Bunga Kasturi Lima" and having done so, was precluded from invoking admiralty jurisdiction again in Singapore by the service of the writ of summons in this action on the "Bunga Melati 5", a sister ship of the "Bunga Kasturi Lima". In support of this contention, reliance was placed on the "one claim one ship" rule, which is often attributed to the English decision of *The Banco* [1973] P 137 ("*The Banco*"). In that case, the plaintiff had commenced an action *in rem* in England and arrested the offending ship as well as six other sister ships as security for the claim. The English Court of Appeal set aside the six sister ship arrests, holding that on a construction of s 3(4) of the UK Administration of Justice Act (which is in *pari materia* to s 4(4) of the Act), the *in rem* admiralty jurisdiction of the court could only be invoked against either the offending ship or any other ship in the same ownership, but not against both ships.

89 This principle laid down in *The Banco* has been accepted as part of Singapore law. In *The Brunei 602* [1983-1984] SLR(R) 306 ("*The Brunei*"), the court held (at [13]):

> In our judgment it is now settled law that when a plaintiff brings an action *in rem* against more than one ship owned by a defendant, the jurisdiction of the court is invoked when the writ is served on one of the named ships and the warrant of arrest is executed. That having been done, the plaintiff cannot go against the other named sister ships and should strike them out of the writ. If he does not do so, the court, on the application of the defendant, will strike the other

named sister ships out of the writ and set aside service of the writ and warrant of arrest on the other named sister ship.

90 As pointed out earlier (at [13]), the court's admiralty jurisdiction *in rem* may be invoked either by an arrest of the vessel or by service of the *in rem* writ on the vessel named in the writ, whichever occurred earlier: see *The Fierbinti* [1994] 3 SLR(R) 574. It was common ground between parties that in considering the application of the "one claim on ship" principle to the present case, the fact that there was no arrest of any vessel but only service of the admiralty writ on the vessel, does not therefore preclude the application of the "one claim one ship" principle.

91 However, it can be observed that the actual ruling in *The Banco* operates within a narrow compass, namely that there can be no multiple invocation of admiralty jurisdiction against more than one ship *concurrently in the same jurisdiction* for the same claim. Essentially, the defendant's counsel in the present case was seeking to extend the ambit of the prohibition to a case where there have been earlier *in rem* proceedings for the same claim commenced in a *foreign jurisdiction* against another sister ship of the defendant, seemingly regardless of the stage or outcome of those foreign proceedings.

92 In support of such a wide reading of *The Banco* principle, Mr Gurbani relied on a Hong Kong court's decision in *The Neptune* [1986] HKLR 345 ("*The Neptune*"). In that case, the plaintiff arrested one of the defendant's ships in Sri Lanka and obtained security in respect of its claim. The plaintiff then arrested another of the defendant's ships in Hong Kong, in respect of the same claim for which *they had previously obtained security* in Sri Lanka. It was held that the plaintiff's act of arresting the second ship owned by the defendant was in conflict "with the principle in *The Banco* that only one vessel may be arrested" (at 354).

93 On the other hand, the plaintiff's counsel Mr Leong cited the English case of *The Kommunar* (No. 2) [1997] 1 Lloyd's Rep 8 ("*The Kommunar*"). There, the defendant's vessel was arrested in England and the plaintiff applied for appraisement and sale of the vessel. One of the defendant's sister ships was earlier arrested by another claimant in South Africa, and the plaintiff had claimed against the proceeds of sale in South Africa. The defendant sought to set aside the arrest of the vessel in England *inter alia* on the ground that the arrest was in breach of the "one ship one claim" rule as encapsulated in s 21(8) of the UK Supreme Act, which provided as follows:

> Where as regards any such claim as is mentioned in section 20(2)(e) to (r), a ship has been served with a writ or arrest in an action *in rem* brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action *in rem* brought to enforce that claim; but this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship.

94 Colman J found that on a construction of s 21(8), it was meant merely to give effect to the principle in *The Banco*, which on its facts was limited to a case of multiple arrests confined to the English ports. The learned judge observed that s 21(8) of their Act did not expressly refer to proceedings outside England. Such express reference to foreign proceedings would have been made, if the intention of the Parliament had been that s 21(8) should have such a wide application. Accordingly, Colman J confined the applicability of s 21(8) to *in rem* proceedings or prior arrests in England only, and held that the earlier South African proceedings were not a bar to the proceedings before him.

95 The English approach is largely consistent with the holding of the Federal Court of Australia in *Patrick Stevedores No. 2 Pty Ltd v Proceeds of Sale of the Vessel MV "Skulptor Konenkov"* (1997) 144

ALR 394 ("*The Skulptor Konenkov*"), another decision relied on by Mr Leong. The claimant in that case had filed a claim in Canada against the sale proceeds one of the defendant's vessels the "Alexsandr Starostenko", which had been arrested by another creditor. The issue before the court was whether the claimant, having recovered some amounts in the *in rem* proceedings in Canada, could proceed for the balance owing to it in the Australian proceedings against another of the defendant's vessels the "Skulptor Konenkov". This turned on the proper interpretation of s 20(3) of the Australian Admiralty Act 1988, which provided that:

> Where a ship has been arrested in a proceeding commenced as mentioned in section 15, 17, 18 or 19, no other ship shall be arrested in the proceeding unless the first-mentioned ship:
>
> (a) was invalidly arrested and has been released from arrest;
>
> (b) was unlawfully removed from the custody of the Marshal...

96 The Australian court also considered the International Convention Relating to the Arrest of Seagoing Ships of 1952 ("the 1952 Arrest Convention"). Article 3(3) of the 1952 Arrest Convention provides for when the arrest of a vessel in one Contracting State will bar a subsequent arrest in another Contracting State, as follows:

> A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any one of such jurisdictions...any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside...

97 Sheppard J commented that while something may be said for the view that s 20(3) should apply extra-territorially to achieve conformity with the effect of the 1952 Arrest Convention, the fact remained that Australia was not a party to the Convention. In the absence of express statutory provision, it was unlikely that the Parliament intended s 20(3) to have extra-territorial effect. There were other difficulties in construing the provision in an expansive manner to encompass foreign proceedings, notable of which was the problem of ascertaining the true nature of the foreign proceedings and whether they were the same as domestic *in rem* proceedings. The Australian court therefore reached the conclusion that the scope of the prohibition in s 20(3) was limited to Australian *in rem* proceedings and arrests in Australia.

98 The question of whether the "one ship one claim" principle extends to foreign proceedings has not, as counsel informed me, been settled by our courts. In *Admiralty Law and Practice*, the learned author first referred to the Hong Kong decision of *The Neptune*, and then to the English and Australian decisions highlighted above, with the following helpful comment on the factors that a Singapore court may have regard in resolving the issue (at 148):

> Whether a Singapore Court would follow these two decisions [*The Kommunar* and *The Skulptor Konenkov*] is a matter of speculation, though when the issue presents itself, the fact that there is no provision equivalent to section 21(8) in the High Court (Admiralty Jurisdiction) Act even after its amendment in 2004, the risk of harassment of ships that could potentially arise from arresting them in different jurisdictions over the same claim, possibly giving rise to an abuse of process, any difficulty in the determination of the nature of the foreign proceedings, the possible extra-territorial application of a domestic legislation and the adverse consequences of *lis alibi pendens* would be some of the relevant factors to consider.

99 It is true, as Mr Gurbani argued, that both the English and Australian decisions were based on an interpretation of their specific statutory provisions respectively, which find no equivalent in the Singapore statute. To that extent, the decisions may not be directly relevant to what the position in Singapore ought to be. However, Mr Gurbani went one step further to contend that the absence of an equivalent provision in the local context to s 21(8) of the English legislation (which has been interpreted by the English court to be of purely domestic effect), must mean accordingly that the local position is not to be similarly circumscribed but should extend to foreign proceedings. With respect, the logic of that submission is not apparent. As Mr Leong rightly highlighted, s 21(8) of the English Act merely represents a codification of the principle in *The Banco*, which has already been accepted as good law by the Singapore courts (see above at [89]). The fact that the Singapore Parliament chose not to expressly legislate (during the 2004 amendments) for the position in *The Banco* does not indicate, one way or another, whether the statutory intent is for the principle to be extended to cover prior arrests or invocation of admiralty jurisdiction in foreign courts.

100 The more pertinent point that can be extracted from the English and Australian authorities relates to the approach adopted, namely that the court would be slow to construe a statutory provision as having extra-territorial effect in the absence of express legislative intention. Also instructive is how the Australian court was influenced by the fact that Australia was not a party to the 1952 Arrest Convention. Singapore similarly is not a party to the Convention. The "one ship one claim" principle is not even statutorily provided for under the Act, and it follows that there obviously is nothing in the Act which expressly extends the scope of its operation to foreign proceedings.

101 What Mr Gurbani advocated was a blanket prohibition against the invocation of the admiralty jurisdiction of the court as long as there had been prior *in rem* proceedings in respect of the same claim in a foreign jurisdiction, regardless of the status and outcome of those foreign proceedings. The proposition is not without difficulties. One would think that matters such as whether there are *concurrent* proceedings before the foreign court and the Singapore court, and whether security had been obtained in the foreign court, should not be irrelevant. In this regard, the facts in *The Neptune* are quite clearly distinguishable from the situation in the present case. There, the claimant had already obtained security in Sri Lanka and was seeking to arrest another of the defendant's ship in Hong Kong to obtain *further security*. The line of English cases referred to in *The Neptune* similarly concerned subsequent arrests in cases where security had already been provided for the release of the vessel in the first jurisdiction. In contrast, the plaintiff in the present case did not actually obtain any security in the US Rule B proceedings, which have since also come to an end. Quite evidently, there is a stronger argument that it is oppressive and an abuse of process for the claimant to be initiating concurrent proceedings in different jurisdictions and obtaining security multiple times.

102 A further problem with extending the scope of the "one ship one claim" principle to foreign proceedings is the difficulty of ascertaining the precise nature of those proceedings. Indeed, under the blanket approach advocated by Mr Gurbani, it would seem that whether a claimant is prevented from invoking the admiralty jurisdiction of the Singapore courts will depend critically on whether the earlier foreign proceedings can be characterised as the same as, or at least sufficiently similar to, local *in rem* proceedings. Yet, this inquiry, which raises the question of foreign law, cannot be expected to be straightforward. It is noteworthy that in the *The Kommunar* and *The Skulptor Konenkov*, the English and Australian courts avoided this tricky comparative exercise, and instead proceeded on the assumption that the foreign proceedings were the same as under their domestic laws. In the case before me, both parties called experts which rendered opinions that are, if I may say so, equally persuasive, yet reaching opposite conclusions. The defendant's experts explained that the Rule B proceedings in the US are very much in the nature of a sister ship *in rem* action as known under Singapore law, because they essentially serve the same two key functions, namely to compel the defendant to appear and answer the plaintiff's claim by subjecting his property within the court's

territorial jurisdiction to the court's control, and for the purpose of obtaining security for the claim. On the other hand, the plaintiff's expert, while accepting that there are quite a number of similarities between Rule B attachment in the US and *in rem* proceedings in Singapore, took the view that there are fundamental differences which indicate that the Rule B procedure is *in personam* in nature, such as the absence of protection against change of ownership and the lack of secured interest in the property attached. The competing opinions, which were both supported by cogent arguments, are illustrative of the difficulties that will be faced by the court in determining whether the foreign proceedings should be regarded as being the equivalent of Singapore *in rem* proceedings. Indeed, the answer may often be a matter of degree, and it would seem odd for the issue of whether a plaintiff is precluded from invoking the admiralty jurisdiction of the Singapore court to turn on something as malleable as the degree of similarity between the foreign proceedings and *in rem* proceedings in Singapore.

103 Bearing in mind that this court's admiralty jurisdiction is derived from the Act, and the general principle that a statute should not be construed to have extra-territorial effect in the absence of express provision to the contrary, I would hesitate to extend the scope of the "one ship one claim" rule (as accepted in *The Brunei*) beyond the context of multiple arrests or service of writs on ships in Singapore. If the Parliament intended for *in rem* proceedings in foreign jurisdictions to be a bar to an action *in rem* in Singapore, the Act would have contained express provision to that effect. The conclusion is all the more so if regard is had to the difficulties that would be faced by the court if it is required to determine whether the foreign proceedings in question should be characterised as being of the same nature as *in rem* proceedings in Singapore for the purpose of triggering the prohibition. Even if the "one ship one claim" rule can be extended to cover earlier foreign proceedings, it should not be a blanket ban as propounded by the defendant in the present case. One must not lose sight of the mischief behind the "one claim one ship" rule in *The Banco*, which is in essence to prevent a claimant from harassing the defendant and abusing the court process. Whether that is so, in the context where a claimant seeks to invoke the Singapore court's admiralty jurisdiction when there already exists prior foreign proceedings, must depend on the facts and circumstances of each case. The important factors to consider should include whether the foreign proceedings are still pending and the potential adverse effects of *lis alibi pendens*, whether the claimant had already obtained security in the foreign proceedings and is seeking to obtain further security, and the reasons why the claimant is bringing a second *in rem* action in Singapore. Thus, it cannot be of no significance in the present case that the proceedings in the US had already come to an end, and that the plaintiff had not managed to obtain any security for its claim from the US proceedings. For the above reasons, had it been necessary for my decision, I would not have struck out the plaintiff's action based on the "one claim one ship" rule. I therefore also declined to declare that the plaintiff is not entitled to invoke the admiralty jurisdiction of the court against the defendant's vessels on account of the "one claim one ship" principle.

Issue estoppel

104 It remains to address the arguments on issue estoppel. The defendant submitted that the plaintiff's allegations of breach of contract and unjust enrichment had been considered and determined by the US courts. As such, the plaintiff was estopped from litigating the same issues before the Singapore court, such that the plaintiff's action herein should be therefore dismissed as being frivolous, vexatious or an abuse of process.

105 The defendant's contention was essentially based on the doctrine of *res judicata*, which can encompass two concepts. A foreign judgment may give rise to a *cause of action estoppel* which prevents a party from asserting or denying as against the other party, the existence of a cause of action, the non-existence or existence of which has already been determined by the foreign court. By

comparison, a foreign judgment may also create an issue estoppel, which will prevent a matter of fact or law necessarily decided by the foreign court from being re-litigated (see *Dicey & Morris on Conflict of Laws* (London: Sweet & Maxwell, 14th ed., 2006) at 14-027). The distinction is succinctly borne out in the following statement by Sundaresh Menon JC (as he then was) in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 at [18]:

> If the previous decision does not determine the cause of action sued on in the later proceedings, that decision may still be invoked as having determined, as an essential step in its reasoning, an issue that proves relevant in the later case and further consideration of that issue maybe foreclosed…

106 In the present case, the defendant's submission was based on issue estoppel as opposed to cause of action estoppel, presumably because it accepted that there was no actual hearing and resolution by the US courts on the substantive causes of action of the plaintiff in contract and unjust enrichment. The only rulings in the US proceedings were made in the context of the defendant's motion to vacate the attachment of the defendant's vessel, the motion succeeding both at first instance and on appeal.

107 In order to establish issue estoppel, the following conditions must be satisfied (see *The "Vasiliy Golovnin"* [2007] 4 SLR(R) 277 at [38]; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853; *The Sennar (No.2)* [1985] 1 WLR 490; *The "Good Challenger"* [2004] 1 Lloyd's Rep 67):

(a) The judgment must be given by a foreign court of competent jurisdiction;

(b) The judgment must be final and conclusive on the merits;

(c) There must be identity of parties in two sets of proceedings;

(d) There must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the proceedings at hand.

108 There was no dispute that the US courts were of competent jurisdiction, and that the same parties were involved in the US proceedings as in the present case. Mr Gurbani argued on behalf of the defendant that the issues before the court in both sets of proceedings were also identical, which related to whether the defendant was liable to the plaintiff either for breach of contracts for the supply of bunkers, or alternatively in unjust enrichment. Insofar as the plaintiff's assertion was that the specific submissions on agency by estoppel and the admission of liability (by virtue of the corporate guarantee) were not canvassed before the US courts, the defendant disagreed, and in any event pointed out that these were matters which ought to have been raised such that the plaintiff was still precluded from raising them in the present proceedings due to the wider conception of abuse of process. I agree generally with Mr Gurbani's submission that there is an identity of issues in the two sets of proceedings, save that it is crucial to remind ourselves that these same issues were decided in the US proceedings *in the context of a jurisdictional challenge at an interlocutory stage to vacate the attachment order* over the defendant's vessel. This has important implications from the perspective of considering whether the US judgments are to be regarded as final and conclusive on the merits, which in my view is the crux of the matter in relation to the point on issue estoppel.

Whether US judgments final and conclusive on the merits

109 In *The Sennar (No. 2)* [1985] 1 WLR 490 ("*The Sennar*"), Lord Diplock explained what constituted a final and conclusive judgment on the merits (at 494):

> It is often said that the final judgment of the foreign court must be "on the merits." The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has Jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that *its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal* to a court of higher Jurisdiction. [emphasis added]

110 In *The "Vasiliy Golovnin"* [2007] 4 SLR(R) 277, Tan Lee Meng J similarly 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". The learned judge also endorsed (at [40]) the following comment made by Lord Brandon of Oakbrook in *The Sennar* on when a judgment is with respect to "the merits of the case":

> 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]

111 Mr Gurbani submitted that in order to obtain a Rule B attachment in the US, one of the requirements which a claimant has to satisfy is that it has a *prima facie* maritime claim against the defendant, and this necessarily involves an examination of the merits of the claim. In the US proceedings, the California District Court had, after considering the evidence in the form of witness declarations, and after hearing full arguments, held that the plaintiff had failed to establish such a *prima facie* case for breach of contract and unjust enrichment. The decision was upheld, after further comprehensive written submissions and oral arguments, by the United States Court of Appeals for the Ninth Circuit. In the circumstances, Mr Gurbani argued, the US judgments must be considered final and conclusive on the merits. In Mr Gurbani's submission, it is immaterial that the US decisions were made in the interlocutory context of considering a jurisdictional challenge.

112 It indeed appears to be generally accepted now that it is possible for a ruling made at the interlocutory stage to nonetheless qualify as being final and conclusive on the merits, for the purpose of raising an issue estoppel. In particular, Mr Gurbani cited the decisions in *The Sennar*, *Tracomin S.A. v Sudan Oil Seeds Co Ltd* [1983] 1 Lloyd's Rep 560 and *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 in support of such a proposition. In the context of considering the recognition and enforcement of foreign judgments, it has also been commented that "decisions on jurisdictional applications or challenges, which may well be interlocutory in the foreign court, may sometimes be seen as final and conclusive" (see Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (London: Informa, 5th ed, 2009)).

113 However, it is critical to appreciate the precise nature of the determination made by the courts in such cases that has been regarded as final and conclusive. In *The Sennar*, the Dutch court had dismissed an action on the ground that a jurisdiction agreement required the claimant to bring its action in Sudan instead. It was the Dutch court's holding on the effect and validity of the jurisdictional agreement that was regarded as being final and conclusive on the merits. In *Tracomin S.A. v Sudan Oil Seeds Co Ltd*, it was the decision of the Swiss court determining if an arbitration clause had been incorporated into the contract. It can be seen that the common thread in these cases is that the ruling in question, even though made at the interlocutory stage, is one that cannot be reopened or varied by the court. This is because issues relating to the applicability or effect of jurisdictional clauses and arbitration clauses, by their very nature, are to be determined and disposed

of once and for all at the jurisdictional stage. Whether a jurisdictional clause means that a matter should be stayed in favour of the contractual forum is clearly an issue that will not be revisited at trial. The very function of such jurisdiction clauses is to address the antecedent question at the preliminary stage of where the litigation should be conducted. Once a jurisdiction clause is held to apply or not to apply during the jurisdictional stage, it will have little purpose to serve beyond that and during the trial on the merits. Indeed, this is the reason why persuasive academic arguments have been made that questions as to the existence and scope of jurisdictional clauses should be established to the requisite standard of certainty in civil proceedings (*ie* on a balance of probabilities) even at the interlocutory stage: see Stephen Pitel & Jonathan de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 Canadian Business Law Journal 66. The same can be said of a holding that an arbitration clause covers the dispute such that the matter should proceed for arbitration.

114 As noted by the learned commentators of *Dicey & Morris on the Conflict of Laws* (London: Sweet & Maxwell, 13th ed., 2000) at para 14-030, the key to understanding how issue estoppel was held to arise in these cases is that the issue in question, even though it might be procedural in nature, had been determined by the court with finality and the order made in respect of that issue was not merely provisional in nature:

> The issue determined by the foreign court in *The Sennar* (No. 2), was that a jurisdiction agreement bound the claimant to bring his claim in Sudan, and as such may have been considered as being procedural in nature. But it was *the final conclusion of the foreign court on the point which it had been asked to decide*, namely, whether the exclusive jurisdiction agreement applied to a claim framed in tort; and it was on this account held capable of supporting an estoppel against the claimant upon the issue. In *Desert Sun Loan Corp. v Hill*, the Court of Appeal accepted in principle that issue estoppel could arise from an interlocutory judgment of a foreign court on *a procedural, non-substantive issue* where there was express submission of the issue in question to the foreign court, and *the specific issue of fact was raised before and decided, finally and not just provisionally, by the court*. It was emphasised that before according preclusive effect to any such finding by a foreign court the need for caution should be borne in mind. [emphasis added]

115 Returning to the present case, the US courts had dealt with the issues of whether the defendant was liable to the plaintiff for breach of contract or unjust enrichment, only for the purpose of deciding whether the attachment order should be vacated, and *only to the extent that the plaintiff had failed to establish a prima facie case based on the state of the evidence before the court*. To my mind, this was not a final conclusion, and it clearly remained open for the US courts to reach a different view on the same issues at the subsequent stage of considering the actual motion to dismiss the Verified Complaint. This is clearly reflected by the following comments of the first instance judge from the transcripts of proceedings:

> On the plaintiff's breach of contract cause of action, there is at least at this stage insufficient support for a breach of contract cause of action in light of the fact that *at least at this stage the evidence is insufficient to make a prima facie showing of a contract between the plaintiff and the defendant*…
>
> …my ruling does not address the motion to dismiss which will be heard at a later time…
>
> Similarly, the court finds that the plaintiff did not meet its burden with respect to the quantum meruit cause of action. *I recognise that plaintiff is not required to prove its case at this time, and my ruling only pertains to this hearing*…

[emphasis added]

Similarly, the judgment of the US appeal court was concerned with whether the lower court properly vacated the attachment, and was limited to a consideration of whether the plaintiff had failed to show it had a valid *prima facie* breach of contract or unjust enrichment against the defendant.

116 It seems clear that the US courts did not actually make any conclusive findings or establish any facts as proved, at any rate not to the requisite full civil standard of proof. It follows that the courts did not express any conclusion with regard to the effect of applying relevant legal principles to *the proven* facts of the case. Adopting the approach of Lord Brandon of Oakbrook in *The Sennar* (see above at [110]), it may therefore be said that the judgments were not "on the merits".

117 It is also telling that a similar position appears to have in fact been adopted by the defendant itself in the US proceedings. The defendant's Answering Brief on appeal to the Ninth Circuit Court of Appeals stated that:

> …the District Court expressly recognised that the Rule E(4)(f) hearing was not for a final determination of the merits of Equatorial's underlying claim, and the Court did not purport to make such a final determination…

118 In my opinion, the findings of the US courts on the issues relating to the defendant's liability in contract or unjust enrichment to the plaintiff were clearly capable of being re-opened and reconsidered by the court in subsequent proceedings to determine the substantive causes of action. In particular, the court, if it subsequently heard the actual motion to dismiss the Verified Complaint, would clearly not have been bound by the earlier findings made in the context of determining whether the attachment of the vessel should be vacated. That being the case, my view is that the US rulings in question are not to be regarded as final and conclusive on the merits in respect of those same issues which are before this court, and accordingly no issue estoppel arises. As such, were it material to my decision, the defendant's argument based on issue estoppel would not have been successful in striking out the plaintiff's claim.

Conclusion

119 To recapitulate, the admiralty jurisdiction of this court was not properly invoked because the plaintiff failed to discharge its burden of establishing a good arguable case on the merits of its claims in contract and unjust enrichment. In addition, the plaintiff's claims were also shown to be plainly and obviously unsustainable. As a result, the defendant's application to strike out the writ of summons was allowed, both on the basis of lack of jurisdiction, as well as pursuant to the court's powers to strike out an action under O 18 r 19 or its inherent jurisdiction.

120 Both parties preferred that the costs of the application be agreed if not taxed, and I so ordered.