# The “Bunga Melati 5”
# [2015] SGHC 190

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| **Case Number** | : Admiralty in Rem No 21 of 2010 |
| **Decision Date** | : 22 July 2015 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Judith Prakash J |
| **Counsel Name(s)** | : Lee Eng Beng SC, Koh See Bin, Amy Seow and Matthew Teo (Rajah & Tann Singapore LLP) for the plaintiff; Ang Cheng Hock SC, Yap Yin Soon, Tan Xeauwei, Edmund Tham Weiheng and Ramesh Kumar (Allen & Gledhill LLP) for the defendant. |
| **Parties** | : EQUATORIAL MARINE FUEL MANAGEMENT SERVICES PTE LTD — THE OWNERS OF THE SHIP OR VESSEL "BUNGA MELATI 5" |

*Admiralty and shipping – admiralty jurisdiction and arrest – action in rem*

*Agency – evidence of agency*

*Agency – agency by estoppel*

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 163 of 2015 was dismissed by the Court of Appeal on 29 March 2016. See [2016] SGCA 20.]

22 July 2015 Judgment reserved.

**Judith Prakash J:**

**Introduction**

1 The question to be answered in this case is whether the defendant, a substantial shipowner and operator, has to pay the plaintiff, a marine fuel supplier, for bunkers supplied to the defendant’s ships. The answer to the question depends on the role played by an entity called MAL which ordered the bunkers from the plaintiff. Was MAL acting on its own account as purchaser or was it acting as the agent of the defendant? Alternatively, even if MAL did not have actual or apparent authority from the defendant to act as its agent, is the defendant estopped from denying MAL’s authority?

**The facts**

***The parties***

2 The plaintiff, Equatorial Marine Fuel Management Services Pte Ltd (“EMF”), is a company incorporated in Singapore. Its business is to procure, sell and supply bunkers to ocean-going vessels.

3 The defendant, MISC Berhad (“MISC”), is a publicly listed company incorporated in Malaysia. It owns and operates commercial vessels and offshore floating facilities and is known to be one of the largest shipowners in the world.

4 MAL, whose full name is Market Asia Link Sdn Bhd, is a company incorporated in Malaysia

initially for the purpose of selling spare parts for ships. In March 2005, MISC approved MAL as a registered vendor of bunkers. Thereafter, until the end of 2008, MISC purchased bunker fuels from MAL many times, pursuant to both fixed price contracts and to spot contracts.

5 Compass Marine Fuels Ltd ("Compass Marine") and OceanConnect UK Ltd ("OceanConnect") are both bunker broking companies based in London. In the period between June 2006 and September 2008, EMF delivered approximately 198,000mt of fuel to MISC vessels pursuant to bunker supply contracts brokered though Compass Marine and OceanConnect. Compass Marine and OceanConnect dealt with EMF and MAL. They had no direct dealings with MISC.

***The claim***

6 EMF's claim has been quantified at US$21,703,059.39 plus contractual interest. It is for non-payment of fuel delivered to vessels owned or operated by MISC under three bunker contracts ("the Disputed Contracts") that EMF had concluded with MAL. MISC's position is that it is not liable at all under any of the disputed contracts: it was not a party to those contracts and EMF must look to MAL, the counterparty, for payment.

7 Two of the Disputed Contracts were fixed price contracts. Each was for the delivery of a total of 35,000mt of fuel to MISC vessels in Singapore ("the Fixed Price Contracts"). The Fixed Price Contracts were concluded with MAL through Compass Marine on 3 July 2008. The third contract was a spot contract for the delivery of 1,100mt of fuel to the vessel *NAVIG8 FAITH* concluded with MAL on 18 September 2008 through OceanConnect ("the Spot Contract").

8 EMF says that it is clear from the evidence that MAL was holding itself out as the bunker broker for MISC when the Disputed Contracts were entered into. Further, MISC knew that MAL was contracting to purchase bunkers in MISC's name. In addition, an employee of MISC had represented to Compass Marine in May 2006 that MAL was MISC's bunker broker. This position taken by EMF combines actual authority, apparent authority and estoppel.

9 As a mainstay of its allegation that MISC knew that MAL was using its name when making purchases of bunkers, EMF also alleges that there was a special relationship and course of dealing between MISC and MAL from 2005 to 2008. MISC's approval of MAL as its registered bunker vendor was only a formality, designed to carry into effect a plan for MISC to award bunker contracts to MAL and for MAL to generate bunker invoices to obtain financing from Affin Bank Bhd ("Affin Bank"). In order to secure the bunker contracts, MAL had to bid at the lowest prices, at a loss to itself. On its part, MISC used the low prices to justify the award of bunker contracts to MAL. MAL had to use MISC's name in order to purchase bunkers from the market on credit since MAL was not an established bunker trader. On the ground and in the performance of the bunker contracts, MISC regarded MAL as no more than its broker.

10 Given the nature of EMF's allegations, it is necessary to describe the role of the broker in bunker supply transactions and deal with MAL's appointment as one of MISC's registered bunker vendors.

***The role of brokers in the bunker industry***

11 Mr Darren Middleton ("Middleton"), the owner and director of Compass Marine who appeared as a witness for EMF, described how brokers operate in relation to the supply of bunkers.

12 The relevant parts of his affidavit state:

7. The bunker brokers connect the sellers and the buyers. They do not take the credit risk of the buyers or the supply risk of the sellers. …

8. The first step in the brokering of a bunker supply contract is the making of an enquiry by the buyers with the bunker brokers. The bunker brokers will then contact sellers in the market place to get the best price and terms for the intended bunker purchase. The bunker brokers will collect the competing quotes and recommend sellers for the buyers' consideration. If the buyers find an offer acceptable, the contract is concluded by way of a nomination of the sellers making the offer.

9. The bunker brokers will prepare and forward to the buyers a bunker sales confirmation to record the terms of the bunker supply. The bunker sales confirmation will usually set out the name of the buyers, the name of the sellers, the name of the vessel to be supplied, the port of supply, the estimated date of supply, the quantity and grade of fuel, the price, the name of the local agent and the terms of payment.

10. The bunker brokers will also prepare and forward to the sellers a bunker sales confirmation containing the same details.

11. The industry practice is that throughout the negotiations and performance of the bunker supply transaction, all communications are channelled through the broker or respective brokers and there would be no direct contact between the buyers and sellers. …

12. After the delivery of the bunkers, the sellers will forward to the bunker brokers their invoice together with the bunker delivery note or receipt. The industry practice is for the invoices to be issued to the buyers, care of the bunker brokers. The bunker brokers will then forward the invoices to the buyers for their attention. Where there are co-brokers, the sellers will forward to the bunker brokers their invoice, and the bunker brokers will in turn forward the invoice to their co-brokers for their onward transmission to the buyers.

***How MAL became a registered vendor of bunkers***

13 MISC has a system in place in relation to the purchase of equipment and supplies. It only makes such purchases from vendors who have been registered by it as suppliers for the particular items. Before March 2005, MAL was registered with MISC only as a ship spares supplier. MAL had been supplying MISC with spare parts since 2000, with its sales to MISC between 2000 and 2005 amounting to RM 47,988,285. On 3 January 2005, MAL wrote to MISC to "officially register its interest" in expanding its business with MISC to include the supply of bunkers. The letter included the following:

> *We act as principals in all transactions, not as a broker, taking all responsibilities* for the sale of bunkers and lubricants in the way of quantity, quality and effective delivery procedure. We are able to offer to supply your vessels at very competitive prices with reliable and prompt service based on 30 days credit from the date of delivery. We would welcome any inquiries from you in the future. [emphasis added]

14 MAL's application to be a registered vendor of bunkers was first evaluated by employees from MISC's Central Administration Unit, who provided a preliminary assessment of MAL's suitability. Thereafter, a Vendor Assessment Form prepared by the Central Administration Unit was sent to officers in MISC's Procurement Services Unit who added their comments on whether MAL should be registered. The Form was then sent to the Head of Group Procurement, Tenders and Contracts ("GPTC"), who recommended MAL for registration. This recommendation was communicated to the

Procurement Services Unit which then prepared and signed off on the Form before sending it to the Vendor Registration Unit. Approval was then sought from the Head of the Finance Division. Thereafter, MAL was registered in the system as a vendor of bunkers. It was informed of such registration on 24 March 2005.

***Pertinent details of the Disputed Contracts***

15 In early July 2008, following communications between MAL and Compass Marine, Compass Marine approached EMF in respect of contracts for the supply of bunkers. As a result, Compass Marine and EMF entered into the Fixed Price Contracts. The price fixed under the first of these was US$744 per metric tonne for deliveries in August 2008 and the price fixed under the second contract was US$750 per metric tonne for deliveries in September 2008.

16 On 3 July 2008, after the Fixed Price Contracts were concluded, Compass Marine sent e-mails to EMF confirming the terms of the agreement. Similar e-mails were also sent to MAL on the same day. On the following day, MAL responded by sending e-mails headed "Fixed Price Agreement" to Compass Marine signalling their acceptance of the price offered. In all of the above e-mails, EMF was named as the seller and MISC as the buyer under the Fixed Price Contracts. On EMF's part, e-mails were sent by EMF to Compass Marine on 11 July 2008 to record the terms and conditions agreed.

17 Between 25 August 2008 and 26 September 2008, MAL sent a number of documents headed "Nomination of Bunker Supply" to Compass Marine for delivery of bunkers between 3 September 2008 and 11 October 2008 under the Fixed Price Contracts. Each of these documents set out the name of a nominated vessel, its estimated time of arrival in Singapore and the quantity of bunkers required. Each also contained instructions for EMF to contact MISC's local agent to arrange for the bunkering operations of the vessel. On receipt, Compass Marine sent a document titled "Bunker Confirmation" to MAL and EMF respectively. EMF responded with an e-mail confirmation to Compass Marine. All of these documents expressly identified MISC as the buyer. Procedurally, everything was done in accordance with the industry practice as set out by Middleton in [11] of his affidavit.

18 The Fixed Price Contracts were duly performed by EMF. After each delivery, EMF issued an invoice to MISC, care of Compass Marine. This was sent to Compass Marine which then forwarded the invoice to MAL. Initially, payment for the deliveries in August 2008 was made within the stipulated 30 days from delivery. However, subsequently payment was delayed. Ultimately, EMF did not receive payment for 21 bunker supply transactions. One of these transactions was the supply of 1,290.012mt to the vessel *FENG HUANG ZHOU* on 27 September 2008.

19 The spot contract made between OceanConnect and EMF required the supply of 1,100mt of bunkers to *NAVIG8 FAITH* on 23 September 2008. An e-mail confirmation recording the terms of the agreement was sent by OceanConnect to EMF on 18 September 2008. EMF responded with an e-mail confirmation on the same day, naming MISC as the buyers.

20 On 25 September 2008, EMF procured the supply of bunkers to the *NAVIG8 FAITH* as per the terms of the Spot Contract and issued an invoice for the sum of US$604,710.24 to MISC, care of OceanConnect. The invoice was sent to OceanConnect, which forwarded it to MAL. However, no payment was received by 24 October 2008, the due date for payment.

21 As a consequence, EMF was owed a total of US$23,703,040.59 for 22 deliveries under the Disputed Contracts. This amount was reduced by a payment of US$1,999,981.20 which was received by EMF on 7 November 2008.

22 It is common ground that for all, except one, of the deliveries made by EMF pursuant to the Disputed Contracts, there was a corresponding transaction under a bunker contract between MISC and MAL. The 21 deliveries in question were matched by:

(a) 13 transactions effected under a six-month fixed price forward contract concluded between MISC and MAL in March 2008 ("the MISC-MAL Fixed Price Contract") under which MAL had agreed to supply 138,000mt of bunkers; and

(b) 8 transactions reflecting 8 spot contracts concluded between MISC and MAL in September 2008 ("the MISC-MAL Market Price Contracts").

23 The one exception referred to concerns the delivery of 1,290.012mt of bunkers to the vessel *FENG HUANG ZHOU*, a vessel chartered to AET Tankers Pte Ltd ("AET"), a subsidiary of MISC. AET's former employee, Mr Nyi Nyi Zaw Min, gave evidence on this transaction. He testified that AET had purchased bunkers for the *FENG HUANG ZHOU* on a spot basis from MAL and not MISC. While EMF sought to characterise this as a "belated fabrication", I agree with MISC that EMF's failure to cross-examine Mr Nyi Nyi Zaw Min means that there is no reason for his evidence not to be accepted. Nevertheless, although this may be fatal to a claim based on the grant of actual authority by MISC, as EMF points out, this does not prejudice a claim based on apparent authority or estoppel. Ultimately, whether MISC has to pay for this delivery depends on my finding on the agency issues.

**Some principles of the law of agency**

***Actual authority***

24 The most succinct legal definition of "actual" authority was given by Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman*") at 502. He defined it as being "a legal relationship between principal and agent created by a consensual agreement to which they alone are parties". The scope of such authority is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.

25 As noted by Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another appeal* [2013] 4 SLR 308 at [148] (citing *Garnac Grain Co Inc v H M F Faure & Fairclough Ltd and Others* [1968] AC 1130 at 1137), the cornerstone of actual authority is a consensual agreement between principal and agent. Such an agreement can arise expressly (or may be implied) from the words and conduct of the parties, who will be deemed to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it. In this regard, implied actual authority simply refers to actual authority arising out of an agreement implied under ordinary contractual principles; no special rules peculiar to the law of agency are involved: Peter Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) ("*Bowstead*") at para 2-031.

***Apparent or ostensible authority***

26 Apparent authority, on the other hand, is widely accepted in the Commonwealth not to be premised on contractual principles but on the theory of estoppel: Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2010) at para 05.008 ("*The Law of Agency*"). As stated by Diplock LJ in *Freeman* at 503:

*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. [emphasis added]

27 Diplock LJ set out (at 506) the elements that have to be established in order for an agent to be clothed in the apparent authority of a principal company. It must be shown that:

(a) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(b) such a representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(c) the contractor was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and

(d) under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

28 MISC submits that given the foundations of apparent authority in estoppel, the law imposes a requirement that the inducement and reliance of a contractor must be reasonable. As observed in *The Law of Agency* at para 05.059:

It would not be reasonable for the third party to rely on the representation where he did not believe that the agent had the authority in question, or he knew that the agent was not acting in the best interests of the principal. ... From a policy point of view, there is no reason why an estoppel should be held against a principal if the third party did not believe that the agent had the requisite authority, or where the circumstances were such that the third party must have known of the agent's want of authority. In such circumstances, the third party takes the risk of contracting with the agent and cannot claim the benefit of an estoppel. …

29 Both local (High Court) case authority and academic opinion suggest that reliance on a representation is not reasonable and thus fatal to a claim based on apparent authority if the contractor was put on inquiry and failed to make the necessary inquiries about the purported agent's authority: see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788 at [173], *Bowstead* at para 8–048.

***Agency by estoppel***

30 Neither MISC nor EMF sets out with precision what the doctrine of agency by estoppel entails. They do not explain how it differs from that of apparent authority even though their submissions address them separately. *The Law of Agency* does not appear to make any such distinction or,

indeed, recognise a separate category of agency by estoppel. This is consistent with the approach taken in this very case by the Court of Appeal on an appeal against a striking out order (see *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*Bunga Melati CA*"). Its judgment lists the elements set out in [27] above as the necessary elements of an "estoppel by representation". *Bowstead*, however, distinguishes between the two. It defines agency by estoppel at para 2–099 as an estoppel preventing a principal from denying the existence of an agency, stating:

> A person may be held liable as principal where it cannot be said that he has made a manifestation or representation as to the authority of another to that other or to a third party as required [for establishing apparent authority], but he is affected in an agency context by the operation of the doctrine of estoppel.

31 Under this formulation, a distinction is drawn between agency by estoppel and apparent authority in that the former may still arise through the application of orthodox estoppel principles where the elements in [27] above may not be satisfied; in particular, where no representation as conventionally defined is made by the principal. This is of great significance to EMF who also argues that MISC is estopped by virtue of its *silence*.

3 2 *Bowstead* goes further by identifying two subsets of agency by estoppel at para 2–101, supported by the illustrations set out at para 2–107. The first is where the principal makes no manifestation of authority but, by conduct (usually *before* the operative transaction), intentionally or carelessly causes the belief that the agent is authorised. The illustration given is the High Court of Australia's decision in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 in which the Documentary Credit Manager of the bank had actual authority to sign letters of credit and authentications of signature but not guarantees of letters of indemnity against delivery of goods without a bill of lading. The manager nevertheless signed such a guarantee which was relied on by the carrier to its detriment. However, because her signature was illegible and did not indicate her identity or status, it could not be said that there was any representation by the bank conferring apparent authority on her. The High Court of Australia nevertheless held the bank liable in contract on the guarantee.

33 The second is where the principal, having notice of such a belief and that it might induce others to change their position, did not take (often *after* the operative transaction) reasonable steps to notify those others of the facts. As an illustration, *Bowstead* cites the English Court of Appeal decision of *Spiro v Lintern* [1973] 1 WLR 1002 ("*Spiro*"). In *Spiro*, the homeowner asked his wife to put the home in the hands of estate agents, which she did. The estate agents then received an offer and informed the wife of the same. She instructed them to accept the offer and authorised them over the phone to sign the contract despite not having the authority herself to do so. The husband subsequently behaved as if he had authorised the transaction. Notwithstanding this, the husband later gave his wife a power of attorney which she used to convey the house to another purchaser. The English Court of Appeal upheld the first transaction, holding that the husband was estopped from saying that his wife had no authority in respect of that transaction. Buckley LJ, in delivering the judgment of the court, stated at 1011:

> … if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation. …

34 MISC submits that the principles to be drawn from *Spiro* are as follows:

(a) If a principal observes that a party claiming under the contract is (i) acting in the mistaken

belief that the agent was authorised to conclude the contract in question; and (ii) in a manner that would be consistent only with such mistaken belief, the principal becomes subject to a legal duty to disclose to the said party that the agent had concluded the contract without authority.

(b) If the principal fails to make such disclosure and acquiesces in the aforementioned act(s) by the party claiming under the contract, such acquiescence amounts to a representation by conduct that the agent was authorised to conclude the contract.

(c) If the party claiming under the contract had acted on that representation to his detriment, the principal will be estopped from asserting that the contract was concluded by the agent without authority.

35 I considered *Spiro* in *Everbright Commercial Enterprises Pte Ltd v AXA Insurance Singapore Pte Ltd* [2000] 2 SLR(R) 287 ("*Everbright*"). In *Everbright*, the first plaintiff was a purchaser of logs who needed to charter a ship to transport them to buyers in India while the second plaintiff was a bank which partially financed the transaction. The marine transit of the cargo was insured with the defendant insurance company through its broker but it was later discovered that the chartered ship was a phantom ship operated by criminals to steal cargo. The issue was whether there was a valid and effective contract of insurance between the first plaintiff and the defendant. I held, in relation to the plaintiffs' submission that an estoppel arose from the defendant's failure to advise the plaintiff that the ship was not an approved ship as required by the policy, that silence only founds estoppel when a duty to speak arises. I distinguished *Spiro* on the facts, finding that there was no such duty on the part of the defendant. Such a duty would only arise where "silence would create an erroneous impression which leads the prospective representee to alter his position for the worse": *Everbright* at [66].

36 MISC submits, seemingly on the authority of *Everbright*, that the principles laid down in *Spiro* must be limited to circumstances in which the principal's silence or acquiescence was *"communicated" by the principal to the party claiming under the contract* so as to constitute a representation affirming the validity of the mistaken belief held by the party claiming under the contract. MISC does not explain how this would operate. In my view, MISC's submission appears to be that the duty to speak can only arise where the parties are engaged in a course of dealing with each other, such that the principal knew that its silence would be acknowledged and acted upon by the other party who was in a *unique* position to construe the silence.

3 7 *Everbright* does not provide express support for this proposition. The reason I found in *Everbright* that there had been no duty to speak was that the defendant there had had no part to play in the choice of the vessel. This finding was made despite the existence of a pre-existing relationship between the plaintiff and the defendant there and so the case cannot be read as requiring such a relationship to exist before the duty to speak arises. MISC's submission is, however, supported by the facts in *Spiro*. I do not think that in an agency situation a duty to speak can arise in the absence of a pre-existing relationship or dealings between the purported agent and the party claiming under the contract. To impose such a duty would impose onerous obligations on would-be principals who would then bear the responsibility of correcting all misrepresentations made by parties claiming to be their agents despite playing no role in the relevant transactions. It must be remembered that the husband in *Spiro* met the would-be purchaser and allowed him to carry out work on the house and garden knowing that the purchaser thought there was a valid sale and purchase agreement. It was such dealings that led to the duty to speak arising, not just the knowledge on the husband's part of the purchaser's mistaken belief.

**The issues**

38 The issues that arise from the pleadings and submissions are:

(a) whether MISC had granted actual authority to MAL to act as its agent in respect of the Disputed Contracts;

(b) whether MISC had clothed MAL with apparent authority to act as its agent in respect of the Fixed Price Contracts;

(c) whether MISC is estopped from denying that MAL was authorised to act as its agent in respect of the Disputed Contracts; and

(d) whether the hearsay evidence that EMF seeks to adduce should be admitted.

Logically, the last issue should be dealt with first but for reasons of clarity and ease of understanding, I will deal with the issues in the order set out above.

***Issue 1 – Did MISC confer actual authority on MAL?***

39 As a preliminary point, MISC argues that since a consensual agreement between MISC and MAL must be proved in order to establish actual authority, only MISC and MAL are in a position to provide *direct* evidence *apropos* the issue of actual authority. Nevertheless, as EMF points out, that is not fatal to its case – actual authority can also be implied by way of inference from the conduct of the parties and the surrounding circumstances.

40 EMF's position is that MISC granted MAL actual authority to act on its behalf in two ways. First, EMF submits that the most probable inference to be drawn from the whole of the evidence is that MISC granted actual authority to MAL to contract as its broker ("the Inference Argument"). Second, EMF submits that MISC had known that MAL was contracting to purchase bunkers as its broker or agent in order to fulfil the bunker contracts that it awarded to MAL. According to EMF, making a finding to that effect would mean finding that MISC had been awarding bunker contracts to MAL with the knowledge that MAL would go into the market and purchase the required bunkers from physical suppliers as its broker, and it must follow that MISC had granted actual authority to MAL to act as its broker ("the Implied Authority Argument").

*The Inference Argument*

41 EMF's submissions in respect of the Inference Argument focus on MISC's approval of MAL as a registered bunker vendor, the manner in which the bunker contracts were awarded by MISC to MAL, the manner in which the bunker contracts were performed and the underlying relationship between MISC and MAL.

42 It is not clear to me what inference the court is being asked to draw under the Inference Argument. There are two possibilities – one is the inference of an express agreement between parties conferring upon MAL the actual authority of MISC; the other is the inference of an implied agreement arising out of the parties' conduct and the surrounding circumstances in the absence of any express agreement. EMF appears to make no distinction between the two, at times even appearing to go further by suggesting that the arrangement between MAL and MISC was a mere façade for what had in fact been an agreement to confer actual authority on MAL. To the extent that EMF suggests that the court should *disregard* what was expressly agreed, it must be rejected. As discussed above at [25],the court must look at all of the facts and circumstances and these must show an agreement, express or implied, that MAL would act on behalf of MISC in order for the court to draw any such

inference.

The approval of MAL as a registered bunker vendor

43 EMF seeks to cast doubts over the propriety of MISC's approval of MAL as its registered bunker vendor. It suggests that there had been no genuine consideration of MAL's application. MAL's application was brief, containing assertions of its collaboration with other bunker suppliers, its client lists and its ability to offer "very competitive prices with reliable and prompt service" without substantiating them with any documents in support. Yet, there had been no attempt by MISC to verify MAL's claims by asking for supporting documents, contrary to MISC's Procurement Manual. While great weight appeared to have been placed by the Central Administration Unit on MAL's record as a spare parts supplier to MISC, there was no evidence that MAL had been assessed in respect of its ability to supply *bunkers*. Similarly, the Procurement Services Unit appears to have been persuaded merely by MAL's partnership with other established oil traders as well as the lack of bids and there was no evidence as to what considerations operated on the Head of GPTC's mind. In this regard, EMF invites the court to draw an adverse inference against MISC for failing to produce its then Senior Manager of Procurement Services as a witness.

44 EMF contends that MISC would not have been approved as a registered bunker vendor had a proper assessment been done. First, there was no one in MAL that had experience in the trading of bunkers at the time of its application to be a registered vendor. The evidence of the MISC employees who had been working in the Bunker Unit at the material time suggested that the MAL employees, whom they had interacted with during the course of their dealings with MAL, were the same as those whom they dealt with in relation to the supply of spare parts. These MAL employees were not designated bunker traders.

45 Second, MAL did not have the capital or credit standing to procure the supply of bunkers on a credit basis nor did it have the financial savvy to deal with the large volume, high value trades which it was expected to do as a registered vendor. It had a paid-up capital of only RM 800,000, yearly revenues of between approximately RM 12.2m and RM 16.5m in the years 2001 to 2003, and net assets of between approximately RM 1.8m and RM 2.1m even taking into account sums exceeding RM 3m owed to it by one of its directors. Mr Douglas Barrow ("Barrow"), a former bunker trader with more than 25 years' experience in the marine fuels industry, testified as an expert witness on behalf of EMF. He stated that it was necessary for an independent bunker supplier to have either physical stock or credit lines with other suppliers. EMF submits that MAL had neither – it was unlikely that it had a physical inventory given that it was not operating a bunker trading business at that time; nor was it likely that it had been given a credit line since there is no evidence that any credit checks had been conducted on it between 2003 and 2008. All these would also have been apparent to MISC which took no steps to verify MAL's ability to perform its likely obligations.

46 MISC did not address the above, pointing instead to the relevant documents underlying MAL's approval as a registered bunker supplier. MAL's letter to MISC expressing its interest in expanding the scope of its business activities to include the supply of bunkers expressly stated that MAL would be acting as *principals* and not brokers in all transactions. Additionally, the recommendation of the Senior Manager of Procurement Services of MISC was for MAL to be included in MISC's *vendor* list and not to be listed as a broker. EMF does not dispute what was expressly agreed between MAL and MISC but argues that it "[does] not address the substance of [their] case". I disagree. At the very least, as is the case for the bunker supply contracts entered into between MISC and MAL, this would be a factor to be considered with the other evidence and analysed as a whole.

47 MISC defends the vendor approval and registration process, pointing to two aspects. First, it

argues that the failure to register MAL as its vendor of lubricants showed that the approval process was not a mere formality. As EMF points out, this is factually incorrect. The letter dated 24 March 2005 informing MAL of its successful application clearly states that "[its] application to expand [its] scope of work as bunker *and lubricant supplier* has been successful". Second, MISC argues that it was "entirely plausible" that it bore an honest belief in MAL's capabilities to act as a bunker trader based on its claimed associations with established oil suppliers. Again, I am not persuaded. A proper assessment of MAL's capabilities would have gone beyond what was being presented at face value to require at least some supporting material or further details of these associations, particularly given the size of the transactions to be entered into between MISC and MAL. Third, MISC argues that no adverse inference should be drawn against it for its failure to produce the key personnel involved in the assessment of MAL on the grounds that they have retired. In my view, little weight should be given to this explanation: as EMF observed, other retired MISC employees were called to testify.

48 The manner in which MAL's application to be a registered bunker vendor with MISC was approved left much to be desired. The relevant employees of MISC appear to have taken MAL's representations at face value. Had a proper assessment been made, it is unlikely that MAL's application would have been approved given its lack of capital and experience in the supply of bunkers. MISC's employees clearly did not pay due regard to the practices and procedures which it had implemented for its own protection. However, at best, the evidence indicates that MISC had acted without due regard to best corporate practices, but EMF's case is not founded on conspiracy or fraud much less a suggestion that such conduct was "aimed" at EMF in anyway. MISC's approval of MAL's application, even if insufficiently considered and improperly granted, is no basis for the inference of the grant of authority to MAL to act as *a broker*.

The manner in which the bunker contracts were awarded by MAL to MISC

49 EMF first points to the sheer volume of bunker contracts awarded to MAL between 2005 and 2008. They argue that "[f]or a company without any prior experience of track record as a bunker supplier or trader, it was incredible that MAL immediately rose to become the major bunker supplier to [MISC]". The evidence given by Ms Noraini binti Ibrahim ("Noraini Ibrahim"), the former Senior Manager of Procurement Services of MISC, corroborates MAL's meteoric ascent as MISC's bunker supplier. In 2005 alone, MAL supplied 24% of all bunkers supplied to MISC. Its share of the business grew to 55% in the following year, peaked at 62% in 2007 and fell to 47% in 2008.

50 EMF highlights how unprofitable the bunker contracts were for MAL. Despite a massive increase in revenue, MAL's profits as a fraction of revenue declined from 2004 onwards after it went into the new business. Even the actual figures declined: in 2007 MAL made a profit of RM 329,742 whereas in 2004, selling only ship spares, it managed to achieve a profit of RM 861,254. The irrationality of MAL's foray into the supply of bunkers was accentuated by Barrow's examination of the spot bunker contracts between MAL and MISC. His analysis showed that MAL sustained a loss of approximately US$845,000 from these contracts. These losses were particularly inexplicable from a commercial perspective given that the spot contracts were entered into on a back-to-back basis where MAL would have been aware of the profit margin even before it entered into these contracts. At the least, MAL was a highly incompetent bunker trader. Pointing to significant cash advances that the directors of MAL had managed to extract through banking facilities, EMF submits that MAL's bunker trading operations were not a genuine commercial business but one designed to allow it to raise finance.

51 Putting aside the inferences that the court is asked to draw in respect of MAL's motives for entering into these contracts, *from MISC's perspective*, it is difficult to see how the fact that a substantial number of bunker supply contracts were awarded to MAL shows anything out of the ordinary, let alone that there was an agreement granting MAL actual authority. As MISC argues, there

is nothing untoward about the number of contracts that were awarded to MAL given that it was the lowest bidder on most occasions; where a lower bid was received, the contract was awarded to the other bidding party. That these contracts were unprofitable to MAL merely reinforces the possibility that they were a bargain from MISC's point of view.

52 EMF contends that the evidence showed that MISC's procurement policy was simply to award bunker contracts to the lowest bidder without due consideration of other salient factors. All of the Fixed Price Contracts were awarded to the bidder with the lowest bid who had accepted all of the MISC's terms and conditions. Internal guidelines were not followed – the evidence given by the employees involved in the procurement of bunkers showed that they were operating under the impression that they were only required to follow the best practices set out in the Purchasing and Procurement Manual; however, as Noraini Ibrahim later conceded, that Manual did have specific provisions for the procurement of bunkers.

53 EMF also takes issue over how the tender process for spot contracts was conducted, specifically:

(a) the bidders were not given sufficient lead time, with the tenders typically being issued only two to three hours before they closed;

(b) the bid evaluation process was fundamentally flawed, in that not only were bidders not assessed on other factors such as their financial and technical capabilities, but late bids would be rejected as long as there was at least one timely bid; and

(c) the review procedure was merely perfunctory as the award decisions were approved without further verification and only after the bunker contracts had been awarded.

54 MISC seeks to explain the lead time, stating that bidders would still have had to wait until near the close of trading hours, at around 4.30pm to 5.30pm, before responding with a quote as they would want to have an idea of what the prevailing market price was. While that may be the case, it would have been in MISC's interest to give bidders as much lead time as possible. Even if bids would only be submitted at the end of the day, a longer lead time may have increased the number of bidders; on one occasion, at least one potential bidder was unable to tender a bid as the "schedule [was too] tight". On the other hand, there appears to be no real advantage in issuing the tenders at such a late hour.

55 As for the bid evaluation process, MISC defends its evaluation of offer price as the most important factor. It also justifies its strict adherence to a specified cut-off time on the grounds of fairness (late bidders having an advantage in being allowed to revise their bids in accordance with the fluctuating market price) and certainty (by encouraging bidders to abide by the stipulated timelines). EMF concedes that these policies were not wrong in principle but argues that it is the inconsistent application of these policies that is objectionable. None of the cited examples are particularly damning – for example, the Award Ratification Approval Form ("ARAF") for the tender for the supply of bunkers to the vessel *WAN HAI 605* indicates that MAL's bid for the supply of MFO and LSFO was accepted despite being late, but I note that none of the other bidders had bid for the supply of *both* MFO and LSFO. More pertinently, MAL was not the sole beneficiary of MISC's inconsistency. In another tender for the supply of MGO to *WAN HAI 605*, MAL was the only party to have submitted a timely bid, yet another company that had tendered its bid a minute beyond the closing time was not recorded as being late. There is therefore insufficient evidence that MISC had favoured MAL in the bid evaluation process.

56 Even if MISC had a tendency to favour MAL, in my view the grant of the bunker supply contracts has little bearing on whether there had been a grant of authority. Taking EMF's case at its highest, even if it could be shown that MISC had conspired with MAL to award an inordinate amount of bunker supply contracts to MAL which it knew MAL would have difficulty performing, I still fail to see how a grant of authority can be inferred. It may well be that MISC knew MAL would rely on these contracts to secure financing but that is an entirely different issue from whether it consented to MAL acting on its behalf. Having put itself in the position of getting cheap oil from MAL, it would have been completely inconsistent for MISC to have granted MAL authority to act as its broker to make more expensive contracts as agent on its behalf.

The manner in which the bunker contracts were performed

57 EMF refers to seven transactions between June 2005 and January 2006 in which the bunker confirmations issued by MAL to MISC explicitly described MAL as the "Broker", MISC as the "Buyer" and the physical supplier as the "Seller". Two of MISC's employees who had been copied in these e-mail confirmations, Ms Intan Fariza binti A Rahim ("Ms Intan") and Mr Mohammad Khairul bin Anwa ("Khairul Anwa"), were cross-examined on their understanding of the contents of the confirmations. Both of them testified that they were unaware of what a broker was at that time – Ms Intan thought that it was another term for a trader, seller or supplier, while Khairul Anwa stated that he had not drawn any distinction between a broker and a trader until 2007. Both of them also stated that they had not taken much notice of the description of MAL as a broker at that time.

58 EMF argues that MISC's employees must have checked the identity of the physical supplier against MAL's tender proposal form when reviewing MAL's bunker confirmation given its importance to MISC. I do not see any significance in this – Ms Intan does not deny that she would have taken note of the identity of the physical supplier but that does not mean that MISC employees would have necessarily noted the reference to the term "broker". Further, I do not think their evidence in respect of their confusion over the terms used is as unbelievable as EMF makes it out to be. Notwithstanding the fact that Ms Intan had been working in procurement services since 2002, her experience prior to 2005 had been in relation to the procurement of spare parts. Khairul Anwa, too, only joined the Bunker Unit in 2005. It is not inconceivable that they would be unfamiliar with the precise meanings of the terms, especially if, as Ms Choong-Ong Gek Hoon ("Mrs Ong"), the Managing Director of EMF conceded, other terms such as "bunker trader" and "bunker supplier" could be used interchangeably. It must also be remembered that it was not MISC's general policy to deal with brokers. It preferred to contract directly with vendors like MAL who were on its list of registered vendors. In such an environment, it is not really surprising that the implications of the word "broker" would not have dawned on MISC's employees.

59 Even if Ms Intan and Khairul Anwa had noticed the use of the term "broker" and were aware of its significance, the confirmations sent by MAL to MISC still do not assist EMF greatly as far as actual authority is concerned. As MISC emphasises, these were unilaterally sent by MAL to MISC in 2005 and were in fact corrected in subsequent confirmations to describe MAL as a "trader". There was nothing to indicate that MISC had consented to such a relationship; in fact, corresponding documents generated and sent to MAL by MISC, such as invitations to bid, purchase orders and invoices, clearly indicate that MISC had been contracting as seller and MAL, as buyer. None of these documents made any reference to the physical supplier, consistent with MISC's assertion that they had entered into independent transactions with MAL.

60 This is further buttressed by the fact that MAL had invoiced MISC for the bunker supplies and had itself been invoiced by the physical supplier of the bunkers. EMF seeks to downplay the significance of such invoicing, arguing that it was merely in accordance with the terms set out in

MAL's bunker confirmations. Yet, that is precisely the point – the arrangements between the purported agent and principal are a critical factor in ascertaining whether an agency relationship existed. In this regard, the evidence of EMF's own witnesses was clearly in favour of MISC. Mrs Ong conceded that it was not EMF's practice to authorise its bunker brokers to receive payment for and on its behalf, nor would it have made commercial sense to do so. Middleton testified that it was universally accepted within the industry that it would be the buyer, and not the broker, who paid the supplier. EMF submits that Middleton's evidence, read in its proper context, merely confirms that liability for payment rests with the buyer and not the broker. However, Middleton's evidence clearly shows that he felt that the identity of the payer was critical in determining who the counterparty was:

Q. It then goes on to say in your first paragraph:

"Was our understanding that funds were being sent directly from MISC, can Equatorial verify the location of the receiving funds for our records."

Why were you asking this question, Mr Middleton?

A. Because there was a question of doubt during that day that who is the party here, is it MISC or is it MAL. So my first reaction is, well, if it was MAL, they would have received the funds from MAL. And that's why I was asking the question, well, if it -- if it's changing, who was paying the bills here. That would be a normal question that a broker would ask, if there's a question about who is the counterparty.

Q. The answer, to your mind, the answer to the question as to who the counterparty is, who paid Equatorial?

A. Yes, I believe that would be the correct – it would be my first line of thought which was there, you know, okay there seems to be some doubt who is the counterparty, but who the one paying the bills, would be my first reaction.

Q. A broker wouldn't be paying the supplier?

A. No.

Q. It would be the buyer, right?

A. That's right.

Q. Everyone in the industry would know that?

A. Absolutely.

61 The arrangement between MISC and MAL in respect of the payment for bunker supplies therefore runs contrary to any assertion of a buyer-broker relationship between them. I note at this juncture that notwithstanding the above arrangement, there were instances when invoices from the physical suppliers were sent to MISC instead of MAL. Nevertheless, since payment was ultimately made by MAL and not MISC, this fact is of greater relevance to the question of whether an agency by estoppel can be established.

62 Next, EMF argues that the evidence showed that MAL had merely served as the conduit between MISC and the physical suppliers in the same manner as a broker would. It cited the following

examples:

(a) MISC's local agent had written directly to EMF (copying Khairul Anwa) in respect of a dispute over bunkers it supplied in September 2008 instead of corresponding with MAL;

(b) on at least three separate occasions, additional charges payable, such as survey fees or cancellation charges, would simply be passed through MAL who was the conduit through which the communications between MISC and the physical supplier were carried out;

(c) on at least one occasion, MAL was a conduit through which MISC made its claim against a physical supplier, with documents in support of the claim being sent to MAL instead of the supplier;

(d) there was at least one occasion on which a supplier regarded MISC as the contracting buyer when a dispute arose – despite MISC putting MAL on notice of its claim for a shortfall in bunkers supplied, it was the supplier who subsequently agreed to issue MISC with the credit note because it "recognise[d] and value[d]" their business relationship with MISC, and who sought confirmation from MISC as to whether the proposal was acceptable;

(e) there was correspondence between MISC and MAL in which MISC appeared to express an intention to hold the physical supplier and not MAL liable and in relation to one of these matters, MISC had communicated directly with the supplier's agent and had requested from MAL the supplier's contact details for a potential settlement;

(f) there were instances when third parties proceeded on the basis that MAL was MISC's agent or a related company of MISC; and

(g) on an occasion when a joint bunker survey was required, the cost was shared between MISC and the supplier and not between MAL and the supplier, as would have been the case had MISC merely been contracting with MAL on a principal-principal basis.

63 MISC partially addresses these examples with the following:

(a) the direct correspondence between MISC's local agent and EMF in [62(a)] above was in fact an attempt to obtain a master's account in relation to a late de-berthing so that an appropriate response could be made to the port authority;

(b) the three occasions in [62(b)] above on which MAL was purportedly the conduit for negotiations between MISC and the physical suppliers were simply attempts by MISC to reduce the fees that the suppliers were seeking to impose on MAL and correspondingly that *MAL would have imposed on MISC*; and

(c) in relation to the examples cited in [62(c)] and [62(d)] above, the claim notices seeking payment were ultimately issued by MISC to MAL and MAL had duly issued a credit note to MISC to effect payment on each occasion.

64 As far as the evidence showing how third parties had viewed the relationship between MAL and MISC is concerned, I do not think that that evidence in any way shows the conferral of authority on MAL by MISC, that being the subject of an agreement solely between these parties. I also do not think that much can be made out of the sharing of the costs for the joint bunker survey. As Khairul Anwa explained, the nature of the agreements between MAL and MISC was such that MISC would

engage their own surveyor for each bunker supply. That the costs were shared for the joint bunker survey does not add anything. Finally, in relation to MISC's request for the supplier's details in [62(e)] above, I note that the claim by MISC was ultimately made against MAL and not the supplier. MAL's subsequent correspondence with the supplier's agent leaves no doubt that MAL was acting on its own account:

> … [The supplier] caused the faulty for supplied off specs fuel and MAL has to bear the damages and loss claim because if we don't agree to accept, this case will jeopardise our reputation to MISC. *We are the top bunker trader currently in MISC and we do not want to lose more business opportunity with MISC.* … [emphasis added]

The underlying relationship between MISC and MAL

65 EMF refers to several factors which, it submits, point to a relationship between MISC and MAL that "traversed well beyond commercial dealings on an arm's length basis":

(a) The relationship between MAL's directors and MISC's senior management – a director of MAL had personal access to the former president/CEO of MISC, to the extent that he could directly contact the CEO and procure payment of MAL's invoices in November 2008. There were also meetings between MAL's senior executives and MISC's employees at least once a year, a practice that did not appear to have been extended to any of MISC's other vendors. Outside of these meetings, employees of MAL and MISC would also fraternise over golf.

(b) The dealings between MAL and MISC outside the official tender process – EMF highlights at least three instances of correspondence between MAL and MISC relating to the supply of bunkers to MISC, two of which were offers to contract outside of the official tender process.

(c) The sharing of confidential information between MISC and MAL – EMF alleges that MISC had shared confidential information with MAL on at least three occasions, one of which involved the sending of the list of bidders to MAL.

(d) MISC's undertaking to make payment into MAL's escrow account – MAL had assigned to Affin Bank all proceeds and moneys due and payable by MISC to MAL. This was acknowledged by MISC which not only undertook to make payment directly into MAL's escrow account with Affin Bank despite there being no commercial benefit to MISC, but demonstrated a willingness to breach that undertaking on MAL's instructions.

(e) MISC's continued support for MAL – even after MAL's default in payments to bunker suppliers had resulted in threats of arrest being made against MISC's vessels, MISC continued its support of MAL by issuing a letter of comfort to MAL's financiers and issuing corporate guarantees and making payment to the physical suppliers to settle their claims against MAL. EMF also highlights MISC's termination of a fixed price contract with a vendor that was immediately followed by MAL's bid for that contract. It suggests that the termination may have been arranged to allow MAL to take over the contract.

66 In relation to MISC's continued support for MAL, EMF makes extensive submissions regarding MISC's conduct between November and December 2008, after it had been pressed by many bunker suppliers for payment of bunkers delivered to its vessels pursuant to purchase contracts made by MAL. The examples cited include:

(a) When confronted with demands for payment from bunker suppliers, MISC did not question

why payment was being sought from it as opposed to MAL. It did not deny that MAL was its bunker broker even when it faced explicit allegations to that effect, instead choosing to first ensure that it had paid MAL for the relevant bunker transactions before informing the bunker suppliers that that payment had been made. It was extremely unusual that MISC had not sought an explanation from MAL as to why the suppliers were under the impression that it was MISC's agent.

(b) Not only did MISC not deny that MAL was its broker but the standard form e-mail sent by MISC in response to the suppliers' demands for payment included a diagram setting out the "flow of order and payment" in the following manner: MISC →MAL →Compass Marine / OceanConnect →physical supplier. The inference to be drawn was that MAL was MISC's payment agent – MISC had paid MAL but the funds were not remitted to the suppliers.

(c) When made aware of MAL's financial struggles, MISC "went out of its way to help MAL resolve its financial difficulties" by continuing to award it substantial bunker contracts between 6 and 14 November 2014. In particular, MAL's internal correspondence indicates that not only had MISC accepted a bid from MAL that was higher than the market price but MAL had routinely bid below the market price on prior occasions. MISC had even issued a letter of support to Affin Bank that glossed over MAL's operational difficulties so as to allow MAL to be granted additional banking facilities.

(d) MISC had offered to make payment and issue corporate guarantees to the physical suppliers on behalf of MAL despite having no obligation to do so. The decision to issue guarantees was made in a clandestine manner such as to avoid leaving evidence of an illicit arrangement between MAL and MISC. Accordingly, the inference to be drawn is that MISC did not want its true relationship with MAL to be disclosed.

(e) The terms of the corporate guarantees were in the form of an unconditional promise to pay by MISC. A better course of action for MISC, from a commercial perspective, would have been to limit its liability by offering security and reserving its rights instead but MISC did not do so.

67 MISC points out that the offers to contract referred to in [65(b)] above were unilateral bids that were ultimately not accepted. It argues that the alleged incidents during which confidential information was shared were either a result of human error or simply did not occur and, in any case, caused no prejudice since the information was shared amongst all bidders. More specifically, in relation to its continued support of MAL, MISC argues that there was nothing unusual about MISC first checking to see if there were any outstanding payments owed by MISC to MAL before confronting MAL on why the payment demands were made against MISC. MISC's failure to immediately disavow an agency relationship was because it had chosen to first embark on a fact-finding exercise which was a perfectly natural response. There was also a clear commercial imperative behind the award of the corporate guarantees given that they were conditional on the suppliers' agreement to take no legal action against MISC or its vessels. From MISC's perspective, provision of the guarantees served to avoid the risk of damage to its reputation with the possibility that they ultimately would not have to make payment if MAL were able to raise funds. Finally, it points out that there was no need to have provided an express denial of liability in the terms of the guarantees as they were explicitly limited to amounts due and owing to EMF by MAL, which made clear that the liability which was being guaranteed was MAL's, not MISC's. An express reservation of rights would not have been acceptable to the suppliers. On my part, I am satisfied by these explanations that there was nothing truly improper about MISC's conduct between November and December 2008.

68 While the diagram referred to at [66(b)] above was not addressed by MISC, I do not think much

can be made out of it. I accept, as MISC's own witness asserted, that the diagram was not intended to show a contractual relationship between MISC and MAL. It was simply indicating the way in which funds flowed between the various parties involved in a supply of bunkers. Further, I do not think that the clear impression it creates is that MAL was MISC's broker as EMF argues. The e-mails in which the diagrams were set out stated that MISC had duly settled the invoices which it received *on MAL's letterhead* and that MAL would remit payment to the suppliers whom *they* were dealing with. In fact, the e-mail to Middleton went further, explicitly stating that MISC had only dealt with MAL. These e-mails, when read in their full context, do not show an agency relationship between MISC and MAL, or lead to an "irresistible inference" that MISC had known that MAL had acted as its broker and that it was liable to the suppliers.

69 The correspondence between MAL and MISC subsequent to these requests for payment also indicates that MAL had not been dealing as MISC's broker. On 14 November 2008, Noraini Ibrahim wrote to MAL in respect of the notices, stating:

> … we have received notices directly from your physical supplier, Equatorial and OWB for non payment of about USD 20 mil each and in view of that we have been informed by our Rotterdam office via MISAN that our vessels will be detained/arrested. Upon checking, it is confirmed that all these payments have been cleared for payment to MAL. It would appear that MAL had not paid the physical suppliers. *Your default in payment to your suppliers has implicated us. Legally, they have no right to detain/arrest our vessels as the transactions are between MAL and MISC.* Kindly take the necessary action so as not to aggravate the situation. [emphasis added]

70 MAL's reply was equally telling:

> With the issue of Equatorial and OW Bunker Rotterdam outstanding payment, we are striving our very best to sort out the due payments to them. Our bank, Affin Bank are currently arranging to provide us additional fund which can only be confirmed on Monday, 17.11.2008. *We have already pleaded to our supplier to hold on their said actions towards MISC*.
>
> Once again, we really apologised for the difficult situation put on MISC.
>
> [emphasis added]

71 EMF submits that the reference to "our supplier" in MAL's e-mail was meant to refer to MISC and MAL together, as principal and agent. This cannot be. It is evident from the above exchange that the references to "we" and "our" are references to the respective companies. It is also apparent that MAL was well aware of its legal obligations to the physical suppliers and the nature of its relationship with MISC was that of a seller *vis-à-vis* a buyer. This goes against any suggestion that MAL had an agreement, implied or otherwise, with MISC that it could act on MISC's behalf.

72 This was not the only example cited by MISC. Another letter sent from MAL to MISC on 18 November 2008, relating to an arrest of one of MISC's vessels due to MAL's default in payment to its suppliers, also demonstrates that the nature of their relationship was not one of principal and agent:

> We deeply regret this incident and *MAL accepts responsibility for it* and will make good all incidental costs incurred as a result of the incident.
>
> Meanwhile we have taken all necessary actions to address all our outstanding and due payments with increased facilities from our bank and we feel confident that no untoward incident will happen in the future. However *we sincerely appeal to your good judgment that you continue*

*paying our outstanding payments when they are due*. It is of utmost importance that we maintain the cash flow in our 'bunker fuel' escrow account with the bank. Without those due payments it will only add burden to our operations.

[emphasis added]

73 EMF construes the above as an apology from MAL for failing to fulfil its duties as a broker and payment agent, with "*our* outstanding payments" in fact referring to payments due to be paid by MISC. With respect, this is a highly strained interpretation that does not fit with the rest of the letter. It is plain, especially in view of MAL's express desire to maintain its "cash flow", that the "outstanding payments" refer to amounts which MISC owed to MAL as a bunker trader and not amounts owed to the physical suppliers that were to be relayed through MAL.

74 More importantly, similar to EMF's submissions on the manner in which the bunker contracts were awarded by MAL to MISC, the evidence at best shows an arrangement for MAL to be given preferential treatment. Even if I were to accept that MISC had unnecessarily undertaken liability for MAL's benefit and had conspired with MAL for MAL to be awarded bunker supply contracts, such behaviour does not go far in establishing an *agency* relationship between the two. Even if there was a "clandestine relationship between the two companies" as EMF asserts, the evidence does not justify calling it a principal and agent relationship, clandestine or otherwise.

Conclusion on the Inference Argument

75 As is apparent from the above, I am not persuaded that the facts and circumstances highlighted by EMF are sufficient for an agreement as between principal and agent to be inferred. EMF sought to draw an analogy to the case of *Liu Wing Ngai (trading as Kam Wah Ultrasonic Engineering Co) v Liu Kok Wai (trading as Almac Machinery)* [1996] 3 SLR(R) 508 ("*Liu Wing Ngai*"), in which the plaintiff manufacturer sued the defendant for the supply of machines. The defendant submitted that it was the agent of the plaintiff for the sale and marketing of these machines, and not its purchaser or distributor. Lai Siu Chiu J held that the plaintiff and defendant stood in a principal-agent relationship by way of an express oral agreement despite the fact that there was a direct contractual relationship between the defendant and the customers and that the defendant derived his profits from the mark-ups on the machines sold to customers. Thus, EMF submits, the court should look beyond the individual facts to consider the totality of the evidence.

76 It should be noted that the goods sold by the plaintiff to the defendant in *Liu Wing Ngai* were custom-made machines tailored to the ultimate buyers' specifications and that the plaintiff had taken an active part in dealing with these customers. Further, the plaintiff himself had on numerous occasions referred to the defendant as his agent in correspondence with both the defendant and third parties, with a nameplate on one of his machines even listing the defendant as his agent. Nothing in the present case is of similar probative value. At the risk of repetition, the evidence adduced by EMF merely shows that MAL and MISC had a relationship that went beyond purely commercial interests, even to the extent that MAL may have been unduly preferred over MISC's other vendors and that MAL may have had other motives for entering into the bunker supply contracts. However, any inference that can be drawn is likely to relate to lack of good corporate governance in MISC or to behaviour aimed at financial gain. No inference that the intention was to confer authority on MAL to act as an agent can stand.

*The Implied Authority Argument*

77 While there is substantial overlap between the Inference Argument and the Implied Authority

Argument in the sense that the knowledge of MISC could lend greater support to the inference of an agreement between MISC and MAL, there is a distinction. The Implied Authority Argument appears to suggest that the award of bunker contracts to MAL by MISC with the relevant knowledge was *in itself* an act impliedly granting actual authority to MAL. This is also to be distinguished from an agency by estoppel, where it would be necessary to find that EMF had acted on MISC's representation to its detriment.

78 The extent of MISC's knowledge will be canvassed in further detail below. As far as actual authority is concerned, even if it could be established that MISC had full knowledge that MAL had been representing itself as MISC's broker or agent, I do not think that its continued award of contracts to MAL would necessarily be a grant of actual authority. EMF has not cited any case in which the courts have implied a grant of actual authority under such circumstances, and the examples of implied actual authority cited in *Bowstead* and *The Law of Agency* also fall outside the circumstances of the present case.

79 With respect, EMF's submissions appear to conflate notions of apparent authority and agency by estoppel, where a *third party* is entitled to assume from the conduct of the principal that the agent has authority; and implied grant of actual authority, where the necessary determination is whether it is reasonable for the *agent* to think that he has been appointed or authorised, and for the *principal* to think that he has appointed or authorised the agent: see *Bowstead* at para 2–031. Even if MISC's award of contracts to MAL with the requisite knowledge satisfies the former, it would not have been reasonable for MISC and MAL to perceive that MAL had been appointed as MISC's agent on that sole basis – mere acquiescence by a principal to a purported agent's misrepresentation to third parties cannot be tantamount to an *agreement* to validate further representations by altering the legal position between parties.

***Issue 2 – Did MISC clothe MAL with apparent authority to act on its behalf?***

80 As set out at [27] above, an essential element for apparent authority to be established is that the principal had made a representation to the contractor that the agent had authority to enter the contract in question on the principal's behalf. EMF's case, as far as apparent authority is concerned, hinges on a purported representation made by an unidentified employee in MISC's Bunker Unit to Middleton. The latter's evidence is that he had made a call to MISC's Bunker Unit on 22 May 2006 to promote Compass Marine's services but was informed by that unidentified employee that MAL was MISC's bunker broker and that he should contact MAL directly instead. This was confirmed by MAL's Head of Operations who told him to contact MAL directly to fix bunkers for MISC's account. However, as MISC submits, there are many difficulties with EMF's case.

*The veracity of Middleton's evidence*

81 MISC highlights numerous examples of how Middleton's evidence was contradicted by documentary evidence and other instances when he had prevaricated. I agree with its submission that little weight, if any, should be given to Middleton's evidence on his dealings with MISC. His testimony was often incoherent. He was especially incomprehensible when he was being pressed on difficult points. Overall, Middleton did not impress me as a reliable witness on matters relating to the transactions in question. I find that no such representation had been made to Middleton on 22 May 2006.

*Middleton's continued attempts to mislead EMF*

82 Sometime in September 2008, EMF noted that payment was overdue in respect of the Spot

Contract and also a number of bunker deliveries under the Fixed Price Contracts. It then sent chasers to Compass Marine for onward transmission to MISC. EMF also asked Middleton to forward the "MISC fullstyle and PIC" to it, which Middleton purported to do so by providing an invalid e-mail address. When this was discovered by EMF, it asked for the name and contact number of the MISC employee whom Middleton had supposedly dealt with. As MISC points out, not only did Middleton fail to make clear that he had in fact dealt with MAL and not MISC, he claimed to have received an update from MISC when it was in fact MAL who had provided him with the update.

83 This was not the only occasion on which Middleton passed off information from MAL as having been received from MISC; he did the same in a follow-up e-mail dated 26 September 2008. What is particularly damning is an e-mail dated 30 September 2008, where Middleton, in response to a request by EMF for "written confirmation … from … MISC", forwarded an e-mail from MAL with the sender's details removed. Even if I were to accept Middleton's explanation that this was normal practice within the industry to protect the channels of communication, which I am not inclined to do, this does not detract from the fact that he was passing off information from MAL as that received from MISC.

84 As at 4 November 2008, some of the invoices continued to be unpaid. EMF thus requested that Middleton provide them with the contact details of the employee of MISC whom he had been liaising with. Middleton initially refused to comply but eventually provided the contact details of Khairul Anwa after EMF expressed its strong displeasure. This was another false representation that he had been dealing directly with MISC when he had not in fact done so.

85 EMF rejects the assertion that Middleton was trying to mislead EMF into thinking that Compass Marine was dealing directly with MISC when it was in fact dealing with MAL. It submits, based on Middleton's testimony, that Middleton had just been trying to settle things amicably between EMF and MISC. According to Middleton, Compass Marine had been dealing with MAL as MISC's in-house broker and the two entities were "one and the same". Middleton also claimed that Compass Marine's client in the transaction was MISC and not EMF.

86 I cannot accept this evidence. Even if, as EMF submits, there is nothing unusual about the broker regarding the buyer as the "client" but receiving commission from the seller, Middleton does not satisfactorily account for why he had provided MISC's contact details (accurate or otherwise) to EMF. If he had truly thought that MAL and MISC were the same entity, he could have simply provided the details of the MAL employee he was dealing with. That he did not shows that he, at the very least, recognised a distinction between MAL and MISC.

Middleton's explanations to EMF

87 Thereafter, EMF e-mailed Khairul Anwa, threatening to arrest MISC's vessels if the outstanding payments were not resolved. It is not disputed that this was the first time that EMF had communicated with MISC. However, it was MAL who responded, apologising for its failure to settle the outstanding amount. Critically, the e-mail made no mention of MISC. This appeared to have been a surprise to EMF, who immediately sought clarification from Middleton as to why MAL was involved. Middleton sent two e-mails to EMF in response. He said in the first of these e-mails:

> Thank you for your message. [MAL] is the co-broker who has approached us to cover enquiry & fix business in Singapore market for account MISC. All of our confirmations state MISC account to both parties. I know that a lot of business in bunker markets worldwide are fixed on co-broker basis & we do not believe we have acted in any bad way. At all times we have acted on your behalf and have passed on information from cobroker concerning payments etc.

88 In his second e-mail, Middleton provided a longer explanation, stating:

> … [MAL] had issued us the enquiry basis Account: MISC. Compass Marine were led to believe that MAL was the in house broker for MISC. However as we have freshly learnt they are in actual fact the co-broker, hence my statement to this effect in my e-mail to Vivienne earlier today. All confirmations from Compass Marine to MAL & [EMF] clearly state buyer MISC, at no stage have we ever been requested to correct this. Was our understanding that funds were being sent directly from MISC, can [EMF] verify the location of the receiving funds ? for our records.
>
> We have learnt only today from Mr Joe@MAL that although instructions were issued at the time of fixing to place the fixed price contracts with [EMF], I am not entirely certain from the conversation with Mr Joe that the same has been instructed from MISC.

89 Three areas of contention arise out of these e-mails. First, Middleton maintained, contrary to what was stated in his first e-mail, that it was he who had approached MAL and not the other way around. EMF seeks to explain the inconsistency by characterising it as a misinterpretation of Middleton's e-mail, referring to his explanation given during cross-examination. However, this explanation was far from satisfactory:

> Q. I am not so concerned about what MISC told you but the fact is you were the one who first approached MAL, correct?
>
> A. That's correct, yes.
>
> Q. But here, you are telling Equatorial that it was MAL who approached you?
>
> A. I was answering the question of where is Market Asia Link – you know, we don't understand Market Asia Link. Market Asia Link approached us for the bunker enquiries. That is how that is meant to read. That's -- that's what that is all about.
>
> Q. I don't think you have answered my question, Mr Middleton. It was you who first approached MAL?
>
> A. That's correct.
>
> Q. But in this e-mail, you are giving the impression to the plaintiff that it was MAL who first approached you.
>
> A. No, that's incorrect. That's not -- I was asked, Market Asia Link. They approached us for the bunker enquiries. It doesn't say my first dealing with Market Asia Link was on this basis. That's one step further.
>
> …
>
> Court: Here you say MAL is the broker who has approached us to cover inquiry and fix business for account MISC. So what does that mean?
>
> A. They are the party that presented to bunker enquiries to us to fix in Singapore, for account MISC. It wasn't -- when was my first dealing with MAL, how this came about. Where did they come? Where they approach us with the enquiries. At the time, you know, that was how I'd phrased it. There was no untoward -- that was how it was.
>
> Court: Sorry, was it correctly phrased?

A. Looking back now, it probably wasn't -- I could have phrased it better. But I was -- at the time when I wrote that e-mail, I was never expecting and understanding exactly what has happened thereafter at that point. had I known what now, then I could have rephrased things more specific, but I didn't expect that -- what was going to be presented to me thereafter.

90 The above extract gives some flavour of Middleton's testimony. It was often hard to understand. Perhaps this was because he was trying to cover too many angles at one time.

91 My understanding of Middleton's explanation above is that his e-mail was merely intended to convey that MAL would generally approach Compass Marine for bunker supplies, and not that their business relations had only commenced after Compass Marine was approached by MAL. This, in my view, is a contrived interpretation of a sentence in his e-mail that not only could have been better phrased but is also at complete odds with the context in which the e-mail was sent. It appears that the first e-mail was intended to placate EMF and to provide an explanation of how MAL came into the picture; I am not persuaded that Middleton's use of the word "approach" in this context is meant to refer to the general conduct of the dealings between Compass Marine and MAL.

92 Middleton further testified that his account was to be believed as it was inconceivable that a company based in Kuala Lumpur such as MAL would approach a broker in London. However, as MISC points out, Mr Grant Foulger ("Foulger"), an employee of OceanConnect, had stated in an affidavit filed in relation to the present proceedings that OceanConnect was contacted by MAL. This puts paid to EMF's submission that "Compass Marine would never have come to deal with MAL as [MISC's] broker if not for the referral by [MISC] itself". An approach by MAL to Compass Marine and OceanConnect would be consistent with MAL's position as a new player in the bunker supply market which needed to go through brokers to find bunker suppliers. From Compass Marine's point of view, as a small broking firm, it would have had much more credibility with suppliers if it represented itself as acting for MISC than if it said straight out that it was acting for a newcomer like MAL.

93 Second, MISC also highlights the fact that Middleton had not mentioned the alleged representation made to him on 22 May 2006 despite his explanations of how he had come to form the impression that MAL was the in-house broker for MISC. Crucially, Middleton continued to make no mention of this alleged representation until sometime around 2010, when EMF was preparing to commence the present action. This adds to the possibility that the alleged representation was a mere afterthought on his part.

94 Third, the second e-mail suggests that Middleton was unaware that MAL had been making payments to EMF until November 2008. He confirmed this position when he was cross-examined. However, MISC submits that this cannot be correct, pointing to several e-mails from MAL to Middleton enclosing remittance slips which showed that MAL (and not MISC) was making payment to the suppliers, or in which Middleton was informed that payment to the suppliers would only be made then as MAL had just been paid by MISC.

95 Middleton could not be cross-examined on these e-mails. This was because they were only provided by EMF on 29 August 2014, after Middleton's cross-examination had ended, despite having been in Mrs Ong's possession since 2012. However, after MISC had completed their review and tendered these e-mails as part of the Supplementary Agreed Bundle on 10 September 2014, EMF declined to recall Middleton as a witness to explain the e-mails. In the absence of any explanation by Middleton, I am inclined to take the evidence at face value and find that, contrary to what he had

stated in the second e-mail and during cross-examination, Middleton had known that it was MAL and not MISC who was making payment. His request for clarification in respect of whether the funds were sent directly from MISC also demonstrates that he was cognisant that MAL and MISC were two distinct entities acting independently.

Invoices issued by Compass Marine to MAL

96 In court, MISC referred Middleton to four invoices issued by Compass Marine to MAL for the supply of bunkers. Middleton replied that they were mere errors which he had not been aware of until the week before the trial. He conceded that there was no reason for these invoices to have been issued since the industry practice is for the physical supplier to issue the invoice in the name of the buyer, and for the broker to issue an invoice to the supplier for its commission. However, e-mails that were only tendered as part of the Supplementary Agreed Bundle on 10 September 2014 show that Middleton had been personally involved in the issue of at least one of these invoices, even providing a revised copy on request. Again, because these e-mails were only provided after Middleton's cross-examination had ended and EMF had declined to recall him as a witness, there is no explanation from Middleton in relation to these e-mails.

97 EMF sought to account for these invoices, explaining them as either errors or transactions in which Compass Marine had actually been involved as a trader. But that still does not address the issue of Middleton's credibility, and why he disavowed knowledge of the invoices when he had been personally involved in at least one of them. Similarly, there is no need for the court to look into the motives behind the issue of such invoices; it is sufficient to find that the invoices cast great doubt on Middleton's credibility due to the inconsistencies in his evidence.

"Corroborating" evidence

98 EMF submits that Middleton's evidence was "strongly corroborated" by the evidence of Dimitris Papadimitriou ("Papadimitriou") and Lars Nielson, both of whom are employees of Brilliant Maritime Services Ltd ("BMS"). In his affidavit, Papadimitriou stated that he had telephoned MISC's Bunker Unit in 2008 and was informed by an employee by the name of Khairul that MAL was MISC's bunker broker, and that he should contact MAL instead to discuss MISC's bunker requirements. It is not claimed that this representation was relayed to EMF.

99 Even if I were to accept that this were true, I agree with MISC's submissions that a representation to a different individual in 2008 is a separate incident, and does not corroborate Middleton's evidence that the alleged representation was made to him in 2006. Nevertheless as the Court of Appeal points out in *Bunga Melati CA* at [49], it could corroborate a broader claim that MISC had a *practice* of making express representations to bunker suppliers that MAL was its agent. As far as the present case is concerned, for the purposes of establishing apparent authority, it is necessary that the representation be made by MISC to *EMF or possibly its agents*. The fact that MISC had made the same representation to other suppliers is therefore, in my view, similar fact evidence.

100 MISC submits, without further explanation, that Papadimitriou's evidence "does not, at law, constitute 'similar fact evidence'". I am not entirely convinced that the matter is as straightforward as MISC makes it out to be, particularly given the uncertainty over whether s 11(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") allows for the admission of similar fact evidence to prove *actus reus*: see Jeffrey Pinsler, *Evidence and the Litigation Process* (2013, 4th Ed, LexisNexis) ("*Pinsler on Evidence*") at paras 3.043–3.044. Neither party submitted specifically on the position to be taken in the present case. However, even if Papadimitriou's evidence were admitted as similar fact evidence, I am still not persuaded that the alleged representation was made to Middleton in 2006

given the numerous flaws in his evidence as set out above.

101 As I have found that there was no representation to Middleton by an MISC employee in 2006, there can be no basis to find any apparent authority from MISC to MAL.

***Issue 3 – Is MISC estopped from denying that MAL was authorised to act as its agent?***

102 Many of the facts raised in Issue 1 were also used by EMF as evidence that MISC had known of MAL's representations to suppliers that MAL was its agent. As far as the manner in which the bunker supply contracts were awarded or performed is concerned, to my mind, this does not show any such knowledge on MISC's part. MISC did not want a broker. It wanted a supplier and even though its method of appointing such a supplier may have been questionable, this deficiency cannot translate into knowing that its supplier was pretending to be a broker. However, MISC's reaction to the receipt of notices from the suppliers seeking payment, while having little bearing on the question on whether MISC had conferred upon MAL its actual authority, does suggest that the allegations of agency did not come as a complete surprise to them. As mentioned at [66(a)] above, MISC did not immediately question MAL and the suppliers as to why payment was being sought from it, as one would expect had they had no knowledge of MAL's representations.

103 More importantly, there were multiple instances on which the physical suppliers issued requests for payment directly to MISC. In particular, in an e-mail sent by MAL to Foulger on 11 September 2007, the writer stated that MISC had queried MAL over purported discrepancies in an invoice that had been sent directly to MISC. There being no apparent reason for that employee to have lied, it can be concluded that MISC had perused the invoice and was aware that a supplier had been operating under the impression that it was the buying party. The focus then turns to whether such knowledge is in itself sufficient to establish an agency by estoppel on the basis of the principles discussed above at [30]–[37].

104 MISC submits that mere knowledge on its part that MAL was sometimes entering into bunker contracts in its name did not give rise to a duty to speak and that there was no evidence that MISC had communicated by its conduct any representation to EMF. MISC also submits that the nature of the knowledge alleged (*ie*, that MAL had been entering into bunker supply contracts with *all* parties in MISC's name and not just the Disputed Contracts) is too general to establish agency by estoppel. As far as the lack of communication is concerned, the definition of estoppel by agency which I have adopted caters precisely for situations in which no representation as usually understood has been made, and therefore silence alone is not sufficient ground for disposing of EMF's case. However, as also discussed, silence has to be coupled with a duty to speak in order for it to constitute a representation. In this particular case, there cannot be a general duty to broadcast to the world that MAL was not MISC's broker. EMF has to show that MISC owed it a duty to speak.

105 As MISC points out, however, there is no evidence that MISC had communicated or dealt with EMF prior to November 2008, or ever received an invoice from EMF or made payment directly to it. Even if MISC had known that MAL had represented itself as MISC's agent, there is nothing to show that MISC was aware that MAL had made that general representation *to EMF*, let alone in respect of the Disputed Contracts. There was no legal or other relationship between MISC and EMF leading to a situation in which MISC's silence would have encouraged EMF to treat MAL as MISC's broker and act accordingly.

106 In any case, I agree with MISC's submission that even if the knowledge of the alleged representation could be imputed to EMF, any such reliance would not have been reasonable. As discussed above at [94]–[95], the unchallenged documentary evidence shows that Middleton had

been aware that MAL and not MISC was the party making payment to the suppliers. Given Middleton's evidence that it would be the buyer and not the broker making payment for the bunkers, it is clear that Compass Marine, as EMF's agent, had been put on inquiry in respect of MAL's authority to act on behalf of MISC. The e-mail set out in [88] above clearly shows that the significance of the paying party was not lost on him.

107 Further, I agree with MISC that the evidence also showed that EMF itself would have been put on inquiry before it entered into the Fixed Price Contracts. It is not disputed that EMF had, between June 2006 and 18 September 2008, delivered substantial quantities of bunkers to MISC's vessels and that MAL had been the party who had made payment to EMF for these deliveries by directly remitting the amounts due into its account. EMF argues that "the mere fact of payment by MAL is not conclusive of the identity of the contracting party" but that is beside the point – it may not be conclusive of the identity of the contracting party but it most certainly would have put EMF on inquiry.

108 That being the case, I am of the view that MISC is not estopped from denying that MAL was its agent.

***Issue 4 – Should the hearsay evidence that EMF seeks to adduce be admitted?***

109 EMF seeks to adduce the following items of hearsay evidence:

(a) An affidavit dated 5 April 2010 by Mohd Yahya Khalid ("Joe Khalid"), formerly the managing director of MAL;

(b) An affidavit dated 31 August 2010 by Foulger, referred to at [92] above;

(c) MAL's documents relating to the supply of bunkers to MISC in 2008;

(d) E-mails sent and received by various MAL employees; and

(e) Oral statements made by Joe Khalid to Middleton and by Siti Hajar, another former employee of MAL, to Mrs Ong.

*Documentary hearsay evidence*

110 The items mentioned in [109(c)] and [109(d)] above are documents. Their admissibility is governed by s 32(1)(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), which provides that a statement may be admitted:

(*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —

(i) any entry or memorandum in books kept in the ordinary course of a trade, business, profession or other occupation or in the discharge of professional duty;

(ii) an acknowledgment (whether written or signed) for the receipt of money, goods, securities or property of any kind;

(iii) any information in market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations; or

(iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,

and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons.

111 The submissions of MISC and EMF were premised on these documents having been admitted.

112 MISC does not argue that the documentary hearsay evidence falls outside the purview of s 32(1)(*b*). This is sensible as it cannot be seriously contended that these documents (which include requests for quotations, invoices, confirmations and correspondence between employees of MAL and other parties or between themselves in relation to bunker transactions) were not statements made "in the ordinary course of … business". Rather, MISC contends that these documents should not be admitted as it would not be in the interests of justice to do so. This is because it would be prejudicial to admit these documents without allowing MISC to cross-examine MAL on their contents.

113 MISC is relying on the exclusion in s 32(3) of the Evidence Act which provides that a hearsay statement which is otherwise relevant shall not be relevant if the court is of the view that it would not be in the interest of justice to treat it as relevant. This provision was considered in the case of *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795 ("*Wan Lai Ting*") which MISC also relies on. In *Wan Lai Ting*, the court held that s 32(3) could apply to exclude affidavits from being tendered as evidence in a situation in which the makers of those affidavits had not been made available for cross-examination.

114 However, as EMF submits, *Wan Lai Ting* was not decided simply on the ground that the plaintiff had no opportunity to cross-examine the maker of the statements. After all, that is the very nature of hearsay evidence. In *Wan Lai Ting* at [18], Edmund Leow JC held that the purpose of s 32(3) was to ensure that the expanded exceptions to hearsay were not abused. He found on the facts that the plaintiff had sought to invoke s 32(1)(*b*) as a means of preventing the maker of the affidavits from being cross-examined and therefore held that it would not have been in the interests of justice to admit the affidavits. No such abuse is alleged here.

115 The Court of Appeal addressed the scope and application of s 32(3) in *Gimpex Ltd v Unity Holdings Business Ltd and another appeal* [2015] 2 SLR 686 ("*Gimpex (CA)*"). This judgment was only released after the close of submissions in the present case. In *Gimpex (CA)* at [105], the Court of Appeal adopted the view advanced by Professor Pinsler that the discretion to exclude evidence by way of s 32(3) depends on whether other countervailing factors outweigh the benefit of having the evidence admitted. What these countervailing factors consist of is set out at [106]–[109]:

106 Turning now to the question of the application of s 32(3), we note that Prof Pinsler (in [*Pinsler on Evidence*] at para 6.052), observed that, "[i]t is immediately noticeable that there are no criteria to guide the court" as to how s 32(3) ought to be applied. He then suggested some factors which the court could take into consideration in determining whether a relevant statement should nevertheless be excluded under s 32(3) (*ibid*):

Ideally, the court would balance the significance of the evidence (its probative value or importance to one or more of the issues) against any factors that militate against its admission. That is, the admissible evidence may be excluded if it does not justify the disadvantages that would result from its admission. ***Such disadvantage would include the***

***danger of unreliability or other harm which might compromise fair adjudication, additional costs (as when a hearsay statement is not necessary because it essentially duplicates other evidence in the case), delay in the proceedings (where additional time is needed to adduce the evidence or the proceedings have to be postponed), the distraction of the court and/or the parties (where the evidence raises collateral issues that require undue attention), its tendency to confuse or its misleading effect (as when there are doubts about authenticity and good faith), lack of reliability (where the circumstances of the author of a statement or in which the statement was made raise concerns about its truthfulness) and prejudice (in the sense of evidence that would have the effect of being substantively unjust or procedurally oppressive).*** It seems to be clear that the less significant or probative the statement, the less forceful the countervailing factors would need to be to justify exclusion. Nevertheless, as the evidence is declared to be admissible by s 32(1) of the [Evidence Act], the court should not normally exercise its discretion to exclude the statement unless the countervailing factors clearly outweigh the benefit that would be gained by its admission.

…

108 We are largely in agreement with Prof Pinsler's suggestions, and also accept that the factors which he set out (see [103] above) are germane and appropriate as a *general* basis from which the court may go about its analysis when deciding whether to exercise its discretion to exclude otherwise admissible evidence pursuant to s 32(3) of the [Evidence Act].

…

109 ***In particular, we think that where the hearsay evidence sought to be admitted is of limited probative value, such evidence should properly be excluded.*** The effect of this is that the party seeking the admission of the hearsay evidence must be able to show the court that there were certain safeguards or measures that applied to that evidence which would ensure a minimal degree of reliability. Of course, the court in doing so must bear in mind the fine line between a decision not to admit hearsay evidence (under s 32(3)) and a decision to admit the hearsay evidence but to accord it less weight (under s 32(5)). The court should not normally exercise its discretion to exclude evidence that is declared to be admissible by the [Evidence Act].

[emphasis in original in italics; emphasis added in bold italics]

116 It should also be noted that the hearsay evidence sought to be adduced in the present case is in the form of contemporaneous business records, as opposed to later written documents made in the course of or for the purpose of legal proceedings. There is less reason to doubt the genuineness of these documents; indeed, MISC does not dispute their authenticity. Admitting the documents does not, however, mean giving full weight to them. What weight should be assigned to any particular document is a matter of assessment of the circumstances in which that document was produced. I conclude that in this case it would not be against the interest of justice to admit the documents concerned. Most were routine documents and MISC has not raised any particular issues with them which would need to be explored in cross-examination.

*Oral hearsay evidence*

117 As for the oral hearsay evidence, EMF argues that it should be admitted by way of the exception provided by s 32(1)(*j*) of the Evidence Act, which provides that such statements may be

admitted if made by a person in respect of whom it is shown:

(i) he is dead or unfit because of his bodily or mental condition to attend as a witness;

(ii) that despite reasonable efforts to locate him, he cannot be found whether within or outside Singapore;

(iii) that he is outside Singapore and it is not practicable to secure his attendance; or

(iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so.

118 Given that EMF seeks to admit the categories of hearsay evidence under different subsections of s 32(1)(*j*), they will be addressed individually.

Joe Khalid's affidavit

119 EMF relies on s 32(1)(*j*)(ii) for the admission of Joe Khalid's affidavit on the basis that it had been unable to locate him despite its "reasonable efforts". What is of greatest assistance to EMF in the affidavit is Joe Khalid's statement that "MISC was aware that MAL was using MISC's name to purchase the bunkers". The only evidence adduced in respect of EMF's efforts to contact Joe Khalid is Mrs Ong's affidavit of evidence-in-chief in which she stated that she had made several calls to Joe Khalid but has not been able to contact him since April 2012. No details were provided as to when these calls were made or, saliently, whether she had made further attempts to contact him closer to the trial date.

120 MISC argues that the calls do not constitute "reasonable efforts" under s 32(1)(*j*)(ii). It refers to two recent cases in which the High Court declined to admit evidence pursuant to s 32(1)(*j*)(ii) as it found that the party seeking to adduce the contested evidence had not undertaken reasonable efforts. The cases are *Gimpex Ltd v Unity Holding Business Ltd* [2013] SGHC 224 and *Pacific Marine & Shipbuilding Pte Ltd v Xin Ming Hua Pte Ltd* [2014] SGHC 102. As was the case for s 32(3), the Court of Appeal has since laid down the principles governing the application of s 32(1)(*j*) in *Gimpex (CA)*. It held at [97] that it is incumbent on the person seeking to invoke s 32(1)(*j*) to prove the ground of unavailability and that "a mere allegation of unavailability is not acceptable". However, none of these cases involved s 32(1)(*j*)(ii), let alone addressed what "reasonable efforts" under s 32(1)(*j*)(ii) entail.

1 2 1 *Pinsler on Evidence* suggests at para 6.029 that the satisfaction of the "reasonable efforts" requirement would depend on a variety of factors, and that guidance can be sought from the interpretation of "cannot be found" under s 33 of the Evidence Act:

… As for the meaning of 'reasonable efforts' in sub-para j(ii), the satisfaction of this requirement must depend on such matters as the ease or difficulty in locating the person (including any potential delay which could have an impact on the timing of the trial), the significance of evidence to the party, the expense and other resources involved in making the necessary arrangements, and the party's ability to take such measures. For example, if the person is out of the jurisdiction and costs of locating him would be disproportionate to the amount of the claim the party might not be regarded as having failed to comply with this criteria (particularly if the evidence is not critical to the case). On the other hand, a letter to the person's last known address in Singapore asking him to respond would not normally be sufficient, if there are reasonable opportunities for communicating with him at some other location or through electronic means. In *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* the Court of

> Appeal considered that the words 'cannot be found' in s 33 of the [Evidence Act] imported the requirement that the party seeking to rely on it must be able to show the court that he acted with 'due diligence' in attempting to find the witness. The party seeking to satisfy this condition would ordinarily be expected to communicate with the other party for the purpose of discovering the possible location of the witness, the steps which might be taken to find him, and to invite any comments or suggestions from that party. There is no reason why these considerations could not be applied to s 32(1)(*j*)(ii) of the [Evidence Act], particularly as the party seeking to rely on this provision would have to satisfy the court that he made 'reasonable efforts' to locate the person who made the statement.

122 EMF's difficulty here is that the details of their attempts to contact Joe Khalid are scant. EMF contends that MISC's failure to cross-examine Mrs Ong on this point precludes any argument that Mrs Ong had not actually made any calls to Joe. I agree. But that says nothing as to the regularity and timing of those calls. As MISC points out, there were other avenues for contacting Joe Khalid that were not attempted by Mrs Ong. Contrast what EMF did to the steps taken by the party that successfully invoked s 33 in *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* [2013] 3 SLR 573 ("*Teo Wai Cheong*") who had, *inter alia*, issued a subpoena and attempted to serve it at the witness' Singapore address, visited the witness' parents' residence and spoken to her father, visited the restaurant in Dubai where the witness used to work, sent a letter by courier to the witness' last known address in Dubai and placed an advertisement in English language newspapers in Singapore and Dubai. In this case, EMF did not make any efforts apart from the phone calls. Nor did it invite any comments or suggestions from MISC as to how Joe Khalid could be contacted, as suggested by the Court of Appeal in *Teo Wai Cheong* at [32]. The statement that Joe Khalid made would, if admitted, have added some weight to EMF's case. It behoved EMF to make more than a desultory effort to procure the attendance of the witness so that he could be cross-examined. In these circumstances, Joe Khalid's affidavit cannot be admitted under s 32(1)(*j*)(ii) of the Evidence Act.

123 It is also pertinent to mention that the probative value of Joe Khalid's statement was open to question. There are inconsistencies between his evidence and the original position taken by MAL and Joe Khalid in relation to the demands for payments by the physical suppliers (for which MAL clearly accepted liability *vis-à-vis* MISC) and in relation to the corresponding US and Malaysian legal proceedings. Further, he does not provide any details of the particular MISC employees who allegedly knew about MAL's alleged representations. He also does not say if the representations which MISC was aware of refer to MAL's representations to bunker traders in general or to Compass Marine, and if they pertained to the Disputed Contracts in particular. There is also no documentary evidence tendered in support of his evidence.

Foulger's affidavit

124 EMF seeks to admit Foulger's affidavit under s 32(1)(*j*)(iv) of the Evidence Act as he had refused to attend the trial to give evidence. This is explained by Mrs Ong, and is not substantiated by any documentary evidence. However, contrary to MISC's submissions, there is no requirement that there should have been reasonable efforts to procure Foulger's attendance at trial. The failure to do so is not therefore not a ground for denying the admission of evidence under s 32(1)(*j*)(iv). In this regard, *Pinsler on Evidence* highlights the case of *Ng Yiu Kwok v PP* [1989] 3 MLJ 166, in which documentary hearsay evidence (in the form of business records) was allowed where its makers were outside the jurisdiction and unwilling to go to Malaysia to testify.

125 Whilst I am willing to admit Foulger's evidence, I do not think it takes EMF's case any further. Folger said that he had been contacted by MAL in respect of a quote for the supply of bunkers to an

MISC vessel and the MAL representative had informed him that MAL was acting as MISC's broker. Subsequent to that, OceanConnect and MAL co-brokered more than 120 bunker transactions involving MISC and OceanConnect and MAL shared co-brokerage fees. OceanConnect's understanding in each of these transactions was that MISC was the true buyer. This evidence does not shed further light on whether there was an agreement between MAL and MISC for the former to act as the latter's agent, or make any claim as to whether representations had been made by MISC and not MAL. It is worth noting that MAL stood to benefit from the brokerage fees if it presented itself as co-broker. It would not have been entitled to share in the same had it been treated as a purchaser.

Oral statements made by Joe Khalid and Siti Hajar

126 The oral statements referred to appear in the affidavits of Mrs Ong and Middleton and relate to representations made by Joe Khalid to Mrs Ong and by Siti Hajar to Middleton. The representations were that MAL was the agent of MISC. EMF seeks the admission of these oral statements by way of s 32(1)(*j*)(ii) of the Evidence Act.

127 The reasons against the admission of Joe Khalid's affidavit evidence canvassed at [119]–[123] above apply equally to his oral statements. Siti Hajar's evidence is plagued by the same problem – there is no mention at all of any efforts made by EMF to contact Siti Hajar, save for Mrs Ong's evidence that she has not been able to contact *MAL* since April 2012. I am therefore of the view that there had been no "reasonable efforts" to locate them and that s 32(1)(*j*)(ii) does not apply.

128 In any case, putting aside the inconsistencies of their alleged statements with the rest of the evidence, I have already considered EMF's case on the basis that such representations had been made to them and to MAL. Even then, given the fact that the oral statements only go to show that the representations as to MAL's purported agency were made by MAL and not MISC, I am of the view that they are insufficient to establish that there was actual or apparent authority, or an agency by estoppel.

**Conclusion**

129 For the reasons given above, I find that EMF, the plaintiff, has not been able to establish liability on the part of MISC, the defendant, for the bunkers delivered under the Disputed Contracts. The plaintiff's claim must therefore be dismissed with costs.