The “Bunga Melati 5”
[2012] SGCA 46

Case Number	: Civil Appeal No 193 of 2010
Decision Date	: 21 August 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Leong Kah Wah, Teo Ke-Wei Ian and Koh See Bin (Rajah & Tann LLP) for the appellant; Prem Gurbani and Tan Hui Tsing (Gurbani & Co) for the respondent.
Parties	: The "Bunga Melati 5"

Civil Procedure – Striking out

Civil Procedure – Jurisdiction

Civil Procedure – Issue estoppel

Admiralty and Shipping – Admiralty jurisdiction and arrest

Admiralty and Shipping – Practice and procedure of action in rem

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 4 SLR 1017.]

21 August 2012

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 In this matter, the appellant claimed that there was a contractual relationship between itself and the respondent (established through the agency of a third party) over bunker supplies for a sum costing more than US$21million. On the respondent’s application, an Assistant Registrar (the “AR”) struck out the appellant’s action under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (the “ROC”) or the inherent jurisdiction of the court on the ground that the appellant’s action was plainly unsustainable and ought not to be allowed to proceed to a full trial. This decision was subsequently affirmed by a High Court judge (the “Judge”) in *The “Bunga Melati 5”* [2011] SGHC 195 (the “GD”).

2 After considering the parties’ submissions, we allowed the appeal and restored the appellant’s action. The detailed reasons for our decision are now set out.

The facts

3 The appellant, Equatorial Marine Fuel Management Services Pte Ltd, is a Singapore company in the business of supplying bunkers. The respondent, MISC Berhad, is a Malaysian shipping company that owns and operates a number of vessels, including the *Bunga Melati* 5.

The appellant’s case

4 According to the appellant, it had, on or about 3 July 2008, entered into two fixed price contracts with the respondent, under which the appellant agreed to supply 35,000 metric tonnes of bunkers to vessels owned or operated by the respondent in August and September 2008 at the price of US$744 and US$750 per metric tonne respectively (the "Fixed Price Contracts"). The appellant also alleged that it had, on or about 18 September 2008, entered into a separate contract with the respondent for the supply of 1,100 metric tonnes of bunkers, on a "spot" basis, to the respondent's vessel *The MT Navig8 Faith* (the "Navig8 Faith Contract"). Both contracts will be collectively referred to as "the Bunker Contracts".

5 According to the appellant, a Malaysian company, Market Asia Link Sdn Bhd ("MAL"), a company engaged in bunker trading, had at all material times acted as the broker or buying agent of the respondent in respect of the Bunker Contracts.

6 In the case of the Fixed Price Contracts, a firm of bunker brokers, Compass Marine Fuels Ltd ("Compass Marine") acted on behalf of the appellant; whereas in the case of the Navig8 Faith Contract, another firm of bunker brokers, OceanConnect UK Ltd ("OceanConnect") acted on behalf of the appellant.

7 The appellant received bunker confirmations from Compass Marine and OceanConnect plainly identifying the respondent (and not MAL) as "buyers" and the appellant as "sellers". The appellant also received two letters from MAL identifying the respondent as "Buyers c/o MAL". In short, all the correspondence/contracting documents between the appellant and MAL, Compass Marine or OceanConnect consistently referred to the respondent as the "Buyers". [note: 1]

The respondent's case

8 The respondent's position, however, was that it *only* had a contractual relationship with MAL. Pursuant to a six-month Bunker Fixed Price Agreement ("BFPA") concluded in March 2008, MAL had agreed to supply 138,000 tonnes of bunkers at a fixed price of US$475 per metric tonne, from 24 March 2008 to 23 September 2008, to vessels owned or operated by the respondent.

9 According to the respondent, the BFPA was the subject-matter of a tender and MAL was amongst eight companies that received bid documents. Six companies submitted bids to the respondent, and eventually MAL was successful in the tender and was awarded the BFPA on 14 March 2008. Notably, in the BFPA, the respondent was referred to as the "Buyer" and MAL as the "Seller" – with no indication whatsoever that MAL was the respondent's buying agent. [note: 2] In addition to the BFPA, there were also nine spot contracts (the "Market Price Contracts") [note: 3] for the supply of bunkers to vessels owned or operated by the respondent at the prevailing market rates for bunkers.

10 The respondent alleged that the only invoices it received were MAL's invoices on MAL's letterhead (*ie*, it had never received any of the appellant's invoices). [note: 4] According to the respondent, it did not have or seek control over how MAL secured its supplies, [note: 5] and none of the documents adduced by the appellant to prove that MAL was the respondent's agent had ever been revealed to the respondent. [note: 6] Pursuant to the contracts between MAL and the respondent, the respondent claimed to have paid MAL in full a sum of US$17,336,660.69 for the supplies which formed the subject matter of the action by the appellant. [note: 7]

The appellant's efforts to recover its dues

The proceedings in California, USA

11 The appellant initially commenced proceedings against the respondent in the United States District Court for the Central District of California (the "California District Court") in late November 2008 when it did not receive full payment in respect of the bunkers it had supplied to/via MAL. Prior to this, when the appellant demanded payment from the respondent on 5 November 2008, its demand was forwarded to MAL which stated that it would take "full responsibility". [note: 8] The appellant also filed a "Verified Complaint" to obtain an attachment order under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure (the "Rule B attachment order"). [note: 9] The Rule B attachment order was executed against one of the respondent's vessel, the *Bunga Kasturi Lima*, at Long Beach, California.

12 An offer to provide a corporate guarantee to secure the appellant's claim against MAL was made to the appellant by the respondent (on condition that the appellant withdrew all suits against the respondent in the United States and ceased commencing any further actions *in rem* against the respondent's vessels) a day after the Rule B attachment order was executed against the *Bunga Kasturi Lima*. The appellant, however, did not accept this offer.

13 The respondent then on 15 December 2008 filed a motion to vacate the Rule B attachment order and to dismiss the Verified Complaint. [note: 10] The California District Court after consideration vacated the Rule B attachment order on 18 December 2008, [note: 11] a decision which was later upheld by the United States Court of Appeals for the Ninth Circuit. [note: 12] Prior to the motion to dismiss the Verified Complaint being heard, the appellant withdrew its action in California.

The proceedings in Singapore

14 Subsequently, the appellant commenced *in rem* proceedings in the Singapore High Court on 5 February 2010 for the sum of US$21,703,059.39 before contractual interest [note: 13] and served the writ *in rem* on the respondent's vessel – the *Bunga Melati 5*.

15 The appellant's case was essentially that the respondent was a party to the Bunker Contracts *via* the agency of the respondent's alleged agent, MAL, and that the respondent was, therefore, contractually liable to the appellant for the bunkers supplied. In the present appeal, the appellant decided to hinge its contractual claim solely on the doctrine of agency by estoppel – that it had relied on representations made by the respondent that MAL was clothed with ostensible authority to conclude the Bunker Contracts on the respondent's behalf. In the alternative, the appellant also submitted that the respondent was liable to it in unjust enrichment for enjoying the use of the appellant's bunkers without paying for them.

16 With regards to the agency claim, the relevant portion of the appellant's Statement of Claim [note: 14] is reproduced here:

> **Agency by Estoppel**
>
> 19. …
>
> 20. The [appellant] avers that at all material times, the [respondent] knew or ought to have known that the [appellant], Compass Marine and [OceanConnect] believed that MAL was acting as the [respondent's] exclusive buying agent or buying agent.

Particulars

(a) To the best of the [appellant's] knowledge, from as early as June 2006, the [respondent] had routinely directed bunker traders, bunker suppliers and/or bunker brokers (including Compass Marine and OceanConnect) to contact MAL to discuss the [respondent's] bunker requirements. By doing so, the [respondent] had led bunker traders, bunker suppliers and/or bunker brokers to believe that MAL was the [respondent]'s exclusive buying agent or buying agent.

(b) At all material times, the [respondent] knew or ought to have known that MAL represented itself to bunker traders, bunker suppliers and/or bunker brokers (including Compass Marine and OceanConnect) as the [respondent's] exclusive buying agent or buying agent.

17 In support of its claim that an express representation had been made to the appellant, the appellant primarily relied on the affidavit of one Mr Darren Middleton ("Mr Middleton"), director of Compass Marine. Mr Middleton had deposed in his affidavit that on or about 22 May 2006, an employee from the respondent's bunker unit (whose name Mr Middleton could not recall) told him that MAL was the respondent's bunker broker, and directed him to contact MAL to discuss the respondent's bunker requirement. According to Mr Middleton, he did so and on or about 25 May 2006, [note: 15] Compass Marine and MAL successfully negotiated a bunker supply contract. As a result of other such transactions concluded between MAL and Compass Marine, Compass Marine formed the belief that MAL "acted exclusively for" the respondent. [note: 16]

The respondent's application

18 On 2 March 2010, the respondent applied to set aside and/or strike out the appellant's writ. On 17 June 2010, the respondent successfully obtained the following orders from the AR: [note: 17]

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

(b) alternatively, that the appellant's writ be struck out and/or set aside on the basis that the admiralty jurisdiction *in rem* of the Court under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HCAJA") had been improperly or invalidly invoked against the *Bunga Melati 5*.

19 The respondent's primary submission was a straightforward denial that there was any agency relationship between itself and MAL. The respondent asserted that at all material times, it had procured the sale and supply of bunkers for its vessels from MAL as contractual sellers. While MAL had in turn procured bunkers from suppliers such as the appellant, there was no contractual relationship between itself and the appellant.

20 Consequently, the respondent submitted that the appellant's claim should be struck out for being plainly unsustainable on the merits. For the same reasons, the respondent submitted that it was not "the person who would be liable on the claim in an action *in personam*" under s 4(4)(*b*) of the HCAJA and that the appellant had therefore wrongly invoked the admiralty jurisdiction *in rem* of the court.

21 In addition, the respondent also relied on the doctrine of issue estoppel, arguing that the US proceedings have estopped the appellant from litigating the same issues before the Singapore courts,

and that this provided an additional ground why the appellant's action should be struck out.

The Judge's decision

22 In the GD, the Judge upheld the AR's decision to strike out the appellant's action under O 18 r 19 of the ROC or the inherent jurisdiction of the court.

23 On the appellants' contractual claim employing the doctrine of agency by estoppel, the Judge held that the appellant's case was fraught with insurmountable evidential difficulties (see the GD at [46]). The existence of the BFPA and the Market Price Contracts, and the respondent's due performance of its respective obligations thereunder to MAL, established to the Judge's satisfaction that MAL was not the respondent's agent.

24 The Judge analysed each of the legal requirements the appellants had to satisfy to establish agency by estoppel and explained why each was found wanting in her opinion:

(a) On the appellants' claim in "express representation", the Judge was of the opinion that it was bound to fail (see the GD at [59]). The Judge found the affidavit evidence of the appellant's witnesses either unpersuasive or irrelevant in proving that the respondent had expressly represented MAL as its agents to the appellant.

(b) On the appellant's claim in "implied representation", the Judge held that the appellant failed to show any convincing evidence that the respondents knew or ought to have known that MAL was representing to the bunker industry that it was acting as the agent of the respondents (see the GD at [60]).

(c) Even assuming that a representation had been made, the Judge held that there was no real evidence that the alleged representation emanated from a person with "actual authority" (see the GD at [61]).

(d) Crucially, the appellant had also relied on various facts which post-dated the conclusion and performance of the Bunker Contracts. The Judge thus held that the requirement of "inducement" to establish agency by estoppel was missing (see the GD at [62]).

25 On the appellant's alternative claim in unjust enrichment, the Judge agreed with the respondent that there was no "unjust factor" to speak of (see the GD at [65]). The Judge was of the opinion that allowing the appellant's claim in unjust enrichment would be tantamount to "[undermining] the parties contractual arrangements". The respondent could also rely on the defence of change of position which, in the Judge's view, successfully stood in the way of the appellant's claim in unjust enrichment (see the GD at [66]).

26 For the above reasons, the Judge held for the respondent by striking out the appellant's action on the ground that the causes of action pleaded were plainly unsustainable pursuant to O 18 r 19 of the ROC. As for the respondent's reliance on issue estoppel, the Judge held that the US proceedings were not "final and conclusive on the merits" and were therefore not capable of giving rise to an issue estoppel in the respondent's favour (see the GD at [74]). The Judge found that the US proceedings in question were only concerned with whether or not the Rule B attachment order was to be vacated, and it was open to the courts in the United States to reach a different view on the same issues at the subsequent stage of considering the *actual motion* to dismiss the Verified Complaint (see GD at [72]).

27 After striking out the appellant's action, the Judge also in an *obiter* discussion expressed her views on whether the appellant's writ *in rem* could be similarly set aside under O 12 r 7 of the ROC for having not properly invoked the admiralty *in rem* jurisdiction of the court. Earlier, the AR had held that when an admiralty plaintiff's writ was challenged, apart from satisfying the relevant provisions of the HCAJA, there was also an *independent requirement* that the plaintiff show a "good arguable case" *on the merits* of its claim to invoke admiralty jurisdiction. The Judge disagreed with the AR, holding that the setting aside of the writ and all consequent proceedings for lack of jurisdiction under O 12 r 7 of the ROC were to be governed solely by the HCAJA, which did not mandate an enquiry into the merits of a plaintiff's claim.

Issues to be addressed

28 Three main issues arose for our consideration in the present appeal:

(a) First, the *sustainability of the appellant's action*: whether the appellant's claim should be struck out under O 18 r 19 of the ROC and/or the inherent jurisdiction of the court.

(b) Second, *issue estoppel*: whether the US proceedings established an issue estoppel to bar the appellant from litigating its claim in Singapore.

(c) Third, the *invoking of the admiralty in rem jurisdiction of the court*: whether it was necessary for the appellant to satisfy a "merits test" in order to properly and/or validly invoke the admiralty jurisdiction of the court.

The sustainability of the appellant's action

The law on striking out

29 The circumstances under which a claim can be struck out pursuant to O 18 r 19 of the ROC are as follows:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
>
> **19.** —(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(*a*).
>
> (3) This Rule shall, as far as applicable, apply to an originating summons as if it were a

pleading.

30 The respondent's application on 2 March 2010 (see above at [18]), adopted a "kitchen sink" approach where three out of four limbs (limbs (*a*), (b) and (*d*)) of O 18 r 19(1) of the ROC) were listed as possible grounds for the appellant's claim to be struck out. [note: 18] The respondent's written submissions before us also did not make it clear exactly which limb in O 18 r 19(1) of the ROC it was relying on.

31 In our view, it would be a good practice for an applicant of a striking out order to precisely correlate the arguments it advances to the *exact limb* under O 18 r 19(1) of the ROC which it seeks to rely on. Such a practice will assist the courts to better understand the thrust of the applicant's arguments and assess them. While there is some similarity and overlap amongst the four limbs of O 18 r 19(1) of the ROC, each limb, conceptually speaking, serves a specific purpose *apropos* the court's power to summarily dismiss a party's claim.

32 In the present case, although the respondent did not specify the exact limb under O 18 r 19(1) of the ROC it was relying on to strike out the appellant's claim, the AR and the Judge below appear to have understood the respondent's arguments to be premised on O 18 r 19(1)(*b*) of the ROC – *ie*, that the appellant's action was "frivolous or vexatious". This can be inferred from their repetitive usage of phrases such as "plainly unsustainable" and "obviously unsustainable" to describe the appellant's action; phrases which have long been articulated in relation to the meaning of the words "frivolous or vexatious" in O 18 r 19(1)(*b*) of the ROC (see *Singapore Civil Procedure 2007* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2007) at para 18/19/12 ("*Singapore Civil Procedure 2007*")).

33 We note that whether an action is *plainly or obviously unsustainable* is also the relevant test governing the inherent jurisdiction of the court to strike out a party's claim, since it is trite law that the court "has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process" (*Singapore Civil Procedure 2007* at para 18/19/16). In other words, when the proceedings are "frivolous or vexatious" (*ie*, obviously or plainly unsustainable), the court can also exercise its inherent jurisdiction to halt such proceedings *in limine* (see *Schwarz & Co (Grain) Ltd v St Elefterio ex Arion (Owners) (The St Elefterio)* [1957] 1 P 179 ("*The St Elefterio*") at 185; *Sunly Petroleum Co Ltd v The Owners of the Ship or Vessel Lok Maheshwari* [1996] SGHC 212 ("*Lok Maheshwari*") at [19]; and the GD at [133]–[135]). This provides coherence between O 18 r 19(1)(*b*) of the ROC and the inherent jurisdiction of the court to strike out a party's claim.

When is an action plainly or obviously unsustainable

34 From a survey of the local case law, the phrases "plainly unsustainable" or "obviously unsustainable" appear to be the furthest a judicial exegesis of O 18 r 19(1)(*b*) of the ROC has gone as far as the sustainability of a party's action is concerned (see *The Osprey* [1999] 3 SLR(R) 1099 ("*The Osprey*") at [8]; *Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd and others* [2009] 4 SLR(R) 43 at [17]). While it cannot be doubted that the generality of the test of sustainability is precisely what enables a court to do justice based on the facts before it, we are of the view that a more analytical formulation of the test will (without sacrificing its flexibility) serve as a helpful guide for future cases. Here, we found Lord Hope's decision in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16 ("*Three Rivers District*") helpful.

35 For the present purposes, the facts in *Three Rivers District* are not important. Very briefly, the claimants were depositors who had lost money as a result of the collapse of the Bank of Credit and Commerce International, and had initiated proceedings against the defendant (the Bank of England) for the tort of misfeasance in public office. The Bank of England applied to strike out the claimants'

claim, and while it succeeded in the English Court of Appeal ("ECA"), the House of Lords overruled the decision of the ECA in a 3:2 decision and allowed the claimants' claim to proceed to trial. The majority Law Lords decided that the Bank of England did not satisfy the "no real prospect of succeeding" test in the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) ("CPR") rule 24.2(a)(i), which reads:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if —
>
> (a) it considers that —
>
> (i) that claimant has no real prospect of succeeding on the claim or issue …

36 The foundation for CPR r 24.2(a)(i) is none other than our current O 18 r 19(1)(*b*) of the ROC, as recognized by Lord Hutton in *Three Rivers District* at [119]. The "no real prospect of succeeding" test in CPR r 24.2(a)(i) therefore "corresponds in a broad way" to the "plainly or obviously unsustainable" test in O 18 r 19(1)(*b*). We have kept in mind, however, that the "no real prospect of succeeding" test was crafted in the UK to make it easier for the courts to dispose of unmeritorious claims summarily as compared with O 18 r 19(1)(*b*) (see Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd Ed, 2006) at pp 285–286), and in that regard the *substantive threshold* which an applicant has to satisfy under the two tests cannot therefore be identical. Nonetheless, the judicial opinions of the House of Lords as to the *general approach* a court should adopt in a striking out application are still helpful, and it is that element of *Three Rivers District* which we now turn our attention to.

37 In our view, Lord Hope's concise analysis at [95] of *Three Rivers District* is particularly instructive:

> I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in [*Swain v Hillman* [2001] 1 All ER 91 at 95] that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

38 An analytical understanding of Lord Hope's holding would reveal the two grounds upon which, in his view, a party's claim may be struck out by the court: First, on the *legal ground* that it is "clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; and second, on the *factual ground* that "the factual basis for the claim is fanciful because it is entirely without substance".

39 In our view, this analytical, fact-law distinction can similarly be applied to O 18 r 19(1)(*b*) of

the ROC or the inherent jurisdiction of the court to strike out unsustainable actions. Such a distinction helps to *more clearly elucidate* what a court means when it holds that an action is "plainly or obviously" unsustainable. Applying this conceptual prism, a "plainly or obviously" unsustainable action would be one which is either:

(a) *Legally unsustainable*: if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; or

(b) *Factually unsustainable*: if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

40 Interestingly, the Judge's reasons in striking out the appellant's claim in our present case could also be analytically deconstructed upon the twin grounds of factual and legal unsustainability as well. We now turn to consider the appellant's invocation of the doctrine of agency by estoppel.

The appellant's claim in agency by estoppel

41 It is established law that an estoppel by representation will arise if the following elements are made out by the appellant (*Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd and Another* [1964] 2 QB 480; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 (upheld on appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540) ("*Skandinaviska (CA)*") at [80]):

(a) a representation had been made to the appellant that MAL had authority to enter (on behalf of the respondent) into the Bunker Contracts;

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

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

42 Having cited the undisputed legal proposition above (see the GD at [51]), the Judge then went on to strike out the appellant's claim for being "plainly and obviously unsustainable" (see the GD at [75]). In our view, the Judge was mistaken in doing so because it *could not* be concluded with sufficient certainty that the factual and legal elements of the appellant's claim would not be satisfied should this case proceed to a full trial.

The appellant's claim could not be said to be so factually unsustainable that it ought to have been struck out

43 From the GD, it appeared that the Judge had found the appellant's claim to be factually unsustainable on two bases (see the GD at [54]):

(a) Firstly, that Mr Middleton's affidavit was contradicted by an affidavit filed on behalf of the

respondent by Mr Shaharum (the respondent's Manager of Bunker Operations and Management). Mr Shaharum had stated that no one in the bunker unit recalled having conversations of the sort alleged by Mr Middleton. [note: 19] In the Judge's own words, this created "*some doubt* … as to whether or not the alleged representations had been made at all" [emphasis added].

(b) Secondly, that Compass Marine might have had a *vested interest* in asserting that MAL was the respondent's agent, for if not, Compass Marine would potentially be liable to the appellant in negligence in having misrepresented that the appellant's contractual buyer was the respondent when it was in fact MAL.

44 In our opinion, these two bases did not make it *plain* that Mr Middleton's allegation or the appellant's claim is factually unsustainable or inherently unprovable. On the first basis, the appellant rightly submitted that if the Judge merely *doubted* whether or not the alleged representations had been made at all, the Judge ought not to have dismissed Mr Middleton's evidence summarily. [note: 20] Indeed, having stated that there was merely "some doubt" in her mind, the Judge should not have "prefer[red] the account of one side rather than the other" (*Boris Abramovich Berezovsky v Roman Arkadievich Abramovich* [2010] EWHC 647 (Comm) at [147]).

45 The second basis was also unconvincing as the credibility and/or motivation of Mr Middleton was a matter which should rightfully be left to trial, given that Mr Middleton had not contradicted himself in his affidavit. *Save in the plainest of cases, a court should not in a striking out application choose between conflicting accounts of crucial facts.* This was not such a case, as the following paragraphs will show.

46 In response, the respondent attempted to shore up the Judge's decision by first questioning the veracity of Mr Middleton's evidence, [note: 21] before suggesting that it would be highly unlikely that the appellant would be able to identify the employee who allegedly made the representation even if this case proceeded to trial. [note: 22] Based on the affidavit evidence available, which was all that the court possessed at this stage of the proceedings, the appellant' claim in express representation before us might at first blush appear to be problematic indeed. After all, the appellant's claim hinged largely on Mr Middleton's affidavit, and yet Mr Middleton could not even recall the name of the employee who allegedly made the representation. However, as counsel for the appellant rightly submitted during oral submissions, we simply could not rule out the possibility that Mr Middleton's memory could be refreshed by documents served upon discovery, or that one of the respondent's employees might corroborate Mr Middleton's claim upon cross-examination should this case proceed to trial.

47 Moreover, we noted certain facts in this case which suggested to us that the appellant had at least an *arguable case*, and that its claim in express representation was therefore *not* "entirely without substance" (*Three Rivers District* at [95]), even if such a claim appeared to be weak on the merits at the present interlocutory stage.

48 First, the respondent did pay off some of the bunker suppliers who were in the same position as the appellant soon after MAL went into financial distress. [note: 23] While the respondent's proffered reason for doing so (*ie*, to avert the arrest of its vessels) [note: 24] is a reasonable one, it could equally be said that the respondent did so because it knew that it was in a contractual relationship with these bunker suppliers. The duty to determine which of these reasons is more plausible given the circumstances lies with the trial judge.

49 Second, Mr Lars Nielsen, the Managing Director of Brilliant Maritime Services ("BMS"), a firm of

bunker traders and brokers, had filed an affidavit deposing that, in or around September 2008, an employee in the respondent's Bunker Unit named "Khairul" told one of his staff that MAL was the respondent's bunker broker, and directed BMS to contact MAL to discuss the respondent's bunker requirements. [note: 25] While the Judge was correct that Mr Nielsen's evidence could not be regarded as an implied representation to the appellant given that BMS was not involved in the appellant's Bunker Contracts (see the GD at [57]), we disagreed that such evidence could be summarily dismissed as irrelevant. In doing so, the Judge appears to have overlooked the fact that based on para 20(a) of the appellant's Statement of Claim, the appellant had not relied *solely* on Mr Middleton's affidavit but also on the alleged fact that "the [respondent] had routinely directed bunker traders, bunker suppliers and/or bunker brokers … to contact MAL" (see above at [16]). In our view, Mr Nielsen's affidavit at the very least *corroborated* the appellant's claim that the respondent had a practice of making express representations to bunker suppliers that MAL was its agent. Whether this corroboration is truly relevant or meritorious is a matter for the trial judge to decide.

50 Third, it was also telling that the respondent had not unequivocally stated on record that it had *never* referred bunker suppliers like the appellant to MAL and that all its employees had been instructed not to make such referrals. This was confirmed by counsel of the respondent during oral submissions. While this did not imply that Mr Middleton's allegation that there was an express representation is to be believed, it did suggest to us that it was certainly not "clear beyond question that the [appellant's] statement of facts is contradicted" by all other circumstantial evidence (*Three Rivers District* at [95]).

51 Fourth, we were unable to share the Judge's certainty that the documents submitted by the respondent had indeed "demonstrated beyond doubt that MAL was not the [respondent's] agent" (see the GD at [49]). In particular, we were concerned that many of the invoices rendered by MAL to the respondent were illegible on the record; [note: 26] and as such, could not be independently and accurately tallied against the evidence of payments claimed to have been made by the respondent to MAL for the disputed transactions. [note: 27] In our view, this did put a gloss as to whether the respondent had indeed conducted its business with MAL in an ordinary manner. Instead of speculating further, we saw this as yet another reason why this case should proceed to trial. Given the ambiguous affidavit evidence as to "the precise relationships of the varies parties involved" (see *The Osprey* at [17]), it would be the role of the trial court – as opposed to a court of summary jurisdiction - to determine whether there was indeed a good faith, arms-length contract between the respondent and MAL such that the latter could not be said to be the respondent's agent.

52 For the above reasons, the appellant's claim in express representation was not so plainly factually unsustainable that it ought to have been struck out. *In striking out the appellant's claim on this ground, the Judge had erred by engaging in the assessment of the weight of the evidence available; a task which strictly belongs to a trial judge who will have the benefit of all the fact-finding processes in a full trial.*

The appellant's claim could not be said to be so legally unsustainable that it ought to have been struck out

53 To be convinced that the appellant's claim was legally unsustainable, the Judge must have been certain that even if the appellant were to succeed in proving the alleged representation made to Mr Middleton, the appellant would still not be entitled to the remedy that it had sought (see [39] above). This would mean that certain legal elements of the appellant's case on agency by estoppel *could not* be made out *even if the facts alleged were proved*, resulting in the appellant's claim being legally unsustainable or bound to fail.

54 From both the AR's and the Judge's decisions below, three distinct legal elements appear to have been highlighted as being unable to be satisfied *even if* the representation alleged by Mr Middleton was assumed to be true:

(a) First, the Judge held that there was no real evidence that any representation, even assuming one had been made, emanated from a person with "actual" authority (see the GD at [61]).

(b) Second, the Judge held that the alleged representations made in 2006 could not be said to have remained operative as the Bunker Contracts concluded in 2008 (see the GD at [58]).

(c) Third, the AR had earlier held that the legal element of "inducement" could not be satisfied because any alleged representation was made to Compass Marine, and not to the appellant (*Equatorial Marine Fuel Management Services Pte Ltd v The "Bunga Melati 5* [2010] SGHC 193 ("*The Bunga Melati 5 (AR)*") at [60]).

55 In the following paragraphs, we address each of these legal elements individually to explain why it could *not* be said at this stage that the appellant's claim in express representation was so plainly *legally* unsustainable that it ought to have been struck out.

(1) Could the alleged representation be said to have emanated from a person with the requisite authority?

56 In its submissions, the appellant argued that while the employee could not be specifically identified until the trial, the employee, being in the bunker unit, must have had either actual or apparent authority to make the alleged representation. [note: 28] The respondent argued, on the contrary, that any such representation would have been made only by one of its junior executives who would not have had the requisite authority to do so. [note: 29]

57 In our view, there was simply insufficient evidence before us to determine if this legal element could be satisfied or not. Given that the identity of the alleged employee remained unknown, it was not possible to determine whether that alleged employee had actual or apparent authority. The onus would be on the appellant to identify, at trial, the specific employee who *had the requisite authority* and did make the alleged representation. It would therefore have been premature to conclude at this stage that this legal element *could not* be made out by the appellant.

58 Moreover, even if no employee in the bunker unit could be said to have the *actual authority* to make the alleged representation, it still remains legally debatable whether the alleged employee's *apparent authority* could similarly have sufficed. Although the Judge below appears to be of the view that only actual authority could suffice, we noted the more nuanced view put forth by established authors in the law of agency that (Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (Thomson Reuters (Legal) Limited, 19th Ed, 2010) at para 8-021; see also Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2010) ("*Tan Cheng Han*") at p 86):

> ... It seems correct in principle to say that an agent can have apparent authority to make representations as to the authority of other agents, provided that his own authority can finally be traced back to a representation by the principal or to a person with actual authority from the principal to make it.

59 Crucially, *at this early stage of the proceedings*, we hasten to add that we are neither

endorsing nor disagreeing with the view of the learned academics cited above. This remains the proper task of the trial judge. The above view did suggest, however, that even if no employee in the respondent's bunker unit had actual authority to make the alleged representation, the appellant's claim would still not be so legally unsustainable that it ought to have been struck out at this stage.

(2) Could the alleged representation made in 2006 be said to have remained operative for the Bunker Contracts concluded in 2008?

60 On the second legal element of whether the alleged representation remained operative, the Judge was of the opinion that it could not be satisfied because the alleged representation in 2006 referred to a completely different transaction from the Bunker Contracts entered into in 2008. Citing from K R Handley, *Spencer Bower, Turner and Handley: Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("*Actionable Misrepresentation*") at para 61 and *Director of Public Prosecutions v Ray* [1974] 1 AC 370, the Judge held that a representation could *only* be said to be "continuing" if it was a representation made for the purpose of a *particular* transaction.

61 In its submissions, the appellant argued that it was precisely because the alleged representation was *not* restricted to a particular transaction but was in essence a general one (*ie*, that MAL was *generally* authorised to act as the respondent's agent) [note: 30] that the authorities cited by the Judge should be distinguished. Although the appellant did not cite any authority which positively established the proposition it sought to rely on (*ie*, that representations of a general nature can be continuing unless withdrawn as well), we were unable to dismiss the proposition as being legally unsustainable summarily. In our *provisional* view, it would be surprising indeed should the law require a principal to make repetitive representations to a long-term business counterparty as to the authority of the same agent for each separate transaction before "agency by estoppel" could be established.

62 Crucially, this *provisional* view of ours is not intended to be binding on any court – least of all the trial court which would be hearing this case – since we did not have the opportunity to hear the parties fully on this issue. In our view, even if the appellant should eventually be held to have been mistaken on this legal element, the arguments it had mounted certainly sufficed to establish "a point of law which require[d] serious argument" (*Singapore Civil Procedure 2007* at para 18/19/6; *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215).

63 If our provisional view is correct, then whether the representation was truly a "continuing" one would naturally depend on *the exact words and context in which* Mr Middleton claimed to have heard from the employee at the respondent's bunker unit, a finding which could only be satisfactorily established at trial. The same could also be said of the contested issue as to whether it was *reasonable* for Compass Marine to assume that the alleged representation (even if it was continuing) was still valid at 2008. [note: 31] Therefore, it was in our view premature for the Judge to have struck out the appellant's claim on the basis that this legal element was unable to be satisfied.

(3) Could the appellant be said to have been induced by the alleged representation?

64 For the final legal element, it was the AR who had held that inducement was not made out because the alleged representation was made to Compass Marine and not to the appellant, and no evidence was adduced by the appellant to show that it (and not Compass Marine) had acted in reliance on the alleged representation. While the Judge did not offer an opinion on this issue, both the appellant and the respondent made substantial written submissions on it before us, disagreeing on whether or not the appellant had *personally* received the alleged representation and relied on it. [note:

[32] However, our *preliminary* opinion is that the true legal position might appear to be somewhat different from how both parties and the AR understood it.

65 In Feltham, Hochberg & Leech, *Spencer Bower: The Law relating to estoppel by representation* (LexisNexis UK, 4th Ed, 2004) at pp 135, the learned authors wrote:

> ... A representee may, of course, receive a representation by an agent … but the principal must still (if he is to raise an estoppel) show that he was, by himself or his agent, actually or presumptively intended to act on it. ...

66 The learned authors of *Actionable Misrepresentation* also stated the following proposition (at para 165):

> The representation may also be made to A, knowing that he is the agent of B, with the intention of inducing A to act on it, on behalf of B, and A may do so without communicating it to B. In such a case B is also a representee and can sue on it because it induced his agent A to act to his, B's, detriment.

67 Therefore, for the legal element of "inducement" to be shown, it appeared to us to be unnecessary for the appellant to actually possess *personal knowledge* of the alleged representation, *as long as* the representation was communicated to Compass Marine (agent of the appellant) *with the intention* of inducing Compass Marine to act on behalf of the appellant. This understanding came across to us as a commercially sensible one, for it encapsulated the very essence of an agency relationship between the appellant and Compass Marine – that the latter had the authority to *receive information and act* on behalf of the former. If this was the true legal position, there were, once again, factual uncertainties as to the alleged representation – in particular, its scope and its underlying intention – which would first need to be resolved at trial before the *trial court* could determine whether this legal element could be made out or not.

68 At the risk of repetition, our understanding of what we deem to be the true legal position on the requirement of "inducement" constitutes only a *provisional* view since the issue was not argued before us; and the trial judge should be free to come to a different conclusion if he or she thinks otherwise. For the purposes of this appeal, however, it was certainly *not* clear beyond question that the appellant could not satisfy the legal element of "inducement" simply because the representation was made to Compass Marine.

(4) Examples of actions that were or could have been struck out because they were legally unsustainable.

69 At this juncture, it might be appropriate for us to highlight previous instances where it could legitimately be said that a plaintiff's action was *legally unsustainable.* In order to arrest a vessel beneficially owned by a party who on the face of the contract was not the contracting party, claimants have often been tempted to mount a claim in agency. It is thus not surprising that there exists a body of case law dealing with the setting aside/striking out of a plaintiff's agency claim in the bunker trading context.

70 Indeed, there have been a number of instances where a bunker supplier, albeit having contracted with a time-charterer for the sale of bunkers, has sought to argue that the ship-owner or the demise charterer was the *principal* of the time-charterer, and should therefore be liable for the bunkers supplied. We observe, however, that it is almost always the case that the plaintiff's action *in such a context* ends up being set aside or struck out by the courts (see *Lok Maheshwari*; *The Yuta*

Bondarovskaya [1998] 2 Lloyd's Rep 357 ("*The Yuta Bondarovskaya*"); *The J Faster* [2000] 1 HKC 652 ("*The J Faster*")). The unifying theme in these three cases which originate from different jurisdictions appears to be this: a claim that a ship-owner or demise charterer is – by its mere act of receiving the bunkers supplied – *representing* that the time-charterer is its agent is a *legally unsustainable* proposition. This is because such a claim runs counter to the universally accepted "underlying basis of a time charter" (*The Yuta Bondarovskaya* at 362, see also *The J Faster* at 656) that in time charters, "it is the charterer who is responsible for the provision and payment for fuel" (Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2nd Ed, 2011) at para 33.31). However, even this well-recognised principle is subject to the principled exception that a plaintiff who had dealt directly with the master of the vessel *with no knowledge whatsoever* that the vessel was chartered *could have an arguable case* binding the ship-owner to the contract (*The Tolla* 1921 PD 22; *Lok Maheshwari* at [16]; *The MV* [1996] 4 MLJ 109). Clearly, the present case before us is distinguishable from these other cases because MAL was *not a time-charterer*; but an independent third-party; thus the allegation that it had contracted on behalf of the respondent *could be* a legally sustainable proposition.

71 We also pause to draw attention to the Singapore High Court decision in *The "AA V"* [1999] 3 SLR(R) 664 ("*The AA V*"), which – while containing facts quite similar to our present case – serves as a good contrast why the appellant's action *in our case* was not legally unsustainable. In *The AA V*, the plaintiff bunker supplier claimed against the defendant tug-owner for the balance sum owed for the supply of marine gas oil to the defendant's tug. The defendant argued, *inter alia*, that it was not liable to the plaintiff *in personam* as the latter had contracted for the sale of the gas oil with a third-party company ("New Acmes") rather than with the defendant, and that New Acmes was not the agent of the defendant. Crucially, in attempting to argue that New Acmes was the defendant's agent, the plaintiff claimed that it had received a call *from an employee ("Mr Lui") of New Acmes claiming that New Acmes was the agent for the defendant* for the purchase of marine gas oil.

72 In setting aside the plaintiff's claim, Prakash J relied on reasons that suggest the plaintiff's action (in alleging that New Acmes was the defendant's agent) was *factually unsustainable*. Firstly, the plaintiff had conducted a Portnet search which clearly revealed that another entity was the defendant's agent. Secondly, the plaintiff's claim did not square with the fact that most of the fuel bought by New Acmes did not even go into the defendant's tug. Thirdly, the plaintiff had always looked to New Acmes for payment and their efforts had partially been rewarded by part-payment made by New Acmes, not the defendant.

73 More importantly, it appears to us that Prakash J could also have relied on the ground that the plaintiff's action was *legally unsustainable*, since the plaintiff's claim in agency was premised upon a representation allegedly made by an employee of the *agent* itself (*ie*, Mr Lui of New Acmes). Leaving aside the fact that the plaintiff's account was strenuously denied by Mr Lui, it is worth noting that *even if* all the facts alleged by the plaintiff were proved, the plaintiff's case would still have collapsed upon the established principle in agency law that "an agent cannot make a representation as to his own authority" (*Skandinaviska (CA)* at [38]; *Armagas Ltd v Mundogas S.A. (The Ocean Frost)* [1986] AC 717; see also *Tan Cheng Han* at p 87). The plaintiff's claim in *The AA V* could therefore have been struck out on the ground that its action was *legally unsustainable*.

74 In contrast, the appellant's claim in agency by estoppel in our present case – even if it appeared weak on the merits – was at least legally sound and did not contradict any established common law principles unlike the plaintiffs in *Lok Maheshwari*, *The Yuta Bondarovskaya*, *The J Faster* and *The AA V*. The present case before us was therefore distinguishable from the cited cases above where the plaintiffs' claims in agency were or could have been struck out for being legally unsustainable.

(5) Conclusion on the "legally unsustainable" ground

75 To sum up, there was insufficient evidence before us to determine if the three legal elements mentioned by the AR and Judge below could be satisfied or not. While Mr Middleton's affidavit *in and of itself* might not satisfy all the above elements fully *at this stage*, it did not follow that the appellant's action should be struck out for being legally unsustainable. The court at an interlocutory stage should not speculate on the evidence that might or might not surface during trial where the parties would have had the benefit of the discovery, interrogatory and cross-examination processes. An action should thus be held to be legally unsustainable at an interlocutory stage only if it is clear beyond question that certain legal elements of a plaintiff's claim based on its pleadings *cannot* be satisfied, or if there is an obvious legal defence or principle in existence which will have defeated the plaintiff's claim even if all the facts alleged by the plaintiff are proved.

76 In the present case, the appellant was unable to fully satisfy the legal elements at this stage not because of any inherent legal deficiency in its claim, but because of factual uncertainties which *might be* resolved at trial in the appellant's favour. Moreover, there also appeared to be knotty points of law requiring serious argument that should not be decided by a court exercising summary jurisdiction. Therefore, we were of the view that the AR and the Judge below had erred in striking out the appellant's claim in express representation on the ground pertaining to it being *legally unsustainable*.

Conclusion on the appellant's claim in agency by estoppel

77 For the reasons stated, we were persuaded that the appellant's action in claiming that there was an express representation leading to agency by estoppel was not so factually or legally unsustainable that it ought to have been struck out. We therefore allowed the appeal for the appellant's action to proceed to a full trial.

78 In the result, there was no need for us to address the appellant's *alternative* claim in unjust enrichment, save as to mention that had the appellant's claim in express representation leading to agency by estoppel been struck out, its claim in unjust enrichment would probably have met the same fate as well for the reasons given by the Judge below (see the GD at [65]–[68]).

Issue estoppel

79 The respondent also attempted to rely on the ground of issue estoppel to strike out the appellant's action, even though this ground had been rejected by both the AR and the Judge below. The respondent submitted that a final and conclusive decision was reached in the US proceedings that the appellant had no *prima facie* case against the respondent, [note: 33] and that the US proceedings thus constituted an issue estoppel against the appellant's present action.

80 It was not disputed that in order to establish issue estoppel, a party must show that (see *The "Vasiliy Golovnin"* [2007] 4 SLR(R) 277 ("*The Vasiliy Golovnin (HC)*") at [38]; *D.S.V. Silo-Und Verwaltungsgesellschaft mbH v Owners of The Sennar and 13 Other Ships* [1985] 1 WLR 490 ("*The Sennar (No 2)*") at 499 (*per* Lord Brandon of Oakbrook)):

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

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

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

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

81 In this appeal, the only dispute between the parties was on requirement (b) – *ie*, whether the US proceedings resulted in a judgment that was "final and conclusive on the merits". A judgment is *final and conclusive on the merits* if it is one which cannot be varied, re-opened or set aside by the court that delivered it (*The Sennar (No 2)* at 494); and also if it is a decision which (*The Sennar (No 2)* at 499):

> ... establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. ...

82 In our view, the Judge below rightly held that there was ample evidence – from the decision of the California District Courtand the respondent's very own submissions before the Ninth Circuit Court of Appeals – that (the GD at [72]:

> ... the US proceedings were only concerned with whether or not the Rule B attachment order was to be vacated, and it was open to the courts in the United States to reach a different view on the same issues at the subsequent stage of considering the actual motion to dismiss the Verified Complaint...

This fact alone would have sufficed to show that the US judgment was not final and conclusive on the merits.

83 However, in its appeal before us, the respondent attempted to rely on the decision in *The Vasiliy Golovnin (HC)* as supporting its stance. [note: 34] In that case, Tan Lee Meng J ("Tan J") had affirmed the Assistant Registrar's ("AR Ang") decision (see *The "Vasiliy Golovnin"* [2006] SGHC 247 ("*The Vasiliy Golovnin (AR)*") that the Lome Release Order at issue was "final and conclusive"; with the result being that issue estoppel was established to bar the plaintiffs from re-litigating on whether it had a right to arrest the defendant's ship before the Singapore courts. AR Ang's decision to set aside the warrant of arrest on the ground of issue estoppel was therefore upheld by Tan J, whose holding was also subsequently approved by this court in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin (CA)*").

84 It was clear that the respondent was attempting to draw an analogy between the Lome Release Order in *The Vasiliy Golovnin (HC)* and the vacation of the Rule B attachment order in the present case; such that if the former led to issue estoppel, so should the latter too. However, we were of the view that this analogy would break down upon a closer analysis of *The Vasiliy Golovnin (HC)* and the differences between a Lome Release Order and the vacation of the US Rule B attachment order.

85 In *The Vasiliy Golovnin (HC)*, the plaintiffs had argued that the Lome Release Order at issue was not "final and conclusive" to give rise to an issue estoppel. To this argument, Tan J held to the contrary for the following reason (at [43]):

> The parties disagreed on the effect of the French words "*l'execution provisoire*" in the Lome Release Order, which were translated as "provisional enforcement". As AR Ang noted, these words might, at first blush, suggest a lack of finality in the Lome Release Order. These words

were considered in *The Irini A (No 2)* [1999] 1 Lloyd's Rep 189 at 193 by Tuckey J, who said that they have a legal meaning, the effect of which regard must be had to the evidence from Togolese lawyers submitted by the parties. After considering the evidence, his Lordship said as follows at 193:

> [O]n the facts I think that the decision of the Lome Court was final in the sense required to found issue estoppel. It is incapable of revision by the Court which pronounced it. It is enforceable and has been enforced. That process is only provisional in the sense that if the Court of Appeal reverses the judgement the execution no longer stands ... That is no different from the position here where the fact that a judgement is under appeal does not mean that it is not final.

86 In our view, the decision of Tuckey J in *The "Irini A" (No 2)* [1999] 1 Lloyd's Rep 189 ("*The Irini A (No 2)*") neatly explains why a Lome Release Order was "not in any sense interim or provisional" (*The Vasiliy Golovnin (AR)* at [23]). In determining whether a foreign judgment was final and conclusive, Tuckey J held that "[the English courts] must look not only at English law but also at what the foreign law itself says about the nature of the judgment" (*The Irini A (No 2)* at 193), an approach earlier established by the seminal House of Lords decision in *Carl Zeiss (No 2) Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 919 (*per* Lord Reid). We would highlight that this principled approach applies in the Singapore courts as well when determining whether a foreign judgment was final and conclusive (see *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck and another* [2006] 3 SLR(R) 712; *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [28]). Each determination must therefore turn on its own facts – and the court must be extra-sensitive, in particular, to "the intention of the [foreign] judge in the earlier proceedings" (*Singapore Court Practice 2009* (Jeffrey Pinsler, SC gen ed) (LexisNexis, 2009) at para 18/19/14).

87 It was thus precisely so that the Lome Release Order in both *The Irini A (No 2)* and *The Vasiliy Golovnin (HC)* were *intended* by the Lome Court granting the order to have been final and conclusive, notwithstanding that the French words "*l'execution proviso ire"* were used. Crucially, the same could not be said of how the California District Court characterised the vacation of the Rule B attachment order in the present case. As highlighted by the Judge below (see the GD at [72]), District Judge Valerie Baker Fairbank of the California District Court had, in deciding to vacate the Rule B attachment order, so held: [note: 35]

> After considering your arguments and the evidence filed today, the court's tentative [*sic*] will be the order of court. *At this time*, the court finds based upon the evidence before the court… that the plaintiff failed to meet its burden of showing a prima facie admiralty claim against the defendant.
>
> …
>
> Similarly, the court finds that the plaintiff did not meet its burden with respect to the quantum meruit cause of action. *I recognize that* [the] *plaintiff is not required to prove its case at this time, and my rulings only pertain to this hearing*.
>
> [emphasis added]

88 In its subsequent appellate brief before the Ninth Circuit Court of Appeals, the respondent had also accepted that the "hearing [to vacate the Rule B attachment order] was not for a final determination of the merits of [the appellant's] underlying claim". [note: 36] In short, it was clear to us that the vacation of the Rule B attachment order in the present case was merely an *interim order*

prior to the actual motion to dismiss the Verified Complaint. Tan J's decision in *The Vasiliy Golovnin (HC)* that a Lome Release Order had given rise to an issue estoppel could therefore be clearly distinguished from the present case.

89 In the result, the US proceedings did not result in a judgment which was final and conclusive on the merits, and as such were not capable of giving rise to an issue estoppel. We therefore upheld the Judge's refusal to strike out the appellant's action on the basis of issue estoppel.

Invoking the admiralty jurisdiction of the court

90 The respondent's final string to its legal bow was to argue that the appellant's writ should have been set aside on the basis that the admiralty jurisdiction of the court under the HCAJA had been improperly or invalidly invoked against the *Bunga Melati 5*. The AR agreed, holding that there was an *independent* requirement that the appellant show a "good arguable case" on the merits in order to invoke the court's admiralty jurisdiction based on his understanding of *The Vasiliy Golovnin (CA)*; and that the appellant had failed to do so for the very same reasons why its action should be struck out under O 18 r 19 of the ROC. The Judge disagreed with the AR's understanding of *The Vasiliy Golovnin (CA)*, and held that there was to be no enquiry into the merits of a plaintiff's claim at the jurisdictional stage of invoking admiralty jurisdiction. Before this court, the respondent submitted that the merits requirement is "built into section 4(4) [of the HCAJA] and does not exist independently of it"; [note: 37] citing this Court's decision in *The Vasiliy Golovnin (CA)* as authority for its submission.

91 Having decided that the appellant's action should not have been struck out, we have in effect determined that the appellant had met the good arguable case threshold. This effectively disposed of the respondent's argument, *even if* (though we do not agree) it was right in arguing that a merits requirement was implicit in s 4(4) of the HCAJA. However, we think it will be helpful to take this opportunity to comment on the Judge's elaborate and helpful discussion of the various steps and standards of proof involved in invoking admiralty jurisdiction under the HCAJA.

The decision of this court in The Vasiliy Golovnin (CA)

92 Section 4(4) of the HCAJA provides:

> **Mode of exercise of admiralty jurisdiction**
>
> **4**.—(1) …
>
> …
>
> (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where —
>
> (*a*) the claim arises in connection with a ship; and
>
> (*b*) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —
>
> (i) that ship, if at the time when the action is brought the relevant person is either the

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

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

93 In *The Vasiliy Golovnin (AR)*, the plaintiffs had their arrest of the defendant's vessel set aside and their writ struck out by AR Ang on the basis that their claims were wholly unmeritorious and did not have an arguable case under ss 3(1)(*g*) and 3(1)(*h*) of the HCAJA (at [27]–[28]). When the case proceeded to the High Court upon the plaintiffs' appeal, Tan J focused specifically on whether the plaintiffs' claims should have been struck out and in the process affirmed AR Ang's decision to strike out the plaintiffs' unmeritorious claims (see *The Vasiliy Golovnin (HC)* at [70]). Dissatisfied, the plaintiffs appealed against Tan J's decision by advancing the following argument before us (see *The Vasiliy Golovnin (CA)* at [46]):

> ... since the applications to set aside the arrest and to strike out the writ and the action were all premised on the ground that there had been a failure to comply with s 3(1) of the HCAJA, a fundamental jurisdictional requirement, this was the sole threshold issue that [Tan J] should have considered and made a definitive finding on. Instead, [Tan J] appeared to have omitted this step and proceeded to address the court's ability to strike out a claim under O 18 r 19 of the Rules of Court or under the inherent jurisdiction of the court. [Counsel for the plaintiffs] vigorously submitted that [Tan J] seriously erred in this respect and should have first paused to address the issue of whether the jurisdictional requirements were met, by deciding whether the claim fell within one of the provisions of s 3(1) of HCAJA.

94 In our opinion, a proper understanding of the context of the plaintiffs' argument in *The Vasiliy Golovnin (CA)* will assist in understanding why this court in *The Vasiliy Golovnin (CA)* did not intend to introduce a new merits requirement for the invoking of admiralty jurisdiction. Crucially, as the quoted paragraph above shows, the plaintiffs' counsel in *The Vasiliy Golovnin (CA)* had advanced a very technical argument which, if successful, would have thrown into doubt the right of the court below (*ie*, *The Vasiliy Golovnin (HC)*) to consider the sustainability of the plaintiffs' cause of action under O 18 r 19 of the ROC or its inherent jurisdiction. If we had accepted her argument (that the court below should only have addressed the issue of whether the requirements of s 3(1) of the HCAJA) had been satisfied, it would have been tantamount to this Court holding that a court cannot strike out the plaintiff's cause of action, unless the defendant specifically pleads that the plaintiff's action is wholly unsustainable *on the merits* of its claim while challenging admiralty jurisdiction.

95 It was in response to this undesirable approach (had the plaintiffs' submission been accepted) that this Court stated the following paragraphs (in *The Vasiliy Golovnin (CA)* at [50]–[52]) which may have given rise to the AR's confusion:

> 50 Satisfying the requirements of s 3(1) of the HCAJA cannot be said to be the end all and be all when assessing the sustainability of an admiralty action. Invoking the admiralty jurisdiction may be in one sense a procedural step but it also plainly attracts substantive considerations. There are two requirements that claimants in every admiralty action must satisfy: first, the *in rem* jurisdiction must be established, through, *inter alia*, ss 3 and 4 of the HCAJA. Second, the claim must, if challenged, also meet the requirement of being a good arguable case on the merits.
>
> 51 The arrest of a vessel is never a trifling matter. Arrest is a very powerful invasive remedy. An arrest of a ship can lead to tremendous inconvenience, financial distress and severe commercial embarrassment (see also [120] below). Even the briefest of delays can sometimes

cause significant losses. It can also in certain instances prejudice the livelihood of the ship's crew and the commercial fortunes of the shipowner. Maritime arrests can, when improperly executed, sometimes be as destructive as Anton Piller orders and even as potentially ruinous as Mareva injunctions, the two nuclear weapons of civil litigation. As such, a plaintiff must always remain cautious and rigorously ascertain the material facts before applying for a warrant of arrest. While there is no need to establish a conclusive case at the outset, there is certainly a need to establish *a good arguable case*, before an arrest warrant can be issued. This determination plainly requires a preliminary assessment of the merits of the claim.

52 The standard to be applied in Singapore at this early stage of the matter, if there is a challenge on the merits, is indeed the "good arguable case" yardstick (see also Karthigesu J's observations in [*The Jarguh Sawit* [1997] 3 SLR(R) 829 ("*The Jarguh Sawit (CA)*")] … . The plaintiff does not have to establish at this stage that he has a cause of action that might probably prevail in the final analysis. Karthigesu J had rightly pointed out in *The Jarguh Sawit (CA)* that the plaintiff need only show that he has a "good arguable case" that his cause of action falls within one of the categories provided for in s 3(1) of the HCAJA. The party invoking the arrest procedure must be prepared, when challenged, to justify that it was entitled right from the outset to invoke this remedy.

96 In essence, all that this court was opining in [50]–[52] in *The Vasiliy Golovnin (CA)* was that when a plaintiff's invoking of admiralty jurisdiction or its arrest of the defendant's vessel *was subsequently challenged*, the plaintiff would need to show (on top of the requirements of ss 3 and 4 of the HCAJA being satisfied) a good arguable case on the merits of its claim as well, in order to avoid having its claim struck out as being plainly or obviously unsustainable pursuant to the normal rules in civil procedure. Should the plaintiff's cause of action be so unsustainable on the merits, as was the case in *The Vasiliy Golovnin (HC)*, a court would on an application being made have to strike out the plaintiff's action at an early stage *under O 18 r 19 of the ROC or the inherent jurisdiction of the court*. It was on this basis that we had, in *The Vasiliy Golovnin (CA)*, disagreed with the plaintiffs' argument that Tan J had somehow erred in *The Vasiliy Golovnin (HC)* by focusing on whether the plaintiffs' claim should be struck out under O 18 r 19 of the ROC or the court's inherent jurisdiction.

97 We therefore entirely agree with the Judge's view that (see the GD at [140(d)]):

[a]t the jurisdictional stage under O 12 r 7 of the ROC, the strength of the plaintiff's claim on the merits, *ie*, the accuracy or validity of any non-jurisdictional matters of fact or law (such as the defendant's possible defences to the claim), *was not relevant to jurisdiction*, but was *a matter for … an application for striking out under O 18 r 19 of the ROC or the court's inherent jurisdiction* ... . [emphasis added]

98 Indeed, there is much to commend the clear distinction drawn by the Judge between challenging admiralty jurisdiction under O 12 r 7 of the ROC *vis-à-vis* striking out a plaintiff's claim under O 18 r 19 of the ROC or the inherent jurisdiction of the court. Drawing this distinction solidifies the established position that a plaintiff need not *prove* who "the person who would be liable on the claim in an action *in personam*" is (*ie*, the "*in personam* liability requirement" under s 4(4)(b) of the HCAJA) for the purposes of establishing admiralty jurisdiction *until* the defendant subsequently challenges the plaintiff's action. Such a position is desirable for a number of reasons.

99 Firstly, this distinction drawn provides a coherent explanation of numerous precedents that could otherwise be read as contradicting one another. Adopting the authoritative case of *The St Elefterio* as the starting position, the *in personam* liability requirement has long been understood to mean "the person who would be liable o*n the assumption that the action succeeds*" [emphasis added]

(*The St Elefterio* at 186; the GD at [112]) – a requirement which the plaintiff can simply "assert …, but not prove" at the jurisdictional stage (Francesco Berlingieri, *Berlingieri on Arrest of Ships* (Informa, 4th Ed, 2006) at para 52.294; see the GD at [115]). However, this proposition immediately runs counter to subsequent cases which would appear to state that that the plaintiff *must* show that the *in personam* liability requirement is satisfied on a good arguable case (*The "Opal 3" ex "Kuchino"* [1992] 2 SLR(R) 231; *The "Thorlina"* [1985–1986] SLR(R) 258, *The AA V*; *The "Rainbow Spring"* [2003] 3 SLR(R) 362 ("*The Rainbow Spring*")). Applying the Judge's perceptive analysis, these latter cases could still be reconciled with *The St Elefterio* so long as it is retrospectively recognised (which we now do) that in those cases, the courts "should have struck out the actions pursuant to their inherent jurisdiction" instead (see the GD at [138]). For under O 18 r 19 of the ROC or the inherent jurisdiction of the court, imposing a burden on the plaintiff to show a "good arguable case" *on the merits of its claim* (*ie*, that its claim is not legally or factually unsustainable) is certainly appropriate and uncontroversial.

100 Secondly, this distinction can be logically defended and provides analytical clarity to this area of law. As the Judge correctly recognised, "[j]urisdictional disputes were necessarily separate from, and logically prior to, the substantive, non-jurisdictional dispute between the parties over the issue of the defendant's liability (*ie*, the merits of the plaintiff's claim)" (the GD at [31]). In her view, even applying the lower standard of an "arguable case" to the *in personam* liability requirement "might erroneously lead to a determination of the issue of liability at the jurisdictional stage when jurisdiction was a logically anterior question" (the GD at [116]). Indeed, we are similarly of the view that as far as possible, a clear distinction should be drawn between *jurisdiction* and *liability*, and that this distinction was appropriately drawn for the *in personam* liability requirement by the position as established in *The St Elefterio*.

101 Thirdly, this approach is supported by a historical analysis of the matter (see the GD at [114] where the lineage of the position established in *The St Elefterio* was traced to the original policy reasons behind the introduction of the *in personam* liability requirement into English admiralty law). We agree with the Judge that the *in personam* liability requirement was a reflection of the ascendancy of the "procedural theory", and was thus designed to *expand* the availability of the *in rem* jurisdiction rather than to restrict it. This explains why the words "would be" rather than "is" were used with reference to the relevant person's liability (see [92] above). On this account, using the *in personam* liability requirement to *restrict admiralty jurisdiction* would run against its very *raison d'etre* indeed.

102 Fourthly, this approach helps to iron out some creases developing in this area of law. It is not infrequently heard these days that there are different categories of defences – with some being "purely on the merits" as opposed to those which actually "go towards jurisdiction"; and that the latter could suffice for a defendant to succeed under O 12 r 7 of the ROC when disputing the *in personam* liability requirement (see the GD at [122], [130]–[131]). This state of affairs is, in our view, an unsurprising development considering the apparent contradiction of many admiralty cases (see above at [99]), where one could easily be led to rationalise that there are *some* substantive defences which can go towards showing that the *in personam* liability requirement has not been met at the jurisdictional stage. While some courts have steadfastly rejected the view that there is such a distinction between different categories of defences (see *The Yuta Bondarovskaya*; *The Owners of the Motor Vessel "Iran Amanat" v KMP Coastal Oil Pte Limited* (1999) 196 CLR 130; the GD at [130]–[131]), we observe that not all courts have spoken with the same conviction or clarity on this matter (see *The AA V*; *The Rainbow Spring*; the GD at [118]–[119]). In light of this conundrum, the approach of considering *all substantive defences* under O 18 r 19 of the ROC or the inherent jurisdiction of the court has certainly much to commend.

103 Finally, we would also highlight that this approach towards the *in personam* liability requirement *would not* result in any practical difference or injustice to defendants in an admiralty claim. Even though the court will not consider the merits of a plaintiff's claim in deciding whether it has properly invoked admiralty jurisdiction, no practical difference or injustice would result (even if the defendant neglects to apply under O 18 r 19 of the ROC when challenging the plaintiff's claim) as the court can simply rely on its inherent jurisdiction to strike out a claim that is legally or factually unsustainable (see the GD at [133]). At the end of the day, the plaintiff's admiralty claim "must, if challenged, [still] meet the requirement of being a good arguable case on the merits" (*The Vasiliy Golovnin (CA)* at [50]).

104 To sum up the discussion above, we agree with the Judge that this court in *The Vasiliy Golovnin (CA)* did *not* introduce a new merits requirement before admiralty jurisdiction could be invoked under the HCAJA. An admiralty plaintiff would, however, still need to show a good arguable case on the merits of its claim *if challenged*; not for the purposes of satisfying the HCAJA, but to prevent its action from being struck out under O 18 r 19 of the ROC or the inherent jurisdiction of the court.

The steps and standards of proof involved in invoking admiralty jurisdiction

105 In the GD, the Judge also analysed s 4(4) of the HCAJA as constituting various "steps" and elaborated on the respective *standards of proof* within each of them. The Judge's comprehensive analysis offers a useful guide to all admiralty litigants. For ease of reference, we summarise the key points established by the Judge before expressing a different view on an issue.

106 To invoke admiralty jurisdiction, a plaintiff must, under s 4(4) of the HCAJA, satisfy the following "steps" (see the GD at [81]). A plaintiff has to:

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

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

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

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

(e) show that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it ("step 5").

107 The various components of the five steps above can be broken down to either:

(a) a "jurisdictional fact" (to be *proved on a balance of probabilities* by the plaintiff);

(b) a "jurisdictional question of law" (to be *shown on a good arguable case* by the plaintiff); or

(c) a "non-jurisdictional matter of fact or law" (the *truth of which to be assumed in the plaintiff's favour* at the jurisdictional stage).

108 The Judge was of the view that only step 1 involves *both* jurisdictional facts and jurisdictional questions of law (see the GD at [83]–[98]), whereas steps 2, 4 and 5 are concerned only with jurisdictional facts (see the GD at [99]–[107]). Step 3 (*ie*, the *in personam* liability requirement) on the other hand concerns a *non-jurisdictional* matter of fact or law, and as mentioned earlier (see above at [99]), could simply be assumed in the plaintiff's favour *for jurisdictional purposes* (see the GD at [108]–[139]). This was the basis upon which the Judge held that the fact that the appellant could not prove on a good arguable case that the respondent was the "relevant person" was not fatal to the appellant's invoking of the admiralty jurisdiction under the HCAJA.

109 Having reviewed the Judge's thorough and well-reasoned analysis, our only comment pertains to her views of jurisdictional questions of law under step 1. The Judge reasoned that a jurisdictional question of law under step 1 has to be shown on a *good arguable case* by the plaintiff, citing the following passage in *The Jarguh Sawit (CA)* at [43] as authority:

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

110 Interestingly, the Judge then quite correctly commented that (the GD at [93]):

> it was not entirely clear from the Court of Appeal's judgment [in *The Jarguh Sawi (CA)*] what authority established the proposition that the standard of proof under s 3(1) was that of a "good arguable case"… .

Indeed, we agree with her that the passage cited in *The Jarguh Sawit (CA)* is, with respect, not entirely helpful – given that no distinction was drawn between a jurisdictional fact and a jurisdictional question of law. More importantly, we find ourselves in agreement with the learned views of Dr Damien J Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (The Federation Press, 3rd Ed, 2008) at p 126 (noted by the Judge below as well at [95] of the GD):

> It clearly is the case that no consideration of the balance of probabilities can be involved if the challenge to jurisdiction does not depend on findings of fact. In such circumstances, the challenge is likely to involve legal questions only. It will be the "legal character" of the claim which must be considered. It seems out of place in many ways then to resolve legal questions by reference to probabilities … This would require a plaintiff in McGechan J's words [in *Baltic Shipping* at 655] "to take the pleadings in one hand, and the statute in the other, and show by comparison that the pleading as worded fits within the statute". An onus of proof *as such* does not seem in point on this approach.

111 As a matter of principle, there is no reason why the test (for jurisdictional questions of law) should not simply be that of an "arguable case". The line delineating a "good arguable case" and an "arguable case", if it exists, may be too fine for a court to draw in many situations. The point however, is that the plaintiff only needs to show that its claim is of the *same legal character* as the s 3(1) limb it is relying on. If the plaintiff cannot show an arguable case on the law, it has failed to prove that it is entitled to invoke the court's admiralty jurisdiction. Indeed, in most cases of legal challenges to jurisdiction, the court would be able to decide whether an arguable case *on the law* has been made out or not (see *The "Golden Petroleum"* [1993] 3 SLR(R) 209). The more appropriate description of the test to apply, where a jurisdictional question of law is being challenged, should therefore be that of an "arguable case".

112 In summary, we re-state the various steps and respective standards of proof for a plaintiff to invoke admiralty jurisdiction in Singapore. Under s 4(4) of the HCAJA, a plaintiff has to, when challenged:

(a) prove*, on the balance of probabilities*, that the jurisdictional facts under the limb it is relying on in s 3(1)(*d*) to (*q*) exist; and show *an arguable case* that its claim is of the type or nature required by the relevant statutory provision ("step 1");

(b) prove, *on the balance of probabilities*, that the claim arises in connection with a ship ("step 2");

(c) identify, *without having to show in argument*, the person who would be liable on the claim in an action *in personam* ("step 3");

(d) prove *on the balance of probabilities*, that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ("step 4"); and

(e) prove on *the balance of probabilities*, that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it ("step 5").

The importance of full and frank disclosure when applying for a warrant of arrest

113 While it is now clear that a plaintiff need not show a good arguable case on the *merits of its claim* (*ie*, under step 3) to establish admiralty jurisdiction, we would pause to remind prospective plaintiffs that their obligation to make *full and frank disclosure* when they apply *ex parte* for a warrant of arrest remains (see *The Rainbow Spring* at [33]; *The Vasiliy Golovnin (CA)* at [83]). Even at that early stage, a plaintiff who fails to disclose all material facts supporting its claim will run the risk of not being granted a warrant of arrest; or if granted initially, could subsequently have its arrest set aside (see *The Rainbow Spring* [35]–[37]) and be liable for wrongful arrest (see *The Vasiliy Golovnin (CA)* at [139]–[141]).

114 While the Assistant Registrar hearing an *ex parte* application for a warrant of arrest should not be overly concerned with the merits or sustainability of the plaintiff's action, he or she could still exercise discretion *not* to grant the warrant of arrest if *obviously insufficient or contradictory documentary evidence* have been adduced to show that the defendant is indeed the "relevant person" under s 4(4) of the HCAJA. To use an extreme example, had the appellant in this case chose to apply for a warrant of arrest (although it did not actually do so) and yet did not disclose either Mr Middleton's affidavit or the bunker confirmations identifying the respondent as the "buyers" (see above at [7]), an Assistant Registrar would have been justified in not granting the appellant a warrant of arrest. This is because without these documents, the appellant would have *absolutely no basis* whatsoever to argue that the respondent was the party liable for the bunkers supplied *via* the doctrine of agency by estoppel.

115 Therefore, although a court should address the sustainability of a plaintiff's action only upon a defendant's application to challenge the plaintiff's writ or warrant of arrest, this does not mean that the plaintiff should have a *carte blanche* right to arrest vessels *without having to show a shred of evidence* justifying the connection between the "relevant person" and the alleged defendant prior to being so challenged.

116 The position which we have reached here strikes an optimal balance between allowing the liberal invoking of admiralty jurisdiction (as the authorities helpfully cited by the Judge suggest) and preventing "the abuse of the [ship] arrest process" (*The Vasiliy Golovnin (CA)* at [105]). The latter is as important a policy concern as the former. *Prior to* the defendant successfully applying to strike out the plaintiff's claim, the defendant could in the interim be inflicted by substantial financial losses due to the plaintiff's completely unjustifiable arrest of its vessel. While these losses might subsequently be the subject of a wrongful arrest claim by the defendant, it is important to keep in mind that not all wrongful arrests, based on the current state of the law, warrants liability and damages (see *The Vasiliy Golovnin (CA)* at [128]); and even if damages are awarded, a plaintiff might not always be in a sound financial state to pay.

117 For that reason, an Assistant Registrar hearing an application for *a warrant of arrest* must act as the first "gatekeeper" against a completely unmeritorious claim, by refusing to grant the warrant should the plaintiff's claim be supported by *obviously insufficient or contradictory documentary evidence*. However, we also caution that as it is not the role of the Assistant Registrar *at that stage* to determine the sustainability of the plaintiff's action, he or she should refuse to grant leave in only plain cases of processoral abuse.

Conclusion

118 For all the above reasons, we reversed the Judge's decision to strike out the appellant's claim under O 18 r 19 of the ROC. The appellant's claim in express representation leading to agency by estoppel was, in our opinion, not so factually or legally unsustainable that it should be barred from proceeding to trial. We therefore allowed the appellant's action to proceed to a full trial.

119 On the issue of costs, we awarded the appellant costs of the appeal while the costs below were ordered to be costs in the cause. The usual consequential orders followed.

Chan Sek Keong CJ:

The steps and standards of proof involved in invoking admiralty jurisdiction

120 Although not necessary to her decision, the Judge also provided an advisory on the standard of proof applicable to the various steps that a plaintiff must satisfy in order to be able to invoke admiralty jurisdiction under s 4(4) of the HCAJA (reproduced at [106] above]). The Judge noted that any jurisdictional challenge in an admiralty action involves either a "jurisdictional fact" or a "jurisdictional question of law". In the case of the former, the standard of proof is the civil standard of a balance of probabilities. In the case of the latter, the standard of proof is that of a good arguable case. For convenience, I shall call the former challenge a "factual challenge" and the latter a "legal challenge".

121 In the context of the five steps described above, the Judge stated that only step 1 would involve *both* factual and legal challenges, *ie*, jurisdictional facts and jurisdictional questions of law (see the GD at [83]–[98]), whereas steps 2, 4 and 5 would involve only factual challenges (see the GD at [99]–[107]). Step 3 (*ie*, the *in personam* liability requirement) on the other hand would concern a *non-jurisdictional* matter of fact or law, to be assumed in the plaintiff's favour *for jurisdictional purposes* (see the GD at [108]–[139]).

122 In my view, the Judge's advisory on the standard of proof in relation to jurisdictional challenges can only be understood in the context of how the court determines such issues procedurally at the interlocutory stage of the proceedings. With respect to a factual challenge, the Judge has provided

an illustrative case (see the GD at [98]) where the dispute relates to whether bunkers supplied by the plaintiff to the defendant ship were supplied as a consumable or as a commodity. If it is the former case, the claim would fall within s 3(1)(*l*) of the HCAJA as being goods supplied for the ship's operation. If it is the latter, it would just be an ordinary civil claim for payment and not a claim under s 3(1)(*l*) of the HCAJA.

123 The Judge's view on the standard of proof of such factual disputes is set out as follows (the GD at [98]):

> ... the court [is] obliged to find, on a balance of probabilities, as a precondition to deciding whether the plaintiff's claim [falls] within s 3(1)(*l*) of the HCAJA ... . This fact [*ie*, whether the bunkers were supplied as a consumable or as a commodity] [is] simply a condition precedent to jurisdiction under s 3(1)(*l*), *ie*, it [is] a jurisdictional fact which [has] to be found at the outset. That fact-finding might be rendered difficult as a result of the preliminary nature or urgency of the action, or the evidence being in affidavit form, [does] not detract from the task of the court … .

The task of the court as set out at [86] of the GD is as follows:

> As a practical matter, it could of course be said (as it was by the learned AR in his grounds of decision) that at such a preliminary stage of the action, in the absence of discovery and cross-examination of witnesses, it would be inappropriate to insist on a standard of proof normally applicable to full trials. However, that was not a principled way of dealing with the point that when the court's entire jurisdiction to adjudicate the action rested upon a disputed question of (jurisdictional) fact, that question of fact had to be resolved once and for all, using a standard of proof that was consistent with that used for proof of facts in general (in the absence of statutory language stating otherwise). Further, such pragmatic objections have not convinced courts in admiralty cases to abandon the standard of a balance of probabilities where proving *jurisdictional facts* was concerned (*I Congreso del Partido* at 535–536; *The Aventicum* [[1978] 1 Lloyd's Rep 184] at 186 and 190; and [*Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37] at [21]).

124 Read together, it is not clear whether these two passages are intended to suggest that a factual challenge can be disposed of solely on the basis of the affidavit evidence, without a full trial of the issue (which would include cross-examining the deponents). If that is the suggestion, it would not, in my view, be a principled way to deal with factual disputes. Under our adversarial system of justice, factual disputes can only be decided on the basis of oral evidence and cross-examination of the witness or deponent, unless the defendant is able to produce undisputable and conclusive evidence that the requisite jurisdictional fact does not exist. This principle must apply to all the steps outlined in the Judge's advisory in relation to a factual challenge.

125 According to the Judge, in a case based on a factual challenge, the standard of proof of proving or disproving the disputed fact even at the preliminary stage of the proceedings is a balance of probabilities (see [123] above reproducing [98] of the GD). If this is what the Judge meant, I can immediately see two difficulties arising in practice. The first difficulty is that, if the factual challenge was to be determined on the balance of probabilities, it might result in the determination also of the plaintiff's action. For example, had the respondent's jurisdictional challenge in the present case been that no bunkers were supplied to its vessels at all (*ie*, a jurisdictional fact under step 1), and this dispute were decided in favour of the appellant at the interlocutory stage, the appellant would have been entitled to judgment as the respondent would have no defence to be tried on the facts subsequently at trial. The second difficulty is that such an approach is not congruent with the

Judge's statement that where there is a legal challenge, *ie*, a jurisdictional challenge on a question of law, the standard of proof is that of *a good arguable case*. The procedural incongruence lies in the consequence that if the court finds that there is indeed a good arguable case on the law, the claim on the facts should ordinarily proceed to a full trial, where the issue of jurisdiction merges with the issue of liability and the plaintiff has to prove its claim on the facts on the balance of probabilities (see *The Jarguh Sarwit (CA)* at [44] as reproduced below).

126 In my view, these procedural problems have arisen partly because of the somewhat elliptical dicta of this court in *The Jarguh Sarwit (CA).* In that case, the appellants argued that they were entitled to plead that the court had no admiralty jurisdiction, *at the trial stage*, even though it had previously been decided at the interlocutory stage that the court had admiralty jurisdiction (at [26]). In response to this argument, the court said (*The Jarguh Sarwit (CA)* at [40]–[44]):

> 40 … [W]e believe that counsel has confused the issues of jurisdiction and substantive liability because of the peculiar nature of admiralty actions *in rem*. Unlike actions *in personam*, in which the court's jurisdiction is founded on the presence of the defendant within the jurisdiction, admiralty jurisdiction *in rem* is founded whenever one of the requirements of s 3(1) of the [HCAJA] are [is] satisfied. The particular ground relied on in this case was ground (c): "any claim in respect of a mortgage of or charge on a ship or any share therein".
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> 41 We acknowledge that for some of the grounds, including ground (c), there is some similarity in the questions posed to determine jurisdiction and substantive liability. When deciding whether it has jurisdiction, the question the court must ask itself is whether there is good arguable case based on a ship's mortgage. When deciding at trial whether a defendant is liable, the question the court must ask itself is whether the claim based on a ship's mortgage is proved on a balance of probabilities.
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> 42 Counsel considered that as the question asked in both cases is the same, and it is only the standard of proof that varies, he was entitled to argue "jurisdiction" twice, with his chances on the second try being better because the plaintiff had a higher burden. The point, however, that counsel missed, was that the standard of proof varies because the nature of the legal examination is different depending on whether one is asserting jurisdiction or liability.
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> 43 In a hearing of an application to dispute jurisdiction, the plaintiff need only show that he has a good arguable case that his cause of action falls within one of the categories of s 3(1), in this case, ground (c). His objective is to persuade the court that there is sufficient evidence that a claim of the type specified in s 3(1)(*c*) exists. As the plaintiff in the present case did so, the court was entitled to find that the plaintiff rightly invoked its jurisdiction.
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> 44 Once the suit reaches the trial stage, however, the nature of the legal examination changes. The court is not deciding if there is good cause for it to assume jurisdiction – it is deciding if there is good cause for it to give judgment for the plaintiff. The same facts cited to establish jurisdiction must then be proved by the plaintiff in the context of the substantive dispute proper and not the context of a jurisdictional dispute. These facts must be proved beyond the standard of a good arguable case. They must be proved to the civil standard of proof, that is, on a balance of probabilities.

127 The court's observations in the above passages are not self-explanatory. The statement at [41] that "[w]hen deciding whether it has jurisdiction, the question the court must ask itself is whether there is good arguable case based on a ship's mortgage", is unhelpful because it is not clear whether the court was referring to a factual or a legal challenge, or one involving an issue of mixed

fact and law. The Judge interpreted the test of a good arguable case in these passages in *The Jarguh Sarwit (CA)* as being referable to a question of law, and not to a question of fact, because whether the claim ""falls within one of the categories of s 3(1)" is a question of characterisation and categorisation, and therefore a question of law" (the GD at [95]). However, this was not what the court in *The Jarguh Sarwit (CA)* actually said. At [43] of its judgment, the court said that "[the plaintiff's] objective is to persuade the court that *there is sufficient evidence* that a claim of the type specified in s 3(1)(*c*) exists" (emphasis added), words which are clearly apt as referring to an issue of fact rather than purely an issue of law. In *The Jarguh Sarwit (CA)*, the disputed issue was whether a mortgage of the ship had been executed – one which could be construed as a question of fact indeed. However, it was not clear whether there was a clearly framed *factual challenge* on jurisdiction in *The Jarguh Sarwit (CA)* at the interlocutory stage of the proceedings, and the comments by the court at [41] that "[w]hen deciding at trial whether a defendant is liable, the question the court must ask itself is whether the claim based on a ship's mortgage is proved on a balance of probabilities" referred to the liability stage rather than the interlocutory stage.

128 In my view, the correct procedural position as to how a court should proceed adjudicating over a factual challenge at the interlocutory/jurisdictional stage was stated by the New Zealand Court of Appeal in *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 ("*Vostok Shipping*"). In that case, Vostok brought a claim *in rem* against the ship *Kapitan Lomaev* which was promptly arrested. The claim related to an *in personam* action against a Russian company ("Orka"), which Vostok alleged was the owner of the vessel. Confederation Ltd applied to the High Court to have the arrest set aside alleging that it, and not Orka beneficially, owned the ship when the action was brought and, therefore, that the High Court had no jurisdiction for the action *in rem* under s 5(2)(*b*)(i) of the Admiralty Act 1973 (corresponding to s 4(4)(*b*)(i) of the HCAJA). The New Zealand Court of Appeal dealt with the factual challenge at [19]–[21] as follows:

> [19] We accept Mr David's arguments. The practice is well established in the jurisdictions to which he referred [ie, England, Australia and Singapore] of requiring a plaintiff on an application to set aside an arrest to prove on balance of probabilities that the proceeding is within the in rem jurisdiction of the Court. ... The practice is now firmly entrenched in England (see, for example, *The "Aventicum"* [1978] 1 Lloyd's Rep 184 (Slynn J) and *The "Nazym Khikmet"* [1996] 2 Lloyd's Rep 362 (Clarke J and the Court of Appeal)) and Singapore (*The Andres Bonifacio* [1993] 3 SLR 521) and accepted in the High Court of Australia (*The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at p 426) and should be followed in this country.
>
> [20] In *I Congreso del Partido* Robert Goff J decided that the question of jurisdiction had to be determined on the motion to set aside the writ and could not be dealt with as an issue in the substantive proceeding. … We are in respectful agreement with the following observation of Robert Goff J at p 1199:
>
> > ". . . it cannot be right for the decision on [jurisdiction] to be allowed to depend on the decision of some issue to be tried in the actions. If there is no jurisdiction as against [the party disputing ownership], they should not be troubled with the actions at all; indeed it cannot be decided whether the actions can be allowed to proceed until the question of jurisdiction has been determined."
>
> [21] But, though holding that the matter of jurisdiction had to be dealt with on the motion, Robert Goff J said that evidence would be admitted for the purpose of the ruling on jurisdiction and there could be oral evidence, for example, by cross-examination of deponents of affidavits. In *Baltic Shipping* this Court said that ownership must, if in issue, be decided on the motion to set aside and must be decided on evidence and not merely on pleadings. *It seems to us that, even*

allowing for the urgency of the matter, there is no reason why the High Court should not allow an adjournment of the application to set aside the proceeding to give time for the assembling of the necessary evidence and, if necessary, for deponents to be brought to this country for cross-examination so that the important question of ownership, or any other factual issue arising under s 5 as a matter going to jurisdiction, can be determined without undue haste and consequent prejudice to a party which perhaps may not have immediate access to all relevant factual materials. If the application to set aside is heard in this manner it will be little different from a R 418 hearing.

[emphasis added]

129 In my view, the court's approach as described in the italicised words in the above passage meets the requirements of procedural justice in determining factual challenges under step 1 in an admiralty action. The court must conduct a trial of the issue *at the interlocutory/jurisdictional stage*, if the defendant seeks a conclusive finding of fact from the court. However, if the defendant is only prepared to rely on its affidavits, the court will only be able to determine the disputed issue on a preliminary basis. Consistent with the nature of the hearing, there can be no finding of fact on the balance of probabilities, but only on a *prima facie* basis that, on the facts, the court has jurisdiction. Although there will be no conclusive finding towards the disputed jurisdictional fact(s) *under step 1* at the interlocutory stage, the issue of jurisdiction will merge at the *liability stage* with the issue of whether the plaintiff has proved its claim on the facts on the balance of probabilities, and the court at the liability stage would be entitled to come to a differing opinion from the court at the interlocutory stage based on evidence beyond contested affidavits which might surface *at trial*. However, at the liability stage, "[t]he court is not deciding if there is good cause for it to assume jurisdiction – it is deciding if there is good cause for it to give judgment for the plaintiff" (*The Jarguh Sarwit (CA)* at [44]). It does not matter how the standard of proof (at the interlocutory/jurisdictional stage) is labelled provided it is understood that a factual dispute cannot be *conclusively* decided on contested affidavit evidence alone.

130 In my view, in the case of a factual challenge to jurisdiction, whether the question of fact would be determined on *the balance of probabilities* depends on *how a defendant wishes to make good its challenge by way of evidence*. It is not in every case that the court is required to decide the dispute of fact on the balance of probabilities. This is only possible, consistent with the requirements of procedural justice, where all the evidence relating to disputed facts are before the court. Each case must depend on what the defendant is prepared to agree to in relation to how the jurisdictional issue should be determined or tried. It is not for the court to compel the defendant to undergo a full pre-trial of the factual dispute if it only wishes to rely on affidavit evidence. In this regard, I am of the view that there is no justification from the perspective of procedural justice for an admiralty action to be treated differently from any other civil action. The court is the master of its own procedure, subject of course, to the ROC, but there is nothing in the ROC which compels the court to deal with factual or legal challenges in admiralty actions in any particular way. There is nothing to prevent the court to prescribe its own procedure, depending on the needs of the parties, and in particular, the needs of the party who wishes to set aside the admiralty action or the consequential arrest of its vessel.

[note: 1] Appellant's Case at [8]. See also Appellant's Core Bundle ("ACB") 2A at pp7-10, 24-26 and ACB 2B at pp4-64.

[note: 2] Respondent's CB2 at pp47 – 69.

[note: 3] Respondent's case at [10]

[note: 4] Respondent's Case at [9]. See also Respondent's Core Bundle ("RCB") 2 at pp70-91.

[note: 5] Respondent's Case at [14].

[note: 6] Respondent's Case at [16].

[note: 7] Respondent's Case at [11].

[note: 8] RA 3F at 232.

[note: 9] Respondent's CB2 at pp154-160.

[note: 10] Respondent's CB2 at pp164-177.

[note: 11] Respondent's CB2 at pp178-209.

[note: 12] Respondent's CB2 at pp213-218.

[note: 13] RA 2 at p23.

[note: 14] RA 2 at p24.

[note: 15] ACB 2B at p 153, para 8.

[note: 16] ACB 2B at pp151 – 192.

[note: 17] RA 2 at p 42.

[note: 18] RA 2 at p39.

[note: 19] RCB2 at pp265-271.

[note: 20] Appellant's Case at [34].

[note: 21] Respondent's Case at [44].

[note: 22] Respondent's Case at [47].

[note: 23] ACB 2A at p127 and p136.

[note: 24] Respondent's Case at [100].

[note: 25] RA 3F at pp135-141.

[note: 26] RCB2 at pp70-91.

[note: 27] RCB2 at pp92-153.

[note: 28] Appellant's Case at [35(e)].

[note: 29] Respondent's Case at [46].

[note: 30] Appellants' Case at [53].

[note: 31] Appellant's Case at [50]; Respondent's Case at [60].

[note: 32] Appellants' Case at [45] – [48]; Respondents' Case at [51] – [58].

[note: 33] Respondent's Case at [146].

[note: 34] Respondents' Case at [152] – [153].

[note: 35] ACB 2B at pp258-260.

[note: 36] ACB 2B at p104.

[note: 37] Respondent's Case at [143].