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To: Transport Industry Operators

Sister ship arrest

The Hong Kong High Court issued a Judgment on 3/6/2015 to deal with a case concerning a sister ship's arrest. [HCAJ 44/2014]

The claim was in respect of the loss of 2 cargoes of waste paper shipped on board the ship "Bo Shi Ji 393" ("393") in Hong Kong under bills of lading dated 28/3/2013. On 29/3/2013, 393 sank in Chinese waters, leading to a total loss of the cargoes.

The *in rem* Writ of summons was issued on 25/3/2014 (hereinafter referred to as "Action"). Pursuant to a warrant of arrest granted on 6/3/2015, the ship "Bo Shi Ji 838" ("Vessel") was arrested in the evening of 18/3/2015.

Before the court, there were two applications by notices of motion both dated 14/4/2015.

- (1) An application by the owners of the cargoes lately laden on board 393 (hereinafter referred to as "cargo owners") for an order for the appraisalment and sale of the Vessel *pendente lite* together with associated orders.
- (2) An application by the owners of the Vessel and 393 (hereinafter referred to as "shipowners") to (i) set aside service of the Writ of summons on the Vessel on the ground that the requirements of section 12B(4) of the High Court Ordinance, Cap. 4 ("HCO") were not satisfied, (ii) strike out the cargo owners' claim against the shipowners pursuant to RHC Order 18 r 19(1)(a), (b) and (d) of RHC on the grounds that the cargo owners' claim disclosed no reasonable cause of action and/or was scandalous, frivolous or vexatious and/or was an abuse of the process of the Court, (iii) set aside the warrant of arrest and (iv) release the Vessel from arrest.

The Vessel was a wasting asset while under arrest and significant charges (relative to the Vessel's estimated value) had been and were still being incurred to keep her under arrest. The court was urged to resolve the matter speedily one way or another.

The bills of lading were issued by Golden Trans Shipping Co Ltd ("GTS") in Hong Kong as agent. The reverse side of the bills of lading contains the following demise clause:

"If the ship is not owned by or chartered by demise to the corporation by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appear to the contrary this Bill of Lading shall take effect only as a contract with the Owner or demise charterer as the case may be as principal made through the agency of the said corporation who act as agents only and shall be under no personal liability whatsoever in respect thereof."

The cargo owners' original case was that the person who would be liable in respect of an action *in personam* was Boluo Water Transport Corporation ("BWTC") whom they believed to be the sole registered owner of 393 at the time the cause of action arose ie on or about 29/3/2013. Their belief was based on 393's Certificate of Vessel's Nationality dated 9/4/2012 which showed BWTC to be the owner and operator of 393. Their cause of action against BWTC lied in contract, bailment and negligence.

The warrant of arrest against the Vessel was granted on the basis of section 12B(4) of HCO which provides:

“In the case of any such claim as is mentioned in section 12A(2)(e) to (q), where –

- (a) the claim arises in connection with a ship; and
- (b) the party who would be liable on the claim in an action in personam (“**the relevant person**”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may ... be brought in the Court of First Instance 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 it 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”.

Actions against “any other ship” are referred to as sister ship actions because the vessel against which *in rem* proceedings are brought will often be owned by the same entity as the vessel in connection with which the claim arose. That was what the cargo owners alleged in the case in question – they claimed BWTC, being the relevant person, was the beneficial owner as respects all the shares in the Vessel at the time when the Action was brought ie 25/3/2014. They did so by relying on the oral inquiries made through a firm of PRC solicitors. The reason why only oral inquiries were made was because formal searches of the shipping register in Hui Zhou, where BWTC was based, were not allowed, according to the PRC solicitors. On 5/3/2015, the PRC solicitors sent an email to the cargo owner’s solicitors confirming that the Vessel was 100% owned by BWTC on 10/3/2014.

On 25/3/2015, a week after the Vessel had been arrested, the shipowners’ solicitors sent an email to the cargo owners’ solicitors attaching a number of documents she obtained after having visited the shipowners in the PRC personally.

As revealed by the Vessel Ownership Registration Certificate of 393, since 10/12/2010, 393 has been co-owned by BWTC (51%) and an individual Liang Ping (49%). It should be immediately apparent that this piece of information is contradictory to what was recorded in 393’s Certificate of Vessel’s Nationality dated 9/4/2012 which still showed BWTC as the sole owner and operator of 393.

As revealed by the Vessel Ownership Registration Certificate of the Vessel, BWTC was her sole owner from 30/6/2008 to 2/9/2014 when she became co-owned by BWTC (51%) and an individual Cheng Wanli (49%). In other words, the Certificate seems to confirm that the Vessel was solely owned by BWTC at the time when the Action was brought ie 25/3/2014.

It was accepted by the shipowners that these Certificates were not formal documents from the shipping registry of Hui Zhou. Apparently, the shipping register of Hui Zhou is not open for public inspection. But the shipowners submitted that these Certificates were the best evidence of what was actually contained in the shipping register. The court was prepared to go along with that submission.

The shipowners also filed a large number of affirmations and witness statements in the Action. The gist of these affirmations and witness statement was as follows:

- (1) Regarding 393, Mr Liang Ping was her sole beneficial owner in that it was he who purchased the vessel from a shipyard in October 1993. He was at all material times the sole operator of 393 and the employer of all her crew. In 2004, he appointed BWTC as his agent for the purpose of handling all documentation matters. The relationship between the two was governed by a management agreement which showed that Mr Liang was the one who had possession and control of 393. In order to comply with the relevant PRC regulations, BWTC must be registered as 393’s owner as to over 50%. Hence, 393 was registered in the names of BWTC as to 51% and Mr Liang as to 49%, as shown in her Vessel Ownership Registration Certificate.
- (2) Regarding the Vessel, the position was similar. Mr Tao Junjie purchased the Vessel in June 2008 and became her sole beneficial owner and operator. He appointed BWTC as his agent for the purpose of handling all documentation matters. Their relationship was also governed by a similar management agreement. In order to comply with the same PRC regulations, he allowed BWTC to be registered as her 100% owner. In September 2014, Mr Tao sold the Vessel to Mr Cheng Wanli. Mr Cheng continued the agency arrangement with BWTC save that the Vessel was registered in the names of BWTC as to 51% and Mr Cheng as to 49%, as shown in her Vessel Ownership Registration Certificate.

- (3) BWTC had no involvement in the actual operation of 393 or the Vessel. Nor was it in possession or control of either vessel.
- (4) The bills of lading were issued by GTS as agent for and on behalf of Liang Ping only.

In light of *inter alia* the two Vessel Ownership Registration Certificates supplied by the shipowners, the cargo owners suggested the relevant persons were both BWTC and Mr Liang, as owners of 393 and carriers under the bills of lading.

The striking out application

Despite the lengthy arguments of the shipowners which the court had fully and carefully considered, the court did not think this was a suitable case for striking out.

The shipowners submitted that the cargo owners had no cause of action against BWTC, whether in contract, bailment or tort and hence BWTC was not and could not be the relevant person. All their submissions, however, were premised on the court accepting in full the evidence which they had adduced.

But it is well-established that the power to strike out is exercisable only when the claim is obviously unsustainable and that it must be impossible, not just improbable, for the claim to succeed. Further, there should be no trial upon affidavits and *importantly* disputed facts must be taken in favor of the party sought to be struck out.

In these circumstances, it was difficult for the court to entertain the striking out application which presupposed all the shipowners' evidence was accepted by the court and before the cargo owners had any opportunity to test their evidence at trial.

Setting aside application

As the court saw it, the real issue was whether or not the requirements of section 12B(4) HCO were satisfied. If they were, the service of the Writ and the warrant of arrest would stand, and *vice versa*.

As far as the "relevant person" was concerned, the court accepted the cargo owners' submissions that it meant the person who would be liable in an action in personam on the assumption that the action succeeded - it was not necessary for the cargo owners to establish, in order to found jurisdiction, that that person was in fact liable on the claim: *The St. Eleferio* [1957] P 179 at 186; *The Rolita* [1989] 1 HKLR 394.

The cargo owners claimed that both BWTC and Mr Liang were the "relevant person" as they are shown in the Vessel Registration Ownership Certificate to be co-owners of 393 at the time the cause of action arose. As the Judge said earlier, although the Certificate was not a formal document from the relevant shipping registry, it was regarded by the shipowners as the best evidence of what was contained in the shipping register. In the absence of any contrary suggestion from either party, the court would proceed on the basis that BWTC and Mr Liang were registered owners of 393 in the ratio shown in the Certificate. Since the cargoes were lost while on board 393 and since 393 was not under demise charter at the time, *prima facie*, the owners would be liable to the shippers and/or cargo owners for loss of the cargoes shipped under the bills of lading: see, for instance, Scrutton on Charterparties and Bills of Lading 125th Anniversary Edition paras. 6-028; 11-098.

The shipowners submitted that only Mr Liang was the "relevant person" as only he was in possession and control of 393. This submission was in substance asking the court to accept in full the evidence they had adduced, including in particular the effect of the management agreement, while ignoring the Vessel Registration Ownership Certificate. This submission was untenable and was to be rejected.

The court therefore found the requirement under section 12B(4)(b) of HCO was satisfied.

As for the requirement under section 12B(4)(ii) of HCO, the shipowners submitted that the Vessel was not at the time of the Writ a sister ship of 393 because BWTC was not the beneficial owner as respects all the

shares in the Vessel. They submitted that although the Vessel's registered owner was until 2/9/2014 BWTC, another person was her beneficial owner and held the economic interest in and had possession and control of the Vessel viz Mr Tao Junjie. It was Mr Tao who paid for the Vessel and who enjoyed the right to sell or dispose of the Vessel.

In the Judge's view, this submission was *again* in substance asking the court to accept in full the evidence adduced by the shipowners, while ignoring the Vessel Registration Ownership Certificate. However, no *expert* evidence had been adduced by the shipowners as to whether the requirements of a trust of ships, if any, under PRC laws had been met on the *factual* evidence adduced and how such trusts of ships interacted with the shipping registration laws in the PRC. The shipowners simply asked this court to assume, on their factual case, the beneficial interest in the Vessel lied with Mr Tao at the time of the Writ.

In *The Almojil 61* (HCAJ 164 of 2012) [2014] 4 HKLRD 313, the court stressed the fundamental importance of shipping registers in establishing legal and beneficial ownership of ships at [29] to [42] in the following terms:

29. The second question for this court is whether, in the absence of fraud or other similarly compelling circumstances, it is open for AMI to go behind registration and contend that MMG was not the beneficial owner of the Vessel as to all her shares (64/64) at the time of the Writ.
30. In my judgment, the answer is no.
31. The word "beneficial" does not appear in the relevant article ie Art 3 of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952 ("**1952 Convention**"). The 1952 Convention was given statutory effect in England by the Administration of Justice Act 1956 ("**1956 Act**"), subsequently replaced by the Supreme Court Act 1981 ("**1981 Act**"). The word "beneficial" was inserted before the words "owner as respects all the shares in it" in the English equivalent of our section 12B(4)(i) & (ii) to cater for the possibility of a trust and to tackle the mischief that would otherwise exist if the true beneficial owner was able to operate its ship under the cloak of a trust.
32. In *The I Congreso del Partido* [1978] QB 500, 542A-B, Robert Goff J said in respect of the words "beneficially owned as respects all the shares therein" in section 3(4) of the 1956 Act as follows: "As I read section 3(4), the intention of Parliament in adding the word "beneficially" before the word "owned" in section 3(4) was simply to take account of the institution of the trust, thus *ensuring that, if a ship was to be operated under the cloak of a trust, those interested in the ship would not thereby be able to avoid the arrest of the ship*". (emphasis added)
33. This meaning of the term beneficial ownership "is the accepted view in nearly all, if not all, maritime jurisdictions": per Ma CJHC (as he then was) in *The Convenience Container supra* at [167(4)].
34. In *The Convenience Container*, the Court of Appeal had the opportunity to examine the concept of beneficial ownership under section 12B(4) of the Ordinance. At [35], [36] and [38], Reyes J stated as follows:
 - [35] *Thus, as far as "beneficial ownership" is concerned, HCO s.12B(4) must be concerned with title to property. "Beneficial ownership" cannot merely be about the control or administration of a vessel or even the enjoyment of the proceeds from the sale of a vessel.*
 - [36] *A person can control a ship but have no title in it. By the same token, a person may for a variety of reasons (including mortgage, charge or assignment) have put out of his hands the full enjoyment of the proceeds of sale from an asset. But that would not necessarily mean that the person is unable to pass good title in the asset to third parties....*
 - [38] *And that key question is purely one about title. It is whether a particular ship is an asset in which a relevant person holds a proprietary interest against which a claimant can enforce his claim. To put it in another way, the question is whether a relevant person can sell or dispose of a ship and, in so doing, convey good title in the asset to a third party purchaser.* (emphasis supplied)
35. In the present case, it was not seriously disputed that MMG was in a position to sell the Vessel and convey a good title to a third party purchaser. In fact, the evidence before this court was that in September 2012, Mr Stewart Macphail, MMG's CEO, had contacted Mr Osama As'ad, CEO of AMI, and explained that MMG would be unable to pay the final instalment, and, due to lack of funds, MMG's intention was to sell the Vessel very shortly after its purchase from Swissco. Applying *The Convenience Container*, it would follow that MMG was the "beneficial owner" of the Vessel within the meaning of section 12B(4).
36. Those statutory words "beneficially owned as respects all the shares therein" were re-enacted in section 21(4) of the 1981 Act and considered by the Court of Appeal in *The Evpo Agnic* [1988] 1 WLR 1090. At 1096C-D, Lord Donaldson MR (with whom the other two members of the Court

agreed) said he regarded “the concept of a registered owner as being a nominal owner as a contradiction” as this would negate the fundamental importance of maintaining registers of ships which recorded the names of the owners.

37. On the ambit of section 21(4), the Master of the Rolls said at 1097E-F:

The purpose of section 21(4) is to give rights of arrest in respect of ‘the particular ship’, ships in the ownership of the owners of ‘the particular ship’ and those who have been spirited into different legal ie registered, ownership, the owners of ‘the particular ship’ retaining beneficial ownership of the shares in that ship. That was the situation in *The Saudi Prince* [1982] 2 Lloyd’s Rep 255 and was alleged to be the situation in *The Aventicum* [1978] 1 Lloyd’s Rep 184.
38. As Mr Smith SC put it, the words “beneficially owned as respects all the shares therein” are there to serve a similar function as an “anti-avoidance” provision in a tax legislation. If, for instance, there is a change in ownership of a vessel after the cause of action has accrued but before the issue of the writ, so that the genuineness of this change requires investigation, as in the case of *The “Aventicum”* [1978] 1 Lloyd’s Rep 184 and *The “Saudi Prince”* [1982] 2 Lloyd’s Rep 255, then the court may have to investigate whether the alleged change is made solely with a view to avoiding the arrest of the vessel. If it is found that the original owner *retains* beneficial ownership of the vessel, then, notwithstanding the apparent change, the vessel may still be liable to arrest: Meeson and Kimbell *Admiralty Jurisdiction and Practice* 4th Ed. para. 3.59; *The “Saudi Prince” supra*.
39. The fundamental importance of shipping registers in establishing legal and beneficial ownership of ships was reiterated by the Court of Final Appeal in *Re Resource 1* (2000) 3 HKCFAR 187. At 207J, Bokhary PJ cited with approval the following passage in *The Evpo Agnic*:

in real commercial life...registered owners, even when one-ship companies, are not bare legal owners. They are both legal and beneficial owners of all the shares in the ship and any division between legal and equitable interests occurs in relation to the registered owner itself.
40. It has been held that a plaintiff is entitled to rely on the particulars shown in the relevant shipping register not only for the purpose of ascertaining “ownership” ie “legal ownership” of a vessel for the purpose of section 12B(4)(b) of the Ordinance but also for the purpose of ascertaining “beneficial ownership” under section 12B(4)(i) or (ii) of the Ordinance: *The Tian Xiang 2 Hao* unrep., HCAJ 322 of 2001; Reyes J., 8 October 2003 at [44].
41. The actual decision and the reasoning of Reyes J were upheld on appeal. In particular, the Court of Appeal, cited with approval the proposition that “the inference must be as a matter of common sense that a registered owner of a ship must be the legal and beneficial owner of the ship”: see *The Tian Xiang 2 Hao* unrep. CACV 327 of 2003; 16 March 2004, at [8].
42. From this survey, it is reasonably clear that the authorities speak in one voice and stress the fundamental importance of the shipping register. ”

The court did not accept there was any valid distinction between the case in question and *The Almojil 61*. On the evidence, the court was not prepared to overlook the Vessel Ownership Registration Certificate and was not satisfied that Mr Tao was the beneficial owner of the Vessel as respects all the shares in it at the time of the Writ.

Disposition and costs order nisi

For the above reasons, both the striking out application and the setting aside application were dismissed. There would be an order *nisi* that costs of the shipowner’s notice of motion dated 14/4/2015 be to the cargo owners, to be taxed if not agreed, with certificate for counsel. The cargo owners were at liberty to restore their notice of motion dated 14/4/2015 for hearing before the court at the first available date.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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