




REI MANAGEMENT SDN BHD v THE OWNERS OF THE SHIP OR
VESSEL “INAIMERAK SUPER”

CaseAnalysis
| [2016] MLJU 1390

 **Rei Management Sdn Bhd v The Owners of The Ship Or Vessel “Inaimerak
Super”**
[2016] MLJU 1390

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AZIZAH BINTI HAJI NAWAWI, J

ADMIRALTY IN REM SUIT NO. WA-27-NCC-23-03/2016

18 October 2016

Gopal Sri Ram (Jagesh Mehalingam, Yong Jit Lee and David Yii) (Jagesh dan Linda Law Chambers)
for the plaintiff.

Ong Chee Kwan (Clive Navin Selvapandian with him) (Christopher & Lee Ong) for the defendant.

Azizah Binti Haji Nawawi J:

Grounds of Decision

Azizah Nawawi, J:

Introduction

[1] There are three (3) applications before this Court:

- (i) Enclosure (14) is the Plaintiff’s Notice of Application dated 25.3.2016 to set aside the Memorandum of Appearance entered by PT Jatim dated 21.3.2016 and to enter a Judgment in Default against the vessel;
- (ii) Enclosure (21) is PT Jatim, the Defendant’s Notice of Application dated 15.4.2016 to strike out and/or set aside the Writ dated 7.3.2016 and/or the Warrant of Arrest dated 7.3.2016; and
- (iii) Enclosure (24) is the Defendant’s Notice of Application dated 15.4.2016 to obtain the release of the vessel “Inaimerak Super” (IMO No. : 8662737) (the “**Vessel**”) upon payment of alternative security.

[2] After considering the facts of the case and the submission of the parties, this Court has dismissed enclosure (14) and allowed enclosure (21). Enclosure 24 is struck out as it has been rendered academic.

The Salient Facts

[3] The Plaintiff is a company incorporated in Malaysia carrying out salvaging works in the waters of Malaysia.

[4] The Defendant, PT Jatim is a company incorporated in the Republic of Indonesia and is authorised by the Government of the Republic of Indonesia to participate in the Indonesian maritime industry.

[5] On 13.3.2013, the Plaintiff contracted with Fujian Heli Industry Trade Co., Ltd of Fuzhou City, China ("**Fujian Heli**") to salvage ship wrecks in the Straits of Malacca (the "**First Contract**"). Under this First Contract, the Plaintiff has appointed Fujian Heli to salvage Sunken Ships, financed by Fujian Heli and the profits are to be shared between the parties as terms in the Agreement.

[6] On 13.9.2013, the Plaintiff further contracted with Fujian Heli to remove the shipwreck of the vessel Fajar Samudera from Port Klang (the "**Second Contract**"). Under this Second Agreement, Fujian Heli shall provide the Vessel "**INAIMERAK SUPER**" for the operation of salvaging sunken ships in the Malaysian waters.

[7] The Second Contract between the Plaintiff and Fujian Heli also contain the following terms:

CLAUSE 1.1.4

The Plaintiff shall assists the Defendant to seek and obtain Government approval for the operations and salvaging works of the sunken Ship known as [**FAJAR SAMUDERA**]

CLAUSE 2.2.1

The Defendant agrees and undertakes to produce the professional crane ship for the said salvaging works/operation.

CLAUSE 2.2.2

- (i) The Defendant agrees and undertakes to bear all cost incidental for the execution and operation of the said salvaging works. This is includes:
 - (a) Insurance coverage for the Vessel and all crew;
 - (b) Diesel for the said Vessel; and
 - (c) Salary and meals for the crew members.

CLAUSE 2.2.11

"Party B ('Fujian Heli') concerned and agrees that if Party B/Party B's company/any representative/agent related to

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Party B was found to be in breach or conflicting the interest of Party A ('Plaintiff') in business operation and development, Party B shall be liable for the loss and compensation including when necessary to sell the heavy vessels/ships used in the project to recover the loss suffered by Party A ('Plaintiff')."

[8] Therefore, pursuant to Clause 2.2.11 of the Second Contract, the Plaintiff and Fujian Heli have agreed, in summary, that if Fujian Heli is found to be in breach of the Second Contract, Fujian Heli shall, if necessary sell the ships used in the salvage or ship removal works to compensate the Plaintiff for its losses.

[9] Pursuant to the terms of the Second Contract, the Plaintiff advanced monies to Fujian Heli for payment of expenses and other charges related to the Vessel's expenses. Fujian Heli has not compensated the Plaintiff for the monies advanced.

[10] The Plaintiff has made repeated demands to Fujian Heli demanding repayment of the monies advanced. However, as at 21.1.2016, the sum of RM1,882,552.47 remains owing by Fujian Heli to the Plaintiff. The particulars of the amount claimed (as at 31.12.2014) are as follows:

DIESEL FOR THE VESSEL	RM 1,333,000.50
SHIPPING AGENT CHARGERS	RM 90,647.00
LICENSING FEES	RM 34,529.17
MISCELLANEOUS CHARGES	RM 309,346.35
OTHERS ADVANCE & COST	RM 550,000.00

[11] On 7.3.2016, the Plaintiff caused to be issued the Writ and Warrant of Arrest to recover the amount due and owing. The Vessel was arrested by the Plaintiff on 7.3.2016 at Carey Island, Port Klang.

[12] Fujian Heli did not enter an appearance, but PT Jatim has entered an appearance on 21.3.2016, claiming to be the owner of the vessel, "INAIMERAK SUPER". Hence the Plaintiff's application is to set aside the Memorandum of Appearance entered by PT Jatim and to enter a JID against the Vessel.

[13] At the same time, PT Jatim, claiming to be the owner of the Vessel has filed an application to set aside the writ and the warrant of arrest and seeking damages against the Plaintiff.

Findings of the Court

(i) Enclosure (14)

[14] Enclosure (14) is the Plaintiff's application to set aside the Memorandum of Appearance entered by PT Jatim dated 21.3.2016 and to enter a Judgment in Default against the vessel, INAIMERAK SUPER. The application is premised on the sole issue that PT Jatim is not the owner of the Vessel, and therefore has no legal right to enter appearance in this action.

[15] In the present case, the Plaintiff has named the Owners of the vessel, 'INAIMERAK SUPER' as the Defendant. In *Calyex Oil (Aust) Pty Ltd v The Dredge Willemstad* (1976) 11 ALR 227, the Australian High Court stated as follows:

"... In an action in rem, the person who may become defendants, if they choose to appear, are the owners and others interested in the ship..."

[16] In *The 'Mawan'* [1988] 2 Lloyds LR 460, Sheen J said:

"The persons referred to on the writ as 'the defendant' must be the company which is the owner of the ship 'Mawan' when the writ was issued. Only that company could be liable to the plaintiff in this action"

[17] Our Court of Appeal takes a similar position in the case of *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 and states that:

"Only the owners of Brihope (and those legally liable for the plaintiff's claim) should have been described as defendants ... The ship's owners (and those legally liable for the plaintiff's claim) could enter appearance as of right. Persons interested must obtain leave to intervene and after obtaining leave appear as interveners."

[18] Therefore, the sole issue here is whether PT Jatim is the owner of the vessel, 'INAIMERAK SUPER'.

[19] The Plaintiff relied on exhibit 'CTF – 6', a Mongolian Certificate of Registry, issued on 9.12.2014, which shows that the registered owner is **Heli Ocean Engineering Ltd**. From exhibit 'CTF – 5', the Mongolia Ship Registry confirms that no deletion certificate will be issued when this case is pending from 6 months from the date of the letter, 9.3.2016. Thus there will be no deletion to the Mongolian Registry until 9.9.2016.

[20] However, I am of the considered opinion and I agree with the Defendant that that the certificates issued by the Mongolian Ship Registry does not reflect the ownership, but reflects the identities of the bareboat charterers, as can be seen from 'CTF – 1'.

[21] From exhibit 'CT-1', annexed to the Plaintiff's affidavit affirmed on 23.5.2016 by Chee Teck Fah, the director of the Plaintiff's company, shows that the Mongolian registration is a "Bareboat Charter-in Registration". The name of the charterer is Heli Ocean Engineering Limited, based in Hong Kong. The previous name of the Vessel was Zhong Run 26 and registered in P.R China. The registration was dated 23.1.2014 and the date of expiry is 16.12.2016.

[22] Added to that, from exhibit 'CTF – 8', the previous owners were Mr Chen Di Jie and Zhong Xiang Run Shipping (Xiamen) Co Ltd, and the Vessel then was named as "**Zhong Run 26**", and was registered at the Xiamen Maritime Bureau, China since 16.11.2012.

[23] From the affidavit filed by the Defendant affirmed by Merina Liem on 9.6.2016, exhibit "ML -1" and "ML – 2" is the Certificate of Registration of Bareboat Charter No. : 06ZG006059 dated 11.9.2013 (the

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'Certificate of Registration of Bareboat Charter'). The said Certificate was issued by Xiamen Maritime Safety Administration of the People's Republic of China (the 'Xiamen MSA'). By the Certificate of Registration of Bareboat Charter, the Xia Men MSA consented to the Previous Owners bareboat chartering the Vessel to Heli Ocean Engineering for a period of 3 years from 23.8.2013 to 22.8.2016. The same Certificate was also annexed to the Plaintiff's affidavit and marked as exhibit "CTF – 8".

[24] From exhibit "ML – 3", on 4.12.2013 the Previous Owners entered into a bareboat charter agreement for the Vessel with Heli Ocean Engineering for a period of 2 years on the terms of the BIMCO Standard Bareboat Charter ('BARECON 2001') (the 'Bareboat Charter Agreement'). Following Heli Ocean Engineering's agreement to bareboat charter the Vessel, Heli Ocean Engineering registered the Vessel at the Bareboat Charter Registry of the Mongolian Maritime Administration (the 'MMA') on or about 23.1.2014.

[25] Therefore from the said documents, "CTF – 1" and "CTF – 8" of the Plaintiff's documents and "ML – 1", "ML -2" and "ML-3" of the Defendant's documents, I am of the considered opinion that the information in the documents and certificates issued by the MMA and/or the Mongolian Ship Registry (the 'MSR') at all times only reflects the identity of the bareboat charterers of the Vessel, and not the owners of the Vessel.

[26] As the MMA's Bareboat Charter Registry is only a registry of bareboat charterers and not a registry of ownership of vessels, the certificates and documents issued by the MMA and the MSR do not shed any light on the identity of the owners of the Vessel. Only the then underlying registry, the Xiamen Maritime Bureau, can provide any indication of the ownership of the Vessel, whereby the ownership of the Vessels was Chen Di Jie and Zhong Xiang Run Shipping (Xiamen) Co Ltd. Therefore, from the Certificate of Ownership issued by the Xiamen Maritime Bureau, the ownership of the said Vessel was with Chen Di Jie and Zhong Xiang Run Shipping (Xiamen) Co Ltd, and not Heli Ocean Engineering or Fujian Heli. In **Kawasaki Kisen Kaisha Ltd (supra)**, the High Court held that the ship register is conclusive proof of ownership except for error or *fraud*. *The Court added that:*

".....I would take the view that the ship register is conclusive except for error or fraud. Two authorities clearly established this point. In the case of the "Tian Sheng No 8" (supra) the Hong Kong Court of Final Appeal had stated as follows:

Conceivably, there are circumstances where it might be shown that the registered owner was in fact not the legal and beneficial owner of all the shares in the ship: The fraudulent procurement of registration would be an example. But, in the general run of things, registration would be virtually conclusive and it would take an exceptional case for it to be otherwise.

In the case of the "Kapitan Temkin" (supra) at p. 257 the court therein inter alia also makes the position clear as follows:

The certificate of registration, adds Chorley & Giles Shipping Law at p. 36, 'fulfils to a certain extent the function of title deed'. In this sense the certificate of registration is similar to a certificate of title issued under the Torrens system of land registration which was replicated from the paradigm of the ship registration system. The title evidenced by the certificate of registration is similarly indefeasible, subject of course to rectification in cases like error or fraud. See The Bineta [1966] 2 Lloyd's Report 419.

....

The onus of proof is therefore on Pan Ocean and the defendant to show that Able Shipping's name on the register appears by error or fraud. Since they have not done this it must be taken that the register is conclusive. Under English law, in the case of a registered ship, once the plaintiff establishes that the defendant is the registered owner of the ship when the writ is issued, the burden of proof shifts to the person contending otherwise. A reference to the book by Chorley and Giles, Shipping Law, 8th Edition supports the above proposition wherein at p. 35 it had this to say:

registration is also important as proof of title. It is not conclusive but furnishes at least prima facie evidence of the registered owner being the true owner, thus resulting in a shifting of the burden of proof. Whoever without being registered claims ownership must displace that prima facie evidence. "

(emphasis added)

[27] Therefore, I do not agree with the Plaintiff's contention that the owner of the Vessel is Heli Ocean Engineering Ltd, based simply on the Mongolian Certificate of Registry.

[28] The Plaintiff is also relying on the letter issued by Kementerian Perhubungan Direktorat Jenderal Perhubungan Laut (Indonesia) dated 5.1.2016 to show that PT Jatim is the port agent, not the owner of the vessel, 'INAIMERAK SUPER'.

[29] However, based on the documents before this Court, I am of the considered opinion and I agree with the Defendant that the Defendant, PT Jati is the current owner of the Vessel. This is based on the following reasons:

- (i) Via Memorandum of Agreement dated 1.8.2015 (the 'Memorandum of Agreement'), executed between the Previous Owners (Zhong Xian Run Shipping (Xiamen) Co Ltd and Chen Di Jie) as sellers, and the Defendant, PT Jatim as the buyers, the Previous Owners sold the Vessel to the Defendant for USD1,000,000.00 (see exhibit "ML -7")
- (ii) Pursuant to the terms of the Memorandum of Agreement, the Previous Owners agreed that:-
 - (a) Under clause 2(a), upon payment of half of the Purchase Price, a bill of sale will be prepared and notarially attested by a notary public in China (see Exhibits "ML-4" and "ML-5"); and
 - (b) Upon payment of the Purchase Price, the Previous Owners will deliver to the Defendant a certificate certifying that the Vessel has been deleted from the Xiamen Maritime Bureau – see Exhibits "ML-8" to "ML-11". From exhibit "ML-9", the Certificate of Deletion of Ship Registration issued by Xiamen Maritime Bureau, China shows that the previous owner registration of the vessel, Zhong Run 26 was deleted from the registration on 15.10.2015.
- (iii) Following the deletion by the Xiamen Maritime Bureau, the Zhong Run 26 was issued with a Provisional Certificate of Registry by the Sierra Leone Maritime Administration (exhibit "ML -12"). In the said Certificate, the new owner is PT Jatim Perkasa Lines. The provisional certificate was for a period of three (3) months to undertake a single voyage from Port Klang, Malaysia, to Surabaya, the Republic of Indonesia, where the Defendant is based (see Exhibits "ML-12" and "ML-13").
- (iv) Subsequently, the Sierra Leone Maritime Administration issued a Transcript of Registry on 17.5.2016 and the Transcript of Registry is valid until 15.8.2016 or until the completion of the

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voyage, and it also names PT Jatim Perkasa Lines as the owners of the Vessel (Exhibit "ML – 15"). Therefore, premised on the case of **Kawasaki Kisen Kaisha Ltd (supra)** the Sierra Leone registration is conclusive evidence that PT Jatim is the owner of the vessel, 'INAIMERAK SUPER'.

[30] The Defendant's claim is supported by the Equasis Report dated 3.5.2016 (the 'Equasis Report')(exhibit "ML-16") which names PT Jatim Perkasa Lines as the owners of the Vessel since 15.2.2016; and the Seaweb Report (exhibit "ML – 17"), which also names PT Jatim Perkasa Lines as the registered owners of the Vessel since February 2016.

[31] The Plaintiff disputed the Defendant's ownership of the Vessel solely on the basis that the Bill of Sale (**Exhibits "ML-4" and "ML-5"**) does not contain PT Jatim Perkasa Lines' signature and stamp. However, I agree with the Defendant that there is no merit in such argument. This is because the Bill of Sale is clearly addressed to PT Jatim Perkasa Lines and the body of the Bill of Sale names PT Jatim Perkasa Lines as the *'buyer'* of the Vessel. Further the Memorandum of Agreement now names PT Jatim Perkasa Lines as *"Buyers"* of the Vessel.

[32] Added to that, I agree with the Defendant's submission that the Plaintiff's case itself is riddled with inconsistencies. The Plaintiff's case is that Heli Ocean Engineering is at all times the registered owner of the Vessel. However the Plaintiff's evidence in support of this stand is contradictory, as can be seen from the followings:

- (i) The Plaintiff alleges that **Heli Ocean Engineering** are the owners of the Vessel at all material times, based on **Exhibit "B"**;
- (ii) The Plaintiff alleges that **Fujian Heli** were the owners of the Vessel when this suit was initiated (see paragraph 16(b) of Enclosure 9);
- (iii) The Plaintiff then alleges that **Heli Ocean Engineering is the bareboat charterers** of the Vessel from 23.8.2013 to 22.8.2016, and this would include the time when the Writ was issued;
- (iv) The Plaintiff then relies on a letter dated 9.3.2016 issued by the MSR which refers to the **Plaintiff itself as the bareboat charterer** of the Vessel (see **Exhibit "T"**);
- (v) The Plaintiff relies on a Continuous Synopsis Record (which the Plaintiff claimed is still valid) which refers to one **Chi-Ocean Engineering Shipping Limited as the bareboat charterers of the Vessel (see Exhibit "B" of Enclosure 9; Exhibit "D" of Enclosure 15; Exhibit "JM-6" Exhibit "CTF-6")**;
- (vi) The Plaintiff relies on a letter dated 5.1.2016 issued by the Indonesian Government which names the **Plaintiff itself as the owners of the Vessel** (see Exhibit **"CTF-14"**); and,
- (vii) The Plaintiff relies on a Ship Radio Station Licence issued on 9.12.2015 (valid until 16.12.2016) which merely refers to **Heli Ocean Engineering as a licensee** but does not name Heli Ocean Engineering as the registered owner of the Vessel (**Exhibit "JM-5-c" and Exhibit "CTF-2"**) despite the a column on the Ship Radio Station Licence to do so.

[33] With regards to the Plaintiff's reliance on the shipping licence issued by the Malaysian Domestic Shipping Licensing Board on 11.3.2016 for the period of 11.3.2016 to 1.4.2016 as proof that Heli Ocean Engineering were the registered owners of the Vessel when the Writ was issued, I agree with the

Defendant the said license is a self – serving document because the said Licence is for a period commencing 11.3.2016, but the Vessel was under arrest since 7.3.2016 rendering the Vessel unable to undertake any salvage activity.

[34] On the Plaintiff's allegation that Fujian Heli, Heli Ocean Engineering and Mr Chen Di Jie, one of the previous owners of the Vessel, are common partners in the project secured by the Plaintiff for which the Second Contract was entered into, the Plaintiff seems to rely on what the Plaintiff alleges to be a copy of an excerpt of Mr Chen Di Jie's passport (**Exhibit "CTF-9"**), a copy of Mr Chen Di Jie's multiple entry visa (**Exhibit "CTF – 10"**) and, an undated photograph of Mr Chen Di Jie, Mr Chee Teck Fah and one Mr Chen Rui Xi.

[35] However, I agree with the Defendant that nothing in the Second Contract, or the First Contract to indicates that Mr Chen Di Jie, Heli Ocean Engineering or Fujian Heli were common partners in any project. The Plaintiff has not exhibited a joint venture agreement or an agency contract between the parties to prove its assertions.

[36] Added to that, there is nothing in the Plaintiff's evidence to establishes that Mr Chen Rui Xi represented both Fujian Heli and Heli Ocean Engineering. There no company search results of both Fujian Heli and Heli Ocean Engineering showing Mr Chen Rui Xi as a common director.

[37] The Plaintiff further alleges that PT Jatim Perkasa Lines are the agents of Mr Chen Di Jie. The Plaintiff also alleges that PT Jatim Perkasa Lines were appointed by Mr Chen Di Jie to deliver the Vessel to Surabaya, Indonesia to carry out salvage works. In support of this allegation, the Plaintiff relies on document that the Plaintiff alleges to be:

- (i) A joint venture agreement entered into between Mr Chen Di Jie and PT Jatim Perkasa Lines dated 16.1.2015 involving the Vessel (**Exhibit "CTF-12 (b)"**);
- (ii) An email dated 30.12.2015 received by its Chief Operating Officer (**Exhibit "CTF – 13 (a)"**);
- (iii) A crew list prepared by PT Jatim Perkasa Lines on 30.12.2015 (**Exhibit "CTF-13(b)"**); and
- (iv) A letter dated 5.1.2016 issued by the Indonesian Government's Ministry of Communication to PT Jatim Perkasa Lines (**Exhibit "CTF-14"**).

[38] On the facts before this Court, I find that the joint-venture agreement dated 16.12.2015, exhibited at Exhibit "**CTF-12-b**" refers to a different vessel and not the Vessel arrested in these proceedings. The Joint-Venture Agreement was an agreement between Mr Chen Di Jie and PT Jatim Perkasa Lines for Mr Chen Di Jie to provide a suitable vessel at his disposal to take part in salvage operations jointly with PT Jatim Perkasa Lines in Indonesian waters.

[39] Lastly, on the Plaintiff allegation that Heli Ocean Engineering, Fujian Heli and PT Jatim Perkasa Lines have colluded to present PT Jatim Perkasa Lines as the new owners of the Vessel, there is simply no evidence of the same.

[40] Therefore, premised on the reasons enumerated above, I am of the considered opinion that the Defendant, PT Jatim were the owners of the Vessel when the Writ was issued and therefore have the locus to file the Memorandum of Appearance. In the premise, I find no merit in the Plaintiff's application and dismiss the same with costs.

Enclosure (21)

[41] Enclosure (21) is the Defendant's application dated 15.4.2016 to strike out and/or set aside the Writ dated 7.3.2016 and/or the Warrant of Arrest dated 7.3.2016. The grounds of the application are as follows:

- (i) when the cause of action arose, Fujian Heli was not the owner or charterer of the Vessel and/or that the Defendant was not personally liable to the Plaintiff;
- (ii) that the Plaintiff's claim does not fall under the admiralty jurisdiction and/or authority of this Court; and
- (iii) that there was non – disclosure of material facts.

[42] In the present case, the Plaintiff's basis to invoke the *in rem* action is premised on section 20(2)(g) of the United Kingdom Supreme Court Act 1981 (the "**SCA 1981**"). However, in order to bring a claim under section 20(2)(g) of the SCA 1981, the Plaintiff must comply with section 21(4) of the SCA 1981, which provides as follows:

"(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), 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 ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,*

In an action in rem may (whether or not the claim give 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 respect all the shares in it or the charterer of it under a charter by demise; or*
- (ii) any other ship which, at the time the action is brought, the relevant person is the beneficial owner as respects all shares in it."*

[43] Therefore in order to bring a claim under section 20(2)(g) of the SCA 1981, the Plaintiff must fulfill the three (3) requirements in section 21(4) of the SCA 1981, which are –

- (i) that the claim must arise in connection with a ship;
- (ii) that the person who would be liable in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship; and
- (iii) at the time when the action is brought, the relevant person is either the beneficial owner of that ship as respect all the shares in it or the demise charterer of the vessel.

[44] In the present case, paragraph (16) of the Affidavit in Support of the Warrant of Arrest and affirmed by Jagesh Mehalingam on 4.3.2016 reads as follows:

"16. Tindakan ini dibawa keatas Defendan menurut Aturan 70, kaedah-kaedah Mahkamah 2012 dan dimana saya sesungguhnya percaya

- (a) Tuntutan Plaintiff ada kaitan terus dengan Vessel ini hendaklah ditahan;
- (b) Orang yang bertanggung jawab secara Personam iaitu Pengarah dan Pemegang saham Fujian Heli Industry Trade Co. Ltd apabila tindakan ini dimulakan oleh Plaintiff, adalah tuan punya atau pencatat/penyewa atau mempunyai milikan dan kawalan keatas Vessel; dan
- (c) Bahawa orang yang bertanggung jawab secara peribadi (Personam) pada waktu dan masa Writ dalam tindakan ini dikeluarkan, adalah pemunya beneficiary bagi semua saham atau/dan kepentingan masih belum dapat menuntt semua tuntutan terakru, Exhibit "A" dan "B" di rujuk untuk mengesahkan semua butir-butir mengenai tuan punya vessel masih seperti tertera sejak 18.11.2013"

[45] The Plaintiff's claim against Fujian Heli is premised on a breach of the Second Contract. Therefore, the issue here is whether Fujian Heli is the beneficial owner of that ship as respect all the shares in it or the demise charterer of the vessel.

[46] In the English case of *The "St. Merriel"* [1963] 1 Lloyd's Rep. 63, Hewson J stated as follows:

"Beneficially owned" is not defined in this Act; and there are circumstances where a ship is owned by one person – that is true ownership – where that person is the only person with the right to sell and yet where the same ship is beneficially possessed – if I may use that expression – or is beneficially controlled, by some other person, such as in this case, where the ship is under charter by demise. But the words of the Act are 'as respects all the shares therein', and I conclude that the **words are there for some purpose and that that purpose is to indicate the true owner, that is, the only person with a right to sell all the shares.**" (emphasis added)

[47] The above case was followed in the Singapore Court of Appeal case of *"The Pangkalan Susu/Permina 3001"* [1977] 2 MLJ 129, where the court held as follows:

"The question is what do the words "beneficially owned as respects all the shares therein" mean in the context of the Act. These words are not defined in the Act. Apart from authority, we would construe them to refer only to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship. Our construction would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein. It would not, in our opinion, cover the case of a ship which is in the full possession and control of a person who is not also the equitable owner of all the shares therein. In our opinion, it would be a misuse of language to equate full possession and control of ship with beneficial ownership as respects all shares in a ship. The word 'ownership' connotes title, legal or equitable, whereas the expression 'possession and control', however full and complete, is not related to title. Although a person with only full possession and control of a ship, such as a demised charterer, has the beneficial ownership as respects all the shares in the ship and the ship is not 'beneficially owned as respects all the shares therein' by him within the meaning of section 4(4)" (emphasis added)

[48] The same position was taken by the Court in *Kawasaki Kesin Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 6 MLJ 433 where the court held as follows:

....

"The term 'beneficial owner of all the shares in the ship' found in 21(4) of SCA refers to the person named as the owner of the vessel at the port of registry where the ship is registered. Only that particular person, who is the 'relevant person' fulfilling either of the two criteria stipulated by s 21(4) of the SCA, can become the proper defendant to the suit. This is 'the relevant person' who would be liable to the plaintiff on the action in personam, that is, suffer personal liability in the event the plaintiff succeeds in proving his claim. Thus, only the 'relevant person' could enter appearance as of right, conditional or otherwise, in the capacity of a defendant..."

[49] In the matrix of our present case, if we look at exhibit "A" relied by the Plaintiff, the charterer is Heli Ocean Engineering Limited, and in Exhibit "B", Heli Ocean Engineering Limited is named as the 'current registered owner'. There is nothing in these documents to show that Fujian Heli Industry Trade Co Ltd is the registered or beneficial owner of the Vessel, INAIMERAK SUPER. As such, the Plaintiff is not entitled to arrest the Vessel as a result of its dispute with Fujian Heli.

[50] It is clear that when the Plaintiff makes the allegation in paragraph (16) that Fujian Heli is the beneficial owners or demise charterer of the Vessel, it was made without any basis whatsoever.

[51] Next, I will deal with the grounds of the arrest. In paragraph (14) of the Affidavit in Support of the Warrant of Arrest and affirmed by Jagesh Mehalingam on 4.3.2016 reads as follows:

"Tindakan ini dibawa oleh Plaintiff menurut seksyen 20(2)(g) dan seksyen 21(3) United Kingdom Supreme Court Act 1981 yang diguna pakai di Malaysia melalui seksyen 24(b) Courts of Judicature Act 1964 dan pada masa ini Plaintiff berniat untuk menahan vessel ini dalam tindakan ini."

[52] Therefore, the Plaintiff's claim in this suit falls under section 20 (2) (g) and section 21(3) of the SCA 1981 which reads:

"

20. Admiralty jurisdiction of High Court

(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say –

(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

.....

(2) The questions and claims referred to in subsection 1(a) are –

.....

(g) **any claim for loss of or damage to goods carries in a ship"**

....

"21. *Mode of exercise of Admiralty jurisdiction*

- (1) *Subject to section 22, an action in personam may be brought in the High Court in all cases within Admiralty jurisdiction of that court.*
- (2)
- (3) *In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought to the High Court against that ship, aircraft or property."*

(i) section 20 (2) (g) of the SCA 1981

[53] The Plaintiff's claim, which forms the basis for the invocation of the Warrant Arrest against the Vessel is premised on a claim for loss or damage to goods carried in a ship. In *The Eschersheim* [1976] 1 Lloyd's Re 81, Sir Gordon Wilmer observed at p. 93 that a claim under section 20 (2) (g):

"is designed to cover the claim of a cargo- owner against the ship to which he has entrusted his cargo".

[54] In the factual matrix of this case, the Plaintiff's claim is not a claim for loss or damage to goods on the Vessel, INAIMERAK SUPER. The Plaintiff's claim is for the sum of RM1,882,552.47 premised on the Second Contract for advances made by the Plaintiff for and on behalf of its contractual partner, Fujian Heli as can be seen from the Second Agreement marked as "E" and "E – 1", annexed to Jagesh Mehalingam's affidavit. In paragraph 11(g) of Jagesh Mehalingam's affidavit, he states that:

"(g) Selaras dengan terma-terma [Perjanjian2] tersebut dari Januari 2014 hingga Disember 2014 Plaintiff atas permintaan Defendan telah mendahulukan (advance) membayar perbelanjaan dan lain-lain caj yang berkaitan perbelanjaan Vessel defendan seperti butir-butir di bawah." (emphasis added)

[55] From the two (2) Notices of Demand (exhibit "F" and "G") issued by the Plaintiff against the Vessel, the notices is for *"outstanding sum of RM1,882,552.47 being paid for diesel, shipping and forwarding and licensing fees related services rendered upon your company or vessel representative request.."*

[56] Therefore, the Plaintiff's invocation of the admiralty jurisdiction premised on section 20 (2) (g) of the CA 1981 is clearly misconceived.

[57] Further, the Plaintiff relied on Clause 2.2.11 of the Second Contract, which gives it the right to sell the Vessel to recover the alleged losses that it has suffered due to Fujian Heli alleged breach of the Second Contract. In other words, the Plaintiff takes the position that Clause 2.2.11 of the Second Contract allows this Court to exercise its admiralty jurisdiction to sell the Vessel as the clause extends this Court's jurisdiction to include a vessel used to remove wrecks. This can be seen from paragraph 17 and 18 of the affidavit affirmed by Jagesh Mehalingam:

"

....

17. *Plaintif dan Defendan bersetuju secara tulus dan salah satu terma yang menjadi intipati Perjanjian – 2 (exhibit E-E1) di (Klausula 2.2.11) bahawa plaintif berhak menuntut gantirugi daripada Defendan termasuk dengan menjual "INAIMERAK SUPER" melunaskan (satisfy) segala kos-kos dan lain-lain caj yang dialami oleh Plaintif sekiranya defendan melanggar syarat-syarat atau/dan melanggar kepentingan Plaintif dalam perjanjian ini.*
18. *Plaintif tidak memperolehi sebarang pampasan/gantirugi daripada Defendan dan bantuan dan proses Mahkamah Yang Mulia adalah dikehendaki untuk menguatkuasakan pembayaran tersebut dengan penahanan Vessel "INAIMERAK SUPER".*

[58] On this issue, I agree with the Defendant that it is trite that the admiralty jurisdiction of the Court is conferred and circumscribed by statute, the SCA 1981. Therefore this Court cannot extend its admiralty jurisdiction even when parties have purportedly agreed to such an extension. Consequently Clause 2.2.11 of the Second Contract cannot be used to invoke this Court's admiralty jurisdiction to sell vessels used to remove wrecks. In the case *The "Alexandrea"* [2002] 1 SLR(R) 812, the Singapore High Court held as follows:

"

9. *Before me, counsel for the defendants, Mr. Dason, proceeded on the basis of a concession that the plaintiff's claim framed in negligence fell within the scope of s 3(1)(l) of the Act.*
10. *For the reasons explained below, counsels' concession is misplaced. I accordingly rejected it. GP Selvam JC (as he then was) in *The Ohm Mariana ex "Peony"* [1992] 1 SLR (R) 556 at [15] stated:*

*The admiralty jurisdiction of the High Court of Singapore is essentially statutory, namely jurisdiction conferred on the High Court by the High Court (Admiralty Jurisdiction) Act (Cap 123) ('the Act'). The Act lays down the conditions, which must be satisfied before a claimant avails himself of the right to institute in rem proceedings against a ship and the powerful right to effect an arrest of the ship. **As the in rem jurisdiction is created and limited by statute, the parties cannot confer such jurisdiction by agreement or waiver.**" (emphasis added)*

[59] The same position applies in Malaysia. The admiralty jurisdiction of the High Court is provided by section 24(b) of the Courts of Judicature Act 1964, whereby the court has:

"the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981."

[60] Therefore under the SCA 1981, the admiralty jurisdiction of the High Court is in respect of claims that fall within section 20(2) of the Act. This Court cannot extend its admiralty jurisdiction premised on what the parties have purportedly agreed to as reflected in Clause 2.2.11 of the Second Contract.

(ii) Section 21(3) of the SCA 1981

[61] Section 21(3) of the SCA 1981 deals with maritime lien or other charges which encumbers the vessel, thus an action *in rem* may be brought against that vessel. In respect of maritime lien, in the case

of "MV HUA HONG SATU" [1999] 6 CLJ 197, Hassan Lah JC (as His Lordship then was) stated as follows:

"The maritime lien is a concept peculiar to maritime law. As regards certain maritime claims the ship or other property in respect of which the claim arises is charged with that claim, the maritime lien being that "charge", so that the maritime lien can be enforced by an action in rem in whosoever's hands the property may be. The classic definition of a maritime lien was provided by Sir John Jervis in The "Bold Buccleugh" where he said:

Having its origin in the rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process and Mr. Justice Story explains that process to be a proceeding in rem and adds, that wherever a lien of claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only court competent to enforce it ... This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.

There are numerous other judicial definitions in similar terms.

The claims which give rise to maritime liens

*Only a limited class of **maritime liens** are recognised in English law. In The "Bold Buccleugh" four categories were listed:*

- (i) *damage done by a ship;*
- (ii) *salvage;*
- (iii) *seamen's wages;*
- (iv) *bottomry and respondentia.*
- (v) *To these must be added a fifth, statutory category:*
- (vi) *Master's wages and disbursements.*

*Having considered the plaintiffs' alleged claim as indorsed in the writs and as stated in the statement of claim I hold that the **plaintiffs' claim does not give rise to maritime lien since it does not fall under any of the five categories of the claim mentioned above. As such the provision of s. 21(3) of the said Act does not apply to the plaintiffs' claim.**" (emphasis added)*

[62] On the factual matrix of this case, Without prejudice to my averments in this affidavit and my averments in paragraphs 24 to 29 of Enclosure 29, I aver that despite filing 4 affidavits thus far in this suit, the Plaintiff has not specified the specific maritime lien that it intends to rely on. Therefore, I am of the considered opinion and I agree with the Defendant that the facts of the Plaintiff's case do not entitle the Plaintiff to bring a case under any of the maritime liens.

(iii) proposed amendment to include section 20(2)(m) of the SCA 1981

[63] Even if we go further and accept the Plaintiff's contention that the admiralty jurisdiction falls under s.

....

20(2)(m) of the SCA 1981 (as per the proposed amendment), that is claims in respect of goods or materials supplied to a ship for her operation or maintenance, the issue here is whether on the factual matrix of this case, the Plaintiff's claim on the supply of bunkers comes within the admiralty jurisdiction.

[64] However, the Plaintiff had only advanced money to Fujian Heli to pay for all supplies, which included the supply of bunkers. Therefore, I agree with PT Jatim that since the Plaintiff did not supply the bunkers to vessel, they cannot invoke the admiralty jurisdiction premised on s. 22(2)(m) of the SCA 1981.

[65] Premised on the reasons enumerated above, the Writ dated 7.3.2016 is struck out and the Warrant of Arrest dated 7.3.2016 is hereby set aside.

Damages

[66] With regards to damages the Defendant submit that the Plaintiff had wrongfully invoked the admiralty jurisdiction of this Court, and therefore the Plaintiff should pay for damages for the wrongful arrest of the Vessel.

[67] In the Singapore High Court case of *The "Xin Chang Shu"* [2015] SGHC 308 Steven Chong J observed the policy and the principles of law relating to damages for wrongful arrest of vessel, as follows:

"

1. ***The law on wrongful arrest was developed to protect shipowners against malicious arrests or arrests brought with "so little colour" or "so little foundation" that implies malice on the part of the arresting party.***
2. *Proof of actual malice is often difficult to establish, especially at the interlocutory stage, where most applications for wrongful arrest are pursued. However, the malice threshold can be satisfied by inference in circumstances where the case is so hopelessly bereft of merit that it warrants a finding that the claim is seriously lacking in "colour" or "foundation".*
3. *Ship arrest is an extremely draconian remedy. It can be very disruptive and may inflict severe economic hardship on the shipowner's trade and operations. In order for the protection against this draconian measure to be meaningful and effective, the judicial threshold should not be set too high so as to render the right to damages practically illusory.*
4. *In appropriate cases, where the threshold has been crossed, the court should express its opprobrium towards the arresting party's conduct by ordering it to be accountable for the damages occasioned by its wrongful arrest. Indeed, our courts have in a number of cases held the arresting party accountable for wrongful arrest.*

.....

42 Thus, to conclude, a claim that is "so unwarrantably brought, or brought with so little colour, or so little foundation" may alone be sufficient to justify a finding of malice, regardless of the arresting party's subjective state of mind at the time of the arrest. The finding of malice would be made even more compelling in circumstances where the court determines that the arresting party knew or must have known that it had no

....

reasonable cause of action when arresting the vessel. Malice, however, remains the centrepiece of the inquiry, and a finding of malice is ultimately a fact-sensitive exercise." (emphasis added)

[68] In view of the fact that the Plaintiff's claim do not fall within the admiralty jurisdiction of this Court, that the Plaintiff's own documents do not support its claim that Fujian Heli is the registered owner of the Vessel, that its failure to obtain the Port Risk Insurance and its refusal to accept alternative security, clearly supports the Defendant's application for damages for the wrongful arrest.

Conclusion

[69] Premised on the reasons enumerated above, I am of the considered opinion that enclosure (14) is to be dismissed with costs and enclosure (21) is allowed with costs and damages for the wrongful arrest of the vessel to be assessed by the Deputy Registrar. The Vessel, INAIMERAK SUPER is to be released to PT Jatim immediately. In view of the above findings, enclosure (24) has been rendered academic.

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