



*E-Update 2012/5 – SEPTEMBER 2012*

## **'Bunga Melati 5': Interesting lessons for Bunker Suppliers**

### **Preamble:**

The recent Singapore Court of Appeal (the "CA") decision in the case of *The "Bunga Melati 5"* [2012] SGCA 46 would be of great interest to the shipping industry and, in particular, to those in the bunkering business. If you are a bunker supplier, you would do well to get some guidance from this case – especially since it discusses what happens when bunker trades, involving intermediaries such as brokers and agents, are done. In such arrangements, the business is often smooth-sailing until someone in the chain suffers financial distress. When that happens, it might be too late to ask whether you can obtain security by arresting the vessel. Such a scenario was played out in the case of *The "Bunga Melati 5"* where the CA overturned the decisions of a Assistant Registrar and a High Court Judge and allowed the appellants, Equatorial Marine Fuel Management Services Pte Ltd ("Equatorial"), to continue to pursue its claims for the price of the bunkers supplied (worth more than US\$ 21 million) to vessels belonging to MISC Berhad ("MISC").

### **The Parties:**

Equatorial is in the business of supplying bunkers and MISC is the owner of a number of vessels, including the *Bunga Melati 5*.

Disputes arose between Equatorial and MISC over alleged unpaid bunkers supplied by Equatorial to vessels belonging to MISC. Consequently, Equatorial

commenced a legal action in rem against the *Bunga Melati 5*.

As is common in the bunkering industry, Equatorial was represented by bunker brokers – Compass Marine Fuel Ltd and OceanConnect UK Ltd (collectively the "Seller's Brokers") in its sales of bunkers. MISC was represented by its own brokers - a Malaysian company called Market Asia Link Sdn Bhd (the "Buyer's Broker") which subsequently suffered from financial distress.

### **The Dispute:**

**Equatorial's Case:** The crux of this dispute revolves around Equatorial's claim that MISC was the party whom Equatorial ultimately contracted with - that MISC was the one liable to pay for the bunkers (and not the Buyer's Brokers). Equatorial substantiated its argument by producing bunker confirmations which it received from the Seller's Brokers which clearly identified itself (Equatorial) as the "Sellers" and the Ship Owner as the "Buyers". Equatorial also produced documents from the Buyer's Broker stating that it was acting on behalf of MISC. One of Equatorial's key arguments was that there was agency by estoppel as it had received representations (from the Buyer's Broker) that the Buyer's Broker had the authority to enter into the contracts on behalf of MISC.

**MISC's Case:** MISC's argument was that it only contracted with the Buyer's Broker and did not

contract with either Equatorial or the Seller's Brokers. MISC substantiated its position by producing contractual documents between itself and the Buyer's Broker - evidencing that MISC was the "Buyer" and the Buyer's Broker was the "Seller". MISC also asserted that all invoices received were on the Buyer's Broker's letterheads and it had already paid to the Buyer's Broker for all the bunkers supplied. MISC argued that Equatorial's claim should be struck out because Equatorial had improperly invoked the High Court (Admiralty Jurisdiction) Act (the "HCJA") by failing to show a "good arguable case on the merits of its case". MISC also applied to strike out Equatorial's claims on the basis that it had never been in a contractual relationship with Equatorial and was thus not liable to Equatorial in any way.

### ***The Judgments:***

In the first instance, the Assistant Registrar ("AR") struck out Equatorial's action based on MISC's arguments. Equatorial then appealed to a High Court Judge in Chambers where its appeal was also dismissed. Equatorial subsequently appealed to the CA which reversed the rulings of the AR and the High Court Judge and allowed Equatorial's appeal so that it could continue prosecuting its claim against MISC for the price of the bunkers that were supplied.

### ***Important Lessons:***

#### **A. Agency**

The AR and the High Court Judge struck out Equatorial's action for being "plainly and obviously unsustainable" because Equatorial had substantial difficulties proving that it had received representations that the Buyer's Broker had the requisite authority to enter into the contracts on behalf of MISC. However, the CA found that there was just enough evidence to possibly show that Equatorial's case of agency was not a hopeless one. Therefore, the CA held that it was premature to rule on the factual and legal elements of Equatorial's claim without a full trial and thus refused to strike out Equatorial's claim.

The evidence and facts which worked in Equatorial's favour were as follows:

- i. MISC's payment to some bunker suppliers who were in the same position as Equatorial soon after the Buyer's Broker went into financial difficulties. The CA was of the view that such payments were indicative that, at some level, MISC must have acknowledged that it had a contractual relationship with such bunker suppliers (whom it dealt with through the Buyer's Broker). This lent weight to Equatorial's assertions;
- ii. Equatorial managed to produce the affidavit of the Managing Director of an unrelated party to the dispute (another bunker broker) stating that an employee from the Buyer's Broker told his company that the Buyer's Broker was MISC's appointed broker. The CA felt that this corroborated Equatorial's assertions;
- iii. MISC did not put on record that it had never referred bunker suppliers (like Equatorial) to the Buyer's Broker and that none of its employees were ever instructed not to make such arrangements. This served to persuade the CA that the case warranted a full trial; and
- iv. The CA did not share the High Court Judge's conviction that the documents submitted by MISC "demonstrated beyond doubt" that the Buyer's Broker was not MISC's agent. The CA was also concerned about the illegibility of the invoices rendered by the Buyer's Broker that were tendered to the court. The CA was therefore convinced that the precise relationship between the various parties should be determined at trial rather than by summary determination.

The CA noted that the facts in this case were quite unlike some earlier reported decisions where the ship arrest was (rightly) set aside because the contract to supply bunkers was entered into with the

time charterers of the vessel as opposed to the actual owners of the vessels.

**B. No need to prove “good arguable case on the merits”**

Since the CA’s earlier decision in *The “Vasiliy Golovnin”* [2008] SGCA 39, there was not a bit of uncertainty as to whether a plaintiff had to show a “good arguable case on the merits” in its affidavit leading the arrest when applying for a warrant of arrest against a vessel. The CA has now clarified that there is no need for an arresting party to show a “good arguable case on the merits” of its claim when invoking the High Court’s admiralty jurisdiction under the HJCA (i.e. for vessel arrests) at the **FIRST INSTANCE**. In other words, an arresting party does not need to prove the merits of its case when it wants to arrest a vessel for, say, unpaid bunkers when applying for a warrant of arrest. However, if the vessel owner subsequently challenges the arrest, the plaintiff must be able to show an arguable case on the merits of its claim against the vessel owner or risk the claim being struck out by the Court.

**C. Full & frank disclosure is still paramount**

The CA also reiterated that an arresting party must provide full and frank disclosure of all material facts in its affidavit leading the arrest since such an application is an *ex parte* one. Otherwise, the defendant may apply to set aside the warrant of arrest on the basis of material non-disclosure. This may render the arresting party liable for damages for wrongful arrest.

**Conclusion: Know your customer**

We wait with bated breath to see what eventually happens in the trial between Equatorial and MISC. In the meantime, players in the bunkering business should take away one very important lesson from *The “Bunga Melati 5”* and that is - it is paramount for bunker suppliers to ensure that they know that they are contracting with the actual ship owner. They also need to ensure that all the documents and communications reflect accurately, and beyond doubt, this important fact. This is especially

important when intermediaries are involved. The failure to do so could result in a situation where the bunker supplier ends up with no security for its claim and no hope of ever obtaining payment of its bunker invoice – not an enviable position to be in indeed.

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