IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 117

Admiralty in Rem No 26 of 2011

Admiralty action in rem against the ship or vessel
"PWM SUPPLY" EX "CREST SUPPLY 1"

Between

AKN MARINE SUPPLIES PTE LTD

… *Plaintiff*

And

THE OWNERS OF THE SHIP OR VESSEL "PWM SUPPLY" *EX* "CREST SUPPLY 1"

… *Defendant*

JUDGMENT

[Admiralty and Shipping] – [Admiralty jurisdiction and arrest] – [Action in rem]

[Damages] – [Loss of chance]

[Damages] – [Rules in awarding] – [Proof of actual damage]

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The "PWM Supply" *ex* "Crest Supply 1"

[2016] SGHC 117

High Court — Admiralty in Rem No 26 of 2011
Tan Lee Meng SJ
16 – 20 July 2012, 22 – 23 November 2012, 4 – 7 March 2013, 1 – 3 July 2015; 27 July 2015; 23 May 2016

23 June 2016 Judgment reserved.

Tan Lee Meng SJ:

1 The plaintiff, A.K.N. Marine Supplies Pte Ltd ("AKN Marine"), instituted Admiralty in Rem No 26 of 2011 ("the present action") against the "*PWM Supply*" ("the Vessel") to recover the cost of services rendered and expenses incurred as the ship manager and/or agent of the Vessel. The defendant, PWM Singapore Pte Ltd ("PWM"), was the owner of the Vessel before she was sold by the Sheriff after Deutsche Bank Nederland NV ("Deutsche Bank"), the bank that financed the purchase by PWM of the Vessel, applied for the judicial sale of the Vessel. PWM, who contended that the judicial sale would not have been necessary if AKN Marine had not impeded its efforts to sell the Vessel to Kith Marine & Engineering Pte Ltd ("Kith Marine") at a price higher than that obtained in the Sheriff's sale, counterclaimed against AKN Marine for damages, which included the difference between the price offered by Kith Marine and that obtained in the Sheriff's sale.

2 The trial was completed three years ago in March 2013 and the parties were directed to file written submissions by 15 April 2013. However, before the written submissions were filed, PWM's directors passed a resolution on 26 March 2013 to have the company wound up voluntarily and on 5 April 2013, Borrelli Walsh Pte Ltd was confirmed as PWM's liquidator. This resulted in a statutory stay of the proceedings pursuant to section 299(2) of the Companies Act (Cap 50, 2006 Rev Ed).

3 On the liquidator's application, the stay of proceedings was lifted on 24 September 2013. After the lifting of the stay, matters were held in abeyance for more than 16 months as AKN Marine discharged three sets of solicitors before appointing their present solicitors, Advocatus Law LLP, who played no part in the trial in 2013.

4 Even after the closing submissions were finally filed, AKN Marine and the liquidator took some time to try and resolve their differences in order to reach a settlement. However, by November 2015, the court was informed that no settlement could be reached.

Background

5 AKN Marine, which carries on business as, *inter alia*, ship managers and/or agents, is part of the AKN Group of Companies ("the AKN Group") set up by Mr Jamalediin Emtiyaz ("Jamal") in several countries. According to AKN Marine, the AKN Group is run like a family business and consists of companies set up by Jamal, who provides the funds to set up a company within the group and appoints one of his family members to run it. It was asserted that, as a general rule, Jamal would hold 85% of the shares in the

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companies he set up while the remaining 15% would be allotted to the family member asked to run the company in question to motivate that family member to treat that company as his own in order to maximise profits.

6 AKN Marine's directors are Jamal and his cousin, Mr Emtiaz Hamed ("Hamed"). Hamed, the present chief executive officer ("CEO") of AKN Marine, holds 15% of the shares of AKN Marine while Jamal holds the remaining 85%.

7 At the material time, PWM's directors were Jamal's brother, Mr Mark Nezam Emtiaz ("Mark"), and Mr Foroughmand Arabi Amir Yadollah ("Arabi"). Arabi was formerly associated with AKN Marine. He was a director of AKN Marine and was also its CEO from 2005 until he was removed from his positions in AKN Marine in 2010.

8 Although the present action ostensibly involves a dispute between two companies, it has its roots in an extremely bitter feud between the two siblings, Jamal and Mark. Jamal claims to have given Mark around US$13.16m to set up and operate Pacific World Marine LLC ("Pacific World"), a United States company that owns PWM. Jamal's claim to 85% of the shares of PWM and its parent company, a claim denied by Mark and PWM, is not the subject matter of this suit. Nonetheless, Jamal's attempt to get Mark to acknowledge his 85% shareholding in PWM should be borne in mind for a more complete picture of the savagery of the dispute between the two brothers in this suit.

9 The background of the dispute between AKN Marine and PWM, shorn of details, is as follows. On 10 February 2006, AKN Marine agreed to

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purchase the Vessel, which was then named "*Crest Supply 1*", from Pacific Crest Pte Ltd ("Pacific Crest"), for US$4.5m. On 24 March 2010, the agreement for the sale and purchase of the Vessel was amended to reflect the Vessel's change of name from "*Crest Supply 1"* to "*PWM Supply*".

10 On 28 April 2006, PWM was incorporated. On that day, AKN Marine agreed to let PWM take over the purchase of the Vessel from Pacific Crest for US$4.5m. A novation agreement dated 20 June 2006 was executed by the relevant parties to have PWM recorded as the purchaser of the Vessel.

11 To finance the purchase of the Vessel, PWM entered into a credit agreement for a loan of US$2.7m ("the loan") from Hollandsche Bank-Unie NV ("Hollandsche Bank"), which was subsequently acquired by Deutsche Bank. Under the agreement with Hollandsche Bank, two of Jamal's companies within the AKN group, namely, A.K.N. World Trade Pte Ltd ("AKN World") and A.K.N. Offshore Supplies & Services Pte Ltd ("AKN Offshore"), assumed joint and several liability for the loan to PWM. This showed how closely the AKN Group and PWM worked together before Jamal and Mark parted company.

12 As the loan of US$2.7m was insufficient to pay for the Vessel, which cost US$4.5m, PWM also took a loan from Mr Hesamedin Emtiaz ("Hesam"), who is the brother of Jamal and Mark. Apparently, Hesam transferred around US$2.1m to PWM to pay for part of the purchase price for the Vessel as well as for bunkers and additional charges.

13 On 16 May 2006, by way of a BIMCO Standard Ship Management Agreement ("the Management Agreement"), PWM appointed AKN Marine as

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the Vessel's managers with effect from 1 June 2006. The agreed annual management fee was US$110,400, to be paid in monthly instalments of US$9,200. Under the Management Agreement, AKN Marine undertook to deal with, among other things, crew management, technical management, insurance and the future sale of the Vessel.

14 Earlier on, on 8 March 2006, by way of a BIMCO Standard Ship Agreement, AKN Marine had sub-contracted the management of the Vessel to Strato Maritime Services Pte Ltd ("Strato Maritime"). The sub-contract (the "Strato Agreement") was entered into in anticipation of the Management Agreement, which was concluded on 16 May 2006. Under the Strato Agreement, Strato Maritime was entitled to US$8,000 per month for its management services.

15 On 23 June 2006, the Vessel was registered in PWM's name and renamed "*PWM Supply*".

16 As ship managers of the Vessel, Strato Maritime, incurred expenses and paid for disbursements. It issued a monthly invoice to AKN Marine, accompanied by a summary of the expenses, purchase orders, invoices from others and bunker delivery notes. AKN Marine would pay Strato Maritime the sums claimed and present the same documents to PWM for reimbursement. This was the practice from 2006 to 2012.

17 On 26 November 2010, AKN Marine's Finance Manager, Mr Chris Yeo Wei Hock, who was then also a director of PWM, emailed Mark to ask for the payment by the end of November 2010 of US$191,426.28 allegedly

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owed by PWM to AKN Marine. A Statement of Accounts tabling the expenses incurred by the ship managers was enclosed.

18 PWM replied that it needed time to scrutinise the accounts submitted by AKN Marine and clarifications were sought on alleged discrepancies in the said accounts. PWM also wanted AKN Marine to forward supporting documents for the disbursements. Between May 2010 and April 2011, AKN Marine's invoices in relation to the management of the Vessel were not paid by PWM despite repeated requests for payment.

19 In the meantime, charter rates had dropped drastically and the Vessel was no longer on charter as from September 2010. PWM decided to sell the Vessel but the response from potential buyers was poor. By January 2011, the Vessel remained unsold.

20 On 16 January 2011, AKN Marine's Hamed emailed Mark and said that Jamal intended to arrest the Vessel unless PWM paid the amount owed to AKN Marine. Hamed suggested that the dispute between the parties be resolved by Mark agreeing to transfer 85% of the shares of PWM to Jamal. This proposal was not accepted by Mark.

21 PWM asked Deutsche Bank to defer the payment of the January 2011 instalment payment. On 1 February 2011, Deutsche Bank rejected the request for deferment and gave PWM two months to sell the Vessel.

22 On 2 February 2011, Mark emailed Hamed to say that if AKN Marine tried to arrest the Vessel, Deutsche Bank would foreclose on the loan facility

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and a distressed sale of the Vessel would leave insufficient funds for PWM to pay AKN Marine.

23 On 7 February 2011, AKN Marine commenced the present action to recover the monies claimed by it from PWM. However, the writ was not served at this juncture.

24 On 21 February 2011, Oon & Bazul LLP ("O & B"), acting on behalf of both Jamal and the AKN Group, wrote to Mark to assert that all the funds for setting up, maintaining and operating PWM had been provided by Jamal and to demand that Mark transfer 85% of the shares of PWM to Jamal on the ground that Mark held 85% of the shares of PWM on trust for Jamal.

25 On 21 February 2011, PWM entered into a Memorandum of Agreement ("MOA") with Kith Marine for the sale of the Vessel at US$3.2m. The MOA specifically stated that Kith Marine had the power to act on behalf of Wayneridge Inc Fze. Under the MOA, Kith Marine was entitled to inspect the Vessel, put four of its representatives on board the Vessel to familiarise themselves with the Vessel and conduct sea trials. The stated date for delivery of the Vessel to the buyer under the MOA was between 25 and 28 February 2011. Kith Marine paid a deposit of US$320,000 to PWM.

26 PWM alleged that AKN Marine made numerous efforts to obstruct the sale of the Vessel to Kith Marine by failing, refusing and/or neglecting to give it access to the Vessel to enable Kith Marine to place men on board to inspect her and conduct sea trials. On 22 February 2011, Mark emailed Deutsche Bank to say that AKN Marine was obstructing the sale of the Vessel and to

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ask the bank to take foreclosure measures to facilitate the sale of the Vessel to the proposed buyer, Kith Marine. In this email, Mark stated:

> It is a bit strange that I write you this email; however a peculiar situation has develop[ed]. PWM Singapore is in dispute with AKN, as such, AKN is trying to block the sale of the vessel, even though their action is contrary to their business interest. Given that PWM Singapore is in default of the loan, *I suggest Deutsche Bank foreclose on the loan immediately, take over the vessel and sell the vessel to the buyer (we already have the MoA and the deposit from the buyer).* As strange as this request sounds, it seems like it is the best option at the moment…
>
> Please let me have your thoughts.
>
> [emphasis added]

On 22 February 2011, Deutsche Bank rejected Mark's suggestion.

27 On 24 February 2011, PWM asked Deutsche Bank for the documents required to discharge the loan through the sale of the Vessel. On the same day, Jamal's solicitors, O & B, informed PWM's solicitors, Rodyk & Davidson LLP ("R & D"), that Jamal would be commencing a suit for the transfer of 85% of the shares in PWM to him, and asked PWM to cease all attempts to sell the Vessel pending the outcome of the proposed suit, failing which action will be taken to restrain the sale of the Vessel.

28 On the same day, O & B informed R & D that AKN Marine would not object to the sale of the Vessel provided the following conditions were met:

(a) the Vessel was sold at a fair market price to be approved by Jamal;

(b) Deutsche Bank and AKN Marine were paid first from the sale proceeds; and

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(c) the balance of the sale proceeds was placed in an escrow account pending the disposal of Jamal's claim to 85% of the shares in PWM.

29 On 25 February 2011, PWM's solicitors, R & D, made what was stated to be a final and non-negotiable proposal, which included the following terms:

(a) the sale proceeds of the Vessel, less the amount owed to Deutsche Bank, brokerage fees and other related sale expenses, shall be paid into an escrow account held by a third party to be mutually agreed upon;

(b) documentary evidence of AKN Marine's claim for agency and/or ship management fees shall be produced, after which the parties shall attempt to resolve the claim amicably, failing which the claim shall be referred to arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre; and

(c) The buyer of the Vessel and the Vessel shall be released and discharged from all actions, proceedings, claims, demands, obligations, liabilities of whatsoever kind or nature, in law, equity or otherwise, which they have, may have had or may in future have in respect of the disputes between them and PWM pertaining to the claim for agency and ship management fees.

30 On the same day, O & B replied to say that AKN Marine was of the view that US$3.3m would be the fair market value of the Vessel and that the latter would not object if the Vessel was sold at a price not below S$3.3m. O

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& B added that the supporting documents for the disbursements had already been given to PWM, who should be in a position to say what it was disputing and what it was prepared to pay. In this context, O & B stated that depending on the amount in dispute, it was prepared to recommend to AKN Marine to leave the disputed sum in the escrow account to be paid out upon agreement by parties or by way of an arbitration award.

31 On 25 February 2011, R & D informed O & B that the sale price of the Vessel was US$3.2m and requested AKN Marine to allow the Vessel to be inspected. On the same day, O & B informed R & D that the buyer's representatives could inspect the Vessel. AKN Marine also requested that a copy of the MOA be forwarded to it.

32 On 25 February 2011, Strato Maritime's solicitors, Loy & Company, informed R & D and O & B in separate letters that Strato Maritime was resigning as the Vessel's ship manager because it had been receiving conflicting instructions from AKN Marine and PWM. Strato Maritime intended to hand over possession of the Vessel to PWM and made it clear that it would apply by way of interpleader summons for directions from the High Court if AKN Marine objected to this.

33 On 26 February 2011, R & D informed O & B that Kith Marine had indicated that it will not proceed with the proposed sale if the Vessel cannot be delivered free of encumbrances by 3 March 2011. This meant that AKN Marine would have to withdraw the present action by 3 March 2011 in order to facilitate the sale. R & D made it clear that PWM was no longer willing to negotiate with AKN Marine. At this juncture, PWM still wanted the balance of the sale proceeds after payment of the amount due to Deutsche Bank and sale-

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related expenses to be paid into the account of the bank's solicitors, Allen & Gledhill LLP ("A & G"), pending the resolution of the dispute between PWM and AKN Marine through arbitration. In the meantime, PWM required AKN Marine to discontinue the present action despite its rejection of AKN Marine's proposal that the undisputed part of the latter's claims be paid out of the sale proceeds once the Vessel was sold.

34 On 27 February 2011, O & B informed R & D that while AKN Marine did not object to PWM paying the usual brokerage fees for the sale of a vessel, it could not agree to an unlimited amount to be paid out from the sale proceeds as sale-related expenses. AKN Marine thus wanted PWM to disclose the MOA or to give a breakdown of the sale-related expenses that were to be deducted from the proceeds of sale of the Vessel. Obviously, AKN Marine and Jamal did not trust PWM's director, Arabi, who played an active role in the proposed sale of the Vessel to Kith Marine and they feared that the sale-related expenses would be inflated. In fact, on 1 March 2011, AKN Marine, AKN World and AKN Offshore commenced Suit No 130 of 2011 ("Suit 130") against Arabi, for misappropriating their funds while he was also their director. For the record, judgment was entered against Arabi by Lai Siu Chiu J, who found that he made up his evidence as he went along and that his claims for expenses incurred were "quite, quite incredible".

35 On 28 February 2011, R & D emailed O & B to say that PWM was not obliged to disclose all matters relating to the sale of the Vessel.

36 On 28 February 2011, PWM was informed that Kith Marine was willing to wait until 10 March 2011 to complete the sale and purchase of the Vessel.

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37 On 1 March 2011, O & B emailed R & D to explain that the request for the MOA or a breakdown of the sale-related expense in the alternative was made because of AKN Marine's concern that PWM would pay out an unlimited amount of monies under the guise of sale-related expenses and leave AKN Marine without any security for its claim. It was reiterated that AKN Marine wanted the undisputed portion of its claim to be paid out immediately from the proceeds of sale before the balance was placed in the proposed escrow account.

38 On 1 March 2011, R & D sent a letter to O & B, alleging that AKN Marine was in breach of clauses 4.1 and 15 of the Management Agreement. Clause 4.1 required the manager of the Vessel to use its best endeavours to provide management services as agents for and on behalf of the shipowner in accordance with sound ship management practice and to protect and promote the interest of the shipowner. Clause 15 of the Management Agreement provides that the shipowner shall have the right at any time after giving reasonable notice to the manager to inspect the Vessel for any reason it considers necessary. PWM demanded that AKN Marine remedy the alleged breaches.

39 On 3 March 2011, O & B replied to R & D and reiterated that AKN Marine had no desire to obstruct the sale and was merely seeking payment for its long outstanding claim. R & D was asked to confirm that PWM will pay AKN Marine's outstanding claim immediately or furnish security for the claim to avoid an arrest of the Vessel. The security sought amounted to US$471,893.76.

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40 On 3 March 2011, Deutsche Bank emailed PWM to inform the latter that it will foreclose on the loan.

41 On 4 March 2011, R & D informed O & B that PWM would not be furnishing any security.

42 On 4 March 2011, O & B wrote to R & D to say that a forced sale of the Vessel would not benefit either AKN Marine or PWM and to urge the parties to work together to avoid a forced sale of the Vessel. On the same day, R & D replied and laid the blame for the impending foreclosure measures on AKN Marine. It added that PWM did not wish to negotiate further with AKN Marine and demanded that AKN Marine agree to the terms stated in its letter dated 25 February 2011.

43 On 7 March 2011, R & D emailed O & B to say that PWM would extend a copy of the MOA to AKN Marine with the buyer's information redacted but only *after* AKN Marine has unequivocally and unconditionally agreed to immediately discontinue all or any actions in Singapore or otherwise against the Vessel and to accept that sale-related expenses would be immediately paid out from the sale proceeds.

44 On 9 March 2011, Kith Marine terminated the MOA on the ground that PWM failed to deliver the Vessel within the stipulated time and/or failed to allow Kith Marine's crew to stay on board the Vessel and/or to allow Kith Marine's crew to conduct sea trials. Despite the termination of the MOA, Kith Marine indicated to PWM that it was still interested to purchase the Vessel if AKN Marine and PWM could resolve their differences.

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45 On 14 March 2011, Mark informed Deutsche Bank in an email that Kith Marine may still be interested in purchasing the Vessel but was now offering to pay between US$2.5m to US$2.8m, which was US$400,000 to US$700,000 less than the original offer of US$3.2m for the Vessel. Mark once again invited Deutsche Bank to foreclose on the mortgage, arrest the Vessel and negotiate with Kith Marine for the sale of the Vessel.

46 On 22 March 2011, R & D wrote to O & B to put on record that Kith Marine had already terminated the MOA for the sale and purchase of the Vessel at US$3.2m and that PWM held AKN Marine liable for the losses arising from the said termination.

47 On 6 April 2011, Deutsche Bank commenced Admiralty in Rem No 72 of 2011 ("ADM 72") to recover the sum of approximately €1,134,208.93, which was the amount owed to it under the credit facility. On the same day, Deutsche Bank applied to arrest the Vessel.

48 On 21 April 2011, O & B informed Strato Maritime's solicitors, Loy & Company, that AKN Marine would not object to the handing over of the Vessel to PWM.

49 On 26 April 2011, Strato Maritime's interpleader application, which was commenced on 7 March 2011, was heard. The court declared that PWM was entitled to possession of the Vessel and ordered costs against AKN Marine.

50 On 26 April 2011, the court ordered that the Vessel be sold *pendente lite*.

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51 On 11 May 2011, the writ with respect to the present action was finally served by AKN Marine on the Vessel. On 16 May 2011, PWM entered unconditional appearance in the action.

52 On 1 June 2011, the Vessel was sold by the Sheriff for S$3,666,434.41. The sale proceeds were paid into court. Deutsche Bank, which obtained judgment on its claim against PWM, obtained a partial determination of priorities and an order for the payment of the amount owed to it by PWM out of the sale proceeds. The balance of the sale proceeds, which is now lying in court, amounts to S$1,359,087.67, excluding interest.

53 On 13 June 2011, PWM filed its Defence and Counterclaim in the present action.

The Witnesses

54 AKN Marine called as its witnesses Jamal, his fellow-director, Hamed, and Strato Maritime's marketing executive, Ms Cynthia Lee Miow Hoon ("Cynthia Lee"). Surprisingly, although PWM made innumerable allegations against Jamal and contended that he pursued a personal vendetta against PWM, Jamal was cross-examined for less than half a day.

55 As for PWM, Mark and his fellow director, Arabi, filed affidavits of evidence-in-chief. However, Arabi did not appear at the trial to be cross-examined. Undoubtedly, Arabi was a material witness. After all, he was AKN Marine's CEO from 2005 until 2010 and he was involved in the purchase by AKN Marine of the Vessel in 2006. While serving as AKN Marine's CEO, he signed the Strato Agreement on AKN Marine's behalf. Furthermore, he played

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a key role in the proposed sale of the Vessel by PWM to Kith Marine. It was thus rather inexplicable that he chose not to come to court to prove the numerous allegations that he made against AKN Marine and Jamal in his affidavit of evidence-in-chief ("AEIC") filed on 4 July 2012. Among them was that Jamal had removed him from his position in AKN Marine because their relationship soured for reasons that need not be considered here. It was rather telling that Arabi did not disclose in his AEIC that AKN Marine, AKN World and AKN Offshore had commenced Suit 130 against him for misappropriation of company funds or that judgment was entered against him in Suit 130 and that he was ordered to pay S$611,006.43 and US$443,562.06 to AKN Marine, AKN World and AKN Offshore.

56 No satisfactory reason was given to the court for the absence of Arabi, who was made a bankrupt after judgment was entered against him in Suit 130. While his bankruptcy disqualified him from continuing to serve as a director of PWM, this is not a good reason for him to absent himself from the trial or to fail to make arrangements to give his evidence by video link. There can be no doubt that Arabi's AEIC should be disregarded altogether.

AKN Marine's Claim against PWM

57 AKN Marine's statement of claim was filed on 30 May 2011 in respect of the following:

> (a) the sums of S$424,196.42 and US$225,919.32, or alternatively for damages to be assessed, in respect of sums expended and/or disbursements incurred by the Plaintiff between the months of May 2010 and April 2011 in its capacity as ship managers and/or ship

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agents in the course of providing management services to the Vessel and/or PWM pursuant to the Management Agreement, on account of the Vessel and/or PWM at the request of, and as agents for the Vessel and/or PWM;

(b) interest; and

(c) costs.

58 AKN Marine pleaded that its claim against PWM was for sums "on account of services rendered to [PWM], and expenses incurred by [it]... as agents and/or ship managers, in the supply of necessaries, goods, provisions, bunkers and other ship related material and services on account of and at the request of [PWM], their agents and/or servants in respect of [the Vessel]".

PWM finally admits liability for a major part of AKN Marine's claim

59 PWM, which contended that only AKN Marine's "true" disbursements were within the ambit of the admiralty jurisdiction of the court, conceded during the trial that it owed AKN Marine S$412,196.42 and US$133,919.32 for true disbursements incurred for the Vessel. AKN Marine is thus entitled to judgment *in rem* for these sums and to interest on these sums at 5.33% per annum from the date of the writ until the date of judgment.

AKN Marine's remaining claims

60 In view of the position taken by PWM during the trial, the only claims of AKN Marine that require consideration in this judgment are book-keeping and administrative fees amounting to S$12,000, as well as the management

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fees totalling US$92,000. PWM's position is that these fees are not within the ambit of an *in rem* action.

61 The admiralty jurisdiction of the High Court is governed by the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act"), which provides that the High Court has jurisdiction to hear and determine questions or claims listed in section 3(1)(*a*) to (*r*) of the Act. AKN Marine asserted that its claim against PWM for book-keeping, administrative and management fees falls within the ambit of section 3(1)(*o*) of the Act, which gives the court jurisdiction to hear and determine any "claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship".

62 As it was not disputed that AKN Marine was PWM's agent, the former would be entitled to judgment *in rem* for the book-keeping, administrative and management fees if these fees may be regarded as disbursements made on account of the Vessel.

Book-keeping and administrative fees

63 In relation to the book-keeping and administrative fees, AKN Marine explained that it made sense for it to keep accounts for PWM because a proper system was required to properly account for the income and expenses of the Vessel. It pointed out that it had been charging PWM for keeping the latter's books for several years and that PWM had not asked it to stop the book-keeping and administrative work and had not sought a refund of the fees already paid for such work. Mark testified that he knew that PWM was paying AKN Marine S$1,000 per month for book-keeping and administrative fees.

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64 PWM pointed out that book-keeping and administrative fees are not disbursements, as understood in maritime law, and that no book-keeping work was called for under the Management Agreement. When cross-examined, AKN Marine's director, Hamed, conceded that the book-keeping and administrative fees were incurred on behalf of PWM and not the Vessel. The relevant part of the proceedings is as follows:[1]

> Q Do you agree with me that the purpose of bookkeeping and administration was so that *PWM Singapore's day-to-day operations* and accounts *as a company* would be kept in proper order?
>
> A Yes.
>
> …
>
> Q It's a pure fee charged by AKN Marine, in this case?
>
> A That's correct.
>
> Q: To PWM Singapore?
>
> A: That's correct.
>
> Q *So in that sense it is not a disbursement of any sort?*
>
> A *No.*
>
> [emphasis added]

65 I thus find that the claim for book-keeping and administrative fees does not fall within the ambit of an *in rem* action.

Management fees

66 Under the Management Agreement between AKN Marine and PWM, the former was entitled to management fees of US$110,400 per annum or

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[1] Transcripts, 17 July 2012, p 61, line 6 onwards.

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US$9,200 per month. AKN Marine claimed that for 10 months, PWM did not pay management fees totalling US$92,000.

67 While AKN Marine contended that a claim for management fees falls within the ambit of section 3(1)(*o*) of the Act, PWM took the position that such fees are outside the ambit of an *in rem* action.

68 Whether ship management fees may be claimed in an *in rem* action is an interesting question, to which different answers have been given. For a start, the meaning of "disbursements" should be determined. In *The "Orienta"* [1895] P 49, a decision of the English Court of Appeal, Lord Esher MR, with whom Lopes and Rigby LJJ agreed, explained (at p 55) the meaning of "disbursements" in the context of payments by the master of a ship as follows:

> The real meaning of the word "disbursements" in Admiralty practice is disbursements by the master, which he makes himself liable for in respect of *necessary things for the ship, for the purposes of navigation*, which he, as master of the ship, is there to carry out - necessary in the sense that they must be had immediately - and when the owner is not there, able to give the order, and he is not so near to the master that the master can ask for his authority, and the master is therefore obliged, necessarily, to render himself liable in order to carry out his duty as master.
>
> [emphasis added]

69 PWM asserted that Lord Esher's elucidation of disbursements by a master is equally applicable to disbursements by a managing agent. Thus, disbursements by a managing agent relate to necessary expenses for the ship for the purposes of navigation. That is why insurance premiums for a vessel that are paid for by brokers are not disbursements as insurance is required for a shipowner's financial comfort and not to keep the insured vessel going: see

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Bain Clarkson Ltd v The Owners of the Ship "*Sea Friends*" [1991] 2 Lloyd's Rep 322.

70 In an English case, *The "Westport" (No. 3)* [1966] 1 Lloyds' Rep 342, Hewson J held that ship management fees fall within the ambit of an *in rem* action. He stated (at pp 342 – 343) as follows:

> Under Section 1(1)(*p*) of the Administration of Justice Act 1956, this Court has jurisdiction (*inter alia*) in respect of "any claim by" an "agent in respect of disbursements made on account of a ship". Obviously an agent does not work for nothing in making disbursements and the usual arrangements that an agent is expected to make. In my view he is entitled to include in his claim a reasonable figure for his services.

71 Hewson J gave no reason to justify his view that an agent is entitled to include a sum for his services in his *in rem* claim for disbursements. Furthermore, he held that an agent is only entitled to include in his claim a "reasonable" sum for his services. This may not be the same amount as that provided for in the agency contract.

72 While it is quite obvious that an agent does not work for nothing when making disbursements, whether his fees for making the disbursements may be claimed in an *in rem* action is a separate question altogether. It ought to be borne in mind that *The "Westport" (No. 3)* concerned a motion for judgment in default of appearance by the owners of a vessel and Hewson J, who issued a very brief judgment containing only three rather short paragraphs, did not have the benefit of the shipowner's submissions on whether or not management fees may be claimed in an *in rem* action. PWM's counsel rightly pointed out that earlier English cases that defined a master's disbursements do not appear to have been considered by the judge.

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73 A different and better-reasoned approach was taken in an Australian case, *Patrick Stevedores No 2 Pty Ltd v the proceeds of the sale of the vessel MV "Skulptor Konenkov"* [1997] FCA 1634; [1997] FCA 424 (*The "Skulptor Konenkov"*). In this case, the plaintiffs' claim for agency commission for services rendered in relation to the operation of a vessel was disallowed by Tamberlin J on two grounds. The first was that the agency agreement in question was a contract for services to the shipowners themselves and the commission claimed could not be said to be "on account of the ship". Secondly, and more pertinent to the present issue, Tamberlin J had no doubt that an agent's commission could not be regarded as a "disbursement" and should not be regarded as a maritime claim. He explained as follows:

> In my view the agent's remuneration in the present case is payable in respect of services provided to the shipowner. *The commission is paid in consideration for the agent arranging the supply of goods and services to the vessel. It cannot properly be that the commission itself constitutes the supply of goods or services to the vessel.* Nor, in my view, can it be said that the agent's reward is in respect of the supply or goods or services to the vessel. Properly analysed the remuneration payable to the agent… is not for services to the vessel itself. … *In no way can the act of arranging or procuring, by an agent, the supply of goods or services by a third party to the ship be described as the supply of those goods or services to the ship within para (m) or as a "disbursement" on account of the ship. The services are supplied to the shipowner for its purposes and not to the ship for its operation or maintenance.* The actual "disbursement" for the goods and services themselves, on the other hand, can properly be described as a "disbursement" on account of the ship. It is the super-added element of an agency fee or commission which does not fit the description.
>
> [emphasis added]

74 On appeal, whether or not the commission claimed may be regarded as a disbursement was not considered as Tamberlin J's decision was affirmed on the ground that the agency agreement in question involved services rendered

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to the shipowners generally and not with respect to a specific vessel (see *Opal Maritime Agencies Pty Ltd v "Skulptor Konenkov"* [2000] FCA 507).

75 In Hong Kong, whether or not management fees give rise to an *in rem* claim was considered in two cases. In *Oceanic Group Pte Ltd & Anor v The Owners and/or Demise Charterers of the Ship or Vessel "Oriental Dragon"* [2014] 1 HKLRD 649, the Hong Kong Court of First Instance held that a ship manager is entitled to arrest a vessel for a lump sum fee that included a fee payable with respect to "ship management". Peter Ng J appeared to have relied solely on *The "Westport" (No. 3)* for his decision. After reiterating that disbursements must relate to the operational aspect of the ship, he stated as follows (at [28]):

> Further, a ship's agent is entitled to include a reasonable figure for his own services in his claim for disbursements made on account of a ship: *The Westport (No 3)* [1966] 1 Lloyd's Rep 342.

76 Subsequently, in *The Ruby Star* [2015] 1 HKLRD 543, the Hong Kong Court of Appeal expressed the view that management fees are not within the ambit of an *in rem* claim. In this case, a ship manager who was entitled to management fees under a ship management agreement with the demise charterers of the vessel made an *in rem* claim against the vessel on the basis of monies owed to it under a running account. The shipowner intervened in the action to challenge the jurisdiction of the court with respect to the ship manager's claim. The ship manager's practice was to offset the vessel's income against debts owed to it by the demise charterer for, *inter alia*, crew salary, bunker costs, insurance and management fees. In the statement of claim, the ship manager claimed two lump sums due under the running account without specifying the category of expenses that had been paid for and

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what type of expenses remained outstanding. The decision of the Hong Kong Court of Appeal hinged on the fact that the evidence did not show that the credits given to the demise charterers in the running account were utilised to pay non-*in rem* expenses first, leaving the balance claimed in the action as money intended to cover the *in rem* expenses. As such, whether the amount still owing to the ship manager was in respect of *in rem* claims or non-*in rem* claims cannot be determined. Even so, it is pertinent to note that while considering the items of expenditure in one part of the running account that included crew salary, bunker costs, insurance and management fees, Cheung JA, with whom Barma JA agreed, observed (at para 11.2) as follows:

> There is no dispute that of the Item B operating costs and management fees, the following items are non *in rem* claims, namely insurance, brokerage and Port DA, general and *management fees.* The *in rem* claims are crew salary and bunker.
>
> [emphasis added]

77 In my view, the well-substantiated position taken by Tamberlin J in *The "Skulptor Konenkov*" that management fees claimed by a managing agent cannot be the subject of an *in rem* claim has much to commend it. Clearly, the plain meaning of the phrase "disbursements made on account of a ship" in section 3(1)(*o*) of the Act does not cover any remunerative element, whether by way of commission or fee, for an agent making the disbursements. Section 3(1)(*o*) should be confined to disbursements incurred for the supply of goods or services to the ship, and especially so because of the words "made on account of a ship" in the statutory provision. As such, the decision of Tamberlin J in *The* "*Skulptor Konenkov*" is to be preferred over that of Hewson J in *The "Westport" (No. 3)*, which appears to involve a broad-brush approach of combining disbursements made on account of a ship with an

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agent's fees. Thus, I find that AKN Marine is not entitled to include management fees in its *in rem* claim.

78 AKN Marine further argued that if it was not entitled to include the US$92,000 owed to it by PWM for management fees in its *in rem* claim, the US$80,000 that it paid to Strato Maritime as sub-management fees may be regarded as "disbursements" that were made on behalf of PWM. On this basis, AKN Marine contended that the payments to Strato Maritime could be included in its *in rem* claim. However, as mentioned earlier on (at [73]), Tamberlin J stressed in *The "Skulptor Konenkov*" that "properly analysed the remuneration payable to the agent… is not for services to the vessel itself" and cannot be part of an *in rem* claim. The fact that the managing agent pays another party money for management services under a sub-contract does not alter the fact that a payment for management services or sub-management services cannot be regarded as a payment for services to the vessel itself. As such, the sub-management fees paid by AKN Marine to Strato Maritime are also not within the ambit of its *in rem* claim.

Whether AKN Marine is entitled to judgment *in personam* for its non-*in rem* claims

79 AKN Marine contended that if it failed to establish that book-keeping, administrative and management fees fall within the ambit of section 3(1)(*o*) of the Act, it is entitled to judgment *in personam* for these claims.

80 Admittedly, there is no room in Singapore for a hybrid writ that includes *in rem* and non-*in rem* claims. In *The "Nagasaki Spirit"* [1993] 3 SLR(R) 891, G P Selvam JC, as he then was, explained (at [8]) that whatever may have been the practice in the past, a hybrid writ cannot be issued in

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Singapore as the Rules of the Supreme Court 1970 do not provide for it and such a writ will lead to undesirable and embarrassing complications. However, whether or not a plaintiff in an *in rem* action is entitled to judgment *in personam* if his *in rem* claim fails is a different question altogether and the answer depends on whether or not the defendant has entered an unconditional appearance in the *in rem* action. The position is summed up in Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 2nd ed, 2007) (at pp 16 – 17) as follows:

> If the shipowner appears in the action and submits to jurisdiction personally, *the action may nonetheless proceed in personam and judgment may be rendered against him, even if there is no admiralty jurisdiction in respect of the action in rem* or if admiralty jurisdiction has not been validly invoked. If, however, the shipowner does not appear, then judgment of the action which remains purely in rem is limited to the value of the res or the bail or other security furnished in its place. It also follows that no judgment can be obtained against such a non-appearing shipowner personally.
>
> [emphasis added]

81 In *The "August Eighth"* [1983-1984] SLR(R) 1, where the question before the court was whether or not Order 14 of the Rules of the Supreme Court 1970 applies to an *in rem* action, the Privy Council advised (at [23]) as follows:

> By the law of England, once a defendant in an admiralty action *in rem* has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him not only as an action *in rem* but also as an action *in personam*: *The Gemma* [1899] P 285 at 292 *per* A L Smith LJ. There is no reason to suppose that the admiralty law of Singapore differs from the admiralty law of England so far as this important principle is concerned. On the contrary there is every reason to suppose that it is the same. If then that principle is applied in the present case, the situation is that, from the time when the shipowners entered an

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> appearance in the master's action, as they did on 2 February 1978 the action continued not only *in rem* against the property proceeded against, namely, the ship, but also *in personam* against the shipowners themselves.

82 The above-mentioned passage was cited with approval by the Court of Appeal in *The "Ohm Mariana"* ex *"Peony"* [1993] 2 SLR(R) 113. In this case, the defendant's assertion that the plaintiff's claim for disbursements incurred and paid for by the plaintiff ship managers was not within the ambit of para (*o*) of Section 3(1) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed) was rejected. It is noteworthy that the Court of Appeal observed that even if the defendant was right, the action could proceed as an action *in personam*. LP Thean J, as he then was, who delivered the judgment of the Court of Appeal, explained (at [39] – [40]) as follows:

> 39 Further, even if the action *in rem* was instituted in error on the ground that, when the cause of action arose, the respondents were not the owners of *Ohm Mariana*, that error was not fatal to the appellants' claim at the trial. As we have held, the claim of the plaintiffs came within para (*o*) of s 3(1) of the Act, and the court has jurisdiction to hear and determine the claim. The defendants had not, at the initial or any subsequent stage of the proceedings, applied to set aside the writ and the warrant of arrest. They entered an appearance unconditionally and in so doing submitted to the jurisdiction of the court and from then onwards the action continued as an action *in rem* as well as an action *in personam*: see *The Gemma* [1899] P 285 and *The August 8* [1983] 2 AC 450; [1983] 1 Lloyd's Rep 351. ….
>
> 40 Accordingly, at the time the action came before the learned judicial commissioner, it was an action *in personam* as well as an action *in rem*. Assuming that the action *in rem* was wrongly instituted, the action *in personam* was clearly maintainable on the point of jurisdiction. There was no impediment to the plaintiffs bringing an action *in personam* against the defendants making the same claim as was made in this action. Equally, we can see no impediment to the action continuing as an action *in personam*. The subject matter of the claim was before the court and the court had jurisdiction

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> to hear and determine it. In our judgment, the claim ought not to have been dismissed on the ground of lack of jurisdiction.

83 A similar approach was taken by Chan Seng Onn JC, as he then was, in *The "Trade Resolve"* [1999] 2 SLR(R) 107. In this case, the plaintiff instituted an action *in rem* to recover unpaid demurrage and the defendant, who entered an appearance in the action, applied to set aside the arrest of the vessel on the ground that the arrest was effected outside Singapore's territorial waters and was thus wrongful. The judge stated as follows (at [47] – [48]):

> 47 On the facts, since both the service of the writ *in rem* and the arrest were outside jurisdiction (*ie* outside territorial waters), any submission to jurisdiction would only be to the extent of the jurisdiction of the court against the defendants in an action *in personam*. Thus the court could still determine the merits of the lien and the action, and award a judgment *in personam* against the defendants if the plaintiffs proved their claim. …
>
> 48 In conclusion, by the defendants' entry of an appearance and their submission to the court's jurisdiction to determine the merits of the plaintiffs' claim and their claim to the lien, they had submitted personally to the jurisdiction of the court. Under the unusual circumstances of this case where both the writ and warrant were served out of jurisdiction, the action would nonetheless continue and proceed as an action only *in personam*, and if judgment *in personam* was entered for the plaintiffs, the defendants would become liable for the full amount of the plaintiffs' proved claim even though the judgment sum might eventually exceed the value of the vessel.

84 As PWM entered unconditional appearance in the present action on 16 May 2011, AKN Marine is entitled to judgment *in personam* for the book-keeping and administrative fees, which amounted to S$12,000. As for the management fees claimed by AKN Marine, it was clear that US$9,200 was payable per month by PWM in accordance with the Management Agreement. As PWM owes AKN Marine management fees for ten months, AKN Marine

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is also entitled to judgment *in personam* for the sum of US$92,000 for outstanding management fees. In relation to the judgment *in personam* for the book-keeping and administrative fees as well as the management fees, AKN Marine is entitled to interest at 5.33% per annum from the date of the writ to the date of judgment.

PWM's counterclaim against AKN Marine

85 In its counterclaim against AKN Marine, PWM sought damages for conversion, trespass and/or breach of contract. PWM contended that it suffered damage as a result of AKN Marine's interference with its rights as the owners of the Vessel by failing, refusing and/or neglecting to give it access to the Vessel to enable Kith Marine's representatives to inspect the Vessel and conduct sea trials.

86 PWM contended that the claim in contract arose because AKN Marine, as ship managers, failed to supervise the sale and purchase of the Vessel in accordance with clause 3.6 of the Management Agreement, which provides as follows:

> The Managers shall, in accordance with the Owners' instructions, supervise the sale or purchase of the Vessel, including the performance of any sale or purchase agreement, but not negotiation of the same.

PWM pointed out that clause 15 of the Management Agreement gave it the right at any time after giving reasonable notice to the Managers to inspect the Vessel and added that AKN Marine also breached clauses 4, 3.4 and 15 of the Management Agreement as well as the implied terms of the said Agreement when it failed to co-operate in giving access to Kith Marine's representatives for the purpose of facilitating the sale of the Vessel.

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87 As for conversion, PWM alleged that AKN Marine converted the Vessel to its own use and acted in a manner inconsistent with PWM's ownership of the Vessel by refusing to grant access to the Vessel to Kith Marine's representatives to inspect the Vessel and conduct sea trials when ordered to do so by PWM.

88 In regard to trespass, PWM contended that as it had legal possession of the Vessel, the alleged interference by AKN Marine with its possession of the Vessel by failing to accord it access to the Vessel so that Kith Marine's representatives can inspect the Vessel and conduct sea trials constituted a trespass.

89 PWM submitted that the measure of damages is the ordinary measure for breach of contract, conversion and trespass, which in practical terms, leads to the same result in the circumstances of this case. The alleged losses suffered by PWM were listed as follows:

(a) The difference between the price for the private sale had Kith Marine purchased the Vessel at US$3.2m and the S$3,666,434.41 obtained in the Sheriff's sale, which amounted to S$322,621.67.

(b) The exchange rate losses arising from Deutsche Bank's claim, which concerns the amount PWM would have paid the said bank from the private sale proceeds for its outstanding loan, interest and fees as at 28 February 2011 as compared to the amount paid to the bank on 22 July 2011, which came to US$66,679.72.

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(c) The interest charges, costs and/or all other sums payable to Deutsche Bank from 28 February to 29 July 2011, the date when the bank's claim was satisfied, which amounted to S$165,434.44.

(d) The costs and/or expenses incurred by PWM for maintaining the Vessel from 28 February 2001 to 19 April 2011, the date when another company, Hellenic Overseas Maritime Enterprises Pte Ltd, took over ship managing duties in relation to the Vessel. PWM claimed that the costs and expenses in question were S$54,365.67 and US$36,936.

(e) The Sheriff's commission, costs and/or expenses, which totalled S$263,115.93.

(f) The costs of Deutsche Bank's application for judicial sale of the Vessel and the arrest and preservation of the arrest up to and including the appraisal and sale of the Vessel, which was quantified at S$150,000.

(g) PWM's legal costs in ADM 72, which was commenced by Deutsche Bank against PWM, and in the negotiations with AKN Marine prior to the commencement of the said action, which amounted to S$60,000.

90 Although PWM's counterclaim is a claim *in personam*, it may be considered by the court in an action *in rem*. In *The "Cheapside"* [1904] P 339, where the English Court of Appeal allowed the defendant to set up a counter-claim *in personam* for demurrage to be heard in an action *in rem*, Collins MR explained (at p 343) that a judge in an admiralty action does not cease to be a

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judge of the High Court because he is judge of the Court of Admiralty, and whether or not he can blend those two jurisdictions is a matter for his discretion. This decision was followed by the Malaysian Court of Appeal in *The Owners of the Ship or Vessel "Siti Ayu"and "Melati Jaya" v Sarawak Oil Palm Sdn Bhd & Anor* [2006] 1 MLJ 630. This is a practical approach and obviates the need for the court to hear the counterclaim on another occasion in a separate suit.

91 PWM contended that it is entitled to set-off the damages due to it under its counterclaim against AKN Marine's claims in the present action. It pointed out that the damages claimed by it for conversion, trespass and/or breach of contract, if awarded by the court, will extinguish AKN Marine's claim against it. AKN Marine asserted that being able to bring a counterclaim does not, without more, entitle a defendant to a set-off. It took the position that PWM had no right of set-off as the conditions for a set-off, which are limited to money claims, were not met.

Whether AKN Marine's failure to co-operate caused PWM's alleged loss

92 PWM blamed AKN Marine for Deutsche Bank's foreclosure on the mortgage and alleged that it suffered a loss because AKN Marine failed to co-operate with it by giving access to the Vessel to Kith Marine's representatives to inspect her and to conduct sea trials. Its point was that if AKN Marine had co-operated with it, the Vessel would have been sold to Kith Marine and Deutsche Bank would not have foreclosed on the mortgage as what was owed to the bank would have been paid off with part of the sale proceeds. This was not quite true as Mark had been asking Deutsche Bank to foreclose on the mortgage as early as 22 February 2011 and he repeated this request in further

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emails on 24 February 2011, 28 February 2011 and 1 March 2011. Furthermore, on 3 March 2011, R & D wrote to Deutsche Bank's solicitors, A & G, to ask Deutsche Bank to foreclose on the mortgage. It is PWM's case that it asked Deutsche Bank to do so to facilitate the sale of the Vessel to Kith Marine.

93 In its closing submissions, PWM referred to numerous instances when AKN Marine failed to co-operate with it on the sale of the Vessel. It pointed out that AKN Marine acted wrongly when, among other things, it initially instructed Strato Maritime to prevent Kith Marine's representatives from boarding the Vessel for inspection and when it initially prevented Kith Marine's representatives from conducting sea trials. PWM also complained that AKN Marine and Jamal had demanded through their solicitors, O & B, that it cease all attempts to sell the Vessel as Jamal would be commencing an action against PWM to regain what he claimed to be his 85% shareholding in PWM. Finally, PWM complained that despite its offer to pay the balance of the proceeds of sale of the Vessel after paying Deutsche Bank and sale-related expenses into an escrow account pending the resolution of the dispute between the parties, AKN Marine refused to allow the sale of the Vessel to proceed by withdrawing the present action.

94 AKN Marine denied that it failed to co-operate with PWM in the proposed sale of the Vessel to Kith Marine and added that it ought not be overlooked that it was in its own interest that the Vessel be sold because two other companies in the AKN Group were the guarantors of the Deutsche Bank loan to PWM. AKN Marine also pointed out that in response to R & D's email of 25 February 2011, which was sent at 3.29 pm to demand that AKN Marine

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allow the Vessel to be inspected by Kith Marine's representatives by 4 pm on that day, it replied at 4.04 pm on the same day to state that Kith Marine's representatives could inspect the Vessel. AKN Marine also confirmed in the said email that the proposed sea trial could be conducted with the present crew as well as Kith Marine's representatives and crew on board. Thereafter, other sticking points developed during the correspondence between the solicitors of AKN Marine and PWM and both parties could not reach a compromise.

95 In the face of the allegations against it in PWM's counterclaim, AKN Marine also sought to exonerate itself by claiming that it had possession of the Vessel, an untenable argument for as Steven Chong JC, as he then was, explained in *The "Catur Samudra"* [2010] 2 SLR 518 (at [64]), it would be wrong to treat ship managers as being "in possession or in control" of a vessel as their responsibilities in relation to the vessel managed by them arise by reason of their appointment by their principals, the shipowners. He added that if ship managers exercise any right of control or possession over a vessel, they do so on behalf of the shipowners and not on the basis of an independent legal right to possession of the vessel.

96 Two important points may be made about PWM's counterclaim. First, it is absolutely crucial to note that Kith Marine only wanted to purchase the Vessel if she was unencumbered by suits and debts. This is understandable as no one would want to pay US$3.2m for a Vessel and take on the task of fending off an *in rem* action for such a large sum as that claimed by AKN Marine in the present action. Notably, clause 9 of the MOA between PWM and Kith Marine required the Vessel to be free from charters, *encumbrances*, mortgages and maritime liens *or any debts whatsoever* at the time of delivery

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while PWM is obliged under clause 8 of the MOA to hand over to Kith Marine two copies of the Legal Bill of Sale warranting that the Vessel is free from all *encumbrances or any other debts* whatsoever in exchange for the balance of the purchase price. Furthermore, in its email to O & B on 26 February 2011, PWM's solicitors, R & D, stated that the buyer would abandon the purchase of the Vessel if she was not delivered *free from encumbrances* by 3 March 2011. Even after aborting the MOA, Kith Marine, which indicated that it was still interested in purchasing the Vessel but at a very much reduced price, reiterated in an email on 9 March 2011 that "due consideration must be taken to ensure that the [Vessel] is free from encumbrance". Once Deutsche Bank had agreed to the proposed sale of the Vessel to Kith Marine, the only encumbrance left on the Vessel was the present action and so long as this *in rem* action was not withdrawn by AKN Marine, the condition requiring PWM to hand over an unencumbered vessel to Kith Marine could not be met.

97 The second point to be noted about the counterclaim is that whether PWM would really have benefited from a sale of the Vessel to Kith Marine was dependent on the actions of a third party, namely, Kith Marine. As such, the counterclaim may be considered on the basis of a loss of a chance to sell the Vessel to Kith Marine. In this context, it is trite law that while PWM need not prove that Kith Marine would have completed the purchase of the Vessel on a balance of probabilities, it nonetheless has to show that it lost a "real or substantial" chance of completing the sale of the Vessel to Kith Marine. In *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661 ("*Asia Hotel*"), the Court of Appeal reiterated (at [137]) that what constitutes a real or substantial chance need not be proved on a balance of probabilities. Chao Hick Tin JA, who delivered the judgement

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of the Court, relied on *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, where Stuart-Smith LJ stated (at 1611 and 1614) that while there is no reason in principle why a plaintiff can only succeed if the chance of success can be rated at over 50%, the plaintiff must nonetheless prove "as a matter of causation" that he has a real or substantial chance as opposed to a speculative one.

Whether AKN Marine was entitled to maintain the present action

98 As it was clear that Kith Marine wanted to purchase an unencumbered vessel and in view of the importance of establishing causation of loss, attention should first be focussed on whether AKN Marine was entitled to maintain the present action. *If AKN Marine was entitled to maintain the present action and to refuse to withdraw it in the circumstances of the case, it cannot be blamed for PWM's failure to hand over an unencumbered vessel to Kith Marine.*

99 PWM took the position that AKN Marine acted wrongly when it refused to withdraw the present action to facilitate the sale of the Vessel to Kith Marine. When referring to AKN Marine's assertion that the sale of the Vessel to Kith Marine could not have gone through without the withdrawal of the present action, PWM stated in its closing submissions (at paras 151 and 152) as follows:

> 151 This is again a self-serving allegation, since the purchase price would have gone towards discharge of Deutsche Bank's mortgage, leaving [AKN Marine's] action *in rem* as the only encumbrance in question.
>
> 152 The Vessel could have been delivered by the Defendant free of all encumbrances if the Plaintiff acted fairly and reasonably. It was suggested to the Plaintiff by the Defendant

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> that the parties come to an agreement where the Vessel was sold and her sale proceeds placed in an escrow account pending the resolution of disputes between the parties. This arrangement would have allowed the action *in rem* to be discontinued and the Vessel delivered free of encumbrances, while safeguarding the Plaintiff's claim.

100 PWM contended that AKN Marine should have withdrawn the present action because it had offered to provide security for the latter's claim by proposing that the sale proceeds of the Vessel after payment of the amount owed to Deutsche Bank be placed in escrow pending the resolution of the parties' dispute through arbitration. However, this proposed arrangement was unacceptable to AKN Marine. Whatever may have been its earlier position, it was clear that in the final stages of the negotiations between the parties, AKN Marine wanted the undisputed part of its claim against PWM to be paid from the sale proceeds of the Vessel, with only the disputed part of its claim reserved for arbitration. It pointed out that there was no evidence that A & G had agreed to hold the proceeds of the sale of the Vessel on behalf of the parties and it feared that unless PWM agreed to pay the undisputed part of its claim with the sale proceeds immediately after the sale, there would be insufficient funds left from the sale proceeds to settle its claim.

101 Apart from owing Deutsche Bank around US$1.43m as at 1 April 2011, PWM also owed US$2.1m to Mark's brother, Hesam, who loaned this sum to it in 2006 to finance the purchase of the Vessel and to pay for bunkers and other expenses. If the Vessel was sold to Kith Marine for US$3.2m, there would be insufficient money to pay Deutsche Bank, Hesam and AKN Marine. Although Mark testified that he would have paid AKN Marine first, Hesam stated in an affidavit filed in a separate suit, namely, Suit No 493 of 2011, which was commenced by AKN World against PWM, that he had a general

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understanding with Mark that if the Vessel was sold, PWM and/or its parent company, Pacific World, would hold on to his money. In short, Hesam expected the sale proceeds of the Vessel to be utilised to pay him the money that he loaned to PWM.

102 PWM was aware of the importance of furnishing adequate security for AKN Marine's claim in exchange for the withdrawal of the present action and it knew all along that it owed money to AKN Marine. Although PWM claimed that it did not admit before the trial that it owed any sum to AKN Marine, this was plainly untrue. Mark explained in an email to Hamed dated 2 February 2011 that if AKN Marine arrested the Vessel, Deutsche Bank will foreclose on the mortgage of the Vessel and added if there was a judicial sale of the Vessel, there will be insufficient funds left for PWM to, in his own words, "pay its debt" to AKN Marine after the bank has recovered the loan balance, the outstanding interest on the loan and the expenses incurred. Mark also admitted in an email to Strato Maritime's marketing executive, Cynthia Lee, on 21 February 2011 that PWM owed AKN Marine money as he stated as follows:

> By way of introduction, my name is Mark Emtiaz... I am a director of PWM Singapore Pte Ltd. Mr Amir Arabi is also a director of PWM Singapore. Mr Arabi has a power of attorney from me to act on my behalf to sell PWM Supply... Upon sale of the vessel, PWM Singapore will pay all of its obligations *including its debt to AKN Marine.* ...
>
> [emphasis added]

103 PWM finally conceded during the trial that it owed AKN Marine the bulk of the money claimed by the latter in the present action. Had PWM made this concession earlier on and agreed to pay the undisputed part of AKN Marine's claim out of the sale proceeds of the Vessel, leaving the disputed part of the said claim to be resolved through arbitration, the present action might

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have been withdrawn. PWM could also have ensured that the present action was withdrawn by furnishing adequate security for AKN Marine's claim. Furthermore, PWM could have applied to the court to have the present action struck out if it believed that it had grounds to take such a step. Instead, despite knowing that the present action had to be discontinued because Kith Marine wanted to take delivery of the Vessel only if she was unencumbered, PWM chose to insist that AKN Marine discontinue the present action on its "non-negotiable" terms that were unacceptable to AKN Marine.

104 In blaming AKN Marine for failing to withdraw the present action, PWM was in fact asserting that any plaintiff who commences an action *in rem* is obliged to facilitate the sale of the vessel by withdrawing that action and giving up his security on terms which the shipowner thinks are reasonable but which the plaintiff finds unpalatable for whatever reason. No authority was cited for such a bold assertion. Mark conceded that AKN Marine was entitled to maintain the present action as he testified as follows when he was cross-examined on this matter:[2]

> Q: Since the plaintiff's claim was not settled, nor was adequate security furnished, *the plaintiff cannot be compelled to discontinue its court proceedings against the vessel*. Do you agree?
>
> A: *Yes*.
>
> [emphasis added]

105 As for PWM's assertion that AKN Marine refused to withdraw the present action because Jamal has a vendetta against Mark, this assertion was not proven. More importantly, when an action *in rem* is instituted by a

[2] Transcript, 6 March 2013, p 57, line 9 onwards.

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plaintiff, the court is only concerned with whether or not the admiralty jurisdiction of the court has been properly invoked and, if so, whether or not the plaintiff can prove his claim. No plaintiff with a valid *in rem* claim will be turned away merely because he is obnoxious. In this context, it is worth noting that in *The "Arktis Fighter"* [2001] 2 SLR(R) 157, Choo Han Teck JC, as he then was, stated (at [9]):

> Once the court is satisfied that a vessel has been lawfully arrested, it will order its release *only upon adequate security being furnished; otherwise the plaintiff will be relinquishing a substantial security in exchange for a vulnerable one.*
>
> [emphasis added]

106 Undoubtedly, in the circumstances of the case, AKN Marine was not obliged to withdraw the present action to facilitate the sale of the Vessel to Kith Marine merely because PWM thought that its terms for the withdrawal of this encumbrance on the Vessel were reasonable. As such, I find that AKN Marine did not act wrongly by refusing to withdraw the present action in order to facilitate the sale of the Vessel to Kith Marine.

107 As Kith Marine wanted to purchase the Vessel only if she was unencumbered, what really stood in the way of the completion of the sale of the Vessel to Kith Marine was the fact that she was encumbered by the present action. This would be the result even if Kith Marine had been satisfied with the Vessel's condition after inspecting her and conducting sea trials. Thus, PWM cannot say that it lost a real or substantial chance of completing the sale and purchase of the Vessel as a result of AKN Marine's failure to co-operate with it by giving Kith Marine access to the Vessel for the simple reason that the sale could not be completed so long as the present action was not withdrawn. As AKN Marine was justified in maintaining the present action

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and refusing to withdraw it, the lengthy submissions of both parties as to whether or not AKN Marine co-operated with PWM by giving access to the Vessel to Kith Marine need not be considered. PWM's counterclaim based on breach of contract clearly lacked merit and must be dismissed.

Conversion and trespass

108 As for PWM's counterclaim for damages for conversion and trespass, it may be recalled that PWM took the position that in practical terms, the damages claimed by it for conversion and trespass lead to the same result as its counterclaim for breach of contract. This is understandable as PWM's complaint must be that it lost a real or substantial chance to sell the Vessel to Kith Marine because of AKN Marine's alleged trespass and conversion. In view of my finding that the sale of the Vessel would not have gone through because AKN Marine was entitled to refuse to withdraw the present action, PWM's counterclaim in relation to trespass and conversion is also dismissed.

No proof of quantum of loss

109 For the sake of completeness, it may be noted that even if PWM had established that AKN Marine had breached the Management Agreement and caused it to lose a real or substantial chance to sell the Vessel to Kith Marine, it did not prove the quantum of its alleged loss.

110 A bifurcated trial would have given PWM time to prepare its case on the assessment of damages for loss of a chance. However, PWM declined to have a bifurcated trial. Claiming that there was nothing speculative about the completion of the sale of the Vessel to Kith Marine, it urged the court to award

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damages to it for the loss of a chance on the basis that the proposed sale of the Vessel to Kith Marine was a "near certainty". In its closing submissions, PWM contended (at paras 158 and 159) as follows:

> 158 The Court of Appeal [i]n the *Asia Hotel* case set out the approach in awarding damages for loss of chance:
>
> (1) First, did the breach on the part of the defendant cause the plaintiff to lose a chance to acquire an asset or a benefit?
>
> (2) Second, was the chance lost a real or substantial one; or putting it another way, was it speculative?
>
> (a) What constitutes a real or substantial chance need not be proved on a balance of probabilities. (*Asia Hotel* at [137])
>
> (b) The range lies somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other.
>
> 159 On the evidence in this case, the Court is invited to find that not only is there a substantial chance of the purchase of the Vessel being completed, the chance was a near certainty.

111 What PWM overlooked was that there was a separate hearing for the assessment of damages in *Asia Hotel* and the evidence on the actual losses flowing from the loss of a real or substantial chance by the plaintiff in that case, which included the evidence of expert witnesses, was so voluminous that the judgment on the assessment of damages (*Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and Another* [2007] SGHC 50) contained 480 paragraphs. In the present case, no witness from Kith Marine was called to verify PWM's assertion that the sale of the Vessel was a "near certainty". PWM submitted that it need not call any witnesses from Kith Marine to prove its loss as the existence of the MOA itself was sufficient evidence to demonstrate that there was a real or substantial chance of the

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Vessel being sold to Kith Marine. It added that the fact that Kith Marine had issued a cheque for 10% of the purchase price shows the latter's genuine interest to complete the sale. It also claimed that Kith Marine had a charter that needed to be fulfilled urgently. AKN Marine retorted that there was no evidence that the sale of the Vessel to Kith Marine for US$3.2m would definitely have gone through as there was a definite possibility that Kith Marine could have rejected the Vessel after undertaking the inspection and conducting sea trials.

112 Without the benefit of adequate evidence, the court is in no position to assess how close PWM came to clinching the deal with Kith Marine and what were the actual losses suffered by PWM. Notably, a few days after Kith Marine cancelled its proposed purchase of the Vessel on 9 March 2011, it indicated that it was still interested in purchasing the Vessel at a much lower price of between US$2.5m to US$2.8m, which was significantly less than its original offer of US$3.2m. As Kith Marine reduced its offer price for the Vessel by such a large amount within a few days of its termination of the MOA, a question arises as to whether it would have been really willing to pay an additional US$400,000 to US$700,000 for the Vessel a few days earlier. Surely, the representatives of Kith Marine, who, according to the MOA, had the power to act on behalf of another company, Wayneridge Inc Fze, must be available for cross-examination on a wide range of issues, including why Kith Marine reduced its offer price for the Vessel by up to US$700,000 within the space of a few days and what the market price of the Vessel was at the material time. After all, it was open to Kith Marine to say before it terminated the MOA that it was not satisfied with the Vessel's condition and that it

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wanted a discount of US$700,000 to proceed with the sale and purchase of the Vessel.

113 AKN Marine rightly pointed out that the events that transpired after Deutsche Bank commenced ADM 72 on 6 April 2011 also reveal the extremely speculative nature of PWM's claim for the loss of a chance to sell the Vessel to Kith Marine. To begin with, shortly after the proposed sale of the Vessel to Kith Marine was aborted, another party, Miclyn Express Offshore, expressed an interest in purchasing the Vessel in early April 2011 but did not make any offer to purchase her. Another company, Star Global Shipping Pte Ltd, inspected the Vessel on or around 20 April 2011 but also made no offer to purchase her after the said inspection. On 4 May 2011, yet another party, PT Fowohi Kentiti Jaya, inspected the Vessel but was only willing to offer US$2m for her for various reasons, one of which was that her engine plants required overhauling as the Vessel had not been in operation for almost a year.

114 Why PWM assumed that the court will accept without further proof that it was a near certainty that Kith Marine would have purchased the Vessel for US$3.2m cannot be fathomed, and especially so since the Vessel was encumbered with the present action. As such, even if I had decided that PWM lost a real or substantial chance to sell the Vessel to Kith Marine, I would have awarded it nominal damages because it failed to prove the alleged damages suffered by it.

Costs

115 AKN Marine is entitled to costs.

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Tan Lee Meng
Senior Judge

Christopher Anand s/o Daniel, Ganga d/o Avadiar and Harjean Kaur (Advocatus Law LLP) for the plaintiff;
Lawrence Teh Kee Wee, Loh Jen Wei and Khoo Eu Shen (Dentons Rodyk & Davidson LLP) for the defendant.

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