IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 201

Suit No 268 of 2015
(Registrar's Appeal Nos 302 and 303 of 2016)

Between

Anglo-American Corporation Sdn Bhd

… *Appellant*

And

(1) The London Steam-ship Owners' Mutual Insurance Association Ltd

(2) A. Bilbrough & Co Ltd

(3) Ince & Co

(4) Richard Ian Lovell

… *Respondents*

JUDGMENT

[Civil Procedure] — [Striking out]

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Anglo-American Corp Sdn Bhd
v
The London Steam-ship Owners' Mutual Insurance Association Ltd and others

[2018] SGHC 201

High Court — Suit No 268 of 2015 (Registrar's Appeal Nos 302 and 303 of 2016)
Belinda Ang Saw Ean J
3, 4, 5, 17 April, 27, 28, 29, 30 August 2018

11 September 2018 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 Registrar's Appeal Nos 302 and 303 of 2016 are appeals against the Assistant Registrar's ("AR") decisions in Summons No 1187 of 2016 and Summons No 901 of 2016 respectively. The two applications by way of summons were brought to strike out the claims of the plaintiff, Anglo-American Corporation Sdn Bhd ("AAC"), in Suit No 268 of 2015. The first defendant, The London Steam-ship Owners' Mutual Insurance Association Ltd ("D1"), and the second defendant, A. Bilbrough & Co Ltd ("D2"), brought their striking out application in Summons No 1187 of 2016, pursuant to O 18 r 19(1)(*b*) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") and the inherent jurisdiction of the court. The fourth defendant, Richard Ian Lovell ("D4"), applied in Summons No 901 of 2016 to strike out AAC's claim pursuant to O

18 r 19(1)(*b*) and O 18 r 19(1)(*d*) of the ROC and the inherent jurisdiction of the court. The third defendant is not involved in these proceedings at all. AAC has not served the Writ of Summons on the third defendant.

2 AAC's claim against the three defendants arises out of a collision between the *United Endurance* and the *Sunbright* in Singapore on or about 28 October 2006 ("the Collision"). AAC was at all material times the owner of the *Sunbright*. Shipowners' Mutual Protection and Indemnity Association (Luxembourg) ("SOP") was the Protection and Indemnity ("P&I") insurer of the *Sunbright* and Hilary Michael Hammond ("MH") was the London-based claims-handler for SOP in respect of the Collision. D1 was the P&I insurer of the *United Endurance*. D2 was the manager of D1, and Ioanna Pavlidou, commonly referred to as Joanna Pavlidis ("JP"), was an associate director of D2. Spica Services (S) Pte Ltd ("Spica") was the Singapore correspondent for D1, D2 and SOP. A Rahman ("Rahman") from Spica was in charge of the matter with respect to the *United Endurance* while Thomas Yan ("TY") from Spica was in charge of the matter with respect to the *Sunbright*. D4 was at the material time an English solicitor in Ince & Co's Singapore office. He was appointed by D2 to represent the owner of the *United Endurance*, Trade Tankers Inc. ("Trade Tankers"), in respect of the Collision.

3 The test of whether a claim can be struck out under O 18 r 19(1)(*b*) of the ROC or under the inherent jurisdiction of the court depends on whether the party's action is plainly or obviously unsustainable. The Court of Appeal held in *The "Bunga Melati 5"* [2012] 4 SLR 546, at [39], that a "plainly and obviously unsustainable action" would be one which is either:

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> (a) *legally unsustainable*: if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; or
>
> (b) *factually unsustainable*: if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

4 As to O18 r 19(1)(*d*), a claim is considered to be an abuse of the court's process if the court's machinery is being misused. This ground involves a fact-specific inquiry. After all, there is considerable variety in the particular methods by which an abuse of the court's process may be brought to bear. An example of an abuse of process is that of bringing a claim for a collateral purpose (see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649).

5 It is fair to say that before me, the arguments of all the parties were mainly based on O18 r 19(*b*).

Registrar's Appeal No 302 of 2016

6 In Suit No 268 of 2015 and the proceedings before the AR, AAC asserted two claims against D1 and D2. The first was for breach of contract ("the Contract Claim") and the second was for misrepresentation pursuant to s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Misrepresentation Claim"). In the course of the current appeal proceedings, two new additional arguments have been canvassed by AAC. The first argument is a claim in unjust enrichment while the second is on the issue of good faith.

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The Contract Claim

7 In the Contract Claim, AAC pleads that the terms of the contract are as follows:

(a) It is an express term that AAC and D1 and D2 would hold off formal steps until D1, D2 and/or Trade Tankers had been given a reasonable opportunity to take a position on settlement;

(b) It is an express term that D4 (as agent of or on behalf of D1, D2 and/or Trade Tankers) would consider AAC's claim with due dispatch and make reasonable proposals to settle it amicably;

(c) It is an express term that in the event that AAC's claim was not settled amicably, D1 and/or D2 would provide AAC with suitable security in the usual form of a P&I letter of undertaking from D1; and

(d) Alternatively, it is an implied term that in the event that AAC's claim was not settled amicably, D2 would provide AAC with suitable security in the usual form of a P&I letter of undertaking from D1.

AAC claims that "formal steps" under term (a) include, on the part of AAC, the issuance of an *in rem* writ and a warrant of arrest against the *United Endurance*, ship-watch on the *United Endurance*, demand and negotiation for security from D1 and/or D2, and unless such security is obtained, execution of the warrant of arrest against the *United Endurance*. On the part of D1 and/or D2, formal steps include a formal offer to provide or the provision of suitable security in the usual form of a P&I letter of undertaking from D1, to avert the risk of arrest.

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8 I note that AAC's position on the formation of the contract has been inconsistent as to the whether the contract was formed orally or in writing, and whether the email sent by D4 to AAC's solicitor, Mr Goh Kok Leong ("Mr Goh"), on 22 January 2007 ("the 22 January Email") concluded the contract or merely confirmed the contract already made orally. For the purpose of the appeal on striking out, I take AAC's final position that the contract was in writing, with the 22 January Email being the offer and the email reply from Mr Goh to D4 on the same day being the acceptance. The telephone conversation between MH and D4 on 17 January 2007 ("the 17 January Telephone Conversation") set the context for and gave rise to this contract. AAC alleges that D1 and D2 breached the contract when they refused to provide security for AAC's claim after parties failed to settle.

Factual support for the pleaded terms

9 I start with the pleaded terms (a) and (b) (see [7] above). I am satisfied that there is basis in the email correspondence for the claim that there was a contract agreed between AAC and D1 and/or D2 with terms (a) and (b) as express terms. Terms (a) and (b) can be gathered from the 22 January Email and based on the objective evidence before me, I agree with Mr Goh that the threshold of a plainly or obviously unsustainable action is not made out. The email is as follows:[1]

[1] Defendant's Bundle of Documents Volume 1 ("DBOD"), at p 20.

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> Without Prejudice
>
> Kok Leong,
>
> Thanks for your message.
>
> Yes we do think there is *a reasonable prospect of knocking this one [ie, AAC's claim] on the head* after sight of your clients' claim/supporting documents. I understand it is also the Club's [*ie*, SOP's] preference to *hold off any formal steps until our clients have been given a reasonable opportunity to take a position on settlement.*
>
> …
>
> Regards
>
> Richard [*ie*, D4]
>
> [emphasis added]

10 The 22 January Email, read in the context of correspondence before and after it (analysed below at [10]–[15]), clearly sets out certain commitments on both sides. On AAC's part, it was (a) to stop pressing on with its intention to secure its claim (and all other formal steps in pursuing its claim), (b) to submit its claim papers to those representing the *United Endurance*, and (c) to give them reasonable time to assess the papers. On D1 and D2's part, the commitments were (a) to review the claim papers, (b) to take a position as to the settlement sum, and (c) after taking a position on the settlement sum as described in (b), to begin settlement talks with a view to settle whilst withholding formal steps. The contract between AAC and D1 and/or D2 can reasonably be described as a standstill agreement to settle.

11 The contents of the commitments are capable of being fleshed out and supported by email correspondence both before and after the 22 January Email. The genesis of the 22 January Email was the 17 January Telephone Conversation, which was initiated by D4. The gist of the conversation was

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reflected in the email from MH to D4 on the same day, stating that pursuant to their telephone conversation, he had written to TY of Spica for AAC to submit its claim papers to D4. MH told TY that he had received a call from D4, who said that the "claim (where liability would not appear to be in dispute) ought to be capable of a simple and straightforward resolution" and invited AAC to submit its claim documents to him. MH further informed that he was not sure if there had been any development in terms of getting security, but essentially, D4's approach "was to try and cut through all the protocol and see if a deal [couldn't] be done quickly to wrap this matter up".[2] In D4's reply to MH, he wrote that any position on liability should not get in the way of "a quick commercial settlement on the figures as soon as these [were] available together with the usual supporting documents".[3] The correspondence between D4, MH and TY show that D4 and MH were looking to have AAC agree to hold off formal steps, also referred to as "all the protocol". The ordinary "protocol" in the context of *in rem* claims such as a ship collision case is to secure the claim and this often occurs before attempts at settlement. Typically, the wording of a P&I Letter of Undertaking would respond to any settlement or judgment. An ordinary "protocol" would contemplate, amongst other things, the issuance of an *in rem* writ, for it protects against the running of time and change of ownership (if relevant), and a warrant of arrest if security is not furnished voluntarily. Thus, MH's email to TY shows that the intention of the parties to "cut through all the protocol" includes halting the necessary steps to obtain security as described.

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2 DBOD, at p 14.

3 DBOD, at p 15.

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12 TY then emailed Mr Goh informing him that D4 had contacted SOP, and SOP suggested that parties "should settle this straight forward claim".[4] TY told Mr Goh to contact D4 of Ince & Co. Thus, Mr Goh emailed D4 as follows:[5]

> **WP**
>
> Dear Richard,
>
> I act for the "Sunbright" ("SB").
>
> I am told you are on for the United Endurance "UE".
>
> SOP has suggested that this straight forward claim should be settled.
>
> Please let me know if you agree and whether your client is prepared to admit 100% liability for the collision.
>
> Regards,
>
> gkl

After receiving this email, D4 immediately told MH that he was hoping to "side-step" any discussion on liability "until [he] had seen [AAC's] claims/supporting documents and taken a view as to whether a quick settlement [could] be agreed (which [he] believe[d] [would] be the case)".[6]

13 The 22 January Email (at [9] above) is D4's reply to Mr Goh. In the email, D4 agreed with Mr Goh that there was a reasonable prospect of settling after assessing AAC's claim documents, and that it was also SOP's preference to hold off any formal steps. The requested documents were for the purpose of the *United Endurance* coming to a settlement position, so it can be reasonably inferred that they related to the quantum of the claim, especially since D4

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4 DBOD, at p 17.

5 DBOD, at p 18.

6 DBOD, at p 19.

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wished to side-step the issue of liability. In essence, the parties worked on the assumption that the *United Endurance*'s liability was not in question, and were looking to assess the quantum of AAC's claim.

14 Prior to the 17 January Telephone Conversation, security had been a key issue in the correspondence between the two sides, as well as in the internal correspondence of those writing on behalf of the *Sunbright*. Specifically, D4 was aware that MH had approached JP of D2 for security. The fact that AAC was on the cusp of pursuing security in Singapore prior to the proposal in the 22 January Email to halt formal steps supports the contention by AAC that "formal steps" in the 22 January Email includes pursuing security.

15 That the phrase "formal steps" includes pursuing security is also reflected in the email correspondence and the conduct of the parties after the 22 January Email. A telling email is the reply from MH on 16 January 2010 to queries posted by AAC's solicitors. In response to the query as to what he understood to be "formal steps" in his telephone conversation with D4 and in D4's email, MH stated that it referred to "the need to seek security for the claim of the Sunbright".[7] He further stated that D4 held the view that AAC did not really need to go through "the formality of arranging security" on "at least at that stage, a small and simple claim"; all that the *Sunbright* had to do "was to pass to [D4 its supporting] claim papers". The conduct of D4 and Mr Goh provides further evidence. Subsequent to the confirmation by Mr Goh that AAC "[c]ould hold off" formal proceedings, AAC stopped demanding security from D1 and D2 through Spica's Rahman. The focus of the communications between

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7 DBOD, at p 116.

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the parties shifted to the issue of AAC providing its claim documents for the *United Endurance* to assess the claim and come to a settlement position. D4 continuously sent chasers and reminders to Mr Goh asking for claim documents and seeking replies to enquiries, in the hope "for a quick and amicable settlement".[8] In one of the reminder emails sent on 8 March 2007, D4 stated that the matter "[could] be resolved amicably and promptly" and his "clients remain[ed] ready to consider [AAC's] properly documented and supported claims".[9] When the claim was still not settled after nearly two years of correspondence on the claim documents, D4 proposed a time extension for any claim to be brought against the *United Endurance* (in view of the time bar for claims) in the hope that "an amicable settlement [could] be reached", and suggested that it was "not necessary for [AAC] to issue a protective writ".[10] The conduct of the parties subsequent to 22 January 2007 underscores the existence of an agreement that all legal avenues were to be held in abeyance, for those representing the *United Endurance* to assess AAC's claim to reach a settlement position, in the hope of an amicable settlement. As a result of the agreement between the parties, the pursuit of the *in rem* claim and security was delayed. The standstill agreement to settle as described is quite different from an agreement to agree as suggested by counsel for D1 and D2, Mr Ian Teo ("Mr Teo"). I will elaborate on Mr Teo's point at [24] below.

16 The 22 January Email and the rest of the correspondence paint a consistent picture that D4 was asking AAC to submit its claim papers for the

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8 DBOD, at p 34.

9 DBOD, at p 36.

10 DBOD, at p 59.

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United Endurance to reach a settlement position. At the same time as the *United Endurance* was assessing AAC's claim, both parties were holding off formal steps, including pursuing security. The evidence shows that there were defined commitments on both sides.

17 Mr Teo submits that the issue of forbearance in seeking security was not even discussed between the parties, and cannot possibly be a contractual term. He argues that the issue was not brought up in the 17 January Telephone Conversation at all, as attested to by both MH and D4 in their affidavits. Given the evidence contained in the email correspondence as set out at [9]–[15] *supra*, there is a divergence in evidence as to whether formal steps include pursuing security, clearly constituting a triable issue. Mr Teo further submits that the emails show an informal understanding between the parties to put on hold formal steps and the basis of the informal understanding was that AAC's claim documents were ready. In so arguing, Mr Teo relies on the email from MH to TY on 17 January 2007 stating that D4 invited AAC to submit its claim "if [AAC] [had] complied [*sic*] [its] claim",[11] and on the email from MH to D4 sent on the same day reporting that he had told TY that "if [AAC's] claim [was] ready", it could submit it to D4.[12] These two emails sent by MH may merely mean that if the claim papers were ready, AAC could send them to D4. Mr Teo further points out that D4 referred to "a quick commercial settlement" in his email to MH.[13] This reflects D4's opinion that the settlement would be fast, rather than Mr Teo's argument that the understanding between the parties was

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11 DBOD, at p 14.

12 DBOD, at p 13.

13 DBOD, at p 15.

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only for a short period of time on the basis that AAC's claim documents were ready. Moreover, the continuous chasers and reminders sent by D4 to Mr Goh on the claim documents and the discussions between D4 and Mr Goh on the heads of claim and quantum over a period of nearly two years do not support D1 and D2's position.

18 With regard to term (c) (see [7] above), the averment of an express term to the effect that D1 and/or D2 would provide AAC with suitable security from D1 in the event that AAC's claim was not settled amicably is not supported by the evidence and there is no indication that the parties have even discussed such an express term. As Mr Teo rightly pointed out, the offer does not contain a term stipulating that D1 and/or D2 are to provide security in the event that AAC's claim cannot be resolved by settlement. Neither does any of the email correspondence show that the parties have addressed their minds to the situation where they are unable to settle. MH and D4 also testified in their affidavits that they did not discuss security during the 17 January Telephone Conversation. In this case, both the objective evidence and the affidavits of MH and D4 paint the same picture – the parties did not address the possibility of settlement negotiations breaking down and there is no express term dealing with such an eventuality. As such, I agree with the AR that term (c) should be struck out.

19 Nevertheless, I find that there is an arguable case that there is an implied term in fact on security in the event there is no settlement. The three requirements to be fulfilled to imply a term in fact are firstly, that there is a true gap in the agreement in that the issue was never considered by the parties; secondly, that it is necessary to imply the alleged term to give the agreement business efficacy; and thirdly, that the parties would have unhesitatingly

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affirmed the term should the question as to the existence of the term be posed at the time of the contract (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") at [101]). D1 and D2's reliance on JP's communication to MH that D1 did not give in-principle agreement to provide security is unhelpful to their case because this communication took place on 30 October 2006, which was before D4 proposed that the parties hold off formal steps for the *United Endurance* to come to a settlement position. I accept that there is an arguable case as to whether the implied term as claimed is necessary for business efficacy and whether the parties – who are well versed in admiralty practice, including the steps needed to secure the *in rem* claim in this case following the collision in Singapore involving a Liberian registered vessel – would be more likely to have affirmed the proposed implied term. As stated at [11] *supra*, the usual protocol in admiralty practice is to obtain security. Security is especially important in the present case since the *United Endurance* was the only ship owned by Trade Tankers. AAC was pursuing security when it agreed to put it on hold, even though security was important to ensure payment. MH's reply to Mr Goh's queries in 2010 (see [15] *supra*) stated that there was no need for AAC to seek security at that point in time in view of a likely settlement, implying that the understanding was that D1 would pay the settlement sum agreed between the parties. The question as to what would happen if settlement fell through has to be answered against this backdrop. I find that the context provides an arguable case that the proposed term is necessary for business efficacy and that the parties would have emphatically affirmed it.

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20 Mr Teo argues that term (d) cannot be implied because it is too vague – the term is silent on the quantum of security and a breakdown thereof. On the other hand, AAC submits that it is well settled as a matter of admiralty practice that a claimant is entitled to security based on the claimant's reasonably arguable best case, as stated in the *The Moschanthy* [1971] 1 LLR 37 at 44. Mr Teo's argument on quantum and breakdown misses the point. Neither do I consider it to be a drawback. Crucially, whether a term can be implied in fact turns on whether the three-step test in *Sembcorp* is met. At this stage, as regards the three-step test, it would not be wrong for this court to proceed upon the basis that there is sufficient evidence to satisfy an arguable factual case and a legally recognisable case of implied term in fact.

21 Parties did not address me on the requirement of consideration. In any case, a forbearance to sue is good consideration for a promise where it is requested by the other contracting party (*Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 at [22]; *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [91]). On the facts, the proposal for AAC to hold off formal proceedings, including the initiation of legal proceedings, was put forth by the defendants.

Was there a valid offer and acceptance?

22 Mr Teo submits that the 22 January Email cannot constitute a valid offer because it only contains D4's opinion that the claim was amenable to settlement and his reporting of SOP's preference. As explained above, there are clear commitments in the 22 January Email. For the sake of argument, reading the email on its own may support D1 and D2's position; however, the absence of a

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valid offer is not so clear-cut, contrary to Mr Teo's submission, when one considers the context leading up to the email. It is superficial for D1 and D2 to argue that D4 was simply conveying SOP's preference to hold off formal steps for the *United Endurance* to consider its settlement position and that AAC was carrying out the suggestion of SOP in holding off formal steps. The evidence shows that it was D4 who first suggested to MH to halt all formal steps for the *United Endurance* to assess AAC's claim documents to come to a settlement position. During that time, the *United Endurance* was perceived to be the paying party. The context shows that D1 and D2 proposed this arrangement as an offer.

23 Furthermore, I find that there is an arguable case that the reply from Mr Goh that he thought "[he] [could] hold off formal steps for the time being" can constitute a valid acceptance. Mr Teo argues that the language used does not show a final and unqualified expression of assent to the terms of the offer. Whether there is a valid acceptance depends on whether there is evidence of an objective intention to be bound – evidence of intention includes not only the choice of words used, but also the context in which the words were used and the conduct of the offeree (*Cooperatieve Centrale Raiffeisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [47]). It should be decided from the whole of the documents whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards (*Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798 at [16]). There is an arguable case that the reply was an affirmative assent, in light of the communications between the two sides prior to the 22 January

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Email, as well as the clear forbearance of AAC in seeking security (or initiating any other legal steps) and the shift of the focus of both sides to AAC's claim documents after the reply. Given the context, Mr Goh's choice of words "for the time being", in ordinary speech, could be used to mean for a reasonable period of time and it could also serve as a point of reference for the time to be allowed for performance of the standstill agreement to settle.

Was there intention to create legal relations?

24 D1 and D2 further argue that AAC's Contractual Claim should be struck out because there was no intention to create legal relations. They allege that the 17 January Telephone Conversation contains no more than an informal understanding between D4 and MH that the parties should attempt a quick and informal approach to settle the claim. The offer in the 22 January Email and the acceptance of that offer are similarly informal and non-committal. Moreover, the 22 January Email includes the heading "Without Prejudice". There was no discussion on the length of time the parties would engage in negotiations, when AAC would provide the claim documents, when negotiations could be said to be broken down. D1 and D2 further claim that any agreement to negotiate settlement is equivalent to an agreement to agree, which cannot constitute a contract. Once again, D1 and D2's position is not obvious and clear when one looks at the entire context of the correspondence between the two sides. The correspondence culminating in the 22 January Email suggests a serious intention on the part of those representing the *United Endurance* to resolve the Collision as quickly as possible because it was a simple matter that ought to be amenable to a settlement. There are definitive commitments on both sides (see [9] *supra*), distinguishing the present standstill agreement to settle from an

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agreement to agree. That the parties did not discuss when AAC would provide the claim documents and when negotiations could be said to be broken down does not show so clearly and obviously that there was no intention to create legal relations.

Was AAC's subsequent conduct incompatible with the existence of the alleged contract?

25 Mr Teo submitted that AAC's subsequent conduct after settlement negotiations broke down is incompatible with the existence of the alleged contract. Firstly, Mr Goh wrote to Trade Tankers' solicitors that AAC had refrained from arresting the *United Endurance* at the request and instruction of SOP. This argument holds little weight because Mr Goh sent a subsequent email to clarify that AAC had refrained from arresting the *United Endurance* because "[Trade Tankers'] P&I Club [*ie*, D1] had earlier requested that [he] should hold off formal steps".[14] Secondly, Mr Teo argued that by asking whether Trade Tankers would be "prepared to put up security",[15] Mr Goh did not demand for security, contrary to his belief that AAC was entitled to security. In my view, Mr Teo cannot rely solely on the language to show that there was no demand for security and to strike out the existence of the alleged contract. Thirdly, Mr Teo submitted that had there been a contract, there would have been no need for Mr Goh to agree to a time extension to negotiate a settlement. The agreement to a time extension is always a good measure to take to protect AAC's claim against the time bar, and is of little import with regard to the existence of the alleged contract.

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14 DBOD, at p 90.

15 DBOD, at p 90.

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Authority

26 D1 and D2 argue that D4 at all times acted solely on behalf of Trade Tankers, and that D4 did not have actual nor apparent authority to enter into the alleged contract. In so arguing, D1 and D2 rely on Rule 21.1.1 of D1's Rules, which provides that D1 has the right to appoint and employ on an assured's behalf lawyers. D1 and D2 also rely on the email from JP to D4 thanking D4 for confirming that he was free to act on behalf of the owner of the *United Endurance*,[16] and on the email from MH to TY stating that D4 was acting for the owner of the *United Endurance*.[17] On apparent authority, D1 and D2 argue that at no point in time did D1 and D2 represent to AAC that D4 had authority to enter into any contract on their behalf.

27 Contrary to the arguments above, I accept that there is an arguable case on both express and apparent authority. A piece of evidence that supports the existence of express authority is the email from D4 to MH sent on 17 January 2007, in which D4 stated that he heard from "[his] clients" that MH contacted them in October 2006.[18] The person whom MH contacted in October 2006 was JP from D2 – this means that D4 referred to D2 as his client. Moreover, Rule 21.1.2 of D1's Rules states that D1 shall have the right to direct the conduct of any claim or legal or other proceedings against an assured relating to any potential liability for which an assured is or may be insured by D1 in whole or in part, including direction that such claim or proceedings should be settled, compromised, or otherwise disposed of in such manner and upon such terms as

16 DBOD, at p 1A.

17 DBOD, at p 14.

18 DBOD, at p 12.

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D1 may require.[19] D4 was likely to be acting on the instructions of D1 and D2, and, arguably, Rule 21.1.2 may be a basis for establishing apparent authority. Thus, there is an arguable case that D4 had authority to enter into the purported contract on behalf of D1 and D2. It was not suggested that AAC and their lawyers were put on inquiry as to D4's lack of authority. Accordingly, there would have been no reason for AAC and their lawyers to suspect that D4 did not have D1 and D2's authority to bind D1 and D2 in the light of Rule 21.1.2 which is a commonly known standard feature of international P&I Clubs. The present case is distinct from a case of a self-authorising agent as suggested by D1 and D2.

The Misrepresentation Claim

28 The AR concluded that the Misrepresentation Claim is obviously unsustainable, and should be struck out. AAC claims that D4, as agent for and on behalf of D1 and D2, has made representations in the 17 January Telephone Conversation and in the 22 January Email. AAC pleads that the representations made are false and untrue from their inception, and remained false for the whole period AAC refrained from commencing proceedings against the *United Endurance*. The same set of representations was pleaded in the claim against D4 in the fraudulent misrepresentation (see [45] below).

29 The Misrepresentation Act allows a representee to claim damages for any non-fraudulent misrepresentation in respect of which he could have recovered damages had the misrepresentation been fraudulent. The remedy is only available if the parties had entered into a contract and where the

[19] Pavlidis' 3rd affidavit, at p 47.

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misrepresentation has *not* been incorporated as a term of the contract. Where a representation has been incorporated into the contract, the consequences of non-fulfilment lie to be determined by the principles of breach of contract (Pearlie Koh, "Misrepresentation and Non-disclosure" in ch 11 of *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 11.001). The Act does not alter the law as to what amounts to an actionable misrepresentation (*Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [23]), and the ingredients of a fraudulent misrepresentation have to be present save for the ingredient of dishonesty. Section 2(1) of the Misrepresentation Act states:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

30 In a claim for fraudulent misrepresentation, the following elements must be satisfied (*Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]; *ACTAtek, Inc and another v Tembusu Growth Fund Ltd* [2016] 5 SLR 335 at [46]):

(a) There must be a false representation of fact made by words or conduct;

(b) The representation must be made with the intention that it should be acted upon by the plaintiff;

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(c) It must be proved that the plaintiff had acted upon the false statement;

(d) It must be proved that the plaintiff suffered damage by so doing; and

(e) The representation must be made with the knowledge that it is false, or in the absence of any genuine belief that it is true, or with recklessness as to whether it is true or not.

To establish a claim under s 2(1) of the Misrepresentation Act, all the requirements except for requirement (e) have to be satisfied.

31 For the purpose of the appeal against the application to strike out the claim, I will take AAC's case at its highest, which is assuming that AAC is able to prove the existence of the representations it asserts. I will proceed on AAC's case that although the word "security" was not mentioned in the 17 January Telephone Conversation and in the 22 January Email, the phrase "formal steps" in the 22 January Email encompasses pursuing security.

32 Before the Misrepresentation Act is engaged, it has to be shown that the alleged representations are not incorporated into the alleged contract. The issue is especially acute in the present case because the sources of the alleged misrepresentations and those of the alleged contractual terms are the same, *ie*, the 17 January Telephone Conversation and the 22 January Email. The alleged misrepresentations and terms of contract are produced in the table below for easy comparison:

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Alleged representations	Alleged terms of contract
(a) D4 expressed his desire to see the case dealt with quickly and amicably; (b) AAC's claim against the *United Endurance* was a fairly straightforward case about liability and could easily be resolved without recourse to asking for security; (c) AAC did not need to go through the formality of arranging security on what was after all, at least at that stage, a small and simple claim to be addressed; (d) All that D4 needed was to see the details of the claim of the *Sunbright*, after which an offer would be made to settle it; (e) There was a reasonable prospect of knocking this one on the head after sight of AAC's claim/supporting documents; and (f) It is also the Club's preference to hold off any formal steps until D4's clients have been given a reasonable opportunity to take a position on settlement.	(a) It is an express term that AAC and D1 and D2 would hold off formal steps until D1, D2 and/or Trade Tankers had been given a reasonable opportunity to take a position on settlement; (b) It is an express term that D4 (as agent of or on behalf of D1, D2 and/or Trade Tankers) would consider AAC's claim with due dispatch and make reasonable proposals to settle it amicably; (c) It is an express term that in the event that AAC's claim was not settled amicably, D1/D2 would provide AAC with suitable security in the usual form of a P&I letter of undertaking from D1 (to be struck out); and (d) It is an implied term that in the event that AAC's claim was not settled amicably, D2 would provide AAC with suitable security in the usual form of a P&I letter of undertaking from D1.

33 It can be clearly seen from the table that all the pleaded representations are similar to the pleaded terms of the contract. Not only are the alleged misrepresentations from the same sources as the alleged contractual terms,

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representations (e) and (f) are the exact words used by D4 in the 22 January Email, on which the confirmation of the alleged contract between the parties is based. It is also arguable that representation (d) has been incorporated into the alleged contract as it corresponds to term (b). Thus, it is unclear that there is a claim under the Act separate from the Contractual Claim at all. Nevertheless, since there is scant argument presented by counsels on this point, I will not strike out the claim on this ground.

34 It has been submitted by the defendants with great emphasis that the representations are not actionable because they are statements of opinion. On the surface, the representations as phrased do seem to be statements of opinions and not statements of facts. A statement of opinion is generally not actionable, but a speaker would have made a false statement of fact if he expressed the opinion without holding it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it (*Chitty on Contracts* (Sweet & Maxwell, 32nd Ed, 2015) ("*Chitty on Contracts*") at para 7-008). A statement of opinion may also imply a representation of fact that the speaker has grounds for holding that particular opinion, and whether such an assertion of fact will be implied depends on the circumstances and the meaning of the statement conveyed to the representee (*The Law of Contract in Singapore* at para 11.044; *Chitty on Contracts* at para 7-009). Therefore, merely submitting that the alleged representations are statements of opinion would not bring the Misrepresentation Claim beyond the threshold of being clearly unsustainable. At this stage, the claim should not be struck out in the presence of evidence to satisfy an arguable case that the alleged representations imply underlying statements of fact.

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35 That said, the Misrepresentation Claim is to be struck out because the evidence pointed out by AAC does not show that the representations are untrue from their inception. AAC has drawn the court's attention to four points: (a) D4 evinced no desire to deal with AAC's claim amicably; (b) the settlement negotiations stretched for more than 20 months; (c) the offer of settlement is unreasonable; and (d) D1 and D2 refused to provide security after a settlement could not be reached and denied that there was an agreement to provide security in such an eventuality. These four points do not show that the representations made are untrue since their inception. D4's repeated chasers sent to Mr Goh for documents and replies go against the claim that D4 evinced no desire to deal with the claim amicably; moreover, the email correspondence shows that AAC was supposedly the one responsible for a large part of the delay in the negotiations. The settlement offer made two years after the alleged representations does not show that the representations were untrue when they were made. None of the representations envisaged the situation where no settlement could be reached, so the fourth point made by AAC does not engage the veracity of the alleged representations at all. Since there is no evidence to show that the representations were untrue when they were made, the claim is to be struck out. For the avoidance of doubt, the findings canvassed here are specifically in relation to the requirements to establish a claim in misrepresentation, and are not to affect the findings of the trial judge on the Contractual Claim.

36 Having concluded that the Misrepresentation Claim is to be struck out, it is not necessary to deal with D1 and D2's further submission that the Misrepresentation Claim is time-barred. For completeness, however, there is no

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operative time bar. D1 and D2 submit that the claim is a tortious claim and an action founded on tort shall not be bought after the expiration of six years from the date on which the cause of action accrued, pursuant to s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed). According to D1 and D2, the cause of action accrues from the date the plaintiff first suffers loss due to his entering into a contract as a result of the misrepresentations, and in the present case, that is when the *United Endurance* was demolished, *ie*, 16 August 2007. Since the Misrepresentation Claim was only brought on 20 March 2015, the action is time-barred. AAC, on the other hand, argues that the loss was suffered only when D1 and D2 refused to provide security, and that was on 23 March 2009. I agree with AAC's position that its loss was suffered only when D1 and D2 refused to provide security, because it was not a foregone conclusion that there would be any loss to AAC before that date. Thus, the claim is not time-barred. Nevertheless, for the reasons above, the Misrepresentation Claim is to be struck out because it is frivolous and obviously unsustainable.

Unjust Enrichment

37 In the alternative to the Contractual Claim, AAC argues that it has a claim in unjust enrichment against D1 and D2.

38 The elements to establish a claim in unjust enrichment has been set out in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [98] as follows:

(a) Has the defendant benefited or been enriched?

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(b) Was the enrichment at the expense of the claimant?

(c) Was the enrichment unjust?

(d) Are there any defences?

39 AAC claims that the benefits received by D1 and D2 are that they avoided the time and costs associated with attending to an arrest of the *United Endurance* and the negotiations on providing security to AAC and counter-security from the owner of the *United Endurance*, as well as the benefit of receiving advice from D4 who would not be qualified to represent them in any Singapore proceedings. The losses sustained by AAC, as claimed, are that AAC gave up its right to arrest the *United Endurance* pending the settlement of the claim before the ship was demolished, and the opportunity to resolve the case more expeditiously through court processes.

40 I agree with D1 and D2 that the second requirement to establish a claim in unjust enrichment obviously cannot be satisfied on the basis of how AAC intends to plead the gain and the loss. There needs to be a nexus between the value that was once attributable to the plaintiff and the benefit received by the defendant, *ie*, the defendant has to have received a benefit from a subtraction of the plaintiff's assets. This requirement is not a *carte blanche* to substitute any sort of connection, causal or otherwise, between the gain and the loss; the plaintiff has to prove that he has lost a benefit to which he is legally entitled or which forms part of his assets, and which is reflected in the recipient's gain (*Anna Wee* at [113] and [128]). D1 and D2's benefits in the avoidance of costs of legal proceedings and the negotiations of securities, as well as in having D4 as the solicitor for the *United Endurance* cannot be said to be a subtraction of

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the AAC's assets. Based on AAC's arguments, the benefits are only causally related to AAC's forbearance to initiate legal proceedings against the *United Endurance*. Therefore, AAC's claim in unjust enrichment is obviously unsustainable on this legal requirement and should not be allowed to be included as a cause of action.

41 To complete the discussion, as to whether the enrichment is unjust, the last legal requirement, it is arguable that the unjust factor on the facts is that of a failure of basis. The core underlying idea of failure of basis is that a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional; if the condition is not fulfilled, the recipient must return the benefit. This condition may be the existence of a state of affairs (Goff & Jones, *The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("*Goff & Jones*") at para 12-01). A failure of basis has been referred to as a failure of consideration (*Goff and Jones* at para 12-10), which is an unjust factor listed in *Anna Wee* at [132]. On the facts of the present case, it is arguable that the existence of the *United Endurance* was the state of affairs upon which the parties based their understanding to hold off formal steps, including ship arrest and the provision of security, in order to reach an amicable resolution. Once the *United Endurance* was demolished, there was no need for D1 to provide any security to avert the threat of arrest. The change in the circumstance forming the basis of the parties' understanding means that the continued retention of any benefit at the expense of AAC is unjust. But, this was not how AAC put forward its argument on benefit.

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Good Faith

42 I find that the argument on the issue of good faith is plainly and obviously unsustainable. AAC clarified in oral submissions that its case is not that there is a free-standing actionable duty on D4, but that D4's actions pursuant to the alleged contract between D1 and/or D2 and AAC should be construed in light of D4's duty of good faith. AAC bases its argument on r 7(1)(*b*) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("LPPCR 2015") that stipulates "[a] legal practitioner must deal with another legal practitioner in good faith". On the facts, AAC alleges that D4 did not deal with AAC's solicitors in good faith in that he did not inform the latter prior to the *United Endurance* being broken up and did not offer a fair amount in settlement.

43 Even leaving aside the points that r 7(1)(*b*) was not in force at the time of the alleged contract and that LPPCR 2015 does not apply to foreign legal practitioners, the legal basis for AAC's position that the rule governing the conduct of the parties' solicitors can be used to construe the parties' actions under a contract is devoid of any legal principle or authority. Rule 7(1)(*b*) is intended to govern the conduct of solicitors towards each other, and it is inconceivable that the rule is intended to affect the contractual relationships between the solicitors' clients. A reading of r 7(1)(*b*) suggests that a solicitor's duty of dealing in good faith is owed only to another solicitor.

Registrar's Appeal No 303 of 2016

44 This appeal is against the AR's decision allowing D4's application. In the proceedings before the AR and on appeal, AAC claims against D4 for

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fraudulent misrepresentation. The representations alleged are the same as those in the Misrepresentation Claim, as set out at [32] *supra*. AAC's case is that D4 knew that the above representations were false or was reckless as to their truth when he made the alleged representations. The AR found that the claim to be plainly and obviously unsustainable. I agree with the AR.

45 The analysis at [35] *supra* similarly applies to this claim. I find that there is no evidence to show that the representations are untrue. Thus, the claim on fraudulent misrepresentation should similarly be struck out. Although this is sufficient to dispose of the claim, I will go on to address the issue of fraud.

46 In submitting that D4 was fraudulent, AAC relies on the following: D4 requesting for further claim documents around November 2008 even after AAC had allegedly provided sufficient documents; the allegedly unreasonable settlement offer in relation to the non-loss of use heads of claim made on 28 November 2008; and the fact that the owner of the *United Endurance* disputed liability and filed a counterclaim in the action brought by AAC in July 2009. AAC claims that D4 had advised his clients on the settlement sum, and had advised them to dispute liability and file the counterclaim. These events that AAC seeks to rely on took place almost two years after D4 made his representations. There is no evidence showing any actual link between the three events pointed out by AAC and any fraudulent intention when D4 made the representations. Even on AAC's allegation that D4 had advised his clients on the settlement sum, the dispute on liability and the counterclaim, there is no evidence of any link between the advice given almost two years later to any fraudulent intent two years earlier. There is no contemporaneous evidence to support AAC's claim that D4 did not actually have any desire nor intention to

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settle AAC's claim. The burden of proof is on AAC to show that there was fraudulent intention, and the standard of proof is a high one (*Anna Wee* at [31]). To resist a striking out application, AAC has to point to some evidence to substantiate its claim that there is fraud, failing which the claim is fanciful. I see no evidence which hints at any fraudulent intent harboured by D4 when he made the representations.

47 On the other hand, objective evidence points to the absence of any fraudulent intent. Email correspondence shows that D4 had been negotiating with AAC until the end of 2008, and was the one who had asked for time extensions twice to negotiate in the hope of achieving an amicable settlement. Moreover, email evidence shows that D4 was proactive in chasing AAC's representatives for documents and information. The evidence of MH buttresses the evidence that it was D4 who was trying to make progress on the claim to achieve an amicable resolution.

48 Mr S Mohan, counsel for D4, further submits that the claim in fraudulent misrepresentation is out of time. D4's case is that AAC was alerted to the alleged falsity of D4's representations on 18 March 2009 when the solicitors representing the *United Endurance* wrote to Mr Goh that security "[might] not be forthcoming" because their clients were "not obliged" to provide security.[20] If this is taken to be the date that AAC was alerted to the falsity, then the claim made on 20 March 2015 would be time-barred. However, it was only in the email sent on 23 March 2009 that the solicitors representing the *United Endurance* confirmed that their clients would not be putting up security.[21]

[20] DBOD at p 92.

[21] DBOD at p 96.

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Taking this to be the date on which AAC was alerted to the alleged falsity of D4's representations, AAC's claim would be within time. In assessing the merits of AAC's claim, I have assumed that the claim is within time.

Conclusion

49 Based on the reasons given above, the Misrepresentation Claim against D1 and D2 as well as the claim in fraudulent misrepresentation against D4 are struck out. The proposed inclusion of the claim in unjust enrichment, and the claim regarding good faith against D1 and D2 are disallowed. The Contractual claim against D1 and D2 is not struck out, except for the pleading that there is an express term (c) in the alleged contract.

50 I will hear parties on costs as well as attend to any specific orders and directions that are required following the decision made. Parties would probably require directions on amendments to the Statement of Claim and consequential amendments to D1 and D2's Defence. Parties are to write to the Registry for a hearing date.

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Sgd.
Belinda Ang Saw Ean
Judge

Goh Kok Leong, Muhammad Asyraf bin Isnin and John Koh (Ang & Partners) for the appellant;
Ian Teo Ke-Wei and Dedi Affandi bin Ahmad (Rajah & Tann Singapore LLP) for the first and second respondents;
third respondent not represented, not present;
Mohan s/o Ramamirtha Subbaraman, Adrian Aw Hon Wei and Rachel Loke Jia Min (Resource Law LLC) for the fourth respondent.

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