IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 43

Admiralty in Rem No 48 of 2019
(Summons No 2585 of 2020)

Between

(1) POS Maritime NX S.A.
(2) Pan Ocean Co., Ltd.

… *Plaintiffs*

And

Owner and/or Demise Charterer of the vessel Caraka Jaya Niaga III-11 (IMO No. 9018359)

… *Defendant*

JUDGMENT

[Admiralty and Shipping] — [Collision]
[Debt and Recovery] — [Counterclaim] — [Time-bar] — [Single liability principle]

Version No 1: 22 Feb 2021 (14:44 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **2**

THE PARTIES' ARGUMENTS **5**

TWO PRELIMINARY POINTS **7**

THE SINGLE LIABILITY PRINCIPLE **10**

THE SINGLE LIABILITY PRINCIPLE AS A FORM OF SET-OFF 18

CONCLUSION **20**

Version No 1: 22 Feb 2021 (14:44 hrs)

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The "CARAKA JAYA NIAGA III-11"

[2021] SGHC 43

General Division of the High Court — Admiralty in Rem No 48 of 2019
(Summons No 2585 of 2020)

S Mohan JC
21 September 2020

22 February 2021 Judgment reserved.

S Mohan JC:

Introduction

1 When two vessels are involved in a collision and both vessels are to blame for the collision occurring, the loss and damage suffered by the owners (which reference includes demise charterers) of the respective vessels will ordinarily give rise to claims and cross-claims by one owner against the other. Under Singapore law, liability for the collision is apportioned in accordance with s 1 of the Maritime Conventions Act 1911 (Cap IA3, 2004 Rev Ed) ("**MCA 1911**"). The general rule is that liability is apportioned according to the degree to which each vessel was at fault.

2 Depending on the apportionment of liability and the recoverable quantum of each shipowner's loss and damage based on that liability apportionment, one shipowner may be either the net payor (*ie,* net paying party) or the net payee (*ie,* net receiving party). This is because in practice, the

quantum of the smaller recoverable claim is deducted from the quantum of the larger recoverable claim, leaving only one net balance to be paid by the net payor to the net payee. This outcome is the result of applying what is known as the "single liability principle".

3 The application of the single liability principle as summarised above is a straightforward one in cases where the claims of both shipowners against each other are not time-barred. However, what happens in a case where the claim of one of the shipowners against the other *is* time-barred? Can that shipowner, as the net payor, still avail itself of the single liability principle in order to reduce its liability to the net payee? These questions lie at the centre of the application before me. I am given to understand by counsel that this is the first case in which these questions have squarely arisen for determination in Singapore whereas they have been considered once in the English High Court (see [18] below).

Background

4 In HC/SUM 2585/2020 ("**SUM 2585**"), the defendant sought an order for the court to determine a preliminary question of law or issue pursuant to O 33 r 2 of the Rules of Court (Cap 332, R5, 2014 Rev Ed) ("**ROC**") and/or the inherent powers of the court. At the hearing of SUM 2585 on 21 September 2020, there was initially some disagreement between the parties as to whether the original phrasing of the question by the defendant was appropriate. After hearing the parties and with input from the court, the following question was framed with the consent[1] of the parties ("**Question**"):

> Whether the Defendant is able, on the basis of the agreed facts annexed to this Order as Annex A, to rely on or raise the 'single liability principle' (as referred to in Annex B to this Order), in

[1] Minute Sheet dated 21 September 2020 at p 1.

Version No 1: 22 Feb 2021 (14:44 hrs)

> diminution and/or reduction of the Plaintiff's claim in this action in circumstances where the Defendant's counterclaim against the Plaintiff is time-barred.

The agreed facts and procedural history

5 The factual matrix surrounding the Question is not in dispute. The agreed facts are set out in Annex A of my order dated 21 September 2020 ("**Order**").

6 The first plaintiff is the registered owner of the vessel *Grand Ace12* and the second plaintiff is its demise charterer.[2] The defendant is the demise charterer of the vessel *Caraka Jaya Niaga III-11*.[3]

7 On or about 3 April 2017, a collision occurred between the *Grand Ace12* and the *Caraka Jaya Niaga III-11*. Both the plaintiffs and the defendant claim to have suffered loss and damage as a result of the collision.

8 Under s 8 MCA 1911, the time-bar to bring proceedings (including by way of a counterclaim) came into effect on or about 3 April 2019.

9 On 29 March 2019, the plaintiffs issued an *in rem* writ against the *Caraka Jaya Niaga-III 11* in HC/ADM 48/2019 ("**ADM 48**").

10 On 6 May 2019, the writ in ADM 48 was served on the *Caraka Jaya Niaga-III 11*.

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2 Affidavit of Minjoo Kim dated 5 July 2019 ("Kim's Aff") at para 1.

3 Affidavit of Annsley Wong Sue Ee dated 19 June 2020 ("Annsley's Aff") at para 4.

Version No 1: 22 Feb 2021 (14:44 hrs)

11 On 13 May 2019, the defendant issued an *in rem* writ against the *Grand Ace12* in HC/ADM 64/2019 ("**ADM 64**"). The writ in ADM 64 was not served and lapsed on or about 13 May 2020.

12 In ADM 48, the defendant applied in HC/SUM 2924/2020 filed on 12 June 2019 for an extension of time, pursuant to s 8(3) MCA 1911, to maintain a counterclaim against the plaintiffs notwithstanding that the counterclaim was by then time-barred under s 8(1) MCA 1911.

13 The application was heard on 19 August 2019 by an assistant registrar ("**AR**") and dismissed on 4 October 2019. No appeal was brought by the defendant against the decision of the AR.

14 Accordingly, the defendant's claim or counterclaim against the plaintiffs arising out of the collision is time-barred.

15 On 11 June 2020, the plaintiffs and defendant entered into a Consent Judgment which provided that the plaintiffs shall bear 40% of the blame for the collision and the defendant 60% of the blame. The Consent Judgment was entered into without prejudice to the defendant's reliance on the single liability principle and without prejudice to the plaintiffs' right to challenge the defendant's reliance on the single liability principle when so presented or argued.

16 These are the agreed facts which form the factual substratum on which the Question is to be determined. After making the Order, I also heard the parties' substantive arguments on the Question on 21 September 2020 and reserved judgment thereafter.

Version No 1: 22 Feb 2021 (14:44 hrs)

The parties' arguments

17 The defendant argues that the fact that its counterclaim is time-barred is "irrelevant" because it is merely seeking to defend itself against the plaintiff's claim by relying on the "single liability principle" as applied in *The Khedive* [1882] 7 App Cas 795 ("*The Khedive*"). It is not seeking to bring any proceedings against the plaintiffs. Based on the apportionment of liability agreed in the Consent Judgment (see [15] above), the plaintiffs would expect to recover 60% of their recoverable loss and damage and the defendant 40% of its recoverable loss and damage. The defendant argues that it should be entitled to set-off 40% of its loss and damage against 60% of the plaintiffs' recoverable loss and damage in reliance on the single liability principle, thereby reducing its liability to the plaintiff to the net sum due.[4]

18 In support of its case, the defendant relies primarily on the English High Court's decision in *MIOM 1 Ltd v Sea Echo ENE (No 2)* [2012] 1 Lloyd's Law Reports 140 ("*Sea Echo*"). Mr R Govin, counsel for the defendant, contends that *Sea Echo* should be followed and applied in Singapore. In particular, Mr Govin draws my attention to the following paragraphs of Justice Nigel Teare's judgment (at [76], [78] – [79]):[5]

> 76. The important question, it seems to me, is whether section 8 of the Maritime Conventions Act 1911 and its successor, section 190 of the Merchant Shipping Act 1995, have modified the single liability principle so as to enable a shipowner to assert and claim a liability which does not take into account the damage suffered by the other vessel whose owner has not complied with the time limit provided by those Acts.

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4 Defendant's Written Submissions for SUM 2585 dated 17 September 2020 ("DWS") at paras 26, 30, 34 – 36.

5 DWS at paras 23 – 24

Version No 1: 22 Feb 2021 (14:44 hrs)

> 78. Section 190 bars the remedy of bringing proceedings as did its predecessor, section 8 of the Maritime Conventions Act 1911: see *Aries Tanker Corporation v. Total Transport Ltd (The Aries)* [1977] 1 WLR 185 at page 188 per Lord Wilberforce. A shipowner who expects to be the net payee needs to enforce the remedy available to him by bringing proceedings against the other shipowner. If he has failed to comply with section 190 that remedy is barred. **However, where he expects to be the net payer, he may not wish to commence proceedings but only, if sued by the other shipowner, to rely upon the principle established by *The Khedive* to ensure that any judgment obtained against him takes account of the damage suffered by him. In that event he is merely defending himself by relying upon the limitation imposed by the rule in Admiralty on the sum in respect of which the defendant is liable to the claimant. He is not bringing proceedings**.
>
> 79. I have therefore concluded that section 190 does not affect the application of the principle established by The Khedive. **It follows that, whether or not the court may properly grant the defendant an extension of time, the defendant remains entitled to rely upon that principle**.
>
> [emphasis added]

19 On the other hand, counsel for the plaintiffs, Ms Vivian Ang, submits that the defendant is not entitled to rely upon the single liability principle to diminish or reduce the plaintiffs' claim. She submits that such a backdoor route to circumventing the time bar cannot be countenanced,[6] and that the single liability principle does not apply where the counterclaim is time-barred. The plaintiffs also contend, among others, that the decision in *Sea Echo* should not apply to the present case as it can be distinguished on the facts and is, in any event, unsound and should not be followed.[7]

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6 Plaintiffs' Written Submissions on the substantive merits of the Single Liability issue dated 17 September 2020 ("PWS") at paras 2, 6 – 7.

7 PWS at para 13.

Version No 1: 22 Feb 2021 (14:44 hrs)

Two preliminary points

20 Before dealing with the application and the Question proper, I make two preliminary points.

21 First, the discussion by Teare J on the single liability principle espoused in *The Khedive* and its interplay with s 190 of the UK Merchant Shipping Act 1995 (which is *in pari materia* with s 8 MCA 1911) was *obiter dicta*. In *Sea Echo*, the court had already determined the apportionment of liability for the collision after a full trial. The plaintiffs did not raise any objection to the defendant's counterclaim on the basis of it being time-barred at any point during the trial on liability – certainly, no time-bar had ever been pleaded. The issue of the counterclaim being time-barred was only raised by the plaintiffs when Teare J had to decide on the appropriate orders for the costs of determining liability. It was only at that point that the plaintiffs contended that the defendant was not entitled to costs because it had no existing counterclaim, on the basis that the defendant's counterclaim was by then time-barred. Teare J found on the facts that it was much too late for the plaintiffs to raise a time-bar point on the defendant's counterclaim and they were accordingly estopped from doing so. On this ground alone, Teare J found and held that there was a valid and existing counterclaim that he could take into account for the purposes of assessing the legal costs for determining the apportionment of liability for the collision and consequently, what the appropriate cost order should be. It is also pertinent to note that unlike the defendant in this case who did not pursue its application for an extension of time to maintain its counterclaim any further following the dismissal of the application by the AR, the defendant in *Sea Echo* actively sought, as an alternative, an extension of time to maintain its counterclaim. Indeed, Teare J concluded that, if necessary for his decision, he would have been prepared to grant the defendant in *Sea Echo* the requisite extension of time

Version No 1: 22 Feb 2021 (14:44 hrs)

to maintain its counterclaim (see [63]). Therefore, strictly speaking, the decision in *Sea Echo* did not turn on the application of the single liability principle to a time-barred counterclaim, unlike the situation in SUM 2585.

22 Second, it is also important to understand the nature and effect of the time bar under s 8 MCA 1911.

23 Section 8 MCA 1911 prescribes a two-year time bar in respect of, among others, collision claims and states as follows:

> **Limitation of Actions**
>
> 8.—(1) No action shall be maintainable to enforce any claim or lien against a ship or her owners in respect of —
>
> > (a) any damage or loss to another ship, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former ship, whether such ship be wholly or partly in fault; or
>
> …
>
> unless proceedings therein are commenced within 2 years from the date when the damage, loss or injury was caused or the salvage services were rendered.
>
> (2) An action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment.
>
> (3) Notwithstanding subsections (1) and (2), any court having jurisdiction to deal with an action to which this section relates —
>
> > (a) may, in accordance with the Rules of Court, extend any such period, to such extent and on such conditions as it thinks fit; and
> >
> > (b) shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant ship within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides

Version No 1: 22 Feb 2021 (14:44 hrs)

> or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

24 Time bars may take effect by either: (a) barring the remedy sought by the party whose claim is not brought in time; or (b) extinguishing altogether the substantive rights underlying one's claim (Toh Kian Sing, *Admiralty Law and Practice* (3rd Ed, 2017) ("*Toh Kian Sing*") at p 428).

25 It is well established that the time bar under s 8 MCA 1911 is procedural in nature and falls into the former category. Thus, a plaintiff's failure to bring its claim within the time-limit prescribed by s 8 MCA 1911 merely bars the remedy sought by the plaintiff (*The Aries Tanker Corporation v Total Transport Limited* [1977] 1 Lloyd's Rep 334 at 402c). In other words, s 8 MCA 1911 bars the "maintainability" of proceedings by a plaintiff (*Sea Echo* at [36] and [78]).

26 It is also accepted that s 8 MCA 1911 applies equally to counterclaims (*The El Arish* [1994] 1 SLR(R) 141 in the context of s 8 MCA 1911 and *The Pearl of Jebel Ali* [2009] 2 Lloyd's Rep 484 at [32] and [34] in relation to s 190 of the UK Merchant Shipping Act 1995).

27 Thus, the fact that the defendant's counterclaim is time-barred prevents the defendant from seeking any remedy for its counterclaim but does not extinguish the underlying rights which gave rise to the counterclaim.

28 Reverting to the case at hand, the issue before me pivots on whether the single liability principle is applicable even when the defendant's counterclaim is time-barred, and whether the counterclaim may be raised, not as a remedy in the sense of a cause of action seeking substantive relief (since the remedy is time-barred), but simply as a way to reduce the defendant's liability to the plaintiffs.

Version No 1: 22 Feb 2021 (14:44 hrs)

The single liability principle

29 In my judgment, the resolution of the Question very much turns on the true nature and operation of the single liability principle. Annex B of the Order states that:

> The 'single liability principle' is a reference to the principle as applied in *The Khedive* (1882) 7 App Cas 795.

30 Thus, it is critical to first understand what principle was decided and applied in *The Khedive*, and the reasons and context underpinning the decision.

31 At its core, the single liability principle may be summarised as follows. Where two vessels are involved in a collision for which both vessels are to blame, there does not exist two cross-liabilities in damages (*ie,* a separate liability on the part of one vessel to the owner of the other vessel for the proportion of his loss and *vice versa*). Instead, there is only a single liability for the difference between the moiety (*ie,* a portion) of the larger claim and a moiety of the smaller claim (see *The Khedive* at 801 – 807, especially at 801 where the central issue in *The Khedive* is framed). That difference is then payable by the net payor to the net payee.

32 *The Khedive* was a case involving a collision between two vessels, the *Voorwaarts* and the *Khedive.* The actual circumstances leading up to the collision are not relevant for the present purposes. It suffices to say that the collision caused damage to both vessels and to the cargo onboard. The damage to the *Voorwaarts* was more extensive than the damage to the *Khedive.* The owners of the *Voorwaarts* brought an action against the owners of the *Khedive* and the owners of the *Khedive* counterclaimed in respect of their own loss and damage. Both vessels were subsequently held equally to blame for the collision. The owners of the *Khedive* then commenced a limitation action and set up a

Version No 1: 22 Feb 2021 (14:44 hrs)

limitation fund. The fund in court was insufficient to satisfy all the claims for which the owners of the *Khedive* were answerable in damages.

33 The owners of the *Khedive* submitted that the limitation fund ought to be apportioned rateably between the owners of the *Voorwaarts* and the other claimants. The owners of the *Khedive* also contended that the *in rem* action brought by the owners of the *Voorwaarts* should be stayed except as regards to the counterclaim of the *Khedive's* owners which they sought to continue. On the other hand, the owners of the *Voorwaarts* argued that their claim against the limitation fund was for a moiety of the damage that the *Voorwaarts* had suffered *less* a moiety of the damage sustained by the owners of the *Khedive*, thereby wiping out the smaller claim of the owners of the *Khedive*. The owners of the *Voorwaarts* contended that once the respective damages had been ascertained and the net balance in favour of *Voorwaarts* established, both the claim and counterclaim should be stayed, leaving the owners of *Voorwaarts* to prove their rateable claim against the limitation fund of the *Khedive.* In short, the issue before the House of Lords in *The Khedive* was whether the tonnage limit of liability of the *Khedive* applied only after each shipowner's proportionate claim had been taken into account and a single liability had been determined.

34 The House of Lords reversed the English Court of Appeal's decision and answered the question in the affirmative in favour of the owners of the *Voorwaarts*. It held that the owners of the *Voorwaarts* were entitled to prove against the limitation fund of the *Khedive* for a moiety of their damage, less a moiety of the damage suffered by the owners of the *Khedive,* and to be paid, in respect of the net balance due to them, *pari passu* with the other claimants out of the limitation fund of the *Khedive*.

Version No 1: 22 Feb 2021 (14:44 hrs)

35 It is not easy to discern the true *ratio decidendi* in *The Khedive* which requires a close reading of the leading opinion of the House of Lords delivered by Lord Selborne L.C. The core inquiry was framed as follows (at 801):

> **The question is whether there are, in these cases [*ie,* both-to-blame collision cases], two cross liabilities in damages, of each shipowner to the other for half the loss which that other has sustained, or only one liability, for a moiety of the difference of the aggregate loss beyond the point of equality.** If both parties were solvent, and *if there were no statutory limit of liability*, the result, either way, would practically be the same; because, up to the point of equality, the loss would be borne (in the one view) by the owner who suffered it, and (in the other view) the one liability would be compensated by, or set off against the other, according to an equity which would most certainly have been enforced in the Court of Admiralty. If, however, by the effect of a supervening bankruptcy before judgment or of the statutory limitation of liability, the position of the two parties were rendered unequal, so that a claim by the one would only be to receive a dividend out of a fund, while a claim by the other would be payable in full, the distinction may become important. But a consequence arising out of circumstances foreign to the rule itself ought not to be regarded in the determination of this question, whether it may tend, practically, to disturb or to maintain that equality of participation in the loss arising from a common fault, which is the principle of the Admiralty rule.
>
> [emphasis added in italics and bold italics]

36 Crucially, Lord Selborne L.C. thought that the "solution of this question", depended "upon the *true effect of the procedure*, and the *forms of decrees*, of the Admiralty Court, in this class of cases" [emphasis added] involving both-to-blame collisions (*The Khedive* at 801).

37 Lord Selborne L.C. then embarked upon an examination of the historical procedure of the English Court of Admiralty in collision actions, and stated that when a suit was brought following a collision, it was always by one party, alleging the other party to be at fault. There would also generally be a cross-suit by the other party, with a like allegation of fault against his opponent in cases

Version No 1: 22 Feb 2021 (14:44 hrs)

where both parties were ultimately found to be at fault and both vessels had sustained damage (*The Khedive* at 802). Thereafter Lord Selborne L.C. summarised the genesis and workings of the single liability principle as follows (at 802 - 803):

> … At the hearing, whether of one such suit only, or of two such suits, heard separately, or conjoined, the Court, **when it determined that both ships were to blame, usually pronounced in each suit a separate decree.** It cannot be denied that the more common and recent form of such decree seems (prima facie, at all events) favourable to the contention of the respondents. In each suit there was (as I have said) a separate decree, declaring that both ships were in fault; "and that the damage arising therefrom ought to be borne equally" by the owners of both ships; and afterwards proceeding to "condemn" the defendants and their bail in a moiety of the damages proceeded for by the plaintiffs; and referring it to the Registrar, assisted by merchants, to assess the amount of such damages (with or without costs, as the Court might think fit). **Under every such decree, the Registrar made a report, finding that a moiety of the damages sustained by the plaintiffs amounted to so much, and (ordinarily) computing interest thereon from the date of the decree. A moiety of the damages sustained by the other party (if plaintiff in a cross suit) was in like manner found (also with interest) sometimes by the same, and sometimes by a separate report. It does not appear that, on the face of the reports made under this form of decree, any balance was ever struck** ; but, unless the parties, by a voluntary settlement, rendered further resort to the Court unnecessary, **the proper course would have been for that plaintiff, to whom a balance was due, to apply to the Court for a monition requiring the other party to pay it. A monition was seldom issued in practice ; indeed, Mr. Butt, in his argument for the respondents, stated that he had been unable to find one on the records of the Court. <u>But there cannot, I think, be any doubt, that, if issued, it would have been in favour of one plaintiff only and that for the balance representing one moiety of the excess of the aggregate loss beyond equality</u>, and the interest thereon, and the costs (if any) to which the plaintiff might be entitled.**
>
> [emphasis added in bold, added emphasis in bold underline]

Version No 1: 22 Feb 2021 (14:44 hrs)

38 Based on Lord Selborne L.C.'s summary above of the history behind the single liability principle and how it operated, the critical points to note are that the single liability principle was, first, borne out of the *procedure* applied in the English Court of Admiralty dating back to at least the 1800s. Second and more importantly, the application of the single liability principle clearly presupposed that both ships were at fault, both ships suffered damage and *both* shipowners advanced claims and counterclaims or cross-claims against each other that were valid (*ie, that were not time-barred*), be it in one suit or separate but conjoined suits. It was in this context that separate decrees on liability were issued in favour of each shipowner and, if a "monition" was issued by the Admiralty Registrar, it would be issued in favour of one party only "for the balance representing one moiety of the excess of the aggregate beyond equality."

39 In my judgment, this is the true essence of the single liability principle. It is in reality, a rule of procedure that has its origins in the "ancient rule of the Admiralty" (*per* Lord Selborne L.C. at 804). The key point is that the single liability principle as decided and applied in *The Khedive* presupposes the existence of valid or maintainable claims *and* cross-claims or counterclaims. This is so that the court could then, following the procedure in the Court of Admiralty, pronounce a single judgment (or "monition") in favour of the net receiving party for a moiety of its damage beyond the point of equality. It should be noted that on the facts of *The Khedive*, neither the claim of the *Voorwaarts* nor the counterclaim of the *Khedive* was time-barred.

40 My conclusion above is further supported by Lord Selborne L.C.'s speech at 806 – 807:

> These authorities are, I think, sufficient to prove that the course of the Court of Admiralty has been to use **its powers over its own procedure**, so as, **either at the hearing of a cross suit after decree and report in the original suit, or at the hearing**

Version No 1: 22 Feb 2021 (14:44 hrs)

> **<u>of two conjoined suits,</u>** or in that later stage at which a monition might be applied for, **to bring about the same result as if the whole controversy between the owners of the two ships had been, from the first dealt with in one proceeding**; and this, not by way of set-off, but in a manner which can only be explained as resulting from the view which that Court took of the principle, and the just consequences, of its own rule.
>
> [emphasis added in bold and bold underline]

41 In my view, the logical corollary of the passage quoted above is that the single liability principle as applied in *The Khedive* requires that both the claim and the cross-claim (or counterclaim) are maintainable and not time-barred. This being the case, with respect, I do not think that a shipowner who expects to be the net payor can instead of issuing proceedings in time, sit back, do nothing and rely on the single liability principle to defend himself simply because "[h]e is not bringing proceedings" (*Sea Echo* at [78] – [79] as reproduced above at [18]). The single liability principle, as a procedural rule, does not, in my view, apply or operate in a case where s 8 MCA 1911 is applicable to prevent the defendant from bringing or maintaining proceedings (including a counterclaim) in the first place.

42 I note that in arriving at his view (see [18] above), Teare J derived support from the decision of Dr Lushington in *The Seringapatam* (1848) 3 Wm Rob 38 ("*The Seringapatam*"), a decision which was also cited by Lord Selborne L.C. and Lord Blackburn in *The Khedive* at 806 and 821 respectively. Mr Govin also relied on *The Seringapatam* to support his argument that the application of the single liability principle did not require a valid or subsisting counterclaim.

43 With respect, I do not think *The Seringapatam* furthers the analysis. It is also a case that is distinguishable on its facts. The decision itself appears to have

Version No 1: 22 Feb 2021 (14:44 hrs)

involved a scenario where there were, in fact, valid and maintainable claims and cross-claims although the latter was subsequently discontinued.

44 *The Seringapatam* involved somewhat peculiar circumstances. A collision occurred in England between a foreign owned vessel, the *Harriet* and a British ship, the *Seringapatam.* The owners of the *Harriet* brought an action for damage in the English Admiralty Court and the owners of the *Seringapatam* brought a cross-action against them. As the *Harriet* had sunk following the collision and its owners were foreigners, the owners of the *Seringapatam* could not serve the writ in their cross-action. The owners of the *Seringapatam* thus applied to stay the action brought by the owners of the *Harriet* until the latter furnished bail in the cross-action brought by the *Seringapatam* against the *Harriet* (an application not dissimilar to that permitted under O 70 r 27 of the ROC). The application to stay the *Harriet*'s action was dismissed by Dr Lushington. Subsequently, the owners of the *Seringapatam* discontinued their cross-action against the owners of the *Harriet* because the former were unable to compel the latter to enter an appearance in the cross-action and had no security for their claim.

45 It was in those unusual circumstances that the court was faced with a motion by the owners of the *Seringapatam* for an order that the court, in assessing the amount of damage due to the owners of the *Harriet*, deduct a moiety of the damage sustained by the *Seringapatam*. Dr Lushington dismissed the motion holding that, the cross-action having been discontinued, the owner of the *Seringapatam* could not have the benefit of a decree which, in point of fact, had never been pronounced in their favour. However, to prevent injustice, the court did not permit the owners of the *Harriet* to recover its damages *unless* they *submitted* to the deduction of a moiety of the damage sustained by the owners of the *Seringapatam*.

Version No 1: 22 Feb 2021 (14:44 hrs)

46 It is clear from the facts summarised above that the court's sympathy was with the owners of the *Seringapatam* (even though the application by its owners was disallowed). It remained true that the owners of the *Seringapatam* had been compelled to abandon their cross-action. However, leaving that aside, it is material to note from the case report that the owners of the *Seringapatam had* commenced their cross-action before any time-bar had set in. There is also no suggestion in the case report that the cross-claim of the *Seringapatam* was time-barred, even at the time of Dr Lushington's decision on their application. *The Seringapatam* is thus not an authority that supports the defendant's argument that the single liability principle would apply even when the claim, cross-claim and/or counterclaim of one of the shipowners is barred by the limitation of time.

47 As I have explained above at [21], *Sea Echo* was also not, strictly speaking, a case that involved a time-barred counterclaim.

48 Mr Govin also contended that the essence of the single liability principle is based on equity and fairness in that one party should not be made to pay more than it should when the other party was also partly to blame for the collision.[8]

49 For the foregoing reasons, I disagree that the essence of the principle is based on considerations of equity and fairness or that such considerations can override others. As explained above at [39], the single liability principle was borne out of a procedure that was applied in the English Court of Admiralty, which procedure in turn operates on the premise that both shipowners' claims and counterclaims or cross-claims are not time-barred. If the defendant's

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[8] NOA p 4 at ln 15 – 18.

Version No 1: 22 Feb 2021 (14:44 hrs)

argument on fairness and equity was correct, it would, as Ms Ang submitted, effectively render s 8 MCA 1911 otiose or nugatory in a great many cases where a net paying defendant fails to mount its counterclaim in time.[9]

The single liability principle as a form of set-off

50 I now deal briefly with the defendant's submission that it is merely seeking to rely on the single liability principle as a form set-off to reduce the amount that it is liable to pay the plaintiff.[10]

51 I disagree with the defendant's submission that the single liability principle represents a form of set-off.

52 Various passages in *The Khedive* and subsequent cases make clear that the single liability principle does not pertain to set-off or constitute a form of set-off. In *The Khedive,* Lord Selborne L.C. made this explicit when he stated as follows (at 806 – 807):

> These authorities are, I think, sufficient to prove that the course of the Court of Admiralty has been to use its powers over its own procedure, so as, either at the hearing of a cross suit after decree and report in the original suit, or at the hearing of two conjoined suits, or in that later stage at which a monition might be applied for, to bring about the same result as if the whole controversy between the owners of the two ships had been, from the first dealt with in one proceeding; and this, **not by way of set-off,** but in a manner which can only be explained as resulting from the view which that Court took of the principle, and the just consequences, of its own rule.
>
> [emphasis added]

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9 PWS at paras 32.

10 DWS at para 35.

Version No 1: 22 Feb 2021 (14:44 hrs)

53 *The Tojo Maru* [1970] P. 21, a case decided almost a century later, involved a claim in the context of a salvage operation carried out negligently. In gist, salvors, in the course of their attempts to salvage the *Tojo Maru,* negligently caused a fire and explosion onboard the *Tojo Maru* which resulted in considerable damage to the ship. The salvors commenced arbitration proceedings against the owners for their claim for salvage remuneration. The owners of the *Tojo Maru* sought to (a) counterclaim against the salvors for causing damage to their ship, and (b) deny the salvors their salvage remuneration by setting it off against the damage suffered by the ship. Amongst others, the owners stated that if the salvors were liable in damages on the owners' counterclaim, there should be a set-off in respect of the owners' damages and the salvage reward prior to the salvors limiting their liability. The owners cited the single liability principle in *The Khedive* in support of their contention.

54 At first instance, Wilmer LJ (at 48C – 48D) concluded that if a "cross-claim for damages is statute barred under the Limitation Acts, *there would be nothing to set-off*" and later (at 49A) "[i]t will be seen, therefore, that *The Khedive … was not a case of true set-off at all*, as was made abundantly clear in the speech of Lord Selborne L.C." [emphasis added].

55 While the English Court of Appeal subsequently reversed Wilmer LJ's decision and remitted the case back to the arbitrator, this was on unrelated grounds. On the question of whether the single liability principle applied in respect of a claim for salvage remuneration and a claim for damage to a ship, the court agreed, *obiter*, with Wilmer LJ. Salmon LJ echoed Wilmer LJ's comments and noted that *The Khedive* "had nothing to do with true set-off but depended upon the old practice in the Admiralty Division relating only to collision cases" (at 75H).

Version No 1: 22 Feb 2021 (14:44 hrs)

56 Second, while the application of the single liability principle might in most cases have the same practical *effect* as applying set-off, the principle in its true unadorned form is, as explained at [39], a procedural mechanism based on a rule of some antiquity originating in the English Court of Admiralty. It thus has nothing to do with set-off.

57 In light of the foregoing, I disagree with Teare J's view that "the principle in *The Khedive* is a form of set-off long recognised in Admiralty law" (*Sea Echo* at [81]).

Conclusion

58 In the final analysis, I respectfully disagree with the reasoning in *Sea Echo* (at [78]). Nonetheless, I find myself, somewhat curiously, in agreement with Teare J's ultimate conclusion (at [79]) that the application of the single liability principle is not affected by the operation of s 190 of the UK Merchant Shipping Act 1995 (or in the case of Singapore, s 8 MCA 1911). However, I arrive at this conclusion for quite different reasons. In my judgment, the single liability principle as laid down in *The Khedive* already presupposes that both the claim and cross-claim or counterclaim are not time-barred. Thus, a defendant shipowner who is a net payor would only be able to rely on the single liability principle to reduce its liability *if* its counterclaim is not otherwise time-barred (*ie,* the counterclaim is "maintainable" under s 8 MCA 1911).

59 To that extent and in that context, s 8 MCA 1911 does not add anything to the single liability principle or modify it in any way. If the defendant's counterclaim is time-barred under s 8 MCA 1911, the single liability principle, quite simply, does not apply.

Version No 1: 22 Feb 2021 (14:44 hrs)

60 SUM 2585 requires me to determine the Question (see [4] above). For the foregoing reasons, I determine the Question by answering it in the negative.

61 I will hear the parties on costs separately.

S Mohan
Judicial Commissioner

Vivian Ang Hui Ming, Ho Pey Yan and Douglas Lok Bao Guang
(Allen & Gledhill LLP) for the first and second plaintiffs;
R Govin and Tan Hui Tsing (Gurbani & Co LLC) for the defendant.

Version No 1: 22 Feb 2021 (14:44 hrs)