

HIGH COURT MALAYA, KUALA LUMPUR  
ATAN MUSTAFFA YUSSOF AHMAD JC  
[ADMIRALTY IN REM NO: WA-27NCC-8-01-2017]

D There were three applications herein, namely (i) the plaintiff's application  
against the defendants pursuant to O. 70 r. 21 and r. 23 of the Rules of Court  
2012 ('ROC') ('encl. 438') for the determination of priorities and payment  
out from the proceeds of sale of a vessel; (ii) the second defendant's  
E application pursuant to O. 42 r. 13 and O. 92 r. 4 of the ROC ('encl. 433')  
and the inherent jurisdiction of the court for orders relating to the payment  
of sale proceeds of a vessel, the setting aside of a consent order relating to  
the sale of the vessel and stay of proceedings pending the disposal of encl.  
433; and (iii) the first defendant's application ('encl. 489') for the setting  
aside of the consent order of the vessel. The vessel 'PDZ Mewah' was  
F arrested pursuant to a warrant of arrest issued by the High Court, at the  
instance of the plaintiff. By a consent order, it was ordered that, amongst  
others, the vessel and its bunkers, fuel, lubricants and other consumables on  
board ('bunkers'), if any, be appraised and sold by the Sheriff by private  
treaty within two months from the date of the first appraisal, failing which  
G the vessel would be sold through a private treaty in an open tender. An  
appraisement of the vessel was conducted by the Sheriff-appointed appraisers  
and the prevailing market value of the vessel was appraised to be within the  
region of USD2 million. Subsequently, an offer was received from a  
prospective purchaser, Somap International Pte Ltd ('Somap'). The plaintiff  
then filed to have the vessel sold below the appraised value and the High  
H Court allowed the vessel to be sold for USD1,524,368. Pursuant to the  
consent order, the vessel and the bunkers remaining on board were sold to  
Somap at the aggregate sum of USD1,677,075 and the sales proceeds of the  
vessel in the sum of RM6,298,481.23 (after conversion from USD1,534,368)  
and also the sales proceeds for the bunkers remaining on board in the sum  
I of RM585,807.24 were paid by Somap. The plaintiff informed the Sheriff  
that the sale proceeds of the vessel was paid into a joint account held in the

name of the solicitor for the plaintiff and the solicitor for the first defendant. The vessel was released from arrest to facilitate the sale of the vessel to Somap. The matter went for trial and the court held that, amongst others, the second defendant was the beneficial owner of the vessel and that the second defendant was to pay the plaintiff's claims ('judgment'). The issues that arose were: (i) whether the second defendant had the rights to sell and dispose of the vessel given that the court made a finding after trial that the second defendant had beneficial ownership of the vessel; (ii) whether sales proceeds of the vessel need to be distributed by the liquidator of the second defendant in accordance with s. 527 of the Companies Act 2016 as the second defendant was wound up after the plaintiff commenced the action *in rem*; (iii) whether the consent order was null and void given that it was adjudged after the trial that the vessel was beneficially owned by the second defendant at the time the consent order was entered into; (iv) whether the plaintiff was entitled to the sale proceeds as prayed in encl. 438 given that the plaintiff only prayed for the second defendant to settle the plaintiff's claim and did not pray for the utilisation of the sale proceeds to settle the plaintiff's claim; and (v) whether there were any special circumstances to stay encl. 433 and all other proceedings in this action pending the determination of encl. 438. A preliminary objection was raised in respect of encl. 438 whereby the second defendant objected to the affidavit-in-support affirmed by the plaintiff's solicitor, on the ground that the solicitor affirmed an affidavit which contained substantial dispute as to facts, particularly paras. 16 and 21, where it was averred that there was no other claimant against the second defendant or the vessel and there was no charge or lienholder in this matter.

**Held (allowing encl. 438; dismissing encls. 433 and 489):**

- (1) There was no merit in the second defendant's objection. The solicitor for the plaintiff was capable of affirming the affidavit-in-support on behalf of the plaintiff as this was based on knowledge derived from the fact that there were no valid and subsisting caveats against release and payment out filed by any party at the time encl. 438 was filed, based on the various cause papers filed in the present suit. The plaintiff's solicitors would have been aware of the existence of any other statutory lien holders based on the records at hand. The affidavit-in-support did not run foul of O. 41 r. 5(2) of the ROC and it was a legally admissible and competent document for the current purpose. Further, despite the second defendant's objection to the plaintiff's solicitor averring that there was no other party that was claiming against the second defendant, the liquidator who would have knowledge of the same had not stated or provided proof otherwise and the second defendant's submission on this point was rejected. (paras 23-25)

- A (2) When the plaintiff initiated the present *in rem* action, the plaintiff held the status as a statutory lienholder upon the sales proceeds who was considered as a secured creditor. Being the statutory lienholder, the plaintiff, apart from being entitled to pursue their claim *in rem* against the vessel, was also entitled to realise the vessel and use the proceeds of sale to answer the plaintiff's claim. The vessel was arrested as security for the plaintiff's claim against the second defendant. Thus, the plaintiff ranked higher than the other creditors of the second defendant in the order of priority of the claims against the proceeds of sale of the ship. The second defendant did not have the right to dispose the vessel and was not entitled to the sales proceeds even if it was declared the beneficial owner of the vessel. (paras 36 & 38)
- B
- C
- D (3) When the *in rem* action was initiated, the plaintiff was legally accorded the status as a statutory lienholder upon the sales proceeds. The vessel was arrested by the plaintiff as a pre-judgment security. As a security lienholder, the plaintiff was deemed a secured creditor. The plaintiff was not subject to the law under the Companies Act 2016 nor the Insolvency Act 1967, despite the second defendant being now in liquidation. The plaintiff, being a secured creditor, was entitled to the sales proceeds and the same could be used to satisfy the plaintiff's claim. The proceeds of the sale could not be returned to the second defendant for the distribution in the liquidation process as the vessel no longer formed part of the common pool of assets available to the second defendant and its unsecured creditors until the secured claim of the plaintiff was satisfied. (paras 43, 49 & 50)
- E
- F (4) Although in the pleadings it was not specifically stated that her sales proceeds should be used to satisfy the plaintiff's claim, this was not necessary as when the ship was arrested, the ultimate purpose was to provide pre-judgment security to the plaintiff who, as a secured creditor, was entitled to the vessel and the sales proceeds for the purpose of satisfying the plaintiff's claim. The *in rem* action accorded the plaintiff with the status of a statutory lienholder, which was considered as a secured creditor and having priority over the sales proceeds of the vessel. The arrest served to provide pre-judgment security to the plaintiff. The vessel was therefore subject to any *in rem* judgment granted against it. (paras 56 & 57)
- G
- H
- I (5) The consequences of entering into the consent order ought to be clear to the first and second defendants. The outcome that, if the plaintiff were to be successful in its claim, the court would find that the second defendant was the beneficial owner of the vessel due to the sham transfer and that the plaintiff had a lien over the vessel which entitled payment to the plaintiff out of the proceeds of sale of the vessel ought to be

obvious to the first and second defendants. There was thus no merit to the contention of the second defendant that the understanding of parties when the consent order constituted a mistake on the identity of the owner of the vessel and the rights of the second defendant in respect of the vessel. There was also no merit to the first defendant's submissions that the consent order had directly affected the second defendant's rights and interest by depriving the second defendant's rights and interest to sell and deal with the vessel. The Sheriff's rights to deal with the proceeds was intact. There was no reason for the second defendant to now hold the sales proceeds. (paras 72 & 74)

- (6) The second defendant had not proven that there were special circumstances which rendered the stay to be granted. The second defendant only made averments as to the fact that there was an appeal against the judgment which concerned the alleged wrongful arrest of the vessel and the court's decision on the setting aside of the consent order in encl. 438 would be rendered academic if the plaintiff's application for the determination of priorities were to proceed. These by themselves did not constitute special circumstances and in fact, the second defendant did not aver that these were special circumstances to justify the stay. In any event, encls. 433 and 438 were both being determined by the court on the same issues, mainly relating to the right of the plaintiff as a statutory lienholder and secured creditor to the proceeds of sale of the vessel. There was no need to dispose encl. 433 before encl. 438 as these could be heard together. (paras 78 & 79)

**Case(s) referred to:**

- Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors And Another Appeal* [2007] 1 CLJ 1 CA (*refd*)
- Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC (*refd*)
- Baiduri Bank v. Garnet Sdn Bhd & Anor* [2010] MLJU 708 (*refd*)
- BSC Elevators Sdn Bhd v. Sineo Enterprise Sdn Bhd & Anor* [2016] 1 LNS 1767 HC (*refd*)
- Bukit Melita Sdn Bhd v. Revolusi Rancak Sdn Bhd* [2020] 2 CLJ 199 CA (*refd*)
- Huddersfield Banking Company, Limited v. Henry Lister & Son, Limited* [1895] 2 Ch 273 (*refd*)
- Kerajaan Malaysia v. PKNS Engineering & Construction Bhd* [2019] 1 LNS 2101 HC (*refd*)
- Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185 SC (*refd*)
- Kuo Fen Ching and Another v. Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR (R) 79 (*refd*)
- Lee Chai Seng v. Magnum Consortium Sdn Bhd* [2015] 1 LNS 243 CA (*refd*)
- Lim Bock Lai v. Selco (Singapore) Pte Ltd* [1987] 1 LNS 25 (*refd*)
- Marsden v. Marsden* [1972] 2 All ER 1162 (*refd*)
- Million Group Credit Sdn Bhd v. Lee Shoo Khoo & Ors* [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 HC (*refd*)

- A *Omega Holdings Bhd v. Dato’ Tiah Thee Kian & Ors* [2002] 7 CLJ 125 HC (*refd*)  
*Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd* [2013] 1 LNS 984 CA (*refd*)  
*Ramesh Rajaratnam v. SL Sharlini Marnickam* [2018] 1 LNS 1608 HC (*refd*)  
*Re Aro Co Ltd* [1980] 1 Ch 196 (*refd*)  
*Smith’s Dock Co Ltd v. The St Merriel (Owners), The St Merriel* [1963] 1 All ER 537 (*refd*)
- B *Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation)* [2020] 4 CLJ 841 FC (*refd*)  
*Tengku Reza Shah Tengku Chaidzir Shah v. Asiapura Lands Sdn Bhd* [2020] 1 LNS 478 HC (*refd*)  
*The Government Of Malaysia v. Datuk Kadir Mohamad Mastan & Another Case* [1993] 4 CLJ 98 HC (*refd*)
- C *The Monica S* [1968] P 741 (*refd*)  
*The “Pangkalan Susu/Permina 3001RDQUO; Rasu Maritima SA v. Pn Pertambangan Minyak Dan Gas Bumi Negara & Anor* [1977] 1 LNS 143 (*refd*)  
*The Store (Terengganu) Sdn Bhd v. Abi Construction Sdn Bhd & Anor* [2013] 1 LNS 565 HC (*refd*)
- D *Tokai Corporation v. DKSH Malaysia Sdn Bhd* [2016] 1 LNS 1092 HC (*refd*)
- Legislation referred to:**  
Companies Act 2016, s. 527  
Rules of Court 2012, O. 41 r. 5(2), O. 42 r. 13, O. 70 rr. 21(1), 23, O. 92 r. 4, Apendix B1 item 53
- E Companies Act [Sing], s. 262(3)  
High Court (Admiralty Jurisdiction) Act [Sing], s. 4(4)  
Senior Courts Act 1981 [UK], s. 20(2)(m)
- For the plaintiff - Oon Thian Seng & Wiwin Abdul Kahar; M/s TS Oon & Partners  
For the 1st defendant - K Kandiah, Eric TS Lai & Tseng Seng Guan; M/s Mohd Latip & Assocs*
- F *For the 2nd defendant - Lim Wei Han; M/s Shu Yin, Teh & Taing*  
*Reported by Lina E*

## JUDGMENT

- G **Atan Mustaffa Yussof Ahmad JC:**
- [1] This judgment concerns:
- H (i) the plaintiff’s application (“encl. 438”) against the defendant pursuant to O. 70 r. 21 and r. 23 of the Rules of Court 2012 (“ROC 2012”) for determination of priorities and payment out from the proceeds of sale of a vessel;
- I (ii) the second defendant’s application (“encl. 433”) pursuant to O. 42 r. 13, O. 92 r. 4 of the ROC 2012 and the inherent jurisdiction of the court for orders relating to the payment of sale proceeds of a vessel, the setting aside of a consent order relating to the sale of the vessel and stay of proceedings pending the disposal of encl. 433; and
- (iii) the first defendant’s application (“encl. 489”) for the setting aside of the said consent order relating to the sale of the vessel.

[2] I heard all three applications together and after reserving my decisions, on 26 April 2021 I decided as follows: A

- (i) enclosure 438 was allowed with costs to the plaintiff in the sum of RM3,000 to be paid by each of the defendants to the plaintiff;
- (b) enclosure 433 was dismissed with costs to the plaintiff in the sum of RM3,000 to be paid by each of the defendants to the plaintiff; and B
- (c) enclosure 489 was dismissed with costs to the plaintiff in the sum of RM5,000 to be paid by the first defendant to the plaintiff.

[3] This judgment contains the full grounds for my decisions. C

#### Background Facts

[4] The vessel “PDZ MEWAH” (IMO No.: 9064009) (“the vessel”) was arrested on 24 January 2017 at Pengerang, Johor pursuant to a warrant of arrest issued by the Kuala Lumpur High Court at the instance of Dan-Bunkering (Singapore) Pte Ltd, the plaintiff in this admiralty *in rem* action. The Bailiff of the court executed the service of the warrant of arrest on the vessel on 24 January 2017. D

[5] By a consent order dated 22 February 2018 (“the consent order”), it was ordered that, amongst others, the vessel and its bunkers, fuel, lubricants and other consumables on board (“the bunkers”), if any, be appraised and sold by the Sheriff by private treaty within two months from the date of the first appraisal, failing which the vessel will be sold through private treaty (open tender). E

[6] Pursuant to the consent order, the commission for appraisal and sale was issued by the court to the Sheriff on 31 May 2018. An appraisal of the vessel was conducted by the Sheriff-appointed appraisers and the prevailing market value of the vessel was appraised to be within the region of USD2,000,000. F

[7] Subsequently, an offer was received from a prospective purchaser, Somap International Pte Ltd (“Somap”) who *via* their shipbrokers submitted a letter of offer *via* email on 23 May 2018 to the Sheriff of the High Court of Kuala Lumpur, where the prospective purchaser offered to buy the vessel at USD1,534,368 which is below the appraised value of USD2,000,000. G

[8] The plaintiff then filed a notice of application ie, encl. 223 to have the vessel sold below the appraised value. On 20 July 2018 the High Court allowed the plaintiff’s application for the vessel to be sold for USD1,534,368. H

[9] Pursuant to the consent order, the vessel and the bunkers remaining on board were sold to Somap at the aggregate sum of USD1,677,075 and the sale proceeds of the vessel in the sum of RM6,298,481.23 (after conversion I

- A from USD1,534,368) and also the sale proceeds for the bunkers remaining on board in the sum of RM585,807.24 (after conversion from USD142,707) were paid by Somap into a joint Maybank Account No.: 51425353411 (“the Maybank account”) held in the name of the solicitor for the plaintiff ie, Mr Oon Thian Seng of Messrs T S Oon & Partners and the solicitor for
- B the first defendant ie, Ms Kunamony a/p S Kandiah of Messrs Mohd Latip & Associates, pending determination of priorities. The plaintiff’s solicitors, by way of an email dated 2 October 2018, informed the Sheriff that the sale proceeds of the vessel in the sum of RM6,298,481.23 was paid into the joint account. On 22 October 2018, the vessel was released from arrest to facilitate the sale of the vessel to Somap.
- C

- D [10] The matter went for trial in February and March 2020 and on 3 August 2020, in the court’s judgment dated 3 August 2020 (“the judgment”) the court held that, amongst others, the second defendant is the beneficial owner of the vessel and that the second defendant is to pay the plaintiff’s claims.

#### **The Applications**

##### *Enclosure 433*

- E [11] In encl. 433, the second defendant sought mainly for the following orders:
- F (i) that the plaintiff and the first defendant must pay the sale proceeds for the vessel namely RM6,884,288.47 and/or such other amount currently being held in the Maybank account within seven days from the date of the order to the first defendant;
- (ii) that the second defendant is allowed to set aside consent order; and
- (iii) that all proceedings in this action be stayed pending the disposal of the second defendant’s application herein including the appeal, if any, arising from this application.

- G *Enclosure 438*

- H [12] In encl. 438, which was opposed by both the first defendant and the second defendant, the plaintiff sought mainly for the following orders:
- I (i) that the order of priority of all claims against the proceeds of sale of the vessel in the sum of USD1,534,368 (or RM6,298,481.23) together with interest earned thereon if any (“the fund”) be determined as follows:
- (a) firstly, the Sheriff’s commission in respect of the sale of the vessel;
- (b) secondly, Sheriff’s expenses incurred by the plaintiff for preservation and maintenance of the vessel;
- (c) thirdly, the plaintiff’s costs of and incidental to the arrest of the vessel including attendances before the Sheriff up to the transfer of title to the successful purchaser of the vessel as producer of the fund;

(d) fourthly, the plaintiff's claim as a statutory lienholder pursuant to the judgment; and A

(e) lastly, all other claims of lesser priority, *pari passu*.

(ii) payment out of the fund consistent with the order of priorities prayed for. B

[13] The plaintiff's application for determination of priorities and payment out from the proceeds of sale of the vessel is made pursuant to O.70 r. 21 of the ROC 2012, particularly O. 70 r. 21(1) which provides:

(1) Where in an action *in rem* against a ship the Court has ordered the ship to be sold, any party who has obtained or obtains judgment against the ship or proceeds of sale of the ship may: C

(a) in a case where the order for sale contains the further order referred to in paragraph (2), after the expiration of the period specified in the order under subparagraph (2)(a); or

(b) in any other case, after obtaining judgment, D

apply to the Court by notice of application for an order determining the order of priority of the claims against the proceeds of sale of the ship.

[14] The plaintiff submitted that the priorities for the payment of the proceeds of sale of the vessel are in the following order and manner: E

(i) Firstly, towards the Sheriff's commission in respect of sale of vessel where is entitled to commission as the vessel is being sold pursuant to the order of court. Appendix B1 High Court Fees, item 53 of the ROC 2012 provides for the Sheriff's commission to be calculated at 5% on the first RM1,000, and 2.5% on the excess of the sale proceeds of the vessel. The total amount for the Sheriff's commission comes up to RM157,487.03. F

(ii) Secondly, towards the Sheriff's expenses where the plaintiff should be reimbursed for the monies advanced by the plaintiff to the account of Sheriff's costs and expenses for the preservation and maintenance of the vessel and her crew, as taxed in accordance with the plaintiff's bill of costs for Sheriff's expenses dated 10 December 2018. This is pursuant to the consent order which provides for all costs arising out of and in connection with the execution of the omnibus order, if granted, including but not limited to the maintenance of the vessel and her crew, be made part of Sheriff's costs and expenses and, where paid by the plaintiff, the said costs be paid to the plaintiff and/or its solicitor out of the sale proceeds of the vessel. G  
H

I

- A (iii) Thirdly, towards arresting party's costs which are incurred in connection with the arrest carried out by the plaintiff on 24 January 2017 which also includes the attendances before the Sheriff, the vessel's appraisal and sale up to the transfer of title to the successful purchaser of the vessel.
- B (iv) Fourthly, towards the plaintiff's claim as a statutory lienholder pursuant to the judgment. The remaining sum after the Sheriff's commission, Sheriff's expenses and the arresting party's costs have been dealt with will be due to the plaintiff in satisfaction of the judgment granted in their favour and their status as the statutory lienholder.
- C (v) Lastly, towards other claims of lesser priority, *pari passu*. If there is any balance of sale proceeds left after all the claims of earlier priorities have been satisfied, this will be distributed to other claimants of lesser priority in *pari passu*. The second defendant, being an unsecured creditor will only receive their portion if there is any residue.

D  
*Enclosure 489*

[15] In encl. 489, the first defendant sought mainly for an order that the first defendant is allowed to set aside consent order.

#### Issues For The Court's Determination

- E [16] I considered the nature of all three applications by the second defendant in encl. 433, by the plaintiff in encl. 438 and by the first defendant in encl. 489. The plaintiff's application in encl. 438, although for determination of priorities and payment out from the proceeds of sale of the vessel, was resisted by the first defendant and the second defendant on some common grounds relied on by the second defendant for its application in encl. 433 and by the first defendant in its application in encl. 489. Thus it was appropriate for all three applications to be heard together.
- F [17] The common issues in encls. 433, 438 and 489 are as follows:
- G (i) whether the second defendant had the rights to sell and dispose of the vessel given that the court made a finding after trial that the second defendant has beneficial ownership of the vessel;
- H (ii) whether sale proceeds of the vessel need to be distributed by the liquidator of the second defendant in accordance with s. 527 of the Companies Act 2016 as the second defendant was wound up after the plaintiff commenced the action *in rem*; and
- I (iii) whether the consent order was null and void given that it was adjudged after the trial that the vessel was beneficially owned by the second defendant at the time the consent order was entered into.

[18] A common issue which was raised in encls. 433 and 438 is whether the plaintiff is entitled to the sale proceeds as prayed in encl. 438 given that in the statement of claim the plaintiff only prayed for the second defendant to settle the plaintiff's claim and did not pray for the utilisation of the sale proceeds to settle the plaintiff's claim. A

[19] An issue which was particular to encl. 433 is whether there are any special circumstances to stay encl. 433 and all other proceedings in this action pending the determination of encl. 438. B

### Preliminary Objections

#### *Affidavit Of The Plaintiff's Solicitor* C

[20] Before proceeding to the substantive issues, I wish to address a preliminary objection raised by the second defendant in respect of encl. 438. The second defendant objected to the affidavit-in-support of encl. 438 affirmed by the plaintiff's solicitor (encl. 439) on the ground that the solicitor affirmed an affidavit which contains substantial dispute as to facts, particularly at paras. 16 and 21 where it was averred that there is no any other claimant against the second defendant or the vessel and/there is no charge or lienholder in this matter. D

[21] The second defendant relied on *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 and *Ramesh Rajaratnam v. SL Sharlini Marnickam* [2018] 1 LNS 1608 for the proposition that an affidavit-in-support affirmed by solicitors must be disregarded because there are disputed questions of fact known only by the litigant herself. It follows that encl. 438 be dismissed as it has not been supported by any competent affidavit-in-support. E F

[22] The plaintiff in response submitted that the solicitor for the plaintiff is capable of affirming the affidavit-in-support on behalf of the plaintiff for the following reasons:

(i) The plaintiff's affidavit-in-support of encl. 438 affirmed by the plaintiff's solicitor contains facts which are known to the solicitors from their records and are not facts which are disputed. The fact averred that there was no other statutory lienholder in respect of the vessel and who has obtained judgment against the vessel was derived from the fact that there were no valid and subsisting caveats against release and payment out filed by any party at the time encl. 438 was filed. G H

(ii) As one of the solicitors having conduct of the present suit, the deponent for the affidavit-in-support would have access to the various cause papers filed in the present suit, and would have been aware of the existence of any other statutory lienholders based on the records at hand. I

- A This satisfies the requirement in O. 41 r. 5(2) of the ROC 2012 where an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds. The plaintiff referred the court to *Kerajaan Malaysia v. PKNS Engineering & Construction Bhd* [2019] 1 LNS 2101; [2019] MLJU 1880; *Tokai Corporation v. DKSH Malaysia Sdn Bhd* [2016] 1 LNS 1092; [2016] MLJU 621; *Baiduri Bank v. Garnet Sdn Bhd & Anor* [2010] MLJU 708; and *Omega Holdings Bhd v. Dato’ Tiah Thee Kian & Ors* [2002] 7 CLJ 125; [2002] 6 MLJ 20 in support of this submission.
- B
- C [23] I find that there is no merit to the second defendant’s objection. The solicitor for the plaintiff is capable of affirming the affidavit-in-support on behalf of the plaintiff as this was based on knowledge was derived from the fact that there were no valid and subsisting caveats against release and payment out filed by any party at the time encl. 438 was filed based on the various cause papers filed in the present suit. The plaintiff’s solicitor would have been aware of the existence of any other statutory lienholders based on the records at hand.
- D
- [24] The affidavit-in-support does not run foul of O. 41 r. 5(2) of the ROC 2012 and it is a legally admissible and competent document for the current purpose.
- E
- [25] Further, despite the second defendant’s objection to the plaintiff’s solicitor averring that there was no other party that is claiming against the second defendant, the liquidator who would have knowledge of the same has not stated or provided proof otherwise and the second defendant’s submission on this point is rejected.
- F
- Affidavit Of The Plaintiff’s Group Legal Counsel*
- G [26] In encl. 489, the first defendant raised a preliminary objection in relation to the plaintiff’s affidavit-in-reply affirmed by Yip Wei Yen (“Ms Yip”) who the first defendant described as the plaintiff’s “parent company’s solicitor”. The first defendant contended that there were substantial disputes as to facts and the parent company may not have the requisite or personal knowledge of the case as the source of belief was never disclosed. The first defendant relied on the case of *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* (*supra*) for the proposition that solicitors should not file contentious affidavits in pending applications and only litigants should give evidence.
- H
- [27] The plaintiff pointed out that Ms Yip was the group legal counsel of the plaintiff at the time when the invoices were incurred and also took part in the negotiations which led to the settlement agreement which was part of her testimony at trial. Thus according to the plaintiff, she was not only giving testimony of documents in her possession but also as a person with direct knowledge of the facts.
- I

[28] The first defendant's submission on this point is rejected and the preliminary objection is dismissed. Ms Yip is making an affidavit out of her personal knowledge given her involvement in the matter. She is also entitled to make the affidavit stating her belief with sources and grounds thereof. The plaintiff's submission that Ms Yip is affirming the affidavit as the plaintiff's parent company's solicitor is erroneous on the facts as Ms Yip is not the solicitor of the plaintiff's parent company but the group's legal counsel. Thus the case of *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* (*supra*) referred to by the first defendant is not applicable as it deals with the issue of solicitors, not officers of the litigant, filing contentious affidavits.

[29] Having dismissed these preliminary objections, I move on to the substantive issues at hand.

### Analysis And Findings Of The Court

#### *Rights Of The Second Defendant To Sell And Dispose Of The Vessel*

[30] The first defendant submitted for both encls. 438 and 489 that the effect of the judgment, which states that the vessel was legally and beneficially owned by the second defendant, is that it is the second defendant which is vested with the rights to sell and dispose of the vessel. The first defendant relied on the cases of *Smith's Dock Co Ltd v. The St Merriel (Owners)*, *The St Merriel* [1963] 1 All ER 537 and *The "Pangkalan Susu/Permina 3001RDQUO; Rasu Maritima SA v. Pn Pertambangan Minyak Dan Gas Bumi Negara & Anor* [1977] 1 LNS 143; [1977] 2 MLJ 129 to support the proposition that only the beneficial owner of a vessel has the rights to sell the vessel. It follows that when the vessel was sold, neither the plaintiff nor first defendant had the rights to dispose and sell the vessel without the consent of the second defendant who is the beneficial owner and the consent order ought to be set aside.

[31] The plaintiff submitted that the judgment declaring the second defendant as the beneficial owner of the vessel proves that the plaintiff was claiming from the correct party liable for the losses that the plaintiff has suffered and that the admiralty *in rem* jurisdiction was correctly exercised against the vessel.

[32] The plaintiff submitted that as a statutory lienholder it is entitled to pursue their claim *in rem* against the vessel, realise the vessel and use the proceeds of sale to answer the plaintiff's claim. In relation to this it was further submitted by the plaintiff as follows:

- (i) When the writ *in rem* was issued against the vessel, a statutory lien accrued in favour of the plaintiff.

- A (ii) A statutory lien accrues to the claimant at the time the writ *in rem* issued and remains exercisable against the vessel despite a subsequent change of ownership of the vessel. The lien confers on its holder the status of a secured creditor for the purpose of corporate insolvency. The plaintiff referred the court to *The Monica S* [1968] P 741 for this proposition.
- B (iii) The plaintiff’s right as a statutory lienholder is not affected by the change of ownership as the court on 3 August 2020 found that the change of ownership was based on a sham transaction and the beneficial ownership of the vessel remained with the second defendants at the time the action was commenced.
- C (iv) As the vessel was amenable to the plaintiffs’ *in rem* suit, the vessel was subject to any *in rem* judgment granted against it.

[33] I do not agree with the first defendant’s submission because the beneficial owner has the rights to sell and dispose of the vessel in the circumstances of the case. The position taken by the first defendant is correct only in circumstances which do not involve a sham transfer of a vessel as in this case. However, here, the plaintiff commenced the *in rem* action on 20 January 2017 against the owner of the vessel at the material time, the second defendant, to whom the plaintiff sold bunkers to and who failed to pay to the plaintiff part of the sum owed for the bunkers. The first defendant, who was the registered owner at the point the writ *in rem* was filed, served and the vessel arrested, filed its appearance and raised in its defence that the plaintiff’s vessel was already legally transferred from the second defendant to the first defendant on 30 November 2016 before the action was commenced and the vessel arrested. Thus, according to the first defendant, the admiralty *in rem* jurisdiction was incorrectly exercised against the vessel.

[34] The plaintiff thus had to advance its case that the beneficial ownership of the vessel remained in the second defendant despite the transfer of the vessel to the first defendant on 30 November 2016. This necessitated proving that the second defendant is the beneficial owner of the vessel at the trial on account that the transfer of the vessel was a sham. At the conclusion of the trial, the judgment declared that the vessel transfer was a sham and the second defendant is the beneficial owner of the vessel. This establishes that the plaintiff was claiming from the correct party liable for the losses (the beneficial owner of the vessel) that the plaintiff has suffered and that the admiralty *in rem* jurisdiction was correctly exercised against the vessel.

[35] Having established that the second defendant was indeed the beneficial owner of the vessel at the time the action *in rem* was brought, the question of whose right it is to sell and dispose the vessel is easily answered.

I

[36] When the plaintiff initiated the present *in rem* action, the plaintiff held the status as a statutory lienholder upon the sales proceeds who is considered as a secured creditor as illustrated in the case of *The Monica S* (*supra*). In this case, Brandon J, after an extensive review of authorities, ruled that a statutory lien accrues to the claimant at the time the writ *in rem* issued.

[37] Being the statutory lienholder upon the sales proceeds of the vessel, the plaintiff, apart from being entitled to pursue their claim *in rem* against the vessel, is also entitled to realise the vessel and use the proceeds of sale to answer the plaintiff's claim. The vessel was arrested as security for the plaintiff's claim against the second defendant, thus the plaintiff ranks higher than the other creditors of the second defendant in the order of priority of the claims against the proceeds of sale of the ship.

[38] Therefore, the second defendant does not have the right to dispose the vessel and is not entitled to the sales proceeds even if it is declared the beneficial owner of the vessel.

*Distribution Of The Sale Proceeds By The Liquidator*

[39] The second defendant submitted that the sale proceeds of the vessel need to be distributed in accordance with s. 527 of the Companies Act 2016 as the plaintiff has surrendered the vessel or sale proceeds of the vessel to the second defendant. Section 527 sets out the order of priority for payments of unsecured debts. The second defendant referred the court to the case of *BSC Elevators Sdn Bhd v. Sineo Enterprise Sdn Bhd & Anor* [2016] 1 LNS 1767 to persuade the court to examine the conduct of the plaintiff and to decide whether the plaintiff has surrendered the security back to the liquidator.

[40] The first defendant also submitted that in this instance the liquidator has custody and control of the first defendant's property, the duty to collect the assets and apply them in the discharge of the company's liabilities relying on the case of *Tee Siew Kai v. Machang Indah Development Sdn Bhd (In Liquidation)* [2020] 4 CLJ 841; [2020] MLJU 229 (Federal Court).

[41] The plaintiff submitted that despite the subsequent insolvency of the second defendant, the plaintiff as a statutory lienholder is entitled to pursue their claim *in rem* against the vessel, realise the vessel and use the proceeds of sale to answer the plaintiff's claim, as it is a secured creditor of the vessel to the exclusion of all the unsecured creditors of the second defendant which was only wound up after the commencement of the action. In relation to this it was further submitted by the plaintiff as follows:

- (i) As the plaintiff issued the writ *in rem* before the commencement of winding up it is to be treated as a secured creditor for the purpose of winding up, relying on *Re Aro Co Ltd* [1980] 1 Ch 196; *Lim Bock Lai v. Selco (Singapore) Pte Ltd* [1987] 1 LNS 25; [1987] 2 MLJ 688; and *Kuo Fen Ching and Another v. Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR (R) 793.

- A (ii) As the plaintiff is a secured creditor of the vessel and of the sale proceeds, the vessel and the sale proceeds do not fall into the common pool of assets available to the liquidator and the unsecured creditors of the second defendant.
- B (iii) The second defendant is not entitled to payment out of the sales proceeds without the court making an order to determine the priorities of claims, including the second defendant’s claim on the sales proceeds.
- C (iv) The plaintiff submitted that it is not subject to the law under the Companies Act 2016 nor the Insolvency Act 1967 despite the second defendant being now in liquidation as the plaintiff is a secured creditor and is entitled to the sales proceeds and the same can be used to satisfy the plaintiff’s claim.

D [42] I do not agree with the second defendant that the sale proceeds of the vessel are to be distributed in accordance with s. 527 of the Companies Act 2016 after the second defendant was wound up as the plaintiff is a secured creditor of the vessel to the exclusion of all the unsecured creditors of the second defendant which was only wound up after the commencement of the action.

E [43] When the *in rem* action was initiated on 20 January 2017, the plaintiff was legally accorded the status as a statutory lienholder upon the sales proceeds. The vessel was arrested by the plaintiff as pre-judgment security on 20 January 2017. As a statutory lienholder, the plaintiff is deemed a secured creditor. The winding-up petition was presented against the second defendant on 27 February 2017 and the second defendant was wound up on 13 April 2017, after the commencement of the action and after the statutory lien accrued in favour of the plaintiff.

G [44] The plaintiff’s claim in respect of goods or material supplied to a ship for her operation or maintenance as provided in s. 20(2)(m) of the Senior Courts Act 1981 and considered as a statutory lienholder once the plaintiff filed the writ *in rem* in the present action. A plaintiff who issues the writ *in rem* before the commencement of winding up is to be treated as a secured creditor for the purpose of winding up. In *Re Aro Co Ltd (supra)*, it was held that the plaintiff who issues the writ *in rem* before the commencement of winding up is to be treated as a secured creditor for the purpose of winding up. Brightman LJ said this:

H The usual object of suing *in rem* is to obtain security. The plaintiff becomes entitled upon the institution of his suit to the arrest and detention of the subject matter in the custody of an officer of the court pending adjudication, and on adjudication in his favour to a sale and satisfaction of his judgment out of the net proceeds thereof, subject to other claims ranking in priority to or *pari passu* with his own. So stated, the rights of

I

a plaintiff suing *in rem* have points of similarity with the rights of a legal or equitable mortgagee or chargee, such persons are also entitled in appropriate circumstances to have the subject matter of the charge preserved for their benefit, and if the account is in their favour to have it sold in order to satisfy the debt. The similarity is carried a stage further by the decision in *The Monica S* [1968] P 741, where it was held that the burden of the statutory right of action *in rem* in a case under s. 3(4) of the Administration of Justice Act 1956 ran with the ship so as to enable the plaintiff to serve the writ on the ship notwithstanding a transfer of ownership since the writ was issued. It must follow from that decision that the plaintiff *in rem* is entitled to have the ship arrested despite change in ownership and notwithstanding that the writ has not been served. The case is of critical importance to our decision because, applied to the instant case, it means that, had the liquidator sold the ship, he could only have sold subject to the plaintiffs' claim; this does not seem far removed from saying that the liquidator could only sell a proprietary interest, equivalent to a right to redeem.

...

It seems more logical to test the position of the plaintiffs by asking whether, immediately before the presentation of the winding up petition, they could properly assert as against all the world that the vessel *Aro* was security for their claim, not whether they could assert that they had invoked the jurisdiction of the Admiralty Court within the meaning of section 3 of the Act of 1956. If it is correct to say ... that after the issue of the writ *in rem* the plaintiffs could serve the writ on the *Aro*, and arrest the *Aro*, in the hands of a transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the *Aro* was not effectively encumbered with the plaintiffs' claim. In our judgment the plaintiffs ought to be considered as secured creditors for the purpose of deciding whether or not the discretion of the court should be exercised in their favour under section 231.

[45] Brightman LJ reasoned that a statutory lienholder may be likened to a secured creditor such as a mortgagee or charge in two respects:

- (i) first, with statutory lien, he is entitled to arrest the ship which will be subsequently be sold judicially so that the proceeds can be used to satisfy his claim, in the same way that a secured creditor is able to satisfy his claim from the proceeds of sale of the encumbered property; and
- (ii) secondly, he is entitled to arrest the ship after the writ has been issued notwithstanding any subsequent change of her ownership, which is what a secured creditor is entitled to do once his security is perfected.

[46] In *Lim Bock Lai v. Selco (Singapore) Pte Ltd (supra)*, a decision of the Singapore High Court, the plaintiffs had filed the writs of admiralty *in rem* before the commencement of the winding up of the company, although none of the writs were served before the liquidation. Lai Kew Chai J granted the

A plaintiff’s application in this case for leave to continue and pursue the action under s. 262(3) of the Singapore Companies Act (Cap 50, 1985 edn). The court held:

B The issue of a writ *in rem* in exercise of what has been generally referred to as the statutory right of action *in rem* has crucial consequences which enure to the benefit of such plaintiffs. Their claims are not affected by any subsequent changes of ownership ...

C If I be right that the plaintiff is in this sense a “secured creditor” this fact is also a substantial consideration in the exercise of my discretion, in all the circumstances, I exercise my statutory discretion and grant leave to the plaintiff to continue the relevant actions *in rem*.

D [47] In *Kuo Fen Ching and Another v. Dauphin Offshore Engineering & Trading Pte Ltd (supra)*, the Singapore Court of Appeal had to decide whether a judgment *in rem* could be entered despite the fact that the vessel’s owner, a company, had been dissolved. In delivering the judgment of the Court of Appeal, Karthigesu JA, commented:

E What is clear is that once a vessel is arrested, the ship, or the security provided *in lieu* of it, represents pre-judgment security. It also turned the respondents in this case into secured creditors of the owners of the Capricorn. As such, it was held by the English Court of Appeal in *Re Aro Co Ltd* that a plaintiff who issued a writ against the ship before the owners were wound up becomes a secured creditor and that when the writ *in rem* is issued, the statutory lien accrues in favour of the plaintiff. This entitles the plaintiff to arrest and detain the ship and if the court adjudicates in his favour, to a judicial sale and satisfaction of his claim out of the proceeds of sale. The plaintiff’s statutory lien is not defeated by any transfer of property apart from one effected by a judicial sale.

G [48] The second defendant submitted that the cases of *Re Aro Co Ltd*; *Lim Bok Lai v. Selco (Singapore) Pte Ltd (supra)*; and *Kuo Fen Ching and Another v. Dauphin Offshore Engineering & Trading Pte Ltd (supra)* are not applicable because these are not decided in relation to an application pursuant to O. 70 r. 21(1) of the ROC 2012. I do not accept this submission as the underlying principles which govern whether the proceeds of sale of a vessel on which a statutory lien accrues are applicable in determining the order of priorities in such an application.

H [49] Therefore, the plaintiff is not subject to the law under the Companies Act 2016 nor the Insolvency Act 1967 as submitted by the first defendant despite the second defendant being now in liquidation. The plaintiff being a secured creditor is entitled to the sales proceeds and the same can be used to satisfy the plaintiff’s claim as held above.

I

[50] Given the clear position in law stated above the proceeds of the sale cannot be returned to the second defendant for the distribution in the liquidation process as the vessel no longer forms part of the common pool of assets available to the second defendant and its unsecured creditors until the secured claim of the plaintiff is satisfied.

A

*No Prayer In Statement Of Claim Of The Plaintiff For The Utilisation Of The Sale Proceeds To Settle The Plaintiff's Claim*

B

[51] The second defendant submitted that because the plaintiff only prayed for the second defendant to settle the plaintiff's claim and did not pray for the utilisation of the sale proceeds to settle the plaintiff's claim, the plaintiff is not entitled to the sale proceeds as prayed in encl. 438 and the sale proceeds ought to be paid to the second defendant in encl. 433 in order for the second defendant to satisfy the judgment granted in favour of the plaintiff when the court declared that the second defendant is the beneficial owner of the vessel on 3 August 2012. The second defendant referred the court to the cases of *Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd* [2013] 1 LNS 984 (Court of Appeal) and *Bukit Melita Sdn Bhd v. Revolusi Rancak Sdn Bhd* [2020] 2 CLJ 199 for the proposition that the court cannot provide a relief which was not adverted to in the pleadings.

C

D

[52] The second defendant further submitted that by praying that the second defendant needs to settle the plaintiff's claim and for a declaration that the second defendant is a beneficial owner of the vessel, the plaintiff is deemed to have surrendered the vessel or the sale proceeds of the vessel back to the second defendant.

E

[53] The first defendant and the second defendant both submitted that another reason why the sales proceeds should be sold by the second defendant is O. 70 r. 21 of the ROC 2012 is inapplicable under which encl. 438 was filed by the plaintiff. According to the first defendant O. 70 r. 21 is only applicable when the court orders the ship to be sold and when the plaintiff obtained a judgment against the ship or her proceeds of sale but in this instance the plaintiff did not obtain a judgment against the ship or proceeds of sale of the ship.

F

G

[54] The plaintiff submitted that it can apply for payment out after the determination of priorities by the court as it is enforcing its lien against the vessel after judgment. In this regard:

H

- (i) The vessel was arrested as security for the plaintiff's claim and the *in rem* action accorded the plaintiff with the status of a statutory lienholder. The lien operated on the vessel and when she was sold, the *in rem* proceedings apply equally to the sale proceeds as the "*res*" taking place of the vessel.

I

- A (ii) The plaintiff is not required to specifically state in the pleadings that the vessel and her sales proceeds should be used to satisfy the plaintiff's claim, as that was the very purpose of the vessel being arrested in the first place.
- B (iii) The arrest serves to provide pre-judgment security to the plaintiff in the present action and the vessel is therefore subject to any *in rem* judgment granted against it as the vessel was amenable to the plaintiff's *in rem* action.
- C [55] It is my respectful view that the first defendant and the second defendant are misconceived as to the principles of law that apply in an *in rem* action and misapplied the law relating to obtaining reliefs based on prayers and pleadings. The first defendant and second defendant's submissions are therefore rejected. By diverting the court's attention to the issue of the prayers pleaded by the plaintiff in the *in rem* action, the first and second defendants have ignored the object of the vessel being arrested and the plaintiff's status of a statutory lienholder and its consequent rights to the vessel and the sales proceeds.
- E [56] I agree with the submissions of the plaintiff. Although in the pleadings it was not specifically stated that her sales proceeds should be used to satisfy the plaintiff's claim, this was not necessary as when the ship is arrested the ultimate purpose is to provide pre-judgment security to the plaintiff who as a secured creditor, is entitled to the vessel and the sales proceeds for the purpose of satisfying the plaintiff's claim. The finding by the court that the beneficial owner of the vessel is the second defendant confirms the entitlement of the plaintiff as the secured creditor and that the vessel was properly arrested as she belonged to the second defendant even if there was a transfer of the ship from the first defendant to the second defendant. The cases of *Re Aro Co Ltd (supra)*; *Lim Bok Lai v. Selco (Singapore) Pte Ltd (supra)*; and *Kuo Fen Ching and Another v. Dauphin Offshore Engineering & Trading Pte Ltd (supra)* which I referred to earlier are followed.
- G [57] The *in rem* action accorded the plaintiff with the status of a statutory lienholder, which is considered as a secured creditor and having priority over the sales proceeds of the vessel. The arrest serves to provide pre-judgment security to the plaintiff in the present action. The vessel is therefore subject to any *in rem* judgment granted against it.
- H *Validity Of The Consent Order*
- I [58] It is the first defendant's position that because this court had decided after the trial that the vessel was beneficially owned by the second defendant at the time the consent order to sell the vessel to Somap for the price of USD1,534,368 was entered, the first defendant had no capacity or was not entitled to enter into the consent order and the vessel was sold without the

second defendant's consent. Hence, the filing of encl. 489 to set aside the consent order. In this regard, the first defendant further contended that the second defendant's solicitor was never a signatory of the stakeholder joint account into which the monies from the sale of the vessel were held.

[59] The first defendant further contended that the consent order had the effect of disposing the second defendant's rights to deal and sell the vessel but after trial it was determined that the beneficial owner of the vessel is the second defendant. The first defendant thus submitted that consent order must be set aside as it was entered opposed to second defendant's rights, interest and consent as the beneficial owner of the vessel.

[60] On the power of the court to set aside a consent order, the first defendant submitted as follows:

- (i) a consent order which lacks *consensus ad idem* or free consent caused by fraud, mistake, total failure of consideration, misrepresentation, coercion, undue influence and other grounds in equity could be set aside as held in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 (Federal Court);
- (ii) the court has jurisdiction to set a consent order aside when the order was proceeded upon the common mistake of a material fact, relying on *Huddersfield Banking Company, Limited v. Henry Lister & Son, Limited* [1895] 2 Ch 273;
- (iii) even a consent order which was final and had been perfected could be set aside in the same action following the decision in *Marsden v. Marsden* [1972] 2 All ER 1162; and
- (iv) a consent order can be set aside when it was entered by a party that was with ignorant to his interest, relying on *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761.

[61] The first defendant further submitted that the consent order had directly affected the second defendant's rights and interest and the deprivation of the second defendant's rights and interest to sell and deal with the vessel might occasion injustice. The first defendant referred the court to the case of *Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors And Another Appeal* [2007] 1 CLJ 1; [2007] 1 MLJ 225 and *Lee Chai Seng v. Magnum Consortium Sdn Bhd* [2015] 1 LNS 243; [2015] MLJU 1871 for the proposition that when there is a breach of the rules of natural justice the court has the jurisdiction to have its orders declared as void.

[62] The second defendant in encl. 433 also prayed for the setting aside of the consent order. It submitted that the consent order ought to be set aside as there is a change of circumstances as subsequent to the consent order, the court on 3 August 2020 declared that the second defendant is the beneficial

- A owner of the vessel. Further, the consent order was entered by the parties on the understanding that the first defendant is the rightful owner of the vessel and not the second defendant. The second defendant referred the court to the case of *The Store (Terengganu) Sdn Bhd v. Abi Construction Sdn Bhd & Anor* [2013] 1 LNS 565 to support the proposition that fresh circumstances can warrant the court to set aside an order of the court.
- B [63] The second defendant submitted in the alternative that there was a mistake on the identity of the owner of the vessel and the rights of the second defendant in respect of the vessel as it was the understanding, leading to the consent order, that the owner of the vessel was first defendant and not the
- C second defendant. Therefore, the consent order was vitiated due to mistake by the parties or the second defendant. The second defendant also referred the court to *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd (supra)* as an authority for the proposition that a consent could be set aside if the free consent that the order is based is vitiated by mistake.
- D [64] The plaintiff submitted that the consent order was not entered into on the assumption that the first defendant was the beneficial owner of the vessel as the issue of ownership of the vessel was a contested issue between the parties and it has always been the plaintiff's contention that the second
- E defendant was the owner of the vessel and that the first defendant came into possession of the vessel *via* a sham transaction. According to the plaintiff, the vessel was sold with the consent of the second defendant. In this regard, the plaintiff further submitted as follows:
- F (i) The consent order was entered into by the plaintiff, the first defendant and the second defendant on the basis that the vessel's condition continued to deteriorate and that there was a potential buyer for the vessel ie, Somap.
- G (ii) It was upon the agreement of all three parties that to avoid the value of the vessel from further diminishing due to her condition, the vessel should be sold pursuant to the consent order.
- H (iii) There was never an agreement between parties that the first defendant was the registered owner of the vessel and it was the plaintiff's contention that the second defendant owned the vessel.
- I (iv) At that point of time, the identity of the owners of the vessel was still in question where the ownership of the vessel was the subject matter of the trial and only on 3 August 2020 it was decided that the second defendant was the beneficial owner of the vessel.
- (v) The sales proceeds in a Maybank joint account in the names of the plaintiff's solicitors and the first defendant's solicitors are held on behalf of the Sheriff who still has custody of the proceeds where parties could only deal with this sum with the concurrence of the Sheriff or an order of court.

(vi) When the consent order was entered it was not only between the plaintiff and the first defendant as the second defendant was represented by its own solicitors who would have advised the second defendant as to the effect of the consent order and executed the consent order on behalf of the second defendant. A

(vii) It is the new liquidators who have a change of heart although earlier the company in liquidation validly consented to the order which still stands. B

[65] Before proceeding with my analysis and finding on this point I wish to address an objection by the first defendant to the plaintiff's submissions on the ground of *res judicata*. The first defendant took objection to the plaintiff's submissions that pending the determination of the contested issue of ownership of the vessel by way of a trial, the consent order was entered into by the plaintiff, the first defendant and the second defendant on the basis that the vessel's condition which was under the custody of the Sheriff, continued to deteriorate and that there was a potential buyer for the vessel ie, Somap and it was the agreement of all three parties that to avoid the value of the vessel from further diminishing due to her condition, the vessel should be sold pursuant to the consent order. The first defendant argued that the plaintiff is barred by estoppel and *res judicata* as the plaintiff is attempting to re-litigate the matter which has been decided by the court that the beneficial ownership belongs to the second defendant. C D E

[66] I find no merit in this submission. There is no re-litigation here as the plaintiff is not arguing the issue of beneficial ownership of the vessel but rather submitting on the circumstances that the consent order was entered into by the parties which is the central issue in this application. F

[67] The court accepts the plaintiff's submission. The consent order was recorded on 20 July 2018. The issue of beneficial ownership was raised by the plaintiff as early as 10 March 2017 when the plaintiff filed its reply and defence to the counterclaim. At the point of entering into the consent order, the issue of who is beneficial owner of the vessel was already raised and was still a live issue to be determined at the trial. Parties could not have entered into the consent order on any assumption of whom the vessel belonged to. Thus it cannot be said that when parties entered into the consent order it was on the assumption that the first defendant owned the vessel. G

[68] I also observe that the first defendant's only evidence on this point is a bare averment by Tan Chor How Christopher, the deponent of the first defendant's affidavit-in-support of encl. 489 where he states at para. 6: H

6. Saya sesungguhnya menyatakan bahawa Perintah Persetujuan ini telah dimasuki atas anggapan bahawa Defendan Pertama adalah pemilik benefisial vessel. I

A [69] No other material was before the court on the issue that parties entered into the consent order based on the assumption that the first defendant was the beneficial owner of the vessel.

B [70] It is factually not true that the consent order was entered only between the plaintiff and the first defendant and the vessel was sold without the second defendant’s consent. The averments of Tan Chor How Christopher in his affidavit indicates otherwise. He said at para. 5:

C Saya sesungguhnya menyatakan bahawa **satu perintah persetujuan telah dimasukkan pada 20.07.2018 antara Plaintiff, Defendan Pertama dan bekas Pelikuidasi Defendan Kedua** di mana hasil jualan vessel PDZ Mewah (selepas ini dirujuk sebagai “Vesel tersebut”) dibayar ke dalam satu akaun yang dipegang bersama atas nama peguamcara Plaintiff, Defendan Pertama dan bekas peguamcara Defendan Kedua sementara menunggu penentuan keutamaan. (emphasis added)

D [71] The minutes of 20 July 2018 also shows that the solicitor for second defendant, Mohammad Danial of Messrs S Ravenesan was in attendance when the consent order was entered into. In fact there were some oral amendments to the prayers of the application (encl. 223) and both the first defendant and second defendant confirmed the amendments with no objections. The second defendant also signed off on the draft order (encl. 235). It is perplexing to see why the first defendant insisted that the consent order was entered into without the second defendant’s consent.

F [72] The consequences of entering into the consent order ought to be clear to the first defendant and the second defendant who were represented by their solicitors. The outcome that, if the plaintiff were to be successful in its claim, that the court will find that the second defendant is the beneficial owner of the vessel due to the sham transfer and that the plaintiff has a lien over the vessel which entitles payment to the plaintiff out of the proceeds of sale of the vessel ought to be obvious to the first defendant and the second defendant. There is thus no merit to the contention of the second defendant that the understanding of parties when the consent order constitutes a mistake on the identity of the owner of the vessel and the rights of the second defendant in respect of the vessel. There is also no merit to the first defendant’s submissions that the consent order had directly affected the second defendant’s rights and interest by depriving the second defendant’s rights and interest to sell and deal with the vessel.

G [73] The cases of *The St Merriel* (*supra*) and *The Pangkalan Susu/Permina 3001* (*supra*) do not assist the first defendant. In *The St Merriel*, the issue before the court was whether there was beneficial ownership of a vessel held under a possessory lien and the court held that under the Administration of Justice Act 1956, an “other charge” on any ship does not include a possessory lien.

I

The court then went on to explain what “beneficial ownership” entails in the context of when an action *in rem* lies to enforce a maritime lien or other charge on any ship for the purpose of the Act. In *The Pangkalan Susu/Permina 3001*, the issue was whether a person who had only full control and possession of the ship arrested beneficially owned the ship within the meaning of s. 4(4) of the Singapore High Court (Admiralty Jurisdiction) Act. Holding it did not, the court explained that “beneficial use” is not the same as beneficial “ownership”. In both cases, there is no question regarding whether a party adjudged by the court after trial to have beneficial ownership of a ship should hold the proceeds of sale of the vessel.

[74] Here I wish to note that the defendants’ argument on the consent order being invalid has fallen and the Sheriff’s rights to deal with the proceeds is intact. There is no reason for the second defendant to now hold the sale proceeds. The issue that is left is only how to distribute the proceeds.

*Special Circumstances For Stay*

[75] The second defendant prayed in encl. 433 for all other proceedings in this action to be stayed until the determination of encl. 433 first as other proceedings including the notice of taxation of the costs incurred by the Sheriff and the determination of priority for the pay out of the sale proceeds in encl. 438 will render encl. 433 nugatory and academic as both the application in encls. 433 and 438 or any further proceedings concerned involve determination by this court on the sale proceeds for the vessel.

[76] The second defendant submitted the stay application is necessary as any proceedings if allowed to proceed, including the notice of taxation of the costs incurred by the Sheriff and the determination of priority for the pay out of the sale proceeds will render encl. 433 nugatory and academic as both the applications in encls. 433 and 438 and any further proceedings concerned involve determination by the court on the sale proceeds for the vessel. The *status quo* on the sale proceeds of the vessel must be preserved until the disposal of the second defendant’s application in encl. 433. The second defendant relied on the High Court case of *Tengku Reza Shah Tengku Chaidzir Shah v. Asiapura Lands Sdn Bhd* [2020] 1 LNS 478 to argue that on a balance of convenience the *status quo* must be preserved by the stay.

[77] The plaintiff submitted that the second defendant has not shown any proof that its encl. 433 has any special circumstances which render it necessary for the stay on the plaintiffs encl. 438 to be granted. In support of this submission, the plaintiff relied on the case of *The Government Of Malaysia v. Datuk Kadir Mohamad Mastan & Another Case* [1993] 4 CLJ 98; [1993] 3 MLJ 514 which held that to show special circumstances the applicant must show that there is something exceptional in character.

- A [78] I rejected the submission of the second defendant as it has not proven that there are special circumstances which render the stay is to be granted. The second defendant only made averments as to the fact that there is an appeal against the judgment dated 3 August 2020 which concerns the alleged wrongful arrest of the vessel and the court’s decision on the setting aside of the consent order in encl. 438 would be rendered academic if the plaintiff’s application for the determination of priorities were to proceed. These by themselves do not constitute special circumstances and in fact the second defendant did not aver that these were special circumstances to justify the stay.
- B
- C [79] In any event, encl. 433 and encl. 438 are both being determined by the court on the same issues, mainly relating to the right of the plaintiff as a statutory lienholder and secured creditor to the proceeds of sale of the vessel. There is no need to dispose encl. 433 before encl. 438 as these could be heard together.
- D **Conclusion**
- E [80] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiff had clearly met the requirements for the orders for determination of priorities and payment out from the proceeds of sale of the vessel pursuant to O. 70 r. 21 of the ROC 2012 to warrant the court to allow encl. 438. The second defendant and the first defendant’s applications in encls. 433 and 489 respectively are also dismissed due to, for the main part, the plaintiff’s status as a statutory lienholder and a secured creditor following *Re Aro Co Ltd* (*supra*); *Lim Bok Lai v. Selco (Singapore) Pte Ltd* (*supra*); and *Kuo Fen Ching and Another v. Dauphin Offshore Engineering & Trading Pte Ltd* (*supra*).
- F

---

G

H

I