

Client Alert

Singapore Court of Appeal Considers Shipowner's Liability Under the Concept of Agency by Estoppel

For further information please contact

Chan Leng Sun, SC
+65 6434 2703
LengSun.Chan@bakermckenzie.com

Liu Zeming
+65 6434 2274
Zeming.Liu@bakermckenzie.com

Baker & McKenzie, Wong & Leow
8 Marina Boulevard, #05-01
Marina Bay Financial Centre Tower 1
Singapore 018981

www.bakermckenzie.com

Introduction

Under what circumstances would you be liable on a contract to which you were not a party?

In *The "Bunga Melati 5"* [2016] SGCA 20 ("**Bunga Melati 5**"), the Singapore Court of Appeal discussed one of the established exceptions to the doctrine of privity of contract -- the principle of agency.

The general idea is that a putative principal will be liable on a contract made between his agent and a third party if:

1. The principal has given express or implied authority for the agent to contract on his behalf (i.e. actual authority); or
2. The principal has, through words or conduct, represented to the third party that the agent has authority to contract on his behalf, and there was reasonable reliance by the third party on the representation (i.e. apparent authority).

But what if there was no positive representation from the principal? Is silence or inaction sufficient and if so, under what circumstances? Is there a separate doctrine of agency by estoppel and how is it different from the established concept of apparent authority?

The Court of Appeal considers these issues and the concept of agency by estoppel in *Bunga Melati 5*.

The Facts

MISC Berhad (the "**Defendant**") owns and operates commercial vessels. It is known to be one of the largest shipowners in the world.

Between 2005 to 2008, the Defendant purchased bunker fuel (i.e. vessel fuel) from one of its registered bunker vendors, Market Asia Link Sdn Bhd ("**MAL**"). To meet the Defendant's demands, MAL in turn entered into bunker contracts with various bunker suppliers. Equatorial Marine Fuel Management Services Pte Ltd (the "**Plaintiff**") was one such bunker supplier.

Between 2006 to 2008, the Plaintiff delivered approximately 198,000mt of bunkers to the Defendant's vessels pursuant to bunker supply contracts with MAL. MAL failed to make payments to the Plaintiff under three such bunker contracts (the "**Disputed Contracts**").

Accordingly, the Plaintiff commenced proceedings against the Defendant to claim more than US\$21,000,000 for fuel delivered to vessels owned and operated by the Defendant under the Disputed Contracts.

The Plaintiff's case was that the Defendant was, in fact, the counterparty to the Disputed Contracts and that MAL was acting as the Defendant's agent. The Defendant's case was that it was never party to the Disputed Contracts and that the Plaintiff had to look to MAL for payment. The Defendant said that it purchased the bunkers from MAL and paid MAL in full.

At trial, the Plaintiff advanced three arguments, all of which were rejected at first instance:

1. MAL had actual authority from the Defendant to act as its agent.
2. MAL had apparent authority from the Defendant to act as its agent.
3. The Defendant was estopped from denying MAL's authority to transact on its behalf as its agent.

On appeal, the Plaintiff pursued only the last point, i.e. the High Court Judge's finding that the Defendant was not estopped from denying that MAL was its agent.

The Court of Appeal's Decision

The Court of Appeal upheld the trial judge's decision, and found that the Defendant was not estopped from denying that MAL was its agent.

The Court of Appeal observed in passing that, while there is academic writing supporting a distinction between the concepts of apparent authority and agency by estoppel, the doctrine of agency by estoppel has not been clearly ascertained as a separate basis of liability from apparent authority. The doctrine of apparent authority has been analysed as an instance of estoppel. The Court of Appeal held that the inquiry in this case should be undertaken within the traditional framework of estoppel by examining three essential elements:

1. A representation by the person against whom the estoppel is sought to be raised;
2. Reliance on such representation by the person seeking to raise the estoppel; and
3. Detriment.

The Court of Appeal accepted that silence or inaction may constitute a representation, but only in circumstances where there was a legal (not merely moral) duty to make disclosure, communication or correction.

The onus and ambit of responsibility of the silent party has to be decided by reference to whether a mistaken party could *reasonably* have expected to be corrected. This will inevitably depend on the *precise circumstances* of the case.

In this case, the Plaintiff did not point to any positive representation from the Defendant. Instead, its case on estoppel was that the Defendant *knew* that MAL was conducting *all* its transactions with *all* its bunker suppliers (including the Plaintiff) on the basis that it was the Defendant's agent, and failed to correct the Plaintiff's mistaken belief.

On the facts, the Court of Appeal found that the Plaintiff could not even prove, on a balance of probabilities, that the Defendant *knew* that the MAL was conducting all its transactions with all its bunker suppliers on the basis that it was the Defendant's agent.

This was a predicate to the Plaintiff's case, and having failed to prove this, there was neither the need nor the basis for the Court of Appeal to consider whether the Defendant had a duty to communicate to the Plaintiff that MAL was not its agent.

Comments

The problem which the Plaintiff faced in this case was that it was unable to point to any positive conduct on the part of the Defendant to satisfy the traditional requirement of a "*representation*" under the concept of apparent authority. The Plaintiff's argument that the conduct of the putative principal taken as a whole may be sufficient to found the estoppel was too general to establish a representation.

The Plaintiff could therefore only rely on the Defendant's silence and inaction, and sought to do so under the doctrine of estoppel.

In this instance, it brought the Plaintiff's case no further in the absence of a legal duty to speak.