ANNOTATED

IN THE HIGH COURT OF AUSTRALIA No P 46 of 2013

PERTH REGISTRY

BETWEEN:

THE SHIP "GO STAR"

Appellant

DAEBO INTERNATIONAL SHIPPING CO LTD

Respondent

APPELLANT'S REPLY

Part I: Publication Certification

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

10 **Part II: Reply to the Argument of the Respondent**

Connection to the People's Republic of China

2. The Respondent's Submissions at [4] suggest that the only factual connection of the tort of inducing breach of contract to the People's Republic of China (**PRC**) was that the *Go Star* was in Chinese territorial waters at the time the cause of action arose. This is inconsistent with the finding of the trial judge at TJ [100]-[101] (AB 217-218) that it was also the objective of the agent of the owners to prevent the vessel being loaded in the PRC.

3. In any event, it may equally well be said that the "only" factual connection with Singapore was that this was the location of a person who made a decision to cause a breach of contract. Singapore was not the jurisdiction of the person who made the communications which
20 induced the decision to breach the contract. Mr Pantelias was in Greece. Singapore was not the jurisdiction where the vessel was registered. That jurisdiction was Malta: TJ [1] (AB 198). Singapore was not the jurisdiction of either company which was party to the

Date of Document: 20 November 2013
Filed on behalf of the Appellant by
DLA Piper
Level 31, 151-158 St George's Terrace
PERTH WA 6000

Tel: +61 8 6467 6000
Fax: + 61 8 6467 6001
Ref: Richard Edwards / Jason Morris

contract which was breached. They were companies based in another jurisdiction. Singapore was not the location where payment was due. Again, that was a bank in South Korea. Singapore was not the jurisdiction of the proper law of the contract which was breached. That was England.

4. This simply underlines that the case has factual connections with a number of international jurisdictions. The question is the appropriate legal test which should be used to select one of these jurisdictions as the *lex loci delicti* for the tort of inducing a breach of contract. That question is not answered by stating that the factual connection with one or other jurisdiction is the "only" factual connection with that jurisdiction.

10 ***Significance of the act and intention of the defendant***

5. The Respondent's Submissions at [6]-[10] contrast the test used to determine the *lex loci delicti* for the tort of negligent misstatement with the test used to identify the *lex loci delicti* for the tort of defamation. All that this highlights is the difficulty of stating a single rule of location for all torts: see ***Dow Jones & Co Inc v Gutnick*** (2002) 210 CLR 575 at [43]. It does not otherwise particularly illuminate what should be the legal test for selecting the *lex loci delicti* for the tort of inducing a breach of contract.

6. The Respondent contends, at [9], that the gravamen of the tort is the intention of the tortfeasor. However, there is a double-edge to this submission. Given that the intention of the tortfeasor is to induce a breach of contract, a focus on the intention of the tortfeasor
20 suggests that the place where the tortfeasor intended the breach of contract to occur is the location of the tort.

Accessorial liability

7. The Respondent seeks to undermine the House of Lord's reasoning in ***OBG*** by submitting, at [17], that a theory of accessorial liability "presumes that the damages available against the tortfeasor are to be the same as the damages available against the contract breaker." However, an explanation of the tort in terms of accessorial liability does not depend upon any such presumption. Accessorial liability can be imposed which differs from the primary actor's liability. See, for example, this Court's consideration of the remedies available against the accessory and the fiduciary in a case of knowing assistance in the breach of a
30 fiduciary duty: ***Michael Wilson & Partners Ltd v Nicholls*** [2011] HCA 48; (2011) 244 CLR 427 at 457-458 [106].

8. An understanding of the tort in terms of accessorial or secondary liability has also found favour in this Court, albeit by way of *obiter dicta*: ***Roadshow Films Pty Ltd v iiNET Ltd*** [2012] HCA 16; (2012) 86 ALJR 494 at 515 [109]-[110] (Gummow and Hayne JJ); 286 ALR 466 at 492. This is consistent with the requirement that it is necessary for there to be a (primary) breach of contract before there can be any (secondary) liability for procuring a breach of contract: ***McKernan v Fraser*** (1931) 46 CLR 343 at 358-359.

9. Further, an agent cannot be liable for procuring a breach of its principal's contract, while acting within the scope of the agent's authority: ***O'Brien v Dawson*** (1942) 66 CLR 18 at 32, 34. While the agent acts on behalf of the principal, the agent is not an accessory but (in legal theory) the principal itself. However, if there was a separate theory of non-accessorial liability for the tort of inducing a breach of contract, as the Respondent submits, it would follow that the agent could nevertheless be liable for procuring the principal's breach of contract, because the agent would be subject to an independent liability to the victim for his or her acts of inducing a breach. That is inconsistent with ***O'Brien***.

10. The Respondent argues, at [18], that a focus on the breach of contract directs attention to the proper law of the contract as being the applicable law for the tort. However, this is fundamentally inconsistent with the principle established in ***Zhang*** that the choice of law rule for foreign torts is the *lex loci delicti*: see Appellant's Submissions at [50]. Even prior to ***Zhang***, this Court's decision in ***Voth v Manildra Flour Mills*** (1990) 171 CLR 538 determined the law of the place of the tort of negligent misstatement in relation to the provision of accountancy services, without any reference to the proper law of the contract governing the provision of those accountancy services. See ***Voth*** at 567-569.

Quasi-proprietary rights

11. The Respondent's Submissions at [19]-[22] seek to dismiss the "quasi-proprietary right" thesis of Kitto J in ***Attorney-General (NSW) v Perpetual Trustee Co Ltd*** (1952) 85 CLR 237 at 294-295. Yet Kitto J's thesis was fundamental to this Court reasoning in ***Zhu v Treasurer of New South Wales*** [2004] HCA 56; (2004) 218 CLR 530 at [123]-[134]. There has been no application to re-open or reconsider ***Zhu***.

12. The Respondent at [21] refers to the dissenting judgment of Windeyer J in ***Haque v Haque*** ***(No 2)*** (1965) 114 CLR 98 at 136 as authority for the proposition that analysis of the location of a contractual right is artificial. However, Windeyer J continues on to conclude that "law for its own purposes puts all its incorporeal creatures in their proper places". See

also, to similar effect, ***Livingston v Commissioner of Stamp Duties (Qld)*** (1960) 107 CLR 411 at 451-452 (Kitto J). Given that the law will assign a geographical location to an intangible right, where this is necessary to give effect to its doctrines, there is no difficulty in adopting the quasi-proprietary analysis in ***Zhu***. In any event, the Respondent attributes its own place to a breach of contract at [35] of its submissions.

13. The Respondent further submits that recognition of the quasi-proprietary nature of the contract rights for the purposes of the tort of inducing a breach of contract suggests that contractual rights should also be protected from negligent interference. However, the recognition that contractual rights are in *some* respects like proprietary rights does not
10 require contractual rights to be recognised as being in *all* respects like proprietary rights.

Metall und Rohstoff

14. In ***Metall*** Slade LJ selected the *lex loci delicti* "by taking account of the breaches (particularly the effective breaches) induced and the resulting damage" (449C-D, see also at 448G). The focus upon the effective breaches and where they occurred is precisely the test advanced by the Appellant. In relation to the site where the loss is suffered, in Australia this is not a test of *lex loci delicti* according to ***Voth***.

15. In the context of ***Metall***, the Respondent suggests, at [24], a particular difficulty in looking to the place of the breach of contract to determine the place of the tort. It submits that the same act of inducement could be actionable in respect of certain breaches but not in respect
20 of others. However, the Respondent has not given any concrete example of how the difficulties it contemplates would create any real issues. If two different contracts are breached in different locations, why should there not be two different causes of action relating to inducing breaches of different contracts?

Haphazard results

16. The Respondent submits, at [26], that there are no haphazard results which flow from adopting the place where a person was induced to breach a contract as the test for the *lex loci delicti*. That is because the Respondent says that the relevant place is where the induced person was *expected to be*, rather than the place where the induced person was *actually* located. However, this gloss to the test of the *lex loci delicti* is unattractive.

30 17. Using the Iceland example in the Appellant's Submissions at [70], the Respondent's gloss would lead to the result that Singaporean law is applied, even though the recipient of the

communication is in Iceland, the communication is made from Greece and the breach of contract occurs in China. That is, it would result in the application of Singaporean law in circumstances where no relevant actor is in Singapore, and no relevant action takes place in Singapore. The submission that Captain Hu's email server is located in Singapore is beside the point and, moreover, without an evidentiary foundation.

Repudiation

18. The Respondent contends at [37]-[38](a) that the relevant breach of contract was breach of the payment obligation by Nanyuan rather than a repudiation because the failure to pay occurred before the emails demonstrating repudiatory intent were sent. However, the Respondent's pleaded case is one of repudiation: Further Re-Amended Statement of Claim, [15] (AB 5). The payments were not simply late; they were never made. The reason for non-payment was clarified by the subsequent emails which evidenced repudiatory intent.

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19. The Respondent's submission at [38](a) that there was no finding at first instance that the Appellant intended to bring about a repudiation is, with respect, wrong. See TJ [92] (AB 215) and [99] (AB 217). Further, the distinction between a time sub-charterparty and a voyage sub-charterparty, relied upon in the Respondent's Submissions at [38](c), is irrelevant. Nanyuan intended not to proceed with the sub-charterparty altogether.

20. At [39](d), the Respondent asserts that Nanyuan's repudiatory conduct was not accepted by the Respondent. However, the *existence* of a repudiatory breach for the purposes of establishing a tortious claim, does not in any way depend upon whether the other party "accepts" it. If there is a repudiatory breach, the counterparty may elect to terminate the contract, but is not bound to do so. In any event, the lack of express acceptance may be explained by the matter being overtaken by events: the *Go Star* was withdrawn from the head charterparty on 15 January 2009. See TJ [40] (AB 206); FC [9] (AB 242).

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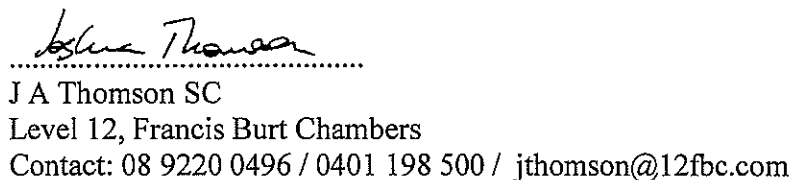
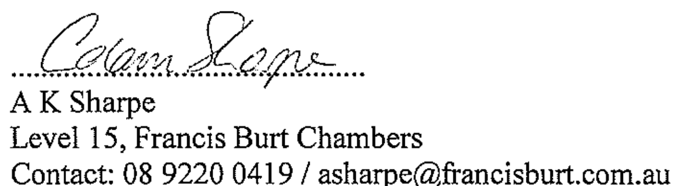


J A Thomson SC
Level 12, Francis Burt Chambers
Contact: 08 9220 0496 / 0401 198 500 / jthomson@12fbc.com



A K Sharpe
Level 15, Francis Burt Chambers
Contact: 08 9220 0419 / asharpe@francisburt.com.au