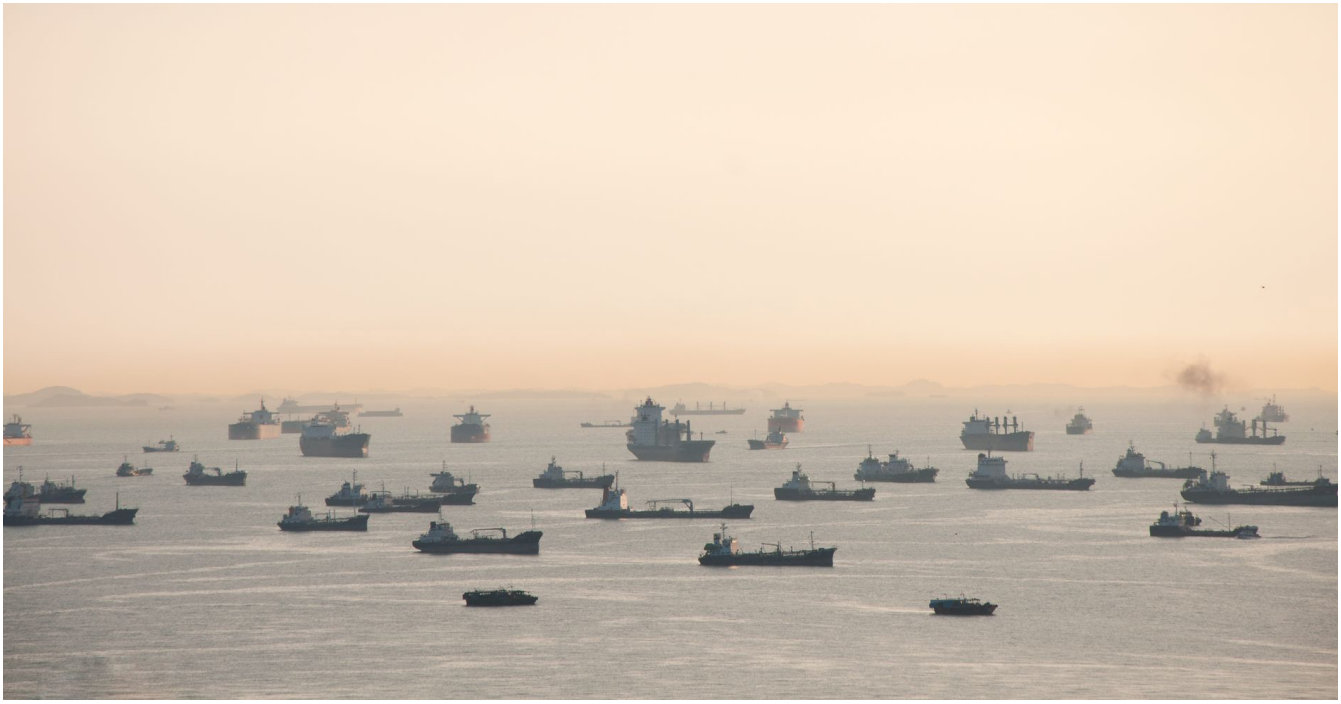

A question of authority in Singapore

Earlier this year the Singapore Court of Appeal clarified the law of agency in bunker supply contracts involving intermediaries.

Published 26 September 2016

In the BUNGA MELATI 5* ([2016] SGCA 20) case, the appellant, Equatorial Marine Fuel Management Services Pte Ltd (EMF) is a Singapore company which sells and supplies bunkers to ocean-going vessels. The respondent, MISC Berhad (MISC) is one of the largest global shipowning companies.

Background and brief facts

Market Asia Link Sdn Bhd (MAL) is a Malaysian company which was an approved bunker vendor to MISC's vessels. MAL would procure bunkers from various physical suppliers - including EMF - through bunker brokers and then deliver the bunkers to MISC's fleet of vessels pursuant to bunker contracts MAL entered into as sellers with MISC.

EMF's claim against MISC was for USD 21.7 million, being non-payment for approximately 71,100 mt of bunkers delivered to vessels owned or operated by MISC, under three contracts (the 'disputed contracts'). At the trial in the Singapore High Court, EMF argued that MISC was liable for the cost of the bunkers under the disputed contracts on the grounds that at all material times MAL (as EMF's contractual counterparty):

1. Acted as MISC's agent and had actual and/or apparent authority to enter into the disputed contracts on MISC's behalf.
2. As an alternative argument, that there was an "agency by estoppel" – that is to say, MISC was prevented from denying that MAL was acting as its agent with respect to the disputed contracts.

The High Court decided in favour of MISC, and dismissed EMF's claim with costs ([2015] SGHC 190).

EMF filed an appeal to the Court of Appeal.

The Appeal

EMF's appeal was confined to their alternative case that there was an "agency by estoppel". EMF contended that MISC was prevented from denying MAL's agency relating to the disputed contracts because MISC allegedly knew that MAL had entered into the disputed contracts representing itself as MISC's agents and failed to correct EMF's mistaken belief that MAL was not entering in the contracts in its own right. EMF relied on the following arguments:

1. MISC had knowledge that MAL had represented to all its bunker suppliers in respect of all its transactions that it was MISC's agent.
2. In spite of such knowledge, MISC did not correct EMF's mistaken belief that MISC was its contractual counterparty.
3. In addition, MISC encouraged MAL in its misrepresentations to its bunker suppliers that it was MISC's agent.
4. EMF relied on these misrepresentations to its detriment – i.e. but for MAL's misrepresentation, EMF would not have entered into the disputed contracts.
5. MISC was therefore prevented from denying that MAL was its agent in respect of the disputed contracts.

The Court of Appeal rejected EMF's arguments, and dismissed the appeal with costs.

In arriving at its decision, the Court examined the law on agency by estoppel and apparent authority in detail but stopped short at deciding whether agency by estoppel was a distinct and separate doctrine from apparent authority. The Court approached the matter within the traditional estoppel framework – that is to say, estoppel would be found where:

(i) A representation was made by the party against whom the claim of estoppel was being brought;

(ii) The party claiming the estoppel relied on such representation; and

(iii) The party relying on the representation did so to their detriment.

The decision

The Court of Appeal affirmed the established principle that a representation could be made by silence or inaction in the following circumstances:

1. Where the putative principal (MISC) had a legal (as opposed to merely moral) duty to disclose the facts to the third party (in this case, the fact that MAL was not its agent); and
2. The putative principal (MISC) by his silence/inaction failed to correct the third party's (EMF's) mistake/misapprehension.

The fundamental component in establishing a duty to speak is proof that the putative principal **knew** that the claimant was proceeding on the basis of a mistaken belief.

The facts of each case would have to be closely examined to determine if the mistaken party could have reasonably expected to be corrected.

As EMF had no direct evidence to prove that MISC had such knowledge, EMF argued that the requisite knowledge could be inferred from certain facts which according to EMF, showed that MISC knew MAL was holding itself out as its agent.

The Court of Appeal disagreed with EMF and found that the evidence did not support EMF's factual allegations. As an inference could only be drawn from proven facts if it is the **sole inference** *that can be drawn, which the Court of Appeal found to be not the case, the Court of Appeal held that the requisite knowledge which EMF was seeking to impute on MISC was not established. EMF's case therefore failed and their appeal was dismissed with costs.*

Conclusion and recommendations

The Appeal Court's decision in the *BUNGA MELATI 5* is positive for Gard's Members and clients, confirming that a failure to speak will not usually give rise to an agency by estoppel. However, the judgment also suggests that where a shipowner has reason to suspect a third party is holding itself out as an agent of the shipowner, this can impose a positive obligation on the shipowner to investigate further and disclose the correct position to its commercial partners.

It is also apparent from this judgment that the existence of an agency by estoppel depends on the facts of each case. From a practical standpoint therefore, if a Member or client has any reason to suspect that a third party is holding itself out as its agent, or is notified of this by a counterparty, we recommend that:

1. The Member or client to communicate the correct position directly with its counterparties.
2. Clear internal reporting procedures are in place to address any instances giving rise to suspicion by operations staff.

A related Insight article about agency and authority under English law can be found here .

Please take a second to rate this article based on how useful and relevant it is by clicking on the stars in the top right hand corner.

Questions or comments concerning this Gard Insight article can be e-mailed to the Gard Editorial Team .