IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 117

Suit No 184 of 2018

Between

CIMB Bank Berhad

… *Plaintiff*

And

World Fuel Services (Singapore) Pte Ltd

… *Defendant*

JUDGMENT

[Banking] — [Lending and security]

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CIMB Bank Bhd
v
World Fuel Services (Singapore) Pte Ltd

[2020] SGHC 117

High Court — Suit No 184 of 2018
Dedar Singh Gill JC
29, 30, 31 October, 1, 5 November 2019, 27 December 2019

9 June 2020 Judgment reserved.

Dedar Singh Gill JC:

Introduction

1 In this action, CIMB Bank Berhad ("CIMB") claims against World Fuel Services (Singapore) Pte Ltd ("WFS") for sums under a deed of debenture dated 15 July 2016 ("the Debenture"). The Debenture assigned to CIMB rights under 11 invoices issued by Panoil Petroleum Pte Ltd ("Panoil") ("the 11 Panoil Invoices") and 11 sales confirmations issued by Panoil ("the 11 Panoil Sales Confirmations"). The 11 Panoil Sales Confirmations incorporated terms from a document titled "Panoil's Terms and Conditions For Sales of Marine Fuel" ("Panoil's Terms and Conditions"). The aforesaid invoices, sales confirmations and terms and conditions are collectively referred to as "the Sales Documents". The Sales Documents related to 11 separate sales of marine fuel oil by Panoil to WFS ("the Subject Transactions").

Facts

Background

2 CIMB is the Singapore branch of a bank incorporated in Malaysia and is licensed to provide banking services in Singapore.[1] CIMB provided such services to Panoil. On 2 October 2017, Panoil was placed under judicial management.[2] It has since been wound up. Panoil occupied a different position in the supply chain for marine fuel oil from WFS.[3] Panoil was a physical *supplier* of marine fuel oil to vessels.[4] WFS is a bunker *trader* with access to the supply of marine fuel oil from "oil majors" and cargo traders.

3 CIMB's banking services to Panoil were governed by a facility letter dated 29 June 2016 ("the Facility Letter"). The loan facility contained therein was secured, *inter alia*, by an all monies limited debenture over all the goods and/or the receivables and documents representing the goods financed by CIMB. Under the Facility Letter, Panoil was obliged to execute such a debenture.[5] On 15 July 2016, Panoil purportedly executed the Debenture in favour of CIMB.[6] In substance, the Debenture assigned certain rights to CIMB. CIMB relies on those rights in this action against WFS.

4 In or around mid-August 2017, CIMB discovered that Panoil was in

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1 KMMEVAEIC, para 3.

2 LSJAEIC, para 14.

3 LCCAEIC, para 4.

4 LCCAEIC, para 4.

5 KMMEVAEIC, paras 6 to 7.

6 KMMEVAEIC, para 7; see KKMEV-3 for the copy of the Debenture.

financial trouble.[7] Based on news that Panoil's bunker crafter operator's license had been revoked, CIMB realised that Panoil's operations could suffer.[8] CIMB then issued WFS a notice of assignment on 29 August 2017 ("the Notice of Assignment") of its rights under the Debenture.[9]

5 On 22 February 2018, CIMB sought to exercise its rights as the legal assignee under the Debenture against WFS.[10]

The witnesses

6 The following witnesses appeared for CIMB:

(a) Bay Gek Qwee ("Ms Bay"), an associate director for trade sales in CIMB.[11] Ms Bay testified that she had personally sent the Notice of Assignment to WFS.

(b) Lai Shing Joo ("Ms Lai"), a relationship manager in CIMB handling Panoil's affairs.[12] Ms Lai described CIMB's commercial relationship with Panoil and explained why CIMB had not called Panoil's former employees as witnesses in the present proceedings.

(c) Khoo May May Evelyn Vanessa ("Ms Khoo"), a director of commercial banking in CIMB.[13] Ms Khoo was the main witness for

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7 KMMEVAEIC, para 21.

8 KMMEVAEIC, para 27.

9 KMMEVAEIC, para 28.

10 KMMEVAEIC, para 34.

11 1BAEIC; BGQAEIC, para 1.

12 1BAEIC; LSJAEIC, paras 1 and 3.

13 2BAEIC; KMMEVAEIC, para 1.

CIMB. She testified extensively on the Subject Transactions and, more generally, on the commercial relationship between CIMB and Panoil.

(d) Neo Tiau Gee ("Mr Neo"), the executive director of SDE International Pte Ltd. He has more than 26 years of experience in the bunker industry.[14] Mr Neo was an expert witness on various matters relating to the bunkering industry.[15] He tendered an expert report ("Mr Neo's Expert Report").

7 The following witnesses appeared for WFS:

(a) Tan Chee Boon ("Mr Tan"), WFS' supply manager. Mr Tan was personally involved in WFS' dealings with Panoil.[16] He testified that WFS had entered into a number of separate contracts with Panoil that gave it certain rights of set-off against Panoil. He explained that the sums due to Panoil under the Subject Transactions had been validly set-off pursuant to various set-off notices.

(b) Adrienne Beth Bolan ("Ms Bolan"), the former senior Vice President and Treasurer of WFS.[17] Ms Bolan testified to the authenticity of a key document which WFS relies on in this action. Ultimately, her evidence was not material to the proceedings for the reasons explained at [82].

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14 1BAEIC; NTGAEIC, para 1.

15 NTGAEIC, para 3.

16 TCBAEIC, para 1.

17 ABBAEIC, para 1.

(c) Loh Chee Choon ("Mr Loh"), the Vice President (Asia Supply) of WFS.[18] Like Mr Tan, Mr Loh testified to the business dealings with Panoil and how the sums owed to Panoil had been validly set off.

(d) Tay Liang Seng ("Mr Tay"), the financial controller of WFS.[19] Mr Tay gave evidence on the contracts that WFS had entered into with Panoil, which granted it rights of set-off.

(e) Lee Boon Meng Francis ("Mr Lee"), the managing director of WFS.[20] Mr Lee's evidence was that he had personally signed three of the key documents which WFS relies on to defend CIMB's claims. Like Ms Bolan, his evidence was ultimately not relevant to the proceedings.

The parties' cases

CIMB's case

8 CIMB claims that Panoil assigned to it certain rights under the Sales Documents pursuant to the Debenture.[21] These Sales Documents incorporated cl 8.2 of Panoil's Terms and Conditions, which provide that WFS was obliged to pay Panoil for each sales invoice "free … of set-off".[22]

9 The details of the 11 Panoil Invoices are as follows:[23]

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18 LCCAEIC, para 1.

19 TLSAEIC, para 1.

20 LBMFAEIC, para 1.

21 SOC (Amendment No.2), para 4.

22 SOC (Amendment No.2), para 6.

23 SOC (Amendment No.2), para 8.

Sales Confirmation Ref. No.	**Invoice Date**	**Invoice No.**	**Invoice Amount (USD)**	**Late Payment Interest as at 19 Feb 2018 at 2% per month (USD)**
SO-1706-0986	6 July 2017	PS-B17/07-0016	381,602.89	50,625.98
SO-1706-0964	9 July 2017	PS-B17/07-0025	395,953.61	51,737.94
SO-1707-0996	10 July 2017	PS-B17/07-0028	396,532.50	51,813.58
SO-1707-1027 (Amended Sales Confirmation)	20 July 2017	PS-B17/07-0047	526,258.98	64,905.27
SO-1707-1062	31 July 2017	PS-B17/07-0083	189,568.67	21,989.97
SO-1707-1065	31 July 2017	PS-B17/07-0087	204,165.00	23,683.14
SO-1707-1073	6 August 2017	PS-B17/08-0004	304,351.57	34,087.38
SO-1707-1080	7 August 2017	PS-B17/08-0008	1,890,456.80	210,470.86
SO-1708-1091	10 August 2017	PS-B17/08-0017	410,579.72	44,890.05
SO-1708-1102	10 August 2017	PS-B17/08-0023	90,013.13	9,841.44
SO-1707-1111	12 August 2017	PS-B17-08-0030	304,160.95	32,849.38

10 In total, CIMB claims US$5,093,643.82 and late payment interest of US$596,894.99[24] under the rights contained in the Sales Documents pursuant to the Debenture.

[24] SOC (Amendment No.2), paras 12(1) and (2).

WFS' case

11 WFS denies the authenticity of the Debenture. WFS also maintains that, as a matter of contractual interpretation, the Debenture did not assign Panoil's rights under the Sales Documents to CIMB.

12 In addition, WFS does not admit that the Sales Documents governed the Sales Transactions. Instead, WFS claims that each of the Subject Transactions was covered by at least one of the following documents:[25]

(a) a contract of affreightment between WFS and Panoil dated 30 December 2016 ("the 2016 COA");

(b) a contract of affreightment between WFS and Panoil dated 11 July 2017 ("the 2017 COA");

(c) a Transportation Agreement M/T "OPHELIA" dated 1 January 2017 ("the 2017 TA"); and

(d) an agreement between WFS and Panoil on or around 20 August 2014, providing for the mutual setting off of certain payable sums ("the 2014 Offset Agreement").

13 I refer to the first three documents collectively as the "Umbrella Contracts".

14 Essentially, WFS contends that the Subject Transactions were part of a composite "buy-sell" relationship in which Panoil sold fuel oil to WFS before

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[25] Defence (Amendment No.2), para 2.2.

Panoil bought the *same* quantity of oil from WFS.[26] Thereafter, the oil would be delivered by Panoil to WFS' vessels.[27] This arrangement was governed by the Umbrella Contracts and/or the 2014 Offset Agreement. Under these contracts, WFS had rights of set-off exercisable against Panoil. Having exercised these rights against Panoil, WFS claims that it no longer owes CIMB.

15 WFS also denies that cl 8.2 of Panoil's Terms and Conditions had been successfully incorporated into any of the Sales Documents and, in particular, into the Sales Confirmations. Accordingly, WFS retained its rights of set-off. WFS successfully exercised these rights of set-off against Panoil and is therefore no longer liable to CIMB in respect of the Subject Transactions. Finally, WFS submits that CIMB must prove "loss" in order to succeed in its claims.

Issues to be determined

16 The following issues arise in this action:

(a) whether CIMB has proven the authenticity of the Debenture;

(b) have Panoil's rights under the Sales Documents been assigned under the Debenture;

(c) which documents governed the Subject Transactions;

(d) in any event, whether WFS was entitled to set-off the sums due under the Subject Transactions before the Notice of Assignment; and

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26 Defence (Amendment No.2), para 2.6.

27 Defence (Amendment No.2), para 2.6.

(e) whether CIMB is required to prove loss.

Is the Debenture authentic?

17 The Debenture contains two signatures purportedly belonging to Alvin Yong Chee Ming ("Yong"), Panoil's former managing director, and Lim Shi Zheng ("Lim"), a director of Panoil. WFS insists that CIMB proves these signatures belong to Yong and Lim.

18 CIMB's treatment of the original Debenture in this suit is relevant in two aspects.

19 First, the late disclosure of the original Debenture. CIMB disclosed a *copy* of the Debenture to WFS by way of a letter from its solicitors on 14 February 2018. Similarly, it disclosed a copy of the Debenture in its list of documents dated 28 September 2018. However, the original Debenture was only disclosed to WFS on 24 October 2019, when CIMB's solicitors wrote to WFS' solicitors informing them that the "original deed [was] available for [their] inspection…" WFS inspected the original Debenture on 25 October 2019. Having inspected the original Debenture, WFS filed a Notice of Non-Admission ("the Notice") as required by O 27 r 4(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The trial commenced on 29 October 2019. No reason was put forward for the late disclosure.

20 Second, although Ms Khoo referred to and exhibited a copy of the Debenture in her affidavit of evidence-in-chief, the original Debenture was not admitted through any of CIMB's witnesses. Instead, the original Debenture was

first introduced at trial during the cross-examination of WFS' witness, Mr Loh (see below at [41]).[28]

21 At trial, CIMB did not call Yong and Lim as witnesses to testify to the authenticity of the signatures. CIMB maintains that it cannot trust the credibility of Yong and Lim's evidence as they are presently being investigated for wrongdoing against it, including for "double financing".[29] CIMB also claims that the Commercial Affairs Department had asked it to assist in investigations against Yong and Lim.[30]

22 Despite not calling Yong and Lim as witnesses, CIMB seeks to prove the authenticity of the signatures by relying on s 75(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA").

23 Section 75(1) of the EA provides:

> **Comparison of signature, writing or seal with others admitted or proved**
>
> 75.—(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

24 CIMB submits that the signatures of Yong and Lim are clearly authentic upon comparison with their signatures on other documents, the authenticity of

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28 NE, 1/11/2019, p 32.

29 LJSAEIC, paras 27 to 28.

30 LJSAEIC, paras 27 to 28.

which WFS does not challenge.[31] CIMB also points to the fact that it had produced the original Debenture for inspection.[32] Further, CIMB contends that WFS had not expressly pleaded that Yong and Lim's signatures were inauthentic.[33]

25 While WFS did not expressly *plead* that Yong and Lim's signatures were inauthentic, it did not admit, in Defence (Amendment No.2), to CIMB's claims that its banking facilities were secured by the Debenture, and that Panoil had assigned, pursuant to the Debenture, all its rights, title, benefit, interest*, etc*, under the Sales Documents.[34] WFS also filed the Notice on 26 October 2019 which states that "*[WFS] requires [CIMB] to prove the authenticity of [the Debenture] at the trial of this action*" [emphasis added].[35] In my view, this placed CIMB on notice to prove the Debenture's authenticity at trial.

The law

26 The Court of Appeal in *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("*Jet Holding (CA)*") established the following principles relating to the proof of documents:

> (a) A party is legally entitled to object to the authenticity of documents. It is entitled to insist that the documents be admitted in accordance with the proper rules of evidence (*Jet Holding (CA)* at [36]).

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31 PCS, para 40.

32 PRS, para 17.

33 PRS, para 14.

34 Defence (Amendment No.2), paras 3 and 4.

35 Notice of Non-Admission of Documents dated 26 October 2019.

(b) The general principle is that the party wishing to admit documents into evidence must comply with the provisions of the EA (*Jet Holding (CA)* at [48]).

(c) The relevant provisions on the admission of documents include ss 63 to 67 of the EA (*Jet Holding (CA)* at [37]).

(d) A party is generally deemed to admit authenticity unless he can bring himself within O 27 r 4(2) of the ROC by showing that he had issued a notice of non-admission within the requisite window of time (*Jet Holding (CA)* at [73]).

27 In *Jet Holding (CA)*, the court held that documents exhibited in a supplemental affidavit of evidence-in-chief had not been properly admitted in evidence because the plaintiff failed to adduce *primary evidence* of those documents (*ie*, the originals). This is required under s 66 of the EA, which provides that documents must be proved by primary evidence except where permitted under s 67 of the EA. Primary evidence is defined in s 64 of the EA as meaning "the document itself [is] produced for the inspection of the court". The plaintiff failed to show that any of the exceptions for adducing *secondary* evidence (*ie*, non-original documents) under s 67 of the EA applied.

28 The EA was amended in 2012. One amendment was the addition of s 67A. Section 67A of the EA provides that where a document is admissible under s 32(1), it may be proved by the "production of a copy of that document, or of the material part of it, authenticated in a manner approved by the court". In other words, where a party satisfies one of the exceptions in s 32(1) of the EA, it may rely on a "copy" of that document. Section 66 must now therefore be read subject to s 67A. Notwithstanding the introduction of s 67A of the EA, the

general principles expressed by the court in *Jet Holding (CA)*, in my view, continue to be applicable. Although the present case does not centre on the provisions dealt with in *Jet Holdings (CA)*, *viz*, ss 66 and 67, the principles articulated above at [26] are relevant to this dispute, which concerns ss 69(1) and 75(1) of the EA.

29 Even where primary evidence of a document is produced, its *authenticity* may be in issue. In other words, a party may still insist on the other party proving that the signature belongs to the person who is alleged to have signed it, *despite that party having produced the original document*. This point is made clear by the learned authors of Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (Wadhwa & Co, 16th Ed, 2007) ("*Sarkar*") at 1248:

> *… There still remains the most important question, viz, the genuineness of the documents produced as evidence, ie, Is a document what it purports to be?* The production of a document purporting to have been signed or written by a certain person is no evidence of its authorship. Hence the necessity of rules relating to the *authentication* of documents, *ie*, proving their genuineness and execution. Proof, therefore, has to be given of the handwriting, signature and execution of a document. In *Stamper v. Griffin,* 1856, 20 Ga 312, 320 (Am) Benning, J said: -
>
> > No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a foregery [*sic*] until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing or the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence.
>
> [emphasis added in italics]

30 In this regard, it is also apposite to cite the observations by the High Court in *Jet Holding and others v Cooper Cameron (Singapore) Pte Ltd* [2005] 4 SLR(R) 417 ("*Jet Holding (HC)*") that the mere production of the original document is not sufficient to prove what it purports to be (at [146]):

> The making, execution or existence of a document has, for instance, to be proven by the evidence of the person who made it or one of the persons who made it, or a person who was present when it was made. In *Deutz Far East (Pte) Ltd v Pacific Navigation Co Pte Ltd* [1989] 2 SLR(R) 392, the original log book was tendered to court for identification. The court held the log book inadmissible as the person responsible for the logbook who was the master of the vessel was not called as a witness to establish that the log book was the vessel's log, that the signatures in the log were his and that he kept the log according to the statutory regulations. This decision demonstrates that a mere tender of even the original document is not enough. *Documents are not ordinarily taken to prove themselves or accepted as what they purport to be. There has to be an evidentiary basis for finding that a document is what it purports to be.*
>
> [emphasis added]

31 These observations do not appear to have been disturbed on appeal in *Jet Holdings (CA)*.

32 Section 69 of the EA provides:

> **Proof of signature and handwriting of person alleged to have signed or written document produced**
>
> **69.**–(1) If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

33 According to *Sarkar*, s 67 of the Indian Evidence Act of 1872 (which is in *pari materia* with s 69 of the EA) does not establish a new rule on what kind of proof must be given to prove the authenticity of a signature. Instead, the provision merely embodies what is the universal rule in all cases: *he who makes an allegation must prove it* (*Sarkar* at 1249). The general principle is that writing purporting to be of a certain authorship cannot be treated as genuine. There must be some *evidence* of its genuineness or its execution (at 1250).

34 There are various ways to prove that a document is authentic and was signed by the person who is alleged to have signed it. The following may be called as a witness:

(a) the person who signed the document;

(b) the person who witnessed the document being signed;

(c) a person who is acquainted with the handwriting of the person who signed the document (see s 49 of the EA); and

(d) a handwriting expert (see s 47 of the EA).

35 In addition, under s 75(1) of the EA, the disputed signature can be compared by a witness or by the court with a signature already admitted or proved. Section 75(1) of the EA is similar to s 73 of the Indian Evidence Act of 1872. While s 75(1) of the EA expressly provides that the comparison can be done by the court, s 73 of the Indian Evidence Act is silent on who can undertake the comparison. However, the position under Indian law is clear that the comparison can be undertaken by the court (*Sarkar* at 1307). Yet, Sarkar points out that the comparison should not *normally* be done by the court:

> Though, there has been no legal bar to the Judge using his own eyes to compare the disputed writings with the admitted writings; as a matter of prudence, *extreme caution, and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signatures with that of the admitted signatures or handwritings and hesitate to base its findings with regard to the identity of the handwritings solely on such comparison made by itself.* [emphasis added in italics]

36 *Yeoh Wee Liat v Wong Lock Chee and another suit* [2013] 4 SLR 508 ("*Yeoh Wee Liat*")[36] concerned two suits to rectify the share register of a company called Next Capital Pte Ltd ("NCPL"). In one suit, HRT Corporation ("HRT"), as plaintiff, claimed that the defendant, Wong, had agreed for it to hold 33% of the total shares in NCPL. The defendant alleged that this agreement was merely a non-binding understanding which was displaced by a subsequent agreement under which the plaintiff was entitled only to a 24.5% shareholding. To corroborate the subsequent agreement, the defendant relied on a share transfer form transferring only 24.5% of NPCL's shares to the plaintiff. This form was allegedly witnessed by HRT's sole director, Phuah. HRT filed a notice of non-admission in respect of the share transfer form. Citing s 69 of the EA, Quentin Loh J held that "since HRT has challenged the authenticity of the share transfer form, Wong had to produce the original *and prove that the signature thereon was in fact Phuah's*" [emphasis added]. Wong, however, failed to produce the original share transfer form. Neither did he prove that the signature belonged to Phuah. In the circumstances, the court found that HRT could not be taken to be aware that it had only been allocated 24.5% of the shares (*Yeoh Wee Liat* at [31]).

37 In *Raman Subbalakshmi Krishan v Indian Overseas Bank* [1994] SGHC 8, the plaintiff was the bank's customer, and had purportedly signed two letters of authority. As the bank relied on these letters in its claim, the bank bore the burden of proof. Three bank officers testified on its behalf. The bank also called a senior scientific officer of the Department of Scientific Services. The officer examined the signatures on various documents, and ultimately concluded that the *plaintiff* had signed the letters. In other words, they were authentic

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[36] DBOA, Tab 13.

documents. Having regard to the expert evidence, the court found that the plaintiff had signed the two letters of authority.

38 In *Bank of India v Dr Pravinchand P Shah* [1994] SGHC 276 ("*Bank of India*"), the bank claimed against the defendant under a guarantee. The defendant argued that the bank had failed to prove the guarantee as required under s 69 of the EA as it did not lead evidence of his signature. The plaintiff provided primary proof of the guarantee by producing it at the hearing. The defendant had admitted in a letter on 1 September 1987 that he was a guarantor to the bank but belatedly denied the existence of the guarantee on 9 September 1988. The court observed that s 69 of the EA does not prescribe the mode of proving the authenticity of a signature, and that the signature may be proved other than by direct evidence. Having regard to the defendant's conduct, the court was satisfied that he had signed the guarantee.

39 In *Chua Kim Eng Carol v The Great Eastern Life Assurance* [1998] SGHC 403 ("*Chua Kim Eng Carol*"), the plaintiff claimed for wrongful termination. The defendant had terminated an agency agreement with the plaintiff on the basis that signatures on certain policy documents had been forged by the plaintiff. Despite the defendant calling an expert witness to prove that the signatures had been forged, and the plaintiff calling her own expert witness to prove that the signatures were not forged, Tay Yong Kwang JC (as he then was) found that the plaintiff had not breached the agency agreement by forging the policyholders' signatures. In doing so, the court made the following observations:

> (a) There is no requirement in law that the evidence of a handwriting expert must be corroborated. However, it would not be safe, even on a balance of probabilities, to conclude that the documents had been

forged, especially where more direct evidence was available (*Chua Kim Eng Carol* at [90]).

(b) The court should not compare signatures under s 75(1) of the EA especially when more direct evidence is available (*Chua Kim Eng Carol* at [90]).

(c) It was crucial to call the policyholders to testify as to their signatures, which was a matter so clearly within their knowledge (*Chua Kim Eng Carol* at [91]).

(d) The defendant knew its burden at trial. However, the defendant had not shown that it had approached the policyholders or that they had refused to testify (*Chua Kim Eng Carol* at [91]).

(e) If the policyholders turned hostile, they could be impeached. If the impeachment failed, then the defendant's allegations would not be borne out by the evidence (*Chua Kim Eng Carol* at [91]).

(f) An adverse inference ought to be drawn against the defendant under s 116(g) of the EA (*Chua Kim Eng Carol* at [91]).

Analysis

40 In this case, the burden rests on CIMB to prove the authenticity of the two signatures. While it had produced the original Debenture, it failed to call Yong and Lim as witnesses. In my judgment, CIMB cannot prove the signatures' authenticity merely by producing the original Debenture. It must also adduce sufficient evidence to prove that the relevant signatures contained in the Debenture belong to Yong and Lim. As noted by the Court of Appeal in

Jet Holdings (CA) at [48], WFS has the right to insist on compliance with the EA provisions. This includes s 69 of the EA.

41 I also did not find it appropriate to exercise my discretion under s 75 of the EA to compare Yong and Lim's signatures on the Debenture with their signatures on other documents. I am of the view that such comparison, ordinarily, requires expert evidence. Generally, the court is not equipped to compare signatures to ascertain their authenticity. In addition, the exercise of comparing signatures is not a matter for lay witnesses to perform, save where they are especially acquainted with the signatures in dispute. On this point, counsel for CIMB had asked Mr Tan during cross-examination to compare Yong and Lim's signatures on the original Debenture with their signatures on other documents.[37] However, Mr Tan is plainly not an expert on signatures. Nor is there any evidence that he was someone especially acquainted with Yong and Lim's signatures. It was therefore inappropriate to allow counsel to embark on this line of questioning. I did not allow counsel to pursue this line of questioning.

42 *Chua Kim Eng Carol* makes apparent that *even expert evidence* may be insufficient where more direct evidence is available (at [90]–[91]). In my judgment, the present case similarly called for such direct evidence. In this case, Yong and Lim's evidence would constitute direct evidence. The question of their signatures' authenticity was something so clearly within their knowledge. In this regard, CIMB's explanation for failing to do so is wholly unsatisfactory. While Yong and Lim may be subject of investigations for wrongdoing against CIMB, this does not, by itself, mean that their evidence in court would have

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37 NE, 1/11/2019, p 32.

been unreliable. For CIMB's purposes, Yong and Lim would have been required to testify on a single issue: did they sign the Debenture? This issue did not give them much room to be untruthful. Either they had signed it or they had not.

43 In the circumstances, CIMB took a calculated but ultimately ill-advised risk not to call Yong and Lim. I also take heed of the fact that CIMB had in HC/RA 306/2019, on 22 October 2019, asserted privilege in relation to communications with Yong in the period around August 2017 to February 2018.[38] While I did not accept its assertion of privilege, this claim shows that CIMB was communicating with Yong from August 2017 to February 2018. Despite there being some recent history of communication between CIMB and Yong, CIMB failed to show that it had even *approached* Yong to testify as a witness. In addition, I found the tardy manner in which CIMB had produced the Debenture for WFS' inspection – *one day before trial* – troubling. Hence, in the absence of Yong and Lim's testimony, CIMB has failed to prove the authenticity of the Debenture.

44 I note that there is some suggestion that the Debenture produced at trial was only a draft. For example, cl 4(s)(III) of the Debenture provided as follows:[39]

> [W]ithout prejudice to the generality of the foregoing, [Panoil] shall:
>
> [forthwith upon entry into a Purchase Agreement, Sale Agreement or upon Issuance of a Letter of Credit or Letter of Indemnity or upon entry into a Wash-Out Agreement, as the case may be]*
>
> [at the Bank's [*ie*, CIMB's] request]*

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38 Minute Sheet for RA 306/2019.

39 Debenture dated 15 July 2016.

> * *delete as applicable*
>
> Give notice to the assignment created by this Deed to the seller under each Purchase Agreement, to the issuer of each Letter of Credit and Letter of Indemnity …
>
> [emphasis added in italics]

45 Conspicuously, neither the phrase "forthwith upon entry into a Purchase Agreement…" or "at the Bank's request" has been deleted in accordance with the terms of the Debenture. The last page of the Debenture states that "IN WITNESS WHEREOF, [Panoil] has caused its Common Seal to be hereunto affixed", with Yong and Lim's purported signatures appearing alongside an affixed seal. There is a paragraph below these signatures which provides:

> I, , an Advocate and Solicitor of the Supreme Court of the Republic of Singapore hereby certify that on the day of the Common Seal of was duly affixed …

46 Notably, a lawyer's name does not appear in this paragraph. Key details, such as the date that the "Common Seal" had been affixed that ought to have been filled, also appear blank.

47 I now deal with CIMB's submission that the Debenture is *admissible* under s 32(1)(*b*)(iv) of the EA, which provides as follows:

> **32.–**(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> **or is made in the course of trade, business, profession or other occupation;**
>
> (*b*) when the statement was made by a person in the ordinary course of trade, business, profession or other occupation and in particular when it consists of –
>
> …
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation
>
> and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons.

48 In my judgment, CIMB's reliance on s 32(1)(*b*)(iv) of the EA is misconceived. Although *Jet Holding (HC) and Jet Holding (CA)* were decided *before* the 2012 amendments to the hearsay provisions, *ie*, s 32 of the EA, it is relevant to cite the High Court's observations (*Jet Holding (HC)* at [150]) on the distinction between the concepts of authenticity and admissibility:

> Section 32(b) [*ie*, a predecessor provision to s 32(1)(*b*)(iv) of the EA] does not assist JSL and JHL. First, there is a *distinction in concepts between authenticity of documents, relevance and the procedure for proving contents of documents and admissibility under the exception to the hearsay rule*. Second, evidence of authenticity is lacking. *Authentication of documents is to be distinguished from and has to be resolved* ***before relevance and admissibility under the exception to the hearsay rule.*** [emphasis added in italics and bold italics]

49 The distinction between the concepts of authenticity and admissibility is also referred to in *Jet Holding (CA)* (at [25]):

> 25 It is apposite to note, at this juncture, that *even if the plaintiffs succeeded in the present appeal on the issue relating to the authenticity of the Documents, they had to surmount one further legal hurdle.* Indeed, this particular hurdle has already been mentioned above but bears repeating. The plaintiffs had also to prove, to the satisfaction of the present court, that the contents of the Documents were true. *In particular, they had to surmount the objection stemming from the rule against hearsay.* [emphasis added in italics]

50 More recently, it was observed in *Super Group Ltd v Mysore Nagaraja Kartik* [2018] SGHC 192 ("*Super Group Ltd*") that *authenticity* is a precondition to admissibility. In *Super Group Ltd*, Vinodh Coomaraswamy J dealt with the issue of whether certain emails, which the plaintiff relied on, were authentic. The plaintiff sought to prove this by relying on both direct evidence of fact and expert evidence (at [57]). In dealing with this issue, the court distinguished between the concepts of *authenticity* and *admissibility* (at [53]):

> Authenticity is a necessary condition of admissibility. It is true that formal proof of authenticity is commonly dispensed with in civil cases. But that should not be allowed to obscure the fundamental evidential point that, *until authenticity is established*, admissibility has no meaning. Evidence which has been fabricated is no evidence at all: it is incapable of proving anything other than, perhaps, the very fact that it has been fabricated. [emphasis added in italics]

51 In other words, a party must prove that a document is authentic before its admission can be considered.

52 The Court of Appeal endorsed the following definition of hearsay evidence (see *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430 and *Orion-One Development Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No 3556 (suing on behalf of itself and all subsidiary proprietors of Northstar @ AMK) and another appeal* [2019] 2 SLR 793 at [9]):

> [T]he assertions of persons made out of court whether orally or in documentary form or in the form of conduct tendered to prove the facts which they refer to (*ie* facts in issue and relevant facts) …

53 Hence, a party seeking to admit documentary hearsay typically seeks to prove the truth of the contents referred to in the document that it seeks to admit. In this case, however, the fact-in-issue centres on the *authenticity* of the Debenture, *viz*, whether the signatures on the Debenture did, in fact, belong to Yong and Lim. The dispute does not concern the *truth of the contents of the Debenture*. As I have mentioned above at [34], there are various ways that CIMB could have proven the authenticity of the Debenture. Even if CIMB decided to risk not calling Yong or Lim, whose evidence, as I pointed out above at [42] would have constituted "direct evidence" on the authenticity of the signatures, CIMB could have, at the very *least*, called an expert to testify on this point. An expert's evidence, if unrebutted by any contrary testimony, could have provided a basis for accepting the original Debenture as authentic. CIMB did not see it fit to call an expert.

54 *If* CIMB had successfully proven the authenticity of the Debenture, it would have been necessary for me to consider the secondary issue of admissibility under the s 32(1)(*b*)(iv) of the EA. Having failed to prove the

Debenture's authenticity, the question of admissibility under the s 32(1)(*b*)(iv) of the EA *simply does not arise*. CIMB cannot circumvent the need to prove the authenticity of the Debenture by seeking to rely on s 32(1)(*b*)(iv) of the EA to admit a document when its authenticity has not been admitted and has not been proven.

55 As all of CIMB's claims rest entirely on the Debenture being authentic, I dismiss all its claims.

56 Nonetheless, for completeness, I proceed to consider the remaining merits of CIMB's claims.

What were the rights assigned to CIMB under the Debenture?

57 WFS claims that Panoil's rights under the Sales Documents were not assigned to CIMB under the Debenture. In this regard, WFS contends that Ms Khoo had accepted that CIMB was relying *only* on cll 3.1(c) and 3.1(d) of the Debenture.[40] It submits that, on a true construction of these clauses, the Debenture does not assign Panoil's rights under the Sales Documents. First, cl 3.1(c) provides for the assignment of "all *Receivables* … relating to or arising from any and all *Goods* and *Relevant Agreements*…" [emphasis added]. "Goods" and "Relevant Agreements" are, however, restricted under cl 1 of the Debenture to matters which did not cover the subject matter of the Sales Transactions. Second, cl 3.1(d) assigns all "Contract Rights", which WFS also argues did not cover the subject matter of the Subject Transactions.

58 I find that Ms Khoo did not accept that CIMB was relying only on cll 3.1(c) and 3.1(d) of the Debenture as the basis of the assignment of Panoil's

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40 DWS, para 134.

rights under the Sales Documents. While Ms Khoo may have made such a concession during cross-examination, she made it clear during re-examination that CIMB was also relying on cl 3.1(e) of the Debenture.[41] Similarly, CIMB adopts this position in its written submissions and argues that cl 3.1(e) is the operative provision assigning Panoil's rights under the Sales Documents. WFS further raises the objection that CIMB failed to plead cl 3.1(e) in its statement of claim.

59 At para 4 of CIMB's Statement of Claim (Amendment No.2), CIMB pleaded as follows:[42]

> … By the Debenture, [Panoil] *inter alia* assigned to [CIMB] all its right, title, benefit and interest under the [Sales Contracts] issued by [Panoil] to [WFS], and in all moneys payable by [WFS] to [Panoil] under the said Sales Contracts.

60 In my view, it was not essential for CIMB to have pleaded the specific term of the Debenture so long as its contractual effect is clear. There is support for this proposition in the following extract from Prof Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 15.020:

> The rule is that "the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material". Therefore, the reference to the effect of the document or purport of the conversation should be brief. The actual words contained in the document or conversation should not be pleaded unless the words themselves have particular significance …

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41 NE, 30/10/2019, pp 102–103.

42 Statement of Claim (Amendment No.2), para 4.

61 The language used in para 4 of CIMB's Statement of Claim (Amendment No.2) makes plain that CIMB is relying on all the clauses under the Debenture which assigned to it Panoil's rights, title, benefit and interest under the Sales Documents. Ultimately, cl 3.1 is the main operative provision assigning Panoil's rights to CIMB. Naturally, it follows that CIMB is entitled to rely on the various sub-clauses therein in its claim against WFS.

62 In any event, I find that WFS did not suffer any prejudice by CIMB's failure to expressly plead cl 3.1(e).

63 In *Doka Formwork Pte Ltd v Grandbuild Construction Pte Ltd* [2016] SGHC 248 ("*Doka Formwork*"), Andrew Ang SJ cited, at [57], the Court of Appeal's observation in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1522 at [40] that the law permits a departure from the general rule of pleadings where no irreparable prejudice would be caused to the other party or where it would be clearly unjust for the court not to do so. In this regard, the court has a "degree of discretion in allowing parties to rely on points that were not expressly or specifically pleaded". Hence, even though the plaintiff had not pleaded the specific clauses under the contract which it was relying on, the court found that the defendant was not irreparably prejudiced by such failure as: (a) the contract itself was pleaded in the Statement of Claim; (b) the plaintiff's reliance on the specific contractual clauses became clear when the affidavits of evidence-in-chief were filed; (c) the plaintiff expressly referred to the contract clauses in its opening statement; and (d) the defendant had full opportunity during trial and closing submissions to question the plaintiff's reliance on those contractual terms and make relevant submissions (*Doka Formwork* at [58]).

64 Similarly, CIMB had, in its Statement of Claim (Amendment No.2), expressly pleaded that it was relying on the Debenture. And even though Ms Khoo referred only to cll 3.1(c) and 3.1(d) in her affidavit of evidence-in-chief,[43] it was made clear during the trial that CIMB was also relying on cl 3.1(e).[44] WFS also had the opportunity to make submissions on cl 3.1(e) after Ms Khoo referred to it during re-examination but failed to do so. I do not see how WFS suffered any prejudice from CIMB's failure to expressly plead cl 3.1(e). Nor did WFS make any submissions on why this was so.

65 Turning to the substantive issue, I find that the language of cl 3.1(e) is sufficiently wide to include Panoil's rights under the Sales Documents. Clause 3.1(e) of the Debenture provides as follows:[45]

> … [Panoil] …
>
> (e) ***assigns and charges to [CIMB] by way of first fixed security all present and future contract rights, receivables, books and other debts and monetary claims now or at any time hereafter due or owing to [Panoil]***, in consideration of or against which [CIMB] has extended or may hereafter extend banking or credit facilities or accommodation of any kind, together with the full benefit of all guarantees and securities therefor and indemnities in respect thereof and all Collateral Instructions, liens, reservations of title, rights of tracing and other rights enabling [Panoil] to enforce such contract rights, receivables, debts or claims …
>
> [emphasis added in bold italics]

66 The language of cl 3.1(e) is contrasted with cll 3.1(c) and 3.1(d). Unlike cll 3.1(c) and 3.1(d), cl 3.1(e) does not capitalise the terms "contract rights", "receivables" and "debts". While the terms "Receivables", "Goods" and

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43 KMMEVAEIC, para 8.

44 NE, 30/10/2019, p 107–111.

45 2BAEIC, p 446.

"Relevant Agreements" are specifically defined under cl 1 of the Debenture, the terms "contract rights", "receivables" and "debts", which are not capitalised, are not. By not capitalising these terms, the parties must have intended to distinguish these terms from their capitalised equivalents under cll 3.1(c) and 3.1(d). Hence, the "contract rights", "receivables" and "debts" under cl 3.1(e) are not restricted to their definitions under cl 1 of the Debenture. These terms must therefore be given their plain and ordinary meaning in accordance with the ordinary rules of contractual interpretation. In my view, it is clear that the language of cl 3.1(e) is sufficiently wide to include Panoil's rights under the Sales Documents, these being present or future "contract rights" that were due and owing to Panoil. Pursuant to the Debenture, Panoil's rights under the Sales Documents were therefore assigned to CIMB.

Which documents governed the Subject Transactions?

Parties' arguments

67 Both sides dispute the documents which governed the Subject Transactions.

68 CIMB submits that the documents which governed the Subject Transactions were the 11 Panoil Sales Confirmations.[46] In brief, CIMB's case is that each of the 11 Panoil Sales Confirmations is an independent and separate contract containing details such as the quantity, price and delivery date.[47] If the 11 Sales Confirmations governed the Subject Transactions, CIMB contends that WFS will not be entitled to any rights of set-off, given that the 11 Sales

46 PWS, para 91.

47 PWS, para 95.

Confirmations incorporate a clause excluding any right of set-off (see above at [8]).

69 WFS contends that at least one of the Umbrella Contracts and/or the 2014 Offset Agreement governed each of the Subject Transactions. In support of its case, WFS provides the following reasons:

(a) CIMB is a stranger to the contractual relationship between WFS and Panoil. Thus, CIMB does not know the parties' contractual intentions.

(b) According to WFS' witnesses, the parties' contractual intentions were for the Umbrella Contracts and/or the 2014 Offset Agreement to govern the Subject Transactions.[48]

(c) Panoil never suggested that the Umbrella Contracts did not govern the Subject Transactions.[49]

(d) It is illogical for WFS and Panoil to negotiate and enter into the Umbrella Contracts only for them not to apply.[50]

(e) The 2014 Offset Agreement refers to the right to set off "any sums payable by any entity of Panoil to any entity of [WFS]" against "any amount payable that any entity of [WFS] has to any entity of

48 DWS, para 98.

49 DWS, para 103.

50 DWS, para 104.

Panoil". This right of set off applies to *all* transactions between Panoil and WFS, including the Subject Transactions.[51]

70 If the Umbrella Contracts and/or the 2014 Offset Agreement governed the Subject Transactions, WFS submits that it is entitled to rights of set-off. In this respect, WFS contends that it has *already* paid for the sums due for the Subject Transactions as it had issued various "offset notices" to Panoil, which constituted due payment.

Analysis

71 The relevant contractual principles are:

(a) The law applies an objective approach to questions of contractual formation (*R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") at [51]).

(b) The objective approach involves ascertaining the parties' objective intentions gleaned from the parties' correspondence and conduct in the light of the relevant background disclosed by the evidence (*R1 International* at [51]).

(c) The relevant background includes the industry in which the parties are in, the character of the document which contains the terms in question and the course of dealings between the parties (*RI International* at [51]).

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51 DWS, para 107.

(d) In interpreting a contract, it is the parties' objectively ascertained intentions that are relevant, not their *subjective intentions* (*Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30]).

72 Next, I set out the undisputed facts relating to the Subject Transactions. As CIMB was not an original party to these transactions, the account of the various transactions was provided by WFS' witness, Mr Loh. In this judgment, I refer to each of the Subject Transactions as the 1st Sales Transaction, 2nd Sales Transaction, *etc*.

73 The parties entered into the 1st Sales Transaction as follows. On 29 June 2017, WFS sent Panoil an order confirmation for the delivery of 1,300 Metric Tons of marine fuel oil from between 5 to 6 July 2017.[52] That same day, Panoil issued a sales confirmation, SO-1706-0986, which stated, *inter alia*, that the sale was "subjected to the standard terms and conditions of Panoil which is updated from time to time".[53] On 6 July 2017, Panoil sent WFS an email, attaching a copy of Panoil's bunker delivery note. This served as confirmation that the fuel oil had been delivered on 6 July 2017. Panoil also attached a copy of its sales invoice (PS-B17/07-0016) in the email to WFS.[54]

74 Generally, all of the Subject Transactions followed the same chronology described above. First, WFS would issue Panoil an order confirmation. Subsequently, Panoil would issue WFS a sales confirmation. Next, upon delivery, Panoil would send WFS a bunker delivery note, which constituted evidence of delivery. Panoil would also send WFS a copy of its sales invoice.

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52 LLCAEIC, para 39.

53 LLCAEIC, para 45.

54 LLCAEIC, para 46.

75 In each sales confirmation issued by Panoil to WFS, key details of the sale are provided under the heading "[w]ith reference to our earlier conversation, we are pleased to confirm the nomination with the following details".[55] These include, among other things, the identities of the buyer and seller, delivery date, product specifications, quantity, and mode of payment. Further, in each sales confirmation, under the heading "terms", it is provided that "sales [*sic*] is subjected to the standard terms and conditions of Panoil which is updated from time to time".

76 Applying the offer and acceptance analysis, WFS' purchase confirmation is the contractual "offer", and Panoil's sales confirmation is the contractual acceptance.

77 An acceptance of an offer is the final and unqualified expression of assent to the terms of an offer (*Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd* [2019] SGHC 287 at [51]). In *Pan-United Shipping Pte Ltd v Cummins Sales and Services Singapore Pte Ltd* [2017] SGHC 198 at [83], Chan Seng Onn J observed that in a classic "battle of the forms" scenario, the "last shot" must be a counter-offer in order to destroy the original offer and constitute the new terms on which an agreement is formed, citing *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 ("*Butler Machine*"), the leading decision on "battle of the forms". In *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332, the Court of Appeal endorsed the analysis of the majority in *Butler Machine* that the court would examine each "shot" which was "fired" by the respective parties, and only find a concluded agreement when a final and

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55 LCCAEIC, p 318.

unqualified acceptance has been made (at [63]). In this regard, it has been observed by Dyson LJ in *Tekdata Interconnections Ltd v Amphenol Ltd* [2010] 1 Lloyd's Rep 357 ("*Tekdata*") at [25] that while there is no general rule that applies in all cases where there is a "battle of the forms", where A makes an offer on its conditions and B accepts that offer on its conditions and performance follows without more, the correct analysis is that there is a contract on B's conditions.

78 In this case, it is common ground that the sales confirmation issued by *Panoil* was the final document sent before delivery of each parcel of fuel oil for each of the Subject Transactions. Applying *Tekdata*, each of the Subject Transactions is a separate contract separately embodied under the 11 Panoil Sales Confirmations and the terms contained therein.

79 The terms of the 11 Panoil Sales Confirmations also show that each sales confirmation represents a separate contract for the sale of fuel oil. As mentioned above at [75], each document provides the key details of each sale. These constitute the essential terms of the contract necessary for contractual formation.

80 In establishing which documents governed the Subject Transactions, I also took the relevant commercial background into account (*R1 International* at [51]). In this respect, I accept Mr Neo's evidence that it was industry practice to treat sales confirmations as embodying the contracts between the parties. Mr Neo also testified that parties in the bunkering industry treat the *suppliers' sales confirmation* as the governing contract for an individual sale transaction.[56] In this case, Panoil was both the supplier and the party issuing the sales

[56] Neo's Expert Report, para 39.

confirmation. The evidence does not suggest that the parties intended to depart from this usual commercial practice. Moreover, the parties had a consistent course of dealing in which all of the key terms were contained in each of the 11 Sales Confirmations. In my view, this indicates that the parties had intended the 11 Panoil Sales Confirmations to govern the Sales Transactions.

Did the Umbrella Contracts and/or 2014 Offset Agreement govern the Subject Transactions?

81 Specifically, WFS claims as follows:[57]

(a) the 1st and 2nd Sales Transactions were governed by the 2017 TA;

(b) the 3rd Sales Transaction was governed by the 2016 COA; and

(c) the 4th to 11th Sales Transactions were governed by the 2017 COA.

82 Despite initially disputing the authenticity of the Umbrella Contracts and the 2014 Offset Agreement,[58] CIMB eventually accepted (belatedly) in its closing submissions that the documents were authentic.[59] On its part, WFS had called Ms Bolan, who testified by video-link, and Mr Lee to give evidence on the existence and authenticity of the documents.

83 The circumstances surrounding WFS' and Panoil's entry into the Umbrella Contracts and the 2014 Offset Agreement are not in dispute. However,

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57 Defence (Amendment No.2), para 2.7.

58 KMMEVAEIC, paras 39 to 41.

59 PWS, para 147.

parties disagree on whether these contracts were intended by WFS and Panoil to govern the Subject Transactions.

84 On 20 August 2014, WFS and Panoil entered into the 2014 Offset Agreement,[60] which provided that "in consideration for entering into contracts for the supply, service, distribution and/or purchase of fuel products and/or marine lubricants by [WFS] with [Panoil] … any sums payable by [Panoil] to [WFS] may be offset against any amount payable that [WFS] has to [Panoil]".

85 On 30 December 2016, Panoil and WFS entered into the 2016 COA.[61] Similarly, the 2016 COA provided that WFS may "deduct or set off any amounts owed to [it] by Panoil under [the 2016 COA] against any amounts payable by [WFS] to [Panoil] under [2016 COA]".[62]

86 On 1 January 2017, Panoil and WFS entered into the 2017 TA. The 2017 TA also included a term providing WFS with the right to deduct or set off amounts owed to it by Panoil.[63]

87 Finally, on 11 July 2017, Panoil and WFS entered into another contract of affreightment, *ie*, the 2017 COA. Clause 1 the 2017 COA provides that WFS shall be entitled to "offset account payables as against its account receivables vis-à-vis Panoil in accordance with the Credit Security Arrangement, and the [2014 Offset Agreement]", and such provisions as contained…."[64]

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60 TCBAEIC, para 10.

61 TCBAEIC, para 12.

62 TCBAEIC, para 12.

63 TCBAEIC, para 13.

64 TCBAEIC, para 15.

Analysis

88 I note that none of the key documents behind the Subject Transactions, *viz*, the 11 Sales Confirmations, the Purchase Confirmations, and the invoices, issued in relation to the Subject Transactions, expressly refers to the Umbrella Contracts or the 2014 Offset Agreement. Presumptively, this suggests that the Umbrella Contracts or the 2014 Offset Agreement were not intended by the parties to cover the Subject Transactions. It is only reasonable to expect some reference to the Umbrella Contracts or the 2014 Offset Agreement in at least some of the documents relating to the Subject Transactions. There was, however, none.

89 WFS submits that the "True Job Orders" (*ie*, the actual documents that passed from WFS to Panoil) made references to the Umbrella Contracts.[65] In this regard, Mr Loh's affidavit-of-evidence in chief provides as follows:

(a) For PS-17/07-0016, the order confirmation used the letters "TC" indicating that the order was made under "time charter" and accordingly governed by the 2017 TA.[66]

(b) For PS-B17/07-0025, the order confirmation used the letters "TC".[67] The 2017 TA was applicable to this order.[68]

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65 DWS, para 101.

66 LCCAEIC, para 40.

67 LCCAEIC, para 50.

68 LCCAEIC, para 51.

(c) For PS-B17/07-0028, the order confirmation used the letters "TC".[69] However, as the Ophelia vessel was not available for use, Panoil used its Jazeel vessel for delivery of the fuel oil, and therefore the 2016 COA governed the sale.

(d) For PS-B17/07-0047, PS-B17/07-0083, PS-B17/08-0004, PS-B17/08-0008, and PS-B17/08-0023, the order confirmations used the letters "COA", indicating that the 2017 COA governed the sale.[70]

90 Taking WFS' case at its highest, it is clear that none of the order confirmations *expressly refers* to any of the Umbrella Contracts. In my view, the abbreviation "COA" is plainly insufficient to show that the *2017 COA* governed a particular transaction, even if I accept that "COA" refers to a contract of affreightment. WFS also failed to call any witnesses from Panoil to testify that "COA" refers to the 2017 COA. If the parties had intended for a specific sales transaction to be governed by the 2017 COA, I would have expected a reference to the "2017 COA" or something to the effect that "the transaction is governed by the 2017 COA". As for the reference to "TC", Mr Tan accepted that this was only a reference to a "time charter".[71] I do not see how the reference to a "time charter" necessarily means that the Subject Transactions in question were governed by the 2016 COA or the 2017 TA. In any event, given my finding above at [80] that the documents governing the Subject Transactions were the 11 Sales Confirmations, any incorporation or reference to the Umbrella Contracts must be contained in the 11 Sales

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69 LCCAEIC, para 56.

70 LCCAEIC, para 64; LCCAEIC, para 70; LCCAEIC, para 82; LCCAEIC, para 88; LCCAEIC, para 101.

71 NE, 31/10/2019, pp 106–107.

Confirmations. References to the Umbrella Contracts in other documents not covering the Subject Transactions do not show that one of the Umbrella Contracts governed the specific Subject Transactions, or that its terms have been incorporated into the 11 Sales Confirmations.

91 I now consider each of WFS' claims at [81] and examine the relevant clauses under the Umbrella Contracts.

(1) 1st and 2nd Sales Transactions

92 Clauses 4 and 5 of the 2017 TA provide as follows:[72]

> 4. From time to time, WFS may elect, at its option, to sell Fuel Oil to Panoil on a barge delivered basis, at a price per MT of the mid-point of the daily AAFER00 Platts Bunkerwire Singapore 380CST Bunker Ex-Wharf Quotation on the 20th day of the month prior to the month of delivery (the "**Platts Price**"), to be laden and shipped on board the Vessel. In the event that there is no published Platts Price on the 20th day of the month, the quoted price on the next working day will apply. Upon the exercise of the aforegoing option(s) from time to time, WFS shall on *each occasion issue Panoil with a* ***sale confirmation in WFS' standard format applicable from time to time*** (the "**Sale Confirmation**")
>
> 5. On each occasion that WFS sells Fuel Oil to Panoil pursuant to this Agreement, above, WFS shall simultaneously purchase a like same amount of Fuel Oil on a barge delivered basis, at a price per MT of Platts Price + Freight Premium. On each occasion that WFS purchases Fuel Oil in accordance with this Agreement, WFS shall issue Panoil with a purchase confirmation in WFS' standard format applicable from time to time (the "**Purchase Confirmation**") …
>
> [emphasis added in bold italics]

93 Clause 7 of the 2017 TA further provides that each time WFS exercises its sale and purchase options under the agreement, it shall provide Panoil with

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72 3BAEIC, p 1020; TCBAEIC, p 104.

written notice of its sale and shipment requirements, as well as two other documents, a *sale confirmation* and a *purchase confirmation*, within usual office working hours.[73]

94 Construing the above clauses, it is clear that: (a) WFS must first issue a *sales confirmation* when it sells fuel oil to Panoil; and (b) WFS must then issue a purchase confirmation to Panoil when it simultaneously purchases the *same* amount of fuel oil from Panoil. In the present proceedings, it is common ground that WFS did not produce any such "sales confirmations" as evidence.

(2) 3rd Sales Transaction

95 The material terms of the 2016 COA are as follows:[74]

73 TCBAEIC, p 105.

74 TCBAEIC, pp 79–80.

> 6A1. On each occasion that WFS sends to Panoil a [j]ob [o]rder, it shall simultaneously sell the like same volume of Bunker Fuel entered on the [j]ob order to Panoil on [a barge] delivered basis, …….. On each occasion that a *[j]ob [o]rder* is submitted such that Bunker Fuel is sold to Panoil, WFS shall issue Panoil with a ***sale confirmation*** in WFS' standard format applicable from time to time (the "**Sale Confirmation**").
>
> 6A2. On each occasion that WFS issues a *[j]ob [o]rder* and sells Bunker Fuel to Panoil pursuant to this Agreement WFS shall simultaneously purchase a like same amount of Bunker Fuel as is sold pursuant to Clause 6A1 above on a barge delivered basis, at a price per MT of Platts Price + Freight. On each occasion that WFS purchases Bunker Fuel in accordance with this Agreement, ***WFS shall issue Panoil with a purchase confirmation*** in WFS' standard format applicable from time to time (the "**Purchase Confirmation**".)
>
> 6A3. On each occasion that WFS exercises its sale and purchase options and obligations pursuant to this Agreement, it shall promptly provide Panoil with written notice of its sale and shipment requirements and such notification ***shall be promptly followed up by the provision by WFS to Panoil of a Sale Confirmation and a Purchase Confirmation within usual office working hours.***
>
> [emphasis added in bold italics]

96 Reading the above clauses, it is apparent that any transaction under the 2016 COA must involve the following documents: (a) a job order; (b) a sale confirmation; and (c) a purchase confirmation. Both the sale confirmation and purchase confirmation were required to be issued by *WFS* to *Panoil*.

97 Clause 2.1 of the 2016 COA provides that the contract shall apply to the supply of barges pursuant to documents called *job orders*.[75] WFS is obliged to issue these job orders to Panoil. WFS, however, failed to adduce any evidence of a job order that it had issued to Panoil in respect of any of the Subject

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75 TCBAEIC, p 77.

Transactions. In particular, Mr Tan accepted that no job order, sale confirmation, or purchase confirmation had been issued.[76]

(3) 4th to 11th Sales Transactions

98 The material terms of the 2017 COA are as follows:[77]

> 7.6 On each occasion that [WFS] sends to Panoil a [j]ob [o]rder, it shall simultaneously sell the like same volume of Bunker Fuel entered on the *[j]ob [o]rder* to Panoil on a barge delivered basis … On each occasion that a *[j]ob [o]rder* is submitted such that Bunker Fuel is sold to Panoil, [WFS] *shall issue Panoil with a sale confirmation*, incorporating the GTC which Panoil accepts to apply to each such sale, in [WFS'] standard format applicable from to time to time (the "**Sale Confirmation**".)
>
> 7.7 On each occasion that [WFS] issues a *[j]ob [o]rder* and sells Bunker Fuel to Panoil pursuant to this Contract, [WFS] shall simultaneously purchase a like same amount of Bunker Fuel as is sold pursuant to Clause 7.6, above on a barge delivered basis, at a price per MT of Platts Price + Freight. On each occasion that [WFS] purchases Bunker Fuel in accordance with this Contract, [WFS] shall issue Panoil with a purchase confirmation in [WFS'] standard format applicable from time to time … (the "**Purchase Confirmation**".)
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> [emphasis added in italics]

99 Similarly, as under the 2016 COA, cll 7.6 and 7.7 of the 2017 COA contemplate the following two steps:

(a) First, when a job order is submitted (*ie*, at the time the fuel oil is sold to Panoil), WFS issues Panoil a sales confirmation;

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76 NE, 31/10/2019, pp 88–90.

77 TCBAEIC, p 159.

(b) Second, when WFS simultaneously purchases the same amount of fuel oil from Panoil, WFS issues Panoil a purchase confirmation in its standard format.

100 A transaction under 2017 COA would also involve the following documents:

(a) a job order;

(b) a sale confirmation; and

(c) a purchase confirmation.

101 WFS did not disclose any of the above documents in the present proceedings.

102 Clauses 3.1, 4.1, 4.2 and 4.3 of the 2017 COA provide as follows:

> 3.1 This Contract shall apply to the supply of the Barge(s) and the performance of all barging and other related services by Panoil for [WFS] pursuant to all *[j]ob [o]rders.*
>
> 4.1 [WFS] shall issue to Panoil a [j]ob [o]rder for each Job Delivery which [WFS] requires Panoil to perform.
>
> 4.2 Panoil shall comply in all respects with each [j]ob [o]rder and shall execute each [j]ob [o]rder expeditiously and in any case, within the timeline specified by [WFS] for the [j]ob [o]rder. Time of delivery shall be of the essence of this Contract and each [j]ob [o]rder.
>
> 4.3 Panoil undertakes to [WFS] not to perform any Job Delivery unless and until a [j]ob [o]rder has been issued to it by [WFS] and [WFS] may refuse payment in respect of any Job Delivery performed by Panoil which is not supported by a [j]ob [o]rder.
>
> [emphasis added in italics]

103 These clauses show that the job order is an important document facilitating any transaction between WFS and Panoil. In this regard, Mr Tan

accepted that Panoil and WFS would need to comply with cll 4.1, 4.2, and 4.3 of the 2017 COA in order for the 2017 COA to apply to the specific transaction in question.[78]

Findings on the Umbrella Contracts

104 In my judgment, WFS' claim that one of the Umbrella Contracts governed each of the Subject Transactions is without merit. This is for the following reasons.

105 First, the transactions envisioned under the Umbrella Contracts do not correspond with the Subject Transactions *actually carried* out by the parties:

(a) Under the 2017 TA, WFS was obliged to provide Panoil with a sale confirmation and a purchase confirmation. However, there is no evidence that such documents were ever issued in relation to the 1st and 2nd Sales Transactions.

(b) Similarly, transactions under the 2016 COA involved job orders, sales confirmations, and purchase confirmations, which were to be issued by WFS to Panoil. Again, there is no evidence that these documents were ever issued to Panoil in respect of the 3rd Sales Transaction.

(c) Likewise, transactions under the 2017 COA involved job orders, sales confirmations, and purchase confirmations. There is no evidence that these documents were issued by WFS to Panoil in respect of the 4th to 11th Sales Transactions.

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78 NE, 31/10/2019, p 79.

106 In contrast, in the case of the Subject Transactions, *WFS* would issue *Panoil* an *order confirmation*. Then, *Panoil* would issue *WFS* a *sales confirmation* (see above at [74]). In other words, the *only documents* which *WFS* issued to *Panoil* for the Subject Transactions were *order confirmations*. Under the Umbrella Contracts, WFS was to issue sales confirmations and purchase confirmations. Further, save for the 2017 TA, the remaining Umbrella Contracts contemplated the issuance of job orders. WFS, however, failed to produce *any of these documents* contemplated under the Umbrella Contracts in these proceedings. The lack of evidence makes clear that no such documents were ever issued and no transactions were carried out pursuant to the Umbrella Contracts.

107 Second, there is no objective evidence that any of the transactions contemplated under the Umbrella Contracts had ever been carried out. The substance of the Umbrella Contracts was that WFS would sell the same quantity of fuel oil back to Panoil in a composite "buy-sell" transaction. There is no evidence that such transactions had ever taken place. Put a different way, there is no objective evidence that WFS had concurrently sold to Panoil the same quantity of fuel which it had bought from Panoil under the Subject Transactions. I do not accept Mr Tan's assertions on affidavit, unsupported by objective documentary evidence, that there had been such buy-sell transactions with Panoil. In particular, I find it unbelievable that it was "generally not possible to track each Panoil purchase of … fuel oil from WFS to [a] particular sale from Panoil to WFS". According to Mr Tan, on a monthly basis, WFS ensured that the volume of fuel oil sold to and purchased from Panoil tallied. In this respect, WFS entered into various contracts for the supply of fuel oil to end-user vessels or vessel owners. WFS performed such contracts by purchasing fuel oil from its suppliers, including Panoil. Panoil would then purchase the fuel oil from WFS

for delivery to WFS' customers, *ie*, the end-user vessels or vessel owners.[79] Under this arrangement, WFS would be required to monitor its net position with Panoil under internal documents called "monthly reconciliations".[80] WFS closely monitored these statements such that the volume of fuel oil bought and sold by WFS to Panoil tallied at the end of the month.[81] To show that there had been such "monthly reconciliations", WFS produced records of its "reconciliation statements".[82] In my view, these monthly "reconciliation statements" do not prove that there had been composite "buy-sell" transactions in respect of the Subject Transactions. At bottom, these "reconciliation statements" are internal financial documents prepared by WFS. They do not evidence that there had been "buy-sell" transactions under the Umbrella Contracts. WFS could have called witnesses from Panoil or, alternatively, produced the relevant documents contemplated under these contracts, *viz*, purchase confirmations or sales confirmations or job orders, which it had issued to Panoil. If such transactions had been carried out, it is probable that WFS would retain copies of these documents. As I mentioned above at [105], WFS did not produce these documents in these proceedings. In the circumstances, I find that there were no composite "buy-sell" transactions in respect of the Subject Transactions. It follows that the Subject Transactions are not governed by the Umbrella Contracts.

108 Third, I find that WFS and Panoil did not act in a manner consistent with the payment terms required under the Umbrella Contracts. Under the Umbrella

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79 TCBAEIC, para 19.

80 TCBAEIC, para 21.

81 TCBAEIC, para 22.

82 TCBAEIC; Exhibit TCB-10 and TCB 11.

Contracts, each party was required to pay the other within 15 days of the presentation of the sales invoice (for *eg*, cl 7.3 of the 2016 COA, cl 10 of the 2017 TA and cl 8.4 of the 2017 COA). However, it is undisputed that WFS' purchase confirmations in respect of the Subject Transactions all provided for payment to be made within 30 days.

109 Fourth, the terms of the Umbrella Contracts themselves show that the Subject Transactions were not governed by the Umbrella Contracts because they do not mention the dates, prices, payment mode, or indeed any other details.

110 Finally, even though CIMB was, at the time, a third party to the Subject Transactions between WFS and Panoil, I find this immaterial to the issue of which documents governed the 11 Sales Transactions. It is a well-established principle that contracts are appraised objectively. Applying this objective analysis, it is plain from the terms of the Umbrella Contracts that the Subject Transactions were not covered by these same documents.

111 Given the above, I find that the Subject Transactions were not governed by the Umbrella Contracts.

Did the 2014 Offset Agreement govern the Subject Transactions?

112 WFS submits that the 2014 Offset Agreement includes all transactions between WFS and Panoil.[83] This is because the 2014 Offset Agreement refers to the right to set off "any sums payable by any entity of Panoil to any entity of [WFS]" against "any amount payable that any entity of [WFS] has to any entity

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83 DWS, para 107.

of Panoil". It is not necessary for me to make a finding on whether the 2014 Offset Agreement governed the Subject Transactions, given my finding below that any rights of set-off arising from it would be superseded in any event by the rights under the Sales Documents (see below at [125]–[130]).

Is WFS entitled to a right of set-off?

Clause 8.2 of Panoil's Terms and Conditions

Parties' arguments

113 CIMB submits that each of the 11 Panoil Sales Confirmations incorporates cl 8.2 of Panoil's Terms and Conditions. In this regard, CIMB argues that "reasonable notice" of the term has been given, and that no set-off clauses are common in the bunkering industry.[84]

114 WFS disputes that the 11 Panoil Sales Confirmations incorporate cl 8.2 on several grounds: (a) Panoil's Terms and Conditions are not proven;[85] (b) CIMB did not at any time believe that these terms governed the Subject Transactions;[86] and (c) there is insufficient notice of the incorporation of cl 8.2 of Panoil's Terms and Conditions.[87] In this regard, it contends that there must be some reference to where the applicable terms and conditions can be found.[88] Furthermore, as cl 8.2 provides that the applicable standard terms and conditions

84 PWS, para 108.

85 DWS, p 54.

86 DWS, para 163.

87 DWS, paras 171.

88 DWS, para 175.

of Panoil may be updated from time to time, the specific version applicable (at any given time) is unknown. Hence, there is insufficient notice.[89]

Analysis

115 Clause 8.2 of Panoil's Terms and Conditions provided as follows:

> Payment for each delivery of marine fuel shall be in United States Dollars or Singapore Dollars as specified in the invoice and such payment shall be made by the Buyer free and clear of any deduction, set-off, counter claims, whatsoever on cash in advance or by telegraphic transfer to Seller's bank after each delivery is completed as directed by Seller on the date shown on the invoice.

116 Both parties accept that reasonable notice must be provided in order to incorporate a set-off clause.

117 The relevant legal principles are uncontroversial.

118 In *Wartsila Singapore Pte Ltd v Lau Yew Choong and another suit* [2017] 5 SLR 718 ("*Wartsila Singapore*"), Belinda Ang Saw Ean J explained that one of the methods of incorporating terms is by reasonable notice (at [122]). In *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012), the learned authors explained at para 07.022 that incorporation by reasonable notice is "by its very nature, heavily dependent on the particular facts of the case concerned" and that actual notice is not required for incorporation.

119 In *Circle Freight International Ltd (T/A Mogul Air) v Medeast Gulf Experts Ltd (T/A Gulf Export)* [1988] 2 Lloyd's Law Reports 427 ("*Circle*

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89 DWS, para 177.

Freight"), the plaintiff successfully incorporated an *exclusion clause* found in the standard conditions of the Institute of Freight Forwarders. The clause provided that "all business is transacted by the company under the current trading conditions of the Institute of Freight Forwarders a copy of which is available on request". The English Court of Appeal held (at 433) that the clause was validly incorporated:

> [I]t is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. Other considerations apply if the conditions or any of them are particularly onerous or unusual.

120 In my judgment, CIMB had provided reasonable notice of cl 8.2 of Panoil's Terms and Conditions under the 11 Sales Confirmations.

121 First, I accept Mr Neo's evidence that clauses such as cl 8.2 of Panoil's Terms and Conditions are common or usual terms in the bunkering industry. WFS does not deny this. Mr Loh himself conceded that the general terms and conditions, which he had seen, contained such clauses excluding the right of set-off.[90] After all, even WFS' own general terms and conditions included a clause excluding the right of set-off.[91] Given the common and usual nature of cl 8.2, it stands to reason that the requirement of "reasonable notice" is more easily satisfied.

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90 NE, 31/10/2019, 63:8–63:20.

91 NE, 31/10/2019, 63:21–64:15.

122 Second, in determining what constitutes "reasonable notice", I have regard to the fact that WFS is a sophisticated commercial party with a history of business dealings with Panoil.

123 Third, upon examination of the clause that seeks to incorporate cl 8.2, I find that reasonable notice was provided. Each of the 11 Sales Confirmations is a brief document, and did not spell out the terms of the contract of sale at length. Instead, as appears common with the bunkering practice, under the heading "terms" (as in terms of the contract), it provided that "sales [*sic*] is subjected to the *standard terms and conditions of Panoil* which is updated from time to time" [emphasis added]. Evidently, this case should be distinguished from cases where the incorporating clause is printed in small and illegible print. The incorporating clause in each of the 11 Sales Confirmations is prominent and easily seen. Another point to note is that, other than the clause stipulating that the sale is subject to Panoil's Terms and Conditions, there are only a few contractual terms listed under the heading "[a]dditional terms". To any reasonable commercial party, it is obvious that all of the main contractual terms will be found in Panoil's Terms and Conditions, given the bare bones nature of each sales confirmation.

124 Finally, it is clear that WFS had *actual notice* of Panoil's Terms and Conditions as the evidence shows that WFS possessed a copy of the same. In his affidavit of evidence in chief, Mr Loh conceded that WFS had a copy of one version of Panoil's Terms and Conditions that WFS disclosed in its List of Documents.[92] I also note that WFS does not deny that it had received this version of Panoil's Terms and Conditions from Panoil, but simply claims that it does

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92 LCCAEIC, para 122.

not accept this version of the terms as being in force at the material time.[93] While it is clear that there were different versions of Panoil's Terms and Conditions (the copy which CIMB possessed differed from WFS' copy), both versions presented to the court contained cl 8.2. It is also not WFS' case that the version of Panoil's Terms and Conditions at the material time did not contain cl 8.2. Given WFS' possession of the version of Panoil's Terms and Conditions, I find that WFS likely obtained a copy of the document from Panoil. Even if WFS did not have actual notice of Panoil's Terms and Conditions, it is, in any event, apparent that it had reasonable notice of those terms. Furthermore, even though the incorporating clause does not provide that Panoil's Terms and Conditions were available on request, I do not think it was necessary for parties to include such a term given their commercial sophistication and history of business with each other.

Cl 8.2 supersedes any set-off right arising under each of the Umbrella Contracts and the 2014 Offset Agreement

125 I have found that the Subject Transactions were governed by the 11 Sales Confirmations at [80]. The 11 Sales Confirmations incorporate cl 8.2, which does not allow any right of set-off. This extends to any rights of set-off which may arise under the Umbrella Contracts and/or the 2014 Offset Agreement.

126 Hence, even *if* at least one of the Umbrella Contracts or 2014 Offset Agreement covered each of the transactions between WFS and Panoil, the no set-off right under cl 8.2 supersedes any rights of set-off under these contracts.

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93 LCCAEIC, para 122.

127 *In Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2017] 2 SLR 372 ("*Sintalow*"), the parties signed a letter containing general terms and conditions for the purchase of sanitary ware ("the Master Contract"). The respondent later accepted three separate product quotations for the sanitary ware ("the Products Agreements"). The Court of Appeal held that the Master Contract merely prescribed general terms and conditions for the supply of the sanitary ware, but did not require the respondent to buy or the appellant to sell them. Instead, the sale and purchase of the products were governed by the separate Products Agreements.

128 The court explained the applicable approach where there is inconsistency between terms in different contractual documents:

(a) A well-drafted contract normally provides a hierarchy of precedence to deal with inconsistencies between contractual terms or clauses, or general terms and specific terms (*Sintalow* at [53]).

(b) However, if the contract does not expressly provide an order of precedence between the different documents or specify that a certain class of documents should prevail over others, "*the more specific document ought to prevail over a standard form document*" [emphasis in original] (*Sintalow* at [53]).

(c) Where there is no order of precedence clause stipulating the hierarchy between contractual documents, the terms of the sales contract, which contained the specifically agreed clause, take precedence over a clause incorporated by reference to the general terms and conditions (see *Indian Oil Corporation v Vanol Inc* [1991] 2 Lloyd's Rep 634) (*Sintalow* at [54]).

(d) The court should try to reconcile the terms to preserve the general terms. Only where there is a clear and irreconcilable discrepancy is it necessary to resort to the contractual order of precedence to resolve the inconsistency. Even where there is no order of precedence clause, the principle is that the general terms and conditions are superseded or varied by inconsistent specific terms and conditions to the extent of their inconsistency (*Sintalow* at [55]–[57]).

129 In this case, there is a clear inconsistency between the terms in the Umbrella Contracts and the 2014 Offset Agreement, and the 11 Sales Confirmations. The former contracts provide for rights of set-off, while the latter contracts expressly exclude any rights of set-off.

130 Similar to the Products Agreements in *Sintalow*, the 11 Sales Confirmations were the *specific contractual documents* which governed each of the Subject Transactions. The 11 Sales Confirmations set out specific terms such as the price, mode of payment, date of delivery, *etc*, which are not contained in the Umbrella Contracts and the 2014 Offset Agreement. Likewise, the Umbrella Contracts and the 2014 Offset Agreement, assuming that they governed the Subject Transactions, are akin to the Master Contract in *Sintalow*, these being documents lacking any of the specific details of each sales transaction. As there is a clear and irreconcilable inconsistency between the terms in these two sets of agreements, it is necessary to apply the principle that the terms in the more specific contract should prevail over the terms in the less specific contract. Hence, cl 8.2, which had been incorporated under the 11 Sales Confirmations, supersedes any rights of set-off under the Umbrella Contracts and the 2014 Offset Agreement (even if they were applicable to the Subject Transactions).

Relevance of the offset notices

131 Given that WFS has no rights of set-off pursuant to the Umbrella Contracts and/or 2014 Offset Agreement, any offset notices issued by WFS have no legal effect.

132 At trial, the evidence showed that WFS only began issuing these offset notices *after* it became clear that Panoil was in financial trouble. There was no indication that WFS had been issuing such offset notices at or around the time of the Subject Transactions.

133 On or around 25 May 2017, Panoil stopped paying WFS' debts in cash.[94] WFS became concerned.[95] At this stage, WFS issued its *very first* offset notice to Panoil. WFS proceeded to issue a further 10 offset notices to Panoil.[96] In this regard, Mr Loh expressly *acknowledged* that WFS *did not use* to offset payments to Panoil. Instead, each party would pay the other in full.[97] Likewise, Mr Tan confirmed that WFS never used set-offs until June 2017.[98] Mr Loh and Mr Tan's evidence shows that Panoil and WFS never acted in accordance with the Umbrella Contracts or the 2014 Offset Agreement. The failure to issue offset notices at the time of the Subject Transaction also supports my finding at [111] that the Umbrella Contracts were never intended to govern the Subject Transactions.

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94 LLCAEIC, para 16.

95 LLCAEIC, para 16.

96 TCBAEIC, para 29.

97 NE, 1/11/2019, 26:21–27:12.

98 NE, 31/10/2019, 117:7–117:20.

Is an equitable right of set-off available to WFS?

134 WFS claims that it is entitled to equitable set-off. In support, it submits that there is a close relationship or connection between certain dealings between WFS and Panoil and the Subject Transactions.[99] WFS points to its longstanding buy-sell relationship with Panoil since 2014, and its issuance of a large volume of invoices to Panoil.

135 I have already found at [107] that there is insufficient evidence of contemporaneous buy-sell transactions between Panoil and WFS in connection with the Subject Transactions. These are the same transactions which WFS relies on in support of its claim for equitable set-off. Accordingly, there is insufficient evidence of any closely connected dealings between Panoil and WFS.

136 Nonetheless, I proceed to consider whether WFS can exercise equitable rights of set-off, assuming that these transactions exist.

137 The relevant law is clear. The right of equitable set-off applies where there is a close relationship or connection between the dealings and the transactions which give rise to the respective claims, such that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other (*BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others and another matter* [2020] 1 SLR 627 at [49], citing Sundaresh Menon JC (as he then was) in *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [26]). In *Pacific Rim Investments Pte Ltd*

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[99] DWS, para 226.

v Lam Seng Tiong [1995] 2 SLR(R) 643 ("*Pacific Rim*"), the Court of Appeal held at [35] that the exercise of an equitable set-off is permitted only if *equitable considerations* support such an exercise and cited Lord Denning MR in the English Court of Appeal decision in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 ("*The Nanfri*") at 974–975:

> [I]t is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

138 The right to equitable set-off may be expressly excluded by contract (*Pacific Rim* at [36]).

139 Recently, the Court of Appeal in *Koh Lin Yee v Terrestrial Pte Ltd and another appeal* [2015] 2 SLR 497 ("*Koh Lin Yee*") held that parties can agree to contract out of an *equitable* right of set-off. In *Koh Lin Yee*, the relevant clause was as follows (at [6]):

> All payments to be made by [Allgo or Koh] under the [Loan Agreement] shall be made without set-off, counterclaim or condition…
>
> [emphasis in original removed]

140 Interpreting the above clause, the court held that the right of equitable set-off was excluded (at [15]–[17]):

> 15. … ***In accordance with the principle of the freedom of contract, it must be understood that parties can agree to contract out of the right of set-off and, if they intend to do so, clear words must be used. The defence of an equitable set-off can thus, equally, be contractually excluded.*** …
>
> 16. As explained in [Rory Derham, *Derham on the Law of Set-Off* (Oxford University Press, 2010)] (at para 5.95), the general common law principle is one based on commercial logic and

common sense as well as on giving effect to the agreement that the parties have signed; in the words of the learned author:

> It may be important for cash flow reasons that a party should receive payment in full under a contract so that, if the other party has a cross-claim which otherwise would give rise to an equitable set-off or a common law defence of abatement, that other party should not be entitled to rely upon it as a justification for tendering a reduced amount, but should be required to seek his or her remedy in separate proceedings. …

17. Looking at the words of cl 12.2, we did not see how they could be interpreted to refer only to legal set-offs and not equitable ones. In our view, cl 12.2 excluded *all* forms of set-off, with no distinction between the two. Mr Asokan argued that for an equitable set-off to be expressly excluded by the contract, the clause concerned had to state "without equitable set off". If this particular argument were correct, by parity of reasoning it would mean that for a legal set-off to be excluded, the clause would have to state "without *legal* set off" – an argument which we note Mr Asokan had not attempted to make. On the contrary, Mr Asokan's argument was, instead, based on the assumption that the words "without set-off" in cl 12.2 meant "without legal set-off". ***In our view, this was a pedantic as well as artificial argument that was wholly without merit, not least because it completely ignored the crystal clear language ("without set-off") utilised by the parties which evinced their equally crystal clear intention, as seen in the entire context of the agreement itself, to exclude all manner of set-offs, both legal and equitable.*** Indeed, Mr Asokan was *adding* to the words "without set-off" in cl 12.2 the word "legal" when the words "without set-off" were perfectly clear in stating what the parties had intended.

[emphasis added in bold italics]

141 For convenience, I reproduce cl 8.2 of Panoil's Terms and Conditions:

> Payment for each delivery of marine fuel shall be in United States Dollars or Singapore Dollars as specified in the invoice and such payment shall be made by the Buyer free and clear of any deduction, set-off, counter claims, whatsoever on cash in advance or by telegraphic transfer to Seller's bank after each delivery is completed as directed by Seller on the date shown on the invoice.

142 Like the relevant clause in *Koh Lin Yee*, cl 8.2 expressly provides that payment for each delivery of marine fuel shall be made "free of any deduction, set-off, or counterclaim". The language in cl 8.2 is sufficiently clear to show the parties' intention to exclude *both* legal and equitable rights of set-off. Hence, WFS is precluded from relying on an equitable right of set-off.

Is CIMB required to prove loss?

143 WFS submits that CIMB's action must fail because CIMB has not shown that it has suffered loss.[100] In this respect, WFS contends as follows:

(a) CIMB has filed a proof of debt in the liquidation proceedings involving Panoil totalling US$4,234,596.00. CIMB, however, claims against Italmatic (the identity of which is not relevant) and WFS for a total of US$7,524,864.69 (excluding interest), which exceeds the amount filed in the proof of debt against Panoil.[101]

(b) CIMB fails to explain why it claims for its "losses" in the present proceedings whilst not claiming, under the proof of debt, that the 11 Panoil Invoices are unpaid.[102]

(c) There is no direct evidence that CIMB has suffered any loss.[103]

144 CIMB denies that proof of loss is relevant to the present proceedings.[104]

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100 DWS, para 230.

101 DWS, para 234.

102 DWS, para 235.

103 DWS, para 238.

104 PWS, p 32.

145 In my judgment, WFS' submission cannot succeed. There is no need for CIMB to establish that it has suffered "loss", so long as it is entitled to exercise the assigned rights under the Debenture without any corresponding right of set-off by WFS. As I have found above at [113]–[142], WFS has no rights of set-off under the Umbrella Contracts and, in any case, any rights of set-off under the Umbrella Contracts (or the 2014 Offset Agreement) are superseded by cl 8.2 of Panoil's Terms and Conditions, which is incorporated in each of the 11 Panoil Sales Confirmations. In any event, cl 10.4(d) of the Debenture expressly provides that CIMB may recover in excess of what Panoil has borrowed from it, except that such surplus "shall be paid to [Panoil] or any other person entitled thereto".

Conclusion

146 As CIMB did not prove the authenticity of the Debenture, I dismissed its claims.

147 I will hear parties on costs.

Dedar Singh Gill
Judicial Commissioner

Chan Kia Pheng, Samuel Lee Jia Wei and Tan Jia Hui (LVM Law Chambers LLC) for the plaintiff;
Nair Suresh Sukumaran, Bryan Tan Tse Hsien and Bhatt Chantik Jayesh (PK Wong & Nair LLC) for the defendant.