IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 120

Suit No 1126 of 2020 (Registrar's Appeal Nos 65 and 66 of 2021)

Between

Bank of China Ltd, Singapore Branch

… *Plaintiff*

And

(1) BP Singapore Pte Ltd
(2) Lim Oon Kuin
(3) Lim Huey Ching
(4) Lim Chee Meng

… *Defendants*

JUDGMENT

[Civil Procedure] — [Pleadings] — [Striking out]
[Bills of Exchange and other Negotiable Instruments] — [Letter of credit transaction]

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v
BP Singapore Pte Ltd and others

[2021] SGHC 120

General Division of the High Court — Suit No 1126 of 2020 (Registrar's Appeal Nos 65 and 66 of 2021)

Andre Maniam JC
28 April 2021

31 May 2021 Judgment reserved.

Andre Maniam JC:

Introduction

1 When a bank has paid a beneficiary under a letter of credit, can the bank seek to recover that payment on the basis that the beneficiary had *negligently* misled the bank into making payment? At first instance, it was held that the law did not allow such a claim, and that claim was struck out.

Background

2 I have before me a pair of appeals arising from an application to strike out the claims of the plaintiff (the "Bank") against the first defendant ("BP") on the ground that the statement of claim discloses no reasonable cause of action. On such an application, the pleaded facts are generally presumed to be true in favour of the plaintiff: *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R)

844 at [29]. The facts stated in this judgment are thus based on the statement of claim, or are matters of record, unless stated otherwise (see, in particular [22] and [53]–[54] below regarding further matters BP sought to raise).

The parties

3 The plaintiff Bank is the Singapore branch of a Chinese bank.[1]

4 The first defendant BP is a Singapore company engaged in the activity of manufacturing and supplying refined petroleum products.[2]

5 The second defendant ("OK Lim") was, until 17 April 2020, the managing director of Hin Leong Trading (Pte) Ltd ("Hin Leong") and Ocean Tankers (Pte) Ltd ("Ocean Tankers"). He is also a shareholder of Hin Leong and Ocean Tankers.[3]

6 The third and fourth defendants are, respectively, OK Lim's daughter and son; at all material times, they were also shareholders and directors of Hin Leong and Ocean Tankers.[4]

Hin Leong's banking facilities from the Bank

7 The Bank provided banking facilities to Hin Leong for the purposes of financing Hin Leong's purchase of petroleum products from sellers acceptable to the Bank. Various letters of credit ("LCs") were issued under the facilities.[5]

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1 Plaintiff's Statement of Claim ("SOC") at para 1.

2 SOC at para 2.

3 SOC at para 3.

4 SOC at paras 4–5.

5 SOC at para 9.

The transactions between Hin Leong and BP

8 This suit concerns three LCs which were issued to BP, on which BP obtained payment from the Bank. Each LC was issued in respect of a purported purchase contract between Hin Leong and BP, whereby Hin Leong purported to purchase certain quantities of gasoil from BP.[6]

9 Each purported purchase contract was on a back-to-back basis with a purported sale contract whereby Hin Leong purported to sell to BP the same quantity of gasoil that BP purported to sell back to Hin Leong (at a higher price).[7] The Bank did not know of the back-to-back nature of the transactions.[8]

The Bank's payment to BP

10 BP presented documents to receive payment under the three LCs, and the Bank paid BP. The documents BP presented comprised BP's commercial invoices, and letters of indemnity ("LOIs") in the form prescribed under the LCs.[9] The LCs allowed BP to present LOIs if the shipping documents were not available upon negotiation, the shipping documents being: a full set of the original bills of lading plus three non-negotiable copies, a copy of the certificate of quality, a copy of the certificate of quantity, and a copy of the certificate of origin.[10]

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6 SOC at paras 12, 15 and 18.

7 SOC at para 31.

8 SOC at para 35.

9 SOC at paras 19, 37 and 42.

10 SOC at paras 12, 15 and 18.

Hin Leong's interim judicial managers' report

11 On 27 April 2020, Hin Leong was placed under interim judicial management; on 7 August 2020, it was placed under judicial management;[11] on 8 March 2021 it was wound up. Hin Leong has not reimbursed the Bank the sums which the Bank paid BP under the LCs.

12 On 22 June 2020, Hin Leong's interim judicial managers issued a report ("the IJM Report") stating that they had uncovered a significant number of irregularities in Hin Leong's affairs:[12]

(a) Hin Leong had fabricated documents on a massive scale; and

(b) Hin Leong had obtained financing from banks through a variety of financing schemes structured around the sale and repurchase of cargo at a loss; those schemes appeared to have no commercial benefit to Hin Leong apart from the generation of additional liquidity, and some of these schemes also involved the use of forged documents, non-existent inventory, or the sale of the same inventory to multiple parties.

13 Paras 152–158 of the IJM Report set out details of 27 back-to-back transactions involving cargo that did not exist, for which the corresponding LCs have a value of around US$624 million.[13]

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11 SOC at para 7(a).

12 SOC at para 28.

13 SOC at para 29.

14 Three of those transactions and corresponding LCs are the ones in respect of which the Bank had paid BP sums amounting to around US$125 million.[14]

The suit

15 The Bank sued BP to rescind the three LCs and recover the sums paid and/or damages and other relief.

16 The Bank asserted four causes of action against BP:

(a) fraud, *ie*, deceit and/or fraudulent misrepresentation;[15]

(b) negligence, *ie*, negligent misrepresentation/misstatement;[16]

(c) conspiracy (with the individual defendants, or any of them);[17] and

(d) unjust enrichment.[18]

17 The Bank also claimed against the individual defendants damages for inducing breach of contract[19] and/or conspiracy.[20]

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14 SOC at para 30.

15 SOC at paras 48–66.

16 SOC at para 67.

17 SOC at paras 77–80.

18 SOC at para 68.

19 SOC at paras 69–76.

20 SOC at paras 77–80.

The striking out application

18 BP applied to strike out all of the Bank's claims against it, on the basis that the Bank's statement of claim ("SOC") discloses no reasonable cause of action against BP.

19 The registrar who heard the application struck out the Bank's claim in negligence, and its claim in unjust enrichment independent of fraud. He allowed the Bank to continue with its claims against BP in fraud, conspiracy, and unjust enrichment involving fraud.

20 The Bank and BP both appealed: by Registrar's Appeal No 65 of 2021 ("RA 65"), the Bank asks to reinstate what had been struck out; by Registrar's Appeal No 66 of 2021 ("RA 66"), BP maintains that all of the Bank's claims against it should be struck out.

Striking out for no reasonable cause of action – principles

21 A claim should only be struck out in plain and obvious cases: the claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out: *Singapore Civil Procedure 2020* vol I (Chua Lee Ming gen ed) (Sweet & Maxwell, 2019) ("*White Book*") at para 18/19/6. The plaintiff has a reasonable cause of action if he has a cause of action with *some* chance of success when only the allegations in the pleading are considered: *White Book* at para 18/19/10. When the application is brought under O 18 r 19(1)(a) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") to strike out a claim for disclosing no reasonable cause of action, O 18 r 19(2) of the ROC provides that no evidence shall be admissible on that application. As I noted above (at [2]), the pleaded facts are generally presumed to be true in favour of the plaintiff.

22 In BP's application, besides citing O 18 r 19(1)(a) of the ROC, it also invoked the inherent jurisdiction of the court – in that instance, affidavit evidence may be used: *White Book* at para 18/19/5. However, BP filed no affidavit to put evidence before the court, and its counsel confirmed at the start of his oral submissions at first instance that BP was not relying on any evidence and was relying solely on the pleadings and submissions.[21] In his reply oral submissions, however, he referred to an aspect of the LOIs that appeared to go beyond the facts in the SOC.[22] That also happened at the hearing before me, again at the stage of oral reply submissions, and BP's counsel then made submissions based on the full text of the LOIs (shown to me) including portions that were not set out in the SOC.[23] I shall return to this in my discussion of the negligence claim (see [53]–[54] below).

Payment on a letter of credit - principles

23 An LC is regarded as a separate transaction from the sale contract on which it is based – the bank's obligation to pay the beneficiary is independent of the underlying contract between the beneficiary (the seller) and the applicant for the LC (the buyer): *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 ("*UCM*") at 183; *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2003] 1 SLR(R) 597 ("*Beam*") at [12]–[13]. This has been termed the "autonomy" or "independence" principle.

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21 Notes of Argument, 5 February 2021, p 3 lines 9–12 and 19–20.

22 Notes of Argument, 5 February 2021, p 13 lines 28–31.

23 Notes of Argument, 28 April 2021, p 12 lines 28–29.

24 An exception to the autonomy principle is where there is fraud or knowledge of fraud on the part of the beneficiary: *UCM* at 183–184; *Beam* at [22], [27] and [31].

25 While fraud is an established exception to the autonomy principle, negligence on the part of the beneficiary has not similarly been accepted as a justification for a bank to refuse payment: *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 ("*Carrier*") at [95].

26 In the present case, the issue with the Bank's claim in negligence is, however, not whether negligence was a basis for *refusing* payment to BP on the LC, but rather, whether the Bank could *recover* payment after paying BP on the same. With that, I turn to consider whether the Bank's SOC discloses any reasonable cause of action against BP.

Does the Bank have a reasonable cause of action against BP?

Does the Bank have a reasonable cause of action in negligence?

27 The registrar relied on *Carrier* in concluding that the Bank did not have a reasonable cause of action in negligence, and so he struck out that claim (as pleaded in para 67 of the SOC). In *Carrier*, the judge's views on whether a bank can sue a beneficiary in negligence to recover payment made under an LC were expressed at [94]–[107]. It was *obiter* because the judge had already decided that the bank could recover payment for the beneficiary's deceit (see [94]); whether or not the bank also had a valid cause of action in negligence made no difference to the result.

28 The judge reasoned that, if the beneficiary's negligence is not an exception that would allow a bank to refuse payment on an LC, it necessarily

follows that a bank cannot thereafter recover payment from the beneficiary based on the beneficiary having been negligent (see *Carrier* at [99]).

29 The judge's view on whether a bank has a valid claim in negligence to recover payment, rests on the premise that the bank can only *recover* payment on grounds that would have allowed the bank to *refuse* payment in the first place. As the judge stated (*Carrier* ([25] above) at [99]):

> If we were to accept [the plaintiff's] contention that a bank may rely on negligent misrepresentation by a beneficiary to recover any money it had paid out to the beneficiary, the law would also have to accept that banks are entitled to invoke negligent misrepresentation by the beneficiary as a ground for not paying the beneficiary in the first place.
>
> [emphasis added]

30 Notwithstanding the views expressed in *Carrier*, I consider that the Bank does have a reasonable cause of action in negligence against BP.

31 First, it is arguable that there is a distinction between the two situations – *refusing* payment, and *recovering* payment. The effect of the autonomy principle is that an applicant (buyer) cannot prevent payment on the LC by pointing to a dispute with the beneficiary (seller) regarding the underlying sale contract. But that does not mean the beneficiary might not have to disgorge that payment later, if the applicant successfully sues the beneficiary for breach of the underlying sale contract.

32 In *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420, in relation to standby letters of credit, the Court of Appeal of Victoria stated (at [51]):

> The purpose of the independence principle … is to provide the beneficiary with an unfettered, immediate remedy [*ie*, payment] … The purpose is not to prevent any subsequent challenge to

> the validity of the beneficiary's claim, but to ensure that 'contractual disputes wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party'.

33 There are similar observations in Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) at pp 138–139:

> The rationale for the principle of autonomy stems from the fact that the system of documentary credits in international trade was developed to give to a seller the assurance that as long as he presented conforming documents, he could be paid before he parted with control of the goods, regardless of any dispute that he might have with the buyer regarding the performance of the sale contract. … The established understanding between the parties in such transactions is that where there is a dispute in the underlying contract, the applicant would seek redress against the beneficiary by bringing a separate action and not by withholding all or part of the credit or guarantee amount, *ie*, he has to pay first and sue later.
>
> [emphasis added]

34 That "pay first and sue later" principle is consistent with a beneficiary's right to payment under an LC being regarded as "the equivalent of cash in hand": *PH Grace Pte Ltd and others v American Express International Banking Corp* [1985–1986] SLR(R) 979 at [20], referring to *Continental Illinois National Bank & Trust Co of Chicago v John Paul Papanicolaou* [1986] 2 Lloyd's Rep 441.

35 It is arguable that not only an applicant, but also a bank, is entitled to "pay first and sue later".

36 Second, it has been recognised that, even if a beneficiary generally owes no duty of care to an issuing bank in presenting third party documents (such as shipping documents) to obtain payment under an LC, he may nevertheless be

under a duty of care in the preparation of documents that he has himself issued (in the present case, BP's commercial invoices and LOIs).

37 In *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 1 Lloyd's Rep 344 ("*Niru Battery*"), the surveyors had negligently issued an inspection certificate stating that goods had been loaded, when the goods had, in fact, not been loaded. The inspection certificate was presented to obtain payment on an LC. Thereafter, both the applicant and the bank successfully sued the surveyors in negligence, and that was upheld by the English Court of Appeal.

38 In the present case, BP issued commercial invoices and LOIs, which BP then presented to obtain payment from the Bank. BP was not a third party (unlike the surveyors in *Niru Battery*), but that does not necessarily mean BP was under no duty of care to the Bank.

39 In *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2002] 1 WLR 1975 ("*Montrod*"), the court accepted that a beneficiary could be under a duty of care in relation to documents that it has issued. GK (the beneficiary) signed an inspection certificate in the belief that it had been authorised by Montrod (the applicant for the LC) to do so, when in fact GK had not been so authorised. GK then presented the certificate for payment on the LC and was paid by the bank. Montrod, which was required to reimburse the bank, sought to bring claims against GK in negligence.

40 The court rejected a primary claim that a beneficiary of an LC owes the applicant a duty to take reasonable care in presenting documents for payment. However, Montrod was allowed to pursue a narrower negligence claim, in respect of inspection certificates that the beneficiary GK had signed, which

ought instead to have been signed by Montrod (see *Montrod* at [69]–[75]). That narrower negligence claim was premised on a voluntary assumption of responsibility by GK, unlike the primary negligence claim (see *Montrod* [67]–[69] and [75]).

41 Although the intended negligence claims in *Montrod* were as between applicant and beneficiary (rather than bank and beneficiary), both the judge at first instance and the English Court of Appeal considered the position as between bank and beneficiary, as part of their reasoning. The judge said, "[t]he beneficiary does not owe a duty of care to the issuing bank" (see *Montrod* at [64]), and the English Court of Appeal agreed that the beneficiary's "agreement to the terms of a letter of credit" alone was insufficient to give rise to a duty of care (see *Montrod* at [66]–[68]). That was said, however, in relation to the primary negligence claim that a beneficiary is generally under a duty of care in relation to documents presented. Those remarks did not stand in the way of the courts allowing the narrower negligence claim in respect of the inspection certificates that the beneficiary had signed, and then presented.

42 Both *Niru Battery* ([37] above) and *Montrod* were considered in *Carrier* ([25] above): the judge stated that he was not inclined to accept that a beneficiary may in certain instances owe a duty of care to the bank; but, in any event, from the evidence he could not find an assumption of responsibility by the beneficiary that could give rise to a duty of care (at [105]).

43 Third, the judge's overarching view in *Carrier* – that a bank cannot sue a beneficiary in negligence – was based on equating the grounds for a bank *refusing* payment to the grounds for it *recovering* payment, rather than an application of the principles for determining whether there is a duty of care. The English Court of Appeal in *Niru Battery* and *Montrod*, on the other hand, did

not equate grounds for refusing payment with grounds for recovering payment; instead they applied principles from the law of negligence, in particular, that of assumption of responsibility.

44 The applicable test or framework in Singapore for determining the imposition of a duty of care is that set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"): a preliminary requirement of factual foreseeability, followed by a first stage of legal proximity, then a second stage of policy considerations (at [73]) (see also *Chu Said Thong and another v Vision Law LLC* [2014] 4 SLR 375 at [129]–[224]). The Court of Appeal in *Spandeck* noted that different tests are applied in England.

45 English cases on whether there is a duty of care in a particular factual scenario should thus be read against that backdrop. A finding that there is no duty under the English tests does not necessarily equate to there being no duty under *Spandeck*, and *vice versa*.

46 In the present case, I consider it arguable that BP did owe the Bank a duty of care in relation to the commercial invoices and LOIs it issued, and presented to the Bank.

47 Fourth, to the extent that there are statements in the cases that go against the imposition of a duty of care on a beneficiary vis-à-vis a bank, the position is not so well-settled as to justify striking out the Bank's claim here.

48 Whether such a duty exists was not the *ratio decidendi* in *Carrier* ([25] above), *Montrod* ([39] above), or *Niru Battery* ([37] above). Moreover,

Singapore courts are not bound by English authorities, and have in a number of instances departed from them. *Spandeck* itself is an illustration of this.

49 I would also highlight two examples in the context of LCs. The first example is *Beam* ([23] above), where the Court of Appeal decided that a bank could refuse payment if it were satisfied that a material document is a nullity (see *Beam* at [33]–[36]). In so doing, the Court of Appeal declined to follow *Montrod* on there being no nullity exception to the autonomy principle (see *Beam* at [26]–[36]). Instead, the Court of Appeal preferred the views expressed by the English Court of Appeal in its earlier decision in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1981] 3 WLR 242 that a bank could refuse payment if it knew that a document presented for payment was forged (see *Beam* at [17]–[19] and [31]). That point was then left open by the House of Lords in *UCM* ([23] above) (see *Beam* at [20]–[26] and [31]).

50 The second example is the recognition in Singapore that unconscionability on the part of a beneficiary is a separate and distinct ground from fraud for restraining payment on a performance guarantee or bond: *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262. It has been suggested in that regard that there should be no difference between performance guarantees or bonds, and LCs: Ali Malek QC & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed, 2009) at para 9.28.

51 English law has yet to recognise unconscionability as an exception, although it stems from a *dictum* of Eveleigh LJ in *Potton Homes Ltd v Coleman Contractors (Overseas) Ltd* (1985) 28 BLR 19, and the point has been left open in *Montrod* (at [59]–[60]).

52 That the Singapore courts can chart their own course is particularly significant when the issue has yet to be determined as the *ratio decidendi* of any English or local case. The issue of whether a beneficiary of an LC owes the bank any duty of care, particularly in relation to documents prepared by the beneficiary, should not be summarily determined against the Bank here on a striking out application.

53 Fifth, the further matters which BP sought to rely upon (beyond what is stated in the SOC – see [22] above) do not justify striking out the Bank's negligence claim. BP put before me the full text of the LOIs to support its submissions that a duty of care should not be imposed, because: (a) the LOIs were addressed to Hin Leong (albeit then presented to the Bank); and (b) the full text of the LOIs suggested that only Hin Leong should have any rights under them. Given that BP filed no affidavit, and moreover had informed the registrar at the start of the first instance hearing that it was only relying on the pleadings and submissions, I was reluctant to allow BP to belatedly introduce evidence in the form of the full text of the LOIs.

54 In any event, the matters relied upon by BP did not render the Bank's negligence claim unarguable. Whatever BP and Hin Leong may have intended as between themselves, it remained the case that the LOIs were in the form prescribed by the Bank in the LCs, and they were presented to the Bank. Arguably, the LOIs could still amount to representations by BP to the Bank, and BP could still owe the Bank a duty of care in the circumstances. Moreover, BP presented not only the LOIs, but also its commercial invoices.

55 The Bank's claim in negligence against BP does have *some* prospect of success, and I thus reverse the registrar's decision to strike out that claim.

Does the Bank have a reasonable cause of action in fraud?

56 The elements of a claim in deceit are well-settled (*Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]):

> … First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff … acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

57 The Bank pleaded that, by presenting documents for payment under the LCs (including BP's LOIs), BP made various representations as particularised in paras 48, 54 and 60 of the SOC. There are two broad themes:

(a) that there were genuine sales of goods by BP, rather than back-to-back transactions and/or what the Bank described as the "Fictitious Purchase Scheme"; and

(b) that the goods existed.

58 The Bank pleaded at paras 50, 56 and 62 of the SOC that the representations were false, in that:

(a) there was no genuine sale of goods by BP, instead these were back-to-back transactions and/or part of the Fictitious Purchase Scheme;

(b) the goods did not exist.

59 The Bank pleaded at paras 51, 57 and 63 of the SOC that BP made the representations "fraudulently in that BP knew that they were false when it made

them or was reckless, not caring whether they were true or false". Further, at paras 49(a), 55(a) and 61(a) of the SOC, the Bank pleaded that BP would or ought to have known that the representations were false, having regard to the background the Bank pleaded in relation to the transactions between Hin Leong and BP (see [9] above), the LCs (see [54] above), and what Hin Leong's interim judicial managers had found (see [12]–[14] above).

60 The Bank pleaded at paras 52, 58 and 64 of the SOC that BP intended for the Bank to rely on the representations, in that the representations were made to induce the Bank to pay BP on the LCs.

61 The Bank pleaded at paras 53, 59 and 65 of the SOC that it relied on the representations by paying BP and further, at para 66 of the SOC, that it suffered loss and damage as a consequence.

62 BP's attack on the Bank's fraud claim focused on the element of fraudulent intent (see [59] above). BP contends that the Bank's pleading on this was formulaic – it simply recited the legal formulation of that element.[24]

63 BP relies on the High Court decision in *Kim Hock Yung and others v Cooperative Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party)* [2000] 2 SLR(R) 455 ("*Kim Hock Yung*") where a claim of fraud was struck out. The court noted that it is not enough merely to plead that a false statement has been made, without there also being a sufficient pleading of the alleged fraudulent intent (at [4]):

> A false statement is not necessarily a fraudulent statement in the context of fraudulent misrepresentation. There are innocuous reasons why a person might have made a statement that turns out to be untrue. A fraudulent misrepresentation is

[24] 1st Defendant's Written Submissions dated 21 April 2021 ("1DWS") at para 75.

> a representation made by a person knowing that it was false or so recklessly uncaring as to whether it was true or not.

64 The court thus went on to say (at [6]):

> … details of the alleged fraudulent intent must be provided. In this context of this case, I would expect, for example, a statement setting out the defendants' knowledge of some specific fact or facts, or the existence of some specific fact or circumstances which were clearly contradictory and inconsistent with the representations made by them. Otherwise, the pleading is no more than a bare accusation that the defendants intended to deceive. The pleading of a cause of action founded on the tort of deceit must give full particulars of the basis for the averment or else it must be struck out.

65 In *Kim Hock Yung*, the pleading as to fraudulent intent, which was struck out, read (at [5]):

> All the representations to the first plaintiff were made by the defendants, their aforementioned servants and/or agents:
>
> (a) knowing that they were false,
>
> (b) without any belief in their truth,
>
> (c) reckless, without care as to whether they were true or false.

66 That pleading provided no *basis* for the allegations of fraudulent intent, and it was struck out.

67 In the present case, however, the Bank did not merely plead that "BP knew that [the representations] were false when it made them or was reckless, not caring whether they were true or false". The Bank also pleaded that BP would or ought to have known that the representations were false, having regard to the background the Bank pleaded in relation to the transactions between Hin Leong and BP, the LCs, and what Hin Leong's interim judicial managers had found (see [59] above).

68 I evaluate this in relation to the two categories of allegedly false representations: as to the nature of the transactions, and as to the existence of the goods.

Is there a sufficient pleading of fraudulent intent, in respect of the representations as to the nature of the transactions?

69 The Bank's complaint is that it was led to believe it was financing a genuine sale of goods by BP (a seller acceptable to the Bank) to Hin Leong, when that was not the case. The Bank did not know that the goods purportedly sold by BP emanated from Hin Leong itself (if those goods even existed). As between Hin Leong and BP, each transaction was a purported back-to-back sale and repurchase, but the Bank did not know that.

70 The Bank also did not know what the interim judicial managers would later find out: that each of these transactions between Hin Leong and BP involved Hin Leong incurring a loss (because Hin Leong was contracting to buy back the same goods at a higher price); and that the transactions were apparently intended solely to obtain liquidity for Hin Leong so there was no commercial benefit to Hin Leong apart from this.

71 Were the two legs of each back-to-back transaction genuine sale and purchase contracts, or was each back-to-back transaction in substance a loan? To answer this, the court will have to ascertain the true nature and substance of the transactions: *Thai Chee Ken and others (Liquidators of Pan-Electric Industries Ltd) v Banque Paribas* [1992] 1 SLR(R) 280 at [24] and [26]; [1993] 1 SLR(R) 871 at [9] and [12]). In that case, the High Court and the Court of Appeal both concluded that there was a genuine sale and repurchase, having regard to the circumstances of the case, which included the company having given negative pledge covenants that a secured loan would have offended

against. On the facts in *Re Curtain Dream* [1990] BCLC 925, however, the court concluded that the purported sale and repurchase there was in substance a loan.

72 In this case, BP itself described the back-to-back transactions as:[25]

> … a structured finance arrangement between Hin Leong and BP, under which Hin Leong would sell gasoil to BP and BP would sell back the gasoil to Hin Leong on a back-to-back basis which would give both parties commercial benefits, *viz*, in relation to BP, the benefit of a 'spread' (i.e. the difference in purchase and sale price) earned, and, in relation to Hin Leong, the benefit of obtaining liquidity.

73 For present purposes, it is sufficient for me to say that the Bank has an arguable case that the back-to-back transactions between Hin Leong and BP were in substance a loan from BP to Hin Leong, with BP earning a "spread" in the nature of interest on that loan, and Hin Leong using the LCs from the Bank to repay the loan.

74 If the Bank succeeds on the issue of characterisation, that would in turn support the Bank's assertions that BP knew what the true nature of the back-to-back transactions was, and that BP knowingly misrepresented that to the Bank. From that, the Bank could contend that (as it has pleaded), BP had the requisite fraudulent intent.

Is there a sufficient pleading of fraudulent intent, in respect of the representations as to the existence of the goods?

75 As stated by the Court of Appeal in *Panatron* ([56] above), "the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true" (at [14]). The Court of Appeal also cited *Derry v Peek* (1889) 14 App Cas 337

[25] 1st Defendant's Written Submissions dated 14 January 2021 at para 11.

("*Derry v Peek*") for its holding that in an action of deceit the plaintiff must prove actual fraud: "[t]his fraud is proved only when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false" (at [13]).

76 In *Derry v Peek*, Lord Herschell said that the third case ("recklessly"), is but an instance of the second case ("without belief in its truth"), "for one who makes a statement under such circumstances can have no real belief in the truth of what he states" (at 374). He continued, "[t]o prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth" (at 374).

77 The Bank pleaded at paras 51, 57 and 63 of the SOC that BP made the false statements "fraudulently in that BP knew that they were false when it made them or was reckless, not caring whether they were true or false". As pleaded, the Bank has alleged fraudulent intent within the first and third of Lord Herschell's three cases, *ie*, knowledge of falsity, and recklessness. However, in view of Lord Herschell's observations as to the relationship between recklessness and the lack of an honest belief in truth, the Bank could seek also to rely on the second case (lack of an honest belief in truth). Indeed, that is how the Bank's arguments proceeded. If the pleadings ought to be more specific on this, that is a matter for amendment, not striking out.

78 BP contends that the Bank had not pleaded sufficient particulars of the alleged fraudulent intent. In particular, BP argues that the Bank had not pleaded facts relating to BP's *knowledge* that the cargo did not exist at the time of the presentation of documents.[26] The Bank, on the other hand, contended that it was

[26] 1DWS at para 77.

sufficient if it proved that BP had said the cargo existed, *recklessly* or *without an honest belief in the truth* of what it was saying.[27]

79 The Bank had pleaded at paras 49(a), 55(a) and 61(a) of the SOC that BP would or ought to have known that the representations were false, having regard to the background the Bank pleaded in relation to the transactions between Hin Leong and BP, the LCs, and what Hin Leong's interim judicial managers had found (see [59] above). That pleading focused on BP's actual or constructive knowledge, and recklessness was not specifically mentioned there. However, if BP ought specifically to refer to recklessness in that context, that too is a matter for amendment, not striking out.

80 The fundamental question is whether the background pleaded by the Bank provides sufficient particulars for its allegation of fraud by BP, in relation to BP's representations that the goods existed (when in fact they did not).

81 According to the Bank's pleadings at paras 19(a)(i), 19(b)(i), 37(a) and 42(a) of the SOC, BP's commercial invoices were for goods that had purportedly already been shipped on particular vessels.

82 The Bank also pleaded at paras 19(a)(ii), 19(b)(ii), 37(b) and 42(b) of the SOC that BP's LOIs all refer to the goods as being in existence: there are references to a certain quantity "of the said product [gasoil]" and to "the cargo"; and warranties "that we were entitled to possession of the product", "we had good title to such product", and "that title in the product has been passed as provided in the agreement".

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27 Plaintiff's Written Submissions dated 21 April 2021 ("PWS") at para 41.

83 BP presumably did not have the shipping documents when it presented those commercial invoices and LOIs to the Bank for payment under the LCs; on the terms of the LCs, if the shipping documents were available to BP it ought to have presented them instead (see [10] above).

84 That in turn raises the question: on what basis (if any) did BP say that goods existed, when in fact they did not? Did BP know that the goods did not exist? Did BP lack an honest belief in whether the goods existed? Was BP reckless in not caring whether the goods existed or not?

85 The Bank pleaded at para 29 of the SOC (citing para 154(a) of the IJM Report) that the 27 transactions involving non-existent goods typically involved Hin Leong providing to its counterparty documents referencing the goods, such as an invoice, a copy of the bill of lading and/or a letter of indemnity. If BP had received such documents from Hin Leong before issuing its commercial invoices and LOIs, that would tend to go against an allegation that BP knew the goods did not exist. Even if BP did not have those documents in hand when it issued its commercial invoices and LOIs, it does not necessarily follow that BP knew the goods did not exist.

86 In either scenario, though, might the Bank still have an arguable case that BP was reckless in not caring whether the goods existed, or lacked an honest belief in the existence of the goods?

87 As each transaction between Hin Leong and BP was on a back-to-back basis, with the goods (if they existed) originating from Hin Leong and being sold straight back to Hin Leong, did BP care about the stated quantity or quality of the goods, or whether the goods existed at all? If the back-to-back transactions were in substance a loan (as discussed above at [71]–[73]), and if

BP viewed them as such, might BP have regarded the transactions as merely a way for Hin Leong to generate liquidity, with BP being paid a spread (in the nature of interest on a loan) for its role in the transactions? Did BP think that because the goods were simultaneously being repurchased by Hin Leong, the quantity, quality, or even existence of the goods really did not matter? After all, as between Hin Leong and BP, Hin Leong could hardly complain about any issues with the quantity, quality, or existence of goods that emanated from Hin Leong itself.

88 The questions I have posed above are not appropriate for summary determination on a striking out application. I consider that the Bank does have an arguable case on whether BP was fraudulent, at least in the sense of BP being reckless in not caring whether the goods existed and/or lacking an honest belief in the existence of the goods.

89 As such, I agree with the registrar that the Bank's claim in fraud should not be struck out.

Conspiracy

90 The registrar also did not strike out the Bank's claim in conspiracy.

91 On appeal, BP contends that even if the fraud claim were allowed to stand, the conspiracy claim should be struck out because the Bank has not identified the individuals in BP who allegedly engaged in the conspiracy.[28]

92 The Bank's pleaded conspiracy claim against BP at para 77 of the SOC was that BP, together with Hin Leong, Ocean Tankers, and the three individual

[28] 1DWS at para 103.

defendants (or any of them) "wrongfully and/or dishonestly and with intent to injure the Bank by unlawful means, conspired and combined together to enter into and/or carry out the Fictitious Purchase Scheme … and/or to procure that the Bank issue [the LCs] and/or make payment to BP thereunder".

93 In its particulars to the pleaded conspiracy claim, the Bank repeated what it had pleaded in paras 2–76 of the SOC. That included the background in relation to the transactions between Hin Leong and BP, the LCs, and what Hin Leong's interim judicial managers had found; and the Bank's allegations of fraud and negligence against BP.

94 At paras 77(b)–(c) of the SOC, the Bank set out how the alleged conspiracy was carried out, including the applications made to obtain the LCs from the Bank, and how the Bank was led to make payment under those LCs.

95 At para 77(e) of the SOC, the Bank set out various unlawful acts and means carried out pursuant to and in furtherance of the conspiracy, by which the Bank was injured. These included the matters that are the subject of the Bank's fraud and negligence claims against BP, and also: Hin Leong's breaches of Banking Agreements with the Bank; the individual defendants' inducement of those breaches; Hin Leong's and the individual defendants' misrepresentations and/or concealment of matters; the issuance of false bills of lading; breaches of fiduciary duties owed by the individual defendants to Hin Leong and/or Ocean Tankers; and breaches of statutory duties under s 157(1) of the Companies Act (Cap 50, 2006 Rev Ed) by the individual defendants.

96 BP contends that the Bank needs to go further, and identify who in BP did what. BP relies on the High Court decision in *Antariksa Logistics Pte Ltd*

and others v Nurdian Cuaca and others [2018] 3 SLR 117 ("*Antariksa*"), where the court said (at [146]):

> … although a company, being a legal person, can be a party to a conspiracy, it is an artificial construct. In order for it to be fixed with the requisite intention or state of mind, it is necessary to pinpoint some human actor with that state of mind and to determine whether, as a matter of law, that state of mind may be attributed to the company.

97 In *Antariksa*, the plaintiffs had identified the first defendant (a natural person) as the agent of the second defendant company (see [148]). The sufficiency of particulars of conspiracy was not in issue in *Antariksa*. The case concerned an application by the second defendant to strike out the claim against it for being internally contradictory, which the court rejected.

98 *Antariksa* cited *The Dolphina* [2012] 1 SLR 992 where the issue at trial was whether the knowledge of a member of the board of directors could be attributed to the defendant company. That case too did not concern any issue of sufficiency of particulars.

99 Unlike *Antariksa* and *The Dolphina*, there is no issue in the present case of whether the knowledge of particular individuals in BP is to be attributed to BP. BP's complaint is more basic: the Bank has not identified any particular individuals within BP. In reply submissions, however, BP's counsel said BP was not arguing that in every case involving a corporate conspirator, the plaintiff would need to identify individuals, or face having its claim struck out; rather, the complaint was that the Bank did not have enough to make out the requisite state of mind on BP's part, for a conspiracy claim. Specifically, BP contended

that it was not sufficient for the Bank simply to say that BP as a beneficiary wanted the Bank to pay it on the LCs.[29]

100 There must be sufficient particulars of a conspiracy claim; the defendants must know what case they have to meet from the pleadings. I find that the Bank's pleadings sufficiently informs BP what case it has to meet in respect of conspiracy. The Bank's fraud and negligence claims against BP (which I consider the Bank is entitled to pursue) are themselves aspects of the Bank's conspiracy claim against BP. The Bank has said what acts of BP it is complaining of, and what BP's knowledge and intention was. The Bank has not named individuals within BP, but BP itself would know which individuals within BP were involved in the matters the Bank is complaining of. The Bank is not simply saying that BP wanted to be paid on the LCs, and so BP is a conspirator.

101 Accordingly, I agree with the registrar that the Bank's claim in conspiracy should not be struck out.

Unjust enrichment

102 The registrar struck out this claim in part: he allowed the Bank to assert unjust enrichment further to its claim in fraud, but not independent of fraud.

103 As discussed in the section on negligence (see [27]–[55] above), I consider it is arguable that the grounds on which a bank could seek to *recover* payment from a beneficiary it has paid on an LC, are not limited to the grounds on which the bank could *resist* making payment (see [31] above). It follows that

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[29] Notes of Argument, 28 April 2021, p 12 lines 15–20.

if a claim for unjust enrichment can be made out, the absence of fraud would arguably not defeat the claim.

104 BP relied on *Mees Pierson NV v Bay Pacific (S) Pte Ltd and others* [2000] 2 SLR(R) 864 ("*Mees Pierson*"). There, after the bank had made payment, it found that the bill of lading had been antedated and that the health certificate was a forgery (see [11]–[12] and [19]). However, the beneficiary had innocently presented these documents to the bank (see [21], [23], [25] and [50]).

105 The court held that if the health certificate was a forgery it would be a nullity; and if the bank knew that before making payment, it would have been under no obligation to accept the document and pay (see *Mees Pierson* at [42]). However, the LC in that case was governed by the *Uniform Customs and Practice for Documentary Credits (1993 Revision)* (ICC Publication No 500) ("the UCP 500") which required the bank to give notice of rejection of documents by the close of the seventh banking day following the date of receipt, and the bank did not do so (see *Mees Pierson* at [45]). Art 14(e) of the UCP 500 provides that, if the bank fails to give notice of rejection within the stipulated period, the bank "shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the credit" (see *Mees Pierson* at [45]).

106 The bank's claim in *Mees Pierson* failed, not because unjust enrichment was not an available cause of action *per se*, but because under the UCP 500 the bank was precluded from claiming that the documents were not in compliance with the credit – and that was the mistake on which its unjust enrichment claim was based. If, however, the fraud exception applied, the court accepted that the bank could then have sued in fraud, and that it might also have sought restitution (see *Mees Pierson* at [49]).

107 In the present case, the commercial invoices and LOIs which BP presented were not forged documents – they were issued by BP. The Bank's unjust enrichment claim is not based on those documents being forged and non-compliant. The Bank's claim, as pleaded at para 68(d) of the SOC, is based on well-established unjust factors under the law of unjust enrichment: mistake of fact and absence/failure of basis (*Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [132]–[133]).

108 It is arguable that a valid cause of action in unjust enrichment (by a bank against the beneficiary of an LC) is not limited to cases of fraud. In *Niru Battery* ([37] above), the English Court of Appeal upheld the trial judge's decision that CAI (which had received payment under the LC on behalf of the beneficiary) was not liable in deceit, but was liable to make restitution of the monies received – on the basis of payment by the bank under a mistake of fact.

Conclusion

109 In view of the above, I allow the Bank's appeal in RA 65 and dismiss BP's appeal in RA 66. I will hear the parties on costs.

Andre Maniam
Judicial Commissioner

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