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

[2022] SGHCR 5

HC/ADM 308 of 2020
HC/SUM 2709 of 2021

Between

ING Bank NV, Singapore Branch

… *Plaintiff*

And

The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"

… *Defendant*

JUDGMENT

[Admiralty and Shipping – bills of lading – delivery of cargo against presentation of bills of lading]

[Civil Procedure – summary judgment]

ING Bank NV, Singapore Branch
v
The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"

[2022] SGHCR 5

General Division of the High Court — ADM No 308 of 2020 (Summons No 2709 of 2021)
Justin Yeo AR
1 March 2022

8 April 2022

Justin Yeo AR:

1 The present action was brought by the Plaintiff, ING Bank NV, Singapore Branch ("the Plaintiff"), against the Defendant, the demise charterer of the ship or vessel "Navig8 Ametrine" ("the Defendant"), for misdelivery of a cargo of about 13,749.681 metric tons of light naphtha ("the Cargo"). The Cargo was shipped upon the vessel "Navig8 Ametrine" ("the Vessel") under a set of original bills of lading ("the Bills of Lading") and delivered to Hin Leong Trading (Pte) Ltd ("HLT") without presentation of the Bills of Lading.

2 The Plaintiff brought the present application for summary judgment under O 14 r 1 of the revoked Rules of Court as in force immediately before 1 April 2022 ("the Rules of Court"). For the purposes of this application, the Plaintiff relied only on the cause of action for breach of the contract of carriage

on the basis that the Cargo was delivered without presentation of the Bills of Lading. The Plaintiff sought summary judgment in the sum of USD8,561, 342.03, being the invoice value of the Cargo ("the Invoice Sum"), or alternatively, for interlocutory judgment to be entered against the Defendant with damages to be assessed.

3 For the reasons given in this judgment, I dismiss the Plaintiff's prayer for judgment on the Invoice Sum and grant instead the alternative prayer for interlocutory judgment with damages to be assessed.

Background Facts

4 The Plaintiff is the Singapore branch of a bank headquartered in Amsterdam, the Netherlands. It carries on the business of trade financing activities. At the material time, the Plaintiff's customers included Aeturnum Energy International Pte Ltd ("AEI") and HLT.

5 The Plaintiff had granted HLT credit facilities of up to USD140m for, amongst other things, the issuance of letters of credit to finance HLT's trading activities ("the HLT Banking Facilities"). The terms and conditions for HLT's use of the HLT Banking Facilities are found in a facility letter dated 29 July 2019 ("the HLT Facility Letter"). The HLT Facility Letter provided, amongst other things, that the HLT Banking Facilities were secured by a pledge of documents of title and transportation documents representing or relating to any goods financed by the HLT Banking Facilities, including but not limited to the "[f]ull set (3/3) original Bills of Lading … made out or endorsed to the order of the [Plaintiff]… In its absence, letter of indemnity … issued by suppliers countersigned by international banks, or issued by suppliers acceptable to the

[Plaintiff]". The HLT Banking Facilities were also subject to various other conditions, including the terms found in the Plaintiff's Continuing Commercial Credit Agreement ("the HLT CCA") and the Plaintiff's General Security Agreement relating to the Import and Export of Goods ("the HLT GSA"). Collectively, the HLT Facility Letter, the HLT CCA and the HLT GSA are referred to as the "HLT Financing Documents".

6 There were various events relevant to the background to the present action. I focus on those which are relevant to the present application, and briefly describe them in chronological order.

7 In December 2019, AEI agreed to purchase a cargo of 25,000 metric tons of light naphtha from BCP Trading Pte Ltd. AEI sold the cargo under separate contracts to Total Trading Asia Pte Ltd ("Totsa") and HLT respectively. Under the terms of both contracts, AEI would arrange and pay for the shipment of the cargo from the load port to the discharge port. The present action concerns only the Plaintiff's financing of HLT's purchase of the Cargo from AEI. However, mention is made here of Totsa to provide background to one of the issues that arose in this application (see [13]–[15] and [20] below).

8 The Vessel was time-chartered by the Defendant to Navig8 Chemicals Pool Inc ("the Time Charterer"). The Time Charterer, in turn, voyage chartered the Vessel to AEI by way of a voyage charterparty dated 20 January 2020. Both the time charterparty and voyage charterparty contained clauses which bound the Defendant and the Time Charterer, respectively, to discharge and deliver the Cargo without presentation of the Bills of Lading against indemnities furnished under the respective charterparties.

9 On 22 January 2020, HLT submitted a letter of credit application form to the Plaintiff ("the HLT LC Application Form"), which included and incorporated the HLT CCA. The HLT LC Application Form was for the issuance of a letter of credit to finance HLT's purchase of the Cargo from AEI. Pursuant to this, the Plaintiff issued a letter of credit advised to AEI, dated 23 January 2020 ("the Letter of Credit"). The Letter of Credit provided, in Field 46A, that documents required for payment thereunder included the full set of 3/3 original clean on board bills of lading plus three non-negotiable copies issued or endorsed to the order of the Plaintiff; and in the event that such documents are not available at the time of negotiation, payment will be effected at maturity against presentation of AEI's letter of indemnity in a prescribed format. The prescribed format required that AEI expressly agree to "make all reasonable efforts to obtain and surrender to [the Plaintiff] as soon as possible the full set of 3/3 original bills of lading".

10 The Vessel arrived in Singapore on or around 7 February 2020. On 11 February 2020, the Defendant completely discharged and delivered the Cargo at the Universal Oil Terminalling Hub ("Universal Terminal") to HLT as the receiver. This was done without the presentation of the Bills of Lading by HLT, on the instructions of and against the indemnity issued by the Time Charterer.

11 On 19 February 2020, AEI presented an invoice for the Invoice Sum, as well as a letter of indemnity in the prescribed format. On 3 March 2020, the Plaintiff paid the Invoice Sum to AEI under the Letter of Credit.

12 On 13 March 2020, the Plaintiff received the full set of Bills of Lading from Sumitomo Mitsui Banking Corporation ("SMBC"). SMBC had specifically endorsed the Bills of Lading in favour of the Plaintiff.

13 The Plaintiff thereafter mistakenly endorsed the Bills of Lading to Totsa and delivered the Bills of Lading to Totsa on or about 9 June 2020. The Plaintiff had actually intended to endorse a *different* set of bills of lading to Totsa, being the bills of lading relating to the cargo to be delivered to Totsa (see [7] above). The Plaintiff discovered the mistake on 15 June 2020, and on 16 June 2020, endorsed and delivered the correct bills of lading to Totsa, exchanged those with the Bills of Lading, and stamped the words "cancelled" on the Bills of Lading at the place where the Plaintiff's endorsement in favour of Totsa was marked.

14 On 18 June 2020, the Plaintiff's then-solicitors wrote to the Defendant to inform the Defendant that the Plaintiff was the lawful holder of the Bills of Lading, and sought confirmation that the Defendant was holding the Cargo and would deliver the Cargo to the Plaintiff on presentation of the Bills of Lading. In addition, on the advice of the Plaintiff's then-solicitors, the Plaintiff's representative went to Totsa's offices on 29 July 2020, where Totsa stamped the Bills of Lading to the order of the Plaintiff. This was "[w]ithout prejudice to the Plaintiff's position that its initial 'endorsement' of the Bills of Lading to Totsa… was a mistake and therefore did not constitute a valid endorsement in Totsa's favour".[1]

15 By way of a letter dated 25 August 2020, the Defendant's then-solicitors informed the Plaintiff's then-solicitors that the Defendant had delivered the Cargo to Totsa, and that the Bills of Lading no longer carry the right of possession to the Cargo. The Plaintiff's then-solicitors responded to say that this was an admission of misdelivery of the Cargo. For completeness, the Defendant

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[1] Affidavit of Toh Hwee Choon (dated 10 June 2021) at paragraph 43.

has recently explained, in its reply affidavit in the present application,[2] that the position taken by its then-solicitors in the 25 August 2020 letter was due to confusion as to the cargo under the two contracts.

16 On 19 November 2020, the Plaintiff commenced the present action and arrested the Vessel. The Vessel was subsequently released on 22 December 2020 after security was provided for the claim.

The Present Application

17 The legal principles relating to summary judgment are well established and are not in dispute between the parties. The relevant principles may be shortly stated as follows:

(a) The summary judgment process is intended to prevent delay and enable a plaintiff to obtain a quick judgment without trial where there is plainly no defence to the claim (see, *eg*, *Bee Cheng Hiang Hup Chong Foodstuff Pte Ltd v Fragrance Foodstuff Pte Ltd* at [2003] 1 SLR(R) 305 at [32]; see also *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) ("*Singapore Civil Procedure 2021*") at paragraphs 14/1/2 and 14/4/2, and the cases cited therein).

(b) In order to obtain summary judgment, the plaintiff must first establish a *prima facie* case for summary judgment. If the plaintiff successfully does so, the burden shifts to the defendant to show that there is "an issue or question in dispute which ought to be tried or that there

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2 Affidavit of Jens Groenning (dated 4 August 2021) at paragraph 23.

ought for some other reason to be a trial" (see O 14 r 3(1) of the Rules of Court). Unconditional leave to defend may be granted if a defendant demonstrates "a fair probability of a *bona fide* defence", while conditional leave to defend may be granted where the defendant is only able to show that the defence raised is "not hopeless" (*Akfel Commodities Turkey Holding Anonim Sirketi v Townsend, Adam* [2019] 2 SLR 412 at [41]).

(c) The court adopts a robust approach when considering summary judgment applications (*Mirae Asset Daewoo Co, Ltd v Sng Zhiwei Joei* [2021] SGHC 166 at [82]). In so doing, the court assiduously avoids distraction from irrelevant facts and arguments, so as to separate the factual or legal wheat from the chaff (see *ibid*). The fact that an action may involve complex issues is not an answer to a claim for summary judgment if the claim is otherwise well-founded (*The "Yue You 902" and another matter* [2020] 3 SLR 573 ("*The Yue You*") at [23], citing *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR(R) 675 at [19]). In seeking leave to defend, it is insufficient for a defendant to merely throw up factual assertions without more; instead, the court assesses whether the defence is equivocal, lacking in precision, inconsistent with undisputed contemporary documents or inherently improbable (see, *eg*, *Engineering Centre of Industrial Constructions and Concrete v EFE (SEA) Pte Ltd* [2021] SGHC 1 at [24] and *The Yue You* at [20], and the cases cited therein).

Whether there is a *prima facie* case

18 In *The Star Quest* [2016] 3 SLR 1280, the court found that a *prima facie* case was made out for the purposes of summary judgment in the context of a claim for misdelivery without presentation of original bills of lading, because (see *The Star Quest* at [15]):

(a) the bills of lading were issued naming the physical supplier as the shipper of the cargo, and to its order;

(b) the bills of lading were signed by the representatives of the shipowners or the demise charterers, either by or on behalf of the master; and

(c) the onward deliveries were made without presentation of the bills of lading.

19 Reasoning by analogy to *The Star Quest*, a *prima facie* case is made out on the present facts. It is undisputed that the Bills of Lading bore the signature of the master of the Vessel and the Vessel's stamp,[3] and that the Cargo was discharged and delivered to HLT without presentation of the Bills of Lading.[4]

20 The issue of whether the Plaintiff was the lawful holder of the Bills of Lading requires some elaboration. The Plaintiff first became the lawful holder of the Bills of Lading under s 5(2) of the Bills of Lading Act (Cap 384, 1994

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[3] Statement of Claim (dated 11 December 2020) at paragraph 5 and Defence (Amendment No 2) (dated 16 September 2021) at paragraph 2.

[4] Defence (Amendment No 2) (dated 16 September 2021) at paragraphs 6(d)(i), 6(e)(i), 6(e)(ii) and 15.

Rev Ed) ("Bills of Lading Act"), when SMBC presented the Bills of Lading to the Plaintiff, endorsed to the Plaintiff's order, and the Plaintiff accepted the same on 13 March 2020 (see [12] above). I am cognisant of the mistaken stamping and delivery of the Bills of Lading to Totsa on 9 June 2020. However, the evidence shows that Totsa was aware that the stamping and delivery of the Bills of Lading to it was a mistake (see [13] above). As such, Totsa cannot be considered to have accepted the delivery of the Bills of Lading such that it became the lawful holder thereof under s 5(2)(*b*) of the Bills of Lading Act. In this last-mentioned regard, I refer to the instructive decision of *Aegean Sea Traders Corporation v Repsol Petroleo SA and another (The "Aegean Sea")* [1998] 2 Lloyd's Rep 39 ("*The Aegean Sea*"). In *The Aegean Sea*, the court held that a person does *not* become the lawful holder of a bill of lading if that person "obtains the bill of lading merely in consequence of someone endorsing it and sending it to him"; instead, s 5(2)(*b*) of the Carriage of Goods by Sea Act 1992 (c 50) (UK) ("COGSA") (with which s 5(2)(*b*) of the Bills of Lading Act is *in pari materia*) requires the person to "have possession as a result of the completion of an endorsement by delivery" (*The Aegean Sea* at 59). On the facts of *The Aegean Sea*, the court found that the entity into whose possession the bill of lading fell never accepted delivery of the bill as the endorsee or transferee. This was because knew that the bill of lading should have been endorsed to another party, as it was that other party which had purchased the cargo in question. Put another way, the requirement of possession as a result of completion by delivery of an endorsement has "consensual elements on the part of the endorsee or transferee" (*The Aegean Sea* at 60). The upshot of the above is that despite the Totsa detour, the Plaintiff remained the lawful holder of the Bills of Lading from 13 March 2020.

21 I therefore find that the Plaintiff has made out a *prima facie* case for summary judgment.

Whether there are triable issues or some other reason for a trial

22 The burden now shifts to the Defendant to show that there are triable issues, or that there ought for some other reason to be a trial. The Defendant raised multiple purportedly triable issues. I crystallise these (in paraphrase) as five distinct issues:

(a) whether the fact that English law is applicable to the Bills of Lading alone provides sufficient cause for leave to defend to be granted ("the Applicable Law Issue");

(b) whether the Plaintiff was a lawful holder "in good faith" of the Bills of Lading ("the Good Faith Issue");

(c) whether the Bills of Lading are spent or accomplished ("the Spent Bills Issue");

(d) whether the Plaintiff had authorised HLT to take delivery of the Cargo without presentation of the Bills of Lading, or alternatively, ratified HLT's taking of delivery without presentation of the Bills of Lading ("the Authority Issue"); and

(e) whether the Plaintiff is entitled to damages quantified as the Invoice Value ("the Quantum Issue").

The Applicable Law Issue

23 For the purposes of this application, the Plaintiff was prepared to accept that the Bills of Lading are governed by English law, on the basis that the voyage

charterparty (which is governed by English law) was incorporated into the Bills of Lading. In this regard, each party obtained expert opinions on issues of English law. Mr Henry James Byam-Cook QC rendered two opinions on the request of the Defendant, while Mr Richard Lord QC rendered two opinions on the request of the Plaintiff. The opinions touched on two issues, *ie*, the Authority Issue and the Quantum Issue. The experts were not invited to express opinions on the Good Faith Issue and the Spent Bills Issue; indeed, both these issues were approached by both sets of counsel as being governed by Singapore law.[5]

24 It is trite that foreign law must be proved as a matter of fact, rather than law. Defendant's counsel contended that the fact that English law is applicable, in itself, provides sufficient cause for leave to defend to be granted. As authority, Defendant's counsel cited a proposition from *Singapore Civil Procedure 2021* at paragraph 14/4/8, *ie*, "[i]f foreign law applies to the contract being considered, that alone provides sufficient cause for leave to defend to be granted", which was apparently attributed to the decision of the Malaysia High Court in *Lin Securities (Pte) Ltd v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("*Lin Securities*"). I have doubts that *Lin Securities* stands for this proposition, and in any event, have serious reservations about so stark a proposition.

(a) First, one must consider the context in which the proposition arose in *Lin Securities*. In *Lin Securities*, a heavily contested question related to the question of which law (*ie* whether Malaysia law or Singapore law (being the foreign law)) applied to the contract and, depending on which law was applicable, various implications flowed

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5 See, *eg*, Defendant's Written Submissions (dated 25 February 2022) at paragraph 67.

therefrom. The court observed that "whether foreign law applies or not could itself be an issue to be tried". In the context of the case, there were "far too many questions to be dealt with… some of which are difficult questions of law", one such difficult question being "whether [the foreign] law applies". It was in this context that the court opined that if the foreign law applies, "that alone provides sufficient cause to deny the plaintiffs summary judgment". The court further observed that if the foreign law indeed applied, various other issues would have to be decided, thus rendering the summary judgment process inappropriate in the circumstances. I do not think that the court had established, or intended to establish, a hard and fast rule that the mere fact that foreign law applies to a contract means that leave to defend *must* be granted.

(b) Second, the proposition in [24] above was in fact considered in *PMA Credit Opportunities Fund and others v Tantono Tiny* [2011] SGHC 89 ("*PMA Credit*"), albeit with reference to an earlier edition of *Singapore Civil Procedure* and without reference to *Lin Securities*. Faced with a summary judgment application, the court in *PMA Credit* observed that another treatise had stated that "[w]here a point of law arises out of a foreign law which applies to the case, the court is *reluctant* to try the issue on the basis of affidavit evidence, particularly if there is a hint of legal complexity" (emphasis in original) (see *PMA Credit* at [35]). The court also pointed out that in *The Hung Vuong-2* [2000] 2 SLR(R) 11 ("*Hung Vuong-2*"), the Court of Appeal had observed that "it does not follow that in every instance where there is a conflict of opinions, the Singapore courts should always shy away from examining the opinions given" and eventually rejected an opinion advanced by a

Vietnamese legal expert on the basis that it was "clearly unsustainable" (see *PMA Credit* at [36], citing *Hung Vuong-2* at [16] and [19]). On the facts of *PMA Credit* itself, the court drew conclusions on Indonesian law after studying the parties' respective expert's opinions.

25 It follows from the analysis above, and also the need for robustness in assessing summary judgment applications (see [17(c)] above), that the court should not be too quick to grant leave to defend simply because the applicability of foreign law is in question, or because there are differing opinions advanced by foreign law experts.

26 In the present application, it is undisputed that the Bills of Lading are governed by English law. It is also undisputed that the Quantum Issue is governed by English law, while the Good Faith Issue and the Spent Bills Issue are governed by Singapore law (see [23] above). There is less clarity on whether the Authority Issue is governed by English law. Mr Byam-Cook QC appears to analyse the Authority Issue under English law, but also expressly recognised that the HLT Financing Documents (which are core to the Authority Issue) are governed by Singapore law. Mr Lord QC took the view that the Authority Issue is to be determined under Singapore law, but nonetheless provided his analysis of the Authority Issue under English law in response to Mr Byam-Cook QC's opinion. In my view, the Authority Issue is to be determined under Singapore law, given that it is Singapore law which governs the HLT Financing Documents and the relationship between the Plaintiff and HLT. In any event, as will be seen at [28]–[34] and [43] below, the Authority Issue does not give rise to any triable issue, whether under Singapore law or English law.

27 In determining whether any triable issue arises by virtue of the fact that English law applies (or potentially applies) to the Authority Issue and the Quantum Issue, I turn to examine the opinions of Mr Byam-Cook QC and Mr Lord QC for any conflict of opinion or legal complexity that would give rise to a triable issue in the present case.

English Law on the Authority Issue

28 As mentioned in [26] above, it appears to me that the Authority Issue is properly governed by Singapore law, in which case, any differences in Mr Byam-Cook QC's and Mr Lord QC's opinions do not give rise to any triable issue. However, *even if* the Authority Issue is governed by English law, I find that Mr Byam-Cook QC and Mr Lord QC are in accord on most, if not all, of the applicable principles. In essence:

(a) First, it is a breach of a bill of lading contract for delivery to be effected other than against presentation of the bill of lading (see, *eg*, *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81, *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd's Rep 541 ("*The Houda*") and *SA Sucre Export v Northern River Shipping Ltd (the "Sormovskiy 3068")* [1994] 2 Lloyd's Law Reports 266 ("*The Sormovskiy 3068*")).[6]

(b) Second, it is a defence for a contractual carrier (facing a claim for breach of contract by delivering a cargo without presentation of the original bills of lading) if the carrier had delivered the cargo to an *agent*

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6 First Opinion of Mr Richard Lord QC (27 October 2021) ("*Lord-1*") at paragraph 31.

of the holder of the bills of lading, where such agent was authorised by the holder to collect the cargo on the holder's behalf without presenting the bills of lading. For this proposition, Mr Byam-Cook QC cited *Fimbank Plc v Discover Investment Corporation (The "Nika")* [2021] 1 Lloyd's Rep 109 ("*The Nika*"), while Mr Lord QC cited, amongst other cases, *The Sormovskiy 3068*.[7] Whether the carrier has a successful defence on this ground turns on the facts of the case.[8] I pause to observe that Mr Byam-Cook QC and Mr Lord QC do have differing views on whether this defence is a defence to a claim for substantial damages or a defence on liability, but nothing material turns on this in the present case (see [34(a)] below).

(c) Third, ratification will be implied from any act of the principal showing an intention to adopt the transaction. No action in reliance is required, and ratification may even be inferred in appropriate cases from silence or mere acquiescence. Like the grant of actual authority, ratification need not be communicated to the third party. As far as the third party is concerned, a ratified transaction is valid as if actually authorised. The above principles were cited by Mr Byam-Cook QC based on *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell,

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7 First Opinion of Mr Henry Byam-Cook QC ("*Byam-Cook-1*") at paragraph 25, Lord-1 at paragraph 34, Second Opinion of Mr Henry Byam-Cook QC ("*Byam-Cook-2*") at paragraph 7 and Second Opinion of Mr Richard Lord QC (26 January 2022) ("*Lord-2*") at paragraph 9(1).

8 *Lord-1* at paragraph 34 and *Byam-Cook-2* at paragraph 7.

33rd Ed, 2018) at paragraphs 31-028 and 31-033, with which Mr Lord QC agreed.[9]

29 The main difference in opinion between Mr Byam-Cook QC and Mr Lord QC appears to be in relation to the recent English decision of *The Nika* and its relevance to the present factual matrix. As far as I am aware, *The Nika* has not been considered in any published decision of the Singapore courts. I therefore turn to discuss *The Nika* in some detail.

30 In *The Nika*, cargo was shipped under various bills of lading from Ukraine to Egypt. The cargo was discharged in Egypt, without presentation of any bills of lading and against a letter of indemnity, to the local agent of a customer of the claimant bank (which claimed to be the lawful holder of the bills of lading). The cargo was consigned to a bonded warehouse, and thereafter released from the warehouse against forged bills of lading. The claimant bank aimed to pursue arbitration against the carrier for damages for misdelivery and applied to the English High Court for a freezing injunction in support of the arbitration.

31 Under the financing arrangements between the claimant bank and its customer, the customer's seller would receive payment for the shipment from the claimant bank against tender of the original bills of lading, and the claimant bank would then forward those bills to a collecting bank in Egypt with instructions to transfer the bills to the end buyer on a cash against documents basis. The bills of lading were intended to be retained by the claimant bank and

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9 *Byam-Cook-1* at paragraph 28 and *Lord-1* at paragraph 36.

held on its behalf until payment by the corresponding collecting bank long after the vessel would have discharged the cargo. The arrangement between the bank and its customer was that the cargo would be discharged by the carrying vessel, without presentation of any bills of lading, and transferred by the bank's customer to a bonded warehouse.

32 The court applied the general law of agency and held that the bank's customer had *actual authority* from the claimant bank to take delivery of the cargo without presentation of the bills of lading. In coming to this conclusion, the court studied the arrangements amongst the parties, and specifically referred to a clause in the material agreement by which the claimant bank (as holder of the bills of lading) expressly authorised the bank's customer to take delivery of the goods from the vessel without presentation of the bills of lading, and to escort the goods to a warehouse to ensure that the goods are intact and not appropriated in any way inimical to the claimant bank's interests. The court therefore concluded that the claimant bank did not, in the context of its application for a freezing injunction, have a "good arguable case" against the carrier.

33 For completeness, I point out that the court in *The Nika* observed a possible divergence in judicial views concerning whether a shipowner delivering to a party entitled, but without presentation by that party of the bills of lading, (a) is *not* in breach of the bill of lading contract at all; or (b) alternatively, *is* in breach but liable to that party only for nominal damages (*The Nika* at [27]). As an example of such divergence, the court pointed to the formulations adopted by Neill LJ and Millett LJ in *The Houda* at 552 and 556 respectively. The court then observed that "it is not clear … that any debate as

to that is fully and definitively settled", but concluded that on the facts of *The Nika*, "at worst for the defendant here it would be the latter – that is to say, there would be no liability for substantial damages" (*The Nika* at [27]).

34 While Defendant's counsel contended that the position under English law was not straightforward (by virtue of *The Nika*), I did not detect any relevant difference in opinion between Mr Byam-Cook QC and Mr Lord QC which would give rise to a triable issue in the present case.

(a) First, Mr Byam-Cook QC opined that if HLT had *actual authority* to take delivery of the Cargo without presentation of the Bills of Lading, or if the Plaintiff had *ratified* HLT's action of taking delivery without presentation of the Bills of Lading, this would provide a "complete defence" under English law.[10] Mr Lord QC agreed that these scenarios would provide the Defendant with a defence, although he considered this a defence to a claim for substantial damages rather than a defence on liability.[11] The differing positions taken by Mr Byam-Cook QC and Mr Lord QC mirror the possible divergence expressed in *The Houda*, but this has no material impact on the outcome in the present case. As a baseline, if HLT is found to have the requisite authority or the Plaintiff is found to have ratified HLT's action, then the Defendant would have – at the very least – a defence to a claim for substantial damages, thus giving rise to a triable issue.

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10 *Lord-1* at paragraph 47(b).

11 *Lord-2* at footnote 4.

(b) Second, Mr Byam-Cook QC opined that an English Court considering the facts of the present case would probably find that the Defendant had a real prospect of establishing that the Plaintiff had either conferred actual authority on HLT to take delivery of the Cargo without presentation of the Bills of Lading, or ratified that act. Mr Lord QC disagreed with this conclusion (with the caveat that the Authority Issue should, in any event, by determined under Singapore law), distinguishing the facts of *The Nika* from the present case. The difference in opinion between the experts on this point relates not to the *content* of English law, but only to possible *conclusions* that may be reached based on the present factual matrix. The fact that the experts reach different conclusions after applying principles of law (which they do not dispute) to the facts does not give rise to any triable issue. As both experts readily acknowledged, it is for the Singapore court, rather than the experts, to come to a conclusion on whether the Defendant has a a fair probability of a *bona fide* defence.

English Law on the Quantum Issue

35 On the Quantum Issue, Mr Byam-Cook QC and Mr Lord QC are in accord on the following principles of English law:

(a) First, damages are assessed on the basis of putting a plaintiff in the position, as far as money can do, in which it would have been had the contract been performed.

(b) Second, the normal measure of damages is the market value of the misdelivered goods at the time and place at which they should have

been delivered.[12] In determining the appropriate measure of damages, the court must consider when the goods "should have" been delivered, taking into consideration the express or implied terms of the contract of carriage as well as other documents and circumstances forming part of the factual matrix.[13]

(c) Third, the invoice value of the cargo will not necessarily be determinative of the quantum of loss. For completeness, Mr Lord QC did observe in his final opinion that – in many circumstances – the invoice value would be the best evidence of the loss, for instance, where (as in *The Yue You*) there is an absence of contrary evidence on the quantum of loss.[14]

(d) Fourth, the court will consider what would have happened in the counterfactual situation that the contract was performed. For completeness, Mr Lord QC pointed out that in the *Standard Chartered Bank v Dorchester LNG (2) Ltd (The "Erin Schulte")* [2013] 2 Lloyd's Rep 338 there was no indication that a counterfactual situation was considered; but he also explained that in that case it was agreed that the damages were essentially the market value at the time of delivery.

(e) Fifth, depending on the facts of the case, there may be a duty to care for cargo when the holder of the bills of lading does not claim delivery within a reasonable time and the master has to (or may be under

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12 *Byam-Cook-1* at paragraph 36 and *Lord-1* at paragraph 72.

13 *Byam-Cook-2* at paragraph 34.

14 *Lord-2* at paragraph 34.

a duty to) land and warehouse the cargo, with the shipowner having a correlative entitlement to charge the holder with expenses properly incurred for this purpose.[15]

36 There was one area relating to the Quantum Issue upon which the experts had some disagreements on English law. In gist, Mr Byam-Cook QC submitted that under English law, it is an implied term of the contract of carriage that the goods will be unloaded by the consignee within a reasonable time, *ie*, that it is the duty of the consignee to present the bills of lading and take delivery to prevent unreasonable delay to the vessel (citing *Tradigrain SA v King Diamond Shipping SA (the "Spiros C")* [2000] 2 Lloyd's Rep 319 ("*The Spiros C*") at 334).[16] However, Mr Lord QC disagreed with this interpretation of *The Spiros C*, citing the recent decision of *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd (the "Sea Master")* [2021] 1 Lloyd's Rep 500 ("*The Sea Master*") as an example where the English court concluded that implying such a term was not necessary given that the proposed implied term was contrary to and inconsistent with the express terms of the voyage charterparty. Mr Byam-Cook QC's response was that *The Sea Master* turned on the effect of a clause in that case which provided that the charterer was to be exclusively liable for demurrage,[17] but Mr Lord QC pointed to a clause in the voyage charterparty in the present case which did precisely the same thing, *ie*, allocating responsibility for demurrage and damages for detention to the charterer of the vessel rather than the consignee of the Cargo or the holder of the Bills of Lading. While Mr

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15 *Byam-Cook-2* at paragraph 37 and *Lord-2* at paragraph 38.

16 *Byam-Cook-1* at paragraph 39(a).

17 *Byam-Cook-2* at paragraph 36.

Byam-Cook QC did not have an opportunity to reply on this issue, Defendant's counsel did not seek any further leave to clarify the point. In any event, the disagreement between Mr Byam-Cook QC and Mr Lord QC, if any, relates only to the conclusion that may be reached on the present factual matrix (in relation to whether a term should be implied on the facts of the case), rather than any disagreement on the relevant principles of English law.

Conclusion on the Applicable Law Issue

37 For the reasons in [28] to [36] above, I find that any differences in the experts' opinions are either immaterial to the present case, or are merely differences as to the conclusions to be drawn based on the present factual circumstances. I therefore do not find any triable issues arising from any conflict of opinion on English law, or legal complexity thereof. My substantive analyses on the Authority Issue and the Quantum Issue are found later in this judgment.

Good Faith Issue

38 I turn next to the Good Faith Issue. The Defendant's pleaded case is that the Plaintiff was not the lawful holder of the Bills of Lading in "good faith" under the COGSA or, alternatively, the Bills of Lading Act.[18] The issue of "good faith" under English law was not addressed at all in the experts' opinions; counsel on both sides appeared to cross swords on Singapore law instead. In any event, the relevant provision of the Bills of Lading Act is *in pari materia* with the COGSA – both pieces of legislation provide, in section 5(2), that "… a person shall be regarded for the purposes of this Act as having become the

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[18] Defence (Amendment No 2) (dated 16 September 2021) at paragraph 6(e).

lawful holder of a bill of lading whenever he has become the holder of the bill in *good faith*" (emphasis added). While "good faith" is defined in neither piece of legislation, it has been the subject of judicial exposition both in Singapore and England. In this regard, the Singapore and English cases cited to me speak with one voice in relation to "good faith" (see the Singapore cases of *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR(R) 1 ("*UCO Bank*") and *The Yue You*, and the English case of *The Aegean Sea*). In gist, in *The Aegean Sea*, the concept of "good faith" was taken to connote honest conduct. In *UCO Bank*, the Court of Appeal agreed with this and observed that the "good faith" requirement was "obviously to preclude the case where possession is obtained *unlawfully*, or by *other improper means*" (emphasis added) (*UCO Bank* at [39]–[40]). In *The Yue You*, the court explained that the phrase "other improper means" in *UCO Bank* referred "only to improper means involving *dishonesty*" (emphasis added).

39 The Defendant's position is that the Plaintiff did not hold the Bills of Lading in good faith because it (*ie* the Plaintiff) had represented the Bills of Lading as "*bona fide* security" for its financing of the Cargo, when the Plaintiff did not actually view the Bills of Lading as security.[19] The triable issue put forward here is that of whether a person who has no genuine interest in the cargo underlying a bill of lading who takes the bill of lading purely for bare rights of suit has acted "honestly" for the purposes of the "good faith" requirement.[20] This argument is very similar to that advanced and rejected in *The Yue You*, where the defendant had submitted that the scope of "good faith" could be developed

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19 Defence (Amendment No 2) (dated 16 September 2021) at paragraph 6(e)(ix).

20 Defendant's Written Submissions (dated 25 February 2022) at paragraph 88.

incrementally, including considering whether it is contrary to "good faith" for a holder to "take possession of bills of lading to obtain a bare right of suit against a carrier without any real interest in the goods under the bills of lading" (*The Yue You* at [103]). The weight of authority (see especially *The Yue You* at [103] to [107] and the cases cited therein) entirely undercuts the Defendant's contention that the present factual matrix affords an opportunity for the court to further assess the parameters of the scope of "good faith". I therefore find that the Good Faith Issue does not present any triable issue.

The Spent Bills Issue

40 In relation to the Spent Bills Issue, the Defendant's pleaded position is that delivery of the Cargo to Universal Terminal "constituted the accomplishment of the Bills of Lading".[21] I understand the Defendant's use of the term "accomplishment" to mean that the Bills of Lading were "spent" or "exhausted".

41 The position taken by the Defendant is somewhat puzzling. Even on the Defendant's pleaded case, the holder of the Bills of Lading at the time of delivery was SMBC,[22] and the delivery of the Cargo was done against a letter of indemnity rather than the Bills of Lading. The well-established position in case law over the past century and a half is that delivery to a person not entitled does not render a bill of lading spent (*The Yue You* at [58]). Indeed, there is specific case authority that delivery of goods *against an indemnity* to a person who does not have a right to delivery under the bill of lading does not render

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21 Defence (Amendment No 2) (dated 16 September 2021) at paragraph 6(h)(vii).

22 Defence (Amendment No 2) (dated 16 September 2021) at paragraph 6(f).

the bill of lading spent or exhausted (see *BNP Paribas* at [30] and *The Yue You* at [45]). I therefore find that the Spent Bills Issue does not present any triable issue.

The Authority Issue

42 The Authority Issue finds its genesis in the Defendant's pleaded defence that the Plaintiff "had or must be taken to have agreed to and/or acquiesced and/or consented and/or ratified and/or authorised the discharge of the Cargo against a letter of indemnity and/or without presentation of the original Bills of Lading".[23] The particulars provided clarify that the defence is really that the Plaintiff had *conferred authority* on HLT to take delivery of the Cargo without presentation of the Bills of Lading, and that the Defendant had delivered to HLT "acting as the agent of the Plaintiff".[24] Such conferring of authority may be either *ex ante* authorisation or *ex post* ratification.

43 As mentioned in [26] above, it appears to me that the Authority Issue is properly governed by Singapore law. The Defendant has not explained why English Law applies to the Authority Issue and, in any event, the Defendant has not illustrated any specific aspect or principle of English law which it relies upon that diverges from the position under Singapore law. Indeed, Mr Lord QC referred to numerous Singapore decisions when addressing principles relating to the Authority Issue (*eg, The "Cherry" and others* [2003] 1 SLR(R) 471, *BNP Paribas* and *The Yue You*), and none of the principles cited therein were

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23 Defence (Amendment No 2) (dated 16 September 2021) at paragraph 7.

24 Defence (Amendment No 2) (dated 16 September 2021) at paragraph 7(g) and (h); Affidavit of Jens Groenning (dated 4 August 2021) at paragraphs 5, 35 and 36.

controverted in Mr Byam-Cook QC's reply. While the Defendant referred to *The Nika*, I am unable to see how that case makes any material difference to the analysis regardless of whether Singapore law or English law applies. In any event, the Authority Issue does not give rise to any triable issue, whether under Singapore law or English law.

44 The Defendant's argument on *ex ante* authorisation is not supported by the evidence and is, indeed, undercut by the clauses in the HLT Financing Documents. On this, I make five observations:

(a) First, the Defendant's contention that HLT was authorised (by the Plaintiff) to take delivery of the Cargo without presentation of the Bills of Lading runs contrary to the Defendant's own pleaded defence that SMBC was the lawful holder of the Bills of Lading at the time the Cargo was delivered.[25] Given that the Bills of Lading only came into the Plaintiff's possession on 13 March 2020, I do not see how the Defendant can plausibly contend that the Plaintiff had provided the necessary authorisation to HLT when the Plaintiff was not the holder of the Bills of Lading at the time of delivery.

(b) Second, there is no express contractual basis upon which the Defendant contends that the Plaintiff had authorised HLT to take delivery of the Cargo without presentation of the Bills of Lading. This is in stark contrast with *The Nika*, where there was a clause to this effect; indeed, the clause in *The Nika* went so far as to require the authorised

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[25] Defence (Amendment No 2) (dated 16 September 2021) at paragraph 6(f).

party taking delivery to escort the goods to a warehouse for safekeeping (see [32] above).

(c) Third, the "Security" provision in the HLT Facility Letter expressly required that any financing provided by the Plaintiff to HLT by way of a letter of credit be secured by a pledge of a full set of bills of lading (see [5] above). Such a provision would be inconsistent with the Defendant's contention that the Plaintiff had authorised HLT to take delivery of the Cargo without presentation of the Bills of Lading, for conferring such authority would have destroyed the Plaintiff's own security for financing the Cargo (see also *BNP Paribas* at [60] for a similar observation).

(d) Fourth, the Defendant suggested that a clause in the HLT GSA (which required HLT to provide the Plaintiff with periodical reports and particulars concerning the Cargo as the Plaintiff requires) made sense only if the Cargo might be in HLT's possession. However, that clause is entirely silent about any question of authority to take delivery of the Cargo without presentation of the Bills of Lading. Furthermore, the Defendant's proposition is also inconsistent with another clause in the HLT GSA, which expressly authorised the Plaintiff to "land, store, transport and warehouse" the Cargo if required. I flag that this arrangement appears to be the converse of that in *The Nika*, where the material clause in fact required the authorised recipient of the goods to take delivery and transport the goods to a warehouse (see [32] above).

(e) Fifth, the Letter of Credit provided, in Field 46A, that documents required for payment thereunder included the full set of 3/3 original

clean on board Bills of Lading (see [9] above). Likewise, the draft letter of indemnity in the prescribed format also provides that AEI agrees to "make all reasonable efforts to obtain and surrender to [the Plaintiff] as soon as possible the full set of 3/3 original bills of lading" (see [9] above). The Plaintiff evidently looked to the Bills of Lading as security, which undercuts the Defendant's allegation that the Plaintiff was prepared to take security only in the form of a letter of indemnity.

45 The Defendant's argument on *ex post* ratification is also not supported by the evidence. For the reason cited in [44(a)] above, I do not see how the Plaintiff can be said to have ratified the delivery of the Cargo when the delivery was done before the Plaintiff became the lawful holder of the Bills of Lading. Furthermore, it is trite that in the context of ratification, the agent must profess to be acting on behalf of a named or ascertainable principal who is in existence at the time the relevant act is done (see, *eg*, *Halsbury's Laws of Singapore* vol 15(3) (LexisNexis) at paragraph 180.216 and the authorities cited therein). In this regard, the Defendant has neither pleaded nor given any evidence that HLT had professed to be the Plaintiff's agent when taking delivery of the Cargo.

46 I therefore find that no triable issue arises in relation to the Authority Issue.

Quantum Issue

47 On the Quantum Issue, the Plaintiff's position was that the damages should be awarded by reference to the Invoice Value, referring to two Singapore decisions (*The Yue You* and *Voss Peer v APL Co Pte Ltd* [2002] 1 SLR(R) 823 ("*Voss Peer*")) and two Hong Kong decisions (*Star Line Traders Limited v*

Transpac Container System Limited [2009] HKCU 1355 ("*Star Line*") and *He-Ro Chemicals Ltd v Jeuro Container Transport (HK) Ltd* [1993] 2 HKC 368 ("*He-Ro Chemicals*")).[26]

48 I do not think that the cited cases stand for the proposition that the court will, in cases involving misdelivery of cargo, *invariably* award damages by reference to the invoice value. Indeed, Mr Lord QC appears to accept this point, expressly agreeing with Mr Byam-Cook QC that the invoice value will not necessarily be determinative of the quantum of loss (see [35(c)] above). In *The Yue You* (see [141]) and *He-Ro Chemicals* (see 373A-B), the respective courts had awarded the invoice value in the complete absence of evidence that the market value had fallen between the date of the contract and the date of the (mis)delivery; had some evidence been placed before the court, the outcome may well have been different. As for *Voss Peer* and *Star Line*, it is not apparent whether the invoice value was disputed as the appropriate measure of damages.

49 Analysing the present facts through the lens of the principles set out at [35] above, I find that there are triable issues arising from the Quantum Issue.

(a) First, should the Invoice Value be accepted as the quantum of damages, or is the market value of the Cargo the more appropriate measure?

(b) Second, what is the date on which the Cargo "should have" been delivered ("the Notional Date"), given that the Bills of Lading do not

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[26] Plaintiff's Written Submissions (dated 25 February 2022) submissions at paragraph 120.

include an express date as the due date of delivery of the Cargo? The Notional Date is a question of fact to be determined after considering the matters mentioned at [35(b)] above, *ie*, the express or implied terms of the contract of carriage as well as other documents and circumstances forming part of the factual matrix. On the evidence before me, the determination is unlikely to be straightforward.

(i) For example, it appears that the Plaintiff may not have been able to present the Bills of Lading to recover against the Defendant prior to 22 April 2020, given that HLT was required to reimburse the Plaintiff only upon that date (being the maturity of the Letter of Credit).[27] It is unclear whether this would affect determination of the Notional Date.

(ii) Furthermore, both experts agreed that the counterfactual situation in the present case would involve the Defendant declining to discharge the Cargo until such time the Bills of Lading were presented, and Mr Lord QC acknowledged that it is "difficult to assess what would have happened" in such a situation.[28] While Mr Lord QC opined that the provision of the Bills of Lading "may have been accelerated",[29] there is no firm evidence to support this hypothesis and it nonetheless remains an open question as to how any such acceleration would affect

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27 Further and Better Particulars of the Statement of Claim served pursuant to Order of Court dated 18 March 2021 (dated 1 April 2021) at paragraph 4(i).

28 *Byam-Cook-1* at paragraph 39 and *Lord-1* at paragraph 79.

29 *Lord-1* at paragraph 79.

the Notional Date. It also appears to me that the court may have to consider whether a term should be implied that the Cargo will be unloaded within a reasonable time (which would affect determination of the Notional Date) (see [36] above), as well as issues concerning any duty to care for cargo and the correlative right to payment of expenses incurred (see [35(e)] above).

(c) Third, there is a triable issue as to the valuation of the Cargo, given that this has to be assessed as at the Notional Date. Unlike in the cases cited at [47] above, the Defendant has tendered evidence from two third-party databases purportedly showing substantial fluctuations in the market price of the Cargo during the first half of 2020. The Plaintiff has levied various criticisms of the evidence, including that the evidence is unverified by expert evidence in the present case. However, save for submitting that the Invoice Value should be adopted as the best evidence of the value of the Cargo, the Plaintiff has not provided any concrete evidence on the appropriate value of the Cargo (nor could it, given that Notional Date is yet to be determined).

50 For the reasons above, I find that there are triable issues in relation to the Quantum Issue.

Conclusion

51 For the reasons above, I find that there are triable issues in relation to the Quantum Issue, but *not* the Applicable Law Issue, the Good Faith Issue, the Spent Bills Issue and the Authority Issue. For completeness, I do not find any

other reason for a trial, save in relation to the Quantum Issue for which there are issues that ought to be tried.

52 I therefore dismiss the Plaintiff's prayer for judgment on the Invoice Sum and grant instead the alternative prayer for interlocutory judgment with damages to be assessed. I will hear parties on costs.

Justin Yeo
Assistant Registrar

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