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

[2022] SGHC 242

Admiralty in Personam No 115 of 2021 (Registrar's Appeal No 108 of 2022)

Between

Standard Chartered Bank
(Singapore) Limited

… *Plaintiff*

And

Maersk Tankers Singapore
Pte Ltd

… *Defendant*

And

Winson Oil Trading Pte Ltd

… *Intervener*

JUDGMENT

[Civil Procedure — Summary judgment]
[Admiralty and Shipping — Bills of lading — Delivery of cargo against presentation of bills of lading]

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Standard Chartered Bank (Singapore) Ltd
v
Maersk Tankers Singapore Pte Ltd
(Winson Oil Trading Pte Ltd, intervener)

[2022] SGHC 242

Admiralty in Personam No 115 of 2021 (Registrar's Appeal No 108 of 2022)
Ang Cheng Hock J
22 July 2022

27 September 2022 Judgment reserved.

Ang Cheng Hock J:

1 This is an appeal against the decision of the Assistant Registrar ("AR") who granted summary judgment for the plaintiff against the defendant on the issue of liability, but with damages to be assessed.

Background to the appeal

2 The plaintiff, Standard Chartered Bank (Singapore) Ltd, is a Singapore bank which provided trade financing for one of its customers, Hin Leong Trading (Pte) Ltd ("HLT"), which was then an oil trading company based in Singapore. As is well known, HLT was one of the largest oil traders in this part of the world, until its financial collapse in April 2020.

3 On 12 February 2020, and subsequently amended by an addendum dated 17 February 2020 (the "Addendum"), HLT entered into a contract for the

purchase of 750,000 barrels ("bbls") of Gasoil 10ppm Sulphur, as per "Formosa Export Specifications", from the intervener, Winson Oil Trading Pte Ltd ("WOT"), which is another oil trader based in Singapore (the "Sale Contract").[1]

4 The terms of the Sale Contract required WOT to deliver the 750,000 bbls of gasoil on a DES (or delivery ex-ship) basis at one safe port / berth, Singapore, or by ship to ship transfer at Tanjung Pelepas / Johor Port Limit, Malaysia (clause 6 of the Sale Contract read with clause 1 of the Addendum). The delivery window was stipulated to be 21 to 25 February 2020, both dates inclusive (clause 6 of the Sale Contract read with clause 2 of the Addendum).[2] HLT was required to make payment by an irrevocable letter of credit 30 days after the vessel carrying the 750,000 bbls of gasoil had tendered its notice of readiness to discharge the gasoil ("NOR") (clause 8 of the Sale Contract).[3]

5 The defendant, Maersk Tankers Singapore Pte Ltd, was the owner of the "MAERSK PRINCESS" (the "Vessel") at the material time. WOT chartered the Vessel from the defendant to carry the 750,000 bbls of gasoil from Mailiao, Taiwan, in order to fulfil its obligations under the Sale Contract.[4] On 21 February 2020, the 750,000 bbls of gasoil were shipped on board the Vessel, and four sets of bills of lading were issued, two of them being 20-MAO-MP20600B and 20-MAO-MP20600D (the "Bills of Lading") in respect of 92,870 bbls of Gasoil 10ppm Sulphur (the "Gasoil Cargo").[5]

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1 Agreed Bundle of Documents Volume 1 ("1AB") at pages 493–499.

2 1AB at pages 493 and 499.

3 1AB at page 494.

4 Affidavit of Tung Ching Ching affirmed on 10 February 2022 ("Ms Tung's 3rd Affidavit") at paras 10 and 15 (1AB at pages 433 and 436).

5 Ms Tung's 3rd Affidavit at para [14] and pages 73–84 (1AB at pages 435 and 500–511).

6 On the morning of 27 February 2020, the Vessel arrived at Universal Terminal, Singapore ("UT"), a storage facility which was partly owned by HLT.[6] NOR was tendered by the Vessel, and the discharge of the 750,000 bbls of gasoil took place on the morning of 28 February 2020 and was completed a day later on the morning of 29 February 2020.[7] It is common ground that the discharge of the 750,000 bbls of gasoil at UT would amount to delivery to HLT under the DES terms in the Sale Contract.[8] It is also undisputed that delivery to HLT was done without the production of the original Bills of Lading by HLT.[9]

7 On 3 March 2020, HLT applied to the plaintiff for an issuance of a letter of credit in favour of WOT in the sum of US$6,129,977.22.[10] The application provided that the letter of credit was to pay for 92,870 bbls of Gasoil 10ppm Sulphur (*ie*, the Gasoil Cargo) to be delivered on a DES basis at UT. It also provided as follows: "LATEST DELIVERY DATE IS THE NOR TENDERED AT DISCHARGE PORT: 29 FEBRUARY 2020."[11]

8 On 4 March 2020, the letter of credit (the "LC") was duly issued by the plaintiff in favour of WOT for the sum of US$6,129,977.22.[12] In line with HLT's application, the terms of the LC provided at field 45A ("DESCRIPTION OF GOODS AND/OR SERVICES") that the Gasoil Cargo was to be delivered on a DES basis at "UNIVERSAL TERMINAL SINGAPORE", and that the

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6 Ms Tung's 3rd Affidavit at para 17 and page 97 (1AB at pages 436 and 524).

7 Ms Tung's 3rd Affidavit at para 16 (1AB at page 436).

8 Ms Tung's 3rd Affidavit at para 16 (1AB at page 436).

9 Statement of Claim ("SOC") at para 21; Defence at para 22.

10 Affidavit of Richard Martin Allan affirmed on 24 January 2022 ("Mr Allan's 2nd Affidavit") at para 15 (1AB at page 83).

11 Mr Allan's 2nd Affidavit at para 15 and pages 82–83 (1AB at pages 83 and 159–160).

12 Mr Allan's 2nd Affidavit at para 17 and pages 87–91 (1AB at pages 83 and 164–168).

"LATEST DELIVERY DATE IS THE NOR TENDERED AT DISCHARGE PORT: 29 FEBRUARY 2020".[13]

9 The terms of the LC also provided that payment would be made by the plaintiff upon presentation by WOT of, *inter alia*, "3/3 SET CLEAN ON BOARD ORIGINAL BILL OF LADING ISSUED OR ENDORSED TO THE ORDER OF 'STANDARD CHARTERED BANK (SINGAPORE) LIMITED'".[14] It further provided that, in the event that the original Bills of Lading are not available, then payment by the plaintiff would be effected against WOT's commercial invoice, and a letter of indemnity issued by WOT.[15] In this regard, the form of the letter of indemnity to be issued by WOT was attached to the LC.[16]

10 The letter of indemnity was to be addressed to HLT. There are three things of particular note in the form of the letter of indemnity. First, it states that the indemnity was being given by WOT in consideration of HLT having agreed to accept delivery of the Gasoil Cargo without having been provided with the Bills of Lading. Second, it includes an undertaking by WOT that it would provide the Bills of Lading to HLT as soon as they come into WOT's possession, and with such provision of the Bills of Lading to HLT, WOT's liability under the letter of indemnity would cease. Third, it contains a clause excluding the rights of third parties which provides:

> NO TERM OF THIS INDEMNITY IS INTENDED TO, OR DOES CONFER A BENEFIT OR REMEDY ON ANY PARTY OTHER THAN THE NAMED BUYER [HLT] UNDER THE UNDERLYING AGREEEMENT WHETHER BY VIRTUE OF THE CONTRACTS

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13 1AB at page 164.

14 1AB at page 164.

15 1AB at page 165.

16 1AB at pages 165–166.

(RIGHT OF THIRD PARTIES) ACT OF SINGAPORE OR HOWSOEVER.

11 On 12 March 2020, WOT, through UniCredit Bank AG, Singapore Branch ("UniCredit"), presented the following documents to the plaintiff:[17] (i) WOT's signed commercial invoice dated 5 March 2020 for the sale of the Gasoil Cargo to HLT; and (ii) WOT's letter of indemnity (the "LOI") to HLT also dated 5 March 2020, which was in the form as required under the LC.[18] The plaintiff paid WOT the sum of US$6,129,977.22 accordingly on or around 27 March 2020.[19]

12 On or around 7 August 2020, WOT, through UniCredit, delivered to the plaintiff the full set of the original Bills of Lading, amongst other shipping documents.[20] On the face of the Bills of Lading, there were chains of indorsement from the named consignee of the cargo all the way to the plaintiff. The last indorsement was that of WOT, which had indorsed the Bills of Lading to the plaintiff's order.[21]

13 On 19 November 2020, on the basis that it was the lawful holder of the Bills of Lading, and thus entitled to delivery of the Gasoil Cargo, the plaintiff wrote to the defendant to demand delivery of the Gasoil Cargo.[22]

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17 Mr Allan's 2nd Affidavit at para 20 (1AB at page 84).

18 1AB at page 174.

19 Mr Allan's 2nd Affidavit at para 22 (1AB at page 85).

20 Mr Allan's 2nd Affidavit at para 24 and pages 102–124 (1AB at pages 85 and 179–201).

21 Mr Allan's 2nd Affidavit at pages 104–109 and 115–120 (1AB at pages 181–186 and 192–197).

22 Mr Allan's 2nd Affidavit at para 39 (1AB at pages 89–90).

14 On 26 February 2021, the plaintiff and WOT entered into an escrow agreement, pursuant to which WOT put up security in respect of the plaintiff's claim against the defendant for misdelivery of the Gasoil Cargo.[23] This was because WOT had also issued a separate indemnity to the defendant in respect of the delivery of the Gasoil Cargo to HLT.[24]

15 On 26 October 2021, the plaintiff commenced these proceedings against the defendant. The claim is for damages for breach of the contract of carriage, arising from the defendant's failure to deliver the Gasoil Cargo to the plaintiff despite the latter being the lawful holder of the Bills of Lading in respect of the Gasoil Cargo.[25] The plaintiff also pleaded an alternative claim in conversion.[26] WOT applied to intervene in these proceedings, and was granted leave to do so.[27]

16 I should add that the defendant pleaded that the Bills of Lading incorporated the terms of the voyage charterparty between WOT and the defendant, and as a result of an English governing law clause in that charterparty, English law applies to the determination of the plaintiff's claims against the defendant in the present proceedings.[28] The plaintiff does not admit to this, and has instead pleaded that Singapore law applies to the determination

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23 Mr Allan's 2nd Affidavit at para 41 and pages 174–190 (1AB at pages 90 and 238–254).

24 Affidavit of Tung Ching Ching affirmed on 2 November 2021 at para 7(d) and pages 27–30.

25 SOC at paras 20–21.

26 SOC at para 22.

27 Summons for Leave to Intervene in HC/ADM 115/2021 (HC/SUM 5004/2021); Minute Sheet for HC/ADM 115/2021 (HC/SUM 5004/2021) on 3 November 2021.

28 Defence at para 11.

of the dispute.[29] In any event, nothing material turns on this because there appears to be no disagreement that the applicable English and Singapore law in relation to claims by a lawful holder of the bill of lading for misdelivery are similar.[30]

The Assistant Registrar's decision

17 The AR granted interlocutory judgment in favour of the plaintiff, with damages to be assessed. The defendant made a number of arguments as to why it should be granted unconditional leave to defend the action. However, the AR found that none of those arguments raised any triable issues, save for the issue as to the quantum of damages suffered by the plaintiff as a result of the misdelivery of the Gasoil Cargo.[31]

18 The AR rejected the various arguments raised by the defendant that the plaintiff was not the "lawful holder" of the Bills of Lading, as defined under s 5(2) of the Carriage of Goods by Sea Act 1992 (c 50) (UK) and s 5(2) of the Bills of Lading Act 1992 (2020 Rev Ed). This was because he found that, by WOT's indorsement of the Bills of Lading to the plaintiff, there had been a voluntary and unconditional transfer of possession by the holder of the Bills of Lading to the indorsee and an unconditional acceptance by the indorsee: *Standard Chartered Bank v Dorchester LNG (2) Ltd (The "Erin Schulte")* [2015] 1 Lloyd's Rep 97 at [28].[32] He also rejected the submission that the plaintiff was not acting in "good faith" given that there was no evidence that the

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29 Reply at para 7(c).

30 Respondent's (Plaintiff) Written Submissions ("PWS") at para 36; Defendant/Intervener's Joint Written Submissions ("DWS") at paras 51–130.

31 Minute Sheet for HC/ADM 115/2021 (HC/SUM 339/2022) on 26 April 2022 ("SUM 339 Minute Sheet") at para 21.

32 SUM 339 Minute Sheet at para 4.

plaintiff was acting dishonestly: *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR(R) 1 at [39].[33]

19 The AR also rejected the submission that the Bills of Lading were spent. This was because the Bills of Lading were never indorsed to HLT, and at the time of delivery of the Gasoil Cargo, *ie,* 28 to 29 February 2020 (see [6] above), the defendant's own case was that BP Singapore Pte Ltd, and Petrochina International (Hong Kong) Co Ltd or Formosa Petrochemical Corporation, were the lawful holders of the Bills of Lading. As such, in line with the established law that bills of lading would only become spent upon delivery of the cargo to the lawful holder of the bills of lading (see *eg*, *The "Yue You 902" and another matter* [2020] 3 SLR 573 at [58]), the Bills of Lading were not spent by delivery of the cargo to HLT.[34]

20 As for the submission that the plaintiff had consented to the defendant's discharge of the Gasoil Cargo without presentation of the Bills of Lading, the AR found that this did not raise any triable issues.[35] This was for various reasons, but chiefly, the AR found that the fact that the plaintiff had permitted the discharge of the cargo against the LOI did not indicate, without more, that the plaintiff had given up its rights to demand delivery of the cargo upon presentation of the Bills of Lading. According to the AR, this was because payment under the LC, upon the presentation of WOT's commercial invoice and the LOI, was permitted only if the Bills of Lading were not available. Further, the LC required that the Bills of Lading be indorsed "to the order of [the plaintiff]". In short, the AR accepted the submission by counsel for the

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33 SUM 339 Minute Sheet at para 5.

34 SUM 339 Minute Sheet at paras 7–8.

35 SUM 339 Minute Sheet at paras 12–18.

plaintiff that the latter never intended to abandon its rights under the Bills of Lading to demand delivery of the Gasoil Cargo from the defendant.[36]

21 However, as for the quantum of damage suffered by the plaintiff as a result of the misdelivery of the Gasoil Cargo, the AR found that there were triable issues that were not suitable for summary determination. One reason for the AR's decision in this regard was that, while it was common ground that the value of the Gasoil Cargo should be determined as at 19 November 2020 (the date of the plaintiff's demand for delivery of the Gasoil Cargo from the defendant (see [13] above)), neither of the parties produced evidence of the value of the Gasoil Cargo as at that date.[37] The plaintiff has not appealed against this part of the AR's decision.

The Registrar's Appeal

22 It is a well-established principle that summary judgment will only be granted if the court is satisfied that all the defences raised by the defendant to resist the claim are "wholly unsustainable", as a matter of fact and law: *Lim Oon Kuin and others v Ocean Tankers (Pte) Ltd (interim judicial managers appointed)* [2022] 1 SLR 434 at [1]. To obtain summary judgment, the plaintiff first has to show that he has a *prima facie* case for summary judgment. If the plaintiff succeeds in doing so, the burden shifts to the defendant who, in order to obtain leave to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence: *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 ("*M2B*") at [17]. Leave to defend ought to be granted as long as there are triable issues or questions, or there is

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36 SUM 339 Minute Sheet at paras 14–15.

37 SUM 339 Minute Sheet at paras 19–21.

some other reason for a trial: *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 14/4/5. Disputes of fact, the resolution of which will have an impact on the defendant's liability, will ordinarily suffice to show that there are triable issues.

23 That does not mean, of course, that bare denials or bare assertions made by the defendant are all that is needed: *M2B* at [19]. The court must examine the defences raised to determine if *any* one of them raises a fair or reasonable probability of a *bona fide* defence. If so, unconditional leave to defend will be granted. In some limited circumstances, the court may decide to grant conditional leave to defend, with the condition usually being in the form of the defendant having to furnish security for the plaintiff's claim (see generally *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [44]–[46]; *Ling Yew Kong v Teo Vin Li Richard* [2014] 2 SLR 123 at [36]). But, that issue does not arise in this case because WOT has secured the plaintiff's claim to its satisfaction (see [14] above).

24 In respect of the summary judgment application in this case, there is no dispute that the plaintiff has established a *prima facie* case for judgment in respect of its claim, as a lawful holder of the Bills of Lading, against the defendant for damages for breach of the contract of carriage because of the delivery of the Gasoil Cargo to HLT without presentation of the Bills of Lading. The tactical burden has thus shifted to the defendant to show that there are some triable issues which would merit a grant of leave to defend. In this regard, I should point out that the plaintiff's application for summary judgment has been confined to its cause of action for misdelivery, *ie*, breach of the contract of carriage, and the plaintiff has not relied on its alternative claim for conversion.

Defendant's case

25 In his arguments before me at the hearing of the appeal, counsel for the defendant focused mainly on one aspect of the plaintiff's claim for misdelivery as raising specific triable issues.[38] That was the question of causation, *ie*, whether the defendant's delivery of the Gasoil Cargo to HLT on 28 to 29 February 2020, without presentation of the Bills of Lading by HLT, caused the plaintiff any loss, such that the plaintiff would be entitled to recover damages.

26 The defendant submits that, when the plaintiff issued the LC in favour of WOT, it knew that the Gasoil Cargo on board the Vessel had already been delivered to HLT. The defendant argues that this would have been clear from HLT's application for the LC on 3 March 2020, where it was stated that the latest delivery date was 29 February 2020 (see [7] above). In fact, the LC issued by the plaintiff stated that delivery would take place by ship at UT, with the latest delivery date being 29 February 2020 (see [8] above). According to the defendant, this must mean that, when HLT made its application for the LC on 3 March 2020 and the plaintiff issued the LC on 4 March 2020, the plaintiff knew that the Gasoil Cargo for which HLT was seeking financing had already been delivered into HLT's tanks at UT, without the presentation of the Bills of Lading.[39] Yet, the plaintiff raised no issue about this and proceeded to finance this purchase of the Gasoil Cargo by HLT from WOT.

27 The defendant submits that the plaintiff's conduct *vis-à-vis* the delivery of the cargo indicates that it never regarded the Bills of Lading as security when

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38 Minute Sheet for HC/ADM 115/2021 (HC/RA 108/2022) on 22 July 2022 ("RA 108 Minute Sheet") at pages 1–4.

39 RA 108 Minute Sheet at page 2.

it provided the financing. In other words, the plaintiff never intended to look to the defendant to deliver up the Gasoil Cargo, if HLT defaulted on its payment obligations.[40] The defendant also refers to the fact that HLT had been the plaintiff's customer since at least 2009;[41] that the plaintiff must have been aware that HLT had a practice of taking delivery of cargo without presentation of bills of lading;[42] and that HLT's oil trading business included re-selling the cargo after storage at its tanks at UT, or blending the gasoil with other grades of oil to create a new product for sale.[43] The defendant also argues that the banking facility documents between the plaintiff and HLT, which have been disclosed so far in these proceedings, show that the financing granted by the plaintiff to HLT was granted on an unsecured basis.[44] According to the defendant, this is consistent with the fact that the LC permitted payment against the LOI (which did not indicate that the Bills of Lading would have to be delivered to the plaintiff and also excluded the rights of the plaintiff to obtain the Bills of Lading), and that would not have been the case if the financing provided by the plaintiff had been secured financing.[45]

28 In short, the defendant argues that there are various indicia which point towards the plaintiff never having regarded the Bills of Lading as security for the financing granted to HLT. This meant that the effective or proximate cause of the plaintiff's loss was not the misdelivery by the defendant of the Gasoil Cargo to HLT without presentation of the Bills of Lading. Instead, it was the

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40 RA 108 Minute Sheet at page 3.

41 DWS at para 127.

42 DWS at para 128.

43 DWS at para 130(b).

44 DWS at paras 25–27 and 130(f).

45 DWS at paras 19–21 and 130(d); RA 108 Minute Sheet at page 3.

insolvency of HLT and the way in which the plaintiff's financing arrangements were structured.[46]

Plaintiff's case

29 The plaintiff submits that the financing arrangements between itself and HLT were that the Bills of Lading would be the plaintiff's security for the financing it extended to HLT to purchase the Gasoil Cargo. The plaintiff points out that the Bills of Lading were always intended to be passed to it as security. That can be seen from the terms of the facility and security documentation with HLT which required HLT to pledge the Bills of Lading to the plaintiff, as well as the terms of the LC which required WOT to indorse the Bills of Lading to the order of the plaintiff.[47]

30 The plaintiff also disputes that it was aware, from HLT's application for the LC on 3 March 2020, that the Gasoil Cargo on board the Vessel had already been delivered to HLT. It argues that this was not clearly apparent from the wording of HLT's application, which referred to both the "latest delivery date" and the "NOR" date being 29 February 2020.[48] Before it issued the LC, the plaintiff also denies having had sight of the Sale Contract, which had words to the same effect concerning the "latest delivery date".[49] The plaintiff also argues that it did not know of HLT's alleged practice of taking delivery of cargo

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46 RA 108 Minute Sheet at page 1.

47 RA 108 Minute Sheet at page 5.

48 PWS at para 115; Affidavit of Richard Martin Allan affirmed on 25 March 2022 ("Mr Allan's 3rd Affidavit") at paras 29–34, 44–45 and 47–48 (Agreed Bundle of Documents Volume 3 ("3AB") at pages 1454–1456 and 1459–1460).

49 PWS at para 70.

without presentation of bills of lading, and that knowledge of past incidents of misdelivery without complaint is irrelevant.[50]

31 In any event, counsel for the plaintiff submits that the plaintiff's knowledge of the misdelivery is irrelevant to the issue of breach of contract; even if the plaintiff knew that the Gasoil Cargo had already been discharged into HLT's tanks at UT when it issued the LC, this does not change the fact that the defendant misdelivered the Gasoil Cargo, *ie*, that the defendant delivered the Gasoil Cargo to HLT in breach of the contract of carriage since HLT never presented the Bills of Lading.[51] The plaintiff submits that it did not consent to or ratify the acts of misdelivery. There can be no consent because the misdelivery took place before the plaintiff entered the picture as the financer of HLT's purchase.[52] Also, the defendant could not point to any communication from the plaintiff that would show that it ratified the acts of misdelivery.[53]

32 As to the defendant's argument about causation, the plaintiff takes the position that the cause of its loss is the misdelivery by the defendant in breach of the contract of carriage. As the lawful holder of the Bills of Lading from 7 August 2020, the plaintiff submits that it now holds the right of action in relation to this claim for misdelivery of the cargo, even if it knew that there had been misdelivery prior to the time it became the lawful holder of the Bills of Lading.[54]

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50 PWS at para 121.

51 RA 108 Minute Sheet at page 5.

52 RA 108 Minute Sheet at page 5.

53 PWS at para 118.

54 RA 108 Minute Sheet at page 5.

Analysis

33 The parties cited a host of authorities in relation to claims by bill of lading holders for misdelivery by defendant carriers. I find three of them to be particularly relevant.

34 In *Fimbank Plc v Discover Investment Corporation (The "Nika")* [2021] 1 Lloyd's Rep 109 ("*The Nika*"), the claimant was a bank that had financed the purchase by its customer ("AD") of a cargo of wheat carried on board the vessel, "Nika". The cargo of wheat was discharged and delivered to AD's agent at Alexandria, Egypt without production of the bills of lading. The wheat was then stored at a bonded warehouse, but later removed from there against production of forged bills of lading. The claimant bank was never paid, and it brought proceedings against the owner of the vessel for damages for misdelivery. The issue before the court was whether the claimant could establish a "good arguable case" that it would be entitled to substantial damages from the defendant so as to justify the grant of a freezing order.

35 Andrew Baker J ("Baker J") in *The Nika* examined the financing arrangements between the claimant and the defendant shipowner. He found that it was always intended between the claimant and AD that the wheat would be discharged by the carrier without production of the bills of lading, and stored at the bonded warehouse until payment was made by AD's end-buyers, who could then collect the wheat from the warehouse by presenting the bills of lading (see *The Nika* at [20]–[22]). There was no evidence that these arrangements were communicated to the defendant shipowner, who had simply discharged and delivered the cargo pursuant to a letter of indemnity (see *The Nika* at [23]).

36 Baker J held that the claimant bank did not have a good arguable case that the defendant was liable to it for substantial damages (*The Nika* at [32]). He found that the claimant bank had no claim for misdelivery because AD and its agent were authorised by the claimant bank to take delivery from the vessel without production of the bills of lading, and that it was immaterial that the defendant was not told that AD and its agent were so authorised (*The Nika* at [26]–[28]). He also found that, even if AD's agent had not been authorised by the claimant to collect the cargo from the vessel, the claimant would face "formidable difficulties of causation" (*The Nika* at [29]–[30]). This was because the wheat was discharged and stored in the warehouse pursuant to the arrangements agreed between the claimant and AD. As such, the "only effective cause of loss [was] not the shipowner's discharge of the cargo otherwise than against bills of lading that the claimant had no intention of presenting to the ship or allowing the shipowner to take, but rather the breakdown in the arrangements ashore by way of the claimant becoming the victim of a fraud that had nothing to do with the shipowner" (*The Nika* at [34]). In short, the claimant's loss was not caused by the misdelivery by the shipowner, and the claimant would not be entitled to any substantial damages even if there was a valid claim for breach of the contract of carriage.

37 In *UniCredit Bank AG v Euronav NV* [2022] EWHC 957 (Comm) ("*The Sienna*"), the claimant bank brought a claim for damages for breach by the defendant shipowner of the bill of lading contract by delivering a cargo of low sulphur fuel oil to a third party without production of the bill of lading. On 1 April 2020, the claimant had financed the purchase by its customer, Gulf Petrochem FZC ("Gulf"), of part of the cargo of fuel oil from BP Oil International Ltd (the "financed cargo"), shipped on the vessel, "Sienna". The bill of lading provided that the financed cargo would be delivered at Fujairah,

United Arab Emirates. However, between around 26 April 2020 and 2 May 2020, the defendant discharged the financed cargo by ship to ship transfer to two other vessels at Sohar, Oman, without requiring production of the bill of lading: see *The Sienna* at [1]–[10].

38 The claimant's representative gave evidence at the trial that she did not approve, or even know of, the discharge of the financed cargo by ship to ship transfer at Sohar, and that, if she had been asked by Gulf to authorise discharge in that manner so that delivery could be made to Gulf's end-buyers, she would not have agreed to do so (see *The Sienna* at [58]).

39 The financing arrangements between the claimant bank and Gulf were that the financed cargo would be re-sold to end-buyers on terms that required those end-buyers to pay the claimant directly (see *The Sienna* at [8]). After examining in some detail the correspondence that had passed during the material time between the claimant's representative and Gulf, Moulder J made certain critical findings:

(a) First, it was inherent in the financing arrangements between the claimant bank and Gulf that the financed cargo would be discharged by the defendant shipowner without production of the bill of lading. In fact, the claimant bank had accepted that the bill of lading would not be available until discharge had taken place: *The Sienna* at [89]–[90].

(b) Second, the claimant bank had implicitly, if not expressly, approved of discharge without production of the bill of lading, and the claimant had no concerns at that time about Gulf defaulting on its repayment obligations: *The Sienna* at [92] and [120].

(c) Third, if the claimant had been aware of, or told that, discharge would be made to the end-buyers by ship to ship transfer at Sohar, the claimant bank would not have objected to this course of action: *The Sienna* at [121].

40 In the result, Moulder J dismissed the claimant bank's claims on the basis that any breach by the defendant shipowner of the bill of lading contract by discharging the financed cargo, without production of the bill of lading, did not cause the loss suffered by the claimant (*The Sienna* at [122]).

41 HC/ADM 16/2021 ("*The STI Orchard*") is a recent case concerning a claim for misdelivery of cargo that also arises from the collapse of HLT. The plaintiff in that case, Oversea-Chinese Banking Corporation Limited ("OCBC"), financed HLT's purchase of a cargo of gasoil shipped on board the defendant's vessel, "STI Orchard". HLT's financial position subsequently deteriorated, and it defaulted on its obligation to repay OCBC. HLT was eventually ordered to indorse the bills of lading in favour of OCBC, and OCBC then commenced proceedings against the defendant shipowner for delivering the cargo of gasoil to HLT without presentation of the bills of lading.

42 OCBC applied for summary judgment on its claim. AR Navin Anand ("AR Navin") granted the defendant shipowner unconditional leave to defend the action in *The "STI Orchard" (Winson Oil Trading Pte Ltd, intervener)* [2022] SGHCR 6 ("*The STI Orchard* (HCR)"), and OCBC's appeal against that decision was dismissed by Kwek Mean Luck J ("Kwek J") in HC/RA 174/2022.

43 Both AR Navin and Kwek J were of the view that there were several triable issues. One of those issues was whether the financing and security arrangements between OCBC and HLT were such that OCBC actually regarded

the bills of lading as its security for financing the purchase of the gasoil. Several facts led to the courts' decision. First, the letter of credit issued by OCBC provided that the bills of lading were to be issued or indorsed to HLT's order, not OCBC's (see *The STI Orchard* (HCR) at [55]).[55] Second, OCBC had entered into a trust receipt loan with HLT for the sums due under the letter of credit, after the delivery of the cargo had taken place. OCBC did not impose a requirement that HLT had to indorse the bills of lading, or hand them over, to OCBC (see *The STI Orchard* (HCR) at [56(a)]–[56(b)]).[56] There was also some evidence which showed that OCBC knew, or was put on notice, that the gasoil would be blended and on-sold by HLT to PT Pertamina (Persero) ("Pertamina"), and that OCBC was looking to those sale proceeds to be held on trust by HLT for OCBC under the trust receipt arrangements as security (see *The STI Orchard* (HCR) at [56(c)]).[57]

44 Another triable issue found by the court was whether the trust receipt loan granted by OCBC amounted to OCBC's *ex post facto* consent to, or ratification of, the seller's instructions to the defendant shipowner to deliver the cargo without production of the bills of lading. Again, this was because of the evidence that OCBC knew, or was put on notice, of the arrangements by HLT to blend the gasoil into a different product and on-sell that to Pertamina, and

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55 Decision of Kwek Mean Luck J in HC/RA 174/2022 ("Kwek J's Decision") at para 32(b) (Notes of Evidence ("NE"), HC/ADM 16/2021 (HC/RA 174/2022) at page 34).

56 Kwek J's decision at paras 32(f)–32(g) (NE, HC/ADM 16/2021 (HC/RA 174/2022) at page 35).

57 Kwek J's decision at paras 32(h)–32(l) (NE, HC/ADM 16/2021 (HC/RA 174/2022) at pages 35–37).

that OCBC was looking to those sale proceeds as collateral to secure HLT's indebtedness (see *The STI Orchard* (HCR) at [68]–[76]).[58]

45 Having considered the parties' submissions, I find myself in agreement with the defendant that it has raised some triable issues in relation to the issue of causation, and that it should be granted leave to defend the action. Specifically, there is a triable issue as to whether the defendant's misdelivery *caused* the plaintiff's loss, *ie*, whether the plaintiff has suffered a recoverable loss from the defendant's breach of the contract of carriage. In that regard, it is then relevant to consider whether the plaintiff looked to the Bills of Lading as security for its financing of HLT's purchase of the Gasoil Cargo. In my view, this is an issue which ought to be fully explored at trial.

46 I pause to note that the position at law is unclear as to *how* the test of causation should be applied. The approach taken in *The Nika* and *The Sienna* appears to suggest that the court should consider whether the misdelivery is the effective or proximate cause of the claimant's loss. On this view, even if the carrier had misdelivered the cargo, that misdelivery would not be the effective or proximate cause of the claimant's loss if the claimant would not have insisted on the discharge of the cargo against presentation of the bills of lading in any event.

47 I certainly accept the point made by counsel for the plaintiff that the facts of *The Nika*, *The Sienna* and *The STI Orchard* are all different.[59] For example, it was clearly a material fact in *The Nika* that the claimant bank and its customer, AD, had entered into an agreement for the warehousing of the cargo upon its

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58 Kwek J's decision at paras 46–50 (NE, HC/ADM 16/2021 (HC/RA 174/2022) at pages 42–44).

59 RA 108 Minute Sheet at pages 5–6.

discharge without the need for presentation of the bills of lading (see *The Nika* at [21]). In *The Sienna*, Moulder J regarded as relevant the facts that (i) Gulf was insured for 90% of the receivables under the contracts with the end-buyers of the financed cargo, and the claimant bank had the benefit of an assignment of that insurance policy (which excluded related parties as end-buyers from coverage); and (ii) the claimant bank's representative had been informed of the identities of the end-buyers of the financed cargo and had confirmed that those end-buyers were acceptable (see *The Sienna* at [108] and [120]). That suggested that the claimant bank might have been prepared to take the credit risk of those end-buyers, and would have permitted discharge of the financed cargo without production of the bill of lading (see *The Sienna* at [121]). In *The STI Orchard*, it was significant that there was evidence that OCBC knew that the cargo of gasoil would be blended into a different product for on-sale to Pertamina (see *The STI Orchard* (HCR) at [74]).[60] That act would have rendered the bills of lading in respect of the gasoil worthless. It suffices for me to say that, in a summary judgment application such as this, the particular facts of each case must be carefully scrutinised to determine whether any triable issues arise.

Whether the plaintiff looked to the Bills of Lading as security is a triable issue

48 What is clear from the approach in *The Nika*, *The Sienna* and *The STI Orchard* is that the precise financing and security arrangements between the financing bank claimant and its customer must be examined so that the court can answer the question – did the claimant regard the relevant bills of lading as security? I am not convinced that this question can be answered in a summary way from the affidavits filed by the parties and the documents so far disclosed.

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[60] Kwek J's decision at paras 46–50 (NE, HC/ADM 16/2021 (HC/RA 174/2022) at pages 42–44).

49 In my judgment, whether the plaintiff looked to the Bills of Lading as security for its financing of HLT's purchase of the Gasoil Cargo is a triable issue. In turn, at least two triable issues of fact arise, which are material to the question of whether the plaintiff looked to the Bills of Lading as security:

(a) whether the plaintiff had knowledge that the Gasoil Cargo had already been discharged into HLT's tanks at UT, at the time it accepted HLT's LC application; and

(b) what the specific financial arrangements between the plaintiff and HLT were.

Whether the plaintiff had knowledge that the Gasoil Cargo had already been discharged into HLT's tanks at UT

50 The facts of this case are rather peculiar in that this is not a typical situation where it is immediately obvious that a bank has financed the purchase of goods, and finds itself having to look to the goods as security when its customer has failed to make payment of the loan. Rather, it is certainly arguable that, by the time the plaintiff agreed to finance the purchase of the Gasoil Cargo from WOT, it knew, or at least ought to have known, that the Gasoil Cargo was already in the custody of HLT. The plaintiff disputes that it had such knowledge, and points out that the reference to 29 February 2020 being the "latest delivery date" in HLT's application form is far from clear (see [30] above). I accept that the wording used by HLT is not entirely clear, but this gives rise to a dispute of fact pertaining to the state of the plaintiff's knowledge as to the whereabouts of the Gasoil Cargo as of 3 to 4 March 2020 (when HLT applied for the LC and when the plaintiff issued the LC). It may be that discovery or interrogatories in these proceedings will shed light on this issue.

51 I am unable to agree with the plaintiff's contention that its knowledge, or otherwise, about the Gasoil Cargo being already discharged into HLT's tanks at UT is not a triable issue.[61] The plaintiff submits that its level of knowledge is irrelevant to whether it can still maintain a claim against the defendant for misdelivery. However, if it is the case that the plaintiff knew that the cargo was already in HLT's custody at UT *before* the plaintiff proceeded to finance the purchase and issue the LC, then that could arguably indicate that the plaintiff did not regard the Bills of Lading as security. Put another way, if the plaintiff was aware that the Gasoil Cargo had already been delivered to HLT at UT, the plaintiff could not expect that the Bills of Lading would remain as the 'keys to the warehouse', and that the defendant would deliver up the Gasoil Cargo upon presentation of the Bills of Lading. Viewed from the prism of a causation of loss analysis, that would mean that, while there was a breach of the contract of carriage because the defendant misdelivered the Gasoil Cargo to HLT, that breach was arguably not the proximate or effective cause of the plaintiff's loss. Instead, the plaintiff's loss would have been caused by HLT's financial collapse in April 2020, which rendered HLT unable to repay its loan owed to the plaintiff.

The financial arrangements between the plaintiff and HLT

52 The plaintiff's position is that the LC which it issued in the present case was provided pursuant to facilities it had granted to HLT in 2017.[62] More specifically, the facility in question was described as "Import LCs – Unsecured". The purpose of this facility was described as "[i]ssuance of Doc LCs against Presold Contracts from buyers listed in approved buyers list …

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61 RA 108 Minute Sheet at page 5.

62 Mr Allan's 3rd Affidavit at paras 25 and 27 (3AB at page 1453); PWS at para 7.

[i]ssuance of Doc LCs against Unsold Cargos not to exceed USD80million".[63] It would therefore appear that the plaintiff might have been aware that it was financing a cargo of gasoil that remained unsold by HLT, *ie*, the Gasoil Cargo would have to be stored with HLT at UT. That there was a limit set of US$80m would also suggest that the plaintiff was prepared to grant unsecured financing to HLT up to a certain amount.

53 The plaintiff explains that the reference to the financing of this transaction being "unsecured" was because the Bills of Lading had not yet been indorsed to the plaintiff, presumably as at the time of the issuance of the LC.[64] The defendant submits that this explanation is "curious" given that the plaintiff's position is that the Bills of Lading must be indorsed and delivered to it for payment to be made, in accordance with the terms of the LC, and hence the financing should be regarded as "secured" if the plaintiff's position is right.[65]

54 The plaintiff points to the fact that the terms of the "Import LCs – Unsecured" facility require a "[f]ull set of BLs to pass through the Bank". According to the plaintiff, this makes it clear that the plaintiff always looked to the Bills of Lading as security.[66] On the other hand, the defendant has drawn the court's attention to an express exception, in the terms of the facility, where bills of lading are not required by the plaintiff.[67] This exception reads:[68]

> In cases where the BL is not received by the Bank, payment under the Doc LC may be permitted subject to submission of

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63 3AB at page 1489.

64 PWS at para 10.

65 DWS at para 25.

66 PWS at para 11; RA 108 Minute Sheet at page 5.

67 DWS at para 26.

68 3AB at page 1489.

> invoice and acceptable LOI. LOI counterparties in this case are restricted to oil major, national oil company, large independent traders and OIF buyers.

According to the defendant, this suggests that, in certain limited circumstances, the plaintiff may have been prepared to forgo looking to the Bills of Lading as security for its financing, and was instead prepared to assume the credit risk of the issuer of the letter of indemnity.[69]

55 It also appears from the documents disclosed that HLT had requested a trust receipt arrangement to cover the period of 27 March 2020 (which is the date when the loan from the plaintiff fell due to be paid by HLT) to 27 April 2020. In response, the plaintiff granted HLT an "Import Loan" for 31 days on 27 March 2020.[70] This effectively extended the time for HLT to make payment to the plaintiff by 31 days. The plaintiff did not ask for any security for this "Import Loan", *eg*, by way of a trust receipt arrangement. This suggests that the plaintiff might have been aware that the Gasoil Cargo was unsold, and that HLT was requesting for time to sell the Gasoil Cargo before it could repay the loan to the plaintiff. It also suggests that the plaintiff might have been perfectly willing to assume the risk of HLT defaulting on its payment obligations, without having recourse to any security.

56 In my judgment, there are clearly triable issues in relation to the financing and security arrangements between the plaintiff and HLT that must be investigated at trial. That would allow the court to determine, with the necessary certainty, whether the plaintiff did in fact regard the Bills of Lading

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69 DWS at paras 26–27; RA 108 Minute Sheet at page 3.

70 3AB at page 1507–1509; Mr Allan's 3rd Affidavit at para 61 (3AB at page 1464).

in this case as security for its financing, or whether it was always prepared to assume the credit risk of HLT on an unsecured basis.

57 That the plaintiff was willing to permit payment under the LC without presentation of the Bills of Lading by WOT, but against, *inter alia*, the LOI, also raises a triable issue as to the plaintiff's intentions in relation to the Gasoil Cargo and the Bills of Lading. It bears reiteration that the LOI issued by WOT was in the standard form set out in the LC issued by the plaintiff itself. The LOI which was required to be addressed by WOT to HLT stated, in part:[71]

> IN CONSIDERATION OF YOUR MAKING PAYMENT OF U.S. DOLLARS USD 6,129,977.22 … FOR … 92,870.000 BARRELS … OF THE CARGO IN ACCORDANCE WITH THE UNDERLYING AGREEMENT *AND HAVING AGREED TO ACCEPT DELIVERY OF THE CARGO WITHOUT HAVING BEEN PROVIDED WITH 3/3 ORIGINAL BILLS OF LADING* AND OTHER SHIPPING DOCUMENTS REQUIRED TO BE PRESENTED BY US IN ACCORDANCE WITH THE UNDERLYING AGREEMENT … WE HEREBY REPRESENT AND WARRANT AS FOLLOWS … [emphasis added]

Based on this wording, counsel for the defendant argues that the plaintiff was clearly prepared to accept the scenario where the Gasoil Cargo would be delivered to HLT without presentation of the Bills of Lading, and as such, the plaintiff never looked to the Bills of Lading as security.[72] I agree that this raises questions that can only be properly answered after a trial.

58 I should add that the LOI also requires WOT to undertake to send the Bills of Lading, once those have come into its possession, to *HLT*, whereupon WOT's obligation to indemnify HLT would cease. That again might suggest that, for this particular transaction, it was not intended that the Bills of Lading

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71 1AB at page 174.

72 RA 108 Minute Sheet at page 3.

would "pass through the Bank", and that the bank would not look to the Bills of Lading as security. The defendant argues that the fact that the Bills of Lading were subsequently indorsed by WOT to the plaintiff in August 2020 was simply because, by then, HLT had suffered its financial collapse and the plaintiff was seeking all means to try to recover its losses, and hence wanted the Bills of Lading indorsed to it. It contends that the plaintiff's demand for the Bills of Lading was "contrived, coming only after HLT was in financial difficulties and where the prospects of recovery had been preliminarily assessed at 18%", and that the plaintiff "never had any intention to call on or demand for the [Gasoil Cargo] and was now effectively looking to lay its losses at [the defendant's] feet when it did not look to the Bills of Lading as security at the time it financed HLT's purchase of the [Gasoil Cargo] or when it further extended the loan to HLT".[73] In my view, a trial is needed in order for the court to determine whether this is the case.

59 The defendant also points out that, in any event, the plaintiff was arguably not entitled to enforce the LOI issued by WOT to obtain the Bills of Lading. As mentioned above at [9]–[10], the form of the letter of indemnity provided that it was to be issued by WOT to HLT (and not the plaintiff). Moreover, the form contained a clause expressly excluding any benefit or remedy from being conferred under the letter of indemnity on any party other than the named buyer (HLT). The defendant contends that, under the LOI, the plaintiff thus does not have any benefit or remedy. According to the defendant, this suggests that the plaintiff did not intend for the Bills of Lading to be security. This is because the plaintiff agreed that payment under the LC would be made against the presentation of an LOI which did not give it any rights to obtain the Bills of Lading, effectively "disclaim[ing] any interest in the Bills of

[73] DWS at paras 42–44.

Lading and [leaving] any disposal of the Bills of Lading to be a matter between HLT and WOT".[74] In my judgment, whether the plaintiff had relinquished its rights to the Bills of Lading, and whether this suggests that the plaintiff did not regard the Bills of Lading as security, are triable issues.

60 I should also add that the issue is further complicated by the fact that HLT was a long-standing customer of the plaintiff, and the issue of what the plaintiff knew about HLT's intentions regarding the Gasoil Cargo must also be investigated. As HLT's business model meant that it would probably store this unsold Gasoil Cargo in its tanks at UT, the plaintiff might well have been aware that the cargo had already been delivered to HLT for its storage at UT by the time it issued the LC to finance the cargo's purchase. That might possibly explain why the plaintiff did not appear to be concerned by the wording of HLT's application for financing on 3 March 2020, which suggested that the cargo might have already been delivered to HLT. As already explained (see [51] above), if the plaintiff had knowledge that the Gasoil Cargo was already in HLT's possession, the question that presents itself is whether one can describe the plaintiff's loss, which arises from the financing which it granted to HLT after the defendant misdelivered the Gasoil Cargo, as being effectively caused by the prior act of misdelivery by the defendant.

Conclusion and orders made

61 For the above reasons, I find that the defendant has raised triable issues, and I therefore grant the defendant unconditional leave to defend the action. I am unconvinced that the defences raised in relation to the issue of causation are "wholly unsustainable", as a matter of fact and law (see above at [22]). Let me

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[74] DWS at paras 19–21.

be clear though, that I have not determined in any way the various contentions of the parties on the merits of the claim, including those that were dealt with by the AR below concerning whether the plaintiff is a lawful holder of the Bills of Lading, whether the Bills of Lading were spent, and whether there was consent and/or ratification of the delivery of the cargo. In this judgment, I have only considered the defendant's arguments in relation to causation, and in this regard, I have only focused my mind on whether the defendant has managed to raise triable issues as to whether the plaintiff has suffered any recoverable loss from the misdelivery of the Gasoil Cargo.

62 I therefore allow the appeal and set aside the orders made by the AR below. The costs of the application below (HC/SUM 339/2022) and for this Registrar's Appeal are to be in the cause.

Ang Cheng Hock
Judge of the High Court

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