BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and Another, Third Parties)
[2003] SGHC 111

Case Number : Suit 476/2001

Decision Date : 12 May 2003

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Peter Gabriel (Gabriel Peter & Partners) for the plaintiffs; Murali Pany (Gabriel Peter & Partners) for the plaintiffs; Kenneth Tan S.C. (Kenneth Tan Partnership) for the defendants; Wang Wei Chi (Kenneth Tan Partnership) for the defendants

Parties : BNP Paribas — Bandung Shipping Pte Ltd — Shweta International Pte Ltd; Lanyard Foods Limited

Admiralty and Shipping – Bills of lading – Conditions of charterparty – Provision for discharge against letters of indemnity – Whether provision acted as a defence to wrongful discharge of cargo against letters of indemnity

Admiralty and Shipping – Bills of lading – Delivery of cargo without presentation of bills of lading – Whether plaintiff had any title to sue in contract – Whether plaintiff was holder of bills of lading

Admiralty and Shipping – Bills of lading – Delivery of cargo without presentation of bills of lading – Whether plaintiff had consented to delivery without presentation

1 The present action is between a bank, BNP Paribas ("BNP"), that had financed several purchases of crude palm oil and RBD palm oelin for its customer, Shweta International Pte Ltd ("Shweta"), and a shipowner, Bandung Shipping Pte Ltd ("Bandung"). BNP's complaint against Bandung is that the latter as shipowner wrongfully delivered various consignments of edible palm oil and RBD palm oelin (hereafter individually and collectively referred to as "the cargo") at Kandla, India, without the production of the relevant bills of lading to which BNP was the lawful holder and/or person entitled to immediate right to possession of the cargo. The cargo was released against letters of indemnity provided by Lanyard Foods Limited ("Lanyard"). Lanyard did not pay for the cargo and Shweta in turn defaulted on its credit line from BNP in the principal sum of US$3,174,046.61.

2 BNP's claim, arising from the alleged wrongful discharge of the cargo, is brought in contract pursuant to the bills of lading, in tort and in bailment. Bandung has raised as an issue the bank's title to sue. The second issue is that the delivery without production of bills of lading but letters of indemnity was with the consent or authority of BNP. At this trial, I am asked by the parties to deal with the issue of liability alone.

3 I should mention that Bandung commenced third party proceedings against Shweta as 1st Third Party and Lanyard as the 2nd Third Party to whom Shweta had on-sold the cargo. Lanyard was at all material times an importer of edible oils in India and the parent company of Shweta. The 1st and 2nd Third Party did not participate at the trial. After the conclusion of the trial of the main action, Bandung on 1 November 2002 entered default judgment against the 1st and 2nd Third Party.

The Witnesses

4 BNP called three witnesses. The first is Catherine Low Peck Cheng ("Low") who, at the material time, was the Relationship Manager of BNP in charge of the customer, Shweta. Her evidence related to BNP's dealings with Shweta. The next witness is Frederic Amoudru, the Head of BNP's Asset

Restructuring and Recovery Department since 2000 and finally, S Venkiteswaran, a lawyer practising in India. The latter's evidence related to Indian Customs law and the procedure for discharge of edible oils, a dutiable cargo, at Indian ports.

5 Bandung had the same number of witnesses. Yong Por Kwong is the Insurance/Claims manager of Samta Shipmanagement Pte Ltd, managers of the vessel *"Victoria Cob"* and Prashant S Pratap, a lawyer practising in India. The latter is Bandung's expert on Indian Customs law. The last witness is Raju V Pappachan, an executive for Tanker Operations in JM Baxi & Company. His evidence related to the procedure for discharge of edible oils in Indian ports and storage of dutiable cargo in bonded shore tanks.

6 No one from Shweta or Lanyard testified at the trial.

Background Facts

7 Shweta is a company incorporated in Singapore on 18 January 1999 with an authorised and paid up capital of S$3 million and S$2.3 million respectively.

8 On 28 July 1999, BNP granted a US$ 10 million credit line to Shweta for the purchase of edible oils from suppliers in Malaysia and Indonesia. Shweta was the sourcing arm of Lanyard for edible oils and utilised the credit line to purchase edible oils. All of Shweta's sales were intended for Lanyard, as was the fact. For the transactions in question, Shweta voyage chartered the vessel *"Victoria Cob"* in February 2000 and again in April 2000. The two voyages were undertaken between April and June 2000.

9 The present action is concerned with 38 bills of lading issued by Bandung for carriage to and delivery at Kandla of Shweta's purchases that were loaded on board *"Victoria Cob"*. The bills of lading were owner's bills. They were made out to order. Lanyard was named as "Notify Party". Except for two bills of lading, Shweta was named as shipper on 36 bills of lading. All the 38 bills of lading were indorsed in blank and delivered to BNP. In all 38 bills of lading, the presumption in s19(2) Sales of Goods Act (Cap 393) that the respective shipper intended to retain property where the bill of lading is taken to its own order has not been rebutted. The bills of lading in question are:

a) PGG/IND-01 dated 6 April 2000 where Pan Century Edible Oil Sdn

Bhd was named as shipper;

b) SIN(BEL)/KNL nos. 9 to 12, 19, 20, 27 to 28 all dated 13 April 2000;

c) PGG/IND-04 dated 15 May 2000 where Kulai Edible Oil Sdn Bhd

was named as shipper;

d) SIN(BTM)/KAN nos. 1 to 26, 29 to 30 all dated 25 May 2000

10 The 38 bills of lading may be classified under three categories:

(i) Initial bills (2 in number)

11 Bandung accepts that BNP is pledgee and lawful holder of bills of lading nos. PGG/IND-01 dated 6 April 2000 and PGG/IND-04 dated 15 May 2000. BNP became pledgee and lawful holder of bill of lading nos. PGG/IND-01 and PGG/IND-04 on 9 May 2000 and 23 June 2000 respectively. They are

the dates when BNP approved the use of the credit facility and paid Shweta's suppliers for the cargo.

12 Both bills were made out to the order of the shippers who were the suppliers. As the presumption in s19(2) Sales of Goods Act has not been rebutted, Pan Century Edible Oils Sdn Bhd was the person with immediate right to possession of the cargo on 1 May 2000 and Murtaza Trading Company (Singapore) Pte Ltd was the person with the right to immediate possession of the cargo on 16 June 2000.

(ii) Switch bills (12 in number)

13 The switch bills are those listed under item (b) in paragraph 9 above and SIN (BTM)/KAN nos. 25 to 26 and 29 to 30. The switch bills were issued in exchange for the original set of bills of lading nos. BEL/KNL-09 to 12 all dated Belawan 13 April 2000 and PGG/IND-05 dated Pasir Gudang 7 April 2000, PGG/IND-01 and PGG/IND/03 both dated Pasir Gudang 15 May 2000 and PGG/IND-10 dated Pasir Gudang 10 April 2000.

14 Shweta as voyage charterer had an arrangement with Bandung to issue a new set of bills of lading (the switch bills) in exchange for the original set, the new bills containing some altered details. Clause 3 which is identical in both voyage charters provides:

> " Charterers have the option to exchange local for global bs/l basis one-to-one exchange basis, at load port or port Klang or Singapore at no extra costs. Strictly no double issuance of bs/l."

Addendum no.01 provides:

> "Charterers' option for on-board commingling (sic) with following to apply:
>
> …
>
> B. Owners/Agents to issue global bs/l (and manifest) for this final product as "Crude palm Oil" and/or other notations such as cargo specifications, L/C markings, b/l date basis any port of loading which vessel must physically called (sic) to load.
>
> Such global bs/l to be issued in Singapore and be withheld by owners and/or agents until charterers exchange the bs/l as per rider clause 3….."

15 A new set of bills of lading in the tanker bill form was issued for the same cargo but with some alteration in the details like date and load port. One purpose of issuing switch bills is the splitting up of a bulk cargo shipped under one bill of lading into smaller parcels. The altering of details may be for a number of reasons such as to conceal the origin of the goods, identity of the original shipper, date of shipment or due to on board co-mingling as envisaged by Addendum no. 01. Yong was not able to explain the reason for the alterations in this case. The provision for a new set of bills of lading is often agreed by shipowners for commercial motives, but it is, undoubtedly, an accommodation that is not without risks. Longmore J in *The Atlas* [1996] 1 Lloyd's Law Rep 642 at 644 referred to it as a practice that "is fraught with danger".

16 No switch bills of lading were presented to the master of *"Victoria Cob".* The cargo was discharged against letters of indemnity from Lanyard who had agreed to indemnify Bandung against any consequent liability, loss or damage as a result of the delivery of the cargo without production of the bills of lading. Except for cargo shipped under switch bill of lading nos. SIN(BTM)KAN 25 and 26, ten other switch bills were indorsed and delivered to BNP after the discharge at Kandla. All the switch

bills of lading were subsequently remitted to Lanyard's bankers in India for collection of payment against documents.

(iii) Batam bills (24 in number)

17 Bill of lading no. 001 and dated 26 March 2000 was for 10,000mt of Crude Palm Oil in bulk, which was shipped on board the vessel "*Vincita"* at Rotterdam for carriage from Rotterdam to Batam. The bill of lading was issued by Pakhoed Agencies Rotterdam B.V. on owner's behalf and it was made out to order naming Safic Alcan, a French corporation as shipper and Shweta and Lanyard as the "Notify Party". The face of the bill of lading recorded in print that the responsibility of the owner of "*Vincita"* would cease at Batam.

18 "*Vincita"* discharged her cargo at Batam without presentation of the "*Vincita"* bill of lading. It came through the banking channel to BNP who financed Shweta's purchase on 22 May 2000 and later sent the bill of lading on to the collecting bank in India. Unbeknown to the bank, part of the cargo in the total sum of 7,517.599mt was loaded on board "*Victoria Cob"* at Batam and Bandung issued 24 bills of lading for cargo received by the vessel. They are SIN(BTM)/KAN-01 to 24 all dated Batam as at Singapore 25 May 2000. Batam was the port of loading and Kandla was the port of delivery. Each bill of lading was for 250mt save for bill of lading no SIN(BTM)/KAN-24 which was for 269.697mt. The cargo was similarly described as crude palm oil. The shipper named on each bill of lading was Shweta. They were all order bills with Notify party as Lanyard. The relevant voyage charterparty was dated 19 April 2000 between Bandung and Shweta. The parties have referred to the 24 bills of lading as the "transhipment bills". I deemed the terminology inappropriate and have referred to them as the "Batam bills".

19 "*Victoria Cob"* arrived in Kandla on 12 June 2000. Discharge commenced on 14 June 2000 and was completed by 16 June 2000. The Batam bills of lading were not presented to the master who discharged the cargo against letters of indemnity from Lanyard. Shweta had possession of the Batam bills at the time of discharge. The "*Vincita"* bill of lading was remitted by BNP to State Bank of Saurashtra, Mumbai branch, for D/P collection.

20 According to Low, she only learned on 5 July 2000 that the cargo shipped on board "*Vincita'* had been delivered at Batam to Shweta against the latter's letter of indemnity and that the cargo was shipped on board "*Victoria Cob"* at Batam and subsequently discharged at Kandla. Shweta agreed to her demand that the Batam bills be immediately indorsed and handed over to BNP.

21 On 5 July 2000, Shweta indorsed in blank and delivered the Batam bills of lading to BNP. Low instructed her office not to send the bills for collection. She explained her decision:

> " …on or about 5 July, I realised that this shipment which had been financed by BNP involved a transhipment at Batam. I managed to obtain the switched bills, including the Victoria Cob bills of lading. At that point, it was understood that it's the same underlying cargo for both the Vincita bill of lading and the switched bills of lading. The bank had both bills of lading; the bank had the option to either go after the "Vincita" owners for the value of the cargo at Batam , or go after "Victoria Cob" owners for the value of the cargo at India. By July, …the bank was already seriously considering the recall of bills of lading from banking channels in India, which were lying unpaid. And therefore it did not make sense for the bank to send "Victoria Cob" bills of lading to India for subsequent recall because by July it was a sure thing that, or rather, it was a relatively sure thing that Lanyard would not be paying for these documents."
>
> [Verbatim Notes p. 298]

22 Low visited India with her colleague on or about 6 July 2000 on field investigations. There she learned that Bandung had released the cargo without production of bills of lading but against letters of indemnity issued by Lanyard. On or about 17 July 2000, BNP recalled all bills of lading from the collecting banks. The "*Vincita"* bill was recalled in October 2000 about one month after Low left the employment of BNP.

Title to sue

23 The issue of title to sue is raised in connection with the switch bills and Batam bills. It is common ground that BNP has title to sue insofar as the initial bills are concerned. A matter for consideration is the nature and extent of the bank's right to require delivery of the cargo to it when it was discharged in the period between May and June 2000. Although pleaded, Counsel for BNP did not advance the bank's case either in negligence or bailment in BNP's Opening Statement and Closing Submissions. I, therefore, need only deal with the issue of title to sue in the context of BNP's claim against Bandung in contract and/or for conversion.

(i) Contract

24 It is settled law that an order bill entitles the holder to call for delivery of the goods. Where the goods are surrendered to a person other than the holder of the bill of lading, the shipowner so delivering is exposed to risk of liability to the holder: *Sze Hai Tong Bank v Rambler Cycle Co Ltd* [1959] AC 576 at 586. Leggatt LJ in *The Houda* [1994] 2 Lloyd's Rep 541 stated:

> "Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession…" [p553]

25 Leggatt LJ explained that the shipowner in agreeing to issue "to order" bill of lading that makes the goods deliverable "to order" had by so doing accepted the obligation to deliver to the holder upon production of the bill of lading.

26 The material bills of lading each contained the standard clause on the front:

> " In witness whereof the master has signed three bills of lading of this tenor and date, one of which being accomplished, the other is void."

This clause obliges Bandung to deliver cargo to the holder of the bill of lading. Clarke J in *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266 considered a similar clause and said:

> " ..subject to the terms of the particular contract and save in exceptional circumstances a shipowner must not deliver the goods otherwise than against presentation of an original bill of lading. That seems to me to be implicit in the express provision…that any one of the bills of lading being accomplished the others to stand void. In my judgment it is implicit in that provision that save, perhaps, in exceptional circumstances, one would expect one of the bills of lading to be "accomplished" by being presented to the master or shipowner."
>
> [p.272]

27 BNP says that the bills of lading entitled it to call for delivery of the cargo and that this entitlement was lost because the cargo was discharged by the master without authority on the basis of letters of indemnity, of which it was not aware had been provided by Lanyard. BNP submits that as

a consequence of being furnished with the shipping documents, upon making payment to Shweta's suppliers, it acquired a "special property" as pledgee in the cargo sufficient to entitle it to sue in conversion. Furthermore, it is entitled to sue in contract, as it is the lawful holder of bills of lading that had been indorsed in blank and delivered to it. The deposit of a generally indorsed bill of lading with the intention of creating a pledge over the cargo operates to render the pledgee the holder of the bill under the Bill of Lading Act (Cap.384). As a consequence contractual rights of suit against the carrier are transferred to the pledgee: s2(1). S5(2)(b) refers to the completion "of any other transfer of the bill". A transfer by way of pledge would fall within those words.

28 In response, Bandung submits that the bank never acquired any right with respect to the cargo. It was not a pledgee of the Batam bills and switch bills because there was no specific undertaking by Shweta that the cargo represented by those bills were to be pledged. Further, the bank was only the remitting bank for the shipping documents and in that capacity no implied pledge over the cargo arose.

29 In my view, on the evidence, and I so find, that the cargo was in each case pledged to the bank by the deposit of generally indorsed bills of lading. The bank as pledgee became the holder of the bills of lading (both switch and Batam bills) by virtue of section 5(2)(b) of Bills of Lading Act. As lawful holder, the bank is entitled to delivery of the cargo and Bandung is under a duty to deliver the cargo to the bank on presentation of the bills of lading. A holder of the bill of lading is entitled to sue in contract in respect of any breach of contract committed even prior to the time at which the claimant became holder of the bill. A lawful holder is defined by the Act as a person in possession of the bill who is either the consignee or the indorsee to whom the bill has been transferred in good faith. There is nothing to suggest that BNP did not become a holder in good faith.

30 I also find that the cargo was delivered between the months of May and June 2000 to persons who were not entitled to possession so much so that BNP is not a holder of spent bills of lading (both switch and Batam bills). The contract of carriage generally continues and the bill of lading remains effective until the goods are delivered to the person entitled under the bill of lading: see *The Future Express* [1992] 1 Lloyd's Rep 252. In that case, the bill of lading was not spent or exhausted as delivery was not to the person who had a right to demand delivery or was entitled to them. The goods were delivered against an indemnity to a person who did not have a right to delivery under the bill of lading. The decision was affirmed on grounds that made it unnecessary for the Court of Appeal to decide on the issue whether the bill of lading was spent.

31 Even if a contrary view is taken that once the carrier has parted with possession of the cargo, the bill of lading cannot transfer constructive possession of the cargo, BNP would be a holder who would come within the provisions of section 2(2) of the Bill of Lading Act and the extended definition of "holder" in s5(2). A holder of a bill which is indorsed after delivery has taken place could still sue the carrier in contract: s2(2). The holder must have become a holder by virtue of some prior transaction (i.e. facility agreement as in this case) before the bill of lading became spent: s5(2)(c).

32 I shall now elaborate on my findings and decision.

33 In the case of the switch bills, Bandung's contention is that there was no pledge over these bills. The argument is that switch bills are different from the original bills that were pledged.

34 It is common ground that the switch bills were handed over in exchange for the original set, the new bills containing some altered details. In my view, even with the details altered, the switch bills were for the very same cargo financed by BNP. At any one time, only one set would be in

circulation. The switch bills replaced the original set, as was the fact. It has not been denied by Bandung that each switch bill is evidence of a contract of carriage once the charterer had indorsed and parted with it.

35 I now turn to Bandung's second argument which is that the switch bills were only released to BNP as the remitting bank for onward transmission to India for payment. BNP, therefore, took possession of the switch bills as agent for Shweta to present the switch bills as remitting bank for payment by Lanyard. See Articles 3 and 5 of ICC Uniform Rules for Collections ("URC 522"). I am not persuaded by Counsel's submissions, which he says, accord with the financial arrangement as well as the documentary evidence.

36 Bandung has placed reliance on Low's testimony specifically where she said that the switch bills were physically not the same bills pledged to the bank. Her testimony has been taken literally and in isolation. It is incongruous when considered with the rest of her testimony where she consistently said that the bank's security is in the documents of title representing the underlying cargo. In any case, whether and at what stage the bank became a pledgee of the cargo is a question of mixed fact and law for the court to decide. Counsel's submissions ignored the bank's twofold relationship with Shweta: there was both a lender-borrower relationship and banker-customer relationship. The one did not end with the other. Both relationships existed concurrently and in tandem. It is necessary to look at the factual matrix to see how this twofold relationship operated.

37 It is common for banks to take security over a bill of lading to secure the advance made to finance the transaction itself. It is no different in the present case. In addition to the security over the material bills of lading, BNP also had other separate security such as personal guarantees and cash deposit of US$1 million.

38 Under the terms of the Facility Agreement, the facility could be utilised for opening letters of credit or execution of trust receipt with maximum tenor of 30 days. Each time Shweta utilised the US$10 million facility, there must be lodged with the bank, Shweta's confirmed sale contract with Lanyard.

39 It is common ground that the original bills before switching were pledged to BNP. With BNP's approval of Shweta's application to draw on the US$10 million credit facility, BNP undertook a contractual commitment to pay the suppliers. The contractual commitment and payment by BNP in good faith to Shweta's suppliers had the effect of conferring on it a right to possession of the cargo by way of security. BNP became a pledgee of the cargo as from the time it received the original bills indorsed in blank.

40 The release of the original bills of lading to Shweta under the various Trust Receipts did not put to an end the pledge. See *North Western Bank Ltd v John Poynter Son and Macdonalds* [1895] AC 56*; Re David Allester, Limited* [1922] 2 CH 211. Lord Wright in *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 explained:

> "It was contended that …the respondents had parted with their pledge on these goods by giving back possession of the railway receipts to the insolvents. In their Lordships' judgment, this contention is based on a misuse of the word "possession". The respondents did not part with the possession of the goods or receipts in the juridical sense of that word; they merely parted with the custody by entrusting the receipts to the insolvents as their agents.. for the special purpose of convenient dealing with the goods by collecting them…and putting them into the… warehouse on behalf of the respondents. Such action does not involve a parting with possession and accordingly it does not in any way affect rights of pledge; the redelivery by the pledgee to the

pledgor for a limited purpose without the pledgee thereby losing his right, is illustrated by *North Western Bank Ltd v Poynter, Son and Macdonalds* and the more recent case in *Re David Allester Ltd*. In both these cases the limited purpose was in order that the goods should be realised by the pledgors as experts in that class of business. In this case the limited purpose was that the goods should be handled, not by the respondents who were bankers but by those whose business it was to do so. Such procedure is in the usual course of business, and is obviously either necessary, or at least convenient for the conduct of the business in question." [p 63]

41 The Trust Receipt (with a maximum tenor of 30 days) states that it is executed in consideration of the bank delivering to Shweta the bill of lading relating to the cargo "which was immediately prior to the execution [of the Trust Receipt] pledged to [the bank as security]". Under Clause 1, Shweta is to hold the documents and goods as trustee for the [bank] for the purposes only of landing, storing and to thereafter sell the goods and apply the proceeds in satisfaction of the amount owing by it to the bank. Under Clause 6, prior to any sale Shweta undertook to return the cargo and documents on demand. Under Clause 11, the bank has the liberty to exercise its rights as pledgee of the cargo. From the last two clauses, there is acknowledgment that the bank's right as pledgee did not cease to exist or extinguish with the release.

42 Under the Facility Agreement, the financing would be for cargo to be on-sold to Lanyard on documents against payment or D/P basis. It follows that the authorisation under the Trust Receipt to sell the cargo would be on the same limited footing. The trust created by each Trust Receipt would take effect when the sale proceeds are paid. Trust as a concept need not be relied upon so long as the cargo is not paid for and the bank can rely on its special interest as pledgee, which continues to exist. Trust law would come into the picture after sale when Shweta no longer has title to the cargo and the bank has no special right in the cargo. Consistent with Clause 1 of the Trust Receipt, Shweta had specially instructed BNP in the Export Bill form to offset the export proceeds (i.e. sale proceeds) against the related trust receipt.

43 In these circumstances when the original bills were surrendered for cancellation and in exchange for the switch bills, Shweta held the switch bills, albeit for a very short time, on trust for the bank and on the same terms. The switch bills were indorsed and transferred to BNP within the same day the original bills were released to Shweta. The rationale for an implied pledge, which is the furnishing of the original bills of lading indorsed in blank to the bank as security for payment to suppliers by the bank, would apply equally to the switch bills. Even though in this case the cargo was discharged into bonded shore tanks leased by Lanyard, the general property in the cargo still remained with Shweta until the documents are paid for and with it the bank's special interest as pledgee. See *Carver on Bills of Lading* (1st ed) paragraphs 6-032 and 6-033.

44 In my judgment, the delivery of the switch bills to BNP was not solely to enable it to collect payment from Lanyard's banks in India, but entitled it to have the cargo delivered to it if its debt was not satisfied. To elaborate, the switch bills of lading indorsed and delivered to BNP served two purposes. First, the bank received the switch bills to remit to the Indian banks for collection of payment against documents. It is received as a part of the process and means of on-selling the cargo to Lanyard when it remits the documents for collection on D/P basis. The bank's role is as agent to present the documents for collection. This is where the bank-customer relationship is evident. Secondly, the bills of lading also served as a means of securing the bank's advance. It is security in respect of the cargo which is subject of the bills of lading in the event that payment is not made. BNP is entitled to have the documents back if the documents are not taken up.

45 If Lanyard pays against the documents, the general property passes from Shweta to Lanyard and the special property from the bank to Lanyard. The bank as is previously instructed would utilise

the sale proceeds to setoff what it is owed under the related Trust Receipt. Shweta's Special Instructions to BNP in the Export Bill form read:

(i) Export proceeds to be offset [against] the related trust receipt

(ii) Partial payment allowed and documents are to be released only upon full payment of the bill amount."

46 In my view, and I so find that the bank never had any intention implied or otherwise to surrender its security over the switch bills of lading before payment by Lanyard. The bank had not lost any right or interest under the switch bills of lading when it forwarded them to the Indian banks for payment by Lanyard on D/P basis. This position accords with the commercial reality of the situation where the switch bills were to provide security to the bank until payment against the documents by Lanyard. The documents in my view were remitted on the basis that until payment they were to retain their character as security for the money paid out by BNP. As it turned out, the documents sent to Indian banks were never taken up and paid for.

47 Turning now to the Batam bills, Bandung's contention is that BNP had a pledge only over the "*Vincita"* bill of lading and consistently acted on the basis that its pledge was over that bill alone. There was no pledge over the Batam bills under which BNP claims in this action. Alternatively, any pledge of the Batam bill gave rise to no right of suit in contract because at the time of discharge, Shweta was the holder of the Batam bills of lading and were the party entitled to possession of the cargo.

48 BNP's contention is that the indorsement and delivery of the Batam bills was to continue the financing granted by BNP to Shweta under the "*Vincita"* bill. This is because the cargo represented by the Batam bills of lading were the same as "*Vincita"* bill. Bandung's response is that different carriers had issued the "*Vincita"* bill and Batam bills. It is argued that a pledge of the Batam bills did not automatically arise as a result of a prior pledge of the "*Vincita"* bill. The bank did not automatically become pledgee or lawful holder of the Batam bills.

49 In my view the position is this. When Shweta agreed to indorse and release the Batam bills on 5 July 2000 to BNP, Lanyard had still not paid for the cargo. The "*Vincita"* bill was still at the counter of the collecting bank as it had not been taken up. The general property in the cargo remained with Shweta. The effect of the delivery of the Batam bills of lading and indorsement in blank was to create an implied pledge of the same cargo which had previously been pledged using the "*Vicinta"* bill. Put another way, it was a re-pledge of part of the same cargo with another "key to the warehouse". It was not to change the "key", as it were, which was still in the banking channel.

50 It is possible, in principle, to deposit shipping documents issued by different carriers as security for advances. In this case, additional security was furnished. The "*Vincita"* bill was for a voyage from Rotterdam to Batam of 10,000mt of edible oil and the Batam bills was for a voyage from Batam to Kandla not of 10,000mt of edible oil, but 7,517.599mt. With the two keys at its disposal, the bank has recourse to either of the two "keys" when it came to enforce the security.

51 When BNP found out about the Batam bills, Shweta willingly indorsed and delivered them to BNP. The indorsement and delivery was pursuant to a financing arrangement and an advance of money on the security of the cargo. Counsel for Bandung relies on Shweta's letter dated 5 July 2000 in support of his contention that the release to the bank was in its role as agent remitting the documents. I disagree with Counsel. The same analysis and reasoning mentioned in the paragraphs above on switch bills apply equally to the Batam bills.

52 It is further argued by Bandung that the Batam bills were indorsed and delivered to BNP on 5 July 2000. At the time of discharge, Shweta was the lawful holder of the Batam bills and the discharge was on the instructions of Shweta. Bandung in effect delivered the cargo to Shweta or Shweta's order. Bandung's argument is premised on the bills of lading being evidence of the contracts of carriage between Shweta as shipper and Bandung. This is not so in law. Shweta was the voyage charterer and the contract of carriage between Shweta and Bandung is the respective voyage charter. In the hands of Shweta, the bill of lading is only evidence of receipt of the cargo and not evidence of the contract of carriage.

53 More importantly, the discharge was against Lanyard's letters of indemnity and not the bills in the possession of Shweta. As Lanyard had no right to take delivery, the Batam bills were not spent when the cargo was delivered to Lanyard. It cannot be said that Lanyard was in any case the person entitled to delivery. Shetwa did not hold the bills of lading on behalf of Lanyard.

(ii) Conversion

54 In order to succeed in conversion, BNP must be able to show its entitlement to possession or delivery as at the time of the conversion. What this means is that BNP must establish that on the various dates, namely 1 May 2000 and 16 June 2000, the bank was in possession of the relevant bills of lading. The Court of Appeal in *The Cherry* [2003] 1 SLR 471 affirmed this principle overruling the Judge below who held that the right to sue in conversion may be transferred to the claimant from a previous holder of that antecedent right.

55 On the evidence, as at those dates, BNP was holder of the two switch bills that were indorsed before delivery on 14 June 2000. For the rest of the other 36 bills, the cargo was discharged before the pledge was created or before BNP became holder of the bills of lading. BNP therefore can sue in conversion for only two bills, namely SIN(BTM)KAN 25 and SIN(BTM)KAN 26.

Consent to Delivery

56 An alternative defence raised by Bandung is that the bank was aware that letters of indemnity were to be used and must be taken to have agreed to this course or consented to the use of the letters of indemnity to obtain discharge. If it did, so the argument runs, it could not maintain its claim in this action. The contention is that BNP had through its Trust Receipt authorised Shweta to instruct Bandung to discharge the cargo into shore tanks in India without production of the bills of lading.

57 Counsel for Bandung submits that the bank's financing arrangement with Trust Receipt made Shweta its trustee and agent for the document of title and the cargo. The Trust Receipt gave Shweta control over the bill of lading and the cargo and, in addition, authority to land, store, sell and deliver the cargo. Shweta as the party entitled to possession of the cargo under the bill of lading by virtue of the Trust Receipt had instructed, authorised and required Bandung to discharge the cargo into bonded shore tanks without production of the bill of lading. BNP by virtue of the Trust Receipt is bound by such instructions and are, therefore, unable to sue the carrier for delivery to Lanyard.

58 Bandung further submits that BNP would have expected the cargo to be landed and stored before Shweta obtained payment from Lanyard. The Trust Receipt was for a tenor of 30 days and the Shweta financing involved shipments from Malaysia and Indonesia to India, which were relatively short voyages. It was within BNP's contemplation that Shweta would obtain a discharge of the cargo from the vessel without production of the bill of lading and then store the cargo pending payment.

59 I am not persuaded by Bandung's argument. It is plainly wrong to construe the Trust Receipt as authority to Shweta to take delivery at Kandla against letters of indemnity issued by Lanyard without production of the bills of lading. Bandung's argument is founded on a literal reading of the wording of the Trust Receipt and without regard to some salient evidence. Low said that the credit facility to Shweta was structured to revolve round bills of lading as documents of title and the bank's security in them. So, when Shweta applied to BNP to approve the use of the available credit to pay its supplier, Shweta would have to, and did, submit a duly executed Trust Receipt accompanied by a confirmed sale contract with Lanyard on D/P basis of the cargo to be financed. The financing arrangement required the bills of lading to go through BNP for D/P collection. The Trust Receipt in this case was not intended to operate in an unrestricted way. In my judgment, Shweta as trustee was only allowed to sell the cargo to Lanyard on D/P basis and without in any way affecting BNP's pledged rights. In the circumstances, there cannot arise by virtue of the Trust Receipt any consent, authority or ratification argued for.

60 In reality, the cargo arrived earlier than the bills of lading because of the duration of the voyage. That fact of and in itself, even with the knowledge of BNP, cannot give rise to any actual implied authority to Shweta to instruct the shipowner to discharge cargo without the relevant bills of lading. Low denies that BNP had authorised Shweta to land and store the cargo. It is clear from Low's evidence that the bank looked to the document of title as security and it made no sense for the bank to destroy its own security if it were to consent to release of cargo against a letter of indemnity. Amoudru reasoned that the bank would not be concerned with matters such as arrival of vessel and physical discharge of cargo as the sale transactions to Lanyard were carried out on D/P basis. Bandung submits that the discharge of the cargo for storage at Kandla would be without production of the bill of lading as the bill of lading had to remain with Shweta for the latter to present to Lanyard's bankers for payment. BNP, therefore, endorsed or ratified Shweta's act of obtaining discharge and storing the cargo in Kandla without production of the bills of lading. In my view, that statement and conclusion is specious.

61 There is no evidence that BNP was told or was aware that the cargo would be discharged to Lanyard against letters of indemnity. Shweta, on the contrary, had in connection with some earlier consignments misinformed BNP in March 2000 that the consignments were discharged by the vessel into bonded shore tanks and they could and would be released only against production of the bill of lading along with customs clearance. Low's evidence is that right up to end June 2000, she was still labouring under that impression. Detailed inquiries were initiated by BNP in early July 2000. In the course of these inquiries, Low said the bank became aware for the first time (i.e. after 6 July 2000) that the cargo was discharged against letters of indemnity.

62 Furthermore, the cargo was discharged against letters of indemnity issued by Lanyard. It was not Shweta who had landed and stored the cargo as trustee under the Trust Receipts. It was Lanyard who after filing the requisite bill of entry with customs at Kandla proceeded to land the cargo and stored it in bonded shore tanks leased by Lanyard.

63 There are other factors that militate against Bandung's argument. They are:

(a) The problem with Bandung's argument is that save for two Trust Receipts dated 14 June 2000, the cargo was discharged against letters of indemnity on 1 May 2000 and 16 June 2000 well before Trust Receipts were executed. Amongst the Trust Receipts are two undated Trust Receipts. I would imagine that as they form part of the switch bills, they would probably have come into existence at the same time as the others, which is after the discharge.

(b) Shweta's instruction on the Export Bill form for D/P collection submitted to BNP only after discharge gave the impression that the cargo might not have arrived at Kandla. The particular instruction in question read: " (ii) Payment may be deferred until arrival of carrying vessel;.."

(c) The conduct of Shweta in holding back the Batam bills without informing the bank of their existence is relevant. No consent, authorisation or ratification argued for by Bandung can be inferred in the circumstances.

64 Bandung has not on the evidence established that the instructions to discharge or release the cargo against letters of indemnity was with the consent or authority of BNP so much so that the bank cannot complain about the breach. Bandung knew that it was delivering not to a bill of lading holder but to Lanyard who had issued the letters of indemnity to it. In so doing, Bandung acted in the full knowledge that Shweta or Lanyard was in no position to produce the bills of lading at the time of discharge. Accordingly, I find Bandung to be in breach of contracts evidenced by the relevant bills of lading. I also find Bandung liable for conversion in respect of cargo shipped under bills of lading nos. SIN(BTM)KAN 25 and SIN(BTM)KAN 26.

Clause 16 of Charterparty

65 The bills provide that all conditions, liberties and exceptions of the relevant charterparty are incorporated in the conditions of carriage. Clause 16 is identical in both charterparties. Clause 16 provides:

"In the absence of original b/ls at discharge port(s), owners to release the entire cargo to receivers against charterers' LOI (Shweta or Lanyard) without bank guarantee. (LOI wording always to be in Owners' P and I Club format)."

66 Clause 16 recognises the need to present the bill of lading for Bandung to deliver the cargo. It also reflects Bandung's willingness to run the risk of being held liable for wrongful discharge of cargo should problems arise in relation to payment. The right of the holder of a bill of lading is not taken away by a provision for the vessel to discharge against a letter of indemnity even though the vessel would arrive at the discharge port ahead of the bill of lading. Tamberlin J in *The Stone Gemini* [1999] 2 Lloyd's Rep 255 considered a similar clause. He stated:

> "The letter of indemnity is designed to provide a remedy for a shipowner, where the master releases the cargo at the request of a party, in respect of claims which may be brought as a consequence of such release. It is not an authority by the holder of the bearer bill of lading for the shipowner to deliver the cargo to whoever produces a letter of indemnity." [p266]

67 Clarke J in *The Sormovskiy 3068* said:

> "The purpose of the clause was to ensure that the defendants would discharge the cargo even if the bill of lading was not available for presentation, but on terms that they would be protected by a letter of indemnity. It thus contemplated that they would be liable to the holder of the bill of lading if they delivered otherwise than in return for an original bill of lading." [p274]

68 Choo Han Teck JC (as he then was) in *The Nordic Freedom* [2001] 1 SLR 232 considered a clause similar to Clause 16 and came to the same conclusion.

69 Accordingly, Clause 16 and its incorporation in the bills of lading cannot on a proper

consideration provide a defence to wrongful discharge of the cargo against letters of indemnity.

The Result

70 For these reasons, there be judgment for BNP with costs and damages to be assessed by the Registrar.

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