IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 61

Suit No 673 of 2013

Between

Malayan Banking Berhad

… Plaintiff

And

(1) ASL Shipyard Pte Ltd
(2) PT ASL Shipyard Indonesia
(3) Bakri Navigation Company Ltd
(4) Red Sea Marine Services Ltd

… Defendants

JUDGMENT

[Personal Property] — [Charges] — [Floating]
[Tort] — [Conspiracy]
[Tort] — [Malicious prosecution]
[Equity] — [Defences] — [Equitable set-off]

Version No 1: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

THE PARTIES **2**

THE PARTIES' CASES **3**

ISSUES TO BE DETERMINED **4**

THE BACKGROUND **5**

THE DEBENTURES AND ASSIGNMENTS 5

NGV'S CONTRACTS WITH THE DEFENDANTS 6

THE IMPUGNED TRANSACTIONS 7

The Price Reduction Agreements *7*

The Agency Agreements *7*

Transfer of titles in Hulls 1117 and 1118 ..... *9*

Delivery of Hulls 1117 and 1118 ..... *10*

NGV DEFAULTS 11

THE INJUNCTION 12

PRELIMINARY ISSUES **12**

THE SCOPE OF MBB'S CLAIM 13

ADMISSIBILITY OF DEFENDANTS' DOCUMENTS 16

SEAPA Contract *16*

(1) First aspect 17

(2) Second and third aspects 22

Price Reduction Agreements *24*

Direct Payments *25*

RELEVANCE OF MALAYSIAN LAW 25

Version No 1: 27 Oct 2020 (22:41 hrs)

MBB'S INTEREST IN HULL 1118 26

MBB'S ALLEGED INTEREST IN HULL 1118 26

Fixed charge *27*

Floating charge *31*

(1) Automatic crystallisation 32

(A) Encumbrance *33*

(B) Process *42*

(2) Out of the ordinary course of business 42

(3) Written notice 48

MBB'S INTEREST AS AGAINST RED SEA'S INTEREST IN HULL 1118 49

Set-off *52*

CONSPIRACY 54

PRICE REDUCTION AGREEMENTS 57

ALTERATION OF CONTRACT PRICE FOR HULL 1118 59

DIRECT PAYMENTS 61

DELIVERY OF HULL 1118 61

SEAPA CONTRACT 62

BREACH OF THE DEBENTURE AND THE ASSIGNMENTS 63

EXTENSION OF LETTER OF CREDIT 64

CONCLUSION ON CONSPIRACY 65

THE COUNTERCLAIM 66

THE INJUNCTION 66

MALICIOUS PROSECUTION 67

CONCLUSION 69

Version No 1: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Malayan Banking Bhd
v
ASL Shipyard Pte Ltd and others

[2019] SGHC 61

High Court — Suit No 673 of 2013
Vinodh Coomaraswamy J
26–29 September; 3–4 October; 5 December 2017; 12 February; 26 March; 7, 14 and 23 May 2018

18 March 2019 Judgment reserved.

Vinodh Coomaraswamy J:

1 A bank extends credit facilities to a shipbuilder. The facilities are secured by a debenture. The debenture creates a fixed and floating charge over the whole of the shipbuilder's undertaking. The shipbuilder enters into a shipbuilding contract with a buyer to build and deliver a vessel. The shipbuilder and the buyer then enter into a series of transactions, unbeknownst to the bank. The net result of the transactions is that a third party steps into the shoes of the buyer and secures title to and possession of the vessel free of any payment to the shipbuilder.

2 Does the bank have an interest in the vessel by virtue of its fixed or floating charges? If so, is its interest superior to the third party's? And was there a conspiracy between the shipbuilder and its customers to deprive the bank of its security over the vessel? These are the three questions raised in this action.

The parties

3 The bank is Malayan Banking Bhd ("MBB"). MBB is the plaintiff in this action and is a company incorporated in Malaysia.[1]

4 The shipbuilder is NGV Tech Sdn Bhd ("NGV"). NGV too is a company incorporated in Malaysia.[2] It was wound up in 2013 in Malaysia on grounds of insolvency. NGV is not a party to this action.

5 The original buyer of the vessel is the third defendant, Bakri Navigation Company Ltd ("Bakri"). Bakri and NGV novated the benefit of the shipbuilding contract to the fourth defendant, Red Sea Marine Services Ltd ("Red Sea"), who claims to have acquired title to the vessel. Bakri and Red Sea are both companies incorporated in Saudi Arabia.[3] They are both part of the Bakri group of companies and share the same registered address.[4] Bakri owns and operates ships.[5] Red Sea manages ships.[6]

6 Although MBB commenced this action against four defendants, it now proceeds only against Bakri and Red Sea. MBB has discontinued its action against the other two defendants, who have played no part in this action. As a result, references in this judgment to "the defendants" are references to Bakri and Red Sea only.

---

1 Statement of Claim (Amendment No 4) at paragraph 1.

2 Defendants' Closing submissions at paragraph 7.

3 Statement of Claim (Amendment No 4) at paragraphs 4–5.

4 Reply and Defence to Counterclaim of the Third Defendant (Amendment No 1) at paragraph 2.

5 Defendants' Closing Submissions at paragraph 6.

6 Defendant's Closing Submissions at paragraph 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

The parties' cases

7 MBB extended credit facilities to NGV totalling over RM884m.[7] Those facilities were secured collectively by a series of six debentures which NGV executed in favour of MBB.[8] There is no suggestion that it is necessary to distinguish between the debentures in order to determine MBB's claim. I shall therefore refer to all six of the debentures collectively in the singular, *ie* as the "Debenture". It is also convenient to refer to the Debenture as having created a single fixed charge and a single floating charge. By a shipbuilding contract with NGV, Bakri commissioned Hull 1118 ("the vessel").[9] The shipbuilding contract was later novated by Bakri to Red Sea.[10]

8 MBB's case is that it has an interest in the vessel by virtue of the fixed charge or the floating charge created under the Debenture.[11] Further, MBB argues that its interest is superior to Red Sea's because Red Sea is not a *bona fide* purchaser of legal title for value without notice.[12] In the alternative, MBB argues that the defendants and NGV conspired to deprive MBB of its interest in the vessel through a series of transactions[13] entered into between 2009 and 2012. MBB was unaware of any of these transactions until it commenced this action[14] and impugns all of them as fraudulent.

---

7 Statement of Claim (Amendment No 4) at paragraph 6.

8 Plaintiff's Closing Submissions at paragraph 11.

9 Defendant's Closing Submissions at paragraph 16.

10 Defendant's Closing Submissions at paragraph 19.

11 Plaintiff's Closing Submissions at paragraph 2.

12 Plaintiff's Closing Submissions at paragraphs 118–121.

13 Plaintiff's Closing Submissions at paragraph 5.

14 Plaintiff's Reply Closing Submissions at paragraph 4.

Version No 1: 27 Oct 2020 (22:41 hrs)

9 The defendants' case is that Red Sea is indeed a *bona fide* purchaser of legal title for value without notice.[15] Red Sea's title therefore defeats any security interest which MBB might have had in the vessel. Finally, the defendants and NGV did not conspire to injure MBB as alleged or at all.[16] The defendants also bring a counterclaim against MBB in the tort of malicious prosecution and for the loss it has suffered by reason of an interlocutory injunction which MBB obtained at an early stage in this action.[17]

Issues to be determined

10 The issues to be decided in this action therefore are:

(a) Does MBB have an interest in the vessel which is superior to Red Sea's title?

(b) Did the defendants and NGV conspire to cause loss to MBB?

(c) Is MBB liable to Red Sea in the tort of malicious prosecution or for loss suffered by reason of the interlocutory injunction?

11 I now summarise the factual background before turning to an analysis of these issues.

---

15 Defence and Counterclaim (Amendment No 2) of the Fourth Defendant at paragraphs 21 and 23(a).

16 Defence and Counterclaim (Amendment No 2) of the Fourth Defendant at paragraphs 23(b)–(e) and (g).

17 Defence and Counterclaim (Amendment No 2) of the Fourth Defendant at paragraphs 27–28 and Defence and Counterclaim (Amendment No 1) of the Third Defendant at paragraphs 22–23.

Version No 1: 27 Oct 2020 (22:41 hrs)

The background

The debentures and assignments

12 As I have mentioned, NGV executed the Debenture to secure substantial credit facilities extended by MBB.[18] The Debenture contains four key provisions which are relevant to MBB's claim. First, cl 3.1(a) of the Debenture creates a fixed charge in favour of MBB and cl 3.1(b) creates the floating charge in favour of MBB.[19] I set out cl 3.1(a) at [72] and cl 3.1(b) at [83] below. Second, the Debenture provide two mechanisms by which MBB's floating charge may crystallise. First, under cl 4.2, MBB can crystallise the floating charge by notice in writing to that effect to NGV.[20] Second, under cl 4.3, the floating charge crystallises automatically if, broadly speaking, NGV encumbers in favour of a third party any property which is subject to the floating charge.[21] "Encumbrance" is further defined in cl 1.2 of the Debenture.[22] I set out cll 4.3 and 1.2 at [86] below. Third, cl 8.1 of the Debenture sets out a negative pledge by NGV. I set out cl 8.1 at [137] below. Finally, the Debenture stipulates expressly that it is governed by the laws of Malaysia.[23]

13 As additional security, NGV assigned the proceeds of its shipbuilding contracts to MBB by way of assignments executed in 2008 and 2010.[24] I shall refer to these collectively as the "Assignments".

---

18 Statement of Claim (Amendment No 4) at paragraph 7.

19 Plaintiff's Core Bundle, tab 46, pp 4–5.

20 Plaintiff's Core Bundle, tab 46, p 6.

21 Plaintiff's Core Bundle, tab 46, p 6.

22 Plaintiff's Core Bundle, tab 46, p 3.

23 Plaintiff's Core Bundle, tab 46, p 23.

24 Statement of Claim (Amendment No 4) at paragraphs 11 and 13.

Version No 1: 27 Oct 2020 (22:41 hrs)

NGV's contracts with the defendants

14 From 2006 to 2010, Bakri commissioned a number of vessels from NGV.[25] The background to this dispute involves four of those vessels: Hulls 1090, 1091, 1117 and 1118.

15 Bakri commissioned Hulls 1090 and 1091 by two shipbuilding contracts with NGV entered into in late 2006.[26] NGV was obliged to deliver the vessels by March 2008. The price for each vessel was about US$6.3m.[27]

16 Bakri commissioned Hulls 1117 and 1118 by two shipbuilding contracts with NGV entered into in August 2007.[28] NGV was obliged to deliver the vessels by July 2010 and August 2010 respectively.[29] The price for each vessel was US$6.33m.[30] The purchase price for the vessels was to be paid by an irrevocable letter of credit. Operating the letter of credit required NGV to present, *inter alia*, a statement from MBB confirming that it no longer had any security interest in the vessel in question:[31]

> [the letter of credit] has not been assigned or transferred or novated to any other party or Bank and that [MBB] fully agrees with the delivery of [Hulls 1117 and 1118] to [Bakri] and that [Hulls 1117 and 1118] … are not in any way or form charged or mortgaged to [MBB] and that [MBB] has no encumbrances or interest or liens in or against [Hulls 1117 and 1118] as of the date of Deliver[y].

---

25 Defendants' Closing Submissions at paragraph 15.

26 AEIC of Michael Smith at p 304, s/n 14 and 15.

27 AEIC of Michael Smith at p 304, s/n 14 and 15.

28 AEIC of Michael Smith at p 304, s/n 19 and 20; Defendants' Closing Submissions at paragraph 16.

29 Defendants' Closing Submissions at paragraph 22.

30 Defendants' Closing Submissions at paragraph 16.

31 Plaintiff's Core Bundle, tab 9 at p 36, cl p.

Version No 1: 27 Oct 2020 (22:41 hrs)

17 In late 2007, Bakri novated the shipbuilding contracts for both Hulls 1117 and 1118 to Red Sea.[32]

The impugned transactions

18 I now summarise the transactions which MBB impugns in this action, and by reason of which Red Sea claims to be a *bona fide* purchaser of legal title in the vessels for value without notice.

The Price Reduction Agreements

19 In April 2009, NGV and Red Sea entered into an agreement to reduce the contract price of Hulls 1117 and 1118 by US$1.5m each.[33] The reduction was said to be "full and final compensation" to Bakri for losses which it had allegedly incurred due to NGV's alleged delay in delivering Hulls 1090 and 1091. I shall refer to these agreements as "the Price Reduction Agreements".

20 Although the price of Hulls 1117 and 1118 were each reduced by US$1.5m each in April 2009, Red Sea continued from 2009 until 2012 to procure extensions of the letter of credit for Hulls 1117 and 1118 at the full contract price of US$6.33m.[34]

---

32 Defendants' Closing Submissions at paragraph 19.

33 Plaintiff's Core Bundle, tabs 22–23.

34 Plaintiff's Bundle of AEICs, vol 3, pp 1879–1880.

Version No 1: 27 Oct 2020 (22:41 hrs)

The Agency Agreements

21 Since 2005, the defendants had used a company known as Quoin Island Marine WLL ("QIM") as a consultant and broker.[35] In January 2011, NGV entered into two agency agreements with QIM. These agreements appointed QIM as NGV's agent and allowed QIM to take over from NGV full and exclusive control of the construction of the two vessels in order to complete them. Under the Agency Agreements, QIM was to:[36]

> act as the agent of [NGV] … to the exclusion of [NGV] and all other persons to direct and instruct the SUBCONTRACTORS and or EQUIPMENT SUPPLIERS … as regards the implementation of their duties and obligations … in respect of the construction and completion of [Hulls 1117 and 1118].

I shall refer to these agreements as "the Agency Agreements".

22 In May 2011, NGV and QIM executed an addendum to the Agency Agreements.[37] The effect of the addendum was to empower QIM as NGV's attorney to deliver title and possession of the two vessels:

> a. to negotiate and agree any terms in relation to the delivery of possession and control over [Hulls 1117 and 1118] to [Red Sea] …
>
> b. to negotiate, agree on behalf of [NGV] with the VENDORS any and all issues arising out of the delivery contemplated by the [Agency Agreements] and all outstanding claims in respect of … the construction and completion of [Hulls 1117 and 1118]
>
> …
>
> d. to sign, seal, execute and deliver for and on behalf and in the name of [NGV] and any all other documents whatsoever including, but not limited to the original legal Builders'

---

35 Certified Transcript, 28 September 2017, at p 115, lines 13–18 and Plaintiff's Closing Submissions at paragraph 70.3.

36 Plaintiff's Core Bundle, tab 61, p 1 and tab 62, p 1.

37 Plaintiff's Core Bundle, tab 76.

Version No 1: 27 Oct 2020 (22:41 hrs)

> Certificate, Undertaking and Declaration of Warranty, Commercial Invoice, Protocol of Transfer of Risk, Protocol of Delivery and Acceptance and to take all measures … as [QIM] may in his absolute discretion think fit in connection with the above …

23 NGV then signed a number of documents acknowledging that it owed Red Sea over US$16.8m for the completion of both Hulls 1117 and 1118.[38] Red Sea had allegedly paid these sums directly to NGV's subcontractors in order for them to continue construction of the two vessels and complete them. I shall refer to these sums collectively as the "Direct Payments".

24 NGV agreed to set off its debt to Red Sea arising from the Direct Payments against the purchase prices of Hulls 1117 and 1118. The effect of the Direct Payments was that Red Sea became entitled to take delivery of the two vessels without any payment. Indeed, the effect of the set-off was that NGV continued to owe Red Sea a substantial sum of money even after it had taken delivery of the two vessels without payment. But Red Sea does not appear to be pursuing this debt, at least not in this action.

Transfer of titles in Hulls 1117 and 1118

25 In May 2011, NGV and Red Sea executed two Completion Contracts for Hulls 1117 and 1118.[39]

26 The Completion Contracts transferred title to and possession of Hulls 1117 and 1118 to Red Sea while providing that the risk in the two vessels remained with NGV.[40] Further, under the Completion Contracts, NGV agreed to pay Red Sea liquidated damages for the late delivery of Hulls 1117 and 1118.

---

38 Plaintiff's Bundle of AEICs, vol 3, pp 1683–1684.

39 Statement of Claim (Amendment No 4) at paragraph 52.

40 Statement of Claim (Amendment No 4) at paragraph 53.

Version No 1: 27 Oct 2020 (22:41 hrs)

Having acquired title to Hulls 1117 and 1118 through the Completion Contracts, Red Sea registered the vessels in its name at the ship registry of Saint Vincent and the Grenadines on the same day.[41]

27 Both vessels were then still under construction.

Delivery of Hulls 1117 and 1118

28 In July 2012, NGV informed Red Sea that it was unable to complete construction of the two vessels. Soon after, NGV transferred the partly-completed vessels, with Red Sea's consent but unbeknownst to MBB,[42] to ASL Shipyard Pte Ltd and PT ASL Shipyard Indonesia to complete the vessels.[43]

29 After Hulls 1117 and 1118 were completed, in May 2013, Red Sea de-registered them at the ship registry of Saint Vincent and the Grenadines and re-registered them in the ship registry of Saudi Arabia.[44] Hull 1117 was then delivered to Red Sea in Jeddah, Saudi Arabia, while Hull 1118 was delivered to the Saudi Arabia Ports Authority ("SEAPA") in Yanbu, Saudi Arabia.[45]

NGV defaults

30 In early 2011, NGV began to experience difficulty in servicing the credit facilities granted by MBB.[46] With MBB's consent, NGV appointed Ernst &

---

41 Statement of Claim (Amendment No 4) at paragraph 50(f).

42 AEIC of Michael Smith at paragraph 75 and AEIC of Leow Boon Lai at paragraphs 122–123.

43 Defendants' Closing Submissions at paragraphs 32 and 33.

44 AEIC of Michael Smith at paragraph 76 and Defendants' Reply Closing Submissions at paragraph 46.

45 AEIC of Michael Smith at paragraph 76 and pp 702–703 and Defendants' Closing Submissions at paragraphs 44. See also Plaintiff's Closing Submissions at paragraph 82.

Version No 1: 27 Oct 2020 (22:41 hrs)

Young as its monitoring accountants in July 2011.[47] As monitoring accountants, Ernst & Young's role was to assist NGV in assessing the additional facilities it required to complete Hulls 1117 and 1118.[48]

31 In due course, MBB agreed to grant a term loan of RM7.5m to NGV to finance the completion of Hulls 1117 and 1118.[49] However, NGV was unable to fulfil MBB's conditions precedent and was unable to draw down the loan.

32 NGV ultimately defaulted on the credit facilities granted by MBB.[50] As at February 2013, NGV owed MBB in excess of RM698m.[51] In March 2013, MBB served two notices in writing on NGV pursuant to cl 4.2 of the Debenture crystallising its floating charge.[52] Later that month, MBB terminated the credit facilities.[53]

33 In April 2013, under the terms of the Debenture, Ernst & Young was appointed as NGV's receivers and managers.[54] In May 2013, on the application of a creditor unrelated to MBB and to this dispute, NGV was ordered to be wound up in Malaysia.[55]

---

46 Certified Transcript dated 26 September 2017, at p 63, lines 8–18.

47 Statement of Claim (Amendment No 4) at paragraph 15.

48 Statement of Claim (Amendment No 4) at paragraphs 15 and 29.

49 Statement of Claim (Amendment No 4) at paragraph 30.

50 Statement of Claim (Amendment No 4) at paragraph 17.

51 Defendants' Closing Submissions at paragraph 10.

52 Statement of Claim (Amendment No 4) at paragraphs 18–19.

53 Statement of Claim (Amendment No 4) at paragraph 21.

54 Statement of Claim (Amendment No 4) at paragraph 22.

55 Statement of Claim (Amendment No 4) at paragraph 23.

Version No 1: 27 Oct 2020 (22:41 hrs)

The injunction

34 MBB commenced this action in July 2013. At the same time, MBB applied *ex parte* for an injunction to restrain the defendants from dealing with Hull 1118.[56] I granted the injunction subject to a proviso that it would be discharged if Red Sea tendered to MBB a banker's guarantee for US$750,000 issued by a bank in Singapore (the "Injunction").[57] MBB gave the usual undertaking to comply with any order the court might make as to damages if it were later were to find that the Injunction had caused loss to Red Sea, and were to decide that Red Sea should be compensated for that loss.[58]

35 Red Sea duly furnished a banker's guarantee.[59] The Injunction was thus discharged. MBB's undertaking, of course, continued to bind it in respect of any loss which Red Sea might have suffered while it was in place.

Preliminary issues

36 Before I turn to the three issues which I have to decide (see [10] above), I address three preliminary issues. The first is an issue raised by the defendants on the scope of MBB's pleaded claim. The second is an evidential issue raised by MBB on the admissibility of certain documents relied on by the defendants and certain evidence-in-chief from the defendant's witnesses. The third is to do with the application of Malaysian law in this action.

---

56 SUM 3886/2013.

57 Certified Transcript for SUM 3886/2013 dated 30 July 2013 at p 5.

58 Certified Transcript for SUM 3886/2013 dated 30 July 2013 at p 6.

59 Statement of Claim (Amendment No 4) at paragraph 49.

Version No 1: 27 Oct 2020 (22:41 hrs)

The scope of MBB's claim

37 The first preliminary issue is the defendants' contention that MBB's claim as pleaded is limited to Hull 1118 and does not extend to Hull 1117.[60] In other words, the defendants contend that MBB' pleadings confine its claim in this action to an interest *only* in Hull 1118 and a claim in tort that the defendants and NGV conspired to deprive MBB of its interest *only* in Hull 1118. MBB responds by contending that its pleadings are sufficient to claim an interest in *both* vessels and are sufficient to seek damages against the defendants in tort for having conspired with NGV to deprive MBB of its interest in *both* vessels.[61]

38 I accept the defendants' argument. MBB's pleadings make no claim in this action in respect of Hull 1117. Although MBB does refer to Hull 1117 in its pleadings, those references when read in context serve only as background for its claim in respect of Hull 1118. Thus, paragraph 63 of MBB's statement of claim asserts that Hull 1117 is no longer traceable and confines it claim to Hull 1118:[62]

> 63. [MBB] is unaware of the whereabouts of Hull No. 1117. *[MBB's] claim herein is in respect of its charge on Hull No. 1118*, pursuant to which [MBB] restrained the release of Hull No. 1118. [emphasis added]

So too, the prayer in MBB's statement of claim seeks relief in respect only of Hull 1118, either pursuant to an interest as chargee or arising from a conspiracy:[63]

> **WHEREFORE**, [MBB] claims:-

---

60 Defendants' Closing Submissions at paragraph 69.

61 Plaintiff's Reply Closing Submissions at paragraph 16.

62 Statement of Claim (Amendment No 4) at paragraph 63.

63 Statement of Claim (Amendment No 4) at pp 24–26.

Version No 1: 27 Oct 2020 (22:41 hrs)

> In respect of its claim as a chargee of *Hull No. 1118*, [MBB] claims …
>
> In respect of its claim that [Bakri] and/or [Red Sea] conspired with NGV to deprive [MBB] of its interest in [*Hull 1118*] … [MBB] claims …
>
> [emphasis added]

39 Further, MBB confirmed that this was its position in an exchange with counsel for the defendants at a pre-trial conference in August 2017. On that occasion, counsel for the defendants asserted expressly that this action relates only to Hull 1118." Counsel for MBB confirmed this, saying:[64]

> [i]t is correct that *we are dealing with only Hull 1118*. But there is mention of four hulls to show a system to show how [Bakri] and [Red Sea] have been dealing with these vessels. For that purpose, reference has been made to how they have been dealing with all the vessels … [emphasis added]

40 It is a rule of pleading that a plaintiff must state specifically in its statement of claim the relief or remedy which it seeks: O 18 r 15 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"). This rule ensures that a defendant has reasonable advance notice of the case which it has to meet at trial: *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382 at [22]. See also *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [2].

41 Having said that, I recognise that the rules of procedure are not an end in themselves. They are merely a means to the end of attaining a fair resolution of the parties' dispute. The courts are thus not required to adopt an overly formalistic and inflexibly rule-bound approach to procedure, and in particular to pleadings. The courts may thus allow an unpleaded point to be raised if no

---

64 Certified Transcript dated 21 August 2017 at p 5.

Version No 1: 27 Oct 2020 (22:41 hrs)

prejudice is caused to the other party: *Sun Electric Pte Ltd and another v Menrva Solutions Pte Ltd and another* [2018] SGHC 264 at [32] and *V Nithia* at [40].

42 In the present case, however, it appears to me to be obvious that the defendants will be prejudiced if MBB's claim were now to be taken to extend to Hull 1117. MBB's pleadings assert a claim only in respect of Hull 1118. Hull 1117 is referred to in the pleadings merely as background. MBB through counsel confirmed this at a pre-trial conference. The defendants have, quite reasonably, taken all of that at face value in preparing for trial. They have thus conducted their entire defence on the basis that MBB's claim is confined to Hull 1118.[65]

43 The end of trial is too late an occasion for MBB to attempt to resile from this position. To allow MBB to do so would amount to depriving the defendants of all opportunity to rebut MBB's case on Hull 1117 and would cause them real prejudice: see *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [160].

44 Any claim which MBB might have in respect of Hull 1117 is not before me in this action and cannot now be put before me in this action. I therefore analyse and consider in this judgment only MBB's claim in respect of Hull 1118.

Admissibility of defendants' documents

45 The second preliminary point I deal with is a matter of evidence. MBB argues that certain evidence relied on by the defendants is inadmissible. The evidence relates to three issues in this action: (i) evidence of a contract said to

---

65 Defendants' Opening Statement at paragraph 1, Defendants' Closing Submissions at paragraph 69.

Version No 1: 27 Oct 2020 (22:41 hrs)

be between Red Sea and SEAPA for the onward sale of Hulls 1117 and 1118 to SEAPA ("SEAPA Contract"); (ii) whether Red Sea was entitled to claim the liquidated damages from NGV which were alleged to form the basis of the Price Reduction Agreements; and (iii) whether Red Sea actually made the Direct Payments to NGV's subcontractors.

46 I address these objections in turn, starting with the admissibility of the SEAPA Contract.

SEAPA Contract

47 The SEAPA Contract is relevant to the matters in question in this action because the defendants rely on it as evidence that the impugned transactions were in fact genuine transactions and not the result of any conspiracy. The defendants' case is that, when it became likely that NGV may not perform its contractual obligation to build and deliver Hulls 1117 and 1118 on time, Red Sea took legitimate steps to protect its position under the SEAPA Contract by entering into the impugned transactions (see [18] – [29] above).[66]

48 MBB characterises its objection to the SEAPA Contract as being an objection to the contract being admitted as evidence of the truth of its contents.[67] A close reading of MBB's submissions shows that MBB in fact objects to three separate aspects of the defendants' evidence in relation to the SEAPA Contract: (i) the defendants' failure to prove the SEAPA contract by primary evidence;[68] (ii) the admissibility of the evidence-in-chief of the defendants' witnesses that Red Sea and SEAPA in fact entered into the SEAPA Contract;[69] and (iii) the

66 Plaintiff's Closing Submissions at paragraph 89.

67 Plaintiff's Closing Submissions at paragraph 98.

68 Plaintiff's Closing Submissions at paragraph 91.

69 Plaintiff's Closing Submissions at paragraph 92.

Version No 1: 27 Oct 2020 (22:41 hrs)

evidence-in-chief of the defendants' witnesses that the impugned transactions were genuine transactions which Red Sea entered into in order to protect its position under the SEAPA Contract.[70]

(1) First aspect

49 On the first aspect, MBB points out that it challenged the authenticity of the SEAPA Contract as required by the Rules from the time the defendants disclosed it in discovery.[71] Despite this, the defendants chose not to prove the contract at trial by primary evidence, *ie* by producing the original SEAPA Contract to the court, as required by the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). The defendants have produced only what they claim to be a copy of the contract.[72]

50 The EA mandates that documentary evidence be proved by primary evidence save in certain exceptions specified in s 67:

> **Proof of contents of documents**
>
> **63.** The contents of documents may be proved by primary or secondary evidence.
>
> **Primary evidence**
>
> **64.** Primary evidence means the document itself produced for the inspection of the court.
>
> …
>
> **Secondary evidence**
>
> **65.** Secondary evidence means and includes —
>
> …
>
> (*b*) … copies made from the original by electronic, electrochemical, chemical, magnetic,

70 Plaintiff's Closing Submissions at paragraph 98.

71 Plaintiff's Closing Submissions at paragraphs 90 and 91.

72 Plaintiff's Closing Submissions at paragraph 91.

Version No 1: 27 Oct 2020 (22:41 hrs)

> mechanical, optical, telematic or other technical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;
>
> **Proof of documents by primary evidence**
>
> **66.** Documents must be proved by primary evidence except in the cases mentioned in section 67.

Sections 63 to 67 of the EA are the statutory embodiment of the common law rule of evidence known as the "best evidence" rule.

51 On the second and third aspects of this objection (see [48] above), MBB argues that the evidence-in-chief of the defendants' witnesses on both these issues is inadmissible hearsay. By that, MBB means that the defendants' witnesses have no personal knowledge of the facts of which they purport to give evidence and cannot therefore give direct evidence of those facts as defined and mandated in s 62 of the EA.[73] Insofar as it relates to evidence of fact, s 62 of the EA mandates proof by direct evidence in the following terms:

> **Oral evidence must be direct**
>
> **62.**—(1) Oral evidence must in all cases whatever be direct —
>
> (*a*) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;
>
> (*b*) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;
>
> (*c*) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;
>
> …

[73] Plaintiff's Closing Submissions at paragraph 98.

Version No 1: 27 Oct 2020 (22:41 hrs)

MBB points out, further, that the defendants have failed to give notice to MBB of any intention to rely on any exception to the direct evidence rule in s 62 of the EA, *eg*, under s 32(4)(*b*) of the EA read with O 38 r 4 of the Rules.[74]

52 I accept MBB's argument that the defendants have failed to prove the SEAPA Contract in accordance with the EA. It is not disputed that the defendants have not proven the SEAPA Contract by the best evidence of the contract, *ie*, by primary evidence of it within the meaning of s 64 of the EA. This failure is especially notable given that MBB expressly challenged the authenticity of the SEAPA Contract.[75] Further, the defendants have failed to bring themselves within any of the statutory exceptions to the best evidence rule set out in s 67 of the EA which could have permitted them to prove the contract by secondary evidence within the meaning of s 65 of the EA and as permitted by s 67 of the EA. It is not for MBB to prove that none of the exceptions under s 67 of the EA are applicable. Under s 106 of the EA, the burden of proving that secondary evidence of the SEAPA Contract is admissible under s 67 of the EA falls on the defendants. The defendants have wholly failed to discharge its burden.

53 The most relevant exception to s 66 of the EA is that found in s 67(1)(*c*) of the EA. That exception permits a party to prove a document by secondary evidence where "the party offering the evidence of its contents cannot for any … reason not arising from his own default or neglect produce it in reasonable time". But it appears difficult to see in what way the defendants were unable to produce the original SEAPA Contract for the court at trial "in reasonable time", given that they were aware more than three years[76] before trial that MBB

74 Plaintiff's Closing Submissions at paragraph 99.

75 Plaintiff's Closing Submissions at paragraph 91.

76 Plaintiff's Closing Submissions at paragraph 91.

Version No 1: 27 Oct 2020 (22:41 hrs)

challenged the authenticity of the copy of the SEAPA Contract produced in discovery and required the defendants to prove the SEAPA Contract at trial strictly in accordance with the EA.

54 Red Sea submits that the SEAPA Contract falls within s 32(1)(*b*) of the EA,[77] and thereby seeks to rely on s 67A of the EA[78] to prove the contract without producing primary evidence of it. Section 67A was introduced into the Evidence Act by amendment in 2012 and creates an exception to the requirement that documentary evidence be proved by primary or secondary evidence as mandated by s 63 of the EA. It enables documentary evidence which is rendered admissible under s 32(1) of the EA to be proven in accordance with s 67A of the EA rather than in accordance with s 63 of the EA.

55 I reject Red Sea's submission. Red Sea's argument assumes that the SEAPA Contract is or contains "a statement of relevant fact made by a person" within the meaning of s 32(1) of the EA. I do not consider that to be the case. The SEAPA Contract, if genuine, is a document which embodies an agreement between Red Sea and SEAPA. The document itself, by reason of the parties' signifying their bilateral assent to it in it, gives rise to the parties' agreement. Insofar as Red Sea seeks to rely on it, the SEAPA Contract is a bilateral performative act. Red Sea does not seek to admit it because it contains "statements of relevant facts made by a person … in the ordinary course of a trade, business, profession or other occupation" (s 32(1)(*b*) of the EA). The SEAPA Contract is therefore outside the scope of s 32(1) of the EA entirely.

56 Further, even if I assume in Red Sea's favour that the SEAPA Contract comes within s 32(1) of the EA, that is not enough in itself to render a statement

---

77 Defendants' Closing Submissions, paragraph 318.4 on page 154.

78 Defendants' Closing Submissions, paragraph 319 on page 155.

Version No 1: 27 Oct 2020 (22:41 hrs)

of relevant fact admissible. For the statement to be admissible in civil litigation, the party seeking to rely on it must also comply with the notice requirements under s 32(4)(*b*) of the EA read with O 38 r 4 of the Rules. If those notice requirements are not complied with, the statement remains inadmissible even if the conditions of s 32(1) of the EA are satisfied. In this case, Red Sea failed to comply with the notice requirements of s 32(4)(*b*) of the EA. The SEAPA Contract remains inadmissible despite satisfying the requirements of s 32(1)(*b*) of the EA. Section 67A of the EA cannot assist Red Sea to prove the SEAPA Contract.

57 Finally, even if s 67A of the EA does apply, it does not mean that a document constituting or containing the statement of relevant fact can be proven otherwise than by primary evidence, *ie*, simply by producing a copy of it. Section 67A of the EA requires the "copy of that document, or of the material part of it, authenticated in a manner approved by the court". The copy of the SEAPA Contract which Red Sea produced at trial is not authenticated in any manner, whether by the evidence-in-chief of its witnesses (see [58]–[63] below) or otherwise, and is certainly not authenticated in a manner approved by the court.

(2) Second and third aspects

58 I also accept MBB's argument that the evidence-in-chief of the defendants' witnesses on the following two issues is inadmissible by reason of s 62 of the EA: (i) that Red Sea and SEAPA actually entered into the SEAPA Contract;[79] and (ii) that Red Sea's exposure to SEAPA under the SEAPA Contract made it necessary for Red Sea to protect its position as against SEAPA by entering into the impugned transactions.[80]

---

79 Plaintiff's Closing Submissions at paragraph 92.

Version No 1: 27 Oct 2020 (22:41 hrs)

59 Both of the defendants' witnesses[81] admitted in cross-examination that they have no personal knowledge that Red Sea entered into the SEAPA Contract or of the post-contractual communications between Red Sea and SEAPA which allegedly made it necessary for the defendants to protect their position as against SEAPA by entering into the impugned transactions. By their own admission, their evidence on this issue is not direct evidence within the meaning of s 62 of the EA.

60 The defendants argue that MBB failed to raise this objection when affidavits of evidence-in-chief were exchanged and is therefore barred from raising this objection in its closing submissions after trial.[82] It is true that MBB did not object to this disputed evidence in its notice of objections to the defendants' affidavits of evidence-in-chief.[83] But MBB's failure to object to admissibility at that time does not bar MBB from objecting to admissibility at this time. And it certainly does not bar the court from now considering whether the disputed evidence is in fact admissible. This is because the provisions of the EA are mandatory. A failure to raise a timely objection to inadmissible evidence does not make the evidence admissible: *Keimfarben GmbH & Co KG v Soo Nam Yuen* [2004] 3 SLR(R) 534 at [17] and *Teknikal Dan Kejuruteraan Pte Ltd v Resources Development Corporation (Pte) Ltd* [1992] SGHC 321.

61 The defendants rely on *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265 ("*Nagase*") in support of their submission. That case is of no assistance, because it is not a case on the admissibility of evidence. The plaintiff in *Nagase* argued in its closing submissions for the first time that

---

80 Plaintiff's Closing Submissions at paragraph 98.

81 Certified Transcript dated 3 October 2017 at p 6, line 17 to p 8, line 10.

82 Defendants' Reply Closing Submissions at paragraph 22.

83 Annexures to Defendants' Reply Closing Submissions at annex 15.

Version No 1: 27 Oct 2020 (22:41 hrs)

the defendants were precluded from raising positive defences to the plaintiff's claim because the defendants' only pleaded defence was a series of "bare denials". But, as the court noted, "the plaintiff failed to raise any objections on the 'bare denials' point in respect of any affidavits in its objections to contents of affidavits of evidence-in-chief". The court thus held that:

> even though the bare denials would have otherwise prevented [the defendants] from raising certain defences, it is too late in the day for the plaintiff to raise any objections to the contents of the defendants' affidavits and consequently, any arguments premised thereon.

Notably, the court accepted the principle that "inadmissible evidence does not become admissible simply by reason of a party's failure to object", but acknowledged expressly that that principle was not the governing principle in that case (*Nagase* at [175]–[177]).

62 The governing principle in *Nagase* was not admissibility but *relevance*. The question which the court considered was whether a defendant may adduce evidence which is not relevant to any of its defences as pleaded and whether a plaintiff loses the right to object to irrelevant evidence if it fails to do so at the earliest opportunity (see *Nagase* at [175]). *Nagase* was therefore not a case which considered whether a plaintiff loses the right to object to evidence which is *inadmissible* under the EA.

63 The gist of MBB's complaint is not that the defendants' witnesses' evidence is irrelevant to the issues raised by the defendants' pleadings. The gist of MBB's complaint is that the defendants' witnesses' evidence on these two issues is inadmissible under the EA. The decision in *Nagase* is not to the point. The answer is that the disputed evidence is inadmissible under the EA, and has not been rendered admissible merely because MBB failed to object to it earlier.

Version No 1: 27 Oct 2020 (22:41 hrs)

Price Reduction Agreements

64 MBB also objects to the admissibility of evidence-in-chief from Mr Abdul Majeed Khan ("Mr Khan"), a witness for the defendants, dealing with the price reduction which NGV agreed with Red Sea for the price of Hulls 1117 and 1118. The objection is that Mr Khan does not have personal knowledge of the facts underlying the price reductions, *ie*, that NGV had an accrued liability to the defendants for liquidated damages under the shipbuilding contracts for the Hulls 1090 and 1091.[84]

65 I agree that Mr Khan's evidence on the facts underlying the price reductions is inadmissible. In cross-examination, Mr Khan admitted that he had no personal knowledge of the facts said to underlie the price reduction.[85] His evidence is therefore not direct evidence of those facts within the meaning of s 62 of the EA. The defendants do not seek to admit his evidence on this issue under any exception to the requirement of direct evidence under s 62.

Direct Payments

66 MBB objects to the admissibility of certain parts of the defendants' witnesses' evidence-in-chief which deals with the Direct Payments.[86] The objection, once again, is that the defendants' witnesses have no personal knowledge that Red Sea in fact incurred the Direct Payments and therefore cannot give direct evidence on that issue within the meaning of s 62 of the EA.

67 I accept MBB's submission that the defendants' witnesses' evidence of the Direct Payments is inadmissible. Both of the defendants' witnesses[87]

---

84 Plaintiff's Closing Submissions at paragraph 102.

85 Certified Transcript dated 3 October 2017, at p 9, line 2 to p 11, line 2.

86 Plaintiff's Closing Submissions at paragraph 108.1 and 108.3.

Version No 1: 27 Oct 2020 (22:41 hrs)

admitted in cross-examination that they have no personal knowledge of the truth of the evidence they have given on this issue. Their evidence on this issue is thus not direct evidence within the meaning of s 62 of the EA and is inadmissible.

Relevance of Malaysian law

68 The third preliminary issue is the relevance of Malaysian law. The Debenture is expressly governed by Malaysian law.[88] MBB does not, however, allege in its pleadings that Malaysian law differs from Singapore law in relation to the issues in this action which arise under the Debenture.

69 MBB initially sought to adduce expert evidence of Malaysian law on these issues. At my suggestion, the parties instead agreed to proceed on the basis that this court may refer to cases from both Singapore and Malaysia, as well as from other commonwealth jurisdictions, in order to determine the questions of Malaysian law which arise in connection with the Debenture.[89] No expert evidence on Malaysian law was therefore required or adduced.

MBB's interest in Hull 1118

70 I now turn to consider whether MBB has an interest in Hull 1118 which is superior to Red Sea's interest. This issue resolves into two sub-issues:

(a) Does MBB have an interest in Hull 1118?

(b) If so, is that interest superior to Red Sea's?

---

87 AEIC of Michael Smith at paragraphs 48 and 52; Certified Transcript dated 3 October 2017, at p 22, line 21 to p 25, line 10.

88 Plaintiff's Core Bundle, tab 46, p 23.

89 Certified Transcript dated 21 August 2017 at pp 6–8.

Version No 1: 27 Oct 2020 (22:41 hrs)

MBB's alleged interest in Hull 1118

71 MBB claims an interest in Hull 1118 on two bases: (i) by virtue of the fixed charge created under the Debenture;[90] and (ii) by virtue of the floating charge created under the Debenture.[91] I consider these in turn.

Fixed charge

72 MBB contends that cl 3.1(a)(ii) of the Debenture created a fixed charge in its favour over Hull 1118.[92] Clause 3.1(a) of the Debenture provides as follows:[93]

> 3.1 Fixed and Floating Charges
>
> … [NGV] as beneficial owner hereby charges to MBB and so that the charge hereby created shall be a continuing security:-
>
> (a) by way of a first fixed charge:-
>
> (i) all the freehold or leasehold property of [NGV] both present and future including all buildings all fixtures (including trade fixtures) from time to time on any such property all liens charges option agreements rights and interest over the land both present and future and all plant, machinery, motor vehicles, computers and other equipment of [NGV] both present and future and the full benefit of all warranties and maintenance contracts for any of the same but excluding stock in trade of [NGV];
>
> (ii) all stocks shares bonds and securities of any kind whatsoever whether marketable or otherwise and all other interests including but not limited to loan capital of [NGV] both present or future in any company firm consortium or entity wheresoever situate including all allotments accretions offers rights benefits and advantages whatsoever at any time accruing offered or arising in respect of the same whether by way of

90 Plaintiff's Closing Submissions at paragraph 175.

91 Plaintiff's Closing Submissions at paragraph 179.

92 Plaintiff's Closing Submissions at paragraph 175.

93 Plaintiff's Core Bundle, tab 46, pp 4–5.

Version No 1: 27 Oct 2020 (22:41 hrs)

> conversion redemption bonus preference option dividend interest or otherwise;
>
> (iii) the uncalled capital and all patents patent application inventions trade marks trade names registered design copyrights know how and other intellectual property right and all license and ancillary rights and benefits including all royalties fees and other income deriving from the same both present and future of [NGV];
>
> (iv) all the goodwill and connection of all businesses for the time being carried on by or on behalf of [NGV] for the time being owned or held by [NGV] …

MBB argues that the phrase "securities of any kind whatsoever whether marketable or otherwise and all other interests including but not limited to …" in cl 3.1(a)(ii) was deliberately framed wide enough to include Hull 1118.[94]

73 I do not accept this submission.

74 In interpreting a contract, the task of the court is to ascertain the objective intention of the parties at the time they entered into the contract, paying close attention to both text and context: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Soup Restaurant*") at [32] and [35]. Text and context are of equal importance and often interact with each other. Despite that, the text is the first port of call: *Soup Restaurant* at [32].

75 The text of cl 3.1(a)(ii), the context of cl 3.1(a)(ii) and the commercial character of a fixed charge all lead me to conclude that the Debenture did not create a fixed charge over Hull 1118.

76 I begin with the text of cl 3.1(a)(ii). The phrase "securities of any kind whatsoever whether marketable or otherwise and all other interests including

[94] Plaintiff's Closing Submissions at paragraph 176.

Version No 1: 27 Oct 2020 (22:41 hrs)

but not limited to …" in cl 3.1(a)(ii) must be read *ejusdem generis* with the other parts of cl 3.1(a)(ii): see, *eg*, *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2013] 3 SLR 1017 at [33]. This is underscored by the fact that the parties to the Debenture organised the sub-clauses in cl 3.1(a) by the type of interests over which MBB was to have a fixed charge. Clause 3.1(a)(i) created a fixed charge over NGV's land and chattels, cl 3.1(a)(ii) over NGV's interests in other companies, cl 3.1(a)(iii) over NGV's intellectual property, and cl 3.1(a)(iv) over NGV's goodwill. The further sub-categories within each sub-clause of cl 3.1(a) must thus be read *ejusdem generis*, as coming within each of the four broader categories into which the parties divided cl 3.1(a).

77 Reading "securities of any kind whatsoever whether marketable or otherwise and all other interests including but not limited to …" *ejusdem generis* with the other parts of cl 3.1(a)(ii), the references to "securities" and "all other interests" must refer to interests in the debt or equity of other companies. This is because the other sub-categories in cl 3.1(a)(ii) – such as stocks, shares, bonds and loan capital – all relate exclusively to interests in the debt or equity of other companies. NGV's interest in Hull 1118 is not an interest in the debt or equity of another company. Clause 3.1(a)(ii) thus did not create a fixed charge over NGV's interest in Hull 1118.

Version No 1: 27 Oct 2020 (22:41 hrs)

78 I now turn to the context. The context within the Debenture demonstrates that NGV and MBB recognised that it made no commercial sense to create a fixed charge over NGV's stock in trade. This is evident from their decision to use specific language to exempt stock in trade from the fixed charge created under the Debenture. Clause 3.1(a)(i) provides:

> 3.1 Fixed and Floating Charges
>
> … [NGV] as beneficial owner hereby charges to MBB and so that the charge hereby created shall be a continuing security:-
>
> (a) by way of a first fixed charge:-
>
> (i) … all plant, machinery, motor vehicles, computers and other equipment of [NGV] both present and future … but *excluding stock in trade of [NGV]* …
>
> [emphasis added]

The term "stock in trade" refers to assets which a business trades for profit: *Yarmouth v France* (1887) 19 QBD 647 at 658. As a shipbuilder, NGV's stock in trade includes its vessels under construction and even after completion, up to and including delivery. Under cl 3.1(a)(i), vessels were excluded from the scope of MBB's fixed charge.

79 This interpretation is entirely consistent with the commercial character of a fixed charge. Under a fixed charge:

> the assets charged as security are permanently appropriated to the payment of the sum charged, in such a way as to give the chargee a proprietary interest in the assets. So long as the charge remains unredeemed, the assets can be released from the charge only with the active concurrence of the chargee …

(*Jurong Data Centre Development Pte Ltd (provisional liquidator appointed) (receivers and managers appointed) v M+W Singapore Pte Ltd and others* [2011] 3 SLR 337 at [73] citing *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 at [138]).

Version No 1: 27 Oct 2020 (22:41 hrs)

80 It cannot have been the commercial objective of MBB and NGV in entering into the Debenture to create a fixed charge over vessels under construction at NGV's yard such as Hull 1118. NGV was in the business of building ships.[95] A fixed charge over vessels under construction would leave NGV unable to deal with the vessels without MBB's concurrence. That in turn would inhibit NGV's ability to trade.

81 It was this very aspect of the commercial character of a fixed charge which led to the innovation of the floating charge. A floating charge enables a business to "offer the security of a charge over the whole of the [business'] undertaking without inhibiting its ability to trade": *Re Brightlife* [1987] 1 Ch 200 at 214–215. See also *Re Lin Securities (Pte) Ltd; Chi Man Kwong Peter and others v Asia Commercial Bank and others* [1988] 1 SLR(R) 220 ("*Re Lin Securities*") at [58].

82 For all of these reasons, I find that the Debenture did not create a fixed charge over vessels under construction at NGV's shipyard, and in particular over Hull 1118.

---

95 Plaintiff's Closing Submissions at paragraph 10.

Version No 1: 27 Oct 2020 (22:41 hrs)

Floating charge

83 MBB's alternative case is that the Debenture created a floating charge in its favour over Hull 1118. This aspect of MBB's case rests on cl 3.1(b) of the Debenture:[96]

> 3.1 Fixed and Floating Charges
>
> … [NGV] as beneficial owner hereby charges to MBB and so that the charge hereby created shall be a continuing security:- …
>
> (b) by way of a first floating charge, the undertaking of [NGV] and all its other movable and immovable property, other assets, all book debts and proceeds of book debts and other debts revenues claims and rights whatsoever and wheresoever, both present and future (including bank deposits and credit balances and all things in action due or owing or which may become due or owing to or purchased or otherwise acquired by [NGV].

84 There is no doubt that Hull 1118 is within the scope of the floating charge created under the Debenture. The only question is whether that floating charge crystallised, and if so, when. MBB argues that the floating charge crystallised because, on the facts of this case, the automatic crystallisation provision in cl 4.3 of the Debenture has been triggered.[97] Alternatively, MBB argues that the floating charge crystallised when NGV dealt with Hull 1118 outside the ordinary course of its business.[98]

85 I deal with the two mechanisms of crystallisation in turn.

---

96 Plaintiff's Core Bundle, tab 46, p 5.

97 Plaintiff's Closing Submissions at paragraph 181.

98 Plaintiff's Closing Submissions at paragraph 208.

Version No 1: 27 Oct 2020 (22:41 hrs)

(1) Automatic crystallisation

86 Clause 4.3 of the Debenture sets out the circumstances in which MBB's floating charge will automatically crystallise:

> 4.3 Automatic Crystallisation Provision
>
> If [NGV] charges pledges or otherwise encumbers in favour of any third party, whether by way of a fixed or floating security any of the Charged Property or attempts to do so without the prior written consent of MBB or if any person attempts to levy any distress execution sequestration or other process against any of the Charged Property of if any floating charge whether created before or after the date hereof, shall crystallise over any of the Charged Property the floating charges hereunder shall automatically without notice operate as fixed charges instantly when such event occurs.

87 MBB submits that[99] cl 4.3 of the Debenture provides that its floating charge crystallises automatically if NGV "encumbers" Hull 1118 in favour of any third party without MBB's consent or if any person attempts to subject Hull 1118 to a "process". MBB contends that automatic crystallisation was triggered on the facts of this case because the effect of NGV entering into the Price Reduction Agreement and then transferring possession of and title to Hull 1118 to Red Sea without MBB's knowledge and consent amounted to either: (a) NGV "encumbering" Hull 1118 without MBB's consent; or (b) a person subjecting Hull 1118 to a "process".

88 It appears to be common ground between the parties that it is open to the holder of a floating charge and its debtor to provide by bilateral agreement in their debenture that the floating charge will crystallise automatically upon events specified in that clause occurring.[100] I accept that that is the position under Singapore law and Malaysian law. However, I do not accept that automatic

99 Plaintiff's Closing Submissions at paragraphs 202–205.

100 Defendants' Closing Submissions at paragraphs 96.6 and 99.

Version No 1: 27 Oct 2020 (22:41 hrs)

crystallisation within the meaning of cl 4.3 has occurred on the facts of this case on either ground relied upon by MBB.

(A) ENCUMBRANCE

89 In my view, the transfer of title to and possession of Hull 1118 and the Price Reduction Agreements do not constitute an "encumbrance" within the meaning of cl 4.3.

90 MBB's submits that "any transaction which has the legal or economic effect of depriving [MBB] of [its] security interests in [Hull 1118]" falls within the definition of "encumbrance" under Clause 1.2.[101] That submission is far too wide and I reject it. Automatic crystallisation clauses, though valid in Singapore and Malaysian law, are not to be given a lavish interpretation. Crystallisation of a floating charge has far-reaching implications not only for the debtor but also the secured creditor and especially for third parties who continue to deal with the debtor, *eg*, by extending credit to it, unaware that the charge has crystallised automatically. The interpretation of "encumbrance" urged upon me by MBB is a lavish interpretation, unwarranted by the word itself.

91 Under the general law, and at the broadest level, an encumbrance is simply a right in the property of one person created in favour of another person. Applied to the context of security, where a person (D) is obliged to render performance of a contractual obligation to another person (C), an encumbrance granted by D in favour of C gives C the right to have recourse to property belonging to D for satisfaction in the event that D defaults in performance of the contractual obligation. The essence of an encumbrance, therefore, is that the encumbrance is a right which facilitates the satisfaction of a separate right

101 Plaintiff's Closing Submissions at paragraph 202(i).

Version No 1: 27 Oct 2020 (22:41 hrs)

vested in its holder: *Muhibbah Engineering (M) Bhd v Pemungut Duti Setem* [2017] 6 MLJ 564 at [60] and *Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors* [2015] 3 MLJ 791 at [29(c)] citing *Words, Phrases & Maxims* (Vol 13) (LexisNexis, 2008) at pp 506–507.

92 The definition of "encumbrance" in the Debenture is entirely consistent with this general meaning. "Encumbrance" is defined in the definition clause of the Debenture as follows:[102]

> 1.2 Further definitions
>
> In this Debenture each of the following expressions has … the meaning shown opposite it:-
>
> …
>
> | | |
> |---|---|
> | Encumbrance | any mortgage, pledge, lien, charge (whether fixed or floating), assignment, hypothecation, deposit, sale with right of retention or other security interest of any kind (including without prejudice any title retention, assignment or transfer by way of security, sale and lease-back and/or sale and repurchase on credit terms) or any other arrangement having substantially the same economic and legal effect as any of the foregoing … |

The encumbrances listed in cl 1.2 of the Debenture all share that essential trait: they are all a right in the property of an obligor which is vested in the holder of the encumbrance and which is granted to facilitate the satisfaction of a separate right vested in its holder as against the obligor.

93 As an example, cl 1.2 of the Debenture lists a mortgage as an encumbrance. Underlying a mortgage is a contract pursuant to which a debtor takes on an obligation to repay money advanced by the creditor. The mortgage involves the debtor transferring to the creditor the legal title to some property

102 Plaintiff's Core Bundle, tab 46, p 3.

Version No 1: 27 Oct 2020 (22:41 hrs)

belonging to the debtor and empowering the creditor to have recourse to the property for satisfaction should the debtor default in repayment of the money advanced. A mortgage is an encumbrance because the creditor gains *a right in the property of the debtor*; the legal title to the property. This right *facilitates the satisfaction of the creditor's right to be repaid* by the debtor. It allows the debtor to have recourse to the debtor's property if the debtor defaults in repayment of the loan.

94 An "encumbrance", on the proper construction of cl 1.2, must be a transaction which creates a right in favour of a creditor in the property of a debtor which facilitates the satisfaction of some other right vested in the creditor. The transfer of possession of and title to Hull 1118 and entering into the Price Reduction Agreements are not encumbrances. These transactions were not entered into to facilitate the fulfilment of *some other right* vested in Red Sea. Instead, they were simply part of performing the sale of Hull 1118 to Red Sea. There was no *other right* vested in Red Sea when it took possession of and title to Hull 1118 and entered into the Price Reduction Agreements.

95 Quite apart from the meaning of "encumbrance", however, it cannot have been the commercial intent of the parties that a transfer of possession of and title to a vessel should trigger the automatic crystallisation clause. That was the ultimate objective of NGV's shipbuilding business: to transfer possession of and title to vessels. And the ultimate commercial objective of the floating charge was to permit NGV to carry on its business without seeking MBB's consent to the various classes of transactions which are necessary to carry on its business. If MBB's floating charge were to crystallise into a fixed charge every time NGV transferred possession of and title to a vessel, with or without a price reduction, NGV would have to constantly seek MBB's consent for all such transactions. That makes no commercial sense.

Version No 1: 27 Oct 2020 (22:41 hrs)

96 Further, if automatic crystallisation took place upon every transfer of possession of or title to a vessel, the result would be that MBB's floating charge would crystallise – not just over the vessel in question – but over *the whole of NGV's undertaking* as soon as the transfer took place. That is because the floating charge created by cl 3.1(b) of the Debenture expressly covers the whole of NGV's undertaking (see *Dresdner Bank AG and others v Ho Mun-Tuke Don and another* [1992] 3 SLR(R) 307 at [60] and *Haw Par Brothers International Ltd v Overseas Textile Co Ltd* [1977-1978] SLR(R) 352 at [23]). And the automatic crystallisation clause in the Debenture does not allow partial crystallisation, *ie*, crystallisation limited only to specific assets. Once again, it is important not to give automatic crystallisation clauses a lavish interpretation.

97 The commercial effect of NGV needing constantly to seek MBB's consent to a transfer of possession and title and the consequence that a failure to do so would crystallise automatically MBB's floating charge over the *whole* of NBV's undertaking is that NGV's business would constantly and automatically be paralysed. This would defeat the very purpose of granting a floating charge: to enable the chargor to raise credit secured by a charge over the whole of its business undertaking without inhibiting its ability to trade.

98 I recognise that one way to deal with this commercial result would be under the express "decrystallisation" clause in cl 4.4:[103]

> 4.4 Refloatation
>
> At any time after the floating charge shall crystallise over any of the Charged Property (hereinafter referred to as "the Crystallised Charge") whether pursuant to a notice given under clause 4.2 or by reason of the appointment of a receiver or receivers pursuant to clause 12 or otherwise howsoever, MBB

103 Plaintiff's Core Bundle, tab 46, p 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

> may decrystallise or refloat the Crystallised Charge over all or any of the assets subject thereto by notice in writing to that effect to [NGV].

The effect of a decrystallisation clause is to cause the fixed charge which results upon the crystallisation of floating charge to cease to operate where crystallisation is not intended and upon compliance with the conditions for decrystallisation set out in the decrystallisation clause: *Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others v BP Singapore Pte Ltd and another matter* [2018] SGHC 215 ("*Jurong Aromatics*") at [95].

99 It is true that MBB has the contractual power under the decrystallisation clause to refloat the charge over all of the assets caught by the crystallisation or over some only of the assets. So it is possible, in theory, for MBB's charge to crystallise automatically every time NGV transfers possession of and title to a vessel and then for MBB to refloat the floating charge over the whole of NGV's undertaking save for the vessel. However, in my view, this possibility does not adequately address the commercial impracticality which MBB's interpretation of the automatic crystallisation clause entails. This is because the floating charge would still bite, and NGV's business would still be paralysed until MBB issued notice in writing refloating the charge on the remainder of NGV's undertaking. This would render the floating charge created by the Debenture no different in substance from a fixed charge, and would have the same result of constantly disrupting NGV's business. This cannot have been the commercial intention of the parties.

100 MBB argues that:[104]

> not only is it perfectly reasonable for [MBB] to insist that NGV get [MBB's] consent before NGV transfers titles in the vessels to third party buyers, such practice is also in line with the

[104] Plaintiff's Reply Closing Submissions at paragraph 28.

Version No 1: 27 Oct 2020 (22:41 hrs)

> intentions of [MBB] and NGV when the Financing Facilities were provided. It is for this reason that the Letters of Credit and the Shipbuilding Contracts require that prior to the vessels being delivered and titles in the vessels being transferred to the buyer, NGV must obtain a statement from [MBB] stating the following:-
>
> (i) The Letters of Credit for the Vessels have not been assigned or transferred by [MBB] to any other party or bank;
>
> (ii) [MBB] agrees with the delivery of the Vessels to [Red Sea]; and
>
> (iii) [MBB] does not have a charge, mortgage, encumbrance, interest or lien in the Vessels and the materials, equipment and machinery thereon.

101 I do not agree. It is true that the shipbuilding contract and the letter of credit for Hull 1118 require a statement from MBB to the effect set out above (the "Statement").[105] But the requirement for the Statement in these two documents does not indicate that the parties *to the Debenture* (*ie*, MBB and NGV) intended for NGV to have constantly to seek MBB's consent in order to carry on its business, as MBB suggests.

102 First, the terms in *the shipbuilding contract* are the product only of the intention of *the parties to the shipbuilding contract*, *ie* NGV and Bakri (and subsequently Red Sea, through novation). MBB was not a party to and therefore did not agree to the terms of the shipbuilding contract. It thus cannot be argued that the requirement for the Statement in *the shipbuilding contract* is evidence of an intention on the part of NGV and *MBB* for NGV constantly to seek MBB's consent in carrying on its business.

103 Second, the requirement for the Statement in the letter of credit similarly does not show that NGV and MBB intended for NGV constantly to seek MBB's consent in carrying on its business. This is because MBB did not always require

---

105 Plaintiff's Core Bundle, tab 9 at p 36, cl p, tab 14 at p 69 and tab 15.

Version No 1: 27 Oct 2020 (22:41 hrs)

such a Statement to be provided. From December 2005 to March 2006,[106] Bakri made payment for vessels purchased from NGV by fixed instalments.[107] Under this method of payment, there was no requirement for a Statement from MBB. Instead, all that was required was a warranty from *NGV* that the vessel was free from encumbrances.[108]

104 It was only from November 2006 to August 2007[109], when the method of payment was changed to irrevocable letters of credit issued by the defendants' bank ("Riyad Bank"), that the requirement for the Statement was introduced. This shows that it was not MBB's and NGV's intention that NGV would have to constantly seek MBB's consent in carrying out its business. If that was the intention, the requirement for a Statement would have been imposed from the outset and never relaxed. But there was no such requirement in the sale of the vessels from December 2005 to March 2006.

105 In my view, even the requirement for a Statement in the letters of credit from November 2006 to August 2007 does not support an intention on the part of MBB and NGV for NGV constantly to seek MBB's consent to carry on its business. The requirement for the Statement appears to have been included more for Riyad Bank's and Red Sea's benefit than for MBB's. The Statement was required only when the method of payment changed to irrevocable letters of credit issued by Riyad Bank. As the issuing bank for the letter of credit and as the applicant for the letter of credit respectively, Riyad Bank and Red Sea had a clear interest in ensuring that they were receiving good title to the vessels, free of encumbrances. As the defendants' witness testified, the lawyers included the

---

106 AEIC of Michael Smith at pp 303–304, s/n 1–13.

107 AEIC of Michael Smith at paragraph 13.

108 See for example AEIC of Michael Smith at p 154, cl 3(f) and p 187, cl 3(f).

109 AEIC of Michael Smith at p 304, s/n 14–20.

Version No 1: 27 Oct 2020 (22:41 hrs)

requirement for the Statement in the letter of credit as "an abundance of caution" to ensure such good title.[110]

106 To argue that the transfer of possession of and title to Hull 1118 and entering into the Price Reduction Agreements constitute "encumbrances", MBB relies on the decision of the High Court of Malaya in Kuala Lumpur in *NGV Tech Sdn Bhd (receiver and manager appointed) (in liquidation) and another v Ramsstech Ltd and others* [2015] 1 LNS 1017 ("*Ramsstech*").[111] *Ramsstech* is a case involving the same bank, the same shipbuilder and debentures in the same terms as in the case before me.

107 In *Ramsstech*, as in the case before me, MBB granted a number of credit facilities to NGV[112] in return for which NGV executed a series of debentures in favour of MBB.[113] The debentures in *Ramsstech* appear to be identical to the Debenture in this case in all material respects. They created fixed and floating charges and contain the same automatic crystallisation, decrystallisation and definition clauses.[114] In 2010, NGV entered into a shipbuilding contract with a buyer at a price of US$16.4m.[115] The contract provided that the price was to be paid directly to NGV.

108 The court in *Ramsstech* found that the automatic crystallisation clause in the Debenture was triggered because the shipbuilding contract was an encumbrance, or an attempt to encumber, within the meaning of cl 1.2 of the

---

110 Certified Transcript dated 28 September 2017, at p 157, line 8 to p 160, line 10. See also AEIC of Michael Smith at paragraph 91.

111 Plaintiff's Reply Closing Submissions at paragraph 30.

112 *Ramsstech* at [2].

113 *Ramsstech* at [6].

114 *Ramsstech* at [77] and [85].

115 *Ramsstech* at [12].

Version No 1: 27 Oct 2020 (22:41 hrs)

debentures: *Ramsstech* at [95]–[96]. This is because the shipbuilding contract provided for the contract price of US$16.4m to be paid to NGV, "by-pass[ing] [MBB] completely". The decision in *Ramsstech* was upheld on appeal to the Malaysian Court of Appeal.[116] No reasons appear to have been given on appeal.

109 With the greatest respect, for the reasons outlined at [89]–[98] above, I am unable to agree that by-passing MBB constitutes an encumbrance, or an attempt to encumber, within the meaning of cl 1.2 of the Debenture. As noted earlier, the parties have agreed that this action will proceed on the basis that Malaysian law does not differ materially from Singapore law. *Ramsstech* is thus relevant only as an authority and even then, only of persuasive effect, and not as evidence of Malaysian law. I thus decline to follow *Ramsstech*.

(B) PROCESS

110 The transfer of possession of and title to Hull 1118 and the Price Reduction Agreements also do not constitute "processes" within the meaning of the automatic crystallisation clause.

111 I agree with the defendants' submission that the term "process" must be read *ejusdem generis* with the phrase "or if any person attempts to levy any distress execution sequestration or other attempts or other process".[117] Distress, execution and sequestration are all processes put in place through the coercive power of the courts over a debtor's property. The transfer of title to and possession of Hull 1118 and the Price Reduction Agreements did not involve the coercive power of the courts.

---

116 Plaintiff's Bundle of AEICs, vol 3, at p 2109.

117 Defendants' Reply Closing Submissions at paragraph 65.

Version No 1: 27 Oct 2020 (22:41 hrs)

112 Further, if the transfer of possession of and title to Hull 1118 and the Price Reduction Agreements were to constitute "processes" so as to crystallise the floating charge, this would ascribe to the parties an intention which I have found could not have been their commercial intent, objectively ascertained (see [95]–[105]).

(2) Out of the ordinary course of business

113 Finally, MBB argues that "[w]here a borrower deals with [an] asset subject to a floating charge outside of its ordinary course of business … the floating charge automatically crystallises into a fixed charge".[118] For this proposition, MBB relies on *Fire Nymph Products Ltd v The Heating Centre Pty Ltd (in liq) and others* (1992) 7 ACSR 365 ("*Fire Nymph*"). I am unable to agree with MBB. Merely dealing with an asset which is subject to a floating charge outside the ordinary course of a company's business does not crystallise a floating charge.

114 *Fire Nymph* does not stand for the proposition for which MBB cites it. In that case, the appellant, FN, supplied goods to a customer, THC. THC had granted a creditor, AGC, a floating charge over its undertaking. THC was in possession of a certain quantity of goods which it had purchased from FN. Title in all of the goods had passed to THC, but THC had not paid FN for all of the goods. Both FN and THC were experiencing financial difficulties. FN and THC entered into an agreement which purported to revest in FN title in the goods which THC had purchased from FN but not yet paid for. AGC appointed receivers over THC. FN asked THC's receivers to return the goods. THC's receivers refused and instead sold the goods for the benefit of AGC. FN sued

---

118 Plaintiff's Closing Submissions at paragraph 208.

Version No 1: 27 Oct 2020 (22:41 hrs)

THC's receivers in conversion, asserting that title to the goods which the receivers had sold had revested in FN by reason of the revesting agreement.

115 It bears emphasising that *Fire Nymph* was a case of automatic crystallisation, not a case of crystallisation by operation of law. AGC's debenture in *Fire Nymph* contained the following automatic crystallisation clause:

> … if the mortgagor shall deal with all or any of the mortgaged property other than in the ordinary course of its ordinary business then the floating charge herein created shall ipso facto become fixed to all of the mortgaged property at the moment immediately prior to such dealing and at that point of time the mortgagee shall be deemed to have intervened and to have exercised all or any of its rights of intervention in respect of all the mortgaged property …

This clause not only provided for automatic crystallisation, but also for the automatic crystallisation to be retrospective: AGC's floating charge was said to become a fixed charge "at the moment immediately prior to" the triggering event.

116 The question before the Supreme Court of New South Wales was whether THC's act of entering into the revesting agreement with FN had triggered the automatic crystallisation clause, and had crystallised AGC's floating charge at the moment immediately prior to THC entering into the agreement, thereby converting AGC's floating charge over the goods into a fixed charge immediately before the revesting agreement took effect. If so, FN took title to the goods under the revesting agreement subject to AGC's fixed charge.

117 The court held unanimously that THC's act of entering into the revesting agreement was not an ordinary transaction entered into in the ordinary course

Version No 1: 27 Oct 2020 (22:41 hrs)

of THC's business. But it did so because it held that a "dealing with assets … subject to a floating charge otherwise than with a view to *carrying on the chargor's business* is a crystallising event" (*Fire Nymph* at 379) [emphasis added]. In other words, THC's act of entering into the revesting agreement with FN crystallised the floating charge because it entered into the agreement otherwise than with a view to continuing in business. At the time THC entered into the revesting agreement, there was "no realistic basis for thinking that THC would continue in business" and the revesting agreement "was nothing more than a way of (FN) recovering its money from an insolvent debtor by return of stock" (*Fire Nymph* at 370).

118 It is thus apparent that *Fire Nymph* does not stand for the proposition that merely dealing with assets which are subject to a floating charge outside of the ordinary course of a company's ordinary business suffices automatically to crystallise a floating charge. *Fire Nymph* requires that the dealing be outside the ordinary course of business in the sense that it is otherwise than with a view to *carrying on* the business (at 379):

> The sale of the undertaking is but an example of dealing with the assets otherwise than in the ordinary course of business, that is to say … otherwise than with a view to carrying on the concern.

See also *Re Lin Securities* at [73]–[74]; *Re City Securities Pte* [1990] 1 SLR(R) 413 at [69] and *Goode on Legal Problems of Credit and Security* (Louise Gullifer, ed) (Sweet & Maxwell, 5th Ed, 2013) ("*Goode*") at para 5–42.

119 As I have pointed out, *Fire Nymph* was a case which turned on the interpretation of an automatic crystallisation clause. MBB relies on it, however, as authority for a crystallising event which arises separately from an express automatic crystallisation clause. Even on that basis, it seems to me there is no

Version No 1: 27 Oct 2020 (22:41 hrs)

reason why merely dealing with an asset within the scope of a floating charge outside the ordinary course of a company's business should in itself crystallise a floating charge when the terms of the debenture do not expressly provide for that consequence. The commercial rationale for the security provided by a floating charge is to enable a company to offer its undertaking as security for credit without inhibiting its ability to trade. Once it ceases to trade or is disabled from trading, the commercial rationale for the floating charge disappears. It is only at that point that there is no longer a commercial need for the charge to float. It is only then that the floating charge crystallises into a fixed charge: *Goode* at para 4–37. See also *Fire Nymph* at 379.

120 MBB argues that:[119]

> [i]t would make nonsense of the entire framework of financing and security transactions, to suppose that a chargor can borrow money from a bank upon the provision of security in the form of a floating charge, but thereafter defeat the bank's interest in the floating charge by executing transactions which are outside the ordinary course of its business …

121 I am unable to accept MBB's submission. As the Court of Appeal noted in *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129 (*"Diablo Fortune*") at [46], in a floating charge, the "constraint placed on the chargor is … fairly weak" as the chargee is "incapable of asserting any proprietary or possessory right to any specific asset even if dispositions of the assets are made outside the chargor's ordinary course of business or in breach of the terms of the debenture creating the floating charge". See also *Fire Nymph* at 377–378. Having said that, the chargee may of course obtain injunctive relief to stop such dispositions or appoint a receiver if its security is in jeopardy (*Diablo Fortune* at [46]).

---

119 Plaintiff's Reply Closing Submissions at paragraph 19.

Version No 1: 27 Oct 2020 (22:41 hrs)

122 It is precisely because the constraint placed on the holder of a floating charge is fairly weak that debentures typically incorporate negative pledges or, as in this case,[120] guarantees. Rejecting the proposition that any dealing with an asset which is within the scope of a floating charge outside the ordinary course of a company's business is a crystallising event does not "make nonsense of the entire framework of financing and security transactions" as MBB submits. It is instead very much in line with the framework, which recognises that such an event is not a crystallising event, unless the parties expressly agree, and therefore recognises that the creditor can protect itself in other ways (*eg*, negative pledges and guarantees). As an aside, I note that MBB has commenced an action against the personal guarantors of the banking and financing facilities granted by MBB to NGV.[121]

123 I would also make the point that, in *Fire Nymph*, the goods comprised in the revesting agreement were caught by the automatic crystallisation clause in AGC's debenture because it expressly provided that the crystallisation should be retrospective and take effect from the *scintilla temporis* immediately *before* THC and FN attempted to revest title to the goods in FN by executing the revesting agreement. There is no basis in MBB's debenture or at common law for any such retrospective effect, even if NGV's dealing with Hull 1118 were sufficient in itself to crystallise MBB's floating charge.

124 In summary, merely dealing with an asset subject to a floating charge outside the ordinary course of a company's business does not crystallise a floating charge. It is only when the dealing is otherwise than with a view to continuing to carry on the company's business that the floating charge will

---

120 Plaintiff's Core Bundle, tab 46, p 17, cl 14.

121 Statement of Claim (Amendment No 4) at paragraph 24.

Version No 1: 27 Oct 2020 (22:41 hrs)

crystallise. I thus reject MBB's argument[122] that the Price Reduction Agreements and Completion Contracts were crystallising events.

125 I further reject MBB's argument that executing the Agency Agreements, the addendums to the Agency Agreements and the documents acknowledging the Direct Payments were crystallising events.

126 The crux of MBB's case is that, by entering into these agreements, "NGV … surrendered all its rights and control over the construction of the Vessels and allowed QIM a free hand in dealing with the Vessels … to the complete exclusion of NGV itself".[123] MBB argues that, by executing these documents, NGV was "no longer trading as a going concern".[124]

127 I disagree. Trading as a going concern does not require the powers of management to remain with the directors of the company: *Goode* at paras 4–37 and 4–38. As an example, the appointment of receivers does not indicate that the company has ceased to trade as a going concern. On the contrary, receivers are commonly appointed to carry on the business of the company. This is despite the fact that the appointment of receivers results in the powers of the directors being suspended and transferred to the receivers.

128 I am aware that the appointment of receivers is a crystallising event. But the appointment of receivers is a crystallising event not because it indicates that the company is no longer trading as a going concern, but because it is a form of intervention by the chargee to take control of the charged assets: *Goode* at para 4–37.

---

122 Plaintiff's Closing Submissions at paragraphs 218.2.1–218.3.2.

123 Plaintiff's Closing Submissions at paragraph 218.1.2.

124 Plaintiff's Closing Submissions at paragraph 218.1.3.

Version No 1: 27 Oct 2020 (22:41 hrs)

129 As a result, I am unable to find that NGV's surrender of its management powers to QIM was otherwise than with a view to carrying on its business. In fact, the evidence shows that NGV's business was still very much alive at that point in time. Shortly after the execution of the addendum to the Agency Agreements, NGV secured a contract from the Malaysian Ministry of Defence worth RM300m.[125]

(3) Written notice

130 MBB's floating charge thus only crystallised on 21 March 2013, when MBB gave NGV written notice to that effect pursuant to cl 4.2 of the Debenture.[126]

MBB's interest as against Red Sea's interest in Hull 1118

131 The question then is: how do Red Sea and MBB's interests in Hull 1118 rank in terms of priority? Red Sea gained title to Hull 1118 on 18 May 2011, pursuant to the Completion Contracts.[127] MBB's floating charge over the whole of NGV's undertaking crystallised on 21 March 2013.

132 Where a third party obtains an asset which is within the scope of a floating charge in the ordinary course of the chargor's business, the third party has priority over the chargee when the charge crystallises. That is so even if the third party had knowledge of the existence of the floating charge. This is because, until the floating charge crystallises, the chargor has implied authority to dispose of its assets in the ordinary course of its business. But this is subject to an exception. Where the debenture imposes restrictions on the chargor's

125 Defendants' Reply Closing Submissions at paragraph 78.4.

126 Statement of Claim (Amendment No 4) at paragraphs 18–19.

127 Statement of Claim (Amendment No 4) at paragraph 52.

Version No 1: 27 Oct 2020 (22:41 hrs)

ability to deal with the assets and the chargor transfers the asset to a third party in breach of the restrictions, the chargee will rank ahead of the third party if the third party took the asset with notice of the restrictions.

133 On the other hand, where a third party obtains an asset which is subject to a floating charge outside the ordinary course of the chargor's business, the third party takes the asset free of the chargee's interest only if the third party is equity's darling, *ie*, a *bona fide* purchaser of legal title for value without notice (see *Diablo Fortune* at [52] and *Goode* at paras 5–40 to 5–42).

134 As the Court of Appeal in *Diablo Fortune* noted at [46], "the threshold to be crossed before an activity is seen to be outside a party's ordinary course of business is high". Indeed, the term "in the ordinary course of business" has been interpreted to cover any transaction which (*Goode* at 5–40):

> is designed to promote rather than to terminate or destroy its business. Even a sale of its goodwill, assets and undertaking will be considered in the ordinary course of business if intended in furtherance of the business, and *not with a view to ceasing trading.* [emphasis added]

135 For the reasons given above at [126]–[129], I am of the view that the impugned transactions did not fall outside the ordinary course of NGV's business. I further add that the impugned transactions were part of the sale of Hulls 1117 and 1118 to Red Sea, *ie*, in the course of pursuing NGV's business as a shipbuilder.

136 I now consider whether the exception (at [132] above) applies – whether the impugned transactions were in breach of the terms of the Debenture and if so, whether Red Sea had knowledge of these terms.

137 MBB argues that the impugned transactions were in breach of the

Version No 1: 27 Oct 2020 (22:41 hrs)

negative pledge in cl 8.1(b) and (j) of the Debenture.[128] I now set out the relevant portions of cl 8.1:

> [NGV] covenants with MBB as follows:
>
> (a) not to create or permit to exist upon or affect any of the Charged Property any Encumbrance which ranks, or may come to rank in priority to or *pari passu* with the floating contained charge in clause 3.1(b) or, except with the prior written consent of MBB, any Encumbrance which will rank after the charges contained in this Debenture;
>
> (b) not to transfer, assign, charge, sell, lend or otherwise dispose of any of the Charged Property and (in particular) not to exercise any statutory or other powers of making leases or of accepting or agreeing to accept surrenders of lease, and not to part with possession of, or grant any licence or right to occupy, any of the freehold or leasehold property from time to time and at any time owned by [NGV] without the prior written consent of MBB;
>
> (c) not to transfer, sell, lease or otherwise dispose of any property or assets subject to this Debenture (other than the property referred to in sub-clause (b) above) otherwise than by way of sale on arm's length terms in the ordinary course of [NGV's] day-to-day trading …
>
> …
>
> (g) except with the prior written consent of MBB, not to transfer, factor, discount, sell, release, compound, pledge, assign, subordinate, defer or otherwise vary the terms of any book or other debts or amounts from time to time and at any time due, owing or payable to [NGV] and not to deal otherwise with the same except by getting in the same in the usual course of trading …
>
> …
>
> (i) except with the prior written consent of MBB, not to negotiate, compromise, abandon or settle any claim for compensation … or other claim;
>
> (j) not to lessen the value of [NGV's] interest in any of the Charged Property from time to time at any time owned by [NGV];
>
> …
>
> (s) not do or cause to permit to be done anything which may in any way depreciate jeopardise or otherwise prejudice the value

[128] Plaintiff's Closing Submissions at paragraph 152.

Version No 1: 27 Oct 2020 (22:41 hrs)

> to MBB of the Charged Property and not (without the prior consent in writing of MBB) incur any expenditure or liabilities of an exceptional or unusual nature …

138 It is not part of MBB's pleaded case that the impugned transactions were entered into in breach of the terms of the Debenture.[129] This argument was made for the first time in MBB's closing submissions. The defendants have not had sufficient notice of this issue in order to afford them a fair opportunity to meet MBB's case on this issue (see [41] above). I therefore find that the defendants would be prejudiced if I were to consider this argument at this late stage. I thus decline to consider MBB's argument that the impugned transactions were in breach of the terms of the Debenture.

139 In any event, even if the impugned transactions were in breach of the terms of the Debenture, I find that Red Sea did not have knowledge of those terms. Although the Debenture was registered in accordance with the laws of Malaysia,[130] this is not sufficient to fix Red Sea with constructive notice of the terms of the Debenture (see *Wilson v Kelland* [1910] 2 Ch 306 at 313). The particulars of the Debenture lodged with the Registrar of Companies did not make any mention of the restrictions on NGV dealing with its assets in the ordinary course of its business.[131]

140 The result is that Red Sea's interest in Hull 1118 is superior to MBB's.

Set-off

141 In their supplementary closing submissions, the defendants raise the issue of whether Red Sea can set-off the sums it has expended in completing

---

129 See also Defendants' Reply Closing Submissions at paragraph 13.

130 Statement of Claim (Amendment No 4) at paragraph 10.

131 Plaintiff's Bundle of AEICs, vol 2, at pp 1059–1061 and 1249–1252.

Version No 1: 27 Oct 2020 (22:41 hrs)

Hull 1118 against MBB's claim for Hull 1118, should MBB succeed in its claim as chargee in respect of Hull 1118. I then directed the parties to file further supplementary closing submissions on this point.[132]

142 Having found that Red Sea's interest in Hull 1118 is superior to MBB's, it is not necessary for me to make a determination on this issue. Nevertheless, seeing as parties have made submissions on this issue, I shall make some brief comments.

143 The defendants have argued both a contractual and equitable right of set-off in respect of the sums incurred in completing Hull 1118.[133] In my view, Red Sea would not have had a contractual right of set-off. And whether Red Sea would have had an equitable right of set-off would depend on whether the sums were incurred before or after the floating charge crystallised.

144 There would not have been a contractual right of set-off because there was no contract between Red Sea and MBB, let alone a contract providing for a right of set-off. The defendants have argued that there existed a contractual right of set-off between Red Sea and *NGV*.[134] Even if that were true, that would not entitle Red Sea to a set-off against *MBB*.

145 As for an equitable right of set-off, parties accept that mutuality is required.[135] Mutuality requires that the debts be due between the same parties, in the same right: *Jurong Aromatics* at [125]. Whether there is mutuality between Red Sea's claim for the sums it has expended and MBB's claim for

---

132 Certified Transcript dated 14 May 2018, at p 43.

133 Defendants' Supplementary Closing Submissions at paragraphs 25–26.

134 Defendants' Supplementary Closing Submissions at paragraphs 24–25.

135 Defendants' Supplementary Closing Submissions at paragraphs 28.3 and Plaintiff's 2nd Supplementary Submissions at paragraph 3.

Version No 1: 27 Oct 2020 (22:41 hrs)

title to Hull 1118 depends on when the sums were spent. If the sums were spent before the floating charge crystallised, MBB would not have had an interest in Hull 1118 at that point in time (*Diablo Fortune* at [51]). The sums spent by Red Sea would thus be claimable against *NGV*, not against MBB. There would thus be no mutuality between Red Sea's claim for the sums it expended and MBB's claim for title to Hull 1118.

146 In contrast, if the sums were spent after the floating charge crystallised, MBB would by then have a proprietary interest in Hull 1118. The sums incurred by Red Sea would thus be claimable against MBB, and there would be mutuality between Red Sea's claim for the sums expended and MBB's claim for title to Hull 1118: see *Jurong Aromatics* at [35] and [138].

Conspiracy

147 I now turn to MBB's alternative claim in tort. MBB argues that the defendants conspired with NGV to deprive MBB of its interest in Hull 1118.[136] This conspiracy is said to be evidenced by entry into the impugned transactions.[137] MBB's alternative claim in tort rests on both a conspiracy by unlawful means and a conspiracy by lawful means.[138]

148 To succeed in its claim in conspiracy by unlawful means, MBB must establish that:

(a) the defendants and NGV combined together to do certain acts;

(b) the acts were unlawful;

---

136 Statement of Claim (Amendment No 4) at paragraphs 60.1–60.3.

137 Plaintiff's Closing Submissions at p 74.

138 Statement of Claim (Amendment No 4) at paragraph 60.2.

Version No 1: 27 Oct 2020 (22:41 hrs)

(c) the defendants and NGV intended to cause damage or injury to MBB by those acts;

(d) the acts were performed in furtherance of the agreement; and

(e) MBB suffered damage as a result of the conspiracy.

(see *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2013] 1 SLR 860 at [112]).

149 To succeed in its claim in conspiracy by lawful means, MBB must establish that:

(a) the defendants and NGV combined together to do certain acts;

(b) the defendants and NGV had a predominant intention to cause damage or injury to MBB by those acts;

(c) the acts were performed in furtherance of the agreement; and

(d) MBB suffered loss as a result of the conspiracy.

(see *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 at [150]).

150 I reject MBB's claim in conspiracy, whether unlawful means or lawful means conspiracy. I cannot find that the defendants and NGV acted with any intention to cause damage or injury to MBB, let alone a predominant intention to do so. In my view, the defendants were protecting their position as rational commercial actors against default by NGV in delivering Hull 1118.

Version No 1: 27 Oct 2020 (22:41 hrs)

151 MBB's claim in conspiracy by lawful means is based on five acts carried out by the defendants and NGV:

(a) First, the defendants are not entitled to the price reduction which formed the basis for the Price Reduction Agreements.[139] Because the defendants were not so entitled, they executed the Price Reduction Agreements pursuant to an agreement between them to deprive MBB of its interest in Hull 1118 by reducing the value of that interest.[140]

(b) Second, the defendants knew that the contract price of Hull 1118 could not be altered without MBB's consent, given MBB's status as the assignee of the proceeds of sale of Hull 1118.[141] Despite this knowledge, the defendants and NGV executed the Price Reduction Agreements with a common intention to deprive MBB of its interest in Hull 1118 by reducing the proceeds of sale which MBB would receive.

(c) Third, the defendants did not actually incur the Direct Payments.[142] The Direct Payments were dishonestly acknowledged by NGV with a common intention to allow Red Sea to take title to Hull 1118 free of charge in order to deprive MBB of its interest in Hull 1118.

(d) Fourth, the defendants deliberately procured the delivery of Hull 1118 from NGV's shipyard to themselves without MBB's prior knowledge and consent.[143] This was again pursuant to a common intention to deprive MBB of its interest in Hull 1118.

---

139 Plaintiff's Closing Submissions at paragraph 136.1.

140 Plaintiff's Closing Submissions at paragraph 136.1–136.3.

141 Plaintiff's Closing Submissions at paragraphs 136.4–136.6.

142 Plaintiff's Closing Submissions at paragraph 137.5.

143 Plaintiff's Closing Submissions at paragraph 139.

Version No 1: 27 Oct 2020 (22:41 hrs)

(e) Finally, there was no SEAPA Contract.[144] Alternatively, Red Sea could have obtained an alternative shipbuilder to complete Hull 1118 once NGV began experiencing financial difficulties.[145] There was thus no necessity for Red Sea to elect to affirm the shipbuilding contract for Hull 1118 when NGV was in repudiatory breach of it by failing to deliver Hull 1118 and instead to enter into and carry out the impugned transactions in order to procure the delivery of Hull 1118.[146]

152 As for conspiracy by unlawful means, MBB relies on the following two acts by the defendants and NGV as the unlawful means:

(a) First, the defendants procured NGV to breach its contracts with MBB; namely, the Debenture and the Assignments.[147]

(b) Second, the defendants and NGV defrauded MBB of its interest in Hull 1118 by procuring extensions of the letter of credit for Hull 1118's full contract price (*ie,* without reflecting the $1.5m discount under the Price Reduction Agreements) in order to mislead MBB into believing that payment for Hull 1118 would be forthcoming.[148]

153 In both branches of its case in conspiracy, MBB invites me to draw the inference from the very nature of the relevant acts that the defendants and NGV acted with the common intention necessary to establish that branch of conspiracy.

---

144 Plaintiff's Closing Submissions at paragraph 141.

145 Plaintiff's Reply Closing Submissions at paragraph 8.

146 Plaintiff's Closing Submissions at paragraph 143.

147 Plaintiff's Closing Submissions at paragraphs 148–154.

148 Plaintiff's Closing Submissions at paragraphs 158–159.

Version No 1: 27 Oct 2020 (22:41 hrs)

154 I deal with each of MBB's premises in turn.

Price Reduction Agreements

155 MBB contends that the defendants have failed to prove that they are entitled to the price reductions recorded and implemented in the Price Reduction Agreements.[149] This is because there is no evidence that NGV owed liquidated damages to Bakri for the purported delayed delivery of Hulls 1090 and 1091.[150] MBB further contends that the defendants have not produced any witness who can give direct evidence as to the existence or genuineness of Bakri's claim for such liquidated damages.[151]

156 I accept MBB's contentions. The basis for the price reduction was not proved at trial because the protocols of delivery and acceptance for Hulls 1090 and 1091 were not proved at trial.[152] There is thus no evidence as to when Hulls 1090 and 1091 were delivered to Bakri. The liquidated damages for Hulls 1090 and 1091 are calculated by reference to the date on which the two vessels were actually delivered. The failure to prove the protocols of delivery and acceptance necessarily means that there is no evidence as to how much in liquidated damages NGV owed Bakri for delayed delivery of those two vessels.

157 The fact of the price reduction too was not proved at trial. The Price Reduction Agreements record that Bakri and NGV recognise that Hulls 1090 and 1091 "will not be delivered on the date as agreed" and therefore as "full and final compensation in respect of damages incurred by" Bakri, NGV agreed to a price reduction of US$1.5m each for Hulls 1117 and 1118.[153] Neither of the

149 Plaintiff's Closing Submissions at paragraph 136.1.

150 Plaintiff's Closing Submissions at paragraph 101.

151 Plaintiff's Closing Submissions at paragraph 103.

152 Certified Transcript dated 28 September 2017, at p 154, line 22 to p 155, line 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

witness whom the defendants chose to call at trial can give direct evidence of the fact of the price reduction within the meaning of s 62 of the EA (see [64]–[65]). The only evidence of the fact of the price reduction is the statement of that fact which is recorded in the Price Reduction Agreement. But that statement is admissible in evidence only if: (a) the Price Reduction Agreement is proved in accordance with the EA; and (b) if that statement is rendered admissible as evidence of the truth of its contents by satisfying the conditions imposed in s 32 of the EA. The Price Reduction Agreements cannot prove themselves. They must be proved by a witness who is able to speak to the fact that the Price Reduction Agreements were entered into and that the statements of fact set out in the agreements are true. And the Price Reduction Agreements do not satisfy the conditions for admissibility under s 32 of the EA.

158 I therefore find that the defendants have failed to prove the basis for Bakri's claim for the liquidated damages which formed the basis of the Price Reduction Agreement and the fact that the price reduction was in fact implemented.

Alteration of contract price for Hull 1118

159 MBB claims that the defendants knew that the contract price of Hull 1118 could not be altered without MBB's consent.[154] In support of this claim, MBB points to the fact that the shipbuilding contract, letter of credit, and Completion Contract for Hull 1118 all required the Statement from MBB.[155]

160 As stated earlier, I am of the view that the Statement was included as a requirement under the shipbuilding contract, letter of credit, and Completion

153 Plaintiff's Core Bundle, tabs 22 and 23.

154 Plaintiff's Closing Submissions at paragraphs 136.4–136.6.

155 Plaintiff's Closing Submissions at paragraphs 48–49 and 55–58.

Version No 1: 27 Oct 2020 (22:41 hrs)

Contract for Hull 1118 merely out of an abundance of caution (see [105]). I do not accept that the Statement was included as a requirement because the defendants had knowledge that the proceeds of Hull 1118 were assigned to MBB. Indeed, this cannot have been the case. The shipbuilding contract and letter of credit for Hull 1118 were dated 18 August 2007[156] and 15 January 2008, respectively.[157] NGV assigned the proceeds of its shipbuilding contracts to MBB only later, by the Assignments which are dated 24 January 2008 and 11 June 2010.[158] The requirement for the Statement in the shipbuilding contract and the letter of credit could not have been the result of Red Sea's knowledge of the Assignments, given that the Assignments had not even taken place at that time.

161 Although the Assignments had been executed at the time of the Completion Contract for Hull 1118, the fact that the Statement was required all along – in the shipbuilding contract and the letter of credit – buttresses my finding that the Statement was included as a requirement merely out of an abundance of caution.

162 Further, even assuming that the defendants had knowledge that the contract proceeds for Hull 1118 were assigned to MBB, it is a leap of logic to assume that the defendants had knowledge of the terms of the Assignment. Specifically, I cannot infer that the defendants knew that the contract price could not be altered without MBB's consent.[159] The particulars of the Debenture lodged with the Registrar of Companies do not make any mention of such a restriction.[160]

---

156 Plaintiff's Closing Submissions at paragraph 14.2.

157 Plaintiff's Core Bundle, tab 15.

158 Statement of Claim (Amendment No 4) at paragraph 11.

159 Plaintiff's Bundle of AEICs, vol 2, at p 1071, cl 7.1(m).

160 Plaintiff's Bundle of AEICs, vol 2, at pp 1059–1061 and 1249–1252.

Version No 1: 27 Oct 2020 (22:41 hrs)

163 Finally, I note that the shipbuilding contract for Hull 1118 required Red Sea's prior written consent for any assignment.[161] NGV does not appear to have obtained such consent. In the circumstances, I cannot see how Red Sea should be imputed with knowledge of the Assignments and their restrictions. Nevertheless, seeing as no submissions were made on this point, I do not rest my decision on it.

Direct Payments

164 MBB contends that the defendants have failed to prove that they incurred the Direct Payments as they did not disclose documents evidencing the payments to NGV's subcontractors.[162]

165 I reject MBB's contention. The defendants have disclosed and proved the relevant documents and rendered their contents admissible under s 67A read with s 32(1)(*b*) of the EA.[163]

Delivery of Hull 1118

166 MBB contends that the defendants deliberately procured the delivery of Hull 1118 to themselves without MBB's consent.[164] MBB alleges that the defendants knew that MBB's consent was required, as evidenced by the requirement of the Statement.

167 I disagree. As explained above (see [105] and [160]–[161]), the Statement was required out of an abundance of caution, for the defendants'

---

161 Plaintiff's Core bundle, tab 9, p 29, art XIV.

162 Plaintiff's Closing Submissions at paragraph 107.

163 Fourth Defendant's Bundle of Documents, items 36–599.

164 Plaintiff's Closing Submissions at paragraph 139.

Version No 1: 27 Oct 2020 (22:41 hrs)

benefit, and not because the defendants thought that MBB's consent was required for the delivery of Hull 1118. The defendants' failure to obtain the Statement before accepting delivery of Hull 1118 thus cannot be construed as them "surreptitiously [putting Hull 1118] out of the reach" of MBB.[165]

168 Further, I note that the defendants did not *deliberately* avoid obtaining the Statement. Mr Smith testified that he sought the Statement from NGV, and was told that it was forthcoming.[166] The defendants were content to accept delivery before obtaining the Statement as this was a common practice between them and NGV.

SEAPA Contract

169 MBB claims that the defendants have failed to prove that Red Sea owed obligations to the SEAPA as the copy of the SEAPA Contract is inadmissible and no witness capable of testifying to the truth of the SEAPA Contract was produced.[167] MBB further claims that Red Sea could have terminated the shipbuilding contract for Hull 1118 and obtained an alternative shipbuilder to fulfil the SEAPA Contract.[168]

170 I have accepted MBB's objections in relation to the copy of the SEAPA Contract above (see [52]–[57]). I thus find that the SEAPA Contract has not been properly proven in this action.

171 It is true that Red Sea could have terminated the shipbuilding contract for Hull 1118 upon NGV's breach. But an innocent party presented with a

---

165 Plaintiff's Closing Submissions at paragraph 139.

166 Certified Transcript dated 29 September 2017, at p 8, lines 4–17 and p 24, lines 5–11.

167 Plaintiff's Closing Submissions at paragraphs 91, 95 and 141.

168 Plaintiff's Reply Closing Submissions at paragraph 8.

Version No 1: 27 Oct 2020 (22:41 hrs)

breach of contract has the right to elect whether to terminate the contract or to affirm it and hold the contract-breaker to its contractual obligations. I accept the defendants' evidence that they decided to affirm the shipbuilding contract for Hull 1118 as a result of commercial considerations and time constraints.[169]

Breach of the Debenture and the Assignments

172 One of the unlawful means which MBB alleges the defendants and NGV engaged in is that the defendants procured NGV to breach the terms of the Debenture and the Assignments.[170] The defendants are said to have procured NGV to breach cll 8.1(b) and 8.1(j) of the Debenture, requiring NGV to obtain MBB's prior consent before transferring Hull 1118 and prohibiting NGV from reducing the value of MBB's interest in Hull 1118, respectively.[171] As for the Assignments, the procured breaches are said to be of cll 7.1(g) and 7.1(m) which prohibit NGV from permitting any act which may preclude MBB from demanding the sale proceeds of Hull 1118 and from agreeing to any variation or modification of the shipbuilding contracts without MBB's approval, respectively.[172]

173 I have earlier declined to consider MBB's claims that the defendants procured NGV to breach the terms of the Debenture as these allegations were not pleaded (see [138]). For the same reason, I decline to consider MBB's claims that the defendants procured NGV to breach the terms of the Assignments. These claims were also not pleaded.

---

169 Certified Transcript dated 29 September 2017 at p 66, lines 1–3.

170 Plaintiff's Closing Submissions at paragraph 146.

171 Plaintiff's Closing Submissions at paragraph 152.

172 Plaintiff's Closing Submissions at paragraph 153.

Version No 1: 27 Oct 2020 (22:41 hrs)

174 In any event, as I have found (see [139]), Red Sea is not fixed with knowledge of the terms of the Debenture simply because they were registered. I further find that Red Sea did not have knowledge of the terms of the Assignments, which were not required to be registered. The defendants cannot be said to have *procured* the breach of terms which they did not even know existed.

Extension of letter of credit

175 The second aspect of its case in unlawful means conspiracy is that the defendants and NGV conspired to defraud MBB by "deliberately procur[ing] the extensions of the Letters of Credit for the full Contract Price until 30 April 2012" in order to mislead MBB into believing that payment for Hull 1118 would be forthcoming.[173] MBB claims this was done to induce MBB to continue providing and increasing the financing facilities to NGV for construction of Hull 1118.[174]

176 I disagree. I accept the defendants' evidence that the letter of credit for Hull 1118 was not amended to reflect the Price Reduction Agreements as it would have been time consuming and costly to do so.[175] This is because such an amendment would require a full review of the facility at Red Sea's expense.

177 Further, I do not agree that the defendants sought to mislead MBB by concealing the fact that the contract price for Hull 1118 was reduced. The defendants provided NGV's monitoring accountants (appointed by MBB) with a copy of the Completion Contracts.[176] The Completion Contracts expressly state that the contract price for Hull 1118 "has previously been adjusted".[177]

173 Plaintiff's Closing submissions at paragraphs 158–159.

174 Plaintiff's Closing submissions at paragraph 162.

175 AEIC of Abdul Majeed Khan at paragraph 15.

Version No 1: 27 Oct 2020 (22:41 hrs)

178 I pause to observe that it is indeed odd for Red Sea to have procured the extension of the letter of credit until April 2012 even though Red Sea had obtained title to Hull 1118, free of charge, on 18 May 2011.[178] Nevertheless, I do not consider this oddity sufficient for me to infer on the balance of probabilities that the defendants did so in order to injure MBB. There are any number of reasons related to protecting or advancing the genuine commercial interests of the parties which do not lead to the inference which MBB urges upon me, particularly bearing in mind that MBB's case requires especially cogent evidence, being a case based on fraud.

Conclusion on conspiracy

179 In conclusion, I find that there is no basis for MBB's claims in conspiracy. It is true that the defendants have failed to prove the basis of the liquidated damages which are said to underlie the Price Reduction Agreement and to prove the SEAPA Contract. But I cannot find, for those reasons alone, that every single one of the impugned transactions was carried out with an intent to injure MBB, let alone with a predominant intention to injure MBB. I also cannot find that there is any fraud in any of the impugned transactions.

The counterclaim

180 I now turn to the defendants' counterclaim for: (i) damages for loss suffered as a result of the Injunction; and (ii) malicious prosecution.

---

176 AEIC of Chin Yen Lee at paragraph 27.

177 Defendants' Core Bundle, vol 2, at p 622, art III.

178 Statement of Claim (Amendment No 4) at paragraph 52.

Version No 1: 27 Oct 2020 (22:41 hrs)

The Injunction

181 I have found against MBB in this action in both its claim for a superior interest in Hull 1118 and its claim in conspiracy. As a condition of obtaining the Injunction, MBB gave the usual undertaking to comply with any order the court might make as to damages if it were later were to find that the Injunction had caused loss to Red Sea, and were to decide that Red Sea should be compensated for that loss.[179]

182 Nevertheless, as the wording of the undertaking implies, the right of Red Sea to claim such damages from MBB is not automatic. The court retains a discretion to determine whether there should be an inquiry into the damages payable on the undertaking. In exercising this discretion, the courts consider all circumstances of the case. In particular, the court must be satisfied that the injunction was wrongly sought and that there are no special circumstances militating against enforcing the undertaking: *Neptune Capital Group Ltd and others v Sunmax Global Capital Fund 1 Pte Ltd and another* [2016] 4 SLR 1177 at [46].

183 Having found that MBB does not have a superior interest in Hull 1118, I find that the Injunction was wrongly secured. It thus remains for MBB to show, in a separate hearing which will follow this judgment, whether there are any special circumstances militating against the enforcement of its undertaking, and, if it is enforced, for Red Sea to show an arguable case that it has sustained a loss falling within the terms of MBB's undertaking.[180] See *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others and another matter* [2016] 2 SLR 737 at [36]. I will hear the parties separately on whether

---

179 Defendants' Closing Submissions at paragraph 288.

180 Defendants' Closing Submissions at paragraph 289.

Version No 1: 27 Oct 2020 (22:41 hrs)

there should be an inquiry as to the damage suffered by the defendants as a result of the Injunction.

Malicious prosecution

184 The defendants have further sought damages from MBB for malicious prosecution. At the time parties filed their closing submissions it was "not entirely clear" whether the tort of malicious prosecution applied to civil proceedings in Singapore, as the defendants candidly acknowledged.[181]

185 Since then, the tort of malicious prosecution has been definitively held not to apply to civil proceedings *generally*. The tort continues to apply to specific categories of civil proceedings where case law has recognised its applicability. One such category is proceedings in relation to the arrest of a ship. The categories of specific civil proceedings where the tort applies are not to be expanded absent extremely persuasive reasons. See *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 ("*Lee Tat*") at [84] and [128].

186 The Court of Appeal in *Lee Tat* found that the underlying commonality between the specific categories of civil proceedings in which the tort of malicious prosecution has been recognised (or at least the ones relevant to this case) is that they involve "*ex parte* interlocutory orders by the party initiating the proceedings, the effect of which is (potentially at least) to inflict immediate and perhaps even irreversible damage to the reputation of the other party": *Lee Tat* at [77].

187 Once the Injunction is left out of account, no aspect of the present case is within any of the categories of specific civil proceedings to which the tort of

[181] Defendants' Closing Submissions at paragraph 291.

Version No 1: 27 Oct 2020 (22:41 hrs)

malicious prosecution has been held to apply. I decline to extend the tort of malicious prosecution to this category of case. These are general commercial proceedings. On MBB's primary case, this action is between a creditor claiming a security interest and defendants who claim to have defeated the security interest. On MBB's alternative case, this action is between an alleged victim of the tort of conspiracy and the alleged conspirators. It cannot be said that this action in itself has caused immediate and irreversible damage to the defendants.

188 As the Court of Appeal in *Lee Tat* noted at [94] and [120], persons in the defendants' position are not without a remedy. They have recourse to the usual procedural orders and costs consequences, and had the opportunity to bring this action to a prompt end, for example, by applying to strike out MBB's statement of claim. And insofar as the Injunction is concerned, they have the benefit of MBB's undertaking as to damages. It is still open to them to persuade me that an inquiry as to damages should be ordered.

Version No 1: 27 Oct 2020 (22:41 hrs)

Conclusion

189 For the reasons above, I hold in favour of the defendants on the claim and the plaintiff on the counterclaim for malicious prosecution. I will hear the parties separately on costs as well as on whether there should be an inquiry into the damages, if any, payable by MBB to Red Sea on the undertaking it gave to support the Injunction.

Vinodh Coomaraswamy
Judge

Prem Gurbani, Govintharasah s/o Ramanathan and Wu Lennon Leong Chong (Gurbani & Co LLC) for the plaintiff;
Bazul Ashhab bin Abdul Kader, Nora Jessica Chan Kai Lin, Lailatulqadriah binte Jaffar and Cassandra Chow Qilei (Oon & Bazul LLP) for the third and fourth defendants.

Version No 1: 27 Oct 2020 (22:41 hrs)