IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 41

Civil Appeal No 87 of 2019

Between

Malayan Banking Berhad

… *Appellant*

And

(1) Bakri Navigation Company Ltd
(2) Red Sea Marine Services Ltd

… *Respondents*

In the matter of 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

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

[Credit and Security] — [Charges] — [Floating charges]
[Tort] — [Conspiracy]
[Civil Procedure] — [Pleadings]
[Evidence] — [Principles] — [Foreign law]

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

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Malayan Banking Bhd
v
Bakri Navigation Co Ltd and another

[2020] SGCA 41

Court of Appeal — Civil Appeal No 87 of 2019
Judith Prakash JA, Steven Chong JA and Woo Bih Li J
20 November 2019

29 April 2020 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 The main issue in this appeal is whether certain actions by a Malaysian shipbuilding company had the effect of crystallising a floating charge over its assets and undertaking, and thereby created a fixed charge over a vessel under construction identified in the shipyard as Hull 1118. The appellant-bank had provided financing to the shipbuilder on the security of a debenture that created a fixed and floating charge over the shipbuilder's undertaking, including Hull 1118 which was then in the process of being constructed for the first respondent. By way of a novation, the second respondent eventually became the buyer of Hull 1118 and acquired title to it in 2011. The shipbuilder defaulted on its repayment obligations to the appellant in 2013 and the appellant then enforced its debenture.

2 Before the High Court Judge ("the Judge"), the appellant claimed that its interest in Hull 1118 was superior to that of the second respondent for various reasons. Alternatively, the appellant claimed that there was a conspiracy between the shipbuilder and the respondents to deprive the appellant of its security in the vessel. Upon conclusion of the trial, the Judge found that the floating charge only crystallised after the second respondent gained title to the vessel, and that the second respondent's interest was superior to that of the appellant. In this regard, in interpreting the automatic crystallisation clause in the debenture, the Judge declined to follow a Malaysian judgment involving the same shipyard, the same bank, and the same debenture, which the appellant had relied on as proof of Malaysian law. The Judge also rejected the claim in conspiracy.

3 The key issues in the appeal relate to the crystallisation of the floating charge, the priority of interests between the appellant and the second respondent, and the question of whether the requisite intention to establish conspiracy had been proved below. The crystallisation issue throws up interesting points. One of these is whether the Judge was bound to follow the Malaysian judgment and hold that the automatic crystallisation clause of the debenture had been triggered, given that the debenture was governed by Malaysian law. The other is whether a transaction outside the ordinary course of the shipbuilder's business would be a crystallising event by operation of law.

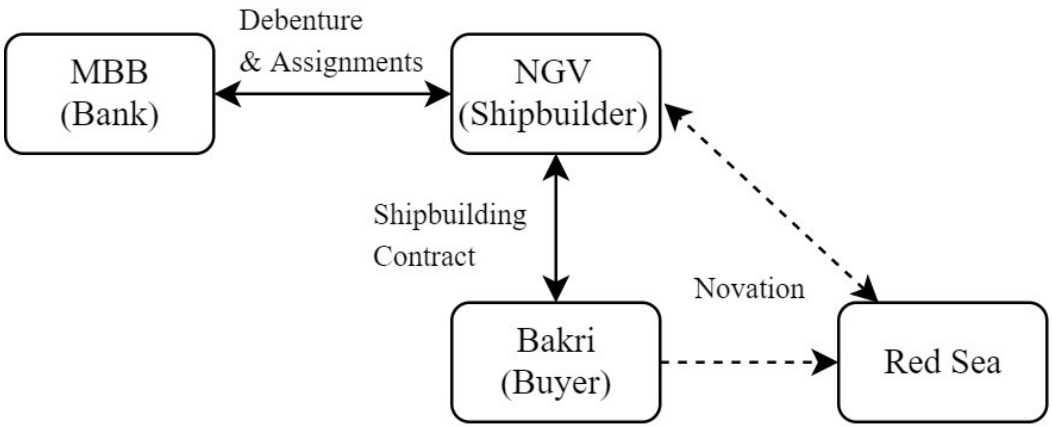
Facts

4 The facts are primarily drawn from the Judge's findings in the decision *Malayan Banking Bhd v ASL Shipyard Pte Ltd and others* [2019] SGHC 61 ("the Judgment"), and from the parties' cases.

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

Parties to the dispute

5 The relationships between the parties are encapsulated in the following diagram and described in further detail below.



6 The appellant is Malayan Banking Bhd ("MBB"), a bank incorporated in Malaysia. MBB extended credit facilities to the shipbuilder, NGV Tech Sdn Bhd ("NGV"), between 2004 and 2012 for the purpose of its ordinary business which was to build vessels for sale at its shipyard in Malaysia. NGV is not a party to the action.

7 The first respondent is Bakri Navigation Company Ltd ("Bakri"), the original buyer of Hull 1118 and its sister vessel, Hull 1117, pursuant to two shipbuilding contracts with NGV entered into in August 2007. These shipbuilding contracts were novated to Red Sea Marine Services Ltd ("Red Sea"), the second respondent, on 12 December 2007. Bakri and Red Sea are part of the Bakri group of companies. They have the same registered address, and are incorporated in Saudi Arabia. Bakri owns and operates ships, while Red Sea manages ships.

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

The Debenture and Assignments

8 The credit facilities extended by MBB to NGV were secured by six debentures executed by NGV in favour of MBB. It is not necessary to distinguish between the six debentures, their terms being identical, and hence the court below referred to them collectively as "the Debenture".

9 Clause 3.1(b) of the Debenture created a floating charge in favour of MBB over, *inter alia*, all of NGV's movable and immovable property and other assets. The Debenture provided two mechanisms for the crystallisation of the floating charge:

(a) MBB could crystallise the floating charge by notice in writing to that effect to NGV (cl 4.2); and

(b) The floating charge would crystallise automatically if NGV "encumbered" in favour of a third party any property which was subject to the floating charge (cl 4.3). Clause 4.3 is also referred to as the "automatic crystallisation clause".

10 The word "encumbrance" played a significant part in MBB's claim. The word is defined in cl 1.2 of the Debenture:

> 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 |

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

> 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* …
>
> [emphasis in original in underline, emphasis in italics added]

11 The Debenture was expressly governed by Malaysian law (cl 22.14). However, the parties agreed in the court below to proceed on the basis that the court would be able to refer to cases from Singapore, Malaysia and other Commonwealth jurisdictions in order to determine any question of Malaysian law arising in connection with the Debenture. Accordingly, no expert evidence on Malaysian law was required or adduced in the court below.

12 To repay MBB for sums advanced, NGV assigned the proceeds of all its shipbuilding contracts to MBB by way of agreements for assignment executed in 2008 and 2010 (referred to collectively as the "Assignments"). The Debenture and the Assignments were duly registered at the Malaysian Registry of Companies in order to preserve their enforceability in the event of the liquidation of NGV.

The shipbuilding contracts

13 The relationship between NGV (as a shipbuilder) and Bakri (as a purchaser of vessels) led to the construction of four vessels, *ie*, Hulls 1090, 1091, 1117 and 1118. Hulls 1090 and 1091 were commissioned in late 2006, while Hulls 1117 and 1118 were commissioned in August 2007. The price to be paid for Hulls 1117 and 1118 was US$6.33m each.

14 The mode of payment for vessels commissioned from NGV changed over time. From December 2005 to March 2006, the shipbuilding contracts

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

provided that payment for vessels was to be by way of fixed instalment payments. From 2006 to 2010, the relevant shipbuilding contracts provided for what we refer to as the "New Mode". Under the New Mode, payment was to be made in one lump sum on completion and delivery of the vessels by irrevocable letters of credit issued by the respondents' bank ("Riyad Bank") against, *inter alia*, a statement from MBB ("the Statement") stating that:

(a) The letters of credit for the vessels had not been assigned or transferred by MBB to any other party or bank;

(b) MBB agreed with the delivery of the vessels to the buyer; and

(c) MBB did not have a charge, mortgage, encumbrance, interest or lien over the vessels and the materials, equipment and machinery thereon.

15 The New Mode of payment applied to Hulls 1117 and 1118.

The Impugned Transactions

16 Unbeknownst to MBB, several transactions were entered into by NGV and Red Sea between 2009 and 2012. MBB asserted that the net result of these transactions was that Red Sea secured title and possession of Hulls 1117 and 1118, without making payment to NGV. These transactions were impugned by MBB in the action as being outside the ordinary course of business and/or fraudulent and were used as a basis for its submissions on crystallisation and conspiracy. Red Sea relied on the same transactions to claim its status as *bona fide* purchaser of legal title for value without notice. The transactions are collectively referred to in the Judgment as the "Impugned Transactions", and we adopt the same usage here.

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

17 First, in April 2009, NGV and Red Sea entered into agreements to reduce the purchase price of Hulls 1117 and 1118 by US$1.5m each, the shipbuilding contracts having been novated to Red Sea in late 2007. The respondents alleged in the trial that the reduction was made for the purpose of providing "full and final compensation" from NGV to Bakri for NGV's delay in delivering Hulls 1090 and 1091. It was asserted that as a result of the delay, NGV had become liable to pay Bakri liquidated damages.

18 Despite the price reduction, Red Sea continued from 2009 until 2012 to procure extensions of the letters of credit for Hulls 1117 and 1118 at the full contract price of US$6.33m each. According to MBB, it was not aware of the price reduction until after the commencement of the action below.

19 Second, in January 2011, NGV entered into two agreements ("the Agency Agreements") with Quoin Island Marine WLL ("QIM"). Under the Agency Agreements QIM was appointed NGV's agent to take over the construction of Hulls 1117 and 1118. By subsequent addenda to the Agency Agreements, QIM was further authorised to agree to the terms of the delivery of the vessels to Red Sea and empowered as NGV's attorney to deliver title and possession of the vessels.

20 Third, according to Red Sea, it paid US$16.8m directly to NGV's subcontractors in order for them to complete construction of Hulls 1117 and 1118 ("Direct Payments"). Evidence of this includes meeting minutes that were signed in January 2013 by NGV acknowledging this debt to Red Sea, as well as a variety of invoices and other documents.

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

21 NGV then allegedly agreed to set off its debt for the Direct Payments against the purchase price of Hulls 1117 and 1118, the net result being that Red Sea became entitled to take delivery of the two vessels without any payment to NGV. The fact of the Direct Payments and set off was contested between the parties in the trial below.

22 Fourth, on 18 May 2011, NGV and Red Sea executed two contracts (known as the "Completion Contracts") which provided for transfer of title to, and possession of, Hulls 1117 and 1118 to Red Sea while providing that the risk in the two vessels remained with NGV. On 16 June 2011, NGV effected transfer of legal title of Hulls 1117 and 1118 to Red Sea pursuant to the Completion Contracts. The vessels were still under construction at the time of transfer of title. Red Sea registered the vessels under its ownership at the ship registry of Saint Vincent and the Grenadines on the same day. MBB was not informed of the purported transfer of title or the subsequent registration of the vessels.

23 Fifth, in July 2012, NGV informed Red Sea that it was unable to complete construction of Hulls 1117 and 1118. NGV then physically transferred the partly-completed Hulls 1117 and 1118, with Red Sea's consent but without MBB's knowledge, to shipyards in Singapore and Batam to be completed. These shipyards were run by ASL Marine Holdings Ltd, a Singapore company, and PT ASL Shipyard Indonesia, its Indonesian associate. For convenience we refer to both companies as "ASL".

24 In March 2013, the vessels were de-registered from the ship registry of Saint Vincent and the Grenadines. In April 2013, Hulls 1117 and 1118 were re-registered in the ship registry of Saudi Arabia under the ownership of Saudi Arabia Govt Ports under the names "*Radhwa 22*" and "*Radhwa 23*"

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

respectively. According to ASL, by then Hull 1117 had left its yard but Hull 1118 was still in its possession.

NGV's default

25 NGV defaulted on the credit facilities granted by MBB – as of February 2013, it owed MBB in excess of RM698m. In March 2013, MBB served two notices in writing on NGV, pursuant to cl 4.2 of the Debenture, to crystallise its floating charge. In May 2013, on the application of a creditor unrelated to this dispute, NGV was ordered to be wound up in Malaysia.

26 In the meantime, in mid-2012, MBB had discovered that the vessels had been removed to Singapore and Batam without its consent and without any payment having been made to NGV by Bakri or Red Sea. On 5 February 2013, it notified Red Sea that all sale proceeds of Hull 1118 had been assigned to it and demanded payment from Red Sea. Red Sea did not reply. On 12 March 2013, MBB notified ASL that the vessels had been charged to it by NGV and that the vessels were not to be removed or released from ASL's custody without MBB's consent. Various correspondence took place thereafter in the course of which ASL asked for evidence of the charge asserted by MBB. On 22 July 2013, ASL's Singapore solicitors wrote to MBB's solicitors to state that as they had not been given evidence of MBB's rights, they intended to deliver Hull 1118 to Red Sea on 30 July 2013. They also notified MBB that Hull 1117 had left their possession prior to 12 March 2013 (*ie*, the date of MBB's notification to ASL of its interest). ASL informed MBB that if it still considered it had rights over Hull 1118 it should commence the appropriate action in the Singapore courts.

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

The proceedings in Singapore

27 On 26 July 2013, MBB commenced High Court Suit No 673 of 2013 ("Suit 673") against the two ASL companies, Bakri and Red Sea, purportedly in respect of Hulls 1117 and 1118. Concurrently, MBB applied for an injunction to restrain ASL and the respondents from dealing with Hull 1118. At the hearing, it was confirmed that Hull 1118 was in the Singapore shipyard. The Judge granted the injunction, subject to a proviso that the injunction would be discharged if Red Sea tendered a banker's guarantee for US$750,000 ("the Injunction"). This was because the Judge took the view, on the evidence before him, that as at the time it left MBB's yard Hull 1118 was incomplete and likely only worth about the amount of steel that had gone into it, it would therefore not be just to grant an interlocutory injunction for the full value of the completed vessel. MBB gave the usual undertaking to comply with any order the court might make as to damages if it was later found that the Injunction had caused loss to Red Sea.

28 Red Sea subsequently furnished the banker's guarantee, and the Injunction was discharged. MBB's undertaking continued to bind it for any loss suffered by Red Sea while the Injunction was in place. Hull 1118 was released and left Singapore. Later, MBB discontinued Suit 673 as against both ASL companies, proceeding only against the respondents.

Summary of Arguments Below

29 MBB's case in the court below was that it had an interest in Hull 1118 by virtue of the fixed or floating charge created under the Debenture. MBB argued that automatic crystallisation under cl 4.3 of the Debenture was triggered because the Price Reduction Agreement and transfer of possession of and title

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

to Hull 1118 to Red Sea amounted to "encumbering" Hull 1118. Further, its interest was superior to Red Sea's, because Red Sea was not a *bona fide* purchaser of legal title for value without notice. Alternatively, MBB presented a conspiracy claim – the respondents and NGV conspired to deprive MBB of its interest in Hull 1118 through the Impugned Transactions.

30 The respondents' case was that Red Sea was a *bona fide* purchaser for value without notice. The alleged conspiracy was denied. The respondents also brought a counterclaim against MBB for the tort of malicious prosecution and for the loss they suffered by reason of the Injunction.

31 In closing submissions, the respondents argued that MBB's claim as pleaded was limited to Hull 1118 and did not include Hull 1117. MBB argued that its pleadings were sufficient to include both vessels for its primary claim to ownership and its alternative claim in conspiracy.

Decision Below

32 As a preliminary point, the Judge agreed that MBB's pleadings made no claim in respect of Hull 1117 and were confined to Hull 1118 (Judgment at [37]–[44]).

33 In respect of MBB's substantive claim, the Judge ruled that the Debenture did not create a fixed charge over Hull 1118 (Judgment at [82]). This ruling has not been appealed against and therefore need not be discussed further. The Judge accepted that the Debenture did indeed create a floating charge over NGV's assets, including Hull 1118, but held that the floating charge did not crystallise by operation of the automatic crystallisation clause (cl 4.3) in the Debenture. This was because, in the view of the Judge, the Price Reduction

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

Agreements and transfer of possession of and title to Hull 1118 to Red Sea did not amount to "encumbering" Hull 1118. The transfer lacked the essence of an "encumbrance", which is a right which facilitates the satisfaction of a separate right vested in its holder (Judgment at [89]–[94]).

34 The Judge declined to follow the decision of the High Court of Malaya at Kuala Lumpur ("HC Malaya") in *NGV Tech Sdn Bhd (receiver and manager appointed) (in liquidation) and another v Ramsstech Ltd and others* [2015] 1 LNS 1017 ("*Ramsstech*"), a case which involved NGV and the same debentures in favour of MBB. The case concerned a shipbuilding contract between NGV and a buyer that provided that the price was to be paid directly to NGV. The HC Malaya in *Ramsstech* held that the transaction *did* trigger the identical automatic crystallisation clause on 6 March 2010 as, when executed on that date, the shipbuilding contract constituted an "encumbrance". This was because the shipbuilding contract provided for the contract price to be paid to NGV, "by-pass[ing] [MBB] completely". *Ramsstech* was upheld on appeal to the Malaysian Court of Appeal but without grounds being delivered. The Judge disagreed with the interpretation of "encumbrance" in *Ramsstech*, holding that it was only an authority with, at the most, persuasive effect and was not evidence of Malaysian law (Judgment at [109]).

35 The Judge also rejected MBB's submission that dealing with an asset subject to a floating charge outside the ordinary course of business would result in crystallisation of the floating charge. Not only was such a submission not supported by authority, it also did not make commercial sense (Judgment at [115]–[119]).

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

36 The Judge held that, other than the automatic crystallisation clause being triggered, it makes commercial sense for crystallisation to occur only when the chargor ceases to trade or is disabled from trading. The Judge rejected MBB's argument that the Agency Agreements (and addenda) and the Direct Payments were crystallising events on the basis that these agreements and payments did not show that NGV was no longer trading as a going concern. The evidence showed that NGV's business was still very much alive (Judgment at [127]–[129]) at the time of these events. Accordingly, the floating charge only crystallised later, on 21 March 2013, when MBB gave NGV its first written notice pursuant to cl 4.2 of the Debenture.

37 Having ascertained this, the Judge went on to find that Red Sea's interest in Hull 1118 was superior to MBB's. He applied the principles stated in *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129 ("*Diablo Fortune*") which laid down applicable priority rules depending on whether the transaction was outside or within the chargor's ordinary course of business. The Judge held that the Impugned Transactions did not fall outside the ordinary course of NGV's business. In such a case, MBB's interest could only take priority over Red Sea's if the former could show that NGV's transfer of Hull 1118 to Red Sea was in breach of restrictions in the Debenture, and Red Sea had taken the asset with notice of such restrictions. However, MBB had not pleaded any breach of the Debenture as part of its case, and the Judge refused to consider this on ground of prejudice (Judgment at [135] and [138]).

38 The Judge found that the alleged conspiracy was not proven. The conspiracy element of intention to cause damage or injury to MBB by the Impugned Transactions was not established by MBB. In his view, there were commercial reasons behind the respondents' acts (Judgment at [150]).

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

39 In respect of the counterclaim, the Judge found that the Injunction was wrongly secured (Judgment at [183]) but declined to extend the tort of malicious prosecution to the present case (Judgment at [187]). Red Sea and Bakri have not appealed against the dismissal of their counterclaim. The Judge said he would hear the parties separately on whether there should be an enquiry as to the damages suffered by the respondents as a result of the Injunction (Judgment at [188]).

Parties' cases on appeal

Appellant's case

40 MBB appealed on two grounds:

(a) That its claim to have an interest in Hull 1118 that was superior to that of Red Sea should have been allowed, and the Judge erred in holding that Red Sea had a superior interest; and

(b) That its claim in conspiracy in respect of both Hulls 1117 and 1118 should have succeeded and, in relation to Hull 1117, the Judge erred in his holding that the conspiracy claim had not been pleaded.

41 At the hearing of the appeal, however, counsel for MBB, Mr Prem Kumar Gurbani, confirmed that MBB's appeal was restricted to Hull 1118 and that MBB was not challenging any findings made below in so far as they related to Hull 1117.

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

42 MBB argues that it had in fact pleaded that the Impugned Transactions amounted to breaches of the Debenture and had raised the argument in written submissions on 13 May 2016 and 17 February 2017.

43 In relation to the crystallisation of the floating charge, MBB makes the following points:

(a) *Ramsstech* ([34] *supra*) is final and binding. MBB's floating charge therefore crystallised on 6 March 2010 in accordance with the holding of the HC Malaya in that case.

(b) The transfer of title in Hull 1118 to Red Sea on 18 May 2011, and NGV's retention of it in its shipyard until 23 August 2012, was an "encumbrance" under cl 1.2 in the Debenture, as a "sale with right of retention".

(c) The Judge was wrong to hold that dealings by a chargor outside its ordinary course of business do not crystallise a floating charge by operation of law.

(d) The Impugned Transactions were outside of NGV's ordinary course of business.

(e) At the time of the Agency Agreements (*ie*, January 2011), NGV had in fact ceased to operate as a going concern.

44 In relation to its claim in conspiracy (though this point really goes towards MBB's arguments on priority of interest), MBB argues that Bakri and Red Sea were not *bona fide* purchasers for value without notice. MBB further argues that the conspiracy was established because the Impugned Transactions

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

were executed (and could only have been executed) by the respondents in combination with NGV. Furthermore:

(a) In relation to the alleged conspiracy by lawful means, MBB argues that where there is neither necessity nor legal obligation to carry out the Impugned Transactions, the respondents should be held to have acted with the predominant intention to injure the plaintiff.

(b) In relation to the alleged conspiracy by unlawful means, MBB submits that because letters of credit were extended by the respondents until April 2012, despite Red Sea having obtained title on 18 May 2011, MBB was induced to believe that the sale proceeds were forthcoming. MBB further argues that the Judge had erred in refusing to hold that the extension of the letters of credit amounted to conspiracy to defraud MBB, challenging the factual basis for the Judge's holding.

Respondents' case

45 On the issue of whether Red Sea was a *bona fide* purchaser for value without notice, the respondents argue that the burden of proof does not fall on Red Sea, given that Red Sea already held legal title to Hull 1118. Red Sea was a purchaser for value.

46 On the effect of *Ramsstech*, the respondents argue that MBB had never previously pursued the case that the floating charge crystallised by virtue of the declaration made in *Ramsstech*, and it is not open to MBB to do so now without leave of court: O 57 r 9A(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Leave should not be granted on grounds of prejudice.

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

47 The respondents argue that the Impugned Transactions did not fall outside NGV's ordinary course of business – they were carried out with the intention of facilitating the performance of the shipbuilding contracts.

48 On whether the automatic crystallisation clause was triggered, the respondents effectively repeat and add on to the Judge's reasoning.

49 On conspiracy, the respondents emphasise the requirement that MBB has the burden of proving intent to injure. In any event, in the present case, there were commercial objectives driving the Impugned Transactions.

50 On the acts alleged to comprise the conspiracy, the respondents argue:

(a) It was never MBB's pleaded case that the extension of the letters of credit for Hulls 1117 and 1118 was for the purpose of fraudulently inducing MBB into a false sense of security that sale proceeds were forthcoming.

(b) MBB's argument that the Impugned Transactions were a breach of the Debenture such as to trigger the automatic crystallisation clause was not sufficiently pleaded.

The issues and analysis

51 These are the key issues before this court:

(a) In relation to the crystallisation of the Debenture:

(i) Whether the Malaysian decision of *Ramsstech* ([34] *supra*) should have been followed.

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

(ii) Whether MBB's floating charge crystallised pursuant to the automatic crystallisation clause in the Debenture.

(iii) Whether a transaction outside the ordinary course of the chargor's business is a crystallising event by operation of law.

(iv) Whether the Impugned Transactions fell outside the ordinary course of NGV's business.

(b) Whether the allegations that the Impugned Transactions amounted to breaches of the Debenture, and the allegation that the extension of the letters of credit after Red Sea acquired title was to give the false impression to MBB that sales proceeds were forthcoming, were sufficiently pleaded.

(c) Whether Red Sea was a *bona fide* purchaser for value without notice for the purpose of ascertaining priority.

(d) Whether there was intention (or the predominant intention, in the case of conspiracy by lawful means) to cause damage or injury to MBB by the Impugned Transactions.

52 We will deal with the issues in turn.

Whether the Malaysian decision of **Ramsstech** *should have been followed*

53 It is important to recall the agreement on the applicable law in the present case which was cited in the Judge's decision on this point at [109] of the Judgment. It was agreed prior to the trial that parties would proceed by making submissions on the law, "as though the issue were governed by Singapore law",

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

on the basis that "neither [party was] going to rely on unique features of Malaysian law" not found in Singapore law. No expert evidence on Malaysian law was to be called. This means that it was open to the Judge, and is open to this court, to decide issues of law relating to the interpretation of the clauses of the Debenture and the principles governing crystallisation of floating charges in the same way as if the transactions had taken place in Singapore and were governed by Singapore law. No special principle of foreign law need be applied. On this basis, in the court below, MBB relied on *Ramsstech* as indicating Malaysian law by way of submissions only, and did not adduce expert evidence of Malaysian law. On appeal, however, it contends that the *Ramsstech* case is evidence:

(a) of Malaysian law;

(b) that as a matter of Malaysian law, MBB's first floating charge over NGV's assets arising under the Debenture crystallised into a fixed charge in favour of MBB on 6 March 2010 by reason of NGV's transactions entered into with Ramsstech Ltd and that MBB "will thus have priority [over NGV's assets] *vis-à-vis* … any other party" (*Ramsstech* at [98]); and/or

(c) specifically, that as a matter of Malaysian law, MBB's first floating charge over NGV's assets arising under the Debenture crystallised by reason of, *inter alia,* the Impugned Transactions.

54 To understand MBB's contentions, it is necessary to go into the facts of *Ramsstech* in more detail. The case arose from a debenture between NGV and MBB in identical terms to the one in question here with the same automatic crystallisation, decrystallisation and definition clauses. On 6 March 2010, NGV

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

entered into a shipbuilding contract with a purchaser, Ramsstech Ltd, on terms that the purchase price of the ship to be constructed by NGV would be paid directly to NGV. On completion of the vessel, a dispute arose as to whether Ramsstech Ltd (who had paid NGV for its construction) or MBB had a superior right to the vessel. MBB and NGV sued Ramsstech Ltd in the HC Malaya. Although NGV had received payment from Ramsstech Ltd, it was a plaintiff in the action as by that time, it was under receivership (at the instance of MBB) and also in liquidation. Its claim was, essentially, for the transfer of title to the vessel to Ramsstech Ltd that it had effected to be declared void. The HC Malaya held that the automatic crystallisation clause in the debenture was triggered when the shipbuilding contract was concluded on 6 March 2010 because the contract was an "encumbrance" falling within the definition in cl 1.2 of the debenture. This was because the shipbuilding contract provided for the contract price to be paid to NGV, "by-pass[ing MBB] completely" (*Ramsstech* at [95]). The judgment also noted that in another case, *Malaysian International Merchant Bankers Bhd v Highland Chocolate and Confectionary Sdn Bhd & Anor (No 2)* [1998] 4 CLJ Supp 32 ("*MIMB (No 2)*"), at 48, the HC Malaya had held that an attempt to sell the charged asset in question would cause the floating charge to crystallise immediately (*Ramsstech* at [94]).

55 The *Ramsstech* decision was upheld on appeal to the Malaysian Court of Appeal, but no grounds were delivered by the appellate court. It will be recalled that the learned Judge disagreed with the interpretation of "encumbrance" in *Ramsstech*, holding that it was only authority with persuasive effect, and was not evidence of Malaysian law (Judgment at [109]).

56 While the contentions at [53(a)] and [53(c)] above were revived from the trial, this was not the case with the contention at [53(b)]. MBB sought to

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

argue in the appeal that the effect of the holding in *Ramsstech* that the shipbuilding contract was an encumbrance was that, on and from 6 March 2010, the floating charge became fixed and attached to all NGV's assets at that time, including Hulls 1117 and 1118. Therefore, MBB's interest in Hull 1118 preceded Red Sea's as the latter came into existence, at the earliest, in 2011.

57 A preliminary issue arises because the respondents argue that this is a new argument for which leave is required, and leave should not be granted because of prejudice that it would cause them. The prejudice suffered would include the respondents' inability to lead expert evidence on this issue of Malaysian law, or otherwise present any evidence or submissions in defence. While the parties had agreed to proceed on the basis that Malaysian law is consistent with Singapore law, the respondents argue that the agreement was limited to "issues *in this action* which arise under the Debenture" (referring to the *interpretation* of its terms), which does not include the appellant's reliance on *Ramsstech* for the purpose of contending that the floating charge crystallised on 6 March 2010.

58 We accept the respondents' submission in relation to the argument of crystallisation on 6 March 2010. The parties had agreed that evidence of Malaysian law could be led by way of submissions, without the need for an expert on Malaysian law to testify, as no difference between Malaysian and Singapore law had been pleaded. There was no pleading that, as decided in *Ramsstech*, the floating charge in the Debenture had crystallised three years before MBB gave notice to NGV that it was crystallising the floating charge (see [25] above). Indeed, by paragraph 18 of the Statement of Claim ("SOC"), MBB had pleaded that specific notice issued on 20 March 2013 was the crystallising event. If it had been clear to the respondents that the position MBB

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

was taking despite the pleading was that the floating charge had instead crystallised on 6 March 2010, it is highly unlikely that they would have agreed to dispense with expert evidence on Malaysian law, especially with regard to whether the pronouncements in *Ramsstech* bound other parties who were contracting with NGV at the material time and were not party to the *Ramsstech* litigation or documentation. It is clear from the Judgment that this assertion was not presented below and therefore was not considered by the Judge. Although all the parties were aware that MBB would be relying on *Ramsstech*, the impression was that such reliance was for the purpose of establishing Malaysian legal principle, rather than to establish the *fact* of crystallisation of the Debenture on a specific date. Accordingly, we agree with the respondents that they would be prejudiced if MBB were allowed to present the argument for the first time at the appellate stage. Thus, we will proceed on the basis that the Debenture did not crystallise on 6 March 2020 due to NGV's dealings with Ramsstech Ltd.

59 We turn now to the issue of whether the Judge ought to have followed *Ramsstech* as establishing Malaysian law on the meaning of "encumbrance" and the triggering of the automatic crystallisation clause. Foreign law is an issue of fact which must be proved. In Singapore, one method of proof is by directly adducing raw sources of foreign law as evidence, even if such sources are not part of a foreign law expert's evidence: *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [54]–[55]. Foreign judgments are relevant under s 40 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") for the determination of foreign law, and collections of laws and reports of decisions are presumed to be genuine under s 86 of the EA. The court in *Pacific Recreation* accepted (at [58]) the text of *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (Sripada

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

Venkata Joga Rao ed) (Butterworths, 17th Ed, 2001) ("*Law of Evidence*"), commenting on the equivalent sections of the Indian Evidence Act of 1872 at vol II, p 2169:

> [a] judgment of the highest tribunal of that foreign country is the best evidence to adjudicate what the law there is. … The effect of [s 38 of the Indian Evidence Act, which is equivalent to s 40 of the EA] and s 84 [which is equivalent to s 86 of the EA] is that the court may take judicial notice of a publication containing a foreign law … and may accept the law, as set out in such publication, as a law in force in the particular country …

The above quote in *Pacific Recreation* is, in the full text of *Law of Evidence*, followed by the following words:

> But such a publication cannot be evidence that what is contained in it is the whole law. What the whole law of a foreign country … is, cannot, therefore, be proved except by calling in expert evidence …

60 This much is recognised by the court in *Pacific Recreation*, with its acknowledgment that even if such raw sources of foreign law are admissible, the courts are not obliged to accord these sources any evidentiary weight. It is preferable that solicitors provide expert opinions on foreign law whenever possible: at [60]. Especially where the issue is of complexity or the subject of controversy in its native jurisdiction, it would be difficult for the Singapore courts to competently interpret on their own such raw sources of foreign law. For instance, certain apparently simple words or phrases when translated may well bear special meaning under the foreign law, or the authors of the judgment might not have been particularly clear in their exposition: *Wong Kai Woon and another v Wong Kong Hom and others* [2000] SGHC 176 at [55], cited with approval at [60] of *Pacific Recreation.*

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

61 With respect, given s 40 of the EA and the holding in *Pacific Recreation* set out above, it is unclear why the court below found that *Ramsstech* is not evidence of Malaysian law (at [109] of the Judgment). The reference in *Ramsstech* to *MIMB (No 2)* seems to indicate that *Ramsstech* was not a decision purely on interpretation, but was also a case affirming a certain principle in Malaysian law. In our view, it *was* evidence of Malaysian law.

62 Nevertheless, we consider that it was not wrong for the court below to decline to follow the outcome in *Ramsstech*. The court was not bound to follow *Ramsstech*. It is clear from the text of *Law of Evidence* cited in *Pacific Recreation* that raw evidence in the form of individual judgments is not complete evidence of the whole law.

63 Although the high degree of factual similarity between *Ramsstech* and the present case renders it significant relevant evidence of Malaysian law, the persuasiveness of *Ramsstech* is somewhat lessened by the lack of reasons given in the judgment. It did not explain *why* the shipbuilding contract constituted an encumbrance, apart from stating that the payment under the shipbuilding contract by-passed MBB (at [95]). This is merely a description of the agreed transaction under the shipbuilding contract and does not amount to a reason for concluding that the shipbuilding contract constituted an encumbrance. This was especially so because NGV's ordinary course of business was to build and sell ships and MBB had arranged for the proceeds of shipbuilding contracts (*ie*, from the said sale of ships) to be assigned to it so that on receipt of the proceeds, NGV was obliged to pass the same to MBB and until then would have held the proceeds for and on behalf of MBB. We also note that no reasons were given in the extracts of *MIMB (No 2)* cited in *Ramsstech*. In any event, MBB does not rely on *MIMB (No 2).* While *Ramsstech* was upheld on appeal, the appellate

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

court did not give any reasons for its decision. In contrast, the Judge relied on two Malaysian authorities at [91] of the Judgment to derive the definition of the term "encumbrance". Not only was it open for the Judge to have done so as part of his evaluation of what the law was, the fact that these cases aided in construing the definition of "encumbrance" provided the Judge with valid ground to give them greater weight.

64 We did consider whether concerns of comity or inconsistent outcomes should cause the Singapore courts to be slow to depart from the *Ramsstech* outcome. We concluded that these concerns should not determine the outcome. *Ramsstech* was introduced as a matter of evidence of Malaysian law. The parties chose not to include NGV in the proceedings and did not plead the crystallisation of the charge on 6 March 2010 as a fact. In the circumstances, *Ramsstech* stands on the same footing as any other case authority. We further note that no issue of issue estoppel arises here, given that there is no identity of parties in the two sets of proceedings: *The "Bunga Melati 5"* [2012] 4 SLR 546 at [80]. Also, this is not an argument being pursued by MBB.

65 Further, given the parties' agreement that Malaysian and Singapore law could be relied on, it was not incorrect for the Judge to apply a contextual approach to contractual interpretation by considering the commercial objectives of the parties regarding the use of the floating charge, in line with the Singapore cases cited therein (Judgment at [74], [81], [95]–[99]). In particular, it could not have been the objective and commercial intent of the parties that a transfer of possession of and title to a vessel should trigger the automatic crystallisation clause, because (a) the ultimate commercial objective of the floating charge was to permit NGV to carry on business without seeking MBB's consent to necessary transactions to carry on such business; and (b) the commercial effect

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

of NGV having to constantly 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 be constantly paralysed, which would defeat the very purpose of granting a floating charge. These commercial considerations further buttress the Judge's reasons for giving less weight to the *Ramsstech* decision. In fact, as MBB had agreed that it was not going to rely on any aspect of Malaysian law that was different from Singapore law, MBB cannot now complain that *Ramsstech* was not treated as the final word on the matter.

Whether on the facts of this case MBB's floating charge crystallised pursuant to the automatic crystallisation clause

66 MBB argues, alternatively, that NGV's sale of Hull 1118 while retaining possession of it amounts to a "sale with right of retention" (and was therefore an "encumbrance" under cl 1.2). It points out that while title in Hull 1118 was allegedly transferred to Red Sea on 18 May 2011, the hull itself continued to be retained in NGV's shipyard until mid-2012. The effect of this retention was that the automatic crystallisation clause was triggered and the floating charge became a fixed charge in May 2011.

67 The respondents' rebuttal is that the term "sale with right of retention" refers to retention of title, not mere possession, citing *Benjamin's Sale of Goods* (Michael G Bridge Ed) (Sweet & Maxwell, 9th Ed, 2014) at paras 5-144 to 5-148. In our view, however, these paragraphs of the book explain what a "retention of title" clause results in, but do not answer the question of whether the term "sale with right of retention" is a reference to sale with right of retention *of title*. Left undefined in the Debenture, it cannot be said with certainty what the term "right of retention" meant.

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

68 Nevertheless, the flaw in MBB's argument is more fundamental – even if we assume that "sale with right of retention" refers to a right to retain possession, the mere *fact* that Hull 1118 remained in the possession of NGV does not mean that NGV had the *right* to retain such possession. No evidence has been relied on by MBB to show that any such legal right existed. This argument must therefore fail.

Crystallisation by operation of law

69 MBB submits that given that the purpose of a floating charge is to allow a company to continue trading in its ordinary course of business, dealings which are outside the ordinary course of business would put an end to the company's licence to deal with its assets, thereby crystallising the floating charge. It points out that, as stated by certain texts, a floating charge will crystallise in the following situations (William James Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) ("*Gough*") at pp 135–137 and Paul L Davies, Sarah Worthington and Eva Micheler, *Gower's Principles of Modern Company Law* (Sweet and Maxwell, 10th Ed, 2016) at para 32.8):

(a) if the company goes into winding-up;

(b) if the company stops trading or ceases to carry on business without being in winding-up;

(c) if the company disposes of in substance the whole of its undertaking or trading assets with a view to the cessation of trading or cessation as a going concern; or

(d) if a receiver is appointed over the charged assets by or on behalf of the chargee.

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

70 MBB submits that the overarching essential characteristic of such crystallising events is that they are outside the chargor's ordinary course of business. As such, in the Australian case of *Fire Nymph Products Ltd v The Heating Centre Pty Ltd (in liq) and others* (1992) 7 ACSR 365 ("*Fire Nymph*"), Sheller JA stated (at 379):

> In my opinion a dealing with assets then subject to a floating charge otherwise than with a view to carrying on the chargor's business is a crystallising event. The effect of such a dealing is that the assets pass to the disponee subject to a fixed charge. …

71 In view of the above, MBB says that as a matter of law, transactions and events which occur outside the ordinary course of a chargor's business must automatically crystallise a floating charge. If that were not so, the chargor and a third party would be able to engage in dealings (even fraudulent dealings) in respect of charged assets and yet the floating charge would not crystallise and the security interest given to the financier in return for its facilities would amount to nothing.

72 We do not accept MBB's legal submissions on this point. We explain why below.

73 We accept that there exists a category of crystallising events which relates to the crystallisation of a floating charge on the occurrence of an event which is incompatible with the continuance of trading by the chargor company as a going concern: Roy Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet and Maxwell, 6th Ed, 2017) ("*Goode*") at para 4-32. This category is also known as crystallisation "as a matter of law". Despite that nomenclature, there is no mandatory rule of law which precludes a charge from continuing to float when a company ceases

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

trading. It is merely the law's response to the unlikelihood of the debenture holder intending to allow the charge to continue to float when the chargor ceases to be a going concern. Hence the law implies a term providing for crystallisation on events denoting cessation of trading as a going concern (*Goode* at paras 4-33 to 4-35). Once the chargor ceases trading as a going concern, the rationale for the freedom to dispose of its assets under the floating charge disappears (*Goode* at para 4-36). Other categories of crystallising events include the appointment of a receiver by a debenture holder, because this appointment deprives the chargor of control of its assets, and crystallising events specified as such in the debenture.

74 There are two types of events denoting cessation of trading as a going concern that can bring about "crystallisation as a matter of law". These are:

(a) Winding up of the company.

(b) *De facto* cessation of trading. This includes disposal of, in substance, the whole of a company's undertaking or trading assets with a view to cessation of trading (see *Gough* at p 136; *Re Lin Securities* (1988) 2 MLJ 137 at 150; *Fire Nymph* [70] *supra* at 371).

75 From the texts and the authorities, it is clear that crystallisation by operation of law occurs when the chargor ceases trading as a going concern. This was also recognised by the Judge who explained the rationale for this position at [119], [121]–[122] of the Judgment. MBB's argument – that transactions that are merely outside of the ordinary course of the charger's business crystallise the floating charge as a matter of law – is not supported by academic writings or case authority.

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

76 *Fire Nymph*, on which MBB relies, does not assist it. There, the crystallisation of the charge was based on a construction of the debenture clause in question, not on operation of the law. In *Fire Nymph*, cl 3.1 of the debenture provided, *inter alia*, that "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 …" [emphasis added]. Thus, it was by reason of the contractual agreement between the parties, and not by the operation of any mandatory rule of law, that the actions of the mortgagor which were out of its ordinary course of business resulted in the crystallisation of the charge. The case cannot be taken as authority for the proposition that transactions outside the ordinary course of business would, as a matter of law, immediately crystallise a floating charge.

77 We observe that the threshold for crystallisation as a matter of law is a high one. In the case of *Hubbuck v Helms* (1887) 56 LJ Ch 536 ("*Hubbuck*"), the chargor company was in financial difficulty and sold to a mortgagee all its substantial assets, with part of the purchase money applied to repay the mortgage debt. The chargor did this with the intention of discontinuing operations altogether. It was held that, in such circumstances, the floating chargee was entitled to seek appointment of a receiver and manager and to have the security realised. *Hubbuck* was decided before the term "crystallisation" was adopted for such situations. The rationale of the case was that the right of the chargee to intervene and realise its security was available as much in the situation of a cessation of the company as a going concern as it would be in the situation of winding up of the company. This rationale has been subsequently treated as direct authority for the proposition that ceasing business as a going

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

concern causes crystallisation as much as winding up does (*Gough* at pp 144–145).

78 In sum, we reject MBB's submission that transactions outside of the ordinary course of the chargor's business crystallises the floating charge as a matter of law.

Whether the Impugned Transactions were outside NGV's ordinary course of business

79 Notwithstanding our decision on the scope of crystallisation by operation of law, for completeness, we will move on to consider when it may be said that a transaction is outside the ordinary course of business. This point is also relevant to the question of priority.

80 As MBB submitted, the applicable test is the two-stage test elucidated in *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch) ("*Ashborder*") at [227], as affirmed by this court in *Diablo Fortune* ([37] *supra*). The court in *Ashborder* also commented that the threshold to be crossed before an activity is seen as being outside a company's ordinary course of business is a high one (at [46]). The test is as follows:

(a) First, the court is to ascertain, as a matter of fact, whether an objective observer with knowledge of the company would view the transaction as having taken place in the ordinary course of its business.

(b) Second, the court considers whether, on the proper interpretation of the document creating the floating charge, the parties nonetheless did not intend that the transaction should be regarded as being in the ordinary course of business for the purpose of the charge. In this

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

> consideration, the mere fact that a transaction is unprecedented, exceptional, liable to be avoided in liquidation as a fraudulent or wrongful preference, or even made in breach of a director's fiduciary duty does not necessarily preclude the transaction from being in the ordinary course of the company's business. However, transactions which are intended to bring to an end, or have the effect of bringing to an end, the company's business are not transactions in the ordinary course of its business.

81 The cases in this area use different terminology and this is the cause of some confusion. On the one hand, there is a usage which treats dealings in the "ordinary course of business" as having a meaning that is equivalent to "trading as a going concern". On the other hand, some cases do not conflate the term "dealings in the ordinary course of business" with "trading as a going concern", and regard ordinary dealings or even extraordinary dealings as being apart from a company carrying on as a going concern.

82 We elaborate on the first usage. For context, the floating charge has been described as a security for the chargee coupled with a business dealing licence for the chargor. The scope of this "business dealing licence" is implied – the chargor can deal with the charged assets for the purpose of its business, so long as there is no cessation of its business (*Gough* at 186–187). As *Gough* also states (at 188), the courts have in some instances described this implied usage as extending to dealings within the ordinary course of business of the company. But in other cases the courts have also, without any apparent distinction being drawn, referred to the liberty of the chargor to deal with the charged assets in any manner, so long as the chargor remains a going concern. *Gough* further notes that it appears that the expression "ordinary course of business" was not

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

intended as a particular limitation on the implied licence, and the only real limitation is that the chargor remains a going concern at the time of dealing. This approach was affirmed in *Fire Nymph* ([70] *supra* at 370–371) where the court treated the expression "dealing in the ordinary course of business" as meaning the same as "transactions with a view to carrying on business as a going concern". In other words, while "a dealing in the ordinary course of business" would invariably constitute "carrying on business as a going concern", the converse is not necessarily true.

83 The second type of usage refers to dealings which do not amount to a cessation of business. A good example of this is the New South Wales Court of Appeal case of *Reynolds Bros (Motors) Pty Ltd & ors v Esanda Ltd* (1983) 8 ACLR 422, where it was emphasised that a transaction will be within the ordinary course of business even if it is extraordinary or exceptional in character. Mahoney JA stated (at 428):

> … [W]ithin this principle, "ordinary" is not to be confined to what is in fact ordinarily done in the course of the particular business of the company. Transactions will be within this principle even though they be, in relation to the company, exceptional or unprecedented. Thus, in *Willmott v London Celluloid Co* (1866) 34 Ch D 147, a fire had destroyed most of the company's business and the insurance moneys were taken by the directors on a garnishee in respect of debts due to them personally: it was held that they took them free of the equitable charge. …

Priestley JA stated in the same case at 431:

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

> … Transactions will undoubtedly be in the ordinary course of the business if, within its course they are made for the purpose of carrying on the business or to achieve ends not disparate from those of the business activity …

84 In the English case of *In re Automatic Bottle Makers, Limited* [1926] Ch 412 at 421, the court stated that the expression "in the ordinary course of business" of the company "should be construed in a commercial sense, that is to say in the ordinary course of carrying on the manufacturing and commercial transactions [which are] the object of its incorporation". *Gough* (at pp 208–209) states that a transaction is not within the ordinary course of business if it is (a) not a business transaction effected within the powers of the company and within the directors' powers; or (b) fraudulent.

85 More specifically, fraudulent dealings, being outside the implied licence of a floating charge, refer to those dealings which are not in good faith for the purposes of the chargor's business (*Gough* at p 209). Where a fraudulent dealing is carried out, the implications and remedies for the chargee depend on other factors (*Gough* at pp 210–214):

> (a) Where a transaction outside the implied licence also causes crystallisation *through business cessation*, the floating chargee has all the usual remedies available on crystallisation.
>
> (b) Where a transaction outside the implied licence is not also accompanied by business cessation, there is no crystallisation of the floating charge:
>
> > (i) Instead, the third party takes subject to the prior floating charge (*ie*, the chargee's interest takes priority over the third

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

party buyer's) but only if the third party buyer takes the charged property with notice of the fraud.

(ii) Alternatively, it appears that the chargee is entitled to seek judicial remedies to restrain the transaction, such as by an injunction (*In re Borax Company* [1901] 1 Ch 326).

86 In other words, the authorities relied on by MBB in its submissions correctly reflect the principle that the implicit business licence granted under a floating charge is for the chargor to dispose of its assets in the ordinary course of business. Those authorities, however, do not allow MBB to make the further submission that transactions outside the ordinary course of business (short of ceasing trading as a going concern) result in crystallisation of the floating charge. The classes of events resulting in crystallisation by operation of law (as described at [74] above) do not include transactions that are merely outside the ordinary course of business but which do not amount to a cessation of business. The chargee must instead seek recourse through the rules of priority.

87 Finally, *Diablo Fortune* ([37] *supra* at [46]) held that dispositions of charged assets outside the ordinary course of business do not necessarily crystallise the floating charge. MBB seeks to distinguish *Diablo Fortune*, arguing that the issue in dispute in that case was whether a lien on sub-freights was a charge that was void for want of registration. This court, however, held that the lien should be categorised as a floating charge and, in doing so, had defined the floating charge and the floating chargee's position. Thus, the remarks which this court made in relation to crystallisation are of general application.

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

88 Turning to the facts of the present case, MBB argues that the Impugned Transactions fulfilled the *Ashborder* test ([80] *supra*) and fell outside NGV's ordinary course of business, as (a) they were extraordinary; (b) NGV could no longer operate as a shipbuilder as a result of the Agency Agreements and addenda; (c) they wrongfully preferred Bakri and Red Sea over other creditors and were liable to be avoided in NGV's liquidation; and (d) there was no necessity for Bakri and Red Sea to require NGV to continue the construction of Hull 1118.

89 MBB's second point relates to NGV no longer operating as a going concern, and is dealt with separately below (at [91]). Taking MBB's first, third and fourth points in turn, it is clear that the mere fact that the Impugned Transactions were "extraordinary" is insufficient to take the Impugned Transactions outside the ordinary course of business. As for wrongful preference, as the respondents point out, there is no evidence to show that there was such preference that would be liable to being unwound or avoided upon NGV's liquidation. Further, even assuming that there was wrongful preference, that circumstance alone would not necessarily take the Impugned Transactions outside the ordinary course of business, according to the considerations in *Ashborder*. In relation to the fourth point, given the high threshold of the test, it is also clear that simply because the Impugned Transactions might not have been necessary does not render them outside the ordinary course of business.

90 Returning to MBB's argument that if fraudulent transactions were not crystallising events, that would be an absurd result (see above at [71]), we disagree. This is because if these transactions fall outside the ordinary course of business, the chargee's interest would still rank first. Even if, under the *Ashborder* test, the Impugned Transactions are considered to be outside the

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

ordinary course of business, it would not be absurd for them not to be crystallising events. The Judge rejected the very same submission when it was made in the court below (at [120]–[124] of the Judgment). We agree with the Judge's reasoning and decision in this respect. In a floating charge, "[t]he 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"; therefore, the "constraint placed on the chargor is … fairly weak": *Diablo Fortune* at [46]. It is precisely because the constraint placed on the chargor is weak that the chargee typically protects itself via guarantees (as indeed provided for in the Debenture). This does not "make nonsense of the entire framework of financing and security transactions", as MBB submitted, but recognises that the framework allows the creditor to protect itself in other ways if it so chooses. In fact, MBB has commenced action against the personal guarantors of the financing facilities granted by MBB to NGV (Judgment at [122]).

91 Turning to MBB's argument that NGV was no longer operating as a going concern, MBB's first argument is the point made above, that NGV no longer retained management powers after the Agency Agreements and addenda were entered into. In our view, this point was adequately considered and dealt with in the Judgment at [126]–[129], and we agree with the learned Judge's reasoning for rejecting it. As he stated, citing *Goode on Legal Problems of Credit and Security* (Louise Gullifer, ed) (Sweet & Maxwell, 5th Ed, 2013) at paras 4-37 and 4-38, trading as a going concern does not require the powers of management to remain with the directors. We add that the respondents' statement – that the Agency Agreements and addenda did not affect NGV's management powers, and merely gave QIM "greater oversight and direction"

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

of the construction of Hulls 1117 and 1118 – is incorrect to the extent that they clearly took away powers of management from NGV (as powers of management were given to QIM "to the exclusion" of NGV) in respect of the hulls in question. As we have said however, management powers need not be retained to support a finding that NGV was still operating as a going concern. In any event, these agreements had no effect on NGV's ability to manage the rest of its business, particularly in relation to the construction of other vessels. As the Judge noted, NGV was, around the time of the addenda, actively trying to secure a contract from the Malaysian Ministry of Defence.

92 MBB's second argument is that the Judge had erred in relying on the appointment letter issued by MBB's monitoring accountant in finding that the Ministry of Defence contract was successfully secured by NGV. The Judge had relied on the evidence before him to find that shortly after the execution of the addenda to the Agency Agreements, NGV secured a contract from the Malaysian Ministry of Defence worth RM300m. The Judge concluded that this showed that NGV's business was still very much alive (Judgment at [127]–[129]). The basis of MBB's factual challenge was that the monitoring accountant "did not know of the factual situation at NGV's shipyard". The respondents argue that the contract with the Malaysian Ministry of Defence was in fact the impetus for MBB having required the appointment of the monitoring accountant; it is therefore incredible for MBB to claim that the monitoring accountant "did not know the factual situation at NGV's shipyard". All in all, we do not see any ground on which to disturb the Judge's finding of fact, it being based on his assessment of the evidence before him.

93 The Judge held at [133] of the Judgment that the Impugned Transactions did not fall outside the ordinary course of NGV's business. Our discussion

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

above on the ordinary course of business has traversed much the same ground as covered by the Judge and we agree with his conclusion. While the Impugned Transactions were not the usual way in which NGV had handled its business, they were effected as part of the sale of Hulls 1117 and 1118 to Red Sea and as such were in the course of NGV's usual business.

Whether MBB pleaded that the Impugned Transactions amounted to breaches of the Debenture

94 On whether MBB's case included the assertion that the Impugned Transactions amounted to breaches of the Debenture, we are of the view that the pleadings were insufficient in this respect.

95 MBB relies on para 62 of the SOC read with para 8 of the same, to argue that the breaches of the Debenture by reason of the Impugned Transactions had been pleaded. Paragraph 62 effectively refers to facts pleaded earlier in the SOC for the conspiracy claim, and para 8 (being one of the paragraphs referenced) lists the material terms of the Debenture. However, the respondents are correct in pointing out that no *breach* of the terms of the Debenture is alleged in para 8. This answers the crux of MBB's argument.

96 MBB then relies on the fact that this argument was raised "throughout the course of proceedings" – namely, in two sets of submissions dated 13 May 2016 and 17 February 2017 – to argue that there was no prejudice. In our view, the respondents are correct in pointing out that these submissions were made in relation to interlocutory applications, and not the substantive claims. Further, the portions of these written submissions referenced by MBB merely set out the allegation as "background facts". More importantly, these submissions (May 2016 and February 2017) *pre-date* the final version of the SOC – 16 May 2018.

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

It was therefore reasonable for the respondents to have proceeded on the basis that the SOC set out MBB's case in its final form. In the result, the respondents were not given adequate notice of the allegation against them. In any event, given that Red Sea did not have knowledge of the terms of the Debenture (see Judgment at [139], [174]), the respondents could not be said to have procured the breach of terms which they did not know existed.

Whether MBB pleaded that the extension of letters of credit after Red Sea obtained title amounted to conspiracy to defraud

97 As for whether MBB's allegation at [44(b)] above was pleaded, we are of the view that the pleadings did not contain the material facts relied on. MBB's allegation on appeal is that the letters of credit were extended after Red Sea obtained title and that this amounted to conspiracy to defraud. In the court below, the argument advanced by MBB was slightly different – MBB had alleged that the extensions of letters of credit were misleading due to the full purchase price being used. The issue of the extensions being procured after the transfer of title was not brought to the fore.

98 MBB points to para 50(b) of the SOC as supporting its new point, which states that the letters of credit issued by Riyad Bank for Hulls 1117 and 1118 had been extended on "various occasions" based on the full contract price of the vessels. In so far as it is a new argument, O 57 r 9A(4)(*b*) of the ROC applies. We agree with the respondents that the allegation was not pleaded. Paragraph 50(b) of the SOC does not mention the fact that title had passed to Red Sea prior to the extension, this being the material fact relied on by MBB on appeal.

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

99 While it is pleaded at para 33 that the extension of the letters of credit did carry on until April 2012, by which time the Completion Contracts were executed, it was not alleged that the extensions, by virtue of being post-transfer of title, amounted to deception. Furthermore, no mention of this was made within the list of issues in the lead counsel's statement filed in relation to the trial. As the respondents argue, to allow MBB to pursue this fresh allegation would prejudice them as the respondents did not have the opportunity to lead evidence in response.

The issue of Red Sea's bona fides

100 At [93] above, we agreed with the Judge that the Impugned Transactions did not fall outside NGV's ordinary course of business. As the Judge noted in the Judgment at [133], the issue of whether Red Sea was a *bona fide* purchaser for value without notice only becomes relevant if the Impugned Transactions are held to fall outside NGV's ordinary course of business. Hence, we need not deal further with this issue. We therefore turn to the issue of conspiracy.

Conspiracy: whether there was intention to cause damage or injury

101 The Judge held that to succeed in its conspiracy claim, MBB must establish that the respondents and NGV had the intention (or the predominant intention, in the case of conspiracy by lawful means) to cause damage or injury to MBB by the Impugned Transactions. The Judge further held that this element was not established by MBB, as the respondents were protecting their position as rational commercial actors against default by NGV in delivering Hull 1118 (Judgment at [150]).

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

102 On appeal, MBB argues, first, that because it was not necessary for the respondents to enter into the Impugned Transactions, since they did so they should be treated as having done so with the predominant intention of injuring MBB. In this regard, MBB relies on the case of *SH Cogent Logistics Pte Ltd and another v Singapore Agro Agricultural Pte Ltd and others* [2014] 4 SLR 1208 ("*SH Cogent*") at [151]–[152].

103 In our view, MBB has mischaracterised the decision in *SH Cogent*, which does not in fact support its case. In *SH Cogent*, the defendants had asserted that they had carried out the relevant acts because they believed they were legally obliged to do so (at [107]). This reason was held to be an excuse to mask their predominant purpose which was to cause damage to the plaintiffs (at [116]). Nowhere does the court in *SH Cogent* state that where the acts are not a necessity, the defendants should be held to have acted with the predominant intention to injure the plaintiff.

104 Secondly, MBB alleges that the conspiracy was made out because the Impugned Transactions were executed (and could only have been executed) by the respondents in combination with NGV. MBB cites the following examples: (a) QIM's appointment which authorised it to take over the construction of Hulls 1117 and 1118, deliver possession thereof and transfer title to the hulls could only have been carried out if NGV allowed QIM to do so (*ie*, enter NGV's shipyard and execute documents in NGV's name); and (b) the transfer of title in Hulls 1117 and 1118 to Red Sea free of charge pursuant to the Completion Contracts and the extension of letters of credit was achieved by agreement between Red Sea and NGV.

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

105 We do not accept this argument. Even though the Impugned Transactions required the involvement of NGV and, even if the respondents had notice of the floating charge, this does not lead to the conclusion that the respondents intended to injure MBB. As the Judge found, the respondents were acting for a commercial reason which was to prevent NGV from defaulting on its contractual obligation to construct and deliver Hull 1118. Indeed, the respondents were trying to salvage the situation and gain the useable vessel they had contracted for and which MBB clearly had difficulty completing in time. In this effort, they also incurred considerable expense by way of the Direct Payments as the Judge found (at [165] of the Judgment).

106 Thirdly, MBB challenges the Judge's basis for his factual finding that the extension of letters of credit did not amount to conspiracy to defraud MBB even though he found it odd that the letters of credit had been extended. Briefly summarising MBB's argument in the court below and the Judge's holding, MBB argued that the respondents and NGV deliberately procured 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, to induce MBB to continue providing financing facilities to NGV for the construction of Hull 1118. The Judge disagreed, and accepted the respondents' 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. This was because such an amendment would require a full review of the letter of credit facility at Red Sea's expense (Judgment at [175]–[176]).

107 On appeal, MBB argues that it is simply "logically inconceivable" why an application for a reduction in a letter of credit amount would lead to a full

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

review of Red Sea's banking facility. MBB does not refer to any evidence to support this argument. In our view, this is tantamount to seeking a re-trial of the matter based on nothing more than an assertion. This contention had been answered in the course of trial to some extent during the cross-examination of the respondents' witness, Mr Abdul Majeed Khan, who confirmed that amending the letter of credit, whether upwards or downwards, would be time-consuming and costly in the particular banking system of Saudi Arabia. Having assessed the evidence, the Judge came to a finding of fact that any amendment to the letter of credit would result in a costly review of the facility, which provided good reason to explain why the amendments were not made (Judgment at [175]–[176]). MBB has provided no good reason for us to disturb this finding.

108 Accordingly, the appeal on the conspiracy claim must fail.

Conclusion

109 For the reasons given above, we dismiss MBB's appeal with costs fixed at S$50,000 inclusive of disbursements. There will be the usual consequential orders for release of the security.

Judith Prakash	Steven Chong	Woo Bih Li
Judge of Appeal	Judge of Appeal	Judge

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

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