

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

[2022] SGHCR 6

Admiralty in Rem No 16 of 2021 (Summons No 5040 of 2021)

**Admiralty action in Rem against the vessel “STI
ORCHARD”**

Between

Oversea-Chinese Banking
Corporation Limited

... Plaintiff

And

Owner and/or Demise
Charterer of the vessel “STI
ORCHARD”

... Defendant

And

Winson Oil Trading Pte Ltd

... Intervener

JUDGMENT

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

TABLE OF CONTENTS

INTRODUCTION.....	1
BACKGROUND FACTS	2
THE PARTIES	2
THE SALE CONTRACT AND LETTER OF CREDIT	3
DELIVERY OF THE CARGO	10
DELIVERY AND INDORSEMENT OF BILLS OF LADING TO OCBC	13
ACTION AGAINST OWNER.....	15
THE PARTIES' POSITIONS.....	17
LAW ON SUMMARY JUDGMENT	19
ISSUES	20
PART 1: LAW GOVERNING THE BILLS OF LADING	21
INCORPORATION OF CHOICE OF LAW CLAUSE?	21
NECESSITY OF ENGLISH LAW OPINIONS	22
PART 2: WHETHER THERE IS A <i>PRIMA FACIE</i> CASE	24
PART 3: WHETHER THERE ARE TRIABLE ISSUES OR SOME OTHER REASON FOR TRIAL.....	25
GOOD FAITH.....	25
SPENT BILLS.....	33
CONSENT TO MISDELIVERY	35
CONCLUSION.....	40

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.

The “STI Orchard” (Winson Oil Trading Pte Ltd, intervener)

[2022] SGHCR 6

General Division of the High Court — Admiralty in Rem No 16 of 2021
(Summons No 5040 of 2021)

Navin Anand AR

15 March 2022

23 May 2022

Judgment reserved.

Navin Anand AR:

Introduction

1 Bills of lading play an essential role in trade financing. As a document of title to the goods, it is common for banks to take the bills of lading as security for the financing advanced to their customer to purchase the goods. Save for unusual or exceptional circumstances, case law has generally upheld the financing bank's right to assert its security in the face of a defaulting customer, and to call for the delivery of the goods to which the bill of lading relates. This has serious implications for a shipowner responsible for the carriage of goods, as it is settled law that a shipowner who delivers the goods without production of the bills of lading does so at his peril and is typically liable for any consequential losses suffered by the holder of the bills of lading: see *The “Star Quest” and other matters* [2016] 3 SLR 1280 at [4].

2 The present case arises from the collapse of Hin Leong Trading (Pte)

Ltd (“HLT”), formerly one of Asia’s top oil traders, and is one of the many pending actions by a financing bank seeking to rely on the security apparently afforded to it by bills of lading in its possession. The Plaintiff, Oversea-Chinese Banking Corporation Limited (“OCBC”), financed HLT’s purchase of a cargo that was shipped on board the Defendant’s vessel “STI Orchard” (“Vessel”) under a set of three bills of lading dated 28 February 2020 (“Bills of Lading”). HLT defaulted on its obligation to reimburse OCBC, and OCBC commenced the present suit against the Defendant, STI Orchard Shipping Company Limited, (“Owner”) for delivering the cargo to HLT without presentation of the Bills of Lading.

3 In this application, OCBC seeks summary judgment against the Owner in the sum of US\$13,608,000, being the invoice value of the cargo, or alternatively, for interlocutory judgment to be entered against the Owner with damages to be assessed.

4 After hearing the parties, I have decided to grant the Owner unconditional leave to defend. The issues in this case merit further investigation, the chief of which is whether the Bills of Lading were intended to be relied on as security for OCBC’s financing in the underlying transaction. I set out my full grounds below.

Background Facts

The Parties

5 OCBC is a Singapore bank that asserts its rights in this suit as the holder of the original Bills of Lading issued in respect of 36,016.480mt of Gasoil 10ppm Sulphur (“Cargo”) shipped on board the Vessel for carriage from

Mailiao, Taiwan, to Singapore (“Voyage”).¹

6 HLT is OCBC’s customer, and is in the business of oil trading. HLT’s oil trading business included the sale and purchase of oil, wherein it bought various grades of oil that were blended into bunker grade oil and on-sold to HLT’s customers.²

7 The Owner is the registered owner of the Vessel.³ At the material time, the Owner had time-chartered the Vessel to Scorpio LR2 Pool Ltd (“Scorpio”).⁴ Scorpio in turn voyage-chartered the Vessel to the Intervener, Winson Oil Trading Pte Ltd (“Winson Oil”).⁵

The Sale Contract and Letter of Credit

8 The Voyage itself arose out of an international sale of goods between Winson Oil and HLT. By way of a sale contract dated 19 February 2020 (“Sale Contract”), HLT purchased 780,000 barrels of Gasoil 10ppm Sulphur from Winson Oil on a Delivery Ex-Ship (DES) basis.⁶ Payment under the Sale Contract was by an irrevocable letter of credit.⁷ The Cargo that is the subject of the present suit constituted around one-third of the total product purchased

¹ Statement of Claim at paras 12 and 19. 3rd Affidavit of Chua Tiong Nam Martin dated 5 November 2021 (“Chua’s 3rd Affidavit”) at pp185-186.

² 2nd Affidavit of Tung Ching Ching dated 23 December 2021 (“Tung’s 2nd Affidavit”) at p167.

³ Chua’s 3rd Affidavit at p192.

⁴ 2nd Affidavit of Brian Lee dated 3 January 2022 (“Lee’s 2nd Affidavit”) at para 12.

⁵ *Ibid.*

⁶ Chua’s 3rd Affidavit at pp78-83.

⁷ Lee’s 2nd Affidavit at para 14.

under the Sale Contract.⁸

9 OCBC extended trade facility financing to HLT as evidenced by the following documents:

- (a) a credit facilities letter dated 17 July 2019 (“Facilities Letter”);⁹
- (b) OCBC’s Terms and Conditions for Letter of Credit (“LC T&Cs”);¹⁰ and
- (c) OCBC’s Standard Terms and Conditions governing Banking Facilities.¹¹

10 The LC T&Cs purported to give OCBC extensive rights against HLT, including among other things, a pledge over bills of lading, the right to direct HLT to procure the indorsement of bills of lading in favour of OCBC, and the appointment of OCBC as HLT’s agent to do all acts as OCBC deems desirable to perfect its security over the financed goods. The salient terms of the LC T&Cs read as follows:¹²

1. [OCBC] may, at its discretion, issue the letter of credit issued pursuant to [HLT’s] application (‘the Credit’) ...

....

3.(a) Without prejudice to any security credited herein and by general law, [HLT] irrevocably and unconditionally agree to pledge and do hereby pledge to [OCBC] as security for the payment obligations and/or liabilities arising under or in connection with the Credit as well as any other actual, future

⁸ Intervener’s Written Submissions (“IWS”) at para 15.

⁹ Chua’s 3rd Affidavit at pp37-44.

¹⁰ *Ibid* at pp46-47.

¹¹ *Ibid* at pp49-61.

¹² *Ibid* at pp46-47.

or contingent liabilities that may be owing by [HLT] to [OCBC], any and all documents (including but not limited to, bills of lading ...) received by [OCBC] under the Credit (hereinafter, ‘the received documents’) ... Such security shall not be affected even if the presented documents or Goods are released to or upon [HLT’s] order on trust receipt.

(b) [HLT] hereby recognise and admit [OCBC’s] special property in and unqualified right to the possession and disposal of the received documents and in and to the Goods.

...

...

10. [HLT] undertake, where required by [OCBC], to procure and obtain the necessary blank or special endorsement of bills of lading presented under or in connection with the Credit ... in [OCBC’s] favour.

...

13. [HLT] irrevocably appoint [OCBC] ... to be [HLT’s] agent and in [HLT’s] name to execute and deliver all documents and do all acts as [OCBC] ... deems desirable for perfecting [OCBC’s] security over the goods ...

...

22. ... [HLT] further undertake to forthwith execute all documents and take all actions upon [OCBC’s] request with a view to protecting [OCBC’s] interests in the Goods. ...

...

11 On the morning of 6 March 2020, HLT applied for a letter of credit from OCBC in favour of Winson Oil for the sum of US\$16,500,000 (“LC Application”). Two points ought to be noted from the LC Application.

(a) First, HLT provided OCBC with copies of: (i) the Sale Contract, and (ii) a contract dated 3 December 2019 by which HLT agreed to sell Gasoline 92 RON Unleaded to PT Pertamina (Persero) (“Pertamina”).¹³ HLT’s staff stated that these two contracts were “[p]urchase and sales contract for LC issuance to [Winson Oil]”. Gasoline 92 RON Unleaded

¹³ *Ibid* at pp69-109.

is a different product from the Cargo (Gasoil 10ppm Sulphur), and it appeared that HLT intended to blend the Cargo and on-sell it (as Gasoline 92 RON Unleaded) to Pertamina.

(b) Second, OCBC’s letter of credit application form allowed the customer to select the document(s) required from the seller to receive payment under the letter of credit (see Figure 1 below).¹⁴

4 Documents required from seller ▶ All documents must be issued in English & sent in one lot by courier

Common documents in 3 copies ▶ Select accordingly Transport documents ▶ Select accordingly We must receive delivery order, made out to the Applicant, in duplicate. It must be signed by your authorised signatories evidencing delivery of goods. We must verify the signatures ◀	☐ Signed commercial invoice ☐ Packing list ☐ Certificate of _____ (country) origin ☐ Bill of lading in <u>full set 3/3</u> made out to order of Oversea-Chinese Banking Corporation Limited Freight ☐ Prepaid ☐ Collect ▶ Notify _____ ☐ Air Waybill consigned to <u>Oversea-Chinese Banking Corporation Limited</u> Freight ☐ Prepaid ☐ Collect ▶ Notify _____ ☐ Delivery order made out to the Applicant
---	---

Figure 1: Extract of OCBC’s letter of credit application form.

As evident from the application form, if OCBC’s customer requires the seller to present bills of lading to obtain payment under the letter of credit, these bills of lading are to be “*made out to order of [OCBC]*” [emphasis added]. However, when HLT submitted its completed letter of credit application form, none of the boxes in Figure 1 were selected. Instead, HLT specified in additional instructions to OCBC that the seller

¹⁴

Ibid at p126.

(ie, Winson Oil) was to present bills of lading issued or indorsed to the order of HLT.¹⁵

12 At 6.18pm on 6 March 2020, OCBC issued an irrevocable letter of credit in favour of Winson Oil for the sum of US\$16,500,000 (“Letter of Credit”).¹⁶ Payment for the Cargo under the Letter of Credit was to be made against the presentation of, *inter alia*, Bills of Lading issued or indorsed to the order of HLT.¹⁷ It was also provided that if the Bills of Lading were not available, a letter of indemnity issued by Winson Oil to HLT on the terms set out in the Letter of Credit could be presented for payment instead. The salient terms of the Letter of Credit read as follows:¹⁸

46A: Documents Required

AGAINST PRESENTATION OF THE FOLLOWING DOCUMENTS IN 1 ORIGINAL PLUS 2 COPIES UNLESS OTHERWISE STATED:-

...

2. 3/3 SET CLEAN ON BOARD ORIGINAL BILL OF LADING ISSUED OR ENDORSED TO THE ORDER OF ‘[HLT]’ MARKED ‘FREIGHT PAYABLE AS PER CHARTER PARTY’.

...

IN THE EVENT THAT DOCUMENTS STATED ABOVE ARE NOT AVAILABLE UPON PRESENTATION / NEGOTIATION, PAYMENT WILL BE EFFECTED AGAINST:

- A. BENEFICIARY’S COMMERCIAL INVOICE INDICATING NOR DATE AT DISCHARGE PORT
- B. BENEFICIARY’S LETTER OF INDEMNITY DULY SIGNED BY AUTHORIZED SIGNATORY(S)

¹⁵ *Ibid* at pp119-124.

¹⁶ *Ibid* at pp130-136.

¹⁷ *Ibid* at p131.

¹⁸ *Ibid* at pp131 and 134.

C. COPY OF NOTICE OF READINESS (NOR) TENDERED
AT DISCHARGE PORT VIA MT ‘STI ORCHARD’/SUB
NOT LATER THAN 07 MARCH 2020.

...

*BENEFICIARY’S LETTER OF INDEMNITY FORMAT AS
PROVIDED:*

...

[emphasis added]

13 On 12 March 2020, the Singapore branch of ING Bank N.V. (“ING Bank”), who was Winson Oil’s advising bank in the transaction, presented the following documents to OCBC for payment under the Letter of Credit:¹⁹

- (a) Winson Oil’s provisional invoice for the sum of US\$13,608,000;
- (b) a notice of readiness to discharge dated 5 March 2020 tendered by the Vessel at Singapore; and
- (c) a letter of indemnity dated 10 March 2020 (“Payment LOI”) in lieu of the original Bills of Lading. The relevant portion of the Payment LOI reads as follows:²⁰

TO: [HLT]
FROM: [WINSON OIL]

LETTER OF INDEMNITY

WE REFER TO [THE SALE CONTRACT] IN RESPECT OF
YOUR PURCHASE FROM US OF [THE CARGO] SHIPPED ON
BOARD [THE VESSEL] LOADED AT MAILIAO, TAIWAN
(LOADING PORT) PURSUANT TO THE [BILL OF LADING].

IN CONSIDERATION OF YOUR MAKING PAYMENT OF
[US\$13,608,000] FOR ... THE CARGO IN ACCORDANCE
WITH THE [SALE CONTRACT] AND HAVING AGREED TO
ACCEPT DELIVERY OF THE CARGO WITHOUT HAVING
BEEN PROVIDED WITH 3/3 ORIGINAL BILLS OF LADING

¹⁹ *Ibid* at pp145-149.

²⁰ *Ibid* at p148.

AND OTHER SHIPPING DOCUMENTS REQUIRED TO BE PRESENTED BY US IN ACCORDANCE WITH THE [SALE CONTRACT] (‘THE DOCUMENTS’), WE HERELY REPRESENT AND WARRANT AS FOLLOWS:

...

... WE HEREBY AGREE TO PROTECT, INDEMNIFY AND HOLD YOU HARMLESS FROM AND AGAINST ANY AND ALL DAMAGES, LOSSES, LIABILITIES, COSTS, CLAIMS AND REASONABLE EXPENSES WHICH YOU MAY SUFFER BY REASON OF:

- (A) OUR FAILURE TO PRESENT THE DOCUMENTS TO YOU IN ACCORDANCE WITH THE [SALE CONTRACT], AND/OR
- (B) ANY ACTION OR PROCEEDING BROUGHT OR THREATENED AGAINST YOU BY REASON OF OUR SAID FAILURE ...

OUR LIABILITY HEREUNDER SHALL REMAIN IN FULL FORCE AND EFFECT UNLESS AND UNTIL WE PROVIDE YOU WITH THE DOCUMENTS, WHICH WE IRREVOCABLY AGREE TO PROVIDE TO YOU AS SOON AS THE SAME HAVE COME INTO OUR POSSESSION. ...

14 Later that same day (*ie*, 12 March 2020), OCBC issued an import bill notification to HLT to inform the latter of the receipt of the documents presented under the Letter of Credit.²¹ In the same notification, OCBC sought HLT’s confirmation that it would accept the documents presented by completing and signing an instruction form attached thereto. HLT completed and signed the instruction form, and requested OCBC to grant it a trust receipt loan from 3 to 28 April 2020 for the sum of US\$13,608,000 that was due under the Letter of Credit.²² Trust receipt financing from OCBC is governed by an additional set of terms, which are set out in the Master Trust Receipt Agreement dated 19 June 2001 (“Master Trust Receipt Agreement”).²³ The salient terms of the Master

²¹ *Ibid* at pp155-156.

²² *Ibid* at p158.

²³ Tung’s 2nd Affidavit at pp216-218.

Trust Receipt Agreement read as follows:²⁴

In consideration of [OCBC] handing over to [HLT] ... shipping documents and documents of title for or relating to goods which are now or hereafter from time to time and at any time pledged to [OCBC] as security for payment or discharge to [OCBC] of [HLT’s] liability to [OCBC] (hereinafter called the ‘Documents’) ... :-

1. [HLT] hereby undertake to hold any and all Documents so handed over to [HLT] now and hereafter from time to time (together with the goods to which they relate (‘the Goods’) and the proceeds of sale) on trust for [OCBC] as trustee(s) for [OCBC].
2. [HLT] will hold the Documents and will deal with them only for the following purpose and on the following terms that is to say in order to obtain delivery of and to warehouse the Goods. ...
3. [HLT] hereby undertake to ... deliver to buyers to whom [HLT is] not indebted or under any liability the Goods and receive the proceeds of sale as trustee(s) for [OCBC] and as agents on [OCBC’s] behalf and not otherwise and on sale of all or any of the Goods to remit to [OCBC] the entire proceeds of sale or any part payment immediately when received without any set off or deduction whatsoever ...

15 On 3 April 2020, OCBC acceded to HLT’s request, and assigned an internal reference number ‘TR5CF02003549’ for the trust receipt loan to HLT (‘Trust Receipt Loan’).²⁵ On the same day, OCBC paid the sum of US\$13,608,000 to ING Bank under the Letter of Credit.²⁶

Delivery of the Cargo

16 The Cargo was delivered to HLT between 5 and 6 March 2020 at Tanjung Pelapas, Malaysia, via ship-to-ship discharge to the vessel “Chang Bai

²⁴ *Ibid* at p216.

²⁵ Chua’s 3rd Affidavit at p160.

²⁶ *Ibid* at p162.

San” upon the invocation of cl 28 of the voyage charterparty between Scorpio and Winson Oil (“Voyage Charterparty”).²⁷ Clause 28 read as follows:²⁸

28. BILL OF LADING

DISCHARGEPORTSHOWN [sic] IN BILL OF LADING NOT TO CONSTITUTE A DECLARATION OF DISCHARGEPORTAND [sic] CHARTERERS TO HAVE RIGHT TO ORDER VESSEL TO ANY PORT WITHIN TERMS OF THE CHARTER PARTY. CHARTERERS HEREBY INDEMNIFY OWNERS AGAINST CLAIMS BROUGHT BY HOLDERS OF BILLS OF LADING AGAINST OWNERS BY REASON OF CHANGE OF DESTINATION.

SHOULD BILLS OF LADING NOT ARRIVE AT DISCHARGEPORTIN [sic] TIME, THEN OWNERS AGREE TO RELEASE THE ENTIRE CARGO WITHOUT PRESENTATION OF THE ORIGINAL BILLS OF LADING AGAINST DELIVERY BY CHARTERERS OF MUTUALLY ACCEPTABLE LETTER OF INDEMNITY IN ACCORDANCE WITH OWNERS P AND I CLUB WORDING, NO BANK GUARANTEE, WHICH LETTER OF INDEMNITY SHALL BE LIMITED TO DEAL EXCLUSIVELY WITH ALL CLAIMS OF HOLDERS OF ORIGINAL BILL(S) OF LADING IN RELATION TO DISCHARGE OF CARGO WITHOUT PRESENTATION OF ORIGINAL BILLS OF LADING ...

17 In essence, this clause allowed Winson Oil to order the Vessel to a port other than that specified in the Bills of Lading and to deliver the Cargo without production of the Bills of Lading, provided Winson Oil furnished Scorpio with an acceptable letter of indemnity on the latter’s P&I Club’s terms.

18 Pursuant to cl 28 of the Voyage Charterparty, Winson Oil instructed the Vessel to discharge and deliver the Cargo to HLT at Tanjung Pelapas, Malaysia (instead of Singapore, the discharge port specified in the Bills of Lading) without presentation of the original Bills of Lading.²⁹ These instructions were

²⁷ Lee’s 2nd Affidavit at paras 21-24,

²⁸ *Ibid* at p259.

²⁹ *Ibid* at pp303-305.

accompanied by a letter of indemnity issued by Winson Oil (“Letter of Indemnity”), and conveyed up the charterparty chain from Scorpio to the Owner.³⁰ Under the Letter of Indemnity, Winson Oil would be liable for the consequences of its request to discharge the Cargo without presentation of the Bills of Lading at Tanjung Pelapas, Malaysia. The relevant parts of the Letter of Indemnity read as follows:³¹

TO : [SCORPIO]

...

FOR DELIVERY AT THE PORT OF SINGAPORE BUT WE, [WINSON OIL], HEREBY REQUEST YOU TO ORDER THE VESSEL TO PROCEED TO AND DELIVER THE SAID CARGO AT TANJUNG PELAPAS, MALAYSIA VIA STS DISCHARGE TO CHANG BAI SAN TO [HLT] ... WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING.

IN CONSIDERATION OF YOUR COMPLYING WITH OUR ABOVE REQUEST, WE HEREBY AGREE AS FOLLOWS :-

1. *TO INDEMNIFY YOU, YOUR SERVANTS AND AGENTS AND TO HOLD ALL OF YOU HARMLESS IN RESPECT OF ANY LIABILITY, LOSS, DAMAGE OR EXPENSE OF WHATSOEVER NATURE WHICH YOU MAY SUSTAIN BY REASON OF THE SHIP PROCEEDING AND GIVING DELIVERY OF THE CARGO IN ACCORDANCE WITH OUR REQUEST.*

...

3. *IF, IN CONNECTION WITH THE DELIVERY OF THE CARGO AS AFORESAID, THE SHIP ... SHOULD BE ARRESTED OR DETAINED OR SHOULD THE ARREST OR DETENTION THEREOF BE THREATENED, OR SHOULD THERE BE ANY INTERFERENCE IN THE USE OR TRADING OF THE VESSEL (WHETHER BY VIRTUE OF A CAVEAT BEING ENTERED ON THE SHIP’S REGISTRY OR OTHERWISE HOWSOEVER), TO PROVIDE ON DEMAND SUCH BAIL OR OTHER SECURITY AS MAY BE REQUIRED TO PREVENT SUCH ARREST OR DETENTION OR TO SECURE THE RELEASE OF SUCH SHIP OR PROPERTY OR TO REMOVE SUCH*

³⁰ *Ibid* at pp307-308.

³¹ *Ibid* at pp303-305.

INTERFERENCE AND TO INDEMNIFY YOU IN RESPECT OF ANY LIABILITY, LOSS, DAMAGE OR EXPENSE CAUSED BY SUCH ARREST OR DETENTION OR THREATENED ARREST OR DETENTION OR SUCH INTERFERENCE, WHETHER OR NOT SUCH ARREST OR DETENTION OR THREATENED ARREST OR DETENTION OR SUCH INTERFERENCE MAY BE JUSTIFIED.

...

FOR AND BEHALF OF

[WINSON OIL]

[emphasis added]

Delivery and Indorsement of Bills of Lading to OCBC

19 On 10 April 2020, HLT appointed financial and legal advisors to advise and assist it in a debt restructuring exercise.³² Shortly thereafter, on 14 April 2020, HLT informed its bank lenders of its precarious financial position, with total liabilities in the region of US\$4.05bn and assets of only around US\$714m.³³ On the same day (*ie*, 14 April 2020), OCBC wrote to HLT alleging various events of default under the Facilities Letter, and demanding immediate payment of the Trust Receipt Loan granted in respect of the Letter of Credit:³⁴

We, [OCBC] refer to the *credit facilities (the ‘Facilities’) extended by us pursuant to [the Facilities Letter], [Master Trust Receipt Agreement]* and Bank’s Standard Terms & Conditions.

...

As you know, various events of default have arisen under or in connection with the [Facilities Letter]. In any case, the Facilities are uncommitted and repayable on demand and *we hereby declare that all sums owing under the Facilities including the contingent liabilities listed in the Appendix hereto ... and the TR Outstanding Sums are immediately due*

³² Tung’s 2nd Affidavit at p175.

³³ *Ibid* at p176.

³⁴ Chua’s 3rd Affidavit at pp165-166

and payable. Accordingly, we hereby demand the full payment of all sums owing immediately... [OCBC] reserves our right to protect our security interests over all assets financed by it and dispose of them as deem fit to secure our exposure. Under our terms of financing, you shall not dispose the goods without our consent. The Facilities are herewith cancelled.

...

APPENDIX

...

TR Outstanding

S/No	LC Reference	Amount	Interest
1	TR5CF02003549	13,608,000.00	7,817.04
..	...	...	...

[emphasis added]

20 On 27 April 2020, HLT was placed under interim judicial management by the General Division of the High Court. Thereafter, on 11 May 2020, OCBC issued a demand to Winson Oil via SWIFT message to deliver the original Bills of Lading to OCBC. In issuing this demand, OCBC acted as the agent of HLT pursuant to the terms of the LC T&Cs (see [10] above). The SWIFT message read as follows:³⁵

4. PLEASE TAKE NOTICE THAT *HLT HAS, BY WAY OF CONTRACT, IRREVOCABLY APPOINTED [OCBC] TO BE ITS AGENT AND TO ACT IN ITS NAME TO DO ALL SUCH ACTS INCLUDING TO PROCURE AND DELIVER ALL DOCUMENTS RELATING TO THIS [LETTER OF CREDIT] AS [OCBC] DEEMS DESIRABLE TO PERFECT ITS SECURITY IN RELATION TO HLT'S LIABILITIES ARISING UNDER OR IN CONNECTION WITH THE [LETTER OF CREDIT]. THIS WOULD INCLUDE ACTING IN HLT'S NAME TO REQUEST THAT YOU DELIVER THE FULL SET OF 3/3 ORIGINAL BILL OF LADING TO [OCBC].*

[emphasis added]

³⁵

Ibid at pp168-169

21 Winson Oil complied with OCBC’s demand, and on 22 June 2020, delivered the original Bills of Lading to OCBC in full cancellation of the Payment LOI.³⁶ The Bills of Lading received by OCBC were, as provided for under the Letter of Credit (see [12] above), indorsed to the order of HLT.

22 On 15 December 2020, OCBC applied in HC/SUM 5587/2020 (“SUM 5587”) for an order that HLT indorse the Bills of Lading in favour of OCBC.³⁷ OCBC and HLT’s judicial managers reached an agreement on the terms of the draft order to be made in SUM 5587, and on 15 February 2021, Kannan Ramesh J ordered HLT to indorse the Bills of Lading in favour of OCBC without prejudice to “the rights acquired by any person to the Bills of Lading, the goods in relation to the Bills of Lading and/or sale proceeds thereof prior to the making of this Order”.³⁸ On 17 February 2021, HLT by its judicial managers indorsed the Bills of Lading in favour of OCBC.³⁹

Action against Owner

23 On the morning of 18 February 2021, OCBC commenced the present action against the Owner for loss and damage suffered by the misdelivery of the Cargo.⁴⁰ Later on the same day (at 9.22pm), OCBC emailed the Owner to demand delivery of the Cargo, and to seek information on its whereabouts.⁴¹ There was no response, and on 1 March 2021, OCBC emailed the Owner to put it on notice that OCBC was holding it fully liable for the misdelivery of the

³⁶ *Ibid* at p171.

³⁷ *Ibid* at para 35.

³⁸ *Ibid* at para 35 and pp181-183.

³⁹ *Ibid* at para 36 and pp185-190.

⁴⁰ Admiralty *in rem* writ for HC/ADM 16/2021.

⁴¹ Chua’s 3rd Affidavit at pp213-221.

Cargo.⁴²

24 On 4 March 2021, the Vessel called at Singapore, and OCBC effected service of the *in rem* writ issued in this action pursuant to O 70 r 10A of the revoked Rules of Court (2014 Rev Ed) as in force immediately before 1 April 2022 (“Rules of Court”).⁴³

25 The service of the writ precipitated a series of proceedings in England and in Singapore between the parties in the charterparty chain on the furnishing of security to prevent the Vessel’s arrest.

(a) On 8 April 2021, the Owner obtained an *ex parte* interim mandatory injunction in the English High Court to compel Winson Oil to put up security for OCBC’s claim against the Owner.⁴⁴

(b) On or about 22 April 2021, the Owner provided security for OCBC’s claim by way of a letter of undertaking from Steamship Mutual Underwriting Association (Europe) Limited (“LOU”).⁴⁵

(c) On 6 May 2021, Scorpio obtained a mandatory injunction in the English High Court compelling Winson Oil to provide replacement security to OCBC on terms which provide for the release and cancellation of the LOU.⁴⁶

⁴² *Ibid* at pp223-226.

⁴³ *Ibid* at para 39.

⁴⁴ 1st Affidavit of Tung Ching Ching dated 10 June 2021 (“Tung’s 1st Affidavit”) at para 9.

⁴⁵ *Ibid* at para 12.

⁴⁶ *Ibid* at para 13 and pp49-51.

(d) On 7 June 2021, and pursuant to an application by Scorpio, Chua Lee Ming J similarly ordered Winson Oil to provide replacement security for OCBC’s claim against the Owner.⁴⁷

26 OCBC has not received any replacement security to date, and is still holding on to the LOU furnished by the Owner.⁴⁸

The Parties’ Positions

27 OCBC filed the present application for summary judgment pursuant to O 14 r 1 of the Rules of Court. For the purposes of the application, OCBC relies only on the cause of action for breach of the contract of carriage.⁴⁹ OCBC seeks final judgment for the sum of US\$13,608,000, which is the invoice value of the Cargo under the Sale Contract. In the alternative, OCBC seeks interlocutory judgment, with damages to be assessed.

28 OCBC pitches its case as a straightforward one in misdelivery. OCBC submits that it acquired rights of suit as the lawful holder of the Bills of Lading, and is entitled to call for delivery of the Cargo.⁵⁰ Since there is no dispute that the Owner delivered the Cargo to HLT without production of the Bills of Lading, OCBC argues that it has a *prima facie* claim against the Owner for breach of contract, to which there are no real or *bona fide* defences.⁵¹

29 On the other hand, the Owner and Winson Oil submit that the Owner

⁴⁷ *Ibid* at para 14 and pp52-53.

⁴⁸ Plaintiff’s Written Submissions (“PWS”) at para 39.

⁴⁹ *Ibid* at para 7.

⁵⁰ *Ibid* at paras 5 and 45-61.

⁵¹ *Ibid* at paras 5-6, 62-63, and 94-149.

should be granted unconditional leave to defend, on three main grounds that demonstrate a fair probability of *bona fide* defences against OCBC’s claim.

(a) First, OCBC did not become the holder of the Bills of Lading in good faith.⁵²

(b) Second, the Bills of Lading were spent by the time they were indorsed to OCBC.⁵³

(c) Third, OCBC consented, authorised, or acquiesced to the delivery of the Cargo without presentation of the Bills of Lading.⁵⁴

30 The parties also submitted on the law governing the Bills of Lading. The contest between OCBC, on the one hand, and the Owner and Winson Oil, on the other, was whether Singapore law or English law applied.⁵⁵ This in turn determined the applicable legislation governing the rights under the Bills of Lading – either Singapore’s Bills of Lading Act 1992 (2020 Rev Ed) (“Bills of Lading Act”) or the UK’s Carriage of Goods by Sea Act 1924 (c 50) (“COGSA 1924”). The Owner and Winson Oil also adduced English law opinions from Sir Richard John Pearson Aikens (“Sir Aikens”) and Mr Charles Debattista (“Mr Debattista”) respectively. In response, OCBC argues that expert evidence on English law is unnecessary in this case, even if English law applied.⁵⁶

⁵² Defendant’s Defence (Amendment No. 1) (“DD”) at para 7(c). Defendant’s Written Submissions (“DWS”) at paras 43-48. Intervener’s Defence (Amendment No 1) (“ID”) at para 14(c). Intervener’s Written Submissions (“IWS”) at paras 54-64.

⁵³ DD at para 7(f). DWS at paras 49-67. ID at para 14(f). IWS at paras 66-96.

⁵⁴ DD at para 8. DWS at paras 68-77. ID at para 15. IWS at paras 97-124.

⁵⁵ DD at paras 5(b)-(d). ID at paras 11(b)-(d). Reply to Defendant’s Defence (Amendment No. 1) at para 3(3). Reply to Intervener’s Defence (Amendment No. 1) at para 6(3).

⁵⁶ PWS at paras 76-83.

31 For completeness, I should add that the Owner and Winson Oil had raised defences relating to the quantum of OCBC’s claim.⁵⁷ These defences will not be considered in this judgment, which will focus instead on the issues impacting liability.

Law on Summary Judgment

32 The principles relating to summary judgment are well settled. It suffices for me at this juncture to highlight a few general points.

33 To obtain summary judgment, the plaintiff must first show that he has a *prima facie* case for summary judgment. If the plaintiff meets this threshold, the defendant then bears the tactical burden to show that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason to be a trial: see *The “Yue You 902” and another matter* [2020] 3 SLR 573 (*“The ‘Yue You 902’”*) at [19]. In admiralty *in rem* proceedings, this tactical burden may also be discharged by an intervener, who is permitted to set up any and such defences that the defendant shipowner could have set up had it elected to defend the action itself: see *The “Soeraya Emas”* [1991] 2 SLR(R) 479 at [32]–[42].

34 Aside from granting summary judgment, the Court may grant a defendant leave to defend the claim, or part of the claim, either unconditionally or on such terms such as to the giving of security: see O 14 rr 3–4 of the Rules of Court.

35 The process of determining whether to grant summary judgment, unconditional leave, or conditional leave to defend is a single composite

⁵⁷ DWS at paras 99-103. IWS at paras 131-139.

exercise, depending on the overall picture which emerges to the court: see *Akfel Commodities Turkey Holding Anonim Sirketi v Townsend, Adam* [2019] 2 SLR 412 (“*Akfel*”) at [41].

(a) Where the court forms the view that there is *no* issue or question in dispute which ought to be tried or there is *no* other reason for a trial of that claim, judgment should be entered: see *Akfel* at [42].

(b) Conversely, if the court is satisfied that the plaintiff has shown a *prima facie* case for judgment but is also satisfied that the defendant has demonstrated a fair probability of a *bona fide* defence, unconditional leave should be granted: see *Akfel* at [41].

(c) However, if what the defendant has shown does not amount to a fair probability of a *bona fide* defence, but only that the defence raised is not hopeless, the court should impose a condition on the grant of leave to defend, as some demonstration of commitment on the defendant’s part to the claimed defence is warranted: see *Akfel* at [41] and [46]. This is subject to the qualification that it is not appropriate for the court to order further security as a condition, where the plaintiff is already fully secured for the whole of its claim together with interest and costs: see *The “Jarguh Sawit”* [1997] 3 SLR(R) 829 at [53]–[54]. Such an issue may arise in admiralty *in rem* proceedings (such as the present case), where security is provided for the plaintiff’s claim (see [25]–[26] above).

Issues

36 With the above principles in mind, the overarching issue of whether summary judgment should be granted may be approached in three parts. I deal

first with the law governing the Bills of Lading, and the necessity of expert evidence to determine the issues in this application. I will next consider whether OCBC has established a *prima facie* case for summary judgment. Finally, I will consider the defences raised, and decide, based on the overall picture which emerges, whether I should grant summary judgment, unconditional leave, or conditional leave to defend.

Part 1: Law Governing the Bills of Lading

Incorporation of Choice of Law Clause?

37 There is no explicit reference in the Bills of Lading to the governing law. However, the front of the Bills of Lading contains general words of incorporation, which read as follows:⁵⁸

...

FREIGHT PAYABLE AS PER CHARTER PARTY

...

This shipment is carried under and pursuant to the terms of the Charter dated _____

at _____ Month _____ Day _____ Year
between _____ and _____ as
Charterer, *and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.* Copy of the Charter may be obtained from the Shipper or Charterer.

...

[emphasis added]

38 Where an incorporation clause refers to, but does not identify a charterparty, the court will assume that the reference is to any charter under

⁵⁸ Chua’s 3rd Affidavit at p185.

which the goods are carried: see *The SLS Everest* [1981] 2 Lloyd’s Rep 389 at 391–392; *The “Epic”* [2000] 2 SLR(R) 240 at [30]–[33]. Thus, the words of incorporation in the Bills of Lading should be construed to refer to the Voyage Charterparty, which is the relevant charter under which the Cargo was carried from Mailiao, Taiwan to Tanjung Pelapas, Malaysia.

39 The general words of incorporation in the Bills of Lading, with the reference to “all the terms whatsoever of the said Charter except the rate and payment of freight specified therein”, are wide enough to incorporate cl 9 of the Voyage Charterparty, which provides for “ENGLISH LAW TO APPLY”:⁵⁹ see *The “Dolphina”* [2012] 1 SLR 992 at [128]–[132].

40 Thus, based on the materials before me, cl 9 of the Voyage Charterparty was incorporated into the Bills of Lading. This amounted to an express choice of English law as the governing law. OCBC’s claim for breach of the contract of carriage is therefore governed by English law and COGSA 1992.

Necessity of English Law Opinions

41 A party wishing to prove the content of foreign law can do so by adducing raw sources of foreign law as evidence, or by adducing the opinion of an expert on foreign law: see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 (“*Pacific Recreation*”) at [54]. However, where misdelivery and the rights under COGSA 1992 are concerned, I echo the sentiments of Choo Han Teck JC (as he then was) in *Swiss Singapore Overseas Enterprises Pte Ltd v Navalmar UK Ltd* [2003] 1 SLR(R) 688 at [6] (articulated albeit in a different context involving the UK Contracts (Rights of Third Parties) Act 1999) that evidence from an English law expert is not

⁵⁹ Lee’s 2nd Affidavit at p255.

necessary, and it would be sufficient to adduce the relevant English decisions or secondary materials: see *Pacific Recreation* at [57]–[59]; ss 40, 59(1)(b) and 59(2) of the Evidence Act 1893 (2020 Rev Ed).

42 To begin with, Singapore’s Bills of Lading Act was adopted from, and is *in pari materia* with, the UK’s COGSA 1992: see *Bandung Shipping Pte Ltd v Keppel TatLee Bank Ltd* [2003] 1 SLR(R) 295 (“*Bandung Shipping*”) at [14]; Tan Lee Meng, *Law on Carriage of Goods by Sea* (Academy Publishing, 3rd Ed, 2018) at para 07.016. COGSA 1992 was initially applicable in Singapore by virtue of s 5 of the Civil Law Act (Cap 43, 1988 Rev Ed) (“Civil Law Act”). When s 5 of the Civil Law Act was repealed in 1993 by the Application of English Law Act (Cap 7A, 1994 Rev Ed), the latter legislation provided for the continued application of COGSA 1992 in Singapore. In 1994, COGSA 1992, as applied in Singapore, was revised and renamed the Bills of Lading Act.

43 As such, the law concerning Singapore’s Bills of Lading Act is largely similar, if not identical to, the law relating to the UK’s COGSA 1992. Counsel and the Singapore courts alike have not had difficulty grappling with arguments and issues relating to COGSA 1992, without the assistance of an opinion from English law experts: see, for example, *The “Dolphina”* at [155]–[180].

44 At the hearing before me, counsel for the Owner and Winson Oil accepted that Singapore law and English law are the same, insofar as it concerns OCBC’s rights of suit under the Bills of Lading. Accordingly, while I have considered the views expressed by Sir Aikens and Mr Debattista, I do not find these English law opinions necessary or determinative of the issues in this application, and will not be referring to them in any detail in my judgment.

Part 2: Whether there is a *prima facie* case

45 It is settled law that an order bill of lading entitles the lawful holder to call for delivery of the goods covered by that bill: see *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties)* [2003] 3 SLR(R) 611 (“*BNP Paribas*”) at [24]–[26]. The duty imposed on the shipowner under the bill of lading contract is to deliver the goods, on production of the bill of lading, to the person entitled under the bill of lading: see *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 at 586. Delivery without production of the bill of lading constitutes a breach of contract, and a shipowner who delivers the goods to a person other than the lawful holder of the bill exposes himself to the risk of liability to the holder: see *BNP Paribas* at [24]. The bill of lading remains effective until the goods are delivered to the person entitled under the bill of lading, and it follows that a lawful holder is entitled to sue for breach of contract committed prior to the time it became the lawful holder: see *BNP Paribas* at [30].

46 In the present case, the Bills of Lading were signed by the Master of the Vessel,⁶⁰ and are order bills that were specially indorsed to OCBC (see [22] above; *Bandung Shipping* at [18]–[20]). The Owner did not deliver the Cargo to OCBC when the latter demanded delivery in February 2021, as holder of the Bills of Lading (see [23] above). Evidently, this was not possible as the Cargo had been delivered to HLT close to a year earlier by the Owner without production of the Bills of Lading and against the Letter of Indemnity issued by Winson Oil (see [16]–[18] above).

⁶⁰ Chua’s 3rd Affidavit at p185.

47 Given the above, it cannot be seriously disputed that OCBC has raised a *prima facie* case for summary judgment. The tactical burden thus shifts to the Owner or Winson Oil to show that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason to be a trial.

Part 3: Whether there are triable issues or some other reason for trial

48 I now consider the three main defences raised by the Owner and Winson Oil against OCBC’s claim for breach of contract.

Good Faith

49 I begin with the defence that OCBC did not become the holder of the Bills of Lading in good faith. To frame the discussion on this issue, I first set out how the question of good faith impacts the transfer of the rights of suit under the Bills of Lading.

50 On the facts of this case, OCBC would be the lawful holder of the Bills of Lading, and acquire the rights of suit thereunder, if it proves either of the following:

(a) That OCBC was in possession of the Bills of Lading: (i) as a result of the completion of an indorsement by delivery, and (ii) in good faith: see s 2(1)(a) read with s 5(2)(b) of COGSA 1992; *The “Aegean Sea”* [1998] 2 Lloyd’s Rep 39 at 59–60.

(b) Alternatively, if the Bills of Lading are spent (*ie*, possession of the Bills of Lading no longer gives a right, as against the Owner, to possession of the Cargo), that OCBC was in possession of the Bills of Lading:

- (i) as a result of the completion of an indorsement by delivery;
- (ii) in good faith; and
- (iii) pursuant to a contractual or other arrangement made before the time when the Bills of Lading became spent.

(See s 2(2)(a) read with s 5(2)(c) of COGSA 1992; *The “Erin Schulte”* [2015] 1 Lloyd’s Rep 97 at [53]–[58]; *The “Yue You 902”* at [87]–[99].)

51 In either situation, OCBC must establish (a) completion of an indorsement by delivery, and (b) good faith, to show that it acquired the rights of suit. Before turning to address the parties’ arguments on good faith, I do not think OCBC faces any difficulty proving the requirement of completion of an indorsement by delivery. As explained by Moore-Bick LJ in *The “Erin Schulte”* (at [28]), “completion of an indorsement by delivery requires the voluntary and unconditional transfer of possession by the holder to the indorsee and an unconditional acceptance by the indorsee”. There is no suggestion here that this did not take place when the judicial managers of HLT indorsed the Bills of Lading to OCBC on 17 February 2021 (see [22] above).

(1) Parties’ Arguments on Good Faith

52 According to the Owner and Winson Oil, the Bills of Lading were not intended to be relied on by OCBC as security when it financed HLT’s purchase of the Cargo.⁶¹ Instead, OCBC knew that the Cargo would be blended and on-sold to Pertamina, and OCBC looked instead to the sale proceeds that HLT was

⁶¹ DD at para 7(c). DWS at paras 43-48. ID at para 14(c). IWS at paras 54-64.

to hold on trust for OCBC under the Trust Receipt Loan. As such, OCBC cannot be said to have become the holder of the Bills of Lading in good faith, as it is now bringing a contrived claim against the Owner due to the financial collapse of HLT.

53 In response, OCBC argues that it had contractual rights under the LC T&Cs to require HLT to indorse and deliver the Bills of Lading to it, for which OCBC had given valuable consideration by issuing the Letter of Credit.⁶² The exercise of such rights by OCBC was not, and could not be, dishonest. OCBC is thus entitled to sue in respect of the Cargo as pledgee and lawful holder of the Bills of Lading.

(2) My Decision

54 After careful consideration of the competing arguments and the materials before me, I find that there is indeed a triable issue on whether OCBC was in possession of the Bills of Lading in good faith. The arguments on good faith threw up several matters that I am unable to meaningfully determine on the affidavit evidence before me, such as the financing and security arrangements between OCBC and HLT. These matters ought to be investigated at trial, where the judge will have the benefit of the discovery, interrogatory and cross-examination processes. I set out my detailed reasons in the paragraphs that follow, but I emphasize at the outset that nothing I say here should be taken to pre-empt the outcome of the trial.

⁶² PWS at para 136.

55 When OCBC extended financing to HLT, the underlying arrangements suggest that OCBC did not intend to take security through a pledge of the Bills of Lading, and therefore, the Cargo.

(a) A pledge of the bills of lading would only constitute a pledge of the goods, if the possession of the bills of lading constitutes a constructive possession of the goods themselves: see Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) at p 108. Hence, to enjoy the security conferred by a pledge, a bank that finances the shipment of goods by a letter of credit must ensure that the bills of lading are made out to the bank’s order or indorsed in blank. Otherwise, the transfer of the bills of lading to the bank would be ineffective to constitute a pledge, as the bank does not gain constructive possession of the underlying goods. Accordingly, the bank’s right to sell the goods to meet the financing would be prejudiced: see Sir Richard Aikens *et al*, *Bills of Lading* (Informa Law, 3rd Ed, 2020) (“*Aikens, Bills of Lading*”) at para 8.35.

(b) When OCBC issued the Letter of Credit on 6 March 2020, it acceded to HLT’s request for the Bills of Lading to be issued or indorsed to HLT’s order (see [12] above). This was in spite of OCBC’s letter of credit application form which provided, by default, that bills of lading required for presentation were to be made out to the order of OCBC (see [11(b)] above).

(c) Subsequently, when OCBC granted the Trust Receipt Loan to HLT on 3 April 2020, it also did not arrange for the Bills of Lading to be indorsed to OCBC’s order or indorsed in blank.

(d) In other words, it was open to OCBC when it financed the purchase of the Cargo to create a pledge through the deposit of properly indorsed bills of lading. It did not do so, and this fact alone distinguishes the present case from other decisions where summary judgment was entered in favour of the financing bank: see *The “Yue You” 902* at [9]; *The “Navig8 Ametrine”* [2022] SGHCR 5 at [5], [9] and [12].

56 On the contrary, the underlying arrangements suggest that OCBC looked instead to the proceeds of HLT’s sale to Pertamina as collateral.

(a) OCBC granted a Trust Receipt Loan to HLT from 3 to 28 April 2020 for the sums due under the Letter of Credit, which were governed by the terms of the Master Trust Receipt Arrangement (see [14] above).

(b) In general, trust receipt financing involves the release of the bills of lading by the financing bank to the customer for the latter to sell the documents or the goods, in return for the customer’s undertaking to hold the sale proceeds on trust for the bank to cover the amount advanced. While a trust receipt protects the bank against the customer’s insolvency, it does not protect the bank from the customer’s dishonesty in selling the goods and disposing of the sale proceeds otherwise than in accordance with the terms of the trust receipt. As explained by Michael Bridge, *Benjamin’s Sale of Goods* (Sweet & Maxwell, 11th Ed, 2021) at para 18-504:

Where bills of lading are held, generally by a bank, as security for an advance, it is often necessary for the debtor (often a buyer of the goods) to sell the goods in order to obtain the funds required to pay the advance. This need may be satisfied, and the interests of the bank to a large extent protected, by the use of trust receipts. *These documents are by no means uniform in content, but their essential features are as follows. They provide for the release by the bank of the bills of lading to the debtor as trustee for the bank, and*

authorise him to sell the documents or the goods on behalf of the bank. *The debtor, for his part, undertakes to hold the goods and their proceeds in trust for the bank, and to remit the proceeds to the bank, at least up to the amount of the advance. Under such a document, the bank is protected against the debtor’s insolvency, though not against his dishonesty.*

[emphasis added]

(c) OCBC knew, or at the very least was put on notice, that HLT intended to blend the Cargo and on-sell it as Gasoline 92 RON Unleaded to Pertamina (see [11(a)] above). Given that Gasoline 92 RON Unleaded is a different product from the Cargo, the Bills of Lading could not have been used as documents of title for the sale to Pertamina; new bills of lading would have to be issued by HLT. These new bills of lading would then be sold for OCBC to recover the sums advanced under the Letter of Credit. Hence, it is arguable that the effect of the Trust Receipt Loan was to authorise HLT to: (i) sell the blended cargo to Pertamina (using new bills of lading issued by HLT), and (ii) hold the sale proceeds on trust for OCBC to secure the amount advanced.

(d) In making the observations above, I should also highlight that the circumstances surrounding HLT’s sale to Pertamina is a critical piece missing from this puzzle. It is unclear whether HLT’s sale to Pertamina even took place, and if it did, what has become of the sale proceeds. This is relevant because while a trust receipt can protect OCBC against HLT’s insolvency, it does not protect OCBC from any dishonesty on HLT’s part in selling the blended cargo and disposing of the sale proceeds (see [56(b)] above).

57 My views on the financing and security arrangements between OCBC and HLT are corroborated by the affidavit of Mr Lim Oon Kuin (“Mr Lim”)

dated 17 April 2020, which was filed in support of HLT’s application in HC/OS 405/2020 for six months’ moratorium relief pursuant to s 211B of the Companies Act (Cap 50, 2006 Rev Ed).⁶³

(a) Mr Lim was the managing director and founder of HLT, and he had, in his affidavit, enumerated a list of HLT’s secured creditors and the corresponding security held by these creditors.

(b) Notably, Mr Lim did not list pledges of bills of lading as the security held by OCBC. Instead, Mr Lim described OCBC’s security in the following terms:⁶⁴

Uncommitted trade finance facility to finance the procurement of crude and petroleum products, with the following securities:

- *Assignment over all rights, title and interests in relation to sale proceeds under the sale contracts financed by OCBC*

[emphasis added]

(c) However, Mr Lim *did* identify banks that had taken pledges of bills of lading as security for their financing. For example, in respect of ING Bank, Mr Lim described its security in the following terms:⁶⁵

Uncommitted short term credit facilities to finance trade activities, with the following securities:

- *Trust Receipts and/or Pledge and hypothecation of bills, drafts, documents of title, transportation documents, warehouse receipts, insurance policies relating to goods financed by ING*

[emphasis added]

⁶³ The affidavit of Lim Oon Kuin dated 17 April 2020 is exhibited in Tung’s 2nd Affidavit.

⁶⁴ Tung’s 2nd Affidavit at p181.

⁶⁵ *Ibid* at p180.

58 OCBC did try to perfect its “security”, by having the Bills of Lading delivered to it and indorsed in its favour. However, OCBC only took such steps after it was informed of HLT’s financial difficulties on 14 April 2020 (see [19]–[22] above). By that time, the Cargo had been discharged from the Vessel, and apparently blended into a new product for on-sale to Pertamina under the Trust Receipt Loan (see [56(c)] above). Under these circumstances, I question whether it is even possible to create a security interest in the Bills of Lading in the manner sought by OCBC, if it was not in the commercial contemplation of the parties and in fact contrary to the arrangement agreed upon. For completeness, I do not think the order of court dated 15 February 2021 (see [22] above) for HLT to indorse the Bills of Lading to OCBC changes the above analysis. This is because it was made without prejudice to the rights acquired by any person to the Bills of Lading (such as the Owner) prior to the making of the order.

59 The term “good faith” in s 5(2) of COGSA 1992 was held by Thomas J in *The “Aegean Sea”* (at 60) to connote honest conduct. The Court of Appeal in *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR(R) 1 agreed with Thomas J’s formulation of “good faith”, and further commented that “good faith” obviously precluded a situation “where possession is obtained unlawfully, or by other improper means”: see [39]–[40].

60 In light of the rather unique circumstances of this case, I find it is at least arguable that OCBC did not meet the threshold of honest conduct because: (a) it did not look to the Bills of Lading as security at the time it financed HLT’s purchase of the Cargo, and (b) it is now attempting to bring a claim on such purported security. OCBC’s title to sue is not beyond doubt, and the Owner should be granted unconditional leave to defend based on this issue alone.

Spent Bills

61 The next defence raised by the Owner and Winson Oil is that the Bills of Lading are spent and do not transfer any rights of suit to OCBC. In response, OCBC submits that even if the Bills of Lading are spent, it can rely on s 2(2)(a) read with s 5(2)(c) of COGSA 1992 to acquire the rights of suit against the Owner.

62 As previously mentioned (at [50(b)] above), even if the Bills of Lading are spent, OCBC will have rights of suit if it is in possession of the Bills of Lading: (a) as a result of the completion of indorsement by delivery, (b) in good faith, and (c) pursuant to a contractual or other arrangement made before the time when the Bills of Lading became spent. The first requirement is not an issue (see [51] above); I have concluded in the preceding section that the second requirement of good faith should be decided at trial.

63 Accordingly, assuming OCBC can cross the hurdle of good faith, there are two issues arising in respect of this defence:

(a) first, whether the Bills of Lading are spent, and if so, when that occurred; and

(b) second, whether OCBC is in possession of the Bills of Lading pursuant to a contractual or other arrangement made before the time when the Bills of Lading became spent.

(1) Whether the Bills of Lading are Spent

64 In my view, the Bills of Lading became spent on 17 February 2021, when HLT received the Bills of Lading in order to endorse them in favour of OCBC.

(a) A bill of lading is only spent when delivery is effected to the person entitled to the goods: see *The “Yue You 902”* at [69]. In circumstances where the person who received the delivery of the goods subsequently becomes the holder of the bill of lading, the bill of lading would also be spent. This is because the bill of lading’s status as the symbol of the goods is exhausted when the symbol is united with the goods: see *The “Yue You 902”* at [70], citing *Barber v Meyerstein* (1870) LR 4 HL 317 at 333.

(b) In the present case, the Cargo was delivered to HLT between 5 and 6 March 2020 (see [16] above). Although HLT was not in possession of the Bills of Lading at the time of delivery, it subsequently possessed the Bills of Lading on 17 February 2021 for the purpose of indorsing the same to OCBC. By this time, and prior to their indorsement to OCBC, the Bills of Lading had been indorsed to the order of HLT, making HLT the party entitled to the Cargo (see [21] above). Thus, when HLT became the holder of the Bills of Lading on 17 February 2021, the Bills of Lading became spent as they were transferred to the person who was entitled to and had earlier obtained delivery of the Cargo.

(2) Contractual or other arrangement

65 The next issue is whether OCBC was in possession of the Bills of Lading pursuant to a contractual or other arrangement made before the Bills of Lading became spent. To determine this, the approach is to simply identify the arrangement, if any, pursuant to which the bills of lading were transferred: see *The “Erin Schulte”* at [56]. This is a factual inquiry. In *BNP Paribas* at [31] and *The “Yue You 902”* at [94], the relevant “contractual or other arrangement” was

identified by the Singapore court in *obiter* to be the facility agreement between the bank and its customer.

66 In the present case, I accept OCBC’s argument that the transfer of the Bills of Lading to OCBC was made pursuant to the Facilities Letter, which was subject to the LC T&Cs.

(a) OCBC exercised its rights under the LC T&Cs to act as HLT’s agent, and demand that Winson Oil deliver the Bills of Lading to OCBC (see [20] above). This resulted in the transfer of the Bills of Lading from Winson Oil to OCBC.

(b) Thereafter, HLT, by its judicial managers, indorsed the Bills of Lading to OCBC, which according to OCBC, was also done pursuant to the terms of the Facilities Letter.⁶⁶

67 Accordingly, the transfer of the Bills of Lading to OCBC was pursuant to the Facilities Letter, which was entered into before the Bills of Lading became spent on 17 February 2021. Had it not been for the issue of good faith, I would have found that OCBC had the rights of suit under the Bills of Lading pursuant to s 2(2)(a) read with s 5(2)(c) of COGSA 1992.

Consent to Misdelivery

68 Finally, I consider the defence that OCBC consented, authorised, or acquiesced to the delivery of the Cargo without presentation of the Bills of Lading. For ease of reference, I will refer to this as the defence of consent.

⁶⁶ Chua’s 3rd Affidavit at paras 34-36. PWS at para 119.

69 Preliminarily, it should be noted that the defence of consent assumes that OCBC had acquired the rights of suit under the Bills of Lading. As such, if OCBC is unable to prove the issue of good faith at trial, the defence of consent need not be considered at all.

(1) General Principles

70 The defence of consent seeks to excuse the shipowner’s breach of the contract of carriage in delivering the goods without production of the bills of lading. The defence of consent captures a range of possible circumstances, but the essence is that the holder of the bills of lading gave instructions to the shipowner (or is deemed to have done so) which were acted on by the shipowner, such that the holder cannot now complain about the breach: see *The “Cherry” and others* [2003] 1 SLR(R) 471 (“*The ‘Cherry’*”) at [27]. The defence of consent may be established through any one of the following:

- (a) Express consent in the form of written instructions from the holder to the shipowner to release the goods without production of the original bills of lading: see *Forsa Multimedia Limited v C&C Logistics (HK) Limited* [2011] HKCU 254 at [22].
- (b) Acquiescence, in the form of inactivity under such circumstances that the holder’s assent to the release of the goods without production of the original bills of lading may be reasonably inferred from it: see *The “Neptra Premier”* [2001] 2 SLR(R) 754 at [38].
- (c) Actual authority from the holder for a third party to take delivery of the goods without production of the original bills of lading: see *The “Nika”* [2021] 1 Lloyd’s Rep 109 at [26].

71 The defence of consent covers instructions emanating from a person who was not the holder of the bills of lading at the time of delivery but subsequently became the holder. As a matter of principle, I see no reason why a person should be allowed to resile from his earlier instructions that led to the shipowner’s breach. I further find support for this proposition from the *obiter* remarks in *The “Cherry”*.

(a) The case arose from a shipment of a cargo of oil, which was to be carried on the appellants’ vessel from Kuwait to blending facilities in Fujairah owned and operated by an entity known as Metro. In December 1997, the respondents issued instructions for the vessel to discharge the cargo into the blending facilities at Fujairah. Unbeknown to the respondents, the vessel only discharged part of the cargo in Fujairah, with the rest of the cargo being carried to Singapore. The respondents subsequently became the holder of the bills of lading in February 1998, and sued the appellants for having breached their obligation under the bills of lading to deliver the entire cargo at Fujairah.

(b) The Court of Appeal in *obiter* stated that the defence of consent would have been demonstrated in respect of the cargo delivered at Fujairah without production of the bills of lading. The Court explained (at [27]):

... [T]he respondents were never in a position to insist on delivery of the cargo without the bill of lading whether such demand was made to Metro or to the appellants directly and the appellants could have refused to deliver the cargo at Fujairah or to deal with it there in any way until the bills were produced. The appellants did not take this course. ... The appellants thus knowingly committed acts that were in breach of contract and to escape liability for doing so they would have to establish that the respondents had given the instructions on which they acted or could be deemed to have done so and therefore that the respondents could not complain about the breach. *They would have been able to*

establish this in answer to a contention by the respondents that discharge into the storage tanks at Fujairah without production of the bill of lading was a breach since the evidence was clear that that was what the respondents as voyage charterers had instructed Metro to do. ... [emphasis added]

72 In general, the defence of consent is hard to prove. As succinctly explained in *Aikens, Bills of Lading* (at paras 8.48–8.49):

8.48 The defence of consent or acquiescence is generally difficult to establish. *For one thing, insofar as banks regard the underlying goods they finance as their security, it is difficult to see why they would give that up by consenting to delivery of the goods to a third party before the loan is discharged. This is particularly so if an issuing bank requires the bills of lading to be specially endorsed in its favour under the terms of the credit or executes a pledge over the bills of lading and underlying goods.* The fact that the underlying carriage is of a short duration or that the underlying goods would be delivered against a letter of indemnity may be known to a bank, but such knowledge per se is not tantamount to consent to delivery without production of bills of lading. The bank is entitled to rely on the carrier’s contractual promise to deliver against production of a bill of lading and to expect that a carrier who risks a claim for breach of that promise to demand a letter of indemnity to protect itself ... *This defence is even less convincing if the delivery without presentation of bills of lading had taken place prior to the bank’s becoming holder of the same and extending financing against them, since it would entail consent on the bank’s part prior to its becoming a holder of and acquiring rights under the bills of lading ...*

8.49 Another difficulty to the defence of consent is that the carrier is usually unable to establish that he delivered the goods without production of bills of lading on the instructions or with the authority of the bank, being the other party to the contract of carriage. Unless there was communication between the bank and the carrier at the time of such delivery ... it is hard to see how a bank could have instructed or authorised the antecedent delivery without presentation of a bill of lading or against a letter of indemnity. *Indeed, acceptance of a letter of indemnity is meant to protect a carrier as by delivering without presentation of bills of lading, he is doing “what he is not contractually obliged to do”. As the carrier knows and expects that he may be sued for misdelivery, he should not be spared from the consequences of his action ...*

[emphasis added]

(2) My Decision

73 To begin with, there are facts that strongly militate against a finding of consent. It is undisputed that there were no communications between OCBC and the Owner at the material time. Further, the Owner’s own reaction to OCBC’s claim was to institute proceedings against Winson Oil under the Letter of Indemnity, and to compel Winson Oil to put up security for OCBC’s claim. This suggests that the Owner discharged the Cargo because it believed its potential liability under the Bills of Lading for misdelivery was covered by the Letter of Indemnity, and not because it believed that it had no liability due to any perceived consent on OCBC’s part: see *The “Yue You 902”* at [123].

74 However, I do not consider the defence to be clearly unarguable on the facts of this case. The Cargo was delivered by the Owner on Winson Oil’s instructions between 5 and 6 March 2020, and OCBC granted the Trust Receipt Loan on 3 April 2020. When OCBC granted the Trust Receipt Loan, it knew or was put on notice that the Cargo would be blended by HLT, and on-sold as a different product to Pertamina. The circumstances surrounding the Trust Receipt Loan suggest that OCBC looked to the proceeds of HLT’s sale to Pertamina, rather than the Bills of Lading, as the collateral to secure the amount advanced to HLT (see [56] above). Accordingly, whether the Trust Receipt Loan amounted to OCBC’s *ex post facto* consent to, or ratification of, Winson Oil’s instructions to the Owner to deliver the Cargo without production of the Bills of Lading is a matter that should be investigated at trial.

75 In arriving at my view, I recognise that the courts in *BNP Paribas* (at [59]) and *The “Yue You 902”* (at [123]) both rejected attempts by the shipowners to infer consent, authority or ratification on the part of the financing bank arising

from the trust receipt arrangements in those cases. However, these decisions were premised on the finding that the bills of lading had been pledged by the customer to the financing bank as security, and that they were required in the on-sale that was on documents against payment (D/P) terms: see *BNP Paribas* at [29], [44]–[46], [59]–[60]; *The “Yue You 902”* at [116]. It is thus unsurprising that the court did not construe the trust receipt arrangement to operate in an unrestricted manner that would prejudice or affect the financing bank’s pledged rights. The present case is clearly distinguishable since: (a) OCBC did not have a pledge over the Bills of Lading when the Trust Receipt Loan was granted (see [55] above), and (b) the Bills of Lading could not be used in the on-sale to Pertamina.

76 Consequently, I find that the defence of consent also warrants unconditional leave being granted to the Owner.

Conclusion

77 Ultimately, the power to grant summary judgment is intended only to apply to cases where there is *no reasonable doubt* that a plaintiff is entitled to judgment: see *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21]. Given the many unanswered questions I have on OCBC’s claim, I am not persuaded that this threshold has been met. The Owner shall be granted unconditional leave to defend, as I am satisfied that there is a fair probability of a *bona fide* defence.

78 On the issue of costs, I order that the costs of this application shall be in the cause.

79 In closing, it remains for me to thank counsel for their helpful submissions, from which I have derived much assistance in the preparation of this judgment.

Navin Anand
Assistant Registrar

Kenny Yap, Ho Pey Yann and Douglas Lok Bao Guang (Allen & Gledhill LLP) for the plaintiff;
Kenneth Tan SC (Kenneth Tan Partnership) (instructed), Daryll Richard Ng and Ang Kaili (Virtus Law LLP) for the defendant;
Bazul Ashhab Bin Abdul Kader, Prakaash s/o Paniar Silvam, Tan Yu Hang and Levin Lin Lok Yan (Oon & Bazul LLP) for the intervener.
