IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 106

Admiralty in Rem No 105 of 2016
(Registrar's Appeal No 258 of 2017)
(Registrar's Appeal No 259 of 2017)
(Summons No 334 of 2018)

Between

Oversea-Chinese Banking Corporation Limited

… *Plaintiff*

And

Owner and/or Demise Charterer of the vessel "Yue You 902"

… *Defendant*

Admiralty in Rem No 115 of 2016
(Registrar's Appeal No 260 of 2017)
(Registrar's Appeal No 261 of 2017)
(Summons No 336 of 2018)

Between

Oversea-Chinese Banking Corporation Limited

… *Plaintiff*

And

Owner and/or Demise Charterer of the vessel "Yue You 902"

… *Defendant*

GROUNDS OF DECISION

[Admiralty and Shipping] — [Bills of lading] — [Bills of Lading Act]

[Admiralty and Shipping] — [Bills of lading] — [Delivery of cargo against presentation of bills of lading]

[Civil Procedure] — [Summary judgment]

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[2019] SGHC 106

High Court — Admiralty in Rem No 105 of 2016 (Registrar's Appeal No 258 of 2017, Registrar's Appeal No 259 of 2017 and Summons No 334 of 2018) and Admiralty in Rem No 115 of 2016 (Registrar's Appeal No 260 of 2017, Registrar's Appeal No 261 of 2017 and Summons No 336 of 2018)

Pang Khang Chau JC
29 January, 5 March 2018

24 April 2019

Pang Khang Chau JC:

Introduction

1 The plaintiff is Overseas-Chinese Banking Corporation Ltd ("OCBC"). The defendant is Jiang Xin Shipping Co Ltd, the owner of the vessel *Yue You 902* ("the Defendant"). OCBC claims against the Defendant for its failure to deliver to OCBC a cargo of palm oil to which 14 bills of lading in OCBC's possession relate. OCBC had extended a loan to the buyer of the cargo, Aavanti Industries Pte Ltd ("Aavanti"), for the purchase price of the cargo and took the bills of lading as security for the loan. OCBC's loan to Aavanti was governed by a facility agreement made several years before. After Aavanti requested the loan but before OCBC granted it, the Defendant had discharged the cargo at the request of, and against a letter of indemnity ("LOI") provided by, FGV Trading

Sdn Bhd ("FGV"). FGV was the seller of the cargo as well as the voyage charterer of *Yue You 902*. OCBC sought delivery of the cargo from the Defendant after Aavanti defaulted on the loan.

2 Among other things, this case raises the issue of whether the bills of lading were spent before OCBC became their holder, thereby making s 2(2) of the Bills of Lading Act (Cap 384, 1994 Rev Ed) applicable. It also raises the issues of what constitutes relevant prior "contractual or other arrangements" for the purpose of s 2(2)(*a*) of the Bills of Lading Act and what constitutes "good faith" for the purpose of s 5(2) of the Bills of Lading Act.

Background facts

3 On 11 March 2016, FGV entered into a voyage charterparty with the Defendant to charter *Yue You 902* for two voyages.[1] The laycan for the first voyage was 10–15 April 2016 while that for the second voyage was 22–29 April 2016.

4 On 4 April 2016, Aavanti contracted with Ruchi Soya Industries Ltd ("Ruchi") to sell 10,000 metric tons of refined, bleached, and deodorised palm olein ("the palm oil") to Ruchi.[2] On 5 April 2016, Aavanti contracted with FGV to purchase 10,000 metric tons of the palm oil from FGV, on "Incoterms CNF Mangalore, India".[3] The payment term for the contract between FGV and Aavanti was cash against documents.

5 On 5 April 2016, the Defendant received instructions for *Yue You 902*

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1 Qiu Jingbo's 6th affidavit ("6QJB"), dated 1 August 2017, at para 9 and p 37A.

2 Shweta Arora's 1st Affidavit (1SA), dated 25 August 2018, at pp 9–10.

3 Khandelwal Rajiv's 1st Affidavit ("1KR") (filed in HC/OS 658/2016) dated 29 June 2016, at pp 394–396.

to transport 10,000 metric tonnes of the palm oil from Lubuk Gaung, Indonesia to Chittagong, Bangladesh.[4] On 12 April 2016, the Defendant received revised instructions for the palm oil to be transported to New Mangalore, India instead.[5] On 15 April 2016, *Yue You 902* took on 9,999.964 metric tonnes of the palm oil from Lubuk Gaung, Indonesia. 14 bills of lading, LBG/NWM-01 – LBG/NWM-14, were issued on behalf of the Defendant for the palm oil.[6] The bills of lading identified the shipper as PT Intibenua Perkasatama and the consignee as "To Order". They also named New Mangolore, India as the port of delivery and Ruchi as the notify party. The bills of lading were released to FGV on 19 April 2016 following payment of freight to the Defendant.[7]

6 Clause 11 of the voyage charterparty between FGV and the Defendant provided that:[8]

> If original bills of lading are not available for presentation at discharging port(s) prior to [vessel's] arrival, [vessel] to discharge the [charterer's] entire cargo to receivers against [charterer's] LOI (with text according to owner's P[&]I club format) without any supporting bank guarantee.

Clause 6 of the sale contract between FGV and Aavanti similarly provided that:[9]

> At discharge port, in the absence of original B/L, buyer/receiver to receive cargo by providing letter of indemnity (wording as per vessel owner's P and I club format) with first class bank guarantee.

7 On 22 April 2016, FGV issued an LOI to the Defendant, requesting the Defendant to deliver the cargo to Ruchi without production of the original bills

4 6QJB, at p 43.

5 6QJB, at p 46.

6 Saswira bin Ismail's 2nd affidavit ("2SBI"), dated 8 December 2016, at pp 9–92.

7 6QJB, at para 14.

8 6QB, at p 39.

9 1KR, at pp 394–396.

of lading.[10] On the same day, Aavanti issued a back-to-back LOI to FGV requesting FGV to deliver the cargo to Ruchi without production of the original bills of lading.[11] Ruchi had, on 19 April 2016, also issued a back-to-back LOI to Aavanti requesting Aavanti to deliver the cargo to Ruchi without production of the original bills of lading.[12] Thus, there was a chain of back-to-back LOIs from the ultimate buyer, Ruchi, to the sub-seller, Aavanti, and then to the ultimate seller, FGV, and finally to the Defendant shipowner.

8 *Yue You 902* arrived at New Mangalore on 24 April 2016, and began discharging the cargo on 27 April 2016 at 5:05pm local time. The cargo was completely discharged on 29 April 2016 at 8:55am local time (11:25am Singapore time).[13]

9 In the meantime, OCBC received the 14 bills of lading from FGV through Maybank on 26 April 2016 under cover of a documents against payment collection schedule.[14] The bills of lading were blank endorsed by FGV. On the same day, OCBC informed Aavanti of the arrival of the documents and requested payment instructions from Aavanti.[15] Aavanti replied requesting financing for the entire purchase price of USD 7,454,973.16 by way of a trust receipt loan.[16] On 29 April 2016, OCBC granted the loan for the sum requested with a tenor of 21 days.[17] Payment of the purchase price was effected by OCBC

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10 6QJB, at pp 55–56.

11 6QJB, at p 59

12 1KR, at pp 373–374.

13 6QJB, at p 64

14 2SBI, at p 93.

15 2SBI, at p 133.

16 2SBI, at para 9 and p 135.

17 2SBI, at p 137.

to Maybank at 8:32pm on the same day.[18] In other words, the cargo had been completely discharged from *Yue You 902* before OCBC remitted the purchase price to Maybank.

10 It is not clear when Aavanti made the request for the trust receipt loan, although it is indisputable that it must have been made between 26 and 29 April 2016. As Aavanti's request for the trust receipt loan contains a fax header with the timestamp "26-Apr-2016-13:18", the Defendant suggested that the request was made on 26 April 2016.[19] This is incorrect. Aavanti's request for the loan was made by way of a handwritten annotation on OCBC's request to Aavanti for payment instructions. The fax header with the 26 April 2016 timestamp states that it is from "OCBC TFD" and to "65382183" (which is Aavanti's fax number – see the letterhead on Aavanti's LOI referred to at [7] above). Thus the timestamp indicates the time of OCBC's request for payment instructions, and not the time of Aavanti's reply requesting the loan.

11 At the end of the 21-day tenor, Aavanti obtained an extension of time from OCBC till 3 June 2016 but nevertheless failed to repay the loan.[20] After Aavanti defaulted on the loan, OCBC proceeded on 14 June 2016 to enforce its security over the bills of lading by demanding delivery of the cargo from the Defendant, which the Defendant failed to do.[21] OCBC then initiated proceedings against the Defendant pursuant to the 14 bills of lading for breach of contract of carriage, breach of contract of bailment, conversion and detinue.

Procedural history

18 1SA, at p 22.

19 Defendant's Submissions Order 14 Application for Summary Judgment ("Defendant's Submissions"), dated 25 January 2018, at p 7.

20 Saswira bin Ismail's 6th Affidavit ("6SBI"), dated 25 August 2018, at para 15.

21 2SBI, at p 180.

12 OCBC split its claim in respect of the 14 bills of lading across two admiralty *in rem* actions - Admiralty *in rem* No 105 of 2016 ("ADM 105") in respect of the first five sets of bills of lading and Admiralty *in rem* No 115 of 2016 ("ADM 115") in respect of the remaining nine sets. *Yue You 902* was arrested pursuant to ADM 105 while sister ship arrest was effected against *GNG Concord 1* pursuant to ADM 115. Both ships were released with the Defendant furnishing security of USD 7.8 million.[22]

13 After OCBC applied for summary judgment in ADM 105 and ADM 115 on 8 December 2016, the Defendant:

(a) amended its Defence on 30 December 2016 pursuant to O 20 r 12 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) (without need for leave of court);

(b) applied on 23 February 2017 for specific discovery against OCBC, which application was dismissed on 31 March 2017;

(c) appealed on 13 April 2017 against the dismissal of its discovery application, which appeal was dismissed on 26 May 2017;

(d) applied for leave on 9 May 2017 to further amend its defence and obtained leave to do so on 20 June 2017;

(e) applied for leave on 29 August 2017 to file a further affidavit containing a further expert opinion from Mr Tagore Pradip Kumar and obtained leave to do so on 7 September 2017.

14 On 11 September 2017, OCBC obtained summary judgment against the Defendant for US$3,727,500 and US$3,727,473.16 with interest of 5.33% per

[22] 6QJB, at para 3.3.

annum.

15 Following summary judgment:

(a) the Defendant filed Registrar's Appeals 259 and 261 of 2017 ("RAs 259 & 261") against the learned Assistant Registrar's ("the AR") decision granting summary judgment;

(b) OCBC filed Registrar's Appeals 258 and 260 of 2017 ("RAs 258 & 260") against the AR's decision, at [13(e)] above, allowing the further affidavit to be filed; and

(c) the Defendant took out Summonses 334 and 336 of 2018 (SUMs 334 & 336) to further amend its Defence.

16 RAs 259 & 261, RAs 258 & 260 and SUMs 334 & 336 were all heard before me on 29 January 2018. At the said hearing, OCBC's counsel suggested that, to avoid repetition and unnecessarily prolonging the hearing:

(a) parties should launch straight into substantive arguments on RAs 259 & 261 (the appeals against summary judgment) instead of dealing first with RAs 258 & 260 and SUMs 334 & 336 as preliminary issues;

(b) I could therefore proceed to hear substantive arguments in RAs 259 & 261 on the assumption that the further affidavit which form the subject matter of RAs 258 & 260 and the proposed amendments to the Defence which form the subject matter of SUMs 334 & 336 were already before me; and

(c) depending on my eventual decision in RAs 259 & 261, I could then decide on how RAs 258 & 260 and SUMs 334 & 336 should be disposed of.

As there were no objections from the Defendant's counsel, I decided to proceed in the manner suggested by OCBC's counsel.

17 After hearing submissions and reserving judgment, I dismissed RAs 259 & 261, and confirmed the AR's decision to grant summary judgment in ADM 105 and ADM 115. As a consequence of that decision, I made no orders on RAs 258 & 260 and SUMs 334 & 336.

18 The Defendant has appealed against my decision in RAs 259 & 261.

The law concerning summary judgment

19 In an application for summary judgment, the plaintiff bears the burden of showing that he has a *prima facie* case for summary judgment. If the plaintiff manages to show that he has a *prima facie* case, the burden shifts to the defendant 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 (O 14, r 3(1) of the Rules of Court).

20 To satisfy the court that there is an issue or question in dispute which ought to be tried (a "triable issue"), the defendant must show grounds which raise a reasonable probability that he has a real or *bona fide* defence in relation to the issues that he says ought to be tried (see *Wee Cheng Swee Henry v Jo Baby Kartika Polim* [2015] 4 SLR 250 at [36], *JP Choon Pte Ltd v Lal Offshore Marine Pte Ltd* [2016] SGHC 115 at [14] and *Sim Kim Seng (trading as Kim Seng Ship Building) v New West Coast Shipyard Pte Ltd* [2016] SGHCR 2 at

[10]). In this regard, the task of the court is neatly summarised in the following passage in *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25]:

> 25 It is a settled principle of law that in an application for summary judgment, the defendant will not be given leave to defend based on mere assertions alone*: Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray and Christopher John Walters* [1984] 1 Lloyd's Rep 21 at 23. The court must be convinced that there is a reasonable probability that the defendant has a real or bona fide defence in relation to the issues. In this regard, the standard to be applied was well-articulated by Laddie J in *Microsoft Corporation v Electro-Wide Limited* [1997] FSR 580, where he said at 593 to 594 that:
>
> > [I]t is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. The court must look at the complete account of events put forward by both the plaintiff and the defendants and … look at the whole situation. The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. *If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief.*
>
> [emphasis added]

21 In a passage cited with approval recently by the Singapore High Court in *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [19] and *Calvin Klein, Inc and another v HS International Pte Ltd and others* [2016] 5 SLR 1183 at [45], the Supreme Court of Malaysia observed in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 that:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. *Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the*

> *judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.*
>
> [emphasis added]

22 Further, as observed in *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 at [46]:

> The policy underlying summary judgment is twofold and comprises a private and a public element. First, summary judgment enables a plaintiff with a strong claim to secure a judgment in a period of time and at an expense which is proportionate to the dispute. Second, summary judgment proceedings enable the court to conserve scarce public resources where there is no reasonable or fair probability that deploying those resources in a full trial would make a difference to the just determination of the dispute.

23 Finally, as noted in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2007] 1 SLR(R) 675, the fact that an action involves complex issues is not an answer to a claim for summary judgment if the claim is otherwise well-founded (at [19]).

Whether the plaintiff has made out a *prima facie* case for summary judgment

24 It is settled law that an order or bearer bill entitles the holder to call for delivery of the goods to which the bill of lading relates. The carrier who issued the bill of lading is thus obliged to deliver the goods only to the person in possession of the bill, whether as original shipper or as transferee of the bill by indorsement (where necessary) and delivery.

25 In the present case, the bills of lading were signed on behalf of the master of *Yue You 902* and made "To Order". As the bills were blank endorsed by FGV before delivery to OCBC, they were in OCBC's hands, bearer bills: see *Bandung Shipping Pte Ltd v Keppel TatLee Bank Ltd* [2003] 1 SLR(R) 295 ("*Keppel TatLee*") at [20] *per* Chao Hick Tin JA. OCBC acquired a special

property in the goods as pledgee when it granted a trust receipt loan to Aavanti for the purchase price. OCBC thus became holder of the bills of lading pursuant to s 5(2)(*b*) of the Bills of Lading Act. When OCBC demanded delivery of the cargo as holder of the bills of lading, the Defendant did not make the delivery to OCBC as demanded.

26 These elements are sufficient to make out a *prima facie* case that the Defendant has breached its duty to deliver the cargo to OCBC upon presentation of the bills of lading.

Whether there are triable issues or some other reason for the matter to go to trial

27 The Defendant raised six separate defences.[23] First, it was claimed that OCBC had not acquired any right of suit under the Bills of Lading Act. The cargo had been discharged on the morning of 29 April 2016, *prior* to the plaintiff becoming the holder of the bills of lading. As such, the Defendant argued that the bills had become spent before the plaintiff acquired the bills.

28 Second, it was alleged that OCBC was not a holder of the bills in good faith under s 5(2) of the Bills of Lading Act as OCBC had obtained the bills for a mere right of suit. In this regard, it was also alleged that the plaintiff had particular knowledge of Aavanti's commercial practices and knew the cargo had already been discharged against a LOI by the time OCBC became holder of the bills.

29 Third, it was claimed that OCBC had consented, authorised, or otherwise ratified the discharge of the cargo without presentation of the bills.

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[23] Defendant's Submissions, at paras 11–13.

30 Fourth, the Defendant claimed that estoppel by convention or acquiescence prevented OCBC from asserting the claim for wrongful discharge.

31 Fifth, it was alleged that OCBC did not have the right to sue in conversion as OCBC did not become holder of the bills of lading until after the cargo has been discharged.

32 Sixth, it was claimed that OCBC had no claim in bailment as it was not in a bailor-bailee relationship with the Defendant.

33 The Defendant also argued that the measure of damages should not have been the invoiced sums, but the market value of the goods at the time and place where they should have been delivered, less the costs of delivery. It was submitted by the Defendant that expert evidence at trial was required to determine the issue.[24]

Issue 1: Did the plaintiff acquire a right of suit pursuant to s 2 of the Bills of Lading Act?

34 To appreciate the Defendant's submission concerning s 2 of the Bills of Lading Act, it is useful to first set out the relevant parts of s 2:

> **2.**—(1) Subject to the following provisions of this section, a person who *becomes* —
>
> (*a*) the lawful holder of a bill of lading;
>
> …
>
> shall (*by virtue of becoming the holder of the bill* or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.
>
> (2) Where, *when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against*

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[24] Defendant's Submissions, at paras 161–162.

> *the carrier) to possession of the goods to which the bill relates*, that person shall not have any rights transferred to him by virtue of subsection (1) unless he becomes the holder of the bill —
>
> > (*a*) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
> >
> > (*b*) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.
>
> …
>
> [emphases added]

35 The Singapore Bills of Lading Act *is in fact* UK's Carriage of Goods by Sea Act 1992 ("COGSA 1992") made applicable in Singapore by s 4(1)(*a*) of the Application of English Law Act (Cap 7A, 1994 Rev Ed). COGSA 1992 was enacted to address certain difficulties encountered with the Bills of Lading Act 1855 (UK), which tied the transfer of contractual rights of suit under a bill of lading to the passing of property in the goods to which the bill relates. (Prior to the enactment of the Bills of Lading Act 1855, transfer of a bill lading operated, at common law, to transfer constructive possession of the goods (as well as property in the goods, if so intended) but did not operate to transfer contractual rights under the contract of carriage contained in or evidenced by the bill. The Bills of Lading Act 1855 plugged this gap by providing that contractual rights of suit under a bill of lading would be transferred in cases where property in the goods "pass, upon or by reason" of the transfer of the bill.) First, COGSA 1992 decoupled the transfer of rights of suit from the passing of property. Secondly, to address the concern that decoupling the transfer of rights of suit from the passing of property could lead to potentially undesirable transfer of rights after a bill of lading is spent, COGSA 1992 imposes limits on the transfer of rights of suit in relation to spent bills.

36 Thus s 2(1) of COGSA 1992 provides for transfer of rights of suit to the lawful holder of a bill of lading "by virtue of [him] becoming the holder of the bill". There is no longer a reference to the passing of property in the goods (as was the case with s 1 of the Bills of Lading Act 1855). Section 2(2) then carves out an exception for cases where "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" (*ie,* "spent" bills). Section 2(2) provides that the transfer of a spent bill does *not* transfer any rights of suit unless ss 2(2)(*a*) or (*b*) applies. Section 2(2)(*a*) allows the transfer of a spent bill to have the effect of transferring rights of suit *if* the transfer of the bill was pursuant to "contractual or other arrangements" made *before* the bill became spent. Section 2(2)(*b*) concerns rejection of goods or documents by a buyer, and is not relevant for present purposes.

37 The Defendant adopts a two-step submission. In the first step, the Defendant submits that, because OCBC became the holder of the bills of lading *after* the Defendant had completed delivery of the cargo to Ruchi, the bills have become spent before OCBC became their holder.[25] Consequently, s 2(2) of the Bills of Lading Act applies, and no rights of suit could be transferred to OCBC unless OCBC can bring itself within s 2(2)(*a*). In the second step, the Defendant submits that OCBC's situation does not fall within s 2(2)(*a*) because the relevant "contractual or other arrangements" for the purpose of s 2(2)(*a*) is the granting of the loan by OCBC to Aavanti. Since this took place *after* the Defendant had completed delivery of the cargo to Ruchi, it is not a contractual or other arrangement made before the bills became spent.[26] Consequently, OCBC could not derive any rights of suit pursuant to s 2(2)(*a*) read with s 2(1).

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25 Defendant's Submissions, at para 15.

26 Defendant's Submissions, at para 23.

Whether the bills of lading had become spent by the time OCBC became their holders

38 In the first step of its submission, the Defendant adopts the following two alternative routes:

> (a) Assuming that the weight of the authorities favours the view that that a bill of lading is spent when the goods covered by it have been delivered to the person entitled to delivery under the bill, it is the Defendant's submission that FGV was a person so entitled because FGV was still the holder of the bills of lading at the time the cargo was being discharged. Therefore, delivery to Ruchi on FGV's instructions constituted delivery to a person entitled.
>
> (b) Alternatively, the Defendant urges the court to adopt a wider interpretation of s 2(2) of the Bills of Lading Act, and hold that s 2(2) applies once the carrier has parted with possession of the cargo irrespective of whether delivery was made to a person entitled or not.

39 I will deal first with the alternative submission at [38(b)] above, as it raises an issue which is conceptually antecedent to that raised in the Defendant's primary submission at [38(a)] above. The key to assessing the correctness of this alternative submission is the meaning to be assigned to the phrase "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" in s 2(2), as the meaning of that phrase determines whether s 2(2) applies or not.

40 After citing a passage from The Law Commission and The Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea* (Report, Law Com. No. 196, Scot. Law Com. No. 130, 19 March 1991) ("the Law Commission Report") which referred to a bill of lading being incapable of

transferring constructive possession of the goods once the goods have been delivered to a person entitled under the bill of lading, the Defendant submits that "it is noteworthy that the drafters of the UK COGSA 1992 chose not to limit the wording of Section 2(2) to when the cargo covered by the bill of lading was delivered to the person entitled to delivery under the bills of lading".[27]

41 The Defendant then suggested that:

(a) no local cases have dealt with this point, as Belinda Ang Saw Ean J had left the point open in *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties)* [2003] 3 SLR(R) 611 ("*BNP Paribas*"); and

(b) the determination of this important issue mandates that the matter proceed to trial.

42 Taking the last argument first, there is no principle of law or procedure which says that an important point of law cannot be dealt with in summary judgment proceedings. This is especially so in the present case, where:

(a) the resolution of the point of law does not involve any factual disputes; and

(b) more than a year had elapsed between the initial filing of OCBC's summary judgment application and the hearing before me, thus giving parties ample time and opportunity to research and submit on the relevant points of law.

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27 Defendant's Submissions, at para 30.

43 Given the factual matrix, the Defendant submits that OCBC became the holder of the bills of lading only at 8:32pm on 29 April 2016, when OCBC remitted the funds to Maybank. To simplify the summary judgment proceedings, OCBC agreed to concede the point solely for the purposes of the summary judgment proceedings, while reserving its right to show, in subsequent stages of these proceedings (if it becomes necessary) that OCBC became the holder of the bills of lading before 29 April 2016. Since the funds were remitted to Maybank only after the discharge of cargo was completed, the implication of this concession is that, for the purposes of the summary judgment proceedings, I am obliged to assume that OCBC became holder of the bills of lading only after the Defendant had completely discharged the cargo and delivered it to Ruchi. For this reason, there are no relevant disputes of fact, for the purpose of the summary judgment proceedings, which touch on the issue of whether s 2(2) of the Bills of Lading Act applies.

44 As for the argument at [41(a)] above, the Defendant is mistaken that Ang J had left the point of law open in *BNP Paribas*. The relevant part of her judgment reads:

> 30 I also find that the cargo was delivered between the months of May and June 2000 to persons who were not entitled to possession so much so that BNP is not a holder of spent bills of lading (both switch and Batam bills). The contract of carriage generally continues and the bill of lading remains effective, until the goods are delivered to the person entitled under the bill of lading: see *The Future Express* [1992] 2 Lloyd's Rep 79. In that case, the bill of lading was not spent or exhausted as delivery was not to the person who had a right to demand delivery or was entitled to them. The goods were delivered against an indemnity to a person who did not have a right to delivery under the bill of lading. The decision was affirmed on grounds that made it unnecessary for the Court of Appeal to decide on the issue whether the bill of lading was spent.
>
> 31 Even if a contrary view is taken that once the carrier has parted with possession of the cargo the bill of lading cannot transfer constructive possession of the cargo, BNP would be a

> holder who would come within the provisions of s 2(2) of the Bills of Lading Act and the extended definition of "holder" in s 5(2). A holder of a bill which is indorsed after delivery has taken place could still sue the carrier in contract: s 2(2). The holder must have become a holder by virtue of some prior transaction (ie facility agreement as in this case) before the bill of lading became spent: s 5(2)(c).

45 Ang J could not have been clearer at [30] of *BNP Paribas* that she was making a definitive finding. The sentence "I also find that the cargo was delivered … to persons who were not entitled to possession so much so that BNP is not a holder of spent bills of lading" could only mean that Ang J found that delivery to persons not entitled does *not* cause a bill of lading to be spent. The point made at [31] is merely an "even if" point to fully address all possibilities. It is not language used by a judge who wishes to leave a point open.

46 Therefore, contrary to the Defendant's submission, the position under Singapore law has been clearly and definitively articulated in *BNP Paribas* which I respectfully follow. However, since *BNP Paribas* cited *The Future Express* [1992] 2 Lloyd's Rep 79 as authority for the proposition at [30], and since the correctness of certain *dicta* in *The Future Express* had been doubted in some textbooks, I will consider *The Future Express* in greater detail below. It suffices for the moment to note that the specific *dictum* from *The Future Express* which *BNP Paribas* relied on was *not* the subject of the said academic criticism.

(1) Meaning of the phrase "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates"

47 I will begin my discussion with the Defendant's argument, at [40] above, concerning the lack wording in s 2(2) to expressly limit its application to cases

where the delivery of cargo was made to persons entitled under the bill of lading. The wording which the drafters of s 2(2) chose is "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" ("the Phrase in Question"). This language does not seek to catalogue in detail all the individual scenarios under which a bill would become spent. Instead, it is language describing a generic or overarching concept. It is therefore not surprising that specific scenarios, such as delivery to a person entitled, are not singled out for mention in s 2(2). The lack of specific reference in s 2(2) to particular scenarios (such as delivery to persons entitled) is merely a drafting technique to ensure that the Phrase in Question is crafted in a sufficiently general manner to include all instances where a bill of lading would become spent at law, without having to list out all the possible scenarios one by one. This manner of drafting is not evidence of a decision on the part of the drafters to create new categories of spent bills not previously known to law.

48 In my view, the Phrase in Question in s 2(2) and the similar phrase found in s 5(2)(*c*) of the Bills of Lading Act refer to the document of title function of a bill of lading in transferring constructive possession of the goods to which the bill relates. That this is the reading intended by the drafters of COGSA 1992 is made abundantly clear in the Law Commission Report, which refers to "transfer [of] constructive possession" at para 2.42 and to "transferable document of title" at paras 2.22 and 2.44 and at p 53 in the explanatory note to cl 5(2) of the draft Bill. In *East West Corporation v DKBS 1912* [2002] 2 Lloyd's Rep 182 ("*East West Corp* (HC)", Thomas J held, at [40], that:

> It seems to me clear from the 1992 Act that the reference to the right to possess is a reference to one of the primary rights emanating from *the bill of lading's function as a document of title.*
>
> [emphasis added]

On appeal, Mance LJ similarly held, in *East West Corporation v DKBS AF 1925 A/S and another* [2003] QB 1509 ("*East West Corp* (CA)") at [44], that:

> However, section 2(2) refers to the possibility of a person becoming the holder of a bill at a time "when … possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates", and to "the time when such a right to possession ceased to attach to possession of the bill". Whilst this assumes a linkage between possession of the bill and possession of the goods, the subsection's purpose is no more than to regulate the passing of contractual rights *in circumstances when a bill of lading would at common law be regarded as "spent".*
>
> [emphasis added]

49 *Scrutton on Charterparties and Bills of Lading* (Bernard Eder *et al*, eds) (Sweet & Maxwell, 23rd Ed, 2015) ("*Scrutton*") takes the same view, commenting, at para 3-021, that:

> Once a bill of lading is spent, in that *it no longer embodies constructive possession of the goods* to which it refers, s.2(2) of the 1992 Act provides that in principle its transfer to a lawful holder does not trigger a transfer of rights of suit under s.2(1).
>
> [emphasis added]

Similarly, Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2nd Ed, 2011) ("*Girvin*") takes the view that the Phrase in Question refers to the ability of a bill of lading to transfer constructive possession (at paras 8.32–8.36). In a similar vein, *Interests in Goods* (Norman Palmer & Ewan McKendrick, eds) (LLP, 2nd Ed, 1998) ("*Palmer & McKendrick*") considered that s 2(2) applies to a bill of lading "after its function as a document of title has been exhausted" (at p 592).

50 I should note for completeness that *Carver on Bills of Lading* (Guenter Treitel & F.M.B. Reynolds, eds) (Sweet & Maxwell, 4th Ed, 2017) ("*Carver*") suggests that the Phrase in Question "seems, from the context, to indicate that

the "right" referred to is the *contractual* right to have the goods delivered and this is not necessarily the same as the *constructive possession* of the goods" (emphasis in original) (at para 6-035). Similarly, the learned authors of *Bills of Ladings* (Richard Aikens, Richard Lord & Michael Bools) (Informa Law, 2nd Ed, 2016) ("*Aikens, Lord & Bools*") also considered, at para 8.82, that the Phrase in Question refers to "a contractual right to possession".

51 While *Carver* cites no authorities for the view that the Phrase in Question refers to a *contractual* right to possession, *Aikens, Lord & Bools* cites the judgment of Aikens J in *The Ythan* [2006] 1 Lloyd's Rep 457 as authority for this view. In that case, the cargo was totally lost when the vessel carrying it sank as a result of an explosion. As the buyer acquired the bill of lading after the destruction of the cargo, the issue was whether any rights of suit were transferred to the buyer pursuant to s 2(1) of COGSA 1992. In holding that the applicable provision for determining whether the buyer became holder of the bills was s 5(2)(c) of COGSA 1992, Aikens J reasoned as follows:

> 70. In my view, valuable assistance on the ambit of the words in s 5(2)(c) 'at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods" is gained from the analysis of Lord Hobhouse in his speech in *The Berge Sisar*. In para [31] of his opinion, Lord Hobhouse notes that the 1992 Act is concerned solely with contractual obligations created in a bill of lading in relation to the carriage and delivery up of the goods. He emphasises that the Act is not dealing with proprietary rights of anyone who becomes a holder of the bill of lading. This distinction is important. It means that when a ship sinks and the cargo carried under a bill of lading is lost permanently, the question to ask in connection with the wording in section 5(2)(c) under consideration is: does possession of the bill of lading any longer give a *contractual right* (as against the carrier) to possession of the goods to which the bill relates?
>
> [emphasis in original]

52 With respect to Aikens J, I believe Lord Hobhouse was not discussing s 5(2)(c) or s 2(2) at [31] of *The Berge Sisar* [2002] 2 AC 205. Instead, Lord Hobhouse's comment was directed specifically at s 3 of COGSA 1992. The relevant part of Lord Hobhouse's remarks at [31] reads:

> The important point which is demonstrated by *this part of the report* and carried into the Act is that it is the contractual rights, not the proprietary rights (be they general or special), that are to be relevant. The relevant consideration is the *mutuality of the contractual relationship* transferred to the endorsee and the reciprocal contractual rights and obligations which arise from that relationship.
>
> [emphasis added]

53 The phrase "this part of the report" in the passage quoted above refers to paras 3.15–3.22 of the Law Commission Report (which Lord Hobhouse quoted in an earlier part of the same paragraph). These paragraphs of the Law Commission Report dealt with what eventually became s 3 of COGSA 1992. That is a provision dealing with the mutuality of contractual relationship between the shipowner and the holder of a bill of lading who had contractual rights under the bill transferred to him. In my view, Lord Hobhouse's comment that COGSA 1992 transfers contractual rights and not proprietary rights does not affect how the Phrase in Question should be understood. This is because the Phrase in Question does not purport to be an operative phrase transferring any rights. Instead, the Phrase in Question merely defines a condition which, if present, could dis-apply the operative provision for transfer in s 2(1).

54 Further, as noted by Thomas J in *East West Corp* (HC), at [50]:

> The rights transferred to the lawful holder under the 1992 Act are the "rights of suit"; this phrase was taken from the 1855 Act. Although "rights of suit" have been described as rights of "suing upon the contract" (as in *The Freedom*, (1871) L.R. 3 P.C. 594 at p. 599), the phrase was not used to distinguish "rights of suit" from "rights under the contract". It is clear, in my view, that the phrase refers not merely to the right to sue, but the

> rights under the contract. *These include the contractual right as against the carrier to demand delivery against presentation of the bill of lading and hence the right to possess.*
>
> [emphasis added]

Thus what is transferred by s 2(1) is not merely the right to sue, but also contractual rights generally under the contract of carriage, including the contractual right to possession. Since s 2(1), if applicable, would transfer the contractual right to possession, and the Phrase in Question determines whether s 2(1) applies, it would be circular to read the Phrase in Question as also referring to the contractual right to possession (as opposed to referring to constructive possession pursuant to the bill of lading's function as a document of title).

55 Finally, *Aikens, Lord & Bools* remarked, at para 8.49, that the phrase "right (as against the carrier) to possession", which forms part of the Phrase in Question, did not appear in the Law Commission Report. To the extent that this remark may be taken as support for the view that the Phrase in Question, as enacted in s 2(2) should be given a different meaning from that envisaged in paras 2.42–2.44 of the Law Commission Report, I would point out that the remark is inaccurate. The phrase "right as against the carrier to possession" actually appears in para 2.42 of the Law Commission Report.

56 I do not think much turns on whether the Phrase in Question refers to the transfer of constructive possession or the transfer of contractual right to possession, if it is *not* suggested that the ambit of s 2(2) would be broader or narrower under one or the other view of the phrase. However, to the extent that it is suggested that the ambit of s 2(2) would differ according to whether the Phrase in Question is understood as referring to the contractual right to possession or to the transfer of constructive possession, I would prefer the view

taken in *Scrutton, Girvin, Palmer & McKendrick, East West Corp* (HC) and *East West Corp* (CA) because it more closely reflects the recommendations and discussion in the Law Commission Report.

57 In other words, I hold that, irrespective of whether the Phrase in Question is understood as referring to the transfer of contractual right to possession or to the transfer of constructive possession, the Phrase in Question ought to be interpreted as covering the situation where a bill of lading would at common law be regarded as spent.

(2) Whether a bill of lading is spent by delivery to a person *not* entitled to delivery under the bill

58 On the basis of my holding that a "spent bill" for the purpose of s 2(2) covers the same ground as a spent bill at common law, I return to consider the Defendant's submission that delivery by a carrier to a person *not* entitled to delivery under the bill of lading would cause the bill to be spent. In my view, this submission goes against the position well established in the case law of the past 150 years, that delivery to a person not entitled does not cause a bill of lading to be spent.

59 In *Barber v Meyerstein* (1870) LR 4 HL 317, a bill of lading was pledged for a loan *after* the goods have been landed but were still held at the wharf on behalf of the shipowner pending payment of freight. It was held (at 330 and 332) that the bill was not yet spent at the time of pledge as the goods have not yet been delivered to a person entitled to possession of the same. More than a hundred years later, *Barber v Meyerstein* continued to be cited with approval in *The Delfini* [1990] 1 Lloyd's Rep 252 (per Mustill LJ at 269).

60 After the enactment of COGSA 1992, it was held in *East West Corp* (HC) that a bill of lading was not spent when the goods to which the bill relates were delivered to a person who had no right to take delivery of the goods and, consequently, s 2(2) of COGSA 1992 did not apply in such a situation (at [39]–[41]). More recently, in *The Erin Schulte* [2015] 1 Lloyd's Rep 97 ("*The Erin Schulte* (CA)"), although it was common ground between parties at first instance that the bill of lading was spent when the cargo was delivered against a LOI from the seller, Moore-Bick LJ commented on appeal that this concession was wrongly made. As Moore-Bick LJ explained (at [53]):

> It was common ground below that by 7 July 2010, when [the seller] accepted payment from [the bank], the bill of lading no longer gave a right as against [the carrier] to possession of the goods to which it related because that right had been lost once discharge began on 15 June 2010. In my view, that was not in fact the case, because *the rights under the contract of carriage, including the right to obtain delivery of the goods from the carrier, did not cease when the goods were discharged against the letter of indemnity. They remained in existence and were capable of forming the basis of a claim against [the carrier] for misdelivery.*
>
> [emphasis added]

In other words, delivery to the buyer against a seller's LOI does *not* have the effect of bringing the matter within the ambit of s 2(2).

61 In Singapore, it was held in *BNP Paribas* (at [30]) that delivery to a person not entitled does not cause the bill of lading to be spent. It was similarly held in the later case of *The Pacific Vigorous* [2006] 3 SLR(R) 374 that (at [5]):

> Even though the shipowner no longer has the goods, the bill of lading is not spent and as such it does not cease to be a transferable document of title. The contract of carriage generally continues and the bill of lading remains effective until the goods are delivered to the person entitled under the bill of lading...

62 Concerning the use of LOIs, I return to the case of *The Future Express* which I had discussed briefly at [46] above. In that case, the cargo was shipped in March 1985 and discharged at the destination and delivered to the buyer about two months later against a LOI from the seller. In the meantime, the seller had agreed at the buyer's request to delay sending the shipping documents through the banking chain, in order to delay the moment when the buyer would need to reimbursement the buyer's bank for payments made under the letter of credit. This meant that, at the time of discharge and delivery of the cargo, the seller was still in possession of the bills of lading. At the same time, the deadline for negotiation of the shipping documents under the letter of credit was extended by the buyer's bank, at the buyer's request, from July 1985 to September 1985 and then to December 1985. In December 1985, the buyer requested a further extension of the deadline for negotiation of documents to March 1986. By then the buyer's bank had found out that cargo had already been discharged and delivered, but it nevertheless agreed to extend the deadline to March 1986. The seller put the shipping documents into the banking chain within this new deadline. After the buyer's bank made payment under the letter of credit and failed to recover the payment from the buyer, it sued the shipowner under the bills of lading.

63 As *The Future Express* was decided before the enactment of COGSA 1992, the transfer of contractual rights of suit under a bill of lading still depended on passing of property in the underlying goods. Judge Diamond QC therefore disposed of the case on the basis that the buyer's bank was not a pledgee either because the seller did not intend to create a charge over the goods through delivery of the bills of lading (since passing of property is a matter of intention) or because the seller was incapable of creating a charge over the goods due to the *nemo dat* rule (since general property in the goods had already

passed by agreement from the seller to the buyer before the shipping documents were put in the banking chain) (at 93).

64 Judge Diamond QC then went on to discuss, in *obiter*, whether the bills of lading were exhausted as documents of title. After considering the authorities, Judge Diamond QC raised the hypothetical situation of "delivery of goods against an indemnity to *a person who was rightfully entitled to them had he surrendered the bill of lading*" (emphasis added) and suggested that he "would, however, be reluctant to hold that a bill of lading becomes exhausted as a document of title once the carrier has delivered the goods against an indemnity to *a person authorized to receive delivery*" (emphasis added) (at 99). He then went on to say:

> It is not, however, necessary in the present case to express any concluded view on the question I have just discussed *since it is clear in any event that delivery of goods was not made to some person having a right to claim them under the bills of lading*, within the test laid down by Mr. Justice Willes in *Meyerstein v. Barber*.
>
> [emphasis added]

65 In other words, Judge Diamond QC:

(a) held that delivery against a LOI to a person who is *not* entitled to claim them under the bills of lading does *not* exhaust a bill of lading and that, on the facts of the case, the buyer was *not a person entitled* to delivery when the cargo was delivered to him against a LOI from the seller; and

(b) expressed a preferred view (without deciding the point) that delivery to a *person entitled* under the bill of lading would also not exhaust the bill if the delivery is made against a LOI without surrender of the bill of lading.

While the point at (b) above had been doubted in works like *Carver* (para 6-036), *Girvin* (para 8.34), *Scrutton* (para 10-036, fn 137) and *Aikens, Lord & Bools* (paras 2.95–2.96), none of these learned works took issue with Judge Diamond QC's conclusion at point (a) above. In other words, the specific point in *The Future Express* which *BNP Paribas* relied on remains uncontroversial and the correctness of that point had not been doubted in the academic literature.

66 One might ask, if a bill of lading is spent only when delivery is made to a person entitled to delivery under the bill, would the scenario of trafficking in spent bills, as described in para 2.43 of the Law Commission Report ever arise? In other words, would not delivery to a person entitled involve presentation and surrender of the bill of lading to the carrier, thus leaving no room for the further transfer of the bill? Secondly, if a bill of lading is spent only if delivery is made to a person entitled to delivery under the bill of lading, would the fact that a bill is spent imply that there was no misdelivery? If so, would any purpose be served by transferring rights of suit to the holder of the bill of lading pursuant to s 2(2)(*a*) given that there would be no occasion for such a transferee to make claims for misdelivery against the carrier?

67 With regard to the first group of questions, the premise that delivery to a person entitled under a bill of lading *necessarily* involves surrender of the full set of bill of lading to the carrier is incorrect. First, bills of lading are typically issued in sets of three originals (also described as "issued in three parts"). Bills issued in sets of three typically contain a clause which reads along the lines of: "one of which being accomplished, the others will be void". A carrier is not obliged (and also not entitled) to call for the full set of bill of lading before making delivery. Instead, the carrier is obliged to deliver so long as any one of the three parts of the bill of lading is presented to him. (See *Scrutton* at para 13-009, *Carver* at para 6-077 and *Aikens, Lord & Bool* at para 5.65.) The carrier's

delivery against one part of the bill of lading would render all three parts spent. Therefore, in a situation where only one part of a bill of lading is presented to the carrier, there would be opportunities for the other two parts to be transferred or pledged separately from the first part. Examples of how this could happen are found in some of the older reported cases, such as *Barber v Meyerstein* and *Glyn Mills Currie & Co v The East and West India Dock Company* (1882) LR 7 App Cas 591 ("*Glyn Mills*"). In *Barber v Meyerstein*, the transferee of a bill of lading issued in three parts pledged two parts to Meyerstein and, two days later, pledged the third part to Barber, who obtained delivery of the cargo from the carrier using this third part of the bill of lading. In *Glyn Mills*, the consignee of a bill of lading issued in three parts pledged one part of the bill to a bank to secure a loan and then proceeded, without the bank's knowledge or consent, to obtain delivery of the cargo from the carrier using the second part of the bill.

68 Secondly, while a carrier's duty is to deliver on presentation of a bill of lading, the carrier is not obliged to retain the bill of lading so presented or require its surrender. This creates the possibility that all three parts of the bill may continue to remain physically in the hands of the party who received delivery of the cargo even though the bill has already been spent by the said delivery.

69 Thirdly, the bill of lading would be spent by delivery to a person entitled to delivery under the bill of lading even if the delivery was made without the carrier sighting the bill of lading. While the carrier may be acting negligently and in breach of the contract of carriage for delivering without sight of the bill of lading, whether the bill is spent depends on whether delivery was made to the right person and not on whether the carrier *knew* that he had delivered to the right person. Thus delivery to the right person would cause the bill to be spent even though the carrier had not ascertained whether the person receiving

delivery was a person entitled. (This scenario is similar to the hypothetical situation discussed by Judge Diamond QC in *The Future Express* – see [65(b)] above. Like the learned authors of *Carver, Girvin*, *Scrutton* and *Aikens, Lord & Bools*, I prefer the view that the bill of lading would be spent in such a situation.)

70 Fourthly, cargo could have been delivered to a person who was expecting to receive, but had not yet received, the bill of lading. In that situation, delivery of the cargo before the arrival the bill of lading would not cause the bill of lading to be spent, as the person receiving the cargo was not yet the holder of the bill. (As noted in *Pacific Vigorous* at [5], "the shipowner…does not fulfil its contractual obligations if the goods are delivered to a person (even the cargo owner) who cannot produce the bill of lading".) Nevertheless, the bill would become spent when the person who received delivery of the goods subsequently becomes the holder of the bill of lading. The bill of lading being the symbol of the goods, the office of the symbol is exhausted when the symbol is united with the goods (see *Barber v Meyerstein* at 333, per Lord Hatherley, LC).

71 In each of the four scenarios described above, the risk of trafficking in a spent bill, as alluded to in para 2.43 of the Law Commission Report, would exist and therefore there remains a role to be fulfilled by s 2(2) in each of these scenarios.

72 As for the second group of questions at [66] above, the answer is that even in a case where there is no misdelivery, there could still be contractual rights of suit to transfer, *eg*, for damage to cargo, short delivery, *etc*.

73 For the foregoing reasons, I do not consider that s 2(2) would be rendered otiose if it were held that a bill of lading is spent only when delivery is made to a person entitled to delivery under the bill.

74 In the light of the foregoing, my holdings on the Defendant's alternative submission at [38(b)] above are:

(a) Section 2(2) of the Bills of Lading Act applies to a bill of lading which is regarded at common law as spent; and

(b) Delivery against a LOI to a person who is *not* entitled to delivery under the bill of lading does not cause the bill to be spent.

(3) Whether FGV was a person entitled to delivery under the bill of lading

75 I turn now to the Defendant's primary submission, at [38(a)] above, that FGV was a person entitled to delivery under the bill of lading. The Defendant submitted that:[28]

(a) at the time the cargo was being discharged, the bills of lading were in OCBC's custody but, as the purchase price had not yet been paid, neither OCBC nor Aavanti could be regarded as the holder of the bills of lading;

(b) therefore, FGV remained the holder of the bills of lading at the time the cargo was being discharged;

(c) since delivery to Ruchi at FGV's instructions amounts to delivery to FGV, the delivery was made to a person entitled to delivery under the bills of lading.

76 This submission brings into issue the status of a seller under cost & freight terms who had endorsed a bill of lading in blank and parted possession with it by sending it through the banking chain with a bill of exchange, to be

[28] Defendant's Submissions, at paras 23, 27–28.

delivered to the buyer on documents against payment basis. FGV had sold the cargo to Aavanti on "Incoterms CNF". "CNF" is the old abbreviation for "cost & freight", now abbreviated as "CFR" under the International Chamber of Commerce's rules on the use of domestic and international trade terms ("Incoterms 2010"). One of the key obligations of the seller under CFR terms is to provide the buyer with the "usual transport document for the agreed port of destination" which must, among other things, "enable the buyer to claim the goods from the carrier at the port of destination" (obligation A8 for CFR, *Incoterms 2010* (International Chamber of Commerce, 2010), at p 102).

77 In the present case, FGV blank endorsed the bills of lading and delivered them to the buyer through banking channels. The bills of lading were received by OCBC and presented to the buyer for acceptance *one day before* the discharge of the cargo commenced. The bills of lading were accepted by the buyer (when the buyer requested the trust receipt loan) and paid for by OCBC three days later, within hours after completion of the discharge operation. (The discharge operation lasted almost 40 hours.) The Defendant's suggestion that, under the relevant contractual arrangements, a seller in FGV's position would retain the ability to demand delivery of the cargo *as the lawful holder of the bills of lading* while the bills were physically with the buyer's bank awaiting the buyer's acceptance simply does not make sense.

78 In my view, it does not follow that, just because neither OCBC nor Aavanti had become persons entitled to delivery under the bills of lading, FGV would remain a person entitled to delivery under the bills of lading. Going back to first principles, it seems clear to me that a seller who endorsed a bill of lading and parted possession with it for the purpose of obtaining payment would have rendered himself incapable of demanding delivery under the bill of lading for the simple reason that he would be in no position to present the bill of lading to

the carrier in exchange for delivery of the cargo. In such a situation, the seller would only regain his entitlement to delivery of the cargo under the bill of lading if the bill were to be re-delivered to him through the banking chain (typically, this would happen if the buyer does not take up the bill).

79 Support for this view is found in *The Erin Schulte* (CA). In that case, Moore-Bick LJ held that the buyer's bank became holder of the bill of lading only when it eventually made payment under the letter of credit on 7 July 2010 (at [56]), and not when the bill of lading was initially presented to it by the seller's bank on 4 June 2010. Moore-Bick LJ then noted (at [57]) that, after the buyer's bank informed on 9 June 2010 that it considered the shipping documents to be non-compliant with the letter of credit, the buyer was entitled to demand the return of the bill of lading for the purpose of taking delivery of the cargo from the carrier. Instead, the buyer chose to issue a LOI to the carrier for the carrier to discharge the cargo without bill of lading (while leaving the bill of lading with the buyer's bank). As noted at [60] above, Moore-Bick LJ's view is that discharge of the cargo under such circumstances did *not* cause the bill of lading to be spent.

80 Furthermore, any claim that FGV was acting as lawful holder of the bills of lading when it gave instructions concerning delivery is inconsistent with the plain meaning of the relevant documents. FGV's delivery instructions to the Defendant is contained in its LOI to the Defendant dated 22 April 2016. It reads:[29]

> The above cargo was shipped on the above ship by the above shipper and consigned to the above consignee for delivery at the port NEW MANGALORE, INDIA but the bill of lading has not arrived and we, FGV TRADING SDN BHD, hereby request you

[29] 6QB, at pp 55–56.

> to deliver the said cargo to RUCHI SOYA INDUSTRIES LIMITED … 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 delivering the cargo in accordance with our request.
>
> …

81 The draft LOI was accompanied by an email on 18 April 2016 from AC Tankers Services Pte Ltd ("AC Tankers"), which the Defendant accepted were FGV's brokers.[30] Significantly, AC Tankers' representative emailed the Defendant stating "draft LOI for delivery or cargo *without OBL* at New Mangalore for your approval" (emphasis added).[31] The delivery instructions from FGV assumed that delivery ought legally to have been made against the original bill of lading, but explained that the bill of lading had not arrived, thereby giving rise to the need for FGV to give the carrier an indemnity to deliver without presentation of the bill of lading. This is not the language used by a party claiming to be entitled to delivery under the bill of lading as lawful holder. Instead, it is language used by a party who recognised that it was not, at the material time, a person entitled to delivery under the bill of lading. Were it otherwise, FGV's delivery instructions would have simply asserted that FGV, as lawful holder of the bill of lading, was demanding delivery against presentation of the bills of lading. As noted in *Carver*, the practice of delivery against LOI is "based on the assumption that in law delivery can be claimed, and can be claimed only, by the holder of the bill" (at para 6-009).

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30 6QB, at para 10.

31 6QB, at p 54.

82 In the final analysis, it does not matter that, at the material time, neither OCBC nor Aavanti had yet become persons entitled to delivery under the bill of lading. The fact that OCBC had not yet become entitled to delivery under the bill does not necessarily mean that FGV continued to remain a person entitled. Whether FGV was entitled to delivery under the bill of lading would depend on (a) whether the bill was endorsed to it or, alternatively, was blank endorsed, and (b) whether it had possession of the bill of lading such that it was in a position to present the bill of lading to the carrier in exchange for delivery of the cargo. FGV did not meet criterion (b) at the material time.

83 For the foregoing reasons, I hold that neither FGV nor Ruchi were persons entitled to delivery under the bills of lading at the time the cargo was being discharged and delivered to Ruchi.

84 For completeness, I also considered whether the existence of cl 11 in the voyage charterparty, which obliges the Defendant to deliver against a LOI from FGV if bills of ladings are not available (see [6] above), would make any difference to the foregoing analysis. This point was considered in *BNP Paribas*, where Ang J analysed the issue in the following manner:

> 65 The bills provide that all conditions, liberties and exceptions of the relevant charterparty are incorporated in the conditions of carriage. Clause 16 is identical in both charterparties. Clause 16 provides:
>
> > In the absence of original b/ls at discharge port(s), owners to release the entire cargo to receivers against charterers' LOI (Shweta or Lanyard) without bank guarantee. (LOI wording always to be in Owners' P and I Club format.)
>
> 66 Clause 16 recognises the need to present the bill of lading for Bandung to deliver the cargo. It also reflects Bandung's willingness to run the risk of being held liable for wrongful discharge of cargo should problems arise in relation to payment. The right of the holder of a bill of lading is not taken away by a provision for the vessel to discharge against a letter

> of indemnity even though the vessel would arrive at the discharge port ahead of the bill of lading. Tamberlin J in *The Stone Gemini* [1999] 2 Lloyd's Rep 255 considered a similar clause. He stated at 266:
>
> > The letter of indemnity is designed to provide a remedy for a shipowner, where the master releases cargo at the request of a party, in respect of claims which may be brought as a consequence of such release. It is not an authority by the holder of the bearer bill of lading for the shipowner to deliver the cargo to whoever produces a letter of indemnity.
>
> 67 Clarke J in *The Sormovskiy 3068* said at 274:
>
> > The purpose of the clause was to ensure that the defendants would discharge the cargo even if the bill of lading was not available for presentation, but on terms that they would be protected by a letter of indemnity. It thus contemplated that they would be liable to the holder of the bill of lading if they delivered otherwise than in return for an original bill of lading.
>
> 68 Choo Han Teck JC (as he then was) in *The Nordic Freedom* [1999] 3 SLR(R) 507 considered a clause similar to cl 16 and came to the same conclusion.
>
> 69 Accordingly, cl 16 and its incorporation in the bills of lading cannot on a proper consideration provide a defence to wrongful discharge of the cargo against letters of indemnity.

85 I agree with the foregoing analysis and would similarly hold that the existence of cl 11 in the charterparty in the present case does not affect the conclusion I have reached at [83] above.

(4) Conclusion on whether the bills of lading were spent

86 In the light of the matters discussed above, I hold that the bills of lading were not spent by the time OCBC become holder of the bills.

Assuming the bills of lading were spent, whether OCBC came within s 2(2)(a)

87 Assuming I was wrong on the question of whether the bills of lading were spent when the cargo was discharged, and assuming therefore that s 2(2)

applies, the issue then is whether OCBC had become holder of the bills "by virtue of a transaction effected in pursuance of any contractual or other arrangements" made before the time when the bills had become spent (s 2(2)(*a*)).

(1) The law

88 The key terms in s 2(2)(*a*) are "transaction", "in pursuance of" and "contractual or other arrangements". A distinction is drawn in s 2(2)(*a*) between the "transaction" by virtue of which a person became the holder of the bill of lading and "contractual or other arrangements" pursuant to which the "transaction" was effected. As explained in *The Ythan*, the term "transaction" refers to the physical process by which the bill is transferred from one person to another (at [66]) while "contractual or other arrangements" refers to the reason or cause for the transfer (at [84]).

89 In *The David Agmashenebeli* [2003] 1 Lloyd's Rep 92, Colman J held that, for a transfer to be regarded as having been "effected in pursuance of any contractual or other arrangements", it has to be a transfer "provided for by the antecedent contractual or other arrangements" or "called for" by the contractual or other arrangements (at 118). In *The Pace* [2010] 1 Lloyd's Rep 183, Teare J noted (at [45]) that the use of the term "called for" by Colman J suggested a requirement that a transferee needed to be entitled to the transfer of the bill of lading pursuant to the terms of the contractual or other arrangements. Teare J considered this requirement to be unnecessarily strict having regard to the fact that the object and purpose of s 2(2) was to prevent "trafficking in bills of lading simply as pieces of paper which give causes of action against sea carriers" (at [48]). Instead, Teare J suggested that:

> … the objective or aim of section 2(2)(a) to avoid trafficking in bills of lading will be achieved if the *reason or cause* of the transfer is the contractual or other arrangements in existence before the bills were spent. Such an interpretation may have a wider scope than one based upon contractual entitlement…but it is nevertheless consistent with the aim or object of section 2(2)(a). It will avoid trafficking in bills of lading.
>
> [emphasis added]

90 It was also suggested in *The Ythan* that such "reason or cause" should be the "immediate reason and proximate cause of the transfer" (at [85]). In *The Erin Schulte* [2013] 2 Lloyd's Rep 338 ("*The Erin Schulte* (HC)"), Teare J disagreed that the test should be "immediate reason" or "proximate cause". Instead, Teare J held that the test should be whether the contractual or other arrangement is the "real and effective cause" of the transfer (at [68]). On appeal, Moore-Bick LJ disagreed with Teare J in the following passage (*Erin Schulte* (CA) at [56]):

> I do not myself think that it is helpful to seek to identify the "real and effective cause" of the transfer. Given that section 2(2)(a) refers to a transaction effected in pursuance of a contractual or other arrangement, I think it is preferable simply to identify the arrangement, if any, pursuant to which the transfer was made.

Moore-Bick LJ then went on to conclude that the payment (and thus acceptance of the bill of lading) by the buyer's bank was pursuant to the letter of credit, notwithstanding that this was done after the letter of credit had expired and after the buyer's bank had earlier decided not to honour the letter of credit.

91 At first blush, it may appear that, by paraphrasing "in pursuance of" simply as "pursuant to", Moore-Bick LJ had merely restated the question rather than answered it. However, I believe that, in doing so, Moore-Bick LJ was emphasising that the phrase "in pursuance of" should be read simply as an ordinary English phrase, and that the phase should not be encrusted with legal

concepts such as "real and effective cause", "immediate reason or proximate cause", "provided for", "called for" or "contractual entitlement". Thus *Scrutton* interprets *Erin Schulte* (CA) as requiring "merely that the pre-existing arrangement provides the trigger for the transfer, not that it creates a legal entitlement to the transfer of the bill of lading" (at para 3-022). In a similar vein, *Aikens, Lord & Bools* commented that *Erin Schulte* (CA) had adopted "an apparently broad approach to causal connection" which "is to be welcomed" (at para 8.85).

(2) Application to the facts

92 Turning to the facts of the present case, OCBC submits that, assuming s 2(2) applies, the relevant "transaction" would be Aavanti's request for and OCBC's grant of a trust receipt loan while the relevant "contractual or other arrangements" would be the facility agreement between OCBC and Aavanti. It was pursuant to the facility agreement (made in 2014 and amended in 2015) that Aavanti sought the loan and OCBC granted it.[32]

93 The Defendant submits that the "contractual or other arrangement" pursuant to which the bills of lading were transferred to OCBC was the trust receipt loan itself. This was because, under the facility agreement, OCBC retained the discretion whether to grant the loan, and was not obliged to grant loans to Aavanti on demand. Thus the facility agreement, by itself, did not give rise to a contractual entitlement for OCBC to call for the bills of lading. It was only pursuant to the trust receipt loan that OCBC's entitlement to the bills arose.[33]

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32 Plaintiffs'/Respondents' Submissions for HC/RA 258/2017 and HC/RA 259/2018 ("Plaintiff's Submissions"), dated 23 January 2018, at para 96.

33 Defendant's Submissions, at para 39.

94 OCBC's submission finds support in *BNP Paribas*, which similarly involved a buyer's bank who became holder of the bills of lading as pledgee. Ang J held that, if s2(2) applied, the facility agreement between the buyer's bank and the buyer would constitute the relevant "contractual or other arrangement" (at [31]). On the other hand, the Defendant's submission harks back to the approach suggested in *The David Agmashenebeli* of asking whether the transfer of the bill of lading was "provided for" or "called for" by the "contractual or other arrangement" (see [89] above). But this approach is no longer good law in the light of the decision in *Erin Schulte* (CA). For the foregoing reasons, I would accept OCBC's submission and follow *BNP Paribas* in holding that the relevant "contractual or other arrangement" is the facility agreement. It is undeniable that the request and grant of the trust receipt loan were made pursuant to the facility agreement.

95 For completeness, I should add that, even if there was no facility agreement to rely on (or, alternatively, even if no reliance is placed on the facility agreement), OCBC could rely on the sale contract between FGV and Aavanti as the relevant "contractual or other arrangement". Given the broad approach to causal connection adopted in *Erin Schulte* (CA), and the consequent eschewing of the "provided for" or "called for" criteria suggested in *The David Agmashenebeli*, there is no reason why the relevant "contractual or other arrangement" must be one which OCBC is a party to. In other words, if it can be said that the sale contract between Aavanti and FGV is a cause or reason for the trust receipt loan, the fact that OCBC was not a party to the sale contract is no obstacle to the sale contract being regarded as the relevant "contractual or other arrangement" for the purpose of s 2(2)(*a*). In the preceding sentence, I referred to "a cause or reason" instead of "the cause or reason" in the light of the decision in *Erin Schulte* (CA) that the relevant "contractual or other

arrangement" *need not* be the "immediate reason", "proximate cause" or "real and effective cause" of the transfer.

96 Returning to the facts of the present case, since Aavanti requested the trust receipt loan from OCBC in order to carry out and fulfil the sale contract, and since OCBC's grant of the trust receipt loan was to enable Aavanti to obtain the bills of lading and the underlying cargo pursuant to the sale contract, I see no difficulty holding that the trust receipt loan was a transaction "in pursuance of" the sale contract. The trust receipt loan served a legitimate commercial purpose (of trade financing) which flows from the sale contract between Aavanti and FGV.

97 As para 2.43 of the Law Commission Report made clear, the distinction is between "selling lawsuits as articles of commerce" and "taking an assignment where one has genuine commercial interest in so doing". OCBC's grant of the trust receipt loan *before* Aavanti could obtain the bills of lading and with a view to allowing Aavanti to take delivery of the bills of lading subject to OCBC's security interest in the bills clearly falls within the situation of "taking an assignment where one has genuine commercial interest in so doing". It is therefore definitely not a situation of "trafficking in bills of lading *simply* as pieces of paper which give causes of action against sea carriers" (emphasis added) which the said para 2.43 was addressing.

98 For the foregoing reasons, I hold that, even if it were assumed that s 2(2) applies, OCBC would come within the scope of s 2(2)(*a*), and would therefore have obtained rights of suit under the bills of lading pursuant to s 2(1) of the Bills of Lading Act.

Conclusion on Issue 1

99 In the light of my conclusions at [86] and [98] above, and subject to the discussion on "lawful holder" and "good faith" in the next section, I hold that the Defendant has failed to raise a triable issue on whether OCBC had acquired rights of suit in respect of the bills of lading pursuant to s 2(1) of the Bills of Lading Act.

Issue 2: Was the plaintiff a holder of the bills of lading in good faith?

100 The Bills of Lading Act distinguishes between a mere "holder" of a bill of lading and a "lawful holder" of a bill of lading. Sections 5(2)(*a*)–(*c*) define three situations in which a person not originally party to a bill of lading would become the "holder" of the bill of lading. The proviso at the end of s 5(2)goes on to provide that:

> …a person shall be regarded for the purposes of this Act as having become *the lawful holder* of a bill of lading wherever he has become the *holder of the bill in good faith.*
>
> [emphasis added]

Section 2(1)(*a*) provides for the transfer of contractual rights of suit to a "lawful holder". This means that, for rights of suit to be transferred to the holder of a bill of lading pursuant to s 2(1), he needed to have "become the holder of the bill in good faith".

The law

101 The meaning of the term "good faith" in s 5(2) of COGSA 1992 was considered by Thomas J in *The "Aegean Sea"* [1998] 2 Lloyd's Rep 39 in the following passage (at 60):

> The Act does not define good faith in contra-distinction, for example to s. [61(3)] of the Sale of Goods Act, 1979 which

> provides that "a thing is deemed to be done in good faith… when it is done honestly, whether it be done negligently or not" or the Uniform Commercial Code (Section 1-201(19)) where good faith is defined as "honestly in fact or in the conduct of the transaction". The owners contended that Repsol obtained the bill of lading honestly and that was sufficient to make them lawful holders.
>
> Although it could be argued that in view of lack of definition in COGSA, 1992, a broad meaning should be attributed to "good faith", I do not consider that would be the correct interpretation. In the commercial context of bills of lading, the meaning of the term good faith should be clear, capable of unambiguous application and be consistent with the usage in other contexts and countries. In my view, *it therefore connotes honest conduct and not a broader concept of good faith such as "the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned".*
>
> [emphasis added]

102 This passage from *The Aegean Sea* was cited with approval by the Singapore Court of Appeal in *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR(R) 1 ("*UCO Bank*") where the Court of Appeal, at [39], held that "good faith" in s 5 of the Bills of Lading Act connotes "honest conduct". The Court of Appeal added, also at [39], that it did not see "why more should be read into the provision than its plain meaning". The Court of Appeal further commented, at [40], that "[i]t is obviously to preclude the case where possession is obtained unlawfully, or by other improper means, that s 5(2) prescribes that the person (be he the named consignee or an indorsee) must become the holder 'in good faith'."

103 The Defendant seized upon the Court of Appeal's reference to "other improper means" at [40] of *UCO Bank* to argue that the Court of Appeal did not intend, by its remarks at [39] to confine the meaning of "good faith" *only* to honest conduct.[34] The Defendant therefore submitted that the scope of "good faith" could be developed incrementally by the courts, including to consider

[34] Defendant's Submissions, at para 49

whether it is contrary to good faith for a holder to take possession of bills of lading to obtain a bare right of suit against a carrier without any real interest in the goods under the bills of lading.[35]

104 I do not accept the Defendant's submission. First, given the bill of lading's status as a document of title used in international sales, the transfer of which could in law transfer the property in the underlying goods or the right to possess those goods, I agree fully with Thomas J that the meaning of "good faith" in the Bills of Lading Act should take reference from its meaning in the law of sale of goods. In this regard, I would note that s 47(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA") also contains a specific provision dealing with the transfer of a document of title to a person "who takes it in good faith and for valuable consideration". There is therefore much to be said for aligning the meaning of the term "good faith" in the Bills of Lading Act with the meaning which that term would bear in s 47(2) of SOGA.

105 Secondly, as noted by Thomas J, in the commercial context of bills of lading, the meaning of the term good faith should be clear and capable of unambiguous application. This consideration militates against the Defendant's submission that the meaning of good faith in the Bills of Lading Act should be left open-ended to be developed by the court from case to case. In fact, the suggestion that "good faith" should be given a broad meaning in COGSA 1992 was specifically considered and expressly rejected by Thomas J in *The Aegean Sea*.

106 Thirdly, it is clear that the Court of Appeal in *UCO Bank* did not intend, by the term "other improper means" at [40], to undo its very clear pronouncement at [39] concerning the scope of "good faith" in s 5(2). This is

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[35] Defendant's Submissions, at paras 50–52.

especially since the Court of Appeal had specifically cited Thomas J's analysis in *The Aegean Sea* and expressly adopted it. From the context, it is clear that the phrase "other improper means" at [40] of *UCO Bank* referred only to improper means involving dishonesty.

107 Finally, the Defendant's attempt to use "good faith" as the gatekeeper against transfer of bills of lading to obtain a bare right of suit against the carrier conflates and confuses the function of s 2(2) and the function of the proviso on good faith in s 5(2). As paras 2.43–2.44 of the Law Commission Report made clear, the concern over transfers to obtain bare right of suits is addressed by s 2(2). In fact, the Law Commission Report spelt out expressly at para 2.22 that:

> By lawful holder we mean the consignee named in the bill or any indorsee (or holder of a "bearer" bill) who is in possession of the bill in good faith, including those cases where the person becomes a lawful holder after the bill of lading has ceased to be a transferable document of title, though subject to what is said below at paragraph 2.42 – 2.44.

There is therefore neither reason nor justification to broaden the scope of the good faith requirement in s 5(2) to deal with a mischief that is already addressed by s 2(2).

108 I therefore conclude that the holder of a bill of lading holds it in good faith for the purpose of s 5(2) of the Bills of Lading Act if he became its holder honestly.

Application to the facts

109 The Defendant contends that OCBC was not a holder of the bills of lading in good faith because OCBC knew that the cargo had been discharged before it agreed to extend the loan to Aavanti. The Defendant based this factual allegation on two sources of information.

110 The first source of information is an affidavit filed on behalf of Aavanti in support of its application in Originating Summons 658 of 2016 ("OS 658") for leave to convene a meeting of creditors to consider a scheme of arrangement pursuant to s 210 of the Companies Act (Cap 50, 2006 Rev Ed).[36] In the said affidavit, Aavanti alleged that it was part of its usual course of business to obtain delivery of shipped cargo to Ruchi on the basis of LOIs, without bills of lading.[37] The affidavit further alleged that Aavanti's institutional lenders, such as OCBC, were "aware of and acquiesced to" this practice.[38]

111 The second source of information is the evidence of a banking expert filed by the Defendant. According to the expert's resume, he spent almost his entire career working for an Indian bank (including at its branches in Singapore, Malaysia and London).[39] In other words, this expert had no direct knowledge of OCBC's operations and was attempting to give his opinion concerning the banking industry generally.[40] The expert suggested that:[41]

> (a) OCBC would, from its dealings with Aavanti, have knowledge of (i) how its customer Aavanti conducts its business, (ii) the commodities industry in which Aavanti trades, and (iii) the shipping cycle of the commodities in which Aavanti trades; and
>
> (b) from such knowledge, "OCBC would have been aware that Aavanti's commercial arrangement with their buyers would require the discharge of the Cargo without the production of BLs".

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36 1KR, dated 29 June 2016, filed in OS 658.

37 1KR, at para 70.

38 1KR, at para 71.

39 Pradip Kumar Tagore's 1st Affidavit ("1PKT"), dated 7 August 2017, at Exh PKT-1.

40 1PKT, at para 3.

41 1PKT, at paras 14–17.

The expert also suggested that OCBC would have performed a due diligence check with the International Maritime Bureau ("IMB") of the International Chamber of Commerce to ascertain whether *Yue You 902* had arrived at the port of discharge before granting the trust receipt loan. The expert further opined that he "would have expected OCBC to enquire with Aavanti, after receiving Aavanti's request for the Trust Receipt, on the status of the Cargo such as whether the Cargo has been discharged …".[42]

112 OCBC objected to the Defendant's reliance, by way of notice of intention to refer, on the affidavit filed by Aavanti in OS 658. OCBC submits that a notice of intention to refer applies only to affidavits filed previously in the same proceedings and not to affidavits filed in other proceedings.[43] While I find OCBC's objection cogent, it is not necessary (for the reasons given below) for me to rule on that objection. The statement in Aavanti's affidavit, even if admitted as evidence in these proceedings, is a bare assertion. Aavanti claimed in the affidavit that it had conveyed its practice of securing discharge of cargo by LOI to the institutional lenders "via correspondence or at face-to-face meetings" but failed to exhibit any such correspondence.[44] More importantly, even though Aavanti's affidavit specifically mentioned the two ship arrests made in the present proceedings,[45] Aavanti did not allege that OCBC had actual knowledge that *Yue You 902* had discharged the cargo before OCBC decided to grant the loan in respect of the cargo. In other words, Aavanti's affidavit contains no evidence of OCBC's actual knowledge concerning when the cargo on *Yue You 902* was discharged.

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42 1PKT, at paras 23–24.

43 Plaintiff's Submissions, at para 64.

44 1KR, at para 71.

45 1KR, at para 74.

113 As for the expert opinion, I find it largely speculative since it is not grounded on actual evidence concerning how OCBC operates. At most, the expert opinion stands for the propositions that OCBC would have general knowledge that LOIs may be used in the trade of certain commodities involving short voyages and that OCBC would have the ability, had it decided to do so, to find out whether the cargo has been discharged (by asking either IMB or Aavanti). Again, there is no allegation that OCBC *actually* knew that the cargo had already been discharged.

114 I am therefore not persuaded that the Defendant has raised a substantial dispute of fact over OCBC's actual knowledge. However, even if I were to consider that the Defendant has raised a substantial dispute of fact over OCBC's actual knowledge, it does not necessarily mean that the Defendant has successfully raised a triable issue. This is because it cannot be said that a decision by OCBC to grant the trust receipt loan, even assuming it already knew that the cargo had been discharged, constitutes dishonest conduct.

115 First, this is not a case of OCBC obtaining the bills of lading by theft, fraud or deception. OCBC provided valuable consideration (in the form of the loan to Aavanti) in return for a security interest in the bills of lading. Secondly, OCBC received the bills of lading from the seller who sent it through banking channels. This is good indication that the bills could not have been spent bills in OCBC's hands, even if the cargo were to be discharged and delivered by the carrier while the bills were in OCBC's possession. This is because any such delivery would not be delivery to a person entitled to delivery under the bills of lading (since any person receiving such delivery would, at the time of delivery, not be in possession of the bills). This is to be contrasted with the situation where a bank receives the bill of lading directly from the buyer (and not from the seller through the banking chain). In that situation, there could be a risk that the buyer

may have already obtained delivery of the cargo with the bills of lading, thereby causing it to be spent, before attempting to pledge it with the bank. Therefore, as far as OCBC was concerned, the bills of lading remained, by all appearances, effective and valid documents of title.

116 Thirdly, Aavanti did not simply ask for a loan from OCBC. It asked specifically for a *trust receipt* loan. The exact words used by Aavanti was "Kindly grant us TR for USD 7454973.16".[46] In respect of trust receipt loans, *Benjamin's Sale of Goods* (Sweet & Maxwell, 10th Ed, 2017) explained (at para 18-286):

> Where bills of ladings 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 repay 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.

Thus, when Aavanti requested a trust receipt loan, the request constituted a proposal to pledge the bills of lading to OCBC as security for the loan as well as an indication that Aavanti planned to obtain physical delivery of the bills of lading from OCBC against a trust receipt in order to transfer the same to its sub-buyer. This amounts to a representation by Aavanti to OCBC that the bills of lading remained documents which could be meaningfully pledged as security for the loan.

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46 2SBI, at p 135.

117 The undisputed facts therefore demonstrate that OCBC's granting of the loan in return for a security interest over the bills of lading constitutes honest conduct. In fact, the Defendant did not dispute that OCBC had acted honestly. That explains why Defendant had submitted that the requirement of "good faith" in s 5(2) ought to be given a broader meaning than "honest conduct".[47]

118 I therefore hold that the Defendant has failed to raise a triable issue on whether OCBC was a lawful holder of the bills of lading.

Issue 3: Whether the plaintiff consented to the carrier discharging the cargo without presentation of the bills of lading?

119 The Defendant submits that, by granting the loan to Aavanti with the knowledge that the cargo would be or had been delivered against a LOI without presentation of bills of lading, OCBC had consented to the discharge of the cargo without production of the bills of lading, and that such consent afforded the Defendant a valid defence against OCBC's claim.[48]

120 The Defendant was not able to cite any authority where such a defence had succeeded. However, it pointed to *BNP Paribas* and *The Stone Gemini* [1999] 2 Lloyd's Rep 255 as examples where the defence of consent was rejected by the court after a full trial, and submitted that the defence of consent ought to be explored at trial and the issue was not suitable for disposal in summary judgment proceedings. This submission ignores those cases where the defence of consent was disposed of at the summary judgment stage – examples include *The Pacific Vigorous*, *Star Line Traders Limited v Transpac Container System Limited* [2009] HKCU 1355, *Kai Min Fashion (HK) Ltd v Fond Express*

47 Defendant's Submissions, at paras 50–51.

48 Defendant's Submissions, at paras 99–100.

Logistics Ltd [2012] HKCU 1982, and *Synehon (Xiamen) Trading Co Ltd v American Logistics Ltd* [2009] HKCU 1000.

121 In the *Pacific Vigorous*, Belinda Ang J rejected the defence of consent as the cargo was discharged against LOIs and not on the basis of *any prior consent* by the plaintiff (at [7]). In *BNP Paribas*, Ang J similarly held (at [59]–[60]):

> 59 … It is plainly wrong to construe the trust receipt as authority to [the buyer] to take delivery at Kandla against letters of indemnity issued by [the sub-buyer] without production of the bills of lading. … In the circumstances, there cannot arise by virtue of the trust receipt any consent, authority or ratification.
>
> 60 In reality, the cargo arrived earlier than the bills of lading because of the duration of the voyage. That fact of and in itself, *even with the knowledge of BNP*, cannot give rise to any actual [or] implied authority to [the buyer] to instruct the shipowner to discharge cargo without the relevant bills of lading. … It is clear from Low's evidence that the bank looked to the document of title as security and it made no sense for the bank to destroy its own security if it were to consent to release of cargo against a letter of indemnity.
>
> [emphasis added]

In *Nederlandsche Handel-Maatschappij v Strathlorne Steamship Company* (1931) 39 Lloyd's Rep 171, a case decided in the Scottish Court of Session, Lord Anderson held (at 175–176) that the defence of consent implied that "something was said or done by the pursuers which affected the mind of the master of the ship, induced him to conclude that they were consenters, and thus encouraged him to make delivery without production of the bills of lading".

122 In the present case, the Defendant was not able to point to anything said or done by OCBC which could have induced the Defendant to conclude that OCBC had consented to the delivery of the cargo without bill of lading. In fact, the Defendant accepts that there were no communications between OCBC and

the Defendant prior to the discharge of the cargo. More importantly, the Defendant's submission is that OCBC's consent was expressed through the grant of the loan. Since it is common ground that the loan was granted only after the discharge of cargo was completed, there could have been no *prior consent* by OCBC to the discharge of the cargo.

123 Nor could OCBC's grant of the trust receipt loan be construed as *ex post facto* consent to, or ratification of, the misdelivery. OCBC's decision to grant a trust receipt loan (as opposed to other types of loan) and take the bills of lading as security is clearly inconsistent with any intention to waive its contractual rights of suit against the Defendant under the bills of lading. Subsequent to the granting of the loan, nothing was said or done by OCBC which could be construed as ratification of the misdelivery or waiver of OCBC's rights of suit. When Aavanti defaulted on the loan, OCBC promptly claimed against the Defendant under the bills of lading. Instead of telling OCBC that it had no claim because it had consented to the misdelivery and therefore waived its rights of suit, the Defendant's reaction to OCBC's claim on 14 June 2016 was to immediately institute its own claim on 17 June 2016 against FGV under the LOI.[49] Quite clearly, the Defendant discharged the cargo because it believed that its potential liability under the bills of lading for misdelivery was covered by the LOI and not because it believed that it no longer had liabilities under the bills of lading due to any perceived consent on OCBC's part.

Issue 4: Whether the plaintiff is estopped from asserting a misdelivery claim

124 The Defendant submitted on both estoppel by acquiescence and estoppel by convention.[50]

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49 Plaintiffs'/Respondents' Bundle of Key Documents, at Tab 10.

50 Defendant's Submissions, at paras 119 and 133.

Estoppel by acquiescence

125 The requirements for estoppel by acquiescence are:

(a) The defendant must be mistaken as to his own legal rights;

(b) The defendant must have expended money or done some act on the faith of his mistaken belief;

(c) The plaintiff must know of his own rights;

(d) The plaintiff must know of the defendant's mistaken belief; and

(e) The plaintiff must encourage the defendant in the defendant's expenditure of money or other act, either directly or by abstaining from asserting his legal right.

Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd [1999] 2 SLR(R) 817 ("*Nasaka*") at [70].

126 It was plain that the Defendant's defence on this front could not get off the ground. The first *Nasaka* requirement necessitated the Defendant to have been mistaken about its entitlement to deliver the goods to Ruchi without the presentation of the bills of lading: see *Nasaka* at [71]. And yet the Defendant's delivery against a LOI is precisely an acknowledgement and acceptance that they are *not* entitled to deliver without presentation of the bills, and might become liable for misdelivery otherwise. The Defendant's acceptance of and reliance on FGV's LOI demonstrates that it was not mistaken about it legal rights.

127 I did not view it as necessary to dwell on the other requirements, but I will mention that it was equally clear that the Defendant could not succeed on

the fifth requirement either. Here, the Defendant claimed that OCBC had deliberately refrained from communicating with Aavanti or the Defendant to put the Defendant on notice that it should not discharge the cargo without production of the bills of lading.[51] As *Nasaka* at [80] makes clear, for this requirement to hold, there must be something which OCBC's silence did to cause the Defendant to undertake some action it would not otherwise have done. On the facts of the present case, the Defendant had the benefit of FGV's LOI to cover the Defendant for potential liabilities under the bills of lading for misdelivery. Such potential liabilities were expressly referred to in clauses 1, 2 and 3 of the LOI.[52] Delivery of the cargo without the bills of lading was therefore an act undertaken by the Defendant in full knowledge that it would be exposed to liabilities under the bills of lading. Defendant was induced to undertake such exposure because of the coverage provided by the LOI (and which it in fact sought to enforce) and not because of OCBC's silence.

128 To put it another way, the Defendant well knew what its legal obligations under the bills of lading were and OCBC had no duty to reach out to the Defendant to remind the Defendant to comply with the well-established legal obligations of a carrier under a bill of lading. Those obligations existed before OCBC came into the picture and OCBC's silence did nothing to take them away.

Estoppel by convention

129 In relation to the defence of estoppel by convention, the Defendant claimed that both OCBC and Aavanti (on its behalf and on behalf of the Defendant) had contemplated the fact that the cargo would be discharged

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51 Defendant's Submissions, at para 126.

52 6QJB, at p 56.

without the presentation of the bills of lading.[53]

130 The requirements for estoppel by convention were clarified in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista*") at [31]:

> (a) The parties must have acted on "an assumed and incorrect state of *fact or law*" (emphasis in original);
>
> (b) The assumption must be either shared by both parties pursuant to an agreement or something akin to an agreement, or made by one party and acquiesced to by the other; and
>
> (c) It must be unjust or unconscionable to allow the parties (or one of them) to go back on that assumption.

131 The Defendant conceded that their arguments were seeking to extend the law on estoppel by convention.[54] Nevertheless, I would simply comment on the second *Travista* requirement.

132 I could not see how OCBC could have shared a common assumption with the Defendant since they did not communicate with each other prior to the cargo being discharged. Nor, for reasons I have mentioned (at [127] above) did I consider OCBC to have acquiesced to any assumption made by the Defendant.

133 On the part of the Defendant, it was also not apparent to me how they could have been "aware of the facts on which the common assumption in question was said to have been based" (*Travista* at [31]), since at the time the

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53 Defendant's Submissions, at paras 129–130.

54 Defendant's Submissions, at para 133.

cargo was discharged, the Defendant could not have any knowledge of OCBC, much less OCBC's dealings with Aavanti.

134 It followed that both the defences of estoppel by acquiescence and estoppel by convention did not raise triable issues.

Issues 5 & 6: Conversion, detinue and bailment

135 Given that my findings on Issues 1 to 4 above were sufficient for judgment to be granted in OCBC's favour on the basis of the rights of suit transferred to OCBC pursuant to the Bills of Lading Act, it is not necessary for me to consider OCBC's claims in conversion, detinue and bailment.

Whether there are some other reasons for the matter to go to trial

136 The Defendant submitted, alternatively, there is "some other reason" for a trial as most of the facts and evidence relevant to whether OCBC had actual knowledge of the discharge of the cargo are under OCBC's control.[55] In support of this submission, the Defendant cited the case of *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 1 SLR(R) 465 ("*Concentrate Engineering*").

137 In *Concentrate Engineering*, the plaintiff company sued the defendant bank for making wrongful payment from the plaintiff's bank account against forged cheques. The manner in which the cheques were forged gave rise to a strong suspicion that the forgery was committed by a person within the plaintiff's organisation (at [10]–[11]). Noting that "O 14 is for the plain and obvious and not for the devious and crafty" (at [19]), the court observed (at [18]):

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[55] Defendant's Submissions, at para 115.

> …
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> No doubt, the defendants are unable to point to a specific defence, but, in theory, the following scenarios are possible: (a) that, assuming that the defendants accept the conclusions of the handwriting expert, the cheques were copied by the signatories themselves, *ie* they are "self-forgeries"; (b) that the signatures were copied with the knowledge or consent of both the signatories or one of them; (c) that the signatures were copied by or with the knowledge or consent of the controlling mind of the plaintiffs, whoever he may be at the material time.

The court therefore granted unconditional leave to defend because "the circumstances are such that the defendants ought, in the interest of justice be given time and with it the opportunity to investigate further the fraud by whatever means that are available to them, including a trial, to determine for themselves whether they are liable as bankers" (at [17]).

138 The first point of distinction between the present case and *Concentrate Engineering* is that the Defendant is not suggesting there was fraud or forgery on the part of OCBC or any of its employees. The second point of distinction is that any of the three potential scenarios listed at [18] of *Concentrate Engineering*, if found to be true after investigation, would have afforded the defendant bank a viable defence. In comparison, given the view I have taken of the various defences discussed above, even if the Defendant succeeds in proving that OCBC had actual knowledge that the cargo had been discharged, the Defendant would still not have a viable defence against OCBC's claim. For these reasons, the Defendant has failed to make out a case that there ought to be "some other reason" for the matter to go to trial.

Quantum of damages

139 Citing *McGregor on Damages* (Harvey McGregor) (Sweet & Maxwell, 19th Ed, 2014) ("*McGregor*") at para 30-003, the Defendant submits that the

normal measure of damages for non-delivery under a contract of carriage is the market value of the goods at the time and place at which they should have been delivered less the amount it would have cost to get to the place of delivery. Later in the same passage, *McGregor* clarified that this normal measure is on the assumption that the carriage freight had not been paid. Where freight had been paid (as in the present case) the measure of damages would simply be the market value of the goods.

140 The Defendant then submitted that expert evidence would be required to determine the market value of the cargo at the time and place of delivery. I do not agree. A similar argument was raised in *He-Ro Chemicals Ltd v Jeuro Container Transport (HK) Ltd* [1993] 2 HKC 368, where Kaplan J held (at [25]):

> Finally, Mr Reyes submitted that even if I was against him, I should only order judgment for damages to be assessed because there is no evidence as to the value of the goods at the date of conversion. There is only the invoice value a little time before. I reject this argument as the defendants have not said a word on quantum, and if the market in zinc oxide had in fact fallen between the date of the contract and the date of misdelivery, I would expect them to file evidence on this point. The invoice value of the goods is, in my judgment, as good an indication of the value of the goods at the time of misdelivery as a court could reasonably expect.

141 In the present case, there are two relevant indications of the value of the goods. In the sale contract between Aavanti and Ruchi dated 4 April 2016, the price of the palm oil was agreed at USD 776.50 per metric ton.[56] In the sale contract between FGV and Aavanti dated 5 April 2016, the agreed price was USD 745.50 per metric ton.[57] Since the place of delivery was Ruchi's storage facilities at New Magalore, India,[58] the price in the Aavanti-Ruchi contract is

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56 1SA, at p 9.

57 1KR, at pp 394–396.

probably the more relevant and accurate indicia of the value of the goods at the place of delivery. However, OCBC is only claiming based on the (lower) price in the FGV-Aavanti contract, as the loan given by OCBC to Aavanti was for the amount which FGV had invoiced Aavanti. The Defendant has provided no evidence that there was any significant drop in the market price of the palm oil during the three weeks between the conclusion of the sale contracts and the discharge of the palm oil at New Mangalore.

142 I would therefore assess the quantum of damages as the invoice value of the cargo in the sale between FGV and Aavanti, which is USD 7,454,973.16.

Conclusion

143 For the reasons given above, I held that the Defendant had failed to raise any triable issue or establish any other reasons for a trial. I therefore dismissed RAs 259 & 261 and affirmed the summary judgment order made below for USD 7,454,973.16, with interest of 5.33% per annum from date of writ to date of judgment.

144 As substantial costs of $36,000 against the Defendant were ordered in the court below, I fixed costs against the defendant at $6,000 plus disbursements for RA 259 and $6,000 plus disbursements for RA 261.

Pang Khang Chau
Judicial Commissioner

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[58] 6QJB, at para 16.

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