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IS *WILMAR TRADING PTE LTD V HEROIC WARRIOR INC* A CAUSE FOR CONCERN OR SIMPLY A REITERATION OF WELL-ESTABLISHED PRINCIPLES OF TORT?

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Establishing a title to sue by a cargo claimant has long been a necessary and integral step towards obtaining a successful recovery of its claim. Yet, some have raised concerns that the decision in *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 has apparently upset the proverbial apple cart in this respect where the claimant who had not proved its ownership of the cargo at the time of loss was permitted to claim in tort against the shipowner. This article considers the application of the test for tortious claims in Singapore and the Singapore court's incremental approach applied towards cargo claims in tort.

LIM Min Isabel
LLB (Hons) (Durham University);
Advocate and Solicitor (Singapore);
Legal Associate, Gurbani & Co LLC.

TAN Hui Tsing
LLB (Hons) (Bristol), *LLM (Southampton)*;
Advocate and Solicitor (Singapore);
Director, Gurbani & Co LLC.

I. Introduction

1 Where a claimant sues for loss and damage arising from cargo damage, the preliminary consideration often put forward is whether the claimant has the title to sue in the first place. In the recent case of *Wilmar Trading Pte Ltd v Heroic Warrior Inc*[1] ("*Wilmar Trading*"), the Singapore High Court explored the requirement for

1 [2019] SGHC 143.

such a consideration as well as the underlying legal principles and context surrounding this seemingly necessary condition.

II. Facts and decision

A. Brief background facts

2 In *Wilmar Trading*, the dispute centred on damage to a cargo of palm oil loaded on board *MT Bum Chin* (the "Vessel") on 17 April 2013. The plaintiff, Wilmar Trading Pte Ltd, had purchased the cargo on free on board ("FOB") terms. The defendant was the registered owner of the Vessel which had been nominated by the plaintiff to carry the cargo.

3 The Vessel had been time chartered by the defendant to STX Pan Ocean, who in turn sub-time chartered the Vessel to NHL-Development Ltd. NHL-Development Ltd then voyage chartered the Vessel to Raffles Shipping International Pte Ltd or "nominee". Raffles Shipping International Pte Ltd nominated the plaintiff as the voyage charterer of the Vessel. The chain of relationship is depicted as follows:

Heroic Warrior Inc (*owners*)	→	STX Panocean (*time charterer*)	→	NHL (*sub-time charterer*)	→	Wilmar Trading (*voyage charterer*)

4 The cargo was loaded at a terminal in Kuala Tanjung, Indonesia, for carriage to and delivery at Jeddah and Adabiyah. The plaintiff had bought the cargo from PT Multimas Nabati Asahan ("MNA") through three FOB sale contracts. Non-negotiable bills of lading were to be issued upon loading of the cargo where MNA was to be named as shipper on the non-negotiable bills of lading. The non-negotiable bills of lading were thereafter to be switched with original bills of lading in Singapore where the plaintiff would be named as shipper in the original bills of lading.

5 However, after completion of loading of one of parcels of cargo into the Vessel's tank 4S ("Tank 4S") and in the course of

clearing the product line by blowing through, the longitudinal bulkhead of Tank 4S buckled and the tank top fractured (the "Incident"). As the result of the Incident, all of the cargo already loaded on board the Vessel had to be discharged as it was clear the Vessel was unable to perform the voyage. The cargo was thereafter loaded onto a substitute vessel which performed the voyage.

6 At the time of the Incident, bills of lading had not been issued.

B. The parties' respective claims

7 The plaintiff claimed against the defendant under contract and tort for losses arising from the Incident, including cargo damage, cargo shortage and the loss of use of the Vessel. The main thrust of the plaintiff's case was that its loss and damage had resulted from the pre-existing structural weaknesses of Tank 4S and the over-pressurisation of Tank 4S as a result of the insufficient venting system and/or the Vessel crew's lack of control of the manifold valve. The plaintiff claimed that this rendered the Vessel unseaworthy.

8 As to contract, the plaintiff's position was that there would have been an express and/or implied contract of carriage between the plaintiff and defendant. The plaintiff contended that an implied contract existed because of the original bills of lading that would have been issued to the plaintiff in Singapore had the Incident not occurred. The plaintiff's case was that the original bills of lading would have incorporated the Hague-Visby Rules,[2] thereby imposing contractual obligations on the defendant to exercise due diligence to ensure that the Vessel was seaworthy and cargoworthy.

9 The plaintiff also brought a further and alternative claim under tort as cargo owner and FOB buyer of the cargo.

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2 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 as amended by the Protocols of 23 February 1968, attached as Schedule to the Carriage of Goods by Sea Act (Cap 33, 1998 Rev Ed).

10 To this end, the defendant denied the factual allegations of the plaintiff and also suggested that the causal factors for the failure of Tank 4S as identified by the plaintiff were irrelevant. The defendant also relied on the defences under the Hague-Visby Rules.

11 In addition to its defence, the defendant counterclaimed for costs of repairs to the Vessel, allegedly arising from breach of the plaintiff's contractual duties in that the terminal personnel (allegedly as agents of the Plaintiff) carried out the loading operations carelessly, thereby resulting in damage to the Vessel.

C. The decision

12 The issues before the court were:

(a) whether there existed a contractual relationship between the plaintiff and defendant; and

(b) in a claim in negligence, whether it was legally necessary for the plaintiff to have a proprietary interest in the cargo at the time of the Incident before it was entitled to sue for substantial damages. In the absence of proprietary interest in the cargo, could a duty of care still arise?

13 Given that none of the three charterparties involved in the carriage of the cargo were between the plaintiff and the defendant, the court found that there was no express contract of carriage between the parties.

14 Likewise, the plaintiff's submission that there existed an implied contract of carriage, by reason of the original bills of lading to be issued in Singapore, was also dismissed as no bills of ladings were in fact issued by the defendant and there was no evidence of an antecedent contract of carriage between the parties. Instead, the court found that the original bills of lading contemplated by the plaintiff were to be issued by NHL-Development Ltd. Hence, the bills of lading, had they been issued, would have been a charterer's bill of lading and not an owner's bill of lading. Thus, the court held that defendant was not the contractual carrier and was not liable to the plaintiff in contract.

15 Moving on to the plaintiff's claim in negligence, the court found that property had not passed to the plaintiff because the plaintiff had not proved that it had paid for the cargo by the time of the Incident (under a classic FOB contract, property passed on payment). The court thus held the plaintiff was not the owner of the cargo at the time of the Incident.

16 However, the court agreed that the plaintiff was entitled to sue in tort as FOB buyer of the cargo and could recover damages for loss or damage to the cargo and also for losses flowing from damage to the cargo. The court dismissed the defendant's argument that the plaintiff could not sue in negligence because it had no proprietary interest in the cargo. In particular, the court rejected the defendant's reliance on the English Court of Appeal case of *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd*[3] ("*The Aliakmon*"), which is case authority for the proposition that a buyer has no title to sue the shipowner in negligence if title to and possession of the damaged property had not passed to the buyer at the time the goods were damaged.

17 Instead, the court referred to *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*[4] ("*NTUC Foodfare*"), observing that the Court of Appeal in *NTUC Foodfare* had expressly rejected the principle in *The Aliakmon* and found that the proposition supported by *The Aliakmon* no longer applied in Singapore. The court concluded that a "cargo claimant" without any proprietary or possessory interest in the cargo nonetheless had *locus standi* to sue for pure economic loss. The court also referred to the principles enunciated in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[5] ("*Spandeck*") and held that the question turned simply on whether the defendant owed the plaintiff a duty of care in respect of the loss suffered.

18 Applying the principles in *Spandeck* and in *NTUC Foodfare*, the court found that all the requirements to establish a duty of care were satisfied:

3 [1986] 1 AC 785.
4 [2018] 2 SLR 588.
5 [2007] 4 SLR(R) 100.

(a) Factual foreseeability. The defendant as performing carrier would have reasonably foreseen that its negligence would cause economic loss to a buyer of cargo who bore the risk of damage to or loss of the cargo.[6] In this regard, the court paid particular attention to the fact that as the buyer of the cargo on FOB terms, the plaintiff had nominated the Vessel.

(b) Legal proximity.[7] The relationship between the plaintiff and defendant was sufficiently proximate because under the FOB sales contract, in which risk in the goods had passed from MNA (as seller) to the plaintiff (as FOB buyer) when the cargo was put on board the Vessel; the plaintiff was therefore bearing the risk of cargo damage when the cargo was on board the Vessel. The defendant as registered owner of the Vessel had been in possession of the Vessel and her crew at all material times.

(c) Policy considerations. The court highlighted that there was no issue of indeterminate liability to the world at large because the plaintiff as FOB buyer was the only party who bore the risk of loss or damage to the cargo and was within an identifiable class of persons who would suffer loss as a result of the defendant's negligence.[8]

19 Having found that the defendant owed a duty of care to the plaintiff, the court then found that this duty of care was breached. The court held that the structural weaknesses from the identified defects coupled with the Vessel crew's failure to properly control the Vessel's manifold valve during line-blowing had caused the failure of Tank 4S. The court found the defendant liable for the plaintiff's loss caused by the defendant's negligent failure to provide a cargoworthy vessel and further failure to take care of the cargo loaded on board the Vessel.[9]

6 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [39].
7 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [41].
8 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [42].
9 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [222].

III. Analysis: Are the principles applied in *Wilmar Trading Pte Ltd v Heroic Warrior Inc* a cause for concern?

20 At first glance, *Wilmar Trading* appears to be groundbreaking. Concerns have been raised that it may change the complexion of cargo claims which are so often premised at the outset on whether the claimant has title to sue. Thus, there appears at first blush to be a departure or even circumvention of the proof of title to the cargo.

21 However, the authors of this article submit that *Wilmar Trading* is not a cause for concern and in fact does nothing more than apply the position under the law of tort in Singapore.

A. Affirmation of the Spandeck *principles*

22 First, *Wilmar Trading* simply affirms the principles governing liability for negligence as established in *Spandeck* and as applied in *NTUC Foodfare*.

(1) A question of proximity

23 *Spandeck* laid down the universal framework for establishing a duty of care, namely the two-stage test of proximity and policy considerations, which are together preceded by a preliminary requirement of factual foreseeability. The central tenets of the tort of negligence are whether there was a duty of care owed which had been breached and whether this breach had caused loss and damage to the claimant. If so, then as long as there were no countervailing policy considerations, the claimant ought to be compensated for the loss and suffering.

24 In this regard, *Spandeck* confirmed that proximity includes legal proximity as between the claimant and defendant for a duty of care to arise[10] and also a physical, circumstantial as well as causal proximity such as the voluntary assumption of responsibility and reliance.[11]

10 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [77].

11 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [81].

25 Hence, the question of ownership does not necessarily come into play. Indeed, ownership is but one of the factors that may arise in ascertaining proximity. However, there is no requirement that the claimant *must* own or have possessory title to the property in order to sue for losses flowing from the damage to this property. As seen in *NTUC Foodfare*, the Court of Appeal held that:[12]

> 35 Second, and more fundamentally, under our law of negligence, there is no requirement that a plaintiff must own or have possessory title to the property to sue for loss flowing from damage to that property. There is such a requirement under English law: see *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 809 (*per* Lord Brandon of Oakbrook). However, it is critical to appreciate the basis of this requirement under English law. It is simply a corollary of the exclusionary rule against recovery for pure economic loss under English law: the rule that a defendant will not generally owe a duty of care to a party who suffers pure economic loss due to the defendant's negligence. Pure economic loss is loss that is not consequent upon damage to one's person or property: see *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 21st Ed, 2014) ('*Clerk & Lindsell*') at para 8-93. It therefore follows from the exclusionary rule that a plaintiff may only recover loss flowing from damage to *its* property, rather than the property of a third party. However, in *Spandeck* ([1] *supra*), we rejected the exclusionary rule against recovery for pure economic loss (at [69]). There is thus no basis under our law for a requirement that a plaintiff must own or have possessory title to property to sue for loss flowing from damage to that property. Any such requirement would be a relic of the exclusionary rule, which we rejected in *Spandeck*. Under our law, a plaintiff need only show that the *Spandeck* test is fulfilled to establish that it was owed a duty of care.

26 In *Spandeck*, the Court of Appeal rejected any suggestion that Singapore law would not remedy instances of pure economic loss solely because the loss was purely economic and not physical.[13] Instead, the Court of Appeal was unequivocal that the same touchstones for liability for negligence would continue to apply in cases of negligently caused economic loss.[14]

12 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [35].
13 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [69].
14 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [70].

27 Anticipating response to concerns of indeterminate liability, the Court of Appeal held that:[15]

> 71 … In cases of *physical* damage, there is usually no difficulty with regard to a control mechanism to prevent indeterminate liability. However, the adoption of a single test would serve to constrain liability *even in* those extremely rare cases where *physical* damage *might possibly* result in indeterminate liability. It may well be that there are policy considerations in restricting recovery for pure economic loss in *certain* situations, but this in itself does not make it necessary for a wholly different approach in the form of a separate test altogether. [emphasis in original]

28 As to the application of the two-stage test, the Court of Appeal suggested that:[16]

> 73 … We would add that this test is to be applied incrementally, in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy. As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. …

29 Thus, in application of the principles set out in *Spandeck* and in *NTUC Foodfare* above, the court in *Wilmar Trading* unsurprisingly found that the damage to property as well as economic loss flowed directly from the defendant's breach:[17]

> 227 The nature of the losses for Category A to G are those that directly arise from the defendant's negligence. In breach of the duty of care owed by the defendant to the plaintiff, I find that the losses under Category A to G are reasonably foreseeable and they flow directly from the negligent acts or omissions of the defendant; resulting in the *Bum Chin* being unable to carry out

15 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [71].

16 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73].

17 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [227].

> the voyage and the cargo having to be loaded onto a substitute vessel, as well as any loss or damage to the cargo. The question that remains is for the plaintiff to prove the quantum of the claim, and the defendant has put the plaintiff to strict proof.

(2) Carving out a separate test for admiralty claims?

30 *Spandeck* has made it clear that there exists a single and universal test for all claims in tort, regardless of the type of damages claimed. Therefore, it must follow that the same single universal test is used for claims in tort, regardless of where the tort occurred, whether on land or in water.

31 This point was addressed by the Court of Appeal in *Spandeck*, who explained that adopting separate tests to ascertain the imposition of a duty of care according to the type of damages claimed would be incoherent and unreliable, as this would give rise to a perception that a claimant could pick and choose the various tests in order to succeed in his claim:[18]

> 71 As such, in our view, a *single* test is preferable in order to determine the imposition of a duty of care in all claims arising out of negligence, *irrespective* of the *type* of the damages claimed, and this should include claims for pure economic loss, whether they arise from negligent misstatements or acts/omissions. In cases of *physical* damage, there is usually no difficulty with regard to a control mechanism to prevent indeterminate liability. However, the adoption of a single test would serve to constrain liability *even in* those extremely rare cases where *physical* damage *might possibly* result in indeterminate liability. It may well be that there are policy considerations in restricting recovery for pure economic loss in *certain* situations, but this in itself does not make it necessary for a wholly different approach in the form of a separate test altogether.
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> 72 Ultimately, a single test to determine the existence of a duty of care for all claims of negligence would do well to eliminate the perception that there are, at once, two or more tests which are equally applicable. While it may be that all these tests could yield the same result, their serial applicability diminishes the desirability of having a general principle that can provide a coherent, consistent and reliable way of determining

18 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [71]–[72].

> or recognising a duty of care. We now turn our attention to considering what the *single* applicable test may be.

B. Wilmar Trading Pte Ltd v Heroic Warrior Inc *will not circumvent an existing contract of carriage*

32 Another concern that has been raised is whether the ruling of *Wilmar Trading* would allow tortious claims to trump the obligations imposed and protections afforded in an existing contract of carriage.

33 It is settled law that a tortious duty arises even if there is an underlying contractual relationship. Tortious duties are placed on parties by the law whereas contractual duties are premised on parties' autonomous decisions to enter into certain obligations which thereby impose on each other mutually agreed duties.

34 That said, certain contracts make it clear that a claim in tort will not circumvent contractual terms. An example is the Hague-Visby Rules which are typically incorporated into contracts of carriage evidenced by bills of lading: Art IV bis(1) of the Hague-Visby Rules makes it clear that contractual defences remain applicable even if the claim is framed in tort:

> 1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

35 In a case where there are existing contractual relationships (although not as between the plaintiff and the defendant, but as between the plaintiff and a third party), the question to consider is whether imposing a duty of care upon the respondent (with whom the claimant has no contractual relationship) would result in leaping across contractual relationships and pre-allocated risks.

36 Such an example arose in *Spandeck* where the contractor who had won a contract to work on a project with the Government of Singapore sued the superintending officer of the project in tort for failing to apply professional skill and judgment in certifying payment for work done by the contractor. In that case, it was held that the respondent superintending officer's responsibility was

solely to the employer of the project, *ie*, the Government of Singapore and there was no proximity arising between the superintending officer and the contractor. The Court of Appeal held that there was no assumption of responsibility by the superintending officer since there was already a mechanism for dispute resolution in respect of certification made by the superintending officer in the contract between employer and contractor.

37 In *Wilmar Trading*, there was no direct contractual relationship between the plaintiff and the defendant. There was, however, a chain of charterparty relationships between the plaintiff and defendant and in fact the defendant had attempted to bring its counterclaim down the charterparty chain against the plaintiff for alleged damage to the Vessel. To the extent that one may suggest that there was a pre-allocation of risk of sorts in place, by reason of this charterparty chain, it must be said that such a suggestion remains to be tested against proximity and a consideration of whether any policy concerns arise with regard to indeterminate liability.

38 On the facts, the court had found there was proximity as between the plaintiff and the defendant simply by reason of the plaintiff's nomination of the defendant's Vessel to carry the cargo and by loading the cargo on board the Vessel. There was no doubt that factual foreseeability arose, as it was foreseeable that any breach of duty on the part of the defendant in its handling of the cargo would cause harm to the plaintiff; that, coupled with the absence of exposure to indeterminate liability (since only the plaintiff who bore the risk of the cargo could bring the claim), meant the court in *Wilmar Trading* was naturally fortified in its view that the defendant owed a duty of care to the plaintiff and no countervailing policy considerations arose to affect the finding of a duty of care.

39 Therefore, where there are existing contractual relationships in place, the authors' view is that a court is likely to consider the underlying contractual relationship and examine firstly the impact of the legal relationship, if arising, as between the parties, and the proximity, if arising as between the parties outside such contractual relationship.

IV. Conclusion

40 The takeaway from *Wilmar Trading* is that a claimant does not need to have proprietary interest in the damaged property in order to sue for loss and damage to that property.

41 What appears to be a radical shift in the realm of cargo claims is, upon careful review and consideration, a reiteration of the well-established principles pronounced by the Court of Appeal in *Spandeck* and affirmed by the same court in *NTUC Foodfare*.

42 That is not to say that a court will always allow tortious claims brought in respect of cargo damage, because *Spandeck* must be applied carefully, particularly when considering whether the issue of indeterminate liability arises. The authors respectfully submit that if a court finds no proximity as between a claimant and a defendant and where the defendant would be exposed to liability to an indeterminate class of persons, the court may conclude that the second-stage test of *Spandeck* has not been satisfied and hence the claimant's claim in tort may not succeed.