

# **THE STI ORCHARD AND THE REQUIREMENT OF HONESTY FOR HOLDERS OF BILLS OF LADING IN GOOD FAITH**

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## **I. Introduction**

1 Shipping and trade finance are the lifelines of commerce and very often go hand in hand. It is a common feature of international trade that traders will buy and sell goods and transport them by sea from one place to another, and for payment to be made by way of letters of credit. It is also commonplace for the buyers to obtain financing from financial institutions in the form of trust receipt loans where the institutions would take pledges of the bills of lading of the cargoes as security.

2 The spectacular collapse of Hin Leong Trading (Pte) Ltd (“HLT”) in April 2020 led to a number of claims amongst various stakeholders in the shipping and trade industry and financiers who had extended trade finance facilities.

3 The majority of the claims by the banks against the carriers are claims for mis-delivery for delivering the cargo without presentation of the bills of lading. It is in this context that the issue of the financier’s position as the holder of a bill of

lading in good faith has arisen in the recent decision of *The STI Orchard*.<sup>1</sup>

4 This article will examine the jurisprudence outlining the circumstances when a bank may not be regarded as a holder of the bill of lading in good faith.

## II. The Singapore Bills of Lading Act 1992 and the holder of the bill of lading in good faith

5 A bill of lading functions as evidence of a contract of carriage between the shipper and the carrier, as well as a document of title over the goods shipped. Due to its function as a document of title, a bill of lading is intended to be endorsed to the consignee or other endorsee down the line in the chain of sale.

6 Prior to 1855, the consignee and endorsee would have difficulties framing a cause of action against the carrier for any breaches of the contract of carriage as there was no privity of contract between the consignee or endorsee and the carrier.

7 The Bill of Lading Act 1855 was passed to address the problem of lack of privity.<sup>2</sup> By virtue of the Bill of Lading Act 1855, the right of suit was transferred from the shipper to the consignee or endorsee when the bill of lading was endorsed and delivered. However, the transfer of the right of suit under the Bill of Lading Act 1855 was tied to the transfer of property in the goods and this position was not satisfactory.

8 The UK Parliament then passed the Carriage of Goods by Sea Act 1924<sup>3</sup> (the “COGSA 1924”) which removed the requirement that transfer of the right of suit must be effected together with the transfer of property in the underlying goods. The COGSA 1924

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1 [2022] SGHCR 6.

2 See general discussion on this at *The Yue You 902* [2020] 3 SLR 573 at [35].

3 c 50.

was adopted by Singapore in the form of the Bills of Lading Act 1992<sup>4</sup> (“BLA 1992”).

9 Section 2(1) of the BLA 1992 provides as follows:

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 ...) 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.

10 Section 5(2) of the BLA 1992 in turn provides that references in the Act to the lawful holder of a bill of lading mean someone who has become the holder of the bill in good faith:

... and 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.

11 Under the BLA 1992, in order to be regarded as the lawful holder of a bill of lading, the person in possession of the bill must have come into possession in good faith. This requirement is necessary to ensure that the right of suit against the carrier is properly transferred to a person who ought to have a right of suit against the carrier. It would be illogical for a thief who stole the bill of lading, or someone who obtained it by fraudulent means, to have right of suit against the carrier simply because he has physical possession of the bill of lading.

### **A. Good faith**

12 The BLA 1992 does not define “good faith” or the circumstances when a person is regarded as having come into possession in good faith. However, the aforesaid is discussed in the English High Court decision of *The Aegean Sea*.<sup>5</sup>

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4 2020 Rev Ed.

5 *Aegean Sea Traders Corporation v Repsol Petroleo SA “The Aegean Sea”* [1998] 2 Lloyd’s Law Rep 39.

13 One of the issues in that case was whether the first defendant (“Repsol”) was the lawful holder of the bill of lading pursuant to the COGSA 1992. The plaintiff in that case was the owner of the *Aegean Sea* who chartered the vessel to the second defendant (“ROIL”) which was a wholly owned subsidiary of Repsol.

14 ROIL purchased the cargo from Louis Dreyfus. When Louis Dreyfus sent the bill of lading to ROIL, they had inadvertently endorsed the bill of lading to Repsol in error. The bill of lading was returned to Louis Dreyfus where the endorsement was struck through and re-endorsed to ROIL instead.

15 On the issue of the definition of “good faith” under the COGSA 1992, the English High Court held as follows:<sup>6</sup>

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’.

16 The above passage in *The Aegean Sea* was cited with approval by the Singapore Court of Appeal in *UCO Bank v Golden Shore Transportation Pte Ltd*<sup>7</sup> where the Court of Appeal held that there was no reason why more should be read into the provision other than its plain meaning. The Court of Appeal held that the requirement of “good faith” at s 5(2) of the BLA 1992 was obviously to preclude cases where the holder obtained possession unlawfully or by other improper means involving dishonesty.

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6 *Aegean Sea Traders Corporation v Repsol Petroleo SA “The Aegean Sea”* [1998] 2 Lloyd’s Law Rep 39 at 60.

7 [2006] 1 SLR(R) 1 at [39].

**B. The Yue You 902**

17 In the more recent Singapore High Court decision of *The Yue You 902*,<sup>8</sup> the concept of “good faith” arose in the context of a claim by a bank, as lawful holder of the bill of lading, against the carrier for delivery without presentation of the original bills of lading.

18 In that case, the plaintiff was OCBC and the defendant was the owner of the vessel Yue You 902. OCBC granted a loan to the buyer of the cargo, Aavanti Industries Pte Ltd (“Aavanti”), for the purchase of the cargo in the form of a trust receipt loan and retained the bills of lading as security for the loan.

19 When Aavanti defaulted on the loan, OCBC commenced proceedings against the carrier pursuant to the bills of lading and eventually obtained summary judgment against the carrier.

20 The carrier argued that by the time OCBC came to be in possession of the bills of lading, the vessel had already completed discharging the cargo. It was argued that when OCBC agreed to grant the trust receipt loan to Aavanti, OCBC knew or ought to have known that the vessel had already completed discharge. On that premise, it was argued by the carrier that OCBC was not the holder of the bills of lading in good faith.

21 The carrier sought to develop the argument that “good faith” is not confined to honest conduct and could be developed incrementally to include situations where it may be considered contrary to good faith for a holder to take possession of the bill of lading in order to obtain a bare right of suit against the carrier without any real interest in the underlying goods covered by the bill of lading.

22 The court rejected the carrier’s argument and held that the holder of a bill of lading holds it in good faith if he became its holder honestly. “Good faith” as defined in *The Aegean Sea* was expressly cited with approval and adopted by the court. The

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8 [2020] 3 SLR 573.

court also agreed with the observations in *The Aegean Sea* that the words “good faith” should not be given a broad meaning nor should they be left open-ended to be developed by the court from case to case.

23 On the facts of this case, the court noted that Aavanti did not simply ask for a loan from OCBC but specifically requested for a trust receipt loan. By asking for a trust receipt loan, it was clear that Aavanti’s intention was to pledge the bills of lading to OCBC as security for the loan.

24 It did not matter that by the time the bills of lading were pledged to OCBC the underlying cargo had already been discharged. The court observed that in the *Rights of Suit in Respect of Carriage of Goods by Sea* report<sup>9</sup> (“the Law Commission Report”), it was expressly stated that lawful holder means the consignee or indorsee in possession of the bills of lading including those who became a lawful holder after the bills of lading ceased to be a transferable document of title.

25 The evidence showed that from OCBC’s perspective, the bills of lading remained, by all appearances, effective and valid documents of title. Having given good consideration in return for the pledge over the bills of lading, the court held that there was nothing dishonest about OCBC’s conduct.

26 The carrier was thus unable to raise any triable issues and summary judgment was entered against the carrier.

### **C. Navig8 Ametrine**

27 The case of *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”*<sup>10</sup> (“*Navig8 Ametrine*”) is another case that arose from the fall of the HLT empire.

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9 The Law Commission and The Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No. 196, Scot Law Com No. 130, 19 March 1991).

10 [2022] SGHCR 5.

28 The plaintiff, ING Bank, brought a claim against the demise charterer of the Navig8 Ametrine for mis-delivery of cargo. It was not disputed that the cargo was delivered to HLT without presentation of the bills of lading. The bank applied for summary judgment against the demise charterer and summary judgment with damages to be assessed was granted by the court at first instance.

29 The bank granted credit facilities to HLT to finance its trading activities. The credit facilities granted included the issuance of letters of credit. It was expressly provided in the facility letter that the facilities granted by the bank were to be secured by a pledge of documents of title and transportation documents representing or relating to any goods financed by the bank and included the full set of the bills of lading covering the goods financed.

30 The cargo that was shipped on board the Navig8 Ametrine was supposed to be sold to two parties, namely Total Trading Asia Pte Ltd (“Totsa”) and HLT. HLT submitted its application to ING Bank for the issuance of a letter of credit to finance the purchase. The letter of credit issued by the bank provided that the documents required for payment included the original bills of lading issued or endorsed to the order of ING Bank. In the event the original bills of lading were not available, payment would be effected against the seller’s letter of indemnity in a prescribed format which included wording to the effect that the seller shall make all reasonable efforts to obtain and surrender to the bank the full set of the original bills of lading.

31 The vessel arrived in Singapore on 7 February 2020 and completed discharge of the cargo by 11 February 2020. On 19 February 2020, the seller presented the letter of indemnity with the other documents required under the letter of credit and payment was made to the seller by the bank on 3 March 2020.

32 The plaintiff eventually received the full set of the bills of lading on 13 March 2020. After receiving the bills of lading, the plaintiff mistakenly endorsed and delivered the wrong set of bills of lading to Totsa. When the mistake was discovered, the

plaintiff then endorsed the correct set of bills of lading to Totsa in exchange for the previous set that was mistakenly endorsed in favour of Totsa. The previous endorsement was cancelled.

33 In relation to the “good faith” argument, the demise charterer argued that it is a triable issue whether a party with no genuine interest in the underlying cargo of a bill of lading but is a holder purely for the bare rights of suit had acted “honestly” for the purposes of the “good faith” requirement.

34 The court noted that the arguments raised in this case are almost identical to those raised and rejected in *The Yue You 902*. The court also accepted the statements in *The Yue You 902* and in *UCO Bank* on the definition of “good faith” and that these were binding on the court at first instance. The court rejected the demise charterer’s argument that the facts of the present case presented another opportunity for the court to further assess the parameters of the scope of “good faith”.

35 On the facts of this case, the court held that there was no triable issue except in relation to the quantum claimed, and ordered interlocutory judgment to be entered with damages to be assessed.

#### **D. The STI Orchard**

36 The case of *The STI Orchard* follows on the heel of *Navig8 Ametrine* and also arose from the fall of the HLT empire. Like *The Yue You 902* and *Navig8 Ametrine*, the claim here is by a bank against the carrier for mis-delivery of cargo without presentation of the bills of lading. The bank in this case similarly applied for summary judgment. However, unlike the other two cases mentioned above, the court in *The STI Orchard* held that there were triable issues and declined to enter summary judgment.

37 In this case, OCBC extended trade facility financing to HLT. The terms of the facility granted gave OCBC extensive rights against HLT, including a pledge over the bills of lading and the right to direct HLT to procure the endorsement of the bills of lading in favour of OCBC.



38 The cargo that was shipped on board the *STI Orchard* was a cargo of Gasoil 10ppm Sulphur that was shipped from Taiwan for delivery in Singapore. The cargo was delivered to HLT in Singapore.

39 HLT purchased the cargo from Winson Oil and applied for an irrevocable letter of credit to be issued in favour of Winson Oil as payment of the purchase price.

40 Two aspects of the application for the letter of credit were noted by the assistant registrar. First, together with its application for a letter of credit, HLT submitted a copy of the sales contract with Winson Oil as well as a copy of a contract of sale between HLT and PT Pertamina for the sale of Gasoline 92 RON Unleaded. The evidence suggests that HLT's intention all along was to blend the cargo with some other components to achieve the specifications for Gasoline 92 RON Unleaded which was subsequently sold to PT Pertamina.

41 The second point noted by the assistant registrar was that OCBC's standard application form provides for the bills of lading to be made out to the order of OCBC. However, when HLT submitted its application form for the issuance of the letter of credit, the box requiring the bills of lading to be issued to the order of OCBC was left unmarked. Instead, HLT inserted additional instructions to OCBC that the seller was to present bills of lading issued or indorsed to the order of HLT instead.

42 When the letter of credit was issued, one of the documents required for payment was expressly stated as the original bills of lading issued or endorsed to the order of HLT. The letter of credit also provided that in the event the original bills of lading were not available, Winson Oil was permitted to present its letter of indemnity in favour of HLT for payment in lieu of the original bills of lading.

43 When OCBC received the documents presented by Winson Oil through its advising bank, OCBC issued an import bill notification to HLT to inform HLT of the receipt of the documents. Of the documents presented, Winson Oil did not

present the original bills of lading and presented the letter of indemnity issued in favour of HLT instead as permitted by the terms of the letter of credit.

44 After confirming that the documents presented were acceptable, HLT then requested OCBC to grant a trust receipt loan. HLT's request was acceded to by OCBC which proceeded to pay the sums due under the letter of credit and the amount paid out by OCBC was recorded by OCBC as a trust receipt loan.

45 One week after granting the trust receipt loan and making payment under the letter of credit, HLT appointed financial and legal advisers and went into a debt-restructuring exercise. OCBC then wrote to HLT alleging that there were various defaults and demanded the immediate repayment of the trust receipt loan.

46 OCBC went on to write to Winson Oil to demand that Winson Oil deliver the original bills of lading to OCBC. Winson Oil complied with OCBC's demand and delivered the original bills of lading to OCBC but the bills of lading were endorsed to the order of HLT.

47 OCBC then applied to court for an order that HLT's judicial managers indorse the bills of lading in favour of OCBC. OCBC and HLT's judicial managers subsequently came to an agreement on the terms of the order which provides that the bills of lading were to be indorsed in favour of OCBC but without prejudice to "the rights acquired by any person to the Bills of Lading, the goods in relation to the Bills of Lading and/or sale proceeds thereof prior to the making of this Order".

48 At the hearing of the application for summary judgment, the carrier argued that OCBC did not intend to rely on the bills of lading as security when OCBC financed the purchase of the cargo. OCBC knew that the cargo would be blended and on-sold to PT Pertamina and that arguably OCBC's intention when granting the trust receipt loan was to look to the proceeds of sale that HLT would be holding on behalf of OCBC instead. It was argued that OCBC was now bringing a contrived claim against the carrier due to the financial collapse of HLT.

49 The assistant registrar reasoned that a pledge of the bills of lading would only constitute a pledge of the goods if the possession of the bills of lading constituted a constructive possession of the goods themselves. In order for the bank to have constructive possession of the goods, the bills of lading must be made out to the bank's order or indorsed in blank otherwise possession of the bills of lading does not confer any constructive possession of the underlying goods covered by the bills of lading.

50 On the facts of this case, OCBC acceded to HLT's request to have the bills of lading issued to the order of HLT when HLT applied for the issuance of the letter of credit. Although OCBC could have requested that HLT endorse the bills of lading to the bank when it granted the trust receipt loan, the bank did not do so.

51 On top of that, the evidence showed that OCBC knew HLT intended to blend the cargo and to onward sell the blended product to PT Pertamina. The bills of lading covering the cargo would not be relied upon to transfer title in the blended product to PT Pertamina. The assistant registrar held that it was at least arguable that the effect of the trust receipt loan was to authorise HLT to sell the blended product to PT Pertamina and to hold the sale proceeds on trust for the bank.

52 Although the bank tried to perfect its security subsequently by obtaining an order of court for the judicial managers to endorse the bills of lading to the bank, the court held that by this time, the cargo had already been blended and sold, and questioned whether it was possible to create a security interest in such a manner.

53 The fact that the bills of lading were not issued or endorsed to the order of the bank was found to be a distinguishing factor from the previous cases such that there was sufficient triable issue to grant the carrier unconditional leave to defend.

54 The assistant registrar adopted the definition of "good faith" as explained in *The Aegean Sea* and *UCO Bank* and held that on the facts of this case, it was at least arguable that OCBC did

not meet the threshold of honest conduct. It was questionable whether OCBC intended to look to the bills of lading as security at the time the bank financed the purchase of the cargo, and the bank is now attempting to bring a claim on such purported security.

### III. Comments and conclusion

55 First and foremost, it must be recognised that the decision in *The STI Orchard* is a decision arising from an application for summary judgment. At this stage, all that the defendant carrier needs to show is that there is a triable issue requiring a trial of the matter to be conducted. The assistant registrar also said expressly that the matters regarding the financing and security arrangement between OCBC and HLT ought to be investigated at trial, and that this decision should not be taken to pre-empt the outcome of the trial.

56 The Singapore cases have all adopted the definition of “good faith” as espoused in *The Aegean Sea*. The law in Singapore therefore defines “good faith” in the context of the Bills of Lading Act as meaning “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”.<sup>11</sup>

57 It would appear that if one party to a commercial transaction acted unfairly in order to become a holder of the bills of lading, that party may still be regarded as a holder in good faith so long as his unfair acts do not cross the threshold of honest conduct.

58 What amounts to honest conduct would be something for the courts to interpret as cases come before the courts in future. What is clear is that if a party obtains the bills of lading through fraud, theft or misrepresentation, these are clear-cut examples of what is not regarded as honest conduct.

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11 *Aegean Sea Traders Corporation v Repsol Petroleo SA “The Aegean Sea”* [1998] 2 Lloyd’s Law Rep 39 at 60.

59 In the case of *The STI Orchard*, it would appear that the court took the view that by not asking for the bills of lading to be endorsed to itself, or for the letter of indemnity to be addressed to itself instead of HLT, OCBC had no intention of taking a pledge over the cargo. There are various other indicia but the absence of any endorsement of the bills of lading to OCBC appears to be the most important.

60 It was only after it became clear that HLT was going to default on the loan that OCBC decided that it wanted the bills of lading covering the cargo to be endorsed to the bank as security.

61 Although OCBC had the right to require HLT to endorse the bills of lading to the bank pursuant to the terms of its financing documents, it appears that the court considered that the sudden about-turn by the bank may potentially amount to some form of dishonest conduct by the bank.

62 In the authors' view, it is indeed rather puzzling why the bank agreed to finance the purchase of the cargo without asking for the bills of lading to be issued or endorsed to the order of the bank. The court correctly observed that a clearer picture as to the bank's intention *vis-à-vis* taking a pledge over the cargo may emerge after completion of discovery and the presentation of evidence at trial.

63 Hypothetically, if the evidence adduced at trial shows that there was an agreement between the bank and HLT where the bank agreed not to take a pledge over the cargo, the bank's change in position after HLT's collapse may amount to dishonest conduct under such circumstances where the bank required HLT's judicial managers to endorse the bills of lading to the bank notwithstanding the initial agreement with HLT not to take a pledge over the cargo.

64 On the other hand, if the evidence shows that the failure to demand that the bills of lading be issued or endorsed to the order of the bank was unintended, for instance due to an administrative oversight, while the bank's demand for the bills of lading to be endorsed subsequently by the judicial managers

may well be unfair or even embarrassing, such conduct was unlikely to meet the threshold of dishonest conduct required.

65 The issue of whether the threshold of what constitutes dishonest conduct in the context of such cases will be altered by *The STI Orchard* remains undecided until the outcome of this matter at trial and a written judgment by the Singapore courts in this regard will provide some insights into this subject.