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Case Comment

BANKS AS THE AUTHORS OF THEIR OWN MISFORTUNE

The Maersk Katalin [2024] SGHC 282

[2025] SAL Prac 21

The ability to transfer rights of suit found in a bill of lading has served international traders well by giving them something to offer trade finance banks as security for trade credit facilities. By becoming the lawful holder of a bill of lading, a bank obtains the right to take delivery of the cargo or sue the carrier if the cargo cannot be delivered. However, the circumstances under which some banks became holders of bills of lading have recently come under scrutiny, and exposed them to the charge of bad faith in their attempts to enforce cargo claims against carriers. This comment discusses a number of cases involving such scenarios.

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I. Introduction

1 A series of cases heard by the Singapore High Court recently raised questions about the rights of banks (which were holders of bills of lading) to bring cargo misdelivery claims against carriers. Conventionally, a lawful holder of a bill of lading has a nearly watertight case against a carrier which delivers cargo otherwise than against production of the original bill of lading. So watertight was such a holder's position that it was normal for summary judgment to be granted by the courts.

2 These cases arose out of the collapse of oil trader Hin Leong Trading Pte Ltd, and banks which had provided trade

finance facilities to Hin Leong faced unexpected obstacles in enforcing their rights as holders of bills of lading, which they obtained after payment had been made and the cargo had been delivered to Hin Leong.

II. *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"*

3 In *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"*[1] ("*Navig8 Ametrine*"), the plaintiff applied for summary judgment against the demise charterer of the vessel, because the cargo had been delivered to Hin Leong without presentation of the bills of lading. The charterer attempted to raise triable issues in order to defeat the application for summary judgment. Among the issues raised were whether the bank had obtained the bills of lading in good faith ("Good Faith Issue"), whether the bills of lading were spent ("Spent Bills Issue") and whether the bank had authorised Hin Leong to take delivery of the cargo without the bills of lading ("Authority Issue").

4 The Good Faith Issue was raised because rights of suit under a bill of lading can be acquired by the holder only if it obtained the bills in good faith. The argument was that the bank did not obtain the bills of lading in good faith because it did not actually view the bills as security. The common fact in all the cases is that the banks were prepared to pay the sellers on their presentation of letters of indemnity, and without requiring presentation and delivery of the original bills of lading. The banks only sought to obtain the bills of lading after Hin Leong had become insolvent and was unable to repay the banks which had financed its purchases of oil. The court decided that this was not a triable issue as the established legal position was that good faith connotes honest behaviour,[2] and there was nothing dishonest about a bank seeking to enforce its security by obtaining and suing on the bills of lading.

1 [2022] SGHCR 5.
2 *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR(R) 1.

5 The Spent Bills Issue was also given short shrift as the established legal position was that a bill of lading does not become spent unless the cargo was delivered to the person entitled under the bill, and that was not the case here.

6 Regarding the Authority Issue, the argument was that the bank knew and accepted that the cargo would be delivered without production of the original bills of lading, and therefore authorised such a practice. Reference was made to the common practice of cargo being delivered without production of bills of lading, and of which the bank was aware. As will be discussed, the cases present slightly different fact situations but in the *Navig8 Ametrine*, the facts did not support any triable issue suggesting that the bank had authorised the misdelivery by the defendant carrier. Summary judgment was therefore granted to the bank.

III. *The STI Orchard*

7 By contrast, in *The STI Orchard*[3] similar issues were raised but the court found that these gave rise to triable issues, and granted the defendant carrier unconditional leave to defend the claim. In respect of the Good Faith Issue, the bank's position was undermined by the fact that it had acceded to Hin Leong's request for the bill of lading to be issued or indorsed to Hin Leong's order. This required a conscious amendment of the bank's standard letter of credit application form which provided, by default, that bills of lading were to be made to the order of the bank. Further, when the bank subsequently granted Hin Leong a trust receipt loan, it also did not arrange for the bills to be endorsed to the bank's order. These facts made it arguable that the bank had no intention of taking security over the bills of lading and the cargo, and was not acting in good faith when it sought to become the holder of the bills of lading after Hin Leong became insolvent and could not pay the bank. There was also evidence that the bank knew that the cargo was to be blended

3 [2024] 4 SLR 37.

and on-sold to Pertamina, and looked to the proceeds of sale as security for payment.

8 As for the Spent Bills Issue, the court found that the bills of lading were arguably spent before they were endorsed to the bank. This was because Hin Leong was entitled to the goods and the bills of lading became spent when Hin Leong obtained the bills prior to endorsing the same to the bank. The point at which the goods and the bills of lading (being the symbol of the goods) merged was the point where the bills became spent.

9 The Authority Issue also gave rise to a triable issue because when the bank granted the trust receipt loan, the bank knew Hin Leong would blend the cargo and sell it on as a different product. This suggested that the bank looked to the proceeds of the onward sale rather than the cargo to secure the amount owing by Hin Leong. This gave the defendant shipowner the opportunity to argue at trial that the trust receipt loan amounted to the bank's *ex post facto* consent to, or ratification of, the charterer's instructions to the owner to deliver the cargo without production of the bills of lading. The bank's appeal to the High Court judge was dismissed.

IV. *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd*

10 In *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd*,[4] the assistant registrar granted the bank summary judgment and rejected the argument that there were triable issues arising out of the Good Faith Issue, the Spent Bills Issue and the Authority Issue. On appeal, however, the High Court judge reversed the lower court's decision and held that there was a triable issue on what can be called the Causation Issue.

11 The argument is as follows: The carrier's breach of the contract of carriage – by delivering the cargo without production of the bills of lading – did not cause the bank's loss because the

4 [2023] 4 SLR 572.

bank did not regard the cargo as security and would, if asked, have allowed the carrier to discharge the cargo without production of the bills of lading. The court therefore found that there were triable issues relating to the financing and security arrangements and, in particular, whether the bank actually looked to the bills of lading as security. The author was involved in this case on behalf of the bank, but the matter was settled prior to trial.

V. *The Maersk Katalin*

12 The matters that were said to give rise to triable issues in the foregoing summary judgment cases were considered in much greater depth when they were heard and determined following a trial in *The Maersk Katalin*.[5] In its decision which reinforced the conventional understanding of the strength of the rights of lawful holders of bills of lading, the High Court allowed the bank's claim for misdelivery against the carrier. Ultimately, the charterer, which had given the carrier a letter of indemnity to protect the latter from such misdelivery claims, was liable to indemnify the carrier and bear the costs of the claim. The carrier raised a number of defences including some which gave rise to difficulties in the summary judgment cases discussed above.

13 In respect of the Good Faith Issue, the judge reiterated that the law simply requires there to be no dishonesty in the manner the transferee of the bills of lading had obtained them. The carrier argued that the bank was dishonest because: (a) it knew it was not entitled to the bills of lading under the letter of indemnity given to the bank by the seller (the payment letter of indemnity ("LOI")), but still demanded delivery of the bills with threats of legal consequences; and (b) it never intended for the bills to function as security and wanted them for the sole purpose of contriving a claim against the carrier. Reliance was placed on *The STI Orchard*, where it was contemplated that bills of lading may not have been acquired in good faith where the claimant bank never intended for those bills to function as security to begin with. However, as *The STI Orchard* was decided

5 [2024] SGHC 282.

in the context of summary judgment applications, it was not determinative of the Good Faith Issue. The judge found that there was no dishonesty in the way the bank became the holder of the bills of lading. It was held that it is not a want of good faith for a transferee to intend to acquire mere rights of suit, rather than actual possession of the goods carried under the bills of lading.

14 In respect of the Spent Bills Issue, it was argued by the carrier that Hin Leong was the party entitled to delivery of the cargo at the time it was delivered. This argument was easily dismissed as Hin Leong was never in possession of the bills of lading and therefore was never entitled to take delivery of the cargo pursuant to the bills. Therefore, these bills were not spent at the time they came into the bank's possession. Alternatively, the court found that if the bills were spent, the bank was entitled to rely on s 2(2)(*a*) of the UK Carriage of Goods by Sea Act 1992[6] ("UK COGSA"). This section, which is materially the same as the equivalent statutory provision in Singapore law,[7] allows the transfer of rights of suit contained in spent bills of lading, if the holder of the bills obtained them by virtue of a transaction effected pursuant to any contractual or other arrangements made before the bills became spent.

15 The reasoning was that the bank became holder of the bills of lading pursuant to a contractual or other arrangement which predated any possible date when the bills became spent, in particular the date of discharge of the cargo to Hin Leong. The court was faced with three possible arrangements which could be considered as the reason for the bank becoming the holder of the bills of lading. The defendant argued that it was either the letter of credit or the payment LOI, both of which post-dated the discharge of the cargo. The bank argued that it was the sale and purchase contract between buyer and seller which culminated in the indorsement and delivery of the bills of lading to the bank – this contract predated the delivery of the cargo. The court reasoned that the terms of the sale contract set in motion the chain of events leading to the bank becoming holder

6 c 50 (UK).
7 Bills of Lading Act 1992 (2020 Rev Ed) s 2(2).

of the bills. That sale contract required payment by a letter of credit and the terms of the letter of credit allowed for payment against a payment LOI. Therefore, the bank was entitled to rely on s 2(2)(*a*) of the UK COGSA if the bills were spent before the bank obtained them.

16 The Authority Issue was argued at length and certain interesting facts came to light. For instance, when Hin Leong applied to the bank for the letter of credit, the cargo had already been discharged and delivered by the carrier to Hin Leong. This raised the question of whether the bank knew of that fact when the letter of credit was issued a day later. The carrier raised various legal arguments by way of defence such as consent, acquiescence, ratification, waiver and estoppel. The court rejected all of these arguments because there was no evidence of any communication between the bank and Hin Leong, or the bank and the defendant shipowner, at any material time. Therefore, there was no act or statement by the bank communicated to the defendant shipowner which could be construed to be consent or authority to breach the contract of carriage.

17 Finally, the Causation Issue was examined at length. This was based on relatively recent UK authority in *Unicredit Bank AG v Euronav NV*[8] ("*The Sienna*") and *Fimbank Plc v Discover Investment Corporation (The Nika)*[9] ("*The Nika*"). In *The Sienna*, Unicredit financed the purchase by Gulf of a cargo of low sulphur fuel oil from BP. The cargo was discharged without production of the original bills of lading partly due to delays caused by COVID-19. Unicredit eventually obtained the original bills of lading but Gulf was found to have been guilty of fraud in relation to the cargo, and no repayment by Gulf was forthcoming under Unicredit's letter of credit. Unicredit then looked to the shipowner and commenced a misdelivery claim based on the bills of lading. In respect of the Causation Issue, two related defences were raised. First, it was argued that Unicredit caused its own loss as it had authorised the owners to discharge the cargo without production of the bills of lading. This was described as the "positive causation

8 [2023] Bus LR 1391.
9 [2021] 1 Lloyd's Rep 109.

defence". Second, it was argued that the owner's breach did not cause Unicredit's loss as it would have suffered the same loss in any event. This was called the "negative causation defence".

18 On appeal, the English Court of Appeal examined the negative causation defence. It was first noted that Unicredit had in fact offered its view on what would have happened if the owners had observed the terms of the contract of carriage and refused to discharge the cargo in the absence of the original bills of lading. First, the owners would have contacted BP, the seller and charterer. Then, BP would have informed owners that the bills had been endorsed and transferred to the bank. The bank would then have engaged with the owners and instructed them not to discharge the cargo without its consent. This last step was the focus of the enquiry and the negative causation defence crystallised into a single question: Would Unicredit have consented to the owners' discharge without production of the original bills of lading? Based on the evidence presented at trial, the question was answered in the affirmative and therefore, the conclusion was that the owners' breach did not cause the loss, or at least the bank would have suffered the same loss in any event. The evidence against the bank's position was elicited from the bank's own witness, who effectively admitted that the bank was aware of and accepted that the cargo would be discharged without production of the bills of lading. If the question had been asked at the relevant time, there was no reason for the bank to have objected and refused consent. The bank was aware that the bills of lading were delayed and had no concerns about Gulf's creditworthiness. Further, there was evidence that the bank had purchased credit insurance which would have paid out in the event of default by Gulf or its buyer.

19 Returning to *The Maersk Katalin*, the bank took the position that Maersk would and should have retained possession of the cargo when asked to discharge the same without production of the bills of lading. The defendant shipowners argued, but did not plead, that the bank would have authorised the discharge to Hin Leong without production of the bills of lading. This is akin to the negative causation defence raised in *The Sienna*. What made this case "entirely different"

from *The Sienna*, however, was the way the defendant shipowners presented their counterfactual. Against the bank's position, the defendant asserted a counterfactual ending with the bank's authorisation of discharge to Hin Leong without the bills of lading. However, nothing was said in the defendant's pleadings or submissions about the intermediate steps, such as were volunteered by Unicredit in *The Sienna*. Still less was any evidence led to establish the probability of those intermediate steps transpiring. The defendant's witness had testified that the defendant would have taken instructions regarding discharge from the charterer in any event. However, the charterer's witness was not asked what she would have done had the defendant sought instructions regarding delivery without the bills of lading. Assuming all parties intended to scrupulously observe the terms of the bills of lading, the owners would have sought the charterer's consent, the charterer would have sought consent from the holders of the bills of lading and this would eventually have led to Hin Leong.

20 Unlike in *The Sienna*, the counterfactual would not have involved the claimant financing bank, UOB, because it was not even in the picture at the time of the misdelivery. Therefore, it would have been completely artificial to ask UOB's witness what the bank would have done if it had been asked to consent to the owner's delivery to Hin Leong without production of bills of lading, and no such questions were in fact asked. As such, unlike in *The Sienna* where the bank's own witness testified that the bank would have consented to discharge without production of the bills of lading, there was no such witness here. Thus, there was no evidence of what the bank would have done had its consent been sought. It was merely speculated by the defendant that the bank would, in the prevailing circumstances, have consented or at least not objected to the cargo being delivered to Hin Leong without production of the bills of lading. Therefore, the causation defence failed.

VI. Conclusion

21 The causation defence therefore is a potential weakness for holders of bills of lading. The negative causation defence in

particular is likely to thwart any attempt at obtaining summary judgment, because the question of what the claimant would have done in given circumstances is eminently a triable issue. What *The Maersk Katalin* shows, however, is that the court will rigorously apply the rules of proof. While the law requires the claimant bank to show that the breach was the effective or dominant cause of the loss, to defend claims by the bank, it would be the defendant shipowner's burden to lead evidence that the bank would have counterfactually given its authorisation to the act that resulted in the loss, *ie*, even with the defendant's breach, the bank would have suffered the same loss.