

## 2. ADMIRALTY AND SHIPPING LAW

### ADMIRALTY LAW

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2.1 One admiralty law decision was handed down by the Court of Appeal in 2022: *The Jeil Crystal*.<sup>1</sup>

#### I. *The Jeil Crystal*

##### A. *Material facts*

2.2 In *The Jeil Crystal*, the plaintiff, a bank, had provided trade financing to its customer in respect of cargo shipped on board the defendant's vessel. A set of original bills of lading ("the Original B/Ls") were issued with respect to the cargo. An *in rem* writ was issued on 10 October 2020, and a warrant of arrest obtained the same day. The claim reflected in the writ issued and warrant of arrest obtained was that the plaintiff was, *inter alia*, the lawful holder of the Original B/Ls, and the defendant had delivered the cargo without production of the Original B/Ls. The plaintiff arrested the defendant's vessel, and the vessel was subsequently released against the provision of security.

2.3 However, when the warrant of arrest was obtained, the plaintiff in fact no longer had possession of the Original B/Ls. The Original B/Ls had been released and endorsed by the plaintiff to its customer sometime in late June 2020, more than three months prior to it obtaining the warrant of arrest. The Original B/Ls were subsequently surrendered to the defendants, who issued a set of switched bills of lading ("the Switched B/Ls") in place of the Original B/Ls pursuant to the customer's request.

2.4 The plaintiffs applied to amend its statement of claim, replacing original claim for misdelivery with a claim for wrongful switching of the Original B/Ls without the plaintiff's knowledge or consent. The defendants applied to set aside the warrant of arrest, strike out the writ and seek a return of the security provided.

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1 [2022] 2 SLR 1385.

**B. *The decision below*<sup>2</sup>**

2.5 The judge dismissed the defendant's application to set aside the warrant of arrest and to strike out the writ, but allowed the plaintiff's application to amend its statement of claim. The judge found the plaintiff's failure to disclose the fact that it did not have possession of the Original B/Ls at the time when the action commenced to be material but exercised his discretion to not set aside the warrant of arrest because his Honour was satisfied that the non-disclosure was negligent and not intentional.

**C. *Issues on appeal***

2.6 The defendants appealed the judge's decision, and the sole question on appeal was framed as follows:<sup>3</sup>

In an application to set aside a warrant of arrest of a ship, can the warrant of arrest be upheld on the basis of an amended claim and/or cause of action which was not originally pleaded by the arresting party at the time of the application for and the issue of the warrant of arrest?

2.7 The Court of Appeal distilled the following three issues out of this question:<sup>4</sup>

- (a) What is the true nature of a warrant of arrest?
- (b) Can an amendment to a statement of claim have a corresponding effect on a warrant of arrest?
- (c) If not, what then is the status of a warrant of arrest following an amendment to the statement of claim?

**D. *The true nature of a warrant of arrest***

2.8 This issue was not raised by the parties in the court below, and hence not directly addressed by the judge. The Court of Appeal observed that the judge's decision assumed that an amendment to the statement of claim would have a corresponding effect on both the *in rem* writ and the warrant of arrest. The Court of Appeal noted that, while the former is correct, the latter is not necessarily so, bearing in mind that the warrant of arrest and *in rem* writ are distinct in nature. Hence, the nature of the warrant of arrest needs to be considered before considering whether an amendment to the statement of claim does in fact have a corresponding effect on the warrant.

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2 *The Jeil Crystal* [2021] SGHC 292. Covered in (2021) 22 SAL Ann Rev 38 at 42–47.

3 *The Jeil Crystal* [2022] 2 SLR 1385 at [3].

4 *The Jeil Crystal* [2022] 2 SLR 1385 at [25].

2.9 The Court of Appeal observed that a warrant of arrest is an order of court and reasoned that the applicant for a warrant of arrest is in essence seeking interlocutory relief from the court to obtain pre-judgment security. As the instrument which entitles the plaintiff to such relief, the warrant of arrest is accordingly an order of court.

2.10 The Court of Appeal also noted that the procedure to obtain a warrant of arrest is one in which the plaintiff seeks to persuade the court that it is entitled to the *in rem* remedy of arrest. The issuance of the warrant of the arrest represents the determination by the court that the plaintiff is properly entitled to the relief sought. In such circumstances, the Court of Appeal noted, there can be no doubt that a warrant of arrest is an order of court.

***E. Whether an amendment to a statement of claim can have a corresponding effect on a warrant of arrest***

2.11 The Court of Appeal held that an amendment to a statement of claim will *not* have a corresponding (and retrospective) effect on the warrant of arrest.

2.12 As a warrant of arrest is an order of court, the Court of Appeal stated that the starting point of analysis would be O 20 r 11 of the Rules of Court<sup>5</sup> (“ROC 2014”), which governs the amendment of judgment and orders.

2.13 Order 20 r 11 of the ROC 2014 only provides for limited circumstances in which an order of court can be amended, namely: “(a) when there are clerical mistakes; or (b) where there are errors arising from an accidental slip or omission, in the court’s judgment or order”.<sup>6</sup>

2.14 The Court of Appeal provided two examples where O 20 r 11 of the ROC 2014 can be invoked: “where the quantum of the judgment sum was misstated due to an inadvertent typographical error”; and “where there had been an error in the word used to express the court’s manifest intention in a court order, so that the court’s intention was not accurately captured in the wording of that order”.<sup>7</sup>

2.15 In the context of issuing a warrant of arrest, the Court of Appeal stated that “the court’s manifest intention is to grant the plaintiff the arrest

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5 2014 Rev Ed.

6 *The Jeil Crystal* [2022] 2 SLR 1385 at [40].

7 *The Jeil Crystal* [2022] 2 SLR 1385 at [40].

remedy for the purposes of the claim verified in the supporting affidavit”<sup>8</sup>. This is because the warrant issued is based on the claim as verified in the supporting affidavit filed by the plaintiff in the arrest application. Any subsequent amendment to the statement of claim and the *in rem* writ would have no effect on the supporting affidavit. The court’s manifest intention in issuing the warrant of arrest remains premised on the original claim as verified in the supporting affidavit. Hence, the Court of Appeal held that, notwithstanding an amendment to the statement of claim, in the absence of any clerical mistake or accidental error, there would be no basis to invoke O 20 r 11 of the ROC 2014 to amend the warrant of arrest.

2.16 The Court of Appeal held that, since there is no legal basis for the amendment to the statement of claim to have a corresponding effect on the warrant of arrest, the warrant of arrest cannot be upheld on the basis of an amended claim not originally pleaded.

2.17 The Court of Appeal pointed out that the “invalid invocation of the court’s admiralty jurisdiction at the time when the warrant of arrest was obtained is not the only ground on which a warrant of arrest can be set aside”<sup>9</sup>. The Court of Appeal reiterated that a “warrant of arrest can be set aside so long as the court is satisfied that there is no legal and/or factual basis to support the arrest of the vessel”<sup>10</sup>.

2.18 The Court of Appeal noted that it was beyond dispute that the plaintiffs did not have any cause of action as stated in the warrant of arrest. There was clearly no factual basis to support the arrest on the original claim, even if the claim fell within the court’s admiralty jurisdiction. Accordingly, the Court of Appeal held that the warrant of arrest must be set aside.

#### ***F. Status of a warrant of arrest following an amendment to the statement of claim***

2.19 The Court of Appeal further opined that, following an amendment to the statement of claim, the plaintiff in an admiralty action is effectively seeking to pursue a different claim in the *in rem* action to the one set out in the supporting affidavit. In the event where the original claim on which the warrant of arrest is issued is abandoned altogether, there would no longer be any basis for the plaintiff to arrest the vessel on the strength of the original claim. Hence, the Court of Appeal stated that the warrant

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8 *The Jeil Crystal* [2022] 2 SLR 1385 at [41].

9 *The Jeil Crystal* [2022] 2 SLR 1385 at [54].

10 *The Jeil Crystal* [2022] 2 SLR 1385 at [54].

of arrest must be set aside in such situations. The vessel must be released, and any security furnished returned.

2.20 The Court of Appeal, however, pointed out that it is not the case that a plaintiff can never pursue an arrest of a vessel on the basis of an amended claim. It laid out three situations.

2.21 Firstly, “[i]n a situation where the amendment to the statement of claim was made before the issuance of a warrant of arrest, there would be no legal impediment in ensuring that the claim in the warrant of arrest reflects the amended claim”.<sup>11</sup>

2.22 Secondly, in a situation where the amendment is made after the issuance of a warrant of arrest and where the warrant has yet to be executed, the plaintiff can file fresh court papers to obtain a fresh warrant of arrest. The papers would include a new affidavit verifying the amended claim together with an explanation on the circumstances which led to the amendment. It would then be for the court hearing the fresh application to determine whether a fresh warrant of arrest should be issued. Issues of intervening time bars and the nature of the amendment would be relevant.

2.23 Lastly, in a situation where the amendment completely substitutes the original claim with a new claim after the execution of the warrant of arrest, the warrant of arrest must be set aside. This is because the warrant of arrest would not be able to stand on the basis of the original claim.

### **G. Material non-disclosure**

2.24 In *dicta*, the Court of Appeal also pointed out that the case was not strictly a case of non-disclosure of material facts. The Court of Appeal observed that the fact that the plaintiff was not in possession of the Original B/Ls meant that it did not have any reasonable cause of action and its original claim was clearly frivolous and vexatious and thus open to summary dismissal. The fact went towards the plaintiff’s entitlement to the remedy of arrest rather than the court’s exercise of discretion. In such a situation, the Court of Appeal noted, it would be odd to describe the plaintiff’s failure to disclose the fact as non-disclosure because that would be tantamount to saying that the plaintiff ought to have disclosed the fact that it did not have the pleaded cause of action in the first place.

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11 *The Jeil Crystal* [2022] 2 SLR 1385 at [59].

## SHIPPING LAW

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2.25 In 2022, the General Division of the High Court (“High Court (General Division)”) handed down an important judgment relating to shipping law in *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”*<sup>12</sup> (“*The Navig8 Ametrine*”).

### I. *The Navig8 Ametrine*

#### A. *Introduction*

2.26 This case arose out of the collapse of Hin Leong Trading (Pte) Ltd (“HLT”), formerly one of Asia’s top oil traders. In this case, the plaintiff bank (“the plaintiff”) who had financed the purchase of a cargo of light naphtha carried on board the “Navig8 Ametrine” (“the Vessel”) under a set of original bills of lading (“the HLT Bills of Lading”) brought an *in rem* action against the Vessel and applied for summary judgment on the basis that the plaintiff was the holder of the HLT Bills of Lading and that the defendant who were the demise charterers of the Vessel (“the defendant”) had delivered the said cargo to HLT without presentation of the HLT Bills of Lading.

2.27 Assistant Registrar Justin Yeo did not find any triable issues relating to liability but found that there was a triable issue in relation to quantum. He therefore dismissed the application for summary judgment and granted instead the alternative prayer for interlocutory judgment with damages to be assessed.

#### B. *Material facts*

2.28 The plaintiff had financed HLT’s trading activities pursuant to credit facilities of up to US\$140m for, amongst other things, the issuance of letters of credit (“the HLT Banking Facilities”). The HLT Banking Facilities were subject to terms and conditions which could be found in a facility letter dated 29 July 2019 (“the HLT Facility Letter”). The HLT

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12 [2022] SGHCR 5.

Facility Letter stated, amongst other things, that the loans were secured by a pledge of documents of title and transportation documents representing or relating to any goods financed by the HLT Banking Facilities, including but not limited to the “[f]ull set (3/3) original Bills of Lading ... made out or endorsed to the order of the [Plaintiff] ... In its absence, letter of indemnity .... issued by suppliers countersigned by international banks or issued by suppliers acceptable to the [Plaintiff]”.<sup>13</sup> The HLT Banking Facilities were also subject to other conditions, including the terms in the plaintiff’s Continuing Commercial Credit Agreement (“the HLT CCA”) and the plaintiff’s General Security Agreement relating to the import and export of goods (“the HLT GSA”). The HLT Facility Letter, the HLT CCA and the HLT GSA are collectively referred to as the “HLT Financing Documents”.<sup>14</sup> The plaintiff’s customers included Aeturnum Energy International Pte Ltd (“AEI”).

2.29 In December 2019, AEI agreed to purchase 25,000 metric tons of light naphtha (“the AEI Cargo”) from BCP Trading Pte Ltd and thereafter sold the AEI Cargo under separate contracts to Total Trading Asia Pte Ltd (“the Totsa Cargo”) and HLT (“the HLT Cargo”). Under the terms of the latter two contracts, AEI would arrange to pay for the shipment of the AEI Cargo from the load port to the discharge port. The action concerned only the HLT Cargo, but reference is made to the Totsa Cargo as it relates to one of the issues that arose in the action.<sup>15</sup>

2.30 The defendant who was the demise charterer of the Vessel had time-chartered the Vessel to Navig8 Chemicals Pool Inc (“the Time Charterer”), which in turn had voyage chartered her to AEI. Both the time charterparty and the voyage charterparty contained clauses which obliged the defendant and the Time Charterer respectively to discharge and deliver the AEI Cargo without presentation of the bills of lading and instead against indemnities furnished under the respective charterparties.<sup>16</sup>

2.31 On 22 January 2020, to finance HLT’s purchase of the HLT Cargo from AEI, HLT submitted to the plaintiff a letter of credit application form, which included and incorporated the HLT CCA. Pursuant to this application, the plaintiff issued a letter of credit to AEI, dated 23 January

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13 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [5].

14 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [5].

15 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [7].

16 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [8].

2020 (“the HLT Letter of Credit”). The documents required for payment under the HLT Letter of Credit included the full set of 3/3 original clean on board bills of lading plus three non-negotiable copies endorsed to the order of the plaintiff. In the event that such documents were not available at the time of negotiation, payment would be effected at maturity against presentation of AEI’s letter of indemnity in a prescribed format. The prescribed format required AEI to expressly agree to “make all reasonable efforts to obtain and surrender to [the plaintiff] as soon as possible the full set of 3/3 original bills of lading”.<sup>17</sup>

2.32 The Vessel arrived in Singapore on or around 7 February 2020, and on 11 February 2020 completed discharge and delivered the HLT Cargo to HLT at the Universal Oil Terminalling Hub (“the Universal Terminal”) without presentation of the HLT Bills of Lading by HLT, on the instructions of and against the indemnity issued by the Time Charterer.<sup>18</sup>

2.33 On 19 February 2020, AEI presented an invoice for the sum of US\$8,561,342.03, which was the invoice value of HLT’s Cargo (“the Invoice Sum”), as well as a letter of indemnity in the prescribed format. On 3 March 2020, the plaintiff paid the Invoice Sum to AEI under the HLT Letter of Credit. On 13 March 2020, the plaintiff received the full set of the HLT Bills of Lading from Sumitomo Mitsui Banking Corporation (“SMBC”) which had been specifically endorsed by SMBC in favour of the plaintiff.<sup>19</sup>

2.34 On or around 9 June 2020, the plaintiff mistakenly endorsed and delivered the HLT Bills of Lading to Totsa, when it in fact intended to endorse to Totsa a different set of bills of lading relating to the Totsa Cargo. The plaintiff discovered this mistake on 15 June 2020 and subsequently delivered the correct bills of lading to Totsa in exchange for the HLT Bills of Lading on 16 June 2020. The plaintiff stamped the words “cancelled” at the place on the HLT Bills of Lading where the plaintiff had endorsed the HLT Bills of Lading to Totsa.<sup>20</sup>

2.35 On 18 June 2020, the plaintiff informed the defendant that the plaintiff was the lawful holder of the HLT Bills of Lading, and asked

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17 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [9].

18 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [10].

19 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [2] and [11]–[12].

20 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [13].

the defendant to confirm that the HLT Cargo was in the defendant's possession and that it would deliver the HLT Cargo to the plaintiff on presentation of the HLT Bills of Lading. In addition, on 29 July 2020, the plaintiff sent its representative to Totsa's office where Totsa stamped the HLT Bills of Lading to the order of the plaintiff.<sup>21</sup>

2.36 On 25 August 2020, the defendant informed the plaintiff that the defendant had delivered the HLT Cargo to Totsa and that the HLT Bills of Lading no longer carried the right of possession to the HLT Cargo. The plaintiff responded to the defendant and alleged that the e-mail from the defendant was an admission of misdelivery of the HLT Cargo. The position taken by the defendants was apparently due to confusion as to the cargo under the two contracts. The plaintiff commenced proceedings against the defendant and arrested the Vessel. The Vessel was released on 22 December 2020 after security was provided for the claim.<sup>22</sup>

### C. *The court's findings*

2.37 Assistant Registrar Yeo first dealt with the legal principles relating to summary judgment which are well established and not in dispute. The key issues which had to be dealt with were whether the plaintiff had established a *prima facie* case and, if it had, whether there were triable issues or some other reason for trial.<sup>23</sup>

#### (1) *Whether there was a prima facie case*

2.38 On the facts, Assistant Registrar Yeo found that, on the reasoning by analogy to *The Star Quest*,<sup>24</sup> a *prima facie* case had been made out. It was undisputed that the HLT Bills of Lading bore the signature of the master of the Vessel and the Vessel's stamp, and the HLT Cargo had been discharged and delivered to HLT without presentation of the HLT Bills of Lading.<sup>25</sup>

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21 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [13]–[14]. This was "[w]ithout prejudice to the plaintiff's position that its initial 'endorsement' of the bills of lading to Totsa ... was a mistake and therefore did not constitute a valid endorsement in Totsa's favour".

22 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [15]–[16].

23 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [17]; Rules of Court (2014 Rev Ed) O 14 r 3(1). [2016] 3 SLR 1280.

25 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [18]–[19].

2.39 Assistant Registrar Yeo was of the view that the detour of the HLT Bills of Lading to Totsa did not have any impact on the issue as to whether the plaintiff was the lawful holder of the HLT Bills of Lading as the evidence showed that Totsa was aware that the stamping and delivery of the HLT Bills of Lading to it was a mistake. The plaintiff therefore remained the lawful holder of the HLT Bills of Lading from 13 March 2020.<sup>26</sup>

(2) *Whether there were triable issues or some other reason for trial*

2.40 Upon finding that a *prima facie* case had been made out, the burden fell on the defendant to show if there were any triable issues or some other reason for a trial. Assistant Registrar Yeo crystallised the five purportedly triable issues raised by the defendant as follows:<sup>27</sup>

- (a) whether the fact that English law applied to the HLT Bills of Lading was sufficient to raise a triable issue (“the Applicable Law Issue”);
- (b) whether the plaintiff was a lawful holder in good faith of the HLT Bills of Lading as required by s 5(2) of the Bills of Lading Act<sup>28</sup> (“the BLA”) (“the Good Faith Issue”);
- (c) whether the HLT Bills of Lading were spent or accomplished (“the Spent Bills Issue”);
- (d) whether the plaintiff had authorised HLT to take delivery of the HLT Cargo without presentation of the HLT Bills of Lading or whether the plaintiff had ratified HLT’s taking of delivery without presentation of the HLT Bills of Lading (“the Authority Issue”); and
- (e) whether the plaintiff was entitled to damages in the value of the Invoice Sum (“the Quantum Issue”).

2.41 Assistant Registrar Yeo dealt with each of the issues and found that none of the above except for the Quantum Issue gave rise to any triable issues.

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26 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [20].

27 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [22].

28 Cap 384, 1994 Rev Ed.

(a) The Applicable Law Issue

2.42 It was not disputed in this case that the HLT Bills of Lading and the Quantum Issue were governed by English law, and the parties accepted that the Good Faith Issue and the Spent Bills Issue were governed by Singapore law.<sup>29</sup>

2.43 There was less clarity on whether the Authority Issue was governed by English law. Both the plaintiff and the defendant obtained expert opinions on the issues of English law in relation to the Authority Issue and the Quantum Issue.<sup>30</sup>

2.44 Assistant Registrar Yeo found that the Authority Issue was to be determined under Singapore law because it was Singapore law that governed the HLT Financing Documents as well as the relationship between the plaintiff and HLT.<sup>31</sup> Nonetheless, he went on to examine the opinions of the experts to determine whether any conflict of opinion or legal complexity existed that would give rise to a triable issue.<sup>32</sup>

i. English law on the Authority Issue

2.45 Assistant Registrar Yeo concluded that, whilst his view was that the Authority issue was governed by Singapore law, the differences in the opinions of the experts did not give rise to any triable issue even if the Authority Issue were to be governed by English law. This was because the experts were in accord on most, if not all, the applicable principles. In essence he was of the view that:

(a) It is a breach of a bill of lading contract for delivery to be effected other than against presentation of the bill of lading.<sup>33</sup>

(b) Delivery of the cargo to an agent of the holder of the bills of lading, where such agent was authorised by the holder to

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29 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [23] and [26].

30 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [23] and [26].

31 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [26].

32 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [27].

33 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [28(a)]. See *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81; *Kuwait Petroleum Corp v I & D Oil Carriers* [1994] 2 Lloyd's Rep 542; and *SA Sucre Export v Northern River Shipping Ltd* [1994] 2 Lloyd's Rep 266.

collect the cargo on the holder's behalf without presenting the bills of lading, would be a defence.<sup>34</sup>

(c) Ratification will be implied from any act of the principal showing an intention to adopt the transaction. No action in reliance is required, and ratification may even be inferred in appropriate cases from silence or mere acquiescence. Like the grant of actual authority, ratification need not be communicated to the third party. As far as the third party is concerned, a ratified transaction is valid as if actually authorised.<sup>35</sup>

2.46 The parties' experts differed in opinion in relation to the recent English decision of *Fimbank plc v Discover Investment Corp (The "Nika")*<sup>36</sup> ("*The Nika*") and its relevance to the present factual matrix. The High Court examined the case in some detail as it has not been considered in any published decision of the Singapore courts.<sup>37</sup>

2.47 In *The Nika*, the carrier delivered the cargo on board the vessel without production of the bills of lading against a letter of indemnity. The bank which had financed the purchase of the goods aimed to pursue arbitration against the carrier and applied to the English High Court for a freezing injunction in support of the arbitration. The cargo was consigned to a bonded warehouse, and thereafter released from the warehouse against forged bills of lading.<sup>38</sup>

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34 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [28(b)]. For this proposition the defendant's expert cited *Fimbank plc v Discover Investment Corp (The "Nika")* [2021] 1 Lloyd's Rep 109 whilst the plaintiff's expert cited, amongst other cases, *SA Sucre Export v Northern River Shipping Ltd* [1994] 2 Lloyd's Rep 266. Whether the carrier has a successful defence on this ground turns on the facts of the case. The parties' experts differed in views as to whether this defence is a defence to a claim for substantial damages or a defence on liability, but the court found that nothing material turned on this in the present case.

35 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [28(c)]. These principles were cited by the defendant's expert based on *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at paras 31-028 and 31-033, with which the plaintiff's expert agreed.

36 [2021] 1 Lloyd's Rep 109.

37 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [29].

38 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [30].

2.48 The financing arrangements were such that the claimant bank would pay the customer's seller for the shipment against tender of the original bills of lading.<sup>39</sup>

[T]he claimant bank would then forward those bills of lading to a collecting bank in Egypt with instructions to transfer the bills to the end buyer on a cash against documents basis. The bills of lading were intended to be retained by the claimant bank and held on its behalf until payment by the corresponding collecting bank long after the vessel would have discharged the cargo. The arrangement between the bank and its customer was that the cargo would be discharged by the carrying vessel, without presentation of any bills of lading, and transferred by the bank's customer to a bonded warehouse.

2.49 Applying the general law of agency, the court held that "the bank's customer had *actual authority* from the claimant bank to take delivery of the cargo without presentation of the bills of lading" [emphasis in original].<sup>40</sup> The court found in that case:<sup>41</sup>

... a clause in the material agreement by which the claimant bank (as holder of the bills of lading) expressly authorised the bank's customer to take delivery of the goods from the vessel without presentation of the bills of lading, and to escort the goods to a warehouse to ensure that the goods [were] intact and not appropriated in any way inimical to the claimant bank's interests. The court therefore concluded that the claimant bank did not, in the context of its application for a freezing injunction, have a 'good arguable case' against the carrier.

2.50 Although the experts did not completely agree with each other, Assistant Registrar Yeo did not detect any relevant difference in opinion between the experts to give rise to a triable issue in this case for the following reasons:<sup>42</sup>

(a) Whether actual authority or ratification provided a substantial defence to a claim for substantial damages or a defence as to liability (which was where the experts differed) would not have a material impact on the outcome of the case, as a finding that there was actual authority or ratification would at the very least have been a defence to a claim for substantial damages, thus giving rise to a triable issue.

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39 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [30]–[31].

40 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [32].

41 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [32].

42 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [33]–[34].

(b) The fact that the experts differed in views as to how an English court would decide on the facts of the case as to whether there was actual authority or ratification would also not give rise to a triable issue as both experts readily acknowledged that it was for the Singapore court, rather than the experts, to come to a conclusion on whether the defendant had a fair probability of a *bona fide* defence.

ii. English law on the Quantum Issue

2.51 The High Court (General Division) found that the two experts were in accord on the principles governing the assessment of damages under English law<sup>43</sup> but did not agree on one area, which was whether it is the duty of the consignee to present the bills of lading and take delivery to prevent unreasonable delay to the vessel, or that implying such a term was not necessary given that the proposed implied term was contrary to and inconsistent with the express terms of the voyage charterparty. The High Court (General Division) took the view that this disagreement related only to the conclusion that may be reached on the factual matrix of the case rather than any disagreement on the relevant principles of English law.<sup>44</sup>

2.52 The High Court (General Division) therefore concluded that no triable issues arose in respect of the Applicable Law Issue. Any differences

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43 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [35]. The principles were as follows:

(a) "[D]amages are assessed on the basis of putting a plaintiff in the position, as far as money can do, in which it would have been had the contract been performed."

(b) "[T]he normal measure of damages is the market value of the misdelivered goods at the time and place at which they should have been delivered. In determining the appropriate measure of damages, the court must consider when the goods 'should have' been delivered, taking into consideration the express or implied terms of the contract of carriage as well as other documents and circumstances forming part of the factual matrix."

(c) "[T]he invoice value of the cargo will not necessarily be determinative of the quantum of loss"; "in many circumstances – the invoice value would be the best evidence of the loss, for instance, where there is an absence of contrary evidence on the quantum of loss".

(d) "[T]he court will consider what would have happened in the counterfactual situation that the contract was performed."

(e) "[D]epending on the facts of the case, there may be a duty to care for cargo when the holder of the bills of lading does not claim delivery within a reasonable time and the master has to (or may be under a duty to) land and warehouse the cargo, with the shipowner having a correlative entitlement to charge the holder with expenses properly incurred for this purpose."

44 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [36].

in the experts' opinions were either immaterial to the present case or merely differences as to conclusions to be drawn based on the factual circumstances in that case.<sup>45</sup>

(b) The Good Faith Issue

2.53 The triable issue put forward here was whether a person who has no genuine interest in the cargo underlying a bill of lading and who takes the bill of lading purely for bare rights of suit had acted “honestly” for the purposes of the “good faith” requirement.<sup>46</sup>

2.54 The issue was dealt with under Singapore law. The relevant provision under the BLA is *in pari materia* with the UK Carriage of Goods by Sea Act 1924<sup>47</sup> (“COGSA”), and neither statute defines “good faith”.<sup>48</sup>

2.55 The defendant's position was that the plaintiff did not hold the HLT Bills of Lading in good faith as the plaintiff had represented the HLT Bills of Lading as “*bona fide* security” for its financing of the HLT Cargo when the plaintiff did not actually view the HLT Bills of Lading as security.<sup>49</sup>

2.56 Assistant Registrar Yeo considered the Singapore cases of *UCO Bank v Golden Shore Transportation Pte Ltd*<sup>50</sup> (“*UCO Bank*”) and *The Yue You 902*<sup>51</sup> (“*The Yue You*”), and the English case of *Aegean Sea Traders Corp v Repsol Petroleo SA*<sup>52</sup> (“*The Aegean Sea*”), where the issue of “good faith” was discussed. In *The Aegean Sea*, the concept of “good faith” was described as honest conduct. The Court of Appeal in *UCO Bank* agreed with the description of “good faith” in *The Aegean Sea* and stated that

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45 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [37].

46 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [39].

47 c 50.

48 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [38].

49 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [39]. This argument is very similar to that advanced and rejected in *The Yue You 902* [2020] 3 SLR 573 at [103], where the defendant had submitted that the scope of “good faith” could be developed incrementally including considering 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”.

50 [2006] 1 SLR(R) 1.

51 [2020] 3 SLR 573. *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [38].

52 [1998] 2 Lloyd's Rep 39.

the “good faith” requirement was “obviously to preclude the case where possession is obtained unlawfully, or by other improper means”.<sup>53</sup> In *The Yue You*, it was held that the phrase “other improper means” in *UCO Bank* referred “only to improper means involving dishonesty”.<sup>54</sup>

2.57 The defendant contended that the present factual matrix afforded an opportunity for the court to further assess the parameters of the scope of “good faith”, but Assistant Registrar Yeo disagreed as the weight of authority (especially *The Yue You* and the cases cited therein) entirely undercut the defendant’s contention. The Good Faith Issue therefore did not present any triable issue.<sup>55</sup>

(c) The Spent Bills Issue

2.58 The defendant contended that delivery of the HLT Cargo to HLT at the Universal Terminal constituted the accomplishment of the HLT Bills of Lading which meant that the HLT Bills of Lading were thereafter spent or exhausted. Assistant Registrar Yeo rejected this argument as the holder of the HLT Bills of Lading at the time of delivery of the cargo was SMBC and the delivery of the HLT Cargo was done against a letter of indemnity rather than against the presentation of the HLT Bills of Lading. Assistant Registrar Yeo referred to the well-established position in case law that delivery of a bill of lading to a person not entitled to it does not result in a bill of lading becoming spent.<sup>56</sup> He therefore found that the Spent Bills Issue was also not a triable issue.<sup>57</sup>

(d) The Authority Issue

2.59 The Authority Issue arose from the defendant’s pleaded defence that the plaintiff had conferred authority on HLT to take delivery of the HLT Cargo without presentation of the HLT Bills of Lading, and that the defendant had delivered the HLT Cargo to HLT “acting as the agent

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53 *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR(R) 1 at [39]–[40].

54 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [38]; *The Yue You 902* [2020] 3 SLR 573 at [106].

55 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [39].

56 *The Yue You 902* [2020] 3 SLR 573 at [58]. The High Court also referred to *BNP Paribas v Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611, where it was held that delivery of goods against an indemnity to a person who does not have a right to delivery under the bill of lading does not render the bill of lading to be spent or exhausted.

57 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [40]–[41].

of the plaintiff". Such conferring of authority may be either *ex ante* authorisation or *ex post* ratification.<sup>58</sup>

2.60 Assistant Registrar Yeo was of the view that the Authority Issue was properly governed by Singapore law. The defendant had not illustrated any specific aspect or principle of English law which it relied on which diverged from the position under Singapore law, and in any event, he found that the Authority Issue did not give rise to any triable issue, whether under Singapore law or English law.<sup>59</sup>

2.61 He also found no evidence in favour of the defendant's argument on *ex ante* authorisation and that the argument was inconsistent with the HLT Financing Documents. He went on to make five observations:

(a) The plaintiff could not have authorised HLT to take delivery of the HLT Cargo without presentation of the HLT Bills of Lading when the defendant's pleaded case was that the plaintiff was not the holder of the HLT Bills of Lading at the time of delivery. According to the plaintiff's pleaded case, SMBC was the lawful holder of the HLT Bills of Lading at the time the HLT Cargo was delivered.<sup>60</sup>

(b) In stark contrast to *The Nika*,<sup>61</sup> there was no express contractual basis upon which the defendant contended that the plaintiff had authorised HLT to take delivery of the HLT Cargo without presentation of the HLT Bills of Lading.<sup>62</sup>

(c) The "Security" provision in the HLT Facility Letter expressly required that any financing provided by the plaintiff to HLT by way of a letter of credit be secured by a pledge of the full set of bills of lading. This would be inconsistent with the defendant's case that the plaintiff had authorised HLT to take delivery of the HLT Cargo without presentation of the HLT Bills

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58 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [42].

59 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [43].

60 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [44(a)].

61 See para 2.22 above.

62 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [44(b)]. In fact, the clause in *Fimbank plc v Discover Investment Corp (The "Nika")* [2021] 1 Lloyd's Rep 107 went so far as to require the authorised party taking delivery to escort the goods to a warehouse for safe keeping.

of Lading, for conferring such authority would have destroyed the plaintiff's own security for financing the HLT Cargo.<sup>63</sup>

(d) The defendant's argument that the clause in the HLT GSA which required HLT to provide the plaintiff with periodical updates concerning the HLT Cargo made sense only if the HLT Cargo was in HLT's possession was also rejected. The clause in the HLT GSA did not raise any question of authority to take delivery of the HLT Cargo without presentation of the HLT Bills of Lading, and it was inconsistent with another clause in the HLT GSA which expressly gave the plaintiff authority to "land, store, transport and warehouse" the HLT Cargo if required, which was converse to that in *The Nika*, where the material clause in fact required the authorised recipient of the goods to take delivery and transport the goods to a warehouse.<sup>64</sup>

(e) The documents required for payment under the HLT Letter of Credit included the full set of 3/3 original clean on board bills of lading. The draft letter of indemnity in the prescribed format also provided that AEI agreed to "make all reasonable efforts to obtain and surrender to [the plaintiff] as soon as possible the full set of 3/3 original bills of lading". Assistant Registrar Yeo found that the plaintiff evidently looked to the HLT Bills of Lading as security, which undercut the defendant's allegation that the plaintiff was prepared to take security only in the form of a letter of indemnity.<sup>65</sup>

2.62 The defendant's argument on *ex post* ratification also failed for lack of supporting evidence. Assistant Registrar Yeo could not see how the plaintiff could be said to have ratified the delivery of the HLT Cargo when the delivery was done before the plaintiff had become the lawful holder of the HLT Bills of Lading. Furthermore, in the context of ratification, the agent must profess to be acting on behalf of a named or ascertainable principal who was in existence at the time the relevant act was carried out, but in this regard, the defendant had neither pleaded

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63 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [44(c)]. See also *BNP Paribas v Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611 at [60].

64 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [44(d)].

65 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [44(e)].

nor shown evidence that HLT professed to be the plaintiff's agent when taking delivery of the HLT Cargo.<sup>66</sup>

2.63 The Authority Issue was therefore not a triable issue.<sup>67</sup>

(e) The Quantum Issue

2.64 The plaintiff argued that it should be awarded damages in the value of the Invoice Sum, relying on two Singapore judgments, *The Yue You*<sup>68</sup> and *Voss Peer v APL Co Pte Ltd*<sup>69</sup> (“*Voss Peer*”), as well as two Hong Kong judgments, *Star Line Traders Ltd v Transpac Container System Ltd*<sup>70</sup> (“*Star Line*”) and *He-Ro Chemicals Ltd v Jeuro Container Transport (HK) Ltd*<sup>71</sup> (“*He-Ro Chemicals*”) in support.<sup>72</sup>

2.65 Assistant Registrar Yeo, however, rejected the plaintiff's argument: In *The Yue You* and *He-Ro Chemicals*, the respective courts awarded the invoice value as there was no evidence put forward to show that the market value of the cargo had fallen between the date of the contract and the date of the misdelivery; and in *Voss Peer* and *Star Line*, it was not mentioned whether the invoice value was disputed as the appropriate measure of damages.<sup>73</sup>

2.66 Assistant Registrar Yeo found that the Quantum Issue did give rise to the following triable issues, namely:

(a) whether the invoice value or the market value should be the more appropriate measure;<sup>74</sup>

(b) what the date on which the cargo “should have been delivered” (“the Notional Date”) was, given that the HLT Bills of Lading did not include an express date as the due date of delivery of the HLT Cargo. The Notional Date was therefore a question of fact to be determined after considering the express or implied

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66 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [45].

67 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [46].

68 See para 2.32 above.

69 [2002] 1 SLR(R) 823.

70 [2009] HKCU 1355.

71 [1993] 2 HKC 368.

72 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [47].

73 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [48].

74 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel “Navig8 Ametrine”* [2022] SGHCR 5 at [49(a)].

terms of the contract of carriage, as well as other documents and circumstances forming part of the factual matrix;<sup>75</sup> and

(c) what the valuation of the HLT Cargo should be given that the valuation had to be assessed as at the Notional Date and the defendant had tendered evidence from two third-party databases purportedly showing substantial fluctuations in the market price of the HLT Cargo during the first half of 2020, whilst the plaintiff had not provided any concrete evidence on the appropriate value of the HLT Cargo and the High Court acknowledged that the plaintiff could not do so as the Notional Date had yet to be determined.<sup>76</sup>

2.67 For the above reasons, Assistant Registrar Yeo found that there were triable issues in relation to the Quantum Issue. Thus, he dismissed the plaintiff's application for summary judgment on the Invoice Sum and granted instead interlocutory judgment with damages to be assessed.

## II. Commentary

2.68 The case above demonstrates that the Singapore courts will scrutinise the security and financing arrangements and terms between the bank and its customer to ascertain whether or not the bank treated the bills of lading as security when it financed its customer's purchase of the cargo, and to ascertain from the facts what is in fact the proximate and effective cause of the loss. Accordingly, banks providing trade financing need to take note to ensure that if the intention is to ensure that the bills of lading are to be held as security for payment of the cargo, the terms of its financing and security agreements should make that clear. Banks should not assume that they would automatically have recourse to the bills of lading or the underlying cargo they financed simply because the bills of lading are held by them or eventually come into their possession.

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75 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [49(b)] and [35(b)].

76 *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 at [49(c)].