The “Dolphina”
[2011] SGHC 273

Case Number : Admiralty in Rem No 113 of 2008

Decision Date : 30 December 2011

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Vivian Ang, Kenny Yap and Bryna Yeo (Allen & Gledhill LLP) for the plaintiff; Prem Gurbani and Bernard Yee (Gurbani & Co) for the defendant.

Parties : The "Dolphina"

Admiralty and Shipping

30 December 2011 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This has been, in many ways, a most unsatisfactory case, as evidenced by the length of time it has taken since the first day of trial for this judgment to be released.

2 The cause of this has been the evolution of the nature of the case as it radically transformed from a fairly straightforward claim for breach of contract due to misdelivery of cargo without production of the original bills of lading into a claim for civil conspiracy, with a detour through issues of subrogation. In order to accommodate fresh evidence coming to light, fundamental assumptions being challenged and jettisoned, the opening of different trains of enquiry, and new causes of action and/or submissions being formulated in response, these proceedings have occupied four tranches:

(a) From 22 February to 16 March 2010 (the “first tranche”), the action was originally mounted, fought and tried on the basis of breach of contract due to misdelivery of cargo, and I reserved judgment at the conclusion of the trial. In the course of my deliberations I began to entertain serious misgivings about certain fundamental matters that had apparently been taken for granted by both parties, but this was not taken up by them when I sought clarification of my doubts in January 2011.

(b) By 6 June 2011 (the “second tranche”), however, I was certain that the characterisation of the action as a claim for delivery of cargo without production of bill of lading was questionable in that some significant issues (including the equitable remedy of subrogation) had been overlooked, and I invited parties to address me on them. On 18 July 2011, however, one of the parties sought to introduce important new documentary evidence which would alter the complexion of the case quite dramatically.

(c) From August to September 2011 (the “third tranche”), after numerous adjournments, the new documentary evidence was finally admitted and the pleadings allowed to be amended to include a new claim in conspiracy.

(d) The proceedings finally concluded in November 2011 (the “fourth tranche”) with the

hearing of the conspiracy claim.

3 As will become apparent, these unfortunate and unsatisfactory vicissitudes are attributable to the nature of the allegations, which involve fraud and commercial roguery implicating a number of actors; to the state of the evidence, which, though substantial, was not always presented in a coherent fashion and has had to be painstakingly pieced together (and even now there are still some missing links); and to the issues of law involved, several aspects of which are quite complex.

Dramatis Personae

4 Before explaining what this case is all about and exploring the facts in greater detail, it is important to first record the key characters in this saga.

The plaintiff

5 The plaintiff is Bank of Communications Co Ltd, Hangzhou Branch, now known as Bank of Communications Co Ltd, Zhejiang Provincial Branch ("BOC"), a mainland Chinese bank that provides financial services to import and export companies, [note: 1] and represented in these proceedings by Ms Vivian Ang ("Ms Ang").

The defendant

6 The defendant is Universal Shipping Group Inc ("Universal"), a company incorporated in Panama and the registered owner of the vessel *Dolphina*, represented in these proceedings by Mr Prem Gurbani ("Mr Gurbani").

7 Universal has three directors: Kwan Ngen Wah ("Alvin Kwan"), his brother Kwan Ngen Chung ("Steve Kwan"), and Chong Kan Hiung ("K H Chong"). [note: 2] The two shareholders of Universal, and the beneficial owners of the *Dolphina*, are Alvin Kwan and Steve Kwan. [note: 3] As the following paragraphs will demonstrate, these two individuals own shareholdings, and occupy directorships, in a number of other entities which feature prominently in these proceedings.

Kwantas Oil Sdn Bhd

8 One such company is Kwantas Oil Sdn Bhd ("KOSB"), an operator of palm oil mills and a palm oil refinery plant, as well as a wholesaler and distributor of palm oil products. [note: 4]

9 That Universal and KOSB are closely connected is, in my view, amply borne out by the following:

(a) The ultimate parent company of KOSB was and is Kwantas Corporation Berhad ("KCB"), [note: 5] a Malaysian listed company which has also been publicly recorded in Lloyd's Sea-Web as being the "Group Owner" of Universal, [note: 6] and, even as late as 22 February 2010 [note: 7] and 2 November 2011, [note: 8] Universal continues to be publicly recorded in Lloyd's Sea-Web as a "subsidiary" of KCB.

(b) Alvin Kwan, Steve Kwan and K H Chong are all directors of KOSB, as well as director-shareholders of KCB (indeed Alvin Kwan and Steve Kwan are substantial shareholders of KCB, and Steve Kwan is the Managing Director thereof). [note: 9]

(c) Universal provided the sea freight requirements of KCB and its subsidiaries (which I will refer to as the "KCB Group"), and those transactions were disclosed in KCB's 2008 Annual Report as freight charges paid to a related party (namely, Universal), "a company in which certain directors of [KCB] have interest [*sic*]". [note: 10]

(d) Universal occupies a physical address at 1st Floor, Fordeco Building, Jalan Singamata, 91100 Lahad Datu, Sabah, which is identical to that of KOSB and KCB, [note: 11] while the domain name of Universal's e-mail and website address – kwantas.com.my – refers to that of KOSB. Lloyd's Sea-Web also publicly recorded Universal as having a second address at Suite 1-6-W9, 6th Floor, CPS Tower, Jalan Centre Point, 88000 Kota Kinabalu, Sabah, which is the same address that appears on Universal's letterhead. [note: 12] That latter address was also clearly used by KOSB as its business address, for instance, in key documents such as the charterparty relating to the charter of the *Dolphina*, [note: 13] KOSB's commercial invoice [note: 14] and letter of indemnity, [note: 15] a letter of credit with KOSB as beneficiary, [note: 16] as well as in KOSB's banking correspondence, [note: 17] and furthermore was the venue of choice for meetings of the board of KCB. [note: 18]

(e) In addition to the identical addresses, even though KOSB and Universal purportedly had their own staff, some employees of the former also helped out in the office of the latter. [note: 19]

Dongma Oils and Fats (Guangzhou Free Trade Zone) Co, Ltd

10 Another company related to Universal and KOSB is Dongma Oils and Fats (Guangzhou Free Trade Zone) Co, Ltd ("Dongma"), which, *inter alia*, operates a palm oil refinery and other downstream installations. [note: 20] Dongma's links to Universal (through KOSB) are disclosed by the facts that:

(a) Dongma was 51% owned by KCB at the material time. [note: 21]

(b) Alvin Kwan, Steve Kwan and K H Chong are all directors of Dongma, [note: 22] and Steve Kwan is in fact its "Legal Representative". [note: 23]

(c) Wang Shi Hui (also known as Sophia Wang) ("Sophia Wang"), the assistant manager of Dongma, was a witness for Universal, and testified that she saw KOSB as Dongma's "head office". [note: 24]

(d) The domain name of Dongma's e-mail and website address – "kwantas.com.cn" – like that of Universal's (see [9(d)] above) again refers to that of KOSB.

Fordeco Shipping Sdn Bhd

11 Yet another associated company is Fordeco Shipping Sdn Bhd ("Fordeco"), which acted as Universal's shipping representative, [note: 25] and is connected to Universal by the following facts:

(a) Alvin Kwan and Steve Kwan are director-shareholders of Kwan Ah Hee Holdings Ltd, which wholly owns Fordeco. [note: 26]

(b) Universal and Fordeco occupy the same physical address (which is the same as that of

KOSB and KCB (see [9(d)] above)). [note: 27]

(c) KOSB was formerly known as Fordeco Oil Sdn Bhd. [note: 28]

(d) Universal's shipping manager, Yong Kui Fong ("K F Yong"), who was authorised to run the commercial business of Universal, was also being employed by Fordeco. [note: 29]

Zhejiang Zhongguang Industry Co Ltd

12 A company known as Zhejiang Zhongguang Industry Co Ltd ("Zhongguang") was a customer of BOC and a buyer of palm oil from KOSB.

Felda Vegetable Oil Products Sdn Bhd

13 Felda Vegetable Oil Products Sdn Bhd ("Felda") is a Malaysian company in the business of refining crude palm oil and palm kernel oil for the oleochemical industries.

Ningbo Shanke Import and Export Co Ltd

14 Ningbo Shanke Import and Export Co Ltd ("Shanke"), like Zhongguang, is a customer of KOSB, [note: 30] and there is some suggestion that Zhongguang was a nominee buyer of KOSB's palm oil for Shanke in relation to the events leading to these proceedings. [note: 31]

15 Beyond that, very little is known about Shanke, save that a Ms "Xu Feng Zheng" (also known as Xu Zheng Feng) seems to have been acting on its behalf at the material time.

Malayan Banking Berhad

16 Malayan Banking Berhad ("Maybank") played a number of different roles in this case, some of which did not come to light until the third tranche of the proceedings, but it can now be said with some confidence that, at the material time, Maybank was the banker of both KOSB and Felda, but that on one occasion it was not acting on their behalf as banker or agent, but in its own right as principal.

These Proceedings

17 How I intend to approach the exposition of the facts and procedural history of this case is to set out the four tranches over which these proceedings took place. Within each tranche I then explain what facts were available to me (and what were missing). I also set out some of my findings in relation to the disputed facts, although legal analysis is deferred to subsequent portions of this judgment.

18 I should also mention, for completeness, that before this action came on for trial before me, there had been a failed attempt by BOC to obtain summary judgment against Universal, as well as a number of other interlocutory matters such as an application by Universal for security for costs.

First Tranche

19 The first tranche of these proceedings appeared to be a fairly straightforward claim by BOC against Universal for breach of contract for misdelivery of cargo without production of the original bills

of lading, based on the following facts.

Available evidence

(1) The Zhongguang Contract

20 On or around 16 January 2008, KOSB entered into a contract (numbered ZJZ/RPL/16118/0308) with Zhongguang, pursuant to which KOSB sold a parcel of 3,000 mt (2% more or less at the seller's option) of Refined Bleach Deodorised ("RBD") Palm Oelin to Zhongguang at a price of US$1,138.20 per mt (*ie*, a total sum of US$3,414,600.00) (the "Zhongguang Contract"). [note: 32]

21 As will become apparent below, there were in fact *two* versions of the Zhongguang Contract: the actual, real version (any references to the Zhongguang Contract should be read as referring to this version), and another version (the "Good Copy"). More will be said about the Good Copy later, but the Zhongguang Contract, in addition to those summarised at [20] above, contained the following key terms: [note: 33]

(a) Shipment was to be effected during March 2008 and before 31 March 2008.

(b) Payment was to be made by draft at ninety (90) days after sight by the buyer, Zhongguang, opening an irrevocable letter of credit in favour of the seller, KOSB, for 100% of the contract value seven (7) days before shipment.

(c) The documents required for payment under the letter of credit were, *inter alia*: KOSB's signed commercial invoice and a full set of "clean on board Bill(s) of Lading made out to order and blank endorsed".

22 KOSB's invoice and packing list dated 16 January 2008 (the "16 January 2008 invoice") addressed to Zhongguang for 2,999.901 mt of RBD Palm Olein was produced in evidence. [note: 34] The 16 January 2008 invoice bore a signature in Chinese characters which, according to Sophia Wang, was that of an employee of Dongma, who was signing on behalf of KOSB. [note: 35] Although ostensibly issued in relation to the Zhongguang Contract, the 16 January 2008 invoice had in my view clearly been backdated, because it listed the subject cargo as being 2,999.901 mt of RBD Palm Oelin (instead of the figure originally stipulated in the Zhongguang Contract, *viz*, "3,000 mt of RBD Palm Oelin (2% more or less at the seller's option)"), when that exact figure was only known on or around 23 March 2008 when BL4 was issued. In addition, the 16 January 2008 invoice notably contained a different term of payment from the Zhongguang Contract, namely, "100% cash against documents via Buyer's Nominated Banks".

23 I should add at this point that another version of the invoice (bearing reference number SS/RPL 0166/08 and also ostensibly issued in relation to the Zhongguang Contract) dated 24 March 2008 (the "24 March 2008 invoice") was produced in evidence. [note: 36] Apart from the difference in dates, the 24 March 2008 invoice contained several important differences from the 16 January 2008 invoice; in particular, it had been signed by KOSB's General Manager, Christopher Chai, [note: 37] and the payment term was no longer "100% cash against documents via Buyer's Nominated Banks", but referred to a letter of credit. That reference, however, gave away the fact that the 24 March 2008 invoice had also been backdated, because the letter of credit to which it referred only existed after 6 June 2008 (see [42] and [101] below).

(2) The February Charterparty

24 Pursuant to a voyage charterparty dated 19 February 2008 (the "February Charterparty"), [note: 38] which was in the amended Vegoilvoy form together with some additional clauses, Universal chartered the *Dolphina* to KOSB to carry 11,500 mt of RBD Palm Oelin from Kuantan, Malaysia, to Huangpu, China.

(3) The Felda Contract

25 In early March 2008, KOSB bought 11,500 mt of RBD Palm Oelin (the "Cargo") from Felda (the "Felda Contract"). It was this Cargo which was to be the subject-matter of the February Charterparty, and it was from this Cargo that the Zhongguang Contract was going to be fulfilled (see [29] below). [note: 39]

26 Although it was known at the time of the first tranche of the proceedings that KOSB bought the Cargo from Felda, the precise terms of the Felda Contract were not.

(4) The bills of lading and BL4

27 On or around 23 March 2008, the Cargo was loaded on board the *Dolphina* at Kuantan and Universal issued four bills of lading (bill of lading nos KTN/HPU-01 (3,000 mt), KTN/HPU-02 (3,000 mt), KTN/HPU-03 (2,500 mt), and KTN/HPU-04 (2,999.901 mt)) to Felda as the named shipper of the Cargo, all dated at Kuantan on 23 March 2008. All four bills of lading were cut the same way: Felda was named as the shipper, the Cargo was consigned "TO ORDER", and the notify party was Dongma. [note: 40]

28 Although four separate bills of lading were issued for what were apparently four separate parcels of cargo, the Cargo was stowed in a number of cargo tanks with no segregation as to parcels, and the bills of lading themselves provided that the Cargo would not be segregated: [note: 41]

> For the whole shipment 4 Sets of Bill of Lading have been issued for which the Vessel is relieved from all responsibilities to the extent it would be if one set only would have been issued. The Vessel undertakes to deliver only that portion of the cargo actually boded [*sic*] which is represented by the percentage that the total amount specified in the Bill(s) of Lading bears to the total of the commingling shipment delivered at destination. Neither the Vessel nor the owners assume any responsibility for the consequences of such commingling nor for the separation thereof at the time of delivery.

29 Nonetheless, the present action is concerned with bill of lading no KTN/HPU-04 ("BL4"), and it is common ground that the 2,999.901 mt of RBD Palm Oelin which formed the subject-matter of BL4 (the "BL4 Cargo") was to be used to fulfil the Zhongguang Contract.

(5) The Cargo is shipped from Kuantan

30 Notwithstanding Zhongguang's failure to open a letter of credit seven days before shipment as required under the Zhongguang Contract (see [21(b)] above), the entire Cargo of 11,500 mt of RBD Palm Oelin was shipped as undivided bulk cargo on or around 23 March 2008. [note: 42]

(6) The Cargo arrives in Huangpu and is discharged against KOSB's letter of indemnity

31 On 25 March 2008, Fordeco, acting on behalf of Universal, appointed Jade Shipping Agency

(Guangzhou) Company Limited ("Jade Shipping") as the *Dolphina*'s agents in Huangpu. [note: 43]

32 On or around 26 March 2008, with the *Dolphina* arriving in Huangpu, Jade Shipping inquired of Fordeco whether the Cargo could be released to the receivers without production of the original bills of lading (including BL4, which is at the root of this dispute). This request was copied to, *inter alia*, Steve Kwan. [note: 44]

33 On 27 March 2008, KOSB as charterer issued a letter of indemnity ("LOI") in favour of Universal, agreeing, *inter alia*, to indemnify Universal against all liability arising as a result of delivering the Cargo to Dongma without production of the original bills of lading. [note: 45] The LOI was signed by Christopher Chai, the General Manager of KOSB, and provided, *inter alia*, as follows:

> In consideration of you [Universal] complying with our [KOSB's] request [to deliver the Cargo to Dongma without production of the original bills of lading], we hereby agree as follows: -
>
> 1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the [Cargo] in accordance with our request.
>
> ...
>
> 4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
>
> 5. As soon as all original bills of lading for the above [Cargo] shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.
>
> ...

34 KOSB obtained a similar LOI (for delivery of the Cargo to Dongma without production of the original bills of lading) from Dongma on the same day, apparently *before* KOSB issued its LOI to Universal. [note: 46]

35 On 28 March 2008, with the *Dolphina* already at Huangpu, Fordeco confirmed to Jade Shipping that the Cargo could be released and discharged without requiring the original bills of lading to be produced. This too was copied to, *inter alia*, Steve Kwan. [note: 47]

36 At some point, Dongma had apparently entered into an agreement with Dongguan Huanan Oils & Fats Industrial Co, Ltd ("Huanan") for storage of the Cargo in shore tanks belonging to Huanan. There is some dispute between the parties as to the validity of this agreement, and therefore whether Huanan was storing the Cargo for Dongma, but in my view this is not material to the present action. In any event, on 30 March 2008, the *Dolphina* began discharging the Cargo into Huanan's shore tanks (as nominated by Dongma) against KOSB's LOI, and the discharge was completed by 1 April 2008 (the "Discharge Date"). [note: 48]

37 It does not appear that the BL4 Cargo was separated from the rest of the Cargo during the discharge into Huanan's shore tanks. Although there was some mention of "splitting" the four bills of

lading, [note: 49] this turned out to be for customs purposes only, and not to segregate the Cargo.

38 It is common ground that, as at the Discharge Date, neither KOSB nor Dongma had possession of the bills of lading (in particular, BL4), and it has not been suggested that the bills of lading were being held on their behalf.

(7) April to June 2008

39 Between April to June 2008, Huanan released the Cargo (including the BL4 Cargo) to various end-buyers in China. [note: 50]

(8) Zhongguang applies for a letter of credit from BOC with the "Good Copy" of the Zhongguang Contract

40 On 6 June 2008, BOC received Zhongguang's application for an irrevocable letter of credit in favour of KOSB in the sum of US$3,414,600.00 (*ie*, the agreed price for the BL4 Cargo under the Zhongguang Contract (see [20] above)). [note: 51]

41 In applying for the letter of credit, Zhongguang provided BOC with a copy of the Zhongguang Contract that was marked "Good Copy". [note: 52] The Good Copy was a different version of the Zhongguang Contract, for it provided that the BL4 Cargo was to be shipped *during June 2008* and *before 30 June 2008*, whereas the Zhongguang Contract had provided that shipment was to take place *during March 2008* and *before 31 March 2008* (see [21(a)] above). The Good Copy was otherwise identical to the Zhongguang Contract.

(9) The June L/C

42 BOC issued Zhongguang a letter of credit (no LCZE 001200800924) on 6 June 2008 (the "June L/C"), [note: 53] but not without Zhongguang paying BOC a security deposit of 15% of the sum for which the June L/C was issued (*ie*, US$512,190.00), which sum was apparently provided to Zhongguang by Shanke. [note: 54]

43 The June L/C was expressed to be subject to the ICC Uniform Customs and Practice for Documentary Credits 600 ("UCP 600"), [note: 55] and among the documents that had to be presented in order to receive payment under the June L/C were: [note: 56]

> SIGNED COMMERCIAL INVOICE IN 4 ORIGINALS AND 3 COPIES INDICATING L/C NO. AND CONTRACT NO. ZJZ/RPL/16118/0308
>
> FULL SET (3/3) CLEAN ON BOARD OCEAN BILLS OF LADING MADE OUT TO ORDER AND BLANK ENDORSED, MARKED "FREIGHT PREPAID" AND NOTIFYING DONGMA OILS AND FATS (GUANGZHOU FREE TRADE ZONE) CO., LTD. NO. 15 JING QIAO ROAD, GUANGZHOU FREE TRADE ZONE GUANGZHOU, CHINA 510730 IN 3 ORIGINALS AND 3 COPIES.

44 HSBC Bank Malaysia Berhad ("HSBC"), Kota Kinabalu, as advising bank, advised the opening of the June L/C on 6 June 2008, the terms of which were as follows: [note: 57]

40A : Form of Documentary Credit

IRREVOCABLE

20 : Documentary Credit Number

LCZE001200800924

31C : Date of Issue

080606

Jun-06-2008

40E : Applicable Rules

[UCP 600]

31D : Date and Place of Expiry

Date :080702

Jul-02-2008

Place :MALAYSIA

50 : Applicant

[Zhongguang]

59 : Beneficiary – Name & Address

[KOSB]

32B : Currency Code, Amount

[USD 3,414,600.00]

…

41D : Available With…By… - Name&Addr NameAndAddress

: ANY BANK Code : BY NEGOTIATION

42C : Drafts at…

AT 90 DAYS AFTER SIGHT FOR 100.0PCT INVOICE VALUE

42A : Drawee – BIC

[BOC]

…

44C : Latest date of shipment

080615

Jun-15-2008

…

48 : Period for Presentation

DOCUMENTS TO BE PRESENTED WITHIN 100 DAYS AFTER THE DATE OF SHIPMENT BUT WITHIN THE VALIDITY OF THE CREDIT

HSBC's letter of advice also contained the following remarks:

> THIS ADVICE… SHOULD BE PRESENTED WITH THE DOCUMENTS/DRAFTS *FOR NEGOTIATION/PAYMENT/ ACCEPTANCE*, AS APPLICABLE. [emphasis added]

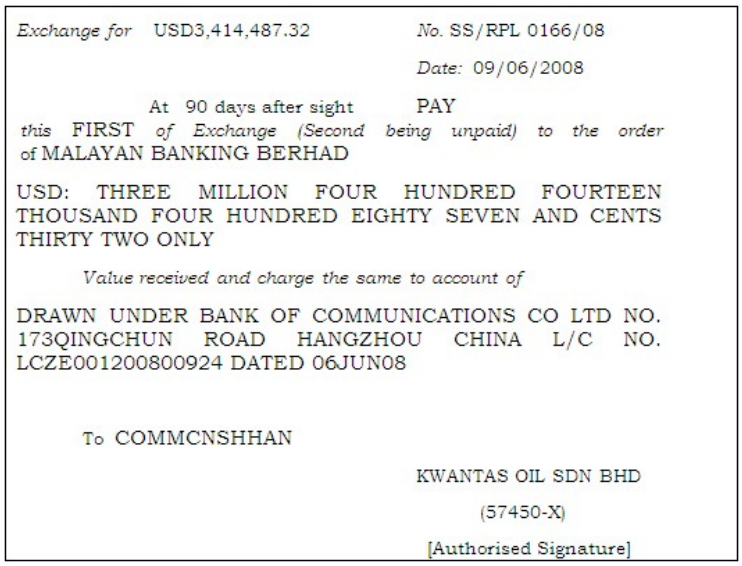
45 The June L/C also provided instructions to the "paying/accepting/ negotiating bank" as follows: [note: 58]

> ALL DOCUMENTS SHOULD BE SENT TO OUR COUNTER AT NO. 173 QINGCHUN ROAD HUANGZHOU CHINA IN ONE LOT BY COURIER SERVICE. UPON RECEIPT OF THE DOCUMENTS AND DRAFT(S) IN STRICT COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS CREDIT, WE SHALL ACCEPT THE DRAFT(S) AND REIMBURSE THE PRESENTING BANK AS INSTRUCTED AT MATURITY.

46 In other words, anyone hoping to be paid by Zhongguang (via BOC) under the June L/C had to present to BOC (via that person's bank) BL4 (endorsed in blank) as well as KOSB's commercial invoice in respect of the Zhongguang Contract, within 100 days of shipment (the latest shipment date being 15 June 2008), [note: 59] but presentation had to take place in any case before the expiry of the June L/C on 2 July 2008. [note: 60] Payment under the June L/C would be made by draft ninety (90) days after sight, which was consistent with the payment term under both the Zhongguang Contract and the Good Copy (see [21(b)] and [41] above).

47 A bill of exchange dated 9 June 2008 was drawn by KOSB on BOC for payment of the sum of US$3,414,487.32 to the order of Maybank at 90 days after sight (the "June B/E"). [note: 61] In other words, the payee, Maybank, had to present the June B/E and the other relevant documents to the drawee, BOC, for acceptance, whereupon the maturity date (the date by which BOC was required to make payment to the order of Maybank) would be fixed at 90 days after the date of presentation of the June B/E (see A G Guest, *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (Sweet & Maxwell, 17th ed, 2009) at paras 2-086 and 6-004).

48 The June B/E was signed by K H Chong, one of the directors of KOSB, [note: 62] and its text was as follows: [note: 63]



Exchange for USD3,414,487.32 *No.* SS/RPL 0166/08

Date: 09/06/2008

At 90 days after sight PAY
this FIRST *of Exchange (Second being unpaid) to the order* of MALAYAN BANKING BERHAD

USD: THREE MILLION FOUR HUNDRED FOURTEEN THOUSAND FOUR HUNDRED EIGHTY SEVEN AND CENTS THIRTY TWO ONLY

Value received and charge the same to account of

DRAWN UNDER BANK OF COMMUNICATIONS CO LTD NO. 173QINGCHUN ROAD HANGZHOU CHINA L/C NO. LCZE001200800924 DATED 06JUN08

To COMMCNSHHAN

KWANTAS OIL SDN BHD
(57450-X)
[Authorised Signature]

49 On the reverse side of the June B/E was Maybank's endorsement as payee: [note: 64]

Pay/~~Delivered~~ To The Order of

For Maybank (3813-K)

Karamungsing Trade Finance Centre

[Signature]

[Illegible text]

(10) Maybank presents BOC with the relevant documents for payment under the June L/C

50 On 9 June 2008, Maybank sent the following letter (the "presentation letter") to BOC: [note: 65]

OUR REFERENCE : 99160WAM1907793 PAGE: 1

KARAMUNSING TRADE FINANCE CENTRE
NO: 1 LORONG KEMAJUAN
KARAMUNSING 88000
KOTA KINABALU, SABAH, MALAYSIA

JUNE 9, 2008

SWIFT : MBBEMYKLXXX
TELEX :
CABLE :

TELEX ANSBK :

DOCUMENTARY CREDIT SCHEDULE

MAIL TO:
BANK OF COMMUNICATIONS
NO. 173 QUINGCHUN ROAD
HANGZHOU – CHINA

YOUR REFERENCE: LCZE001200800924 DATED: 06/06/08

APPLICANT :
ZHEJIANG ZHONGGUANG INDUSTRY
CO LIMITED

BENEFICIARY :
KWANTAS OIL SDN BHD
SUITE 1-6-W9, 6TH FLOOR, CPS
TOWER, NO 1: JLN
CENTRE POINT,
88000 KOTA KINABALU, SABAH
REF: SS/RPL0166/08

REF:

DATE OF BILL : JUNE 9, 2008
TENOR : 90 DAYS AFTER SIGHT
AMOUNT : USD 3,414,487.32
SHIP DATE : MARCH 23, 2008
VESSEL NAME : MT DOLPHINA

WE ENCLOSE THE FOLLOWING DOCUMENTS FOR NEGOTIATION/PAYMENT :

MAILING 1	MAILING 2	DOCUMENT NAME
3/3		CLEAN MARINE 'BOARD' B/L
7		COMMERCIAL INVOICE
2		BILL OF EXCHANGE
3		N/N BILL OF LADING
1		DOCUMENTS FOR ISSUING FILE

COVERING SHIPMENT OF: RED PALM OLEIN
WE ENCLOSE THE ABOVE DOCUMENTS DRAWN IN ACCORDANCE WITH THE TERMS OF YOUR ABOVE DOCUMENTARY CREDIT EXCEPT THE FOLLOWING DISCREPANCY (IES),(IF APPLICABLE):-

KINDLY EFFECT YOUR PAYMENT IN ACCORDANCE WITH THE INSTRUCTIONS GIVEN BELOW:-

WE CERTIFY ENDORSEMENT OF DRAWING AMOUNT IS ON THE REVERSE OF CREDIT
WE CERTIFY DOCUMENTS RECEIVED WITHIN PRESENTATION PERIOD AND VALIDITY OF CREDIT

WE CERTIFY ALL TERMS AND CONDITIONS OF LETTER OF CREDIT ARE COMPLIED WITH

ADVISE ACCEPTANCE AND MATURITY DATE BY SWIFT/TELEX.

UPON PAYMENT, KINDLY REMIT PR
EXPRESS BK LTD, NEW YORK 3 WO
10285-2300 USA FOR CREDIT OF
NUMBER AND ADVISE US BY AUTHE...

EXPRESS BK LTD, NEW YORK 3 WO
10285-2300 USA FOR CREDIT OF
NUMBER AND ADVISE US BY AUTHE...

PLEASE ALSO INSTRUCT AMERICAN ...
23RD FLOOE, NEW YORK NY 10285
MT202/MT400 OF THE AMOUNT CRE...
TELEX NUMBER IS / SWIFT CODE

PAYMENT INSTRUCTION

PAY TO AMERICAN EXPRESS BANK LTD, NY VIA SWIFT MT202 AS FOLLOWS:

Related Reference	**Field 21**	**99160WAM1907793**
Intermediary	**Field 57A**	**AEIBUS33**
Beneficiary Institution	**Field 58A**	**MBBEMYKL**

NOTE: PLEASE DO NOT COMBINE PAYMENT
QUOTE REFERENCE IN FIELD 21 CORRECTLY

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51 There were a number of noteworthy features about Maybank's presentation letter:

(a) In addition to BL4 and KOSB's commercial invoice, the June B/E was also being presented,

even though it was not actually one of the required documents under the June L/C (unlike BL4 and KOSB's commercial invoice) (see [43] above). For convenience, I will refer to the June B/E, BL4 and KOSB's commercial invoice as "the relevant documents".

(b) I have already mentioned that two invoices were ostensibly issued by KOSB in relation to the Zhongguang Contract (see [22] and [23] above), and what was being presented by Maybank on 9 June 2008 was KOSB's 24 March 2008 invoice.

(c) Maybank's presentation letter contained the following remarks:

> WE CERTIFY ENDORSEMENT OF DRAWING AMOUNT IS ON THE REVERSE OF CREDIT
>
> WE CERTIFY DOCUMENTS RECEIVED WITHIN PRESENTATION PERIOD AND VALIDITY OF CREDIT
>
> WE CERTIFY ALL TERMS AND CONDITIONS OF LETTER OF CREDIT ARE COMPLIED WITH
>
> ADVISE ACCEPTANCE AND MATURITY DATE BY SWIFT/TELEX

(d) As a result of Maybank's presentation of both the June B/E as well as the other relevant documents, some of these remarks were referable to the June B/E while others were referable to the June L/C. The first remark referred to the endorsement on the reverse side of the June B/E (see [49] above), the second and third remarks were standard UCP 600 terms referable to the June L/C (see [43] above) and the final remark related once again to the June B/E – it has already been explained that presentation of the bill of exchange for acceptance was required to fix the maturity date (see [47] above), and given that it was presented on 9 June 2008, the maturity date was therefore 9 September 2008, and Maybank's presentation letter directed BOC to pay US$3,414,487.32 to American Express Bank Ltd ("Amex").

(e) Maybank's presentation letter stated that BL4, KOSB's commercial invoice and the June B/E were "for negotiation/payment".

52 On 11 June 2008, BOC received by courier the relevant documents specified in Maybank's presentation letter, [note: 66] and they were found on their face to comply with the terms of the June L/C. I should say that, by this point in time, the reverse side of BL4 carried three endorsements: an endorsement in blank by Felda, an endorsement by Maybank to KOSB, and an endorsement in blank by KOSB. [note: 67] It has always been common ground that that was the order in which the endorsements took place, [note: 68] but as none of these endorsements was dated, the grave difficulty I have had in this case has been in deciding when and the circumstances in which these various endorsements were executed, on which my views have changed as between the first and third tranches of the proceedings as a result of the new evidence which emerged.

53 On the same day (11 June 208), the relevant documents were sent by BOC to Zhongguang, which, by endorsing BOC's document entitled "Notice for Payment under L/C", confirmed that it had received the relevant documents presented on 11 June 2008, examined them and instructed and authorised BOC to make payment under the June L/C to the presenting bank (*ie*, Maybank), and to debit its account with BOC. [note: 69] BOC duly accepted the June B/E and its obligation thereunder to pay the sum of US$3,414,487.32 to Maybank crystallised.

(11) BOC is left in the lurch

54 After BOC's acceptance of the June B/E (11 June 2008) but before payment on the maturity date (9 September 2008), however, BOC ran into a number of problems.

55 On 13 June 2008, Zhongguang returned the relevant documents to BOC, citing financial difficulties. [note: 70] Although the evidence of when and how BL4 was returned to or recovered by BOC is inconsistent, in my view, nothing turns on this as there is no doubt that BOC was and is in physical possession of the full set of BL4.

56 Following Zhongguang's refusal to take up the relevant documents, BOC despatched its representatives to Huangpu to demand delivery of the BL4 Cargo from Jade Shipping. At Huangpu, BOC's representatives were eventually informed by Dongma (which information was later confirmed by Jade Shipping), to their consternation, that the BL4 Cargo had been released and discharged by the Discharge Date (1 April 2008), without production of BL4. [note: 71] BOC thus realised that the BL4 Cargo had been shipped in March 2008, and not June 2008, and that the BL4 Cargo had long been dispersed.

57 On 16 June 2008, BOC understandably commenced legal proceedings in China against Zhongguang and all its guarantors, [note: 72] but, at the time of the proceedings, BOC had apparently not made any successful recovery in China. [note: 73]

58 On 17 June 2008, BOC also desperately sent a SWIFT message to Maybank informing it that the transactions in connection with the June L/C were suspected of being fraudulent, and demanded that Maybank stop or cancel any ongoing or outstanding export finance regarding KOSB. [note: 74] Unfortunately, Maybank replied stating that it had already paid KOSB on 10 June 2008, and that Maybank was holding BOC to its acceptance of the June B/E and its obligations thereunder. [note: 75]

59 On 3 July 2008, BOC commenced the present *in rem* proceedings against the *Dolphina*, claiming to sue as lawful holder of BL4 for misdelivery of the BL4 Cargo to Dongma without proper production of BL4. On 20 July 2008, the *Dolphina* was arrested in Singapore, and Universal furnished security in the sum of US$4.4 million for BOC's claim. [note: 76]

60 Despite the grim situation, BOC nonetheless honoured its obligations under the June B/E, and paid US$3,414,487.32 at Maybank's order to Amex on 9 September 2008. [note: 77]

Parties' arguments in the first tranche

61 I now come to the arguments of the parties during the first tranche of the proceedings, which I briefly set out so that the subsequent turn of events leading to the second, third and fourth tranches may be made sense of.

62 A preliminary issue dividing the parties was whether the contract of carriage contained in or evidenced by BL4 was governed by English law (as BOC contended) or by Malaysian law (as Universal contended). I resolved this issue in BOC's favour for the reasons I explain below (see [113] to [132]).

63 In relation to the substantive merits, Ms Ang for BOC was essentially arguing that, by virtue of the facts set out above, BOC was entitled to BL4 and the BL4 Cargo, that it was a term of the contract of carriage evidenced by or contained in BL4 that Universal would only deliver the BL4 Cargo against the production of BL4, and that by failing to do so, Universal was in breach of contract. Although a cause of action in conversion had also been pleaded by BOC, Ms Ang conceded that she

was relying on the contractual claim alone.

64 Mr Gurbani for Universal sought to meet BOC's breach of contract claim primarily on the basis that BOC had not acquired any rights of suit against Universal, because BL4 had been "spent" (*ie*, incapable of transferring rights of suit in relation to the contract of carriage) as at the Discharge Date because the BL4 Cargo had by then already been delivered to the person entitled to it. This argument depended on, *inter alia*, establishing who was entitled to the BL4 Cargo at the Discharge Date, which in turn depended on establishing when the various endorsements of BL4 (see [52] above) had taken place, and it also drew upon the case of *London Joint Stock Bank Limited v British Amsterdam Maritime Agency Limited* [1908-1911] KB 571 ("*London Joint Stock*").

Unavailable evidence and unanswered questions

65 I am compelled to observe that Universal's argument, as I have just described it, was substantially without evidential support during the first tranche of the proceedings, and rested on rather extravagant presuppositions and logical leaps which ignored material gaps in the evidence. I do not wish to dwell on this matter because it was eventually superseded by the events which I describe below, but it must be said that a frustrating amount of energy was therefore expended in an attempt t o follow Mr Gurbani's arguments, only to discover that they resulted in dead-ends. I note, furthermore, that this lack of evidence was not accidental, as none of the following individuals, who clearly possessed a great deal of material knowledge, was called to give evidence on behalf of Universal:

(a) Steve Kwan, who had been copied into e-mail correspondence relating to the shipment and discharge of the Cargo without production of the bills of lading, swore almost all the affidavits on behalf of Universal in relation to BOC's application for summary judgment and the other interlocutory matters, and it is clear to me that he played a key role in this entire affair.

(b) KOSB's General Manager, Christopher Chai, was another major character in the events leading up to these proceedings but whose evidence was conspicuously absent.

(c) As the person who was apparently involved in the charter of the *Dolphina* and who was generally authorised to handle Universal's commercial business (see [11(d)] above), K F Yong's evidence would also have been obviously relevant.

Instead of these possible candidates, however, Universal furnished Alvin Kwan and Sophia Wang as witnesses of fact, both of whom were of remarkably little assistance.

66 The former professed to be in overall charge of Universal but displayed very little knowledge of the company and its affairs to support his claim. For instance, he testified that Universal has two directors, [note: 78] when in fact it has three (see [7] above). In addition, Alvin Kwan himself admitted that he possessed no direct personal knowledge about the facts of the case and his evidence was thus entirely unhelpful.

67 The other factual witness, Sophia Wang, was an employee of Dongma, and her role in all this was somewhat peripheral.

68 In short, nothing was heard from the persons who, at least on the face of the documentary evidence, quite clearly possessed actual knowledge of the sale and shipment of the Cargo in March 2008, and I have no doubt that, given the close connection between them, Universal could have called someone appropriate from KOSB to testify on its behalf had it wanted to, especially given that

Universal was invoking the terms of KOSB's LOI, [note: 79] and that it was therefore KOSB's funds which were at stake in these proceedings.

69 As a result, I was left with very little oral evidence with which to make sense of the documentary evidence (or to be more precise, the documentary evidence that was available to me), resulting in the following unanswered questions casting a pall over my deliberations:

(a) The circumstances surrounding, and the events following, Zhongguang's failure to open a letter of credit at the time required by the Zhongguang Contract: one would have thought that such an obligation would have been a condition of the Zhongguang Contract, so why did KOSB not terminate the Zhongguang Contract but instead continue to perform by shipping the BL4 Cargo?

(b) The significance of KOSB's 16 January 2008 invoice containing a different payment term from the Zhongguang Contract, and the circumstances surrounding the creation and backdating of KOSB's 24 March 2008 invoice: what was the explanation for these discrepancies?

(c) The terms of the Felda Contract: had Felda been paid by KOSB for the Cargo, and if so, how and when?

(d) What was the reason for Maybank's endorsement of BL4 to KOSB?

(e) The circumstances surrounding the creation of the Good Copy: who was responsible for it and what induced them to do it?

(f) The significance of BOC approving the opening of the June L/C by reference to the Good Copy rather than the Zhongguang Contract: what were the implications of this, if any?

70 Although BOC was clearly aware of some of these matters as well (for instance, it argued that the Good Copy had been created to conceal the fact that the BL4 Cargo had already been shipped [note: 80]), it too was ultimately stymied by the lack of evidence, and could not make much of them. Given that BOC's claim was essentially for breach of contract, it could not legitimately pursue other lines of enquiry. Unfortunately, however, this meant that in some respects BOC was barking up the wrong tree, by relying on certain false assumptions, such as the validity of KOSB's endorsement of BL4, which was a matter that troubled me greatly from an early stage of the proceedings. [note: 81]

71 As I have said, Mr Gurbani was arguing that BL4 had been spent as of the Discharge Date (see [64] above). KOSB must have known that the BL4 Cargo had been discharged as of the Discharge Date, because KOSB had requested that Universal make delivery against its LOI of 27 March 2008 (see [33] and [35] above). Yet, no point was being taken by Ms Ang in relation to the fact that KOSB had, after the Discharge Date, gone ahead to endorse BL4 in blank, thereby treating it (and intending that it be so treated) as a subsisting, negotiable document of title capable of transferring rights of suit. This peculiarity was exacerbated by the fact that KOSB's LOI obliged it to surrender BL4 to Universal once it was in KOSB's hands. Thus, it seemed to me seriously questionable whether KOSB's endorsement of BL4 in blank had been *bona fide* and was valid, as the parties (and especially BOC) seemed to have assumed.

72 On 28 January 2011, I therefore invited the parties to consider the validity and effect (if any) of KOSB's endorsement of BL4 in blank, in the following terms:

[T[he parties are to consider the significance, if any, of the following facts in evidence before the

court.

> KOSB obtained [BL4] from Felda in June 2008, and despite its promise under the [LOI] issued on 27 March 2008 to surrender [BL4] to [Universal], KOSB negotiated it to obtain payment. In short, KOSB went ahead to endorse and transfer [BL4] as a negotiable document of title as against the ship to a third party like [BOC] when the allegation was that by then [BL4's] function as a document of title had exhausted.

73 Perhaps predictably, Mr Gurbani submitted that KOSB's endorsement was irrelevant to Universal's defence, as KOSB and Universal were separate legal entities, and that KOSB's conduct could not bind Universal (which had not acquiesced in them) in any way. Surprisingly, however, Ms Ang also took the position that KOSB's endorsement of BL4 in blank was irrelevant to BOC's claim, submitting, *inter alia*, that the only significance of the matters I had raised was the prospect of a cause of action by Universal against KOSB under KOSB's LOI of 27 March 2008.

74 I was not at all satisfied with these responses, and I cannot help observing that an enormous amount of the time and effort that was subsequently expended to explore these matters and formulate the true controversies could have been saved had the parties been more concerned about these troubling details from an early stage of the litigation.

Key matters overlooked

75 I soon began to uncover other matters which, to my dismay, had been glossed over, and in order to explain them it is necessary for me to elaborate how I viewed the evidence during the first tranche of the proceedings.

(1) Maybank as pledgee of BL4?

76 As I have said, one of the relevant issues was who was entitled to the BL4 Cargo on the Discharge Date, which turned on when and in what circumstances the various endorsements on BL4 had taken place (see [64] above). I knew that Universal had issued BL4 to Felda on or around 23 March 2008 (see [27] above), and I knew that Maybank presented BL4 to BOC on 9 June 2008 (see [50] above). What, then, happened to BL4 in between and how were the various endorsements on BL4 to be accounted for?

77 On the less than ideal state of the evidence at the time, I considered there to be two possible scenarios.

78 The first was that no financing was required in respect of the Felda Contract, and Felda was simply waiting to be paid by KOSB. As I did not know the terms of the Felda Contract (see [26] above), and because there was no evidence to the contrary, I assumed that Felda had not been paid by KOSB, and that, due to the large sums of money involved, KOSB would pay by way of a letter of credit. Based on Mr Gurbani's statement from the Bar that Maybank was Felda's bank and collecting agent (in addition to being KOSB's bank), I considered that Felda had, at some point in time before June 2008, endorsed BL4 in blank and passed it to Maybank to hold as collecting agent until such time as KOSB was ready to pay Felda by way of a letter of credit. By 6 June 2008, KOSB would have known that Zhongguang had opened the June L/C with BOC (of which KOSB was the beneficiary) (see [44] above). On 9 June 2008, Maybank would then have presented BL4 (along with KOSB's 24 March 2008 invoice and the June B/E) to BOC as required under the June L/C, endorsing it to KOSB around that time. Likewise around that time, KOSB would have endorsed BL4 in blank. On this scenario, as at the Discharge Date, Felda would have been entitled to the BL4 Cargo.

79 The second scenario again assumed that Felda had not been paid by KOSB, but also assumed that financing was required in respect of the Felda Contract, and that BL4 was pledged to Maybank as security for trade financing. Either Felda or KOSB could have been the pledgor, with the movement of BL4 differing as between the two possibilities:

(a) If Felda had been the pledgor, Felda would have pledged BL4 to Maybank, endorsing BL4 in blank as it did so. Maybank as pledgee would have held on to BL4 until KOSB was ready to make payment in respect of the Felda Contract, which would have been around 9 June 2008 after Zhongguang had applied for the June L/C. Maybank, as pledgee, would then have endorsed BL4 to KOSB and KOSB would then have endorsed it in blank.

(b) If KOSB had been the pledgor, Felda would have endorsed BL4 in blank and Maybank would have held it as Felda's collecting agent, pending payment from KOSB. KOSB would have obtained trade financing from Maybank (as KOSB's banker) to pay Felda, pledging BL4 to Maybank in the process. Upon paying Felda, KOSB would have received BL4 from Maybank (as Felda's collecting agent), with Maybank for some reason endorsing BL4 to KOSB. KOSB would then have returned BL4, endorsed in blank, to Maybank.

The second scenario would have had the consequence that, as at the Discharge Date, Maybank would have been entitled as pledgee to the BL4 Cargo.

80 What puzzled me, however, was Maybank's endorsement of BL4 to KOSB. Only if Felda had pledged BL4 to Maybank could the endorsement satisfactorily be explained, because Maybank would have been endorsing BL4 in its own right *qua* pledgee of BL4. In any other situation, however, Maybank would have been acting as collecting agent for Felda, in which case it had no business endorsing BL4 in its own name.

(2) Maybank not acting on behalf of and as agent for KOSB

81 What was even less explicable was the seemingly common ground that, regardless of how the various endorsements ended up on BL4, on 9 June 2008, Maybank was in possession of BL4 and presented it (as well as the other relevant documents) to BOC on behalf of and as agent for KOSB (the beneficiary under the June L/C). To my mind, this was an incorrect view of the evidence (such as it was), and it did not become less so merely because both parties shared it (see *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd* [2008] 1 SLR(R) 375 at [9] and *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [32]).

82 In my opinion, two things had not been adequately appreciated.

83 First, under the terms of the Zhongguang Contract, KOSB was giving Zhongguang 90 days' worth of credit (see [21(b)] above). On the evidence, Zhongguang did not take steps towards making payment until 6 June 2008, when the June L/C was opened. The June L/C, however, contemplated a *further* 90-day period of credit ("Drafts at: At 90 days after sight…") (see [44] above), which meant that KOSB was not going to be paid in respect of the Zhongguang Contract till at least 9 September 2008 – some 6 months after shipment. One would expect, therefore, that as an unpaid seller, KOSB must have been extremely concerned about this state of affairs, especially given the KCB Group's policy on trade credits and control over receivables, set out in KCB's financial statements for the financial year ending 30 June 2008, in the following terms: [note: 82]

The Group's primary exposure to credit risk arises through its trade receivables. The Group's trading terms with its customers are mainly on credit, except for new customers, where payment

> in advance is normally required. The credit period is generally for a period of 14 days, extending up to three months for major customers. Each customer has a maximum credit limit. The Group seeks to maintain strict control over its outstanding receivables and has a credit control department to minimise credit risk. Overdue balances are reviewed regularly by senior management… Trade receivables are non-interest bearing.

84 Second, given the June L/C's instructions to the "paying/accepting/negotiating bank" (see [45] above), HSBC's letter of advice expressing the June L/C to be "[a]vailable with" or "by" "[a]ny bank" "[b]y negotiation" (see [44] above), as well as Maybank's statement in its presentation letter that it was presenting BL4, KOSB's 24 March 2008 invoice and the June B/E "for negotiation/payment" (see [50] above), it was clear to me that the June L/C was a negotiation credit, that is, a credit in which the issuing bank's undertakings are directed to any bank which becomes a *bona fide* holder of the bill of exchange and the other documents stipulated by the credit (A Malek QC and D Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th ed, 2009) at para 2.20).

85 In my view, the appropriate inference to be drawn from the foregoing observations, and which neither party seemed inclined to draw, was that KOSB, perhaps because of the KCB Group's strict control over outstanding receivables, negotiated the June L/C and the other relevant documents (*ie*, BL4 and KOSB's 24 March 2008 invoice) to Maybank, endorsing BL4 in blank as it did so, and that when Maybank presented the relevant documents to BOC on 9 June 2008, it was *not* doing so on behalf of and as agent for KOSB (the beneficiary of the June L/C), but as *principal in its own right*, intending thereby to itself obtain payment from BOC when the draft matured. As R King, *Gutteridge and Megrah's Law of Banker's Commercial Credits* (Europa Publications, 8th ed, 2001) ("*Gutteridge*") at para 4-100 observes, a negotiation credit is:

> … *an invitation to* a named bank or *banks generally* (as stipulated in the credit) *to act on the credit by purchasing the benefit of it from the beneficiary* against the promise of the issuing bank to pay in accordance with the terms of the credit on presentation of the documents. [emphasis added]

Gutteridge continues at para 4-102:

> A negotiating bank negotiates on the invitation contained in the credit and *not as an agent*. The credit constitutes an offer, which is accepted when the negotiating bank acts on it.

Similarly, E McKendrick, *Goode on Commercial Law* (LexisNexis, 4th ed, 2009) at p 1070 describes a negotiation credit as:

> … an undertaking not merely to S [the original beneficiary of the credit] but also those negotiating S's draft and/or documents. Such a credit is known as a negotiation credit and its effect is that anyone who, pursuant to the authority in the credit, negotiates S's drafts in good faith and in reliance on the credit may call upon [the issuing bank]… to honour the draft, provided that this is accompanied by documents presented in accordance with the credit and in apparent good order at the time the draft was purchased.
>
> …
>
> *Thus negotiation involves the purchase… of draft and/or documents, and with it, the entitlement to present the documents and collect payment in its own right at the due date. The original beneficiary, S, receives payment for the drafts and documents, not payment under the credit*

and then drops out of the picture, being replaced as beneficiary by the negotiating bank.

[emphasis added]

86 In light of the foregoing, I was certain, therefore, that regardless which of the two scenarios I have described at [78] and [79] above represented the true state of affairs, KOSB must have negotiated the June L/C to Maybank in early June 2008, endorsing BL4 as it did so, and that Maybank therefore could not have been acting on behalf of and as agent for KOSB when Maybank presented the June B/E and the other relevant documents under the June L/C to BOC on 9 June 2008, but was rather acting as principal in its own right.

Second tranche

87 While I could not in good conscience have acceded to a version of the facts which the parties were not disputing but which I believed to be wrong, neither would it have been in the interests of justice for me to have rendered a decision without first hearing what the parties had to say about my views. Accordingly, on 6 June 2011 I informed the parties that in the absence of evidence to the contrary, I was likely to find that, *inter alia*:

(a) BL4 had been held by Felda or Maybank (whether as collecting agent or pledgee) up to about 9 June 2008 and that at some earlier point Felda had endorsed BL4 in blank to Maybank.

(b) Maybank in turn endorsed BL4 to KOSB and KOSB then negotiated the June L/C to Maybank, endorsing BL4 in blank as it did so.

(c) On 9 June 2008, Maybank acting as principal sent BL4 and the other relevant documents to BOC for negotiation and payment under the June L/C.

I should add that I was still operating on the assumption that either one of the two scenarios I have described at [78] and [79] above represented the true state of affairs, *ie*, Felda had not been paid by KOSB and Maybank had quite possibly financed the Felda Contract.

88 On the basis of these proposed findings, I invited submissions from the parties on the following issues:

(a) The validity and effect of KOSB's endorsement of BL4 in blank in light of what KOSB knew at the time (see [71] above).

(b) Whether BOC was subrogated to the rights of Felda or Maybank.

(c) Whether there was any need for BOC to revive its claim in conversion.

The reason I asked for submissions on the latter two issues was because, in my view, either Felda (on the first scenario) or Maybank (on the second scenario) would have been entitled to the BL4 Cargo on the Discharge Date, and Universal would likely have been liable to one of them in conversion for discharging the BL4 Cargo without requiring production of BL4, and furthermore I entertained the possibility that BOC might have been subrogated to the rights of either Felda or Maybank on the authority of some of the statements made by Channell J in *London Joint Stock*, a case on which Mr Gurbani had relied strongly (see [64] above).

89 In response to my directions of 6 June 2011, BOC tendered its submissions on 11 July 2011. In essence, Ms Ang argued that KOSB's endorsement of BL4 was ineffective, that BOC was subrogated

to the rights of Maybank and/or Felda, and that BOC also had a cause of action in conversion. These submissions were made on the assumption (which I also entertained) that Maybank had likely financed the Felda Contract (*ie*, the second scenario at [79] above). More importantly, BOC had all along assumed (as had I) that BL4 had been in circulation within the banking system until about early June 2008 (probably after the June L/C had been opened) when it apparently came into KOSB's possession and was endorsed in blank by KOSB. After Ms Ang tendered her submissions, however, on 18 July 2011 Universal belatedly asked for directions to introduce thirty new documents from KOSB in evidence to show, inter alia, that Maybank had not in fact financed the Felda Contract at all, and that BL4 had come out of circulation much earlier, in early April 2008.

Third tranche

The new documentary evidence is admitted

90 Universal's new documentary evidence from KOSB was clearly relevant and necessary for the just and fair disposal of the issues, and it was admitted without much difficulty, since Ms Ang was not challenging the authenticity and contents of the new documents, which included, *inter alia*:

(a) The terms of the Felda Contract (the Felda Contract was in fact two separate contracts, but nothing turns on this), signed by Christopher Chai. [note: 83]

(b) A bill of exchange dated 23 March 2008 drawn by Felda on KOSB payable to the order of Maybank (the "March B/E"). [note: 84]

(c) A collection order which revealed that Maybank was in receipt of the March B/E and the relevant documents (including BL4) by 1 April 2008, and that Maybank's instructions to its Sabah branch were to deliver the relevant documents against payment. [note: 85]

(d) A collection order dated 2 April 2008 from Maybank's Sabah branch to KOSB which revealed that Maybank's Sabah branch was ready to present the relevant documents (including BL4) to KOSB. [note: 86] In the same document, Maybank asked KOSB for signed authorisation to debit the latter's account to settle the March B/E.

(e) KOSB's authorisation (signed by Steve Kwan and K H Chong) on a copy of the collection order, allowing Maybank to debit its current account (to pay Felda for the Cargo purchased by KOSB under the Felda Contract), which Maybank did on 4 April 2008. [note: 87]

(f) KOSB acknowledged receipt of the relevant documents (including BL4) on 4 April 2008. [note: 88]

(g) A "Documentary Collection and/or Negotiation Form" dated 9 June 2008, signed by Steve Kwan and K H Chong. [note: 89]

(h) An e-mail exchange dated 2 August 2011 between Sophia Wang and one Chong Thien Wu ("T W Chong"), the Operations Manager of KOSB, wherein T W Chong sought clarification of "any correspondence from… Zhongguang regarding the change of shipment month from 31 Mar 2008 [t]o 30 Jun 2008…", to which Sophia Wang replied that, "Ningbo [*ie*, Shanke] Ms.Xu [*ie*, Xu Feng Zheng] advised to amend shipment… so that bank could open [letter of credit]… Other item remain [*sic*] unchanged". [note: 90]

Significance of the new documentary evidence

91 The admission of the new documentary evidence meant that a number of inaccurate assumptions held during the first tranche of the proceedings could now be corrected, and that many of the unanswered questions I highlighted at [69] above were now capable of being cautiously, if not confidently, explained.

(1) Wrong assumptions corrected

92 It is now known, for instance, that contrary to my views in the first tranche (see [79] above), no financing was required from Maybank in respect of the Felda Contract, and that KOSB paid Felda for the Cargo on 4 April 2008 from its own funds. The movement of BL4 was therefore completely different from what BOC and I had initially envisioned:

(a) Whereas it was previously thought that Felda had endorsed BL4 in blank any time in or before early June 2008, it is now known that Felda had in fact endorsed BL4 in blank much earlier, on or before 1 April 2008.

(b) Whereas it was previously thought that, between 23 March 2008 to early June 2008, BL4 was being held either by Felda, by Maybank *qua* Felda's collecting agent, or by Maybank *qua* pledgee, it is now known that Felda only held BL4 up to about 1 April 2008, before sending it to Maybank *qua* Felda's collecting agent, and that Maybank in that capacity only held BL4 up to about 2 or 3 April 2008.

(c) Whereas it was previously thought that Maybank had endorsed BL4 to KOSB in early June 2008 (either as Felda's collecting agent or as pledgee in its own right), it is now known that Maybank in fact endorsed BL4 to KOSB on or before 2 April 2008. It would therefore appear that Maybank endorsed BL4 in its capacity as Felda's collecting agent, although why it should have done that remains a mystery to me.

(d) Most importantly, whereas it was previously thought that BL4 had always been in circulation in the banking system from 23 March to early June 2008, it is now known that it had in fact come out of circulation on 4 April 2008 when it was received from Maybank by KOSB, and that KOSB then seems to have retained BL4 up to early June 2008. I do not accept that BL4 ever left KOSB's possession between 4 April and early June 2008: in particular, I do not accept that BL4 ever found its way back to Universal during this period (see [109] below).

(e) Whereas it was previously thought that KOSB had endorsed BL4 in blank in early June 2008, it is now clear that the endorsement took place between 4 April and early June 2008. I remain of the view (see [86] above), however, that KOSB must have negotiated the June L/C to Maybank in early June 2008, and I am inclined to think that KOSB's blank endorsement of BL4 was part of that process and therefore probably took place in early June 2008 (see [101] below), for I can think of no reason why KOSB would endorse BL4 in blank before that date, since there is no evidence that any other negotiation or transfer of BL4 was in contemplation (save for KOSB's promise under its LOI to return BL4 to Universal, but KOSB would not have needed to endorse BL4 for that purpose).

(2) Unanswered questions explained

93 In addition, as a result of the new evidence, I am now in a position to make some sense of what must have happened in the critical months of March, April and June 2008 to have led to the

present proceedings.

94 As I still have not been furnished evidence as to what happened to the Zhongguang Contract after Zhongguang failed to open a letter of credit seven days before shipment as required, I find that the Zhongguang Contract continued to subsist and that, for reasons best known to it, KOSB allowed the BL4 Cargo to be shipped on or around 23 March 2008, despite Zhongguang not having opened the letter of credit.

95 Sometime around 23 March 2008, the BL4 Cargo was quantified at 2,999.901 mt, and the 16 January 2008 invoice (which reflected that quantity) must then have been issued and backdated (see [22] above). Sophia Wang's oral testimony was to the effect that the 16 January 2008 invoice had been prepared by Dongma for customs purposes only, [note: 91] though she also testified that that another invoice would be issued by Dongma's "head office" (*ie*, KOSB) for the purposes of opening a letter of credit, though the contents of both invoices would be the same. [note: 92] I am not entirely convinced that the 16 January 2008 invoice was only for customs purposes, and in the absence of further evidence to the contrary, I am prepared to infer that the payment term in 16 January 2008 invoice was different from that found in the Zhongguang Contract because by the time the former was issued, Zhongguang had not opened a letter of credit as required and the BL4 Cargo had already been shipped, and that a plausible and reasonable explanation for the difference in payment terms is that KOSB and Zhongguang must have agreed to vary the mode of payment in respect of the BL4 Cargo to "100% cash against documents via Buyer's Nominated Banks" (which also perhaps explains why KOSB did not terminate the Zhongguang Contract and allowed the BL4 Cargo to be shipped and delivered on 90-day credit terms, as K H Chong's evidence in the fourth tranche suggested [note: 93]). As there is no evidence, however, that any of the other terms of the Zhongguang Contract had been varied, KOSB was still obliged to give Zhongguang 90 days' worth of credit, and when the Cargo (including the BL4 Cargo) was shipped in March 2008 on board the *Dolphina* KOSB was therefore probably still expecting to be paid for the BL4 Cargo, though in the absence of further evidence I am unable to say what payment date was in contemplation.

96 As KOSB had yet to pay Felda for the Cargo by the Discharge Date, it was not then in possession of the bills of lading, hence the recourse by both Dongma and KOSB to their respective LOIs in order that Universal would discharge the Cargo. After KOSB paid Felda on 4 April 2008, however, it came into possession of BL4, and thereafter retained it while, I infer, awaiting payment from Zhongguang in respect of the BL4 Cargo. In the meantime, to the knowledge and probably with the consent of KOSB, the Cargo (including the BL4 Cargo) was steadily being released from Huanan's shore tanks to the various end-buyers.

97 The e-mail exchange between Sophia Wang and T W Chong revealed that Shanke had apparently initiated the creation of the Good Copy, in order that BOC would approve Zhongguang's application for the June L/C, presumably to pay KOSB in respect of the Zhongguang Contract and the BL4 Cargo. On this basis, I am prepared to infer that around early June 2008, it must have transpired that cash payment by Zhongguang to KOSB was not going to be possible, and that a decision was then made that Zhongguang would open a letter of credit with BOC (*ie*, the June L/C). This appears to have been a reversion to the mode of payment prescribed under the Zhongguang Contract (albeit highly delayed), but whether that was truly what had been agreed between KOSB and Zhongguang is somewhat immaterial: in my view the true motivation for opening the June L/C was to protect KOSB's commercial interests by transferring its loss onto an unsuspecting third party financial institution like BOC.

98 I find that there was quite clearly bad faith and fraud involved in the opening of the June L/C,

on the basis of what I consider to be the following overwhelming evidence:

(a) In order to open the June L/C, Zhongguang had to provide BOC with a copy of the Zhongguang Contract. [note: 94] This was obviously a problem, since it is most unlikely that BOC would have approved the June L/C had it known that it was financing a transaction that had been completed months earlier, and that it would in all probability have no recourse to the BL4 Cargo in the event that it was not reimbursed by Zhongguang. Consequently, the Zhongguang Contract had to be doctored.

(b) The e-mail exchange between Sophia Wang and T W Chong indicates that the Good Copy was not the result of some administrative oversight or innocent error (not that I considered such a thing likely in any event), but a premeditated and deliberate effort orchestrated with the singular purpose of inducing BOC's approval of the opening of the June L/C.

(c) The e-mail exchange also indicates quite strongly that there was complicity between Zhongguang and KOSB in the creation of the Good Copy.

(d) Even apart from the e-mail exchange, however, are the facts that the Good Copy was signed by KOSB's General Manager, Christopher Chai (and not some minor functionary), and impressed with Zhongguang's company seal (which, I am prepared to infer, was done by Zhongguang's legal representative, who would typically be the keeper of the company seal). The evidence in fact goes considerably further than this, because there is a copy of the Good Copy with *only* Christopher Chai's signature, [note: 95] demonstrating that the Good Copy must have been prepared and signed by KOSB before being passed to Zhongguang for its execution.

I conclude and I find as a fact that the Good Copy was executed by KOSB and Zhongguang, on the advice Xu Feng Zheng of Shanke, for the express purpose of duping BOC into approving the opening of the June L/C. The Good Copy was undeniably a sham document, as that term is classically understood, because it was intended by KOSB and Zhongguang to give to third parties (in particular, BOC) "the appearance of creating between [them] legal rights and obligations different from the actual legal rights and obligations… which [they] intend to create" (*Snook v London & West Riding Investments Limited* [1967] 2 QB 786 at 802 (per Diplock LJ)); as between them KOSB and Zhongguang continued to operate on the basis of the Zhongguang Contract.

99 At one point in his submissions that BOC did not acquire any rights of suit against Universal in relation to BL4, Mr Gurbani faintly suggested that BOC must have known that the BL4 Cargo had been shipped on or around 23 March 2008 and that it was not going to be shipped in June 2008 (as provided for in the Good Copy), because, *inter alia*, BOC allowed, in Mr Gurbani's words, "an extraordinarily long time of 100 days for presentation of [the relevant documents under the June L/C] from date of shipment", [note: 96] when the normal presentation period provided for in the UCP 600 is only 21 days. Although he did not say so in terms, Mr Gurbani's argument implies that BOC was somehow aware of the existence of the Zhongguang Contact, and therefore that the shipment date provided for in the Good Copy was not intended to be acted upon. This argument, based as it is on unarticulated and speculative inferences, is so completely against the weight of the clear and direct evidence given by BOC's witnesses that I reject it entirely.

100 I therefore find that, when the June L/C was being opened, BOC was ignorant of the fact that the BL4 Cargo had already been shipped in March 2008, and similarly that, at all relevant times, BOC never knew of or saw the Zhongguang Contract providing for such shipment.

101 Although BOC was thus successfully fooled into approving the June L/C, I remain of the view that, after paying Felda for the Cargo, KOSB must have been unable or unwilling to wait an additional 90 days for payment under the June L/C, thereby deciding to negotiate the June L/C and the relevant documents to Maybank. I consider that the Documentary Collection and/or Negotiation Form dated 9 June 2008 provides strong corroborative evidence of this negotiation, because KOSB instructed Maybank that, upon "negotiation/discount of this bill [*ie*, the June B/E]", the proceeds therefrom were to be credited to KOSB's account with Maybank, and the account was accordingly credited for US$3,414,487.32 the very next day on 10 June 2008. In order for the June L/C to be successfully negotiated to Maybank, however, all the relevant documents had to be in order, *ie*, KOSB had to provide Maybank with a "signed commercial invoice" indicating the serial number of the June L/C and a full set of BL4, made out to order and "blank endorsed" (see [43] above). The 16 January 2008 invoice would not do, since it indicated a different payment term of "100% cash against documents via Buyer's Nominated Banks", and I therefore find that the 24 March 2008 invoice (which, incidentally, was signed by Christopher Chai), had to have been created and backdated around this time. In addition, I find that BL4 must have been endorsed in blank by KOSB around this time, in early June 2008.

102 The June L/C was thereby successfully negotiated to Maybank, so that when Maybank presented the June B/E drawn under the June L/C and relevant documents to BOC on 9 June 2008, it was doing so in its own right and not on behalf of KOSB (see [86] above).

103 What happened thereafter has already been traversed, but the new evidence did throw up one further significant development: that KOSB's account had been credited again in September 2008 for US$3,414,362.32, apparently as payment of the June B/E drawn under the June L/C (as denoted by Maybank's internal reference number "9916WAM1907793" and KOSB's internal reference number "SS/RPL1066/08" (see [23] and [48] above)). This second payment has never been satisfactorily explained, [note: 97] but I surmise that what must have happened is that the June L/C was negotiated to Maybank on a full recourse basis, [note: 98] and that, after BOC informed Maybank on 17 June 2008 of its suspicions (see [58] above), Maybank must have exercised its right of recourse against KOSB to unwind its payment of US$3,414,487.32 to KOSB on 10 June 2008, and that the crediting of KOSB's account for US$3,414,362.32 in September 2008 represented payment by BOC under the June B/E (see [60] above).

Why did the new evidence come to light so late?

104 I cannot over-emphasise the significance of the thirty new documents, as well as the effect they had on the case, and I must express my extreme dissatisfaction that this evidence from KOSB appeared so late in the day. Indeed, I cannot help wondering whether something sinister lurks behind Universal's selective and delayed disclosure, especially when it is borne in mind that Steve Kwan had, in resisting BOC's application for summary judgment, sworn an affidavit deposing that KOSB had been in possession of BL4 on or about 28 March 2008 (which, if true, would have provided Universal with a complete defence to BOC's action for misdelivery), [note: 99] a claim that was now completely contradicted by Universal's new evidence which revealed that KOSB had come into possession of BL4 only after the Discharge Date of 1 April 2008. The wealth of information contained in the thirty new documents also contrasts sharply with the paucity of Universal's evidence during the first tranche of the proceedings, on which I have already commented (see [65] above).

105 It was never satisfactorily explained to me why the thirty new documents were not disclosed earlier, as they were plainly relevant to the arguments canvassed by Universal in the first tranche. Mr Gurbani claims that the new documents were not then relevant since Universal merely had to meet

BOC's pleaded case, and their disclosure was only necessitated to correct my misapprehension of the true state of affairs during the second tranche. I disagree, for it was obvious even at the first tranche of the proceedings that much would turn on when the various endorsements on BL4 had been made (especially since Universal itself was arguing that it had correctly delivered the BL4 Cargo to the person entitled to it), and that having sight of these new documents from KOSB would have assisted me in making important findings of fact in relation thereto. In addition, in my view there is no reason why this evidence could not have emerged soon after I gave directions on 6 June 2011 for further submissions, rather than on 18 July 2011, *after* Ms Ang had already returned with submissions on the issue of subrogation pursuant to my directions, with the consequence that Ms Ang's efforts were rendered entirely futile, since (as I explain at [184] below) the new documents completely destroyed any possibility of BOC being subrogated to the rights of Felda or Maybank.

BOC amends its pleadings

106 In any event, on 15 August 2011, Ms Ang made an oral application to amend BOC's pleadings to include a claim in civil conspiracy, reflecting BOC's reaction to the new evidence which had come to light and which necessitated a radical shift in BOC's case. After numerous adjournments and delays, I finally heard the application in late September 2011, where Ms Ang asked for some latitude on the basis that the new evidence revealed BOC to have been a victim of a fraud to which Universal had been privy, and that Universal ought not in fairness to be allowed to get away with what it had done with impunity. Unsurprisingly, Mr Gurbani vigorously resisted Ms Ang's application, contending first that, as a jurisdictional matter, a claim in conspiracy did not fall within s 3(1)(*g*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) (the "HCAJA"); and second, that BOC's application to amend its pleadings came far too long after the trial to be permitted.

107 I did not consider there to be any real force in the jurisdictional point, for I could not see why the proposed amendment introducing the tort of conspiracy would offend s 3(1)(*g*) of the HCAJA. As for the lateness of BOC's application, it was trite that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise (*Wright Norman and another v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 at [6]). If these requirements were satisfied, an amendment to the pleadings might even be allowed after the conclusion of the trial (see *Tang Chay Seng v Tung Yang Wee Arthur* [2010] 4 SLR 1020 ("*Tang Chay Seng*")). It is of course true that in *Tang Chay Seng* (perhaps the closest case to the present), Tan Lee Meng J differentiated between "an amendment that merely clarifies an issue in dispute and one that raises totally different issues at too late a stage" (citing *Ketteman and others v Hansel Properties Ltd and others* [1987] 1 AC 189 at 220 (per Lord Griffiths)), and that no new evidence was required in relation to the proposed amendment, whereas in the present case it could arguably be said that the proposed amendment raised a totally different issue and clearly required (and indeed had been precipitated by) new evidence. Nonetheless, a number of considerations impelled me to allow BOC's application:

(a) Central to Mr Gurbani's objection was the point that there had already been sufficient material before the court for BOC to have pleaded a claim in conspiracy. Mr Gurbani submitted that the common directorships of Alvin Kwan and Steve Kwan had been raised during the first tranche of the proceedings, with the questions asked by Ms Ang (in Mr Gurbani's words) "veering to conspiracy", and that BOC was now "bringing things which long existed at the trial". In short, according to Mr Gurbani, it had always been BOC's case that KOSB and Universal's directors were working in concert. That being so, it seemed to me that Mr Gurbani himself tacitly accepted that conspiracy was an issue in dispute, which BOC's proposed amendment would clarify, rather than a completely different issue as such.

(b) Given that it was Universal which had so belatedly introduced the new evidence in the first place, I was of the view that it lay ill in Universal's mouth to now allege that the lateness of BOC's proposed amendment was fatal because it required the investigation of new evidence to determine (especially when most of the evidence to be investigated was that adduced by Universal). For the same reasons, I would not have countenanced any submission that the proposed amendment caused prejudice to Universal, and to his credit Mr Gurbani did not press the point.

(c) This was an exceptional case in which the discovery of evidence given by Universal has been selective, to say the least, and because of the highly unusual route by which this evidence was eventually disclosed.

Fourth tranche

108 Some time then had to be set aside for Universal to call witnesses to respond to BOC's conspiracy allegation, and in this regard I heard K H Chong's testimony over the course of two days.

109 Like Alvin Kwan, K H Chong turned out to be an exceedingly uninformed witness, claiming that his only involvement as a director of Universal was to lend his name to its incorporation, and that he had otherwise no knowledge of how Universal was run, its business, its employees, or indeed almost anything to do with the matters with which this action is concerned. Nonetheless, K H Chong's evidence confirmed what I already suspected (*viz*, that BL4 was retained by KOSB from 4 April to early June 2008 and not returned to Universal as required under the terms of KOSB's LOI), for he testified, *inter alia*, that while he did not know what became of BL4 after KOSB received it from Maybank on 4 April 2008, he considered it unlikely that BL4 was returned to Universal, and that it was more likely that BL4 was kept by KOSB as it had not been paid for the BL4 Cargo.

110 Finally, both parties' closing submissions on the conspiracy claim were addressed to me, and I was once again obliged to reserve my judgment in order to take into account all the new developments, evidence and submissions, and the impact they had on the case.

Issues

111 Having thus clarified the facts, and the procedural history of this case, it is now possible to crystallise the issues that I have to decide:

(a) BOC's claim for breach of contract:

(i) The proper law of BL4

(ii) Whether Universal was in breach of contract by delivering the BL4 Cargo without production of BL4

(iii) Whether BOC acquired any rights of suit under BL4

(b) BOC's claim for civil conspiracy

(i) Lawful means conspiracy

(ii) Unlawful means conspiracy

BOC's Claim for Breach of Contract

112 BOC has not abandoned its original claim for breach of the contract of carriage by Universal for misdelivery without production of BL4, and a preliminary question which arises is what the proper law of the contract is. I in fact decided this issue quite early in the first tranche (see [62] above), and I now give my reasons for doing so.

The proper law of BL4

113 Ms Ang's position was that the contract of carriage, contained in or evidenced by BL4, was governed by English law, while Mr Gurbani submitted that the contract was governed by Malaysian law. Both parties tendered expert evidence to support their respective positions, but in determining the proper law of BL4, I had to apply Singapore's own conflicts of law rules, and the opinions of expert witnesses would be, and indeed were, heavily discounted (see generally the observations of Aikens J in *Primetrade AG v Ythan Ltd (The "Ythan")* [2006] 1 Lloyd's Rep 457 ("*The Ythan*")) at 462).

114 Singapore adopts the three-stage test as explained in *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285 at [82], and affirmed by the Court of Appeal in *Pacific Recreation* at [36]:

> The first stage is to examine the contract itself to determine whether it states expressly what the governing law should be. In the absence of an express provision one moves to the second stage which is to see whether the intention of the parties as to the governing law can be inferred from the circumstances. If this cannot be done, the third stage is to determine with which system of law the contract has its most close and real connection.

Express choice of law in BL4

115 It was not in dispute that there was no explicit reference in BL4 to the governing law, however, BL4 expressly incorporated the terms of the February Charterparty as follows: [note: 100]

> This shipment is carried under and pursuant to the terms of the Charter dated 19 February 2008 between [Universal] as owner and [KOSB] as [charterer], and all conditions, liberties and exceptions whatsoever of the said Charter apply to and govern the rights of parties concerned in this shipment.

Clause 32 of the February Charterparty expressly stated: [note: 101]

> THIS CP TO BE GOVERNED BY ENGLISH LAW.

116 The question, therefore, was whether the words of incorporation in BL4 were apt to incorporate cl 32 of the February Charterparty. If they were, it would amount to an express choice of law (see R Aikens, R Lord and M Bools, *Bills of Lading* (Informa, 2006) at para 14.10).

(1) BOC's arguments

117 Ms Ang argued that, on the authority of *Pacific Molasses Co and United Molasses Trading Co Ltd v Entre Rios Compania Naviera SA (The "San Nicholas")* [1976] 1 Lloyd's Rep 8 ("*The San Nicholas*"), it was settled that where there were general words incorporating charterparty terms into a bill of lading, they would be sufficient to incorporate an express choice of law clause in the charterparty.

118 Ms Ang's argument rested on the premise that the word "conditions" in BL4 was to be given a wide meaning, so as to include all terms or provisions unless they were of a particular type (such as an arbitration clause) requiring specific words of incorporation, and that a choice of law clause (like cl 32 of the February Charterparty) was on this approach to be considered a "condition".

(2) Universal's arguments

119 Mr Gurbani argued that there was no express choice of law in BL4 by way of incorporation of cl 32 of the February Charterparty because cl 32 was not a "condition" (which, in this branch of the law, Mr Gurbani argued, meant only those matters which have to be dealt with by both the shipowner and the consignee in relation to the carriage, discharge and delivery of the cargo), nor was it a liberty or exception clause. Rather, relying on *Siboti K/S v B P France SA* [2003] 2 Lloyd's Rep 364 ("*The Siboti*"), it was an ancillary provision, much like an arbitration or jurisdiction clause, which could not be incorporated into BL4 by general words of incorporation such as "all terms whatsoever", but required specific or express wording.

120 Mr Gurbani further submitted that, even if such general words could *prima facie* incorporate cl 32, such incorporation would be defeated due to "linguistic inapplicability" (*ie*, the clause to be incorporated from the charterparty does not fit the bill of lading) because cl 32 specifically referred only to the "CP" (*ie*, the February Charterparty) and was therefore not intended to apply to BL4.

(3) My decision

121 I was not persuaded by Mr Gurbani's submissions. First of all, I agreed with Ms Ang that Mr Gurbani's reliance on *The Siboti* was misplaced.

122 The relevant clause in the charterparty in that case was cl 49, which provided:

> 49. GOVERNING LAW/DISPUTE RESOLUTION
>
> Notwithstanding anything to the contrary in this Charter Party…, the parties hereby agree as follows:
>
> (a) This Charter Party shall be construed and interpreted in accordance with, and governed by, the laws of England…
>
> (b) Subject to subclause (c) below, any dispute of whatsoever nature arising under this Charter Party shall be determined by the English [Court]… and the parties hereby expressly submit to the exclusive jurisdiction of the English… Courts…
>
> (c) Notwithstanding the foregoing… either party may… elect to have any such dispute referred (and exclusively determined by)… arbitration in London…
>
> (d) …
>
> (e) All bills of lading under this Charter Party shall incorporate this exclusive dispute resolution clause…

As can be seen, cl 49(a) was the choice of law clause and cl 49(b) was the exclusive jurisdiction clause, which was the principal issue in *The Siboti*. Ms Ang was quite right that cl 49(a) was never in issue, because Gross J in *The Siboti* was considering cl 49(b) and not cl 49(a). That this was so could be seen from [48] of *The Siboti*, where Gross J held that cll 49(b) and (e) were provisions ancillary to

the subject-matter of the bill of lading: in contrast, there was no such ruling on cl 49(a).

123 Second, not only was *The Siboti* not an authority for the proposition that a choice of law clause is an ancillary clause, there was, as Ms Ang pointed out, clear authority that a choice of law clause could be incorporated by general words of incorporation. *Bills of Lading* at para 14.10 says so in terms, and the learned authors refer to *The San Nicholas* for that proposition.

124 In *The San Nicholas*, the incorporation clause in the bill of lading read:

> This shipment is carried under and pursuant to the terms of the Charter dated [blank] at [blank] between [blank] and [blank] as Charterer, and all the terms whatsoever of the said Charter except for the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.

It was argued that the clause was meaningless, as no charterparty (let alone the head charter, which was what was sought to be incorporated) had been identified. The English Court of Appeal rejected this argument, and held that the head charter was the applicable charterparty. The question then arose as to whether an express choice of law clause in the head charter, providing that "[t]his Contract shall be governed by the laws of England", was incorporated into the bill of lading.

125 Lord Denning MR held that it was, and (at 12) his Lordship drew a clear distinction between an arbitration clause in the charterparty, which would not be incorporated into the bill of lading in the absence of specific words, and a "clause which defines the proper law of the contract", which would (citing *The Njegos* [1936] 1 P 90).

126 In *The Njegos*, cargo was damaged by fire on board the vessel, and the cargo owners alleged that the ship was unseaworthy. A preliminary point arose as to the proper law of the bills of lading, which the cargo owners argued was English law, while the shipowner submitted was Yugoslavian law, the law of the flag. It was common ground, however, that the proper law of the charterparty (which was in the Centrocon form) was English law (because the charterparty provided for arbitration in London), and that the bills of lading incorporated "all the terms, conditions and exceptions" of the charterparty, "including the negligence clause". It was therefore not disputed that one of the clauses of the charterparty that was incorporated into the bills of lading was cl 29, which provided that the ship:

> … shall not be liable for loss or damage occasioned by… perils of the sea… fire from any cause occurring… or any latent defects in… appurtenances… even when occasioned by the negligence, default or error of judgment of the… master, mariners or other servants of the shipowners…

What was in dispute was whether cl 29 of the charterparty was to be incorporated into the bills of lading entirely isolated from its context and with no indication of the proper law governing the contract from which it was taken; or whether it was to be incorporated as an extract of a contract to which English law was known to be applicable.

127 Sir Boyd Merriman rightly favoured the latter approach, for his Lordship considered it absurd to ignore the proper law of the charterparty when a term such as the exceptions clause, which was directly material to the shipment, carriage and delivery of the cargo (and therefore a "condition", as Mr Gurbani would have me understand the term), was sought to be incorporated into the bill of lading. Sir Boyd stated (at 104):

> I do not myself profess to understand how anyone contracting on the basis that the liabilities of

> the shipowner in connection with the receipt, carriage and delivery of the cargo are subject to the exceptions contained in a separate document, can know the terms on which he is contracting, unless and until he informs himself as to the system of law by which those exceptions are governed.

On this basis, in the absence of any evidence to the contrary, his Lordship considered that, as a matter of business efficacy, the parties were to be presumed to have intended that the proper law of the bills of lading incorporating the relevant terms of the charterparty was to be the same as that of the charterparty itself, *viz*, English law.

128 The incorporation clause in BL4, with its reference to "all conditions, liberties and exceptions whatsoever of [the February Charterparty]", was wide enough to incorporate all provisions of the February Charterparty which are directly germane and material to the shipment, carriage and delivery of the BL4 Cargo (*ie*, all "conditions"). By virtue of cl 32 of the February Charterparty, those provisions would be governed by English law. I agreed with Sir Boyd Merriman that it would not be sensible to incorporate those provisions into BL4 but ignore the fact that they were intended (in their original setting in the February Charterparty) to be governed by English law. Indeed, I was prepared to go further and conclude that cl 32 was itself a "condition", for it provided a system of law by which the other conditions (*ie*, provisions in respect of the shipment, carriage and delivery of the BL4 Cargo) were to be construed for their meaning, scope and effect. That BL4 and the February Charterparty related to the same voyage by the same carrier also meant that it made good commercial sense for its rights and obligations as carrier against the original and any later holder of the bill of lading to be, as far as possible, the same as its rights and obligations against the charterer. Consequently, as in *The Njegos*, I held that the only sensible inference to be drawn from the terms of the February Charterparty and BL4, in the circumstances of this case, was that the parties intended to choose English law as the law governing both contracts.

129 Third, I did not accept that the incorporation of cl 32 of the February Charterparty was defeated because it was "linguistically inapplicable" to BL4, as Mr Gurbani argued. This idea finds its expression in a statement by Lord Robson in *T W Thomas & Co, Limited v Portsea Steamship Company, Limited* [1912] 1 AC 1 ("*Thomas v Portsea*") at 10, that:

> … the terms of the charterparty when incorporated or written into the bill of lading shall not be insensible or inapplicable to the document in which they are inserted…

Thomas v Portsea, however, was concerned with the incorporation of an arbitration clause (which, as *The Siboti* and *The San Nicholas* demonstrate, cannot normally be effected by general words of incorporation) and was therefore quite a different case from the present.

130 A similar sentiment was expressed by Lord Diplock in *Miramar Maritime Corporation v Holborn Oil Trading Ltd* [1984] 1 AC 676 ("*The Miramar*") at 687 to 688:

> My Lords, in 22 of the 26 clauses in [the charterparty] *there are express references to contractual rights or obligations of "the Charterer" under that designation*. I can see no business reason for verbal manipulation of that designation in any of those clauses so as to substitute for the words "the Charterer", or to include within that expression, "the consignee" or "holder of a bill of lading"…
>
> …
>
> … this House should take this opportunity of stating unequivocally that, where in a bill of lading

there is included a clause which purports to incorporate the terms of a specified charter-party, there is not any rule of construction that clauses in that charter-party which are directly germane to the shipment, carriage or delivery of goods *and impose obligations upon the "charterer" under that designation*, are presumed to be incorporated in the bill of lading with the substitution of… or inclusion in… the designation "charterer", the designation "consignee of the cargo" or "bill of lading holder".

[emphasis added]

The italicised portions of the quotation indicate quite clearly why *The Miramar* had no application to the present situation: the House of Lords refused to "verbally manipulate" the term "charterer" so as to substitute or include the term "bill of lading holder" because to do so would result in a change in pre-existing and agreed contractual liabilities, by transferring the obligation to pay demurrage from the charterer to the consignee when the obligation to pay demurrage was, on the facts of *The Miramar*, the charterer's alone. Incorporating cl 32 of the February Charterparty into BL4, however, would result in no such alteration of the parties' pre-existing contractual obligations; it simply enabled those obligations to be understood and given effect to.

131 I therefore decided that cl 32 of the February Charterparty was incorporated into BL4 with some manipulation of the term "CP" in cl 32 by adding the words "or bill of lading" (rather than replacing the term "CP" with "bill of lading", as suggested by Ms Ang), in order for it to fit BL4 exactly (see to similar effect *The Annefield* [1971] 1 P 168 at 184 to 185 (per Lord Denning MR)). I did not regard this result as being repugnant to or inconsistent with the other terms in BL4: for instance, the lien clause printed on the front page of BL4 similarly states that "[t]he Owners shall have an absolute lien on the cargo for all… monies due *under the above mentioned Charter or under this Bill of Lading*" [emphasis added].

132 For these reasons, I concluded that the general words of incorporation in BL4 were apt to incorporate cl 32 of the February Charterparty into BL4, which incorporation amounted to an express choice of applicable law, and that the proper law of BL4 was English law.

Inferred choice of law and real and close connection

133 Given my conclusion above, it was not necessary to explore the other limbs of the three-stage test set out at [114] above.

Whether Universal was in breach of contract by delivering the BL4 Cargo without production of BL4

134 The next question, therefore, is whether Universal was, as of the Discharge Date, in breach of the contract of carriage contained in or evidenced by BL4 by delivering the BL4 Cargo without requiring the production of the original set of BL4.

135 Ms Ang's argument (relying on my own decision in *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties)* [2003] 3 SLR(R) 611 ("*BNP Paribas*") at [26]) was simple and straightforward: Universal was contractually obliged not to deliver the BL4 Cargo otherwise than against presentation of BL4.

136 Strictly speaking, Mr Gurbani did not join issue with Ms Ang on the question of whether Universal was in breach of contract. Mr Gurbani's arguments were instead mainly directed towards the issue, considered in the subsequent section of this judgment, of whether BOC had any right to sue in

respect thereof. Arguably the issue of breach may therefore be said to be common ground. However, the effect of cl 19 of the February Charterparty, which authorised Universal to discharge the BL4 Cargo against KOSB's LOI, was not adequately addressed to me, and the question which I therefore have to consider is whether Universal was in breach of contract in delivering the BL4 Cargo without requiring the production of BL4, taking into account cl 19 of the February Charterparty.

The presentation rule

137 The starting point, in my opinion, has to be the fact that, like most bills of lading, the standard provision on the front page of BL4 required delivery of the BL4 Cargo to be effected upon presentation of BL4: [note: 102]

> In Witness whereof, the master has signed 3 (THREE) ORIGINALS Bills of Lading of this tenor and date, one of which being accomplished the others will be void.

138 Such a clause, as I observed in *BNP Paribas* (at [26]):

> … obliges the [shipowner] to deliver the cargo to the holder of the bill of lading. Clarke J in *The Sormovskiy 2068* [1994] 2 Lloyd's Rep 266 considered a similar clause and said at 272:
>
> > [S]ubject to the terms of the particular contract and save in exceptional circumstances a shipowner must not deliver the goods otherwise than against presentation of an original bill of lading. That seems to me to be implicit in the express provision… that any one of the bills of lading being accomplished the others to stand void. In my judgment it is implicit in that provision that, save perhaps in exceptional circumstances, one would expect one of the bills of lading to be "accomplished" by being presented to the master or shipowner.

139 "Accomplished" or "accomplishment", in this context, means completing the performance of the contract of carriage by delivery of the cargo against the surrender of one of the original bills of lading (*Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591 at 599). This proposition was also recognised by Mance LJ in *Motis Exports Ltd v Dampskibsselskabet Af 1912 Aktieselskabet* [2000] 1 Lloyd's Rep 211 ("*Motis Exports*") at 217: "[t]he "accomplishment" of one of the original bills whereupon any other(s) stand void contemplates *delivery against its presentation*" [emphasis added].

140 According to Neill LJ in *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The "Houda")* [1994] 2 Lloyd's Rep 541 ("*The Houda*") at 550, the presentation rule rests on:

> … the general principle that once a bill of lading has been issued only a holder of the bill can demand delivery of the goods at the port of discharge. It is because of the existence of this principle that a bill of lading can be used as a document of title so that the transfer of the document transfers also the right to demand the cargo from the ship at discharge.

141 If the shipowner does not comply with the presentation rule, he may be liable for conversion (*Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 1 AC 576) and breach of contract (*The Houda*). As Leggatt LJ said in the latter case (at 553):

> Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. *Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession*. [emphasis added]

142 According to Clarke J in Sa Sucre Export v Northern River Shipping Ltd (The "Sormovskiy 3068")

[1994] 2 Lloyd's Rep 266 ("The Sormovskiy 3068") at 274:

> It makes commercial sense to have a simple rule that in the absence of an express term of the contract the master must only deliver the cargo to the holder of the bill of lading who presents it to him. In that way both the shipowners and the persons in truth entitled to possession of the cargo are protected by the terms of the contract.

143 In these circumstances, the important question is whether cl 19 of the February Charterparty amounts to an express term of the contract varying or abrogating the presentation rule.

Clause 19 of the February Charterparty

144 KOSB's LOI of 27 March 2008 was essentially a request by KOSB to Universal that the Cargo (including the BL4 Cargo) be delivered to Dongma without production of the original bills of lading (including BL4), and it will be recalled (see [33] above) that by cl 4 it was agreed that:

> If the place at which we [KOSB] have asked you [Universal] to make delivery is a bulk liquid… terminal or facility, … then delivery to such terminal… shall be deemed to be delivery to the party to whom we have requested you to make such delivery [*ie*, Dongma].

145 This course of action appears to have been expressly authorised by cl 19 of the February Charterparty, which read:

> IN THE ABSENCE OF ORIGINAL BL/S AT DISCHARGE PORT, OWNER TO DISCHARGE AND RELEASE ENTIRE CARGO TO RECEIVERS AGAINST PRESENTATION OF CHRTR'S LOI (FORMAT TO BE IN ACCORDANCE WITH OWNER'S PNI CLUB WORDING BUT VALUE OF INDEMNITY TO BE 100PCT CIF VALUE) WITHOUT A FIRST CLASS BANK GUARANTEE OR RECEIVER'S LOI (FORMAT TO BE IN ACCORDANCE WITH OWNER'S PNI CLUB WORDING BUT VALUE OF INDEMNITY TO BE 100PCT CIF VALUE) WITH A FIRST CLASS BANK GUARANTEE ACCEPTABLE TO OWNER.OWNERS TO ENSURE AND ALL CERTIFICATE REQUIRED BY CHINESE PORT AUTHORITIES ARE OBTAINED BEFORE TENDERING NOTICE OF READINESS AT DISCHPORT(S).

146 I have no doubt that cl 19 of the February Charterparty was incorporated into BL4, as it was a term that was germane to the discharge of the Cargo (see [128] above). However, it has consistently been held that the true effect of such clauses is not to *oblige* the shipowner to discharge the cargo without production of the bill of lading, but to *permit* the shipowner to do so if necessary, and to afford the shipowner the benefit of an indemnity from the charterer in case liability should befall the shipowner as a result.

147 This was very clearly explained by the English Court of Appeal in *The Houda*, where cl 13 (as amended by cl 50) of the charterparty in that case provided:

> … The master… shall be under the orders and direction of Charterers as regards employment of the vessel…
>
> Charterers hereby indemnify Owners against all consequences or liabilities that may arise from … (… delivery of cargo without presentation of Bills of Lading…) … Letter of Indemnity to Owners' P & I Club wording to be incorporated in this Charter-Party.

One of the issues for decision was whether the charterers could lawfully require the owners to discharge the cargo without production of the bills of lading, and one of the charterers' arguments in

support of this contention was that that was the effect of cll 13 and 50.

148 Neill LJ rejected this argument, holding (at 551):

> It is by no means uncommon in the oil cargo trade for the cargo to be discharged before the bill of lading is received… there may be a number of reasons for this practice, but it does not seem to me that the existence of the practice or the right to a letter of indemnity can impose on the owners a contractual obligation which does not otherwise exist. Clauses 13 and 50 do not in my view impose any express obligation on the charterers to discharge a cargo in the absence of the bill of lading. They merely provide for a letter of indemnity if such discharge takes place…

Similarly, after explaining the consequences of non-compliance with the presentation rule (see [141] above), Leggatt LJ held (at 553):

> In practice, if the bill of lading is not available, delivery is effected against an indemnity… Clause 50 provides expressly that, if the master complies with charterer's orders to deliver goods without presentation of the bills of lading, the owners are indemnified by the charterers. **In default of production of the bill of lading an indemnity is afforded to the shipowner not on account of the lawfulness of the order to deliver but so as to protect him if he does what he is *not* contractually obliged to do**. [emphasis added in bold]

149 Again, in *The Sormovskiy 3068*, cargo had been delivered without production of the bill of lading, and one of the issues was whether cl 46 of the charterparty, which provided that the defendant shipowners could discharge the cargo against production of a bank guarantee if the original bills of lading were not at the discharge port in time for the vessel's discharge, had been incorporated into the bills of lading and provided the shipowners with an adequate defence to the claims of the plaintiff holders of the bills of lading for breach of contract and conversion.

150 Clarke J (at 274) held:

> In trades where it is difficult or impossible for the bills of lading to arrive at the discharge port in time the problem is met by including a contractual term requiring the master to deliver the cargo against a letter of indemnity or bank guarantee. That is commonplace and indeed there was a provision to that effect here…

After holding that cl 46 of the charterparty was incorporated into the contract contained in or evidenced by the bill of lading, because it was a term which was germane to the discharge of the cargo, Clarke J continued:

> So incorporated it appears to me to give support to the conclusion which I have stated above [*viz*, that the defendants were liable to the plaintiffs because they had delivered the cargo without production of the bill of lading] because it contemplates that *but for the clause the cargo would only be discharged in return for a bill of lading*.
>
> *The purpose of the clause was to ensure that the defendants would discharge the cargo even if the bill of lading was not available for presentation, but on terms that they would be protected by a letter of indemnity. It thus contemplated that they would be liable to the holder of the bill of lading if they delivered otherwise than in return for an original bill of lading.*
>
> [emphasis added]

151 A similar conclusion was reached by Thomas J in *Aegean Sea Traders Corporation v Repsol Petroleo SA and another (The "Aegean Sea")* [1998] 2 Lloyd's Rep 39 ("*The Aegean Sea*") at 61 to 62, where the relevant charterparty clause was very similar to cl 19 of the February Charterparty, for it read (at 57):

> Should Bills of Lading not arrive at discharge port in time then Owners to release the entire cargo without presentation of the original Bills of Lading. Charterers hereby indemnify Owners against all consequences of discharging cargo without presentation of original Bills of Lading…

152 In my opinion, the present case is on all fours with *The Sormovskiy 3068* and *The Aegean Sea*, and a clause such as cl 19 of the February Charterparty does not vary the presentation rule or the consequence of not complying with it: in such circumstances Universal was in breach of contract by discharging the BL4 Cargo against KOSB's LOI.

Whether BOC has title to sue for Universal's breach of contract

153 The critical issue in determining whether Universal is liable to BOC for breach of contract therefore resolves itself into the question of BOC's *locus standi* to sue for Universal's breach.

154 It was for this reason that it had to be decided, as a preliminary issue, what the proper law of the contract was, because English law and Malaysian law provided rather different means of determining BOC's title to sue.

155 Based on my earlier decision that English law is the proper law of the contract (see [132] above), BOC's rights of suit depended on the following provisions of the Carriage of Goods by Sea Act 1992 (c 50) (UK) (the "COGSA 1992"):

> **2 Rights under shipping documents**
>
> (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.
>
> (2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—
>
> (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
>
> (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.
>
> …

5 Interpretation etc.

…

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

…

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

…

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.

Parties' arguments during the first tranche

(1) BOC's arguments

156 Ms Ang argued first that, by reason of ss 2(1) and 5(2)(b) of the COGSA 1992, BOC is the "lawful holder" of BL4 and therefore has title to sue. She regarded that conclusion as almost self-evident on the basis of the following "facts and evidence" that were said to be "not in dispute": [note: 103]

(a) ...

(b) On 6 June 2008… [BOC] issued the [June L/C] in favour of KOSB.

(c) **On 11 June 2008, KOSB via Maybank presented *inter alia* [BL4], which had been endorsed in blank, to [BOC] under the [June L/C]**.

(d) [BL4] and the other documents were in conformity with the [June L/C's] requirements.

(e) [BOC] were therefore obliged to accept and did accept [BL4] and signed on [the June B/E].

(f) [BOC] therefore became liable to pay on the [June B/E] upon maturity and they did pay upon maturity.

…

[emphasis added in bold]

157 Next, Ms Ang contended that, contrary to Mr Gurbani's submissions, BL4 was not "spent" (*ie*, incapable of transferring rights of suit in relation to the contract of carriage) by the time it came into BOC's possession, and that, even if it was, BOC comes within the protection of s 2(2)(a) or (b) of the COGSA 1992. Finally, Ms Ang submitted that BOC did not lose its rights of suit by surrendering BL4 to Zhongguang on 11 June 2008, and even if it did, it was regained or re-acquired when Zhongguang returned BL4 to BOC on 13 June 2008.

(2) Universal's arguments

158 Mr Gurbani first submitted that BOC did not acquire rights of suit under ss 2(1) and 5(2) of the COGSA 1992, because it never became a "lawful holder" of BL4 within the meaning of those provisions. He argued that there was never an intention for BOC to be a "holder", because within hours of receiving BL4 on 11 June 2008, BOC had transmitted BL4 to Zhongguang, demonstrating that it was only intended that BOC should receive BL4 as agent for Zhongguang and not as "holder" in its own right. Mr Gurbani also questioned whether BOC, if it became a "holder" of BL4, did so "in good faith", on the basis that BOC knew, at the time the June L/C was opened, that the BL4 Cargo had been shipped months earlier in March 2008.

159 Next, Mr Gurbani argued that, by the time BOC received possession of BL4, it had been "spent" because the BL4 Cargo had already been delivered to the person who was entitled to it, and therefore BOC could not derive any rights of suit from BL4. To complete his argument, Mr Gurbani also submitted that BOC could not avail itself of s 2(2)(a) or (b) of the COGSA 1992.

The core dispute: was BL4 spent?

160 Eventually, the main issue separating the parties was whether BL4 had become spent after the Discharge Date by reason of the BL4 Cargo being delivered to the person who was entitled to it, with the result that BOC could not derive rights of suit under the COGSA 1992 to sue for Universal's breach of contract.

161 Ms Ang advanced a series of arguments designed, on both procedural and substantive grounds, to undermine Universal's position that BL4 had become spent after the Discharge Date:

(a) Universal failed to plead that the BL4 Cargo had been delivered to any particular person, nor did Universal's pleadings identify the person who was allegedly entitled to the BL4 Cargo.

(b) Universal adopted contradictory positions as to the identity of the person who took delivery of, and was allegedly entitled to, the BL4 Cargo: in Universal's Opening Statement that person was said to be Zhongguang (via Dongma as its warehousing agent) while in its Closing Submissions that person was said to be KOSB (through Dongma as its sales agent).

(c) Universal failed to prove that delivery of the BL4 Cargo had in fact been made to KOSB (assuming that that was indeed Universal's case) since, *inter alia*, Alvin Kwan testified that Universal discharged the BL4 Cargo in accordance with KOSB's instructions and that he did not know who the Cargo was delivered to, [note: 104] no witnesses were called from KOSB, and there was no other evidence in support.

(d) Universal failed to prove that delivery of the BL4 Cargo had in fact been made to Zhongguang (assuming that that was indeed Universal's case) since the evidence was against Universal on this point.

(e) Universal failed to show that the person to whom the BL4 Cargo had been delivered (whether KOSB, Zhongguang, or even Dongma) was entitled to delivery under the terms of BL4 as at the Discharge Date.

In those circumstances, Ms Ang submitted, at the Discharge Date, BL4 was not spent. Therefore, rights of suit in relation thereto could still be transferred via the operation of COGSA 1992, and they were so transferred to BOC when it became the "lawful holder" of BL4 after Felda endorsed BL4 in

blank, Maybank endorsed it to KOSB, KOSB endorsed it in blank, and Maybank presented it to BOC. This argument, as I have said, glossed over a number of problems (the most important being KOSB's endorsement of BL4, which I deal with in further detail below).

162 In addition, I was treated to a great deal of learning by both parties on the somewhat arcane question of whether BL4 would be spent if the BL4 Cargo *had* indeed been delivered to the person who was or would have been entitled to delivery (assuming Mr Gurbani's submissions were accepted in this regard), in circumstances where that person did not tender or produce BL4 (it will be recalled that the Cargo (including the BL4 Cargo) was discharged against KOSB's (and Dongma's) LOIs).

163 While I consider that most if not all of Ms Ang's objections were well taken, and the legal issues involved have certainly been very interesting, unfortunately, all of it has turned out to be entirely academic, simply because the parties had taken for granted the validity of KOSB's purported blank endorsement of BL4 (see for instance the bolded portion of Ms Ang's submission in [156] above), which, as I have said, most likely took place in early June 2008 (see [92(e)] and [101] above).

164 Even during the first tranche of the proceedings I harboured some doubts about the correctness of that view (see [71] above), and I am now entirely satisfied that the evidence shows quite clearly that KOSB's endorsement of BL4 was ineffective and sorely lacking in *bona fides*.

The validity of KOSB's endorsement

(1) Why the matter is relevant

165 The reason the validity of KOSB's endorsement is relevant is because the relevant provisions of the COGSA 1992 (see [155] above) are predicated on there being a "holder" of a bill of lading (in this case BL4), and Ms Ang is relying on the definition of that term in s 5(2)(b) of the COGSA 1992, *viz*, "a person with possession of the bill as a result of the completion, by delivery of the bill, of any *indorsement* of the bill or, in the case of a bearer bill, of any other transfer of the bill" [emphasis added].

166 Although the subsection does not say so in terms, "any indorsement" must surely mean "any *valid* indorsement", and this is borne out by a number of authorities (I will come to the position of a bearer bill after discussing them).

167 In *The Aegean Sea*, the shipowners chartered the vessel to the second defendant, Repsol Oil International Ltd ("ROIL"), for the carriage of cargo to "one or two safe port(s) EUROPEAN MEDITERRANEAN". ROIL directed the vessel to discharge the cargo at La Coruña, but in attempting to berth at La Coruña, the vessel ran aground and exploded, resulting in a loss of the vessel and most of her cargo, as well as large scale environmental pollution and damage to private property. The cargo had been shipped under two bills of lading, one naming Sun Oil Great Britain Ltd ("Sun Oil") as the shipper ("the Sun Oil bill"). The cargo covered by the Sun Oil bill had been sold by Sun Oil to Louis Dreyfus Energy Ltd ("Louis Dreyfus"), which in turn sold it to ROIL, which in turn sold it to the first defendant, Repsol, its holding company. The Sun Oil bill provided for delivery to, or to the order of, Louis Dreyfus, and was endorsed by Sun Oil to Louis Dreyfus. Louis Dreyfus inadvertently endorsed the Sun Oil bill to Repsol instead of ROIL, and when the mistake was discovered, Repsol reconveyed the Sun Oil bill to Louis Dreyfus, which voided the endorsement in favour of Repsol and re-endorsed it to ROIL. On these facts, the shipowners sought to claim against both ROIL and Repsol for the losses they suffered as a result of the destruction of the vessel and cargo, as well as their exposure to third parties as a result of the pollution and property damage.

168 For present purposes, I am only concerned with the shipowners' claim against Repsol, which proceeded on the argument that Repsol was the lawful holder of the Sun Oil bill, under which there was an implied term as to the safety of the port nominated and an implied indemnity. Thomas J disagreed, holding (at 59) that Repsol never became a "holder" of the Sun Oil bill for the purposes of s 5(2)(b) of the COGSA 1992, because there had been no "delivery" to Repsol. While that reasoning is not really germane to the present point, Thomas J went on to deal with an argument that, Louis Dreyfus having endorsed the Sun Oil bill to Repsol, Repsol should have endorsed it back to Louis Dreyfus for the latter to re-endorse to ROIL. Thomas J rejected this argument, holding (at 61):

> In my view, this submission… reinforces the conclusion that Repsol never became the lawful holders. It cannot have been intended by the draftsman of [the COGSA 1992] that a person to whom a bill of lading is endorsed and sent in error has then to act as if he was a person entitled to endorse the bill of lading as a precondition of the person who made the mistake being enabled to rectify his error by re-endorsing and delivering it to the correct party; *the person to whom it was sent was not the lawful holder* and not therefore entitled to endorse it. [emphasis added]

In other words, an endorsement of a bill of lading which is in error is not an effective endorsement, and the person to whom the bill of lading was mistakenly endorsed will not be a "holder" of it for the purposes of s 5(2)(b) of the COGSA 1992.

169 In *Bandung Shipping Pte Ltd v Keppel TatLee Bank Ltd* [2003] 1 SLR(R) 295 ("*Bandung Shipping*"), the appellant shipowners ("Bandung") issued two bills of lading for a shipment of cargo by Shweta International Pte Ltd ("Shweta"). Shweta sold the cargo to Ranchhoddas Purshottam Holdings ("RPH"), endorsing the bills of lading in blank and delivering them to RPH who, in turn, sold the cargo to Lanyard Foods Ltd ("Lanyard"). Thereafter, RPH delivered the two bills of lading to the respondent ("Keppel") for negotiation, without adding any name to Shweta's blank endorsement. Keppel subsequently added the name of "the State Bank of Saurashtra in India" ("State Bank") to Shweta's blank endorsement, and forwarded the bills of lading to State Bank to hold for collection by Lanyard, but Lanyard never paid for the cargo and the two bills were duly returned to Keppel, without any endorsement being made by State Bank either in blank or specially in favour of Keppel TL. In the meantime, the vessel discharged the cargo to Lanyard without production of the bills of lading, and Keppel brought an action against Bandung, claiming that it (Keppel) was the lawful holder or endorsee of the two bills of lading and thus entitled to the cargo.

170 Keppel's claim was struck out by the Court of Appeal, on the basis that, with the insertion of the name of State Bank into the blank endorsement of both bills of lading, and the conveyance of the bills of lading to State Bank, State Bank became the "lawful holder" for the purposes of s 5(2)(*b*) of the Bills of Lading Act (Cap 384, 1994 Rev Ed) (*in pari materia* with s 5(2)(b) of the COGSA 1992), and that, since State Bank did not re-endorse the bills of lading to Keppel, the latter never became a "lawful holder" and therefore enjoyed no rights of suit. For present purposes, the interest in *Bandung Shipping* lies in the Court of Appeal's pronouncement (at [28]) that, "[p]hysical possession of a [bill of lading] does not constitute the holder the lawful holder; *there must be a valid indorsement*" [emphasis added]. Although it is true that there was in fact no endorsement at all in *Bandung Shipping*, I see no good reason why the position should be any different where there is an endorsement, but in circumstances where the validity of that endorsement is impaired.

171 I read these authorities to mean, therefore, that if KOSB's blank endorsement of BL4 was invalid, then Maybank (which, in my view, received BL4 pursuant to KOSB's negotiation to it of the June L/C (see [86] and [92(e)] above)) did not obtain "possession of the bill as a result of the completion… of any indorsement of the bill", and thus never became a "holder" of BL4 within the meaning of s 5(2)(b) of the COGSA 1992, with the result that, when BL4 was presented by Maybank

and accepted by BOC, BOC did not thereby become a "holder" of BL4 either, and therefore obtained no rights of suit under the COGSA 1992.

172 Nor is BOC's position improved by relying on the words "or, in the case of a bearer bill, of any other transfer of the bill" in s 5(2)(b) of the COGSA 1992, because BL4 could only have become a bearer bill as a result of KOSB's blank endorsement (*Bandung Shipping*), which of course presupposes that that endorsement was valid.

(2) KOSB's endorsement was not valid

173 In what circumstances, then, will an endorsement of a bill of lading not amount to a valid endorsement for the purposes of s 5(2)(b) of the COGSA 1992?

174 Curiously, there seem to be no authority on this question. When I called for submissions on this point in the second tranche, Ms Ang took the position that KOSB's endorsement was invalid, relying on S C Boyd, S Berry, A S Burrows, B Eder, D Foxton and C F Smith, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 21st ed, 2008) ("*Scrutton on Charterparties*") at A103 and A104, but that portion of *Scrutton on Charterparties* deals with when an endorsement of a bill of lading will not pass property or title to the endorsee at common law, which is a different matter from whether an endorsement is effective for the purposes of s 5(2)(b) of the COGSA 1992, since the COGSA 1992 is only concerned with contractual rights and not proprietary or possessory rights (although it must be admitted that *Scrutton on Charterparties* at A104 cites *The Aegean Sea*, which is a case on the COGSA 1992). Mr Gurbani did not submit on this point at all, but rather sought to introduce the new evidence which led to the third and fourth tranches.

175 The passage from *The Aegean Sea* I have quoted at [168] above sheds some slight light on the matter, because Thomas J considered that a person to whom a bill of lading had been endorsed in error was "not entitled" to endorse the bill of lading. While the facts of *The Aegean Sea* were somewhat different, I consider that there may be circumstances in which a bill of lading is "not entitled" to be endorsed, and in those circumstances, any such endorsement will be invalid and incapable of constituting any subsequent transferee of the bill of lading a "holder" for the purposes of s 5(2)(b) of the COGSA 1992. I am thinking particularly of situations where the endorsement of the bill of lading is tainted by fraud, as in this very case.

176 Under the terms of its LOI, KOSB promised Universal that BL4 would be returned as soon as it came into KOSB's possession: the intention, therefore, was that once KOSB paid Felda for the Cargo (including the BL4 Cargo) and received BL4 from Felda, BL4 would be deemed to have no further purpose or legal effect, *ie*, BL4 would be deemed accomplished or spent, not merely as a document of title, but also for the purposes of transferring rights of suit under the COGSA 1992. KOSB was therefore clearly aware that it was not entitled to deal with BL4 or endorse it to any third party, but was obliged to withdraw it from circulation by returning it to Universal.

177 Yet, KOSB went ahead to endorse BL4 in blank, falsely representing that it still had legal effect, and intending that it be so treated, as part of a raft of measures to defraud third parties. I have already described the fraud involved in opening the June L/C (see [98] above), and the endorsement of BL4 in blank, as well as the creation and backdating of the 24 March 2008 invoice, was merely a continuation of that fraud, because the relevant documents had to be doctored and a false trail created in order to comply with the key requirements of the June L/C (see [101] above), so that payment could be obtained thereunder.

178 Although I have cautioned against relying too heavily on authorities dealing with a bill of

lading's function as a document of title, I note that my views are at least consistent with them. For instance, G Treitel and F M B Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell, 2nd ed, 2005) at para 6-009 indicates that "[s]ince *Lickbarrow v Mason* it has… been settled that the transfer of a bill of lading will operate to transfer the transferor's property in the goods, *if the transfer was made with that intention*" [emphasis added]. Likewise, in *Newsom and another v Thornton and another* (1805) 6 East 17 ("*Newsom v Thornton*"), Lord Ellenborough CJ clearly stated (at 41):

> A bill of lading indeed shall pass the property *upon a bonâ fide indorsement* and delivery, *where it is intended so to operate*… I consider the indorsement of a bill of lading, *apart from all fraud*, as giving the indorsee an irrevocable, uncountermandable right to receive the goods… [emphasis added]

Again, in *Motis Exports*, it was held that a carrier which had delivered cargo against a forged bill of lading, in circumstances where the fact that the bill of lading was not genuine was not known or reasonably apparent to the carrier, was guilty of misdelivery and liable to the holder of the genuine bills (and hence the owners of the cargo) for the loss of the cargo. Stuart-Smith LJ held (at 216) that:

> A forged bill of lading is in the eyes of the law a nullity; it is simply a piece of paper with writing on it, which has no effect whatever. That being so delivery of the goods… was not in exchange for the original bill of lading but for a worthless piece of paper.

I cannot see that it should make much difference if the bill of lading, instead of being forged, is fraudulently endorsed (see *Carver on Bills of Lading* at para 6-061), especially in the light of Lord Ellenborough CJ's statements in *Newsom v Thornton*; in Stuart-Smith LJ's language in *Motis Exports*, such a fraudulent endorsement, in the eyes of the law, is a nullity and without any legal effect whatever.

179 In the circumstances, I do not accept that KOSB was entitled to endorse BL4, or that BL4 was validly endorsed by KOSB, for the purpose of s 5(2)(b) of the COGSA 1992.

Conclusion on BOC's title to sue

180 For the above reasons, in my judgment BOC did not become a "holder" of BL4 within the meaning of s 5(2)(b) of the COGSA 1992, and as such never acquired rights of suit in relation to BL4 under s 2(2) of the COGSA 1992.

181 Consequently, it is not necessary for me to deal with the bulk of the arguments raised by the parties, which comes as something of a relief given that they involve rather complex issues and would add significantly to the length of this already long judgment.

Postscript: subrogation

182 As I already entertained doubts during the first tranche of the proceedings as to the validity of KOSB's endorsement of BL4 in blank, I directed parties to submit arguments on this point at the start of the second tranche. At the same time, I also asked the parties to investigate the possibility of BOC being subrogated to the rights of Felda and/or Maybank (see [88] above).

183 This possibility was based on the assumption that Maybank had been a pledgee of BL4 because it had financed the Felda Contract (see [79] above), and I considered that, on such an assumption, an analogy might perhaps have been drawn to *London Joint Stock*, where, on somewhat similar facts,

it seems to have been held by Channell J that subrogation was available to the plaintiff bank in that case.

184 That assumption no longer stands after the new evidence in the third tranche revealed that Maybank never financed the Felda Contract and thus never became a pledgee of BL4. There can thus be no question of any subrogation, and I therefore say no more about it.

Conclusion on BOC's claim for breach of contract

185 I therefore conclude that BOC's contractual claim fails because it did not become a "holder" of BL4 within the meaning of s 5(2)(b) of the COGSA 1992. As a result, it cannot derive any rights of suit in relation to BL4 under s 2(2) of the COGSA 1992, and since BOC was not otherwise a party to the contract of carriage, it has no standing to sue Universal for its breach in delivering the BL4 Cargo without requiring the production of BL4.

BOC's Claim for Civil Conspiracy

186 I now come to BOC's alternative claim against Universal in the tort of conspiracy.

The pleading points

187 Mr Gurbani raised a number of technical objections, arguing that BOC's pleadings on conspiracy were defective on the following grounds.

188 First, Mr Gurbani contended that at one point in its pleadings, BOC specified that the individuals involved in the conspiracy were Alvin Kwan and/or Steve Kwan and/or K H Chong and/or Christopher Chai and/or T W Chong and/or Xu Feng Zheng, [note: 105] but there was no allegation that any of the individuals were acting on behalf of Universal.

189 I do not accept this argument. BOC has clearly pleaded that these individuals are officers of various companies, [note: 106] and it is obvious from BOC's pleadings that what it is alleging is that these individuals acted in their official capacities. Of course, whether Christopher Chai, T W Chong or Xu Feng Zheng can be said to be officers of or represent Universal is another matter, but that is a question of whether the substantive requirements of conspiracy have been made out.

190 Second, relying on *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR(R) 451 ("*Wu Yang*"), *Mr* Gurbani argued that BOC did not plead the precise category of conspiracy it is relying on.

191 *Wu Yang* was a rather different case in which the plaintiff made an entirely unparticularised allegation of "conspiracy", making it difficult to determine whether to apply the requirements of lawful means conspiracy or those of unlawful means conspiracy, and it was in that context that Phang J made the point (at [82]) that "the plaintiff did not clearly indicate which particular category of the tort of conspiracy it was in fact relying upon". Here, however, BOC has pleaded that it is relying on *both* forms of conspiracy in the alternative, and that is by no means uncommon (see *Fornet Enterprise Co Ltd v Howell Universal Pte Ltd and others* [2006] 2 SLR(R) 349 at [10] and [58], *Beckett Pte Ltd v Deutsche Bank AG and another* [2008] 2 SLR(R) 189 at [119] and *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318 at [5]).

192 Such a course of action, however, raises a different problem, that of inconsistent pleadings, which I discuss in relation to Mr Gurbani's third argument.

193 Third, again relying on *Wu Yang*, Mr Gurbani submitted that, if BOC was relying on unlawful means conspiracy, the unlawful means had to be identified in the pleadings, which BOC failed to do. Mr Gurbani's argument was essentially that if BOC was alleging that there had been fraud or deceit, then that had to be expressly pleaded, because fraud must be proved to a high standard of proof, and in the absence of an express allegation of fraud that standard cannot be met.

194 Mr Gurbani is on somewhat firmer ground here, because Ms Ang's response was rather contradictory, in that on the one hand she argued that BOC's pleadings plainly alleged that the Good Copy and 24 March 2008 invoice were "bogus", [note: 107] that BOC had been "duped", [note: 108] and that the relevant documents were not "genuine and valid"; [note: 109] but on the other she appeared to be saying that fraud was not part of her case, especially in relation to lawful means conspiracy.

195 The difficulty for Ms Ang (and all counsel who rely on both forms of civil conspiracy) is that she cannot rely on lawful means conspiracy if she is asserting fraud (or any other unlawful means), and she cannot rely on unlawful means conspiracy if she does not plead something unlawful (such as fraud). In the end, the only way to avoid being impaled on Morton's Fork is to accept that only one form of conspiracy can possibly succeed (if at all), but in my view in these sorts of cases counsel are nonetheless at liberty to plead both forms of conspiracy in the alternative *ex abundanti cautela* (see *Ng Chee Weng v Lim Jit Ming Bryan and another* [2011] SGCA 62 at [31] to [38]).

196 There remains the question, however, of whether the unlawful means alleged by BOC have been adequately pleaded. It is true that the words "fraud" and "deceit" do not appear in BOC's pleadings (no doubt because it was thought that that might have restricted the availability of a cause of action in lawful means conspiracy), but in my view the use of the synonyms and other paraphrases described at [194] above left no doubt as to what BOC was alleging the unlawful means were.

197 Consequently, I reject Universal's contention that BOC's pleaded case in conspiracy is deficient.

The alleged conspiracy and conspirators

198 On BOC's pleaded case, Universal is said to have conspired with KOSB and/or Dongma and/or KCB and/or Fordeco (and/or Zhongguang) to induce BOC to issue the June L/C, accept the relevant documents presented thereunder by Maybank and to make payment accordingly. [note: 110]

199 It must be said that there is some infelicity in BOC's position as regards Zhongguang. BOC's pleadings are ambiguous as to whether Zhongguang is a party to the conspiracy or not, [note: 111] as are BOC's submissions. [note: 112] However, I do not really see how Zhongguang can rationally be excluded from any alleged conspiracy, and as BOC's pleadings are just about adequate to support such a view, I have taken BOC's position to be that Zhongguang was indeed an alleged conspirator.

Lawful means conspiracy

200 This head of claim can be disposed of relatively shortly. I have already determined that BOC was a victim of fraud, and if so, any conspiracy pursuant to which that fraud was carried into effect can hardly be said to have involved "lawful means" (*Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 ("*Quah Kay Tee*") at [49]).

201 In addition, it is well-established that one of the requirements of lawful means conspiracy is that the conspirators must have acted with the "predominant purpose" or motive of causing injury or

damage to the plaintiff (*Quah Kay Tee* at [45] and [49]). It should be apparent from what I have said at [97] above that the predominant purpose or motive here was for KOSB to be paid in respect of the Zhongguang Contract and thereby protect its own commercial interests; it may well have been that in order to realise that purpose, it was intended that BOC should suffer a loss that might otherwise have been suffered by KOSB, but that is not sufficient to make out a claim in lawful means conspiracy (*Quah Kay Tee* at [49] and [50] and *Wu Yang* at [82]).

Unlawful means conspiracy

202 The real question, therefore, is whether BOC has made out its claim for unlawful means conspiracy, and the requirements of unlawful means conspiracy were stated to be as follows in *Quah Kay Tee* (at [45]):

> A conspiracy by unlawful means is constituted when *two or more persons combine* to commit *an unlawful act* with the *intention of injuring or damaging the plaintiff*, and *the act is carried out and the intention achieved*. [emphasis added]

203 Although the *Quah Kay Tee* test itself is familiar and uncontroversial, applying it to the facts of this case is not entirely straightforward.

A preliminary problem: what did Universal know?

204 Part of the problem is that unlawful means conspiracy, being an intentional tort, requires the conspirators to possess a certain state of mind; most obviously an intention to injure the victim, but also knowledge that they are part of an agreement, combination or common design.

205 Naturally, being a legal person, a company can be a party to a conspiracy, but as a company is an artificial construct, in order for it to be fixed with the requisite intention or state of mind, it is necessary to pinpoint some human actor with that state of mind and to determine whether, as a matter of law, that state of mind also counts as the company's, via a process known as "attribution".

206 As I have said, BOC's case rests on Universal being a party to a conspiracy to induce BOC to issue the June L/C, accept the relevant documents presented thereunder by Maybank and to make payment (see [198] above). That seems to imply (and indeed BOC is arguing) that Universal was aware of these matters. Whose state of mind, then, does BOC say is to be attributed to Universal? Ms Ang naturally pointed to the Universal's board of directors, and she argued strongly that it is Steve Kwan whose knowledge is most relevant for present purposes.

207 Even before considering whether unlawful means conspiracy has been made out, therefore, it is necessary to determine what knowledge Steve Kwan possessed, and whether that knowledge can be attributed to Universal.

(1) What did Steve Kwan know?

208 In attempting to ascertain what Steve Kwan knew, I am of course hampered by the fact that Steve Kwan never appeared as a witness in these proceedings (see [65] above), despite having had a clear opportunity to do so in the fourth tranche so as to meet BOC's allegations.

209 Nonetheless, I consider that Steve Kwan's knowledge was considerable for a number of reasons:

(a) In an affidavit affirmed for the purpose of resisting BOC's (ultimately unsuccessful) application for summary judgment, Steve Kwan deposed his belief that, around 28 March 2008, when the Cargo was being discharged into Huanan's shore tanks, BL4 was in the possession of KOSB. [note: 113] It is now known that BL4 only came into KOSB's possession on 4 April 2008 (see [92(d)] above), but the point is that Steve Kwan was purporting to give evidence on important matters, such as the movement of BL4 and Universal's commercial or operational affairs.

(b) In the same affidavit, Steve Kwan deposed to the fact that KOSB had issued the LOI to Universal, in order that the Cargo could be discharged: it seems clear, therefore, that he knew of KOSB's LOI and its terms.

(c) That Steve Kwan was in fact actively involved in the management of Universal's shipping business and affairs was also evident in his being copied into many of Jade Shipping and Fordeco's e-mails regarding the *Dolphina* (including its request for permission to release the Cargo in the absence of the original bills of lading, as well as Fordeco's reply permitting this (see [32] and [35] above)). [note: 114]

(d) On 4 April 2008, KOSB authorised Maybank to debit its current account to pay Felda for the Cargo, and the authorisation was signed by Steve Kwan (as well as K H Chong) (see [90(e)] above).

(e) On 9 June 2008, Steve Kwan (and K H Chong) signed a Documentary Collection and/or Negotiation Form (see [90(g)] above) to Maybank, which clearly specified that the relevant documents (including BL4) were being presented for negotiation/payment under the June L/C.

(f) Amongst his many portfolios (see [7] to [11] above), Steve Kwan is one of three directors in both Universal and KOSB, but is the only director not to have testified in this case. In addition, the other two directors (Alvin Kwan and K H Chong) who did testify vociferously denied having any knowledge about the events leading to these proceedings. Unless I am to believe that the entire board of directors of Universal and KOSB was collectively ignorant of the goings-on in either company, and that all the actions taken by their employees were without approval or authority, which is not supported by the evidence, it must follow that the common course of business had been followed (s 116(*f*) of the Evidence Act (Cap 97, 1997 Rev Ed)) and that everything that was done was done with board approval or knowledge, and that the reason Steve Kwan has not come forward to produce evidence is that such evidence would not be favourable to either him or to Universal (s 116(*g*) of the Evidence Act).

(g) K H Chong testified that he did not know whether Alvin Kwan was "the man in charge" of Universal, [note: 115] and, when pressed by Ms Ang, admitted that the facts deposed to in his affidavit of evidence-in-chief came to his knowledge from information provided to him by Steve Kwan and Christopher Chai. [note: 116]

210 I am therefore prepared to infer, on the basis of the foregoing and in all the circumstances of the case, that Steve Kwan knew: that the Cargo (including the BL4 Cargo) had been discharged by the Discharge Date without production of the original bills of lading but against KOSB's LOI; that BL4 was therefore supposed to be returned to Universal once KOSB obtained it; that BL4 had in fact been obtained by KOSB (although he may not have known the exact date on which this occurred); that the June L/C had been opened in KOSB's favour; that the June L/C required, *inter alia*, BL4 to be endorsed in blank; that KOSB endorsed BL4 in blank; that KOSB was negotiating the June L/C to Maybank; and that BL4 was therefore being passed off as a valid document in order to secure payment under the

June L/C.

(2) Can Steve Kwan's knowledge be attributed to Universal?

211 Simply because Steve Kwan is possessed of certain knowledge, however, does not mean that Universal should also be taken as possessing that knowledge, especially since much of what Steve Kwan knew appears to have been learned as a director of KOSB, rather than as a director of Universal.

212 Whether and in what circumstances Steve Kwan's knowledge should be regarded as Universal's knowledge depends, as I have said, on the law of attribution. This is an area of the law which has not been explored in great depth by our courts, and as such most of the leading cases emanate from other jurisdictions. Consequently, while I received some assistance from both counsel as to the relevant jurisprudence, I find it necessary to approach the matter from first principles.

(A) Attribution generally

213 The law in this area owes a great debt to the opinion of Lord Hoffmann in the Privy Council decision of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ("*Meridian*"), but I will defer detailed examination of *Meridian* for the time being in favour of more general considerations.

214 As a matter of law, it is often necessary for the acts, knowledge or liability of one person (A) to be attributed to another (B). This need arises because B does not always act in person: B may for instance employ and authorise subordinates to act on his behalf. Consequently, the law has evolved a number of doctrines to determine when A's actions, state of mind or obligations will be seen as that of B's. For instance, the doctrine of vicarious liability renders B liable for A's tortious conduct where that conduct is sufficiently closely connected to A's employment by B that it is fair and just to hold B liable for it (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries Pte Ltd and another* [2011] 3 SLR 540 ("*Skandinaviska*") at [75] and [86]). Vicarious liability is not, however, relevant to this case, because BOC is not suggesting that Universal is vicariously liable for anyone's tort: it claims that Universal is liable for its own tort of conspiracy.

215 That leaves, therefore, two other relevant attribution doctrines: agency and identification.

(B) Agency

216 Agency is one of the most common means by which the knowledge of A is to be regarded as the knowledge of B, and the position is stated in this way by *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 19th ed, 2010) at para 8-207, Art 95(1):

> The law may impute to a principal knowledge relating to the subject matter of the agency which the agent acquires *while acting within the scope of his authority*. [emphasis added]

217 Directors are agents of the company (*Ferguson v Wilson* (1866) LR 2 Ch App 77 at 89 (per Cairns LJ)), but it has been repeatedly held that information received by a director outside his agency (*ie*, outside the course of his directorship) is not *ipso facto* attributed to the company. This includes knowledge gained by the director in the course of his directorship in a different company, unless the director owed not only a duty to the first company to receive that knowledge (and it seems that he will only owe such a duty where the company has a duty to inquire into the matters to which that knowledge is relevant), but also a duty to the second company to communicate it.

218 In *Re Hampshire Land Company* [1896] 2 Ch 743 ("*Re Hampshire Land*"), the articles of association of the Hampshire Land Company required the authorisation of the company in general meeting before certain sums could be borrowed. A meeting was called to authorise the taking of such a loan from a building society, but, in beach of the articles, insufficient notice had been given to the shareholders of the company regarding the purpose of the meeting, though the loan was nonetheless approved. One Mr Wills was the secretary of both the company and the building society, and the question was whether his alleged knowledge of the irregularity was to be attributed to the building society.

219 Vaughan Williams J refused to do so, stating (at 748):

> … it is said that [Mr Wills'] knowledge as the officer of the company is equally his knowledge as the officer of the society, and that therefore I ought to impute this knowledge to the society. I do not agree. [Counsel] shrank from saying that wherever there is a common officer of two societies, the knowledge of such officer personally is to be imputed to both the societies employing him. In fact it was quite impossible… that they could successfully contend for so wide a proposition… *[T]he knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice*… [emphasis added]

2 2 0 *Re Hampshire Land* was subsequently approved in *Re David Payne & Co, Limited* [1904] 2 Ch 608 ("*Re David Payne*"), where the English Court of Appeal refused to treat knowledge gained by a director of a company outside the course of his directorship as having been attributed to the company, on the basis that it was not the duty of the company to make any inquiry into that matter, and as such there was no duty on the director to have communicated his knowledge to the company (see especially the judgment of Romer LJ at 619).

2 2 1 *Re David Payne* was followed in *El Ajou v Dollar Land Holdings plc and another* [1994] 2 All ER 685 ("*El Ajou*"), an important case with somewhat complicated facts. The plaintiff ("EA") owned substantial funds under the control of an investment manager, who was bribed to invest them in fraudulent share schemes operated by three Canadian fraudsters. Some of the proceeds of the fraud were injected into an innocent company, the defendant ("DLH"). One of DLH's directors, Mr Ferdman, was aware that the money had been fraudulently obtained, as he (through his company SAFI) was an agent for the Canadian fraudsters (but not directly implicated or a participant in their fraud). EA brought a claim for knowing receipt against DLH, on the basis that DLH when it received the proceeds from the Canadians knew (via Mr Ferdman) that it represented the proceeds of fraud, and the issue was therefore whether Mr Ferdman's knowledge, obtained as a director of SAFI, could be treated as DLH's knowledge for the purposes of a claim in constructive trust and/or knowing receipt.

222 EA sought to argue that Mr Ferdman's knowledge was to be treated as DLH's knowledge on two quite distinct bases: first, under the doctrine of agency, and second, under the identification doctrine, but only the former will be dealt with here.

223 The English Court of Appeal unanimously refused to attribute Mr Ferdman's knowledge to DLH under the rules of agency, and all three judges relied on *Re David Payne* in reaching that conclusion, with Rose and Hoffmann LJJ concluding that, in receiving the money from the Canadians, DLH owed no duty to inquire into or investigate its source, and that as such any knowledge of such matters possessed by Mr Ferman *qua* director of SAFI was not relevant to DLH, and therefore Mr Ferdman

could not be treated as if he had owed and discharged a duty to disclose his knowledge of the illegal provenance of the money to DLH.

224 The effect of these authorities, therefore, is that the knowledge of an agent, such as a director of a company, acquired outside the course of his agency or directorship (such as *qua* director of a different company) cannot be attributed to his principal unless the principal was under a duty to inquire into or investigate the matters of which the agent is aware. It is not entirely clear how and when a principal will be under such a duty to inquire or investigate for these purposes (see *Bowstead & Reynolds on Agency* at para 8-211). In *Mohammad Jafari-Fini v Skillglass Ltd & others* [2007] EWCA Civ 261 ("*Jafari-Fini*") at [94], Moore-Bick LJ considered that the principal must employ an agent to "perform a task or transaction of a kind which imposes on the principal a duty to investigate", but that seems to me to be rather circular.

225 Before I move on to the identification doctrine, I wish to draw attention to one further aspect of *Re Hampshire Land*, which is that it has generally been understood as laying down the following proposition: "[k]knowledge is not attributed to the principal where it is acquired by an agent who is defrauding the principal in the same transaction" (*Bowstead & Reynolds* at para 8-207, Art 95(4)).

226 This has become known as the "*Hampshire Land* principle" or the "fraud exception", and was laid down in this way in *Re Hampshire Land* (at 749):

> [I]f Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting the fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Mr. Wills was guilty of irregularity – a breach of duty in respect of these transactions – the same inference is to be drawn as if he had been guilty of fraud.

227 To say that the *Hampshire Land* principle is controversial is an understatement. Indeed, so extremely polarised is the debate that on the one hand it has been said to be "a general principle of agency" (*Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391 ("*Stone & Rolls*") at [138] (per Lord Walker)), while on the other its very existence has been denied (P Watts, "Imputed Knowledge in Agency Law – Excising the Fraud Exception" (2001) 117 LQR 300 ("Watts' "Imputed Knowledge" article")).

228 Although the *Hampshire Land* principle has been applied and/or accepted in numerous cases, including by the House of Lords in *J C Houghton and Company v Nothard, Lowe and Wills, Limited* [1928] 1 AC 1 and *Stone & Rolls*, the exact nature and scope of the *Hampshire Land* principle is open to serious debate.

229 For instance, although many formulations (see for instance *El Ajou* at 702 (per Hoffmann LJ) and *Stone & Rolls* at [227] (per Lord Mance)) refer only to the agent "defrauding" or committing a fraud "upon" the principal (*ie*, the principal must be the "target" of the fraud (*Re Bank of Credit and Commerce International SA (in liquidation) (No 15)* [2005] 2 BCLC 328 ("*Re BCCI (No 15)*") at [114])), the *Hampshire Land* principle is "arguably wider than this and may extend to acts of an agent which are in breach of his duty to his principal and which have, in fact, resulted in harm to his principal" (*Safeway Stores Ltd v Twigger* [2011] 1 Lloyd's Rep 462 at [28] (per Longmore LJ) (see to similar effect *Stone & Rolls* at [198] (per Lord Brown))). The broader version of the *Hampshire Land* principle appears to be justified by Vaughan Williams J's reasoning in *Re Hampshire Land* itself (see [226] above), and is endorsed in more or less similar terms by a number of their Lordships in *Stone & Rolls*

(at [43] (per Lord Phillips), [106] (per Lord Scott) and [137] to [138] (per Lord Walker)), though it is fair to say that doubt still lingers over the matter, as a result of older authorities which appear to require actual fraud (see Watts' "Imputed Knowledge" article at p 319).

230 For the purposes of this case, however, it is unnecessary to resolve this debate, for reasons which will become plain when I discuss the doctrine of identification.

(C) Identification

231 The identification doctrine (sometimes also known as the "directing mind and will" or "alter ego" doctrines) is another means by which A's acts and/or knowledge may be attributed to B. It is a quite separate means of attribution from the doctrine of agency (see *El Ajou* at 695 (per Nourse LJ) and 701 (per Hoffmann LJ) as well as *Jafari-Fini* at [90] (per Moore-Bick LJ)) and that of vicarious liability (see *KR v Royal & Sun Alliance plc* [2007] Lloyd's Rep IR 368 ("*KR*") at [51]), because, unlike these latter doctrines, which fundamentally still treat A and B as two different legal persons, the identification doctrine treats A and B, for certain purposes, as the same legal person. For the avoidance of doubt, however, I should make clear that the identification doctrine is not to be confused with lifting the corporate veil, which is concerned with holding the shareholders of a company liable for its debts.

232 In many ways the *fons et origo* of the identification doctrine is still the decision of the House of Lords in *Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited* [1915] 1 AC 705 ("*Lennard's*"), where cargo on board a ship was lost by a fire caused by the ship's defective boilers. The respondent cargo-owners sued the appellant shipowner ("Lennard's Carrying Co") for damages for the loss of the cargo, and as a defence, Lennard's Carrying Co relied on s 502 of the Merchant Shipping Act 1894 (c 60) (UK), which excused a shipowner from liability if the loss or damage occurred "without his actual fault or privity". The key question was therefore whether Lennard's Carrying Co could bring itself within those words, in circumstances where it was managed by another company, and the managing director of the latter, Mr Lennard (who was the registered managing owner of the ship and also a director of Lennard's Carrying Co), knew or ought to have known about the defective boilers but took no steps to do anything about it.

233 Holding that it could not, Viscount Haldane LC stated (at 713):

> Now, my Lords, did what happened [*sic*] take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

234 The identification doctrine thus developed out of a statutory context; where courts had to determine who in a company had the state of mind or fault required by the relevant statute as a precondition to the imposition of or exculpation from liability (see for instance *Tesco Supermarkets Ltd v Nattrass* [1972] 1 AC 153 ("*Tesco*") and *Director General of Fair Trading v Pioneer Concrete (UK) Ltd and another* [1995] 1 AC 456).

235 In *El Ajou*, however, the English Court of Appeal applied the identification doctrine in a case which had no statutory context; rather, the question was as to DLH's liability for knowing receipt, and it will be recalled that the knowledge of Mr Ferdman was sought to be attributed to DLH under both the law of agency and the doctrine of identification (see [222] above). In keeping with Viscount

Haldane LC's view in *Lennard's* that the identification doctrine was separate from agency, the English Court of Appeal held that, notwithstanding that Mr Ferdman's knowledge could not be attributed to DLH under the laws of agency as a result of *Re David Payne*, nonetheless Mr Ferdman was the "directing mind and will" of, and to be identified with, DLH for the purposes of the impugned transactions, with the result that his knowledge of them was to be attributed to DLH in order to render it liable in knowing receipt.

236 Soon after *El Ajou*, the identification doctrine was put on a principled footing by Lord Hoffmann in the watershed *Meridian* decision, where one Mr Koo, the chief investment officer of the appellant investment management company ("Meridian"), with Meridian's authority but without the knowledge of its board of directors, used funds managed by Meridian to acquire shares in another company ("ENC"), with the result that Meridian became a "substantial security holder" in ENC within the meaning of s 20 of the Securities Amendment Act 1988 (No 234 of 1988) (NZ). However, Meridian did not give notice thereof as required under s 20, because Mr Koo was acting in his own interest and did not want Meridian to find out about his transactions, and the question was therefore whether Mr Koo's knowledge was attributable to Meridian for the purposes of liability under s 20.

237 Lord Hoffmann explained that the identification doctrine, like the rules of agency and vicarious liability, was simply a tool to ascertain what acts, conduct and/or states of mind of human persons were to be attributed to a company. A similar function was performed by a company's articles of association, as well as the rule that the unanimous consent of all shareholders on a matter *intra vires* the company is an act of the company. Such rules were needed because a company, being a legal fiction, could not think and act for itself; consequently, "primary rules of attribution" (contained in the company's articles of association or the unanimous consent rule) and "general rules of attribution" (the law of agency and vicarious liability) usually allowed for the adequate determination of a company's rights and obligations. However, on occasion, these rules were inapplicable or not feasible, and where that was so but the relevant right or obligation of the company nonetheless had to be determined, a "special rule of attribution" had to be fashioned. Such special rules of attribution were "always a matter of interpretation" (at 507):

> [G]iven that [a particular substantive rule] was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

On this basis, Lord Hoffmann explained *Lennard's* as a case in which Viscount Haldane LC was simply fashioning a special rule of attribution based on the language and purpose of s 502 of the Merchant Shipping Act 1894, so as to ascertain the person (Mr Lennard) who could be identified with Lennard's Carrying Co in order that s 502 could be applied to it.

238 Lord Hoffmann concluded that, given the policy of s 20 of the Securities Amendment Act 1988, the knowledge to be attributed to a corporate substantial security holder was the knowledge of the person who acquired the securities with the authority of the company, *ie*, Mr Koo.

239 At this juncture, three comments about *Meridian* are appropriate. First, although *Meridian* itself was a case in which the relevant substantive rule or obligation was a statutory one, Lord Hoffmann clearly envisaged that the identification doctrine could apply whenever the substantive rule was meant to apply to companies, regardless whether it was of a statutory (*eg*, *Tesco*), common law or even equitable (*eg*, *El Ajou*) nature. Second, Mr Koo's deliberate attempt to suppress his knowledge from Meridian was not regarded as an obstacle to attributing it to Meridian, suggesting that the

Hampshire Land principle was not relevant. Third, in Singapore, *Meridian* was approved by the Court of Appeal in *Singapore Airlines and another v Fujitsu Microelectronics (Malaysia) Sdn Bhd and others* [2000] 3 SLR(R) 810 and applied by me in *Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd* [2006] 3 SLR(R) 12.

240 Returning to the current of English cases, however, despite being a Privy Council decision, *Meridian* has been enthusiastically received by the English courts, as evinced by the decisions in *Re BCCI (No 15)*, *KR*, *Jafari-Fini*.

241 In *Re BCCI (No 15)*, one Mr Samant, the general manager of the London Branch of Bank of India ("BOI"), facilitated and arranged for Bank of Credit and Commerce International ("BCCI") to make several deposits with BOI. These deposits were fraudulently used by senior managers at BCCI, and when BCCI collapsed, its liquidators brought a claim against BOI pursuant to s 213 of the Insolvency Act 1986 (c 45) (UK) (the equivalent of s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed)), and the question was whether Mr Samant's knowledge and dishonesty could be attributed to BOI, notwithstanding that he had no authority to enter the transactions with BCCI on behalf of BOI. The English Court of Appeal unanimously endorsed *Meridian* and held that Mr Samant's dishonesty was to be attributed to BOI. In so doing, the *Hampshire Land* principle was also held to be inapplicable in the circumstances of the case.

242 In *KR*, applying *Meridian*, the English Court of Appeal held that the controller of a company operating a children's care home business was to be equated with it for the purposes of construing an exclusion clause in an insurance policy which excluded the liability of the insurers for a "deliberate act or omission of the insured", with the result that the insurers were able to avail themselves of the exclusion clause, because the intentional torts (child abuse) of the controller were regarded as the deliberate acts of the company. It is notable that there appears to have been no argument about whether the *Hampshire Land* principle would have applied in this case.

243 *Jafari-Fini* arose out of the plaintiff's acquisition of a company via a corporate vehicle known as "PAL", with funding effected through the first defendant, a company known as "Skillglass". The question was whether PAL was in breach of its contractual obligations to Skillglass because it had failed to notify Skillglass of a bribe paid to one of Skillglass' directors by the plaintiff. The answer to that question depended on whether knowledge of the bribe had come to the attention of PAL, which in turn depended on whether one Mr Webster, a director of PAL, knew of the bribe, and whether that knowledge was to be attributed to PAL.

244 All three members of the English Court of Appeal agreed on the relevant principles of law involved, albeit Carnwath LJ dissented on the factual question of whether Mr Webster had known the bribe. The majority judges, however, held that Mr Webster did have knowledge of the bribe. In deciding whether that knowledge was to be attributed to PAL, Moore-Bick LJ in his leading judgment followed *El Ajou* and stated that both the doctrines of agency and identification had to be considered as possible bases of attribution. As with *El Ajou*, attribution of Mr Webster's knowledge to PAL on the ground of agency was rejected (at [92]) because Mr Webster did not acquire that knowledge in his capacity as a director of PAL, but Mr Webster's knowledge was nonetheless attributed to PAL on the basis that Mr Webster, as part of the board of directors of PAL, could be identified with it for the purposes of determining PAL's knowledge of the bribe.

245 While there was some argument as to whether the *Hampshire Land* principle stood in the way of attributing Mr Webster's knowledge to PAL (see [89] of *Jafari-Fini*), this objection did not seem to have weighed heavily in any of the judges' minds, albeit the submission was not seriously pursued (see [99]).

246 Lord Hoffmann subsequently reiterated the principles his Lordship had earlier laid down in *Meridian* in the Privy Council decision of *Lebon v Aqua Salt Co Ltd* [2009] BCC 425 ("*Lebon*"), and at the same time approved of both *El Ajou* and *Jafari-Fini* as an application of those principles. Like those two cases, *Lebon* was a case in which the identification doctrine was used to attribute knowledge to a company for a non-statutory purpose, with the result that a shareholder-director's bad faith was attributed to his company so as to prevent it from obtaining an indefeasible title to a plot of land it had purchased.

247 Finally, in *Stone & Rolls*, the plaintiff company was used as a vehicle for fraud by its controller, Mr Stojevic, who (it was agreed) was its "sole directing mind and will". The plaintiff employed the defendant accountants as its auditors, so as to render it more respectable and therefore a better tool for Mr Stojevic to defraud banks, which he did successfully. One of these banks successfully sued the plaintiff and Mr Stojevic for deceit, but the plaintiff was unable to pay and went into liquidation. The liquidators then brought proceedings against the defendant auditors, alleging that they had been negligent in failing to detect and prevent Mr Stojevic's dishonest activities. The auditors argued that the plaintiff's claim was barred by the maxim *ex turpi causa non oritur actio*, on the basis that Mr Stojevic's dishonesty and fraud was to be attributed to the plaintiff.

248 The judgment of the House of Lords is exceedingly complicated, since all five members delivered substantial judgments, but it can at least be said that *Meridian* was impliedly or expressly approved by a majority (at [39] to [42] (per Lord Phillips), at [105] (per Lord Scott), at [134] (per Lord Walker) and at [221] (per Lord Mance)), albeit technically only in *obiter dicta* since there was no dispute that Mr Stojevic was indeed the "embodiment" of the plaintiff. The true dispute was whether anything prevented the attribution of Mr Stojevic's fraudulent state of mind to the plaintiff, and it was argued on behalf of the plaintiff that because Mr Stojevic was acting in fraud of the plaintiff, his knowledge could not be attributed to it as a result of the *Hampshire Land* principle.

249 As already discussed (see [229] above), the House of Lords could not even agree on the proper nature and scope of the *Hampshire Land* principle, but in any event, the plaintiff's argument was rejected by the majority judges on a number of grounds. Lord Phillips considered that the *Hampshire Land* principle did not apply because the plaintiff was not a victim of the fraud (at [55] of *Stone & Rolls*) and/or because the fraud was attributed to it (at [60]). Lord Brown held that the *Hampshire Land* principle did not apply because it was a principle of agency and had no application where Mr Stojevic's fraud was being attributed to the plaintiff not under the rules of agency but by virtue of his being identified with it (at [198] to [200]), but his Lordship also agreed with Lord Walker that there was a "sole actor" exception to the *Hampshire Land* principle (at [201]), and that that exception applied on the facts of the case.

(D) Attribution in this case

250 Having reviewed the relevant authorities, I am now in a position to consider whether Steve Kwan's knowledge, to the extent that it was acquired *qua* director of KOSB, can be attributed to Universal either under the laws of agency or under the identification doctrine.

251 Any knowledge acquired by Steve Kwan in the course of his directorship of KOSB cannot be attributed to Universal via the law of agency unless Universal itself was under a duty to inquire into or investigate the matters of which Steve Kwan *qua* director of KOSB was aware. Only if Universal was under such a duty can it be said that Steve Kwan *qua* director of Universal was under a duty to receive that knowledge and transmit it to Universal.

252 I am not persuaded that Universal was under such a duty. Either those matters were already

known to Universal (*eg*, the discharge of the Cargo without production of the original bills of lading) or they were KOSB's affairs (*eg*, the opening of the June L/C) into which Universal was not duty-bound to inquire. Consequently, I cannot accept Ms Ang's argument that Steve Kwan's knowledge *qua* director of KOSB can be attributed to Universal simply because he is a common director of both KOSB and Universal.

253 However, Steve Kwan's knowledge *qua* director of KOSB can still be attributed to Universal under the doctrine of identification. In order for that to be possible, the substantive rule or obligation which the doctrine of identification is being prayed in aid of must be applicable to a company, and its purpose will then dictate whether Steve Kwan should be identified with Universal, with the result that his knowledge counts as that of Universal's.

254 Clearly the tort of conspiracy can be applied to a company, so who for that purpose is to be identified with Universal? It is in fact rather difficult to pinpoint the purpose of the tort of conspiracy, but it seems to lie in the law's concern to prevent harmful combinations (*Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 ("*Total Network*") at [44] (per Lord Hope) and [77] (per Lord Walker)), which explains the particular emphasis on the tortfeasor's intention. That being so, for this purpose, Universal should be identified with the person or persons who could cause it to combine with others (such as KOSB) so as to harm BOC, which in the first instance would be Universal's board of directors.

255 However, two of those three directors have already testified that they were not involved in Universal's business and that they know close to nothing about the matters that are in dispute in this case. By contrast, there is clear evidence (and I find as a fact) that, in addition to being a director and the treasurer of Universal and a co-owner of the *Dolphina*, Steve Kwan was actively and routinely involved in the management of Universal's shipping business and affairs relating to the *Dolphina*. Consequently, it seems to me that, by a process of elimination and upon a consideration of the evidence, there is good reason to identify Steve Kwan with Universal for the purposes of determining Universal's liability in the tort of conspiracy, and to treat Steve Kwan's knowledge, *including* his knowledge gained as a director of KOSB, as the knowledge of Universal for these purposes.

256 I come full circle by returning to *Lennard's*, where Viscount Haldane LC was very much of the same view regarding Mr Lennard's failure to testify at the trial (at 713 to 714):

> My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard… was registered as the person designated for this purpose in the ship's register. Mr *Lennard was therefore the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken… but about his own position and as to whether or not he was the life and soul of the company…*
>
> [I]n that state of the law it is obvious to me that *Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action…*
>
> [emphasis added]

Likewise, on the state of the evidence and the law in this case, Steve Kwan's failure to testify means that there is nothing to rebut the adverse inference I draw against Universal that, for the purposes of unlawful means conspiracy, Steve Kwan's knowledge and state of mind fall to be treated as those of Universal's.

257 In an attempt to avert this result, Mr Gurbani argued that the *Hampshire Land* principle prevented Steve Kwan's knowledge from being attributed to Universal, although exactly how the *Hampshire Land* principle was supposed to have operated on the facts of this case was not made entirely clear during the course of oral arguments.

258 I do not accept Mr Gurbani's submission, because, with the exception of *Stone & Rolls*, all the cases on the identification doctrine I have cited above impliedly or expressly hold that the *Hampshire Land* principle is a principle of agency law that has no application to the identification doctrine (and indeed this view was shared by Lord Brown in *Stone & Rolls*), because in virtually all of them the person whose knowledge was attributed to the company could be said to have been guilty of a fraud on or a breach of duty towards the company. I accept that most of their Lordships in *Stone & Rolls* seem to have thought the *Hampshire Land* principle relevant, but it is difficult to extract a clear *ratio decidendi* from the majority speeches, and in those circumstances, notwithstanding the eminence of the court that decided it, I do not consider *Stone & Rolls* to be a strong authority on this point.

259 In fact, because I have not heard arguments on it, and because it is not necessary to express a view on the matter in this case, I reserve my opinion on whether the *Hampshire Land* principle (especially in its broader formulation) is good law, especially in the absence of any previous local authority applying the *Hampshire Land* principle. For present purposes, what I will say is that, even if, contrary to my view, the *Hampshire Land* principle is in theory applicable to the identification doctrine, Steve Kwan's knowledge was certainly not obtained by defrauding Universal, nor do I think it can even be said that Steve Kwan's knowledge was obtained in breach of duty to Universal, and as such, the *Hampshire Land* principle does not apply on the facts.

(3) Conclusion on Universal's knowledge

260 I therefore hold that, for the purposes of determining Universal's liability for unlawful means conspiracy, Steve Kwan is to be identified with Universal, with the consequence that Steve Kwan's knowledge is to be treated as Universal's.

261 With that in mind, it is now possible to discuss whether the various requirements of unlawful means conspiracy have been satisfied in this case.

A combination of two or more persons and an unlawful act

262 As the Court of Appeal noted in Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch) [2006] 1 SLR(R) 901 at [19]:

> It is not often that the victim of a conspiracy will be able to obtain direct evidence to prove the allegation. Proof of conspiracy is normally to be inferred from other objective facts.

263 Similarly, in *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [95] and [96], Andrew Ang J stated that a combination or agreement between conspirators need not be in the nature of an express agreement, and that the court may infer an agreement from the acts of the parties alleged to be conspiring. Lai Kew Chai J in *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Pte Ltd and others* [2002] 2 SLR(R) 896 ("*MITCO*") at [59] was to similar effect: "evidence of overt acts and omissions together are available to prove the fact of a conspiratorial combination or agreement".

264 In other words, the requirements of "combination" and "unlawful act", although in theory discrete, in practice often have to be considered together because direct evidence of a combination

is unlikely to be forthcoming, and therefore proof of the agreement or combination is usually gathered from the unlawful acts committed, for such acts are often sufficient (when taken with any relevant surrounding circumstances) to justify the inference that their commission was the product of concert between the alleged conspirators.

265 It should be clear from what I have said at [98] above that I consider that there was certainly a combination between Zhongguang and KOSB in the issuance of the Good Copy in early June 2008. Contrary to Ms Ang's submissions, I consider that there is no proof that Universal was a party to the combination at this stage. That is not necessarily fatal, however, since the conspirators need not all have joined in the scheme at the same time, nor need each know what the other conspirators have agreed to do so long as they are sufficiently aware of the surrounding circumstances and share the same object: the question is how far each of the parties to the conspiracy was aware of the plan and then "joined in the execution thereof" (see *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others* [2004] SGHC 115 at [49]).

266 Ms Ang submitted that Universal's awareness of the plan or agreement for KOSB to fraudulently obtain payment from BOC, and its participation therein, could be inferred from the fact that Universal permitted KOSB to use BL4 to obtain payment under the June L/C, despite Universal's knowledge (attributed via Steve Kwan) of the matters I have described at [210] above.

267 This raises the interesting question of whether, for the purposes of unlawful means conspiracy, the "unlawful means" can be constituted by an omission rather than an act.

268 Mr Gurbani contended vigorously that what was needed in order to establish liability in unlawful means conspiracy was an "overt act" committed "in furtherance of" the agreement or combination, and that here, Universal had done nothing at all, which was neither an "overt act" nor "in furtherance of" anything. Even if it could be said that Universal had passively assisted KOSB in allowing KOSB to make use of BL4 to negotiate the June L/C, Mr Gurbani argued that on the authority of *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19 ("*Credit Lyonnais*"), that would not be sufficient, because that would merely amount to facilitating, rather than procuring, KOSB's tort.

269 I accept that many of the authorities on unlawful means conspiracy use the term "overt act" in identifying the range of unlawful acts which may give rise to a finding of conspiracy (see *MITCO* at [263] above). I do not accept, however, that a person can only ever be liable in unlawful means conspiracy by acting rather than by omitting to act. It seems obvious to me that "unlawful means" can be effected through an omission, and that, where the context requires, "act" can mean "omission" (s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed)). I am glad to find that a similar view was expressed in *obiter dicta* by Young J in *Reitano v Jones* [2001] NSWSC 1076 at [32] to [39], although that was a case of lawful means conspiracy.

270 As for Mr Gurbani's reliance on *Credit Lyonnais*, I should first point out that the English Court of Appeal's language of one conspirator "procuring" his co-conspirator's tort was based on the notion that the tort of conspiracy could simply be equated with the doctrine of joint tortfeasance, a view which can no longer stand in the light of *Total Network* (see [101] to [104] (per Lord Walker), [116] (per Lord Mance) and [225] (per Lord Neuberger)). Even on its own terms, however, I do not think that *Credit Lyonnais* assists Mr Gurbani in any way, and it is necessary to explain the rather complex facts and reasoning involved in that case in order to appreciate why.

271 A fraudster, Mr Chong, knew that the plaintiff bank ("Credit Lyonnais") could be induced to purchase bills of exchange drawn by an exporter on foreign buyers against a guarantee from the

defendant ("ECGD") that the foreign buyer would pay for the goods in due course according to the contract of sale. Mr Chong had the idea of posing as an exporter of goods and conjuring up fictitious contracts for the sale of goods supported by fraudulently drawn bills of exchange with forged acceptances in the name of imaginary buyers, in order to obtain money from Credit Lyonnais by selling it these forged accepted bills of exchange. In order to effect this fraud, Mr Chong corrupted a senior officer of ECGD ("Mr Pillai") who dealt with the underwriting of the ECGD guarantees. Initially, the guarantees were issued in the form of Comprehensive Bank Guarantees ("CBGs"), but that part of the case is not material for present purposes. Eventually ECGD decided to phase out the use of CBGs and began issuing guarantees in the form of Specific Bank Guarantees ("SBGs"). Mr Chong decided to use Mr Pillai to help him obtain SBGs, and in this connection Mr Pillai wrote letters to Credit Lyonnais in January and May 1988 assuring it that the relevant documentation was acceptable ("the acceptability letters"). In all Credit Lyonnais was swindled of over £10m, and, Mr Chong having absconded and Mr Pillai having passed away, it sued ECGD in both contract and tort, but only the latter is relevant for present purposes: Credit Lyonnais claimed that ECGD was vicariously liable for the acts of Mr Pillai in authorising the underwriting of the SBGs, which, Credit Lyonnais argued, was his essential role in the scheme and amounted to a conspiracy with Mr Chong to deceive Credit Lyonnais.

272 Although the trial judge found that Mr Pillai, in authorising the underwriting of the SBGs, was not a party to Mr Chong's fraud, this finding was reversed on appeal, it being conceded and accepted that, by signing the acceptability letters in January and May 1988, Mr Pillai was clearly complicit in Mr Chong's fraud (at 32 (per Stuart-Smith LJ) and 40 (per Hobhouse LJ)). That being so, the English Court of Appeal held that Mr Pillai's assistance of Mr Chong's fraud, in issuing the acceptability letters and thus authorising the issuing of the SBGs, was given in pursuance and furtherance of the common design to deceive Credit Lyonnais, so as to render Mr Pillai liable in conspiracy to deceive and as a joint tortfeasor in the tort of deceit (at 36 (per Stuart-Smith LJ) and 46 (per Hobhouse LJ)). This was because it was (at 36 (per Stuart-Smith LJ)):

> … permissible to draw the inference of a common design from all the evidence in the case, including that relating to the acceptability letters… The issue of the SBGs was an essential part of the fraud, because without them the bank would not have purchased the bills of exchange.

Thus, if matters had ended there (as they would have if, for instance, Mr Chong and Mr Pillai had been sued personally by Credit Lyonnais for unlawful means conspiracy), Credit Lyonnais would have succeeded against Mr Pillai.

273 This conclusion, however, was of no use to Credit Lyonnais, because it was suing ECGD, and ECGD could not be held vicariously liable either for Mr Pillai's conspiracy to deceive or his deceit, as neither occurred in the course of Mr Pillai's employment because he had no authority from ECGD to sign the acceptability letters (at 37 (per Stuart-Smith LJ) and 41 (per Hobhouse LJ)). I have some reservations as to the correctness of this view (which was not challenged in the subsequent appeal to the House of Lords in [2000] 1 AC 486 at 492)), in the light of the decision in *Lister and others v Hesley Hall Ltd* [2002] 1 AC 215 (see *Skandinaviska* at [86]). In any event, it was in those circumstances that counsel for ECGD was forced to rely on the argument that Mr Pillai was guilty of a tort in knowingly assisting Mr Chong in the commission of the latter's tort by underwriting the SBGs (which was not in and of itself unlawful), and that ECGD was vicariously liable for that assistance (at 41 (per Hobhouse LJ)). That submission was rejected by the English Court of Appeal, on the basis that mere facilitation of, or knowingly assisting in, another's tort did not amount to conspiracy to commit that tort, if it could not be shown that this was done pursuant to and in furtherance of a common design (at 46 (per Hobhouse LJ)).

274 The reason Mr Gurbani derives no help from *Credit Lyonnais* is because, as I have said (see

[214] above), no question of vicarious liability arises in this case; the question here is whether Universal, possessed as it was of Steve Kwan's knowledge, by allowing KOSB to make use of BL4 in the way that it did, was guilty of "unlawful means", and whether it can be inferred from that that doing so was how Universal "joined in the execution" of a common design to ensure that KOSB would obtain payment at the expense of BOC.

275 In my view, the answer is clear. Universal already knew, whether through Steve Kwan or otherwise, that the Cargo (including the BL4 Cargo) had been discharged on the Discharge Date against KOSB's LOI, and that, under its terms, BL4 was supposed to be returned to Universal and deemed accomplished once it was obtained by KOSB. As a result of Steve Kwan's knowledge, Universal also knew that BL4 had at some point in fact been obtained by KOSB; that the June L/C had been opened in KOSB's favour and that it required, *inter alia*, BL4 to be endorsed in blank; that BL4 therefore had to be endorsed in blank in order to comply with the terms of the June L/C if KOSB was to negotiate it or receive payment on maturity of the June B/E; that KOSB in fact endorsed BL4 in blank and transferred it to Maybank as part of KOSB's negotiation of the June L/C; and that KOSB was thereby falsely representing that an accomplished bill of lading was still valid, and intending that BL4 be so regarded, in order to negotiate the June L/C or to secure payment upon maturity of the June B/E.

276 Knowing all this, Universal was in a position to prevent KOSB from effecting the fraud by simply demanding the return of BL4, as it was fully entitled to do. In addition, there was every reason for Universal to have done so in light of its earlier breach of the presentation rule (*ie*, delivery of the BL4 Cargo without production of BL4), because as long as BL4 remained out of Universal's possession, there was every possibility that (as has happened in this case) Universal would be exposed to liability from someone who came into possession of BL4 and decided to sue Universal for misdelivery of the BL4 Cargo once it was discovered that the BL4 Cargo had been discharged otherwise than against presentation of BL4.

277 Looking at all the facts, on analogy with what was said in *Credit Lyonnais* (see [272] above), the inference seems to me irresistible that Universal was operating in furtherance of a common design with KOSB so as to perpetuate an unlawful fraud by early June 2008: the blank endorsement of BL4 by KOSB was an essential part of the fraud, because without it there would have been no compliance with the requirements of the June L/C and BOC would not have disbursed funds thereunder to KOSB, and Universal not only knew all this but also knew of KOSB's blank endorsement of BL4, yet Universal did nothing to prevent it, in circumstances where Universal had absolutely no reason to allow such an endorsement. In my view, Universal's conduct is only explicable on the basis that it had come to an agreement with KOSB that the latter could dishonestly make use of BL4 so as to trick BOC into advancing funds under the June L/C.

278 Therefore, not only does *Credit Lyonnais* not support Mr Gurbani's position, in fact it supports Ms Ang's: just as what Mr Pillai did clearly indicated that he was part of and furthering Mr Chong's fraud, and thus himself also guilty of fraud and unlawful means, what Universal did not do here in my opinion also indicates that it was part of and furthering KOSB's fraud, and thus itself also guilty of fraud and unlawful means.

An intention to injure BOC

279 It appears that, consistently with the test of intention in the tort of causing loss by unlawful means laid down by the House of Lords in *OBG Ltd and another v Allan and others* [2008] 1 AC 1 ("*OBG v Allan*"), the conspirators must have intended to cause loss to the plaintiff as an end in itself or as a means to an end (see *The Bank of Tokyo-Mitsubishi UFJ, Ltd and another v Baskan Gida*

Sanayi Ve Pazarlama AS and others [2009] EWHC 1276 (Ch) at [833] and G Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at paras 15.060 to 15.061). Given the character of the unlawful means and the circumstances in which they were employed, Universal must have intended to injure BOC (see s 108(*a*) of the Evidence Act). It is undeniable that causing loss to BOC was a necessary means of achieving Universal's and KOSB's common end of ensuring that KOSB received payment for the BL4 Cargo: loss to BOC was very much the "obverse side of the coin" from gain to KOSB (*OBG v Allan* at [167] (per Lord Nicholls)).

Damage

280 That BOC has suffered loss is obvious, and forms the entire reason for these proceedings. Mr Gurbani argued, however, that BOC's loss was caused, not by any alleged conspiracy, but by the financial straits of BOC's customer, Zhongguang.

281 In my view, once the necessary intention to injure is made out, the requisite nexus between the unlawful means used and the loss suffered by BOC is also made out, and it can thus be said that the economic harm suffered by BOC was suffered "as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators" (*Total Network* at [44] (per Lord Hope)).

Conclusion on BOC's claim for civil conspiracy

282 For the foregoing reasons, I conclude that BOC's succeeds in its claim against Universal in the tort of conspiracy. It does so, however, on a more limited basis than what was alleged in BOC's pleadings (see [198] above): I make no finding as to whether Dongma, KCB or Fordeco was a party to the conspiracy, or as to whether Universal was aware that BOC had been deceived into issuing the June L/C on the basis of the sham Good Copy, since those matters are not relevant as far as Universal's liability is concerned. A conspirator need not know all the details of the plot as long as he is aware of the common objective and what his role in bringing it about involves.

Conclusion

283 In conclusion, while BOC has no title to sue for Universal's breach of contract and Universal is not therefore liable to BOC in contract, Universal is liable to BOC in tort on the basis of unlawful means conspiracy.

284 That being so, BOC is entitled to damages equivalent to the face value of the June B/E (US$3,414,487.32) less the 15% received from Zhongguang as a security deposit for opening the June L/C. According to my calculations, that should come up to a figure of US$2,902,314.22, but BOC has in its pleadings claimed a different figure of US$2,896,002.87. [note: 117] That latter figure is based on BOC's letter of demand to Zhongguang, [note: 118] and was confirmed to be correct by BOC's witnesses. [note: 119] In the circumstances, the better course is for me to adopt BOC's figure. Accordingly, there is judgment in BOC's favour for the sum of US$2,896,002.87.

285 In principle, expenses incurred in investigating and mitigating the conspiracy are recoverable, provided they are directly attributable to the conspiracy (see H McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed, 2009) at para 40-024). However, as, BOC has not claimed for these expenses, I make no award on, this head of damages. Furthermore, given the history of these proceedings, *ie*, the fact that the claim in conspiracy was only prosecuted in September 2011, I consider that an award of interest based on s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) would

be inappropriate.

286 I will hear the parties on costs.

[note: 1] Affidavit of Evidence-in-Chief ("AEIC") of Li Haifeng dated 19 October 2009 at para 9.

[note: 2] Transcript of Evidence dated 2 November 2011 at pp 4 to 5 and 10.

[note: 3] Transcript of Evidence dated 26 February 2010 at p 4; Transcript of Evidence dated 2 November 2011 at p 11.

[note: 4] Agreed Bundle of Documents Volume 1 ("1AB") at p 99.

[note: 5] 1AB at p 99.

[note: 6] Plaintiff's Bundle of Documents ("PB") at pp 411 and 419.

[note: 7] PB at p 425.

[note: 8] Plaintiff's Bundle of Documents for Cross-Examination at Tab 3.

[note: 9] 1AB at pp 43 to 45; Transcript of Evidence dated 2 November 2011 at pp 4 to 6.

[note: 10] 1AB at p 112.

[note: 11] 1AB at p 39; Agreed Bundle of Documents Volume 2 ("2AB") at pp 530 and 544; PB at p 425 and Transcript of Evidence dated 26 February 2010 at p 5.

[note: 12] PB at pp 363 and 364.

[note: 13] 1AB at p 130.

[note: 14] 1AB at p 182.

[note: 15] 1AB at p 188.

[note: 16] 2AB at p 372.

[note: 17] Defendants' Bundle of Documents filed 15 September 2011 ("2DB") at pp 68 to 78 and 82.

[note: 18] 1AB 34.

[note: 19] Transcript of Evidence dated 26 February 2010 at pp 5 to 7.

[note: 20] 1AB at p 100.

[note: 21] 1AB at p 100.

[note: 22] Transcript of Evidence dated 26 February 2010 at p 3; Transcript of Evidence dated 2 November 2011 at p 5.

[note: 23] 2AB at p 418; Transcript of Evidence dated 3 March 2010 at p 44.

[note: 24] Transcript of Evidence dated 4 March 2010 at p13.

[note: 25] Transcript of Evidence dated 26 February 2010 at pp 8 to 9.

[note: 26] Transcript of Evidence dated 2 November 2011 at p 6.

[note: 27] 2AB at pp 530 and 544; Transcript of Evidence dated 2 November 2011 at p 7.

[note: 28] Transcript of Evidence dated 2 November 2011 at p 7.

[note: 29] Transcript of Evidence dated 26 February 2010 at pp 8 to 9.

[note: 30] AEIC of Wang Shi Hui dated 3 March 2010 at para 7.

[note: 31] AEIC of Wang Shi Hui dated 3 March 2010 at paras 8, 9 and 16.

[note: 32] 2AB at p 436.

[note: 33] 2AB at p 437.

[note: 34] 2AB at p 439.

[note: 35] Transcript of Evidence dated 4 March 2010 at p 43

[note: 36] 1AB at p 182.

[note: 37] Transcript of Evidence dated 4 March 2010 at p 63.

[note: 38] 1AB at pp 130 to 134.

[note: 39] 2DB 1-14.

[note: 40] 1AB at pp 173to 177.

[note: 41] 1AB at p 176.

[note: 42] AEIC of Kwan Ngen Wah dated 19 October 2009 at pp 10 to 23.

[note: 43] 1AB at p 185.

[note: 44] 1AB at pp 190 and 192.

[note: 45] AEIC of Kwan Ngen Wah dated 19 October 2009 at para 22; 1AB at pp 188 to 189.

[note: 46] Defendant's Chronology of Events appended to its Opening Statement; Transcript of Evidence dated 4 March 2010 at p 29.

[note: 47] 1AB at pp 190 and 192.

[note: 48] 1AB at pp 194 and 243.

[note: 49] 1AB at p 147.

[note: 50] AEIC of Wang Shi Hui dated 3 March 2010 at paras 29 to 31.

[note: 51] AEIC of Xue Feng dated 19 October 2009 at para 23 and pp 300 to 301; 1 AB at pp 4 to 5.

[note: 52] AEIC of Xue Feng dated 19 October 2009 at para 27 and pp 303 to 305.

[note: 53] 2AB at p 372.

[note: 54] AEIC of Xue Feng dated 19 October 2009 at para 30 and pp 326 to 331.

[note: 55] 2AB at p 372.

[note: 56] 2AB at p 373.

[note: 57] 2AB at pp 372 to 377.

[note: 58] 2AB at p 376.

[note: 59] 2AB at p 373.

[note: 60] 2AB at p 372.

[note: 61] 2AB at p 383.

[note: 62] Transcript of Evidence dated 2November 2011 at p 128.

[note: 63] 2AB 383

[note: 64] 2AB at p 384.

[note: 65] 2AB at p 385.

[note: 66] AEIC of Xue Feng dated 19 October 2009 at para 44.

[note: 67] 1AB at p 177.

[note: 68] Transcript of Evidence dated 11 March 2010 at pp 18 to 20 and 64

[note: 69] 1AB at pp 7 to 9; AEIC of Xue Feng dated 19 October 2009 at paras 47to 50 and pp 378 to 380.

[note: 70] AEIC of Xue Feng dated 19 October 2009 at paras 52 to 58.

[note: 71] AEIC of Xue Feng dated 19 October 2009 at paras 59 to 66.

[note: 72] AEIC of Xue Feng dated 19 October 2009 at para 67.

[note: 73] AEIC of Li Haifeng dated 19 October 2009 at para 44.

[note: 74] AEIC of Xue Feng dated 19 October 2009 at para 68.

[note: 75] AEIC of Xue Feng dated 19 October 2009 at para 69.

[note: 76] AEIC of Li Haifeng dated 19 October 2009 at para 37.

[note: 77] 2AB at p 489; AEIC of Li Haifeng dated 19 October 2009 at para 38.

[note: 78] Transcript of Evidence dated 26 February 2010 at p 3.

[note: 79] PB at pp 363 to 365.

[note: 80] Plaintiffs' Opening Statement dated 10 February 2010 at para 17.

[note: 81] Transcript of Evidence dated 11 March 2010 at p 72.

[note: 82] 1AB at p 104.

[note: 83] 2DB at pp 1 to 14.

[note: 84] 2DB at p 48.

[note: 85] 2DB at pp 66 to 67.

[note: 86] 2DB at pp 68 to 70.

[note: 87] 2DB at pp 71 to 77.

[note: 88] 2DB at p 72.

[note: 89] 2DB at p 78.

[note: 90] 2DB at p 86.

[note: 91] Transcript of 4 March 2010 at p 41.

[note: 92] Transcript of 4 March 2010 at pp 40 and 41.

[note: 93] Transcript of Evidence dated 2 November 2011 at p 58.

[note: 94] AEIC of Xue Feng dated 19 October 2009 at para 27.

[note: 95] AEIC of Christopher David Edwards dated 1 February 2010 at pp 24 to 26.

[note: 96] Defendant's Closing Submissions dated 11 March 2010 at para 22.

[note: 97] Transcript of Evidence dated 2 November 2011 at pp 99 and 133 to 134.

[note: 98] 2DB at p 79

[note: 99] Affidavit of Kwan Ngen Chung dated 3 December 2008 at para 7.

[note: 100] 1AB at p 176.

[note: 101] 1AB at p 133.

[note: 102] 1AB at p 176.

[note: 103] Plaintiffs' Closing Submissions dated 11 March 2010 at para 57.

[note: 104] Transcript of Evidence dated 26 February 2008 at pp 33to 34.

[note: 105] Statement of Claim (Amendment No 3) dated 3 October 2011 at para 20.

[note: 106] Statement of Claim (Amendment No 3) dated 3 October 2011 at para 17.

[note: 107] Statement of Claim (Amendment No 3) dated 3 October 2011 at paras 20(1) and 21(1).

[note: 108] Statement of Claim (Amendment No 3) dated 3 October 2011 at para 21(1).

[note: 109] Statement of Claim (Amendment No 3) dated 3 October 2011 at para 21(1).

[note: 110] Statement of Claim (Amendment No 3) dated 3 October 2011 at paras 16, 20 to 22.

[note: 111] Statement of Claim (Amendment No 3) dated 3 October 2011 at paras 16 and 20(3).

[note: 112] Plaintiffs' Closing Submissions – Conspiracy dated 4 November 2011 at para 32 and Plaintiffs' Reply Submissions – Conspiracy dated 11 November 2011 at para 10.

[note: 113] Affidavit of Kwan Ngen Chung dated 3 December 2008 at para 7.

[note: 114] 2AB at pp 20, 21, 22, 24, 26, 27, 29, 30, 32, 34, 35, 36 and 37.

[note: 115] Transcript of Evidence dated 2 November 2011 at p 15.

[note: 116] Transcript of Evidence dated 2 November 2011 at p 29.

[note: 117] Statement of Claim (Amendment No 3) dated 3 October 2011.

[note: 118] 2AB at p 487.

[note: 119] AEIC of Xue Feng dated 19 October 2009 at para 72.