IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 166

Originating Application No 418 of 2023

Between

Da Hui Shipping (Pte.) Ltd. (in creditors' voluntary liquidation)

… *Claimant*

And

An Rong Shipping Pte. Ltd. (in liquidation)

… *Defendant*

And

(1) Societe Generale, Singapore Branch
(2) Petrochina International (Singapore) Pte. Ltd.

… *Non-parties*

GROUNDS OF DECISION

[Restitution — Unjust enrichment — Contribution from co-debtor]
[Restitution — Subrogation — Securities in the form of ship mortgages granted to lender — Subrogation to extinguished securities in equity —

Subrogation to extinguished securities under s 2 of the Mercantile Law Amendment Act 1856]
[Insolvency Law — Administration of insolvent estates — Conduct of legal proceedings]

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v
An Rong Shipping Pte Ltd (in liquidation)
(Societe Generale, Singapore Branch and another, non-parties)

[2024] SGHC 166

General Division of the High Court — Originating Application No 418 of 2023
S Mohan J
26 October, 16 November 2023

28 June 2024

S Mohan J:

1 HC/OA 418/2023 ("OA 418") arose out of a secured lending transaction involving one lender and two co-borrowers. The lender was the Bank of America N.A., Singapore Branch ("BofA"). The borrowers were the claimant, Da Hui Shipping (Pte.) Ltd. ("Da Hui"), and the defendant, An Rong Shipping Pte. Ltd. ("An Rong").

2 Da Hui was the owner of the vessel "Sea Equatorial" registered in the Commonwealth of Dominica. An Rong was the owner of the vessels "Ocean Jack" and "Ocean Goby", both of which were registered in Singapore (collectively, the "An Rong Vessels"). The loan from BofA was secured by, among other things, mortgages over all three ships. As Da Hui and An Rong

were unable to repay the debt due to BofA, the three ships were eventually sold, and the sale proceeds applied by BofA in satisfaction of that debt.

3 In a nutshell, Da Hui's complaint in OA 418 was that it had effectively paid more than its fair share of the debt due to BofA. Da Hui therefore sought, among other things:

(a) leave under s 133(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) to commence and continue OA 418 against An Rong, which was necessitated by An Rong having since entered into compulsory liquidation ("Prayer 1");

(b) a declaration that An Rong was indebted to Da Hui in the sum of US$12,460,161.55 (which figure was subsequently revised to US$13,021,856.67), that being Da Hui's claim in contribution against An Rong ("Prayer 2"); and

(c) a declaration that Da Hui was entitled to be subrogated to any extinguished securities held by BofA pursuant to the loan agreement, including BofA's mortgages over the An Rong Vessels ("Prayer 3").

4 On 16 November 2023, I gave oral judgment allowing Prayer 1 of the application but otherwise dismissing the rest of the application. On 29 February 2024, Da Hui lodged an appeal against my decision to the Court of Appeal. Accordingly, I set out the grounds of my decision.

The background

5 BofA is the Singapore branch of the Bank of America, N.A., a multinational bank headquartered in the United States of America.[1]

6 Da Hui and An Rong were both Singapore-incorporated subsidiaries of Xihe Capital (Pte.) Ltd ("Xihe Capital").[2] Da Hui, An Rong, and Xihe Capital in turn belonged to a wider group of vessel-owning companies known as the "Xihe Group".[3] Vessels owned by the Xihe Group were chartered to Ocean Tankers (Pte.) Ltd. ("OTPL"), which in turn sub-chartered the vessels to (or entered into contracts of carriage with) its sister company, Hin Leong Trading (Pte) Ltd ("HLT").[4] HLT, OTPL, and the Xihe Group were all beneficially owned and/or controlled by Mr Lim Oon Kuin and his family.[5] It is of course now well-known that both OTPL and HLT collapsed financially in 2020 and are both currently in liquidation.

The loan agreement

7 On or around 24 August 2018, Da Hui and An Rong entered into a secured term loan facility agreement[6] (the "Loan Agreement") with BofA to obtain refinancing for the three vessels owned by Da Hui and An Rong respectively (see [2] above).[7]

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1 Tam Chee Chong's first affidavit dated 24 April 2023 ("TCC-1") at [7].

2 TCC-1 at [4]–[5].

3 TCC-1 at [6].

4 TCC-1 at [6].

5 TCC-1 at [6].

6 TCC-1 at pp 30–137.

7 TCC-1 at [8].

8 Under the Loan Agreement, BofA undertook to make available to Da Hui and An Rong an aggregate amount of up to US$37,200,000.00.[8] It was not disputed that Da Hui and An Rong were jointly and severally liable insofar as their obligations under the Loan Agreement were concerned.[9]

9 Clause 2.1 of the Loan Agreement provided that the credit extended by BofA would be drawn down in three tranches:[10]

(a) In the first tranche ("Tranche A"), the borrowers were entitled to draw the "lower of US$12,000,000 and 60% of the Fair Market Value" of the "Sea Equatorial". The amount eventually drawn down in this tranche was US$8,400,000.00.[11]

(b) In the second tranche ("Tranche B"), the borrowers were entitled to draw the "lower of US$12,600,000 and 70% of the Fair Market Value" of the "Ocean Goby". The amount eventually drawn down in this tranche was US$10,281,250.00.[12]

(c) In the third tranche ("Tranche C"), the borrowers were entitled to draw the "lower of US$12,600,000 and 70% of the Fair Market Value" of the "Ocean Jack". The amount eventually drawn down in this tranche was US$10,281,250.00.[13]

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8 TCC-1 at p 33, Recital.

9 TCC-1 at p 50, cl 2.2.1; TCC-1 at [8].

10 TCC-1 at p 50, cl 2.1.

11 TCC-1 at [12(a)].

12 TCC-1 at [12(b)].

13 TCC-1 at [12(b)].

10 It was also envisaged by cl 3.1 of the Loan Agreement that the sums drawn in each tranche would be used to refinance the corresponding vessel:[14]

> **3.1 Purpose**
>
> Each Borrower shall apply all amounts borrowed by it under the Facility towards refinancing of its Vessel(s) as follows:
>
> (i) Tranche A shall be used for refinancing the ["Sea Equatorial"];
>
> (ii) Tranche B shall be used for refinancing the ["Ocean Goby"]; and
>
> (iii) Tranche C shall be used for refinancing the ["Ocean Jack"].

11 The following table summarises the credit extended under each tranche and the sums drawn:

Tranche	Vessel	Credit Limit	Actual Drawdown
A	The "Sea Equatorial"	Lower of US$12,000,000 and 60% of the Fair Market Value of the "Sea Equatorial"	US$8,400,000.00 (29.0% of the total drawdown)
B	The "Ocean Goby"	Lower of US$12,600,000 and 70% of the Fair Market Value of the "Ocean Goby"	US$10,281,250.00 (35.5% of the total drawdown)
C	The "Ocean Jack"	Lower of US$12,600,000 and 70% of the Fair Market Value of the "Ocean Jack"	US$10,281,250.00 (35.5% of the total drawdown)
		Total:	**US$28,962,500.00**

[14] TCC-1 at pp 50–51, cl 3.1.

The mortgages

12 As I mentioned at [2] above, BofA's loan was secured by (among other things) mortgages over the three vessels. The "Sea Equatorial" was mortgaged by Da Hui to BofA by a first preferred Dominican ship mortgage dated 24 August 2018.[15] This was accompanied by a Deed of General Assignment.[16]

13 Statutory ship mortgages of the "Ocean Goby"[17] and the "Ocean Jack"[18] (both dated 29 August 2018 and registered in Singapore) were likewise granted by An Rong to BofA and accompanied by deeds of covenant and general assignment.

The sale of the vessels and payment out of the proceeds

14 HLT's financial troubles came to light in or around April 2020, and the events that followed are now notorious. For present purposes, it suffices to note that Da Hui entered into creditors' voluntary liquidation on or around 19 November 2021.[19] An Rong, for its part, entered into compulsory liquidation on or around 4 July 2022.[20]

The "Sea Equatorial"

15 After it became clear that Da Hui and An Rong would not be in a position to meet their debt obligations under the Loan Agreement, it was

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15 TCC-1 at [11(a)].

16 TCC-1 at pp 139–156.

17 Claimant's Bundle of Documents dated 19 October 2023 ("CBOD") at pp 370–408.

18 CBOD at pp 686–724.

19 TCC-1 at [4].

20 TCC-1 at [5].

agreed between the parties to the Loan Agreement that the "Sea Equatorial" should be sold, and the proceeds applied in partial satisfaction of the debt.[21]

16 The "Sea Equatorial" was thus sold by way of a private sale for US$21,447,121.86 on or around 14 October 2020.[22] Out of that sum:[23]

(a) US$8,425,265.19 was applied in full satisfaction of the principal and interest outstanding in respect of Tranche A;

(b) US$12,460,161.55 was applied in part satisfaction of the outstanding principal and interest under Tranches B and C; and

(c) the remainder of US$561,695.12 was applied towards various costs and expenses incurred by BofA under the Loan Agreement.

The "Ocean Goby"

17 To recover the remainder of the debt, BofA commenced admiralty actions *in rem* against:

(a) the "Ocean Goby" *vide* HC/ADM 92/2021 ("ADM 92") on 23 August 2021; and

(b) the "Ocean Jack" *vide* HC/ADM 94/2021 ("ADM 94") on 26 August 2021.

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21 TCC-1 at [16].

22 TCC-1 at [17].

23 TCC-1 at pp 167–170, paras 4–7; TCC-1 at pp 163–165.

18 The "Ocean Goby" was eventually sold on 10 February 2022 for US$8,761,000.00, and the sale proceeds were paid into court on the same day.[24]

19 On 16 October 2023, the court in ADM 92 ordered that from the sale proceeds:[25]

(a) US$222,009.75 be paid to the Sheriff;

(b) S$153,250.50 be paid to the Maritime & Port Authority of Singapore ("the MPA");

(c) S$13,431.29 be paid to Thome Ship Management Pte Ltd ("Thome");

(d) US$455,614.89 and S$796,433.72 be paid to BofA's solicitors (being reimbursement for expenses incurred as Sheriff's expenses); and

(e) US$6,169,010.79 and S$110,968.19 be paid to BofA's solicitors (in satisfaction of BofA's judgment debt in ADM 92).

20 On Da Hui's estimation, a residue of approximately US$1,200.000.00 remained in court thereafter.[26]

21 It should be noted that prior to the commencement of ADM 92, other admiralty *in rem* actions had been brought against the "Ocean Goby" by:

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24 TCC-1 at [22(a)].

25 HC/ORC 4935/2023.

26 Claimant's written submissions in HC/OA 418/2023 dated 19 October 2023 ("CWS") at [29(a)].

(a) Petrochina International (Singapore) Pte. Ltd. ("Petrochina") *vide* HC/ADM 88/2020; and

(b) Societe Generale, Singapore Branch ("SocGen") *vide* HC/ADM 143/2020, HC/ADM 144/2020, and HC/ADM 145/2020.

From the available material, it seemed that default judgment had been entered in Petrochina and SocGen's *in rem* actions against the "Ocean Goby", but neither party had otherwise received any payment out of the sale proceeds.

The "Ocean Jack"

22 Turning to ADM 94, the "Ocean Jack" was sold on 30 December 2022 for US$9,110,000.00, and the sale proceeds were paid into court on the same day.[27]

23 On 20 April 2023, the court in ADM 94 ordered that from the sale proceeds:[28]

(a) US$230,560.75 be paid to the Sheriff;

(b) S$108,228.00 be paid to the MPA;

(c) S$34,785.40 be paid to Thome;

(d) US$319,873.10 be paid to BofA's solicitors (being reimbursement for expenses incurred as Sheriff's expenses); and

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27 TCC-1 at [22(b)].

28 HC/ORC 1843/2023.

(e) US$8,369,710.04 be paid to BofA's solicitors (in satisfaction of BofA's judgment debt in ADM 94).

24 On 12 October 2023, the court in ADM 94 further ordered that a total of US$395,711.70 and S$21,420.00 be paid out of the sale proceeds to BofA's solicitors on account of various costs incurred by and interest accrued to BofA.[29] With this, BofA's claims arising out of the Loan Agreement were fully satisfied. On Da Hui's estimation, a residue of approximately US$30,000.00 to US$40,000.00 remained in court thereafter.[30]

25 Prior to BofA commencing ADM 94, Petrochina had also brought an action *in rem* against the "Ocean Jack" *vide* HC/ADM 89/2020 ("ADM 89") on 22 April 2020. Default judgment was entered in Petrochina's favour in ADM 89 on 5 July 2023.[31] Petrochina applied shortly thereafter in ADM 94 for payment out of the sale proceeds to satisfy its judgment debt in ADM 89.[32] In light of OA 418 and the reliefs sought therein by Da Hui, Petrochina's application was adjourned pending the final resolution of OA 418.[33]

26 Given the circumstances as detailed at [21] and [25] above, SocGen and Petrochina appeared in OA 418 as the first and second non-parties respectively. Pursuant to permission granted at a case management conference before an Assistant Registrar, Petrochina contested OA 418 through its counsel, Ms Wendy Tan. SocGen, on the other hand, maintained a watching

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29 HC/ORC 4874/2023.

30 CWS at [29(b)].

31 HC/ORC 3051/2023.

32 HC/SUM 2077/2023.

33 HC/ORC 4946/2023.

brief but indicated to me at the start of the hearing that their position was that Da Hui should be denied the reliefs it sought.

The issues

27 In light of the facts and the reliefs sought in OA 418, the three key issues that arose for my determination were:

(a) whether Da Hui had a claim in contribution against An Rong ("Issue 1");

(b) if so, whether Da Hui had a right to be subrogated to BofA's extinguished securities over An Rong's property, namely the mortgages over the An Rong Vessels ("Issue 2"); and

(c) whether Da Hui should be granted leave to commence and continue OA 418 against An Rong ("Issue 3").

28 Although Issue 3 is, strictly speaking, procedurally anterior to Issues 1 and 2, I will traverse the issues in the order set out above for reasons that will become apparent later on in these written grounds.

Issue 1: Whether Da Hui had a claim in contribution against An Rong

29 Da Hui's basic argument was that because the sum disbursed by BofA in each tranche was for the express purpose of refinancing a particular vessel, the benefit of that sum enured to Da Hui or An Rong exclusively as owner of that vessel. It was therefore argued that notwithstanding Da Hui and An Rong having been jointly and severally liable to BofA under the Loan Agreement,

the burden of satisfying the debt to BofA could and should be apportioned *pro rata* as between Da Hui and An Rong.[34]

30 As it were, the proceeds from the sale of the "Sea Equatorial" were applied not only towards the total discharge of the debt incurred under Tranche A (which was for refinancing that vessel), but also the partial discharge of the debt incurred under Tranches B and C (which were for refinancing the "Ocean Goby" and "Ocean Jack" respectively). Accordingly, Da Hui submitted that, having discharged more than its fair share of the debt, it had a claim in contribution against An Rong for that portion of the sale proceeds of the "Sea Equatorial" that had been applied towards the latter's share of the burden.[35]

31 As I mentioned at [3(b)] above, the contribution sum was initially pegged at US$12,460,161.55 and subsequently revised to US$13,021,856.67.[36] However, nothing in the final analysis turned on the precise amount claimed.

The applicable principles

32 It is settled law that a co-debtor or co-surety who discharges more than his fair share of a debt will have a right to claim contribution for the excess as against his other co-debtors or co-sureties. In *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021), the learned authors observed (at para 19-027) that:

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34 CWS at [45]–[46].

35 CWS at [47].

36 TCC-1 at [26]; Tam Chee Chong's second affidavit dated 26 May 2023 ("TCC-2") at [5].

> Joint and joint and several debtors have a restitutionary right of contribution among themselves: that is to say, if one has paid more than their share of the debt, they can recover the excess from the others in equal shares, subject to any agreement to the contrary. In the absence of agreement to the contrary each co-debtor is liable for an equal share of the debt or obligation. …

33 As the foregoing passage indicates, a debtor's *prima facie* right to a contribution from his co-debtor(s) may be excluded by evidence of an agreement that there should be no such right. In this case, however, cl 2.2.2 of the Loan Agreement provided that:[37]

> Each Borrower agrees that any rights which it may have at any time by reason of the performance of its obligations under the Finance Documents [which includes the Loan Agreement] to be indemnified by the other Borrower shall be exercised in such manner and on such terms as the Lender may reasonably require. …

It was therefore contemplated by cl 2.2.2 that Da Hui and An Rong might acquire rights against each other by reason of their individual performance of (joint and several) obligations under the Loan Agreement, and that such rights should be exercised in a manner suitable to BofA. There was hence no question of Da Hui's claim in contribution being barred by the terms of the Loan Agreement.

34 In what proportions, then, ought the burden of the debt be divided as between Da Hui and An Rong? Da Hui submitted that although the court will generally presume that equity is equality as between co-debtors (so that the burden will be *equally* apportioned between them), that was merely a starting point that could be departed from where the equities of the case so required.[38]

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37 TCC-1 at p 50, cl 2.2.2.

38 CWS at [42].

35 In this connection, Da Hui relied on the relevant principles distilled in *Periasamy Ramachandran and another v Sathish s/o Rames and another* [2020] SGHCR 8 (at [60]),[39] which were derived from the decision of the Supreme Court of New South Wales (Equity Division) in *Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116:

> (a) When persons fall under a common liability as sureties, and the creditor enforces the remedies available to him in such a manner that a disproportionate burden falls on one of the sureties, that surety has an entitlement in equity to contribution by the others so that, overall, the burden is distributed fairly: at 119F.
>
> (b) The starting point for the court's determination of whether a surety is entitled to contribution from his co-sureties, and if so, how much contribution, is the application of the equitable principle "equity is equality". That principle assumes that the co-sureties are in positions of equality so that equality of outcome is appropriate. Since equality ordinarily produces a just outcome, the assumption of "equal sharing should not be lightly departed from": at 119F, 120B and 125C.
>
> (c) However, as ever with equitable relief, the court is in search of the "substance of transactions"; specifically, whether the "true relationship" between the parties is as co-sureties with a common liability: at 119G and 120A. That relationship may be ascertained from one or more sources:
>
> > (i) First, the terms of documents or express arrangements between the parties (such as, in *Citibank*, a Deed of Supplementary Loan reflecting common liability as between the couple and the second defendants). In "most cases", the parties' true relationship may be amply reflected in such agreements: at 119G and 120D. However, because the right to contribution arises from "equitable doctrine and not the actual or imputed agreement of co-sureties" – meaning that the court is ultimately "not enforcing contractual or other legal rights of the parties, but is intervening, as a court of conscience, to secure a just outcome" – the court does not, and

[39] CWS at [42].

should not, limit its consideration to such express documented agreements: at 123D–E and 120C–D.

(ii) Second, apart from those recorded in written documents, other agreements (actual or imputed), understandings or common intentions between the parties that they are not in an equal relationship as sureties. These may but need not amount to contract: at 120A and D–E, 122C–D and 124D–E.

(iii) Third, an intention held by a co-surety at the time of becoming a surety – irrespective of whether this intention was shared with the other co-sureties – that the parties are not in an equal relationship as sureties: at 120D–E, 122E–F and 124E.

(d) The circumstances in which the parties acted, including any representations, conventions or detriments, may make their relationship sufficiently clear without there being any particular arrangement, objective expression of intention, or actual advertence to the subject of contribution. Indeed, cases in which it is most obvious that a co-surety is not entitled to contribution from another may be cases where there is least likely to be express advertence to contribution: at 120A and D–E, and 123F–G.

(e) One circumstance in which it may be inequitable to require contribution is where the plaintiff co-surety enjoys the whole benefit of the guarantee (such as the money advanced): at 125D–127A; see also the Supreme Court of Canada's decision in *Bater and Anor v Kare* [1964] SCR 206 ("*Bater*") at 210–211; the English High Court's decision in *Day v Shaw and another* [2014] EWHC 36 (Ch) ("*Day v Shaw*") at [36]; *Courtney, Phillips & O'Donovan* at para 12-212; and *Goff & Jones* at para 20-100. This is consistent with the rationale for equity's intervention described at [54] above; namely, that contribution is founded on the assumption that co-sureties share a common interest and a common burden. When this assumption is displaced, a different conclusion must follow. As Cartwright J explained in *Bater* (citing the notes to *Lampleigh v Braithwait* in Smith's *Leading Cases*, 13th ed, vol 1 at 163), "where two persons are under an obligation to the same performance, though by different instruments, if both share the benefit which forms the consideration, they must divide the burden; if only one gets the benefit he must bear the whole".

(f) In the final analysis, the court's overriding aim is to "achieve natural justice, and that task involves recognising and giving appropriate weight to the factors which bear upon whether or not the supposed contributories stand in the same

> position for the purpose of granting contribution as an equitable remedy": at 127D–F.

I found this to be a fair and helpful summary of the relevant principles. The real question before me, however, was whether they pointed to the result argued for by Da Hui.

My decision

36 As a starting point, I was mindful that the three utilisation requests[40] (by which the borrowers sought to draw on the credit extended under the Loan Agreement) were jointly made by Da Hui and An Rong. In all three requests, the sums to be drawn down were to be credited to a BofA bank account held by Xihe Holdings (Pte) Ltd. There was no evidence before me of how the moneys were actually utilised thereafter – in particular, whether the moneys disbursed in each tranche were ringfenced and utilised specifically for refinancing the corresponding vessel.

37 Nevertheless, as noted in the passage reproduced at [35] above, the "true relationship" between the parties will often be reflected in their documented agreements. In that regard, it was apparent on the face of the Loan Agreement that the purpose of each tranche was to refinance a specific vessel that was either owned solely by Da Hui or An Rong, and that An Rong was intended to receive a greater benefit thereunder (see [10] above). Furthermore, cl 21.34 of the Loan Agreement contemplated the possibility of BofA's mortgage over the "Sea Equatorial" being discharged upon repayment of "any and all outstanding amounts under or in connection with Tranche A" (provided no event of default had occurred, was continuing or would occur,

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40 CBOD at pp 409–414.

and that BofA would have remained adequately secured).[41] This was yet another indication that the contracting parties – or at least, Da Hui and An Rong – understood that the burden of meeting the obligations to BofA should be split proportionately and not equally.

38 In the premises, I was prepared to proceed on the basis that the presumption of equality was displaced in this case and that the burden of repaying BofA's debt could be equitably apportioned in the manner contended for by Da Hui (see [29]–[30] above), with the result that Da Hui did, in principle, have a claim in contribution against An Rong for the excess it had repaid for An Rong's benefit.

Issue 2: Whether Da Hui could be subrogated to BofA's extinguished securities in the An Rong Vessels

39 However, Da Hui was not satisfied with only a right of contribution against An Rong. Given that An Rong was itself in liquidation, such a right in and of itself was potentially illusory. Therefore, Da Hui further contended that it had a right to be subrogated to "any extinguished securities held by BofA pursuant to the [Loan Agreement], including its mortgage[s] over [the An Rong Vessels]".[42] This right, so it was submitted, existed both at common law and under s 2 of the Mercantile Law Amendment Act 1856 (2020 Rev Ed) (the "MLAA").[43]

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41 TCC-1 at p 101, cl 21.34.

42 TCC-1 at [3(c)].

43 CWS at [62]–[63].

The basic principles

Subrogation to extinguished rights in equity

40 The equitable remedy of subrogation, although of ancient vintage, remains somewhat obscure and is not entirely well-understood. As Lord Hoffmann observed in the seminal case of *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 ("*BFC*"), "the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion" (at 231). The law has since developed distinctions between contractual and non-contractual subrogation, as well as between subrogation to personal rights and proprietary interests. The characterisation of the remedy Da Hui sought had to therefore be approached with some caution.

41 Here, I was concerned with a putative *non-contractual* right of subrogation to a *proprietary* interest (*ie*, ship mortgages) upon the discharge of a secured debt. The paradigm case in which this form of subrogation will be allowed involves one co-debtor or surety ("*A*") discharging the *entire* debt owed by the co-debtor or principal debtor ("*B*") to a creditor ("*C*"). In addition to *A* acquiring a claim in contribution against *B* (who has paid nothing), *A* will – subject to exceptions – also acquire a right to be subrogated to any securities given by *B* to *C* in respect of the debt: *Liberty Mutual Insurance Company (UK) Ltd and another v HSBC Bank Plc* [2002] EWCA Civ 691 at [43].

42 It is not difficult to discern the justification for this equitable remedy, which is based upon considerations of fairness and natural justice. In the ordinary course of things, unencumbered title to the property would be restored to *B* upon the total discharge of the underlying debt by *A*. However, the law recognises the inequity in *B* reclaiming the unencumbered title at *A*'s

expense. In this way, the remedy of subrogation operates to prevent or reverse *B*'s unjust enrichment: *BFC* at 231.

43 Before proceeding further, it is necessary to clarify the meaning of the phrase "subrogation to *extinguished* securities" – an expression deployed by Da Hui in its prayers for relief. Academic commentators have used this expression to account for the fact that the security in the hands of a creditor will almost invariably be extinguished (usually by operation of law) upon discharge of the secured debt. However, the court may, by resort to an established legal fiction, treat the security as subsisting for the purposes of allowing the subrogee to succeed to it and, if need be, enforce it as against the principal debtor. This stands in contradistinction to "simple subrogation", which involves the succession to *rights* that have not been extinguished by any prior act or event; the prime example of this is an insurer's right of subrogation to its assured's chose(s) in action against third parties: Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*The Law of Restitution*") at pp 146–147.

Subrogation to extinguished securities under s 2 of the MLAA

44 The discussion so far has been concerned with the common law. I turn now to the MLAA. The MLAA in its present form descends from the Mercantile Law Amendment Act 1856 (c 97) (UK) (the "English MLAA"). Sections 3 and 5 of the English MLAA were preserved as part of Singapore law by s 4(1)(*a*) read with the First Schedule of the Application of English Law Act 1993 (2020 Rev Ed), and they exist today as ss 1 and 2 of the MLAA respectively. As such, English cases on these provisions remain persuasive.

45 As I mentioned at [39] above, Da Hui took the position that its right of subrogation was also grounded in s 2 of the MLAA. That provision reads:

> **Surety who discharges liability to be entitled to assignment of all securities held by creditor, and to stand in place of creditor**
>
> **2.** *Every person who*, being surety for the debt or duty of another, or *being liable with another for any debt or duty*, *shall pay such debt or perform such duty*, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person *shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from* the principal debtor, or any co-surety, co-contractor, or *co-debtor*, as the case may be, *indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty*, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him:
>
> Provided that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.
>
> [emphasis added]

46 Section 5 of the English MLAA – and therefore, s 2 of the MLAA – essentially codified the common law rules on subrogation to extinguished security interests: *The Law of Restitution* at p 148. As Deputy Master Dray observed in *Leon v Kensington Mortgage Co Ltd and another* [2023] EWHC 121 (Ch) ("*Leon*") (at [69]–[70]), the legislators considered it necessary to enact s 5 of the English MLAA "to overcome what was considered to be the logical problem that, on payment by the surety, the principal debtor's debt was discharged and the creditor's rights thereby extinguished", although this

problem was arguably more apparent than real given the courts' ready use of the legal fiction referred to at [43] above. Overall, however, this provision confers nothing more or less than what has long been available at common law.

Whether subrogation was available despite Da Hui having only partially discharged An Rong's rateable debt obligation

47 Having set out a few of the basic and relevant principles on subrogation to extinguished securities, I turn now to the question of whether Da Hui was entitled to that remedy on the facts before me.

48 The scenario I sketched out at [41] above contemplates a situation in which *A* procured the *full* discharge of the principal debt to *C*. That was not the case here. Da Hui and An Rong's debt to BofA had only been *partially* discharged following the sale of the "Sea Equatorial" and the application of the proceeds in the manner set out at [16] above. The question that arose from this was whether subrogation was a remedy available in such circumstances. For convenience, I will use the term 'partial subrogation' to refer to subrogation in this limited form.

49 The authorities indicate that there is no bar to the grant of partial subrogation as an equitable remedy. I begin with *Patten v Bond* (1889) 60 LT 583 (Ch) ("*Patten*"), which was a case involving two trusts. The first trust, which I will refer to as the "Bond Trust", was a settlement of a house; that house was encumbered by a mortgage for a loan of £1000. The second, which I will refer to as the "Dixon Trust", was a trust of monies. Mr James Patten was a trustee of both. At some point, the mortgagee of the house called on the loan, and so Mr Patten took £600 from the Dixon Trust and applied it in part satisfaction of the mortgage debt.

50 The beneficiaries of the Bond Trust (who were the defendants in the action along with another trustee of the Bond Trust) eventually obtained a transfer of the mortgage to themselves by repaying the £400 outstanding on the mortgage debt. They then refused to repay the £600 or recognise any charge on the property in favour of the plaintiffs (*ie*, Mr Patten and his son as joint trustees of the Dixon Trust). Faced with this, the plaintiffs brought an action claiming *inter alia* that they were entitled to be subrogated to the mortgage insofar as it had been redeemed by the payment of £600.

51 Kay J found that the mortgage was "still kept alive so far as £600" and held that the plaintiffs were to be subrogated to that mortgage (*Patten* at 586). It was also ordered that unless the defendants redeemed the mortgage to which the plaintiffs were subrogated, the house was to be foreclosed upon. It seems that legal title to the house having revested in the Bond Trust beneficiaries, the plaintiffs were being subrogated to an *equitable* mortgage over the house (to the extent of £600) exigible against the beneficiaries as legal owners. In reaching his decision, Kay J observed (at 584–585) that:

> … [T]here can be no doubt that transactions of this kind [*ie*, the payment of £600 by the plaintiffs to the original mortgagee] are within the well-known rule of equity … that where a person not interested in the equity of redemption pays off part of the mortgage, that is not a discharge; it is not the intention that there should be a complete discharge. The court always looks at the intention of the parties, and presumes an intention to do that which is most for the benefit of the party who pays the money. The court will assume that the mortgage is not discharged, even though the whole of the debt was paid off to the mortgagee, but considers it to be kept on foot in equity for the benefit of the person who paid.

52 Intention-based justifications for the remedy of *non-contractual* subrogation (as espoused in the foregoing passage by Kay J, who looked to the parties' presumed intentions) have since been overtaken by the courts' acceptance that the remedy exists to prevent or reverse unjust enrichment *independent* of any agreement or understanding between the party enriched and the party deprived (*BFC* at 234):

> These cases seem to me to show that it is a mistake to regard the availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral. Such an analysis has inevitably to be propped up by presumptions which can verge upon outright fictions, more appropriate to a less developed legal system than we now have. I would venture to suggest that the reason why intention has played so prominent a part in the earlier cases is because of the influence of cases on contractual subrogation. But I think it should be recognised that one is here concerned with a restitutionary remedy and that the appropriate questions are therefore, first, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust; and thirdly, whether there are nevertheless reasons of policy for denying a remedy. …

53 Importantly, however, the cases following on from *Patten* indicate that the courts have been willing to grant *partial* subrogation as a remedy. *BFC* is one such case. The facts of *BFC* are fairly complex and it is unnecessary for present purposes to lay out all of them. In essence, *BFC* involved a property subject to two charges securing two separate loans to the first defendant ("Parc"). "Charge A" was granted to "A" as security for "Debt A"; "Charge B" was granted to "B" as security for "Debt B". Parc (who was the owner of the property) and B (who was the second defendant in the action) belonged to the same group of companies (the "Group").

54 At some point, a loan of DM30,000,000.00 was procured from the plaintiffs ("BFC") for the purpose of partially refinancing Debt A. To avoid

triggering certain of BFC's obligations under Swiss banking law, the loan was made out to a third party who then paid the moneys to Parc. Parc in turn used the moneys to partially discharge Debt A. BFC procured a "postponement letter" stating that all companies in the Group would not call on any of their loans to Parc until after BFC's loan had been repaid in full. That aside, BFC's loan was, for all practical purposes, unsecured.

55 Parc eventually became insolvent and a three-cornered fight over the property arose between A, B, and BFC. The key issue in the appeal in *BFC* was whether BFC was entitled to be subrogated to Charge A insofar as Debt A had been partially discharged using BFC's moneys. Their Lordships answered that question in the affirmative. In doing so, Lord Hoffmann dismissed the argument that there was a "conceptual problem" in A and BFC sharing the same charge (*BFC* at 235–236):

> In my view this is not a real problem. [BFC] does not claim any priority over [A]. It accepts that [A] was entitled to rely upon its first charge, in priority to [BFC], in respect of the whole of its outstanding indebtedness. [BFC] claims only to be able to rely upon that security against [B] after [A] has been paid. In this respect the case is in my view no different from *Chetwynd v. Allen* [1899] 1 Ch. 353, 357 in which Romer J. said that the unpaid balance of Terrell's debt would take priority over Mynors's claim by way of subrogation to his security. …

56 In light of the authorities affirming – or at the very least, not explicitly rejecting – the availability of partial subrogation as an equitable remedy, I was prepared to proceed on the basis that subrogation was *not* precluded in this case simply because Da Hui had only contributed towards the *partial* discharge of the joint and several liability to BofA.

Da Hui could not be subrogated to security interests that had already been spent in the hands of BofA

57 In my judgment, the key difficulty that stood in the way of Da Hui's prayer pertaining to subrogation was the fact that by the time OA 418 had been filed, BofA had already *fully enforced* the securities it had in the form of the mortgages over the An Rong Vessels. The "Ocean Goby" and the "Ocean Jack" were arrested by BofA in ADM 92 and ADM 94 respectively, which were admiralty actions *in rem* commenced by BofA in order to enforce its claims as mortgagee of the An Rong Vessels. The An Rong Vessels were judicially sold, and their proceeds paid into court (see [17]–[24] above). Therefore, Da Hui was, in short, seeking to be subrogated to securities that had already been *spent* in the hands of BofA.

58 In all of the decided cases to which I was referred by counsel for Da Hui, Mr Daniel Tan, the claimants sought to be subrogated to securities that – although 'extinguished' in the technical sense explained at [43] above – had *yet* to be enforced by the creditor. I was presented with no authority for the proposition that a claimant may, whether at common law or under s 2 of the MLAA, be subrogated to security interests that have been fully enforced and are therefore spent. Having approached the question from first principles, I was of the view that such a remedy was not one that either the equitable doctrine of subrogation or s 2 of the MLAA could accommodate.

59 The available case law tends to speak of subrogation to extinguished securities as a remedy that places the subrogee in the position of the subrogor prior to the discharge of the secured debt. For instance, it was observed in *Leon* (at [63]) that:

> [A] surety who discharges the principal debtor's liability … has the right to stand in the shoes of the creditor in enforcing the

> principal obligation of the debtor and the right to any securities held by the creditor in respect of the principal obligation and any rights and remedies *which the creditor enjoyed prior to the performance of the principal obligation*.
>
> [emphasis added]

60 This statement, however, is in my view merely a description of the remedy's practical effect, and ought not to be confused for the objective of (or rationale for) the remedy. At a foundational level, the vice that the remedy seeks to cure is the *unconscionability* of the defendant insisting on being restored to his collateral – or the defendant denying the claimant's entitlement to an interest in the collateral – in circumstances where the claimant had met the burden of discharging the defendant's liability to his creditor. In *Boscawen and others v Bajwa and another* [1996] 1 WLR 328, it was explained (at 335) that:

> [Subrogation] is available in a wide variety of different factual situations in which it is required in order to reverse the defendant's unjust enrichment. Equity lawyers speak of a right of subrogation, or of an equity of subrogation, but this merely reflects the fact that it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. *The equity arises from the conduct of the parties on well settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff.* A constructive trust arises in the same way. Once the equity is established the court satisfies it by declaring that the property in question is subject to a charge by way of subrogation in the one case or a constructive trust in the other.
>
> [emphasis added]

61 Much the same point was made in *Lord Napier and Ettrick v Hunter* [1993] AC 713 (at 738), albeit in the context of an insurer's right of subrogation to damages recovered by an insured in an action against the wrongdoer:

> … The principles which dictated the decisions of our ancestors and inspired their references to the equitable obligations of an insured person towards an insurer entitled to subrogation are discernible and immutable. They establish that such an insurer has an enforceable equitable interest in the damages payable by the wrongdoer. The insured person is guilty of unconscionable conduct if he does not provide for the insurer to be recouped out of the damages awarded against the wrongdoer. *Equity will not allow the insured person to insist on his legal rights to all the damages awarded against the wrongdoer and will restrain the insured person from receiving or dealing with those damages so far as they are required to recoup the insurer under the doctrine of subrogation.*
>
> [emphasis added]

62 Inherent to these articulations of the law is the assumption that the defendant in fact possesses (or will in due course possess) a right or interest which he cannot in good conscience keep the claimant out of. The logic of that is obvious: a person cannot realistically be said to retain a right or interest which he or she does not have to begin with.

63 In this case, there was no question of An Rong acting unconscionably in denying Da Hui any security interest in the An Rong Vessels. The mortgages over those vessels having been fully enforced and clean title to the vessels having passed to their respective buyers pursuant to their judicial sales, An Rong's equities of redemption were completely extinguished. As An Rong retained no residual interest whatsoever in the vessels thereafter, there was no question of An Rong regaining any securities unfairly. Conversely, it was plain that all of BofA's interests as mortgagee of the An Rong Vessels had either been extinguished by operation of law, or merged into the admiralty *in rem* causes of action BofA possessed as mortgagee and the judgments BofA had obtained in ADM 92 and ADM 94. In my view, there was hence *no proprietary interest* left to which Da Hui could succeed or be subrogated.

There were policy reasons for refusing Da Hui the remedy that it sought

64 It was apparent to me that in seeking to be subrogated to BofA's extinguished mortgages over the An Rong Vessels, it was not Da Hui's expectation that it would obtain any valuable interests in the vessels *per se*. What Da Hui in fact sought was the *priority* accorded to mortgagees in the payment out of the An Rong Vessels' sale proceeds (in accordance with the usual order of priorities of admiralty claims over a vessel's judicial sale proceeds). That priority ranking, if obtained by Da Hui, would have allowed it to leapfrog over Petrochina and SocGen's lower-ranking claims as statutory lien claimants. That much was evident from the following parts of Da Hui's written submissions:[44]

> … Da Hui is entitled to seek permission from the Court to stand in BofA's shoes in the existing proceedings in ADM 92 and ADM 94 once BofA's debts arising from the [Loan Agreement] have been fully discharged. As held in *Re Lamplugh*, Da Hui will also be entitled to the same priority that BofA had in relation to the sale proceeds of the respective vessels, prior to the satisfaction of BofA's claims. This necessarily means that Da Hui's claim will rank in priority to other *in rem* writ claimants' (i.e., SocGen and PetroChina), as well as An Rong's (as the former vessel owner).

65 In my view, the obvious difficulty with this position was the fact that upon full repayment of BofA's outstanding debt from the An Rong Vessels' sale proceeds, BofA fell out of the pool of *in rem* claimants and hence ceased to have any priority to which Da Hui could succeed. If Da Hui's submission was correct and its claim against An Rong were accorded the priority it sought, the net result would have been an *ex post* enlargement of the amount secured by the mortgages over the An Rong Vessels (*ie*, it would amount to

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44 CWS at [64].

the value of BofA's mortgage debt *plus* the value of Da Hui's claim in contribution). *BofA itself* could not have possibly asserted such an enlarged right in ADM 92 and ADM 94.

66 Leaving aside the legal implausibility of the outcome Da Hui sought to achieve, it was also plain as day that Da Hui was attempting (very late in the day) to steal a march on other lower-ranking *in rem* claimants who were looking to recover their judgment debts from the An Rong Vessels' residual sale proceeds (such as Petrochina and SocGen). The remedy of subrogation may be refused on grounds of public policy (*BFC* at 234; see [52] above), and it goes without saying that the *fair* distribution of an insolvent debtor's assets to its creditors is a matter of high public policy. This was, in my view, yet another feature of this case that militated against subrogating Da Hui to BofA's spent mortgages. Simply put, I did not consider it fair to allow Da Hui the advantages of that remedy in the circumstances of this case.

Conclusion

67 To sum up, I was not persuaded to grant Da Hui the declaration it sought by Prayer 3 of the application (see [3] above) as I did not think that it was possible for Da Hui to be subrogated to a security that had already been fully enforced and therefore spent in the hands of BofA. That aside, I would also have disallowed Prayer 3 for reasons of public policy: the state of affairs Da Hui sought to bring about could not have been achieved without unfairly prejudicing the other *in rem* creditors in ADM 92 and ADM 94.

68 Having refused Prayer 3 of the application, there was in my view no basis or justification to allow Prayer 2. Da Hui had already filed its proof of

debt with An Rong's liquidators in respect of its claim in contribution.[45] Whether An Rong was in fact indebted to Da Hui in the amount claimed for was a matter that could be determined in the adjudication of debts filed in An Rong's liquidation. Prayer 2 was therefore disallowed without prejudice to the adjudication of the proof of debt filed by Da Hui with An Rong's liquidators.

Issue 3: Whether Da Hui should be granted leave to commence and/or continue with OA 418

69 Leave to commence or continue OA 418 was sought by Da Hui for the purpose of obtaining the substantive reliefs sought in Prayers 2 and 3. This prayer was not objected to by Petrochina. Having disallowed Prayers 2 and 3, it appeared to me that there was no longer any practical reason to allow Prayer 1.

70 However, Ms Tan (on behalf of Petrochina) was prepared to accept that the question of Da Hui's entitlement to the remedy of subrogation (as sought by Prayer 3) was not a matter that An Rong's liquidators could determine – that was a factor that leaned in favour of granting Da Hui leave: *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and another* [2023] 3 SLR 1604 at [35]. I therefore allowed Prayer 1 to regularise my substantive determinations on the rest of the application.

Conclusion

71 To summarise, I granted an order in terms of Prayer 1 but dismissed Prayer 2 without prejudice to the adjudication of the proof of debt filed by Da Hui with An Rong's liquidators. I also dismissed Prayer 3.

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45 TCC-2 at [4].

72 Turning to the question of costs, in the circumstances of this case, I did not think that it would have been fair or just to order that the parties bear their own costs, or to make no cost orders in favour of Petrochina as a non-party. The circumstances in which Petrochina appeared and participated in the hearing of OA 418 (see [21] and [25]–[26] above) were sufficiently special or out of the ordinary to warrant costs being ordered in its favour. Bearing in mind that Prayer 1 was eventually allowed (and not objected to), I fixed costs of the application at S$7,000.00 (all-in) to be paid by Da Hui to Petrochina.

S Mohan
Judge of the High Court

Daniel Tan Shi Min, Hoang Linh Trang, Ee Yong Chun Bernard and Suresh Viswanath (Shook Lin & Bok LLP) for the claimant;
Defendant absent and unrepresented;
Jonathan Lim Shi Cao (Resource Law LLC) for the first non-party (watching brief);
Tan Poh Ling Wendy, Kelley Wong Kar Ee and Xu Hongli, Terry (Morgan Lewis Stamford LLC) for the second non-party.