## I. INTRODUCTION

1. This is an appeal against the decision of the Honourable Justice Goodman made on 29 January 2021, in overturning the Assistant Registrar's decision granting summary judgment in favour of the appellants, Banque d'Angleterre ("BAT").

## II. KEY FACTS

2. The parties connected to the matter are as follows:

    i. Navire Shipping Co Ltd ("Navire"), the shipowner and respondent in this appeal;

    ii. SIM Trading Sdn Bhd ("SIM"), the charterer and origin seller,

    iii. BTC Industries Pte Ltd ("BTC), the buyer and sub-seller;

    iv. BAT, BTC's bank with which it has a facility agreement; and

    v. Kent Ridge Soya Industries Pte Ltd ("KRI"), the sub-buyer.

3. SIM contracted to sell a cargo of palm oil (the "cargo") to BTC on "Incoterms CNF Mangalore, India". BTC on-sold this cargo to KRI.

4. In furtherance of the above contract to sell, SIM entered into a voyage charterparty with Navire for the charter of MT LE BATEAU, which lifted the cargo on 15 April 2019 at Lubuk Gaung, Indonesia. The bills of lading identified the consignee as "To Order" and were released to SIM.

5. Pursuant to Clause 11 of the voyage charterparty, Navire was obliged to discharge the cargo against a letter of indemnity provided by SIM, in the event that the bills of lading were not in the hands of KRI when LE BATEAU arrived at New Mangalore.

6. On 22 April 2019, SIM issued the said letter of indemnity to Navire and issued instructions identifying KRI as the party to which the cargo would be delivered.

7. On 24 April 2019, LE BATEAU arrived at New Mangalore, ahead of the bills of lading, which BAT received only on 26 April 2019. At some point between 26 and 29 April 2019, BTC requested financing for the entire purchase price by way of a trust receipt loan.

8. On 25 April 2019, LE BATEAU diligently carried out the instructions of SIM and executed its Clause 11 obligation by discharging the cargo to KRI. This was completed on 29 April 2019 at 8.55 am.

9. BAT only granted the loan to BTC at 8.32pm on 29 April 2019, i.e. after the discharge of the cargo was completed. It is not known at this stage of the proceedings whether BAT knew that the discharge had been completed when it granted the loan to BTC, or whether it had, due to negligence, recklessness, or some other reason, omitted to enquire on the status of the cargo before releasing the funds to BTC.

10. BTC eventually defaulted on the loan from BAT.

11. BAT then sought to enforce its security over the bills of lading by demanding delivery of the cargo from Navire, which Navire failed to do given that it had discharged the cargo to KRI in good faith and accordance with its charterparty obligations and instructions from SIM. BAT then initiated proceedings against Navire pursuant to the bills of lading for breach of contract of carriage, breach of contract of bailment, conversion and detinue.

## III. RESPONDENT'S CONTENTIONS

### a. RA 1822/2020 should be allowed as Navire has a fair probability of conducting a bona fide defence

12. Goodman J was right in his decision to allow RA 1822/2020 as there is reasonable doubt as to whether BAT is entitled to judgment, and there is a fair probability that Navire has a reasonable bona fide defence.

13. The power to give summary judgment under O 14 of the Rules of Court is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay. On the other hand, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. (*Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 ("*Habibulla*"), following *Jones v Stone* [1894] AC 122 ("*Jones*")).

14. In this matter, Navire has a fair case and probability for setting up a bona fide defence and thus ought to have leave to defend. In particular, there are triable issues as to:

    i. Whether Navire is entitled to rely on the defence of consent;

    ii. Whether there is another reason to go to trial, in light of BAT's control over potential evidence of its actual knowledge of the discharge of the cargo; and

    iii. Whether the bills of lading were spent.

### A. There is a triable issue as to whether Navire is entitled to rely on the defence of consent

#### *a. **BAT may have waived its right to sue Navire when it granted the trust receipt loan to BTC***

15. In *The "YUE YOU 902"* [2019] SGHC 106 ("*YUE YOU 902*"), the defence of consent was denied to the defendant shipowner. Pang JC relied on *Nederlandsche Handel-Maatschappij v Strathlorne Steamship Company* (1931) 39 Lloyd's Rep 171 ("*Nederlandsche*") in establishing a requirement that a finding of consent required a positive communication of consent: "something… said or done by the pursuers which affected the mind of the master of the ship, induced him to conclude that they were consenters, and thus encouraged him to make delivery without production of the bills of lading".

16. The Court ought not to place reliance on *Nederlandsche* for the proposition that a positive communication is required for consent to be made out. While the bench in *Nederlandsche* was unanimous in its judgment, it was an opinion nevertheless unsupported by authority.

17. On the other hand, the Court ought to rely on the established common law doctrine of waiver in determining whether Navire ought to be excused. Under the Singapore Court of Appeal's most recent restatement of the relevant principles in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317; [2018] SGCA 4 ("*Audi*"), a plaintiff that has waived its rights by election will be held to have abandoned that right if it is aware of the facts which have given rise to the existence of the right to election, and has communicated its election in clear and unequivocal terms to the other party (at [54]). In particular, the content of the communication is that of the choice whether or not to exercise the right which has become available to it (at [57]).

    i. <u>BAT may have communicated its election to affirm Navire's breach if it had actual knowledge that the cargo had already been discharged</u>

18. As regards the requirement for clear and unequivocal communication, the Court in *Audi* has established that silence is not fatal to a finding of waiver in instances where a duty to speak arises (at [59]). The expression "duty to speak" does not refer to a legal duty as such, but to circumstances in which a failure to protest would lead a reasonable party to think that the other party has waived its rights by election. Whether such circumstances have arisen must be decided having regard to the relationship between the parties, which is in turn understood based on the facts of the case at hand and the legal context in which the case arises (at [61]).

19. Whether a pledgee bank has a "duty to speak" if it has actual knowledge that the pledged cargo was discharged by the shipowner in the absence of the original bills has not yet been considered by any court. However, having close regard to the facts of the current matter, the Court ought to find that the circumstances and legal context place Navire and BAT within such a relationship as to reasonably infer from BAT's conduct that it had waived its rights.

20. Under the circumstances, BAT was pledgee of the cargo held aboard Navire's vessel and thus connected to the underlying sale and purchase contracts and charterparty that effected delivery of the cargo. As pledgee, BAT would also have been expected to ensure that the cargo, its sole security, was not discharged, as it formed the sole security for its loan given to BTC. Had BAT been aware of the discharge of the cargo, it also would have been aware of its need to elect between "alternative and inconsistent rights": either to refuse the loan to BTC or to grant it notwithstanding the discharge of the cargo.

21. If BAT had actual knowledge that the cargo had already been discharged its subsequent lack of protest and issuance of the trust receipt loan would lead a reasonable party to think that it had elected to waive its right to claim against Navire for that delivery, notwithstanding the absence of any positive communication to that effect. BAT's election would be final and binding (*Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391 at 397–398, *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33] ("*Chai Cher Watt*"), followed in *Audi*).

i. <u>The question of whether BAT possessed such actual knowledge ought to be determined in a full trial</u>

22. As for the requirement of knowledge required to trigger the waiver, the relevant level and content of knowledge is "knowledge of the facts giving rise to those rights [of election]" (*Chai Cher Watt* at [34]; *Audi* at [54]). The Court ought not to dismiss the current matter at the summary judgment stage as there is a need to investigate the strong probability that BAT did in fact have knowledge of the cargo being discharged when it issued the trust receipt loan to BTC.

23. The Court ought to note that the process of verification (of whether the cargo had been discharged) is an inexpensive one and that BAT was expected in the expert opinion to have conducted such verification "on the status of the Cargo such as whether the Cargo has been discharged". Given the relative ease of checking the status of the cargo to BAT, coupled with the its crucial importance as security for the trust receipt loan, there is a reasonable probability that BAT did in fact have actual knowledge of the discharge, save for the possibility of gross negligence or recklessness. The Court ought to investigate the extent of BAT's knowledge through the full extent of discovery, interrogatories and cross-examination.

24. In essence, whether BAT has waived its right to make a claim against Navire for misdelivery can only be determined after a finding as to whether it had actual knowledge that the cargo was already discharged when it issued the trust receipt loan to BTC. It is not appropriate to dispose of the issue during summary judgment proceedings, especially in light of the fact that most of the facts and evidence relevant to whether BAT had actual knowledge of the discharge are under its own control.

**B. There is another reason to go to trial as the evidence relating to BAT's actual knowledge is mostly under BAT's own control**

a. **Further evidence is needed to determine whether defence of consent is available to Navire**

25. As argued above, whether or not BAT had, by way of election, waived its right to bring a claim against Navire can only be decided by the Court through a determination on whether BAT possessed actual knowledge as to whether the cargo had been discharged when it granted the trust receipt loan to BTC.

26. It would thus be in the interest of justice for the Court to benefit from the full extent of discovery, interrogatories and cross-examination, as most of the facts and evidence relevant to whether BAT had actual knowledge of the discharge of the cargo are under its own control. Thus was the case in *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 1 SLR(R) 465 ("*Concentrate Engineering*"), where the Court granted unconditional leave to defend against the plaintiff bank because "the circumstances are such that the defendants ought, in the interest of justice be given time and with it the opportunity to investigate further the fraud by whatever means that are available to them, including a trial, to determine for themselves whether they are liable as bankers".

27. In the present matter, all documents, including correspondence, meeting notes or due diligence reports in respect of and in relation to the Credit Facility which BAT extended to BTC are within BAT's own control. Similarly, all potential correspondence between BAT and the related parties to the string of transactions, *viz*.: SIM, BTC, KRI, and Navire, are in the possession and control of BAT.

28. The likelihood that the extent of BAT's knowledge can be established by a full investigation into the abovementioned correspondence and documents is strong and not insignificant.

29. On the matter of BAT's due diligence, the expert opinion indicates that the results of such due diligence would likely provide evidence on BAT's understanding of how BTC conducts its business, and potentially, its awareness that all commercial arrangements with SIM would have required the discharge of the cargo without the production of BLs. Such a finding is made more likely by BTC's own affidavit which alleges outrightly that BAT was "aware of and acquiesced to" said practice of discharging cargoes in the absence of the original bills.

30. On the matter of BAT's correspondence with all related parties including BTC, the expert opinion is that BAT would likely have enquired with BTC on the status of the cargo after receiving its request for the Trust Receipt. This opinion, coupled with the relative inexpensiveness and ease for BAT to make such enquiries, especially when considering the key nature of the cargo as security for the trust receipt loan, makes it reasonably probable that further investigations by the Court would likely be fruitful in producing evidence of BAT's knowledge that the specific cargo in question had already been discharged.

31. Given further that Navire's key defence of consent and waiver by BAT turns on the issue of BAT's knowledge, it is evident that granting leave to defend to investigate the above matters in full would not be done "for the mere purposes of delay" given that the circumstances outlined above create reasonable doubt that BAT is entitled to judgment in light of its potential knowledge (*Jones*).

**C. There is a triable issue as to whether the bills of lading were spent**

32. BAT obtains rights of suit under the bills of lading pursuant to s 2(1) of the Bills of Lading Act unless, among other things, the bills have become spent within the meaning contained in s 2(2) of the Act.

33. Whether the bills are spent under s 2(2) of the Act relate to the circumstances in which the bills are regarded as spent at common law (*YUE YOU 902*).

    a. **There is a serious question of policy to be considered which militates in favour of departing from the existing common law position**

34. It is conceded that under the existing common law position, the original bills are not spent and BAT still has rights of suit against Navire under the bills, notwithstanding the fact that the cargo has been discharged to KRI. This is the position in light of the fact that KRI did not produce the original bills of lading; delivery by a shipowner to a person who does not produce the original bills does not cause the bills to be spent (*YUE YOU 902*).

35. Be that as it may, there is still a serious issue to be tried as to whether BAT has rights of suit as the Court ought to consider whether it should depart from the existing common law position on grounds of policy.

36. Whereas the current common law regime penalises the shipowners for misdelivery in the event that they deliver the cargo to the "wrong party", it also penalises them for misdelivery even where they deliver the cargo to the "right party" (*viz*.: nominee of the shippers or charterers) but the bank is not repaid its loan. To hold a shipowner liable under the second circumstance, i.e. even where the cargo is delivered to the "right party" who is often named in the charterer's express instructions and/or the express terms of the charterparty, would effectively render it as a guarantor for the underlying sale and purchase contract and associated bank loans. (*ICMA XVI Congress Papers, Singapore: Delivery Of Cargo Without Production Of Bills Of Lading - Default Financing* (42, 2007))

37. In other words, as a matter of law, the current position would extend rights of suit to banks in the position of BAT to recover their losses from shipowners, regardless of their own potential negligence in contributing to their own losses.

38. In the interest of fairness and commercial sense, the Court ought to consider whether a shipowner in the position of Navire, which discharged its own charterparty obligations in good faith and with diligence, ought to be the party that ultimately indemnifies banks from *all* losses, even in instances where the banks themselves may potentially have incurred those losses due to their own negligent or reckless conduct in omitting to ascertain the status of the cargo before granting such loans.

39. The unsatisfactory nature of the present position is underscored further when considering that the bank acquires rights of suit against shipowners even though shipowners may be acting in good faith under express instructions from charterers, the obligations to whom the shipowner is most concerned with.

40. On the other hand, the current position would always avail to banks the opportunity to recoup their losses by acquiring rights of suit against the shipowner, even where their own potential negligence and recklessness as to the status of the cargo may have contributed to their own losses; or worse still, where they may grant loans even in the full knowledge that the cargoes had long since been discharged by shipowners acting under instructions, knowing that the shipowners' technical breach can always used as security for the loan in any event should the cargo be discharged.

41. The upholding of such a judicial position that indemnifies banks from their own negligence would undermine the general policy position: that banks engaged in trade finance ought to act with diligence to avoid losses. The ABS Code of Best Practices for Commodity Financing (Nov 2020) sets out the general policy principle that lenders in the position of BAT are expected to implement appropriate policies, procedures, and controls to actively assess and mitigate credit risk in a risk proportionate manner.

42. It is arguable that it would be risk proportionate for a bank in the position of BAT to perform a basic and inexpensive check on the status of the LE BATEAU and her cargo, which formed the entire security for its trust receipt loan to BTC, before issuing that loan to BTC.

43. The implementation of these "prudent commodity trade financing… principles", as set out by the "vast majority of commodity finance lenders in Singapore", thus presents a serious question which the Court ought to consider in a full trial, *viz*.: whether the Court should depart from the existing common law position, to prevent banks in the position of BAT from acquiring rights of suit against shipowners even in instances where their own negligence or recklessness may have contributed significantly to their losses. Denying BAT rights of suit in this instance would have the welcome effect of bringing the position closer in line with the overarching policy principle promoting prudence amongst lenders.

44. The Court may be particularly minded to do so in the present matter, given that the respondent's technical breach was committed in the diligent, good faith performance of its contractual obligations to the charterer (SIM).

45. For the above reasons, there is a serious and triable issue as to whether the Court ought to depart from the existing position and hold that bills of lading were spent.

b. **The rationale of the existing common law position would not be frustrated if Navire were to be excused for delivering the cargo in the absence of the original bills**

46. The possibility that the Court may depart from the established common law position is enhanced further given that the rationale of the common law position would not necessarily be frustrated if it were to excuse Navire for its breach.

i. <u>The requirement for production of original bills incorporates an assumption that shipowners cannot identify the party entitled to delivery</u>

47. It is trite that under the present position on order bills, a shipowner is liable to the holder of the bills if it delivers the cargo to a person who does not produce the bills of lading (*Carver on Bills of Lading* ("*Carver*") at 6-008, cited with approval in *Glencore International AG v MSC Mediterranean Shipping Co SA* [2015] EWHC 1989; [2015] 2 Lloyd's Rep. 508 at [16]). It is also well-established that the delivery must be done only "upon production of the original bill of lading" and delivery without production of the bills constitutes misdelivery (*The Houda* [1994] 2 Lloyd's Rep 541 at 553). As such, under the present common law position, a bill of lading is not regarded as spent if it is delivered to a "non-entitled person" who does not produce the original bill.

48. This requirement of "production" of the bills is the necessary consequence of order bills being recognised as "negotiable" documents of title. (*Motis Exports Ltd v Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep. 211) Arguing from first principles, the rationale for this necessity is to prevent the "key to the warehouse" (*BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties)* [2003] 3 SLR(R) 611; [2003] SGHC 111) from falling into the hands of parties who demand delivery without having any rightful claim or entitlement over the cargo, whether fraudulently or by mistake.

49. Critically, the underlying assumption is that "until such a bill is presented the carrier will not know the identity of the party entitled to delivery" which gives rise to the risk of falling victim to a fraudulent misrepresentation (*J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 A.C. 423 at [6]). In this classical hypothetical circumstance, it may be regarded as fair to allow the holder of the bill rights of suit against the shipowner pursuant to s 2(1) of the Bills of Lading Act.

50. The force of this rationale and assumption in the case of order bills is further evidenced by the contrasting position on straight bills (with named consignees), where the likelihood of fraud or mistake is lower, there is no general principle that named consignees are required to produce carriage documents in order to claim delivery (*Carver* at 6-020).

ii. Navire understood that KRI was intended to be the ultimate recipient of the cargo when it discharged the cargo to KRI, and KRI had a valid contractual right to the cargo

51. As a matter of fact, the crucial assumption contained in the common law position, that shipowners are unable to verify the identities of the party entitled to delivery, does not hold on the facts of this matter as Navire was expressly informed and instructed by SIM to deliver the cargo to KRI at New Mangalore well before the vessel arrived at the port.

52. In fact, KRI, being no stranger to the arrangements, was far from being a party attempting to fraudulently obtain delivery; it was apparent to everyone involved in the string of transactions that KRI was the intended ultimate holder of the BLs in the ordinary course of events, having itself entered into a binding agreement to obtain title over the cargo for good consideration. It was thus contemplated by SIM, BTC, KRI and Navire that KRI would ultimately be entitled to hold the bills of lading and, as such, constructive possession of the cargo. Had payment been made and the bills successfully transmitted down the banking chain, KRI would certainly have been expected to hold the bills and produce them on the arrival of LE BATEAU.

53. As such, even though delivery was not done on production of the bills of lading, the Court is not precluded from excusing Navire's delivery of the cargo to KRI given that it was not a stranger to the transaction but an active participant in the string of transactions that had put up good consideration for title to the cargo.

## D. CONCLUSION

54. It is reiterated that the power to give summary judgment under O 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay.

55. On the other hand, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. (*Habibullah*, *Jones*).

56. The respondent has demonstrated above that there is reasonable doubt that the appellant is entitled to judgment. The respondent has also demonstrated its own fair case and thus that it ought to have leave to defend. In particular, there are triable issues as to:

    i. Whether Navire is entitled to rely on the defence of consent;

    ii. Whether there is another reason to go to trial, in light of BAT's control over potential evidence of its actual knowledge of the discharge of the cargo; and

    iii. Whether the bills of lading were spent.

57. In the circumstances, the respondent prays that the appeal be dismissed.