UCO Bank v Golden Shore Transportation Pte Ltd
[2003] SGHC 137

Case Number : Suit 1582/2001, RA 261/2002

Decision Date : 25 June 2003

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Sarjit Singh Gill SC (Shook Lin & Bok) for the plaintiff; Dylan Lee (Shook Lin & Bok) for the plaintiff; Toh Kian Sing (Rajah & Tann) for the defendant; Aileen Boey (Rajah & Tann) for the defendant

Parties : UCO Bank — Golden Shore Transportation Pte Ltd

Conflict of Laws – Exclusive jurisdiction clause – Whether clause in bills of lading was exclusive jurisdiction clause – whether stay should be granted – forum non conveniens – whether India was clearly the more appropriate forum.

Introduction

1 The plaintiff UCO Bank ("UCO") claimed damages in this action, as a holder of bills of lading, against the defendant Golden Shore Transportation Pte Ltd ("Golden Shore") who was the owner of the vessel "ASEAN PIONEER".

2 Golden Shore then applied for a stay of this action on two grounds:

(a) clause 17 in the bills being an exclusive jurisdiction provision which provided for claims to be dealt with under the jurisdiction of the courts at the intended port of delivery i.e Kandla, India,

(b) that, in any event, India is clearly the more appropriate forum to hear the dispute.

The application was heard by an Assistant Registrar who granted a stay on the basis that clause 17 was an exclusive jurisdiction provision but made no decision on the second ground.

3 UCO then appealed to a judge-in-chambers. Its arguments were that clause 17 was not an exclusive jurisdiction provision and, even if it was, there was strong cause why UCO should not be held to such a provision on the particular facts of the case. In turn, Golden Shore filed an appeal to a judge-in-chambers on the basis that the Assistant Registrar should also have ruled on the second ground in its favour but, in my view, such an appeal was unnecessary since Golden Shore was the successful party below and it could still rely on the second ground in its argument against UCO's appeal.

4 After hearing submissions, I allowed UCO's appeal. I was of the view that clause 17 was an exclusive jurisdiction clause but nevertheless, the stay should be refused. I made no order on Golden Shore's appeal. Golden Shore has since appealed to the Court of Appeal.

5 I should add that there is a similar claim in Suit 1583/2001 by UCO against Golden Orient Maritime Pte Ltd as the owner of another vessel "ASEAN SUCCESS" on similar facts, the outcome of which followed the present action. There is likewise an appeal to the Court of Appeal in that action.

Background Facts

6 UCO is an Indian bank carrying on business in Singapore. At all material times it was its

Singapore branch which was involved in the transactions which I am about to describe.

7 Golden Shore is a company incorporated in Singapore and, as I have said, was the owner of the vessel in question.

8 At all material times, SOM International Pte Ltd ("SOM"), a company also incorporated in Singapore, was a customer of UCO.

9 On various dates between September and December 2000, SOM applied to UCO for the issuance of letters of credit in favour of various vendors of Sarawak Round Logs. UCO accordingly did so. In January 2001 the vendors separately presented documents called for under the letters of credit, including the first set of bills of lading issued by the master of the vessel, through the negotiating bank HSBC. On receipt of the documents UCO paid HSBC a total of US$556,514.08 and became the holders of these bills of lading. I will refer to them as "the original bills". The dates thereon were between 22 and 31 December 2000. The consignee named in the original bills is "to the order of UCO Bank". The stated parties to be notified were SOM and UCO.

10 In the meantime, SOM requested Golden Shore to issue switched bills of lading which it did, through its agent Glory Ship Management Pte Ltd ("Glory Ship Management"), without requiring the original bills to be exchanged (i.e contemporaneously) for cancellation or UCO's agreement that it would no longer rely on the original bills. It is not clear when the request was made and when the switched bills were actually issued but the dates thereon were between 22 to 30 December 2000. Subsequently, buyers in India presented to the agent of Golden Shore in Kandla the switched bills and obtained delivery of the logs between 15 and 25 January 2001 (see para 11 of the first affidavit of Sum Kam Weng who is the General Manager of Glory Ship Management).

11 According to UCO, SOM did not pay UCO in the meantime despite numerous promises to do so. It also transpired that UCO did not make any demand or claim for the logs until Rajah & Tann, who were the Singapore solicitors for Golden Shore and Glory Ship Management, wrote to UCO by fax dated 21 June 2001 to ask for the return of the original bills. It was then that UCO reverted on 3 August 2001, through its Singapore solicitors Shook Lin & Bok to reserve UCO's rights against Golden Shore and subsequently to commence the present action on 20 December 2001.

Was clause 17 an exclusive jurisdiction provision?

12 It was not disputed that if clause 17 was a jurisdiction provision, it was an exclusive one. Clause 17 of the original bills states:

> Claims. Any *claims* that may arise hereunder must be made at the port of delivery for *determination* and settlement at that port only. The Carrier's liability in case of loss or damage to goods for which they are responsible within the limits of this Bill of Lading to be calculated on and in no case to exceed the net invoice cost and disbursement or pro rata on that basis in the event of partial loss or damage. Unless *notice of loss or damage* and the general nature of such loss or damage be given in writing to the Carrier or their agents at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or if, the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the Carrier of the goods as described in the Bill of Lading. In any event, the Carrier shall be discharged from all liability in respect of loss or damage unless *suit* is brought within one year after delivery of the goods or the date when the goods should have been delivered.
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> In no circumstances shall liability exceed the actual loss or damage sustained, the carrier shall not be

liable for any consequential or special damages and shall have the option of replacing any lost or damaged goods. Any sum paid to or recovered by Customs Authorities under any Bond for exportation given by the shippers or owners of goods shall not be considered to form part of any actual loss or damage sustained by or in connection with such goods for which the carrier is or shall be liable. If the ship comes into collision with another ship as a result of the negligence of the other ship or object and any act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or object or the owners in so far as such loss or liability represents loss of, or damage to, any *claim* whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or object or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or object or her owners as part of their claim against the carrying ship or Carrier. At any port where, in accordance with Customs regulations, the goods have to be landed into the charge of the Customs or other Authorities no *claims* for shortage or damage will be considered by the Carrier, beyond that noted by the Authorities at the time of receiving the goods into their charge.

In the case of any actual or apprehended loss or damage, the Carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods. The carrier shall not be liable to pay any compensation if the nature or the value of the goods has been wilfully mistated. The above includes *claims* in the nature of General Average.

This clause in its entirety shall also apply in any case of loss sustained as a result of mis-delivery, *non-delivery*, wrongful delivery or delivery to any person whomsoever not entitled to the goods. [Emphasis added]

13 Mr Sarjit Singh Gill SC, Counsel for UCO, submitted that the first sentence of clause 17 required only "claims" to be made at Kandla being the port of delivery and "claims" meant written demands but not suits. He pointed out that in the last sentence of the first paragraph of clause 17 the word "suit" was used and argued that this demonstrated that "claims" must mean nothing more than notification of loss or damage. Otherwise, there would not have been the use of two different words (see para 22 of his written submission). Accordingly, his submission was that clause 17 was not a jurisdiction provision.

14 Mr Gill's next argument for this proposition was that if the word "claims" was to include suits, such an interpretation would be incongruous in the context of clause 17. For example, the words, "no claims for shortage or damage will be considered by the Carrier" could not be read to mean "no suits will be considered by the Carrier". Likewise the words "The above includes claims in the nature of General Average" could not mean "The above includes suits in the nature of General Average".

15 Mr Gill also referred to the words "At any port where … the goods have to be landed into the charge of the Customs or other Authorities no claims … will be considered by the Carrier, beyond that noted by the Authorities at the time of receiving the goods into their charge". He asked rhetorically whether suit had to be commenced at, say, an African port if the logs had for some unexpected reason to be landed at an African port instead of at Kandla. In my view, this submission was misplaced because the words Mr Gill referred to did not amount to a jurisdiction provision but were for a different purpose. They merely meant that Golden Shore was not obliged to meet any claim for more than what would have been noted by the relevant authorities.

16 Mr Gill then contrasted clause 17 with clause 6 which states:

… Claims for services by other vessels belonging to the carrier, wherever rendered, may be adjudicated

upon in the Singapore Court whose decisions shall bind the owners of the goods …

He submitted that clause 6 was specific about the forum of litigation unlike clause

17 Mr Gill also submitted (in his para 28) that at best, clause 17 sets out the procedure and time frame within which "… the initial stages in processing a claim (notification of loss or damage) were to be set in motion …", relying on *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253.

18 Mr Gill then drew my attention to other cases where the provisions were clear in stipulating the forum for litigation. He also relied on *The Sinar Mas* [1982] 1 MLJ 279, where, in dealing with an identical sentence as the first sentence of clause 17, Mohamed Azmi J said, at p 279:

> On the first ground, the relevant part of Clause 17 reads as follows:
>
> > "Claims. Any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only …."
> >
> > In *Shorter Oxford Dictionary*, "claims" means a demand for something as due; an assertion of a right to something. In my view, a claim in the context of Clause 17 does not amount to a litigation which, according to the same dictionary, means the action of carrying on a suit in law or equity; legal proceedings; and disputation. Having regard to the judgments in *The Fehmarn* and *The Adolf Warski*, I think there is a distinction between "claims" and "disputes". Clause 17 does not envisage any dispute on litigation. It is confined to "claims" pure and simple as, for example, where a consignee wishes to claim for the goods under the Bill of Lading, then it must be done only in Kuching, which is the port of delivery. I am, therefore, of the view that Clause 17 is not a jurisdiction clause or even a forum clause. The court should not import extra words into Clause 17 so as to give it new meaning which regard to the intention of the contracting parties.

19 Mr Gill's final argument, in respect of the interpretation of clause 17, was that any ambiguity therein should be read against Golden Shore under the contra proferentem rule.

20 Mr Toh Kian Sing, Counsel for Golden Shore, submitted that there were other cases with similar, although not identical, provisions in which the provisions were construed as jurisdiction ones.

21 As for *The Sinar Mas*, Mr Toh had, interestingly enough, criticised the decision in his book on Admiralty Law & Practice at p 455 where he said the distinction between a dispute and a claim seemed "rather semantic". He also submitted that the two cases relied upon i.e *The Fehmarn* [1958] 1 All ER 333 and *The Adolf Warski* [1976] 1 Lloyd's Rep 107, did not provide any support for the decision in *The Sinar Mas*.

22 Mr Toh further submitted that the interpretation advocated for UCO did not give effect to the word "determination" which must mean "adjudication". If the effect of clause 17 was merely to give notification of loss or damage, "determination" would not be necessary.

23 As for the case of *Oriental Insurance*, Mr Toh submitted that the requirement of notification of claims there was to enable insurance companies to conduct investigations and UCO had erroneously relied on it to support its position.

24 As for the use of the word "suit" in the last sentence of the first paragraph of clause 17, Mr Toh said that this sentence was actually a reproduction of Article 3 rule 6 of the Hague Rules 1924. Accordingly, "suit" was not specifically inserted to distinguish it from "claim".

25 Therefore, Mr Toh submitted that there was no ambiguity and the contra proferentem rule would not apply.

26 I was of the view that Mr Toh's arguments on clause 17 were well-founded.

27 In the first sentence of clause 17, the word "determination" made it clear that it was more than a provision providing for the notification of claims. In *The Sinar Mas*, the court did not give any weight to this word.

28 I also found the cases relied on by Mr Toh persuasive. For example, *In Maharani Woollen Mills Co v Anchor Line* [1927] 29 Lloyd's Rep 169, the provision was similar, although not identical, and Lord Justice Scrutton said:

> This is an appeal from an order of McCardie, J., varying an order of the Master who had stayed the action by striking out the writ. It arises in this way. Some goods were shipped to Indian consignees to be delivered at Bombay. They are alleged to have arrived mildewed. There is a clause in the bill of lading that "all claims arising shall be determined at the port of destination according to British laws." The port of destination was Bombay, and the consignees were in Bombay, and the evidence of the condition of the goods when they arrived is in Bombay. But the Indian consignees did not think it necessary to sue the ship, and they sued the underwriters. Their underwriters seemed to have paid them near the end of the year and then, having paid them, they are subrogated to the rights of the owners of the goods. But the difficulty is that they have been so long in paying that by the time they issued their writ in India the twelve months from the delivery of the goods, the period within which the claim must be made, would have expired; and so they issued their writ in England within twelve months. Thereupon an application was made that the claims should be determined at the port of destination and the Master, in a carefully written judgment, held that the objection was good and the action ought to be stayed. McCardie, J., went further, and said that the jurisdiction was in India, and that therefore the writ ought to be set aside. I agree with the view taken by the Judge. In my view the parties to this bill of lading have agreed, and have made a reasonable agreement, that in the first place disputes as to the condition of the goods and damage done to them shall be settled where the goods and all the witnesses are. Mr. Bevan says it is a difficult clause to understand, but, like my brother, I saw no difficulty in it until I heard Mr. Bevan explain it, though, having heard him explain, I still do not see any difficulty ….

29 The same conclusion was reached by the court in *"The Media"* 41 Lloyd's Rep 80 on a similar clause as in *Maharani Woollen Mills*.

30 I was of the view that although the clause in these two cases expressly stated that the determination was to be in accordance with a governing law, this did not change the character of the clause. The clause was already a jurisdiction clause even without the express reference to the governing law. The express reference simply made it clear therein which was the governing law. Although clause 17 before me did not expressly state the governing law by which the determination was to be made, the governing law was nevertheless stated on the front of each of the original bills to be Singapore law. That being the case, there was no need to repeat it in clause 17.

31 According to Mr Toh, *The Media* was accepted as a case involving a jurisdiction clause by Yong Pung How J (as he then was) in *The Asia Plutus* [1990] SLR 543 at 547. However, I noted that in *The Asia Plutus*, Yong J was actually referring to the leading judgment of Brandon J in *The Eleftheria* [1969] 1 Lloyd's Rep 237 in which Brandon J summarised the principles established by six authorities in a stay application. One of the six authorities was *The Media*. Therefore, Yong J did not explicitly concur with the interpretation of the clause in *The Media.* In any event, Mr Toh had the cases of

Maharani Woollen Mills and *The Media*, among others, to rely on.

32 It seemed that neither of these two cases were referred to the court in *The Sinar Mas*. I also accepted that the cases of *The Fehmarn* and *The Adolf Warski* did not provide any support for the decision in *The Sinar Mas* regarding the interpretation of clause 17.

33 As for the cases relied on by Mr Gill as illustrations of clear jurisdiction provisions, I was of the view that those cases did not mean that clause 17 was not a jurisdiction provision.

34 As for *Oriental Insurance*, it was a case involving a claim against an insurer. More importantly, the provision there was quite different. At paras 26 to 28, Yong Pung How CJ, delivering the judgment of the Court of Appeal, said:

> *Choice of jurisdiction clause*
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> 26 There was no express choice of jurisdiction clause. It was, however, provided that claims are payable in India or Singapore in US dollars. Two interpretations of this clause was possible. The first, suggested by the respondents, was that this amounted to a jurisdiction clause, with exclusive jurisdiction to India and Singapore. In that event, with the Singapore courts already being seized of jurisdiction and there being no pending proceedings in India, the normal course of action would have been to refuse a stay.
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> 27 We were, however, not impressed by this argument. Adjacent to the clause stipulating that 'Claims [are] payable at India or Singapore in US dollars', the contract clearly states that
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>> In the event of loss or damages which may involve a claim under this insurance, immediate notice thereof and application for survey should be given to: Survey Settling Agents, The Oriental Insurance Co Ltd, AVM Building, North Cotton Road, Tuticorin.
>
> Though falling short of a stipulation that claims are to be made to The Oriental Insurance Co Ltd in India, we were prepared to infer from this that, even if the parties had not gone so far as to contemplate that a claim would be settled (or rejected) by the appellants in India, the initial stages in processing a claim (notification of damage and survey) were to be set in motion in India.
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> 28 We therefore took the view that the second interpretation of the provision that claims are payable in India or Singapore is the better one, namely, that the effect of that clause is simply that, wherever the claim is processed, amounts payable, if any, may be paid in India or Singapore at the parties' convenience. As the place of payment clause did not amount to a jurisdiction clause it did not have the effect of limiting the processing of a claim to India or Singapore. The question of what was the proper forum to dispute a claim was therefore still an open question to be determined in accordance with established principles.

It seemed to me that Mr Gill had taken the last clause of para 27 i.e "the initial stages in a claim … were to be set in motion in India" out of context.

35 It also seemed to me that clause 17 may have been cannibalised from Article III clause 6 of the Hague Rules which states:

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such

removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

> If the loss or damage is not apparent, the notice must be given within three days of the delivery.
>
> The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject to joint survey or inspection.
>
> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.
>
> In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

As can be seen, the first and second sentences of clause 6 (of the Hague Rules) are similar to the third sentence of clause 17 (of the bills). The fourth sentence of clause 6 is identical to the last sentence of the first paragraph of clause 17. In the context of clause 6, the first three sentences are clearly in respect of a notification of loss or damage and do not amount to a jurisdiction provision. However, clause 17 had its first sentence, which does not appear in clause 6.

36 In my view, the word "claims" in the first sentence of clause 17 was used to include suits, although not every use of the word "claim" in the rest of clause 17 necessarily included a suit. It depended on the context. The word "suit" in the last sentence of the first paragraph of clause 17 was used because that was the more appropriate word in that sentence. In the circumstances, I was of the view that clause 17 was an exclusive jurisdiction provision and I declined, with respect, to follow *The Sinar Mas*.

Was there a strong cause in favour of not staying UCO's action in Singapore?

37 Mr Gill submitted that even if clause 17 was an exclusive jurisdiction provision, the court was not bound to order a stay where there was strong cause why UCO should not be required to commence action in India. One of the authorities for that proposition was the decision of the Court of Appeal in *The Jian He* [2000] 1 SLR 8. That proposition was not disputed by Mr Toh. There Chao Hick Tin JA said at para 28:

> *Strong cause*
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> 28 It is trite law that when a party seeks to bring an action in our courts in breach of an exclusive jurisdiction clause, he must show 'strong cause' (*The El Amria)* [1981] 2 Lloyd's Rep 119) why the court should exercise its discretion in his favour and assist him in breaching his promise to bring the action in the contractual forum. What is 'strong cause' and what are the circumstances the courts would take into account were addressed by this court in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975-77] SLR 258 at p 260, citing from a passage of Brandon LJ in *The Amria*, supra, at pp 123-124, as follows:
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>> The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court

may have regard to the following matters, where they arise:

(a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.

(c) With what country either party is connected and, if so, how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

38 Accordingly the arguments on this issue centred on whether there was strong cause and it was not disputed that the burden was on UCO to establish this. Mr Gill submitted that there was strong cause because:

(a) the evidence was situated or more readily available in Singapore,

(b) the original bills were governed by Singapore law,

(c) the parties were connected to Singapore,

(d) Golden Shore did not have any defence and hence did not genuinely desire trial in the contractual forum,

(e) UCO would be met with a time bar if it had to commence action in India. On this point, UCO sought to explain why a protective writ was not filed on time in India. I will deal with the explanations later. Suffice it for me to say here that Mr Gill submitted that if the court did not accept any explanation from UCO for its omission to file a protective writ in India, the time-bar was a neutral point.

39 Mr Toh submitted that not only was there an absence of strong cause, but India was clearly the more appropriate forum. He raised many arguments.

40 First, UCO was an Indian bank. However, I did not think this was a strong argument. The fact of the matter was that it was the Singapore branch of UCO which had granted financing to SOM and held the original bills. It was also the Singapore branch which had negotiated the switched bills. Mr Toh had conveniently ignored these factors. Furthermore, Golden Shore was itself a Singapore company, as was SOM.

41 Mr Toh's second argument was that Golden Shore had commenced proceedings in India to sue the Indian receivers of the logs and SOM. He submitted that there were common issues of fact in that action and the action before me and included the question as to who, as between UCO and the Indian receivers, had better title to the logs. He also submitted that a risk of inconsistent findings by the Singapore and the Indian courts would be avoided as UCO's action in India could, according to advice from an attorney in India, be consolidated with Golden Shore's action there.

42 Thirdly, some key witnesses were in India. One of them was the managing director of SOM, one Som Nath Sood, whom I shall refer to as "the MD" to differentiate him from the company SOM. He was the one who dealt with UCO and who arranged the switching of the bills. He had since relocated permanently in New Delhi in India and could give evidence, inter alia, as to whether he told UCO about the switched bills while UCO was still holding onto the original bills. Mr Toh elaborated that the MD had refused to speak to Golden Shore's representatives. However, according to advice from an attorney in India, the MD could be subpoenaed to give evidence in India.

43 Another "important" witness was S Srinivasan who had returned to India. He was the Senior Manager of Credit Sanction in the Singapore branch of UCO. He was also the officer responsible for SOM's trade finance account. Mr Toh submitted that although Mr Srinivasan was still employed by UCO, there was no undertaking by UCO that he would be produced in Singapore as a witness. There was also no assurance that he would remain in UCO's employment.

44 I will deal with the second and third arguments of Mr Toh together. As regards the existence of the Indian action commenced by Golden Shore, I accepted Mr Gill's submission that this was really a self-serving step. Although I was and am not an expert on Indian law, I could not help but wonder how it was possible for Golden Shore to maintain a bona fide claim against the Indian receivers. It was not the Indian receivers who approached Golden Shore to issue the switched bills. Neither did they make any promise or give any assurance to Golden Shore. All they did was to rely on and present the very bills (i.e the switched bills) which Golden Shore's agent had issued. It did not lie in Golden Shore's mouth to assert that the Indian receivers were not entitled to delivery of the logs.

45 Mr Toh had relied on, inter alia, *The Endurance 1* [2000] 3 SLR 190 where G P Selvam J said at paras 35 and 36:

> 35 *Clerk & Lindsell on Torts* (17th Ed, 1998), in para 13-143 presents this proposition of law:
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>> Possession with an assertion of title, or even possession alone (which is the case of a bailee), gives the possessor such a property as will enable him to maintain an action against a wrongdoer: *for possession is prima facie evidence of property.* (Italics supplied by me.)

The proposition is amply supported by *The Winkfield*.

> 36 There stems from the above an important derivative rule which is relevant to this case. It is this: Where there are more than one bailor of a thing and one of them recovers or otherwise deals with a third person the other bailor is barred further recovery from the third person. 'The wrongdoer having once paid full damages to the bailee, has an answer to the bailor,' said Collins MR in *The Winkfield* at p 61.

46 However, in my view, the facts there were very different from those before me. In that case, the defendants were the owners of the vessel Tokai Maru, later renamed the Endurance 1. They chartered the vessel to Cotan Petroleum Pte Ltd ("Cotan") for one year and Cotan then sub-

chartered the vessel to the plaintiffs. A parcel of marine gas oil ("MGO") bunkering equipment and provisions were carried on board the vessel pursuant to the terms of the charter and sub-charter. As Cotan failed to pay the charter for the second month, the defendants terminated the charter on 24 April 1994. On 11 and 16 May 1994, the plaintiffs' agent Wonjin sent faxes asking for the transfer of the MGO and other things. Subsequently, on 16 June 1994, Wonjin issued three invoices to Cotan in respect of the MGO and other things and required payment for the same. Cotan never paid. However, one Albert Lim who controlled the defendants and other companies arranged for the sale of the MGO to be set-off (partially) against a debt or debts owed by Cotan which was accepted by Cotan. Then, one of Albert Lim's companies commenced action against one Johnny Tay, who controlled Cotan and its related companies, on a personal guarantee he gave for the debts of the Cotan companies. In this action, Cotan asserted that it was the owner of cargoes and materials on board the Tokai Maru and the defendants had converted Cotan's goods, relying on the invoices issued by Wonjin as the basis for such an assertion. Summary judgment was given against Johnny Tay for a certain sum on 18 October 1995. On 19 October 1995, Cotan sued the defendants for breach of the charterparty and also made a claim for conversion of two water makers on board. Eventually, the Court of Appeal found that the withdrawal of the vessel by the defendants was wrongful and that there was also conversion by the defendants.

47 In the meantime, on 5 January 1996, the plaintiffs filed their action against the owners of the Tokai Maru claiming against the defendants as bailees or sub-bailees of the plaintiffs' goods. By the time, Selvam J gave his judgment in respect of the plaintiffs' action, the Court of Appeal had determined Cotan's claim against the defendants, as mentioned above. It was in these circumstances that Selvam J said that if there was a conversion of the article of bailment, both the bailor and the sub-bailor had a cause of action for conversion against the sub-bailee (see his para 31) and that where there is more than one bailor of a thing and one of them recovers or otherwise deals with a third person, the other bailor is barred further recovery from the third person (see his para 36 again). For this reason as well as the fact that Wonjin had issued invoices in favour of Cotan, for the MGO and other items, in exchange for the indebtedness of Cotan which Cotan acknowledged, the plaintiffs' action was dismissed.

48 I would add that Selvam J also stressed that the bailment rules he had outlined do not apply to the holder of a bill of lading (see para 39 of his judgment).

49 I was of the view that Mr Toh's submission that one of the issues was who had the better title to the logs was disingenuous. It seemed to me that UCO and the Indian receivers, were each prima facie entitled to claim delivery of the logs from Golden Shore. If Mr Toh's submission was valid, the owner of a vessel could issue many sets of bills of lading covering the same cargo with impunity and disclaim liability to all the holders of the different sets, save one, on the basis that someone else had a superior title to the cargo.

50 This was not a situation in which UCO was suing the Indian receivers for the logs. If it had done so, then the issue might have been who, as between UCO and the Indian receivers, had the better title. Even if, for the sake of argument, the Indian receivers had conspired with SOM to deceive Golden Shore, that was a separate issue from UCO's claim against Golden Shore.

51 As for the evidence of the MD, Mr Gill did not accept that there was sufficient evidence to establish that the MD was in Singapore as the evidence of the MD's Singapore's solicitors was self-serving because at the material time the MD had been attempting to evade service of process in Singapore. However, Mr Toh had other evidence to rely on, namely, the inquiries made by Golden Shore's attorney in India. In my view, there was sufficient evidence that the MD was in India.

52 On the other hand, I accepted Mr Gill's submission that, so far, Golden Shore itself had not even asserted that the MD had told it that UCO had agreed to the issuance of the switched bills or UCO was in any event aware of such bills at the material time. It seemed to me that Golden Shore was really hoping that the MD would say that he had secured UCO's agreement to the issuance of the switched bills or that, at the very least, he had told UCO about the switched bills at the material time and UCO did not protest. However, again, I could not help but note that if either of these possibilities was indeed the truth, the MD would have come forward to assist Golden Shore and raise a hue and cry over UCO's claim. Yet, from what Mr Toh had informed me, the MD was avoiding Golden Shore.

53 As for the evidence of Mr Srinivasan, Mr Toh did not have much reason to submit that Mr Srinivasan was an important witness. The fact that Mr Srinivasan was the Senior Manager of Credit Sanction and the officer responsible for SOM's trade finance account did not necessarily mean that he had knowledge of the switched bills at the material time or was the only who would have had such knowledge. After all, he was not the only staff involved. As G V Ramanadham, a Senior Manager of UCO, said in his third affidavit, there were two different departments in the Singapore branch dealing with trade finance: one being the Imports Department and the other being the Exports Department. According to Mr Ramanadham, these two departments handled very different transactions and facilities and one department could not be expected to check and compare bills of lading received or negotiated by one department against other bills of lading received or negotiated by another department. His point was that when UCO negotiated the switched bills, it was not aware that these bills covered the same logs as the original bills. Indeed, UCO did not accept that they covered the same logs, although this might have been the case. Mr Ramanadham said that the three relevant officers in the Imports Department (whom he identified) were still in Singapore and the two relevant officers in the Exports Department (whom he also identified) were also still in Singapore. True, Mr Ramanadham did not elaborate as to what each of these five persons knew but the action before me was still at an early stage of the proceedings. Indeed, the defence of Golden Shore had not been filed pending the outcome of the stay application. Mr Gill had also said that if and after the defence was filed, he would be seeking particulars thereof and if Golden Shore was not able to provide particulars, he would apply to have the defence struck out.

54 It seemed to me that the real reason why Mr Toh had described Mr Srinivasan as an important witness was because Mr Srinivasan had returned to India and Mr Toh was using this as an excuse to support the stay application.

55 As for the question of an undertaking from UCO, Mr Gill gave an undertaking on UCO's behalf to produce Mr Srinivasan as a witness in Singapore since Mr Srinivasan was still employed by UCO. I would add that it would be in UCO's interest to produce Mr Srinivasan as a witness in Singapore, if a trial takes place here, whether he is still employed by UCO or not. Otherwise, UCO will take the risk of an adverse inference being drawn against it, aside from the question whether the omission to do so would amount to a breach of the undertaking or not.

56 Mr Toh's fourth point was that any fresh action in India by UCO would be time-barred as it would be more than one year after delivery of the logs. Accordingly, to refuse to grant a stay would be to deny Golden Shore the benefit of that defence. On the other hand, Mr Gill submitted that to grant a stay would be to prejudice UCO since an action in India would be time-barred. Mr Toh countered by pointing out that there was no satisfactory explanation by UCO as to why it had failed to file a protective writ in India when it filed the present action on 20 December 2001. Although the dates of the original bills were between 22 to 31 December 2000, time did not begin to run from the dates of their issuance but from the dates of discharge of the logs, which were between 15 and 25 January 2001. Furthermore, the Indian courts had a discretion to grant an extension of three months to file an action in India and UCO knew that Golden Shore was applying to stay the Singapore action.

Yet UCO did not seek such an extension.

57 UCO sought to explain the omission to file an action in India on the basis that it had taken a view that clause 17 was not a jurisdiction clause. It was also suggested during submission that UCO had to act in a rush because it did not know when the logs were discharged and so had to use the dates of the issuance as a guide (see Mr Dylan Lee's submission at p 15 of the Notes of Argument). Another explanation was that by the time the affidavit of Mr Sum was served on 24 June 2002, it was too late to file a protective writ in India (see para 44 of the written submission for UCO).

58 I was not persuaded by the explanations proferred. First, UCO already knew from Rajah & Tann's first fax dated 21 June 2001 that Golden Shore was seeking the return of the original bills. By 3 August 2001, Shook Lin & Bok had replied to reserve UCO's rights against Golden Shore. Indeed, Mr Ramanadham himself had said in his third affidavit that when the developments had come to UCO's attention, he had confronted SOM and SOM promised to pay by September 2001. In September and October 2001, SOM again requested time to pay. By December 2001, UCO had no alternative but to commence legal proceedings. In the circumstances, I was of the view that UCO had had plenty of time to seek advice from solicitors in Singapore and India about a time-bar and the interpretation of clause 17.

59 Secondly, if UCO or its solicitors took the view that clause 17 was not a jurisdiction provision, they must or should have considered the opposite possibility and the question of filing a protective writ in India.

60 Thirdly, UCO and its solicitors also had had sufficient time to ask Golden Shore as to when the logs were discharged or to try and obtain such information from other sources. Apparently, they did not do so.

61 Fourthly, as Mr Toh pointed out, the stay application was made on 11 January 2002 (and presumably served around then), although the first affidavit of Mr Sum was served on 24 January 2002. Again, UCO and its Singapore solicitors should have considered, before 24 January 2002, the question of filing a protective writ in India if they had not already done so and sought advice from Indian solicitors, if indeed it was their intention to file a protective writ. Yet, as Mr Gill conceded, they did not seek such advice. As it turned out, it appeared from the advice of Golden Shore's attorney in India that the Indian courts have a discretion to grant an extension of time of three months to file a writ.

62 Moreover, for Suit 1583/2001, the last date of discharge of the logs was in February 2002. So it was still not too late to file a protective writ when Mr Sum's first affidavit was served on 24 January 2002. Yet no protective writ was filed in India also as regards the logs in Suit 1583/2001.

63 It was quite clear to me that the explanations for UCO's failure to file a protective writ were poor excuses.

64 However, in view of the judgment of Chao JA in *The Jian He*, I accepted Mr Gill's submission that the existence of a time-bar in India in the circumstances before me was a neutral factor. In *The Jian He*, Chao JA said, at paras 30 to 33:

> 30 There is a limitation period of one year under Chinese law which may not be extended by mutual consent of the parties. It would be too late for the plaintiffs to commence any action in China. While these circumstances may, on first impression, seem quite compelling, we must point out an even stronger contrary argument. In *Citi-March v Neptune* [1997] 1 Lloyd's Rep 72 at p 75 Colman J stated

the point in this manner:

The feature of the time bar consideration which differentiates it from all the others is that its existence arises from the omission of the plaintiff to take the steps necessary to preserve time in the Courts of the contractual jurisdiction. Therefore, when having failed to take the necessary steps, he invites the English court to refuse a stay on the grounds that he would be prejudiced by the claim then being time barred in the contractual forum, what he is really doing is praying in aid of the jurisdiction of an uncontractual forum his own failure to pursue his claim in the contractual forum in sufficient time. *In essence, his prejudice is self induced.* [Emphasis added.]

31 In the later case *The MC Pearl* [1997] 1 Lloyd's Rep 566 at p 570 Rix J expressed a view in similar vein as follows:

In the absence of any authority, I would have regarded the failure of a plaintiff to commence proceedings [*sic*] in time within the contractual jurisdiction as prima facie a factor assisting the defendant in enforcing the parties' jurisdictional bargain. After all, those who contract for an exclusive jurisdiction must be taken to be aware of the limitation law of that jurisdiction, a fortiori if the time limit is a contractual one. If, therefore, a plaintiff fails to bring proceedings in the contractual jurisdiction within time, the defendant has an accrued right of limitation which prima facie ought to protect him. … The idea that one could escape the limitation period applicable in the contractual jurisdiction by commencing proceedings is [*sic*] another, ex hypothesi, uncontractual jurisdiction seems strange and contrary to principle. The further idea that the existence of a time bar in the contractual jurisdiction which does not apply in England should actually assist the plaintiff to preserve his action in England seems ever stranger.

32 The rationale for such a judicial approach was elaborated in an earlier case, The *KH Enterprise* [1994] 1 Lloyd's Rep 593, where Lord Goff quoted with approval (at p 606) the following passage taken from the judgment of the Hong Kong Court of Appeal:

If you find yourself bound to litigate in a forum which is more expensive than the one you would prefer, deliberately to choose the latter rather than the former seems to me (although the judge thought otherwise) to be forum shopping in one of its purest and most undesirable forms. And if in pursuance of your deliberated decision to litigate here instead, you let time run out in the jurisdiction in which you are bound to litigate, without taking the trouble (because of the expense) even to issue a protective writ there, you are not, as I think, acting reasonably at all; you are gambling on the chance of a stay on being refused here and you cannot complain if you then lose that gamble. That may seem to you at the time a justifiable commercial risk to take. But that, in the context of the litigation, does not make your decision a reasonable one.

33 Thus, the mere fact that the action would be time-barred in China is not of itself a sufficient ground for the court to exercise its discretion in favour of a plaintiff. It is really a neutral point, as refusing a stay would deprive the defendants of their accrued rights and granting a stay would defeat the plaintiffs' claim altogether. The plaintiffs must justify their conduct in allowing limitation to arise in the contractual forum. They must show that they did not act unreasonably in failing to commence proceedings within time in the contractual forum, such as, by issuing a protective writ: see also *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 and *The El Amria* [1981] 2 Lloyds Rep 119. They must explain fully and fairly to the court why they allowed time to lapse in the contractual forum: *The Bergen* [1997] 2 Lloyd's Rep 710. Therefore, the factor of time-bar in the contractual forum is a two-edged sword, depending very much on the reasons given.

65 Thereafter, Chao JA considered the explanation proferred by counsel for the plaintiff there for

the omission to file a protective writ in China. From paras 34 to 39 of his judgment, Chao JA did not find the explanation satisfactory but nevertheless he concluded at para 40:

> 40 Accordingly, we hold that although limitation has set in in the contractual forum, that per se is really a neutral factor.

66 Therefore, although para 33 of Chao JA's judgment mentioned that plaintiffs must justify their conduct in allowing limitation to arise in the contractual forum and must show that they did not act unreasonably, this must be read in the context of his subsequent paragraphs and in particular para 40.

67 With respect, I would add that, aside from the binding authority of *The Jian He*, I would also have been of the view that a time bar in the contractual forum is a neutral factor in the absence of a satisfactory explanation. If a plaintiff wishes to take a gamble that the Singapore court will not stay his action, then the dice should not be loaded against him. Otherwise, the very existence of a time bar in the contractual forum would automatically mean that a stay will be granted, in the absence of a satisfactory explanation for the omission to file a protective writ.

68 Mr Toh's fifth point overlapped with his third point in the sense that both dealt with points of evidence. His fifth point was that evidence relating to discharge and delivery of the logs would be located in Kandla and as regards the quantum of damages for UCO, this would be the market price of the goods at the port of discharge at the time of discharge. On the latter issue, Mr Sum said that only one of the timber merchants in India had responded positively to inquiries about the market price and that merchant had expressed reluctance to travel to Singapore. To that end, a fax dated 24 January 2002 from the merchant Gira International Pvt Ltd was exhibited.

69 I was of the view that evidence relating to the discharge and delivery of the logs in Kandla was immaterial to the dispute between UCO and Golden Shore. Indeed, Golden Shore's defence really hinged on what UCO's Singapore branch knew and the evidence on that, including documentary evidence, would come primarily from Singapore.

70 As for evidence regarding damages, I was of the view that, even if the market value of the logs was the correct formula for calculating damages, there was no valid reason why evidence thereon should be difficult to obtain. I was also of the view that the fax of 24 January 2002 from Gira International was calculated to serve the interest of Golden Shore:

(a) In para 15 of Mr Sum's first affidavit, filed coincidentally on 24 January 2002 as well, Mr Sum had asserted that Golden Shore had contacted "various timber merchants in India who have the relevant price information …". It was only in Mr Sum's second affidavit filed on 11 March 2002 that he alluded, in paras 6 and 7 thereof, that only one timber merchant in India had responded positively and exhibited the fax from Gira International. No explanation was given as to why the other timber merchants were reluctant to assist at all. In my view, this was suspicious in the light of the positive assertion in the first affidavit of Mr Sum that various timber merchants have the relevant price information.

(b) Secondly, the fax from Gira International was undated (although there was evidence it was sent or received on 24 January 2002). It was unsigned and the designation of the sender Neeraj Khetan (or Khotan) was unknown. More importantly, his fax merely made a bare assertion that "it would be most inconvenient for us to make a trip to Singapore". No elaboration was given.

71 It is unnecessary for me to deal in detail with Mr Toh's other points regarding:

(a) absence of security for UCO's claim, the force of which I was unable to understand,

(b) fairness of trial, which was irrelevant since neither side contended that it would not be possible to obtain a fair trial in India or Singapore.

(c) speed of proceedings in India, since Mr Toh was not suggesting that proceedings in India would be faster than in Singapore. Indeed, he was only attempting to counter, with the aid of advice from an attorney in India, the criticism of UCO's lawyer in India about the slow speed in which cases in India were disposed of.

72 I now come to one of Mr Gill's main points on the issue of strong cause. As I have said, Mr Gill submitted that there was no defence and accordingly Golden Shore did not genuinely desire trial in the contractual forum. Mr Gill relied on many cases for this proposition but it is unnecessary for me to elaborate on them as this proposition was not seriously contested by Mr Toh. Mr Gill also relied on various case-law and textbook authorities for the proposition that it was for Golden Shore to ensure that it did not issue switched bills unless the original bills had been surrendered to it. Again this proposition was not seriously contested. Yet, Mr Toh vigorously asserted that this was not a straightforward claim of delivery without presentation of bills of lading and that there were at least five real and substantial defences.

73 The first defence was that UCO had no intention to take delivery of the logs. This defence was premised on the point that for a number of months, UCO had not sought delivery of the logs even though UCO must have known that the logs would have already reached Kandla. Mr Toh said that UCO had not given any convincing explanation as to why it failed to seek delivery. He suggested that the omission amounted to a consent by UCO to Golden Shore's delivery of the logs to Indian receivers without the original bills.

74 I did not accept that this was a plausible defence because mere omission could not, by itself, amount to consent. At most, the omission was a factor in trying to establish consent on UCO's part but Mr Toh would require much more evidence to establish consent. Besides, Mr Ramanadham had said that he had contacted SOM to seek payment and the MD and Mrs Renn Sood (presumably the MD's wife) both told him that because an earthquake had struck Gujerat, including Kandla, many people had fled the area. Many sawmills in Kandla were destroyed and SOM was unable to find a buyer. Also, the vessel in question had stranded. Mr Ramanadham's third affidavit also exhibited internet reports on the earthquake which occurred in January 2001.

75 The second defence was the time bar in India. In my view, that was irrelevant because the question was whether Golden Shore had a defence to the claim before me.

76 The third defence was SOM's fraud. Mr Toh submitted that since UCO derived its rights to the original bills from SOM, UCO was subject to any defence that could be raised against SOM. Mr Toh relied on s 3(1) of the Bills of Lading Act (Cap 384) under which a party making a claim under the Act would be subject to the same liabilities under the contract constituted under the bills. Mr Toh then submitted that, alternatively, UCO would be held to the estoppel which Golden Shore could have exercised against SOM.

77 I was of the view that this third defence was also a disingenuous argument. Any right which Golden Shore had against SOM did not arise from the bills but from the request and/or any assurance from SOM for the switched bills to be issued. That was quite separate and distinct from the original bills. Secondly, as Mr Gill pointed out, UCO did not receive the original bills from SOM but from the vendors of the logs or their bank.

78 The fourth defence was that by negotiating the switched bills, UCO could not say that it did not treat the switched bills as documents of title. Accordingly, it could no longer rely on the original bills. I was of the view that the latter argument did not follow the former unless UCO knew at the time of negotiation that the bills they negotiated were in fact switched bills and covering the same logs as the original bills.

79 The fifth defence was that if it could be shown that the Indian receivers had a superior title, Golden Shore would not be liable to UCO. However, I have already dealt with the alleged issue of competing titles to the logs.

80 Mr Toh then submitted that there were unusual features in the case. This submission overlapped the first defence regarding the alleged consent of UCO to the switched bills. Relying, inter alia, on the evidence of Soh Chee Seng, who purported to be a banking expert, Mr Toh submitted:

(a) that the different departments in UCO did not operate in isolation and would be supervised by a credit committee,

(b) that the volumes of transactions handled by UCO for the relevant months, which volumes UCO had mentioned, were not in fact high and therefore there was no great difficulty in cross-referencing the bills received by the different departments particularly in respect of a high volume customer like SOM,

(c) that it was puzzling that UCO was prepared to negotiate the switched bills even though they were stale, i.e presented late,

(d) that UCO must have been aware of the switched bills at the material time because some of the switched bills had similar information and markings as the originals.

81 In my view, the question as to what UCO knew at the material time was sufficient to persuade me not to conclude yet that Golden Shore had absolutely no defence. However, it seemed to me that Golden Shore was hanging onto a thin thread to weave the defence of consent or acquiescence. The points raised by Mr Toh about unusual features were not persuasive. It is all very well for a third party or counsel to say that one of the parties would have done or known this or that but the reality might be quite different. As for UCO's negotiation of the switched bills which were allegedly stale, this allegation was irrelevant because UCO had been paid on those bills.

82 Mr Toh also added that it was common for bills of lading to be switched. However, he stopped short of asserting that carriers were entitled to issue switched bills without contemporaneous surrender of the first set or the consent of the person holding the first set.

83 I would add that as regards the other Singapore action commenced by UCO ie. Suit 1583/2001, UCO did not even negotiate the switched bills. Nevertheless, Mr Toh applied substantially the same arguments for that case, mutatis mutandis.

84 In summary, after re-arranging the factors reiterated in *The Jian* He, I was of the view that:

(a) UCO and Golden Shore were more closely connected with Singapore

(b) It was undisputed that the governing law under the original bills was Singapore law

(c) There was one main issue i.e whether UCO had somehow consented to or acquiesced in the

switched bills such that UCO would no longer be entitled to rely on or claim under the original bills. The evidence on this issue was primarily in Singapore

(d) Golden Shore did not genuinely desire trial in India

(e) The time-bar point was a neutral factor.

85 I was also of the view that it is not necessary for a plaintiff to establish that there is no defence in order to establish strong cause. Although many of the cases of strong cause were based on a conclusion of no defence, this is not a necessary requirement. For example, in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975-1977] SLR 258, the Court of Appeal declined to stay an action in Singapore, even though it was in breach of an agreement to submit disputes to a foreign court, because all the evidence was in Singapore. Naturally, each case must depend on its own facts.

86 Accordingly, I was of the view that UCO had shown strong cause. Furthermore, India was not the more appropriate forum for the same reasons.

87 I stress that the views I have expressed should be read in the light of the nature of the application as well as the state of the pleadings and evidence before me.

Plaintiffs' appeal allowed.

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