IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 19

Civil Appeal No 107 of 2020

Between

CIMB Bank Berhad

… *Appellant*

And

World Fuel Services
(Singapore) Pte Ltd

… *Respondent*

Civil Appeal No 130 of 2020

Between

CIMB Bank Berhad

… *Appellant*

And

World Fuel Services
(Singapore) Pte Ltd

… *Respondent*

In the matter of Suit No 184 of 2018

Between

CIMB Bank Berhad

… *Plaintiff*

And

World Fuel Services
(Singapore) Pte Ltd

… *Defendant*

JUDGMENT

[Banking] — [Lending and security]
[Contract] — [Contractual terms]
[Evidence] —[Principles] — [Necessity for best evidence]

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v
World Fuel Services (Singapore) Pte Ltd and another appeal

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Court of Appeal — Civil Appeal Nos 107 and 130 of 2020
Judith Prakash JCA, Tay Yong Kwang JCA and Woo Bih Li JAD
26 November 2020

5 March 2021 Judgment reserved.

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 Civil Appeal No 107 of 2020 ("CA 107/2020") is an appeal by CIMB Bank Berhad ("CIMB") against the decision of the High Court judge (the "Judge") in *CIMB Bank Berhad v World Fuel Services (Singapore) Pte Ltd* [2020] SGHC 117 (the "Judgment"). The Judge dismissed CIMB's claims in Suit No 184 of 2018 ("HC/S 184/2018") on the ground that the authenticity of a deed of debenture (the "Debenture"), which formed the basis of CIMB's claims, was not established. Civil Appeal No 130 of 2020 ("CA 130/2020") is CIMB's appeal against the Judge's costs order and is only engaged if the appeal in CA 107/2020 is not allowed.

Background to the disputes

2 CIMB is the Singapore branch of a bank incorporated in Malaysia and is licensed to provide banking facilities and services in Singapore to its customers. Panoil Petroleum Pte Ltd ("Panoil") was CIMB's customer and took banking facilities from it. Panoil was placed under judicial management in October 2017. The respondent, World Fuel Services (Singapore) Pte Ltd ("WFS") is a bunker trader. Parties accepted that WFS had purchased marine fuel from Panoil and did not dispute the occurrence of 11 sales transactions between WFS and Panoil, which are the subject of CIMB's claims ("Subject Transactions"). However, the actual contractual documents and/or terms that governed these transactions were disputed.

3 The details of the Subject Transactions and the corresponding invoices (the "Invoices") are:

Sr. No.	Sales Confirmation Ref. No.	Invoice Date	Invoice No.	Invoice Amount (US$)	Late Payment Interest as at 19 Feb 2018 at 2% per month (US$)
1	SO-1706-0986	6 July 2017	PS-B17/07-0016	381,602.89	50,625.98
2	SO-1706-0964	9 July 2017	PS-B17/07-0025	395,953.61	51,737.94
3	SO-1707-0996	10 July 2017	PS-B17/07-0028	396,532.50	51,813.58
4	SO-1707-1027 (Amended Sales Confirmation)	20 July 2017	PS-B17/07-0047	526,258.98	64,905.27

Sr. No.	Sales Confirmation Ref. No.	Invoice Date	Invoice No.	Invoice Amount (US$)	Late Payment Interest as at 19 Feb 2018 at 2% per month (US$)
5	SO-1707-1062	31 July 2017	PS-B17/07-0083	189,568.67	21,989.97
6	SO-1707-1065	31 July 2017	PS-B17/07-0087	204,165.00	23,683.14
7	SO-1707-1073	6 August 2017	PS-B17/08-0004	304,351.57	34,087.38
8	SO-1707-1080	7 August 2017	PS-B17/08-0008	1,890,456.80	210,470.86
9	SO-1708-1091	10 August 2017	PS-B17/08-0017	410,579.72	44,890.05
10	SO-1708-1102	10 August 2017	PS-B17/08-0023	90,013.13	9,841.44
11	SO-1707-1111	12 August 2017	PS-B17-08-0030	304,160.95	32,849.38

4 Each Subject Transaction in this judgment will be referred to in the order reflected in this table, *ie*, the transaction with the invoice dated 6 July 2017 will be referred to as the first transaction and so on.

5 CIMB offered Panoil loan facilities up to a limit of US$5,000,000 pursuant to a facility letter dated 29 June 2016 (the "First Facility Letter"). Subsequently, CIMB made a revision to the First Facility Letter by way of a supplementary facility letter dated 12 July 2016 (the "Second Facility Letter").

Thereafter, CIMB made variations to the First and Second Facility Letters by another supplementary facility letter dated 6 July 2017.

6 CIMB's case here, and in the suit below, is that Panoil had executed the Debenture dated 15 July 2016 in favour of CIMB over all goods and/or receivables and documents representing goods financed by CIMB as security. In respect of the Subject Transactions, Panoil issued the Invoices to WFS on dates between 6 July and 12 August 2017. The aggregate sum due under the Invoices came to US$5,093,643.82 without interest (see the table at [3] above). In or around August 2017, Panoil faced financial difficulties. CIMB gave notice to WFS by way of a notice of assignment dated 29 August 2017 (the "NOA") that Panoil had assigned all its rights, title, interest and benefit under the Invoices to CIMB. CIMB then demanded payment from WFS of the sums under the Invoices including late payment interest. When WFS did not make payment, CIMB commenced HC/S 184/2018 based on its rights under the Debenture as the legal assignee.

7 As to the contractual documents that governed the Subject Transactions, CIMB's case was that the contracts governing Panoil's sale of marine fuel to WFS were (a) Panoil's sales confirmations ("Panoil's Sales Confirmations"), which incorporated Panoil's terms and conditions for sales of marine fuel ("Panoil's Terms and Conditions"); and (b) the corresponding Invoices issued by Panoil (collectively, the "Sales Contracts"). Clause 8.2 of Panoil's Terms and Conditions precluded the right of set-off ("Clause 8.2").

8 WFS' case was that the Subject Transactions were not governed by the Sales Contracts, but by three contracts entered into between WFS and Panoil, each of which contained a provision entitling WFS to a right of set-off:

(a) a Contract of Affreightment dated 30 December 2016 (the "2016 COA") which governed the third transaction;

(b) a Transportation Agreement, M/T "OPHELLIA" dated 1 January 2017 (the "2017 TA") which governed the first and second transactions; and

(c) a Contract of Affreightment dated 11 July 2017 (the "2017 COA") which governed the fourth to eleventh transactions.

9 The 2016 COA, 2017 TA and 2017 COA shall be referred to collectively as the "Umbrella Contracts". In addition, Panoil and WFS had entered into an offset agreement dated 20 August 2014, providing for the mutual setting off of certain payable sums (the "2014 Offset Agreement"). Under the 2014 Offset Agreement and the Umbrella Contracts, WFS was entitled to set off the sums due under the Invoices to Panoil.

10 CIMB argued that the Umbrella Contracts did not apply to the Subject Transactions, and that the terms of the 2014 Offset Agreement did not apply to or were not incorporated into the Sales Contracts. In any event, any right of set-off which arose under the Umbrella Contracts and/or the 2014 Offset Agreement had been superseded by Clause 8.2.

11 WFS claimed that in exercise of its rights under the 2014 Offset Agreement, it had issued eight offset notices between 11 July 2017 to 16 August 2017. By virtue of these notices, WFS had set off the entire sum due to Panoil under the Invoices. WFS claimed that at the date of the receipt of the NOA on 29 August 2017, there were no longer any amounts outstanding or accruing to Panoil pursuant to the Subject Transactions.

12 WFS explained its relationship with Panoil as follows. WFS was a bunker trader with access to a supply of marine fuel and entered into contracts for the supply of fuel to end-user vessels or vessel owners. However, it did not have the necessary license issued by the Maritime Port Authority to deliver the marine fuel. As such, it hired independent physical suppliers with the requisite licenses, such as Panoil, to serve as its intermediaries. Accordingly, WFS entered into "barging or delivered deals" where Panoil would be allowed to load WFS' product on the basis that the Panoil-nominated bunker barges would deliver the fuel to WFS' customers (the "barging or delivered deals"). It was a matter of trade practice that bunker traders such as WFS would supply marine fuel by way of sale to independent physical suppliers like Panoil on appropriate credit terms. WFS had extended credit to Panoil and permitted Panoil typically up to 30 days following delivery of marine fuel to effect payment.

13 WFS also explained that under these "barging or delivered deals", WFS would sell marine fuel to Panoil and then repurchase the same quantity of marine fuel from Panoil at an agreed mark-up. The difference between the sale price and the repurchase price represented the freight payable to Panoil for transporting the fuel. This arrangement was necessary as it was a condition of Panoil's license that it held title to the marine fuel that it was transporting at the point of supply to the vessel. WFS claimed that these "barging or delivered deals", including the repurchases under the Subject Transactions, were governed by the Umbrella Contracts.

The decision below

14 At the trial, the Judge formulated the issues between the parties as follows (at [16] of the Judgment):

(a) whether CIMB had proven the authenticity of the Debenture;

(b) whether Panoil's rights under the Sales Contracts had been assigned to CIMB under the Debenture;

(c) which documents governed the Subject Transactions;

(d) in any event, whether WFS was entitled to set off the sums due under the Subject Transactions before the NOA; and

(e) whether CIMB was required to prove loss.

15 The Judge dismissed CIMB's claims on the ground that it failed to prove the authenticity of the Debenture. The Judge however, considered and found in favour of CIMB in respect of the other issues in contention, holding as follows:

(a) The language of cl 3.1(e) of the Debenture was wide enough to include Panoil's rights under the Sales Contracts, such that pursuant to the Debenture, Panoil's rights had been assigned to CIMB (Judgment at [66]).

(b) Panoil's Sales Confirmations governed the Subject Transactions and the Umbrella Contracts did not. The Judge did not find it necessary to make a finding as to whether the 2014 Offset Arrangement governed the Subject Transactions as Clause 8.2 superseded any right of set-off that would have arisen under the 2014 Offset Agreement as well as the Umbrella Contracts (Judgment at [80], [111]–[112], [125]–[126]).

(c) As there was insufficient evidence of contemporaneous buy-sell transactions in connection with the Subject Transactions, there would also be insufficient evidence of closely connected dealings between

Panoil and WFS. WFS therefore had no right of equitable set-off (Judgment at [134]–[135]). In any event, the Judge found that Clause 8.2 had expressly excluded both legal and equitable set-off by contract (Judgment at [142]).

(d) There was no need for CIMB to establish that it had suffered "loss", so long as it was entitled to exercise its rights under the Debenture as the legal assignee without any corresponding right of set-off by WFS (Judgment at [145]).

Issues on appeal in CA 107/2020

16 In the substantive appeal before us, CA 107/2020, it was undisputed that if CIMB had established the authenticity of the Debenture, the terms of the Debenture did assign to CIMB all rights which Panoil had against WFS. WFS also did not argue that CIMB was required to prove loss.

17 Furthermore, although the Judge discussed the question of contractual set-off, relied upon by WFS, under two separate headings, *ie*, (a) which documents governed the Subject Transactions; and (b) whether WFS was entitled to a right of set-off, we are of the view that these issues overlap and should be considered together under the question of whether WFS was entitled to a contractual right of set-off. In addition, WFS also relied on equitable set-off. Thus, the following issues arise for determination in this appeal:

(a) whether CIMB had proven the authenticity of the Debenture (the "Authenticity Issue"); and

(b) whether WFS was entitled to a contractual or equitable right of set-off (the "Set-off Issue").

The Authenticity Issue

The Judge's findings

18 The Judge found that CIMB had not proven the authenticity of the Debenture despite the fact that CIMB had produced a document entitled "Limited Deed of Debenture" to which the common seal of Panoil had apparently been affixed, allegedly in the presence of two persons, Yong Chee Ming ("Yong") and Lim Zhi Sheng ("Lim"). Yong was a director of Panoil and Lim was a director and company secretary of Panoil. Two signatures, allegedly those of Yong and Lim, were on the Debenture and the central issue of authenticity related to whether these were authentic signatures of Yong and Lim. The Judge held that CIMB was put on notice to prove the Debenture's authenticity at trial pursuant to the second of the two notices of non-admission. Further, while WFS did not expressly plead that the signatures of Yong and Lim were not authentic, its Defence (Amendment No 2) ("the Defence") did not admit CIMB's claims that its banking facilities were secured by the Debenture, and that Panoil had assigned to CIMB all its rights, title, benefit, interest *etc*, under the Sales Contracts (Judgment at [25]).

19 The Judge held that CIMB could not prove the authenticity of the signatures of Yong and Lim merely by producing the original Debenture, and that it had to adduce sufficient evidence to prove that the signatures belonged to Yong and Lim. Even where primary evidence of a document is produced, its authenticity could remain in issue. As such, a party may still insist on the other party proving that the signature on the document belongs to the person who is alleged to have signed it (Judgment at [29]).

20 The Judge declined to exercise his discretion under s 75 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") to compare the signatures of Yong and Lim on the Debenture with their signatures on other documents, as such comparison would ordinarily require expert evidence (Judgment at [41]). In coming to this conclusion, the Judge referred to Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (Wadhwa & Co, 16th Ed, 2007) ("*Sarkar*") at p 1307, in relation to s 73 of the Indian Evidence Act of 1872 which is similar to s 75 of the EA. According to *Sarkar*, comparison of disputed signatures with that of admitted signatures or handwriting should not normally be undertaken by the court, although there is no legal bar to the court doing so (Judgment at [35]).

21 In the Judge's view, proving the authenticity of the Debenture in this case called for direct evidence through the testimony of Yong and Lim. CIMB's reason for not calling Yong and Lim to testify was that they were the subject of investigations of wrongdoing against CIMB. The Judge was of the view that this reason was wholly unsatisfactory. Yong and Lim needed only to answer the single question of whether they had signed the Debenture, which did not leave much room for untruthfulness (Judgment at [42]). Furthermore, CIMB could have at the very least called an expert to testify on the authenticity of the signatures, which would have afforded a basis on which to consider that the Debenture was authentic, but it did not do so (Judgment at [53]).

22 The Judge was of the view that CIMB's late production of the original of the Debenture, just before the trial commenced, was "troubling" (Judgment at [19] and [43]). We elaborate at [47] below on this late disclosure. He also noted that while a copy of the Debenture was referred to and exhibited in the affidavit of evidence-in-chief ("AEIC") of one of CIMB's witnesses, Ms Khoo May May Evelyn ("Ms Khoo"), the original was not admitted through any of

CIMB's witnesses. Instead, it was first introduced by CIMB's counsel when he cross-examined WFS' witness, Mr Loh Chee Choon ("Mr Loh"), who was the Vice President (Asia Supply) of WFS (Judgment at [20]). He further noted that there was some suggestion that the Debenture produced at the trial was only a draft (Judgment at [44]–[46]).

23 The Judge found CIMB's submission that the Debenture was admissible under s 32(1)(b)(*iv*) of the EA to be misconceived. Relying on *Jet Holding and others v Cooper Cameron (Singapore) Pte Ltd and another* [2005] 4 SLR(R) 417 ("*Jet Holding (HC)*") at [150], *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("*Jet Holding (CA)*") at [25] and *Super Group Ltd v Mysore Nagaraja Kartik* [2018] SGHC 192 at [53], the Judge held that a party must prove that the document was authentic before the question of admissibility came into question. Since the authenticity of the Debenture was not proved, the question of its admissibility did not even arise (Judgment at [48]–[51], [54]).

24 As CIMB's claims rested on the Debenture and it had not proven the Debenture's authenticity, its claims were dismissed (Judgment at [55]).

CIMB's case

25 Before us, CIMB contended that it had discharged its burden of proving that the Debenture was authentic. CIMB ran four key arguments in support of its contention that the Debenture was authentic. First, CIMB submitted that its burden was limited to proving the authenticity of the Debenture by the "best evidence rule" in the manner required under ss 63 to 67 of the EA. This was because WFS had not pleaded or contended that the signatures on the Debenture were forged. It had only pleaded to the effect of the Debenture, such as by

denying that the Subject Transactions fell within the ambit of the Debenture. WFS had therefore accepted that the Debenture was in existence, and in consequence, CIMB's burden of proof would be met by adducing the original Debenture in court. CIMB based this argument on [234(b)] of *Hai Jiao 1306 Ltd and others v Yaw Chee Siew* [2020] 5 SLR 21 ("*Hai Jiao*").

26 Second, CIMB submitted that it had discharged its burden by adducing *primary evidence* of the Debenture through the production of its original in court, and additionally, via *secondary evidence* through adducing the following evidence pursuant to ss 67(1)(*b*) and 67(3) of the EA:

(a) Key features in the charge referred to in the Registration of Charge lodged with the Accounting and Corporate Regulatory Authority ("ACRA") were identical to the Debenture – the charge instrument was described as a "Limited Deed of Debenture" dated 15 July 2016 and the chargee was CIMB.

(b) The Statement containing Particulars of Charge ("the Statement of POC") which was lodged with ACRA together with the Registration of Charge stated that:

(i) the chargor company under the "Limited Deed of Debenture" was Panoil;

(ii) the chargee was CIMB;

(iii) the Debenture was executed in the presence of Yong and Lim; and

(iv) the description of the charge in Part 1 of the Annexure was nearly identical to cl 3.1 of the Debenture.

27 CIMB submitted that while it had the legal burden of proving the authenticity of the Debenture, the evidential burden had shifted to WFS to rebut the evidence relied on by CIMB.

28 Third, insofar as the Judge had relied on *Yeoh Wee Liat v Wong Lock Chee and another suit* [2013] 4 SLR 508 ("*Yeoh Wee Liat*") as authority for the proposition that the party who adduced the document had to prove both its authenticity and that of the signatures, CIMB argued that the court at [31] of that case had in fact dealt with them as two distinct issues. On CIMB's reading of the case, the court had applied s 64 of the EA for its finding that the party had to produce the original document to prove the document's authenticity, and *separately* relied on s 69 of the EA relating to the authenticity of the signatures because it was disputed whether the person who allegedly signed the form had in fact been the signatory. CIMB further referred to *Bank of India v Dr Pravinchand P Shah* [1994] SGHC 276 ("*Bank of India*"), *Raman Subbalakshmi Krishnan v Indian Overseas Bank* [1994] SGHC 8 and *Chua Kim Eng Carol v The Great Eastern Life Assurance* [1998] SGHC 403 ("*Chua Kim Eng Carol*") and submitted that s 69 of the EA was only engaged or would have been engaged in these cases because the authenticity of the *signatures* in question was expressly disputed. In contrast, CIMB argued that in the present case, s 69 of the EA had never been engaged as the authenticity of the signatures had never been put in issue.

29 Fourth, CIMB averred that in any event, it had proven the authenticity of the signatures of Yong and Lim. CIMB submitted that indirect or circumstantial evidence could be adduced to prove the authenticity of signatures under s 69 of the EA. CIMB sought to rely on *Bank of India*, where the High Court held that "section 69 [of the EA] refers to proof generally, and does not

preclude the use of indirect or circumstantial evidence". *Chua Kok Tee David v DBS Bank Ltd* [2015] 5 SLR 231 ("*Chua Kok Tee David*") at [35] further stood for the proposition that if the circumstances or inferential chain are "obvious and compelling", they could be as probative as direct evidence. CIMB relied on the following to establish the "circumstances or … inferential chain":

(a) The execution of a debenture was a condition precedent to the provision of banking facilities being granted. The First and Second Facility Letters in turn pre-dated the Debenture by merely 16 days and 3 days respectively.

(b) The Debenture was registered with ACRA four days after the stated date of execution. The Debenture and the charge registered and described in the Registration of Charge and Statement of POC appeared to be the same document based on the similarities in details as explained in [26] above. The authenticity of these two documents (*ie*, the Registration of Charge and Statement of POC) had also not been disputed by WFS.

(c) CIMB extended facilities to Panoil after 15 July 2016 (the date reflected on the Debenture). CIMB had allowed Panoil to draw down on facilities, which pointed toward the authenticity of the security document in place (*ie*, the Debenture).

30 Additionally, CIMB argued that the Judge had erred in declining to compare the signatures of Yong and Lim with other purportedly undisputed signatures of these persons on the Statement of POC, as well as on the three facility letters, pursuant to s 75 of the EA. Finally, in relation to the Judge's

observations that the Debenture may be a draft, CIMB submitted that that was not pleaded, and that the lapses were merely clerical oversights.

31 We note that in its closing submissions for the trial below, CIMB also submitted that WFS did not contend that the common seal of Panoil was wrongfully affixed on the Debenture. CIMB had further submitted that the solicitors who acted for Panoil in the registration of the Debenture on the charge register, Yeo-Leong & Peh LLC, would not have confirmed that "the instrument of charge (if any) or a copy thereof is kept at the registered office of the company and is open to the inspection of any creditor or member of the company without fee" unless it was assured of the Debenture's authenticity. Ms Li Ee Waugh ("Ms Li") of Yeo-Leong & Peh LLC had declared the information on the Registration of Charge to be true and correct to the best of her knowledge. If the Debenture had not been authentic, the solicitors acting for Panoil would have been liable to prosecution.

WFS' case

32 In contrast, WFS' case was that CIMB had failed to prove the Debenture's authenticity. It submitted that by not admitting to CIMB's pleadings in respect of the Debenture and filing two notices of non-admission, it had put the authenticity of the Debenture in issue. Even though it did not plead forgery, the burden of proof remained on CIMB to prove the Debenture's authenticity. WFS submitted that the original Debenture was not properly adduced through any of CIMB's witnesses, as the Judge had noted. The alleged original document was also produced only shortly before trial and no reason was given for this late disclosure. WFS also submitted that the Judge was right to conclude that the authenticity of the Debenture had not been proven as CIMB

had failed to adduce direct evidence by calling Yong and Lim as witnesses. If Yong and Lim had given untruthful testimony, their evidence would have been given the appropriate weight under the law.

33 WFS further submitted that the Judge was right not to compare Yong and Lim's signatures with those on other documents. The Debenture appeared to be only a draft as crucial sections were not completed. CIMB had also not called any expert witness to testify on the authenticity of the signatures or the Debenture. Furthermore, no other original document had been produced bearing Yong and Lim's signatures for comparison. Finally, whether to exercise the power under s 75 of the EA was also a matter for the Judge's discretion and the Court of Appeal should be slow to interfere with it.

Our decision on the authenticity issue

Preliminary observations

34 Before addressing the parties' substantive arguments, we are of the view that CIMB's arguments on the issue of authenticity of the Debenture were based on various invalid premises. First, CIMB had argued that WFS did not plead that the signatures on the Debenture were forged and had only made general averments of non-admission. As we elaborate below, it was not necessary for WFS to plead forgery of the signatures to raise the issue of authenticity of the Debenture.

35 Second, CIMB argued that it had proved authenticity because it had proved the Debenture by primary and secondary evidence in accordance with the EA. However, as we elaborate below, proving the Debenture by primary or secondary evidence is different from proving the authenticity of the Debenture.

Whether the authenticity of the Debenture was in issue

36 We are of the view that the authenticity of a document like the Debenture may be put in issue in various ways. For example, the disputing party:

(a) could allege specifically that the signatures were forgeries;

(b) deny the authenticity of the document;

(c) simply not admit the authenticity of the document either by a specific or a general averment in its pleadings; or

(d) where the document is not pleaded but has only been produced in discovery, by a notice of non-admission.

37 CIMB's reliance on cases where a disputing party had specifically denied the execution of a document, such as by challenging the authenticity of the signatures, did not assist it. As we elaborate below, WFS could rely on its non-admission to raise the issue of authenticity and the burden would lie on CIMB to prove that the Debenture it produced was authentic.

38 We find that WFS had put the authenticity of the Debenture in issue. CIMB had referred to paras 3, 4 and 9 of the Statement of Claim (Amendment No 2) ("the SOC") but we need consider only paras 3 and 4. Paragraph 3 stated that CIMB's facilities to Panoil were secured by the Debenture. Paragraph 4 stated that by the Debenture, Panoil had assigned to CIMB all its right, title, benefit and interest under the Sales Contracts issued by Panoil to WFS. These two paragraphs were not admitted in paras 3 and 4 of the Defence.

39 Although it is true that the non-admissions were general and did not specifically mention that the execution of the Debenture was not admitted, this did not mean that WFS had accepted the existence of the Debenture such that the authenticity of the Debenture was not in issue. CIMB itself argued that because WFS had accepted the existence of the Debenture, CIMB's burden to prove the authenticity of the Debenture was through the best evidence rule through ss 63 to 67 of the EA. In other words, CIMB knew that it still had the burden of establishing authenticity.

40 Furthermore, CIMB had first disclosed a copy of the Debenture to WFS on 14 February 2018 by way of a letter from its solicitors. Thereafter, CIMB listed a copy of the Debenture as Item No 3 in its Plaintiff's List of Documents filed on 1 October 2018. On 22 October 2018, WFS filed a notice of non-admission of various documents under O 27 r 4(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) including the copy of the Debenture.

41 CIMB then adduced the original Debenture much later on 24 October 2019. Having inspected the original Debenture on 25 October 2019, WFS filed another notice of non-admission dated 26 October 2019 specifically in respect of the Debenture (the "Second Notice of Non-Admission"). The trial commenced on 29 October 2019.

42 By issuing the notices of non-admission, in particular the Second Notice of Non-Admission, WFS had made it clear to CIMB that it was disputing the authenticity of the Debenture (see, *eg*, *Yeoh Wee Liat* at [31] and *CIMB Bank Bhd v Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd* [2020] SGHC 160 ("*Italmatic Tyre*") at [71]).

43 As mentioned, it was not necessary for WFS to plead that the signatures on the Debenture were forged. It was open to WFS to plead forgery if it had a basis for doing so or it could simply put CIMB to strict proof of the execution of the Debenture, which it was entitled to do. In this case, WFS had put CIMB to strict proof by its non-admissions in the Defence and the two notices of non-admission.

Whether the original Debenture had been adduced in evidence

44 As the authenticity of the Debenture was in issue, the production of that document in evidence was important. We now address WFS' argument that the original Debenture was not even properly adduced through one of CIMB's witnesses. Instead, it was introduced only when WFS' witness, Mr Loh, was being cross-examined.

45 WFS relied on *Jet Holding (CA)* at [36] where the Court of Appeal held that where the authenticity of a document is in issue, it is not sufficient merely to exhibit a copy of it to an affidavit. The document will not be admitted into evidence by this route. The admission of the document into evidence is only achieved when the requirements of the EA have been met. We agree with that observation. However, it should be borne in mind that, in that case, the originals of the documents in question were never produced before the trial judge during the trial (see *Jet Holding (CA)* at [38]). Further, it should be noted that the plaintiffs in *Jet Holding (CA)* had sought to argue that the exhibited copy could be automatically admitted into evidence as authenticity was no longer in issue. That is incorrect and would circumvent the relevant rules embodied within the EA (*Jet Holding (CA)* at [36]). At this stage of the analysis, we are concerned only with the question of whether the document had been properly adduced.

Thereafter, CIMB still had to show that the Debenture was authentic in order to rely on the Debenture as a legal instrument.

46 We agree that the original should have been adduced through one of CIMB's witnesses since its authenticity was in issue. For example, since Ms Khoo had referred to the Debenture in her AEIC and exhibited a copy of it, the original should have been shown to her for her to confirm that it was the original of the document she was referring to. As a representative of the bank, she would have been a competent witness to testify that the original Debenture had been received by the bank and that the bank had been relying on it to allow the drawdown of facilities by Panoil. Alternatively, CIMB could also have called the lawyers who registered the Debenture with ACRA to give evidence. In this case, it did not take any of the above steps. It seemed to us that CIMB and its solicitors had been lax about their responsibility to ensure the proper adduction of evidence of a document where its authenticity was in issue. That said, we are of the view that the omission to adduce the original through one of CIMB's witnesses was not fatal to CIMB's case, as we elaborate below.

47 In the present case, the original was disclosed to WFS by CIMB on 24 October 2019, although the disclosure was made late in the day and very close to the commencement of the trial. WFS inspected it on 25 October 2019, although it did not admit its authenticity after the inspection. The original was then introduced by CIMB's counsel in the course of cross-examination of WFS' witness Mr Loh. Counsel had informed the court that WFS' solicitors had inspected the original and he then asked for the original to be marked as Exhibit P1. The original was then marked by the court without objection. Counsel also pointed out that a copy was located in CIMB's core bundle of documents. At that time, WFS' counsel did not argue that the original should have been

introduced through one of CIMB's witnesses instead. Also, in closing submissions before the Judge, no such objection was raised by WFS although the Judge referred to the lapse in the Judgment. Furthermore, it was not alleged at the trial, or in the appeal before us, that the form and contents of the original were not the same as the copy exhibited in Ms Khoo's AEIC or the copy found in CIMB's core bundle of documents for the trial. Accordingly, we are of the view that the original had been adduced in evidence by CIMB.

Whether adducing the original of the Debenture was sufficient to prove authenticity

48 CIMB had sought to limit the scope of its burden of proof to that of adducing the original document, on the basis that WFS had accepted the existence of the Debenture. However, its attempt to do so was without merit. As we have explained above, WFS had put the authenticity of the Debenture in issue. We then turn to the question of whether CIMB had proven the authenticity of the Debenture by adducing its original.

49 As CIMB has relied on ss 63 to 67 of the EA, we make some observations on these provisions as they relate to the issues raised in the present case. Section 63 of the EA states:

> The contents of documents may be proved by primary or secondary evidence.

It follows that the subsequent references to primary and secondary evidence in ss 64–67 of the EA are directed at the question of proof of the *contents* of documents. This is distinct from the truthfulness or accuracy of the contents of documents, and also distinct from the authenticity of the documents themselves.

50 CIMB's argument that it had discharged its burden of proof on authenticity by simply producing the original document in court arose from a misinterpretation of the EA. We agree with the Judge's reference to *Sarkar* (Judgment at [29]) where it was stated at p 1248:

> … **There still remains the most important question, viz, the genuineness of the documents produced as evidence, ie, Is a document what it purports to be?** … The production of a document purporting to have been signed or written by a certain person is no evidence of its authorship. Hence the necessity of rules relating to the *authentication* of documents, *ie*, proving their genuineness and execution. Proof, therefore, has to be given of the handwriting, signature and execution of a document. … [emphasis in bold added by the Judge]

51 As stated clearly in *Jet Holding (HC)* at [146]:

> I begin with the best evidence rule, which is that the contents of documents must under s 66 of the Evidence Act be proved by primary evidence (*ie* the originals themselves) except in situations falling within s 67. The original documents are to be produced to the court for inspection: s 64 of the Act. Secondary evidence (*eg* photocopy) is, however, allowed only upon satisfaction of the existence of the circumstances mentioned in s 67. Section 67 lists the cases in which secondary evidence relating to documents may be given. *A document produced as primary evidence or secondary evidence will have to be proved in the manner laid down in ss 69–75. The making, execution or existence of a document has, for instance, to be proven by the evidence of the person who made it or one of the persons who made it, or a person who was present when it was made.* In *Deutz Far East (Pte) Ltd v Pacific Navigation Co Pte Ltd* [1989] 2 SLR(R) 392, the original log book was tendered to court for identification. The court held the log book inadmissible as the person responsible for the log book who was the master of the vessel was not called as a witness to establish that the log book was the vessel's log, that the signatures in the log were his and that he kept the log according to the statutory regulations. *This decision demonstrates that a mere tender of even the original document is not enough. Documents are not ordinarily taken to prove themselves or accepted as what they purport to be. There has to be an evidentiary basis for finding that a document is what it purports to be.* [emphasis added]

52 It is clear that after primary or secondary evidence of a document is produced the authenticity of the document still has to be established. In this regard, CIMB's reference to *Hai Jiao* was misconceived. The court in *Hai Jiao* held at [234(b)] that the defendant had not proven the "authenticity of [the] documents at trial in the manner required by ss 63 to 67 of the Evidence Act" by merely producing copies of the documents instead of the original. The court did not hold that producing an original was in itself sufficient to establish the document's authenticity.

53 CIMB raised a further argument that it did not have to prove the authenticity of the *signatures* on the Debenture to establish the Debenture's authenticity as WFS had not specifically put the authenticity of the signatures in issue.

54 However, CIMB's argument that the authenticity of a document and the authenticity of signatures therein are two distinct issues is incorrect. In the present case, they overlap. CIMB had assumed that the authenticity of a document and the authenticity of a signature were separate questions, similar to how the question of whether a document had been properly adduced would be analysed separately from the question of the authenticity of a signature therein. In truth, the authenticity of a document may be put in issue *because* the authenticity of the signatures was disputed. In such a case, they would not be two distinct issues. A party who has the burden of proving the authenticity of a document first has to produce primary or secondary evidence thereof, *ie*, the alleged original or a copy, within the provisions of the EA. Thereafter, it also has to prove that the document is what it purports to be. This would include proving the authenticity of the signatures if authenticity was in dispute (see, *eg, Yeoh Wee Liat* at [31]).

Whether the indirect or circumstantial evidence was sufficient to prove the authenticity of the signatures

55 We turn next to the question of whether there was sufficient evidence to prove the authenticity of the signatures and hence the authenticity of the Debenture. The relevant provision which applies to the present case is s 69(1) of the EA, which states:

> **Proof of signature and handwriting of person alleged to have signed or written document produced**
>
> **69**.—(1) If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

56 This provision does not provide that the authenticity of the document may be established only by direct evidence, *ie*, by the signatories themselves or by a witness to the signatories. WFS submitted that where direct evidence is available, then such direct evidence must be adduced. It relied on *Italmatic Tyre* where the court said at [70]:

> The authenticity of a document must be proved by admissible evidence: s 106 the Evidence Act. A witness who proves a document must do so by evidence as to the circumstances in which the document was created which is either: (a) direct evidence of those circumstances within the meaning of s 62 of the Act; or (b) within one of the exceptions to the requirement in s 62 of the Act, principally those in s 32 of the Act. That ordinarily means, for all practical purposes, that a witness who proves a document must either be the maker of the document or someone who was present when the maker created the document.

57 We are of the view that *Italmatic Tyre* does not go so far as to suggest that where direct evidence is available, such direct evidence must always be adduced to establish authenticity. It was merely referring to the ordinary and

practical means of establishing authenticity. That said, direct evidence would usually be the strongest evidence available to a party, and the maker of a document should generally be called as a witness to prove its authenticity (see, *eg, Chua Kok Tee David* at [47]). A party's failure to call a witness to give direct evidence could also potentially result in an adverse inference being drawn against it under s 116, illustration (*g*) of the EA. However, the omission to adduce direct evidence where it is available is not necessarily fatal to proving a document's authenticity. The impact of not adducing direct evidence is dependent on the facts of each case. Relevant but non-exhaustive factors include the strength of the indirect or circumstantial evidence adduced, the reasons given by the relevant party for not adducing direct evidence, and the probative value of the direct evidence if it had been adduced.

58 Indeed, in our case, the Judge said that the following persons may have been called as witnesses (see Judgment at [34]):

> 34 There are various ways to prove that a document is authentic and was signed by the person who is alleged to have signed it. The following may be called as a witness:
>
> (a) the person who signed the document;
>
> (b) the person who witnessed the document being signed;
>
> (c) a person who is acquainted with the handwriting of the person who signed the document (see s 49 of the EA); and
>
> (d) a handwriting expert (see s 47 of the EA).

59 Evidence from a person who is acquainted with the handwriting of the signatory or from a handwriting expert is not direct evidence. A party may resort to such evidence even where direct evidence would have been available and there is no authority to say that such indirect evidence may not otherwise be

relied upon. We will elaborate on the power of the court to compare signatures below.

60 Further, by referring to *Bank of India*, which CIMB also relied upon, the Judge acknowledged that a signature may be proved other than by direct evidence, such as by the defendant's conduct (see Judgment at [38]). In that case, the defendant had admitted in a letter that he was a guarantor to the plaintiff bank but subsequently denied the existence of a guarantee he had signed, and the court considered this in determining whether he had in fact signed the guarantee in question.

61 We agree with CIMB's contention that a party may rely on indirect or circumstantial evidence to establish authenticity even where direct evidence would have been available. Unfortunately for CIMB, the Judge did not examine the circumstantial evidence in detail beyond observing some lapses or discrepancies which suggested that the Debenture was only a draft and noting that CIMB was late in producing the original. We turn, therefore, to consider the circumstantial evidence of execution that CIMB relied on.

62 We note that, first, although CIMB did not call Yong and Lim as witnesses, there was no suggestion that either Yong or Lim had at any point disowned his signature on the Debenture. Second, there was no suggestion that Panoil was disowning the Debenture.

63 In fact, it was not disputed that CIMB required a limited debenture as one of the security instruments from Panoil as part of the terms of CIMB's facility to Panoil and that CIMB had, since the purported date of the Debenture, been operating under the belief that the Debenture had been validly executed.

Further, there was no suggestion then or subsequently by Panoil that the Debenture had not been executed or that its execution was invalid.

64 In addition, the Debenture was registered with ACRA. This was done with the lodgement of the Statement of POC with ACRA. The Statement of POC referred to the date of the instrument as 15 July 2016 and described it as a limited deed of debenture. The chargor was Panoil and the chargee was CIMB. These were the particulars of the Debenture. Importantly, the Statement of POC was also signed by Yong and Lim (where Lim's designation was described as "Secretary" or alternatively as "Director") and the authenticity of their signatures on this document was not disputed by WFS. Furthermore, the Statement of POC was lodged by Yeo-Leong & Peh LLC who were the solicitors for Panoil. The logical inference was that the Debenture was registered with ACRA on the instructions of Panoil. This inference could be drawn even though Ms Li from Yeo-Leong & Peh LLC was not called by CIMB as a witness.

65 Finally, the common seal of Panoil was affixed onto the Debenture. Sealing is a necessary requirement for the execution of a deed under the common law, save to the extent that it has been removed by statute, such as s 41B of the Companies Act (Cap 50, 2006 Rev Ed) (see, *eg*, *Lim Zhipeng v Seow Suat Thin and another matter* [2020] 2 SLR 1151 at [37]). At the time the Debenture was executed, sealing was still a necessary requirement. WFS had not disputed that the seal had been properly affixed onto the Debenture, even though it disputed the authenticity of the signatures of the purported witnesses (*ie*, Yong and Lim) to such affixing. It would be logical to infer that the appropriate resolutions had been passed to authorise the execution of the

Debenture, and the affixing of Panoil's common seal lends support to the view that the Debenture was authentic.

66 Accordingly, in our view, the circumstantial evidence to establish the authenticity of the Debenture was overwhelming and the lapses or discrepancies in the instrument itself did not detract from the weight to be given to such evidence.

Whether the Judge had erred in declining to compare the signatures under s 75 EA

67 Section 75 of the EA states:

> **Comparison of signature, writing or seal with others admitted or proved**
>
> 75.—(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.
>
> (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.
>
> (3) This section shall apply also, with any necessary modifications, to finger impressions.

68 It is clear from this provision that the court has the power to compare the signatures on a disputed document with other signatures admitted or proved to the satisfaction of the court to have been made by the signatories, but is not obliged to do so. CIMB relied on authorities from India, Malaysia and Singapore where the court decided to exercise a similar power to compare

signatures, but this exercise did not assist it much as it did not dispute that the court could also decline to compare signatures and has on other occasions declined to do so. Indeed, during the oral hearing of the appeal before us, CIMB's counsel, Mr Lok Vi Ming SC stated that he was not inviting the court to make a finding on the authenticity of the Debenture by comparing the signatures of Yong and Lim on the Debenture with other signatures of these persons as an independent exercise although the court had the power to do so, but to compare the signatures to see if they detract from the circumstantial evidence supporting the authenticity of the Debenture.

69 In the circumstances, we need only say that there was insufficient basis to say that the Judge had erred in declining to exercise the power under s 75 of the EA. We add that CIMB had only itself to blame for not adducing expert evidence on the signatures in question. No good reason was advanced for this omission although, fortunately for CIMB, the omission was not fatal in the circumstances. As a matter of prudence, we have considered the signatures on the original Debenture with the signatures of Yong and Lim in other documents where authenticity was not disputed, not to determine authenticity as such under s 75 of the EA, but rather to see if there was any reason why the circumstantial evidence we have referred to should not be given due weight. We saw no such reason.

Conclusion on the authenticity issue

70 In the present case, it was not disputed that the legal burden of proof to show authenticity was on CIMB. We have considered the omission by CIMB to call Yong and Lim or to introduce any expert evidence together with the rest of the evidence. Relying predominantly on the circumstantial evidence available

before the court, however, we reach a different conclusion from the Judge on the issue of authenticity. We find that CIMB has established authenticity of the Debenture on a balance of probabilities and discharged its burden of proof.

The set-off issue

The Judge's findings

71 The Judge found that it was Panoil's Sales Confirmations which governed the Subject Transactions. We cite below the reasons from the Judgment:

> 74 Generally, all of the Subject Transactions followed the same chronology described above. First, WFS would issue Panoil an order confirmation. Subsequently, Panoil would issue WFS a sales confirmation. Next, upon delivery, Panoil would send WFS a bunker delivery note, which constituted evidence of delivery. Panoil would also send WFS a copy of its sales invoice.
>
> 75 In each sales confirmation issued by Panoil to WFS, key details of the sale are provided under the heading '[w]ith reference to our earlier conversation, we are pleased to confirm the nomination with the following details'. These include, among other things, the identities of the buyer and seller, delivery date, product specifications, quantity, and mode of payment. Further, in each sales confirmation, under the heading 'terms', it is provided that 'sales [*sic*] is subjected to the standard terms and conditions of Panoil which is updated from time to time'.
>
> 76 Applying the offer and acceptance analysis, WFS' purchase confirmation is the contractual 'offer', and Panoil's sales confirmation is the contractual acceptance.
>
> 77 An acceptance of an offer is the final and unqualified expression of assent to the terms of an offer (*Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd* [2019] SGHC 287 at [51]). In *Pan-United Shipping Pte Ltd v Cummins Sales and Services Singapore Pte Ltd* [2017] SGHC 198 at [83], Chan Seng Onn J observed that in a classic "battle of the forms" scenario, the "last shot" must be a counter-offer in order to destroy the original offer and constitute the new terms on which

an agreement is formed, citing *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 ("*Butler Machine*"), the leading decision on "battle of the forms". In *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332, the Court of Appeal endorsed the analysis of the majority in *Butler Machine* that the court would examine each "shot" which was "fired" by the respective parties, and only find a concluded agreement when a final and unqualified acceptance has been made (at [63]). In this regard, it has been observed by Dyson LJ in *Tekdata Interconnections Ltd v Amphenol Ltd* [2010] 1 Lloyd's Rep 357 ("*Tekdata*") at [25] that while there is no general rule that applies in all cases where there is a "battle of the forms", where A makes an offer on its conditions and B accepts that offer on its conditions and performance follows without more, the correct analysis is that there is a contract on B's conditions.

78 In this case, it is common ground that the sales confirmation issued by *Panoil* was the final document sent before delivery of each parcel of fuel oil for each of the Subject Transactions. Applying *Tekdata*, each of the Subject Transactions is a separate contract separately embodied under the 11 Panoil Sales Confirmations and the terms contained therein.

79 The terms of the 11 Panoil Sales Confirmations also show that each sales confirmation represents a separate contract for the sale of fuel oil. As mentioned above … , each document provides the key details of each sale. These constitute the essential terms of the contract necessary for contractual formation.

80 In establishing which documents governed the Subject Transactions, I also took the relevant commercial background into account (*R1 International* at [51]). In this respect, I accept Mr Neo's evidence that it was industry practice to treat sales confirmations as embodying the contracts between the parties. Mr Neo also testified that parties in the bunkering industry treat the *suppliers' sales confirmation* as the governing contract for an individual sale transaction. In this case, Panoil was both the supplier and the party issuing the sales confirmation. The evidence does not suggest that the parties intended to depart from this usual commercial practice. Moreover, the parties had a consistent course of dealing in which all of the key terms were contained in each of the 11 Sales Confirmations. In my view, this indicates that the parties had intended the 11 Panoil Sales Confirmations to govern the Sales Transactions.

[emphasis in original]

72 WFS' case was that the 2014 Offset Agreement and the Umbrella Contracts governed the Subject Transactions and that it was entitled to a right of set-off under these documents. It was undisputed that these documents contained a provision granting WFS a right of set-off or referring to WFS' right of set-off.

73 However, the Judge disagreed that WFS was entitled to a right of set-off for various reasons. One of his reasons was that none of the key documents, *ie*, Panoil's Sales Confirmations and Invoices issued from Panoil to WFS and the order confirmations issued from WFS to Panoil referred to the Umbrella Contracts. Presumptively, this suggested that the Umbrella Contracts were not intended to cover the Subject Transactions (Judgment at [88]). With respect, we do not accept the Judge's reasoning. We are of the view that if any of the key documents had referred to any of the Umbrella Contracts, this would have supported WFS' contention but, on the other hand, the absence of any reference did not bear any significance. It did not raise a presumption that the Umbrella Contracts were not intended to apply. Likewise, the absence of a reference to the 2014 Offset Agreement meant nothing.

74 We come now to the Judge's other reasons. One was that each of the Umbrella Contracts envisaged that WFS was to issue Panoil with a sales confirmation and a purchase confirmation, or a job order, a sales confirmation and a purchase confirmation. However, for WFS' transactions with Panoil, WFS had only issued Panoil with order confirmations, and did not issue job orders, sales confirmations or purchase confirmations. WFS did not adduce any of these documents contemplated under the Umbrella Contracts (Judgment at [105]–[106]).

75 Second, there was no objective evidence that any of the transactions contemplated under the Umbrella Contracts had ever been carried out. The substance of these contracts was that WFS would sell a quantity of fuel oil to Panoil and then buy the same quantity from Panoil in a composite buy-sell transaction. According to WFS, the repurchases were reflected in the Subject Transactions. However, WFS was not able to adduce evidence to match the sales and repurchases to prove such buy-sell transactions with Panoil (Judgment at [107]).

76 Third, the parties did not act consistently with the payment terms of the Umbrella Contracts, under which each party was required to pay the other within 15 days. WFS' own order confirmations in respect of the Subject Transactions provided for payment to be made within 30 days (Judgment at [108]).

77 Fourth, the Umbrella Contracts did not mention the details of the Subject Transactions such as dates, prices or payment mode (Judgment at [109]).

78 As for the 2014 Offset Agreement, the Judge noted that WFS' contention was that it applied to all transactions between WFS and Panoil. However, he concluded that it was unnecessary for him to decide whether it applied to the Subject Transactions as he was of the view that the right of set-off thereunder was in any event superseded by the terms of Panoil's Sales Confirmations. Each of Panoil's Sales Confirmation stated that the sale was subject to the standard terms of Panoil which was updated from time to time. Clause 8.2 (of such standard terms) provided that the buyer was to make payment free and clear of any set-off. The Judge concluded that Clause 8.2 superseded the 2014 Offset Agreement.

The parties' cases

79 In the appeal, CIMB advanced arguments similar to the Judge's reasons. However, CIMB also submitted that in the Defence, WFS appeared to rely only on a right of set-off under the 2014 Offset Agreement and not under the Umbrella Contracts. As Panoil's Sale Confirmations did not expressly refer to the 2014 Offset Agreement, the terms in the agreement had not been incorporated by reference. Furthermore, for more than three years after the conclusion of the 2014 Offset Agreement, the parties had not exercised any right of set-off and had always paid each other in full. CIMB did not dispute that WFS had issued eight offset notices to Panoil between 11 July and 16 August 2017, before the NOA from CIMB was sent to WFS, but argued that none of these notices explicitly mentioned that the set-off was made pursuant to any of the Umbrella Contracts and/or the 2014 Offset Agreement. Furthermore, WFS' exercise of any purported right of set-off would not assist WFS if it did not in fact have such a right. This too was the Judge's view.

80 On its part, WFS relied primarily on the 2014 Offset Agreement for its contractual right of set-off and alternatively on the Umbrella Contracts. It submitted that the Umbrella Contracts did govern the Subject Transactions and reaffirmed WFS' right of set-off. The 2014 Offset Agreement was an expressly agreed and signed contract between WFS and Panoil, and it was clear on its terms that it applied to the Subject Transactions, which were "contracts for the supply, service, distribution and/or purchase of fuel products".

81 WFS submitted that the 2014 Offset Agreement was an overarching agreement which applied to all sale transactions between WFS and Panoil and did not need to be incorporated into the Sales Contracts to be applicable to the

Subject Transactions. Whether or not it applied to the Subject Transactions depended on the language of the contractual terms. It also disagreed with the Judge that Clause 8.2 had superseded the 2014 Offset Agreement. It submitted that the Offset Agreement continued to apply unless there was clear objective evidence that parties had intended to terminate it, and it should not be displaced by unilateral standard terms from Panoil which WFS never agreed to. It stressed that prior to the NOA being issued from CIMB, WFS had issued various notices of set-off to Panoil, including the eight offset notices in relation to the Invoices, all of which Panoil did not object to.

Our decision on the set-off issue

82 The first sub-issue is whether WFS is entitled to rely on the 2014 Offset Agreement for a right of a set-off. If so, it would be unnecessary for it to rely on the Umbrella Contracts. This position also accords with WFS' pleaded case, which was that the eight offset notices by which it had set off the entire amount due under the Invoices were issued in exercise of its rights under the 2014 Offset Agreement (see para 8.5 of the Defence).

83 The 2014 Offset Agreement was executed on 20 August 2014. It was between World Fuel Services Corporation on behalf of itself and its affiliates, subsidiaries and branch offices, including WFS, on the one hand and Panoil and its affiliates, subsidiaries, parent companies and branch offices on the other. It was not well-drafted but it was undisputed and clear on its terms that it did permit WFS and Panoil to set off any sums payable to one party against sums payable from that party. It was also clearly stated that the 2014 Offset Agreement was entered into "[i]n consideration for entering into contracts for the supply, service, distribution and/or purchase of fuel products and/or marine

lubricants". We agree with WFS that the 2014 Offset Agreement would be construed as a master contract which was intended to and did *prima facie* apply to all contractual transactions between WFS and Panoil.

84 Even if each Sales Confirmation from Panoil to WFS contained the applicable terms for each sale of fuel oil from Panoil to WFS and even if each Sales Confirmation incorporated Clause 8.2, this did not necessarily mean that the 2014 Offset Agreement would not apply to the Subject Transactions. If both the 2014 Offset Agreement and Clause 8.2 applied, then the question would be which would prevail.

85 The key issue is ascertaining the contractual intention of the parties and whether they had intended the 2014 Offset Agreement to apply to the Subject Transactions. As discussed above at [73], it is our view that it was not necessary for subsequent contracts between these parties to explicitly refer to the 2014 Offset Agreement for that agreement to apply to them, although any explicit reference would have removed the need for argument. The fact that the parties did not exercise any right of set-off for three years thereafter also does not assist CIMB because there was no pleading that by reason of such conduct, WFS had permanently waived its right to a set-off or was estopped from asserting such a right. Neither was such an argument mounted by CIMB and even if it had been mounted, it was unlikely to succeed in view of the fact that the parties did agree to a right of set-off for WFS in the Umbrella Contracts and specifically mentioned the 2014 Offset Agreement in the 2017 COA (at Recital E). Even if the Umbrella Contracts did not govern the Subject Transactions, they showed that the right of set-off was within the contemplation of parties in their transactions. Also, the 2014 Offset Agreement had not dropped out of the picture. Furthermore, no objection was raised by Panoil when WFS issued the

eight notices of set-off amongst others. Therefore, the earlier omission to exercise any set-off was only a matter of historical information which did not affect the parties' rights.

86 The real question was whether the 2014 Offset Agreement had been superseded by Clause 8.2, assuming that the Judge was correct that each Sales Confirmation from Panoil was the applicable contract document for each of the sales by Panoil to WFS. Relying on *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2017] 2 SLR 372 ("*Sintalow*"), the Judge concluded that Clause 8.2 had superseded the 2014 Offset Agreement. His reasons were stated thus:

> 127 In *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2017] 2 SLR 372 ('*Sintalow*'), the parties signed a letter containing general terms and conditions for the purchase of sanitary ware ('the Master Contract'). The respondent later accepted three separate product quotations for the sanitary ware ('the Products Agreements'). The Court of Appeal held that the Master Contract merely prescribed general terms and conditions for the supply of the sanitary ware, but did not require the respondent to buy or the appellant to sell them. Instead, the sale and purchase of the products were governed by the separate Products Agreements.
>
> 128 The court explained the applicable approach where there is inconsistency between terms in different contractual documents:
>
> > (a) A well-drafted contract normally provides a hierarchy of precedence to deal with inconsistencies between contractual terms or clauses, or general terms and specific terms (*Sintalow* at [53]).
> >
> > (b) However, if the contract does not expressly provide an order of precedence between the different documents or specify that a certain class of documents should prevail over others, '*the more specific document ought to prevail over a standard form document*' [emphasis in original] (*Sintalow* at [53]).
> >
> > (c) Where there is no order of precedence clause stipulating the hierarchy between contractual

> documents, the terms of the sales contract, which contained the specifically agreed clause, take precedence over a clause incorporated by reference to the general terms and conditions (see *Indian Oil Corporation v Vanol Inc* [1991] 2 Lloyd's Rep 634) (*Sintalow* at [54]).
>
> (d) The court should try to reconcile the terms to preserve the general terms. Only where there is a clear and irreconcilable discrepancy is it necessary to resort to the contractual order of precedence to resolve the inconsistency. Even where there is no order of precedence clause, the principle is that the general terms and conditions are superseded or varied by inconsistent specific terms and conditions to the extent of their inconsistency (*Sintalow* at [55]–[57]).
>
> 129 In this case, there is a clear inconsistency between the terms in the Umbrella Contracts and the 2014 Offset Agreement, and the 11 Sales Confirmations. The former contracts provide for rights of set-off, while the latter contracts expressly exclude any rights of set-off.
>
> 130 Similar to the Products Agreements in *Sintalow*, the 11 Sales Confirmations were the *specific contractual documents* which governed each of the Subject Transactions. The 11 Sales Confirmations set out specific terms such as the price, mode of payment, date of delivery, *etc*, which are not contained in the Umbrella Contracts and the 2014 Offset Agreement. Likewise, the Umbrella Contracts and the 2014 Offset Agreement, assuming that they governed the Subject Transactions, are akin to the Master Contract in *Sintalow*, these being documents lacking any of the specific details of each sales transaction. As there is a clear and irreconcilable inconsistency between the terms in these two sets of agreements, it is necessary to apply the principle that the terms in the more specific contract should prevail over the terms in the less specific contract. Hence, cl 8.2, which had been incorporated under the 11 Sales Confirmations, supersedes any rights of set-off under the Umbrella Contracts and the 2014 Offset Agreement (even if they were applicable to the Subject Transactions).
>
> [emphasis in original]

87 However, *Sintalow* can be distinguished on two grounds. First, in *Sintalow*, the master contract contained *general* terms and conditions. In contrast, the 2014 Offset Agreement was a short one-page document covering

one substantive issue only, *ie*, the right of set-off. This suggested that the parties had focused on this sole issue and entered into a contract encapsulating their agreement on it, intending for the right of set-off to apply to their transactions. On the other hand, Clause 8.2 was part of a pre-printed set of *general* terms and was merely one provision in a set of terms canvassing multiple issues.

88 Second, and crucially, the three product agreements in *Sintalow* which were found to have superseded the master contract were signed by both parties. In contrast, Panoil's Sales Confirmations were pre-printed documents unilaterally issued by Panoil. Panoil's Terms and Conditions, which CIMB argued were incorporated through the Sales Confirmations, were also *standard* terms that were pre-printed and unilaterally issued by Panoil. Conversely, the 2014 Offset Agreement was signed by both parties.

89 Neither the 2014 Offset Agreement nor Clause 8.2 could be said to be included specifically for a particular contract. Each was meant to apply generally to transactions between the parties with the 2014 Offset Agreement being a master contract and Clause 8.2 being allegedly incorporated whenever a Sales Confirmation was issued for a sale transaction between Panoil and WFS. However, for the reasons stated above, the 2014 Offset Agreement clearly superseded Clause 8.2 because it was specifically agreed to between the parties whereas Clause 8.2 was not. The holding in *Sintalow* that "the more specific document ought to prevail over a standard form document" (at [53]) would in fact apply to support WFS' case that the 2014 Offset Agreement should take precedence over Clause 8.2.

90 In this case, the 2014 Offset Agreement was not merely a pre-printed document unilaterally issued by WFS and unsigned by Panoil. If that were the

case, the approach in the "battle of forms" might have applied to the contest between the terms in the 2014 Offset Agreement and in Panoil's Sales Confirmations, such that the last document sent would contain the terms governing the transactions. However, this approach is not applicable in the present case for the reasons that we have stated above.

91 This conclusion that WFS still had a right of set-off under the 2014 Offset Agreement is consistent with other documents signed by the parties. Thus, even if the Judge were correct in concluding that the Umbrella Contracts did not apply to the Subject Transactions, it is worthwhile noting that each of the Umbrella Contracts, which were signed by both WFS and Panoil, also contained a provision or a reference to a right of set-off for WFS.

92 Accordingly, it is unnecessary to address WFS' argument that an adverse inference should be drawn against CIMB for not calling Yong and Lim as witnesses on the right of set-off.

93 WFS was therefore entitled to a right of contractual set-off under the 2014 Offset Agreement. In the circumstances, the question of the application of the Umbrella Contracts to the Subject Transactions is academic. Likewise, it is unnecessary to consider WFS' claim to an equitable set-off.

94 We therefore find that CIMB cannot succeed in its claims against WFS, but for a different reason than that of the Judge, and dismiss CIMB's appeal in CA 107/2020. Although CIMB has established the authenticity of the Debenture, WFS has established its right of set-off.

Costs

CA 130/2020

95 This brings us to the question of costs. CA 130/2020 is CIMB's appeal against the Judge's costs order, which CIMB had filed in the event that CA 107/2020 was dismissed. CIMB had proceeded on the basis that the issue of authenticity took up much less time than the issue of WFS' right of set-off. It submitted that WFS should only be entitled to 5% of the costs below instead of the 60% granted by the Judge. On the other hand, WFS submitted that costs should follow the event and it should have obtained full costs even though it did not succeed on every issue. In any event, the Judge's costs order was not excessive.

96 CIMB had assumed that if its appeal were dismissed, it would be for the same reason relied upon by the Judge. The tables have been turned on CIMB in the light of our decision. Based on CIMB's argument, WFS would have been entitled to 95% of the costs below as it has succeeded in establishing its right of set-off. In the circumstances, CIMB no longer has a basis to complain about the 60% of the costs granted by the Judge to WFS and we dismiss its appeal in CA 130/2020.

Costs of the appeals in the present proceedings

97 In so far as the present proceedings are concerned, WFS should be entitled to 60% and 100% of the costs of the appeals in CA 107/2020 and CA 130/2020 respectively. In relation to CA 107/2020, we are of the view that the arguments before us on the right of set-off involved more issues of fact than the authenticity issue, even though it was unnecessary for us to make further findings of fact as a result of our conclusion that the 2014 Offset Agreement

applied to the Subject Transactions and also superseded Clause 8.2. WFS should therefore be entitled to 60% of the costs of that appeal. In relation to CA 130/2020, WFS has fully succeeded in the appeal and is entitled to 100% of the costs in that appeal.

98 Parties did not file their costs schedules for the appeals. We are of the view that a fair estimate of 100% of the costs in CA 107/2020 would be $45,000 inclusive of disbursements. Thus, 60% of $45,000 would be $27,000. For CA 130/2020, a fair estimate of 100% of the costs would be $5000 inclusive of disbursements as it was a significantly less complex appeal than CA 107/2020. We order CIMB to pay WFS forthwith costs of $32,000 for both appeals. The usual consequential orders apply.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

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