The "Epic"
[2000] SGCA 28

Case Number : CA 186/1999

Decision Date : 27 June 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Lim Tean and Minn Naing Oo (Rajah & Tann) for the appellants; Belinda Ang SC, Hong Heng Leong and Gerald Yee (Ang & Partners) for the respondents

Parties : —

Admiralty and Shipping – Carriage of goods by sea – Wrongful interference and detention of cargo by shipowner – Shipowner's right of lien over cargoes – Ownership of cargo – Lien clause in head time charter – Existence of spot charter between time charterers and bill of lading holders – Whether lien clause incorporated into bill of lading or spot charter

Contract – Collateral contracts – Formation of contract – Whether collateral contract formed through exchange of telexes – Acceptance of entire terms by shipowner

(delivering the judgment of the court): In the court below, Petromar Energy Resources Pte Ltd, the respondents, claimed against Cresta Shipping Ltd, the appellants, damages for wrongful interference and detention of their cargo of fuel oil on board the latter`s vessel, the Epic, for the period from 16 to 28 February 1998. The appellants counterclaimed a sum of US$378,408.69, being the balance of the hire due on the vessel. The claim and the counterclaim were heard before Lai Siu Chiu J, and at the conclusion she allowed the claim and dismissed the counterclaim. She entered interlocutory judgment against the appellants with damages to be assessed by the registrar. Against her judgment, this appeal is now brought.

Background facts

The relevant facts that gave rise to the dispute were briefly these. On or about 6 November 1997, the appellants chartered the Epic to a company, Metro Trading International Inc. (`Metro`), under a time charterparty (`the time charter`), which was in the `Shelltime 4` form. Under the time charter, the hire for the use of the vessel was payable as follows:

> *Hire US$12,375 for first 40 days - US$15,000 thereafter including overtime and crew war bonus, if any, PDPR.*
>
> *Hire payable 7 days in advance for first time thereafter every 10 days in advance.*
>
> *Settlement of delivery respectively redelivery bunkers on completion of redelivery, any over/under payment of hire to be settled by either party within 3 working days after redelivery.*

The time charter by cl 26 conferred on the appellants a lien upon all cargo and freights, sub-freights and demurrage for any amounts due under the charter, and the clause read as follows:

> *Owners shall have a lien upon all cargoes and all freights, sub-freights and*

demurrage for any amounts due under this charter and charterers shall have a lien on the vessel for all monies paid in advance and not earned, and for all claims for damages arising from any breach by Owners of this charter.

On 31 January 1998, the respondents entered into a contract with Sanko Oil (Pte) Ltd (`Sanko Oil`) for the purchase of 20,000 metric tons of fuel oil HSFO 180 CST. Under the terms of the contract, the respondents were to nominate a vessel for the carriage of the fuel oil. The respondents first nominated the vessel named Ouranos but later substituted it with the Epic. Payment for the fuel oil was to be made by way of a letter of credit issued by Credit Lyonnais, Singapore, on behalf of the respondents in favour of Sanko Oil. The letter of credit was duly issued and was subsequently negotiated by Deutsche Bank on Sanko Oil`s behalf.

On or about 14 February 1998, a cargo of 19,024.406 metric tons of fuel oil (`the cargo`) was shipped on board the Epic under a bill of lading No 3138 dated 14 February 1998 (`B/L No 3138`). The cargo was to be shipped from VOT, Pulau Sebarok, Singapore, for delivery at PST, Pulau Sebarok, Singapore. The B/L No 3138 was issued by the master of the vessel and it was in Van Ommeren Terminal`s form. It named Hin Leong Trading (Pte) Ltd as the shipper and was consigned to the order of Sanko Oil. It was later endorsed to the respondents, and they became the holders and endorsees of the bill of lading.

As of February 1998, several vessels of the appellants, which were under the agency of the appellants` Greek agents, Dynacom Tankers Management Ltd (`Dynacom`), including the Epic, were on time charter to Metro. On 15 February 1998, representatives from Metro met with representatives of Dynacom, and at the meeting, Dynacom was informed that Metro was unable to continue with the time charters because of the financial difficulties it was facing and Dynacom was told to do whatever was necessary against the cargoes on board the vessels so as to safeguard the interest of their principal. At that point in time, the charter hire due from Metro on the Epic had been paid only up to 14 February 1998. Hence, as at 15 February 1998, Metro was in default of payment of the hire under the time charter.

On 16 February 1998, Dynacom, on behalf of the appellants, sent a notice of lien by telex to Metro (via its German agents, Rima Marine), Centinium (Metro`s agents in Singapore), the shipper, Hin Leong Trading (Pte) Ltd and the consignee, Sanko Oil. The notice stated that Metro owed the appellants US$350,551 for the charter hire, bunkers and port charges which were due and that the appellants were exercising their lien pursuant to cl 26 of the time charter. The notice demanded that the freights and sub-freights for the cargo, that was then on board the Epic, be paid to the appellants.

This notice of lien was, on the same day, forwarded by Rima Marine to the respondents. On 16 February 1998, shortly after receiving the notice, the respondents sent a telex to Dynacom. In that telex, the respondents identified themselves as the persons who were the holders and endorsees of the B/L No 3138 and requested for the cargo of fuel oil on board the Epic to be discharged and delivered to Credit Lyonnais for the account of the respondents without the production of the original bills of lading. In exchange, the respondents gave an indemnity (in terms therein stated) to the appellants and undertook to pay the sub-freight in the sum of US$42,804.91, such payment to be made by a bank draft from Credit Lyonnais favouring Crest Shipping Ltd which would be presented to the master of the Epic on 17 February 1998. They requested for confirmation from the appellants that they would instruct the master to discharge the cargo upon the master notifying them (the appellants) of the receipt of the draft.

Dynacom responded by telex on the same day and a copy of the reply telex was sent to Metro. The reply confirmed that the vessel would discharge the cargo once the appellants were notified by the master of the receipt of the bank draft for the payment of the sub-freight. However, some five hours later, Dynacom sent a second telex to the respondents in which they said that they learnt with surprise that the respondents were an affiliated subsidiary of the appellants` debtor, Metro. The telex went on to say as follows:

> *This fact had not been disclosed to us or to our principals before we agreed to the arrangements which were offered by Messrs Petromar. Had it been disclosed to us that the equitable and beneficial owner of the cargo on board the EPIC was and is the vessel`s charterer Metro Trading International Inc., our principals would have exercised their lien not only on the subfreights but also on the cargo for all amounts due to them under the charter party. Accordingly please be advised that the vessel has received instructions from owners not to discharge any of the cargo on board, and to enforce the vessel owners` maritime lien up to the amounts notified to you under our earlier telex today, ie USD 194,878.12 in respect of freight: USD 46,020 in respect of bunkers: USD 70,000 in respect of port costs ...*
>
> *Finally, please note that the master has been instructed not to discharge any of the cargo until and unless the original bill of lading has been presented to him duly endorsed or a proper letter of indemnity, in accordance with the form recommended by owners` P and I club, has been signed by Petromar and has been endorsed by Messrs Credit Lyonnais, Singapore which must undertake to be liable as principal in the event of any inconsistent claim of title to the cargo by other parties.*

The respondents replied to Dynacom`s second telex the following day. In their reply, the respondents asserted that they were a separate legal entity from Metro and denied that they were an affiliate or a subsidiary of Metro. The respondents also said that they were arranging for the letter of indemnity through their bank and hoped that everything would be in order. Later on the same day, Dynacom received a telex from Credit Lyonnais, Singapore. This telex was a letter of indemnity from the respondents and was countersigned by Charles Maulino, the regional manager of the oil and commodities trade finance department of Credit Lyonnais, Singapore. Subsequently, Dynacom received another telex from the respondents which demanded for a clear decision from the appellants on whether they would discharge the cargo upon presentation of the bank draft of US$42,804.91 to the master of the Epic at the port of delivery. The respondents also warned that they would be taking legal action if they did not hear from the appellants within two hours.

There was no response from either Dynacom or the appellants and two days later, on 19 February 1998, Credit Lyonnais wrote to Dynacom, referring to the letter of indemnity that it had sent via telex on 17 February 1998. Credit Lyonnais noted that the cargo on board the Epic had not, as yet, been discharged and enquired if the appellants were rejecting the telex letter of indemnity and if so, for what reason. However, no reply was received from the appellants, and the respondents commenced proceedings against the appellants, and on 20 February 1998, obtained an ex-parte mandatory injunction from Tay Yong Kwang JC ordering the appellants to discharge the cargo. In return, the respondents were to pay the sum of US$42,804.91 for the sub-freight, and provide the appellants with a guarantee from a bank in the sum of US$240,898.12 to secure the appellants` alleged lien and present the original B/L No 3138, or alternatively, a letter of indemnity duly countersigned by a bank in Singapore. The order of court was served on the Epic on 21 February 1998 together with a bank draft and a bank guarantee complying with the terms of the court order. Despite this, the cargo

remained undischarged.

In the meantime, the appellants applied to vary the order of court, and on 25 February 1998, Choo Han Teck JC varied the earlier court order and the respondents were ordered to provide the appellants with a banker`s guarantee, the wording and amount of which were to be acceptable to the appellants to secure the appellants` claim on the cargo for amounts due and owing to the appellants under the time charterparty dated 6 November 1997. The respondents were further ordered to present the original B/L No 3138 before the discharge of the cargo could take place. Pursuant to the order of court, the respondents provided a letter of guarantee dated 27 February 1998 for the sum of US$577,564.362 to secure the appellants` alleged lien. This amount was subsequently reduced to US$527,054.54 on 19 March 1998. On 28 February 1998, the respondents presented the original B/L No 3138 to the master of the Epic, whereupon discharge of the cargo finally took place.

The respondents` claim

The respondents in the action claimed damages arising from the wrongful detention of and interference with the cargo by the appellants for the period from 16 to 28 February 1998. The respondents claimed that they were, at all material times, the owners of the cargo and were the holders and endorsees of the B/L No 3138, and that they were the sub-charterers of the Epic under a voyage charter (`the spot charter`) dated 10 February 1998, which they entered into with the time charterers, Metro. Under the spot charter, the freight payable was US$42,804.91 (at the rate of US$2.25 per metric ton on the quantity stated in the bill of lading).

The respondents also claimed that there was a collateral contract made between them and the appellants arising from the exchange of the telexes between them, namely the telex of the respondents of 16 February 1998 to the appellants` agent, Dynacom and the first telex of Dynacom in reply of the same day; that under the collateral contract, it was agreed that the appellants would discharge the cargo without the production of the original bill of lading in exchange for the respondents agreeing to indemnify the appellants on the terms set out in the telex and the payment to the appellants of the sub-freight by way of a bank draft to be presented to the master; and that the appellants subsequently repudiated this collateral contract and wrongfully purported to enforce a lien on the respondents` cargo for the amount of US$310,898.12 allegedly due and owing to the appellants from Metro under the time charter. It was contended that the appellants were not entitled to any lien on the cargo, and that further even if the appellants were so entitled, the lien was limited to the sub-freight due from them to Metro under the spot charter and did not extend to the amount alleged to be owed by Metro, as the B/L No 3138 did not incorporate any of the terms of the time charter.

The appellants` case

The appellants` defence was that there was no collateral contract arising from the exchange of telexes; that they were legally entitled to have a lien on the cargo loaded on board the Epic; that their right to the lien was derived from cl 26 in the time charter; and that Metro and the respondents were one and the same party and the cargo belonged to Metro. In the alternative, even if they were not the same party and the cargo belonged to the respondents, cl 26 of the time charter had been incorporated into the B/L No 3138, and the appellants were entitled to have a lien on the cargo. The appellants also challenged the existence of the spot charter, claiming that it was a fabrication concocted by the respondents in order to defeat the appellants` counterclaim.

Decision below

Lai Siu Chiu J allowed the respondents` claim and dismissed the appellants` counterclaim. First, she found that the respondents were the owners of the cargo of fuel oil loaded on board the Epic under the B/L No 3138, her finding being based on the documentary evidence as well as the oral testimony of the respondents` witnesses. Next, she found that there was a spot charter between Metro and the respondents in respect of the Epic at the material time, and she rejected the appellants` contention that the spot charter was a sham created by the respondents. Thirdly, she held that there was a collateral contract made between the respondents and the appellants arising from the exchange of telexes on 16 February 1998. And finally, she held that it was the terms of the spot charter that were incorporated into the B/L No 3138 and not those of the time charter. Hence, the lien clause in the time charter had no application and the appellants were not entitled to enforce their lien on the respondents` cargo. Thus, she found in favour of the respondents and interlocutory judgment was entered against the appellants with damages to be assessed by the registrar.

Prior to the hearing of the appeal, the appellants made an application for leave to adduce fresh evidence before us. The fresh evidence consists of affidavits and documents exhibited therein, and one of those documents was a memorandum of sale of a quantity of fuel oil by the respondents to Metro, which the appellants alleged was the same cargo of fuel oil loaded on board the Epic. The appellants sought to rely on these documents to disprove the respondents` claim as well as the findings made by the learned judge. In opposing the application the respondents also filed several affidavits and exhibited several documents to show first, that the sale of the quantity of fuel oil referred to by the appellants in the memorandum was different from the cargo loaded on board the Epic, and secondly, that the sale had been cancelled. We allowed all these affidavits and the exhibits referred to therein to be admitted in evidence.

The appeal

The main issues raised and argued before us are the following:

(a) whether the cargo of fuel oil loaded on board the Epic under the B/L No 3138 belonged to Metro or the respondents;

(b) whether there was a spot charter of the Epic made between Metro and the respondents;

(c) whether cl 26 of the time charter has been incorporated into the B/L No 3138; and

(d) whether there was a collateral contract between the respondents and the appellants arising from the exchange of telexes between the respondents and the appellants` agent, Dynacom.

Ownership of the cargo

We turn to the first issue. Initially, it was part of the appellants` case that Metro and the respondents were one and the same legal entity and the cargo of fuel oil belonged to Metro. This was subsequently abandoned. Before us, the appellants` case is that the respondents had sold the cargo to Metro and accordingly the cargo belonged to Metro. In support, they rely mainly on documentary records relating to the voyage made by the Epic at the relevant time which were kept by Metro and which the appellants obtained from Metro`s Greek liquidator. Among the documents produced was a

copy of the memorandum of sale in facsimile form dated 11 February 1998, by which the respondents confirmed their sale of a quantity of 20,000 MT of HSFO 180 CST fuel oil to Metro. For convenience, we shall refer to this contract as the `Metro oil contract`. On the basis of this document, counsel for the appellants submits that the quantity of fuel oil referred to in the Metro oil contract was the same fuel oil referred to in the contract of sale between Sanko Oil and the respondents, which we shall refer to as the `Sanko Oil contract`. Therefore, the cargo of fuel oil loaded on board the Epic, which the respondents had purchased under the Sanko Oil contract, had been on-sold to Metro and therefore the cargo belonged to Metro. In support of the contention, counsel highlighted various similarities between the two contracts, such as the descriptions of the quantity and quality of the fuel oil, the coincidence in the loading period stipulated and the fact that the Epic was also one of the vessels nominated to carry the cargo.

Further, counsel draws our attention to the fact, which was not disputed, that the Metro oil contract was a FOB contract. Thus Metro would be responsible for the shipment of the cargo as well as the costs, including freight, incurred for the shipment. It is argued that since the shipment of the cargo was Metro`s responsibility, no freight would be owing by the respondents to Metro. There was, therefore, no reason for the respondents to enter into a spot charter with Metro for the carriage of the goods. It follows that the spot charter was a fabrication by the respondents, and the respondents` representation in their first telex on 16 February 1998 to pay the freight they owed to Metro was fraudulently made. By this argument, the appellants impute fraud, dishonesty and misrepresentation on the part of the respondents and their main witness, Michael Tziolas.

On the other hand, the respondents claim that the Metro oil contract was in fact cancelled by Metro and the respondents on the same day after it was concluded. The respondents rely on a facsimile transmission that was sent by the respondents to Metro confirming their agreement to cancel the Metro oil contract. Since the contract had been so cancelled, the quantity of fuel oil in the Metro oil contract had not been purchased by Metro and did not belong to Metro. In any event, the respondents say that the Metro oil contract had no connection with the cargo of fuel oil which was loaded on board the Epic. In this respect, the respondents drew attention to the significant differences between the two contracts of sale. The Metro oil contract was therefore completely irrelevant.

The learned judge held that on the evidence she had little doubt that the respondents were the owners of the cargo carried on board the Epic under the B/L No 3138. Her finding was based on the following documentary evidence:

(i) the contract with the sellers, Sanko Oil, for the purchase of the cargo of fuel oil, which by cl 11 provided that the title to and risk in the cargo would pass to the buyer upon the loading of the cargo;

(ii) the invoice No 23356 of Sanko Oil addressed to the respondents dated 18 February 1998, which referred to B/L No 3138;

(iii) the letter of credit (No 98IM0060SIN) issued by Credit Lyonnais, Singapore, on behalf of the respondents in favour of Sanko Oil which was negotiated by Deutsche Bank on Sanko Oil`s behalf; and

(iv) the endorsement of the B/L No 3138 by Sanko Oil in favour of the Deutsche Bank, which in turn endorsed it to Credit Lyonnais which then re-endorsed it to the respondents;

and also on the testimony of Michael Tziolas and Charles Maulino. We think that the finding of the learned judge on the evidence before her is unimpeachable.

However, before us counsel for the appellants relies on the Metro oil contract (which was admitted on appeal) to disprove this finding. Notwithstanding this fresh evidence, we have difficulty in accepting the contention advanced on behalf of the respondents. If the respondents had on-sold the cargo under the Metro contract, there would be no need for the respondents to offer to pay the sub-freight to the appellants. The fact was that they did. Furthermore, apart from the undertaking to pay the sub-freight by way of bank draft, the respondents even gave an indemnity (in terms of their telex) to the appellants in exchange for the discharge of the cargo. If the respondents had sold the cargo to Metro, there would be no reason, and neither would it make any commercial sense, for the respondents to assume such liability, for the payment of the sub-freight and the issue of the indemnity. Indeed, it should not be forgotten that it was the respondents who eventually put up the bank guarantee for the release of the cargo. On the basis of what had transpired, the conduct of the parties does not lead to the conclusion that the relationship between the respondents and Metro was that of a FOB seller and buyer, as was alleged by the appellants.

The appellants rely only on the Metro oil contract and purely on this document, they say that the respondents had sold the cargo of fuel oil on board the Epic and by implication suggest that the respondents were making a false claim for the cargo which did not belong to them. That document alone is far from being conclusive and is certainly not sufficient for the purpose. In examining the descriptions of the quantities of fuel oil and other matters contained in the two contracts, we find that although there were similarities, there were also significant differences between them. Having regard to all the evidence adduced before us, we have considerable doubt that the quantity of fuel oil in the Metro oil contract was the same cargo of fuel oil carried on board the Epic, and we are far from satisfied that the respondents had on-sold the cargo to Metro. In the premises, we agree with the finding of the learned judge.

Spot charter

The respondents` case is that they had entered into a spot charter with Metro to sub-charter the Epic for the carriage of the fuel oil referred to in the B/L No 3138. In proving the spot charter, the respondents produced only a copy of the fax dated 10 February 1998 from the respondents to Metro setting out the terms of the spot charter, and the original was never produced. Michael Tziolas in his evidence explained that a party, Glencore International AG, in the proceedings instituted against the respondents, had obtained an Anton Piller order which was executed on or about 12 June 1998. The original fax was probably amongst the documents that had been seized and retained by Glencore. The learned judge was satisfied with this explanation and accepted the evidence of Michael Tziolas. In respect of this document, there are two material points to bear in mind. First, it is not disputed that when the respondents applied for and obtained the injunction against the appellants on 20 February 1998, a copy of the spot charterparty was exhibited in the affidavit filed by Michael Tziolas in support of that application. No objections were raised by the appellants then. Nor was any suggestion made by the appellants that that document was a sham and a fabrication of the respondents. Secondly, in the respondents` list of documents filed on 16 December 1998, the spot charter was also referred to and disclosed, and yet at that time, no action was taken by the appellants` solicitors to inspect the document or to challenge its authenticity. In the result, the appellants were deemed, pursuant to O 27 r 4(1) of the Rules of Court, to have admitted the authenticity of the copy of the fax pertaining to the terms of the spot charter.

The learned judge found that there was a spot charter of the Epic between Metro and the respondents. She said at [para] 51 of her judgement:

> *On a balance of probabilities, I am prepared to accept there was indeed a spot charter by the plaintiffs of the vessel. It was a common enough practice for the plaintiffs to fix such spot charters when the cargo being carried on board a vessel had been on-sold to them by the original buyers in the course of the voyage, more often than not by Metro. In this regard, I accept Tziolas` testimony that convenience was the main reason for such practice, in order to move cargo from point A to point B in Singapore. As SPC had previously accepted the vessel for its cargo also purchased from the (same) sellers and, both the fuel oil and SPC`s cargo were loaded by Hin Leong Trading Pte Ltd (see PB 42-44), Tziolas said there was no reason for the sellers not to accept the vessel; hence the spot charter preceded the nomination. He added that there were occasions where within one day, the plaintiffs changed nominations three times (N/E102). I would observe that the defendants adopted an inconsistent stand - before they did a volte face by the agents` second telex of 16 February 1998, they had impliedly accepted (by the first telex) that there was such a sport charter, by their agreement to accept from the plaintiffs, the sub-freight of USS$42,804.91 due to Metro.*

The appellants challenge this finding and seek to show that since the original spot charter was never produced, that is highly suggestive that the spot charter was never made and was a sham. We are unable to accept the appellants` contention in the light of the plausible explanation given by Michael Tziolas as to why the original fax on the spot charter could not be produced and that explanation was accepted by the trial judge.

A piece of evidence on which counsel for the appellants relies heavily was the voyage instructions dated 12 February 1998 sent by Metro to the master of the Epic, which stated that the cargo was to be loaded on `Acct: ***Metro Trading International Inc*** `. It is argued on behalf of the appellants that this would not have been the case if the Epic had indeed been on spot charter to the respondents. Counsel for the respondents, on the other hand, seeks to refute this evidence by referring to a hand-written fax, dated 13 February 1998, that was sent by Captain Fotis Margaritis of Metro to the master of the vessel. The fax purported to correct an error in the earlier telex sent by Metro and stated that the crucial line should read as ` ***Account Petromar Energy Resources Pte Ltd*** ` instead. We do not find that the voyage instructions given by Metro to the master helpful in determining this issue, for the simple reason that the reference to the loading being on Metro`s account is highly equivocal and does not throw any light on who exactly is the charterer of the vessel. The learned judge found that neither the voyage instructions nor the subsequent hand-written fax was crucial to her determination of the issue of whether there was a spot charter and as such, she did not give much significance to either of the two documents. Whilst there may be some unsatisfactory parts in the evidence of both parties on this issue, the learned judge, on the evidence, was entitled to make the finding, as she did, that there was a spot charter between Metro and the respondents. We accept the finding of the learned judge; certainly we have no grounds for disturbing it.

The appellants` lien

We now turn to the issue of whether the appellants had a lien on the cargo of the respondents on board the Epic. Clause 26 of the time charter conferred upon the appellants a contractual lien over the cargo for any amounts due under the charter. It is contended on behalf of the appellants that they were entitled to a lien on the cargo carried on board the Epic under the B/L No 3138, firstly because the cargo belonged to Metro, and Metro had defaulted in payment of the amount due to the appellants, and secondly, in the alternative, even if the cargo did not belong to Metro but to the

respondents, the appellants were still entitled to the lien on the cargo on the ground that cl 26 had been incorporated into the B/L No 3138, which became binding on the respondents as holders of the bill of lading.

Incorporation of the lien clause

Generally, a shipowner`s right of lien on the cargoes as provided in a charterparty can only be enforced against the holder of a bill of lading, if such provision has been incorporated into the terms of the bill of lading. Such a lien is contractual in nature and accordingly creates rights only as between the parties to the contract in which it is contained. In the present case, if the lien clause in the time charter had been incorporated into the B/L No 3138, it would allow the appellants to exercise a right of lien over the cargo on board the Epic, even if the cargo was owned by the respondents, to secure payment of the amounts due under the time charter: **The Chrysovalandou-Dyo** [1981] 1 Lloyd`s Rep 159. Whether or not a term in the charterparty has been incorporated into the bill of lading depends on the words of incorporation used in the bill of lading. In the B/L No 3138, the relevant incorporation clause is stated in the following terms:

> *Freight and all other conditions and expectations (sic) as per Chartered (sic) Party dated in* ***freight payable as per charter party****.*

It is accepted that the term `expectations` was a typographical error and that the word should be read as `exceptions`.

In the court below, the learned judge referred to a passage from ***Scrutton on Charterparties*** (20th Ed) in art 38 at p 76 which dealt with such an issue. The relevant extract of art 38 reads as follows:

> *Where the incorporating clause refers to, but does not identify, a charterparty, the court will assume that the reference is to any charter under which the goods are being carried ([ast]footnote). Difficulties can arise where there are two charters, one between the shipowner and a charterer, and one between the charterer and a sub-charterer. It is submitted that a general reference will normally be construed as relating to the head charter ([ast]footnote), since this is the contract to which the shipowner, who issues the bill of lading, is a party. But this will not invariably be so, and the court may conclude, on examining the facts, that the intention was to incorporate the sub-charter, or even, in extreme cases, that the bill of lading is so ambiguous as to be void.*

The relevant footnote (No 48) accompanying this passage states:

> *At any rate if it is a voyage charter: approved in* ***K/s A/S Seatem v Iraq National Oil Co (The Sevonia Team)*** *[1983] 2 Lloyd`s Rep 640 at p 644. The position is less clear where it is a time charter, the terms of which are in many respects inapposite to the carriage of goods on a voyage. The court might well hesitate to hold the consignee liable for, say, unpaid time charter hire : approved in* ***The Nanfri*** *[1978] 1 Lloyd`s Rep at p 591, per Kerr J.*

The above passage was cited with approval and applied by the English Court of Appeal in **The SLS Everest** [1982] 2 Lloyd`s Rep 389. In that case, the plaintiffs entered into a voyage charter with a

company called D Ltd for a ship to be arranged by D Ltd to carry a quantity of phosphate from Casablanca to Chittagong. D Ltd time chartered the vessel SLS Everest from the shipowners. The bill of lading for the plaintiffs` cargo was signed by the master of the ship and stated, inter alia, the following:

> *Freight and other conditions as per [lowbar][lowbar][lowbar] including the exoneration clause ...*

The blank in the clause was never filled in. The plaintiffs sued the shipowners for damage sustained by the cargo during the course of the carriage. Lord Denning, after citing the extract in ***Scrutton on Charterparties*** and the footnote, concluded that the charter that was incorporated was the voyage charter and not the time-charter. Dunn LJ was of the same view, and he added that it could not have been the head charter that was incorporated into the bill of lading, as it was a time charter and its terms would have been quite inapplicable to the bill of lading.

What was decided in ***The SLS Everest*** (supra) is applicable to the present case. The B/L No 3138 covered the carriage of cargo over an extremely short distance, from one terminal to another within the same island, Pulau Sebarok, Singapore. The terms of the time charter were somewhat incongruent with those of the B/L No 3138. By comparison, the spot charter was much more consistent with the bill of lading, both of them dealing exactly with the same voyage. It is argued by counsel for the appellants that the B/L No 3138 was issued at the Van Ommeren Terminal where the cargo was loaded and it was in the terminal standard form, and that at the time it was issued neither the appellants as the owners of the vessel nor the master who signed the bill of lading knew of the spot charter. That may be so. But the fact remained that under the terms of the time-charter, the master was required to act under the orders and directions of the charterers as regards the employment of the vessel and to sign bills of lading at the direction of the charterers or their agent. The spot charter was made on the 10 February 1998 and the B/L No 3138 was issued on 14 February 1998. This bill of lading must have been issued by the master at the direction of the charterers pursuant to the terms of the time-charter.

In our opinion, it is the terms of the spot charter, and not those of the time charter, that were incorporated into the B/L No 3138, and there was no provision in the B/L No 3138 itself or the spot charter that conferred on the appellants a right of lien over the cargoes on board the Epic. In our judgement, the appellants did not have any such right to exercise a lien over the respondents` cargo, and it follows that their detention of the cargo was clearly wrongful. Our decision on this issue is sufficient to dispose of the appeal. However, as counsel for both parties have argued at length on the issue of whether there was made between the appellants and the respondents a collateral contract relating to the discharge of the cargo, we should also address this issue.

Collateral contract

This issue hinges on the exchange of telexes between the respondents and the appellants` agent, Dynacom. To recapitulate, on 16 February 1998, Dynacom sent a notice of lien by telex to Metro, the shipper, Hin Leong Trading (Pte) Ltd and the consignee, Sanko oil, saying, inter alia, that Metro was indebted to the appellants in the sum of US$350,551 and that the appellants were exercising their lien pursuant to cl 26 of the time charter, and demanding the payment of freights and sub-freights for the cargo on board the Epic. At that point in time, the respondents did not have with them the B/L No 3138 and in order to secure the release and discharge of the cargo on board the Epic, the respondents had to offer to issue a letter of indemnity in lieu of the production of the bill of lading and

to make payment of the sub-freight. If the indemnity or the terms thereof as offered by the respondents were not acceptable, the appellants were entitled to refuse delivery. However, if the appellants did accept the indemnity offered and they agreed to discharge the cargo on payment of the sub-freight, then there was concluded a collateral contract whereby the appellants would be obliged to deliver the cargo to the respondents in exchange for the letter of indemnity.

It is helpful to produce the material parts of the two telexes in exchange. The telex of 16 February 1998 from the respondents to Dynacom, in so far as material, read as follows:

> *The above goods were shipped on the above vessel by Messrs Hin Leong Trading (Pte) Ltd and consigned to the order of `Sanko Oil (Pte) Ltd` who will endorse it to the order of `Credit Lyonnais, Singapore` who will finance this purchase and who will subsequently endorse the bills of lading to the order of `Petromar Energy Resources Pte Ltd` upon receipt of all monies due to Credit Lyonnais under the L/C Ref: No 981M0060SIN from Petromar Energy Resources Pte Ltd. But the relevant bills of lading have not yet arrived. We hereby request you to deliver such goods to Credit Lyonnais for account of Petromar Energy Resources Pte Ltd without production of the bills of lading.*
>
> *In consideration of your complying with our above request we hereby agree as follows:*
>
> *1 To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability loss or damage of whatsoever nature which you may sustain by reason of delivering the goods to Petromar Energy Resources Pte Ltd in accordance with our request.*
>
> *...*
>
> *For the discharge of above, we Petromar Energy Resources Pte Ltd undertake to pay the freight agreed between the time charterer and Petromar Energy Resources Pte Ltd for USD 42,804.91 (B/L QTY 19,024.406 MTS x USD 2.25/MT).*
>
> *Payment will be made by bank draft from Credit Lyonnais favouring Crest Shipping Ltd and this draft will be presented to the master of MT Epic tomorrow (17 February 1998). Please confirm that you will instruct master to discharge the cargo upon master notifying you of receipt of above draft tomorrow.*
>
> *Please confirm the above arrangement is fully acceptable to yourselves by return telex asap.*

In response, Dynacom, the appellants` agent replied as follows:

> *With reference to your telex dated 16 February 1998, on behalf of our principals, owners of the MT EPIC, we confirm the vessel will discharge the cargo once master notifies us of receipt of the irrevocable bank draft in the amount of USD 42,804.91 duly confirmed by the bank.*

Counsel for the appellants argues that no collateral contract was made by this exchange of telexes, as Dynacom did not accept the entire offer as contained in the respondents` telex. There were two essential elements in the offer. The first was the indemnity with detailed terms proposed by the respondents in lieu of the production of the bill of lading, and the second was the proposed payment of the sub-freight by way of banker`s draft. Dynacom by their reply by telex accepted only the proposed payment of the sub-freight and made no mention of the terms of the indemnity. In counsel`s submission, the appellants through their agents did not accept in full the terms of the respondents` offer as contained in their telex, and hence no contract was made between them.

In our opinion, this argument is unsustainable. The appellants, as the carriers of the cargo, are not obliged to deliver the cargo on board their vessel without the production of the relevant bill of lading. Where the bill of lading is not available at the time when the cargo is ready to be discharged, they may, in accordance with recognised commercial practice, deliver the cargo to the recipient upon the latter providing a letter of indemnity (with or without it being countersigned by a bank, depending on the circumstances) in lieu of the bill of lading. That precisely was what the appellants and the respondents had agreed. The respondents did not have available, at the time, the bill of lading and they furnished to the appellants a letter of indemnity with detailed terms in their telex of 16 February 1998; and in that telex they also proposed a payment of the sub-freight by way of a banker`s draft. By the reply telex, Dynacom on behalf of the appellants expressly accepted the proposed payment and agreed to release and discharge the cargo to the respondents. By necessary implication, they had by that telex accepted the terms of the indemnity as stated in the respondents` telex; otherwise they would not have agreed to release and discharge the cargo to the respondents merely upon receipt of the payment of the sub-freight. It is clear to us that the appellants had accepted the entire terms as stated in the respondents` telex.

It is then contended that the subsequent telexes exchanged between the parties must also be looked at, and these showed that the appellants did not in fact accept the terms of the indemnity initially offered by the respondents. In our opinion, the subsequent telexes are irrelevant on the question of whether or not there was a collateral contract made. If the contract had been made, the subsequent telexes of Dynacom could not unmake or alter it unilaterally.

Next, counsel for the appellants contends that no binding agreement had been made, on the ground that there was no consideration provided by the respondents for the collateral contract. This argument also has no merit. The respondents provided the letter of indemnity and offered to pay the sub-freight by way of a bank draft and these constituted good and valuable consideration. We are therefore in agreement with the finding of the learned judge that there was a collateral contract made between the appellants and the respondents as a result of the exchange of telexes on 16 February 1998.

Conclusion

In our judgment, the appellants had no right to exercise any right of lien over the cargo carried on board the Epic under the B/L No 3138, and they were thus liable for wrongful detention and interference of the cargo which belonged to the respondents. In purporting to enforce the lien over the respondents` cargo, they were also in breach of their obligations under the collateral contract. We affirm the decision below and dismiss the appeal with costs. The deposit in court as security for costs, with interest, if any, is to be paid to the respondents or their solicitors to account of costs.

Outcome:

Appeal dismissed.