

Hyphen Trading Ltd v BLPL Singapore Pte Ltd and others [2023] SGHC 302 – Sale of cargo pendente lite

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In maritime and commodities disputes, it is not uncommon for goods which are the subject matter of the dispute to be held up and unable to be delivered due to pending proceedings, either in court or in arbitration. Occasionally, this may arise even where the goods themselves are not the subject matter of the dispute, such as where a vessel is arrested in respect of a claim against the vessel/vessel owner, with cargo laden on board.

Parties may thus find themselves facing the unwelcome prospect that the goods in question diminish in value as the proceedings drag on, or that the costs of maintenance or preservation of the goods are so high as to substantially erode the value of the goods. This is no doubt of little benefit to anyone. A party who succeeds in proving its entitlement to goods which by the end of trial have little to no value may enjoy nothing more than a pyrrhic victory.

In such cases, one option is for a party to seek a sale of the goods *pendente lite*, i.e., pending litigation. This was what happened in *Hyphen Trading Ltd v BLPL Singapore Pte Ltd and others* [2023] SGHC 302, where the Singapore High Court had the opportunity to consider an application for the sale of a cargo to which there were competing claims of ownership.

The Parties and the Cargo in dispute

This case centred around a cargo of nickel briquettes (the “Cargo”) to be shipped from Pasir Gudang, Malaysia, to Nhava Sheva, India. The first defendant, BLPL Singapore Pte Ltd, was the contractual carrier who allegedly issued the bills of lading in respect of the Cargo.

There were two competing claims to the Cargo. On the one hand, the claimant, Hyphen Trading Limited (“Hyphen”), claimed to be the owner of the Cargo and the lawful holder of the three genuine and original bills of lading relating to the Cargo. On the other hand, the third defendant, Trafigura India Pvt Ltd (“Trafigura”), also claimed to have good title to the Cargo and to be the lawful holder of the true, valid and binding original bills of lading.

Shortly after commencing proceedings, Hyphen obtained an order from the Singapore High Court for the preservation of the Cargo at Henry Bath LME warehouse in Port Klang, Malaysia, until the disposal of the proceedings (the “Preservation Order”). At the time, part of the Cargo had arrived at Nhava Sheva and was due to be discharged, while the rest of the Cargo was awaiting transshipment at Colombo for on-carriage to Nava Sheva. Pursuant to the Preservation Order, the Cargo was relocated to Henry Bath LME warehouse in Port Klang.



The Application for Sale *Pendente Lite*

Subsequently, Hyphen applied for the Cargo to be sold *pendente lite* under Order 13, Rule 4(1) of the Rules of Court 2021. The reasons given by Hyphen were three-fold: (a) the diminishing value of the Cargo due to the decreasing demand for de-warranted nickel briquettes; (b) safety concerns in relation to the long-term storage of the Cargo, particularly the risk of theft and/or fraud; and (c) the unnecessary accrual of upkeep costs (i.e., storage costs, insurance and hedging costs).

The application was resisted by Trafigura, who argued that the reasons raised by Hyphen did not justify a sale of the Cargo.

The Applicable Principles to Sale Applications

The Court first noted that this appeared to be the first reported decision concerning a sale application under the newly-introduced Order 13, Rule 4(1) of the Rules of Court 2021. The Court opined that the approach to be adopted and the relevant considerations under the new provision were no different from those under the older provision (Order 29, Rule 4(1) of the Rules of Court).¹

¹ See [2], [14] - [15]

In other words, the general principle remained that a court may order a sale *pendente lite* where there is good reason for it and it is in the interests of justice to do so, the underlying rationale being to convert the property in dispute into cash so that its value is not eroded while litigation ensues.²

The Court then set out the following non-exhaustive factors that the court may take into account in exercising its wide discretion to order a sale *pendente lite*:³

(a) whether (and if so, to what extent) the value of the property is likely to diminish or be eroded due to the deterioration in the quality/condition of the property, even if the property is not strictly perishable;

(b) whether (and if so, to what extent) the accruing costs and expenses in storing and maintaining the property is likely to eat into and reduce its value (i.e., whether the property is a wasting asset);

(c) whether any alternative security or undertaking is forthcoming from any party, including the property owner, to bear the expenses/costs of preserving the same pending the outcome of the proceedings;

(d) whether the property has been abandoned;

(e) the sum total of claims relative to the value of the property, taking into account any reduction or diminution in value; and

(f) whether there are third parties whose interests would be adversely affected if a sale is not ordered.

The Court's Decision – No Sale

Applying the above principles, the Court declined to order a sale *pendente lite* of the Cargo, and dismissed Hyphen's application. The main factors considered by the Court were as follows.

First, the Court found that Hyphen's assertions that the market value of the Cargo was likely to diminish (owing to, for instance, the de-warranting of the Cargo and allegedly diminishing buyer prospects) were bare assertions, for which no supporting evidence was provided. On the other hand, Trafigura had adduced some evidence of market value and price forecasts from the Bloomberg Commodity Price Forecasts for Nickel, which showed that nickel prices were expected to increase slightly in 2024. While the forecast was not conclusive, the balance of the evidence meant that Hyphen had failed to discharge its burden of showing that the value of the Cargo was likely to diminish.⁴

Second, the Court observed that the Preservation Order contained a provision for the costs of the detention and preservation of the Cargo to be borne by Hyphen at first instance but recoverable as part of Hyphen's claim in the proceedings. This meant that the upkeep costs would not eat into or diminish the monetary value of the Cargo – if Hyphen ultimately succeeded on its claim, then it could recover these costs against the defendants; but if Hyphen did not succeed, then Trafigura would get the full value of the Cargo since the costs would have been paid by Hyphen. The Court considered this a distinguishing factor from other cases where the costs of preserving the property in question would directly erode the value of the property.⁵

Third, the Court noted that the upkeep costs were only a fraction (around 2.1%) of the value of the Cargo. It was thus unlikely that these costs would cause any significant reduction to the value of the Cargo pending the conclusion of the proceedings. The Court cautioned, however, that it was not simply a mathematical exercise of calculating projected expenses as a percentage of the value of the Cargo and ascertaining whether a theoretical "sweet spot" of unacceptable diminution had been reached – the assessment also had a qualitative aspect.⁶

Finally, the Court rejected Hyphen's argument of the risk of theft and/or fraud as speculative and unfounded, based on the evidence relied upon by Hyphen. The Court noted that the Cargo had already been verified to be nickel, and Hyphen itself had nominated the Henry Bath LME warehouse in Port Klang as a secure location to preserve the Cargo.⁷

Case Comment

This is the first reported decision in Singapore which sets out a clear framework for the determination of applications for the sale of property *pendente lite* under Order 13, Rule 4(1) of the Rules of Court 2021. The decision helpfully crystallises the rationale underlying the Court's power to order a sale *pendente lite*, and sets out the various principles and non-exhaustive factors the Court may take into consideration in exercising its discretion whether or not to order the sale of property *pendente lite*.

The decision also demonstrates the practical and evidence-based approach that a Singapore Court may take in such applications. It involves both a qualitative and quantitative exercise. Questions of diminishing market value and projected expenses are often difficult to grapple with as they involve prospective forecasts. This is especially so for the commodities trade, where market price movements of commodities can sometimes be volatile and unpredictable. Much will inevitably turn on the evidence. The Court's reasoning in this case highlights the importance of ensuring that a party's arguments (either in favour of or against the sale) are backed up by legitimate and reliable evidence, even if such evidence (such as market forecasts) may not be conclusive.

Finally, while this case involved the sale of cargo, the principles set out in the Court's judgment are likely to be equally applicable to applications for the sale of a vessel *pendente lite* – this is because there are parallels between both types of sales and the rationale of a sale *pendente lite* is to ensure that the value of the property is not eroded pending litigation.

The author was part of the Helmsman team that successfully represented Trafigura in this case.

² See [18] - [19]

⁵ See [26] - [28]

³ See [20]

⁶ See [30] - [38]

⁴ See [21] - [25]

⁷ See [41] - [43]