IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 84

Civil Appeal No 22 of 2020

Between

Owner and/or Demise Charterer of the vessel "LUNA"

… *Appellant*

And

Phillips 66 International Trading Pte Ltd

… *Respondent*

In the matter of Admiralty in Rem No 231 of 2014

Between

Phillips 66 International Trading Pte Ltd

… *Plaintiff*

And

Owner and/or Demise Charterer of the vessel "LUNA"

… *Defendant*

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Civil Appeal No 28 of 2020

Between

(1) Owner and/or Demise Charterer of the vessel "STAR QUEST"
(2) Owner and/or Demise Charterer of the vessel "NEPAMORA"
(3) Owner and/or Demise Charterer of the vessel "PETRO ASIA"
(4) Owner and/or Demise Charterer of the vessel "ZMAGA"
(5) Owner and/or Demise Charterer of the vessel "AROWANA MILAN"

… *Appellants*

And

Phillips 66 International Trading Pte Ltd

… *Respondent*

In the matter of Admiralty in Rem No 228 of 2014 (consolidated with Admiralty in Rem Nos 229, 230, 232–238 of 2014)

Between

Phillips 66 International Trading Pte Ltd

… *Plaintiff*

And

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(1) Owner and/or Demise Charterer of the vessel "STAR QUEST"
(2) Owner and/or Demise Charterer of the vessel "NEPAMORA"
(3) Owner and/or Demise Charterer of the vessel "PETRO ASIA"
(4) Owner and/or Demise Charterer of the vessel "ZMAGA"
(5) Owner and/or Demise Charterer of the vessel "AROWANA MILAN"

… *Defendants*

JUDGMENT

[Admiralty and Shipping] — [Bills of lading] — [Bills of lading as contract of carriage]
[Admiralty and Shipping] — [Bills of lading] — [Bills of lading as document of title]
[Admiralty and Shipping] — [Bills of lading] — [Delivery of cargo against presentation of bills of lading]
[Admiralty and Shipping] — [Admiralty jurisdiction and arrest] — [Wrongful arrest]
[Civil Procedure] — [Appeals] — [Notice] — [Appeals against costs order]

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The "Luna" and another appeal

[2021] SGCA 84

Court of Appeal — Civil Appeals Nos 22 and 28 of 2020
Judith Prakash JCA, Steven Chong JCA, Quentin Loh JAD
28 June 2021

20 August 2021 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 The bill of lading has been described as the cornerstone of modern sea carriage. It typically co-exists, in the context of the carriage of goods by sea, alongside an underlying sales contract. However, these two instruments serve different purposes that have been extensively explored in contemporary jurisprudence. But once in a blue moon, these co-existent and distinct instruments may assume roles unlike their traditionally well-recognised ones. On this occasion, the blue moon has indeed shone its light on the *Luna* – and thus presents a fitting opportunity for us to examine and clarify some of the fundamental principles undergirding the symbiotic relationship between bills of lading and their underlying sales contracts.

2 While it is correct that a bill of lading contract is typically independent of the underlying sale contract, it does not follow that the terms of the sale contract would play no role in construing the *effect* of a bill of lading. In most

cases, when a bill of lading is used to serve its traditional functions, its legal effect would be self-evident. However, on the rare occasions when it is clear that the bill of lading could not possibly serve any of its traditional functions, the question would then arise as to what legal effect, if any, should be ascribed to such a bill of lading. In those situations, over-emphasis on the "independence" of a bill of lading from its underlying sale contract would risk obfuscating the proper analysis of its true legal effect.

3 It cannot be gainsaid that a bill of lading is invariably issued to fulfil an underlying sale transaction which would usually precede the bill of lading. While a bill of lading is independent in the sense that the parties, *ie*, the shipper and the carrier, are different from the parties to the sale contract, *ie*, the buyer and the shipper/seller, and the two instruments are governed by different terms, there can be no dispute that these two separate or "independent" contracts operate in tandem. It therefore stands to reason that the terms of the sale contract will usually be useful to elucidate the true legal effect of the accompanying bill of lading.

4 On the unique facts of this case, the High Court judge ("the Judge") found that the relevant bills of lading "served none of the purposes" which a bill of lading is expected to serve. This, in itself, is quite a remarkable finding and only serves to demonstrate the exceptional circumstances of this case. Yet, the Judge decided that the relevant bills of lading "had contractual force as bills of lading and that the [appellants] had, by issuing the [bills of lading] undertaken to the [respondent] to deliver only against presentation of the [bills of lading]" [emphasis in original omitted].

5 In our judgment, the holding by the Judge that the bills of lading had contractual force is ultimately incompatible with his finding that those bills of

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lading "served none of the purposes" of a typical bill of lading. For the reasons set out below, we disagree with the decision below and accordingly allow the appeals save for the appeal against the dismissal of the counterclaim for wrongful arrest in CA/CA 28/2020 ("CA 28").

Facts

The parties

6 The respondent in CA/CA 22/2020 ("CA 22") and CA 28 is Phillips 66 International Trading Pte Ltd. One of the respondent's business activities is the trading and supply of bunker fuel. This entails purchasing fuel oil in bulk, storing and blending the fuel oil in storage tanks leased from Vopak Terminal Pte Ltd ("Vopak Terminal"), and then selling the product from Vopak Terminal. In some of these sales, the bunkers were sold on an FOB basis for delivery to bunker barges. The bunker fuel loaded on board these bunker barges would then be on-sold by the respondent's customers to ocean-going vessels in Singapore. This is referred to as the sale of "ex-wharf bunkers".

7 The appellant in CA 22 ("the CA 22 appellant") was the demise charterer of the vessel *Luna*. The appellants in CA 28 ("the CA 28 appellants") were the owners of the vessels *Zmaga*, *Nepamora*, *Star Quest*, *Petro Asia* and *Arowana Milan*. The *Luna*, *Zmaga*, *Nepamora*, *Star Quest*, *Petro Asia* and *Arowana Milan* (collectively, "the Vessels") are bunker barges used to supply bunker fuel to other vessels.

The sale contracts

8 By way of three sale contracts dated 10 September 2014, 22 September 2014 and 13 October 2014, the respondent sold several parcels of bunkers FOB

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to OW Bunker Far East (Singapore) Pte Ltd and Dynamic Oil Trading (Singapore) Pte Ltd (collectively, "the Buyers"). The Buyers were subsidiaries of OW Bunker A/S ("OW Bunker"), one of the world's largest bunker suppliers prior to its insolvency in 2014.

9 The terms of the sale contracts were substantially similar and will be discussed in greater detail below. At this point, it suffices to highlight that the sale contracts incorporated the respondent's General Terms and Conditions for Sales of Marine Fuel February 2013 ("GTC"). The sale contracts also provided that payment for the bunkers would only become due upon the expiry of 30 calendar days after the certificate of quantity ("CQ") date. In other words, the Buyers purchased the bunkers from the respondent on 30 days' credit.

The loading of the bunkers and the issuance of the Vopak BLs

10 Pursuant to the sale contracts, the Buyers nominated the Vessels for loading of the bunkers at Vopak Terminal on various dates between 10 October 2014 and 29 October 2014. Upon loading, Vopak Terminal generated several documents in respect of the bunkers, including a CQ and a document issued in triplicate titled "Bill of Lading" ("the Vopak BLs").

11 The Vopak BLs were required to be signed and stamped by the master of the Vessel. The main terms of each Vopak BL read as follows:

> …
>
> SHIPPED in apparent good order and condition by **PHILLIPS 66 INTERNATIONAL TRADING PTE LTD** on board the **SINGAPORE** vessel called [name of vessel] whereof [captain's name] is Master of this present voyage now at the port of **PULAU SEBAROK, SINGAPORE** and bound for **BUNKERS FOR OCEAN GOING VESSELS**
>
> …

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> Remarks:
>
> which are to be delivered in the like good order and condition at the aforesaid port of **BUNKERS FOR OCEAN GOING VESSELS** or so near as the vessel can safely get, always afloat, unto **TO THE ORDER OF PHILLIPS 66 INTERNATIONAL TRADING PTE LTD** or assigns weight, quantity or quality unknown.
>
> Not responsible for leakage, deterioration of quality and contamination. Freight and all other conditions and expectations as per Chartered stated dated in **PAYABLE AS AGREED**
>
> In witness whereof, the Master of said ship has signed THREE(3) ORIGINAL Bill of Lading all of this tenor and date, one of which being accomplished, the others to stand void.
>
> …
>
> [emphasis in original]

12 Shortly after the completion of each loading, the CQ, the Vopak BLs and other documents would be sent by Vopak Terminal to the respondent. In the event that the original CQ and the Vopak BLs were not yet in hand, the respondent would email scanned copies of the CQ and the Vopak BLs together with its invoice to the Buyers. Once in hand, only the original CQ would be couriered to the Buyers; the Vopak BLs would remain with the respondent until after payment was received. In this case, the respondent issued its invoices for the bunker shipments sometime after the loading dates, between 31 October 2014 and 5 November 2014.

The delivery of the bunkers

13 Meanwhile, the Vessels delivered the bunkers to various ocean-going vessels within several days from the date of loading. This was done without production of the original Vopak BLs, which were still in the respondent's possession at the material time. In the case of some of the Vessels, they returned to Vopak Terminal or went to another terminal in Singapore to load additional

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bunkers even before the previous shipment of bunkers had been fully discharged. This resulted in the commingling of bunkers on board.

The letters of demand and arrest of the Vessels

14 Sometime in November 2014, OW Bunker became insolvent and the Buyers defaulted on payment. The respondent found out about OW Bunker's insolvency on or about 6 November 2014.

15 On or about 14 November 2014, the respondent demanded delivery of the bunkers from the appellants, on the basis that it was the shipper and/or person entitled to possession of the bunkers under the Vopak BLs and the holder of the Vopak BLs.

16 The Vessels were separately arrested by the respondent on 14 November 2014, 15 November 2014, and 17 November 2014.

Application for summary judgment

17 After the Vessels were arrested, the respondent applied for summary judgment of its claims against the appellants. This was dismissed at first instance by the learned Assistant Registrar Nicholas Poon ("the AR"), who granted the appellants unconditional leave to defend.

18 On appeal, the AR's decision was upheld by the High Court in *The "Star Quest" and other matters* [2016] 3 SLR 1280 ("*The Star Quest*"). One of the main issues raised in the summary judgment proceedings was whether the Vopak BLs had been intended to operate as contractual documents and/or as documents of title. While the respondent contended that the Vopak BLs were typical bills of lading and ought to be given their full force as such, the

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appellants submitted that the Vopak BLs merely functioned as acknowledgements of the receipt of the bunkers and did not operate as contractual documents and/or as documents of title (see *The Star Quest* at [12]–[13]).

The decision below

19 Following the grant of unconditional leave to defend, the relevant issues were fully ventilated before the Judge over the course of an 18-day trial. The respondent's case was that the appellants were liable to it in contract, conversion, bailment, negligent misrepresentation, and/or for damage to its reversionary interest. The appellants denied these claims and, in the alternative, sought to rely on several defences including want of authority, estoppel and custom. They further counterclaimed against the respondent for wrongful arrest.

20 In an oral judgment issued on 30 January 2020, the Judge allowed the respondent's claim in contract and dismissed the appellants' counterclaims for wrongful arrest. In his decision, the Judge made the following factual findings.

(a) First, the Judge explained the traditional functions of a bill of lading, and acknowledged that the Vopak BLs in this case served none of these purposes.

(b) Second, the Judge recognised that typically, a bill of lading is issued to evidence an antecedent contract of carriage between the shipper and the carrier. He accepted that in this case, no antecedent contract of carriage existed between the respondent and the appellants.

(c) Third, the Judge noted that "the [Vopak] BLs were not important to the Buyers" and that the respondent "had no real obligation to transfer

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the [Vopak] BLs to the Buyers". In this regard, he observed that there was no requirement under the sale contracts for the respondent to present the Vopak BLs to the Buyers for payment. Nor was the Buyer expecting to receive the Vopak BLs for the purposes of claiming delivery of the bunkers from the appellants, as the arrangement was that the appellants would simply deliver the bunkers to ocean-going vessels at the Buyers' instructions. There was nothing in the underlying contractual arrangements that envisaged that the respondent would, or was authorised to, give such instructions.

(d) Fourth, although the Judge observed that the Vopak BL was used by the respondent as a "hedge against the Buyers' insolvency", the Judge accepted that the respondent "well knew" that "those bunkers would be immediately delivered to various ocean going vessels", such that by the time the Buyers failed to pay at the end of the 30-day credit period, the bunkers would no longer be in existence.

(e) Fifth, the Judge recognised that multiple deliveries of sub-parcels to different vessels were contemplated under the Vopak BLs, although only one set of Vopak BLs was issued covering the entire parcel.

(f) Sixth, the Judge observed that the manner in which the respondent "held on to and made use of the Vopak BL made it impossible for the [appellants] to comply with their obligations under the [Vopak] BL". Specifically, the respondent did not indorse the Vopak BLs to the Buyers until *after* the 30-day credit period had expired.

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(g) Finally, the Judge accepted the appellants' evidence that they were engaged only in the domestic bunker trade, and that the masters of the Vessels would not have had experience in international trade.

21 Despite the above factual findings, the Judge held "that the Vopak BLs had contractual force and functioned as typical bills of lading". Four principal reasons were given by the Judge for this conclusion.

(a) The phrase "bunkers for ocean going vessels" contained in the Vopak BLs was not void for uncertainty. In the Judge's view, this phrase referred to ocean-going vessels in or around the port of Singapore.

(b) The lack of an antecedent contract of carriage between the respondent and the appellants did not stand in the way of the Vopak BLs having contractual force, as there was no reason in principle why the Vopak BL could not itself be the contract.

(c) There was no inherent inconsistency between the contemplation of multiple deliveries of sub-parcels to different vessels and the issuance of only one set of Vopak BLs covering the entire parcel.

(d) It was no defence for the appellants to claim that it was impossible for them to comply with their obligations under the Vopak BLs without breaching their obligations to the Buyers, and *vice versa*.

22 Having made these findings, the Judge went on to reject the appellants' other defences, and to dismiss the appellants' counterclaims for wrongful arrest. As the Judge had found for the respondent on the basis of its claim in contract, he did not deal with the respondent's alternative causes of action.

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The parties' cases on appeal

The appellants' case

23 On appeal, the appellants submit that the Judge erred in finding that the Vopak BLs were documents of title and contractual documents. According to the appellants, the Vopak BLs merely served as acknowledgments of the receipt of the bunkers. In this regard, the appellants highlight, among other things, the following circumstances:

(a) the use of the phrase "bunkers for ocean going vessels" in the Vopak BLs;

(b) the contemplation of multiple deliveries under the terms of the Vopak BLs;

(c) the 30-day credit period under the terms of the sale contracts;

(d) the passing of title and possession under the terms of the sale contracts; and

(e) the absence of any reference in the sale contracts to bills of lading.

24 In the alternative, the appellants submit that the Judge ought to have accepted their defences. The defences relied upon by one or more of the appellants are (a) want of authority; (b) estoppel by acquiescence; (c) custom; and (d) that there had been an accepted mode of performance. As an aside, we note that although the last defence has been characterised by the parties as a new point of law that is being raised on appeal, it is in truth a reformulation of the appellants' primary case, *ie*, that the appellants and the respondent had agreed for the bunkers to be delivered to ocean-going vessels at the Buyers' instructions

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without presentation of the Vopak BLs. It therefore does not add anything of note to the analysis.

25 Finally, only the CA 28 appellants maintain their counterclaim for wrongful arrest against the respondent. The CA 22 appellant has abandoned its appeal against the Judge's dismissal of its counterclaim for wrongful arrest.

The respondent's case

26 The respondent submits that the Judge was correct in finding that the Vopak BLs gave rise to contracts of carriage and constitute documents of title. Accordingly, the appellants were bound to deliver the bunkers only upon presentation of an original Vopak BL ("the presentation rule"). The respondent emphasises the following features of the Vopak BLs:

(a) they were issued in triplicate;

(b) they contained the relevant Vessel's stamp and a signature at a place designated for the master's signature;

(c) they reflected the particulars of the cargo shipped;

(d) they contained a bold typewritten order clause and an attestation clause;

(e) they contained the usual clausing and exceptions found on bills of lading; and

(f) they contained expressions commonly found in bills of lading.

27 The respondent further submits that the Judge was also correct in rejecting the appellants' defences, based on the evidence that had been adduced

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at the trial. On this basis, the appellants are liable to the respondent in conversion for misdelivery of the bunkers. In the alternative, the respondent maintains its claims against the appellants in bailment, negligent misrepresentation and damage to its reversionary interest in the bunkers.

28 Finally, the respondent submits that it is not liable to the CA 28 appellants for wrongful arrest. There was no material non-disclosure as alleged by the CA 28 appellants because the matters that were not disclosed did not amount to "knock out blows" against the respondent's claims.

Our decision

The nature of the Vopak BLs

29 The central issue in these appeals concerns the precise nature of the Vopak BLs. As explained in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 2 AC 423 at [38] (cited by the High Court in *The Star Quest* at [17]), the modern bill of lading serves three functions: it operates as (a) a receipt by the carrier acknowledging the shipment of goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage; and (c) a document of title to the goods. In this case, the question for this court's consideration is whether, in addition to being a receipt for the shipment of the bunkers, the Vopak BLs were also intended to function as contracts of carriage and/or as documents of title.

The approach to determining the nature of the Vopak BLs

30 It is important to bear in mind that in this case, the court is not simply construing a particular term of the Vopak BL. Instead, it is ascertaining the parties' intentions behind the issuance of the Vopak BLs, specifically, whether

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the parties had intended for the Vopak BLs to have contractual force and to operate as documents of title. This goes towards the *existence* of a contract, rather than its *interpretation*. This is an important distinction. Despite the close similarity in the techniques used in interpretation cases and formation cases, as well as the overarching emphasis on the objective principle and contextualism (see Gerard McMeel, *McMeel on the Construction of Contracts* (Oxford University Press, 3rd Ed, 2017 ("*McMeel*") at paras 14.01–14.02), there remain significant differences between the approaches that are employed in the two situations. In cases involving interpretation, the parol evidence rule and the principles governing the admission of extrinsic evidence set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") undoubtedly apply. In cases involving contract formation, however, the "approach to background is wider as there is no restriction on the evidence which the court may consider" (see *McMeel* at paras 14.01–14.02).

31 Such a distinction between formation and interpretation cases is sound as a matter of principle. Although the court in both cases is concerned with ascertaining the parties' objective intentions, the circumstances surrounding such an exercise are fundamentally different. In interpretation cases, the court is ascertaining "what the parties, from an objective viewpoint, ultimately *agreed* upon" [emphasis added] (see *Zurich Insurance* at [132(d)]). The underlying premise is therefore that the parties had reached an agreement. Accordingly, the parol evidence rule and the *Zurich Insurance* principles apply because the parties' mutual understanding of such agreement and its terms can only be based on matters that were relevant, reasonably available to both parties and related to a clear or obvious context. This premise obviously does not apply in formation

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cases, where the court is considering the anterior question of whether the parties had even reached an agreement in the first place.

32 This is not a novel distinction. As Aedit Abdullah JC (as he then was) observed in *Wang Choong Li v Wong Wan Chin* [2015] 4 SLR 41 ("*Wang Choong Li*") at [51]:

> Both [sections 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed)] are predicated on the existence of a contract. All the cases considering the application of ss 93 and 94, such as *Zurich Insurance* … are concerned with the interpretation of contracts between the parties, and not with the actual formation and existence of such contracts.

In *Wang Choong Li* itself, Abdullah JC was faced with the question of whether a contract to licence pre-wedding photographs had been formed by the respondent signing a form for the collection of wedding gowns. Answering this question in the negative, Abdullah JC took into consideration extrinsic evidence such as the cost of renting six dresses from another boutique, although it does not appear from the judgment that both parties would have known about this fact at the relevant time (see *Wang Choong Li* at [42]).

33 The distinction between formation and interpretation was also raised by this court in *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696, albeit in the context of considering whether evidence of subsequent conduct could be taken into consideration in formation and interpretation cases. This court observed at [78]–[79] as follows:

> 78 … The admissibility and relevance of subsequent conduct in the formation and interpretation of contracts has yet to receive detailed scrutiny by this court. We have in the past opined that, while there is no absolute prohibition against evidence of subsequent conduct in interpreting a contract, such evidence is likely to be inadmissible in construing a written contract because it does not elucidate the parties' objective intentions or relate to a clear or obvious context … However,

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> where the court is ascertaining whether a contract has been *formed*, evidence of subsequent conduct has traditionally been regarded as admissible and relevant, although there is some instability in this rule … It may be argued that a distinction between the evidential rules applicable to the formation and interpretation of contracts is untenable … On this basis, a case could be made that the restrictive approach adopted in respect of contractual interpretation ought to be extended to contractual formation, though the case for consistency could equally lead to the opposite conclusion because the decision whether to adopt a consistently restrictive or consistently liberal approach depends on arguments of policy and principle …
>
> 79 … Since we have not heard argument on this issue, we decline to reach any firm views on the admissibility, relevance and probative value of subsequent conduct for the purpose of either contract formation or interpretation. …
>
> [emphasis in original]

34 Notably, this court was considering the specific question of whether evidence of subsequent conduct may be taken into consideration in formation and interpretation cases. Any concerns as to inconsistency should therefore be understood in that context. In other words, this court was not suggesting that the distinction between formation and interpretation cases should be done away with entirely. On the contrary, for the reasons explained above, such a distinction is justified on the basis of principle and authority.

35 Turning to the English authorities, a similar distinction between formation and interpretation cases was explained by Lord Millett in *Homburg Houtimport BV and others v Agrosin Private Ltd and another (The Starsin)* [2004] 1 AC 715 ("*The Starsin*") at [175]–[176], as follows:

> 175 The identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. *It goes to the very existence of the contract itself.* If it is uncertain, there is no contract. Like the nature and amount of the consideration and the intention to create legal relations *it is a question of fact and may be established by evidence. Such evidence is admissible*

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> *even where the contract is in writing, at least so long it does not contradict its express terms, and possibly even where it does …*
>
> 176 Where a contract is contained in a signed and written document, the process of ascertaining the identity of the parties and the capacity in which they entered into the contract must begin with the signatures and any accompanying statement which describes the capacity in which the persons who appended their signatures did so. This may require interpretation, and to this extent the process may without inaccuracy be described as a process of construction. *But it is not of the same order as the process of construing the detailed terms and conditions of the contract.* These describe the incidents of the contract and the nature and extent of the parties' obligations to each other. But the identity of the parties themselves is not an incident of the contract. Where a signature is accompanied by a description of the capacity in which the signatory has appended his signature the description is not a term or condition of the contract. It is part of the signature and so part of the factual evidence of the identity of the party which is undertaking contractual liabilities under the contract.
>
> [emphasis added]

36 In our view, the appropriate approach in formation cases is that described by VK Rajah JC (as he then was) in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [52], as follows:

> … In the final analysis, the touchstone is whether, in the established matrix of circumstances, the conduct of the parties, objectively ascertained, supports the existence of a contract. Reduced to its rudiments, it can be said that this is essentially an exercise in intuition. Legal intentions, whether articulated or unarticulated, should not be viewed in isolation but should be filtered through their factual prism. …

37 Similarly, the authors of Andrew Phang Boon Leong & Goh Yihan, *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 3.011 and 3.014 explain the objective approach employed by the court when ascertaining whether there has been an offer and acceptance (*ie*, a question of the formation of a contract), as follows:

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> 03.011 … It is permissible for the court to objectively consider what the parties understood from their respective perspectives.
> …
>
> …
>
> 03.014 … [T]he focus must always be, in the final analysis, on a holistic and integrated approach that not only takes into account, *inter alia*, the perspectives of the parties themselves but also attempts its level best to ascertain the subjective intentions of the parties by reference to all the objective evidence that is both relevant as well as available to the court.

38 Coming back to the present enquiry, it is clear that "[t]he formation of a contract of affreightment is governed by the normal principles of general contract law" (see David Foxton *et al*, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 24th Ed, 2020) ("*Scrutton*") at para 2-001). Thus, when ascertaining whether the parties intended for the Vopak BLs to have contractual effect, the court is not limited by the more restrictive approach applied to the interpretation of a contract, which includes the parol evidence rule and the *Zurich Insurance* principles governing the admission of extrinsic evidence to aid interpretation of its terms. Instead, the court is entitled to take into account all the relevant circumstances of the case in order to draw the appropriate inferences as to what the parties had objectively intended by the issuance of the Vopak BLs.

39 Furthermore, in cases involving bills of lading, or documents titled bills of lading, the observations made by Lord Hoffmann in *The Starsin* at [74] and [76] are apposite:

> 74 To whom is a bill of lading addressed? It evidences a contract of carriage but it is also a document of title, drafted with a view to being transferred to third parties either absolutely or by way of security for advances to finance the underlying transaction. It is common general knowledge that such advances are frequently made by letter of credit and that the bill of lading is ordinarily one of the documents which must be presented to the bank before payment can be obtained. *The*

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> *reasonable reader of the bill of lading will therefore know that it is addressed not only to the shipper and consignee named on the bill but to a potentially wide class of third parties including banks which have issued letters of credit.*
>
> …
>
> 76 *As it is common general knowledge that a bill of lading is addressed to merchants and bankers as well as lawyers, the meaning which it would be given by such persons will usually also determine the meaning it would be given by any other reasonable person, including the court.* The reasonable reader would not think that the bill of lading could have been intended to mean one thing to the merchant or banker and something different to the lawyer or judge.
>
> [emphasis added]

40 Although Lord Hoffmann's observations were made in the context of ascertaining the identity of a contracting party to the bill of lading, in our view, they are equally applicable to the present enquiry, *ie*, ascertaining whether the parties had intended the Vopak BLs to have contractual force and to operate as documents of title. In both situations, as Lord Millett highlighted (see [35] above), the court's enquiry is directed towards the formation or existence of a contract. Therefore, in determining objectively whether a reasonable person in the position of the parties would have intended the Vopak BLs to have contractual force and to operate as documents of title, the court may have regard not only to the perspectives of the shipper and the carrier (*ie*, the respondent and the appellants), but also to the perspectives of other parties who were generally known to use the Vopak BLs.

41 Having set out the relevant principles, we turn to consider the facts of the present case.

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The role and function of the Vopak BLs

(1) The underlying sale arrangements

42 Here, the Vopak BLs were issued in respect of bunkers sold by the respondent to the Buyers under the sale contracts. Given that the Vopak BLs were inextricably connected to the sale contracts, it is apposite to first examine the commercial arrangements between the respondent and the Buyers under these sale contracts. Before doing so, however, we caution that it is not in *every* case that it will be relevant and permissible to examine the terms of the sale contracts or the underlying sale arrangements in construing the *terms* of the bill of lading. It bears emphasis that in this case, the court is ascertaining the *nature or legal effect* of the Vopak BL and not simply construing its terms. Thus, the court is entitled to take into account a broader range of circumstances (see [30]–[40] above), including how the Vopak BLs were used in the context of the underlying sale arrangements. In a typical case concerning the construction of the *terms* of a bill of lading, it would only be permissible to examine the sale contracts and/or the underlying sale arrangements if they are relevant, reasonably available to all the contracting parties and relate to a clear or obvious context (see *Zurich Insurance* at [132(d)]; *Scrutton* at para 2-053).

43 We turn now to the salient features of the sale contracts and the surrounding commercial arrangements. First, pursuant to cl 2.1(a) of the GTC, payment for the bunkers only became due upon the expiry of 30 days from the date of the CQ. In other words, the Buyers were given a 30-day credit period by the respondent, who thereby accepted the risk of default *vis-à-vis* the Buyers. Such sales of bunkers on credit terms are entirely explicable in the bunker trade. In such situations, the buyer purchases the bunkers on credit, on-sells the

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bunkers within the credit period, and then uses the sale proceeds to pay the seller prior to the expiry of the credit period.

44 Second, payment was required to be made by the Buyers against presentation of the respondent's commercial invoice and the original CQ. If the original CQ was not available, the respondent could present its invoice and a letter of indemnity ("LOI") for payment. This was reflected in cll 2.1(c)–2.1(d) of the GTC, which also contained an agreed format and wording for the LOI. We note that it is unusual for a shipper to provide an LOI to the buyer. Usually, it is for the *buyer* to provide an LOI to the *carrier* to obtain delivery without production of the bill of lading.

45 Third, title to and possession of the bunkers passed to the Buyers upon loading. In relation to title, cl 2.1(b) of the GTC provides that:

> Notwithstanding any right of the Seller to retain the shipping documents until payment, title to and risk in the Product shall pass to the Buyer as the Product passes the Vessel's permanent flange connection at the Loading Terminal or the supplying Vessel's manifold.

46 As regards possession, the language of cl 2.1(f) of the GTC and the warranties contained in the LOI show that the respondent and the Buyers had intended for possession of the bunkers to pass to the Buyers *upon loading*. Specifically, cl 2.1(f) provides that under certain circumstances, the respondent "shall have the right to *regain* possession of Marine Fuel delivered" [emphasis added]. The LOI also contains warranties by the respondent that "we *were* entitled to possession of the Marine Fuel" and "we *had* good title to the Marine Fuel" [emphasis added]. The deliberate use of the past tense (as compared to other representations and warranties that employ the present tense) reinforces the view that possession of the bunkers had passed upon loading. This is also supported by the commercial context; the Buyers required possession of the

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bunkers in order to lawfully order the delivery of the bunkers to various ocean-going vessels for their consumption.

47 Fourth, there is a conspicuous absence of any reference to bills of lading in the terms of the sale contracts and the GTC. Indeed, the Judge observed that the sale contracts "did not call for the use of bills of lading". Although the respondent has sought to argue that the term "shipping documents" in cl 2.1(b) of the GTC refers to bills of lading, this argument is untenable. The term "shipping documents" could not possibly refer to a document that does not feature at all in the sale contracts and the GTC. Furthermore, given that cl 2.1(b) refers to the retention of "shipping documents until payment", the view that "shipping documents" does not refer to bills of lading is consistent with the undeniable fact that the Vopak BLs were not required for payment (see [44] above).

48 Finally, as the Judge found, the parties' commercial arrangement was that following the loading of the bunkers on board the Vessels, it was the Buyers and not the respondent who would give instructions to the appellants to deliver the bunkers to ocean-going vessels. Furthermore, the respondent well knew that these deliveries would be made shortly after loading, such that by the time the credit period expired, any attempt by the respondent to "regain possession" or to demand delivery of the bunkers would be futile because the bunkers would by then have been delivered to ocean-going vessels.

(2) The Vopak BLs *vis-à-vis* the respondent and the Buyers

49 In light of the sale arrangements described above, it comes as no surprise that the Judge found that the respondent had no real obligation to transfer the Vopak BLs to the Buyers for payment. Nor were the Buyers expecting to receive

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the Vopak BLs for the purposes of claiming delivery of the bunkers from the appellants. This was clear from the fact that the Vopak BLs were not indorsed to the Buyers until *after* the expiry of the 30-day credit period, sometimes as late as 72 days after such expiry. In our view, it follows that the respondent and the Buyers could not have intended for the Buyers to be able to lawfully deal with the bunkers *only* upon presentation of an original Vopak BL. Rather, the Buyers could deal with the bunkers as soon as they were loaded on board the Vessels, with payment being made 30 days later. Put differently, the Vopak BLs did not *enable* the Buyers to take delivery of the bunkers, nor did they *restrict* the Buyers' ability to do the same.

50 To suggest otherwise, *ie*, that the Buyers were not permitted to deal with the bunkers during the credit period while the Vopak BLs remained with the respondent, would mean that the bunkers would have had to remain stored on board the Vessels until payment was made, which was typically on or just before the 30-day deadline. If this was right, the extension of the credit period would serve no commercial purpose. Why would a buyer obtain credit terms if it could not deal with the goods prior to payment? Furthermore, such an arrangement makes no commercial sense as the Buyers would incur demurrage during this period, which would in all likelihood outweigh any savings obtained by virtue of the credit terms. It also contradicts the purpose of loading the bunkers on board the Vessels, which is to deliver them to ocean-going vessels as soon as possible. As the Judge had observed, "the local bunker trade … relies on quick turnaround and delivery of bunkers to ocean going vessels". In this regard, the respondent suggests that the Buyers could have paid earlier if they wished to take delivery of the bunkers. However, this too is untenable as it would again defeat the very purpose of negotiating for and obtaining a credit period. It would

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make no sense for a buyer to pay *early* when the sole purpose of a negotiated credit period is to enable the buyer to pay *later* by the end of the credit period.

51 In these circumstances, it is clear that as between the respondent and the Buyers, the Vopak BL was a non-essential document with no contractual force or effect as a contract of carriage or as a document of title. It did not and could not serve the traditional functions of a bill of lading. Indeed, the Judge made much the same observation when he found that:

> (a) the Vopak BLs did not allow the Buyers to claim delivery of the cargo by presenting the bill of lading and ensuring that the carrier would only deliver the cargo to the lawful holder of the bill of lading;
>
> (b) the Vopak BLs did not facilitate the sale and purchase of the bunkers while they were on board the Vessels; and
>
> (c) the Vopak BLs were not presented by the respondent in exchange for payment.

52 At best, the Vopak BLs assisted the respondent and the Buyers to divide a particular shipment of bunkers into different quantities to be allocated to different contracts and/or different buyers. In such situations, the CQ was of limited utility as it only reflected the *aggregate* amount of bunkers loaded in each shipment. The Vopak BLs were thus used to reflect the quantity of bunkers allocated to each sub-parcel.

(3) The Vopak BLs *vis-à-vis* the respondent and the appellants

53 The next question is how this affects the analysis of the Vopak BLs as between the respondent and the appellants. Typically, "a carrier that issues a bill of lading assumes a fundamental obligation to deliver the goods at destination

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only against presentation of the bill" (see *Scrutton* at para 1-028). However, in light of the respondent's commercial arrangements with the Buyers, the respondent knew that the Vopak BLs would not allow it to regain possession of the bunkers it had sold by presenting the same to the appellants and demanding delivery. Indeed, as we observed at [20(d)] above, the Judge made much the same finding. Although the respondent submits that the appellants were not parties to the sale contracts, the point remains that the *respondent* was such a party and would have known of this state of affairs.

54 To illustrate this point, it is useful to set out the following table, which shows (a) the dates of the Vopak BLs (which correspond to the loading dates); (b) the dates when deliveries were made to various ocean-going vessels; (c) the date of expiry of the 30-day credit period for each shipment; and (d) the dates when the respondent sought to demand delivery of the bunkers from the appellants.

Vessel	**B/L date / loading date**	**Date of delivery to ocean-going vessels**	**Expiry of credit period**	**Date of demand**
Luna	22/10/2014	23/10/2014 – 24/10/2014	21/11/2014	12/11/2014 14/11/2014
Petro Asia	11/10/2014	11/10/2014 – 12/10/2014 14/10/2014 – 15/10/2014 17/10/2014 – 18/10/2014 (commingled)	10/11/2014	14/11/2014
Star Quest	10/10/2014	11/10/2014 12/10/2014 – 13/10/2014 (commingled)	10/11/2014	14/11/2014
Nepamora	12/10/2014	13/10/2014 17/10/2014 – 18/10/2014	10/11/2014	14/11/2014

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Nepamora	21/10/2014	22/10/2014 – 23/10/2014 26/10/2014 (commingled)	20/11/2014	14/11/2014
Zmaga	29/10/2014	29/10/2014 30/10/2014 – 31/10/2014 (commingled)	28/11/2014	14/11/2014
Arowana Milan	18/10/2014	23/10/2014 10/11/2014 (commingled)	17/11/2014	14/11/2014

55 We make several observations in relation to the above table. It is apparent that the bunkers were delivered to various ocean-going vessels very shortly after they were loaded on board the Vessels, well *before* the expiry of the 30-day credit period. There were also occasions of commingling of bunkers and cases where the Vessels returned to load another shipment of bunkers even before the 30-day credit period had expired. This is accepted by the respondent. In our view, this would have indicated to the respondent that the bunkers were being discharged shortly after loading without production of the Vopak BLs, since it was still in possession of the Vopak BLs at the material time. Notwithstanding that its purported rights as the lawful holder of the Vopak BLs were ostensibly being infringed, the respondent only sought to demand delivery of the bunkers under the Vopak BLs *after* it found out about the Buyers' insolvency, *ie*, the very risk it had accepted when it extended 30-day credit terms to the Buyers. All of this shows that the respondent had always looked to the Buyers for payment, rather than regarded the Vopak BLs as security against the risk of non-payment. Notably, this would also have been known by the appellants who, as the carriers loading and discharging the bunkers bought and sold, were active participants in the commercial arrangements between the respondent and the Buyers.

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56 Therefore, when the Vopak BLs were issued, neither the respondent nor the appellants could have intended for delivery of the bunkers to be made only upon presentation of an original Vopak BL. Put differently, the Vopak BL was not regarded as "a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be" (see *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327 at 341). On the contrary, all parties conducted themselves on the basis that the Buyers could direct the Vessels to deliver the bunkers to various ocean-going vessels immediately after loading, without any involvement on the respondent's part. The corollary of this arrangement is that the Vopak BLs could not have offered the respondent any security against default by the buyer that typical bills of lading would (see *APL Co Pte Ltd v Voss Peer* [2002] 2 SLR(R) 1119 at [53]). In sum, the parties' commercial arrangements indicate that they had not intended for the Vopak BLs to function as typical bills of lading.

The terms of the Vopak BLs

57 The above analysis is supported by the terms of the Vopak BLs. In particular, the Vopak BLs contain several features that are atypical of traditional bills of lading, which reinforces the view that they were not intended by the parties to operate as such.

(1) Destination of discharge

58 The Vopak BLs do not specify a port of discharge. Instead, the phrase "bunkers for ocean going vessels" is inserted where a destination would ordinarily be indicated. The respondent and the Judge both recognised that the provision of a destination for the discharge of the bunkers is essential for the Vopak BLs to function as documents of title and contracts of carriage, and sought to establish this point with reference to the terms of the Vopak BLs.

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Specifically, the Judge interpreted the phrase "bunkers for ocean going vessels" to mean that the bunkers were to be delivered to ocean-going vessels in or around the port of Singapore. In other words, the Vopak BLs did specify a destination of discharge. As such, he found that the Vopak BLs were not void for uncertainty.

59 In our view, however, there are some difficulties with this approach. First, this construction is flawed. The *Arowana Milan* was not permitted to operate within Singapore port limits. Conversely, the other Vessels were not restricted to operating only within Singapore port limits.

60 Second, apart from its inaccuracy, this construction is also overly broad. As the Judge observed, "there could be hundreds of ocean going vessels within the port limits of Singapore on any day". The respondent seeks to circumvent this difficulty by suggesting that any uncertainty could be cured via the nomination of a destination by the respondent or its indorsees (which the Judge accepted). However, there was no such right or obligation on the part of the respondent or its indorsees to nominate a destination for the bunkers *after* the issuance of the Vopak BLs. That would involve a variation of the bill of lading, which the carrier must agree to (see *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*") at [71]). No evidence was adduced at trial of any such agreement between the respondent and the appellants. In fact, the evidence is to the contrary effect as the Judge recognised that the respondent "never made any such choices [as to which vessel the bunkers should be delivered to] in practice and, in the context of the relevant contractual arrangements, did not have any role in making such choices".

61 Finally, the insertion of the phrase "bunkers for ocean going vessels" where a destination would ordinarily be indicated suggests that the parties

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intended to omit a destination altogether. This is wholly consistent with the commercial context, which is that bunker barges operate essentially as "mobile petrol kiosks", *ie*, they supply other ocean-going vessels with bunkers for those vessels' consumption. On this view, the bunkers loaded on board the Vessels were not intended for carriage from one port to another in the traditional sense, but were intended to be pumped into the bunker tanks of ocean-going vessels to be subsequently burnt as fuel. This fundamental difference between the Vessels' carriage of the bunkers and a typical contract of carriage suggests that the Vopak BLs were no ordinary bills of lading, and had not been intended by the parties to operate as such. In our judgment, the significance of the absence of a port of destination is not to show that the Vopak BLs were void for uncertainty but rather to illustrate the point that the Vopak BLs were not intended to function as contracts of carriage and/or as documents of title.

62 In this regard, the respondent's evidence is that the phrase "bunkers for ocean going vessels" was inserted to indicate that the bunkers were to be consumed by vessels leaving Singapore, rather than for domestic consumption. This would then allow the goods and services tax on such bunkers sales to be zero-rated. This was explained by Ms Chan Lai Wan Joyce as follows:

> … Eventually, [the Inland Revenue Authority of Singapore ('IRAS')] agreed to allow Kinetic to zero-rate the [Goods and Services Tax] for ex-wharf bunker sales on [the] condition that the fuel oil was going to be consumed as bunkers by ocean-going vessels (i.e. vessels leaving Singapore). In this regard, IRAS said that we had to change the destination on the bills of lading from '*Singapore*' to '*bunkers for ocean going vessels*' to make it clear that the fuel oil was not for domestic consumption. … [emphasis in original]

63 We observe that this explanation actually *supports* the view that a destination had been deliberately omitted to show that the bunkers were meant for the consumption of ocean-going vessels. Nevertheless, we do not place

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much significance on the origins of the phrase "bunkers for ocean going vessels". In our view, such origins are irrelevant. The critical question remains whether the Vopak BLs did in fact function as typical bills of lading, having regard to the parties' conduct and intentions. In this regard, the omission of a destination in the Vopak BLs represents a significant departure from ordinary practice, from which it may be inferred that the parties did not intend for the Vopak BLs to operate as typical bills of lading, either in terms of being contracts of carriage or documents of title.

(2) Multiple deliveries

64 Another incompatible feature of the Vopak BLs is that the parties contemplated delivery of the bunkers to *multiple* ocean-going vessels. In our opinion, the fact that multiple deliveries were contemplated is entirely in line with the deliberate omission to specify a destination of discharge, and it reinforces the view that the Vopak BLs were not intended to operate as typical bills of lading.

65 In the proceedings below, the Judge held that "there is no inherent inconsistency between multiple deliveries of sub-parcels and the issuance of only one [Vopak] BL covering the entire parcel" because multiple deliveries could be effected by the Vopak BLs being indorsed to the Buyers, who could then give instructions to the appellants to deliver to various ocean-going vessels. However, there are several inherent difficulties with this approach.

66 First, this proposed method of effecting multiple deliveries envisions a *single initial* delivery to the lawful holder of the Vopak BLs, followed by multiple deliveries *thereafter* to various ocean-going vessels. This is an unjustifiable gloss on the express wording of the Vopak BLs, which ultimately

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exposes the incompatibility of the presentation rule (see [26] above) with the notion of making multiple deliveries under a single set of bills of lading.

67 Second, this interpretation would mean that during the credit period and while the Vopak BLs were in the possession of the respondent, only the respondent as the lawful holder of the Vopak BLs could give delivery instructions for the bunkers. The evidence is however plainly contrary to such an interpretation. As we have observed, the Judge found that the respondent "never gave instructions to the [appellants] to make deliveries to specific ocean going vessels" and "had no role, pursuant to the underlying contractual arrangements, to give such instructions". Furthermore, given the Judge's finding that the respondent did not indorse the Vopak BLs to the Buyers until after the 30-day credit period had expired, it is also wholly hypothetical to suggest that the Vopak BLs could be indorsed to the Buyers who would then give instructions to the Vessels.

68 Finally, as the Judge recognised, his interpretation meant that "the way the [respondent] held on to and made use of the Vopak BL made it impossible for the [appellants] to comply with their obligations under the [Vopak] BLs without breaching their obligation to the Buyers and vice versa". The Judge sought to resolve this difficulty in the following manner:

> … In my view the BL contract is independent from the underlying contractual arrangements. If the two sets of obligations conflict, it is no defence for the [appellant] to set up one set of obligations in order to excuse it from complying with the other set of obligations. If the BL has contractual force, the [respondent] is entitled to expect the [appellant] to perform its obligations under the BL. …

69 At the hearing before us, counsel for the CA 28 appellants, Mr Chan Leng Sun SC, rightly acknowledged that if indeed the appellants had undertaken

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conflicting obligations, then it was no defence to point to one set of obligations to excuse compliance with the other set of obligations. However, it bears emphasis that this is predicated on an antecedent finding that the Vopak BLs *were* intended to have contractual force. Put differently, it *assumes* that the appellants had agreed to undertake such conflicting obligations in the first place. That begs the question because the relevant enquiry before us is *precisely* whether the Vopak BLs were contracts of carriage and documents of title. In our view, contrary to the Judge's finding that breach of contract was an unavoidable consequence of the parties' arrangements, the conflict between the presentation rule and the contemplation of multiple deliveries, especially in light of the 30-day credit period, should have instead led him to find that the parties never intended the presentation rule to apply.

The allocation of risk

70 It is clear from our analysis above that by extending credit to the Buyers and deliberately omitting to stipulate for the use of traditional bills of lading under the sale contracts, the respondent had accepted the risk of non-payment by the Buyers. It bears mention that these two features go hand in hand. In granting the credit period such that the Buyers would be able to take delivery of the bunkers during the credit period without production of the Vopak BLs, it follows that it would not be necessary for the respondent to tender the Vopak BLs to obtain payment from the Buyers.

71 In a typical sale contract involving shipment, the bill of lading is the most crucial shipping document. Because the terms of the contract provide expressly or impliedly that delivery is only made upon production of the bill of lading and that document is only released to the buyer upon payment, it operates, metaphorically, as the key to the warehouse. As explained in Sir

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Guenter Treitel & F M B Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell, 4th Ed, 2017) at para 6-002, the effect of a bill of lading being a document of title is that "by retaining the bill, the holder can retain his property or security interest in the goods until specified conditions (typically as to payment) have been performed". If that had been done here, there would be no question of risk of non-payment as between the respondent and the Buyers. However, the parties, including the respondent, expressly agreed that the Vopak BLs would play *no* role in facilitating the delivery of the bunkers to the Buyers or their order. The risk of non-payment thus arose as a direct election by the respondent to extend credit and not to stipulate for the use of bills of lading under the underlying sale contracts. By such conduct, the respondent effectively took the position that the Vopak BL would not operate as a key to the warehouse. In other words, by reason of the terms of the underlying sale contracts, the respondent elected to leave the warehouse "unlocked". It is therefore absurd to suggest that the respondent's decision to accept the risk of non-payment by the Buyers could, in any way at all, result in the transfer of that risk to the carrier.

72 It is also untenable for the respondent to suggest that the appellants somehow agreed to assume the risk of non-payment by the Buyers. This would effectively mean that the appellants had agreed to a situation whereby they would be in breach of their obligations to the respondent under the presentation rule *in every case*. In the event of non-payment by the Buyers, the appellants would be liable to the respondent for damages (see *The "Cherry" and others* [2003] 1 SLR(R) 471 at [27]). As the Judge accepted, this is an extremely "onerous" outcome that would "shift the risk and burden of the Buyers' insolvency on the [appellants] all of whom are small enterprises of little means". Furthermore, it bears note that the appellants were simply the carriers – there

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was no reason for them to assume the risk of non-payment by the Buyers under an entirely separate contract to which they were not a party.

73 To mitigate the potential harshness of a finding that the appellants had agreed to assume the risk of the Buyers' non-payment, the respondent argues that the appellants could have obtained LOIs from the relevant parties. However, this is equally unworkable. It would be unrealistic to expect the appellants to obtain LOIs from the Buyers or the charterers who were giving instructions on behalf of the Buyers. From the Buyers' perspective, they already had title to and possession of the bunkers pursuant to the sale contracts. Nor could the appellants obtain LOIs from the ocean-going vessels. These vessels were purchasing bunkers for their own consumption, rather than loading cargo for transhipment pursuant to a bill of lading contract. Indeed, there is no credible evidence that LOIs were *ever* obtained by the appellants or by other bunker barges in the ex-wharf bunker industry. The absence of any such evidence attests to the impracticability of such a practice. Furthermore, even if the appellants could have obtained LOIs from the relevant parties, they would still remain liable *vis-à-vis* the shipper and would assume the risk of recovery under the relevant LOI. This is no simple or sure process. Where the buyer itself has become insolvent (as in the present case involving one of the largest bunker traders in the world), the carrier's prospects of recovering its losses from the buyer would be slim, if not non-existent.

74 Therefore, based on the evidence before the court, the appellants could not possibly have agreed to assume the risk of non-payment in the underlying sale contracts between the respondent and the Buyers. Pertinently, the respondent by its own conduct and arrangement with the Buyers knew that the appellants had not undertaken such an onerous obligation.

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75 Against this backdrop, it is immaterial that subjectively, the respondent may have procured the issuance of the Vopak BLs as a risk management measure. First, as the respondent's counsel, Mr Toh Kian Sing SC ("Mr Toh"), conceded, subjective motives are irrelevant and the court must ascertain the parties' objective intentions. Second, there is no evidence that the appellants knew of the respondent's subjective intention. Third, this subjective intention is ultimately incompatible with the respondent's commercial arrangements with the Buyers and the risk of non-payment that it had agreed to accept pursuant to such arrangements. Having agreed to 30-day credit terms and to the Buyers being able to deal with the bunkers immediately upon loading, and knowing that the bunkers would be delivered to ocean-going vessels shortly after loading, the respondent could not legitimately expect the Vopak BLs to offer it any security in the way that typical bills of lading would. It bears emphasis that a bill of lading does not *ipso facto* clothe the lawful holder with a cause of action. That flows from the function of the bill of lading as a contract of carriage and a document of title. Where those functions are not – and indeed, cannot be – practically served or intended, no such cause of action can arise. In other words, if the respondent never expected to use the Vopak BLs to take delivery or to give instructions in relation to the bunkers which it had sold to the Buyers, it could not possibly rely on the Vopak BLs to serve those functions when the risk of non-payment materialised. The Vopak BLs were not intended to function as documents of title from their inception. Thus, the Vopak BLs could not possibly be used as a risk management tool against the appellants to guard against the risk of non-payment by the Buyers.

76 Finally, we address the respondent's argument that several bills of lading similarly worded to the Vopak BLs had been relied upon by banks to provide financing. In this regard, the respondent points to the Judge's observation that

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"[t]here is evidence that similar bills of lading in the local bunker trade had been negotiated with and accepted by banks". In our view, this argument is beside the point. As Mr Toh acknowledged, there is no clarity as to whether such cases involved the use of credit terms, as in the present case. Indeed, cases involving banks would invariably involve the use of letters of credit or the requirement for payment against presentation of the bill of lading. The extension of credit terms to the buyer would typically remove the need for bank financing. They are usually mutually exclusive. Furthermore, the payment terms used in each case can entirely alter the allocation of risk among the parties and what the parties intend when the bill of lading is issued by the carrier. As such, it is not helpful to compare the Vopak BLs issued in this case to the bills of lading issued in cases involving banks.

The appellants' defences

77 Given our conclusion that the Vopak BLs were not contracts of carriage or documents of title, such that the respondent's claim in contract against the appellants ought to have been dismissed, we do not propose to address the appellants' other defences in detail. We only observe that if the Vopak BLs are indeed contracts of carriage and documents of title (which we have found they are not), we do not see any reason to disturb the Judge's finding that the other defences raised by the appellants are not sustainable.

The respondent's alternative claims

78 In light of our analysis above, we also reject the respondent's alternative claims against the appellants. We deal briefly with each of these claims.

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Bailment

79 The respondent's case in bailment is that having shipped the bunkers on board the Vessels, it bailed the bunkers to the appellants and was thereby entitled to demand delivery of the same in accordance with the terms of the bailment as set out in the Vopak BLs. The respondent also relies on the order clause in the Vopak BLs to argue that there was an attornment by the appellants in favour of the respondent.

80 However, as we have found at [45]–[46] above, title to and possession of the bunkers had passed to the Buyers upon loading. The bunkers that had been loaded on board the Vessels therefore could not be regarded as the respondent's goods. Accordingly, no relationship of bailment arose between the respondent and the appellants (see *East West Corporation v DKBS 1912 A/S and another, Utaniko Ltd v P&O Nedlloyd BV* [2003] 2 All ER 700 ("*DKBS*") at [24] and [41]). There is also nothing to suggest that a "special agreement" or "special contract" was made between the respondent and the appellants such that a relationship of bailment nevertheless arose despite the respondent having passed title to and possession of the goods to the Buyers (see *DKBS* at [34], citing *Albacruz v Albazero (The Albazero)* [1977] AC 774 at 786).

81 Nor do the facts show that the appellants had attorned in favour of the respondent. Norman Palmer, *Palmer on Bailment* (Sweet & Maxwell, 3rd Ed, 2009) explains at para 20-011 that "[i]n order to prove an attornment C must show that B has acknowledged C's title to the goods and that he is entitled to delivery of them". Furthermore, as this court observed in *Wing Tai Garment Manufactory (Singapore) Ltd v Port of Singapore Authority* [1971–1973] SLR(R) 324 at [17], "the question whether or not there is an attornment is a question of fact". In this case, however, the appellants continued to look to the

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charterers or the Buyers for instructions in relation to the discharge of the bunkers (see [48] above). Furthermore, the order clause, when read in the context of the other terms of the Vopak BLs and the parties' commercial arrangements, does not constitute an acknowledgement by the appellants of any title to the goods or entitlement to delivery on the respondent's part. For these reasons, we reject the respondent's claim in bailment.

Negligent misrepresentation

82 The respondent also argues that the appellants misrepresented their state of mind or intention at the time of issuing the Vopak BLs. This is because, although the Vopak BLs bore the indicia of a typical bill of lading, the appellants never intended to comply with the express terms therein. The respondent relied on this misrepresentation by treating the Vopak BLs as typical bills of lading.

83 However, it follows from our analysis above that a reasonable person in the position of the respondent would not have understood the Vopak BLs as constituting a representation by the appellants to hold the bunkers to the respondent's order and only deliver the bunkers upon presentation of an original Vopak BL. There was therefore no misrepresentation as alleged by the respondent. Furthermore, as the Judge found, the respondent in fact knew that the appellants would deliver the bunkers to ocean-going vessels without presentation of an original Vopak BL. Nevertheless, the respondent continued to load the bunkers on board the Vessels. In these circumstances, it cannot be said that the respondent relied on the appellants' alleged misrepresentation. Therefore, the respondent's claim in negligent misrepresentation also fails.

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Damage to reversionary interest

84 The respondent further argues that the appellants interfered with its reversionary interest as co-owner of certain bunkers that had been commingled ("the commingled bunkers") by wrongfully discharging the same. To establish its proprietary interest in the commingled bunkers, the respondent relies on cl 2.1(f) of the GTC, which provides as follows:

> If the Marine Fuel delivered is commingled with other Marine Fuel or products, Buyer hereby assigns and transfers to Seller such quantity of the admixture as would satisfy all outstanding debt owed to Seller in respect of the Marine Fuel delivered. In the event payment is not made by Buyer in the manner provided hereunder, Seller shall have the right to regain possession of Marine Fuel delivered without obligation to give further notices. All costs and expenses incurred shall be borne by Buyer and shall be aggregated with and form part of the outstanding debt owed to Seller.

85 In our view, such reliance is misplaced. Clause 2.1(f) states that the Buyer "assigns and transfers … such quantity of the admixture as would satisfy *all outstanding debt* owed to Seller *in respect of the Marine Fuel delivered*" [emphasis added]. This must mean that any assignment or transfer pursuant to cl 2.1(f) can only take place *after* payment for the bunkers has become due and outstanding. In this case, that would be upon the expiry of the 30-day credit period. However, the commingled bunkers had already been delivered to various ocean-going vessels by then (see [54] above), such that the Buyers no longer had any title to the commingled bunkers which they could have transferred to the respondent. There was therefore nothing upon which cl 2.1(f) could operate and, accordingly, no proprietary interest which the respondent can point to in support of its claim.

86 In any case, even if the respondent can establish a proprietary interest in the commingled bunkers, that is not the end of the matter. Michael A Jones,

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Anthony M Douglas & Mark Simpson, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 23rd Ed, 2020) explain at para 16-151 that:

> The action for reversionary injury lies … in respect of *any act which would, but for the problem of the claimant's lack of title to sue, amount to trespass, negligence or conversion*, provided it has the effect of depriving him either temporarily or permanently of the benefit of his reversionary interest, whether because the goods are destroyed or seriously damaged or because they are wrongfully disposed of by a transaction whereby the disponee acquires a good title, so preventing recovery of them. [emphasis added]

87 Similarly, Mance LJ remarked in *DKBS* at [32] as follows:

> … Andrew Tettenborn observes that the concept of reversionary damage to chattels 'arose piecemeal as an answer to the inadequacy of, and by way of extension of, three separate torts – trespass to goods, conversion, and negligence'. The author suggests … that liability for reversionary damage 'will arise if, and only if, the defendant's act would on the facts have made him liable in conversion or negligence or trespass proper'. Any claim for reversionary injury must, in effect, be treated as ancillary or parasitical to the principal tort to which it relates. …

88 However, by virtue of our rejection of all of the respondent's other claims, there is no wrongful act on the part of the appellants that can serve as the basis for the respondent's claim for damage to its reversionary interest in the commingled bunkers. Accordingly, this claim also fails.

Wrongful arrest

89 We turn now to the CA 28 appellants' appeal against the Judge's dismissal of their counterclaim for wrongful arrest. The principles applicable to wrongful arrest are well established and may be summarised as follows.

(a) Damages for wrongful arrest may be awarded where "the action and the arrest were so unwarrantably brought, or brought with so little

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colour, or so little foundation, as to imply malice or gross negligence" (see *Vasiliy Golovnin* at [137], cited in *The "Xin Chang Shu"* [2016] 1 SLR 1096 ("*Xin Chang Shu*") at [29]).

(b) In the context of material non-disclosure, damages for wrongful arrest may be awarded "if the non-disclosure is deliberate, calculated to mislead, or if it was caused by gross negligence or recklessness" (see *Xin Chang Shu* at [43], citing *Vasiliy Golovnin* at [140]).

(c) An arresting party is "not obliged to disclose all the defences which a defendant may reasonably raise at trial". Instead, it must disclose only those that are "of such weight as to deliver the 'knock out blow' to the claim summarily", *ie*, "matters that show up the claim as an abuse of process, or one that is so obviously frivolous or vexatious as to be open to summary dismissal and, on any reasonable view, their omission … is tantamount to or constitutes an abuse of process" (see *The "Eagle Prestige"* [2010] 3 SLR 294 at [73] and [75]; *Xin Chang Shu* at [47]–[48]).

90 The CA 28 appellants submit that (a) the respondent acted with malice or gross negligence in proceeding to arrest the Vessel without waiting to hear negative advice from its lawyers; and (b) the respondent failed to disclose matters which were potential "knock out blows" to its claims.

91 In our view, the facts of this case do not rise to the level to justify an award of damages for wrongful arrest. In relation to the substance of the claim, it is notable that the dispute between the parties centred primarily on a point of law. Although we have eventually found that the respondent's arguments on this point of law do not pass muster, it cannot be said that the claims were so

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unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence. Furthermore, the matters relied upon by the CA 28 appellants would not have delivered a "knock out blow" to the respondent's claims. Indeed, the High Court found at the summary judgment stage that the respondent had shown a *prima facie* case (see *The Star Quest* at [15]). Our extensive discussion above also indicates that these were not matters that would have justified a summary dismissal of the respondent's claims. For these reasons, we find that the respondent is not liable for wrongful arrest.

Appeal against costs

92 We turn to the final issue in this judgment, which concerns the appellants' appeals against the Judge's decision on costs. In this case, the Judge's decision on costs was delivered some time after his decision on the merits, and after the appellants had already filed notices of appeal in respect of the latter. After the Judge delivered his decision on costs, the appellants applied for leave to amend the notices of appeal that they had previously filed. This was sensibly consented to by the respondent and granted by the court.

93 There is some ambiguity in the case law as to the appropriate approach when a decision as to costs ("the costs decision") is rendered separately from and after the decision on the merits of the dispute ("the substantive decision"). Much of this ambiguity arises from s 29A(1)(*c*) read with para 3(*f*) of the Fifth Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). Pursuant to these provisions, leave to appeal is required where "the only issue in the appeal relates to costs". These appeals thus present a useful opportunity for us to clarify the steps that parties should take in the future when seeking to appeal against a costs decision that is issued separately from and after the substantive decision.

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94 We turn first to the case law. The first case of note is this court's decision in *Clearlab SG Pte Ltd v Ma Zhi and another* [2016] 3 SLR 1264 ("*Clearlab*"). In *Clearlab*, the costs decision was delivered some time after the notice of appeal had been filed against the substantive decision. The appellant therefore filed a separate notice of appeal against the costs decision. As both parties objected to the consolidation of the appeals, the appeal against the substantive decision ("the substantive appeal") was heard and dismissed prior to the hearing of the appeal against the costs decision ("the costs appeal"). Furthermore, although the appellant initially took the position that leave to appeal was not required in relation to the costs appeal, it subsequently applied for leave to appeal five days before the hearing of the costs appeal.

95 This court was thus faced with the question whether the appellant in *Clearlab* required leave to pursue the costs appeal. Answering this question in the affirmative, the court observed at [12] that:

> … [P]arliament's intention in making the amendments to the SCJA to regulate or restrict the right to appeal to the Court of Appeal was to *enable the court's efficient working* by screening certain categories of appeals. … In our judgment, to *conserve the judicial resources of our apex court*, Parliament has enacted a subject-matter restriction by way of s 34(2)(*b*) so that appeals solely on questions of costs or hearing fees can only be made with leave. In circumstances like the present, *where the putative appeal relates* only *to the question of costs, and is pursued regardless of the outcome of the substantive merits of the case, the appeal would in every sense be a standalone appeal* and the quintessential type of case which the Court of Appeal should not be troubled with unless there is a reason justifying the grant of leave. [emphasis in original]

96 This court then went on to consider the position if the appeals had been consolidated rather than heard separately, observing at [14] as follows:

> As to whether it would have made a difference had the two appeals been consolidated and the application for leave been filed on time, in our judgment, *this might well have led to a*

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> *different outcome as a matter of practical application rather than of principle*. We consider that in such a situation, leave would still have been required simply because the legislation is structured in such a way that a subject-matter restriction is imposed in appeals lodged solely on questions of costs; but *if an application had been made for leave to appeal the question of costs on the basis that the appeals on costs and on the substantive merits would then be consolidated, then as a practical matter one would expect that leave would likely have been given*. This follows because in substance, *there would not have been a real issue of wasting scarce judicial resources*. In essence, this would have been akin to a situation where the appeal was not one of costs only but extended also to the substantive merits and *the Court of Appeal would have been in a position to deal with both issues readily without having to expend much in the way of additional resources*. We reiterate that we make these observations not as a pronouncement of a rule of law but *as a matter of common sense* because in our judgment that is how the rules regulating the processes of the court should generally be approached. [emphasis added]

97 The next case of significance is *Qilin World Capital Ltd v CPIT Investments Ltd and another appeal* [2019] 1 SLR 1 ("*Qilin*"), which is another decision of this court which dealt with a costs order which was issued following the appeal against the substantive decision. In *Qilin*, after deciding to allow the appellant's appeal and to dismiss the respondent's cross-appeal, this court was faced with the question of the appropriate costs orders in respect of the appeals and the proceedings below. The respondent's solicitors contended that it was not open to the appellant to seek the costs of the proceedings below, as such costs had not been the subject of the appellant's notice of appeal (see *Qilin* at [7(a)]). This argument was rejected, with this court observing at [9] that:

> … [T]he fact that the costs of the first instance proceedings were absent from [the appellant's] notice of appeal is not surprising. The notice of appeal was filed on 20 July 2017. The decision of the trial judge on costs was published on 5 March 2018. *Despite the fact that the costs of the proceedings below are not mentioned in the notice of appeal, the court is entitled and empowered to deal with the costs of the proceedings below*. Even if the notice of appeal is to be regarded as deficient in this respect, it is a deficiency which could readily be cured by amendment. In the

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> circumstances an amendment is not necessary. [emphasis added]

98 *Qilin* was cited by the Singapore International Commercial Court in *Beyonics Asia Pacific Ltd and others v Goh Chan Peng and another* [2020] 5 SLR 235 ("*Beyonics*"). In *Beyonics*, Simon Thorley IJ delivered his costs decision after the appellants had filed a notice of appeal against his substantive decision. The issue therefore was whether leave was required to appeal against the costs decision. The appellants indicated that they only wished to challenge the costs decision if their substantive appeal succeeded wholly or in part (see *Beyonics* at [3]–[5]). In these circumstances, Thorley IJ held that a separate notice of appeal was not necessary, so that leave to serve one was also not required (see *Beyonics* at [28]–[30]). In reaching this conclusion, Thorley IJ analysed *Qilin* in the following manner (see *Beyonics* at [18] and [25]–[26]):

> 18 The emphasised passage [from *Qilin* at [9]] is clear and is directly on point. *The Court of Appeal has control over its own proceedings and, once it has reached a conclusion different to that of the trial judge, it has the power to do that which is right in the light of its decision so far as costs are concerned* wherever those costs have been incurred.
>
> …
>
> 25 *Qilin* is authority for the proposition that *where there is a substantive appeal and a notice of appeal is filed before a costs order is made in respect of the trial costs, if the appellant wishes only to challenge the costs order should the appeal succeed in part, no separate notice of appeal is required.* The most that may be required is that the notice of appeal against the substantive judgment is amended to make this clear. The Court of Appeal in *Qilin* did not expressly decide that such an amendment was necessary, contenting itself with holding that it was not necessary on the facts of that case.
>
> 26 However, the reasoning of the Court of Appeal in the passage in [9] of *Qilin* … suggests that it is not. *If the Court of Appeal is 'entitled and empowered to deal with the costs of the proceedings below' it would seem to follow that an express*

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> *request that the court exercise that power is an unnecessary requirement.*
>
> [emphasis added]

99 Thorley IJ also distinguished *Clearlab* from *Qilin* in two respects. First, in *Clearlab*, the costs appeal was not consolidated with the substantive appeal. Second, the costs appeal in *Clearlab* was a "standalone appeal" in the sense that the appellant "was not only seeking a different award of costs if the appeal succeeded in whole or in part, it was inviting the Court of Appeal to alter the costs award below even if the appeal failed". In Thorley IJ's view, it was only in such standalone cases that a separate notice of appeal and leave to appeal were required (see *Beyonics* at [22]–[23]).

100 The final and most recent case on this issue is the decision of the Appellate Division of the High Court ("the Appellate Division") in *Ser Kim Koi v GTMS Construction Pte Ltd and others* [2021] 1 SLR 1319 ("*Ser Kim Koi*"). In *Ser Kim Koi*, the lower court's costs decision was issued shortly after its substantive decision, such that the applicant could have filed a single notice of appeal in respect of both decisions. However, the applicant did not do so. Instead, the applicant filed a notice of appeal against the substantive decision and, separately, sought the court's leave to file another notice of appeal in respect of the costs decision (see *Ser Kim Koi* at [4]–[7]).

101 The Appellate Division held that the applicant should have filed a single notice of appeal in respect of both decisions. In such a situation, para 3(*f*) of the Fifth Schedule to the SCJA would not apply as the notice of appeal would relate to both the substantive appeal and the costs appeal (see *Ser Kim Koi* at [12]). However, since the applicant had already filed a separate notice of appeal in respect of the substantive decision, the question remained as to whether leave

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to appeal should be granted in respect of the costs decision. In this regard, the Appellate Division analysed *Clearlab* as follows (see *Ser Kim Koi* at [16]):

> … The reasons why the Court of Appeal [in *Clearlab*] declined to grant the appellant leave to proceed with the second appeal on costs were two-fold. Firstly, the appellant took the affirmative position that *it did not wish both appeals to be consolidated* such that both appeals were fixed for hearing on different dates. Secondly, the application for leave was made late, *ie*, five months after the appellant had indicated it would apply for leave and just five days before the date of hearing of the costs appeal (*Clearlab* at [6]). *The Court of Appeal also said that had both appeals been consolidated, this might well have led to a different outcome as a matter of practical application rather than of principle* (*Clearlab* at [14]). This meant that although the appellant would still have required leave to appeal because the second Notice of Appeal was on costs alone, *one would expect that leave would have been given if both appeals were consolidated*. There would then be less concern about the wasting of scarce judicial resources. [emphasis added]

102 Given that the applicant in *Ser Kim Koi* was agreeable to having the appeals heard together, the Appellate Division granted the applicant leave to appeal. Furthermore, in order to avoid the incurring of further costs, the Appellate Division ordered that instead of consolidating the appeals, the appeals would be fixed for hearing together (see *Ser Kim Koi* at [18]–[19]). Finally, the Appellate Division observed in *obiter* that there had been a suggestion in *Qilin* and *Beyonics* that a notice of appeal against a substantive decision could be amended to include the costs appeal. The Appellate Division expressed its reservations as to whether this was possible where the costs decision was delivered *after* the filing of the notice of appeal, given that "there would then be no costs decision to appeal against as at [that] date" (see *Ser Kim Koi* at [25]).

103 In our view, the cases show that the correct procedure is as follows. Where a costs decision is delivered *before* a notice of appeal has been filed in respect of the substantive decision, the appellant should file a single notice of appeal against both the substantive decision and the costs decision (see *Ser Kim*

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Koi at [12]). Such an appellant who has filed an appeal against the whole decision within time is at liberty to argue as of right that the costs order below should change *regardless* of the outcome of the substantive appeal.

104 Where a costs decision is delivered *after* a notice of appeal has been filed in respect of the substantive decision, there are two possible situations.

(a) Where the costs appeal rests on the outcome of the substantive appeal (*ie*, the appellant is seeking a different costs order on the basis that the substantive appeal would be allowed), the appellant need not file an additional notice of appeal in respect of the costs decision or amend the notice of appeal filed in respect of the substantive decision (see *Qilin* at [9]; *Beyonics* at [25]–[26]).

(b) Where the costs appeal is independent of the substantive appeal (*ie*, the appellant is seeking a different costs order regardless of the outcome of the substantive appeal), the appellant will need to seek leave to file an additional notice of appeal in respect of the costs decision (see *Clearlab* at [11]–[12]; *Beyonics* at [22]–[23]). In such cases, leave to appeal will generally be granted if the appellant is agreeable to having the appeals consolidated or fixed for hearing together (see *Clearlab* at [14]; *Ser Kim Koi* at [16]). If leave is not granted, that would be the end of the matter but if leave to appeal is granted, such an appellant would necessarily have to file a separate notice of appeal given that the earlier notice of appeal against the substantive decision cannot be amended to include the costs appeal for which leave to appeal was *subsequently* granted (see *Ser Kim Koi* at [25]).

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105 As far as possible, judges should endeavour to issue their costs decision *prior* to the expiry of the period limited for filing a notice of appeal against the substantive decision. Save for technically complex cases, time for the filing of the costs submissions should be such that a decision on costs can be made timeously prior to the expiry of the time limited for the filing of the notice of appeal. This would avoid any uncertainty to the parties and their lawyers as well as the incurring of unnecessary costs or the need to provide separate security in the filing of a separate notice of appeal.

Conclusion

106 For all of the above reasons, we find that the Vopak BLs are not contracts of carriage or documents of title, and that the respondent's various claims against the appellants must fail. However, the respondent is not liable for wrongful arrest. Accordingly, we allow the appeals save that we do not allow the CA 28 appellants' appeal against the Judge's dismissal of their counterclaim for wrongful arrest. The costs order below is reversed in favour of the CA 22 appellant and the CA 28 appellants, to be taxed if not agreed.

107 As for the costs of the appeals, taking into account the parties' respective costs schedules and the outcome of the parties' respective appeals, we order the respondent to pay the CA 22 appellant costs fixed at $70,000 and the CA 28

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appellants costs fixed at $65,000, both inclusive of disbursements. There will be the usual consequential orders.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Bazul Ashhab bin Abdul Kader, Yap Ming Kwang Kelly, Prakaash s/o Paniar Silvam, Toh Ka-Chun Gregory (Tu Jiajun), Shawn Lim Zi Xuan and Tan Yu Hang (Oon & Bazul LLP) for the appellant in CA/CA 22/2020;
Chan Leng Sun SC (Chan Leng Sun LLC), Teo Ke-Wei Ian, Chen Zhida and Huang Peide (Helmsman LLC) (instructed), Lim Wei Ming Keith, Reuben Tan Wei Jer and Joel Raj Moosa (Quahe Woo & Palmer LLC) for the appellants in CA/CA 28/2020;
Toh Kian Sing SC, Vellayappan Balasubramaniyam, Dinesh Sabapathy, Ravi Dharini and Chan Qin Pei (Rajah & Tann Singapore LLP) for the respondent in CA/CA 22/2020 and CA/CA 28/2020.

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