IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 28

Court of Appeal / Civil Appeal No 1 of 2023

Between

Kuvera Resources Pte Ltd

… *Appellant*

And

JPMorgan Chase Bank, N.A.

… *Respondent*

In the matter of Suit No 57 of 2020

Between

Kuvera Resources Pte Ltd

… *Plaintiff*

And

JPMorgan Chase Bank, N.A.

… *Defendant*

JUDGMENT

[Banking — Letters of credit — Confirming bank]
[Banking — Letters of credit — Applicable principle]
[Contract — Contractual terms]
[Damages — Assessment]

TABLE OF CONTENTS

INTRODUCTION **1**

THE MATERIAL FACTS **3**

THE PARTIES 3

EVENTS LEADING UP TO THE DISPUTE 3

THE DECISION BELOW **6**

THE PARTIES' CASES ON APPEAL **8**

OUR DECISION **11**

NATURE OF CREDIT TRANSACTIONS 11

INTERPRETATION OF THE SANCTIONS CLAUSE 15

The Sanctions Clause should be construed objectively *17*

The evidence does not prove that the Omnia was under Syrian beneficial ownership *23*

Whether the Sanctions Clause is compatible with the commercial purpose of the Confirmations *31*

DAMAGES 36

CONCLUSION **41**

Version No 1: 28 Sep 2023 (12:29 hrs)

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Kuvera Resources Pte Ltd
v
JPMorgan Chase Bank, N.A.

[2023] SGCA 28

Court of Appeal — Civil Appeal No 1 of 2023
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
1 August 2023

28 September 2023 Judgment reserved.

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

Introduction

1 Unlike armed conflict or military intervention, the coercive power of economic sanctions is derived not from what they do to entities and nations that do not comply with international laws and policies but what they do not, in the sense that they operate not through a formal declaration and imposition of war, but by way of "material exclusion from the world economy" (Nicholas Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Yale University Press, 2022) ("*The Economic Weapon*") at pp 3 and 14). In withholding international trade and commerce from polities and nations, economic sanctions have become a powerful instrument of international diplomacy, and sanctions regimes have, over the course of the past few centuries, been imposed against states and non-state actors as a response to and a means of exerting political influence over their policies and behaviours and

enforcing visions of international order. It is therefore unsurprising that economic sanctions have been described as "something more tremendous than war" in that "[i]t does not cost a life outside of the nation boycotted, but it brings a pressure upon that nation which … no modern nation could resist" (*The Economic Weapon* at pp 1–2; see also Natalino Ronzitti, "Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective" in *Coercive Diplomacy, Sanctions and International Law* (Natalino Ronzitti ed) (Brill, 2016) ch 1 at pp 9–14).

2 However, while primarily a geopolitical instrument, economic sanctions have found their way into contractual dealings and have thereby assumed a legal dimension. We see this in the present case, where the respondent denied liability to pay the appellant, the beneficiary of two letters of credit, on the basis that the confirmations of the letters of credit bear a contractual clause (the "Sanctions Clause") which extinguished the respondent's liability as the underlying commercial transaction was allegedly caught by the sanctions laws of the United States of America ("US").

3 The court's task is to interpret such a clause as a term of the contracts which are embedded within the two letters of credit and, in this task, the geopolitical considerations that underpin the deployment of sanctions may not be relevant or helpful. In that regard, the principles governing contractual interpretation must take centre stage with geopolitical considerations receding to the backdrop.

4 It is common ground between the parties that the burden is on the respondent to prove that it is entitled to invoke the Sanctions Clause to deny payment to the appellant. The present appeal, CA/CA 1/2023 ("CA 1"), concerns how this burden is to be discharged. In the court below, there were two

Version No 1: 28 Sep 2023 (12:29 hrs)

competing and divergent approaches to the treatment of the respondent's burden of proof as to whether the vessel on which the goods were shipped was "subject to any applicable restriction", such that the Sanctions Clause could be invoked. The High Court judge (the "Judge") preferred the respondent's approach and accepted that: (a) it would suffice to establish that the respondent would have been found by the US Office of Foreign Assets Control ("OFAC") to be in breach of the sanctions if it had paid against a complying presentation; and (b) it was not necessary to prove that the vessel was in fact owned by an entity which was subject to the sanctions. It appears to this court that the respondent's approach was not predicated on an objective yardstick but was likely to have been shaped by risk management considerations. As we will explain below, such an approach is not permissible as it is not in accordance with the terms of the Sanctions Clause. It was on this basis that we have arrived at a different conclusion from that of the Judge below.

The material facts

The parties

5 The appellant, Kuvera Resources Pte Ltd ("Kuvera"), is a Singapore-incorporated company in the business of trading coal sourced from Indonesia. The respondent, JPMorgan Chase Bank, N.A. ("JPMorgan"), is a national banking association chartered under US laws, which has its head office in New York and a network of branches worldwide including a branch in Singapore.

Events leading up to the dispute

6 On 23 July 2019, a company in Indonesia, PT Borneo Guna Energi (the "Seller"), contracted to sell coal (to be delivered in two parcels) to a company

Version No 1: 28 Sep 2023 (12:29 hrs)

in the United Arab Emirates ("UAE"), Oilboy DMCC (the "Buyer"). To facilitate this transaction, the following arrangements were made:

(a) Kuvera advanced funds to the Seller to enable it to purchase the coal for on-selling to the Buyer;

(b) the Buyer was to pay for each of the two parcels by irrevocable letters of credit ("LCs") payable at sight in which Kuvera would be named as the beneficiary;

(c) both LCs were issued by a bank in Dubai, Bank Alfalah Limited (the "Issuing Bank"), and expressly made subject to the Uniform Customs and Practice for Documentary Credits, 2007 Revision (the "UCP600"); and

(d) the Issuing Bank appointed JPMorgan as the advising bank and the nominated bank for both LCs, and JPMorgan duly advised both LCs to Kuvera (the "Advices") and confirmed (the "Confirmations") the LCs and their amendments.

7 The first LC ("LC1") was dated 8 August 2019 and was confirmed by JPMorgan on 13 September 2019. The second LC ("LC2") was dated 23 September 2019 and was confirmed by JPMorgan on 27 September 2019. Subsequent amendments to LC1 and LC2 by the Issuing Bank were also confirmed by JPMorgan. All of JPMorgan's Advices and Confirmations contained a Sanctions Clause which provided that:

> [JPMorgan] must comply with all sanctions, embargo and other laws and regulations of the U.S. and of other applicable jurisdictions to the extent they do not conflict with such U.S. laws and regulations ("applicable restrictions"). Should documents be presented involving any country, entity, vessel or individual listed in or otherwise subject to any applicable

Version No 1: 28 Sep 2023 (12:29 hrs)

> restriction, we shall not be liable for any delay or failure to pay, process or return such documents or for any related disclosure of information.

8 On or about 28 November 2019, Kuvera made a presentation of documents through its presenting bank (the "Presenting Bank") to JPMorgan under the LCs. The presentation was for a value of US$2,422,111.07 (the "Principal Sum") and the parties do not dispute that this was a complying presentation within the meaning of the UCP600.

9 JPMorgan then sent the presented documents for its internal sanctions screening procedure. The process revealed that the vessel (the "*Omnia*") on which the coal in the sale contract (the "Sale and Purchase Agreement") had been shipped was included in a list internal to JPMorgan, known as the Master List. The Master List, which was not accessible to the public, contained the names of various entities and vessels that had been determined by JPMorgan to have a sanctions nexus and/or concern. We note that this was a separate list from another publicly accessible list published by OFAC on its website, known as the OFAC Specially Designated Nationals and Blocked Persons list (the "OFAC List"). The OFAC List contained a list of individuals and companies owned, controlled by or acting on behalf of targeted countries as well as individuals, groups and entities designated under non-country-specific programmes, whose assets are blocked and with whom US persons are generally prohibited from dealing. JPMorgan's evidence was that apart from the individuals and companies named in the OFAC List, there were other entities that OFAC might not have specifically identified which had known businesses in the sanctioned countries. Depending on the results of its due diligence, JPMorgan would make a determination as to whether it was prohibited from dealing with that entity under US sanctions laws notwithstanding that the entity was not identified in the OFAC List, and if so, the entity would be added to the Master List.

Version No 1: 28 Sep 2023 (12:29 hrs)

10 On 3 December 2019, JPMorgan informed the Presenting Bank that it could not accommodate Kuvera's presentation of the documents as the transaction did not comply with the applicable sanctions laws, rules and regulations and/or its internal policies designed to ensure compliance, and returned the documents to the Presenting Bank. JPMorgan also informed Kuvera that JPMorgan could not obtain internal approvals to pay Kuvera. LC1 expired on 15 December 2019 and LC2 expired on 16 December 2019.

11 Kuvera commenced HC/S 57/2020 ("Suit 57") against JPMorgan on 17 January 2020, claiming that JPMorgan had acted unlawfully in not paying Kuvera the Principal Sum of US$2,422,111.07 or any part thereof after this sum under LC1 and LC2 became due and payable on 3 December 2019. It claimed for the Principal Sum and for damages in the sum of S$11,429.32 incurred for travel expenses as a result of JPMorgan's non-payment under LC1 and LC2.

12 Thereafter, Kuvera made efforts to secure payment directly from the Buyer. Following negotiations between Kuvera, the Issuing Bank and the Buyer, and a resulting Memorandum of Understanding dated 23 January 2020 (the "MOU"), the Buyer paid Kuvera US$2,204.042.74 (or UAE Dirham ("AED") 8,096,000) in exchange for Kuvera's documents.

The decision below

13 The Judge in Suit 57 found that letters of credit and confirmations were separate and autonomous unilateral contracts with one *sui generis* exception, *ie*, that an issuing or confirming bank has a contractual obligation to the beneficiary not to revoke its offer (for which no consideration has to be provided or supplied) (*Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 ("*GD*") at [34]–[49], [50]–[66]).

Version No 1: 28 Sep 2023 (12:29 hrs)

14 In light of this finding, the Judge then found that the Sanctions Clause had been duly incorporated as a contractual term of JPMorgan's Confirmations (*GD* at [98]). Since a confirmed letter of credit transaction comprised multiple separate and autonomous contracts, there was no legal impediment to a confirming bank adding a term to its confirmation of a letter of credit that was not in the letter of credit itself, as long as the term was not fundamentally inconsistent with the commercial purpose of the confirmation (*GD* at [80]–[82]). The Sanctions Clause was included in the Confirmations as an express term of JPMorgan's offer, and JPMorgan had not failed to draw the Sanctions Clause to Kuvera's attention (*GD* at [84], [88] and [92]). Further, the Sanctions Clause did not need to be the subject of any offer, acceptance or consideration as the Confirmations were offers of unilateral contracts (*GD* at [93]–[96]).

15 Next, the Judge found that the Sanctions Clause was valid and enforceable as it was not fundamentally inconsistent with (in the sense of being directly contradictory to) the commercial purpose of a confirmation, which was to give the beneficiary an alternative paymaster other than the issuing bank (*GD* at [102]–[107]). Moreover, the Sanctions Clause was a narrow sanctions clause which did not confer on JPMorgan a discretion that was so broad as to render the Confirmations *de facto* revocable, and which did not go beyond the obligations imposed by US sanctions, laws and regulations (*GD* at [117]). The Judge also found that the Sanctions Clause did not come within the scope of the rule against non-documentary conditions and was not worded so broadly as to be unworkable (*GD* at [123] and [125]–[130]).

16 Finally, the Judge found that the Sanctions Clause entitled JPMorgan to refuse to pay Kuvera. JPMorgan, as the Singapore branch of a US-incorporated and US-regulated bank, was not insulated from being subject to a law other than Singapore law (*GD* at [138] and [142]). The Judge found that JPMorgan was

Version No 1: 28 Sep 2023 (12:29 hrs)

obliged as a matter of US law to comply with US sanctions law and regulations (*GD* at [158]). The Judge also found that JPMorgan could avail itself of the benefit of the Sanctions Clause if JPMorgan could prove that OFAC would have found JPMorgan to be in breach of the Syrian Sanctions Regulations 31 CFR (US) § 542 (2014) (the "SySR") had JPMorgan paid Kuvera against its complying presentation (*GD* at [159]–[160]). The Judge was satisfied that OFAC would have regarded the red flags detected by JPMorgan in its due diligence as pointing towards continued Syrian beneficial ownership of the *Omnia*, and therefore that OFAC would have considered JPMorgan to be in breach of the SySR had JPMorgan paid Kuvera against its complying presentation (at [186]–[191]). In any event, the Judge also found that those red flags constituted sufficient circumstantial evidence to discharge JPMorgan's burden of proving that the *Omnia* was in fact owned by a Syrian entity at the material time, such that payment to Kuvera would have violated the SySR (at [192]–[193]).

17 For the foregoing reasons, the Judge dismissed Kuvera's claim in its entirety with costs (at [195]).

The parties' cases on appeal

18 On appeal, Kuvera contends that the Judge erred in finding that the Sanctions Clause was incorporated by way of its inclusion in the Confirmations. Kuvera contends that the terms of the contract are to be found in the LCs only, which Kuvera describes as the "mother" of the Confirmations. Further, Kuvera submits that the Sanctions Clause is a contradiction to the undertaking of the Confirmations and should not be given effect to. Kuvera also disputes that the letters of credit should be regarded as unilateral contracts such that the bank's promise becomes binding once it is communicated to the seller, even before the

Version No 1: 28 Sep 2023 (12:29 hrs)

seller has done any act of acceptance. Finally, Kuvera submits that the Sanctions Clause constitutes a non-documentary condition and should be rejected.

19 Secondly, Kuvera submits that the Judge erred in his interpretation of the Sanctions Clause. Kuvera submits that the applicable restriction under the Sanctions Clause must be in respect of parties listed in the OFAC List. However, instead of complying with the restrictions stated in the publicly available OFAC List, JPMorgan had exercised unilateral discretion in deciding not to honour the confirmed LCs, going beyond statutory or regulatory requirements.

20 Thirdly, Kuvera contends that the Judge erred in finding that the *Omnia* was owned by a Syrian entity. Kuvera's position is that the *Omnia* was more likely to be owned by a Cypriot national or a Dubaian company. Kuvera also contends that even if the *Omnia* was found to be infected by Syrian ownership, Kuvera's receipt of monies under the LCs would have had nothing to do with paying anyone connected to the *Omnia* as the sale was on a free-on-board basis.

21 JPMorgan in turn takes the position that there is no legal impediment to a confirming bank adding a term to its confirmation which was not found in the letter of credit itself. Further, the Sanctions Clause did not need to be the subject of any separate offer, acceptance or consideration as documentary credits are recognised as a *sui generis* exception to the principles of orthodox contract law. JPMorgan also submits that it had sufficiently brought Kuvera's attention to the Sanctions Clause and that the Sanctions Clause was not unusual, onerous or obscure.

22 Secondly, JPMorgan submits that the Sanctions Clause was valid and enforceable. The Sanctions Clause was not fundamentally inconsistent with the commercial purpose of the Confirmations and such clauses were in fact a

Version No 1: 28 Sep 2023 (12:29 hrs)

common industry practice among banks involved in trade finance transactions. Moreover, the Sanctions Clause did not confer a high level of discretion and did not impose restrictions which went beyond or were in conflict with the statutory or regulatory obligations imposed on JPMorgan. The Sanctions Clause was also not a non-documentary condition as it did not operate as a variation of the LCs and did not govern what Kuvera must do to make a complying presentation under the LCs or the Confirmations. Finally, the fact that Kuvera was not aware of the restrictions applicable to JPMorgan did not render the Sanctions Clause unworkable, as it was JPMorgan and not Kuvera which had to ensure compliance with the applicable laws.

23 Thirdly, JPMorgan submits that the Sanctions Clause did entitle JPMorgan to refuse payment to Kuvera. JPMorgan contends that it was not required to prove that the *Omnia* was Syrian-owned. Rather, it only had to prove that proceeding with the transactions involving the *Omnia* (on the facts known to JPMorgan at that time) would violate US sanctions. Due to OFAC's central role in the enforcement of US sanctions, the question of whether transactions involving the *Omnia* would violate US sanctions would entail a consideration of whether OFAC would have determined the transactions to be in violation of such sanctions.

24 Further, with respect to whether the transactions were prohibited by US sanctions (which was a question of US law), JPMorgan relies on the evidence of its US law expert, Mr Brian James Egan ("Mr Egan"). Mr Egan testified about US sanctions against Syria as contained in Executive Order 13582 (August 17, 2011) and the SySR, as well as OFAC's approach towards breaches of the SySR. JPMorgan contends the Judge rightly accepted that JPMorgan could rely on the Sanctions Clause if JPMorgan could prove that OFAC would have found payment to Kuvera to be in breach of US sanctions. Further,

Version No 1: 28 Sep 2023 (12:29 hrs)

JPMorgan submits that the Judge was correct in finding that OFAC would have considered JPMorgan to be in breach of US sanctions had it paid Kuvera, and that the Judge's findings were consistent with Mr Egan's expert evidence and the evidence presented by JPMorgan.

25 JPMorgan contends that in the circumstances, the Judge was entitled to find that JPMorgan had proven, on a balance of probabilities, that the *Omnia* was in fact owned by a Syrian entity at the material time, such that proceeding with the transactions would have been in violation of the SySR.

26 Finally, JPMorgan submits that on the issue of damages, Kuvera had mitigated the bulk of its alleged losses through the MOU with the Buyer under which it recovered US$2,204,042.74 out of the Principal Sum. As for the remaining US$218,068.33 (the "Balance Sum") which the Buyer had not agreed to pay it pursuant to the MOU, a significant portion of this sum did not represent loss suffered by Kuvera as it would have had to be credited back or paid to the Buyer even if JPMorgan had made payment under the Confirmations.

Our decision

Nature of credit transactions

27 We begin by endorsing the Judge's view that a documentary credit transaction comprises a number of discrete contracts with each being autonomous and separate from the others.

28 That a documentary credit transaction is made up of *multiple* transactions/relationships is an established feature of modern banking and hence an uncontentious proposition both practically and legally speaking (*United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 ("*United*

Version No 1: 28 Sep 2023 (12:29 hrs)

City Merchants") at 182–183; Michael Brindle, Richard Coleman, James McClelland and Deborah Horowitz, "Documentary Credits and Related Transactions" in *Law of Bank Payments* (Michael Brindle and Raymond Cox eds) (Sweet & Maxwell, 5th Ed, 2018) ("*Documentary Credits and Related Transactions*") at para 7-030; Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (Oxford University Press, 17th Ed, 2017) at p 81; Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit* (LexisNexis, 5th Ed, 2003) at p 956).

29 It is also settled law that the contracts in a compound letter of credit transaction operate independently of each other. This is commonly referred to as the principle of autonomy, under which the bank's obligation to pay the beneficiary is independent of the underlying contract between the seller and the buyer (*Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 at 129*; United City Merchants* at 183; *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2003] 1 SLR(R) 597 at [12]–[13]). As articulated by this court in *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 ("*Brody*") at [19]:

> … An irrevocable credit constitutes an independent contract between the issuing banker and the beneficiary, *which is not affected by any irregularities in the underlying contract in pursuance of which the credit is issued.* This rule is crucial to the smooth functioning of the world of international trade and trade-financing. … [emphasis added]

30 What this means is that when considering liability under one contract, it will generally be unhelpful to examine whether there is any other underlying dispute in the suite of contracts. Absent a finding of fraud, there would be no basis for enjoining the issuing bank (and by extension the confirming bank) from paying under the letter of credit or the confirmation respectively (*Brody* at [20]; *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT*

Version No 1: 28 Sep 2023 (12:29 hrs)

Energy Trading Co Ltd and another suit [2022] 4 SLR 1 ("*Crédit Agricole Corporate*") at [17]–[18]). This is due to the nature of letters of credit and the vital role they play in international commerce and commercial transactions, such that the courts would be slow to "intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand" (*Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 at [32], cited in *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [1]).

31 The independence of a confirmation from the letter of credit is further supported by James E Byrne, Vincent M Maulella, Soh Chee Seng and Alexander Zelenov, *UCP600: An Analytical Commentary* (The Institute of International Banking Law & Practice, Inc, 2010) ("*UCP600 Analytical Commentary*") which also states with respect to Art 8 of the UCP600 (at pp 394–395) that:

> Although not expressly stated in UCP600 Article 8, the undertaking of the confirmer is *independent of the transactions that gave rise to it* including the undertaking of the issuer and the confirmer's ability to obtain reimbursement from the issuer. … As a result, the confirmer may not refuse to honor a complying presentation on grounds that are not stated in the terms and conditions of the letter of credit. [emphasis added]

32 It follows that it is *only* the confirming bank which becomes liable in contract to the seller/beneficiary under the confirmation specifically (Adrian Beltrami QC *et al*, *Banking Litigation* (Nicholas Elliott and Charles Hewetson eds) (Sweet & Maxwell, 3rd Ed, 2011) at para 7-015, citing *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd's Rep 87). It is therefore possible that a confirming bank's liability under a confirmation may be subject to conditions that are not reflected in a letter of credit, that being an independent contract relating to the rights and obligations between the issuing bank and the beneficiary.

Version No 1: 28 Sep 2023 (12:29 hrs)

33 It appears to us that Kuvera is well aware that a confirmation is "not necessarily identical" to a letter of credit given its own reference to *UCP600 Analytical Commentary* (at pp 93–94) in support of the same proposition. Kuvera acknowledges that a confirmation may not be identical and may carry additional conditions save that these additional conditions would cease to be permissible qualifications when they contradict the undertaking inherent in the confirmation. It suffices at present for us to observe that this opens up the question of whether the Sanctions Clause in our case is valid and enforceable (which we will consider below), but the fact remains that Kuvera does not deny the independence of the Confirmations from the two LCs.

34 Against this backdrop, it appears to us that Kuvera's characterisation of LC1 and LC2 as the "mother" of the Confirmations has conflated the independent legal status of the contracts in a compound letter of credit transaction with the practical harmony of the relationships which these independent contracts are designed to give rise to. It is true that, practically speaking, if the transaction is properly set up, the effect is that "the terms and conditions in the various contracts relating to the documents that the seller has to present under the credit will correspond" (*Documentary Credits and Related Transactions* at para 7-030). This *practical* effect does not mean, however, that the contracts are not independent of each other in terms of the *legal* relationships they give rise to and the distinct legal obligations and rights which each contract confers upon the respective parties.

35 Further, we are also in agreement with the Judge that the LCs and Confirmations are best understood as unilateral contracts that bear the *sui generis* quality of irrevocability. What makes a confirmation an irrevocable unilateral contract is the character of a credit, which as defined in Art 2 of the UCP600, is (a) irrevocable and (b) an undertaking to honour a complying

Version No 1: 28 Sep 2023 (12:29 hrs)

presentation. It follows that one cannot enter into a unilateral contract to confirm a credit subject to the UCP600 unless that undertaking is irrevocable. If it were revocable, it would not be a credit and therefore cannot come within the terms of the UCP600.

36 This characterisation of letters of credit and confirmations as unilateral contracts explains how JPMorgan's obligations under the Confirmations were brought into existence upon the fulfilment of a specific condition (*ie*, Kuvera's complying presentation) (see *Dickson Trading (S) Pte Ltd v Transmarco Ltd* [1987] SLR(R) 674 at [38]). We note that a similar view of the characterisation of a letter of credit as a unilateral contract was recently adopted by the Singapore International Commercial Court in *Crédit Agricole Corporate* at [150].

37 In light of the independent and unilateral nature of a confirmation, the Sanctions Clause need not be separately offered or accepted and can simply be incorporated in the Confirmations as was done in the present case. It remains for us to consider three questions pertaining to the Sanctions Clause:

(a) First, given that the Sanctions Clause was incorporated as a term of the Confirmations, what was its true effect and meaning?

(b) Second, was the Sanctions Clause fundamentally inconsistent with the commercial purpose of the Confirmations?

(c) Third, given its true effect and meaning, has JPMorgan discharged its burden of proof in order to rely on the Sanctions Clause?

Interpretation of the Sanctions Clause

38 The starting point for contractual interpretation is to examine the text of the contract itself. At the same time, the court may have regard to the relevant

Version No 1: 28 Sep 2023 (12:29 hrs)

context as long as the context is clear, obvious and known to both parties, so as to place the court in the best possible position to ascertain the objective intentions of the parties by interpreting the expressions used by them in their proper context. Further, the meaning ascribed to the terms of the contract must generally be one which can be reasonably borne by the expressions used by the parties (*CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 at [19], citing *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [72], *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129] and *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]). With these principles in mind, we turn to consider the true effect and meaning of the Sanctions Clause.

39 As mentioned at [7] above, the Sanctions Clause provided that:

> [JPMorgan] must comply with all sanctions, embargo and other laws and regulations of the U.S. and of other applicable jurisdictions to the extent they do not conflict with such U.S. laws and regulations ("applicable restrictions"). *Should documents be presented involving any* country, entity, *vessel* or individual *listed in or otherwise subject to any applicable restriction*, we shall not be liable for any delay or failure to pay, process or return such documents or for any related disclosure of information. [emphasis added]

40 It is undisputed that the *Omnia* was not "listed in" any applicable restrictions (the only possible "applicable restriction" raised in this case being the OFAC List). As such, the only remaining condition for invoking the Sanctions Clause is for JPMorgan to establish that the *Omnia* was "otherwise subject to any applicable restriction".

Version No 1: 28 Sep 2023 (12:29 hrs)

41 JPMorgan justified its decision not to pay – which the Judge below accepted at [183]–[185] of the *GD* – by arguing that where there was an unresolved possibility that the *Omnia may* be caught under "any applicable restriction", then the Sanctions Clause would entitle JPMorgan to err on the side of caution to decline payment. However, on its terms, that is not what the Sanctions Clause provided for.

The Sanctions Clause should be construed objectively

42 The Judge accepted that for JPMorgan to avail itself of the Sanctions Clause, it would suffice for JPMorgan to prove that OFAC would have held that paying Kuvera against its complying presentation would be a breach of the SySR (*GD* at [159]–[160]). The Judge then found that JPMorgan's risk-based decision – that it would rather be sued by Kuvera as a result of failing to pay against a complying presentation than be found by OFAC to have breached US sanctions – was a "rational and contractually justified approach" (*GD* at [186]). While it might have been "rational" from a risk management perspective, we disagree that it was "contractually justified". There are several difficulties inherent in such an approach independent of the fact that it is not permitted by the text of the Sanctions Clause.

43 With respect, the Judge's erroneous approach was a direct consequence of the manner in which he framed the relevant inquiry. In our view, the question of whether a vessel is "subject to any applicable restriction" should be determined on an objective basis without third-party input from entities such as OFAC. It bears mention that the inquiry is directed at the ownership of the *Omnia*, *ie*, whether it remained Syrian-owned at all material times, which is quintessentially an issue capable of objective determination.

Version No 1: 28 Sep 2023 (12:29 hrs)

44 For starters, the effect of the Sanctions Clause on JPMorgan's irrevocable obligation to pay under the Confirmations must be construed strictly. In its efforts to discharge its burden of proof, JPMorgan has relied on its exchange of correspondence with OFAC. It seems to us that JPMorgan's engagement with OFAC was driven by its consideration as to whether OFAC would have held that it would be in breach of the SySR had it paid Kuvera. This would necessitate the parties and eventually the court having to decide on the likelihood of a third party like OFAC (who is not identified in the Sanctions Clause) holding that JPMorgan might be in breach for paying against a complying presentation of the documents under the Confirmations. There is a certain element of speculation and arbitrariness inherent in such an approach in that it requires the parties as well as the court to extrapolate what finding OFAC might arrive at based on largely circumstantial evidence. That would practically render it impossible for a beneficiary of a letter of credit like Kuvera to know with certainty whether it would be paid notwithstanding its full compliance with the documentary requirements. This appears to be borne out by the Judge's analysis at [173]–[177] of the *GD*. He referred to the elaborate process which OFAC would undertake to investigate cases of wilful breach of US sanctions. It begins with the service of a "pre-penalty notice" which sets out the reasons why OFAC considers that the entity has breached the sanctions and gives details of the proposed penalty. In response, the accused entity is entitled to provide exculpatory or mitigating information. If the explanation is not accepted, OFAC will issue a final penalty notice which is subject to appeal to the federal courts. Our difficulty with this analysis is that none of this happened here. That was precisely the reason why JPMorgan invited the court to undertake a notional process by which OFAC would determine the prospects of JPMorgan violating the sanctions if it had paid Kuvera.

Version No 1: 28 Sep 2023 (12:29 hrs)

45 It is telling that in response to a question from the Judge as to whether a vessel could be added to JPMorgan's Master List even if the risk of violation of US sanctions was less than 50 percent, Ms Alisha T Burke (JPMorgan's Head of Governance and Oversight) ("Ms Burke") acknowledged that she did not examine it "from a percentage perspective" and stated that the vessel would be added so long as "a sanctions nexus [is] found in [their] evidence". Implicit in her answer is that proof need not be more than 50 percent before JPMorgan would be free to add any vessel to its Master List to justify non-payment. The presence of some "nexus" would suffice. This is reflected in the Judge's response to Ms Burke's evidence when he asked whether it was correct that JPMorgan "would prefer the risks associated with a false positive to the risks associated with a false negative", to which Ms Burke expressed agreement. This is in contrast to the objective approach which requires proof on a balance of probabilities. This leads us to point out another critical difference in the two competing approaches. A court's objective approach is based on an assessment of *admissible* evidence on a balance of probabilities. OFAC, on the other hand, is not so constrained as it is strictly not bound by the rules of evidence. Therein lies the unsatisfactory and unfair nature of JPMorgan's approach which is entirely a reflection of risk management considerations.

46 The unsatisfactory nature of JPMorgan's approach is borne out by its exchange of correspondence with OFAC. We begin with an extract from JPMorgan's letter of 6 May 2020:

> On January 17, 2020, [Kuvera] filed a suit against [JPMorgan] in the High Court of the Republic of Singapore alleging, amongst others, that [JPMorgan] had breached its obligations as confirming and/or nominated bank under the LCs by refusing to honor the drawings drawn under the LCs. [Kuvera] claims that it suffered losses as a result of [JPMorgan's] alleged breach and is seeking damages in the sum of USD 2,422,111.07. [JPMorgan's] position is that it was prohibited from honoring the drawings drawn under the LCs, as doing so, would have

Version No 1: 28 Sep 2023 (12:29 hrs)

> resulted in a violation of the Syria Sanctions (31 CFR 542). [JPMorgan] was therefore required to reject the transaction pursuant to OFAC regulations.
>
> On April 6, 2020, [Kuvera] filed an application for summary judgment against [JPMorgan] on the basis that [JPMorgan] has no defense to its claim. The application for summary judgment is scheduled to be heard on June 17, 2020. *In order to support our decision to reject the transaction based on OFAC requirements, [JPMorgan] would like to provide OFAC's written formal guidance in writing, as evidence at the hearing as part of its defense. If [JPMorgan] loses the summary judgment motion it will receive judgment against it and will be liable to pay [Kuvera].* In light of the above, [JPMorgan] requests that OFAC provide its confirmation in writing that [JPMorgan] was prohibited from processing the transaction due to the vessel being owned by Syrian parties under the Syria Sanctions (31 CFR 542).
>
> [emphasis added]

47 It is clear from the above extract that JPMorgan was actively seeking *support* from OFAC to justify its decision in refusing payment under the Confirmations by highlighting the legal consequences of Kuvera's summary judgment application should JPMorgan be found liable. In other words, it was looking to OFAC for help to justify its prior decision to refuse payment. In response, on 8 May 2020, OFAC sought additional information with regard to the ownership of the *Omnia* which JPMorgan duly provided on 22 May 2020:

> In 2015, the company Ali Samin Group was identified as the beneficial ownership of several vessels including Lady Mona (IMO 9595204). (Exhibit A) Public research identified that Ali Samin Group was a Syrian commercial shipping entity with locations in Tartous, Syria and Cyprus. (Exhibit B). In the same research, the Lady Mona's reported commercial operator at that time was identified as Sea Sovereignty Shipmanagement Limited. [JPMorgan] added the vessel and IMO to its internal filter on June 8, 2015 with instructions to reject.
>
> In May 2019, [JPMorgan's] internal filters were updated to change the name of the vessel when [JPMorgan] received notice from Lloyds List that the vessel was renamed to Omnia (IMO 9595204). In August 2019, [JPMorgan] conducted a re-review of the vessel Omnia's ownership. The August 2019 due diligence refresh identified that public and subscription sources no longer clearly reported the current beneficial ownership of

Version No 1: 28 Sep 2023 (12:29 hrs)

> the vessel. Subscription services including Lloyds identified a new Registered Owner as Omnia Maritime Limited, a potential shell company in Barbados, with no beneficial ownership reported. (Exhibit C) Third party websites were *inconclusive* regarding any updated ownership, but identified *possible ownership* by Sea Sovereignty Shipmanagement. (Exhibit D) Further research indicated that Sea Sovereignty Shipmanagement was located in Syria and that it was formerly known as Samin Shipping Company, which was a close name match to the same company that originally was identified as the beneficial owner of the Lady Mona. (Exhibit D) Additionally, in the August 2019 review, the Technical Manager and ISM Manager reported by Lloyds was Serenity Ship Management JLT/DMCC. (Exhibit C) Serenity Ship Management JLT/DMCC has been identified by research on subscription service Lexis Nexis to be owned by Ali Samin as well. (Exhibit E)
>
> *While the information was not conclusive on who the beneficial owners of the vessel were*, based on prior knowledge of the Syrian ownership and connections, and the risk associated to the name change, and ownership layers to potentially disguise Syrian ownership as well as continued reference to Sea Sovereignty Shipmanagement in the due diligence, [JPMorgan] *made a risk-based decision to retain the vessel on its internal filter as a Syrian-owned vessel.*
>
> [emphasis added]

48 OFAC replied on 12 June 2020, stating that:

> Research by [JPMorgan] and its Singapore branch indicated that the vessel is owned by the Syrian commercial entity Ali Samin Group, located in Tartous, Syria. Had [JPMorgan] and its Singapore branch not rejected the trade documents for a non-U.S. person's sale of cargo shipped via a Syrian vessel, it would have resulted in an apparent violation of OFAC regulations.

49 Counsel for Kuvera, Mr Mahmood Gaznavi s/o Bashir Muhammad ("Mr Gaznavi"), submits that JPMorgan had "steered OFAC to seek *confirmation* of its already decided position" by way of its letter to OFAC dated 6 May 2020 [emphasis in original]. While we would not go so far as to suggest that JPMorgan was steering OFAC to agree with its decision to reject the otherwise complying documents, it does appear to us that JPMorgan was

Version No 1: 28 Sep 2023 (12:29 hrs)

looking *retrospectively* to OFAC to justify its decision which, by its own admission, was based on *inconclusive* information as regards the beneficial ownership of the *Omnia*.

50 Next, JPMorgan relies on Mr Egan's expert opinion that:

> … if [JPMorgan] were to process a transaction involving those entities and vessels [on its internal restricted list] without OFAC authorization, [JPMorgan] would violate the prohibition on the direct or indirect export of services to Syria in Executive Order 13582 and Section 207 of the SySR, as well as potentially other provisions of U.S. sanctions on Syria.

For context, s 207 of the SySR prohibits US persons from supplying services directly or indirectly to Syria (including rendering services anywhere in the world where the benefit of such services is received in Syria). Section 210 of the SySR also provides that US persons shall not approve, finance, facilitate or guarantee transactions by foreign persons prohibited by the SySR.

51 Mr Egan's unchallenged expert evidence on US law was accepted by the Judge below. While we have no reason to disagree with his evidence, it is important to bear in mind that the Judge had, in considering Mr Egan's evidence on US law and his opinion on whether OFAC would have found JPMorgan to be in breach of the SySR had it paid Kuvera, proceeded on the basis that JPMorgan's risk management approach was permissible under the Sanctions Clause. Given our decision to the contrary, Mr Egan's evidence has no material bearing on the proper interpretation of the Sanctions Clause. OFAC's response and Mr Egan's expert opinion, taken at their highest, merely demonstrated that there were risks that the *Omnia* may be subject to an applicable restriction. If JPMorgan should choose to rely on an internal list such as the Master List as opposed to the OFAC List, it must accept the risk that such reliance may not be sufficient to discharge its burden of proof.

Version No 1: 28 Sep 2023 (12:29 hrs)

52 JPMorgan also relies on several "red flags" surrounding the ownership of the *Omnia* which it had detected but which could not be resolved to its satisfaction via its internal due diligence checks. Following on from that approach, it then made the decision not to pay Kuvera by assessing the risk of being sued by Kuvera weighed against the risk of being found guilty of breaching US sanctions laws. JPMorgan chose the former option which led to the present proceedings. In our judgment, this falls short of establishing that the *Omnia* was subject to an applicable restriction. On that note, we turn to consider the Judge's finding that the *Omnia* remained Syrian-owned at the material time.

The evidence does not prove that the Omnia was under Syrian beneficial ownership

53 The Judge found that the red flags surrounding the *Omnia's* change of name and registered ownership constituted sufficient circumstantial evidence to discharge JPMorgan's burden of proof (*GD* at [192]–[193]). In approaching this issue, it is imperative to bear in mind the two material timestamps of relevance, namely: (a) 2015, when JPMorgan decided to place the vessel (then named "*Lady Mona*") on its Master List; and (b) 2019, when the vessel's name was changed to the *Omnia* under a new registered ownership.

54 On appeal, Kuvera contends that JPMorgan's evidence on the Syrian ownership of the *Omnia* was "inconclusive" in 2019 as well as in 2015 when it was named the *Lady Mona*. We begin by noting that JPMorgan decided to place the *Lady Mona* on its Master List in 2015 because the beneficial owner of the *Lady Mona* was then the Ali Samin Group which had its head office in Cyprus and also an office in Syria. The Ali Samin Group's parent company, Ali Samin & Co, was also located in Syria. Further, the *Lady Mona's* owner and commercial operator was indicated online as one Sea Sovereignty

Version No 1: 28 Sep 2023 (12:29 hrs)

Shipmanagement Limited, which shared the same head office address as the Ali Samin Group, formerly known as Samin Shipping Company Limited. The managing director of Sea Sovereignty Shipmanagement Limited was listed as one Mr Ali Samin. These findings of a connection between the owner of the *Lady Mona* and Syria in 2015 were borne out in the documentary evidence furnished by JPMorgan. The common denominator giving rise to the *Lady Mona's* Syrian connection in 2015 is that her beneficial owner, its parent company and the ship operator/management company all had a place of business in Syria. In other words, the inquiry into the Syrian connection of the *Lady Mona* was rightly directed at the shipowning/operating entities.

55 While Mr Gaznavi seeks to cast doubt on whether these factual points have been adequately corroborated by the available evidence, we are satisfied that JPMorgan had sufficiently established the *Lady Mona*'s Syrian connection in 2015. Thus, the crucial issue is whether the *Omnia* under her new registered ownership remained under Syrian beneficial ownership in 2019.

56 JPMorgan contends that following further checks in 2019, there was no conclusive evidence that the Syrian ownership of the *Lady Mona*, now renamed the *Omnia*, had been extinguished. It appears to us that such an argument effectively places the burden on Kuvera to prove a negative when the burden of proof that the beneficial ownership had remained unchanged squarely rests with JPMorgan.

57 During the hearing, we invited Counsel for JPMorgan, Mr Cavinder Bull SC ("Mr Bull"), to address the court on the relevance or utility of the body of case law relating to change of ownership for *in rem* jurisdiction in ascertaining the beneficial ownership of *Omnia* for the purposes of the Sanctions Clause. Mr Bull submitted that those cases would not be relevant as

Version No 1: 28 Sep 2023 (12:29 hrs)

they were concerned with an entirely different purpose of establishing *in rem* jurisdiction. While we acknowledge that the issue before this court concerns the determination of the beneficial ownership of the *Omnia* for a different purpose, *ie*, whether the *Omnia* was subject to "any applicable restriction" under the Sanctions Clause, in our view, the existing case law on change of ownership in the context of *in rem* jurisdiction is instructive since it ultimately addresses the same inquiry, *ie*, the *evidential process* by which a change of ownership of a vessel is established.

58 Briefly, under the High Court (Admiralty Jurisdiction) Act 1961 (2020 Rev Ed) ("HCAJA"), an action for a claim which does not carry a maritime lien can be commenced *in rem* against a vessel, provided that the vessel's ownership at the time when the cause of action arose remains unchanged at the time when the writ is issued. Once the *in rem* writ is properly issued, a statutory lien would accrue to such a claimant. For this reason, it is not uncommon for the owner of an arrested vessel to challenge the validity of an *in rem* writ by raising a change of ownership prior to the issuance of the writ in order to defeat the *in rem* claim (see s 4(4) of the HCAJA; *The "Bolbina"* [1993] 3 SLR(R) 894 at [14]; *The "Ocean Winner" and other matters* [2021] 4 SLR 526 at [32]–[33]).

59 The determination of a vessel's beneficial ownership has been the subject of numerous admiralty decisions. The decision of *The "Min Rui"* [2016] 5 SLR 667 ("*Min Rui*") is a useful case to illustrate the evidential inquiry involved in examining a vessel's beneficial ownership. The issue before the court was whether the defendant was the beneficial owner of a vessel, the *Min Rui*, at the time when the plaintiffs issued the *in rem* writ (*Min Rui* at [5]–[9]). The court recognised that under Singapore law, the *prima facie* inference of ownership arising from the vessel's registered ownership can be displaced by evidence that someone else is the beneficial owner for the purpose of s 4(4) of

Version No 1: 28 Sep 2023 (12:29 hrs)

the HCAJA. This is essentially a factual inquiry involving the assessment of the evidence and the drawing of the proper conclusions and/or inferences. There is no strict requirement to establish fraud or similarly compelling circumstances in order to go behind the registration of a ship for the purpose of identifying the beneficial owner in the context of s 4(4)(*i*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) (which is the analogue of s 4(4)(*c*) of the HCAJA) (*Min Rui* at [27] and [33]). The manner in which the issue of beneficial ownership ought to be investigated depends on the circumstances of the particular case, and the court noted at [34] of *Min Rui* that:

> … The nature and type of evidence needed to determine the question of beneficial ownership is likely to concern principles of equity and trust, the principles relating to avoiding fraudulent conveyances to delay or defeat creditors, the principles relating to piercing the corporate veil, the principles relating to transfer of title to goods and the principles of estoppel … Thus, proof of beneficial ownership is admitted where there are allegations such as fraud, trust, nominee holding and legal effect of a sale of the vessel to name a few types of allegations that were raised in past decided cases. The outcome of the challenge depends on the quality and weight to be given to the evidence adduced.

60 The court would typically examine the evidence to decide whether a *bona fide* change of ownership has occurred. In that regard, the court in *Min Rui* provided some indicators (at [46]) to assist in evaluating the evidence in relation to change of ownership, specifically in determining whether the transactions for the sale of the vessels were in fact shams:

(a) the close relationship between the transferor and transferee;

(b) the lack of authority of person(s) executing relevant documents;

(c) the suspicious method and documentation used to effect the transfer and payment;

Version No 1: 28 Sep 2023 (12:29 hrs)

(d) the lack of documentation or accounts from the buyer to show that it owns or deals with ships;

(e) the lack of any evidence of delivery of the vessel;

(f) the lack of any evidence of intention or fact of payment from buyer to seller; and

(g) having a non-existent entity or an entity not yet capable of holding property at the time of the purported memorandum of sale as a buyer.

61 While we recognise that the evidential inquiry in the context of *in rem* jurisdiction may not be entirely applicable for the purpose of the present appeal (chiefly because the owner of the vessel is not a party to the appeal and therefore the documents relating to the sale and transfer of the vessel are not within the custody, control or possession of either JPMorgan or Kuvera), what is clear from the case law is that the ownership of a vessel and any change thereof is an issue capable of proof. This assumes significance here because it is common ground that JPMorgan bears the burden of establishing that the *Omnia* remained Syrian-owned notwithstanding the change in her registered ownership. This reflects our view at [43] above that the inquiry as to whether the *Omnia* remained Syrian-owned is an issue capable of objective determination. We should add that the fact that JPMorgan might not have control of or even access to the sale and transfer documents pertaining to the vessel cannot be relied upon to displace or dilute its burden of proving on a balance of probabilities that the *Omnia* remained Syrian-owned. The imposition of the burden of proof on JPMorgan is a function of JPMorgan's reliance on the Sanctions Clause to deny payment under the Confirmations.

Version No 1: 28 Sep 2023 (12:29 hrs)

62 Applying this factual inquiry to our present case, we do not think that JPMorgan has displaced the *prima facie* inference of ownership arising from the registered (non-Syrian) owner of the *Omnia* in 2019. In this regard, we turn to examine the red flags which the Judge regarded (at [188]–[192] of the *GD*) to be "sufficient circumstantial evidence" to discharge JPMorgan's burden of proof. Before doing so, it cannot be over-emphasised that the expression "red flags" is not a legal term of art. From an evidential point of view, "red flags" only assume legal significance if they carry probative weight. In short, there are "red flags" and there are "red flags", and it is crucial to assess what evidential weight should be ascribed to any alleged red flag.

63 First, the Judge referred to the change to the vessel's name and her registered ownership with no information about her beneficial owners. In our view, it is not sufficient to suggest that just because information on her beneficial owner is not available, it must follow that there is some masking or concealment as regards the identity of her beneficial ownership. Neither is it sufficient to turn to, as JPMorgan has done, sanctions guidelines which state that interested parties *may* seek to mask the true ownership of vessels to avoid being caught by sanctions. JPMorgan is required to demonstrate how on the specific facts and circumstances of the present case, such masking of the *Omnia's* true ownership was likely to have occurred. It is not uncommon for vessels from a flag of convenience registry like the Barbados not to provide information about the vessels' beneficial ownership. As such, JPMorgan's suggestion that the registered owner of the *Omnia* may be a shell company is neither here nor there.

64 Next, the Judge referred to the "unknown" status of the beneficial owners of Serenity Ship Management JLT/DMCC ("Serenity Ship Management"), which was listed as the *Omnia's* technical and Internal Safety

Version No 1: 28 Sep 2023 (12:29 hrs)

Management Code ("ISM") manager. This suffers from the same flaw as the above argument. The absence of information about the identity of either the beneficial owners of the *Omnia* or her technical manager does not necessarily mean that there was concealment of her beneficial ownership.

65 The Judge then considered the "publicly available sources [which] suggested that the *Omnia* continued to have links to Syria" (*GD* at [188(e)]). We note that there was no analysis of the "publicly available sources" in the *GD*. Nor were the underlying documents expressly identified save for a footnote reference. In any event, as foreshadowed at [54] above, when examining the question of the *Omnia's* continuing links to Syria in 2019, the relevant link to be drawn is that of the shipowning/operating entities having a Syrian nexus. The mere fact that the *Lady Mona* was properly regarded as a vessel under Syrian beneficial ownership in 2015 does not invariably mean that she should still be regarded as such under her new registered ownership in 2019. This is an inquiry which must be separately undertaken. After the vessel's name was changed to the "*Omnia*" on 4 February 2019, the Lloyd's List Intelligence database listed the *Omnia*'s registered owner as "Omnia Maritime Limited", a Barbados entity. The *Omnia's* technical and ISM Manager is listed as Serenity Ship Management, a UAE entity. It appears that none of the *Omnia*'s shipowning/operating entities bore any "Syrian nexus" in 2019.

66 One of the "publicly available sources" relied upon by JPMorgan is an All Company Information report on Serenity Ship Management DMCC as at 8 August 2017 prepared by a company curiously named "LexisNexis *Risk Management* Solutions" [emphasis added]. The report reflected one Mr Ali Samin, a Cypriot national, as the managing director and general manager of Serenity Ship Management. It is significant that although Mr Ali Samin had an interest in Serenity Ship Management by 2017 well before the *Lady Mona*

Version No 1: 28 Sep 2023 (12:29 hrs)

changed her name to the *Omnia* in 2019, JPMorgan did not place Serenity Ship Management in its Master List. To our mind, this suggests that the "Syrian nexus" alleged by JPMorgan was not Mr Ali Samin, a Cypriot national, but the shipowning/operating entities having a place of business in Syria instead. In any event, there is no evidence of Mr Ali Samin's interest in Serenity Ship Management in 2019. During the hearing, Mr Bull submitted that since the report was retrieved on 19 May 2020, it can be inferred that the information stated in the report would be current. Such an argument might be persuasive to OFAC who is not bound by the rules of evidence but it is strictly not legal proof of Mr Ali Samin's interest as in 2019.

67 In our judgment, it is plainly insufficient for JPMorgan to rely on Mr Ali Samin's apparent involvement in Serenity Ship Management in *2017* to establish, on a balance of probabilities, that the Syrian beneficial ownership of the *Omnia* had continued into *2019*. By 2019, the *Omnia* was owned by a Barbados company and operated by a UAE entity with a Cypriot national as its managing director. In our view, this explains why JPMorgan acknowledged that the evidence in relation to the *Omnia's* continued Syrian beneficial ownership in 2019 was "inconclusive".

68 In light of the "inconclusive" evidence before the court, we do not think that JPMorgan's decision based on its own risk-taking calculus to refuse payment to Kuvera was sufficient to establish that the *Omnia* was subject to "any applicable restriction" under the Sanctions Clause. As such, JPMorgan was not entitled to invoke the Sanctions Clause to deny payment to Kuvera upon a complying presentation of documents. It is on this basis that we allow the appeal.

Version No 1: 28 Sep 2023 (12:29 hrs)

Whether the Sanctions Clause is compatible with the commercial purpose of the Confirmations

69 Given our decision that JPMorgan was not entitled to rely on the Sanctions Clause to withhold payment under the Confirmations, it is strictly not necessary for us to consider whether the Sanctions Clause was compatible with the commercial purpose of the Confirmations. Since the issue was addressed by the parties, we shall take this opportunity to provide some provisional views on the extent of a confirming bank's discretion to impose additional terms in a confirmation beyond those stipulated in a letter of credit. Our provisional views are not intended to apply to sanctions clauses in general but are restricted to the specific context of this case where the sanctioned entity is the owner of a vessel. This is because a beneficiary under a letter of credit is typically not involved in the nomination of the vessel and the beneficial ownership of the vessel might not be apparent from the publicly available records.

70 The Judge found that the discretion afforded by a term to decide whether to pay against a complying presentation ends where the term sought to be included is inconsistent with the commercial purpose of the confirmation. There is however scant authority to assist in evaluating when a term will be regarded as being inconsistent. It is perhaps apt to bear in mind that "the whole commercial purpose" behind the system of confirmed irrevocable documentary credits in international trade is to "give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment" (see *United City Merchants* at 183).

Version No 1: 28 Sep 2023 (12:29 hrs)

71 The question of whether sanctions clauses are incompatible with the nature of irrevocable documentary credit transactions remains an open and difficult one, and for good reason. The literature on this subject has noted that sanctions clauses may bring into question the documentary and irrevocable nature of the credit (Cayle S Lupton, "A Critical Evaluation of the Use of Sanctions Clauses in Letters of Credit" (2022) 25 PER/PELJ 1 ("*Critical Evaluation of the Use of Sanctions Clauses*") at p 12). The contractual validity of sanctions clauses has also been argued to be questionable due to the uncertainty they introduce to the documentary credit transaction as well as the unfairness of allowing a bank to deny reimbursement owed to the beneficiary (*Critical Evaluation of the Use of Sanctions Clauses* at pp 18–19). The article further observed that the "consequent 'trend' of returning (conforming) documents to the beneficiary (which occurred in this case) further undermines conventional documentary credit law, which requires the return of documents only if they are *not* in conformity with the requirements of the credit" (*Critical Evaluation of the Use of Sanctions Clauses* at p 12). Further, it has been suggested that sanctions clauses which allow banks a discretion to dishonour a presentation if payment would violate the bank's internal policies in relation to sanctions compliance, *ie*, which give the bank a discretion to withhold payment if it *suspects* that it may be subject to sanctions, may undercut the purpose of the letter of credit by calling the issuer's obligations into question and run counter to the legal certainty and predictability inherent in a letter of credit transaction (*Critical Evaluation of the Use of Sanctions Clauses* at pp 20–21). As astutely noted, "the banks cannot have it both ways by representing to a beneficiary that payment is conditioned only on a complying demand, but reserving [the] right to dishonour where it is unsure of its legal liabilities" (Damien Smith, "Sanctions Disclaimers in Letters of Credit" [2014] Journal of International Commercial Law 259 at p 278).

Version No 1: 28 Sep 2023 (12:29 hrs)

72 There have been a number of English cases dealing with sanctions clauses in the context of commercial contracts. However, they typically concerned issues such as (a) the proper construction of sanctions clauses, and (b) the legal effect of sanctions clauses relating to suspension or exemption of contractual liability. We examine some of these decisions below.

73 In the recent decision of *Mamancochet Mining Ltd v Aegis Managing Agency Ltd and others* [2018] EWHC 2643 (Comm) ("*Mamancochet*"), the English High Court considered a sanctions clause in a marine cargo insurance policy which provided that:

> No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws, or regulations of the European Union, United Kingdom or the United States of America.

74 The issue before the English High Court was whether the sanctions clause should be construed as suspending or extinguishing the insurer's liability once the insurer was exposed to sanctions. The court found that the wording of the clause did not permit a construction whereby the liability of the insurer was extinguished once the insurer was exposed to sanctions (*Mamancochet* at [78]).

75 In *M/V Pacific Pearl Co Limited v Osios David Shipping Inc* [2021] EWHC 2808 (Comm), the issue before the English High Court was whether a letter of undertaking from an owner's P&I Club which contained a sanctions clause constituted security in a reasonably satisfactory form. This was answered in the affirmative (at [70]) because the legal effect of the sanctions clause was merely to suspend the club's liability to pay in the event that payment would be unlawful or in the event that a bank was unwilling to pay (which would be

Version No 1: 28 Sep 2023 (12:29 hrs)

reactivated if the club's reasonable endeavours to enable payment were successful), and not to terminate it altogether. The decision of the English High Court in *Banco San Juan Internacional Inc v Petróleos de Venezuela SA* [2020] EWHC 2937 (Comm) ("*Banco San Juan Internacional*") similarly concerned the proper construction of a sanctions clause, *ie*, whether the clause suspended the borrower's repayment obligation. For present purposes, it is not necessary to examine the express wording of the sanctions clause in *Banco San Juan Internacional* save to say that the borrower sought to rely on *Mamancochet* for the proposition that it was perfectly normal and sensible in commercial agreements to suspend payment obligations where payment would otherwise be in breach of sanctions clauses. The court distinguished *Mamancochet*, finding that the sanctions clause in that case *expressly* provided for an exception to the insurer's liability (*Banco San Juan Internacional* at [46]–[47]). The point of relevance to this appeal is simply that the construction of sanctions clauses and therefore the legal effect to be accorded to them remains a fact-specific and context-specific exercise in contractual interpretation.

76 From the above survey of English cases, there is no doubt that there is a trend of judicial recognition of sanctions clauses in commercial transactions. However, none of them dealt with rules such as the UCP600 and did not have to consider the question of whether such rules would prohibit sanctions clauses which are incompatible with the underlying commercial purpose of the contracts. In addition, we would be slow to place reliance on the above cases, as they do not concern documentary credit transactions, which by their nature are unique in that one autonomous contract within the transaction has the effect of securing the payment promised under another autonomous contract. It follows that the consequential impact of sanctions clauses on this unique effect of documentary credit transactions must be borne in mind. Moreover, letters of

Version No 1: 28 Sep 2023 (12:29 hrs)

credit and confirmations differ from the commercial contracts examined in the foregoing cases, as the former are *unilateral* contracts and significantly, the sanctions clauses would therefore not have been agreed to or negotiated by sellers/beneficiaries prior to the acceptance of the letter of credit or confirmation.

77 To close off this point, we note that Kuvera has relied on the International Chamber of Commerce's "Guidance Paper On The Use Of Sanctions Clauses In Trade Finance-Related Instruments Subject To ICC Rules" (Document No 470/1238) (the "ICC Guidance Paper") which states at para 2.4 that "[i]f the sanctions clauses in ... letters of credit … allow the issuer a level of discretion as to whether or not to honour *beyond* the statutory or regulatory requirements applicable to that issuer, they bring into question *the irrevocable and documentary nature of the letter of credit*" [emphasis added]. However, the ICC Guidance Paper does not provide any views on the propriety of sanctions clauses in the context of letters of credit and/or confirmations, save to note that where these sanctions clauses grant an issuer far too much discretion, they would undermine the very nature of a letter of credit. This provides no guidance as to when sanctions clauses would cross the line. At this point, it suffices for us to observe that a balance must be struck between preserving the autonomy of individual contracts within a documentary credit transaction (such that it is open to parties to insert conditions in each autonomous contract) and upholding the commercial viability of a documentary credit transaction, whereby each autonomous contract is intended to correspond to and/or provide a safety net for the other contracts in the transaction.

78 We should mention that if the Sanctions Clause is to be construed as JPMorgan claims it should (*ie*, that JPMorgan is entitled to deny payment against a complying presentation as long as it finds that on a risk-based

Version No 1: 28 Sep 2023 (12:29 hrs)

assessment, it would prefer to be sued by Kuvera than to risk being penalised by OFAC), then the Sanctions Clause would most likely be incompatible with the commercial purpose of the Confirmations due to the significant unpredictability such an interpretation would introduce into the Confirmations. Although we have construed the Sanctions Clause as requiring an objective determination as to whether the *Omnia* was subject to any applicable restriction, it would still have been unclear to Kuvera whether the Sanctions Clause would apply as it was not aware of the *Omnia's* nomination at the time when JPMorgan added its Confirmations to the two LCs and in any event, the *Omnia's* alleged "Syrian nexus" would not have been apparent from the publicly accessible records. Therein lies the uncertainty facing a beneficiary like Kuvera as it would not know at the time it accepted the Confirmations whether the Sanctions Clause would apply to deny it payment. Intuitively, such uncertainty (which was entirely beyond the control of Kuvera) may run counter to the commercial purpose of a confirmed letter of credit which is to provide security to the beneficiary that it will receive payment so long as it is able to present the requisite complying documents.

Damages

79 We turn now to the issue of damages. When the action was commenced, Kuvera's claim was quantified at US$2,422,111.07 which is the full sum payable under the two LCs. However, shortly thereafter, Kuvera entered into the MOU and received payment in the sum of US$2,204.042.74 (or AED8,096,000) from the Buyer (see [12] above). Clearly, it was no longer tenable for Kuvera to maintain the same claim against JPMorgan.

80 The MOU led Kuvera to amend its claim for the Balance Sum of US$218,068.33, which was the difference between the Principal Sum of

Version No 1: 28 Sep 2023 (12:29 hrs)

US$2,422,111.07 and AED8,096,000 (US$2,204.042.74) (*ie*, the sum paid under the MOU), as added to Kuvera's claim for additional damages in the sum of S$11,429.32 incurred for travel expenses as a result of JPMorgan's non-payment under the Confirmations (the "Travel Expenses"). Kuvera describes this amended claim as its "alternative claim". This is strictly incorrect because it suggests that the Principal Sum remains available when in truth, Kuvera is only able to maintain at best its amended claim for the Balance Sum.

81 With respect to the Balance Sum of US$218,068.33, JPMorgan submits that a significant portion of this sum did not represent loss suffered by Kuvera, as it would in fact have to be credited back or paid over to the Buyer even if JPMorgan had made payment under the Confirmations. As was recorded in the MOU, three sums were deducted from the Balance Sum:

(a) A sum of US$123,344.20 relating to credit due to the Buyer from the Seller (the "Credit to Buyer" sum);

(b) A sum of US$8,893.96 for confirmation charges (the "Confirmation Charges"); and

(c) A discount of US$89,892.91, being the total sum of US$2,289,892.91 stated as being due to Kuvera less the sum of US$2,200,000 that the Buyer offered to pay (the "Discount").

82 With respect to the Credit to Buyer sum of US$123,344.20, US$73,000 was recorded as a discount by the seller for "quality issues" and US$50,344.20 was recorded as "Demurrage – Seller's liability at Load Port". At the trial below, the director of Kuvera, Mr Arjan Bhisham Chotrani ("Mr Chotrani"), initially claimed that these two sums of money were not truly discounts for quality issues but were instead ways of "couching" further discounts Kuvera had conceded to

Version No 1: 28 Sep 2023 (12:29 hrs)

because the "[B]uyer knew [Kuvera was] in trouble" and "wanted to drive down the payment". However, under cross-examination, Mr Chotrani acknowledged that the same sum of US$73,000 was part of an agreed discount under an addendum to the Sale and Purchase Agreement. Under that same addendum, Kuvera was authorised by the Seller to remit the discount directly to the Buyer from the sale proceeds. However, Mr Chotrani asserted that even if the US$73,000 was the agreed discount under the addendum, it was for Kuvera to separately repay that discount to the Buyer. Accordingly, he maintained that Kuvera was still entitled to claim this sum from JPMorgan. In our view, it is clear that under either scenario, the outcome would have been no different in that Kuvera would still be required to pay the Buyer the same agreed discount of US$73,000 whether directly or indirectly. Therefore, Kuvera is not entitled to claim the sum of US$73,000 from JPMorgan by way of damages.

83 In the same vein, Mr Chotrani had adopted the same argument with respect to the US$50,344.20 discount for demurrage and similarly acknowledged that had Kuvera received the Principal Sum from JPMorgan, the sum of US$50,344.20 would still have to be paid over by Kuvera to the Buyer. As such, on the evidence, Kuvera is not entitled to its claim for the whole of the Credit to Buyer sum.

84 As for the Confirmation Charges of US$8,893.96, this sum was levied by JPMorgan for acting as the confirming bank. However, the evidence as to whether Kuvera would have had to repay this sum to the Buyer had JPMorgan paid Kuvera under the LCs is not entirely satisfactory:

(a) At the trial, Mr Chotrani acknowledged that Kuvera did not incur or pay those charges and it was the Buyer who had paid for them. This

Version No 1: 28 Sep 2023 (12:29 hrs)

is borne out by the SWIFT messages indicating that the Issuing Bank had paid this sum to JPMorgan.

(b) However, under the MOU, it was expressly stated that the Confirmation Charges of US$8,893.96 were denied by Kuvera but were agreed to so as to encourage settlement, and in particular that part of the sum (amounting to US$5,974.38) was allowed *gratis*.

(c) Further, under cross-examination, Mr Chotrani accepted that if Kuvera had recovered the Balance Sum, it would have had to pay the Confirmation Charges to the Buyer although he did not accept that Kuvera would have had to pay the Confirmation Charges to the Buyer had JPMorgan paid the Principal Sum.

85 We note Kuvera's express denial in the MOU of its obligation to pay for the Confirmation Charges and the lack of evidence that Kuvera would have had to pay the Confirmation Charges to the Buyer in the first place. The mere fact that the Issuing Bank had paid the Confirmation Charges does not necessarily mean that Kuvera was obliged to return the same sum to the Buyer. As such, we allow Kuvera's claim for the sum of US$8,893.96.

86 Finally, we turn to the Discount of US$89,892.91. Under the MOU while the total amount due to Kuvera was US$2,289,892.91, nonetheless, Kuvera agreed to accept US$2,200,000 from the Buyer. There is no evidence to suggest that this discount of US$89,892.91 was given to account for specific expenses for which Kuvera was liable. We accept Mr Gaznavi's submission that Kuvera was negotiating the MOU from a position of vulnerability and agreed to the further discount in order to facilitate the settlement. In the circumstances, we also allow Kuvera's claim for the sum of US$89,892.91.

Version No 1: 28 Sep 2023 (12:29 hrs)

87 With respect to the Travel Expenses, Mr Chotrani testified that he had incurred two sets of "consequential costs": a sum of S$4,733.70 for "airfares and accommodation", apparently in relation to flights to Dubai to negotiate the MOU and to deliver documents pursuant to the MOU, and a sum of S$6,695.62, apparently in relation to Kuvera's unsuccessful attempts to present the documents to the Presenting Bank and the Issuing Bank. We say "apparently" because the claim has not been particularised and the specifics of the trips were not outlined in Mr Chotrani's affidavit. Instead, he merely stated that he had approached the Presenting Bank and Issuing Bank and also travelled to Dubai to negotiate the MOU, and exhibited a series of flight invoices and hotel bookings in the same affidavit. Nonetheless, we are satisfied that they were incurred for the MOU negotiations. But for the non-payment by JPMorgan under the two Confirmations, there would have been no need to negotiate any settlement with the Buyer or the Issuing Bank. Accordingly, we allow the sum of S$11,429.32 for Kuvera's travel and accommodation expenses.

88 In the circumstances, we allow the appeal and award Kuvera damages in the sums of US$98,786.87 and S$11,429.32, the breakdown of which is as follows:

(a) US$8,893.96 (the Confirmation Charges);

(b) US$89,892.91 (the Discount, *ie*, the difference between the settlement under the MOU and the actual sum paid out by the Buyer to Kuvera); and

(c) S$11,429.32 (the Travel Expenses incurred by Kuvera).

Version No 1: 28 Sep 2023 (12:29 hrs)

Conclusion

89 Given the partial success of Kuvera's appeal, we invite both parties to file their written submissions on costs, here and below, limited to seven pages within the next seven days from the date hereof.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Mahmood Gaznavi s/o Bashir Muhammad and Rezza Gaznavi (Mahmood Gaznavi Chambers LLC) for the appellant;
Cavinder Bull SC, Chia Voon Jiet, Charlene Wong Su-Yi and Grace Lim Rui Si (Drew & Napier LLC) for the respondent.

Version No 1: 28 Sep 2023 (12:29 hrs)