**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2016] SGHC 100**

Admiralty in Rem No 228 of 2014
(Registrar's Appeal No 53 of 2016)

Between

Phillips 66 International Trading Pte Ltd

… *Appellant*

And

Owner and/or Demise Charterer of the vessel "STAR QUEST"

… *Respondent*

Admiralty in Rem No 229 of 2014
(Registrar's Appeal No 54 of 2016)

Between

Phillips 66 International Trading Pte Ltd

… *Appellant*

And

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

… *Respondent*

Admiralty in Rem No 230 of 2014
(Registrar's Appeal No 55 of 2016)

Between

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Phillips 66 International Trading Pte Ltd

… *Appellant*

And

Owner and/or Demise Charterer of the vessel "PETRO ASIA"

… *Respondent*

Admiralty in Rem No 231 of 2014
(Registrar's Appeal No 56 of 2016)

Between

Phillips 66 International Trading Pte Ltd

… *Appellant*

And

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

… *Respondent*

Admiralty in Rem No 232 of 2014
(Registrar's Appeal No 57 of 2016)

Between

Phillips 66 International Trading Pte Ltd

… *Appellant*

And

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

… *Respondent*

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Admiralty in Rem No 235 of 2014
(Registrar's Appeal No 58 of 2016)

Between

Phillips 66 International Trading Pte Ltd

… *Appellant*

And

Owner and/or Demise Charterer of the vessel "AROWANA MILAN"

… *Respondent*

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# JUDGMENT

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[Admiralty and shipping] — [Bills of lading] — [Bills of lading as document of title]

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# The "Star Quest" and others

**[2016] SGHC 100**

High Court — Admiralty in Rem Nos 228–232; 235 of 2014 (Registrar's Appeals Nos 53–58 of 2016)
Steven Chong J
24 March 2016

20 May 2016 Judgment reserved.

**Steven Chong J:**

## Introduction

1 When is a bill of lading not a bill of lading? This is the key question posed in this consolidated application for summary judgment. It has arisen from another series of actions following the wake of the insolvency of O.W. Bunker A/S and its subsidiaries ("OW Bunker"), including O.W. Bunker Far East (Singapore) Pte Ltd ("OW Far East") and Dynamic Oil Trading (Singapore) Pte Ltd ("Dynamic Oil"). As OW Bunker was one of the world's largest bunker suppliers, the impact of its insolvency was massive and far reaching. This "imbroglio", as described by Lloyd's List, has generated numerous legal proceedings all over the world including the US, the UK, Canada, Denmark and Netherlands, in addition to Singapore.[1] Many physical suppliers who traded with OW Bunker had no viable choice but to look to

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[1] David Osler, "OW Bunker: the end of the beginning?" *Lloyd's List* (20 March 2016).

other non-contracting parties in their quest to recover their losses in full. For instance, I recently had to consider several innovative claims brought by physical suppliers against non-contracting parties in the context of a consolidated interpleader proceedings – *Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others and other matters* [2015] 4 SLR 1229. Those claims were premised, *inter alia*, on retention of title clauses, breach of bailment, conversion, unjust enrichment, collateral contract and maritime liens, all of which I found to be unarguable on the facts of that case.

2 The search by the physical suppliers for alternative avenues of recovery continues, and has led to the institution of the present proceedings before me for an aggregate claim of about US$7m against the six respondents. The appellant, as a physical supplier, sold several parcels of marine fuel oil ("the bunkers") to OW Far East and Dynamic Oil (collectively "the Buyers"). The bunkers were shipped onboard the respondents' vessels ("the Vessels") for which various bills of lading ("the Vopak bills of lading" or simply "the Vopak bills") were issued naming the appellant as the shipper. It is important to bear in mind that the bunkers were loaded not for the Vessels' own use but as cargoes for onward delivery to other vessels for their own consumption as bunkers. The bunkers were subsequently delivered onwards, but crucially these deliveries were without production of the Vopak bills of lading.

3 Following the announcement of the insolvency of OW Bunker and consequently OW Far East and Dynamic Oil, the appellant which retained possession of the original Vopak bills demanded delivery of the bunkers to its order. However, by then, the bunkers had already been delivered, or misdelivered according to the appellant. The appellant claims that the delivery



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of the bunkers to the other vessels without production of the Vopak bills of lading constituted breaches of contracts, breaches of bailment and conversion.

4 Ordinarily, such claims are quite straightforward as the law in this area is well settled. A carrier who delivers cargoes without production of the original bill of lading does so at its own risk and is typically liable for any consequent losses suffered by the holder of the bill of lading: *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 ("*Sze Hai Tong Bank*") at 586.

5 However, the Vopak bills of lading have several unusual features which merit closer scrutiny. For example, there is no express port of discharge stated therein. Instead the bills state that the goods are "bound for BUNKERS FOR OCEAN GOING VESSELS"[2] ostensibly as the destination for the bunkers. Each Vopak bill of lading also contemplates delivery to multiple "OCEAN GOING VESSELS". How would such delivery to multiple vessels in respect of the same loaded parcel be possible against a *single* set of bills of lading? To add to this complexity, the Vopak bills of lading also contain some of the usual clauses found in regular bills of lading including the notation "one of which being accomplished, the others to stand void" which is typically associated with the requirement for delivery against production of the original bill of lading. Given these seemingly inconsistent features, how should the Vopak bills be construed? This question engendered the respondents to advance several interesting and somewhat novel arguments including the proposition that the Vopak bills of lading were not, in fact and in law, bills of lading *qua* documents of title or contractual documents, but were merely

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[2] First affidavit of Tan Ban Heng Joseph for ADM 229/2014 dated 25 March 2015 ("First TBHJ affidavit for Nepamora"), p 127.



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acknowledgments of the receipt of the bunkers. In other words, they were never intended to operate as security either as against the respondents as carriers or against the Buyers for payment under the underlying sale contracts.

6 Despite the vast gulf between the parties as to the legal purport and effect of the Vopak bills of lading, there is at least common ground that the unusual features of the Vopak bills of lading as well as the underlying sale contracts clearly contemplate delivery of the bunkers *without* production of these bills of lading. The pivotal divide between the parties is whether this common understanding meant that the Vopak bills of lading were merely acknowledgements of receipt of the bunkers, and it was therefore permissible to deliver the bunkers without their production, *or* whether the risks attendant to such deliveries were to be addressed by way of suitable indemnities to be arranged directly between the respondents as carriers and the parties which gave the instructions to deliver in this manner.

**Facts**

7 The appellant, Phillips 66 International Trading Pte Ltd, is a multinational company engaged, *inter alia*, in the sale of bunkers.[3] It stores its bunker fuel at the Pulau Sebarok terminal of Vopak Terminals Singapore Pte Ltd ("the Vopak Terminal") from which its buyers take delivery of the bunkers.[4] The Buyers were subsidiaries of OW Bunker, which was one of the world's largest bunker suppliers before its insolvency as I noted above.

8 The respondents were the owners and/or demise charterers of the Vessels. Each of the Vessels was licenced by the Maritime and Port Authority

3 First TBHJ affidavit for Nepamora, para 5.

4 First TBHJ affidavit for Nepamora, para 6.



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of Singapore ("MPA") to operate as a bunker barge,[5] save for *The Arowana Milan* which had a similar license from the Malaysian Domestic Shipping Licencing Board.[6] As bunker barges, the Vessels were permitted to supply bunkers to other vessels within Singapore port limits. At the material time, the Vessels were acting under the instructions of their time charterers or other third parties. These instructing parties had commercial arrangements with the Buyers for the sale, purchase and supply of bunkers.

9 The appellant and the Buyers, in line with their previous course of dealings, entered into three contracts for the sale of bunkers dated 10 September 2014, 22 September 2014 and 13 October 2014.[7] The material terms of the sale contracts are largely identical, and will be further examined below. Pursuant to the sale contracts, the Buyers nominated the Vessels for loading of the bunkers at the Vopak Terminal, as follows:

| **Suit** | **Vessel** | **Sale contract** | **Quantity of bunkers loaded as stated in the Vopak bills of lading (MT)** | **Loading date** | **Price as reflected in seller's invoice (US$)** |
|---|---|---|---|---|---|
| Admiralty in Rem No 228 of 2014 ("ADM | *The Star Quest*[8] | Dynamic Oil contract dated 22 September | 998.881 | 10 October 2014 | 534,308.35 (invoice dated 5 November |

5 First affidavit of Koh Seng Lee for ADM 229/2014 dated 17 April 2015 ("First KSL affidavit for Nepamora"), para 10.

6 First affidavit of Poh Fu Tek for ADM 235/2014 dated 17 April 2015 ("First PFT affidavit for Arowana Milan"), paras 11–14.

7 First TBHJ affidavit for Nepamora, p 87; First affidavit of Tan Ban Heng Joseph for ADM 228/2014 dated 25 March 2015 ("First TBHJ affidavit for Star Quest"), p 88; First affidavit of Tan Ban Heng Joseph for ADM 231/2014 dated 25 March 2015 ("First TBHJ affidavit for Luna"), p 89.

8 First TBHJ affidavit for Star Quest, pp 88, 125 and 127.



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| | | | | | |
|---|---|---|---|---|---|
| 228") | | 2014 | | | 2014) |
| Admiralty in Rem No 229 of 2014 ("ADM 229") | *The Nepamora*[9] | OW Far East contract dated 10 September 2014 | 2,000.000 | 12 October 2014 | 1,086,660.00 (invoice dated 4 November 2014) |
| Admiralty in Rem No 230 of 2014 ("ADM 230") | *The Petro Asia*[10] | Dynamic Oil contract dated 22 September 2014 | 3,999.138 | 11 October 2014 | 2,139,166.55 (invoice dated 5 November 2014) |
| Admiralty in Rem No 231 of 2014 ("ADM 231") | *The Luna*[11] | OW Far East contract dated 13 October 2014 | 2,002.175 | 22 October 2014 | 1,008,095.11 (invoice dated 31 October 2014) |
| Admiralty in Rem No 232 of 2014 ("ADM 232") | *The Zmaga*[12] | OW Far East contract dated 10 September 2014 | 2,497.913 | 29 October 2014 | 1,222,853.31 (invoice dated 4 November 2014) |
| Admiralty in Rem No 235 of 2014 ("ADM 235") | *The Arowana Milan*[13] | OW Far East contract dated 10 September 2014 | 2,000.000 | 18 October 2014 | 990,660.00 (invoice dated 4 November 2014) |

10 It is undisputed that, after the bunkers were loaded, Vopak bills of lading were prepared and furnished by the Vopak Terminal naming the appellant as the shipper, and to its order.[14] These documents were signed on

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9 First TBHJ affidavit for Nepamora, pp 87, 125 and 127.

10 First affidavit of Tan Ban Heng Joseph for ADM 230/2014 dated 25 March 2015 ("First TBHJ affidavit for Petro Asia"), pp 88, 126 and 128.

11 First TBHJ affidavit for Luna, pp 89, 129 and 131.

12 First affidavit of Tan Ban Heng Joseph for ADM 232/2014 dated 25 March 2015 ("First TBHJ affidavit for Zmaga"), pp 87, 124 and 126.

13 First affidavit of Tan Ban Heng Joseph for ADM 235/2014 dated 25 March 2015 ("First TBHJ affidavit for Arowana Milan"), pp 87, 123 and 125.



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behalf of each respondent and subsequently sent to the appellant by the Vopak Terminal.[15] After receiving them, the appellant proceeded to invoice the Buyers for the amounts stated in the table above; but as the dates of these invoices indicate, this was only done later.

11 By that point, the Vessels, being bunker barges, had already supplied the cargoes to other vessels, which had expended them for their own consumption.[16] Crucially, these onward deliveries had been performed without the production of the original Vopak bills of lading. These were still in the appellant's possession. Thus, shortly after finding out about the collapse of OW Bunker, on or about 6 November 2014, and failing to receive payment from the Buyers, the appellant demanded delivery of the cargoes from the respondents on the basis that it was the holder of the Vopak bills of lading.[17] This, of course, was not possible as the respondents no longer had possession of the cargoes.

**Parties' respective cases and decision below**

12 The appellant's case is simple and straightforward. The Vopak bills of lading should be given their full force and effect as documents of title, and contractual documents. They contain or evidence the contracts of carriage formed between itself as the shipper and the respondents as carriers. Accordingly, the deliveries of the bunkers by the respondents without production of the Vopak bills of lading constituted breaches of contract,

14 Defendants' Combined Submissions for RA 53, 54, 55, 57 and 58 of 2016 dated 22 March 2016 ("DCS"), para 8; Defendant's Written Submissions for RA 56/2016 dated 23 March 2016 ("DS for Luna"), para 11.

15 First TBHJ affidavit for Nepamora, para 12.

16 First KSL affidavit for Nepamora, para 33.

17 First TBHJ affidavit for Nepamora, paras 18 to 20.



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breaches of bailment and conversion. Even if there were no concluded contracts of carriage, the respondents are nevertheless liable for breaches of bailment and/or conversion as the right to immediate possession of the bunkers remained vested at all material times with the appellant.

13 On the other hand, the respondents have raised five discrete defences to oppose the summary judgment application, each of which, if found to be reasonably arguable, would justify an order for unconditional leave to defend.

(a) First, the Vopak bills of lading operated merely as acknowledgments of the receipt of the bunkers. They had no contractual force as there were no carriage contracts formed between the appellant and the respondents. Even if it is found otherwise, the bunkers could and were always intended to be delivered without the necessity of producing the Vopak bills. In essence, these fundamental arguments seek to undermine the usual operation of a bill of lading as a contractual document and a document of title.

(b) Second, the appellant's claims in bailment and conversion should be rejected as both title to and possession of the bunkers had passed to the Buyers upon loading under the terms of the underlying sale contracts.

(c) Third, in the Singapore and Malaysia bunker industry ("the local bunker industry"), there exists a custom which permits bunkers to be delivered to vessels without production of any bill of lading.

(d) Fourth, in respect of three of the actions, namely ADM 228, 230 and 231, the appellant is estopped from denying that the



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respondents were permitted to deliver the bunkers without production of the bills of lading by reason of previous course of dealings.

(e) Finally, in respect of ADM 228, 231, 232 and 235, the respondents are not liable because the Vopak bills of lading were signed not by the Master, but by the Chief Officer or the Cargo Officer of the relevant vessel without authority.

14 At the hearing below, the Assistant Registrar ("the AR") gave unconditional leave to defend on the basis that there is an uncomfortable degree of uncertainty over the purpose, and hence function, of the Vopak bills of lading. He was especially troubled by the terms of the underlying sale contracts which, in his view, seemed inconsistent with the appellant's submission that the Vopak bills of lading were intended to operate as security documents. These issues gave rise to real disputes of fact relating to the arrangement between the appellant, the Buyers and the respondents. He also found that the respondents' argument as to the general custom of the local bunker industry and estoppel were not unarguable, and ought to be fully canvassed at trial.[18]

15 As the consolidated application before me is for summary judgment, it is strictly unnecessary for the respondents to prove their defences at this stage. First, the appellant must show that it has a *prima facie* case (O 14 rr 3(1) and 7 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC")). But this cannot be seriously disputed given that the respondents accept that:

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[18] Certified Transcript of Summonses Nos 1362–1364, 1366–1367 and 1370 dated 1 February 2016 ("Transcript of AR hearing").



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(a) the Vopak bills of lading were issued naming the appellant as the shipper of the cargoes, and to its order;

(b) the Vopak bills were then signed by the respondents' representatives, either by or on behalf of the Master; and

(c) the onward deliveries were without production of the Vopak bills.

Ordinarily, such a scenario would give rise to claims in contract, bailment and conversion in favour of the holder of the bills of lading (see [19] below).

16 The burden is thus on the respondents to show that "there is an issue or question in dispute which ought to be tried" (O 14 r 3(1) of the ROC). For this, it suffices if the respondents are able to show that they have "a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that [they have] a *bona fide* defence" in relation to the issues they say ought to be tried: *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21]. With this guiding principle in mind, I shall examine the defences raised by the respondents.

**Defence based on the nature of the Vopak bills of lading**

17 It is trite that the bill of lading serves three functions. As Lord Steyn observed in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 2 AC 423 ("*The Rafaela S*") at [38]:

> In modern commercial usage the bill of lading is one of the pillars of international trade, providing the credit necessary for the financing of mercantile trade. The principal characteristics of the modern bill of lading are threefold. It operates as: (a) a receipt by the carrier acknowledging the shipment of the goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage,



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> which will usually have been concluded before the signing of the document; (c) a document of title to the goods which enables the consignee to take delivery of the goods at their destination or to dispose of them by the endorsement and delivery of the bill of lading. …

As noted above, the respondents' defence is that the Vopak bills of lading were merely acknowledgments of the receipt of the bunkers, but not contractual documents or documents of title.

18 The Vopak bills of lading admittedly contain some terms which are usually found in regular bills of lading. They were issued in sets of three. They name the port of loading as well as the vessels on which the bunkers were shipped in "apparent good order and condition". The quantities of the loaded bunkers are also specified. They were signed by or on behalf of the Masters of the Vessels and bear the Vessels' stamps. They state that the goods are to be delivered "TO THE ORDER OF PHILLIPS 66 INTERNATIONAL TRADING PTE LTD or assigns", with the appellant identified as the shipper. Significantly, they expressly contain the notation "one of which is accomplished, the others to stand void". To cap it all, each of them is expressly labelled as "Vopak BILL OF LADING".

19 The Vopak bills of lading thus contain the usual indicia of an "order" bill, *ie*, a bill of lading which provides for delivery of the goods to be made to the order of a person named in the bill or an indorsee thereof (Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell, 3rd Ed, 2011) ("*Carver*") at paras 1-01 and 6-008). The appellant therefore submits that they should be construed as regular bills of lading, and accorded their full effect as both contractual documents and documents of title. If this submission is accepted, the appellant's case would be practically unassailable. In the context of an order bill, there is an abundance of legal authorities to support



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the proposition that in the absence of express consent, the carrier is liable in contract, bailment and/or conversion if the cargo is delivered without production of the bill of lading: *The Cherry and others* [2003] 1 SLR(R) 471 ("*The Cherry*") at [27]; *Sze Hai Tong Bank* at 586; *East West Corporation v DKBS 1912 and others* [2003] 1 Lloyd's Rep 239 ("*DKBS 1912*") at [61]; *Carver* at para 6-008.

20 In particular, the appellant has attached much significance to the notation "one of which is accomplished, the others to stand void". This notation has been judicially considered in a number of decisions to imply the requirement that the cargo can only be lawfully delivered against production of the bill of lading: see *BNP Paribas v Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611 ("*BNP Paribas*") at [26]; *The Rafaela S* at [45]; *SA Sucre Export v Northern River Shipping Ltd (The Sormovskiy 3068)* [1994] 2 Lloyd's Rep 266 ("*The Sormovskiy 3068*") at 272.

21 While the appellant highlights these typical features found in regular order bills, the respondents, not unexpectedly, focus on features of the Vopak bills of lading which are far from usual.

***Lack of reference to any destination of discharge***

22 To begin with, there is no specified port of discharge. The respondents submit that this is a fundamental omission indicating that the Vopak bills of lading are not evidence of any contracts of carriage formed between itself and the respondents. In this respect, I agree with the AR that it is strictly not a requirement for a bill of lading to have a "destination port", *ie*, a *geographical* port of discharge. A bill of lading which provides for, say, a ship-to-ship transfer to another named vessel or even a refinery is no less a bill of lading.



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That is not to say that it is unnecessary to specify a *destination* for the bunkers. After all, a bill of lading contains or is evidence of the terms of the contract of carriage between the carrier and the shipper. One of its basic features is that it evinces a promise by the carrier to carry the goods to an agreed and particular destination: *The Rafaela S* at [38]; *Carver* at para 1-009. For the carrier to perform this promise, it stands to logic that the particular destination, or at least a limited range of destinations amenable to nomination by the shipper or a subsequent indorsee of the bill of lading, must be specified or capable of being determined by reference to the terms of the contract of carriage. Otherwise, the contract would be too uncertain to be enforceable (see, in the analogous context of a f.o.b. sale contract failing to identify any port of shipment, *Cumming & Co Ltd v Hasell* (1920) 28 CLR 508 at 512; Ewan McKendrick, *Goode on Commercial Law* (Penguin Books, 4th Ed, 2010) at p 1034).

23 Here, while the Vopak bills of lading were taken out to the order of the appellant "or assigns", the specific destination for the bunkers is not apparent on the face of the bills of lading. There are two provisions in the Vopak bills where this difficulty is manifest. First, it is stated that the bunkers were shipped "at the port of **PULAU SEBAROK, SINGAPORE** and bound for **BUNKERS FOR OCEAN GOING VESSELS**" [emphasis in original]. Next, it is also provided that the bunkers are to be delivered "at the aforesaid port of **BUNKERS FOR OCEAN GOING VESSELS** or so near as the vessel can safely get, always afloat" [emphasis in original]. The ostensible port of discharge, "bunkers for ocean going vessels", is of course a reference to the cargo itself, and not any destination. But even if the phrase is construed as simply referring to "ocean going vessels", this stipulation is still far too vague and wide.



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24 To overcome this difficulty, the appellant relies on the provisions of the time charterparties under which the Vessels, save for *The Luna*, were operating ("the Charterparties"). In particular, it argues that the geographic range where the cargo was to be discharged to "ocean going vessels" was circumscribed by the clause in the Charterparties defining the "Trading Limits" of each vessel. These clauses are each worded slightly differently,[19] and there was never a formal written time charterparty signed for *The Arowana Milan*.[20] But the clauses generally state that the Vessels were confined to the local port limits in line with their licences to operate as bunker barges. For instance, *The Nepamora* was confined to trade within "Singapore Port Limits, Port of Tanjong Pelapas and Pasir Gudang". Leaving aside *The Luna*, the appellant claims that the terms of the Charterparties are applicable because they have been expressly incorporated into the Vopak bills of lading. I am not convinced that this is so at this stage of the proceedings. The incorporation clauses in the Vopak bills of lading are oddly worded: "Freight and all other conditions and expectations as per Chartered [*sic*] stated dated in **PAYABLE AS AGREED**"[21] [emphasis in original], with the word "Party" included after "Chartered" in some of the bills.[22] Apart from the obvious grammatical difficulties with this incorporation clause, it also omits to identify the date of the specific charterparty which is to be incorporated. I accept that this omission, on its own, is not determinative. The authorities indicate that

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19 First affidavit of Poh Fu Tek for ADM 228/2014 dated 17 April 2015 ("First PFT affidavit for Star Quest"), p 149; First KSL affidavit for Nepamora, p 121; First affidavit of Poh Fu Tek for ADM 230/2014 dated 17 April 2015 ("First PFT affidavit for Petro Asia"), p 166; First affidavit of Koh Seng Lee for ADM 232/2014 dated 17 April 2015 ("First KSL affidavit for Zmaga"), p 119.

20 First PFT affidavit for Arowana Milan, para 15.

21 First TBHJ affidavit for Star Quest, p 127.

22 First TBHJ affidavit for Nepamora, p 127.



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where an incorporation clause refers to, but does not identify a charterparty, the court will assume that the reference is to any charter under which the goods are being carried: *Bangladesh Chemical Industries Corporation v Henry Stephens Shipping Co Ltd and Tex-Dilan Shipping Co Ltd (The SLS Everest)* [1981] 2 Lloyd's Rep 389 ("*The SLS Everest*") at 391–392; *Scrutton on Charterparties and Bills of Lading* (B Eder gen ed) (Sweet & Maxwell, 23rd Ed, 2015) at paras 6-020 and 6-023.

25 On the present facts, however, the section of the Vopak bills of lading where the date of the charterparty was to be filled was not left blank, as in cases such as *The SLS Everest*. Rather, it was deliberately type-written in with the phrase "payable as agreed", which *prima facie* suggest that no incorporation of any charterparty was intended. At the very least, the infelicitous wording of the incorporation clause, which was unexplained by the appellant, raises questions about its efficacy. With regard to *The Arowana Milan*, there is also clear authority for the view that only the terms of a charterparty which have been reduced to writing are incorporated: *Partenreederei M/S Heidberg and another v Grosvenor Grain and Feed Co Ltd and others (The Heidberg)* [1994] 2 Lloyd's Rep 287 at 310–311. Finally, for ADM 231, there is simply no similar provision to be incorporated as *The Luna* was only under a bareboat charterparty.[23]

26 So I find that it is at least arguable that the Vopak bills of lading cannot be relied upon as contractual documents – the lack of reference to any destination of discharge therein gives reasonable grounds for the respondent to argue that no contracts of carriage were intended or formed.

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[23] First affidavit of Lin Shin Louis for ADM 231/2014 dated 3 July 2015 ("First LSL affidavit for Luna"), para 5.



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***Contemplation of multiple deliveries***

27 Even if "bunkers for ocean going vessels" is an acceptable destination and the Vopak bills of lading had contractual force, the difficulties of the appellant are not resolved. This is because the express terms of the Vopak bills of lading contradict the appellant's submission that they operated as documents of title. The question here is whether it was a term of the contracts of carriage that delivery could only be made against the Vopak bills of lading. Otherwise, the Vopak bills could not have been documents of title in the common law sense (*ie*, a document, the transfer of which operates as a transfer of the constructive possession of the goods covered therein) since it is generally agreed that a document can have that status *only* if it does have to be produced to the carrier by the person claiming delivery of goods: *Carver* at para 6-024.

28 While the Vopak bills of lading do contain the time honoured notation "one of which is accomplished, the others to stand void", the undeniable fact remains that they specifically contemplate delivery of the bunkers to *multiple* ocean going *vessels*. As the appellant was aware, each parcel of bunkers loaded onboard the Vessels was to be delivered in several sub-parcels to other vessels. Crucially, this difficulty is inherent in the terms of the bills of lading. This was conceded by the appellant's counsel, Mr Toh Kian Sing SC, in the course of the appeal before me. By the appellant's own argument, although the bills of lading were issued in sets of three, when one copy is presented for delivery of a sub-parcel, the other two copies would be spent and hence no longer valid to take delivery of the balance bunkers. Therein lies the principal difficulty in construing the bills of lading as documents of title. Given that deliveries to multiple vessels were expressly contemplated under the terms of the Vopak bills of lading, it would be unworkable to expect delivery of each



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sub-parcel to be accomplished only against its production. Thus, even on the face of the Vopak bills of lading, the respondents' submission that there was no requirement for delivery only against production of a bill of lading is clearly arguable.

***Underlying sale contracts and commercial context***

29 The respondents submit with some force that the appellant's position is even more untenable when the terms of the sale contracts are closely examined. Can the court take cognisance of the sale contracts in construing the bills of lading?

30 The overriding principle is that the terms of the bill of lading, when it contains or evidences the contract of carriage, are to be determined in accordance with the general principles of the law of contract (*Scrutton* at para 2-047; *Carver* at para 3-012). So the court's task is to construe the parties' intentions objectively, taking into account the full commercial background in which the contract was made. There are, however, some unique considerations to keep in mind given the status of a bill of lading as a negotiable instrument which may need to be understood by various persons other than the original parties (see *Homburg Houtimport BV and others v Agrosin Private Ltd and another (The Starsin)* [2004] 1 AC 715 ("*The Starsin*"); *Glencore International AG v MSC Mediterranean Shipping Co SA and another* [2015] EWHC 1989 at [22]). As Lord Hoffmann held in *The Starsin* [73]–[76]:

> 73 … *The interpretation of a legal document involves ascertaining what meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.* A written contract is addressed to the parties; a public document like a statute is addressed to the public at large; a patent specification is addressed to persons skilled in the relevant art, and so on.



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> 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 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]

31 Applying the above analysis, there is no reason why the terms of the underlying sale contract cannot be taken into account in construing the bill of lading, *as long as these terms form part of the background knowledge which was reasonably available to the parties at the time of the contract*. This answer also follows from the general principle that extrinsic evidence is admissible in aid of contractual interpretation when it "is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132(d)]).

32 In the present case, while the appellant is right to point out that the respondents were not parties to the underlying sale contracts, the fact remains that the respondents, the appellant and the Buyers were all active operators in



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the local bunker industry. Indeed, all three groups had ongoing commercial relationships with each other. Apart from the sale agreements between the appellant and the Buyers, and the alleged contracts of carriage between the appellant and the respondents, the evidence indicates that the Vessels were operating under the instructions of time charterers and other third parties who had commercial arrangements with the Buyers at the material time. In other words, despite being non-parties to the sale contracts, the respondents were not complete strangers to the commercial dealings between the appellant and the Buyer. In this context, even though the respondents may not have known the exact terms of the sale contracts, they would have had a working knowledge of the essential features of the bargain between the appellant and the Buyers. Hence, I find that it is open to me to take into consideration the essential features of the underlying sale contracts in construing the Vopak bills of lading, insofar as it is arguable that these features comprise background knowledge which was reasonably available to *both* the appellant and the respondents.

*Credit period*

33 Of the terms in the underlying sale contracts, those pertaining to payment are perhaps the most germane. These payment terms, *inter alia*, are as follows:[24]

> (a) Payment for the Marine Fuel shall be made in United States Dollars in full, without any discount, deduction, withholding, abatement, set-off or counterclaim to the Seller's nominated bank account by telegraphic transfer of immediately available funds ("the same day funds") within thirty (30) calendar days after the certificate of quantity ("CQ") date (the CQ date to count as day zero).

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[24] First TBHJ affidavit for Nepamora, p 89.



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> (b) Invoice quantity shall be based on the certificate of quantity issued by the Loading Terminal, save for fraud and/or manifest error.
>
> (c) Payment will be effected against presentation of the following documents:
>
> (i) the Seller's commercial invoice; and
>
> (ii) the original certificate of quantity issued by the Loading Terminal.
>
> (d) If the documents referred to in section 10(c) are not available for presentation to the Buyer on or before the payment due date, the Buyer shall pay the Seller upon presentation to the Buyer of:
>
> (i) the Seller's commercial invoice; and
>
> (ii) the Seller's letter of indemnity ("LOI") in the form as per Schedule 1 appended herein.

34 The key provision is sub-cl (a) which provides for a credit period of 30 days. The respondent's evidence, which was largely unrebutted, is that the grant of such a credit period of up to 30 days is the standard practice in the local bunker industry.[25] If so, this term would form part of the factual matrix in which the Vopak bills of lading ought to be construed. This poses several problems for the appellant.

35 First, the availability of the credit period indicates that a requirement for delivery only against the Vopak bills of lading would have made no commercial sense. If this position is taken to its logical conclusion, onward delivery of the bunkers could only have taken place 30 days after the certificate of quantities ("CQs") were issued by the Vopak Terminal. This is when the Buyers would have made payment and received the Vopak bills. During this period, the bunkers could not have been lawfully supplied to other vessels, and would have necessarily remained onboard the Vessels. However,

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[25] First KSL affidavit for Nepamora, para 50.



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such an operation is simply not commercially workable. For one, demurrage would be incurred and payable by the charterers to the respondents during this period. Apart from this, the respondents' counsel, Mr Collin Seah, drew my attention to the fact that the bunker barge licenses issued by the MPA contained a specific prohibition that the Vessels were "NOT TO BE USED FOR STORAGE OF PETROLEUM CARGO".[26] It is not clear if a similar prohibition applied to *The Arowana Milan*, which was registered in Malaysia. But what is clear is that the appellant's construction of the terms of the Vopak bills of lading, read in the context of the agreed credit period, would necessarily entail a violation, and perhaps the revocation, of the MPA licences. This is a situation which no reasonable commercial entity in the parties' positions would have intended.

36 Second, a requirement for delivery only against the Vopak bill of lading would have been impracticable given that the cargoes were bunkers bound for "ocean going vessels", as evident from the Vopak bills themselves. Thus, as the appellant would have known, the cargoes had to be delivered onwards to other vessels for their consumption as bunkers. This delivery invariably would have to be completed before the expiry of the 30-day credit period and, again, only possible without production of the Vopak bills of lading.

37 Finally, the 30-day credit period supports the respondents' submission that the bunkers were sold by the appellant on the creditworthiness of the Buyers. Though the appellant was permitted under cl 7.6(g) of its General Terms and Conditions ("GTC"), which were incorporated into all the underlying sale contracts, to require the Buyers to furnish security for payment

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[26] First KSL affidavit for Nepamora, p 27.



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if it was of the opinion that Buyers' "reliability or financial responsibility" was "impaired or unsatisfactory",[27] this option was never exercised. The *quid pro quo* to this arrangement was that the Buyers were contractually liable to pay the full invoice price to the appellant without a CQ, and based only on the appellant's letter of indemnity ("LOI"). It seems to me that this illustrates the true commercial bargain between the parties. The underlying sale contracts were part of a trade between two large and very substantial companies. Both parties entered into the transaction on the basis of the others' financial standing and creditworthiness. The trust in the Buyers unfortunately turned out to be misplaced on this occasion. So the appellant is now waving the Vopak bills of lading to claim delivery of the bunkers from the respondents in circumstances where it knew and permitted the bunkers to be dealt with by the Buyers without reference to the bills of lading.

*Lack of any reference to bills of lading*

38 The lack of any reference to bills of lading in the underlying sale contracts is the other essential feature of the bargain between the appellant and the Buyers which the respondents highlight. Just as with the 30-day credit period, the respondents assert that this is in line with the practice of the local bunker industry where no bills of lading are used.[28] The appellant naturally contests this assertion as it goes to the heart of its case. However, I find that the evidence tendered by the respondents to support its position, including some 368 CQs for shipments in 2014 for which no bills of lading were issued,[29] does indicate that it is at least arguable that there is such a practice. If so, this

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27 First TBHJ affidavit for Nepamora, p 101.

28 First KSL affidavit for Nepamora, para 55.

29 DCS, Schedule C.



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practice would be added to the factual matrix in which the terms of the Vopak bills of lading ought to be construed. It would also provide a basis for this aspect of the underlying sale contracts to be taken into account as well.

39 To start with, sub-cl (b) of the payment terms indicates that payment was due under the sale contracts against two documents: the CQ and the appellant's commercial invoice. Tellingly, there is no mention whatsoever of bills of lading. Typically, f.o.b. sale contracts such as those in the present case would expressly provide for the seller to procure a bill of lading to evidence the shipment (*Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 at 424). Here the crucial document to evidence the loading is the CQ instead.

40 The analysis remains unchanged under sub-cl (d) which deals with the situation where the appellant is unable to provide the CQ "on or before the payment due date". This provision recognises the possible delay in obtaining payment prior to the receipt of the CQ, and specifically permits the appellant to obtain full payment from the Buyers against an LOI even without the CQ. It further serves to highlight that, under the terms of the sale contracts, the CQ is the critical document for the appellant to procure. The bill of lading, once again, does not feature.

41 Given the conspicuous omission of any reference to bills of lading in the sale contracts, it is difficult to see how the appellant can attribute such critical importance to these documents. To meet this challenge, the appellant relies on cl 2(1)(b) of the GTC which provides as follows:[30]

> 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

[30] First TBHJ affidavit for Nepamora, p 95.



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> permanent flange connection at the Loading Terminal or the supplying Vessel's manifold.
>
> [emphasis added]

It is asserted that the "shipping documents" referred to in cl 2(1)(b) must be understood to include bills of lading. While I do not disagree that this is often the case in the context of f.o.b sale contracts, it is at least arguable that this was not what the parties had in mind when they entered into the sale contracts. I say this because a bill of lading is usually the central document in a contract for the sale of goods which entails shipment. However, there is no mention *at all* of any bills of lading in the sale contracts here. This omission must have been deliberate. For the same reason, I am unable, at this stage, to accept the appellant's argument that it had relied on the Vopak bills of lading as security for payment.

42 Finally, the appellant contends that it specifically instructed Vopak Terminal to generate the Vopak bills. No written correspondence was adduced to evidence this instruction; but, in my view, this point is neither here nor there. The mere fact that the Vopak Terminal was instructed to arrange for the Vopak bills of lading to be issued does not *ipso facto* mean that these documents should be given full legal effect. Besides, it is curious that the requirement was allegedly communicated by the appellant to the Vopak Terminal instead of the respondents.

43 The impact of the absence of any reference to any bills of lading in the sale contracts was not fully appreciated by both parties in their submissions before me, as well as in the court below. The appellant's case is that the Buyers or their nominees could only contractually take delivery of the bunkers against production of the bills of lading. In other words, it was within the contractual contemplation of the parties to the underlying sale contracts that



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the bills of lading were intended to operate as the "key to the warehouse". The difficulty with this case theory is that, based on the evidence before me, it appears that the Buyers might not even have been aware that Vopak bills of lading were issued, especially as there is no mention whatsoever of any bills of lading in the sale contracts. The appellant has asserted in its affidavits that on previous occasions, it did "endorse the full set of original bills of lading in favour of and courier the same to the buyer" once full payment was received.[31] However, as conceded by Mr Toh at the oral hearing, these are bare assertions. There is no objective evidence before the court that the Buyers, even after payment, ever received the endorsed bills of lading for the previous shipments.

44 Instead, the critical document was always the CQ, which was issued by the Vopak Terminal and not the respondents. Given this background, it is certainly arguable, at this stage, that the respondents were not required to deliver only against the production of the Vopak bills of lading.

45 The respondents also sought to rely on the terms of the LOI as these too contemplate that the Buyers would take delivery of the cargoes before receiving the Vopak bills of lading (see [53(b)] below). However there is no evidence before me, either in the respondents' affidavits or otherwise, that knowledge of the LOI and its terms would have formed part of the background knowledge which was reasonably available to *both* the appellant and the respondents. Thus it is inappropriate for me to take into account these terms in construing the contracts of carriage for the purposes of these appeals; the point may well be further explored should the matter proceed to trial. This difficulty as to the respondents' knowledge though does not extend to my analysis of the appellant's claims in bailment and conversion. There, the key question is when

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[31] First TBHJ affidavit for Nepamora, para 9.



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title or possession in the bunkers was intended to pass from the appellant to the Buyers, which necessarily turns on the full terms of the contracts of sale between them, including the LOI.

46 The only remaining question is what purpose, if any, the Vopak bills of lading were intended to serve under the sale contracts. The respondents' position is that they were mere receipts for the quantity of bunkers received by the Vessels. The appellant's response is that CQs were in fact issued to fulfil this purpose. But the quantities stated in the CQs do not match the amounts reflected in the invoices issued to the Buyers.[32] This discrepancy, which Mr Toh could not account for, is anomalous as sub-cl (b) of the payment terms under the sale contracts expressly requires the invoice quantity to be based on the CQs. Instead, the quantities stated in the invoices were based on the Vopak bills of lading (see [9] above), suggesting that the respondents' case theory is certainly plausible. In other words, it appears that the appellant treated the Vopak bills *as if* they were CQs for the purposes of obtaining payment under the sale contracts. Ultimately, this point cannot be examined in a vacuum, and can only be resolved at the trial of these actions. But it is perhaps apposite to refer to *Anonima Petroli Italiana SpA and Neste OY v Marlucidez Armadora SA (The Filiatra Legacy)* [1991] 2 Lloyd's Rep 337. The seller in that case argued that it had reserved the right of disposal by taking the bill of lading to its order. However, that argument did not gel with the terms of the underlying sale contract which provided for a similar 30-day credit period, and clearly contemplated that the cargo would be delivered to the buyer before payment was due, just as in the present case. Hence, Mustill LJ (as he was then) observed at 343 that: "… the sellers still took a bill of lading to their own order. We suspect that this was done as a matter of routine." This may very

[32] DCS, para 140.



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well be true here as well. As rightly observed by Lord Bingham in *The Rafaela S* at [5], "[i]t is always the task of the court to determine the true nature and effect of a legal document, and in performing that task the court is not bound by the label which the parties have chosen to apply to it." Here, this task cannot be summarily determined at this interlocutory stage of the proceedings. So the purpose, if any, for the issuance of the Vopak bills of lading should be fully examined at the trial of the action.

***Indemnity from charterers***

47 For completeness, I should mention that the appellant also relies on the clause titled "Responsibility on Cargo" found in the Charterparties. Again, it is assumed that the unwritten terms of *The Arowana Milan* charterparty were the same as those of *The Nepamora*. The clause is an indemnity from the charterers, and the appellant submits that it reflects the respondents' recognition that delivery of the bunkers without production of the Vopak bills of lading would attract liability. In support, it has cited cases such as *The Nordic Freedom* [1999] 3 SLR(R) 507, *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd's Rep 541 and *BNP Paribas*. In these cases, it was held that a clause which contemplates delivery against a letter of indemnity does not negate the obligation to deliver only against the bill of lading (*The Nordic Freedom* at [11]); instead it reflects the shipowners' willingness to run the risk of being held liable for wrongful discharge of cargo should problems arise in relation to payment (*BNP Paribas* at [66]). These authorities, however, are clearly distinguishable.

48 The clause is substantially the same in all the time charterparties; for *The Nepamora* it reads:[33]



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> **Responsibility on Cargo**
>
> Bunker Supervisors or Cargo Officers when employed by Charterers and stationed on board shall be responsible for the proper tallying, documentation, liaising, loading / unloading of cargo under Charterer's instructions. Charterers shall indemnify Owners or their servants on all cargo losses, claims and liabilities while under Charterer's instructions. …

49 Based on this clause, the appellant submits that the commercial bargain between the parties was that the respondents would look to the charterers for any losses or liabilities arising from delivery of the bunkers without production of the bills of lading. Indeed, the appellant further claims that this was precisely what the respondents did in reaction to its demands for delivery of the cargoes after the collapse of OW Bunker. The clause, however, is a variation of the usual employment and indemnity clause typically found in time charterparties: *Scrutton* at para 17-043. Reading it as a whole, it is clear that it covers the Cargo Officers' overall responsibility for the handling of the cargo as the charterer's employee. The indemnity in favour of the owners arises from this allocation of responsibility, and covers a broad range of cargo losses going beyond claims arising from misdelivery. By contrast, the letter of indemnity provisions which were before the courts in *The Nordic Freedom* and *BNP Paribas* were for the specific purpose of the carriers accepting the charterers' instructions to deliver the cargo without production of the bills of lading. The difference is critical. In the latter situation, the provision acknowledges that delivery of cargo without production of bill of lading is a breach of the contract of carriage. The letter of indemnity is intended to protect the carrier against this risk. Here, there is no such specific indemnity or delivery contemplated. Further, the appellant's assertion that the respondents, in response to the demands for delivery of the cargoes, had asked it to look to

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[33] First KSL affidavit for Nepamora, p 121.



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the time charterers for the losses is not quite correct. All that was stated by the respondents in their letter dated 14 November 2014 in reply to the appellant's demands was that the charterers had placed "their cargo officer onboard to handle for all cargo transactions", and that the respondents were "therefore not responsible for the care, custody and control of any cargo loaded" on the Vessels.[34] This was simply a denial of liability. It certainly cannot be construed as a concession that there was an obligation to deliver the bunkers only against the Vopak bills of lading. I should add that my overall analysis of the nature of the Vopak bills of lading would have remained unchanged even if the respondents had asked the appellant to look to the charterers for any losses. As the AR rightly noted, the issue of the respondents' liability, if any, is logically anterior. Thus focussing on any indemnity which the respondents may have against their charterers puts the cart before the horse.[35]

50 For the above reasons, I find that the respondents have an arguable defence that the Vopak bills of lading were not intended to operate as either contractual documents or documents of title. Hence, the respondents are entitled to unconditional leave to defend the appellant's claims in contract.

**Defence to the claims in bailment and conversion**

51 Further or in the alternative, the appellant submits that they have an indisputable case for breach of bailment and/or conversion. Ordinarily, the appellant would be able to assert that it retained title to the cargoes by holding on to the bills of lading which were taken to its order: s 19(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed); *Mitsui & Co Ltd and another v Flota*

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34 First affidavit of Poh Teck Heok for ADM 235/2014 dated 17 November 2014 ("First PTH affidavit for Arowana Milan"), p 33.

35 Transcript of AR Hearing, p 5.



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*Mercante Grancolombiana SA (The "Cuidad de Pasto" and "Cuidad de Neiva")* [1988] 2 Lloyd's Rep 208. This submission, however, is open to doubt given my finding that the Vopak bills of lading arguably did not operate as documents of title. Nevertheless, it is not disputed that the claims based on bailment and conversion do not rest on the appellant having title to the bunkers at the time of the loss. Instead, it suffices that the appellant retained the immediate right to possession of the bunkers: *The Cherry* at [62]; *DKBS 1912* at [69].

52 The difficulty the appellant faces here is that its claim to immediate possession of the bunkers is also largely based on its status as the holder of the Vopak bills of lading. Ultimately, the passing of possessory interest in the cargoes depends on the intention of the parties to the underlying sale contracts which is to be objectively ascertained from their terms: *DKBS 1912* at [41].

53 Having examined the terms of the underlying sale contracts, I agree with the respondents that possessory interest had arguably passed to the Buyers upon loading.

(a) Section 2.1 of the appellant's GTC provides that title and risk passed to the Buyers when the bunkers passed the vessels' permanent flange connection at the loading terminal. Further, s 2.1(f) of the GTC permits the appellant to "regain" possession of the bunkers in the event of non-payment by the Buyers. The language used presupposes that possession, in addition to title and risk, had passed to the Buyers upon loading.

(b) The language of the LOI, which contains warranties by the appellant that "we *were* entitled to possession of" and "*had* good title to" the bunkers [emphasis added], also assumes that possession had



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already passed to the Buyers upon loading.[36] The deliberate choice of different tenses in the warranties supports this construction. The LOI also contemplates the Buyers "having agreed to accept delivery" of the cargo before being provided with the CQ and when payment would not have been due. That would only be possible if possession had been transferred to the Buyers upon loading.

(c) The scheme of the sale contracts appears to be consistent with the Buyers having the immediate right to disposal of the Bunkers upon loading. The 30-day credit period granted to the Buyers as elaborated above reinforces this construction as plausible.

54 Accordingly, the respondents are also unconditionally entitled to defend the appellant's claims for breaches of bailment and conversion.

**Other defences**

55 Given my finding that the respondents have raised an arguable defence in respect of the claims under the bills of lading, bailment and conversion, it is strictly not necessary to decide whether the other defences are arguable.

56 However, with a view to assist the parties to narrow the issues which will eventually be fully ventilated at the trial, it is perhaps useful to make some quick observations.

57 The alternative defences will only arise for consideration if the respondents fail in their primary defences. Should that happen, the bills of

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[36] First TBHJ affidavit for Nepamora, p 112.



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lading will *ex hypothesi* be construed as regular order bills. The examination of the alternative defences should therefore proceed on this premise.

***Custom of the local bunker industry***

58 The respondents assert that it is the custom in Singapore and Malaysia that no bills of lading are presented, or required, in exchange for the supply of bunkers by bunker barges to other vessels. There have been several attempts to prove the existence of customs to excuse the carrier from liability for delivering cargoes without production of the bills of lading: see *The Sormovskiy 3068* at 280–282; *Olivine Electronics Pte Ltd v Seabridge Transport Pte Ltd* [1995] 2 SLR(R) 527. Each of them has failed for one reason or another.

59 Assuming that the respondents are able to adduce reliable and consistent evidence to support the alleged custom (which is a fact-intensive exercise), it is common ground that to succeed in this defence, "the custom should be certain, reasonable and not repugnant. It would be repugnant if it were inconsistent with any *express term* in any document it affects, whether that document be regarded as a contract or as a document of title" [emphasis added]: *Chan Cheng Kum v Wah Tat Bank Ltd* [1971-1973] SLR(R) 28 at [15].

60 The difficulty which the respondents face with this defence is that once the Vopak bills of lading are construed as regular order bills, it follows that delivery can only be lawfully done against production of the Vopak bills. Any other interpretation would necessarily be "repugnant" to the legal effect of the Vopak bills of lading *qua* documents of title. In reply, the respondents suggest that the custom defence would only be displaced if it is repugnant to an



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"express term", and that any term requiring delivery against production of the Vopak bills of lading would be, at most, an implied term. Such an implied term, it is argued, ought to be displaced by the custom to the contrary. This is a tenuous argument. Even if the term requiring delivery only against the bill of lading is found to be an implied term, it would no less be a term of the contract of carriage. As has been held, evidence of custom is admissible only "to explain mercantile expressions and to add incidents, or to annex usual terms and conditions which are not inconsistent with the written terms between the parties"; it cannot change the intrinsic character of the document (*Charles J Robinson v Richard Mollett and others* (1875) LR 7 HL 802 at 815; *Scrutton* at para 2-067). The time honoured stipulation apparent on the face of the Vopak bills – "one of which is accomplished, the others to stand void" – however is clear and fundamental to the operation of the Vopak bill of lading as a document of title (see [19] above). So in my view, it is unlikely that the term can be overcome by the force of custom simply on the basis that it is "implied".

***Estoppel***

61 In relation to ADM 228, 230 and 231, the respondents argue that the appellant is estopped from asserting that delivery only against the Vopak bills of lading was a requirement under the carriage contracts. The elements of an estoppel by acquiescence, which is the doctrine relied on by the respondents, are well established. As held in *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* [1999] 2 SLR(R) 817 at [70]:

> 70 According to *Halsbury's Laws of England* vol 16 at para 1473, the term acquiescence applies when a person (A) having a right, and seeing another person (B) about to commit, or in the course of committing, an act infringing that right stands by in such a manner as to induce B, who might otherwise have abstained from doing the act, to believe that A



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> assents to it being committed. Generally, five circumstances must be present in order that the estoppel may be raised against A:
>
> (a) B must be mistaken as to his own legal rights;
>
> (b) B must expend money or do some act on the faith of his mistaken belief;
>
> (c) A must know of his own rights;
>
> (d) A must know B's mistaken belief;
>
> (e) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right: see para 1474 of *Halsbury's* (*supra*).

62 For all three actions, the parties accept that:

(a) there were previous dealings between the appellant and the respondents in which similar Vopak bills of lading were issued for cargoes shipped on *The Star Quest*, *The Petro Asia* and *The Luna*;[37]

(b) on those occasions, the bunkers were delivered onwards by the respondents without production of any bills of lading; and

(c) the appellant did not protest against these alleged misdeliveries, or communicate to the respondents that these earlier cargoes should have been delivered only against the presentation of the Vopak bills.

63 The appellant's case is that as the Buyers had paid for these shipments, the issues pertaining to the Vopak bills of lading never arose. Hence, its silence and inactivity in not enforcing its rights for these previous shipments was not acquiescence to delivery of the cargoes without production

[37] Second affidavit of Tan Ban Heng Joseph for ADM 228/2014 dated 22 May 2015 ("Second TBHJ affidavit for Star Quest"), para 29; Second affidavit of Tan Ban Heng Joseph for ADM 230/2014 dated 22 May 2015 ("Second TBHJ affidavit for Petro Asia"), para 30; First TBHJ affidavit for Luna, para 11.



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of any bills of lading. The respondents' position is that the appellant had in fact treated these earlier Vopak bills of lading as nothing more than receipts; so it would be inequitable for it to now assert otherwise. Clearly, this is a *bona fide* defence which ought to be fully canvassed at trial as it gives rise to triable issues concerning the circumstances surrounding these previous shipments, and the parties' intentions when they were carried out.

***Want of authority***

64 The defence that the Vopak bills of lading were signed without authority is pleaded in ADM 228, 231, 232 and 235. In all these actions, save ADM 231, the respondents' position is that it was the Chief Officer rather than the Master who signed the Vopak bill. It is difficult to see how this defence can succeed given that the relevant Vopak bills expressly bear each vessel's stamp, and the signature of the respondent's representative is right above the word "Master". In other words, no issue of want of authority arises on the face of the relevant Vopak bills. The assertion that it was the Chief Officers of *The Star Quest*, *The Zmaga* and *The Arowana Milan* who signed these documents is also bare and unsupported by any evidence, as the appellant rightly points out. None of these officers have produced an affidavit, and no objective evidence was tendered on this point. In any case, even if it was the Chief Officers who signed the Vopak bills of lading rather than the Masters, the evidence as it stands indicates that the Chief Officers had either the express or implied authority to sign these documents. Even on the respondent's own case, it is acknowledged that the Chief Officers were not acting on their own accord and had signed the Vopak bills of lading in the ordinary course of their employment, albeit under the understanding that they were merely receipts of the quantity of bunkers received. Thus, their use of the vessel's stamps as well as their signing of the Vopak bills was likely to have been authorised.



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Alternatively, the respondents are bound by the doctrine of apparent authority (see *The Bunga Melati 5* [2015] SGHC 190 at [26]–[29]). By allowing the Chief Officers to sign and stamp the Vopak bills of lading, the respondents had clearly represented to the appellant that the Chief Officers had the authority to do so. The respondents then retained copies of the Vopak bills, and fully carried out the contracts of carriage which the appellant was induced to enter into as a result of the representation. This reliance was entirely reasonable given that there was no indication that the Vopak bills of lading had been signed other than by the Master. Thus for ADM 228, 232 and 235, I find that the defence of lack of authority is unarguable.

65 In ADM 231, the defence is, at first blush, more plausible. For one, the Cargo Officer, Chia Teck Ghee Ezen ("Chia"), who signed the bill of lading has given affidavit evidence stating that it was him rather than the Master who signed the Vopak bill of lading issued in respect of the bunkers loaded onboard *The Luna*.[38] The respondent's evidence is also that Chia was an independent contractor rather than a member of *The Luna*'s crew. Finally, Chia also states that the stamp which he used was not provided by the Master or the respondent, but by the third party cargo superintendents whom the respondent had engaged. These distinctions, however, only take the respondent so far. First, although Chia was an independent contractor, the facts nevertheless indicate that he was given either the express or implied authority to sign the Vopak bills in the ordinary course of his role as the vessel's Cargo Officer. It is undisputed that there were multiple previous dealings between *The Luna* and the appellant which were similar. Chia himself accepts that the process on the day at issue was "as is usually the case".[39] But

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[38] First affidavit of Chia Teck Ghee Ezen for ADM 231/2014 dated 3 July 2015 ("First CTGE affidavit for Luna"), para 10.



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on all these previous occasions, there was no dispute as to the Cargo Officer's authority to sign the Vopak bills of lading, and Chia's evidence suggests that this was *in fact* his role because he needed to confirm the quantity of the bunkers loaded onto the vessel. So his signing of the Vopak bill of lading which is the subject of ADM 231 must have been authorised. There is no suggestion by the respondent in ADM 231 that *no one* onboard *The Luna* was authorised to sign *any* bill of lading. In other words, it appears that the Vopak bills would have been issued in any event even if they had not been signed by the Cargo Officer. In any case, even if Chia did not have actual authority to sign the Vopak bills, the doctrine of apparent authority would apply. Just as in the other three cases above, the respondent had, by allowing Chia to sign the Vopak bills and use the stamp produced by the cargo superintendents bearing the vessel's name, clearly represented to the appellant that he had the authority to do so as the vessel's Cargo Officer. As the appellant's reliance on this representation was entirely reasonable, I find that the defence of lack of authority is untenable in ADM 231 as well.

**Conclusion**

For the above reasons, I affirm the AR's decision in granting the respondents unconditional leave to defend. The appeals are thus dismissed with costs. The costs order by the AR below is to stand but costs should follow the event for the dismissal of the appeals. In respect of the costs of the appeals for ADM 228, 229, 230, 232 and 235, since the respondents therein are represented by the same set of solicitors, the appellant is ordered to pay each of the respondents the sum of $2,500 inclusive of disbursements. The

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[39] First CTGE affidavit for Luna, para 7.



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appellant is also to pay a separate sum of $3,000 inclusive of disbursement to the respondent in ADM 231.

Steven Chong
Judge

Toh Kian Sing, SC and Vellayappan Balasubramaniyam (Rajah & Tann Singapore LLP) for the appellant;
Seah Lee Guan Collin and Lim Wei Ming, Keith (Quahe Woo & Palmer LLC) for the respondents in ADM Nos 228–230, 232 and 235 of 2014;
Bazul Ashhab bin Abdul Kader and Prakaash Silvam (Oon & Bazul LLP) for the respondent in ADM No 231 of 2014.

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