2. ADMIRALTY AND SHIPPING LAW

ADMIRALTY LAW

TOH Kian Sing
LLB (Hons) (National University of Singapore),
BCL (Oxon); Advocate and Solicitor (Singapore).

2.1 The Singapore courts handed down four admiralty judgments in 2021, including one by the Court of Appeal. These decisions are reviewed below.

I. *The Luna*

A. Material facts

2.2 In *The Luna*,[1] the plaintiff, Phillips 66 International Trading Pte Ltd ("P66"), arrested six bunker barges following the collapse of OW Bunker Far East (Singapore) Pte Ltd ("OW") and Dynamic Oil Trading (Singapore) Pte Ltd ("DOT"). P66 had sold fuel oil to OW and DOT on a free on board basis, with payment to be made 30 days after the date of the certificate of quantity ("CQ"). The CQs were issued by the terminal from which the bunker barges loaded the cargo.

2.3 P66 alleged that it was the shipper under various bills of lading signed by the masters of various bunker barges. Typically, the bills of lading remained with P66 until after payment was received. In the meantime, the bunker barges delivered the cargo as bunkers to various ocean-going vessels without the production of the original bills of lading.

2.4 P66 alleged that the appellant shipowners/demise charterers of the bunker barges had misdelivered the cargo without presentation of an original bill of lading. The Court of Appeal allowed the defendants' appeal, finding, *inter alia*, that the documents in question were not intended to function as contracts of carriage and/or as documents of title; they thus did not and could not serve the traditional functions of a bill of lading.

1 [2021] 2 SLR 1054.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

2.5 This review covers the admiralty aspects of the decision in *The Luna*, namely, whether or not P66 was liable for the wrongful arrest of the bunker barges. In that regard, the appellants contended that:

(a) P66 had acted with malice or gross negligence in proceeding to arrest the bunker barges without waiting to hear negative advice from its lawyers; and

(b) there had been material non-disclosure of facts which were potential "knock out blows" to its claims.

B. Wrongful arrest claim

2.6 The Court of Appeal declined to award damages for wrongful arrest. Steven Chong JCA, delivering the judgment of the Court of Appeal, held that the facts of the instant case did not rise to the level to justify an award of damages for wrongful arrest.

2.7 In relation to the substance of the claim, the dispute between the parties centred primarily on a point of law, namely, whether or not the documents in question were intended to serve the traditional functions of bills of lading. The Court of Appeal held that, although it had eventually found that P66's arguments on this point of law did not pass muster, it could not be said that the claims were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence.

2.8 Furthermore, the matters relied upon by the appellants would not have delivered a "knock out blow" to the respondent's claims. Indeed, the High Court found at the summary judgment stage that the respondent had shown a *prima facie* case. The Court of Appeal's extensive discussion (spanning more than 80 paragraphs) also indicates that these were not matters that would have justified a summary dismissal of the respondent's claims. For those reasons, the Court of Appeal declined to find the respondent liable for wrongful arrest.

2.9 *The Luna* is an example of a case where the wrongful arrest claim was the subject matter of a trial, rather than being brought by way of a setting-aside application. It also demonstrates the high threshold which a defendant shipowner has to meet in order to successfully prove wrongful arrest: on the facts of *The Luna*, even though P66's claim was dismissed, the counterclaims for wrongful arrest were not made out.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

II. *The Ocean Winner*

A. Material facts

2.10 In *The Ocean Winner*,[2] following the collapse of the Ocean Tankers group of companies in 2020, PetroChina International (Singapore) Pte Ltd ("PC") issued four *in rem* writs against vessels which had been bareboat chartered by Ocean Tankers (Pte) Ltd ("OTC"). Before the writs were issued on 22 April 2022 without leave of court, OTC had applied for an automatic moratorium pursuant to s 211B(1) of the Companies Act[3] ("CA") ("the s 211B Moratorium"). This decision raises several important issues which overlap between the different regimes of admiralty and insolvency law, which are different regimes built on different principles and policy considerations.

2.11 PC did not serve the writs on any of the vessels. On 6 May 2020, OTC applied to withdraw its application for the s 211B Moratorium, and for an order that it be placed under judicial management and, pending the determination of that application, that it be placed under interim judicial management.

2.12 On 8 May 2020, OTC's interim judicial managers applied to set aside or strike out the writs under O 12 r 7(1) and/or O 18 r 19(1) of the revoked Rules of Court 2014. In the meantime, by way of an order of court dated 12 May 2020, the High Court granted OTC's application to withdraw the application for a s 211B Moratorium and placed OTC in interim judicial management. On 7 August 2020, OTC was placed under judicial management, and its interim judicial managers were appointed as its judicial managers ("the JMs").

2.13 OTC contended that PC ought to have obtained leave of court before filing the writs, pursuant to ss 211B(8)(*c*)–211B(8)(*d*) of the CA (in force at the material time). Two issues arose for determination:

> (a) whether or not the filing of admiralty *in rem* writs constituted the commencement of "proceedings" against "the company" (that is, OTC), under s 211B(8)(*c*) of the CA ("the First Issue"); and
>
> (b) whether or not the filing of admiralty *in rem* writs constituted an "execution, distress or other legal process" against the "property" of OTC under s 211B(8)(*d*) of the CA ("the Second Issue").

2 [2021] 4 SLR 526.
3 Cap 50, 2006 Rev Ed.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

B. *The First Issue: Would filing of writ constitute commencement of proceedings?*

2.14 Ang Cheng Hock J answered the First Issue in the negative. In coming to his decision, Ang J considered that the filing of an admiralty *in rem* writ merely created a security interest, *viz* the statutory lien granted by s 4(4) of the High Court (Admiralty Jurisdiction) Act[4] ("HCAJA"), for the plaintiff. The issuance of an *in rem* writ merely crystallised a plaintiff's security interest, and the insolvent company was not denied any "breathing space" by the mere filing of the writ, nor was it in any way hindered by its efforts to devise a scheme of arrangement.

2.15 Absent the service of the writ on the vessel named therein, the court's admiralty jurisdiction had yet to be invoked. In that limited sense, the action had not substantively "commenced" until service of the writs.

2.16 Ang J further held that, conversely, if a plaintiff was unable to file the admiralty *in rem* writ to even create its statutory lien, its right to a security interest in the form of a statutory lien over the vessel was potentially at risk of being destroyed by the insolvent company. This was because the shipowner could defeat a plaintiff's *in rem* claim by terminating the bareboat charters with the charterers' agreement and accepting physical redelivery of the vessel before the writ was filed. While s 211B of the CA was intended to protect companies from being distracted by having to defend legal proceedings while devising a scheme proposal, it was never intended to defeat or deny the creation of substantive legal rights.

2.17 The latter was precisely what OTC and the respective registered owners (that is, "the Xihe Group") had sought to do in the instant case: The person who would be liable *in personam* for PC's cargo claims was the bareboat charterer (that is, OTC), not the vessels' owners (that is, the respective Xihe Group entities). Yet, on or around 18 May 2020, after OTC had been placed under interim judicial management, OTC had sought to terminate the majority of its bareboat charterparties by redelivering the vessels to the respective Xihe Group entities. This was an obvious attempt to ringfence the Xihe Group's assets. The termination of the bareboat charterparties prevented further admiralty in rem writs from being issued against these ships pursuant to s 4(4) of the HCAJA, since OTC would no longer be the vessels' bareboat charterers.

2.18 Furthermore, the mere filing of the writs was not "against the company", since an action *in rem* was an action against the *res*, not the

4 Cap 123, 2001 Rev Ed.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

owner or demise charterer of the vessel. Thus, the fact that the bareboat charterer, OTPL, was the so-called "true defendant" because PC's cargo claims were, in substance, against the bareboat charterer was beside the point. If no appearance had been entered, the actions would remain, at all times, actions *in rem* against the *res* (that is, the vessels), and OTC would not be personally liable at all.

2.19 Having said that, Ang J noted that since OTC had entered appearance in the respective admiralty actions, the actions had become a "mixed" action *in rem* and *in personam*. In the circumstances, in light of the existing moratorium in favour of OTC arising from the fact that it was now in judicial management, PC would have to obtain leave of court to proceed with the claim in the writs, including service of the writs of the vessels and/or arrest of the vessels. Such steps would constitute commencing and thereafter continuing "proceedings" against OTC.

B. The Second Issue: Would filing of writ constitute "execution, distress or other legal process"?

2.20 Ang J further held that the mere filing of an *in rem* writ was not an "execution" within the meaning of s 211B(8)(*d*) of the CA. In that regard, Ang J held that the writs of execution were writs meant to enforce a judgment or order of court. The mere filing of an *in rem* writ was also not "distress" within the meaning of s 211B(8)(*d*) of the CA, because "distress" was the process of distraining movable property to realise an amount of unpaid rent.

2.21 The term "other legal process" in s 211B(8)(*d*) of the CA meant enforcement processes similar in nature to "execution" and "distress" proceedings. In other words, it referred to processes to seize the money or property of a company. As the filing of an admiralty *in rem* writ merely created a statutory lien and thus security interest in the vessel, there was no element of enforcement in such a step. Accordingly, the mere filing of the writs did not come within the meaning of "other legal process" in s 211B(8)(*d*) of the CA.

III. *The Jeil Crystal*

2.22 In *The Jeil Crystal*,[5] the plaintiff had provided trade financing to its customer in respect of a cargo shipped onboard the defendant's vessel. The plaintiff issued the writ and obtained a warrant of arrest against the defendant's vessel. The claim was advanced on the basis that the plaintiff

5 [2021] SGHC 292.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

was, *inter alia*, the lawful holder of the original bills of lading (the B/Ls") issued in respect of the cargo in question, and that the defendant had delivered the cargo without production of the original bills of lading.

2.23 However, when the claim was commenced and the warrant of arrest obtained, the plaintiff in fact no longer had possession of the B/Ls. The B/Ls had been sent by the plaintiff to its customer and, thereafter, switched by the defendant with a fresh set of B/Ls which was allegedly effected without the plaintiff's knowledge or consent. The writ was served, and the vessel was arrested and subsequently released against the provision of security.

2.24 When the above facts came to light, the plaintiff sought leave to, *inter alia*, amend its statement of claim. In essence, the plaintiff wished to assert, in place of its original claim,[6] an amended claim for, *inter alia*, breach of contract and/or negligence on the basis that the defendant had wrongfully switched the B/Ls without the plaintiff's knowledge and consent, in consequence of which the plaintiff was removed as a party to the contract of carriage and its rights and interests in the cargo extinguished ("the Amendment Application").

2.25 The defendant concurrently applied to set aside the writ and the warrant of arrest on grounds of material non-disclosure and, in the alternative, to strike out the action ("the Setting-aside Application").

A. The Amendment Application

2.26 S Mohan J allowed the Amendment Application. In coming to his decision, Mohan J considered that the plaintiff's proposed amendments to plead claims against the defendant in negligence and/or breach of contract and/or bailment were not legally or factually unsustainable or doomed to fail.

2.27 Mohan J also considered that the plaintiff's amended claim would *also* have fallen within the court's admiralty subject matter jurisdiction under s 3(1)(*h*) of the HCAJA;[7] as a result, it would have cured the defect in the writ in framing the wrong cause of action.

---

6 See para 2.23 above.
7 *The Jeil Crystal* [2021] SGHC 292 at [22].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

B. The Setting-aside Application

2.28 Mohan J agreed with the defendant that there had been material non-disclosure. The facts relied upon by the plaintiff in applying for the warrant of arrest were later disproved. As a result, the plaintiff needed to amend the statement of claim. In particular, the plaintiff had to amend the statement of claim to reflect the fact that the plaintiff was no longer in possession of the original B/Ls and that had endorsed the original B/Ls to its borrower when it applied for the warrant of arrest.

2.29 Mohan J held that the above facts were material and ought to have been brought to the attention of the assistant registrar hearing the application for the warrant of arrest. Mohan J further held that having it was clearly incumbent on the plaintiff to have checked that the assertion that it had possession of the original B/Ls endorsed to it was factually correct, given that it was fundamental to the title to sue asserted by the plaintiff when it issued the writ and applied for the warrant of arrest. The fact that the plaintiff contended that it honestly believed at the time the writ was issued that it was the lawful holder of the original B/Ls did not detract from the fact that objectively, there was, when the warrant of arrest was applied for, material non-disclosure to the court of the true state of affairs as far as the original B/Ls were concerned.

2.30 Having said that, Mohan J declined to exercise his discretion to set aside the writ on grounds of material non-disclosure for the following reasons:

(a) To begin with, the non-disclosure by the plaintiff and the circumstances in which it occurred, whilst "sailing close to the wind", did not appear to be deliberate or intended to mislead the court. Mohan J considered that it was "more likely" the result of negligence internally within the plaintiff's organisation.

(b) Secondly, having allowed the Amendment Application, the effect of the same was to cure any defect in the cause of action pleaded in the writ, and the amended claim would *also* have fallen within the court's admiralty jurisdiction.

C. Issue on appeal: Whether a warrant of arrest can be upheld on the basis of an amended claim and/or cause of action which was not originally pleaded

2.31 Subsequent to the dismissal of the Setting-aside Application, the defendant obtained leave to appeal against the same on the basis that the application raised a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage, and/

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

or a question of general principle to be decided for the first time. The issue in question was whether or not a warrant of arrest could be upheld on the basis of an amended claim and/or cause of action which was not originally pleaded by the arresting party at the time of the application for and the issue of the warrant of arrest ("the Issue").

2.32 Mohan J answered the Issue in the affirmative. In that regard, Mohan J disagreed with the defendant's contention that an amended statement of claim could not cure any defect that may have existed in the cause of action originally framed in the writ or warrant of arrest for a few main reasons.

2.33 Mohan J first held that the defendant's reliance on *The Amigo*[8] was misplaced. In that case, the plaintiff had agreed to sell the vessel *Amigo* to the defendant. The defendant buyer's cheque for the balance of the purchase price was dishonoured, leading to the plaintiff commencing two *in personam* actions against the defendant and its director personally for the balance of the purchase price.

2.34 The plaintiff in *The Amigo* subsequently commenced an action *in rem* against the vessel in Hong Kong. In its original pleading, the plaintiff pleaded that it had transferred 100% of the shares in the vessel in favour of the defendant's nominee. It also pleaded that it had been fraudulently induced by the director to accept the post-dated cheque and that, in pursuance of the contract and receipt of the cheque, the plaintiff delivered the vessel to the defendant as agent for the defendant's nominee. In the relief section of its statement of claim, the plaintiff claimed the balance of the purchase price and possession of the ship. On the basis of this pleading, the plaintiff also obtained a warrant of arrest against the vessel.

2.35 Following the arrest of the vessel, the defendant's solicitors wrote to the plaintiff's solicitors and informed them that the statement of claim did not disclose a reasonable cause of action. The defendant took the position that the claims for possession and for the balance of the purchase price were mutually exclusive, and the plaintiff's pleading itself claimed that ownership had been transferred to the defendant and a cheque for the balance of the purchase price was accepted. In response, the plaintiff amended its statement of claim, which it appeared to have been entitled to do so without leave under the Hong Kong court rules. Its amended pleading was that it "was and is the sole owner of the vessel".[9] It only allowed the defendant to carry out decoration work on the vessel. The plaintiff accepted the cheque on condition that the vessel would

8 [1991] HKCFI 64.
9 *The Jeil Crystal* [2021] SGHC 292 at [44].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

not be delivered, and the ownership of the vessel would be retained by the plaintiff until the cheque was honoured, and sought, *inter alia*, declarations that it was the lawful owner of the ship. The defendant then applied for the amendments to the statement of claim to be disallowed and the claim for possession to be struck out. It also applied for the warrant of arrest to be set aside on the grounds that (a) the statement of claim before amendment did not disclose any reasonable cause of action; and (b) there was material non-disclosure.

2.36 The Hong Kong Court of First Instance set aside the arrest on both grounds. In coming to his decision, Barnett J held that the claim as originally framed by the plaintiff, on the face of the unamended statement of claim, did not disclose any cause of action *giving rise to an action in rem*, that is, one for the balance of the purchase price. In contrast and on the facts of *The Jeil Crystal*, Mohan J held that it was undisputed that the original claim fell squarely within the admiralty jurisdiction of the court.

2.37 Mohan J also distinguished *The Amigo* on the basis that the plaintiff in that case had not disclosed, in its *ex parte* application for the arrest warrant against the vessel, that it had commenced the two other non *in rem* actions.

2.38 Secondly, the defendant's technical objection that the writ and warrant of arrest were not amended because the first prayer of the Amendment Application only sought to amend the statement of claim was dismissed. Mohan J held that an order allowing the plaintiff to amend the statement of claim and to uphold Warrant of Arrest 39 should be taken as consequentially allowing an amendment of the writ and the warrant of arrest as well, because (a) the statement of claim and warrant of arrest were "intractably interlinked";[10] and (b) O 20 r 8 of the revoked Rules of Court 2014 explicitly grants the court power to amend *any* document in the proceedings on its own motion or on the application of any party. Mohan J held that the claim in the unamended writ and warrant of arrest would constitute a defect or error in the proceedings, which were not fatal to the warrant of arrest. Mohan J thus held that he would have been prepared to exercise the power conferred by O 20 r 8 in any event.

2.39 Thirdly, Mohan J held that the "Relation Back Rule" (*viz* that an amendment duly made, with or without leave, takes effect, not from the date when the amendment is made, but the date of the original date of the original document which it amends; and this rule applies to every successive amendment of whatever nature and at whatever stage the amendment is made) supported the upholding of the warrant of arrest.

10 *The Jeil Crystal* [2021] SGHC 292 at [57].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

As the amendment to the statement of claim cured the pleading defect in the endorsement of claim in the writ, the application of the Relation Back Rule in that context was such that the endorsement to the writ was also treated as having been amended, or cured, retrospectively to the date of issuance of the writ.

2.40 Fourthly, the Amendment Application did not seek to introduce a new cause of action or facts that did not exist at the time the writ had been issued. At the material time, the switch of the original B/Ls had occurred and the cargo had been delivered to third parties and, as the plaintiff asserted, without its knowledge or consent. The cause of action under the amended claim thus existed at the material time.

2.41 The defendant has obtained leave to appeal to the Appellate Division of the High Court against the dismissal of the Setting-aside Application.

IV. *The Caraka Jaya Niaga III-11*

2.42 The third admiralty decision handed down by the General Division of the High Court in 2021, *The Caraka Jaya Niaga III-11*,[11] concerned the question of time bar under s 8 of the Maritime Conventions Act[12] ("MCA"). Cross-claims between the parties arose following a collision between the plaintiff's vessel and the defendant's demise-chartered vessel. The plaintiff issued and served an *in rem* writ against the defendant's vessel. The defendant then issued an *in rem* writ against the plaintiff's vessel but the writ lapsed before it was served.

2.43 The defendant later applied for an extension of time to maintain a counterclaim in the plaintiffs' action notwithstanding that the counterclaim was otherwise time barred under s 8(1) of the MCA. This application was subsequently dismissed and no appeal was filed by the defendant. Accordingly, the defendant's claim or counterclaim against the plaintiffs arising out of the collision remained time barred.

2.44 The defendant, having accepted 60% of the liability (by way of a consent judgment), sought to rely on the "single liability principle" (as set out in *The Khedive*)[13] to set off its liability to the plaintiff with its own loss for which the plaintiff would be liable for. The defendant then applied for the determination of a preliminary question of law or issue pursuant to

11 [2021] 4 SLR 611.
12 Cap IA3, 2004 Rev Ed.
13 [1882] 7 App Cas 795.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

O 33 r 2 of the revoked Rules of Court 2014 and/or the inherent powers of the court, namely, whether the defendant was able, on the basis of the agreed facts, to rely on or raise the single liability principle in diminution and/or reduction of the plaintiffs' claim in this action in circumstances where the defendant's counterclaim against the plaintiffs was time barred ("the Question"). This is the first time that *The Khedive* has been applied and affirmed in Singapore.

2.45 S Mohan JC answered the Question in the negative. In so doing, Mohan JC considered that the single liability principle posits that where two vessels are involved in a collision for which both are to blame, there does not exist two cross-liability in damages. Instead, there is only a single liability for the difference between the moiety of the larger claim and a moiety of the smaller claim. That difference is payable by the net payor to the net payee. This presupposes that both vessels are at fault, both ships suffered damage and both shipowners advanced claims and counterclaims or cross-claims against each other that were valid (that is, *that were not time barred*), be it in one suit or separate conjoined suits.

2.46 The single liability principle thus requires both the claim and cross-claim to be maintainable and not time barred. The single liability principle, as a procedural rule, does not apply or operate in a case where s 8 of the MCA applies to prevent the defendant from bringing or maintaining proceedings (including a counterclaim).

2.47 In that regard, Mohan JC also clarified that *The Khedive* and subsequent cases which deal with the single liability principle do not pertain to set off or constitute a form of set-off. Thus, if the defendant's counterclaim is time-barred under s 8 of the MCA, the single liability principle does not apply.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

SHIPPING LAW

Vivian **ANG**
LLB (Hons) (National University of Singapore),
LLM (University of Wales);
Advocate and Solicitor (Singapore);
Partner, Allen & Gledhill LLP.

2.48 In 2021, the High Court handed down one judgment relating to shipping law in *The Navios Koyo*,[14] and the Court of Appeal handed down two judgments, being the appeals in *The Navios Koyo*[15] and *The Luna*.[16]

I. *The Navios Koyo* – High Court's decision

2.49 The matter came before the High Court following an appeal against the decision of the assistant registrar who stayed the Singapore proceedings pursuant to s 6(1) of the International Arbitration Act[17] ("IAA") in favour of arbitration unconditionally. The key issue before the judge was whether or not the stay should be made conditional upon the defendant's waiver of its time-bar defence in the arbitration, where the imposition of the condition would effectively exclude the defendant's right to rely on a substantive defence in the arbitration.

A. Facts

2.50 This matter arose from three admiralty actions ("Admiralty Actions") commenced by the plaintiff, Batavia EXIMP & Contracting (S) Pte Ltd, against the defendant, the owner of the *Taikoo Brilliance* and her sister vessels, for the alleged misdelivery of a cargo of New Zealand pine logs ("the Cargo") that had been shipped under four bills of lading ("Bills of Lading") on board the *Taikoo Brilliance*, without presentation of the original Bills of Lading.

2.51 The defendant was the registered owner of the *Taikoo Brilliance*. At the time of the shipment of the Cargo, China Navigation Co ("China Navigation") had time chartered the *Taikoo Brilliance* from the defendant. Subsequently, China Navigation sub-chartered the *Taikoo Brilliance* to TPT Shipping Ltd ("TPT Shipping") under a voyage charterparty dated 3 July 2019 ("Voyage Charterparty").

14 [2021] SGHC 131.
15 [2022] 1 SLR 413.
16 See para 2.2 above.
17 Cap 143A, 2002 Rev Ed.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

2.52 The plaintiff came to be the holder of the Bills of Lading pursuant to a memorandum of understanding ("MOU") whereby the plaintiff extended financing to Amrose Singapore Pte Ltd ("Amrose") for its purchase of the Cargo.

2.53 Pursuant to the MOU, the plaintiff procured the Bank of Baroda to issue letters of credit to Amrose's supplier of the Cargo, TPT Forests Limited ("TPT Forests"), and as security for the financing, Amrose would provide the plaintiff with the Bills of Lading that covered the Cargo. TPT Forests accordingly endorsed and delivered the Bills of Lading to the order of the Bank of Baroda who, in turn, endorsed and delivered the Bills of Lading to the order of the plaintiff. The plaintiff received the Bills of Lading from the Bank of Baroda on or about 12 September 2019.[18]

2.54 The face of the Bills of Lading identified a charterparty dated 3 July 2019 whilst cl 1 on the reverse of the Bills of Lading provided as follows:[19]

> All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herewith incorporated.

2.55 On 15 September 2019, the *Taikoo Brilliance* arrived in India and commenced the discharge of the Cargo. By 23 September 2019, it appeared that the Cargo had been fully discharged as the *Taikoo Brilliance* departed Kandla Port on that day.[20]

2.56 When doubts arose in July 2020 about Amrose's ability to make payment as specified under the MOU, the plaintiff commenced the Admiralty Actions on 18 August 2020 against the *Taikoo Brilliance* and her sister vessels on the grounds that the defendant had failed to deliver the Cargo to the plaintiff upon the presentation of the Bills of Lading. The plaintiff also commenced similar actions in Malaysia and New Zealand on 20 August 2020 and 7 September 2020 respectively.[21]

2.57 The plaintiff alleged that at around the same time, it had also asked Amrose for a copy of the relevant charterparty, but Amrose had refused and instead assured the plaintiff that it would make payment as specified under the MOU. However, Amrose failed to do so.[22]

18 *The Navios Koyo* [2021] SGHC 131 at [5]–[6].
19 *The Navios Koyo* [2021] SGHC 131 at [13]–[14].
20 *The Navios Koyo* [2021] SGHC 131 at [8].
21 *The Navios Koyo* [2021] SGHC 131 at [9].
22 *The Navios Koyo* [2021] SGHC 131 at [10].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

2.58 On 18 September 2020, the plaintiff arrested the *Taikoo Brilliance*'s sister ship, the *Navios Koyo*. On 23 September 2020, China Navigation informed the plaintiff that the Voyage Charterparty contained a reference to arbitration in London. Later that day, the plaintiff requested a copy of the Voyage Charterparty from China Navigation. China Navigation sent a copy of the Voyage Charterparty the next day, on 24 September 2020.[23]

2.59 The defendant claimed that Voyage Charterparty was the charterparty that was incorporated into the Bills of Lading and that the relevant arbitration clause provided as follows:[24]

> *Any dispute arising from or in connection with this Charter Party shall be referred to arbitration in London*. In the event of such dispute, the parties shall endeavour to agree on the choice of a sole arbitrator or, failing agreement on the appointment of such an arbitrator within 14 days of one party calling on the other to do so, such sole arbitrator shall be appointed by the London Maritime Arbitrators Association. The decision of the sole arbitrator shall be final and binding. [emphasis in original]

2.60 On 6 November 2020, the defendant applied for a stay of the Admiralty Actions in favour of arbitration in London pursuant to s 6 of the IAA. On 17 December 2020, an unconditional stay of the Admiralty Actions was granted by the assistant registrar.[25] On 21 December 2020, the plaintiff filed a notice of appeal against the decision.[26]

2.61 It was common ground between the parties that the Admiralty Actions commenced on 18 August 2020 were within the applicable one-year time-bar period under the Hague–Visby Rules.[27] The plaintiff did not concede that its claims under the Bills of Lading in the London arbitral proceedings commenced on 22 December 2020 were time barred but was prepared to accept for the purposes of the stay applications that they were.[28]

23 *The Navios Koyo* [2021] SGHC 131 at [11]–[12].
24 *The Navios Koyo* [2021] SGHC 131 at [14].
25 *The Navios Koyo* [2021] SGHC 131 at [15].
26 *The Navios Koyo* [2021] SGHC 131 at [16].
27 25 August 1924; amended 23 February 1968 and 21 December 1979; effective 24 February 1982. See Art III rule 6 of the Hague–Visby Rules and the Hague Rules which were said to be incorporated by cll 2(a) and 2(b) of the Bills of Lading; see *The Navios Koyo* [2021] SGHC 131 at [17].
28 *The Navios Koyo* [2021] SGHC 131 at [18].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

B. Key issue

2.62 The grant of a stay was not contested. The key issue was whether on the facts, the stay order should be conditional on the waiver of defence of time bar.[29]

C. Plaintiff's case

2.63 It was not in dispute that in granting a stay under s 6(1) of the IAA, the court has unfettered discretion in imposing conditions whenever the justice of the case calls for it.

2.64 However, the plaintiff argued that the stay should be made conditional upon the defendant's waiver of the time-bar defence in arbitration. The plaintiff submitted that it had done all that was reasonable to protect its position in the given circumstances. It had filed protective writs in three jurisdictions within the one-year time period. It was unaware of the relevant terms of the Bills of Lading including the arbitration clause because Amrose had refused to provide it with a copy of the Voyage Charterparty despite its repeated demands, and its solicitors only gave the plaintiff's solicitors a copy of the Voyage Charterparty on 24 September 2020, by which time the claims were time barred. The plaintiff also submitted that the defendant's conduct after the arrest of the *Navios Koyo* demonstrated an intention to withhold information from the plaintiff such that the plaintiff's claims became time barred and, finally, that the grant of an unconditional stay would cause undue and disproportionate hardship to it.[30]

D. Decision of the High Court

2.65 In the High Court, Chua Lee Ming J agreed with the assistant registrar and refused to exercise his discretion to make the stay conditional on the time-bar waiver. Relying on *The Duden*,[31] his Honour recognised that in granting a stay under s 6(1) of the IAA, the court had an unfettered discretion in imposing conditions whenever justice called for it. However, as it is a wide discretionary power, it should be exercised with great caution and courts generally would be slow to interfere in the arbitration process. Chua J further noted that the imposition of a condition that the time-bar defence be waived could only be justified in "very special circumstances" as it would take away a substantive right

29 *The Navios Koyo* [2021] SGHC 131 at [16] and [22].
30 *The Navios Koyo* [2021] SGHC 131 at [23]–[24].
31 [2008] 4 SLR(R) 984.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

of one of the parties.[32] In his Honour's view, a plaintiff "seeking a time-bar waiver as a condition to a stay pending arbitration has to show that it is *unjust* to penalise it for having allowed its claim to become time-barred",[33] and two factors were relevant in this context:[34]

> (a) whether the plaintiff's own conduct in not commencing arbitration, before the claim was time-barred, was reasonable, and (b) whether the defendant should be faulted for the plaintiff's failure to commence arbitration proceedings before its claim became time-barred.

(1) The plaintiff's conduct was not reasonable

2.66 Chua J was of the view that the plaintiff had not done all that was reasonable in the circumstances to protect its position until it was too late and that the plaintiff had had ample time to obtain a copy of the Voyage Charterparty but did not do so. Even without asking for a copy of the Voyage Charterparty, the plaintiff would have known of the existence of an arbitration clause as cl 1 on the reverse of the Bills of Lading expressly referred to the incorporation of "the Law and Arbitration Clause" from a charterparty dated 3 July 2019. In any event, the plaintiff had also made no effort to contact the owner of the *Taikoo Brilliance* when Amrose allegedly refused to provide a copy of the Voyage Charterparty.[35]

2.67 Chua J was therefore of the view that the plaintiff's predicament was "due to its own failure to ascertain the terms applicable to the Bills of Lading"; and the plaintiff "had shown complete disinterest in finding out the terms that had been incorporated into the Bills of Lading until it was too late".[36]

(2) No evidence of the defendant's impropriety

2.68 The plaintiff alleged that the defendant would have been put on notice that it had no knowledge of the relevant charterparty terms, including the arbitration clause, and the defendant had chosen to remain silent until the plaintiff's claims were time barred and had not explained why it did not bring the existence of the charterparties or the arbitration clause to the plaintiff's attention before that.

2.69 Chua J rejected the plaintiff's complaints and found that there was no evidence of impropriety on the defendant's part. His Honour found

32 *The Navios Koyo* [2021] SGHC 131 at [20].
33 *The Navios Koyo* [2021] SGHC 131 at [21].
34 *The Navios Koyo* [2021] SGHC 131 at [21].
35 *The Navios Koyo* [2021] SGHC 131 at [25]–[28].
36 *The Navios Koyo* [2021] SGHC 131 at [31].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

that the defendant was under no obligation to bring the existence of the Voyage Charterparty or the arbitration clause to the plaintiff's attention. Besides, the plaintiff would have known from the Bills of Lading of the existence of the Voyage Charterparty as well as the existence or, at least, the potential existence of an arbitration clause. The defendant could not be expected to second guess the plaintiff's reasons for commencing the Admiralty Actions instead of arbitration.[37]

(3) Undue and disproportionate hardship to the plaintiff irrelevant

2.70 Chua J also dismissed the plaintiff's contention that an unconditional stay would cause undue and disproportionate hardship to it as its claims amounted to US$4,419,833.61. In his Honour's view, the value of the plaintiff's claims carried little weight in the context of a time-bar waiver. It was also irrelevant as to whether the plaintiff had acted reasonably in not commencing arbitration before the time-bar period and it would be wrong in principle to treat a plaintiff more favourably because of a higher value claim.[38]

(4) The Duden *and* The Xanadu *distinguished*

2.71 The facts in *The Duden*[39] and *The Xanadu*[40] were easily distinguishable. In *The Duden*, the bills of lading did *not* identify a charterparty and the plaintiff was only informed of the existence of the charterparty *after* its claim became time barred. In *The Xanadu*, the bill of lading was sufficiently ambiguous as to whether it had identified the relevant arbitration clause that was being invoked. In both cases, the court found that the plaintiff's conduct could not be faulted. The same, however, could not be said of the plaintiff in the present case as it clearly had notice of the Voyage Charterparty and the potential existence of an arbitration clause.[41]

2.72 Unsurprisingly, Chua J held that the plaintiff had not acted reasonably and failed to show very special circumstances to justify imposing a time-bar waiver as a condition.[42] The plaintiff appealed.

37 *The Navios Koyo* [2021] SGHC 131 at [33].
38 *The Navios Koyo* [2021] SGHC 131 at [35].
39 See para 2.65 above.
40 [1997] 3 SLR(R) 360.
41 *The Navios Koyo* [2021] SGHC 131 at [36]–[37].
42 *The Navios Koyo* [2021] SGHC 131 at [38].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

E. **The Navios Koyo** *–Decision of the Court of Appeal*

2.73 The Court of Appeal dismissed the appeal and held that the appellant had failed to protect its own commercial interests and could not expect the court to insulate it from the consequences of its own actions or inactions. More fundamentally, the court held that it would be exceedingly slow to carve out substantive defences, such as a defence of time bar, from the jurisdiction of an arbitral tribunal. This was reinforced by the fact that it was not in contention that this dispute ought properly to have proceeded to arbitration from the very outset, and it was thus not open to the appellant to seek the court's assistance to exclude defences or issues which the arbitral tribunal was entitled to determine given the terms of the bills of lading. [43]

2.74 The Court of Appeal laid down the applicable test for the imposition of conditions affecting substantive issues which ought properly to be adjudicated by the arbitral tribunal. The Court of Appeal also took the opportunity to clarify whether the quantum of a potentially time-barred claim in the arbitration can legitimately be relied upon as a proxy to determine the extent of "undue hardship" in assessing whether a waiver of a time-bar defence should be imposed as a condition of a stay,[44] a suggestion earlier made in *The Xanadu*.[45]

(1) Incorporation of the arbitration clause

2.75 The starting point of the Court of Appeal's analysis was that it was clear from the outset that the arbitration clause in the Voyage Charterparty had been incorporated into the Bills of Lading and any claims under the Bills of Lading would be subject to arbitration.[46] It is a well-established rule that a clause in a bill of lading that merely purports to incorporate the terms of a charterparty, without express reference to the arbitration clause, may *not* be sufficient to incorporate the arbitration clause, given that arbitration clauses are "ancillary" to the main contract to which they relate.[47] The Bills of Lading dated 6 and 12 August 2019 categorically stated that "[a]ll terms and conditions … of the Charter Party, dated overleaf, *including the Law and Arbitration Clause* are herewith incorporated" [emphasis added]. The charterparty referred to was specifically identified as the charterparty dated 3 July 2019. It was the appellant's own case that it received the Bills of Lading from the Bank of

---

43 *The Navios Koyo* [2022] 1 SLR 413 at [4].
44 *The Navios Koyo* [2022] 1 SLR 413 at [5].
45 [1997] 3 SLR(R) 360 at [6].
46 *The Navios Koyo* [2022] 1 SLR 413 at [20].
47 *The Navios Koyo* [2022] 1 SLR 413 at [21].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Baroda on or about 12 September 2019, and it must therefore have been aware, from 12 September 2019, that any claims under the Bills of Lading would be subject to arbitration.[48]

2.76 However, regardless of the reasons for the wording of the incorporation clause, the Court of Appeal was of the view that the appellant was well aware that the Voyage Charterparty's terms had been incorporated into the Bills of Lading by its subsequent conduct. For instance, by stating in its affidavit in support of the arrest of the *Navios Koyo* that the appellant neither had a copy of the charterparty nor was aware of its terms, it was clear that the appellant knew that the terms of the Voyage Charterparty had been incorporated into the Bills of Lading. The fact that it did not know the *precise* terms of the same was merely a consequence of its own conduct in not asking for a copy of the charterparty earlier.[49]

(2) Factors governing the court's exercise of discretion to impose conditions on a stay

2.77 The Court of Appeal laid down the following factors in determining whether a party seeking a stay has proper justification for the imposition of any stay:[50]

> (a) the reasons for the conditions being sought, and whether those reasons could have been obviated by the applicant's own conduct; (b) whether the need for any of the conditions was contributed to or caused by the conduct of the respondent; and (c) the substantive effect on the parties of any condition that the court may impose.

2.78 The Court of Appeal considered it would not be strictly necessary to consider if the plaintiff's conduct was "unreasonable" in failing to commence the arbitration within time.[51]

(3) Distinction between administrative conditions and conditions which determine substantive issues

2.79 Further, when considering the substantive effect of the condition to be imposed, the Court of Appeal considered that a distinction had to be drawn between conditions which were merely administrative in nature and which gave effect to the arbitration agreement, and conditions which purport to determine a substantive issue that was reserved to the

48 *The Navios Koyo* [2022] 1 SLR 413 at [22].
49 *The Navios Koyo* [2022] 1 SLR 413 at [22].
50 *The Navios Koyo* [2022] 1 SLR 413 at [30].
51 *The Navios Koyo* [2022] 1 SLR 413 at [30].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

arbitration. The nature of the condition sought in the present case was therefore significant. Given that the issue of time bar was a substantive defence to be determined in the arbitration and the fact that the appellant itself had joined issue over this point, there did not appear to be any justification to remove that issue from the scope of the arbitration.[52]

2.80 However, the Court of Appeal was careful to point out that it was not going so far as to suggest that all conditions sought which do not solely facilitate or give effect to the arbitration agreement are necessarily impermissible. Rather, regard must always be had to all of the surrounding facts and circumstances. Conditions which do not merely facilitate or seek to give effect to the arbitration agreement, however, "ought to be subject to a heightened level of scrutiny, and the threshold for such conditions to be granted may be said to be considerably higher than that applicable to essentially administrative conditions".[53]

(4) Quantum of a claim is irrelevant

2.81 Although the appellant had conceded that the quantum of the claim was irrelevant, the Court of Appeal nonetheless went on to confirm that "the size of the claim is *not* relevant in determining whether hardship would be engendered if a condition was not imposed" as "it would be impossible to conclusively state *when* the line would be crossed such that a claim was sizeable enough to warrant the imposition of a condition that a time-bar defence be waived" [emphasis in original; other emphasis omitted].[54] Hardship also worked both ways and imposing a condition that a time-bar defence be waived would operate in absolute terms which meant that the size of a claim "would have highly dramatic and potentially disproportionate effects if deemed to be relevant".[55]

F. Conclusion

2.82 The appeal was accordingly dismissed. The Court of Appeal succinctly concluded that the reasons underpinning the appellant's seeking of the condition lay entirely upon its own dilatory conduct and failure to exercise due diligence, there being no suggestion of any wrongdoing by the respondent which led to or contributed to the appellant's failure or omission. Moreover, "imposing the condition sought by the appellant would deprive the respondent of an *accrued* and *substantive* defence" and "[t]here did not appear to be any proper justification for doing so"

52 *The Navios Koyo* [2022] 1 SLR 413 at [27]–[28].
53 *The Navios Koyo* [2022] 1 SLR 413 at [29].
54 *The Navios Koyo* [2022] 1 SLR 413 at [42].
55 *The Navios Koyo* [2022] 1 SLR 413 at [42].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

[emphasis in original].[56] As conceded by the appellant, the size of its claim was also irrelevant in determining whether the court should grant the condition.[57]

G. *Comment*

2.83 This judgment demonstrates that where a bill of lading expressly incorporates a charterparty and, in particular, its "Law and Jurisdiction" clause, it behoves the claimant to make all efforts to obtain a copy of the charterparty as soon as possible to enable it to commence proceedings in the correct forum before the expiry of the applicable limitation period. *The Navios Koyo* is a cautionary tale to claimants that, on an application to stay proceedings in favour of arbitration, the Singapore court is very unlikely to impose any condition to waive a time-bar defence which is substantive in nature where the claimant is the author of its own misfortune.

II. *The Luna*

A. *Introduction*

2.84 In *The Luna*,[58] the Court of Appeal had the opportunity to consider the novel issue as to when a document titled "bill of lading" is not a bill of lading. In a landmark judgment, the Court of Appeal concluded that the bills of lading issued by local bunker barge operators were intended to be neither contracts of carriage nor documents of title and thus fell short of the requirements of being "true" bills of lading.

B. *Facts*

2.85 The appellants in the two appeals[59] dealt with in *The Luna* were respectively the demise charterers of the bunker barge *Luna* and the owners of the bunker barges *Zmaga, Nepamora, Star Quest, Petro Asia* and *Arowana Milan* (collectively "Vessels"). The Vessels were used to supply bunker fuel to other vessels.[60]

2.86 The respondent was Phillips 66 International Trading Pte Ltd, whose business activities involved the trading and supplying of bunker fuel. This entailed purchasing fuel oil in bulk, storing and blending the

56 *The Navios Koyo* [2022] 1 SLR 413 at [43].
57 *The Navios Koyo* [2022] 1 SLR 413 at [39].
58 See para 2.2 above.
59 Civil Appeal No 22 of 2020 and Civil Appeal No 28 of 2020.
60 *The Luna* [2021] 2 SLR 1054 at [7].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

fuel oil in storage tanks leased from Vopak Terminal Pte Ltd ("Vopak Terminal") and subsequently selling the fuel oil from Vopak Terminal.[61] In some of these sales, the bunkers were sold on a free on board ("FOB") basis for delivery to bunker barges. The bunker fuel loaded on board these bunker barges would then be on-sold by the respondent's customers to ocean-going vessels in Singapore. Such sales were known as the sale of "ex-wharf bunkers".[62]

2.87 In the present case, the respondent sold bunker fuel FOB to OW Bunker Far East (Singapore) Pte Ltd and Dynamic Oil Trading (Singapore) Pte Ltd (collectively "Buyers") via three sale contracts ("Sale Contracts"). The Buyers were the subsidiaries of OW Bunker A/S ("OW Bunker"). The respondent's "General Terms and Conditions for Sales of Marine Fuel February 2013" ("GTC") were incorporated into the Sale Contracts. Further, the Sale Contracts provided that payment for the bunkers would only become due upon the expiry of 30 calendar days after the certificate of quantity ("CQ") date, that is, the Buyers purchased the bunkers from the respondent on 30 days' credit.[63]

2.88 Pursuant to the Sale Contracts, the Buyers nominated the Vessels for loading of the bunkers at Vopak Terminal on various dates between 10 October 2014 and 29 October 2014. Upon loading, Vopak Terminal generated several documents in respect of the bunkers, which also included a CQ and a document issued in triplicate titled "Bill of Lading" ("Vopak BLs").[64] The Vopak BLs were required to be signed and stamped by the master of the Vessels and its main terms were:[65]

> …
>
> SHIPPED in apparent good order and condition by **PHILLIPS 66 INTERNATIONAL TRADING PTE LTD** on board the **SINGAPORE** vessel called [name of vessel] whereof [captain's name] is Master of this present voyage now at the port of **PULAU SEBAROK, SINGAPORE** and bound for **BUNKERS FOR OCEAN GOING VESSELS**
>
> …
>
> Remarks:
>
> which are to be delivered in the like good order and condition at the aforesaid port of **BUNKERS FOR OCEAN GOING VESSELS** or so near as the vessel can safely get, always afloat, unto **TO THE ORDER OF PHILLIPS**

61 *The Luna* [2021] 2 SLR 1054 at [6].
62 *The Luna* [2021] 2 SLR 1054 at [6].
63 *The Luna* [2021] 2 SLR 1054 at [8]–[9].
64 *The Luna* [2021] 2 SLR 1054 at [10].
65 *The Luna* [2021] 2 SLR 1054 at [11].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> **66 INTERNATIONAL TRADING PTE LTD** or assigns weight, quantity or quality unknown.
>
> Not responsible for leakage, deterioration of quality and contamination. Freight and all other conditions and expectations as per Chartered stated dated in **PAYABLE AS AGREED**
>
> In witness whereof, the Master of said ship has signed THREE (3) ORIGINAL Bill of Lading all of this tenor and date, one of which being accomplished, the others to stand void.
>
> …
>
> [emphasis in original]

2.89 After the completion of each loading, Vopak Terminal would send the CQ, the Vopak BLs and other documents to the respondent. Upon receipt of these documents, the respondent would send the CQ to the Buyers while it remained in possession of the Vopak BLs until after payment was received. In this case, the respondent issued its invoices for the bunker shipments sometime after the bunkers were loaded onto the Vessels.[66]

2.90 In the meantime, several days after loading, the Vessels delivered the bunkers to various ocean-going vessels without production of the original Vopak BLs as the Vopak BLs were still in the respondent's possession at all times. Some of the Vessels returned to Vopak Terminal or went to another terminal in Singapore to load additional bunkers while carrying the previous shipment of bunkers, resulting in the bunkers being commingled.[67]

2.91 Sometime in November 2014, OW Bunker became insolvent; consequently, the Buyers defaulted on payment. The respondent demanded delivery of the bunkers from the appellants on the basis that it was the shipper and/or person entitled to possession of the bunkers and the holder of the Vopak BLs. Shortly thereafter, the respondent arrested the Vessels.

C. Application for summary judgement

2.92 After the arrests of the Vessels, the respondent applied for summary judgment of its claim but failed, and the appellants were given unconditional leave to defend. The respondent appealed against

66 *The Luna* [2021] 2 SLR 1054 at [12].
67 *The Luna* [2021] 2 SLR 1054 at [13].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

the assistant registrar's decision but the High Court in *The Star Quest*[68] upheld the assistant registrar's decision. One of the key issues raised in the summary judgment proceedings was whether the Vopak BLs were to be properly regarded as contractual documents and/or as documents of title at law.

D. Decision of the High Court

2.93 In the High Court, the respondent argued that the appellants were liable to it in contract, conversion, bailment, negligent misrepresentation, and/or for damage to its reversionary interest. The appellants denied these claims and relied on defences such as want of authority, estoppel and custom. Furthermore, the appellants counterclaimed against the respondent for wrongful arrest.[69]

2.94 In an oral judgment, the judge allowed the respondent's claim in contract and dismissed the appellants' counterclaims for wrongful arrest. As the judge had found for the respondent on the basis of its claim in contract, he did not consider the respondent's alternative causes of action.[70]

E. Decision of the Court of Appeal

2.95 The Court of Appeal allowed the appeal save for the appeal by one of the appellants against the judge's dismissal of the counterclaim for wrongful arrest. The Court of Appeal relied on the judge's factual findings and held that the Vopak BLs were not contracts of carriage or documents of title, and that the respondent's various claims against the appellants must fail.

E. Key issues

2.96 The key issues before the Court of Appeal were:

(a) "whether, in addition to being a receipt for the shipment of the bunkers, the Vopak BLs were also intended to function as contracts of carriage and/or as documents of title";[71] and

68 [2016] 3 SLR 1280 ("*The Star Quest*"). See the review of *The Star Quest* in (2016) 17 SAL Ann Rev 51 at 69–73, paras 2.55–2.68.
69 *The Luna* [2021] 2 SLR 1054 at [19].
70 *The Luna* [2021] 2 SLR 1054 at [22].
71 *The Luna* [2021] 2 SLR 1054 at [29].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(b) whether the appellants were liable to the respondent in its alternative claims for (i) bailment; (ii) negligent misrepresentation; and/or (iii) damage to reversionary interest.

(1) Whether the Vopak BLs were contractual documents and operated as documents of title

2.97 The central issue in this appeal concerned the precise nature of the Vopak BLs. The Court of Appeal began its analysis by observing that the modern bill of lading served three functions: it operated as (a) a receipt by the carrier acknowledging the shipment of goods in a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage; and (c) a document of title to the goods.[72]

2.98 In considering the nature of the Vopak BLs, the Court of Appeal clarified that the parol evidence rule and the principles in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*[73] did not apply to cases which involved ascertaining the *existence* of a contract as opposed to cases involving the *interpretation* of a contract.[74] Therefore, when ascertaining whether the parties intended the Vopak BLs to have contractual force and to operate as documents of title, the court was entitled to take into account all the relevant circumstances of the case in order to draw the appropriate inferences as to what the parties objectively intended by issuing the bills of lading. Furthermore, the court may have regard not only to the perspectives of the shipper and the carrier but also to the perspectives of other parties who were generally known to use the Vopak BLs.[75]

2.99 Having set out the relevant principles, the Court of Appeal considered the following:

(a) the role and function of the Vopak BLs;

(b) the terms of the Vopak BLs;

(c) the allocation of risk; and

(d) the appellants' defences.

72 *The Luna* [2021] 2 SLR 1054 at [29].
73 [2008] 3 SLR(R) 1029.
74 *The Luna* [2021] 2 SLR 1054 at [30]–[38].
75 *The Luna* [2021] 2 SLR 1054 at [38] and [40].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(a) Role and function of the Vopak BLs

(1) Underlying sale arrangements

2.100 The Court of Appeal started its analysis by examining the underlying sales arrangements between the Buyers and the respondent as it considered that the Vopak BLs were "inextricably linked" to the Sale Contracts.

2.101 The court cautioned at the outset, however, that:[76]

> … it is not in *every* case that it will be relevant and permissible to examine the terms of the sale contracts or the underlying sale arrangements in construing the terms of the bill of lading. It bears emphasis that in this case, the court is ascertaining the *nature or legal effect* of the Vopak BL and not simply construing its terms. Thus, the court is entitled to take into account a broader range of circumstances. [emphasis in original]

2.102 The Court of Appeal noted five important features of the Sale Contracts and the surrounding commercial arrangements:

(a) Pursuant to cl 2.1(a) of the GTC, the Buyers were given a 30-day credit period by the respondent who thereby accepted the risk of default *vis-à-vis* the Buyers.[77]

(b) Payment was required to be made by the Buyers against presentation of the respondent's commercial invoice and the original CQ. If the CQ was not available, the respondent could present its invoice with a letter of indemnity ("LOI") for payment, a feature which the Court of Appeal considered "unusual" as an LOI was typically provided by the buyer to the carrier.[78]

(c) Under the GTC, title to and possession of the bunkers passed to the Buyers upon loading.[79]

(d) There was a conspicuous absence of any reference to bills of lading in the terms of the Sale Contracts and the GTC.[80]

(e) The parties' commercial arrangement was that, following the loading of the bunkers on board the Vessels, it was the Buyers and not the respondent who would give instructions to the appellants to deliver the bunkers to ocean-going vessels, and the respondent was well aware that these deliveries would be

76 *The Luna* [2021] 2 SLR 1054 at [42].
77 *The Luna* [2021] 2 SLR 1054 at [43].
78 *The Luna* [2021] 2 SLR 1054 at [44].
79 *The Luna* [2021] 2 SLR 1054 at [45]–[46].
80 *The Luna* [2021] 2 SLR 1054 at [47].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

made quickly after loading and before the expiry of the 30-day credit period. As a result, the respondent would not have been able to retain possession of the bunkers as they would have been delivered to ocean-going vessels.[81]

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

2.103 The Court of Appeal next considered the Vopak BLs *vis-à-vis* the respondent and the Buyers. The Court of Appeal reaffirmed the judge's findings that in light of the sale arrangements described above, the respondent had no real obligation to transfer the Vopak BLs to the Buyers for payment. Furthermore, the Buyers were not expecting to receive the Vopak BLs to claim delivery of the bunkers from the appellants as the Vopak BLs were not indorsed to the Buyers until after the expiry of the 30-day credit period. It therefore followed that the respondent and the Buyers could not have intended for the Buyers to be able to lawfully deal with the bunkers *only* upon presentation of an original Vopak BL. Instead, the Buyers were allowed to deal with the bunkers as soon as they were loaded on board the Vessel, with payment being made 30 days later.[82]

2.104 The Court of Appeal held that it would make no commercial sense for a buyer to negotiate for credit terms if it could not deal with the goods prior to payment. The Court of Appeal also noted the judge's observation that "the local bunker trade … relie[d] on quick turnaround and delivery of bunkers to ocean going vessels".[83]

2.105 The Court of Appeal also rejected the respondent's argument that the Buyers could have paid for the bunkers earlier if they wished to take delivery of it, as it would defeat the purpose of negotiating and obtaining a credit period. The Court of Appeal further held that it would make no sense for a buyer to pay *early* as the sole purpose of a credit period is to allow the buyer to pay *later* by the end of the credit period.[84]

2.106 The Buyers were permitted to deal with the bunkers during the period while the Vopak BLs remained with the respondent. It was clear that as between the respondent and the Buyers, the Vopak BLs were non-essential documents with no contractual force or effect as a contract of carriage or as a document of title. They did not and could not serve the traditional functions of a bill of lading. As observed by the judge below, the Vopak BLs did not allow the Buyers to claim delivery of the cargo

81 *The Luna* [2021] 2 SLR 1054 at [48].
82 *The Luna* [2021] 2 SLR 1054 at [49].
83 *The Luna* [2021] 2 SLR 1054 at [50].
84 *The Luna* [2021] 2 SLR 1054 at [50].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

by presenting the bill of lading and ensuring that the carrier would only deliver the cargo to the lawful holder of the bill of lading, did not facilitate the sale and purchase of the bunkers while they were onboard the Vessels, and were not presented by the respondent in exchange for payment. At best, the Vopak BLs assisted the respondent and the Buyers to reflect the quantity of bunkers allocated to each sub-parcel.[85]

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

2.107 The Court of Appeal noted that typically "a carrier that issues a bill of lading assumes a fundamental obligation to deliver the goods at destination only against presentation of the bill".[86] However, in light of the respondent's commercial arrangements with the Buyers, the respondent knew that the Vopak BLs would not allow it to regain possession of the bunkers it had sold by presenting the same to the appellants and demanding delivery. Although the appellants were not parties to the Sale Contracts, the point remained that the respondent was such a party and would have known of this state of affairs.[87]

2.108 Looking at the (a) dates of the Vopak BLs (which corresponded to the loading dates); (b) dates when deliveries were made to various ocean-going vessels; (c) date of expiry of the 30-day credit period for each shipment; and (d) dates when the respondent sought to demand delivery of the bunkers from the appellants, the Court of Appeal found that it was apparent that the bunkers were delivered to various ocean-going vessels very shortly after they were loaded on board the Vessels, well *before* the expiry of the 30-day credit period. There were also occasions of commingling of bunkers and cases where the Vessels returned to load another shipment of bunkers even before the 30-day credit period had expired. The Court of Appeal was of the view that this would have indicated to the respondent that the bunkers were being discharged shortly after loading without production of the Vopak BLs, since it was still in possession of the Vopak BLs at the material time. Notwithstanding that its purported rights as the lawful holder of the Vopak BLs were ostensibly being infringed, the respondent only sought to demand delivery of the bunkers under the Vopak BLs *after* it found out about the Buyers' insolvency, that is, the very risk it had accepted when it extended 30-day credit terms to the Buyers. All of this showed that the respondent had always looked to the Buyers for payment instead of regarding the Vopak BLs as security against the risk of non-payment.

85 *The Luna* [2021] 2 SLR 1054 at [51].
86 *The Luna* [2021] 2 SLR 1054 at [53].
87 *The Luna* [2021] 2 SLR 1054 at [53].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Notably, this would also have been known by the appellants, who, as the carriers loading and discharging the bunkers bought and sold, were active participants in the commercial arrangements between the respondent and the Buyers.[88]

2.109 Neither the respondent nor the appellants could therefore have intended for the delivery of the bunkers to be made only upon the presentation of an original Vopak BL. They were not the "key" to the warehouse as such. Instead, all parties had conducted themselves on the basis that the Buyers could direct the Vessels to deliver the bunkers to various ocean-going vessels immediately after loading, without any involvement from the respondent, and the Vopak BLs could not have offered the respondent any security against default by the Buyer that typical bills of lading would. In sum, the parties' commercial arrangements indicated that they had not intended for the Vopak BLs to function as typical bills of lading. [89]

(b) Terms of the Vopak BLs

(i) Destination of discharge

2.110 The Vopak BLs did not specify a port of discharge and described as its destination "BUNKERS FOR OCEAN GOING VESSELS". The provision of a destination for the discharge of the bunkers was essential for the Vopak BLs to function as contracts of carriage and documents of title. The judge below held that the phrase did specify a destination of discharge; thus, the Vopak BLs were not void for uncertainty as the judge's interpretation of the phrase was that the bunkers were to be delivered to ocean-going vessels in or around the port of Singapore.[90]

2.111 However, the Court of Appeal disagreed and held that the judge's interpretation was, first, inaccurate in that one of the Vessels was not permitted to operate within Singapore limits whilst the other Vessels were not restricted to operating only within Singapore port limits.

2.112 Second, the finding was too broad as there could be hundreds of ocean-going vessels within the port limits of Singapore on any day. Whilst the respondent argued that any uncertainty could be resolved by nominating a destination by the respondent or its indorsees, the Court of Appeal rejected the argument as the respondent or its indorsees had no such right or obligation to nominate a destination for the bunkers after

88 *The Luna* [2021] 2 SLR 1054 at [55].
89 *The Luna* [2021] 2 SLR 1054 at [56].
90 *The Luna* [2021] 2 SLR 1054 at [58].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

the issuance of the Vopak BLs, and in fact never made any such choice in practice and did not have any role in making such choices in the context of the relevant contractual arrangements.[91]

2.113 The Court of Appeal held that the insertion of the phrase “BUNKERS FOR OCEANGOING VESSELS” where a destination would normally be indicated suggested that the parties intended to omit a destination altogether. This was wholly consistent with the commercial context, which is that the bunker barges operated essentially as “mobile petrol kiosks” and were not intended for carriage from one port to another in the traditional sense. This therefore illustrated the point that the Vopak BLs were not intended to function as contracts of carriage and/or as documents of title. The omission of a destination in the Vopak BLs therefore represented a significant departure from ordinary practice; as a result, the Court of Appeal held that it may be inferred that the parties did not intend for the Vopak BLs to operate as typical bills of lading, either in terms of being contracts of carriage or operating as documents of title.[92]

(ii) Multiple deliveries

2.114 The Court of Appeal found that another incompatible feature of the Vopak BLs was that the parties contemplated delivery of the bunkers to *multiple* ocean-going vessels and considered that the fact that multiple deliveries were contemplated was entirely in line with the deliberate omission to specify a destination of discharge. This reinforced the court’s view that the Vopak BLs were not intended to operate as typical bills of lading.[93]

(c) Allocation of risk

2.115 Turning to this factor, the Court of Appeal held that by extending credit to the Buyers and where the Sale Contracts deliberately did not call for the use of traditional bills of lading, the respondent had accepted the risk of non-payment by the Buyers. It would also be untenable for the respondent to claim that the appellants had agreed to assume the risk of non-payment by the Buyers as it would shift the risk of the burden of the Buyers’ insolvency on the appellants. Further, the Court of Appeal held that there was no reason for the appellants, as carriers, to assume the risk

91 *The Luna* [2021] 2 SLR 1054 at [60].
92 *The Luna* [2021] 2 SLR 1054 at [60]–[63].
93 *The Luna* [2021] 2 SLR 1054 at [64]–[69].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

of non-payment by the Buyers under an entirely separate contract which they were *not privy to*.[94]

(d) Appellants' defences

2.116 The Court of Appeal did not consider it necessary to consider the appellants' other defences, having concluded that the Vopak BLs were not contracts of carriage or documents of title. It said, however, that it did not see any reason to disturb the judge's finding that the other defences raised by the appellants were not sustainable.

F. Rejection of the respondent's alternative claims

2.117 As the respondent's claim in contract had failed, the Court of Appeal went on to deal with the respondent's alternative claims and rejected all of them.

(1) Bailment

2.118 The respondent's cause of action in bailment was that upon having shipped the bunkers on board the Vessels, it had bailed the bunkers to the appellants and hence was entitled to demand delivery of the same in accordance with the terms of the bailment set out in the Vopak BLs. The respondent also relied on the order clause in the Vopak BLs to claim that there was an attornment by the appellants in favour of the respondent. The Court of Appeal rejected the respondent's argument and held that the title to and possession of the bunkers had passed to the Buyers upon the loading of the Vessels. Thus, the bunkers that had been loaded were not the respondent's goods and no relationship of bailment arose between the respondent and the appellants. The Court of Appeal further held that there was nothing to suggest that there was an arrangement of bailment between the respondent and the appellants.[95]

2.119 The Court of Appeal also held that the appellants had not attorned in favour of the respondent. The appellants continued to approach the charterers or the Buyers for instructions regarding the discharge of the bunkers. Furthermore, the order clauses in the Vopak BLs, when read together with the other terms of the Vopak BLs and the parties' commercial arrangements, did not constitute an acknowledgment by the appellants of any title to the goods or entitlement to delivery on the

94 *The Luna* [2021] 2 SLR 1054 at [47] and [70]–[72].
95 *The Luna* [2021] 2 SLR 1054 at [79]–[80].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

respondent's part. Thus, the Court of Appeal dismissed the respondent's claim in bailment.[96]

(2) Negligent misrepresentation

2.120 The respondent argued that the appellants had misrepresented their state of mind or intention at the time of issuing the Vopak BLs, in that although the Vopak BLs looked like a typical bill of lading, the appellants never intended to comply with the express terms therein and the respondent had relied on this misrepresentation by regarding the Vopak BLs as typical bills of lading.[97]

2.121 However, the Court of Appeal held that a reasonable person in the position of the respondent would not have construed the Vopak BLs as constituting a representation by the appellants to hold the bunkers to the respondent's order and only deliver the bunkers upon presentation of the original Vopak BL. Therefore, there was no misrepresentation as alleged by the respondent. Furthermore, the respondent was aware that the appellants were delivering the bunkers to ocean-going vessels without presentation of an original Vopak BL. Despite this, the respondent continued to load the bunkers on board the Vessels. It therefore could not be said that there was any reliance on the alleged misrepresentations. Hence, the respondent's claim in misrepresentation also failed.[98]

(3) Damage to reversionary interest

2.122 The respondent argued that the appellants had interfered with its reversionary interest as co-owner of several bunkers that had been commingled by wrongfully discharging the same. However, the Court of Appeal rejected this argument as all of the other respondent's claims were rejected; therefore, there was no wrongful act on the part of the appellants that could serve as a basis for the respondent's claim for damage to its reversionary interest in relation to the commingled bunkers.[99]

96 *The Luna* [2021] 2 SLR 1054 at [81].
97 *The Luna* [2021] 2 SLR 1054 at [82].
98 *The Luna* [2021] 2 SLR 1054 at [83].
99 *The Luna* [2021] 2 SLR 1054 at [84] and [88].

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

G. *Wrongful arrest*

2.123 For completeness, it should be mentioned that the wrongful arrest claim[100] was also dismissed by the Court of Appeal. Whilst the respondent's arguments on the points of law did not pass muster, it could not be said that the claims were so unwarrantably brought, or brought with so little colour, or so little foundation as to imply malice or gross negligence. Furthermore, the matters relied upon by the appellants would not have delivered a "knock out blow" to the respondent's claims. In fact, the High Court found at the summary judgment stage that the respondent had shown a *prima facie* case and the Court of Appeal's extensive discussion indicated that these were not matters that would have justified a summary dismissal of the respondent's claims.[101]

H. *Comment*

2.124 The Court of Appeal's decision in *The Luna*[102] is a landmark decision offering welcome clarification on the circumstances in which a document which calls itself a bill of lading may not be regarded as such at law in that it fails to fulfil the well-known functions of being a receipt of shipment, evidence of a contract of carriage and a document of title.

2.125 The key points emerging from the decision are that whilst the bill of lading is independent of the sale contract, in that the parties are different and the terms are different, the two separate and independent contracts operate in tandem and the terms of the sale contract will usually be useful to elucidate the true legal effect of the accompanying bill of lading. The Court of Appeal also drew a distinction in the application of the parol evidence rule between ascertaining the existence of a contract and the interpretation of a contract. In the former situation, the court is entitled to take into account all the relevant circumstances of the case in order to draw the appropriate inferences as to what the parties objectively intended by the issuance of the bills of lading, and should have regard to the perspectives of not only the parties to the bill of lading but also other parties who are generally known to use the bills of lading in determining whether a document is a true bill of lading. On the facts of this case, the

---

100 Only the appellants in Civil Appeal No 28 of 2022 maintained its counterclaim against the order of the judge below who had dismissed the counterclaim for damages for wrongful arrest.

101 *The Luna* [2021] 2 SLR 1054 at [84] and [91].

102 See para 2.2 above.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Court of Appeal found that the Vopak BLs were not true bills of lading because they simply were never intended to be.

© 2022 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.