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Case Comment

THE "BILL OF LADING" SEEN IN THE SINGAPORE BUNKER INDUSTRY IS NOT THE KEY TO THE WAREHOUSE

The Luna [2021] 2 SLR 1054

[2022] SAL Prac 1

The Luna [2021] 2 SLR 1054 is a landmark decision on formation of contracts. The decision makes it clear that different principles apply when determining whether a contract exists and when interpreting the terms of a contract. This article highlights the key takeaways of the Court of Appeal's decision.

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I. Introduction

1 In *The Luna*,[1] the central issue was whether a document titled "bill of lading" issued by local bunker barge operators was a typical bill of lading. Applying the more liberal principles in relation to contract formation (as opposed to the more restrictive principles in relation to interpretation of contract), the Court

1 [2021] 2 SLR 1054.

of Appeal found that the document was neither a contract of carriage nor a document of title.

2 *The Luna* is also one of few local authorities which discuss the tort of damage to reversionary interest. It also clarifies the procedural steps an appellant should take where a costs decision is delivered after a notice of appeal has already been filed in respect of the substantive decision.

II. *The Luna*

A. Facts

3 The respondent was Phillips 66 International Trading Pte Ltd, which was involved in the trading and supply of bunker fuel. This entailed purchasing fuel oil in bulk, storing and blending the fuel oil in storage tanks leased from Vopak Terminal Pte Ltd ("Vopak Terminal") and then selling the fuel oil from Vopak Terminal.

4 The bunker fuel in question (the "Bunkers") was sold by the respondent to subsidiaries of OW Bunker A/S (the "Buyers") on 30-day credit terms shortly before OW Bunker A/S's insolvency in 2014.

5 The appellants were the demise charterers and owners of various bunker barges which delivered the Bunkers from Vopak Terminal to ocean-going vessels which called at Singapore for refuelling.

6 When the barges attended at Vopak Terminal for loading of the Bunkers, Vopak Terminal generated several documents in respect of the Bunkers, including a certificate of quantity and a document issued in triplicate titled "Bill of Lading" (the "Vopak BLs"). On their face, these Vopak BLs resembled traditional bills of lading in many ways and were required to be signed and

stamped by the barge's master. The main terms of the Vopak BLs read as follows:[2]

> …
>
> 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 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]

7 The Bunkers were then delivered by the barges to various ocean-going vessels within several days after loading without the Vopak BLs being surrendered in exchange. Shortly after delivery, OW Bunker A/S became insolvent and the respondent arrested the appellants' barges for misdelivery of the Bunkers.

B. The Star Quest

8 Subsequently, the respondent applied for summary judgment. The application was dismissed at first instance. On appeal, the assistant registrar's decision was upheld by the High

2 *The Luna* [2021] 2 SLR 1054 at [11].

Court in *The Star Quest*.[3] A key contested issue in the summary judgment proceedings was whether the Vopak BLs were typical bills of lading. The respondent argued that the Vopak BLs were contractual documents and/or documents of title. The appellants' position was that the Vopak BLs were mere documents evidencing receipt.

C. The High Court's decision

9 Following an 18-day trial, the trial judge delivered an oral judgment in favour of the respondent. It is noteworthy that the trial judge acknowledged that the Vopak BLs served none of the traditional functions of a bill of lading. The trial judge also noted that "the [Vopak] BLs were not important to the Buyers" and that the respondent "had no real obligation to transfer the [Vopak] BLs to the Buyers".[4] However, the trial judge ultimately held that, notwithstanding all these, "the Vopak BLs had contractual force and functioned as typical bills of lading".[5]

D. The Court of Appeal's decision

10 On appeal, relying on the trial judge's findings of fact, the High Court decision was reversed. The Court of Appeal found that the Vopak BLs did not function as contracts of carriage and did not operate as documents of title. The Court of Appeal also rejected the respondent's alternative causes of action in bailment,[6] negligent misrepresentation[7] and damage to reversionary interest.[8]

III. Key takeaways

11 *The Luna* provides useful guidance in relation to three issues. These are discussed in turn below.

3 [2016] 3 SLR 1280.
4 *The Luna* [2021] 2 SLR 1054 at [20(c)].
5 *The Luna* [2021] 2 SLR 1054 at [20(c)].
6 *The Luna* [2021] 2 SLR 1054 at [79]–[81].
7 *The Luna* [2021] 2 SLR 1054 at [82]–[83].
8 *The Luna* [2021] 2 SLR 1054 at [84]–[88].

A. Formation of contract versus *interpretation of contract*

(1) Summary of applicable principles and key evidence

12 The key question in *The Luna* was whether parties had intended for the Vopak BLs to have contractual force and to operate as documents of title. The Court of Appeal opined that this question required an examination as to the existence of a contract rather than an interpretation of the contract and proceeded to clearly articulate the principles applicable to each.[9] The Court of Appeal noted that, while contract formation and contractual interpretation both involve the objective principle and contextualism, in relation to the former, the "approach to background is wider as there is no restriction on the evidence which the court may consider".[10] In contrast, contractual interpretation is narrower as "the parol evidence rule and the principles governing the admission of extrinsic evidence set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ('*Zurich Insurance*') undoubtedly apply".[11]

13 Having identified that what had to be determined was the antecedent question of whether there was in fact a contract between the parties, the Court of Appeal proceeded to consider all the facts and circumstances surrounding the case.

14 First, the Court of Appeal considered the role and function of the Vopak BLs by examining the underlying sale arrangements between the respondent and the Buyers.[12] The Court of Appeal highlighted the following five salient features of the underlying sale contracts:

> (a) the respondent gave the Buyers a 30-day credit period and thereby accepted the risk of default *vis-à-vis* the Buyers;

9 *The Luna* [2021] 2 SLR 1054 at [30].
10 *The Luna* [2021] 2 SLR 1054 at [30].
11 *The Luna* [2021] 2 SLR 1054 at [30].
12 *The Luna* [2021] 2 SLR 1054 at [42]–[48].

(b) payment was required to be made by the Buyers against presentation of the respondent's invoice and the original certificate of quantity;

(c) title to and possession of the Bunkers passed to the Buyers upon loading;

(d) there was a conspicuous absence of any reference to bills of lading in the underlying sale contracts; and

(e) it was the Buyers and not the respondent who would give instructions to the appellants to deliver the Bunkers to the ocean-going vessels and the respondent well knew that these deliveries would be made shortly after loading and before the credit period expired.

15 Second, the Court of Appeal considered the role and function of the Vopak BLs *vis-à-vis* the respondent and the Buyers.[13] The Court of Appeal noted that the trial judge found that the respondent had no real obligation to transfer the Vopak BLs to the Buyers for payment. In other words, the Buyers were permitted to deal with the Bunkers during the 30-day credit period. Therefore, the Court of Appeal found that, as between the respondent and the Buyers, the Vopak BL had no contractual force or effect as a contract of carriage or as a document of title.

16 Third, the Court of Appeal considered the role and function of the Vopak BLs *vis-à-vis* the respondent and appellants.[14] The Court of Appeal held that neither the respondent nor the appellants could have intended for delivery of the Bunkers to be made only upon presentation of an original Vopak BL. In particular, the dates of loading, delivery and expiry of credit periods would have indicated to the respondent that the Bunkers were delivered to various ocean-going vessels very shortly after they were loaded on board the barges, well before the expiry of the 30-day credit period. The Court of Appeal held that all parties conducted themselves on the basis that the Buyers could direct the Vessels to deliver the Bunkers to various ocean-going

13 *The Luna* [2021] 2 SLR 1054 at [49]–[52].
14 *The Luna* [2021] 2 SLR 1054 at [53]–[56].

vessels immediately after loading, without any involvement on the respondent's part.

17 Fourth, the Court of Appeal considered the terms of the Vopak BLs.[15] Two key features were considered. The first was the phrase "bunkers for ocean going vessels", which was inserted where a destination would ordinarily be indicated. The trial judge held that this phrase specified a destination of discharge and, therefore, the Vopak BLs were not void for uncertainty as he had interpreted this phrase to mean that the Bunkers were to be delivered to ocean-going vessels in or around the port of Singapore. However, the Court of Appeal disagreed. One of the reasons for this was that this interpretation was overly broad given that, as the trial judge had found, there could be hundreds of ocean-going vessels within the port limits of Singapore on any given day. The Court of Appeal also opined that the insertion of the phrase "bunkers for ocean going vessels" where a destination would ordinarily be indicated suggested that parties intended to omit a destination altogether. Notably, the Court of Appeal also considered the respondent's evidence that the phrase was inserted to indicate that the bunkers were to be consumed by vessels leaving Singapore, rather than for domestic consumption. This would then allow the goods and services tax on such bunkers sales to be zero-rated. However, the Court of Appeal took the view that such origins of the phrase were irrelevant and opined that this evidence supported the view that a destination had been deliberately omitted.

18 The second feature was that the Vopak BLs contemplated delivery of bunkers to multiple ocean-going vessels. The trial judge held that multiple deliveries could be effected by the Vopak BLs being indorsed to the Buyers, who could then give instructions to the appellants to deliver to various ocean-going vessels. The Court of Appeal disagreed. One reason for this was that, if the Vopak BLs operated as typical bills of lading, only the respondent, as the lawful holder of the Vopak BLs during the 30-day credit period, could give delivery instructions. However, as the trial judge had found, the respondent never gave such

15 *The Luna* [2021] 2 SLR 1054 at [57]–[69].

instructions to the appellants and had no role, pursuant to the underlying contractual arrangements, to give such instructions.

19 Finally, the Court of Appeal considered how risk was allocated.[16] It found that, by extending credit to the Buyers and deliberately omitting to stipulate for the use of traditional bills of lading in the underlying sale contracts, the respondent had accepted the risk of non-payment by the Buyers. In the same vein, the Court of Appeal found it untenable for the respondent to suggest that the appellants somehow agreed to assume the risk of non-payment by the Buyers.

20 The foregoing led the Court of Appeal to conclude that the Vopak BLs were neither contracts of carriage nor documents of title.

(2) Observations on the evidential principles applied by the Court of Appeal

21 It is worth highlighting two evidential principles applied by the Court of Appeal.

22 First, before considering the terms of the underlying sale contracts between the respondent and the Buyers, the Court of Appeal made it clear that it was not limited by the requirements that evidence be relevant, reasonably available to all contracting parties and relate to a clear and obvious context,[17] and that it was entitled to take into account a broader range of circumstances when ascertaining the nature or legal effect of the Vopak BLs (and not simply construing its terms).[18]

23 The Court of Appeal opined that this distinction was sound in principle as interpretation cases involved the underlying premise that parties had reached an agreement. Therefore, parties' mutual understanding of such agreement and its terms could only be based on matters that were relevant, reasonably available to both parties and related to a clear or obvious context.

16 *The Luna* [2021] 2 SLR 1054 at [70]–[76].
17 *The Luna* [2021] 2 SLR 1054 at [38].
18 *The Luna* [2021] 2 SLR 1054 at [42].

This premise does not apply in formation of contract cases, where the court is considering the necessary anterior question of whether the parties had even reached an agreement in the first place.[19]

24 It is submitted that this distinction is sensible and that the absence of an admissibility requirement for evidence to be reasonably available to both parties in contract formation cases led to a fair outcome in *The Luna*. The underlying sale contracts are a good illustration of this. While the Court of Appeal does not appear to have made (and did not have to make) any express finding on whether the appellants had known of all of the specific terms of the underlying sale contracts,[20] it would be fair to say that the appellants, as third parties to the underlying sale contracts, may not have been able to establish that some or all of the specific terms of the underlying sale contracts were reasonably available to them. If so, and if the usual rules of contractual interpretation applied, the outcome of the appeal may have been different as the appellants would have been precluded from relying on some, if not all, of the salient terms of the underlying sale contracts which pointed to the Vopak BLs not being contracts of carriage and/or documents of title.

25 Second, the Court of Appeal considered evidence of subsequent conduct in *The Luna*. In its earlier decision in the case of *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon*[21] ("*Simpson Marine*"), the Court of Appeal discussed the admissibility and relevance of subsequent conduct in contract formation and interpretation cases. In so doing, the Court of Appeal observed that there could be an argument that an inconsistency in the evidential rules between contract formation and interpretation might be untenable, but did not reach any firm views on the issue:[22]

> 78 … The admissibility and relevance of subsequent conduct in the formation and interpretation of contracts has

19 *The Luna* [2021] 2 SLR 1054 at [31].
20 See para 14 above for a summary of the salient terms of the Vopak BLs.
21 [2019] 1 SLR 696.
22 *The Luna* [2021] 2 SLR 1054 at [33].

> yet to receive detailed scrutiny by this court. We have in the past opined that, while there is no absolute prohibition against evidence of subsequent conduct in interpreting a contract, such evidence is likely to be inadmissible in construing a written contract because it does not elucidate the parties' objective intentions or relate to a clear or obvious context … However, where the court is ascertaining whether a contract has been formed, evidence of subsequent conduct has traditionally been regarded as admissible and relevant, although there is some instability in this rule … It may be argued that a distinction between the evidential rules applicable to the formation and interpretation of contracts is untenable … On this basis, a case could be made that the restrictive approach adopted in respect of contractual interpretation ought to be extended to contractual formation, though the case for consistency could equally lead to the opposite conclusion because the decision whether to adopt a consistently restrictive or consistently liberal approach depends on arguments of policy and principle …
>
> 79 … Since we have not heard argument on this issue, we decline to reach any firm views on the admissibility, relevance and probative value of subsequent conduct for the purpose of either contract formation or interpretation. …

26 It is noteworthy that, in *The Luna*, the Court of Appeal clarified that, in *Simpson Marine*, it was "considering the specific question of whether evidence of subsequent conduct may be taken into consideration in formation and interpretation cases" and that therefore "any concerns as to inconsistency should therefore be understood in that context".[23]

27 However, the Court of Appeal then proceeded to consider evidence of subsequent conduct. For example, the Court of Appeal noted that the Bunkers were delivered to various ocean-going vessels very shortly after they were loaded on board the barges and well before the expiry of the 30-day credit period, but that the respondent had only sought to demand delivery of the Bunkers after it had found out about the Buyers' insolvency. The Court of Appeal found that this showed that the respondent had looked to the Buyers for payment rather than regarded the Vopak BLs as security against the risk of non-payment.[24]

23 *The Luna* [2021] 2 SLR 1054 at [34].
24 *The Luna* [2021] 2 SLR 1054 at [55].

28 Therefore, in future cases, it may be challenging to mount an argument for consistency in the evidential rules between contract formation and interpretation of contractual terms in respect of evidence of subsequent conduct.

(3) Wrongful arrest

29 While the appellants' claim for wrongful arrest was dismissed, due in no small part to the novelty of the facts in this case, the Court of Appeal has shown the way for future cases. The decision in *The Luna* ought to give cause, at least in unusual bill of lading claims moving forward, for lawyers to consider more carefully the nature of any document titled "bill of lading", which a plaintiff may rely on to found a cause of action. All background facts surrounding the issuance of such a document, and its precise terms, should be examined to ascertain whether the document is in fact a contract of carriage or document of title before advising whether an arrest would be permissible. Failure to do so may result in the arrest being set aside subsequently, accompanied by the usual consequences.

B. Damage to reversionary interest

30 *The Luna* is also noteworthy because it adds to the sparse local authorities on damage to reversionary interest.[25] The respondent's claim for damage to reversionary interest failed, in part, because, on the facts of this case, the respondent did not have any reversionary interest.[26]

31 However, the Court of Appeal also opined that establishing a proprietary interest is not the end of the matter and endorsed the following statement at para 16–151 of *Clerk & Lindsell on Torts* that:[27]

> The action for reversionary injury lies … in respect of any act which would, but for the problem of the claimant's lack of title

25 See, for example, *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636.
26 *The Luna* [2021] 2 SLR 1054 at [84]–[85].
27 Michael A Jones, Anthony M Douglas & Mark Simpson, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 23rd Ed, 2020). See *The Luna* [2021] 2 SLR 1054 at [86].

> to sue, amount to trespass, negligence or conversion, provided it has the effect of depriving him either temporarily or permanently of the benefit of his reversionary interest, whether because the goods are destroyed or seriously damaged or because they are wrongfully disposed of by a transaction whereby the disponee acquires a good title, so preventing recovery of them.

32 The Court of Appeal also endorsed the following statement in *East West Corporation v DKBS 1912 A/S, Utaniko Ltd v P&O Nedlloyd BV*:[28]

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

33 Therefore, having rejected the respondent's alternative claims in bailment and negligent misrepresentation, the Court of Appeal also rejected the claim for damage to reversionary interest as there was no wrongful act on the part of the appellants that could serve as the basis for the respondent's claim for damage to reversionary interest.[29]

C. Appeal against costs

34 Finally, *The Luna* provides useful guidance on what steps an appellant should take in the event that a costs decision is delivered after a notice of appeal has been filed in respect of the substantive decision. Prior to *The Luna*, there was some ambiguity as to the appropriate approach to take in such an event.[30] An appellant would have to grapple with vexing questions such as whether to apply to amend its notice of appeal, whether to file a separate notice of appeal and whether leave to appeal had to be sought.

28 [2003] 2 All ER 700. See *The Luna* [2021] 2 SLR 1054 at [87].
29 *The Luna* [2021] 2 SLR 1054 at [88].
30 *The Luna* [2021] 2 SLR 1054 at [93].

35 *The Luna* identifies the following two possible situations and explains what an appellant should do in each.[31]

36 First, where the costs appeal rests on the outcome of the substantive appeal (*ie*, the appellant is seeking a different costs order on the basis that the substantive appeal would be allowed), the appellant need not file an additional notice of appeal in respect of the costs decision or amend the notice of appeal filed in respect of the substantive decision.

37 Second, where the costs appeal is independent of the substantive appeal (*ie*, the appellant is seeking a different costs order regardless of the outcome of the substantive appeal), the appellant will need to seek leave to file an additional notice of appeal in respect of the costs decision. In such cases, leave to appeal will generally be granted if the appellant is agreeable to having the appeals consolidated or fixed for hearing together. If leave is not granted, that would be the end of the matter. However, if leave to appeal is granted, such an appellant would necessarily have to file a separate notice of appeal given that the earlier notice of appeal against the substantive decision cannot be amended to include the costs appeal for which leave to appeal was subsequently granted.

IV. Conclusion

38 *The Luna* provides welcome guidance to practitioners on the distinction between the principles governing contract formation and interpretation of contracts. The case also adds to local jurisprudence in respect of the tort of damage to reversionary interest. Finally, from the procedural aspect, it clearly lays out the steps for appealing against a costs order when it is made only after the notice of appeal is filed.

31 *The Luna* [2021] 2 SLR 1054 at [104].