

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 62

Suit No 588 of 2014

Between

G-FUEL PTE LTD

... Plaintiff

And

GULF PETROCHEM PTE LTD

... Defendant

JUDGMENT

[Contract] — [Formation]

[Contract] — [Contractual Terms]

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G-Fuel Pte Ltd
v
Gulf Petrochem Pte Ltd

[2016] SGHC 62

High Court — Suit No 588 of 2014
Tan Lee Meng SJ
25-28 May 2015; 20 October 2015

14 April 2016

Judgment reserved.

Tan Lee Meng SJ:

1 The plaintiff, G-Fuel Pte Ltd (“G-Fuel”), is in the business of trading crude oil, petroleum-related products and commodities. The defendant, Gulf Petrochem Pte Ltd (“Gulf”), is in the business of general wholesale and wholesale of petrochemical products. G-Fuel sued Gulf to recover the sum of US\$2,002,404.78 (“the outstanding sum”) allegedly owed to it for supplying to the latter 2,989.467 MT of marine fuel oil 380 CST (“MFO”) on 8 February 2014 at the price of US\$626 per MT. Gulf denied having purchased the cargo.

Background

2 In August 2013, New Energy Resources Pte Ltd (“NER”), a distributor of petroleum products, expressed an interest in purchasing MFO from G-Fuel

on credit terms on a regular basis. G-Fuel was not prepared to sell MFO to NER on credit terms.

3 NER had an on-going business relationship with Gulf, which utilised its services to supply MFO to ships owned by Gulf’s customers. NER asked Gulf to be its credit sleeve provider whenever it required MFO from G-Fuel (“the sleeving arrangement”). Under a sleeving arrangement in the bunkering industry, a party, known as the “credit sleeve provider”, to whom the seller is prepared to sell fuel on credit terms, becomes the contractual buyer of the fuel required by a third party. The credit sleeve provider benefits from the arrangement by charging the third party a fee for sleeving a transaction. Both G-Fuel, who was prepared to sell MFO to Gulf on credit terms, and Gulf agreed to the sleeving arrangement. Gulf charged NER at least US\$3 for every metric tonne of MFO that it purchased from G-Fuel for NER’s use.

4 It was common ground that each transaction under the sleeving arrangement involved a separate contract between G-Fuel and Gulf for the sale and purchase of MFO. Arrangements for the contracts under the sleeving arrangement were handled by G-Fuel’s then trading manager, Mr James Lim Chung Meng (“James Lim”), and Gulf’s then senior bunker trader, Mr Gary Chew Sung Kwang (“Gary Chew”), on behalf of their respective companies.

5 The first and second contracts under the sleeving arrangement involved parcels of MFO that were delivered on 7 December 2013 and 31 January 2014 respectively. Gulf paid G-Fuel for the MFO delivered under these two contracts.

6 The dispute between the parties concerns a parcel of 2,989.467 MT of MFO delivered by G-Fuel on 8 February 2014 (“the *Joaquim* cargo”).

According to G-Fuel, this was the third contract under the sleeving arrangement made on 7 February 2014 by James Lim and Gary Chew on behalf of G-Fuel and Gulf respectively in the same way that the contracts for the first and second transactions were made.

7 Although Gary Chew informed James Lim on 7 February 2014 that the deal with respect to the *Joaquim* cargo was “confirmed” and the MFO was delivered on the following day, Gulf informed G-Fuel some three weeks later that it did not agree to sleeve the transaction for this cargo. At that time, Gulf had problems with NER, who owed it a very substantial amount of money.

8 Despite numerous demands by G-Fuel, Gulf refused to pay the outstanding sum claimed by the former. As such, G-Fuel instituted the present action to claim the outstanding sum or, alternatively, damages from Gulf.

The Parties’ Positions

9 According to G-Fuel, the sequence of events leading to the contract for the sale and purchase of the *Joaquim* cargo up to the time G-Fuel invoiced Gulf for the said cargo was as follows:

- (a) On 7 February 2014, NER’s Mr Philip Tan Meng Huat asked James Lim through Yahoo Messenger to confirm that G-Fuel could supply 3,000 MT of MFO.
- (b) James Lim replied that he had to confirm with Gary Chew whether or not Gulf will agree to sleeve the proposed transaction for the 3,000 MT of MFO.
- (c) On the same day, James Lim telephoned Gary Chew, who confirmed that Gulf would be the credit sleeve provider, with the

quantity and price fixed at 3,000 MT and US\$626.00 respectively. The cargo was to be delivered on 8 or 9 February 2014.

(d) After speaking to Gary Chew, James Lim sent a mobile text message at around 6.15pm on the same day to record the confirmation of the order. The message was “Hi, gary, we cfm the sales of 3kt exwh at 626, loading 8-9”.

(e) Gary Lim’s immediate reply via a mobile text message was “K thnks”, which is short for “Okay. Thanks”.

(f) Shortly thereafter, at 6.22pm, G-Fuel sent its Sales Confirmation No G-F 2194 dated 7 February 2014 to Gulf by e-mail. The said document recorded that the contract was for “3,000 metric tons (+/-5% tolerance)” of MFO 380 CST at the price of US\$626 per MT and that the said cargo was to be delivered to a barge at Universal Terminal on 8 or 9 February 2014.

(g) Forty minutes later, in an email timed at 7.02pm, NER nominated *The Joaquim* to lift the 3,000 MT of MFO at Universal Terminal, Singapore on the next day, 8 February 2014.

(h) No further instructions were received from Gulf and on 8 February 2014, 2989.467 MT of MFO were loaded onto NER’s barge, *The Joaquim*, at the named terminal.

(i) G-Fuel issued a tax invoice dated 8 February 2014 for the sum of US\$2,002,404.78 to Gulf for the *Joaquim* cargo. The invoice stated that this amount was to be paid within 30 days.

10 On 10 February 2014, James Lim sent a mobile text message to Gary Chew at around 11am stating “Hi Gary, pls send the [Deal Recap confirmation] to us *for book keeping*. Thks” [emphasis added].

11 On the same day, Gary Chew replied at 3.31pm with the message “Chas[e] elaine”. Ms Elaine Koh was the junior accountant in Gulf’s Finance & Accounts Department.

12 On 11 February 2014, in an email timed at 5.25pm, James Lim asked Elaine Koh to send him the deal recap. He said that he telephoned Elaine Koh twice to remind her to forward the deal recap to him and that she promised on both occasions to send the deal recap to G-Fuel.

13 It was only on 28 February 2014, almost three weeks after the delivery of the *Joaquim* cargo on 8 February 2014, that Gulf first denied that it purchased the MFO in question. Subsequently, on 3 March 2014, Gulf informed G-Fuel that as it did not authorise the loading of the *Joaquim* cargo on 8 February 2014, it was treating the transaction as “cancelled”.

14 In the light of the sequence of events outlined above, G-Fuel contended that it was beyond doubt that Gulf was bound by the terms of the contract for the sale and purchase of the *Joaquim* cargo that was concluded on 7 February 2014 by James Lim and Gary Chew on behalf of their respective companies and that Gulf had to pay the outstanding sum to it.

15 On 14 February 2014, Gulf sent NER an e-mail, to which was attached a table spreadsheet that showed that the *Joaquim* cargo delivered on 8 February 2014 was part of the oil already supplied by it to NER. Despite this,

Gulf contended that it did not have to pay for the *Joaquim* cargo for a number of reasons.

16 First, Gulf asserted that whatever arrangements may have been agreed upon by Gary Chew and James Lim on 7 February 2014, it had to send a formal purchase confirmation called a “deal recap” in response to G-Fuel’s Sales Confirmation No G-F 2194 before there could be a binding contract with G-Fuel. Its case was that as it did not send a deal recap to G-Fuel for the *Joaquim* cargo, there was no binding contract for this transaction.

17 Secondly, Gulf contended that for it to be bound by any sleeving transaction, the MFO may be delivered by G-Fuel only after it has issued a barge nomination form to G-Fuel to load the MFO onto its nominated barge. As G-Fuel loaded the *Joaquim* cargo onto a barge nominated by NER, Gulf contended that the risk of such loading fell on G-Fuel.

18 Thirdly, Gulf claimed that G-Fuel knew or ought to have known that the sleeving of the purchase of the *Joaquim* cargo was conditional upon NER’s compliance with certain terms stated in its email to NER on 8 February 2014. Although G-Fuel was never informed about the terms in this email to NER, Gulf insisted that as the said conditions were not fully met, it was not bound to pay G-Fuel for the *Joaquim* cargo.

19 Finally, Gulf contended that the *Joaquim* cargo was delivered by G-Fuel to NER pursuant to a contract between them and that NER should pay G-Fuel for the said cargo.

Gulf's Failure to call Gary Chew as a Witness

20 G-Fuel's case is that James Lim and Gulf's then senior bunker trader, Gary Chew, entered into a contract on behalf of their respective companies for the sleeving of the *Joaquim* cargo on 7 February 2014. As such, one would have expected Gulf to call its former key staff member, Gary Chew, to testify on the events surrounding the *Joaquim* cargo, including how a contract for the purchase of MFO under the sleeving arrangement is made, whether a deal recap is required for the formation of a contract and whether there must be a written barge nomination by Gulf before the *Joaquim* cargo can be loaded on the barge nominated by NER. Regrettably, Gulf chose not to call Gary Chew as a witness in these proceedings.

21 Gulf's main witness, its current trading manager, Mr Avik Ghosh, acknowledged that Gary Chew, who is now a partner in another bunker oil trading firm, had personally handled all the transactions under the sleeving arrangement and that the latter is the best person to give direct evidence on what transpired in these transactions.¹ He could not explain why his company did not call Gary Chew to testify in these proceedings and could only say that he was not the person who called the witnesses.² Instead of calling Gary Chew, Gulf thought that it could make do with Avik Ghosh's attempt to explain in paragraph 13 of his affidavit of evidence-in-chief ("AEIC") the mechanics of the sleeving arrangement, including the need for a deal recap and a barge nomination. However, he did not have personal knowledge of these matters and his AEIC merely dealt with inferences and his belief and/or opinion.

¹ Notes of Evidence, Day 3, at p 36, lines 12-17.

² Notes of Evidence, Day 3, at p 36, line 23.

22 In these circumstances, Gary Chew was a crucial witness who should have been called by Gulf to testify at the trial. G-Fuel’s counsel, Mr Kelly Yap, said that his client had to sub-poena Gary Chew to testify after it found out, much to its surprise, that Gulf was not calling him to give evidence. He submitted that Gulf had deliberately not called Gary Chew to testify because his testimony would show that there was an oral contract between the parties on 7 February 2014 for the supply of the *Joaquim* cargo. As it turned out, Gary Chew’s testimony on whether the contract for the *Joaquim* cargo was concluded on 7 February 2014, whether Gulf’s deal recap is required for the formation of a contract and whether MFO could be loaded if there is no written barge nomination by Gulf was rather damaging to Gulf’s case. In fact, Gary Chew testified that his former employer, Gulf, acted in bad faith when it refused to honour the contract for the *Joaquim* cargo.

Whether a Deal Recap is required for a contract between G-Fuel and Gulf

23 As with the first and second contracts under the sleeving arrangement, there was no written contract for the *Joaquim* cargo and no discussion between the parties as to whether a deal recap is required for there to be a binding contract.

24 Often enough, an agreement is formed at an earlier stage and a deal recap merely recapitulates the terms of the agreement. In *TTMI Sarl v Statoil ASA* (“*The Sibohelle*”) [2011] EWHC 1150 (Comm); [2011] 2 Lloyd’s Rep 220, Beatson J pointed out (at [27]) in the context of shipping contracts that “it is common for charterparties to be concluded by an exchange of emails or faxes, with the terms *being recapitulated in a fixture recap*, and they can be *concluded orally and recapitulated*” [emphasis added]. In the present case, the deal recap sent by Gulf to G-Fuel for the first two contracts under the sleeving

arrangement recapitulated the essence of what had already been agreed upon between James Lim and Gary Chew, namely that the sellers and buyers were G-Fuel and Gulf respectively, the quantity of MFO required and the unit price. In each case, the deal recap specifically stated that the “confirming party” was Gary Chew.

25 G-Fuel contended that it did not know and there was no basis for saying that it ought to have known that a deal recap from Gulf was required before a binding contract under the sleeving arrangement can be concluded. In contrast, Gulf’s position, as found in para 7 of its amended defence was as follows:

The Plaintiff knew or ought to have known that the Defendant’s agreement to sleeve would only be confirmed and formalised by the Defendant sending *or agreeing to send* to the Plaintiff a formal Purchase Confirmation (Deal Recap) in response to the Plaintiff’s email attaching its Sales Confirmation No G-F-2194 dated 7 February 2014 at 6.22pm. In other words, had the Defendant agreed to sleeve the purchase of the MFO, the Defendant would have sent *or agreed to send* its formal Purchase Confirmation (Deal Recap) confirming the transaction. As the Defendant did not send *or agree to send* to the Plaintiff a formal Purchase Confirmation (Deal Recap), this meant that the Defendant did not agree to sleeve the purchase of the MFO.

[emphasis added]

26 Significantly, Gulf pleaded that if it sent or *agreed to send* G-Fuel the deal recap, the sleeving of the transaction would be confirmed. This means that there can be a contract for the sleeving of a transaction if Gulf had agreed to send the deal recap to G-Fuel. There was sufficient evidence that Gulf had agreed to send the deal recap for the contract for the *Joaquim* cargo to G-Fuel. It may be recalled that when James Lim asked Gary Chew for the deal recap for the *Joaquim* cargo, the latter asked him to “chase” Elaine Koh from Gulf’s finance and accounts department for the deal recap. James Lim testified that

he telephoned Elaine Koh on two occasions to ask her for the deal recap and that she assured him on both occasions that she would send the said document to G-Fuel. Gulf's accounts manager, Mr Kannan Sampath, agreed during cross-examination that Gary Chew must have instructed Elaine Koh to send the deal recap to G-Fuel by the time he asked James Lim to chase her for the said document.³ Gulf could have called Elaine Koh, who is still its employee, to testify and contradict James Lim's testimony that he was promised by Elaine Koh that the deal recap would be sent to G-Fuel but it chose not to do so and must accept the consequences of its choice. I found the evidence of James Lim, who is no longer working for G-Fuel, credible and I believe his version of events. As Gulf did not adduce any credible evidence to counter the assertion that Gary Chew and Elaine Koh had agreed to send the deal recap for the *Joaquim* cargo to G-Fuel, I accept that Gulf had agreed to send the said document to G-Fuel. It follows that on the basis of its own pleadings, Gulf had agreed to sleeve the transaction for the *Joaquim* cargo

27 In any case, there was no intimation by Gulf to G-Fuel at any time before the *Joaquim* cargo was delivered that a contract will only be binding if it has sent or has agreed to send G-Fuel a deal recap. Furthermore, Gulf's assertion that its deal recap was required for the formation of a contract under the sleeving arrangement was not supported by the evidence of key witnesses from both G-Fuel and Gulf. G-Fuel's former employee, James Lim, testified that a deal recap is part of the industry practice of exchanging sale/purchase confirmations to document a transaction already agreed upon. He added that he did not require a deal recap to confirm the deal for the *Joaquim* cargo and that the said document was only required by G-Fuel for audit purposes and Goods and Services Tax ("GST") invoicing. Notably, when he contacted Gary

³ Notes of Evidence, Day 4, p 26, lines 15-21.

Chew on 10 February 2014 to request for the deal recap for the *Joaquim* cargo, he specifically stated that this document was required for “book keeping” purposes.

28 Gulf’s Gary Chew testified that a deal recap is sent *after* a deal has already been done, which means that the deal recap is only a confirmation of a deal already concluded between the parties. The relevant part of Gary Chew’s testimony during re-examination is as follows:⁴

Q: [W]hat are these documents, these sales confirmations, deal recap and then this email to release the oil?

A: *First there should be a deal done*, then we follow up with a deal recap between ... both parties.

[emphasis added]

29 Gary Chew referred to the role played by Elaine Koh and others in her department as the “operation part of the business”, to be activated *after* he has concluded a deal on behalf of the company with James Lim. He testified as follows:⁵

After the deal is done, the operation part of the business goes to that department. There is this girl ... Elaine ... and ... Nidhi and there’s Kannan and they will do – agree to release the oil, but I think they also check with Prerit, and that time I think there is a new guy called Avik that just came in, they check with him also. [emphasis added]

30 Where an authorised representative of a company, such as Gary Chew, has, in his own words, “done” a deal with G-Fuel, the operation of the contract may be handled by another department but this does not mean that the concluded deal becomes undone if that other department does not do what is

⁴ Notes of Evidence, Day 1, p 47, lines 1-5.

⁵ Notes of Evidence, Day 1, p 38, lines 3-11.

required of it. In this case, what was outstanding after the contract for the *Joaquim* cargo was concluded between James Lim and Gary Chew on 7 February 2014 was the forwarding of the deal recap. This explains why Gary Chew testified that he thought that the sending of a deal recap was a “given” after he had confirmed the deal for this cargo (see [32] below).

31 Gulf contended that Gary Chew “testified multiple times in cross-examination that proper paperwork must be done in order to constitute Gulf’s authorisation of a sleeving transaction”. This is an inaccurate reading of Gary Chew’s evidence. When cross-examined, Gary said:⁶

Q: How are all these transactions put together? On the one hand, G-Fuel is saying at the moment you said okay on the phone or SMS, the deal is done ...

A: Yes, yes.

Q: Is that one way, or must you do up the paperwork and make sure it’s all done properly?

....

A: Okay, it’s very obvious – whatever we do, you have to follow up with proper paperwork.

32 All that Gary Chew said was that it is important to “*follow up*” with proper paperwork. Even G-Fuel agreed that proper paperwork is important for the purpose of book-keeping and payment of tax to the authorities but that does not prevent a contract from being made before a deal recap is sent by Gulf to G-Fuel. It may be noted that when James Lim asked Gary Chew for the deal recap for G-Fuel’s accounting purposes, the latter did not say that there was no contract. Instead, he asked James Lim to “chase” Elaine Koh for the deal recap. In fact, Gary Chew testified that he thought that the deal recap

⁶ Notes of Evidence, Day 1, p 51, lines 3-16.

would be sent for the *Joaquim* cargo as a matter of course. When cross-examined, he stated as follows:⁷

Q: Do you agree with me that for the [disputed] transaction ... Gulf did not send any deal recap? ...

A: I cannot recall, because it's – to me, *it's a given that it should be sen[t]*...

[emphasis added]

33 G-Fuel pointed out that in the case of the first contract under the sleeving transaction in December 2013, Gulf honoured its obligations under the first contract under the sleeving arrangement even though the MFO was also delivered *before* Gulf despatched its deal recap to G-Fuel. In this case, Gary Chew orally agreed with James Lim on 6 December 2013 to buy 2,400 MT of MFO at US\$617 per MT for loading on the very next day. On 7 December 2013, 2,389.867 MT of MFO were loaded onto NER's barge. Subsequently, Gulf's deal recap was sent to G-Fuel and Gulf paid for the MFO a month later on 6 January 2014.

34 Avik Ghosh said that the deal recap for the first contract was not sent before the MFO was loaded onto NER's barge because G-Fuel's sales confirmation was received after the close of business on a Friday. However, the person in charge of sending the deal recap for the first contract, Mr Reddi Joseph, was not called by Gulf to give evidence as to why the deal recap was sent *after* the cargo had already been loaded onto the nominated bunker barge. More importantly, Gulf did not complain to G-Fuel about the loading of the cargo before the receipt of the former's deal recap.

⁷ Notes of Evidence, Day 1, p 47, lines 13-18.

35 As for Gulf's assertion that the fact that G-Fuel chased its staff for the deal recap showed that this document was crucial for the formation of a contract, G-Fuel retorted that James Lim continued to press Gulf for the deal recap because he was concerned that Gulf might be planning to back out of the deal for the *Joaquim* cargo. I accept that G-Fuel wanted the deal recap to ensure that Gulf did not avoid its obligations under the contract for the *Joaquim* cargo.

36 For the reasons stated, I find that Gulf failed to establish that a deal recap must be issued by it before a binding contract can be made between it and G-Fuel under the sleeving arrangement.

Whether a contract between G-Fuel and Gulf was concluded on 7 February 2014

37 Having determined that the lack of a deal recap does not stand in the way of the formation of a binding contract under the sleeving arrangement, whether a contract for the sale and purchase of the *Joaquim* cargo was concluded on 7 February 2014 will now be considered.

38 In *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407, where the parties also did not sign a written agreement and the issue was whether or not the parties had concluded a valid contract of sale and purchase, the Court of Appeal said (at [39] and [40]) as follows:

39 ... The existence of any contract must thus be culled from the written correspondence and contemporaneous conduct of the parties at the material time.

40[T]he function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring *consensus ad idem* is objective. Thus, the language used by one party, whatever his real intention may be, is to be

construed in the sense in which it would reasonably be understood by the other.

39 On 7 February 2014, James Lim and Gary Chew agreed on the essential terms of the contract, namely, the quantity of MFO to be sleeved under the contract for the *Joaquim* cargo, the price of the MFO and the date the said cargo was to be lifted. Both parties agreed that the contract involved the sale of 3,000 MT of MFO at US\$626 per MT and that the MFO was to be lifted between 8 and 9 February 2014. The overall effect of Gary Chew’s testimony is that a deal between Gulf and G-Fuel under the sleeving arrangement is struck when he has reached full and final agreement with James Lim for Gulf to sleeve a transaction, after which Gulf is, to use his exact phrase, “obligated” to perform obligations under the deal. The relevant part of his testimony is as follows:⁸

Q: How are all these transactions put together? On the one hand, G-Fuel is saying [that] the moment you said okay on the phone or SMS, the deal is done, *that means*

A Yes.

Q --- *you’re obligated.*

A Yes, *yes.*

[emphasis added]

40 Gary Chew admitted that he “confirmed” Gulf’s agreement to sleeve the transaction for the *Joaquim* cargo in his telephone conversation with James on 7 February 2014. The relevant part of his testimony is as follows:⁹

Q: James called you?

A: James call me, yes.

⁸Notes of Evidence, Day 1, p 51, lines 3-9.

⁹ Notes of Evidence, Day 1, p 61, lines 23-25 and p 62, lines 1-7.

Q: What did James talk to you about?

A About this *done* deal...

Q: So what did James ask you?

A: *Is the deal confirm[ed]? I say yes.*

[emphasis added]

41 Gary Chew also testified that the text messages exchanged between him and James Lim on 7 February 2014 involved a “typical confirmation” between him and the latter for deals agreed upon. The relevant part of his testimony is as follows:¹⁰

Q: It says text messages ... Friday 7 February 18:15:

“Hi gary we [confirm] the sales of 3kt [exwharf] at 626, loading 8 – 9th”.

The response is:

“K [thanks].”

Looking at this, can you tell us what this exchange of SMSes [is] about?

A: It’s a *typical confirmation* between me and James on this deal.

[emphasis added]

42 Conspicuously, Gulf did not allege that Gary Chew had exceeded his authority. I find his evidence and that of James Lim credible and that their evidence shows that the two of them concluded a contract for the *Joaquim* cargo on 7 February 2014.

43 At the material time, Gulf was required to have MFO delivered to a number of vessels owned by its customers. Gulf had an arrangement with

¹⁰ Notes of Evidence, Day 1, p 23, lines 13-22.

NER for the latter to deliver MFO to these vessels. Avik Ghosh elaborated on Gulf's arrangements with NER as follows:¹¹

Basically, NER had to deliver the oil which *we are loading from G-Fuel* to the end user, which is ships, and there was four – and ... each ship is called a “stem”, so the condition was I let them load and I will honour the sleeve if they deliver this oil to these ships because once they deliver the oil to the ships, the ships will pay us and we, in turn, pay G-fuel. So ... we protect ourselves from a credit risk.

[emphasis added]

44 Crucially, Avik Ghosh admitted that the *Joaquim* cargo was required to fulfil Gulf's own obligations to supply MFO to its customers' vessels in the week after the said cargo was loaded by G-Fuel onto the barge nominated by NER on 8 February 2014. When cross-examined, he testified as follows:¹²

Q: It follows that *NER had to use the MFO obtained from G-Fuel to make those deliveries which had been planned for that week*. Do you agree?

A: Yes.

...

Q: Therefore *part of the MFO to be supplied by G-Fuel on 8 February 2014 was intended to be delivered to the Cape Clipper*. Do you agree?

A: Yes.

Q: *The deal for the Cape Clipper was concluded with Dan-Bunkering, am I correct?*

A: Yes.

Q: *Dan Bunkering is your customer, am I correct?*

A: Yes.

[emphasis added]

¹¹ Notes of Evidence, Day 3, p 89, lines 5-15.

¹² Notes of Evidence, Day 3, p 95, lines 19-23 and p 97, lines 14-22.

45 Interestingly, Avik Ghosh added that Gulf would honour the sleeving arrangement in relation to the *Joaquim* cargo provided NER utilised the said cargo to supply MFO to all the four vessels owned by its customers and confirmed that this task had been completed by forwarding the relevant Bunker Delivery Notes (“BDN”) to Gulf.

46 A similar position was taken by Avik Ghosh in his email to NER on 8 February 2014, which will be discussed in greater detail later on. For the moment, what matters is that Avik Ghosh stated in this email to NER as follows:

I am willing to let you load on one clear condition.

I will honour the sleeve ... only if I get [every Bunker Delivery Note] next week. If even a single delivery is pushed or cancelled I will not honour the sleeve with G-Fuels.

47 As Avik Ghosh’s evidence is that he will honour the sleeving of the contract for the *Joaquim* cargo if NER supplied MFO to *all* four ships owned by Gulf customers, this means that Gulf will not sleeve the contract for the *Joaquim* cargo if NER only managed to supply MFO to only three of the said four ships. Why Avik Ghosh thought that he could make use of G-Fuel’s MFO to enable NER to supply MFO to Gulf’s customers without having to pay G-Fuel for the *Joaquim* cargo if only three out of four of its customers’ ships had been supplied with MFO cannot be fathomed. Avik Ghosh was in fact seeking to rewrite the terms of the sleeving arrangement with respect to the *Joaquim* cargo. At no time did James Lim and Gary Chew agree on behalf of G-Fuel and Gulf respectively that Gulf will sleeve the transaction only if NER supplied MFO to all four of Gulf’s customers in the week following the loading of the *Joaquim* cargo on 8 February 2014 and forwarded the BDNs to Gulf.

48 Even more strange was Avik Ghosh's assertion that if only three of the four ships in question were supplied with G-Fuel's MFO and Gulf is paid by the owners of these three ships for the MFO supplied by G-Fuel, Gulf is entitled to keep the money without having to pay anything to G-Fuel for the *Joaquim* cargo. When cross-examined, he testified as follows:¹³

Q: But look at my example, where three out of four of the stems are completed and your customers pay you for the fuel which you delivered to them *using the fuel that G-Fuel had supplied to you*. What do you do with that money that your customers pay you?

A: *The amount which customers pay us, it goes into our account*. I mean, that's what happens, right?

[emphasis added]

49 Avik Ghosh thus expected to sell G-Fuel's MFO to the three ships owned by its customers, pocket the sums paid by its customers and not pay G-Fuel for the *Joaquim* cargo because NER did not supply the fourth ship with MFO. This is absolutely ridiculous and especially so when, as will be pointed out below (at [51]-[56]), Gulf had insisted in its communications with NER that it had already transferred the *Joaquim* cargo to NER on 8 February 2014.

Gulf's conduct is totally consistent with a contract on 7 February 2014

50 Gulf's conduct immediately after 7 February 2014 is totally consistent with there being a contract made on that date for the sale and purchase of the *Joaquim* cargo. Where the issue before the court is whether or not a contract was concluded between the parties, subsequent conduct may be relevant. In considering such conduct, the court is not looking at past conduct to construe the terms of the contract, a matter dealt with extensively by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193,

¹³Notes of Evidence, Day 3, p 94, lines 16-23.

or to see whether new terms may be introduced into the contract. Subsequent conduct was taken into account by VK Rajah JC (as he then was) in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 (“*Midlink Development*”), where the court had to determine whether or not an oral agreement between the parties for the lease of premises for a further terms of two years as from 1 July 2002 at an adjusted rental of \$3.05 psf was concluded by the parties. The judge held that the parties’ conduct subsequent to the meeting on 2 May 2002, including the reduction of the rental deposit and the payment of the adjusted rent, was wholly consistent with the existence of such an agreement.

51 In relation to subsequent conduct, what was absolutely unacceptable in the present case was that despite denying that it had sleeved the contract for the *Joaquim* cargo, Gulf took the position in its own communications with NER that it had already handed over the *Joaquim* cargo to NER on 8 February 2014. On 16 February 2014, eight days after G-Fuel loaded the *Joaquim* cargo onto NER’s barge, Avik Ghosh emailed NER to express his consternation that NER had failed to supply MFO to Gulf’s own customers pursuant to arrangements between Gulf and NER despite the fact that Gulf had just handed over to NER the *Joaquim* cargo on 8 February 2014. In the second paragraph of this email, Avik Ghosh stated:

However, what I fail to understand is how you cannot supply my vessel *when we gave you the oil a week ago*. (Not to mention you hold another 25kt of our oil in any case, so having oil can’t surely be an issue.)

[emphasis added]

52 Avik Ghosh admitted that he was referring to the *Joaquim* cargo in the email in question. However, he sought to downplay the significance of this

crucial admission in a manner that thoroughly demolished his credibility. The relevant part of his testimony is as follows: ¹⁴

Q: In your email, you say that you gave the oil to NER a week ago. By “oil”, you mean the MFO supplied by G-Fuel on 8 February 2014, do you agree?

A: Yes.

Q: If you didn’t buy MFO from G-Fuel on 7 February which was loaded onto the *Joaquim* the next day, you could not have said to NER on 16 February that you had given it oil a week ago. Do you agree?

A: No, I don’t agree. I’d like to explain.

[emphasis added]

53 When invited to explain the second paragraph of his email, Avik Ghosh stated as follows: ¹⁵

The second paragraph is basically in reference to them not completing the deliveries for what they had promised, for which we did not agree to sleeve the G-Fuel. So that second paragraph is basically referring to that condition.

54 Avik Ghosh’s explanation made no sense whatsoever. While the second paragraph of his email was a complaint that NER had not completed the delivery of oil in accordance with its promises, the fact remains that if Gulf had not agreed to sleeve the contract for the *Joaquim* cargo, it had no right to tell NER that the said cargo had been handed over by it to NER. It is absurd for Avik Ghosh to assert in his correspondence with NER that Gulf had already handed the *Joaquim* cargo to NER on 8 February 2014 and take the position before this court that Gulf did not purchase the said cargo from G-Fuel.

¹⁴ Notes of Evidence, Day 3, p 104, line 25 and p 105, lines1- 8.

¹⁵ Notes of Evidence, Day 3, p 105, lines10-14.

55 Avik Ghosh was not the only one in Gulf who took the position that the *Joaquim* cargo was part of that company's own stock of MFO that was transferred to NER on 8 February 2014. On 14 February 2014, Gulf's finance and accounts manager, Nidhi Bhatia, sent NER an email, to which was attached a table spreadsheet with details of MFO handed over by Gulf to NER. Significantly, this table spreadsheet recorded that the *Joaquim* cargo *had been handed over by Gulf to NER*. This was confirmed by Gulf's accounts manager, Kannan Sampath, who testified as follows:¹⁶

Q: According to this table, on 8 February, G-Fuel had loaded 2989.467 metric tonnes. Do you agree or disagree? ...

A: The table shows as 2989, yes....

Q: ... According to this table, on 8 February 2014, NER now owes Gulf 32,458.94 metric tonnes of MFO That's an increase from the previous entry.... Correct?

A: Yes...

Q: *The increase is due to G-Fuel's loading on 8 February 2014 of 2989.467, correct?*

A: Yes.

Q: *This entry on 8 February 2014, where G-Fuel had loaded 2989.467 metric tonnes of MFO, was the third sleeving transaction. Do you agree?*

A *Third sleeve, yes.*

[emphasis added]

56 Notwithstanding his concession that the *Joaquim* cargo was included in the table spreadsheet as MFO *already delivered by Gulf to NER*, Kannan Sampath was not the least embarrassed to insist that Gulf did not purchase the said cargo from G-Fuel. When re-examined, he tried to wriggle out of the morass he found himself in by saying that Gulf takes account of the *Joaquim*

¹⁶ Notes of Evidence, Day 4, p 34, lines 8-25, p 35, lines 1-9.

cargo in its own books only when a deal recap and a barge nomination have been sent¹⁷ and as there was no deal recap and barge nomination in the case of the *Joaquim* cargo, the transaction was “cancelled”.¹⁸ What he meant by “cancelled” was not satisfactorily explained to the court. What is clear is that there is no reason for Gulf to incorporate the *Joaquim* cargo into the table spreadsheet forwarded to NER several days *after* the said cargo had been loaded unless someone in the accounts department was told that the *Joaquim* cargo had already been acquired by Gulf from G-Fuel. Kannan Sampath was not the person who prepared the spreadsheet and Gulf must take the consequences of failing to call Nidhi Bhatia, who was responsible for keeping a record of MFO supplied by Gulf to NER as well as the person who prepared the spreadsheet, as a witness in these proceedings to explain matters relating to her entries in the table spreadsheet.

57 Secondly, as mentioned earlier, James Lim testified that when he telephoned Elaine Koh on two occasions to ask for the deal recap for the *Joaquim* cargo, he was assured by her that the deal recap would be sent to him. There can be no doubt that by agreeing to forward the deal recap to G-Fuel, Gulf acknowledged that the contract for the *Joaquim* cargo had been made between James Lim and Gary Chew on 7 February 2014.

58 Thirdly, there was evidence that after the *Joaquim* cargo was loaded, Gulf withheld payment of the invoice for the second contract in order to negotiate the cancellation of the invoice for the *Joaquim* cargo. G-Fuel’s invoice for the second contract was due for payment on Saturday 1 March 2014. Its accounts assistant, Ms Chio Sok Kuan (“SK Chio”), sent two emails

¹⁷ Notes of Evidence, Day 4, p 54, lines 8-25, and p 55, lines 1-6.

¹⁸ Notes of Evidence, Day 4, p 55, lines 3-5.

to remind the defendant that the sum of US\$1,845,283.88 was due for payment on 1 March 2014. Her evidence was that when she called Nidhi Bhatia of Gulf's accounts and finance department to remind her that the invoice for the second contract was due for payment on the next day and to inquire about the invoice for the *Joaquim* cargo, Nidhi Bhatia told her that if the invoice for the *Joaquim* cargo was cancelled, Gulf would pay the amount due under the invoice for the second contract.¹⁹ When SK Chio told Nidhi Bhatia on 3 March 2014 that G-Fuel could not cancel the invoice for the *Joaquim* cargo, Gulf paid the amount due under the second invoice four days late but the amount due under the invoice for the *Joaquim* cargo was not paid when it became due. Gulf could have and should have called Nidhi Bhatia to contradict SK Chio's evidence and to shed light on other matters but it chose not to do so. Gulf contended that as Nidhi Bhatia had suggested the cancellation of the third invoice and not the third contract, it did not recognise the third contract. What matters is that Gulf's attempt to use the payment of the amount due under the second invoice as a bargaining chip for the cancellation of the invoice for the *Joaquim* cargo was not necessary if it was really confident that there was no contract for the *Joaquim* cargo.

59 Gulf also tried to rely on its conduct after 8 February 2014 to bolster its case that there was no contract for the *Joaquim* cargo. It asserted that its prolonged silence in the face of G-Fuel's offer to it to sleeve the transaction for the *Joaquim* cargo and the fact that a deal recap was not sent to G-Fuel suggested that it did not agree to sleeve this transaction. Gulf's assertion is fundamentally flawed because it did not remain silent. After Gary Chew concluded the contract for the *Joaquim* cargo on 7 February 2014, both he and Elaine Koh assured James Lim that the deal recap for this transaction would

¹⁹ Notes of Evidence, Day 2, p 89, lines 18-25 and p 90, lines 1-6.

be forwarded to G-Fuel. In any case, it is noteworthy that in *Midlink Development*, VK Rajah JC (as he then was) made it clear (at [51]) that “to say that silence can never be unequivocal evidence of consent may be going too far” and added in some matters, there could be a duty to speak arising from the relationship between the parties. In the present case, Gary Chew confirmed on 7 February 2014 that Gulf would sleeve the transaction in relation to the *Joaquim* cargo and Gulf knew that the said cargo would be delivered within one or two days of that confirmation. In these circumstances, and considering the nature of the sleeving arrangement, Gulf should have made it clear to G-Fuel much earlier that it was not bound by the disputed transaction, and especially so when in the meantime, Gary Chew and Elaine Koh were assuring G-Fuel that the deal recap would be sent shortly.

Conclusion on whether Gulf agreed to sleeve the disputed transaction

60 For the reasons stated above, I find that a contract for the sleeving of the contract for the *Joaquim* cargo was concluded by James Lim and Gary Chew on behalf of their respective companies on 7 February 2014. Most damning to Gulf’s case was the fact that Gary Chew testified that Gulf’s refusal to pay for the *Joaquim* cargo smacked of “bad faith”.²⁰ I have no doubt that viewed in the context of the traditional offer and acceptance analysis for the formation of a contract, James Lim made an offer on behalf of G-Fuel on 7 February 2014 for a third contract under the sleeving arrangement and Gary Chew accepted that offer on behalf of Gulf. As such, there was a binding contract between G-Fuel and Gulf for the sleeving of the transaction in relation to the *Joaquim* cargo.

²⁰ Notes of Evidence, Day 1, p 60, line 4.

Whether G-Fuel must receive a Barge Nomination from Gulf before loading the MFO

61 Gulf's assertion that it is entitled to refuse to pay for the *Joaquim* cargo because the said cargo was loaded onto a barge not nominated by it but onto a barge nominated by NER will next be considered. Gulf contended that as it did not nominate the barge to take delivery of the said cargo, G-Fuel had no authority to load the cargo onto *The Joaquim* and having done so, the latter assumed the risk of loading the MFO in question.

62 G-Fuel's case is that it was not a contractual requirement for a barge nomination to be made by Gulf before it can load the required MFO onto the barge nominated by NER.

63 The arrangements for the delivery of the MFO required by NER under the sleeving arrangement were rather haphazard. There are no written terms as to whether Gulf must nominate the barge under the sleeving arrangement and there is no evidence of any express oral terms on this matter. While James Lim testified that G-Fuel was entitled to rely on a barge nomination by either Gulf or NER,²¹ Gary Chew testified that Gulf did not have any hard and fast rule on how G-Fuel was to be authorised to release MFO purchased by it on behalf of NER under the sleeving arrangement. His testimony during re-examination was as follows:²²

Q: When you say no hard and fast rule here, what do you mean by that?

A: I said industry practice is such that some companies release the oil from a phone call, some with an email, strictly with an email, and some with looser controls,

²¹Notes of Evidence, Day 1, p 94, lines 19-24 and p 95, lines 1-13.

²²Notes of Evidence, Day 1, p 72, lines 21-25, and p 73, lines 1-11.

they don't even bother. The barge operator can just call direct the terminal and the oil is taken away...

For Gulf ... *I don't think there is actually a hard and fast rule, but of course for the bigger ones, like Shell, BP, I guess, yes, there is a proper, maybe even in black and white that you need an email.* So for Gulf, we don't have it in black and white.

[emphasis added]

64 Notably, in the case of the first and second contracts, Gulf honoured the transactions and paid for the MFO delivered by G-Fuel in accordance with NER's "barge nominations", which were in fact emails from NER to Gulf to request the latter to arrange with G-Fuel to have the MFO loaded onto the barge named in the said emails. This is not surprising as the sleeving arrangement was entered into for the specific purpose of enabling NER to have the MFO after Gulf has agreed to sleeve the transaction in question.

65 The transaction for the *Joaquim* cargo, like the transaction under the first contract, involved a "rushed" loading or "prompt" loading situation, which required the loading of MFO at short notice. G-Fuel's managing director, Mr Teng Chee Keong ("CK Teng"), who has had at least 15 years of experience in the bunkering trade, testified that in prompt loading situations, there may not be enough time to wait for a formal written confirmation from the buyer before the seller proceeds to arrange for the loading of MFO onto the nominated barge because if one waits for a written confirmation, the loading slot at the loading terminal for bunker barges may be lost and loading may be delayed. The *Joaquim* cargo was in fact loaded on the very next day after Gary Chew confirmed the deal for this cargo with James Lim on 7 February 2014.

66 For the first contract, which also involved a prompt loading situation, it was NER and not Gulf which nominated the barge to receive the MFO on 7

December 2013 and G-Fuel relied on NER's barge nomination without consulting Gulf. Avik Ghosh admitted that Gulf did not send any barge nomination to G-Fuel for the first contract.²³ If, as Gulf claimed, its written barge nomination is crucial to its assumption of liability for a transaction under the sleeving arrangement, it is surprising that it did not complain to G-Fuel about the loading of the MFO under this contract. Avik Ghosh said that Gulf did not nominate a barge because Gary Chew had already asked Gulf's staff, one Mr Roji, to send a deal recap to G-Fuel. When cross-examined, he said:²⁴

Q: You explained that there was no need to send a barge nomination because Gary had sent this email on 6 December, 7.42, saying:

"Roji, fyi! Pls send confirmation back."

That was your answer.

A: That's right...

Q: *Are you saying that there was no need to send a barge nomination because Gary Chew had sent this email on 6 December 2013 7.42pm ...?*

A: *That is correct, yes.*

[emphasis added]

67 In the case of the *Joaquim* cargo, Gary Chew had asked James Lim to "chase Elaine" for the deal recap and Gulf's accounts manager, Kannan Sampath, agreed during cross-examination that Gary Chew must have instructed Elaine Koh to send the deal recap to G-Fuel by the time he asked James Lim to chase her for the said document.²⁵ If, as Avik Ghosh explained, there was no need for Gulf to send G-Fuel a barge nomination for the first

²³Notes of Evidence, Day 3, p 59, lines 15-19.

²⁴ Notes of Evidence, Day 3, p 61, lines 12-17 and p 62, lines 10-14.

²⁵ Notes of Evidence, Day 4, p 26, lines 15-21.

contract because Gary Chew had already instructed Roji to issue a deal recap to G-Fuel, it follows that Gulf's written barge nomination was also not required for the *Joaquim* cargo as Gary Chew had already instructed Elaine Koh to send the deal recap to G-Fuel.

68 In the case of the second contract, Gulf forwarded a barge nomination in writing to G-Fuel but G-Fuel loaded the MFO in question on the basis of NER's requirements instead of those stated in Gulf's barge nomination. In an email on 28 January 2014 at 7.11pm to Gulf, which was copied to G-Fuel, NER asked Gulf to arrange for the MFO to be loaded on 31 January 2014. A few minutes later, in an email to G-Fuel timed at 7.14pm, Gulf nominated a barge to receive the said 3,000 MT of MFO on 1 February 2014. G-Fuel ignored the loading date indicated in Gulf's nomination form, namely 1 February 2014, and loaded the cargo on 31 January 2014. When cross-examined, Avik Ghosh admitted after some cajoling that Gulf did not complain to G-Fuel that the latter relied on NER's barge nomination to load the MFO in question. His testimony during cross-examination on this point²⁶ may be noted as an example of his evasiveness and refusal to concede the obvious during the trial:

Q: In this second sleeving transaction, Gulf never complained to G-Fuel that G-Fuel had loaded based on NER's barge nomination rather than Gulf's barge nomination. Do you agree?

A: No.

Q: Is there anything in writing to show that such a complaint was made to G-Fuel?

A: *Not here, no.*

Q: Not here. Is it anywhere?

²⁶ Notes of Evidence, Day 3, p 77, lines 12-25 and p 78, lines 1-2.

- A: *No it's not here*, no. No, no.
- Q: You're sure? You don't have it stashed somewhere else?
- A: No.
- Q: And this is not contained in any affidavits, either in Kannan's or yours, right?
- A: That's right, yes.
- [emphasis added]

69 When it was put to Avik Ghosh that Gulf had never given G-Fuel any reason to believe that it could not load when a barge nomination was sent by NER to Gulf and copied to G-Fuel, all that he could say was that the “barge nomination *generally* has to come from the person who is taking title”.²⁷ James Lim rightly pointed out to Gary Chew shortly after Gulf denied liability for the contract for the *Joaquim* cargo that if Gulf had wanted to insist on being the party to send the barge nomination under the sleeving arrangement, this could have been communicated to him much earlier. It cannot be overlooked that it was only on 3 March 2014 that Gulf first raised the issue of barge nomination. This was more than 3 weeks after the loading of the *Joaquim* cargo on 8 February 2014. By then, as has been mentioned earlier (at [51]-[55]), Gulf had taken the position in its correspondence with NER that the *Joaquim* cargo was to be regarded as having been handed over by Gulf to NER. It may be recalled that Avik Ghosh had written to NER about the *Joaquim* cargo having been handed over by Gulf to NER and the same cargo had been included as part of the MFO handed over by Gulf to NER in Gulf's spreadsheet sent to NER by Nidhi Bhatia on 14 February 2014, less than a week after the *Joaquim* cargo was loaded onto the barge nominated by NER.

²⁷ Notes of Evidence, Day 3, p 78, lines 3-9.

70 In the case of the *Joaquim* cargo, on 7 February 2014, NER emailed Gulf at 7.02pm to ask Gulf to arrange for that cargo MFO to be loaded onto the nominated barge on 8 February 2014. Gulf suggested that NER’s email, a copy of which was forwarded to G-Fuel, was a mere request to Gulf to arrange for the loading of the MFO and not a barge nomination form. However, in the case of the second contract, G-Fuel also acted on a similar email from NER to Gulf, which was copied to it, and Gulf did not complain to G-Fuel about this.

71 It is worth reiterating that in his email to NER on 8 February 2014, Avik Ghosh stated that he would “allow” NER to “load” the MFO in question if its customer, Dan-Bunkering, confirmed that it had received MFO from NER and if NER sends to Gulf all the requisite BDNs on the following week to confirm that certain ships owned by Gulf’s customers had been supplied with MFO by NER. The required confirmation from Dan Bunkering was obtained. As for the other condition regarding BDNs, Avik Ghosh admitted that NER could only supply the *Joaquim* cargo to Gulf’s customers and send the BDNs with respect to these customers *after* NER has taken delivery of the said cargo. In these circumstances, Gulf, which expected G-Fuel to load the *Joaquim* cargo onto NER’s barge for NER to supply MFO to Gulf’s own customers, cannot be allowed to rely on its own failure to send a barge nomination form to G-Fuel to refuse to honour the contract for the *Joaquim* cargo.

72 Curiously, Avik Ghosh, having informed NER on 8 February 2014 that he would allow NER to “load” the *Joaquim* cargo provided certain conditions were made, made a ludicrous attempt to distance himself from his use of the word “load” by saying that “load” in this case meant “take title” to the goods. He added that what he meant was that Gulf would pay G-Fuel only if title to the *Joaquim* cargo passed to it. Apart from the fact that loading has absolutely

nothing to do with title to goods, Avik Ghosh’s evidence does not make sense as he had told NER that he would allow the latter to “load” cargo and if “load” meant “taking title”, he was in fact saying that he would allow NER to take title to the *Joaquim* cargo when he was actually more concerned with Gulf’s title to the said cargo.

73 I accept Gary Chew’s evidence that Gulf had no hard and fast rules regarding barge nominations to enable G-Fuel to deliver MFO under the sleeving arrangement. In the rough and tumble of the bunkering trade and prompt loading schedules, I accept James Lim’s evidence that for a barge nomination form to be acted on, what matters is that it contains all the salient details relating to the barge name, quantity, date of loading and the terminal at which the MFO is to be loaded. I thus find that Gulf has not established that it was a requirement of the contract that G-Fuel had to receive a barge nomination from Gulf before the *Joaquim* cargo could be loaded onto the barge nominated by NER.

Whether Gulf’s pre-conditions imposed on NER were relevant to the disputed transaction

74 Gulf also contended that it need not honour the contract for the *Joaquim* cargo because certain conditions imposed by it on NER in an email sent to the latter on 8 February 2014 at 2.48am (“the pre-conditions email”) were not met.

75 Apparently, Gulf was dissatisfied with certain matters relating to its own business dealings with NER and it informed the latter that certain conditions must be complied with before it would continue with the sleeving arrangement. The pre-conditions email was worded as follows:

Your request is noted, following are my conditions

1 Jefferson has to drop an email to us, even if it's a short one ... confirming the stems.

2 I see the delivery date ranges are very wide 10-22 Feb. This date range does not justify an emergency loading. You can very well wait till next week to load.

However, assuming point 1 is satisfied, I am willing to let you load ... on one clear condition.

I will honour the sleeve with G-Fuels only if I get all delivery BDNs next week. If even a single delivery is pushed or cancelled... I will not honour the sleeve with G Fuels.

If G Fuels loads New Energy without our consent, I will not honour any sleeve.

Please inform [G Fuel] of this condition to sleeve.

Gulf Petroleum team, please make this condition clear in any correspondence with G-Fuels.

[emphasis added]

76 Gulf's solicitors summed up their client's position on the pre-conditions email as follows in their closing submissions (at para 21):

In this regard, as a pre-condition for the Defendant to sleeve the disputed subject transaction, the Defendant had imposed two conditions on the transaction for purchase of the Marine Fuel Oil in the email sent from the Defendant to NER dated 8 February 2014 at 2.48am. The Defendant's first condition required Dan-Bunkering (Singapore) Pte Ltd's Jefferson Chan to send an email to the Defendant confirming an order in respect of the vessel CAPE CLIPPER. The Defendant's second condition required that it receive all Bunker Delivery Notes in respect of orders between the Defendant and NER scheduled to be delivered in the week of 10 to 16 February 2014. While the first condition was fulfilled, the second condition was not fulfilled. Therefore, the Defendant never agreed to sleeve the transaction for the purchase of the Marine Fuel Oil.

77 Gulf's argument that G-Fuel is bound by its terms stated in the pre-conditions email cannot be taken seriously for the simple reason that G-Fuel had no notice whatsoever of the said email at the material time. When cross-examined, Avik Ghosh conceded that the pre-conditions email was not communicated to G-Fuel by his staff although he had instructed them to do so.²⁸

78 Gulf clutched at straws when it argued that G-Fuel had assumed the risk of NER’s failure to pass on the relevant information about the conditions in the pre-conditions email to it because NER was the conduit for communications between G-Fuel and Gulf. Gulf also argued that as NER initiated the first and second transactions as well as the transaction for the *Joaquim* cargo, “it is a logical conclusion that NER functions as a conduit for communications between G-Fuel and Gulf”. G-Fuel rightly pointed out that this assertion was not pleaded. In response, Gulf claimed that this point was pleaded in para 10 of its Defence (Amendment No 1), which states as follows:

Further, given the nature of sleeving, the Plaintiff knew or ought to have known that the Defendant’s agreement to sleeve the purchase of the MFO was conditional upon the Defendant’s terms being fulfilled. The Defendant made it clear in its e-mail to NER dated 8 February 2014 at 2.48am that it would not agree to sleeve the purchase of the MFO if NER failed to fulfil the Defendant’s terms. These terms imposed on NER are set out in the said email from the Defendant to NER.

79 Paragraph 10 of the Defence (Amendment No 1) does not support Gulf’s assertion that NER was the conduit for communications between G-Fuel and Gulf. Furthermore, no evidence was introduced to show that NER acted as such a conduit or that NER is obliged to transmit information received from Gulf to G-Fuel. If Gulf wanted to impose conditions on the sleeving of the transaction for the *Joaquim* cargo on G-Fuel, it should have informed G-Fuel about this before Gary Chew agreed with James Lim on 7 February 2014 that Gulf would sleeve the deal for the *Joaquim* cargo. As such, Gulf’s assertion that it was not bound by the contract for this transaction because the terms in the pre-conditions email were not met by NER must be rejected.

²⁸ Notes of Evidence, Day 3, p 107, lines 15-23.

Whether G-Fuel contracted with NER

80 In the aftermath of Gulf’s denial that it had agreed to sleeve the transaction for the *Joaquim* cargo, G-Fuel’s managing director, CK Teng, and James Lim discussed the problem of Gulf’s refusal to send the deal recap for the said cargo with NER’s Mr Ho Keng Tiong (“KT Ho”).

81 According to CK Teng and James Lim, KT Ho assured them that he will get Gulf to pay for the *Joaquim* cargo and that if Gulf did not do so, NER will pay for the said cargo. For this purpose, KT Ho asked G-Fuel to send him a sales confirmation for the *Joaquim* cargo. James Lim testified on why the meeting with NER was called as follows:²⁹

... My MD said in this case, maybe we have a word with Gulf or we have a word with New Energy. So I told my MD that I had a word with Gulf. Gulf is assuring that they will send a recap to me in terms of my phone call. I spoke to Gary and I spoke to Ms Elaine.... Mr Teng asked me to set up a meeting with New Energy ... to discuss like if what happens that, touch wood, that Gulf is trying to – not going to honour this deal.

82 As for what was discussed at the said meeting, James Lim testified as follows:³⁰

Basically was telling New Energy is that now the oil has been loaded ... Gary actually approve and confirmed that this sleeve was agreed, and after the oil was loaded ... we have been chasing for the deal recap ... in order for us to put into record purposes.... So, Mr Ho, I think is the MD of New Energy reassure us that they will get Gulf ... to honour what they have agreed on, which is the sleeving arrangement. However, ... he said – if, let’s say, if worse scenario, if let’s say, Gulf is really not going to honour this deal,... New Energy reassured us that they will still talk to Gulf. If not, New Energy actually reassured us by making us feel more assured – he asked us to

²⁹ Notes of Evidence, Day 2, p 50, lines 22-25, and p 51, lines 1-7.

³⁰ Notes of Evidence, Day 2, p 51, lines 9-25, and p 52, lines 1-7.

send them the confirmation. If, let's say, really Gulf is not going to pay up, New Energy will pay.

83 James Lim stressed that while G-Fuel agreed to send a sales confirmation to NER for the *Joaquim* cargo, neither he nor NER had agreed that the contractual parties to the transaction for this cargo were G-Fuel and NER.

84 Gulf took a different view of the situation and asserted that by sending the sales confirmation and tax invoice for the *Joaquim* cargo to NER, G-Fuel confirmed that it had entered into a contract for the sale and purchase of this cargo with NER.

85 I accept that after Gulf unexpectedly reneged on the deal for the *Joaquim* cargo, G-Fuel was willing to clutch at straws and accept any offer of assistance by NER. After all, Gary Chew had suggested to James Lim that he talk to NER about the problem arising from Gulf's refusal to pay for the *Joaquim* cargo. G-Fuel forwarded a sales confirmation and tax invoice for the *Joaquim* cargo to NER only because it wanted to hedge bets and be paid for the said cargo if Gulf did not honour its commitments. However, G-Fuel's primary concern was to get Gulf to pay for the said cargo. It pointed out that whereas the sales confirmation and tax invoice addressed to NER was only a "paper assurance", its sales confirmation and tax invoice addressed to Gulf earlier on were for auditing and Goods and Services tax invoicing purposes.

86 Gulf also sought to rely on an email that it received from NER on 16 February 2014, in which the latter stated that it was "agreeable to take in the G-Fuel loading (8 Feb) into [its own] account". According to Gulf, this e-mail showed that the disputed transaction was a matter between G-Fuel and NER. However, G-Fuel was not privy to this email. In any case, Gulf did not call the

writer of the email to testify and G-Fuel rightly objected to the admissibility of this email as evidence.

87 It is also relevant to note that Gulf is in no position to say that the *Joaquim* cargo was loaded pursuant to a contract between G-Fuel and NER when, as explained earlier (at [51]-[55]), it had taken the position in its dealings with NER that this cargo had already been handed over by it to NER on 8 February 2014. I thus find that the sending of a sales confirmation and tax invoice by G-Fuel to NER does not prevent G-Fuel from holding Gulf to the deal for the *Joaquim* cargo, and especially so when the bulk of the evidence was in favour of there being a contract between it and Gulf with respect to the said cargo.

Conclusion

88 The evidence of Gary Chew and James Lim was much more credible than that of Gulf's two witnesses, Avik Ghosh and Kannan Sampath. Gulf's witnesses came to court with a prepared script that purportedly supported their company's case and stubbornly stuck to that script regardless of its relevance to the questions posed to them or the effect on their credibility.

89 I find that Gulf has no real defence to G-Fuel's claim and is liable for the sum claimed by the latter in relation to the sale and purchase of the *Joaquim* cargo. I totally agree with Gulf's former key employee, Gary Chew, that his former employer's failure to honour its obligations under the contract for the *Joaquim* cargo smacked of bad faith.

90 G-Fuel is entitled to judgment for the amount claimed in its tax invoice dated 8 February 2014 for the *Joaquim* cargo as well as interest at 5.33% per annum on the said amount from the date of the writ until the date of judgment.

Tan Lee Meng
Senior Judge

Kelly Yap Ming Kwang and Kelly Toh (Oon & Bazul LLP) for the
plaintiff;
Thomas Tan and Loh Chiu Kuan (Haridass Ho & Partners) for the
defendant.