Gulf Petrochem Pte Ltd
v
Petrotec Pte Ltd and others

[2018] SGHC 83

High Court — Suit No 1224 of 2014
Woo Bih Li J
17–18, 23, 25 May 2016; 11–14, 18–21 July 2017; 16 October 2017

Contract — Contractual terms — Which of two contracts applied

Contract — Formation — Certainty of terms — Guarantee

Contract — Consideration — Guarantee

Contract — Consideration — Promissory estoppel

Credit and security — Guarantees and indemnities

6 April 2018

Woo Bih Li J:

Introduction

1 The present suit involves the supply of fuel oil pursuant to a contractual agreement between the plaintiff and the 1st defendant. The nature of this contractual arrangement is at the centre of the dispute. It was not disputed that the 1st defendant collected fuel oil from the plaintiff's suppliers and delivered it to third party end-purchasers, pursuant to contracts for the sale of fuel oil entered into between the plaintiff and the end-purchasers. However, the question is whether the relationship between the plaintiff and the 1st defendant

was one of sale and re-purchase, or one where the 1st defendant merely performed the delivery but at no time purchased the fuel oil? A written contract between the plaintiff and the 1st defendant suggested the former; but the plaintiff argued that an oral contract supporting the latter superseded that written contract. The plaintiff also claimed that the 2nd to 4th defendants were guarantors of the debt that the 1st defendant owed.

Background

Parties

2 The plaintiff, Gulf Petrochem Pte Ltd ("Gulf"), is a Singapore-incorporated company in the business of trading petroleum products.[1]

3 Mr Chew Sung Kwang ("Gary Chew") was Gulf's Senior Bunker Trader and its only employee in the bunker trading department in Singapore during his term of employment between 1 November 2011 and 31 August 2014. Among other things, Gary Chew's job profile involved "[m]arketing and [b]ack to back bunker sales in Singapore … [t]rading cargoes, [and d]eveloping ex-wharf sales in Singapore".[2] Gary Chew's duties and authority did not materially change during his term of employment.[3]

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1 Statement of Claim (Amendment No 2) ("SOC") at para 1.

2 Gary Chew's AEIC at p 26.

3 Gary Chew's AEIC at para 11.

4 Gary Chew reported to Mr Kalrav Dixit ("Dixit"),[4] who was the head of bunker trading at Gulf's parent company.

5 Dixit in turn reported to Mr Prerit Goel ("Goel"), who had been a director of Gulf since 3 June 2010 and was based in Gulf's parent company in the United Arab Emirates. At all material times, Goel was in charge of Gulf's overall management and business affairs.[5]

6 The 1st defendant, Petrotec Pte Ltd ("Petrotec"), was a Singapore-incorporated company engaged in the business of dealing in marine petroleum products and providing fuel oil delivery services.[6] It was originally set up by the 2nd defendant, Mr Tan Keng Huat, Dennis ("Dennis Tan"), in 2007 to provide offshore engineering services, and it started to deal in fuel oil sometime in 2011.[7]

7 At all material times, Dennis Tan was the sole director and sole shareholder of Petrotec, as well as a director and a shareholder of Oasis Asia Maritime Pte Ltd ("Oasis"), another Singapore-incorporated company.[8]

8 The 3rd defendant, Mr Tan Shuping ("Aroy Tan"), was a shareholder of Oasis until around 3 May 2013,[9] and a director of Oasis until 13 March 2014.[10]

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4 Gary Chew's AEIC at paras 19, 60; NE Day 1, p 15, lines 31–32.

5 Goel's AEIC at para 9.

6 SOC at para 2.

7 Dennis Tan's AEIC at para 12.

8 Goel's AEIC at para 6.

9 Dennis Tan's AEIC at para 18, p 69.

10 Goel's AEIC at para 7.

9 The 4th defendant, Mr Soon Kok Khoon ("Steven Soon"), was the secretary and a director of Oasis until around May 2013. He was also a shareholder of Oasis until around the same date.[11]

10 Oasis was incorporated by Dennis Tan, Aroy Tan, and Steven Soon in Singapore on 3 June 2011 to deal in fuel oil and to serve as a physical supplier of fuel oil to vessels calling within Singapore port limits.[12] The intention was for Oasis to apply for a Bunker Supplier Licence and a Bunker Barge Operator Licence issued by the Maritime and Port Authority of Singapore ("MPA"). Apparently, only licensees could carry out the sale and supply of fuel oil to vessels within Singapore port limits.[13] However, around May 2013, because Oasis had still not been awarded the two licences by MPA, Steven Soon and Aroy Tan both sold their shares in Oasis to Dennis Tan.[14] Steven Soon resigned as director on 3 May 2013,[15] and Aroy Tan did the same on 13 March 2014.[16]

11 For ease of reference, the 1st to 4th defendants will be collectively referred to as "the Defendants". Further, for present purposes, the terms "bunker" and "fuel oil" are used interchangeably to refer to the cargo that was sold and/or delivered.[17]

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11 Dennis Tan's AEIC at paras 18–19, p 69.

12 Dennis Tan's AEIC at para 14.

13 Dennis Tan's AEIC at para 14.

14 Dennis Tan's AEIC at paras 18–19, p 69.

15 Dennis Tan's AEIC at para 18, p 70.

16 SOC at para 4.

17 See Dennis Tan's AEIC at para 7; NE Day 4, p 44, lines 19–20.

Genesis of the relationship

12 The business relationship between Gulf and Petrotec was largely built upon the personal relationship between Gary Chew and Dennis Tan. As mentioned, Oasis was set up in June 2011. At around the same time, Petrotec started to deal in fuel oil. Sometime in 2011, Dennis Tan got in touch with Gary Chew to explore the possibility of Gulf doing business with Petrotec and Oasis.[18]

Two contractual arrangements

13 Eventually, Gulf and Petrotec entered into a contractual arrangement relating to the supply of fuel oil. The parties agreed that the arrangement lasted for slightly more than two years from August 2012 to around November 2014.[19] However, they disagreed as to the nature of the contractual arrangement. Petrotec claimed that the business arrangement between it and Gulf involved a sale and re-purchase as constituted or evidenced by a written contract between the parties. This written contract was titled "Payment Net-Off Contract (Barging Agreement)" ("Net-Off Contract").

14 Gulf did not dispute the existence of the Net-Off Contract or the fact that the parties had initially entered into that contract, but Gulf denied that it had ever been performed.[20] Gulf claimed that the Net-Off Contract had been superseded and dealings between the parties were instead based on an oral agreement providing for Petrotec to receive, transport, and deliver Gulf's fuel

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18 Dennis Tan's AEIC at paras 21–22.

19 Defendants' Closing Submissions at para 15.

20 Goel's AEIC at para 21.

oil (without any attendant sale or re-purchase between Gulf and Petrotec). This oral arrangement was referred to at trial as the "New Business Model".

15 I now set out the details of the two contractual arrangements at issue.

Net-Off Contract

16 It was undisputed that on 22 August 2012, Gulf and Petrotec entered into the Net-Off Contract which came into force on the same day for the period of one year. Gary Chew and Dennis Tan signed the Net-Off Contract on behalf of Gulf and Petrotec respectively.[21]

17 The terms of the Net-Off Contract provided for the sale, re-purchase, and delivery of bunker fuel oil. There were two main components. First, under cl 2(ii) of the Net-Off Contract, Gulf would sell fuel oil to Petrotec on an ex-wharf basis (under a "Sale Contract"). The term "ex-wharf basis" in this context meant that Petrotec would directly collect the fuel oil from Gulf's suppliers ("the Suppliers"). Second, under cl 2(i) of the Net-Off Contract, Gulf would re-purchase fuel oil from Petrotec on a delivered basis (under a "Purchase Contract"). "Delivered basis" meant that it was Petrotec (and not Gulf) that would deliver the fuel oil to downstream buyers ("the Buyers"). Accordingly, transactions under the Net-Off Contract involved the sale and re-purchase of fuel oil between Gulf and Petrotec.[22]

18 The Net-Off Contract also provided for a payment mechanism. Pursuant to cl 3.1 of the Net-Off Contract, a running account was maintained between

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21 Gary Chew's AEIC at para 13.

22 Defence and Counterclaim (Amendment No 4) ("Defence") at para 15.

Gulf and Petrotec based on the quantities and prices under the Purchase Contracts and Sale Contracts. At the end of each calendar month, the consolidated payment obligations accrued under the Sale Contracts for that month would be "net off" against the consolidated payment obligations accrued under the Purchase Contracts for the same month. Under cl 3.2 of the Net-Off Contract, depending on which consolidated sum was greater, either Gulf or Petrotec would be entitled to invoice the other party for the difference.

19 The Net-Off Contract itself did not provide all the terms of the business arrangement. Petrotec gave affidavit and oral evidence as to how business arrangements between the parties had in fact been conducted pursuant to the Net-Off Contract. According to Dennis Tan, the business arrangements proceeded as follows:

> (a) Petrotec sourced for potential purchasers of fuel oil on a delivered basis. On request of Petrotec, the Buyers would send their orders to Gulf for confirmation. Thereafter, any contract for the purchase of fuel oil would be entered into directly between the Buyers and Gulf. Apparently, this process was called "sleeving", where orders from Petrotec's customers were "sleeved" to Gulf.[23]
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> (b) Gulf collated the Buyers' orders until a threshold quantity was reached. Thereafter, Gulf would email Petrotec for confirmation that Petrotec would deliver the orders using fuel oil which Gulf would provide.

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[23] Dennis Tan's AEIC at para 42.1.

(c) If Petrotec agreed to make the deliveries, Gulf would purchase the corresponding quantity of fuel oil from the Suppliers on an ex-wharf basis. Gulf would then issue a "Barge Confirmation" to Petrotec containing instructions to collect the fuel oil from the Suppliers. In response, Petrotec would email Gulf a "Barge Loading Nomination" nominating a barge for the collection.

(d) Barges nominated by Petrotec would then collect the fuel oil from the Suppliers at the terminals. Simultaneously, Gulf (which had purchased the said fuel oil from the Suppliers) would onsell the fuel oil to Petrotec pursuant to a Sale Contract. The sale price under the Sale Contract was the purchase price of the fuel oil between Gulf and the Suppliers with an additional uplift ("the Uplift Charges"). The Uplift Charges were supposed to represent Gulf's profit in the business arrangement.

(e) Subsequently, Gulf would respond to the Buyers' orders and enter into contracts for the purchase of fuel oil directly with the Buyers. Invoices would be raised by Gulf to the Buyers for the fuel oil sold.[24] Apparently, Petrotec did not have copies of these invoices.[25] Gulf would then (i) forward to Petrotec the firm orders for the purchase of fuel oil that the Buyers had sent ("Firm Orders");[26] and (ii) issue Barge Confirmations to Petrotec for the latter to carry out the deliveries. (Some of the Firm Orders annexed in Dennis Tan's affidavit of

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24 Dennis Tan's AEIC at para 42.13.

25 Dennis Tan's AEIC at para 42.13.

26 Dennis Tan's AEIC at para 42.11.

evidence-in-chief ("AEIC") appear to have been addressed to Tankoil Marine Services Pte Ltd ("Tankoil") instead of Gulf or Petrotec,[27] but since neither party raised any issue or made submissions on it, I place no weight on this).

(f) According to Petrotec, these forwarded Firm Orders constituted offers by Gulf to purchase the stated quantity of fuel oil from Petrotec on a delivered basis. If Petrotec agreed to the sale of fuel oil to Gulf, two things would happen. First, Gulf would purchase from Petrotec the stated quantity of fuel oil on a delivered basis pursuant to a Purchase Contract. The purchase price would be the price at which Gulf had purchased the fuel oil from the Suppliers ("the Base Price").[28] Second, Petrotec would carry out physical deliveries of fuel oil to the Buyers in accordance with details set out in the Firm Orders. Petrotec claimed that it did not usually object to sale of fuel oil to Gulf pursuant to the Firm Orders, since the Buyers were usually customers sourced by Petrotec itself for Gulf.[29]

20 As mentioned (at [18] above), there was a "net off" process envisaged under the Net-Off Contract. Pursuant to the arrangement, Gulf would send Petrotec a monthly debit note setting out the monthly consolidated accounts and appending a spreadsheet demonstrating the numbers and calculations that constituted the "net off" process.[30] The process used a "system minus", which referred to the difference between the price of the Firm Order (*ie*, the price that

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27 Dennis Tan's AEIC at Exhibit DT-13.

28 Defence at para 14(11).

29 Defence at para 14(9); Dennis Tan's AEIC at para 42.12.

30 See Gary Chew's AEIC at pp 37–45.

Gulf receives from the Buyers for the fuel oil) and the Base Price (*ie*, Gulf's purchase price for the fuel oil from the Suppliers, which does not include the Uplift Charges). This "system minus" was reflected in a special column of the spreadsheet attached to Gulf's monthly debit notes to Petrotec. Multiplying the "system minus" by the quantity of fuel oil sold under the Firm Order, a "system minus value" would be derived. Conceptually, this "system minus value" appears to refer to the quantum of profit or loss that Gulf would have made if Gulf had purchased the relevant quantity of fuel oil at the Base Price from the Suppliers, and sold the same to the Buyers at the price of the Firm Order, *without the involvement of Petrotec*. The net amount of "system minus value" across the entire month's consolidation of Firm Orders would give Gulf's total monthly profit or loss from the resale of fuel oil ("the Purchase Margin"). If there was a profit (which would be achieved when, given a particular quantity of fuel oil ordered under a Firm Order, the price of the Firm Order exceeded the Base Price), credit would be given by Gulf to Petrotec; if there was a loss (when the price of the Firm Order was lower than that of the Base Price), Petrotec would bear the loss.[31]

21 There were also various types of charges which Petrotec agreed that it had to pay Gulf under this contractual arrangement, even though the terms of the Net-Off Contract did not expressly mention them:

(a) First, Petrotec agreed that it had to pay Gulf the Uplift Charges of US$3.00 per metric tonne ("MT") of fuel oil. However, there was a dispute regarding some of the Uplift Charges imposed at the commencement of the parties' contractual arrangement, as those charges

[31] Dennis Tan's AEIC at para 42.15.

were imposed and paid at rates of more than US$3.00 per MT. I will elaborate on this later.

(b) Second, any charges imposed by the Suppliers against Gulf for mooring and pilotage during the bunker loading operations would be charged by Gulf to Petrotec on a back to back basis.[32] Similarly, any claim made by the Buyers against Gulf for demurrage and/or delays would also be charged by Gulf to Petrotec on a back to back basis.[33] These charges are hereinafter collectively referred to as the "Back to Back Charges".

22 In addition, Gulf also imposed other charges which Petrotec disputes even though it paid them in the past. Indeed, some of the paid charges are the subject of Petrotec's counterclaim. I will elaborate on these later.

New Business Model

23 According to Gulf, after the Net-Off Contract was entered into but before it was performed, Gulf and Petrotec orally entered into the New Business Model. This New Business Model was a separate contract which governed the parties' relationship *vis-à-vis* the supply of fuel oil. The Net-Off Contract was never performed and thus "fell away".[34]

24 Gulf explained that the New Business Model was orally requested by Gulf, and orally agreed to by Petrotec.[35] This new arrangement was necessary

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32 Dennis Tan's AEIC at para 42.10.

33 Dennis Tan's AEIC at para 42.17.

34 SOC at para 13A.

35 SOC at para 11(c).

because the Net-Off Contract provided a credit period of up to 30 days for Petrotec to make payment for its purchases of fuel oil from Gulf. At the time it entered into the Net-Off Contract, Gulf had intended to obtain credit insurance to protect itself from, *inter alia*, any potential default by Petrotec. However, after the contract was signed, Gulf was unable to obtain the credit insurance. Thus, Gulf "was not prepared" to proceed with the Net-Off Contract and orally requested for the New Business Model, which Petrotec allegedly agreed to.[36]

25 According to Gulf, the flow of business under the New Business Model was as follows:[37]

(a) Petrotec arranged and negotiated the sale of fuel oil with the Buyers on behalf of Gulf.

(b) Once the sale price and quantity were agreed upon, the Buyers would send "Confirmations of Nomination" directly to Gulf. Gulf would in turn send "Sales Confirmations", which included the terms and conditions of sale, to the Buyers.

(c) Gulf then purchased the fuel oil from the Suppliers on an ex-wharf basis, and appointed Petrotec to receive, hold, and transport the fuel oil to the Buyers by way of a "Barge Confirmation Purchase Side".

(d) Once Gulf's fuel oil was loaded onto Petrotec's nominated barge, the Suppliers would invoice Gulf for Gulf's purchase of the fuel

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36 SOC at para 11.

37 SOC at para 13.

oil. Gulf would then send to Petrotec a "Barge Confirmation Sales Side" in respect of Gulf's sale of fuel oil to the relevant Buyer.

(e) Pursuant to the Barge Confirmation Sales Side, Petrotec would transport and deliver fuel oil to the Buyers. This delivery was evidenced by bunker debit notes. Gulf would then invoice the Buyers directly for Gulf's sale of fuel oil to them.

26 In essence, under the New Business Model, Gulf remained the owner of the relevant fuel oil *vis-à-vis* Petrotec and at no time sold fuel oil to, or purchased fuel oil from, Petrotec.[38] Petrotec was appointed only to receive, hold, transport, and deliver Gulf's fuel oil on Gulf's behalf. Petrotec would not be involved in the receipt or payment of any invoices between Gulf and the Suppliers,[39] or between Gulf and the Buyers.[40]

27 The risk-profit apportionment between Gulf and Petrotec mentioned above in relation to the Net-Off Contract (see [20] above), however, appeared to remain largely similar under the New Business Model. This was because even under the New Business Model, debit notes would be sent by Gulf to Petrotec on a monthly basis at the start of each calendar month, indicating the net sum due from Petrotec to Gulf in the preceding month. One aspect of these debit notes was the "system minus" as described above in relation to the Net-Off Contract (see [20] above). However, under the New Business Model, this "system minus" was said to represent a purely financial arrangement rather than

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38 SOC at paras 13(h), 14.

39 SOC at para 13(ha).

40 SOC at para 13(k).

a sale and re-purchase arrangement.[41] Using the price of the Firm Order and the Base Price,[42] Gulf would calculate the net profit or loss from the sale of fuel oil by Gulf to the Buyers (without intermediate sales and re-purchases from Petrotec). If the price of the Firm Order exceeded the sum of the Base Price and other relevant charges, Gulf would credit the surplus to Petrotec; if the converse, Petrotec would pay Gulf the deficit.[43]

Contractual performance and debit notes

28 As mentioned, the business relationship between Gulf and Petrotec lasted for slightly more than two years from August 2012 to November 2014.[44] The parties agreed that the first time a barge nominated by Petrotec was loaded with fuel oil purchased by Gulf from the Suppliers was on 24 August 2012.

29 During the term of their business relationship, Gulf sent at least three types of debit notes to Petrotec, two of which were implicated in the present proceedings.

30 The first type of debit notes recorded the net monthly payments that should be made by Petrotec to Gulf ("the Barge Settlement DNs"). At the start of each month (save for August 2012 to December 2012 where Gulf issued one consolidated debit note in January 2013 for these months), Gulf issued a debit

41 SOC at para 20.

42 SOC at paras 15B, 16.

43 SOC at para 15A.

44 Defendants' Closing Submissions at para 15.

note to Petrotec indicating the net sum due from Petrotec to Gulf in the preceding month which comprised the following four components:[45]

(a) the Purchase Margin, which represented the net profit or loss from the sale of the fuel oil to the Buyers;[46]

(b) the Uplift Charges, being US$3.00 per MT of fuel oil (the permissible rate is disputed) purchased from Gulf's Suppliers – Gulf charged this to Petrotec as Gulf's "operational costs of doing this business";[47]

(c) interests at the rate of 6% per annum that Gulf charged Petrotec on the Base Price from the date Gulf paid the Suppliers for the fuel oil to the date Gulf received payment for the same from the Buyers ("the Finance Charges");[48] and

(d) late payment interests that Gulf charged Petrotec at a rate of 2% per month from the first day of the month in which Gulf issued the debit note to the date payment was made by Petrotec ("the Late Payment Interests").[49]

31 The second type of debit notes was issued by Gulf to Petrotec for the Back to Back Charges (see [21(b)] above).[50]

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45 SOC at para 20.

46 SOC at para 15A.

47 SOC at para 19(a).

48 SOC at para 19(b); Gary Chew's AEIC at para 29(c).

49 SOC at para 19(c).

50 SOC at para 23; see Dennis Tan's AEIC at para 42.17.

32 A third type of debit notes was for the "Cancellation Charges", which refer to the difference between the price of the Firm Orders and the purchase price that the Buyers eventually had to pay (which was usually higher) for fuel oil from an alternative source if their purchase from Gulf was cancelled. Apparently, the Buyers would bill the Cancellation Charges to Gulf, which would in turn raise a debit note to Petrotec on a back to back basis.[51]

Guarantee

33 According to Dennis Tan, he received a phone call from Gary Chew in 2012. Gary Chew told Dennis Tan that Gulf wanted Dennis Tan and his two partners in Oasis, Aroy Tan and Steven Soon, to sign a document in order to kick-start the business with Gulf.[52] Gary Chew also allegedly told Dennis Tan that he did not have to worry about anything, and that Gary Chew would take care of them like how he took care of another bunker supplier who had engaged in a similar business with Gulf.[53]

34 After receiving Gary Chew's call, Dennis Tan called Steven Soon to come down to the office. That evening, Gary Chew arrived at Dennis Tan's office and obtained Steven Soon's and Dennis Tan's signatures on the document.[54] Dennis Tan then dispatched the document to Aroy Tan, who signed it and returned the document to Gulf.[55]

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51 Dennis Tan's AEIC at para 46.

52 Dennis Tan's AEIC at para 24.

53 Dennis Tan's AEIC at para 24.

54 Dennis Tan's AEIC at paras 24–26.

55 Dennis Tan's AEIC at para 26.

35 That document turned out to be a personal guarantee ("the Guarantee"), the validity and enforceability of which is in dispute. The 2nd, 3rd, and 4th defendants are referred to collectively as "the Guarantors".[56] I will elaborate on the Guarantee and its terms later.

End of the relationship

36 On or around 5 November 2014, Gulf suspected that Petrotec was facing financial difficulties and stopped doing business with it.[57] Apparently, the industry was in turmoil during that period as allegations of fraud were raised against certain major marine fuel companies such as OW Bunker and its subsidiary, Dynamic Oil Trading Pte Ltd ("DOT"). DOT had business relations with Tankoil, a company which had some connection with Petrotec and Dennis Tan. Investigations and claims against DOT and Tankoil led to disruptions in Petrotec's performance of its delivery and payment obligations with Gulf.[58]

37 As at the time Gulf stopped doing business with Petrotec, there were seven outstanding debit notes with the outstanding sum under them being US$3,937,105.33.[59] Petrotec had made part payment of US$580,205.25 for one of the outstanding debit notes as of 8 November 2014.[60]

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56 SOC at para 49; Dennis Tan's AEIC at p 61.

57 SOC at para 30.

58 Dennis Tan's AEIC at paras 101–127.

59 SOC at para 31(b).

60 SOC at para 31(a).

38 On or around 8 November 2014, Dennis Tan sent a text message to Goel requesting for financial assistance to pay the debt. Goel suggested a meeting to discuss the proposal, but Dennis Tan did not reply.[61]

39 On 10 November 2014, Gulf's lawyers wrote a letter of demand to Petrotec requesting immediate payment of US$4,268,852.05 which was then due and owing, and delivery of 15,794.86 MT of fuel oil which allegedly belonged to Gulf.[62] On the same day, Gulf's lawyers also wrote to each of the Guarantors to demand payment of US$4,268,852.05, and delivery of the "inventory quantity" of 15,794.86 MT of fuel oil valued at US$8,408,463.31.[63]

40 According to Gulf, the amount of US$4,268,852.05 stated in the letters of demand included (a) the outstanding debt owed by Petrotec as at the date of the letters, and (b) the debt under a Barge Settlement DN for November 2014 which had not yet been issued by Gulf at the time of the letters.[64] That Barge Settlement DN was subsequently issued on 1 December 2014 for a sum of US$303,684.86.[65] The amount stated in the letters of demand may not have been accurate as it appears to have mistakenly estimated the amount that would have been stated in this Barge Settlement DN as US$331,746.72.[66] However, nothing in the present case turned on this discrepancy. In any event, neither Petrotec nor the Guarantors complied with the letters of demand.[67]

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61 SOC at para 32.

62 SOC at para 34; 4DBD at pp 422–423.

63 4DBD at pp 420–421.

64 SOC at para 34.

65 SOC at para 39(b); Goel's AEIC at p 253.

66 4DBD at pp 420–423.

67 SOC at paras 54–57; 4DBD at pp 420–423.

41 On 11 November and 1 December 2014, Gulf issued a debit note for the Back to Back Charges and the above-mentioned Barge Settlement DN for November 2014 (see [40] above) respectively. There were therefore a total of nine outstanding debit notes, for a total face value of US$4,833,589.19. Given the part payment of US$580,205.25 made as of 8 November 2014 (see [37] above), the outstanding sum purportedly owed by Petrotec to Gulf was US$4,253,383.94.

Claims and counterclaims

42 The present suit was commenced on 18 November 2014. Gulf's claim comprised three main parts:[68]

(a) claim against Petrotec for delivery up of 15,309.248 MT of fuel oil ("the Surplus Oil") which Petrotec had allegedly received and held on behalf of Gulf, or alternatively payment of US$8,123,896.43 being the approximate value and/or price of the Surplus Oil, or further and/or alternatively damages for conversion or detinue in respect of the Surplus Oil;

(b) claim against Petrotec for the outstanding sum of US$4,253,383.94 due under debit notes issued between August and December 2014; and

(c) claim against the Guarantors under the Guarantee for similar reliefs as were sought against Petrotec.

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[68] SOC at p 32.

43 Petrotec counterclaimed the return of the following sums which were allegedly paid by mistake and/or led to the unjust enrichment of Gulf:[69]

(a) US$15,963.42 being the excess Uplift Charges levied by Gulf on Petrotec above the rate of US$3.00 per MT of fuel oil;[70]

(b) US$2,734,809.13 "being part of" the Finance Charges paid by Petrotec to Gulf from December 2012 to June 2014;[71] and

(c) US$1,102,560.49 being the Late Payment Interests paid by Petrotec to Gulf from February 2013 to June 2014.[72]

For present purposes, there is no material distinction between each kind of payment and I collectively address them as "the Payments".

44 There was also an alternative counterclaim for damages to be assessed in respect of the Payments.

45 Petrotec also sought a declaration that the Guarantee was void and/or unenforceable against the Guarantors.

Issues

46 Based on the parties' positions, the following issues arise for determination:[73]

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69 Defence at para 67A.

70 Defence at para 65.

71 Defence at paras 32, 66.

72 Defence at paras 32, 67.

73 Plaintiff's and Defendants' Lead Counsel Statements both dated 4 May 2017.

(a) whether the business between Gulf and Petrotec was carried out based on the Net-Off Contract or the New Business Model;

(b) given the answer to issue (a):

(i) whether Gulf is entitled to the Surplus Oil; and

(ii) whether Gulf is entitled to the sums due under the outstanding debit notes;

(c) in relation to the excess Uplift Charges, the Finance Charges, and the Late Payment Interests that Petrotec paid to Gulf, whether Petrotec is entitled to recover them from Gulf under the counterclaim; and

(d) whether Gulf is entitled to enforce the Guarantee against the Guarantors.

Whether the Net-Off Contract or the New Business Model applied

47 The first issue is whether the Net-Off Contract or the New Business Model was applicable in relation to the parties' contractual arrangement between August 2012 and November 2014.[74]

Gulf's arguments

48 Gulf's case was that notwithstanding the written Net-Off Contract, Gulf and Petrotec had orally agreed to "change to" the New Business Model shortly after 22 August 2012, before the Net-Off Contract was *ever* performed.[75]

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74 Defendants' Closing Submissions at para 15.

75 Reply and Defence to Counterclaim (Amendment No 2) ("Reply") at paras 5, 10.

Thereafter, Gulf and Petrotec conducted all the business between them based on the New Business Model.[76]

49 According to Gulf, the documentation and the conduct of the parties demonstrated that the New Business Model applied. In particular, Gulf made the following arguments:[77]

(a) There was no running account (or spreadsheet) maintained between the parties that was pursuant to the Net-Off Contract.[78] Rather, the account kept by Gulf was based on the New Business Model.[79]

(b) The fuel oil could not have been sold and re-purchased between Gulf and Petrotec because no invoices had been issued by either party for the alleged transactions.[80]

(c) The Barge Confirmations provided that Petrotec would be responsible for the fuel oil and did not evidence sale and re-purchase transactions.[81]

(d) Gulf had taken out insurance on the fuel oil loaded on Petrotec's nominated barges, and was the named beneficiary of the policy, even though Petrotec paid the premium on the policies.[82]

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76 Reply at para 6.

77 Plaintiff's Closing Submissions at para 54.

78 Plaintiff's Closing Submissions at paras 55, 69.

79 Reply at para 7.

80 Plaintiff's Closing Submissions at paras 58, 61, 62.

81 Plaintiff's Closing Submissions at para 59.

82 Plaintiff's Closing Submissions at para 60.

50 In response to the arguments by Petrotec (see [52]–[54] below), Gulf argued that the change from the Net-Off Contract to the New Business Model was valid because:

(a) it was supported by consideration as it was for mutual benefit;[83] and

(b) since the New Business Model was a new and separate contract, there was no need to comply with cl 6.2 of the Net-Off Contract (see [54(b)] below),[84] and in any event, Petrotec was estopped from demanding such compliance, or had waived its right to insist on such compliance, as it had continued to make payments to Gulf without dispute as to any of the charges or interests imposed in the debit notes.[85]

51 Accordingly, pursuant to the New Business Model, there was no sale or re-purchase of fuel oil between Gulf and Petrotec at any time.[86] Rather, Gulf was the owner of the fuel oil from the time it purchased the fuel oil from the Suppliers to the time the fuel oil was sold to the Buyers. Petrotec merely received, transported and delivered Gulf's fuel oil.[87] Petrotec would also bear the Purchase Margin, the Uplift Charges, the Finance Charges, and the Late Payment Interests under the New Business Model.

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83 Reply at para 13.

84 Reply at para 15A.

85 Reply at para 14.

86 SOC at para 14; Reply at paras 8–9.

87 Reply at paras 8–9.

Petrotec's arguments

52 Petrotec's case was that all of its transactions with Gulf were pursuant to the Net-Off Contract. Petrotec denied entering into any agreement based on the New Business Model, whether in writing or orally.[88] As such, business arrangements involving fuel oil between Gulf and Petrotec should be characterised as sale and re-purchase transactions in accordance with the Net-Off Contract.[89] Petrotec denied being appointed merely to receive, hold and transport Gulf's fuel oil at Gulf's instructions.[90]

53 In this regard, Petrotec made the following arguments:

(a) There was no discussion between the parties on any change in the contractual arrangements immediately after the Net-Off Contract was entered into.[91]

(b) The imposition of the Back to Back Charges evidenced that the business arrangements between Gulf and Petrotec were sale and re-purchase transactions.[92]

(c) A draft "Bunker Trading Contract" prepared by Gulf in relation to its business with Tankoil, which was a related company of Petrotec,[93]

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88 Defence at para 15.

89 Defence at para 9.

90 Defence at para 13.

91 Dennis Tan's AEIC at para 37.

92 Defence at para 14(6).

93 ACB at pp 179–196.

suggested that the contractual arrangement between Gulf and Petrotec had until then been governed by the Net-Off Contract.[94]

(d) Letters of demand sent by Gulf's own external lawyers to Petrotec and the Guarantors stated that the applicable contractual arrangement was the Net-Off Contract.

(e) An affidavit affirmed by Mr Dwivedi Vivek Kumar ("Dwivedi"), the Senior Vice President of Gulf, on 17 November 2014 and filed in an earlier application by Gulf for an injunction against Petrotec stated that the Net-Off Contract applied.[95]

(f) In online chats between Gary Chew and Dennis Tan during the course of the business relationship, Gary Chew had used terms such as "price", "selling", and "buying".[96]

(g) The structure of the transactions under the Net-Off Contract was in accordance with market practice in Singapore.[97]

54 Even if Gulf and Petrotec had orally agreed to the New Business Model, it was not enforceable because:

(a) there was a failure of consideration;[98] and/or

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94 Plaintiff's Closing Submissions at paras 65–67.

95 NE Day 1, p 52, line 23; NE Day 2, p 50, lines 13–15; see Exhibit D1.

96 Defendants' Closing Submissions at paras 29.1–29.2.

97 Dennis Tan's AEIC at para 38.

98 Defence at para 16.

(b) the change to the New Business Model was not made in accordance with cl 6.2 of the Net-Off Contract which provided that it "shall not be altered, changed, supplemented or amended except by written instrument signed by all the Parties hereto".[99]

Analysis

55 In the subsequent analysis, I will deal with the parties' arguments in the following clusters:

(a) circumstances leading to the purported change in arrangement;

(b) documentary evidence of the business arrangement between the parties, such as the Barge Confirmations and invoices;

(c) other documents referencing the contractual arrangement;

(d) contemporaneous communications between representatives of Gulf and Petrotec;

(e) the substance of the arrangement; and

(f) other factors such as the MPA licensing regime.

Circumstances leading to the purported change in arrangement

56 The first factor I examine is Gulf's explanation for the circumstances leading to the purported change in contractual arrangement from the Net-Off Contract to the New Business Model.

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[99] Defence at para 17.

57 As mentioned above (see [24] above), Gulf claimed that the New Business Model was necessary because, after the Net-Off Contract had been entered into, Gulf was unable to obtain credit insurance to protect itself from potential defaults by Petrotec under the Net-Off Contract and was therefore "not prepared" to proceed with that contractual arrangement. It thus orally requested for the New Business Model, which Petrotec allegedly agreed to.[100]

58 According to Gulf, the New Business Model was entered into between 22 and 24 August 2012 pursuant to discussions between Goel, Dixit and Gary Chew who represented Gulf, and Dennis Tan who represented Petrotec.[101] In his AEIC and initially during his oral testimony in court, Gary Chew maintained that he had attended these discussions regarding the change from the Net-Off Contract to the New Business Model with Goel and Dixit.[102]

59 However, this was not consistent with the oral evidence of Goel, who also testified as a witness for Gulf. Goel's initial position in his AEIC was consistent with Gary Chew's evidence – that discussions leading to the New Business Model were conducted between him, Dixit, Gary Chew and Dennis Tan.[103] However, Goel took a contradictory position in court. He first stated that Dixit and Gary Chew had been the persons who discussed the New Business Model with Petrotec, whereas Goel's own involvement had merely been an internal one within Gulf.[104] He then wavered and testified that he "[did] not

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100 SOC at para 11.

101 SDB at p 125, para 1.

102 Gary Chew's AEIC at para 16; NE Day 3, p 81, lines 12–14.

103 Goel's AEIC at para 17.

104 NE Day 1, p 43, lines 11–12.

know if [Dixit] was also present" at the particular meeting with Petrotec when the New Business Model was discussed.[105] Subsequently, Goel asserted that when the New Business Model was agreed to, Dixit "would have been there",[106] because "Gary himself was not authorised to take decisions of this nature alone".[107] Yet again, Goel later reversed and claimed that he was not sure if Dixit was present but claimed that Dixit "was aware of what was happening".[108]

60 I note that insofar as Goel's initial evidence was that he *had* participated in internal discussions with Dixit and/or Gary Chew on the New Business Model, there was no evidence supporting these discussions, whether in the form of phone records, attendance notes, or any other contemporaneous record.[109] As for Goel's new position that he had *not* been present at the purported discussions between Gulf and Petrotec regarding the New Business Model, that meant that he did not have personal knowledge of what had transpired. This placed increased importance on the evidence of Gary Chew and Dixit. Yet, despite the significance of Dixit's evidence on this issue, Gulf did not call Dixit as a witness.[110] No reason was provided as to why this was so.

61 In any event, Gary Chew's own evidence on this point was unreliable. When first asked in cross-examination, "So you meant that [Dixit] and [Goel] were present at the discussions where the [N]ew [B]usiness [M]odel was then

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105 NE Day 1, p 43, lines 23–27; NE Day 1, p 44, lines 4–6.

106 NE Day 1, p 44, lines 14–16.

107 NE Day 1, p 44, lines 21–25.

108 NE Day 1, p 45, lines 14–16.

109 NE Day 1, p 46.

110 Defendants' Closing Submissions at para 22.2.1.

agreed upon?", Gary Chew replied unreservedly, "Yes, of course".[111] Gary Chew was then confronted with the contradictory evidence of Goel (who had earlier testified in court) that Goel had not been present at these discussions. Gary Chew responded, "I think maybe [Goel] was saying … that the initial part of it, he was --- he --- he didn't come of course", and that Dixit "came initially without [Goel]".[112]

62 In contrast, Dennis Tan's evidence was consistently that there had been no discussion about the New Business Model between 22 and 24 August 2012. According to him, Gary Chew had been his sole contact person for Gulf until sometime in 2013 when he met other representatives of Gulf. Even after that, Gary Chew remained the primary contact point from Gulf.[113] Dennis Tan only stopped dealing with Gary Chew sometime in or about July 2014, soon after which Gary Chew left Gulf's employment and another person took charge of Gulf's dealings with Petrotec.[114] Goel and Dixit therefore did not enter the picture *vis-à-vis* Petrotec until much later after performance commenced under the Net-Off Contract.

63 While there may not have been direct objective evidence proving or disproving the alleged discussions between Gulf and Petrotec that led to the New Business Model, the burden is on Gulf to prove the departure from a written document as alleged. In the circumstances, I am not persuaded that the alleged discussions leading up to the New Business Model had in fact occurred.

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111 NE Day 3, p 81, lines 12–14.

112 NE Day 3, p 81, lines 17–19, 31.

113 NE Day 5, p 25, lines 30–31.

114 Dennis Tan's AEIC at para 33.

Documentary evidence of the business arrangement

64 The second factor I examine is the objective documentary evidence of the business arrangement involving fuel oil between Gulf and Petrotec.

(1) Barge Confirmations

65 At the outset, I note that although Gary Chew mentioned the importance of documenting transactions in "black and white" and that he had made it a point to keep formal documentation between Gulf and Petrotec,[115] there was no contemporaneous document between him and Dennis Tan to show that the Net-Off Contract had been replaced by the New Business Model. Indeed, there was no evidence adduced showing the formal termination or amendment of the Net-Off Contract. Nevertheless, in cross-examination, Gary Chew claimed that the Barge Confirmations constituted "very clear" evidence that the Net-Off Contract was no longer operative and that the New Business Model applied to the business arrangement involving fuel oil between Gulf and Petrotec.[116]

66 The Barge Confirmations had a generally standardised template. The chapeau of the documents read:

> We hereby appoint your company as barge transporter for the deal stated below

67 The Barge Confirmations then go on to state information including the seller, buyer, port/terminal, location, description of the goods, quantity and unit price, trade terms, and payment terms.

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115 NE Day 3, pp 82–83; NE Day 4, p 39, lines 26–27.

116 NE Day 3, pp 82–83; NE Day 4, p 39, lines 26–27.

68 Under the row labelled as "Remarks", the documents stated:

> Barge operator or company is responsible for the final quantity of fuel delivered to the ship and they are responsible for oil lost, stolen, spilling or any such kind of misappropriated handling.

69 In my view, when taken in their proper context, the Barge Confirmations (which use the header "Barging Confirmation") are neutral as to the nature of the relationship between Gulf and Petrotec.[117]

70 First, the phrase "appoint your company as barge transporter" merely meant that the Barge Confirmations were instructions given by Gulf to Petrotec to receive and/or lift certain lots of fuel oil from the Suppliers (see [19(c)] and [25(c)] above), or for Petrotec to deliver certain lots of fuel oil to the Buyers (see [19(e)] and [25(d)] above). In this context, the documents related to an aspect of the business arrangement that was undisputed and common between the Net-Off Contract and the New Business Model, *ie*, Petrotec acted as a transporter for the fuel oil. However, they do *not* address the real issue in dispute, *ie*, whether Petrotec, in addition to acting as the transporter, also took title to the fuel oil from Gulf at some point on a sale and re-purchase basis.

71 Second, for the same reason, the fact that in certain Barge Confirmations the "Buyer" was stated as Gulf rather than Petrotec, or that the "Seller" was also stated as Gulf, does not add much to the question of whether there had been sale and re-purchase transactions between Gulf and Petrotec. Regardless of whether the Net-Off Contract or the New Business Model applied, it was undisputed that the buyer from the Suppliers and the seller to the Buyers would both have been Gulf.

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117 Dennis Tan's AEIC at pp 562–563.

72 Third, the fact that Petrotec was held responsible for the final quantity of fuel oil delivered to the Buyers, and for lost, stolen or spilt fuel oil is neither here nor there. Indeed, as Gary Chew acknowledged in cross-examination, Petrotec would have been responsible for the final quantity of oil delivered to the Buyers regardless of whether the Net-Off Contract or the New Business Model applied, since it served as the transporter of fuel oil in either situation.[118]

73 In the circumstances, I am of the view that the Barge Confirmations are of no probative value for present purposes.

(2) Running account

74 Further, Gulf submitted that the running account it maintained between the parties had been based on the New Business Model rather than the Net-Off Contract.[119] This running account involved a netting off of the aggregate monthly accounts between Gulf and Petrotec, and the calculation of a "system minus". I have explained these in detail above (see [20] and [27] above).

75 In my view, the running account is neutral, as the account could exist in the same form regardless of whether the Net-Off Contract or the New Business Model applied. Under the New Business Model, the running account would represent a financial arrangement between the parties apportioning the risk of fluctuation in sale and purchase prices. Under the Net-Off Contract, the running account tabulated debts owed to and by each party as a result of the sale and re-purchase of fuel oil. Either situation, however, would involve the same

118 NE Day 4, pp 74–75.

119 Reply at para 7; Plaintiff's Closing Submissions at paras 55, 69.

"net off" process and the same calculation of the system minus. Nothing can therefore be inferred from the running account.

(3) Invoices

76 Gulf further argued that the Net-Off Contract could not have applied as there had been no invoices to evidence the alleged sale and re-purchase transactions between Gulf and Petrotec.[120] Under cross-examination, Dennis Tan suggested that it was because Gulf did not want to do the "paperwork",[121] and that it would have been odd for Petrotec to raise certain invoices to Gulf given that Petrotec was the one that owed moneys to Gulf.[122] Further, given the significant number of deliveries, it would have been administratively impracticable to issue an invoice for each transaction.[123] Ms Wong Mun Wai ("Wong"), Oasis's Administrative and Accounts Manager who provided management services to Petrotec, also gave evidence that there was no need for an invoice to be issued for each and every transaction given that there would be a consolidated billing as per the Barge Settlement DN at the end of each month.[124] I accept the explanations of Dennis Tan and Wong, and I add two points. First, the non-issuance of invoices is explicable on the basis that the business arrangement involving fuel oil between Gulf and Petrotec was purely internal whereas to the rest of the world, Gulf was the buyer from the Suppliers and the seller to the Buyers. Second, there were invoices between Petrotec and

120 NE Day 6, pp 8–10.

121 NE Day 6, p 73, lines 9–10.

122 NE Day 6, p 10, lines 24–28.

123 NE Day 5, p 16, lines 1–2.

124 NE Day 7, p 26, lines 3–11.

Tankoil for the alleged sale and purchase of fuel oil between those parties.[125] These invoices suggested that Petrotec had bought the fuel oil from Gulf and then onsold it to Tankoil. In any event, the absence of invoices between Gulf and Petrotec does not mean that the business arrangement between them could not have been that of sale and re-purchase.

77 For the foregoing reasons, I am of the view that the above-mentioned documents evidencing the business arrangement between the parties are equivocal as to which of the two contractual arrangements applied.

Other documents referencing the arrangement

78 I turn now to the documentary evidence that, while not strictly speaking directly related to the business arrangement between Gulf and Petrotec, nevertheless makes reference to and sheds light on its nature and the question of which contractual arrangement applied.

(1) Draft Tankoil Contract

79 In October 2014, Gulf contemplated entering into a business relationship with Tankoil for Tankoil to take over certain business arrangements that Gulf had with Petrotec. Accordingly, Gulf prepared a draft contract ("Draft Tankoil Contract"), which was intended to replace the then-existing business arrangement between Gulf and Petrotec.[126] The Draft Tankoil Contract was prepared by Gulf and sent by Ms Nidhi Bhatia ("Bhatia") on behalf of Gulf to Dennis Tan by way of an email dated 28 October 2014.[127]

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125 Dennis Tan's AEIC at paras 60–61.

126 NE Day 2, p 20, lines 6–10.

127 ACB at pp 178–196.

80 The terms of the Draft Tankoil Contract are notable:

(a) Recital (b) confirmed that Gulf "desire[d] to wind down the business with [Petrotec] and do more business of buying and selling oil for bunkering with [Tankoil]".

(b) Clause 2.1 stated that "[Gulf] and [Petrotec] are *currently doing business pursuant to a Payment Net-Off Agreement* dated 22 August 2012" [emphasis added].

(c) Clause 4.1 stated that "[f]rom the Effective Date [of the Draft Tankoil Contract], [Tankoil] and [Gulf] shall sell and purchase oil for bunkering" pursuant to several sub-clauses, in which sale and purchase contracts between Gulf and Tankoil are referenced. In cl 1.1, "Sale Contract" and "Purchase Contract" are defined as "written and signed order[s] for the sale or purchase of oil from [Tankoil] or [Gulf] (as the case may be) which incorporate[] the terms and conditions contained" in the Draft Tankoil Contract.

(d) Clause 4.3 stated that "[t]itle to the Oil sold to [Tankoil] pursuant to this [Draft Tankoil] Contract shall pass when the Sale Contract is entered into [accordingly]".

(e) Clause 4.4 stated that "[t]itle to the oil sold to [Gulf] pursuant to this [Draft Tankoil] Contract shall pass when the Purchase Contract is entered into [accordingly]".

81 Clause 2.1 of the Draft Tankoil Contract clearly stated that the applicable contractual arrangement between Gulf and Petrotec (as of October 2014) was the Net-Off Contract.

82 When Goel was confronted with this clause in cross-examination, he explained that the Draft Tankoil Contract was only a draft,[128] and that "[h]ad it been signed, we would have corrected it".[129] Gulf's closing submissions also stressed that cl 2.1 was a "mistake".[130]

83 I do not accept either reason as a sufficient explanation for what cl 2.1 clearly stated. First, cl 2.1 was not one of the standard form provisions, and some attention must have been paid to its drafting. Indeed, it was undisputed that the Draft Tankoil Contract was prepared by Gulf. If it was true that the Net-Off Contract had been superseded immediately after it was entered into (see [48] above), and that the parties had thereafter proceeded on the basis of the New Business Model for around two years, it was unlikely that Gulf would have overlooked such an apparent error. This remained the case even though Gary Chew had left Gulf by the time the Draft Tankoil Contract was prepared. Furthermore, Goel's evidence was that the draft was "prepared by our legal counsel, Ms Divya Thota, in discussion with Mr Thomas Tan".[131] Mr Thomas Tan was from the firm of external solicitors advising Gulf then, and was also Gulf's counsel at trial.

84 Second, despite Goel's attempts to distance himself from the drafting of the Draft Tankoil Contract,[132] he subsequently conceded under cross-examination that he had been copied in Bhatia's email to Dennis Tan

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128 NE Day 2, p 18, lines 5–9.

129 NE Day 2, p 47, line 1.

130 Plaintiff's Closing Submissions at para 65.

131 NE Day 2, p 17, lines 23–24.

132 NE Day 2, p 47, lines 8–11.

which attached the Draft Tankoil Contract.[133] Notably, Goel would have been aware that the New Business Model had been entered into because of Gulf's alleged failure to get credit insurance for the Net-Off Contract (assuming this was true). Further, the email attaching the Draft Tankoil Contract was also copied to several of Gulf's key employees, including Dwivedi, Ms Divya Thota ("Thota"), Mr Avik Ghosh ("Avik"), and Mr Kannan Sampath. In the circumstances, I do not believe that if cl 2.1 was incorrect in citing the Net-Off Contract as the applicable contractual arrangement which the Draft Tankoil Contract was intended to replicate, no one from Gulf had noticed the error.

85 Third, apart from cl 2.1, other clauses of the Draft Tankoil Contract (see [80] above) also clearly envisaged a sale and re-purchase arrangement between Gulf and Tankoil. As mentioned, the Draft Tankoil Contract was structured to *mirror* the existing contractual arrangement between Gulf and Petrotec. Therefore, if the New Business Model had indeed been applicable as between Gulf and Petrotec, it would have been obvious to any employee or lawyer (whether internal or external) from Gulf who was involved in the drafting of the Draft Tankoil Contract that its whole premise was erroneous. Yet, there was no suggestion of anyone from Gulf raising any query or concern.

86 In its closing submissions, Gulf sought to stress cll 2.2 and 3.2 of the Draft Tankoil Contract which respectively stated as follows:

> (a) "As at ____ 2014, [Petrotec] owes [Gulf] ____ in stock and $____ as balance in account (the "Outstanding Accounts") …"

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133 NE Day 2, p 48, line 5.

(b) "… [Tankoil] assumes the Outstanding Accounts of [Petrotec] and is holding ____ MT of oil for [Gulf] and owes the sum of $____ to [Gulf]."

87 Gulf submitted that if Gulf and Petrotec had transacted on a sale and re-purchase basis, Petrotec would not have owed any "stock" to or held any oil for Gulf.[134] I am not persuaded. First, insofar as the values had not been filled out, it is not clear that Petrotec held any oil on behalf of Gulf. Second, the Draft Tankoil Contract was a draft sent by Gulf to Petrotec, and it cannot be assumed that Petrotec would have accepted these clauses as a correct and true reflection of the state of affairs in October 2014. Gulf did not raise these provisions with Dennis Tan in cross-examination.

88 For the foregoing reasons, I am of the view that the Draft Tankoil Contract was a probative piece of evidence in favour of Petrotec's case that the Net-Off Contract applied. I will say more about the question of Petrotec holding oil for Gulf when I come to the issue about Petrotec's confirmation to Gulf's auditors (see [106]-[109] below).

(2) Letters of demand

89 I turn now to Gulf's letter of demand to Petrotec dated 10 November 2014.[135] This letter of demand was drafted by Mr Thomas Tan and addressed to Petrotec. Paragraph 2 of the letter stated:

> By a Payment Net-Off Contract (Barging Agreement) dated 22 August 2012, our client agreed among others to purchase oil

134 Plaintiff's Closing Submissions at paras 65–67.

135 4DBD at pp 422–423.

> from you on delivered basis, and to sell oil to you on ex-wharf basis.

90 Paragraph 3 of the letter then stated:

> Pursuant to said Contract, our client purchased from and sold oil to you on various dates and in various quantities as agreed.

91 Another letter of demand was sent by Gulf (under the hand of Mr Thomas Tan) to the Guarantors on 10 November 2014.[136] Paragraph 3 of this letter contained the same references to the Net-Off Contract: "We are instructed that pursuant to a Payment Net-Off Contract (Barging Agreement) made on 22 August 2012…" The preceding paragraph 2 also asserted that under the Guarantee the Guarantors "personally guaranteed our client for any *sale* of ex-wharf oil *to you*" [emphasis added].

92 In my view, the references to the Net-Off Contract in the letters of demand could not have been inadvertent. By the time the letters were sent, the relationship between Gulf and Petrotec had soured. Litigation was contemplated, and Gulf would have been more careful when instructing external solicitors to send these letters. Further, the reference to the Net-Off Contract in paragraph 2 of the letter of demand to Petrotec was accompanied by an explanation of the mechanics of the Net-Off Contract: "our client agreed among others to purchase oil from you on delivered basis, and to sell oil to you on ex-wharf basis."

93 Notably, as we discussed earlier (see [65] above), one of Gulf's submissions was that the Barge Confirmations sent by Gulf to Petrotec were

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136 4DBD at pp 420–421.

objective evidence that the New Business Model applied.[137] Goel further testified in court that the New Business Model must have been operative because Gulf's accounting ledger (which Goel stressed was audited by a reputable auditor in Singapore) did not record any sale or re-purchase transactions with Petrotec.[138] If those submissions were valid, then it should have been all the more clear, at least to Gulf, that the Net-Off Contract had been superseded by the New Business Model. Yet, Gulf made the "mistake" of referring to the allegedly superseded Net-Off Contract in the Draft Tankoil Contract and reiterated that in the letters of demand.

(3) Dwivedi's affidavit

94 I now address the affidavit of Dwivedi affirmed on 17 November 2014 and filed in support of Summons No 5741 of 2014 ("SUM 5741").[139]

95 According to Goel, SUM 5741 was filed by Gulf in November 2014, when Petrotec and its affiliated companies were purportedly facing financial difficulties, with the aim of seeking an injunction against Petrotec in order to "take back the oil that was basically outstanding to be delivered to our customers".[140] SUM 5741 sought to restrain the disposal of certain fuel oil by Petrotec, and also sought an injunction prohibiting the Defendants from disposing their assets.[141]

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137 Plaintiff's Closing Submissions at para 59.

138 NE Day 2, p 62, lines 20–31.

139 NE Day 1, p 52, line 23; NE Day 2, p 50, lines 13–15; see Exhibit D1.

140 NE Day 1, p 54, lines 2–6.

141 NE Day 1, p 54, lines 12–16.

96 Dwivedi was the Senior Vice President, Regional Head (Asia Pacific) of Gulf. Goel explained that Dwivedi had joined Gulf around the end of 2013, and was based in Singapore.[142] According to Goel, Dwivedi had two roles. First, he was the head of Gulf's Singapore office, including its administration work,[143] and therefore was also the head of all of Gulf's businesses in the Asia Pacific region.[144] Second, he was responsible for Gulf's global bitumen business.[145]

97 Several paragraphs in Dwivedi's affidavit are salient:

(a) Paragraph 11 stated that there was a "Payment Net-Off Contract (Barging Agreement)" dated 22 August 2012 under which Gulf agreed to sell fuel oil to Petrotec on an ex-wharf basis and buy fuel oil from Petrotec on a delivered basis. Dwivedi then exhibited a copy of the Net-Off Contract.

(b) Paragraph 16 recorded that at the beginning of every month, Gulf would issue a debit note to Petrotec recording the Purchase Margin (see [30(a)] above).

(c) Paragraph 17 further stated that "[n]otwithstanding that Clause 3.1 of the [Net-Off Contract] stipulates the [Net-Off Contract] shall remain in force for one year… until 22 August 2013, [Gulf] and [Petrotec] continued to perform the [Net-Off Contract] after 22 August 2013 on the common understanding that the [Net-Off Contract] shall remain in force until termination by either party."

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142 NE Day 1, p 57, lines 30–31.

143 NE Day 2, p 68, lines 4–9.

144 NE Day 1, p 54, lines 21–26.

145 NE Day 1, p 54, lines 21–26.

98 Notably, Dwivedi's affidavit confirmed that the parties had proceeded on the basis of the Net-Off Contract. It made no mention of or reference to the New Business Model. Nor did it assert that Petrotec had merely transported the fuel oil without taking title to the same.

99 When confronted with Dwivedi's affidavit in cross-examination, Goel explained that Petrotec's financial difficulties had come as a surprise to Gulf and Gulf had to act fast to protect its rights.[146] He also explained that he was "traumatised" at that time,[147] and that Thota, who was Gulf's legal counsel, and Mr Thomas Tan were the ones discussing the court injunction application.[148]

100 In re-examination, Goel was given another chance to explain Dwivedi's affidavit.[149] He said that in November 2014, when Petrotec was suffering from financial difficulties, he had flown to Singapore to discuss the situation with Dwivedi. On the advice of Mr Thomas Tan, they planned to file an injunction. As Goel had to fly out to Dubai for the weekend, Dwivedi signed the supporting affidavit as "he was the only person left in --- in the Singapore office who could do something about this matter."[150] Goel further testified in response to Mr Thomas Tan's question:[151]

> Q Yes, but the question that my learned friend asked is did Mr Dwivedi know anything about the [N]ew [B]usiness [M]odel contract?

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146 NE Day 1, p 57, lines 13–17.

147 NE Day 1, p 58, line 21.

148 NE Day 1, p 57, lines 11–22.

149 NE Day 2, pp 68–69.

150 NE Day 2, p 69, lines 1–2.

151 NE Day 2, p 69, lines 3–8.

> A Well, as he was not directly involved with the business, so it would be difficult for him to, I would say, articulate the matter in the best possible way. *So he would know of it* but would he know the exact situation, I would very much doubt that.
>
> [emphasis added]

101 Goel also explained that Dwivedi "is not a lawyer and he was not directly running the business".[152]

102 I do not accept Goel's explanation. First, Dwivedi was not just any employee. According to Goel's own evidence, Dwivedi was the person in charge of Gulf's Asia Pacific business, and in particular the Singapore office, and was physically based in Singapore (see [96] above). Gulf's business with Petrotec was indisputably a significant part of Gulf's Singapore operations. It could not have been that Dwivedi was not aware of the basic structure of the business arrangement between Gulf and Petrotec. Notably, he was also copied in the email that Gulf sent to Petrotec attaching the Draft Tankoil Contract (see [84] above). Second, it was Goel's own evidence that Dwivedi "would know" of the New Business Model at the time the affidavit was filed (see [100] above). Goel confirmed this fact several times when asked.[153] If Goel is to be believed on this point, there is no plausible explanation why Dwivedi would nevertheless go on oath to state that a superseded contract, *ie*, the Net-Off Contract, still applied. In my view, Goel's attempt to stress that Dwivedi was "not directly involved in the business of bunkering"[154] was merely an attempt to muddy the waters. The truth of the matter was that the Net-Off Contract applied, and that Dwivedi stated this in his affidavit because this was what he knew to be the case

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152 NE Day 2, p 58, lines 22–24.

153 See also NE Day 1, p 58, lines 1–3, 6–13.

154 See, *eg*, NE Day 1, p 57, lines 25–27.

at that time. The New Business Model was only an afterthought when Gulf realised the unfavourable legal consequences of the Net-Off Contract.

103 Furthermore, even putting aside the role and knowledge of Dwivedi, there were at least two other persons in Gulf at the time the affidavit was filed who purportedly knew of the New Business Model.

104 The first person is Goel himself. Even though Goel tried initially to suggest that he had not been involved in the discussions leading up to the filing of Dwivedi's affidavit,[155] he conceded later that the application for injunction had in fact been discussed with him.[156] Indeed, he had flown from Dubai to Singapore especially to discuss Gulf's legal position with Mr Thomas Tan and Dwivedi before the filing of the affidavit (see [100] above). Goel accepted that he was aware of the New Business Model at the time the affidavit was filed.[157]

105 The second person was Avik, who as mentioned above (see [84] above) was also copied in the email attaching the Draft Tankoil Contract. At the time Dwivedi's affidavit was filed, Avik, who was in the employment of Gulf, also knew of the New Business Model.[158] Thus, even if Dwivedi was not directly involved in Gulf's business with Petrotec, Avik was.[159] And even if Avik was not involved in SUM 5741 or in the legal proceedings as Goel claimed,[160] Avik

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155 NE Day 1, p 56, lines 11–17.

156 NE Day 1, p 56, lines 18–22.

157 NE Day 1, p 58, lines 14–15.

158 NE Day 1, pp 58–59.

159 NE Day 1, p 57, lines 25–27.

160 NE Day 1, p 60, lines 1–9.

and Dwivedi (together with Goel) were jointly involved in discussions with Petrotec around November 2014 regarding Petrotec's financial situation.[161] Going into these discussions, Dwivedi must have known from Avik or Goel about the nature of Gulf's business arrangement with Petrotec. Yet, Dwivedi went on oath to state that the Net-Off Contract applied.

(4) Confirmation to Gulf's auditors

106 To support its position that the New Business Model applied, Gulf relied on Petrotec's confirmation to Gulf's auditors on 25 March 2014 that 30,715.881 MT of fuel oil which Petrotec was holding as of 31 December 2013 belonged to Gulf. Apparently, Petrotec sent this confirmation on Gulf's request dated 11 March 2014.[162] The quantity of 30,715.881 MT provided by Petrotec was said to correspond with the surplus 30,674.286 MT of fuel oil which Petrotec lifted and held on behalf of Gulf on 31 December 2013, giving allowance for slight inaccuracies in the measurement of fuel oil quantity.[163]

107 Gulf submitted that this confirmation indicated Petrotec's agreement that the fuel oil which it had lifted before January 2014 belonged to Gulf. It followed that all fuel oil which Petrotec subsequently lifted on behalf of Gulf, including the 15,309.248 MT of Surplus Oil, also belonged to Gulf.[164]

108 Petrotec's position was that the confirmation merely evidenced a certain quantity of fuel oil laden on board the corresponding barges, and was not an

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161 Goel's AEIC at para 50.

162 SOC at para 15; Goel's AEIC at pp 468–490; Dennis Tan's AEIC at paras 84–86.

163 SOC at para 15(c).

164 SOC at para 15.

admission that the said fuel oil belonged to Gulf.[165] Dennis Tan testified under cross-examination that he did not refuse Gulf's request to provide measurements of the quantity of fuel oil on board the corresponding barges because "I dare not talk to somebody that I owe them money in this [manner]. I know I owe Gulf money, but I will not dare to talk to them in this manner."[166]

109 I agree that the confirmation was a piece of evidence in support of Gulf's case. That said, I note that under the Net-Off Contract, it was anticipated by the parties that Gulf would eventually re-purchase the same fuel oil from Petrotec for subsequent sale to the Buyers.

(5) Insurance

110 Another factor raised was the fact that insurance for the fuel oil had been taken out in Gulf's name, but the premium payments were in fact made by Petrotec.[167] Gulf submitted that if it was a sale and re-purchase arrangement between the parties, Gulf would not have required such protection.[168] I am not persuaded. Notwithstanding that Gulf had sold a certain lot of fuel oil to Petrotec, Gulf retained an interest in that lot insofar as it would purchase that lot of fuel oil back under the Net-Off Contract for subsequent sale to the Buyers. Further, by Gulf's own case, if the fuel oil was for some reason unavailable for subsequent sale, it may not be clear whether Petrotec had sufficient financial wherewithal to repay Gulf.[169]

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165 Defendants' Closing Submissions at para 28.6.2.

166 NE Day 6, pp 67–68.

167 SAB at pp 189–224, 600–634.

168 Plaintiff's Closing Submissions at para 60.

169 See NE Day 3, p 89, lines 21–31.

111 For the foregoing reasons, I am of the view that the Draft Tankoil Contract, the letters of demand, and Dwivedi's affidavit are very strong evidence that the Net-Off Contract was the applicable contractual arrangement between the parties. Petrotec's confirmation to Gulf's auditors, while suggestive that Petrotec held fuel oil on behalf of Gulf pursuant to the New Business Model, can also be explained on the basis that under the Net-Off Contract, Gulf would eventually re-purchase any fuel oil that it had earlier sold to Petrotec. In any event, the confirmation did not, in the round, overcome the weight of the evidence in favour of the Net-Off Contract.

Contemporaneous communications

112 I turn now to the communications between the representatives of Gulf and Petrotec during the subsistence of their contractual relationship.

113 Petrotec pointed to messages sent on Yahoo! Chat between Gary Chew and Dennis Tan, during the period from 21 August 2012 to 17 July 2014, in which references were made to Gulf "selling" fuel oil to Petrotec, or Petrotec "buying" fuel oil from Gulf.[170] On 1 July 2013, Gary Chew also told Dennis Tan on Yahoo! Chat that "new energy is the trader!! u should do same with tankoil[.] tankoil is barge operator[.] and petrotec is now the trader[.]"[171] Under cross-examination, Gary Chew conceded that he understood the term "trader" to mean a party that buys and sells fuel oil.[172]

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170 Defendant's Closing Submissions at para 29; 4DBD at pp 125–371.

171 4DBD at p 266.

172 NE Day 4, p 26, lines 18–19.

114 Gary Chew explained that he did not use such language in the technical sense to indicate that there had been sale and re-purchase transactions between Gulf and Petrotec. Rather, he was speaking with Dennis Tan informally using terms of convenience and habit.[173]

115 In my view, the particular terms used by Gary Chew on Yahoo! Chat with Dennis Tan cannot be held against Gulf. A glance at the transcript of the chats makes it clear that the communications were informal, imprecise, and at times incomprehensible. More importantly, while the terms "buy" and "sell" have been used, the context of their usage is not clear given the informality of the conversations, and there is no clarity as to which party was buying from or selling to which other party. The particular reference to Petrotec being the "trader" also appears to be about a prospective proposal rather than a statement about existing fact.

116 For similar reasons, I place no weight on the fact that Dennis Tan had used the terms "sell", "buy", and "return" in communication with Goel by text messages.[174]

Substance of the arrangement

117 Aside from the documentary evidence, I am also of the view that the substance of the business arrangement between Gulf and Petrotec indicated that Petrotec had played a larger role than a barge operator who was merely responsible for transport and delivery of fuel oil. First, I note that all the Back to Back Charges and the Cancellation Charges were charged to Petrotec by Gulf

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173 NE Day 4, p 16, lines 15–22, p 24, lines 14–23.

174 Dennis Tan's AEIC at para 76; see *eg*, ACB at p 37.

(see [31]-[32] above). Second, even though Gulf claimed that Petrotec was only a transporter of fuel oil, Gulf did not provide any satisfactory reason as to why Petrotec (allegedly) had to pay Gulf various charges including the Uplift Charges and the Finance Charges, and why there was no sum payable by Gulf to Petrotec for the service of transportation and delivery of fuel oil.[175] Third, no reason was suggested as to why Petrotec would, if it was merely a transporter under the New Business Model as Gulf alleged, bear the consequences of the price difference between the Firm Order, and the Base Price and other relevant charges under the "system minus" calculation (see [27] above).

Other factors

118 Finally, I deal with three factors which do not neatly fall within any of the above-stated categories.

(1) MPA licences

119 The first point relates to Tankoil's role in the supply of fuel oil between Gulf and Petrotec, and the relevance of the MPA licences.

120 According to Petrotec, it would not have agreed to the New Business Model because such a contractual arrangement would have been in breach of MPA's licensing requirement.[176] Neither Gulf nor Petrotec had any of the two kinds of MPA licences which permit the sale and physical delivery of fuel oil within Singapore port limits (see [10] above). The Net-Off Contract was the only way that Gulf and Petrotec could have complied with the MPA licensing requirement, because it would enable Petrotec to "loop" the chain of title to the

175 See NE Day 6, p 9, lines 17–19.

176 Defendants' Closing Submissions at para 31.

fuel oil through Tankoil, which had connections with Dennis Tan, before the sale and delivery of the fuel oil to the Buyers. It appeared that "looping" the chain of title through Tankoil was an attempt for Gulf and Petrotec to comply with MPA's licensing requirement. In addition, the barges nominated by Petrotec to transport the fuel oil were Tankoil's, and the Back to Back Charges levied by Gulf on Petrotec were also passed onto Tankoil.[177]

121 As the evidence on MPA's licensing regime and the requirements of each MPA licence was not clear, I cannot reach any conclusion as to whether either contractual arrangement would have complied with MPA's licensing regime, or if the parties had intended for either arrangement to meet or to circumvent the regime. Indeed, despite Petrotec's argument that the New Business Model would have contravened the licensing regime, it may be that the same argument applies to the Net-Off Contract. In any event, neither side pleaded illegality and both sides did not appear keen to offer any evidence which might suggest that they might have been parties to transactions which were tainted with illegality.

(2) Market practice

122 In the pleadings, Petrotec claimed that a sale and re-purchase transaction as per the Net-Off Contract accorded with market practice. However, no expert or objective evidence was adduced as to the existence of a market practice or the nature of the arrangements between other industry players in similar relationships. Thus, I place no weight on this point.

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177 Dennis Tan's AEIC at para 60.

(3) Terms of the Net-Off Contract

123 I add one further observation. Although Petrotec's case was primarily based on the Net-Off Contract, that contract itself did not comprehensively provide for all the details of the transactions between Gulf and Petrotec as alleged by Petrotec. For instance, it did not provide for the Uplift Charges of US$3.00 per MT of fuel oil which Petrotec conceded as payable to Gulf.

124 However, in my view, the fact that certain details and charges were not specifically mentioned in the Net-Off Contract is equivocal. The parties were entitled to separately agree on these other matters which were not covered in the Net-Off Contract. There was also no argument that the parties were precluded from waiving by agreement or conduct any formal requirement prescribed by the Net-Off Contract, including cl 6.2 which provided that the contract "shall not be altered, changed, supplemented or amended except by written instrument signed by all the Parties hereto".[178] Indeed, it will be remembered that when Gulf was arguing that the New Business Model applied, it argued that compliance with the requirements of cl 6.2 was not necessary in the circumstances.

Conclusion

125 For the foregoing reasons, I am of the view that the Net-Off Contract applied and the New Business Model did not exist. This finding accorded not only with the objective evidence, which gave shape to the form of the transaction, but also with its substance. Petrotec was the real buyer of the fuel oil, whereas Gulf was in truth only an intermediary: a financier and the party that opened doors to transactions with other major oil companies. The New

178 See Defence at para 17.

Business Model was only an afterthought when Gulf realised the unfavourable consequences of the Net-Off Contract in the light of the precarious financial condition of Petrotec and the uncertain financial condition of the Guarantors.

126 Accordingly, the business arrangements between Gulf and Petrotec from August 2012 to November 2014 involved sale and re-purchase transactions as envisaged by the Net-Off Contract. Even though cl 3.1 of the Net-Off Contract provided for it to subsist for one year, as Dwivedi's affidavit explained, the parties "continued to perform the [Net-Off Contract] after 22 August 2013 on the common understanding that the [Net-Off Contract] shall remain in force until termination by either party" (see [97(c)] above).

127 Since I have found that the Net-Off Contract applied, the issues as to whether the purported change to the New Business Model was supported by consideration and whether it was in compliance with cl 6.2 of the Net-Off Contract (see [50], [54] above) do not arise.

128 For completeness, I note two points. First, the parties had assumed that, under the Net-Off Contract, title passed at the same time as possession. It was not argued that even if the Net-Off Contract applied, Gulf nevertheless retained title to the fuel oil after Petrotec collected it from the Suppliers. Therefore, since I have found that the Net-Off Contract applied, it follows that Petrotec had title to all the fuel oil which it possessed. Second, Petrotec suggested that Gulf's motivation for filing this suit was to claim against certain cargo insurances,[179] and/or to claim against the proceeds of sale of fuel oil that remained on certain

[179] NE Day 2, p 40, lines 28–29.

bunker barges but have been sold pursuant to Orders of Court.[180] There is insufficient evidence on this point and I make no further comment.

Claim for the Surplus Oil

129 Having established that the Net-Off Contract was the applicable contractual arrangement, I turn now to examine the merits of Gulf's claims.

130 The main dispute appeared to be Gulf's claim for ownership of the Surplus Oil loaded on four vessels, namely, "STAR QUEST", "PETRO ASIA", "NORTHWEST SUCCESS", and SKY QUEST".[181]

Gulf's arguments

131 According to Gulf, when Gulf stopped doing business with Petrotec in November 2014, Petrotec held the Surplus Oil which belonged to Gulf. Thereafter, by failing and/or refusing to deliver the Surplus Oil to Gulf:

(a) Petrotec breached an implied term of the New Business Model that Petrotec would return to Gulf, on Gulf's demand, "any quantity or surplus quantity of [Gulf's] fuel oil that it held on behalf of [Gulf]".[182]

(b) Further or alternatively, Petrotec wrongfully detained the Surplus Oil, and/or converted the Surplus Oil to its own use.[183]

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180 Defendants' Closing Submissions at para 30.1.

181 Goel's AEIC at para 71.

182 SOC at para 13(q).

183 SOC at paras 43–48.

On either basis, Petrotec is liable in damages. Alternatively, Gulf claimed US$8,123,896.43 as the approximate price for 15,309.248 MT of fuel oil, or damages on a *quantum valebat* basis for the reasonable value of the oil.[184]

Petrotec's arguments

132 Petrotec's position was that Gulf was not the owner of the Surplus Oil. Since the Net-Off Contract applied, business arrangements between Gulf and Petrotec were sale and re-purchase transactions. Thus, since the Surplus Oil had been sold to Petrotec but was not yet re-purchased by Gulf, Petrotec did not, at any time from August 2012 to November 2014, hold the Surplus Oil on behalf of Gulf.[185] Gulf did not have title to the Surplus Oil.[186] Further, Gulf was estopped from bringing a claim against Petrotec for the wrongful detention and/or conversion of the Surplus Oil.[187] Gulf must also prove its losses and show that it satisfied its duty to mitigate its loss.[188]

133 However, Petrotec accepted that as of November 2014, when Gulf stopped doing business with Petrotec, there was a "shortfall" of around 15,309.248 MT of fuel oil between the aggregate Sale Contracts and Purchase Contracts.[189]

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184 SOC at para 48A.

185 Defence at para 46.

186 Defence at para 51.

187 Defence at para 52.

188 Defence at para 55.

189 Defence at para 50.

Analysis

134 This dispute as to the Surplus Oil turned on whether Gulf had *sold* fuel oil to Petrotec pursuant to the Net-Off Contract, or whether Gulf had appointed Petrotec merely as a barge operator to *deliver* fuel oil to the Buyers while Gulf retained ownership of the fuel oil under the New Business Model. On the basis of my finding that the Net-Off Contract applied, Gulf did not have title to the Surplus Oil which was in the possession of Petrotec. As mentioned, there was no argument that Gulf retained title to the Surplus Oil even if the Net-Off Contract applied (see [128] above).

135 Having said that, since Gulf had sold the Surplus Oil to Petrotec for which Petrotec had not yet made payment, Gulf is entitled to the purchase price of the fuel oil. I do not consider the principles relating to the assessment of damages in a successful conversion claim appropriate in this case,[190] given that Petrotec did not convert the Surplus Oil to its own benefit. Rather, in principle, Petrotec owed Gulf the *purchase price* of the Surplus Oil (*ie*, the Base Price plus the Uplift Charges).

136 In this regard, Gulf did not invoice Petrotec for the Surplus Oil.[191] Rather, Gulf's claim in relation to the Surplus Oil was for US$8,123,896.43 as the "approximate value" of the oil.[192] Varying rates were applied to the quantities of oil on each of the four vessels in question which contained the Surplus Oil (see [130] above). Goel's AEIC explained that the approximate

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190 Plaintiff's Closing Submissions at paras 108–110; Defendants' Closing Submissions at paras 89–91.

191 Defendants' Closing Submissions at para 89.

192 SOC at para 42.

value was "derived from" the price paid by Gulf to the Suppliers.[193] Notably, however, Gulf did *not* claim the Uplift Charges in relation to the Surplus Oil. On Petrotec's part, it did not dispute the quantities or the rates as such. Nor did it dispute the basis on which Gulf's valuation of the purchase price of the Surplus Oil was carried out. In the circumstances, I allow Gulf's claim in relation to the purchase price of the Surplus Oil at US$8,123,896.43.

Claim on the outstanding debit notes

137 Gulf's second claim was for the outstanding sum due under nine debit notes issued between August and December 2014. Of these debit notes, five were Barge Settlement DNs and four were for the Back to Back Charges.[194] As mentioned above (see [41] above), the face value of these debit notes totalled US$4,833,589.19 (with US$4,801,688.75 for the Barge Settlement DNs and US$31,900.44 for the debit notes for the Back to Back Charges). Given the part payment made by Petrotec of US$580,205.25 as of 8 November 2014 (see [37] above), the outstanding sum purportedly due from Petrotec to Gulf at the time of commencement of this suit was US$4,253,383.94.[195]

Gulf's arguments

138 Gulf claimed that the New Business Model entitled Gulf to charge all of the components of the Barge Settlement DNs, *ie*, the Purchase Margin, the

193 Goel's AEIC at para 72.

194 SOC at para 39.

195 SOC at para 39.

Uplift Charges, the Finance Charges, and the Late Payment Interests.[196] In particular, Gulf's position was that:

> (a) The parties had initially agreed on *more than* US$3.00 per MT of fuel oil as the Uplift Charges before eventually settling on US$3.00 per MT.[197] Hence, in relation to four of the debit notes issued at the commencement of the parties' contractual arrangement, Petrotec had paid the Uplift Charges of US$4.00 and US$4.50 per MT without protest.[198]
>
> (b) The parties had also agreed that Petrotec was liable for the Finance Charges at 6% per annum, and the Late Payment Interests at 2% per month. That was why Petrotec paid such charges without protest until after the dispute arose in 2014. Furthermore, neither the Finance Charges nor the Late Payment Interests were penalties.[199]

Petrotec's arguments

139 Petrotec disputed liability to pay certain components of the sums in the Barge Settlement DNs (see [30] above). It accepted that the Purchase Margin and the Uplift Charges at a rate of US$3.00 per MT of fuel oil supplied were payable by Petrotec to Gulf whether the Net-Off Contract or the New Business

196 SOC at paras 19–20.

197 Reply at paras 17–18, 48.

198 Reply at paras 17–19.

199 Reply at para 22.

Model applied.[200] However, Petrotec argued that the Net-Off Contract did *not* allow the imposition of the following:[201]

(a) the Uplift Charges in excess of the rate of US$3.00 per MT;

(b) the Finance Charges; and

(c) the Late Payment Interests.

140 In particular, in relation to the Finance Charges and the Late Payment Interests, Petrotec's position was that:[202]

(a) any separate agreement for the payment of these sums would fail for want of consideration;

(b) any separate agreement for their payment was not made in accordance with the terms of the Net-Off Contract; and/or

(c) these were penalties and were thus unenforceable.

Analysis

141 In relation to the nine outstanding debit notes, I note at the outset that the subject matter of the debit notes implicates charges that were relevant to both Gulf's claim against Petrotec (for the unpaid charges), and Petrotec's counterclaim against Gulf (for the return of the charges that had been paid). In my view, the claim and the counterclaim in respect of the various charges ought to be separately considered. While there may be common issues of facts and

200 Defence at para 43.

201 Defence at paras 24–27.

202 Defence at paras 27–29, 32.

law, the incidence of the legal burden of proof as well as the manner in which the parties have pleaded their cases are different.

142 Gulf claimed that the Finance Charges and the Late Payment Interests were payable under the New Business Model. It was *not* its pleaded case that these charges remained payable even if the Net-Off Contract applied, or that the charges were payable regardless of which contractual arrangement applied. Nor did Gulf plead that there had been an *ad hoc* contract or agreement between Gulf and Petrotec for the payment of these charges. The *sole* basis of Gulf's entitlement to these charges turned on the existence and applicability of the New Business Model.

143 Indeed, in the Statement of Claim (Amendment No 2), which was the latest pleading on the basis of which the trial had proceeded, Gulf had amended the chapeau of the paragraph listing the agreed charges between Gulf and Petrotec from "[Gulf] and [Petrotec] agreed that [Gulf will charge Petrotec the listed charges]" to "[Gulf] and [Petrotec] agreed that *under the New Business Model* [Gulf will charge Petrotec the listed charges]" [emphasis added].[203] The addition of the phrase "under the New Business Model" restricted the basis on which Gulf claimed those charges. Similarly, in the Reply and Defence to Counterclaim (Amendment No 2), Gulf again stated that Petrotec was *not* entitled to a return or refund of the Finance Charges or the Late Payment Interests because it was liable to pay these charges under the New Business Model:

> 49 Paragraph 66 of the Counterclaim is denied. [Petrotec] is not entitled to a return or refund of the Finance Charges. *Under the New Business Model*, the Finance Charge[s are] payable by [Petrotec] to [Gulf] …

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203 SOC at para 19; SDB at p 20.

> 50 Paragraph 67 of the Counterclaim is denied. [Petrotec] is not entitled to a return or refund of the Late Payment Interest[s]. *Under the New Business Model*, the Late Payment Interest[s are] payable by [Petrotec] to [Gulf] …
>
> [emphasis added]

144 Therefore, the *sole* premise of Gulf's entitlement to the Finance Charges and the Late Payment Interests was the New Business Model. Since the premise was not established, the claims resting on it must also fail. Accordingly, Gulf's claim for the Finance Charges of US$551,174.80 and the Late Payment Interests of US$254,626.27 under the outstanding debit notes (see [137] above), which have not yet been paid, must fail.

145 Since I have found that the Net-Off Contract applied and that the outstanding Finance Charges and Late Payment Interests are not payable for the reasons mentioned above, I need not say more on Petrotec's legal submissions on consideration, amendment of contract, and penalty clauses (see [140] above).

146 Although the outstanding Finance Charges and Late Payment Interests (which were components of the five outstanding Barge Settlement DNs) are not payable, Petrotec accepted its liability to pay the remaining total of US$3,447,582.87 under the outstanding debit notes.[204] This sum comprised:

(a) US$31,900.44 being debts owed under the four outstanding debit notes for the Back to Back Charges;[205] and

(b) US$3,415,682.43 being debts owed under the five outstanding Barge Settlement DNs, but of the admitted Purchase Margin and the

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204 Defendants' Closing Submissions at paras 10.1, 59.

205 Goel's AEIC at p 380.

Uplift Charges components only (*ie*, without the Finance Charges and the Late Payment Interests).[206]

Counterclaim for the Payments

Petrotec's arguments

147 I turn now to Petrotec's counterclaim for the Payments. To recapitulate (see [43] above), Petrotec counterclaimed US$3,853,333.04 against Gulf which comprised the following sums which were allegedly paid by mistake and/or led to the unjust enrichment of Gulf:[207]

(a) US$15,963.42 being the excess Uplift Charges levied by Gulf on Petrotec above the agreed rate of US$3.00 per MT of fuel oil;[208]

(b) US$2,734,809.13 "being part of" the Finance Charges paid by Petrotec to Gulf from December 2012 to June 2014;[209] and

(c) US$1,102,560.49 being the Late Payment Interests paid by Petrotec to Gulf from February 2013 to June 2014.[210]

Gulf's arguments

148 Gulf argued that Petrotec's counterclaim must fail because the Finance Charges and the Late Payment Interests were payable under the New Business

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206 Goel's AEIC at p 380.

207 SDB at p 63; Defence at para 67A; Defendants' Closing Submissions at para 58.

208 Defence at para 65; Annex.

209 Defence at paras 32, 66.

210 Defence at paras 32, 67.

Model. Petrotec made willing payment without protest at the material time. There had been no mistake.[211] There was also no unjust enrichment of Gulf.[212]

Analysis

149 The primary basis for Petrotec's counterclaim was that it made the Payments by mistake.[213] In my view, that could not have been the case. First, Dennis Tan's AEIC did not assert that the Payments had been made by Petrotec to Gulf by mistake. More importantly, under cross-examination, Dennis Tan's own evidence was that even though he was reluctant, he knew of the Payments and consented to them:[214]

> Q So can I ask you this question again? [Were] the [F]inance [C]harge[s] brought to your attention by your accounts at that time? Yes or no?
>
> A Yes.
>
> Q And did you agree to pay?
>
> A (No audible answer)
>
> Q Yes or no?
>
> A I think we have a … few discussion with Gary or Prerit over this outstanding payment.
>
> Court: With Gary or who?
>
> Witness: And Prerit. The --- Mr Prerit, Petro --- Gulf Petrochem's boss.
>
> Court: Okay. And you had some discussions and then?
>
> Witness: Then they say they'll try to compromise or reduce it. I say, 'That's no way to carry on the business like that.'

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211 Reply at paras 19–20, 49–50.

212 Reply at para 50A.

213 Defendants' Closing Submissions at para 49.

214 NE Day 6, p 37, lines 22–32, p 38, lines 1–8.

> Q So did you agree to pay? Yes or no?
>
> A I think after several discussion, I think we agree to pay or something like that.
>
> Q 'Something like that'? What is 'something like that'? Either you agreed to pay or you didn't agree to pay.
>
> A We try to bring down the price but they're not willing to do it. Then how? Then we pay.

150 Later during cross-examination, Dennis Tan was further asked whether he had agreed to make the Payments. He said, "In the beginning, no."[215] In my view, this was an implied concession that Dennis Tan had *eventually* agreed that Petrotec would make the Payments to Gulf presumably for commercial reasons. As he explained in court:[216]

> Q … So, again, you say here that Petro[t]ec paid this by mistake. First question, do you agree with me that throughout your whole affidavit, you never said that this was paid by mistake. Do you agree?
>
> A Mr Thomas, this --- the first invoice that came to me is 3.6 million plus a 200,000 thing, I was already very stunned over the first 4 month of 2012, August till December. I was trying very hard to talk to Gary and say, 'Are you serious to do business this way or not that way?' Then here at 2013 February, they slapped me with a 2% interest, 'You must pay.' You know, at that moment, I already have outstanding almost 3 or 4 million, I'm consider a beggar. What choice does have a beggar have? To be sued or to carry on?

151 Dennis Tan's evidence largely corroborated with Wong's. Wong testified that whenever a part of the Payments had to be paid, she would check with Dennis Tan as to whether, when and to which party payment should be

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215 NE Day 6, p 51, lines 6–7; see also NE Day 6, p 42, line 17.

216 NE Day 6, p 43, lines 20–29.

made.[217] I note that Wong did attempt to suggest that the responsibility for checking the numbers rested with the "operations department".[218] However, the point is that the numbers were verified by Petrotec before payment. It is not relevant whether the verification was done by the accounts department or the operations department. Either way, Petrotec cannot subsequently claim to have made payment by mistake.

152 In its Defence and Counterclaim (Amendment No 4), Petrotec also mentioned a cause of action in unjust enrichment. The three requirements of a claim in unjust enrichment are: (a) the enrichment of the defendant, (b) enrichment at the expense of the plaintiff, and (c) the circumstances which make the enrichment unjust (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [110]). Petrotec appeared to have abandoned this cause of action during the course of the trial. Neither did it substantiate its case in this regard in its closing submissions. In any event, given that the payments had been made by Petrotec to Gulf with the knowledge and consent of Dennis Tan, I do not consider that there was anything unjust warranting reversal.

153 Accordingly, Petrotec's counterclaim fails as it has not established a valid cause of action for the return of the Payments that had been made.

154 For completeness, I reiterate that Petrotec did *not* counterclaim the Uplift Charges of US$3.00 per MT that it had already paid. Even though they were not expressly stipulated in the Net-Off Contract, Petrotec accepted that it

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217 Wong's AEIC at para 6.

218 See, *eg*, NE Day 7, pp 56–62.

had agreed to pay US$3.00 per MT of fuel oil purchased from Gulf pursuant to the Sale Contracts insofar as the method by which the "system minus" was calculated had internalised the Uplift Charges.[219]

Claim on the Guarantee

155 I turn now to the Guarantee (see [35] above). The Guarantee read as follows:

> I, Tan Keng Huat Dennis (I/C No. …) together with Tan ShuPing (I/C No. …) and Soon Kok Khoon (I/C No. …) hereby personally guarantee Gulf Petrochem Pte Ltd/FCZ for all oil transported by our companies PetroTec Pte Ltd and Oasis Asia Marine Pte Ltd and also for all oil loaded into our barges 'Episode', 'Sophie 9', 'Pride' and 'SS Prosperity' or any other barge name for purposes of barging, transportation, and delivered supply to ships for Gulf Petrochem Pte Ltd/FCZ.
>
> We also personally guarantee Gulf Petrochem Pte Ltd/FCZ for any sale of ex-wharf oil to us into our above-named barges.
>
> All losses due to theft, robbery, spill or any other reasons will be borne by us.

156 The Guarantee was not dated. Dennis Tan's AEIC did not specify the date of the Guarantee, but suggested that he signed it between January and August 2012.[220] According to Gulf, this Guarantee was provided by the Guarantors between 22 August 2012 (when the Net-Off Contract was entered into) and 24 August 2012 (which is the date of the first transaction between the parties).[221]

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219 See Defendants' Closing Submissions at para 36.1.

220 Dennis Tan's AEIC at para 28.

221 SOC at para 49.

157 Further, Dennis Tan gave evidence that one year later, in July 2013, Gary Chew informed him that some other document for the business deal was required, and that there was a personal guarantee involved.[222] Gary Chew also apparently said then that the Guarantee which Dennis Tan had previously signed was nothing. However, Dennis Tan refused to sign the new document as he did not want to be a personal guarantor. Gary Chew told Dennis Tan not to worry and that he would take care of things.[223] It appears that this second guarantee was not eventually pursued.

Gulf's arguments

158 Gulf sought to enforce the Guarantee against the Guarantors for the following two sums:

(a) US$4,253,383.94 being the balance sum under the nine outstanding debit notes;[224] and

(b) US$8,123,896.43 being the approximate value of the Surplus Oil which Petrotec purportedly holds on behalf of Gulf.[225]

159 In response to arguments by the Guarantors, Gulf's position was that:

(a) The terms of the Guarantee were sufficiently certain.[226]

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222 Dennis Tan's AEIC at para 29.

223 Dennis Tan's AEIC at para 29.

224 SOC at para 50.

225 SOC at para 53.

226 Reply at para 43.

(b) Under the Guarantee, the Guarantors were liable to Gulf for the Finance Charges and/or the Late Payment Interests.[227]

(c) The Guarantee did not distinguish between the liabilities of Dennis Tan on the one hand, and of Aroy Tan and Steven Soon on the other. Nor was the liability of Aroy Tan and Steven Soon restricted to principal debts owed by Oasis.[228]

(d) Properly construed, the Guarantee was an indemnity and therefore Aroy Tan and Steven Soon were bound even if they neither knew nor consented to the New Business Model.[229] Even if the Guarantee was characterised as a guarantee, its terms clearly covered the New Business Model.[230]

(e) Neither Gulf nor its representatives represented that the Guarantee would not be binding, or that Gulf had no intention of enforcing the terms,[231] and even if any of Gulf's representatives had made such a representation, that representative did not have the authority to do so.[232]

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227 Reply at para 43.

228 Plaintiff's Closing Submissions at para 134.

229 Plaintiff's Closing Submissions at para 139.

230 Plaintiff's Closing Submissions at para 140.

231 Reply at para 46A.

232 Reply at para 46B.

160 Gulf added that even if the Net-Off Contract applied, the Guarantors remained liable under the Guarantee.[233]

The Guarantors' arguments

161 The Guarantors resisted liability under the Guarantee on the following grounds:[234]

(a) In fact, no Guarantee had been provided.[235]

(b) The terms of the Guarantee did not apply to the Finance Charges and/or the Late Payment Interests.[236]

(c) The Guarantee was unenforceable as the terms were uncertain.[237]

(d) The Guarantee was unenforceable against Aroy Tan and Steven Soon for want of consideration, as they were at all material times not involved in and/or employed by Petrotec. Gulf neither transacted directly with Oasis, nor brought any claim against it.[238]

(e) Even if the New Business Model applied, Aroy Tan and Steven Soon were discharged from all liability under the Guarantee as they did not know and did not consent to this agreement.[239]

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233 Plaintiff's Closing Submissions at para 142.

234 Defence at para 68.

235 Defence at para 56.

236 Defence at paras 57(c), 60B.

237 Defence at para 57.

238 Defence at para 58.

239 Defence at para 59.

(f) Gulf was estopped from calling on the Guarantee, as Gulf's representative, Gary Chew, had made numerous oral representations and/or promises to Dennis Tan that the Guarantee "was only a matter of formality and that [Gulf] would not enforce the [Guarantee]".[240] Each of the Guarantors relied on these oral representations when they signed the Guarantee.[241]

162 In the circumstances, the Guarantors sought a declaration that the Guarantee was void and/or unenforceable.

163 Even if the Guarantee was enforceable, the Guarantors sought to set off Petrotec's counterclaim *vis-à-vis* Gulf against Petrotec's liability to Gulf.[242]

Analysis

164 I am of the view that the Guarantors' arguments to resist enforcement of the Guarantee are not made out.

Certainty

165 The Guarantors' argument was that the Guarantee was not sufficiently clear to be enforceable. This was because there was no clear identification of the subject matter or the principal contract "pursuant to which the [Guarantee] was issued". Further, the scope of the Guarantors' liability was uncertain and/or unascertainable.[243]

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240 Defence at para 60A(a).

241 Defence at para 60A(b).

242 Defence at para 61.

243 Defendants' Closing Submissions at para 71.1.

166 In my view, there is sufficient certainty for the Guarantee to be given effect to in the present case. While it could have been more elegantly drafted, the Guarantee provided for the Guarantors' liability in respect of principal debts owed by Petrotec to Gulf for the purchase of fuel oil whether under the Net-Off Contract or not. This was contemplated in the second paragraph of the Guarantee which read: "We also personally guarantee Gulf… for any sale of ex-wharf oil to us into our above-named barges." The phrase "any sale… to us" is important. The word "us" in the context of the Guarantee must have included Petrotec since the first paragraph clarified that Petrotec was one of "our companies" – "our" referring here collectively to the Guarantors. The plain meaning of the phrase "any sale" is sufficiently certain. The reference to "any sale" would *not* make sense if the guaranteed obligation referred merely to, for example, a minimum threshold of transactions with the Buyers that Petrotec must "sleeve" to Gulf, since that would render the word "any" otiose. It could also not be that the guaranteed obligation referred merely to the condition of the fuel oil transported by Petrotec to the Buyers, because the key word used in the second paragraph was "sale", and in any case, liability as to theft, robbery and spillage had already been provided for in the third paragraph of the Guarantee.

167 Indeed, apart from a bare assertion of uncertainty, the Guarantors did not in fact provide any alternative reading of the Guarantee that could plausibly fit within its terms. The fact that the Guarantee did not refer to the Net-Off Contract by name, or that it did not use the most precise terms to describe the ownership of the various barges, was not fatal. As stated in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*Phang on Contract*") at pp 145–146, "the courts do not expect commercial documents to be drafted with the outmost precision and certainty" and would generally endeavour to give effect to an agreement rather than strike it down.

Further, as Gulf noted, there was no distinction drawn in the Guarantee between Dennis Tan and the other Guarantors, or between Petrotec and Oasis. Therefore, the Guarantors bear the collective liability of Petrotec and Oasis to Gulf.

168 Finally, there was no good reason why the Guarantors did not realise that what they were signing was a guarantee when the document so clearly used the term "personally guarantee" and it was not a lengthy document.[244]

169 I am therefore of the view that the Guarantee is not so uncertain as to be unenforceable.

Consideration

170 The Guarantors submitted without elaboration that the Guarantee is unenforceable for failure of consideration.[245] They also asserted that there was "no consideration to the [Guarantors] for providing the [Guarantee]".[246]

171 In my view, the consideration provided by Gulf for the Guarantee was its entry into the Net-Off Contract with Petrotec. It is true that Aroy Tan and Steven Soon were not employees or directors of Petrotec, and therefore they were not direct beneficiaries of the consideration.[247] However, it is trite that the consideration provided by Gulf need not be directed at the Guarantors themselves, but may also be provided to Petrotec as one of the principals under the Guarantee. As Low Kee Yang, *The Law of Guarantees in Singapore &*

244 See Steven Soon's AEIC at para 14.

245 Defendants' Closing Submissions at para 71.2.

246 Defendants' Closing Submissions at para 71.2.

247 Plaintiff's Closing Submissions at para 131.

Malaysia (LexisNexis, 2nd Ed, 2003) ("*Low on Guarantees*") stated (at pp 69–70):

> A contract of guarantee must be supported by valuable consideration such as making advances or supplying goods. The essential rule is that consideration must move from the promisee (or his agent) but it need not (though it may) move to the promisor. The promise that we are concerned with here is the surety's promise – to pay the creditor (the promisee) if the principal debtor does not. To enforce the surety's promise, the creditor must show that he has given valuable consideration, *either to the principal debtor or to the surety*. [emphasis added; internal citations omitted]

172 For completeness, I add that such consideration was not past consideration. While the Guarantee was undated, and even though Gulf's pleaded case was that the Net-Off Contract chronologically preceded the Guarantee (see [156] above), Gary Chew's unchallenged evidence in court was that the Guarantee had been signed "before the business started" because otherwise Gulf's "management [would] not approve" the business arrangement with Petrotec.[248] It was also Goel's evidence that the Guarantee was the prerequisite to a business relationship between the parties.[249] The better view of the facts is therefore that the Net-Off Contract and the Guarantee were part of one and the same transaction, and should hence be considered to have been entered into contemporaneously (see *Low on Guarantees* at p 76; *Phang on Contract* at pp 193–195).

173 In the premises, I am of the view that the Guarantee is adequately supported by consideration provided by Gulf.

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248 NE Day 3, p 86.

249 NE Day 2, p 48.

Estoppel

174 The Guarantors further argued that Gulf was estopped from calling on the Guarantee due to the oral representations made by Gary Chew to Dennis Tan which the Guarantors relied on. In particular, they relied on the following alleged representations made by Gary Chew:[250]

(a) that the Guarantee was a mere formality to kick-start business with Gulf;

(b) that Gary Chew would "take care of" Dennis Tan;[251] and

(c) that Dennis Tan "did not have to worry" about the Guarantee.[252]

175 The Guarantors did not specify the species of estoppel relied upon.[253] As Andrew Ang J explained in *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd* [2013] 4 SLR 1023, the appropriate species of estoppel that applies to preclude one party from resiling on his alleged promise or assurance as to future conduct should be promissory estoppel, and not estoppel by representation of fact. It is on this basis that I analyse the Guarantors' submissions.

176 A party pleading promissory estoppel must show three elements: (a) a clear and unequivocal promise by the promisor, whether by words or conduct, (b) reliance on the promise by the promisee, and (c) detriment suffered by the

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250 Dennis Tan's AEIC at para 28.

251 NE Day 4, p 31, lines 1–6.

252 NE Day 4, p 31, lines 9–11.

253 Plaintiff's Closing Submissions at para 144.

promisee as a result of the reliance (see, *eg*, *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [37]).

177 On the facts, the purported representations do not amount to unequivocal promises that the Guarantee would not be enforced.[254] Gary Chew could equally be "taking care" of the Guarantors if he *deferred* reliance on the Guarantee rather than *entirely disclaimed* its use. In this sense, a representation that Gary Chew would try his best to protect Dennis Tan and the other Guarantors did not amount to an unequivocal promise that the Guarantee would not be enforced.[255] Indeed, it would not make any commercial sense for Gulf to require a personal guarantee and yet undertake not to enforce that guarantee.[256]

178 Furthermore, even though Gary Chew conceded under cross-examination that he had told Dennis Tan that he would take care of him,[257] there is no evidence that he had made the same promises to Aroy Tan and Steven Soon. There is also no evidence that Dennis Tan informed the other Guarantors of the promise made by Gary Chew. Further, no submission was made as to whether such indirectly-conveyed promises would suffice to ground a claim in promissory estoppel. In the circumstances, even if Dennis Tan was entitled to raise an estoppel (which he was not), the same cannot be said of the other Guarantors.

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254 Plaintiff's Closing Submissions at para 147.

255 NE Day 4, pp 34–35.

256 See Gary Chew's AEIC at para 58.

257 NE Day 4, pp 30–31.

Guarantee over the New Business Model

179 Finally, the Guarantors argued that Aroy Tan and Steven Soon should be discharged from all liability under the Guarantee to Gulf as the New Business Model was entered into without their consent.[258] Since I have found that the New Business Model did not exist, this submission of the Guarantors must fail.

180 The Guarantors' argument that the terms of the Guarantee did not apply to the Finance Charges and/or the Late Payment Interests[259] also did not arise because of my finding that the New Business Model did not exist and the absence of any pleading that these charges were payable on any other basis.

Conclusion

181 For the foregoing reasons, I am of the view that the Guarantee is enforceable and that the Guarantors are liable to Gulf for debts owed by Petrotec to Gulf in respect of Petrotec's purchase of fuel oil from Gulf under the Net-Off Contract.

182 I add that in its closing submissions, Gulf asserted that the Guarantee was in fact an indemnity.[260] This was not pleaded, and in any event I do not consider the argument sustainable as the Guarantee clearly stated that it involved a "personal[] guarantee" and nothing else suggests otherwise.

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258 Defence at para 59.

259 Defence at paras 57(c), 60B.

260 Plaintiff's Closing Submissions at para 119.

Summary of decisions

183 For the above reasons, since Gulf does not have title to the Surplus Oil, its claims for a delivery up of the Surplus Oil and/or for damages for conversion or detinue are dismissed. Instead, Petrotec is to pay Gulf US$8,123,896.43 as the purchase price of the Surplus Oil. In addition, Petrotec is to pay Gulf US$3,447,582.87 as the aggregate amount due and owing under the nine outstanding debit notes. Also, the Guarantors are jointly and severally liable to pay those two sums to Gulf.

184 Petrotec's counterclaims for the Payments and for a declaration that the Guarantee is void and/or unenforceable are dismissed.

185 I will hear the parties on costs.

186 A final comment is due. At the end of the trial, I gave directions for the Defendants to file and serve written closing submissions by 5.00pm of 21 August 2017, and the plaintiff to do the same by 5.00pm of 11 September 2017. Submissions were filed belatedly by the Defendants on 4 September 2017. On 5 October 2017, counsel for the plaintiff wrote to court stating that even though the plaintiff's closing submissions were (purportedly) due on 25 September 2017, "[the] parties have agreed to an extension of time of three weeks for the Plaintiff to serve its Closing Submissions". I should clarify that while the parties may be agreeable to give each other an extension of time to make submissions, it is ultimately for the court to decide whether to abridge

its direction and to grant the extension. In the present case, I was agreeable to the extension in question but in future the parties should not assume that the court will agree.

Woo Bih Li
Judge

Tan Boon Yong Thomas and Ng Wei Long (Haridass Ho & Partners) for the plaintiff and defendant in the counterclaim;
Fu Simin Charmaine and Wong Shi Yi (Ang & Partners) for the first to fourth defendants and the plaintiffs in the counterclaim.