Abani Trading Pte Ltd *v* BNP Paribas and another appeal
[2014] SGHC 111

Case Number : District Court Appeal Nos 19 and 24 of 2013

Decision Date : 06 June 2014

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Sureshan s/o T Kulasingam (Sureshan LLC) for plaintiff; Toh Kian Sing SC and Jonathan Wong (Rajah & Tann LLP) for defendant.

Parties : Abani Trading Pte Ltd — BNP Paribas

Banking – Letters of Credit

Civil Procedure – Pleadings

Civil Procedure – Costs

6 June 2014 Judgment reserved.

George Wei JC:

Introduction

1 There are two appeals which arise from the learned District Judge's ("the DJ's") decision in District Court Suit No 403 of 2011. The first appeal, District Court Appeal No 19 of 2013 ("DCA 19/2013"), is filed by the plaintiff of the original action, Abani Trading Pte Ltd ("Abani"). This appeal is on the issue of whether the defendant, BNP Paribas ("BNP"), breached its duty or the terms of the letter of credit, and failed to exercise due care in examining the relevant documentation that was presented to it. The second appeal, District Court Appeal No 24 of 2013 ("DCA 24/2013"), is filed by BNP against the DJ's decision to award costs in favour of BNP on a *standard* basis, as opposed to an *indemnity* basis. The two appeals deal with different subject matters; the appeal in DCA 24/2013 will only be relevant if the appeal in DCA 19/2013 is dismissed. After considering the arguments made by both parties, I am dismissing the appeal in DCA 19/2013 and allowing the appeal in DCA 24/2013. I now give the reasons for my decision.

Background facts

2 The plaintiff, Abani, is a trading company based in Singapore which carries on the business of general wholesale trade, including the importation and exportation of goods. The defendant, BNP, is a bank operating in Singapore.

3 The letter of credit in question was obtained in connection with the underlying sale of a consignment of metal bars from Metal Market Dis Ticaret Ltd Sti ("Metal Market") to Abani. In this respect, Abani had apparently bought the consignment of metal bars for the purpose of selling it to another party named Codiscomad. [note: 1] One of the terms of the agreement with Codiscomad required the goods in question to be shipped between November and December 2008. [note: 2]

4 On 9 December 2008, Abani made the application to BNP for a letter of credit to be issued in favour of Metal Market as the named beneficiary. [note: 3] The letter of credit in the amount of US$80,665 was issued in favour of Metal Market the next day on 10 December 2008. The terms of the letter of credit provided, amongst others, that the applicable rules were the "UCP Latest Version" and that the latest date of shipment was 30 December 2008. [note: 4] The latter condition was probably included so as to ensure that Abani could fulfil its contractual obligations to Codiscomad. For the purposes of this appeal, the material clauses of the letter of credit are reproduced as follows: [note: 5]

> 40E : Applicable rules
>
> UCP LATEST VERSION
>
> 44C : Latest Date of Shipment
>
> 30-Dec-2008
>
> 46A : Documents Required
>
> ...
>
> + ORIGINAL FULL SET OF CLEAN ON BOARD BILL OF LADING ISSUED BY CARRIER OR AGENT
>
> (FORWARDER BL NOT ACCEPTABLE.) ...

5 Given that the date of issuance was 9 December 2008, with reference to field 40E, the letter of credit was governed by the provisions of the *Uniform Customs and Practice for Documentary Credits 2007* (International Chamber of Commerce Publication No 600) ("UCP 600").

6 Subsequently, a bill of lading dated 30 December 2008 was issued by Karetta Uluslararasi Tasimacilik Ve Dis Tic Ltd Sti ("Caretta"). [note: 6] The bill of lading and other relevant documents were negotiated through Fortis Bank, which then sought reimbursement from BNP. On 12 January 2009, BNP received the bill of lading and other relevant documents from Fortis Bank.

7 After an exchange of emails and an alleged telephone call between BNP and Abani (both parties dispute what actually transpired during the telephone conversation), BNP eventually debited Abani's account on 16 January 2009. It will be recalled that the agreement with Codiscomad required the goods to be shipped latest by December 2008. Whilst the bill of lading which had been negotiated was dated 30 December 2008, it appears that another bill of lading was issued later, which indicated that the shipping date was 2 January 2009. [note: 7] As a result, Codiscomad complained that Abani was in breach of its contractual obligations due to the late shipment. Given that the market price of the goods in question had fallen over the relevant time period, Abani asserted that it had no choice but to settle Codiscomad's claim by deducting a sum of US$64,431.53 from the original sale price. Abani then brought the action against BNP to recover the sum of US$64,431.53, or alternatively, damages on the basis that BNP had breached its duty or the terms of the letter of credit and had failed to exercise due care in examining the relevant documentation before making payment.

The decision below

8 After a two-day hearing that took place on 22 and 23 January 2013, the DJ dismissed Abani's claim (see *Abani Trading Pte Ltd v BNP Paribas* [2013] SGDC 243). [note: 8] In arriving at his decision,

the DJ made a few key findings, summarised as follows:

(a) Under Art 49(a) of the UCP 600, it is clear that the obligation of the issuing bank to pay pursuant to a letter of credit is detached from the underlying transaction on which it is based.

(b) The established exception concerning cases where the seller had made a fraudulent presentation of documents containing material misrepresentations was not pleaded by Abani and did not, in any event, apply to the facts of the present case.

(c) It was not part of BNP's duties to act on the information supplied to it by Abani or any constructive knowledge which BNP may possibly have acquired in the course of previous transactions involving the same parties. In fact, BNP was prohibited from doing so pursuant to the rules set out in the UCP 600, given that there was no evidence of fraud on the part of the seller.

(d) The bill of lading presented for negotiation, and on which payment was made, was a conforming document given that it was not a "forwarder bill of lading".

(e) Abani failed to establish that it was unable to deliver the goods to Codiscomad as there was no evidence of any attempt being made to obtain delivery from the carrier on the strength of the bill of lading that had been presented for negotiation. On that basis, Abani failed to prove that it had suffered any loss as a result of BNP's payment under the letter of credit.

(f) In the event that Abani was indeed placed in a position of having to negotiate with Codiscomad as a result of the breach of its contractual obligations, the settlement of US$64,431.53 was a reasonable sum.

9 After dismissing Abani's claim on 5 June 2013, the DJ further directed both parties to tender written submissions on the issue of whether costs in favour of BNP should be taxed on a standard or an indemnity basis. This was because BNP had argued that it was entitled to costs on an indemnity basis, as provided for by cl 11.4 of BNP's standard terms and conditions ("the STC"), [note: 9] which governed BNP's grant of credit facilities to Abani. After considering the submissions of both parties, on 24 June 2013, the DJ ordered for costs in favour of BNP to be taxed on a standard basis. Whilst the DJ agreed with BNP that the scope of cl 11.4 of the STC was wide enough to cover claims brought by Abani against BNP, he was of the view that BNP's failure to include its claim for indemnity costs in its pleadings was fatal given that the claim was based on a contractual provision.

The issues

10 The core issues that are raised in DCA 19/2013 are as follows:

(a) whether BNP had breached its duty or the terms of the letter of credit, and failed to exercise due care in examining the relevant documentation that was presented to it;

(b) whether Abani had given express instructions to BNP to accept the bill of lading presented by the seller, and to debit Abani's account accordingly; and

(c) what losses were suffered by Abani.

11 The core issues that are raised in DCA 24/2013 are as follows:

(a) whether the DJ erred in holding that BNP was required to include in its pleading its claim for costs on an indemnity basis, specifically cl 11.4 of the STC;

(b) assuming that BNP was required to, whether the DJ erred in finding that Abani would suffer prejudice as a result of BNP's failure to include its claim for indemnity costs in its pleadings; and

(c) assuming that BNP's failure to include its claim in its pleadings was not fatal, whether cl 11.4 of the STC confers a contractual right to costs on an indemnity basis, and whether the contractual bargain between the parties should be upheld by the court.

The appeal in DCA 19/2013

Whether BNP had breached its duty or the terms of the letter of credit, and failed to exercise due care in examining the relevant documentation that was presented to it

12 There is no dispute that the letter of credit in question is governed by the UCP 600. As noted above, the documents required for payment under the letter of credit included a full set of clean on board bill of lading issued by *the carrier or its agent*. In fact, field 46A of the letter of credit specifically states that a "forwarder [billing of lading]" would not be acceptable. [note: 10]

13 Abani's claim against BNP was based on two broad grounds. First, Abani alleged that the bill of lading presented for negotiation was a *freight forwarder's* bill of lading and thus should have been rejected for non-compliance with field 46A of the letter of credit. Second, Abani claimed that the bill of lading presented for negotiation was not a "true" bill of lading. Abani argued that the "true" bill of lading only surfaced later, revealing that the goods were shipped on 2 January 2009. This is of significance as the letter of credit specified the latest date of shipment to be 30 December 2008.

14 In determining whether the bill of lading presented was a conforming document, the DJ held that a relevant consideration was whether BNP was obliged to act on any information supplied by the applicant for the letter of credit (*ie*, Abani), or constructive knowledge that might possibly have been acquired in the course of previous transactions involving the same parties. This was relevant as Abani had advanced the argument that it was common knowledge that Caretta was a freight forwarding company. Furthermore, it was also claimed that BNP had entered into previous transactions with Abani, also involving letters of credit, where Delmas was the named carrier. In those transactions, the bills of lading presented for payment were signed by CMA CGM Shipping Agency JSC ("CMA CGM") as agent of the carrier. Finally, Abani argued that it had informed BNP on 13 and 15 January 2009 that Caretta was only a freight forwarder, and was not an agent of the carrier, Delmas.

15 In respect of the earlier transactions involving BNP, Abani and Delmas, reference was made to two bills of lading where CMA CGM had signed off as the agent of Delmas. The first was dated 5 October 2008, and was presented by Metal Market pursuant to an earlier letter of credit. [note: 11] The second, which was only tendered during the course of the trial, was dated 19 October 2008. [note: 12] In that bill of lading, Delmas was also identified as the carrier and CMA CGM was referred to as its agent. It bears noting that BNP has disputed the authenticity of the bill of lading dated 19 October 2008. In any event, as will be further discussed below, the relevance of these earlier bills of lading presented under separate transactions is doubtful at best.

16 Given that the letter of credit in question was governed by the rules set out in the UCP 600, a close examination of the relevant articles in the UCP 600 would be necessary. In this regard, Art 4(a) of the UCP 600 states that:

> A credit by its nature is a *separate transaction* from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. ...
>
> [emphasis added]

This overriding principle of autonomy was further explained in the House of Lords decision of *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 ("*United City Merchants*") at 183:

> ... If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the confirming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

17 Beyond that, the House of Lords also recognised that there was one established exception to this general overriding principle of autonomy. Widely known as the "fraud exception", it applies to cases where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents which contain, either expressly or by implication, material misrepresentations of facts that to its knowledge are untrue.

18 The principle of autonomy as explained in *United City Merchants* has also been applied locally. In the Court of Appeal decision of *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146, Lai Kew Chai J, in delivering the judgment of the court, held at [19] that:

> The main principle ... is the principle of autonomy of irrevocable credits ... An irrevocable credit constitutes an *independent contract* between the issuing banker and the beneficiary, which is not affected by any irregularities in the underlying contract in pursuance of which the credit is issued. *This rule is crucial to the smooth functioning of the world of international trade and trade-financing.*
>
> [emphasis added]

The Court of Appeal went on to endorse the comment made by Donaldson LJ in *The Bhoja Trader; Intraco v Notis Shipping Corp of Liberia* [1981] 2 Lloyd's Rep 256 that "[t]hrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the *equivalent of cash in hand*" [emphasis added].

19 As noted by the DJ, the fraud exception is inapplicable to the present case in so far as Abani has not raised any arguments in relation to fraud on the part of the seller. In fact, no evidence appears to have been led with regard to the issue of fraud and the fraud exception was not, in any

event, raised during the course of this appeal. Accordingly, I see no reason to depart from the DJ's finding that the fraud exception was inapplicable on the case as pleaded by Abani.

20 The central question, therefore, is whether the bill of lading presented for negotiation was a conforming document. Abani argued that the bill of lading ought to have been rejected for non-compliance on the basis that it was a "forwarder bill of lading". As discussed above, Abani claimed that BNP should have been aware of the fact that Caretta was a freight forwarding company by virtue of Caretta's international repute. Abani further argued that, in any event, BNP should have been privy to the fact that the agent of the carrier, Delmas, was CMA CGM. This was because BNP had been involved in previous transactions (also in relation to letters of credit) concerning Delmas and Abani. Finally, Abani also highlighted the fact that they had brought the above-mentioned points to BNP's attention by way of a chain of email communications between 13 and 15 January 2013.

21 The general principles governing a bank's duty to examine documents presented pursuant to a letter of credit governed by the UCP 600 are well-known. The principle of autonomy has already been briefly referred to above. I agree with BNP's submissions that the principle of autonomy further gives rise to two key implications. First, in determining whether there has been compliance with the conditions set out in the letter of credit, banks are confined to dealing with the documents that have been presented to them. Second, in examining the documents that have been presented, banks do not take into account matters or circumstances that are extraneous to the documents. It follows that banks are generally not obliged to carry on any further investigations into the allegations made by the applicant for the letter of credit.

22 This view is consistent with and indeed mandated by the provisions of the UCP 600, which governs the letter of credit in question. Article 14(a) of the UCP 600 states unequivocally that:

> A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, *on the basis of the documents alone*, whether or not the documents *appear on their face* to constitute a complying presentation.
>
> [emphasis added]

In fact, it was observed by the Privy Council in *Westpac Banking Corporation v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315 ("*Westpac Banking Corp*"), an appeal from the Court of Appeal of New South Wales, that "[i]t forms no part of the bank's function, when considering whether to pay against documents presented to it, *to speculate about the underlying facts*" [emphasis added].

23 The position set out in *Westpac Banking Corp* is also supported by the learned authors in Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) at p 118, where it was observed that the principle of determining compliance with reference to the documents alone "highlights the principle of autonomy, whereby the examining bank is not supposed to take into account extraneous matters, such as the beneficiary's behaviour in relation to the underlying contract". This is also in line with Art 34 of the UCP 600, which states that a "bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document".

24 There is a commercial rationale for such a strict view of the bank's duty to examine the documents presented for payment. It is driven by the consideration that any obligation placed on the issuing bank to investigate the underlying facts of the transaction would effectively alter the commercial character of the letter of credit, from one of payment on demand, to one of payment only

after being convinced or compelled to pay. In any event, it must be recognised that the bank examining the documents often does not possess the requisite expertise or tools to investigate, inspect or inquire into the truth of the representations which appear on the face of the documents. In fact, it was observed in James E Byrne *et al*, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2010) at p 1254 that:

> ... There is *absolutely no duty* on the part of a letter of credit bank, whether an issuing bank or confirming bank, to *investigate the veracity or accuracy of representations contained in the documents that are presented under a letter of credit, to investigate claims made by the applicant*, or to not honor a complying presentation when claims of fraud are made. Insofar as there is a "duty" as regards allegations, it might be said to be the opposite, namely to *focus on the documents alone and to disregard any allegations related to the underlying transaction.* ... The risk of the fraudulent or false character of the documents rests with the applicant.
>
> [emphasis added]

25 In its submissions, Abani drew the court's attention to a bill of lading that it received from Delmas on or about 23 January 2009, which was issued by CMA CGM as agent for Delmas. [note: 13] This bill of lading was issued on 2 January 2009 and has been referred to by Abani as the "true" bill of lading. To this end, Abani pointed out that the date of issuance for this "true" bill of lading is after the latest date of shipment as indicated in field 44C of the letter of credit (*ie*, 30 December 2008). In the course of this appeal, Abani also referred to an email from Delmas dated 20 February 2013, where it was stated that Caretta was not an agent for Delmas at the relevant time. [note: 14]

26 However, it bears noting at this juncture that even if it is established that the agent for Delmas was CMA CGM, and not Caretta, that does not necessarily mean that BNP had failed in its duty to properly examine the relevant documents before making payment. On the face of the bill of lading itself, it is undisputed that Caretta had signed off as agent for the carrier. In these circumstances, the fact that Caretta was *not* an agent of Delmas (which is disputed) is an underlying fact which BNP may not have been required to investigate, taking into account the various authorities cited above.

27 Furthermore, it will be recalled that BNP had debited the amount due under the letter of credit from Abani's account on 16 January 2009. This occurred well before the point in time when Abani received what has been referred to as the "true" bill of lading from Delmas ([25] above). At the time of deduction, the only bill of lading that had been presented to BNP under the letter of credit (and on the basis of which Fortis Bank had negotiated the bill of lading) was the bill of lading stating the shipment date as 30 December 2008. Under such circumstances, I am of the view that the subsequent communications between the relevant parties and the surfacing of the "true" bill of lading is of limited relevance to the core issue of whether BNP failed to properly examine the bill of lading that had been presented for payment. In arriving at this view, I note that Art 7(c) of the UCP 600 clearly states that an "issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank". Further, Art 15(a) of the UCP 600 provides in no less uncertain terms that "[w]hen an issuing bank determines that a presentation is complying, it *must* honour" [emphasis added].

28 Moving on, Abani, in its submissions, sought to distinguish the House of Lords decision of *United City Merchant* on the basis that the present case does not involve any dispute or breach of the underlying sale transaction. It was further argued that the fact that Caretta carried on the business of freight forwarding was general knowledge and that BNP must have realised through its previous transactions involving the same parties that a different company had signed as agent for Delmas. Abani was of the view that these facts are directly relevant to the question of whether the bill of

lading presented was a compliant document. Abani further submitted that in examining the documents for compliance with the terms of the letter of credit, the bank was under a duty to exercise its judgment, banking experience and general knowledge. In making this submission, Abani relied on the observations made by the learned authors in Ali Malek & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed, 2009) ("*Jack: Documentary Credits*") at para 8.21. On this basis, it was argued that BNP ought to have relied on its banking experience to realise that the bill of lading was not compliant as it was signed by Caretta, which was not the named agent in previous transactions involving Abani, BNP and the same carrier, Delmas. It was also submitted that in exercising its judgment, experience and general knowledge, BNP should have applied the knowledge that it had acquired from the emails sent by Abani, stating that Caretta was only a freight forwarder and that the bill of lading was a "forwarder bill of lading".

29 I am unable to agree with Abani's submissions for the following reasons. At the outset, it must be recognised that Abani's reliance on the specific extract from *Jack: Documentary Credits* is doubtful at best. To understand the context in which that statement was made, it will be necessary to set out at length para 8.21 in *Jack: Documentary Credits* that was referred to by Abani:

> Despite this, it must be recognised that the bank's duty is not to engage in a merely mechanical proof-reading exercise but to use its judgment, banking experience and general knowledge to test compliance. For example, a credit may call for documents evidencing shipment to 'any European port'. A bank can safely accept a bill of lading showing goods consigned to Rotterdam and safely reject one showing goods consigned to Singapore without requiring documentary proof of the fact that the former port is in Europe and the latter is not. *Other cases may be less clear-cut and there must remain some doubt as to where exactly the dividing line falls between a fact which a bank can be expected to know, or to look up in an atlas, and one which it is not required to investigate.*
>
> [emphasis added]

In this regard, it was clearly recognised by the learned authors that there may be cases that are less clear-cut and there remains some doubt as to where the line ought to be drawn. On one end of the spectrum, there are facts which a bank can be expected to know. As highlighted in the extract above, the fact that Singapore is not in Europe would clearly fall within the scope of general knowledge that a bank must be expected to take into account of when examining the relevant documents for compliance. But the example raised in the extract above is far removed from the facts and circumstances of the present case. To that end, it appears to be a stretch to argue that the fact that Caretta was *not* an agent of Delmas falls within the scope of facts that "a bank can be expected to know".

30 In the present case, the bill of lading that was presented to BNP referred to Delmas as the carrier. Furthermore, in the box towards the bottom of the bill of lading, Caretta's name and stamp appear below the words "AS AGENT ON BEHALF OF THE CARRIER". [note: 15] In this regard, the point that the bank must use its banking experience, knowledge and judgment means nothing more and nothing less than the fact that the bank must exercise a certain degree of commercial common sense when examining the presented documents for conformity. It does not mean that a bank is thereby subjected to the duty to investigate the veracity of the representations appearing on the face of the document. As a corollary to that, it follows that a bank should not be subjected to the duty to check the documents presented in the current transaction against similar documents presented in previous transactions. Adopting such a position will only serve to place a considerable burden on the shoulders of the bank, which is inconsistent with the practice and established principles pertaining to documentary credits.

31 Furthermore, the fact that the bill of lading issued by Delmas was signed by CMA CGM in previous transactions involving Abani and BNP is largely immaterial. To this end, it is well established that each letter of credit transaction is a separate and autonomous transaction: see *Rafsanjan Pistacho Producers Co-operative v Bank Leumi* [1992] 1 Lloyd's Rep 513. The fact that CMA CGM had signed as agent for Delmas in previous transactions does not mean that BNP was therefore obligated in the present transaction to reject *any* bill of lading which did not reflect CMA CGM as agent for Delmas. In any event, there is no evidence to suggest that Delmas only used one agent and no other. Whether Caretta was, in fact, an agent of the carrier, Delmas, would more likely fall on the other end of the spectrum, in the category of facts that the bank would not be required to investigate beyond the face of the documents.

32 In relation to the issue of whether the bill of lading was compliant with the conditions set out in the letter of credit, Abani argued that the bill of lading presented for payment was not compliant because it was issued by Caretta in its capacity as a freight forwarder. As explained above, this was expressly prohibited by field 46A of the letter of credit in question. To support its claim, Abani has referred to Art 20(a) of the UCP 600, which states that:

> A bill of lading, however named, must appear to:
>
> i. indicate the name of the carrier and be signed by:
>
> - the carrier or a named agent for or on behalf of the carrier, or
>
> - the master or a named agent for or on behalf of the master.
>
> Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.
>
> Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

The complaint by Abani was that Caretta merely signed as "agent of the carrier", as opposed to signing as "agent of the *named* carrier", which was Delmas. In other words, Abani was of the view that in order for the document to be compliant, the entity signing as an agent must specifically state that it was signing as the agent of Delmas. Furthermore, Abani also pointed out that the bill of lading did not carry the Delmas logo and that it was not printed on Delmas' letterhead. It bears noting, however, that Delmas was clearly named as the carrier in the middle of the first page of the bill of lading. [note: 16]

33 I am unable to agree with the position adopted by Abani. The terms of the letter of credit and the UCP 600 do not dictate the precise form, arrangement or sequence in which the required information and details are to be set out in the bill of lading. In fact, Art 20(a) of the UCP 600 demonstrates the overriding concern for substance over form with the opening words: "A bill of lading, *however named*, must appear to ...". I accept BNP's submissions that there is no express requirement in the UCP 600 which governs the specific position of the carrier's name on the face of the bill of lading. The fact that the bill of lading was not printed with the carrier's letterhead does not in any way render it non-compliant with either the terms of the letter of credit or the provisions of the UCP 600.

34 Counsel for BNP also referred to a position paper issued by the International Chamber of

Commerce, Commission on Banking Technique and Practice, *Position Papers No 1, 2, 3, 4 on UCP 500* (1 September 1994) at p 4 ("the ICC Position Paper"). The ICC Position Paper stated that in so far as the word "carrier" has been used on the front of the document to identify the party acting as carrier, there is no need for the name of the carrier to be placed where the agent is signing on the carrier's behalf. On the facts of the present case, there is no dispute that Delmas has been identified as the carrier on the front of the bill of lading. Therefore, the fact that the words "AS AGENT ON BEHALF OF THE CARRIER" appeared directly above the signature and Caretta's name and stamp would suffice. Contrary to what Abani has argued, there is no requirement for the carrier to be named specifically at the location where the agent signs off the bill of lading, in so far as the carrier is already named elsewhere on the front of the bill of lading. Whilst it is recognised that the ICC Position Paper was issued in relation to the UCP 500, it appears that the relevant provisions in the UCP 500 are the same as those found in the UCP 600. That being so, I see no reason to depart from the DJ's finding that the bill of lading was, on its face, compliant, given that it was signed by Caretta as agent of the carrier and that Delmas was clearly identified as the carrier on the front of the bill of lading.

35 Apart from that, there was also significant dispute over the interpretation of the phrase "forwarder bill of lading" or "freight forwarder's bill of lading". In this respect, whilst it was accepted that these terms were not defined specifically in the UCP 600, Abani submitted that they were generally understood to mean a bill of lading issued by a freight forwarder in its capacity as a freight forwarder, and not as an agent for the carrier.

36 To this end, it must not be overlooked that where a freight forwarder is engaged in the process of arranging for carriage of goods by sea, it may perform a variety of roles. In many circumstances, the freight forwarder may be acting as an agent of the cargo owner or the shipper of the goods. The freight forwarder will often not be the actual carrier of the goods. In certain cases, whilst the freight forwarder is not the actual carrier, it may have entered into a contract of carriage as the contractual carrier. Alternatively, there may also be occasions where the freight forwarder, whilst not the carrier or the contracting carrier, signs the bill of lading in its capacity as an agent for and on behalf of the carrier. In other words, there is no reason in principle as to why a freight forwarder is unable to act as an agent of the carrier in signing the bill of lading. Whether the freight forwarder had signed as an agent of the carrier very much depends on the precise arrangement between the relevant parties. In cases where the freight forwarder signs as an agent of the carrier, the bill of lading will, in form and in substance, be considered a "normal" bill of lading evidencing a contract of carriage between the shipper and the carrier. It will not be considered a "freight forwarder's bill of lading".

37 In this regard, the nature and function of a "normal" bill of lading is well-known. It serves as evidence of the contract of carriage, as a receipt for the goods and as a document of title: see generally Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea* (Butterworths Asia, 2nd Ed, 1994) at chapter 6. As the learned author in Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2nd Ed, 2011) ("*Carriage of Goods by Sea*") explains at para 3.21, a bill of lading that is signed by a freight forwarder in its capacity as a freight forwarder is not strictly considered a bill of lading. Such bills of lading are often referred to as "house bills of lading" or "freight forwarder bills of lading". In such cases, the freight forwarder will likely be acting in the capacity of an agent for the *shipper* to enter into a contract of carriage. Whilst "house bills of lading" and "freight forwarder bills of lading" serve as evidence of receipt of the goods, they are not considered documents of title to the goods and thus are not transferable by indorsement. Where a bill of lading is required to serve the three functions of a "normal" bill of lading as elaborated above, it follows that it would be important to ensure that the bill of lading is not merely a "freight forwarder bill of lading".

38 Accordingly, whether an entity which carries on the general business of a freight forwarder signs the bill of lading in its capacity as a freight forwarder or as an agent for the carrier depends

entirely on the facts and circumstances of each case. As discussed in the paragraph above, a freight forwarder can engage in a variety of roles in the carriage of goods. In fact, as pointed out in *Carriage of Goods by Sea* at para 3.23, a freight forwarder may sign and act as the principal. In such cases, the freight forwarder, by virtue of custom or express terms, will usually have the right to employ subcontractors to perform the carriage.

39 In the final analysis, there is thus no legal impediment or reason why a freight forwarder is unable to sign the bill of lading as an agent of the *carrier*, as opposed to an agent for the *shipper*. In arriving at this conclusion, I have also considered the opinion released by the International Chamber of Commerce Banking Commission ("ICCBC"), set out in Gary Collyer & Ron Katz, *ICC Banking Commission Opinions 2009–2011: New Opinions on UCP 600 and 500, ISBP, URC and URDG* (International Chamber of Commerce, 2011) at pp 39–40. In that opinion, the ICCBC was asked to address the issue of whether several variations on the phrase "forwarders bill of lading not acceptable" had any meaning in terms of the UCP 600. At the outset, the ICCBC acknowledged that in the context of the UCP 600 and letters of credit, the term "freight forwarder bills of lading" has no meaning, whether in respect of them being allowed or not allowed. In this regard, where freight forwarder transport documents are expressly stated to be not acceptable, as in the present case, the term remains "ambiguous and does not clearly define the type of document that would be acceptable". More pertinently, the ICCBC further noted that:

> None of the UCP 600 transport articles refer to the party that is to "issue" the respective transport document. The requirement is that the document must comply with the content of the applicable article and that the document may be "however named". In addition, sub-article 14(l) states "[A] transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules." *It therefore follows that issuance of a transport document by a freight forwarder is an established and acceptable practice under the UCP.* It should not be forgotten that irrespective of the issuer, one of the stated requirements in the referenced articles, with the exception of article 22, is that the document indicate the name of the carrier and be signed by the carrier, the master (in respect of articles 19, 20 and 21) or *a named agent for or on behalf of the carrier* or the master.
>
> [emphasis added]

It bears noting that with reference to the bill of lading in the present case, Caretta had signed as a named agent for the carrier, Delmas.

40 More importantly, it must also be recognised that in cases where a bill of lading is signed by a freight forwarder, the issue of whether the freight forwarded had signed the bill of lading in its capacity as a freight forwarder or as agent for the carrier would very much depend on the precise arrangement between the relevant parties to the transaction. The parties may include the freight forwarder, the shipper or the carrier. In this regard, the bank examining the transport documents presented for payment will be ill-equipped to determine the precise legal status of the signing party (*ie*, the capacity it is acting under). This glaring problem was also alluded to in the opinion of the ICCBC referred to in the previous paragraph. The ICCBC recognised that terms which exclude freight forwarder transport documents do not clearly define the type of document that would be acceptable. More pertinently, it was recognised that a "document examiner will not be in a position to determine the status of the party signing when it signs as carrier". The same principle would apply to cases where the party signs as a named agent for or on behalf of the carrier, such as in the present case. In these circumstances, it will be impractical to impose such an onerous duty on the bank to investigate the legal status of the signing party when it is not privy to the arrangements entered into

by the parties to the shipping transaction.

41 In referring to the opinions and papers released by the ICCBC, I am reminded that whilst these documents are not strictly legally binding, they are often regarded as representative of the views of experts in this particular area of law, and are also regularly accepted by the courts. In the English decision of *Fortis Bank SA/NV v Indian Overseas Bank* [2010] 2 Lloyd's Rep 641, Hamblen J observed at [46] that:

> Both parties also referred to Opinions of the ICC Banking Commission in support of their arguments. These opinions are of *persuasive weight*, as explained in *Brindle and Cox* at paragraph 8-005:
>
> > "The Commission has stated that its Opinions "reflect international practice in their interpretations of the stated circumstances and/or documents presented ... aim to encourage uniformity of practice ... [and] ... serve as guideposts to courts interpreting ICC rules ..." These materials are not of course legally binding as a matter of English law, but as time goes on it seems increasingly likely that the English Courts will regard them as having considerable weight".
> >
> > [emphasis added]

In this regard, I am of the view that whilst the papers and opinions issued by the ICCBC are not legally binding, they ought to be given persuasive weight in so far as they reflect international practice in this specialist area of law.

42 At this juncture, it will be useful to address the related issue of the decision released under the framework of the International Chamber of Commerce's Documentary Credit Dispute Resolution Expertise ("DOCDEX") in the present case. In this regard, following the commencement of the suit by Abani, BNP submitted a request for a DOCDEX decision to the International Chamber of Commerce's International Centre for Expertise. In the present case, Abani declined to participate in the DOCDEX process and it must be noted that Abani was not bound to participate in any event. Pursuant to the DOCDEX framework, decisions will only be binding if both parties have so agreed.

43 Nonetheless, BNP proceeded with the DOCDEX process and the panel of experts eventually released a unanimous decision on 16 August 2011. [note: 17] Two major findings were made by the panel in the DOCDEX decision. First, the panel found the bill of lading presented to BNP for payment to be compliant with the requirements of the letter of credit in question. [note: 18] Second, the panel was of the view that BNP was not obliged to investigate Abani's claims pertaining to the signature of the bill of lading by Caretta. [note: 19]

44 At the outset, it must be recognised that I am not in any way bound by the DOCDEX decision that has been placed before me. Nonetheless, similar to the opinions and papers released by the ICCBC, I am of the view that the DOCDEX decision is of persuasive value. In the English Court of Appeal decision of *Fortis Bank SA/NV v Indian Overseas Bank* [2011] 2 Lloyd's Rep 33 ("*Fortis Bank (CA)*"), Thomas LJ, in delivering the judgment of the court, observed at [29]–[30] that:

> In my view, a court must recognise the international nature of the UCP and approach its construction in that spirit. ... It is intended to be a self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting

> international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literalistic and national approach must be avoided.
>
> I turn therefore to consider first the commercial practice of international bankers and traders which arises when an issuing bank rejects documents, as that is essential to identify any underlying aim and purpose relevant to the issue.

45 In considering the commercial practice of international bankers and traders, the English Court of Appeal referred to, amongst others, DOCDEX Decision 242. It was further acknowledged at [34] that:

> ... DOCDEX decisions are decisions by experts selected by an ICC committee from a list maintained by an ICC committee from a list maintained by the ICC Banking Commission on disputes referred for non-binding resolution according to the ICC DOCDEX Rules. ...

In this regard, although it was accepted that DOCDEX decisions were not legally binding, it is of significance that the English Court of Appeal was prepared to treat the DOCDEX decisions as evidence of international commercial practice.

46 Given the underlying rationale of the need for uniformity and consistency in the interpretation of the UCP 600, I am of the view that the decisions, papers and opinions of the ICCBC are of persuasive value. The remarks made by the learned authors in *Jack: Documentary Credits* on this point are particularly apposite:

> ... From time to time the Commission publishes their decisions or opinions on questions concerning the UCP, most recently *Collected Opinions 1995–2001*. These represent the views of considerable experts, and it is suggested that they should be given substantial weight by a court in accordance with the merits of the particular decision. They are often explanatory of the thinking behind the UCP, and they illustrate banking practice. ...

47 Whilst it may be argued that the comments of Thomas LJ in *Fortis Bank (CA)* were directed towards the issue of relevance of international commercial practice when an issuing bank rejects the presented documents, I am of the view that the same principles apply in cases where the issuing bank has accepted the presented documents as being compliant and this decision is subsequently contested by the applicant for the letter of credit. Furthermore, I also acknowledge the fact that in considering the DOCDEX decision, it must not be overlooked that Abani had elected not to participate or to respond to the reference. The panel of experts would therefore not have had the benefit of arguments from Abani. Nonetheless, I am of the view that the DOCDEX decision is still of some persuasive value. Further, there have been no allegations that BNP had presented its case to the panel in an unfair or underhand manner. In fact, it must be recognised that a large part of the decision-making process depended upon the close examination of the relevant documents, such as the letter of credit and the bill of lading. Apart from that, BNP had also submitted the email exchange between itself and Abani for the expert panel's consideration. In the circumstances, I am of the view that Abani's lack of participation does not render the entire DOCDEX decision useless.

48 In any event, I also note that this is not the first time that a DOCDEX decision has been referred to in subsequent litigation, where one party had elected not to participate in the DOCDEX process. In the case of *Mizuho Corporate Bank Ltd v Woori Bank* [2004] SGHC 219, the defendant had declined to participate in the DOCDEX process that was initiated by the plaintiff. At the hearing before AR Vincent Leow, the defendant argued that no weight should be placed on the DOCDEX decision on the basis that it had not participated in the DOCDEX process. Nevertheless, AR Leow was

of the view that after taking into account the fact that the DOCDEX decision was reached on essentially an *ex parte* basis, the decision would still have some persuasive value and it was treated as such. On this basis, it was noted that the DOCDEX decision echoed the view which the learned Assistant Registrar arrived at with regard to the interpretation of a clause in the letter of credit.

49 Similarly, in the present case, it is noted that the DOCDEX decision is consistent with the decision that I have arrived at after a careful consideration of all the surrounding facts and circumstances. For the avoidance of doubt, the decision to dismiss Abani's appeal is not based solely on the DOCDEX decision. In fact, as mentioned above, it must be emphasised that the DOCDEX decision is not legally binding.

50 By way of summary, I am of the view that BNP has not breached its duty or the terms of the letter of credit, and that it has not failed to exercise due care in examining the relevant documentation that was presented to it.

Whether Abani had given express instructions to BNP to accept the bill of lading presented by the seller, and to debit Abani's account accordingly

51 Having decided in favour of BNP on the first issue, there is strictly no need to consider the second issue on whether Abani had ratified or confirmed BNP's decision to accept the bill of lading. Furthermore, this issue was not dealt with by the DJ as he had arrived at the decision that the bill of lading was, in any event, a conforming document. Nevertheless, given that both parties have made submissions on the issue of ratification, I will make some passing observations on this particular issue.

52 In brief, BNP submitted that after receiving the relevant documents from the negotiating bank, Fortis Bank, its officers proceeded to check the relevant documents for compliance with the terms of the letter of credit. The documents presented were assessed to be compliant and this decision was communicated to Abani on 12 January 2009. To this end, BNP submitted that it had also faxed copies of the relevant documents to Abani. Thereafter, a series of exchanges took place between BNP and Abani, where there appeared to be a divergence of opinion as to whether the relevant documents were compliant. In spite of that, BNP proceeded to debit Abani's account for the value of the letter of credit on 16 January 2009.

53 According to Abani, it had received an email from BNP on 16 January 2009 at 3.05pm, stating that its account would be debited that very day. This was followed by a telephone conversation between the representatives of each party. In this respect, both parties are at variance as to what actually transpired during the telephone conversation. According to Abani, its representative was informed that BNP had already debited Abani's account pursuant to BNP's earlier email that was sent at 3.05pm. Therefore, Abani had "no choice but to accept the situation" and it was alleged by Abani that its representative had made it clear to BNP's representative that Abani would be reserving its rights in full against BNP. Meanwhile, BNP's position was that Abani's argument that it had made it clear that it would be reserving its rights was "little more than an afterthought which ought to be rejected". In support, BNP referred to an email sent by Abani to BNP on 16 January 2009 at 6.18pm, reproduced as follows: [note: 20]

> Dear Kevin,
>
> Following my discussion with Charles, please accept the documents and debit our account.
>
> Best regards,

Jayes

On this basis, BNP argued that the email amounted to a ratification or confirmation by Abani of BNP's decision to accept the documents that had been presented for payment. BNP further argued that in any event, the email contained unequivocal instructions by Abani for BNP to accept the documents and make payment pursuant to the letter of credit. On this basis, BNP submitted that Abani had waived its rights against BNP.

54 Whilst it is accepted that in appropriate cases, issues of ratification, waiver or estoppel may arise in relation to disputes over monies being debited pursuant to payments for letters of credit, the absence of any finding by the DJ on what actually transpired during the telephone conversation complicates the entire matter. In this respect, whether Abani had reserved its rights against BNP is a relevant factor in determining whether there is any merit to BNP's arguments concerning ratification, waiver or estoppel. In the absence of any such finding, coupled with the fact that I have already decided that there was no breach on the part of BNP, no further comments will be made on the submissions by BNP. In any event, the issue of ratification, waiver or estoppel is strictly irrelevant given that BNP had not breached its duties or the terms of the letter of credit.

The losses suffered by Abani

55 Before moving on to BNP's cross-appeal in respect of the claim for costs on an indemnity basis, it will be convenient to briefly address some points which arose in relation to the losses claimed by Abani in the present case.

56 To this end, it will be recalled that the DJ arrived at the finding that even in the event that the bill of lading presented was discrepant, Abani had failed to prove that they suffered any loss as a result of BNP's payment under the letter of credit. In particular, it was noted that there was no evidence of any attempt by Abani to obtain delivery of the goods from the carrier on the strength of the bill of lading. Nonetheless, the DJ acknowledged that in the event that the loss could be attributable to BNP's breach, the sum of US$64,431.53 was a reasonable settlement by Abani.

57 In the present appeal, BNP submitted that the loss had not been established on three broad grounds. First, it was argued that there was no evidence of the settlement agreement entered into between Abani and Codiscomad. Furthermore, there was no evidence that Abani had actually paid the settlement amount to Codiscomad. Second, BNP argued that Abani's claim was fundamentally flawed as no causal connection had been established between BNP's alleged breach under the letter of credit and the loss suffered by Abani in its sale contract with Codiscomad. To this end, even if it is accepted that Metal Market had indeed shipped the goods late, that late shipment would have been the true cause of the loss suffered by Abani under its sale contract with Codiscomad. Third, BNP also advanced the argument that the loss claimed by Abani in respect of the sub-sale to Codiscomad was too remote under the principle of remoteness established in the seminal decision of *Hadley v Baxendale* (1854) 9 Exch 341. In this regard, BNP argued that there was no evidence to establish that it had known of Abani's intention to sub-sell the goods in question. On this basis, the loss suffered by Abani in the sub-sale would be too remote.

58 In the circumstances, given that I have arrived at the decision that there was no breach on the part of BNP, it is not necessary for me to make a finding on whether the settlement sum represents the true loss suffered by Abani or whether the loss was caused by BNP's alleged breach. That said, it must be emphasised that the issues concerning causation and remoteness of damage have to be carefully dealt with. This is especially so in the context of international trade where goods are often sold and re-sold to multiple parties. In these circumstances, multiple contracts between

different contracting parties are likely to be involved. This would include, amongst others, the underlying sale contract (including sub-sale contracts), the contract of carriage of goods, and the financing agreement (*eg*, letters of credit).

59 Whilst these contracts are often related to one another, it must be recognised that each contract carries its own bundle of obligations and duties. To this end, the breach of one contract may result in losses being suffered under another contract, such as where the carrier causes damage to cargo which has been sold or sub-sold to another buyer. In some cases, the causal link between the losses may be less clear.

60 In the present case, assuming that all of Abani's assertions have been established, there would have been two separate breaches. First, the sale contract between Metal Market and Abani would have been breached in respect of the stipulated contractual date of shipment. Second, there would have been a breach on the part of BNP when it accepted the discrepant bill of lading in respect of that shipment. Clearly, the breach on the part of Metal Market would have the effect of placing Abani in breach of its contractual obligations with Codiscomad. Subject to the principle of remoteness, the loss under the sub-sale with Codiscomad may well have been recoverable if a claim had been brought against Metal Market. In this regard, the only remaining question is whether Abani is able to establish that the losses it sustained under the sub-sale agreement were caused or contributed to by BNP's alleged breach under the letter of credit. For the avoidance of doubt, I am not making any finding on the issues of causation and remoteness. The point being made is that such issues pertaining to losses have to be addressed with care when there are multiple interrelated contracts, which are commonplace in the context of modern international trade.

61 For the reasons above, I dismiss Abani's appeal in DCA 19/2013.

The appeal in DCA 24/2013

62 I now move on to deal with BNP's appeal against the DJ's decision to award costs in favour of BNP on a *standard* basis, as opposed to an *indemnity* basis. In brief, BNP's claim for indemnity costs is premised on cl 11.4 of the STC, which applies to the issuance of the letter of credit in question. To this end, it is noted that cl 13 of the letter of credit application form specifically provides, amongst others, that the application was subject to the terms set out in the STC and that the applicant confirms receipt of a copy of the same. For the purpose of this appeal, the relevant portion of cl 11.4 of the STC is reproduced as follows: [note: 21]

> The Borrower shall *fully indemnify and keep indemnified* the Bank (at its head office and any and all branches of the Bank), its agents, sub-agents, Affiliates and every director, officer, employee or agent of any of the foregoing against *any and all losses, damages, reasonable costs and expenses (including but not limited to legal costs on a full indemnity basis)*, charges, actions, suits, proceedings, orders, warrants, injunctions, claims or demands which may be brought against any of them or which any of them may suffer or incur *in connection with or arising from (i) the provision of any Facilities* or the Borrower's account(s) held with the Bank or its Affiliates, or (ii) any transaction referable to, involving or relating to the Borrower or the Facilities or the Borrower's account(s) held with the Bank or its Affiliates ... *save where the same arises directly from their respective gross negligence, wilful misconduct or fraud*. ...
>
> [emphasis added]

Whether a claim for costs on an indemnity basis has to be specifically pleaded

63 The first issue is in relation to the DJ's finding that BNP had failed to include its claim for indemnity costs in its pleadings. Therefore, given that there was no mention of cl 11.4 of the STC in its pleadings, it was held that BNP could not rely on that particular clause to support its claim against Abani for costs on an indemnity basis.

64 In the present appeal, BNP has submitted that there is no requirement for issues pertaining to costs to be pleaded specifically. To this end, BNP has referred to O 18 r 15 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), which states that:

> A statement of claim must state specifically the relief or remedy which the plaintiff claims; but *costs need not be specifically claimed*.
>
> [emphasis added]

Apart from that, BNP has also referred to D B Casson, *Odgers on High Court Pleading and Practice* (Sweet & Maxwell, 23rd Ed, 1991), where the learned author commented at p 148 that "[i]t is unnecessary for either party to plead any matter, or to plead to any matter, which merely affects costs".

65 In further support of its arguments that there was no need for issues regarding costs to be specifically pleaded, BNP has also cited an extract from Jack Jacob & Iain S. Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at p 92:

> *Costs need not be specifically claimed*, nor is it strictly necessary to ask for "general or other relief," since the court will grant the plaintiff the remedies to which he appears to be entitled, provided it is not "inconsistent with that relief which is expressly asked for."
>
> [emphasis added]

It was also argued by BNP that matters relating to costs are, in any event, not material facts. In this respect, it was submitted that there was no need for BNP to include its claim for indemnity costs in its pleadings, in so far as it was only required to plead in its defence facts which it intended to rely on to meet Abani's claim.

66 At the outset, I do accept the existence of the general principle that it is unnecessary to plead any matter which merely affects costs, or to specifically plead any claim for costs. However, I also note that BNP's claim for indemnity costs is premised entirely on a *contractual provision* governing the relationship between both parties. To that end, I am of the view that it would be prudent for a party to specifically plead the term of the contract it intends to rely on, in order to avoid any arguments that the other party was taken by surprise or was prejudiced as a result of the lack of notice. Including the specific term of the contract in one's pleading will allow the other party to make an informed decision at the early stages of the trial as to whether there is a need to adduce evidence to address the enforceability or applicability of that particular contractual provision.

67 In the High Court decision of *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237 ("*Susilawati*"), the defendant bank had asked for indemnity costs at the end of a four-day trial after the plaintiff customer's claim was dismissed by the court. Similar to the facts in the present case, the bank in *Susilawati* also relied on a contractual provision which provided that the customer was to indemnify the bank in full against all costs and expenses incurred, including legal fees on a *solicitor-and-client basis*. In spite of the contractual indemnity clause, Lai Siu Chiu J dismissed the bank's claim for costs on an indemnity basis as it was found that the bank's conduct was "not beyond approach"

(at [101]). More importantly, the learned judge also made the following observations at [100]:

> I note however that despite amending its pleadings, the defendant *did not include a prayer for indemnity costs in its defence*.
>
> [emphasis added]

Whilst it is acknowledged that the bank's claim for indemnity costs was eventually dismissed on the exercise of discretion by the learned judge, the extract above suggests that the learned judge was at least of the view that the bank's failure to include a prayer for indemnity costs in its defence was a significant fact worthy of notice.

68 The High Court decision was appealed against by the customer and before the Court of Appeal, the customer also filed multiple applications to, amongst others: obtain leave to advance a new line of argument; introduce new evidence; and obtain directions for a new trial to be conducted. The appeal and all three applications were eventually dismissed by the Court of Appeal (see *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737). On the issue of costs, the Court of Appeal awarded costs of the appeal and the three applications (that were made during the course of the appeal) to the bank on a *contractual basis* (at [71]). Whilst it was not explicitly set out in the judgment delivered by the Court of Appeal, it is likely that the costs order was premised on the contractual indemnity clause governing the relationship between the customer and the bank. That being so, whilst it appears that the trial judge's order for costs to be paid on a standard basis was not varied by the Court of Appeal, the bank was in any event successful in obtaining contractual costs for the appeal and the three applications that were made before the Court of Appeal.

69 In this regard, I note that the issue of whether there is a need to specifically plead for indemnity costs has not been conclusively determined by the local courts. Given the fact that I have arrived at the finding (as will be explained in the next section) that Abani did not, in any event, suffer any prejudice from BNP's failure to include a prayer for indemnity costs in its defence, it is not necessary for me to make a conclusive finding on this issue.

Whether Abani suffered prejudice as a result of BNP's failure to include its claim for costs on an indemnity basis in its pleadings

70 I turn now to address the next issue of whether Abani suffered prejudice as a result of BNP's failure to specifically plead its claim for costs on an indemnity basis. It will be recalled that BNP had argued, at first instance, that even if there exists a requirement to specifically plead a claim for indemnity costs, BNP should still be allowed to raise the unpleaded point as no injustice would be occasioned. The DJ rejected BNP's arguments and arrived at the finding that BNP had failed to put Abani on notice and thus disavowed Abani of the opportunity to adduce any evidence during the course of the trial to address the applicability of cl 11.4 of the STC in the present case.

71 In the appeal before me, BNP argued that the DJ ought to have permitted the unpleaded point to be raised as no injustice had been caused to Abani. To support its position, BNP referred to the Court of Appeal decision of *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231, where it was held at [18] that the court may permit an unpleaded point to be raised provided that it does not cause injustice or irreparable prejudice:

> Pleadings are meant to "narrow the parties to definite issues" (*Thorp v Holdsworth* (1876) 3 Ch D 637 at 639, *per* Jessel MR). It is trite law that the court may permit an unpleaded point to be raised if no injustice or irreparable prejudice (that cannot be compensated by costs) will be

occasioned to the other party ... In the same vein, evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced ...

72 I agree with BNP's submissions that the unpleaded point ought to have been allowed. In my view, any claim that Abani was taken by surprise is, with respect, misplaced. Whilst it is acknowledged that BNP had failed to include the relevant contractual provisions in its pleadings, it is undisputed that the claim which had arisen concerned a letter of credit obtained pursuant to the credit facilities granted to Abani by way of the facility letter. The existence of the facility letter and the STC was not in doubt as they were referred to and disclosed in the affidavits, as well as the list of documents. Furthermore, in its opening statement filed on 18 January 2013, BNP had expressly stated that it would be seeking costs on an indemnity basis pursuant to the relevant contractual provisions governing the banking relationship between both parties. That being so, I cannot agree with the DJ's finding that Abani had been caught by surprise when BNP asked for costs on an indemnity basis at the conclusion of the trial below.

73 In fact, it bears repeating that after the DJ dismissed Abani's claim on 5 June 2013, both parties were directed to tender further written submissions to specifically address the question of whether BNP's costs ought to be taxed on a standard or an indemnity basis. To this end, a brief perusal of the written submissions reveals that Abani had resisted BNP's claim for indemnity costs on the following grounds:

(a) Clause 11.4 of the STC was a material fact which ought to have been pleaded by BNP.

(b) Clause 11.4, on a true construction, only applied to claims brought by third parties. On this basis, it should not be applicable in the present case where Abani, a contracting party, had brought an action against BNP.

(c) Clause 11.4 (as interpreted by BNP) was unfairly one-sided, and being an onerous condition, BNP should not be allowed to rely on it unless there was evidence of adequate notice being given to Abani before the contract was entered into by both parties.

(d) Clause 11.4 cannot be relied upon by BNP unless it meets the requirements set out in the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the UCTA").

For these reasons, Abani argued that it was caught by surprise and would thereby suffer prejudice in the event that BNP was allowed to rely on the indemnity clause.

74 After considering the submissions put forth by both parties, I am unable to agree with the DJ's conclusion on cl 11.4 of the STC. First, whilst it is accepted that cl 11.4 had not been specifically pleaded by BNP, it is not disputed that BNP had expressly set out its intention to claim indemnity costs in the opening statement tendered at the commencement of the trial.

75 Second, the applicability of cl 11.4 of the STC to the present case is largely a question of construction and interpretation of the relevant contractual terms. Given that both parties were given ample opportunity to make submissions on the legal issues arising in BNP's claim for indemnity costs, Abani would not have been prejudiced by BNP's failure to include the claim in its pleadings. I now proceed to briefly deal with the legal submissions made by both parties regarding the issue of costs.

76 In its submissions, Abani has referred to the need for BNP to establish compliance with the provisions set out in the UCTA. Section 3 of the UCTA reads as follows:

(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term —

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled —

(i) to render a contractual performance substantially different from that which was reasonably expected of him; or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

77 Given that the STC of the facility letter falls within the scope of BNP's written standard terms of business, the question which arises is whether reliance on cl 11.4 of the STC will render contractual performance substantially different from that which was to be reasonably expected. In this respect, it must be recognised that such indemnity clauses are not uncommon in financing agreements. This will be dealt with in greater detail at [91] below. On this basis alone, I am of the view that s 3 of the UCTA is not applicable on the facts of the present case. Meanwhile, it bears noting that s 4 of the UCTA, which subjects indemnity clauses to the test of reasonableness, only applies in favour of a "person dealing as consumer": see generally Andrew Phang Boon Leong *et al*, *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 7.67. In the present case, there is no doubt that Abani did not enter into the contract as a "consumer". Therefore, s 4 of the UCTA will not be applicable on the facts of the present case.

78 Leaving aside the provisions in the UCTA, there exists a line of common law decisions which lay down the broad principle that onerous terms have to be brought to the attention of the contracting party before it can be relied on as a valid contractual term. Many of these cases involve situations where notice of the onerous term was only given *after* the contract was entered into by the contracting parties, such as *Thornton v Shoe Lane Parking* [1971] 2 QB 163 ("*Thornton*") and *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 ("*Interfoto*"). In the latter case, the factual matrix involved a plaintiff who ran a photographic transparency lending business. Following a telephone inquiry, 47 transparencies were delivered to the defendant, together with a delivery order which set out the terms and conditions of the loan. One of the conditions required the transparencies to be returned within 14 days, failing which a fee of £5 would be levied. The English Court of Appeal found this particular condition to be onerous and unusual. It was held that the party seeking to rely on this term was required to show that the term had been brought fairly and reasonably to the attention of the other contracting party.

79 An interesting attempt to rely on this principle can be found in the local High Court decision of *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 ("*Consmat*"). In that case, the plaintiff was the customer of the defendant bank. During the account opening process, the plaintiff had signed an agreement ("the General Agreement") with the defendant bank. To that end, cl 3(c) of the General Agreement required the customer to verify the statements of accounts, and to notify the bank within seven days of any discrepancies, omissions or

debits wrongly made to or inaccuracies or incorrect entries in the account. The clause in question also made any such disputes unchallengeable after the expiry of a certain time limit. This particular clause was found by L P Thean J (as he then was) to be clear and unambiguous. It was held that the clause satisfied the "rigorous" test laid down in *Tai Hing Cotton Mill Ltd v Liu Chong Hin Bank Ltd* [1986] AC 80 ("*Tai Hing*").

80 In brief, the decision of *Tai Hing* raised a number of issues, including the question of whether a customer would be bound by a term which stipulated that the failure of the customer to notify the bank of any errors within the specified time would mean that the customer could no longer challenge the correctness of the monthly statements. The Privy Council held that the term in question was not sufficiently clear to bring home to the customer the importance of inspecting the monthly statements carefully. Lord Scarman described the test as "rigorous", such that (*Tai Hing* at 110):

> ... Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

81 Returning to the decision in *Consmat*, it is noted that Thean J found the particular clause before him to be clear and unambiguous as to its meaning and effect. On that basis, it was held that the bank was entitled to rely on that contractual term. Although the learned judge was of the view that the UCTA did not apply, it was held that, in any event, the clause would have satisfied the test of reasonableness set out in the UCTA. In particular, the learned judge made the following observations at [25]:

> The plaintiffs and the defendants were and are commercial entities and they entered into a general agreement for commercial business. The plaintiffs had a free choice of banks with which they would like to do business, and had decided to do business with the defendants. They entered into the general agreement of their own free will, and it was not suggested that they were not free or permitted to negotiate with the defendants for a variation of the terms thereof. There was no question that they accepted the terms of the general agreement.

Although the observations were made in the context of the UCTA, it is noted that the plaintiff also relied on *Interfoto* to advance the argument that inadequate steps had been taken to draw its attention to the contractual term in question. Thean J, however, found on similar reasoning that it was too late in the day for the plaintiff to complain that the clause had not been drawn to its attention. The agreement had been freely entered into by both parties and there was no evidence to suggest that the plaintiff had been placed in a position where it had no choice but to sign the agreement. In fact, unlike the facts in *Thornton* and *Interfoto*, the plaintiff in *Consmat* had *signed* the agreement itself. Having signed the agreement, the plaintiff must be taken to have read and understood the terms set out in the agreement itself.

82 When a contractual term is found to be onerous and unusual, the question as to whether sufficient steps have been taken to draw the other party's attention to it prior to the contract being entered into is partly a question of fact. For instance, in the High Court decision of *Hakko Products Pte Ltd v Danzas (Singapore) Pte Ltd and another* [1999] 1 SLR(R) 651 ("*Hakko Products v Danzas*"), the defendant freight forwarder submitted a quotation to the plaintiff for airfreighting a machine from Hanover to Singapore and thereafter transporting it to the plaintiff's factory. At the bottom of the quotation, there was an incorporating clause which stated: "All business transacted in accordance with SAAA'S standard trading conditions. Copy available on application." On that basis, the court had to address the issue of whether the exemption and limitation of liability clauses set out in the SAAA's standard trading conditions could be relied upon by the defendant freight forwarder. In rejecting the

defendant's arguments, Goh Joon Seng J held that the relevant clauses could not be relied on and one factor that was taken into account by Goh J was the fact that the incorporating clause "was in very small print and was not legible" (*Hakko Products v Danzas* at [46]). Goh J observed that the incorporating clause read with the exemption and limitation of liability clauses should have been brought to the attention of the plaintiff's representative. In the circumstances, it was not surprising that the defendant's attempt to rely on the specific clauses failed.

83 For completeness, it would also be useful to refer to the High Court decision of *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 ("*Press Automation*"). In that case, the defendant had contracted with the plaintiff to transport an exhibition machine to Bangkok. Whilst the machine was in the defendant's custody, it was damaged. Apart from denying the damage, the defendant also attempted to rely on a contractual clause setting out a nine-month time bar to the claim, as well as a clause limiting its liability to $100,000. These clauses were found in the Singapore Freight Forwarders' Association Standard Trading Conditions (1986) ("the SFFA Conditions"). It was undisputed that the plaintiff had *signed* a confirmation of acceptance which expressly stated that the business was to be transacted in accordance with the SFFA Conditions, a copy of which was available upon application. It was also undisputed that the plaintiff had not asked for a copy of the SFFA Conditions before entering into the contract. After an in-depth review of the English, Canadian and Singapore case law, Judith Prakash J arrived at the conclusion that the conditions were incorporated as a whole. It was held that the line of authorities deciding that onerous and unusual conditions cannot be incorporated unless the attention of the party sought to be bound has been specifically drawn to them does not apply to cases where there is a *signed* contract with an *explicit* incorporating clause. In particular, Prakash J made the following pertinent observations at [39]:

> ... As far as the authorities are concerned, as I have shown above, all those that apply the specific notice requirement for onerous clauses are cases in which there was *no signed contract*. The only exception is the *Tilden* case. I do not consider the *Trident* case an exception as the contract that was found to exist by the court was a contract which was concluded partly orally and partly in writing and the written part did not contain an express incorporation clause referring to Danand's standard term contract. The court there, as was clear from the judgment of the Court of Appeal, was asked to make a finding of incorporation by implication which would be supported by evidence on a previous course of dealing.
>
> Whilst *Tilden* directly supports Patec's position, I decline to follow it. In my judgment, it is not in accordance with the common law position in England and in Singapore. *Where a party has signed a contract after having been given notice, by way of a clear incorporating clause such as the one used in the present case, of what would be included among the contractual terms, that party cannot afterwards assert that it is not bound by some of the terms on the ground that the same are onerous and unusual and had not been drawn specifically to its attention.* Contracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it. *If they do not do so, they will be bound by those terms except to the extent that the UCTA offers them relief*.
>
> [emphasis added]

84 In this regard, the Canadian decision of *Tilden Rent-A-Car Co v Clendenming* [1978] 83 DLR 3d 400 ("*Tilden*") stands for the proposition that a signature can only be relied on as manifesting assent to a document when it was reasonable for the party relying on the signed document to believe that the signor really did assent to its contents. Whilst it may be argued that the approach in *Tilden* may be "fairer", especially in the context of consumer contracts, there is no doubt that this will inevitably

be at the expense of commercial certainty. In any event, it must be noted that the court in *Tilden* acknowledged that the position may be different where the parties had dealt with each other in a *commercial context*.

85 The position adopted by the Prakash J in *Press Automation* has also been further explained by academic commentators. In *The Law of Contract in Singapore*, the learned author rightly comments at para 7.20 that the rule established in *Press Automation* was, in any event, subject to the principles of fraud and misrepresentation, as well as the provisions of the UCTA. Similarly, it was also acknowledged by the learned authors in Michael Furmston & G J Tolhurst, *Contract Formation: Law and Practice* (Oxford University Press, 2010) at para 10.47 that a party will be taken to have notice of the terms if the document signed is contractual, provided there has been no misrepresentation.

86 Returning to the facts in the present case, it is noted that Abani had *signed* the facility letter with BNP on 6 August 2008. The facility letter expressly stated that BNP's STC as attached applied to and formed an integral part of the facility letter. [note: 22] Furthermore, it is also noted that the acceptance page where the parties' representatives had placed their respective signatures specifically referred to the terms and conditions set out in the facility letter and the STC. [note: 23] It bears noting that cl 13 of the letter of credit application form expressly provided that the application shall be subject to: [note: 24]

> ... the Bank's prevailing Standard Terms and Conditions Governing Facilities ['STC'] (a copy of which the Applicant hereby confirms receipt thereof) as may be amended or otherwise modified in this application. ...

It is also undisputed that Abani and BNP had dealt with each other on a *commercial basis*. Abani certainly did not enter into the contract as a consumer. Given that Abani had *signed* the contractual documents, applying the principles laid down in the line of authorities set out above, in particular, the High Court decision of *Press Automation*, I am of the view that cl 11.4 of the STC was incorporated as a whole and thus applied to the letter of credit in question. As explained at [77] above, I am also of the view that the provisions of the UCTA are not applicable to the facts in the present case. For these reasons, I am unable to agree with the DJ's finding that Abani had suffered prejudice as a result of BNP's failure to specifically plead its claim for indemnity costs.

87 In arriving at this conclusion, I have also considered the Hong Kong decision of *DBS Bank (Hong Kong) Limited v San-Hot HK Industrial Company Limited and another* (HCA 2279/2008) ("*DBS Bank (Hong Kong) Limited*"). In that case, judgment was entered for the plaintiff and the defendant's counterclaim was dismissed at the conclusion of the hearing. On the issue of costs, the court awarded costs in favour of the plaintiff on a party-and-party basis. The plaintiff subsequently applied for a variation of the order to that of costs on an indemnity basis. The basis of the application was cl 16 of the "General Commercial Agreement" that had been signed by the parties. In this regard, the defendants opposed the application for variation "on the sole basis that the plaintiff's contractual entitlement to indemnity costs had not been pleaded in the Amended Statement of Claim" (*DBS Bank (Hong Kong) Limited* at [4]).

88 In recognising that the court has an "unfettered discretion" in the making of any costs order, it was held that the court can and should, in the exercise of that discretion, take into account all relevant matters. One of these relevant matters is whether the parties have, by their agreement, agreed upon a basis for the quantification of costs. Of particular interest to the facts in our present case, the court in *DBS Bank (Hong Kong) Limited* also made the following observations at [6]:

> Although the contractual clauses had not been specifically mentioned in the Amended Statement of Claim, counsel did refer to and seek reliance on at least Clause 16 of the General Commercial Agreement during the aforementioned "counsel and bench" exchange prior to the conclusion of the trial. Counsel for the defendant were then duly informed, if not earlier, of the Plaintiff's intention to rely on Clause 16 of the General Commercial Agreement on the issue of what costs order I should grant in due course. ...

For the reasons above, the court held that there was no valid reason for not taking into account the contractual clauses in the exercise of his discretion and in the circumstances, the application for variation of the costs order was granted.

89 In this regard, whilst there was no specific allegation of surprise or prejudice in *DBS Bank (Hong Kong) Limited* as compared to the present case, it cannot be overlooked that both Abani and BNP were, in any event, afforded ample opportunity to address the court below on the question of construction of cl 11.4 of the STC. To this end, whilst Abani has put forth the assertion that they were taken by surprise, it is undisputed that BNP had expressly stated in its opening statement that it would be claiming indemnity costs on the basis of cl 11.4 of the STC. In the circumstances, I am of the view that BNP should be allowed to raise the unpleaded point as Abani had not suffered any prejudice as a result of BNP's failure to include its claim for indemnity costs in its pleadings.

Whether BNP's contractual right to costs on an indemnity basis ought to be upheld by the court

90 Having found that BNP's failure to specifically plead its claim for indemnity costs is not fatal, the only remaining issue is whether BNP's contractual right to costs on an indemnity basis ought to be upheld by the court. To this end, BNP has referred to, amongst others, the High Court decision of *United Overseas Bank Ltd v Sin Leong Ironbed & Furniture Manufacturing Co (Pte) Ltd and others* [1988] 1 SLR(R) 76 ("*United Overseas Bank*"). In that case, the plaintiff bank had applied for summary judgment against the plaintiffs for monies owing under credit facilities and guarantees. The terms of the credit facility expressly stated that the guarantors would pay all costs incurred by the bank on a solicitor-and-client basis. At first instance, the learned Senior Assistant Registrar rejected the bank's claim for indemnity costs and awarded fixed costs of $700 as provided in the Rules of the Supreme Court. On appeal, Chan Sek Keong JC (as he then was) allowed the bank's costs to be taxed on an indemnity basis. The learned judge made the following observations:

> There is no rule of law or public policy which prohibits a borrower from agreeing to pay to a lender the lender's costs in taking steps to recover the loan on a solicitor-and-client basis. Indeed, there is no reason why a lender should put himself potentially out of pocket when making a loan on terms negotiated at arm's length. He is entitled to impose an indemnity as to his costs as one of such terms and where he has done so, it becomes unnecessary for him to rely on the discretionary power of the courts to award him costs. ...
>
> In the present case, the plaintiffs have sued the defendants for costs on a solicitor-and-client basis as part of their claim. They are entitled to such costs in contract. They are not invoking the power of the court to award them costs in accordance with the rules of court but in accordance with their contractual rights. There is no reason why they should not be entitled to such costs.

91 In this regard, it is clear that the courts have long recognised the bank's entitlement to rely on contractual indemnity clauses found in loan documentation governing the relationship between the bank and its customer. In fact, at the hearing below, BNP has raised the point that the fees charged

by banks for issuing and handling letters of credit are often insubstantial as compared to the value of the underlying transaction. To this end, the banks are said to have a legitimate commercial interest in relying on such contractual indemnities so as to minimise any potential exposure to legal costs in the event of litigation.

92 The decision of *United Overseas Bank* is often cited for the proposition that the court's discretion on costs orders may be circumscribed or even excluded by such contractual indemnity provisions. For instance, the learned author in Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 26.003 commented that:

> Apart from the rules, the parties may have agreed to the allocation and assessment of costs should a dispute occur, in which case the court's discretion and the rules concerning automatic mechanisms (such as fixed costs) may be circumscribed or excluded by the pertinent term of a binding contract. ...

The learned author, however, goes on to make certain qualifications to this seemingly strict and unyielding rule at para 26.003:

> ... However, it is submitted that the court has a right to disregard a contractual term if the party relying on it has conducted itself in a manner which would make the assertion of his right unjust. As the court derives its authority to determine costs from statute, it must have the power to override the parties' agreement in order to preserve the integrity of the administration of justice.

This view is also supported by the learned commentator in *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2013) at para 59/2/2 where it was stated unequivocally that "the court may in certain circumstances decline to give effect to the contractual provision on costs".

93 In my view, the court must have the power to override the parties' agreement as to costs in order to preserve the integrity of the administration of justice. In situations where the claim for costs on the basis of a contractual provision is manifestly unjust, the court can and should intervene to disallow the claim in the exercise of its discretion. It is, however, noted that such situations warranting the court's intervention should be limited to deserving cases and the court must exercise its discretion judiciously in order not to unduly unravel the commercial arrangement entered into by both parties. In fact, I go as far as to say that in the absence of manifest injustice, the court will tend towards upholding the contractual bargain entered into by both parties.

94 As discussed at [67] above, the High Court in *Susilawati* was of the view that the bank's conduct "was not beyond approach". On this basis, the bank's claim for costs on an indemnity basis was disallowed. Costs in favour of the bank were ordered to be taxed on a standard basis instead. In the earlier decision of *Hong Leong Finance Ltd v Lee Siang Wah and another* [1993] 2 SLR(R) 577, K S Rajah JC held that the plaintiff mortgagee's contractual right to costs on an indemnity had been forfeited by virtue of its misconduct. As a result, the question of costs became one for the court's discretion. The learned judge went as far as to acknowledge that had it not been accepted that there was a breakdown in communication between the parties, he would have ordered costs *against* the plaintiff mortgagee. On the basis of these authorities, it is clear that the court does possess the discretion to override the parties' agreement as to costs in situations where the outcome is manifestly unjust.

95 Returning to the facts in the present case, I am of the view that there is no evidence to suggest that BNP has acted in an improper manner. In this respect, the rights of parties, especially in commercial transactions, to negotiate and agree on the terms of the contract cannot be overlooked.

As discussed at [93] above, in the absence of manifest injustice, the need for commercial certainty does tend towards the upholding of the contractual bargain entered into by both parties. In the circumstances, I am of the view that BNP's contractual right to costs on an indemnity basis should be upheld by the court.

Conclusion

96 For the reasons above, the appeal by Abani in DCA 19/2013 is dismissed. On the other hand, the appeal by BNP in DCA 24/2013 is allowed. Therefore, costs of the appeals and the hearing below are awarded to BNP on an indemnity basis.

[note: 1] Joint Record of Appeal (Volume IV – Part C) at p 130–131.

[note: 2] Joint Record of Appeal (Volume IV – Part C) at p 130.

[note: 3] Joint Record of Appeal (Volume IV – Part C) at pp 176–178.

[note: 4] Joint Record of Appeal (Volume IV – Part B) at pp 75–76.

[note: 5] Joint Record of Appeal (Volume IV – Part B) at pp 75–76.

[note: 6] Joint Record of Appeal (Volume IV – Part B) at pp 92–93.

[note: 7] Joint Record of Appeal (Volume II – Part A) at p 237.

[note: 8] Joint Record of Appeal (Volume I – Part A) at pp 19–28.

[note: 9] Joint Record of Appeal (Volume IV – Part B) at p 34.

[note: 10] Joint Record of Appeal (Volume IV – Part B) at p 76.

[note: 11] Joint Record of Appeal (Volume IV – Part B) at pp 219–220.

[note: 12] Joint Record of Appeal (Volume IV – Part C) at p 129.

[note: 13] Joint Record of Appeal (Volume II – Part A) at p 237.

[note: 14] Joint Record of Appeal (Volume IV – Part A) at p 108.

[note: 15] Joint Record of Appeal (Volume IV – Part B) at p 92.

[note: 16] Joint Record of Appeal (Volume IV – Part B) at p 92.

[note: 17] Joint Record of Appeal (Volume IV – Part C) at pp 226–231.

[note: 18] Joint Record of Appeal (Volume IV – Part C) at pp 229–230.

[note: 19] Joint Record of Appeal (Volume IV – Part C) at pp 230–231.

[note: 20] Joint Record of Appeal (Volume IV – Part B) at p 208.

[note: 21] Joint Record of Appeal (Volume IV – Part B) at p 34.

[note: 22] Joint Record of Appeal (Volume IV – Part B) at p 26.

[note: 23] Joint Record of Appeal (Volume IV – Part B) at p 28.

[note: 24] Joint Record of Appeal (Volume IV – Part C) at p 177.