IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(I) 1

Suit No 1 of 2021

Between

Crédit Agricole Corporate & Investment Bank, Singapore Branch

… *Plaintiff*

And

PPT Energy Trading Co Ltd

… *Defendant*

Suit No 2 of 2021

Between

PPT Energy Trading Co Ltd

… *Plaintiff*

And

Crédit Agricole Corporate & Investment Bank, Singapore Branch

… *Defendant*

JUDGMENT

[Bills of Exchange and Other Negotiable Instruments — Letter of credit transaction]
[Credit and Security — Guarantees and indemnities — Contracts of indemnity]

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Crédit Agricole Corporate & Investment Bank, Singapore Branch
v
PPT Energy Trading Co Ltd and another suit

[2022] SGHC(I) 1

Singapore International Commercial Court — Suits Nos 1 and 2 of 2021
Jeremy Lionel Cooke IJ
13–17, 20–22 December 2021

13 January 2022 Judgment reserved.

Jeremy Lionel Cooke IJ:

Introduction

1 On 3 April 2020, the plaintiff in Suit No 1 of 2021, Crédit Agricole Corporate & Investment Bank, Singapore Branch (**"**CACIB**"**) issued a letter of credit ("the Letter of Credit") in favour of the defendant in that suit, PPT Energy Trading Co Ltd ("PPT") on the application of Zenrock Commodities Trading Pte Ltd ("Zenrock"). The Letter of Credit was for the purchase by Zenrock of 920,000 (+/- 5%) barrels of Djeno crude oil ("the Cargo") from PPT for the purpose of on-sale to Total Oil Trading SA ("TOTSA").

2 In support of its application for the Letter of Credit, Zenrock furnished CACIB with a copy of its contract with PPT ("the PPT-Zenrock Sale Contract"). Under the terms of the PPT-Zenrock Sale Contract, PPT was to sell the Cargo to Zenrock at the unit price of the average of the mean quotations published in

Platt's crude oil marketwire under the heading "Brent Dated" (which I will hereafter refer to as "Platt's"), plus a premium of US$3.24 per barrel. The Letter of Credit therefore reflected the purchase price of Platt's plus US$3.24 per barrel.

3 As security, CACIB had a registered floating charge over goods purchased by Zenrock and financed by the Letter of Credit, and an assignment of the proceeds of the sale of the Cargo that were due from TOTSA, which was signed in acceptance by TOTSA.

4 On 2 April 2020, Zenrock furnished CACIB with a copy of what it claimed to be its contract with TOTSA ("the Fabricated Zenrock-TOTSA Sale Contract"). This document provided that Zenrock would sell the Cargo to TOTSA at Platt's plus a premium of US$3.60 per barrel. This, had it been a genuine contract, would have meant that the assignment of the sale proceeds payable by TOTSA under the Fabricated Zenrock-TOTSA Sale Contract to CACIB would cover Zenrock's purchase price from PPT and hence, CACIB's exposure under the Letter of Credit. However, the Fabricated Zenrock-TOTSA Sale Contract that was supplied to CACIB on 2 April 2020, as the description suggests, had been fabricated for the purposes of the Letter of Credit. The true Zenrock-TOTSA Sale Contract ("the True Zenrock-TOTSA Sale Contract"), which was later furnished to CACIB by TOTSA on 28 April 2020, showed that the true sale price to TOTSA was not Platt's *plus* US$3.60, but Platt's *minus* US$3.60 per barrel. If the sale price payable by TOTSA under the True Zenrock-TOTSA Sale Contract is compared with the purchase price payable by Zenrock under the PPT-Zenrock Sale Contract, Zenrock would suffer a loss of US$6,942,847.24 on the two transactions, instead of making a profit of

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approximately US$331,270, as a comparison with the Fabricated Zenrock-TOTSA Sale Contract would suggest.

5 The Letter of Credit issued to PPT as beneficiary provided that, *inter alia*, the original bills of lading and other shipping documents relating to the Cargo were to be provided to CACIB in order to trigger payment under it, but as with many such letters of credit, provision was also made for the situation where original bills were unavailable. In their absence, PPT could instead provide its signed invoice and its signed letter of indemnity to CACIB, which was to follow the format set out in the PPT-Zenrock Sale Contract and the Letter of Credit. In due course, in circumstances described later in this judgment, such a letter of indemnity ("the LOI") was provided by PPT to CACIB on 16 April 2020 (together with a commercial invoice ("the PPT Invoice")) in the following form:

> LETTER OF INDEMNITY (L.O.I.)
>
> Date: 09 April 2020
>
> From: PPT Energy Trading Co Ltd
>
> To: Credit Agricole Corporate and Investment Bank, Singapore Branch for account of Zenrock Commodities Trading Pte Ltd
>
> We refer to our contract dated 2 April 2020 in respect of our sale to Zenrock Commodities Trading Pte Ltd of a shipment of 920,191.814 US barrels of Djeno Crude Oil shipped on board the vessel Indigo Nova at the port of Djeno Terminal, Congo with bills of lading dated 06 April 2020.
>
> To date we are unable to provide you with the requisite shipping documents in relation to the said sale which consist of:
>
> 1) Full set 3/3 original and 3 non-negotiable copies clean on board bills of lading issued or endorsed to the order of Credit Agricole Corporate and Investment Bank, Singapore Branch.
>
> In consideration of your making payment of the full invoiced price of USD23,662,732.50 (and payment when due of any subsequent shortfall apparent on any final invoicing and set out in any final invoice) for the shipment at the due date for

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> payment under the terms of the above contract without having been provided with the above documents, we hereby expressly warrant that at the time property passed under the contract we had marketable title to such shipment, free and clear of any lien or encumbrance, and that we had full right and authority to transfer such title to you, and that we are entitled to receive these documents from our supplier and transfer them to you.
>
> We further agree to protect, indemnify and save you harmless from and against any and all damages, costs and expenses (including reasonable legal fees) which you may suffer or incur by reason of the original bills of lading and other documents remaining outstanding or breach of warranties given above …
>
> This Letter of Indemnity shall be governed by and construed in all respects in accordance with the laws of England, but without reference to any conflict of law rules. …
>
> The validity of this Letter of Indemnity shall expire upon our presentation to you of the aforesaid shipping documents or one year after bill of lading date.

6 Under Art 14(a) of *The Uniform Customs and Practice for Documentary Credits 600* ("UCP 600"), which was incorporated into the Letter of Credit, CACIB was obliged to examine documents on presentation and "on the basis of the documents alone" to determine whether or not they appeared on their face to constitute a compliant presentation. Under Art 14(b), a maximum period of five banking days is allowed following the day of presentation to determine compliance. Having determined that a presentation complies, a bank must honour the letter of credit and if it determines that there is non-compliance, Art 16(d) requires it to notify the presenter no later than the close of the fifth banking day following the day of presentation and to state the discrepancy found in the documents presented. Under Art 16(f), if a bank fails to act in accordance with the provisions of the article, "it shall be precluded from claiming that the documents do not constitute a complying presentation".

7 The period of five banking days following the date of presentation of documents by PPT (through the Bank of China ("BOC")) – which was

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Wednesday, 16 April 2020 – expired at midnight on Wednesday, 23 April 2020. By that time, CACIB suspected fraud as a result of receiving an email from TOTSA stating that Zenrock appeared to have assigned the proceeds of sale of the Cargo twice over to different banks. However, CACIB neither paid nor sent an Art 14(c) notice refusing to pay and giving a reason for its refusal. CACIB sought to investigate the position with TOTSA, PPT and the rival bank for the sale proceeds due from TOTSA to Zenrock ("the TOTSA Receivable"), but never declined to pay until it sought and obtained an interim injunction from the High Court on an *ex parte* application on 28 May 2020 (of which PPT was given notice), prior to the due date for payment, which was 5 June 2020. That injunction was later discharged on 13 November 2020 following the court's suggestion and an accommodation between the parties whereby payment under the Letter of Credit was made by CACIB to PPT against PPT's provision of a bank guarantee from BOC ("the BOC Guarantee"), which would operate to pay should the court eventually decide that CACIB's refusal to pay was justified.

8 What has since emerged is that Zenrock had entered into what are called "round-tripping" contracts, purchasing the Cargo from SOCAR Trading SA ("SOCAR"), on-selling it to Shandong Energy International (Singapore) Pte Ltd ("Shandong"), which sold it to PPT, before the Cargo was then sold back to Zenrock under the PPT-Zenrock Sale Contract. Having agreed to sell the Cargo back to TOTSA, under the terms of the True Zenrock-TOTSA Sale Contract, Zenrock then assigned the TOTSA Receivable twice over, firstly to ING Bank NV ("ING") in respect of the letter of credit it had opened for Zenrock in respect of its purchase from SOCAR, and secondly to CACIB. As explained earlier, CACIB believed the TOTSA Receivable to be much higher than the true figure as Zenrock had furnished it with the Fabricated Zenrock-TOTSA Sale Contract,

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and not the True Zenrock-TOTSA Sale Contract when applying for the Letter of Credit (see [4] above).

9 In order to simplify matters, the following summary does not set out any differences in the dates on which the prices of Djeno crude oil in the different contracts of sale and purchase had been derived from Platt's. Nonetheless, the essential structure can be seen from the differentials recorded in those sale contracts by reference to the Platt's index for Brent crude oil.

10 The underlying (and apparently uncontroversial) transaction, to which I alluded at [8] above, involved:

> (a) a sale of the Cargo by SOCAR to Zenrock at Platt's minus US$3.69 per barrel, with the aid of a letter of credit opened by ING at Zenrock's behest (SOCAR had apparently purchased the Cargo from TOTSA, the French trading company in the Total group, which had obtained the Cargo from its affiliated company in Congo, Total E&P); and
>
> (b) a sale from Zenrock to TOTSA at Platt's minus US$3.60, with an assignment by Zenrock of the TOTSA Receivable in favour of ING.

I refer to this as apparently uncontroversial because TOTSA appears to have sold the Cargo to SOCAR and repurchased it from Zenrock for no good reason. That appears in the documents and in WhatsApp messages exchanged between Mr Jason Lai ("Mr Lai") of Zenrock and Mr Naoki Uehara ("Mr Uehara") of PPT sometime after concluding the PPT-Zenrock Sale Contract. Mr Lai informed Mr Uehara that TOTSA had sold the Cargo "and put us in the chain", which to my mind indicates that TOTSA itself may have indulged in a form of

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round-tripping, prior to the Zenrock pre-structured round-tripping involving itself, Shandong and PPT, of which CACIB complains.

11 The latter "round-tripping" contracts consisted of: (a) a sale from Zenrock to Shandong at Platt's plus US$3.02 per barrel ("the Zenrock-Shandong Sale Contract"); (b) an on-sale from Shandong to PPT at Platt's plus $3.05 per barrel ("the Shandong-PPT Sale Contract"); and (c) a further sale by PPT to Zenrock at Platt's plus US$3.24 per barrel (*ie*, the PPT-Zenrock Sale Contract"). These prices were recognised by the parties' experts as being about US$10 per barrel higher than the market price at the time the round-tripping contracts were concluded, which was around US$12 per barrel.

12 In order to obtain the Letter of Credit to finance the PPT-Zenrock Sale Contract, Zenrock provided CACIB with the Fabricated Zenrock-TOTSA Sale Contract, which provided for a sale price of Platt's plus US$3.60, instead of the True Zenrock-TOTSA Sale Contract, which provided for a price of Platt's minus $3.60 per barrel (see [4] above). There is no doubt that Zenrock thus deceived CACIB into opening the Letter of Credit in favour of PPT.

13 On 23 April 2020, on receipt of a request for acknowledgement of CACIB's financing interest in the Cargo sold under the Fabricated Zenrock-TOTSA Sale Contract, TOTSA informed CACIB by email of the following ("the 23 April 2020 Email"):

> (a) it had received two competing notices of assignment from ING and CACIB in respect of the TOTSA Receivable (respectively, "the ING NOA" and "the CACIB NOA", and collectively, the "Duplicate NOAs") (see [8] above);

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(b) Zenrock had asked it on 31 March 2020 to approve an assignment of the TOTSA Receivable to ING, and that it had acknowledged receipt of the email, but it had not countersigned the ING NOA;

(c) on 1 April 2020, Zenrock had asked it not to approve the ING NOA because there had been a mistake on Zenrock's part as the TOTSA Receivable has been assigned to CACIB;

(d) in consequence, TOTSA had countersigned the CACIB NOA on 3 April 2020;

(e) TOTSA was willing to pay the legitimate beneficiary of the TOTSA Receivable.

Copies of the relevant emails were attached to the 23 April 2020 Email.

14 On 28 April 2020, TOTSA sent a further email to CACIB ("the 28 April 2020 Email"). In that email, which had been sent after CACIB provided TOTSA with a copy of the Fabricated Zenrock-TOTSA Sale Contract, TOTSA informed CACIB that the original terms of its contract with Zenrock had been misrepresented. TOTSA attached a copy of the True Zenrock-TOTSA Sale Contract and the deal recap dated 30 March 2020 and confirmed that the terms of the price clause had not been amended. It thus became plain to CACIB that it had been defrauded by Zenrock. Not only had Zenrock assigned the TOTSA Receivable to two different banks by issuing the Duplicate NOAs, but it had also procured the issue of the Letter of Credit by CACIB on the basis of a forged sales contract to TOTSA (*viz*, the Fabricated Zenrock-TOTSA Sale Contract), resulting in a figure in the Letter of Credit which was about 87% higher than the

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approximate market value of the Cargo. What CACIB did not know was the extent to which any other party, such as PPT, was involved in the fraud, but it was deeply suspicious.

15 After exchanges between the competing banks and TOTSA, ING and CACIB requested Mayer Brown (Singapore) Pte Ltd ("Mayer Brown") to act as escrow agent for the true sales proceeds from TOTSA pending discussions and agreement between them as to allocation of the sum in question. An escrow agreement was concluded on 12 June 2020 and on 17 June 2020, TOTSA paid US$16,517,003.06 to Mayer Brown as escrow agent. This resulted in interpleader proceedings, the outcome of which is not in evidence before me. Nonetheless, on the last day of the trial of these proceedings, it transpired that some of those proceeds, approximately US$6m, had been received by CACIB but had not been brought into account in its claim (whether for good reason or bad, did not appear). Zenrock went into interim judicial management on 4 May 2020 following another bank's discovery of similar fraud or frauds perpetrated by Zenrock on it and is presumably unlikely to be a source of recoupment of any outlay.

16 It was in these circumstances that, in the two actions which have been heard together in this court, on transfer from the High Court:

> (a) CACIB seeks a declaration that PPT is not entitled to receive any sums under the Letter of Credit and an order that PPT reimburse it with the sum paid to PPT, which represents the amount putatively due under the Letter of Credit, with interest thereon. CACIB contends that PPT was a participant in the fraud perpetrated by Zenrock and is not entitled to payment; alternatively, even if CACIB is liable under the Letter of

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Credit, PPT is in breach of the warranties given by it in the LOI and consequently liable to pay damages corresponding to the same sum that CACIB would be liable to pay under the Letter of Credit.

(b) PPT originally claimed from CACIB the sums which it says were due under the Letter of Credit, but, having received such a sum by reason of the accommodation referred to at [7] above, it now claims a declaration that it was entitled to such payment and/or damages for CACIB's breach of the contract under the Letter of Credit, including the cost of the BOC Guarantee, together with the costs of a loan from its subsidiary company in Singapore, PPT Energy Trading Singapore Pte Ltd ("PPT Singapore"), because the sum paid by CACIB sits in a blocked account as counter-security for the BOC Guarantee and is not available to PPT.

The ambit of the fraud exception in relation to letters of credit

17 Notwithstanding CACIB's initial attempts to argue the contrary, it is a fundamental principle that letters of credit are the lifeblood of international commerce and are autonomous independent contracts between the issuing bank and the beneficiary and are therefore unaffected by any irregularities in the underlying commercial contract of sale. As stated by the Court of Appeal in *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 ("*Brody*") (at [19]):

> [a]n 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 …

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18 It is trite law that, absent fraud, letters of credit must be honoured by the issuing bank if the terms of the letter of credit are satisfied and that the UCP 600 requires the issuing bank to determine compliance on the basis of the documents presented, without regard to anything else (see, *eg*, Art 14(a) of the UCP 600). It is also clear from *Brody* that the fraud in question must relate to the documents presented under the letter of credit rather than the underlying sale contract. As the Court of Appeal explained in *Brody* (at [21]):

> We had noted that … the respondents claimed fraud in the sense of fraudulent misrepresentation on the appellants' part. However, we were of_the opinion that the respondents had misunderstood the meaning and scope of 'fraud' in the specialised context of documentary credits. It appeared to us that the kind of fraud sufficient to constitute an exception to the autonomy of an irrevocable credit is fraud in the presentation of the required documents to the bank, *ie* where the beneficiary, for the purpose of drawing on the credit, fraudulently presents to the bank documents that contain material representations of fact that to his knowledge are untrue … It would seem that fraud as perpetrated by the seller on the buyer in respect of the underlying contract of sale between them would not affect the contract of documentary credit between the seller and the issuing/confirming bank. This can be seen from the seminal judgment of Lord Diplock in [*United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168] … where he stated that it was 'trite law' that in the contract between the bank and the beneficiary in a documentary credit transaction, the parties involved dealt in documents and not in goods.

19 CACIB's case, as expressed in its Opening Statement, was that "fraud is committed when, among other things, a beneficiary dishonestly or recklessly presents documents for payment under a letter of credit, or he does so with indifference as to whether it is or is not a valid demand for payment". CACIB relied upon the Court of Appeal decision in *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*Arab Banking Corp*") where the Court of Appeal said, in connection with a demand guarantee, that it would be

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fraudulent for a person to make a false representation if he was recklessly indifferent to the truth or falsity of that which he was asserting at the time he made the statement and that a beneficiary who presented an invalid demand under a demand guarantee recklessly, indifferent to whether or not it was a valid demand, would also be acting fraudulently (at [63]–[64]). As the court explained, the fraud exception is an application of the maxim "fraud unravels all" (at [64]).

20 In an action for deceit, fraud is proved when it can be shown that a false representation has been made, either dishonestly (knowingly or without belief in its truth) or recklessly (without caring whether it be true or false): see *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [13], citing *Derry v Peek* (1889) 14 App Cas 337. However, as explained by the Court of Appeal in *Brody*, if the documents presented by a beneficiary to the issuing bank comply with the terms of the credit, the beneficiary is entitled to be paid if the documents themselves are not fraudulent and there is no fraudulent presentation. Since any fraud capable of vitiating a demand for payment under a letter of credit must be in the *presentation of documents itself*, in my judgment, such fraud can only, by definition, encompass a beneficiary who acts *dishonestly*, in presenting otherwise facially compliant documents either with the knowledge that what is contained therein is false, or without belief that what is contained therein is true.

21 Dishonesty is the key to the fraud exception to the obligation to pay under letters of credit and a presentation, said to be recklessly made without investigation by the beneficiary of the circumstances underlying the representation, or of the circumstances of the underlying transaction, cannot vitiate the presentation. Whilst an absence of belief in the truth of a

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representation, in the sense of not caring whether it is true or false, will suffice for deceit, there is no duty of care owed by a beneficiary to the bank when presenting documents to an issuing bank (*DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 ("*DBS Bank v Carrier*") at [103]–[106]) and a failure, even a reckless failure to ascertain the truth of representations, which are made in the honest belief that they are true, will not amount to fraud for the purposes of non-payment under a letter of credit. In my judgment, there is a distinction between the law relating to letters of credit and the law relating to demand guarantees and so nothing in *Arab Banking Corp* impacts upon the Court of Appeal's earlier decision in *Brody*.

22 If PPT could be shown to be party to a scheme to defraud CACIB by presenting documents which on their face appeared to be valid, CACIB could have a defence to the claim on the Letter of Credit, but this would require CACIB to establish an intent on the part of PPT that CACIB be defrauded by Zenrock. CACIB would have to show dishonesty on the part of PPT and an intent to participate in the fraud which Zenrock perpetrated on CACIB. In the absence of any presentation of false, fabricated or forged documents to CACIB for the purpose of obtaining payment under the Letter of Credit, in order to establish a valid defence to a claim under that Letter of Credit, it would not be enough to show that PPT was reckless in not enquiring into the purpose of the round-tripping transactions, without showing that PPT knew that the purpose of these transactions was to effect a fraud on CACIB and/or that Zenrock intended to defraud CACIB by producing a forged sales contract with an inflated price (*viz*, the Fabricated Zenrock-TOTSA Sale Contract) and/or by means of the Duplicate NOAs which Zenrock issued to ING and CACIB.

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CACIB's case as to fraud

23 By the time the parties came to make their closing submissions, counsel for CACIB accepted that CACIB had to show dishonesty on the part of PPT in the presentation of documents and that anything less was not enough to invalidate a demand to be paid under a letter of credit. The key allegation was that PPT had, in presenting the PPT Invoice and the LOI to CACIB, represented that there was a real sale transaction between PPT and Zenrock under which "marketable title" was to pass, when PPT knew that this was not the true position. There was thus a fraudulent misrepresentation on the part of PPT which vitiated its request for payment under the Letter of Credit and CACIB was entitled to refuse to pay. The phrase "marketable title" appears in the LOI as set out earlier in this judgment at [5].

24 CACIB alleged at paras 38–39 of its Statement of Claim that PPT's demand to be paid under the Letter of Credit had been part of a fraudulent scheme to inflate the value of the Cargo and to procure double financing for it and was therefore fraudulent and/or unconscionable. Further, it was specifically alleged that PPT's demand to be paid under the Letter of Credit was fraudulent because no marketable title to the cargo was transferred to Zenrock. It was pleaded that the Zenrock-Shandong-PPT-Zenrock sale transactions were not *bona fide* transactions and were entered into for the purpose of artificially inflating the value of the cargo so as to defraud CACIB into issuing the Letter of Credit and to procure double financing for the Cargo. It was said that title to the Cargo did not in fact pass from Zenrock to Shandong, or from Shandong to PPT, or to Zenrock once again, and that Shandong and PPT knew that they did not have good title or were reckless as to whether they did or did not have such good title to the Cargo.

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25 In its amended pleadings, at para 38(iv) of its Statement of Claim (Amendment No 1), CACIB further alleged that by presenting its "False Invoice and LOI", PPT fraudulently misrepresented that it had transferred marketable title of the Cargo to Zenrock, and was well aware that CACIB would rely on this representation when PPT demanded payment under the Letter of Credit, when, in truth, PPT did not have any such marketable title when it purported to transfer the Cargo to Zenrock. It was said that CACIB had relied on this fraudulent misrepresentation when it issued its "Advice for Receipt of Documents" to Zenrock on 22 April 2020 informing Zenrock that it had received conforming documents under the Letter of Credit, namely the PPT Invoice and the LOI and seeking instructions for settlement of the amount financed, including the submission of any "export documents" (*ie*, documents relating to the sale to TOTSA).

26 The thrust of CACIB's case and most of the cross-examination of PPT's witnesses centred on the allegation that PPT was a knowing participant in the round-tripping transactions and knew or should have known that the prices in the Shandong-PPT Sale Contract and the PPT-Zenrock Sale Contract (see [11] above) were well above the market value of the Djeno crude oil at the time. The question arises as to the nature of the fraud which is said to have been perpetrated and PPT's involvement in it, because it was never suggested in either the pleadings or cross-examination that any of the PPT witnesses were aware of the Fabricated Zenrock-TOTSA Sale Contract, the issuance of the Duplicate NOAs and the consequent inducement to CACIB to issue the Letter of Credit in favour PPT. Neither was it put to the PPT witnesses that they knew that the purpose of the round-tripping transactions was to defraud CACIB in any way, nor that they knew that the prices which appeared in the round-tripping

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transactions were nearly double the market price, as, on the expert evidence, was the case.

27 The highest that the case was put in the Opening Statement was that PPT was not an innocent bystander or feckless participant in Zenrock's fraudulent scheme but was aware that Zenrock had purchased the Cargo from SOCAR before buying it again from PPT, further down a chain of sales and purchases. It was said that PPT had actual knowledge of, or at least was wilfully blind to, the fact that this was a fraudulent scheme because of the following:

(a) it had been offered a pre-structured deal;

(b) the prices offered by Zenrock were not negotiated and were much higher than the market price of Djeno crude oil at the time;

(c) PPT was facilitating over US$9m more credit being provided by CACIB over and above the true value of the Cargo;

(d) the Cargo was being offered two to three days before loading and without Zenrock making any nomination of the vessel to PPT;

(e) Trafigura Pte Ltd ("Trafigura"), which had previously been a projected purchaser from PPT in the chain of sales (but subsequently pulled out of the deal), had required presentation of original shipping documents or a letter of indemnity countersigned by PPT's bank to trigger payment by it;

(f) PPT switched from being the buyer of the Cargo from Zenrock to selling it to Zenrock;

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(g) other companies such as Itochu and Glencore declined to participate in the chain; and

(h) Zenrock wanted 60 days credit for its purchase from PPT as compared with the credit period of ten days for payment by PPT to Shandong.

28 As the hearing progressed, it became plain that CACIB's case was that PPT's personnel were reckless as to the nature of the transaction in which they agreed to participate at Zenrock's instigation and that they should have realised that something was seriously amiss by reason of the round-tripping nature of the transaction and the abnormally high prices which appeared in the Shandong-PPT Sale Contract and PPT-Zenrock Sale Contract. As already stated, it was never suggested that any of the PPT witnesses actually knew that Zenrock intended to defraud CACIB in the manner which actually occurred or knew that Zenrock intended to defraud CACIB in any other way (see [26] above). PPT's witnesses were cross-examined on the basis that they had never made any enquiry as to the reason for their involvement in the round-tripping transactions and asked no questions about it, and not that they *knew* of an intended fraud. It was suggested that they ought to have realised that there was something seriously wrong with the transaction because of the features referred to at [27] above, but not that they actually knew of Zenrock's intention to defraud CACIB and actively participated to assist in that.

29 At no stage was it ever pleaded or suggested to the PPT witnesses that any of them knew of any scheme by Zenrock to produce a forged contract between itself and TOTSA to induce CACIB to issue the Letter of Credit in its favour, nor that they knew of any scheme to issue Duplicate NOAs of the

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TOTSA Receivable to ING and CACIB. Moreover, in its closing address to the Court, counsel for CACIB accepted that he needed to show dishonesty on the part of PPT, whilst stating that blind-eye, Nelsonian knowledge would suffice. The furthest that CACIB was prepared to go was to say that the PPT witnesses had participated in round-tripping transactions without any regard for the inflated prices at which they took place or the reasons lying behind those transactions. It was said that the transactions were not *bona fide* but were sham transactions because there was no intention that property in the Cargo should ever pass under them and that they were financing transactions only, of which PPT was well aware. Thus, when presenting the PPT Invoice and the LOI to CACIB, PPT dishonestly represented that the PPT-Zenrock Sale Contract was a genuine sale pursuant to which marketable title in the Cargo will pass.

30 I set out below the basis upon which I have made my findings of fact in relation to the knowledge and conduct of PPT in these transactions.

The CACIB witnesses

31 I heard evidence from two of CACIB's personnel, namely Mr Fabien Lautode ("Mr Lautode") and Mr Edouard Cazals ("Mr Cazals") whose evidence I accepted but which did not really touch on most of the issues which I have to determine. I reject any suggestion that the prices of the PPT-Zenrock Sale Contract and the Fabricated Zenrock-TOTSA Sale Contract should have alerted CACIB to any potential problem with the transactions. Whilst the evidence showed that CACIB carried out a mark-to-market assessment on a daily basis, CACIB did not have access to the prices of Djeno crude oil and, on the material made available to it, it had no reason to doubt the authenticity of the sale contracts or the CACIB NOA furnished by Zenrock. Whilst CACIB might, had it taken more time and trouble, have ascertained that the price of Djeno crude

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oil in the Fabricated Zenrock-TOTSA Sale Contract was way above the then prevailing market price, the evidence was that, in March/April 2020, with COVID-19 on the rampage, the market was volatile and unpredictable. CACIB was likely to think that its customer Zenrock knew what it was doing and the margin between the PPT-Zenrock Sale Contract and the Fabricated Zenrock-TOTSA Sale Contract was such that, with the CACIB NOA signed in acceptance by TOTSA and a deal which went through with an existing customer in a matter of three days or so, it had no cause for concern. CACIB, unlike PPT, was not a trader.

32 There was nothing in the application for the Letter of Credit or in the information supplied to CACIB, other than the price, which would or should have alerted it to any problem in the transaction as it was presented to it. On the face of it, the TOTSA Receivable (with a 60-day credit period) would have covered the sums payable under the Letter of Credit to PPT, due on the same date. There was nothing which would have put CACIB on notice that there was either any round-tripping or that there was any possibility of duplicate notices of assignment until, on the last day for acceptance of the documents presented under the Letter of Credit, TOTSA sent CACIB the 23 April 2020 Email informing CACIB of the Duplicate NOAs and seeking an explanation from Zenrock (see [13] above).

33 These two CACIB witnesses who gave evidence and were cross-examined, in truth, had little material evidence to give beyond anything that could be garnered from the documents in the trial bundles. It was put to them that they had sought to manufacture a case against PPT in circumstances where they had been defrauded by Zenrock and were looking to make recovery from anyone they could blame in circumstances where there was no possibility of any

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real recovery from Zenrock itself. I found them to be honest witnesses whose suspicions that PPT was involved in the fraudulent scheme led to a genuine belief that this was the case. They took the view that PPT had sought to avoid answering the questions which they raised following the receipt of information from TOTSA about the Zenrock fraud and, in particular, the questions asked about the content and whereabouts of the original bills of lading. Whilst, behind-the-scenes, it appears that PPT were making enquiries of Shandong about the original shipping documents and were being told by their own bank, BOC, not to answer questions or give any assistance to CACIB. CACIB was right to think that PPT made no real attempt to answer CACIB's requests for information or to assist CACIB in its investigations and enquiries as to what had actually happened.

34 I have no evidence before me as to the reasons which lay behind Zenrock's insolvency problems but it is clear that it had a liquidity crisis, perhaps in part resulting from the insolvency of Hin Leong Trading Pte Ltd and it may well be that the round-tripping, the inflated prices and the fraud were effected in an effort to alleviate this problem.

The facts

35 The bare facts emerge from the documents and do not depend upon any evidence from witnesses but in setting out the most important facts, I record the evidence given by PPT's witnesses both as to the background to their dealings with Zenrock and Mr Lai, in particular, and as to the dealings themselves. I also record the extent to which I accepted their evidence.

36 The documents show that ING had made financing facilities available to Zenrock since 2014 and on 3 September 2014, the latter executed a deed of

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charge and assignment of receivables its favour ("the ING Deed"). The effect of the ING Deed was to create a floating charge over all goods financed by ING and an assignment of all Zenrock's contractual rights in respect of goods sold or to be sold and goods purchased or to be purchased where financing had been provided by ING or credit extended. A floating charge was also created over "unencumbered goods", which referred to goods that were not financed by ING. The floating charge only crystallised on the occurrence of defined events which included Zenrock ceasing to carry on business or becoming insolvent, whether by being unable to pay its debts as they fell due or by being declared insolvent. The charge was registered on 3 September 2014 with the Accounting and Corporate Regulatory Authority ("ACRA") and was governed by Singapore law.

37 On 21 August 2018, CACIB offered, by way of a letter, credit facilities to Zenrock for the aggregate amount of USD 100 million ("the Facility Letter"). The Facility Letter stated that the purpose of the facility was to "finance the purchase of Crude Oil / Petroleum, Products and other products (the 'Goods') to be agreed by the Bank". On 24 August 2018, Zenrock executed a deed of charge in favour of CACIB ("the CACIB Deed"). By cl 3.1 of the CACIB Deed (read together with cl 1.1), Zenrock essentially granted to CACIB a floating charge on all goods financed by CACIB and an assignment of all receivables in respect of goods which had been financed by it in one way or another (in a broadly similar manner to the ING charge referred to at [36] above). "Goods" were defined as meaning:

> all and any goods and any right, title or interest of the Company therein now or in the future purchased or to be purchased by the Company, in respect of which any payment has been or may fall to be made by the Bank pursuant to any letter of credit or payment undertaking now or in the future issued by the Bank or in respect of or to facilitate the purchase of which the Bank

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> has extended or hereafter extends to the Company any banking or credit facilities or accommodation of any kind.

38 The floating charge would crystallise if any charged property became subject to an adverse security interest or if Zenrock failed to observe any of its obligations to CACIB. On 7 September 2018, the Deed was registered with ACRA. Like the ING charge, the CACIB charge was also governed by Singapore law.

39 I heard evidence from four witnesses who were employed by PPT, namely: (a) Mr Masahito Shimazaki ("Mr Shimazaki"), the Marketing Director; (b) Ms Fumi Yano ("Ms Yano"), the General Manager of the Oil and Gas Trading Department; (c) Mr Uehara, an Assistant Manager in that department; and (d) Ms Tomomi Shinya ("Ms Shinya"), an Assistant Manager in the operations department. Of these, Ms Yano and Mr Uehara were the most significant witnesses who, as two of the three traders employed by PPT, would be expected to know more about the nature of the transactions between PPT on the one hand and Shandong and Zenrock on the other, to which Mr Uehara agreed, whilst Mr Shimazaki, who gave his approval to the transaction, had a higher-level view and Ms Shinya, in the operations area, were not involved in the negotiation of the deal.

40 It was the evidence of Mr Shimazaki, Ms Yano and Mr Uehara that all deals were discussed amongst the trading team, which had a group email and WhatsApp chat. The latter two testified that many pre-structured deals had been concluded with Mr Lai and Zenrock in the past, although details of only two were given, namely transactions in July 2017 and October 2018, the first of which occurred when Mr Lai was employed at Gunvor and the second when he was at Zenrock. On each of these two occasions PPT was approached to act as

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a buyer from Mr Lai's employers and to sell to another company. In making such approaches terminology such as "sleeve" or "credit sleeve" was apparently used. Whereas Mr Lai had historically dealt with Ms Yano, and on no occasion prior to the present transaction underlying the PPT-Zenrock Sale Contract had he dealt with Mr Uehara, it was the latter who negotiated this transaction with Mr Lai. Mr Uehara joined PPT in April 2017 and his trading experience only began in 2019, although the evidence shows that he consulted with the marketing team including Ms Yano and obtained Mr Shimazaki's approval of the transaction. He had never dealt with Mr Lai before and had only done a few pre-structured back-to-back deals before.

41 Mr Shimazaki had some 30 years' experience in trading in crude oil and petroleum products. Ms Yano had about 20 years of such experience. Neither had dealt much in Djeno crude oil and it appeared that PPT's volume of trading in anything other than Indonesian oil was, in 2020, very limited, amounting to only two or three deals a month. This was borne out by the excitement shown when a deal was proposed by Zenrock. The reality is that PPT had very little business and was keen to enter into transaction actions offered to it.

42 As I have mentioned earlier, PPT had three traders, including Ms Yano and Mr Uehara. In the ordinary way, pre-COVID-19, they would sit at desks in close proximity to one another and discuss matters between them as part of the marketing/trading team. In March/April 2020, each would come into the office on some days and work from home on others and they would keep in touch by WhatsApp exchanges if they were not in the office at the same time. There were no large trading screens in the office with real-time prices. Each trader had a laptop with access to the daily (but not real-time) prices on Platt's and RIM. Because of the nature of the trading in which PPT was involved, they said that

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there was no call to pay much attention to market rates. That would only be required in circumstances where a trader was taking a position and according to Mr Uehara it was an absolute rule that no transaction would be concluded by way of purchase unless a corresponding sale was concluded at the same time.

43 Mr Shimazaki's evidence was that PPT's normal course of business would involve either facilitating a back-to-back transaction between a seller and a buyer or participation in tenders or looking for a counterparty to balance a trade. He said that PPT's clients required PPT to be the go-between where clients faced issues with finding banks that would be willing to issue letters of credit to them. PPT was often approached by its client with transactions that had already been structured and PPT would then carry out the necessary checks internally (and with its bank) on the sellers and the buyers as well as the terms and conditions of the transaction in question. With such a pre-structured transaction, the price would already have been agreed between the seller and the buyer and PPT's interest in it would be the profit margin that it would make on the turn. He said that if there was an appropriate profit margin, PPT would proceed to facilitate the transaction but even if the margin was slim, it might still decide to carry out the trade in order to achieve volume of business.

44 In cross-examination, Mr Shimazaki said that profit was not the only driver and that other factors were also considered, such as giving different opportunities or experience to people in PPT's marketing division, as well as the question of volume of business. After considerable evasion of questions about the relevance of the market price, he eventually said that PPT did not consider the market price when deciding whether or not to enter into back-to-back transactions. He said that PPT traders would only know the major trends in the market but not the absolute value of any products they traded such as

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Djeno crude oil. Ms Yano's evidence was to the same effect. Although it would have been possible to check on the market price for Djeno crude oil for the previous day, neither of them ever did so in the context of this transaction. Nor did Mr Uehara. They stated that they did not appreciate at the time that the prices in the transactions which lie at the heart of this dispute were well above the market price. They were not cross-examined to suggest otherwise, though Mr Shimazaki, when asked, said that a price two or three times the market price or anything conspicuous might be noticed. A price over market price by US$10 a barrel should have been conspicuous.

45 In deciding whether or not to enter into a transaction, Mr Shimazaki set out in his Affidavit of Evidence-in-Chief ("AEIC") four criteria which he said should be met when assessing its acceptability, namely:

(a) whether PPT had previously transacted with the counterparty and there were no issues;

(b) whether the transaction was on a back-to-back basis;

(c) whether PPT's bank had agreed to finance the transaction and the bank had sufficient facilities to finance the deal; and

(d) whether PPT would receive payment based on a letter of credit issued by the counterparty's bank, and the counterparty bank was approved by PPT's bank.

46 The basis of such trading, on Ms Yano's evidence, was always pre-structured back-to-back deals brought to them by someone who required a "sleeve" or "front", which meant that PPT would be interposed between two other parties which, for one of a number of reasons, did not wish to deal directly

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with one another. The three reasons given for PPT's involvement, as set out in Ms Yano's AEIC, were:

(a) to assist buyers and sellers who do not have sufficient credit facilities, such as letters of credit, to deal with each other;

(b) to facilitate a company wishing to remain low profile and needing an intermediary to shield their identity; and

(c) to fill any payment gap, for example, if payment for a cargo is required within ten days of the bill of lading date but the buyer is only able to make payment within 60 days of bill of lading date.

47 Whilst the terminology is not of importance, it seems that the phrase "credit sleeve" was applied by some to pre-structured transactions even where there was no obvious credit assistance and where the term "front" or "sleeve" would seem more appropriate. PPT was a "facilitator" or "go-between". The evidence of both Mr Shimazaki and Ms Yano was that PPT did not ask why it was being asked to act as a go-between. Ms Yano's evidence, which was based on her direct knowledge, was that PPT would not know which of the three reasons outlined at [45] above were applicable, save that in some cases, such as an approach by the China National Offshore Oil Corporation, it was always for credit assistance. There was no reason to ask why a request was being made for PPT's assistance in such pre-structured deals and she expressed the view that competitors for such deals did not make any enquiry either. Ms Yano said that, if Zenrock approached PPT, she would assume that what was sought was a "credit sleeve" without being told or asking. If any approach was made, PPT would assume that it was for one or more of the three reasons outlined above and that a go-between was needed for the transaction to go ahead. The parties

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might have various reasons that they did not want others to know. The main concern of PPT was the profit margin.

48 At para 61 of his affidavit filed for the interlocutory proceedings, Mr Shimazaki had stated ("Mr Shimazaki's Interlocutory Affidavit"):

> the usual commercial practice of international oil trading being made in recent years is that, as long as the visible cargo of oil was transferred to and received properly by the end buyer without failure … original shipping documents were not delivered. Even endorsements were not made as well through the actual chain of the sale. The sale contract was completed by presentation of a commercial invoice and letter of indemnity issued by a seller to a buyer in the format agreed upon when the contract was made.

49 In his oral evidence, Mr Shimazaki stated that this happened often and PPT was involved in such transactions, but did not accept that this was the usual procedure, despite the terms of that affidavit. Ms Yano's evidence was to much the same effect. When asked how many times she had, in her experience of pre-structured deals, ever come across a party who had insisted upon receipt of the original shipping documents before payment, she said "barely any time". Mr Uehara, whose experience was limited, agreed that in back-to-back transactions, most of the time PPT would not receive the original bills of lading. It thus appeared that it was PPT's usual practice to deal in commercial invoices and letters of indemnity rather than original shipping documents and that they would not often see such documents if delivery of the cargo to the end purchaser had been achieved without issues arising, which would ordinarily be the case. Indeed, in a WhatsApp chat with Ms Yano on 27 April 2020, Mr Lai said that in every case when dealing with West Africa or even Oman, Zenrock never used original bills of lading unless buying directly from the producer.

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50 The evidence of Mr Shimazaki, Ms Yano and Mr Uehara was that at the time of the transaction, none of them had any idea that the price paid by PPT and Zenrock was well above the market value (in the order of US$10 per barrel or more) but had come to realise it during the course of the litigation. They all said that they did not check the market price when considering or approving the transaction underlying the PPT-Zenrock Sale Contract. Mr Uehara could not conclude a trading contract without authorisation from his seniors and in this case, Mr Shimazaki gave his approval. The criteria referred to at [44] above were applied and the only additional consideration appeared to be the building up of relationships by the marketing team with others and the experience to be gained in trading by others in the team. No attention was paid to the legal aspects of transfer of ownership and both witnesses were defensive in expressing a lack of understanding of pledges of goods or documents and security granted to banks. The AEICs of all of PPT's witnesses were in English and the documents in the trial bundles also showed that they spoke in English to traders and banks, both in emails and WhatsApp exchanges. All declined to give evidence in English, which was understandable, but it meant that where they hesitated in giving answers or failed to answer the question, it was not because there were any language problems. There was reluctance on the part of Ms Yano and Mr Uehara to accept the circular nature of the round-tripping transactions even when the documents showed that to be the position, and both maintained that they had not appreciated that this was the case at the material time. In particular, Mr Uehara readily accepted that he appreciated that this was the position now, but he maintained that he did not appreciate that at that time. Whilst it might just have been possible to accept that evidence in the case of Mr Uehara, in the light of his limited experience, I did not see how someone of Ms Yano's experience could not have appreciated that the documents which she saw at the time showed that Zenrock appeared in the chain as buyers/sellers higher up the

chain as well as buyers below PPT and I came to the conclusion that Mr Uehara must have done so too. Whether they appreciated the significance of such an appearance in the trade as seller and buyer higher up the chain and immediately below PPT, is a separate question, but I could not accept their evidence that they were unaware that Zenrock was involved in a round-tripping set of transactions. Because of the interactions between the members of PPT's trading and marketing departments, I have to conclude that Mr Shimazaki must have understood the position in the same way.

51 Mr Uehara's evidence was that he had limited understanding of the legal aspects of the documents involved in trading crude oil but understood that endorsees of bills of lading were entitled to take delivery of the cargo referred to in them. He considered that an invoice presented to a bank in order to trigger payment under a letter of credit was no more than a demand to be paid and that the purpose of a letter of indemnity was for presentation to a bank to obtain payment under a letter of credit where the bill of lading was not available. When contracts were concluded, he assumed that the seller would have marketable title to the subject of the sale and enquired no further. Apart from the present case, he knew of no situation where a bank issuing a letter of credit had ever insisted that a letter of indemnity to be given by a seller should be countersigned by a bank. He attributed Trafigura's requirement for that in the present case (see [27(e)] above) to the fact that there had been no trading between PPT and Trafigura since 2009, as that was what he was told by the latter (Trafigura had previously been a projected purchaser from PPT in the present chain of sales, but subsequently pulled out of the deal). The fact that Trafigura would not have accepted a letter of indemnity signed by the seller without such additional countersignature from a bank did not therefore strike him as showing that there was anything untoward about this proposed transaction. He had no real idea why

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a party would want a letter of indemnity countersigned by a bank but considered that this was a form of additional security for the party. I had no reason to doubt his evidence on any of this.

52 Mr Lai approached Mr Uehara on Friday, 27 March 2020 to seek PPT's involvement in a transaction, where a chain was envisaged by Mr Lai consisting of SOCAR-Zenrock-PPT-Trafigura-Zenrock-TOTSA. Specifically, the approach to Mr Uehara was in relation to the Zenrock -PPT-Trafigura part of the chain. The relevant prior exchange on WhatsApp that day is as follows:

> Mr Lai: Meanwhile separately, can check if u can give Trafi [Trafigura] Open
>
> …
>
> Trafi is a separate deal
>
> Mr Uehara: oh I see. Ok, let me check if we sell trafi open basis. We buy from you lc basis and sell trafi open? Also, can we check with our bank the scheme you sent by email basis?
>
> Mr Lai: Yes sure.
>
> Mr Uehara: not gonna disclose detail of course.
>
> [*sic*]

53 An email followed from Mr Lai to Mr Uehara that evening setting out the sale terms of the Zenrock- PPT-Trafigura deal. The sale terms between PPT and Trafigura were dictated by Zenrock, without any communication whatsoever between PPT and Trafigura. It was a pre-structured deal, the only negotiable elements being the amount of margin that PPT would obtain and the credit terms in its "in and out" transactions. Mr Uehara's evidence was that he understood that PPT was being approached because Trafigura and Zenrock could not deal directly with each other, but he was not given any reason for PPT's involvement and did not ask. The reason for PPT's involvement was not

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as important to him as the terms proposed and he did not think that he would be told the reason even if he had asked. Mr Uehara, in the WhatsApp exchange, not only thanked Mr Lai for "giving us this chance" but said "you always help us, we can do something for you".

54 It was on Tuesday, 31 March 2020 that Mr Lai sent a "revised credit terms proposal" for the proposed deal. No prices were given but Zenrock was prepared to give PPT open credit for payment ten calendar days after the bill of lading date whilst providing for Trafigura to pay PPT by letter of credit on the same day. In a WhatsApp exchange that followed, Mr Uehara expressed his concern that those terms required payment to be made on the same date and said that PPT wished to receive payment from Trafigura one day before having to pay Zenrock. Mr Uehara asked if this could be considered or whether an open standby letter of credit would be acceptable. Mr Lai's response was in the following terms:

> Yes such financing deals, these honestly under scrutiny. And usually I wnt [won't] come to you guys, this is initiated by my boss. So please dont forward, u can check Yanosan [Ms Yano] and Iwahirosan. Why dont u guys propose back a chain the best u and ur banks can accept, anything else we cant deal. Better and safer for PPT.
>
> [*sic*]

55 CACIB relies on this WhatsApp exchange to show: that PPT knew that the proposed transaction (and other similar transactions) would come under enhanced scrutiny by the banks; that Zenrock was saying that it should be kept secret; that Mr Uehara should check the position with others in the trading team; and that PPT should come forward with a suggestion as to participants in the chain of buyers and sellers that would be acceptable to it and its bank, which could then be the subject of agreement. Mr Uehara did not accept that this was

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what was being said but it is hard to see what other construction can properly be put upon the words used. It is also interesting to note that Mr Lai described this as a "financing deal" though at that stage there was no difference in the credit period in the two legs of the transaction. It was Mr Uehara's following request for a one-day difference in the payment dates and for Trafigura to open its letter of credit in favour of PPT by 2 April 2020 which was then taken up by Zenrock with Trafigura.

56 Mr Lai then asked Mr Uehara to send a counteroffer with the conditions that PPT was comfortable and to suggest "the fee" in an email. This resulted in an amendment to the terms previously set out by Zenrock with a one-day difference in the dates of payment and a request in the email asking Mr Lai how much "commission" would be payable.

57 Mr Uehara said that he was very keen to do the deal both because it increased the volume of trades carried out by PPT and because he wished positively to respond to a request from an important client. Significantly on the following day, Wednesday, 1 April 2020, the following WhatsApp exchange took place between Mr Lai and Mr Uehara:

> Mr Lai: U have any crude deal in May or June which is able to sell to GV and GV sells to me and I sell back to u? F.O.B. b2b terms. I open LC to u and pass you5 cents.
>
> Mr Uehara: PPT- Gunvor-Zenrock-PPT??
>
> Mr Lai: yes. Your own barrels. u have any?
>
> [*sic*]

58 The nature of the proposed reciprocal trade was clearly appreciated by Mr Uehara, but his evidence was that it was not the case that Mr Lai commonly

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suggested such deals and he could not recall whether there had been any previous suggestion or whether this was the first time that this had happened.

59 Zenrock informed Mr Cazals of CACIB that day (on 1 April 2020) of a potential transaction with Trafigura and TOTSA for which Mr Lai sought CACIB's support. This was for the same cargo that had been the subject of discussion between Mr Lai and Mr Uehara (*ie*, the Cargo). The transaction outlined was one in which Zenrock was to purchase from Trafigura and on-sell to TOTSA. CACIB was thus being asked to finance the purchase by Zenrock of the same cargo from Trafigura in the lower half of the chain, without being informed about the top half which consisted of the purchase by Trafigura from PPT and the purchase by PPT from Zenrock, let alone the purchase by Zenrock from SOCAR that was financed by ING. The transaction involved the purchase and on-sale of the Cargo with laycan on 4–5 April 2020. As such, it is clear now that the Cargo to be sold by Zenrock to PPT and then by PPT to Trafigura was to have been on-sold by Trafigura back to Zenrock and then by Zenrock to TOTSA. Prices were not given but the credit period was 60 days for each of the last two legs with a difference in pricing.

60 It was also on 1 April 2020 that Mr Lai sent Mr Uehara a proposed deal recap which, for the first time, set out prices of Platt's plus US$3.00 per barrel for the PPT purchase and US$3.03 per barrel for PPT's sale, thus giving PPT a commission of US$0.03 per barrel. Mr Uehara's evidence was that he did not check the market price of the product and did not know of a way in which to check it. So far as he was concerned, market price was not a factor in any decision to be taken by PPT as to whether or not to conclude a deal of this kind. What was important to him was the margin and the fact that the buyer from PPT was to pay by letter of credit.

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61 Significantly, on the same day, in an email sent at 6.15pm, Mr Lai, responding to PPT's requirement for a letter of credit from Trafigura by 2 April 2020 (which Mr Uehara had communicated to Mr Lai in an earlier email), told Mr Uehara and Ms Yano that:

> we are also on all possible expedition to issue L/C to Trafi tomorow, thus I think the earliest time for Trafi to issue L/C to you will be on Friday 03 Apr. Please do consider given this situation.
>
> [*sic*]

62 It must have been clear to both Mr Uehara and Ms Yano, if they had not appreciated it before, that Trafigura was selling the *same* cargo to Zenrock which Trafigura was purchasing from PPT, which in turn was buying it from Zenrock in the proposed deal, though Ms Yano maintained she was not aware of the circular nature of the transactions at the time. It was not clear from Mr Uehara's initial answers in cross-examination whether he accepted that he appreciated it at the material time, although he accepted that he now knew it be the case. In later answers, he said that he did not focus on the reference to a letter of credit from Zenrock in favour of Trafigura, since his concern was with the letter of credit that had to be opened by Trafigura in favour of PPT. With such a short email and a reason being supplied for the delay in the Trafigura letter of credit, I find it impossible to believe that they did not both appreciate it at the time. The delay in the provision of the Trafigura-PPT letter of credit was due to delay in the provision of a letter of credit by Zenrock to Trafigura and there could be no other reason for the existence of a Zenrock letter of credit other than a sale by Trafigura to Zenrock. The email was not only sent to Ms Yano and Mr Uehara but also to Mr Nozomu Iwashiro, the third trader at PPT. Moreover, the evidence of PPT's witnesses was that the trading team discussed with one another the limited business which they did do (see [42] above).

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63 The point is driven home by further WhatsApp exchanges on the following day, 2 April 2020, in which Mr Lai says the following:

> Hi Ueharasan [Mr Uehara], coz Trafi and us using CA possible for PPT to use another bank? If not CA may see our whole chain. As long as u wont use CA sing [CACIB].
>
> [*sic*]

64 Mr Uehara's response was to say that PPT was thinking of using BOC and understood that "both of you will use [CACIB]". Whilst he said in evidence that he did not understand that Mr Lai did not want PPT to use CACIB for the reasons given, it is impossible to understand Mr Lai's request in any other way. Mr Uehara said that it did not make sense because CACIB would eventually see the whole chain and he did not see any problem with both parties using CACIB. Of course, CACIB would only see the whole chain if endorsed bills of lading came down the chain in a sequence of endorsements, but it does not seem, in the light of the evidence referred to above, that PPT, including Mr Uehara, even with his limited experience ever expected the original bills of lading to come down the chain (see [49] above). Looking at it now, he said it might be that Zenrock did want to hide the chain, but he did not understand that at the time. That answer is not credible.

65 Zenrock was obviously concerned to hide the round-tripping nature of the transaction from CACIB. As Zenrock was using CACIB for the Trafigura-Zenrock leg, and Trafigura apparently planned to use CACIB for the PPT-Trafigura leg, Zenrock was keen to ensure that PPT should not also use CACIB to finance the Zenrock-PPT leg of the transaction in the top half of the chain, of which CACIB was to be kept ignorant. If PPT had used CACIB for financing its purchase, both the top and bottom halves of the chain would become visible to CACIB.

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66 On 2 April 2020, at 10.13am, Zenrock provided CACIB with the Fabricated Zenrock-TOTSA Sale Contract, with the price of Platt's plus US$3.60. This was in response to CACIB's request on the previous day for copies of the sale and purchase contracts and the letter of credit application text. Zenrock stated that it would provide the purchase contract with the letter of credit draft as soon as possible.

67 About 30 minutes after the above exchange, it became clear that Trafigura's participation would make it impossible to execute the round-tripping of the Cargo. Trafigura made it clear that it was only prepared to accept original bills of lading or a letter of indemnity which was countersigned by PPT's bank, but PPT could not find a bank that was prepared to do this. Trafigura was not prepared to accept a letter of indemnity signed only by PPT without the security of an additional bank as signatory, whether under a letter of credit or for payment by telegraphic transfer ("TT") (which appeared to PPT to be an unusual requirement), but Trafigura would apparently have been prepared to accept a letter of indemnity from Itochu without that additional security. WhatsApp exchanges on 2 April 2020 show discussion of changes in the chain of buyers and sellers which might circumvent the problem of which Zenrock was undoubtedly aware, if Trafigura could not be the purchaser from PPT, namely who would bridge the two halves of the chain and sell on to Zenrock. Suggestions were made that Glencore might replace Trafigura, or Itochu might come between PPT and Trafigura in the chain. This demonstrates that Mr Uehara must have understood the chain to be fluid and that Zenrock could pre-structure deals involving a number of different participants and supports the conclusion that he was aware of the round-tripping.

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68 In his WhatsApp exchange with Mr Lai, Mr Uehara stated that the nomination of the loading vessel and documentary instructions had been received by PPT from Trafigura, which PPT was thinking of passing to Zenrock nonetheless even though the chain of buyers and sellers would eventually be changed. That exchange makes plain Mr Uehara's knowledge of Zenrock's position as both seller and buyer.

69 In the course of the exchanges, PPT asked who was Zenrock's supplier and received the following answer:

> Mr Uehara: Zenrock buying directly from producer? Do you know who is the ultimate buyer?
>
> Mr Lai: We bot [bought] from socar. Final buyer we dont know who, we only do the FOB trades.
>
> [*sic*]

70 This too only seems explicable in the context of discussion of how the chain could be made to work with Zenrock as both a seller up the chain from PPT and a buyer further down. If it bought from SOCAR and would sell to PPT which would on-sell to Trafigura, how could it be expected to know of an ultimate buyer at all, unless it was itself buying further down in the chain? Of course, Zenrock might well not know the ultimate buyer if all the deals in which it was involved were F.O.B. transactions because the ultimate purchaser would take the cargo from the ship (as ultimately happened in China) with presumably a C.I.F. or D.E.S. purchase. In actual fact, as it was selling back to TOTSA, it may be inferred that TOTSA was selling on different terms to the refining company in China.

71 The other possible options of using Glencore or Itochu, came to nothing because it appears that Glencore, like Trafigura, required a countersigned letter

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of indemnity (which could not be provided) and Itochu later informed Mr Lai that it could not participate in the deal.

72 In the middle of the afternoon of 2 April 2020, in a further WhatsApp exchange, Mr Lai told Mr Uehara that Trafigura would have to be removed. Mr Uehara's response was to say "OMG. Take away Trafi, then who will be our buyer? That's the problem?" Mr Uehara explained this in cross-examination as being his concern at the loss of his buyer in a pre-structured back-to-back transaction. The difficulty about such an explanation is that, within two minutes of that response and four minutes after Mr Lai's statement that Trafigura would have to be removed, Mr Lai sent Mr Uehara an email with a replacement transaction which not only did not involve Trafigura, but changed Zenrock's position as a *seller to PPT* to being that of a *buyer from PPT*. The "in and out" transaction for PPT involved Shandong as its seller and Zenrock as its purchaser. Mr Lai was proposing, virtually instantaneously with the removal of Trafigura as a buyer, a new seller who had not previously featured at all in the discussions. How long before he had been contemplating this and when he first contacted Shandong is unknown. Shandong had not been mentioned to Mr Uehara at any previous time in the documentary record, but his evidence was that he was not surprised by the suddenness of this new proposal because he understood Mr Lai to be exploring different possibilities, whether involving Trafigura, Glencore or Itochu or otherwise. As far as he was concerned, it was a new deal which was proposed which he had to consider from scratch.

73 There is no doubt at all that it was exactly the same cargo (*ie*, the Cargo) that was the subject of the potential new back-to-back transaction. Mr Uehara said that he understood it to be a completely new transaction and did not assume that Zenrock was still purchasing the cargo from SOCAR and was therefore a

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seller higher up the chain to Shandong as well as the buyer from PPT. He did not think about who was replacing whom in the previous transaction because this was a new transaction, and he did not think about any connection between the two. He saw them as completely separate. In the light of the other material, however, I consider that Mr Uehara must have appreciated that, as he had been previously told, SOCAR was still selling to Zenrock and that the new pre-structured back-to-back trade in which PPT was to be involved formed part of that chain in which Zenrock was now to be the buyer from PPT.

74 The removal of Trafigura from the position between PPT and Zenrock, (Zenrock's position as buyer from Trafigura having been revealed to Mr Uehara by the email at 6.15pm on 1 April 2020 from Mr Lai (see [61] above)), left PPT selling directly to Zenrock but now with Shandong replacing Zenrock as PPT's seller, so that Zenrock did not appear as PPT's immediate seller and immediate buyer. Mr Uehara's evidence that his focus that time was on the identity of the immediate seller to PPT and its immediate buyer provides no explanation. The fact that he identified the identity of the buyer from PPT as "the problem" in the terms in which he did is not explicable simply on the basis of concern about the absence of a buyer in a pre-structured back-to-back deal organised by Zenrock. Whatever the reasons Zenrock might have for wanting PPT to act as a go-between, PPT was not going to be left exposed by Zenrock on a purchase from Zenrock without a corresponding purchaser from PPT. Furthermore, the most obvious reasons for the interposition of PPT between Zenrock and Trafigura, namely some sort of problem which prevented them dealing directly, obviously did not apply if Trafigura was to fall out of the picture. It should have been obvious that there was a round-tripping chain which had to be constituted in such a way that Zenrock did not appear as the immediate seller to, and the immediate purchaser from, any one entity and so that the structure of the

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financing arrangements between the parties should not reveal to any individual financing bank the presence of Zenrock in more than one place in the chain. It was Mr Uehara's evidence however that he did not understand that Zenrock was putting Shandong in between itself and PPT up the chain and then purchasing directly from PPT in place of Trafigura, which I do not find credible.

75 Once again, as in the original version of the Zenrock-PPT-Trafigura deal, the email sent by Mr Lai to Mr Uehara on the afternoon of 2 April 2020 with the deal recap of the Shandong-PPT-Zenrock transaction did not specify the prices to be paid. PPT was to pay Shandong on an open credit basis ten days after the bill of lading date, whilst it would receive payment from Zenrock 60 days after that date by letter of credit. Zenrock had changed from being the seller to PPT to being the buyer from PPT with a credit differential which would give Zenrock greater liquidity. Mr Uehara said that he would need to check with his bank that a 50-day loan could be obtained in respect of the different periods of credit. As it transpired, BOC was only willing to provide a loan if it issued the letter of credit in respect of the purchase which resulted in a subsequent agreement between Mr Lai and Mr Uehara to change the basis of payment to Shandong to a letter of credit rather than payment on open credit. The WhatsApp exchanges between Mr Lai and Mr Uehara during the course of the afternoon show a discussion of the fee which PPT was to take, consisting of the BOC bank charges to PPT of US$0.14 per barrel in respect of the financing of the 50-days credit differential between payment of the purchase price and receipt of the sale proceeds plus US$0.05 a barrel as outright margin. This was not negotiated in any ordinary sense of the word – once Mr Uehara indicated that there would be costs payable to PPT's bank, Mr Lai agreed that the commission would cover that and that he would grant an additional US$0.05 on top.

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76 The WhatsApp exchanges between Mr Lai and Mr Uehara also show Mr Lai's concern about the identity of the bank to be used by PPT. At this point Mr Lai's concern appears to centre on the use by PPT of a bank which did not require a countersignature by another bank on the seller's letter of indemnity, which would now be given by Shandong to PPT and/or its bank. Mr Uehara said that he saw nothing odd about this because the Trafigura deal had come to nothing because of Trafigura's insistence on a countersigned letter of indemnity. As BOC was content with a letter of indemnity from Shandong, that point did not arise so far as Mr Uehara was concerned. He had no idea whether or not Shandong would be in a position to obtain a bank countersignature to any letter of indemnity issued by it. Mr Uehara also said in the WhatsApp exchange to Mr Lai that it would be much smoother if BOC was used by both PPT and Zenrock, but Mr Lai replied that Zenrock had to use CACIB.

77 In the afternoon of 2 April 2020, Mr Lai also sent a follow-up email to Mr Uehara, which attached Shandong's business profile and annual report so that PPT could carry out its know-your-client review. Shandong responded by sending an audit report, Shandong's certificate confirming its incorporation and its ACRA business profile (I note, however, that it was not until 6 April 2020 that Shandong requested PPT's information of a similar nature).

78 On that same day (2 April 2020), shortly after, Trafigura confirmed that the deal with it was cancelled. Within a matter of minutes, at 5.42pm (Singapore time), Mr Lai sent "finalised deal recaps" for the Shandong-PPT-Zenrock transactions with prices of Platt's plus US$3.05 and US$3.24 per barrel, giving PPT a commission/margin of US$0.19 per barrel. Payment was to be by letter of credit on both legs but with a ten-day period for payment following the bill

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of lading date on the Shandong leg and a 60-day period on the Zenrock leg. Mr Uehara did not check those prices against the market price at the time.

79 That evening, Shandong sent a recap of its leg of the deal with PPT in the terms set out in Mr Lai's email to Mr Uehara and Mr Uehara confirmed that recap shortly thereafter to Shandong, as well as sending to Zenrock a deal recap of the PPT-Zenrock sale which Mr Lai then confirmed.

80 On the same day, 2 April 2020, Zenrock sent TOTSA the CACIB NOA and sought acknowledgement by signature on the notice itself. Zenrock also asked Mr Cazals whether, after obtaining TOTSA's acknowledgement of the CACIB NOA, CACIB would be prepared to support a purchase by Zenrock from PPT in place of Trafigura. So far as CACIB was concerned, instead of buying from Trafigura, Zenrock was now buying from PPT. It was, however, wholly unaware that in the preceding version of the transaction, Zenrock was to sell to PPT first before it sold to Trafigura which was then to sell to Zenrock for its on-sale to TOTSA. Once again, on the new version of the transaction whereby PPT was to sell to Zenrock which would on-sell to TOTSA, CACIB was not being told about the top half of the chain where Zenrock was purchasing from SOCAR and selling to Shandong which in turn was on-selling to PPT. Mr Cazals replied, saying that the change "should be acceptable" as long as the TOTSA Receivable was assigned to CACIB.

81 It was on the morning of 3 April 2020 that Zenrock submitted its application for the Letter of Credit to finance the purchase of the Cargo from PPT, submitting the PPT-Zenrock Sale Contract in support of the application. On the same day, TOTSA replied to Zenrock, copying in CACIB, acknowledging receipt of the CACIB NOA and attaching a copy of the notice

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duly signed by it. This led to CACIB issuing the Letter of Credit that day with PPT as the beneficiary. That day Ms Shinya enquired of Zenrock whether the vessel nomination and documentary instructions previously given by Trafigura would need to be passed again through the "official chain". On being asked about this in cross-examination, she said that there was no unofficial chain and that this merely meant the new chain as opposed to the old, and she had assumed that the position would remain the same as it was the same cargo. This too is consistent with the appreciation that the change from Trafigura to Zenrock as buyer from PPT was of little practical importance in the context of a pre-structured deal arranged by Zenrock.

82 Although, in the various email and WhatsApp exchanges, there were exchanges which pointed to Zenrock being both a seller to PPT in the chain as well as being the buyer from it in the same, it was Ms Yano's evidence that she did not appreciate that this was the position at the time and failed to see the significance of these statements. It was her evidence that, even if she had understood that Zenrock had been a seller in the chain as well as PPT's buyer and had appreciated that the prices referred to in the PPT "in and out" transactions were well above market prices, she did not know whether she would have thought that there was something wrong, although she appeared prepared to accept that she might have thought it strange or "felt strange" about it. She was evasive about the implications of Trafigura being taken out of the chain and refused to answer what she characterised as an hypothetical question based on the documents which showed that the chain in contemplation up until that point was SOCAR-Zenrock-PPT-Trafigura-Zenrock, because what she knew *now* was not what she knew *at the time*. Although Trafigura had been excluded from the transaction at a late stage because of its requirement for the presentation of original shipping documents or a letter of indemnity

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countersigned by a bank, whether for the purpose of triggering payment under a letter of credit or payment by TT (which she had never come across before) this had not indicated to her that there was anything wrong with the transaction.

The events following shipment of the Cargo

83 The vessel, the *Indigo Nova*, completed loading and issued three original bills of lading on 6 April 2020 at the Djeno terminal in the Congo. On 7 April 2020, Shandong sent a package of shipping documents by email to the trading team at PPT, which consisted of a copy of the terminal instructions for distribution of those documents and the usual certificates of quality and quantity, timesheets, ullage reports and the like. The distribution instructions showed that there were three original bills of lading which were all to be sent to TOTSA, in Paris with three non-negotiable bills and various other documents of the usual kind. A copy of a non-negotiable bill of lading was part of the package and showed the shipper as Total E&P Congo and the Cargo as shipped "to the order of [TOTSA]". Other copies of non-negotiable bills of lading were sent to various parties, including the "consignee", various ministries in the Congo, customs authorities and the like. One such copy was carried on the *Indigo Nova* by its Master. It must thus have been apparent to Shandong and PPT that the original bills of lading had been sent to Paris by the time a copy of these shipping documents was supplied to PPT.

84 It is well-known that original shipping documents often do not reach the hands of the ultimate receiver of the cargo in time for discharge of that cargo at the vessel's destination. In this case, the vessel took approximately 48 days to arrive at Qingdao, China on 24 May 2020, where she was to discharge the Cargo. On the evidence of Mr Lautode, in a chain of five sellers or buyers, it could reasonably be expected that the original shipping documents would pass

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through the chain of banks in a period of 30 to 45 days, and there seems no reason to think that, in the ordinary way, such documents would have been unavailable at the date of discharge, let alone 5 June 2020, the due date for payment by CACIB under the Letter of Credit in favour of PPT. There is no evidence before the court as to what happened to the original shipping documents or the basis upon which the *Indigo Nova* discharged the Cargo. No original documents ever came to PPT or its bank BOC and in correspondence, Shandong said that it never received original documents from Zenrock. Whether Zenrock received them from SOCAR or whether SOCAR received them from TOTSA is unknown but it is to be inferred, and Ms Shinya expressed the view, that they never got beyond SOCAR, if indeed they got that far. Given the discharge in China, it may be inferred that TOTSA, which purchased the Cargo from Zenrock after selling it to SOCAR, never sent any documents to SOCAR in accordance with the practice referred to at para 61 of Mr Shimazaki's Interlocutory Affidavit (see [48] above).

85 It was in these circumstances that on 16 April 2020, CACIB received a "Documentary Remittance" from BOC relating to the Letter of Credit. PPT presented the PPT Invoice and the LOI in order to trigger payment under the Letter of Credit. No other shipping documents were presented and under the terms of the Letter of Credit there was no need for anything else. COVID-19 restrictions may have meant that the passing or handling of documents down the chain of sellers and banks might have been more delayed than usual.

86 It was on 21 April 2020 that Zenrock issued a "Collection Instruction" to CACIB relating to the TOTSA Receivable due under the Fabricated Zenrock-TOTSA Sale Contract. The Collection Instruction enclosed Zenrock's invoice to TOTSA in the amount supposedly payable by TOTSA under the Fabricated

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Zenrock-TOTSA Sale Contract and Zenrock's letter of indemnity in favour of TOTSA.

87 On 22 April 2020, CACIB sent an "Advice for Receipt of Documents" to Zenrock, informing the latter that the PPT Invoice and the LOI had been received and that all the terms and conditions of the Letter of Credit had been met for payment. On the same day, CACIB emailed TOTSA to reiterate its entitlement under the CACIB NOA to the TOTSA Receivable and instructing TOTSA to "pay on due date all such … sales proceeds … directly to [CACIB] … as assignee", without referring to any specific price payable.

88 On 23 April 2020, TOTSA sent an email to Zenrock, the contents of which I have referred to at [13] above. The 23 April 2020 Email (which was copied to CACIB and ING) stated as follows:

> 1. TOTSA has received from ING, NV Singapore Branch ('ING') and from Credit Agricole Corporate & Investment Bank Singapore Branch ('CA') notices claiming that each of them was entitled to the same sale proceeds related to the contract between TOTSA Total Oil Trading SA ('TOTSA') and Zenrock Commodities Trading Pte Ltd ('Zenrock') of sale of 920,000 US Barrels of Djeno, FOB from the 04 April to the 05 April 2020 dated 30 March 2020 (the 'Contract'). The Contract provided that Zenrock could assign the sale proceeds without any further consent from the Buyer.
>
> 2. Zenrock asked TOTSA on March 31, 2020 to approve an assignment of proceeds to ING (the 'ING NoA'). TOTSA acknowledged receipt of the email and started its review of the [ING NoA] but didn't countersign it.
>
> 3. On April 1st, Zenrock asked TOTSA not to approve the ING NoA as there was a mistake from Zenrock's part, and that actually the proceeds had been assigned to CA. …
>
> 4. TOTSA countersigned the notice of assignment in favour of CA …

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> 5. For the last couple of days, ING and CA have been both putting TOTSA on notice with respect to their rights to the same proceeds related to the Contract.
>
> 6. Zenrock should of course explain urgently the situation to ING, CA and TOTSA.
>
> 7. TOTSA is willing in good faith to pay the legitimate beneficiary of the proceeds of the Contract. Accordingly, TOTSA would like, unless Zenrock should urgently show any valid cause why there is not an enforceable assignment in favour of at least one of the banks, and in fulfilment of its obligations to pay under the Contract, to pay the monies into an escrow account set up by the lawyers acting for either of ING or CA or as is otherwise acceptable to them, so as to allow them to determine which bank is entitled to the monies whilst having those monies secured between them.

89 The 23 April 2020 Email revealed that the purchase of the Cargo by Zenrock from TOTSA had been double financed with more than one grant of security. CACIB considered that there was also a serious concern as to whether PPT had marketable title to the Cargo when it purported to sell and invoice Zenrock for it and whether there were original bills of lading which could be produced by PPT.

90 On 24 April 2020, CACIB called PPT and requested information concerning the bills of lading relating to the Cargo. Mr Cazals followed up with an email to PPT making the following requests and queries:

> Could you please provide us with a copy of the Bills of Lading (Front and Back)?
>
> Could you please advise, where are the original Bills of Lading currently?
>
> Could you please advise when your company will be able to send to our Bank the 3/3 original Bills of Lading endorsed to Crédit Agricole order?

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91 On the same day (24 April 2020), CACIB called and informed BOC not to release payment to PPT under the Letter of Credit. However, later that day, BOC sent CACIB a SWIFT message, chasing for acceptance of the documents supplied pursuant to the Documentary Remittance sent on 16 April 2020, but also saying that under Art 16(f) of the UCP 600, CACIB was precluded from claiming that the documents did not constitute a compliant presentation. BOC also reserved the right to claim interest from CACIB in the event that payment was made after 5 June 2020.

92 PPT did not reply to CACIB's email of 24 April 2020. On that same day, Mr Uehara, in a WhatsApp exchange with Mr Lai, asked the latter whether the Cargo had already been sold. The answer given by Mr Lai was in these terms:

> Yes it was sold. Is TOTSA cargo, they have sold and put us in the chain. You see any issue on that?
>
> [*sic*]

93 This led to a further question from Mr Uehara asking who the buyer was. Mr Lai said he would check and confirm. Mr Lai later responded that Shandong had sold to PPT and PPT had sold to Zenrock. Mr Uehara said that CACIB had not accepted the documents even though they were in order and BOC was unwilling to discount the proceeds payable under the Letter of Credit in favour of PPT. BOC was asking PPT to pay the amount which it had paid to Shandong. After saying that he had checked the position with his managing director at Zenrock, Mr Tony Lin, Mr Lai informed Mr Uehara on 25 April 2020 that the CACIB documents had been received by Zenrock the preceding day (24 April 2020) and would be approved by Zenrock. Mr Lai reassured Mr Uehara that "it [was] still within 5 banking days". Mr Lai explained that he had asked Mr Lin who the buyer was but had not been told, and that he would continue to enquire.

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Mr Lai also appears to have confirmed to CACIB that the documents were compliant with the Letter of Credit that day.

94 Sometime later (but still on 25 April 2020), Mr Lai reverted to tell Mr Uehara that "we sold [the Cargo] back to TOTSA". Mr Uehara acknowledged the same.

95 CACIB responded to BOC later that day (25 April 2020), suggesting that BOC should not advance funds to PPT on or before 5 June 2020. There followed correspondence between BOC and CACIB between 27 April 2020 and 19 May 2020, in which CACIB sought verification of the sale of the Cargo by PPT, including production of the original bills of lading, and brought to BOC's attention that the "documents presented to BOC are likely to be part of a scheme to defraud banks". BOC continued to insist that payment be made.

96 In the meantime, PPT had not responded to CACIB's email of 24 April 2020 seeking verification of PPT's purported sale and information about the original bills of lading (see [90] above). Since no response was forthcoming from PPT, Mr Cazals sent chaser emails to PPT on 27 and 28 April 2020. PPT remained silent, which created greater suspicion at CACIB.

97 On 27 April 2020, TOTSA sent a further email to CACIB and ING. In this email, TOTSA stated (among other things) that:

> On the face of the two NoAs received, but without access to any other documents you might each be holding, it seems that the NoA in favour of ING, NV Singapore Branch ('ING') should take priority and consequently give rise to the payment of the proceeds, as TOTSA received it on March 31st, 2020, *ie* before the NoA in favour of Credit Agricole Corporate & Investment Bank Singapore Branch (received on April 1st). Please let us know if you disagree with such an analysis.

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98 The next day, on 28 April 2020, TOTSA sent a further email to CACIB's Mr Cazals, which I have referred to at [14] above. The 28 April 2020 Email informed Mr Cazals that:

> Based on the document you sent us it appears that the original terms of our contract have been misrepresented to you.
>
> Please find attached for your review our contract and the deal recap sent on March 30; besides, we can confirm that the terms of the price clause have not been amended.
>
> We are very concerned by the fact that Zenrock appears to have misrepresented the terms of our contract to you in addition to the fact they had already assigned the proceeds of the contract to ING. In that respect we hope to be in a position to clarify the situation rapidly.

99 The 28 April 2020 Email to CACIB attached a copy of the True Zenrock-TOTSA Sale Contract, which showed that the actual sale price to TOTSA was Platt's minus US$3.60 (and not Platt's plus US$3.60). It now appeared that the price terms originally presented by Zenrock to CACIB had been dishonestly altered so as to inflate the price of the Cargo, thereby allowing Zenrock to obtain the drawdown of a larger sum for payment by CACIB to PPT under the Letter of Credit.

100 These revelations by TOTSA raised further concerns for CACIB. On 4 May 2020, CACIB wrote yet again to PPT since PPT still had not replied to any of Mr Cazals' earlier emails. The relevant parts of CACIB's letter read as follows:

> By your LOI you warranted to us that you were entitled to receive from your supplier and transfer to us the Bills of Lading. You further warranted that you had title to the Cargo.
>
> In the LOI you also agreed to indemnify us against all losses we may suffer by reason of the Bills of Lading remaining outstanding or a third party claiming an interest in or lien on the shipment or the proceeds thereof.

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> Accordingly, and pursuant to the terms of the LOI, we hereby require you to:
>
> > deliver to us forthwith the Bills of Lading, should you not be in a position to deliver the Bills of Lading to us forthwith, specify a date on which delivery will occur and the reasons for such delay; and
> >
> > provide to us any other documents supporting your warranted title to the Cargo, including but not limited to evidence of your own purchase from your supplier.
>
> Please note that time is of the essence.

101 On the same day (4 May 2020), HSBC filed an application to place Zenrock in judicial management ("the JM Application"). Zenrock was placed under interim judicial management on 8 May 2020. The timing of the JM Application was significant because HSBC's allegations and the ensuing investigation by the Commercial Affairs Department reinforced CACIB's own concerns about the sale of the Cargo by PPT.

102 Hence, on 5 May 2020, CACIB again wrote to PPT informing PPT of the JM Application, and requesting PPT to "proceed with caution on all transactions for the purchase and sale of the Cargo". The letter went on to seek confirmation from PPT that PPT would be in a position to obtain clear title to the Cargo and receipt of bills of lading from its supplier in a timely manner.

103 On 7 May 2020, CACIB received an email from Mr Zhang Taiming of Zenrock, attaching copies of the following documents without any further explanation in the covering email:

(a) a contract dated 26 March 2020 from SOCAR to Zenrock;

(b) a contract dated 30 March 2020 from Zenrock to TOTSA (which was the True Zenrock-TOTSA Sale Contract);

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(c) a contract dated 1 April 2020 from Zenrock to Shandong (*ie*, the Zenrock-Shandong Sale Contract);

(d) a contract dated 2 April 2020 from PPT to Zenrock (*ie*, the PPT-Zenrock Sale Contract);

(e) a notice of assignment dated 1 April 2020 from Zenrock to TOTSA (*ie*, the ING NOA);

(f) a bill of lading dated 6 April 2020;

(g) an invoice dated 9 April 2020 from Zenrock to Shandong;

(h) an invoice dated 9 April 2020 from PPT to Zenrock (*ie*, the PPT Invoice);

(i) an invoice dated 20 April 2020 from SOCAR to Zenrock;

(j) an invoice dated 21 April 2020 from Zenrock to TOTSA; and

(k) a letter of credit dated 3 April 2020 issued by ING.

104 These documents revealed to CACIB the round-trip transactions between Zenrock-Shandong-PPT-Zenrock and that Zenrock had produced a fabricated sale contract between itself and TOTSA (*ie*. the Fabricated Zenrock-TOTSA Sale Contract) at an inflated price (Platt's plus US$3.60) in order to fraudulently induce CACIB to issue the Letter of Credit, when it in fact had already entered into the True Zenrock-TOTSA Sale Contract at a much lesser price (Platt's minus US$3.60). Zenrock also had apparently assigned the TOTSA Receivable due under that contract to ING, which had financed Zenrock's purchase from SOCAR with a letter of credit dated 3 April 2020, the

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same date as the Letter of Credit issued by CACIB to finance Zenrock's purchase of the Cargo from PPT under the PPT-Zenrock Sale Contract. Zenrock had also fraudulently represented to CACIB that the contract of sale between Zenrock and TOTSA was worth approximately US$6,624,000 more than the actual contract price under the True Zenrock-TOTSA Sale Contract.

105 It was on 12 May 2020, more than two weeks after CACIB first asked PPT for the bills of lading, that PPT finally responded to CACIB, aligning itself with BOC's position and requiring payment, whilst refusing to provide any evidence on the whereabouts of the original bills of lading. The relevant part of PPT's letter reads as follows:

> Our advising bank, Bank of China Limited Singapore ('BOC'), had on 16 April 2020 provided you with (i) our signed commercial invoice and (ii) the LOI (collectively, the 'Documents'). The presentation of the documents by BOC to you has been done pursuant to and in line with Field 46A of the Letter of Credit issued by you on 3 April 2020 pursuant to Zenrock's instructions in relation to the Cargo …. Given the presentation of the Documents to you, we fail to see any basis for your request for the original shipping documents in relation to our contract with Zenrock and the Letter of Credit as set out in your letter dated 4 May 2020 (which we received on 7 May 2020). We expect you to fully honour the Letter of Credit and BOC will continue to correspond with you in that regard.

106 On 15 May 2020, CACIB wrote again to PPT, reiterating the circumstances concerning PPT's sale of the Cargo and the Letter of Credit, and referred to the appointment of a judicial manager to oversee the affairs of Zenrock on the basis of allegations raised in the JM Application concerning dishonesty as well as sham and/or illegal transactions intended by Zenrock to defraud banks. CACIB repeated its request to PPT to provide the bills of lading and all documents referred to in the LOI. CACIB also sought confirmation that the representations and/or warranties in the LOI were true.

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107 On 22 May 2020, Ms Shinya, who had been chasing Shandong for information about the identity of its seller and for the supply of the original shipping documents for which it was being chased by CACIB, was told by Shandong that the supply chain ran from Total-Zenrock-Shandong-PPT-Zenrock-Total. No reference was made to SOCAR.

108 On the same day, PPT wrote to CACIB, essentially repeating the contents of its earlier letter dated 12 May 2020 (see [105] above). It did not respond to CACIB's demands for the original shipping documents or give any confirmation in relation to the title of the Cargo. By 26 May 2020, being the date on which the Cargo was due to be discharged from the vessel *Indigo Nova* in Qingdao, China, PPT had still failed or refused to provide the requested documents and confirmation. CACIB once again wrote to PPT requesting the same on an urgent basis.

109 On 27 May 2020, PPT responded to CACIB's requests by repeating its earlier position. This led to CACIB's application to the High Court for an *ex parte* interim injunction to prevent payment under the Letter of Credit. The terms of the injunction were: "[p]ending trial or further order … payment be prohibited under or pursuant to the … Letter of Credit". That injunction, which was granted by a High Court judge ('the Judge") on 28 May 2020, meant that CACIB could not make payment on 5 June 2020, which was the due date for payment under the Letter of Credit. CACIB could not therefore be in breach of the Letter of Credit contract in not paying at that date.

110 Pursuant to suggestions made by the Judge when parties returned before him on 13 August 2020, the parties entered into negotiations which resulted in the payment of the sum claimed. There was an issue between the parties as to

whether or not that payment constituted payment under the Letter of Credit. Correspondence has been provided to the court between the lawyers acting for CACIB and PPT, from which it is clear that the form of the BOC Guarantee was the subject of negotiation between them. In that correspondence, both the lawyers acting for CACIB and the lawyers then acting for PPT stated their understanding that the Judge had intended payment to be made under the Letter of Credit and a bank guarantee to be provided as security for its repayment, should the Court decide in favour of CACIB. The form of the BOC Guarantee confirms this understanding and the fact that the parties treated the payment made by CACIB as a payment under the Letter of Credit. The BOC Guarantee, after reciting the existence of the two suits commenced by the parties in the High Court and the order for consolidation of the two (see [16] above), recited the injunction and went on as follows:

> Whereas
>
> The price of the cargo had been determined to be USD 23,662,732.50 and the amount of USD 23,662,732.50 would have been due to be paid by CA to PPT on 5 June 2020 pursuant to the terms of the Letter of Credit
>
> Whereas
>
> Pursuant to the directions given by the Honourable Justice Dedar Singh Gill at the hearing of the injunction application on 13 August 2020, PPT has requested for us to provide this conditional guarantee to CA as security for the repayment by PPT of the amounts paid by CA to PPT, or to PPT's order, under the Letter of Credit.
>
> Whereas
>
> The sum of USD 23,662,732.50 has been or will shortly be paid by CA to the order of PPT under the Letter of Credit pursuant to the proceedings in respect of the injunction application and subject to a final disposition of the consolidated suit. …
>
> …
>
> Now, we Bank of China Limited, Singapore branch … hereby on and from the effective date irrevocably and unconditionally

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> guarantee the punctual payment by PPT to you of the sum of USD 23,662,732.50 (the 'guaranteed sum') promptly after the occurrence of the demand date and, in any event by the date falling on or prior to the payment date.

111 The BOC Guarantee would crystallise on the first business day following judgment in the consolidated suit or, if there was an appeal, judgment in the Court of Appeal. The BOC Guarantee was obviously the subject of negotiation and its terms, in referring to the sum which "would have been due" on 5 June 2020 pursuant to the terms of the Letter of Credit", to the guarantee "as security for the repayment by PPT of the amounts paid by CACIB to PPT or to PPT's order under the Letter of Credit" and to the sum which "has been or will shortly be paid by [CACIB] … under the Letter of Credit pursuant to the Proceedings in respect of the injunction application", can be taken as carefully drafted. I have no doubt that PPT's (as well as BOC's) lawyers were involved in this drafting and this reflects the agreement reached between the parties that the sum payable under the Letter of Credit should be secure for both parties pending the determination of the issues between them. It is thus clear, in my judgment, that the parties agreed that the sum payable under the Letter of Credit was not due on 5 June 2020 by reason of the injunction and that the payment made in November 2020 following the discharge of the injunction on 13 November 2020 (see [7] above) was a payment "under the Letter of Credit". This may or may not have significance in the context of the terms of the LOI.

112 The location of the original shipping documents remains unknown. They have never reached PPT nor Shandong, according to correspondence from Shandong to PPT.

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Conclusions on the evidence as to PPT

113 I have already said that I could not accept the evidence of the PPT witnesses that they did not understand Zenrock to be involved in round-tripping of the Cargo. The effect of all the evidence, including, in particular, the communications which revealed Zenrock to have a place in the chain above and below PPT, combined with the virtually instantaneous change in Zenrock's position of a proposed seller to PPT on 2 April 2020 to becoming a buyer from PPT, make it impossible to believe PPT's evidence. Nonetheless, I have to accept the evidence that the PPT witnesses did not know that the prices in the round-tripping transactions in which they participated were well above market prices, which is one of the other essential pieces of knowledge that must be attributed to PPT if it is to be said that PPT had participated in Zenrock's fraud on CACIB.

114 The question arises, just the same, as to what the PPT personnel thought was going on and what was the reason for this circular trading. On the evidence, the short answer to that is that they did not know and did not trouble to find out because they never asked such questions when they were asked to act as a "facilitator" or "go-between" to be interposed in a transaction which was pre-structured by one of the parties to the arrangement, who also pre-determined the terms of the "in and out" trades. Their interest was confined to the profit that they would make and ensuring that they were secured for their sale price under a letter of credit. They looked to BOC for advice to ensure the latter.

115 In these circumstances, although PPT is hardly an "innocent bystander", it cannot be said to be a participant in Zenrock's fraudulent scheme, despite its awareness that Zenrock had purchased the Cargo from SOCAR before buying it from PPT, further down a chain of sales and purchases. It cannot properly be

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said that PPT had actual knowledge of, or was wilfully blind to, the fact that this was a fraudulent scheme because it had, in this case, been offered a pre-structured deal, similar to those in which it had taken part in the past, all of which had gone through successfully without any suggestion of fraud. The very nature of such pre-structured deals, whether or not properly called "credit sleeves" or "sleeves", requires them to be concluded because of a desire to keep a low profile or avoid direct relations between one party or another. This meant that the prices offered by the organiser (in this case Zenrock) were not negotiated in the ordinary sense of the word, but were essentially pre-determined with minimal negotiation of the margin or commission. In the absence of knowledge that the prices were much higher than the market price at the time, PPT would not know that it was facilitating over US$9m more credit being provided by CACIB over and above the true value of the Cargo. The credit period difference in the sale and purchase, whilst not the original purpose behind the transaction, did bear some resemblance to a credit sleeve transaction as the term is more properly used.

116 In trading of this kind, it is not significant that the Cargo was being offered two to three days before loading and without Zenrock making any nomination of the vessel to PPT. The restructuring of the deal which was arranged by Zenrock meant that this was of no significance, even though the PPT's operations department essentially went through the business of passing nomination and documentary instructions up the chain on the F.O.B. purchase to Shandong. Zenrock was known to be organising the deal where Trafigura had previously made the nomination and documentary instructions, which PPT had passed on to Zenrock in its then position as PPT's seller (see [68] above). Further, the fact that Trafigura had previously been a projected purchaser from PPT in the chain of sales and Glencore had required presentation of original

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shipping documents or a letter of indemnity countersigned by PPT's bank to trigger payment by it (and this was undoubtedly an unusual occurrence, particularly if payment was to be made by TT as opposed to by letter of credit), these would appear as more of a comment on PPT's creditworthiness than necessarily a problem with the transaction under the PPT-Zenrock Sale Contract itself.

117 CACIB's expert in oil trading pointed to all these features as anomalies which ought to have signalled "red flags" to PPT and it might be thought that this, with some of the other matters, including in particular the round-trip nature of the transactions would raise questions in PPT's collective mind. It is nonetheless trite law that a beneficiary under a letter of credit owes no duty of care to the issuing bank in presenting documents for payment (see, *eg*, *DBS Bank v Carrier* ([21] above) at [104]–[106]) and the absence of any enquiry or any attempt to ascertain what lay behind the round-tripping and the presence of unusual features in the transaction (particularly in the absence of knowledge of the high prices involved), cannot be said to amount to dishonesty *per se*, nor can dishonesty be inferred from these elements of knowledge, even if all taken together.

118 In the result, I cannot conclude, on the evidence, that PPT's personnel were dishonest or that they had "blind eye" knowledge of a fraud to be perpetrated on CACIB by Zenrock in relation to the passing of title in transactions forming part of the chain of sales after the PPT-Zenrock Sale Contract. Nor, on the evidence, can I conclude that PPT's personnel were dishonest or that they had "blind eye" knowledge of the real fraud to be perpetrated on CACIB by Zenrock in procuring the issue of the Letter of Credit

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with an inflated price, well above the market price, via the provision of the Fabricated Zenrock-TOTSA Sale Contract and the Duplicate NOAs.

The absence of any fraudulent misrepresentation

119 As the evidence emerged, it became clear that the PPT witnesses did not know the reason for the round-tripping transactions and did not ask because it was never their practice to do so in pre-structured back-to-back transactions of the nature of that in dispute here. Although PPT had denied that it was aware of the round tripping-nature of the transactions, I find that at least Ms Yano and Mr Uehara were so aware, but did not consider that this was part of a fraud to be perpetrated on CACIB. Mr Shimazaki's position is less clear but, given the evidence as to the limited amount of business of the trading group at PPT, which he supervised, it is hard to see how he could not have been aware also, but with the same lack of understanding that any fraud was to be perpetrated on CACIB. When asked to act as a go-between in a pre-structured deal, for what amounted to a relatively small commission in the shape of the margin between purchase and sale price, the PPT witnesses assumed that the requesting party (in this case Zenrock) had its own reasons for seeking such a go-between which it was unlikely to divulge. Equally, because it was a pre-structured deal, in which the profit margin was fixed because Zenrock pre-determined the prices for PPT in the back-to-back transactions (*viz*, the Shandong-PPT Sale Contract and the PPT-Zenrock Sale Contract), PPT did not consider it necessary to investigate the market price of the product and in this case did not do so, although it had access to the market prices of Djeno crude oil on a daily, but not a real time basis. Each of the PPT witnesses who was asked, said that they did not check the market price of the Djeno crude oil at the time and only became aware of

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the disparity in comparison to the round-tripping trades during the course of the litigation.

120 Despite pleas that the round-tripping transactions were not "*bona fide* transactions" or were "paper round-tripping transactions" and the contention that these transactions were "sham" in the sense that they were not intended to be genuine sale and purchase contracts at the prices set out therein and for which letters of credit were provided, I could not see that this was sustainable. For a transaction to be "sham", it is necessary for all the parties to that transaction who have a common subjective intention that the transaction documents are not to create the legal rights and obligations which they give the appearance of creating (*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802). The motive for a transaction is not in itself determinative of whether it is a sham or not. It does not matter whether there is an ulterior purpose lying behind the transaction since the question is whether the transaction documents do give rise to the rights and liabilities set out therein. Whether or not the transaction documents appear artificial or uncommercial is neither here nor there. What is required for a sham is a finding the parties to the sham were dishonest in creating a pretence of a transaction in order to deceive others when there was in reality no such transaction.

121 Here, the parties in a chain of sales intended to enter into real sale and purchase transactions which, on their face, provided by recap emails for all the elements which constituted genuine sales, with specific provisions relating to the trades including details of the oil to be sold, quality and quantity provisions and terms relating to price, delivery, payment, lay time and demurrage, applicable law and jurisdiction, assignment, anti-corruption provisions and trade restrictions. Payment of the price was to be made by letter of credit against

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the provision of the seller's commercial invoice and original bills of lading and other usual shipping documents, in accordance with TOTSA's "General Terms and Conditions for F.O.B. Sales of Crude Oil" ("the TOTSA T&Cs") which were incorporated, save that where the original shipping documents were not available by the due date for payment, payment was to be made against the seller's invoice and the seller's letter of indemnity.

122 The sale from PPT to Zenrock, as with all the other sales in the chain, incorporated the TOTSA T&Cs, in addition to the basic terms set out in recap email. The relevant terms of the TOTSA T&Cs provided:

> Section II – DELIVERY TERMS AND PASSING OF RISK OF PROPERTY
>
> II.1 The oil shall be delivered to Buyer in bulk if owed be at the Loading Thermal, on to Vessel (s) be provided by Buyer.
>
> Notwithstanding any right of Seller to retain the shipping documents until payment, risk and property in the Oil and all liabilities with respect thereto shall pass to Buyer when the Oil passes the flanged connection between the delivery hose and the permanent hose connection of the Vessel at the Loading Terminal.
>
> …
>
> Section IV – INVOICING AND PAYMENT
>
> IV.1 The price of the Oil and the due date for payment shall be as specified in the Special Terms and Conditions.
>
> Payment of the full amount of Seller's invoice shall be made without any discount … by wire transfer of immediately available funds … against presentation to Buyer by means of courier, facsimile transmission and/or electronic messaging system, of an invoice and either the original bills of lading and other contractual documents or a letter of indemnity, as provided for in Section X.
>
> …
>
> Section X - DOCUMENTS

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> Seller shall deliver to Buyer original bills of lading and certificates of quantity, quality, origin and an invoice, which may be by means of courier, facsimile transmission and/or electronic messaging system. In the event that the original bills of lading or other contractual shipping documents are not delivered by on or before the due date for payment, Buyer undertakes to pay Seller upon presentation, by means of courier, facsimile transmission or electronic messaging system, of an invoice and of Seller's letter of indemnity ('L.O.I.') substantially in the form set out in Appendix 1.

123 There was no evidence that any of the traders in the chain did not intend property to pass in the Cargo in accordance with the terms of the sale and purchase contracts which they concluded. Whether or not the parties to those transactions ever expected original shipping documents to be provided (and the evidence was that those represented in court did not: see [49] above) is nothing to the point. Trading in oil products frequently involves what amounts to little more than trading in documents with the product being delivered to the ultimate purchaser, with money and documents being exchanged by the intervening participants in the chain from original supplier to that ultimate purchaser. That does not make the transactions any the less genuine or mean that property in the goods does not pass. Whether or not the round-tripping transactions were concluded for the purpose of securing funds for Zenrock from its sale to Shandong greater in amount and more quickly than its sale to TOTSA, and whether or not a fraud was committed by Zenrock against CACIB in the provision of the Fabricated Zenrock-TOTSA Sale Contract and the issue of the Duplicate NOAs to the two banks which financed its purchases from SOCAR and PPT, the round-tripping transactions were genuine sales and purchases under which it was intended that the Cargo should be sold, title in it should pass and payment should be made. To label them as "financing transactions", "sleeve transactions" or "credit sleeve transactions" does not change their character as real transactions whatever the underlying purpose of them might be, as long as

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the intention of the parties to them was to effect a sale or purchase as the case might be.

124 The case made by CACIB ultimately appeared to turn on whether or not PPT was ever in a position to transfer "marketable title" to Zenrock, which was the expression which appeared in the LOI. CACIB's contention was that PPT could not do so because there were no original shipping documents circulating in the chain and because it was never envisaged that there would be. Since property in the Cargo passed at the vessel's flange at the loading port under the chain of F.O.B. sales by reason of the TOTSA T&Cs which governed all the transactions in the chain, and each party in the chain down to Zenrock was able to deliver contractually-compliant documents against which the price was payable, the sales and purchases were all fully effective as sales contracts up to that point, whether a fraud was being perpetrated or not. The contracts were no different from what they purported to be, with whatever legal effect they had in accordance with their terms.

125 Zenrock too, could deliver conforming documents to TOTSA to secure payment on the True Zenrock-TOTSA Sale Contract and had there been no fraud on CACIB, involving a fabricated version of that contract with an inflated price (the Fabricated Zenrock-TOTSA Sale Contract) and the issuance of the Duplicate NOAs in respect of the TOTSA Receivable, there would have been no issue about transfer of title, regardless of the absence of any transfer of original shipping documents. By sending the Cargo in a round-tripping sequence of transactions, Zenrock did not deprive itself of the ability to deliver the Cargo to TOTSA but, in the absence of the fraud it would have suffered a huge loss because the true purchase price payable by TOTSA was less than all the prices in the round-tripping transactions and much less than the price

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represented to CACIB in the Fabricated Zenrock-TOTSA Sale Contract. There was nothing wrong or ineffective about the individual sales themselves, save for the Fabricated Zenrock-TOTSA Sale Contract.

126 Whilst each party in the chain appears, under the TOTSA T&Cs, to have been entitled contractually to the delivery of the original shipping documents from its seller, after presentation of the invoice and letter of indemnity to obtain payment, the evidence showed that, as a matter of commercial practice, traders in legitimate unquestionable chains did not always insist on this and the cargo was delivered to the ultimate receiver without such documents ever reaching it (see [49] above). In pre-structured back-to-back transactions this appeared nearly always to be the case. Title would pass without any issue, whether described as marketable or otherwise, without regard to the original shipping documents, which in all probability were never, as in the present case, put into circulation beyond the original supplier and its affiliate, as appears below.

127 CACIB's case was that the round-tripping transactions were concluded as part of a fraudulent scheme but if the contracts were real contracts and were not sham, how could the PPT Invoice or the LOI, in themselves, be said to be fraudulent or contain fraudulent misrepresentations as to the transfer of marketable title and how could presentation of the two, individually or collectively, amount to such a misrepresentation?

128 The terms of the PPT Invoice contained no express representation of any kind as to title or the passing of title. It was addressed to Zenrock, described the goods, the port of loading as Djeno, the vessel as the *Indigo Nova*, the nature of the trade (F.O.B.), the documentary credit number, the bill of lading date, the date for payment, the bill of lading quantity, the unit price and the total amount

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payable. Whilst it can be said that there was an implied representation as to an agreement for a sale to which the invoice applied and to the terms of which it referred, there was in fact such an agreement (the PPT-Zenrock Sale Contract) which, as I have explained earlier at [120]–[121], was not a sham. There is no basis upon which it could be said that there were any false express representations in the PPT Invoice about the passage of title under the underlying contract of sale, which would be governed by the express terms of the PPT-Zenrock Sale Contract and the TOTSA T&Cs, which were incorporated. Nor, in accordance with hornbook principles of law could it be said that there were any implied representations about the passage of title.

129 Whilst it was initially alleged that there were a number of false representations in the LOI, that case was only faintly pursued at the hearing in relation to one implied representation, said to arise from the statement in the LOI that original bills of lading were not available, apart from the alleged fraudulent misrepresentation of marketable title which was said to be made by the presentation to CACIB of the PPT Invoice and the LOI.

130 If reference is made to the terms of the LOI set out at [5] above, it can be seen that PPT had represented that it was unable to provide "the requisite shipping documents in relation to the said sale [*ie*, the sale under the PPT-Zenrock Sale Contract]", which was obviously true at the time the LOI was presented on 16 April 2020. The requisite shipping documents were defined in the LOI as consisting of a full set of original and non-negotiable copies of clean on-board bills of lading "issued or endorsed to the order of [CACIB]". It is self-evident that if the original documents were not in the hands of PPT, it could not endorse the bills of lading to the order of CACIB. Contrary to CACIB's original contention that there was an implied representation that documents in that form

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existed at the time of the presentation of the LOI, such an implication would be inconsistent with the actual representation of an inability to provide such documents, which had been made by PPT via the terms of the LOI. Nor is there any basis for implying a representation that documents existed which were capable of being endorsed to the order of CACIB at that time. In fact, as a matter of theory, the original bills of lading which were made out "to the order of [TOTSA]" were in fact capable of being endorsed by TOTSA to its purchaser SOCAR, and on down the chain through Zenrock to Shandong and on to PPT who could again endorse them in favour of Zenrock. The reality is that there is no basis for any implied representation in the LOI above and beyond the representation of inability, at the time of presenting the LOI, to provide the requisite shipping documents. An expression of inability to provide documents does not tally with any representation that such documents exist, will come into existence or are capable of being brought into existence.

131 As to any representation in relation to title, the LOI itself contains a number of warranties. A contractual warranty, in the sense of a contractual promise that a given state of affairs exists or has existed, does not amount to a representation in the terms of the warranty itself. A warranty is a promise, not a representation. PPT relies upon the decision of Andrew Baker J in *Idemitsu Kosan Co Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm) (at [14]–[22] and [30]–[31]) in support of this proposition which, to my mind, is self-evident in any event. It appeared to be recognised by CACIB that the other alleged representations based on the express warranties in the LOI which it had pleaded, could not be said to have been made by PPT, except for the alleged fraudulent misrepresentation as to PPT's marketable title, which was made by presenting the LOI, together with the PPT Invoice. There can, however, be no grounds for drawing a distinction between the different warranties in the LOI

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and contending that one such warranty constitutes a representation when the others do not.

132 When the PPT Invoice and the LOI themselves, by their terms, contain no representation as to title, I am unable to see how the presentation of the two documents together to CACIB in order to secure acceptance and payment under the Letter of Credit, can be said to amount to any representation about title or marketable title at all. The LOI contained warranties in relation to title and the reality is that the only case which CACIB could legitimately make in relation to title was that the warranties in the LOI had been broken.

133 Furthermore, whilst the PPT witnesses were somewhat defensive about their knowledge of the legal aspects of the trades in which they were involved, there was no basis upon which I could conclude that any of them thought that PPT did not have marketable title to convey to Zenrock, whatever that expression meant. The issue of misrepresentation is governed by Singapore law, as opposed to the LOI, in which the phrase "marketable title" occurs, which is governed by English law. In ordinary parlance the phrase would be taken to mean saleable title and a person using it might be taken to mean that he was, as owner, able to sell the goods in question in such a way as to grant ownership to the buyer.

134 In cross-examination, the PPT witnesses, when asked, stated that the sales were real but could add little more than that, save to refer to the notion that property in the oil passed at the vessel's flange at the loading port. They considered that PPT was able to pass ownership of the Cargo to a buyer. They could give no meaningful evidence as to what was meant by "marketable title" and as it could be said to be a legal concept, their evidence was that it lay outside

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their sphere of understanding. They did not use the phrase themselves in their dealings in these trades nor in their dealings with CACIB. All that happened was that the LOI, which contained the phrase, was presented by PPT and the reality is that the individuals at PPT gave little or no thought to its contents, as it was in the form which had been agreed in the terms of the pre-structured deal arranged by Zenrock for both legs of the transaction in which PPT was engaged. It was a form of words in what they saw as a fairly standard type of document used in their method of trading. They could not have known if there was any special meaning given to that phrase in the LOI as a matter of English law. In consequence, there is no basis for any finding that they knowingly made any representation that was false in relation to marketable title when presenting the PPT Invoice and the LOI to CACIB.

135 The question of the meaning of the terms in the LOI as a matter of English law and the question whether or not PPT did have marketable title at any point is a matter which is the subject of discussion later in this judgment in relation to the claim for breach of the warranties found in the LOI.

136 In the result, I was unable to see how the PPT Invoice or the LOI would be said to be false or fraudulent in themselves or how it could be said, on the basis of the case made by CACIB, that PPT misrepresented the position on marketable title or was involved in a scheme to defraud CACIB which would provide a defence to payment under the Letter of Credit. In those circumstances, the documents should have been accepted by CACIB by midnight on 23 April 2020 and payment should have been made under the Letter of Credit on 5 June 2020.

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The issues relating to the Letter of Credit

137 The parties produced an agreed list of issues for the purpose of the proceedings ("the List of Issues") which, I do not propose slavishly to follow, particularly since, as a result of some of my findings, some of those issues are irrelevant or do not arise. Nonetheless, with an eye to that list, and in the light of the evidence, I set out my conclusions in relation to the claim for payment under the Letter of Credit.

138 As will already be apparent, it is clear, in my judgment, that PPT made a compliant presentation of documents to CACIB, through BOC, under the Letter of Credit on 16 April 2020. The effect of Arts 14–16 of the UCP 600 is that CACIB was obliged to accept the documents within the five banking day period prescribed, but it failed to do so. It also failed to give any notice of refusal to pay and discrepancies relied on as justifying such refusal. CACIB is therefore, by the terms of the UCP 600, precluded from claiming that the documents did not constitute a complying presentation.

139 There was no fraud in the presentation of the documents to CACIB and the fraud exception to the duty of an issuing bank to honour a letter of credit is therefore inapplicable. For the fraud exception to apply, there must be dishonesty on the part of the presenter of the documents to CACIB which vitiates the presentation (see *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183). In the absence of discrepant documents or a fraudulent presentation by PPT, as part of a scheme to defraud CACIB, CACIB was bound to honour the Letter of Credit. Any fraud in the underlying transaction is irrelevant to the obligation of CACIB to pay under the Letter of Credit (see *Brody* ([17] above) at [22]).

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140 The round-tripping transactions orchestrated by Zenrock could be seen as designed to secure a benefit to Zenrock in the shape of an increased sum to be paid by TOTSA under the Fabricated Zenrock- TOTSA Sale Contract, over and above the price payable under the True Zenrock-TOTSA Sale Contract, but it would be hard to see how that could succeed. The fraud perpetrated by Zenrock on CACIB, if successful would have had the effect of higher prices being paid by CACIB on behalf of Zenrock to PPT, by PPT to Shandong and by Shandong to Zenrock, as compared with the TOTSA Receivable. It was almost inevitable that the fraud would be uncovered when TOTSA was presented with two competing bank claims for the TOTSA Receivable, but if CACIB had accepted the documents presented under the Letter of Credit on 23 April 2020, Zenrock would have eased its cash flow issues, with payments due earlier than 5 June 2020, up the chain. What Zenrock hoped to achieve is uncertain and whether it intended to defraud TOTSA or to defraud CACIB alone is unknown but is irrelevant. In the absence of knowledge of the market price by PPT's personnel (see [42] above), the inflated prices payable in the round-tripping transactions, the price payable under the Fabricated Zenrock-TOTSA Sale Contract and the Duplicate NOAs, PPT was not privy to any such fraud on TOTSA in any event. If Zenrock's intention was to defraud CACIB, as CACIB has alleged, PPT was not privy to that fraud either. The vital element which was unknown to PPT was the purpose of the round-tripping transactions. Its lack of diligence in making any enquiry, investigation or consideration of the reasons for the transactions does it no credit, but that does not make it dishonest or fraudulent. Nor can it properly be said that PPT was reckless in regard to any fraud because the possibility does not appear to have crossed its collective mind or that of its traders whose consideration of these pre-structured back-to-back deals was focused simply on the commission/margin and the security of payment under the buyers' letter of credit.

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141 True credit sleeving in the sense of the provision of credit by interposing a party between two others where that credit would not otherwise be available to the buyer is a recognised industry practice, but that was not the purpose of Zenrock in effecting the round-tripping transactions. Whether or not the transactions in which PPT was involved with Shandong and Zenrock could be described as credit sleeving is ultimately neither here nor there, but in my view, it was not an apt description given the overall context of the round-tripping, despite the fact that there was a difference in the credit period allowed to Zenrock (60 days) as compared with that granted by Shandong to PPT (ten days).

142 Whilst various pejorative terminology could be applied to the round-tripping transactions, they were nonetheless genuine sales and purchases between the parties with all the incidents of such sales and purchases, including the intention to pass property in the Cargo and for it to be ultimately delivered to the ultimate receiver. PPT did not know that the round-tripping transactions were sham because they were not. The round-trip transactions were not in themselves unlawful because Zenrock was at liberty to sell and repurchase the Cargo on such terms as it wished, provided that it still fulfilled its obligations to TOTSA under the True Zenrock-TOTSA Sale Contract. The unlawfulness arose from Zenrock's fabrication of that contract (giving rise to the Fabricated Zenrock-TOTSA Sale Contract) which was presented to CACIB to obtain the Letter of Credit and the Duplicate NOAs purporting to assign the TOTSA Receivable to *both* ING and CACIB.

143 The fraud related to the procuring of the issue of the Letter of Credit to PPT and the payments to be made by TOTSA and/or CACIB with the Duplicate NOAs presumably was intended to give Zenrock more time to resolve its

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liquidity problems by causing both ING and CACIB to think that sums payable by TOTSA would accrue to Zenrock's account with each of the two banks. How much time Zenrock could have gained by this is uncertain, much depending upon the speed of any reaction by TOTSA to the demand for payment under the Fabricated Zenrock-TOTSA Sale Contract and the reaction of the two banks. PPT did not know, nor was there any reason for it to know, that the Fabricated Zenrock-TOTSA Sale Contract was or had been presented to CACIB and the terms of that contract had misrepresented the true price of the Cargo to CACIB.

144 Recklessness as to fraud does not give grounds to restrain payment under a letter of credit and PPT did not act fraudulently in such a way that there were or are grounds restrain payment under the Letter of Credit.

145 In consequence, CACIB is liable under the Letter of Credit and PPT is entitled to a declaration to that effect. CACIB's breach of the contract under the Letter of Credit occurred on 23 April 2020 when CACIB failed to accept the documents presented on 16 April 2020, which were a compliant presentation under Art 14 of the UCP 600. It was not in breach on 5 June 2020 because of the injunction granted by the High Court but its undertaking in damages means that it is potentially liable for the consequences of having obtained that injunction on grounds which are now shown to be unjustifiable. A final injunction in the terms of the interim injunction would not have been granted, had it still been in issue. The sum claimed under the Letter of Credit is now seen to be a sum which should have been paid on 5 June 2020, but which was only paid in November 2020 and was paid into an account which has been blocked by BOC by reason of the BOC Guarantee relating to repayment, which would have been paid out (subject to any appeal) if the court were to find in favour of CACIB.

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146 Furthermore, in the absence of any valid cause of action by CACIB against PPT, whether in fraud or otherwise, there is also no basis for any claim in damages in relation to the payment actually made under the Letter of Credit. Whereas it might be possible to envisage a case where payment was due under the Letter of Credit, but CACIB could have a counterclaim in an equivalent amount in respect of a separate cause of action, that does not arise here, unless there is a valid claim for breach of warranty or for an indemnity under the LOI, which is the subject of consideration in the latter part of this judgment.

147 The specific terms of the loan obtained by PPT from its Singapore subsidiary, PPT Singapore (see [16(b)] above), were not and could not have been known to CACIB at the time of the conclusion of the contract under the Letter of Credit nor could it be said to be within CACIB's contemplation. Nor could the terms of the BOC Guarantee be said to be in the contemplation of the parties at the time. The ordinary position where a sum is due but unpaid is that interest is payable on that sum at the borrowing rate available to the innocent party. These points have not been canvassed in any detail before me and, despite expressing the views that I have in this paragraph, I make no ruling in respect of any additional sum to which PPT might be entitled above and beyond the principal figure payable under the Letter of Credit, whether by way of interest or damages in one form or another.

148 Apart from any additional compensation to which PPT might be entitled, as set out above, the remaining issues turned on the nature and construction of the LOI which contained both express warranties, of which it was said that PPT was in breach, and an express indemnity given by PPT in it. Further points arose in relation to the damages claimed as a result of the alleged breaches and the loss for which the express indemnity in the LOI provided. As the LOI was

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governed by English law, I was addressed by English Queen's Counsel on those issues.

The issues relating to the LOI

The nature of the LOI

149 The questions which arise in relation to the LOI are questions of classification of its nature and questions of construction of its contents. It is said by PPT that the LOI is a unilateral contract which, in accordance with the classic definition to be found in *Chitty on Contracts vol I* (H G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) (at para 4-102), is a contract which arises when one party promises to do something if the other party carries out a specified act without the latter making any promise to do. The contract is referred to as "unilateral" because it arises without the promisee making any counter-promise to perform the stipulated act in question and is to be contrasted with a bilateral contract under which each party undertakes an obligation to do something. The classic example of a unilateral contract is given of a promise by one person to pay £100 if the other will walk from London to York, where the potential walker makes no promise to do so but accepts the offer and is entitled to the promised sum on completion of the journey to the prescribed destination. The offer can only be accepted by performance and not by any counter-promise and it can be withdrawn at any time before acceptance. There is however some dispute as to whether an offer of a unilateral contract can be withdrawn after the offeree has partly performed the stipulated act, but the better view is that the offer is accepted once the promisee commences performance, although he is only entitled to the sum promised when the stipulated act is fully performed.

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150 A letter of credit is in itself an offer of a unilateral contract which can be accepted by the presentation of conforming documents. Unusually for a unilateral contract, the offer is irrevocable because commercial considerations require it to be so. The PPT witnesses who were asked, accepted that the LOI was also irrevocable, and CACIB maintained that this showed that it could not be, in itself, an offer of a unilateral contract. Because a letter of credit is irrevocable, despite it being an offer of a unilateral contract, it does not seem to me that the fact that a letter of indemnity is irrevocable necessarily prevents it from constituting an offer of a unilateral contract. Moreover, as it seems to me, a letter of indemnity could, in any event, be withdrawn after presentation to an issuing bank in circumstances where the presenter, shortly after tendering the letter of indemnity, received the original shipping documents and wished to replace the presentation of the letter of indemnity and commercial invoice (as the case may be) by presenting the original shipping documents and, indeed, under the terms of some forms of letters of indemnity, the presenter might be bound to do so. The true character of a letter of indemnity must therefore be determined by reference to its terms, rather than some *a priori* view as to its revocability.

151 There might appear something odd about the idea that an offer of a unilateral contract in a letter of credit could be accepted by the presentation of a letter of indemnity which constituted another offer of a unilateral contract, but as the Letter of Credit provided for payment against a commercial invoice and a letter of indemnity in the form prescribed in the Letter of Credit and the PPT-Zenrock Sale Contract (which each contained the same form of words for the letter of indemnity which is to be given), it is clear that CACIB's offer to pay, as the issuing bank, could be accepted by provision of documents in that form. The LOI therefore falls to be construed in its commercial context and the PPT-

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Zenrock Sale Contract, but more particularly against the background of the offer in the Letter of Credit of which it constituted an acceptance.

152 PPT gives express warranties in the third paragraph of the LOI, as a *quid pro quo* for the payment referred to in the opening phrase of that paragraph:

> *In consideration of your making payment* of the full invoiced price of USD23,662,732.50 … for the shipment at the due date for payment under the terms of the above contract [the PPT-Zenrock Sale Contract] without having been provided with the above documents, we hereby expressly warrant that …

153 It is submitted by PPT that this amounts to an offer by PPT to give the warranties set out in the LOI only if CAIB makes the payment in question by the due date provided in the PPT-Zenrock Sale Contract and that, for these warranties to become operative, there must be full performance of the prescribed act of payment of the full amount by the due date. The LOI does not set out warranties which are to be given in the event of a mere *agreement* to pay the sum in question, nor warranties which are to be given in the event of a payment made *after* the due date. It is PPT's case that no payment was made by the due date in the PPT-Zenrock Sale Contract, which was 60 days from the date of the bills of lading, namely 5 June 2020, and that is undoubtedly true as a matter of fact. The payment was in fact made on 18 November 2020 pursuant to the accommodation reached between the parties to which reference is made earlier in this judgment (see [109]–[111] above).

154 PPT says that it is not enough to say that the LOI is given by way of acceptance of the offer in the Letter of Credit, since the terms of the LOI itself must govern the rights and obligations of the parties to it, with the result that there is no obligation to give the warranties unless payment under the Letter of Credit is first made by the due date. It is not however true to say that CACIB

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was not, as the offeree of the LOI, obliged to make the payment because it had already committed itself to do so in the offer constituted by the Letter of Credit. CACIB was bound to pay *only* if its offer was accepted by the provision by PPT of the PPT Invoice and the LOI. CACIB was not therefore simply an offeree under the terms of the LOI who could decide whether or not to make the payment referred to in the LOI in order to trigger PPT's obligation to give the warranties. Once the LOI was presented in terms which complied with the Letter of Credit, it was obliged to make the relevant payment, as this court has already found (see [138] and [145] above).

155 The question then arises as to whether, on the proper construction of the LOI, a failure by CACIB to comply with the obligations incumbent upon it under the Letter of Credit has the effect that PPT neither gives, nor is obliged to give, the warranties set forth in the LOI. I asked counsel for PPT whether a payment by CACIB which was one day late as a result of an administrative failure, whether resulting from absence of personnel in the office as a consequence of COVID-19 restrictions then in place or otherwise, would have the effect for which he contended. Unsurprisingly, he submitted that it made no difference whether payment was one day late or six months late because the offer in the unilateral contract could only be accepted by full performance, meaning in this case, payment by the due date set out in the PPT-Zenrock Sale Contract. Whilst this might appear uncommercial, CACIB had no answer, and I do not see any answer, to this point. The warranties plainly do not apply in the absence of a payment and, on the terms of the LOI, cannot apply unless there is payment *at the due date*.

156 The warranties will therefore not apply unless there was an extension of the due date so that the payment made on 18 November 2020 constituted a

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payment by that date for the purposes of the LOI. Whilst there was a dispute as to whether the payment made by CACIB was a payment under the Letter of Credit, as appears earlier in this judgment, I have concluded that the parties agreed that it was to be treated as such (see [111] above). The agreement between the parties was that payment should be made under the Letter of Credit and security provided for its return, should the court decide that this was required.

157 It is not said that there was any express agreement between the parties to extend the due date under the PPT-Zenrock Sale Contract and I cannot see that any such extension could be implied from the terms of the agreement that had been reached between the parties for payment to be made under the Letter of Credit and the BOC Guarantee to be given in respect of any order for its return. The parties were plainly reserving all their rights and conceding nothing. No reference was made to the due date for payment under the PPT-Zenrock Sale Contract or the impact of any payment made by CACIB on the terms or effect of the LOI.

158 It is, however, CACIB's case that the effect of the interim injunction prohibiting payment under the Letter of Credit was to suspend performance of CACIB's obligation to pay under its terms. It would have been a breach of the court order thereafter to make payment under the Letter of Credit and would have amounted to a contempt of court if CACIB had done so. I was unimpressed with the argument put forward by PPT that it was open, under the terms of the interim injunction which prohibited payment under the Letter of Credit alone, for CACIB or Zenrock to pay PPT *directly* by the due date, since the PPT-Zenrock Sale Contract required payment by irrevocable documentary letter of credit and a variation of that contract would be required for payment by any

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other method, although there can be no doubt that PPT would have agreed to payment by any means available. Moreover, the PPT-Zenrock Sale Contract, in the light of established authority, must be seen as varied by the letter of credit contract. In my judgment, it is right to say that CACIB's failure to make payment on 5 June 2020 would not have been a breach of the contract under the Letter of Credit by reason of the injunction.

159 That does not, however, in itself answer the question as to whether or not the due date for payment under the PPT-Zenrock Sale Contract was extended, which is necessary if the warranties in the LOI are to be effective. The Judge was not asked to grant such an extension (whether or not the court had power to do so) and he made no order for such an extension. It was submitted that the extension was a necessary implication from the terms of the interim injunction by reference to a decision relating to a Tomlin Order, which is a somewhat different animal, and would not appear to me to justify reading any such implication into the injunction granted in this case. The injunction sought by CACIB was in an unconventional form in restraining it from making a payment under the Letter of Credit to PPT, whereas the more usual course adopted, in my experience, in such circumstances, is to pay the sum due under the Letter of Credit and seek a freezing injunction over the sum paid, once it is in the hands of the beneficiary. Regardless of that, it was CACIB which sought the injunction which now turns out not to have been justified since payment was due under the Letter of Credit in accordance with the decision set out earlier in this judgment. I cannot see how, in seeking and obtaining this injunction, it can be said that the date in a contract between PPT and Zenrock, which was not a party to the injunction or the proceedings, could be affected. Its terms remained the same and no order by the court could impact upon the PPT-Zenrock Sale Contract without Zenrock being a party to the proceedings. In the absence of

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any express provision in the injunction which had the effect of extending the due date of the PPT-Zenrock Sale Contract for the purposes of the LOI, there is no basis for saying that there was any such extension. In the circumstances, it cannot be said that the payment made by CACIB pursuant to the accommodation reached between the parties and the resultant discharge of the injunction on 13 November 2020, was made by the due date.

160 CACIB submitted, in the alternative, that it had accepted the offer of the unilateral contract contained in the LOI by commencing performance under it, but there was no basis for this contention and, even if there had been, it would not have amounted to the full performance necessary to trigger the warranties. Whilst it was said that, in sending to Zenrock its Advice for Receipt of Documents on 22 April 2020 (see [87] above), CACIB had commenced performance of the contract under the LOI, that document amounted to an advice to Zenrock that CACIB had received documents complying with the Letter of Credit and requesting instructions from Zenrock as to the means of settlement of that amount by Zenrock when it fell to be paid by CACIB to PPT at maturity. It was on 24 April 2020 that Zenrock replied, accepting that the documents complied and giving instructions to debit its account with CACIB on maturity, naming the same account which it had nominated for the receipt of the TOTSA Receivable under the collection instructions provided. I cannot see how the exchange of these documents could in any way amount to part performance of the obligation to pay under the Letter of Credit, let alone amount to performance of the payment obligation under the Letter of Credit for the purpose of triggering the warranties in the LOI. The effect of these documents was not to commence a mechanism of payment to PPT of any kind.

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161 In the result, I conclude that, in the absence of payment by CACIB by the due date of 5 June 2020 as set out in the PPT-Zenrock Sale Contract, PPT did not give any of the warranties that appear in the LOI at all.

The warranties

162 I nonetheless proceed to consider the terms of the warranties and whether or not, had they been given, they would have been broken.

163 There are three warranties contained in the third paragraph of the LOI.

(a) The first two warranties are contained in the words: "we hereby expressly warrant that at the time the property passed under the contract we had marketable title to such shipment, free and clear of any lien or encumbrance, and that we had full right and authority to transfer such title to you …". It is plain on the face of the words used that these warranties relate to the time when the property passed under the PPT-Zenrock Sale Contract. As already mentioned, that sale incorporated the TOTSA T&Cs which provided in section II.1 for property in the Cargo to pass to Zenrock as the oil passed the vessel's flange connection at the load port (see [122] above). The relevant dates when loading took place, as recorded in the time sheet of the *Indigo Nova*, are 5–6 April 2020.

(b) The third warranty, by contrast with the other two, is a warranty which relates to the time when the LOI is presented to CACIB. It is expressed in the present tense: "we are entitled to receive these documents from our supplier and transfer them to you".

164 The meaning of the phrase "marketable title" was the subject of some debate. Because the LOI is governed by English law, reference was made to

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English authorities on the subject. PPT submitted that the phrase meant a title which a purchaser was bound to accept under the relevant sale contract, relying on the decision of the English Court of Appeal in *Barclays v Weeks Legg* [1999] QB 309 ("*Weeks Legg*") (at 325C and 325G). This, however, was not only a decision relating to unregistered real property but also a decision on the meaning of the words "a good marketable title". In the course of deciding what "good marketable title" meant, it was said that the obligation of the vendor was to produce sufficient title to the property which he had contracted to sell and that the expression "good marketable title" described the quality of the evidence which the purchaser was bound to accept as sufficient to discharge that obligation. A good marketable title was said to be one which, although technically defective, was one which the purchaser was bound to accept. In so saying, Millett LJ (as he then was) *cited Pyrke v* Waddingham (1852) 10 Hare 1 ("*Waddingham*") in which Turner VC said that every purchaser was entitled to require a marketable title which he understood to mean one which could be forced upon an unwilling purchaser, although Turner VC also said that it was apparent from repeated court decisions that the court would not compel a purchaser to take "a title which will expose him to litigation or hazard". The English Court of Appeal relied on this latter phrase as a definition of "marketable title" (see *Weeks Legg* at 325G).

165 Millett LJ cited this decision with approval but went on to refer to *In re Spollon and Long's Contract* [1936] Ch 713, where Luxmoore J had decided that a "good marketable title" was a title which enabled the vendors to sell the property without the necessity of making special conditions of sale restrictive of the purchaser's rights.

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166 The effect, as I read it of the Court of Appeal's decision in *Weeks Legg*, is that the phrase "good marketable title" is a stronger expression than "marketable title" and is to be seen in contradistinction to "a good holding title", by which is meant a title which a willing purchaser might reasonably be advised to accept but which the court would not force on a reluctant buyer. A "good marketable title" is one which a court would impose upon an unwilling purchaser, even if claims could be made in respect of the property. The court would have to assess the nature and strength of the claim against the title in order to decide whether there was a marketable title or a good marketable title.

167 The essence of CACIB's case was that a critical aspect of "marketable title" was the receipt of, or at the very least, the right to receive and transfer, negotiable bills of lading to third parties and that any inability to produce original transferable bills of lading vitiated the title to the Cargo. PPT never received the original bills of lading although it remained entitled to them under the terms of section X of the TOTSA T&Cs (see [122] above), which had been incorporated into the terms of the Shandong-PPT Sale Contract. That section required delivery of original shipping documents by the seller to the buyer, regardless of any provision in the contract that payment fell to be made against the presentation of a commercial invoice and a letter of indemnity if such documents were unavailable at the due date. Whilst the Letter of Credit contained no provision requiring such original shipping documents to be delivered to it following payment by it against the PPT Invoice and LOI, the same position which obtained between Shandong and PPT would have applied for delivery of such original documents by PPT to Zenrock under the PPT-Zenrock Sale Contract, had payment been made under the Letter of Credit.

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168 However, what emerged from the evidence that I heard was that the original bills of lading were consigned "to the order of [TOTSA]". There is no evidence that the original bills of lading were ever transferred by TOTSA to SOCAR and the evidence is, so far as it goes, that they did not reach Shandong or any party in the round-tripping transactions. There is no evidence that the original bills of lading were transferred to the ultimate receiver to present to the *Indigo Nova* in Qingdao for discharge of the Cargo there and the evidence of the lawyer instructed by PPT in China to investigate the matter produced only non-negotiable copies from the authorities who appeared reluctant to assist at all. The inference that I draw is that the practice referred to in para 61 of Mr Shimazaki's Interlocutory Affidavit (as set out at [48] above) was adopted and that, with payment against commercial invoices and letters of indemnity, the original bills of lading were never circulated by TOTSA at all.

169 That would not prevent title from passing and issues would only arise as to title to the Cargo in circumstances where the "lawful holder" of an original bill of lading (see s 1(a) of the Carriage of Goods by Sea Act 1992 (c. 40) (UK))) made an adverse claim of entitlement to the Cargo. As long as the original bills of lading remained with TOTSA or were transferred to the ultimate receiver which is likely to have been a refinery in China, no issues would arise, absent the fraud of the Zenrock.

170 The first warranty in the LOI was that, as at 5 or 6 April 2020, PPT had marketable title to the Cargo, free and clear of any lien or encumbrance. Since property in the Cargo passed at the loading port all the way down the chain, PPT had title in the sense of ownership of the Cargo. The title was marketable in as much as ownership could and did pass at the vessel's flange at the loadport. The original bills of lading did not therefore operate to transfer property in the Cargo

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but could, if transferred, operate as a transfer of constructive possession in the Cargo. The question still arises as to whether or not PPT had "marketable title", "free and clear of any lien or encumbrance".

171 A lien is a form of charge. The expression "charge or encumbrance" denotes "some proprietary right whether legal or equitable, over or affecting the goods, or a possessory right such as a lien" (*Benjamin's Sale of Goods* (Michael Bridge gen ed) (Sweet & Maxwell, 11th Ed, 2020) at para 4-022). Counsel for PPT submitted that a title which was subject to a lien or encumbrance was a title which the purchasers under the sale contracts were bound to accept. The Shandong-PPT Sale Contract and the PPT-Zenrock Sale Contract were governed by English law and therefore included the term implied by s 12 of the Sale of Goods Act 1979 (c 54) (UK) ("the 1979 Act") that "the goods are free and will remain free until the time when the property is to pass from any charge or encumbrance not disclosed or made known to the buyer before the contract was made". Such a term is, as a matter of English law, a warranty which, by reason of s 61(1) of the 1979 Act has the effect that neither PPT nor Zenrock would be entitled to reject the Cargo on the basis of a breach of it. An English court would enforce the sale contract despite the lien or charge and a claim for a breach would sound in damages alone. On this basis, in reliance upon Millet LJ's decision in *Week v Legg* ([164] above), it is said that the title in the Cargo was marketable because the purchaser was bound to accept the Cargo, notwithstanding the presence of any lien or encumbrance and an English court would compel a purchaser to accept it.

172 I accept that submission because that is the thrust of Millett LJ's reasoning in *Week v Legg*, regardless of the citation of *Waddingham* ([164] above) in *Week v Legg* and the reference in *Waddingham* to "a title which will

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expose [a purchaser] to litigation or hazard" as being one which the court would not compel him to accept. The difference between unregistered real property and goods which are the subject of the 1979 Act explains why a court would or would not compel the purchaser to accept the title proffered. The key criterion is whether a court would compel acceptance and that is now determined, in the case of goods, by the 1979 Act. Although this appears to have the effect that the words "marketable title" add nothing to the provision that the Cargo should be "free and clear of any lien or encumbrance", it must follow from the principle enunciated.

173 The existence of any lien or encumbrance on the Cargo is said to depend upon the terms of the security granted by Zenrock to ING in the form of the ING Deed dated 3 September 2014 and the CACIB Deed dated 24 August 2018 giving security to CACIB (see [36]–[37] above). Under the terms of each deed, Zenrock gave each bank a first floating charge of all its rights, title, benefits and interest in all goods financed or to be financed by that bank. The charge would crystallise and be converted into a fixed charge in respect of all such goods if it should become subject to any lien, other security interest or other encumbrance which was not permitted under the deed, or on the happening of any Zenrock insolvency event.

174 Because of the nature of a floating charge under Singapore law, which is not in issue, no proprietary interest is created in any of the charged assets until crystallisation. One of the underlying features of a floating charge is the ability of the grantor of the floating charge to buy and sell the assets which are the subject of that charge in the ordinary course of its business. CACIB submits that when Zenrock sent TOTSA, on 31 March 2020, the ING NOA (in respect of the letter of credit obtained from ING for financing of Zenrock's purchase of the

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Cargo from SOCAR), Zenrock created a security interest which encumbered the Cargo contrary to the terms of the CACIB Deed because this was a cargo which CACIB was to finance. It would seem to follow also that, when Zenrock sent TOTSA the CACIB NOA on the following day, it sought to create a security interest contrary to the terms of the ING Deed, which was in comparable terms.

175 Whilst it appears that, as between Zenrock and CACIB, the floating charge granted by the CACIB Deed of 24 August 2018 did crystallise on 31 March 2020, or at the latest on 3 April 2020 when the Letter of Credit was issued for the finance of the Cargo, no entity other than Zenrock could have been aware of this at the time and PPT submits that, regardless of such crystallisation, the charge did not encumber the Cargo when title in the Cargo passed to PPT under the Shandong-PPT Sale Contract on 6 April 2020.

176 The reason advanced for this by PPT is that Zenrock, in accordance with the terms of both of the floating charges in favour of ING and CACIB had apparent authority to enter into agreements for the sale of goods in the ordinary course of business such that a purchaser would take free of any charge. It is common ground that a *bona fide* purchaser for value without notice of the charge would take free of it, but value here means actual payment and Shandong did not pay Zenrock and PPT did not pay Shandong for the Cargo until 16 April 2020, whereas the relevant date for the first two warranties is 6 April 2020 at the latest. As at 6 April 2020, neither Shandong nor PPT could therefore be a *bona fide* purchaser for value. PPT however relies on a further principle set out in, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) (at paras 4-55, 5-02 and 5-53). There it is said that a purchaser under a transaction concluded after crystallisation of the floating charge but before receiving notice of that crystallisation takes free from the

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floating charge. This is said to follow from the power of disposition given to the grantor of the floating charge by the grantee to trade in the assets comprising the security. This is said to be akin to the principle of apparent authority which underlies agency law since the disposition is within the grantor's actual or ostensible powers of management to trade such assets with the consent of the grantee. Even if a purchaser has notice of the floating charge, if it has no notice of crystallisation, it is said that it takes free of the charge. There is no decided authority cited for this proposition, but it would appear to accord with basic principles. The crystallisation of the charge operates as a matter of contract between the grantor and the grantee but that cannot affect third parties who have no notice of it, whether by registration of the now fixed charge after crystallisation, or otherwise.

177 There is no suggestion that Shandong had notice of the crystallisation of the floating charge at the time when the Zenrock-Shandong Sale Contract or the Shandong-PPT Sale Contract were concluded on 1 April 2020, nor that PPT had notice of it at that time, on 2 April 2020 when concluding the PPT-Zenrock Sale Contract, nor at 6 April 2020 when property in the Cargo passed through PPT to Zenrock.

178 Furthermore, if it be relevant, PPT did purchase the legal title in the Cargo and became a purchaser for value without notice on 6 April 2020 as there is no evidence that it knew or should have known that Zenrock had issued the Duplicate NOAs much earlier and that any floating charge, whether under the ING Deed or the CACIB Deed had crystallised.

179 The position is therefore that, as at 6 April 2020, Shandong and PPT acquired ownership of the Cargo free from any floating charge in favour of

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either ING or CACIB because neither had notice of crystallisation. In such circumstances, PPT's warranty that, at the time property in the Cargo passed under the PPT-Zenrock Sale Contract on 6 April 2020, it had marketable title to the Cargo which was free and clear of any lien or encumbrance, was not broken. If the first warranty was not broken it is common ground that the second warranty could not be broken either. There was therefore no breach of the first or second warranties.

180 The third warranty operates at the time of presentation of the LOI. PPT warranted that "we are entitled to receive these documents from our supplier and transfer them to you". The documents referred to can only be those set out earlier in the LOI as "the requisite shipping documents" which are said to "consist of full set 3/3 original and 3 non-negotiable copies clean on board bills of lading issued or endorsed to the order of [CACIB]". The PPT Invoice and the LOI were presented by PPT to CACIB on 16 April 2020. This warranty is different from the other two warranties, not only as to the date to which the warranty refers but also in its subject matter. It does not relate to title, but relates to the shipping documents in circumstances where the title to the cargo may have passed (as here) without reference to the shipping documents.

181 There is a slight oddity about the wording of this provision since, if PPT has not received the original bills of lading, any entitlement that it has to receive them would ordinarily be by virtue of an endorsement of bills of lading in its favour (not bills of lading endorsed in favour of CACIB, which are said to be "the requisite shipping documents"). Neither of the parties submitted that the warranty could not be complied with if the original bills of lading to which PPT was entitled were endorsed in its favour so that it was capable of endorsing them in favour of CACIB. For this purpose, the words "these documents" or

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"requisite documents" must be taken to mean original bills of lading which can be endorsed in favour of CACIB.

182 If the third warranty simply means that PPT is entitled, under the Shandong-PPT Sale Contract to receive the original bills of lading and endorse them in favour of CACIB, there can be no doubt that the warranty was not breached, since the Shandong-PPT Sale Contract provided for such delivery by reference to section X of the TOTSA T&Cs (see [122] above).

183 The warranty is capable of being read differently, however. It could be read as meaning that PPT warrants an entitlement to receive the documents from its supplier, carrying with it a legal entitlement to receive the original bills of lading by reason of a chain of contractual entitlement going back to the original issuer of the bills. In other words, what is warranted is an entitlement that is well-founded in law, not simply by reference to PPT's immediate purchase contract with its supplier, but meaning an entitlement which is not vitiated by any prior contractual hiatus in the sales chain. A third possible meaning is that the warranty amounted to a promise that there was nothing in fact which could vitiate its entitlement to receive the bills of lading and operate to prevent it from receiving them from its supplier.

184 Whilst the LOI has to be read in the context of the Letter of Credit and the PPT-Zenrock Sale Contract so that it is fair to say that CACIB is to pay against the PPT Invoice and the LOI in place of the original bills of lading which could give it constructive possession of the Cargo and enable it to exercise security rights, the wording used speaks of the entitlement to receive the requisite shipping documents "from the supplier". It makes no reference to a wider entitlement which would embrace the entitlement of other purchasers in

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the chain of sales above PPT nor to any "absolute" entitlement which could be vitiated whether by some action or inaction by others up the chain or by fraud. The most natural reading of the third warranty is the obvious one which warrants entitlement to receive the documents under the Shandong-PPT Sale Contract and I can see nothing in the terminology of the warranty which would justify a wider reading than that.

185 Although the recipient of the LOI is to accept the LOI in substitution for the original shipping documents, the warranty is not that such documents will be supplied. The terms of the LOI do not require such documents to be supplied at any time at all, whether before or after payment under the Letter of Credit. Having paid against the LOI, CACIB, as the recipient of it, is not entitled, as against the beneficiary, to receive the original bills of lading, even if the applicant for the Letter of Credit is so entitled. Whereas the PPT-Zenrock Sale Contract, by incorporating section X of the TOTSA T&Cs (see [122] above) does require delivery of such documents to Zenrock even after payment against the PPT Invoice and the LOI, the LOI contains no such provision. Nor can such a provision be implied from the last sentence of the LOI which provides that the LOI is to expire upon presentation of such documents, particularly since there is an alternative expiry date of one year after the bill of lading date.

186 As a matter of entitlement in the contractual chain, and as a matter of fact, there was no theoretical difficulty about receipt by PPT of the original bills of lading. Each sale contract in the chain of contracts required delivery of the original bills of lading pursuant to section X of the TOTSA T&Cs. Moreover, it was open to TOTSA, the original consignee to endorse them to its immediate purchaser and for a sequence of endorsements be made by each successive purchaser/seller, so that they reached PPT. The fact that the participants in the

chain chose not to effect such endorsements but to rely upon the provision for payment against a commercial invoice and letter of indemnity does not affect the entitlement of each purchaser to the original bills of lading under its purchase contract.

187 In my judgment, therefore, the third warranty was also not broken.

The indemnity

188 There remains the issue of the indemnity provided by the LOI. There was some debate as to whether or not the indemnity granted by the LOI in the fourth paragraph was independent of the warranties set out in the third paragraph of the LOI. The fourth paragraph did not commence with the words: "in consideration of your making payment …".

189 I cannot see that this is a material difference; it cannot be said that the third paragraph of the LOI is the offer of a unilateral contract whilst the fourth paragraph is an independent indemnity which simply operates as an acceptance of the offer of the unilateral contract constituted by the issuance of the Letter of Credit. The warranties are available on payment by the recipient of the LOI and the indemnity is offered on the same basis. The opening words of the fourth paragraph "we further agree" shows that it is an obligation undertaken by the issuer of the LOI in addition to the warranties which are only given if payment is made under the Letter of Credit by the due date under the PPT-Zenrock Sale Contract. The agreement to indemnify is qualified in the same way as the warranties. The point is reinforced by the fact that the indemnity operates in relation to any breach of the warranties given in the third paragraph as well as for losses incurred by reason of the original bills of lading and other documents remaining outstanding. It would be nonsensical for the warranties in the third

paragraph of the LOI only to arise after payment under the Letter of Credit has been made but for the indemnity in respect of breaches of any of those warranties to operate under the fourth paragraph regardless of any such payment.

190 The indemnity is therefore equally inapplicable in the present case because of the failure by CACIB to pay the sum due under the Letter of Credit by the due date prescribed in the PPT-Zenrock Sale Contract.

191 The only independent basis of a claim for indemnity above and beyond loss caused by the alleged breach of warranties relates to the indemnity "against any and all damages, costs and expenses… which you may suffer or incur by reason of the original bills of lading and other documents remaining outstanding". The word "outstanding" in relation to those documents can only mean that they have not been presented to CACIB. If the indemnity was applicable, it would operate in respect of losses suffered by reason of the original bills of lading not being presented. In order to ascertain what losses flowed from that, it would be necessary to consider the hypothetical counterfactual where the original bills of lading had been presented to CACIB on 16 April 2020 instead of the LOI. There was no evidence of the law which governed the bills of lading or the charter which was incorporated in it. For the purposes of the counterfactual, the parties proceeded on the basis that the bill of lading was governed by English law or Singapore law, the effect of which is the same.

192 Despite considerable debate on this subject there was, as in other areas of dispute, very little material evidence. It might be expected that the CACIB witnesses would have said what they would have done in such circumstances.

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The probability must however be that CACIB would, in the same manner as it sought confirmation from Zenrock as to the validity of the PPT Invoice and the LOI as documents to trigger payment under the Letter of Credit, have informed Zenrock and TOTSA of the receipt of the original bills of lading, checking their validity with Zenrock and obtaining instructions as to settlement of the sum to be paid to PPT on maturity, whilst notifying TOTSA in order to receive confirmation that, with the tender of the original bills of lading, payment would be made at the end of the requisite 60-day period of credit.

193 The counterfactual must assume that there are no other original bills of lading in existence, whether in the hands of TOTSA or anyone else since the assumption is that they have been presented by PPT to CACIB. There is however no basis for assuming, in the counterfactual, that Zenrock has not perpetrated the same fraud that it did perpetrate, notwithstanding the fact that it would have been unlikely to use original bills of lading in doing so, because the series of endorsements would reveal the round-tripping chain of transactions and its own place at the top and bottom of the chain it had structured. It has therefore to be assumed that TOTSA would have received the Duplicate NOAs and sent the 23 April 2020 Email to CACIB notifying it of the Duplicate NOA (see [13] and [88] above). It would also have sent CACIB the 28 April 2020 Email in which it notified CACIB of the inflated sale price in the Fabricated Zenrock-TOTSA Sale Contract (see [14] and [98] above).

194 In these circumstances there is no basis for saying that CACIB would have accepted the bills of lading as compliant documents before the expiry of the fifth banking day after presentation and before receipt of the 23 April 2020 Email from TOTSA. In the absence of evidence that it would have accepted the documents, the assumption must be that it would have done much as it actually

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did in failing to accept the documents tendered by PPT because it suspected fraud and did not want to participate or connive in it. It would, in all probability, have held onto the original bills of lading in the hope that they would constitute some form of security in respect of obligations outstanding under the Letter of Credit or as a negotiating lever.

195 Although, in order to obtain possession of the Cargo or to sell it to a Chinese refinery, TOTSA would wish to be in possession of the bills of lading, the reality must be that the dispute as to entitlement to the TOTSA Receivable, as between ING and CACIB would have arisen in exactly the same way as it did. TOTSA would not have paid CACIB on a false invoice for an inflated price under the Fabricated Zenrock-TOTSA Sale Contract. The *Indigo Nova* would have continued to China whilst arguments continued between the rival claimants to the TOTSA Receivable.

196 CACIB's case was that, if it had become a lawful holder of the original bills of lading, it would have been able either to obtain possession of the Cargo from the *Indigo Nova* or to enforce rights of suit against the vessel for delivery to someone who was not a holder of the original bills of lading. As PPT points out in its submissions, however, CACIB has not advanced a factual case that it would have accepted the documents and become a holder of the original bills of lading as opposed to merely being a recipient of them. Indeed, there is nothing in the AEICs of Mr Cazals and Mr Lautode to that effect. Whilst it is true that CACIB was constantly pressing PPT to inform it of the terms and whereabouts of the original bills of lading, that was all in the context of the suspected fraud to which CACIB had been alerted by the TOTSA emails. The evidence of CACIB, provided in the support of the application for the interim injunction prohibiting payment under the Letter of Credit, contained expressions of

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concern that if payment were made it could bring a fraudulent scheme to completion in the context of highly probable collusion between Shandong, PPT and Zenrock. The two features of the fraud to which TOTSA had drawn attention were such that CACIB was unlikely to make payment under the Letter of Credit, even if the original bills of lading had been presented to CACIB in place of the PPT Invoice and the LOI.

197 I am unable to find therefore that CACIB would have accepted the bills of lading as conforming documents and become a lawful holder of the original bills of lading at any particular point in time prior to the date of actual payment on 18 November 2020. The likelihood must be that in the hypothetical counterfactual, some accommodation would have had to be reached between ING, CACIB and TOTSA of the kind which was actually made. TOTSA, in this situation, must be taken to be prepared to pay the price under the True Zenrock-TOTSA Sale Contract to whomsoever appeared to be entitled to it, in accordance with the stance which it actually took, and which led to the escrow agreement and interpleader proceedings which were settled. Possession of the original bills of lading was unlikely to affect this. Whilst TOTSA would have wanted the original bills, it cannot be assumed that it would have paid CACIB in order to obtain them and it would doubtless have maintained that it was the true owner of the Cargo by reason of the chain of sale contracts, regardless of the fact that Zenrock's round-tripping transactions had resulted in CACIB being in receipt of the original bills of lading. It would have maintained that CACIB was in possession of the bills by reason of Zenrock's fraud and in the absence of payment by CACIB under the Letter of Credit, that it was not a lawful holder of the bills of lading. It would have resisted any attempt to enforce security rights as it said it would in the actual exchanges between it and CACIB.

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198 As a recipient but not a lawful holder of the original bills of lading because of its unwillingness to accept the documents and pay under the Letter of Credit, CACIB would be in no legitimate position to claim delivery of the Cargo from the *Indigo Nova* against presentation of those bills. It had not made any outlay in respect of the Cargo upon which any charge could be secured. It did not make any payment until 18 November 2020 pursuant to the arrangements reached at the suggestion of the Judge. By then the *Indigo Nova* had long since discharged the Cargo and the bills of lading could not give a right to constructive possession of it.

199 Moreover, the *Indigo Nova*, on arrival at the discharge port of Qingdao on 24 May 2020, if presented with the original bills of lading by CACIB, would have been faced with a claim for the Cargo by the owner of the goods to whom the property had passed under the sale contracts, whether that be TOTSA or, more likely, the Chinese receiving refinery to whom TOTSA appears to have sold the Cargo. In those circumstances, it cannot be said that CACIB would have obtained delivery of the Cargo and it might well be thought that the superior title of the owner would, particularly in a Chinese court, be certain to prevail where CACIB had paid nothing.

200 Because of the absence of evidence as to what exactly CACIB would have done and its effects, whether in China or elsewhere, it is probably not necessary for me to enter into the debate as to the competing rights under English law or Singapore law of an owner of cargo and a lawful holder of original bills of lading, whether before or after the Cargo was discharged in the context of a loss upon which the indemnity in paragraph four of the LOI might bite. However, the True Zenrock-TOTSA Sale Contract was concluded on 30 March 2020, well before any crystallisation of CACIB's or ING's floating

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charge. Even if CACIB had become holder of the original bills of lading before discharge of the Cargo, it does not appear that it would have been in any better position than it was without becoming holder of those bills because TOTSA would have asserted its claim to the Cargo as holder of the legal title and the carrier would have been on notice of the competing claims to the Cargo and would not have delivered to CACIB against any presentation of the bills because of the risk of a claim in conversion from TOTSA.

201 Moreover, if CACIB became a lawful holder of the bills of lading after the Cargo was discharged, and was entitled to bring a suit against the carrier for breach of the contract of carriage by reason of delivery of the Cargo to someone else without presentation of the original bills of lading, it would not have been able to recover substantial damages unless it had a security interest of value of which it had been deprived, because TOTSA's legal ownership of the Cargo resulted from transactions concluded in ignorance of any crystallised charge over it, whether that of ING or CACIB.

202 CACIB has the burden of proof in establishing any loss for which PPT would be liable to indemnify it. As appears from the above recitation of the limited evidence available and the inferences and assumptions which the court would have to make in exploring the counterfactual, CACIB cannot discharge that burden in showing the loss which it would have suffered by reason of the original bills of lading being outstanding. The loss which it has currently suffered is measured by the sum paid out under the Letter of Credit which it was bound, on the findings I have made earlier in this judgment, to pay to PPT regardless of any fraud by Zenrock. The alleged damage is not the result of having to pay that sum but its inability to recover that sum from Zenrock, which had deceived it into issuing the Letter of Credit in the first place with the

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Fabricated Zenrock-TOTSA Sale Contract and the issue of the CACIB NOA which duplicated the ING NOA. The reason why CACIB could not obtain the TOTSA Receivable to cover that outlay was the duplicate assignment that Zenrock had made. Moreover, on the final day of the hearing, it transpired that some US$6m may have been received by CACIB as a result of the settlement of the interpleader proceedings.

203 In the circumstances, CACIB's claim for an indemnity under the LOI must also fail.

204 I have examined the List of Issues in relation to the LOI and have determined those which were still live at the time of the closing submissions and need not refer to the others. As to the relief sought, it is evident from the terms of my decision thus far, that CACIB is not entitled to any relief.

PPT's claims and counterclaims in the two consolidated suits

205 PPT claimed the sum of US$23,662,732.50 but that sum was paid on 18 November 2020. The BOC Guarantee secured repayment of that sum to CACIB in the event that the court should decide that it was entitled to that sum or damages. The court has determined that PPT was entitled to that sum and there is therefore no basis upon which any claim can be made against the BOC Guarantee.

206 PPT seeks pre-judgment interest on that sum at the rate of 5.33% per annum for the period of 5 June 2020 to 18 November 2020. It also claims the sum of US$118,672.22 as fees payable to BOC for the BOC Guarantee, in respect of the period 10 November 2020 to 9 November 2021. A further fee of US$118,313.66 (excluding applicable cable charges) was apparently charged

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for the BOC Guarantee for the period of 10 November 2021 to 10 November 2022 which would fall to be pro-rated in relation to the date of discharge of the BOC Guarantee, which will depend on the finality of the decision made by this court or any appeal court, should there be such an appeal. Additionally, post-judgment interest is claimed at the rate of 5.33% per annum to be compounded quarterly.

207 PPT has previously claimed as damages the interest pursuant to a loan from its affiliate company PPT Singapore to itself but in its closing submissions abandoned that claim "to avoid the risk of double recovery". At the time it did so, I enquired as to the comparative rates of interest that were being claimed, expressing the view that PPT would be entitled to its reasonable costs of borrowing the sum in question and that, as a matter of damages, the costs of the BOC Guarantee and the interest on the loan from PPT Singapore might or might not be too remote as being within or beyond the contemplation of the parties at the time of the issue of the Letter of Credit by CACIB or the acceptance of the contract under the Letter of Credit by PPT. Issues could also potentially arise in relation to CACIB's undertaking in damages when obtaining the injunction on 28 May 2020, which was discharged on 13 November 2020.

208 In these circumstances, it appeared to me then and appears to me now that the right course is to reserve all questions of other relief, in the shape of damages, interest and costs for future determination, if required, so that the parties can digest the decision that I have made on liability, in the hope that agreement can be reached on the financial consequences, without the need for further submissions, whether in writing or at a hearing.

209 For current purposes therefore I need do no more than determine that CACIB's claims for an injunction, declaration and an order for reimbursement of the sum paid under the Letter of Credit to PPT all fail and that PPT is entitled to retain that sum and is likely to recover interest for being kept out of that sum between 5 June 2020 and 18 November 2020. Whether it is entitled to further interest or the other sums claimed, whether as damages or otherwise remains to be determined, as does the question of liability for costs.

Jeremy Lionel Cooke
International Judge

Sara Masters QC (instructed), Nair Suresh Sukumaran, Tan Tse Hsien, Bryan (Chen Shixian), Bhatt Chantik Jayesh and Sylvia Lem Jia Li (PK Wong & Nair LLC) for the plaintiff in Suit No 1 of 2021 and the defendant in Suit No 2 of 2021;
Michael Collett QC (instructed), Giam Chin Toon SC, Lee Wei Yuen Arvin (Li Weiyun), Lyssetta Teo Li Lin, Tay Ting Xun Leon and Wan Hui Ting, Monique (Wen Huiting) (Wee Swee Teow LLP) for the defendant in Suit No 1 of 2021 and the plaintiff in Suit No 2 of 2021.

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