IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 220

Suit No 463 of 2020

Between

Winson Oil Trading Pte Ltd

… *Plaintiff*

And

Oversea-Chinese Banking Corporation Limited

… *Defendant*

Suit No 474 of 2020

Between

Winson Oil Trading Pte Ltd

… *Plaintiff*

And

Standard Chartered Bank (Singapore) Limited

… *Defendant*

JUDGMENT

[Bills of Exchange and Other Negotiable Instruments — Letter of credit transaction — Whether fraud exception established — Whether representation made in document presented to issuing bank was false — Whether beneficiary made representation without belief in its truth]

Version No 2: 18 Aug 2023 (16:33 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

ISSUES **3**

THE FRAUD EXCEPTION **3**

DID WINSON MAKE FALSE REPRESENTATIONS OF MATERIAL FACT TO THE BANKS? 9

WERE THE REPRESENTATIONS FALSE? 11

Had cargo been shipped onboard the Ocean Voyager and Ocean Taipan, pursuant to valid BLs, as described in the LOIs? *11*

(1) Were there valid BLs for the Subject Transactions? 13

(2) Was the cargo described in Winson's LOIs shipped onboard the Ocean Voyager and Ocean Taipan? 20

Was the Winson – Hin Leong sale a sham? *25*

DID WINSON ACT FRAUDULENTLY? 25

What do the events leading up to the presentations indicate about Winson's state of mind? *25*

(1) Chronology 27

(2) Analysis 33

(A) Reasonableness and honesty *33*

(B) Whether the Subject Transactions were pre-structured *33*

(C) No loading documents *36*

(D) Change in Ocean Taipan BL quantity after shipment *37*

(E) Discussions between OCBC and Winson about purchase of the Ocean Voyager cargo *37*

(F) OCBC's rejection of Winson's first presentation for the Ocean Voyager *42*

Version No 2: 18 Aug 2023 (16:33 hrs)

(G) The checks that Winson did (or did not do) 45

(H) Conclusion on Winson's state of mind at the time of the second presentations 54

What do events after the second presentations show about Winson's state of mind at the time of those presentations? 54

THE NULLITY EXCEPTION 58

NON-COMPLIANCE.....59

UNCONSCIONABILITY.....60

WHETHER WINSON'S CLAIM FAILS BECAUSE IT SUFFERED NO LOSS. 60

CONCLUSION AND COSTS.....61

Version No 2: 18 Aug 2023 (16:33 hrs)

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Winson Oil Trading Pte Ltd
v
Oversea-Chinese Banking Corp Ltd and another suit

[2023] SGHC 220

General Division of the High Court — Suits Nos 463 and 474 of 2020
Andre Maniam J
31 January, 1–3, 6–10, 13–17, 21–24 February, 6–9 March, 19 May 2023

18 August 2023 Judgment reserved.

Andre Maniam J:

Introduction

1 Winson Oil Trading Pte Ltd ("Winson") sued Oversea-Chinese Banking Corporation Ltd ("OCBC") and Standard Chartered Bank (Singapore) Ltd ("SCB") for non-payment under letters of credit ("LCs") that the banks had issued to pay for gasoil that Winson had sold to Hin Leong Trading (Pte) Ltd ("Hin Leong").

2 The sales by Winson to Hin Leong were the final legs of circular trades (which I will term the "Subject Transactions") that all took place in the afternoon of 27 March 2020:

(a) Hin Leong sold a quantity of gasoil in two shipments to Trafigura Pte Ltd ("Trafigura");

(b) Trafigura sold the same quantity of gasoil to Winson; and

(c) Winson sold the same quantity of gasoil back to Hin Leong.

3 The banks, however, contend that no cargo of gasoil was shipped for the Subject Transactions (in particular, the Winson – Hin Leong sale, which was financed by the banks' LCs), and that the copy non-negotiable bills of lading ("BLs") which purportedly showed such shipments were forgeries. Winson had relied on those copy BLs in preparing the letters of indemnity ("LOIs") that it presented to the banks for payment under the LCs.

4 The banks rely on the Fraud Exception to resist Winson's claim for payment under the LCs, asserting that Winson had fraudulently made false statements in its presentations for payment under the LCs. The banks contend that the Winson – Hin Leong sale was a sham, and in any event that no cargoes had been shipped for that sale.

5 The banks also rely on the Nullity Exception, contending that because no cargoes had been shipped for the Winson – Hin Leong sale, the LOIs that Winson had presented for payment were nullities.

6 SCB raises three further grounds to resist payment;

(a) that Winson's presentation was not a complying presentation;

(b) unconscionability; and

(c) Winson allegedly having suffered no loss, because Winson had assigned certain rights to Winson Oil Bunkering Pte Ltd ("Winson Oil Bunkering") pursuant to which Winson Oil Bunkering had paid Winson

Version No 2: 18 Aug 2023 (16:33 hrs)

the same amount (US$60,852,855.49) that Winson is claiming from the banks in these suits.

Issues

7 I address the following in turn:

(a) the Fraud Exception;

(b) the Nullity Exception;

(c) non-compliance;

(d) unconscionability; and

(e) whether Winson's claim fails because it suffered no loss.

The Fraud Exception

8 The Fraud Exception was articulated by Lord Diplock in the seminal English decision of *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 (*"United City Merchants"*) at 183, as follows:

> If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the

Version No 2: 18 Aug 2023 (16:33 hrs)

> goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.
>
> To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue.

9 The Fraud Exception has been accepted as the law in Singapore: *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 (*"Brody"*) at [20]–[21], where the Court of Appeal cited *United City Merchants* and quoted the above extract from the judgment in that case. The Court of Appeal also stated at [21] of *Brody*:

> 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: *United City Merchants (Investments) Ltd v Royal Bank of Canada* ([20] supra). 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 the *United City Merchants* case. [emphasis in original]

10 The Fraud Exception involves the beneficiary of an LC *fraudulently* making *false* statements to the bank. As stated in *United City Merchants* and *Brody*, a beneficiary acts *fraudulently* if he presents to the bank documents that contain material representations of fact that **to his knowledge are untrue**. It is, however, common ground between the parties in the present case that a beneficiary is also fraudulent if he makes a false representation "without belief in its truth". That was, moreover, accepted by the Singapore International

Version No 2: 18 Aug 2023 (16:33 hrs)

Commercial Court ("SICC") in *Credit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit* [2022] 4 SLR 1 (*"CACIB v PPT"*). The SICC put it thus at [20]:

> … fraud [in the presentation of documents] can only, by definition, encompass a beneficiary who acts dishonestly, in presenting otherwise facially compliant documents either *with the knowledge that what is contained there is false,* ***or*** *without belief that what is contained therein is true.* [emphasis in original omitted; emphasis added in italics and bold italics]

11 The parties, however, dispute whether a beneficiary would also be fraudulent if he made a false representation recklessly, without caring whether it be true or false. The SICC in *CACIB v PPT* held that in that instance, the beneficiary would not have acted fraudulently: *CACIB v PPT* at [21].

12 In the leading case on the tort of deceit, *Derry v Peek* (1889) 14 App Cas 337 ("*Derry v Peek*"), Lord Herschell stated at 374:

> … fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.

13 Although the parties here disagree over whether the third category in *Derry v Peek* ("recklessly, careless whether it be true or false") would satisfy the Fraud Exception in the case of LCs, Lord Herschell had explained that the third category was but an instance of the second category ("without belief in its truth") for a person who makes a false statement recklessly, careless whether it be true or false "can have no real belief in the truth of what he states". I respectfully agree with that.

Version No 2: 18 Aug 2023 (16:33 hrs)

14 That the second category in *Derry v Peek* encompasses the third category is also supported by the Court of Appeal's decision in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 (*"Panatron"*). The court at [13] cited with approval Lord Herschell's three categories in *Derry v Peek*:

> In *Derry v Peek* (1889) 14 App Cas 337 the tort was further developed. It was held that in an action of deceit the plaintiff must prove actual fraud. This fraud is proved only when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

15 The court in *Panatron* then went on to state at [14] that one of the elements of the tort of deceit was: "the representation must be made with knowledge that it is false; it must be wilfully false, or *at least made in the absence of any genuine belief that it is true*." [emphasis added] The court thereby subsumed the third category ("recklessly, without caring whether it be true or false") in the second category ("without belief in its truth"), which was also Lord Herschell's view of those categories.

16 As the second category in *Derry v Peek* (which the parties agree would amount to fraud) encompasses the third category (which the parties are in dispute over), the dispute over the third category is moot.

17 For completeness, the Court of Appeal in *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 (*"Arab Banking"*) accepted that in cases concerning calls on "on demand" performance guarantees/bonds, the Fraud Exception would include cases in the third category of *Derry v Peek*. At [63] the court said:

> … it would be fraudulent for a person to make a false representation, if he was recklessly indifferent to the truth or

Version No 2: 18 Aug 2023 (16:33 hrs)

> falsity of that which he was asserting at the time he made the statement. In our judgment, in a similar vein, a beneficiary that presents an invalid demand under a demand guarantee *recklessly, that is to say indifferent to whether it is or is not a valid demand, would also be acting fraudulently*. [emphasis in original omitted; emphasis added in italics]

18 Although *Arab Banking* concerned demand guarantees rather than LCs, the court stated at [65] that "there should be no distinction in the operation of the fraud exception in the context either of letters of credit or of demand guarantees".

19 In *CACIB v PPT*, in deciding that the third category in *Derry v Peek* would not suffice for the Fraud Exception, the court at [21] cited *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 (*"DBS v Carrier"*) where the court observed that negligence on the part of the beneficiary had not been accepted as a justification for a bank to refuse payment on an LC (*DBS v Carrier* at [95]). From that, the court in *CACIB v PPT* reasoned that "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".

20 I make two points about that:

(a) The Fraud Exception (and indeed, the tort of deceit) is not premised on the existence of a duty of care (unlike a claim in the tort of negligence). Fraud on the beneficiary's part is a basis on which the bank can deny payment, and that fraudulent beneficiary cannot improve his position by contending that he did not owe a duty of care to the bank.

(b) In declining to accept that recklessness can amount to fraud, the recklessness which the court had in mind in *CACIB v PPT* was not

Version No 2: 18 Aug 2023 (16:33 hrs)

> incompatible with the beneficiary still having "the honest belief that [his representations] are true", whereas the recklessness in the third category of *Derry v Peek*, is such that the representor "can have no real belief in the truth of what he states" (per Lord Herschell in *Derry v Peek*).

21 For the Fraud Exception, recklessness is not merely a more serious type of negligence, *ie*, a more serious failure to take care; there is recklessness for the Fraud Exception where, as stated in *Arab Banking* at [62]–[63], the representor is "recklessly indifferent to the truth or falsity of that which he was asserting". The Court of Appeal cited *Angus v Clifford* [1891] 2 Ch 449 for this explanation of recklessness: "did he make [the statement] without knowing whether it was false, and without caring? Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth". That is what Lord Herschell meant in *Derry v Peek* when he used the phrase, "recklessly, careless whether it be true or false" – "careless" there means "not caring", being indifferent to the truth; rather than "failing to take care" in the negligence sense.

22 For the reasons given above, I would respectfully decline to follow *CACIB v PPT* on this point.

23 The Fraud Exception is thus satisfied if in presenting documents for payment, a beneficiary makes a false representation of material fact knowingly, or without belief in its truth (which *includes* the beneficiary being reckless, in the sense of being indifferent to the truth).

Version No 2: 18 Aug 2023 (16:33 hrs)

Did Winson make false representations of material fact to the banks?

24 The banks say that the LOIs which Winson presented to them contain various representations of material fact, which are false.

25 The LOIs[1] (which were addressed to Hin Leong as Winson's buyer) contained the following statements:

> IN CONSIDERATION OF YOUR MAKING PAYMENT OF U.S. DOLLARS [PAYMENT SUM] FOR [QUANTITY] OF THE CARGO IN ACCORDANCE WITH THE UNDERLYING AGREEMENT AND HAVING AGREED TO ACCEPT DELIVERY OF THE CARGO WITHOUT HAVING BEEN PROVIDED WITH THE FULL SET OF 3/3 ORIGINAL BILLS OF LADING REQUIRED TO BE PRESENTED BY US IN ACCORDANCE WITH THE UNDERLYING AGREEMENT ('THE DOCUMENTS'), WE HEREBY REPRESENT AND WARRANT AS FOLLOWS:
>
> (I) THE EXISTENCE AND VALIDITY OF THE DOCUMENTS
>
> (II) THAT WE ARE ENTITLED TO POSSESSION OF THE DOCUMENTS
>
> (III) THAT, AT THE TIME OF DELIVERY TO YOU, WE WERE ENTITLED TO POSSESSION OF THE CARGO
>
> (IV) THAT, AT THE TIME OF DELIVERY TO YOU, WE HAD GOOD TITLE TO THE CARGO
>
> (V) THAT TITLE TO THE CARGO HAS BEEN PASSED AS PROVIDED IN THE UNDERLYING AGREEMENT TO YOU FREE OF ALL LIENS, CHARGES OR ENCUMBRANCES OF WHATEVER KIND AND
>
> (VI) THAT YOU WILL HAVE THE BENEFIT OF THE CARRANTY AS TO ENJOYMENT OF QUIET POSSESSION OF THE CARGO IMPLIED BY LAW IN THE UNDERLYING AGREEMENT BUT WITHOUT PREJUDICE TO ANY OTHER WARRANTY SO IMPLIED

26 OCBC identifies the following representations of material fact:

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[1] 4AB 516 presented to OCBC, 6AB 297 presented to SCB.

Version No 2: 18 Aug 2023 (16:33 hrs)

(a) the existence and validity of a full set of 3/3 original BLs;

(b) that at the time of delivery (to Hin Leong), Winson had good title to the cargo onboard the Ocean Taipan; and

(c) that at the time of delivery, Winson had passed good title to the cargo to Hin Leong.

27 SCB identifies the following representations of material fact:

(a) that the cargo onboard the Ocean Voyager existed, and was loaded onboard the Ocean Voyager from Tanjung Pelepas, Malaysia on or around 31 March 2020 and bound for Rotterdam, Netherlands;

(b) the existence and validity of a full set of 3/3 original BLs;

(c) that Winson was entitled to possession of the original BLs;

(d) that, at the time of delivery (to Hin Leong), Winson was entitled to possession of the cargo;

(e) that at the time of delivery, Winson had good title to the cargo onboard the Ocean Taipan; and

(f) that at the time of delivery, Winson had passed good title to the cargo to Hin Leong.

28 I accept that the LOIs contained the various representations identified by the banks.

29 Winson did not focus on disputing that the LOIs contained those representations; rather, Winson focused on disputing whether the

Version No 2: 18 Aug 2023 (16:33 hrs)

representations were *false*, and if so, whether Winson had made them *fraudulently*.

Were the representations false?

30 The representations may be summarised as follows: there was cargo shipped, pursuant to valid BLs, onboard the Ocean Voyager and Ocean Taipan (as described in the LOIs) for the Winson – Hin Leong sale, Winson had good title to that cargo, and Winson had passed good title to that cargo to Hin Leong.

31 The representations would be false if:

(a) *no such cargo had been shipped* (even if the Winson – Hin Leong sale were not a sham); or

(b) such cargo had been shipped, but *the Winson – Hin Leong sale was a sham*, in that there was no intention for title to be transferred from Winson to Hin Leong (and no intention for Winson to acquire title in the first place), and so no title was transferred.

Had cargo been shipped onboard the Ocean Voyager and Ocean Taipan, pursuant to valid BLs, as described in the LOIs?

32 I first address whether cargo had been shipped onboard the Ocean Voyager and Ocean Taipan, pursuant to valid BLs, as described in the LOIs. For this analysis, I *assume* that the Winson – Hin Leong sale was not a sham, and that when that sale was concluded on 27 March 2020 Winson believed that for the purposes of that sale, cargo would be shipped – cargo that it would get and pass good title to.

33 The LOIs respectively described the cargo shipped as comprising:

Version No 2: 18 Aug 2023 (16:33 hrs)

(a) 785,997 barrels of Ultra Low Sulphur Diesel ("ULSD") shipped on board the Ocean Voyager loaded at Tanjung Pelepas, Malaysia pursuant to a BL dated 31 March 2020;[2] and

(b) 786,022 barrels of ULSD shipped on board the Ocean Taipan loaded at Universal Terminal, Singapore pursuant to a BL dated 3 April 2020.[3]

34 Winson based this shipment information in its LOIs on two copy non-negotiable BLs that it had received.[4]

35 Winson contends that the cargo was shipped as described in the LOIs pursuant to valid BLs, whereas the banks contend that no such cargo was shipped and the BLs were forgeries.

36 In determining whether the representations in Winson's LOIs were false, there are two related sub-issues:

(a) were there valid BLs for the Subject Transactions; and

(b) was the cargo described in Winson's LOIs shipped onboard the Ocean Voyager and Ocean Taipan?

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2 6AB 297 presented to SCB.

3 4AB 516 presented to OCBC.

4 4AB 190, 4AB 337 (the earlier version of which is at 4AB 193).

Version No 2: 18 Aug 2023 (16:33 hrs)

(1) Were there valid BLs for the Subject Transactions?

37 In a letter from Hin Leong's Interim Judicial Managers ("IJMs"), dated 8 May 2020,[5] the IJMs stated that they had found marked "null and void" 3/3 original BLs with reference number OTK20-997 dated 31 March 2020 for 785,997 barrels of cargo on the Ocean Voyager. Moreover, the reverse sides of those BLs bear no endorsements.[6] Those BLs were the counterpart of the copy non-negotiable BL that Winson had for the Ocean Voyager.

38 Similarly, the IJMs stated in a letter dated 14 May 2020[7] that they had found marked "null and void" 3/3 original BLs with reference number OTK20-1006 dated 3 April 2020 for 786,022 barrels of cargo on the Ocean Taipan. The reverse sides of those BLs bear no endorsements.[8] Those BLs were the counterpart of the copy non-negotiable BL that Winson had for the Ocean Taipan.

39 In a letter dated 16 June 2020 concerning the Ocean Voyager cargo,[9] the IJMs stated that the Ocean Voyager BLs OTK20-997 "were signed by a staff of [Hin Leong]"; in a letter dated 16 June 2020 concerning the Ocean Taipan cargo,[10] they likewise stated that the Ocean Taipan BLs OTK20-1006 (including those dated 3 April 2020 for 786,022 barrels of cargo) "were signed by a staff of [Hin Leong]".

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5 7 AB 47 at 54, para 27.

6 3AB 385–392; further copies of the front pages are at 3AB 381–383.

7 8AB 47 at 60–61, para 49.

8 3AB 551–557.

9 9AB 47 at 48, para 6.

10 9AB 384 at 385, para 6.

Version No 2: 18 Aug 2023 (16:33 hrs)

40 In the IJMs' report to the court dated 22 June 2020,[11] the IJMs commented on three shipments (two of which concern the Ocean Voyager and the Ocean Taipan) where the same cargo was sold to more than one party.[12] The IJMs said that the first leg involved Hin Leong selling cargo to a counterparty for which Hin Leong provided documents such as an invoice and original BLs (or alternatively, LOIs). The second and third legs involved Hin Leong selling the same cargo to one or more counterparties, with another BL (the "2nd BL") being prepared; and then Hin Leong buying back the cargo. The IJMs said that the transactions were unusual because (among other things):

(a) the IJMs had not seen any evidence to suggest that Hin Leong bought back the cargo from Counterparty A before selling it to Counterparty B;

(b) it was unusual for there to be two different BLs issued in respect of the same cargo in the same shipment;

(c) the 2nd BL was typically signed by an employee of Hin Leong, and not by the carrier, Ocean Tankers (Pte) Ltd ("OTPL") or the master of the vessel; and

(d) it appears that the transactions were entered into purely for financing purposes, *ie*, for Hin Leong to get to use the funds obtained from the discounting of sales invoices or negotiating letters of credit, for some time, before repaying the banks for its purchases.

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11 13AB 48.

12 13AB 48 at 104–106, paras 167–170.

Version No 2: 18 Aug 2023 (16:33 hrs)

41 The IJMs stated that the cargo onboard the Ocean Voyager was sold by Hin Leong to at least three buyers, and the cargo onboard Ocean Taipan was sold by Hin Leong to at least two buyers.[13] From the evidence, for both the Ocean Voyager and the Ocean Taipan, the first buyer that Hin Leong sold the cargo to was Unipec Singapore Pte Ltd ("Unipec"), and Trafigura was only a subsequent buyer from Hin Leong of cargo that Hin Leong had already sold to Unipec.[14] I will address the significance of this below (at [60]–[72]).

42 From what the IJMs said, the copy non-negotiable BLs that Winson had (and the corresponding original BLs which had been marked "null and void" and were never endorsed) were not valid BLs – instead of being signed by the master or agent of the Ocean Voyager and the Ocean Taipan (as they purported to be), they were signed by a staff of Hin Leong for use in a scheme to sell cargo that had already been sold, and then to buy the cargo back from a subsequent buyer, so as to obtain financing.

43 Winson does not object to what the IJMs said as being inadmissible hearsay (an objection which Winson does raise for certain other matters), and indeed Winson itself relies on aspects of what the IJMs said, for Winson's own case.[15]

44 Winson, however, objects to the admission of statements by Hin Leong's Mr Freddy Tan to Hin Leong's liquidators,[16] as inadmissible hearsay. SCB seeks to admit redacted copies of those statements as evidence.

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13 13AB 48 at 106, para 170.

14 13AB 48 at 133, para 5, 13AB 48 at 144, para 5.

15 Transcript, day 2, 1 February 2023, page 11 line 13 to page 12 line 13.

16 Copies in Defendant's Bundle of Documents ("DBOD").

Version No 2: 18 Aug 2023 (16:33 hrs)

45 In his first statement, Mr Freddy Tan said at para 2 that he was instructed by Hin Leong's Mr Lim Oon Kuin ("OK Lim") to help him with various transactions / trades, listed at appendix 1, which included:[17] (a) a transaction involving OCBC, Winson and 785,997 barrels of cargo onboard the Ocean Voyager pursuant to a BL dated 31 March 2020; and (b) a transaction involving SCB, Winson and 786,022 barrels of cargo onboard the Ocean Taipan pursuant to a BL dated 3 April 2020. Those cargo details correspond to those in the copy non-negotiable BLs that Winson had, on which Winson based its LOIs.

46 Mr Freddy Tan went on to say at para 6:

> 6. I do not know whether the above-mentioned transactions involve any physical cargo as Mr OK Lim did not tell me. But there are times where he will tell me to use the shipment details of a particular physical shipment to prepare the shipment documents with the different counterparties (eg. in the case of Qi Lian San, Ocean Voyager, Ocean Taipan and Coral Sea).

47 At paras 12–14, he said:

> 12. The Treasury team will inform me once the shipping documents (bill of lading and/or certificate of origin) are ready for signing. When I go to collect these documents, the bills of lading having already been stamped with 'First Original', 'Second Original', 'Third Original' and 'Copy Non-Negotiable', together with Ocean Tankers (Pte) Ltd's company stamp. I do not know where they get these stamps from.
>
> 13. I will proceed to sign on the Bills of Lading as instructed by Mr OK Lim. Some of these Bills of Lading that I have signed are attached in Appendix 2.
>
> 14. I will scan a copy of the Bills of Lading and other shipping documents and send them to the counterparty as required. If the counterparty require the originals, I will get the approval from Mr OK Lim before sending them the originals.

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17 DBOD 11.

Version No 2: 18 Aug 2023 (16:33 hrs)

48 In his third statement, Mr Freddy Tan mentioned contracts relating to Ocean Voyager and Ocean Taipan,[18] specifically, the purchase of two parcels of 780,000 barrels of ULSD on board the vessels Ocean Voyager and Ocean Taipan from Winson for delivery during 29 April 2020 to 3 May 2020 and 6 May 2020 to 10 May 2020 to Rotterdam, Netherlands.[19] He exhibited as Annex L[20] the deal recap he had received from Winson's Head Trader, Mr Derrick Cai ("Mr Cai") on 27 March 2020, which he replied to on 30 March 2020 under Mr OK Lim's instructions.

49 In his first statement at paras 7–8, Mr Freddy Tan explained that the transactions he had helped Mr OK Lim with were different from other transactions, where the traders initiated the trade together with the operations team: those trades and documents were kept in other operational folders associated with the respective operators. For the transactions Mr Freddy Tan helped Mr OK Lim with, on the other hand, documents relating to those transactions were kept in a separate folder on the instructions of Mr OK Lim.[21]

50 Mr Tan said that he did not sign on any of the BLs for the other transactions (where the traders initiated the trade together with the operations team);[22] he said, from what he understood in normal circumstances, the BLs are usually signed by the master or the agent of the vessel and not by an employee of Hin Leong.

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18 DBOD 46 at 52.

19 DBOD 54.

20 DBOD 134–135.

21 Mr Freddy Tan's first statement, DBOD 4, paras 2–5.

22 Mr Freddy Tan's first statement, DBOD 4, paras 7–8.

Version No 2: 18 Aug 2023 (16:33 hrs)

51 Although the contents of appendix 2 to Mr Tan's first statement (which lists some of the BLs that he had signed) were redacted, I am satisfied that Mr Tan had signed the BLs for the Subject Transactions, the buyback leg of which (from Winson to Hin Leong) he had specifically mentioned being involved with, as is moreover evident from the emails. In any event, from what the IJMs said (at [40(c)] above), a staff from Hin Leong had signed the BLs.

52 Although Mr Freddy Tan did not give evidence, his statements are admissible under s 32(1)(*c*) of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act") as statements against the interest of their maker, *ie*, "when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose the person or would have exposed the person to a criminal prosecution or to a suit for damages".

53 Mr Freddy Tan's statement that he, an employee of Hin Leong, had signed OTPL BLs (instead of the master or agent of the vessel), was an admission that he had forged a document purportedly issued by another company, and purportedly signed by another person (the master or agent of the vessel). That is a statement which, if true, could expose him to criminal prosecution or to a suit for damages.

54 As SCB submitted, the IJMs' statements/reports, which include Mr Freddy Tan's statements, are also admissible under s 32(1)(*b*) of the Evidence Act as statements made by a person in the ordinary course of a trade, business, profession, or other occupation. They are documents constituting, or forming part of, the records compiled by the IJMs in the course of carrying out their duties, within the meaning of s 32(1)(*b*)(iv). Furthermore, that section expressly applies to records based on information supplied by other persons

Version No 2: 18 Aug 2023 (16:33 hrs)

(here, staff of Hin Leong including Mr Freddy Tan) – see also *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 at [88]–[95].

55 There is, moreover, no reason for me to exclude such evidence as a matter of discretion.

56 Winson also suggests that if Mr Freddy Tan (or some other staff of Hin Leong) signed the BLs, that may have been done under the authorisation of the master or agent of the vessels.[23] This is complete speculation, it is a point that was for Winson to prove, and Winson has done nothing to prove it. Moreover, Mr Tan had himself contrasted what he did, with what he understood would happen in normal circumstances – that the BLs were usually signed by the master or agent of the vessel and not by an employee of Hin Leong; he did not say that the master or agent had authorised him to sign the BLs, he said he did so simply on the instructions of Mr OK Lim.

57 Further, the liquidators of OTPL have, through solicitors, confirmed that for the OTK20-997 BL in respect of the Ocean Voyager, OTPL "did not issue the aforesaid BL".[24] Winson objects to what OTPL's liquidators have said in this regard, but the admissibility of what OTPL's liquidators said may be justified in the same manner as the admissibility of what Hin Leong's IJMs said.

58 What Winson had was copy non-negotiable BLs, the authenticity of which was disputed by the banks. Winson did not seek to prove the authenticity of those BLs by calling their maker, and I do not accept those BLs as authentic.

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23 Winson's closing submissions, para 196.

24 18AB 139, para 5(b).

Version No 2: 18 Aug 2023 (16:33 hrs)

Indeed, on the evidence I find that they were forgeries signed by Mr Freddy Tan of Hin Leong, or at least a staff of Hin Leong, not by the master or agent of the vessels.

59 If the copy non-negotiable BLs that Winson relied on to prepare its LOIs, and the original counterparts of those BLs, were forgeries, there were no valid BLs pursuant to which cargo was shipped for the Winson – Hin Leong sale, and it follows that Winson's representations to the banks as to the existence and validity of a full set of 3/3 original BLs was false.

(2) Was the cargo described in Winson's LOIs shipped onboard the Ocean Voyager and Ocean Taipan?

60 From the IJMs' statements and available documentary evidence, it appears that Hin Leong had first sold the cargo onboard the Ocean Voyager and Ocean Taipan to Unipec, before then selling the cargo again to Trafigura as part of the Subject Transactions (which culminated in Hin Leong buying the cargo back from Winson).

61 In HC/S/805/2020 ("Suit 805"), the liquidators of Hin Leong have sued Mr OK Lim, his son (Mr Lim Chee Meng), and his daughter (Ms Lim Huey Ching), for various matters, including for having sold cargo onboard the Ocean Voyager and Ocean Taipan to more than one party (at para 56 of the statement of claim), and in particular:

(a) for entering into multiple transactions with Unipec, Glencore Singapore Pte Ltd ("Glencore"), Trafigura and Winson involving the Ocean Voyager cargo, causing Hin Leong to mislead and/or cause the counterparties to obtain financing and banks into granting financing to Hin Leong (at para 57(j) to (o)); and

Version No 2: 18 Aug 2023 (16:33 hrs)

(b) for selling the same cargo on board Ocean Taipan to two counterparties (Unipec and Trafigura) and purchasing the same cargo from a third counterparty (Winson) (at para 57(p) to (v)).

62 SCB highlights that in Mr OK Lim's defence in Suit 805 at para 65(b), he admitted that Hin Leong confirmed a deal to sell 2 x 780,000 barrels +/- 5% operational tolerance of ULSD to Unipec, to be loaded on the Ocean Voyager and the Ocean Taipan, and further that one parcel of 780,000 barrels was to be loaded on board the Ocean Voyager and the other parcel of 780,000 barrels was to be loaded on board the Ocean Taipan. However, Mr OK Lim denied what the liquidator had pleaded concerning the transactions with Trafigura and Winson.

63 For Mr OK Lim to admit that the cargo on the Ocean Voyager and Ocean Taipan at the material time was meant for Unipec pursuant to a sale from Hin Leong to Unipec, is an admission against his interest, for if Mr OK Lim were involved in the Subject Transactions (and I accept from the evidence of Winson's Mr Cai that he was, at least in concluding the Winson – Hin Leong sale) then Mr OK Lim would have been engaged in subsequent dealings with cargo that Hin Leong had no right to – having already committed the same to Unipec.

64 Mr OK Lim's admission is admissible evidence in the present suit that the cargo onboard the Ocean Voyager and Ocean Taipan was meant for Unipec pursuant to a prior transaction between Hin Leong and Unipec – that cargo was not meant for Trafigura or Winson or repurchase by Hin Leong pursuant to the Subject Transactions.

Version No 2: 18 Aug 2023 (16:33 hrs)

65 The position of Hin Leong's IJMs (and now liquidators) that Unipec was the first buyer of the cargo from Hin Leong was set out in the IJMs' letters and report(s), and substantiated by documents.

66 As stated in the IJMs' letter of 8 May 2020 concerning the Ocean Voyager:[25]

(a) Hin Leong and Unipec concluded a sale from Hin Leong to Unipec of 2 x 780,000 barrels of ULSD between 13 March and 20 March 2020, prior to the Subject Transactions on 27 March 2020 (at para 5);

(b) On 1 April 2020, Hin Leong sent Unipec two full sets of original BLs for the Ocean Voyager under reference OTK20-948(a) and OTK20-948(B) for a total quantity of 785,997 barrels (at para 9).

67 As stated in the IJMs' letter of 14 May 2020 concerning the Ocean Taipan:[26]

(a) on 4 May 2020, AmSpec sent to Hin Leong and Unipec an updated loading report referencing a loading of the Ocean Taipan on 3–4 April 2020 with a time log of ship to ship transfer operation, and ullage reports – that 2nd AmSpec Report and the Master's Report indicate that approximately 357,000 barrels of ULSD was loaded from the Wu Yi San, and the Ocean Taipan had an existing cargo of 429,517 barrels before that loading (making a total of some 786,517 barrels (at paras 12–14);

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25 7AB 47.

26 8AB 47.

Version No 2: 18 Aug 2023 (16:33 hrs)

(b) the IJMs had not sighted any documents in relation to the loading of cargo pursuant to the Trafigura and Winson Oil contracts, other than copy non-negotiable BLs under reference OTK20-1006 dated 3 April 2020 for an original quantity of 788,299 barrels and a "corrected" quantity of 786,022 barrels (those being BLs which I have found Mr Freddy Tan had signed) (at para 18).

68 The contrast between the documentation available for the Hin Leong – Unipec sale, and that for the Subject Transactions, is stark. In particular, the contract between Trafigura and Winson[27] provided in clause 11 that the seller (Trafigura) was to appoint and instruct an internationally recognised independent inspector to determine the quantity and the quality of the product at the loadport in accordance with the determination of quantity and quality clause. It further provided that if an independent inspector had already been appointed by the seller or any third party in respect of the shipment prior to the nomination of such shipment by the seller to the buyer, or if such inspection had already been carried out, then both parties shall be bound by the results of such measurement of quantity, sampling and analysis thereof as carried out by such independent inspector to the extent set out in the determination of quantity and quality clause (clause 12) subjected to a stated proviso.

69 There is however no evidence that any independent inspector was appointed by anyone for the purported shipments for the Subject Transactions, and Winson never received any loading documents such as an inspector's report, or certificates of quantity and quality (or equivalent documents). Indeed, no such loading documents were in the evidence. I conclude that no such

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27 4AB 525.

Version No 2: 18 Aug 2023 (16:33 hrs)

inspector was appointed, no inspection took place, and there were no determinations of quantity or quality for the purported shipments for the Subject Transactions.

70 Winson has levelled various criticisms against the documentation for the Unipec transaction, but I do not need to reach any firm conclusion about that documentation – there are interpleader proceedings in relation to the Ocean Voyager and Ocean Taipan cargo in which Unipec and other parties are claiming interests in the cargo (or its proceeds of sale); presently, Winson, OCBC and SCB are all not claiming any interests in the interpleader proceedings. The issue before me is simply whether the cargo for the Subject Transactions was shipped, pursuant to valid BLs, as described in Winson's LOIs. I find that this did not happen, and it was to that end that I compared the Subject Transactions with the Hin Leong – Unipec sale.

71 For the above reasons, I find that Winson made false representations in its LOIs, about:

(a) the existence and validity of BLs for the Winson – Hin Leong sale; and

(b) the cargo described in Winson's LOIs having been shipped onboard the Ocean Voyager and Ocean Taipan (being cargo that Winson had good title to, and which Winson had passed Hin Leong good title to).

72 I thus find that Winson had made the false material representations of fact listed by the banks (set out at [26]–[27] above).

Version No 2: 18 Aug 2023 (16:33 hrs)

Was the Winson – Hin Leong sale a sham?

73 I do not need to reach a conclusion as to whether the Winson – Hin Leong sale was a sham (or, more broadly, whether the Subject Transactions were a sham) to conclude that Winson had made false material representations of material fact in its LOIs. In the circumstances, it is unnecessary for me to make a finding on the issue of sham, and I leave that point open.

Did Winson act fraudulently?

What do the events leading up to the presentations indicate about Winson's state of mind?

74 The next question is whether Winson made those false representations fraudulently, *ie* knowing that they were false, or at least without belief in their truth (which includes being reckless, indifferent to whether they were true or not).

75 I start from the assumption that the Subject Transactions were not a sham, and that when they were entered into on 27 March 2020 Winson believed that there would be real trading of goods, *ie*, that for the Subject Transactions, cargo would be shipped that Winson would get good title to, and which Winson would pass Hin Leong good title to.

76 The question then is whether that Winson no longer believed that by the time of the operative presentations some three weeks later.

Version No 2: 18 Aug 2023 (16:33 hrs)

77 Winson has sued the banks for payment pursuant to presentations of invoices and LOIs dated 15 April 2020.[28] These were Winson's second presentations to each of the banks. It is common ground that Winson's first presentations were superseded by its second presentations, but those first presentations remain relevant in determining Winson's state of mind at the time of the second presentations (which, it is common ground, was the relevant time). The first presentations are relevant because Winson's first presentation to OCBC was for the Ocean Voyager, and that to SCB was for the Ocean Taipan; but Winson's second presentations switched the vessels around – its second presentation to OCBC was for the Ocean Taipan, and that to SCB was for the Ocean Voyager.

78 Winson's second presentation to OCBC was made on 16 April 2020, and its second presentation to SCB was made on 21 April 2020 (through Credit Agricole, on instructions from Winson dated 17 April 2020). The invoices and LOIs for the second presentation are all dated 15 April 2020, and the issue is essentially whether Winson believed in the truth of the representations when those documents were prepared on or around 15 April 2020, and still believed in their truth when the presentations were made to OCBC on 16 April 2020 and to SCB on 21 April 2020 respectively.

79 Winson's LOIs were based on copy non-negotiable BLs (front page only) that it had received. Winson never received original BLs nor copies of the reverse side of the BLs showing any endorsements. Winson also never received any loading documents such as an independent inspector's report, certificates of quality and quantity (or equivalent documents), and Winson was never told

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[28] Winson's statement of claim in Suit 463, paras 21–22, Winson's statement of claim in Suit 474, paras 18–19, Winson's closing submissions, paras 41 and 43.

Version No 2: 18 Aug 2023 (16:33 hrs)

that an independent inspector had been appointed or that inspections had taken place.

(1) Chronology

80 A basic chronology of events after the Subject Transactions were concluded on 27 March 2020, until Winson's second presentations, is as follows.

81 On 30 March 2020, Trafigura nominated the vessel Hua San for the Trafigura – Winson Sale.[29] Winson in turn emailed Hin Leong asking Hin Leong to clear the nomination of the Hua San for the Winson – Hin Leong contract.[30]

82 31 March 2020 was the loading date on the Ocean Voyager copy non-negotiable BL.

83 At 7.22pm on 2 April 2020, Hin Leong emailed Trafigura to nominate the Ocean Voyager and Ocean Taipan for the Hin Leong – Trafigura sale.[31] In turn, at 7.46pm on 2 April 2020, Trafigura emailed Winson to nominate the Ocean Voyager and the Ocean Taipan for the Trafigura – Winson sale.[32] At 11.19pm on 2 April 2020, Hin Leong emailed Winson to counter-propose the Ocean Voyager and the Ocean Taipan, instead of the Hua San which Winson had earlier nominated.[33] Winson says that it was only then that it came to know

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29 3AB 273–284.

30 3AB 303.

31 3AB 163.

32 4AB 371

33 3AB 302.

Version No 2: 18 Aug 2023 (16:33 hrs)

that Hin Leong might be the supplier to Trafigura.[34] I do not accept this – as I explain below (at [109]), I find that the Subject Transactions were pre-structured, and Winson knew from the start (27 March 2020) that it was involved in a circular trade of cargo from Hin Leong to Trafigura, Trafigura to Winson, and Winson back to Hin Leong.

84 3 April 2020 was the loading date on the Ocean Taipan copy non-negotiable BL.

85 Winson's Mr Carl Dong ("Mr Dong"), an executive in Winson's Operations Department, says in his affidavit of evidence-in-chief ("AEIC") that on the morning of 3 April 2020, he called Mr Freddy Tan from Hin Leong to ask why Hin Leong had changed the vessels, and Mr Tan told Mr Dong that Hin Leong was *the* seller to Trafigura.[35] On the stand, Mr Dong sought to change that and say that he understood that Hin Leong was *an* upstream seller to Trafigura, and there might be intermediate sellers between Hin Leong and Trafigura.[36] I do not believe that. Mr Dong readily accepted what Hin Leong told him about changes in the vessels to be used, which Hin Leong would not be able to dictate if there were intermediate suppliers between Hin Leong and Trafigura who could choose to supply Trafigura from a source other than vessels chosen by Hin Leong.

86 In any event, I find that the Subject Transactions were pre-structured and there was an understanding that Hin Leong, who was both the original supplier

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34 Winson's reply at para 17(e) in Suit 463.

35 Mr Dong's AEIC at para 24.

36 Transcript, day 6, 7 February 2023, page 53 line 3 to line 22.

Version No 2: 18 Aug 2023 (16:33 hrs)

and ultimate buyer, would choose the vessel(s) to use; and that specific cargo would be sold, rather than a fungible quantity of gasoil.

87 At 9.50am on 3 April 2020, Winson emailed Hin Leong to seek clearance for the nomination of the Ocean Voyager and Ocean Taipan for the Winson – Hin Leong contract.[37]

88 On 4 April 2020, Winson emailed Hin Leong to ask for copy BLs for both shipments.[38] At 9.55am on 6 April 2020, Winson emailed Hin Leong to ask for loading documents for both vessels.[39]

89 Hin Leong replied in two emails at 3.49pm and 3.55pm on 6 April 2020, providing Winson with copy BLs for the Ocean Voyager and the Ocean Taipan, and shipment details, but no loading documents.[40]

90 Winson made its first presentation to OCBC on 7 April 2020, based on an invoice and LOI both dated 6 April 2020.[41] As at 6 April 2020, however, the nomination of the Ocean Voyager and the Ocean Taipan had yet to be confirmed between Trafigura and Winson in correspondence (which was only sent on 7 April 2020), and in any event, on the terms of the Trafigura – Winson contract, and the Winson – Hin Leong contract, those vessels could still be substituted until the last estimated time of arrival ("ETA") at the disport, which was still in the future.

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37 4AB 47.

38 4AB 142.

39 4AB 147.

40 4AB 189, 192.

41 4AB 300–304.

Version No 2: 18 Aug 2023 (16:33 hrs)

91 On 7 April 2020, Winson emailed Trafigura to say, "we understood that both vessels are ok for subject deal".[42] Trafigura then emailed Hin Leong to say that they accepted the nomination of the Ocean Voyager and the Ocean Taipan.[43] Later that day, Trafigura emailed Winson shipment details for both the Ocean Voyager and the Ocean Taipan.[44]

92 On 8 April 2020, Trafigura emailed Winson to say it would resend corrected figures for the shipments.[45] Hin Leong then emailed Winson corrected quantity figures for the Ocean Taipan, revising the quantity from 788,299 barrels to 786,022 barrels; Hin Leong also provided a corresponding copy non-negotiable BL.[46]

93 Thereafter, Hin Leong emailed Trafigura the corrected figures for the Ocean Taipan and the corresponding non-negotiable BL,[47] and Trafigura emailed Winson the same.[48]

94 On 9 April 2020, Winson made its first presentation to SCB, in relation to the Ocean Taipan.

95 On 13 April 2020, OCBC's Ms Ng Chuey Peng reached out to Winson's Mr Tony Au ("Mr Au") to ask if Winson could help to find an alternative buyer

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42 4AB 370.

43 3AB 162.

44 4AB 313.

45 4AB 368.

46 4AB 335.

47 3AB 160.

48 4AB 354.

Version No 2: 18 Aug 2023 (16:33 hrs)

for the Ocean Voyager cargo (that was the subject of Winson's first presentation).[49] At that point Mr Au declined, but there were further discussions on the topic on both 13 and 14 April 2020.[50]

96 At 5.09pm on 13 April 2020, Winson emailed its lenders, including OCBC, to say that it had no exposure to Hin Leong as all their sales were covered with LCs.[51] By this time, Winson had heard that Hin Leong was in financial trouble.

97 On 14 April 2020, OCBC participated in an all-lenders' call concerning Hin Leong.[52] In relation to that call, OCBC received a slide deck indicating that Hin Leong's inventory did not include cargo on the Ocean Voyager or Ocean Taipan.[53]

98 On 15 April 2020, Mr Nathanael Lin from Hin Leong informed OCBC that Mr OK Lim had admitted to multiple financing and fraudulent BLs, and that he suspected there were multiple BLs for the Ocean Voyager.[54] I mention this (and the information OCBC received in relation to the all-lenders call) not for the truth of what was communicated to OCBC, but only for the fact that it was communicated to OCBC, which provides context for OCBC's actions at the time.

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49 4AB 435.

50 4AB 435, 440

51 4AB 444.

52 Ms Ng's AEIC at para 39.

53 4AB 417 at 428, Mr Ng's AEIC at para 41.

54 Ms Ng's AEIC at paras 44 and 46.

Version No 2: 18 Aug 2023 (16:33 hrs)

99 At 7.06pm on 15 April 2020, OCBC rejected Winson's first presentation as "there was no physical cargo that was shipped to the Ocean Voyager."[55]

100 At 11.17pm on 15 April 2020, Winson's Executive Director, Ms Crystal Tung ("Ms Tung"), received an internal email with the shipment details and copy BLs received from Hin Leong on 6 April 2020.[56]

101 New invoices and LOIs were prepared by Winson, all dated 15 April 2020, which Winson then used for its second presentations to the banks.

102 At 11.21am on 16 April 2020, Winson made its second presentation to OCBC; this time, for the Ocean Taipan.[57]

103 Mr Cai asked Mr Dong to send him loading documents for Winson's sale to Hin Leong; he then asked Mr Dong to get them from Trafigura.[58] At 11.48am on 16 April 2020, Mr Dong emailed Trafigura to ask for the loading documents.[59]

104 On 21 April 2020 at 11.18am, Winson emailed OCBC with the explanation that the second presentation for a different vessel was due to an internal mix-up discovered during an "inter-department reconciliation in

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55 4AB 469.

56 4AB 473, Ms Tung's AEIC at paras 32 and 35.

57 4AB 511.

58 Mr Dong's AEIC at paras 38–39.

59 7AB 319.

Version No 2: 18 Aug 2023 (16:33 hrs)

accordance with [Winson's] standard procedures. Thereafter, revisions were promptly made to rectify the mix up on 15 April."[60]

105 At 5.02pm that same day, Winson's second presentation to SCB, for the Ocean Voyager, was received by SCB.[61]

(2) Analysis

(A) REASONABLENESS AND HONESTY

106 In *DBS v Carrier* at [53], the court observed that unreasonableness of the grounds of the supposed belief will be evidence from which fraud may be inferred, citing Lord Herschell's statement in *Derry v Peek* that there must be many cases "where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one" (*Derry v Peek* at 375–376).

107 In assessing whether, at the time of its second presentations, Winson honestly believed in the truth of the representations in its LOIs, it is thus relevant to consider how reasonable (or unreasonable) that belief would be, in the circumstances then prevailing.

(B) WHETHER THE SUBJECT TRANSACTIONS WERE PRE-STRUCTURED

108 I first consider whether the Subject Transactions (the Hin Leong – Trafigura sale, the Trafigura – Winson sale, and the Winson – Hin Leong sale)

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60 9AB 162, 6AB 274; see also 9AB 235, 6AB 265.

61 6AB 294.

Version No 2: 18 Aug 2023 (16:33 hrs)

was pre-structured. The banks contend that the Subject Transactions were pre-structured as part of their argument that the Winson – Hin Leong sale was a sham, and I have not found it necessary to decide the issue of sham. Nevertheless, whether the Subject Transactions were pre-structured may be relevant to Winson's state of mind when it presented documents for payment under the LCs, even if the Winson – Hin Leong sale were not a sham.

109 I find that the Subject Transactions were pre-structured, for three main reasons. First, having put forged BLs into circulation, Hin Leong would have wanted them back by way of pre-structured transactions, with Trafigura and Winson performing their obligations as downstream sellers using only the vessels and cargo chosen by Hin Leong as original supplier. If Trafigura or Winson were to choose another source for their respective supplies (*ie*, from Trafigura to Winson, or from Winson to Hin Leong), the forged BLs would then have caused trouble for Hin Leong when they were relied upon to collect cargo, and were found to be ineffective. This points to the Hin Leong – Trafigura – Winson – Hin Leong circular trade being for vessels and cargo chosen by Hin Leong, rather than for fungible quantities of gasoil.

110 Second, Winson made its first presentation to OCBC on 7 April 2020 based on an invoice and LOI both dated 6 April 2020, representing that goods had been shipped on board the Ocean Voyager, when the nomination of the Ocean Voyager (and that of the Ocean Taipan) had yet to be confirmed – the correspondence confirming nomination only took place on 7 April 2020, and moreover on the terms of the Trafigura – Winson contract the nominated vessels could still be substituted. Winson argues that the Subject Transactions were not circular until a nomination was made, accepted, and no substitution option

Version No 2: 18 Aug 2023 (16:33 hrs)

remained available.[62] On the terms of the Trafigura – Winson and Winson – Hin Leong contracts, substitution would still be possible until ETA at disport. If that were the case, Winson could not honestly have made its first presentations on 6 and 9 April 2020, for substitution was still possible and Winson could not honestly have represented that it had received title to cargo onboard the Ocean Voyager and the Ocean Taipan. The conclusion I draw is that the Subject Transactions were pre-structured on the basis that Hin Leong (which was both original supplier and ultimate buyer) would decide on the vessels and cargo, with Trafigura and Winson remaining passive in that regard. Trafigura and Winson never had any real nomination or substitution rights.

111 Third, the worsening market conditions in the afternoon of 27 March 2020[63] were such that it made no commercial sense for Hin Leong to repurchase the goods from Winson, unless the Subject Transactions were pre-structured. At 2.54pm on 27 March 2020, Hin Leong sold Trafigura 2 x 780,000 barrels of gasoil at a price of Mean of Platts Singapore ("MOPS") for gasoil 10ppm, plus a premium of US$2.30 per barrel. At 3.19pm that day, Trafigura sold Winson the same quantity of gasoil at MOPS plus US$2.35 per barrel. At 5.10pm, Winson sold Hin Leong the same quantity of gasoil at MOPS plus US$2.35 per barrel. In terms of price, Hin Leong made a loss of US$0.05 per barrel, Trafigura made a profit of US$0.05 per barrel, and Winson broke even. Winson emphasises that in terms of price it made commercial sense for it to have bought gasoil from Trafigura at the price it did (expecting to make a profit), and to have sold it at the same price to Hin Leong (as the market had worsened, and Winson might make a loss if it held onto the gasoil). On a parity of reasoning, though,

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62 Winson's closing submissions, paras 137–145.

63 Mr Cai's AEIC at para 32, Expert Report of Catherine Jago at para 5.63.

Version No 2: 18 Aug 2023 (16:33 hrs)

it made no commercial sense (in terms of price) for *Hin Leong* to have bought back the same quantity of gasoil from Winson at a *higher* price (than what Hin Leong had sold it for to Trafigura), when the market for gasoil had become *worse*. The transacted prices, and the market conditions on the day, suggest that the Subject Transactions were pre-structured, with all parties knowing in advance how they would emerge on a net basis.

(C) NO LOADING DOCUMENTS

112 Winson never received any loading documents for the shipments on the Ocean Voyager and the Ocean Taipan. Winson's Mr Dong had emailed Hin Leong to ask for this on 6 April 2020,[64] but he did not follow up after Hin Leong only sent Winson copy BLs and no loading documents.

113 By the time of the second presentations (the earlier being that to OCBC on 16 April 2020), it had been some 16 days since the Ocean Voyager was supposedly loaded on 31 March 2020, and 13 days since the Ocean Taipan was supposedly loaded on 3 April 2020. The evidence of other trades done by Winson involving cargo shipped to Europe shows that in less time than that, loading documents were always received by Winson (and Winson's buyers). Loading documents were typically made available some two to three days from shipment date, and when that was done as late as eight days after shipment, Winson apologised. That contrasts with Winson not asking Hin Leong again for the loading documents, after its initial request on 6 April 2020.

114 Winson contends that it always believed that cargo had been loaded as shown on the copy BLs, because of the copy BLs, the contracts it had entered

64 4AB 147.

Version No 2: 18 Aug 2023 (16:33 hrs)

into, and the fact that it had obtained the copy BLs from reputable parties (*ie*, Trafigura and Hin Leong).[65] However, the lack of loading documents was a red flag.

(D) CHANGE IN OCEAN TAIPAN BL QUANTITY AFTER SHIPMENT

115 A further red flag was the change in the BL quantity for the Ocean Taipan copy BL, after the BL was issued and the vessel had sailed. The experts agreed that it was not common that "quantity figures stated on Bills of Lading are altered after the BLs are issued and the vessel sailed". The experts further agreed that "an operator would likely ask for the load port inspectors Quantity report, and confirmation from the Master of the vessel that the revised figures were correct and a reasoning for why there had been a discrepancy."[66] The change of BL quantity for the Ocean Taipan was a further red flag, but Winson did not ask for (and was not given) any explanation or documentation to support the change.

116 Further, Winson's expert Ms Catherine Jago agreed that she would expect an operator to check that the earlier set of BLs reflecting the original quantity figures had been cancelled,[67] but Winson never did so.

(E) DISCUSSIONS BETWEEN OCBC AND WINSON ABOUT PURCHASE OF THE OCEAN VOYAGER CARGO

117 On 13–14 April 2020, Ms Ng from OCBC had discussions with Winson's Mr Au and Ms Tung about Winson's possible involvement in a

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65 Winson's reply submissions, paras 164–166.

66 Joint Expert Memorandum at S/N 7 and 8, 21AB 116.

67 Transcript, day 12, 15 February 2023, page 28 line 24 to page 29 line 4.

Version No 2: 18 Aug 2023 (16:33 hrs)

purchase / repurchase of the Ocean Voyager cargo. Ms Ng recounts this in paras 30–38 of her AEIC, and Ms Tung in paras 26–29 of her AEIC; both Ms Ng and Ms Tung testified, but Mr Au was not a witness.

118 I accept Ms Ng's evidence that on 13 April 2020 she had a call with Mr Au, when she enquired whether it was possible for Winson to repurchase the Ocean Voyager cargo, and Mr Au said, "no". Mr Au also told Ms Ng that Mr OK Lim had approached Winson's founder, Mr Tony Tung ("Mr Tung"), the same day to borrow money.

119 Later the same day, Ms Ng spoke to Ms Tung about whether Winson would repurchase the Ocean Voyager cargo. It is common ground that Ms Ng also raised another alternative: for Winson to help find a buyer for the cargo. I accept Ms Ng's evidence that in response to that, Ms Tung said that Winson did not know whether the title to the cargo was clean.

120 Later that evening, however, both Mr Au and Ms Tung sent Ms Ng WhatsApp messages to the effect that Winson was willing to find customers for the cargo. Mr Au's message of 6.44pm said, "We shall start to work on your request and asked [*sic*] the trader to check the cargo. Keep you posted."[68] Mr Au then sent a further message at 6.46pm, "…We also need to make sure the title is clean."

121 Ms Tung's message of 6.45pm read, "…I've checked with our traders. They will try to find customers, maybe shipping to Australia or Europe. Could you please help to check what's the price offered? Also, kindly check if the title

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68 4AB 435.

Version No 2: 18 Aug 2023 (16:33 hrs)

is clean. Thank you."[69] Ms Ng replied to Ms Tung at 6.47pm, "…If the B/L is endorsed to our order we hv better control n say. Therefore hope u can quickly obtain the BL for us." To that, Ms Tung replied, "Yes, we're checking with our supplier."

122 The next day, 14 April 2020, Ms Ng sent Ms Tung a message at 1.41pm, "…I wd need the BL to act. Do u al hv it pls?" Ms Tung replied at 1.54pm, "…My supplier hasn't receive it. My supplier needs to repay their financing bank, then they can release the bl to us. But the due date is around 15 May. We're checking if they [*sic*] are other ways we can ensure clean title." Ms Ng then said at 1.57pm, "I remember your supplier is Trafigura. Title shd be transferred to you for u to present the LOI to us?" Ms Tung replied at 1.58pm, "Yes, but we don't have the bl yet. That's why using LOI."

123 Winson ultimately never agreed to repurchase the cargo. Nor did Winson find any buyers for it.

124 The various references in those discussions as to whether title was clean were a matter of dispute between the parties. Ms Ng's evidence is that they were references to whether Winson had obtained clean title from Trafigura and in turn passed clean title on to Hin Leong. Winson, on the other hand, contends that they were just references to whether Hin Leong may have resold the cargo to some other party.

125 I accept Ms Ng's evidence on this point. The messages of 1.41pm and 1.54pm of 15 April 2020 are of particular importance here. Ms Ng said she would need the BL to act, and asked if Ms Tung's side had it; Mr Tung said

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69 4AB 440.

Version No 2: 18 Aug 2023 (16:33 hrs)

Winson's supplier had not received it, and that supplier needed to repay their financing bank before the BL could be released to Winson. Ms Tung then said, "We're checking if [there] are other ways we can ensure clean title." By "other ways" to ensure clean title, Ms Tung could only have meant ways other than obtaining the BL, which she and Ms Ng had just been discussing. The BL was a document of title to the Ocean Voyager cargo, and obtaining it would have assuaged OCBC's concern that Winson and (through Winson) Hin Leong had not obtained title to that cargo. This interpretation is reinforced by what Ms Ng then said: she asked whether title should have been transferred to Winson for Winson to present the LOI to OCBC; Ms Tung responded to agree with that, but added that Winson did not have the BL yet, which was why it used an LOI.

126 In contrast, there was no express discussion about checking whether Hin Leong had resold the cargo (which is what Ms Tung says the references to "clean title" were all about). Ms Tung says her reference to "other ways we can ensure clean title" meant ways other than OCBC checking with Hin Leong whether the cargo had been resold.[70] I do not accept that. Ms Tung's reference to "other ways" came right after she and Ms Ng were discussing obtaining the BL, and obviously referred to that. Furthermore, if the BL were obtained, it would not show whether Hin Leong may have resold the cargo. Any endorsements in respect of such a sale would not have taken place until after the endorsements and delivery of the BL pursuant to the Trafigura – Winson and Winson – Hin Leong contracts. Therefore, Ms Tung's reference to "other ways" to ensure clean title (meaning, ways other than obtaining the BL) could only have been a reference to checking whether Winson had obtained good title from

[70] Transcript, day 11, 14 February 2023, page 133 line16 to page 136 line10.

Version No 2: 18 Aug 2023 (16:33 hrs)

Trafigura (its upstream supplier), rather than to checking whether Hin Leong (its downstream buyer) may have resold the cargo.

127 The picture which emerges is:

(a) Winson was unwilling to repurchase the cargo, although one might expect a trader who had sold a cargo to be open to repurchasing it if the price was right; and

(b) Winson was willing to help find a buyer for the cargo, but repeatedly emphasised the need to check if title to the cargo was clean, which in the context meant whether Trafigura had passed clean title to Winson, and Winson in turn to Hin Leong. A new buyer would then be able to get clean title to the cargo. Ms Tung recognised that title should have been transferred to Winson for Winson to present its LOI to OCBC, but nevertheless was expressing concern about whether that title transfer had in fact taken place, hence the emphasis on the need to check that title was clean before getting any other party to buy the cargo (with Winson itself being unwilling to do so). While this by itself might not show that Winson already did not believe it had good title to the cargo, it shows that Winson at least had doubts – doubts it should have sought to clear, but which it did not, when OCBC then rejected its first presentation, as I discuss in the next section.

Version No 2: 18 Aug 2023 (16:33 hrs)

(F) OCBC'S REJECTION OF WINSON'S FIRST PRESENTATION FOR THE OCEAN VOYAGER

128 If Winson still needed a wake-up call, it received that when OCBC rejected Winson's first presentation for the Ocean Voyager. This rejection was conveyed by a SWIFT message on 15 April 2020. In that message, OCBC said:[71]

> It has come to the bank's attention that there was no physical cargo that was shipped to the Ocean Voyager. In view of this, the bank would not be honouring the letter of credit now and would hold the documents, pending the procurement of the original B/Ls to be presented by beneficiary.

129 It is a serious matter for an LC-issuing bank to refuse payment on the basis that "there was no physical cargo that was shipped to [the subject vessel]", yet Winson did not even enquire of OCBC why it was saying so.

130 Instead, it appears that Winson prepared new invoices and new LOIs that same day to make its second presentations:

(a) to OCBC for the Ocean Taipan (instead of for the Ocean Voyager that OCBC had raised issues with); and

(b) to SCB for the Ocean Voyager instead of for the Ocean Taipan (although SCB had not raised any issues with Winson's first presentation to it for the Ocean Taipan).

131 Winson says those second presentations were made because Ms Tung realised that Hin Leong had designated OCBC to finance the Ocean Taipan cargo, and SCB to finance the Ocean Voyager cargo, but Winson's first presentations had mixed the vessels up. Indeed, Ms Tung did receive an internal

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71 4AB 471.

Version No 2: 18 Aug 2023 (16:33 hrs)

email at 11.17pm on 15 April 2020 forwarding her the shipment details and copy BLs received from Hin Leong on 6 April 2020, identifying OCBC as the LC-issuing bank for the Ocean Taipan cargo, and SCB as the LC-issuing bank for the Ocean Voyager cargo.[72]

132 However, the OCBC and SCB LCs did not specify which vessels they were being issued for. Indeed, Ms Tung accepted that if OCBC had paid Winson on Winson's first presentation, Winson would have kept the money (rather than return it and make second presentations with the vessels switched around).[73]

133 The designation of SCB and OCBC for specific vessels was a matter between Hin Leong and Winson. It was not relevant to the banks, nor was it a basis on which either bank had disputed Winson's first presentations.

134 Winson was under no obligation to abandon its first presentations and make its second presentations, but making those second presentations allowed Winson to try to avoid the issues OCBC had raised with the Ocean Voyager cargo (by making the Ocean Voyager presentation to SCB instead, and making a presentation to OCBC for the Ocean Taipan, which OCBC had not raised issues with yet).

135 However, the second presentations would not have made issues with the shipment of cargo go away in the long run. If, as OCBC had asserted, "there was no physical cargo that was shipped to the Ocean Voyager", even if SCB paid Winson for the Ocean Voyager cargo, Winson would find itself in breach

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72 4AB 473.

73 Transcript, day 10, 13 February 2023, page 16, lines 15–20.

Version No 2: 18 Aug 2023 (16:33 hrs)

of the Winson – Hin Leong contract (for Winson would not have passed good title to Hin Leong as it had contracted to).

136 An honest trader in Winson's position would have sought to understand why OCBC was saying that for one of the two shipments "no physical cargo…was shipped", and to check if that was in fact the case – particularly when Winson had (unusually) not received any loading documents for either shipment, and there had been an unexplained, undocumented change in BL quantity for the shipment on the Ocean Taipan. Winson did not engage with OCBC to understand OCBC's rejection better, and it did not conduct checks to confirm if the Ocean Voyager cargo (or the Ocean Taipan cargo) had in fact been shipped as represented in its LOIs, as I elaborate in the next section.

137 Before leaving the matter of the second presentations, I add the observation that Winson was not honest with OCBC about the reason for its second presentation to OCBC. What Winson told OCBC was: the second presentation was due to an internal mix up, discovered during an "inter-departmental reconciliation" as part of Winson's "standard procedures".[74] When Winson was pressed for specific discovery, Winson conceded that there were no "standard procedures", but its counsel said Winson would explain that there was an internal meeting.[75] At trial, when Ms Tung was asked about the "internal meeting", she said she had a meeting with Mr Au, but that was not "part of SOP, internal reconciliation, departmental reconciliation".[76]

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74 5AB 297.

75 21AB 72 line 29 to 73 line 20.

76 Transcript, day 10, 13 February 2023, page 35 lines 1–8.

Version No 2: 18 Aug 2023 (16:33 hrs)

138 Winson could have simply told OCBC that it was making a second presentation because Hin Leong had designated OCBC to finance the Ocean Taipan cargo, instead of the Ocean Voyager cargo (for which Hin Leong had designated another bank). Winson, however, did not give that as an honest answer. Instead, Winson dressed up the second presentation to OCBC as being the result of some "inter-departmental reconciliation" as part of Winson's "standard procedures", but this was untrue. Telling the truth might not have adversely affected how OCBC viewed the matter, but Winson chose instead to lie.

(G) THE CHECKS THAT WINSON DID (OR DID NOT DO)

139 Winson's invoices and LOIs for its second presentations to the banks are all dated 15 April 2020, the same date that Winson received OCBC's rejection of the first presentation to OCBC. It appears that Winson proceeded to prepare documents for its second presentations after Ms Tung realised (in the night of 15 April 2020) that Hin Leong had designated OCBC to finance the Ocean Taipan cargo, and SCB to finance the Ocean Voyager cargo.

140 Winson did not seek to find out from OCBC why it was saying that "no physical cargo…was shipped", and such checks as it made (or claims to have made) could not have confirmed that.

141 I first deal with Winson's contention that it understood from OCBC's statement that "no physical cargo…was shipped to the Ocean Voyager" meant that there was simply no cargo onboard the Ocean Voyager, *ie*, the Ocean Voyager was travelling unladen. That is not what OCBC's statement meant, and I do not believe that is how Winson understood it.

Version No 2: 18 Aug 2023 (16:33 hrs)

142 OCBC's statement must be viewed in the context of it responding to Winson's presentation for payment under OCBC's LC, with Winson providing an LOI representing that there was cargo shipped, pursuant to valid BLs, onboard the Ocean Voyager (as described in the LOI) for the Winson – Hin Leong sale, Winson had good title to that cargo, and Winson had passed good title to that cargo to Hin Leong. OCBC's statement meant (and was understood by Winson to mean) that no cargo had been *shipped as represented in Winson's LOI*.

143 Put another way, it would not have satisfied OCBC (as Winson well knew) for there to be some cargo on board, but cargo that:

(a) was not shipped pursuant to BLs that Winson had represented the existence and validity of, and which Winson was entitled to;

(b) was not cargo for the Winson – Hin Leong sale;

(c) was not cargo that Winson had obtained title to; and

(d) was not cargo that Winson had passed Hin Leong good title to.

144 The checks which Winson did (or claims to have done) could not have confirmed that cargo had been shipped to the Ocean Voyager *as Winson had represented in its LOIs*. Those checks could go no further than to show that the Ocean Voyager was carrying *some* cargo, *ie*, it was not unladen, but not whose cargo it was; nor (with any precision) where it was loaded, when it was loaded, or what its quantity was.

Version No 2: 18 Aug 2023 (16:33 hrs)

145 Winson claims to have done various checks "after the issuance of the LOIs to HLT on 15 April 2020".[77] On Winson's own case, despite OCBC rejecting the first presentation on the basis that "no physical cargo…was shipped", Winson took no steps to confirm if cargo had been shipped *as represented in its LOIs*, before proceeding to issue them.

146 Winson mentions the following checks, which I will address in turn:

(a) Mr Cai claims he spoke to Tammy Xie of Trafigura on 15 April 2020, after he was informed of OCBC's rejection of Winson's first presentation.[78]

(b) Ms Tung says that Mr Dong on 16 April 2020 checked "the draft of the vessel and where the vessel [was] going", which checks confirmed that the Ocean Voyager was laden with cargo and on its way to Europe.[79]

(c) Winson carried out checks with the International Maritime Bureau ("IMB"), which confirmed that the Ocean Voyager and Ocean Taipan were bound for Rotterdam – Winson mentioned this in its letter to OCBC dated 24 April 2020,[80] and at trial Winson produced email correspondence relating to those IMB checks.[81]

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77 Winson's closing submissions, para 269.

78 Winson's closing submissions, paras 270–271.

79 Winson's closing submissions, para 272.

80 Winson's closing submissions, para 275, 6AB 352, para 4.

81 Exhibit P1.

Version No 2: 18 Aug 2023 (16:33 hrs)

(d) Mr Dong said that following the IJMs' letters dated 8 May 2020 and 14 May 2020, on Ms Tung's instructions he checked the locations of the Ocean Taipan and Ocean Voyager at the material time.[82]

147 Regarding Mr Cai's supposed call with Tammy Xie of Trafigura on 15 April 2020, this was not in his AEIC, nor in the AEIC of other Winson witnesses in particular Ms Tung. Given the importance of the "no cargo shipped" issue (to paraphrase), one would have expected this call – if it had happened – to be mentioned in Mr Cai's AEIC, but it was not.

148 Moreover, Winson pleaded in its reply in HC/S 463/2020 at para 19, that Trafigura had confirmed that the cargo meant to be loaded on the Ocean Voyager was duly loaded on board on 31 March 2020, and that was also stated in correspondence between Winson and OCBC on 21 April 2020 and 24 April 2020.[83] However, there was curiously no documentary or AEIC evidence to support the pleaded assertion, and no mention of the call from Mr Cai to Trafigura (if that were the evidence of this point).

149 Mr Cai's evidence of what Trafigura said on the call was, "The cargoes have already given you and the documents you have issued, and now the bank is not paying", and "Are you crazy? What has this got to do with me?"[84] Mr Cai

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82 Winson's closing submissions, para 276, Mr Dong's AEIC at paras 43–52.

83 6AB 274.

84 Transcript, day 2, 1 February 2023, page 87, lines 13–23.

Version No 2: 18 Aug 2023 (16:33 hrs)

however accepted that he never asked Trafigura if the cargoes were loaded,[85] and never asked Trafigura for evidence that loading had occurred.[86]

150 Ms Tung, on the other hand, claimed that Trafigura "said cargo has been loaded and on its way to Europe".[87] However, that call between Mr Cai and Trafigura was something that Ms Tung had no personal knowledge of.

151 There is also no reference to that call in subsequent correspondence between Winson and Trafigura (which I discuss below at [173]–[174]), which related to the issue of Trafigura's representations in its LOIs, and whether Winson had received good title to cargo.

152 I doubt whether the call between Mr Cai and Trafigura took place, but even if it did it appears that Trafigura did not confirm that cargo had been loaded as described in the Ocean Voyager copy BL. Mr Cai did not ask about loading, or for evidence of loading, and according to him the furthest Trafigura went was to say, "[t]he cargoes have already given you", which would be to the effect that the cargo had already been sold by Trafigura to Winson. Added to this is the fact that Trafigura was in no better position than Winson itself to know whether the Ocean Voyager had been loaded as described in the copy BL. Hin Leong was the original supplier, Hin Leong chose the vessels to use, and Hin Leong provided the copy BLs; moreover, I have found that Winson knew from the start that the Subject Transactions pre-structured as a circular trade, in particular that it was for Hin Leong (as the original supplier and ultimate buyer) to decide

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85 Transcript, day 3, 2 February 2023, page 4, lines 7 – 20.

86 Transcript, day 2, 1 February 2023, page 88 line 18 to page 89 line 5; day 3, 2 February 2023, page 4, lines 21 – 23.

87 Transcript, day 9, 10 February 2023, page 48, lines 1 – 20.

Version No 2: 18 Aug 2023 (16:33 hrs)

which vessels to use for the sale of specific cargoes (rather than fungible quantities of gasoil).

153 Next, the checks which Ms Tung says Mr Dong did on the draft of the vessels, on 16 April 2020, were not mentioned by Mr Dong in his AEIC or oral testimony, and Ms Tung had no personal knowledge of what checks Mr Dong did or did not do. On the evidence, checks were only done by Mr Dong on the draft (and location) of the vessels several weeks later in May 2020.[88] There is nothing in any of Winson's AEICs, and no documentary evidence, about any such check on 16 April 2020, and I do not accept that such a check was done then. In any event, such a check could only have confirmed that the Ocean Voyager was not unladen, and that it was headed for Europe.

154 As regards the IMB checks, those checks were documented in an email exchange, produced at trial.[89] That shows that Winson approached IMB only on 23 April 2020, *after* both its second presentations. IMB replied the same day. Even then, the only confirmation Winson sought was, "that Ocean Taipan and Ocean Voyager [were] on their way to Rotterdam and the estimate time of arrival", but that in no way addressed OCBC's concern about "no cargo shipped".

155 As for Mr Dong's checks in May 2020 on the locations and drafts of the Ocean Voyager and Ocean Taipan, that too could only confirm the locations of the vessels and whether they were laden, but not whether cargo had been

88 Mr Dong's AEIC, paras 43–52.

89 Exhibit P1.

Version No 2: 18 Aug 2023 (16:33 hrs)

shipped as represented in Winson's LOIs (including that Winson had obtained good title to such cargo, and passed good title to Hin Leong).

156 Moreover, Mr Dong's check on the Ocean Taipan raised a further red flag – he reported his conclusions to Ms Tung by email[90] and said in his AEIC at para 50:

> The results of my checks on the *Ocean Taipan*, as set out in my email to Crystal, showed that … [the vessel] (iv) sailed to Tanjung Pelepas and arrived on or around 31 March 2020, (v) loaded cargo on board as evidenced by the draft change from 9.0 metres to 15.40 metres; and (vi) departed for Rotterdam, Netherlands on or around 4 April 2020. [emphasis in original]

At para 51 of his AEIC he said:

> [I]t was very possible that the cargo was loaded on board *Ocean Taipan* at Tanjung Pelepas, Malaysia, over a period and ending on 3 April 2020, as per the bill of lading issued in relation to the cargo sold in the Trafi-WOT and WOT-HLT Trades. [emphasis in original]

157 The problem with those conclusions is: the stated place of loading on the copy BL for the Ocean Taipan was Universal Terminal, Singapore, not Tanjung Pelepas (as Mr Dong had concluded from the checks he did, and reported to Ms Tung). Yet, instead of looking further into this discrepancy, Winson chose to press OCBC for payment (the due date for which was 18 May 2020). Mr Dong sought on the stand to explain away his contemporaneous reference to Tanjung Pelepas by saying the checks showed the vessel in the area "around Singapore/Malaysia" and "Around the region of Singapore, Tanjung Pelepas".[91] This is obviously rationalisation after the fact, but the point remains

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90 8AB 461.

91 Transcript, day 6, 7 February 2023, page 27 lines 11–13, lines 23–24.

Version No 2: 18 Aug 2023 (16:33 hrs)

that Mr Dong had contemporaneously reported to Ms Tung his conclusion as being that the Ocean Taipan had loaded at Tanjung Pelepas, which contradicted the details in the copy BL, but Winson evidently did not care about that discrepancy.

158 Besides these four checks which Winson did (or claims to have done), certain other aspects of Winson's conduct at the time are noteworthy.

159 First, Winson never checked with OTPL, which had purportedly issued the copy BLs that Winson had relied upon for its LOIs, and for its supposed belief that cargo had been shipped as described in the copy BLs. Given OCBC's rejection of the first presentation on the basis that there was "no cargo shipped", Winson could have sought confirmation from OTPL, but Winson never did.

160 Second, Mr Cai says in his AEIC at para 57 that after hearing that OCBC had rejected the first presentation, he spoke with Mr OK Lim to ask if Hin Leong would directly pay Winson for the Winson – Hin Leong sale; unsurprisingly, Mr OK Lim declined to do so. By then, Hin Leong's financial difficulties were known in the market, and to Winson. Moreover, the Subject Transactions were pre-structured, such that Hin Leong made a loss but obtained financing. In those circumstances one would not expect Hin Leong to agree to pay Winson directly. What is even more odd, is that although OCBC's rejection of Winson's first presentation was the reason for Mr Cai speaking with Mr OK Lim, Mr Cai did not ask Mr OK Lim whether cargo had been shipped as stated in the copy BLs, although Hin Leong was the original supplier and had provided those copy BLs.

161 Instead of asking OTPL, or Hin Leong, Mr Cai asked Mr Dong for loading documents, but Mr Dong had none; Mr Cai then asked Mr Dong to get

Version No 2: 18 Aug 2023 (16:33 hrs)

them from Trafigura.[92] At 11.48am on 16 April 2020, Mr Dong emailed Trafigura to ask for the loading documents.[93] He said, "Aside from BLs, kindly also send us the ship documents (such as surveyor CQ, COQ, SOF, ullage report)". Trafigura belatedly replied on 11 May 2020 to say, "We have requested the same from supplier, and shall revert once received." This response would not have surprised Winson: the original supplier was Hin Leong, not Trafigura, and it was Hin Leong that Winson had initially (on 6 April 2020) requested loading documents from.

162 I do not view this correspondence as a genuine attempt to get loading documents. There was no urgency in Winson's request – 16 April 2020 was the first occasion when Winson requested these documents from Trafigura. Winson had requested loading documents from Hin Leong earlier – on 6 April 2020 – but did not follow up when none was provided. Winson knew that Trafigura was in no better position that it was, in relation to loading documents – those would come from Hin Leong, if at all, who had not provided them to Winson despite Winson's request. Compounding this is the fact that Winson had not received any loading documents in the seven previous circular trades between it and Hin Leong.

163 In this regard, there is also a curious internal email of Mr Dong's dated 6 April 2020, which was then forwarded to Ms Tung on 15 April 2020.[94] In that email, Mr Dong said to his colleagues: "Pls find the loading docs of MT OCEAN VOYAGE [*sic*] & OCEAN TAIPAN". But he had no loading

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92 Mr Dong's AEIC at paras 38–39.

93 7AB 319.

94 4AB 473.

Version No 2: 18 Aug 2023 (16:33 hrs)

documents – he simply sent his colleagues the shipment details and copy BLs he had received from Hin Leong on 6 April 2020. These were certainly not the loading documents which Mr Dong himself said that Winson would expect to receive in a normal trade, *ie*, the surveyor's certificate of quality, certificate of quantity, statement of facts, and ullage report.[95] All this contributes to the overall impression that not only did Winson not have loading documents, it did not expect to receive loading documents, and it did not seriously try to get loading documents. Instead, Winson urgently proceeded with its second presentations, and pressed for payment on the LCs.

(H) CONCLUSION ON WINSON'S STATE OF MIND AT THE TIME OF THE SECOND PRESENTATIONS

164 Based on a review of events up to the time of the second presentations, I conclude that by that time Winson did not believe in the truth of the representations in its LOIs – at the very least, it was indifferent to whether its representations were true or not, in which case it did not believe in their truth. I reach this conclusion given the unreasonableness of the belief Winson claims to have held, in the circumstances at the time, and the unreasonableness of Winson's conduct in responding (or not responding) to those circumstances. It would follow that the false representations in Winson's LOIs were thus made fraudulently.

What do events after the second presentations show about Winson's state of mind at the time of those presentations?

165 I have also considered whether events *after* the second presentations support or go against a conclusion that Winson was fraudulent at the time of

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95 Mr Dong's AEIC at para 11.

Version No 2: 18 Aug 2023 (16:33 hrs)

those presentations. I find that these later events support rather than go against a conclusion that Winson had acted fraudulently.

166 In principle, in determining a party's state of mind at a particular point in time, events both before or after that point in time may be relevant. What that party said, or how it acted, after the event may shed light on its state of mind at the time of the event. In the context of LCs, the English High Court accepted in *Mahonia Ltd v JP Morgan Chase Bank and another* [2003] 2 Lloyd's Rep 911 that if a bank acquired clear evidence of fraud, after demand, but before the hearing of an application for judgment, it could use that evidence in its defence. At the stage of closing submissions, Winson did not dispute that the court could consider events after the second presentations, and all parties made submissions about those events.

167 Some of these post-presentation events have already been discussed in the preceding sections, such as the checks which Winson made after the second presentations, as well as Winson's false explanation to OCBC about the reason for its second presentation to OCBC (which came after that presentation, but before the second presentation to SCB).

168 The last event which I would discuss in this context, is Winson's communications with Natixis, Singapore Branch ("Natixis"), Mashreqbank PSC ("Mashreqbank"), and Trafigura, in relation to the LOIs Trafigura had presented to obtain payment on the LC for the Trafigura – Winson contract (*ie*, the second leg of the circular trades as described in [2]). Those LOIs contained representations that mirrored those in Winson's LOIs.

Version No 2: 18 Aug 2023 (16:33 hrs)

169 Natixis countersigned Trafigura's LOI in relation to the Ocean Taipan, and on 18 May 2020, Winson emailed Natixis,[96] referred to Hin Leong's IJMs' letter(s) dated 14 May 2020 and said:

> Please note that we are only a middleman purchasing the goods directly from Trafigura, a renowned oil trading company, on back-to-back and CIF terms. We did not involve in any shipping arrangements of the Goods and is not privy to the contract between Trafigura and its supplier of the goods.
>
> Based on the IJM Letter, there is a concern that Trafigura might not be able to honour its warranties set out in the LOI.

170 Winson then said it had instructed UBS to honour Trafigura's presentation, but Winson sought to persuade Natixis to place the proceeds of the LC into a suspense account pending further investigations and clarifications from the IJM. It is noteworthy that Winson described itself as a middleman not involved in any shipping arrangements of the goods. There was no reference to any checks Winson made with Trafigura about the goods, as Winson in these proceedings claims to have done.

171 There is similarly no reference to any such checks in Winson's subsequent email of 22 May 2020 to Natixis,[97] in which Winson said:

> Pursuant to the IJM letter dated 14 May 2020 and the fact that Trafigura has failed to honour our demand for the production of the original bills of lading pursuant to our email dated 22 May 2020, it is highly unlikely that Trafigura would be able to honour its warranties and undertakings set out in the LOI.

172 On 26 May 2020, Winson wrote to Mashreqbank (which had countersigned the other Trafigura LOI – that in respect of the Ocean Voyager).[98]

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96 17AB 246–247.

97 17AB 241–242.

98 17AB 249.

Version No 2: 18 Aug 2023 (16:33 hrs)

That correspondence was in even stronger terms. Winson asserted that the LOI contained various misrepresentations. Winson referred to the IJMs' letter of 8 May 2020 and said that by then – when Trafigura received the IJM letter – Trafigura knew of certain facts which were contrary to representations in the LOI, yet Trafigura proceeded to present the LOI on 22 May 2020.

173 On 23 July 2020, Trafigura wrote to Winson,[99] asking if it was still Winson's position that Trafigura had failed to pass good title to Winson in respect of the cargo on the Ocean Voyager and Ocean Taipan.

174 In its response on 30 July 2020,[100] Winson backed down from the position it had taken earlier. Winson did not maintain that Trafigura had not passed good title to it; instead Winson said, "As pointed out by the IJMs of HL and [OTPL], it is now not entirely clear which parties are entitled to the Cargoes. Accordingly, we are not in a position to opine whether you have passed good title of the Cargoes to us."

175 Winson was in an uncomfortable position: OCBC and SCB were not paying it, while Trafigura had presented LOIs for payment on the LCs that Winson had procured. Winson took the position that Trafigura had fraudulently made false representations – at least in respect of Trafigura's LOI for the Ocean Voyager – but Winson did not seek to stop Trafigura from receiving payment. In the present proceedings Winson then contended that the equivalent representations in its own LOIs were not false, and in any event were not made fraudulently.

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99 17AB 287.

100 17AB 289.

Version No 2: 18 Aug 2023 (16:33 hrs)

176 I have found that Winson did make false representations in its LOIs. By May 2020, Winson evidently believed that false representations had been made, as is evident from its correspondence with Natixis and Mashreqbank. Of course, it does not follow that because Winson was alleging in May 2020 (with the benefit of letters from the IJMs of Hin Leong) that Trafigura was fraudulent, that Winson was also fraudulent in April 2020 when it made its second presentations – I accept that Winson did not then have all the facts revealed in the IJMs' letters in May 2020. However, based on what Winson did know at the time of its second presentations, what checks Winson did, and what checks Winson did not do, my conclusion remains that Winson was fraudulent, at least in the sense that it did not believe in the truth of the representations in its LOIs.

177 Accordingly, I conclude that the banks have established the Fraud Exception in relation to Winson's second presentations (which are the operative ones). It follows that Winson's claim for payment on the LCs fails.

The Nullity Exception

178 As I find the Fraud Exception to have been established, it is unnecessary for me to make a finding on whether the banks can rely on the Nullity Exception to resist payment, and I leave that point open.

179 I simply observe that the banks' contentions in relation to the Nullity Exception appear to extend the exception beyond its scope as recognised in the Court of Appeal decision of *Beam Technology (Mfg) Pte ltd v Standard Chartered Bank* ("*Beam*") [2003] 1 SLR(R) 597 at [36], that the "negotiating/confirming bank is not obliged to pay if it has established within the seven-day period that a material document required under the credit is forged and null and void and notice of it is given within that period."

Version No 2: 18 Aug 2023 (16:33 hrs)

180 *Beam* involved an air waybill that was a forgery, purportedly issued by a company that did not exist. In the present case, Winson's invoices and LOIs were themselves not forgeries, but the banks contend that the Nullity Exception extends to documents, not themselves forged, which are based on forged documents like the BLs in the present case (or incorrect information such as details of cargo that had not been shipped as described). It should be considered in a future case whether the Nullity Exception goes that far.

181 Further, the formulation of the Nullity Exception in *Beam* has the bank establishing forgery before the deadline for raising objections to compliance under the Uniform Customs and Practice for Documentary Credits ("UCP"), and giving notice accordingly. In the present case, neither bank gave notice under the UCP 600 (the version of the UCP used in the present LCs), but the banks contend that the Nullity Exception may be raised even after the UCP 600 deadline for giving notice. Again, it should be considered whether the Nullity Exception goes that far.

Non-compliance

182 I agree with Winson that SCB cannot rely on any alleged non-compliance of the operative presentation, to resist payment. SCB's LC was subject to the UCP 600, which stipulates that the bank has a maximum of five banking days to determine if a presentation is complying, and if it refuses to honour the presentations, in that time it must give a rejection notice, stating the discrepancy in respect of which the bank is refusing payment.[101] SCB's witnesses concede that SCB did not issue a rejection notice in accordance with

[101] Winson's closing submissions at paras 289–291.

Version No 2: 18 Aug 2023 (16:33 hrs)

UCP 600.[102] Under the UCP 600, SCB is thus "precluded from claiming that the documents do not constitute a complying presentation".[103]

Unconscionability

183 Given my finding that the Fraud Exception is established, it is unnecessary for me to make a finding on whether unconscionability should be recognised as a ground for resisting payment under an LC, as it is for resisting payment under a demand guarantee; and if so, whether in the present case the unconscionability ground would be satisfied if the Fraud Exception were not. I leave those points open.

184 I simply observe that, as contended for by SCB, unconscionability would extend to a case where the demand was not unconscionable when it was made, but (so SCB contends) it would be unconscionable to now allow the beneficiary to be paid, because of issues with the underlying transaction – here, the fact that there were no valid BLs, and no goods shipped as described in the LOIs. It should be considered whether recognising such an unconscionability defence would undermine the principle of autonomy in relation to LCs.

Whether Winson's claim fails because it suffered no loss.

185 SCB contends that, in any event, Winson's claim against it cannot succeed because of a deed of assignment between Winson and Winson Oil Bunkering pursuant to which Winson received from Winson Oil Bunkering the full sum that it is claiming from the banks in this suit.

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102 Transcript, day 19, 6 March 2023, page 20 lines 1–21; day 20, 7 March 2023, page 86 lines 6–19.

103 UCP 600 article 16(f), 20AB 74.

Version No 2: 18 Aug 2023 (16:33 hrs)

186 I agree with Winson that this contention of SCB's fails.

187 Damage is not an element of Winson's cause of action, which is to enforce *contractual* payment obligations under LCs. Moreover, Winson's claim is for sums due under LCs, not for damages it has suffered from not being paid. Winson is not seeking any consequential loss, but only the amounts of the LCs and interest thereon. The issue of the loss and damage Winson suffered from not being paid, does not arise.

188 Further, Winson did not assign Winson Oil Bunkering the right to sue the banks; indeed, the deed obliges Winson to sue the banks to recover payment under the LCs. In the event that payment is not recovered from the banks, Winson Oil Bunkering may elect to terminate the deed and recover the full sum that it had paid to Winson. Winson has not impaired its rights against the banks by entering into the deed of assignment and obtaining payment from Winson Oil Bunkering on the terms of the deed.

Conclusion and costs

189 For the above reasons, I dismiss Winson's claim against the banks because the Fraud Exception is established.

Version No 2: 18 Aug 2023 (16:33 hrs)

190 The banks are entitled to their costs, to be assessed if not fixed or agreed. For avoidance of doubt, the time for any appeal against this judgment shall run from the date of the judgment.

Andre Maniam
Judge of the High Court

Chelva Retnam Rajah SC (Tan Rajah & Cheah) (instructed) for the plaintiff in both suits, Bazul Ashab bin Abdul Kader, Lua Jing Ing Priscilla, Caleb Tan Jia Chween, Levin Lin Lok Yan, Daren Kim Chang Jin (Oon & Bazul LLP) for the plaintiff in Suit No 463 of 2020, Oommen Mathew and See Wern Hao (Omni Law LLC) for the plaintiff in Suit No 474 of 2020;
Tan Chee Meng SC, Tan Kai Yun, Andrew Pflug and Hudson Wong (WongPartnership LLP) for the defendant in Suit No 463 of 2020;
Sarjit Singh Gill SC, Probin Stephan Dass, Leong Woon Ho, Daryl Cheng On Lun and Suresh Viswanath (Shook Lin & Bok LLP) for the defendant in Suit No 474 of 2020.

Version No 2: 18 Aug 2023 (16:33 hrs)