IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 31

Court of Appeal / Civil Appeal No 40 of 2023

Between

Winson Oil Trading Pte Ltd

… *Appellant*

And

Oversea-Chinese Banking Corporation Limited

… *Respondent*

In the matter of Suit No 463 of 2020

Between

Winson Oil Trading Pte Ltd

… *Plaintiff*

And

Oversea-Chinese Banking Corporation Limited

… *Defendant*

Court of Appeal / Civil Appeal No 41 of 2023

Between

Winson Oil Trading Pte Ltd

… *Appellant*

And

Standard Chartered Bank (Singapore) Limited

… *Respondent*

In the matter of Suit 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 — Fraud exception]
[Bills of Exchange and Other Negotiable Instruments — Letter of credit transaction — Nullity exception]

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v
Oversea-Chinese Banking Corp Ltd and another appeal

[2024] SGCA 31

Court of Appeal — Civil Appeal No 40 of 2023 and Civil Appeal No 41 of 2023
Sundaresh Menon CJ, Steven Chong JCA, Belinda Ang Saw Ean JCA
28 June 2024

21 August 2024 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 It has been said that letters of credit are the lifeblood of commerce. For this reason, the law developed the autonomy principle to insulate the strict payment obligation under letters of credit transactions from disputes which may arise from the underlying sale contracts. The only exception to this principle is fraud because the underlying rationale is that fraud unravels all.

2 The principal legal question in these two appeals is whether the Fraud Exception for letters of credit transactions should bear a higher threshold beyond the standard applicable for other financial instruments such as performance bonds and on-demand guarantees.

3 While the appellant accepts that the Fraud Exception is not limited to actual knowledge of fraud and can also apply to situations where there is an absence of belief in its truth, it seeks to persuade this court that it should not be extended to situations where the false representation was made "recklessly, careless whether it be true or false" within the meaning of the test in *Derry v Peek* (1889) 14 App Cas 337 ("*Derry v Peek*") at 374.

4 Thus, the key question posed in these two appeals is whether there is any compelling reason to justify the different treatments of fraud to different types of financial instruments. As we will expound below, there is neither any legal basis nor legitimate rationale to warrant a different treatment. In our view, the law should "call a fraud a fraud" and the courts should apply a consistent approach in examining this issue.

Facts

5 The appellant in both appeals, Winson Oil Trading Pte Ltd ("Winson") is a Singapore company operating as an energy trading company involved in the business of oil trading, bunkering, and supply chain services. The respondent in CA/CA 40/2024, Oversea-Chinese Banking Corporation Limited ("OCBC") is a multinational banking and financial services corporation headquartered in Singapore. The respondent in CA/CA 41/2024, Standard Chartered Bank (Singapore) Limited ("SCB"), is a Singapore-incorporated indirect subsidiary of Standard Chartered Bank.

6 The disputes surround the last leg of a circular trade that took place on the afternoon of 27 March 2020. At 2.54pm, Hin Leong Trading (Pte) Ltd ("Hin Leong") sold to Trafigura Pte Ltd ("Trafigura") two shipments of 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 (the "Hin Leong – Trafigura sale"). At 3.19pm, Trafigura sold to Winson the same quantity of gasoil at MOPS plus US$2.35 per barrel (the "Trafigura – Winson sale"). At 5.10pm, Winson sold to Hin Leong the same quantity of gasoil at MOPS plus US$2.35 per barrel (the "Winson – Hin Leong sale") (collectively, the "Subject Transactions").

7 SCB issued to Winson a letter of credit on the application of Hin Leong in favour of Winson on 2 April 2020, while OCBC issued to Winson a letter of credit on the application of Hin Leong in favour of Winson on 6 April 2020. Each letter of credit was to finance Hin Leong's purchase of each of the two shipments of gasoil from Winson under the contract for the Winson – Hin Leong sale.

8 Winson made its first presentation to OCBC under a Letter of Indemnity ("LOI") for the Ocean Voyager on 7 April 2020, and its first presentation to SCB under an LOI for the Ocean Taipan on 9 April 2020. On 15 April 2020, OCBC rejected Winson's first presentation on the basis that there was no physical cargo that was shipped on the Ocean Voyager. The next day, Winson made its second presentation to OCBC for the Ocean Taipan instead. On 21 April 2020, Winson emailed OCBC to explain that the second presentation for a different vessel was because of an internal mix-up. Thereafter, revisions were made to rectify the alleged mix-up. On that same day, Winson made its second presentation to SCB, this time for the Ocean Voyager.

9 Both SCB and OCBC refused to pay under the letters of credit, contending that no cargo of gasoil pursuant to the LOIs were shipped for the Winson – Hin Leong sale, which was financed by the letters of credit, and that

the copy non-negotiable Bills of Lading ("BLs") which purportedly evidenced such shipments were forgeries. These copy BLs were relied upon in preparing the LOIs which were presented to the banks for payments under the letters of credit.

10 Winson then brought two suits against OCBC and SCB in HC/S 463/2020 ("Suit 463") and HC/S 474/2020 ("Suit 474") respectively for payment of the sums under the letters of credit.

Decision below

11 In *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another suit* [2023] SGHC 220 (the "Judgment"), the High Court judge ("the Judge") dismissed Winson's claim against OCBC and SCB on the basis that the Fraud Exception had been made out.

12 The Fraud Exception involves the beneficiary of a letter of credit fraudulently making false statements to the bank. The parties in Suit 463 and Suit 474 accepted that a beneficiary is also fraudulent if he makes a false representation "without belief in its truth". However, the parties disagreed on whether a beneficiary is fraudulent if he made a false representation recklessly without caring whether it is true or false (*ie*, the third category of fraud identified in *Derry v Peek*). The Judge noted that the Singapore International 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*"), held that the beneficiary would not have acted fraudulently if he made a false representation recklessly without caring it to be true or false. However, the Judge declined to follow *CACIB v PPT* and found that the Fraud

Exception would be made out if the beneficiary made a false representation recklessly without caring whether it is true or false.

13 On the facts, the Judge found that false representations were made by Winson. The representations in Winson's LOIs were that 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. Assuming that the Winson – Hin Leong sale was not a sham, the Judge found that, first, the BLs were not valid BLs and were instead forgeries by a staff of Hin Leong, and second, there was no cargo shipped on the Ocean Taipan and Ocean Voyager as described in the Winson's LOIs (being cargo that Winson had purportedly good title to, and which Winson purportedly passed Hin Leong good title to).

14 The Judge also found that Winson had acted fraudulently because it did not have belief in the truth of its representations by the time of the second presentations, or at the very least, was indifferent as to whether its representations were true. First, Winson's LOIs were based on copy non-negotiable BLs (front page only) that it had received. Winson never received the original BLs nor copies of the reverse side of the BLs showing any endorsements. Winson also did not receive any loading documents such as an independent inspector's report, certificates of quality and quantity (or equivalent documents), and it was not told that an independent inspector was appointed, or that any inspections had taken place. Second, the Subject Transactions were pre-structured. Third, the Ocean Taipan's quantity figures on the copy BL were changed after the vessel had sailed. Fourth, in the discussions between OCBC and Winson about the purchase of the Ocean Voyager cargo,

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. Additionally, Winson emphasised the need to check if the title to the cargo was clean, showing that Winson had doubts about the existence of the cargo when OCBC rejected its first presentation. Fifth, OCBC rejected Winson's first presentation for the Ocean Voyager by conveying it through a SWIFT message on 15 April 2020. An honest trader would have sought to understand why OCBC was claiming that for one of the two shipments "no physical cargo…was shipped", but Winson did not engage with OCBC to understand the basis of OCBC's rejection. It did not conduct checks thereafter and lied to OCBC about the reason for its second presentation to OCBC. Sixth, Winson claims to have done several checks after OCBC rejected its first presentation for the Ocean Voyager. However, these checks were either not conducted or did not assist Winson's claim.

15 The events after the second presentations supported the conclusion that Winson acted fraudulently. Winson in its communications with Trafigura, Natixis, Singapore Branch and Mashreqbank PSC (the last two are the banks that countersigned Trafigura's LOI in the Trafigura – Winson sale) described itself as a middleman and did not reference any checks it made with Trafigura about the goods. Their email correspondence also showed that Winson believed Trafigura had made false representations in its LOIs.

16 The Judge also considered the other grounds raised by OCBC and SCB. First, on the Nullity Exception, it was unnecessary to make any finding on whether OCBC and SCB could rely on it. Second, it was unnecessary to make a finding on whether unconscionability should be recognised as a ground for resisting payment under a letter of credit. Third, SCB could not rely on any

alleged non-compliance of the presentation to resist payment because SCB's letter of credit was subject to the Uniform Customs and Practice for Documentary Credits ("UCP") 600, and SCB did not issue a rejection notice in accordance with the UCP 600. Fourth, it was not open to SCB to argue that Winson could not make a claim because it suffered no loss by entering into a deed of assignment with Winson Oil Bunkering Pte Ltd and obtaining payment under the deed. Damage is not an element of Winson's cause of action to enforce contractual payment obligations under the letters of credit.

The parties' submissions on appeal

Winson's case

17 In this appeal, Winson argues that the Judge erred: (a) in law in the formulation of the Fraud Exception; (b) in finding that the representations in the Winson's LOIs were false; and (c) in concluding that Winson made the false representations fraudulently.

18 First, Winson submits that the Judge wrongly imported the principles of the tort of deceit into the Fraud Exception, which led the court to err in finding that the Fraud Exception can be made out where the beneficiary made a false representation recklessly without caring whether it is true or false. The juridical basis of each area of the law is distinct because the Fraud Exception is circumscribed by the specific context of payments under letters of credit and the importance of the autonomy principle. Recklessness should not be included as part of the test, primarily because a beneficiary owes no duty of care to the issuing bank in the presentation of documents. Further, *CACIB v PPT* was right in distinguishing the case of *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*Arab Banking*") which accepted that recklessness under

the third category of fraud in *Derry v Peek* engaged the Fraud Exception, because *Arab Banking* was decided in the context of demand guarantees, which is distinguishable from letters of credit in the present case.

19 Second, the Judge erred in finding that the representations in the Winson's LOIs were false by concluding that there were no valid BLs for the Subject Transactions, and that the cargo as described in the Winson's LOIs were not shipped onboard the Ocean Taipan and Ocean Voyager. Winson also argues that the Judge erred in admitting the statements of Mr Freddy Tan ("Freddy") from Hin Leong (the "Freddy Statements"), the correspondence from Ocean Tankers (Pte) Ltd ("Ocean Tankers")'s liquidators (the "Ocean Tankers Correspondence"), and Mr Lim Oon Kuin ("Mr OK Lim") of Hin Leong's defence in HC/S 805/2020 (the "OK Lim Defence") on the basis that they were inadmissible hearsay evidence.

20 Third, the Judge erred in concluding that Winson made the false representations fraudulently. The evidence shows that Winson did not know that the representations were false, and it did not make the representations recklessly.

21 Winson also raises the Nullity Exception and argues that *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2002] 1 WLR 1975 ("*Montrod (EWCA)*") should be followed, and the Nullity Exception should not be recognised. It further argues that the Nullity Exception as expressed by this court in *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2003] 1 SLR(R) 597 ("*Beam Technology*") is a limited one and did not apply on these facts.

The banks' cases

22 OCBC and SCB disagree with Winson and submit that the appeal should be dismissed.

23 First, the banks agree with the Judge's formulation of the Fraud Exception for letters of credit. OCBC and SCB both highlight that even the principle that "fraud unravels all" that undergirds the Fraud Exception would entail the same test as that in *Derry v Peek*, and consequently, that the decision in *CACIB v PPT* was wrong. OCBC argues that there should be no distinction in the operation of the Fraud Exception whether for letters of credit or for demand guarantees and contends that Winson overstates the impact that the Fraud Exception as formulated in the Judgment will have on international trade. SCB also refers to the rationale of the Fraud Exception in other jurisdictions which encompasses other facets of the principle that fraud unravels all, including fraud in the documents, and further argues that the Fraud Exception should also encompass the Nullity Exception.

24 Both OCBC and SCB also agree with the Judge's finding that the representations in the LOIs were false. First, the Freddy Statements, Ocean Tankers Correspondence and the OK Lim Defence are admissible evidence. OCBC and SCB argue that the Freddy Statements are admissible on the basis that the statements were against the interest of the statement maker, and SCB further argue that the Freddy Statements were part of the records compiled by Hin Leong's interim judicial managers ("IJMs") in the course of carrying out their duties and they are thus admissible. OCBC and SCB also contend that the Ocean Tankers Correspondence is admissible because it is a document in the ordinary course of the liquidator's business. While SCB argues that the OK Lim Defence is admissible on the basis that the statement was against Mr OK Lim's

interest, OCBC did not raise any arguments as regards the OK Lim Defence. Second, the banks argue that there were no valid BLs pursuant to which cargo was shipped as described in the Winson's LOIs.

25 The banks also contend that the false representations made by Winson were made fraudulently to engage the Fraud Exception. Their contentions largely reflect the Judge's reasoning in the Judgment. First, the banks submit that the transactions were pre-structured. Second, SCB reiterates the point made in the Judgment that the lack of loading documents was a clear "red flag". Third, OCBC emphasises the finding by the Judge that the change in the quantity of gasoil on the Ocean Taipan BL *after* shipment and while it was *en route* was a "red flag". Fourth, SCB highlights the finding made by the Judge as regards Winson's unwillingness to repurchase the cargo, and further argues that Winson should not be allowed to readily appeal the factual findings because they were based on the veracity and credibility of the witnesses. Fifth, the banks both point out that Winson's response and reaction to OCBC's rejection of Winson's first presentation (including its purported checks) demonstrated Winson's fraudulent state of mind. Sixth, OCBC refer to Winson's correspondence with OCBC after the second presentation on 16 April 2020 for the Ocean Taipan, and argue that this was a clear attempt to hide the fact that the Subject Transactions were pre-structured.

26 OCBC and SCB also submit that the Nullity Exception applies because the invoice and LOIs were based on forged BLs. Thus, they were nullities, and the second presentation was incomplete.

The issues

27 The principal issues to be determined are as follows:

(a) What is the proper formulation of the Fraud Exception for letters of credit transactions?

(b) Whether the two presentations of the documents under the letters of credit were made fraudulently?

Our decision

28 At the oral hearing of the appeals, counsel for Winson, Mr Kenneth Tan *SC* ("Mr Tan"), addressed the above two issues in reverse order. However, given that the analysis of the facts to determine whether the presentations were made fraudulently is sensitive to the correct formulation of the Fraud Exception, in our view, it is more appropriate to first determine the ambit of the Fraud Exception before analysing the facts.

The formulation of the Fraud Exception

The genesis and evolution of the Fraud Exception for letters of credit

29 The usage of letters of credit can be traced at least as far back as the medieval times, although the modern form of letters of credit (in the form of documentary credits) emerged only sometime around the middle of the 19th century and was developed as a response to the need for assured payment in commercial transactions (see E P Ellinger, *Documentary Letters of Credit: A Comparative Study* (University of Singapore Press, 1970) at pp 24 and 29; Arthur Fama Jr, "Letters of Credit: The Role of Issuer Discretion in Determining Documentary Compliance" (1985) 53 Fordham Law Review 1519 at 1519). As explained by the learned author in Poh Chu Chai, *Law of Guarantees and Letters of Credit* (LexisNexis, 5th edn, 2003) at pp 953–954, letters of credit are necessary especially where international trade is concerned because there would

inevitably be a lapse of time between the shipment of the goods by the seller and the receipt by the buyer. A seller will be unwilling to part with his/her goods before payment, and a buyer will likewise be unwilling to make payment before receiving goods. Thus, the bank often stands as the intermediary as a party who is of sufficient credit to be trusted by both parties, and to bridge the gap between the buyer and the seller.

30 Three fundamental characteristics feature prominently in letters of credit transactions. They are: (a) the autonomy principle; (b) the principle of strict compliance; and (c) payment is made against documents not goods (Loo Wee Ling, *Law of Credit and Security* (LexisNexis, 2012) at para 7.45). The autonomy principle dictates that banks deal with *documents* and are not concerned with the substantive agreement underlying the letters of credit. "Autonomy" in this context is used to refer to the notion that the credit is to be treated as an independent transaction, independent of the terms of the underlying transaction giving rise to it, and generally supports two distinct concepts: the first, an assurance that the seller/beneficiary will be paid by the issuing bank as long as documents that conform to the requirements of the credit are presented, regardless of any dispute with the buyer; the second, an assurance that the bank can confidently pay a seller/beneficiary who presents conforming documents, and it will be entitled to claim reimbursement thereafter without having to look into issues in the underlying sale contract (Ali Malek QC & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed, 2009) ("Malek & Quest, *Jack: Documentary Credits*") at para 1.34; Dora Neo, "A Nullity Exception in Letter of Credit Transactions?" (2004) 1 SJLS 46 ("Neo, Nullity Exception") at 47). It is this feature of letters of credit that enables the use of the letter of credit as an unconditional source of payment, and has made it a reliable and attractive payment method for international trade all around the

world. This is also the reason why letters of credit are often described as the "life-blood of international commerce" (see *R D Harbottle (Mercantile) Ltd and another v National Westminster Bank Ltd and others* [1977] 2 All ER 862 at 870).

31 However, courts have also long recognised that fraud can be an exception to the autonomy principle on the basis of the common law maxim, *ex turpi causa non oritur actio*, because the court will not assist a fraudster in his/her fraud (see *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 ("*UniCredit v Glencore (CA)*") at [16]). As early as 1765 in the case of *Pillans v Man Mierop* (1765) 97 ER 1035, there had already been suggestions that fraud would not be tolerated even in the context of letters of credit: Alan Davidson, "Fraud, the Prime Exception to the Autonomy Principle in Letters of Credit" (2003) 8 International Trade and Business Law Review 23 at 25. This is because the assurance of payment provided to the beneficiary exposes the issuing bank (and ultimately the buyer) to the risk of abusive demands for payment. Yet, there is the competing concern that letters of credit may be easily abused if the exceptions to payment under a letter of credit are too broad, thereby diminishing the value of such instruments. It is with this balancing act in mind that the courts have developed limited exceptions to payment under a letter of credit: see Nelson Enonchong, *The Independence Principle of Letters of Credit and Demand Guarantees* (Oxford University Press, 2011) ("Enonchong, *The Independence Principle*") at paras 1.03–1.05. As the Supreme Court of Canada in *Angelica-Whitewear Ltd v Bank of Nova Scotia* [1987] 1 SCR 59 ("*Angelica-Whitewear Ltd*") puts it at [11]:

> The potential scope of the fraud exception must not be a means of creating serious uncertainty and lack of confidence in the operation of letter of credit transactions; at the same time the

> application of the principle of autonomy must not serve to encourage or facilitate fraud in such transactions.

32 The Fraud Exception is thus generally considered to be the only exception to the autonomy principle, and in this vein, the decision in *Sztejn v J Henry Schroder Banking Corp* 31 NYS 2d 631 (1941) ("*Sztejn*") is often regarded as the foundational case that set out the ambit of the Fraud Exception. *Sztejn* concerned a buyer which entered into a contract for the sale of hog bristles with the seller. The buyer arranged for an issuing bank to issue a letter of credit in favour of the seller. The seller loaded the goods onboard a vessel and obtained a bill of lading and other invoices. The seller delivered the documents to the correspondent bank, which presented them to the issuing bank. However, the buyer found that the seller had failed to ship the contracted merchandise and had instead shipped "cowhair, other worthless material and rubbish" (at 633). The buyer applied to the New York Supreme Court for an injunction to prevent payment to the correspondent bank. The court first noted the importance of the autonomy principle, and expressed how it would "be a most unfortunate interference with business transactions if a bank before honoring drafts drawn upon it was obliged or even allowed to go behind the documents" (at 633). However, the court also expressed that the principle of autonomy would not apply where there was intentional fraud and held (at 635) that:

> The distinction between a breach of warranty and active fraud on the part of the seller is supported by authority and reason. As one court has stated: "Obviously, when the issuer of a letter of credit knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognize such a document as complying with the terms of a letter of credit."
>
> …
>
> No hardship will be caused by permitting the bank to refuse payment where fraud is claimed, where the merchandise is not merely inferior in quality but consists of worthless rubbish,

> where the draft and the accompanying documents are in the hands of one who stands in the same position as the fraudulent seller, where the bank has been given notice of the fraud before being presented with the drafts and documents for payment, and where the bank itself does not wish to pay pending an adjudication of the rights and obligations of the other parties.

33 *Sztejn* was subsequently cited in the leading English decision of *United City Merchants and others v Royal Bank of Canada and others* [1983] 1 AC 168 ("*United City Merchants*"). In that case, the contract stated that the goods had to be shipped before a stipulated date. There was a breach of this requirement, and the goods were shipped one day after the stipulated date. The loading agents however fraudulently put a false shipment date although the beneficiary did not know about the fraud. The confirming bank then received information that shipment had not been effected as per the BL and refused payment. The House of Lords found that the Fraud Exception did not apply as the beneficiary did not know of the inaccuracy in the documents and genuinely believed the goods to have been shipped as required under the credit. Lord Diplock in this decision set out the "general statement" that the Fraud Exception is engaged 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" (at 183).

34 However, even after the formulation by Lord Diplock in *United City Merchants* on the applicable test for the Fraud Exception, it was not entirely clear whether documentary fraud (*ie*, fraud on the documents) was mentioned only because it was pertinent to the facts of that case, or whether it was of general application: Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ("Ellinger & Neo, *Documentary Letters of Credit*") at pp 142–143. In so far as Singapore law is

concerned, it was subsequently established in this court's decision of *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 ("*Brody*") that fraud in the underlying transaction would not engage the Fraud Exception, and what is required is fraud on the documents. In *Brody*, the respondent appointed the appellant as its commodity broker, and the respondent was required to provide a trading margin to the appellant. The respondent, in this respect, established letters of credit of US$1.48m in favour of the appellant. The appellant subsequently made margin calls on the respondents of US$1.61m, and the respondent was required to settle the margin calls failing which the appellant intended to commence liquidating positions in the respondent's account. The respondent contended that it reached an agreement with the appellant under which the respondent provided an additional margin of US$200,000 and the appellant undertook, amongst other things, not to liquidate the respondent's positions. It eventually transpired that the appellant had, on the day prior to entering into the alleged agreement, liquidated all of the respondent's positions. The respondent applied for and obtained an injunction to restrain the appellant from drawing on the credit. However, this court discharged the injunction on the basis that the documents presented under the letter of credit were not fraudulent. In this connection, this court held (at [20]–[21]) that:

> 20 The only exception to the autonomy of the documentary credit transaction, therefore, is the fraud rule…
>
> 21 … It appeared to us that the kind of fraud sufficient to constitute an exception to the autonomy of an irrevocable credit is fraud in the presentation of the required documents to the bank, *ie* where the beneficiary, for the purpose of drawing on the credit, fraudulently presents to the bank documents that contain material representations of fact that to his knowledge are untrue … *It would seem that fraud as perpetrated by the seller on the buyer in respect of the underlying contract of sale between them would not affect the contract of documentary credit between the seller and the issuing/confirming bank* …

[emphasis added]

Common law fraud and recklessness

35 It is trite that the common law test for fraud is as set out in the case of *Derry v Peek*, in which Lord Herschell held as follows (at 374): "fraud is proved when it is shewn that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, careless whether it be true or false."

36 *Derry v Peek* was a case involving the tort of deceit, and the three categories of fraud in *Derry v Peek* were also elucidated in the context of the tort of deceit. We also note that the tort of deceit has a different juridical basis from the Fraud Exception: see *UniCredit v Glencore (CA)* at [16]. That said, in determining under what circumstances a document would be considered material, a holistic view of the beneficiary's wrongdoing as the trigger for the Fraud Exception in documentary credits, calls for, amongst other things, an examination of the beneficiary's knowledge of the fact of fraud or an evaluation of the beneficiary's conduct from the evidence available that he could not have honestly believed in the accuracy of material facts in the documents presented for payment. Such an approach is reasonable, and it does not emasculate the notion of *ex turpi causa non oritur actio.* The simple point is that the autonomy principle does not protect a fraudulent beneficiary of a letter of credit and the application of the maxim *ex turpi causa non oritur actio* directs a court to focus on the conduct of the beneficiary to determine whether he has engaged in any wrongdoing in relation to the documents which were presented under the letter of credit. Indeed, in Singapore, the categories of common law fraud identified in *Derry v Peek* have been used in various other contexts apart from the tort of deceit, such as in breaches of the Legal Profession (Professional Conduct) Rules

(see *Law Society of Singapore v Udeh Kumar s/o Sethuraju and another matter* [2017] 4 SLR 1369) and breaches of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (see *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 61 ("*PP v Able Wang*")).

37 Winson argues that not all of the categories of fraud in *Derry v Peek* would engage the Fraud Exception. In particular, Winson argues that recklessness (*ie*, the third category of *Derry v Peek* fraud) would not amount to fraud for the purposes of the Fraud Exception.

38 At this juncture, it is apposite to make some observations about recklessness under the categories of fraud in *Derry v Peek*. First, contrary to Winson's submission, recklessness does not entail the existence of any duty of care. As the English High Court in *Barings plc and another v Coopers and others* [2002] All ER (D) 309 at [58] (citing *Angus v Clifford* [1891] 2 Ch 449) noted, recklessness is made out when a person made a statement "without caring", and "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". Put in another way, as Bowen LJ held in *Le Lievre and Dennes v Gould* [1893] 1 QB 491 at 500–501:

> … If a man makes a wilful statement, intending it to be acted upon, and he is reckless whether it is true or false, he has a wicked mind; but his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement … There seems to have been some sort of an idea that … whether the man had made the representation not knowing and not caring whether the statement was true or false, the expression "not caring" had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart and conscience whether it was true or false, – and that would be wicked indifference and recklessness …

Recklessness, in this sense, is where the fraudster does not actually have sufficient certainty to know the true state of affairs but take steps or chooses not to take steps in order to isolate his or her mind from the truth: Peter Macdonald Eggers, *Deceit: The Lie of the Law* (Informa London, 2009) at para 5.23.

39 Second, recklessness in the *Derry v Peek* sense is subjective in nature. It refers to an indifference to a risk of which the defendant is *actually* conscious, and not one which would have been obvious to a hypothetical reasonable person: *Chu Said Thong and another v Vision Law LLC* [2014] 4 SLR 375 at [125] ("*Chu Said Thong*"). This is in contrast with *objective* recklessness, which is when the defendant creates an obvious risk by an act and does that act without giving any thought to the possibility of there being any such risk, and which is virtually synonymous with negligence: *R v Caldwell* [1982] 1 AC 341 at 354; *PP v Able Wang* at [74].

40 Third, in our judgment, recklessness in *Derry v Peek* is an instance of the second category (*ie*, without belief in the truth of the false representation). In *Derry v Peek*, Lord Herschell described the interaction between recklessness and the second category as such: "[a]lthough 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…" (at 374). In the Judgment, the Judge cited the decision in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") and found that "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)" (Judgment at [13]–[16]). This court also alluded to this conclusion in *Arab Banking* at [61], in holding that the third limb in *Derry v Peek* "is perhaps an instance of the second". While Winson contends

otherwise, we do not see how a person who is reckless can be said to have a belief in the truth of the representation. If the beneficiary was indifferent to the truth of the representations contained in the documents, he could not possibly have an honest belief that they were true. The short point is that in seeking to draw a distinction between absence of belief and recklessness, Winson is effectively drawing a distinction without a difference. The implication is that there is no expansion of the Fraud Exception bearing in mind that it was common ground between the parties that Winson would be taken to have acted fraudulently if it had presented to the banks documents that contained material representations of fact which it knew were untrue or in respect of which it had no honest belief in their truth. The effect of the Judge's reference to "recklessness" is to be understood contextually in that the second and third categories of fraudulent conduct are to be viewed as two sides of the same coin.

41 In this vein, we respectfully disagree with the SICC's analysis of the Fraud Exception in *CACIB v PPT* which was relied on by Winson in arguing that recklessness could not engage the Fraud Exception for letters of credit. In *CACIB v PPT*, the SICC held that the first two categories of fraud in *Derry v Peek* would engage the Fraud Exception, but not recklessness. The SICC explained as follows:

> 21 Dishonesty is the key to the fraud exception to the obligation to pay under letters of credit and a presentation, said to be recklessly made without investigation by the beneficiary of the circumstances underlying the representation, or of the circumstances of the underlying transaction, cannot vitiate the presentation. Whilst an absence of belief in the truth of a representation, in the sense of not caring whether it is true or false, will suffice for deceit, there is no duty of care owed by a beneficiary to the bank when presenting documents to an issuing bank (*DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 ("*DBS Bank v Carrier*") at [103]–[106]) and a failure, *even a reckless failure to ascertain the truth of representations, which are made in the honest belief that they*

> *are true, will not amount to fraud for the purposes of non-payment under a letter of credit*. In my judgment, there is a distinction between the law relating to letters of credit and the law relating to demand guarantees and so nothing in *Arab Banking Corp* impacts upon the Court of Appeal's earlier decision in *Brody*.
>
> [emphasis added]

42 As a preliminary point, we agree that as a result of the principle of autonomy for letters of credit, there is no duty of care owed by the bank or the beneficiary to investigate the documents presented under the letter of credit, as exemplified by the English cases of *Montrod (EWCA)*, *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2001] 1 All ER (Comm) 368 at 383, and the High Court decision of *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [103]–[105].

43 However, in *CACIB v PPT*, the SICC seemed to draw from the premise that there is "no duty of care owed by a beneficiary to the bank when presenting documents", the conclusion that recklessness will not engage the Fraud Exception. With respect, we disagree with this analysis and agree with the Judgment (at [22]) that *CACIB v PPT* should not be followed. As we highlighted at [39] above, subjective recklessness in the *Derry v Peek* sense is different from objective recklessness. It is neither synonymous with negligence, nor is it founded on any duty of care. Instead, subjective recklessness is only made out where there is an actual indifference to the risk of which the defendant is actually conscious. And when subjective recklessness has been made out, we disagree that there can be any "honest belief that the [representations were] true" for the reasons stated at [40] above.

The treatment of the Fraud Exception for independent guarantees

44 Save as for *CACIB v PPT* and the Judgment, there has not been any direct exposition as to whether common law fraud as postulated in *Derry v Peek* recklessness would be applicable to the Fraud Exception for letters of credit under Singapore law. This is in contrast with independent guarantees, where our law is markedly clear on this issue.

45 Put broadly, independent guarantees are guarantees entered into by a bank at the request of an applicant to pay money to the beneficiary in certain circumstances, and these guarantees are intended to protect the beneficiary in the event there is a breach of obligations by the applicant under the substantive contract. Such undertakings can take different forms such as "performance guarantees", and "on-demand guarantees", but they possess the same essential legal character: Ellinger & Neo, *Documentary Letters of Credit* at pp 300–301. They have been described as the "mirror image" of letters of credit, and share important similarities with letters of credit, including the principle of autonomy (see Charles Debattista, "Performance Bonds and Letters of Credit: A Cracked Mirror Image" (1997) Journal of Business Law 289; *Intraco Ltd v Notis Shipping Corporation* [1981] 2 Lloyd's Rep 256 at 257). The Fraud Exception has also been recognised as applicable to such independent guarantees, and English law first applied this exception in the context of performance bonds in the 1978 English Court of Appeal decision of *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 ("*Edward Owen Engineering v Barclays Bank*"): *Paget's Law of Banking* (John Odgers KC & Ian Wilson gen eds) (LexisNexis, 16th Ed, 2023) at para 35.12.

46 In *Arab Banking*, this court had to consider the specific question of whether fraud in the *Derry v Peek* sense would engage the Fraud Exception in

the context of demand guarantees. In *Arab Banking*, the respondent was employed to undertake certain works in Libya. The contract provided for a performance bond and advance payment guarantee to be issued in favour of the entity in Libya which employed the respondent (*ie*, ODAC). The respondent's bank in Bahrain, the appellant, was instructed to furnish counter-guarantees in favour of a Libyan bank. The respondent was obliged, under a facility agreement, to reimburse or indemnify the appellant for any amounts demanded or paid under the counter-guarantees. Due to the Libyan civil war, the respondent discharged the contract and took the position that there was a *force majeure* event. The Libyan bank then made demands to the appellant for payment under the counter-guarantees because the Libyan bank had purportedly received notices of demand by ODAC under the performance bond and advance payment guarantee. The respondents then applied for and obtained an injunction restraining the appellant bank from making payment to the Libyan bank. The appellant bank subsequently made a demand to the respondent under the facility agreement for the sums demanded by the Libyan bank pursuant to the counter-guarantees. The respondent refused to pay the appellant bank. The respondent contended that the demand under the facility agreement was fraudulent because the appellant knew that it did not have any liability to the Libyan bank under the counter-guarantee, and also contended that it would be unconscionable to receive payment from the respondent.

47 The High Court in *Boustead Singapore Ltd v Arab Banking Corp (B.S.C.)* [2015] 3 SLR 38 granted a permanent injunction restraining the appellant bank from receiving payment from the respondent under the performance bond and advance payment guarantee and for making payment to the Libyan bank under the counter-guarantee. This court in *Arab Banking* dismissed the appeal by the appellant bank and agreed with the High Court that

the Libyan bank (*ie*, the beneficiary) made the demands under the counter-guarantee fraudulently in the reckless sense because the appellant was recklessly indifferent to the invalidity with respect to its obligation to pay the Libyan bank. In this regard, this court held at [63] that: "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". This court also opined that recklessness should engage the Fraud Exception for letters of credit at [65], stating 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 … because the obligation that a bank assumes to a beneficiary under a performance bond is analogous to those assumed by an issuing or confirming bank to a seller under a documentary credit", although the statements there were made in *obiter*.

48 This approach to the Fraud Exception for independent guarantees is also consistent with the approach taken in English law. In particular, in the English Court of Appeal decision of *GKN Contractors Ltd v Lloyd's Bank plc* (1986) 30 BLR 48 ("*GKN Contractors*"), the President of the Court, Sir John Arnold, held that the Fraud Exception requires "something in the nature of common law fraud" bearing in mind that fraud as a concept is not peculiar to such guarantees but has its places in other branches of the law (at 66). *GKN Contractors* was concerned with an application for an injunction to restrain a bank from paying under a performance bond on the basis of fraud.

49 More recently, in *Tetronics (International) Ltd v HSBC Bank plc and another* [2018] 1 BLR 450, the applicant sought an injunction against the respondent bank on the basis that the beneficiary had no proper grounds for making a call on the bank guarantee. The English High Court found that the

Fraud Exception applied on the facts of the case, but discharged the injunction on the balance of convenience. The central argument concerned the procurement of the guarantee and the call on the guarantee thereafter. The guarantee had been given by the respondent bank on the basis of a written confirmation from the beneficiary that it was not aware of any circumstances that would give rise to a demand for breach of the underlying contract. However, prior to the procurement of the guarantee, the beneficiary had given notices to the applicant disputing breaches under the underlying contract. In this context, the court concluded that: "considering the contents of both [the notices and the letter] fairly, the contents of both could not be true. One must be false, and *knowingly or recklessly false* [emphasis added]" (at 466). Thus, the court concluded that either the call was made fraudulently, or the guarantee was procured by fraud.

No justification for a different standard of fraud between letters of credit and other financial instruments

50 Winson argues that the law on the Fraud Exception should be different as between letters of credit and independent guarantees because they are different financial instruments. On one hand, letters of credit are primary in form and intent (*ie*, that parties intend that the beneficiary should turn to the instrument as the first port of call for payment). On the other hand, independent guarantees are intended as a fall back (*ie*, to be invoked where there has been default in the performance of the underlying contract): Deborah Horowitz, *Letters of Credit and Demand Guarantees: Defences to Payment* (Oxford University Press, 2010) ("Horowitz, *Letters of Credit and Demand Guarantees*") at paras 5.01–5.02. In this vein, this court in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10] ("*JBE Properties*") similarly explained that a performance bond is "merely security for the secondary

obligation of the obligor to pay damages if it breaches its primary contractual obligations to the beneficiary" and is "not the lifeblood of commerce". Likewise, in *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 ("*Chartered Electronics Industries*") at [36]–[40], the High Court observed that a performance guarantee was merely a security and did not perform the same function as a letter of credit in international trade as a mode of payment in exchange for goods.

51 In both *JBE Properties* and *Chartered Electronics Industries*, the difference between independent guarantees and letters of credit were used to justify the application of different legal tests to restrain a call on the independent guarantee in question. In *JBE Properties*, this court was concerned with whether unconscionability should be a separate and independent ground for restraining a call on a performance bond. In answering this question in the affirmative, this court distinguished between performance bonds and letters of credit and suggested at [10] that a "less stringent standard … can justifiably be adopted for determining whether a call on a performance bond should be restrained [in contrast to letters of credit]". In *Chartered Electronics Institute*, the High Court was concerned with the applicable standard of proof in allowing an injunction to restrain the bank from paying the beneficiary under the performance guarantee on account of a fraudulent demand. The court held that a less onerous test of a "strong *prima facie* case" of fraud applied for performance guarantees in contrast to the "higher standard" of whether it is "seriously arguable that, on the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands", because letters of credit could not be treated the same as performance guarantees (at [29]–[30] and [36]). That said, the different legal tests to restrain a call on independent guarantees and letters of credit have no bearing on the issue as to whether the

ambit of the Fraud Exception for independent guarantees should be different for letters of credit.

52 We also appreciate that what the court looks at in applying the Fraud Exception in the context of letters of credit would often differ in a *practical* sense from independent guarantees. As explained in Horowitz, *Letters of Credit and Demand Guarantees* at [5.65]–[5.67], citing *Edward Owen Engineering v Barclays Bank*, letters of credit involve accompanying documents while independent guarantees often do not (*eg*, demand guarantees). Courts have thus found it difficult to apply the test of "fraud in the documents" in the context of independent guarantees and have instead asked the question of whether there was any honest belief in the validity of the demand made. Indeed, this was the precise enquiry made by this court in determining whether the Fraud Exception was made out in the context of independent guarantees in *Arab Banking* (see [46]–[47] above).

53 However, as for the pertinent question of whether there should therefore be a different standard of fraud for the Fraud Exception in contrast to independent guarantees, we answer this question in the negative, on the basis of principle, precedent and policy. We explain below.

54 First, we find it difficult to find a principled reason, even under a letter of credit, to compel the bank to pay the beneficiary on presentation of the allegedly complying documents where the beneficiary has no honest belief in the truth of its representations. If the court is not to assist a fraudster in his/her fraud (see [31] above), then the standard for fraud should not be so narrow as to allow a beneficiary to bury its head "ostrich-like in the sand" (*Chu Said Thong* at [121]) and benefit from its struthious belief in the truth of its representations.

And as we held above, there is no discernible difference between a person who is aware of the risk of the representations being untrue but *not caring* about whether it is true or not, and a person who has *no honest belief* in the truth of the representations (see [40] above). We do not think that the principle of autonomy would go so far as to allow one to benefit from his/her own wilful disregard of the truth of his/her own representations. To be clear, the "risk" of the representation being true in this particular context does not refer to the inherent risk involved in such transactions, as this may draw the relevant standard of recklessness closer to that of negligence and ascribe to the bank and/or beneficiary a duty of care to verify the truth of the representations made. Instead, the risk refers to the risk that arises because of "red flags" that should prompt the beneficiary to do the necessary checks that are called for in the circumstances before the beneficiary can be said to have formed an honest belief in the truth of the representations in question. This would typically entail being reasonably satisfied by the explanations that are advanced for the "red flags". Consequently, we think that similar to *Arab Banking* which adopted the *Derry v Peek* formulation for fraud in the context of independent guarantees, the same should be adopted in the context of letters of credit.

55 In *Beam Technology,* the credit required, amongst other documents, an airway bill and the buyer had notified the seller that this would be issued by freight forwarders, Link Express. However, Link Express as an entity did not exist. The document purporting to be issued by Link Express was a forgery and hence a nullity. The observations of Chao Hick Tin JA at [33] is apposite:

> While the underlying principle is that the negotiating/ confirming bank need not investigate the documents tendered, it is although a different proposition to say that the bank should ignore what is clearly a null and void document and proceed nevertheless to pay. Implicit in the requirement of a conforming document is the assumption that the document is true and

> genuine although under the UCP 500 and common law, and in the interest of international trade, the bank is not required to look beyond what appears on the surface of the documents. But to say that a bank, in the face of a forged null and void document (even though the beneficiary is not privy to that forgery), must still pay on the credit, defies reason and good sense.

56 If the Fraud Exception for letters of credit does not include recklessness in the *Derry v Peek* sense as explained in [40] above, like *Beam Technology*, it defies good sense if a bank which has grounds to believe that the beneficiary was reckless or indifferent to the truth of the representations contained in the presentation but insufficient to amount to actual knowledge of fraud, would have to comply and pay under the letter of credit. This incongruity is further illustrated by the fact that the *same* bank can then, upon paying the beneficiary, mount a claim in the tort of deceit to recover the *same* amount from the beneficiary. We acknowledge that the parallel drawn here is not a perfect one due to the different juridical bases between the Fraud Exception and the tort of deceit (see *UniCredit v Glencore (CA)* at [16]), but the grounds for establishing the tort of deceit bear many close similarities with the Fraud Exception. The High Court in *Banque de Commerce et de Placements SA, DIFC Branch & Anor v China Aviation Oil (Singapore) Corporation Ltd* [2024] SGHC 145 ("*Banque de Commerce v China Aviation Oil*") also suggested that the elements of the tort of deceit "such as inducement, reliance and resulting damage, remain applicable to invoke the fraud exception" (at [150]), although we also note that damage may not be necessary to establish the Fraud Exception since the Fraud Exception can be invoked even before the bank pays out (see *eg*, Judgment at [187]; Leung Liwen, "Should There be a Negligence Exception to the Autonomy Principle for Letters of Credit?" (2024) LMCLQ 275 at 281–282).

57 As a matter of precedent, while there is no local jurisprudence on this matter, a perusal of foreign jurisprudence reveals that recklessness in the *Derry v Peek* sense may engage the Fraud Exception in the context of letters of credit. In *Royal Bank of Canada v Darlington* [1995] OJ No 1044, the respondents were members of an underwriting syndicate, Lloyd's. The respondents had to lodge a letter of credit in favour of Lloyd's to secure the deposit obligations which underlie their ability to underwrite insurance. As a result of losses caused by the syndicates, Lloyd's made calls on the letters of credit issued by the applicant banks. The respondents resisted the calls and claimed that they were victims of fraud conducted by Lloyd's, and that they tendered sufficient evidence to the applicant banks to relieve them of their obligation to honour the letters of credit. The applicant banks honoured the letters of credit and sought reimbursement from the respondents. The Ontario Court of Justice (General Division) had to consider whether the applicant banks were entitled to such reimbursement. The court noted that notwithstanding that the standby letters of credit were to guarantee the performance of an obligation, it should not be treated as a guarantee but a letter of credit (at [314]–[318]). The court agreed that recklessness can amount to fraud for the Fraud Exception for letters of credit based on the exposition of fraud in *Derry v Peek* (at [233] and [236]). However, on the facts, fraud could not be made out and the applicant banks therefore succeeded in their claim (at [330]).

58 In the case of *Tukan Timber Ltd v Barclays Bank Plc* [1987] 1 Lloyd's Rep 171, the claimants were importers of timber, and the trade was financed by Unitrade. The payment was made by letters of credit opened at the defendant bank with Unitrade as the beneficiary. Subsequently, Unitrade became Unibanco, and the existing letters of credit were cancelled and substituted with a new one. A first presentation was made by the beneficiaries, but the bank

declined to honour it because the signature on the receipt was in its old form and the name on the document was "Unitrade" not "Unibanco". Later Unibanco made its second presentation on instructions from its subsidiary. In the second presentation, the receipt had the heading "Unitrade" but was lightly deleted and "Unibanco" was inserted instead. The receipt also had the same date as the date in the first rejected presentation. The English High Court held that the forgery was so crude and manifest that the beneficiary "could not have honestly believed" that the document which emanated from its subsidiary was valid. The court noted that had the defendant bank intended to honour the letter of credit on the strength of the second receipt, the court would have found that the Fraud Exception was satisfied and "should have been prepared to hold that this was one of those very, very rare cases wherein the strict burden of proof was satisfied" (at 176). However, the application for an injunction to restrain the defendant bank from paying to the beneficiaries was dismissed because the plaintiffs failed to prove that a further demand would be made on the strength of another fraudulent receipt.

59 We also noted that there is support for this approach in academic literature for adopting *Derry v Peek* fraud under the Fraud Exception in the context of letters of credit: see *eg*, Enonchong, *The Independence Principle* at para 5.28; Malek & Quest, *Jack: Documentary Credits* at para 9.18. While there have also been suggestions that an even wider test for fraud should be adopted (see Charles Proctor, *The Law and Practice of International Banking* (Oxford University Press, 2nd Ed, 2015) at para 24.65), we would not go so far as to adopt this.

60 As for policy, Winson argues that recognising recklessness would be an unwarranted expansion of the Fraud Exception and warns that the court should

"be slow to widen the fraud exception lest it brings international trade to a grinding halt". We disagree with Winson's contentions for two reasons. First, there is no widening or "expansion" of the Fraud Exception. As we explained above at [40], recklessness in the *Derry v Peek* sense is but an instance of having no honest belief in the truth of the false representation. Second, even if we assume that the adoption of the third category of fraudulent conduct identified in *Derry v Peek* would be an "expansion" of the Fraud Exception for letters of credit (see *eg*, *Banque de Commerce v China Aviation Oil* at [146] and [154]), we do not think that there is any strong policy reason to reject this "expansion" in any event. Pertinently, we note that the balancing act between not facilitating fraud and ensuring confidence in the operation of letters of credit has been struck differently in various jurisdictions, with some jurisdictions like the US (see *NMC Enterprises, Inc v Columbia Broadcasting* 14 UCC Rep 1427 (NYSC 1974) as per Article 5-144 of the Uniform Commercial Code) and Canada (see *Angelica-Whitewear Ltd*) adopting the position that a fraud in the *underlying transaction* would also engage the Fraud Exception in the context of letters of credit. The experiences of these other jurisdictions support the point that the limited "expansion" (if any) in our holding that recklessness would amount to fraud for the Fraud Exception would not lead to the dire policy consequences which Winson claims would ensue.

61 Consequently, we agree with the Judge (at [23] of the Judgment) that the Fraud Exception for letters of credit may be engaged if, in presenting documents for payment, a beneficiary makes a false representation knowingly, or without belief in its truth (which *includes* the beneficiary being reckless in the sense of being indifferent to the truth).

Winson's false representations were made fraudulently

62 Having set out the formulation of the Fraud Exception, we turn to answer the question of whether the Judge erred in finding that the Fraud Exception for letters of credit was engaged on the facts.

Admission of the disputed evidence

63 As a preliminary point, Winson argues that certain evidence could not be properly admitted because they were hearsay and could not fall within the exceptions to the hearsay rule. These were:

(a) statements by Freddy which included an admission that as an employee of Hin Leong, he signed BLs instead of the carrier, Ocean Tankers or the master of the vessel, and this was done on Mr OK Lim's instructions (the "Freddy Statements");

(b) the correspondence from solicitors acting for Ocean Tankers' liquidators which stated that Ocean Tankers did not issue the BL in respect of the Ocean Voyager (the "Ocean Tankers Correspondence"); and

(c) Mr OK Lim's averment in a separate suit, HC/S 805/2020, that the cargo on board the Ocean Voyager and Ocean Taipan was meant for Unipec Singapore Pte Ltd ("Unipec"). He admitted that Hin Leong had confirmed to sell 2 x 780,000 barrels +/- 5% operational tolerance of ultra-low sulphur diesel to Unipec, and that one parcel of 780,000 barrels was to be loaded onboard the Ocean Voyager and the other parcel of 780,000 barrels was to be loaded on the Ocean Taipan (the "OK Lim Defence").

Freddy Statements

64 The Freddy Statements were a set of three partially redacted statements that were recorded by Hin Leong's IJMs. The first statement dated 15 May 2020 stated that he was instructed by Mr OK Lim to help him with various trades (at para 2). The list of trades as set out in Appendix 1 was heavily redacted, but which shows a transaction involving OCBC and Winson, and 785,997 barrels of cargo onboard the Ocean Voyager, and another transaction involving SCB and Winson, and 786,022 barrels of cargo onboard the Ocean Taipan. Freddy further stated in the first statement that:

> 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).
>
> …
>
> 8. … From what I understand in normal circumstances, the bills of lading are usually signed by the Master or the agent of the vessel and not by an employee of Hin Leong Trading (Pte) Ltd.
>
> …
>
> 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.

Appendix 2, which was referred to in para 13, is completely redacted.

65 The second statement by Freddy, dated 21 September 2020, stated that Freddy's duties in Hin Leong were to "counter and issue contracts" after Hin Leong's traders had concluded the deals (at para 3). He also set out the typical workflow for such contracts (at para 4), and that he would have to take instructions from, amongst others, Mr OK Lim, as part of his preparation of contracts (at para 5).

66 The third statement by Freddy, dated 6 October 2020, stated the following:

> 1. On 27 March 2020 at 5:10 p.m., I received a deal recap from Winson's trader, Derrick Cai CanHuang. Refer to Annex L.
>
> 2. I subsequently replied to Derrick's email to confirm the deal recap on 30 March 2020 at 12:51 p.m under Mr OK Lim's instructions. Refer to Annex L. The instructions could have been communicated to me directly through Mr OK Lim or Serene Seng. If it had been through Serene Seng, she would mention that she had received Mr OK Lim's approval, otherwise, she would have given the instructions after walking out of Mr OK Lim's room.
>
> 3. Although the email was directed to Serene Seng, it is likely that Mr OK Lim had given clearance to Serene Seng for this deal as all deals have to be authorised and / or approved by Mr OK Lim.

Annex L was an email between Mr Derrick Cai, Winson's Head Trader ("Mr Cai") and Hin Leong wherein Mr Cai sent a deal recap for the transaction for the Winson – Hin Leong trade for 2 x 780,000 barrels Ultra Low Sulphur Diesel ("ULSD").

67 The Judge admitted the Freddy Statements on the basis of s 32(1)(*b*) and s 32(1)(*c*) of the Evidence Act 1893 (2020 Rev Ed) (the "EA"). These two

subsections provide that statements made in the course of trade, business, profession or other occupation, and statements made against the interest of the maker respectively are admissible statements even if they are hearsay.

68 Winson first challenged the admission of the Freddy Statements on the basis of s 32(1)(*b*) of the EA. Winson argued that the Freddy Statements were not part of Hin Leong's IJMs' statements/records, and that s 32(1)(*b*) could not be so broad as to also include statements that were not made by the IJMs. We disagree with Winson. The Freddy Statements were recorded by the IJMs and form part of their records; it did not matter that they were not appended to the specific IJM reports. It has also not been suggested why these statements would have been taken if not for the performance of their duties as IJMs. Furthermore, even if the statements were made by Freddy and not the IJMs, they could still properly form part of the IJMs' records: see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 2023) ("Pinsler, *Evidence*") at para 6.008.

69 Winson also challenged the admission of the Freddy Statements on the basis that s 32(1)(*c*) could not apply because there was no evidence that Freddy knew the statements were against his interest. In *Velstra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154, this court held that for a hearsay statement to be admissible under this rule, "it must be shown that the person who made it was conscious that what he said was against his own interest" (at [40]). We disagree that Freddy did not know that the statements were made against his own interest. In particular, while the first statement suggests that Mr OK Lim had directed Freddy to forge the BLs, Freddy also acknowledged that he knew how, in "normal circumstances", the BLs would not be signed by Hin Leong but by the master of the vessels. He also stated that despite knowing this, he proceeded to sign these documents. As the Judge pointed out, this statement that Freddy had

forged a document purportedly issued by another company and signed by another person, if true, could expose him to criminal prosecution or a suit for damages (Judgment at [53]). There is also no evidence that by signing these statements he would be absolved of liability such that the Freddy Statements can be said to be made in Freddy's own interests.

70 Finally, we did not see any good reason to exclude the statements on the basis of s 32(3) of the EA which empowers the court to not admit evidence which are admissible if it would "not be in the interests of justice" to do so. As this court highlighted in *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686, while hearsay evidence may be of limited probative value, the court "should not normally exercise its discretion to exclude evidence that is declared to be admissible by the EA" (at [109]).

Ocean Tankers Correspondence

71 The Ocean Tankers Correspondence is a document sent by the solicitors acting for the liquidators of Ocean Tankers' liquidators dated 30 November 2021 to SCB's solicitors. The relevant portion of the document states:

> Insofar as disclosure is being sought regarding the underlying transactions between [Hin Leong], [Winson], and Trafigura, pursuant to which [the Ocean Voyager BL] was purportedly issued, any third-party disclosure should instead be sought from [Hin Leong] which was a party to those transactions. [Ocean Tankers] is not party to these transactions and, as will be stated below, did not issue the aforesaid BL.

72 The Judge found that the Ocean Tankers Correspondence can be admitted under s 32(1)(*b*) of the EA (Judgment at [54] and [57]). Winson challenged the admission of the Ocean Tankers Correspondence on the basis that these were statements made by the solicitors of Ocean Tankers' liquidators

in correspondence with SCB's solicitors and cannot fall under s 32(1)(*b*) of the EA.

73 In our view, although the Ocean Tankers Correspondence was not a document of the *liquidators* but instead that of their *solicitors*, such evidence is still admissible under s 32(1)(*b*) of the EA. Correspondence in the course of a person's profession as a solicitor can be a "statement made … in the ordinary course of a trade, business, profession or other occupation" (see *eg*, *The Law Society of Singapore v Lee Suet Fern (Lim Suet Fern)* [2020] SGDT 1 at [122]–[138]). We also did not think that s 32(3) of the EA should exclude the admission of the Ocean Tankers Correspondence – there is nothing to suggest that it would not be interests of justice to do so.

OK Lim Defence

74 The Judge held that the OK Lim Defence was admissible for the reason that it was a statement made against Mr OK Lim's interest under s 32(1)(*c*) of the EA. This is because, if Mr OK Lim was involved in the Subject Transactions (which the Judge accepted was the case), then he would have been engaged in subsequent dealings with cargo that he had no right to do so, having committed the same to Unipec.

75 We express our doubts as to whether the OK Lim Defence was admissible under s 32(1)(*c*) of the EA. Preliminarily, the rationale behind s 32(1)(*c*), as stated by this court in *Raj Kumar s/o Aiyachami v Public Prosecutor and another appeal* [2022] 2 SLR 676 at [67], is that "in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true".

76 The relevant part of the OK Lim Defence reads as follows:

> [I]t is admitted that [Hin Leong] confirmed a deal to sell 2 x 780,000 barrels +/- 5% operational tolerance of ultra-low sulphur diesel to Unipec, to be loaded on two vessels, the *Ocean Voyager* and the *Ocean Taipan*. It is admitted that one parcel (i.e. 1 x 780,000 barrels) was to be loaded on board the *Ocean Voyager* and the *Ocean Voyager* was chartered from [Ocean Tankers] to [Hin Leong]. It is admitted that one parcel (i.e. 1 x 780,000 barrels) was to be loaded on board the *Ocean Taipan* …

The important context in which the OK Lim Defence was made was that this was in response to the Statement of Claim by liquidators of Hin Leong, in which the liquidators alleged that Hin Leong had improperly sold the same cargo to other parties, including Trafigura. Mr OK Lim denied the liquidators' pleading that Hin Leong had done so. The Judge's finding that the OK Lim Defence is to Mr OK Lim's own detriment is predicated on a finding that Mr OK Lim was involved in the Subject Transactions. However, Mr OK Lim did not accept this in the OK Lim Defence, and thus, it would not properly fall under the s 32(1)(*c*) exception since he was not conscious that this statement would be made to his detriment (see also [69] above).

Winson's representations were false

77 As the Judge identified, the representations that were made by Winson in its LOIs to OCBC and SCB were essentially that 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 in turn passed good title to Hin Leong. Thus, the representations would be false if there was no cargo shipped pursuant to valid BLs described in the LOIs to OCBC and SCB, even if the Winson – Hin Leong sale were not a sham (Judgment at [30]–[31]).

There were no valid BLs for the Subject Transactions

78 The Judge found that there were no valid BLs for the Subject Transactions. First, the letters and report from Hin Leong's IJMs showed several irregularities involving the Subject Transactions. The original BLs concerning the Ocean Taipan and Ocean Voyager were marked "null and void" and bore no endorsement on the reverse side of those BLs, and the IJMs stated that they were signed by a staff of Hin Leong instead of the master or agent of the Ocean Taipan and Ocean Voyager as they purported to be. The IJMs further detailed transactions where the same cargo was sold multiple times without repurchasing it, using multiple BLs, and for the purposes of financing. As for the Subject Transactions, the IJMs stated that the cargo onboard the Ocean Voyager was sold to at least three buyers, and the cargo onboard the Ocean Taipan was sold to at least two buyers. The IJMs identified Unipec as the initial buyer of the cargo on the Ocean Taipan and Ocean Voyager, and Trafigura was only a subsequent buyer of the cargo that had already been sold to Unipec (Judgment at [37]–[42]). Second, the Freddy Statements (see [64]–[66] above) suggested that Freddy had signed and forged the BLs for the Subject Transactions (Judgment at [45]–[53]). Third, the Ocean Tankers Correspondence confirmed that the BL in respect of the Ocean Voyager was not issued by Ocean Tankers. Thus, the Judge concluded that the copy non-negotiable BLs were forgeries that were not signed by the master or agent of the vessels, there were no valid BLs pursuant to which cargo was shipped for the Winson – Hin Leong sale, and Winson's representations as regards the existence and validity of a full set of 3/3 original BLs were false (Judgment at [59]).

79 Winson argues that the Judge had no basis to conclude that either Freddy or the staff from Hin Leong had signed the BLs without authority because there

is no evidence as to whether they were authorised to do so. The IJMs also referred the unauthorised stamping of the BLs to the authorities (the findings of which are not before the court), and it is unsafe to conclude that the BLs were forged. Winson further contends that there is "*prima facie* evidence that the BLs were not signed by Mr Freddy Tan" – this was on the basis that Freddy's signatures in the Freddy Statements differed from the signature that was on the BLs.

80 We agree with the Judge that the evidence clearly showed that there were no valid BLs and reject Winson's contentions. As for Winson's contention that the staff from Hin Leong may have been authorised to sign the BLs, we find this entirely speculative. There is no evidence to suggest such a relationship of authority or agency as between Hin Leong and the master of the Ocean Taipan and/or Ocean Voyager. Moreover, the fact that the matter has been referred to the authorities does not mean that this court cannot make a finding in this case on whether there were valid BLs based on the evidence before us. We also find that Winson's argument that there was *prima facie* evidence that the BLs were not signed by Freddy is bereft of any merit. Freddy knew clearly (as evidenced by his first statement at [64] above) that his signing on the BLs was irregular, and it would have made no sense to expect him to have signed off on the BLs using his own signature.

There was no cargo shipped as described in the LOIs

81 The Judge also found that the cargo was not shipped as described in the LOIs. He relied on the OK Lim's Defence, which showed that the cargoes onboard the Ocean Voyager and Ocean Taipan were meant for Unipec and not Trafigura or Winson pursuant to the Subject Transactions. This was confirmed by the IJMs' letters which showed that there was significantly more

documentation for the trade between Hin Leong (as the seller) and Unipec (as the buyer). There was also no inspection that was conducted to determine the quantity or quality of the purported shipments for the Subject Transactions, because there was no evidence that any independent inspector was appointed (Judgment at [60]–[69]). The Judge also noted the criticisms levelled against the documentation for the trade between Hin Leong and Unipec but did not reach any firm conclusion on that matter because of separate interpleader proceedings in relation to that cargo (Judgment at [70]).

82 Winson suggests that the Judge was not equipped to make a finding that the cargoes onboard the Ocean Taipan and Ocean Voyager were meant for Unipec given that the parties did not adduce evidence on this issue and which the parties acknowledged was part of separate proceedings. Winson also argues that the documentation for the trade between Hin Leong and Unipec was problematic. The alleged problems include:

(a) two BLs for the Hin Leong – Unipec sale dated 18 March 2020 were issued in respect of cargoes loaded on board the Ocean Taipan and Ocean Voyager at Tanjung Pelapas, but the evidence shows that the vessels were not at Tanjung Pelapas then, nor were they loaded with any cargo;

(b) in the IJMs' report dated 22 June 2020, it was highlighted that it was unusual for the BLs with respect to the Hin Leong – Unipec sale to be dated earlier than the date of physical loading; and

(c) there were concerns raised by Winson's expert about the reliability of the loading reports which indicated that the loading on the

Ocean Taipan and Ocean Voyager were pursuant to the Hin Leong – Unipec BLs.

83 While we are not inclined to admit the OK Lim Defence for the reasons canvassed at [74]–[76] above, we agree with the Judge that the evidence sufficiently showed on a balance of probabilities that there was no cargo shipped as described in the LOIs.

84 As pointed out by OCBC, the critical problem with Winson's contentions in this appeal (see [82] above) is that it erroneously assumes that either one of the trades (*ie*, the Winson – Hin Leong sale, or the Hin Leong – Unipec sale) *must* be genuine, and a finding that the Hin Leong – Unipec sale is not genuine would mean that the Winson – Hin Leong sale was in turn genuine. While a finding that one of the trades *is* genuine would mean the other trade was not, we cannot rule out the possibility that neither of the trades were genuine (although we do not make any findings on this). In this vein, the Judge ultimately did not make any findings on the documentation for the transaction between Hin Leong and Unipec and whether there was *in fact* cargo shipped as described in the BLs between Hin Leong and Unipec (Judgment at [70]). However, the Unipec transaction shows the usual documentation that would be expected for such a trade, which the Hin Leong – Trafigura trade was sorely lacking. There is also no allegation in this appeal that the documentation for the Unipec trade was exceptional, save that Winson contests the details within the said documents.

85 In our judgment, it is most telling that there was no independent inspector appointed for the purported shipments for the Subject Transactions, and Winson never received any loading documents. Further, the Trafigura –

Winson sale required Trafigura to appoint and instruct an independent inspector to determine the quantity and quality at the loadport but there was no evidence that any such inspector was appointed. Even Winson's expert, Ms Catherine Jago, agreed that it would be normal practice, where provided for in the contract, for parties to jointly appoint an inspector at the loadport, yet this was not done for the Subject Transactions.

86 Given our agreement with the Judgment that Winson made false representations because there were no valid BLs for the Subject Transactions and there was no cargo shipped as described in the LOIs, it is not necessary for this court to consider whether the Winson – Hin Leong sale was a sham. Neither OCBC nor SCB pursued this point on appeal.

Winson made the representations fraudulently

87 Having found that Winson made false representations in its LOIs: *ie*, that there were valid BLs for the Winson – Hin Leong sale, and that there were cargoes shipped pursuant to the LOIs, we turn to the question of whether these false representations were made fraudulently.

88 OCBC and SCB both contended in this appeal that Winson did not honestly believe in the truth of its representations. To this end, they argued that the Judge was right in finding that the multiple "red flags" which had arisen between the conclusion of the Subject Transactions on 27 March 2020 until Winson's second presentations, and Winson's responses to these "red flags" showed that Winson was reckless and did not honestly believe in the truth of its representations.

89 In our analysis, we will examine these "red flags" to determine Winson's state of mind at the time of the second presentation, and consequently, whether the Judge had erred in finding that Winson was reckless in that it did not honestly believe in the truth of its representations in the documents on the second presentation.

90 In dealing with these "red flags", we highlight three important points that should be borne in mind. First, in examining this issue, it bears emphasis that recklessness in the *Derry v Peek* sense would suffice to engage the Fraud Exception (see [40] and [61] above). Second, the "red flags", as will be considered below, should not be viewed in isolation but in a "continuum", as Mr Tan submitted in the course of his oral arguments. The proper inquiry is for the court to determine whether given the state of knowledge of all the material facts, Winson had acted fraudulently. Third, while the parties during their oral submissions initially disagreed on the relevant time to assess Winson's state of mind, they eventually reached common ground that this should be assessed as at the date of the second presentation, *ie*, 15 April 2020. It is also common ground that evidence subsequent to the date of the second presentation may be relevant, but only to the extent that it showed Winson's state of mind at the time of the second presentation.

91 A chronology of the events between the conclusion of the Subject Transactions on 27 March 2020 until Winson's second presentation was set out in the Judgment at [81]–[105]. For brevity, we do not repeat the chronology here, and will only refer to the events which are relevant in our analysis of the various "red flags" below.

The "red flags" that were raised

(1) Whether the circular trades were pre-structured

92 The three trades for the same cargo occurred on the same day on 27 March 2020. They were: (a) Hin Leong to Trafigura at 2.54pm at MOPS plus US$2.30 per barrel; (b) Trafigura to Winson at 3.19pm at MOPS plus US$2.35 per barrel; and (c) Winson to HL at 5.10 pm at MOPS plus US$2.35 per barrel.

93 The Judge found that the Subject Transactions were pre-structured. It drew this conclusion from the following reasons:

(a) 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 the original supplier (Judgment at [109]).

(b) 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 of the vessels only took place on 7 April 2020. Moreover, on the terms of the contract for the Trafigura – Winson sale, the nominated vessels could still be substituted (Judgment at [110]).

(c) Third, the worsening market conditions in the afternoon of 27 March 2020 were such that it made no commercial sense for Hin Leong

to repurchase the goods from Winson, unless the Subject Transactions were pre-structured (Judgment at [111]).

94 Winson first argues that even if the transactions were pre-structured, this does not necessarily mean that they were shams. We agree. This issue was previously considered in detail in *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 at [28]–[74], and the court held that circular chains of transactions are not *ipso facto* shams; on appeal, this court likewise did not find a sham agreement even though the transactions in question were circular in nature (see also *UniCredit v Glencore (CA)* at [65]).

95 It was also Winson's position that the invoice and LOI were dated 6 April 2020 because all that was left at that time was for Winson to convey the formal acceptance of the nomination of the Ocean Voyager to Trafigura which Trafigura did so on 7 April 2020. The critical flaw with this argument is that it does not address the main concern raised in the Judgment, which is that Trafigura only provided its LOI to Winson on 9 April 2020 and could have at any time between 7 April 2020 to 9 April 2020 substituted the vessel or use a different source of cargo to fulfil the Trafigura – Winson sale. Winson had simply no basis to issue an LOI based on the copy BL received from Hin Leong.

96 Winson further contends that the Judge erred in finding that the trades were pre-structured because there was no evidence that Hin Leong wanted to avoid the trouble that would have been caused if the ineffective BLs were relied on by Unipec and Trafigura, and there was also no basis to make any findings for Hin Leong's reasons for purchasing the gasoil from Winson.

97 We disagree and find that the court below did not err in concluding that the Subject Transactions were pre-structured. Both OCBC and SCB had argued in the proceedings below that the Subject Transactions were pre-structured and it had provided evidence in the form of the Freddy Statements and Ocean Tankers Correspondence showing that the BLs were forged to prove this fact. Had it not been so pre-structured, then should any other buyer purchase the cargo and attempted to collect it, that would have caused significant difficulty since no cargo had in fact been shipped. It was for Winson to contradict, weaken or explain away the evidence led, and it was insufficient to postulate on other theories on what had transpired especially if they were not plausible ones (*eg*, that Hin Leong had intended to resolve potentially competing claims by purchasing similar shipments of gasoil to substitute the cargoes sold to Unipec or Trafigura, or that Hin Leong had sold the cargo without care for the trouble that would be caused if Unipec and Trafigura had attempted to collect that cargo).

98 While the court below was entitled to find based on the evidence before it, that it might not have made commercial sense for Hin Leong to repurchase the cargo at a higher price very soon after selling that same cargo especially if the market conditions had worsened in the interim period, we attach little weight to this point since there might be other strategic reasons for Hin Leong to have done so.

99 In any event, Winson accepts that it became aware of this circular structure by 3 April 2020, some two weeks before the second presentation even though it represented to OCBC on 3 April 2020 that "[Winson] rarely [does] back-to-back transactions" in response to OCBC's query as to who the supplier for that transaction was. This is the relevant context to bear in mind when one

is evaluating the probative weight of the "red flags" and consequently in assessing the state of Winson's knowledge or awareness at the time of the second presentation.

100 While circular trades may not be *per se* unusual in the oil trading market, what made this particular circular trade unusual was the use of LOIs in a situation where all the relevant parties were based in Singapore which would and should have facilitated the ease in producing the original BLs and the loading documents. That should have caused an honest trader to at least make some inquiries.

101 Furthermore, the parties also appear to have overlooked the fact that the carrier, Ocean Tankers was essentially owned and controlled by Hin Leong. This being the case, there was no reason why the original BL could not have been released by Ocean Tankers to Hin Leong especially since they shared the same office. LOIs are typically used because the original BL is in circulation – the carrier, the shipper and the issuing bank are based in a country different from the buyer/consignee. This is consistent with Winson's evidence of the usual time lapse between the shipment of the cargo to Europe and the presentation of the original BLs. This was not the case here. In our view, given the significant value of the transaction, the parties down the line including Winson would have been expected to query why the original BL was not available. The fact that a copy of a non-negotiable BL was available should have caused even more concern because there would be no reason to explain the absence of the original BL if the non-negotiable copy was somehow available.

(2) Lack of loading documents and inability to produce the original BLs

102 Winson's indifference equally applies to the absence of the loading documents.

103 The Subject Transactions were concluded on 27 March 2020. On 4 April 2020 and 6 April 2020, Winson emailed Hin Leong to ask for the copy BLs for both shipments and the loading documents for both vessels respectively. In two emails dated 6 April 2020 at 3.49pm and 3.55pm, Hin Leong replied providing Winson with copy BLs for the vessels and shipment details, but without the loading documents. However, Winson did not follow up with Hin Leong to seek the loading documents. The copy BLs state that 31 March 2020 was the loading date on the Ocean Voyager, and 3 April 2020 was the loading date on the Ocean Taipan. After OCBC rejected Winson's first presentation on 15 April 2020, Mr Carl Dong ("Mr Dong"), an executive in Winson's Operations Department, emailed Trafigura on 16 April 2020 to ask for the loading documents. However, no loading documents were produced.

104 The Judge found that the evidence of the other trades done by Winson involving cargo shipped to Europe showed how loading documents were always received by Winson and Winson's buyers typically between two to three days from the shipment date. For one of the trades involving the vessel "Sea Star" for cargo shipped to Rotterdam, the cargo was loaded on 25 July 2019 and Winson only sent the documents on 2 August 2019, eight days thereafter. In that instance, Winson even apologised for the delay. This contrasts with Winson's inexplicable decision not to chase Hin Leong for the loading documents at all.

105 This situation had become even more untenable by the time of the second presentation to OCBC and SCB on 21 April 2020. By this time, 16 days

had elapsed since the purported loading on Ocean Voyager and 13 days since the purported loading on Ocean Taipan and yet the critical original BL and loading documents remained inexplicably unavailable. The fact that the cargo on the Ocean Taipan was purportedly loaded at the Universal Terminal in Singapore which was also controlled by Hin Leong should have raised more concerns about Hin Leong's inability to produce the loading documents. Again, this reinforces the finding that Winson was at the very least indifferent which explains why it did not bother to even ask Hin Leong or Ocean Tankers for the original BL and the loading documents.

106 This is especially alarming because by then, OCBC had rejected the presentation on the basis that no physical cargo had been loaded for this transaction. OCBC was asking Winson to produce the original BL to assuage their concerns and yet it was unable to produce it. It also appears that Winson did not even approach Hin Leong or Ocean Tankers for the production of the original BL when it was in constant communication with them at the material time.

107 Winson's argument in this appeal that it had been Winson's practice to prepare documents for presentation based on the copy BLs, which Ms Crystal Tung ("Ms Tung"), Winson's Executive Director, averred to, does not address the point that a "red flag" had arisen by reason of the inexplicable absence of the loading documents. It was not her evidence that Winson's practice was to proceed with the presentation even in the absence of such loading documents. Her evidence was that she did not know of the relevance of these documents and that the copy BLs were only used to *prepare* the documents for presentation. In contrast, Mr Cai, Winson's Head Trader, had admitted that Winson would have been concerned that it had not received loading documents in relation to a

shipment, and they "[would] automatically chase for the documents". Yet, this was not done for the Ocean Taipan and Ocean Voyager.

108 Given the above context and the very substantial amounts involved, the omission on the part of Winson to seek assistance from Hin Leong or Ocean Tankers for the production of the original BL cannot be explained save that it demonstrates Winson's indifference at the very least.

(3) Change in the quantity of gasoil after the issuance of the Ocean Taipan BL

109 Another "red flag" was the change in the quantity of gasoil in the Ocean Taipan copy BL after its issuance and Winson's response to the change.

110 On 8 April 2020 (*ie*, after the purported date of loading on the Ocean Taipan on 3 April 2020), Trafigura emailed Winson to say that it would resend corrected figures for both shipments. Hin Leong then emailed Winson the "corrected shipment details" to revise the quantity from 788,299 barrels to 786,022 barrels of gasoil and provided a corresponding copy BL. Hin Leong also emailed Trafigura the corrected figures for the Ocean Taipan and the copy BL, and Trafigura emailed Winson the same.

111 The BL is typically issued *after* the loading of the cargo onboard and *after* the issuance of primary documents like the loading documents to ensure that the quantity actually loaded is properly reflected in the BL. Therefore, there should be no reason for the change of the quantity without an amended loading certificate. This is especially so after the vessel had set sail when there will be no opportunity to verify the accuracy of the amendment. As noted in the Judgment, the experts agreed that a change in the quantity figures in the BLs

after they had been issued and after the vessel had sailed is uncommon, and that an operator would likely ask for the loadport inspectors' quantity report, confirmation from the master of the vessel that the revised figures were correct, and an explanation for the discrepancy (Judgment at [115]). However, Winson did not seek any explanation or documentation for this change.

112 In Winson's reply submissions on the change in the quantity of gasoil, Mr Tan pointed out that "the change [was] only in respect of the quantity, and this is because the quantity was changed within the plus [five or minus] percent tolerance in the sales contract. The rest of the details remain the same". The 5% tolerance in the sale contract or the letter of credit provides no justification for the change in the quantity in the BL in the absence of a corrected loading certificate. The 5% tolerance is intended to permit the shipper with a *de minimis* margin in the loading of liquid or bulk cargo. It is not intended to be a licence to alter the quantity *after* the issuance of the BL.

(4) Winson's concerns over the "clean title" of the cargo

113 This "red flag" arose from the WhatsApp discussions between Ms Tung and Ms Ng Chuey Peng ("Ms Ng") of OCBC on 13 April and 14 April 2020, a day before OCBC's rejection of Winson's first presentation on 15 April 2020. The relevant context to be kept in mind is that by this time, as was also acknowledged by Mr Tan in the course of Winson's oral submissions in this appeal, news of Hin Leong's financial difficulties had already broken out.

114 There is no dispute that in the WhatsApp discussions, Ms Tung did ask Ms Ng to check if the title was clean. The relevant portions of the WhatsApp discussions state:

> [13/4/20, 6:45:08 PM] [Ms Tung]: Hi [Ms Ng]. 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 is clean. Thank you.*
>
> [13/4/20, 6:47:21 PM] [Ms Ng]: Tku so much Crystal. 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.
>
> …
>
> [14/4/20, 1:42:00 PM] [Ms Ng]: Crystal, I wd need the BL to act. Do u al hv it pls?
>
> [14/4/20, 1:54:17 PM] [Ms Tung]: Hi [Ms Ng]. 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 are other ways we can ensure clean title
>
> [14/4/20, 1:57:44 PM] [Ms Ng]: I remember your supplier is Trafigura. Title shd be transferred to you for u to present the LOI to us?
>
> [14/4/20, 1:58:13 PM] [Ms Tung]: Yes, but we don't have the bl yet. That's why using LOI
>
> [emphasis added]

It is accepted that Ms Tung's reference to clean title in her WhatsApp message dated 13 April 2020 could mean either that there were doubts as to whether there was physical cargo on the Ocean Voyager for resale, or that the cargo which Winson had sold to Hin Leong had in turn been resold to another party.

115 The Judge found that Ms Tung had doubts over whether it had good title over the Ocean Voyager cargo and referred to the WhatsApp conversation between Ms Tung and Ms Ng on 14 April 2020. The reference to "other ways" to ensure clean title could only have been a reference to whether Winson had in the first place obtained good title from Trafigura. First, Ms Ng had sought the BL to address the concerns about title to the cargo, and Ms Tung's reference to "other ways" to ensure clean title was obviously distinct from obtaining the BL.

Further, even if the BL were obtained, it would not show whether Hin Leong had resold the cargo. Thus, Ms Tung's reference to "other ways" referred to whether Winson had clean title, rather than whether Hin Leong had resold the title (Judgment at [124]–[127]).

116 In this appeal, Winson argues that the court had erred in finding so, because the evidence showed that Ms Tung did not harbour doubts on 13 April 2020 that it did not have good title to the cargo. Winson also submits that Ms Tung did not appreciate the significance of the BL as evidence of the transfer of title.

117 We disagree with Winson's submissions and find that the court did not err in its finding that Ms Tung indeed harboured doubts about whether Winson had good title to the cargo. It beggars belief that Ms Tung, who was in charge of Winson, would not have known of the significance of the BL *vis-à-vis* the title to the cargo. But in any event, if the concern was genuinely about whether Hin Leong had resold the cargo, that could easily have been resolved by asking Hin Leong especially since Winson was in regular contact with Hin Leong at the material time. However, there is no evidence that Winson did so.

118 It is quite telling that Winson expressed concern about the clean title of the cargo with respect to a prospective sale to a third party. No such concern was expressed in the sale to Hin Leong because Hin Leong was privy to the arrangement. A resale of the cargo to the third party, if there is no cargo, would expose Winson to liability *vis-à-vis* the third party, unlike Hin Leong. The inference that the concern about the clean title was over the existence of the cargo is further reinforced by the non-availability of the original BLs in spite of the lapse of time since the loading and in spite of OCBC's concern over the

status of the original BLs. Further, by the time Ms Tung expressed concerns about the cargo's clean title, she was already aware of the other red flags above.

(5) Winson's reaction to OCBC's rejection of the first presentation

119 OCBC rejected the first presentation on 15 April 2020 on the basis that no physical cargo was shipped on the Ocean Voyager. Instead of either disputing OCBC's basis (given that it was common ground that the documents were compliant) or asking OCBC to explain the basis for its belief, Winson's reaction was to tender the same documents to SCB on the same day for the Ocean Voyager, and to make a second presentation to OCBC on 16 April 2020 for the Ocean Taipan instead.

120 Winson sought to explain that after being informed of OCBC's rejection of Winson's first presentation, Ms Tung reviewed the documents and noticed that there was a mix-up in the presentation of the documents since the cargo onboard the Ocean Taipan was to be financed by OCBC and the Ocean Voyager by SCB, and this was evidenced in Winson's internal emails. However, Winson's explanation did not make sense. Under the OCBC letter of credit, no specific vessel was identified and therefore there was nothing irregular to tender the documents for the same quantity of cargo purportedly loaded on the Ocean Voyager. In short, the alleged internal mix-up is irrelevant for the presentation to OCBC. In addition, the copy non-negotiable BL that was issued for the Ocean Voyager was made to the order of *SCB* and therefore the initial presentation to *OCBC* for the Ocean Voyager was plainly incongruous. In this context, Winson's explanation that it did not notice the error in the naming of the consignee in the Ocean Voyager BL cannot be believed. The picture which emerges from this sequence of events is that Winson was at the very least

cavalier with the documentary presentation under the letters of credit because they knew it was a paper transaction.

121 While Winson did subsequently respond on 21 April 2020 (*ie*, a week later) to challenge OCBC's rejection, this was after their attempt to overcome OCBC's rejection with the inexplicable switch of the vessels had failed. We do not think that this is how an honest beneficiary would have reacted to a very serious allegation that no cargo had been shipped, especially since the documents were compliant.

122 The purported checks by Winson after the rejection raise even more concerns. They were efforts to provide some peripheral evidence to convince OCBC that some cargo had been loaded on the vessels. In doing these checks, Winson claimed to have acknowledged the banks' concerns and was seeking to address them.

123 In OCBC's SWIFT of 15 April 2020 to reject Winson's first presentation, it was stated that:

> 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

Winson submits that the checks it had done must be put in its proper context, which, in the context of OCBC's SWIFT, was that there was no cargo *at all* on the Ocean Voyager (instead of there being no physical cargo *pursuant to the LOIs*). This, as Winson claims, arises from a "plain meaning" interpretation of OCBC's SWIFT. Thus, its checks were targeted at whether there was *any* cargo

onboard the Ocean Voyager. We do not think that this interpretation of OCBC's SWIFT is tenable. In its email dated 21 April 2020, Winson replied to OCBC's SWIFT stating that the "*cargo effected under the [letter of credit]*… was loaded on the vessel, Ocean Taipan", and that "[t]he supplier confirmed that the *relevant* cargo was duly loaded" [emphasis added]. Winson knew that the concerns by OCBC were not whether there was any cargo onboard the vessels but whether the cargo represented to have been loaded in the documents had in fact been loaded. It is illogical to suggest that OCBC's concerns was whether *any cargo even if unrelated* to the letter of credit was loaded. OCBC as the issuer of the letter of credit was obviously concerned *only* with the cargo that it had purportedly financed.

124 Winson further argues that it had conducted checks in April 2020 before the second presentation to address OCBC's concerns. Winson claims to have made the following checks in April 2020:

(a) On 15 April 2020, after being notified of OCBC's rejection, Mr Cai of Winson spoke to Ms Tammy Xie of Trafigura ("Ms Xie") and informed her of OCBC's refusal to make payment for the cargo. Ms Xie's response was that OCBC's refusal had no relation to Trafigura.

(b) On 16 April 2020, Mr Dong of Winson checked the drafts of the Ocean Voyager and where the Ocean Voyager was heading. He confirmed that the Ocean Voyager was laden with cargo and was on its way to Europe.

125 As regards these purported checks, we agree with OCBC and SCB that the Judge did not err in finding that they did not take place. First, as for the purported call between Mr Cai and Ms Xie, this was not in the affidavits of

evidence-in-chief of Mr Cai or Ms Tung, and was only raised for the first time during the cross-examination of Mr Cai and Ms Tung. While some allusion to this call may have been made by Winson in its email and letter to OCBC on 21 April and 24 April 2020 respectively, this call would have been highly material in establishing Winson's case and one would expect that some documentary evidence such as call logs would have been produced. In any event, it is entirely unclear as to the contents of this call and whether it went to addressing OCBC's concern. While Ms Tung claimed that Mr Cai had checked with Trafigura, who in turn said that the cargoes were loaded and on its way to Europe, Mr Cai's own evidence was that Trafigura only told Winson that the cargoes had been sold to Winson. This would not have addressed OCBC's concerns that there were no cargoes *pursuant to the LOIs* on board the vessels. Second, as for the purported check of the Ocean Voyager's drafts on 16 April 2020, there was even less evidence to prove that this was in fact conducted at all. Mr Dong himself did not mention this in his evidence, and it was only Ms Tung who claimed that this check was conducted by Mr Dong during her cross-examination. In any event, the checks would not have shown whether the cargo pursuant to the LOIs were loaded.

126 The second presentations to OCBC and SCB were made on 16 April 2020 and 21 April 2020 respectively.

127 There were other checks which Winson had conducted which, in Winson's submissions, showed that Winson had an honest belief in the truth of its representations in the second presentations to OCBC and SCB. These alleged checks were:

(a) On 23 April 2020, Winson further made checks with the International Maritime Bureau ("IMB").

(b) In May 2020, Mr Dong checked the locations and drafts of the Ocean Taipan and Ocean Voyager, in response to a letter from Hin Leong's IJMs. This was when Winson was first made aware of the existence of the purported transaction between Hin Leong and Unipec. The checks showed that Ocean Taipan was enroute towards and had reached Huizhou, China on or around 23 March 2020 where it had discharged cargo. The Ocean Taipan only arrived at Tanjung Pelepas unladen on or around 31 March 2020 before departing for Rotterdam, laden on or around 4 April 2020. The conclusion to be drawn was that the cargo onboard the Ocean Taipan was pursuant to the copy BL received by Winson, and not pursuant to any agreement between Hin Leong and Unipec.

128 As for the check on 23 April 2020 with the IMB, we did not think that this showed any genuine interest to ensure that the relevant cargo pursuant to the LOIs were on board the vessels. The contents of the emails to IMB were telling – Winson merely checked with IMB whether the Ocean Taipan and Ocean Voyager were on their way to Rotterdam and their estimated time of arrival. Nothing was said about the cargoes on the vessels.

129 As for the check in May 2020, similar to the check with IMB, they could only confirm the locations of the vessels and whether they were laden, and does not address OCBC's allegation that the relevant cargo pursuant to the LOIs was not loaded on the vessels.

130 Moreover, the check could not have led to the conclusion that the cargo was loaded on the Ocean Taipan pursuant to the LOIs. The check in May 2020 by Mr Dong purportedly revealed that the cargo on the Ocean Taipan was loaded at Tanjung Pelapas instead of Universal Terminal. This was itself a "red flag" since the BL stated that the cargo was loaded at the Universal Terminal. Winson argues that it was not clear from Mr Dong's checks as to whether the Ocean Taipan was at Tanjung Pelapas or Universal Terminal since these ports were quite close to each other, and it was not possible to ascertain with certainty which port the Ocean Taipan was at. However, Mr Dong's contemporaneous email to Ms Tung on 15 May 2020 stated the following:

> MT. OCEAN TAIPAN …
>
> …
>
> 5. Sailing to SG-Tanjung Pelapas, ETA 30-31 Mar 2020, draft 9.00m;
> ETD Tanjung Pelapas 04TH Apr, draft 15.40m

If Mr Dong was uncertain as to the specific port where the loading had taken place, then one would expect that he would have expressed that in his email. But his email was unequivocal that it was loaded at Tanjung Pelapas. Winson's contrived efforts to explain away the "red flag" only served to demonstrate their indifference.

131 In the round, the checks including the purported call to Trafigura, the alleged draft readings, and the IMB inquiries, could not possibly have addressed the banks' concerns. It is indeed troubling that Winson had to resort to such measures when the most obvious and effective option was to approach Hin Leong or Ocean Tankers for the documents to evidence the loading. This also illustrates Winson's abject indifference.

The inference to be drawn from the "red flags"

132 In Winson's oral submissions, it argued that despite the "red flags", a clear indication of Winson's honest state of mind was that it had paid Trafigura under the letters of credit for both shipments. Mr Tan argued that had it not been the case that Winson honestly believed in the truth of its representations, it would not have done so. In truth, Winson had no choice but to pay Trafigura, and this did not arise out of any belief in the genuineness of the transaction. It is also entirely open to Winson to commence separate proceedings against Trafigura if they are so advised.

133 Winson also contends that it was "limited in expertise and ability to carry out investigations" on whether the cargoes pursuant to the LOIs were loaded on the vessels. However, there is no suggestion that Winson had any duty to carry out investigations. The point here is not so much that Winson should have investigated but that Winson's reaction to the "red flags" reflected an undeniable reflection of their indifference.

134 Given the above "red flags" and Winson's responses to them, we agree with the Judge and find that Winson was reckless and did not honestly believe in the truth of its representations. These representations were also false. This means that the Fraud Exception in the context of letters of credit could be successfully invoked against Winson to the effect that Winson cannot compel OCBC and SCB to pay under the letters of credit.

The Nullity Exception

135 In light of our decision above that the Fraud Exception is made out, it is strictly not necessary for us to consider the Nullity Exception, which was

another ground which OCBC and SCB raised in this appeal. Nonetheless, we make a few observations on this exception.

136 OCBC and SCB argue that the entire essence of the commercial invoice and LOI was to evidence that the loading had taken place, and that the sale was completed. However, these were based on forged BLs and non-existent cargoes. Consequently, the commercial invoice and the LOI would constitute nullities and the presentations were incomplete. In support of their contention, OCBC and SCB rely on this court's decision in *Beam Technology*.

137 In *Beam Technology*, the appellants contracted to sell goods to certain buyers, who obtained a letter of credit in favour of the appellants. The letter of credit was subject to the UCP 500. Under the terms of the letter of credit, a full set of clean air waybills was needed to draw on the credit. The buyers notified the appellants that the air waybill would be issued by their freight forwarder. However, when the appellants presented the documents to draw on the letter of credit, the respondent bank rejected the documents on the basis that the freight forwarder was a non-existent company. The question arose as to whether the bank was entitled to refuse payment when the air waybill was a forgery known to the bank. This court held that the bank was entitled to refuse payment.

138 The Judge observed that *Beam Technology* involved a forged document that was tendered by the appellant to the respondent bank. However, the documents presented by Winson to OCBC and SCB in this case were not themselves forged but were instead based on forged BLs and non-existent cargo. The Judge further noted that in *Beam Technology*, this court limited the Nullity Exception to a situation where notice was given before the deadline for raising objections under the UCP. However, in the present case, neither OCBC nor SCB

gave notice under the UCP 600 (the version used in this case) (Judgment at [178]–[181]). It appears to us that the Judge was right in holding that the Nullity Exception in *Beam Technology* is not entirely applicable to these facts.

139 In the English Court of Appeal decision of *Montrod (EWCA)* at [58], the court expressed the concern that a broad Nullity Exception "would be likely to act unfairly upon beneficiaries participating in a chain of contracts in cases where their good faith is not in question. Such a development would thus undermine the system of financing international trade by means of documentary credits". While the limited Nullity Exception postulated in *Beam Technology* may not give rise to these concerns, we share the Judge's reservations on whether the Nullity Exception can and should be extended so far as to be engaged on the present facts. In any event, there is no need to consider this issue here, and we leave this issue to be decided in a future case with the benefit of fuller arguments.

Conclusion

140 For the above reasons, we dismiss the appeals on the basis that the court below did not err in finding that Fraud Exception has been made out.

141 We order Winson to pay costs to OCBC and SCB fixed at $200,000 inclusive of disbursements with the usual consequential orders. This costs order is consistent with the parties' respective costs schedules.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Kenneth Tan *SC* (Kenneth Tan Partnership) (instructed), Bazul Ashhab bin Abdul Kader, Lua Jing Ing Priscilla, Prakaash s/o Paniar Silvam, Caleb Tan Jia Chween, Levin Lin Yok Yan and Kirsten Siow (Oon & Bazul LLP) for the appellant in CA/CA 40/2023;
Kenneth Tan *SC* (Kenneth Tan Partnership) (instructed), Oommen Mathew and See Wern Hao (Omni Law LLC) for the appellant in CA/CA 41/2023;
Tan Chee Meng *SC*, Manoj Pillay Sandrasegara, Tan Kai Yun, Felicia Soong Wanyi, Hudson Wong and Soon Wen Qi Andrea (WongPartnership LLP) for the respondent in CA/CA 40/2023;
Sarjit Singh Gill *SC*, Daryl Cheng On Lun and Suresh Viswanath (Shook Lin & Bok LLP) for the respondent in CA/CA 41/2023.