IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 41

Court of Appeal / Civil Appeal No 9 of 2023

Between

UniCredit Bank AG

… *Appellant*

And

Glencore Singapore Pte Ltd

… *Respondent*

In the matter of Suit No 1007 of 2020

Between

UniCredit Bank AG

… *Plaintiff*

And

Glencore Singapore Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Banking — Letters of credit — Fraud Exception]
[Bills of Exchange and other Negotiable Instruments — Letter of credit transaction]
[Contract — Misrepresentation — Fraudulent]
[Tort — Misrepresentation — Fraud and Deceit]

Version No 1: 28 Nov 2023 (11:30 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **2**

OBSERVATIONS **5**

DECISION OF THE HIGH COURT **8**

OUR DECISION **15**

FRAUD EXCEPTION TO THE PRINCIPLE OF AUTONOMY 15

GLENCORE HAD MADE NO REPRESENTATION TO UNICREDIT 19

THE EXPANDED FIRST REPRESENTATION, IF IT HAD BEEN MADE, WAS TRUE 26

THE LOSS WHICH UNICREDIT SUFFERED COULD NOT BE LAID AT GLENCORE'S DOOR 28

IMPLIED REPRESENTATIONS AS TO ONE'S INTENTION TO PERFORM ON A PROMISE MADE 32

CONCLUSION **35**

Version No 1: 28 Nov 2023 (11:30 hrs)

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UniCredit Bank AG
v
Glencore Singapore Pte Ltd

[2023] SGCA 41

Court of Appeal — Civil Appeal No 9 of 2023
Sundaresh Menon CJ, Judith Prakash JCA and Belinda Ang Saw Ean JCA
30 August 2023

28 November 2023

Belinda Ang Saw Ean JCA (delivering the grounds of decision of the court):

Introduction

1 The sole dispute in this appeal was whether the judge of the General Division of the High Court (the "Judge") had erred in dismissing the appellant's, UniCredit Bank AG ("UniCredit"), claim in the tort of deceit. We heard the appeal on 30 August 2023. It was clear to us that UniCredit's cause of action in deceit was ill-founded on the facts. We thus dismissed the appeal with costs to the respondent, Glencore Singapore Pte Ltd ("Glencore"). These are our full reasons.

Version No 1: 28 Nov 2023 (11:30 hrs)

Facts

2 The appellant, UniCredit, had on 22 November 2019, granted to Hin Leong Trading (Pte) Ltd ("Hin Leong") banking facilities amounting to US$85m. This was done pursuant to a Facility Agreement and Memorandum of Pledge, as well as UniCredit's General Business Conditions. Hin Leong could use these facilities to obtain letters of credit to finance the purchase of oil, petroleum products and other commodities. Five days later, on 27 November 2019, Hin Leong made use of the facility arrangement and applied to UniCredit for an irrevocable letter of credit in the sum of US$37,209,550.35 to finance its purchase of 150,000 metric tons of High-Sulphur Fuel Oil (the "goods") from Glencore. This transaction between Glencore and Hin Leong set the stage for the dispute between UniCredit and Glencore.

3 By a contract made on 27 November 2019 (the "Sale Contract") Hin Leong purchased the goods shipped onboard the oil tanker "*New Vision*" and agreed that the discharge and delivery of the goods would be to a terminal in Singapore during the period of 18 to 25 December 2019. By a separate contract concluded at the same time, Glencore agreed to buy the goods back from Hin Leong (the "Buyback Contract"). The basic terms of the contracts were also contained in an email sent by Hin Leong to Glencore on 27 November 2019, and these two contractual deals will be referred to collectively as the "Sale and Buyback Arrangement". One of the terms of the sale by Glencore to Hin Leong was that at 0001 hours on 2 December 2019, title to the goods would pass from Glencore to Hin Leong. There was an identical term in the contract for the sale from Hin Leong to Glencore. The upshot was that the parties agreed that title to the goods would pass from Glencore to Hin Leong at 0001 hours on 2 December 2019 and then immediately pass back to Glencore from Hin Leong.

Version No 1: 28 Nov 2023 (11:30 hrs)

4 On 27 November 2019, Hin Leong submitted to UniCredit an application for an irrevocable letter of credit to finance the Sale Contract. A request was then made by UniCredit on 28 November 2019 for documents, including the sale and purchase contracts and/or a "deal recap". Hin Leong responded on the same day, clarifying that its application for a letter of credit was for "[u]nsold cargo". While this was what Hin Leong had said, in truth, Hin Leong had already contracted to sell the goods back to Glencore. Hin Leong provided UniCredit with a copy of the Sale Contract but did not disclose the Buyback Contract referred to above (at [3]).

5 Hin Leong then submitted a revised application for an irrevocable letter of credit on 28 November 2019, and UniCredit subsequently issued an irrevocable letter of credit in favour of Glencore as beneficiary on 29 November 2019 ("the November LC"). The November LC was subject to *The Uniform Customs and Practice for Documentary Credits* (2007 Revision) (ICC Publication No 600). It stated that the credit thereunder would be available against the presentation of various stipulated documents such as a signed commercial invoice, and a full set of all three original bills of lading ("BLs") issued or endorsed to the order of "UniCredit Bank AG, Singapore Branch" and marked "freight payable as per charter party". The November LC further provided that in the event that the documents called for were unavailable at the time of presentation or negotiation, payment would be effected against the beneficiary's commercial invoice and the beneficiary's letter of indemnity duly signed by authorised signatory(s). Hin Leong had provided UniCredit with the format and wording of the beneficiary's letter of indemnity for payment when it first applied for the November LC on 27 November 2019. Significantly, the addressee and recipient of the beneficiary's letter of indemnity was Hin Leong. The format and wording of the beneficiary's letter of indemnity were reproduced in the November LC (the "Glencore LOI") without any amendment.

Version No 1: 28 Nov 2023 (11:30 hrs)

6 On 2 December 2019, Glencore presented the following documents to UniCredit for payment under the November LC:

(a) Glencore's commercial invoice for the Sale Contract which was addressed to Hin Leong; and

(b) The Glencore LOI which was addressed to Hin Leong and worded in accordance with the format prescribed in the November LC.

7 On 3 December 2019, UniCredit informed Hin Leong that the documents under the November LC were presented and that UniCredit had determined the documents to be a complying presentation. Glencore, as the beneficiary of the November LC, in a separate arrangement with UniCredit, discounted the bill amount of US$ 37,209,550.35 and received from UniCredit a sum of US$36,997,691.57. More importantly, when UniCredit paid Glencore on 3 December 2019, it still did not know that Glencore had already bought back the goods.

8 After the November LC matured on 28 February 2020, UniCredit again asked Hin Leong if it had sold the goods, and if so, to provide documents relating to that sale. Hin Leong informed UniCredit that the goods remained unsold, which was untrue given that Hin Leong had on 2 December 2019 resold the goods to Glencore.

9 Slightly more than a month later, on 13 April 2020, UniCredit issued a notice of demand to Hin Leong, demanding repayment of, *inter alia*, the outstanding advances and accrued interest arising out of UniCredit's financing of Hin Leong's purchase of goods from Glencore. At this point, Hin Leong had requested a meeting with its bank lenders, including UniCredit. A day later, on

Version No 1: 28 Nov 2023 (11:30 hrs)

14 April 2020, UniCredit asked Glencore if it had the original BLs referred to in the LC. Glencore replied that it did not.

10 Hin Leong was placed under interim judicial management on 27 April 2020 and under judicial management on 7 August 2020. Hin Leong went into liquidation on 8 March 2021. Hin Leong's insolvency left UniCredit without repayment from Hin Leong and without possession of the goods or the original BLs as security for Hin Leong's indebtedness to UniCredit. UniCredit turned to Glencore for redress.

Observations

11 UniCredit sued Glencore on 20 October 2020 *vide* HC/S 1007/2020 and based its claim on multiple causes of action. They were as follows:

(a) Recission of the November LC because the Sale Contract was a sham and/or fictitious transaction.

(b) Fraud or deceit by Glencore.

(c) Conspiracy between Glencore and Hin Leong to injure UniCredit by unlawful means.

(d) Unjust enrichment.

(e) A claim under a Master Discounting Agreement dated 8 August 2014 between UniCredit and Glencore Grain Singapore Pte Ltd (which was later amalgamated into Glencore) as the terms of this agreement permitted UniCredit to seek recourse for losses suffered in specified circumstances .

Version No 1: 28 Nov 2023 (11:30 hrs)

(f) Breach of the Glencore LOI pursuant to the Contract (Rights of Third Parties) Act (Cap 53B) and/or common law.

12 The Judge dismissed all six of UniCredit's claims. The Judge's reasons for dismissing the various causes of action are found in *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 (the "*HC Judgment*").

13 On the first cause of action (*i.e.* [11(a)] above), UniCredit sought recission of the November LC as well as a declaration that Glencore was liable to repay the sum of US$36,997,691.57 together with certain costs and expenses to be assessed, and an order for the repayment of the said sum. This claim for recission was premised on UniCredit's contention that the Sale Contract was a sham. It was perceived to be a sham because of the buy-back transaction. The assertion that the Sale Contract was a sham was equally relied upon as the foundation of the claims in conspiracy by unlawful means and in the tort of deceit.

14 As mentioned, UniCredit's appeal is against the Judge's dismissal of the cause of action in the tort of deceit. As such, we will only set out the salient facts and arguments and the Judge's analysis and reasoning in respect of the claim in the tort of deceit.

15 We note that UniCredit did not appeal against certain findings of fact. As appears below, these facts play an important role in this appeal. The following factual findings were not appealed against:

(a) That the Sale Contract was not a sham. The sale was of existing goods identified to be on board the *New Vision* and the evidence showed that Glencore had title to the goods and, at the material time, Glencore passed title to Hin Leong. The mere fact that Glencore and Hin Leong

Version No 1: 28 Nov 2023 (11:30 hrs)

had entered into a simultaneous buy-back agreement was not determinative of whether the Sale Contract was a sham; and

(b) That the Buyback Contract or both contracts (the Sale Contract and the Buyback Contract) taken together were not sham or fictitious transactions.

16 In this appeal, UniCredit appeared to have blended the fraud exception to the principle of autonomy of letters of credit with the principles of the tort of deceit to establish a representation made by Glencore to UniCredit from the act of tendering of the Glencore LOI to UniCredit on 2 December 2019. This representation was the "hook" needed to advance UniCredit's cause of action in the tort of deceit. UniCredit's approach is curiously strained seeing that the juridical basis of the tort of deceit is different from the fraud exception to the principle of autonomy of credit. While both are concerned with fraud, the former deals with vindicating the right not to be lied to (see [53] below) which is premised on parties' private interests (see generally *Ong Bee Chew v Ong Shu Lin* [2019] 3 SLR 132 at [129] citing *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 at [78]). The fraud exception, however, is founded on public policy which is, as *per* Lord Diplock, an application of the maxim *ex turpi causa non oritur actio*, or if plain English is preferred: "fraud unravels all". The rationale for this juridical basis is that the courts will not allow their process to be used by a dishonest litigant to carry out a fraud (see *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183–184; *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [64]–[65]; *National Infrastructure Development Co Ltd v Banco Santander SA.* [2018] 1 All ER (Comm) 156 at [19]; Clive Schmitthoff, *The Law and Practice of International Trade* (Sweet & Maxwell, 12th Ed, 2012) at para 11-044).

Version No 1: 28 Nov 2023 (11:30 hrs)

Decision of the High Court

17 UniCredit's claim in the tort of deceit depended on the representations which Glencore had allegedly made to it. UniCredit pleaded that Glencore in tendering the Glencore LOI to UniCredit had made two representations to UniCredit as well as to Hin Leong and that these two representations were false representations.

18 First, Glencore represented that it had agreed to locate and surrender the original missing shipping documents to Hin Leong, as stated in the Glencore LOI (the "First Representation"). Secondly, Glencore represented that there was a genuine purchase of the goods by Hin Leong from Glencore in accordance with the terms of Glencore's invoice that was being financed by UniCredit's November LC (the "Second Representation") (*HC Judgment* at [80]).

19 The Judge ruled that neither representation was false. As to the First Representation, it was true that Glencore had agreed to locate and surrender the missing original shipping documents (*ie.* the BLs) to Hin Leong. As to the Second Representation, the court having found that the Sale Contract was not a fictitious or sham transaction, the Second Representation could not possibly be false (*HC Judgment* at [81]–[83]).

20 UniCredit, however, took the position that there was more to both representations. The First Representation meant that Glencore had also intended to, and would, locate and surrender the original BLs to Hin Leong (the "expanded First Representation"). The Second Representation meant that not only was there a genuine purchase of the goods, but there was a genuine purchase or only a purchase of the goods by Hin Leong from Glencore (the "expanded Second Representation"). (*HC Judgment* at [84])

Version No 1: 28 Nov 2023 (11:30 hrs)

21 Notwithstanding UniCredit's failure to plead the expanded First Interpretation (*HC Judgment* at [86]–[87]), the Judge proceeded to address the expanded First Interpretation on its merits. He reasoned that the crux of the issue was whether Glencore had, by representing that it agreed to locate and surrender the BLs, also represented that it had intended to surrender the BLs. In this connection, the Judge considered two propositions (*HC Judgment* at [90]–[91]).

22 First, that when Glencore promised Hin Leong that it would locate and surrender the missing original shipping documents, did it also represent that it intended to do what was promised (*HC Judgment* at [91(a)]? The Judge ruled that whether there was an implied representation that the promisor had intended to do what he promised depended on the circumstances. It was not the case that an implicit representation accompanied every contractual promise. What the parties had contemplated, expected, or intended, would inform what representations (if any) as to their intentions should be implied from the contractual promises made. A representation as to intention could not be implied from a contractual promise if it went against the actual intentions of the parties (at [100]–[102]).

23 Further, if any representation ought to be implied from a contractual promise, it is not that "the promiser intend[ed] to do what was promised in all circumstances, but that the promisor intends to fulfil his obligation if the circumstances require it". After all, the promisor's fulfilment of that contractual obligation might not be required in various circumstances (*HC Judgment* at [96]–[99]).

24 The Judge thus refused to imply any representation that Glencore intended to surrender the BLs to Hin Leong in all circumstances – that would go against the grain of the parties' intentions. The most that could be implied

Version No 1: 28 Nov 2023 (11:30 hrs)

was that Glencore had represented to Hin Leong that it intended to fulfil its contractual obligation to surrender the BLs to Hin Leong if the circumstances required it. It was clear from the facts that the circumstances did not require Glencore to give the BLs to Hin Leong (*HC Judgment* at [105]–[106]).

25 Second, if Glencore had told a third party, here, UniCredit, about the promise it had made to Hin Leong, did Glencore thus represent to UniCredit that it intended to do what had been promised (*HC Judgment* at [91(b)]? The Judge ruled that the only representation which Glencore had made to UniCredit, which was evident from the language prescribed by UniCredit in the November LC, was that Glencore had agreed to locate and surrender the BLs to Hin Leong. Glencore made no implied representation to UniCredit about its intentions regarding the Sale Contract it had concluded with Hin Leong. It was well established that a bank which issues letters of credit deals only in documents and is unconcerned about the underlying contract. UniCredit simply had to pay Glencore if the documents presented conformed with the November LC (which they did). Glencore's intentions as to the Sale Contract were thus irrelevant to UniCredit's obligation to pay Glencore (*HC Judgment* at [107]–[113]).

26 The Judge thus concluded that Glencore had never made the expanded First Representation to UniCredit (*HC Judgment* at [114]).

27 As to the expanded Second Representation, that too was not pleaded (*HC Judgment* at [115]–[116]). In any case, the Judge *also* ruled that UniCredit's claim, even when based on the expanded Second Representation, would fail on the merits (at [117]). He reasoned that UniCredit's shift to the expanded Second Representation meant that UniCredit implicitly accepted that what Glencore had told them was true – that Hin Leong had purchased goods from Glencore on the Sale Contract and that this transaction was not a sham or

Version No 1: 28 Nov 2023 (11:30 hrs)

fictitious one. The nub of UniCredit's complaint, therefore, was that because Glencore had only told UniCredit about the Sale Contract, Glencore had also represented that Hin Leong had not sold the goods (which was not true) (at [118]–[120]).

28 The Judge's starting point was the November LC, which only concerned Hin Leong's purchase of the goods by the Sale Contract and had nothing to do with any sale of the goods by Hin Leong (either to another party, or back to Glencore). The November LC only referred to one transaction involving the goods – which was the Sale Contract, and stated, amongst other things, the amount of credit available to Glencore for Hin Leong's purchase of the goods under the Sale Contract (*HC Judgment* at [121]–[122]).

29 Further, Glencore only had to present its commercial invoice for Hin Leong's purchase of the goods under the Sale Contract. Glencore was not asked to present any invoices which Hin Leong might issue if Hin Leong sold the goods (*HC Judgment* at [123]).

30 Finally, the prescribed format of the Glencore LOI omitted mention of any sale of goods by Hin Leong. It only referenced, amongst other things, the Sale Contract, the invoice price under Glencore's commercial invoice in respect of the Sale Contract and Glencore's transfer of title to the goods to Hin Leong under the Sale Contract (*HC Judgment* at [124]).

31 Glencore was thus not required under the November LC to tell UniCredit anything about any sale of goods by Hin Leong. All Glencore had to do was to present to UniCredit its commercial invoice and the Glencore LOI (*HC Judgment* at [125]).

Version No 1: 28 Nov 2023 (11:30 hrs)

32 UniCredit could have asked Glencore to inform it about any sale of the goods by Hin Leong by making it a requirement of the November LC. This was not done. In making payment on the November LC, UniCredit was only concerned with documentation, and not with the goods, or the contract which requires the goods to be paid for. The Judge reasoned that this meant that UniCredit was not concerned with its customer's subsequent dealings with the goods either – any subsequent dealing by Hin Leong concerning the goods might have been relevant to UniCredit in relation to obtaining reimbursement from Hin Leong, but that was a separate matter from UniCredit paying Glencore on the November LC (*HC Judgment* at [126]–[127]).

33 The Judge then turned to consider how UniCredit would have viewed the presentation of Glencore's commercial invoice and Glencore LOI, considering what it had been told by Hin Leong. He noted that UniCredit had issued the November LC believing the goods to be unsold at that point in time, but it was Hin Leong, and not Glencore, that had misrepresented the position to UniCredit that the goods were unsold when in fact the goods had in fact been sold and continued to maintain that position even when queried by UniCredit (*HC Judgment* at [131]–[132]). This, however, did not change the nature of what Glencore had represented to UniCredit by presenting its commercial invoice and the Glencore LOI. Insofar as Glencore was concerned, it was not concerned with communications between Hin Leong and UniCredit (at [135] and [138]).

34 If Hin Leong told UniCredit the truth, that Glencore had bought back the goods, UniCredit would not have viewed the presentation of Glencore's commercial invoice and Glencore LOI as a representation by Glencore that there was no Buyback Contract (*HC Judgment* at [137]). UniCredit would have been informed of that by Hin Leong, and never expected Glencore to inform it as to whether Hin Leong had sold the goods.

Version No 1: 28 Nov 2023 (11:30 hrs)

35 In short, although Hin Leong had misrepresented the position to UniCredit, it did not follow that Glencore thereby did so as well (*HC Judgment* at [131]). Glencore had simply presented the documents stipulated in the November LC to obtain payment, and in so doing, represented to UniCredit that it had sold the goods to Hin Leong and that it had agreed to locate and surrender the BLs to Hin Leong, both of which were true. UniCredit's complaint under the expanded Second Representation sought to fault Glencore for not doing more to inform UniCredit about what it knew of Hin Leong's sale of the goods – but this was not something which Glencore was obligated to do. Further, and in any case, when one considered the financing arrangement between UniCredit and Hin Leong, it was clear that UniCredit would not have viewed Glencore's LOI and invoice as making representations about whether Hin Leong had sold the goods back to Glencore (*HC Judgment* at [139]–[140]).

36 In addition, while UniCredit believed, at the time the November LC was issued, that the goods were unsold, the Judge found that UniCredit was unlikely to have had such a belief up to the time Glencore sought payment on 2 December 2019 because UniCredit would know that those goods may well have been sold before payment was sought under the November LC. That UniCredit had queried Hin Leong as to whether the goods had been sold on the date of the expiry of the November LC was proof of this (*HC Judgment* at [133]–[134]).

37 Finally, the Judge ruled that Glencore had not told a "half-truth". UniCredit's argument that Glencore had told a "half-truth" by omitting to tell UniCredit that Glencore itself had bought back the goods found no weight with the Judge because UniCredit had *also* taken the position that it was not a "half-truth" if Glencore had not volunteered information about Hin Leong's sales to others. There was, in the Judge's view, no justifiable distinction that could be

Version No 1: 28 Nov 2023 (11:30 hrs)

drawn between a sell and buy-back arrangement between two parties (A-B-A) or three parties (A-B-C-A) (*HC Judgment* at [145]–[148]).

38 In conclusion, there was never any expanded Second Representation. Glencore did not represent that Hin Leong had not sold the goods, nor did Glencore represent that it had not bought back the goods (*HC Judgment* at [150]).

39 UniCredit's case thus failed at the first hurdle. It was unable to establish that Glencore had made any representation. The Judge proceeded, in any case, to set out his views on the remaining elements of UniCredit's claim in fraud/deceit (*HC Judgment* at [151]).

40 As to whether the representations made by Glencore were false, the Judge reasoned that if the expanded First Representation had been made, it would only have been to the extent that Glencore intended to surrender the BLs if the circumstances necessitated it. In this connection, the Judge had accepted the evidence given by Glencore's witnesses that Glencore had such an intention, although Glencore might not have expected to do so (*HC Judgment* at [153]–[154]).

41 The Judge also ruled that Glencore had not acted fraudulently, nor had Glencore knowingly or recklessly made false statements to UniCredit or intended to cheat or defraud UniCredit. In particular, the Judge highlighted that Glencore did not hide the fact from UniCredit that it did engage in a sell and buy-back transactions. Further, because Glencore was not privy to the security arrangements as between Hin Leong and UniCredit, it could not have known that the goods and BLs under the Sale Contract were intended to have been

Version No 1: 28 Nov 2023 (11:30 hrs)

pledged or given as security by Hin Leong to UniCredit (*HC Judgment* at [163]–[165]).

42 As to whether Glencore had intended that UniCredit should act on the expanded First and Second Representations, the Judge concluded that there was no such intention, having found that neither representation had been made in the first place (*HC Judgment* at [169]–[170]).

43 Finally, UniCredit could not show that it had acted, to its detriment, on the expanded First or Second Representations. Assuming those representations had been made, at best, it could only be said that UniCredit had only acted on representations arising from the documents which Glencore had presented – specifically, that Glencore had agreed to locate and surrender the BLs to Hin Leong, and that there was a genuine purchase of the goods by Hin Leong. Both these representations were true. In any event, UniCredit's payment to Glencore could not be attributed to UniCredit's belief that (a) Glencore would surrender the BLs to Hin Leong in all circumstances; or (b) that the goods remained unsold (*HC Judgment* at [171]–[173]).

Our Decision

Fraud exception to the principle of autonomy

44 In advancing its case on deceit in this appeal, UniCredit sought to invoke the law on fraud affecting letters of credit, namely the fraud exception which is a common law exception to the principle of autonomy of letters of credit. The fraud exception, which is also known as the fraudulent presentation rule, is where the beneficiary of the credit, for the purpose of drawing on the credit, fraudulently presents to the issuing or confirming bank documents that contain expressly or by implication, material representations of fact that to his

Version No 1: 28 Nov 2023 (11:30 hrs)

knowledge are untrue (see *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another appeal* [2023] SGCA(I) 7 ("*Credit Agricole*") at [20]).

45 Paragraph 6 of the Appellant's Case summarises its contention as follows:

> UniCredit's primary case …rests on deceit which is recognised as the fraud exception, i.e. the exception to UniCredit's obligation [to] pay under the LC. By tendering documents for payments under the [November LC] on 2 December 2019, Glencore made the representation in the LOI that it intended to locate and surrender the BLs, intending UniCredit to act on the representation, while knowing that the representation was actually false or without genuine belief that it was true or in reckless disregard of whether it was true or false. UniCredit relied on such false representation, paid out under the [November LC], and thereby suffered damage.
>
> [emphasis in original]

46 As it is a short point, we will first consider whether in principle the fraud exception applies at all. This basic query must be addressed before we can consider two related sub-issues:

(a) Was there a representation by Glencore to UniCredit?

(b) If there was a representation, what was the representation of fact and the scope of the representation? In particular, would Glencore's representation in the Glencore LOI that it intended to locate and surrender the BLs to Hin Leong engage the fraud exception to the principle of autonomy of a letter of credit?

47 A critical fact to establishing the fraud exception (if the exception is applicable) is evidence that at the time of presentation of the documents under the credit, the beneficiary of the credit had no intention to locate and surrender

Version No 1: 28 Nov 2023 (11:30 hrs)

the BLs at all (whether to Hin Leong or UniCredit) contrary to what was represented to UniCredit in the Glencore LOI.

48 The fraud exception usually relates to documents that may be forged or untrue in relation to the consignment of goods to which the documents refer. The fraud exception is typically invoked where the documents on their face appear to be correct, but the seller may have shipped non-conforming goods or shipped no goods at all, or the bills of lading were forged or false in that they were antedated to show shipment within a stipulated shipping time specified under the credit. To illustrate, in *Sztejn v Schroder Banking Corp* (1941) 31 NYS 2d 631 (at 633) the documents presented for payment described the shipment as one for bristles when, in reality, cowhair, other worthless material and rubbish had been shipped (see also *Hill Samuel Merchant Bank Asia Ltd v Resources Development Corp Ltd* [1992] 3 SLR(R) 107 at [3], [9] and [11]; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 169). This exception is limited to fraud on the documents (see also *Korea Industry Co Ltd v Andoll Ltd* [1989] 2 SLR(R) 300 at [13]–[15]), and, as we will explain later, this exception clearly did not apply in the present case.

49 Counsel for UniCredit, Mr Kenneth Tan SC ("Mr Tan"), cited *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 ("*Carrier Singapore*"). In that case, the plaintiff issuing bank ("DBS") had sued the defendant beneficiary ("Carrier") for deceit. Carrier was the beneficiary under a letter of credit which had been issued by DBS on the application of its client, Lee Meng Brothers (S) Pte Ltd ("Lee Meng"). Out of the $1.4m payable under the credit, 85% of that sum was secured by two export letters of credit that Lee Meng had obtained from its Vietnamese customer. Certain documents were required for payment under the letter of credit, in particular, originals of the delivery order (at [1]–[3]). Carrier presented this document, DO50191, for

Version No 1: 28 Nov 2023 (11:30 hrs)

payment. In DO50191, Carrier stated that it had delivered certain quantities of goods to Lee Meng on 30 June 2006. DO50191 was presented together with a packing list, and taken together, the documents gave the impression that all the goods had been delivered on 30 June 2006. In truth, only US$424,292.40 in value of such goods had been delivered on 30 June 2006. Carrier's explanation was that it had supplied Lee Meng with similar goods in April, May and June 2006. It subsequently emerged that Carrier's credit control manager had decided that DO50191 would also cover past goods delivered to Lee Meng. This was because Carrier had been having credit issues with Lee Meng and thought it best to consolidate past deliveries under DO50191 (at [4]–[14]). Because the documents Carrier presented complied with the terms of the letter of credit, DBS paid out (at [15]). Thereafter, Lee Meng became insolvent, and in the course of receivership, it emerged that the goods could not have been delivered all in one lot on 30 June 2006 as had been represented in DO50191. Once DBS was made aware of this, it sued Carrier (at [16]).

50 Andrew Ang J ("Ang J"), who heard the case, found that Carrier had indeed represented that all the goods were delivered on 30 June 2006. He reasoned that it was clear on the face of DO50191 that such a representation had indeed been made. DO50191 had listed the delivery date as being 30 June 2006 and stated that the goods had been delivered in "1 lot" (*Carrier Singapore* at [28]–[46]).

51 The representation that had been made in *Carrier Singapore* was that the documents presented for payment under the LOI purported to represent a state of affairs, *viz*, that the goods were all delivered on the same date, which subsequently turned out to be false. The present case was quite different. There was no fraud on the documents. The Glencore LOI was one of the documents stipulated under the credit and it was a genuine document. The representation

Version No 1: 28 Nov 2023 (11:30 hrs)

made on presentation (if any) was that the Glencore LOI was a genuine payment LOI signed by Glencore's authorised representatives. UniCredit's alleged representation (*ie*, the expanded First Representation) was not one that could be found on the face of the document itself. In short, the tender of the Glencore LOI together with the other documents on 2 December 2019 did not give rise to any sort of representation to UniCredit that Glencore had agreed to locate and surrender the BLs to Hin Leong.

52 There is a second reason why the fraudulent presentation principle was inapplicable. Notably, UniCredit did not appeal against the Judge's finding that the Sale Contract was not a sham. Hence, there was no *ex turpi causa* to speak of (see our explanation of this maxim above at [16]). In our view, the Judge had correctly found on the evidence that Glencore would have surrendered the BLs to Hin Leong if the latter had required Glencore to do so (*HC Judgment* at [57]). We discuss this aspect of the case in detail below.

Glencore had made no representation to UniCredit

53 To succeed in this appeal, UniCredit had to establish all the elements of the tort of deceit: namely, (a) a representation of facts made by words or conduct; (b) that the representation was made with the intention that it should be acted on by the plaintiff or a class of persons including the plaintiff (here, UniCredit), (c) that the plaintiff had acted upon the false statements; (d) that the plaintiff suffered damage by so doing; and (e) that the representation must be made with knowledge that it is false, either made wilfully or in the absence of any genuine belief that it was true (*Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]). It also bears emphasising that the essence of the tort of deceit is fraud, and this tort vindicates the right not to

Version No 1: 28 Nov 2023 (11:30 hrs)

be lied to (*Chu Said Thong and another v Vision Law LLC* [2014] 4 SLR 375 at [112]).

54 In our view, and as we explain in the paragraphs that follow, UniCredit's cause of action in deceit was ill-founded. Mr Tan's first difficulty was in demonstrating that Glencore had made the representations as alleged to UniCredit. The second difficulty was with the scope of the alleged representations. No representation, as formulated, was made by Glencore let alone was any lie told to UniCredit. In any event, the facts also demonstrated that UniCredit's loss could not be laid at Glencore's door.

55 Mr Tan argued, in oral submissions, that although the Glencore LOI was addressed to Hin Leong, the representations contained within the Glencore LOI were made to UniCredit. He claimed that UniCredit was one of the class of people to whom the alleged representations were to be addressed, and he specifically cited *Carrier Singapore*. We disagreed. The statements in the Glencore LOI were made to Hin Leong as addressee of the same (see above at [6(b)]). Importantly, the further promise to indemnify for loss and damage was made to Hin Leong. The purpose of the Glencore LOI must be also kept in mind. The trigger for payment under the November LC was, amongst other documents, "a full set 3/3 original BLs issued or endorsed to the order of UniCredit." However, Hin Leong agreed to accept the Glencore LOI as an alternative trigger for payment. This alternative was a stipulated condition in the November LC. In this context, UniCredit could not derive the benefit of any representation from Glencore's statement to locate and surrender the BLs. Nor could UniCredit derive benefit from the Glencore LOI that by implication Glencore *intended* to locate and surrender the BLs to Hin Leong. Whilst UniCredit wanted BLs endorsed in its favour, it was nonetheless content to accept a payment LOI that was addressed to Hin Leong. UniCredit could have,

Version No 1: 28 Nov 2023 (11:30 hrs)

but did not, structure the payment LOI in terms that the BLs be delivered to the bank. In the final analysis, UniCredit accepted the risk that came with such a payment LOI.

56 We agreed with counsel for Glencore, Mr Chan Leng Sun SC, that all said, UniCredit was seeking to rely on a contractual promise to which UniCredit was not privy. It is trite that only parties to a contract have the standing to enforce the obligations contained in that contract (*B High House International Pte Ltd v MCDP Phoenix Services Pte Ltd and another* [2023] SGHC 12 at [1] citing Timothy Liau, "Privity: Rights, Standing, and the Road Not Taken" (2021) 41(3) Oxford Journal of Legal Studies 803; *The "Dolphina"* [2012] 1 SLR 992 at [185]). UniCredit's argument was effectively an attempt by UniCredit to muscle in, under the guise of the tort of deceit, on a contractual obligation between Glencore and Hin Leong concerning the delivery of the BLs.

57 The case would have been quite different had the Glencore LOI in question been addressed to UniCredit instead of Hin Leong (see *Credit Agricole* where the plaintiff bank had sued for breach of a warranty under a payment LOI). The fact that the Glencore LOI had been addressed to Hin Leong, and not UniCredit, would have made it clear to any reasonable bank in UniCredit's position, not only what the nature of that document *was*, but also that its contents were not directed at and promised to UniCredit. We therefore did not regard that situation to give rise to a representation that had been made to UniCredit.

58 We turn to the scope of the representation in the interest of completeness. Mr Tan argued that Glencore's representation was of its intention to locate and surrender the BLs to Hin Leong. The text of the Glencore LOI is material in determining what sort of representations may be reasonably implied. Relatedly, for whom the representation was intended must necessarily depend

Version No 1: 28 Nov 2023 (11:30 hrs)

on the particular implication. Mr Tan had argued in the course of oral submissions that a banker in UniCredit's shoes would have understood, based on the context in which the November LC was issued as well as the text contained in the first paragraph of the Glencore LOI, that Glencore was representing its intention to locate and surrender the BLs to Hin Leong through the banking channels, meaning the BLs would flow through to UniCredit. From the context in which the November LC was issued, Glencore ought to have been aware that a reasonable banker in the position of UniCredit would expect to receive the original BLs from Glencore as its security for financing provided to Hin Leong.

59 This argument found no weight with us. As we pointed out to Mr Tan, it was also important to consider what else the Glencore LOI had stated, specifically, in the subsequent two paragraphs. We reproduce, for ease of analysis, the relevant text of the Glencore LOI below:

> GLENCORE SINGAPORE PTE LTD HAS NOT RECEIVED TO DATE AND THEREFORE IS UNABLE TO DELIVER TO YOU REQUIRED ORIGINAL DOCUMENTS IN CONNECTION WITH THE DELIVERY TO YOU PURSUANT TO CONTRACT NO. 90103105/71150341 DATED 27 NOVEMBER 2019 ('THE CONTRACT') OF A QUANTITY OF FUEL OIL ('THE PRODUCT') SAID TO BE 148,719.226 METRIC TONS SHIPPED ON BOARD THE VESSEL M.T. NEW VISION AT KLAIPEDA PURSUANT TO BILLS OF LADING DATED 19 & 23 NOVEMBER 2019. THE MISSING DOCUMENTS ARE: 3/3 ORIGINAL BILLS OF LADING AND ORIGINAL SHIPPING DOCUMENTS AS LISTED IN L/C NO. 901LC900330 OF UNICREDIT BANK AG, SINGAPORE.
>
> IN CONSIDERATION OF YOUR PAYING THE FULL INVOICE PRICE OF USD 37,209,550.35 WITHOUT DELIVERY TO YOU OF THE 3/3 ORIGINAL BILLS OF LADING AND OTHER ORIGINAL SHIPPING DOCUMENTS, GLENCORE SINGAPORE PTE LTD HEREBY EXPRESSLY WARRANTS TO YOU THAT IT TRANSFERS, HAS TRANSFERRED, OR WILL TRANSFER TO YOU GOOD TITLE TO THE OIL, IN ACCORDANCE WITH THE TERMS OF THE CONTRACT, FREE AND CLEAR OF ALL SECURITY INTERESTS, LIENS AND ENCUMBRANCES, THAT IT HAD, HAS OR WILL HAVE, AS REQUIRED BY THE

Version No 1: 28 Nov 2023 (11:30 hrs)

> CONTRACT, THE FULL RIGHT AND AUTHORITY TO TRANSFER SUCH TITLE AND TO EFFECT DELIVERY OF THE PRODUCT TO YOU AND THAT YOU SHALL HAVE AND ENJOY QUIET POSSESSION OF THE PRODUCT. GLENCORE SINGAPORE PTE LTD HEREBY AGREES TO LOCATE AND SURRENDER TO YOU THE 3/3 ORIGINAL BILLS OF LADING AND OTHER ORIGINAL SHIPPING DOCUMENTS.
>
> GLENCORE SINGAPORE PTE LTD HEREBY AGREES AND UNDERTAKES (WITHOUT PREJUDICE TO YOUR REMEDIES AVAILABLE UNDER THE CONTRACT) TO PROTECT, INDEMNIFY AND SAVE YOU HARMLESS FROM AND AGAINST, ANY AND ALL DAMAGES, LOSSES, COSTS, COUNSEL FEES, AND ANY OTHER EXPENSES WHICH YOU MAY SUFFER, ARISING OR RESULTING FROM ANY BREACH OF THE ABOVE WARRANTIES OR ARISING OR RESULTING FROM THE ORIGINAL BILLS OF LADING OR ANY OF THE OTHER ABOVE LISTED ORIGINAL DOCUMENTS NOT BEING DELIVERED TO YOU AS OF THIS DATE OR ARISING OR RESULTING FROM SUCH DOCUMENTS REMAINING OUTSTANDING, WHATEVER THE REASON MAY BE, INCLUDING WITHOUT LIMITATION, ANY CLAIMS OR DEMANDS WHICH MAY BE MADE BY A HOLDER OR TRANSFEREE OF ANY OF THE 3/3 ORIGINAL BILLS OF LADING AND OTHER ORIGINAL SHIPPING DOCUMENTS OR BY ANY OTHER THIRD PARTY CLAIMING AN INTEREST IN, OR LIEN IN, THE PRODUCT OR THE PROCEEDS THEREOF.
>
> [emphasis added]

60 The Glencore LOI must be read in its entirety. What the Glencore LOI contemplated was that the underlying transaction was one in which it could well be the case that no BLs were eventually delivered, and should this come to pass, Glencore had undertaken to indemnify Hin Leong against any losses. Therefore, on the text of the Glencore LOI, it could not be said that Glencore had impliedly represented to *either* UniCredit or Hin Leong that it intended to find and deliver the BLs to Hin Leong.

61 Returning to the scope of the representation, Mr Tan said that the Judge had made an error in his interpretation of the representation in the Glencore LOI. The Judge had read the representation as Glencore's intention to locate and surrender the BLs "if circumstances require it". Mr Tan contended that the

Version No 1: 28 Nov 2023 (11:30 hrs)

words "if the circumstances require it" were not found in the text of the Glencore LOI. We disagreed with Mr Tan's analysis. There was no attempt by the Judge to put a gloss on the interpretation of the Glencore LOI. The Judge had simply explained the outcome of the eventuality – if it materialised – that Hin Leong asked for the BLs and Glencore could not hand them over to Hin Leong. In the event, at that point the indemnity in the Glencore LOI would be engaged. There was no fraud on Glencore's part.

62 As we noted above, fraud is the essence of the tort of deceit. There was, however, no fraud to be found on the facts. *Carrier Singapore*, which UniCredit had relied on, usefully illustrates this. In that case, Ang J found that Carrier had no honest belief as to the representation it had made in DO50191. In particular, Ang J found that the packing list which accompanied DO50191 was meant to give the false impression that the goods had been shipped in a single lot when this was not the case. The evidence showed that the packing list described a packing process that did not take place. It thus was clear, on the facts of *Carrier Singapore*, that Carrier's employees had gone to lengths to create the impression that all the goods had been delivered on 30 June 2006, when in fact, some of the goods had been delivered earlier.

63 Unlike *Carrier Singapore*, there was no fraudulent intention on Glencore's part. A key ingredient in establishing that there was a fraudulent intention on Glencore's part lay in challenging the legitimacy of the simultaneous Sale and Buyback Arrangement between Glencore and Hin Leong. UniCredit, however, had not challenged the Judge's findings on this point (see above at [15]). In any case, the Sale and Buyback Arrangement in this case was, in our view, an entirely legitimate transaction and not part of a larger scheme hatched by Glencore, or between Glencore and Hin Leong, to defraud UniCredit. As highlighted below by Glencore's Chief Financial Officer,

Version No 1: 28 Nov 2023 (11:30 hrs)

Lodewyk Van Rooyen ("Mr Van Rooyen"), this deal had a legitimate commercial purpose: to allow Glencore to optimise its working capital. We provide a rough sketch of how this deal was commercially beneficial to Glencore.

64 To purchase the goods in the first place from the original seller, Glencore had to borrow funds from another entity within the Glencore group. It was charged a notional interest rate of about 3.7–3.8% for the sum of roughly US$37m which was used to purchase the goods. Glencore sought to reduce the interest payable on this sum. It thus arranged to sell the goods to Hin Leong and repurchase those goods. Glencore's repurchase of the goods from Hin Leong was financed by its bank, Banco Bilbao Vizcaya Argentaria ("BBVA"). Through this arrangement, Glencore effectively obtained a loan from BBVA, for a period of about 87 days, at an effective interest rate of 2.22%.

65 It was thus evident to us that the Sale and Buyback Arrangement was not some sham agreement forming part of a larger scheme aimed at defrauding UniCredit. Glencore had simply used well-established avenues of commercial trading and financing to its advantage. It realised that it could obtain a loan at a lower interest rate by selling the goods to a willing counterparty and having the repurchase of those goods financed by BBVA. As the Judge correctly found, the structure of the transactions as a simultaneous sell and buy-back was not determinative of whether the Sale Contract was a sham (*HC Judgment* at [39]). More importantly, the Judge had *also* found that Glencore had checked that it did have title to pass to Hin Leong, which showed that it genuinely wanted to have title in time to transfer it to Hin Leong (*HC Judgment* at [44]). This was therefore not a sham agreement involving the trading of fictious goods.

Version No 1: 28 Nov 2023 (11:30 hrs)

66 We noted that Hin Leong too enjoyed a benefit under the Sale and Buyback Arrangement which effectively gave it a loan for the sum of roughly US$37m. The one crucial wrinkle in this entire arrangement for UniCredit was that Hin Leong had not been truthful when it applied for the November LC from UniCredit. This was only exposed when Hin Leong became insolvent and was unable to pay the sums owed to UniCredit. More importantly, the Judge held that Glencore was not privy or party to Hin Leong's lie to UniCredit. UniCredit did not appeal against this finding.

The expanded First Representation, if it had been made, was true

67 Even if we accepted Mr Tan's argument that the expanded First Representation had been made (*ie*, that it could be implied from the *text* of the LOI), that representation would have been true. There was no lie. Put differently, it could not be argued that Glencore had no intention of finding and delivering the BLs to Hin Leong.

68 The crux of UniCredit's complaint was that Glencore *knew* that Hin Leong was not going to ask for the BLs, because both Glencore and Hin Leong had entered into the Sale and Buyback Arrangement where title to the goods had passed to Hin Leong and back to Glencore, and so Glencore had never intended to find and surrender the BLs to Hin Leong.

69 This argument, however, was fatally flawed. It did not consider how Glencore had secured financing to complete the re-purchase of the goods. We explain.

70 On 27 November 2019, Hin Leong agreed to sell the goods back to Glencore on 2 December 2019. Payment to Hin Leong was made by way of an irrevocable credit (the "BBVA LC") issued by Glencore's bank, BBVA, under

Version No 1: 28 Nov 2023 (11:30 hrs)

which Hin Leong was named as the beneficiary. The discounting bank in this transaction was The Hongkong and Shanghai Banking Corporation Limited ("HSBC"). While the terms of the BBVA LC provided that payment could also be made upon presentation of a LOI, the format of the LOI as set out in the BBVA LC stipulated that the LOI be addressed to BBVA for the account of Glencore (the "HL LOI"). Hin Leong duly presented the HL LOI in the prescribed format for payment against the BBVA LC.

71 That the HL LOI was addressed to BBVA was significant. This meant that BBVA was party to the LOI and the obligations Hin Leong assumed thereunder. BBVA could write to Hin Leong to demand the BLs. If this happened, Hin Leong would have to ask Glencore for the BLs. It could not therefore be said that Glencore *knew* that Hin Leong would never ask for the BLs. Glencore was aware of the terms on which its bank, BBVA, had issued the letter of credit in favour of Hin Leong. Those terms essentially gave BBVA the right under the HL LOI to demand that Hin Leong locate and surrender the BLs to them.

72 We note that Mr Van Rooyen had explained in his affidavit of evidence-in-chief that Glencore's banks did not require specific security such as BLs because those banks were secured through a corporate guarantee provided by Glencore PLC. BBVA therefore did not "require the bills of lading to be provided as security" because security had already been provided in the form of a guarantee given by Glencore's parent company.

73 In practical terms, it may be true that BBVA would not require specific security in the form of a BL. However, what we consider to be material is the fact that the HL LOI was addressed *to* BBVA and not Glencore. Taking a step back, one could see how BBVA's position was doubly secured. If the financing

Version No 1: 28 Nov 2023 (11:30 hrs)

deal went south, BBVA could use the HL LOI to ask Hin Leong for the BLs. Hin Leong would then have no choice but to ask Glencore for the BLs. In the alternative, BBVA *also* had the option of taking action against Glencore's parent company pursuant to the corporate guarantee. Given this, it could not be said that Glencore knew that Hin Leong would never ask for the BLs because of the sell and buy-back agreement. The manner in which Glencore had financed the repurchase of the goods meant that there was always the possibility that Hin Leong would demand the BLs from Glencore. This aspect of the equation would undermine materially UniCredit's argument that Glencore never intended to surrender the BLs to Hin Leong.

74 To sum up, it was clear that there was no deceit to be found on the facts. For one, Glencore had made no representations to UniCredit – and if one examined the mechanics of the deal, it could not be said that Glencore had no intention of finding and delivering the BLs to Hin Leong. There was also no evidence of any fraudulent intention on Glencore's part. The Sale and Buyback Arrangement that Glencore struck with Hin Leong had a legitimate commercial purpose.

The loss which UniCredit suffered could not be laid at Glencore's door

75 When one considers how UniCredit came to issue the LC, it becomes clear that UniCredit's loss could not be laid at Glencore's door.

76 As mentioned above (at [4]–[5]), On 27 November 2019, Hin Leong applied to UniCredit for an irrevocable LC in the sum of US$37,209,550.35 to finance its purchase of the goods. A day later, on 28 November 2019, Hin Leong submitted a revised LC application to UniCredit. A request was made by UniCredit for documents, including the "[p]urchase and/or [s]ales contracts and/or a "deal recap".

Version No 1: 28 Nov 2023 (11:30 hrs)

From: DApolito Romain (UniCredit) [mailto:Romain.DApolito@unicredit.eu]
Sent: Thursday, 28 November, 2019 9:44 AM
To: E-Tradeops; UniCredit SG - CTF; Lim KarenAK (UniCredit)
Cc: Irene Cheow; Jaslyn Lim; E-Banker Dept; UniCredit Services SG - Trade Finance Services Asia; Au Constance (UniCredit)
Subject: RE: (P4735B GLENCORE TBA) - LC APPLICATION (* LC TO BE ISSUED ON 29 NOVEMBER 2019)

This message has been marked as UC group - CONFIDENTIAL

Dear Freddy,

Thanks for the transaction. In preparation for tomorrow's issuance, we would appreciate if you could share with the us the following documents/ confirmations:

- Purchase and Sales contracts and/or a deal recap
- Origin of the product / Refinery name & location (any supporting document would be much appreciated)
- Signed LC Issuance Application form

Also, it seems that we have not yet received the Marine Cargo Insurance (with UniCredit Bank AG as co-insured). Could you share a copy for our records?

Thanks & Regards,

Romain d'Apolito
Associate Director
Commodity Trade Finance,
Financing & Advisory, Asia Pacific

UniCredit Bank AG
One Raffles Quay
#36-01 North Tower
Singapore 048583
DID: +65 6413 3804 - Fax: +65 6413 3680
Mobile: +65 9023 6597
mail: romain.dapolito@unicredit.eu
www.cib.unicredit.eu

77 Hin Leong responded on the same day, clarifying that its application for a LC was for "[u]nsold cargo". Hin Leong also provided a copy of the Sale Contract.

Version No 1: 28 Nov 2023 (11:30 hrs)

From: Katherine Ong [mailto:katherineong@hinleong.com.sg]
Sent: Thursday, 28 November, 2019 2:26 PM
To: DApolito Romain (UniCredit) <Romain.DApolito@unicredit.eu>; UniCredit SG - CTF <Singapore_CTF@unicredit.eu>; Lim KarenAK (UniCredit) <KarenAK.Lim@unicredit.eu>
Cc: E-Banker Dept <BANKERdept@hinleong.com.sg>; UniCredit Services SG - Trade Finance Services Asia <TradeFinanceServicesAsia@unicredit.eu>; Au Constance (UniCredit) <Constance.Au@unicredit.eu>
Subject: RE: (P4735B GLENCORE TBA) - LC APPLICATION (* LC TO BE ISSUED ON 29 NOVEMBER 2019)

Hi Romain,

This is Unsold cargo, Purchase contract attached.

78 Accordingly, Hin Leong deliberately lied to UniCredit and concealed the fact that it had already contracted to sell the goods back to Glencore. It was evident from this sequence of events that UniCredit had issued the November LC on those terms in favour of Glencore, because of what Hin Leong had said in submitting its revised application for the November LC. Had UniCredit known, or had it been told by Hin Leong, that the goods had already been sold back to Glencore, the terms on which UniCredit extended financing to Hin Leong would have been very different. That much is clear to us from the terms of the Facility Agreement between UniCredit and Hin Leong (see [2] above). As the Judge had noted (*HC Judgment* at [129]–[131]):

> 129 For pre-sold goods, the Specific Conditions stipulated in relation to repayment, that "[w]here the Commodities are sold on open account the off-taker is to be acceptable to the Bank and payment is to be made directly to the Borrower's account held with the Bank". If, however, Hin Leong's sale of the goods was not on an open account basis, but against an export letter of credit, there was no stipulation that the off-taker (Hin Leong's sub-buyer, here Glencore) had to be acceptable to UniCredit; what was stipulated instead, was that the export letter of credit was to be acceptable to UniCredit. In the present case, Glencore financed the Buyback Contract by an LC from Banco Bilbao Vizcaya Argentaria ("BBVA"), and so if Hin Leong had told UniCredit that the goods were pre-sold (to Glencore), there was no necessity for Glencore to be an acceptable off-taker in the

Version No 1: 28 Nov 2023 (11:30 hrs)

> eyes of UniCredit; instead, the BBVA LC would have to be acceptable to UniCredit.
>
> 130 For unsold goods, on the other hand, all that was stipulated in relation to repayment was: "[t]he Letter of Credit shall be refinanced by an Import Loan or repaid by other means as agreed by and acceptable to the Bank" and "[t]he collateral will not be released whilst the goods remain unsold and there remains any amount outstanding". The collateral was: "[f]ull set of bills of lading issued or endorsed to the order of the Bank or in negotiable form or other title documentation acceptable to the Bank."
>
> 131 If the goods were unsold while Hin Leong was applying for the LC, but were then sold by Hin Leong after the LC was issued, the Specific Conditions did not require Hin Leong to obtain UniCredit's consent to that sale. Instead: UniCredit would look to the BLs as collateral; with the LC to be refinanced by an import loan or repaid by other means as agreed by and acceptable to UniCredit. In the present case, UniCredit expected Hin Leong to make repayment from the proceeds of sale of the goods (see [167] below). The problem for UniCredit was that Hin Leong kept telling UniCredit that the goods remained unsold. As I noted above (at [10]), while applying for the LC, Hin Leong represented to UniCredit that the goods were unsold, when it had already entered into the Buyback Contract and so the goods were in fact pre-sold. As late as 28 February 2020, and into early March 2020, Hin Leong still maintained that the goods were unsold, when queried by UniCredit (see [17] above, and [167] below). Hin Leong misrepresented the position to UniCredit, but it does not follow that Glencore thereby did so too.
>
> [emphasis added]

79 Put another way, once UniCredit had agreed to, on Hin Leong's application, to issue the LC on the basis that it was for *unsold* and not *pre-sold* cargo, there was no turning back. Things had been set in motion that could not be undone. As this court had explained in *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2023] SGCA 28 (at [35]), LCs are best characterised as "unilateral contracts that bear the *sui generis* quality of irrevocability". Once UniCredit had issued the November LC, that November LC was irrevocable – UniCredit owed Glencore a contractual obligation to not

Version No 1: 28 Nov 2023 (11:30 hrs)

revoke the November LC, which also included by implication, an obligation not to alter the terms of the November LC: see *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [61] and [64].

80 It could therefore not be seriously contended on the facts here that UniCredit had suffered damage as a result of relying on any alleged representation made by Glencore.

Implied representations as to one's intention to perform on a promise made

81 The points we discussed above sufficed to dispose of the appeal. Be that as it may, for completeness, there is one other point to note. At [58] above, we noted that Glencore's alleged representation was characterised as an *intention* to locate and surrender the BLs to Hin Leong. That characterisation raised, as the Judge had noted, two interrelated questions:

(a) When a promise is made, does the promisor also represent to the promisee that it intends to do what is promised?

(b) If the promisor tells a third party about the promise it had made, does the promisor likewise represent to the third party that it intends to do what was promised?

The common thread underlying both questions concerns whether a promisor, by virtue of making a promise, also impliedly represents an intention to perform on that promise.

82 We note that the English cases appear to have proceeded on the assumption that when one makes a promise, one also represents one's intent to perform on that promise: see generally *John Hudson & Company Limited v Richard Oaten* [1980] WL 612807; *Ex parte Whittaker, In re Shackleton* (1875)

Version No 1: 28 Nov 2023 (11:30 hrs)

LR 10 Ch App 446; *In re Eastgate, Ex parte Ward* [1905] 1 KB 465. Such cases are also common in the United States where they fall under the label of promissory fraud (see generally *Fidelity-Philadelphia Trust Co v Simpson* 143 A. 202 (Pa, 1928); *Alexander v Texaco Inc* 530 F. Supp. 864 (1981); Richard A. Lord, *Williston on Contracts* (Thomson Reuters, 4th Ed, 2023), §69:11).

83 Our courts have also made similar observations. In *Uday Mehra v L Capital Asia Advisors and others* [2022] 5 SLR 113 ("*Uday Mehra*"), the court observed (at [128]), in the context of what constitutes an actionable representation arising from a broken promise, that an "implicit representation accompanies every promise: which is that the promisor genuinely intends to honour his promise".

84 The Judge had also considered this proposition in *Uday Mehra* (*HC Judgment* at [97]) and had taken the view that "if any representation ought to be implied from a contractual promise, it is not that the promisor intends to do what was promised in all circumstances, but that promisor intends to fulfil his obligation if the circumstances require it". We have already explained what the use of the words "if the circumstances require it" was meant to convey at [61] above.

85 As to the sort of representations of intention that may be drawn from a promise made, our provisional view is that this very much depends on the *type* of promise that has been made. It is important to determine exactly what was promised and also consider what the promise says about the probability of the promisor's performance (see Ian Ayres and Gregory Klass, *Insincere Promises* (Yale University Press, 2005); Gregory Klass, "A Conditional Intent to Perform" (2009) 15 Legal Theory 107).

Version No 1: 28 Nov 2023 (11:30 hrs)

86 It was therefore clear to us that statements of general principle are not entirely useful, and we would be slow to resort to generalisations in assessing whether there had been an implied representation of intention arising out of a promise made. The analysis of what implied representations of intention may be drawn from a promise made is a nuanced one that will ultimately turn on what *had* been said and the *context* in which it had been said. The inquiry to be undertaken is necessarily fact-centric; in ascertaining whether there is an implied intention represented in a contractual promise, one must have recourse to the relevant circumstances and the context in which the promise was made as well as what exactly had been promised.

87 This is not a radical restatement of the law, but, rather, a simple application of existing legal principles – that is, in assessing whether a representation had been made and how such a representation should be interpreted, the court is faced with the question of how the representee would have understood the representation to mean in light of the circumstances at the time the representation was made (Andrew Phang Boon Leong (gen ed) *Law of Contract in Singapore* (Academy Publishing, 2nd Ed, 2022) at [11.013]–[11.014]; see also *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] 1 SLR 894 at [174]).

Version No 1: 28 Nov 2023 (11:30 hrs)

Conclusion

88 For the reasons given above, we dismissed UniCredit's appeal. On costs, we ordered UniCredit to pay costs of $100,000, including disbursements, to Glencore. The usual consequential orders applied.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Kenneth Tan SC (instructed) (Kenneth Tan Partnership), Herman Jeremiah, Koh Kia Jeng, Toh Cher Han, Hannah Chua, Stuart Ralph Lim Xiu Wu, Joie Tan Yi Xi and Ooi Shu Min (Dentons Rodyk & Davidson) for the appellant;
Chan Leng Sun SC (instructed) (Chan Leng Sun LLC), Colin Liew (instructed) (Colin Liew LLC), Jeffrey Koh and Hannah Chua (Clasis LLC) for the respondent.

Version No 1: 28 Nov 2023 (11:30 hrs)