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

[2024] SGHC 145

Suit No 675 of 2020

Between

(1) Banque De Commerce Et De Placements SA, DIFC Branch
(2) Banque De Commence Et De Placements SA

… Plaintiffs

And

China Aviation Oil (Singapore) Corporation Ltd

… Defendant

And

Shandong Energy International (Singapore) Pte Ltd

… Third Party

And

Golden Base Energy Pte Ltd

… Fourth Party

JUDGMENT

[Banking — Branch bank — Whether representative office was branch bank — Whether plaintiff had standing to sue]

[Bills of Exchange and Other Negotiable Instruments — Letter of credit transaction — Whether fraud exception established — Whether representation made in document presented to confirming bank was false — Whether beneficiary made representation without belief in its truth]
[Bills of Exchange and Other Negotiable Instruments — Letter of credit transaction — Whether issuing bank having cause of action in negligent misrepresentation against beneficiary for misrepresentation made in document presented to issuing bank]
[Contract — Contractual terms — Rules of construction — Representations and warranties — Whether representation and warranty construed literally or purposively — Whether representation and warranty contain "element of futurity"]
[Contract — Formation — Whether beneficiary presenting documents to confirming bank enters into contract with issuing bank or confirming bank]
[Contract — Illegality and public policy — Whether contract was sham or fraudulent]
[Contract — Remedies — Mitigation of damage — Whether failure to sue third party in addition to defendant for the same loss constitutes failure to mitigate]
[Credit and Security — Guarantees and indemnities — Contracts of indemnity — Letter of indemnity presented by beneficiary for payment under letter of credit — Beneficiary representing and warranting under letter of indemnity the "existence, authenticity and validity" of signed bills of lading "issued or endorsed to the order of" issuing bank — Whether representation and warranty construed literally or purposively — Whether representation and warranty contains "element of futurity"]
[Restitution — Enrichment — At the expense of — Requirement of direct enrichment — Exception for coordinated transactions — Whether it would be unrealistic to consider the transactions separately]
[Tort — Misrepresentation — Fraud and deceit]
[Tort — Negligence — Duty of care — Misrepresentation — Whether issuing bank having cause of action in negligent misrepresentation against beneficiary for misrepresentation made in document presented to issuing bank]

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Banque de Commerce et de Placements SA, DIFC Branch and another
v
China Aviation Oil (Singapore) Corp Ltd (Shandong Energy International (Singapore) Pte Ltd, third party; Golden Base Energy Pte Ltd, fourth party)

[2024] SGHC 145

General Division of the High Court — Suit No 675 of 2020
Goh Yihan J
15–18, 22–25, 29–31 August, 5–7, 12–14, 19–22, 25 September 2023, 7 March 2024

5 June 2024 Judgment reserved.

Goh Yihan J:

Introduction

1 The plaintiffs are the first plaintiff, Banque de Commerce et de Placements SA, DIFC Branch ("BCP Dubai"), and the second plaintiff, Banque de Commerce et de Placements SA ("BCP Geneva") (collectively, and in the singular, "BCP"). The dispute in this case centres on Letter of Credit No GE-157465/AJP (the "LC") issued by BCP Geneva.

2 I first set out, for broad context, the main contours of the dispute surrounding the LC. Essentially, the LC was a payment mechanism for Zenrock Commodities Trading Pte Ltd ("Zenrock") (which has since gone into

liquidation and is not a party to the present proceedings), to purchase a cargo from China Aviation Oil (Singapore) Corporation Ltd ("CAO"), the defendant. To that end, BCP Geneva issued the LC naming CAO as the beneficiary. After the sale of the cargo was completed, CAO presented a letter of indemnity and an invoice to the confirming bank, UBS Switzerland AG ("UBS"). Pursuant to the LC, UBS paid out moneys to CAO, and BCP Geneva reimbursed UBS for the same. BCP now seeks to recover the moneys from CAO on various grounds. For convenience, I shall term BCP's claim against CAO as the "Main Proceedings".

3 CAO resists BCP's claim against it in the Main Proceedings. However, should BCP succeed in the Main Proceedings, CAO has brought third party proceedings ("3PP") against the third party, Shandong Energy International (Singapore) Pte Ltd ("SEIS"), to seek recovery from SEIS in various causes of action. In turn, should CAO succeed in the 3PP, SEIS has brought fourth party proceedings ("4PP") against the fourth party, Golden Base Energy Pte Ltd ("GBE"), to seek recovery from GBE in various causes of action. Broadly speaking, these actions arise because the cargo allegedly passed from GBE to SEIS to CAO to Zenrock in a chain of related contracts which each contained indemnities given by each preceding party to each immediately subsequent party in the chain. I elaborate more on this later.

4 Having taken some time to consider the matter, I dismiss BCP's claim against CAO in the Main Proceedings. It follows that I do not need to deal substantively with the 3PP and the 4PP, which I dismiss on the basis that they are dependent on BCP succeeding in its claim against CAO and that BCP has not so succeeded. For reasons that I will elaborate on below, the main reason being that I find the contract between CAO and Zenrock not to be a sham or

fraudulent transaction, I dismiss BCP's claims against CAO. In my view, BCP has failed to show: (a) that CAO is liable in either fraudulent or negligent misrepresentation; (b) that CAO breached any contract between the parties; (c) that CAO was unjustly enriched at its expense; and (d) that CAO had engaged in an unlawful means conspiracy against it.

The background facts

5 I now turn to the background facts against which the present dispute arose. In doing so, I am not necessarily making findings of fact. Rather, I set out the parties' contended-for positions where relevant so that the paragraphs following this section are more comprehensible.

The LC and the underlying sale contracts

6 On or around 21 January 2020, BCP agreed to provide financing to Zenrock for its purported purchase of approximately 260,000 barrels (+/- 5%) of gasoil 500 parts per million sulphur (the "Cargo") from CAO. BCP had agreed to do so based on, among other things, Zenrock's representation that the Cargo would be on-sold to PetroChina International (East China) Co Ltd ("PetroChina").[1] As such, from BCP's perspective, the transaction would be a "self-liquidating" one, in that BCP's exposure under the LC would be secured by an assignment of receivables due to Zenrock under the latter's sale of the Cargo to PetroChina.[2]

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1 Affidavit of Evidence-in-Chief of Mr Engin Oce dated 23 May 2023 ("OCE") at paras 60–62.

2 OCE at paras 50(b), 57, 62 and 108. See also Affidavit of Evidence-in-Chief of Mr Pierre Galtie dated 22 May 2023 ("PG") at paras 27 and 28.

7 In furtherance of this arrangement, on 23 January 2020, BCP Geneva issued the LC for the sum of US$20,500,000, with CAO named as the beneficiary. As CAO did not consider BCP Geneva to be an "investment-graded" bank, CAO required that the LC be confirmed by UBS, to whom it was available by deferred payment.[3] On 30 January 2020, the LC was eventually confirmed by UBS.

8 In the circumstances, the LC was the payment mechanism for Zenrock to pay CAO the price of the Cargo, which CAO sold to Zenrock on Free-on-Board ("FOB") Melaka terms under a sale contract dated 21 January 2020 (the "CAO-ZR Contract"). The shipment date of the Cargo was to be 24 to 26 January 2020. CAO had entered into the CAO-ZR Contract on back-to-back terms, having bought the Cargo from SEIS under a contract dated 21 January 2020 (the "CAO-SEIS Contract"). According to CAO, it had entered into both of these contracts at Zenrock's request for it to act as an intermediary.[4] This was because SEIS had only been prepared to offer Zenrock 10-day credit terms, whereas Zenrock wanted to buy the Cargo on 45-day credit terms.[5] By bridging this gap, CAO earned a modest profit of US$62,254.32.[6]

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3 Affidavit of Evidence-in-Chief of Mr Koh Jia Mian dated 17 May 2023 ("KJM") at para 29.

4 Affidavit of Evidence-in-Chief of Mr Lang Yansong dated 22 May 2023 ("LYS") at paras 19 and 20.

5 LYS at para 19.

6 LYS at paras 38 and 65.

The terms of the LC

9 The LC incorporates provisions of the current version of the Uniform Custom and Practice for Documentary Creditors developed by the International Chamber of Commerce ("UCP 600") and was available by deferred payment with UBS 45 days after the bill of lading ("BL") date.

10 More specifically, Field 46A of the LC provided for the presentation of the following documents: (a) CAO's commercial invoice (the "CAO Invoice"); (b) a full set of 3/3 original bills of lading to be "made out or endorsed to the order of [BCP Dubai]" (the "BCP OBLs"); (c) a Certificate of Quantity issued or countersigned by an independent inspector at the load port ("Surveyor"); (d) a Certificate of Quality issued or countersigned by a Surveyor; and (e) a Certificate of Origin.

11 Further, Field 47A(10) of the LC provided that in the event that the original shipping documents set out at Field 46A(2) to (5) were not available at the time of presentation, CAO could claim payment under the LC by presenting the CAO Invoice and its letter of indemnity in the form set out at Field 47A(10) (the "CAO LOI"). The agreed text of the CAO LOI required CAO to, among other things, represent and warrant the existence, authenticity, and validity of the BCP OBLs.

12 Finally, Field 78 of the LC provides that:

> AGAINST RECEIPT OF YOUR AUTHETICATED SWIFT CONFIRMING THAT THE DOCUMENTS ARE IN CONFORMITY WITH THE TERMS AND CONDITIONS OF THIS CREDIT, WE SHALL REIMBURSE YOU ACCORDING TO YOUR INSTRUCTIONS ON MATURITY DATE …

CAO's performance of the sale contracts

13 Since CAO, on its case, believed that there was physical shipment and delivery of the Cargo, it proceeded to perform the sale contracts. In particular, CAO avers that its operator, Ms Chng Chai Ling, Cindy ("Ms Chng"), proceeded to attend to the various operational aspects of the transaction. These included: (a) the appointment of independent cargo surveyors, Inspectorate Malaysia Sdn Bhd ("Inspectorate"), at the load port;[7] and (b) the monitoring of the loading of the Cargo on board the performing vessel, "*Petrolimex 18*",[8] which Zenrock, as FOB buyer, had nominated to CAO. Ms Chng received daily updates from Inspectorate between 23 and 27 January 2020.[9] For clarity, this was the only instance of physical loading of the Cargo on board "*Petrolimex 18*". This is important because in the various contracts of sale, the point in time when title passed was when the Cargo passed the flange connection between the delivery hose at the loading port and the "*Petrolimex 18*'s" permanent hose connection (or, described loosely, when the Cargo was loaded onto the ship).[10]

14 When the loading of the Cargo was completed on 27 January 2020, Inspectorate emailed copies of the non-negotiable bills of lading (the "NN BL") to Ms Chng. The NN BL was signed by the Master of "*Petrolimex 18*" and stated that the Cargo had been shipped on board the vessel by Petco Trading

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7 Defendant's Closing Submissions (Main Proceedings) ("DCS") at para 66(c).

8 Affidavit of Evidence-in-Chief of Ms Chng Chai Ling, Cindy dated 17 May 2023 ("CCL") at paras 48–87.

9 CCL at paras 57–65.

10 *Eg*, cl 11 of the CAO-ZR Contract, at Defendant's Core Bundle of Documents ("1 DCB") at p 56.

Labuan Company Ltd ("Petco"). The NN BL was made out to the order of Natixis, Singapore Branch ("Natixis"). It contained an attestation clause which showed that the Master had signed a set of three original BLs:

> IN WITNESS whereof the Master of the said Vessel hath affirmed to 3 (THREE) Bills of Lading all of this tenor and date one of which being accomplished the others to stand void.

15 On 5 February 2020, CAO received SEIS's invoice (the "SEIS Invoice") and LOI (the "SEIS LOI").[11] The SEIS LOI provided that SEIS had been unable to provide CAO with the full set of 3/3 original bills of lading and other shipping documents. Despite this, Ms Chng believed that SEIS had sold and transferred title in the Cargo to CAO.[12] She therefore prepared the CAO Invoice and the CAO LOI on 6 February 2020. CAO's Head of Operations, Mr Jason Wong ("Mr Wong"), signed the CAO Invoice, while its Chief Financial Officer, Mr Xu Guohong, and its Deputy Head of Finance, Mr Koh Jia Mian, signed the CAO LOI.[13]

16 The CAO Invoice and the CAO LOI were addressed to Zenrock and presented to UBS. The CAO LOI, which was in the format as laid out in Schedule A to the CAO-ZR Contract, provides as follows:[14]

> FROM: CHINA AVIATION OIL (SINGAPORE) CORPORATION LTD
>
> TO: ZENROCK COMMODITIES TRADING PTE. LTD

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11 CCL at para 94.

12 CCL at para 97(i).

13 KJM at para 58.

14 1 DCB at p 28.

> WE REFER TO OUR CONTRACT DATED THE 21 DAY OF JANUARY (MONTH), 2020 (YEAR) IN RESPECT OF YOUR PURCHASE FROM US OF 34,681.239 METRIC TONS/ 259,393.000 BARRELS OF GASOIL 500PPM PRODUCT FOB MELAKA, MALAYSIA ('THE AGREEMENT') ON VESSEL 'PETROLIMEX 18', BILL OF LADING DATED 27 JANUARY 2020.
>
> IN CONSIDERATION OF YOUR MAKING FULL PAYMENT OF USD 19,051,378.28 FOR … 259,393.000 BARRELS OF THE SAID PRODUCT IN ACCORDANCE WITH THE AGREEMENT AND HAVING AGREED TO ACCEPT DELIVERY OF THE PRODUCT WITHOUT HAVING BEEN PROVIDED WITH RELEVANT DOCUMENTS REQUIRED UNDER THE AGREEMENT INCLUDING BUT NOT LIMITED TO THE FULL SET OF SIGNED BILL OF LADING ISSUED OR ENDORSED TO THE ORDER OF BANQUE DE COMMERCE ET DE PLACEMENTS SA, DIFC BRANCH, UAE ('THE DOCUMENTS'), WE HEREBY REPRESENT AND WARRANT THE EXISTENCE, AUTHENTICITY AND VALIDITY OF THE DOCUMENTS : THAT WE ARE ENTITLED TO POSSESSION OF THE DOCUMENTS: WE WERE (IMMEDIATELY PRIOR TO THE PRODUCT COMING TO YOUR POSSESSION) ENTITLED TO POSSESSION OF THE PRODUCT: WE HAD (IMMEDIATELY BEFORE TITLE PASSED TO YOU) GOOD TITLE TO SUCH PRODUCT: AND THAT TITLE IN THE PRODUCT HAS BEEN PASSED AS PROVIDED IN THE AGREEMENT TO YOU …

CAO's presentation of the compliant documents to UBS

17 On or around 14 February 2020, CAO presented the CAO Invoice and the CAO LOI, which were on their face compliant with the terms of the LC, to UBS to receive payment under the LC. UBS later forwarded these documents to BCP Geneva. BCP Geneva paid out, under the LC, the sum of US$19,091,491.80 on 12 March 2020, which is 45 days after the BL date of 27 January 2020. On the same day, CAO also received payment under the LC

from UBS in the sum of US$19,051,378.28.[15] Before that, CAO paid SEIS the price of the Cargo under the CAO-SEIS Contract on 6 February 2020.[16]

BCP's decision to commence the Main Proceedings against CAO

18 Given BCP's expectation that it would be reimbursed by PetroChina, it wrote to PetroChina to request for payment. However, on or around 29 April 2020, PetroChina informed BCP that the sale contract between Zenrock and PetroChina had been "cancelled", such that PetroChina was under "no obligation to make payment".[17] BCP was also provided with a "Tripartite Agreement" between Zenrock, GBE, and PetroChina, supposedly dated 20 January 2020. The Tripartite Agreement purported to absolve PetroChina from any liability if it did not receive payment from GBE, or if it failed to receive the Cargo from Zenrock. Further, the Tripartite Agreement also purported to grant PetroChina the unilateral right to terminate either of its contracts with Zenrock or GBE without any consequence.

19 From May 2020, Zenrock was placed under judicial management and then into liquidation. In particular, BCP discovered during these insolvency proceedings, among other things, that: (a) the CAO-ZR Contract was allegedly a sham or fraudulent transaction; (b) CAO allegedly did not sell and/or deliver the Cargo to Zenrock; and (c) there were no BCP OBLs in existence. Instead, the Cargo that had been loaded on "*Petrolimex 18*" had allegedly been

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15 KJM at paras 59 and 60.

16 CCL at paras 107 and 108.

17 OCE at para 124.

purchased by Zenrock from Petco, and then on-sold to Petrolimex Singapore Pte Ltd ("Petrolimex").

20 It was against this background that BCP decided to claim for its loss, being the sum disbursed under the LC, from CAO. Thus, on 29 May 2020, BCP's lawyers first wrote to CAO, alleging that BCP had "reason to believe" that CAO had not transferred title in the Cargo to Zenrock, and demanding that CAO provide BCP with the BCP OBLs.[18] Eventually, BCP commenced the Main Proceedings against CAO on 30 December 2020. This, in turn, set off a chain of actions, namely, the 3PP against SEIS, and the 4PP against GBE.

The parties' general cases

21 I turn now to the parties' general cases.

BCP's case against CAO

22 The crux of BCP's case against CAO is that the CAO-ZR Contract was a sham and/or fraudulent transaction.[19] As such, BCP alleges that CAO did not sell any physical Cargo to Zenrock. BCP further alleges that the other parties in this chain of transactions, which it has termed "Series B", likewise did not sell or deal with any physical Cargo.[20] Instead, Series B "was merely a financial arrangement for the benefit of, inter alia, [CAO]".[21] For convenience, I set out a

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18 LYS at para 53.

19 Statement of Claim (Amendment No 2) ("SOC2") at para 15A.

20 SOC2 at para 15A(f).

21 SOC2 at para 15A(f).

graphical representation of part of Series B, which makes clear that Series B forms a circle:

Series B: Zenrock → GBE → SEIS → CAO → Zenrock

23 Instead of Series B, BCP pleads that the physical delivery of the Cargo only took place in a series of transactions that it has termed as "Series A". In Series A, Zenrock purchased the Cargo from Petco, and then sold the Cargo to Petrolimex.[22] Again, for convenience, I set out a graphical representation of Series A:

Series A: Petco → Zenrock → Petrolimex

24 In any event, to support its allegation that physical delivery of the Cargo took place only in Series A and not Series B, BCP relies on, among other things, Zenrock's interim judicial managers' supposed discovery of a double financing scheme, wherein "there was one bill of lading which was presented to both Bank A [*ie*, Natixis] and BCP".[23] In this regard, the relevant BL is dated 27 January 2020, and "stated that the cargo was shipped by Petco and to the order of Natixis".[24] As such, BCP's position is that CAO "sold" Zenrock a non-existent cargo, and that CAO and Zenrock misled BCP to believe that it was financing a purchase of a genuine cargo.[25]

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22 SOC2 at para 15A(b).

23 "Slides on Petrolimex 18 transaction from Zenrock IJM", found at OCE at pp 764–765.

24 "Slides on Petrolimex 18 transaction from Zenrock IJM", found at OCE at pp 764–765.

25 SOC2 at para 15A.

25 From this position, BCP claims against CAO for the following causes of action, which I will elaborate at the appropriate junctures:

(a) Fraud exception: Despite not having pleaded it, BCP in its closing submissions raised for the first time its reliance on the "fraud exception"[26] as Lord Diplock had set out in the House of Lords decision of *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 ("*United City Merchants*"). BCP addressed the fraud exception together with its submissions on deceit.[27] However, for the reasons that I will explain below, this is not satisfactory because the fraud exception is conceptually distinct from deceit.

(b) Deceit: Apart from the fraud exception, BCP primarily alleges that the CAO Invoice and the CAO LOI contained a number of representations and warranties (the "Representations and Warranties") which were false.[28] These relate principally to the existence, authenticity, and validity of the BCP OBLs.

(c) Negligent misrepresentation: BCP alleges that CAO owed it a duty of care to present documents containing true representations, and/or issue the CAO Invoice and the CAO LOI if there was shipment and delivery of the Cargo in performance of the CAO-ZR Contract, which duty CAO breached.[29]

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26 Plaintiffs' Closing Submissions ("PCS") at p 29.

27 PCS at Section III.

28 PCS at Section III.B.

29 PCS at Sections IV.B and IV.C.

(d) Breach of contract: BCP alleges that it is privy to a contract with CAO, such that, by presenting the CAO LOI for payment, CAO made the Representations and Warranties to BCP, which CAO breached.[30]

(e) Unjust enrichment: BCP alleges that it was operating under a mistake of fact, *ie*, the truth of CAO's representations in the CAO LOI, when making payment under the LC. Alternatively, BCP alleges that there was a total failure of basis for BCP Geneva to pay under the LC as it had intended to finance a genuine sale and purchase transaction, which did not take place.[31]

(f) Unlawful means conspiracy: BCP alleges that CAO conspired with Zenrock by unlawful means to defraud BCP into making payment under the LC.[32]

CAO's case in response to BCP

26 For its part, CAO's position is that it reasonably believed that there was physical shipment and delivery of the Cargo, and that the Representations and Warranties were true.[33] CAO had entered into the CAO-SEIS Contract and the CAO-ZR Contract at Zenrock's request to act as an intermediary. From CAO's perspective, it stood to earn a modest gross profit of US$62,254.32 by bridging

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30 PCS at Section V.

31 PCS at Section VI.

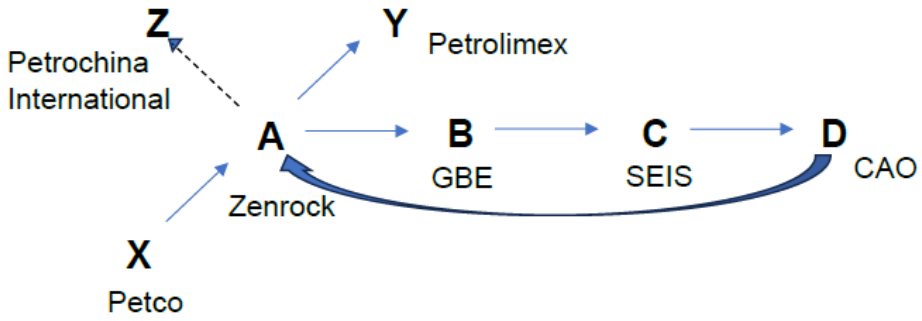
32 PCS at Section VII.

33 Defence (Amendment No 2) ("Defence No 2") at para 15A.

this gap.[34] As such, contrary to BCP's assertions, CAO had not entered into a sham or fraudulent contract with Zenrock. Instead, unknown to CAO at the time of contracting with Zenrock, Zenrock had engineered a circular transaction in the following manner, which is Series B above:

Zenrock → GBE → SEIS → CAO → Zenrock

27 However, in contrast to BCP's position that *only* Series B took place, CAO argues that the Series B "circle" and the Series A "chain" co-existed.[35] Thus, by CAO's case, title to the Cargo passed through the circular Series B transactions before vesting back in Zenrock, to be passed down later to Petrolimex under Series A. This can be represented graphically as follows:[36]



28 On the back of its position in relation to the Cargo, CAO's defence against BCP's pleaded causes of action comprise the following:

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[34] Certified Transcript 24 August 2023 at p 92 lines 5–20.

[35] DCS at para 98.

[36] DCS at Annex A, Figure 6.

(a) Fraud exception: CAO argues that BCP should not be allowed to rely on the fraud exception because it never pleaded it. Further, even if BCP could rely on the exception, BCP has incorrectly characterised its elements. Finally, BCP does not satisfy the proper elements of the fraud exception.[37]

(b) Deceit: CAO submits that, on a true construction of Field 47A(10) of the LC and the terms of the CAO LOI, CAO was entitled to present the CAO LOI as the BCP OBLs were not available at the time of presentation. As such, the reference to the BCP OBLs must mean that the BCP OBLs had yet to be issued or endorsed to the order of BCP Dubai at the time of presentation but that they would, in due course, be so issued or endorsed. CAO terms this the "element of futurity".[38] Alternatively, BCP could not have relied on any alleged misrepresentation in the CAO Invoice or the CAO LOI as BCP was under a self-standing, independent obligation to reimburse UBS under Field 78 of the LC, and/or Art 7(c) of UCP 600.[39]

(c) Negligent misrepresentation: CAO says that it did not owe BCP any duty of care to only present documents containing true representations, and/or issue the CAO Invoice and the CAO LOI if there was shipment and delivery of the Cargo in performance of the CAO-ZR Contract. Further, even if CAO owed BCP such

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37 Defendant's Reply Submissions ("DRS") at Section IV.

38 DCS at para 208.

39 DCS at paras 209, 302 and 303.

a duty, CAO had not breached it because CAO reasonably believed the Representations and Warranties to be true.[40]

(d) Breach of contract: CAO says that it was not a party to any contract with BCP given that it (CAO) did not present documents to BCP for payment. Further, even if there was a contract between CAO and BCP, such a contract was not performed because CAO did not present documents to BCP for payment.[41]

(e) Unjust enrichment: CAO relies on its reasonable belief that the CAO-ZR Contract was a genuine sale and purchase transaction to say that it was not unjustly enriched.[42]

(f) Unlawful means conspiracy: CAO again relies on its reasonable belief that the CAO-ZR Contract was a genuine sale and purchase transaction, with physical delivery of the Cargo. Alternatively, the parties to any conspiracy were Zenrock, SEIS, and/or GBE, but not CAO.[43]

The other parties' cases on the Main Proceedings

29 While BCP technically has not sued SEIS and GBE in the 3PP and 4PP respectively, both SEIS and GBE have an interest in CAO prevailing in the Main Proceedings. This is because if CAO succeeds in the Main Proceedings, the 3PP and 4PP will become moot. As such, GBE made extensive submissions

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40 DCS at para 277.

41 DCS at para 346.

42 DCS at para 372.

43 DCS at para 397.

on the Main Proceedings, which were very helpful. However, rather than summarise GBE's position on the Main Proceedings at this point, which largely mirrors CAO's position, I will refer to its arguments at the relevant parts of this judgment. SEIS did not make any submissions on the Main Proceedings.

The relevant issues

30 With BCP's and CAO's general cases in mind, I now set out the relevant issues that I will discuss below.

31 First, I will deal with a threshold issue of BCP Dubai's standing, being the party that CAO alleges actually suffered loss, to even sue CAO in this case. This threshold issue arose during cross-examination, when it emerged that BCP Dubai had ceased operations as a branch but transitioned to become a representative office. CAO, SEIS, and GBE therefore raised the question of whether BCP Dubai even has standing to sue in the Main Proceedings. To this, BCP's position is that BCP Dubai continued to exist as a legal entity despite having transitioned to become a representative office. For the reasons below, I find that BCP Dubai does not have standing to sue CAO in the Main Proceedings. Despite this being sufficient to dispose of the Main Proceedings, I will nonetheless go on to deal with the substantive issues.

32 Second, I will deal with the overarching factual question of whether the CAO-ZR Contract was a sham or fraudulent transaction. I do this because the resolution of this factual question affects most, if not all, of BCP's causes of action against CAO, which are mainly premised on the CAO-ZR Contract being

a sham or fraudulent transaction.[44] As I will explain below, I find that the CAO-ZR Contract was not a sham or fraudulent transaction. While there is another overarching factual and legal question about the correct interpretation of Field 47A(10) of the LC, I will deal with that question under my discussion of whether CAO is liable for deceit. For completeness, I acknowledge that BCP has, in its closing submissions, attempted to frame its claims in fraud as being alternative to, or independent of, the finding that the CAO-ZR Contract was a sham or fraudulent transaction (*eg*, Plaintiffs' Closing Submissions ("PCS") para 88). However, I reject this and hold BCP to its pleadings, in which it pleaded its case in fraud as a "further" case rather than an alternative case.[45]

33 Third, I will deal with the following substantive issues:

(a) Whether BCP can rely on the fraud exception;

(b) Whether CAO is liable in deceit to BCP;

(c) Whether CAO is liable in negligent misrepresentation to BCP;

(d) Whether CAO is liable in breach of contract to BCP;

(e) Whether CAO is liable for being unjustly enriched at the expense of BCP; and

(f) Whether CAO is liable for engaging in an unlawful means conspiracy against BCP.

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44 Cf PCS at para 88.

45 SOC2 at para 34.

I will explain below why I resolve these substantive issues in CAO's favour. The primary reason, as may already be apparent, is that BCP had primarily pinned its success on these issues to it successfully showing that the CAO-ZR Contract was a sham or fraudulent transaction. It follows that BCP's failure on the foregoing factual issue must necessarily cause it to fail on these substantive issues.

A threshold issue: whether BCP Dubai has standing to sue CAO in the Main Proceedings

The parties' arguments

34 As a threshold issue, CAO points out that BCP's pleaded case is that BCP Dubai is a branch of BCP. CAO has not admitted in its pleadings that BCP Dubai is a branch of BCP. Under cross-examination, both Mr Pierre Galtie ("Mr Galtie"), BCP's Head of Commodity Trade Finance,[46] and Mr Engin Oce ("Mr Oce"), the former First Vice President and Branch Manager of BCP Dubai,[47] admitted that BCP Dubai is no longer a branch of BCP, having ceased operations as of June 2022 and having been converted into a representative office.[48] Since BCP has not pleaded DIFC law to show that BCP Dubai's conversion into a representative office had no effect on its legal status as a branch office, Singapore law must apply to decide this issue. By

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46 PG at para 1.

47 OCE at para 1.

48 Certified Transcript 15 August 2023 at p 23 line 19 to p 24 line 23; Certified Transcript 17 August 2023 at p 9 lines 20−23.

Singapore law, a representative office is not the equivalent of a branch office.[49] Accordingly, BCP Dubai has not proved its legal capacity to sue.

35 In response, BCP makes the following arguments. First, CAO, in disputing the status of BCP Dubai, is putting forward a new positive case that it had not pleaded previously.[50] Second, the documents proving BCP Dubai's new status are inadmissible, and even if they are, they should be given no weight.[51] Third, the change in BCP Dubai's status is immaterial because BCP Dubai clearly continued to exist, and BCP Dubai and BCP Geneva "were one and the same legal entity".[52] In that regard, since BCP Dubai was not a separate legal entity, the loss was suffered by BCP as a single entity.[53] BCP can claim for that loss because its rights under the LC were never transferred away or lost as a result of BCP Dubai's change in status.[54]

My decision: BCP Dubai does not have the standing to sue CAO

36 I find that BCP Dubai does not have the standing to sue CAO. First, since none of the parties have pleaded DIFC law,[55] Singapore law applies as a default rule (see the Appellate Division of the High Court decision of *Ollech David v Horizon Capital Fund* [2024] SGHC(A) 8 at [55]−[56]). At common

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49 DCS at paras 44−47.

50 PCS at paras 309−312.

51 PCS at paras 313−314.

52 PCS at para 317.

53 Plaintiffs' Reply Submissions ("PRS") at para 17.

54 PRS at para 18.

55 PCS at para 320.

law, branches of a bank are regarded as emanations of the bank such that the head office of a bank and its various branches are regarded as a single legal entity (see the High Court decision of *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd* [2024] 3 SLR 476 at [49]). However, given that a plaintiff bears the burden of establishing its standing to sue, BCP has failed to discharge its burden of proving how, under Singapore law, BCP Dubai should be allowed to maintain an action as an emanation of BCP despite the fact that BCP Dubai is no longer a branch of BCP. In this vein, I also reject BCP's arguments in so far as they attempt to reverse the burden of establishing BCP Dubai's standing to sue. These unmeritorious submissions include, among others, arguments that CAO was not entitled to put forward a new positive case that BCP Dubai had closed and lacked standing, and that CAO had to prove the authenticity of the documents challenging BCP Dubai's standing to sue.[56]

37 For completeness, I do not agree with CAO's argument that the effect of Art 3 of UCP 600, which is incorporated into the LC by Field 40E, is that in a letter of credit transaction, the branches of a bank are considered as separate banks from each other and the head office. CAO argues that while Art 3 of UCP 600 does not convert the branch of a bank into a separate legal entity, it affects the rights and obligations that arise from a letter of credit transaction. Thus, in such a transaction, branches of a bank are considered to be separate banks from each other and the head office. Each is entitled to substantive rights or subject to substantive obligations vis-à-vis each other and other parties in a letter of credit transaction. According to CAO, this means that BCP Geneva and

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[56] PCS at paras 309−313(a).

BCP Dubai did in fact treat each other as separate banks. Indeed, BCP Geneva and BCP Dubai treated each other as different entities, warranting a back-to-back LC, rights of reimbursement, and separate booking of losses.[57] However, in my view, the question of how commercial parties relate to each other in relation to a letter of credit transaction is conceptually different from the juridical status of a party to sue in a particular court. I therefore do not think that the effect of Art 3 of UCP 600 can be extended to cover issues of standing.

38 In any event, based on my first reason above, I find that the proper plaintiff under the LC should be BCP Geneva as the issuing bank. While BCP Dubai was the party who suffered the loss because it reimbursed BCP Geneva and its client, Zenrock, defaulted, I take the view that BCP Dubai lacks the legal capacity to sue CAO. The outcome is that BCP Geneva, as the only party who has legal capacity to sue, may not be able to show that it actually suffered loss that ought to be compensated.

39 In the end, however, BCP Dubai's standing does not matter because, even if it had standing, I find, for the reasons explained below, that BCP's various causes of action against CAO should all be dismissed.

Whether the CAO-ZR Contract was a sham or fraudulent transaction

The parties' arguments

40 I turn to the parties' arguments on whether the CAO-ZR Contract was a sham or fraudulent transaction. BCP's contention that this was so rests on two

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[57] DCS at paras 48–52.

independent points.[58] First, CAO did not expect to make, and did not make, physical delivery of the Cargo to Zenrock as it (CAO) knew or ought to have known that there was no Cargo being delivered by SEIS to it.[59] Second, and in any event, CAO failed to deliver good title in the Cargo to Zenrock. Accordingly, the CAO-ZR Contract was part of the series of sham or fraudulent transactions in Series B.[60]

41 More specifically, BCP submits that CAO knew or ought to have known that there was no Cargo being delivered by SEIS to it for the following reasons:

(a) First, there was no discussion of, or concern regarding, a performing vessel between the traders of CAO and Zenrock.[61]

(b) Second, there was an absence of contemporaneous correspondence between CAO, Zenrock, and SEIS regarding key operational matters.[62]

(c) Third, the appointment of Inspectorate was not *bona fides* or genuine.[63]

(d) Fourth, the fact that CAO failed to take steps to mitigate its risks and liabilities showed that it did not genuinely believe that it was

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58 PCS at para 89.

59 PCS at para 89.

60 PCS at para 89.

61 PCS at paras 92–96.

62 PCS at paras 97−105.

63 PCS at paras 106–110.

transacting real cargo or expecting delivery of a real physical cargo.[64]

(e) Fifth, the findings of the then court-appointed interim judicial managers of Zenrock ("IJMs") in several reports (the "IJM Reports") supported the view that the same BL was used in both the Series A and Series B transactions.[65] Further, despite CAO's objections, the IJM Reports are admissible.

(f) Sixth, title of the Cargo did not pass through Series B and particularly, from SEIS to CAO. As such, title did not pass from CAO to Zenrock under the CAO-ZR Contract.[66]

42 In response, CAO submits that the CAO-ZR Contract was a genuine sale and purchase transaction and not a sham or fraudulent transaction.[67] In so submitting, CAO makes the following points:

(a) First, the evidence elicited from CAO's witnesses, regarding their contemporaneous beliefs and subsequent conduct in relation to performing the contracts, demonstrates their intention to enter into genuine contracts.[68]

(b) Second, BCP's reliance on the IJM Reports is misconceived because the reports are inadmissible hearsay evidence and do not

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64 PCS at paras 111–116.

65 PCS at paras 117–122.

66 PCS at paras 123–137.

67 DCS at para 57.

68 DCS at paras 61–69.

fall within any exception to the hearsay rule. In any event, the contents of the IJM Reports are unreliable to determine whether the CAO-ZR Contract was a sham.[69]

(c) Third, BCP's case is premised on a false dichotomy between the Series B "circle" and the Series A "chain". The case ignores the reality that title to the Cargo passed through the circular Series B transactions before vesting back to the originating party, Zenrock, to be passed down later to Petrolimex under Series A.[70] By this account, CAO did not know of any of the Series A transactions.[71] More particularly, circular trades in and of themselves are not shams or fraudulent transactions.[72]

(d) Fourth, despite BCP's expert, Mr David Goh ("Mr Goh"), taking issue with certain aspects of CAO's conduct, those are not indicia of a sham or fraudulent transaction.[73] In any event, the evidence from CAO's expert, Mr Richard Slovenski ("Mr Slovenski"), should be preferred to that of Mr Goh's.[74]

(e) Fifth, CAO's conduct and intention to be bound by terms of the CAO-SEIS Contract and the CAO-ZR Contract, that is, not to

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69 DCS at paras 70–92.

70 DCS at paras 93–95.

71 DCS at paras 105–106.

72 DCS at paras 96–104.

73 DCS at paras 107–174.

74 DCS at paras 183–205.

enter into a sham or fraudulent contract, must also be seen in light of its suite of risk management measures.[75]

43 Finally, GBE argues that BCP has not shown that the CAO-ZR Contract, which was reduced into writing and thus created a very strong presumption that parties intended to be bound by its terms, was a sham or fraud.[76] On the contrary, the evidence shows that real physical Cargo was sold, and that each supplier up the sale chain intended to and did in fact perform their respective contracts.[77] To this, GBE makes the following points:

(a) First, BCP has not denied that Zenrock legitimately purchased the Cargo from Petco at the start of the sale chain.[78]

(b) Second, BCP is not able to prove that Zenrock never intended to sell or appropriate the Cargo to GBE but had sold the Cargo to Petrolimex in the Series A transactions.[79]

(c) Third, noting that there must be common intention to mislead, BCP has not pleaded nor seriously pursued the argument that any of the other parties in the Series B transactions (*ie*, SEIS and GBE), or Inspectorate, were involved or even aware of the purported fraud between CAO and Zenrock.[80]

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75 DCS at paras 175–182.

76 4th Party's Closing Submissions ("4PCS") at paras 1–5.

77 4PCS at para 6.

78 4PCS at para 7.

79 4PCS at para 8.

80 4PCS at para 9.

(d) Fourth, BCP's reliance on the IJM Reports should not be allowed and the court should not accept BCP's invitation to draw untenable inferences that go against the weight of factual evidence and industry practice.[81]

(e) Fifth, and ultimately, BCP's admission that real Cargo was sold by Petco to Zenrock, and the lack of any proof that Inspectorate and the other parties in Series B were complicit or did not intend to be bound by their contacts, is fatal to its (BCP's) claim.[82]

GBE further elaborates on these points in the main body of their closing submissions.

44 With the parties' arguments in mind, I turn first to the applicable law.

The applicable law

45 It is not disputed among the parties that, for a contract to be a sham, there must be a common subjective intention that the transaction documents were not to create the legal rights and obligations which they give the appearance of creating (see the Singapore International Commercial Court ("SICC") decision of *Credit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit* [2022] 4 SLR 1 ("*CACIB (SICC)*") at [120], as well as the High Court decision of *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 ("*UniCredit (HC)*") at [26]–[27]).

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81 4PCS at para 10.

82 4PCS at paras 11–13.

46 Whether there is such a common subjective intention is to be assessed by a holistic consideration of the parties' conduct and other relevant evidence. Importantly, if an agreement is reduced to writing, this creates a strong presumption that the parties intended to enter into the legal relations that those documents purport to create. The onus of rebutting this presumption rests on the party alleging the sham (see the High Court decisions of *Goodwood Associates Pte Ltd v Southernpec (Singapore) Shipping Pte Ltd and another suit* [2020] SGHC 242 ("*Goodwood*") at [114] and *UniCredit (HC)* at [64]).

47 Applied to the present case, BCP needs to show, based on the parties' conduct, that *both* CAO and Zenrock had the common subjective intention that the CAO-ZR Contract would not create the legal rights and obligations that it appeared to do. Also, because the CAO-ZR Contract was reduced to writing, BCP bears the onus of rebutting the strong presumption that CAO and Zenrock intended to enter into the legal relations that the said Contract appears to create. For the reasons that I will now discuss, I find that the CAO-ZR Contract was not a sham or fraudulent transaction.

My decision: the CAO-ZR Contract was not a sham or fraudulent transaction

48 In my judgment, the CAO-ZR Contract was not a sham or fraudulent transaction.

49 First, the evidence shows that CAO clearly intended to enter into genuine contracts, including the CAO-ZR Contract. The relevant evidence includes: (a) CAO's risk management measures; (b) the conduct of CAO's personnel in relation to (especially) the CAO-ZR Contract; and (c) CAO's appointment of Inspectorate.

50 Second, the fact that the CAO-ZR Contract is part of a circular trade does not mean that it is *ipso facto* a sham or fraudulent transaction. This is because a number of Singapore cases have recognised the legitimacy of circular trades, and I am persuaded that there are legitimate commercial reasons for circular trades.

51 Third, I do not find that BCP's expert evidence, elicited from Mr Goh, disproved CAO's intention to enter into genuine contracts. In particular, I do not find Mr Goh's identification of alleged operational lapses (if they were indeed lapses) showed that the CAO-ZR Contract was a sham or fraudulent transaction. In contrast, I prefer Mr Slovenski's view that, when taken in the round, these alleged operational lapses, even if established, cannot prove that the CAO-ZR Contract was a sham or fraudulent transaction.

52 Fourth, in as much as BCP relies on the IJM Reports to prove its case, I find that the IJM Reports are inadmissible as evidence and that, even if they were admissible, they do not advance BCP's case.

53 Fifth, and taking a step back, I find that the CAO-ZR Contract had taken place against the broader Series A transactions. The implication of this finding is that there was real physical Cargo involved in the Series A and Series B transactions, including the CAO-ZR Contract. This also means that even though the CAO-ZR Contract had been part of the circular Series B transactions, that by itself does not show that it was a sham or fraudulent transaction.

54 I will now explain these points in greater detail.

The evidence shows that CAO intended to enter into genuine contracts

(1) CAO's risk management measures

55 To begin with, the division of responsibilities between CAO's Front Office (*ie*, the Trading Department), Middle Office (*ie*, the Operations and Risk Management Departments), and Back Office (*ie*, the Finance Department and Administration) shows that the CAO-ZR Contract was not a sham or fraudulent transaction. This is for the following reasons.

56 First, the suite of risk management measures at CAO would have made it difficult for a sham or fraudulent transaction to be successfully pulled off at CAO. In this regard, apart from the division of responsibilities between CAO's various offices, CAO also utilised an internal risk management system which mitigates the risk of the company engaging in an illicit transaction, by requiring that transaction details are entered into and checked against CAO's internal transaction system, CXL. Thus, each department in CAO carried out inter-departmental checks to ensure that the documentation is consistent with the information which is keyed into CXL. On the facts of the present case, Mr Lang Yansong ("Mr Lang"), who was the Trading Manager involved in the CAO-ZR Contract, copied his colleagues from the Trading Department, Middle Office, and Back Office at the "DealAlert" group email address. This ensured that the other departments were aware of the deal, specifically, the CAO-ZR Contract.[83]

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83 Affidavit of Evidence-in-Chief of Mr Richard Slovenski dated 9 June 2023 ("RS") at para 51(c).

57 All of these measures made it unlikely for an individual trader, such as Mr Lang in this case, to be able to take part in a sham or fraudulent transaction without anyone else at CAO being put on alert. In this regard, I accept Mr Slovenski's evidence that it is important for any trading company to have various processes to manage risk and ensure that the employees' activities are within the company's mandate.[84] This ensures that there is visibility or cross-checks across different departments. This in turns mitigates the risk of fraud or illicit trading.[85]

58 Second, even if an individual at CAO tried to perpetuate the CAO-ZR Contract as a sham or fraudulent transaction, BCP has not pleaded the identity of the specific human actor in CAO whose allegedly fraudulent state of mind should be attributed to CAO.[86] This is an important point because it is necessary to pinpoint some human actor with the requisite state of mind for attribution to the company (see the High Court decision of *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 at [146]). Therefore, in so far as BCP has not identified anyone at CAO with the requisite state of mind, it is not possible to find that CAO had entered into a sham or fraudulent transaction with Zenrock.[87] For completeness, I reject BCP's argument as to why it need not have pleaded the identity of a specific human actor, which is that as long as CAO's employees were acting within the scope of their employment, then vicarious liability allows their fraud to be attributed

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84 RS at paras 46 and 49.

85 RS at para 49.

86 4PCS at para 65.

87 4PCS at para 65.

to the company.[88] This argument is incorrect because the doctrine of vicarious liability concerns the imposition of liability and not the attribution of intention. Thus, the Court of Appeal held in *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 (at [41]) that, under vicarious liability, "the law holds a defendant liable for the negligence of another even if the defendant has not been negligent at all".

59 Accordingly, I find that CAO's risk management measures make it unlikely that anyone at CAO could have entered into a sham or fraudulent transaction without the rest of the company being alerted to it. More specifically, I find that it is unlikely, had it been specifically pleaded, that Mr Lang or Ms Chng had been engaged in a sham or fraudulent transaction with Zenrock through the CAO-ZR Contract.

(2) The conduct of CAO's personnel

60 In any case, CAO's personnel, including Mr Lang and Ms Chng, had followed its processes pursuant to its internal risk management measures in the CAO-ZR Contract.[89] Mr Lang, as the Trading Manager who concluded both CAO's deal recaps (*ie*, a summary of the main terms of the proposed deal) with SEIS and Zenrock, had conducted due diligence prior to commencing negotiations with these parties to ensure that he was dealing with approved counterparties.[90] He then considered the operational and contractual risks of dealing with those counterparties, concluded the deal recaps with the

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88 PRS at para 101.

89 RS at para 52.

90 LYS at paras 11 and 23.

counterparty trader over email, entered the deals into CXL (CAO's internal risk management system), and communicated with his colleagues in a manner that wholly suggested that he treated the transactions as genuine.[91] Indeed, when Mr Lang was cross-examined by Mr Shem Khoo ("Mr Khoo"), who appeared on behalf of BCP, he consistently confirmed that CAO took on the rights and obligations as both buyer and seller in the deals with SEIS and Zenrock respectively.[92]

61 Similarly, Ms Chng's conduct also showed that she believed that the CAO-SEIS Contract and the CAO-ZR Contract created the legal rights and obligations they gave the appearance of creating.[93] Indeed, Ms Chng did not do anything out of the ordinary: she (a) drafted and issued the CAO-ZR Contract; (b) negotiated the CAO-SEIS Contract; (c) negotiated the terms and issuance of the LC in conjunction with the Finance Department; and (d) carried out operational tasks such as vessel nomination, appointing and receiving updates from Inspectorate, checking documents that SEIS presented for payment, and checking the documents that CAO was to present for payment under the CAO-ZR Contract.[94]

62 Accordingly, I find that both Mr Lang's and Ms Chng's conduct in relation to the sale contracts, especially the CAO-ZR Contract, indicate that they treated the transactions as genuine. This suggests that CAO intended to enter into genuine transactions. In this regard, I recognise that BCP alleges that

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91 LYS at paras 37, 46–48.

92 Certified Transcript 24 August 2023 at p 22 lines 7–15; p 23 lines 10–18.

93 RS at para 55.

94 RS at para 55.

Mr Lang and Ms Chng ought to have done more, such as conducting further checks as to the title of the Cargo further upstream.[95] While I will address these concerns later in this judgment, I do not think that these allegations show that Mr Lang and Ms Chng had engaged in a sham or fraudulent transaction. At best, these issues point to some operational lapses. But, as Mr Goh acknowledged, there is a clear distinction between a party who enters into a trade imprudently or carelessly against a party who enters into a transaction that it did not intend to perform.[96]

(3) CAO's appointment of Inspectorate

63 Further, CAO's appointment of Inspectorate, which, as Mr Slovenski explained, is one of a number of cargo surveyors with an international presence who are trusted across the industry, shows that it intended to enter into genuine contracts.[97] Indeed, both Mr Goh and Mr Slovenski agreed at Agreed Item 4 of their Joint Expert Statement dated 30 June 2023 ("Joint Expert Statement") that "[m]arket participants in oil transactions rely on independent inspectors to ensure that the quantity and quality are as per the contract, and to act as a witness to the loading and/or discharge of the cargo".[98] Accordingly, even if Mr Lang had agreed to enter into a sham or fraudulent transaction, as Mr Wong, CAO's Head of Operations, explained, Inspectorate would have independently notified CAO's Middle Office that no cargo was being loaded for the transaction.[99]

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95 PCS at para 222.

96 Certified Transcript 20 September 2023 at p 25 lines 6–17.

97 Certified Transcript 21 September 2023 at p 95 line 23 to p 96 line 18.

98 Joint Expert Statement dated 30 June 2023 at Agreed Item 4.

99 Certified Transcript 6 September 2023 at p 50 lines 9–14.

Indeed, Inspectorate would also have alerted CAO to any fraudulent transactions that may have been attempted through forgery or double financing.[100]

64 As such, as GBE rightly submits, if CAO was involved in a sham or fraudulent contract and wanted to avoid others from detecting that there was no physical cargo, it would not have appointed an independent cargo surveyor who would have exposed any fraud.[101] It must follow that CAO's appointment of Inspectorate shows that it intended to enter into genuine contracts.

65 In this regard, while Mr Khoo had suggested that Inspectorate knew that the CAO-ZR Contract was a sham,[102] he subsequently retracted that statement and confirmed that BCP is not alleging that Inspectorate was a party to any fraud.[103] Similarly, while Mr Goh suggested at Agreed Item 4 of the Joint Expert Statement that Inspectorate may not have acted independently,[104] he later conceded under cross-examination that he had no evidence to show that Inspectorate was not independent or had issued false reports to CAO.[105]

66 Having retreated from the position that Inspectorate itself was a party to any alleged fraud, BCP makes various arguments in its closing submissions as to why CAO's appointment of Inspectorate was not *bona fides* or genuine:

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100 Certified Transcript 5 September 2023 at p 158 line 24 to p 160 line 11.

101 4PCS at para 71.

102 Certified Transcript 30 August 2023 at p 109 lines 7–21.

103 Certified Transcript 31 August 2023 at p 43 line 21 to p 45 line 18.

104 Certified Transcript 19 September 2023 at p 168 lines 4–19.

105 Certified Transcript 19 September 2023 at p 168 line 20 to p 171 line 7.

(a) the appointment of Inspectorate was not "mutually agreed" between CAO and SEIS;[106] (b) Inspectorate failed to invoice, or seek payment from, any of the Series B parties;[107] and (c) CAO failed to question Inspectorate's non-compliance with its instruction that the consignee on the bill of lading was to be CAO (instead of Natixis).[108] I find all these points to be without merit. To begin with, (a) is not true. Ms Chng had proposed the appointment of Inspectorate to SEIS in an email dated 22 January 2020[109] and the latter executed the transaction without raising any objection. This constitutes mutual agreement. As for (b), to the extent that BCP is attempting to argue that Inspectorate was complicit in a bad faith appointment, I reiterate the points at [65] above. This leaves (c), which is insufficient to prove that CAO's appointment of Inspectorate was not genuine. As such, I do not consider that BCP has successfully challenged CAO's evidence in relation to the appointment of Inspectorate and its implications.

67 Accordingly, in my judgment, CAO's risk management measures, CAO's personnel's conduct in relation to (especially) the CAO-ZR Contract, and CAO's appointment of Inspectorate, all support a finding that CAO intended to enter into genuine sale contracts. This means, and I so find, that CAO did not enter into the CAO-ZR Contract without a genuine intention to perform the obligations within. In other words, the CAO-ZR Contract is not a sham or fraudulent transaction. While this is sufficient to dispose of the point, I

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106 PCS at para 108.

107 PCS at para 109.

108 PCS at para 110.

109 CCL at p 355, point 7.

go on to explain why I do not regard BCP's counterevidence to be convincing in refuting this finding.

The fact that the CAO-ZR Contract was part of a circular trade does not mean it is ipso facto *a sham or fraudulent transaction*

68 In so far as BCP makes this point, I turn first to consider whether the CAO-ZR Contract, being part of a circular trade, is *ipso facto* a sham or fraudulent transaction. In my judgment, the mere fact that the CAO-ZR Contract is part of a circular trade does not lead automatically to such a conclusion.

69 As a matter of precedent, there are a number of Singapore cases which have recognised the legitimacy of circular trades. One, Hoo Sheau Peng J in *Goodwood* (at [44]) had acknowledged that circular trades are not *ipso facto* shams. The learned judge drew a further distinction between circular trades in which no *delivery* of goods was contemplated, against those in which no *trading* was contemplated at all. In her view, which I respectfully agree with, only the latter, where no trading was contemplated at all, constitutes a sham (see *Goodwood* at [47]–[48]). Two, Andre Maniam J in *UniCredit (HC)* found that the contract of sale between Hin Leong and Glencore (Hin Leong → Glencore → Hin Leong) was not a sham (at [34] and [39]). This was because the obligations of title transfer and payment were performed. Although the contract was part of a circular trade, this fact did not change the analysis above. Finally, the Court of Appeal in *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another appeal* [2023] SGCA(I) 7 ("*CACIB (CA)*") likewise acknowledged the legitimacy of circular trades in the following terms (at [12]):

> The reasons for these circular arrangements are unknown, though circularity can and does occur in commodity dealing,

> both designedly and fortuitously (see *Garnac Grain Company Incorporated v HMF Faure & Fairclough Ltd and another* [1966] 1 QB 650 (at 679, 683-684) and *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 (at [50]-[65]). In those cases, the motive was the cheaper financing that a simultaneous sale and buy-back using a letter of credit could provide, as compared to ordinary borrowing. …

70 As a matter of principle, evidence was led on the legitimate commercial reasons for circular trades. For example, as Mr Wong explained, "in trading society, because of the time difference, you can trade today with this guy, and then probably a few more days later, you can buy it back. It's quite common in the industry".[110] Indeed, as Hoo J explained in *Goodwood* (at [48]), there is nothing uncommercial in parties seeking to make arbitrage profits or brokerage fees in circular trades. Another example of a legitimate reason for circular trades, as SEIS's Director, Mr Jiang Letian, suggested during cross-examination, is to obtain liquidity of funds while trading.[111] This is likely what happened in the present case:

(a) To begin with, under the sale contract between Zenrock and Petrolimex dated 10 January 2020 ("ZR-Petrolimex Contract"), Petrolimex had 30 days after the bills of lading date to make payment for the Cargo to Zenrock.[112]

(b) The Series B transactions allowed Zenrock to receive payment for the Cargo from GBE within 10 days after the bills of lading

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110 Certified Transcript 5 September 2023 at p 152 lines 8–13.

111 Certified Transcript 13 September 2023 at p 103 line 19 to p 104 line 6.

112 Defendant's Bundle of Accompany Documents (Main Proceedings) dated 8 December 2023 at pp 221 and 225.

date, which was some 20 days *earlier* than when Zenrock would have received the same from Petrolimex.

(c) Then, under the CAO-ZR Contract at the end of Series B, Zenrock was able to retrieve title to the Cargo again, so that it could perform its obligations under the ZR-Petrolimex Contract. This is because title to the Cargo passed instantaneously and sequentially from Zenrock, through the Series B parties, and back to Zenrock again. This point in time when title passed, as provided for in the various contracts of sale, was when the Cargo passed the flange connection between the delivery hose at the loading port and the "*Petrolimex 18*'s" permanent hose connection[113] (or, to put it loosely, when the Cargo is loaded onto the ship).

(d) Finally, after Zenrock repurchased the Cargo from CAO, Zenrock only had to make payment to CAO 45 days after the bills of lading date, which was 35 days after Zenrock received payment from GBE for the same (and some 15 days after Zenrock would have received payment from Petrolimex under the Series A transactions).

In effect, the arrangement under Series A *and* Series B allowed Zenrock to secure funds from GBE within 10 days of its sale of the Cargo, while it was only required to pay CAO some 35 days after receiving the same from GBE.[114] In

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113 *Eg*, cl 11 of the CAO-ZR Contract, at 1 DCB p 56.

114 4PCS at paras 50–54.

other words, the circular trade provided Zenrock with liquidity of funds in the interim period (roughly 35 days) before it had to eventually pay CAO for the Cargo.

71 I will return to discuss how the CAO-ZR Contract is situated within the Series A and Series B transactions. But for now, it suffices for me to conclude that the mere fact that the CAO-ZR Contract was part of a circular trade does not, without more, render it a sham or fraudulent transaction.

BCP's expert evidence does not disprove CAO's intention to enter into genuine contracts

(1) Mr Slovenski's evidence is generally preferable to that of Mr Goh's

72 I turn next to BCP's expert evidence from Mr Goh. To begin with, I generally prefer Mr Slovenski's evidence to that of Mr Goh's for the following reasons.

73 First, and with respect to Mr Goh, I find that he made a number of unsubstantiated and speculative remarks without foundation that cast doubt on his independence as an expert witness. One, as I mentioned above, Mr Goh speculated that Inspectorate was not truly independent without any evidence to substantiate this.[115] Two, Mr Goh suggested, without any evidence, that CAO's CXL system could be gamed by an individual such as the managing director or "trading boss" of the department.[116] Three, Mr Goh conceded under cross-examination that he had been entirely speculative in suggesting that SEIS would

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115 Certified Transcript 19 September 2023 at p 168 lines 4–19.

116 Certified Transcript 20 September 2023 at p 12 line 8 to p 14 line 24.

not have been able to buy a cargo from Petco, when he was unfamiliar with and did not make any enquiries of Petco's requirements when approving trading counterparties.[117] These non-exhaustive examples of Mr Goh's propensity to make unsubstantiated and speculative remarks cast doubt on his independence as he appeared to have attempted to be an advocate of BCP's cause (see the Court of Appeal decision of *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [70], citing the High Court decision of *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 at [82]–[83]). In contrast, I find that Mr Slovenski was measured on the stand, tendered considered views based on firm foundations, and willingly retreated from his opinion when confronted with countervailing points that he accepted.

74 Second, I have concerns about the manner in which Mr Goh prepared his expert report. During cross-examination by Mr Toh Kian Sing SC ("Mr Toh"), who appeared on behalf of CAO, Mr Goh effectively admitted that he had not prepared the report fully by himself. More specifically, Mr Goh said that his report was based on a template prepared for an earlier case in which he had acted as an expert witness.[118] Furthermore, Mr Goh admitted that Valere Capital, which had engaged him as an independent consultant, assisted with the drafting of his report by polishing up the report, toning down his views where appropriate, and making adjustments to his language.[119] For example, Mr Goh was not able to explain the meaning of the expression "unencumbered title" at

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117 Certified Transcript 19 September 2023 at p 151 line 19 to p 152 line 21.

118 Certified Transcript 19 September 2023 at p 27 line 25 to p 28 line 13.

119 Certified Transcript 19 September 2023 at p 28 line 14 to p 30 line 6; p 31 line 8 to p 32 line 3.

para 132 of his report because Valere Capital had inserted that phrase as part of its "additional polishing up".[120] Indeed, Mr Goh's report does not comply with the requirements under O 40A of the Rules of Court (2014 Rev Ed) ("ROC 2014") by not, for example, containing a statement accepting responsibility for its contents. In contrast, there was certainly no suggestion that Mr Slovenski had not prepared his report by himself.

75 Third, and again with respect to Mr Goh, I find that there are gaps in his experience which call into doubt his suitability to comment on the relevant issues in the present case. One, Mr Goh candidly recognised under cross-examination that he had no experience in concluding prompt deals.[121] This is important. After all, he had opined that because the CAO-ZR Contract was a prompt deal, CAO had to take additional due diligence steps. But if Mr Goh does not have the relevant experience, then it is difficult to see how he could have advanced such an opinion convincingly. Two, Mr Goh also conceded that he had never concluded any "pre-structured deals" arranged by a third party, in which his company acted as an intermediary.[122] This again undermines Mr Goh's opinion on the issues in the present case, which are premised on such "pre-structured deals". In contrast, Mr Slovenski was not alleged to lack experience as a trader in pre-structured[123] and prompt deals.

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120 Certified Transcript 19 September 2023 at p 31 line 20 to p 32 line 3; p 38 line 4 to p 39 line 15.

121 Certified Transcript 22 September 2023 at p 119 lines 14–19.

122 Certified Transcript 20 September 2023 at p 104 lines 10–17.

123 Certified Transcript 22 September 2023 at p 53 line 13 to p 54 line 12.

76 Accordingly, for these reasons, I generally prefer Mr Slovenski's evidence to that of Mr Goh's. This, however, does not mean that I will disregard Mr Goh's evidence entirely.

(2) Mr Goh's evidence of supposed operational lapses does not disprove CAO's intention to enter into genuine contracts

77 In any event, even if I were to regard Mr Goh's evidence as entirely reliable, I do not think that his evidence controverted CAO's intention to enter into genuine contracts, nor suggested that the CAO-ZR Contract was a sham or fraudulent transaction.

78 In seeking to show CAO's fraudulent intention, Mr Goh raised a long list of supposed shortcomings or "red flags" regarding CAO's conduct when it was executing the CAO-ZR Contract. For convenience, I find it helpful to assess Mr Goh's concerns by reference to five broad categories,[124] namely: (a) the absence of shipping documents; (b) the absence of correspondence in relation to the performing vessel despite prompt loading; (c) the absence of correspondence about the upstream supplier and end buyer; (d) the last-minute change in nomination of the performing vessel; and (e) the absence of certain operational documents and correspondence. Properly assessed, I find that these various supposed operational lapses referred to by Mr Goh, even if true, are not indicators of a sham or fraudulent transaction. Indeed, in so far as Mr Goh's evidence suggested this, I cannot accept that a genuine transaction must, among other things, be one that is carried out without any operational lapses

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[124] 4PCS at para 161.

whatsoever.[125] Instead, I agree with CAO that falling short of operational perfection, especially in the fast-moving environment in which a trader or operator works, cannot be taken as an indication of a sham or fraud.[126]

(A) THE SPECIFIC CONTEXT IN WHICH THE DEALS WERE TRANSACTED

79 I start with the specific context in which the deals concerned were transacted.

80 First, it is important to bear in mind that these deals were prompt deals that Zenrock – which was at the time a well-known and reputable oil trading company in Singapore[127] – had pre-structured on a back-to-back FOB basis. Thus, as Mr Alexandre de Kalbermatten ("Mr Kalbermatten"), BCP's Head of Legal and Compliance, conceded, on its face, the mere speed of the transaction cannot be an indication that the parties knew or intended that there would be no cargo to be transacted.[128] Indeed, as Mr Galtie stated, it is not unusual for oil shipments to be sold promptly,[129] and "in some cases" for requests for letters of credit to be made a couple of days before loading.[130] This explains why BCP agreed to issue the LC in the first place on 20 January 2020, even though the supplier of the Cargo (and the beneficiary of the LC) was only confirmed to be

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125 Certified Transcript 19 September 2023 at p 71 line 24 to p 72 line 8.

126 DCS at para 109.

127 Certified Transcript 29 August 2023 at p 10 lines 15–23.

128 Certified Transcript 23 August 2023 at p 88 lines 12–18.

129 Certified Transcript 15 August 2023 at p 26 line 24 to p 27 line 13.

130 Certified Transcript 15 August 2023 at p 27 line 21 to p 28 line 9.

CAO that same day, with the anticipated loading window for the shipment starting just four days later, from 24 to 26 January 2020.

81 In this regard, Mr Goh opined in his report that "traders will normally buy and sell petroleum products (such as gasoil) at least 14 to 30 days ahead of the first day of the five-day loading date range (for free on board ('FOB') trades)".[131] In contrast, Mr Slovenski opined that there are no such strict timelines for trading. In his view, "trade depends on whenever somebody has a cargo or what have you".[132] Between these two views, I prefer Mr Slovenski's view because Mr Goh's view actually contradicts BCP's own experience in relation to prompt deals. Accordingly, I do not think that the mere speed of a transaction is an indicium of it being a sham or fraudulent. Indeed, Mr Goh himself does not deny that, in the context of a prompt deal, parties have to work within compressed timelines.[133] From this context, it is perfectly understandable why operational lapses may occur. But these lapses, when they occur, cannot be taken as indicative of the transaction concerned being a sham or fraudulent.

82 Second, it is also important to bear in mind the overall context of the CAO-ZR Contract. By CAO's own calculations, it stood to earn a modest profit of US$62,254.32 by standing as an intermediary between SEIS and Zenrock by taking a 35-day credit risk. Indeed, by Mr Goh's calculations, CAO would only earn a small profit of US$7,781.79.[134] It is therefore unreasonable to think that

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131 Expert Report of Goh Chee Hoe David ("DG") at p 38, para 71 in Affidavit of Evidence-in-Chief of Mr Goh Chee Hoe David dated 21 June 2023.

132 Certified Transcript 19 September 2023 at p 119 line 25 to p 120 line 8.

133 Certified Transcript 19 September 2023 at p 46 line 25 to p 47 line 10.

134 DG at paras 105–107.

CAO would risk its reputation, being a company listed on the Singapore Exchange, by participating in a sham or fraudulent transaction that involved it corresponding with various third parties, including an independent surveyor, whose role is to check against such practices. I therefore accept Mr Lang's evidence that he would not have put CAO's reputation at risk over such a modest profit.[135] While Mr Goh had initially suggested that CAO's small profit does not make sense for a *bona fide* arm's length transaction involving real cargo,[136] he ultimately conceded that he did not honestly believe that CAO would orchestrate a fraud and create a paper trail to cover up the same, merely to earn a small profit of around US$7,000 (by his calculation).[137] This is an important concession in favour of CAO's case.

83 Having dealt with these two points arising from the specific context in which the deals were transacted, I turn to assess Mr Goh's concerns about what were really operational lapses (if at all) by CAO in the CAO-ZR Contract.

(B) THE ABSENCE OF SHIPPING DOCUMENTS

84 To start, Mr Goh opined that the industry practice was for SEIS to send CAO the OBLs and original shipping documents 30 to 90 days after the bill of lading date.[138] Mr Goh also points out that CAO should have given the OBLs and original shipping documents to Zenrock within a reasonable period after receiving payment. As to the length of a reasonable period, Mr Goh vacillates

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135 LYS at paras 65 and 66.

136 DG at paras 105–107.

137 Certified Transcript 20 September 2023 at p 100 line 5 to p 101 line 20.

138 DG at paras 86–88.

between the "30 to 90 days after the [bill of lading] date"[139] to "between 15 and 45 days after BL date"[140] and then back again to "between 30 and 45 days"[141] at various points in his report. In any case, Mr Goh then opined that since the OBLs and shipping documents have not been found for more than three years since 2020, they likely never existed in relation to the Series B transactions.[142] Mr Goh advanced this view despite agreeing that CAO was acting entirely in line with industry practice by presenting an LOI for payment without making enquiries about the whereabouts of the OBLs.[143] In any case, BCP relies on Mr Goh's opinion in submitting that the fact that CAO did not take any steps to check whether information or documents were being passed from Zenrock to SEIS leads to the inference that it knew all along that Series B transactions did not involve real Cargo.[144]

85 I do not accept Mr Goh's opinion and, by extension, BCP's submission. First, leaving aside the apparent inconsistency in his view as to what constitutes a reasonable period, Mr Goh has not provided any basis for the alleged market practice to chase for original documents within such a period of time after loading. When Mr Toh asked Mr Goh to substantiate his opinion during cross-examination, Mr Goh merely alleged that this was based on "internal requirements" of major oil companies (also termed "oil majors").[145] However,

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139 DG at para 86.

140 DG at para 101(i).

141 DG at para 112.

142 DG at para 89.

143 Certified Transcript 20 September 2023 at p 94 lines 1–11.

144 PCS at paras 92 and 100.

145 Certified Transcript 19 September 2023 at p 125 line 24 to p 127 line 2.

given that Mr Goh has never worked in an oil major, it is unclear to me how Mr Goh can claim the expertise to make this assertion. In contrast, I prefer Mr Slovenski's evidence in this regard, which is that "[i]t is not industry practice to check with an FOB seller or its seller(s) where the original bills of lading are or to chase for the BLs, especially if the trader is in the middle of a chain and its downstream buyer is not chasing for the original shipping documents".[146]

86 Second, Mr Goh eventually conceded under cross-examination that if CAO was not chased by Zenrock, it would not have been expected to chase SEIS for the original documents.[147] Indeed, this is consistent with BCP's own conduct in relation to the first letter of credit that it had issued on Zenrock's earlier purchase of a cargo of Iman crude oil from Gunvor Singapore Pte Ltd. Mr Galtie testified that BCP Geneva never received the OBLs for that transaction.[148] Indeed, Mr Goh conceded that he did not know if any parties in the Series A transactions had chased for the OBLs in accordance with his supposed timelines as derived from market practice.[149]

87 Accordingly, there is no evidence to suggest that OBLs and original shipping documents are surrendered within a reasonable period of time, or even sought or surrendered at all. As such, I find that the fact that neither CAO nor any of the other parties in the Series B transactions chased for the OBLs cannot be an indicium of a sham or fraudulent transaction.

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146 Joint Expert Statement at p 42.

147 Certified Transcript 19 September 2023 at p 134 line 23 to p 135 line 6.

148 Certified Transcript 15 August 2023 at p 56 line 24 to p 57 line 1.

149 Certified Transcript 19 September 2023 at p 127 line 21 to p 130 line 4.

(C) THE ABSENCE OF CORRESPONDENCE IN RELATION TO THE PERFORMING VESSEL DESPITE PROMPT LOADING

88 Mr Goh opined that as the CAO-ZR Contract involved the prompt loading of cargo, a *bona fide* trader would have, before agreeing to the deal, requested or asked for the name of the performing vessel.[150] He further elaborated that traders would try to fix a performing vessel two to three weeks in advance of the loading.[151] As such, Mr Goh asserted that the fact that CAO made no such inquiries was "very out of the norm" and implied that CAO therefore did not truly believe that there was a genuine contract.[152] BCP therefore submits that this shows that CAO never intended to deliver a physical cargo, and that CAO has not explained this inference away.[153]

89 Again, I do not accept Mr Goh's opinion and, by extension, BCP's submission. First, it is not possible for there to be rigid timelines in a fast-paced and dynamic environment, where traders have to deal with multiple issues, including vessel availability, in a short time. Indeed, Mr Goh accepted that parties would work on much more compressed timelines in trades involving spot prompt cargoes.[154] Given this fact, I accept CAO's submission that how far in advance a deal or charter is concluded before the first loading date cannot be indicative of a sham. This is merely reflective of the real-world market conditions and demand, as well as cargo and vessel availability. In any event,

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150 DG at paras 90 and 94.

151 Certified Transcript 21 September 2023 at p 56 line 20 to p 57 line 21.

152 DG at para 90.

153 PCS at para 92.

154 Certified Transcript 19 September 2023 at p 46 line 25 to p 47 line 10.

the fixture recap for "*Petrolimex 18*", *ie*, a summary of the essential terms on which "*Petrolimex 18*" was hired, in relation to what BCP asserts to be the legitimate Series A transactions, was dated 16 January 2020, being only seven days before the first loading date. This exceeds Mr Goh's asserted timeline of two to three weeks and therefore refutes his suggestion.

90 Second, the mere fact that a trader did not make inquiries about the performing vessel cannot be taken to be indicative of a sham or fraudulent transaction. This is because a trader would be focused on a multitude of other concerns when negotiating a deal, such as, among other things: (a) reward in the deal; (b) risk taken on for the reward; and (c) operating within the mandates of the organisation.[155] In other words, the trader would not be immediately concerned about vessel-related matters, which can be left to the operator to be dealt with in due course. In my view, Mr Slovenski's opinion in this regard is practical, realistic, and reflective of the separation of functions between CAO's various offices. As Mr Slovenski explained, once a trader has concluded a deal, the trader would hand over the transaction to be dealt with by the operations team. The operations team would then be concerned with ensuring the performance of the contract, including the nomination of vessels.[156]

91 Third, with these points in mind, there is nothing in CAO's conduct, in relation to the performing vessel, which leads to an inference that CAO did not intend to enter into a genuine transaction. To begin with, Zenrock's Operations Executive, Mr Zhang Taiming, had nominated the "*Petrolimex 08"* and sent the

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155 Certified Transcript 21 September 2023 at p 2 line 8 to p 3 line 9.

156 Certified Transcript 21 September 2023 at p 62 line 11 to p 63 line 3.

vessel's questionnaire 88 ("Q88") Form to CAO via email on 21 January 2020 at 4.03pm.[157] This was less than four hours after the transaction between Zenrock and CAO was confirmed via email on 21 January 2020 at 12.29pm.[158] Thus, there were still three days before the start of the laycan period on 24 January 2020 (the "laycan" referring to the period within which a vessel is expected to arrive, with late arrival potentially rendering the buyer liable for damages).[159] At that point on 21 January 2020, Ms Chng considered that it was still early, and that the load port terminal would chase for the vessel nomination of their own accord by passing a message down the sale chain, if it saw the necessity in doing so.[160] There was therefore no urgency that would have caused CAO or any of the parties in Series B to be alarmed even though loading was meant to be prompt. Ultimately, as an intermediary in the sale chain, CAO would not be involved in the securing of the charter, which would have been the end-buyer's responsibility. Thus, CAO would reasonably have been entitled to believe that Zenrock, which was subject to an express contractual obligation to nominate a vessel, would so perform.[161] This is consistent with the duty imposed on an FOB buyer to "provide a vessel at the appointed time and place to enable the seller to bring the goods alongside for loading so as to enable the buyer to receive them within the appointed time" (see the High Court decision of *Soon Hua Seng Co Ltd and others v Bombay Trading Co (Pte) Ltd* [1990] 1 SLR(R) 390 at [14]).

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157 CCL at p 323.

158 Defendant's Core Bundle of Documents Volume 2 at p 12.

159 Certified Transcript 31 August 2023 at p 111 lines 12−14.

160 Certified Transcript 31 August 2023 at p 141 line 20 to p 142 line 7.

161 Certified Transcript 31 August 2023 at p 147 lines 1–8.

92 Fourth, cl 6 of the CAO-ZR Contract gives CAO broad latitude in relation to the loading dates. This clause provides that the loading range of 24 to 26 January 2020 was "given for the sole purpose of calculating laytime and demurrage, and shall not be construed as guaranteed arrival or loading dates at the loadport. It is expressly acknowledged and agreed that the shipment period set out in [the] clause above shall not be of the essence, and that these shall be indicative only, made by the seller as an honest assessment without guarantee".[162] It is clear that cl 6 would have allowed the loading dates to be pushed back if a performing vessel could not arrive or be ready in time. Further, there is nothing in the Petronas Trading Corporation Sdn Bhd General Terms and Conditions for Spot FOB, CFR and CIF Sale of Products (February 2002 Revision) ("Petco GTCs") that specified the date on which the vessel nomination must be made. Indeed, cl 2.4 of Part II of the Petco GTCs relating to vessel nominations, entitled "FOB Provisions", provides that even if a buyer provides documentation instructions and appoints a joint surveyor less than 48 hours prior to the first day of loading date, the seller shall simply "treat the vessel on best endeavour basis".[163] Clause 2.6 also allows for substitution of a vessel with prior notice at any time before the first day of the delivery date range.[164]

93 Accordingly, considering all of the above, there was no real urgency in relation to the vessel nomination at the time the CAO-ZR Contract was concluded. There was no alarm among the traders at the time, nor was there any

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162 1 DCB at p 51.

163 1 DCB at p 99.

164 1 DCB at p 100.

reason for them to be alarmed. In no way does the absence of vessel nomination indicate that CAO lacked an intention to enter into a genuine transaction.

(D) THE ABSENCE OF CORRESPONDENCE ABOUT THE UPSTREAM SUPPLIER AND END BUYER

94 In Mr Goh's view, CAO should have "insisted that [SEIS] reveal the identity of its upstream supplier/seller"[165] and "confirmed with Zenrock that Petrolimex was at the end of the gasoil chain in Series B".[166] Mr Goh further opined that CAO's failure to do so suggested that "all parties involved in Series B (including CAO) knew that the transactions involved a fictitious cargo".[167] It became clear during Mr Khoo's cross-examination of the various witnesses that BCP's position is that CAO's failure to conduct such checks demonstrated its disregard of the truth of the statements made in CAO's LOI that it "had immediately before title passed to [Zenrock] good title to such product" and that "title in the product has been passed as provided in the agreement to [Zenrock] free from all liens, securities, charges or encumbrances of whatever kind".[168]

95 Again, I do not accept Mr Goh's opinion and, by extension, BCP's submission, for a few reasons. First, I accept Mr Slovenski's opinion that it is practically difficult, if not impossible, for a purchaser to check title to a shipment of title. This is because there is no central registry for such checks to

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165 DG at para 93.

166 DG at para 100.

167 DG at paras 93 and 100.

168 Certified Transcript 24 August 2023 at p 31 line 11 to p 33 line 1; PCS at paras 154−155.

be made.[169] Thus, to adhere to Mr Goh's suggestion that it should have confirmed the identity of the upstream seller or supplier, CAO would have to check, not only who supplied the Cargo to SEIS, but also the legitimacy of the entire chain all the way up to Petco, which was the original supplier of the Cargo.[170] It is not clear that CAO could have done this without practical difficulties, if at all.

96 Second, the practical difficulties with verifying the legitimacy of the entire chain explain why the evidence, from the various witnesses at trial, was that it would be highly unusual to expect CAO to have conducted these checks. In particular, apart from the practical difficulties, the fact is that information about a trader's trading counterparties is considered trading secrets.[171] Thus, as Mr Slovenski explained, the commercial reality is that few would ask who a trader's supplier was. Indeed, the trader may not be amendable to disclosing this information given that it is, in Mr Slovenski's words, "private information" possibly amounting to some "sort of intellectual property",[172] and a trader who reveals his source risks being cut out of future deals.[173] In contrast, I regard as commercially unsound Mr Goh's opinion that a trader should have no concerns about being displaced.[174]

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169 Certified Transcript 22 September 2023 at p 31 line 23 to p 32 line 7.

170 Certified Transcript 22 September 2023 at p 32 lines 8–20.

171 Certified Transcript 24 August 2023 at p 26 lines 17–22.

172 Certified Transcript 19 September 2023 at p 77 line 14 to p 78 line 2.

173 Certified Transcript 19 September 2023 at p 77 line 14 to p 78 line 2.

174 Certified Transcript 19 September 2023 at p 75 line 25 and p 76 line 18 to p 77 line 9.

97 Third, there was simply no point in CAO checking whether SEIS had title to the Cargo at the time they entered into an agreement. This is because, in a back-to-back FOB trade in which title passes upon delivery, a supplier would only get title to the Cargo when the cargo was delivered to it. It is only at that point in time (*ie*, upon delivery) that the supplier would have title of its own to pass down to the next purchaser. As such, in the present case, SEIS would only receive title to the Cargo, which it could then pass down to CAO, when the Cargo was delivered to SEIS. This is why it would have been pointless for CAO to have checked if SEIS had title to the Cargo at the time when both parties reached an agreement. What CAO instead needed to do, which they did, was to take steps to ensure that loading was done in accordance with the terms of the FOB contract. If loading and delivery were done properly, then title in the Cargo would be naturally transferred to CAO.[175]

98 In this regard, there are two facts which showed that CAO legitimately thought that there was an actual physical shipment, and that there was thus no need to check with SEIS as to the existence of the Cargo. One, CAO had engaged Inspectorate to monitor the loading of the Cargo. Thus, upon receipt of Inspectorate's reports, CAO was entitled to, as Mr Goh agreed with Mr Toh, "legitimately believe that there was an actual physical shipment".[176] Two, CAO was dealing with its trusted trading partners who were on its approved counter-party list. It is true, as Mr Khoo highlighted during his cross-examination of Mr Lang, that there was an assessment overdue alert on SEIS's status as an approved counter-party, as well as an ambiguous requirement of "No purchase

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175 Certified Transcript 24 August 2023 at p 33 line 3 to p 34 line 2.

176 Certified Transcript 19 September 2023 at p 167 lines 12–16.

(unless PCG from Shandong Energy Group / an entity acceptable to CAOSG can be obtained)" in CAO's approved counter-party list.[177] However, I accept Mr Lang's evidence that this merely restricted CAO from selling to SEIS but did not prevent CAO from purchasing from SEIS.[178] Further, even if Mr Lang misunderstood this ambiguous requirement and breached CAO's internal trading conditions, that did not mean that the transaction with SEIS was not a real transaction. As Mr Slovenski correctly pointed out, the breach of an internal mandate, while important, does not necessarily indicate that the contract entered into is not a real contract.[179]

99 Fourth, contrary to Mr Goh's suggestion,[180] there is no reason for CAO to have checked who the end buyer was. Since the sale to Zenrock was on a FOB basis, CAO's liability and risk for the Cargo would cease upon delivery of the same to Zenrock. It is commercially unrealistic to suggest that CAO would be interested in what Zenrock ultimately did with the Cargo. Indeed, as Hoo J observed in *Goodwood* (at [99]), it is not necessary for all parties in a chain to know the identities of the other parties, in order for the relevant contractual documents to have legal effect. This is especially true in sleeve transactions such as the present – a "sleeving trade" in the fuel oil industry being one where a party, known as the "sleeve provider", contracts to purchase fuel oil from one party and separately contracts to sell it on to another party, benefiting from the

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177 Defendant's Core Bundle of Documents Volume 3 at p 140.

178 Certified Transcript 24 August 2023 at p 84 line 20 to p 86 line 22.

179 Certified Transcript 21 September 2023 at p 66 line 18 to p 68 line 19.

180 DG at para 100.

arrangement by charging a fee (see *Goodwood* at [85], citing *G-Fuel Pte Ltd v Gulf Petrochem Pte Ltd* [2016] SGHC 62 at [3]).

100 Accordingly, considering all of the above, I find that CAO acted in line with the commercial realities of gasoil trading practice despite it not making any checks on the ultimate supplier. In addition, there were no exceptional factors that ought to have prompted CAO to perform such checks. Therefore, the fact that CAO did not verify the identities of the upstream seller and end buyer is not an indicator that the CAO-ZR Contract (and the CAO-SEIS Contract) was a sham or fraudulent transaction.

(E) THE LAST-MINUTE CHANGE IN NOMINATION OF THE PERFORMING VESSEL

101 Mr Goh expressed concerns about the last-minute change in the nomination of the performing vessel from the "*Petrolimex 08*" to the "*Petrolimex 18*". He opined that it was out of the norm for there to be a mistake in vessel nomination for prompt transactions, since there must be a good reason for substitution and the process of clearing a vessel takes time.[181] BCP therefore submits that this is an indicium of the CAO-ZR Contract being a sham or fraudulent transaction.[182]

102 Again, I do not accept Mr Goh's opinion and, by extension, BCP's submission. First, I accept Mr Slovenski's evidence over Mr Goh's, in that there are good reasons why vessel substitutions are required in practice. I prefer Mr Slovenski's evidence because, as I previously observed (at [75]), Mr Goh

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181 DG at paras 96 and 97.

182 PCS at para 92.

conceded that he had no experience in his career in relation to prompt deals.[183] As such, for similar reasons as before, I do not think that Mr Goh has the necessary expertise to opine on matters of vessel nominations for prompt transactions. Returning to Mr Slovenski's evidence, he explained that it is common for vessels to be substituted for operational reasons, such as a breakdown, late arrival, or a more suitable vessel being found.[184] Indeed, this was provided for in cl 2.6 under the Petco GTCs that were incorporated in the CAO-ZR Contract.[185] Accordingly, the mere fact that there was a last-minute change in the nomination of the performing vessel does not, in and of itself, indicate that the CAO-ZR Contract was a sham or fraudulent transaction.

103 Moreover, CAO had no reason to query Zenrock's nomination of the "*Petrolimex 08*". Indeed, there was no evidence led that the "*Petrolimex 08*" was an unsuitable vessel, or that it was not *en route* to the loading port. On this point, Mr Goh agreed that because this was a prompt loading, CAO could legitimately expect that Zenrock's nomination was a valid one and that any change in the nomination was a valid change.[186] Further, although it is true that Zenrock already knew that the performing vessel was supposed to be the "*Petrolimex 18*" and yet chose to nominate the "*Petrolimex 08*" instead, there was no evidence led as to why Zenrock had done so (*ie*, substituted the vessel nomination). And, even if Zenrock had done this out of fraudulent intentions, CAO would not have known of these reasons. In any event, it is not possible for

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183 Certified Transcript 22 September 2023 at p 119 lines 14–19.

184 Joint Expert Statement at pp 32–33.

185 1 DCB at p 100.

186 Certified Transcript 20 September 2023 at p 42 lines 1–21.

me to draw any conclusions on Zenrock's intention because BCP has not called any witnesses from Zenrock as witnesses.

104 Accordingly, I do not find that the last-minute change in the nomination of the performing vessel from the "*Petrolimex 08*" to the "*Petrolimex 18*" was an indication of the CAO-ZR Contract being a sham or fraudulent transaction.

(F) THE ABSENCE OF CERTAIN OPERATIONAL DOCUMENTS AND CORRESPONDENCE

105 Finally, Mr Goh identified a number of purported lapses in the operational aspects of the transaction, which he opines are indicative of a sham or fraud.[187]

106 It is not necessary to go through each of the purported lapses identified by Mr Goh when it is borne in mind that the transactions in the present case were all pre-structured. This means that Zenrock, as a trusted trading partner, had organised and determined the subject matter of the sale, the shipment or loading dates, and had identified and negotiated the involvement of all intermediate parties down the chain (being CAO, SEIS, and GBE).[188] Furthermore, the parties in the present case were buying and selling cargo back-to-back on identical or almost identical FOB terms. In back-to-back contracts, while each intermediate party legally takes on separate liabilities as a purchaser and seller, the commercial reality is that the risk of any performance issues can be passed through to the next party. As Mr Slovenski explained, although an

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187 DG at paras 101−102.

188 4PCS at para 235.

intermediate party's two back-to-back contracts are not technically linked to each other, when viewed from a risk perspective, they are effectively the same.[189]

107 With this context in mind, the focus of an intermediate party in a pre-structured back-to-back transaction is often on its profit level, as well as its ability to meet payment terms.[190] Given this focus, an intermediate party may therefore be less involved in the operational aspects of a deal. As Mr Slovenski explained, these aspects would have been largely organised and sorted out between the ultimate buyer and seller in the chain.[191] It is therefore not unusual for one party to skip its immediate direct buyer and seller and go to another party in the sales chain to pass information, especially in cases of urgency.[192] In my view, this account disposes many of the supposed operational lapses that Mr Goh pointed out.

108 An example of such an alleged operational lapse which Mr Goh identified is that, in relation to the vessel nomination process, there was no SIRE report (a report which ensures that the performing vessel meets quality and safety standards and serves as a risk assessment tool and a vessel inspection report[193]) produced and that the "*Petrolimex 18*"'s Q88 was given by Zenrock to CAO after the vessel had already tendered the Notice of Readiness ("NOR") on 21 January 2020. Leaving aside the fact that the Petco GTCs did not require

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189 Certified Transcript 21 September 2023 at p 60 line 9 to p 61 line 11.

190 Certified Transcript 29 August 2023 at p 16 lines 9–18; p 17 line 10 to p 18 line 4.

191 Certified Transcript 22 September 2023 at p 54 line 13 to p 55 line 13.

192 Certified Transcript 13 September 2023 at p 5 line 19 to p 6 line 5.

193 DG at para 101(c), footnote 38.

the submission of the SIRE Report,[194] I find that, from CAO's perspective, which was that Zenrock was both the organiser of the sales chain for the Cargo to be sold from SEIS to CAO and the purchaser of the Cargo from CAO, it was not unreasonable for CAO to trust that Zenrock would have made the arrangements with the load port terminal to ensure that its nominated vessel would be accepted for loading. Thus, although Ms Chng did not know whether the nomination of the "*Petrolimex 18*" complied with the Petco GTCs, she expected that if the load port terminal had any issues with the vessel, such concerns would then have been passed through CAO to Zenrock, for Zenrock to deal with the issues.[195] Given this expectation, and coupled with the updates from Inspectorate from 23 January 2020 onwards that the "*Petrolimex 18*" had arrived at the load port and tendered the NOR, it is reasonable for Ms Chng to have thought it unnecessary to follow up with SEIS on confirmation of the "*Petrolimex 18*" for loading.[196] And even if it were not reasonable for her to have thought so, Ms Chng's omission to obtain vessel confirmation from SEIS was at most an "operational slip-up".[197] This cannot be extrapolated to impute to CAO an intention to not perform the CAO-ZR Contract or the CAO-SEIS Contract.

109 Yet another example of a supposed operational lapse which Mr Goh pointed out is that CAO should have been anxiously asking about the vessel's estimated time of arrival and current position given that the prompt loading was

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194 1 DCB at p 99.

195 Certified Transcript 31 August 2023 at p 141 line 20 to p 142 line 7.

196 Certified Transcript 30 August 2023 at p 84 lines 10–16.

197 Certified Transcript 20 September 2023 at p 38 line 9 to p 39 line 20.

going to fall over the Lunar New Year period.[198] However, I do not think that this is any indication that the CAO-ZR Contract was a sham or fraudulent transaction. One, the loading date range was not set in stone and loading could be delayed if the vessel did not arrive in time, as explained above (at [92]). Two, one day after CAO was notified of the nomination of the "*Petrolimex 18*", Ms Chng received Inspectorate's update on 23 January 2020 that the vessel had already arrived at the load port. This negated any need to find out the location of the vessel.

110 As a final example of a supposed operational lapse, Mr Goh opined that the absence of correspondence between CAO/Zenrock and the load port shipping agents indicated that there was no physical cargo.[199] However, the evidence suggests that a shipping agent is typically only responsible to the shipowner or charterer of the vessel, and generally liaises between these parties and the load port terminal,[200] rather than intermediate parties. Given that CAO was an intermediate party in the chain who did not have to directly deal with the load port terminal or the shipowner, it is clear why Ms Chng did not see the need to appoint the shipping agent. Indeed, she was already receiving updates from Inspectorate on the vessel's berthing and loading operations.[201] Ms Chng therefore did not need to communicate with the shipping agents on whether there was actual physical loading of the Cargo; she already had that information from the updates from Inspectorate. Accordingly, this supposed operational

198 DG at para 101(h).

199 DG at para 102.

200 Certified Transcript 20 September 2023 at p 36 line 18 to p 37 line 2.

201 Certified Transcript 31 August 2023 at p 149 line 9 to p 150 line 4.

lapse, if at all a lapse, sheds no light on whether there was actual physical loading of the Cargo.

111 Accordingly, bearing the overall context of the transaction in mind, I do not think that the supposed absence of certain operational documents and correspondence rises to the level of indicating a sham or fraudulent transaction. At the most, these reveal operational lapses that, even if undesirable, are not uncommon. But these were really actions (or omissions) that can be readily attributed to the context of the transaction and CAO's role as an intermediate party in the chain.

(3) Summary of findings on BCP's expert evidence

112 In sum, I do not find that Mr Goh's expert evidence disproves CAO's intention to enter into genuine contracts. Since I have already found that the evidence shows that CAO intended to enter into genuine contracts, the fact that Mr Goh's evidence fails to refute that finding only strengthens it. However, for completeness, I go on to consider BCP's reliance on the IJM Reports as a core pillar of its allegation that CAO had not intended to enter into genuine contracts.

The IJM Reports do not assist BCP

113 As CAO rightly observes, BCP has placed substantial reliance on the IJM Reports in alleging that the CAO-ZR Contract was a sham or fraudulent transaction.[202] Indeed, as I explained above (at [Fifth, the findings of the then court-appointed interim judicial managers of Zenrock ("IJMs") in several

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202 DCS at para 70.

reports (the "IJM Reports") supported the view that the same BL was used in both the Series A and Series B transactions. Further, despite CAO's objections, the IJM Reports are admissible.]), BCP maintains that the findings in the IJM Reports are important in showing, among other things: (a) that there was no physical delivery of the Cargo in the Series B transactions; and (b) that Zenrock had participated in transactions involving double financing which bear the same characteristics as the CAO-ZR Contract.[203]

114 At this juncture, it is useful to set out exactly what the IJM Reports consist of. They are:[204]

(a) A set of updated slides referred to as "Slides on *Petrolimex 18* transaction from Zenrock IJM" ("*Petrolimex 18* Slides");

(b) A report referred to as "IJM's Report to Bank Creditors dated 1 June 2020" ("IJM 1 June Report"); and

(c) A report referred to as "Interim Judicial Manager's Report dated 9 July 2020" ("IJM 9 July Report").

115 Having set out the IJM Reports, I now deal with a preliminary matter. Leaving aside BCP's position as stated in its closing submissions, some of BCP's witnesses appear to be inconsistent as to the importance of the IJM Reports. For example, Mr Oce filed an affidavit on 8 November 2021 in response to CAO's application for specific discovery to state that "KPMG's opinion has no bearing on the present proceedings, particularly since KMPG

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203 PCS at para 118.

204 Affidavit of Evidence-in-Chief of Mr Alexandre De Kalbermatten dated 23 May 2023 ("ADK") at p 14.

[*sic*] is not the arbiter of the existence of the Cargo and/or whether the CAO-ZR Contract was a sham and/or fraud".[205] Yet, at trial, Mr Oce asserted that the IJM Reports were "the backbone of [BCP's] strategy".[206] In contrast to Mr Oce's latest position, Mr Kalbermatten stated at trial that BCP did not "believe that it needs to rely on these IJM reports to prove its case".[207]

116 Leaving aside BCP's apparent uncertainty about the importance of the IJM Reports to its case, I turn to the question of admissibility. While BCP has characterised the admissibility of the IJM Reports as an "ancillary issue" that it addressed only briefly at the tail-end of its closing submissions,[208] I would have thought that the admissibility of these Reports is an important threshold point. Indeed, the rules of evidence exist to ensure, among other things, that the best evidence is adduced for trial. Accordingly, before BCP can even rely on the contents of these IJM Reports, it needs to explain why they should be admitted into the evidence.

117 In the event, I find that the IJM Reports are inadmissible. In saying this, I do not deal with the authenticity of the IJM Reports, which CAO and GBE both dispute. While I am inclined towards the view that BCP has not proved the authenticity of the IJM Reports, I base my conclusion that they are inadmissible on a finding that they are hearsay evidence, as I elaborate below. But even if the IJM Reports were admissible, I find that they would not show that the CAO-

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205 Affidavit of Mr Engin Oce dated 8 November 2021 filed in HC/SUM 4685/2021 ("SUM 4685 Affidavit") at para 15(b).

206 Certified Transcript 18 August 2023 at p 30 lines 2–11.

207 Certified Transcript 23 August 2023 at p 110 lines 2–3.

208 PCS at paras 322–324.

ZR Contract was a sham or fraudulent transaction. I now explain the reasons for these conclusions.

(1) The IJM Reports are inadmissible

118 It is trite law that even if the authenticity of a document is proved, the document sought to be adduced into evidence must still be admissible (see the Court of Appeal decision of *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 at [75]). In this regard, I do not think it can be disputed that the IJM Reports are hearsay, or even double hearsay. This is because BCP has not called KPMG, the maker of the IJM Reports, to testify, and no witness whom BCP has called actually has first-hand knowledge of the matters contained in the IJM Reports. Moreover, even KPMG does not have first-hand knowledge of the transaction. In the "Basis of Information/[preparation]" section, which prefaces each of the IJM Reports, KPMG expressly states that their "primary source of information" was, among others, Zenrock's books and records, explanations and representations made available to KPMG, and information and records provided by Zenrock's bank creditors.[209] Thus, unless BCP can show that the IJM Reports fall within the "exceptions" to the general inadmissibility of hearsay evidence under s 32 of the Evidence Act 1893 (2020 Rev Ed) ("EA"), the Reports will not be a relevant fact that is admissible by s 5 of the same Act.

119 But before I even deal with whether BCP has successfully invoked the "exceptions" under s 32 of the EA, I consider GBE's argument that BCP has failed to satisfy the notice requirements under O 38 r 4(1) of the ROC 2014 for

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[209] ADK at pp 15, 19, and 41.

the purposes of admitting hearsay statements in evidence.[210] By O 38 r 4(1), BCP must serve a notice in writing in Form 66B on each of the other parties of its intention to introduce the evidence that is contained in the AEIC of the witness through whom the statement is to be admitted. Further, BCP must serve this notice no later than two weeks after the service of the AEIC of the witness through whom the statement is to be admitted, or at such other time as the court may allowed. Finally, BCP must state on which of the grounds in s 32(1) of the EA it claims that the statement is admissible. The purpose of this provision to provide BCP's counterparties with early warning of BCP's intent to rely on hearsay evidence, which gives them more time to consider their position and make arguments on whether the s 32(1) exception is satisfied or not (see the High Court decision of *Lim Julian Frederick Yu v Lim Peng On (as executor and trustee of the estate of Lim Koon Yew (alias Lim Kuen Yew), deceased) and another* [2024] SGHC 53 at [102], albeit in the context of the equivalent provision in the Rules of Court 2021).

120 In the present case, BCP only served the requisite notice on the first day of trial, which is indisputably more than two weeks after any of its witnesses' AEIC was served on the other parties. In this regard, the High Court had in *Geocon Piling & Engineering Pte Ltd (in compulsory liquidation) v Multistar Holdings Ltd (formerly known as Multi-Con Systems Ltd) and another suit* [2016] SGHC 240 (at [186]) declined to express any view on the applicability of s 32(1)(*b*) of the EA in light of the defendant's failure to comply with the notice requirements in the ROC 2014. I adopt the same approach. This means that BCP's failure to comply with the notice requirements in the

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[210] 4PCS at para 136.

ROC 2014 automatically renders the IJM Reports effectively inadmissible, since the court will not consider the application of s 32(1)(*b*) in the absence of compliance with the requisite notice requirements.

121 But even if I were prepared to consider BCP's belated attempt to rely on s 32(1)(*b*) of the EA as the relevant "exception" by which to admit the IJM Reports into evidence, I would have found that the Reports are inadmissible. To begin with, the rationale for the "business records exception" embodied in s 32(1)(*b*) is that a statement made in the ordinary course of business is a record of historical fact made from a disinterested standpoint and may therefore be presumed to be true (see the High Court decision of *Management Corporation Strata Title Plan No 3556 (suing on behalf of itself and all subsidiary proprietors of Northstar @ AMK) v Orion-One Development Pte Ltd (in liquidation) and another* [2020] 3 SLR 373 at [22]). To give effect to this rationale, for the statements to be made in the ordinary course of business, the statements must be made contemporaneously with the facts which have occurred, or as soon as the exigencies of the situation will permit (see M C Sarkar, et al, *Sarkar's Law of Evidence*, Vol I (Wadha Nagpur, 16th Ed, 2009) at pp 804–805).

122 Applied to the present case, the IJM Reports were, as Mr Oce said on affidavit, *not* produced contemporaneously with the underlying transactions, including the CAO-ZR Contract.[211] As such, BCP cannot invoke s 32(1)(*b*) of the EA to admit the IJM Reports into the evidence. Accordingly, I do not admit

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211 SUM 4685 Affidavit at para 15.

the IJM Reports into the evidence. BCP therefore cannot rely on their contents in support of its case.

(2) Even if the IJM Reports were admissible, they do not show that the CAO-ZR Contract was a sham or fraudulent transaction

123 For completeness, even if the IJM Reports were admissible, I would have found that they are not reliable in showing that the CAO-ZR Contract was a sham or fraudulent transaction. First, the IJM Reports contained numerous disclaimers and restrictions on the use of those Reports. For example, each of the IJM Reports contains a comprehensive disclaimer stating, among other things, that the information set out therein does not constitute an audit. More specifically, the IJM 1 June Report and the *Petrolimex 18* Slides[212] expressly state that they are issued solely to provide an update on the progress of Zenrock's interim judicial management and are not to be used for any other purpose. Thus, the contents of the IJM Reports cannot be relied upon to show that the CAO-ZR Contract was a sham or fraudulent transaction. At the very least, the IJM Reports are not meant to be conclusive findings of fact that can be reasonably relied on in court proceedings. Indeed, Mr Kalbermatten agreed with Mr Toh that from the disclaimers in the IJM Reports, the IJM Reports "do not shed any light on whether the CAO-Zenrock [C]ontract was a sham and/or amounted to a fraud".[213]

124 Second, as Mr Kalbermatten admitted during cross-examination, BCP did not know what information, records, and documents were provided to

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212 ADK at pp 15 and 19.

213 Certified Transcript 22 August 2023 at p 103 lines 2–10.

KPMG to create the IJM Reports, and did not ask KMPG for a list thereof.[214] Therefore, it is not clear, to both BCP and me, as to the basis KPMG had used to come to those findings. This leaves me unable to assess the correctness of KPMG's findings, which exacerbates the difficulty of relying on the IJM Reports as a basis to prove that the CAO-ZR Contract was a sham or fraudulent transaction.

125 Accordingly, given these disclaimers and inherent limitations of the IJM Reports, I would have found that they are not reliable in showing that the CAO-ZR Contract was a sham or fraudulent transaction. The result is that BCP either cannot rely on the IJM Reports or that, even if they could, the Reports would be of no assistance to its case.

The CAO-ZR Contract took place against the broader Series A transactions

126 To recapitulate, I have already concluded that the evidence shows that CAO intended to enter into genuine contracts even if, among other things, the CAO-ZR Contract was part of a circular trade. I have also found that Mr Goh's expert evidence does not disprove CAO's intention to enter into genuine contracts. I have now found that the IJM Reports likewise do not disprove CAO's intention in that regard. Therefore, I maintain my view that CAO intended to enter into genuine contracts and that the CAO-ZR Contract is not a sham or fraudulent transaction. However, beyond finding that the CAO-ZR Contract is not a sham or fraudulent transaction, it is helpful for me to make a finding as to how the CAO-ZR Contract was situated in relation to the other transactions. Specifically, I will now explain why I prefer CAO's and GBE's

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[214] Certified Transcript 22 August 2023 at p 86 line 9 to p 87 line 6.

account that the CAO-ZR Contract took place against the broader Series A transactions.

(1) Series A and Series B formed a single chain of contracts

127 Before I begin my analysis, I set out again what BCP has termed the "Series A" transactions and the "Series B" transactions as follows:

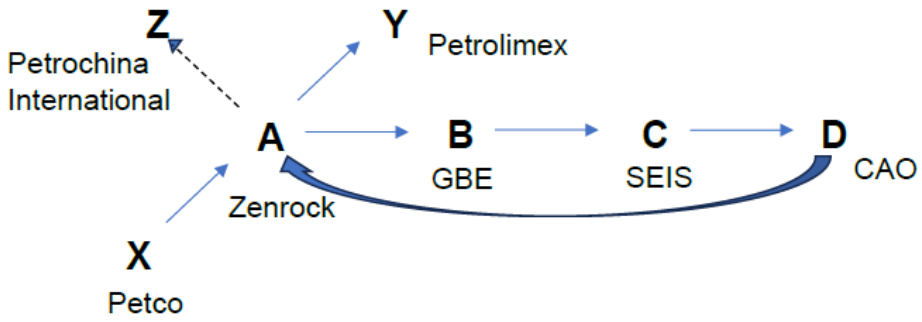
Series A: Petco → Zenrock → Petrolimex

Series B: Zenrock → GBE → SEIS → CAO → Zenrock

For the reasons that follow, I reject BCP's position that Series A and Series B are mutually exclusive such that the real Cargo and title only passed through Series A. Instead, I find that Series A and Series B are, in fact, a single chain of contracts, or a chain containing a circle-out, as follows (the "A-B-A Title Flow theory"):

Petco → Zenrock → GBE → SEIS → CAO → Zenrock → Petrolimex

Or



128 First, the A-B-A Title Flow theory is supported by the interaction between the various clauses in the relevant contracts concerning the point in time when title in the Cargo passes. Clause 15 of the ZR-Petrolimex Contract (*ie*, connection A-Y in the diagram above) provides that title in the Cargo passed only upon receipt of the full contract price.[215] Under cl 9 of the ZR-Petrolimex Contract, payment was due only 30 days after the bill of lading date; also, the letter of credit that Petrolimex caused to be issued in favour of Zenrock provided that it was available by negotiation 30 days after the bill of lading date.[216]

129 Crucially, the point of time in which title passed between Zenrock and Petrolimex (*ie*, connection A-Y) is a different point in time from, and subsequent to, the point at which title in the Series B transactions passed (*ie*, the circle-out in the diagram above). Under the terms of the originating Petco-ZR Contract, as well as the other Series B contracts, title passed as the Cargo passed the flange connecting the delivery terminal's hose and the vessel's intake manifold at the loading terminal[217] (or to put it loosely, when the Cargo was loaded). Thus, when the Cargo was loaded on board the "*Petrolimex 18*", title had passed from Petco to Zenrock, and then instantaneously (and sequentially) passed through all of the parties in Series B, which are GBE, SEIS, and CAO. The title then finally reverted back to Zenrock. The effect of this arrangement was that Zenrock was re-vested with good title to the Cargo from CAO, so that it could pass title to Petrolimex pursuant to the ZR-Petrolimex Contract upon the receipt of full payment from Petrolimex. Accordingly, title in the Cargo

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215 Agreed Bundle of Documents in HC/SUM 178/2022, Vol 2 at p 1403.

216 Agreed Bundle of Documents in HC/SUM 178/2022, Vol 1 at p 339.

217 *Eg*, cl 11 of the CAO-ZR Contract, at 1 DCB at p 56.

passed from Zenrock to Petrolimex only 30 days *after* the bill of lading date. In other words, the point of time at which title passed from Zenrock to Petrolimex (A-Y in the diagram above) under Series A was subsequent to, and different from, the point in time when title passed under the transactions in Series B. Therefore, the two series are not mutually exclusive to each other, and it is entirely possible for the CAO-ZR Contract to be a genuine contract taking place against the Series A transactions.

130 For completeness, I reject BCP's argument that the A-B-A Title Flow theory is not possible because the full ZR-GBE and GBE-SEIS Sale Contracts had not yet been concluded at the time that title passed under the Series B contracts.[218] I prefer CAO's argument that the mere fact that additional terms were not yet agreed does not disprove that binding agreements between Zenrock and GBE, as well as GBE and SEIS, had been concluded.[219] As Sundaresh Menon CJ put it in the Court of Appeal decision of *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 (at [52]):

> … it is not uncommon for parties to first agree on a set of essential terms which the parties may be bound by as a matter of law and on the basis of which they may act, even while there may be ongoing discussions on the incorporation of other usually detailed terms. The fact that the latter issue has yet to be resolved does not prevent the contract based on the essential core terms from coming into existence. Put another way, even if the parties are eventually unable to agree on the remaining terms, it does not necessarily follow that no contract will be found to have been concluded upon the agreed essential terms …

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218 PCS at paras 128−130.

219 DRS at para 118.

In the present case, the "essential terms" had already been agreed by way of deal recaps prior to title passing under Series B. Therefore, the lack of complete agreement on all terms of the relevant contracts does not disprove the correctness of the A-B-A Title Flow theory.

131 Second, I find it likely that Zenrock had good commercial reasons to structure the transaction in the manner above, though I caveat that I cannot make a conclusive finding to this effect as Zenrock is not part of this Suit. Indeed, as I explained above (at [70]), Zenrock likely structured Series A and Series B in this manner to obtain liquidity of funds while trading. Given that Zenrock was able to obtain this benefit legally, it did not need to create a fraudulent circular trade to obtain the same by illegal means. Indeed, I agree with GBE that if Zenrock's goal was purely to defraud BCP, it need not have arranged this elaborate circular trade. It could have, for instance, simply used forged shipping documents and a counterfeit bill of lading to obtain financing from BCP.[220] Indeed, both Mr Goh and Mr Slovenski agreed, albeit without the benefit of Zenrock being involved in these proceedings, that there was no reason why Zenrock would have orchestrated a sham circular trade in Series B, when it could have performed both the Series A and Series B contracts legitimately.[221]

132 Third, in my view, which is again not conclusive as I do not have the benefit of Zenrock being involved in these proceedings, Zenrock's fraud was likely perpetrated not at the point of the CAO-ZR Contract, but afterwards. In this regard, Zenrock's fraudulent misrepresentation to BCP, when applying for

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220 4PCS at para 56.

221 Certified Transcript 20 September 2023 at p 109 line 7 to p 110 line 9.

the LC, was that it had sold the Cargo purchased from CAO to PetroChina, and that it had assigned the proceeds of this non-existent sale to BCP Geneva.[222] This is evidenced by the term sheet that BCP Geneva's Mr Anil Gun emailed to Zenrock on 21 January 2020 at 2.44pm. Assuming that Zenrock affirmed the contents of this term sheet, it stated that the Cargo had been "Pre-sold, sales on [a] o/a basis to a subsidiary of a Major Counterparty [*ie*, PetroChina]" with "Matching payment terms".[223] The payment for Zenrock's purchase of the Cargo was to be made under the LC on a deferred payment basis, that is, 45 days after the bill of lading date. In turn, PetroChina would make payment of its purchase of the Cargo on an open account basis, also 45 days after the bill of lading date. It was also stated in the term sheet that Zenrock would assign to BCP Geneva the proceeds arising from the sale to PetroChina ("PetroChina Sale Proceeds").

133 As it turned out, Zenrock sold the Cargo not to PetroChina, but to Petrolimex. This came to light when PetroChina did not pay the PetroChina Sale Proceeds into Zenrock's account with BCP on 12 March 2020. In response, Zenrock obtained two extensions of time from BCP for payment to be made by 26 April 2020.[224] But when PetroChina failed to make payment on 26 April 2020, BCP Dubai issued a Notice of Default to PetroChina on 28 April 2020.[225] However, PetroChina claimed in an email dated 29 April 2020 that its contract with Zenrock had been cancelled and that no payment would be made.[226]

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222 Plaintiffs' Bundle of Documents Volume 1 ("1 PBOD") at p 357.

223 1 PBOD at p 503.

224 OCE at paras 111–114.

225 OCE at para 123.

226 OCE at pp 741 and 743.

134 It appears that Zenrock had created a trail of contracts for a purported sale of the Cargo to PetroChina that was ultimately cancelled. To begin with, prior to GBE's purchase of the Cargo from Zenrock, GBE entered into the Tripartite Agreement on 20 January 2020 with Zenrock and PetroChina. By this Agreement, Zenrock was to have sold the Cargo to PetroChina, and then from PetroChina to GBE (the "PetroChina Deal") under contracts dated 19 January 2020 between Zenrock and PetroChina ("ZR-PetroChina Contract") and between PetroChina and GBE. However, after the contracts under the PetroChina Deal were executed, Zenrock's Mr Zhang Taiming informed GBE's Ms Guan Yuyin on 20 January 2020 that the PetroChina Deal had been cancelled.[227] Thus, the Cargo was never sold by Zenrock to PetroChina, nor from PetroChina to GBE, pursuant to the PetroChina Deal. Instead, Zenrock purchased the Cargo from Petco, which was then cycled through the Series B contracts before it was sold back to Zenrock, who then transferred title to Petrolimex instead of PetroChina as it had represented to BCP. Accordingly, Zenrock's apparent fraud laid in informing BCP that it had pre-sold the Cargo to PetroChina, and maintaining this misrepresentation, when the PetroChina Deal, including the ZR-PetroChina Contract, had already been cancelled on 20 January 2020. In other words, by maintaining the misrepresentation to BCP that the Cargo had been sold to PetroChina (the original buyer) despite knowing that said deal had already been cancelled, Zenrock acted in a manner that appeared fraudulent.

135 Accordingly, for all the reasons above, I find CAO's and GBE's account of how the CAO-ZR Contract was situated within a longer chain comprising

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227 Affidavit of Evidence-in-Chief of Ms Guan Yuyin dated 17 May 2023 at para 40.

Series B and Series A transactions to be preferable. This account is preferable to BCP's position that only the Series A transactions were genuine. As I have explained, the A-B-A Title Flow theory is supported by: (a) the different clauses in relation to the timing of the transfer of title which, taken together, explain how Series A can legitimately take place after Series B; (b) the fact that Zenrock was more likely to have set up Series A and Series B as a single chain of contracts for legitimate commercial reasons; and (c) the fact that Zenrock's fraud was really at the transaction at the end of Series A, when it wrongly misrepresented to BCP that it sold the Cargo to PetroChina when it had in fact transferred title to Petrolimex. However, this does not mean that the physical Cargo never existed, nor does it preclude title to the Cargo flashing through the parties in Series B before reverting back to Zenrock for it to transfer title to Petrolimex at the end of the Series A transactions.

(2) Mr Goh's contrary view is not convincing

136 In my view, Mr Goh's contrary view that Series A and Series B could not have formed a single chain of contracts is not convincing. First, Mr Goh opined that title could not have passed from Petco to Zenrock to the other parties in Series B because the party holding the bills of lading would have title to the Cargo.[228] However, as CAO submits, Mr Goh's view is premised on a misunderstanding of the function of a bill of lading as a document of title. Thus, the lawful holder of a bill of lading obtains constructive possession of the goods by virtue of a transfer to it of the bills, but not necessarily title to the goods (see

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228 Certified Transcript 19 September 2023 at p 40 lines 2–25.

the High Court decision of *The "Yue You 902" and another matter* [2020] 3 SLR 573 at [35]).

137 Second, Mr Goh opined that "double financing" rendered the circle out in Series B illegitimate.[229] However, Mr Goh also agreed that Zenrock was the only party who had engaged in double-financing.[230] Therefore, the fact of any double financing is not relevant in determining whether CAO intended to enter into a genuine contract in terms of the CAO-ZR Contract. Further, Mr Goh also agreed that, assuming there were two instances of double financing, one each by Natixis and BCP, the two banks had in fact financed different legs of Series B, namely, Natixis for Petco to Zenrock, and BCP for CAO to Zenrock. Importantly, both legs involved genuine title transfers.[231]

138 Third, and ultimately, Mr Goh effectively agreed, after being shown examples of strings and circular trades by Mr Toh, that it was entirely possible for Zenrock to have entered into a circle out with GBE, SEIS, and CAO, such that title is passed down through those parties, then back to Zenrock, and thereafter to Petrolimex 30 days after the bill of lading date.[232] Thus, Mr Goh agreed that the Series A and Series B transactions were not mutually exclusive, which diminishes his view that the Series B transactions were shams.

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229 Certified Transcript 19 September 2023 at p 95 line 21 to p 96 line 10.

230 Certified Transcript 19 September 2023 at p 97 lines 17–25.

231 Certified Transcript 20 September 2023 at p 112 line 25 to p 113 line 17.

232 Certified Transcript 19 September 2023 at p 94 lines 5–23; Certified Transcript 20 September 2023 at p 69 line 16 to p 70 line 3; p 109 line 25 to p 110 line 5.

139 Accordingly, I disagree with Mr Goh's contrary view that Series A and Series B could not have formed a single chain of contracts.

(3) CAO did not know of any of the Series A transactions

140 For all the reasons above, I find that the CAO-ZR Contract took place against the broader Series A transactions, so that Series A and Series B formed a single chain of contracts. Even so, there was no evidence led by BCP that disproved CAO's evidence that CAO was unaware of and did not have any knowledge of the parties in both Series A and Series B, except for its seller, SEIS, and its buyer, Zenrock.[233] As such, CAO could not be complicit in some scheme involving a fictitious chain of contracts for Zenrock to obtain double financing from and defraud BCP.

Consequences of my finding that the CAO-ZR Contract was not a sham or fraudulent transaction

141 In sum, I conclude that the CAO-ZR Contract was not a sham or fraudulent transaction. This will affect BCP's various causes of action against CAO, such as: (a) whether CAO made any alleged representations and warranties fraudulently in relation to the CAO-ZR Contract; (b) whether there was a total failure of basis; and (c) whether CAO was part of an alleged conspiracy with Zenrock to defraud BCP.[234]

142 With this overarching factual finding in mind, I turn now to consider CAO's liability in relation to BCP's substantive causes of action against it.

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233 LYS at para 21.

234 DCS at para 56.

Whether BCP can rely on the fraud exception despite not pleading it

The parties' arguments

143 In its closing submissions, BCP raised the fraud exception that originated from *United City Merchants* for the first time in these proceedings. BCP's position is that because CAO made a misrepresentation in the CAO LOI that bills of lading issued or endorsed to the order of BCP Dubai existed, CAO therefore made a fraudulent presentation (presumably to UBS) because it knew it was false and/or did not have a belief in its truth.[235] BCP therefore submits that this case falls within the fraud exception, in that, if BCP had found out before it paid out under the LC that the presented documents contained false representations that CAO knew were untrue, it (BCP) would not have been obligated to pay out under the LC. The same analysis would apply to UBS, in that if UBS as the confirming bank had been put on notice or discovered that CAO had fraudulently made false representations, it would similarly have been entitled to reject payment.[236] Put this way, it appears that BCP has equated the elements needed to fulfil the tort of deceit with those needed to invoke the fraud exception. I set out the elements of these torts at [147] and [148] below. That said, it also appears that BCP has simultaneously taken the alternative view that there are additional elements in the tort of deceit that do not exist for the fraud exception.[237] For example, BCP points out that "[t]he tort of deceit [*ie*, its cause of action in fraudulent misrepresentation] also requires *additional* elements to

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235 PCS at para 53.

236 PCS at para 53.

237 PCS at para 58.

be fulfilled, namely, the Intention Element and the Reliance Element, which are not present in the Fraud Exception" [emphasis added].[238]

144 In any event, BCP argues that the presence of a confirming bank does not affect the principle that fraud unravels all; after all, it would be unjust and unsatisfactory where only a confirming bank can rely on the fraud exception despite the fact that documents presented to the confirming bank are presented for the specific purpose of drawing on the issuing bank's letter of credit. This is because it is ultimately the issuing bank which suffers the loss that arises from any fraudulent presentation of documents. Thus, the maxim, *ex turpi causa non oritur actio*, should not be limited by the presence of a confirming bank in a letter of credit transaction that consists of interconnected contracts.[239] Accordingly, BCP is entitled, pursuant to the fraud exception, to recover payment that has already been made.[240]

145 In response, both CAO and GBE point out that BCP had never pleaded its reliance on the fraud exception until its closing submissions. Thus, CAO and GBE submit that BCP's reliance on the exception should be disregarded. This is because, among other reasons, the juridical basis of the deceit is different from that of the fraud exception.[241] As such, BCP is effectively putting forward a fresh, unpleaded allegation of fraud, which seeks to get around the requirements for establishing the tort of deceit (on which BCP's cause of action

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238 PCS at para 58.

239 PCS at para 55.

240 PCS at para 53.

241 DRS at para 56 and 4th Party's Reply Submissions ("4PRS") at paras 19–20.

in deceit is founded upon).[242] Also, if BCP is allowed to proceed on the basis of the fraud exception, it would lead to irreparable prejudice to CAO, SEIS, and GBE that cannot be compensated by costs. This is because, among other reasons, CAO would have pleaded differently in response to an averment based on the fraud exception.[243]

146 In any event, even if BCP were allowed to rely on the fraud exception, it has mischaracterised the elements of the exception.[244] When the correct elements of the fraud exception are considered, it will be clear that BCP has not satisfied them.[245] In particular, CAO objects to BCP's reliance on the so-called "expanded test" for the fraud exception in the High Court decision of *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another suit* [2023] SGHC 220 ("*Winson Oil*") at [23], in that the fraud exception may be invoked if the beneficiary made a false representation *recklessly*, without caring whether it to be true or false. But even if this expanded test were applied, it still would not be satisfied on the facts.[246]

The applicable law

147 Leaving the question of whether BCP should be allowed to rely on the fraud exception in the first place, I turn first to the applicable law, starting with the elements of the fraud exception. The Court of Appeal in *CACIB (CA)* (at

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242 DRS at para 58.

243 DRS at para 60; 4PRS at para 23.

244 DRS at para 61.

245 DRS at para 65; 4PRS at para 25.

246 DRS at para 67.

[20]) and *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 ("*UniCredit (CA)*") (at [16], [44], and [48]) defined the fraud exception as arising in a situation where a beneficiary, for the purpose of drawing on a letter of credit, "fraudulently presents to the issuing or confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue". Thus, as summarised in an academic textbook, the following elements must be proved to invoke the fraud exception (see *The Independence Principle of Letters of Credit and Demand Guarantees* (Oxford University Press, 2011) at para 5.12):

(a) the beneficiary must have made a material false representation;

(b) the beneficiary must have known that the representation was false or did not have an honest belief that it was true; and

(c) the bank is likely to act on the false representations or has acted on it and has suffered loss as a result.

148 The Court of Appeal in *UniCredit (CA)* explained (at [16]) that "the juridical basis of the tort of deceit is different from the fraud exception to the principle of autonomy of credit". Thus, while both the tort of deceit and the fraud exception are concerned with fraud, the tort of deceit deals with the parties' private interests vis-à-vis each other not to be lied to. In contrast, the fraud exception is founded on the broad public policy that fraud should unravel all. Although this may be the case, the elements required to invoke the fraud exception are similar to those needed to maintain a cause of action in the tort of deceit, which are (see the Court of Appeal decision of *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]):

(a) a false representation of fact was made by words or conduct;

(b) the false representation was made with the intention that it be acted upon by the representee or a class of persons which included the representee;

(c) the representee had acted on the false representation;

(d) the representee had suffered damage by doing so; and

(e) the false representation was made with the knowledge that it was false, either wilfully or in the absence of any genuine belief that it was true.

For completeness, I note that the parties appear to accept that there exists a cause of action in "fraudulent misrepresentation". I understand from Gary Chan and Lee Pey Woan, "False Representations", *The Law of Torts in Singapore* (Gary Chan ed) (Academy Publishing, 2nd Ed, 2015) at para 14.001 that it is more accurate to say that the making of a false representation is an *element* of a number of torts, including deceit, malicious falsehood, and passing off. This explains why I do not accept that there exists a tort of "fraudulent misrepresentation", and why I interpret all references thereto, to instead be references to the tort of deceit.

149 Moving on from these general principles, I make a number of observations in relation to BCP's submissions on the applicable law.

150 First, contrary to BCP's submissions, the elements of a misrepresentation, such as inducement, reliance, and resulting damage, remain applicable to invoke the fraud exception. More specifically, it is not correct that

BCP need not establish the intention and reliance elements to invoke the fraud exception. Thus, the English High Court in *Rafsanjan Pistachio Producers Co-Operative v Bank Leumi (UK) plc* [1992] 1 Lloyd's Rep 513 (at 541) considered if there was any intention on the beneficiary's part to deceive the bank concerned. Moreover, the court also rejected (at 542) the submission that there can be no reliance on the misrepresentation where the presented documents were rejected. In doing so, the court held that the bank had to rely on any alleged misrepresentations in the presented documents. Therefore, the elements needed to invoke the fraud exception are not fewer than those needed to establish the tort of deceit. BCP cannot be allowed to gain an advantage by invoking the fraud exception which it had never pleaded before.

151 Second, again, contrary to BCP's submissions, the fraud exception requires that any misrepresentation be made by the beneficiary to the bank. The Court of Appeal made this clear in *UniCredit (CA)* (at [47]) in the following terms:

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

Thus, in that case, the issuing bank's claim in misrepresentation failed because the beneficiary's letter of indemnity had been addressed not to the issuing bank, but to the applicant of the letter of credit.

152 Indeed, BCP's reliance on the High Court decision of *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 ("*DBS Bank*") is misplaced. BCP relies on *DBS Bank* for the principle that there is no requirement that the

presented document must have been addressed to the bank. There, BCP points out that the issuing bank successfully relied on fraudulent misstatements contained in a delivery order and packing lists of fictional goods that were made out to the buyer of the goods, but presented to the issuing bank.[247] However, I agree with GBE that the real issue is whether a representation was made *to the bank*, as opposed to whom the documents were addressed to.[248] Seen from this perspective, *DBS Bank* can be sensibly distinguished because the delivery orders and the packing lists were created to satisfy the issuing bank's requirements for payment. The documents therefore constituted representations directed to the bank, although the documents were on their face addressed to the buyer. Thus, the true issue in that case remained whether a representation was made to the bank, as it ought to be in the present case as well.

153 Third, and once again, contrary to BCP's submission in so far as this point is made, the fraud exception does not exclude the contextual interpretation of the relevant documents presented. In this regard, the phrase "on the face" of the documents, as used in the case law (see *eg*, *United City Merchants* at 183D) does not prescribe that a literal interpretative approach be taken in construing the impugned representations. Rather, this expression simply reflects the autonomy principle, that is, that banks deal with documents and not goods, services or performance to which the documents may relate (Art 5 of UCP 600). For context, I set out the full passage from *United City Merchants* (at 183D−F):

> Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, "deal in documents and not in goods,"

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247 PCS at para 52.

248 4PRS at paras 30–31.

> as article 8 of the Uniform Customs puts it. If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price.

154 Fourth, in so far as BCP relies on the expanded test for the fraud exception in *Winson Oil*, in that the fraud exception may be invoked if the beneficiary made a false representation *recklessly*, without caring whether it to be true or false, I find that it is not necessary for me to decide whether this is correct as a matter of principle in the present case. Since, as CAO points out, neither the SICC in *CACIB (SICC)* nor the Court of Appeal in *CACIB (CA)* referred to or adopted this expanded test, I cannot determine whether the courts in that case considered the correctness of the expanded test. It is simply not possible to make an inference in this regard based on the court's inaction. Also, while the parties do not agree that the expanded test should apply, none of the parties have made detailed submissions on this point that are premised on principle. Finally, it is not necessary for me to decide the point to resolve matters in the present case because, as I will explain below, I find that BCP fails to invoke the fraud exception even on the expanded test in *Winson Oil*.

155 With the applicable law in mind, I turn to the facts of the present case.

My decision: BCP cannot rely on the fraud exception

156 In my judgment, BCP cannot rely on the fraud exception for the following reasons.

BCP did not plead the fraud exception and its reliance on it would prejudice the other parties

157 To begin with, BCP never pleaded the fraud exception. While the elements needed to invoke the fraud exception are similar to those needed to establish the tort of deceit, the fact remains that the fraud exception is a distinct cause of action premised on a different juridical basis (see *UniCredit (CA)* at [16]). Indeed, the Court of Appeal in *UniCredit (CA)* rejected the plaintiff's attempt to "blend" the fraud exception with the principles of the tort of deceit so as to establish a representation by the beneficiary in its letter of indemnity presented for payment under a letter of credit.

158 In the present case, BCP cannot be allowed to rely on the fraud exception because CAO might have pleaded its defence differently in response to an averment based on the fraud exception. For example, CAO might have pleaded matters to meet BCP's contention that representations are taken "on the face of" documents since BCP trades on documents.[249] CAO might also have cross-examined BCP's witnesses on issues such as how they relied on the "factual state of affairs on the face of the documents".[250] In short, it would prejudice CAO and the other parties if BCP were allowed to belatedly rely on the fraud exception which it never pleaded.

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249 DRS at para 60(a).

250 DRS at para 60(b).

In any event, BCP would not satisfy the elements of the fraud exception

159 In any event, BCP would not be able to invoke the fraud exception. This is because I find that BCP cannot satisfy even the expanded test advanced in *Winson Oil*. In particular, as I have discussed above, the various steps that CAO took leading to the issuance of the CAO LOI shows that it could not have made its representations, if at all to BCP, in a reckless manner. Indeed, in *Winson Oil*, Winson unreasonably failed to undertake various appropriate steps that were expected of it (at [163]−[164]). For instance, Winson did not appoint any independent inspector (at [69]), did not obtain copies of other shipping documents other than the bill of lading (at [79]), and presented documents for payment before confirming the performing vessel (at [90]). In contrast, CAO did undertake these operational steps, such as the appointment of Inspectorate as an independent inspector. Thus, it cannot be said that CAO was reckless as to any representations that it made to BCP, if at all.

160 Moreover, the CAO LOI and the CAO Invoice were addressed to Zenrock, and not BCP. They were issued pursuant to cl 8 of the CAO-ZR Contract to allow CAO to receive payment from Zenrock under the CAO-ZR Contract. Much like the situation in *UniCredit (CA)* (at [57]), the fact that the CAO LOI and the CAO Invoice were addressed to Zenrock would have made it clear to any reasonable bank in BCP's position "not only what the nature of the document was, but also that its contents were not directed at and promised to" BCP. Indeed, the CAO LOI and the CAO Invoice were never even presented to BCP, but to UBS as the confirming bank. BCP cannot invoke the fraud exception on the basis of documents that were neither addressed to nor

presented to BCP. This outcome is not unjust as BCP suggests.[251] Indeed, BCP as the issuing bank could have relied on the fraud exception to refuse reimbursement to UBS or recover payment from UBS if there was fraud on the face of the documents. The protection afforded by the fraud exception is not illusory simply because BCP's recourse lies elsewhere apart from CAO.

161 For all of these reasons, I find that BCP's reliance on the fraud exception, in support of its claim against CAO, fails.

Whether CAO is liable in deceit to BCP

The parties' arguments

162 BCP's position is that the CAO Invoice and the CAO LOI, each on its own or collectively, contained the following representations and warranties (collectively, the "Representations and Warranties", as defined above at [25(b)]):[252]

(a) CAO represented and warranted the "existence, authenticity and validity" of documents which included the "full set of signed bill of lading issued or endorsed to [BCP Dubai] (the 'BCP OBLs')" (the "Existence, Authenticity, and Validity Representation").

(b) CAO represented and warranted that it was entitled to possession of the documents which included the BCP OBLs (the "Possession of Documents Representation").

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251 PCS at paras 36–40.

252 PCS at para 68.

163 In addition, BCP submits that CAO made other express representations and warranties about the Cargo, as follows:[253]

> (a) that CAO was (immediately prior to the Cargo coming into Zenrock's possession) entitled to possession of the Cargo;
>
> (b) that CAO had (immediately before title passed to Zenrock) good title to the Cargo; and
>
> (c) that title in the Cargo had passed to Zenrock free from all liens, securities, charges, or encumbrances of any kind and Zenrock would have the benefit of the warranty as to enjoyment of quiet possession implied by law in the CAO-ZR Contract but without prejudice to any other warranty so implied.

164 Further, BCP argues that, by presenting the CAO LOI and the CAO Invoice (presumably to UBS), CAO also represented, among other things, that: (a) CAO had entered into the CAO-ZR Contract; (b) the Cargo had been loaded onto the "*Petrolimex 18*"; and (c) there was going to be physical delivery of the Cargo from CAO to Zenrock.[254]

165 Crucially, to succeed in deceit, BCP will need to show that CAO had made the Representations and Warranties either: (a) knowing that they were false; (b) without belief in their truth; or (c) recklessly, carelessly, whether they be true or false. In this regard, BCP's position is that CAO knew, or ought to have known, among other things, that there was no actual Cargo (or title to such

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253 PCS at para 69.

254 PCS at para 70.

Cargo) that was being passed through or delivered down the chain from SEIS, to CAO, to Zenrock, and that there were no BCP OBLs. Indeed, CAO only had sight of a copy of the NN BL before it issued the CAO LOI.[255] Underpinning this position is BCP's interpretation of the Existence, Authenticity, and Validity Representation found in the CAO LOI,[256] which can be described as a literal interpretation thereof.

166 Following from this, BCP also asserts that CAO made the false representations with the intention that they should be acted upon by BCP. Thus, by presenting the CAO Invoice and the CAO LOI to draw on the LC issued by BCP Geneva, CAO intended BCP to make payment pursuant to the LC. BCP then later acted on the Representations and Warranties when it had to honour and make payment under the LC. In doing so, BCP suffered loss and damage, which it now claims against CAO.

167 In response to this, CAO's case is that, on a true construction of Field 47A(10) of the LC and the terms of the CAO LOI, CAO was entitled to present the CAO LOI as the BCP OBLs were not available at the time of presentation. As such, CAO says that the reference to the BCP OBLs contained an element of "futurity", that is, that the BCP OBLs had yet to be issued or endorsed to the order of BCP Dubai at the time of presentation (and therefore, were not available). However, those BLs would be issued or endorsed in due

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255 PCS at para 73.

256 PCS at para 75 and at section III(B)(ii).

course.[257] In short, the CAO LOI should be interpreted not literally, but purposively.[258]

168 Alternatively, CAO says that BCP could not have relied on any alleged misrepresentations in the CAO LOI and the CAO Invoice since BCP were under a self-standing, independent obligation to reimburse UBS under Field 78 of the LC, and/or Art 7(c) of UCP 600.[259] Moreover, CAO also asserts that, even before any presentation of documents, BCP already knew that the BLs were issued to the order of Natixis, and not BCP Dubai, and therefore could not have relied on any alleged representation that the BLs were issued to the order of BCP.[260] In any event, CAO reasonably believed that the Representations and Warranties to be true.[261]

169 GBE adopts largely the same position as CAO.[262]

The applicable law

170 As to the applicable law, a misrepresentation, simply put, is a false representation of past or existing fact which materially induces the innocent party to enter into the contract in reliance on it. Regardless of the type of misrepresentation, the common elements which must be satisfied were set out

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257 DCS at para 208.

258 DCS at paras 226−228.

259 DCS at paras 302−303.

260 DCS at para 336.

261 DCS at paras 209 and 254.

262 4PCS at para 294.

by Lai Siu Chiu J in the High Court decision of *Rahmatullah s/o Oli Mohamed v Rohayaton bte Rohani and Others* [2002] SGHC 222, as follows at [73]:

> It is trite law that for a misrepresentation to be actionable, the following conditions must be satisfied:
>
> (i) a representation was made by one party;
>
> (ii) the representation was acted on by an innocent party;
>
> (iii) the innocent party suffered detriment as a result.
>
> …

171 Furthermore, where deceit is concerned, it must additionally be proved that the representation was made with the knowledge that it is false, in that it must be wilfully false, or at least made in the absence of genuine belief that it is true (see *Panatron* at [14]).

172 Finally, it goes without saying that the meaning of the representation concerned must be interpreted, so as to determine whether it is false. In this regard, the meaning of a representation is objectively assessed from the perspective of a reasonable person in the position of the representee, in light of the factual context or matrix within which the communication was made (see the Court of Appeal decision of *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 at [173]).

173 Indeed, even where the representation is express, the meaning of the representation cannot end with a literal interpretation. Instead, it is necessary to "have regard to the purpose for which the document came into existence, why the statements contained in it were made, and by whom they were intended to be read" (see the Court of Appeal decision of *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another*

[2013] 3 SLR 801 at [36], citing the English Court of Appeal decision of *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 at [52]). This is similar to the interpretation of contractual terms. Thus, in the High Court decision of *Lim Soon Huat v Lim Teong Huat and others and another matter* [2023] SGHC 356 (at [31]–[35]), the court emphasised that "contractual interpretation does not start and end with just the contractual text". As the Court of Appeal stated in the seminal case of *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 ("*CIFG*") (at [19]):

> …
>
> (a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
>
> (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).
>
> (c) The reason the court has regard to the relevant context is that it places the court in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context" (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).
>
> (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see, *eg*, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).

174 As can be seen, the Court of Appeal did not decide that contractual interpretation stops once the court ascertains that the contractual text is clear. Instead, the court held that while the starting point of contractual interpretation is the text, it is permissible, "[a]t the same time", to have regard to the relevant context so long as the threefold admissibility requirements in *Zurich Insurance*

(Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029 are satisfied. Accordingly, the court's use of the expression "[a]t the same time" signifies clearly that the starting point of looking at the text does not displace the possibility of looking at the context. This coheres with judicial pronouncements that the exercise of construction is "one unitary exercise" (see the UK Supreme Court decision of *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [21]).

175 As for the outcome of the interpretative exercise, the Court of Appeal explained in *CIFG* (at [19]) that the meaning that is eventually ascribed to the contractual provision concerned must be one that the words used by the parties can reasonably bear. However, it also explained in another decision that the law "generally favours a commercially sensible construction", while avoiding a "rigid and formalistic" approach which may "lead to commercially insensible results" (see the Court of Appeal decision of *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 at [37]−[38], citing the House of Lords decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771).

176 With the applicable law in mind, I turn now to explain why I conclude that CAO is not liable in deceit.

My decision: CAO is not liable in deceit

CAO's purposive interpretation of the CAO LOI is preferred

(1) The competing interpretations

177 I turn to the interpretation of the relevant part of the CAO LOI, which reads:[263]

> IN CONSIDERATION OF YOUR MAKING FULL PAYMENT … IN ACCORDANCE WITH THE AGREEMENT AND HAVING AGREED TO ACCEPT DELIVERY OF THE PRODUCT WITHOUT HAVING BEEN PROVIDED WITH THE RELEVANT DOCUMENTS REQUIRED UNDER THE AGREEMENT INCLUDING BUT NOT LIMITED TO THE FULL SET OF SIGNED BILL OF LADING ISSUED OR ENDORSED TO THE ORDER OF BANQUE DE COMMERCE ET DE PLACEMENTS SA, DIFC BRANCH, UAE ('THE DOCUMENTS'), *WE HEREBY REPRESENT AND WARRANT THE EXISTENCE, AUTHENTICITY AND VALIDITY OF THE DOCUMENTS* …
>
> [emphasis added]

For brevity, I will refer to the statement "we hereby represent and warrant the existence, authenticity and validity of the documents" as the "Existence, Authenticity, and Validity Representation", as I have defined this term at [162(a)] above. And to be clear, when I use this term, I am referring only to the plain words in the CAO LOI *per se*, and not any party's preferred interpretation thereof.

178 In this regard, BCP's contended-for interpretation (which I have termed above at [165] as the "literal interpretation") is that CAO had, in presenting the CAO LOI, represented the *actual* existence, authenticity, and validity of the

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263 1 DCB at p 28.

full set of signed bills of lading issued or endorsed to the order of BCP Dubai, or what I have termed above as the "BCP OBLs". Since there were no signed bills of lading issued to BCP Dubai at the time that CAO presented the CAO LOI, BCP asserts that the Existence, Authenticity, and Validity Representation must be false.

179 In my judgment, BCP's interpretation of the Existence, Authenticity, and Validity Representation is incorrect. Instead, I prefer CAO's purposive interpretation of the same, which is that: (a) the OBLs had been issued (*ie*, they "exist", and were "authentic" and "valid"); (b) the OBLs were, however, unavailable in that they had yet to be issued or endorsed to BCP Dubai at the time of presentation; but (c) the BCP OBLs would be endorsed to the order of BCP Dubai in due course, after they were received from the seller. CAO's interpretation coheres with the commercial purpose of allowing CAO to use an LOI as an alternative to obtain payment, when the original shipping documents, including the BCP OBLs, may be unavailable. Indeed, as I will go on to explain, this interpretation is also consistent with both the broader context of the other documents such as the LC and the CAO-ZR Contract, as well as the internal context of the CAO LOI itself.

(2) Consistency with the relevant terms of the LC

180 First, the relevant terms of the LC provide as follows:[264]

> 46A: Documents Required
>
> FOR 100 PCT INVOICE VALUE AGAINST SELLER'S PRESENTATION OF THE FOLLOWING DOCUMENTS …

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[264] Agreed Bundle of Documents (Main Proceedings) Vol 1 at pp 616–617.

1) BENEFICIARY'S SIGNED COMMERCIAL INVOICE IN ONE ORIGINAL

2) FULL SET 3/3 ORIGINAL CLEAN ON BOARD BILL OF LADING, MADE OUT OR ENDORSED TO THE ORDER OF 'BANQUE DE COMMERCE ET DE PLACEMENTS SA, DIFC BRANCH, UAE' …

…

47A: Additional Conditions

…

10. *IN THE EVENT THAT ORIGINAL B/L AND/OR SHIPPING DOCUMENTS NUMBERED 2 TO 5 IN FIELD 46A ARE NOT AVAILABLE AT THE TIME OF PRESENTATION, BENEFICIARY MAY CLAIM PAYMENT UNDER THIS LETTER OF CREDIT AGAINST PRESENTATION OF COMMERCIAL INVOICE AND LETTER OF INDEMNITY (L.O.I.)* AS FOLLOWS:

QUOTE

(COMPANY'S LETTERHEAD)

LETTER OF INDEMNITY

DATE:

FROM:

TO:

WE REFER TO OUR CONTRACT DATED THE … DAY OF (MONTH), (YEAR) IN RESPECT OF YOUR PURCHASE FROM US OF … METRIC TONS/BARRELS OF … PRODUCT FOB ('THE AGREEMENT) ON VESSEL '…', BILL OF LADING DATED …

IN CONSIDERATION OF YOUR MAKING FULL PAYMENT … FOR … THE SAID PRODUCT IN ACCORDANCE WITH THE AGREEMENT AND HAVING AGREED TO ACCEPT DELIVERY OF THE PRODUCT WITHOUT HAVING BEEN PROVIDED WITH RELEVANT DOCUMENTS UNDER THE AGREEMENT INCLUDING BUT NOT LIMITED TO THE FULL SET OF SIGNED BILL OF LADING ISSUED OR ENDORSED TO THE ORDER OF BANQUE DE COMMERCE ET DE PLACEMENTS SA, DIFC BRANCH, UAE ('THE DOCUMENTS'), WE HEREBY REPRESENT AND WARRANT THE EXISTENCE, AUTHENTICITY AND VALIDITY OF THE DOCUMENTS …

[emphasis added]

181 The italicised parts of Field 47A(10) of the LC clearly contemplated that CAO could obtain payment on presentation of an LOI in place of the BCP OBLs when the BCP OBLs were unavailable. The "unavailability" of documents includes the situation where only non-complying documents are available (see the English High Court decision of *Trafigura Beheer BV v Kookmin Bank Co* [2005] EWHC 2350 (Comm) at [25]). More specifically, on the facts of this case, this would include a situation where a beneficiary has the OBLs on hand, but the OBLs are non-complying in that they were endorsed to the order of a party other than BCP Dubai.[265] Against this context, the Existence, Authenticity, and Validity Representation cannot be interpreted literally to mean that CAO represented the *actual* existence, authenticity, and validity of the full set of signed bills of lading issued or endorsed to the order of BCP Dubai. Indeed, BCP's interpretation would not make sense when the LC itself contemplates that CAO could present the LOI when the BCP OBLs were not available.

(3) Consistency with the relevant terms of the CAO-ZR Contract

182 Second, the CAO-ZR Contract is also a necessary part of the context against which to interpret the CAO LOI. This is because the CAO LOI makes references to the Contract. The CAO-ZR Contract was also available to all the parties concerned, including BCP.

183 In this regard, cl 8 of the CAO-ZR Contract provides as follows:[266]

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265 Certified Transcript 17 August 2023 at p 75 lines 8–12.

266 CCL at p 220.

> **8. PAYMENT/RETENTION OF TITLE**
>
> PAYMENT SHALL BE BASED ON BILL OF LADING QUANTITY AND SHALL BE MADE BY BUYER TO SELLER IN UNITED STATES DOLLARS (WITHOUT ASSERTING AT THE TIME FOR PAYMENT ANY SETOFF, COUNTERCLAIM OR RIGHT TO WITHHOLD WHATSOEVER, EXCEPT AT SELLER'S OWN DISCRETION).
>
> PAYMENT OF THE PRODUCT SHALL BE MADE BY BUYER TO SELLER WITHIN **FORTY-FIVE (45) DAYS FROM BILL OF LADING DATE** (BILL OF LADING DATE TO BE COUNTED AS DAY ZERO) BY AN IRREVOCABLE DOCUMENTARY LETTER OF CREDIT ISSUED BY A FIRST CLASS INTERNATIONAL BANK IN A FORMAT ACCEPTABLE TO THE SELLER AT LEAST SEVEN (7) WORKING DAYS PRIOR TO THE FIRST DAY OF THE AGREED LOADING DATE RANGE AND, UPON PRESENTATION OF THE FOLLOWING DOCUMENTS:
>
> A) ORIGINAL/PDF/ELECTRONIC COPY OF THE COMMERCIAL INVOICE;
>
> B) A FULL SET OF CLEAN ORIGINAL BILLS OF LADING DULY ISSUED OR ENDORSED;
>
> C) IN THE ABSENCE OF EITHER A FULL SET OF CLEAN ORIGINAL BILLS OF LADING ON PAYMENT DUE DATE, THE BUYER SHALL PAY AGAINST THE SELLER'S ORIGINAL COPY OF THE COMMERCIAL INVOICE AND A LETTER OF INDEMNITY (LOI) (IN THE FORM SET OUT IN SCHEDULE A).
>
> …
>
> [emphasis in original]

184 As can be seen, the effect of cl 8 is that CAO may obtain payment "in the absence" of the "original bills of lading duly issued or endorsed" by presenting an LOI for payment. Thus, if CAO presented its LOI for payment, it must necessarily mean that the BCP OBLs in their endorsed form could not have existed at the time of the presentation, contrary to what the literal interpretation of the Existence, Authenticity, and Validity Representation requires.

(4) Consistency with the internal context of the CAO LOI

185 The purposive interpretation is also consistent with the text of the CAO LOI, which relevantly provides as follows:[267]

> IN CONSIDERATION OF YOUR MAKING FULL PAYMENT OF USD 19,051,378.28 FOR 34,681.239 METRIC TONS/259,393.000 BARRELS OF THE SAID PRODUCT IN ACCORDANCE WITH THE AGREEMENT AND HAVING AGREED TO ACCEPT DELIVERY OF THE PRODUCT WITHOUT HAVING BEEN PROVIDED WITH RELEVANT DOCUMENTS REQUIRED UNDER THE AGREEMENT INCLUDING BUT NOT LIMITED TO THE FULL SET OF SIGNED BILL OF LADING ISSUED OR ENDORSED TO THE ORDER OF BANQUE DE COMMERCE ET DE PLACEMENTS SA, DIFC BRANCH, UAE ('THE DOCUMENTS'), WE HEREBY REPRESENT AND WARRANT THE EXISTENCE, AUTHENTICITY AND VALIDITY OF THE DOCUMENTS : THAT WE ARE ENTITLED TO POSSESSION OF THE DOCUMENTS: WE WERE (IMMEDIATELY PRIOR TO THE PRODUCT COMING TO YOUR POSSESSION) ENTITLED TO POSSESSION OF THE PRODUCT: WE HAD (IMMEDIATELY BEFORE TITLE PASSED TO YOU) GOOD TITLE TO SUCH PRODUCT: AND THAT TITLE IN THE PRODUCT HAS BEEN PASSED AS PROVIDED IN THE AGREEMENT TO YOU FREE FROM ALL LIENS, SECURITIES, CHARGES OR ENCUMBRANCES OF WHATEVER KIND AND YOU WILL HAVE THE BENEFIT OF THE WARRANTY AS TO ENJOYMENT OF QUIET POSSESSION IMPLIED BY LAW IN THE AGREEMENT BUT WITHOUT PREJUDICE TO ANY OTHER WARRANTY SO IMPLIED. …

186 As can be seen, the CAO LOI refers to Zenrock "having agreed to accept delivery of the product without having been provided with [the] relevant documents required under the [CAO-ZR Contract] including but not limited to the [BCP OBLs]". Indeed, the *very premise* of the CAO LOI itself makes clear that it was presented because the BCP OBLs did not exist at that point in time. Accordingly, it cannot be that the Existence, Authenticity, and Validity

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[267] 1 DCB at p 28.

Representation, which appears in the next part of the sentence, means the very opposite of the immediately preceding part of the same sentence.

187 Accordingly, I agree with CAO that the only logical way to interpret the CAO LOI is that the Existence, Authenticity, and Validity Representation is made with reference to the BCP OBL in its unendorsed form. Otherwise, this would render the statement in the LOI, that CAO had been unable to provide the endorsed BCP OBLs to Zenrock, completely otiose.

188 In summary, I prefer CAO's purposive interpretation of the Existence, Authenticity, and Validity Representation for the following reasons. First, under Field 47A(10) of the LC, there was a precondition to the presentation of the CAO LOI. This precondition was that the original BLs issued or endorsed to the order of BCP Dubai were "not available at the time of presentation". This would include the situation where the original BLs could not be presented for payment, due to not having yet been endorsed to the order of BCP Dubai. As such, the representation and warranty made in the CAO LOI that "the Documents" exist, are valid, and authentic, really contain an element of futurity, in that the valid and authentic BLs have been issued, and will in due course be endorsed to the order of BCP Dubai. Second, this is also consistent with cl 8 of the CAO-ZR Contract, which stated that "[i]n the absence of either a full set of clean original bills of lading on payment due date, the buyer shall pay against the seller's original copy of the commercial invoice and a letter of indemnity (LOI) (in the form set out in Schedule A)".

CAO's representations were not false

189 With the above interpretation of the Existence, Authenticity, and Validity Representation in mind, I conclude that CAO's Representations and Warranties were not false. I analyse each representation in turn.

190 First, my preference for CAO's interpretation of the Existence, Authenticity, and Validity Representation over BCP's necessarily means that the said representation is not false. CAO did not represent to BCP that it had the BCP OBLs and original shipping documents *at the time* that it presented the CAO LOI and CAO Invoice.

191 Second, as for the supposed "Possession of Documents Representation", this on a proper construction relates to CAO's *entitlement* to the documents. In this regard, BCP's argument that CAO has not possessed the documents does not make this false. Instead, CAO was clearly entitled to these documents pursuant to the CAO-SEIS Contract and the SEIS LOI.

192 Third, as for the other Representations and Warranties in the CAO LOI, which really relate to whether the CAO-ZR Contract was a sham or fraudulent transaction, and how it took place against the Series A and Series B transactions, my finding above that the CAO-ZR Contract was not a sham or fraudulent transaction necessarily means that these Representations and Warranties are not false. In particular, since Series B was not a sham, the execution of the valid contracts therein caused title to pass from Zenrock, to GBE, to SEIS, to CAO, and then back to Zenrock. As a result, it must follow that: (a) CAO was entitled to possession of the Cargo immediately prior to the Cargo coming into Zenrock's possession; (b) CAO had good title to the Cargo immediately before

title passed to Zenrock; and (c) good title in the Cargo did pass from CAO to Zenrock free from all liens, securities, charges, or encumbrances under the relevant clauses in the CAO-ZR Contract that provided for title to pass when (loosely) the Cargo was loaded onto the vessel. It also follows that: (a) CAO had entered into the CAO-ZR Contract; (b) the Cargo had been loaded onto the "*Petrolimex 18*"; and (c) there was going to be physical delivery of the Cargo from CAO to Zenrock. This necessarily means that, in so far as BCP asserts that CAO made any Representations and Warranties in relation to the foregoing matters, I find that these Representations and Warranties are not false.

In any event, CAO did not make the representations to BCP

193 In any event, CAO did not even make the representations to BCP. It cannot be disputed that BCP was *not* the addressee of the CAO LOI and the CAO Invoice. Instead, Zenrock was the addressee of both documents. Also, CAO had presented the documents to UBS and not BCP. In this regard, I repeat my analysis at [160] above, and also rely on the Court of Appeal's reasoning in *UniCredit (CA)* at [57].

194 For completeness, I reject BCP's submission that representations in an LOI can be made to a bank even if the bank is not the addressee of the LOI.[268] To the extent that BCP attempts to rely on *DBS Bank* for this proposition, I repeat the analysis at [152]. As for BCP's arguments that the presence of UBS as a confirming bank can be disregarded,[269] I also find them to be unmeritorious. The assertion, that CAO's representations were made to BCP because CAO

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268 PCS at para 165.

269 PCS at para 167.

knew that BCP was going to pay out under LC by reimbursing UBS,[270] is simply a *non sequitur*.

195 In addition, it appears from the evidence that despite BCP's attempt to introduce contrary language in those documents which would have made it the addressee, such language was eventually not adopted in the final version of the CAO LOI. BCP's attempt appears to have been made on 22 January 2020, when BCP Dubai made a request for the issuing bank in the CAO LOI to be addressed to the "issuing bank for account of Zenrock commodities".[271] This appears to have been the only time BCP made this request. Subsequent iterations of the CAO LOI did not have BCP as the addressee. This remained the case in the final version of the CAO LOI. Because the LC from BCP Dubai to BCP Geneva was, in essence, BCP Dubai's final word on what it required from the LC, the final position taken by BCP Dubai must have been that it did not require the CAO LOI to be addressed to it. Accordingly, CAO never made the representations to BCP.

Ultimately, the proximate cause of BCP's loss was Zenrock's fraud

196 For completeness, BCP did not suffer detriment as a result of the Representations and Warranties, even if false. In this regard, another way of analysing the reliance point is to consider if the proximate cause of BCP's loss was the Representations and Warranties, or something else (see the Court of Appeal decision of *JSI Shipping (S) Pte Ltd v Teofoongwonglchloong* [2007] 4 SLR(R) 460 at [141]).

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270 PCS at para 167.

271 DCS at para 298.

197 In my judgment, the proximate cause of BCP's loss was actually Zenrock's fraud and subsequent insolvency. Thus, even if CAO had falsely made the Representations and Warranties to BCP, CAO would still not be liable because the Representations and Warranties did not cause BCP's loss. In this regard, the analysis in the High Court decision of *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd (Winson Oil Trading Pte Ltd, intervener)* [2023] 4 SLR 572 is instructive. In that case, which was an appeal against a summary judgment, the plaintiff bank issued a letter of credit, on the application of Hin Leong Trading (Pte) Ltd ("HLT"), in favour of Winson Oil Trading Pte Ltd ("WOT") to finance the former's purchase of gasoil from the latter. The owner of the ship, the defendant, misdelivered the gasoil by delivering it to HLT without presentation of the BLs. In the event, WOT presented the full set of the original BLs to the plaintiff and received payment under the letter of credit. The plaintiff bank, as the lawful holder of the BLs, demanded delivery of the gasoil cargo from the defendant and commenced proceedings against the latter when the defendant failed to deliver the same. The question on appeal was whether the defendants were able to raise a triable issue. Ang Cheng Hock J held that there was a triable issue in relation to causation, the specific question being whether the plaintiff bank had regarded the bills of lading as security for the financing granted to HLT (at [49]). He observed that if the plaintiff bank had, at the time it issued the letter of credit, already known that the gasoil was in HLT's custody, then it could not expect the bills of lading to remain as the "keys to the warehouse", and as a result, it could not have expected the defendant to deliver up the gasoil cargo upon presentation of the bills of lading (at [51]). In such a case, the proximate cause of the bank's loss would not be misdelivery by the defendant but would instead be the insolvency

of HLT (at [51]) and the manner in which the financing arrangement was structured (at [56]−[57] and [60]).

198 In this regard, I note that BCP has asserted that it had issued the LC because it believed it would take security over the financing by taking title to the Cargo with a BL made out to or endorsed in favour of BCP. However, despite the testimony of BCP's witnesses in support of this argument, I find it to be untrue. Rather, the evidence shows that BCP considered its security to be the receivables from PetroChina. Tellingly, there was little emphasis on the Cargo or the BCP OBLs in the contemporaneous correspondence of the Cargo or the OBLs.[272] Instead, the correspondence emphasised the importance of the receivables from PetroChina as BCP's security. BCP also accepted an LOI addressed to Zenrock, with no obligation on CAO to surrender the BCP OBLs to BCP. In fact, BCP had acknowledged all of this in an internal correspondence about its credit approval decision for the issuance of the LC to finance the transaction between CAO and Zenrock.[273] It was clear from the correspondence that BCP's concern was with the existence of the Cargo, which would then be on-sold to PetroChina, from which BCP could claim its ultimate reimbursement. This concern would be satisfied by the (mere) existence of OBLs generally, as opposed to OBLs that were specifically endorsed to BCP. In essence, BCP expected the transaction to be "self-liquidating" in that it would be paid on the same day as it made payment under the LC, through the proceeds of the sale which had purportedly been arranged between Zenrock and PetroChina.[274]

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272 OCE Tab 8 at pp 294−296.

273 OCE Tab 8 at pp 294−296.

274 OCE Tab 8 at p 296.

199 Furthermore, the BCP OBLs could not have been security for the transaction because BCP must have known that it could not have received the BCP OBLs before the Cargo (for which the BCP OBLs would have ostensibly been a "substitute" form of security) was released to PetroChina. I make this finding for the following reasons. In order for BCP to receive the proceeds of the purported on-sale from Zenrock to PetroChina, the Cargo would have to be released from PetroChina first. This is in accordance with the fact that the voyage from the load port to the discharge port was only expected to be a few days. This means that the Cargo would have reached the discharge port way in advance of the credit period of 45 days provided to PetroChina under the purported Zenrock-PetroChina transaction. Thus, in an email from BCP to Zenrock dated 4 March 2020 (at 4.32pm),[275] BCP had asked Zenrock about the whereabouts of the Cargo. Zenrock replied on 5 March 2020 (at 11.06am) that the "[v]essel arrived at disport during the lunar new year holiday period in Vietnam (even though the lunar new year is 23–29 January, it is common for companies to extend for another week)",[276] and later (at 12.30pm), stating that they sold "FOB to [PetroChina] and title and risk pass at load port. [PetroChina] has the cargo. There is no plan B and [PetroChina] has to pay [Zenrock]".[277] This clearly shows that BCP knew that the Cargo had been delivered to PetroChina *before* BCP received the BCP OBLs and that there was no way for any security interest to be realised from the possession of the BCP OBLs. Therefore, since BCP could have no expectation that it would ever receive the BCP OBLs in time *before* the Cargo was released to PetroChina, BCP could

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275 OCE Tab 35 at p 620.

276 OCE Tab 35 at p 610.

277 OCE Tab 35 at p 620.

not logically have regarded the BCP OBLs as security. Indeed, coming back to the point I made in the previous paragraph, BCP was at all material times focused on obtaining an assignment of the sale proceeds (of the Cargo) that PetroChina was supposedly to pay Zenrock. In essence, BCP assumed the credit risk of Zenrock and/or PetroChina, which means that the proximate cause of its loss was Zenrock's fraud and insolvency. Furthermore, in the proof of debt filed with Zenrock's liquidators, BCP does not list this as a security under the field "Security Held"[278] despite saying that the wording in the CAO LOI was "extremely important" to it as CAO was required to make the Representations and Warranties.[279]

200 For all these reasons, I find that CAO is not liable in deceit to BCP.

Whether CAO is liable in negligent misrepresentation to BCP

201 Since I have found, in the context of BCP's claim in deceit, that the Representations and Warranties are not false, it follows that its claim for negligent misrepresentation, which is similarly premised on the falsity of the Representations and Warranties, must fail. Even so, I deal briefly with BCP's claim in this regard.

The parties' arguments

202 BCP's position in its claim for negligent misrepresentation is that: (a) first, the Representations and Warranties were false; (b) second, the

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278 Plaintiffs' Bundle of Documents Vol 3 ("3 PBOD") at pp 1579−1580; Certified Transcript 18 August 2023 at p 38 line 21 to p 39 line 17.

279 OCE at para 29.

Representations and Warranties had induced BCP into paying out under the LC, even if they need not be the sole or decisive factor; and (c) CAO owed a duty of care to BCP, in its capacity as the issuing bank which financed Zenrock's purchase of the Cargo from CAO. In particular, CAO was under a duty of care in preparing the CAO Invoice and the CAO LOI as well as later issuing and presenting them for payment.[280] Thus, BCP says that CAO knew that if the BCP OBLs were not available, BCP would require the CAO Invoice and the CAO LOI from CAO to pay out under the LC. CAO knew that the CAO Invoice and the CAO LOI would be passed down the banking chain, and so assumed responsibility when it prepared the documents required by BCP and presented these documents for payment through the banking chain.[281] Finally, CAO breached this duty when it presented the CAO LOI and failed to take the necessary steps to ascertain and ensure that the Representations and Warranties were true and correct.[282]

203 CAO's position is that a beneficiary does not owe the issuing bank a duty of care in presenting documents for payment (see *DBS Bank* at [103]–[106]).[283] In any event, even if there were such a duty, CAO did not breach such a duty as its conduct was consistent with that of a prudent oil trader, and it did all that it reasonably could have done in preparing and issuing the CAO Invoice and the CAO LOI.[284]

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280 PCS at paras 196 and 215.

281 PCS at paras 179, 183 and 209−210.

282 PCS at paras 217−218.

283 DCS at para 283.

284 DCS at paras 316−318.

The applicable law

204 Generally, as the SICC held in *Hai Jiao 1306 Ltd and others v Yaw Chee Siew* [2020] 5 SLR 21 (at [403(b)]), a claim for negligent misrepresentation at common law may be brought: (a) where the defendant has made a false representation of fact; (b) which has induced reliance; (c) where the defendant owes a duty of care; (d) which the defendant has breached; and (e) thereby causing damage to the plaintiff (see also the High Court decision of *IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 at [121]). As to the question of whether the defendant owes a duty of care to the plaintiff, BCP and CAO agree that it falls to be determined by the test set out in the Court of Appeal decision of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [73].[285] The test follows these steps (see *Spandeck* at [75]−[85]):

(a) As a threshold requirement, was the harm suffered by the plaintiff factually foreseeable by the defendant?

(b) Was there sufficient legal proximity between the plaintiff and the defendant? If the answer is yes, a *prima facie* duty of care arises.

(c) Whether there are any policy considerations that negate this *prima facie* duty?

205 The content of the requirement of proximity differs according to the type of case at hand. In the context of negligent misrepresentations, the Court of

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[285] PCS at para 196; DCS at para 282.

Appeal has found the principles set out by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*") to be relevant (see *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 ("*Anwar*") at [69], citing *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559). The Court of Appeal explained that the "twin criteria" for the *Hedley Byrne* principle to apply are: (a) an assumption of responsibility; and (b) reliance by the plaintiff (see *Anwar* at [70]).

My decision: CAO is not liable in negligent misrepresentation

206 In my judgment, CAO is not liable in negligent misrepresentation to BCP for the primary reason that the Representations and Warranties are not false. This renders it unnecessary for me to deal with whether CAO owes BCP a duty of care and whether it breached that duty. However, I make a few observations in this regard, drawing on the discussion of this issue in *DBS Bank*. Skipping over the requirements of factual foreseeability, which "will almost always be satisfied" (see the Appellate Division of the High Court decision in *The Subsidiary Management Corporation No 01 – Strata Title Plan No 4355 v Janaed and another and another appeal* [2022] 2 SLR 743 at [15]; see also *Spandeck* at [75]), I first briefly address legal proximity. Given that the Representations and Warranties were not addressed to BCP, I have difficulty accepting the argument that CAO assumed responsibility towards BCP, which renders the *Hedley Byrne* principle inapplicable. As for public policy considerations, I take the tentative view that there are cogent public policy reasons as to why a beneficiary of a letter of credit should *not* owe a duty of care to an issuing or confirming bank.

207 The starting point is that "the underlying foundation of the system of documentary credits is to give sellers, as far as possible, an 'assured right' to payment notwithstanding disputes in the underlying sale contract" (see *DBS Bank* at [100], though *cf* the High Court decision of *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd and others* [2021] 5 SLR 738). To recognise a duty of care on the part of the beneficiary towards the issuing or confirming bank would undermine this rationale, because, as Andrew Ang J incisively pointed out in *DBS Bank* (at [99]–[100]):

> If we were to accept DBS's contention that a bank may rely on negligent misrepresentation by a beneficiary to recover any money it had paid out to the beneficiary, the law would also have to accept that banks are entitled to invoke negligent misrepresentation by the beneficiary as a ground for not paying the beneficiary in the first place. The practical effect of this would be to unravel the narrow fraud exception the House of Lords took pains to limit; banks could refuse to pay the beneficiary once there was any inaccurate statement of material fact by simply alleging that the beneficiary had been negligent.
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> …
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> In my view, developing the law to allow for a negligent misrepresentation exception would be an unjustified erosion of this very premise. Documentary credits must be allowed to be honoured, as far as possible, free from interference from the courts. Otherwise, trust in international commerce could be irreparably damaged …

208 Furthermore, as Ang J pointed out, "the rhetoric that a responsible seller must provide to the bank documents which are true … does not *ipso facto* entail that the seller has assumed any responsibility towards the bank" (see *DBS Bank* at [106]). I respectfully agree. Given the foregoing considerations, I am inclined towards the view that CAO does not owe BCP any duty of care to ensure that its Representations and Warranties in the CAO LOI and CAO LC were true. For all these reasons, I find that CAO is not liable in negligent misrepresentation to BCP.

Whether CAO is liable for breach of contract to BCP

The parties' arguments

209 BCP's position in its claim for breach of contract is that there is a contractual relationship between the issuing bank and the beneficiary, which governs the obligation which the issuing bank owes to the beneficiary to pay the beneficiary against a complying presentation of documents (see the High Court decision of *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [37]). BCP takes the view that the LC was an irrevocable offer by BCP to CAO to pay the invoice value upon CAO's compliant presentation of the original BLs and/or the CAO Invoice and the CAO LOI.[286] CAO accepted this offer when it presented the CAO Invoice and the CAO LOI as set out in the LC.[287] In particular, CAO knew that the CAO LOI would be passed down the banking chain and relied on by BCP to pay out under the LC. The CAO LOI contained the Representations and Warranties, which were incorporated into the contract between BCP and CAO. In the alternative, BCP asserts that there is a contractual relationship between BCP and CAO at the time that the LC was issued to the beneficiary pursuant to Art 7 of UCP 600. Following from this, BCP says that CAO breached the Representations and Warranties in the CAO LOI as, among other things: (a) the shipping documents did not exist; and (b) there was no actual Cargo (or title to such Cargo) that was being passed through or delivered anywhere in a circular transaction.[288]

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286 PCS at para 34.

287 PCS at paras 40 and 46(a).

288 PCS at paras 230–234.

210 CAO's position is that there was no contract between BCP and CAO. Further, even if there was such a contract, CAO did not breach its terms.

My decision: CAO is not liable for breach of contract

211 In my judgment, CAO is not liable for breach of contract for the primary reason that there is no contract between BCP and CAO. In this regard, the issuance of a confirmed letter of credit is a unilateral offer to the beneficiary. The contract is formed when the beneficiary makes a complying presentation to the issuing or confirming bank, and the identity of the counterparty to the beneficiary depends on which of the two banks the documents were presented to. This is so for the following reasons.

212 First, the issuing bank is obliged to reimburse the confirming bank on the latter's presentation of documents to the issuing bank. By Art 7(c) of UCP 600, the issuing bank's obligation is an independent one from the issuing bank's undertaking to the beneficiary.

213 Second, in this case, CAO presented documents to UBS and received payment from UBS. Thus, there was simply no contractual relationship between BCP and CAO.

214 Accordingly, if there is no contract between BCP and CAO, BCP cannot succeed in any claim for breach of a contract that does not exist between them.

215 In any event, even if there had been a contract between BCP and CAO, BCP cannot now raise, for the first time in its closing submissions, that there is an implied term by law that a beneficiary is not to present documents that are

fraudulent. Furthermore, BCP does not cite any authority to support the implication of such a term.

Whether CAO is liable for being unjustly enriched at the expense of BCP

216 BCP's claim in unjust enrichment can be dealt with shortly. To succeed in its unjust enrichment claim, BCP will need to show that: (a) there was an enrichment of CAO; (b) such enrichment was at BCP's expense; and (c) there is an unjust factor (see the Court of Appeal decision of *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 at [45]).

217 For BCP to show that CAO was enriched at its expense, there must be a direct transfer of the enrichment from BCP to CAO (see Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at para 02.001). While this generally requires the parties to have dealt directly with one another, or with one another's property, it appears that English cases have accepted the possibility of exceptions to this general position (see the UK Supreme Court decision of *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275 ("*ITC*") at [47]). These are "generally situations in which the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real". Some of the enumerated exceptions in *ITC* are agency, assignment, sham transactions, "co-ordinated transactions", tracing (at [48]), and the discharge of a debt owed by the defendant to a third party (at [49]). The most potentially relevant exception in the present case would be "co-ordinated transactions", which *ITC* rationalised as (at [61]):

> … cases in which, for the purpose of answering the "at the expense of" question, the court has treated a set of related transactions, operating in a co-ordinated way, as forming a

> single scheme or transaction, on the basis that to answer the question by considering each of the transactions separately would be unrealistic. …

218 Unfortunately, there does not appear to be an established test to determine when it would be "unrealistic" to consider the transactions separately. The UK Supreme Court in *ITC* seems to have considered a number of different formulations, such as when the intervening transaction was "no more than a formal act designed to allow the transaction to proceed" (at [62]), or alternatively, when two arrangements "were not separate but part of one scheme, which involved the [plaintiff] throughout" (at [65]). However, I cannot distil any clear principle underlying these statements.

219 In the present case, assuming that the "coordinated transactions" exception forms part of Singapore law (and I make no determination in this regard), it is arguable that the payment by UBS to CAO can be construed together with BCP's subsequent reimbursement of UBS, as a "coordinated transaction". After all, as BCP observes, BCP carried the responsibility to ultimately pay under the LC, whether directly to CAO, or indirectly through the reimbursement of UBS which had paid CAO.[289]

220 Be that as it may, I do not find that there was an unjust factor in the present case. BCP relies on what it says is CAO's misrepresentation to it that there was physical Cargo for the CAO-ZR Contract. However, as I have found above, BCP has not succeeded in making out the misrepresentation. Therefore, there is neither a mistake of fact nor a total failure of consideration, which are

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289 PCS at para 241.

the two unjust factors that BCP has pleaded.[290] BCP's failure to establish an unjust factor consequently means that its claim in unjust enrichment does not succeed.

Whether CAO is liable for engaging in an unlawful means conspiracy against BCP

221 BCP's claim in unlawful means conspiracy can also be dealt with shortly. To begin with, the following elements must be proved in a claim for unlawful means conspiracy: (a) two or more persons combined to do certain acts; (b) the conspirators intended to cause damage or injury to the claimant by those acts; (c) those acts were unlawful (including intentional acts that are tortious); (d) those acts were performed in furtherance of the agreement; and (e) the acts caused loss (see the Court of Appeal decision of *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]). Given my findings above that the CAO-ZR Contract was not a sham or fraudulent transaction, and that CAO was not party to any sham (if it existed), it must follow that the claim in unlawful means conspiracy fails.

Whether BCP had mitigated its loss

222 For the reasons above, I dismiss BCP's claim against CAO. Since CAO is not liable to BCP for any of the pleaded causes of action, I do not need to deal with the question of whether BCP had mitigated its loss and should have its damages reduced on that basis. This is because I find that CAO is not even liable

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290 PCS at para 242.

to BCP to begin with. However, for completeness, I go on to make some observations regarding this issue.

223 I begin by acknowledging that, all things being considered, it was certainly possible, as CAO argued,[291] for BCP to have taken action against PetroChina to claim for the amounts paid out under the LC. This is because BCP was seemingly content to accept PetroChina's assertion that the Zenrock-PetroChina Contract had been cancelled without any demand for supporting evidence. Given that Mr Oce had identified the Tripartite Agreement as "tricky",[292] and Mr Kalbermatten said that BCP regarded it as a "sham",[293] it is curious why BCP did not take action against PetroChina.

224 This is borne out by the correspondence between BCP and PetroChina on this matter. For instance, in the "Last Notice of Default leading to civil and criminal actions" dated 30 April 2020,[294] BCP took a clear stand that PetroChina owed BCP receivables of some US$19m. It is inexplicable then why BCP did not take any action against PetroChina, having taken such a stance. Indeed, BCP's own statement in the aforesaid document is that "it appears that [PetroChina] is acting with full knowledge of the facts as *an accomplice of Zenrock* in carrying out such acts" [emphasis added], such "acts" being that "Zenrock acted fraudulently, diverted payment/receivables to others".

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291 DCS at paras 363−370.

292 Certified Transcript 18 August 2023 at p 83 lines 5−16.

293 Certified Transcript 23 August 2023 at p 102 lines 23−25.

294 3 PBOD at p 1396.

225 Given the above, it is inexplicable that BCP has no record of any documentation to explain why it did not choose to sue PetroChina. Mr Kalbermatten could not confirm whether there are any documents recording the reasons why BCP did not pursue PetroChina.[295] Mr Kalbermatten said that he could not find a specific document which says that BCP cannot sue PetroChina because the goods do not exist, or that PetroChina had been engaged in a conspiracy with Zenrock or any other party.

226 However, just because BCP *could have* sued PetroChina, does not mean that its failure to do so was a failure to mitigate its losses. After all, there is an established rule that claimants need not take steps to recover compensation for their loss from parties who, in addition to the defendant, are liable to them for the *same loss* (see James Edelman & Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2022) ("*McGregor*") at para 9−095). This is based not on any principle of mitigation, but rather, the principle that a plaintiff has an unfettered discretion to claim for their full loss against any of the persons liable to them for that loss (see the English Court of Appeal decision of *Peters v East Midlands Strategic Health Authority and another* [2010] QB 48 at [41], citing *The Liverpool (No 2)* [1963] P 64 ("*The Liverpool*") at 82−84; see also *McGregor* at footnote 396). As Harman LJ observed in *The Liverpool* (at 83), if a defendant could reduce his own liability by obliging a claimant to claim against another potential defendant for the same loss, it would render otiose the laws regarding contributions between tortfeasors. Indeed, *McGregor* (at para 9−095) illustrates the strictness of this principle with reference to the facts of *The Liverpool* itself:

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295 Certified Transcript 22 August 2023 at p 66 line 24 to p 73 line 16.

> … *even if the third party offers payment of the amount for which they are liable, the claimant is not required to accept it in mitigation.* In that case the defendants' ship through negligence came into collision in port with another ship which sank. The claimant harbour board sued the defendants, whose liability was limited, for expense incurred and damage sustained in clearing the port of the wreck. However, the claimants had also taken steps to enforce their statutory right against the owners of the wreck to recover from them any expenses outstanding after raising and selling the wreck, and not only had this amount been established but the money had been tendered, refused by the claimants, and then put on deposit by the owners of the wreck. In such circumstances the Court of Appeal held that the claimants were under no duty to satisfy part of their damages by accepting the money already on deposit …
>
> [emphasis added]

227 Since CAO is alleging that BCP should have sued PetroChina for the same loss that BCP is claiming against CAO (*ie*, the amounts paid out under the LC), the principle in *The Liverpool* applies and CAO's argument must therefore fail.

228 For completeness, I address a few more points that CAO raises. First, I reject CAO's argument that the concessions of BCP's witnesses are relevant to the question of whether BCP had in fact mitigated its loss.[296] I agree with BCP that the question of mitigation is a question of law that does not depend on the subjective perceptions of the witnesses.[297] Secondly, the various cases which CAO relies on, such as *Western Trust & Savings v Clive Travers & Co* [1997] PNLR 925 and the High Court decision of *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2021] SGHC 230 ("*Gomez*"),[298] can be distinguished.

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296 DCS at para 370.

297 PRS at para 227.

298 DRS at para 300.

They are distinguishable simply on the basis that the loss which the claimant could have claimed from the third party was different from the loss which the claimant did in fact try to claim from their respective defendants (see *McGregor* at footnote 391). Taking the case of *Gomez* as an example, the loss which the plaintiff tried to recover from the defendants was loss resulting from the defendant solicitors' alleged negligence (at [44]), while the loss which Mavis Chionh J held that the plaintiff should have tried to recover from the third party (Magnetron) was for commissions which the third party allegedly owed him, but had failed to pay (at [3] and [102]).

229 Therefore, even though BCP failed to bring any claim against PetroChina to recover the receivables from them, I would not have found that BCP had failed to mitigate its loss. However, this is immaterial in light of my conclusion above that BCP's claims against CAO all fail.

The 3PP and the 4PP

230 It therefore follows that the 3PP and 4PP are all dismissed, since those claims are dependent on BCP succeeding in its claim against CAO. For instance, CAO's action against SEIS is, in essence, the enforcement of the former's contractual indemnity against the latter.[299] CAO also clarified that, save for its claim for an indemnity for legal costs against SEIS, all its claims in the 3PP "are premised on the Plaintiff's Allegations being upheld by the Honourable Court in the main action, which would *inter alia* mean that SEIS's Third Party's Warranties were false and made fraudulently and/or negligently".[300]

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299 Defendant's Closing Submissions (Third Party Proceedings) at para 1.

300 Defendant's Reply Submissions (Third Party Proceedings) at para 4.

231 Likewise, SEIS seeks an indemnity against GBE in respect of CAO's claims against SEIS, or alternatively, damages to be assessed, in the event that SEIS is found to be liable to CAO in respect of any of CAO's claims in the 3PP.[301] From the foregoing, it is clear that SEIS's claim against GBE is dependent on CAO's claim against SEIS succeeding, and the latter is in turn dependent on BCP's claim against CAO succeeding. Since BCP's claim fails, all the claims in the 3PP and 4PP also fail.

Conclusion

232 In conclusion, I dismiss all of BCP's claims against CAO. As a threshold issue, I find that BCP Dubai does not have standing to sue because it no longer possesses the legal capacity to do so. Next, I find that the CAO-ZR Contract was not a sham or fraudulent transaction for the reasons set out above. Since this is the crux of BCP's case, my factual finding in this regard imperils most of BCP's causes of action. Turning to the various causes of action, I do not allow BCP to rely on the fraud exception as it has not been pleaded. The claims in deceit and negligent misrepresentation fail because the alleged representations and warranties made by CAO to BCP were not false. As for the other claims, there was no contract between CAO and BCP which negates any claim for breach of contract, there was no unjust factor which means that the claim in unjust enrichment fails, and CAO was not part of any conspiracy, invalidating any claim in unlawful means conspiracy.

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301 Fourth Party Statement of Claim (Amendment No 2) dated 5 January 2023 at para 1.

233 For completeness, since the 3PP and 4PP are dependent on BCP succeeding in its claim against CAO, and BCP has not succeeded, I dismiss them as well.

234 Unless the parties can agree on costs, they are to tender written submissions on costs, limited to ten pages each, within 14 days of this decision.

235 In closing, I express my gratitude to all the parties for their helpful assistance over the course of the trial and after.

Goh Yihan
Judge of the High Court

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Quek Tai Teck Oliver and Tan Si Rui (Oliver Quek & Associates) for the third party;
Lee Sien Liang Joseph, Pak Waltan, Bertrice Hsu Li-Jia and Thong Ying Xuan (LVM Law Chambers LLP) for the fourth party.