IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA(I) 7

Civil Appeal from the Singapore International Commercial Court No 2 of 2022

Between

Crédit Agricole Corporate and Investment Bank, Singapore Branch

… *Appellant*

And

PPT Energy Trading Co. Ltd.

… *Respondent*

In the matter of SIC/S 1/2021

Between

Crédit Agricole Corporate and Investment Bank, Singapore Branch

… *Plaintiff*

And

PPT Energy Trading Co. Ltd.

… *Defendant*

Civil Appeal from the Singapore International Commercial Court No 3 of 2022

Between

Crédit Agricole Corporate and Investment Bank, Singapore Branch

… *Appellant*

And

PPT Energy Trading Co. Ltd.

… *Respondent*

In the matter of SIC/S 2/2021

Between

PPT Energy Trading Co. Ltd.

… *Plaintiff*

And

Crédit Agricole Corporate and Investment Bank, Singapore Branch

… *Defendant*

JUDGMENT

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

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

[2023] SGCA(I) 7

Court of Appeal — Civil Appeal Nos 2 and 3 of 2022
Judith Prakash JCA, Jonathan Hugh Mance IJ and Bernard Rix IJ
19, 20 October 2022

24 October 2023 Judgment reserved.

The Court:

Introduction

1 These appeals arise out of two cases heard by the Singapore International Commercial Court ("SICC"), SIC/S 1/2021 ("Suit 1") and SIC/S 2/2021 ("Suit 2"). Crédit Agricole Corporate & Investment Bank, Singapore Branch ("CACIB") was the plaintiff in Suit 1 and the defendant in Suit 2. PPT Energy Trading Co. Ltd. ("PPT") was the defendant in Suit 1 and the plaintiff in Suit 2. The Judge in the SICC (the "Judge") dismissed CACIB's claim in Suit 1 and allowed PPT's claim in Suit 2. The reasons for the Judge's decisions can be found in Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit [2022] SGHC(I) 1 (the "Judgment"). The decision on liability was delivered on

13 January 2022, but the issues of damages, interest and costs were dealt with in his subsequent order made on 30 March 2022.

2 CACIB appealed against the Judge's decision in both Suits. Although two appeals were filed, CACIB raised the same issues in substance in both.

3 The background to CACIB's claims below was that CACIB had been induced by the fraud of Zenrock Commodities Trading Pte Ltd ("Zenrock") to issue an unconfirmed letter of credit dated 3 April 2020 subject to *The Uniform Customs and Practice for Documentary Credits 600* ("UCP 600") in favour of PPT. Payment under the letter of credit was due 60 days after the bill of lading date. As the original bills were issued on 6 April 2020, the due date for payment was therefore 5 June 2020. In Suits 1 and 2, CACIB sought the following remedies:

(a) an injunction to restrain payment of any sums under the letter of credit;

(b) a declaration that PPT was not entitled to receive any sums under the letter of credit at that date or at all and that CACIB was not liable for any sum under the letter of credit; and

(c) an order that PPT reimburse CACIB for sums debited pursuant to the terms of the letter of credit together with interest; or

(d) if PPT was so entitled to receive payment under the letter of credit, then a finding that PPT was liable, under a letter of indemnity (the "LOI") which PPT issued to CACIB in lieu of presentation of shipping documents under the credit, to indemnify CACIB for any and

all such losses arising from PPT's breaches of the representation and warranties in the LOI.

4 In the course of the proceedings below, CACIB took out an *ex parte* application (of which PPT, but not Zenrock, was given notice) for payment under the letter of credit to be prohibited, which resulted in the issuance of an interim injunction on 28 May 2020 (the "Interim Injunction") prohibiting payment under or pursuant to the letter of credit. After negotiations, an accommodation was reached between CACIB and PPT pursuant to which the Interim Injunction was to be discharged and payment under the letter of credit was to be made by CACIB to PPT. This payment was made in return for a bank guarantee from PPT's bank, Bank of China ("BOC") for reimbursement, should the court hold that CACIB's original refusal to pay was justified. The guarantee was secured by the blocking, in an escrow account, of the amount paid by CACIB as counter-security for BOC's guarantee. CACIB made the payment under the letter of credit to PPT on 18 November 2020. PPT therefore cross-claimed for a declaration that payment was due under the credit, and for damages for non-payment, including the costs of obtaining the guarantee and the borrowing costs of a loan from a subsidiary company.

5 The trading background to Zenrock's fraud on CACIB raises numerous questions, though not all of them are answerable on the available material. That Zenrock committed fraud was undisputed by both parties. To facilitate its purchase of crude oil from PPT for on-selling to Total Oil Trading SA ("TOTSA"), Zenrock had applied for a letter of credit to be issued by CACIB in favour of PPT:

(a) The credit for which Zenrock applied was to be operable against the presentation of shipping documents including signed bills of lading and PPT's signed commercial invoice referring to the shipment FOB of 920,000 net US barrels (plus or minus 5%) of crude oil from Djeno in the Congo (the "Cargo").

(b) The unit price of the Cargo was stated to be the average of the mean quotations published in Platt's crude oil marketwire under the heading Brent Dated (the "Brent rate") on the bill of lading date plus a premium of US$3.24 per barrel.

(c) The letter of credit also provided that "in case" such shipping documents "[were] not available at time of presentation", then payment was to be made upon the presentation of the beneficiary's signed commercial invoice and the beneficiary's signed LOI.

6 To obtain credit facilities from CACIB, Zenrock had previously executed a deed of charge in favour of CACIB, which granted to CACIB a floating charge on all goods financed by CACIB. Zenrock also had to provide CACIB with an assignment of the receivable which Zenrock would obtain under the on-sale covering the amount which CACIB would have to disburse to PPT under the credit (*Judgment* at [37]). Zenrock had a sale contract dated 30 March 2020 for the sale of Djeno crude oil to TOTSA, but it was at a price of only the Brent rate minus US$3.6 per barrel. Zenrock simply doctored a copy of its sale contract with TOTSA to make it appear to CACIB that the price under the TOTSA contract was the Brent rate *plus* US$3.6 per barrel, thereby covering the amount of the proposed credit (*Judgment* at [3]–[4]). CACIB on 1 April 2020 gave notice to TOTSA of the assignment of the TOTSA receivable, which TOTSA counter-signed on 3 April 2020.

7 The effect of Zenrock's fraud is evident from the actual invoice issued by Zenrock to TOTSA, which related to a bill of lading quantity of 920,191.814 net US barrels shipped from Djeno on the vessel *Indigo Nova* on 6 April 2020 at a unit price of US$17.95 per barrel, making US$16,517,443.06 the total amount payable to Zenrock. In contrast, the amount payable by reference to the same shipment under the credit which Zenrock induced CACIB to issue in PPT's favour was US$25.715 per barrel, making a total of US$23,662,732.50. This latter amount is nearly US$8 more per barrel than the former and was about 50% higher than the market price.

8 The wider trading background reveals further peculiarities. First, TOTSA was not only Zenrock's buyer, but also was at the head of a chain under which it sold 920,000 net US barrels (5% plus or minus) FOB Djeno to SOCAR Trading SA ("SOCAR"), which on 26 March 2020 on-sold the same amount to Zenrock (*Judgment* at [10]).

9 Second, to finance its purchase from SOCAR, Zenrock had applied to ING Bank NV ("ING") for a credit in SOCAR's favour, had assigned to ING its receivable under its contract with TOTSA and executed a deed of charge creating a floating charge over all goods financed by ING as well as over "unencumbered goods" not financed by ING (*Judgment* at [36]). SOCAR had on 31 March 2020 given notice to TOTSA of Zenrock's assignment. However, on 1 April 2020, Zenrock had asked TOTSA not to approve ING's assignment, saying that there had been a mistake and that the receivable to be assigned to TOTSA had actually been assigned to CACIB. It appears that Zenrock, short no doubt of cash, had decided to defraud CACIB by introducing a small circle of over-priced contracts which CACIB would be induced to support by Zenrock's production of the doctored copy of its contract for on-sale to TOTSA.

10 Third and most significantly, Zenrock's original approach to PPT had been to seek PPT's involvement in a different circular trade, which would have involved Zenrock on-selling to PPT the cargo acquired from SOCAR, with PPT on-selling such cargo to another company, Trafigura Pte Ltd ("Trafigura"), which would re-sell to Zenrock, which would deliver it under the final TOTSA contract. The Judge found that, in the course of exchanges about such an involvement, PPT became aware of its circularity and that Zenrock wished PPT to avoid using CACIB to finance its proposed purchase from Zenrock, because Zenrock and Trafigura were already using CACIB and did not want CACIB to "see the whole chain" (*Judgment* at [52]–[65]).

11 In the event, Trafigura was eventually withdrawn from this proposed circle. On or about 1 April 2020, Zenrock arranged the interposition of PPT into a different trading circle, involving the purchase by one Shandong Energy International (Singapore) Pte Ltd ("Shandong") from Zenrock of the Cargo at Brent rate plus US$3.02 per barrel and a sale by Shandong to PPT at Brent rate plus US$3.02 per barrel (*Judgment* at [74]). PPT was presented with arrangements made by Zenrock for both its purchase from Shandong and its on-sale back to Zenrock. PPT denies that it was aware of any circle, but the Judge found, on the evidence and in the light of all the circumstances, that it was impossible to believe that PPT was unaware, when it committed itself to this transaction, of the circularity involved in Zenrock's purchase from SOCAR, SOCAR's on-sale to Shandong and Shandong's on-sale to PPT (*Judgment* at [113]).

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. The Judge in the present case held that all the contracts in the expanded chain (including the circle of transactions from Zenrock to Shandong to PPT and back to Zenrock, despite its artificially high prices) were intended to and did operate as genuine contracts, under which property passed (*Judgment* at [123]–[125]). Since all the contracts were on TOTSA's terms and conditions, property passed under each on shipment FOB from Djeno. The transfer of any shipping documents would therefore operate at most as a transfer of a possessory interest, by way of security, giving a right to delivery up of the Cargo at its destination port.

13 Not surprisingly, a main issue at trial was how much further PPT's understanding stretched, "what the PPT personnel thought was going on and what was the reason for this circular trading" (*Judgment* at [114]). CACIB's case was that PPT knew of or shut its eyes to fraud. But the Judge found on the evidence that PPT did not. PPT, on their own account, was "not a very large company" with little trade, which leaped at the opportunity, given from time to time by Zenrock, to be interposed in a chain in return for a small mark-up, without knowing or enquiring about the reason (*Judgment* at [41]). It was entirely unaware that the circle into which it was interposed in the present case involved prices far higher than the market price. To this extent, the Judge held as follows (*Judgment* at [114]–[115]):

> 114. … Their interest was confined to the profit that they would make and ensuring that they were secured for their sale price under a letter of credit. They looked to BOC for advice to ensure the latter.

> 115. In these circumstances, although PPT is hardly an "innocent bystander", it cannot be said to be a participant in Zenrock's fraudulent scheme, despite its awareness that Zenrock had purchased the Cargo from SOCAR before buying it from PPT, further down a chain of sales and purchases. It cannot properly be said that PPT had actual knowledge of, or was wilfully blind to, the fact that this was a fraudulent scheme because it had, in this case, been offered a pre-structured deal, similar to those that had taken place in the past, all of which had gone through successfully without any suggestion of fraud.
> …

14 Remarkable as was PPT's ignorance of even the general level of market prices and its disinterest in what was going on, that is the factual basis on which these appeals proceed. There has been no attempt to disturb the Judge's findings on these points.

15 The anomalies in the overall position came relatively swiftly to CACIB's attention. TOTSA, having received notices of assignment from both SOCAR and CACIB in respect of the amount receivable under Zenrock's sale to it, e-mailed ING, CACIB and Zenrock on 23 April 2020, seeking an urgent explanation from Zenrock as to the legitimate beneficiary of the amount receivable. Shortly thereafter, having received from CACIB a copy, TOTSA pointed out to CACIB that it had been given a forged version of the Zenrock-TOTSA sale contract. CACIB decided not to make any payment under the letter of credit, but sought to investigate. On 28 May 2020, CACIB applied to the General Division of the High Court for and obtained the Interim Injunction restraining payment under the letter of credit (see [4] above). This remained in force until 13 November 2020, whereafter payment was made on 18 November 2020 on the basis indicated at [4] above.

16 Under Art 14(b) of the UCP 600, CACIB had five banking days following the presentation of the letter of credit to examine the documents and

to determine whether they were compliant. Under Art 16(c) read with Art 16(d), CACIB also had, within those five days, to notify PPT or BOC as presenter of the documents of each discrepancy on which it relied in order to refuse to honour or negotiate. Under Art 16(f), a bank which fails to act in accordance with the provisions of Art 16 "shall be precluded from claiming that the documents do not constitute a complying presentation". As CACIB did not make any notification of any discrepancy pursuant to Art 16(c) read with Art 16(d), CACIB was, as the Judge held, precluded under Art 16(f) from resisting payment under the terms of the credit (*Judgment* at [6]–[7]). There is no appeal against that conclusion regarding the position under the UCP 600.

The letter of credit

17 The first issue before this court is, in these circumstances, whether CACIB was entitled to rely on Zenrock's undoubted fraud to set aside and avoid liability to pay under the letter of credit issued in favour of PPT.

18 It is hornbook law that a letter of credit issued by a bank in favour of a seller-beneficiary gives rise to a binding contractual relationship, which is quite separate or autonomous from the underlying contractual relationship between the buyer and seller: *United City Merchants (Investments) Ltd and Glass Fibres and Equipments Ltd v Royal Bank of Canada, Vitrorefuerzos SA and Banco Continental SA* [1983] 1 AC 168 ("*United City Merchants*") at 182–183. Such an instrument is by mercantile usage enforceable immediately upon issue, without consideration: Roy Goode and Ewan McKendrick, *Goode and McKendrick on Commercial Law* (LexisNexis, 6th Ed, 2020), at para 35.51, citing E P Ellinger, *Documentary Letters of Credit, a comparative study* (University of Singapore Press, 1970) at p 122; see also *United City Merchants* and *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of*

Oil, Republic of Iraq [2018] AC 690 at [25] and [95] (*per* Lord Clarke and Lord Mance). This is in accordance with the definition of a "credit" in Art 4 of the UCP 600 which establishes the irrevocability of letters of credit from the moment of their issue. The same principle has recently been endorsed by this court in *Kuvera Resources Pte. Ltd. v JPMorgan Chase Bank, N.A.* [2023] SGCA 28 ("*Kuvera*"), where this court accepted a characterisation of letters of credit as independent and autonomous unilateral contracts with a *sui generis* exception of irrevocability (at [29] and [35]).

19 CACIB's letter of credit in favour of PPT was expressly subject to the autonomy of a credit from underlying transactions and related contracts. This principle as stated in Art 4 of the UCP 600 reads:

> Credits v. Contracts
>
> a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. ….

20 The established common law exception to this rule is the fraudulent presentation rule, that is, "where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue": *United City Merchants* at 183 and *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 ("*Edward Owen Engineering*") at 169. Both courts in *United City Merchants* and *Edward Owen Engineering* approved the landmark American case of *Sztejn v J. Henry Schroder Banking Corporation* (1941) 31 N.Y.S. 2d 631 at 634, which affirms

that where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller. The same principle of course applies to an unconfirmed credit, such as that here issued by CACIB.

21 In *United City Merchants*, the House of Lords rejected the "broad proposition" that a confirming bank is not under any legal obligation to the seller or beneficiary of a documentary credit to pay to him the sum stipulated in the credit against a complying presentation of documents, should the documents contain some inaccurate statement of material fact. The House of Lords noted that this proposition, which did not require knowledge on the part of the seller or beneficiary of the existence of the inaccuracy, would render the fraud exception superfluous and "destroy the autonomy of the documentary credit which is its raison d'être": (at 184–185).In other words, the proposition would result in an unsatisfactory situation whereby the seller's right to payment by the confirming bank would be contingent on the buyer's rights against the seller under the sale of goods contract, of which the confirming bank will have no knowledge (at 185E). It also went on to reject a "half-way" house submission (which the lower English Court of Appeal in *United City Merchants (Investment Ltd) and others v Royal Bank of Canada and others* [1981] 3 WLR 242 had adopted). The proposition rejected was that (*United City Merchants* at 187B):

> … if any of the documents presented under the credit by the seller/beneficiary contain a material misrepresentation of fact that was *false to the knowledge of the person who issued the document* and intended by him to deceive persons into whose hands the document might come, the confirming bank is under no liability to honour the credit, even though, as in the instant case, the persons whom the issuer of the document intended to, and did, deceive included the seller/beneficiary himself.

22 The English Court of Appeal, in accepting this half-way house approach, had started from the premise that a bank "could refuse to pay against a document that it knew to be forged, even though the seller/beneficiary had no knowledge of that fact" (*United City Merchants* at 187F–187G). Lord Diplock doubted that the premise was correct, even in relation to a document which was forged or a nullity. That being said, the case before the House of Lords concerned a bill of lading with the wrong date of loading placed on it by the carrier's agent and that "was far from being a nullity. It was a valid transferable receipt for the goods giving the holder the right to claim them at their destination": *per* Lord Diplock at 188B. Lord Diplock went on to say that, even if the half-way house approach were assumed to be correct as regards forgery by a third party, "to say that this leads to the conclusion that fraud by a third party which does not render the document a nullity has the same consequence appears to me, with respect, to be a non sequitur" (at 188C). The House of Lords thus rejected the Court of Appeal's half-way house approach. The rejection of the proposition that a fraud by a third party to the letter of credit could affect its enforceability is worth noting in relation to the issue currently before this court.

23 Another established principle is that a bank issuing to a seller-beneficiary an instrument such as the present credit is entitled to impugn the validity of the credit by reference to any fraud or misrepresentation by the beneficiary inducing its issue: *Solo Industries UK Ltd v Canara Bank* [2001] 1 WLR 1800 ("*Solo*"), citing *Safa Ltd v Banque Du Caire* [2000] 2 Lloyd's Rep 600 ("*Safa*")" at 1809E. In its submissions, CACIB focused on the reference in these authorities and in various textbooks to a bank's entitlement to impugn the validity of the credit. It submits that this embraces a claim by a bank that it has been induced by the buyer, its customer, to issue a letter of credit in favour of a seller-beneficiary.

24 There is no support for CACIB's submission. The references to impugning the validity of an on-demand instrument like a performance bond (in *Solo*) or a credit (in *Safa*) were confined carefully and expressly to situations where the seller-beneficiary was party to the fraud or misrepresentation (see *Safa* at 608; *Solo* at 1809, 1814 and 1816). Though the court in *Solo* (at 1814F) said that the beneficiary in that case was seeking to impose on the bank "the risk of being misled into entering into the instrument, when the only risks that the bank may fairly be taken to have accepted are the risks undertaken under the instrument, *assuming* it to be valid" [emphasis in original], it was identifying the incongruity of holding a bank to an obligation which was suggested to exist towards someone who had misled the bank into undertaking the obligation. In other words, the court in both cases was focusing on a situation where one and the same relationship embodied the obligation and was being impugned. One relationship was in issue, not two autonomous relationships, as is the present case.

25 CACIB relies on another case, *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) Plc* [1992] 1 Lloyd's Rep 513 ("*Rafsanjan*"). In that case, the finding that the bank's customer (the buyer, Firegreen Ltd) obtained the issue of a letter of credit by fraud would, on CACIB's case, have been sufficient to defeat the seller-beneficiary's claim, without more. However, in *Rafsanjan*, both the bank, who was represented by the most experienced of counsel in this field, and the court correctly approached the matter on the basis that it would be necessary to prove the involvement of the seller-beneficiary in fraud on the bank in one of three possible ways, described as "Fraud issue 1 – alleged complicity with Firegreen's application"; "Fraud issue 2 – taking benefit with knowledge" and "Fraud issue 3 – fraudulent presentation of documents" (see *Rafsanjan* at 525, 534–535, 539).

26 CACIB further invokes the second alternative ground of decision indicated by Hirst J in *Rafsanjan* (at 539). In *Rafsanjan*, Hirst J stated:

> *Fraud issue 2 – taking benefit with knowledge*
>
> My conclusion in favour of the defendants on their primary case in fraud also embraces a finding in their favour under this second heading.
>
> If however I am wrong in my conclusion on their primary case, I am satisfied, having regard to my impending findings under the third fraud case set out below, that they would be entitled to succeed on this second basis.
>
> It is well settled that once a fraud has been committed, not only the original party but also every other party is precluded from taking any benefit from it, unless there has been some consideration moving from him, and that he becomes a party to it as soon as he knowingly seeks to derive such benefit (*Scholefield v. Templar*, (1859) Johns 155 *Huguenin v. Baseley* 14 Ves. 273).
>
> Even if, contrary to my view, Mr. Mortazavi [the managing director of the plaintiffs] was not in complicity with Firegreen, he must have known on receipt of the [letters of credit] that each one of them was inconsistent with the underlying transactions … Mr. Mortazavi in evidence accepted that on their face the [letters of credit] demonstrated that the bank was under a misapprehension as to the underlying transactions …
>
> As to consideration, it is plain that no consideration was given, seeing that [the plaintiffs] had parted with the goods under all the [letters of credit] before those [letters of credit] were issued.
>
> Consequently [the bank] would be entitled to succeed on their second case in fraud even if they had failed on the first.

27 The third fraud issue which Hirst J held to have been proved was to the effect that the invoices presented under the letter of credit were, to the knowledge of the plaintiffs/sellers, fraudulent concoctions, which misstated the whereabouts of the goods to make it appear that they satisfied the letter of credit requirements (*Rafsanjan* at 539–540). Hirst J therefore decided the third fraud case by reference to the fraud exception identified at [20] above. The second fraud issue which he held to have been positively established in the light of his

findings in relation to the third fraud issue was that, although the sellers were not actually complicit in the buyer's fraud, the sellers *knew* as soon as they received the letters of credit that their opening had been fraudulently procured by the buyer and took the benefit under the letters of credit without consideration, as they did not in any way rely on the letters of credit, having parted with the goods independently of such letters of credit (at 539). Aside from very special facts of that nature, we do not consider that there is any more general or presently relevant principle to be derived from *Scholefield v Templar* (1859) Johns 155 ("*Scholefield*") and *Huguenin v Baseley* 14 Ves 273 ("*Huguenin*"), which were cited by Hirst J. The principle in those cases that fraud precludes not only the original party but every other party from taking any benefit (unless there has been some consideration moving from him) – well-known or not in other fields of the law – has made no other appearance in the field of letters of credit or similar instruments. We think that this is for good reason. Their principle relates to the receipt by A, without giving any consideration, of a benefit as a result of the fraud of B, but in circumstances which can be unravelled without prejudice to A. But, understood and applied literally in a banking context in the width stated by Hirst J in his third paragraph quoted at [26] above, the principle would undermine the contractual relationships between sellers and banks which are, daily and for good commercial reasons, treated as binding by mercantile usage *even without consideration* and are relied on accordingly, even if it may subsequently emerge that the buyer has procured the credit by fraud. Such a principle would cut across, confuse and potentially undermine the established principles governing letters of credit, set out in [18]–[23] above and [31] below. We therefore do not accept that the principle in *Scholefield* and *Huguenin* has any role or application in relation to the facts of the present case, unusual though they may be.

28 Further, nothing in Art 4 of the UCP 600 lends support to CACIB's submission. On the contrary, Art 4 states that a credit "by its nature is a separate transaction from the sale *or other contract* on which it may be based" and that consequently the bank's undertaking to honour the credit "is not subject to claims or defences by the applicant *resulting from its relationships with the issuing bank* or the beneficiary" [emphasis added]. The autonomy of the contractual relationships between: (a) the bank's customer and the bank; and (b) the bank and the seller-beneficiary is also highlighted in *United City Merchants* (at 183H–184C). CACIB's submissions fuses the two relationships in a manner which is without precedent.

29 CACIB suggests that the principle which it invoked could be confined to cases of nullity of, or fraud inducing, a letter of credit. We accept that, if a credit was fabricated so as to be a nullity, and somehow issued so as to make it appear that it came from the bank named in it, it would not be a document to which the bank named in it was party at all. But fraud by a bank's customer inducing a bank to issue to a third party beneficiary a credit is not analogous to a situation of nullity. Further, if there were (which there is not) any analogy with the situations addressed in *Solo, Safa* and *Rafsanjan*, those cases would not support confining relief to situations of fraud, since they expressly contemplate that either fraud or misrepresentation by a beneficiary would suffice to enable the court to grant relief.

30 CACIB also suggests that whether the letter of credit was confirmed is significant. That is an irrelevant consideration in the present context. If, as CACIB suggests, an issuing bank like CACIB might be able to invoke its customer's fraud but a confirming bank could not, the wholly anomalous result would be to impose an obligation to pay on a confirming bank, in circumstances

where it had no right of indemnity from the issuing bank for fulfilling its obligation. That is a risk quite outside any undertaken by a confirming bank.

31 The fundamental problem with CACIB's case on the letter of credit is that it would, if accepted, significantly undermine the whole system of documentary credits. The effect would be that no seller-beneficiary could be assured of payment under a letter of credit, without investigating the integrity of the issuing bank's customer in its relationship with the issuing bank, which is a practical impossibility, or without seeking some further contractual protection or insurance against the risk that the issuing bank's customer may have misled the issuing bank. Therefore, we unhesitatingly reject CACIB's appeal in relation to the letter of credit.

The letter of indemnity

32 The second issue that arises in these appeals concerns the promises provided under the LOI, which PPT issued to CACIB, as called for under the letter of credit, in the absence of bills of lading for the Cargo concerned.

33 The LOI mirrors the language set out in the letter of credit itself and reads as follows:

> LETTER OF INDEMNITY (L.O.I.)
>
> DATE: 09 APRIL 2020
>
> FROM: PPT ENERGY TRADING CO., LTD
>
> TO: CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, SINGAPORE BRANCH FOR ACCOUNT OF ZENROCK COMMODITIES TRADING PTE LTD
>
> We refer to our contract dated 02 April 2020 in respect of our sale to Zenrock Commodities Trading Pte Ltd of a shipment of 920191.814 net U.S. barrels of Djeno Crude Oil shipped on

> board the vessel Indigo Nova at the port of Djeno Terminal, Congo with bills of lading dated 06 April 2020.
>
> To date we are unable to provide you with the requisite shipping documents in relation to the said sale which consist of:
>
> 1) Full set 3/3 original and 3 non-negotiable copies clean on board bills of lading issued or endorsed to the order of Credit Agricole Corporate and Investment Bank, Singapore Branch.
>
> In consideration of your making payment of the full invoiced price of USD 23,662,732.50 (and payment when due of any subsequent shortfall apparent on any final invoicing and set out in any final invoice) for the shipment at the due date for payment under the terms of the above contract without having been provided with the above documents, we hereby expressly warrant that at the time property passed under the contract we had marketable title to such shipment, free and clear of any lien or encumbrance, and that we had full right and authority to transfer such title to you, and that we are entitled to receive these documents from our supplier and transfer them to you.
>
> We further agree to protect, indemnify and save you harmless from and against any and all damages, costs and expenses (including reasonable legal fees) which you may suffer or incur by reason of the original bills of lading and other documents remaining outstanding or breach of warranties given above …
>
> This Letter of Indemnity shall be governed by and construed in all respects in accordance with the laws of England, but without reference to any conflict of law rules. …
>
> The validity of this Letter of Indemnity shall expire upon our presentation to you of the aforesaid shipping documents or one year after bill of lading date.

34 The LOI contains two relevant promises which are to be considered. The first was PPT's warranty that "at the time property passed under the contract [PPT] had marketable title to such shipment, free and clear of any lien or encumbrance", and the second was its agreement to "protect, indemnify and save [CACIB] harmless from and against any and all damages, costs and expenses … which [CACIB] may suffer or incur by reason of the original bills of lading remaining outstanding or breach of warranties given above".

35 The first promise was expressly given "[i]n consideration of [CACIB] making payment … at the due date for payment under the terms of the [letter of credit]". The second promise was not expressly made similarly in consideration of payment under the credit on its due date, but the Judge held, and we concur, that this was the natural meaning of the document, as underlined by the fact that the indemnity was given not only against losses by reason of the bills of lading remaining outstanding but also against losses by reason of breach of the "warranties given above" (which were expressly given "in consideration of payment" at the due date) (*Judgment* at [189]). We shall refer to the first promise as the "Warranty", and to the second promise as the "Indemnity".

36 The due date for payment under the letter of credit was originally 5 June 2020, which was the same date that payment was due under the sale contract between PPT and Zenrock (the "PPT-Zenrock Sale Contract"). It will be recalled that on 28 May 2020 CACIB obtained its Interim Injunction against payment under the letter of credit, and that the Injunction was later discharged under an arrangement (described at [4] above) whereby CACIB made payment to PPT under the letter of credit on 18 November 2020 and was protected by a bank guarantee secured by the payment sums being placed in escrow. Interest on that sum was subsequently awarded to PPT to cover the lateness of payment beyond 5 June 2020 (this among other consequentials was covered by a separate judgment given by the Judge, on the papers and without a hearing, dated 30 March 2022). The Judge hence held that PPT was entitled to interest at the rate of 5.33% and *pro rata* on the said sum from 5 June 2020 to 18 November 2020.

The Judge's reasoning

37 The Judge held that the LOI did not operate to protect CACIB in the event that CACIB failed to make payment under the letter of credit. He accepted PPT's submission that on a true construction, the LOI required payment (and not the mere agreement to pay) (and not merely at a later date, even if recompensed by interest), and those requirements had not been met on the due date (*Judgment* at [155]).

38 The Judge arrived at this conclusion by treating the LOI as a unilateral contract which could only be effective when its conditions had been fulfilled. In particular, the Judge treated the requirement of payment at the due date as a condition. In the absence of timely payment at the due date, there was no acceptance of the LOI which simply failed to take effect. The Judge stated (*Judgment* at [155]):

> Whilst this [late payment, even one day late due to an administrative error] might appear uncommercial, CACIB had no answer, and I do not see any answer, to this point. The warranties plainly do not apply in the absence of a payment, and, on the terms of the LOI, cannot apply unless there is payment *at the due date*.
>
> [emphasis in original]

39 The Judge rejected CACIB's contention that the Interim Injunction had extended time for payment (*Judgment* at [158]–[159]). Even though, as he accepted, by reason of the injunction, it would not have been a breach of the letter of credit not to have paid by 5 June 2020, the Judge declined to read this situation as extending time for payment under the PPT-Zenrock Sale Contract which was the subject-matter of the LOI. He exemplified a more usual court order in such situations whereby payment is made and then immediately frozen. He stressed that Zenrock was not a party to the injunction proceedings, which

could not therefore have affected the date for payment under its contract with PPT. The Judge therefore concluded (*Judgment* at [161]):

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

40 The Judge thereafter went on to consider in *obiter* whether, in any event, the Warranty had been breached, and whether the Indemnity operated to protect CACIB (*Judgment* at [162]).

41 As to the Warranty, which he treated as constituting two separate warranties, one relating to "marketable title" and the other relating to such title being "free and clear of any lien or encumbrance", the Judge held that there was no breach. PPT's title was "marketable" in as much as ownership could and did pass at shipment on 6 April 2020 in accordance with the terms of the sale contracts (*Judgment* at [170]). The bills of lading were therefore not necessary to pass title. As for freedom from liens and encumbrances, the impediment relied upon by CACIB, namely the floating charges granted by Zenrock to ING and CACIB (under earlier instruments dated 3 September 2014 and 24 August 2018 respectively) over all goods financed or to be financed by each bank, created no proprietary interest until crystallisation; and even such crystallisation did not affect a sale in the ordinary course of trade to a purchaser without notice of such crystallisation. Therefore, as neither of the relevant buyers of the Cargo (*ie*, neither Shandong nor PPT) had notice of the crystallisation when title passed on shipment on 6 April 2020, there was no lien or encumbrance on the title (*Judgment* at [173]–[178]). The Judge concluded (at [179]):

> The position is therefore that, as at 6 April 2020, Shandong and PPT acquired ownership of the Cargo free from any floating charge in favour of either ING or CACIB because neither had

> notice of crystallisation. In such circumstances, PPT's warranty that, at the time property in the Cargo passed under the PPT-Zenrock Sale Contract on 6 April 2020, it had marketable title to the Cargo which was free and clear of any lien or encumbrance, was not broken. If the first warranty was not broken it is common ground that the second warranty could not be broken either. There was therefore no breach of the first or second warranties.

42 The Judge proceeded to consider the Indemnity provided by the LOI (*Judgment* at [188]). He asked himself whether any losses had been caused to CACIB by reason of the bills of lading having been "outstanding", *ie*, not available to CACIB (*Judgment* at [191]). The Judge concluded that, even if the original bills of lading had been provided, exactly the same series of events would have taken place as did in fact take place, *viz* that TOTSA would not have paid CACIB on a false invoice for an inflated price under the fraudulent Zenrock-TOTSA sale contract, and that CACIB would not have accepted or made use of the bills (or been able to make any straightforward use of the bills) but would ultimately have settled with TOTSA and ING in the way which actually occurred. Meanwhile, the vessel would have continued to its destination in China while arguments continued between the rival claimants to the genuine TOTSA receivable. The Judge expressed these conclusions as follows (*Judgment* at [196]–[199], [202]):

> 196. CACIB's case was that, if it had become a lawful holder of the original bills of lading, it would have been able either to obtain possession of the Cargo from the *Indigo Nova* or to enforce rights of suit against the vessel for delivery to someone who was not a holder of the original bills of lading. As PPT points out in its submissions, however, CACIB has not advanced a factual case that it would have accepted the documents and become a holder of the original bills of lading as opposed to merely being a recipient of them. …
>
> 197. I am unable to find therefore that CACIB would have accepted the bills of lading as conforming documents and become a lawful holder of the original bills of lading at any particular point in time prior to the date of actual payment on

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

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

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

…

> 202. CACIB has the burden of proof in establishing any loss for which PPT would be liable to indemnify it. As appears from the above recitation of the limited evidence available and the inferences and assumptions which the court would have to make in exploring the counterfactual, CACIB cannot discharge that burden in showing the loss which it would have suffered by reason of the original bills of lading being outstanding. The loss which it has currently suffered is measured by the sum paid out under the Letter of Credit which it was bound, on the findings I have made earlier in this judgment, to pay to PPT regardless of any fraud by Zenrock. The alleged damage is not the result of having to pay that sum but its inability to recover that sum from Zenrock, which had deceived it into issuing the Letter of Credit in the first place with the Fabricated Zenrock-TOTSA Sale Contract and the issue of the CACIB [notice of assignment] which duplicated the ING [notice of assignment]. The reason why CACIB could not obtain the TOTSA Receivable to cover that outlay was the duplicate assignment that Zenrock had made. Moreover, on the final day of the hearing, it transpired that some US$6m may have been received by CACIB as a result of the settlement of the interpleader proceedings.

43 In sum, there was no breach of the Warranty, and no loss was proven to have been caused by reason of the bills of lading not having been provided. However, the Judge does not appear to have dealt expressly with the question of the loss caused by a breach of the Warranty, had there been one. This may have been because CACIB's pleaded case at trial was simply that the loss suffered both by reason of the breach of the Warranty and pursuant to the Indemnity was on the basis that CACIB had been "deprived by PPT of being the lawful holder of the [endorsed bills of lading] and exercising its proprietary rights".

The parties' submissions

44 On appeal, CACIB submits that the Judge erred in the following main respects:

(a) First, the Judge was wrong to interpret the LOI as a unilateral contract or as ineffective because of failure to pay by 6 June 2020.

(b) In any event, the reference to payment at that date was not a condition of the LOI, but merely served to identify (or mis-identify) the payment obligation in question.

(c) In any event, the obligation to pay had been suspended by the Interim Injunction.

So much on interpretation of the LOI, which was therefore an effective instrument.

45 Then, as to breach of the Warranty, CACIB's arguments are that:

(a) There was no marketable title at shipment where the beneficiary of the warranty was exposed to "litigation or hazard" for various reasons, which included Zenrock's intention to pass title directly to TOTSA under its earlier contract, rather than to Shandong under the later loop via Shandong-PPT-Zenrock-TOTSA, as well as Zenrock's fraud and the charging of the goods under two separate floating charges.

(b) The goods were not free and clear of any lien or encumbrance, because of the floating charges, which were registered and had in any event crystallised by 6 April 2020, as was known at least to Zenrock, which had deliberately deceived CACIB.

46 In relation to the Indemnity, CACIB's submission is that the Judge had, contrary to the evidence, adopted the wrong counterfactual to the effect that CACIB, even if presented with the bills of lading, would have acted in exactly

the same way and thus never taken up the bills in order to become the lawful holder of them. The Judge should have adopted a counterfactual that, if the bills of lading had had to be presented, the fraud would never have taken place at all, because the indorsed bills would have revealed the fraud.

47 Finally, as for the damages for the breach of the Warranty, CACIB's argument is that damages were independent of the question of an indemnity, and depended on the position where there would have been no blight or encumbrance on the title, in other words, where there had been no fraud by Zenrock.

48 PPT submits that the Judge was right for the reasons which he gave. In brief, the consideration to be given under the LOI was the payment, and not the mere promise of payment contained in the letter of credit. The due date of 6 June 2020 under the sale contract had not been affected by the Interim Injunction against payment under the letter of credit. There was no breach of the Warranty, because title had been transferred down the line of contracts on shipment, as the various sale contracts provided, without any reservation of title. In any event, "marketable" title added nothing to freedom from lien or encumbrance, and there could be no complaint of breach of the Warranty where title had passed in the ordinary course of trade and without proven notice of crystallisation of the floating charges. As for the Indemnity, there was no loss, because CACIB would have acted in exactly the same way in disputing liability to pay and therefore would not have taken up the documents or thus become a holder of the bills of lading. As to loss by reason of any breach of the Warranty, it had never been pleaded or claimed that if the Warranty had been performed, there would have been no fraud, which in any event was a misconceived submission. The same went for any attempt to support the indemnity quantum

on the submission that there would have been no fraud if the bill of lading had been produced.

49 In these circumstances, the following issues arise for our determination in relation to the LOI:

(a) What is the true construction and effect of the LOI? In particular, was payment by the due date of the sale contract a condition of that contract?

(b) If the LOI was effective at all, was there a breach of the Warranty? In particular, was there a marketable title, free and clear of any lien and encumbrance that was passed under the sale by PPT?

(c) If there was a breach of the Warranty, what damages were incurred?

(d) What was the quantum of any loss to be indemnified under the Indemnity in the absence of the bills of lading?

Issue 1: What is the true construction and effect of the LOI?

50 The Judge was of the view that the LOI was crucially a unilateral contract, which could only be accepted by CACIB if CACIB had fulfilled the precise conditions specified in the offer contained in the LOI. Since CACIB had not paid the specified price "at the due date for payment [*viz*, 5 June 2020] under the terms of the above contract [*viz*, the PPT sale contract to Zenrock]" (see [33] above), the LOI never came into effect.

51 In our judgment, however, the LOI was in its context effective from the moment of its issue. The fundamental question, therefore, is whether the payment of the letter of credit on its due date, or, if it matters, the payment of the amount due under the sale contract on its due date, was a condition precedent of PPT's obligation to indemnify CACIB.

52 The LOI was effective, for its true terms, from the date of its issue. In the absence of the bills of lading, it was *already* PPT's obligation, if it wished to take advantage of CACIB's letter of credit, to supply the agreed LOI, as it was CACIB's obligation, if the LOI was provided, to pay under the letter of credit. This is evident from the language of the letter of credit, which states:

> … Documents required against presentation of the following documents in one original plus two copies unless otherwise stated:
>
> …
>
> 2) Full set of 3/3 original plus 3 non-negotiable copies clean on board bills of lading issued or endorsed to the order of Credit Agricole Corporate and Investment Bank, Singapore Branch marked freight payable as per charter party.
>
> 3) Certificate of quality.
>
> 4) Certificate of quantity.
>
> 5) Certificate of origin.
>
> In case documents No. 2 to 5 are not available at time of presentation, then payment to be made against presentation of following documents:
>
> A) Beneficiary's signed commercial invoice …
>
> B) Beneficiary's *signed letter of indemnity* …
>
> [emphasis added]

53 The underlying arrangement therefore entailed that PPT had no option but to provide the LOI if it wanted to be paid, and that CACIB had no option, if

the LOI was provided, but to pay the agreed credit. PPT could not withdraw the LOI once it had been provided, or at any rate once CACIB had indicated that it was accepting it, which it did on 22 April 2020 by its Advice for Receipt of Documents informing Zenrock that PPT's documents had been received and that all the terms and conditions of the letter of credit had been met for payment. Similarly, CACIB could not choose whether to pay the credit, subject to a possible defence of fraud or other arguments (which have failed) once the stipulated documents had been provided. As confirmed by *Chitty on Contracts vol I* (H G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) (at para 4-108), an irrevocable letter of credit, despite the absence of any counter-promise by the beneficiary to the bank, is not itself a unilateral contract, because it is regarded as being binding as soon as it is communicated to the seller, *ie*, before the seller has even done any act of acceptance. The LOI itself provided that it remained valid (*ie*, that it could not be withdrawn) until presentation of the bills of lading or for one year after the bill of lading date (see [33] above).

54 None of these arrangements fits comfortably with the doctrine of a unilateral contract, such as the traditional examples of a promise to pay £100 to someone who walks from London to York, or an offer made to the world at large such as was found in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA). But they reflect and fit perfectly with the now well-established understanding of a letter of credit as a unilateral and irrevocable contract: see paragraph 18 above. It follows that the LOI has to be construed as a *prima facie* effective contract, subject of course to the terms stated therein.

55 The next question, then, is the interpretation of the words "[i]n consideration of your making payment of the full invoiced price … for the shipment at the due date for payment under the terms of the above contract".

Is payment "at the due date" a condition precedent? What if payment is made an hour late, due to some administrative error? What if it is made early and so not "at" the due date but rather, "by" the due date? The Judge, who considered it necessary, even if apparently uncommercial, to be strict, nevertheless construed "at" as "by" (see *Judgment* at [161]), even though that does not fit all that easily with the words "making payment … *at the due date*". However, we see no need to construe the reference to "at the due date for payment" as a strict condition, as distinct from a description of the obligation and an innominate term. In this connection, we refer to what was said by the Court of Appeal of England and Wales as to an obligation of timely payment not being a condition making time of the essence, even where emphasised by a termination clause: see *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982 at [39(iv)]. In context, CACIB's obligation to pay on 5 June 2020 was already to be found in the letter of credit, where the obligation was not a condition. It therefore seems strange to construe the equivalent obligation in the LOI as a condition. If it be said that the obligation of payment referred to in the LOI was the obligation to pay under the sale contract, then that obligation was not a condition either. Eventually, CACIB paid on the letter of credit, and paid interest in remedy of the breach of late payment.

56 A question arises as to whether this analysis is in any way disturbed because the LOI refers to payment of the price of the Zenrock-PPT sale contract, rather than to payment under the letter of credit. For instance, if CACIB's consideration was to pay under the sale contract, to which CACIB was not a party, unlike its letter of credit, might it be said that the LOI was a true unilateral contract because the background did not involve CACIB as being already obliged to pay under that contract? We do not consider that is so. As a matter of history, the language concerning a letter of indemnity had been brought into the

letter of credit by inserting into it the already existing terms of the sale contract's letter of indemnity clause, with its repeated references to the sale contract. That was not perhaps appropriate. Even so, the LOI does not in terms say that the payment is to be made under the sale contract as distinct from "at the due date for payment under the terms of the above contract". As things stood, that was the date for payment under the letter of credit. Payment of the letter of credit at its due date would therefore amount to payment of the stipulated price at the due date for payment under the terms of the sale contract. As such, we are of the view that the above analysis is not faulted by this additional consideration.

57 That leads on to the further question of whether the Interim Injunction obtained by CACIB against payment of the letter of credit amount had the effect of extending time for payment, so that, as CACIB submits, there was in any event no failure to pay "at the due date". There is also a further question of whether the reference to the due date for payment under the sale contract meant that the Interim Injunction had no effect on the LOI, as the Judge concluded and PPT submits anew on appeal. CACIB could have protected itself by making timely payment into court or otherwise freezing the proceeds of payment by court order pending the adjudication of the dispute. This has also been the conventional way of dealing with such letter of credit disputes. In our judgment, the Judge was right about this. The due date under the terms of the sale contract could not be affected by the court's order without making Zenrock a party to the proceedings, which did not occur. As it was, even the due date for payment under the letter of credit was not changed, for interest was paid for late payment.

58 In sum, we would therefore answer this first question by concluding that the LOI was effective, and that CACIB, although in breach of the LOI by reason of late payment, was not defeated by any condition which made time of the

essence. Our conclusion avoids us having to give to these arrangements an uncommercial effect.

Issue 2: Was there a breach of the Warranty?

59 The Judge was of the view that there was no breach of the Warranty of marketable title, because he considered that title had passed in the ordinary way on shipment and that the expression "marketable title" added nothing to the words "free and clear of any lien or encumbrance" (*Judgment* at [179]).

60 In our judgment, however, the words "marketable title" have to be given their own effect, and existing jurisprudence explains that effect as a title that may at all times and under all circumstances be forced on an unwilling buyer, which is contrasted with a title which will expose the buyer to "litigation or hazard": see *Barclays Bank PLC v Weeks Legg & Dean (A firm)* [1999] QB 309 ("*Weeks Legg"*) (at 325), citing *Pyrke v* Waddingham (1852) 10 Hare 1 at 8.

61 CACIB submits that the Warranty was broken both because: (a) Zenrock always intended title to pass to TOTSA under a genuine sale and not to Shandong on the round-tripping chain under a fraudulent sale; and (b) PPT's title was not free from litigation or hazard.

62 We reject CACIB's first submission. Circles within chains of contracts are not unknown. Although the round-tripping chain was inserted into an existing chain, the result was ultimately a longer chain. Title passed on shipment, by which time that longer chain had been constructed. Title therefore passed on shipment down that longer chain. CACIB, on the other hand, seeks to present the matter as two entirely separate chains, with title passing down the "first" chain from SOCAR to Zenrock and then directly to TOTSA (first in the

sense that the contracts in that chain were concluded by 30 March 2020) rather than down the later "second" chain involving Shandong and PPT and then back to Zenrock. However, until shipment the goods were unappropriated, and title did not pass until shipment, by which time the two chains had become one, with the fraudulent round-tripping inserted into what ultimately became a longer chain.

63 But was that title "marketable"? The Judge asserted that "[t]he title was marketable in as much as ownership could and did pass at the vessel's flange at the loadport" (*Judgment* at [170]). He then went on immediately to consider whether that title was "free and clear of any lien or encumbrance". He concluded that it was, because the crystallisation of any floating charge was unknown to the buyer (*Judgment* at [175]). But in the course of considering that question, he reverted, hypothetically, to the question whether a court would enforce the chain despite a lien or charge. He reasoned that that question was concluded in the case of sale of goods (distinguishing sale of real property, the subject-matter of *Week Leggs*) by s 12(2) of the Sale of Goods Act 1979 (c 54) (UK) ("Sale of Goods Act"), which implies a term that "the goods are free and will remain free until the time when the property is to pass from any charge or encumbrance not disclosed or made known to the buyer before the contract was made", a term which s 61(1) of the same Act makes clear is a warranty, *ie*, a term sounding only in damages. In other words, even if there had been a breach of the warranty that the goods were "free and clear of any lien or encumbrance", the goods could be forced on an unwilling buyer in the sense that the buyer could not reject the goods but would be limited to damages. Therefore, he concluded that the warranty of "marketable title" added nothing to the warranty that the goods were free and clear of any lien or encumbrance (*Judgment* at [164]–[166] and [171]–[172]).

64 However, we are not persuaded by that reasoning, which PPT seeks to uphold on this appeal. First of all, the fact that title passed does not mean that it was a "marketable" title. Second, the fact that breach of a warranty of marketable title may sound only in damages does not mean that it is not a breach. Third, we are not concerned with the term "free and clear of any lien or encumbrance", but with the warranty of marketable title, about which the Sale of Goods Act says nothing. Fourth, the implied term in s 12 of the Sale of Goods Act is a term implied in a contract for the *sale of goods*, whereas we are concerned with an express term in a letter of indemnity given in the absence of a bill of lading, a document of title. It follows that the LOI Warranty is not a "warranty" of the Sale of Goods Act variety, breach of which is confined "at all times, and under all circumstances" to a remedy in damages. Fifth, we do not understand the jurisprudence, which counterpoints the expressions "a title which exposes a purchaser to litigation or hazard" and "a title which the court will force upon an unwilling purchaser", to mean that a title which exposes a purchaser to litigation or hazard and thus is to be regarded as *prima facie* not marketable will be forced on an unwilling purchaser because breach of the promise of a marketable title might sound only in damages, with the consequence that the title has to be regarded as marketable after all. Otherwise, the breach of warranty would be made to disappear, even though there is plainly a difference between title and marketable title. A title subject to litigation and hazard may in due course be vindicated as a good title, but only after actual litigation and hazard.

65 We therefore proceed to consider whether PPT's title was marketable. In our judgment that must depend on the true facts, not on the facts as may or may not have been known at the time of title passing. The true facts are that Zenrock was a fraudster (which in any event Zenrock of course knew), and that

by reason of its fraud, it had crystallised the inconsistent floating charges which it had given to CACIB and ING respectively. PPT obtained its title from Shandong and Shandong obtained its title from Zenrock. But the title held by Shandong and *a fortiori* the title held by PPT in turn was of uncertain value in circumstances where inconsistent charges had been granted over the same goods, the floating charges had therefore been crystallised, Zenrock was not a seller acting in the ordinary course of business and PPT was not a *bona fide* purchaser for value. The Judge accepted that the floating charges had crystallised "on 31 March 2020, or at the latest on 3 April 2020 when the Letter of Credit was issued for the finance of the Cargo" (*Judgment* at [175]), *ie*, before shipment on 6 April 2020. He also accepted that, although a seller may *prima facie* have had apparent authority to enter into agreements for the sale of goods in the ordinary course of business such that a *bona fide* purchaser for value without notice of a charge would take free of it, neither Shandong nor PPT were *bona fide* purchasers for value, since value entails actual payment and no payment was made by Shandong or PPT until 16 April 2020, whereas the question in issue related to title as of shipment on 6 April 2020.

66 Even if PPT was acquitted of actual complicity in Zenrock's fraud, the Judge might have said that Zenrock was plainly not acting in the ordinary course of business in its fraudulent endeavours, and that PPT was hardly a *bona fide* purchaser in the light of his general findings. These general findings included the Judge's determination that PPT was aware of the round-tripping and of Zenrock's position as both seller and buyer (*Judgment* at [50] and [67]). The Judge also found that it should have been obvious that there was a round-tripping chain which had to be constituted in such a way that Zenrock did not appear as the immediate seller to, and the immediate purchaser from, any one entity and so that the structure of the financing arrangements between the parties

should not reveal to any individual financing bank the presence of Zenrock in more than one place in the chain (*Judgment* at [67]–[74]). As it was, CACIB never suggested that PPT had actual knowledge of the fraud (*Judgment* at [28]).

67 In our view, the attempts at trial on the part of PPT's witnesses to deny any knowledge of such round-tripping were unbecoming and redolent of PPT's lack of good faith. Though the Judge eventually accepted that PPT did not know that the round-tripping prices were well above market price (*Judgment* at [113]), he described a PPT witness as evasive on the subject of market prices (*Judgment* at [44]). The Judge also opined that the evidence which the PPT witnesses gave was "not credible", as they sought to deny knowledge of Zenrock's endeavour to hide the round-tripping nature of the chain from CACIB (*Judgment* at [64]–[65]). Ultimately, the Judge concluded that although PPT could not be said to be a participant in Zenrock's fraud, PPT could hardly be described as an innocent bystander (*Judgment* at [115]). We agree with the Judge's finding on this point. In our view, there are well-founded concerns about the marketability of the title held by PPT from these circumstances alone.

68 Nevertheless, on the separate question of whether the title transferred was "free and clear of any lien or encumbrance", the Judge was persuaded, in the absence of any decided jurisprudence, that "a purchaser under a transaction concluded after crystallisation of the floating charge but before receiving notice of that crystallisation takes free from the floating charge", by analogy with the doctrine of the apparent authority of a seller acting in the ordinary course of business (*Judgment* at [176]). In this respect, the Judge cited *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) (at paras 4-55, 5-02 and 5-53). In the light of our decision as to marketable title, this further area of dispute may not matter. However, we would briefly observe

that: (a) the failure of Zenrock to have acted in the ordinary course of business remains; (b) PPT's failure to be a *bona fide* purchaser remains; (c) there was a *prima facie* breach of warranty since the Cargo was not free of liens or encumbrances once the floating charges crystallised; (d) PPT had notice of the charges, since they were registered, although not necessarily of the terms of those charges, if that mattered, which is uncertain; and (e) the absence of jurisprudence directly in point emphasises the importance of the absence of a marketable title free of hazard or litigation. However, we do not have to decide and refrain from deciding this additional point arising out the warranty's language "free and clear of any lien or encumbrance".

69 In sum, we conclude under this issue that there was a breach of the Warranty in that PPT lacked a marketable title.

Issue 3: If there was a breach of the Warranty, what damages were incurred?

70 The Judge said nothing on this issue. He did not have to, since this whole part of his judgment was *obiter*, and he had found that the Warranty was not breached. In any event, no separate case on damages had been pleaded by CACIB other than by reference to the quantum claimed under the indemnity given for failure to supply bills of lading. However, on appeal, CACIB presented an alternative claim: that CACIB should be put in the same position as it would have been in if either "the warranties had been true" or the original bills had been presented.

71 As to the latter of those alternatives, we will deal with that under the heading "Issue 4: What is the quantum of the loss under the Indemnity?" below,

because it is identical to the position there. Under this issue, we will deal solely with the first alternative, which is a new argument on appeal.

72 PPT opposes CACIB's alternative claim, on the basis that it was not pleaded and is a new argument on appeal. It also opposes it on the ground that breach of the Warranty did not involve any loss of the goods, only a defective title. In any event, PPT's position is that it did not follow from the counterfactual of an unprejudiced title that there would have been no fraud.

73 In our judgment, the fact that the alternative counterfactual that there would have been no fraud was *not pleaded* does not serve to eliminate the point, since it is entirely one of law. CACIB's argument on appeal is that in the absence of the breach, which was founded on Zenrock's fraud creating a defect in the marketability of the title, there would simply have been no fraud. If the title had been marketable, that could only be because the reasons which made it unmarketable, namely Zenrock's fraud, would not have occurred. We are of the view that this is a valid submission, and one that we should allow.

74 In its written case, CACIB claimed as its loss the difference between the sum paid under the letter of credit, US$23,662,732.50, and the recovery it made in the interpleader proceedings totalling US$6,197,532.75, giving a net loss of US$17,465,199.75. But in its oral submissions, CACIB claimed only the net difference between the price payable by TOTSA to Zenrock and caught by the interpleader proceedings, namely US$16,517,532.06, and the recovery of US$6,197,532.75 achieved by CACIB in the settlement of those proceedings, giving a net loss of US$10,319,470.81. We consider that CACIB's revised thoughts and reduction of its claim are correct. The existence of the claim depends on the letter of credit and the LOI given pursuant to the letter of credit.

CACIB cannot claim under either document for loss which it would only have avoided if it had not entered into those documents at all. What CACIB is entitled to claim under the LOI is loss which it would have avoided if it had unquestionable security over the receivable payable by TOTSA to which it was entitled under the LOI, and which it would have had in the absence of fraud, in return for making payment under the letter of credit. This is subject only to a degree of uncertainty raised by PPT as to the amount of CACIB's recovery in the settlement. If any uncertainty remains, and the parties cannot eliminate it to their own satisfaction, any outstanding dispute may be referred back to this court.

Issue 4: What is the quantum of the loss under the Indemnity?

75 The Judge found, as a matter of causation, that there would have been no loss to be indemnified, because if the bills of lading had been produced, rather than replaced by the LOI, CACIB would have acted in the same way as it had done in fact (*Judgment* at [193]–[202]). Namely, CACIB would have refused to take up the documents, would have refused to pay out under the letter of credit, would have never become the lawful holder of the bills of lading and would therefore never have been able to exercise any of the rights of such a holder either against the carrying vessel and her owners or against the Cargo at its destination in China. Therefore, CACIB lost nothing by having the bills of lading unavailable to it. Moreover, even if CACIB had taken up the bills, its remedies would have been entirely speculative.

76 CACIB submits that the Judge ignored CACIB's evidence, which was that, if the bills of lading had been presented, CACIB would have taken them up and been in a position to exercise its remedies against the shipowner and/or the Cargo. At the very least, CACIB would have lost the chance of the value of

such remedies, and the Judge should have evaluated that lost chance, or this court should do so.

77 In our judgment, however, it is impossible to go behind the Judge's careful findings that the position would have been no different, despite the evidence of CACIB's witnesses that it would have been. The Judge heard and saw those witnesses. Moreover, if the bills had been available, CACIB would have seen from the endorsements on those bills and understood, as Mr David Joseph KC ("Mr Joseph KC") acknowledged on behalf of CACIB, that a fraud had been committed, with Zenrock selling the goods twice under different credits. Where fraud had thus been confirmed, rather than merely suspected, it is all the less likely that CACIB would have taken up the documents and paid out under the letter of credit.

78 Mr Joseph KC therefore had an alternative argument, which was that the inevitability of the discovery of fraud from the presentation of the bills meant that there would never have been a fraud in the first place. That is to use the "no fraud" alternative argument for the purpose of the Indemnity, as well as for the purpose of the breach of warranty. However, in this context, the counterfactual of no fraud does not work. We are no longer hypothesising what would have happened if there had been no breach of warranty, but what would have happened if the bills of lading had been presented in the situation in which the parties found themselves when the LOI was presented instead.

79 We would therefore reject CACIB's attack on the Judge's findings under this issue.

80 However, we note, even though it does not affect the result, that CACIB is entitled to its quantum recovery not only as damages for breach of the Warranty, but also by way of the Indemnity, since the Indemnity also covers "all damages … which you may suffer … by reason of the … breach of warranties given above" (see [33] above).

Conclusion

81 In summary, we allow CACIB's appeals solely on the ground that PPT had breached its Warranty under the LOI that it had marketable title at the time that property passed and give judgment in favour of CACIB in the sum of US$10,319,470.81, subject only to the matter raised at [74] above. We set aside the orders made below on 30 March 2022, including the costs order in favour of PPT. The parties shall file written submissions limited to 20 pages within 21 days hereof on:

(a) the principal amounts and periods for which interest is payable to either party, if any, and the rate applicable thereto; and

(b) the costs to be awarded for the appeals and the trial.

Judith Prakash
Justice of the Court of Appeal

Jonathan Hugh Mance
International Judge

Bernard Rix
International Judge

David Joseph KC and Bibek Mukherjee (Essex Court Chambers) (instructed); Nair Suresh Sukumaran and Bryan Tan (PK Wong & Nair LLC), Tay Yu-Jin (Mayer Brown (Singapore) Pte Ltd) for the appellant;
Michael Collett KC (Twenty Essex Chambers) (instructed); Lee Wei Yuen Arvin, Giam Chin Toon SC, Wan Hui Ting, Monique and Tay Ting Xun Leon (Wee Swee Teow LLP) for the respondent.
