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

[2022] SGHC 263

Suit No 1007 of 2020

Between

UniCredit Bank AG

… *Plaintiff*

And

Glencore Singapore Pte Ltd

… *Defendant*

JUDGMENT

[Banking — Letters of credit — Relationship of parties]
[Bills of Exchange and other Negotiable Instruments — Letter of credit transaction]
[Contract — Misrepresentation — Fraudulent]
[Contract — Misrepresentation — Statements of intention]

TABLE OF CONTENTS

UniCredit Bank AG
v
Glencore Singapore Pte Ltd

[2022] SGHC 263

General Division of the High Court — Suit No 1007 of 2020
Andre Maniam J
17–20, 23–27 May, 25 July 2022

21 October 2022 Judgment reserved.

Andre Maniam J:

Introduction

1 In international trade, the purchase of goods is commonly financed by a letter of credit ("LC"):

(a) the buyer (applicant) gets a bank to issue an LC in favour of the seller (beneficiary);

(b) the seller presents to the issuing bank documents as stipulated in the LC;

(c) the bank pays the seller if the documents comply with the LC; and

(d) the buyer reimburses the bank thereafter.

2 The buyer might resell the goods it purchased, to another party, or back to the seller. That resale might be simultaneous with the buyer's initial purchase, or at some other time.

3 In a case where the *seller* has *simultaneously* bought back the goods it had sold, is the seller ***fraudulent*** if it does not tell the issuing bank about that buyback transaction?

4 The plaintiff bank ("UniCredit") contended that this was fraud, and so it sought to recover from the defendant seller ("Glencore") the amount UniCredit had paid to Glencore under an LC.

5 UniCredit also alleged that the buyer's purchase of the goods from Glencore was a sham or fictitious transaction, and so the LC should be rescinded, and Glencore should return what UniCredit had paid it. The buyer was Hin Leong Trading (Pte) Ltd ("Hin Leong"), a company now in liquidation.

Background

Hin Leong's banking facilities from UniCredit

6 On 22 November 2019, UniCredit granted Hin Leong banking facilities in the sum of US$85m, which Hin Leong could use to obtain LCs to finance the purchase of oil, petroleum products and other commodities.[1]

7 On 27 November 2019, Hin Leong applied to UniCredit for an irrevocable LC in the sum of US$37,209,550.35 to finance the purchase of some 150,000 metric tonnes of High-Sulphur Fuel Oil ("the goods").[2]

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1 2AB 1180.

2 2AB 1779.

Hin Leong's purchase of the goods from Glencore, and Glencore's buyback of the goods

8 Hin Leong contracted to purchase the goods from Glencore the same day (the "Sale Contract"). The Sale Contract stated that the goods would be shipped on board the vessel "MT New Vision" and delivered to Singapore in the period of 18 to 25 December 2019.[3]

9 Glencore, however, agreed to simultaneously buy back the goods from Hin Leong (the "Buyback Contract").[4] Hin Leong and Glencore agreed that at 0001 hours on 2 December 2019, title to the goods would pass from Glencore to Hin Leong, and immediately back to Glencore.

Hin Leong's misrepresentation to UniCredit that it had not sold the goods

10 On 28 November 2019, Hin Leong submitted to UniCredit a revised LC application. UniCredit asked Hin Leong for documents including the "Purchase and Sales contracts and/or a deal recap".[5] Hin Leong replied the same day, saying that its LC application was for "Unsold cargo" and providing a copy of the Sale Contract.[6] In fact, the goods were not "unsold cargo" – Hin Leong had already contracted to sell the goods back to Glencore.

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3 2AB 1794 and 1875.

4 2AB 1867.

5 2AB 1889.

6 2AB 1888.

The LC

11 UniCredit issued the LC on 29 November 2019.[7] It was subjected to *The Uniform Customs and Practice for Documentary Credits* (2007 Revision) ("UCP 600"). The LC stated that the credit thereunder would be available against the presentation of various stipulated documents, including a signed commercial invoice, and "full set 3/3 original bills of lading ["BLs"] issued or endorsed to the order of 'UniCredit Bank AG, Singapore Branch' marked 'freight payable as per charter party'."

12 The LC further stated that:

> in the event that documents called for are not available at time of presentation/negotiation, payment will be effected against:
>
> (a) Beneficiary's commercial invoice.
>
> (b) Beneficiary's letter of indemnity duly signed by authorized signatory(s).

13 The format of the letter of indemnity ("LOI") was prescribed in the LC.

Glencore's presentation of documents, and UniCredit's payment

14 On 2 December 2019, Glencore presented the following documents to UniCredit for payment under the LC:[8]

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

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7 3AB 1925.

8 3AB 2001.

(b) Glencore's LOI addressed to Hin Leong, worded in accordance with the format prescribed in the LC (and so it mentioned the Sale Contract, but not the Buyback Contract) (see [79] below).

15 On 3 December 2019, UniCredit paid Glencore pursuant to the LC. UniCredit made early payment based on a discount it had agreed with Glencore: UniCredit paid Glencore US$36,997,691.57.[9]

16 When UniCredit issued the LC on 29 November 2019, and when UniCredit paid Glencore on 3 December 2019, UniCredit did not know that Glencore had bought back the goods.

Hin Leong's continued misrepresentation to UniCredit that Hin Leong had not sold the goods

17 The LC's maturity date was 28 February 2020.[10] On that day, UniCredit asked Hin Leong if the goods had been sold by Hin Leong, and if so for documents relating to that sale. Hin Leong replied the same day, saying that the goods "[s]till remain[ed] unsold".[11] This was again untrue. Hin Leong had resold the goods to Glencore, indeed, on terms that had passed title to the goods back to Glencore at 0001 hours on 2 December 2019.

UniCredit's demands, Hin Leong's fate

18 On 13 April 2020, UniCredit issued a notice of demand to Hin Leong, demanding repayment of, among other things, the outstanding advances and accrued interest arising out of UniCredit's financing of Hin Leong's purchase

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9 3AB 2076.

10 3AB 2018.

11 3AB 2179.

of the goods from Glencore.[12] By this time, Hin Leong had requested a meeting with its lenders.

19 On 14 April 2020, UniCredit asked Glencore if it had the original BLs referred to in the LC; Glencore replied that it did not have the original BLs.[13]

20 Hin Leong was placed under interim judicial management on 27 April 2020, under judicial management on 7 August 2020, and into liquidation on 8 March 2021.

21 UniCredit thus found itself without repayment from Hin Leong, without the goods, without the BLs, and without security over the goods or the BLs.

UniCredit's claims

22 UniCredit advances various causes of action against Glencore:

(a) rescission of the LC because the Sale Contract was a sham or fictitious transaction (Statement of Claim (Amendment No 4) dated 9 September 2022 ("SOC"), paras 42 to 43);

(b) fraud or deceit by Glencore (SOC, paras 44 to 49A);

(c) conspiracy between Glencore and Hin Leong to injure UniCredit by unlawful means (SOC, paras 50 to 52);

(d) unjust enrichment (SOC, paras 53 to 57);

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12 3AB 2361.

13 3AB 2374; 3AB 2379.

(e) a claim under the Master Discounting Agreement between UniCredit and Glencore Grain Singapore Pte Ltd (which was later amalgamated into Glencore) dated 8 August 2014 (SOC, paras 57A to 57B); and

(f) breach of the LOI pursuant to the Contract (Rights of Third Parties) Act (Cap 53B) and/or common law (SOC, paras 58 to 63).

23 UniCredit seeks the following relief: rescission of the LC; a declaration that Glencore is liable to repay the sum of US$36,997,691.57 together with certain costs and expenses; an order for repayment of the said sum; further or alternatively, damages to be assessed; interest; costs; and further or other relief.

24 UniCredit's case has two dominant themes:

(a) the Sale Contract was a sham or fictitious transaction because the Buyback Contract was a simultaneous buyback of the goods by Glencore; and

(b) Glencore made fraudulent misrepresentations by its LOI and invoice, in that Glencore only mentioned the Sale Contract but not the Buyback Contract, thereby falsely representing that it intended to surrender the BLs to Hin Leong (when, having bought back the goods, Glencore intended to keep the BLs).

25 I now address UniCredit's causes of action in turn.

(1) Rescission of the LC because Hin Leong's purchase of the goods was a sham or fictitious transaction

26 UniCredit asserts that the Sale Contract was a sham or fictitious transaction used to obtain finance from UniCredit and/or to deprive UniCredit of any security over the goods and the BLs).[14]

27 There was substantial agreement as to the legal principles applicable to this claim, as stated in the "points of law not in dispute" section in the parties' lead counsel's statements:

> 2. For a transaction to be sham, it is necessary for all parties to that transaction to have a common subjective intention that the transaction documents are not to create the legal rights and obligations which they give the appearance of creating.
>
> 3. There is a strong presumption that the parties to a contract intend to create legal relation by way of the contractual documents, and that the onus to rebut this presumption lies on the party alleging the sham. See *Goodwood Associates v Southernpec* [2020] SGHC 242, at [40]; *Toh Eng Tiah v Jiang Angelina* [2021] 1 SLR 1176 at [80], [83].
>
> 4. [On motive]
>
> Plaintiff's wording:
>
> The motive for a transaction is not in itself determinative of whether it is a sham. See *Credit Agricole v PPT Energy Trading* [2022] SGHC(I) 1 at [120].
>
> Defendant's wording:
>
> The motive of the parties, for example to make arbitrage profits, optimize working capital, leverage on credit terms or make use of available financing, does not render a transaction a sham if there was an intention to create legal relations in connection with genuine cargo. See *Goodwood Associates v Southernpec* [2020] SGHC 242, at [48]; *Credit Agricole v PPT Energy Trading* [2022] SGHC(I) 1 at [123], [141], [142].

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14 SOC, para 33(a).

Whether a "financing deal" is necessarily a sham

28 UniCredit argues that "[Glencore] has admitted that the simultaneous sale and buyback of the Goods between [Hin Leong] and [Glencore] was for the purposes of obtaining cheaper working capital … therefore … this was not a regular trade and there was **no** genuine sale and purchase of the Goods."[15] [emphasis in original] UniCredit builds on this as follows:[16]

> First, [Glencore] has admitted that the Simultaneous Sale and Buy-Back Transactions was a financing deal. It was not a regular trade. A financing deal, by definition, cannot be a genuine sale and purchase that the autonomy principle in LCs for the facilitation of international trade was intended to protect. [Hin Leong's] Purchase Transaction was no more than a part of the Simultaneous Sale and Buy-Back Transactions that [Glencore] employed to obtain financing from [UniCredit] to optimize [Glencore's] working capital by taking advantage of the lower interest rate offered by [UniCredit] in commodity transactional financing (through an LC) as compared to the Glencore group treasury interest rate (and banks' lending rates on clean lines).

29 These submissions by UniCredit contradict what it had (in its lead counsel's statement) agreed was a point of law not in dispute, based on UniCredit's own wording: "The motive for a transaction is not in itself determinative of whether it is a sham."

30 UniCredit's argument that the Sale Contract is a sham, is premised on Glencore having initiated the transactions for the purposes of obtaining cheaper working capital (and that is why Glencore described the transactions as a "financing deal"[17]). Glencore's *motive* was indeed "financing", but UniCredit agreed (and rightly so) that motive is not in itself determinative of whether the

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15 UniCredit's closing submissions, para 4.

16 UniCredit's closing submissions, para 242.

17 2AB 1663.

transactions were a sham. As Glencore formulated the point on motive (at [27] above): "financing" as a motive does not render the transactions a sham "if there was an intention to create legal relations in connection with genuine cargo".

31 It adds nothing for UniCredit to say (at [28] above) that "[a] financing deal, by definition, cannot be a genuine sale and purchase". That is just *UniCredit's own definition* of what a genuine sale and purchase is – UniCredit's argument is merely an *assumption* of the conclusion it wishes to reach.

32 A *genuine* sale and purchase is one that is *not a sham*. A "financing" transaction might or might not be a sham – that depends on whether all parties to the transaction (here, Glencore and Hin Leong) had a common subjective intention that the transaction documents are not to create the legal rights and obligations which they give the appearance of creating. In respect of the Sale Contract, those legal rights and obligations would include:

(a) Glencore's obligation to transfer title to the goods to Hin Leong (and Hin Leong's corresponding right to such transfer of title); and

(b) Hin Leong's obligation to pay for the goods (and Glencore's corresponding right to such payment).

33 The Sale Contract would not be a sham unless there is evidence of a common intention between Glencore and Hin Leong that the *purported* rights and obligations under the Sale Contract are *not real* rights and obligations.

Whether Glencore and Hin Leong shared a common intention that the purported rights and obligations under the Sale Contract were not to be real rights and obligations

34 UniCredit has not proven, on the evidence, that Glencore and Hin Leong had such a common intention. On the contrary, it appears that the rights and obligations under the Sale Contract were real, and indeed the obligations of title transfer and payment were performed: Glencore transferred title to the goods to Hin Leong, and Hin Leong paid for the goods (by getting UniCredit to issue an LC pursuant to which UniCredit paid Glencore).

35 Hin Leong could have resold the goods in various ways. Here, it was a *simultaneous* resale of the goods back to the *seller*, Glencore. However, Hin Leong could also have:

(a) sold the goods to a *third party* (simultaneously or otherwise); or

(b) sold the goods back to Glencore, but at *some later point* rather than simultaneously.

36 In scenarios (a) and (b) above, the Sale Contract would not be a sham. Hin Leong's decision to sell the goods to a third party would not involve any common intention between Hin Leong and Glencore relating to the Sale Contract. Nor would any subsequent agreement between Hin Leong and Glencore (for Glencore to buy back the goods) retrospectively make the Sale Contract a sham, if it was not a sham at the time of contracting.

37 UniCredit's argument thus reduces to the following: because Hin Leong and Glencore agreed on a *simultaneous* buyback of the goods by *Glencore*, the Sale Contract was a sham. Even so, a simultaneous sale-and-buyback arrangement may involve a genuine sale, and a genuine buyback.

38 In *Thai Chee Ken and others (Liquidators of Pan-Electric Industries Ltd) v Banque Paribas* [1992] 1 SLR(R) 280 (HC) at [21], [24] and [26]; [1993] 1 SLR(R) 871 (CA) at [9], [12] and [36], the High Court and the Court of Appeal both concluded that, having regard to the circumstances of the case, there was a genuine sale and buyback of shares between Pan Electric ("Pan-El") and Banque Paribas ("BP") to raise financing for the former. A key fact was that Pan-El had given negative pledge covenants to other banks that a secured loan would have offended against, making BP's alternative proposal of a loan on the mortgage of the shares untenable. Parties thus explored and entered into a *bona fide* sale and buyback of the shares to avoid affecting the bank's credit or security position; the transactions were not a lending on security disguised as a sale and buyback.

39 The *structure* of the transactions in the present case as a simultaneous sale-and-buyback is thus not determinative of whether the Sale Contract was a sham (as UniCredit contended it was).

40 UniCredit argues that Glencore did not intend title in the goods to pass to Hin Leong under the Sale Contract, for Glencore "did not even care to check that contractually, [it] did in fact have title to the Goods that could be passed on [Hin Leong] on 2 December 2019 at 0001 as required under the [Sale Contract]."[18]

41 The evidence, however, presents a different picture: Glencore *did* check that it had title to pass to Hin Leong. Glencore purchased the goods from its sister company, Glencore Energy UK Ltd ("GENUK"), and a 27 November

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18 UniCredit's closing submissions, para 245(c).

2019 email[19] confirmed that title in the goods would pass from GENUK to Glencore at 2359 hours on 1 December 2019, *ie*, in time for Glencore to pass title to Hin Leong at 0001 hours on 2 December 2019. Glencore's Mr Pereira said this was "the most important email".[20]

42 The contract between GENUK and Glencore also provided for title to pass on 1 December 2019 at 2359 hours.[21] UniCredit however points to the retention of title provision in that contract, which provided that "title and risk shall not pass to Buyer until Buyer has made and Seller has received payment".[22] Glencore made payment to GENUK by way of internal settlement,[23] which Glencore's Mr van Rooyen explained as follows: "it is settled against an intercompany account";[24] "no money passes hands but there is an internal set-off or debit, credit entry in the account of GENUK and the account of [Glencore] as they're in the same group".[25]

43 Even if that payment as between Glencore and GENUK had not been made as of 2359 hours on 1 December 2019, it was open to GENUK and Glencore to agree that title would pass from GENUK to Glencore nevertheless, and the confirmation email of 27 November 2019 is to that effect. Indeed, UniCredit appears to accept this, when it says that the retention of title provision "was not adhered to and ignored", and "because of the internal trade, the terms

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19 2AB 1593.

20 Transcript, 24 May 2022, 64:5–21.

21 2AB 1613.

22 2AB 1614.

23 Mr van Rooyen's AEIC at para 58, 1DBAEIC 19.

24 Transcript, 23 May 2022, 30:15–20.

25 Transcript, 23 May 2022, 30:21–25.

would not be enforced as between GENUK and [Glencore]."[26] Put another way, the retention of title provision would not stand in the way of title passing from GENUK to Glencore if they intended title to pass (and they did). GENUK and Glencore wanted title to pass from GENUK to Glencore, so that Glencore would not be in breach of the Sale Contract for not having title to pass to Hin Leong. Given the confirmation email of 27 November 2019, the fact that Glencore's Mr Pereira did not delve into the contractual terms does not advance UniCredit's case.

44 Far from showing that the transfer of title from Glencore to Hin Leong under the Sale Contract was a sham, the GENUK-Glencore correspondence shows the contrary: the confirmation email of 27 November 2019 shows that Glencore genuinely wanted to have title in time to transfer title to Hin Leong. This is not a case where Glencore had not even purchased the goods for which it was purportedly passing title to Hin Leong, or where Glencore had only agreed to get title from GENUK after the Glencore-Hin Leong transactions had purportedly been performed.

45 What UniCredit is left with to demonstrate a common intention between Hin Leong and Glencore are the following:

(a) Glencore did not deliver the goods to Hin Leong; and

(b) Glencore did not deliver the BLs to Hin Leong.

46 As far as delivery of the goods is concerned, whether Hin Leong itself wished to take delivery would depend on whether Hin Leong resold the goods (whether to a third party, or back to Glencore). If Hin Leong resold the goods,

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[26] UniCredit's closing submissions, para 185(a)(vi).

it might no longer require delivery of the goods to itself; instead, it might want the goods delivered directly to its sub-buyer. This does not make any obligation of delivery in the Sale Contract a sham obligation. Indeed, goods may be resold (possibly more than once) with physical delivery only going to the ultimate buyer, as the English Court of Appeal observed in *Garnac Grain Company Incorporated v HMF Faure & Fairclough Ltd and another* [1966] 1 QB 650 ("*Garnac Grain*"): see [49]–[56] below. The decision was unsuccessfully appealed to the House of Lords on grounds other than those for which I cite *Garnac Grain* in this judgment.

47 As for non-delivery of the shipping documents, in particular, the BLs:

(a) pursuant to the Sale Contract Glencore was to present the BLs, or an LOI, to obtain payment,[27] and on the terms of the LC UniCredit agreed to make payment on the same basis; but

(b) pursuant to the Buyback Contract Hin Leong was likewise to present the BLs, or an LOI, to obtain payment.[28]

48 In the event, both Glencore and Hin Leong obtained payment by way of LOIs, without the BLs changing hands. Glencore did not give the BLs to Hin Leong, and Hin Leong did not give the BLs back to Glencore. Hin Leong never asked Glencore for the BLs, and the BLs simply remained with GENUK:[29] evidently, that was fine with both Hin Leong and Glencore.

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27 2AB 1795.

28 2AB 1868.

29 3AB 2436.

49 As Glencore had bought back the goods from Hin Leong, it might not have expected to have to surrender the BLs to Hin Leong. That does not, however, mean that Glencore *never had an* ***obligation*** to surrender the BLs to Hin Leong, or that Glencore *never had an* ***intention*** *to fulfil* such an obligation, if circumstances required it. The fact that the parties do not expect an obligation to be performed (for reasons other than that obligation not existing in the first place) does not make that obligation a sham. *Garnac Grain* is authority for this.

50 *Garnac Grain* involved a circle of contracts: the same goods were sold by Allied to Gersony, by Gersony to Garnac, by Garnac to Faure, and finally by Faure back to Allied. The circle might be described as A-B-C-D-A. The trial judge decided that the contract between Faure and Allied (*ie*, D-A in the circle) was a sham or fictitious contract. This was however reversed by a unanimous decision of the English Court of Appeal.

51 Sellers LJ said (at 668):

> In many trades it may be that in the ordinary working of the market where goods are sold along a line or string, goods after changing hands will be bought back by the original seller and so a circle may be created. That is not this case. Here this circle was not fortuitous but was designed by Allied when it made the first sale and the reason was to raise finance.

52 Even so, Sellers LJ did not find the Faure-Allied contract to be a sham or fictitious. He noted that the trial judge had accepted Faure's evidence that it had a business purpose, and he said (at 673–674), "I do not find the evidence sufficient to establish some other agreement between Faure and Allied than that which the documents record." Glencore's evidence in the present case is, similarly, that it had a business purpose for the transactions with Hin Leong: the transactions enabled Glencore to obtain cheaper working capital. As for Hin Leong's motive, UniCredit points to Hin Leong's interim judicial managers'

("IJMs") statement that "these transactions were not entered into for any commercial benefit to [Hin Leong] except for the sole purpose of raising liquidity to pay loans that were or were becoming due and payable".[30] That is another way of saying that the transactions were of commercial benefit to Hin Leong in raising finance. The transactions between Hin Leong and Glencore allowed each of them to use their respective bank facilities, to their own commercial benefit in terms of financing. In *Garnac Grain*, Allied's purpose too was "financing": Allied required the transactions to be financed by its customers (at 676), and for their role in the circle the various participants would each make a profit on resale.

53 Sellers LJ further observed (at 674):

> There may be many cases where the parties do not expect to complete the transaction but to trade on differences in the hope that the result will be a profit, but if there is an obligation to fulfil the contract according to its tenor if circumstances require it, then the contract is enforceable.

54 Danckwerts LJ's judgment was in similar vein (at 679):

> The method of trading which the participants adopted was a series of sales, each at an enhanced price, to give the traders a profit. They could, of course, have adopted other methods, but they were entitled, if they chose, to adopt this method of a series of sales and purchases. No doubt normally it was not expected that any delivery of documents would take place until the final export sale, but, on the documents, there plainly was a right in the respective purchasers to demand delivery of documents.
>
> I do not think these were unreal transactions. There is no real evidence that they were other than what they purported to be.

55 Likewise, Diplock LJ said (at 683–684):

> No doubt it was contemplated by all parties to all four contracts that if all went well those who knew themselves to be

[30] IJMs' Report at para 162, 4AB 3079.

> intermediate parties, that is, both buyers and sellers, would not insist upon handling the shipping documents but differences in price would be settled in account. The actual property in the goods would never pass to them and the contracts would not be performed according to their terms. No doubt Allied and Faure, who knew that the contracts formed a circle, contemplated that if all went well no documents would be delivered at all and no lard shipped pursuant to any of the contracts. But all might not go well …
>
> The mere fact that Allied and Faure expected all to go well, that there would in fact be no insolvency and that none of the parties to the circle of contracts would insist upon delivery of documents or shipments of the goods under their contracts because in the absence of insolvency there would be no business reason for doing so, does not affect their legal rights under the contracts …
>
> … [T]he [trial] judge meant no more than that the party as respects whom the contract is 'fictitious' did not contemplate that the contract would be performed in accordance with its terms. But, as I have already said, unless some question of waiver or estoppel arises the contemplation or expectation or intention (unless incorporated in the contract) of the parties or either of them as to the way in which it will be performed or left unperformed does not affect their legal rights or obligations under it. To affect these it is necessary to go further and to show that the parties really made some other and different contract between them and agreed that the ostensible contract should not give rise to legally enforceable rights or liabilities.

56 To all three Lord Justices, *expecting not to have to perform* an obligation given the circumstances does not make that obligation a sham. The court would have to find that the parties had the common subjective intention that there was *no real obligation*, for there to be a sham.

57 I accept Glencore's evidence that if Hin Leong had required it to surrender the original BLs, Glencore would have done so:

(a) Glencore's Mr Pereira said, if Hin Leong asked for the BLs "I would proceed to find them and pass them on.";[31] "I do not know when or why … or if [Hin Leong] would request for the BLs. However, if they did, I would have acted on it."[32] Mr Pereira also said that if the BLs landed on his desk (as BLs sometimes did), he would have given them to Hin Leong as was his practice.[33]

(b) Glencore's Ms Tan said, "The bills of lading can still be passed through the chain, even though it's a flash title … There's nothing wrong to send the bills of lading through the proper chain … We can still pass it through the chain, for it to come back to us."[34] She added, "If I'm requested by Hin Leong to present the documents through the bank, I can do it. And I will oblige";[35] "… if I am requested by Hin Leong to present the bills of lading, endorse it to [UniCredit], I will gladly hand over to the bank."[36]

(c) Glencore's Mr van Rooyen said that if Glencore received the BLs or if a counterparty requested them, Glencore would pass them on.[37]

58 In the event, Glencore never received the BLs from GENUK, and Hin Leong never asked for them, so Glencore simply never surrendered the BLs to Hin Leong. That does not indicate that the purported obligation to surrender the

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31 Transcript, 24 May 2022, 71:24–72:3.

32 Transcript, 24 May 2022, 71:6–8, 71:24–72:3, 72:25–73:1.

33 Transcript, 24 May 2022, 88:18–89:3.

34 Transcript, 19 May 2022, 78:6–24.

35 Transcript, 19 May 2022, 79:21–22.

36 Transcript, 19 May 2022, 81:9–11.

37 Transcript, 23 May 2022, 71:2–3, 72:11–13, 72:18–21; see also 73:4 and 74:2.

BLs was a sham. There was no common subjective intention between Hin Leong and Glencore that there was only a sham obligation to surrender the BLs, and the obligation was thus not a sham one.

59 *Garnac Grain* was applied in the local case of *Goodwood Associates Pte Ltd v Southernpec (Singapore) Shipping Pte Ltd and another suit* [2020] SGHC 242 ("*Goodwood*"). *Goodwood* too involved circular transactions. The transactions in July 2015 involved the sale of fuel oil from SPPL to Taigu, Taigu to UA, UA to BMS, BMS to Digiland, Digiland to Goodwood, and Goodwood to SPPL. The issue before the court was whether the contracts whereby Goodwood sold fuel oil to SPPL were shams.

60 The court noted first at [44] that circular chains of transactions are not *ipso facto* shams, citing *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2011] 2 AC 457 at [77]. The court went on at [45]–[46] to cite *Garnac Grain* as an example of "a genuine circular chain of four back-to-back contracts for the sale and purchase of lard", quoting from the judgments of Danckwerts LJ at 679 and Diplock LJ at 683–684 (see [54]–[55] above).

61 At [47], the court drew a distinction between circular trading transactions in which *no delivery* of goods is contemplated and those in which *no trading* is contemplated at all:

> In the first scenario, the parties fully intend the legal title in the subject-matter commodity to pass through the various parties in the circular chain of transactions. The intention to be bound to the various trade contracts constituting the circular chain is therefore present. In contrast, in the second scenario, the parties do not intend to trade in any commodity at all. They do not intend to take legal title in the subject-matter commodity, and do not intend the creation of any legal obligation to pay for the trades in the subject-matter commodity. The entire circular

> series of transactions, therefore, is nothing more than fiction. …

62 The court thus emphasised at [48] that:

> [N]othing in [paragraph 47] should be taken to be an endorsement of circular trades in *fictitious* commodities … [T]here may be nothing uncommercial in parties seeking to make arbitrage profits or brokerage fees by exploiting the rapid and often capricious ebbs and flows of the commodities market as long as they trade in *genuine* commodities, albeit in a circular fashion. It is an entirely different matter if the parties seek to manipulate their reported financial performance by purporting to trade in commodities which in fact do not exist, or which the parties know are not available for trading *eg* commodities which are legally owned by *none* of the parties to the trading arrangement. According, if any party to a circular trading arrangement has such knowledge at the time the relevant trades are entered into, this is … *prima facie* evidence of his knowledge of a sham trading arrangement. [emphasis in original]

63 The present case is not one where *no trading* was contemplated between Hin Leong and Glencore. To the extent that *no delivery* (of documents or goods) was contemplated, that does not make the transactions between Hin Leong and Glencore a sham (*Goodwood* at [47]). Nor does the present case involve *fictitious* goods, or goods which the parties knew *were not available for trading*: it involves a real cargo of fuel oil, which Glencore had purchased from GENUK and confirmed it had title to, in advance of the stipulated time for title to be transferred from Glencore to Hin Leong, and then back to Glencore.

64 In *Goodwood*, the court stated that it would be necessary for Southernpec (SPPL and SPSPL – the defendants in the two suits) to prove on the evidence that Goodwood knew that its contract with SPPL was part of a scheme involving *non-existent* fuel oil (at [49] read with [15]–[17]). Southernpec failed in that regard (at [111]–[114]): on the evidence, there was no basis to conclude that Goodwood knew or intended the contracts to be shams

(at [111]); Goodwood did not know about the whole circle, in particular it did not know about UA/Taigu (at [112]); but even if Goodwood knew that its contracts with SPPL were part of circular chains of trading transactions, there remained insufficient evidence to indicate that Goodwood knew that the fuel oil purportedly transacted was in fact non-existent and that therefore the circular chain of trading transactions was a sham (at [113]); by the whole of its conduct, Goodwood demonstrated that it consistently treated its contracts with SPPL as genuine (at [114]).

65 Southernpec's appeals were dismissed by the Court of Appeal, which was not persuaded that the trial judge was wrong, in particular, that the transactions were not sham ones.

66 Another local case in which circular transactions were not found to be a sham is *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit* [2022] SGHC(I) 1 ("*Crédit Agricole*"). There, a cargo of crude oil was sold by Zenrock to Shandong, Shandong to PPT, and PPT to Zenrock. Zenrock had procured an LC in favour of PPT. The LC issuing bank sought a declaration that PPT was not entitled to payment under the LC for its fraudulent participation in Zenrock's round-tripping arrangements. The court found that at least two of PPT's representatives were aware of the round-tripping nature of the transactions (at [113]–[115] and [119]). Nevertheless, the court did not find the circular transactions to be shams (at [120]–[121], [123] and [126]):

> 120 Despite pleas that the round-tripping transactions were not "*bona fide* transactions" or were "paper round-tripping transactions" and the contention that these transactions were "sham" in the sense that they were not intended to be genuine sale and purchase contracts at the prices set out therein and for which letters of credit were provided, I could not see that this was sustainable. *For a transaction to be "sham", it is*

necessary for all the parties to that transaction who have a common subjective intention that the transaction documents are not to create the legal rights and obligations which they give the appearance of creating (*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802). *The motive for a transaction is not in itself determinative of whether it is a sham or not.* It does not matter whether there is an ulterior purpose lying behind the transaction since the question is whether the transaction documents do give rise to the rights and liabilities set out therein. Whether or not the transaction documents appear artificial or uncommercial is neither here nor there. *What is required for a sham is a finding the parties to the sham were dishonest in creating a pretence of a transaction in order to deceive others when there was in reality no such transaction.*

121 Here, the parties in a chain of sales intended to enter into real sale and purchase transactions which, on their face, provided by recap e-mails for all the elements which constituted genuine sales, with specific provisions relating to the trades including details of the oil to be sold, quality and quantity provisions and terms relating to price, delivery, payment, lay time and demurrage, applicable law and jurisdiction, assignment, anticorruption provisions and trade restrictions. Payment of the price was to be made by letter of credit against the provision of the seller's commercial invoice and original bills of lading and other usual shipping documents, in accordance with TOTSA's "General Terms and Conditions for F.O.B. Sales of Crude Oil" ("the TOTSA T&Cs") which were incorporated, save that where the original shipping documents were not available by the due date for payment, payment was to be made against the seller's invoice and the seller's letter of indemnity.

…

123 *There was no evidence that any of the traders in the chain did not intend property to pass in the Cargo in accordance with the terms of the sale and purchase contracts which they concluded. Whether or not the parties to those transactions ever expected original shipping documents to be provided (and the evidence was that those represented in court did not: see [49] above) is nothing to the point.* Trading in oil products frequently involves what amounts to little more than trading in documents with the product being delivered to the ultimate purchaser, with money and documents being exchanged by the intervening participants in the chain from original supplier to that ultimate purchaser. That does not make the transactions any the less genuine or mean that property in the goods does not pass … *the round-tripping transactions were genuine sales and purchases under which it was intended that the Cargo should be sold, title in it should pass and payment should be made. To label*

> *them as "financing transactions", "sleeve transactions" or "credit sleeve transactions" does not change their character as real transactions whatever the underlying purpose of them might be, as long as the intention of the parties to them was to effect a sale or purchase as the case might be.*
>
> …
>
> 126 *Whilst each party in the chain appears, under the TOTSA T&Cs, to have been entitled contractually to the delivery of the original shipping documents from its seller*, after presentation of the invoice and letter of indemnity to obtain payment*, the evidence showed that, as a matter of commercial practice, traders in legitimate unquestionable chains did not always insist on this and the cargo was delivered to the ultimate receiver without such documents ever reaching it* (see [49] above). In pre-structured back-to-back transactions this appeared nearly always to be the case. Title would pass without any issue, whether described as marketable or otherwise, without regard to the original shipping documents, which in all probability were never, as in the present case, put into circulation beyond the original supplier and its affiliate, as appears below.
>
> [emphasis added]

67 The decision in *Crédit Agricole* affirms several propositions already discussed above:

(a) the motive for a transaction is not in itself determinative of whether the transaction is a sham or not, and that includes "financing transactions" (*Crédit Agricole* at [120], [123]);

(b) a sham transaction is one where the parties had a common intention to create a pretence of a transaction in order to deceive others (*Crédit Agricole* at [120]); and

(c) if the documentation appears genuine, and there is no evidence that the parties did not intend the rights and obligations to be real ones, the transaction would not be a sham (*Crédit Agricole* at [121], [123]).

68 *Crédit Agricole* at [126] also recognises (as did *Garnac Grain* and *Goodwood*) that if the circumstances are such that the parties do not *expect* to have to perform an obligation (such as the delivery of shipping documents from one party to another), that does not mean the obligation is not a real one.

69 I would also mention *BWG v BWF* [2020] 1 SLR 1296 ("*BWG*") which was cited (and distinguished) in *Goodwood* (at [105]–[110]). In *BWG*, X sold cargo to the appellant, the appellant sold the cargo to the respondent, and the respondent sold the cargo back to X. The Court of Appeal agreed with the respondent that this was in fact a disguised loan arrangement (with the appellant injecting funds to kick-start the process for a substantial profit), rather than a series of genuine sale and purchase transactions. The transactions in *BWG* had the following questionable features (as noted in *Goodwood* at [107]):

(a) the appellant could not explain why it was willing to sell a cargo worth more than US$30m to the respondent without any security and without any history of trading between the parties;

(b) the only indication of the purported delivery of cargo was an email "update" from the master, which furthermore stated that the discharging of the crude oil had been completed without mentioning the cargo purportedly transacted, or the parties to the transaction; and

(c) the notice of readiness tendered was not addressed to the appellant or the respondent, but to two other entities whose involvement was not explained.

70 There are no such questionable features in the present case. In particular, the Sale Contract and the Buyback Contract were not on credit terms, instead payment was to be made by LCs (and those payments were duly made).

71 UniCredit relies on *Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and another* [2008] 1 SLR(R) 375 ("*Koon Seng*"), where an allotment of shares was found to be a sham, but that case too is distinguishable. There, 700,000 shares in Chenab were purportedly issued to Koon Seng as "fully paid", to raise Chenab's share capital and thus qualify it for a tender with the Port of Singapore Authority ("PSA"). In fact, Koon Seng paid nothing for the shares. The accounting documents reflected a loan from Chenab to a director, to pay for the shares; but Koon Seng did not have a director on the board of Chenab, and such financial assistance would moreover have *prima facie* been a breach of s 76 of the Companies Act (Cap 50, 2006 Rev Ed) carrying penal liabilities.

72 Chenab's counsel said that Koon Seng had "admitted that they are not in a real sense, shareholders of the company because the Plaintiffs are only entitled to 47% share of the profits of the PSA contract … and not any other contracts or profits of the company"; and Koon Seng's counsel in effect confirmed this, saying that Koon Seng did not buy the shares with cash because it was not interested in the other contracts of Chenab, rather, Koon Seng's interest was limited to the PSA contract (at [61]). Further, Raj (a majority shareholder and director of Chenab) admitted that Chenab had hoodwinked PSA into thinking that Chenab had $1.5m in paid-up capital, so as to qualify for a tender (at [66]).

73 All these features of *Koon Seng* are absent from the present case. I reject UniCredit's submission that Glencore's production of the Sale Contract was "merely a paper exercise, akin to the actions of the defendant in *Koon Seng*."[38]

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38 UniCredit's closing submissions, para 245(b).

74 For the above reasons, I find that the Sale Contract was not a sham or fictitious transaction (and for completeness, neither was the Buyback Contract, or both contracts taken together). It follows that UniCredit's attempt to rescind the LC on this ground fails.

(2) Fraud / deceit

Elements

75 The parties agree on the elements of the tort of deceit, as set out in their lead counsel's statements (as a "point of law not in dispute"):

> (a) a representation of fact made by words or conduct; (b) that the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff; (c) that the plaintiff had acted upon the false statement; (d) that the plaintiff suffered damage by so doing; and (e) the representation must be made with knowledge that it is false (it must be wilfully false, or at least made in the absence of any genuine belief that it is false), or made recklessly, without caring whether it be true or false. See *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2020] 2 SLR 1256 at [138]; *Panatron Pte Ltd and anor v Lee Cheow Lee and anor* [2001] 2 SLR(R) 435 at [13].

76 In presenting its commercial invoice and the LOI to obtain payment under the LC, Glencore intended UniCredit to act on the *documents* by paying on the LC, and UniCredit did so. But what *representations* had Glencore thereby made to UniCredit, on which UniCredit could mount a claim in fraud / deceit?

77 I consider the following:

(a) *What was represented* by Glencore to UniCredit?

(b) Were Glencore's representations to UniCredit *false*?

(c) Did Glencore act *fraudulently*?

(d) Did Glencore *intend* that UniCredit should act on Glencore's representations?

(e) Did UniCredit *act to its detriment* on Glencore's representations?

What was represented by Glencore to UniCredit?

The pleaded representations

78 UniCredit says that on 2 December 2019, Glencore made false (and fraudulent) representations to UniCredit, when it presented to UniCredit its commercial invoice (addressed to Hin Leong) and the LOI (also addressed to Hin Leong).

79 The LOI (which was in the format prescribed by UniCredit in the LC) read as follows:[39]

> DATE: 02 DECEMBER 2019
>
> FROM: GLENCORE SINGAPORE PTE LTD
>
> TO: HIN LEONG TRADING (PTE) LTD
>
> …
>
> L/C NO.: 901LC900330 DATED 29 NOVEMBER 2019 ISSUED BY UNICREDIT BANK AG, SINGAPORE
>
> LETTER OF INDEMNITY
>
> GENTLEMEN,
>
> GLENCORE SINGAPORE PTE LTD HAS NOT RECEIVED TO DATE AND THEREFORE IS UNABLE TO DELIVER TO YOU REQUIRED ORIGINAL DOCUMENTS IN CONNECTION WITH THE DELIVERY TO YOU PURSUANT TO CONTRACT NO. 90103105/71150341 DATED **27 NOVEMBER 2019** ('THE CONTRACT') OF A QUANTITY OF **FUEL OIL** ('THE PRODUCT') SAID TO BE **148,719.226 METRIC TONS** SHIPPED ON

[39] 3AB 2003; 3AB 2021.

> BOARD THE VESSEL M.T. **NEW VISION** AT KLAIPEDA PURSUANT TO BILLS OF LADING DATED **19 & 23 NOVEMBER 2019**. THE MISSING DOCUMENTS ARE: 3/3 ORIGINAL BILLS OF LADING AND ORIGINAL SHIPPING DOCUMENTS AS LISTED IN L/C NO. **901LC900330** OF **UNICREDIT BANK AG, SINGAPORE**.
>
> IN CONSIDERATION OF YOUR PAYING THE FULL INVOICE PRICE OF **U.S.D. 37,209,550.35** WITHOUT DELIVERY TO YOU OF THE 3/3 ORIGINAL BILLS OF LADING AND OTHER ORIGINAL SHIPPING DOCUMENTS, GLENCORE SINGAPORE PTE LTD HEREBY EXPRESSLY WARRANTS TO YOU THAT IT TRANSFERS, HAS TRANSFERRED, OR WILL TRANSFER TO YOU GOOD TITLE TO THE OIL, IN ACCORDANCE WITH THE TERMS OF THE CONTRACT, FREE AND CLEAR OF ALL SECURITY INTERESTS, LIENS AND ENCUMBRANCES, THAT IT HAD, HAS OR WILL HAVE, AS REQUIRED BY THE CONTRACT, THE FULL RIGHT AND AUTHORITY TO TRANSFER SUCH TITLE AND TO EFFECT DELIVERY OF THE PRODUCT TO YOU AND THAT YOU SHALL HAVE AND ENJOY QUIET POSSESSION OF THE PRODUCT. GLENCORE SINGAPORE PTE LTD HEREBY AGREES TO LOCATE AND SURRENDER TO YOU THE 3/3 ORIGINAL BILLS OF LADING AND OTHER ORIGINAL SHIPPING DOCUMENTS.
>
> …
>
> THIS LETTER OF INDEMNITY SHALL EXPIRE UPON PRESENTATION TO YOU OF PROPERLY ISSUED OR ENDORSED 3/3 ORIGINAL BILLS OF LADING AND ORIGINAL SHIPPING DOCUMENTS IN L/C NO. 901LC900330 ISSUED BY **UNICREDIT BANK AG, SINGAPORE** EXCEPT FOR ANY CLAIMS ARISING UNDER THIS LETTER OF INDEMNITY MADE TO GLENCORE SINGAPORE PTE LTD PRIOR TO SUCH PRESENTATION.
>
> [bold in original; underlining added for emphasis]

80 UniCredit pleads the two allegedly false representations as:

(a) Glencore had agreed to locate and surrender to Hin Leong the original missing shipping documents (including the BLs), as stated in the LOI (the "first representation"); and

(b) there was a genuine purchase of the goods by Hin Leong from Glencore (*ie*, the Sale Contract) in accordance with the terms of

Glencore's invoice that was being financed by UniCredit's LC (the "second representation").[40]

81 I have found (at [74]) that the Sale Contract was not a sham or fictitious transaction – there was a genuine purchase of the goods by Hin Leong from Glencore. Accordingly, any representation to that effect, *ie*, the second representation, would not be a false representation. That leaves the first representation.

82 The first representation too was literally true: Glencore *had* agreed to locate and surrender to Hin Leong the original missing shipping documents (including the BLs).

83 At face value, both the pleaded representations were not *false* representations, and UniCredit's claim for fraud / deceit would fail accordingly.

84 However, UniCredit says that there is more to the two representations that meets the eye; it argues that:

(a) the first representation was that Glencore "*not only* ***agreed*** but ***also intended*** and ***would*** locate and surrender the original BLs to [Hin Leong]" [emphasis added];[41] and

(b) the second representation was *not only* that there was a *genuine purchase* of the goods, but that there was "a *genuine purchase* ***or only a***

40 SOC, para 44.

41 UniCredit's closing submissions, para 161.

> ***purchase*** of the Goods by Hin Leong from Glencore" [emphasis added].[42]

85 I refer to these as the "expanded first representation" and "expanded second representation" respectively.

The expanded first representation

(1) Pleading requirements

86 If UniCredit wished to assert that the first representation that Glencore had "*agreed* to locate and surrender" the BLs to Hin Leong (as pleaded)[43] meant that Glencore had "*not only* ***agreed*** *but* ***also*** ***intended*** and ***would*** locate and surrender" the BLs (as submitted), UniCredit ought to have pleaded that compound meaning. As the Court of Appeal stated in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 at [174]: "where a representation can be interpreted in a number of ways, a plaintiff is required to establish (and to plead) the sense in which he understood the representation at the time it was made, and it is in that sense which it must be established to be false".

87 Having said that, UniCredit did plead that the first representation was false in that Glencore "never had the intention to and/or did not have the intention at the material time to and/or knew that it would never surrender" the BLs to Hin Leong. It is tolerably clear from this that UniCredit was saying that the first representation said something about Glencore's *intention* to surrender the BLs, or that it *would* surrender the BLs; the first representation did not

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42 UniCredit's closing submissions, heading before para 189; paras 191, 194, 200, and 203.

43 SOC, para 44(a).

merely convey the *fact of agreement* between Glencore and Hin Leong. Glencore did not take a pleading objection against the compound meaning advanced by UniCredit, but dealt with the expanded first representation on the merits, as do I.

(2) Should a representation of intention be implied between promisor (seller) and promisee (buyer)?

88 An actionable misrepresentation must be a false statement of existing or past fact: *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 2 SLR(R) 307 ("*Tan Chin Seng*") at [20]–[21]. There is a distinction between an actionable representation and a future promise – an affirmation of the truth of a fact is different from a promise to do something in the future (*Tan Chin Seng* at [21]).

89 Here:

(a) The representation that Glencore *had agreed* with Hin Leong to locate and surrender the BLs to Hin Leong was a statement of existing or past fact: that there was such an agreement between Glencore and Hin Leong. This representation of fact was ***true***.

(b) A representation that Glencore *intended* to surrender the BLs is a statement of existing or past fact: as to Glencore's present or past intentions. The question is whether such a representation had been made.

(c) A representation that Glencore *would* surrender the BLs is a statement as to the future, not a statement of existing or past fact.

90 The issue therefore reduces to this: by representing that Glencore *had agreed* to locate and surrender the BLs, had Glencore ***also*** represented that it *intended* to surrender the BLs?

91 Two propositions need to be examined in that regard:

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

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

92 As authority for proposition (a) – representation as between promisor and promisee – UniCredit cites *Uday Mehra v L Capital Asia Advisors and others* [2022] SGHC 23 ("*Uday Mehra*") at [128]–[129], where the court stated:

> 128 A broken promise gives rise to a viable claim in fraudulent misrepresentation only if the representor had no intention of fulfilling the promise at the time he made it. This is not an exception to the rule that an actionable misrepresentation must be a statement of fact. That is because, in truth, it is not the broken promise which is the actionable misrepresentation. *The actionable misrepresentation is the implicit representation which accompanies every promise: that the promisor genuinely intends to honour his promise.* If the promisor has no such intent, the promise is made fraudulently. That is because the implicit representation which accompanies the promise is false …
>
> 129 … [C]lassifying the alleged representation as a promise rather than a statement of fact is not in itself a ground on which to dismiss the plaintiff's claim in fraudulent misrepresentation. All that that means is that this claim cannot succeed simply by the plaintiff showing that the LCA Group has broken its promise. The plaintiff can nevertheless succeed by proving fraud, ie that the LCA Group represented to the plaintiff that it would pay him '2.5% of the gross profits of Fund II' with *no intention of keeping the promise.*

> [emphasis added]

93 UniCredit also cites the commentary in *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 23rd Ed, 2020) ("*Clerk & Lindsell*") at [17-11]–[17-12]:

> … [A] statement as to the future will *often* imply a statement as to present intention; as Lord Herschell put it, 'that which is in form a promise *may* be in another aspect a representation'. Thus a promisor *generally* represents by implication that he has at the moment of making the promise the intention of fulfilling the obligations that he is undertaking; and if it can be shown that no such intention existed in his mind at that moment, he is guilty of a misrepresentation. [emphasis added]

94 I make two points before stating my conclusion on this issue.

95 First, there are various types of promises. There are contractual promises, and non-contractual promises. Some non-contractual promises are intended to be acted upon – such as a promise made to induce the promisee to enter into a contract (which was the contention in *Uday Mehra* – see [81] of the judgment). Other non-contractual promises might not be intended to have any legal effect – when parting acquaintances promise to "keep in touch", they generally do not expect those pleasantries to be grounds for a claim in fraud. Whether there is an implied representation that the promisor intends to do what he promised, will depend on the circumstances.

96 My analysis pertains to contractual promises, like that in this case: that Glencore would locate and surrender the BLs to Hin Leong. A contractual promise is an obligation which the promisor must fulfil, or face the consequences of breach of contract. However, the promisor's fulfilment of that contractual obligation might not be required in various circumstances, because of supervening illegality, frustration, novation, variation, waiver, and so on. If, as *Clerk & Lindsell* suggests (at [93] above), a promisor generally represents by

implication that he intends to fulfil the obligations that he is undertaking, that intention does not go beyond the subsistence of the obligations in question. An implied representation that the promisor intends to fulfil his obligations simply means that he intends to do what he had promised, *if circumstances require it*. He does not promise to do what he is no longer obliged to, and he does not impliedly represent that he intends to do that either.

97 I thus consider that *if* any representation ought to be implied from a contractual promise, it is not that the promisor intends to do what was promised *in all circumstances*, but that the promisor intends to fulfil his obligation *if circumstances require it*.

98 *Garnac Grain* (discussed at [49]–[56] above) is instructive in this context as well. Sellers LJ said that there may be many cases where the parties do not expect to complete the transaction but instead to trade on differences; Danckwerts LJ said, "normally it was not expected that any delivery of documents would take place until the final export sale"; Diplock LJ said, "it was contemplated by all parties to all four contracts that if all went well those who knew themselves to be intermediate parties, that is, both buyers and sellers, would not insist upon handling the shipping documents but differences in price would be settled in account. The actual property in the goods would never pass to them and the contracts would not be performed according to their terms." (See also *Crédit Agricole* at [126], cited at [66] above.)

99 In a case like *Garnac Grain*, it would not be appropriate to imply a representation that the parties intended to deliver documents or pass property in the goods to intermediate parties in the chain *in all circumstances*. That is not what they intended. This does not however mean that there was no "obligation to fulfil the contract according to its tenor *if circumstances require it*" [emphasis

added] (as Sellers LJ put it), and on a parity of reasoning, the parties could still have intended to do what was contractually promised *if circumstances require it*.

100 Second, the High Court in *Uday Mehra* expressed the proposition in absolute terms, that there is an implicit representation accompanying **every** promise. *Clerk & Lindsell*, however, does not put the proposition in absolute terms. *Clerk & Lindsell* says a statement as to present intention "will often" be implied, and that a promisor "generally" represents by implication that he intends to fulfil the obligations undertaken; Lord Herschell is quoted saying that a promise "may" be in another aspect a representation. This recognises that a promise might carry with it an implied representation, or it might not – it will depend on the circumstances.

101 Just as a term cannot be implied into a contract if it goes against the actual intentions of the parties (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [95]), a representation as to intention cannot be implied from a contractual promise if it goes against the actual intentions of the parties.

102 Whether a representation should be implied from a contractual promise (and if so, what representation) must depend on the circumstances. Diplock LJ held that "the contemplation or expectation or intention … of the parties or either of them as to the way in which it will be performed or left unperformed" does not affect their legal rights and obligations. In a similar vein, what the parties contemplated, expected, or intended, will inform what representations (if any) as to their intentions should be implied from the contractual promises they made.

103 It has been observed that if a promisee "sues upon what is in truth a promise, he must show that this promise forms part of a valid contract.": Andrew Phang Boon Leong, *Law of Contract (Second Singapore and Malaysian Edition)* (Butterworths Asia, 1998), cited with approval in *Tan Chin Seng* at [21]. Where the promise is part of a valid contract, that contract would govern the parties' rights and obligations in relation to that contractual promise. That promise may be fulfilled, it may be breached, or the obligation to perform may be discharged or waived. To overlay the contractual framework with implied representations as to intention (which may afford a claim for fraud) has implications (for want of a better word).

104 The promisee might recover in fraudulent misrepresentation what he might not have in contract – for instance, because of the expiry of a time-bar for contractual claims, contractual defences, or the contractual measure of damages. Adding a potential fraud claim to a contractual framework would not be appropriate where the parties had dealt with each other based on the contract between them, and not based on their respective intentions as to whether to perform that contract. Indeed, they may have carefully prescribed the consequences of potential breaches of contract, not expecting a fraud claim to also subsist alongside.

105 As between Glencore and Hin Leong, I would not imply any representation that Glencore intended to surrender the BLs to Hin Leong *in all circumstances* – that would go against what the parties contemplated, expected, or intended to happen (borrowing the phrase of Diplock LJ's from *Garnac Grain* at 683–684). At most, what might be implied – as between Glencore and Hin Leong – is a representation that Glencore intended to fulfil its contractual obligation to surrender the BLs to Hin Leong *if circumstances required it*.

106 In the present case, Hin Leong sold the goods back to Glencore based on a simultaneous transfer of title from Glencore to Hin Leong, and back to Glencore. Glencore assumed a contractual obligation to give the BLs to Hin Leong, but Hin Leong assumed a corresponding obligation to give the BLs back to Glencore. With the sale-and-buyback arrangement, Hin Leong and Glencore did not expect Glencore to have to give Hin Leong the BLs, only for Hin Leong to give them back to Glencore. Hin Leong never asked Glencore for the BLs. Did the circumstances require that Glencore give the BLs to Hin Leong? No.

(3) Should a representation of intention be implied as between seller (beneficiary) and issuing bank?

107 UniCredit is one step away from the Sale Contract between Glencore and Hin Leong. What representation (if any) might be implied as between Glencore and Hin Leong would depend on the context between them, but that was a context that UniCredit was not party or privy to. Indeed, it is well-settled that an issuing bank like UniCredit deals in *documents*, and not the underlying contract between Glencore and Hin Leong, *ie*, the Sale Contract. That is enshrined in Articles 4a and 5 of UCP 600 which applies to the LC:[44]

> **Article 4 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.
>
> A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

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44 2DBAEIC 1359.

> …
>
> **Article 5 Documents v. Goods, Services or Performance**
>
> Banks deal with documents and not with goods, services or performance to which the documents may relate.

108 It is quite inconsistent for a bank dealing in documents, that is "in no way concerned with or bound by [the underlying] contract" (Article 4a), to be concerned with the seller's *intentions* in relation to the underlying contract. Indeed, it is well settled that a bank must pay on an LC even if "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 … 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." (*United City Merchants (Investments) Ltd and others v Royal Bank of Canada and others* [1982] 2 All ER 720 ("*UCM*") at 725.)

109 The Court of Appeal put it thus in *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2003] 1 SLR(R) 597 ("*Beam*") at [13]:

> The banker is only concerned with documents and what the credit requires them to be, *not with goods or the contract which requires them to be paid for*. If he does what he is told, he is safe; if he departs from the terms and conditions of the credit, he acts at his own risk. He is not obliged to go behind the documents and to consider whether the terms of the underlying contract conforms to the terms of the LC or whether they have been or *will be performed* … [emphasis added]

110 If an issuing bank is not concerned with the underlying contract, and not obliged to consider whether the terms of the underlying contract "will be performed", it should not matter to the bank what the seller's *intentions* are in relation to that contract, on matters such as delivery of documents or goods to the buyer.

111 The fraud exception still allows an issuing bank to refuse payment if the seller "fraudulently presents … documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue." (*UCM* at 725; see also *Beam* at [22]). A seller cannot fraudulently present documents describing a shipment as bristles (which he had contracted to sell) when in fact he has shipped cowhair, other worthless material and rubbish: *Sztejn v Schroder Banking Corp* (1941) 31 NYS 2d 631. A seller cannot represent that all the goods contracted for were delivered on a particular date, if he knows that a vast majority of the goods were delivered on three other dates: *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261.

112 In the present case, however, there was no such fraud by Glencore. Glencore's representation that it had agreed to locate and surrender the BLs to Hin Leong was true: Glencore had agreed to do so. That representation was made in language prescribed by UniCredit in the LC. That is the only representation which I find Glencore made to UniCredit in that regard; Glencore did not impliedly represent to UniCredit anything about Glencore's *intentions* regarding the Sale Contract between Glencore and Hin Leong.

113 Those intentions were irrelevant to UniCredit's obligation to pay Glencore if the *documents* presented conformed with the LC (and they did). UniCredit paid because the documents complied with the LC, not because UniCredit relied on Glencore's intentions regarding the Sale Contract.

114 I thus find that the expanded first representation was never made by Glencore to UniCredit.

The expanded second representation

(1) Pleading requirements

115 The expanded second representation was a shift by UniCredit away from its pleaded case. What UniCredit pleaded was a representation that there was a genuine purchase of the goods by Hin Leong from Glencore.[45] What UniCredit submitted, however, was that there was "a genuine purchase ***or only*** *a purchase* of the Goods by Hin Leong from Glencore" [emphasis added].[46]

116 That is not a minor refinement – it is a brand-new allegation of fraud. UniCredit first alluded to this in its Opening Statement at para 21(d) where it said that Glencore's representation in the LOI and invoice about its sale to Hin Leong was a half-truth, for Glencore knew by then that it had already bought back the goods (and it did not tell UniCredit this). However, UniCredit never sought to amend its pleadings, and so the pleaded allegation remains: Glencore represented that there was *a genuine purchase* of the goods by Hin Leong from Glencore, ***not*** that Glencore represented that there was *a genuine purchase* ***or only*** *a purchase* of the goods by Hin Leong from Glencore.

117 I accept Glencore's submission[47] that UniCredit should not be permitted to pursue an unpleaded fraud case. In any event, the new fraud case would have failed on the merits, as I explain below.

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45 SOC, para 44(b).

46 UniCredit's closing submissions, heading before para 189; paras 191, 194, 200, and 203.

47 Glencore's closing submissions, paras 271–273.

(2) Did Glencore represent that there was only a purchase of the goods by Hin Leong from Glencore, *ie*, that Hin Leong had not sold the goods?

118 The shift to the half-truth case is significant, for it introduces an *alternative* to Glencore's pleaded case that the Sale Contract was a sham or fictitious transaction. The half-truth case implicitly accepts that the "half of the truth" which Glencore told UniCredit *was true*: Hin Leong had purchased the goods from Glencore on a Sale Contract that was *not* a sham or fictitious transaction. UniCredit's pleaded case though, was and is that the "half of the truth" was not true to begin with: *ie*, there was no genuine purchase of the goods by Hin Leong, and the Sale Contract was a sham or fictious transaction.

119 With UniCredit shifting from "sham" to "half-truth", the complaint becomes: Hin Leong had truly purchased the goods from Glencore, *ie*, the Sale Contract was not a sham or fictitious transaction; but this was a half-truth (and thus misleading) because Glencore did not tell UniCredit about the BuybackContract, another transaction that was also not a sham or fictitious transaction.

120 The question thus becomes (as UniCredit expresses it): by only telling UniCredit about the Sale Contract, was Glencore representing that Hin Leong had not sold the goods?

(A) WHAT THE LC EXPECTED OF GLENCORE

121 I start with the LC. The LC had everything to do with Hin Leong's *purchase* of the goods by the Sale Contract, and nothing to do with any *sale* of the goods by Hin Leong (whether by the Buyback Contract, or by some other contract).

122 The LC only referred to one transaction involving the goods, namely, the Sale Contract. Thus, the LC stated the amount of credit available to Glencore for Hin Leong's purchase of the goods under the Sale Contract, the goods that Hin Leong was purchasing under the Sale Contract, the shipping terms under the Sale Contract (CFR Singapore via MT "New Vision" or substitute), and the unit price of the goods under the Sale Contract.[48]

123 Whether Glencore presented the full set of documents under the LC, or an LOI in place of some of them, it would have to present its commercial invoice for Hin Leong's *purchase* of the goods under the Sale Contract. Glencore was not asked to provide any invoices *Hin Leong* might issue for any *sale* of the goods by Hin Leong.

124 The prescribed format of the LOI likewise said nothing about any *sale* of the goods by Hin Leong, it only referred to Hin Leong's *purchase* of the goods by the Sale Contract. The prescribed format thus referenced the Sale Contract, the invoice price under Glencore's commercial invoice in respect of the Sale Contract, Glencore's transfer of title to the goods to Hin Leong under the Sale Contract, and so on.[49]

125 The LC thus did not require Glencore to tell UniCredit anything about any sale of the goods by Hin Leong (whether a sale back to Glencore, or a sale to a third party). In presenting to UniCredit its commercial invoice and the LOI, Glencore simply did what the LC called for.

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48 3AB 1925–1926.

49 3AB 1927.

126 If UniCredit had wanted Glencore to tell it about any sale of the goods by Hin Leong, it could have made that a requirement of the LC, but UniCredit did not do so. Given that the LC only asked about the Sale Contract, it should not have been surprising to UniCredit that Glencore would only mention the Sale Contract.

127 Moreover, as I observed above at [107]–[110], UniCredit *in paying on the LC* was only concerned with documents, "*not with goods* or the contract which requires them to be paid for" [emphasis added] (*Beam* at [13], quoted above at [109]). It follows that in that context UniCredit was not concerned with its customer's subsequent dealings with the goods either. This may have been material to UniCredit in relation to *obtaining reimbursement* from Hin Leong, but that is separate from the matter of UniCredit *paying* Glencore on the LC.

(B) WHAT THE FACILITY AGREEMENT EXPECTED OF HIN LEONG

128 I now look at the situation as between UniCredit and Hin Leong. The facility agreement dated 22 November 2019 between UniCredit and Hin Leong[50] had Specific Conditions[51] that allowed the facilities to be used for pre-sold goods, as well as unsold goods. Goods were pre-sold if Hin Leong had sold them, otherwise they were unsold.

129 For pre-sold goods, the Specific Conditions stipulated in relation to repayment, that "[w]here the Commodities are sold on open account the off-taker is to be acceptable to the Bank and payment is to be made directly to the Borrower's account held with the Bank". If, however, Hin Leong's sale of the goods was not on an open account basis, but against an export letter of credit,

50 2AB 1180.

51 2AB 1208.

there was no stipulation that the off-taker (Hin Leong's sub-buyer, here Glencore) had to be acceptable to UniCredit; what was stipulated instead, was that the export letter of credit was to be acceptable to UniCredit. In the present case, Glencore financed the Buyback Contract by an LC from Banco Bilbao Vizcaya Argentaria ("BBVA"), and so if Hin Leong had told UniCredit that the goods were pre-sold (to Glencore), there was no necessity for Glencore to be an acceptable off-taker in the eyes of UniCredit; instead, the BBVA LC would have to be acceptable to UniCredit.[52]

130 For unsold goods, on the other hand, all that was stipulated in relation to repayment was: "[t]he Letter of Credit shall be refinanced by an Import Loan or repaid by other means as agreed by and acceptable to the Bank" and "[t]he collateral will not be released whilst the goods remain unsold and there remains any amount outstanding". The collateral was: "[f]ull set of bills of lading issued or endorsed to the order of the Bank or in negotiable form or other title documentation acceptable to the Bank."

131 If the goods were unsold while Hin Leong was applying for the LC, but were then sold by Hin Leong after the LC was issued, the Specific Conditions did not require Hin Leong to obtain UniCredit's consent to that sale. Instead: UniCredit would look to the BLs as collateral; with the LC to be refinanced by an import loan or repaid by other means as agreed by and acceptable to UniCredit. In the present case, UniCredit expected Hin Leong to make repayment from the proceeds of sale of the goods (see [167] below). The problem for UniCredit was that Hin Leong kept telling UniCredit that the goods remained unsold. As I noted above (at [10]), while applying for the LC, Hin Leong represented to UniCredit that the goods were unsold, when it had already

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52 3AB 1961.

entered into the Buyback Contract and so the goods were in fact pre-sold. As late as 28 February 2020, and into early March 2020, Hin Leong still maintained that the goods were unsold, when queried by UniCredit (see [17] above, and [167] below). Hin Leong misrepresented the position to UniCredit, but it does not follow that Glencore thereby did so too.

132 Because of Hin Leong's misrepresentation whilst applying for the LC, I accept that UniCredit *issued* the LC believing that the goods were unsold *at that point in time*.

133 However, this was only UniCredit's belief as to the state of the goods at the time of the LC's *issuance*. Even if the goods were truly unsold (*ie*, there was just the Sale Contract, and no Buyback Contract) when the LC was issued, Hin Leong might still have sold the goods thereafter, between the time the LC was issued on 29 November 2019 and the time Glencore sought payment on 2 December 2019. Thus, where UniCredit *issued* an LC for unsold goods, UniCredit would know that before *payment* was sought under the LC, those goods may well have been sold. Indeed, after issuing the LC on 29 November 2019, it was only on 28 February 2020 (the date of expiry of the LC), that UniCredit asked Hin Leong whether the goods had been sold (see [17] above). That query itself shows that UniCredit knew it was possible that Hin Leong had sold the goods in the interim.

134 Accordingly, I do not accept that UniCredit still believed that the goods remained unsold up to the time Glencore sought payment on 2 December 2019; UniCredit would have known that Hin Leong might have sold the goods. As between UniCredit and Glencore, it is the time of payment and not the time of issuance that matters: UniCredit attributes the expanded second representation

to Glencore's invoice, which it presented to obtain payment, *after* the LC had been issued.

135 If, prior to Glencore seeking payment on 2 December 2019, UniCredit did believe that the goods remained unsold, that would be based on what Hin Leong had said (coupled with UniCredit itself thinking that Hin Leong had not sold the goods in the interim) – it would not be based on any representation by Glencore, for the only representations UniCredit attributes to Glencore are in relation to Glencore's presentation of its commercial invoice and the LOI on 2 December 2019.

136 To elaborate, before Glencore thus entered the picture:

(a) Hin Leong might have misrepresented to UniCredit (while applying for the LC) that the goods were unsold – this is what happened; or

(b) Hin Leong might have told UniCredit the truth that the goods were pre-sold, *ie*, Hin Leong might have told UniCredit about the Buyback Contract.

137 In scenario (b) above, if Glencore proceeded to present its commercial invoice and LOI to UniCredit as it did, UniCredit would not have viewed that as a representation by Glencore that there was no Buyback Contract. UniCredit would have been told by Hin Leong that there was a Buyback Contract, and it would not consider that Glencore was contradicting that, just because Glencore did not mention the Buyback Contract. Indeed, UniCredit never expected *Glencore* to inform it as to whether *Hin Leong* had sold the goods: if UniCredit were expecting to hear about that from anyone, it was Hin Leong, not Glencore.

138 Scenario (a) above does not change the nature of what Glencore represented to UniCredit. Whether or not Hin Leong misrepresented to UniCredit that the goods were unsold, Glencore would not have acted any differently. Glencore had no reason to believe that Hin Leong would lie to its bank, UniCredit. In any event, Glencore was entitled to regard the communications between Hin Leong and UniCredit as a matter between the two of them, it was not something that Glencore had to be concerned with.

139 Glencore simply presented documents as stipulated in the LC, to obtain payment. Glencore thereby represented to UniCredit that it had sold the goods to Hin Leong on the terms of the Sale Contract (which was true), and that it had agreed to locate and surrender the BLs to Hin Leong (which was also true).

140 UniCredit's half-truth case seeks to fault Glencore for not doing more; for not telling UniCredit what it knew of Hin Leong's sale of the goods. But Glencore was under no obligation to do so: the LC did not require Glencore to do so; and Glencore was not otherwise under an obligation to do so. If the complaint shifts from misrepresentation to non-disclosure, the non-disclosure case fails. Given that UniCredit was only expecting to hear from Glencore about the Sale Contract (and not about Hin Leong's subsequent dealings with the goods), UniCredit would not have viewed Glencore's LOI and invoice as saying anything about whether Hin Leong had sold the goods (back to Glencore, or to another party).

(C) WHETHER GLENCORE TOLD A HALF-TRUTH

141 What Glencore said about the Sale Contract was not false by reason of Glencore not also telling UniCredit that Hin Leong had sold the goods. A "half-truth" is a "partial and fragmentary statement of fact" where "the withholding

of that which is not stated makes that which is stated absolutely false": *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 at [125], citing *Peek v Gurney* (1873) LR 6 HL 377 at 403. What amounts to a half-truth is a "highly fact-sensitive" inquiry: *Clerk & Lindsell* at [17-07]. Here, the LC required Glencore to provide information and documents about the Sale Contract, and Glencore duly did so, truthfully. Not mentioning the Buyback Contract did not make any aspect of what Glencore said about the Sale Contract false.

142 As articulated in UniCredit's closing submissions, Glencore would be a fraudster if it knew of *any* sale of the goods by Hin Leong, and did not tell that to UniCredit. UniCredit's argument was that by only telling UniCredit about the Sale Contract, Glencore was representing (falsely) that Hin Leong had not sold the goods. This would cover various scenarios:

(a) a *simultaneous* buyback of the goods by *Glencore* (as with the Buyback Contract);

(b) a *subsequent* buyback of the goods by Glencore;

(c) a sale of the goods by Hin Leong to the original seller, GENUK (who had sold the goods to Glencore);

(d) a sale of the goods by Hin Leong to *another party* (not Glencore or GENUK).

143 In oral submissions, UniCredit's counsel narrowed the scope of that argument, seeking to limit it to a buyback of the goods by *Glencore*, whether simultaneous or subsequent, *ie*, scenarios (a) and (b) above.[53] That however

[53] Transcript, 25 July 2022, pages 158–166.

undermines the submission in UniCredit's written closing submissions, that by presenting its commercial invoice and the LOI (which only mentioned the Sale Contract), Glencore told a half-truth, namely, representing that there was *only a purchase of the goods by Hin Leong from Glencore*.[54]

144 As explained in oral submissions, UniCredit considered it unobjectionable if, when it presented the LOI, Glencore knew that Hin Leong had already sold the goods to GENUK or to another party, and did not tell UniCredit about this. UniCredit would not regard it as a half-truth for Glencore not to volunteer information about Hin Leong's sales to others; but UniCredit maintains it was a half-truth for Glencore not to tell UniCredit that *Glencore* itself had bought back the goods.

145 It is noteworthy that UniCredit did not consider it objectionable for Glencore not to mention a sale by Hin Leong of the goods back to GENUK (although that would complete a circle of transactions, GENUK-Glencore-Hin Leong-GENUK). GENUK was the party holding the BLs, and with the closing of the circle GENUK would contractually be entitled to get the BLs back if it parted with them to Glencore, and Glencore in turn to Hin Leong.

146 The core complaint UniCredit clings to, is that Glencore represented that it intended to surrender the BLs to Hin Leong, when there was no such intention. Why would that complaint not apply equally to a circular transaction back to GENUK which held the BLs? As Diplock LJ noted in *Garnac Grain* at 683–684, those who know that the contracts form a circle (and in this scenario, Glencore would know) "contemplated that if all went well no documents would

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54 UniCredit's closing submissions, para 200(a).

be delivered at all and no [goods] shipped pursuant to any of the contracts", *ie*, the BLs would just stay with GENUK, and so would the goods.

147 Indeed, the sale and buyback arrangement between Glencore and Hin Leong is just another form of circular transaction; the "circle" simply involves only two parties. It does not make sense that UniCredit would consider a GENUK-Glencore-Hin Leong-GENUK circle unobjectionable, but regard a Glencore-Hin Leong-Glencore one as a sham or fictitious, involving fraud being perpetrated by Glencore on UniCredit.

148 Likewise, if Hin Leong had sold the goods to another party (not GENUK or Glencore), Hin Leong might simply have asked that the BLs be delivered directly to that party, bypassing Hin Leong. As Danckwerts LJ observed in *Garnac Grain* at 679, "normally it was not expected that any delivery of documents would take place until the final export sale [to a party outside the circle]". Indeed, the goods might even be delivered to the ultimate purchaser without the BLs ever reaching it. The court in *Crédit Agricole* found at [126] that:

> Whilst each party in the chain appears … to have been entitled contractually to the delivery of the original shipping documents from its seller, after presentation of the invoice and letter of indemnity to obtain payment, the evidence showed that, as a matter of commercial practice, traders in legitimate unquestionable chains did not always insist on this and the cargo was delivered to the ultimate receiver without such documents ever reaching it.

149 By the end of oral submissions, UniCredit did not have a half-truth case anymore.[55] It had reverted to its contention that Glencore represented that it had

[55] Transcript, 25 July 2022, pages 165–166.

an intention to surrender the BLs to Hin Leong, when Glencore had no such intention. I have already rejected that contention in the preceding section, at [86]–[114].

150 In presenting its commercial invoice and the LOI to UniCredit, Glencore represented that Hin Leong had purchased the goods from it on the terms of the Sale Contract, and that Glencore had agreed to surrender the BLs to Hin Leong. Glencore did not represent that Hin Leong had not sold the goods; Glencore did not represent that it had not bought back the goods. There was no expanded second representation.

Were Glencore's representations to UniCredit false?

151 What I have said above is sufficient to dispose of UniCredit's claim in fraud / deceit. For completeness, these are my views on the other elements of the claim.

152 I have already found above (at [80]–[83]) that Glencore only made truthful representations to UniCredit:

(a) Glencore had agreed to locate and surrender to Hin Leong the original missing shipping documents (including the BLs), as stated in the LOI (the first representation); and

(b) there was a genuine purchase of the goods by Hin Leong from Glencore (*ie*, the Sale Contract) in accordance with the terms of Glencore's invoice that was being financed by UniCredit's LC (the second representation).[56]

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[56] SOC, para 44.

153 If the expanded first representation had been made, it would only have been to the extent that Glencore intended to surrender the BLs *if circumstances require it* (see [105]–[106] above). That too was true.

154 I have accepted the evidence of Glencore's witnesses (at [57] above) that Glencore did intend to surrender the BLs to Hin Leong if circumstances require it: it might not have *expected* to have to do so, but if Hin Leong asked for the BLs Glencore would have located and surrendered them. So too, if Glencore came into possession of the BLs it would have surrendered them to Hin Leong.

155 I cannot infer from the fact of Glencore never giving the BLs to Hin Leong, a lack of a genuine intention on Glencore's part ever to do so. It was open to Glencore and Hin Leong as the contracting parties to vary the contractual obligations between them. Further, as between Glencore and Hin Leong, Glencore's obligation to surrender the BLs to Hin Leong was an obligation for Hin Leong's benefit; as such it was an obligation which Hin Leong could waive performance of. Further, in this regard:

(a) Hin Leong never asked for the BLs;

(b) Hin Leong had resold the goods back to Glencore and title had been transferred back to Glencore; and

(c) if Glencore gave the BLs to Hin Leong, Hin Leong would have had to give them back to Glencore pursuant to the Buyback Contract.

156 By their conduct, Hin Leong and Glencore varied their contractual obligations such that Glencore did not have to give the BLs to Hin Leong, and Hin Leong did not have to give them back to Glencore. At the very least, Hin Leong waived its right to get the BLs from Glencore. Fulfilment of Glencore's

obligation to give the BLs to Hin Leong was thus, in the circumstances, not required.

157 In this context, the position taken by Hin Leong's IJMs is noteworthy. UniCredit's lawyers had corresponded with the IJMs' lawyers with a view to getting the IJMs to demand the BLs from Glencore.[57] The IJMs' lawyers replied to say that the IJMs would not be doing so. They explained:[58]

> As this was a buy-and-sellback transaction, and Hin Leong did sell the HSFO back to Glencore (and the title to the HSFO transferred to Glencore thereon), Hin Leong had a corresponding obligation to redeliver the Glencore Transaction BLs. The IJMs have ascertained that Hin Leong presented a letter of indemnity to Glencore's bank in respect of the sale of the HSFO wherein Hin Leong agreed to surrender the Glencore Transaction BLs to Glencore. Thus, the IJMs are not in a position to procure Hin Leong to make a demand for the Glencore Transaction BLs from Glencore.

158 Hin Leong's IJMs correctly recognised that while Glencore had a contractual obligation to deliver the BLs to Hin Leong, Hin Leong had a corresponding obligation to redeliver them back to Glencore. Indeed, if Hin Leong were to obtain the BLs and give them to UniCredit, Hin Leong would run the risk of breaching its obligation to give the BLs back to Glencore (in the event of UniCredit refusing to part with the BLs). In the event, Hin Leong never sought to obtain the BLs from Glencore.

159 As the court in *Uday Mehra* recognised (see [92] above), a plaintiff claiming in fraudulent misrepresentation cannot succeed simply by showing that a promise has been broken; he must prove that when the promise was made, there was no intention to honour it.

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57 4AB 2712. (See also 4AB 2903.)

58 4AB 3143.

160 That point is illustrated by *Trafigura Beheer BV v Kookmin Bank Co* [2005] EWHC 2350 (Comm) ("*Trafigura*"). The seller (Trafigura) too had presented an LOI to obtain payment on an LC (issued by Kookmin). In the LOI issued to the buyer (Huron), Trafigura stated that it was then unable to provide the original BLs, but that it agreed to "make all reasonable efforts to locate and surrender … as soon as possible, the full set of 3 [BLs] (or 2/3 [BLs] and Masters receipt for 1/3 of the original [BLs])". When it presented the LOI, Trafigura did not have compliant BLs to present for payment, it had non-compliant ones. Subsequently Trafigura obtained compliant BLs, but it gave Kookmin 2 BLs and a Masters receipt in place of the third BL. Kookmin complained about not receiving all 3 original BLs – in parallel proceedings before the South Korean courts, it asserted that Trafigura acted fraudulently as it "received payment for the shipment with no intention to forward the remaining original bill of lading" (at [13(ii)]). Before the English court, Trafigura sought a declaration that it "did not undertake or represent that it would (or intended to) provide all the Bills of Lading to the Defendant" (at [16]).

161 The court noted that the basis of Kookmin's allegation "appear[ed] to rest at the point when payment was obtained by Trafigura with the intention of not sending the original Bills of Lading to Kookmin rather than on the subsequent failure to send them, and on a fraudulent intention at the time of obtaining such payment" (at [14]). The court found that there was no viable claim against Trafigura for fraudulent misrepresentation. Under the LC, Trafigura was entitled to present the LOI to obtain payment when conforming BLs were unavailable (at [25]). As such, in presenting the LOI, it was not thereby representing that it had no BLs whatsoever – it could be that it did not have 3 sets of conforming BLs (as was the case). The fact that Trafigura did not eventually provide 3 BLs, but only 2 plus a Masters receipt in place of the third,

did not support a conclusion that when Trafigura presented the LOI, it had no genuine intention to provide 3 BLs.

162 I have similarly found that Glencore intended to surrender the BLs to Hin Leong *if circumstances required it.* Accordingly, I reject what UniCredit alleged in para 47 of the SOC, that "[Glencore] never had the intention to and/or did not have the intention at the material time to and/or knew that it would never surrender the original Missing Shipping Documents (including the original BLs) to [Hin Leong] as represented in the LOI".

Did Glencore act fraudulently?

163 I do not accept that Glencore acted fraudulently. Having considered the written and oral evidence of Glencore's representatives, I do not accept that they knowingly or recklessly made false statements to UniCredit. I do not accept that Glencore intended to cheat or defraud UniCredit.

164 I highlight that on 31 May 2018, Glencore's Mr van Rooyen informed UniCredit's Mr Patrick Welch by email that Glencore engaged in "sale and buy back" repo financing transactions "for working capital optimisation".[59] Glencore did not seek to hide from UniCredit the fact that it engaged in "sale and buy back" transactions. UniCredit seeks to distinguish such repo financing transactions from the Glencore-Hin Leong transactions, on the basis that in repo financing transactions the bank has visibility of both legs of the "sale and buy back". The point remains, though, that there is nothing inherently wrong about a "sale and buy back" arrangement; UniCredit would know Glencore did not think there was anything wrong with it; and UniCredit would have known from

[59] 6AB 4357.

that time, that Glencore did engage in "sale and buy back" transactions. UniCredit would thus not have concluded, when Glencore presented documents to obtain payment under the LC, that Glencore had not bought back the goods from Hin Leong.

165 Further, I do not accept UniCredit's assertion that Glencore knew or ought to have known that the goods and BLs under the Sale Contract were intended to have been pledged or given as security by Hin Leong to UniCredit.[60] Glencore's own financiers (for the Buyback Contract) did not require such security from Glencore,[61] and I accept that Glencore did not know (nor ought it to have known) what the security arrangements between Hin Leong and UniCredit were – in particular that UniCredit intended to obtain a pledge over the goods and the BLs, for which it would require possession over them. Glencore's own Uncommitted Framework Agreement with UniCredit did not envisage a pledge either, but only a guarantee.[62]

166 If it were crucial to UniCredit to have possession of the BLs, it could have made that a condition of payment under the LC, but instead it agreed to accept an LOI (addressed to Hin Leong) stating that Glencore had agreed to surrender the BLs *to Hin Leong*. Indeed, UniCredit's Ms Loh testified that UniCredit contemplated receiving BLs only after the loan had been repaid and the transaction between UniCredit and Hin Leong had been closed.[63] In that scenario, the BLs would not be security to UniCredit for the loan to Hin Leong, for that loan would have already been repaid.

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60 SOC, para 39.

61 Mr van Rooyen's AEIC at paras 14–15, 1DBAEIC 5–6.

62 2AB 1263 and 1415.

63 Ms Loh's AEIC at para 25(a), 2PBAEIC 1002.

167 Indeed, UniCredit wanted Hin Leong to sell the goods and use their proceeds to repay UniCredit. In early March 2020, Hin Leong falsely informed UniCredit that the goods had been discharged into Hin Leong's Universal Terminal, and remained unsold.[64] UniCredit asked that Hin Leong sell the goods quickly.[65] Meanwhile, UniCredit had on 28 February 2022 granted Hin Leong a 60-day import loan for US$37,209,550.35.[66] By encouraging Hin Leong to sell the goods, UniCredit was encouraging Hin Leong to part with the goods (and, if necessary, the BLs too) in favour of a sub-buyer. UniCredit's Mr Iacono confirmed (with reference to UniCredit's internal documents) that after discharge of cargo, UniCredit would be looking to receivables, *ie*, sale proceeds, rather than to BLs, as security.[67]

Did Glencore intend that UniCredit should act on Glencore's representations?

168 I accept that Glencore intended UniCredit to act on documents in which Glencore represented that it had agreed to give the BLs to Hin Leong, and that it had sold the goods to Hin Leong pursuant to the Sale Contract; but I have found that those representations were true.

169 I do not accept that Glencore intended UniCredit to act on the expanded first representation (as to Glencore's intentions regarding the Sale Contract, in particular, whether it intended to surrender the BLs to Hin Leong in all circumstances). Glencore intended UniCredit to act on the *documents* it presented; Glencore did not intend thereby to represent anything about its

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64 3AB 2261–2262.

65 3AB 2287.

66 3AB 2209.

67 1AB 112; Transcript, 18 May 2022, 21:4–22:2.

intentions regarding the Sale Contract, nor did Glencore intend that UniCredit should act on this.

170 Likewise, I do not accept that Glencore intended UniCredit to act on the expanded second representation (that Hin Leong had not sold the goods). Glencore did not say anything about whether Hin Leong had or had not sold the goods. Glencore made no representation in that regard, and it follows that it could not have intended that UniCredit should act on any such representation either.

Did UniCredit act to its detriment on Glencore's representations?

171 UniCredit acted on the *documents* Glencore presented, in paying Glencore under the LC. To the extent that UniCredit acted on *representations* by Glencore, that would not go beyond the first representation (that Glencore had agreed to locate and surrender the BLs to Hin Leong), and the second representation (that there was a genuine purchase of the goods by Hin Leong). Both those representations were true.

172 I do not accept that the expanded first representation (as to Glencore's intentions regarding the Sale Contract) was made, but in any event UniCredit's payment to Glencore cannot be attributed to UniCredit believing that Glencore would surrender the BLs to Hin Leong in all circumstances: see [107]–[113] above.

173 I also do not accept that the expanded second representation (that Hin Leong had not sold the goods) was made, but in any event UniCredit's payment to Glencore cannot be attributed to UniCredit believing that the goods remained unsold: see [132]–[138] above.

174 UniCredit complains that it failed to obtain any security in the goods, or in the BLs, but that is the consequence of UniCredit's arrangements with *Hin Leong*, and how *Hin Leong* acted. UniCredit cannot blame its plight on Glencore.

175 Hin Leong gave UniCredit a memorandum of pledge[68] which stipulated that UniCredit "shall have a pledge upon the Pledged Goods and all … bills of lading … issued in respect of the Pledged Goods (the "Pledged Documents"), which are now or may hereafter be … in [its] possession (whether actual or constructive) … or received by, deposited or lodged with, transferred to or otherwise held by [it] …".

176 Despite this *agreement to pledge* the goods and the BLs under the Sale Contract, UniCredit never had an *actual pledge* over the goods or the BLs, for UniCredit never had possession of the goods or the BLs. UniCredit accepts this.[69] UniCredit complains about Glencore not giving UniCredit the BLs, but Glencore was under no obligation to do so. Glencore's obligation was to surrender the BLs *to Hin Leong*, as stated in the LOI, not to surrender the BLs to *UniCredit*. Indeed, if Glencore had surrendered the BLs directly to Hin Leong, and Hin Leong did not then give them to UniCredit, UniCredit would be in a similar position to its present predicament: without the BLs, and without a pledge over the BLs. UniCredit says it counted on Glencore giving the BLs to Hin Leong through the banking chain[70] (rather than directly) in which case UniCredit would come into possession of them; but Glencore was not obliged

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68 2AB 1239.

69 UniCredit's closing submissions, paras 136 and 142.

70 UniCredit's closing submissions, para 223.

to give the BLs to Hin Leong *through the banking chain*, it was simply obliged to give the BLs to Hin Leong.

177 At the time of its LC application Hin Leong misrepresented to UniCredit that the LC was for "unsold goods" (when Hin Leong had already sold them to Glencore by the Buyback Contract). Hin Leong continued to misrepresent to UniCredit into early March 2020 that the goods remained unsold, when title had already passed back to Glencore (on 2 December 2019) and long after the delivery window under the Sale Contract (18 to 25 December 2019). None of this is Glencore's fault. In this regard, UniCredit does not seek to rescind the LC because of Hin Leong's misrepresentations, independent of fault on the part of Glencore (by Glencore entering into a sham transaction, or Glencore making fraudulent misrepresentations to Unicredit).[71]

178 UniCredit asserts that it would not have *issued* the LC if it had known of the Buyback Contract,[72] but that has nothing to do with UniCredit relying on representations by Glencore: when UniCredit issued the LC, Glencore had not made any representations to UniCredit – the only such representations UniCredit relies on were made when Glencore presented its commercial invoice and LOI on 2 December 2019, *after* the LC had been issued on 29 November 2019.

179 UniCredit also says that if it had known of the Buyback Contract at the time of *payment* under the LC, it would not have paid Glencore.[73] That too has nothing to do with UniCredit relying on any representations by Glencore.

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71 SOC, para 66 read with paras 37 and 42 to 49A.

72 SOC, para 41.

73 SOC, para 41.

UniCredit paid Glencore because the documents presented for payment complied with the LC. Whether or not there was the Buyback Contract, the documents complied with the LC. I do not believe that UniCredit would have withheld payment from Glencore if, prior to payment, UniCredit had found out about the Buyback Contract. That would have put UniCredit in breach of its payment obligation under the LC, and exposed it to a suit by Glencore to which UniCredit would have no defence (see [107]–[109] above). If, for example, when Glencore presented documents to UniCredit, Glencore had also mentioned the Buyback Contract, and told UniCredit that it expected Hin Leong would not require the BLs (but that if Hin Leong did, Glencore would surrender the BLs to Hin Leong), Glencore would not have falsely represented anything to UniCredit. If UniCredit then refused to pay Glencore, that would have nothing to do with UniCredit relying on any false representations by Glencore. In any event, I do not believe UniCredit would have refused to pay Glencore.

180 For all the above reasons, UniCredit's claim against Glencore for fraud / deceit fails.

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

181 In its conspiracy claim, UniCredit says much about how Hin Leong had defrauded it;[74] its claim that Glencore also defrauded it[75] falls back on its claim against Glencore for fraud / deceit – a claim that fails for reasons stated above.

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74 SOC, para 51(a) to (g).

75 SOC, para 51(h) and (i).

182 What is left is a general plea that Hin Leong and Glencore conspired to defraud UniCredit,[76] but there is no evidence of any such conspiracy. To the extent that the conspiracy is based on the allegation that the Sale Contract was a sham or fictitious transaction, I have found that the Sale Contract was not a sham, and it was not fictitious. There is no evidence that Glencore knew, or ought to have known, that Hin Leong was misrepresenting to UniCredit that the goods were "unsold" when in fact Hin Leong had sold them back to Glencore by the Buyback Contract. The dealings between Hin Leong and UniCredit were not Glencore's responsibility or concern.

183 Accordingly, I dismiss UniCredit's conspiracy claim as well.

(4) Unjust enrichment

184 UniCredit's unjust enrichment claim is based on:

(a) the alleged fraud and/or conspiracy; and/or

(b) UniCredit having acted under a mistaken belief ("UniCredit's Misapprehension"[77]).

185 To the extent that the unjust enrichment claim is based on the alleged fraud and/or conspiracy, I have dismissed both the fraud and conspiracy claims, and they thus provide no foundation for claiming unjust enrichment.

186 UniCredit's Misapprehension is said to involve UniCredit believing the following as a result of the acts of Hin Leong and Glencore:[78]

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76 SOC, paras 50 and 50A.

77 SOC, paras 34–35.

78 SOC, paras 34–35.

(a) the Sale Contract was genuine;

(b) Hin Leong had, and would continue to have, valid title to the goods pursuant to the Sale Contract;

(c) UniCredit would have security over the goods and the BLs;

(d) the goods and the BLs would be delivered by Glencore to Hin Leong and eventually to UniCredit, or to UniCredit directly; and

(e) the goods had not been sold by Hin Leong.

187 I have dealt with most of these aspects in discussing the fraud and conspiracy claims, and would simply make the following brief points:

(a) The Sale Contract was genuine, there was no misapprehension there.

(b) Glencore did transfer title to Hin Leong under the Sale Contract. There was nothing to stop Hin Leong from reselling the goods, which it did – back to Glencore, by the Buyback Contract, transferring title back to Glencore in the process. Glencore never represented to UniCredit that Hin Leong would continue to have title to the goods, *ie*, that Hin Leong would not resell the goods or transfer title to them. Indeed, UniCredit expected, and encouraged, Hin Leong to sell the goods: see [167] above.

(c) Glencore made no representation to UniCredit that UniCredit would have security over the goods and the BLs – whether UniCredit had any such security depended on the arrangements between UniCredit and Hin Leong.

(d) Glencore made no representation that the goods and the BLs would be delivered by Glencore to Hin Leong and eventually to UniCredit, or to UniCredit directly. Glencore made no representation that the *goods* would be delivered to UniCredit, indirectly or directly; indeed, UniCredit was not looking to take delivery of the goods. As between Hin Leong and Glencore, any obligation to deliver the goods could be modified – in the event, Hin Leong sold the goods back to Glencore, and Hin Leong did not seek to take physical delivery of the goods and redeliver them to Glencore. As for the BLs, Glencore never represented that it would give the BLs indirectly or directly to UniCredit. All that Glencore represented to UniCredit was that it had agreed to surrender the BLs to Hin Leong. As between Hin Leong and Glencore, that obligation could be modified – in the event, Hin Leong never asked for the BLs, and they remained with GENUK.

(e) Glencore made no representation to UniCredit that Hin Leong would not resell the goods.

188 Whatever grievances UniCredit may have against Hin Leong, it cannot blame UniCredit's Misapprehension on Glencore. There is nothing unjust in Glencore being paid on the LC – Glencore was legally entitled to that payment, having presented complying documents to UniCredit. Moreover, that payment was for a genuine sale of goods by Glencore to Hin Leong. Glencore transferred title to the goods to Hin Leong in consideration for payment (which it then received from UniCredit under the LC). Glencore then detrimentally changed its position in reliance on that payment, by reimbursing its bank BBVA in the

sum of US$37,194,678.42 (for the Buyback Contract), a sum which exceeds the US$36,997,691.57 that UniCredit had paid Glencore.[79]

189 Accordingly, I dismiss UniCredit's unjust enrichment claim.

(5) Claim under the Master Discounting Agreement

190 UniCredit's claim under the Master Discounting Agreement is premised on there being some "fraud, illegality or unauthorized act on [Glencore's] part, in relation to [UniCredit's] discounted payment" under the LC.[80] UniCredit relies on its allegations of fraud / deceit and/or conspiracy as entitling it to recourse against Glencore under the Agreement. I have dismissed UniCredit's claims for fraud / deceit and conspiracy, and it necessarily follows that I dismiss UniCredit's claim under the Master Discounting Agreement as well. In the circumstances, I do not need to resolve the dispute as to whether the Master Discounting Agreement was even applicable to begin with.

(6) Breach of the LOI pursuant to the Contract (Rights of Third Parties) Act and/or common law

191 This final claim appears to have been largely abandoned by UniCredit, as Glencore observes in its closing submissions.[81]

192 The LOI was addressed to *Hin Leong*, and Glencore stated in it that it had agreed to surrender the BLs to *Hin Leong*.

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79 Defence (Amendment No 2) dated 15 December 2021, para 29A.

80 SOC, paras 21A(c) and 57A.

81 Glencore's closing submissions, para 45.

193 On a proper construction of the LOI, Glencore and UniCredit did not intend that the LOI would be enforceable by UniCredit. The LOI was in UniCredit's prescribed form, and if UniCredit had wanted to be able to enforce the LOI itself, it could have prescribed that the LOI was to be addressed to UniCredit (rather than to Hin Leong), or to both UniCredit and Hin Leong; it could also have required Glencore to surrender the BLs to UniCredit, or to Hin Leong through UniCredit. UniCredit did not do so.

194 That the LOI was enforceable by Hin Leong (and not by UniCredit) is reinforced by the fact that UniCredit, as an LC-issuing bank, dealt in documents and was not concerned with the underlying Sale Contract or the delivery of goods and BLs by Glencore to Hin Leong.

195 Moreover, I find that Glencore had not breached the LOI. Glencore agreed to surrender the BLs to Hin Leong, but that was an obligation that could be modified as between them. Had Glencore surrendered the BLs to Hin Leong, Hin Leong would have been obliged to surrender them back to Glencore. In the event, the Sale Contract and the Buyback Contract were performed in terms of payments, and simultaneous title transfers, without the BLs changing hands. Had Hin Leong asked for the BLs, Glencore would have obtained and surrendered the BLs to Hin Leong; but Hin Leong never asked for them, and the BLs thus remained with GENUK. By its conduct, Hin Leong indicated that it did not require the BLs, and Hin Leong's IJMs too declined to demand the BLs from Glencore. Glencore did not breach the LOI in not giving Hin Leong the BLs.

196 Further, Glencore never agreed to give the BLs to *UniCredit* – Glencore agreed to give the BLs to *Hin Leong*. UniCredit claims damages for Glencore

failing to give the BLs to UniCredit,[82] but there was no such obligation on Glencore.

197 The court in *Trafigura* at [34] similarly noted that the bank could not claim against the beneficiary under the LOI in that case:

> If complaint is made against Trafigura about what occurred after payment against the LOI, it can only be based upon the terms of the LOI, to which Kookmin was not a party, as it has repeatedly said. If it is not a party, it can have no claim under the LOI, whereas, if it did have such a contractual claim, it would be subject to the jurisdiction clause in favour of the English Courts. Kookmin agreed to pay against the commercial invoice and the LOI with the obligation in the latter to deliver Bills of Lading and/or a Master's receipt to Huron, not to itself. If documents were then delivered in accordance with the terms of the LOI, there could not be any unlawful act *vis-à-vis* Huron, nor an unlawful act as against Kookmin.

198 I dismiss UniCredit's third party rights claim as well.

Conclusion

199 For the above reasons, I dismiss all of UniCredit's claims against Glencore. Glencore was entitled to the payment which it received from UniCredit under the LC. Glencore did not defraud or deceive UniCredit; it did not conspire with Hin Leong to injure UniCredit; it was not unjustly enriched. UniCredit is not entitled to rescind the LC, or to recover the payment it made to Glencore.

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82 SOC, para 63.

200 I award Glencore, as the successful party, costs to be assessed. I will address the quantum of those costs separately.

Andre Maniam
Judge of the High Court

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