

Letters of Credit: Banks Successfully Prove Fraud Exception Where Beneficiary Recklessly Made False Representations

The General Division of the High Court of Singapore (**High Court**) has, in examining the fraud exception to an issuer's obligation to pay under a letter of credit (**LC**), clarified that a beneficiary would be fraudulent if he made a false representation recklessly, not in the sense of carelessness, but in the sense of being indifferent to the truth. The High Court found, on the facts of this case, that the banks successfully made out the fraud exception, at least in the sense that the beneficiary did not believe in the truth of the representations in documents it presented to the banks: *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another suit* [2023] SGHC 220.

Our Tan Chee Meng SC, Tan Kai Yun, Andrew Pflug and Hudson Wong acted for Oversea-Chinese Banking Corporation Ltd, the successful defendant in Suit No 463 of 2020.

Our Comments

LCs are often described as being the lifeblood of international commerce. It is well established that, once a beneficiary claiming on an LC presents to the confirming or issuing bank documents that conform with the requirements of the credit, that bank is under a contractual obligation to honour the credit. Notwithstanding the autonomous nature of documentary credits, the bank may be entitled to dishonour the credit where, for the purposes of the claim, the beneficiary fraudulently presents to the bank documents that contain material representations of fact that the beneficiary knows to be untrue.

However, fraud is notoriously difficult to prove. This is one of the few decisions in Singapore where an issuer bank has successfully established the fraud exception to resist payment under an LC, and is a significant win for trade finance banks.

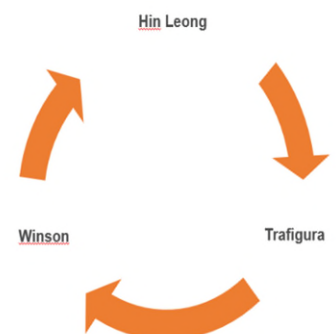
This update takes a look at the High Court's decision.

Background

Winson Oil Trading Pte Ltd (**Winson**) brought proceedings against Oversea-Chinese Banking Corporation Ltd (**OCBC**) and Standard Chartered Bank (Singapore) Ltd (**SCB**) for non-payment under two LCs issued by OCBC and SCB. These LCs were meant to finance the purchase of two similar parcels of gasoil by Hin Leong Trading (Pte) Ltd (**Hin Leong**) from Winson.

The sales by Winson to Hin Leong were the final legs of a circular trade, which took place in a single afternoon on 27 March 2020:

- (a) Hin Leong sold the gasoil in two shipments to Trafigura Pte Ltd (**Trafigura**);
- (b) Trafigura sold the same gasoil in two shipments to Winson; and



- (c) Winson then sold the same quantity of gasoil in two shipments back to Hin Leong, on cost, insurance and freight (CIF) terms.

Winson had made two presentations to each of the banks of certain invoices and letters of indemnity (**LOIs**). Winson's first presentation to OCBC was for cargoes on board the vessel *Ocean Voyager*, and its first presentation to SCB was for cargoes on board a different vessel, *Ocean Taipan*.

It was common ground that neither bank paid out on the first presentation. OCBC had rejected Winson's first presentation, citing the ground that there was "*no cargo shipped*".

Winson then made a second presentation to both banks, which switched the vessels around. This time, its second presentation to OCBC was for cargoes on board the *Ocean Taipan*, while its second presentation to SCB was for cargoes on board the *Ocean Voyager*.

Winson sued both banks for payment pursuant to these second presentations (**Operative Presentations**).

In resisting Winson's claim for payment under the LCs, the banks relied on, among other things, the fraud exception articulated in the House of Lords decision of *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 and accepted as law in Singapore (**Fraud Exception**).

The Fraud Exception is an established exception to the autonomy principle governing LCs, and is engaged where the beneficiary, for the purpose of drawing on the credit, fraudulently presents to the bank documents that contain material representations which are false.

Here, the banks contended that Winson had fraudulently presented for payment the LOIs which contained false representations of material facts. The banks' case was that the misrepresentations related to the existence and validity of a full set of 3/3 original bills of lading (**BLs**) relating to the underlying gasoil cargoes and that, at the time of delivery, Winson was entitled to possession of the original BLs, had good title to the gasoil cargoes, and had passed good title to the gasoil cargoes to Hin Leong.

The banks also asserted that the Winson – Hin Leong sale was a sham and that, in any event, the cargoes in question were never shipped on the *Ocean Taipan* or the *Ocean Voyager* (collectively, **Vessels**).

The High Court's Decision

The High Court held that the banks had established the Fraud Exception in relation to the Operative Presentations, and dismissed Winson's claim against the banks for payment on the LCs.

Fraud exception satisfied if, in presenting documents for payment, the beneficiary makes a false representation of material fact recklessly in the sense of being indifferent to its truth

It was common ground between the parties that Winson would be taken to have acted fraudulently if it had presented to the banks documents that contained material representations of fact: (a) which it knew were untrue; or (b) in respect of which it had no belief in their truth.

The parties however disputed whether a beneficiary (such as Winson) would also be fraudulent if it had made the false representations *recklessly*, without caring whether they were true or false.

The High Court held that it would, i.e., the Fraud Exception is a basis on which a bank can deny payment, if in presenting documents for payment under a letter of credit, a beneficiary makes a false representation of material fact knowing the statement is untrue or without belief in its truth, which *includes* the beneficiary being reckless, in the sense of being indifferent to the representation's truth or falsity.

In reaching this conclusion, the High Court declined to adopt the approach taken by the Singapore International Commercial Court (SICC) in *Credit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit* [2022] 4 SLR 1. In that case, the SICC held that the beneficiary would not have acted fraudulently if it had made false representations recklessly, without caring whether they were true or false.

The High Court instead endorsed the views of Lord Herschell in the leading case on the tort of deceit, in *Derry v Peek* (1889) 14 App Cas 337 that representations made recklessly “*are but an instance of [representations made without belief in its truth], for one who makes a statement under such circumstances can have no real belief in the truth of what he states*”.

The High Court also noted that this formulation in *Derry v Peek* was supported by the Singapore Court of Appeal on at least two occasions.

Application to the facts

The High Court found that Winson made false representations in the LOIs it presented to the banks.

It also found that Winson did not believe in the truth of those representations – or at the very least, by the time of the Operative Presentations, Winson was indifferent to whether its representations were true or not, and in which case, did not believe in their truth.

False representations of material facts

The High Court found that the representations in the LOIs were false, as the BLs which Winson relied on to prepare its LOIs were forgeries. The BLs were signed by an employee of Hin Leong instead of the carrier or the master of the vessels, and were later marked “*null and void*”. There were no valid BLs pursuant to which cargo was shipped pursuant to the Winson – Hin Leong sale.

There was also no evidence before the High Court that there was any independent inspector appointed by anyone for the purported shipments. Winson never received any loading documents, such as an inspector's report, or certificates of quantity and quality (or equivalent documents). On the facts, the High Court concluded that no inspection took place, and there were no determinations of quantity or quality for the purported shipments Winson sold to Hin Leong.

Hence, Winson's representations in the LOIs as to the existence and validity of a full set of 3/3 original BLs, and Winson's representations that it had good title to cargo described in its LOIs, and that Winson passed good title to these cargoes to Hin Leong, were found to be false.

Winson did not reasonably hold an honest belief in the truth of its representations

In assessing whether, at the time of the Operative Presentations, Winson had honestly believed in the truth of the representations in its LOIs, the High Court considered how reasonable (or unreasonable) that belief would be, in the circumstances then prevailing.

The High Court held that fraud may be inferred where the alleged belief was destitute of all reasonable foundation, such that the court is convinced this belief was not really entertained.

The High Court found in this case that the evidence supported, rather than went against, a conclusion that Winson had acted fraudulently and did not honestly believe in the truth of the representations in the LOIs.

In particular, the High Court concluded, among other things, that the transactions were pre-structured as a circular trade.

- (a) First, the evidence showed that the circular trade could only have been for vessels and cargoes chosen by Hin Leong, rather than for fungible quantities of gasoil.
- (b) Second, when Winson made its first presentation to OCBC on 7 April 2020 using an invoice and LOI dated 6 April 2020, the nominations of the Vessels had yet to be confirmed. Winson argued that the transactions were not circular until a nomination was made, and no substitution option was available. However, if substitution was possible until the Vessels' last estimated time of arrival at the disport, Winson could not have honestly represented in its LOI of 6 April 2020 that it received good title to the cargoes on board.
- (c) Third, the evidence, including the transacted prices and market conditions on the day, again suggested that the transactions were pre-structured, with all parties knowing in advance how they would emerge on a net basis.

The High Court also considered the following circumstances in making its decision:

- (a) Winson never received any loading documents for shipments on the Vessels but nevertheless urgently proceeded with its Operative Presentations.
- (b) The quantity for the copy non-negotiable BL for the *Ocean Taipan* was changed days after the BL was purportedly issued and the *Ocean Taipan* was sailing to its destination, which was unusual. Winson did not ask for, and was not given, any explanation or documentation to support the change.
- (c) Winson's trade expert agreed in cross-examination that she would expect an operator to check that the earlier set of BLs (reflecting a different quantity) had been cancelled, but Winson never did so.
- (d) OCBC had requested Winson to repurchase the cargoes, but Winson was unwilling to do so. While Winson later stated that it was willing to help find a buyer for the cargo, it repeatedly emphasised the need to check if the title to the cargo was clean, i.e., whether Trafigura had

passed clean title to Winson, which showed that Winson had doubts over the transfer of title to the goods.

- (e) Winson did not follow up after OCBC rejected its first presentation on the ground that there was “*no cargo shipped*”, or check whether the cargo was in fact shipped according to its LOIs. Instead, Winson made the Operative Presentation to OCBC the next day after OCBC’s rejection and gave a false explanation to OCBC for it.
- (f) Winson did not make serious attempts to get loading documents, but instead urgently proceeded with the Operative Presentations and pressed the banks for payment under the LCs.

Consequently, the High Court found that Winson did not, at the time of Winson’s Operative Presentations, believe in the truth of the representations in its LOIs, or that, at the very least, it was indifferent to whether its representations were true or not, in which case it did not believe in their truth.

The High Court therefore held that the Fraud Exception had been established and dismissed Winson’s claim against the banks with costs.

Having concluded that the Fraud Exception was successfully established by the banks, the High Court left open the question whether the banks could rely on a nullity exception that extended to documents that were not themselves forged, but which were based on forged documents.

The High Court also left open the question whether unconscionability should also be recognised as a ground for resisting payment under an LC, as it is for resisting payment under a demand guarantee.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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