

Case Note

LETTERS OF CREDIT: IS RECKLESSNESS FRAUD?

Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd [2023] SGHC 220

In *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220, the General Division of the High Court held that the “Fraud Exception” for refusing payment under a letter of credit is satisfied where a beneficiary makes a false representation recklessly, in the sense of being indifferent as to the truth of the representation. This case note suggests that the court’s conclusion was sound as a matter of principle and explains the practical guidance that parties can derive from the decision.

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I. Introduction

1 If a party that seeks to draw on a letter of credit presents documents containing false representations without caring whether they are true or false, is a bank entitled to refuse payment? In the recent case of *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd*¹ (“*Winson Oil*”), the General Division of the High Court (“General Division”) had to answer this question. It did so in the affirmative.

2 Given the decision’s legal and practical significance, this case note discusses its salient aspects. Having set out the background to letters of credit in international commerce, the case note summarises

1 [2023] SGHC 220.

and comments on *Winson Oil*. It also explains the practical guidance that parties can derive from the decision.

II. Letters of credit in international commerce

3 Letters of credit are frequently used in cross-border transactions for the sale of goods. They provide the beneficiary (typically the seller) with the right to obtain payment by drawing on the letter of credit. The autonomous and independent nature of the letter of credit means that, pursuant to its terms (and potentially also the parties' contract), the seller has the right to be paid under the letter of credit even where there is a dispute about whether the seller is entitled to payment under the contract.²

4 Under English law,³ Singapore law⁴ and the laws in other Commonwealth jurisdictions,⁵ there is a well-established exception to the autonomous nature of letters of credit: the bank providing the letter of credit may refuse to release funds where the beneficiary's attempt to draw on it is fraudulent (the "Fraud Exception"). This will arise where the beneficiary knowingly makes false representations to the bank, in its attempt to draw on the letter of credit.⁶

5 This raises the following question: what if a false representation is not made knowingly (*ie*, with the knowledge that it is not true), but recklessly as to whether it is true or false? This is the question the court was called on to answer in *Winson Oil*.

2 *MW High Tech Projects UK Ltd v Biffa Waste Services* [2015] EWHC 949 (TCC) at [29].

3 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183.

4 *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 at [20]–[21].

5 For example, Australia: *Olex Focas Pty Ltd v Skodaexport Co Ltd* (1996) 134 FLR 331 at 348; India: *Standard Chartered Bank v Heavy Engineering Corporation Ltd* (2020) 13 SCC 574 at [23]; Canada: *Angelica-Whitewear Ltd v Bank of Nova Scotia* 1987 CarswellQue 24 at [17]–[18]; the US: *Sztejn v J Henry Schroder Banking Corp*, 31 NYS 2d 631 at 722–723 (NY Sup, 1941); and Hong Kong: *JML Craft Pty Ltd v China Ping An Insurance (Hong Kong) Co Ltd* [2021] HKCFI 1468 at [20].

6 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183; *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 at [20]–[21].

III. Decision in *Winson Oil*

A. Background

6 Winson Oil Trading Pte Ltd (“Winson”) sold cargoes of gasoil to Hin Leong Trading (Pte) Ltd.⁷ This sale was financed by letters of credit issued by two banks.⁸ Winson made two presentations to the banks for payment under the letters of credit, the second presentation superseding the first.⁹ The documents presented to the banks included letters of indemnity (“LOIs”) which had been prepared on the basis of bills of lading for the cargoes shipped.¹⁰ These LOIs stated that: (a) valid bills of lading existed; and (b) Winson had good title to the cargoes.¹¹ The banks refused to pay, including on the basis that both (a) and (b) above were fraudulent representations by Winson.¹² The banks had been alerted to the falsity of these representations by the supplier of Winson’s cargoes as well as by third parties.¹³

7 Winson applied to the General Division to obtain payment. In assessing whether the Fraud Exception had been made out, the court analysed three issues. First, what (if any) material representations had been made? Second, were those representations false? Third, were these representations made fraudulently?

8 The first and second issues can be addressed together and briefly. The court found that representations (a) and (b) above were material representations and were false.¹⁴

9 The most contentious and significant issue before the court was the third: were these representations made fraudulently?

7 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [1]–[2].

8 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [3].

9 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [77].

10 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [3].

11 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [25].

12 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [4], [26(b)] and [27(e)].

13 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [97]–[98].

14 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [28] and [72].

10 Based on the decision of the House of Lords in *United City Merchants (Investments) Ltd v Royal Bank of Canada*,¹⁵ the court noted that the Fraud Exception would apply where the beneficiary presents documents that to its knowledge were untrue.¹⁶ It was also common ground between the parties that the Fraud Exception would apply where the beneficiary makes a false representation without belief in its truth.¹⁷

11 The parties disagreed on whether the Fraud Exception would bite in a letter of credit case where the beneficiary made a false representation “recklessly, without caring whether it be true or false”.¹⁸

B. Does recklessness amount to fraud for purposes of letters of credit?

12 The court found that recklessness as to the truth of a document was a part of the Fraud Exception for letters of credit for the following reasons:

(a) That recklessness in this sense could amount to fraud was recognised by the House of Lords in *Derry v Peek*.¹⁹ In that case, Lord Herschell famously laid down a three-prong test as to what amounts to fraud for the purposes of an action for deceit: “fraud is proved when it is shewn that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false”.²⁰

(b) *Derry v Peek* had been accepted as a part of the Singapore law of deceit.²¹

(c) In *Derry v Peek*, Lord Herschell noted that the third prong of fraud (recklessness, in the sense of being indifferent to the truth) was an instance of the second prong of fraud (lack of belief in the truth).²² This was because a person who made a false statement recklessly, careless whether it be true or false,

15 [1983] 1 AC 168.

16 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183.

17 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [10].

18 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [11].

19 (1889) 14 App Cas 337; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [12]–[13].

20 *Derry v Peek* (1889) 14 App Cas 337 at 374.

21 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [14].

22 *Derry v Peek* (1889) 14 App Cas 337 at 374; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [13].

could have no real belief in the truth of the statement.²³ The court was persuaded by Lord Herschell's reasoning on this point and noted that there was authority in Singapore that accepted the third prong of fraud as being part of the second prong.²⁴ Since the parties were in agreement that the second prong was a part of the Fraud Exception for letters of credit, it followed that the third prong was also a part of the Fraud Exception.²⁵

(d) The third prong of fraud had been recognised as part of the Fraud Exception in Singapore in the context of demand or performance bonds or guarantees²⁶ in *Arab Banking Corp (BSC) v Boustead Singapore Ltd*.²⁷ The court noted that there should be no distinction in the application of the Fraud Exception to demand bonds on the one hand and letters of credit on the other hand.²⁸

13 The court in *Winson Oil* was presented with seemingly contrary authority from the Singapore International Commercial Court in *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd*²⁹ (“CACIB”). In *CACIB*, the court had found that a “reckless failure to ascertain the truth of representations, which are made in the honest belief that they are true” would not amount to fraud for the purposes of the Fraud Exception under a letter of credit.³⁰

14 The court considered whether *CACIB* stood for the proposition that recklessness could not amount to fraud (and thus could not trigger the Fraud Exception in a letter of credit case). The court in *Winson Oil* distinguished *CACIB* by holding that *CACIB* was concerned with the situation where the beneficiary was reckless in that it did not take care to ascertain whether the representations were true, but was not reckless as to the veracity of the representations itself, since it had the honest belief

23 *Derry v Peek* (1889) 14 App Cas 337 at 374; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [13].

24 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [15].

25 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [16].

26 In this case note, the term “demand bond” is used to refer to all of these instruments.

27 *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [17].

28 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [18].

29 [2022] 4 SLR 1; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [11] and [19].

30 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [21]; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [19].

they were true.³¹ In contrast, the court in *Winson Oil* held that recklessness in the sense of indifference as to the truth of the representation would amount to fraud and attract the Fraud Exception because, in such a case, the beneficiary by definition does not honestly believe that the representation it makes is true.³²

15 On the facts of the case, the court agreed with the banks that the Fraud Exception had been made out and the letters of credit could not be encashed.³³

IV. Comment

A. *Should recklessness amount to fraud in letter of credit cases?*

16 The authors' view is that the court was right to conclude that recklessness as to the truth of a statement is fraud in cases concerning letters of credit.

17 As a matter of principle, the decision in *Winson Oil* is sensible. A party that is making a statement to a bank for the purpose of encashing a letter of credit must be understood to be putting that statement forward as accurate and something the bank can rely on. If that party is reckless as to the veracity of the statement in the sense that it does not care whether the statement is true, that party by definition does not hold the belief that the statement is accurate. As Lord Bramwell put it more vividly in *Derry v Peek*: "A man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue."³⁴

18 This is also consistent with Singapore jurisprudence on the application of the Fraud Exception in demand bond cases. Ensuring uniformity in the content of the Fraud Exception in respect of both letters of credit and demand bonds is logical and creates certainty, simplicity and predictability in an area of law where the need for certainty is paramount.³⁵ While courts in Singapore have treated these two instruments differently in some respects for commercial reasons (such

31 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [19] and [20(b)].

32 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [20(b)] and [21].

33 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [164].

34 *Derry v Peek* (1889) 14 App Cas 337 at 350.

35 *Montrod Ltd v Grundkötter Fleischertriebs GmbH* [2001] EWCA Civ 1954 at [58].

as in recognising an unconscionability exception for demand bonds),³⁶ there is no logical basis for defining fraud differently.

19 In Singapore, recklessness is part of the test of fraud in a case for deceit.³⁷ It is therefore logical for the court to apply the same test of fraud for letters of credit. After all, fraudulent representations made in presentations for payment under letters of credit or demand bonds give rise to an action for deceit by the bank.³⁸

20 Further, if the Fraud Exception for letters of credit were to *exclude* recklessness in the sense of being indifferent to the truth of a representation, beneficiaries might be incentivised not to apply their minds to the truth of the representations they make and plead innocent ignorance. This would place a premium on recklessness.

21 The decision in *Winson Oil* also aligns the position in Singapore with that of other common law jurisdictions.³⁹ This helps bring certainty to users of letters of credit in international commerce.

22 Arguably the most challenging aspect of the court's decision in *Winson Oil* is whether it can be reconciled with the decision in *CACIB*. As a matter of fact, the cases are different in that in *Winson Oil*, the beneficiary was held not to have honestly believed in the veracity of the representations it had made (and so fraud was found), whereas in *CACIB* the opposite was found to be the case (and so fraud was not found). It is suggested that the two cases are consistent because in both cases, the question of whether the Fraud Exception applied turned on the critical issue of whether the beneficiary honestly believed in the veracity of the representations it had made.

23 In the authors' respectful view, the court in *CACIB* was correct to hold that a representation "made without investigation by the beneficiary

36 *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [18].

37 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [48] and [53].

38 Steven Gee KC, *Gee on Commercial Injunctions* (Sweet & Maxwell, 7th Ed, 2021) at pp 627 and 634.

39 For example, England: *Petrosaudi Oil Services (Venezuela) Ltd v Novo Banco SA* [2016] EWHC 2456 (Comm) at [66]–[89] and *Petrosaudi Oil Services (Venezuela) Ltd v Novo Banco SA* [2017] EWCA Civ 9 at [88] (note: although the decision was reversed on the facts, the Court of Appeal considered the Fraud Exception as including reckless indifference to the truth of the representations made); Hong Kong: *Rllifung Co Ltd v Bank of China* [1995] HKEC 1052 at [24]; Australia: *Ideas Plus Investments Ltd v National Australia Bank Ltd* [2006] WASCA 215 at [93]; Canada: *Ontario Inc v Onofri* 50 ACWS (3d) 691 at [4], [15] and [18].

of the circumstances underlying [it]” can be held honestly⁴⁰ and, therefore, can validly form the basis of a call on a letter of credit. However, the court’s characterisation in *CACIB* of such an honestly-held representation as one that was made “recklessly” is arguably unhelpful, given the implications of the term “recklessness” in the context of fraud generally. The failure to check the veracity of an honestly-held representation may be best characterised as negligent rather than reckless.

B. Practical application: how to prove reckless fraud?

24 The decision in *Winson Oil* will also be of interest to practitioners across the Commonwealth for being a rare example of the Fraud Exception being invoked successfully. While cases of this nature inevitably turn on their precise facts, two matters from *Winson Oil* are of practical significance.

25 First, the court’s reliance on Winson’s failure to take action after being made aware of a potential misrepresentation, as indicative of fraud.⁴¹ This is not the only recent instance of the Fraud Exception being successfully invoked after a party had been forewarned or put “on notice” of a potential misrepresentation.⁴²

26 The second matter of significance is that the court’s conclusion that Winson had acted fraudulently was informed by the fact that it would have been unreasonable for Winson to have belief in the truth of the representations.⁴³ This is a useful reminder of the principle that the unreasonableness of the grounds of the supposed belief in a representation may be evidence from which fraud may be inferred.⁴⁴ In other words, where a representation is unbelievable, courts may rely on this as evidence to infer that the party did not believe in it. That principle has been invoked with success in other cases involving the Fraud Exception in relation to a letter of credit.⁴⁵ Although it is difficult to conceive of situations where evidence of the unreasonableness of a belief is (or can be) the *sole* basis

40 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [21].

41 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [127(b)] and [128]–[138].

42 For example, *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [90].

43 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [164].

44 *Derry v Peek* (1889) 14 App Cas at 337 at 375–376.

45 For example, *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [98(f)]; *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [53]–[58] and [61]–[62].

for a finding of dishonesty, *Winson Oil* confirms that such evidence is an important part of the overall case put forward to prove fraud.

V. Conclusion

27 In the authors' respectful view, the court in *Winson Oil* was correct to recognise recklessness as being part of the Fraud Exception in cases concerning letters of credit.

28 Since the decision in *Winson Oil*, the Singapore Court of Appeal has addressed the Fraud Exception in two other cases: *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd*⁴⁶ and *UniCredit Bank AG v Glencore Singapore Pte Ltd*.⁴⁷ In neither case did the Court of Appeal specifically address the issue of whether recklessness would amount to fraud for the purpose of the Fraud Exception. It is hoped that appellate authority addresses this issue definitively.

46 [2023] SGCA(I) 7.

47 [2023] 2 SLR 587.