HCCL000022/1989

HEADNOTE

Commercial Law - Letter of Credit - whether discrepancies - whether bank can rely upon discrepancies not originally notified - U.C.P. Article 16 - whether bank gave notice without delay and by telecommunication - meaning of "bill".

1989, No. CL22

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

COMMERCIAL LIST

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BETWEEN

HING YIP HING FAT CO. LTD. Plaintiff

AND

THE DAIWA BANK LTD. Defendant

_____

Coram: Kaplan, J.

Dates of Hearing: 15 - 17 January 1991

Date of Handing Down Judgment: 11 February 1991

JUDGMENT

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1. This case raises some interesting and important issues on Letters of Credit and although important to the parties, this judgment may well have a wider effect. In essence, the issues are whether there was strict compliance with the terms of a letter of credit, and whether rejection was given expeditiously and whether a bank can subsequently rely upon discrepancies which were not specified in the original advice of discrepancies. This latter point raises an important point of construction under Article 16 of the Uniform Customs and Practice for Documentary Credits - 1983 Revision ("U.C.P.").

2. The facts fall within a small compass and are commonplace in Hong Kong.

3. On 23rd August 1988, the Defendants (Daiwa) issued in Hong Kong an Irrevocable Documentary Credit No. LC853-00032 in favour of the Plaintiffs in the sum of US$376,000.

4. The letter of credit was required because the Plaintiffs had sold to Cheergoal Industries Limited of Hong Kong (Cheergoal) 400 metric tons of ferro silicon for the sum of US$376,000. Thus Cheergoal were the applicants for the credit and the Plaintiffs, the beneficiaries of it.

5. The letter of credit issued by Daiwa, the subject matter of this claim recorded that shipment was from Zhanjiang in China for transportation to a Japanese main port. The letter of credit required the following documents to be presented:

"Signed commercial invoice in 4 copies;

Packing List in 4 copies;

Certificate of Quality/Quantity issued by CCIB in 4 copies."

These documents had to evidence shipment of :

"400 M/T OF FERRO SILICON

SPEC. SI 75% MIN MIN. AL 2% MAX

SIZE : 10-100M 90% MIN.

PRICE : AT US$940 PER M/T FOB ZHANJIANG, CHINA

PACKING: IN 50KG BAG, IMT PP WOVEN BAG OR GUNNY BAG"

6. The second page of the letter of credit required 3 other documents but the only one I need mention is a :

"Full set of clean on board ocean Bills of Lading made out to order and blank endorsed and marked "freight prepaid" and notify Kanematsu-Gosho Limited ...Japan ..."

7. Certain special instructions were also set out and the only two I need mention are :

" 1. All docs except invoice, draft and beneficiaries copy of telex must not show number of this credit, invoice value and any reference to this credit.

2. 5% more or less, both on credit amount and quality of goods are acceptable."

8. So it can be seen that the Plaintiffs sold this material to Cheergoal who then on sold it to Kanematsu-Gosho with the two letters of credit being "back to back".

9. On 25th August 1988, the letter of credit was amended by recording that the shipment date had been extended to 6th September 1988 and the expiry date of the credit had to be extended to 15th September 1988.

10. The Nanyang Commercial Bank (NCB) presented the documents relating to this credit to Daiwa on 9th September 1988. Daiwa's receipt stamp snows receipt at 11.38 a.m. on 9th September 1988. That was a Friday. The evidence establishes that on 10th September this credit was entered into a Bills Register. When the documents had been registered and the file copy retrieved, the whole set of documents were handed to Edmund Wong, the Supervisor of he Inward Bills Department (IBD). He then distributed the documents to a checker for checking. Mrs. Wong of the IBD told me that 20 letters of credit were registered on 10th September 1988. September is a busy month and Mr. Cheung, the Deputy Manager of IBD, told me that the system was that the documents would be processed in the order in which they arrived.

11. On Monday September 12th 1988, Miss Ng, a checker, carried out the first check. She noted an alleged discrepancy relating to the Certificate of Quality. She then passed the documents to Miss Lai, another Checker, who carried out a second check on Tuesday 13th September. She did not find any further discrepancies.

12. Some time during the afternoon of 13th September, Miss Lai passed the documents to Mr. Cheung and he noted two additional alleged discrepancies. He then passed the documents to a Junior Bills Clerk for completion of the necessary documentation. Mr. Cheung telephoned the Manager of Cheergoal on 13th September and informed him of the discrepancies. The Manager said he would consider Cheergoal's position when he received a written advice.

13. During the morning of Wednesday 14th September, Mrs. Wong received a telephone call from a gentleman employed by NCB who enquired as to the position relating to this letter of credit. She then asked around the office for who was dealing with this case. Mr. Cheung said it was he and he went to check the register. He then told Mrs. Wong that there were discrepancies and Mrs. Wong passed on the information to the gentleman to whom she was speaking. She did not tell him what the discrepancies were but on the other hand, she says he did hot ask. Had he asked, she says, and I accept, and she would have told him. She also confirmed that phone calls of this nature from presenting banks were very common.

14. During the afternoon of the 14th September, Mrs. Wong signed the advice of discrepancies and took it together with a pile of other documents relating to different cases to the mailing department. She did not know how it was sent because Daiwa sometimes used mail and sometimes used a courier service.

15. Quite naturally neither Mr. Cheung nor Mrs. Wong, the only witnesses of fact called, can be too precise on timing. It seems to me that I can reasonably draw the inference that the advice of discrepancies was received by NCH during the morning of Thursday, 15th September.

16. The relevant chronology is thus as follows :

Documents presented	11.38 am Fri 9 Sept. 1988
Documents registered	am Sat 10 Sept. 1988
Checked by Miss Lai	Mon 12 Sept. 1988
Checked by Miss Ng	Tue 13 Sept. 1988
Checked and rejected by Mr. Cheung	pm Tue 13 Septa. 1988
Phone request for information by NCB	am Wed 14 Sept.1988
Advice of discrepancies signed and given to mailing department	pm Wed 14 Sept. 1988
Receipt of advice of discrepancies by NCB	am Thu 15 Sept. 1988

The Advice of Discrepancies

17. This was on a Daiwa printed form. The discrepancies were listed as follows :

" 1. Inspection of Cert. of Quality/Quantity presented instead of Cert. of Quality/Quantity.

2. B/L showing "on board" without dated.

3. Insp. Cert. of Quality/Quantity showing

Si. 75.42% and Al 1.30% differs from invoice."(Sic)

18. It is common ground that only the first discrepancy is relevant although Daiwa do seek to rely upon a further ground which was not set out in the advice of discrepancies and it is this point that gives rise to an argument on the construction of Article 16 of U.C.P. I also have to decide whether under the umbrella of the first discrepancy Daiwa are able to advance two further points, namely that the certificate did not sufficiently relate to the goods the subject matter of the letter of credit and that there was insufficient evidence showing that the goods certified were the ones shipped (these two points are called the linkage argument).

Cheergoal Industries/Industrial

19. The letter of credit was applied for by Cheergoal Industries Limited of Room 1609, Shun Tax Centre, Hong Kong whose name and address appears in the box headed "applicant" in the letter of credit

20. NCB presented the letter of credit on a document which showed the drawee as "Cheergoal Industrial Limited" The advice of discrepancies dated September 14th also showed the applicant as Cheergoal Industrial Limited with the same address namely 1609, Shun Tak Centre, Hong Kong.

21. I have to decide whether this was a discrepancy or whether it was a slip in a nature of a typographical error and if satisfied that it was a discrepancy whether Daiwa can rely upon it in this action it not having been adverted to in the advice of discrepancies.

The "Bill" Point

22. The advice of discrepancies ended with the following :

"With reference to the above mentioned bill, we hereby advise you that we are unable to take up the documents due to the above discrepancies and are contacting our customer to obtain their acceptance.

We shall revert to this matter in due course. Meanwhile, the relative bill is being held by us at your risk and disposal."

23. This argument revolves around whether this form of words is sufficient compliance with Article 16 of U.C.P. to which I shall shortly refer.

Subsequent events

24. On 9th March 1989, solicitors for the Plaintiff telexed Daiwa and asked them to confirm that the discrepancies were those listed in the advice dated 14th September. Daiwa replied on March 15th confirming that discrepancies were in fact the ones listed in that advice.

25. The writ was issued on 14th March 1989. The pleadings took an unusual course running as they did into a rejoinder.

26. The claim is for US$376,000 together with interest.

The issues

1. Were the documents discrepant?

2. If yes, was this notified in accordance with Article 16 U.C.P.?

3. Can Daiwa rely on a ground not notified in 14th September 1988 advice of discrepancies or are they precluded from so doing by Article 16(e)?

4. Do the arguments relating to linkage come within the advice of discrepancies dated 14th September 1989?

5. Does the reference to "bill" in the advice of discrepancies in fact refer to the documents presented in this case?

Witnesses

27. Apart from Mr. Cheung and Mrs. Wong who were called by Daiwa as witnesses of fact, Daiwa also called two experts, the first being Mr. Cannon of the Hongkong Bank and the second Mr. Tsang of the Bank of East Asia.

The U.C.P.

28. The letter of credit stated that :

"The above-mentioned documentary credit is subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision ICC Paris France Publication No. 400)."

History of U.C.P.

29. I need to delve a little into the history of the U.C.P. because Mr. Bunting for Daiwa has submitted that if I accepted Mr. Faulkner's argument on the construction of Article 16, I would be revolutionizing Anglo-American Jurisprudence on the issue whether a party who terminates a contract on one ground can subsequently defend the termination on another ground not notified at the time of termination.

30. In the 1920's a number of banks in different countries commenced a search for uniformity in relation to letters of credit. The first international effort came in 1929 at a Congress of the ICC in Amsterdam. Only Belgium and France adopted the finished product. The next ICC Congress was in Vienna in 1933. A version of the U.C.P. was adopted by bankers in a number of European countries and individually by some American banks. It is significant that "the United Kingdom and most Commonwealth countries kept aloof. It is clear that the code failed to lead to , uniformity. It was, however, well-known and understood in Europe" (see Professor Ellinger's Article in 1984 Lloyds Maritime and Commercial Law Quarterly to which I am indebted for this historical background).

31. Nothing further happened until after the War when a thorough Revision took place following an ICC Congress in Lisbon. This version was widely accepted but again not by the United Kingdom banks.

32. The next Revision was in 1962 when it was desired to attain world wide recognition and this naturally made it essential to make the U.C.P. more palatable to United Kingdom banks. The 1962 Revision achieved this end.

33. Changes in the number of banks and the increase in technology led to a new Review in 1974 which received world-wide acclaim. This Revision took out various permissive

phrases in the earlier Review thus limiting the discretion of banks. This Review contained three important innovations and was thus not merely an update of an earlier version.

34. Towards the end of 1979, ICC's Commission on Banking Techniques and Practice appointed a working party to prepare a new Revision. The 1983 Revision was promulgated on 1st October 1984 by the ICC in consultation with United Nations Commission on International Trade Law (UNCITRAL).

35. This potted history shows that although the view of the United Kingdom banks had to be accommodated over the years in the search for world-wide uniformity it would not be correct to refer to the U.C.P. as representing solely Anglo-American Jurisprudence. The influence of the Civil Law countries cannot be denied.

36. The Article which is relevant to this case is Article 16 and I propose to set it out in full and then set out in full its 1974 equivalent, Article 8.

37. Article 16 (1983)

" (a) If a bank so authorized effects payment, or incurs a deferred payment undertaking, or accepts, or negotiates against documents which appear on their face to be in accordance with the terms and conditions of a credit, the party giving such authority shall be bound to reimburse the bank which has effected payment, or incurred a deferred payment undertaking, or has accepted, or negotiated, and to take up the documents.

(b) If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, it must determine, on the basis of the documents alone, whether to take up such documents, or to refuse them and claim that they appear on their face not to be in accordance with the terms and conditions of the credit.

(c) The issuing bank shall have a reasonable time in which to examine the documents and to determine as above whether to take up or to refuse the documents.

(d) If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible by other expeditious means, to the bank from which it received the documents (the remitting bank), or to the beneficiary, if it received the documents directly from him. Such notice must state the discrepancies in respect of which the issuing bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presentor (remitting bank or the beneficiary, as the case may be). The issuing bank shall then be entitled to claim from the remitting bank refund of any reimbursement which may have been made to that bank.

(e) If the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.

(f) If the remitting bank draws the attention of the issuing bank to any discrepancies in the documents or advises the issuing bank that it has paid, incurred a deferred payment undertaking, accepted or negotiated under reserve or against an indemnity in respect of such discrepancies, the issuing bank shall not be thereby relieved from any of its obligations under any provision of this article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained."

38. Article 8 (1974)

" (a) In documentary credit operations all parties concerned deal in documents and not in goods.

(b) Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorized to do so, binds the party giving the authorization to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

(c) If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(d) The issuing bank shall have a reasonable tine to examine the documents and to determine as above whether to make such a Claim.

(e) If such claim is to be made notice to that effect, stating the reasons therefor, must, without delay, be given by cable or other expeditious means to the bank from which the documents have been received (the remitting bank) and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto.

(f) If issuing bank fails to hold the documents at the disposal of the remitting bank, or fails to return the documents to such bank, the issuing bank shall be precludes from claiming that the relative payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(g) If the remitting bank draws the attention of the issuing bank to any irregularities in the documents or advises such bank that it has paid, accepted or negotiated under reserve or against a guarantee in respect of such irregularities, the issuing bank shall

not thereby be relieved from any of its obligations under this article. Such guarantee or reserve concerns only the relations between the remitting bank and the beneficiary."

Issue 1. Were the documents discrepant?

(a) Cheergoal Industries/Industrial

39. The use of the word "Industrial" was clearly an error as it should have been "Industries". Mr. Cheung of Daiwa was not misled because he told me that when he decided to reject these documents he looked for Cheergoal Industries Limited's card and phoned the manager. Daiwa, in fact, made the same error when they referred to "Industrial" in the advice of discrepancies.

40. Mr. Bunting relied upon the strict compliance approach which stems from a passage in the speech of Lord Sumner in Equitable Trust Co. New York v. Dawson partners [1927] 27 Ll. L Rep. 49 at p. 52 where he said

"It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk. The documents tendered were not exactly the documents which the defendants had promised to take up, and prima facie they were right in refusing to take them."

41. Mr. Bunting also referred me to passages in Commercial Banking Co. of Sydney v. Jalsard [1973] A.C. 279; Gian Singh v. Banque De L'Indochine [1974] 1 W.L.R 1234 and Banque De L'Indochine v. J.H. Rayner [1983] 1 QB 711.

42. The authors of Gutteridge's The Law of Bankers Commercial Credits, 7th edition 1984 at page 120 were of the opinion that strict compliance :

"does not extend to the dotting of i's and crossing of t's or to obvious typographical errors either in the credit or the documents. Because of the wide variations in language to be found in both, it is impossible to be dogmatic or even to generalize. Each case is to be considered on its merits, and the bank's obligation may obviously be most difficult to fulfill."

43. I have been influenced by the following points. Firstly the error is minor and it is the sort of mistake that can easily occur in a society where English is not the first language of 98% on the population. Secondly Daiwa knew exactly whom to contact and Mr. Cheung took out the Cheergoal Industries Limited's card which shows the same address and he phoned the number on that card. He spoke to the manager who said he would wait till he received a written advice. Thirdly Daiwa repeated this error in their advice of discrepancies. I accept the passage above-quoted from Gutteridge which makes good sense and does no unnecessary violence to Lord Sumner's strictures on compliance.

44. I am satisfied that the use of the word "Industrial" was an obvious typographical error from the wore "Industries" and I therefore conclude that this is not a discrepancy upon which Daiwa can rely. Because of this conclusion, I do not feel it necessary to comment other than by stating Mr. Faulkner's alternative point, namely that if this was a discrepancy then it was also wade by Daiwa in the advice of discrepancies and on that basis, he submitted, Daiwa could not show that notice had been given to the beneficiary which was Cheergoal Industries Limited. I believe that my conclusion on the "Industrial" argument accords with justice and common sense and thus avoids having to consider such an argument which is as unrealistic as the argument which it seeks to meet.

Are Daiwa precluded from relying on the "Industrial" point

45. If I be held wrong on the conclusion at which I have arrived in relation to the "Industrial" point, I must go on to consider whether Daiwa can rely upon this ground given that it was not stated in their advice of discrepancies nor did Daiwa seek to rely upon it when specifically asked to state their position in March 1989.

46. Mr. Faulkner submitted that Article 16 makes it plain that Daiwa cannot rely on this point. Article 16(d) provides that the bank must give notice that it is rejecting the documents without delay and "must state the discrepancies in respect of which the issuing bank refuses the documents". Article 16(e) then goes on to provide that "if the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this Article ... the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit."

47. Mr. Bunting submitted that there is no suggestion in any of the books that the 1983 Revision intended by Article 16(e) to change the law in what he described as a radical manner. He referred me to Article 8 of the 1974. Revision which has no provision similar to Article 16(e) of the 1983 Revision. Article 8(f) simply provides that if the issuing bank fails to hold the documents at the disposal of the remitting bank or fails to return the documents to them then the issuing bank "shall be precluded from claiming that the relative payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit".

48. The researches of Counsel have not disclosed any authority in any jurisdiction on the effect of Article 16(e). Mr. Bunting relies heavily on cases decided under the 1974 Revision and on the absence of any comments in the textbooks indicating that Article 16(e) effected a radical change. In some of the comments on Article 16 of the 1983 Revision, cases decided on the 1974 Revision are cited.

49. It is necessary to start with a decision of Parker J. in The Lena [1981] 1 Lloyds Rap. 68. That case concerned the 1974 Revision. The judge was faced with an argument based on estoppel. It was put alternatively on the basis of a true estoppel by representation of fact and of promissory estoppel. It was agreed by Counsel that in English Law the statement of a particular reason or reasons for rejecting documents is not alone enough to found a representation, waiver or promissory estoppel. What was, however, alleged in that case was that there were special circumstances giving rise to such an estoppel. The fact that special circumstances could in certain circumstances give rise to such an estoppel was not challenged in principle.

50. At page 79, the learned Judge said this :

> "The question to be determined is, therefore, whether the

circumstances are such as to create a factual or promissory representation with regard to any or all of the objections now raised and if so whether the plaintiffs acted upon such representation so as to preclude the defendants from now raising such matters.

With the exception of the final letter from the Janata Bank sent in response to a specific request to give reasons, I can find nothing which could be regarded as amounting to a representation. Having found what, at the particular times, they considered to be good and sufficient reasons for rejection, the Janata Bank specified them. To hold that they thereby made any representation would in my view involve a radical departure from the accepted legal position and would seriously undermine the whole system of documentary credits, for banks would be obliged, for their own protection and the protection of their customers, always to scrutinize with the utmost care every document presented from beginning to end, notwithstanding that they may find in the first few lines of the first document at which they looked one or more good and sufficient reasons for refusal to pay. It is true that there were here successive presentations and that on Dec. 16 the bank were asked to state whether, but for the injunction, they would pay, but I do not consider that this is sufficient. Suppose (1) there are five documents and the bank reject for three specified defects in document No. 1; (2) that the beneficiary rectifies the three defects and presents again. It is clear that the bank is not by this alone estopped from raising other defects. If on this presentation it finds further defects either in the initial document or the next document it can reject again, and again it will not be estopped. It is for the beneficiary to see that the documents are all in order and he has no cause for complaint if the bank rejects as soon as they find one or more defects or if they reject again on finding further defects, and so on."

51. This passage upon which Mr. Bunting relies is not an authority on the interpretation of Article 16 of the 1983 Revision. However, Mr. Bunting points out that this decision is cited by various authors as being authority for the same proposition under the 1974 Revision as it is under Article 16 of the 1983 Revision.

52. Cresswell and Others' Encyclopaedia of Banking at para. 306 at F 146 assumes, without reasons or discussion, that The Lena is an applicable authority to Article 16 of the 1983 Revision. Mr. Bunting submits that this shows that these authors did not consider that any radical change had been made by Article 16 of the 1983 Revision.

53. At page 645 in the 10th edition of Paget's Law of Banking under the heading "No duty to identify all discrepancies" one finds the following passage:

"The notice need only identify the discrepancies in respect of which the documents are rejected on that particular occasion. There is no wider duty to identify each and every discrepancy. Accordingly the statement of a particular reason or reasons for rejecting documents is not alone enough to found a representation, waiver or promissory estoppel in respect of other discrepancies, although special circumstances may give rise to an estoppel. The position was succinctly states by Parker J. in Kydon Compania Naviera v. National Westminster Bank Ltd: [The Lena]

'It cannot, as a matter of general principle, be right that a bank can never be estopped any more than it can that a bank by stating one reason impliedly represents that the documents are otherwise in order or impliedly promises that if the stated defect is rectified it will pay.' "

There then follows two sub-paragraphs which state:

> "3 REJECTION ON INVALID GROUNDS WHERE VALID GROUNDS EXIST
>
> At common law a bank which rejects documents on invalid grounds would appear to be entitled if its rejection is challenged to rely upon all valid grounds which it might have taken, this being analogous to the assertion of a valid ground for terminating a contract after termination on an invalid ground. The UCP contains no express provision on this point and accordingly the common law rule prima facie applies even where the UCP have been incorporated. There is, however, a difficulty in reconciling this position with the requirement that the issuing bank is required to specify in a rejection notice the discrepancies in respect of which the documents are refused. If discrepancies are required to be stated, it is difficult to see how such a requirement is satisfied in any commercially sensible way if none of the stated discrepancies in fact

exist; in practice, the beneficiary is then no better off than if no discrepancies had been stated at all, and in the latter event Art 16(e) provides an estoppel. Notwithstanding this difficulty, it is submitted that the mere statement of invalid grounds of rejection does not give rise to an estoppel preventing the raising of valid grounds. To hold otherwise would be an unwarranted departure from the basic rule that the beneficiary is entitled to be paid only if he presents conforming documents.

4 ESTOPPEL IN CASES OF DEFECTIVE REJECTION

The specific requirements in Art 16(d) as to the form of rejection of documents are given sanction by Art 16(e) :

'If the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.'

This provision reflects the fundamental principle that the parties to a credit transaction are not entitled both to retain the documents and to refuse payment. The consequence of Art 16(e) is that defective rejection amounts to deemed acceptance, which has the same legal effect as waiver. It has been said, rightly it is submitted, that the position is then just the same as if there had been no discrepancies in the first place."

54. I do not find these two paragraphs very helpful. Having stated that an estoppel arises, the author then goes on to deny the estoppel on the grounds of this would be a departure from the basic rule that the beneficiary is only entitled to be paid if he presents conforming documents.

55. Gutteridge's Law of Bankers Commercial credits 7th edition 1984 is of little assistance because although coming out in 1984 and containing the 1983 Revision as an appendix, its text is solely a commentary on the 1974 Revision. Yet again The Lena is referred to in support of the general proposition that "it cannot be that, in refusing the documents for a reason given, the issuing bank warrants or represents that the documents are otherwise in order;".

56. Professor Schmitthoff considered the question of discrepancies in an article in The Journal of Business Law 1987. At page 104 where he said this

> "Supplementary reasons for rejection of documents
>
> In principle, a bank is not prevented from supplementing the grounds on which it has rejected the documents by adding later other - valid - grounds. It happens, for example, sometimes that the issuing bank informs the advising bank or the beneficiary that, before deciding to accept the documents, it wants to obtain the instructions of the applicant for the credit and passes on his objections, which may be wholly irrelevant, and that it later raises other objections on the grounds of discrepancy. It was held in Skandinaviska Aktiebolaget v. Barclays Bank Limited that such a supplementation of the reasons for rejection is perfectly valid. This is in harmony with a general principle of contract law which is sometimes invoked in the sale of goods if a new ground for the rejection of defective goods is added to, or substituted for, those originally claimed. This general principle is stated in Benjamin's Sale of Goods as follows :

'It is a general principle of the law of contract that a person who refuses to perform a contract and gives a ground which does not justify the refusal, or no ground at all, may nevertheless subsequently rely on another ground, which does justify the refusal to perform, provided that that other ground in fact existed at the time of the refusal.'

On the other hand, it is not permissible for the issuing bank (or the applicant for the credit) to supplement the stipulations in the mandate by further conditions after the advising bank has confirmed the credit to the beneficiary. The confirming bank is in a contractual relationship with him and this relationship, like every other contract, cannot be altered unilaterally. The writer had once to deal with a case in which the issuing bank,

probably not of its own volition but as the result of outward pressure, attempted to introduce supplementary conditions into the mandate and this attempt was rightly resisted by the confirming bank. Similarly an irrevocable and unconfirmed credit cannot be unilaterally altered by the issuing bank after it is accepted by the beneficiary."

57. Unfortunately, Professor Schmitthoff does not subject Article 16(d) and (e) to the detailed analysis the benefit of which I have had in this case.

58. In an interesting and detailed article in Lloyds Maritime and Commercial Quarterly 1984 page 578, Professor Ellinger considered "The Uniform Customs - their nature and the 1983 Revision". At page 586 he points out that the "1983 Revision makes far-reaching changes in quite a number of areas". At pages 594/5 he considered Article 16 and said this :

> "Article 16(e) clarifies a number of points which were left open in Art. 8(e) of the 1974 Revision. If the issuing bank decides to reject the documents it has to inform the party from whom it received them, without delay, by telecommunication or other expeditious means. The new Article here uses the word "telecommunication", and not "teletransmission", in order to cover telephone conversations. An innovation of the new provision is that it specifically mentions the beneficiary as one of the parties to whom the notification may have to be given. The earlier version referred only to a "remitting bank".
>
> Another requirement is that the notice state the "discrepancies in respect of which the issuing bank refuses the documents". The previous version called only for a statement of the "reasons" for the rejection. Thus, under Art. 8(e) of 1974, the issuing bank was entitled to state generally that it rejected the documents due to discrepancies. Article 16(d) requires the bank to be more specific. like its predecessor, the new provision requires the issuing bank to advise the party from whom it receives the rejected documents whether it is holding them on his behalf or is returning them.
>
> The new Article adds that the issuing bank's right to a refund of any amount which may have been paid to the remitting bank is subject to the issuing bank's compliance with the procedure outlined. The need

for such a refund arises where the confirming, advising or negotiating bank has obtained payment from the bank charged by the issuer with reimbursement.

Article 16(e) (based on Art. 8(f) of 1974) settles a related point. If the issuing bank fails to observe its duties under the two preceding paragraphs, it is precluded from asserting the non-conformity of the documents. It is arguable that this provision suggests. that any objection to the documents, which is not raised when their rejection is advised, cannot be pleaded at a later stage. English law has taken a view to the contrary, allowing a bank to raise any objection to the documents in the pleadings 85. It remains to be seen whether the courts will give effect to the new provision or will regard the matter as one of procedure, which may be unaffected by the Code." [my underlining.]

Footnote 85 refers, inter alia, to The Lena.

59. At the end of the day, I have to construe the words used in Article 16 (d) and (e) and give to those words their ordinary and natural meaning. I am not assisted by any case law because none has been cited on the construction of Article 16 although Professor Ellinger at least adverts to the argument which has been addressed to me.

60. At all times, I have to bear in mind that I am construing a set of rules which were designed to cover a very important commercial activity and that I am also construing commercial documents which have to be considered in the light of those rules. In those circumstances, it is appropriate to bear in mind the observations of Maule J. in Cockburn v. Alexander [1848] 6 C.B. 791 at 814, where he said :

"It is to be borne in mind that we are here dealing with a mercantile instrument, in the interpretation of which we must look at the substance of the matter, and are not restrained to such nicety of construction as is the case with regard to conveyances, pleadings and the like."

61. For a Modern statement to the same effect, one can do no better than to consider what Lord Diplock said in The Antaios [1985] 1 A.C. 191 at 201 :

"While deprecating the extension of the use of the expression "purposive construction" from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrator's award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

62. I cannot construe Article 16(d) and (e) in the way Mr. Bunting suggests. I am not put off by his argument in terrorem. Under Article 16 the issuing bank has to "state the discrepancies in respect of which the issuing bank refuses the documents". Daiwa did that on 14th September 1988. They were asked in March 1989 to confirm the position which they did. It is only in their defence that they seek to rely upon the "Industrial" point. Thus they did not act in accordance with Article 16 (d) and I do not see how they can now contend that they are not precluded from claiming that the documents are not in accordance with the terms and conditions of the credit. In my judgment to find otherwise would be to ignore the clear meaning of Article 16(e) when read with Article 16(d). Whether or not these changes from the 1974 Revision were intended, I know not.

63. To say as Mr. Bunting does that the bank only has to specify the grounds relied on at the time of rejection is to introduce an element of unreality and uncertainty. On this basis, a bank could reject on 3 completely spurious grounds. It is then sued and possibly months after rejection it puts in a defence admitting that these 3 grounds were spurious and relying upon a 4th arguable ground. How, in these circumstances, can it be said that the bank has acted without delay in stating the discrepancies in respect of which it genuinely refuses the documents? The whole purpose behind Article 16 seemed to me to be that the beneficiary should know precisely what his position is at the earliest opportunity. The consequences to a beneficiary of non-payment under a letter of credit can be grave indeed. Surely he should be told what it is that he needs to get accepted. On the facts of this case the "Industrial" point was readily apparent on the face of the credit and there was no question of Daiwa having to delve into the documents presented to discover this alleged discrepancy. I should have added that when NCB presented this letter of credit to Daiwa under special instructions there appeared the following "discrepancies, if any, please refer to the credit opener for acceptance. Please phone to us when the payment effected." The credit opener was Cheergoal and when discrepancies were allegedly discovered that is precisely what Daiwa did they phoned the Cheergoal Industries Limited number and spoke to the manager who as I have said already reserved his position until he received a written notice. At all times Daiwa knew that Cheergoal

Industrial was an error for "Industries" and they acted all the way through as if it read "Industries".

64. If I dad held the "Industrial" point to be a good one I would have gone on to hold that Daiwa are precluded from relying upon it by reason of the terms of Article 16(e) when read in conjunction with Article 16(d).

Inspection Certificate of Quality/Quantity

65. It was agreed by Mr. Bunting that the document tendered was a CCIB document.

66. The main point here is that what was required was a Certificate of Quality/Quantity but what was tendered was an Inspection Certificate of Quality/Quantity. Mr. Bunting submits that the document tendered only records an inspection and the result thereof. This, he says, is only a certificate of the inspection. He invites me to have regard, to the commercial purpose of the document and asks rhetorically whether CCIB could be sued for negligent certification on the basis of the document tendered. He submitted that Daiwa should not have to scratch its head to see whether this document will do just as well and he again reminded me of Lord Sumner's strict compliance test referred to above.

67. Mr. Bunting maintains that the certificate tendered does not certify quality or quantity but only certifies that the goods were inspected and were up to contractual specification. He said that there is no indication how many of the 400 bags were inspected but he agreed that his point would not run if the certificate said "all 400 bags inspected".

68. Mr. Bunting relied on Commercial Banking Company of Sydney v. Jalsard [1973) A.C. 279 where one of the documents required for a letter of credit in relation to a quantity of battery operated Christmas lights was a "Certificate of Inspection". Such a document was tendered and the money paid. When the goods arrived at their destination they were found to be defective, not on visual inspection but only by physical inspection. The buyer sued the bank alleging that the documents tendered did not comply and that it was submitted that "Certificate of Inspection" meant a document certifying the condition and quality of the goods inspected i.e. that the goods were of acceptable standard and conformed to the requirements of the contract under which they were sold. The Privy

Council allowed the bank's appeal on the ground "that on the ordinary meaning of the words Certificate of Inspection' the minimum requirement implicit was that the goods had been inspected and if it were intended that a particular matter of inspection should be adopted or particular information recorded it would heed to be expressly stated : the document tendered, therefore, fell within the description of 'Certificate of Inspection and was sufficient to comply with the requirements of the credit."

69. Mr Faulkner sought to gain assistance from a passage at page 286 E/F where Lord Diplock said :

"Their Lordships are of opinion that the documents tendered by the two surveyors in the instant case clearly fall within the generic description "Certificate of Inspection". They recall that the goods themselves, as well as the packages, were inspected. This, in the Board's view would itself be sufficient to comply with the requirements of the credit. In addition, they contained an express statement as to the condition of the cases and an implied statement that the goods contained in the cases were in apparent good condition so far as could be seen in the course of supervising the packing of them."

70. Mr. Faulkner submitted that the Inspection Certificate in this case certifies on its face the quality and quantity of the goods. He says that it does not purport to be an Inspection Certificate only but is one which certifies quantity and quality. He points out that there has been an actual analysis of the goods and the exact result is given. It does not state on its face that only sample bags have been analyzed. Further, all the bags have been weighed.

71. The document itself is a printed form but "quality" and "quantity" have been typed in to meet the requirements of the particular case. Mr. Faulkner also points out that the credit itself does not state what has to be contained in the Certificate and he submits that this document which does certify the specification and quantity is in full compliance with the terms of the credit.

72. Finally Mr. Faulkner submits that Daiwa cannot take this point because the point was not referred to in the advice of discrepancies which sought only to rely on the use of the word "inspection", as opposed to the word "certificate". I reject this submission because I do not think it necessary for the advice of discrepancies to be treated like a pleading. It is

sufficient for Daiwa to refer to the document which they say does not comply and they need not adumbrate further.

73. As to Mr. Bunting's submission that the Inspection Certificate of Quality/Quantity is not in compliance with the terms of the credit. I reject such submission. It seems clear to me that CCIB have certifies what the credit requires, namely that the goods are ferro silicon with a specification of 75% silicon min. and aluminium 2% max. and that the goods are of a total of 400 metric tons packed in one metric ton bags. It is clear that a printed Inspection Certificate has been adapted to meet the facts of this case. I therefore find that this Certificate dated 29th August 1988 is in conformity with the terms of the credit.

Linkage

74. Mr. Bunting's next point is that the Certificate does not evidence shipment of the goods the subject matter of this contract and credit. He points out that the name of the consignee and the ship carrying these goods are absent and there is no reference to any marks on the bags which would tie in the goods certified with the goods the subject matter of the contract. He says that this is not a rare substance and there is nothing special in a quantity of 400 metric tons. How can anyone be sure, he says, on this document that reference is made to the same goods?

75. Mr. Bunting conceded that the invoice, packing list and bill of lading all related to the same goods.

76. In support of his linkage argument, Mr. Bunting relied upon the case of Bank Melli Iran v. Barclays [1951] 2 L1. R 367 where McNair J. was concerned with a letter of credit to support a contract for the sale of 100 new Chevrolet trucks. The invoice tended referred to "new condition" and the judge decided that this phrase was not synonymous with "new". The document submitted as complying with the requirement of a "U.S.A. Government undertaking confirming the trucks are new" certified in relation to "100 new, good Chevrolet ... trucks". The judge also held that this phrase was not synonymous with new. He went on to hold that the certificate did not purport to relate to any specific trucks. He said :

"The trucks as to which the certificate is given are not identifies as the trucks covered by the invoice or a fortiori by the delivery order, which did not come into existence until some five or six weeks after the date of the certificate."

77. McNair J. therefore concluded that the documents were not in accordance with the Bank's mandate.

78. Finally, Mr. Bunting relied on Banque De L Indochine v. J.H. Rayner [1983] 1 Q.B. 711. In that case the Bank raised a number of discrepancies in respect of the documents tendered. Parker J. found for the Bank and on appeal Sir John Donaldson M.R. dealt with the points on linkage commencing at page 729 where he said :

> "The linking of documents
>
> Parker J. held that on this point the bank was entitled to succeed his conclusions being set out ante p. 722B-D; [1982] 2 Lloyd's Rep. 476, 482 (col. 2).
>
> I approach this aspect of the appeal on the same basis as did the judge: namely that the banker is not concerned with why the buyer has called for particular documents (Commercial Banking Co. of Sydney ltd. v. Jalsard Pty. Ltd. [1973] A.C. 279), that there is no room for documents which are almost the same, or which will do just as well, as those specified (Equitable Trust Co. of New York v. Dawson Partners Ltd. (1926) 27 L1. L. Rep. 49). that whilst the bank is entitled to put a reasonable construction upon any ambiguity in its mandate, if the mandate is clear there must be strict compliance with that mandate (Jalsard s case [1973] A.C. 279), that documents have to be taken up or rejected promptly and without opportunity for prolonged inquiry (Hansson v. Hamel and Horley Ltd. [1922] 2 A.C. 36) and that a tender of documents which properly read and understood calls for further inquiry or are such as to invite litigation are a bad tender (M. Golodetz & Co. Inc. v. Czarnikow-Rionda Co. Inc. [1980] 1 W.L.R. 495).
>
> The starting point is therefore the mandate, read in the light of the

Uniform Customs and Practice for Documentary Credits (1974 rev.)."

79. He then set out the relevant terms of the credit. At page 731 he turned to the facts and arguments and said :

> "No complaint is or was made by the bank about the commercial invoice. The argument has turned upon the other documents. It seems that the sugar came from two different sources. As a result some of the documents related to quantities smaller than the total contract quantity. Thus whilst there was only one commercial invoice and one bill of lading, there were two certificates of weight, quality and packing, two certificates of origin and three E.U.R. 1 certificates. The crux of the argument was the extent to which these documents had on their face to be linked to each other and to the commercial invoice.
>
> Mr. Buckley, for the merchants submits that in the light of article 33 it is sufficient if the various certificates purport to be certificates of the type called for, describe the goods at least in general terms and cover the full quantity of goods mentioned in the invoice. In particular, in the light of article 7, it is not necessary that the documents should on their face be linked one to the other provided that they are not inconsistent with each other.
>
> Mr. Saville, for the bank, submits that there must be sufficient linkage to prove that the documents, if accurate all relate to the parcel of goods which are the subject of the commercial invoice. In support of this submission he referred us to In re an Arbitration between Reinhold & Co. and Hansloh (1896) 12 T.L.R. 422, where the certificate of quality did hot mention that the bags concerned were marked with an "F" and the bill of lacing referred to bags so marked. The Divisional Court held that this was a bad tender, since there was no evidence that the bags shipped were those which were the subject matter. of the certificate. He also relied upon the decision of McNair J. in Band Melli Iran v. Barclays Bank (Dominion Colonial & Overseas) [1951] 2 Lloyd's Reg. 367, that a certificate that a number of vehicles were in new condition was defective in that it failed to identify the vehicles. From these authorities the correctness of which has never been doubted, he sought to extract the principle that it is not sufficient to produce a certificate of quality or other supporting document called for by the credit, if that document is merely "not inconsistent" with the other documents and, in

particular, the commercial invoice. It must he submitted, be consistent and only consistent if it is to render the letter of credit operative. For my part, I would accept this submission in a case to which the U.C.P. does not apply. However, that is not this case.

Article 7 undoubtedly supports Mr. Buckley's submission and I do not consider that any of the documents producer were necessarily inconsistent with each other. This is not surprising if, as I suspect is the case, the documents in fact relate to the sugar concerned. His submission also gains support from the second sentence of article 32 (c) in that again I do not think that the description of the goods in any of the documents is inconsistent with the description in the credit. Article 33 adds little. It entitles and requires the bank to accept a document purporting to be a certificate of quality or whatever as being such a certificate. A11 the documents tendered purport to be documents of the kind called for by the credit.

So far so good from the point of view of the merchants. But there is another obstacle in their way. There is, in my judgment, a real distinction between an identification of "the goods," the subject matter of the transaction; and a description of those goods. The second sentence of article 32 (c) gives latitude in description, but not in identification. For example the E.U.R. certificate or certificate of origin could identify "tae goods" by reference to marks on the bags or by reference to a hold in the vessel which they occupied provided that no other goods were in the hold. Having so identified "the goods" they could then describe them as "sugar" simpliciter since this description is not inconsistent with "E.E.C. White Crystal Sugar Category No. 2, Minimum Polarisation 99.8 degrees Moisture Maximum 0.08 per cent." But however general the description, the identification must, in my judgment, be unequivocal. Linkage between the documents is not as such, necessary provided that each directly or indirectly refers unequivocally to "the goods." This seems to me to be the proper and inevitable construction to place upon article 32 (c) if the specified documents are to have any value at all. It is here that the merchants are in difficulties.

No problem arises with the commercial invoice or the bill of lading, the latter showing 40,000 polythene lined unmarked jute bays of white crystal sugar weighing 2,018.6 metric tons gross loaded on the Markhor at Antwerp bound for Djibouti in transit for The Yemen. There are two quality certificates which in total have the same gross

> weight as that shown in the bill of lading and, by calculation from the net weights, the same number of sags. However, one refers to the sugar to which it relates as having been loaned on the "M.V. Markhor or substitute." Clearly this could be a different vessel and accordingly refer to a different parcel of sugar. There are two certificates of origin. One refers to consignment by "M.V. Markhor or substitute." the other to "Transports mixtes a destination Djibouti Port in Transit Yemen." The quantities are correct but the certificates might refer to two other parcels of sugar. There are three E.U.R. 1 certificates. The total quantities are correct but one names Tate & Lyle for account their principals as consignees another Rayners for account their principals and the third Rayners simpliciter. Two give no indication of the method of transport one says simply "Fer" One refers to preferential terms between France and Djibouti and the other to France and Yemen Nord. Clearly these certificates could relate to the goods but they do not necessarily do so. This will not do.
>
> For these reasons I agree with the judge that the bank was entitled to reject the documents on this ground as well as on that concerning the portmarking clause in the bill of lading."

80. Kerr L.J. and Sir Sebag Shaw agreed with the Master of the Rolls. Article 32(c) of the 1974 Revision is replicated in Article 41(c) of the 1983 Revision. Clearly one of the problems in that case was that there were two certificates of origin which might have referred to two different parcels of sugar. It is also worth noting that at page 713/4, Parker J. sets out the terms of the advice of discrepancies. This makes the linkage point expressly which is very different to what happened in the instant case.

81. It is also important to have regard to the terms of Article 23 of the 1983 Revision (which differs from the 1974 Revision) it states :

"When documents other than transport documents, insurance documents and commercial invoices are called for, the credit should stipulate by whom such documents are to be issued and their wording or data content. If the credit does not so stipulate, banks will accept such documents as presented, provided that their data content makes it possible to relate the goods and/or services referred to therein to those referred to in the commercial invoice (s) presented, or to those referred to in the credit if the credit does not stipulate presentation of a commercial invoice."

82. Mr. Bunting relies on the absence of bag marks and details of the voyage. Voyage details are set out in the invoice, packing list and of course on the bill of lading. It is also important to note and that on August 19th 1988 Daiwa issued a letter of credit in favour of Cheergoal Industries on the application of Kanematsu-Goshu of Japan. This was for a total of 900 metric tons divided into two parcels, one of 400 metric tons and one of 500 metric tons. The specifications were identical to the Plaintiffs' specification and it showed delivery to a Japanese main port. It was admitted by Mrs. Wong that this was a back to back transaction and I prefer her evidence on this point as opposed to Mr. Cheung's hollow denial.

83. Mr. Faulkner submits that Article 23 of the 1983 Revision indicates a relaxation of the unequivocal rule referred to by Sir John Donaldson M.R. Whether or not he be right in this submission the fact remains that the credit required the Certificate of Quality/Quantity to evidence shipment of 400 metric tons of ferro silicon etc. and this has to be established before the Plaintiffs can succeed on this point.

84. Having given this matter the most careful consideration, I am quite satisfied that there is sufficient linkage in this case. I take into account the following points:

(1) The credit is dated 23rd August and the Certificate is dated 25th August.

(2) The credit shows shipment from a Chinese port and the Certificate shows the consignor as Chinese.

(3) The quantity is exactly the same in both documents.

(4) The specifications in the two documents tie up and are within the permitted maximum and minimum.

(5) The weight is identical in both documents.

(6) The packing certified was 1 metric ton PP woven bag which was one of the two permitted packing requirements in the credit.

(7) The size was identical in both documents, namely 10 - 100 mm 90% min.

(8) The gross weight in the Certificate is identical to the gross weight in the packing list and the latter document clearly shows that the goods were shipped from Zhanjiang to Hong Kong and thence to Japan (the shipping details also tie in with the commercial invoice. In this connection, it is interesting to note that in the advice of discrepancies itself it is stated that this quantity was shipped from Zhanjiang to Osaka and that its origin was Chinese and it was carried on the steamer Fu Chun.)

85. The argument advanced that the certificate may be referring to a different consignment to that referred to in the letter of credit is, in my judgment, fanciful. The facts of this case are very different from the case considered by Sir John Donaldson above. There was in that case a doubt and thus the strict compliance rule had not been complied with. I have no such doubts in relation to the facts of this case. I am satisfied that the Certificate does sufficiently relate to the goods the subject matter of the credit and I am also satisfied that the Certificate relates to the goods invoiced.

86. If, however, I be held wrong about this, I would then go on to hold that under Article 16(e) Daiwa are precluded from relying on this ground as it was not a ground referred to in the advice of discrepancies dated 14th September 1988. The advice was clearly relying upon the submission of an Inspection Certificate as opposed to a Certificate of Quality/Quantity. Had Daiwa taken the point on 14th September or earlier it may have been possible for the Plaintiffs to rectify the position by obtaining a certificate which referred to shipping details or bag marks (if any) which Mr. Bunting conceded would have put the matter beyond any argument or doubt. By not taking this point without delay, the Plaintiffs have forever been prevented from attempting to rectify these matters and in my judgment, this is one of the main reasons why Article 16(d) refers to "without delay" and why there is a preclusion in 16(e) if there is delay. I intend to place reliance on the above comments in support of my general conclusion on the construction of Article 16 which I have dealt with earlier in this judgment.

Delay/Bill

87. Having decided that there were no discrepancies or that reliance cannot now be placed upon them, it is strictly not necessary for me to deal with the delay argument or the argument in relation to the word "bill". However in case, this case should go further, it may help if I state my conclusions on the two remaining points as I have had the benefit of full and helpful argument thereon.

Delay

88. I need not repeat the facts. Daiwa called two experts. The first was Mr. Cannon of the Hongkong Bank and the second was Mr. Tsang from the Bank of East Asia. Both considered that the time taken in this case was within the norm applicable in Hong Kong in 1988. The Plaintiffs called no expert evidence. Both experts confirmed that in Hong Kong it was the practice of banks to give notice by letter which was delivered by post, messenger or courier. Fax and telex were not used because of the difficulty in verification and thus proof. Mrs. Wong made clear that information was frequently given by phone as it was in the case when NCB phoned to inquire of progress.

89. Mr. Faulkner submitted that the advice of discrepancies could have been given sooner. There is, in my judgment, a great danger in considering any particular case in isolation from what was happening at Daiwa at the particular time. They certainly had more than one set of documents to check and they can be forgiven for putting in place a system of checking which included several people.

90. The high water mark of Mr. Faulkner's submission was a recent decision of Hirst J. in Bankers Trust v. State Bank of India 31st July 1990 (Lexis only). In that case there were 967 sheets to check. They were received on 21st September 1988. On 28th September, Bankers Trust sent a telex to State Bank of India alerting them to certain problems. On 30th September, they rejected the documents and listed the discrepancies. Hirst J. heard expert evidence from both sides. One of the experts called by Bankers Trust was Professor Ellinger whose helpful article I have already referred to above. The Defendants relied upon expert evidence from Barclays Bank which showed that Barclays allowed a period of three days for checking documentary credit. The learned judge held that the time taken in that case was too long and dismissed the claim. However in considering "reasonable time" he made the following observations with which I respectfully agree (see page 20) :

"I do not think the requirement of "reasonable time" in Article 16(c) was intended to allow, let alone encourage, an intricate minute-by-minute examination of the issuing banks' work of the kind undertaken here, but rather to require consideration in broad terms whether the issuing bank set about its work conscientiously and, reviewed overall, handled the matter with reasonable promptness either by reference to an appropriate fixed time limit or generally. This was an unusually (though not uniquely) onerous checking exercise."

91. Applying this test Hirst J. held that Bankers Trust had fully complied with these requirements during the first stage, namely from receipt of the documents to the decision to reject. He then went on to hold that Bankers Trust failed to give notice of their decision to reject without delay.

92. In the present case, there were 19 pages of documents which were required to be checked against 4 pages of letters of credit. Mr. Cannon agreed that it was difficult to imagine a case where less documents were required to be examined but that this number was about average. He thought that an experienced checker would take about 45 minutes to check these documents.

93. There are two points which I believe are important to bear in mind. Firstly Daiwa are not, on the evidence before me, a large Bank and Hirst J. specifically stated that "for a smaller bank with smaller resources a reasonable time limit might be longer". That is longer than the three days that Barclays set themselves generally and contended for in the Bankers Trust case. Secondly and I think more importantly it has to be borne in mind that most checkers of documentary credits in Hong Kong will not have English as their mother tongue. This must add time to the checking process and must justify a fairly rigorous checking procedure and hierarchy.

94. I have to take into account the expert evidence which states that the period taken in this case is normal for Hong Kong. Mr. Cannon stated that the Hongkong Bank, which has the largest documentary credit department in the world, allowed themselves seven days in 1988. Since the Bankers Trust case, staff have been given only 2 to 3 hours in which to find out whether discrepant documents will be accepted. The expert evidence is not binding upon me. If I felt that the period taken in this case was too long on the facts of the case, I would not hesitate to so find despite the practice of banks in Hong Kong. It

is, of course, possible that the practice does not accord with fulfilling the obligations contained in Article 16.

95. I also take into account that with hindsight it is always possible to look at a transaction and see where minutes or hours could be saved. However this exercise ignores that other essential work was going on at the same time at Daiwa and I cannot ignore Mrs. Wong's evidence that 20 sets of letters of credit were registered by Daiwa on Saturday, 10th September 1988.

96. I do not accept Mr. Faulkner's submission that in this case even 48 hours would be excessive. Looking at the matter on the basis of the evidence adduced including the expert evidence I cannot find that the period for 11.38 am on Friday, 9th September to the afternoon of Wednesday, 14th or for that matter the morning of the 15th was excessive in all the circumstances. The documents arrived in the morning after the first internal delivery of post and thus did not reach the appropriate department until the afternoon. Saturday was, of course, a half day. This all happened in September which on the evidence is a very busy month and this particular September was no difference. In order to marry up my conclusions with the submissions made to me, I make the following findings:

(1) The time taken from receipt of documents until the completion of checking was not excessive and was without delay.

(2) The time taken from the decision to reject until the communication of that decision was reasonable and without delay.

(3) The whole period from receipt of documents until sending out the advice of discrepancies and the receipt next morning of such advice was reasonable and without delay.

97. I therefore reject all the arguments based on delay.

Telecommunication

98. Mr. Faulkner submits that the discrepancies should have been notified by telecommunication and that this was not done. The phone call from NCB was not in compliance with Article 16(d) because the grounds relied upon were not given by Mrs. Wong. I accept that the incoming phone call was not compliance because the grounds were not given and I reject Mr. Bunting's submission that somehow a waiver of this requirement arose because the gentleman from NCB did not ask for the grounds.

99. I have heard a lot of evidence about the fact that faxes and telexes are not used for this purpose because of the problems with authentication and verification. In Hong Kong the practice is to send the advice of discrepancies by mail, courier or messenger and this has been found satisfactory given the size of Hong Kong and the propinquity of most banks to each other.

100. Article 16(d) simply says "without delay by telecommunication, or if that is not possible by other expeditious means". No one suggested that telecommunication, which, both sides concede, include a telephone call, was not possible but only that it was hard to prove. I am not impressed with this argument. If telecommunication whether by phone, fax or telex is possible then it ought to be used so that the beneficiary knows as soon as possible that a problem exists and so the beneficiary has as much time as possible before the expiration of the credit to get the alleged discrepancies accepted or to consider giving an indemnity.

101. In this case a telephone call could have been made setting out the discrepancies and following this up with a written notice as was in fact done. Alternatively Mrs. Wong could have complied with the requirement by giving the grounds to the caller from NCB.

102. If the relevant parties had a fax then that could have been sent with the original taken round by hand or by mail. A messenger would arrive somewhat after the fax had been sent and received.

103. So it follows that whereas I am satisfied as a question of fact on the evidence before me that Daiwa acted without delay I find that they did not give notice by

telecommunication, which I find, in one form or another and certainly by phone, was possible in September 1988.

104. I do not believe that my conclusion will place a great burden on the banking community. Once documents are checked and discrepancies found which justify rejection a phone call should be made to the remitting bank in which the discrepancies are explained and this should be followed up by a written advice of discrepancies, confirming the telephone call, which should be sent by messenger, courier or, if not possible, by mail. No doubt the rejecting bank will ask to identify the person to whom they are speaking at the remitting bank and no doubt they will recall this fact and the time of the telephone call. If an issue should ever arise as to whether such a call was made it would be resolved by the court in the usual way. The fact that a telephone call cannot be proved in the same way as a SWIFT message is, in my judgment, not relevant because the same argument applies to a letter which is not sent by registered post. A receipt in the messenger's delivery book will usually be conclusive. Banks in Hong Kong have relied upon letters and in so far as they have been sent by ordinary mail there is always a possibility of arguments about non-receipt. Yet the practice has continued for some time and I do not see why a telephone call and a letter cannot be used as this would fulfill the requirements of Article 16(d). It goes without saying that Article 16(d) can also be complied with by sending a fax or telex where it is possible and sending the original or a letter containing the same information by hand, courier or post.

105. I should add that Mr. Cannon said that the lack of authentication of a phone call was not vital but it was just that his bank did not feel comfortable with giving notice by telephone. Mr. Tsang conceded that the phone was used quite a lot and this is followed up by a rejection letter but for some unexplained reason the letter does not refer to the phone call. It follows therefore that what I am suggesting as being compliance with Article 16(d) is not very far removed from the practice adopted, at least by the Bank of East Asia.

The Bill

106. The advice of discrepancies dated 14th September 1988 ended with these words:

> "With reference to the above-mentioned bill, we hereby advise you that we are unable to take up the documents due to the above

> discrepancies and are contacting our customer to obtain their acceptance.
>
> We shall revert to this matter in due course. Meanwhile the relative bill is being held by us at your risk and disposal."

107. Mr. Faulkner submitted that this was not in compliance with Article 16(d) because that provides that where the bank refuses the documents it "must also state whether it is holding the documents at the disposal of, or is returning them to, the presentor (remitting bank or the beneficiary as the case may be)". Because Daiwa have not done this, so says Mr. Faulkner, they are precluded under Article 16(e).

108. This argument turns on the use of the word "bill". Mr. Cannon agreed that the prima facie meaning of "relative bill" meant the bill of exchange (document 13) drawn by the Plaintiff's on Cheergoal dated 2nd September 1988 in the sum of US$376,000. In cross-examination he agreed that the words "bill and draft" were interchangeable. He then added that to his mind the use of the word "bill" in these circumstances conveyed to him the bill and the documents i.e. the entire set of documents. This is how he, as a presenting bank, would understand the above-quoted paragraph.

109. Mr. Tsang agreed that Bank of East Asia used the word "documents" in this context. He understood "relative bill" to refer to the draft together with the other documents. However, he did agree that he construed it this way because it was Daiwa's obligation to hold all of the documents.

110. I also note that at the top of the draft there appears the following words "drawn on L/C LC853-00032 issued by the Daiwa Bank ltd. dated 23rd August 1988".

111. I do not consider that there was any doubt in anyone's mind what it was Daiwa was saying namely that they were nodding the documents at the Plaintiff's risk and disposal. The advice of discrepancies refers to the letter of credit and the reason for rejection and it also gives details of the bill by setting out its tenor (sight) the drawer (the Plaintiff) and the amount (US$376,000). The advice of discrepancies refers to Daiwa being "unable to take up the documents" due to the stated alleged discrepancies.

112. In my judgment, there is nothing in this point. I have to construe the words used in the context of the commercial arrangement into which the parties had entered. I must avoid a semantic construction which flouts business common sense. I rely upon the evidence of Mr. Cannon which I accept, that he, as an experienced banker dealing with credits of this sort would understand that reference was being made to the set of documents and not merely to the bill. I therefore conclude that on this ground the Plaintiff's submission fails and to the extent there has been compliance with Article 16(d).

Conclusion

113. It follows therefore that the Plaintiffs have successfully traversed the minefield of letters of credit and are entitled to judgment for the sum claimed, namely US$376,000 which I accordingly order.

114. Clearly they are entitled to interest on that sum but I would hope that this could be agreed and I will not make any order in relation to interest pending an attempt at agreement. If no agreement can be reached, I will of course hear the parties and hake an appropriate order.

115. As to costs I propose to make a costs order nisi in favour of the Plaintiff's but this does not extend to the costs which have already been reserved. If the parties cannot reach agreement as to how these costs should be disposed of I shall of course hear them on this subject.

116. It only remains for me to thank Counsel for the most helpful oral and written submissions in a case which bristled with difficulty.

(Neil Kaplan)

Judge of the High Court

Representation:

Mr. R. Faulkner, instructed by M/s. Crump & Co. for the Plaintiff.

Mr. M. Bunting, instructed by M/S. Stevenson Wong & Co. for the Defendant.