

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 121

Suit 1030/1986

Between

Amixco Asia (Pte) Ltd

... Plaintiff

And

Bank Bumiputra Malaysia Bhd

... Defendant

GROUND OF DECISION

Banking — Letters of credit — Applicable principle; Banking — Letters of credit — Applicable principle

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Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd

[1992] SGHC 121

Suit 1030/1986
G P Selvam JC
06 May 1992

1 Cur Adv Vult

2 ***The case***

3 This case concerns a documentary letter of credit issued by the defendants, the issuing bank. The plaintiffs were the beneficiaries of the credit and the sellers of tin slag, the merchandise in the underlying contract of sale. The applicants for the credit were Sunko (S) Co Pte Ltd, the buyers of the tin slag.

4 The credit was governed by the Uniform Customs and Practice for Documentary Credits issued by the International Chamber of Commerce (`the UCP`) 1983 Revision. The UCP was first issued in 1933 with revisions in 1951, 1962, 1974 and 1983. The applicable year of revision will accompany the abbreviation.

5 The applicants, by a contract dated 12 November 1984, agreed to purchase from the plaintiffs tin slag up to the value of US\$500,000. Tin slag is the residue after tin has been extracted from ore by smelting. Commercial value

of tin slag is in its content of tantalum (referred to in the underlying contract as Ta205). It was a condition of the contract that the tin slag must contain a minimum of 2.5% tantalum. Tin slag with very low tantalum content has little commercial value. Accordingly, the contract provided that slag with less than 2.5% tantalum content would be rejected.

6 The payment for the slag was to be made by irrevocable letter of credit at sight. Accordingly, on 20 December 1984, on the application of the applicants, the defendants established a letter of credit with a limit of US\$500,000 in favour of the plaintiffs. The advising bank was Banque National de Paris ('BNP'). The expiry date of the credit was 30 April 1985. Partial delivery was permitted and hence, partial utilization of the credit was available. The credit further provided, inter alia, that the plaintiffs' drafts drawn on the applicants were to be accompanied by the following documents:

- (a) signed commercial invoices in quadruplicate;
- (b) combined certificate of weighing/sampling/determination of moisture by Alfred H Knight, Singapore or Penang stating total Ta205 contained in quadruplicate;
- (c) assay certificate by Alfred H Knight, United Kingdom in quadruplicate;
- (d) if original warehouse receipt is presented, the signature(s) of Alfred H Knight appearing thereon must be verified by the negotiating bank before any negotiation is to be done;
- (e) documents to evidence that merchandise are [sic] packed in second-hand steel drums or PP Bags;
- (f) if goods are delivered to warehouse in Penang or Singapore original warehouse receipt made out to order of the defendants countersigned by Alfred H Knight, Penang or Singapore as the case may be with confirmation that the merchandise was correct according to their survey and had been escorted by them, in duplicate.

The documents to evidence delivery of the following merchandise:

Tin slag containing tantalum with TA205 minimum 2.5% on the following price basis: US\$11 per lb TA205 contained, basis 3% TA205. For each 0.1% TA205 above 3% to 4% TA205, the price shall be increased by US\$0.20 per lb TA205, fractions pro-rata. For each 0.1% TA205 below 3% TA205 down to 2.5% TA205, the price shall be decreased by US\$0.40 per lb TA205, fractions pro-rata.

7 The plaintiffs were not the direct suppliers of the slag. They depended on an American corporation called Bomar Resources Inc for the supplies of slag. The payment arrangement between the plaintiffs and Bomar was by an undertaking by BNP to Bomar to transfer to Bomar the full value of goods not exceeding US\$370,000 out of the proceeds from the credit provided the `documents conformed to the letter of credit conditions`. BNP further undertook not to part with the warehouse receipt received from Bomar should it not be in a position to make payment to Bomar. This arrangement, however, was outside the ambit of the credit and the contract of sale between the commercial parties. It did somewhat complicate the role of BNP as an intermediary bank.

8 In due course, the defendants received three drafts drawn by the plaintiffs for the total amount of \$441,275.66. The defendants refused to honour all of them. Hence this action. I shall first consider the legal context in which the case arose.

9 **Credit available by negotiation: art 10(a)**

10 The UCP 1983 recognizes three types of credit, viz those:

- (a) available by **payment** (which may be at sight or deferred);
- (b) available by **acceptance** ;
- (c) available by **negotiation** ; in this case the issuing bank undertakes to pay without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary on the applicant

or to provide for negotiation by another bank and **to pay as above if such negotiation is not effected** : art 10(a)(iv) UCP 1983.

11 The credit in question was available by negotiation by an intermediary bank. It stated `that the credit was available by negotiation of your drafts at sight drawn on the applicant`. It further stated: `We hereby engage with drawers and/or bona fide holders that drafts drawn and negotiated in conformity with the terms of this credit will be duly honoured on presentation`. It also contained the following instruction to the negotiating bank: `Upon receipt of documents in compliance with the terms of and conditions of the letter of credit, we will remit to the negotiating bank, in accordance to their instructions.`

12 BNP, the advising bank, made it clear to the plaintiffs that the credit was not confirmed by it. In consequence, it only constituted the issuing bank's engagement.

13 It was evident that any bank could effect a negotiation and seek payment from the issuing bank provided the documents conformed with the terms of the credit. Negotiation here meant that the intermediary negotiating bank named as the payee in the draft would become the holder of it. In short, the intermediary negotiating bank would purchase the draft. Article 3(a)(iii) of the UCP 1974 made it clear that negotiation and purchase were two sides of the same thing. The UCP 1983 omitted the tautology by retaining `negotiation` only. An assertion by an intermediary bank that it negotiated the credit without making an advance would be against the spirit and letter of the UCP 1983. If such a contention is upheld, it would lead to uncertainty and confusion. As between the non-confirming intermediary bank which negotiates and its own customer the negotiation may be done with recourse. If the beneficiary is unable to find a bank which is willing to negotiate, the beneficiary may present the documents

and demand payment: see art 10(a)(iv) of the UCP 1983. The credit as required by art 46 of the UCP 1983 provided an expiry date for presentation of documents for negotiation: 30 April 1985. If no negotiation is effected because the beneficiaries are unable to find a bank willing to purchase the documents, then the documents must be presented to the issuing bank for payment within the lifetime of the credit.

14 Reasons for refusal of payments: art 16

15 A documentary letter of credit subject to the UCP is a free-standing instrument of payment. As such, it concerns itself with documents and not with the goods or services which are the subject matter of the underlying contract. The documents need only appear on their face to be in accordance with the terms and conditions of the credit.

16 The opening bank may avoid liability under two distinct circumstances: on the ground of breach of non-documentary conditions or on the ground of non-conformity with documentary conditions. Both such circumstances are alleged to exist in the present case. Failure to present the documents within the lifetime of the credit would come under the first ground. In such a case, whether or not the documents are in conformity with the credit is irrelevant and the issuing bank need not examine the documents for conformity. Where the second ground is concerned, before liability to make payment can be avoided, the issuing bank is under a duty to examine the documents.

17 I shall deal with the latter ground first. The duties of the issuing bank in respect of the documentary conditions are defined in the UCP. The relevant provision is set out below. I shall refer to them as discrepancy provisions.

18 Article 8 of the UCP 1962 provided, inter alia, as follows:

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.

19 If such claim is to be made, notice to that effect, stating the reasons therefor, must be given by cable or other expeditious means to the bank from which the documents have been received and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto. The issuing bank shall have a reasonable time to examine the documents.

20 Article 8 of the UCP 1974 made certain important amendments to the above discrepancy provisions. In the amended text, the relevant parts read as follows:

(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 time 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 the 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 precluded 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.

21 The UCP 1983 introduced further amendments to the discrepancy provision. Articles 15 and 16, inter alia, provide as follows:

Article 15:

Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit.

Article 16

(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 presenter (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.

22 **A second bite at the cherry (common law)**

23 It is the contention of the defendants that a bank which gives notice of rejection is not required to state all discrepancies which may exist and is entitled to rely on other grounds at a later date. Such entitlement, according to them, is preserved under the discrepancy provision of the UCP 1983 and is also available under the general law outside the UCP. In support of this contention, the defendants relied on the following cases:

(a) **Skandinaviska Kreditaktie Bolaget v Barclays Bank** [1925] 22 Lloyd LR 523

(b) **Kydon Compania Naviera SA v National Westminster Bank Ltd ; The Lena** [1981] 1 Lloyd's Rep 68

(c) **Westpac Banking Corp and Commonwealth Steel Co Ltd v South Carolina National Bank** [1986] 1 Lloyd's Rep 311

24 The defendants also relied on statements in passages from 3(1) *Halsbury's Laws of England* (4th Ed) para 285 and contended that the

contention made by them holds good under the three revisions of the UCP reproduced above. The passage in ***Halsbury's Laws of England*** reads as follows:

The above provisions provide an estoppel against an issuing bank which fails to act in accordance with them, and/or fails to hold the documents at the disposal of, or to return them to, the presenter. An estoppel may also arise outside those provisions, either as between the beneficiary and the confirming or issuing bank, or as between a bank authorized to pay and the issuing bank. However, the mere statement of a particular reason or reasons for rejecting documents is not alone enough to found a representation, waiver or promissory estoppel in relation to reasons not so stated. A bank is entitled to rely upon a ground of rejection not relied upon at the time of rejection even where the ground actually relied upon is subsequently abandoned, although in such a case the bank lacks the practical support which it can derive from an actual rejection on the ground relied upon.

25 Having reviewed the law, I find myself unable to accept the contention made by the defendants. In my judgment, under the UCP 1983 the issuing bank must state all the discrepancies it seeks to rely on in the notice of rejection without delay. This means within reasonable time. No new discrepancies may be raised after the lapse of reasonable time. I shall now consider the authorities.

26 In **Taylor v Oakes, Roncoroni & Co** [1922] 127 LT 267 at p 269, Greer J said:

It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.

27 Devlin J stated the principle admirably in **Universal Cargo Carriers Corp v Citati** [1957] 2 QB 401 at p 443: `A rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason.` See also the

speech by Lord Sumner in ***British & Beningtons Ltd v NW Cachar Tea Co Ltd*** [1923] AC 48 at p 71.

28 In ***Skandinaviska Kreditaktie Bolaget v Barclays Bank*** [1925] 22 Lloyd LR 523 the plaintiffs were the issuing bank of the credit. They opened it at the request of the defendants. The credit was for the purchase of potatoes by the defendants' customers. The defendant advised the plaintiffs to accept the instructions of the buyers with regard to the credit. In accordance with these instructions, the plaintiffs accepted bills of lading dated 29 May 1922 and made payment to the sellers. The plaintiffs then requested the defendants to reimburse them but the defendants refused to do so. They passed some untenable complaints raised by the buyers. Later in the proceedings the defendants contended that the bill of lading was outside the contemplation of the credit. This ground had not been raised when payment was first refused. There was no contractual provision requiring reasons to be given for the refusal to pay and it was before the advent of the UCP. Greer J was asked to express his view as to whether in failing to raise in the first instance the objection they raised later, the defendants had either by estoppel or waiver under English law deprived themselves of the right they would otherwise have had of resisting the claim. Greer J expressed his views as follows:

*It is suggested in the correspondence by the plaintiff bank that they have a grievance because the defendant bank did not in the first instance raise the objections that are now raised to the documents, but referred the matter to their customer in Hull and simply sent forward the customer's complaints, which were not in the first instance based upon the documents, but which were based on some untenable contention which he put forward; and it is suggested that by that means the defendants had either by estoppel or waiver, but some rule of law applicable in this country, deprived themselves of the right that they would otherwise have had of resisting the claim. I am clearly of opinion that they have not done so. ***Skandinaviska Kreditaktie Bolaget v Barclays Bank*** [1925] 22 Lloyd LR 523 in which he*

applied the principle he had stated earlier, became a paradigm case for future cases to follow.

29 In **Kydon Compania Naviera SA v National Westminster Bank Ltd** [1981] 1 Lloyd's Rep 68 the credit was subject to the UCP 1962. The credit was established by the defendant in respect of the purchase of a ship. The credit was available upon presentation of a draft drawn on Eurasia Carriers Ltd and other specified documents. On various occasions documents were presented. The defendants refused to accept them, giving inadequate reasons. In the proceedings against them the defendants raised the ground that the draft had been drawn on another party and not Eurasia Carriers Ltd and several other grounds. These grounds had not been raised earlier. Parker J held that the issuing bank was entitled to raise grounds which had not been raised at the time of rejection. He referred to the following statement of the law in ***The Law of Bankers' Commercial Credits*** by Gutteridge and Megrah (6th Ed) at pp 145-146:

What is the position if after an objection to documents is raised and resolved by rectification within the time validity of the credit, further objections are raised which the beneficiary cannot rectify before the credit expires? Even though a beneficiary may be thus indirectly prevented from complying with the credit in time, a bank cannot, in the absence of any express or implied undertaking to the contrary, be bound to accept the documents after rectification of the irregularity, because the seller has only himself to blame and if in doubt should have inquired at the time the documents were first returned for rectification. It cannot be that, in refusing the documents for a reason given, the issuing banker warrants or represents that the documents are otherwise in order; at no time was the tender valid and at no time was the seller entitled to assume that it was. But it would be unwise to assume that this would always be the case, for there could be circumstances in which such reasoning would not apply, as where the first refusal amounted to a representation that payment would be made on rectification of the irregularity on which refusal was based. Such is documentary credit work, however, that a banker would draw attention, at the time of refusal to pay, to those irregularities which he had first discovered and is under no duty to the beneficiary so to

scrutinize the documents as to make sure that there were no other irregularities.

30 Thus, Parker J followed the **Skandinaviska** [1925] 22 Lloyd LR 523 paradigm and rejected the estoppel and representation theories which were argued before him. He said:

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.

31 There was no focus on art 8 of the UCP 1974 which governed the credit. **Westpac Banking Corp and Commonwealth Steel Co Ltd v South Carolina National Bank** 3 was an appeal to the Privy Council from New South Wales. The credit was subject to the UCP 1974. It called for a clean on board bill of lading. The printed form of the bill of lading tendered included the words `received for shipment` as well as the words `shipped on board`. The issuing bank refused the document on the ground that the bill of lading was not in accordance with the credit on the ground that words `shipped on board` constituted a notation which had not been signed or initialled as required by art 20(b) of the UCP 1974 which provided as follows:

Loading on board a named vessel or shipment on a named vessel may be evidenced either by a bill of lading bearing wording indicating loading on board a named vessel or shipment on a named vessel, or by means of a notation to that effect on the bill of lading signed or initialled and dated by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board the named vessel or shipment on the named vessel.

32 The trial court held that the words `shipped on board` did not constitute a notation as they were part of the original printed forms. Further, even though in its original form it was a `received for shipment` bill of lading by virtue of the words `shipped on board`, it was an on board bill of lading. Before the Court of Appeal the defendant bank abandoned the argument that the words `shipped on board` constituted a notation and contended that the bill of lading did not show that the goods had been shipped. The Court of Appeal held that the words `received for shipment` were inconsistent with the words `shipped on board` and manifested a doubt whether the goods were loaded on board. The Court of Appeal made certain inferences as to what might have happened, going beyond what appeared on the bill and looking outside the documents for guidance. The Privy Council held that the bill of lading was not internally inconsistent and the words `shipped on board` meant that the goods had been shipped. The bill of lading accordingly was an `on board` bill of lading and was in conformity with the terms of the credit. In giving the decision of the Board, Lord Goff of Chieveley said:

Before their Lordships, and indeed in the courts below, there has been no dispute as to the applicable principles of law. Indeed, once the argument that the words `shipped on board` constituted a notation had been abandoned, as it was before the Court of Appeal, the question at issue was simply whether the bills as tendered to SCNB, including those words, were `clean on board bills of lading` as required by the letter of credit, having regard to the provisions of art 20(b) of the UCP to which reference has already been made, or whether a competent employee of a bank, acting with due care, might reasonably regard the bill as not falling within that description.

33 In considering that question, it is not unreasonable to observe at the outset that this is not one of those cases where the bank in question has rejected documents on a certain ground, and it is subsequently sought to argue that in so doing the relevant employee of the bank formed a view of the documents which a competent employee, acting with due care, might reasonably form. On the

contrary, in the present case the bills were first accepted by Westpac from Commonwealth Steel without question, and were then rejected by SCNB on a ground which has now been abandoned by them, since they now accept that the words `shipped on board` do not constitute a notation. Of course SCNB is fully entitled to establish, if it can, that there was some other ground upon which it could have rejected the documents; but it lacks the practical support which it could have derived from an actual rejection on the ground now relied upon by it.

34 It should be noted that the abandonment of the initial ground and presentation of a new ground was in reality a change in form and not substance. The substance of the rejection was that no `on board` bill of lading was presented. The correctness of the result of this case is beyond question. The reflection by Lord Goff that the issuing bank was `fully entitled to establish that there was some other ground upon which it could have rejected the documents`, however, needs explanation in the context of the UCP. The *Westpac* case³ did not focus on the discrepancy provisions of the UCP 1974 as it was not necessary to do so.

35 **Exceptions to the rule**

36 To the common law rule stated above there are certain recognized exceptions. First, `if the point not taken is one which if taken could have been put right the principle will not apply` - per Somervell LJ in *Heisler v Anglo-Dal Ltd* [1954] 1 WLR 1273 at p 1278. Parker J cited this statement with approval in *Andr, et Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep 463 at p 469. Secondly, the rule is subject to the qualification that a party may by its conduct preclude itself from setting up another ground at a later date: see *Panchaud FrSres SA v Etablissements General Grain Co* [1970] 1 Lloyd's

Rep 53 and ***Cerealmangimi SpA v Toepfer (Alfred C)***, **The Eurometal** [1981]

3 All ER 533 Thirdly, the rule does not apply where a statute as a matter of construction precludes a party from raising other grounds at a later time: see **Davis (W) & Sons v Atkins** [1977] AC 931 an unfair dismissal case made under the Employment Protection Act 1975 [UK].

37 **One bite only under the UCP**

38 To the exceptions mentioned above, I would add this: when a statute or contract imposes a time limit to give reasons for doing or refusing to do an act, all grounds to be relied upon must be given within the time allowed. The party must stand or fall on the grounds given within the time. It would be illogical if some grounds may be given at a later time as it would negate the statute or contract. I would, accordingly, hold that in credits subject to the UCP, new grounds for rejecting documents may not be given after reasonable time. Article 16(d) and (e) bars a second bite at the cherry. By this article the parties have clearly contracted out of the liberty of adducing additional discrepancies after the lapse of reasonable time.

39 In so holding, I would adopt the reasoning given in ***Case Studies in Documentary Credits*** (1989) case 53:

Query:

If documents contain several discrepancies but the issuing bank only states one of them in its notice of refusal and if that discrepancy turns out to be invalid can the issuing bank then legitimately raise the other discrepancies to refuse the documents?

Answer:

Article 16(d) gives the answer to this question because it clearly evidences that `such notice must state the discrepancies`. Since the discrepancies is to be understood to mean all discrepancies,

the issuing bank would not be entitled to raise discrepancies which it had not raised in its notice of refusal.

40 Article 16(d) is perfectly clear in its statement that in respect of rejection of documents and giving notice of rejection.

41 `Such notice must state the discrepancies in respect of which the issuing bank refuses the documents ... `

42 This is common sense since it might be possible for the discrepancies to be rectified and the documents to be represented within the time limits of arts 46 and 47(a).

43 If, therefore, the issuing bank rejects the documents and states only one discrepancy but later tries to raise other discrepancies for the purpose of refusing the documents, obviously this is contrary to UCP 1983 and also contrary to what would be fair treatment of the beneficiary.

44 The United States Court of Appeals in **Kerr-McGee Chemical Corp v Federal Deposit Insurance Corp** [1989] 872 F 2d 971 in applying the discrepancy provision in the UCP 1983, held that a bank would be estopped from subsequently asserting a ground not taken initially. Associate Justice Powell put it succinctly:

The question presented is whether, after initially dishonouring a letter of credit on the basis of specified grounds, a bank may subsequently dishonor the credit on the basis of a different ground. We think that under the Uniform Customs and Practices for Documentary Credits, which are expressly incorporated by letter of credit at issue here, appellee bank was required to state all of its reasons for dishonoring the credit when it was first presented.

45 My conclusion also follows from the logic of the decision of the English Court of Appeal in **Bankers Trust Co v State Bank of India** [1991] 2 Lloyd's Rep 443. In that case Hirst J and the English Court of Appeal held that if the issuing bank failed to state valid discrepancies within the reasonable time, it would be precluded from avoiding liability on the ground that the documents were discrepant. Time would not be extended to enable it to consult the applicant for additional grounds.

46 **Negotiation or collection: art 46**

47 I turn next to the opening bank's entitlement to avoid payment on the ground of breach of non-documentary conditions.

48 By O 18 r 7(4) of the Rules of the Supreme Court 1970, a condition precedent necessary for the case of a plaintiff is to be implied in his pleading. The defendant must therefore raise in his defence the point of non-compliance with a condition precedent: O 18 r 8(1). The RSC stipulates that 'a party must plead specifically any matter which he alleges makes any claim of the opposite party not maintainable'. This places the plaintiff in the position of having pleaded the conditions in his statement of claim and 'the burden of proving its due performance rests on the plaintiff': the **Supreme Court Practice** 1991 (White Book) para 18/7/10.

49 Article 46 of the UCP 1983 provides that 'all credits must stipulate an expiry date for presentation of documents' and 'documents must be presented on or before such expiry date'. Presentation of the documents under the credit for payment, acceptance or negotiation before the expiry of the credit is a condition precedent. It is a non-documentary condition precedent to the issuing bank's liability under the credit. It is a non-documentary condition in the sense

that the conditions spelt out in arts 15 and 16 of the UCP 1983 relating to the contents of the documents do not apply where the issuing bank can refuse to pay because the documents were not presented within time. In such a case, the bank need not even examine the documents for discrepancies. Furthermore, as art 16 does not apply, the issuing bank may rely on this ground at a later date.

50 If an intermediary bank is prepared to negotiate the draft under a negotiation credit, the documents must be presented within the lifetime of the credit even though the negotiation itself may be completed later. Presentation of documents to an intermediary bank with a mere request for negotiation which does not result in negotiation would not be a presentation before the expiry of the credit. Where there is no negotiation, the documents must reach the issuing bank before the expiry of the credit.

51 In this case the plaintiffs` pleaded case is that `On or about 11 April 1985 the plaintiffs presented a draft at sight for the sum of \$90,511.82 drawn on Sunko together with a full set of the documents as required by and in conformity with the terms of the said letter of credit to the advising bank for negotiation.` Further, `On or about 30 April 1985, the plaintiffs presented two drafts at sight for the sums of US\$331,039.08 and US\$19,724.76 respectively drawn on Sunko together with a full set each of the documents as required by and in conformity with the terms of the said letter of credit to the advising bank for negotiation.` The defendants put the plaintiffs to strict proof that the last two drafts were presented on or prior to the expiry date of 30 April 1985. The plaintiffs do not plead that there was negotiation by the advising bank or any other intermediary bank. Indeed, if there had been a negotiation the negotiating bank and not the beneficiary would be entitled to payment from the issuing bank. In this case no claim for payment is made against the opening bank by an intermediary bank on the basis that there was a negotiation. The claims for payment in this action

are made by the beneficiaries. This entails an obligation to present the documents to the issuing bank on or before and not after 30 April 1985.

52 On 15 April 1985 BNP made a claim on the defendants for a partial utilization of the credit. It said:

We have negotiated the undermentioned credit according to the instructions contained therein and forward on herewith the following documents. ... Please credit the proceeds telegraphically to our account with Philadelphia International Bank We confirm that all terms and conditions of the credit have been complied with.

53 In a separate advice to the beneficiaries, BNP said:

This negotiation is made under the usual recourse which means that the payment is made subject to the final payment by the opening bank. ... Bill amount of US\$90,511.82 less our negotiating commission of US\$113.14.

54 Payment effected under reserve due to discrepancy noted in this bill.

55 Interest at 1.25%pa will be chargeable to your account as from today till date of receipt of funds.

56 BNP had also obtained a letter of indemnity from the beneficiaries relying on discrepancies.

57 The documents were received by the issuing bank within time but it refused to effect payment. By reason of this, it is likely that the negotiation was reversed by BNP, leaving it to the beneficiaries to claim payment directly.

58 Two other drafts with documents were sent by BNP to the defendants under two advices dated 2 May 1985. They had been received by BNP on 30 April 1985. There was no assertion by BNP as in the previous advice that there

was a negotiation or that the terms and conditions had been complied with. Instead, each advice said: `We have pleasure in forwarding the following documents approval basis. Documents against payment.`

59 Oral evidence during trial established that BNP had not purchased the documents. Accordingly, in my judgment there was no negotiation and BNP's role in forwarding the documents was merely that of a collecting agent. The presentation was made after the expiry of the credit. Accordingly, the issuing bank incurred no liability in respect of these two drafts.

60 **Liability on first draft: arts 16(b) and (c), 23 and 47**

61 On 15 April 1985 the defendants received a draft for US\$90,511.82 with documents. The defendants, on 18 April 1985, telexed BNP in the following terms:

We received documents for US\$90,511.82 under your ref: 506060 drawn under our L/C No DC-10051 and have noted the following discrepancies:

(1) One of the total dry net weight of 1,777,934.5kg of TA205, 63,218.5kg of TA205 is 2.44% which is below the required minimum of 2.5%.

(2) Invoice pricing calculated on the average of TA205 2.53% basis instead of individual TA205 percentage basis.

(3) Late presentation (warehouse receipts dated 1/2/85, 14/2/85, 7/3/85 and 9/3/85 respectively).

(4) Documents (other than the certificates of weighing, sampling and moisture determination) do not indicate that goods are packed in second-hand steel drums or PP bags.

(5) Signature of Alfred H Knight on original warehouse receipt not verified by negotiating bank.

We have communicated with our principals and we were advised that the discrepancies are not acceptable to them. We await your

further advise. Meanwhile the documents are held by us at your disposal.

62 The plaintiffs relied on art 16(b) and (c) of the UCP 1983 and contended that the defendants failed to make a determination to take up or to refuse the documents as required by the article because the defendants merely stated that the discrepancies were not acceptable to their principals. It was argued that the defendants failed to state that they as distinct from the applicants refused the documents.

63 The plaintiffs relied on the judgments of Farquharson LJ and Megaw LJ in ***Bankers Trust Co v State Bank of India***.¹³ In that case the issuing bank of a documentary letter of credit subject to the UCP 1983 received documents on 21 September 1988 and rejected the documents nine days later on 30 September 1988. During this time the issuing bank, after finding some discrepancies, referred the documents to the applicants of the credit. The applicant found more discrepancies. It was argued that the bank had failed to act in accordance with art 16(c) of the UCP 1983. Hirst J in ***Bankers Trust Co v State Bank of India***¹⁴ held that the bank, though entitled to consult with the applicant to ascertain whether he wishes to waive any discrepancies, must do so within the reasonable time allowed by art 16(c) and no extra time would be allowed for such consultation. The bank had not acted within reasonable time contemplated by art 16(c). Farquharson LJ said:

I would hold that an issuing bank is acting within a reasonable time in making its determination if it consults where necessary a translator, an expert in the commodity being sold, or its applicant for the purposes described. ...

64 Article 16 does not, in my judgment, contemplate a period of time for the applicant to go through the documents, as in the present case, to see if it could find further discrepancies. While the bank may consult the customer for

the limited purpose set out, it is still the bank which has to make the decision whether to reject.

65 The provision that the bank should arrive at its decision on the basis of the documents alone does not, in my judgment, prohibit consultations of this kind. It is merely to emphasize that the decision must be based on the discrepancies in the documents and not on any defect in the goods.

66 Sir John Megaw made statements to the same effect. The Court of Appeal agreed with Hirst J that the bank had not given a notice of rejection of documents with the grounds within reasonable time and dismissed the appeal.

67 In my judgment, art 16 does not preclude the issuing bank from referring the documents to the customer to look for discrepancies and adopt the discrepancies as its own if it agrees with them as long as the bank does it within reasonable time. In any event, whether a bank has made a determination of compliance and whether the rejection is made within reasonable time are questions of fact. In this case the bank clearly made its own determination and consulted its customer as it was entitled to. The bank's statement, 'We have received the documents and noted the following discrepancies. Meanwhile the documents are held by us at your disposal' was clear evidence that the bank made its own determination and that there was a rejection by the bank.

68 I shall now consider the discrepancies raised by the defendants.

69 Article 23 of the UCP 1983 provides:

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.

70 Article 47(a) of the UCP 1983 provides:

In addition to stipulating an expiry date for presentation of documents, every credit which calls for a transport document(s) should also stipulate a specified period of time after the date of issuance of the transport document(s) during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated, banks will refuse documents presented to them later than 21 days after the date of issuance of the transport document(s). In every case, however, documents must be presented not later than the expiry date of the credit.

71 Based on the above and art 16 of the UCP 1983, the defendants contended that the first set of documents was discrepant. The draft was in respect of 3,695 bags with a net wet weight of 183,333.6kgs and net dry weight of 177,934.5kgs. There was no single `combined certificate regarding weighting/sampling/determination of moisture by Alfred H Knight, Singapore or Penang stating total TA02 contained`. Instead, there were four sets of warehouse receipts; weight, sampling and moisture determination by Alfred Knight (Malaysia), certificates of assay; and certificates of moisture analysis. There was, however, no combined certificate of assay for the 3,695 bags issued by Alfred Knight (UK).

72 One of the certificates of assay evidenced a tantalum content of 2.44% even though the combined certificate of assay gave the average tantalum content as 2.53%. In my judgment this was clearly a discrepancy. BNP, in fact, considered this to be a discrepancy when it obtained the letter of indemnity.

73 **Stale documents: art 47 UCP**

74 Another point raised was that the warehouse receipts were not issued within 21 days of issue and/or were stale when presented. There is nothing in the credit or the UCP 1983 about the age of warehouse receipts. In my judgment, warehouse receipts are not transportation documents. They do not evidence a contract of carriage from one place to another which is the essential attribute of a transport document. Under the UCP 1983 there is no room for the nebulous concept of `stale documents`. In any event, the so-called concept of stale documents is restricted to transportation documents and does not extend to warehouse receipts. In the absence of an express provision that warehouse receipts must be presented within 21 days, the issuing bank must accept them as presented subject to the documents being compliant in other respects. This ground of rejection though made within time was not a valid ground. As regards discrepancies based on the contention that the warehouse receipts under the second and third drafts were stale, I hold that the ground of rejection was untenable.

75 By remittance schedule dated 2 May 1985, BNP sent the draft for \$331,439.08 together with documents. They were sent on approval basis. The schedule stated: `documents against payment`. I concluded earlier that in fact the draft and documents were sent on collection basis by BNP acting as agents.

76 The documents were received by the defendants on 4 May 1985. On 6 May 1985 the defendants sent an advice to BNP in the following terms:

We are to inform you that we are unable to accept the documents as presented under the above documentary credit owing to the following discrepancies:

(1) Late presentation (Hoogwerff - CWT Service (Pte) Ltd's receipt dated 31 March 1985).

(2) Certificate of weight/assay does not indicate the weight of the merchandise.

However we are communicating with our principals to ascertain whether the documents may be acceptable to them despite the irregularities. We shall advise you of the outcome shortly. Meanwhile, the documents are retained by us at your disposal.

77 The first ground meant that the rejection was based on late presentation of the warehouse receipt. My conclusions on late presentation in respect of the warehouse receipt accompanying the first draft apply to this ground. Accordingly, the ground is rejected.

78 I shall now deal with the second ground of objection relating to the certificate of weight/assay. This certificate stated that the client was Bomar Resources Ltd and not the beneficiaries. It described the material as tin slag. It also stated that it was an assay of the sample. The certificate did not give the marks, packaging or weight of the merchandise.

79 When a technician in a bank examines a document submitted under a documentary letter of credit, he must apply a measure of common sense, logic and knowledge in respect of the merchandise described in the credit. Assay is done on the sample. For the assay of the sample to have any meaning, it must give the quantum of the aggregate which is the source from which the sample is taken. In this case the invoice was based on 320,337.8kgs of tin slag containing tantalum. The certificate of assay did not give this weight. What if the sample had been taken from a small quantity? The sample cannot represent the total quantity. This is a conclusion of common sense. There was nothing in the certificate of weight/assay to relate the goods referred to in the invoices to the certificate as required by art 23.

80 The plaintiffs referred to *Midland Bank Ltd v Seymour* 15 and *Landisi v American Exchange National Bank* 16 and contended that if documents between them give a perfect description of the merchandise, they constitute a sufficient tender. These two cases were decided before the advent of the UCP. They also relied on an unreported decision by Sinnathuray J (Singapore Suit No 4755 of 1983) in support of their contention. These cases were decided on their own facts. The dispute before me is not over description of merchandise. The merchandise was sufficiently described as tin slag. The real problem was whether there was sufficient data to relate the certificate of sample to the invoice. The certificate of data which was specifically required by the credit did not contain the most essential data and indeed no data at all. The plaintiffs failed to overcome the difficulty presented by art 23. In short, the certificate of assay failed to evidence the merchandise as required by the credit. I accordingly hold that this was a valid ground of rejection.

81 **Other discrepancies**

82 In respect of the first draft rejected on 18 May 1985, the documents other than the certificate of weighing, sampling and moisture determination did not indicate that goods were placed in second-hand steel drums or PP bags. The signature of Alfred H Knight on the original warehouse receipt was not verified by the negotiating bank.

83 The former ground was valid because the credit expressly provided that the merchandise must be packed in second-hand steel drums or PP bags. There, however, was no provision in the credit that the original warehouse receipt must be verified by the negotiating bank before any negotiation is to be done. There was an instruction to that effect in the application to the credit but the defendants did not insert the requirement in the credit. I accordingly reject this ground.

84 In the defence several discrepancies which had not been stated in the notice of rejection were pleaded. I have held that the defendants are not entitled to raise them. It is therefore not necessary to consider them.

85 Finally, it must be added that neither BNP nor the plaintiffs appeared to have an interest in this litigation. I say this because the plaintiffs failed to produce the original warehouse receipts to the court. Oral evidence showed that they had been returned to Bomar Resources Inc and that the goods in question had been auctioned off. In my judgment, the plaintiffs, assuming that they had presented proper documents to the defendants within reasonable time, could not in any event be given judgment unless they were in a position to produce the original warehouse receipt to the defendants. The point of course is academic.

86 It would not be out of place to comment on a subsidiary matter. The pleadings in this case were somewhat unsatisfactory in certain matters. The plaintiffs pleaded that the second and third drafts were presented on or about 30 April 1985. The word `about` means it could have been after 30 April 1985, meaning that on their own case there might not have been presentation within time. The pleadings were silent on the meaning and effect of the word `negotiation`. However, there was adequate evidence, documentary or oral, before me to consider the points and give my conclusions. In doing so, I had in mind the following words of advice per Lord Normand in ***The Geo W McKnight*** :¹⁷ `The court is not bound by the pleadings of parties and must proceed upon the evidence which it deems to be most accurate and trustworthy.`

87 Per Lord Jauncey in ***David Selden Courtenay Hannays v Mahadeo Baldeo*** :¹⁸

The purpose of the rules of court is to ensure that litigations proceed expeditiously and smoothly and in a manner which

provides a fair opportunity to all parties to present their cases. They are, however, the servants not the masters of justice and should not be used to defeat or postpone just results.

88 In the result, the plaintiffs' claim is dismissed with costs.

89 Mr Anthony Lee and Mr KS Chung, counsel for the parties, presented their case with consummate competence and skill. I record my appreciation of their assistance.

90 ***Plaintiffs' claim dismissed.***

G P Selvam JC

Anthony Lee and Lim Chong Boon (Allen & Gledhill) for the
plaintiffs
KS Chung (Harry Elias & Partners) for the defendants
