IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 331

Suit 286/1988

Between

Joon Hin (suing as a firm)

… *Plaintiff*

And

Lynnex Timber Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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Joon Hin (suing as a firm) v Lynnex Timber Pte Ltd

[1992] SGHC 331

Suit 286/1988
G P Selvam J
24 December 1992

1 **Judgment:**

2 **The Claim**

3 The plaintiff instituted this action against the defendants for breach of a contract for the sale of sawn timber. The contract was made in Singapore between the plaintiff and the defendants. Both Singapore parties. The shipment was to be effected at Belawan Deli, Indonesia. Payment was by irrevocable letter of credit. The defendants established a letter of credit but it lapsed before any shipment was made. The plaintiff requested an extension of the credit. The defendants refused but promised that they would pay after delivery if the plaintiff would ship the goods which were then ready for loading. The plaintiff relied on the defendants' promise and shipped 58 tons of sawn timber valued at S$27,089.65. The defendants refused to pay the price on the ground that the plaintiff was in breach of the contract. It was further alleged that the plaintiff was in breach of another contract they had with the defendants. The defendants counter-claimed damages for breach of contract and asserted a set-off.

4 **The counterclaim**

5 By the contract which was the subject matter of the counterclaim the plaintiff had agreed to sell and the defendants agreed to purchase 606 tons of sawn timber. Payment was to be by letter of credit. It was asserted that the plaintiff in breach of the contract failed to deliver any timber. The plaintiff delivered a reply and a defence to the counterclaim alleging that the defendants had failed to establish a letter of credit as stipulated in the contract. It was contended that the plaintiff, therefore, was discharged from his obligation to ship any timber.

6 On summons for directions it was ordered that affidavits of the evidence in chief of all witnesses be limited to one affidavit by each witness to be filed and exchanged within six months. It was also ordered that the evidence in chief or the substance thereof of all expert witnesses should be in the form of affidavit and should be exchanged/disclosed within six months.

7 The six months period expired but the defendants failed to deliver any affidavit evidence of an expert.

8 **Objection to evidence**

9 When the case came on for trial the defendants consented to judgment being entered against them for $23,512.06 and costs. That left the counterclaim to be tried. In respect of the counterclaim the defendants tendered an affidavit by a Malaysian lawyer, Mr Dennis George Frost, as an expert. His credentials were: He was an advocate and solicitor in the High Court of Malaya. He had been actively engaged in the timber export trade of Malaysia and Singapore from 1954 until 1990 either as an exporter or as consultant and legal adviser to the trade. He was a founder member of the Timber Exporters Association of Malaysia (formerly known as Federation of Malaya Timber Exporters

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Association) and had served as Vice President and Committee Member from 1957 until 1979 and as part-time executive director from 1979 to 1990. During the above period he had served as member of the Malaysian Timber Board (a ministerial appointment) for approximately seven years representing the Timber Exporters Association of Malaysia. Finally, he had been recently appointed to the panel of lawyers of the Malaysian Timber Industry Board. The evidence which he proposed to give was as follows:

10 In the timber export trade, there has always been flexibility in respect of supplies of timber as well as payments therefor by the very nature of the trade. Even in the case of contractual payment conditions calling for payment by letter of credit, such flexibility has prevailed appertaining to contracts not specifically giving a time limit for the establishing of such letters of credit. It is quite normal in the timber trade for flexibility to be given to the time for establishment of letters of credit, with letters of credit being established after the supplier of the timber has given some intimation to the buyers as to approximately when the goods are anticipated to be delivered by him. Therefore, unless the contract specifically stipulates a time limit for establishing a letter of credit, the establishment of a letter of credit immediately upon entering into a contract for the sale of timber is not regarded as a condition precedent of the contract, provided that the letter of credit is established shortly after intimation by the supplier that the goods would be supplied in the near future or are in the course of manufacture.

11 The plaintiff objected to the evidence to being given either in the form of an affidavit or as oral evidence. The objection was based on delay in delivering the affidavit. It was claimed that the plaintiff was prejudiced in his preparation to meet the proposed evidence.

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12 In order to determine whether what was sought to be adduced as evidence was admissible counsel was asked to state the facts which were sought to be established by the evidence. Counsel was also asked to state whether it was foreign law that the plaintiff was seeking to prove as fact. Counsel's response was that it was evidence of the law which governed the rights of the parties. Counsel for the defendants, however, conceded that all questions of law must be decided on the basis of authorities and reason and not by evidence of witnesses.

13 Apart from delay there were two other objections to the evidence being tendered. First, the matters relied on were not pleaded at all. The defendants were precluded from adducing evidence on the matter not pleaded.

14 **Letter of credit - condition precedent**

15 It has long been established that except when the parties have agreed otherwise, where a contract for sale of goods provides for payment by a banker's letter of credit, the establishing of credit is a condition precedent to the seller making the goods ready for delivery. And the credit must be made available for the whole shipment period.

16 Pavia & Co., S.P.A. v Thurmann-Nielsen < 1952 > 2 QB 84 concerned a contract for the sale of three thousand metric tons of Brazilian groundnuts. It provided for shipment from Brazil to Genoa as to the first fifteen hundred tons in February, March, or April, 1949. As to the second fifteen hundred tons shipment was to be in March, April or May at the sellers' option. Payment was to be by confirmed credit utilisable by sellers on delivery of certain documents. The question arose as to when the credit had to be established. The buyers

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submitted that they were under no obligation to open the credit until the sellers were ready to tender the documents or took steps to ship the goods.

17 On the other hand on behalf of the sellers it was contended that the buyers' obligation under this contract was to make the credit available to the sellers, if they reasonably can, so that the sellers had the whole of the shipping period prescribed by the contract available to them. McNair J held against the buyers said:

18 The contract simply will not work if the buyers are under no obligation to put up a credit until they know that the sellers are ready to ship. Confirmed credit is a devise, as I see it, intended primarily for the sellers' benefit. Unless the buyer is under the obligation of opening this credit and causing it to be confirmed at an early date, the sellers for whose protection the credit is opened may be deprived of part of their legitimate period of shipment.

19 The buyers appealed to the court of appeal which affirmed the decision of McNair J. Somervell LJ said:

20 The contract would be unworkable if the buyer was under no obligation until a date, which he could not possibly know, and which there is no machinery for his finding out, namely, when the seller actually has the goods down at the port ready to be put on the ship. There are no words in the contract which would justify us in arriving at that result and there is no reason why we should imply any such term into this contract. I do not think it is a question of implication. I think when a seller is given a right to ship over a period and there is machinery for payment, that machinery must be available over the whole of that period. If the buyer is anxious, as he might be if the period of shipment is a long one, not to have to put the credit machinery in motion until shortly before the seller is

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likely to want to ship, then he must put in some provision by which the credit shall be provided 14 days after a cable received from the seller, or the like.

21 Denning LJ in his judgment said:

22 The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller, and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. This credit is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise the seller would not be entitled to draw on it.

23 The question in this case is this: In a contract which provides for payment by confirmed credit, when must the buyer open the credit? In the absence of express stipulation, I think the credit must be made available to the seller at the beginning of the shipment period. The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship; and whenever he does ship the goods, he must be able to draw on the credit. He may ship on the very first day of the shipment period. If, therefore, the buyer is to fulfil his obligations he must make the credit available to the seller at the very first date when the goods may be lawfully shipped in compliance with the contract.

24 The Pavia concerned a c.i.f. contract. Diplock J in Ian Stach Ltd v Baker Bosley Ltd < 1958 > 2 QB 130 held that even in the case of a f.o.b. contract the credit must be established.

25 In Plasticmoda Societa per Azioni v Davidson (Manchester) Ltd < 1952 > 1 Lloyds Rep 538 Denning LJ said:

26 It is settled by the case of Pavia & Co S.P.A. v Thurmann-Nielsen, that, when nothing is said, the buyer must establish the credit at the beginning of the shipment period. There was in this case no shipment period, but only a shipment date, a specified date for shipment, originally Mar. 9, 1950, varied subsequently to May 15, 1950. The letter of credit ought, no doubt, to have been established a reasonable time before that date. That was a condition precedent to the obligation of the seller to ship the goods, and that condition precedent was not fulfilled.

27 Later in Sinason-Teicher Inter-American Grain Corporation v Oilcakes and Oilseeds Trading Co Ltd < 1954 > 1 WLR at 1400 Denning LJ put the following gloss on the Pavia case:

28 The Pavia case does not decide that the buyer can delay right up to the first date for shipment. It only decides that he must provide the letter of credit at least by that date. The correct view is that, if nothing is said about time in the contract, the buyer must provide the letter of credit within a reasonable time before the first date for shipment.

29 The true position in my view is that if the shipment period is long the buyer must establish the credit to be available on the first date of shipment. On the other hand if the period is short the buyer must establish it within a reasonable time before the first date of shipment to afford ample time to the seller to procure or prepare the goods for shipment.

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30 The purpose of the rule is to facilitate trade by giving certainty in favour of the seller before he procures the goods. The seller may also use the credit to establish a back to back credit in favour of his supplier. The buyer however has no right to demand proof of readiness of goods before establishing the credit. The seller if he wants to inspect the goods first should make a stipulation to that effect in the contract. If the buyer is in breach of the documentary credit clause such breach will discharge the seller from his obligations under the contract. Further the buyer will be liable to the seller in damages if they can be proved. The proposition made by Mr Dennis Frost is a complete anathema to principles which are well established and have been acted upon for the last 50 years. There is no reason to depart from them.

31 In this case the defendants agreed to establish a credit. The contract did not stipulate some other obligation. He failed to establish the credit - a condition precedent to the plaintiff's obligation to prepare the goods. The defendants' counterclaim accordingly had no legal basis or merit. I therefore held that the proposed evidence of Mr Dennis Frost was not admissible. Thereupon the defendants withdrew the counterclaim and agreed to pay the costs of the counterclaim to the plaintiff.

G P Selvam J

Stanley Wong for the plaintiffs
Yeo Kee Chin for the defendants

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