**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[1993] SGHC 146**

Suit 2254/1992

Between

Kvaerner Singapore Pte Ltd

… *Plaintiff*

And

UDL Shipbuilding (Singapore) Pte Ltd

… *Defendant*

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# GROUNDS OF DECISION

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Civil Procedure — Injunctions; Contract — Contractual terms; Credit and Security — Guarantees and indemnities

Version No 1: 11 Sep 2026 (01:05 hrs)

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# Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd

**[1993] SGHC 146**

Suit 2254/1992
G P Selvam JC
30 June 1993

1 Cur Adv Vult

2 This matter involves an application to forestall payment under a performance guarantee and it is founded on the defendants` failure to open a letter of credit in favour of the plaintiffs.

3 The plaintiffs, the applicants, a company incorporated in Singapore, contracted to sell to the defendants a pumping system and a cargo valve control system (`the equipment`) for a total price of $1,000,000. The equipment was to be installed in an ocean tanker the defendants were constructing for a Taiwanese company called Energy Shipping Co Ltd (`Energy Shipping`).

4 Delivery of the equipment was to be in instalments beginning with the 25th week of 1992 (20 June 1992) and ending with the 32nd week (8 August 1992). Under the agreement the defendants were required to make part payment equivalent to 30% of the purchase price and the plaintiffs were required to deliver to the defendants a banker`s performance guarantee (`the performance guarantee`) for an equivalent amount. The performance guarantee was to be

valid until the delivery of the equipment by the plaintiffs to the defendants on 2 August 1992. After delivery of the equipment the amount of the performance guarantee was to be reduced to 10% of the total purchase price and continue to be valid up to the commissioning of the system or until 30 October 1992 whichever was earlier. The defendants were further required to make payment of the balance of the purchase price amounting to $700,000 being 70% of the total purchase price by way of an irrevocable letter of credit issued by a Singapore bank. The letter of credit was to be issued 30 days prior to shipment which the plaintiffs computed as 1 June 1992.

5 The plaintiffs caused to be issued in favour of the defendants a performance guarantee dated 2 April 1992 and issued by Den Norske Bank AS (`the bank`). By the performance guarantee the bank undertook `unconditionally and irrevocably to pay to you on your first written demand to us in case that the seller has failed or refused to fulfil his obligations under the contract notwithstanding any objection by the seller the amount of the letter of guarantee or any part thereof up to a maximum amount of Singapore dollars Three Hundred Thousand only (S$300,000) equal to 30% of the total contract price of S$1,000,000`.

6 The defendants made the deposit of $300,000 but failed to establish the letter of credit for the sum of $700,000 as they had undertaken. Notwithstanding the defendants` failure, the plaintiffs said that they delivered on 5 June 1992 equipment to the defendants $14,200 in value without receiving any payment. In June the defendants were informed that the goods were ready for shipment. Yet there was no letter of credit established. In view of the defendants` failure, the plaintiffs by letters dated 13 October 1992 and 27 October 1992 informed the defendants that in the event the letter of credit was not issued before 1

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November 1992 the plaintiffs would treat the defendants as having repudiated the sale of goods agreement. Notwithstanding this no letter of credit was established by the defendants. Instead the defendants made a demand for payment under the performance guarantee on 29 October 1992. To forestall receipt of any payment the plaintiffs on 30 October 1992 issued these proceedings and applied for an interlocutory injunction. The effect of such injunction would restrain the bank from making any payment after it received notice of the injunction. On the same day I granted an ex-parte order good until the next day restraining the defendants from receiving the moneys which in effect forestalled any payment by the bank with notice of the order. I further directed service of the papers on the opponents for the matter to be heard inter partes the following day.

7 The reason why I granted the injunction was the familiar principle: that when a contract for the sale of goods stipulates for payment for the goods by a letter of credit, it must be established by the agreed date or a reasonable time before shipment date to enable the seller to prepare the goods. The letter of credit is a condition precedent to the seller`s obligation to ship or deliver the goods and the time for establishing the credit is of the essence of the contract of sale. The opening of credit is not merely a matter of mode of security which enables the seller to obtain payment before the goods are delivered. If the buyer fails to establish the credit, the seller at his option may treat the contract as discharged and recover damages for breach of contract from the buyer unless the seller has waived the requirement for the credit. Where the seller waives the original time for the opening of the credit the credit must be established within the extended time. See ***Pavia & Co SPA v Thurmann-Nielsen, Ian Stach Ltd v Baker Bosley Ltd, Trans Trust SPRL v Danubian Trading Co Ltd, Sinason-Teicher Inter-American Grain Corporation v Oilcakes and Oilseeds***

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***Trading Co Ltd*** , and ***Plasticmoda Societa Per Azioni v Davidsons (Manchester), Ltd.*** On the evidence before me, the defendants persisted in their failure to establish the letter of credit even though the plaintiffs as the sellers granted indulgence to the defendants as buyers. The plaintiffs never waived the requirement for the credit for they merely extended the time and at all times insisted on the credit. The defendants never in fact opened it. The plaintiffs were therefore released from their obligation to deliver the equipment by reason of the defendants` failure to establish the credit. The credit was also a condition precedent to their right to call on the performance bond. And they failed to fulfil the condition precedent. Accordingly it was eminently just and convenient to restrain a party from taking advantage of his own wrong.

8 The matter was eventually heard inter partes on 7 November 1992. At all times the defendants never disputed that they failed to provide the letter of credit. They merely asked for extension of time to which they were not entitled.

9 The defendants invoked the principle in ***Edward Owen Engineering Ltd v Barclays Bank International Ltd*** , that except in cases of established fraud known to the issuer of the performance guarantee he cannot be restrained from making payment on the ground that the party to the underlying contract disputes liability. Later cases show that it is not an immutable principle of universal application. And in my view it has no application where the injunction is sought against a party to the underlying contract who seeks to take advantage of the performance guarantee where by his own volition he fails to perform a condition precedent in the sense I have described. See ***Elian and Rabbath v Matsas and Matsas*** , and ***Potton Homes Ltd v Coleman Contractors Ltd.*** Eveleigh LJ in the latter case said at p 28 :

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> *As between buyer and seller the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract prima facie, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. If the contract is avoided or if there is a failure of consideration between buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand. It is true that in* ***Edward Owen Ltd v Barclays Bank*** *it was unsuccessfully submitted that the failure of the buyer to procure a letter of credit in accordance with the contract terms should entitle the plaintiffs to an injunction against the bank. That case, however, was not concerned with the position as between buyer and seller, and any statements as to the irrelevance of the failure to provide the letter of credit must be seen in that context.*

10 The present case falls within the principle I have stated.

11 Furthermore, a demand under the performance guarantee can be made only when `the seller has failed or refused to fulfil his obligations under the contract`. The seller`s failure or refusal is a condition precedent to the buyer making a demand. An assertion to that effect is implied in a demand made by the buyer. In circumstances where it can be said that the buyer had no honest belief that the seller has failed or refused to perform his obligation, a demand by the defendants/buyers in my view is a dishonest act which would justify a restraint order. On the facts of the case a demand made by the buyer was utterly lacking in bona fides. For all these reasons I continued the injunction until further order.

12 Application allowed.

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G P Selvam JC

Herman Jeremiah (Haridass Ho & Partners) for the plaintiffs
Alvin Yeo and Sim Mei Ling (Wong Meng Meng & Partners) for the defendants

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