IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 225

Suit 994/1992

Between

Energy Shipping Co Ltd

… *Plaintiff*

And

UDL Shipbuilding (Singapore) Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Energy Shipping Co Ltd v UDL Shipbuilding (Singapore) Pte Ltd

[1994] SGHC 225

Suit 994/1992
G P Selvam J
31 August 1994

1 **Judgment:**

2 CORAM: G P SELVAM, J

3 **GROUNDS OF JUDGMENT**

4 The Parties/Background

5 Energy Shipping Co Ltd, ("the plaintiffs"), a Taiwanese company, were engaged in the business of owning and managing specialised vessels for the carriage of crude oil and oil products.

6 The defendants, UDL Shipping (Singapore) Pte Ltd, were incorporated in Singapore to carry on the business of shipbuilding and shiprepairing. The dispute between the parties relates to a shipbuilding agreement.

7 During the late 1980s the plaintiffs required two new buildings. As both vessels were to be operated under Taiwanese flag it was required by Taiwanese

law that they should be built by a Taiwanese shipyard. The major shipyards in Taiwan capable of constructing the required ships were busy constructing larger vessels such as ULCCs and VLCCs. The plaintiffs found that it would be cheaper to build the vessels outside Taiwan. The plaintiffs then applied for and obtained the necessary exemption from the Ministry of Communications ("MOC") in Taiwan to enable them to place their orders for these vessels outside the Taiwan. Thereafter the plaintiffs invited tenders from various shipyards to build the two vessels. The plaintiffs, having done a survey of the region, preferred Singapore and awarded the contract to a Singapore shipyard called Argos Engineering Pte Ltd ("Argos Engineering").

8 This led to the signing of the shipbuilding contract between the plaintiffs and Argos Engineering on 5 December 1989. I shall refer to this as "the Argos contract". Under the Argos contract the construction price was US$7,460,000 payable in Singapore dollars at the fixed exchange rate of S$1.98 per US dollar and the delivery of the vessel was to be effected not later than on 31 December 1991. The performance of the Argos contract was guaranteed by Chung Wah Shipbuilding and Engineering Co Ltd ("Chung Wah") the parent company of Argos. Chung Wah was a public listed company in Hong Kong.

9 The Argos contract required Energy Shipping to make payments as follows :

10 (a) US$373,000 representing 5% of the contract price upon signing of the contract.

11 (b) US$373,000 upon laying of the keel.

12 (c) US$373,000 upon launching of the ship.

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13 (d) US$373,000 upon completion of sea trials.

14 (e) US$5,968,000 being 80% of the price plus any price adjustment upon delivery of the vessel. There was to be a letter of credit in respect of this payment.

15 Although the Argos contract required the plaintiffs to arrange for a letter of credit, they actually arranged for a letter of guarantee in the sum of US$5,968,000 (being the equivalent of 80% of the contract price) to be issued by the Bank of Communications ("BOC") in favour of Argos.

16 It was issued on or about 1 June 1990 and called "a payment guarantee". I set out, in a condensed form, the letter of guarantee :

17 Quote: Argos Engineering Pte Ltd No 3, Benoi Road, Jurong Town Singapore 2262

18 Our letter of guarantee No 117791066401

19 We refer to the shipbuilding contract dated 5th day of December, 1989 (hereinafter referred to as ("the said Contract") entered into by and between Argos Engineering Pte Ltd, (hereinafter called the "the Builder") and Energy Shipbuilding Co. Ltd. (hereinafter called "the Buyer"). Under the said contract, the builder has undertaken to construct and deliver to the buyer on/or before (contractual delivery date) a vessel bearing builder's Hull No 8629 (hereinafter referred to as "the Vessel"). In connection with the above, if the builder shall become entitled to payment we Bank of Communications, do hereby irrevocably and unconditionally guarantee :

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20 (A) Upon the first written notice of the builder to us that the buyer has failed in the performance of its obligations under the contract we shall without demur and without any further confirmation from the buyer, pay to the builder USD 5,968,000.

21 (B) This guarantee is irrevocable and any change in the corporate constitution of the buyer, or of the builder shall not discharge our liability hereunder.

22 (C) Although as between the buyer and ourselves we are guarantor only, we agree and confirm that between ourselves, and the builder we shall be treated as if we were the principal debtor and shall pay the amount in (A) above without requesting you to take any further steps or procedures against the buyer.

23 (D) We shall not be discharged or released from our obligations under this guarantee, by any arrangement made between the buyer and the builder without our consent, or by any alteration in the obligations undertaken by the buyer or by forbearance by the builder whether as to payment time, performance or otherwise.

24 (E) This guarantee shall be valid till December 31, 1991 or until the payment hereunder has been effected whichever is earlier.

25 (F) No assignment of this guarantee to any third parties shall be made without the prior written consent of our bank.

26 In fulfilment of their obligations under the Argos contract, the plaintiffs paid to Argos the first instalment on 19 December 1989 and the second

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instalment on 6 August 1990. By then, the vessel's keel had been laid. Thereafter there was no progress in the construction of the vessel.

27 This was because by March 1991, Argos Engineering suffered liquidity problems and was unable to proceed with the construction of the vessel. This was a radical change of the situation. It brought about the intervention of another Hong Kong public company called UDL Holdings Ltd ("UDL").

28 There were then negotiations between the plaintiffs, UDLH, Chung Wah and Argos Engineering whereby UDLH, Chung Wah and Argos Engineering sought, inter alia, a novation of the Argos contract from Argos Engineering to a wholly owned subsidiary of UDLH, ULD Shipbuilding (Singapore) Pte Ltd, the defendants herein. An increase in the contract price and a delay in the delivery date were sought by the UDLH side. The negotiations culminated in an agreement in writing dated 7 March 1992 ("the novation agreement") between Argos Engineering, Chung Wah, UDLH and Energy. The defendants were not a party to this agreement.

29 By then the delivery date under the Argos contract had passed and the payment guarantee issued by BOC had expired.

30 The novation agreement contained the following material provisions :

31 1. The Contract shall promptly and with effect as of the date hereof be assigned to UDL Shipbuilding (Singapore) Pte Ltd., a wholly owned subsidiary of UDL (hereinafter referred to as the "Assignee"). Energy shall as of the date hereof be deemed to have released Argos from all liability under the Contract.

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32 2. The parties agree that the delivery date under the Contract shall be deferred from 31 December 1991 to 30 December 1992 and the terms of the Contract shall, except otherwise provided apply as if the deferred date was the date originally agreed therein.

33 5. The purchase price referred to in the Contract shall be changed from "United States Dollars Seven Million Four Hundred Sixty Thousand Only (US$7,460,000)" to "United States Dollars Eight Million Four Hundred and Seventy Thousand and One Hundred Only (US$8,470,100)". The difference between the original & the new contract prices in the amount of United States Dollars One Million Ten Thousand and One Hundred Only (US$1,010,100) shall be added to the 5th instalment and be payable upon delivery of the vessel.

34 6. The requirement of the bank guarantee under Article XIX (c) of the Contract shall be waived by the Assignee and other parties concerned.

35 7. Energy shall establish a revolving letter of credit of up to the limit of Singapore Dollars Eight Million (S$8,000,000) in favour of UDL or the Assignee to be drawn down by UDL or the Assignee according to the terms of purchase orders issued by UDL or the Assignee for the purchase of material and equipment required for the completion of the vessel. Details of the purchases shall be supplied to Energy by UDL or the Assignee. In the event of that this letter of credit is not established within 45 days of the execution of this agreement, the new delivery date shall be extended accordingly. If this letter of credit is not established within 60 days of the execution of the agreement, the Contract shall become null and void.

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36 8. Energy shall pay the Assignee or UDL Singapore Dollars One Million within 7 days of the execution of this Agreement and a further Singapore Dollars One Million within 14 days of the execution of this Agreement.

37 9. The total amount disbursed under Clause 7 and 8 herein shall be offset against the 5th instalment as an adjustment to the Contract Price pursuant to Article II 5(e) of the Contract.

38 10. All technical details and specifications of the vessel shall be agreed upon between Energy and the Assignee within 7 days of the execution of this Agreement. In the event that any such technical details and specifications are not agreed upon within 7 days of the execution of this Agreement, the new delivery date referred to in Clause 2 hereof shall be extended accordingly.

39 11. Upon execution of this Agreement, Energy shall become the owners of materials, and equipment as and when these are ordered, procured or used for the ship. Energy shall become owners of the hull, machinery and vessel in general as the building work progresses. The foregoing provision notwithstanding, the Assignee may exercise their right to retain the vessel pursuant to Article XI of the Contract.

40 14. Each of the parties hereto covenants to each of the other that it will execute such documents within 14 days or other date as agreed upon by the parties hereabove and take such other action as shall be required to give full force and effect hereto and to perfect the transactions resulting herefrom.

41 The words in italics "the contract" mean the original contract between Argos Engineering and the plaintiffs. The italics were supplied by me .

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42 Pursuant to cl 14 of the novation agreement, a formal deed of novation was made on 12 March 1992 by Argos, UDLH, the defendants and the plaintiffs ("the formal deed"). Thus the defendants became the assignees of the Argos contract with the result that the plaintiffs released Argos Engineering from its liabilities under the contract and the defendants assumed the same. Under the new arrangement the contract price was increased by $2,000,000 and the delivery date was extended to 31 December 1992. Another important feature was that ownership of the materials and equipment purchased or used for the ship became vested on the plaintiffs as and when the same were ordered, procured or used.

43 The Plaintiffs' failure to establish revolving letter of credit

44 The plaintiffs paid $2,000,000 as required by cl 8 of the novation agreement. But the revolving letter of credit was not established within the stipulated time. The defendants, relying on the plaintiffs' failure to establish the revolving letter of credit, stated on 15 May 1992 that they were entitled to treat the agreement as null and void. Their letter read as follows :

45 We refer to clause 7 of the agreement dated 7 March 1992 made between Argos Engineering Pte Ltd, Chung Wah Shipbuilding & Engineering (Holdings) Co Ltd and UDL Holdings Limited (the "Agreement") which required you to furnish us with a revolving or standby letter of credit for S$8,000,000 within 60 days of the execution of the Agreement. The Agreement required the precise compliance by you of the provisions of clause 7 by the time stipulated in clause 7 and as you have failed or refused to furnish us with the revolving or standby letter of credit within the time stipulated therein, the construction contract dated 5 December 1989 in respect of the above hull (the

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"Contract") has been repudiated by you, which repudiation we accept and by the provisions of clause 7 of the Agreement, the Contract is null and void.

46 In the circumstances, we are no longer bound to perform our obligations under the Contract and we are entitled to and will keep all payments made by you pursuant to the Contract and the Agreement and without prejudice to our rights, dispose of the subject matter of the Contract. In addition, we shall hold you liable for all losses and damages incurred or suffered by us as a consequence of or resulting from your breach or default of clause 7 of the Agreement. (Italics supplied by me) .

47 The plaintiffs did not deny their failure to establish the revolving letter of credit. They said that they were not under an obligation to provide the revolving letter of credit. They pleaded their case as follows :

48 14. On or about 25 March 1992 at a meeting held at the office of UDL Singapore, UDL Singapore through their representative Y K Leong orally requested Energy represented by Paul Cheng and Vincent Wong to amend Clause 7 of the March Agreement and provide a standby letter of credit instead of a revolving letter of credit. Alternatively such amendment was orally requested by Simon Lim of UDL Singapore at a second meeting on 25 March 1992 at Hong Kong Bank. Such meeting was attended by Wong Sok Chong and Pang Tit Khuen of Hong Kong Bank.

49 15. Such amendment was agreed by Energy through Paul Cheng and/or Vincent Wong on or about 25 March who offered to provide a Standby Letter of Credit in similar terms as the BOC Guarantee referred to in paragraph 4 above, save as to amount, name of Builders, and validity date which was accepted by Simon Lim. Alternatively, if it be contended by UDL Singapore

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that they did not propose such amendment on 25 March or at all, nevertheless it was agreed between Energy and UDL Singapore on or about 25 March, alternatively 11 April, that the revolving letter of credit required by Clause 7 of the March Agreement be replaced by a standby letter of credit. On a proper construction of such amendment Energy's obligation was to provide a standby letter of credit in favour of UDL Singapore to be drawn down in one drawing in an amount equal to sums expended by UDL Singapore pursuant to contracts entered into or to be entered into by UDL Singapore with various suppliers for the purchase of materials and equipment required for the completion of the Hull 8629, such draw down to be effected on delivery of Hull 8629 to Energy. It was an implied term that UDL Singapore would accept the tender of terms of a standby letter of credit which complied with the said obligations. Such term was implied to give business efficacy to the March Agreement and in particular Clause 7 as amended. UDL Singapore's obligations was to establish a credit facility with Hong Kong Bank to pay for the said materials and equipment until reimbursement by Energy on delivery or draw down under the standby letter.

50 16. Pursuant to their obligations under Clause 7 as amended, on or about 16 April 1992, Energy tendered terms of a standby letter of credit to UDL Singapore. Alternatively Energy satisfied their obligations under Clause 7 of the March Agreement on or about 1 May 1992 by tendering the terms of a standby letter of credit to UDL Singapore by Vincent Wong handing the same to K K Goh, the Commercial Manager of UDL Singapore.

51 17. Wrongfully and/or in breach of an implied term referred to in paragraph 15 above UDL Singapore refused to accept the terms of the standby letter of credit but by a letter dated 15 May 1992 purported to hold Energy in repudiation of the Contract on the grounds that Energy had failed to provide a

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revolving or standby letter of credit within 60 days of the execution of the March Agreement.

52 18. Further or in the alternative in breach of Clause 7 as amended of the March Agreement on or about 11 April 1992 UDL Singapore presented terms of a standby letter of credit to Energy which were not consistent with Clause 7 as amended of the March Agreement but which UDL Singapore now required. These terms were not consistent with Clause 7 of the March Agreement (inter alia) because :

53 (1) The beneficiary required was Hong Kong Bank instead of UDLH or UDL Singapore.

54 (2) It required BOC to honour any indebtedness of UDL Singapore to Hong kong Bank and was not restricted to indebtedness arising in relation to Hull 8629 generally nor the purchase contracts for material and equipment therefore in particular.

55 (3) The document permitted partial drawdowns.

56 19. Further or in the further alternative in breach of the March Agreement UDL Singapore required a further amendment to Clause 7 namely that the standby letter of credit to be acceptable to the Hong Kong Bank.

57 20. Such demand for further amendments to Clause 7 of the March Agreement were again made by UDL Singapore on 13, 15 and 18 April. None of the proposed terms set out in paragraphs 18 and 19 were agreed to by Energy.

58 21. Further or alternatively Hong Kong Bank refused to accept any standby letter of credit tendered by Energy and/or by Bank of Communications

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on Energy's behalf unless the financial risk of UDL Singapore was borne by Energy and/or BOC. Insofar as Hong Kong Bank acted as agents for UDL Singapore in the exchanges relating to the production of a standby letter of credit pursuant to Clause 7 as amended of the March Agreement such demand was a breach of the said Clause 7 by UDL Singapore. Such demand was made to Vincent Wong representing Energy by Wong Sok Cheng of Hong Kong Bank on 30 April 1992.

59 22. Further or in the further alternative the letter of UDL Singapore dated 15 May 1992 referred to in Paragraph 17 above was in itself a repudiation by UDL Singapore of the Contract or the March Agreement as it evinced an intention not to be bound thereby, nor any part thereof. Such repudiatory breach was accepted by Energy commencement of proceedings on 26 May 1992 alternatively by call upon UDLH under the Performance Guarantee alternatively by the service of this statement of claim.

60 23. Alternatively by reason of the facts and matters referred to in paragraphs 14, 15, 18, 19 and 21 and whilst Energy agreed only to the amendment to Clause 7 of the March Agreement as set out in paragraphs 14 and 15 Energy was prepared to explore the possibilities of providing UDL Singapore with a standby letter of credit as sought and as set out in paragraphs 18, 19 and 21. It was implicit in Energy's acceptance of the amendment to Clause 7 of the March Agreement as set out in Paragraphs 14 and 18 above, and their preparedness to explore the matters which UDL Singapore sought as set out in paragraphs 18 and/or 19 and/or 21 that the time period for the provision of the standby letter of credit be extended to 24 May, and then sequentially to 10, 12, 14, 17 and 29 June 1992. In breach of the extensions of the period within which Energy were to tender a standby letter of credit on terms as set out in paragraphs

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14 and 15, UDL Singapore repudiated the same and for particulars of which Energy repeat paragraph 22 above.

61 24. Further or alternatively Clause 7 of the March Agreement required UDLH and UDL Singapore to provide Energy with copies of purchase orders made or to be made by UDLH or UDL Singapore with various suppliers of materials and equipment necessary for the completion of Hull 8629 prior to the establishment of a revolving letter of credit. Clause 10 of the March agreement required all technical details and specifications of Hull 8629 to be agreed between Energy and UDL Singapore within 7 days of the execution of the March Agreement. It was an implied term of the March Agreement, implied to give business efficacy thereto and reflecting the intention of the parties; that the purchase orders would be made and copies thereof supplied to Energy immediately upon the technical details being agreed.

62 25. In breach of such implied term UDL Singapore failed to provide the required purchase orders immediately after 14 March 1992 but Argos provided the same on 30 March 1992. By reason of such breach, the period within which Energy had to provide the required letter of credit was reduced to 37 days instead of 60. It was a further implied term, implied to give business efficiency to the March Agreement and the intention of the parties thereto at 7 March that the 60 day period would be extended to give Energy the same period to produce the letter of credit as if UDL Singapore had complied with the March Agreement and produced the necessary purchase orders immediately on 14 March 1992. By reason of the foregoing the period set out within Clause 7 of the March Agreement was therefore extended to 31 May 1992. UDL Singapore were in breach of the terms set out above and for particulars thereof paragraph 22 above is repeated.

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63 The defendants' case

64 The defendants responded to the plaintiffs' assertions in the statement of claim by the following assertions in their defence :

65 7. Save that there was a meeting on 25 March 1992 of Mr Paul C P Cheng and Mr Vincent Wong of the plaintiffs, Mrs Wong Sok Cheng and another of Hongkong and Shanghai Banking Corporation and Mr Simon Lim and Mr Franklin Lau of the Defendants, paragraphs 14 and 15 are denied. The defendants had not at any material time, whether at this meeting or on 25 March 1992 or at any other meeting, requested the plaintiffs to amend clause 7 of the March Agreement to provide for a standby letter of credit instead of a revolving letter of credit as required under the said clause.

66 8. At the said meeting on 25 March 1992, the defendants only indicated their willingness to accept a standby letter of credit instead of a revolving letter of credit. The defendants confirmed their position by a letter dated 11 April 1992. All other requirements of clause 7, in particular, that the letter of credit be furnished within 60 days from the date of the March Agreement, (i.e. by 6 May 1992) remained unchanged.

67 9. The defendants deny that the plaintiffs had tendered any terms of a standby letter of credit to the plaintiffs on 16 April 1992 or 1 May 1992 or at all as alleged in paragraph 16 of the Re-Re-Amended Statement of claim and put the plaintiffs to strict proof thereof.

68 10. On or about 16 April 1992, the plaintiffs' Bank of Communications offered to the defendants a letter of guarantee. The letter of guarantee was not

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in compliance with clause 7 as modified by the defendants in their letter of 11 April 1992 in the following respects :

69 (a) it was not a letter of credit, whether revolving or standby, and was in term and essence a performance guarantee;

70 (b) it did not provide for progressive payments to the defendants against its representation of purchase orders; and

71 (c) it only provided for payment at the completion of the Contract in the event that the plaintiffs failed to pay the defendants the full outstanding sum of $8 million.

72 11. By letter dated 18 April 1992 to the plaintiffs, the defendants rejected the letter of guarantee on the ground that it was fundamentally different from the agreement set out in clause 7 of the March Agreement. By this letter, the defendants also reminded the plaintiffs that the contract would be null and void if the letter of credit was not established within 60 days from the date of execution of the March Agreement.

73 12. By reason of the matters aforesaid, the defendants deny that they had wrongfully and/or were in breach of the March Agreement by refusing to accept the plaintiffs' alleged standby letter of credit as alleged in paragraph 17 of the Re-Re-Amended Statement of Claim.

74 13. The defendants deny paragraphs 18, 19, 20, 21, 22 and 23 of the Re-Re-Amended Statement of Claim and put the plaintiffs to strict proof thereof. As the plaintiffs had failed and/or refused to furnish the revolving or alternatively, standby letter of credit to the defendants by 6 May 1992, that is

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within 60 days from the execution of the March Agreement, the plaintiffs were themselves in breach of the March Agreement.

75 14. By virtue of the plaintiffs' aforesaid breach as stated in paragraphs 10 and 13 above, the defendants are therefore entitled to treat the Contract as null and void which they did on 15 May 1992.

76 15. Save that clause 10 of the March Agreement required all technical details and specifications of Hull 8629 to be agreed between the plaintiffs and defendants within 7 days of the execution of the March Agreement, paragraph 24 of the Re-Re-Amended Statement of Claim is denied. The defendants say that the said clause is for the benefit of the defendants and is not relevant to the provisions of the purchase orders by the defendants to the plaintiffs.

77 16. The defendants deny that they were in breach of the March Agreement as alleged in paragraphs 24 and 25 of the Re-Re-Amended Statement of Claim as there was no express or implied condition or requirement in the March agreement for the defendants to furnish the purchase orders to the plaintiffs immediately after 14 March 1992, that is, upon agreement by the parties as to the technical details and specifications of Hull 8629. In any event, the defendants aver that they had provided copies of the purchase orders to the plaintiffs on or about 27 March 1992.

78 17. Further or alternatively, the defendants aver and maintain that the supply of the purchase orders to the plaintiffs was not a condition precedent to the establishment of the revolving or standby letter of credit by the plaintiffs to the defendants.

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79 18. In any event, the plaintiffs knew at all material times and accepted that the purchase orders would be issued by the defendants on a case by case basis as and when materials and equipment were required for the completion of Hull 8629 as the plaintiffs had on or about 26 March 1992 agreed, for the defendants to issue certificates to enable the plaintiffs to acknowledge the placement of the purchase orders as and when they were required.

80 19. If at all the defendants had failed to provide the required purchase orders immediately after 14 March 1992, (which is not admitted), the defendants say that this does not constitute a fundamental breach of the March Agreement and/or would entitle the plaintiffs to have a cause of action and claim for damages thereof.

81 20. By reason of the plaintiffs' aforesaid breach of the March Agreement, the defendants were thereby not furnished with the necessary finance to purchase the materials and equipment required for the completion of Hull 8629.

82 Construction of clause 7

83 Certain preliminary comments on cl 7 of the novation agreement would be apt and useful before I begin a discussion on the evidence of the main issue of the case - that is who was in breach of contract.

84 The standby letter of credit is an American invention. It was a devise to overcome a rule which prohibited banks from issuing bonds by way of guarantees. It is now generally used in international business transactions just as a documentary letter of credit. The Uniform Customs and Practice for Documentary Credits (1983 Revision) seeks to define "documentary credits" and "standby letters of credit" as "any arrangement, however named or

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described, whereby a bank acting at the request and on the instructions of a customer is to make payment for or to the order of a third party against stipulated documents provided that the terms and conditions of the credit are complied with". : See Article 2. Notwithstanding this definition The Law of Bankers' Commercial Credits by H C Gutteridge and Maurice Megrah, 7th Ed at p 15 makes this comment :

85 A relatively recent innovation to the normal documentary credit financing transaction is the requirement that the due performance of a contract for the supply of, especially, capital goods shall be accompanied by a performance bond or simple demand guarantee, known as a standby credit, referred to in the 1983 Revision of the Uniform Customs, but not defined. The effect of such a bond or guarantee must depend upon its terms and when first introduced it included an undertaking to pay, but without conditions.

86 The conventional understanding of the term "standby credit" therefore, is that it is a performance guarantee. But it is not a term of art. The nature of a letter of credit depends upon its contents and function and not on how the parties chose to describe it.

87 What was issued by the Bank of Communications to Argos Engineering, strictly speaking, was not a letter of credit but a simple performance or a payment guarantee. It could be encashed only when the contract had been performed - that is when the ship had been constructed and was ready for delivery. During the construction the builder could not make a partial draw-down. In other words the builder had to source his own funds to finance the construction and would own the ship until he delivered it against payment.

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88 The conventional understanding of a revolving letter of credit is that it contemplates reviving payments against supply of goods or services and the maximum amount for each drawing remains constant. A banker giving evidence in Nordskog & Co v National Bank (1922) 11 Lloyds Rep 652 at p 656 accurately described it as follows :

89 It is a little difficult to define, but a revolving credit technically means a credit for a certain sum at any one time outstanding, which is automatically renewed by putting on at the bottom what has been taken off the top. If you have a revolving credit for 50,000 open for three months, to be operated on by drafts at 30 days sight as drafts are drawn, they temporarily reduce the amount of the credit below 50,000. As these drafts run off and are presented and paid they are added again to the top of the credit, and restore it again to the 50,000. That is what is known technically as a revolving credit, and it is automatic in its operation and does not need any renewal.

90 It should be noted that the amount stated in a revolving credit is the maximum amount available for any one drawing and not the total amount of the drawings, which would depend on the number of drawings permitted under the underlying supply agreement and the banker's undertaking to be bound by the seller's entitlement to make such number of drawings.

91 Clause 7 of the novation agreement spoke of "a revolving letter of credit up to the limit of S$8,000,000 in favour of UDL or the plaintiffs to be drawn down by UDL or the plaintiffs according to the terms of the purchase orders issued by UDL or the plaintiffs for the purchase of material and equipment required for the completion of the vessel. Details of the purchases were supplied to Energy by UDL or the plaintiffs". The true construction of the above clause is that the parties were not using the term "revolving letter of credit" in its

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conventional sense or as a term of art which entitled the beneficiary to make repeated drawings up to $8,000,000 in respect of each drawing. It was a simple "documentary letter of credit" or "standby letter of credit" as defined in the Uniform Customs (1983). It was a credit providing for partial withdrawals for the purchase of materials and equipment required for the construction of the vessel as and when a confirmed purchase order was in place. Thus the plaintiffs provided the finance for the purchase of materials and equipment. Once such a credit was firmly in place the defendants would be in a position to convince suppliers of the source of their funds to pay for the order or use it to make back-to-back arrangements with their own bank to issue secondary letters of credit to the prospective suppliers. The fundamental objective of the arrangement was that the plaintiffs' bankers pay for the purchase of materials and equipment against purchase orders. This was tied in with clause 11 of the novation agreement which gave ownership to the plaintiffs in the hull and materials and equipment purchased using the credit.

92 The express provision in cl 7 entitling the defendants to an extension of delivery date in case the credit was not established within 45 days and to terminate the contract to build the vessel in case it was not established within 60 days shows that the establishing of the credit went to the heart of the matter. The purchase orders were essential not for the opening of the credit but for making draw downs under the credit. The credit therefore comes first and the purchase orders come next. Sixty days was more than ample time to establish the credit. Under the special circumstances of this case it was a generous period.

93 The above analysis of cl 7 clearly makes commercial sense and was so understood by the plaintiffs. The plaintiffs' witness, Mr Paul Cheng, in connection with the revolving letter of credit was asked this question: (at p 17

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of Notes of Evidence) "The financial risk was on Energy?" His unqualified answer was:

94 "Yes". It was also put to him that the purchase orders were meant for draw-down.

95 He responded saying "Yes".

96 Mr Paul Cheng stated at p 18 the terms of the revolving letter of credit in the following words :

97 "Limit $8 million Partial draw down Confirmed purchasing order Signature of yard and us. The beneficiary was the yard"

98 Mr Paul Cheng who had earlier offered a revolving letter of credit to Argos Engineering explained what he meant by a revolving letter of credit in his affidavit evidence in chief (at para 52) :

99 I made it clear and all parties to the meeting understood that when the terminology "revolving letter of credit" was used in this context, what was intended was a letter of credit which allowed repeated partial drawdown up to a total credit limit of S$8 million. The scheme envisaged would involve Argos presenting us with confirmed purchase orders which we would approve and present to BOC. BOC would then permit periodic drawdown against invoices submitted in accordance with those purchase orders. My view was that this system would have the following advantages :

100 (i) it would provide Argos with the financial stability they required to obtain further financial backing elsewhere;

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101 (ii) Energy would be able to monitor progress in the Vessel's construction;

102 (iii)suppliers would be more willing to do business with Argos because they knew that they would be paid;

103 (iv) Energy could ensure that all monies made available by them were directed to the construction of the Vessel and were not diverted to the other vessels under construction in the Yard at the time.

104 The evidence on setting up the revolving letter of credit

105 There can therefore be no doubt that the credit preceded confirmed purchased orders. It was therefore crucial that the credit was established within the stipulated time. So what did Mr Paul Cheng do to fulfil the obligation? The relevant parts of his affidavit evidence in chief on this point were as follows:

106 73. On 11 March I had a meeting with Ms Kuo and Ms Liu of BOC Head Office in Taipei to apply for the revolving letter of credit. During the meeting I related the history of the transaction and discussed our requirements. BOC confirmed that as the loan approval to Energy was still valid, they were in a position to provide financing. As the confirmed purchase orders to be covered by the revolving letter of credit were to be produced and presented in Singapore, BOC requested that we liaise with BOC, Singapore Branch to supervise the presentation of the purchase orders locally and to act as local advisory bank.

107 74. Two days later, on 13 March, I wrote to BOC, Taipei, setting out events to date and formally applying for the revolving letter of credit. I also enclosed a copy of the Agreement.

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108 75. Whilst I was dealing with the provision of the revolving letter of credit, V. Wong went to Singapore from Hong Kong to advance the technical discussions required by Clause 10 of the Agreement and to press for the purchase orders to be provided to us.

109 76. On 24 March I flew to Singapore to have a meeting to discuss the revolving letter of credit with BOC, Singapore Branch. At this stage no purchase orders had been provided despite our frequent requests. I therefore decided to take this opportunity to drop in on the Yard to chase them for the purchase orders and to review progress generally.

110 Two points came out clearly from the above :

111 (i) He had applied for the credit but he does not make an assertion that the bank irrevocably and in writing or otherwise had agreed to issue the revolving letter of credit.

112 (ii) As the confirmed purchase orders required by the revolving letter of credit were to be produced and presented in Singapore Branch, he was requested to liaise with BOC, Singapore to supervise the presentation of the purchase orders locally and to act as local advisory bank.

113 (iii)The purpose of his visit to Singapore on 24 March was to discuss the revolving letter of credit with BOC, Singapore Branch.

114 Under cross-examination he elaborated on the point. He said at p 19 :

115 Our bank was ready to issue the revolving letter of credit by its Singapore office. This would make it easy. I came to Singapore". A direct question was put to him in the cross-examination.

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116 The question and answer are at p 40 :

117 "Q Did BOC (Bank of Communications) agree to issue the RLC (revolving letter of credit)?

118 A They agreed to issue RLC in accordance with clause 7."

119 The plaintiffs called no witness from BOC office at Taipei. They did, however, call as a witness the officer in charge of the Singapore office, one Mr Chang Yang Lian, who described himself as "Vice President and Deputy General Manager of Bank of Communications Taiwan". In summary his evidence was as follows at p 70 and 71 :

120 "This matter is between our head office and Energy Shipping Co Ltd. I got involved this morning. I knew they wanted to take a loan ... . In March 1992 I was in Singapore. I met Paul Cheng in 1992 in Singapore. He came to ask if the bank in Singapore would give him a loan. The head office did not give me any instructions on this ... . The application was made, Miss Liu told me so ... . I don't know whether head office approved the application in principle ... . The branch in Singapore has no connection with this. It was the head office ... . There is no file in Singapore relating to Energy for the relevant period".

121 The bank officer's evidence adduced by the plaintiffs made it crystal clear that Paul Cheng was mendacious on material points. The bank officer made it plain that Paul Cheng had not secured the agreement of BOC, in Taipei or Singapore, to issue the revolving letter of credit and therefore he had a major problem. The probable reason for BOC not agreeing to issue the credit was set out in a letter Mr Paul Cheng wrote on 4 May 1992. The relevant parts are as follows :

122 Bank of Communications have been slow with the finalisation of any letter of credit because of caution urged by their Singapore branch as a result of the outstanding liabilities of Argos, apparent legal action by certain Argos creditors against UDL Singapore and doubts about the capacity of UDL Singapore in such circumstances to continue with construction of the vessel under the Shipbuilding Contract. Bank of Communications has to be satisfied as to your capacity as modified by the Agreement of 7 March before proceeding. They are concerned about your ability to perform on account both of uncertain financial condition and the risks of interference from third party creditors notwithstanding the benefit of a S$8,000,000 letter of credit facility for materials and equipment.

123 Because of the apparent deterioration of circumstances in Singapore, Bank of Communications have become unenthusiastic about releasing a letter of credit despite our best efforts to persuade them to the contrary. We do not think we would have had difficulty had everything been settled for the purpose of the now envisaged standby letter of credit far earlier and before matters concerning yourselves and Argos in Singapore had served to produce a now negative impression on the part of Bank of Communications.

124 I now turn to the first point raised by the plaintiff that there was a variation of the contract whereby the defendants asked for a change from a revolving letter of credit to a standby credit in the form of a letter of guarantee.

125 The plaintiffs said that the defendants asked for the change. I do not accept the plaintiffs' case and evidence on this. My reasons are as follows: First, the defendants had no reason to ask for such a change and it would be in conflict with cl 11 giving the plaintiffs the ownership of materials and equipment. The revolving letter of credit was more advantageous to them in that it provided the

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finance which they needed badly to get on with the construction. Mr Paul Cheng said that he was told that this was required by the defendants as part of a general finance the defendants were getting from their bank. I reject this evidence of Mr Paul Cheng. In my view he made up this story because he was unable to establish the revolving letter of credit because BOC either delayed or refused to issue it. From the totality of the evidence I could not see any arrangement for a new general finance arrangement. Furthermore it is consistent with the defendants' position that if the defendants did not want a standby letter of credit under which the financial obligation vested with the defendants the plaintiffs could go back to the original arrangements. I therefore conclude that it was Mr Paul Cheng who made the overture to the defendants regarding the idea of a standby letter of credit and that he did not inform the defendants at the outset that the standby credit would be in the form of a letter of guarantee. This was confirmed by the evidence of the defendants' bank officer, Mrs Wong Sok Cheng, whom I found to be a witness of truth.

126 In any event, when the defendants stated that they would accept a credit they made it clear that even under such standby credit the financial obligation to pay for the purchase of materials and equipment was on the plaintiffs and gave the plaintiffs the option of reverting to the original obligation under cl 7: see the defendants' letter of 11 April 1992, 18 April 1992 and 20 April 1992.

127 Based on the above analysis, my conclusions are as follows :

128 (a) The plaintiffs were in breach of their obligation to establish the letter of credit within the time stipulated in cl 7 of the novation agreement.

129 (b) The breach entitled the defendants to treat the Argos contract as null and void which they did on 15 May 1992.

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130 (c) There was no express or implied obligation for the defendants to furnish the purchasing orders before the plaintiffs established the revolving letter of credit.

131 (d) The plaintiffs and not the defendants asked for an amendment to cl 7 and the plaintiffs did not at the outset make it clear that it would be in the nature of a letter of credit. In any event there was no concluded agreement to alter cl 7 by substituting a letter of guarantee in the stead of a revolving letter of credit.

132 (e) The other points raised by the plaintiffs have no merits on the principle that a party cannot take advantage of its own wrong.

133 Consequence of plaintiffs' breach

134 Clause 7 provided that if the plaintiffs failed to furnish the revolving letter of credit "the Contract shall become null and void". Both parties submitted that this merely meant that the Contract was voidable at the option of the defendants. I accept their submission as correct. I would add that it merely affirms the correct legal point that the establishment of a letter of credit within the stipulated time is a condition precedent and the innocent party is entitled to have itself discharged from further obligations under the contract and the novation agreement without prejudice to its right to sue for damages. This also means that they must give credit for the amounts they received under the agreement.

135 Injunction discharged

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136 After the plaintiffs issued the writ, they applied for and I granted the following interlocutory injunction :

137 1. That the defendants by their directors, agents, servants or otherwise howsoever be restrained until after the further hearing of the aforesaid summons on the 10th June 1992 at 5 p.m., from removing any of their assets out of the jurisdiction, or disposing of or charging or otherwise dealing with any of their assets within the jurisdiction so as to deplete the same below $5,000,000.

138 2. That in particular and without prejudice to the generality of the foregoing, the defendants by their directors, agents, servants or otherwise howsoever be restrained until after the further hearing of the aforesaid summons on the 10th June 1992 at 5 p.m. from removing from the jurisdiction, disposing of, charging or otherwise dealing with the vessel presently under construction known as Hull No.8629 and any materials or equipment ordered, procured or to be used for the construction of the said vessel by the defendants for the plaintiffs, presently in the possession and/or control of the defendants.

139 3. Provided that the defendants are at liberty to expend:

140 (a) ordinary and proper business expenses in each case upon informing the plaintiffs' solicitors of the source or accounts from which such sums are drawn.

141 (b) reasonable sums on legal advice and representation as may be requisite.

142 4. That the Order of Court dated 28th May 1992 insofar as it requires that the defendants do within seven (7) days from being served with a copy of

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the said order by facsimile transmission disclose the full value of their assets within the jurisdiction of this court identifying with full particularity the nature of all such assets and their whereabouts be suspended until further order.

143 5. That the costs of this application be costs in the cause.

144 6. That the parties be at liberty to apply.

145 As the substratum on which the application for the interlocutory injunction had collapsed and as the plaintiffs did not come to the court with clean hands, I granted the defendants' application to discharge the injunction.

146 Judgment for the defendants

147 I made on 2 November 1993 the following formal decisions:

148 I hold that the plaintiffs were in breach of the contract/agreement dated 7 March 1992 in failing to establish the letter of credit within the 60 day period which breach discharged the defendants from any further obligation under the contract and entitled them to recover damages from the plaintiff for breach of March agreement and shipbuilding contract.

149 Declaration as in prayer 2 of counterclaim.

150 Accordingly the plaintiffs' claim is dismissed and I give interlocutory judgment to the defendants and there will be a reference to the Registrar to assess the loss and damage and interest.

151 Credit must be given for the amounts paid by the plaintiffs to the defendants in assessing the defendants' loss and damage.

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152 Plaintiffs to pay the costs of the claim and counterclaim.

153 The interlocutory injunction is discharged and I order inquiry into damages if any.

154 The plaintiffs to pay the costs of the injunction proceedings.

155 Inquiry to be held together with the assessment of damages.

G P Selvam J

Prem Gurbani with Tan Siew Tiong for the plaintiffs
Alvin Yeo with Steven Soh for the defendants

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