IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1996] SGCA 72

CA 64/1996, 66/1996

Between

Brown Noel Trading Pte Ltd

… *Appellant*

And

Donald & McArthy Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Contract — Breach; Contract — Remedies — Damages; Contract — Waiver

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

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Brown Noel Trading Pte Ltd v Donald & McArthy Pte Ltd

[1996] SGCA 72

CA 64/1996, 66/1996
Karthigesu JA; L P Thean JA; Yong Pung How CJ
27 November 1996

1 Cur Adv Vult

2 There are two appeals before us. First, there is Civil Appeal No 64 of 1996 in which Brown Noel Trading Pte Ltd, who were the defendants in the proceedings below (the defendants), appeal against that part of the decision of the High Court disallowing their claim for S$235,715 (the equivalent of US$150,000) which they had paid to Sintra Merchants Pte Ltd, the plaintiffs, as damages for breach of the contract made with the plaintiffs. The second appeal is Civil Appeal No 66 of 1996 in which Donald & McArthy Pte Ltd, who were the third party below (the third party), appeal against the whole of the decision of the High Court in which it was held that the third party were in breach of their contract made with the defendants and were liable in damages. Both appeals arose from the same decision of the High Court, and were heard together.

3 **The facts**

4 The relevant facts that gave rise to these appeals were as follows. Sometime in September 1992, a related company of the defendants called

Global Exim Pte Ltd (Global), negotiated with the third party for the supply by the third party of a quantity of prime deformed steel reinforcing bars. Global were an import and export company and acted as a middleman. They wanted to procure the quantity of steel bars so that they could in turn supply it to their customer, Sintra Merchants Pte Ltd (Sintra). Thus, they were negotiating with the third party for the purchase of the goods, whilst at the same time they were negotiating with Sintra for the re-sale of the same goods. By these transactions, Global stood to earn a commission of US$2.50 per metric ton of the goods from the third party as well as a profit margin from the re-sale of the goods to Sintra. The negotiations culminated in the making of two agreements on 21 October 1992 by the defendants, one with the third party and the other with Sintra. Just before concluding the agreements, the defendants were substituted as a contracting party in place of Global, as Sintra wanted the defendants to be the contracting party rather than Global on the ground that the defendants had greater financial and trading resources than Global. The third party agreed to the substitution.

5 The agreement made between the defendants and the third party provided for the supply by the latter of 10,000 metric tons of prime deformed steel reinforcing bars to be shipped to Fangcheng or Shekou, China, latest by 1 December 1992, at a price of US$285.50 per metric ton. The other relevant terms of the contract were as follows:

6 Payment terms: Irrevocable L/C negotiable and payable 100% value at the counters of negotiating bank in Singapore and allowing TT reimbursement.

7 Penalty Clause: Should the buyer fail to open L/C favouring seller later than 31st October 1992, the seller shall have the option to either cancel the contract or grant a grace period of 1 to 3 days prior to cancellation. In the event

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

of failure to open L/C as per contract and time stipulated, seller has the right to claim up to 1.0% of the contract value.

8 The same quantity of prime deformed steel reinforcing bars with the same quality formed the subject matter of the agreement made between the defendants and Sintra and the terms contained in that contract were almost identical to those in the agreement between the defendants and the third party, save that in the agreement with Sintra, the defendants agreed to sell the goods to Sintra at US$291 per metric ton, and that the pattern of the steel bars was specified as `fish-bone shape`. In addition, Sintra agreed to open the letter of credit in favour of the defendants (Sintra`s letter of credit) by 29 October, failing which the same penalty as that provided in the contract between the defendants and the third party would be payable.

9 The letter of credit in favour of the third party was not opened by the stipulated date, ie 31 October 1992. The defendants` explanation for the delay was that they could not open their letter of credit on time because they had not received Sintra`s letter of credit. As that letter of credit was to be back-to-back with that in favour of the third party, the terms of the latter could not be finalised until the terms of Sintra`s letter of credit were finalised. According to the defendants, their managing director, Mac Yim, spoke to one Aaron Chen, the Vice-President of the third party, requesting for an extension of five days from 31 October 1992 for the defendants to open their letter of credit in favour of the third party, and Aaron Chen agreed to the extension.

10 Sintra opened their letter of credit in favour of the defendants on 29 October 1992, which the defendants received on the following day. The defendants then arranged for a back-to-back letter of credit to be opened in favour of the third party. On 2 November 1992, the defendants` bank, Credit

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

Lyonnais, issued a letter of credit in favour of the third party. On the same day, the defendants faxed to the third party stating: `We have today opened our L/C for the above cargo via Credit Lyonnais to your banker Swiss Bank Corporation ... Please confirm receipt in due course ...`. The letter of credit was dated 3 November and was delivered to the third party who accepted it.

11 About a week later, Aaron Chen informed Mac Yim that the third party were having problems of supplying the defendants with the goods, and offered goods with alternative specifications. This was followed by a fax dated 10 November 1992 confirming the same; that fax was sent to Global by a company, Chemet Handel Trading (S) Pte Ltd, which is an associate company of the third party.

12 The defendants then enquired with Sintra whether they were willing to accept the alternative goods offered, and the latter refused. Mac Yim then faxed to Aaron Chen the response from Sintra. At the same time, he told Aaron Chen that the defendants would continue with their effort to persuade Sintra to accept the alternative goods. On 13 November Aaron faxed a letter to Mac Yim referring to the various telephone discussions and stating that they (the third party) were `working hard` to obtain the goods fulfilling `the exact requirements` of the defendants` customer. Following that, on 24 November the third party through Aaron Chen faxed to the defendants another letter stating that the material fulfilling the requirements would only be ready for shipment in the later half of January 1993 and that for shipment in December 1992 they could offer goods with alternative specifications. The content of this letter was passed on to Sintra who rejected the proposal. Subsequently, no goods fulfilling the requirements of the contract were forthcoming, and on 20 January 1993, Sintra decided that they had waited long enough for the goods, and put the defendants on notice of their claim for damages for breach of contract. On the

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

same day, the defendants in turn put the third party on notice of their claim for damages for breach of contract.

13 On 20 January 1993, the defendants received a letter from the third party and learnt for the first time that the third party had cancelled the contract owing to the defendants` failure to open a letter of credit by 31 October 1993. The defendants immediately replied on 21 January reminding the third party of the verbal agreement between Aaron Chen and Mac Yim to extend the dateline for the opening of the letter of credit by 5 days. On the same day, the third party wrote to the defendants stating, among other things:

> *There was never any verbal or written agreement to allow any extra day for opening of the L/C. We never waived the condition. It was only due to the late opening of your L/C, we missed the deadline. As a matter of fact we did not receive your L/C until 05.11.92 in our bank.*
>
> …
>
> (3) As the L/C was not received in time, the previous contract was cancelled. However to co-operate with you we offered alternative materials, which has nothing to do with the contract entered into.

14 As a result of the defendants` failure to supply the goods, Sintra commenced an action against them on 29 March 1993 claiming damages for breach of contract. The defendants in turn instituted third party proceedings against the third party. On 13 July 1993, the defendants settled Sintra`s claim for the sum of US$150,000, after the latter had filed an application for summary judgment. Hence, only the defendants` claim against the third party and the latter`s defence proceeded to trial.

15 The defendants claimed as damages the following:

16 (a) a sum of US$55,000 for loss of profits on the sub-sale to Sintra;

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

17 (b) currency exchange losses arising therefrom; and

18 (c) a sum of S$235,715 (the equivalent of US$150,000) which the defendants had paid to Sintra in settlement of the claim against them.

19 The defence of the third party was twofold. First, the defendants had breached the agreement by failing to open a letter of credit by 31 October 1992, there being no agreement between them for an extension of time. Secondly, the letter of credit opened by the defendants was not in conformity with the agreement and the defendants were in repudiatory breach. In consequence, they counterclaimed a sum of US$28,550 as liquidated damages based on 1% of the contract value as stated in the penalty clause in the contract.

20 **Decision below**

21 Before the trial judge four issues were raised. The first was whether the third party granted an extension of time to the defendants to open the letter of credit. Under the terms of the contract the defendants were obliged to open the letter of credit by 31 October 1992, but the letter of credit was not opened until 3 November 1992 and a copy was delivered to the third party only on 5 November 1992. On the basis of the documentary evidence and the evidence of one Samir Devmurari, who was at the material time in the employ of the third party as a marketing executive, the trial judge found that an extension of five days had been granted to the defendants to open the letter of credit.

22 The next issue considered by the trial judge was whether the letter of credit opened by the defendants was in conformity with the terms of the contract. This issue was raised by the third party about a week before the commencement of the trial and the pleadings were then re-amended. The trial

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

judge found that there were material deficiencies in the letter of credit. In particular, the inclusion of the clause requiring the defendants` telex advice accepting the nomination of the vessel as a condition for payment, `appears to remove the very platform on which the letter of credit rests`. The trial judge found that the defendants failed to open a letter of credit in conformity with the terms of the contract and were in repudiatory breach.

23 There then arose a third issue, namely, whether the third party had waived their rights to terminate the contract in view of the repudiatory breach of contract by the defendants. The trial judge found that based on the exchange of correspondence between the parties and the language and tone therein, the third party clearly indicated that they were still anxious to proceed with the contract. The trial judge found that the third party, having full cognisance of the terms of the credit, represented to the defendants that they were endeavouring to fulfil their part of the bargain under the concluded contract. In the circumstances, there was a waiver of the discrepancies contained in the letter of credit. The contract therefore remained in force, and as the third party failed to deliver the goods they were in breach of contract and the defendants were thus entitled to damages.

24 Finally, on the issue of damages, the trial judge found that the third party knew, prior to and at the time the contract was concluded that the defendants were buying goods for resale. On that ground the defendants were entitled to the loss of profit in the sum of US$55,000 as claimed by them.

25 Turning to the loss of currency exchange on the sum of the US$55,000 which was estimated to be in the sum of S$13,282.50, the trial judge decided that justice would be done by awarding interest to the defendants at the rate of 8% pa on the US$55,000 from 17 December 1992, the date on which the

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

defendants were expected to have been paid that sum by Sintra, if the contract had been performed. In any event, the trial judge found that the defendants` inclusion of a general all-embracing prayer for interest rendered their claim for loss of currency exchange somewhat nebulous.

26 Finally, on the defendants` claim of S$235,715 (the equivalent of US$150,000) which they had paid to Sintra, the trial judge disallowed this claim for the following reasons. First, in the third party proceedings, there was a direction that the liability of the defendants to Sintra be tried at the trial of this action. Despite this order, the defendants had proceeded to settle the claim without consulting the third party, and thus Sintra had vanished from the picture. The trial judge felt that the defendants` action interfered with the proper canvassing of the issue before the court as to what damages, if any, were payable by the defendants to Sintra and consequently by the third party to the defendants. The third party were deprived of the opportunity to test this claim in court and any agreement which was reached between the defendants and Sintra could not bind the third party.

27 Secondly, it was evident that the third party were not aware of any terms and conditions of the contract between the defendants and Sintra; neither was there any evidence to suggest that the third party knew that Sintra were going to sell the goods to another party. The defendants themselves said that until the contract was signed, they did not inform the third party who the purchasers were.

28 **The issues on appeal**

29 Before us the third party raised mainly two issues, namely: (i) whether the third party must expressly communicate to the defendants their acceptance

of the defendants` repudiation of the contract in failing to open a letter of credit in conformity to the contract, and (ii) whether the third party had waived the defendants` repudiatory breach. The defendants raised only the issue whether they are entitled to the sum of S$235,715 (the equivalent of US$150,000) as part of the damages for breach of contract by the third party.

30 **Letter of credit**

31 The third party complained that the letter of credit opened by the defendants was not in conformity to the terms of the contract, and that there were multiple discrepancies between the terms of the credit and those of the contract. They particularised no less than ten discrepancies in their amended defence. The defendants did not dispute the existence of these discrepancies but they contended that they were not so material as to render the letter of credit inoperative. Some of the discrepancies complained of were minor and we need not concern ourselves with them. However, there are two material discrepancies, namely, the inclusion, among other things, of the two provisions in the `Special Instructions` of the letter of credit which were not agreed to under the contract. First, there was cl 5 of the Special Instructions which provided: `A copy of the applicant`s [the defendants`] telex accepting the vessel nominated is required`. Secondly, there was cl 7 which stated: `Shipment must be directly from loading port to Fangcheng, China being the appointed destination port or indirectly to Shekou, China being the other alternative destination port. Buyer must declare discharge port by telex or fax to beneficiary not later than 7 days prior to vessel sailing`.

32 The learned judge directed his finding mainly on the unauthorised insertion of cl 5 of the Special Instructions and held that the defendants were in

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

breach of their obligations to open a letter of credit in conformity with the contract. He found as follows:

> *There is no gainsaying that there were indeed several alterations and modifications in the letter of credit which were neither agreed to by the parties nor contemplated earlier. One of them, particularly the requirement to obtain first the buyer`s telex accepting the nominated vessel, appears to undermine the whole tenor of the agreement between the parties.*

33 Later, he said:

> *In my view, whatever explanation attempted by the defendants in this regard comes nowhere near to salvaging the gross deficiency in the letter of credit. The inclusion of the clause requiring the defendants` telex advice accepting the nomination of the vessel as a condition for payment, appears to remove the very platform on which the letter of credit rests.*

34 There is a real danger that the defendants could simply refuse to issue the telex advice accepting the vessel nominated for whatever expediency which may present itself to them and in such an event the bank could lawfully refuse payment to the beneficiary. In fact, the insertion of this unagreed provision in the letter of credit appears to undermine its very structure and the argument advanced by counsel that this clause was just an insignificant matter and does not alter the binding contract entered into between the parties, lacks force and substance. In my finding the defendants were indeed in breach of their obligation to open a letter of credit in conformity with the contract.

35 We agree with the learned judge. In addition, we find that cl 7 was also a term which was materially inconsistent with the contract. With the presence of these clauses, payment would be dependent on the procurement of documents of which the third party were not in control, and they undermined and defeated the very nature and purpose of the letter of credit. After all, even if the third

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

party did procure the goods, the bank could lawfully refuse to pay them if these two clauses were not complied with.

36 The defendants clearly did not open a letter of credit in conformity to the terms of the contract in material respects and that amounted to a repudiatory breach of the contract. A case in point is ***Wahbe Tamari & Sons Ltd and Jaffa Trading Co v `Colprogeca` Sociedade Geral De Fibras, Cafes E Produtos Coloniais, LDA*** [1969] 2 Lloyd`s Rep 18. There, the contract of sale called for a confirmed letter of credit, and the correspondent bank purported to confirm the credit but reserved a right of recourse against the seller in regard to all the bills drawn and negotiated under the documentary credit. It was held that such confirmation was completely inconsistent with the conception of a confirmed credit and thus the buyer had failed to furnish a letter of credit in conformity to the terms of the contract of sale, and the seller was entitled to treat the contract as having been repudiated. Megaw J said at p 21:

> *In my judgment, the sellers were entitled to reject that confirmation subject to those conditions as not conforming to the terms of the contract. I am not going to deal with various minor points. I can interpret the condition that the "Sellers would remain liable on any draft negotiated by Ilbank under the credit" only as meaning that Ilbank was stipulating that the sellers, if they negotiated to Ilbank a draft in connection with the sale of these goods, would do so on the basis that Ilbank should have right of recourse against the sellers. That is something which seems to me to be completely inconsistent with the conception of a confirmed credit.*

37 There was also the provision that confirmation charges were to be for the sellers` account. This was no part of the terms of the contract. In my judgment, there was, even on Aug 15, no confirmation of the credit to which the sellers were entitled and which they should have had by July 18. That was never put right; certainly it was not put right before Aug 25, when the sellers treated the whole contract as having been repudiated.

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

38 After the letter of credit was opened, no steps were taken by the defendants then or thereafter to put the matter right by deleting the two objectionable clauses in the Special Instructions. There was thus a wrongful repudiation of the contract by the defendants. That, however, did not conclude the matter, because the repudiatory breach by the defendants did not automatically terminate the contract. The third party had a right to elect whether or not to accept the repudiation and treat the contract as at an end. They did not exercise their right and accept the repudiation by the defendants, and in consequence the contract was kept alive and remained in force for the benefit of both parties.

39 In ***Bunge Corp v Vegetable Vitamin Foods (Pte) Ltd*** [1985] 1 Lloyd`s Rep 613, one of the issues raised was that the buyers opened the letter of credit late and it was held that it was for the sellers to accept that as repudiation of the contract. Neil J said, at p 618:

> *But in this case, as I have already indicated, the sellers did nothing whatever to show that they were accepting the late tender of the letter of credit as a repudiation. On the facts of this case I am satisfied that Mr Young [counsel for the buyers] is right in saying that even if the letter of credit was opened late, which could of course, subject to what I say later, have amounted to a repudiation, the sellers cannot rely on it in the absence of any indication that they were accepting that repudiatory conduct.*

40 In ***State Trading Corp of India Ltd v M Golodetz Ltd*** [1989] 2 Lloyd`s Rep 277, 285, Kerr LJ said:

> *... the mere commission of a repudiatory breach by either party does not bring the contract to an end. It merely provides the other party with a right of election to treat the contract as terminated if it wishes to do so. If and so long as it does not do so, all obligations under the contract remain alive.*

41 See also ***Siti v Lee Kay Li*** [1996] 3 SLR 310.

42 It follows that the third party in order to accept the repudiation on the part of the defendants must communicate their acceptance to the defendants or at least by some overt act evince to the defendants that such repudiation was accepted. In ***M Golodetz Ltd*** (supra) Kerr LJ dealt with this question, obiter, at p 286:

> *What is commonly referred to as an acceptance of a repudiation must be communicated to the party in breach or at least overtly evinced: (see eg* ***Chitty on Contracts*** *(25th Ed) Vol 1 para 1598,* ***Heyman v Darwins*** *(1942) 72 Lloyd LR 65 at p 68; [1942] AC 356 at p 361 and* ***The Mihalis Angelos****[1970] 2 Lloyd`s Rep 43; [1971] 1 QB 164 explicitly at p 54, col 2, p 204E per Lord Justice Megaw. The decision of the High Court of Australia in* ***Holland v Wiltshire****(1954) 90 CLR 409 shows that an unequivocal overt act which is inconsistent with the subsistence of the contract may be sufficient, without any concurrent manifestation of intent directed to the other party. But saying and doing nothing at all, other than a continuing failure to perform, cannot constitute an acceptance of a repudiation even if the grounds for such an acceptance then exist. Such conduct would be equivocal and equally consistent with a decision not to exercise the right to treat the contract as repudiated.*

43 In this case, the third party had not by any act intimated to the defendants that they accepted the latter`s repudiation of the contract. Counsel for the third party, however, submitted that such communication was not necessary. In his submission, the obligation of the defendants to open a letter of credit in conformity to the terms of the contract was a condition precedent to the third party`s obligation to deliver the goods, and until that condition was fulfilled, the defendants were not entitled to call upon the third party to deliver the goods. The defendants did not fulfil this condition, and therefore, they were not entitled to claim against the third party for non-delivery of the goods.

44 Counsel relied on ***Trans Trust SPRL v Danubian Trading Co Ltd*** [1952] 2 QB 297. In that case, the defendant buyers were unable to open a letter of credit and they repudiated the contract. The plaintiff sellers sued for damages

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

and the main issue before the court was the extent of the damages recoverable by the plaintiff. Denning LJ in the course of his judgment had this to say with reference to the stipulation of opening a letter, at p 304:

> *What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In these cases the stipulation `subject to the opening of a credit` is rather like a stipulation `subject to contract`. If no credit is provided, there is no contract between the parties. In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of the contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.*

45 Later, the learned Lord Justice said, at p 305:

> *That condition was not fulfilled. The sellers extended the time for the credit but it never came, not even after reasonable notice. The sellers were, therefore, discharged from any further performance on their side, and are entitled to claim damages.*

46 Counsel also relied on ***Etablissements Chainbaux SARL v Harbormaster Ltd*** [1955] 1 Lloyd`s Rep 303 and in particular the following passage of the judgment of Devlin J at p 310:

> *They [the buyers] are suing here for delivery of the goods. The furnishing of a letter of credit was a condition precedent to the delivery of the goods, and therefore prima facie if they want to establish the breach of delivering the goods they must allege that they have fulfilled the necessary condition precedent, that they have furnished the letter of credit.*

47 There, again, the buyers were unable to open a letter of credit notwithstanding the extension of time granted, and the sellers subsequently by notice to the buyers terminated the contract on the ground of repudiation by the buyers. It was held that the sellers were justified in terminating the contract.

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

48 Neither of these authorities really supports the contention made on behalf of the third party. The contention would have some validity, if the factual position were that on or soon after 5 November 1992 neither party did anything with reference to carrying out the contract. It could then be said that the third party were under no obligation to arrange for the shipment of the goods, as the defendants had not opened a letter of credit in conformity to the contract. Such, however, was not the position.

49 **Waiver**

50 Until 21 January 1993 the third party had never treated themselves as having been discharged from the contract. The stand they took at the time was that they `had cancelled` the contract on the ground that the defendants had failed to open the letter of credit by 31 October 1992 and no extension of time had been granted to the defendants. That was denied by the defendants and the learned judge found that an extension of five days was granted by the third party to the defendants.

51 Next, until shortly before the trial the third party had never complained of any defect or deficiency in the letter of credit. It cannot be said that they were not aware of the terms of the letter of credit at all material times. A copy of the letter of credit was sent to them by their advising bank on or soon after 5 November 1992. There was no response from the third party on the letter of credit after they had received it. They certainly did not raise any objections to the defendants. Far from treating themselves as having been discharged from the contract the third party went ahead attempting to perform the contract. On 10 November 1992, their associate company, Chemet Handel Trading (S) Pte Ltd, faxed to Global (a related company of the defendants) a letter offering a replacement quantity of steel reinforcing bars, but the offer was not acceptable

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

to Sintra. Following that, the third party on 13 November faxed the following message to Mac Yim of Global:

> *Further to our various discussions and telcons, we are now working hard to get your customer`s exact requirements, if not at least the chemistry constraints they have stated in contract.*

52 We thank you for your patience, efforts and understanding. We expect to be able to give you more details sometime Saturday or Monday.

53 On 20 November 1992 Mac Yim faxed to Aaron Chen of the third party the following:

> *Per our discussion today, we will try our best to persuade our client on your two proposals below:*
>
> *To accept a stocklot of 6000 MT which can be shipped within December but carbon is 0.30-0.37%.*
>
> (2) To accept a later shipment i.e. January 1993 where a Ukraine mill can produce to our exact contracted spec.
>
> *Failing which, we must brace ourselves for a claim from the Chinese. As we are dealing with a large Chinese controlled corporation, we hope you are prepared (as we are) to face the consequences of our non-performance.*

54 There ensued further discussions between Aaron Chen and Mac Yim. On 24 November Aaron Chen faxed to Mac Yim the following letter:

> *As discussed situation as follows:*
>
> *Material according to Buyer`s chemistry and mechanicals is GOST 5781-82 ST 25 G2S.*
>
> *Material can only be ready for shipment latter half January `93. Production in second half of December as in all Europe comes to standstill view Christmas and New Year.*
>
> *For December shipment, best can do is mixture as follows:*
>
> *...*
>
> *Material as per last para ready for shipment and size breakdown to be advised you later today for total 10,000 MT.*

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

> *Please advise Buyers accordingly. Awaiting advice their decision by return.*
>
> *As already said, apologies for current situation. Appreciate your cooperation and efforts.*

55 On the evidence, it is apparent that the third party were at all material times eager to proceed with the contract. Indeed, as the learned judge found and we agree, both parties were anxious to keep the contract going and worked hard at trying to find an alternative cargo. The learned judge found as follows:

> *... The exchange of correspondence between the parties and the language and tone therein clearly indicate that the third party were anxious to proceed with the contract - so much so on 13 November 1992 the third party in an urgent fax conveyed the message to the defendants that they were working hard to get the defendants` customers` exact requirements and thanked them for their patience, efforts and understanding. Even as late as 24 November 1992, the third party was on record apologising to the defendants for the current situation.*

56 The foregoing communication could never have emanated from the third party if they had, as they claim, rescinded the contract and disregarded the letter of credit. My finding in this regard is that the third party did grant an extension of time for the issuance of the letter of credit and having full cognizance of the terms of the credit, represented to the defendants that they were indeed endeavouring to fulfil their part of the bargain under the concluded contract. In the circumstances there is a patent act of waiver of whatever discrepancies contained in the letter of credit.

57 Thus the learned judge found that the third party had waived whatever discrepancies existing between the terms of the letter of credit and the terms of the contract. This finding was challenged by the third party.

58 On this issue, it is helpful to refer to the well-known case of ***Panchaud Freres SA*** v ***Etablissements General Grain Co*** [1970] 1 Lloyd`s Rep 53.

There, the sellers sold to the buyers 5500 metric tons of Brazilian yellow maize cif Antwerp. The contract provided, among other things, that the shipment was to take place during the period of June/July 1965 and that the bill of lading was to be considered proof of date of shipment in the absence of evidence to the contrary. Pursuant to the contract the sellers tendered a bill of lading dated 21 July 1965 in respect of 200 metric tons of Brazilian yellow maize shipped on the African Night. But other shipping documents tendered in respect of the goods stated: `Loaded on 10 August to 12 1965`. On arrival at Antwerp the buyers refused to take delivery of the goods on the ground that the number of bags did not correspond with number stated in the bill of lading and commenced arbitration. The umpire upheld the buyers` claim and the sellers appealed to the Committee of Appeal of London Corn Trade Association Limited, where for the first time the buyers contended that the 200 tons of maize were not shipped during the contractual shipping period. The sellers conceded that they had breached the contract but contended that the buyers had waived the breach. The Committee of Appeal allowed the sellers` appeal but stated a case for the High Court. Roskill J held, inter alia, that the buyers by taking up the documents did not waive their rights to reject the goods on the ground that they were not shipped during the contract shipping period.

59 On appeal, his decision was reversed by the Court of Appeal. Lord Denning MR said :

> *The present case is not a case of `waiver` strictly so called. It is a case of estoppel by conduct. The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct ... If a man, who is entitled to reject goods on a certain grounds, so conducts himself as to lead the other to believe that he is not relying on that ground, then he cannot afterwards set it up as a ground of rejection, when it would be unfair or unjust to allow him so to do.*

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

60 His Lordship later said at p 58 :

> *The Committee of Appeal held that the buyers `cannot be deemed to have been unaware` that the maize was loaded between 10 and 12 August 1965. By taking up the documents and paying for them, they are precluded afterwards from complaining of the late shipment or of the defect in the bill of lading. That seems to me to be the finding of the Committee of Appeal, and I see no error in law in it. They used the word `waiver` but that does not matter. The buyers are precluded, by their conduct, from relying on the late shipment as a ground for rejecting the goods.*

61 Win LJ, the other member of the court, substantially agreed with Lord Denning MR. Cross LJ, the third member of court, upheld the finding of the Committee of Appeal.

62 In ***Bremer Handelsgesellschaft mbH v C Mackprang JR*** [1979] 1 Lloyd`s Rep 221, Lord Denning MR after referring to numerous authorities including ***Panchaud Freres SA*** said:

> *If a buyer, who is entitled to reject goods or documents on the ground of a defect in the notices or the timing of them, so conducts himself as to lead the seller reasonably to believe that he is not going to rely on any such defect - whether he knows of it or not - then he cannot afterwards set up the defect as a ground for rejecting the goods or documents when it would be unfair or unjust to allow him to do so.*

63 The instant case is not one where the defendants did not furnish a letter of credit at all. The letter of credit was opened within the extended time, and if the third party had at or about that time taken any objection to the material discrepancies the defendants would have had the opportunity to put the matter right prior to the contractual date of shipment. In not raising the objections which they were entitled to raise and further in proceeding actively trying to fulfil the requirements of the contract, the third party led the defendants to believe that the third party had accepted the letter of credit with the terms therein. It would be unfair and unjust in the circumstances to allow the third

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

party at such a late stage as shortly before the trial to assert that the letter of credit was not in conformity to the contract in material respects.

64 **Damages**

65 We now turn to the issue of damages. It is settled law that the measure of damages is that as laid down by Alderson B in ***Hadley v Baxendale*** (1854) 9 Ex 341 at pp 354-355:

> *Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.*

66 It is not disputed that prior to entering into the contract with the defendants, the third party knew that the defendants were buying the goods for resale. Indeed, the third party themselves in their fax to the defendants on 1 October 1992 stated, among other things, the following:

> *... as for debar, we will be in a position to offer you debar from the CIS and Romania quite soon, hopefully by tomorrow morning. Please give us a rough idea of sizes and quantities that* ***your customers*** *will require so that we can save time and give you a workable offer ... [Emphasis is ours.]*

67 On the basis of these facts and following the cases of ***Household Machines Ltd v Cosmos Exporters Ltd*** [1947] 1 KB 217 and ***R & H Hall Ltd v WH Pim (Junior) Co Ltd*** (1927-1928) 33 Com Cas 325 the learned judge allowed the defendants` claim for US$55,000 for loss of profit. It was submitted by counsel for the defendants that the same facts would justify the defendants` claim for the sum of $235,715 (the equivalent of US$150,000) which they had paid to Sintra, on the ground that such damages were recoverable under the second branch of the rule in ***Hadley v Baxendale*** (supra).

68 In support, counsel referred to numerous authorities. The first is the old case of ***Grebert-Borgnis v J & W Nugent*** (1885) 15 QBD 85, where the defendants contracted to sell to the plaintiff a quantity of sheep skin and prior to the contract were informed by the plaintiff that he wanted them for supply to a customer in Paris to fulfil a contract. The defendants subsequently delivered part of the sheep skin ordered but failed to supply the remainder. The plaintiff claimed damages. There was no market price for such skin. In consequence of the defendants` breach of contract the plaintiff failed to supply to his customer and in consequence was sued in Paris, and judgment was given against him. Denman J allowed the plaintiff`s claim for the loss of profit and also the damages which he was liable to pay to the French customer. His decision was affirmed by the Court of Appeal. That case was distinguishable from the case at hand, as there it was shown that the defendants knew that the plaintiff was purchasing the goods to fulfil a contract with a customer. But, in this case, there was no evidence that the third party knew at the time the contract was made with the defendants that the latter had made or would be making a contract with Sintra who in turn would sell the goods to their buyer. Hence ***Grebert-Borgnis*** is not strictly an authority in support of the defendants` case.

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

69 Counsel next relied very strongly on ***Hammond & Co v Bussey*** (1887) 20 QBD 79, where the defendants contracted to sell to the plaintiffs a certain quantity of coal of certain description knowing that the plaintiffs were buying such coal for the purpose of resale, and subsequent to the contract they did re-sell the coal. The coal delivered to the plaintiffs and by them to their buyer did not comply with such description. This was later discovered by the sub-buyers when they sued the plaintiffs for breach of contract. The plaintiffs defended the claim but were found liable and damages were awarded against them. They then sued the defendants claiming the amount of damages they had paid to the sub-buyers and the costs of defending the claim. The defendants paid the amount of damages awarded in the previous action but resisted the claim for costs. The trial judge held he was liable for such costs. The Court of Appeal affirmed his decision. The court held that the costs claimed were recoverable under the second branch of the rule in ***Hadley v Baxendale*** as being damages which might reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. Lord Esher said, at p 93:

> *To my mind it is perfectly clear that, according to a reasonable business view of the reasonably probable course of business, the parties may be supposed to have contemplated, at the time when the contract was made, as the inevitable or at any rate the highly probable result of a breach of it, that there would be a lawsuit between the plaintiffs and their sub-vendees, in which it would be reasonable for the plaintiffs to defend, and in which, if it turned out that there was a breach of the warranty, the plaintiffs would lose, and that they would thereby necessarily incur costs. Costs incurred under such circumstances appear to me to fall within the second branch of the rule in* ***Hadley v Baxendale.***

70 Fry LJ dealt with the issue in more explicit terms at p 100:

> *First, what are the damages which actually resulted from the breach of contract? It seems to me that the loss actually sustained by reason of such breach was that of the damages recovered by the sub-vendees in their action against the plaintiffs and the costs of that action. Secondly, was the contract made under any special circumstances, and, if so, what were such*

> *circumstances? It appears that it was made by the plaintiffs with the intention of re-selling the coal to steamships visiting Dover in the course of their usual business. Thirdly, what at the time of making the contract was the common knowledge of both parties? The purposes for which the plaintiffs bought the coal were as well known to the defendant as to the plaintiffs themselves.*

71 Having dealt with these questions the learned Lord Justice arrived at the following conclusion:

> *It seems to me that they must have contemplated, if there was a breach of the contract, that the plaintiffs` sub-vendees would make a claim and bring an action against the plaintiffs to enforce such claim; and further, that the plaintiffs would on such an action being brought behave as reasonable men and would pay without contest if it was unreasonable to defend the action, but would defend the action if it was reasonable to do so. I think all these matters may be reasonably supposed to have been within the contemplation of the parties. That being so, it follows that the costs of a reasonable defence would be in the contemplation of the parties, if they had worked out the question what the damages were which would reasonably be payable upon a breach of contract.*

72 ***Frank Mott & Co v WMH Muller & Co (London) Ltd*** (1922) 13 Lloyd LR 492 is a decision, where there being no available market, the buyer was held entitled to recover against the seller the loss of profit on resale as well as damages which he had to pay his sub-buyer on the ground that the seller knew that the goods sold were intended by the buyer for resale. Rowlatt J said, at p 493:

> *Well, they were sold to a merchant. The seller did not know what the merchant`s commitments were or what he would do with them, but they knew he had a customer of course, that he did not want the rods for himself. Well, the defendants knew this perfectly well, that the plaintiffs, the buyers, were going to re-sell to someone else and if they sold to someone else and could not deliver, that someone else would claim against them and plaintiffs would have to satisfy them.*

73 They would then not only lose their own profit, but they would have to satisfy their buyer. That was all perfectly well known to the defendants, and it

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

seems to me if a man sells goods under those circumstances he must pay damages on that footing. The difficulty which arises in this case, and what has been at the bottom of the discussion, was as to the amount. It is unthinkable to my mind to say the seller is not to compensate his buyer against loss which he knows his buyer would incur by reason of a claim by a third party if the contract was broken.

74 The last English case relied upon by counsel for the defendants is ***R & H Hall Ltd v WH Pim (Junior) and Co Ltd*** (1927-1928) 33 Com Cas 325. There, the buyers bought from the seller a cargo of Australian wheat and the contract was in the standard form of the London Corn Trade Association for use for members of that association. The contract contained specific provisions for appropriation of cargo and for circumstances where the cargo could be resold one or more times before delivery. Both buyers and sellers knew at the time the contract was made that there was a probability of re-sale of the cargo. The sellers failed to make delivery and the buyers sued for damages. It was held by the House of Lords that the damages recovered by the buyer should include their loss of profits on re-sale and damages for which they would be liable to pay to the sub-buyer for their breach of contract. Viscount Haldane LC said, at pp 326-327:

> *I think further that the contract and the conditions which it incorporates show that it was contemplated that the cargo might be passed on by way of sub-sale if the buyer did not choose to keep it for himself, and that the seller in such a case contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them. They were regarded by the terms of the original contract as sub-contracts which the original buyer was to be in a position to enter into, with stipulations which bound the original seller to enable the original buyer to fulfil them. Whether the latter was likely to enter into such sub-contracts and pass the cargo down a chain of re-sales is not material. It is enough that the contract contemplated by its terms that he should have the right to do so if he chose.*

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

75 This being the case, there has been an admitted breach. The original seller has failed to deliver at the due date, and the buyer has been left open to claims from his sub-buyers based on the contracts made with them in reliance on the clauses in the document of Nov 3.

76 In these circumstances I am of opinion that the measure of damages is clear. It is not merely the amount of damage, measured by loss in the market, which arises in the usual course of business from the breach. It extends whenever the special circumstances require this, to such possible damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. This is in accordance with what is called the second branch of the rule in ***Hadley v Baxendale*** (1854) 9 Exch 341, a rule which is fully explained by Lord Esher MR, in ***Hammond & Co v Bussey*** (1887) 20 QBD 79. He points out that the principle is not to be confined to a sub-contract already actually made at the date of the original contract, but applies also to the case of a sub-contract which will probably be made.

77 There is no doubt that the law is correctly explained in ***Hammond & Co v Bussey*** and I am of opinion that the case before me depends on a question of construction which comes directly within it and must be answered in accordance with the buyers` contention.

78 Viscount Dunedin said, at p 330:

> *The result of the default which did ensue was twofold. The buyer lost his profit, but also he had to pay damages to his sub-buyer. It is argued that although there may be liability for the first item, there could not be for the second. Rowlatt J held that the two were inseparable. The Court of Appeal did not have to consider the point. In my opinion the one is the corollary of the other.*

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

79 Lord Shaw said, at p 334:

> *The present instance naturally fits in to the oft-quoted dicta in* ***Hadley v Baxendale*** *(1854) 9 Ex 341.*

80 It appears to me that a sensible rule clearly covers the loss not only of the original buyer`s profit which he has been prevented from earning, but also the loss sustained by him in being saddled with the claims of those to whom he had, in a contemplated course of trade, disposed of the goods. I think that ***Hadley v Baxendale*** as a decision results in such a rule.

81 In Australia, it has also been decided that where there is no available market and the seller knows that the buyer is likely to resell the goods to someone else, the measure of damages in the event of non-delivery of the goods by the seller is the buyer`s loss of profit on the resale as well the damages he is liable to his sub-buyer for non-delivery. In ***Australian Fruit and Produce Co Ltd v Terry Pty Ltd*** (1934) 29 Tas LR 102, the court held that the defendants knew that the plaintiffs bought the apples to re-sell them and following ***R & H Hall Ltd*** and ***Hammond v Bussey*** allowed the claim of the plaintiffs for loss of profits on resale and damages for non-delivery on the resale. Similar conclusion was arrived at by the Supreme Court of South Australia in ***Lamson Paragon Ltd v Spicers (Australia) Ltd and Sleigh Ltd*** [1953] SASR 297. There again the court followed the English decisions in ***R & H Hall Ltd*** and ***Hammond v Bussey*** .

82 The local case of ***Bulsing Ltd v Joon Seng & Co*** [1972] 2 MLJ 43; [1969-1971] SLR 565 is also relevant on the point in issue. There, the plaintiff bought from the defendant 50,000 metric tons of urea at US$69 per metric ton, and the defendant in breach of contract failed to open a letter of credit in favour of the plaintiff, it was held that the plaintiff was entitled to recover from the

defendant by way of damages loss of profit as well as damages the plaintiff had to pay to their supplier, as the defendant knew that the plaintiff was not the manufacturer and had to purchase it from the supplier. FA Chua J said, [1972] 2 MLJ 43 at p 45; [1969-1971] SLR 565 at p 570:

> *I am also of the view that the plaintiff is entitled to recover from the defendant the damages which the plaintiff had to pay to Chimimport. The defendant knew that the plaintiff was not the manufacturer of the urea and that the plaintiff had to purchase it from Bulgaria. It must have been in the contemplation of the parties that in the event of a breach of the contract the plaintiff would have to pay damages to the supplier in Bulgaria.*

83 Although the case dealt with the buyer`s default in opening a letter of credit, the decision on the measure of damages by analogy is applicable to the instant case.

84 Reverting to the case at hand, the evidence established that the third party at the time they made the contract with the defendants knew that they bought the goods for the purpose of re-sale and it was within their contemplation that if they failed to deliver the goods contracted for, the defendants would lose their profit on re-sale and also would be liable to the sub-purchaser in damages. They (the third party) had failed to deliver the goods and there was no available market in which the defendants could have bought the goods. They were therefore liable to pay damages to Sintra and they had paid such damages. Having done that they are entitled to recoup from the third party their loss of profit on the re-sale to Sintra and the damages which they were liable to pay and did pay to Sintra. These two heads of damages clearly fall within the second branch of the rule in ***Hadley v Baxendale*** (supra). The authorities we have referred to are overwhelmingly in support of their claim. Both on principle and authorities their claims for such damages should succeed. They have succeeded

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

on their claim for loss of profit; they should also have succeeded on their claim for the damages they had paid to Sintra.

85 **Quantum of damages**

86 The next question is whether the amount the defendants had paid to Sintra was reasonable in the circumstances. In their statement of claim, Sintra claimed a total sum of US$263,965.56 as damages comprising:

> *Loss of profit on resale at US$14.00 per metric ton US$ 140,000.00*
>
> *Claims from sub-buyer US$120,000.00*
>
> *Documentary credit application charges incurred by Sintra US$ 3,965.56*
>
> *Total: US$ 263,965.56*

87 There was documentary evidence which shows that Sintra having purchased the goods from the defendants at the price of US$291 per metric ton c & f sold them to a Chinese buyer at US$305 per metric ton cif. There was a loss of profit suffered by Sintra but not the full extent of US$140,000 as claimed, because Sintra would have to bear the cost of insurance in their contract with the Chinese buyer. A small portion of the claim would have to be subtracted as the costs of insurance. Subject to the determination of the quantum, the defendants had no defence to the claim by Sintra for such loss.

88 The defendants were also liable in principle for damages which Sintra would have to pay for failing to deliver the cargo to the Chinese buyer. On this claim no evidence was produced; but it is likely that there would be such a claim. Between the time when the defendants made the contract with Sintra and the time of the claim, ie end of January to early February 1993 the prices of steel

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

bars had escalated beyond the range of US$300 per metric ton. The defendants would also be liable to Sintra for costs and interests.

89 In reaching the settlement the defendants were advised by their solicitors and there was nothing to suggest that their solicitors` advice was patently wrong or that there was anything suspicious. In all the circumstances, the settlement arrived at was reasonable, and the amount the defendants had paid to Sintra should have been allowed.

90 In ***Biggin & Co Ltd v Permanite Ltd*** [1951] 2 KB 814, the plaintiffs bought certain goods from the defendants for re-sale to the Dutch government and this was known to the defendants. The goods proved to be unsatisfactory and the Dutch government claimed damages against the plaintiffs. The Dutch government agreed to submit to arbitration in England. The plaintiffs acting on legal advice settled the claim and claimed to recover from the defendants the amount paid and the costs. It was held by the Court of Appeal that the amount was in the circumstances reasonable and was recoverable by the plaintiffs from the defendants. Somervell LJ in dealing with the question whether the settlement reached with the Dutch government was reasonable said at p 321:

> *The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter. The question, in my opinion, is: what evidence is necessary to establish reasonableness? I think it relevant to prove that the settlement was made under advice legally taken. The client himself could do that, but I do not think that the advisers would normally be relevant or admissible witnesses. I say `normally`. It may be that in special cases they might be. The plaintiff must, I think, lead evidence, which can be cross-examined to, as to facts which the witnesses themselves prove and as to what would probably be proved if, as here, the arbitration had proceeded, so that the court can come to a conclusion whether or not the sum paid was reasonable.*

91 Singleton LJ said, at p 326:

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

> *The question is not whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one; and, in considering it, the court is entitled to bear in mind the fact that costs would grow every day the litigation was continued. That is one reason for saying that it is sufficient for the purpose of the plaintiffs if they satisfy the judge that somewhere around the figure of settlement would have been awarded as damages.*

92 In the Australian case of ***Wong v Hutchison*** (1960) 68 WN (NSW) 55 a trader who failed to deliver goods to his buyer was held liable to the buyer for damages which the latter settled with the sub-buyer. Owen J of the Supreme Court of New South Wales held the settlement reached in that case was prima facie reasonable. He said, at p 58:

> *Apart however from these considerations, it seems to me that where a trader fails to deliver goods and thereby commits a breach of contract to which he has no apparent answer and thereafter proceeds to settle a claim for damages for that breach by making payment of an amount which, on the face of it, does not appear to be exorbitant having regard to the value of the goods which he has undertaken to deliver and the difficulties of replacing them, such a settlement should prima faciebe regarded as reasonable, since as a matter of common sense it is surely the exception rather than the rule for a commercial man to settle a claim made against him by paying an extravagant or unreasonable amount because he has a remedy over against a third party who may or may not be worth and shot. In the absence of anything to raise a suspicion to the contrary, I think it is a fair presumption that a business man who settles a business claim made against him has acted reasonably in doing so.*

93 In the result, the defendants` appeal Civil Appeal No 64 of 1996 is allowed and there will be judgment for the defendants in the sum of $235,715. On the question of interest, as the defendants `were given an instalment payment scheme stretching one year from 7 July 1993 to 30 June 1994` we would allow interest on that sum at 6% pa from 1 July 1994 to the date hereof. We so order. The third party`s appeal, Civil Appeal No 66 of 1966, is dismissed. The defendants will have their costs in both the appeals. There will be the usual

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

consequential order that the deposit in court in Civil Appeal No 64 of 1996 is to be refunded to the defendants and the deposit in Civil Appeal No 66 of 1966 is to be paid to the defendants or their solicitors to account of costs.

94 ***Appellants` appeal allowed; respondent`s appeal dismissed.***

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Jimmy Yim and Lau Kok Keng (Drew & Napier) for the appellants
Vangat Ramayah (Wee Ramayah & Partners) for the respondents

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