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

**[1996] SGHC 71**

Suit 653/1993

Between

Sintra Merchants Pte Ltd

… *Plaintiff*

And

Brown Noel Trading Pte Ltd

… *Defendant*

And

Donald & Mcarthy Pte Ltd

… *Third Party*

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# GROUNDS OF DECISION

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Contract — Breach; Contract — Remedies — Damages; Contract — Remedies — Damages; Evidence — Admissibility of evidence — Hearsay; Commercial Transactions — Sale of goods

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

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# Sintra Merchants Pte Ltd v Brown Noel Trading Pte Ltd (Donald & Mcarthy Pte Ltd, Third Party)

**[1996] SGHC 71**

Suit 653/1993
MPH Rubin J
10 April 1996

1 Cur Adv Vult

2 In this action the contest is essentially between Brown Noel Trading Pte Ltd, the defendants, and Donald & Mcarthy Pte Ltd, the third party, over the latter`s alleged failure to supply 10,000 metric tons of steel reinforcing bars under the terms of a written contract (the Donald Mcarthy contract) between them dated 21 October 1992. Sintra Merchants Pte Ltd, the plaintiffs in this action who commenced the proceedings in this matter against the defendants on account of the defendants` inability to fulfil their obligations under a contract entered into between the plaintiffs and the defendants also dated 21 October 1992 (the Sintra contract) for the supply of the same goods, did not appear at the trial since their claim had apparently been met by the defendants by a payment of US$150,000. The defendants` claim on the other hand against the third party is for: (a) US$55,000 being loss of profits; (b) currency exchange loss arising therefrom; and (c) a sum of S$235,715 being the equivalent of US$150,000 which had been paid by the defendants to the plaintiffs. A claim for a sum of S$12,807.05 under para 14(ii) of the defendants` claim was

abandoned upon the defendants` counsel conceding that the said claim is subsumed in the claim for US$55,000.

3 In the main the dispute centres around the terms of the written contract between the parties and a letter of credit opened by the defendants in favour of the third party pursuant to the Donald Mcarthy contract. As is not uncommon in proceedings such as the one at hand, there was much variance between the versions narrated by the respective witnesses at the trial. It is therefore necessary to set forth the facts in some detail as could be gathered from ***viva voce*** evidence as well as documents referred to in the course of these proceedings.

4 Sometime in the course of September 1992, a related company of the defendants known as Global Exim Pte Ltd (Global) where the defendants` Mr Mac Yim Wan Yip (Mr Mac Yim) was the principal figure, began negotiations with the third party for the supply of a quantity of prime deformed steel reinforcing bars (the goods). Global`s representatives Mr Mac Yim and his colleague Mr Ringo Fok Kar Seng (Mr Ringo Fok) were then dealing with the third party through one Aaron Chen, a former executive of the third party. Global at that stage were acting as commission agents for the third party expecting to earn US$2.50 per metric ton from the third party. Right up to 20 October 1992 (ie one day before the said two contracts were signed) the expectation was that the potential purchaser would open the relevant letter of credit in favour of the third party and the third party would pay Global the agreed commission. Global at that stage did not reveal the identity of the potential purchaser to the third party for fear that the third party might undercut the defendants and deal direct with the purchaser, a situation the defendants wanted to avoid to safeguard their interests.

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

5 On 21 October 1992, once the prospects became firm the defendants decided to substitute themselves as the contracting parties in the transaction. Consequently on 21 October 1992 the defendants signed the said two contracts - one with the plaintiffs and the other with the third party for the sale and purchase of 10,000 metric tons of the goods. Insofar as material, the relevant parts of the Donald Mcarthy contract provide as follows:

> *Contract No: 92/Steel/10/09 Date: 21 October 1992*
>
> *This is to confirm that Brown Noel Trading Pte Ltd of 32/33 Duxton Road, Singapore 0208 has bought the following goods under the terms and conditions stipulated below from Donald & Mcarthy Pte Ltd of 87 Beach Road, #05-01, Chye Sing Building, Singapore 0718.*
>
> *Material: Prime deformed steel reinforcing bars*
>
> ...
>
> Quantity: 10,000 mt (+/- 10% at seller`s option)
>
> Size Menu: ...
>
> Length: ...
>
> Chemical: ...
>
> Composition: ...
>
> ...
>
> Shipment: Latest December 1st 1992, subject force majeure.
>
> Load Port: Any Black Sea port
>
> Price: US$285.50 PMT C&F FO CQD Fangcheng or Shekou, China.
>
> ...
>
> Payment Terms: Irrevocable L/C negotiable and payable 100% value at the counters of negotiating bank in Singapore and allowing TT reimbursement.
>
> 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 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.
>
> Late Shipment: ...
>
> ...
>
> *Dated 21 October 1992.*
>
> *Confirmation:*
>
> *(signed) (signed)*
>
> *Brown Noel Trading Pte Ltd Donald & Mcarthy Pte Ltd*

6 The terms contained in the Donald Mcarthy contract are almost identical to those in the Sintra contract, save that the agreed price in the Sintra contract is US$291 per metric ton, higher by US$5.50. In other words, the defendants by simultaneously entering into these two contracts, stood to gain US$55,000 (US$5.50 x 10,000 metric tons) upon completion of the purchase and sale. The other difference observed from the perusal of the two contracts was that in the Sintra contract, the pattern of the steel bars was specified as `fish-bone shape` whereas such a description was missing in the Donald Mcarthy contract.

7 In so far as material to the proceedings at hand, the letter of credit in favour of the third party was not opened by the stipulated date, ie 31 October 1992. The reason the defendants attributed to this delay was that their buyers, ie the plaintiffs did not fulfil their obligation in opening their letter of credit on time.

8 Mr Mac Yim in his affidavit of evidence-in-chief said that as he envisaged the possibility of the defendants being unable to open their letter of credit in favour of the third party by 31 October 1992, he spoke to Aaron Chen of the third party on 28 October 1992 requesting an extension of time of five

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

days from 31 October 1992. According to Mr Mac Yim, Aaron Chen readily agreed to the five-day extension.

9 The rest of the evidence of Mr Mac Yim as regards the circumstances and events culminating in their opening a letter of credit in favour of the third party and their subsequent differences is best stated in his own words. Paragraphs 12 to 17 of his affidavit read as follows:

> *... The plaintiffs opened their letter of credit in favour of the defendants on 29 October 1992. The defendants received the letter of credit the following day on 30 October 1992. Upon receipt, the defendants 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 Lyonnais, issued a letter of credit in favour of the third party. ...*

10 ... The defendants` letter of credit was received and accepted by the third party. The defendants then awaited shipment of the goods by the third party.

11 ... About a week later, Aaron Chen informed me that the third party were having problems supplying the defendants with the goods. He explained that the third party`s Russian supplier could not produce goods to the specifications stipulated in the agreement, and offered to supply us with goods of alternative specifications. This was followed by a fax dated 10 November 1992 from Chemet Handel Trading (S) Pte Ltd to Global Exim Pte Ltd confirming the same. Chemet Handel Trading (S) Pte Ltd is a company owned by the same shareholders as the third party, namely, Vinod Kumar Didwania and Mrs Nidhi Vinod Didwania. ... On the same day, I enquired from the plaintiffs if they were prepared to accept the alternative goods, but they replied that they were unable to do so. I then communicated this to Aaron Chen by way of a fax dated 10 November 1992, ... I also agreed to try to continue to persuade the plaintiffs to accept the alternative goods.

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

12 ... Between 11 November 1992 and the middle of January 1993, the defendants kept pressing the third party to come up with the goods contracted for, while at the same time, were trying their best to persuade the plaintiffs to accept goods of alternative specifications. All this while, no mention was made by the third party of their rejection of the defendants` order of the goods on the grounds that the letter of credit was only opened on 2 November 1992. There was nothing in the conduct of the third party to suggest that the third party`s continued efforts to obtain the goods were pursuant to a fresh contract with the defendants. It would be preposterous to even suggest that. After all, the third party was so apologetic about not being able to supply the goods to the defendants. Aaron Chen had agreed to the extension of the dateline for the opening of the defendants` letter of credit. If there was indeed a fresh contract, there would have been no need for an extension of the deadline. There would also have been the need to open a fresh letter of credit on fresh terms. The existing letter of credit which had been sent to the third party would have been returned to the defendants for cancellation. It never was, to this day. ...

13 ... On 20 January 1993, the plaintiffs decided that they had waited long enough for the goods, and put the defendants on notice of their [plaintiffs`] claim against the defendants for breach of contract. On the same day, the defendants in turn put the third party on notice of their claim against the third party for breach of its agreement to supply the goods to the defendants. ...

14 ... On 21 January 1993, the defendants heard for the first time from the third party that the third party`s agreement to supply the goods to the defendants had long been `cancelled` on the grounds of the defendants` failure to open a letter of credit by 31 October 1993. On the same day, Ringo Fok of the defendants replied and reminded the third party [of] the verbal agreement

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

between Aaron Chen (who had by now left the third party`s employment) and myself to extend the deadline for the opening of the defendants` letter of credit to 5 November 1992. ...

15 Mr Ringo Fok who testified for the defendants, averred in his affidavit of evidence-in-chief that following the extension granted by Aaron Chen, he caused an irrevocable letter of credit to be opened by the defendants` bankers, Credit Lyonnais, in favour of the third party for the stated amount of US$2,855,000. He said in his affidavit (paras 5 to 8):

> *... Notwithstanding the opening of the said letter of credit in favour of the third party, the third party failed to deliver the goods to the defendants. According to the third party`s Aaron Chen, the third party had encountered problems with their Russian suppliers who were unable to produce the goods to the specifications stipulated in the agreement. The third party offered to supply the defendants with alternative goods, but the defendants could not accept them since the plaintiffs refused to agree to the alternative goods.*

16 ... The defendants had no choice but to require the third party to supply the goods contracted for, but up to January 1993, the third party still failed to supply the goods to the defendants, resulting in the defendants in turn being unable to supply the goods to the plaintiffs. Meanwhile, the letter of credit opened by the defendants in favour of the third party remained with the third party, until it eventually expired.

17 ... As a result of the defendants` inability to supply the goods to the plaintiffs, the plaintiffs commenced the present action against the defendants on 29 March 1993 for breach of contract. The defendants had no good defence to this action, but instituted third party proceedings against the third party.

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

18 ... On 13 July 1993, the defendants settled the plaintiffs` claim for US$150,000, after the plaintiffs filed an application for summary judgment to be entered against the defendants. The defendants saw little purpose in defending a claim to which they had no real defence, and decided to mitigate their losses by settling for an amount far less than the amount of the plaintiffs` claim. ...

19 As stated by Mr Ringo Fok, the proceedings herein were commenced by the plaintiffs against the defendants. The plaintiffs` claim was for (a) loss of profit on resale at US$140,000; (b) claims from their sub-purchaser at US$120,000 and (c) costs of credit application charges incurred by the plaintiffs at US$3,965.56 - the total being US$263,965.56. The defendants naturally sought to shift the burden to the third party and commenced third party proceedings against them. The third party directions issued by the court provided amongst other things, the following:

> (1) the said third party be at liberty to appear at the trial of this action and take such part as the judge shall direct, and be bound by the result of the trial; and
>
> (2) the question of the liability of the said third party to the defendants be tried at the trial of this action, but subsequent thereto.

20 Surprisingly though, the defendants instead of awaiting the trial of this action, settled the plaintiffs` claim by paying them a sum of US$150,000. Mr Ringo Fok claimed that the defendants saw little purpose in defending a claim to which they had no real defence and decided to mitigate their losses by settling for an amount far less than the amount of the plaintiffs` claim. The effect of this settlement and the absence of the plaintiffs at the trial were a subject of query by the court and I shall revert to this issue later in these grounds. Suffice it if I

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

said that on the day the defendants signed the agreement with the third party, the third party only knew that the defendants were purchasing the material for a Chinese buyer; the third party were not informed of the terms and conditions negotiated between the defendants and the plaintiffs; nor did the third party have sight of the Sintra contract; further, they did not know of the existence of any further sub-purchasers.

21 The defence filed by the third party alleged that the defendants, by failing to open their letter of credit by 31 October 1992, had been in breach of the agreement entered into between them; that there was no verbal agreement between them for the grant of any additional grace period and that the defendants were told on 1 November 1992 that the third party had exercised its option to terminate the agreement. Additionally, it was contended by the third party that at any rate, the letter of credit opened by the defendants was not in conformity with the agreement. The last contention was raised only after the matter came up for trial before this court on 17 April 1995. Paragraph 4 of the amended defence and particulars of the discrepancies provided thereunder, read as follows:

> *a The unit price per metric ton stated in the letter of credit differs from the contract.*
>
> b The total value of the letter of credit, the quantity and unit price are inconsistent.
>
> c The contract specified negotiable at counters of negotiating bank whereas the letter of credit does not provide this.
>
> d The contract specified that the letter of credit must be payable at counters of negotiating bank whereas the letter of credit is not payable at counters of negotiating bank.
>
> e The contract specifies that the letter of credit must allow TT reimbursement whereas the letter of credit does not provide this.

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

> f Clause 5 of `Special Instructions` annexed to the letter of credit provides that `A copy of applicant`s telex accepting vessel nominated is required.` This makes the letter of credit non-operative.
>
> g The letter of credit provides the last day for shipment as 1 December 1992 and the last day of negotiation as 22 December 1992 whereas only seventeen (17) days are allowed after shipment for negotiation as per cl 8 of `Special Instructions` of letter of credit. This makes the letter of credit contradictory.
>
> h Clause 7 of `Special Instructions` was specifically rejected by the third party.
>
> i Clause 2 of `Special Instructions` provides for telex advise within three (3) days whereas five (5) days were agreed.
>
> j Clause 11 of `Special Instructions` was not agreed to by the third party.

22 The third party`s defence primarily rested on the evidence of Mr Vinod Kumar (Mr Kumar), their then managing director. He averred in his affidavit of evidence-in-chief (paras 3, 5, 6, 7, 8 and 9):

> *... On 21 October 1992, the defendants and the third party entered into a written contract for the sale and purchase of approximately 10,000 metric tonnes prime deformed steel reinforcing bars at the purchase price of US$285.50 per metric tonne (the contract).*

23 ... On 21 October 1992, the defendants forwarded in draft to Aaron Chen, (hereinafter referred to as `Chen`) then a consultant of the third party, an application for issuance of irrevocable documentary credit. The draft was to be approved by the third party prior to issue of the letter of credit as required under the contract. The draft was amended by Chen and duly approved by me, then returned to the defendants. The defendants were thereafter required to open the letter of credit on or before 31 October 1992 in accordance with the contract.

24 ... Soon after 21 October 1992, I asked the defendants` Mac Yim on a few occasions as to whether the letter of credit was ready. Each time Mac Yim

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

would reply saying that the letter of credit was already established and that the third party would receive it the following day. By 31 October 1992, the defendants had not opened the letter of credit as required under the terms of the contract. ... Mac Yim in fact called me to ask for an extension of time. However I informed him that we could not accept his request as the letter of credit was out of time. The third party thereafter treated the contract as at an end and were under no further obligation to the defendants. The fact that no extension of time was granted by the third party is reflected in the defendants` solicitors` letter dated 27 January 1993 addressed to the third party wherein it is stated that the defendants relied on an automatic and/or implied grant of the maximum three-day grace period as stipulated in the contract and not on an oral agreement by the third party to extend the time for opening the letter of credit as alleged. ...

25 ... A copy of the letter of credit was eventually received by the third party on 5 November 1992 at 3.45pm although it was dated 3 November 1992. It was clearly noted on the third party`s copy of the letter of credit that the receipt date was 5 November 1992. At no time did the third party accept the letter of credit as it was issued after the option to terminate the contract had been exercised by the third party. Since the letter of credit was unacceptable, the third party did not wish to incur further expenses in collecting the original from its bank. Hence the original letter of credit was not collected by the third party and it eventually expired. ...

26 ... Between 5 November 1992 and 9 November 1992, there were no further developments with respect to the transaction. On the third party`s part the reason for this was clear, namely, that the contract had been repudiated and that repudiation had been accepted by the third party. ...

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

27 ... Since the contract had been repudiated by the defendants, the third party is thereby entitled under the terms of the contract to damages pursuant to the penalty clause ... at the rate of 1% of the contract value.

28 Alleging breach on the part of the defendants and claiming that there was no agreement as to any grace period or extension of time, the third party by their counterclaim claimed against the defendants a sum of US$28,850 as liquidated damages as provided for under the penalty clause of the agreement.

29 Mr Kumar was subjected to some extensive cross-examination. He was particularly referred to a fax message dated 2 November 1992 (AB-80) from the defendants addressed to the third party which reads:

> *Re: 10,000 Steel Debars For China*
>
> *We have today opened our L/C for the above cargo via Credit Lyonnais (sic) to your banker Swiss Bank Corporation. Our L/C No is 921102 IM765 SIN/826/92 for value US$2,855,000. [Please] confirm receipt in due course. [Please] also give us your [vessel] nomination in a day or two.*
>
> *(signed Mac Yim)*

30 When asked what decision he had taken after reading the fax message, Mr Kumar replied `Mr Mac Yim had been telling me that he had opened the letter of credit. He had been telling this for many days. Therefore I did not believe what he said in this fax.` When asked why he did not instruct Aaron Chen to respond to this fax, he said that he did not think that it was necessary (NE 159).

31 The defendants in their reply and defence to the counterclaim contended that the third party`s allegations concerning the letter of credit were frivolous and misconceived and averred as follows:

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

(a) The unit price per metric ton as stated in the letter of credit as amended on 4 November 1992 is the same as that stated in the contract, viz US$285.50 per metric ton.

(b) The total value of the letter of credit, the quantity of goods involved and their unit price as stated in the letter of credit as amended is wholly consistent and/or identical with the relevant terms in the contract.

(c) While the contract specified `... negotiable at counters of negotiating bank in Singapore`, the letter of credit provides for `negotiation at sight` with Credit Lyonnais, Singapore, which was in fact the negotiating bank in Singapore. Thus, the letter of credit conforms with the contract.

(d) The letter of credit does not state that it is not payable at counters of the negotiating bank. On the contrary, the letter of credit states that it is payable at Credit Lyonnais, which is the negotiating bank.

(e) The letter of credit does not prohibit TT reimbursements. On the contrary, it states that upon receipt of documents in strict conformity with the terms and conditions of this credit, Credit Lyonnais, the negotiating bank will pay the third party according to their instructions.

(f) It is neither a condition nor term of the contract that the letter of credit to be opened is not to contain a provision that a copy of the applicant`s telex accepting vessel nominated is required. In any event, the inclusion of this provision does not make the letter of credit inoperative.

(g) Although there appears to be a difference in the respective provisions for negotiation of the letter of credit as stated in the letter of credit and the special instructions therein, such a difference within the letter of credit does not amount to a nonconformity with the contract. Neither does the difference affect the validity of the letter of credit. In any event, it would always be open to the defendants to correct the difference if they were so requested by the third party.

(h) Clause 7 of the special instructions was not rejected by the third party. The third party merely considered the inclusion of cl 7 to be unnecessary. In any event, even if the third party had rejected cl 7, which is denied, the inclusion of cl 7 in the letter of credit does not amount to nonconformity with the contract.

(i) The defendants deny that they had agreed to allow the third party to provide telex advice within five days as alleged. In any

> event, the fact that cl 2 of the special instructions requires a telex advice to be provided by the beneficiary within three days does not amount to nonconformity of the agreement.
>
> (j) The defendants deny that the third party did not agree to cl 11 of the special instructions. In any event, such a non-agreement does not amount to nonconformity with the contract.

32 Since the terms of the letter of credit play a major role in the dispute between the parties it is useful to reproduce certain relevantparts of the letter of credit issued by Credit Lyonnais dated 3 November 1992, addressed to Swiss Bank Corp, Singapore by order and for account of the defendants in favour of the third party. The relevant parts read:

> *Singapore, 03/11/92*
>
> *... By order and for account of Brown Noel Trading Pte Ltd ... We hereby issue our irrevocable documentary credit as follows:*
>
> *40A Form of documentary credit: Irrevocable.*
>
> ...
>
> (31) C Date of issue: 02/11/92.
>
> (31) D Date and place of expiry: 22/12/92 Singapore.
>
> (50) Applicant: Brown Noel Trading Pte Ltd.
>
> ...
>
> (59) Beneficiary: Donald & Mcarthy Pte Ltd.
>
> ...
>
> (32) B Currency code, amount: USD 2,855.000.
>
> ...
>
> (41) M Available with/by: Credit Lyonnais, Singapore for negotiation at sight.
>
> ...
>
> (43) P Partial shipments: Allowed.
>
> (43) T Transhipment: Allowed.
>
> (44) Loading on board/

dispatch/taking in charge: Shipment from any Black Sea port to Fangcheng or Shekou. China latest on 01/12/92.

…

(47) A Additional conditions: 1 Documents to be sent to LC issuing bank in one lot.

2 All banking charges for account of beneficiary.

(48) Period for presentation: Documents are to be presented not later than 17 days after date of issuance of the transport documents but within the validity of the credit.

…

(78) Instructions to the paying/

accepting/negotiating bank: Upon receipt of documents in strict conformity with the terms and conditions of this credit we shall pay you according to your instructions.

*This documentary credit is subject to UCP 1983. ICC publication No 400.*

*Yours faithfully,*

*(signed)*

*Credit Lyonnais*

*Singapore*

*Authorized Signatures*

*This forms part of our irrevocable letter of credit No 921102lM765SIN/826/92.*

33 ***Merchandise Description***

*10,000 mt (+/- 10%) of prime deformed steel reinforcing bars at US$291 per mt C&F FO CQD Fangcheng or Shekou, China.*

34 ...

35 ***Special Instructions***

*1 Bills of lading showing name of shipper as Brown Noel Trading Pte Ltd.*

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

> (2) An original copy of beneficiary`s telex is required advising applicant (telex no: RS 50706 EXIM) name of carrying vessel, name & contact number of shipping agent (in Singapore & China), loading port, ETD, L/C no, merchandise description and quantity shipped within three working days after shipment date.
>
> (3) Beneficiary must send by courier service one copy each of documents including non negotiable bills of lading to applicant within five working days after shipment. Beneficiary`s certificate to this effect and relevant courier service receipt are required.
>
> (4) Charter party bills of lading is acceptable.
>
> (5) A copy of applicant`s telex accepting the vessel nominated is required.
>
> (6) All documents, except the mill test certificate, must be dated after 22 October 1992 and made out in English and manually signed.
>
> (7) 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 seven days prior to vessel sailing.
>
> (8) Documents must be presented for negotiation within 17 days after the date of issuance of bills of lading but within the credit validity.
>
> (9) Vessel flying flags of the following countries are not acceptable: Israel, South Korea, South Africa, Taiwan, Iraq and Vietnam.
>
> (10) 10% more or less on the credit amount and merchandise quantity shipped are allowed.
>
> (11) All amendment charges are for account of beneficiary.
>
> *Swiss Bank Corporation for Credit Lyonnais*
>
> *Singapore branch Singapore*
>
> *(signed) (signed)*

36 Before dealing with the factual and legal issues which require resolution in this case, it is necessary to recapitulate the relevant part of the evidence of

two bankers, Ms Sheena Kwan, operations manager of Credit Lyonnais who was called by the defendants as their witness and Mr Stephane Jaquemet, a former Swiss Bank executive and currently the senior accounts manager with Mees Pierson NV, who testified for the third party.

37 Ms Kwan`s evidence was more factual in nature. She confirmed in her affidavit of evidence-in-chief that Credit Lyonnais issued the letter of credit under reference in favour of the third party on the instructions of the defendants. She said that the said letter of credit was issued on a back to back basis of another earlier letter of credit issued by the Development Bank of Singapore (DBS), on the application of the plaintiffs in favour of the defendants. She affirmed that the letter of credit issued by Credit Lyonnais in favour of the third party was delivered by the bank`s delivery staff to Swiss Bank on 3 November 1992. She disclosed that Credit Lyonnais subsequently amended the said letter of credit by a letter dated 4 November 1992 (exh D-1). The amendments contained therein are to the following effect:

> *Singapore 04/11/92*
>
> *...*
>
> *Please note above documentary credit is amended as follows:*
>
> *1 Field 43P partial shipment: Prohibited*
>
> (2) Field 43T transhipment: Prohibited
>
> (3) Field 45A to read as: 10,000 mt (plus/minus 10 pct) of prime deformed steel reinforcing bars at USD285.50 per mt CNF FO COD Fangcheng or Shekou, China.
>
> (4) Field 46A item No 9 to read as: Vessel flying flags of the following countries are not acceptable: Israel, South Korea, South Africa, Taiwan, Iraq and Vietnam. Shipping company`s certificate to this effect is required for negotiation.
>
> *Otherwise unchanged.*

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

38 Commenting on the third party`s assertion (contained in para 7 of the affidavit of evidence-in-chief of Mr Kumar filed on 1 March 1995), Ms Kwan said (paras 5, 6 and 7):

> *... I am referred to para 7 of the affidavit of Vinod Kumar, filed herein on 1 March 1995, wherein he states that a copy of the letter of credit was only received by the third party on 5 November 1992 at 3:45pm. He also states in that paragraph that the original letter of credit was not collected by the third party and remained with their bank, Swiss Bank until it expired. The expiry date of the letter of credit is 22 December 1992.*

39 ... Normal banking practice requires an advising bank, in Swiss Bank`s position, to inform its clients, being the party to be advised, as soon as possible, of the fact that a letter of credit has been issued in that clients` favour. Given that the letter of credit was sent by hand to Swiss Bank on 3 November 1992, it would have been normal banking practice for Swiss Bank to inform and advise the third party by telephone or telefax on 3 or 4 November 1992 that a letter of credit had been issued in their favour. It is my opinion that in sending a copy of the letter of credit to the third party only on 5 November 1992, Swiss Bank must have acted on the third party`s instructions over the telephone, telefax or otherwise between 3 November 1992 to 4 November 1992.

40 ... I based my professional opinion that there must have been instructions from the third party to Swiss Bank on 3 or 4 November 1992 on another more important reason. Swiss Bank had merely sent a copy of the letter of credit to its clients instead of the original. This is clearly against both normal banking practice and the duty of an advising bank, unless instructed by their clients, for this reason. As the letter of credit is to be negotiable at the bank only, anyone in the third party`s position would require the original letter of credit and the other relevant documents in order to obtain payment from the bank. A mere copy of the letter of credit would not suffice. An advising bank in the position of Swiss

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

Bank would have normally sent the original letter of credit over to the third party, unless otherwise instructed by the third party.

41 Mr Stephane Jaquemet who testified on behalf of the third party confined himself to addressing the discrepancies between the stipulations agreed to between the parties and the actual letter of credit issued and opined that the letter of credit as issued was `commercially unworkable`.

42 One other witness whose evidence requires mention is Samir Devmurari, a former employee of the third party. He testified that he was in the employ of the third party between mid-1992 and May 1994. He claimed that the agreement between the defendant and the third party was at all times subsisting; it was not cancelled as alleged by the third party and that the third party was unable to supply the goods to the defendants. He added that sometime on 9 or 10 November 1992, Mr Kumar instructed him to offer some replacement cargo to the defendants. In this regard, he referred to a fax message from Chemet Handel Trading (S) Pte Ltd (Chemet), an associate company of the third party, dated 10 November 1992. That fax message from Chemet bespeaks a proposal to replace the material so far committed to the defendants.

43 The first issue in this case is whether the contract entered into between the parties had been cancelled following the defendants` failure to open their letter of credit on or before 31 October 1992.

44 Evidence on this issue was markedly at variance between the parties. The defendants claimed that Aaron Chen who was then representing the third party expressly granted them a verbal extension of five days from 31 October 1992 to open the letter of credit. This claim was vehemently contested by the

third party`s Mr Kumar. He asserted that his decision not to grant any extension was conveyed to the defendants by Aaron Chen and he had also personally informed the defendants` Mr Mac Yim that he could not entertain the latter`s request for any extension. Who is telling the truth? There is very little to distinguish the performance of Mr Mac Yim and Mr Kumar in court. Aaron Chen, the connecting link, is now serving a prison term in the United States and was therefore not available to give evidence.

45 Consequently the defendants applied to the court to admit Aaron Chen`s affidavit in evidence purportedly under s 32(c) of the Evidence Act (Cap 97, 1990 Ed) which provides:

> *Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:*
>
> ...
>
> (c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;
>
> ...

46 Counsel for the defendants in urging the court to admit the affidavit of Aaron Chen, whose presence could not be secured in view of the fact he is now incarcerated in the United States, submitted that inasmuch as the said affidavit contained material which made him liable to be sued by the third party`s Mr Kumar, it should be admitted.

47 In my opinion, I found the submission unmeritorious. The affidavit referred to was affirmed by Aaron Chen to support the standpoint of the

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

defendants. There is nothing in the affidavit which could be considered as being against the pecuniary or proprietary interest of Aaron Chen; nor does the affidavit contain any wrongdoing, negligent or reckless conduct on the part of the maker to expose him to any dire consequences from anyone. In the event, the application by the defendants was rejected and the affidavit consequently held inadmissible.

48 However, Devmurari`s testimony evinced to the court that, even as late as 9 or 10 November 1992, Mr Kumar had instructed him to offer some replacement cargo to the defendants. Devmurari`s testimony was assailed by the third party on the ground that he was a disgruntled former employee; his services were terminated on account of some wrongdoing and he had an axe to grind against the company.

49 Though it appeared to the court that Devmurari might well be entertaining some grudge against his former employers, his fax message to the defendants dated 10 November 1992 was unmistakable. The fax message is indicative of a fact situation that the agreement between the parties was not cancelled but still subsisting.

50 Aaron Chen`s absence did not appear to handicap the defendants. Besides Devmurari`s evidence, there were other features of the transaction which seemed to militate against the third party`s present contention.

51 Two documents in the agreed bundle particularly call for attention: one a fax message dated 12 November 1992 (AB-91) from Mr Mac Yim to Aaron Chen which reads amongst other things:

> *... we have to come up with a replacement cargo soonest possible. Needless to remind you [that] the penalty clause for non-*

> *performance of this contract is quite astronomical. [Please] work harder for a replacement cargo.*

52 The other, a reply from Aaron Chen on 13 November 1992 (AB-92) is categorical. It reads:

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

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

54 The implications of the foregoing exchanges are enormous. They do not in any way support the claim of the third party that these exchanges were nothing more than a mere voluntary gesture and a non-obligatory rendering in the name of goodwill.

55 There are yet other features which do not seem to go hand in hand with the third party`s stated position in this case. Why would the defendants go about opening a letter of credit in favour of the third party around the 3 and 4 November 1992 if they had been told in clear terms by not one but two persons from the third party, that the whole deal had been called off in view of the non-issuance of the letter of credit on the appointed day. Why should the third party, having cancelled the contract and having disregarded the defendants` letter of credit, go about finding replacement cargo without a fresh contract and without a valid letter of credit for the new cargo?

56 The elementary truth appears to be that there was indeed an extension granted to the defendants for the late opening of the letter of credit. There was a faint attempt by the third party to deny that Aaron Chen had any authority to

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

grant such an extension. But Devmurari`s fax message, albeit from Chemet which is an associate company of the third party, was admittedly on the instructions of Mr Kumar. In the circumstances the third party could not be heard to say that neither Aaron Chen nor Devmurari had been clothed with the indicia of authority to deal with the defendants. The tone and substance of all the documentary evidence included in the agreed bundle testify to the fact that there was no cancellation or annulment of the agreement entered into between the parties.

57 The next issue is whether there are any material discrepancies in the defendants` letter of credit that would entitle the third party to avoid or terminate the contract and whether the third party had waived their right or estopped from relying on these discrepancies as a ground for avoiding or terminating the contract.

58 It was conceded by counsel for the third party that she had discovered the ten inconsistencies listed in the pleadings (para 4(a) to (j) of the re-amended defence) only a week before the commencement of this trial. Leave to re-amend the defence of the third party to include the said inconsistencies was granted only on 17 April 1995 with an award of $1,500 as costs forthwith to the defendants. Counsel for the third party submitted that the discrepancies were material in nature and had the effect of rendering the letter of credit totally inoperable. She suggested that the absence of an immediate objection was not fatal to the third party`s defence and inasmuch as the letter of credit was not in conformity with the bilateral terms agreed to between the parties, the defendants cannot unilaterally disregard them and maintain that those discrepancies did not really matter. In order to appreciate the arguments advanced in this respect, it is useful to tabulate side by side ***some*** , though not all of the agreed terms (AB-

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

59 to 61), and ***some of the provisions under attack*** in the letter of credit issued (AB-82 to 86):

59 Relying on the foregoing discrepancies, counsel for the third party contended that these discrepancies, some of which were major, rendered the whole letter of credit non-operative. Counsel for the defendants on the other hand argued that these discrepancies were not material in nature and at any rate inasmuch as that they were raised only on the date when the hearing commenced, they were ***ex post facto*** and water under the bridge. Counsel`s alternative contention was that the indifference and inaction by the third party in not raising their objections to any of the terms of the letter of credit must be equated with waiver on the part of the third party.

60 There were altogether ten discrepancies listed by the third party in their pleadings (para 4(a) to (j) of their defence - see pp 22-25 herein). The first two (4(a) and (b) of the third party`s defence) relates to the error as to the unit price of the goods contracted to be supplied. It should be noted at the outset that this error was almost immediately rectified by the issuing bank, ie Credit Lyonnais on 4 November 1992 (exh D-1). At any rate the total value of the letter of credit has been correctly stated as US$2,855.

61 As to the third and fourth discrepancies (paras 4(c) and (d) of the third party`s defence), the explanation given by Ms Sheena Kwan was that the issuing bank, Credit Lyonnais is also the negotiating bank within the meaning of the letter of credit issued. Counsel for the defendant after referring to Ms Kwan`s evidence at pp 93C-D, 96D-F and 99C-D of the notes of evidence, submitted that Credit Lyonnais` role as negotiating bank is not in discord with the agreed terms of the contract.

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

62 In this connection, it must be noted that though the contract includes a provision (AB-54, first three lines) that the letter of credit is negotiable at the counters of `our` (meaning third party`s) negotiating bank in Singapore, the absence of any clear indication by the third party in the contract as to the identity of the negotiating bank renders their present contention somewhat limp.

63 As to the fifth discrepancy (para 4(e) of the third party`s defence) relating to the absence of the provision of telegraphic transfer, even the third party`s expert witness, Mr Stephane Jaquemet opined that this clause was unnecessary in the circumstances of the case.

64 The sixth complaint (para 4(f) of the third party`s defence) relates to a condition (cl 5 of the special instructions) in the letter of credit requiring the defendants` telex, accepting the vessel nominated. This provision was nowhere to be found in the contract but curiously found its way into the letter of credit. The third party contended that this clause made the whole letter of credit non-operative.

65 Mr Ringo Fok when cross-examined (NE 75) admitted that this clause was nowhere to be found in the contract entered into between the parties and as a result there existed a likelihood of non-payment. Later in re-examination, whilst still maintaining that it was indeed a discrepancy, he tried to ameliorate the situation by suggesting that `if the defendants were to accept the discrepancy, the beneficiary will be paid.` Mr Jaquemet when asked by the court on this issue said that a prudent banker will not finance goods to be purchased by such a letter of credit.

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

66 Moving on to the other complaints listed by the third party in their defence, it is manifest that contrary to what had been agreed to between the parties, the defendants appeared to have unilaterally reduced the time allowed for negotiations of the letter of credit by five days under cl 8 of the special instructions (para 4(g) of the third party`s defence). Evidence adduced in this connection which was not in any way controverted by the defendants, showed that the letter of credit provided the last day of shipment as 1 December 1992 and the last day for negotiation as 22 December 1992, a period of 22 days, whereas cl 8 of the special instructions of the letter of credit (AB-86) allowed only 17 days from the date of shipment. This alteration or agreement clearly makes the letter of credit contradictory.

67 Similarly, cl 2 of the special instructions in the letter of credit (AB-86) requires a telex advice from the third party giving particulars of vessel and goods within three days after shipment, whereas the agreement between the parties was for five days (para 4(i) of the third party`s defence). Additional complaints by the third party concern the unilateral inclusion by the defendants of cll 7 and 11 of the special instructions (AB-86) in the letter of credit. Clause 11 under which all amendment charges (of the letter of credit) were required to be borne by the third party never featured in the contract between themselves. Clause 7 which provides inter alia that ` ***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*** `, was admittedly expressly rejected by the third party.

68 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

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

first the buyer`s telex accepting the nominated vessel, appears to undermine the whole tenor of the agreement between the parties.

69 The obligation on the part of the buyers to open the letter of credit in conformity with the contract of sale requires no elaboration. It is settled law that the buyers must furnish the seller with the type of credit that has been agreed upon in the contract of sale. Furthermore the credit to be provided by the buyers must conform not only in form but also in substance to the type specified in the contract of sale (see ***Benjamin`s Sale of Goods*** (4th Ed) para 23-046). In ***Wahbe Tamari & Sons Ltd& Anor v `Colprogeca`-Sociedade Geral De Fibras, Cafes E Produtos Coloniais, Lda*** [1969] 2 Lloyd`s Rep 18, the contract of sale stipulated a confirmed credit. The correspondent banker purported to confirm the credit but reserved a right of recourse against the seller in regard to all bills drawn and negotiated under documentary credit. It was held by the court that such an undertaking did not constitute a confirmation and that the buyer had failed to furnish the type of credit required from him under the contract of sale.

70 An unreported decision, ***H & J M Bennett Europe Ltd v Angrexco Co Ltd*** (unreported, 6 April 1990), annotated by the authors of ***Benjamin`s Sale of Goods*** ( ***supra*** , fn 1 at p 1478) states that an attempt to modify the contract of sale by inserting onerous, unagreed requirements in the documentary credit constitutes a breach of contract on the buyer`s part.

71 Counsel for the defendants endeavoured to explain to the court that the discrepancies alluded to including the one in relation to the buyer`s telex advice accepting the nomination of the vessel, were nothing more than peripheral.

72 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.

73 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.

74 What follows next? Does this breach, which in my finding is substantial and serious in nature, operate to terminate the performance of the contract automatically. Have the third party by their conduct and action waived their right to rely on the breach or repudiation on the part of the defendants.

75 Notwithstanding occasional observations to the contrary (see ***Harbutt`s `Plasticine` Ltd v Wayne Tank and Pump Co Ltd*** [1970] 1 QB 447) overruled in ***Photo Production Ltd v Securicor Transport Ltd*** [1980] AC 827; ***JM Thomson*** (1978) 41 MLR 137, neither a breach of contract nor a repudiation of obligation automatically terminates the performance of a contract. It is a settled principle of law that when a breach of contract gives rise to a right to

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

terminate, termination will not take place until the party not in breach, ie the promisee elects to terminate performance.

76 ***In Heyman v Darwins Ltd*** [1942] AC 356, Viscount Simon LC in his speech lays down the principle that if the conduct of one party to a contract amounts to a repudiation and the other party does not accept it as such but goes on performing his part of the contract and affirms the contract, the alleged act of repudiation is wholly nugatory and ineffective in law. He said at p 361: `... repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.` The expression `acceptance of repudiation` is the act of rescission by the innocent party`.

77 The foregoing principle could also be discerned from the observation of Scrutton LJ in ***Golding v London & Edinburgh Insurance Co Ltd*** (1932) 43 Lloyd LR 487 at p 488 which reads: `... what effect the repudiation of one party has unless the other party accepts the repudiation.` So much so, Asquith LJ in ***Howard v Pickford Tool Co Ltd*** [1951] 1 KB 417 at p 421 commented: `An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind.` (See also ***White And Carter (Councils) Ltd v McGregor*** [1962] AC 413 at p 444.)

78 The valid exercise of a right to terminate is a species of election and a promisee will satisfy the requirement, if by his words or conduct, he makes clear his intention to bring about the termination. In this regard, no particular form is necessary; a written or oral communication so long as the promisee uses a clear expression such as `cancel`, `rescind`, `annul`, `off`, `at an end`, `no longer binding` or states that the promisor`s breach has been accepted as a repudiation

of the contract, will suffice (see ***Breach of Contract*** (1984 Ed) by JW Carter, para 1016; see also ***Lakshmijit s/o Bhai Suchit v Faiz Mohammed Khan Sherani*** [1974] AC 605 at p 616).

79 In the case at hand, there is no express communication of the acceptance of the repudiation. Worse still, the third party was found to be going about corresponding with the defendants as if the contract was afoot and that they were earnest in securing the goods agreed to be supplied under the contract.

80 The question is: What is the effect of such a conduct on the part of the third party. Have they waived their rights? The principles applicable in this regard are well encapsulated by the authors of ***Chitty on Contracts*** (27th Ed) in Vol 1, para 24-002, and are as follows:

> *Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have `affirmed` the contract.* ***He will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him.*** *Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract. Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. But if the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract. [Emphasis added.]*

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

81 Lord Wright in ***Ross T Smyth & Co Ltd v TD Bailey Son & Co*** [1940] 3 All ER 60 at p 70 said:

> *The word `waiver` is a vague term used in many senses [* ***Stroud`s Judicial Dictionary*** *lists at least 13]. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election as where a person decides between two mutually exclusive rights. Thus, in the old phrase, he claims in* ***assumpsit*** *and waives the tort.* ***It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by laches. ...****[Emphasis added.]*

82 In ***Banning v Wright*** [1972] 2 All ER 987 at p 998; [1972] 1 WLR 972 at p 979, Lord Hailsham of St Marylebone LC in discussing waiver in the context of a revenue statute said:

> *In my view, the primary meaning of the word `waiver` in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. This appears to accord with the dictionary meaning of the term and with the two discussions of the subject, each to the same, or similar, effect in* ***Halsbury`s Laws of England****. In the former of these it is said:*
>
> *`Waiver is the abandonment of a right ... A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist.`*

83 The authors of 9 ***Halsbury`s Laws of England*** (4th Ed), para 574, say:

> *Waiver may be express or implied from conduct, but in either case* ***it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances.****Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance of the concession. [Emphasis added.]*

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

84 Bearing the foregoing principles in mind, I proceeded to analyse the evidence adduced and arguments presented. In my opinion, the claim by the third party that they had simply ignored the letter of credit as they had earlier terminated the contract, does not have an impress of truth nor any conformity to probability. 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 apologizing to the defendants for the current situation (see AB-96).

85 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.

86 I find, therefore, that the third party by their failure to deliver the goods under the terms of the contract are in breach of their obligations and consequently the defendants are entitled to damages. But the question is: What is the amount due to them?

87 ***Damages***

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

88 The defendants under the head damages, first claim US$55,000 representing the element of profit they would have received from their sub-sale of the goods to the plaintiffs if the third party had fulfilled their obligations. Such a claim for loss of profit is recoverable at law where it can be shown that the third party had knowledge that the goods contracted were intended for sale by the defendants and in this regard it is useful to refer to at least two English decisions: ***Household Machines Ltd v Cosmos Exporters Ltd*** [1947] 1 KB 217 and ***Hall v Pim*** (1928) 33 Com Cas 324 (HL).

89 In the ***Household Machines*** , the plaintiffs entered into a series of contracts for the supply to the defendants of certain goods which were, to the plaintiffs` knowledge, intended for resale by the defendants to exporters. The plaintiffs failed to deliver some of the goods and the defendants declined to make any payments for those goods which the plaintiffs had delivered until the question of the undelivered items was settled. The plaintiffs thereupon brought an action for the price of the goods delivered and the defendants counterclaimed for damages for non-delivery of part of the goods subject to the contracts and for a declaration of indemnity in respect of any damages which they might be liable to pay to the person to whom they had contracted to resell the goods. The court held that the defendants were entitled to damages for breach of contract based on their loss of profit and to a declaration of indemnity limited to such damages as might be found to be legally due from the defendants to a subsequent purchaser as a result of the non-delivery by the plaintiffs.

90 In ***Hall v Pim*** (as annotated in ***McGregor On Damages*** (15th Ed) at para 761), the plaintiff bought from the defendants an unascertained cargo of wheat which he resold without awaiting delivery and further resales of the goods took place by a series of contracts. The plaintiff failed to deliver the goods and

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

the House of Lords allowed the plaintiff the loss of profit on his resale, even though the arbitrators had found that the chance of the buyer keeping the goods for himself and the chance of his reselling them were almost equal. It must be remembered, however, that ***Hall v Pim*** was special on its facts since the contract therein contemplated by its terms the provisions for sub-sales. The decision, however, lays down the principle that where damages are allowed, it will not be for any extravagant and unusual bargains.

91 As in the ***Household Machines*** case, the third party in the present case knew that the defendants were buying the goods with a view to resale and this has been amply proven by the series of correspondence exchanged between the parties prior to the formation of the agreement (AB-7, AB-10, AB-11, AB-12, AB-15, AB-18, AB-22, AB-23, AB-26, AB-29 and AB-37). Furthermore, the defendants` resale price of US$291 per metric ton as compared to their purchase price of US$285.50 per metric ton cannot be regarded as anything extravagant or unusual. At any rate, the court was not presented with any agreement by the third party that the amount of resale profit was unreasonable or exaggerated. In the premises the claim by the defendants for US$55,000 on account of loss of profit ought to be allowed.

92 The defendants` next claim is for an award for loss of currency exchange. A claim for currency exchange loss being damages arising as a consequence of a breach of contract received attention by the Singapore High Court in **Indo Commercial Society (Pte) Ltd v Ebrahim & Anor** [1992] 2 SLR 1041 at p 1055.

93 The ***Indo Commercial*** case extensively deals with a doctrine propounded by the Privy Council in ***Miliangos v George Frank (Textiles) Ltd***

[1976] AC 443; [1975] 3 All ER 801. Briefly stated, the doctrine reinforces the inherent powers of the court to give in some instances, judgment for a sum of money expressed in foreign currency but converted to local currency at the date when the ***plaintiff was given leave to levy execution*** . In the ***Indo Commercial*** case, Michael Hwang JC, after a careful analysis of a number of reported decisions and learning expressed his view that on a claim by the plaintiff for exchange loss, if the plaintiff were to suffer an exchange loss on conversion, he may have a separate remedy by means of a claim for damages for breach of contract arising from exchange losses based on the rule in ***Hadley v Baxendale*** (1854) 9 Ex 341; 156 ER 145. He had however declined to express any definite view on the House of Lords decision in ***Lips Maritime Corp v President of India*** [1988] AC 395 (per Lord Brandon of Oakbrook at p 425) where the House of Lords had held that there is no such thing as a cause of action in damages for late payment of damages and that the only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute.

94 In the case at hand, the defendants apparently relying on the observations of Michael Hwang JC in the ***Indo Commercial*** have framed their claim for `damages for currency exchange loss`. Curiously however, they are also claiming for interest on the judgment sum. Counsel for the defendants contended that the claim for currency exchange loss has become necessary as a result of the fall in the value of the US dollar as against the Singapore dollar over the past 21/2 years. The sum involved is US$55,000. It was contended for the defendants that they would have been able to earn this sum on or about 17 December 1992 (see Mr Ringo Fok`s testimony at NE 62B) had the third party supplied the goods to the defendants for their supply in turn to the plaintiffs. During that time, the currency exchange rate was approximately US$1 =

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

S$1.6380. During the trial however, the exchange rate was around US$1 = S$1.3965. The nett currency exchange loss on US$55,000 was estimated by the defendants` counsel as S$13,282.50.

95 The Singapore Court of Appeal is yet to consider the views expressed in the ***Lips Maritime*** case. Be that as it may, in my view, even if it is open to the defendants to frame a claim for loss of exchange, their inclusion of a general, all-embracing prayer for interest tends to render their claim for loss of exchange somewhat nebulous. Moreover, the US dollar as one notes from the financial pages of the newspapers now stand at about S$1.41. In the context of this case, I am of the view that justice will be done if I awarded interest to the defendants at the rate of 8% pa on the US$55,000 from 17 December 1992, the date on which they were expected to have been paid the said sum, if everything went according to the sale agreement.

96 Now on the next claim by the defendants for a sum of S$235,715 being the equivalent of US$150,000 which the defendants claimed that they had paid to the plaintiffs, the defendants appear to face monumental difficulties.

97 Firstly, in this third party proceedings, the order for third party directions entered by consent includes a direction that the liability of the third party to the defendants be tried at the trial of this action, but subsequent thereto (see para 7 of the order of court dated 24 May 1993). Despite this order, the defendants without consulting the third party had proceeded to settle the claim of the plaintiffs and as a result the plaintiffs had completely vanished from the picture. This, in my view, has undoubtedly interfered with the proper canvassing of issues before the court as to what damages if any, are payable to the plaintiffs by the defendants and consequently by the third party to the defendants. The

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

upshot is that the plaintiffs` claim for a specific sum of damages against the defendants was not tested in court and consequently any unilateral agreement the defendants might have reached with the plaintiffs could not, in fairness, bind the third party. The third party, as envisaged in the third party directions, ought to have been given the opportunity to cross-examine the plaintiffs, but this was not done.

98 Secondly, the evidence as proffered by the defendants makes it patent that the third party was not aware of any of the terms and conditions of the defendants` contract with the plaintiffs (NE 24) neither was there any evidence to suggest that the third party knew that the plaintiffs were going to sell the goods to another party. It is also relevant to recall at this stage the defendants` stated position that until 20 December 1992, the day before both the Sintra and the Donald Mcarthy contracts were signed, they did not inform the third party who the purchasers of the goods were.

99 What are the principles of law applicable in this regard? In ***Borries v Hutchinson*** (1865) 18 CB (NS) 445; 144 ER 518, the seller sold caustic soda knowing that the buyer was buying for resale on the Continent. In an action for damages for non-delivery the seller admitted liability for the loss of profit on the resale, but successfully contested the buyer`s claim for the amount he had paid his sub-buyer by reason of his breach of the sub-contract occasioned by the defendant`s non-delivery. On the other hand in ***Grebert-Borgnis v J & W Nugent*** (1885) 15 QBD 85 (CA) the seller sold sheepskins to the plaintiff, knowing that, except as to price, the contract was substantially the same as the plaintiff`s sub-contract with a French customer. In an action for damages for non-delivery the seller again did not dispute liability for the loss of profit on the resale, but here the buyer successfully recovered the damages he had paid his

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

sub-buyer in a suit in a French court. The Court of Appeal said that the damages awarded by the French court were not as a matter of law the exact amount the plaintiff was entitled to, but that this amount might be treated as a not ***unreasonable one*** at which the damages might be assessed.

100 Though textbook writers prefer ***Grebert-Borgnis*** ,Salter J in ***Patrick v Russo British Grain Export Co Ltd*** [1927] 2 KB 535 at p 540 thought that the probability of a resale might well have been insufficient to support a claim for costs incurred in litigation with a sub-buyer or for penalties or damages paid to him. This was cited with approval by Devlin J in ***Heskell v Continental Express Ltd & Anor*** [1950] 1 All ER 1033 at p 1049.

101 In my opinion, besides the absence of the plaintiffs at the trial, inasmuch as the third party were kept totally in the dark not only as to the terms and conditions of the sale between the defendants and the plaintiffs but worse still the third party did not know that the plaintiffs had another sub-buyer, this particular claim for S$235,715 by the defendants as well as a prayer for an indemnity are ill-founded and bound to fail. The undisputed evidence that, until 20 October 1992, the third party did not even know the identity of the plaintiffs tends to undermine the defendants` claim herein substantially. At any rate, the plaintiffs` claim as pleaded by them in the statement of claim, ie for a total of US$263,965.56, appears, in my opinion to be both excessive and extravagant considering the fact the defendants themselves were making from this deal only US$55,000. As observed by me earlier, the defendants should have sought further directions from the court before settling the plaintiffs` claim unilaterally. They should have availed the third party an opportunity to cross-examine the plaintiffs on the sums claimed and the quantum payable and paid to the plaintiffs. Unhappily for the defendants, this was not done.

102 In the premises, for the reasons I have given, I enter judgment for the defendants in the sum of US$55,000 under para 14(i) of the statement of claim and award interest on the said sum with effect from 17 December 1992 at 8% pa until judgment, pursuant to s 9 of the Civil Law Act (Cap 43). No order is made on para 14(ii) of the claim for a sum of S$12,807.05 since the defendants had, at the outset abandoned this prayer. The defendants` other claims under paras 14(iii), (iv) and (v) are, for reasons given, disallowed. Consequently, the third party`s counterclaim is also dismissed. The defendants are further awarded costs of the action and the counterclaim.

103 ***Defendants` claim allowed in part; third party`s counterclaim dismissed.***

MPH Rubin J

Plaintiff unrepresented and absent
Jimmy Yim and Lau Kok Keng (Drew & Napier) for the defendants
Chiang Wen-Shan and Jerry Loo (Wee Ramayah & Pnrs) for the third party

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