

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 12

Suit No 1342 of 1994

Between

Todd Trading Pte Ltd

... Plaintiff

And

Alfon Far East Pte Ltd

... Defendant

GROUND OF DECISION

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Todd Trading Pte Ltd v Alfon Far East Pte Ltd

[1997] SGHC 12

Suit No 1342 of 1994
MPH Rubin J
15 January 1997

1

Judgment:

2 Cur Adv Vult

3 JUDGMENT

1 The dispute in this action revolves around a contract dated 19 July
1994 for the sale

of Vietnamese groundnut kernel by the plaintiffs to the defendants and a letter of credit

to be opened in respect thereof by the defendants.

5 2 Insofar as material, the contract as entered into between the parties
(AB-78/79)

6 (a) The unit price of the goods (ie, grade 1 Vietnamese groundnut kernel)
was US\$680

7 (b) The quantity of the goods to be supplied was 800 metric tons (plus
or minus 10% at

8 (c) Shipment of the goods was to be effected between 25 July 1994 and
31 August 1994 -

9 (d) The defendants were required to open a letter of credit at value of
US\$530 per

10 (e) The said letter of credit was subject to the production of the following documents:

12 (2) full set clean on board bills of lading;

13 (3) certificate of origin issued by the Chamber of Commerce (sic);

14 (4) Certificate of quantity/quality weight and packing issued by SGS Vietnam (sic);

15 (5) Certificate of Fumigation issued by the Ministry of Agriculture; and

16 (6) Phytosanitary certificate issued by the Ministry of Agriculture.

17 (f) The defendants to remit the balance of US\$150 per metric ton to the
plaintiffs upon

receipt of the plaintiffs' fax confirming the quantity to be shipped, the vessel's
name

and the sailing date, three days before shipment;

18 (g) The plaintiffs to issue a 5% performance bond of the full contract
value within

seven working days upon confirmation of business (sic); and

19 (h) The said letter of credit is to be delivered to the plaintiffs by 23 July
1994.

20 3 On or about 20 July 1994, the defendants forwarded to the plaintiffs a
copy of their

application for the said letter of credit ('the Alfon LC') seeking confirmation of
the

terms and conditions therein set out (AB-80/81). In the event the plaintiffs by their fax

also dated 20 July 1994 (AB-84) requested the defendants to effect a number of amendments

thereto. Insofar as material the said fax reads as follows:

21 ... Many thanks your fax copy of L/C application today. As per our discussion just,

kindly make the following changes as follows:

22 1) Certificate of Vietnamese origin issued by Chamber of Commerce to read as

Certificate of Origin issued by Chamber of Commerce certifying that the goods are of

Vietnamese origin .

23 2) To allow transshipment.

24 3) Under Special Conditions, delete Point No. 2 and replace it with beneficiary to

advise applicant by telex (telex No. RS36472 TUNGCO) full shipment details including

[illegible]

1994.

27 Other terms and conditions remain unchanged. Kindly confirm by return
that _____ above _____ will

be done. ...

requesting further amendments to be made to the letter of credit. The said fax with _____ the

confirmation subsequently endorsed thereon by the defendants (AB-86) reads as follows:

Further our fax today and our telephone conversation just, please further amend
the L/C

term and conditions as follows:

29 1. Certificate of Fumigation issued by the Vietnam Fumigation
Department.

30 2. Phytosanitary Certificate issued by the Plant Production and
Protection Department.

31 3. Shipment to be effected into maximum five (5) lots with first shipment
to be

effected not later than 10th August 94.

32 4. Transshipment allowed. Please confirm all in order. Meantime, we
confirmed above all

in order. Best regards, Steven Low ... < Todd Trading Pte Ltd > We hereby
confirm to

accept above terms and conditions. Terms and conditions set out on this page
shall

constitute an integral part of the sales contract No. P94SIN280 dated 20th July
1994.

(signed Alfon Far East Pte Ltd) ...

33 5 The defendants thereupon proceeded to instruct their bankers,
Industrial &

Commercial Bank Ltd ('ICB') to amend the terms of the Alfon LC accordingly.
They also

informed the plaintiffs on 22 July 1994 (AB-96) that the Alfon LC had been
opened with ICB

and requested them to contact ICB to arrange for its collection.

34 6 The Alfon LC (AB-123/124) thus issued by ICB incorporating the
amendments requested

by the plaintiffs was received by them on 28 July 1994. However, after receipt
of the

document, the plaintiffs wanted to further amend it upon realising that the earlier

amendments they had sought were either insufficient or inappropriate. In this
connection,

the plaintiffs' two requests as contained in two separate communications both
dated 28

July 1994 (AB-121 and AB-122) read as follows:

35 Many thanks your above L/C which we received today. As discussed
with Ms Christina,

kindly make the necessary changes in the L/C as follows :

36 1. Under documents required, please amend as follows: A. Certificate of
Origin issued

by Chamber of Commerce and Industry of Vietnam certifying that the goods
are of Vietnamese

origin I/O stated. B. Certificate of Quantity/Quality/Weight and Packing issued
by SGS

Supervise Vietnam Limited I/O stated. C. Certificate of Fumigation issued by
the Vietnam

Fumigation Company I/O stated.

37 2. Under Special Conditions, please amend as follows: A. 10% more or
less on quantity

and value allowed. B. All documents are to be forwarded to us in full set in one
lot. (No

need for courier service as this is a local L/C.) *C. B/L to indicate shipment
effected by

container I/O original stated.

38 3.* Under specifications, please delete 'well dry' and insert 'well dried'.

*

<

Note: Paragraphs 2C and 3 were included in AB-121 but not in AB-122 > .

Please expedite

above L/C amendments as we are presently preparing cargo for shipment. ...

39 7 The plaintiffs by their pleadings allege that an oral agreement was reached between

the parties to amend the Alfon LC as detailed in their letter dated 28 July 1994.

Mr Low

Lup Boon (PW-3), the plaintiffs' former senior manager in his affidavit of

evidence-in-chief (paras 17 and 18) claimed that these amendments were not substantive in

nature but were necessary and essential in order to identify the relevant authorities in

Vietnam responsible for the required certificates, failing which the Alfon LC would be

rendered inoperative. Mr Low claimed that the reason why the plaintiffs had to request the

said amendments was due to the confused political and economic situation prevailing in

Vietnam which rendered the names of the various government departments uncertain and

subject to changes.

40 8 Mr Low testified that the defendants were fully aware of the situation in Vietnam at

the material time and despite several assurances that the amendments were being attended

to and notwithstanding the plaintiffs' providing the defendants with the requisite

performance bond, the defendants in breach of the agreement reached between the parties,

failed to furnish them with an operative letter of credit. In his testimony, Mr Low

asserted that when he spoke with Ms Christina Tay See Wan (DW-4) on 28 July 1994 and

before and afterwards concerning the proposed amendments, she had readily agreed to effect

9 The exchange of telexes between the parties prior to the issue of the writ herein

by the plaintiffs at about 4.57pm to the defendants (AB-137) in which the plaintiffs

latter would amend the Alfon LC by 10.00am on 2 August 1994, the plaintiffs would consider

the cargo and commence proceedings against them for any losses, costs and expenses

42 10 The defendants' reply on 2 August 1994 (AB-139) was that they had
already provided a

accept the goods under the terms of the contract.

contract.

came to grief and these require reproduction. The first in this series was dated 3 August

45 Your telex dated 2 Aug 1994 refers. Very disappointed at position you
have taken. We

names/descriptions, viz :

48 (3) Chamber of Commerce to Chamber of Commerce and Industry of
Vietnam.

50 (5) Well dry to well dried . As experienced trader in Vietnam, you should
know that we

had made a mistake in the names of the companies in items (1) and (2) above.

To be

operative, an L/C must obviously reflect the correct names. You are trying to take

advantage of our typographical errors. We hereby put you on notice that you are in breach

of contract by refusing to furnish us with an operative L/C. We, therefore, have no choice

but to dispose of the cargo at current market prices and hold you fully responsible for

all losses, cost and expenses. You will hear from our solicitors in due course. ...

51 13 The reply from the defendants to the plaintiffs dated also 3 August 1994 (AB-151)

reads:

52 ... Your telex dated 03/08/1994 refers. We write to point out that you did not show

your intention to perform your obligation, otherwise, you need not to hold the performance

bond for a week without any reason. We wish to remind you that you did not

give us ample

time to consider your amendment requirements. In your telex dated 02/08/1994
< AB-142

> sent on 11:37 a.m., you request the amendment reach you by your close today
(ie

02/08/1994). We strongly felt that we are trying to put us on a very difficult
position

and tried to give us hard time. We repeatedly (sic) to say that we are in all time
willing

to accept the goods under the terms of contract. And therefore, we once again
to remind

you that we did not reject to meet your requirements, so far. Now, please
confirm per

return by 10:00 a.m. on 4th August 1994 that there will be no more amendments
of above

L/C. Upon receipt your confirmation, we will amend above L/C in accordance
to your fax

dated 28th July, 1994. ...

53 14 The next telex dated 4 August 1994 (AB-157) from the plaintiffs to the defendants,

in a way, set the seal to the commencement of the proceedings herein and it reads:

54 ... We refer to your telex dated 3rd August 1994 and our reply dated 3rd August 1994.

You have not responded to our telex until today closing. We repeat that we are not in

breach of contract. It is you who are in breach of contract by wrongfully disposing of the

goods. As you have been well aware, we have contracted to re-sell these goods to Bandan

Urusan Logistik, Indonesia. This is the reason for us to include the clause read as 'All

documents (except invoices and draft) must bear import application No. 031/030/8015/94 and

H.S. number 1202.20.000' in the above L/C. As a consequence of your breach, we are in turn

unable to fulfil our obligation to Bandan Urusan Logistik, Indonesia and we put

you on

notice that we look to you for compensation. We hereby accept your repudiation of the

contract. We expressly reserve all our rights against you. ... 15 On 4 August 1994, the

plaintiffs' former solicitors wrote to the defendants in the following terms (AB-158):

55 ... We act for Todd Trading Pte Ltd and refer to your telex of 3 August 1994 to our

clients. We are instructed by our clients to put you on formal notice that you are in

breach of the above ontract by failing to furnish our clients with an operative letter of

credit pursuant to the terms of the above contract. Your letter of credit was received by

our clients on 28 July 1994. By telex on the same day, you were informed that various

amendments were required to correctly reflect the names of various parties and certain

descriptions. The required amendments were obvious and not substantive. By
telex dated 29

July 1994, our clients informed you that the first lot of the cargo would be
shipped on

the Mekong Spring V9432 ETD 3 August 1994. Despite several follow-up
communications from

our clients urging you to amend your letter of credit, you have refused to do so.
The

Mekong Spring V9432 duly sailed on 3 August 1994. As you had steadfastly
refused to amend

the letter of credit, our clients had no choice but to divert the cargo to Singapore.
Our

clients will be endeavouring to sell the goods at best available price. You are
hereby put

on notice that our clients will be seeking to recover to all losses, costs and
expenses

from you. ...

56 16 On 15 August 1994 the plaintiffs' present solicitors wrote to the defendants'

solicitors enquiring whether the latter would accept service of process to be issued and

the defendants' solicitors responded on the same day that they would. In the event, the

writ in this matter was issued on 17 August 1994 and duly served on the defendants.

57 17 The plaintiffs' director, Mr Goh Hock Mong (PW-5) in his affidavit of

evidence-in-chief (P-8) detailed the damages suffered by the plaintiffs as a result of the

breach of contract on the part of the defendants. His evidence is summarised as follows.

58 18 In order to perform the contract entered into with the defendants, the plaintiffs

had ordered the 800 metric tons of groundnut kernels from three different suppliers - 300

metric tons from one Hachimex Trading Company ('Hachimex'), 200 metric tons from one VN

National Foodstuffs Import Export ('Vinalimex') and 300 metric tons from one
Haprosimex at

US\$600 per metric ton each. Following the breach and in order to mitigate their
losses,

the plaintiffs endeavoured to cancel their contract with their suppliers and
managed to

cancel the Hachimex and Vinalimex contracts totalling 500 metric tons. But as
to the

Haprosimex contract, the plaintiffs were only able to cancel only 84 metric tons
and had

to find a buyer for the remaining 216 metric tons of the groundnuts.

59 19 In regard to the Hachimex contract, the plaintiffs quantified their loss
of profit

as US\$7,399.29. As to the Vinalimex contract, they claimed their loss of profit
as

US\$4,683.72. As regards the 84 metric tons out of 300 metric tons of the
Haprosimex

contract, their loss of profit was said to be US\$2,066.25 and the sub-total of the

foregoing three items amounted to US\$14,149.26.

60 20 As regards the remaining 216 metric tons of the Haprosimex contract which the

plaintiffs said could not be cancelled, Mr Goh alleged that the said goods which were

already shipped and set to sail for its destination on 3 August 1994, were redirected to

Singapore and in the event subsequently sold to an Indonesian party known as UD Delapan

Delapan at US\$680 per metric ton. In the process, the plaintiffs had to incur various

expenses amounting to S\$12,086.87 (see annexure 1 to the defendants' written submission -

paras 36 to 43 of Mr Goh's affidavit of evidence-in-chief) and a further sum of US\$30,401

being a credit note given to the said UD Delapan Delapan owing to the deterioration of the

quality of the goods when delivery was taken by UD Delapan Delapan

sometime between 1

October and 3 November 1994 (see AB-23 and page 138 of the NE). Ultimately,
the total

claim by the plaintiffs was for

61 (a) loss of profits in respect of goods not procured amounting to
US\$14,149.26;

62 (b) in respect of goods sold to UD Delapan Delapan amounting to
US\$30,401; and

63 (c) expenses incurred in relation thereto amounting to S\$12,086.87.

64 21 As regards the credit note issued by the plaintiffs to UD Delapan
Delapan in

connection with the sale of 216 metric tons of groundnuts to them, a degree of
uncertainty

and inconclusiveness appear to surround the documentation. It was noted from
the documents

submitted that the plaintiffs had for some reason issued two invoices, both
bearing the

same number 947841 and the same date 22 August 1994 covering the same
shipment (see AB-258

and AB-259). To compound the matter further, one invoice which was made in
favour of UD

Delapan Delapan states that the sale price of the goods was US\$680 per metric
ton; whereas

the other invoice concerning the same shipment issued in favour of one Badan
Urusan

Logistik states the sale price as US\$500 per metric ton. Mr Goh tried to explain
this

anomaly by saying that UD Delapan Delapan did not have the requisite permit
to import

goods into Indonesia and as a result the goods had to be channelled through the
said Badan

Urusan Logistik (see page 111 of the NE). The question as to why there was a
difference in

price was not satisfactorily answered.

65 22 Mr Goh claimed that though the goods were shipped to Jakarta on or
about 25 August

1994, the requisite licence to import the goods into Indonesia known as Laporan

Pemeriksaan Surveyor ('LPS') was issued only on 9 November 1994 (page 116 of the NE) after

a pre-shipment inspection carried out in Singapore on their behalf by an organisation

known as P T Surabaya Indonesia ('PTSI') (page 114 of the NE). Mr Goh could not come up

with any plausible reason for such a long delay on the issue of the LPS; nor could he

explain why their Indonesian buyers had taken delivery of the goods in Indonesia from

about 1 October 1994 onwards - whilst according to him it normally took only about three

days for the goods to reach Jakarta - at any rate even before the issue of the LPS.

66 23 Mr Goh further revealed that though the inspection of the goods carried out in

Singapore before they were shipped to Indonesia had established that they were in good

order and condition (see page 136 of the NE), the buyers in Indonesia ie, UD

Delapan

Delapan, had complained later that some 45% of the goods were found to have been

deteriorated (see page 119 of the NE). All the same, the plaintiffs took the word of the

Indonesian buyers and without any further survey or inspection, issued a credit note for

US\$30,401. Mr Goh admitted that the deterioration in the quality of the goods must have

been caused at the Indonesian end because the goods were lying in the Indonesian port for

some time whilst awaiting the issue of the LPS.

67 24 Mr Vu Quy Vy (PW-2), a lawyer from Vietnam was called by the plaintiffs to give

expert evidence in relation to the nomenclature of certain Vietnamese organisations and

governmental authorities mentioned in the letters of credit. He testified that there is no

government department, authority or organisation in Vietnam called 'Chamber of Commerce'

and the relevant organisation instead is known as the 'Chamber of Commerce and Industry of

Vietnam'. He said that there is no enterprise in Vietnam called 'SGS Vietnam' and the

appropriate body licenced by the State Committee for Cooperation and Investment in Vietnam

is styled 'Supervise Vietnam Ltd'. He stated that there is no government department,

authority or organisation in Vietnam called the 'Vietnam Fumigation Department' and the

company which grants certificates of fumigation for all products exported from Vietnam is

a state-owned company called 'Vietnam Fumigation Company'.

68 25 Before dealing with the defendants' evidence, it must be mentioned that there was

one other issue raised by parties in the pleadings ie, whether the defendants were

entitled to make a call or demand on the performance bond issued by the plaintiffs.

However, the court was informed by counsel that this issue need not detain the court's

time as the call on the bond would materialise only if the case were to be decided in

favour of the defendants.

69 Defendants' evidence

70 26 The defendants' managing director and their chief witness Mr Yeo
Kiat Hui (DW-1),

whilst not disputing the terms of the contract entered into between the parties
and the

correspondence exchanged in relation thereto, averred (see para 7 of exh D-1,
his

affidavit of evidence-in-chief) that the defendants, in reliance of the plaintiffs'

assurance that there would not be any further changes to the contract and that
the

variations and amendments agreed between the parties to the Alfon LC
following the

plaintiffs' telex dated 20 July 1994 (AB-86 - see para 4 therein) were in order, proceeded

to conclude a separate contract ('Mitra contract') with one Indonesian company known as P

T Mitra Sarana Purnama ('PT Mitra') on 20 July 1994 to sell the 800 metric tons of

groundnuts.

71 27 Mr Yeo claimed that the terms of the Mitra contract were in most respects identical

to that of the contract between the parties except that the sale price of the goods to P T

Mitra was US\$775 per metric ton.

72 28 After detailing the events relating to the provision of the performance bond, Mr Yeo

averred that (see para 15 of his affidavit) though the plaintiffs after receipt of the

Alfon LC on 28 July 1994 requested the defendants to cause yet a few other amendments to

be effected to the said letter of credit, no one in the defendants' employ including their

accounts assistant, Christina Tay had agreed to cause the said amendments to be made. He

complained that the plaintiffs' ultimatum contained in their telex dated 2 August 1994

(AB-142) giving the defendants time only until the close of 2 August 1994 to effect these

amendments was unreasonable. He added that in the first instance any amendments to be made

to the Alfon LC would have to be cleared with PT Mitra and that the said ultimatum by the

defendants allowed little time for their bankers to process the amendments.

73 29 As to the plaintiffs' stand that the deadline of 2 August 1994 was necessary because

the vessel carrying the first batch of cargo was to set sail on 3 August 1994, Mr Yeo

after making reference to the terms of the contract (AB-86) which stipulated that the

first shipment was to be not later than 10 August 1994, said that the deadline imposed was

unreasonable because there were vessels sailing from Haiphong to Jakarta via Singapore at

least twice a week with two shipping lines operating on the said route. In reference to

the plaintiffs' allegation as contained in their telex dated 3 August 1994 (AB-150)

notifying the defendants that the latter were in breach of the contract and therefore the

plaintiffs would be selling the cargo to other parties, Mr Yeo invited the attention of

the court to the text of the telex by the defendants (AB-151) highlighting their grievance

that the plaintiffs did not give the defendants 'ample' (sic) time to consider the

amendments. The defendants also requested the plaintiffs to confirm that there would be no

further amendments so that they could proceed to effect the amendments to the

Alfon LC as

requested in their fax dated 28 July 1994.

74 30 Mr Yeo asserted that the plaintiffs were the party in breach and claimed that the

defendants had as a result suffered loss of profits amounting to US\$76,000 representing

the difference between the purchase price of the goods ie, US\$544,000 (US\$680 x 800 metric

tons) and the sale price to P T Mitra of US\$620,000 (US\$775 x 800 metric tons). Mr Yeo

also outlined the basis for an indemnity from the plaintiffs against any claims from PT

Mitra for any losses suffered by the latter on account of the defendants' failure to

supply PT Mitra the goods contracted to be supplied. In this context, he made reference to

the correspondence exchanged between the defendants and P T Mitra (AB-267, 268, 273 and

282) which were admittedly included in the agreed bundle on the basis that one Mr Eka

Gunawan of PT Mitra would be giving evidence on behalf of the defendants. As it transpired

the said Mr Gunawan was not called to give evidence on ground that he was otherwise

engaged in Indonesia and as a result his proposed affidavit of evidence-in-chief was

struck out. I will revert to this later in these grounds.

75 31 Mr Yeo claimed (page 166 of the NE) that he went to Ho Chi Minh city on 30 July 1994

after making an appointment with Mr Low to inspect the goods. To his dismay however, Mr

Low did not keep his appointment and on Mr Yeo's return to Singapore he discovered that

the defendants had received a telex advising them to engage a good lawyer.

76 32 As regards the PT Mitra contract, his answers during cross-examination (see page 172

of the NE) were as follows:

77 Q: How did the plaintiffs know that the goods were re- sold to parties in Indonesia? A:

In the letter of credit application, there is a clause - import application No

031/030/8015/94 and H. S. number 1202.20.000 . Q: Would you agree that by looking at the

foregoing numbers, it is impossible to tell that you had agreed to re-sell the goods to

parties in Indonesia? A: When I purchased the goods from the plaintiffs, I told them it

would be sold to Indonesians. Q: Which person from the plaintiffs did you inform? A:

Steven Low. Q: Why is this evidence missing from your affidavit? A: This was not stated

because it is already stated in the letter of credit.

78 33 As to the defendants' claim they had to communicate with PT Mitra first before the

defendants could incorporate the amendments required, Mr Yeo said (page 179 of the NE)

that the defendants in fact tried to contact PT Mitra sometime on 29 July 1994 but _____ were unable to reach them as the personnel at P T Mitra were probably attending Friday _____ prayers at that time.

79 34 When questioned on a number of documents obtained through further discovery, _____ it _____ came to light that the defendants had utilised a letter of credit issued on or about 13 July

1994 by Citibank on behalf of Badan Urusan Logistik ('Bulog LC') for the supply _____ of _____ some

2,000 metric tons of groundnuts (1,000 metric tons of grade 1 groundnut kernel and _____ another

1,000 metric tons of grade 2 groundnut kernel) (see SAB-28 to 31) which letter of _____ credit

incidentally contained the same import application number 031/030/8015/94 and _____ HS _____ number

1202.20.000 as was in the Alfon LC.

80 35 When further cross-examined Mr Yeo claimed that the Bulog LC was issued in connection with a separate contract entered into between the defendants and PT Mitra on or about 13 June 1994. He said he would endeavour to produce the copy of the contract to the court but in the event did not do so.

81 36 Mr Yeo admitted during further cross-examination that the grade 1 groundnut kernel contracted to be supplied under the agreement referred to in the Bulog LC (SAB-29) had already been delivered and that the defendants had negotiated the Bulog LC and received

full payment thereof (see pages 212 to 214). He admitted further that the defendants had

in fact been acting as commission agents for PT Mitra for the purchase of the said 2,000

metric tons of groundnuts and they had received US\$72,000 or thereabouts in commission

from PT Mitra.

82 37 Mr Yeo added that the supply of 2,000 metric tons of groundnuts had nothing to do

with the contract the defendants had entered into with PT Mitra for the supply of 800

metric tons. According to him, the defendants were acting as commission agents in relation

to the supply of 2,000 metric tons of groundnuts to P T Mitra whereas as regards the 800

metric tons, there was a sale and purchase agreement between the defendants and PT Mitra.

83 38 He told the court (pages 278 to 280 of the NE) that in addition to the Bulog LC

which the defendants had already negotiated, the defendants had also received a second

letter of credit from PT Mitra in connection with the supply of 800 metric tons. He

claimed that he had negotiated both the letters of credit and had the records relating to

the second letter of credit in his office. This second letter of credit was also not produced to the court.

84 39 Miss Chee Sau Ying (DW-3), a shareholder and a former director of the defendants

testified that whilst she was with the defendants, she was the secretary to Mr Yeo and was

in-charge of administration and finance of the defendants. She averred that she had not at

any time agreed to effect the amendments requested in the plaintiffs' fax dated 28 July

1994 (AB-121) nor was she aware of any confirmation by the defendants' accounts assistant,

Christina Tay to make these amendments. She recalled that on 29 July 1994, she answered a

telephone call from Mr Low of the plaintiffs enquiring whether the defendants were

agreeable to the amendments proposed by them in their telex dated 28 July 1994. On

learning that Mr Low was going to Ho Chi Minh city on or around 31 July 1994
and being

aware that Mr Yeo would also be in Ho Chi Minh city at about the same time,
she advised Mr

Low to speak with Mr Yeo in Ho Chi Minh city on the proposed amendments.
To facilitate the

meeting, she also provided Mr Low with Mr Yeo's contact address and the
telephone number

of the hotel where Mr Yeo was staying. She also remembered telling Mr Low
during their

conversation that the defendants would effect the amendments after they had
received

clearance from PT Mitra.

85 40 Miss Chee testified that the defendants were acting as handling and
commission

agents for PT Mitra in connection with the supply of 2,000 metric tons of
groundnuts

referred to in the Bulog LC (SAB-28/31). She contradicted Mr Yeo's evidence

by maintaining

that apart from the Bulog LC referred to, there was no other letter of credit issued

either by Bulog or PT Mitra (pages 196 and 197 of the NE).

86 41 During re-examination by defendants' counsel Miss Chee further contradicted Mr Yeo

by stating that the contract to supply 800 metric tons of groundnuts to PT Mitra was

subsumed in the contract concerning the supply of 2,000 metric tons to P T Mitra (pages

384 and 385 of the NE).

87 42 The last witness for the defendants was Miss Christina Tay, the defendants' accounts

assistant at the material time. She averred in her affidavit of evidence-in-chief (D-4)

that when she received Mr Low's call on 28 July 1994 concerning amendments to be effected

to the letter of credit, she advised him to speak either with Mr Yeo or Miss Chee as she

had no authority to agree to any amendments.

88 43 During cross-examination, when she was asked whether she had the opportunity to

discuss the evidence to be adduced in this case with any other person, she affirmed that

she did not. When specifically asked as to when she last met Miss Chee before her

testimony in court, she replied that she met her a few months before the commencement of

the trial when she was doing some shopping. When confronted by plaintiffs' counsel with

documentary evidence which indicated that she and Miss Chee shared the same office

premises, the witness admitted sheepishly that she met Miss Chee almost daily during work.

89 Submissions and conclusions

90 44 The thrust of the plaintiffs' case as submitted by their counsel in his closing

submission was that the defendants had breached the oral agreement between the parties to

amend the Alfon LC and had persisted with such a breach despite two reminders to honour

the agreement. Counsel contended that as a consequence of the defendants' failure to

honour their commitment, the plaintiffs had little option but to terminate the contract.

Counsel's alternative argument was that the defendants were in breach of their obligations

in failing to provide the plaintiffs with an operative letter of credit. In this regard,

he singled out a clause in the Alfon LC (AB-124) which stated that the 'operative date of

the LC will be advised by the opening bank' and contended that the foregoing was not in

conformity with the agreed terms (AB-81) which stipulated that the 'letter of credit will

be automatically operative only when the beneficiary opens a performance bond for the

value of USD27,200 ...'

91 45 Dealing first with the alternative contention as regards the discrepancy in relation

to the operative date provision, it must be remembered that it is a settled principle of

law that the failure by the buyer to open the letter of credit within the stipulated time

may be treated by the seller as a breach of a condition of the contract and as a

repudiation of it (see *Nichimen Corporation v Gatoil Overseas Inc* < 1987 > 2 Lloyd's

Rep 46). It is also well settled that the furnishing of the credit must be in strict

conformity with the provisions of the contract and any aberration thereof could rightly be

held as a repudiatory breach (see *Wahbe Tamai & Sons and Jaffar Trading Co v*

Colprogeca Sociedade General de Fibras, Cafes & Products Colonias, Lds < 1969 >

2 Lloyd's Rep 18). See also Benjamin's Sale of Goods (4th Edn), para 23-046
and Sintra

Merchants Pte Ltd v Brown Noel Trading Pte Ltd < 1996 > 2 SLR 444 at 461E-
G.

92 46 On the face of it, it would appear that the complaint of the plaintiffs
as to the

discrepancy between the agreed terms and that found in the letter of credit is not
without

merit. However, the events in the present case show that the plaintiffs who had
been

constantly pressing the defendants for amendments after amendments for some
reason did not

even once raise this perceived discrepancy in relation to the operative date of
the Alfon

LC. Even the amended statement of claim filed on 12 August 1994 omits any
reference to the

discrepancy alluded to. Be that as it may, the documents referred to the court
show that

the plaintiffs were notified by the defendants as early as 2 August 1994 (see

AB-139) that

ICB had already been instructed by the defendants to make the letter of credit operative

with immediate effect. Moreover, the advice from ICB dated 3 August 1994 (AB- 149) further

confirms that the Alfon LC was operative as of 3 August 1994. In the premises, the

plaintiffs' arguments concerning the discrepancy alluded to have little merit and

therefore fail.

93 47 Now as regards the other amendments where there had been a flurry of exchange

between the parties since 28 July 1994, I find that the plaintiffs' claim that there was

an 'oral agreement' between the parties to amend the letter of credit somewhat spurious.

Firstly, the claim by Mr Low that he had secured this so-called oral agreement with an

accounts assistant of the defendants - whom he had never met before - was not

supported by

the tone and substance of the plaintiffs' very communication dated 28 July 1994 (AB-121).

The said communication pointedly makes reference in its opening paragraph to a discussion

with 'Christina' as regards the amendments but nowhere in that communication is there any

reference to any agreement arrived at between the parties. Even the subsequent telexes and

faxes sent by the plaintiffs fail to mention this alleged agreement. It was clear to me

after hearing evidence from both parties that this so-called agreement was a figment of Mr

Low's imagination quite apart from the absurdity of the plaintiffs' claim that in a matter

of such significance they had secured or hoped to secure an agreement by speaking to a

hitherto unknown junior employee of the defendants. In arriving at the foregoing

conclusion, I hasten to add that though I found Christina Tay to be brazenly lying to the

court even on peripheral matters, the plain fact appears to be that there could not have

been an agreement as alleged by the plaintiffs, as of 28 July 1994 to amend the Alfon LC.

94 48 Leaving aside the foregoing, the conduct of both parties in regard to the amendments

relating to the description of the Chamber of Commerce, SGS Vietnam, Vietnam Fumigation

Company and the tone of their correspondence thereto, leave much to be desired and in my

opinion both parties were exceptionally unreasonable in many respects.

95 49 First of all, not only had the plaintiffs been extremely inept and sloppy in seeking

endless amendments to the terms of the letter of credit, they had also in my opinion acted

extremely unreasonably in giving a rather narrow deadline to the defendants. In my view,

since the first shipment was not due until 10 August 1994, the plaintiffs should have

given the defendants reasonable time, at least a few more days to organise the amendments

rather than imposing such an extremely narrow deadline especially in view of the fact the

defendants had earlier provided to the plaintiffs the Alfon LC in accordance with the

plaintiffs' stipulations.

96 50 On the flip side, the defendants too appeared to have acted equally in a cavalier

and unreasonable manner. They ought to have known that the amendments sought did not in

any manner affect the substance and character of the contract between the parties. Given

the facts, they should have responded in a positive manner to the plaintiffs' telex of 1

August 1994 (AB- 137) rather than digging their heels in and maintaining that

the

defendants had fulfilled their obligation by providing an operative letter of credit. In

my opinion, both parties had failed to act in their best interests at the relevant time

for reasons only known to them and if they were by then already in consultation with their

solicitors, they did not in my opinion, receive the best advice.

97 51 In the circumstances, it remains for me to say that the plaintiffs' conduct in

purporting to rescind the contract as they had done by their telex dated 3 August 1994

(AB-150) and by their solicitors' letter dated 4 August 1994 (AB-158) was unreasonable and

unjustified: Similarly, the defendants too by their equally unreasonable conduct in not

accommodating the request of the plaintiffs as respects the amendments, could not be

absolved from their responsibility by bringing about the termination of the contract. In

the premises, I found both parties to be equally guilty of bringing about the demise of

the contract and therefore should bear the burden thereof equally.

98 52 The conclusions above should in effect dispose of the matters at hand. All the same,

my comments and conclusions on the damages claimed by the parties are as follows.

99 Plaintiffs' claim

100 53 The plaintiffs' quantification of the damages allegedly suffered by them as appears

from the pleadings as well as their closing submission are as follows:

101 (1) Loss of profits in respect of goods not procured (see para 144 of the written

submission)US\$14,149.26

102 (2) Losses in respect of goods procured (ie, 216 metric tons of goods sold to UD

Delapan Delapan) in respect of which the plaintiffs purportedly gave UD
Delapan Delapan a

credit note US\$30,401.00

103 (3) Losses and expenses incurred in connection with the 216 metric tons
of goods for

excess charges incurred in respect of marine insurance, warehouse handling
charges, survey

fees, trucking and unstuffing, bank charges, etc (see annexure 1 to the written
submission) S\$12,086.87

104 54 If the plaintiffs were to succeed in this action, their entitlement to
damages under

items (1) and (3) above could hardly be assailed. But as respects item (2) relating
to the

credit note, I find this claim wholly unsustainable even going by the plaintiffs'
own

evidence. In this connection, it did not escape my attention that the goods which
left

Singapore in good order and condition after it was surveyed on or about 25
August 1994

should have, even according to the plaintiffs, reached Jakarta within about three days.

For some reason, the goods which should have been delivered shortly after arrival at

Jakarta were taken delivery sometime from 1 October 1994 and that the requisite LPS was

overly delayed due to the fault of the plaintiffs. The other factors which weigh against

the plaintiffs include the fact that the credit note which was allegedly given to UD

Delapan Delapan was admittedly done so without any survey being carried out on the goods

and the admission by the plaintiffs' principal witness Mr Low, that the goods had

apparently deteriorated because of the warehouse conditions at the Jakarta end. These

facts, in my view, do not advance the prospect of the plaintiffs and in a way go to

confirm the view that the loss incurred, if any, could not be passed on to the defendants.

105 Defendants' claim for damages

106 55 The defendants' claim for damages of US\$76,000 for loss of profits
is equally

surrounded by omissions and half- truths. In this connection, a segment of the defendants'

submission on this issue bears reproduction (see paras 25 to 29) and reads as follows:

107 25. Then the question is whether the Defendants are entitled to the profit
US\$76,000.00. This in turn will depend on whether the 800 MT formed part of
the 2,000 MT

referred to in SAB 28-31 (the Citibank LC).

108 26. Refer to Mr Yeo's evidence at page 252-262 where Mr Yeo gave
evidence to say that

the 800 MT and 2,000 MT are separate. In respect of the 2,000 MT, the
Defendants acted as

commission agent only. The reason why the letter of credit at SAB 28-31 was
used was

because P. T. Mitra was in a hurry and it needed the import application number.
Later at
his cross- examination at page 271, Mr Yeo said that this import application
number was
necessary for him to obtain the LPS so that the goods could be exported to P. T.
Mitra in
Indonesia.

109 27. As Your Honour rightly pointed out, Ms Chee said that the 800 MT
was part of the
2,000 MT. We say that she was mistaken because she was not directly involved
in the
negotiations with PT Mitra. What she did was merely to prepare the paper work
in
accordance with Mr Yeo's instructions.

110 28. In SAB 28-31, the Grade 1 groundnuts were to be sold at US\$530.00
per MT whereas
under the contract of sale at AB 87- 88, which is the sub-sale contract, the
contract

price was US\$775.00. There is such a big difference between the two. It implies that they

are separate altogether given that there is such a big difference in the price.

111 29. Finally, even if Your Honour finds the 800 MT does form part of the 2,000 MT and

the Defendants have somehow mitigated their loss, Mr Yeo had said in his evidence that he

received only US\$72,000.00 in commission from SAB 28-31. So that leaves an outstanding

US\$4,000.00 under the contract that they would have made with PT Mitra (AB 87-88). We

submit we will still be entitle (sic) to judgment on this amount.

112 56 The disclosure by Mr Yeo of the supply of 2,000 metric tons of groundnuts to PT

Mitra brought into focus a hitherto concealed facet of the defendants' claim. Mr Yeo

having conceded - albeit not altogether voluntarily - the receipt of some US\$72,000 as

commission for the sale of the said 2,000 metric tons of groundnuts, maintained

that the
supply of 800 metric tons of groundnuts to PT Mitra was a separate matter and
had nothing
to do with the supply of 2,000 metric tons of groundnuts to P T Mitra. However
Miss Chee,
his secretary who happened to be the defendants' former director, a shareholder
of some
25,000 shares and the person then in-charge of finance and administration,
roundly
contradicted Mr Yeo when she said that there were no such separate contracts.
Mr Yeo's
next assertion that there was a separate letter of credit for the supply of this 800
metric tons was equally shot down by Miss Chee when she said that there was
no such
separate letter of credit. As regards the alleged P T Mitra claim, the defendants
had
earlier included in the agreed bundle a series of letters allegedly from Mr Eka
Gunawan of

PT Mitra to evince to the court that PT Mitra was serious in pursuing their claim against

the defendants. Again, this claim fizzled out when the defendants failed to produce Mr

Gunawan.

113 57 I find it strange that the defendants who were admittedly the handling as well as

the commission agents earning a commission of 5% on the goods to be supplied to PT Mitra,

had allegedly entered into a sale and purchase agreement with the latter for the supply of

this 800 metric tons of groundnut kernel at about the same time they were handling a

supply of 2,000 metric tons of groundnut kernel for commission. Having regard to the

several unsatisfactory features in the defendants' evidence including their lack of

candour and omission to produce material documents as well as a key witness, and having

regard to the plaintiffs' somewhat belated disclosure that they had already received their

commission of US\$72,000 in connection with the supply of this 2,000 metric tons of

groundnut kernel which according to Miss Chee included the 800 metric tons, I am impelled

to conclude that their counterclaim for the sum of US\$76,000 based on this so-called P T

Mitra contract, is wholly suspect and unmeritorious. Consequently I disallow their

counterclaim.

114 58 As regards the issue in relation to the performance bond posted by the plaintiffs,

it is common ground as stated by the defendants' counsel at the outset that the defendants

would proceed to enforce it only if their claim succeeded. In view of my finding herein, I

order that the performance bond given by the plaintiffs be hereby discharged.

with each party bearing its own costs.

117 < Judge >

Chow Kin Wah and Teoh Su Yin (Engelin Teh & Young) for the
plaintiffs
Bonnie Lo and Lee Chau Ee (Drew & Napier) for the defendants