Credit Agricole Indosuez v Banque Nationale de Paris
[2001] SGCA 12

Case Number : CA 52/ 2000

Decision Date : 14 February 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Steven Chong SC, Toh Kian Sing and David Tan Yew Beng (Rajah & Tann) for the appellants; Choi Yok Hung, Gan Kam Yuin and Rowena Chew Kiat (Bih Li & Lee) for the respondents

Parties : Credit Agricole Indosuez — Banque Nationale de Paris

Banking – Letters of credit – Whether deferred payment credit or negotiation credit – Examination of terms of letter of credit according to applicable UCP rules and where ambiguity exists

(delivering the judgment of the court): This is an appeal against a decision of the High Court as to the construction of a letter of credit (LC). The High Court granted the respondents judgment for their claim of US$1,333,466.64, being the sum due under the LC. [See [2000] 4 SLR 254.

An alternative basis of the respondents` claim is as a holder in due course of two drafts drawn against the appellants under the LC. In view of its decision on the main issue, the High Court did not go on to consider this question.

A subsidiary issue raised concerns the question whether the court should, even though the action was commenced by way of an originating summons, have directed that the action proceed to trial as there are disputes on facts on which oral evidence would be required.

The background

The facts giving rise to the action are straightforward. On 20 March 1999, Solo Industries Ltd (`Solo`) of Sharjah, United Arab Emirates, applied to the Dubai branch of the appellants, Credit Agricole Indosuez (`CAI`), to establish an LC in favour of a Singapore company, Amerorient Pte Ltd (`Amerorient`). On the application form, Solo stated that the credit was to be `available with BNP, Singapore by deferred payment 180 days from the date of presentation of documents at BNP, Singapore.`

On 21 March 1999, CAI telexed BNP, Singapore (`BNP`) stating that CAI had, on the instructions of Solo, opened an irrevocable LC for up to US$1,333,600 in favour of Amerorient. The LC was stated to be subject to the Uniform Customs & Practice for Documentary Credits 1993 (`UCP 1993`). The relevant terms of the LC will be referred to later.

On 26 March 1999, BNP informed CAI by SWIFT Telex that the former had advised Amerorient as to the contents of the LC and had added its confirmation to the credit. The telex also stated that the LC amount was `available by def payment`. On the same day, BNP negotiated the LC and paid over to Amerorient the sum of US$1,333,466.64. Also on the same day, BNP sent to CAI two covering schedules, each enclosing a set of documents that were presented by Amerorient to BNP pursuant to the terms of the LC. The two schedules were for sums of US$654,264.16 and US$679,202.48. On the top right hand corner of each schedule was a box where in the column entitled `Tenor` it was stated `180 days from date of nego-due on 21 Sept 99`.

On 30 March 1999, CAI advised Solo of the receipt of the documents referred to in the two schedules and in the same note, CAI stated the following:

> *Tenor: 180 days from date of negotiation.*
>
> *Due on: 21.09.99.*

The date 21 September 1999 is exactly 180 days from 26 March 1999. However, it does not appear that this note was copied to BNP.

The next day, 31 March 1999, CAI advised BNP by tested telex that the two sets of documents were `accepted to mature for payment on 21 September 1999` and that `on the said date we will remit proceeds as per your instructions.`

Nothing thereafter transpired between the two banks until 22 April 1999 when CAI requested for copies of the bills of lading and the invoices tendered under the LC. This request was made because of CAI`s internal audit requirements and it was duly acceded to by BNP.

Shortly before 25 May 1999, as a result of investigations carried out, CAI discovered that Amerorient had conspired with Solo to defraud various banks in UAE through the issuance of LCs. Therefore, on that day, CAI advised BNP via SWIFT telex that `by reason of a serious fraud suspicion`, BNP should not make any payment to the beneficiary under the LC until further notice from CAI. BNP were further warned that if they should effect any payment in spite of this notification, then they would be doing so under their `own and exclusive responsibility.`

The next day, 26 May 1999, BNP responded, stating that they had `confirmed and negotiated documents in strict compliance with the LC terms` and expected payment on the due date, namely, 21 September 1999. On 27 May 1999, BNP further informed CAI that they had negotiated and discounted the bills under the LC on 26 March 1999.

Thereafter, solicitors for both parties came into the picture. On the due date, CAI still refused to pay. Thus the action.

Deferred payment or negotiation credit?

As BNP had already negotiated the documents when fraud was discovered, the question whether CAI were under any liability to reimburse BNP under the LC depends very much on whether the credit is a deferred payment credit or a negotiation credit. CAI contend that it is the former while BNP submit it is the latter. BNP can succeed on their claim only if it is established that the credit is a negotiation credit.

The issue is thus one of construction, taking into account the express terms of the LC as well as the rules of the UCP 1993. We will now set out the relevant terms of the LC:

> *By order of Solo Industries Limited, ...*
>
> *We open our irrevocable letter of credit No P900262 favouring Amerorient Pte Ltd ...*

Expiring on 21 May 1999 for not exceeding US$1,333,600 ...

Available against presentation of drafts at 180 days from the date of negotiation by deferred payment.

...

Documents required:

(1) ... clean on board ocean Bills of Lading ...

(2) ... Commercial Invoices.

(3) Packing List.

(4) Certificate of Russian Origin ...

(5) ...

(6) ...

(7) Shipping Marks: ? SIL SHJ? Must be mentioned on Bills of Lading.

Special Conditions:

1 ...

2 ...

3 ...

4 Non legalized/non certified Certificate of Origin issued by exporter acceptable for negotiation in which case Beneficiary`s Certificate stating that the original legalized and certified Certificate of Origin will be sent directly to the Applicant must accompany the documents presented for negotiation.

5 ...

6 ...

7 All documents to be forwarded to Credit Agricole Indosuez ... Dubai, UAE by courier in one lot.

- ...

- Credit available with Banque Nationale de Paris, Singapore and to be confirmed by Bank National de Paris, Singapore.

- We hereby engage that documents presented in conformity with the terms of this credit will be duly honoured at maturity.

- Negotiation under reserve/guarantee not acceptable without prior reference to us.

...

This telex is the operative credit instrument and is subject to Uniform Customs and Practice for Documentary Credits 1993 Revision Brochure No 500 International Chamber of Commerce, Paris, France.

...

The relevant rules of the UCP 1993 are the following:

Article 9

Liability of Issuing and Confirming Banks

a An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with:

i ...

ii If the Credit provides for deferred payment - to pay on the maturity date(s) determinable in accordance with stipulations of the Credit;

iii ...

iv If the Credit provides for negotiation - to pay without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as additional document(s).

b A confirmation of an irrevocable Credit by another bank (the `Confirming Bank`) upon the authorisation or request of the Issuing Bank, constitutes a definite undertaking of the Confirming Bank, in additional to that of the Issuing Bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the Credit are complied with:

i ...

ii If the Credit provides for deferred payment - to pay on the maturity date(s)

determinable in accordance with the stipulations of the Credit;

iii ...

iv If the Credit provides for negotiation - to negotiate without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as additional document(s).

Article 10

Types of Credit

a All Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation.

b

i ...

ii Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation.

c ...

d d By nominating another bank, or by allowing for negotiation by any bank, or by authorising or requesting another bank to add its confirmation, the Issuing Bank authorises such bank to pay, accept Draft(s) or negotiate as the case may be, against documents which appear on their face to be in compliance with the terms and conditions of the Credit and undertakes to reimburse such bank in accordance with the provisions of these Articles.

We should add that documentary credits, besides being classified as provided in art 10(a) of UCP 1993, can be further classified into straight credits and negotiation credits. In a straight credit, the issuing bank engages itself towards the beneficiary only. The beneficiary is the only one who could have recourse against the issuing bank. In contrast, in a negotiation credit, the issuing bank, besides engaging itself towards the beneficiary, also engages itself with the drawers, indorsees and bona fide holders of bills drawn, giving the latter a distinct and separate claim against the issuing bank.

Under a deferred payment credit, the beneficiary of the credit would only be entitled to be paid at maturity: **Banco Santander SA v Bayfern Ltd** [1999] 2 Lloyd`s Rep 239. In contrast, a negotiation credit allows the negotiating bank, pending maturity of the credit, to buy over or give value for the documents and drafts drawn by the beneficiary. The negotiating bank will then be entitled in its own right to present the document and drafts to the issuing bank and obtain payment at maturity. This right of the negotiating bank to obtain payment is not defeated by any fraudulent conduct of the

applicant, the beneficiary or any third party, provided that the negotiating bank takes the documents in good faith and is not privy to, or has knowledge of, the fraud: see art 14(a) of UCP 1993.

Decision below

In the court below, the judge held that the LC, on a true construction, was a negotiation credit. In reaching the conclusion, she took the approach that one must look at the LC document as a whole and not at isolated phrases therein. To her, the most important provision was the availability clause appearing at the top of the LC: `Available against presentation of drafts at 180 days from the date of negotiation by deferred payment`. This coupled with the fact that the LC provided for the presentation of drafts to obtain payment, and drafts were themselves negotiable instruments, strongly indicated that the credit was a negotiation credit. To her, the words `deferred payment` in the availability clause was mere surplusage, indicating that the drafts would not be payable at sight but only after 180 days from negotiation.

The judge also found support for that interpretation from special conditions 4 and 7 where references to negotiation were made, and in particular condition 7 which provided that `negotiation under reserve/guarantee not acceptable without prior reference to (CAI).` She was not impressed with the argument that the credit could not be a negotiation credit because of the absence of an undertaking to engage with drawers, that the drafts drawn and negotiated in uniformity with the credit, would be duly honoured at maturity. She distinguished **Sinotani Pacific Pte Ltd v Agricultural Bank of China** [1999] 4 SLR 34 on the basis that the dispute there was between the beneficiary and the issuing bank and did not concern the question of negotiation.

The appeal

Before us, the issues canvassed are the same as those raised before the High Court. The first being the true nature of the credit - is it a deferred payment credit or negotiation credit? If we should decide that it is a deferred payment credit, there will be a need for us to consider the consequential issue of whether BNP are entitled to claim as a bona fide holder in due course of the drafts. The second issue is whether there are triable issues which pertained to the construction of the LC and/or the conduct of BNP in connection with the negotiation of the LC.

Nature of credit

At this juncture, we think it may be useful to set out the principles which apply to the construction of an LC. A concise statement touching on the question may be found in ***Documentary Credits*** by Raymond Jack (2nd Ed) at pp 6-7:

> ***The construction of documentary credits and the relevance of banking practice****. Under English law, where a contract is contained in a document and the meaning is clear, the basic rule is that no evidence in addition to the terms of the document, no extrinsic evidence, is admissible to modify the meaning of the words used. Extrinsic evidence is, however, always admissible to show that words have a particular meaning in their context, which differs from their ordinary meaning. Also, where the meaning is not clear, where there is ambiguity, evidence of the circumstance in which the contract was made is admissible to help to ascertain the meaning of the written words. As Lord Wilberforce stated in* ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen*** *[1976] 1 WLR 989 at 995 `No contracts are made in a vacuum: there is always*

> *a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as `the surrounding circumstances` but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.` He went on to refer to the object of ascertaining the intention of the parties in an objective sense. He continued `Similarly, when one is speaking of aim, object or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.`*

Thus, in construing an LC one should normally only examine the provisions of the document in the light of the applicable UCP rules. However, where the meaning of the LC is not clear or where it is sought to show that a term therein has a special meaning, then the surrounding circumstances relating to the issues of the LC, namely, the factual matrix, may be looked into for assistance.

In the present LC, the first substantive clause is the availability clause, the very clause on which the court below placed great emphasis, and it reads:

> *Available against presentation of drafts at 180 days from the date of negotiation by deferred payment.*

BNP submit that the availability clause clearly permits negotiation. The clause means that payment will be made later, that is, 180 days from the date of negotiation. It calls for negotiation expressly. The term `deferred payment` in the context simply means that payment is to be made at a later date and not immediately upon presentation of documents or drafts. BNP further say that the use of the term `deferred payment` does not preclude negotiation.

Like the judge below, BNP also rely upon special condition 7 which provides that `negotiations under reserve/guarantee not acceptable without prior reference to us`. They submit that the underlying premise of that condition is `a mandate given by CAI to BNP to negotiate the credit`. They argue that if there was no such mandate, then there would have been no need to make reference to the possibility of negotiation under reserve or under guarantee.

It will be recalled that art 10(a) of UCP 1993 provides that all credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation. The availability clause here is really far from clear. Indeed, it is inherently ambiguous, referring as it does to both `negotiation` and `deferred payment`, these being two distinct types of LC. Interestingly, the term `deferred payment` is preceded by the word `by`, as used in art 10(a). It is not so in respect of the term `negotiation` which is preceded by the word `of` instead of `by`. If it was intended that this should be a `negotiation credit`, then the availability clause would have provided that it is available `by negotiation`. It has been suggested by CAI that the word `negotiation` is a mistake. It should have been `presentation` as can be seen from the application form of Solo. We agree that the availability clause would have made perfect sense if the word `presentation` had appeared instead of `negotiation`.

The judge seemed to have relied very much on the fact that in the availability clause, `drafts` were required. This was what she said:

> *Drafts in themselves are negotiable instruments and the inference to be drawn*

> *from the use of the word `drafts` instead of document was reinforced by the use of the word `negotiation` in the same sentence.*

With respect, we think the judge below placed too much significance on the fact that the LC contemplated the presentation of drafts. While it is true that normally in the case of a deferred payment credit, drafts are not used, it does not follow that that is invariably the case. The following statement in ***Documentary Credits*** by Raymond Jack described the practice, past and present, in this regard (at pp 26-27):

> *In the past deferred payment has commonly been provided for by the use of a time draft, on a maturity of which payment is due. More recently the practice has developed of dispensing with a draft and having the credit provide that payment under it shall be due after the required period from, for example, the date of presentation of documents to the advising bank, or from the date of the transport document, as the credit may provide. It is this streamlined form of the transaction that is commonly called a deferred payment credit.*

In the ***ICC Guide to Documentary Credit Operations for the UCP 1993*** it is recognised that drafts could be used even in a straight documentary credit as the following statement (at p 37) shows:

> *Under the Irrevocable Straight Documentary Credit, the obligation of the Issuing Bank is extended only to the Beneficiary in honouring* ***Draft(s)/document(s)*** *and usually expires at the counters of the Issuing Bank. This kind of Documentary Credit conveys no commitment or obligation on the part of the Issuing Bank to persons other than the named Beneficiary. [Emphasis added.]*

So it is not that unusual for a deferred payment credit to require the presentation of drafts.

Another criticism raised by CAI against the judgment of the court below is that the judge did not give sufficient consideration to the fact that in the LC there is no undertaking by the issuing bank to the drawer, indorsees and bona fide holders of bills drawn and negotiated, to honour the same at presentation. All she said was:

> *I was also not impressed with the argument that it could not be a negotiation credit because of the absence of the undertaking to engage with drawers that the drafts drawn and negotiated in conformity with the credit would be duly honoured at maturity.*
>
> *...*
>
> *In the present case, the wording of the credit was clear enough to indicate its negotiability even without the presence of the undertaking.*

An essential feature of a negotiation credit is that the issuing bank extends its engagement to third parties who negotiate or purchase the beneficiary`s drafts/documents, in conformity with the terms and conditions of the credit. Without such an undertaking, the LC will be purely a financial

arrangement between the issuing bank and the beneficiary. An advising/confirming bank cannot by its unilateral action extend the commitment of the issuing bank. The following passage in ***Documentary Letters of Credit*** by EP Ellinger illustrates the point (at p 17):

> *In negotiation credits, however, although the issuing banker engages himself towards the seller, he adds a further promise, to this effect:*
>
> *`We hereby agree with the drawers, indorsers, and bona fide holders of bills drawn and negotiated in compliance with the terms of this credit that said bills will be duly honoured on presentation at our counter.`*
>
> *The issuing banker thus engages himself also towards the indorsees of the seller`s drafts. It follows that a negotiating banker, who negotiates the seller`s draft drawn under and in compliance with a negotiation credit, does so not merely in reliance on the banker`s promise to the seller, but also in reliance on the engagement undertaken by the banker towards the indorsees. In other words, while a straight credit leads to one legally binding relationship, ie that between the banker and the seller, negotiation credits lead to two such relationships - one between the banker and the seller and another between the banker and the indorsees.*

In ***Sinotani Pacific v Agricultural Bank of China*** (supra), this court stated that a typical example of the wording of the undertaking used in a negotiation credit is as follows:

> *We (issuing bank) hereby engage with drawers and/or bona fide holders the drafts drawn and negotiated in conformity with the terms of the credit will be duly honoured by us and that the drafts accepted within the terms of this credit will be duly honoured at maturity.*

In contrast, special condition 7 of the LC only provides to this effect:

> *We hereby engage that documents presented in conformity with the terms of the credit will be duly honoured at maturity.*

It is clearly in line with an undertaking given in a deferred payment credit, a straight credit. The engagement does not extend to the drawers, indorsees or bona fide holders of the drafts.

In ***Sinotani Pacific*** , the court gave considerable weight to the fact that no such obligation was undertaken towards drawers or bona fide holders of the draft in deciding that the credit in question was not a negotiation credit. The judge below sought to distinguish ***Sinotani Pacific*** on these bases:

> *No doubt the absence of that undertaking influenced the Court of Appeal in **Sinotani**`s case but the provision there which dealt with the availability of the credit did not refer to negotiation at all but simply stated that the credit was available `by acceptance` and drafts drawn would be honoured on presentation at the bank and drafts accepted within the terms of the credit would be honoured at maturity. The only reference to negotiation there was in the context of negotiation by a specific bank, the Royal Bank of Canada, and the dispute in the **Sinotani** case did not involve negotiation. It was a dispute between a beneficiary and an issuing bank.*

The first basis on which the court below distinguished ***Sinotani Pacific*** from the present is that besides the fact that the credit there was available by acceptance, and not negotiation, the availability clause in ***Sinotani*** was also different from that in our present case. The word `negotiation` did not appear in that availability clause. The only location where the word `negotiation` appeared was in the context of presentation to the Royal Bank of Canada which was to `hold special arrangement for negotiation, reimbursement and document forwarding.` While undeniably, the differences in the clauses are there, this court in ***Sinotani Pacific*** had dealt with the principles on negotiation credits and the need for a separate engagement with the indorsees and holders in due course of the draft in a general sort of way. Indeed, counsel for BNP recognises that there has to be such an engagement. What he argues is that where drafts are called for, this by itself implies that there is a separate engagement by the issuing bank on the drafts, which is distinct from the engagement on the documents. But a clause should only be implied if it is necessary to give the transaction business efficacy. Nothing like that can be shown here. See further elucidation of this point in [para] 35 below.

The next basis for the distinction drawn by the judge is that in ***Sinotani Pacific*** , the dispute was between a beneficiary and an issuing bank and it did not concern the question of negotiation. With respect, we do not think this is entirely correct. Admittedly, in ***Sinotani Pacific*** the main issue was on the question of what was the proper law of contract to be applied to the LC. But the answer to that question depended on how the LC was classified: was it a straight credit or negotiation credit? Thus, the decision of the court as to how one should determine whether a credit is straight or negotiable would be relevant to the consideration of the present case. It was only after the court there decided that the credit was a straight credit that it held that the governing law of the LC between the issuing bank and the beneficiary was that of the place where payment would be made against presentation of document under that credit.

Indeed, to find that there is such an engagement on the part of the issuing bank, the engagement clause in favour of third parties must be clear and explicit. An express reference to `negotiation is permitted` coupled with an undertaking such as `we hereby undertake to honour all drafts drawn under and in conformity with the terms of the credit` would not suffice. ***Benjamin`s Sale of Goods*** (5th Ed) explain the rationale as follows (at p 1674):

> *In some cases a documentary credit may not indicate clearly whether it is a straight credit or a negotiation credit. For example, some credits state specifically that `negotiation is permitted` and the undertaking reads: `We hereby undertake to honour all drafts drawn under and in conformity with the terms of this credit.` It is difficult to say categorically whether this engagement is directed only to the seller or extends also to third parties who rely on the `permission to negotiate` and discount the seller`s drafts. The tendency of the courts in cases of such ambiguity is to regard the instrument as a straight credit. This approach derives support from two arguments. First, all documentary credits are specifically addressed to the seller. It is therefore to be presumed that, in the absence of clear language to the contrary, the promise is meant to be confined to this promisee. Secondly, the main object of a documentary credit is to enable the seller to obtain payment of the price from the issuing or confirming banker. It is of course, true that a documentary credit has the additional object of assisting the seller to raise credit. But the banker`s undertaking in a straight credit is adequate for this purpose as it enables the seller to obtain discount facilities from his own bankers. There is therefore not much room for implying a promise by the issuing banker to reimburse any third party who provides bridging or temporary finance by negotiating the seller`s drafts.*

Therefore, BNP`s counsel`s submission that where drafts are called for that implies a separate engagement on the drafts cannot be sustained. It only begs the very question. As mentioned in [para] 26 and 27 above, drafts are sometimes used even in straight documentary credits.

In her judgment, the judge said `drafts in themselves are negotiable instruments.` As a general statement, it may well be so. But whether a draft is in fact negotiable depends on its terms. Section 11(2) of the Bills of Exchange Act (Cap 23) provides that if a bill is payable at a future, determinable time, it must be expressed to be payable on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening of that event may not be certain. It also provides that an instrument expressed to be payable on a contingency is not a bill of exchange and the actual happening of the event would not cure the defect. In **Korea Exchange Bank v Debenhams (Central Buying) Ltd** [1979] 1 Lloyd`s Rep 548 where the contingent event was the act of acceptance, the Court of Appeal held that, where a bill was drawn payable at `90 days after acceptance`, it was not a bill of exchange that satisfied s 11(1).

Here, the drafts envisaged in the LC, and as drawn, were contingent upon `negotiation`, which is an uncertain event. We note the drafts were drawn on 24 March 1999, as that is the date appearing thereon. It would be different if the event is to be the date of the bill of lading or the date of the invoice. The issue of the bill of lading or the invoice is an event which will occur, though the date of that happening may be uncertain. For that reason, the drafts here are not bills of exchange. With respect, we think the judge is wrong to have attributed to the drafts in question the character of negotiability as the drafts are not bills of exchange.

Finally, there is an important aspect of the factual matrix which calls for some consideration. On 26 March, when BNP telexed CAI informing the latter that the former had advised the beneficiary, Amerorient, as to the contents of the LC, the following particulars of the LC appear -

Amount:	USD1,333.600.00	Available by def payment
Validity:	21.03.99	
Tenor:	180 days usuance, interest payable by the beneficiary	

When BNP forwarded the LC to Amerorient, they endorsed on it the term `non-negotiable`. BNP explained that that endorsement was made for the sole purpose of advising Amerorient that it could not negotiate the LC through another bank. It did not mean that the LC could not be negotiated through BNP. Three observations may be made in this regard. First, following from the argument of BNP that the credit was negotiable because the term `negotiation` appeared in three places in the LC, then it should be negotiable generally. There was nothing in the LC which, in any way, suggested that negotiation could only be done through BNP. BNP seemed to have arrogated to themselves the power to restrict the negotiability of the LC. BNP were, for the purposes of the LC, appointed the confirming bank. Nowhere in the LC were BNP appointed the sole negotiating bank. Secondly, the endorsement `non-negotiable` was placed on the copy of the LC forwarded to Amerorient because that was what BNP understood it to be. This was also wholly consistent with BNP`s telex of 26 March 1999 to CAI, where the former described the LC as `Available by def payment`. Thirdly, what BNP had done is certainly consistent with a banker who had negotiated or discounted the documents and the drafts in his own right in pursuance of his own business. This explains why BNP, in forwarding the

two covering schedules to CAI, ***did not expressly state*** that they had negotiated the documents and drafts pursuant to the LC.

In the light of all the considerations set out above, we think, in all probability, that BNP had negotiated the LC in their own right because the LC was, and they knew that it was, a deferred payment credit. Even if assuming that was not the case, but bearing in mind the many problems inherent in the LC as discussed before, it would have been obvious to a reasonable banker that there is considerable doubt as to the precise nature of this LC. It may be useful if we pause here and go back to basics. An LC involves an engagement by the issuing bank to the beneficiary, and to no one else, unless the LC clearly specifies that the bank assumes any further engagement with another party. Raymond Jack very appropriately summarised the position (at p 28) in this statement: `if it does not appear that the undertaking embodied in the credit is to be construed more widely, the credit must be given effect to as a straight credit`. We hold that this is not a negotiation credit and should not be construed to be a negotiation credit.

Reasonable interpretation of LC

BNP have further argued that if the LC was ambigious, they have given it a reasonable interpretation. This argument is based on a principle that is applicable to an agency relationship, that where an agent has been given ambiguous instructions by his principal, the agent is entitled to be reimbursed so long as he gives the instructions a reasonable consideration and acts accordingly: **Ireland v Livingston** [1872] LR 5 HL 395 and **Midland Bank Ltd v Seymour** [1955] 2 Lloyd`s Rep 147. But it is important to bear in mind the words of Goff LJ in **European Asian Bank AG v Punjab and Sind Bank (No 2)** [1983] 2 All ER 508 at p 517:

> *In our judgment there must be some limit to the operation of this principle. Obviously, it cannot be open to every contracting party to act on a bona fide, but mistaken, interpretation of a contractual document prepared by the other, and to hold the other party to that interpretation. ... If instructions are given to an agent, it is understandable that he should expect to act on those instructions without more, but if, for example, the ambiguity is patent on the face of the document it may well be right (especially with the facilities of modern communications available to him) to have his instructions clarified by his principal, if time permits, before acting on them.*

Here, BNP, as the confirming bank, would be an agent of CAI. But the agency was only in relation to confirming the LC. For the sake of argument, even if we assume that the agency could extend to all aspects relating to the LC, the ambiguity in the LC is so obvious as regards the question of negotiability that any reasonable banker-agent would have sought specific clarification from the issuing bank. Yet, what we see here was just undue haste. On the very same day CAI were informed by BNP that Amerorient had been advised of the LC, BNP proceeded to negotiate it without further ado. BNP would have to bear their own losses.

Application form

Before we leave this issue, there is an incidental point which we need to touch on. A document relied upon by CAI to contend that the LC is a deferred payment credit is the application form submitted by Solo to CAI for the issuance of the LC. The judge found that no reference should be made to this document to determine the nature of the LC, as BNP were never supplied with a copy of this

application form. It seems to us that this reasoning is correct. It is true that in ***Sinotani Pacific*** this court took into consideration the application form. There is nothing in the report of that case to indicate whether the beneficiary was or was not aware of the contents of the application form. However, the dispute there was between the beneficiary and the issuing bank. There is a distinct relationship between the beneficiary and the applicant as the latter applies for the LC to pay the former. Payment terms are dictated by the seller-beneficiary. But there is no such nexus between the advising bank and the applicant. Thus, in the present instance, since a copy of the application form was never extended to BNP, and there is no evidence that the latter had any knowledge of what was stated by the applicant therein, it should not be referred to for the purposes of construing the LC as between BNP and CAI.

Estoppel

In the two covering schedules forwarded by BNP to CAI on 26 March 1999, the word `negotiation` was mentioned in the tenor. The judge held that this constituted clear notice to CAI that BNP had negotiated the draft. We have serious doubts that this was so. The words used in the tenor are substantially the same as those set out in the availability clause. We are unable to see how that could constitute clear notice. After all, BNP themselves thought that it was a credit `by deferred payment`, notwithstanding the use of the word `negotiation` in the availability clause: see BNP`s telex of 26 March 1999 informing CAI that the former had advised Amerorient as to the contents of the LC.

Nowhere in the two covering schedules had BNP explicitly stated that they had negotiated and gave value to Amerorient for the documents and the two drafts pursuant to the terms of the LC.

But even assuming that they do constitute clear notice, we are of the opinion that estoppel cannot arise. The alleged representation would be that by raising no objection to what was stated in the covering schedules, CAI had represented to BNP that the negotiation was authorised and CAI are estopped from denying it now. To succeed in estoppel by representation, at least two elements must be proved. First, there must be a representation, and second, there must be reliance. There is also a third element, detriment, which we need not be concerned with here. For the reasons given above, we do not think any representation was made by CAI. But quite clearly, the second element is not something which BNP could have satisfied. On the day that BNP forwarded the two schedules to CAI, the former had already `negotiated` the documents and drafts from Amerorient. So whatever the response of CAI may be, it would not have been of any assistance to BNP. The position here is unlike that in ***European Asian Bank AG v Punjab & Sind Bank (No 2)*** (supra). In this English case, the negotiating bank indicated its wish to negotiate and only negotiated after the issuing bank`s reply did not voice any objections but merely confirmed that the documents had been accepted and would fall due on the maturity date.

Alternative cause: holders in due course of the two drafts

Lastly, we will turn to consider BNP`s alternative cause of action, ie as holders in due course of the two drafts. This is a separate and independent cause of action. A holder in due course of a valid bill of exchange will be entitled to payment on the bill irrespective of fraud that is subsequently discovered: see ***Banco Santander SA v Bayfern Ltd*** (supra).

At [para] 37 above, we had indicated that the drafts are not bills of exchange because they fail to satisfy the requirement for certainty.

There is furthermore a second obstacle to BNP`s claim as a holder in due course of the bills. In the two drafts, BNP are named as the payee of the bill. The drafts were not indorsed over to them. They did not hold the bills as indorsees. Under s 29 of the Bills of Exchange Act, a holder in due course must be a person to whom the bill of exchange is negotiated and s 31(3) provides that a bill payable to order is negotiated by indorsement completed by delivery. In **RE Jones Ltd v Waring and Gillow Ltd** [1926] AC 670 at 680, the House of Lords held that in the light of these provisions, the original payee could not be considered a `holder in due course` within the meaning of the Act.

BNP have also relied on the principle of estoppel by convention to argue that CAI are precluded from saying that they did not accept the drafts. Estoppel by convention may arise where both parties to a transaction have acted on the agreed assumption as to the existence of a state of affairs or as to the true construction of a document. On the facts of this case, we do not see how it could be said there was any agreed assumption as to anything. It is true that CAI accepted the drafts. But that in no way indicates that it was in recognition that the negotiation was pursuant to the LC or that the negotiation was pursuant to BNP`s own business. Furthermore, as indicated in [para] 46 above, BNP would not be able to show any reliance.

Accordingly, the alternative claim of BNP must also fail.

Judgment

In the light of our decisions above, there will be no necessity for us to go into the question of whether there are triable issues of fact. But for completion, we would say this. In [para] 39, we have indicated the problematic aspects relating to the alleged negotiation. The circumstances surrounding the negotiation are matters on which further inquiries should be made, and a trial held.

In the result, the appeal of CAI is allowed with costs, here and below, and the usual consequential orders. The security for costs (with any accrued interest) shall be refunded to the appellants.

Outcome:

Appeal allowed.