Mizuho Corporate Bank Limited v Woori Bank
[2004] SGHC 219

Case Number : Suit 1259/2003, SIC 1232/2004

Decision Date : 09 April 2000

Tribunal/Court : High Court

Coram : Vincent Leow AR

Counsel Name(s) : Toh Kian Sing and Ho Keng Hoong (Rajah and Tann) for plaintiff; Sandrasegara Manoj Pillay and Tan Mei Yen (Drew and Napier LLC) for defendant

Parties : Mizuho Corporate Bank Limited — Woori Bank

23 September 2004

Assistant Registrar, Mr Vincent Leow:

A. Background

1 The supply of gas oil formed the background to this suit for payment under four letters of credit. Petaco Petroleum Inc ("Petaco") had agreed to purchase gas oil from Nissho Iwai Petroleum (Singapore) Pte Ltd ("Nissho Iwai"). Pursuant to that agreement, Petaco went to the defendants, Woori Bank and persuaded them to open four letters of credit ("the letters of credit") in favour of Nissho Iwai. The plaintiffs, Mizuho Corporate Bank Limited, advised Nissho Iwai on the letters of credit. In addition, they were also the confirming and negotiating bank.

2 These irrevocable letters of credit were expressly subject to the provisions of the Uniform Customs and Practice for Documentary Credits (1993) ICC Publication No. 500 ("UCP 500") and their terms were materially the same. Under the terms of the letters of credit, payment was conditional upon the presentation of two documents: (1) seller's commercial invoice; and (2) full set of clean on board ocean bills of lading made out or endorsed to the order of Woori Bank, marked freight payable as per charter party and notify Petaco Petroleum, Inc. There were some slight differences in the descriptions of these documents among the letters of credit, but in substance, these were the documents to be presented for payment under the letters of credit ("the compliance documents").

3 More importantly, these letters of credit all contained a particular clause, which played a star role in these proceedings. I shall refer to this clause as the "51 days clause". The clause read:

> "Negotiation is only allowed on and after 51 days from Bill of lading date but within validity of the letter of credit are acceptable."

4 After the letters of credit were opened, Nissho Iwai presented the compliance documents to the plaintiffs as confirming and negotiating bank. This presentation was done before 51 days from each respective bill of lading date (" the 51 days" or "the 51st day") allowed under the 51 days clause. The plaintiffs purchased and gave value to Nissho Iwai under the letters of credit. The plaintiffs then separately presented the compliance documents to the defendants on or after the 51st day.

5 The defendants refused to accept the compliance documents under each of the letters of credit on the basis that the compliance documents contained various discrepancies. However, the defendants only sent their notice of rejection to the plaintiffs some 6 to 7 banking days after their receipt of the compliance documents. Further, they only returned the compliance documents some

12 to 26 days after they had rejected the compliance documents. By this time, the letters of credit had expired.

6 At around the time the compliance documents were sent to the defendants, Petaco went into liquidation. As such, the practical consequences were that if the defendants made payment under the letters of credit, they would not be able to recover in full the amount paid out from Petaco.

7 The plaintiffs subsequently started this suit against the defendants and took out an application for summary judgment for the amount due from the defendants under the letters of credit. In the course of proceedings, the defendants discovered that the plaintiffs had given value to Nissho Iwai under the letters of credit before the 51st day. They amended their defence and pleaded as an additional ground that this constituted a breach of the 51 days clause, which entitled them to refuse payment. The application for summary judgment came before me and I granted summary judgment. My grounds are as follows.

B. Defences

8 In opposing the summary judgment application, the defendants raised three justifications, as stated in their amended defence, for refusing to make payment under the letters of credit: (1) discrepancies in the compliance documents; (2) breach of the 51 days clause; and (3) misrepresentation. I will deal with each in turn.

(1) Discrepancies in the compliance documents

9 An irrevocable letter of credit constitutes a definite undertaking by the issuing bank to make payment upon the presentation of the stipulated documents. Further, if the letter of credit is available for negotiation by any bank, then where a bank has taken up the offer to negotiate, then a binding contract comes into existence between the issuing bank and the negotiating bank. Hence, once the negotiating bank has presented documents that comply with the requirements under the letter of credit, payment by the issuing bank should follow. To hold otherwise would defeat the practical benefits of financing a transaction by way of letters of credit.

10 The issue here was whether the documents comply with the requirements under the letters of credit. It is trite law that documents presented under a letter of credit for payment must strictly conform with the requirements under the credit and where the documents presented do not comply, the issuing bank is entitled to reject the tender: see the grounds of the Court of Appeal as delivered by Yong Pung How J (as His Honour then was) in *Bhojwani v Chung Khiaw Bank Ltd* [1990] SLR 128. There is a simple reason for this. Business cannot proceed securely on any other line: see *Equitable Trust Co of New York v Dawson Partners* [1926] 27 Lloyd's LR 49. However, this requirement of strict compliance does not mean that there must be literal compliance with all terms. Where the discrepancies on the documents tendered are minor and inconsequential in nature or if the discrepancies do not call for an inquiry or investigation, then the discrepancies can be disregarded. This point was made by LP Thean J (as His Honour then was) in delivering the decision of the Court of Appeal in *Indian Overseas Bank v United Coconut Oil Mills Inc* [1993] 1 SLR 141that:

> We do not think that the authorities have established that strict compliance of the documents with the terms of the credit in effect amounts to literal compliance. As Parker J said in *Banque de l'Indochine,* Lord Sumner's statement of law cannot be taken to require 'rigid meticulous fulfilment of precise wording in all cases'.
>
> …

> On these authorities, it seems to us that the standard of conformity required of the documents tendered under a letter of credit is one of strict conformity to its terms but not one of literal conformity. Very minor and inconsequential discrepancies between the documents and the terms of the credit may be disregarded, but any discrepancy which calls for an inquiry or investigation or 'such as to invite litigation' would render the tender of the documents bad or defective.

11 As such, it is not sufficient to just point out that there are discrepancies. It must be shown that the discrepancy complained of 'calls for an inquiry or investigation' or is such a nature 'as to invite litigation'. Having examined all the discrepancies complained of, I did not think that the discrepancies were of such a nature or in some cases, I did not even think that they could even be considered discrepancies. By way of illustration, I need only turn to the first discrepancy complained of on all the letters of credit. The defendants contended that the letter of credit number was not indicated on the Bill of Lading. I could not see how this was a valid discrepancy as there was no requirement for this to be stated under the letter of credit, nor under UCP 500 or the International Standard Banking Practice. Many of the other discrepancies complained of were of a similar nature and I do not propose to deal with each in turn, save that I would mention that I have examined all of them and found them to be minor, inconsequential or invalid.

12 For the sake of completeness, I should add that arguments were raised in the hearing as to whether the defendants were entitled to rely upon these discrepancies because they had failed to issue notices of rejection and return the documents within reasonable time as required under the UCP 500. Given my above finding on the validity of the discrepancies, I see no need to address those arguments, but I would just opine that there appears to be a breach of the reasonable time requirement for both the rejection and especially the return of the compliance documents: see *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's LR 443.

(2) Breach of the 51 days clause

13 The concept of negotiation is central to the operation of an international transaction financed by letters of credit. In particular, where traders operate in different countries, letters of credit serve to bridge the impasse of credibility between buyers and sellers. In such transactions, after opening the letter of credit for the buyer, the issuing bank will normally appoint another bank to act on its behalf in the seller's country. This bank may merely advise the seller or it can take a more active role by confirming the letter of credit. The letter of credit may also be addressed to any bank in the seller's country inviting them to negotiate drafts presented. This serves to provide convenience to all parties. The seller can present the documents to and obtain payment from a bank that he is familiar with in his own country. That bank will then seek reimbursement from the issuing bank and the issuing bank will then obtain repayment from its customer. In return for this convenience, banks charge a commission to their clients. The instant case was no exception, save for the existence of the 51 days clause. This clause was the principal basis on which the defendants sought to resist summary judgment. For ease of reference, I will set out the 51 days clause again:

> "Negotiation is only allowed on and after 51 days from Bill of lading date but within validity of the letter of credit are acceptable."

14 The defendants contended that the 51 days clause was very clear. It only permitted negotiation on or after the 51st day. Since, the plaintiffs had clearly negotiated the bill (by giving value to Nissho Iwai) before the 51st day, there was a breach of the 51 days clause and this breach entitled them to refuse payment.

15 The plaintiffs took the opposite view. They asserted that there was no such breach as the clause did not preclude them giving value to Nissho Iwai under the letters of credit, but only precluded the issuing bank from making payment before the 51st day has passed. Further, they argued that even if there was a breach, the breach did not have the draconian effect of allowing the defendants to refuse to make payment.

16 Given these arguments, I turned to look at the exact wording of the clause. To my mind, the keywords in the 51 days clause was "negotiation is only allowed on and after 51 days from the Bill of Lading date" as the remainder of the words merely stated that negotiation must be done within the validity of the letters of credit. The question to be answered was thus what does 'negotiation' mean. For guidance, I turned to Article 10(b)(ii) of UCP 500 which states:

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

17 Further, Article 10(d) of UCP 500 provides that:

> "(d) By nominating another bank, or by allowing for negotiation by any bank, or by authorizing or requesting another bank to add its confirmation, the Issuing Bank authorizes 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."
>
> [Underlining mine]

18 Under article 10(b)(ii) of UCP 500, only the giving of value by 'banks authorised to negotiate' could constitute 'negotiation'. This meant that only the plaintiffs who were a 'bank authorised to negotiate' could by giving value to another party create a 'negotiation'. This interpretation meant that the 51 days clause only prevented the letters of credit from being negotiated to the plaintiffs before the 51st day. It did not prevent Nissho Iwai or any other party from presenting documents to the defendants immediately for payment. Counsel for the defendants asserted that this could not be so. They insisted that the 51 days clause must be read to cover the issuing bank making payment to all parties before the 51st day. In principle, I agreed that using the UCP 500's definition did not appear correct, as it would mean that Nissho Iwai could have obtained payment immediately, by appointing the plaintiffs as collecting bank to present the documents. This would render nugatory any bar against negotiation under the 51 days clause.

19 As such, I took the view that the word 'negotiation' in the 51 days clause could not be construed in the manner envisioned by Article 10(b)(ii) of UCP 500. Both parties did not disagree with this view. What they differed on was the way in which to construe the word 'negotiation'. At this point, some definition may be necessary for clarity. The presentation by Nissho Iwai to the plaintiffs will be referred to as 'initial negotiation', the presentation by the plaintiffs to the defendants will be referred to as 'reimbursement', while the presentation by Nissho Iwai to the defendants directly will be referred to as 'presentation'.

20 Counsel for the plaintiffs suggested that the word 'negotiation' must be looked at in the whole banking context. He stated that it must refer to the entire process originating from Nissho Iwai, via the plaintiffs and ending at the defendants. In other words, the word 'negotiation' must refer to the process of initial negotiation coupled with reimbursement. Hence, a breach can only

occur if the entire process takes place before the 51st day. Thus, it is not a breach where part of the transaction occurs before the 51st day (the initial negotiation) and the other part occurs on or after the 51st day (the reimbursement) as in this instant case.

21 In contrast, counsel for the defendants suggested that the word 'negotiation' must be construed in relation to each transaction. He mooted that the word 'negotiation' would encompass all three transactions separately. Hence, the initial negotiation would be a negotiation, the reimbursement would be a negotiation and the presentation would also be a negotiation. As such, the initial negotiation between Nissho Iwai and the plaintiffs would be a negotiation and hence it would be caught by the bar against negotiation in the 51 days clause.

22 In deciding between these two constructions, I referred to the commercial circumstances surrounding this particular clause for guidance. This approach was endorsed by Chao Hick Tin JA in delivering the judgment of the Court of Appeal in *Credit Agricole Indosuez v Banque Nationale de Paris* [2001] 2 SLR 1. Chao JA stated at [20] – [21] that:

> 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, <u>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.</u>
>
> [Underlining mine]

23 In this respect, counsel for the plaintiffs explained that these letters of credit, which were all at sight letters of credit, were issued in relation to the gas oil contract. The gas oil contract provided that Petaco would have a 60 days credit term. As such, the intention behind the letters of credit must be that the defendants would only be required to make payment on or after the 51st day

as this would mean that the defendants could only seek reimbursement from Petaco approximately 60 days after the bills of lading date if one allows the bank nine days to do all the checks and processing of the documents.

24 Counsel for the defendants placed a different spin on the background to the 51 days clause. He referred to an affidavit filed by Sang II Suh, the Executive Director of Petaco, who stated that the 51 days clause was to "ensure that the gas oil to be supplied would arrive at its destination before [Nissho Iwai] receives payment."

25 In my judgment, the explanation given by counsel for the plaintiffs made more sense. It would make commercial sense to impose a moratorium of 50 days before requiring the defendants to make payment, as this would only allow the defendants to seek reimbursement from Petaco sometime after that, which was consistent with the 60 days term of credit provided for in the underlying contract. In contrast, Mr Sang's explanation did not make sense given that it only takes about 5-6 days at most for the goods to reach Korea from China or Taiwan (the ports of loading).

26 With the above in mind, I turned again to the 51 days clause and considered its interpretation given the commercial background. I felt that the definition of "negotiation" given by counsel for the defendants made more sense. In particular, if I accepted the plaintiff's construction, this would mean that the same problem, which I had highlighted earlier at [18], would surface again. To recap, the proposed definition did not deal with the situation where Nissho Iwai personally or through a collecting bank presents the compliance documents immediately to the defendants. Counsel for the plaintiffs' reply was simply that this was a lacuna in the drafting. He also added that it would, in practice, never create a problem because Nissho Iwai would not present documents before the 51st day as to do so would result in Nissho Iwai being in breach of the 60 days credit period of the underlying contract as the defendants could collect from Petaco before the 60 days were up.

27 I felt that this reply was not completely satisfactory. A letter of credit is a separate document from the underlying contract. As far as possible, it should stand by itself. Hence, I felt that the word 'negotiation' should be taken in its banking context, which would simply be the giving of value for the compliance documents in reliance on the credit. I was fortified in my conclusion by the case of *Indian Bank v Union Bank of Switzerland* [1994] 2 SLR 121 where Chao Hick Tin J (as His Honour then was) in delivering the decision of the Court of Appeal stated that the word 'negotiation' must mean "the purchase of or the giving of value for the stipulated draft and/or documents in reliance of the credit." Taking this construction, the 51 days clause would bar any party (not just a bank authorised to negotiate) from giving value on the letters of credit. As such, I held that the plaintiffs, by giving value to Nissho Iwai, had breached the 51 days clause. As an aside, it should be noted that the same conclusion would be reached even if I had adopted the definition of the word 'negotiation' as provided in UCP 500.

28 However, this just answered the first half of the question as a breach does not automatically entitle the defendants to refuse making payment. As in all contracts, the next question to be asked in the event of a breach is what are the consequences of a breach of the contract? In this respect, I did not agree with counsel for the defendants that the consequence of the plaintiff's breach was that they would be entitled to refuse making payment.

29 I started by examining the principle that when a letter of credit is made available for negotiation with conditions attached, the conditions stipulated in the credit have to be strictly complied with by the bank negotiating the credit before it is entitled to have recourse to the party issuing the credit. It must be noted that this proposition is applied normally in relation to two areas

only: (1) the documents that must be presented for payment; and (2) time limits for presentation.

30 In relation to the first area, I have already elaborated on this earlier at [10] to [11]. I reiterate that the approach our Courts take in relation to documents is that "each case must be decided on its own merits, however, having regard to the words used in the letter of credit and the background circumstances in which the credit was established": see *Bhojwani v Chung Khiaw Bank* at 132. As such, our Courts have resiled in this area from requiring rigid conformity in all cases.

31 In relation to the second area, which appeared on the face of it, completely relevant to the issue at hand, the cases state unequivocally that where a deadline for negotiation is specified in a letter of credit, the restriction has to be strictly observed by a negotiating bank. This point was simply put by Chao Hick Tin J (as His Honour then was) in delivering the judgment of the Court of Appeal in the *Indian Bank v Union Bank of Switzerland* [1994] 2 SLR 121 that:

> At this juncture, we think we ought to make this observation. Under the letter of credit, there was a deadline each for shipment and for negotiation. Any non-compliance with either of those two deadlines would mean that the credit would not be available to the beneficiary. Because of the incorporation of UCP 400 into the credit terms, a third deadline was added by virtue of art 47, namely, that the documents must be presented for payment, acceptance or negotiation within 21 days of the date of issue of bill of lading. Non-compliance with this deadline would give rise to the same consequence.

32 However, I do not think that the Court of Appeal in the *Indian Bank* case intended to lay down a general principle applicable to all timelines. In the *Indian Bank* case, it was a term of the letter of credit that negotiation had to be done **by a specific date**. In such a term, a limitation is placed upon the obligation of the issuing bank and it provides, at the same time, an indirect incentive upon the beneficiary and the negotiating bank to perform their reciprocal obligations with due haste. Hence, where the deadline has passed, the contract between the parties ends and the issuing bank would no longer be liable to make payment. In contrast, in the instant case, the 51-day clause merely **imposed a moratorium** during which negotiation cannot take place. When the moratorium applied, it did not mean that the contract has ended. On the contrary, the reverse is the truth. The contract still applied, although the contractual effect is that the payment obligation of each party was held in abeyance pending the 51st day.

33 Moving from this premise, where a party attempts to negotiate during the moratorium, the other party is under no obligation to fulfil his end of the bargain (although they can choose to make payment if they wish). Thus, where the negotiating bank seeks reimbursement or the beneficiary presents the documents directly before the 51st day, the issuing bank is not obliged to make payment. This does not mean that the issuing bank can necessarily rely upon the fact that there was an attempt to collect payment to continue to refuse to make payment once the 51st day has come. After all, payment was never made. There was no breach.

34 The ingenious argument that counsel for the defendants then raised was that the breach they were referring to was not the attempt at seeking reimbursement from the issuing bank. Rather it was the initial negotiation between Nissho Iwai and the plaintiffs. That breach had already taken place and since it could not be cured by the plaintiffs, the defendants were now entitled to rely upon that breach and refuse payment to the plaintiffs. In contrast, where there was no breach, but only an attempt to collect payment, the beneficiary upon rejection by the issuing bank can simply try again by presenting the documents on the 51st day.

35 The fallacy with this argument was that counsel for the defendants had conflated the breach with the assumption that the 51 days clause made it a condition precedent to reimbursement that the initial negotiation must have been done on or after the 51st day such that a breach automatically discharged the defendants from all further obligations under the contract or alternatively, that the defendants had no obligation to make payment until and unless compliance takes place. This approach ignored the possibility that the 51 days clause may merely be a term which, if broken, would give a remedy in damages, but would not entitle the innocent party to terminate or suspend their obligations.

36 I turned then to consider whether the 51 days clause was a condition precedent to reimbursement (as pleaded by the defendants in their defence). The phrase 'condition precedent' is a term of art. It has two alternative meanings: see *Trans Trust S.P.R.L. v Danubian Trading Co Ltd* [1952] 2 QB 297. First, it refers to a condition which must be fulfilled before any binding contract is concluded: see *Mount Elizabeth Health Center Pte Ltd v Mount Elizabeth Hospital Ltd* [1993] 1 SLR 1021 and *Computer Supermarkets (S) Pte Ltd v Goh Chin Soon Ricky and Others*[1997] 3 SLR 501. Second, it refers to a condition which does not prevent the existence of a binding contract, but which suspends the performance of it until fulfilment of the condition: see *Ang Kim Leng v Koh Tze Kad* [1996] 3 SLR 41 and *Bestland Development Pte Ltd (in liquidation) v Manit Udomkunnatum* [1996] 3 SLR 92. It was clear that the first meaning was not applicable here. Counsel for the defendants was not contending that the letters of credit were not concluded. Instead, they were relying upon the second meaning, that the defendants' obligation to pay was suspended until the fulfilment of the condition.

37 In this regard, it is clear that the common law has long recognized that not all the obligations created under a contract are of equal importance. Further, cases have laid down certain principles applicable to construing a clause as a condition precedent, which include the following:

(1) It is open to the parties to indicate expressly the consequences to be attached to any particular breach. Where it is clear as to what they have agreed, the Court will not be influenced by any suggestion that they would have been wiser to make a different agreement;

(2) Where the parties have not expressly stated the consequences, the Court will have to examine the clause to determine whether it is a condition precedent. In deciding between competing interpretations, the Court will look to see which interpretation gives the more reasonable result: see *Attica v Ferrostaal* [1976] 1 Lloyd's LR 250;

(3) The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they shall make that intention abundantly clear: see *L. Schuler A.G. v Wickman Machine Tools* [1974] AC 235.

(4) It is more likely that a clause is a condition precedent where the term relates to the whole of the consideration as opposed to where they go only to a part: see *Cutter v Powell* (1795) 6 Term Rep 320; and

(5) Where the breach is not likely to give rise to any real loss, that would militate against construing the provision as a condition precedent: see *Bayerische Vereinsbank v Bank of Pakistan* [1997] 1 Lloyd's LR 59.l.

38 I started by considering the rationale of the 51 days clause. This must be looked at in the context of the underlying contract. Here, the ill that the parties must have sought to curb must be

the early payment of money by the defendants for they would then claim from Petaco before the 60 days credit term. As such, the initial negotiation by Nissho Iwai to the negotiation bank was something that one would expect not to have featured very importantly to the parties. This was, of course, assuming that the initial negotiation did not mean that Petaco would then be expected to reimburse the issuing bank ahead of the 60 days credit term.

39 Seen in this context, it was easier to construe the meaning of the 51 days clause. The clause provided that negotiation could not be done before the 51st day. One view of this was that any early negotiation would result in the issuing bank's liability to pay being suspended unless the breach is cured (or terminated if the breach cannot be cured). However, if this was the true intention, it should have been made clearer given the draconian consequences that would follow as a result. In fact, this was not just a case of not making it clear. Rather, it was a case where there was no indication at all of this intention. The clause itself just provided that "Negotiation is only allowed on and after 51 days from bill of lading date…" It cannot be said that this was a case where parties had unequivocally provided that a particular stipulation was a condition precedent.

40 Further, there appeared to be no commercial reason why the parties would possibly want to prevent Nissho Iwai from negotiating the letter of credit to the plaintiffs. This was especially since the defendants and Petaco would clearly suffer no prejudice as long as the negotiating bank was not allowed to present the documents to the defendants until the 51st day.

41 This conclusion was further strengthened by DOCDEX decision 242. As the legitimacy of the DOCDEX decision was itself in dispute, I will discuss it in greater depth. DOCDEX is an institution set up by the International Chamber of Commerce ("ICC"). Its panel includes several experts on international standard banking practice, who serve to provide impartial and prompt decisions relevant to letter of credit disputes. The plaintiffs had initiated an inquiry to DOCDEX in relation to the instant dispute. The defendants were informed, but they declined to participate. The plaintiffs supplied all the relevant documents to the panel of experts who did not request for any supplemental documents.

42 Counsel for the defendants contended that I should not place any weight on the DOCDEX decision because they did not participate in it. Further, there was a possibility of bias given that the plaintiffs' expert witness, Mr Collyer, was and still is the technical adviser to the ICC Banking Commission. I was not convinced by counsel for the defendants' arguments that no weight should be placed on the DOCDEX decision. Mr Collyer's affidavit clearly stated that he was not involved in the decision. Similarly, ICC issued a letter confirming that Mr Collyer had no involvement in the final review. However, I did take into account the fact that the DOCDEX decision was reached on essentially an ex parte basis as the defendants had chosen not to participate. Nevertheless, I felt that the DOCDEX decision would have some persuasive value and treated it as such.

43 I turn then to the DOCDEX decision. In relation to the question posed as to "whether the cited [51 days clause] has any consequence on the [defendants'] obligation to reimburse the [plaintiffs]", DOCDEX stated:

> "44. In all four L/Cs, the [plaintiffs] reports having received documents from [Nissho Iwai] prior to the 51st day from shipment and having advanced monies under a funding arrangement between the [plaintiffs] and [Nissho Iwai]. Such funding and financing arrangements are outside the scope of the UCP and are independent, in the sense of UCP Article 3, of the L/C.
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> 45. However, in all four L/C, the [plaintiffs] sent documents to the [defendants] no earlier than

51 days after the date of shipment. In each of its initial notices of refusal, the [defendants] notes the Date of Utilization as the same date as the [plaintiffs'] cover letter remitting the documents which is a minimum 51 days after the date of shipment. Accordingly, the [defendants] received complying documents on or after 51 days from the date of shipping.

…

47. The Experts agree that such a clause would bind the [defendants] to reimburse the [plaintiffs] on the designated earliest day (the "on or after day") if complying documents are received prior to that date and to reimburse at sight if complying documents are received after that date.

48. The Experts do not find that an independent funding arrangements [sic] between the [Nissho Iwai] and the [plaintiffs] creates a discrepancy nor does it relieve the [defendants] of its L/C obligations as issuing bank."

[Underlining mine]

44 This conclusion echoed my earlier holding. It similarly stated that the clause would only entitle the defendants to refuse making payment before the 51st day. Further, it noted that "an independent funding arrangements [sic]" did not relieve the defendants of its payment obligation. As such, in my judgment, it would not be appropriate to treat the 51 days clause as introducing a condition precedent to an issuing bank's right to reimbursement. All that the 51 days clause provided the defendants was the right to refuse payment prior to the 51st day. Once that day has come and gone, then provided that the letters of credit were still valid, the defendants must make payment upon presentation of the compliance documents. If the defendants suffered any loss by the plaintiff's early negotiation of the documents, then they would be entitled to recover it by way of a claim for damages, but counsel for the defendants was unable to show me any loss that they have suffered or were likely to suffer. Additionally, the fact that no loss was likely to be suffered was not a good reason for treating the 51 days clause as a condition precedent. On the contrary, it stood for the reverse, especially since parties had not stated otherwise in clear words.

45 I should add that I did not consider the last possible meaning ascribed to the term 'condition precedent', which is of a condition, breach of which entitles the innocent party to treat the contract as at an end. This variation in meaning is used only in the older cases and is not applicable today: see *Kim Lewison*, The Interpretation of Contracts, London, Sweet & Maxwell 2004. Instead, if that was the intended meaning, the applicable wording is either 'a breach of a condition' or 'a breach going to the root of the contract'. Since neither of these was pleaded in the amended defence, I do not need to consider them. Further, even if they were pleaded, I did not see how they can stand up to close examination for the exact same reasons that I held that the 51 days clause was not a condition precedent. The parties have not expressly agreed that the clause was a condition, neither can it be said that it must be so by necessary implication: see *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, *Lombard North Central Plc v Butterworth* [1987] QB 527, *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711, *Barber v NWS Bank plc* [1996] 1 WLR 641 and *BS & N Ltd v Micado Shipping Ltd* [2001] 1 Lloyd's LR 341. Similarly, I failed to see how the breach of the 51 days clause goes to the 'root of the contract' or deprived the defendants of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for reimbursing the plaintiffs: see *Hong Kong FIR Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

(3) Misrepresentation

46 The last ground that the defendants raised to object to summary judgment was that of misrepresentation. This ground stemmed from the fact that each of the cover letters accompanying the plaintiffs' request for reimbursement to the defendants bore a date that had been altered to reflect the 51st day. Furthermore, the letter contained a statement "we certify that all terms and conditions of the credit have been complied with."

47 The defendants' argument ran along the lines that they had relied upon the statement and believed that negotiation took place on the 51st day. Hence, they were unaware of the breach of the 51 days clause at the time when they sent their Notices of Rejection. On this basis, the defendants contended that they had suffered loss as they could now not rely upon this breach to refuse to make payment as it was not stated in their Notices of Rejection. As such, they contend that the tort of deceit was made out.

48 In response, counsel for the plaintiffs agreed for the purposes of the Order 14 hearing to waive any rights that they may have to object to the defendants' reliance on breach. Further, counsel for both parties recognised that this defence did not in itself create a right for the defendants to avoid making payment and that it was intrinsically linked to the breach of the 51 days clause. Hence, counsel for the defendants agreed that they would not be relying on this defence at this juncture. In any case, this point did not create a triable issue given my holding that the breach of the 51 days clause did not entitle them to refuse making payment.

Conclusion

49 The law on summary judgment is clear. Judgment should only be awarded against the defendants if it is absolutely clear and there is no reasonable doubt whatsoever that they have no defence in the action. In particular, judgment should not be granted where there is a serious conflict as to matters of fact or any real difficulty as to a matter of law or when the case involves complex issues of fact and law. All that the defence needs to show is a triable issue or question or that for some other reason there ought to be a trial. In this case, I saw no such triable issue. The defendants were not entitled to rely on either the alleged discrepancies or the breach of the 51 days clause to refuse payment. Hence, there was no triable issue or question. Further, I saw no other reason why this matter should not be disposed of at this stage. The questions raised are all matters of law. Even if leave to defend was granted, I do not see how going to trial would shed any additional light on this matter. The defendants were not alleging that there was a collateral contract or that there was an oral agreement not reflected in the letters of credit. Instead, all that the parties were disputing was the interpretation of a particular clause or the nature of discrepancies. In such circumstances, it would be most expedient for all parties if this matter was dealt with at this juncture. Given the above, I ordered judgment in favour of the plaintiffs and made orders as to costs. I would like to record my appreciation to Mr Toh and Mr Manoj, counsel for both parties for their able assistance on this case.