DBS Bank Ltd v Carrier Singapore (Pte) Ltd
[2008] SGHC 53

Case Number : Suit 660/2006

Decision Date : 09 April 2008

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Lee Eng Beng, Poon Kin Mun Kelvin and Loke Pei-Shan (Rajah & Tann LLP) for the plaintiff; Khoo Boo Teck Randolph, Loo Teck Lee Johnson and Keow Mei-Yen (Drew & Napier LLC) for the defendant

Parties : DBS Bank Ltd — Carrier Singapore (Pte) Ltd

Bills of Exchange and Other Negotiable Instruments – Letter of credit transaction – Whether beneficiary liable to issuing bank in deceit for representation made in document presented to issuing bank – Whether issuing bank suffering loss – Whether chain of causation broken – Elements of tort of deceit

Bills of Exchange and Other Negotiable Instruments – Letter of credit transaction – Whether issuing bank having cause of action in negligent misrepresentation against beneficiary for misrepresentation made in document presented to issuing bank

Damages – Letter of credit transaction – Quantum of damages arising from deceit of beneficiary – Whether contributory negligence applies in reducing quantum of damages awarded for tort of deceit

9 April 2008 Judgment reserved.

Judith Prakash J:

1 This was an action framed in deceit and, alternatively, in negligence brought by DBS Bank Ltd ("DBS") against Carrier Singapore (Pte) Ltd ("Carrier") arising out of a representation made by Carrier in a Delivery Order No 50191 ("DO50191"). Carrier was the beneficiary under a letter of credit ("the LC") issued by DBS on 30 June 2006 on the application of its customer Lee Meng Brothers (S) Pte Ltd ("Lee Meng"). DO50191 was one of the documents that Carrier was required to present under the LC.

2 The LC was secured against two export letters of credit obtained by Lee Meng from its Vietnamese customer, Duc Khai Corporation ("the Export LCs") which would cover 85% of the value of the LC.

3 The documents required under the terms of the LC were the following:

(a) Carrier's signed tax invoice in three originals and two copies;

(b) Packing list in three originals; and

(c) Delivery order in three originals and two copies signed by Carrier made out to Lee Meng:

(i) indicating the LC number;

(ii) stating the delivery date as not being later than 15 July 2006;

(iii) showing delivery of goods from Carrier's warehouse to Lee Meng's warehouse; and

(iv) stamped and countersigned by one authorised signatory of Lee Meng, acknowledging receipt of the goods in good order and condition.

Those documents were to be presented within 14 days after delivery date and within the validity period of the LC.

4 In DO50191, Carrier stated that 3,936 sets of Toshiba RAS-10GKPX-V/GAX-V air-conditioners, 1,003 sets of Toshiba RAS-12NKPX-V/NAX-V air-conditioners and 450 sets of Toshiba RAS-18NKPX-V/NAX-V air-conditioners ("the Goods") had been delivered in "1 lot" from Carrier's warehouse to Lee Meng's warehouse. DO50191 also stated that the "Delivery Date" of the Goods was "30 June 2006". A representative of Lee Meng signed on DO50191, acknowledging receipt of the Goods.

5 In fact, only US$424,292.40 in value of such Goods were delivered on 30 June 2006. However, according to Carrier, it had, in the course of its dealings with Lee Meng, earlier supplied the latter with similar goods in April, May and June 2006 which totalled more than the amount of US$1,391,726.70 payable under the LC.

6 During the trial, it emerged that DO50191 was actually prepared in two stages. A skeletal DO50191 was first prepared *before* Carrier had received a copy of the LC. The only details contained in the skeletal DO50191 were:

(a) the delivery date of 30 June 2006;

(b) the words "1 lot" in the left-most column; and

(c) the phrase "Toshiba Air Conditioners".

From the evidence, it appeared that Carrier's credit control manager, Lim Soon Meng ("Lim") had decided that DO50191 would cover past goods and would represent 30 June 2006 as the delivery date of the Goods even before he saw the LC.

7 Lim, in his affidavit of evidence-in-chief, testified that Carrier had been having credit issues with Lee Meng for some time since April 2006. His account of how the LC came about was, in short, that Lee Meng had agreed to obtain the LC to reduce outstanding debts owing to Carrier in respect of past deliveries of goods. For this reason, he saw no wrong in consolidating past deliveries of goods as "deemed delivery" under DO50191. Carrier's position was that the LC was not restricted to purchases of fresh goods but could be used to pay for goods already delivered.

8 Lim had formed this view despite the fact that the bankers he had spoken to were themselves unsure "whether the LC can be used to pay for past goods". Lim himself admitted during the trial that he had never encountered a letter of credit that covered previous deliveries.

9 According to Lim, the bankers he had spoken to had told him, "so long as you are compliant with the terms of the LC, you get paid". The only document which he had sight of when preparing the skeletal DO50191 was the LC application form that Lee Meng had submitted to DBS on 26 June 2006. That application form contained only a sketch of the bare commercial terms of the LC.

10 On the morning of 20 June 2006, Lim brought the skeletal DO50191 to Jenny Lee ("Lee") of Lee Meng for her signature. At the time Lee signed DO50191, it did not state the amount of the Goods

that was allegedly delivered.

11 The details of the Goods and the LC number were only later inserted by Carrier at its office. According to Lim's evidence, it was Lee who provided the quantity of the Goods stated in DO50191. Carrier's witnesses also confirmed that DO50191 was designed to conform to the terms of the LC.

12 Concurrently, Carrier prepared a packing list and a tax invoice that it intended to present to DBS under the LC. Carrier's witnesses testified that DO50191 and its corresponding packing list and invoice were generated solely for presentation to DBS under the LC. None of the previous deliveries had a packing list. During the trial, Carrier's logistics manager Toh Wee Seng ("Toh") conceded that DBS would have had reason to reject the previous deliveries due to the absence of packing lists.

13 The packing list presented described the Goods as being packed into cartons numbered 1 to 5,389. Toh conceded that the packing list described an imaginary packing process. He also conceded that the packing list, when read with DO50191, would convey to a reader the impression that all the goods were delivered in a single lot on 30 June 2006. Both Lim and Toh agreed that the packing list, when read with DO50191, served to confirm that the Goods were delivered "all in one lot". DBS therefore contended that the unmistakable purpose behind this was to convey to DBS the false notion that the Goods were all shipped in a single lot when in fact they were not.

14 On 12 July 2006, Carrier's banker, The Hongkong & Shanghai Banking Corporation Ltd ("HSBC") presented DO50191 (duly signed by Lee Meng) with a tax invoice, the packing list and a bill of exchange for US$1,391,726.70 to DBS for acceptance under the LC. In the tax invoice, Carrier stated that the price for the Goods was US$1,391,726.70. This figure tallied exactly with the amount stated in the bill of exchange. The packing list described the number of cartons in which the Goods were allegedly packed and delivered.

15 As the documents that Carrier presented conformed, on their face, to the terms of the LC, DBS accepted the bill of exchange for US$1,391,726.70 on 13 July 2006. On 12 September 2006, DBS paid out US$1,395,748.02 (comprising principal and interest) due under the bill of exchange after it had matured.

16 By that time, Lee Meng had become insolvent; DBS had placed Lee Meng under receivership on 11 September 2006. In the course of the receiver's review of Lee Meng's records, he discovered that the Goods could not have been delivered all in one lot on 30 June 2006 as represented in DO50191. On 18 September 2006, the receiver duly informed DBS of his findings. That led to these proceedings.

17 Carrier admitted that not all the Goods were delivered on 30 June 2006. Carrier also admitted that it had delivered only US$424,292.40 in value of the Goods to Lee Meng on 30 June 2006. Of these, part was delivered by Lee Meng to its Vietnamese customer as a result of which DBS received payment of US$224,070 under the Export LCs. Carrier's Lim admitted that US$127,575 in value of the Goods were subsequently repossessed by Carrier in September 2006 together with other goods.

18 Carrier was, of course, aware that not all the Goods were delivered on 30 June 2006. Indeed, its own account was that a vast majority of the Goods had been delivered on 28 April 2006, 26 May 2006 and 26 June 2006.

19 DBS's case was that if DO50191 had stated those delivery dates, it would not have accepted the bill of exchange accompanying DO50191 since, by the terms of the LC, the Goods delivered on those dates would not have been covered.

20 In particular, DBS pointed out the following:

(a) Field 48 of the LC required all documents to be presented within 14 days of the delivery date. Given that HSBC had presented the documents to DBS on 12 July 2006, more than 14 days had therefore elapsed between the alleged delivery dates and the presentation date.

(b) Field 46A of the LC also required the delivery order presented to state the LC number. The delivery orders for the Goods allegedly delivered on 28 April 2006, 26 May 2006 and 26 June 2006 could not have indicated the LC number since the LC was issued only on 30 June 2006.

(c) The amount drawn under the bill of exchange (US$1,391,726.70) would not have tallied with and would have greatly exceeded the value of the Goods actually delivered on 30 June 2006 (US$424,292.40).

(d) Lim admitted that payment for the delivery allegedly made on 26 June 2006 came from a different letter of credit. Accordingly, the LC could not have covered that lot of goods.

21 In fact, through Lim's testimony, Carrier had stated that neither the Goods described in the LC nor the amount of the LC could be related to any particular lot of new goods or even of any previous purchases allegedly delivered on 28 April 2006, 26 May 2006 or 26 June 2006. DBS contended therefore that DO50191 did not only misrepresent the date of delivery of the Goods, it represented a completely fictional delivery.

22 DBS contended that, in reliance upon the truth of the statements in DO50191, DBS paid out US$1,395,748.02 – a sum that it would not have paid had it known the truth. In the circumstances, DBS submitted that Carrier was liable for the loss and damage that DBS sustained in that regard.

23 DBS therefore advanced two causes of action against Carrier: one in deceit and an alternative claim in negligent misrepresentation.

The issues

24 The following are the issues in regard to the cause of action in deceit:

(a) Did Carrier represent that all the Goods were delivered on 30 June 2006 ("the Representation")? ("Issue 1")

(b) Was the Representation false? ("Issue 2")

(c) If the Representation was false, was it made fraudulently – *ie*, did Carrier make it knowingly, or without belief in its truth or recklessly, without caring whether it be true or false? ("Issue 3")

(d) Did Carrier intend that DBS should rely on the Representation? ("Issue 4")

(e) Did DBS rely on the Representation? ("Issue 5")

(f) Did DBS suffer loss as a result of reliance on the Representation? ("Issue 6")

25 With the exception of Issue 3, all the other issues in regard to an action in deceit would be equally applicable in regard to the cause of action in negligent misrepresentation. However, the

antecedent question that arises is whether there is a cause of action in negligent misrepresentation in this case. ("Issue 7")

26 On the question of quantum, the following issues arise:

(a) Was DBS's loss caused by or contributed to by DBS's own negligence? ("Issue 8")

(b) Should DBS's claim be reduced or extinguished with respect to such part of the Goods as were physically delivered to Lee Meng on 30 June 2006? ("Issue 9")

(c) Were goods delivered to Lee Meng's warehouse on 26 June 2006? ("Issue 10") If so, should DBS's claim be reduced or extinguished with respect to the value of the Goods delivered on that date? ("Issue 11")

(d) Whether DBS is required to give credit for the US$224,070 it received under the Export LCs. ("Issue 12")

We shall deal with each issue in turn.

Issue 1: Did Carrier make the Representation?

27 DBS's case is that Carrier made the Representation when it issued and presented DO50191 to DBS.

28 From the evidence, it is unarguable that Carrier did make the Representation in DO50191. The following is clear on the face of the document:

(a) The Goods were described, as "Toshiba Air Conditioning Equipments [*sic*]" and the particulars as to the number of sets and the model number matched those in the LC.

(b) The "Delivery Date" was stated as "30 June 2006".

(c) DO50191 also stated that the Goods were delivered in "1 lot".

29 Lim himself admitted, under cross-examination, that a third party reading DO50191 would take it to mean that Carrier had delivered all the Goods in a single lot on 30 June 2006. Lim also conceded that it was "possible" that DBS could have read DO50191 to mean that Carrier had delivered all the Goods in a single lot on 30 June 2006.

30 DBS therefore submitted that the Representation was unequivocally made in DO50191.

31 DBS further submitted that its case that the Representation was made in DO50191 became even more compelling when it was read with the packing list that accompanied it. The packing list described the Goods as having been packed and delivered in 5,389 cartons that were numbered sequentially from 1 to 5,389. When DO50191 was read in light of the packing list, the reader was inexorably drawn to conclude that all the Goods were delivered in a single lot on 30 June 2006.

32 Lim himself agreed, when questioned by the court, that reading DO50191 in light of the packing list would suggest that all the Goods had been delivered at the same time.

33 Counsel for Carrier pointed out that DBS had never averred in its pleadings that it had been misled by any representation in the packing list and contended that DBS could not rely on the packing

list for any part of its claims in the action. Counsel went on to say that the extended cross-examination by DBS in regard to the packing list was "completely irrelevant" and uncalled for under the pleadings.

34 I agree with counsel for Carrier that DBS had not pleaded that any statement in the packing list was a false representation upon which DBS had relied to its detriment; its causes of action were solely in respect of the Representation in the DO50191. However, it does not follow that cross-examination by DBS in regard to the packing list was irrelevant. As will be seen below, Carrier's position was that its officer responsible for the issuance of DO50191 *honestly believed* that the terms of the LC allowed Carrier to "deem" past deliveries as being delivered in one lot on 30 June 2006 together with the actual delivery of US$424,292.40 in value of the Goods. It was open to DBS to test whether that belief was honestly held by cross-examination on, *inter alia*, the packing list.

35 Carrier's own case was that DO50191 was a document that evidenced the Goods being "deemed" delivered on 30 June 2006. In making this assertion, it relied on Fields 46A and 47A of the LC.

36 Field 46A of the LC merely states that one of the documents required for payment is a delivery order signed by Carrier and made out to Lee Meng. The delivery order must:

(a) state a delivery date "not later than 15 July 2006";

(b) indicate DBS's documentary credit number;

(c) show delivery from Carrier's warehouse to Lee Meng's warehouse; and

(d) be stamped and countersigned by one authorised signatory of Lee Meng acknowledging receipt of the Goods in good order and condition.

Field 46A further states that "partial deliveries are allowed".

37 Field 47A states that "in the event that the delivery date *differs* from the date of the acknowledgment of goods, *then*, the date of acknowledgment of goods is deemed to be the delivery date" (emphasis added).

38 Carrier's case on the combined effect of Fields 46A and 47A of the LC appeared to be:

(a) that it permitted Carrier to obtain Lee Meng's signed acknowledgment on a single delivery order consolidating all previous deliveries on the date of such acknowledgment by the authorised signatory of Lee Meng; and

(b) that all such previously delivered Goods meeting the description under the LC of up to US$1,391,726.70 would be deemed to be delivered on the acknowledgment date.

39 I agree with DBS that Carrier's contention is untenable. First, since the delivery order had to state the documentary credit (*ie*, LC) number, it had to be in respect of Goods delivered on or after issue of the LC.

40 Second, there is nothing in Fields 46A and 47A that permits Carrier to issue a *single* delivery order consolidating past deliveries.

41 Third, Carrier's reading of the "deeming" provision in Field 47A is unwarranted:

(a) Field 47A was clearly aimed at determining what the proper delivery date ought to be *if* the delivery date stated by Carrier in the delivery order in respect of that shipment of goods *differed* from the date stated in the delivery order signifying when Lee Meng acknowledged receipt of the Goods. Thus, Field 47A was premised on there being *two* different dates stated in the delivery order. But there was no acknowledgment date stated on DO50191. Were there two different dates, the date on which Lee Meng acknowledged receipt of the Goods would be deemed the delivery date for the purpose of the LC. This was clearly to accommodate any delay between the time Carrier issued a delivery order and when the Goods actually arrived at Lee Meng's warehouse.

(b) Nothing in Field 47A even remotely suggested that it would "deem" all *previous* deliveries of the Goods described in the LC as being delivered on the date of acknowledgment.

42 Fourth, Carrier's reading of the combined effect of Fields 46A and 47A could conflict with Field 48:

(a) Field 48 of the LC provides that "documents must be presented for negotiation within 14 days after delivery date".

(b) Field 48 would be rendered effete if Carrier could easily circumvent it by arbitrarily choosing a convenient date.

43 On its part, Carrier argued that DBS's contentions above (which I accepted) would render Field 47A a "dead letter" in that under DBS's construction, the delivery dates under both Fields 46A and 48 had to be actual dates. With respect, that is clearly a false conclusion. To illustrate, let us suppose that the delivery order bore the delivery date "1 July 2006", that being the date on which the Goods were to have left Carrier's warehouse. Assume that in fact the goods reached Lee Meng's warehouse only on 2 July 2006 and that Lee Meng's acknowledgment was dated that same day. There would therefore be two different dates. In such an event, Field 47A would apply and the date of acknowledgment (2 July 2006) would be deemed the delivery date. Field 46A would be satisfied as such deemed delivery date would be before 15 July 2006. Field 48 would also be satisfied if within 14 days after 2 July 2006, the requisite documents were presented for negotiation.

44 Equally, if delivery actually took place on the date shown on the delivery order (*ie*, 1 July 2006) but for any reason the acknowledgment was delayed until the next day, the date 2 July 2006 would be deemed the date of delivery for the purposes of Fields 46A and 48. It can be seen therefore that Fields 46A, 47A and 48 can be construed harmoniously. Accordingly, I reject Carrier's argument that DBS's contention would render Field 47A a dead letter.

45 In any event, Carrier's reading of the combined effect of Fields 46A and 47 would not advance its case on **Issue 1** unless it could show that DO50191 in fact represented that the Goods were "deemed" delivered on 30 June 2006. There is nothing in DO50191 to suggest that it was intended to convey such a representation:

(a) DO50191 did not detail the dates of the previous deliveries that Carrier says it was intended to consolidate. If that were the purport of DO50191, it would be logical for Carrier to list the previous deliveries. Besides, without there being a difference between the delivery dates and a date that Lee Meng expressly states in DO50191 as the date on which it acknowledges receipt of the Goods, the "deeming" provision in Field 47A cannot be triggered.

(b) DO50191 stated that the Goods were delivered in "1 lot". This contradicted Carrier's claim that DO50191 represented the "deemed" delivery dates of the previous deliveries.

(c) In any event, Lim himself accepted that a third party reading DO50191 would take it to mean that all the Goods were delivered on 30 June 2006.

46 For all the above reasons, the answer to **Issue 1** was a clear "yes".

Issue 2: Was the Representation false?

47 Spencer Bower, Turner and Handley, *Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("*Spencer Bower*") at para 101 states that –

> [T]he falsity of a representation is to be tested by the meaning which the words reasonably conveyed to the representee. It is no defence to a charge of *falsity* that the representor intended the words to convey a different meaning which was true. [emphasis in original]

Upon a plain reading, it is clear that the Representation was false when set against Carrier's own admissions that:

(a) Not all the Goods were delivered on 30 June 2006. A vast majority of the Goods were in fact delivered on 28 April 2006, 26 May 2006 and 26 June 2006.

(b) It had delivered only US$424,292.40 worth of Goods to Lee Meng on 30 June 2006.

Issue 3: Was the Representation made fraudulently?

48 In *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405, the Court of Appeal held at [13]:

> The law as regards fraudulent representation is clear. Since the case of *Pasley v Freeman* (1789) 3 Term Rep 51, it has been settled that a person can be held liable in tort to another, if he knowingly or recklessly makes a false statement to that other with the intent that it would be acted upon, and that other does act upon it and suffers damage. This came to be known as the tort of deceit. In *Derry v Peek* (1889) 14 App Cas 337 the tort was further developed. It was held that in an action of deceit the plaintiff must prove actual fraud. This fraud is proved only when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

Although an essential element in the tort is the representor's intention that the representee should act in the way he did, there is no need to prove any further intention and the representor's *motive* is irrelevant. In *Derry v Peek* (1889) 14 AC 337 at 374, Lord Herschell stated:

> [I]f fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

Thus it is irrelevant that Carrier might have had no intention of damaging DBS when it made the Representation.

49 On the other hand, it is of fundamental importance whether the representor honestly believed that his statement was true. As Lord Herschell held in *Derry v Peek* ([48] *supra*) at 359:

> In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite.

Further on in his judgment, at 374, Lord Herschell identified what that "something more" was:

> To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.

The "something more" therefore is the absence of an honest belief by the representor that his statement was true.

50 In this regard, the test to be applied is different from that as to the falsity of the statement. *Spencer Bower* at para 101 explains it thus:

> [T]he falsity of a representation is to be tested by the meaning which the words reasonably conveyed to the representee. It is no defence to a charge of *falsity* that the representor intended the words to convey a different meaning which was true. But where the inquiry is whether the representation was *fraudulent*, another test must be applied. What we are now investigating is not the effect of the words upon the representee, but the state of mind of the representor when he uttered them. *In deciding whether the representation was fraudulent*, the question is not whether the representor honestly believed it to be true in the sense assigned to it by the court, or on an objective consideration of its truth or falsity, but whether he honestly believed it to be true in the sense in which he understood it when it was made. There are limitations. The meaning professed by the representor may be so unreasonable that the court will find that he did not honestly believe it was true in that sense. But the principle is clear: proof of fraud involves an examination of the representation in the sense in which the representor honestly understood it. [emphasis in original]

51 The above passage in *Spencer Bower* was drawn largely from the Privy Council decision in *Akerhielm v De Mare* [1959] AC 789. In that case, the defendant had signed a circular letter wrongly stating that about a third of the capital of a certain company had "already been subscribed in Denmark". The defendant was wrong although, as the trial judge found, he had honestly thought his statement was true. The Court of Appeal for Eastern Africa reversed the trial judge's finding that the defendant honestly believed it to be true, and awarded damages. The Privy Council were firstly of the view that the Court of Appeal was not justified in reversing the trial judge's view formed after seeing and hearing the defendant give his evidence. Secondly, and more significantly for our purposes, the Privy Council held at 805 that the Court of Appeal had construed the representation:

> … as they thought it should be construed according to the ordinary meaning of the words used, and having done so went on to hold that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. Their Lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. This general proposition is no doubt subject to limitations. For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true.

52 In reliance on the foregoing, Carrier submitted that:

(a) DBS's interpretation of the LC was irrelevant; what was in issue was Lim's honesty in believing what the LC meant;

(b) Whether Lim's construction of the LC and Fields 46A and 47A was legally correct was equally irrelevant; the relevant question was whether Lim honestly believed "his own private interpretation" of the LC.

53 Carrier went on to cite *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th Ed, 2006) ("*Clerk & Lindsell*") at para 18–17 for the proposition that it did not matter how unreasonable the belief was so long as it was honestly held:

> **The state of mind necessary for liability in deceit**
>
> Although the decision in *Pasley v Freeman* established the existence of a tort based on fraud, it did not make entirely clear what state of mind was required in the defendant in order to establish it. The leading case on this point is the later decision of the House of Lords in *Derry v Peek*. There, Lord Herschell laid down the essentials of fraud in the following propositions:
>
> > "First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth."
>
> It follows from this that a statement honestly believed to be true, however implausible it may be, is not capable of amounting to fraud. Thus, in *Niru Battery Manufacturing Co v Milestone Trading Ltd* a bank presented a letter of credit to a buyer for payment, despite the fact that it was obvious to any reasonable person that no payment was due under it since the goods had never been shipped. But this fact was not in the mind of the relevant bank officer when he arranged the presentation: it followed that, however casual or naïve he might have been, no claim lay in deceit.

Had counsel read further on, he would have noted this qualification:

> Nevertheless, although the unreasonableness of the grounds of the belief will not of itself support an action for deceit, it will of course be evidence from which fraud may be inferred. As Lord Herschell has pointed out, there must be many cases
>
> > "where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one."

54 Moreover, DBS's submissions on *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 1 Lloyd's Rep 344 ("*Niru Battery*") shed further light as to how the statement in *Clerk & Lindsell* relied upon by Carrier (in [53] above) ought properly to be understood. It appears that the Queen's Bench report of *Niru Battery* (at [2004] QB 985) reproduced in Carrier's Bundle of Authorities does not report the Court of Appeal's judgment on deceit as fully as the Lloyd's Law Reports.

55 In *Niru Battery*, a false bill of lading (representing a fictitious shipment of goods) was presented by a bank (Credit Agricole Indosuez) ("CAI") to the claimant bank (Bank Sepah Iran) ("Bank Sepah") for payment under a letter of credit. Bank Sepah brought a claim in deceit against CAI on the basis (at [96]) that:

> [I]n presenting the documents to Bank Sepah under the letter of credit CAI represented that the bill of lading was genuine, although it knew that it was in fact false, and did so with the intention that Bank Sepah should accept it as genuine and make payment accordingly.

56 It is pertinent to note that CAI did *not* issue the false bill of lading. However, it was contended that CAI should have known that the bill of lading was false because it held the warrants to the goods purportedly shipped under the bill. Without the warrants, the goods could not have been shipped. Notwithstanding this, the trial judge held that CAI's bank officer did not fully appreciate the fact that the bill of lading must have been false and found CAI not liable for deceit (at [125]).

57 On appeal, the Court of Appeal in England was critical of the trial judge's decision. Clarke LJ held (at [133]) that CAI's bank officer "had a case to answer on dishonesty, just as he had a case to answer as to his knowledge of the [false bill of lading]". Clarke LJ, however, declined to disturb the trial judge's finding. Equally, Sedley LJ (at [175]) found it difficult to understand "how what [CAI's bank officer] did, in the circumstances in which he did it, was not dishonest even by this exacting standard", but also declined to disturb the trial judge's finding.

58 The statement in *Clerk & Lindsell* that Carrier sought to rely on (*viz*, that "a statement honestly believed to be true, however implausible it may be, is not capable of amounting to fraud") must therefore be understood in light of the above.

59 It should also be said that Carrier's protestations as to what Lim honestly believed the LC meant (see [52] above) are not quite to the point. It was noted in [48] above that apart from the representor's intention that the Representation be acted upon, there is no need to prove any further intention and that the representor's motive is irrelevant. Thus Lim's own "private interpretation" of the LC as permitting the presentation of a delivery order in respect of goods previously delivered will not exculpate Carrier. The key question really is what Lim honestly believed DO50191 represented. Instead of nailing his colours to the mast, he repeatedly insisted that DO50191 was designed to conform to the LC.

60 It was only in cross-examination that Lim asserted that the 30 June 2006 date in DO50191 represented a consolidation of deliveries up to 30 June 2006. Could he have honestly believed that that was what DO50191 stated?

61 In any event, Carrier's claim that Lim based his honest belief on the terms of the LC was seriously undermined by Lim's answers during cross-examination:

> (a) Lim testified that the skeletal delivery order was prepared and presented for Lee's signature even *before* he saw the LC. In fact, before Lim saw the LC he had already proceeded on the basis that DO50191 would cover past goods and would represent 30 June 2006 as the delivery date of the Goods. Thus, Lim *could not have relied* on the "deeming" effect of Field 47A when he prepared DO50191.
>
> (b) Lim confirmed that when he prepared the skeletal DO50191, he had *not* seen a draft of the LC. Prior to 30 June 2006, all that Lim had sighted was a copy of Lee Meng's application for the LC. The application form was completely silent as to whether the LC would contain a clause

having the deeming effect that Carrier claimed Field 47A provided. There was, therefore, no basis for Lim's assertion that his "honest belief" was derived from the terms of the LC.

(c) Lim testified that it was Lee who provided particulars as to the quantity of the Goods stated in DO50191.

(d) Underpinning Lim's interpretation of Fields 46A and 47A (see [35] and [38] above) was his belief that letters of credit could cover past deliveries. Lim's evidence was that bankers he had spoken to were themselves "unsure whether the LC [could] be used to pay for past goods". Lim himself admitted that he had never once encountered a letter of credit that covered previous deliveries. Under those circumstances, what could have engendered Lim's belief that the LC covered past deliveries? (In raising this question, I do not suggest that a letter of credit cannot possibly cover past deliveries. What is in question is the basis for Lim's alleged belief.)

(e) According to Lim, Carrier's bankers had told him: "so long as you are compliant with the terms of the LC, you get paid". Lim should therefore have checked the terms of the LC before preparing DO50191. In truth, as earlier noted, Lim prepared the skeletal DO50191 before seeing the terms of the LC.

(f) In any case, once Lim read the LC, it should have been obvious from Field 48 that the LC could not possibly cover *all* previous deliveries. After all, Field 48 provided that the documents had to be presented within 14 days of delivery and within the validity period of the LC. When confronted with this, Lim claimed that he had overlooked Field 48. According to Lim, it also did not occur to him that his interpretation of the LC would render Field 48 completely otiose. Given that he had allegedly given consideration to Fields 46A and 47A when he interpreted the LC as permitting "deemed" deliveries, Lim's evidence that he had overlooked Field 48 is difficult to accept.

(g) If Lim thought that the LC covered the previous deliveries of 28April 2006, 26 May 2006 and 26 June 2006, why did he not use the actual "system" delivery orders covering those deliveries? When confronted with this obvious question in cross-examination, Lim explained that the banks might reject the "system" delivery orders because they were not acknowledged by Lee Meng's authorised signatories. Yet, when he was confronted with the fact that the actual "system" delivery orders were signed by Lee (who was Lee Meng's authorised signatory), Lim conceded that the earlier reason he had given to the court did not apply. Clearly, his reason for not using the actual "system" delivery orders was disingenuous.

(h) Lim knew that the delivery made under a delivery order numbered DO161443 (for Goods allegedly delivered to Lee Meng's warehouse in Thailand on 26 June 2006) could not have been covered under the LC. Lim testified that Lee had told him that the Goods shipped under DO161443 were covered under a US$1.2m letter of credit from which Carrier received payment from Netaxis Bank. Evidently, the LC that DBS issued did not cover the Goods allegedly delivered on 26 June 2006. In those circumstances, Lim could not have honestly believed that DO50191 was intended to consolidate Goods including those allegedly delivered on 26 June 2006. In fact, Lim accepted in his affidavit of evidence-in-chief that neither the Goods described in the LC nor the amount of the LC could be related to any particular lot of goods newly or previously delivered. Inasmuch as DO50191 closely tracked the description of the Goods in the LC, it represented a completely fictional delivery.

62 Carrier's alleged honest belief that DO50191 did not contain the Representation is patently insupportable in light of the express statements made in DO50191 and the packing list that

accompanied it.

(a) DO50191 stated that the Goods were delivered in "1 lot". That was clearly meant to give the impression that the Goods were delivered in one shipment.

(i) Under cross-examination, Toh (Carrier's logistics manager) conceded that the word "lot" when used in the actual "system" delivery orders referred to a shipment; thus "1 lot" meant "one shipment". Thus, the words "1 lot" in DO50191 must have been intended to convey the meaning that the Goods were delivered in a single shipment. That militated against Lim's claim that the phrase "1 lot" denoted a "consolidated lot".

(ii) While Toh sought to explain that the meaning of "lot" in the "system" delivery orders was different from that used in DO50191, he failed to give any reason why that ought to be so. Toh's explanation was simply incredible.

(iii) The LC did not require the delivery order to state that the Goods were delivered in "1 lot". The fact that Lim gratuitously incorporated this statement in DO50191 strongly suggested an intention to give DBS the false impression that all the Goods were delivered in a single lot on 30 June 2006; he clearly did not intend for DBS to regard DO50191 as a consolidation of previous deliveries.

(b) Consistently with DO50191, the packing list accompanying DO50191 described the Goods as having been packed into cartons numbered 1 to 5,389. The unmistakable intent behind this was to convey to DBS the false impression that the Goods were all shipped in a single lot, when as a matter of fact they were not.

(i) During cross-examination, Toh conceded that the packing list described a packing process that did not take place.

(ii) Toh also conceded that the packing list when read with DO50191 would convey to a reader the impression that all the Goods were delivered in a single lot on 30 June 2006.

(iii) Toh also agreed that the packing list was generated solely to comply with the terms of the LC. He accepted that all the previous delivery orders did not have accompanying packing lists and that if those delivery orders had been presented DBS would have had reason to reject them for lack of accompanying packing lists.

(iv) Toh vainly strove to explain that the packing list did not convey the idea that the cartons were numbered from 1 to 5,389. He contended that it merely stated the total number of cartons delivered. Toh's explanation was plainly false. There was clearly no need for the packing list to state (for example, in relation to RAS-10) "1-3936" cartons instead of "3936" cartons. Indeed, when this question was put to Toh, he could provide no explanation.

(v) Significantly, when Lim himself was asked whether the carton numbers in the packing list would suggest that the Goods were delivered in "truly one lot" and not a "consolidated lot", he agreed. He also agreed that the packing list when read with DO50191 served to confirm that the Goods were delivered "all in one lot" and not a "consolidated lot" as he contended.

63 All the above lead to the irresistible conclusion that Carrier did not honestly believe in the truth of the representations in DO50191. Carrier clearly intended to make the Representation in DO50191 to

secure payment from DBS under the LC. In all probability, Lim's actions were driven by a desire for Carrier to receive payment for what were long overdue debts from Lee Meng. The e-mails exchanged with Lee Meng as disclosed in Lim's affidavit of evidence-in-chief (in particular his alleged perception of the LC as a "debt reduction instrument") revealed that as the driving factor in his entire decision-making process. In all likelihood, that clouded Lim's judgment and pushed him over the edge into a reckless, if not an entirely fraudulent mindset. In the circumstances, the Representation in DO50191 was made fraudulently. The answer to **Issue 3** must therefore be in the affirmative.

Issue 4: Did Carrier intend that DBS should rely on the Representation?

64 This question can be answered shortly. Carrier clearly intended DBS to rely on the Representation in DO 50191. It did not deny this in the pleadings or in its closing submissions. In fact, Carrier's witnesses conceded during cross-examination that the packing list and DO50191 were generated solely for the purpose of obtaining payment under the LC. It is also common ground that DBS duly paid under the LC following the presentation of DO50191 and the other documents called for under the LC.

Issue 5: Did DBS rely on the Representation?

65 In order to succeed in an action in deceit, a claimant must show that he acted in reliance on the defendant's misrepresentation. If he would have acted no differently in the absence of such representation, he will fail. Thus Spencer Bower states (at para 116):

> [W]henever the representee has failed to discharge the burden of establishing that he was *in fact* induced he has failed. He may have relied *solely* on something other than the misrepresentation, his own skill or judgment, his general knowledge of business, faith in the venture, special enquiries, or knowledge of the truth. The representee may not have read the document containing the misrepresentation; it may not have been addressed to, or intended for him, or for a class of which he was a member, he may not have examined the article so that the active concealment of its defects had no effect on his decision; or it may appear that he was determined to take the risk, whatever it was. [emphasis in original]

66 Despite DBS having paid under the LC following presentation of DO50191, Carrier contended that DBS did not rely on the Representation therein. Carrier asserted that it did not matter to DBS when the Goods were shipped; that DBS's "sole pre-occupation was to support turnover of Lee Meng and its overseas sales, in an effort to sustain the [rejuvenation of] Lee Meng's business"; and that "had DBS known the true facts of the actual delivery date of the Goods, it would still have proceeded to accept the documents presented".

67 Carrier did not have any witness to support its contention. It therefore sought in cross-examination of DBS's witnesses to extract admissions prejudicial to DBS. Upon a review of the evidence, my view is that Carrier failed in its quest; each of DBS's witnesses firmly maintained that had it been known that the Representation was untrue, DBS would not have accepted the bill of exchange that Carrier presented under the LC.

68 For example, I note the following unchallenged testimony of Chu Hui Lee, Vice President of Trade Operations at DBS, at para 24 of his affidavit of evidence-in-chief:

> If any of the officers in the Document Checking Team at TRP [DBS's Regional Processing located in Hong Kong] was aware that the facts in the DO might be false, or that not all the Goods were delivered by Carrier to Lee Meng on 30 June 2006 and that only US$424,292.40 in value of goods

were delivered on that day, they would not have accepted the bills presented for payment under the letter of credit immediately. Instead, they would have done an internal escalation, to the managers within TRP, Lee Meng's relationship manager, DBS's Credit Manager, and if necessary to DBS's Legal, for an appropriate decision.

69 It is, I think, unarguable that had the truth of the actual delivery dates been stated, the trade department of DBS would not have immediately accepted the bills of exchange presented and would have "escalated" the matter internally. The question then is what DBS's relationship manager responsible for the Lee Meng account would have done. Would he have recommended that DBS accept the documents in any event?

70 This is what the relationship manager Chua Yew Hock Alexander ("Chua") had to say (at para 32 of his affidavit of evidence-in-chief):

> Had anybody from TRP, who is responsible for processing the trade documentation, highlighted any discrepancy between the documents presented for negotiation under the letter of credit and the terms and conditions of the letter of credit, I would not have approved payment o be made under the letter of credit. This is because Lee Meng was then already in some financial difficulty.

71 Chua was closely cross-examined on this but his evidence, which I accept, was that the sole commercial basis for the LC was Lee Meng's claim that it needed the LC to obtain fresh Goods from Carrier for export to Vietnam. The answers which Chua gave in cross-examination were consistent:

(a) Chua was asked whether he would have proceeded with the LC, if told shortly before the LC was issued, that some goods (the purchase of which the LC was required) had already been shipped to Lee Meng's obligations to Duc Khai Corporation. Chua answered that he would have issued a letter of credit but the amount of goods covered by it would have been reduced by the amount already delivered to Vietnam.

(b) Chua was also asked whether he would have approved payment under the LC if he were told that the Goods had been delivered but remained unpaid and that the proceeds under the LC were required to pay for the Goods. Chua's testimony was that he would not have financed the Goods that had already been delivered.

(c) Chua explained that he needed to ensure that the LC was used for the purpose for which Lee (of Lee Meng) had requested it. Chua emphasised at various times that, in the circumstances described in (b) above, he would use a separate product or banking facility to address Lee Meng's difficulty. Moreover, it was not as if the DBS would lend in any event. As he indicated, DBS would "talk about it on a separate note" and would try to help the customer.

(d) Chua was specifically asked why DBS would require its customer to go through fresh documentation for a new product when the LC was already in place to finance the previous deliveries. The reason that Chua gave was "[a]ccountability for the product that is being used to finance the relevant purchases … compliance with whatever internal policy; basically proper credit covenants". Chua went on to explain the rationale for his stance in the following terms:

> It's basically good banking practice. You do not mix one product, one loan product, for use of another product. For example, you do not give an OD to buy a property with a long-term intention in mind. There is no right or wrong, but it's just something that is not done correctly in terms of credit decisions.

72 Apart from Chua, Lim Hai Yian ("Ms Lim") also gave evidence on behalf of DBS. Ms Lim was a credit officer overseeing Lee Meng's account with DBS. Had an issue concerning the acceptance of discrepant documents been escalated internally within DBS, Ms Lim would have been one of the key decision-makers on that issue.

73 Ms Lim was emphatic in her rejection of Carrier's case that DBS had intended to pay Carrier in all events. In para 3 of her supplemental affidavit of evidence-in-chief, Ms Lim testified that:

> It is untrue that DBS had intended to pay Carrier in all events. DBS would not have immediately accepted the bill of exchange if I had known that a vast majority of the Goods were in fact delivered before the issuance of the letter of credit.

74 Ms Lim added (further down at para 5):

> In fact, it is ludicrous for Carrier to suggest that DBS would have paid Carrier under the letter of credit at all events. … If DBS had wanted to pay Carrier in any event, it could have increased Lee Meng's credit limit on its import line to accommodate Lee Meng's payment of US$1,391,726.70 to Carrier, or issued a guarantee for the same sum in favour of Carrier, there would be no need for any letter of credit or the Export LCs.

75 Crucially, Carrier did not challenge the portion of para 5 of Ms Lim's supplemental affidavit of evidence-in-chief quoted above. Her evidence in that regard was entirely consistent with Chua's evidence that he would have offered an alternative product if Lee Meng needed DBS to finance goods that had already been delivered.

76 Despite intense cross-examination, Ms Lim maintained her stance. She maintained that the LC was meant only for fresh goods.

77 DBS's witnesses consistently testified that the LC was intended to cover goods that were delivered after its issuance. Evidence as to discussions between DBS and Lee Meng revealed the following:

> (a) DBS was told that unless the LC was issued, Lee Meng could not get new goods from Carrier. As a result, Lee Meng would be unable to capitalise on the peak season in Vietnam for air-conditioners.
>
> (b) Lee Meng had proposed to DBS that the LC would be secured against two Export LCs to be obtained from Lee Meng's customer in Vietnam.
>
> (c) Therefore, the LC was clearly premised on Carrier delivering fresh goods to Lee Meng for export to Vietnam. Unless this was done, DBS could not harness the proceeds from the Export LCs to pay down Lee Meng's liability under the LC.

78 While Carrier sought to suggest that Lee Meng might have been misleading DBS, that did not alter the fact that DBS's purpose in issuing the LC was to finance the purchase of fresh goods. This is supported by the provision in Field 46A that required the delivery order to indicate DBS's documentary credit number. Obviously, a delivery order issued prior to the LC date would not have been able to indicate on its face the LC number.

79 Whilst it may have been the case that Lee Meng had undertaken to Carrier that it would procure an LC to reduce its outstandings owing to Carrier in respect of goods previously delivered,

that was something that DBS was not privy to. Moreover, as earlier pointed out, Carrier's protestations as to what Lim honestly believed the LC meant were not to the point.

80 In an endeavour to show that DBS intended the LC to cover goods previously delivered, Carrier pointed out that an express stipulation contained in an earlier draft of the LC (to the effect that it covered only Goods delivered on or after 30 June 2006) had been subsequently omitted from the LC. Leaving aside the question whether it is permissible to rely on previous drafts of a contract in interpreting the contract which they eventually make (see Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2004) at p 56, para 3.05), the fact of the matter is that even without such express stipulation there remains a provision in Field 46A of the LC which militates against such construction, *viz*, that the delivery order must state the documentary credit number. The construction of the LC has already been considered (see [36]–[44] above) and nothing further needs to be added.

81 In the same vein, Carrier pointed out that until 13 September 2007, DBS had taken the stand in this action that the LC covered Goods delivered to Lee Meng's warehouse from 16 June 2006 (*ie*, antedating the LC issue date of 30 June 2006). Carrier contended that it had in fact duly delivered to Lee Meng's warehouse Goods that were worth approximately US$1,371,726.70 between 16 June 2006 and 30 June 2006. It was only on 13 September 2007 that DBS applied to amend its pleadings.

82 At the end of the day, whatever the parties' respective positions might be, the LC will have to be construed in accordance with its terms. On the view I have taken, DBS's earlier construction would have been untenable. In any event, even if that construction were sustained, it would not advance Carrier's case.

83 Clearly, the goods delivered on 28 April 2006 and 26 May 2006 would not qualify. Similarly, the goods allegedly delivered on 26 June 2006 would not qualify for the following reasons:

(a) Lim himself confirmed under cross-examination that those goods were covered under a US$1.2m letter of credit issued by Netaxis Bank.

(b) The goods were not delivered from Carrier's warehouse to Lee Meng's warehouse as required under Field 46A of the LC. (In this regard, I find on the evidence that the bonded warehouse to which the goods were delivered was not Lee Meng's warehouse. In view of the other reasons in sub-paras (a) and (c), it is not necessary for me to go into a detailed evaluation of the evidence which led to my finding.)

(c) Carrier's own witness, Toh, testified that the goods allegedly delivered to the bonded warehouse on 26 June 2006 were in fact delivered from 24 to 28 May 2006. Under cross-examination, he accepted that since the Goods were delivered to the bonded warehouse from 24 to 28 May 2006, there was no basis for Carrier's claim that any part of the goods were delivered during the period 16 June 2006 to 15 July 2006.

84 Thus, for the above reasons, the delivery dates were material to DBS. DBS would have been entitled to reject Goods delivered to Lee Meng's warehouse in Singapore on 28 April 2006 and 26 May 2006. DBS would also have been entitled to reject the goods delivered to the bonded warehouse in Thailand.

85 If Carrier honestly thought that DBS would have paid Carrier "[in] all events", there would have been no need to go through the charade of misleading packing lists and delivery orders. Carrier would have simply tendered the discrepant documents and looked to DBS for payment. The reason Carrier

did not is obvious: they knew that DBS would regard as material the representations contained in DO50191 with regard to the delivery of the Goods. That is why Carrier stated in DO50191 that the Goods were all delivered in "1 lot" despite the LC not stipulating such a requirement.

86 As a result of the Representation, DBS paid out US$1,395,748.02. I find that DBS would not have paid this sum but for Carrier's Representation. It clearly relied on the Representation.

Issue 6: Did DBS suffer loss as a result of reliance on the Representation?

87 Carrier contended that DBS suffered no loss as a causal consequence of the Goods not being delivered in one lot on 30 June 2006; that the Representation had no casual connection to the alleged loss of US$1,395,748.02. It argued that even if all the Goods had been delivered on 30 June 2006, DBS would still have sustained the loss.

88 *Spencer Bower* states (at para 145):

> There must be a causal relationship between the intended inducement, reliance on the misrepresentation, the plaintiff's change of position and the damage to make the misrepresentation actionable. It is not enough that damage followed, or even that it was caused by, the misrepresentation unless it was also a result of intended, induced reliance on it. Unless such a causal connection is made out the representee will fail though he sustained the damage alleged by reason of his belief in the truth of the representation. Whenever the representee can prove that the representor intended the alteration of position which resulted, the question of whether the consequent damage to the representee was the probable result of the misrepresentation becomes immaterial.

89 I fail to see how Carrier could seriously contend that there was no causal connection between the loss suffered and the Representation (which, as I have found, Carrier intended DBS to rely upon). DBS paid under the LC in reliance upon DO50191 and thereby suffered loss. The connection could not be clearer.

90 There is no basis for Carrier's contention that even if all the Goods had truly been delivered on 30 June 2006, DBS would still have suffered the loss. This was pure speculation unsupported by the evidence. Carrier suggested that Lee Meng had sufficient goods in its warehouses which it could have exported so as to claim under the Export LCs. Even if this was so, it did not follow that if fresh Goods had all been delivered on 30 June 2006, as falsely represented in DO50191, they would not have been exported as contemplated.

91 In any event, I have no doubt that "the causative influence of the fraud is not significantly attenuated or diluted by other causative factors": *per* Lord Steyn in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 285. The fact that DBS was later unable to obtain payment from Lee Meng or under the Export LCs, which payments could have extinguished or reduced its loss, is insufficient to break the chain of causation flowing from the deceit. In fact, it is irrelevant to DBS's claim against Carrier, because a claimant need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him: see *Standard Chartered Bank v Pakistan National Shipping Corp* [2003] 1 AC 959; *The Liverpool (No 2)* [1963] P 64; *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 7–079.

92 Carrier appeared also to blame DBS for the loss; it contended that the flaw in the "secured LC" arrangement between Lee Meng and DBS caused the loss. This contention was not seriously pursued and rightly so. It does not lie in the mouth of the representor to say that the loss would not have

happened if the arrangement between the representee and its customer had been more secure. I very much doubt if it would have made any difference to Carrier's liability at law even if the LC facility granted by DBS was unsecured. The defence of contributory negligence has no place in the tort of deceit: *Standard Chartered Bank v Pakistan National Shipping Corp* ([91] *supra*).

93 All ingredients for liability in deceit having been satisfied, I hold Carrier so liable.

Issue 7: Is there a cause of action in negligent misrepresentation in this case?

94 As I have found Carrier liable in deceit, it is not strictly necessary for me to address DBS's claim in negligent misrepresentation against Carrier. Nevertheless, it is perhaps appropriate that I state my views on this claim in case there is an appeal.

95 The current state of the authorities does not support the existence of a cause of action in negligent misrepresentation by an issuing or confirming bank against the beneficiary of a letter of credit. *Gutteridge & Megrah's Law of Bankers' Commercial Credits* (Europa Publications, 8th Ed, 2001) ("*Gutteridge & Megrah*") at p 173 notes that the causes of action available to the bank to recover any payment made to the beneficiary are that of money had and received and the tort of deceit against the beneficiary.

96 This must be right because to accept the contention that a valid cause of action arises in negligent misrepresentation is to introduce into our common law, by way of a back door, a contention emphatically rejected by Lord Diplock in the *locus classicus United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168. In that case, payment for the sale of a certain plant was to be by confirmed irrevocable credit. Under the terms of the letter of credit, the latest date for shipment was 15 December 1976. Although the cargo was in fact shipped one day later on 16 December 1976, the loading brokers fraudulently backdated the bill of lading to 15 December 1976 so as to conform to the terms of the letter of credit. (In so doing they were not acting as agents of the seller.) The documents which were tendered therefore on their face conformed to the credit, but were rejected by the confirming bank which became aware of the loading brokers' fraud. Crucially, there was no evidence of the seller's complicity in the fraud.

97 The issue which arose in an action by the seller against the confirming bank was whether the latter was entitled to refuse payment under the confirmed irrevocable credit on the ground that, although the documents appeared to be in order, in truth the goods were shipped later than as prescribed in the credit. The bank had argued that if the documents presented, despite conforming on their face with the terms of the credit, nevertheless contained some statement of material fact that was not accurate, it was not under any obligation to pay under the credit regardless of whether the seller was party to the fraud or not. In rejecting this proposition, Lord Diplock said (at 184):

> My Lords, the more closely this bold proposition is subjected to legal analysis, the more implausible it becomes; to assent to it would, in my view, undermine the whole system of financing international trade by means of documentary credits.

98 What the House of Lords eventually accepted was a narrower principle: that where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue, the bank is entitled to refuse payment. As summarised by *Gutteridge & Megrah* at para 6–59:

> … *United City Merchants (Investments) Ltd v Royal Bank of Canada* makes it clear that nothing but the fraud of the beneficiary will relieve an issuing or confirming bank of its absolute duty.

99 If we were to accept DBS's contention that a bank may rely on negligent misrepresentation by a beneficiary to recover any money it had paid out to the beneficiary, the law would also have to accept that banks are entitled to invoke negligent misrepresentation by the beneficiary as a ground for not paying the beneficiary in the first place. The practical effect of this would be to unravel the narrow fraud exception the House of Lords took pains to limit; banks could refuse to pay the beneficiary once there was any inaccurate statement of material fact by simply alleging that the beneficiary had been negligent.

100 One has to bear in mind that the underlying foundation of the system of documentary credits is to give sellers, as far as possible, an "assured right" to payment notwithstanding disputes in the underlying sale contract. Lord Diplock said (at 183):

> The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

In my view, developing the law to allow for a negligent misrepresentation exception would be an unjustified erosion of this very premise. Documentary credits must be allowed to be honoured, as far as possible, free from interference from the courts. Otherwise, trust in international commerce could be irreparably damaged: *Harbottle (Mercantile) Ltd v National Westminster Bank* [1978] QB 146 at 155–156.

101 DBS argues that there is support in *Niru Battery* ([54] *supra*) for its contention. It also relies on the principle that an issuer of a document which is to be used in a letter of credit transaction owes a duty to ensure that the statements in that document are true and accurate.

102 A careful reading of *Niru Battery* would show that the English Court of Appeal found that a third party inspection company assumed responsibility to the buyer to take reasonable care to ensure that the inspection certificate it issued was accurate. The Court of Appeal arrived at this decision after examining whether under an objective assessment of the circumstances, the inspection company had assumed responsibility towards the buyer in the manner established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

103 The parties also submitted on the applicability of another English Court of Appeal decision in *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2002] 1 WLR 1975 ("*Montrod*"). The *ratio decidendi* of *Montrod* is that in the circumstances of that case the beneficiary under the letter of credit did not owe a duty of care to the *applicant* in presenting documents under the letter of credit. However, at [64] of its judgment, the English Court of Appeal quoted the following *dicta* from the judgment of Judge Raymond Jack QC without any express approval: "The beneficiary does not owe a duty of care to the issuing bank."

104 The issue therefore is whether the statement is supportable in law. If one were to examine the reasoning behind the *ratio* in *Montrod* carefully, one would conclude that it would similarly be difficult to argue that the beneficiary owed a duty of care to the issuing bank. At para 68 of its judgment, the English Court of Appeal held that a duty of care owed by the beneficiary to the applicant would only arise if the ingredients of a voluntary assumption of responsibility were satisfied; and that the beneficiary's agreement to the terms of the letter of credit was insufficient material from which to imply any such assumption of responsibility. The same reasoning would apply *a fortiori* when one considers whether a duty of care is owed by the beneficiary to the issuing bank. Such a duty of care

will only arise if the ingredients of a voluntary assumption of responsibility are satisfied objectively.

105 Even if I leave aside the difficulties canvassed above regarding the underlying premise of documentary credits and accept that a beneficiary may in certain instances owe a duty of care to the bank (which, as presently advised, I am not inclined to do), DBS has not given me any evidence from which I could find an assumption of responsibility by Carrier.

106 DBS's argument in this regard is the rhetoric that a responsible seller must provide to the bank documents which are true. This does not *ipso facto* entail that the seller has assumed any responsibility towards the bank. The English Court of Appeal in *Montrod* made the apposite comment that in seeking to ensure that documents presented to the issuing bank comply with the terms of the letter of credit, a beneficiary is pursuing his *own* commercial interests; at para 66. It does not owe a duty of care to the bank.

107 I am therefore of the view that DBS has no valid cause of action in negligent misrepresentation against Carrier.

Quantum of damages

Issue 8: Was the loss caused by or contributed to by DBS's own negligence?

108 Carrier sought to avoid or minimise liability for damages by pointing to DBS's alleged negligence:

(a) in failing to take adequate measures to secure its financial position vis-à-vis Lee Meng;

(b) in issuing the LC despite Lee Meng's financial difficulties and without undertaking due diligence in regard to Lee Meng's proffered reason for the LC application; and

(c) in its lack of vigilance and supervision of Lee Meng to ensure that Lee Meng executed the transactions necessary to claim payment under the Export LCs.

However, as pointed out earlier ([92] *supra*), the defence of contributory negligence has no place in the tort of deceit.

109 In *Standard Chartered Bank v Pakistan National Shipping Corpn* ([91] *supra*), Lord Rodger of Earlsferry had this to say (at [42]):

> In agreement with Mummery J in *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 WLR 1462, Lord Hoffmann has concluded that there is no common law defence of contributory negligence in the case of fraudulent misrepresentation. I respectfully regard that conclusion as compelling. As Mummery J pointed out, if the negligence of the plaintiff had been a defence to an action of deceit at common law, this would have mean that it would have been a complete defence, absolving the fraudulent defendant of all liability. Such an extreme doctrine could hardly have passed through the law without leaving its mark in the cases. But there is no trace of it.

110 It is also pertinent to note that in the English Court of Appeal in *Standard Chartered Bank v Pakistan National Shipping Corp*, Potter LJ was of the view, in a similar context, that the loss was suffered *as soon as* the bank paid out the money in reliance on the false representations made.

Issues 9 and 12

111 As I have already found that no goods were delivered to Lee Meng's warehouse on 26 June 2006

(see [83] above), issues 10 and 11 fall away. This leaves us with the two remaining issues:

(a) Whether DBS's claim should be reduced by the value of Goods actually delivered to Lee Meng on 30 June 2006 (Issue 9); and

(b) Whether DBS is required to give credit for the US$224,070 it received under the Export LCs (Issue 12).

In regard to Issue 9, Carrier sought to rely upon the House of Lords decision in *Smith New Court* for their contention that credit has to be given for the US$424,292.40 worth of Goods which were actually delivered to Lee Meng on 30 June 2006.

112 Carrier also cited *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* [2007] 1 SLR 196 for the principle that the measure of damages in deceit cases is generally the difference between the "contract price" of transaction induced by the fraudulent misrepresentation and the true market value of the asset purchased on the date of the contract.

113 DBS, on its part, submitted that the proper measure of damages in an action in deceit is an award that serves to put the plaintiff into the position it would have been in if the misrepresentation had not been made to it, and not into the position it would have been in if the representation had been true. (This, of course, is the well known distinction between the tortious measure of damages and one based on contractual principles.) Accordingly, DBS submitted that it should be entitled to recover the entire sum of US$1,395,748.02 which it was induced to pay under the LC as a result of the Representation in DO50191. It argued that the amount of Goods actually delivered to Lee Meng on 30 June 2006 was irrelevant to the computation of damages.

114 The overarching principle in awarding damages for the tort of deceit is summed up by *Clerk & Lindsell* ([53] *supra*) at para 18–37 as follows:

> The measure of damages in deceit is the loss directly flowing from the claimant's reliance on the defendant's statement: that is, generally speaking, the sum that will put him in the same position as if he had not relied on it. Credit must of course be given for any gains made by the claimant.

115 Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 ("*Doyle v Olby*") held at 167:

> *The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement*. The person who has been defrauded is entitled to say:
>
> > "I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages."
>
> *All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen*. For instance, in this very case Mr. Doyle has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received. [emphasis added]

116 In similar vein, in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162, VK Rajah JC held (at [91]) that where fraud or deceit is exposed, the law pragmatically attempts to cut through the thicket of facts and remedy the wrong by restoration of the status quo, *ie*, the position it would have been in if the fraud had not been committed.

117 On the basis of the foregoing, the amount of damages recoverable by DBS ought to be US$1,395,748.02 less any benefit it received. Clearly, if it had known that the Representation was false, it would not have accepted the bill of exchange by HSBC, thus binding itself to pay the $1,395,748.02. Unlike in *Smith New Court* and *Doyle v Olby*, no asset was purchased by DBS as a result of inducement by the Representation. For the same reason, the principle referred to in *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* ([112] *supra*) is inapplicable. The US$424,292.40 worth of Goods was delivered to Lee Meng and DBS could not *ipso facto* be said to have thereby derived a gain or benefit *pro tanto*.

118 In *Smith New Court*, the issue was not whether credit should be given for the value of certain shares purchased but rather how that value was to be determined or more precisely, at what point of time the shares were to be valued. In that case, the claimants were induced to purchase shares in the Ferranti company by the defendant's agent's fraudulent statement that other persons were interested in acquiring the shares. The shares were bought by the claimants as a market-making risk and at a price commensurate with an acquisition as such. The Ferranti shares turned out to be worth far less as a result of the disclosure that a fraud, unrelated to and occurring in advance of the purchase, had been perpetrated on the company. The claimant disposed of their shares over a period of five to six months and incurred a substantial loss which they sought to recover against the defendant.

119 The normal measure of damages would have been the purchase price of the shares less their actual value at the time of acquisition. The House of Lords held that this was not an inflexible rule and decided, reversing the Court of Appeal, that in order to compensate the plaintiff for the fraud, what fell to be deducted from the purchase price was not the value of the shares at the date of their acquisition but the actual proceeds of their disposal.

120 At 267, Lord Browne Wilkinson summed up the principles to be applied in assessing damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property:

> (1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud.

1 2 1 *Smith New Court* speaks to a situation where the claimant was induced by a fraudulent misrepresentation to buy property. As such, it is not directly applicable to be present case. However,

the underlying sentiments in the principles set out by Lord Browne Wilkinson ought, in my view, similarly to apply here. Just, as in that case, in order to award the claimant full compensation for the wrong suffered, the House of Lords eschewed a mechanical application of the general rule that the value of the shares should be determined as at the date of their acquisition, similarly here, to require DBS to give credit for the US$424,292.40 worth of Goods delivered to Lee Meng on 30 June 2006 would be to deny DBS full compensation for the loss it sustained.

122 In arriving at this conclusion, I am aware of a possible counter-argument along the following lines:

> (a) Having paid under the LC, if DBS were to seek reimbursement from Lee Meng, the latter could not possibly refuse to pay for the Goods it did receive on 30 June 2006, *ie*, the US$424,292.40; and
>
> (b) If Lee Meng did pay DBS that amount, it would not lie in DBS's mouth to contend that it suffered damage in the full amount of US$1,395,748.02 without giving credit for the amount it received from Lee Meng.

My answer is simply that, in fact, DBS did not receive such payment. Lee Meng's failure to pay did not, in my view, break the chain of causation. In the words of Lord Steyn in *Smith New Court* (at 285), "the causative influence of the fraud is not significantly attenuated or diluted" by Lee Meng's insolvency.

123 Moreover, Lee Meng was already in financial difficulties at the time of the Representation. The illustration given by Cockburn J in *Twycross v Grant* (1877) 2 CPD 469 is apposite. He said (at 544–545):

> If a man buys a horse, as a racehorse, on the false representation that it has won some great race, while in reality it is a horse of very inferior speed, and he pays ten or twenty times as much as the horse is worth, and after the buyer has got the animal home it dies of some latent disease inherent in its system at the time he bought it, he may claim the entire price he gave; the horse was by reason of the latent mischief worthless when he bought; but if it catches some disease and dies, the buyer cannot claim the entire value of the horse, which he is no longer in a condition to restore, but only the difference between the price he gave and the real value at the time he bought.

Furthermore, as was noted earlier ([115] above), the damages for fraudulent misrepresentation are not limited to those reasonably foreseeable:

> [T]he victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction induced by the wrongdoer. That includes heads of consequential loss. … [The rule] is squarely based on the overriding compensatory principle, widened in view of the fraud to cover all direct consequences. The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of is reliance on the fraudulent statement.

(*per* Lord Steyn in *Smith New Court* at 282, summarising the principles in *Doyle v Olby* which were endorsed by the House of Lords.)

124 Any unease I might otherwise have felt in holding that the losses suffered by DBS are not to be reduced by the sum of US$424,292.40 is assuaged

(a) by my further holding below that DBS is to give credit for US$224,070 which it received under the Export LCs; and

(b) by Lim's admission under cross-examination that US$127,575 worth of the Goods Carrier delivered on 30 June 2006 were amongst the goods subsequently repossessed by Carrier on or around 16 August 2006.

125 In regard to the US$224,070, the fact that DBS chose to apply the money received towards reducing Lee Meng's other liabilities is irrelevant. It did receive the payment as a result of some of the Goods delivered on 30 June 2006 being delivered onward to Vietnam. That onward delivery gave rise to payment under the Export LCs of the US$224,070.

126 The approach I take follows that adopted in *Komercni Banka AS v Stone and Rolls Ltd* [2003] 1 Lloyd's Rep 383 at [167]:

> [T]he question to be asked is whether the receipt of the benefit was not merely a result of the venture or transaction, in a historical sense, but was part of the complex of obligations and benefits intrinsic, i.e. belonging naturally, to the venture or transaction.

In other words, was the benefit of US$224,070 intrinsic to the LC transaction amongst Carrier, DBS and Lee Meng? It is undisputed that the LC was secured against the two Export LCs obtained by Lee Meng from its Vietnamese customer which would cover 85% of the value of the LC. This means that the benefit to DBS in entering into the LC transaction with Carrier and Lee Meng was that it could look to the payment under the Export LCs as security if Lee Meng defaulted in its reimbursement to DBS. Therefore, in my judgment, the US$224,070 was a benefit received by DBS that was intrinsic to the LC transaction. What DBS subsequently *chose* to do with the US$224,070 it received (such as reducing other outstandings of Lee Meng) was therefore irrelevant.

Conclusion

127 In the result:

(a) I find the defendant (Carrier) liable in damages for fraudulent misrepresentation to the plaintiff (DBS) in the sum of US$1,395,748.02 less the benefit received in the sum of US$224,070;

(b) Pursuant to s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed), I also order interest to be paid from the date of writ until judgment at the rate of 5.33% per annum; and

(c) Costs to the plaintiff to be taxed unless agreed.