**EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**SAINT LUCIA**

**COMMERCIAL DIVISION**

**CLAIM NO. SLUHCM2021/0057**

**BETWEEN:**

**WEIFANG JS TRADING CO LIMITED**

Claimant

**and**

**EURO EXIM BANK LIMITED**

Defendant

**Before:**

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

**Appearances:**

**Ms Renee St Rose with Ms Shari-Ann Walker and Ms Tianah Foster for the claimant**
**Mr Jahn Sifflet for the defendant**

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2023: June 26; 27;
July 3; 4; 5;
August 3; 8; (Written Closing Submissions)
2024: October 4.

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## JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The claimant Weifang JS Trading Co Limited seeks to recover the sum of US$3,240,000.00 from the defendant Euro Exim Bank Limited, under Letters of Credit ("L/C's") obtained between October 2020 and June 2021. The defendant is the issuing bank and the claimant is beneficiary under the L/C's, which were initiated by a third party, United Overseas Trading Co. Ltd ("UOT"), on the basis of Sale and Purchase

Agreements (SPA's) between UOT as buyer and the claimant as seller. Thus, UOT is the applicant who caused the defendant to issue the L/C's for the benefit of the claimant as seller of goods to UOT. UOT is not a party to the claim.

[2] The claimant alleges that the L/C's are irrevocable documentary letters of credit, to which the Uniform Customs & Practice for Documentary Credits ("UCP600 or UCP") apply, and the defendant is obligated to remit payment, for the goods sold by claimant to UOT. The claimant asserts that the defendant handed over its documents to UOT, which allowed UOT to take possession of its goods, before remitting the corresponding payments. The claimant says, by releasing the documents prior to securing payments from UOT, the defendant breached the terms of the L/C's. Consequently, UOT has taken possession of the goods, and the claimant is left without its documents, or payment for the goods sold.

[3] The claimant seeks statutory interest on the sum claimed, and alternatively damages for bailment, or conversion, or a sellers lien pursuant to section 311 of the Commercial Code[1], and costs.

[4] The defendant denies the claim in entirety, and avers that the L/C's are in the form of deferred payment letters of credit (commonly called usance letters of credit), which required that compliant documents from the claimant be handed over to UOT immediately upon receipt by the defendant. Furthermore, certain terms of UCP600 were expressly excluded from the L/C's, and UOT was permitted a grace period of 45 days after receipt of the documents, to remit payment under each L/C. The defendant asserts that it was a strict terms of each L/C, that payment to the claimant was conditional upon receipt of payment from UOT. The defendant further states that it has not breached any of the terms of the L/C's, as no payments were received from UOT within the stipulated time, or at all. Consequently, no payments could have been made to the claimant for the amounts claimed. Thus, there can be no liability for unpaid sums under the L/C's.

[1] Cap 13.13 of the Revised Edition of the Laws of Saint Lucia

[5] I dismissed the claim and awarded costs to the defendant, to be assessed, if not agreed. This judgment contains the full reasons for my decision.

**The Issues**

[6] The following issues engaged the Court's attention, for resolution:-

1. Was the Defendant liable to the claimant for payment of outstanding amounts, under the L/C's?

2. Were any rules of UCP600 expressly excluded or modified in the L/C's?

3. Was the defendant entitled to release the documents presented by the claimant, before remitting the corresponding payment to the claimant?

4. Was it an implied term of the L/C's that the defendant was precluded from releasing the documents, until payment was received from UOT?

5. Whether Field 47A-15 of the L/C's means that the documents presented should be released to UOT only upon receipt of payment by the defendant, from UOT?

6. Did the defendant fail to provide the claimant with notice of non-compliance within the stipulated time as required by UCP600, and if so, what was the effect?

7. Is the defendant liable for conversion by releasing the documents to UOT, prior to making payment to the claimant?

8. Did the defendant breach a duty as bailee of the claimant's property, by releasing the documents to the UOT, before making payment to the claimant?

9. Has the claimant suffered loss and damage as a result of the defendant's actions, and if so, what is the quantum of such loss?

**The Claim**

[7] The claimant is a chemical trading and manufacturing company based in China, that engages in the production and sale of Melamine Powder and MDI Wankua PM200, amongst other things. The defendant is an international financial institution incorporated under the laws of Saint Lucia, having its registered office and headquarters in Saint Lucia, with branch

office in London. The claimant is the seller of Melamine Powder[2] to UOT under seventeen separate SPA's, and MDI Wanhua PM200 under one SPA. UOT, as the buyer, applied to the defendant for eighteen L/C's which named the claimant as beneficiary. The claimant alleges that full payment was received for nine of the L/C's (numbered 1001 to 1006, 1008, 1010 and 1011), partial payment was received for two L/C's (numbered 1012 and 1013) and seven L/C's (numbered 1015 to 1018 and 1020 to 1022) remain wholly unpaid. It is alleged that the defendant owes a balance of US$3,240,000.00 to the claimant, under the partial and unpaid L/C's.

[8] The claimant alleges that it was a term of each of the SPA's that payment would be made by *"100% L/C 45 days after B/L date".* This meant that payment would be made by a letter of credit, 45 days after the bill of lading date. On that basis UOT applied for, and obtained the L/C's from the defendant, with one L/C issued in relation to each SPA. Further it was an express term under Field 43P of the L/C's, that partial shipments were permitted. Relying on this clause, the claimant delivered the goods to UOT in several partial shipments. A separate set of documents were issued by the claimant for each partial shipment and presented to the defendant as the issuing bank under the L/C's. The claimant asserts that the defendant made full payment under nine L/C's and has failed or refused to make full payments under the remaining nine L/C's.

[9] The claimant pleaded that the defendant did not issue any notice rejecting the documents, or made any claim that the documents were discrepant, and proceeded to release the documents to UOT, in breach of the terms of the L/C's. This enabled UOT to take possession of the goods prior to making payment to the defendant, for remittance to the claimant, by the agreed date. The claimant says had the defendant withheld the documents, UOT could not have taken possession of the shipped goods, and by releasing these documents, the defendant wrongly deprived the claimant of use and possession of its documents, and by extension its goods, and converted same to the defendant's own use, thus causing loss to the claimant. The claimant asserts that the documents were presented for the sole purpose of securing payment under the L/C's, and the defendant assumed responsibility for custody

[2] Industrial Grade 99.8%

of these documents. Further, the documents remained the property of the claimant and the defendant became the bailee of the claimant's property. Having released the documents to UOT, before receiving the corresponding payment for the goods, the defendant breached its duty to the claimant as bailee. Thus, the claimant seeks payment of the amounts outstanding under the L/C's, or alternatively general damages for breach of duty as bailee, or for conversion by the defendant, or a lien against the goods.

**The Defence**

[10] The defendant denies breaching the terms of the L/C's and says that full or partial payments were made to the claimant, as and when payments were received from UOT, in accordance with the terms for deferred payment under the L/C's. Further, although partial shipments were allowed under Field 43P, payments to the claimant were for the full value of the L/C's and were conditional upon UOT making payment to the defendant as stated in Field 47A-15 of the L/C's. The defendant avers that it has not received full payment from UOT for the remaining nine L/C's. Further, the L/C's were subject to strict deferred payment terms stipulated as "*45 days after sight",* which means that UOT had 45 days from receipt of documents, to remit payment for the goods sold under the SPA's, under the corresponding L/C. The defendant contends that this arrangement required that the documents which enabled UOT to take possession of the goods would have to be handed over to the UOT, with payment to be made at a later date. Thus, the defendant is not liable to the claimant under the partially paid and unpaid L/C's, for which no payment was received from UOT.

[11] The defendant further states that the UPC600 rules were modified by the issuing terms of the L/C's, and Field 78 expressly stated that the defendant's issuing terms and conditions supersedes UPC600. Furthermore, Article 1 of UCP600 explains how these rules apply to documentary letters of credit, and states that they are binding on all the parties unless expressly modified or excluded by the credit. The defendant's issuing terms modified UCP600 rules, in relation to the guidelines for payment, and the claimant and its advising bank were notified of this prior to issuing the L/C's. Thus, in so far as UCP600 rules contradict or conflict with the defendant's issuing term, including the deferred payment terms, they are not applicable to the L/C's.

[12] The defendant further avers that payment under at least twelve of the L/C's were made directly by UOT to the claimant, and this fell outside the scope of the L/C's. The effect of the claimant's conduct in having accepted direct payments from UOT meant that the claimant did not seek to rely on the corresponding L/C for payment for its goods. In this regard Field 47A-16 of the L/C's expressly states that settlement outside the terms of the L/C's are deemed to be without risk, responsibility or liability on the part of the defendant. The defendant puts the claimant to strict proof of the amounts alleged as being owed under the remaining L/C's. The defendant also avers that as the claimant failed to notify of non-payment by UOT within the 45-day period, this led to the belief that alternative payment arrangements had been made, and the defendant concluded that it was discharged from any payment obligations under the L/C's.

[13] The defendant denies having wrongfully deprived the claimant of the use of its documents or goods, or having converted same to its own use. The defendant denies that it became a bailee of the claimants goods, or that by releasing the documents to UOT, before receiving payment, it had breached a duty to the claimant. The defendant denies having committed the tort of conversion, or breached any duty as a bailee of the claimant's documents or goods, and maintains that it is not liable for damages as claimed. The defendant denied the particulars of loss and damages or that demand was made for the said sums by letter dated 12th October 2021 from the claimant's lawyer, and asks that the claim be dismissed, with costs.

**Reply to Defence**

[14] In its reply, the claimant asserts that the fundamental purpose of a letter of credit is to provide security to a seller, which ensures payment from the issuing bank, provided that documents for delivery of the goods have been submitted to the bank. As all the documents presented were compliant, and the defendant gave no notice of non-compliance within 5 banking days, as required by Article 16(d) of UCP600, the documents were to be held at the disposal of the claimant, or alternatively retuned to the claimant, and the defendant is preclude from claiming that the documents were discrepant.

[15] The claimant says use of the words *"…and upon payment from Applicant*" in Field 47A-15 of the L/Cs constitutes a non-documentary condition under Article 14(h) of the UCP600, and should be disregarded. However, to the extent that the words add a further pre-condition over and above the presentation of compliant documents, Article 16 of the UCP600 should apply equally to the additional pre-condition, and if the Defendant wishes to refuse to honour the L/Cs on the basis that UOT has not paid, then it was obligated to issue a notice to the claimant stating that it was refusing to honour the L/Cs, the reason for the refusal and hold the documents at the disposal of the claimant in accordance with Article 16(c) of the UCP600. As the defendant failed to do so, it is precluded from relying on the pre-condition in Field 47A-15, as a basis for non-payment.

[16] The claimant further asserts that notwithstanding the modification in Field 47A-15, the parties did not intend to depart from or otherwise undermine the fundamental purpose and nature of the L/C's as obtains under UCP600. Thus, the proper construction of the words *"…and upon payment from Applicant*" in Field 47A-15 must mean that the documents would be released to UOT only upon receipt of payment from UOT. Further, this modification did not allow the defendant to release the documents without first receiving payment from UOT, and there is nothing in the express terms of the L/Cs that permitted the defendant to do so. The claimant asserts that Field 47A-15 is ambiguous and unclear on whether the defendant is entitled to release the documents to the UOT without first receiving payment. Therefore, it should be construed *contra proferentum* and against the defendant as the drafter of the L/C's. As the defendant has released the documents and is unable to return them to the claimant, the defendant is liable to make the payment as required under the L/Cs. Alternatively, the defendant is liable to for the tort of conversion and/or bailment for releasing its documents without receiving payment from UOT.

[17] Examination of the pleadings disclose that the following matters are not in dispute:

1. Eighteen SPA's were executed between the claimant and UOT.
2. The SPA's all provided for payment by 100% Letter of Credit, 45 days after the bill of lading date.
3. Eighteen L/Cs were issued by the defendant, with the claimant as beneficiary.
4. All the LC's were identical in form and substance.
5. All goods sold under the SPA's were shipped by the claimant.
6. All the L/C's at Field 42C provided for payment to the claimant "*45 days after sight*".

7. All documents required under the L/Cs which included Bills of Lading were presented to the defendant by Bank of China, on behalf of the claimant.
8. None of the documents issued by the claimant were discrepant, and they were all considered compliant presentations, in each case.
9. The defendant delivered a compliant set of documents to UOT, in relation to each L/C.
10. UOT accepted the compliant documents and took possession of the goods shipped by the claimant under the SPA's.

**The Law and Practice in relation to Letters of Credit**

[18] To add context to the issues to be determined it is necessary to examine the law and commercial practice in relation letters of credit.

[19] The authorities cited by both sides clearly state that the purpose of a letter of credit is to provide security to a seller, by way of guaranteed payment from an issuing bank, once compliant documents evidencing shipment of the goods have been delivered to the issuing bank. It is generally accepted that letters of credit are irrevocable and once issued cannot be amended or cancelled without the consent of the issuer and beneficiary. It is also the case that revocable letters of credit are permissible since parties are free to agree such terms as they choose, but are rare, for the obvious reason that they afford the seller no security of payment and do not fulfil one of the basic or usual functions for which letters of credit were developed and designed.

[20] The learned authors of **Halsbury's Laws of England**[3] explains the position as follows:-

> *"It is often made a condition of an international sale contract that the buyer must pay for the goods by means of a confirmed1, irrevocable2* ***letter of credit****3. It is then his duty to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to pay an agreed sum of money4 against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued5. As between the seller and the bank, the issue of the credit duly notified to the seller6 creates a new contractual*

[3] Financial Institutions (Volume 48 (2021) at para 227

*link and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange on tender of the documents*[7]*. The contract thus created between the seller and the bank is, by reason of the bank's absolute undertaking to the seller, separate from the original contract between the buyer and the seller*[8]*. Having undertaken to pay the seller under the* ***letter of credit****, the bank will protect itself against non-payment by the buyer either by taking security from the buyer or by retaining the document of title, typically the bill of lading, tendered by the seller under the* ***letter of credit***[9]*."*

[21] **LexisPSL Banking & Finance** also provides a useful overview of the general principles which guide the use of letters of credit in internation maritime and commercial transactions, from which extracts have been summarized and incorporated in this section of the judgment.

[22] It is generally accepted that letters of credit provide a secure method of payment under a sales contract between a buyer and seller, when they are located in different countries, or the seller has concerns over the creditworthiness of the buyer or the jurisdiction in which the buyer is located. In these circumstances a seller will often insist that payment is by way of an irrevocable letter of credit. The buyer must arrange for payment to be made by a bank upon presentation by the seller of specified documents, such as shipping documents for the goods being sold. Both parties benefit because the seller has the comfort of a bank's payment undertaking, and knows that payment will be received once it has presented the documents which confirm that the goods have been shipped, and the buyer knows that the bank will not make the payment for the goods until the seller has provided documents which demonstrate that the goods have been shipped to the buyer. Payment by the bank under a letter of credit is an independent obligation, premised on the autonomy principle that a bank's obligation under a letter of credit is a separate independent obligation which is detached from the underlying sales contract to which it relates, or the performance or non-performance of the obligations under the underlying sales contract. The key exception to this rule that a bank must fulfil its obligations under a letter of credit is in the case of fraud, where the authorities establish that a bank is entitled and probably obliged to withhold payment, where it is clearly established or obvious that the beneficiary or its agent was involved in a fraud in relation to the transaction, where the bank knew of the fraud.

[23] Thus, a bank's involved in letters of credit deal in documents only, and not with the underlying facts of the sale contract, and will generally examine only the documents presented under a letter of credit. The bank's only concern is whether the documents presented by the seller/ exported, (the beneficiary), appear on their face to comply with the requirements of the letter of credit and makes this determination on the basis of the documents alone. A bank has no obligation to, and should not get involved in verifying whether the facts stated in the documents presented are correct, or delve into issues relating to the underlying sales contract or any dispute between the parties to the sales contract. Once the documents presented appear on their face to comply with the requirements of the letter of credit, the bank is obliged to pay, under a standard letter of credit.

[24] The documents required to be presented under a letter of credit typically include documents which demonstrate that the goods have been shipped in accordance with the terms of the sales contract which relates to the letter of credit. The most commonly requested documents are a bill of exchange, a commercial invoice, transport documents, e.g. a bill of lading, and insurance and quality assurance documents. These documents must be in strict compliance with the requirements of the letter of credit, otherwise the bank is entitled to reject them.

[25] Letters of credit may be (i) revocable or irrevocable, and (ii) confirmed or unconfirmed. An irrevocable letter of credit cannot be amended or cancelled by the issuing bank (or any confirming bank) without the consent of the beneficiary. Revocable letters of credit are much less common and do not provide the certainty of payment that an irrevocable letter of credit provides. They can be amended or cancelled by the issuing bank for any reason and at any time without notice to or the consent of the beneficiary.

[26] The International Chamber of Commerce has developed a standard set of rules and practices to govern letters of credit, known as the Uniform Customs and Practice for Documentary Credits (UCP600), which provides standard terms and conditions for uniformity of practices for parties that deal with letters of credit. UCP600 does not have the force of law, but it is nonetheless internationally recognized. The provisions must be expressly incorporated into a letter of credit for applicability, and are typically incorporated

into the vast majority of commercial letters of credit. The latest revision was undertaken in 2007.

[27] *Deferred Payment Letters of Credit* : A deferred payment letter of credit stipulates that payment to the beneficiary (seller/ exporter) will take place a certain number of days after the presentation of documents to the issuing bank. The issuing bank is required to deliver the documents to its principal (the buyer), and if the bank is also the drawee it will be under a promise to pay while having lost the security of the documents.[4] Such credits, also known as usance letters of credit, specifies that a beneficiary will be paid, not at the time that the beneficiary makes a complying presentation, but at a later, specified maturity date. The maturity date may be (i) a specified number of days after the beneficiary's presentation, for example "*45 days after sight*"; (ii) a specified number of days after a particular event, often the date of the bill of lading; or (iii) a specified calendar date, usually timed to provide short-term financing for the buyer under the sale agreement (i.e. the applicant under the letter of credit).

[28] In practice it is generally accepted that deferred payment letters of credit are intended to facilitate trade by allowing a delay in payment for goods, after delivery. It provides a grace period post-shipment, within which a buyer is obligated to make payment. The duration must be agreed between the buyer and seller, and clearly stated in the documents. It may extend to several days from the date stated on the bill of lading, thus providing the buyer with sufficient time to clear the goods and manage cash flow. Such postponement may also allow a buyer to inspect the goods, and generate revenue from sales before settling the cost of the goods, resulting in turnover of funds without an initial capital outlay. The seller in turn benefits from a secure payment option, ensuring that they will receive the payment on a future date specified in the conditions of the letter of credit. The risks associated with deferred payment letters of credit involve non-payment, non-delivery, and documentary compliance, which presents a real danger that a party may fail to fulfil its contractual obligation. These risks are usually mitigated through the management of counterparty risks,

[4] Stair Memorial Encyclopaedia Banking, Money and Commercial Paper (reissue) 8. Commercial Paper (4) Commercial Letters of Credit (e) Payment 292. Deferred payment.

which address compliance and discrepancy issues, to ensure both delivery and payment. To mitigate these risks, businesses are usually advised to obtain credit insurance or perform enhanced due diligence such as checking credit ratings and past transaction history, of their counterparts. To mitigate payment risk, a seller may request an advance payment guarantee or seek financing solutions that provide payment assurance against the letter of credit.

[29] The issues at the heart of this claim will be addressed against the backdrop of the foregoing principles. In this regard, the interpretation of the expressed terms of the L/C's, the applicability of UCP600 rules, industry practice, and the conduct of the parties, are all relevant matters for consideration.

**The Evidence**

[30] Tan Jian (Mr Jian), the Sales Manager of the claimant was the sole ordinary witness who testified on behalf of the claimant. He was employed with the claimant for 10 years. Kaushik Amrital Punjani (Mr Punjani) Director of the defendant, and Dr Graham Bright (Dr Bright) Head of Compliance and Operations of the defendant were the ordinary witnesses who testified on behalf of the defendant.

*Mr Jian's Evidence*

[31] Mr Jian stated that between October 2020 and June 2021, the claimant as seller and UOT as buyer concluded a total the eighteen SPA's[5]. In relation to each SPA, UOT opened an irrevocable L/C with the defendant, in favour of the claimant as beneficiary.[6] He was aware that the following documents were required to be presented under the L/Cs in order to receive payment:- (a) Commercial Invoice; (b) Packing List; (c) Bills of Lading made out to the order of the defendant; and (d) Certificate of Origin (collectively referred to as the documents). He was also aware that according to Field 43P of the L/Cs, partial shipments were allowed, and the claimant delivered the goods in several partial shipments.

[5] See Exhibit TL1 – Trial Bundle 5 – pages 1-18
[6] See Exhibit TJ2 – Trial Bundle 5 – pages 19-106

[32] The claimant, through Bank of China, as its advising bank, presented the documents for all the L/Cs to the defendant for payment. There were no discrepancies in the documents presented, neither did the defendant reject or raise any queries concerning discrepant documents.

[33] The claimant received full payment for nine L/C's (numbered 1001 to 1006,1008,1010,1011), partial payments for 2 L/C's (numbered 1012 and 1013), and non-payment of the remaining 7 L/C's (numbered 1015 to 1018 and 1020 to 1022). Further, the claimant was not concerned with whether the payment was received from the defendant or UOT, as long as payment was in accordance with the figures shown on the L/Cs. He was not informed whether payment was received from UOT or the defendant. The claimant had no agreement or arrangement with UOT which stated that payments were to be received directly from UOT. Further, the claimant was not aware of any arrangement between UOT and the defendant regarding payments to the claimant under the L/Cs. Thereafter on 6th, 16th and 17th August 2021 the claimant through Bank of China notified the defendant by way of swift messages of outstanding payments under the respective L/C's, and requested return of the corresponding documents but received no response.[7]

[34] Mr Jian stated that the claimant presented the documents to the defendant for the sole purpose of receiving payment under the L/Cs. He did not expect the defendant to release the documents to UOT without first paying the claimant, otherwise, there would be no point in having the L/C's. It was his understanding that under the L/C's the defendant promised to pay against the presentation of documents. If there is any discrepancies in the documents, or any reason for non-payment, the defendant would retain the documents and notify the claimant. Additionally, if the defendant wished to release the documents to UOT without first receiving payment or sufficient security from UOT, then the risk of non-payment by UOT would be borne by defendant and not the claimant. He says the claimant never agreed that compliant documents should be released to UOT without payment, and never requested that payments be made directly by UOT. Had the defendants not released the documents, the claimant would have recovered its goods. However, despite the claimant's demands, the

[7] See Exhibits TJ3, TJ4 and TJ5 – Trial Bundle – pages 571-573

defendant has refused to pay the outstanding amounts or return the documents to the claimant.

[35] In cross examination Mr Jian agreed that the claimant received and reviewed all the L/C/s. He agreed that there were instances where payments, including partial payments, were made to the claimant directly by UOT. He was unable to confirm whether any payments were received from the defendant, or whether all the payments received were directly from UOT. He agreed that payment 45 days from the bill of lading date was a condition of the L/C's, and was a period allowed to the defendant, but it was not to raise money to make the payment, or to give UOT time to pay. As long as the bank accepted the documents the claimant was to be paid after 45 days. He understood this as the difference between a sight and deferred payment L/C. He agreed that the difference between a sight and deferred payment L/C is the time period that the bank takes to pay the beneficiary, and in this case it was 45 days after receipt of the documents. He stated that the claimant was required to ship the goods in order to receive the compliant documents, which would trigger payment under the L/C's. Several credit advices were shown to him, which he acknowledged went well beyond the 45 day period. He admitted that when payment fell beyond that period the claimant would chase UOT for payment and requested that UOT ask its bank to make the payment. He says delays may have been due to time differences and slow communication and it was only at a later date that he became aware that the payments were remitted directly from UOT.

[36] Mr Jian says that as the claimant's dealings were through L/C's, the claimant was only concerned about receiving the payment and not who made the payment. He agreed that the claimant called UOT for payment and not the defendant, and never had any contact with the defendant, and only chased the defendant for payment through UOT. Eventually when the payments were not made Bank of China was contacted to chase the payments. He states that the claimant was only concerned about receiving the money, delay was not unusually long, and the claimant did not want to ruin its relationship with UOT. Thus, it was only when delay became lengthy that Bank of China would be contacted. He admitted that the claimant

accepted payment later than 45 days but never paid attention to which party made the payment, only that the payment was received.

[37] Concerning review of the L/C's he accepted that he paid attention only to the main terms and conditions, and the claimant had a document administrator who reviewed the details. At that time UOT informed the claimant that these were the normal terms and conditions of an L/C and the claimant trusted and relied on this. He stated that Bank of China was the informing/ advising bank and was required to provide advice to the claimant on the L/C's provided by the defendant. This advice was provided, but he could not recall the details. He recalled an alert about some of the terms, and the claimant was asked to communicate with UOT, but he could not recall what these terms were. He could not say whether there was any communication with the defendant about these terms. He stated that under normal circumstances it should be UOT to communicate with the defendant, as the applicant requesting the L/C's. It was his belief that in normal business practice UOT had the dominating power and the claimant believed what was said about the L/C's, accepted the terms, and equally accepted that the defendant would keep its promise to make the payments. He maintained that whether UOT paid the defendant or not, the defendant was obligated to pay the claimant under the L/C's.

[38] Mr Jian pointed out that the claimant was not the beneficiary under L/C numbers 1007 and 1009 referenced in the defence. It should be noted that these two numbers did not correspond to any of the L/C's issued by the defendant in favour of the claimant. This was confirmed and accepted by both sides.

*Mr Punjani's Evidence*

[39] This witness stated that as director he approved and had oversight of all instruments issued by the defendant. Issuing letters of credit was regular business that the defendant engaged in, and such instruments are issued in accordance with the defendant's customary credit norms and procedures[8]. He confirmed that the defendant issued the L/C's and payment was

[8] See Exhibit KP1 – Trial Bundle 4 – pages 27 - 33

to be made to the claimant 45 days after sight. At Field 47 this was stated to be upon receipt of fully compliant documents from the defendant, and upon payment by the applicant.

[40] Mr Punjani testified that payment to the claimant under the L/C's was only effected upon receipt of payment from UOT. He was aware that payment under twelve of the L/C's were made to the claimant directly by UOT, and this was outside the scope of the L/C's. He claims that this conduct breached the terms of the L/C's and the defendant had no way of knowing the balance due under the L/C's. In his view the claimant failed to notify the defendant of non-payment by UOT, given the pattern of direct dealings between the claimant and UOT. Furthermore, this conduct led the defendant to believe that the L/C's were no longer required and that the claimant and UOT had made alternative payment arrangements. He stated that the defendant had no obligation to pay any outstanding sums under the L/C's, as payment was conditional upon receipt of payment from UOT and that UOT never remitted any payments to the defendant. He further stated that the L/C's clearly stipulated at Field 78 that they were governed by the terms of the instrument, and it was an express term of all the L/C's that payment by the defendant was dependent upon receiving payment from UOT.

[41] Further, each L/C was sent to the claimant and its advising bank for review and approval, and they were free to accept or reject the L/C's and the terms and conditions. It was therefore the decision of the claimant and its advising bank, whether to make shipments under the L/C's, on these terms and conditions. He says there was no obligation on the claimant to ship goods based on the L/C's and it was entirely within the purview of the claimant to decide whether to ship or not. However, once the goods were shipped and documents presented to the defendant, the claimant was deemed to have accepted the terms and conditions of the L/C's and the defendant had 72 hours within which to inform the claimant if the documents were discrepant and the shipment rejected. In such a case the documents would have been returned to the claimant unless stated otherwise. However, once the documents were accepted as compliant they were handed over UOT to take possession of the goods and UOT had 45 days within which to make payments for the goods received.

[42] At paragraphs 23 and 24 of his witness statement Mr Punjani stated that payments made to the defendant by UOT in relation to L/C numbers 1002 to 1006, 1008, 1010 and 1011 were

paid over to the claimant in accordance with the L/C's. Payments were not received for L/C numbers 1007, 1009, 1010, 1011; 1015 to 1018 and 1020 to 1022, and only partial payments were made on L/C numbers 1012 and 1013. In cross examination he recanted from this evidence stating that the defendant never remitted any payments to the claimant, under any of the L/C's, and that the information contained in paragraphs 23 and 24 was extracted directly from the statement of claim and was an error. He went on to say that once payments were not received from UOT after 45 days, the respective L/C's were considered as having expired. He exhibited several copies of wire transfer payments from UOT directly to the claimant, and says the effect of this conduct is that the claimant did not seek to rely on the L/C's contrary to the stipulation contained in Field 47A-16[9].

[43] Concerning release of the documents presented by the claimant Mr Punjani stated that the L/C's expressly stated that the defendant may release the documents, unless instructed otherwise by the claimant within a period of 72 hours. He says the claimant's first attempt to contact the defendant was by demand letter dated 21st October 2021[10]. Thus, the defendant assumed that the claimant was fully aware that payments were not being made to the defendant by UOT and instead opted for alternative payment arrangements with UOT.

[44] In cross examination Mr Punjani confirmed that he was one of two directors of the defendant and its sole shareholder. He stated that documents were reviewed by the compliance department and submitted to him for signature. In this case an invoice would be issued to UOT and once the requisite fees are paid a swift message would be sent to Bank of China. He agreed that each L/C was a separate credit and would attract separate invoices. Once the L/C is issued the claimant will know the conditions, and may request amendments for terms which are not acceptable, or reject the L/C. He stated that the defendant does not obtain security, but issues instruments upon payment by the applicant. The paper work was done by the legal team and all instruments are conditional as included in Field 47.

[45] When questioned about security documents from UOT, he stated that in this case the defendant took no security, and could not recall the particulars of a failed application to join

[9] See Exhibit KP3 - Trial Bundle 4
[10] See Exhibit KP4 - Trial Bundle 4

UOT for indemnity, by way of an ancillary claim in these proceedings. He stated that this was not in his field and that the legal team would deal with these matters. He stated that the terms and conditions are available on the defendant's website which can be accessed by anyone and a beneficiary can contact them on any terms and conditions which require clarification. When material from the application by UOT was put to him concerning obtaining security from UOT, Mr Punjani stated that the compliance and legal team handled the paperwork. He maintained that as far as the defendant was concerned the L/C's were for deferred payment 45 days after sight. He explained that for each set of documents received the defendant would issue acceptance to Bank of China, stating the date of maturity and that the L/C will be paid once the applicant pays. Further if the documents are discrepant they would be rejected and a request made for instruction from the beneficiary, Once they were compliant, payment would be made within 45 days of sight, and if they were discrepant, the documents would be held for 72 hours pending instructions. If no response was received the documents would be released. In this case, the documents received were compliant. In his view once the claimant accepted each L/C and shipped the goods it meant that all the terms and conditions were accepted, and the claimant agreed to accept payment on condition that the defendant received payment from UOT.

[46] He stated that he was not involved in drafting the L/C's, and had staff who drafted these instruments. He agreed that Field 42C meant that payment would be made 45 days after sight, Field 43P allowed partial shipments and Field 44C stated the latest shipment date which is arranged between UOT and the claimant. He stated that if a request was made by UOT and the claimant to amend the L/C's the defendant would have done so. In his opinion, releasing the documents to UOT before receiving payment was a standard procedure for these L/C's, and the defendant was entitled to release the documents before receiving payment from UOT. Further, the defendant was to receive payment from UOT and then pay the beneficiary, and there was no obligation on the defendant to make a payment, unless UOT had paid, as required in Field 47A-15. He maintained that UOT was the one obligated to make the payment. He was aware that once the documents were delivered to UOT, it would receive the goods, but saw this as a risk that the claimant had chosen to take. He agreed that once UOT had the goods there was no chance of the claimant getting it back.

[47] Mr Punjani was adamant that payment under the L/C's was for the full amount, 45 days after the bill of lading date, but this was conditional upon receipt of payment from UOT. He considered the 45 days as an agreement between UOT and the claimant, and the defendant would pay the claimant only upon receipt of payment from UOT. He maintained that it was the responsibility of the claimant to decide whether to reject the L/C's, having reviewed each one. He stated that he was mistaken about the information contained at paragraph 23 of his witness statement which was extracted from the statement of claim, but it should have said that the payments were made by UOT to the claimant, and he now says that UOT made all the payments to the claimant. He stated that in the defence it was said that some payments were made directly to the claimant by UOT but he now says that all of the payments under the L/C"s were made directly by UOT to the claimant. He disagreed that he was fabricating this evidence, stating that it was only when the claim was filed that he became aware that no money was paid to the claimant by the defendant.

[48] He denied having received the swift messages requesting payment, or return of the documents, or the demand letter sent in August 2021. He stated that not many employees were working due to the pandemic lockdown and these matters did not come to his attention. The legal department would have seen it and replied to it, and he leaves these matter to them. He admitted that the defendant received the issuance fees from UOT, for setting up the L/C's. Upon payment of the fees the L/C's were issued. Thereafter the defendant received compliant documents from the claimant and released them to UOT. He agreed that part payment under one L/C would not affect payment under another. He agreed that Field 78 made UCP600 applicable to the L/C's, but it also says subject to the other terms contained or set out in the instruments.

*Dr Bright's Evidence*

[49] Dr Bright's testimony concerned the defendant's compliance procedures for issuing the L/C's. He was aware that a relationship previously existed between UOT and claimant as they had previously approached the defendant for similar business. He stated that a letter of credit typically states that it is subject to UCP600, and the rules and obligations articulated in UCP600 become binding on the bank and all parties, unless the terms and conditions are

modify or exclude the rules in relation to a particular letter of credit. The letters of credit issued by the defendant makes it known that there is a modification in the terms which is permitted by the UCP600 and it is stated that these modifications will precede the guidelines. Further at Field 47A the payment term states that the *"Issuing Bank will effect payment on due date under the credit to the Beneficiary Bank in accordance with their instruction upon receipt of documents fully complying with LC terms and upon payment from Applicant."*

[50] He explained a SWIFT transaction as the process by which the instrument is sent to the beneficiary and its bank for approval and acceptance of the terms of the instrument. Each letter of credit would be reviewed by the beneficiary and its advising bank, following which they decide whether to agree to the terms of the instrument and wish to ship their goods and send their documents, or whether to reject the instrument and return it to the bank. Thus, the payment term was a modification which both the beneficiary and its bank would have noted and agreed to prior to shipping. He had seen a copy of the experts' reports in which both experts agreed that payment at Field *47A* makes the payment under the L/C's dependent on payment from the applicant [UOT].

[51] He says whilst the claimant's expert considers the clause bad banking practice, it is not uncommon in the industry as there is commercial sense and purpose for this type of instrument. In his view the claimant had ample time to query the clause prior to shipping the goods and sending over documents. A request for clarification or modification of the clause could also have been made by the claimant, who was not forced to accept the terms. He says the defendant was left to assume that payment under the instruments was not required, as the claimant and UOT had made alternate arrangements for settlement. He stated that without release of the documents UOT would not have been able to collect the goods, and having not received payment, the claimant had the option of not shipping any more items and contacting the defendant to request that the documents not be released to UOT, as payments had not been made. This, he says, would have mitigated potential losses. He was aware that all the instruments sent to the claimant and its advising bank were accepted and documents were sent to the defendant even after the claimant had purportedly stopped receiving payments from April 2021 onwards. Despite this the claimant continued to ship its goods to UOT.

[52] In cross examination Dr Bright stated that he became an employee of the defendant in 2017. He was not a director or shareholder, and reports to the board of directors. He explained how the SWIFT network functioned in relation to letters of credit. He was not involved with issuing the L/C's but was involved with compliance regarding discrepancies which affect the instruments, and reviewing the shipping documents when they arrived as a shipping set. He agreed that if documents were not compliant they would not be accepted by the defendant and a rejection message would be dispatched to the claimant. In this case there was no reason to send a rejection message as the documents were compliant. He stated that the L/C's had an expiry date and in relation to payment it was 45 days of the bill of lading date or on sight. He was of the view that Field 31D stated the date and place of expiry and did not only relate to the instrument, but also to the presentation of documents to the defendant.

[53] He agreed that the latest date for the claimant to present shipping documents to the defendant was also stated at Field 31D and the latest date of shipment is in Field 44C. He agreed that based on these Fields the claimant had 21 days after issuance of the L/C to ship the goods, and thereafter 30 days to present the shipping documents before expiration of the L/C. He agreed that field 42C meant 45 days after sight or the presentation of documents, and payment would be due after 45 days of receiving the documents. He explained that this was consistent with the use of these particular L/C's, and the defendant was required to pay the claimant on the due date upon receipt of compliant documents and upon payment by UOT.

[54] He disagreed that payment ought to have been secured from UOT at hand over of documents, as it was due within 45 days. He says this gave the buyer/ importer a grace period to make the payment, so they receive interest free capital and the goods before making the payment. That was the purpose of the usance LC which is a deferred payment LC. He stated that there are two kinds of letters of credit, namely sight and deferred. He admitted that the defendant did not secure payment from UOT when the documents were handed over. He accepted that the only payment the defendant received was the issuance fee for each L/C which is about 3.5% of the face value of the L/C.

[55] Dr Bright agreed that the defendant received the documents, handed them over to the UOT and had no obligation to pay the claimant because payment was conditional upon payment by UOT. He disagreed that the defendant did not chase or follow up on payment because they were not concerned that they would have had any liability under the L/C's if the UOT did not pay. He stated that some of the swift messages purported to be sent to the defendant were not received. One document contained no instructions to relay the message to the defendant. Another which contained inquiry about payment contained no reference to the address of the defendant for routing purposes. A third message contained a non-active swift address and would not have reached the defendant. He agreed that attempts were made to contact the defendant but were erroneous and could not be delivered, and that the defendant did not receive any of these messages. He was shown the demand letter dated 25th August 2021, and he agreed that his statement that the defendant was first sent a demand letter in October 2021 was incorrect, and he would have to refer this to the legal department. He agreed that the L/C's were not between UOT and the claimant, and were issued by the defendant in favour of the claimant as beneficiary. Although he agreed that the L/C's were not between UOT and the claimant, it was his view that there were SPA's between UOT and the claimant. If UOT did not receive the goods it could sue the claimant, and if the claimant does not receive payment it could sue UOT.

*Expert Testimony*

[56] *Claimant's Expert*: Kim Sindberg (Mr Sindberg) was the expert put forward by the claimant. His resume stated inter alia, that he worked in trade finance as a consultant with primary focus on documentary collections and demand guarantees for almost 30 years. He has published 12 books on trade finance topics in Danish, English and Chinese and has published numerous articles in international magazines. He has served as Technical Advisor to the ICC, and is accredited as a DOCDEX[11] Expert under the ICC International Centre for Expertise. He serves as Chief Examiner for the CITF[12] offered by The London Institute of Banking & Finance.

[11] Documentary Credit Dispute Resolution Expertise
[12] Certificate in International Trade and Finance

[57] He stated that it is a fundamental principle of letters of credit that documents cannot be delivered to the applicant without payment being made. He cites Official ICC Opinion R694 /TA602rev issued under UPC500 which includes the following wording:

> *"The release of the documents to the applicant, without providing settlement for the full value or seeking authorization to accept a lesser amount before releasing such documents, is clearly a breach of the fundamental principle of holding documents at the disposal of the presenter, as outlined in sub-article 14(d)(ii)."*

[58] He states that the rule has not changed under UCP600 and cites Official ICC Opinion TA918rev which includes the following wording:

> *"As stated in ICC Opinion R694 (TA602rev), release of documents to the applicant, without providing settlement for the full value or seeking authorisation to accept a lesser amount before releasing such documents, is clearly a breach of the fundamental principle of holding the documents pending receipt of instructions of the presenter or an acceptable waiver from the applicant. Otherwise, the issuing bank risks preclusion under UCP600 sub-article 16 (f)."*

[59] Mr Sindberg opined that it is common that letters of credit include a reimbursement clause, which includes conditions describing how and when the issuing bank will pay once a complying presentation is made. He agrees that clause 47A-15 effectively makes any payment by the defendant under L/C's dependent on payment from the applicant. However a core principle of UCP600 is that the undertaking from the issuing bank is independent of the underlying transaction. Thus, the obligation in a letter of credit should not be dependent on any approvals or payments from the applicant. This would be considered bad banking practice. He referenced an example documented in ISBP 745 paragraph vii which reads:

> *"A credit or any amendment thereto should not require presentation of a document that is to be issued, signed or countersigned by the applicant. If, nevertheless, a credit or amendment is issued including such a requirement,* ***the beneficiary should consider the appropriateness of such a requirement and determine its ability to comply with it, or seek a suitable amendment."***

[60] Mr Sindburg acknowledged that the above was not representative of the present scenario and went on to say that the ISBP 745 paragraph strongly discourages letters of credit where the payment is controlled by the applicant. Thus, Field 47A-15 is controversial and contradicts a fundamental principle of the UCP600 in that it dismantles the undertaking of the issuing bank as described in Article 7 of UCP600.

[61] Therefore by including the words *"…and upon payment by the applicant*" makes the field ambiguous and creates confusion, and in his view gives rise to the following questions:

(i) If the payment from the applicant is not received based on this clause, what then applies in respect of the presented documents? This is not clear from the clause or from the L/C's.

(ii) If the payment from the applicant is not received based on this clause, then what would be required by the issuing bank in respect of information towards the presenter of the documents? This is also not clear from the L/C's.

[62] He agreed that by virtue of Field 78 the terms and conditions of the L/C's would override the provisions of the UCP600. However, in order to enforce such "credit norms" those must be included in the L/C's to have effect. He acknowledged that under Article 1, UCP600 rules apply to any letter of credit when the text of the letter of credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the letter of credit. As such modification of a UCP rule can be done in different ways, and the modified article need not be quoted. He accepted that Field 47A-15 is a modification of Article 7 of UCP600 (Issuing Bank Undertaking) which effectively changes the undertaking of the issuing bank. The words "*upon payment from applicant*" could not be considered a non-documentary condition under Article 14(h) of UCP600 and could not be disregarded for the purposes of the L/C's. However, this modification opened up different questions for consideration, which made the L/C's ambiguous, and such ambiguities fell back on the applicant.

[63] *Defendant's Expert:* Mr Vincent O'Brien (Mr O'Brien) was the expert put forward by the defendant. He is an international trade finance specialist with approximately 35 years' experience in international trade finance and international banking operations. He has extensive experience in operations and day to day management of documentary credits, collections and guarantees, and has been a lead content writer for the ICC's online training on UCP600, and other courses.

[64] Concerning whether any terms of UCP600 were excluded from the L/C's he opined that when a bank issues a letter of credit and states within it that the letter of credit is subject to UCP600, the rules and obligations articulated in these rules become binding on that bank

and all parties unless the terms and conditions of the letter of credit modify or exclude these rules in relation to a particular letter of credit. He agreed that Field 40E made UCP600 applicable to each of the L/C's, which meant that the 39 rules applied, except where the rules are modified or excluded by the terms and conditions contained within the letter of credit itself, as issued. He observed at Field 78 that sub-article 14 (b) of UCP600 was excluded from all the L/C's, along with other substantive modifications. He opined that in the absence of modification a letter of credit as defined in UCP600, under Article 2 DEFINITIONS "*Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation."* In practice this means that in the absence of modification a letter of credit is a definite undertaking to honour a complying presentation, independent of any other contingencies. However, in this case all the L/C's contained an expressly stated condition under Field 47A <u>Additional Conditions</u> as follows: "*The Issuing Bank will effect payment on due date under this credit to the beneficiary bank in accordance with their instruction upon receipt of documents required fully complying with LC terms and other conditions "**and upon payment from applicant."*** In his view this condition clearly stated that payment is conditional upon payment from the applicant (UOT). This was a substantive modification that a beneficiary should heed and make a conscious decision as to whether it would be prepared to make shipments under letters of credit containing this condition. The beneficiary has no obligation to ship based on a letter of credit issued by a bank, and it is for the beneficiary to decide whether to ship or not.

[65] The experts presented a joint statement on areas of agreement and disagreement, in which they maintained their respective positions of disagreement in relation to Field 47A-15, with Mr O'Brian stating that it was the obligation of the claimant and its advising bank to review each L/C and to make a request for further amendments, or reject the L/C, or refrain from shipping its goods until it was satisfied with the terms of the L/C. Mr Sindburg on the other hand accepted that the amendments at Field 47A-15 and Field 78 formed part of the L/C's and could not be ignored, however Field 47A-15 created ambiguity in terms of release of compliant documents, in the event of non-payment by UOT.

**Issue 1 : Is the Defendant liable to pay the outstanding amounts claimed, under the L/C's?**
**Issue 2 : Were any of the rules of UPC600 expressly excluded or modified in the L/C's?**

[66] For convenience, issues 1 and 2 will be considered together.

*The Claimants Submissions*

[67] The claimant submits that it was a term of all the SPA's that payment would be made by "*100 % L/C 45 days after B/L date".* This meant that payment would be made under the corresponding L/C's 45 days after the bill of lading date. Further, it was an express term of the L/Cs that partial shipments were allowed in accordance with Field 43P. The claimant delivered the goods in several partial shipments and for each partial shipment, separate bills of lading, commercial invoices, certificates of origin, certificates of analysis and packing lists (collectively referred to as the documents) were issued. Once the documents presented were in accordance with the requirements of the L/Cs, they were considered complying presentations, and the defendant owed an obligation to the claimant as the beneficiary, to pay the value secured under the L/C's regardless of whether the UOT paid the defendant. The claimant's position is that this obligation exists regardless of and separate and distinct from performance under the SPA's between the claimant and UOT.

[68] The claimant argued that UCP600 is the internationally accepted and universally recognized rules governing letters of credit[13]*, and in* **Fortis Bank SA/NV v Indian Overseas Bank[14]**, Thomas LJ said:

> *"…a court must recognise the international nature of the UCP and approach its construction in that spirit... It is intended to be a self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade."*

[13] Encyclopedia of Banking Law, para. 1673
[14] [2011] EWCA Civ 58, [2011] at [29]

[69] The claimant further submitted that in interpreting the terms of a letter of credit issued under UCP600, Lord Sumption in **Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq[15]** stated:

> "*the instrument must be construed as a whole, and as far as possible in such a way as to make each part of it consistent with every other part. Moreover, it must as far as possible be read consistently with the UCP, which are expressly incorporated into it.* ***The UCP may be modified or excluded in specified respects by the terms of the credit****, but otherwise it is a code of rules which enables letters of credit to be routinely dealt with by banks across the world on a common basis. It is therefore fundamental to their acceptability in international commerce*."

[70] Further, applying the dicta from the above cases, the court in **Heytex Bramsche GmbH v Unity Trade Capital Ltd[16]** stated:

> *"It is therefore with good reason that a court will hesitate before concluding that the parties to a letter of credit genuinely intended to depart from such an internationally accepted regime****; it is likely to require the clearest wording to evidence that intention****…. the further that a suggested interpretation of a credit's express term departs from the commercial essence of a documentary credit (as embodied in the provisions of the UCP)* ***the less likely will it be to reflect the intentions of the parties, and to be accepted as such by the court."***

[71] The claimant cited Article 1 of UCP which states that "*The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ("UCP") are rules that apply to any documentary credit… when the text of the credit expressly indicates that it is subject to these rules.* ***They are binding on all parties thereto unless expressly modified or excluded by the credit*****".** [Emphasis added]

[72] The claimant further cited Halsbury's Laws of England[17] where it states:

> 32. "*Where a credit incorporates the Uniform Customs and Practice for Documentary Credits 'except so far as otherwise stated' it is wrong to approach the construction of the credit by looking at the document first without reference to the Uniform Customs and Practice for Documentary Credits... and,* ***if there is ambiguity as to the meaning of the provisions of the [UCP], the ambiguity***

[15] Iraq [2018] AC 690 at [61]
[16] [2002] EWHC 2488 (Ch) at [23]
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***should, if possible, be resolved in a way which will result in their reflecting the position under general maritime and commercial law*"**:

[73] The claimant submitted that when a rule in the UCP is to be excluded, there must be an express indication of this in the letter of credit.[18] Further, there must be clear language used in the letter of credit that provisions of UCP are expressly excluded, and/or an irreconcilable inconsistency clause contained in the letter of credit, in order to support the contention that the parties intended to exclude UPC. Relying on the authorities cited, the claimant contends that the further the modification or exclusion takes the letter of credit away from its fundamental purpose, the more hesitant a court should be to conclude that it was the intention of the parties to depart from the true purpose of the letter of credit.

[74] The claimant says that Field 40E of the L/Cs state that the latest edition of the UCP is applicable. Whilst Field 78 states that in the event of any conflict between the terms of the L/C's and UCP, that the terms of the L/C's shall prevail, it does not expressly exclude the applicability of UCP. Field 78 only expressly excludes Article 14B of UCP, thus with the exception of this Article, all other Articles apply and according to Article 1 of UCP, its rules are binding on all parties unless expressly modified or excluded by the credit.

[75] The claimant contends that since all the L/C's are subject to UCP, any ambiguity between the L/C's and the UCP should be resolved in a manner which will result in an accepted position under general maritime and commercial law. Hence, even if it is accepted that by virtue of Field 78, in the event of any conflicts between the L/C's and the UCP, the L/C's prevails, this must be subject to whether Field 78 reflects the position under general maritime and commercial law. Further, if Field 78 is considered without any reference to UCP, this will have the effect of defeating the entire purpose of the L/Cs and the intention that the UCP is the universally recognized set of rules governing letters of credit.

[76] The claimant submits that there was no exclusion of any of the provisions of UCP which had the effect of absolving the defendant of liability to the claimant for the value secured under

[18] ICC Opinion R716 (TA 704rev)

the L/Cs. The claimant further argued that there was no provision in any of the L/Cs which restricted the receipt of payment directly from UOT. In this regard Article 47A(16) of the L/Cs states that:

> *"Any settlement effected to the parties, outside the terms and conditions of the LC shall be deemed to be without risk, responsibility, or liability on our side…"*

[77] The claimant argued that this article absolved the defendant from liability, risk and responsibility in relation to payment made by parties other than itself, and does not prohibit the claimant from receiving payments from parties other than the defendant. Further, to interpret the L/C's in the manner which the defendant says would defeat the entire purpose and utility of the L/C's, which is to ensure that the claimant is paid for the sum secured by the defendant as the issuing bank. Any interpretation ought to reflect good international practice and achieve consistency, so that such interpretation underpins the operation of letters of credit in international trade. The claimant further submits that based on the autonomy of documentary credit, each L/C is distinct from the underlying SPA, and each L/C is separate and distinct from the other. Therefore, accepting payments directly from UOT has no effect on the L/Cs for which no payments were received.

[78] The claimant contends that even if the Court were to find that the receipt of payment from the UOT voided the L/C's for which that payment was received, this would have no effect on the L/Cs for which no payment has been received. This is due to the autonomy of the L/C's and the fact that each L/C contained its own articles and provisions, and none of the articles nor provisions would have been breached for those L/Cs for which no payment has been made. Further, acceptance of payment from UOT under some of the L/Cs, does not absolve the defendant of its liability for non-payment under the remaining L/Cs where payments remain outstanding.

[79] Concerning expiration of the L/C's the claimant submits that "Field 31D: Date and Place of Expiry" specifies the latest date for presentation under a documentary credit and the place where documents may be presented. The claimant relies on an extract from **Benjamin's Sale of Goods (2020)**[19] which explains Article 6(d) of UCP600 to say that the date at Field

[19] At para [23-088]

31D is the expiry date for presentation of documents. Further that Field 47A-13, which deals with expiry merely provides that after the last date for presentation of documents, the L/C's become null and void. Thus if documents are not presented by the expiry date the L/C's becomes void and nothing can be demanded from the defendant.

*The Defendant's Submissions*

[80] The defendant argued that based on the specific provisions of the L/Cs, it is not liable for the outstanding amounts secured under the L/Cs. In particular the inclusion of the amendment in all the L/C's which modified Field 47A-15 to add ***"and upon payment from applicant"***, meant that payment to the claimant under the L/C's was dependent upon first receiving payment from UOT. It reads as follows:

> "*The Issuing Bank will effect payment on due date under this credit to the beneficiary bank in accordance with their instruction upon receipt of documents required fully complying with LC terms and other conditions and* ***upon payment from applicant."***

[81] The defendant submits that Field 42C of the L/C's states "***45 days after sight***", meaning payment would be due 45 days after UOT received the documents. It is submitted that the L/C's were deferred payment L/C's, in contrast to standard letters of credit, where payment is collected upon handover (or at sight), of the seller's documents to the buyer.

[82] The full text of Field 78 of all the L/C's states:

> *"ALL DOCUMENTS ARE TO BE FORWARDED UNDER ONE COVER QUOTING OUR LC REF. NO. TO REP OFFICE: SUITE 1C, OAKS COURT,1 WARWICK ROAD, HERTS WD61GS, UK. THIS DLC SHALL BE INTERPRETED IN ACCORDANCE WITH THE LAWS OF ST LUCIA AND IS SUBJECT TO THE GENERAL TERMS AND OTHER CONDITIONS GOVERNING ISSUANCE OF THIS CREDIT,* ***CREDIT NORMS OF THE ISSUING INSTITUTION AND UCP 600. IN THE EVENT OF ANY CONFLICT, CONTRADICTION OR INCONSISTENCY BETWEEN ISSUING TERMS OF THIS DLC AND UCP 600/ ISBP745 (AS APPLICABLE), THE DLC ISSUING TERMS SHALL PREVAIL. ARTICLES 14B OF UCP600 SHALL NOT BE APPLICABLE.*** *ANY DISPUTES ARISING IN CONNECTION WITH THIS DLC SHALL BE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF ISSUANCE COUNTRY." [Emphasis Added]*

[83] The defendant submits that this statement clearly articulates that the L/C's were governed by the terms of the instrument itself, as this field falls under the sub heading "*Additional*

*Conditions*". Further, Field 47A-15 is an express modification of UCP600 where payment to the claimant was made conditional upon UPC first making payment to the defendant, and there is no other way to interpret this section, other than as an express modification of UPC. As the claimant accepted the L/C's, as constructed they each represented the agreement between the parties. It was open to the claimant to request amendments upon review, and prior to acceptance. Further, both experts agree that Field 47A-15 is agreed by the parties and cannot be disregarded.

[84] The defendant contends that the claimant's behavior throughout suggests that no reliance was placed on the L/Cs or their applicable terms. Further, the claimant seeks to have terms implied into the agreement which would essentially change the express terms of the L/C's, which govern the obligations of the parties. Several inferences can be drawn from the claimant's behavior, having knowingly accepted the terms of the L/Cs, as an experienced commercial entity which would have been well acquainted with the procedure and governing rules of the L/Cs. The defendant contends that the sanctity of the contract ought to be maintained and the terms of the L/Cs upheld.

[85] The defendant submitted that although UCP600 rules guides the world of letters of credit, they remain guidelines and are not law. These rules support the fact that modification to letters of credit are permitted and should stand where expressly stated. This was agreed by both experts and the terms which are expressly stated in the L/C's cannot simply be ignored, as they are terms which modify and exclude certain UCP600 rules. The claimant seeks to have terms implied into the L/C's where there are expressed terms governing the relationship. Further, the claimant is seeking to ignore the fact that the instruments were sent to its own advising bank, Bank of China, for acceptance or rejection. Between Bank of China and the claimant they agreed to accept the instruments and to ship the goods. The defendant further posits that the claimant wishes to ignore the established laws of contract, when the language of each instrument is quite clear as to its purpose and form.

[86] The defendant submits that each L/C contained an expiration date and 6 of them had in fact expired. Though not specifically pleaded, the dates are stated on all of the instruments and does not constitute new evidence.. Further Article 6 (b) of UCP 600 states that *"A credit*

*must state whether it is available by sight payment, deferred payment, acceptance or negotiation."* Then at Field 47A-13 the L/C's speak of expiry dates and states *"After expiry date this letter of credit shall become null and void whether returned to us for cancellation or not, and any demand received after expiry date shall be considered void."* Thus, the claimant seeks to ignore the clear terms of the L/C's and wishes to apply rules which will assist its case. However, the claimants are bound by the terms and conditions which they agreed to.

[87] The defendant maintains that Field 78 clearly states that the terms and conditions of the L/C's supersede UCP and excluded these rules, wherever they were inconsistent, with the expressed terms of the L/C's. Moreover, it is said that Field 47A-15 was an express modification of the UCP rules which made payment to the claimant conditional upon the applicant making payment to the defendant, and the claimant had ample time and opportunity prior to shipment to reject the L/C's and the terms contained therein. The defendant submits that the L/C's as constructed are commercially viable instruments, which are not uncommon in the world of international trade finance. Further, the evidence shows that the claimant did not take reasonable action when it realized that payments had not been made. In many instances the claimant received payment directly from UOT, long after the 45 day period. Yet, the claimant continued to ship goods and send its shipping documents, which suggests that they choose to overlook these matters, and should not be permitted to digress from the clear terms of the L/C's.

**Analysis**

[88] I accept that a standard letter of credit consists of three separate and distinct contractual transactions namely: the underlying sale agreement between the buyer and seller; the application/ contract between the issuing bank and the applicant for the letter of credit, and the letter of credit between the issuing bank and seller as beneficiary. The issuing bank undertakes to issue the letter of credit, and undertakes to pay the beneficiary upon a compliant presentation of documents. Each of these relationships are entirely independent of the others, and the rights and obligations of the parties to one are not affected by the breach of, or anything to do with any of the others. This principle of autonomy of documentary credits is ingrained in UPC600, and although UCP is not law, it in

internationally recognized, and most issuers expressly incorporate UCP into their letters of credit.

[89] The various forms of letters of credit are generally referred to as documentary letters of credit (DLC). It is of no moment that the terms deferred payment or usance letter of credit were not specifically pleaded. The terms and conditions of the L/C's determine their classification. By deferring payment to 45 days after sight at Field 42C, the L/C's would fall within the category of a deferred payment or usance letter of credit. This is different to a standard or sight letter of credit, which requires that the issuing bank pays the seller immediately upon presentation of compliant documents and handover of the documents to the applicant (buyer).

[90] I therefore accept that the L/C's were deferred payment letters of credit which provided for payment 45 days after sight in Field 42C. The SPA's also stated that payment will be by 100% LC, 45 days after date of Bill of Lading. This meant that payment would be made to the claimant 45 days after compliant documents were delivered to the defendant. Thus, the claimant would not be paid at the time of submitting its documents, but at a later date, specified as the maturity date in the L/C's.

[91] Once compliant documents were delivered to the defendant, the next step would be handover to UOT as the applicant under the L/C's and buyer under the SPA's, in order to take possession of the goods. UOT was not required to make payment immediately upon receiving compliant documents, as would have been the case with a sight letter of credit. Once the documents were accepted as compliant, as was the case with all the L/C's, these documents were required to be released to UOT to take possession of the goods shipped by the claimant, following which UOT would have a grace period of 45 days to make the payment to the defendant, for payment to the claimant. In practice this arrangement allows the buyer to take possession of goods, possibly for inspection and quality assessment, or to commence production or sale of the goods to raise funds for the deferred payment. In this way the buyer is said to be afforded a credit through the deferred payment, which is a distinguishing feature of a deferred payment letter of credit.[20]

[20] See Article 8(c) of UCP600

[92] It is the claimant's contention that when a UCP rule is to be excluded, this must be expressly stated in clear language, and that the L/Cs did not expressly exclude the application of Article 7(a)(i) and (b) of UCP, and the defendant should have made the payment to the claimant upon releasing the documents to UOT.

[93] Article 7 (b) of UPC600 states *"An issuing bank is irrevocably bound to honour as of the time it issues the credit."* However, all the LC's at Field 47A-15 contained the qualification *"…and upon payment from applicant"* which both experts agree cannot be overlooked as an express term of the L/C's. The unmitigated effect is that payment by the defendant was made conditional upon receiving payment from the applicant UOT. Although this runs contrary to Article 7 of UCP, Field 78 in all the L/C's stated that in the event of any conflict or inconsistency between the terms of UCP and the expressed terms of the L/C's, the latter prevails. Thus Field 47A-15 containing the conditional payment modification will override Article 7 in so far as they are in conflict with each other. This was the effect of the plain meaning of the words used in Field 78 and Field 47A-15 which made payment to the claimant under the L/C's dependent upon the defendant first receiving payment from UOT.

[94] The claimant further contends that under Article16(c) of the UCP600, if the defendant decides to refuse to honor the L/C's notice of refusal must be provided, stating among other things, whether the defendant was *either with*holding the documents, returning them, *or* acting in accordance with the claimant's previous instructions (if any). In other words the defendant should *not* release the documents if it decides not to honor the L/C's, *and* must notify the claimant of this decision. This argument is flawed, as Article 16 deals solely with "*Discrepant Documents, Waiver and Notice*", which concerns circumstances where documents presented to an issuing bank are discrepant. It goes on to stated how the issuing bank should proceed in relation to discrepant documents. The parties all agree that each set of documents presented under the L/C's were a compliant presentation. This article would not apply, as all documents presented by the claimant were accepted as compliant. Article 16 does not in any way extend to non-payment under Field47A-15. As these were all deferred payment L/C's release of compliant documents to UOT would have occurred ahead of payment to the claimant.

[95] The claimant appears to be conflating the terms of a standard or sight letter of credit where payment is to be made immediately upon presentation of compliant documents, with that of a deferred letter of credit, where the UOT was allowed a grace period of 45 days after sight (Field 42C) to make the payment. The practice in relation to deferred payment letters of credit is that compliant documents will be handed over to the buyer to facilitate taking possession of goods before payment is made to the seller. There are several reason for this, which have already been alluded to. Thus, it is not the practice that an issuing bank could retain compliant documents for 45 days pending payment from the buyer.

[96] Additionally, both experts agree that the modification in clause 47A-15 made payment by the defendant dependent upon first receiving payment from the UOT. However they disagree on the effect of the amendment, with Mr O'Brian taking the position that the claimant was required to review the L/C's and object to any changes which were unacceptable, or request amendments, or reject the L/C's, or refrain from shipping its goods until satisfied with the terms of the L/C's. Further, he says the claimant had the benefit of an advising bank (Bank of China) to review and guide the claimant on these matters. Mr Sindburg on the other hand says the amendment have created ambiguity in relation to release of the documents, as the nature of a letter of credit is to provide guaranteed payment to the seller. Further, such amendment offends the very purpose of the L/C's and are to be considered a bad banking practice.

[97] I am of the view that Field 47A-15 was clearly articulated in the L/C's and the claimant had knowledge of it, prior to accepting the L/C's. As such the claimant was fully aware of what it was agreeing to in the L/C's and had the further protective buffer of its advising bank, the Bank of China to advise on these matters. In cross examination Mr Jian admitted that Bank of China had some concerns, but despite the concerns the claimant went ahead. The claimant has not demonstrated that the defendant acted outside the scope of the terms the L/C's or the UPC600 rules which were applicable to these L/C's. The risk of handing over documents and awaiting payment 45 days after sight coupled with the caveat in the L/C's that payment was dependent upon receiving payment from UOT, was according to Mr Jian's own testimony, a risk that the claimant elected to take.

[98] The evidence has not revealed any conduct on the part of the defendant which breached the terms of the L/C's. Although partial shipments were permitted under Field 43P partial payments were expressly prohibited under Field 47A-1. Its states that "*Drawing under this credit must be for the whole of the value of this documentary credit.*" On its own, Field 47A-1 would affect the payment of any balance in relation the two L/C's wherein part payment was made to the claimant directly by UOT. Full payment under the L/C's could only have been made by the due date in keeping with field 42C, if full payment was received from UOT within the specified time.

[99] In the circumstances, I accept the testimony of Mr O'Brian over that of Mr Sindburg and resolve these issues in favour of the defendant. The modification in Field 47A-15 made payment conditional upon receipt of payment from UOT and Field 78 imposed this provision over the irrevocable obligation of Article 7 of UCP600. There was no ambiguity in the statement, and Field 78 clearly states that in the event of any inconsistency between the terms of the L/C's and the UCP rules, the express terms of the L/C's shall prevail. The effect is that Field 47A-15 would override Article 7 (b) of UCP600. These are the terms that the claimant agreed to and accepted under the L/C's. It must be remembered that UPC are rules and not law, and parties are free to modify or exclude its application as seen fit. The L/C's with modified payment terms was the contract that the claimant accepted, and the L/C/s clearly made provision for which terms should prevail in the event of a conflict or inconsistency.

[100] I do not agree that these terms should be overlooked merely because it removed the L/C's from the true essence of the purpose of an L/C. It is understandable that an issuing bank would have different considerations and interests to that of the claimant, and the onus would be on the claimant to ensure that it was satisfied that the terms of the L/C's were acceptable before shipping its goods. By failing to do so, it seem to me that the claimant was the architect of its own misfortune.

[101] Field 47A-14 states *"…..If beneficiary is unable to accept all the terms of this LC, they should communicate with applicant promptly through their bank…."* There is no indication that this was done by the claimant. Mr Jian in cross examination admitted that some concerns were

flagged by Bank of China, and the claimant was asked to follow up with UOT. He was unable to say what these concerns were, or whether they were raised with UOT, and what was the outcome. It is clear from the evidence that the claimant proceeded to ship its goods without having resolved or addressed objections to any of the terms of the L/C's. The claimant had the ability to take issue with objectionable terms in the L/C's, and to reject the L/C's if found to be unacceptable. Instead, the claimant proceeded with shipments, presentation of documents to the defendant, and chasing up payments with UOT. It appears that this approach went well for the first nine L/C's, until the claimant was no longer successful in obtaining payment directly from UOT.

*Field 31D – Expiry Date*

[102] Concerning the defendant's position that some of the L/C's had expired by the time the claim was filed, based on Field 31D of the L/C's, the authorities confirm that a credit must state an expiry date for presentation, and an expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation.[21] Upon close examination, I am satisfied that the date stated at Field 31D was not the expiration date of the L/C's but rather the latest date by which the claimant was required to present compliant documents to the defendant, failing which the L/C's would be voided. It is not disputed that compliant documents were in fact presented before the dates stated in Field 31D in each case.

**Issue 3 : Was the Defendant entitled to release the compliant documents presented under the L/C's, before remitting the corresponding payment to the claimant?**

**Issue 4 : Was it an implied term in the L/C's that the Defendant was not entitled to release the documents unless and until the defendant had received payment from UOT?**

**Issue 5 : Whether Field 47A(15) of the L/C's means that the documents presented under the L/C's would be released to UOT only upon the defendant's receipt of payment from UOT?**

[21] Encyclopaedia of Bank Law, Division F International Banking Operations, The unform customs and practice for documentary credits, the 2007 Revision of the UCP 2007 at paragraph 289.

[103] These issues all concerned release of compliant documents to UOT and the timing of payments for remittance to the claimant, and will be addressed together.

### *The Claimant's Submissions*

[104] It is the Claimant's position is that UCP600 and the L/C's contained no provision for the release of compliant documents by the defendant, before providing payment to the claimant, for the corresponding value of the goods. It is said that this position is premised on the fundamental purpose of a letter of credit and the autonomy principle. Thus, once a complying presentation has been made to the issuing bank, the issuing bank is liable to the beneficiary for the amounts claimed and must honour the L/Cs.

[105] Further, based on Article 16 of UCP600, if the defendant is refusing to honour or negotiate the L/Cs, it must give notice to that effect to the claimant. The notice must state inter alia that it is holding the documents pending further instructions from the claimant or that as the issuing bank it is holding the documents until it receives a waiver from the UOT and agrees to accept it, or that the defendant is returning the documents, or is acting in accordance with instructions previously received from the claimant. Further the notice must be given by telecommunication or other expeditious means no later than the close of the fifth banking day following the day of presentation. There are no other circumstances under the UCP which entitles the issuing bank to release the documents. Thus, the claimant contends that release of documents to the UOT without providing settlement for the full value is clearly a breach of the fundamental principle of holding documents pending receipt of instructions of the presenter (the claimant) or an acceptable waiver from the applicant (UOT)[22]. Otherwise, the issuing bank risk preclusion under UCP 600 sub-article 16(f)".

[106] The claimant submitted that even if the defendant's argument that it is only liable to the claimant for the value of the L/Cs when the UOT pays it, the words "***upon payment from Applicant"*** does not entitle the defendant to release the documents to UOT without first

[22] Official ICC Opinion TA918rev

receiving payment from it. The proper construction of these words in Field 47A-15 must mean that the documents will be released to UOT only upon the defendant's receipt of payment from the UOT. Thus, the claimant says that by releasing the documents to UOT without providing payment of the full value of the goods, the defendant breached the fundamental principle of holding documents at the disposal of the claimant. Further, the defendant was precluded from claiming that the documents did not constitute a complying presentation.[23]

[107] In seeking to address ambiguity or conflict between UCP600 and Field 47A 15, the claimant posits that where there is ambiguity or conflict between UCP600 and the L/C's, it should be resolved in a way which will result in an accepted position under general principles of maritime and commercial law. Further, the contra proferentem rule applies in relation to Field 47A-15, in these circumstances. The rule *"requires any ambiguity in an exemption clause to be resolved against the party who put the clause forward and relies upon it."*[24] In any event, it is an implied term in the L/Cs given their fundamental purpose that the defendant is not entitled to release the documents unless and until payment was received from UOT and therefore the defendant breached this implied term.

[108] The claimant urges the Court to accept Mr. Sindberg's testimony that the documents which provided title to the goods were given to the defendant on the understanding that they would be paid by the defendant for the said goods within 45 days and the defendant would not have released the documents until such time as payment had been secured. The claimant is now left without the money and without the goods when the defendant ought not to have released the documents to UOT without first securing payment from UOT. For this reason the defendant is liable to pay the outstanding amounts under the L/C's.

***The Defendant's Submissions***

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[23] See : Official ICC Opinion TA918rev, and Article 16f UCP

[24] Persimmon Homes Ltd and others v Ove Arup & Partners Ltd and another *[2017] EWCA Civ 373* at paragraph 52.

[109] The defendant argued that the terms of Field 47A-15 permitted release the claimant's documents. It states that :

> *"the issuing bank will effect payment on due date under this credit to the beneficiary bank in accordance with their instruction upon receipt of documents required* ***fully complying with LC terms and other conditions and upon payment from the Applicant". [Emphasis Added]***

[110] The defendant argued that the UCP600 rule with the heading **"Discrepant Documents, Waiver and Notice"** prescribes under sub-article 16 (d), a period for the issuing bank to give a notice of refusal to the presenter (seller), in this case the claimant. The rule expressly states *"The notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation"*

[111] Further, there is no evidence to suggest that the defendant gave any notice of refusal in respect of any presentation which it received. The consequence of not giving notice is articulated in UCP600, sub-article 16 (f) which states that : *"If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation"*

[112] This means that the issuing bank is precluded, stopped or prohibited from claiming that the documents do not constitute a complying presentation, (provided the documents were presented before the letters of credit expired). Provided there was a presentation before the letters of credit expired then the documents must be considered as compliant. The defendant would then subsequently be bound by its undertaking which is based on the terms and conditions of the L/C's as issued.

[113] The defendant further submitted that Field 47A-15 makes no reference whatsoever to the release of the documents but expressly states that payment of the L/C is conditional upon payment from the applicant (UOT). Thus, the wording does not mean that the documents presented will only be released to the applicant upon receipt of payment from the applicant.

[114] The defendant further contends that there is no implied term in the letters of credit that it is not entitled to release the documents unless and until the defendant receives payment from

the third-party applicant. On the contrary, there is an expressly stated condition in each letter of credit stating that the defendant may release the documents unless it is expressly instructed by the claimant within a period of at least 72 hours, and that is only in the event that the defendant takes issue with the documents presented and has communicated its objections to the claimant.

[115] The defendant submitted that the express terms of the L/C's constituted the entirety of its obligations, and as such no further obligations should be inserted or read into them. Moreover, the very nature of the L/C's would have suggested payment would be received after release of the documents to the UOT.

**Analysis**

[116] Concerning Article 16 of UPC600 Mr Sindburg stated that it was only applicable where documents did not constitute a compliant presentation. As such it would be correct to say that if the issuing bank gave no notice of refusal pursuant to Article 16, the bank would be precluded from subsequently claiming that the documents did not constitute a complying presentation. Nonetheless, the documents in this case must be considered as a compliant presentation, and non-payments under the L/C's would be based on the reimbursement clause. He accepted that the actual wording in the L/C's preceded UCP600, and therefore Field 47A-15 could not be disregarded. However, this clause only addressed payment, and it did not logically follow that in addition to not paying, the defendant was also allowed to hand over documents to UOT. Therefore, while it was correct, that the claimant could read from the L/C's that payment by the defendant was dependent upon payment from UOT, it was not correct to say that the claimant could read from the L/C's that the documents should be handed over to UOT without payment. He concluded that as the defendant has handed over the documents to UOT, then the defendant is obligated to honour the presentations made under the L/C's.

[117] Mr O'Brien on the other hand, examined Article 16 (c) of UCP600 which deals with ***"Discrepant Documents, Waiver and Notice"*** against Field 47A-16 of the L/C's which says inter alia *"….Notwithstanding any prior communication to the presenter that we are holding documents at the presenter's disposal, we may release the documents……."* He

considered this to be a modification of the standard rule articulated in Article 16 (c) of UCP600, which requires a bank that decides to refuse to honour, to give a single notice to the presenter which among other points must state whether the issuing bank is either holding or returning the documents to the presenter. Thus, each L/C provides that the bank may release the documents unless expressly instructed by the presenter within a period of at least 72 hours, to withhold the documents.

[118] In his view, there was no evidence of any communication in which the claimant gave any instruction for the documents not to be released to UOT. Additionally, the defendant did not give notice of refusal in respect of any presentation received. The consequence of not giving notice is articulated sub-article 16 (f) of UPC600 which states: *"If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation"* This means that the defendant is precluded from claiming that the documents did not constitute a complying presentation. Thus, where there was a presentation before the L/C's expired, then the documents must be considered as compliant, with the defendant is then bound per its undertaking which is based on the terms and conditions of the letters of credit as issued. As the L/C's contained a condition that payment by the bank was conditional upon receipt of payment from UOT, the wording is clear that upon payment by UOT, the defendant is obliged to honour, and conversely, in the absence of payment by UOT, the defendant is not obliged to honour.

[119] Concerning Field 47A-15 Mr O'Brien opined that it made no reference to release of documents, nor does it convey that documents presented will only be released to UOT upon receipt of payment from UOT. There is no implied term that the defendant was not entitled to release the documents unless and until payment was received from UOT. On the contrary, there is an expressly stated condition in the L/C's that the defendant may release the documents as explained in relation to Field 47A-16.

[120] At paragraphs 28 and 31 of his witness statement Mr Jian stated that the claimant presented its documents to the defendant for the sole purpose of receiving payment, and did not expect the defendant to release the documents to UOT before paying under the L/Cs. Further, the

defendant should not have released the documents to UOT unless it agreed to pay the claimant under the L/Cs. Otherwise, there was no point in having the L/Cs. The defendant proceeded to release the documents to UOT without notifying or asking for the claimant's permission before releasing the documents to UOT.

[121] The defendant's witnesses on the other hand remained adamant that they were dealing with deferred payment or usance L/C's, which required that the documents be handed over to UOT, once they were accepted as a compliant presentation.

[122] It appears that the position in terms of release of documents to UOT worked seamlessly between the claimant and defendant on the understanding that the L/C's were deferred payment L/C's in relation to the fully paid L/C's. It is clear that as long as UOT remitted payment to the claimant within the 45-days period, or thereafter, the claimant took no issue with the timing of release of compliant documents to UOT. The conundrum has only arisen because UOT has failed to make payment either to the defendant or the claimant within the deferred payment period, against the backdrop of Field 47A-15.

[123] In this regard Field 47A-1 is important. It states that *"**Drawing** under this credit must be for **the whole of the value** of this documentary credit."* This Field conveys is that the full value of the credit arranged under each L/C's must be paid in one drawing. It does not contemplate partial payments albeit that Mr Jian in the table at para 24 of his witness statement appears to outline that partial payments were made for partial shipments. Partial shipments were allowed at Field 43P of the L/C's, but partial payments were not permitted. There is no evidence which supports a finding that any of the payments which the claimant received, whether partial or otherwise were from the defendant. The evidence relied on for confirmation of payments to the claimant revealed that payments were made by Western Union transfers from UOT, with the reference number for the respective L/C stated in each transfer document. This course of dealings could only have arisen from the defendant releasing the documents to UOT, in order to take possession of the goods, prior to payment.

[124] There is no evidence to confirm that any of the payments which the claimant received were from the defendant. This serves to confirms that the claimant and UOT had embarked on a

course of dealings from inception which permitted the documents to be released by the defendant, ahead of payment.

[125] The combined effect of field 42C and 47A-15 was that payment was deferred for a period of 45 days after sight of the documents. In trade finance practice it means handing over the documents to the buyer (in this case UOT) to take over the goods, with a grace period of 45 days within which to make the payment to the defendant as the issuing bank.

[126] The claimant was obliged to review the L/C's and object to clauses or amendments which may not have fully comply with UCP600, or for its own purposes. In the absence of Field 78 a court could review the position to give precedence to the terms of UCP600 in determining what the parties may have intended. However, as the claimant by its own conduct gave no notice to the UOT or the defendant that it took issue with the respective terms, or made a request for amendments, and proceeded to ship its goods and provide the compliant documents to the defendant, the only logical inference to be drawn from such conduct is that claimant agreed to the terms of the L/C's as presented. Having done so, the claimant accepted all the risks that could have arisen in the event of non-payment by UOT, or release of documents by the defendants ahead of payment. It was the responsibility of the claimant to request changes, or to accept or reject amendments. In this case the claimant elected to accept the terms, even against concerns which may have been raised by its advising bank

[127] Consequently, it cannot be said that the defendant was required to hold compliant documents for 45 days after the goods were shipped. There is no provision in the L/C's which required that compliant documents be held for 45 days. The very essence of a deferred payment option is to allow the buyer to take possession of the goods for various reasons, with a grace period for payment. There are inherent risks which flow from this arrangement, and regrettably the claimant never took the further step of ensuring that these matters were addressed. It is the case that the issuing bank has the ability to amend a letter of credit, and a beneficiary has the right to request changes, accept amendments, or reject the letter of credit.

[128] The cases cited by Counsel for the claimant did not assist as the L/C's clearly stated that in the event of inconsistency or conflict between the express terms of the UPC600 and the L/C's, the express terms of the L/C's prevail. The evidence does not support a finding that this was not what the parties intended. The issuing bank has the ability to exclude UPC600 rules, and it would be up to the seller to accept or reject the bank's terms. All the L/C's were submitted to Bank of China, as the claimant's advising bank for review. Mr Jian admitted this and stated in cross examination that some concerns were raised and the claimant was asked to contact UOT about it. From all indications the claimant accepted the L/C's without resolving any concerns raised by its own advising bank, and proceeded to ship its goods on the basis of the L/C's. That included agreeing to the release of documents prior to payment.

**Issue 6 : Did the Defendant fail to give notice of non-compliance within the stipulated time required by the UCP600, and if so, what is the effect?**

[129] It is common ground that in all instances the documents presented to the defendant were accepted as compliant presentations. Consequently, there was no need to give notice of non-compliance to the claimant. Thus, rejecting discrepant documents and waiver by the defendant, are not a not feature of, and have no relevance to the factual matrix of this case.

**Issue 7 : Is the defendant liable for conversion by releasing the claimant's documents to UTO without first making payment to the claimant.**

*The Claimant's Submissions*

[130] The claimant says the defendant is liable to pay the claimant the outstanding balances owed under the L/Cs for which it released documents and for which no payments have been received.

[131] Article 16(c) of the UCP 600 outlines this fundamental principle of holding documents at the disposal of the presenter and states:

> *"When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give notice to that effect to the presenter. The notice must state:*
> *i. That the bank is refusing to honour or negotiate; and*
> *ii. Each discrepancy in respect of which the bank is refusing to negotiate and*
> *iii. a) that the bank is holding the documents until it receives a waiver from the applicant and agrees to accept it or receives further instructions from the presenter prior to aggreging to accept a waiver; or that the bank is returning the documents; or that the bank is acting with instructions previously received from the presenter"*

[132] Article 16(d) goes on to state that based on the Article 16(c) notice, this notice must be given by telecommunication or, if this is not possible, by some other expeditious means of communication no later than the close of the fifth banking day following the day of presentation. By releasing the documents to UOT before providing and/or ensuring settlement was received by the claimant for their full value, the defendant committed a breach of Article 16(c) of the UCP 600 and is liable to make payment. Further, by releasing the documents to UOT, the defendant transferred ownership in the goods to UOT, and must honor the L/C's by providing full payment for the value of the goods.

[133] Counsel cited the case of **Manitoba Ltd. v National Bank of Canada**[25], in which Scott J stated that the only grounds on which the issuing bank can refuse to honour the L/Cs are fraud and documentary non-compliance. In the present case, there has been no fraud committed and the documents were compliant. Therefore, the defendant was obligated to honor the L/Cs and pay their value.

[134] Further, as the defendant has released the documents to UOT and is unable to return them to the claimants, it is liable for the payments under the L/C's. This position is supported by **ICC Opinion R 694 (602rev)**, where it states that:

> *"The release of documents to the applicant, without providing settlement for the full value or seeking authorization to accept a lesser amount before releasing such documents, is clearly a breach of the fundamental principle of holding documents at the disposal of the presenter, outlined in sub-article 14 (d)(ii)."*

[135] The claimants contended that the position is further supported by ICC Opinion R 862, where it states that:-

[25] [1995] M.J. No. 132 at [8]

*"When the presenting bank is unable to return the complete set of documents it must pay the collection".*

[136] Therefore, it is submitted that the defendant is liable for the outstanding balances owed under the L/Cs, for which it released documents, and for which no payments have been received.

**Liability in tort for conversion**

[137] The claimants submitted that pursuant to Article 309 (1) of the Commercial Code[26], a seller of goods is deemed to be an unpaid seller:

> *(a) when the whole of the price has not been paid or tendered;*
> *(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.*
> *An unpaid seller's rights, in accordance with Article 310 of the Code include obtaining a lien on the goods or right to retain them for the price while they are in possession of them.*

[138] Thus, by releasing the documents to UOT without having ensured that payment had been made to the Claimant, the defendant wrongfully deprived the claimant of the use and possession of the Documents and converted the same to the Defendant's own use. Therefore, the defendant is liable in tort, for conversion.

<u>*The Defendant's Submissions*</u>

[139] The defendant submitted that conversion is an intentional tort which requires "*taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession.*"[27] The elements of conversion are: 1) Intent to convert the tangible or intangible property of another to one's own possession and use, 2) The property in question is subsequently converted. Lord Abinger CJ, elaborated on this by stating that :

> *"……….he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass,*

[26] Cap 13.31 of the Revised Edition of the Laws of Saint Lucia
[27] *Fouldes v Willoughby (1841) 8 M&W 540*

> *is not sufficient to establish a conversion. It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of the chattel."*

[140] Article 5 of UPC600 deals with *Documents v. Goods, Services or Performance.* It states that *"Banks deal with documents and not with goods, services or performance to which the documents may relate".*

[141] It is submitted that the claimant has not provided any evidence to support this cause of action. There is no evidence of the defendant's intent to take, deprive or exercising any control over the goods shipped by the claimant. Moreover, for these purposes the intention was always that UOT would be the party entitled to take possession of the goods shipped by the claimant. As these were deferred payment L/C's, compliant documents must be released to the buyer, in this case UOT. Thereafter UOT had 45 days within which to make the payment to the defendant, for remittance to the claimant, as stated in Field 47A-15. The defendant acted in accordance with the terms of the L/C's by releasing compliant documents to UOT and on that basis the tort of conversion has not been established.

**Analysis**

[142] This issue can be disposed of succinctly. It is trite that in these transactions the defendant does not deal in possession of goods and only engages with documentary material. There is no evidence that the defendant took possession of the goods which were shipped to UOT by virtue of the SPA's. It is also the case that the form of the L/C's necessitated that compliant documents be released to UOT as buyer. This cause of action may best be pursued against UOT, as the buyer and party who took possession of the documents and goods to which the L/C's and the SPA's relate. It is also the party which has failed to remit payment to the defendant under the L/C's, or to the claimant. Directly, as was customary between them.

**Issue 8 : Has the defendant breached a duty as bailee of the claimant's property by releasing the documents to the UOT before making payment to the claimant under the L/C's?**

*The Claimant's Submissions*

**Liability for breach of bailment relationship**

[143] The claimant argued that pursuant to Article 311 of the Commercial Code, an unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely—

> *(a) where the goods have been sold without any stipulation as to credit;*
> *(b) where the goods have been sold on credit, but the term of credit has expired;*
> *(c) where the buyer becomes insolvent.*

[144] Further, Article 311(2) states that the seller may exercise his or her right of lien notwithstanding that they are in possession of the goods as agent or bailee or custodier for the buyer. The defendant, who was the bailee of the claimant's documents, committed a fundamental breach of its duty to the Claimant when it released its documents without ensuring payment had been made to the Claimant.

[145] Therefore, in the alternative, the claimant seeks damages against the defendant for breaching its duty as bailee and in the alternative, a lien on the outstanding shipments until payment is made by the defendant for the outstanding balance claimed.

*The Defendants Submissions*

[146] The defendant position is simply that it was not bailee of the goods, and never took ownership of the goods. It merely acted as agent for transfer of shipping and other documents from the claimant to the UOT.

**Analysis**

[147] The defendant's expert Mr O'Brien opined that in the context of a contract of carriage, his understanding is that the shipper is the bailor, and the carrier is the bailee. This was beyond the scope of UCP600 and the practice for documentary credits and is a complex area of law with varying legal interpretations. An issuing banks obligation is separate to the contract of carriage and banks are no way concerned with any contracts on which the letter of credit may be based. Further, as the L/C's contained a condition that the defendant may release the documents there was no breach of the terms of the L/C's as issued. Without this condition the defendant could have been open to liability.

[148] I have already determined that the defendant did not breach the L/C's by releasing the compliant documents to UOT. Even if the claimant could be entitled to a lien in accordance with Article 309 (1) (b) of the Commercial Code, this is not a remedy which is enforceable against the defendant, but rather against the UOT, as the buyer who has taken possession of the goods and dishonored the L/C's by failing to make the payment to the defendant or directly to the claimant, as was done in relation to the nine L/C's, which were fully paid.

[149] The definition of "*seller*" in Article 309 places the defendant in the shoes of the claimant as seller, as the agent to whom the bill of lading had been endorsed, for the purposes of dealing with the rights of an unpaid seller against goods. This is buttressed by Mr O'Brian observation that UCP600 does not in any way address issues such as title to goods shipped, transfer of such title or any issues surrounding the bailment or release of goods shipped.

[150] I am of the considered view that such cause of action is not available to the claimant, as against that defendant, but may be pursued against UOT.

**Issue 9 : Has the claimant suffered loss and damage as a result of the defendant's actions and what is the quantum of such loss?**

[151] I accept Mr O'Brien opinion that it is for the beneficiary (claimant here) to decide whether the risk is acceptable when entering into contracts for the shipment of goods to an overseas buyer. The terms and conditions included in any letter of credit are of paramount importance and must be reviewed in detail by a beneficiary to determine whether the letter of credit is acceptable or not, and then determine whether to ship or not. If the terms and conditions are not acceptable, there is no obligation on the beneficiary to effect shipment, and it is customary for a beneficiary to request amendments to the wording of letters of credit. If the amendments are not forthcoming then it is not unusual for a beneficiary to refrain from shipping the goods. Had the claimant taken a decision to refrain from shipping its goods, no losses would have been incurred in respect of these transactions. The decision to ship under the L/C's as issued, was that of the claimant alone.

[152] On the evidence, the claimant had the opportunity to review all the L/C's, request amendments, or to reject them before shipping its goods. Further, the claimant accepted the

terms of the L/C's with full knowledge of the amendments, even against the concerns of its advising bank (the Bank of China) after having reviewed the L/C's on behalf of the claimant. Thereafter the clamant proceeded on the basis of the L/C's as presented. Whereas the Article 47A-15 contained an amendment which departed from Article 7 of UCP600, a bank is not precluded from such departure, and a court must give effect to the bargain that the parties contracted.

[153] The claimant submitted that in this regard, judicial notice should be taken of (i) the fact that the defendant received issuance fees from UOT for setting up the L/C's and (ii) the guarantee agreements which were exhibited in a failed application by the defendant to file an ancillary claim against UOT for indemnity in these proceedings.

[154] This application was made late in the proceedings, and was vigorously opposed by the claimant. It did not rise to the threshold required by the rules and was dismissed. The guarantee agreements did not form part of standard disclosure and were not requested by the claimant, by way of specific disclosure. They were not adduced in evidence at trial, and did not form part of the evidence in these proceedings. Payment of issuance fees by UOT to the defendant would only serve to confirm that the L/C's were obtained in the usual manner. I gave no weight to these matters in resolving the issues which arose between the parties to this claim.

[155] Having concluded that there was no breach of the terms of the L/C's by the defendant, the evidence does not support a finding that loss or damage was suffered by the claimant, was as a direct result of the actions of the defendant.

**Conclusion**

[156] In light of the foregoing, I make the following orders:

1. The claim is dismissed.

2. Cost is awarded to the defendant to be assessed, if not agreed within 21 days.

**Cadie St Rose-Albertini**
High Court Judge

**By the Court**

**Registrar**

**[SEAL]**