Fortis Bank SA/NV & Anor v Indian Overseas Bank.

[2009] EWHC 2303 (Comm)

Queen's Bench Division (Commercial Court).
Hamblen J.
Judgment delivered 25 September 2009.

Banking – Letters of credit – Summary judgment – Implied term – Confirming bank – Documents not discrepant save in relation to beneficiary's consolidated certificate – Claimant did act as confirming bank – In circumstances confirmation authorised although not requested by issuing bank – Claimant bank also nominated bank under letter of credit and negotiated complying presentation – Whether defendant precluded from claiming that documents did not constitute complying presentation – Whether implied term that issuing bank which gave notice that it was returning documents had to do so within reasonable time – Uniform Customs and Practice for Documentary Credits, 2007 Revision (UCP 600), art. 16(c).

The claimants applied for summary judgment on claims under letters of credit.

The first claimant (Fortis) was a Belgian bank. The second claimant (Stemcor) was an English company carrying on business in the international distribution of steel and raw materials in London. The defendant (IOB) was an Indian bank.

The claims arose under five letters of credit issued by IOB. Fortis claimed, as confirming bank (alternatively nominated bank), US$5,024,041.80 under three of the IOB L/Cs. Stemcor claimed, as beneficiary, US$3,033,037.20 under two of the IOB L/Cs (which were not confirmed).

Stemcor sold various quantities of containerised scrap to SESA International Limited CFR CY Haldia (or Haldia/Kolkata in sellers' option) under five sale contracts made through MSTC Limited, an Indian government owned company, under the Ministry of Steel.

On the application of MSTC, IOB issued five L/Cs in favour of Stemcor in respect of the purchases by SESA. The L/Cs were duly made available by negotiation with Fortis's London branch each naming Stemcor as beneficiary. Each L/C was expressly subject to the Uniform Customs and Practice for Documentary Credits, 2007 Revision (UCP 600).

Field 72 of each L/C contained a request by IOB to Fortis to advise each credit to Stemcor, which Fortis duly did, as agent for IOB. In the field for 'Confirmation instructions' (Field 49), each L/C stated that Fortis 'may add' its confirmation.

It was also an 'additional condition' of each L/C (Field 47) that 'The LC may be confirmed at the request and cost of beneficiary'. Pursuant to requests by Stemcor, Fortis added its confirmation to the first three L/Cs.

Stemcor made a number of drawings under each of the letters of credit. The documents Stemcor presented in respect of each drawing under L/Cs 1, 2 and 3 were negotiated and honoured by Fortis and forwarded by Fortis to IOB. The documents presented in respect of each drawing under L/Cs 4 and 5 were forwarded by Fortis to IOB. In most cases IOB purported to reject the documents and in all cases refused to authorise the reimbursement of Fortis (in respect of each of the drawings under L/Cs 1, 2 and 3) and payment to Stemcor (in respect of the each of the drawings under L/Cs 4 and 5).

IOB refused to make any payment under any of the L/Cs on the basis of alleged documentary discrepancies. It later accepted that certain of the drawings were non-discrepant. In relation to the remaining drawings IOB disputed the claimants' entitlement to summary judgment. In particular it contended that Fortis' claim was not, as a matter of law, as a confirming bank.

Held, **ruling accordingly:**

1. IOB's discrepancy arguments failed save in relation to the beneficiary's consolidated certificate, which did not follow the exact terms of the L/C, because it certified that the negotiating bank had been advised to despatch the documents by courier at issuing bank's cost, rather than at Stemcor's cost. In that respect there was a documentary discrepancy.

2. IOB did not have a real prospect of defending Fortis's claims on the basis that Fortis was not a confirming bank. The definition of 'Confirming Bank' in art. 2 of UCP 600 provided that a confirming bank meant 'the bank that adds its confirmation to a credit upon the issuing bank's authorisation or request'. In this case the issuing bank had expressly stated to the nominated bank that it 'may add' its confirmation. By agreeing that it 'may' do so it was authorising that to be done. The additional words 'The LC may be confirmed at the request and cost of beneficiary' provided further evidence of authorisation in that IOB had expressly agreed that the L/C might be confirmed in that manner.

3. Even if Fortis was not an authorised confirming bank, it would still have an indisputable claim against IOB as the 'nominated bank' under the letters of credit. Under the UCP the obligation to reimburse the nominated bank arose if it honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. In the present case Fortis did negotiate what on its case was a complying presentation and did forward the documents to IOB. What mattered was the fact of honouring or negotiating a complying presentation.

4. The claimants contended that IOB was in any event precluded from relying on the alleged discrepancies because it had failed to comply with its obligations under art. 16 of UCP 600 by not returning the documents when it had said that it would do so or had been called upon to do so. The claimants sought to rely on an implied term that when the issuing bank stated by notice that it was returning the documents, or was requested to return documents which it was holding, it had to do so within a reasonable time. The implied term point was not pleaded and IOB should have the opportunity to put forward further evidence or other material on that point.

The following cases were referred to in the judgment:

Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] 1 QB 711.
Crédit Agricole Indosuez v Muslim Commercial Bank Ltd [2000] CLC 437.
Equitable Trust Co of New York v Dawson Partners Ltd (1926) 27 Ll L Rep 49.
Kredietbank Antwerp v Midland Bank [1999] CLC 1108.

Timothy Young QC and Malcolm Jarvis (instructed by DLA Piper UK LLP) for the claimant.

Sara Cockerill (instructed by Holman Fenwick Willan) for the defendant.

JUDGMENT

Hamblen J: Introduction

1. The first Claimant ('Fortis') is a Belgian bank. The second Claimant ('Stemcor') is an English company carrying on business in the international distribution of steel and raw materials in London. The Defendant ('IOB') is a bank carrying on business in India, with an International Business Branch in Kolkata, India.

2. The Claimants' apply for summary judgment on all of their pleaded claims (save for Stemcor's claims for container demurrage and port costs).

3. The claims arise under five letters of credit ('L/Cs') issued by IOB in August 2008:

(a) Fortis claims, as confirming bank (alternatively nominated bank), US$5,024,041.80 under three of these IOB L/Cs;

(b) Stemcor claims, as beneficiary, US$3,033,037.20 under two of these IOB L/Cs (which were not confirmed).

A 4. IOB refused to make any payment under any of these L/Cs on the basis of alleged documentary discrepancies. However, it is now accepted that certain of the drawings were non-discrepant. In particular IOB accepts that payment should have been made on the Stemcor drawings of US$161,316.00, US$32,496.00, US$335,990.40 and US$909,130.80.

B 5. In relation to the remaining drawings IOB disputes the Claimants' entitlement to summary judgment. In particular it contends:

(a) In relation to the majority of drawings and the bulk of the quantum IOB raised one or more valid objections to each such drawing, and was therefore entitled to refuse C payment. Alternatively, IOB's case on such drawings has a reasonable prospect of success and should be permitted to advance to trial, the more so given IOB's evidence that expert evidence may be of assistance to the court on a number of the issues which arise.

D (b) In relation to all of Fortis' claim IOB has a further arguable defence, in that Fortis' claim is not, as a matter of law, as a confirming bank, and any alternative claim (as nominated bank) is highly arguable on the facts. It is not therefore the case that Fortis are entitled to judgment on those three drawings where no discrepancy is now maintained, and in relation to the remainder of Fortis' claims IOB have at least two arguable defences.

E **The contractual background**

6. Stemcor had five sale contracts, under which they sold various quantities of containerised scrap to SESA International Limited ('SESA') CFR CY Haldia (or Haldia/Kolkata in sellers' option). F

7. The sale contracts all provided for the incorporation of Incoterms 2000 and that:

(a) the law of England was to govern, with arbitration of disputes in London;

G (b) payment was 100% by sight L/C by a first class bank acceptable to Stemcor, opened in workable form and received in London with the advising bank nominated as Fortis' Aldermanbury Square branch.

H 8. These contracts were made through MSTC Limited ('MSTC'), an Indian government owned company, under the Ministry of Steel, who were described in the L/Cs as 'FACILITATOR'.

9. IOB issued the L/Cs now in dispute upon the application of MSTC who were described in the L/Cs as 'APPLICANT'.

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The letters of credit

10. Upon MSTC's application, IOB issued five L/Cs in favour of Stemcor in respect of the purchases by SESA. The L/Cs were duly made available by negotiation with Fortis's London branch each naming Stemcor as named beneficiary:

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	L/C ref	*L/C date*	*L/C value (US$)*
L/C1	585/LC/166/08*	14 August 2008	1,160,000
L/C2	585/LC/170/08*	18 August 2008	1,440,000
L/C3	585/LC/184/08*	29 August 2008	2,625,000
L/C4	585/LC/171/08	13 August 2008	1,800,000
L/C5	585/LC/164/08	18 August 2008	1,240,000

C

(The L/Cs will be referred to below by the number in the first column in the above table. The asterisks indicate confirmation by Fortis)

D

11. Each L/C was expressly subject to the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ('UCP 600').

12. Field 72 of each L/C contained a request by IOB to Fortis to advise each credit to Stemcor, which Fortis duly did, as agent for IOB, under cover of letters from Fortis to Stemcor dated, respectively, 15 August, 19 August, 1 September, 19 August and 14 August 2008.

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13. In the field for 'CONFIRMATION INSTRUCTIONS' (Field 49), each L/C stated that Fortis 'MAY ADD' its confirmation. It was also an 'ADDITIONAL CONDITION' of each L/C (Field 47) that 'THE LC MAY BE CONFIRMED AT THE REQUEST AND COST OF BENEFICIARY'.

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14. Pursuant to requests by Stemcor, Fortis added its confirmation to L/C numbers 1, 2 and 3 above on 20th October 2008, 13th October 2008 and 13th October 2008 respectively.

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15. Stemcor made a number of drawings under each of the letters of credit:

(a) The documents Stemcor presented in respect of each drawing under L/C numbers 1, 2 and 3 were negotiated and honoured by Fortis and forwarded by Fortis to IOB; and

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(b) The documents presented in respect of each drawing under L/C numbers 4 and 5 were forwarded by Fortis to IOB.

16. In most cases IOB purported to reject the documents and in all cases refused to authorise the reimbursement of Fortis (in respect of each of the drawings under L/C

A numbers 1, 2 and 3) and payment to Stemcor (in respect of the each of the drawings under L/C numbers 4 and 5).

The issues

B 17. The issues arise under four principal headings:

(1) The alleged discrepancies

(2) The confirming bank point

C (3) The preclusion point

(4) The bill of lading date point.

(1) The alleged discrepancies

D *The law*

18. IOB relies on the rigour of the doctrine of strict compliance. In this regard it refers to a number of authorities. In particular:

E (1) the dictum of Viscount Sumner in *Equitable Trust Co of New York v Dawson Partners* (1926) 27 Ll L Rep 49 at 52:

> 'It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly
F observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do
G anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk.'

(2) *Banque de l'Indochine et de Suez v JH Rayner (Mincing Lane) Ltd* [1983] 1 QB 711 at 729H-730B per Sir John Donaldson MR):

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> 'I approach this aspect of the appeal on the same basis as did the judge, namely, that the banker is not concerned with why the buyer has called for particular documents (*Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279), that there is no room for documents which are almost the same, or which will do just as well, as those specified (*Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49), that whilst the bank is entitled to put a

> reasonable construction upon any ambiguity in its mandate (*Jalsard's* case [1973] AC 279), the documents have to be taken up or rejected promptly and without opportunity for prolonged inquiry (*Hansson v Hamel and Horley Ltd* [1922] 2 AC 336) and that a tender of documents which properly read and understood calls for further inquiry or are such as to invite litigation are a bad tender (*M Golodetz & Co Inc v Czarnikow-Rionda Co Inc* [1980] 1 WLR 495).'

19. The Claimants do not dispute the nature of the doctrine of strict compliance, but they stress the following qualifications:

(1) As is reflected in clause 2 of the International Standard Banking Practice for the Examination of Documents (the ISBP; ICC publication No. 681):

> 'The Applicant bears the risk of any ambiguity in its instructions to issue or amend a credit.'

Where instructions are ambiguous a confirming bank which acts upon a reasonable construction of those instructions is still entitled in law to reimbursement, even if the court were ultimately to conclude that that was a wrong construction: *Crédit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] CLC 437 at 280 (per Sir Christopher Staughton) and 281 (per Peter Gibson LJ).

(2) The doctrine does not extend to trivial discrepancies.

(3) The question of compliance should be considered intelligently rather than mechanically and may involve the exercise of judgment:

> '… the requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents. To some extent, therefore, the banker must exercise his own judgement whether the requirement is satisfied by the documents presented to him' – per Evans LJ in *Kredietbank Antwerp v Midland Bank* [1999] CLC 1108 at para. 12.

20. As to the scope for trivial discrepancies, it would appear that this is limited. As stated in Jack, *Documentary Credits* (4th edn 2009 paragraph 8.38):

> 'a document containing an error in a name or similar should be rejected unless the nature of the error is such that it is unmistakably typographical and that the document could not reasonably be referring to a person or organisation different from the one in the credit. In assessing this the bank should look only at the context in which the name appears in the document and not judge it against the underlying facts of the transaction.'

21. Against the background of the legal principles summarised above I will consider each of the alleged discrepancies.

A *(i) Documents not in the name of SESA International*

22. In relation to three drawings under L/C1 IOB purported to reject the documents presented citing the following discrepancy:

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> 'Invoice and other related documents except bill of lading are not prepared in the name of buyer. Role of MSTC Ltd, is limited to that of facilitator. Please refer to Field 47A, clause 7'.

23. IOB points out the L/Cs were raised to cover a contract in which SESA International is the purchaser and stress that the actual contract details are referred to
C at Field 46A and that Field 47A states as an additional condition 'MTSC WILL ACT AS FACILITATOR'.

24. IOB objects that all the documents other than the Bill of Lading appear to reference a sale between Stemcor and MTSC, with MTSC appearing as the party to whom the invoice is addressed, as the consignee, as the applicant for the certificate of
D quality, and as the addressee of the beneficiary's certificate. IOB contends that this is inconsistent with the true commercial facts, which were that the L/Cs were issued in relation to a Stemcor/SESA transaction and with MTSC's defined role (as facilitator) within the L/C.

E 25. I agree with the Claimants that what matters is not the 'true commercial facts' but the documentary requirements of the L/Cs. The L/C does not stipulate the name of the person to whom the documents are to be addressed and does not identify the name of any 'buyer'. The only parties identified in the letters of credit are the 'APPLICANT' (MSTC) and the 'BENEFICIARY' (Stemcor). Although clause 7 of
F Field 47A of L/C1 stated, as an 'ADDITIONAL CONDITION', that 'MSTC WILL ACT AS FACILITATOR', it does not follow that documents issued in the name of MSTC rather than an unnamed 'buyer' do not comply with the documentary requirements in the L/C.

26. Further, UCP 600, art. 18(ii) states that a commercial invoice must be made out
G in the name of the 'applicant'. In this case the 'applicant' was stated to be MSTC. As such, it was appropriate to make out the invoice in MSTC's name and, if so, there can be nothing wrong (in the absence of clear instructions to the contrary) in preparing 'other related documents' in MSTC's name.

H 27. Alternatively, if on their true construction the instructions given did require 'other related documents' to be made out in SESA's name, such instructions were ambiguous and Fortis acted on a reasonable construction thereof.

28. I am accordingly satisfied in relation to this alleged discrepancy that the documents were compliant. Nor do I consider that there is any real prospect of factual matrix or other evidence affecting this conclusion.

(ii) Bill of Lading not in the name of SESA International

29. In relation to drawings under L/C2 IOB purported to reject the documents presented under L/C2 citing the following discrepancy:

> 'All documents except the certificate of origin were required to be prepared in the name of the buyer VIZ. SESA International Ltd, 31, Shakespeare Sarani, Jasmine Tower, 6th Floor, Kolkata-700017, which has not been done, thus non compliance of clause 7 of Field 47A. B/L is not in conformity with clause 7 of Field 47A'.

30. Clause 7 of Field 47A of L/C2 set out the following 'ADDITIONAL CONDITION' for L/C2:

> 'All documents except for certificate of origin to be prepared in the name of the buyer VIZ. SESA International Ltd, 31, Shakespeare Sarani, Jasmine Tower, 6th Floor, Kolkata 700017'.

31. IOB alleges that the Bills of Lading presented were not prepared 'in the name of SESA'.

32. However, the Bills of Lading were made out in the terms required by clause 2 of Field 46A, namely:

> '2. Full set of 3/3 original shipped on board Bills of Lading stamped, signed market freight prepaid consigned to order of Indian Overseas Bank, International Business Branch, 2, Wood Street, Kolkata-700016, India and notify the applicant bank and SESA International Ltd., 31, Shakespeare Sarani, Jasmine Tower, 6th Floor, Kolkata 700017, India. …'

33. IOB disputes this on the basis that SESA was only named as second notify party under the 'Description of Packages and Goods' section. Nevertheless SESA is expressly identified as the second notify party on the face of the Bills of Lading and I am satisfied that this constitutes compliance with the L/C requirements. SESA is clearly not a 'package'. It is, as expressly stated on the Bills of Lading, a 'notify party'. Considering the matter intelligently rather than mechanically, that plain statement is not undermined or made unclear by its position within the Bills of Lading.

34. In relation to drawings under L/C4, IOB purported to reject the documents presented citing the following discrepancy:

> 'As per Field 47A, clause 7 Bill of Lading is not issued in the name of buyer, VIZ, SESA International Ltd, the contracting party. It is issued in the name of MSTC Ltd, whose role is limited to that of facilitator as stated in clause 6 of Field 47A'.

35. Clause 7 of Field 47A was in the same terms as in L/C2 as set out above. Clause 6 of Field 47A set out the following 'ADDITIONAL CONDITION' for L/C4:

> 'MSTC WILL ACT AS FACILITATOR'.

36. IOB's allegation that the Bills of Lading presented were discrepant because they were prepared in the name of MSTC rather than SESA has already been dealt with above, but in addition, L/C4 required the Bills of Lading to name the notify party as 'THE APPLICANT BANK' (i.e. IOB) and the 'APPLICANT' (i.e. MSTC) under clause 2 of Field 46A of L/C4. The Bills of Lading were thus made out in the terms called for by clause 2 of Field 46A, naming, in each case, both IOB and MSTC as the notify party. I am satisfied that this constituted compliance with the L/C requirements.

37. IOB contends that despite the express terms of clause 2 the Bill of Lading should still have been 'prepared in the name of the buyer'. However, it is unclear precisely what this means or how it could be done consistently with the requirements of the specific L/C clause dealing with Bills of Lading.

38. Alternatively, if on their true construction the instructions given did require SESA's name to be on the Bills of Lading, such instructions were ambiguous and Fortis/Stemcor acted on a reasonable construction thereof.

39. I am accordingly satisfied in relation to this alleged discrepancy that the documents were compliant. Again, I do not consider that this is an issue in relation to which evidence of banking practice is likely to be of assistance, still less that there is a real prospect that it would lead to a different conclusion on construction.

(iii) Haldia or Haldia/Kolkata

40. In relation to drawings under L/C4 IOB purported to reject the documents presented citing the following discrepancy:

> 'Commodity and specification: the commercial invoices do not comply the price term of the LC: the price term, ie, 'USD 600.00 NET PMT CFR CY HALDIA, INDIA' does not correspond with that appearing in the credit as per Field 45A'.

41. Field 45A of L/C4 (which relates to 'DESCRIPTION OF GOODS AND/OR SERVICES') describes the price as:

> 'USD 600.00 NET PMT, CFR CY, HALDIA/KOLKATA, INDIA'

whereas the price set out on the commercial invoices presented is:

'USD 600.00 NET PMT, CFR CY, HALDIA, INDIA'.

42. IOB contends that because the commercial invoice does not mention Kolkata as well as Haldia it is discrepant. I agree with IOB that the Claimants' assertion that as a matter of fact Haldia is a port in Kolkata (which is disputed) is no answer. However, I accept the Claimants' case that Haldia and Kolkata were being referred to in the price term as alternatives and that a reference to Haldia alone is appropriate or at least suffices in circumstances where the goods were shipped under the Haldia Bills of Lading.

43. Further or alternatively, the price term in Field 45A of L/C4 was not a documentary requirement so that the documents would be compliant provided that there was no inconsistency with it. There is no inconsistency in circumstances where Haldia is one of the named ports and in the event is the relevant Bill of Lading port.

44. Alternatively, if on their true construction the instructions given did require the invoice to state Haldia/Kolkata, such instructions were ambiguous and Stemcor acted on a reasonable construction thereof.

45. I am accordingly satisfied in relation to this alleged discrepancy that the documents were compliant. Nor do I consider that there is any real prospect of evidence affecting this conclusion.

(iv) Beneficiary's consolidated certificate

46. In relation to a number of drawings IOB purported to reject the documents presented citing the following discrepancy:

'BENEFICIARY'S CONSOLIDATED CERTIFICATE IS CONTRARY TO THE LC TERMS. REFER FIELD 46A CLAUSE 7D'.

47. Field 46A clause 7D sets out the following documentary requirement:

'7. BENEFICIARY'S CONSOLIDATED CERTIFICATE CERTIFYING AS FOLLOWS:

WE HEREBY CERTIFY THE FOLLOWING

…

… D) THAT THE NEGOTIATING BANK HAS BEEN ADVISED TO DESPATCH ORIGINAL SHIPPING DOCUMENTS ONLY BY AIR COURIER SERVICE TO THE LC OPENING BANK AT OUR COST …'

48. The consolidated certificate that Stemcor presented, and which Fortis presented to IOB, stated:

> 'WE HEREBY CERTIFY THE FOLLOWING:
>
> … D) THAT THE NEGOTIATING BANK HAS BEEN ADVISED TO DESPATCH ORIGINAL SHIPPING DOCUMENTS ONLY BY AIR COURIER SERVICE TO THE LC OPENING BANK AT ISSUING BANK'S COST.'

49. The consolidated certificate did not therefore follow the exact terms of L/C by referring to 'OUR' cost and instead replaced it with a reference to the 'ISSUING BANK'S' cost.

50. IOB contends that that consolidated certificate was discrepant because it certified that the negotiating bank had been advised to despatch the documents by courier at 'ISSUING BANK'S' cost, rather than at Stemcor's cost.

51. The Claimants contend that the documentary requirement at Clause 7D) is materially ambiguous because the reference to 'OUR' cost can reasonably be interpreted as a reference either to (a) Stemcor's cost (as issuer of the certificate) or (b) the issuing bank's cost (as the issuer of the L/C). Given that ambiguity, and the fact that Fortis therefore acted on a reasonable interpretation of the word 'OUR' when it accepted the certificate as complying, Fortis is still entitled in law to reimbursement, even if the court were to now disagree with that interpretation.

52. I agree, however, with IOB that there is no ambiguity. The words in clause 7D 'WE HEREBY CERTIFY THE FOLLOWING …' make it plain that (i) the wording of the L/C sets out a pro forma certificate which is to be issued by Stemcor and (ii) 'OUR' is to be identified with 'WE' – i.e. the person giving the certificate – namely Stemcor.

53. The Claimants' alternative argument is that any discrepancy was legally trivial and therefore of no consequence. They contend that by the time IOB received the documents it would have known not only that it had not been charged for the despatch of the documents but that it would not be charged. However, this involves the documentary checker having to investigate the facts rather than merely examine the documents. In this connection I do not accept that a distinction is to be drawn between facts which may be within the knowledge of the bank and other facts, or facts relating to the transaction and other facts. It is the documents alone that fall to be considered and no factual inquiry or investigation should be required. In any event, I do not accept that IOB would have known that it was not going to be charged for the despatch of the documents. On the face of the documents it was going to be so charged regardless of whether or not it had yet been charged.

54. I therefore accept IOB's case that this was a documentary discrepancy. The Claimants agreed that this was a point which should be determined one way or the other and did not depend on further evidence.

(2) The confirming bank point

55. In the alternative, and in relation to the Fortis's claims only, it is argued that IOB has a real prospect of defending Fortis's claims on the basis that Fortis was not a confirming bank.

56. The definition of 'Confirming Bank' is in Article 2 of UCP 600 which provides that a confirming bank means 'the bank that adds its confirmation to a credit upon the issuing bank's authorisation or request'.

57. IOB argues that Fortis added their confirmations in this case without IOB's 'authorisation'. It is contended that the confirmations were what is known as 'silent confirmations' - which is not in law confirmation at all. In this connection IOB rely on:

(1) Goode, *Commercial Law* (3rd edn) p. 959:

> 'It is not uncommon for an advising bank to add its confirmation without authority from IB in return for a commission from S himself. This so called "silent confirmation" is outside the UCP, and the "confirming" bank, though committed to S by virtue of its confirmation, is no more than an advising bank vis-a-vis IB.'

(2) Jack, *Documentary Credits* (4th edn) paragraph 6.25:

> 'exporters … themselves requesting confirmation of a credit by the advising bank without the authorisation of the issuing bank … is referred to as a "silent" confirmation. Such a confirmation will fall outside the ambit of the Uniform Customs.'

58. In the field for 'CONFIRMATION INSTRUCTIONS' (Field 49), each L/C stated that Fortis 'MAY ADD' its confirmation; it was also an 'additional condition' of each L/C (Field 47) that 'THE LC MAY BE CONFIRMED AT THE REQUEST AND COST OF BENEFICIARY'. Fortis contends that thereby IOB did authorise Fortis to add its confirmation to the credits at Stemcor's request.

59. This is supported by Jack, *Documentary Credits*, which expresses the view that an issuing bank that permits the advising bank to confirm a credit at the beneficiary's request and expense, amounts to relevant authorisation for the purposes of UCP 600. The matter is put as follows at paragraph 6.26:

A '(b) Permission to confirm on request

In contrast, sometimes the instruction to the advising bank will expressly permit it to confirm a credit at the beneficiary's request and expense. Such a situation is encompassed by the definition of a confirming bank in Article 2 – namely, "the bank that adds its confirmation to a credit upon the issuing bank's authorization or request" (emphasis added). It is suggested that such an instruction will bring a confirmation at the beneficiary's request within the express terms of Article 8 as a confirmation by a "confirming bank" (because it is a confirmation which has been authorised (though not requested) by the issuing bank). In a credit transmitted by SWIFT, the instruction would be given by including 'MAY ADD' in the confirmation field.'

60. Whilst there is no authority on the point, I agree with this approach. The issuing bank has expressly stated to the nominated bank that it 'MAY ADD' its confirmation. By agreeing that it 'MAY' do so it is authorising that to be done.

61. IOB suggested that the additional words 'THE LC MAY BE CONFIRMED AT THE REQUEST AND COST OF BENEFICIARY' qualify any such authorisation and mean that any confirmation would be a silent confirmation. I do not agree. If anything these words provide further evidence of authorisation in that IOB have expressly agreed that the L/C may be confirmed in this manner.

Fortis as nominated bank

62. Even if Fortis was not an authorised confirming bank, Fortis contends that it would still have an indisputable claim against IOB as the 'nominated bank' under the Letters of Credit. This is disputed by IOB which contends:

(1) Under UCP IOB are only liable to Fortis for failing to reimburse Fortis if Fortis honoured or negotiated a complying presentation as nominated bank: see Article 7(c) of UCP 600 which states: 'An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing banks. Reimbursement for the amount of a complying presentation … is due at maturity …'

(2) If Fortis were to pay or at least to negotiate as nominated bank their obligation to do so arose on sight of the documents at their counter and in any event within five working days of the presentation of the documents, without waiting for reimbursement from IOB as issuing bank.

(3) For the reasons set out in Mr Hardaker's evidence there are serious doubts whether Fortis did negotiate the documents so as to come within UCP 7(c). In particular:

(i) in no case does it appear that Fortis (as they were obliged to do under the terms of the LC) paid or negotiated on sight;

(ii) in a number of cases no negotiation was made until more than five days after presentation of the documents, and negotiation was thus outside the terms of UCP Article 14(b); and

(iii) in a number of other cases payment was not made until after IOB had rejected the documents and therefore after the date for reimbursement under the LC. Such a payment would be contrary to the requirements for a negotiation in UCP Article 2.

63. In all the circumstances IOB contends that any claim by Fortis as nominated bank will require to be investigated further at trial in order that it can be established whether on the facts as to presentation, negotiation and payment of each drawing Fortis did act as a nominated or negotiating bank within the provisions of the UCP so as to give rise to a right of reimbursement by IOB.

64. I reject these arguments. Under the UCP the obligation to reimburse the nominated bank arises if it honours or negotiates a complying presentation and forwards the documents to the issuing bank. In the present case Fortis did negotiate what on their case was a complying presentation and did forward the documents to IOB. What matters is the fact of honouring or negotiating a complying presentation.

(3) The preclusion point

65. The Claimants contend that IOB is in any event precluded from relying on the alleged discrepancies. The preclusion is said to arise as follows:

(a) Article 16(c) of UCP 600 provides that when an issuing bank decides to refuse to honour it must give a notice to that effect to the presenter. Article 16(c) prescribes that that notice must state that the issuing bank will do one of four things with the rejected documents, namely:

(i) that it is holding the documents pending further instructions from the presenter; or

(ii) that it is holding the documents until it receives a waiver from the applicant or receives further instructions from the presenter prior to agreeing to accept a waiver; or

(iii) that it is returning the documents; or

(iv) that it is acting in accordance with instructions previously received from the presenter.

(b) Article 16(f) then provides that if an issuing bank fails to act in accordance with the provisions of Article 16, the issuing bank '… shall be precluded from claiming that the documents do not constitute a complying presentation'.

66. The Claimants contend that, in most cases, IOB's Article 16(c) notice stated that it would 'RETURN' the documents. In the one instance where IOB stated that it would 'HOLD' the documents, Fortis subsequently instructed IOB to 'return' them, in instructions given on 13 and 19 January 2009, so that IOB became obliged to return the documents under Article 16(c)(iii)(b) in accordance with Fortis's instructions. IOB failed to return the documents which it said it would 'return' and failed to return them when instructed by Fortis to do so, despite chasers from Fortis. In the event, IOB finally returned the documents only after Fortis had declared that, by reason of IOB's failure to act in accordance with their obligations, Fortis had no further interest in the documents and was treating IOB's failure to return them as a waiver of the alleged discrepancies.

67. In all the circumstances, the Claimants contend that by reason of IOB's failure to act in accordance with its obligations under Article 16 either at all, or within a reasonable time, IOB is now precluded by Article 16(f) from claiming that the documents presented were not complying presentations.

68. As IOB points out, there is no express requirement in Article 16 that documents be returned, or that instructions from an advising or confirming bank be complied with. It is accordingly contended that no waiver could arise based on failure to return documents, because there is no obligation in the rule to do so.

69. The Claimants' response is that it must be implied that when the issuing bank states by notice that it is returning the documents (or is requested to return documents which it is holding) it must actually do so within a reasonable time. An implication that this be done within some time limit is necessary as a matter of business efficacy and/or is so obvious that it goes without saying, and that the obvious time limit to be implied is the common one of a reasonable time.

70. This is not, however, the Claimants' pleaded case and IOB objected to it being raised for the first time in argument. It was contended that the issue of implication, the terms of any such implication and the question of compliance with any term as might be implied are all issues fit for trial and could not be dealt with summarily. I have carefully considered whether I should dismiss the Claimants' application on these grounds, particularly given the late stage at which the implied term argument was articulated and advanced. On balance, however, I have concluded that the preferable course of action would be to grant IOB the opportunity to put forward such further evidence or other material as it wishes in relation to: (1) whether any term is to be implied; (2) if so, the nature of such term; and (3) compliance with such term. I therefore propose to give IOB that opportunity and will hear counsel as to when and

how that is to be done. In the meanwhile I shall defer any ruling on the preclusion point.

71. I should add for completeness that the Claimants say that they wish to raise an as yet unpleaded claim that IOB was precluded from claiming that the documents were discrepant by reason of its delay in giving its notices of discrepancies, but acknowledged that this issue could not be determined on a summary basis. They also argued that the notices were bad notices if IOB was not in fact returning the documents or holding them to the instructions of the presenter. The latter point will be dealt with at the same time as the preclusion point as they are inter-related.

(4) The bill of lading point

72. IOB raised a new point at the hearing in relation to the drawing of US$365,000 under L/C 3. It was contended that the presentation was non compliant because the re-presentation of the documents occurred more than 21 days after the bill of lading date. Although this was not a point taken at the time it was said that it could found a counterclaim (as yet unpleaded).

73. The short answer to the point is that the presentation was within 21 days of the date of issue of the bill of lading and it is that date rather than the date of shipment which is relevant.

Conclusion

74. I accordingly conclude that all IOB's defences fail save for the consolidated certificate discrepancy defence, which defence succeeds subject to preclusion issues. In relation to the preclusion point I will allow further evidence/argument to be advanced and will hear counsel as to the appropriate order to be made in such circumstances.

(*Order accordingly*)