Case No: CL-2017-000044

Neutral Citation Number: [2018] EWHC 2580 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 09/10/2018

Before :

CHRISTOPHER HANCOCK QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

YUCHAI DONGTE SPECIAL PURPOSE AUTOMOBILE COMPANY LIMITED	**Claimant**
- and -	
SUISSE CREDIT CAPITAL (2009) LIMITED	**Defendant**

- -
- -

Edward Brown (instructed by **Covington and Burling LLP**) for the **Claimant**
Andew Ayres QC and Benjamin Tankel (instructed by **C J Jones Solicitors LLP**) for the **Defendant**

Hearing dates: 21st- 23rd May

- -

Judgment

Christopher Hancock QC :

Introduction:

1. In this trial, the Claimant claims payment pursuant to a letter of credit which they allege was issued by the Defendant on 10 March 2014. A copy of the relevant letter of credit is annexed to this judgment as Annex 1. The Defendant denies that it issued the letter of credit; and contends, in the alternative, that even if it did, the terms of the credit made clear that it was not responsible for payment of the credit. Finally, the Defendant asserts that the Claimant is estopped by convention from claiming that the Defendant issued the letter of credit.

The relevant factual background.

2. The Claimant is a large manufacturing company based in China. The Defendant is a company which provides financial services in support of trade, investment and development. It is not a bank and does not take deposits or undertake investment management; but it is a member of the SWIFT network.

3. The "Suisse Bank Group" was a group of companies which, I was told, was, initially at least, owned and operated by a gentleman known as Mr Wolfgang Zulauf. The Group included Suisse Bank PLC (SB PLC), which was the entity involved in the first letter of credit transaction which was said to be relevant to these proceedings ("LC1"), and Suisse Bank Offshore Limited (SBOL), which was the entity involved in the letter of credit with which I am concerned, which I refer to as "LC2". SBOL also apparently had branches in the Comoros and in London. Despite the superficial similarity of their names, I was told that the Defendant had and has no connection with any member organisation of the "Suisse Bank Group" or with Mr Zulauf other than the specific paid and third party contractual arrangements pursuant to which they (SB PLC and SBOL) instructed the Defendant to send certain SWIFT messages, to which I make reference below.

4. Various Chinese Banks were also involved, namely The Bank of China (Hubei), and the Rural Commercial Bank of Zhangjiagang. These only ever acted as correspondent/advising, non-confirming, banks – for the Claimant.

5. I turn to the chronology of events, which I have taken mainly from the Defendant's helpful skeleton.

(1) On 23 September 2013, Ms Simone Preusser of the Suisse Bank Group, sent to the Defendant a draft letter of credit in the sum of US$7 million (LC1) for payment for the goods in question. A copy of this letter of credit is annexed to this judgment as Annex 2. The draft included, at field 72 (sender to receiver information), the disclaimer "no our responsibility for payment". In this judgment, this statement, along with the "quote/unquote" format utilised in certain later messages is referred to as "the Disclaimers". Ms Preusser asked the Defendant to "issue" the draft. Suisse Bank PLC was duly invoiced 9,500 Euros for "advising" LC1 "as received from Suisse Bank PLC". It is said by the Defendant that the size of that commission was not commensurate to that which would typically be charged for issuing (in the true sense) a LC in the sum of US$7 million. The amount, however, does seem to be consonant with the scale of charges indicated by the Defendant to its customers for services, other than issuing letters of credit, although there is no suggestion that the scale of charge made to SB PLC was made known to the Claimant.

(2) The Defendant sent LC1 to a correspondent bank in China known as the Bank of Ruifeng. The Defendant sent it by way of MT700 at Mr Zulauf's express request. I deal below with the nature of a SWIFT MT700 message.

(3) On 25 September 2013, Bank of Ruifeng forwarded LC1 to the Claimant. On the covering form, it specified that the "issuer" was the Defendant, but also wrote "If you find any…error(s), it is suggest that You Contact applicant directly for necessary amendment(s) so as to avoid any difficulties which may arise when documents are presented." The applicant was the buyer, whilst the applicant bank was said to be SB PLC.

(4) On 23 January 2014, the Claimant apparently presented documents under LC1 via Bank of China (Hubei Branch) to SB PLC, which was described in the documentary remittance covering the presentation as "reimbursing bank/drawee bank". The documentary remittance again described LC1 as having been "issued" by the Defendant. The Claimant included in the presentation charter party bills of lading naming SB PLC as consignee. By charter party bills of lading I mean bills of lading incorporating the terms of a charter party.

(5) On 5 February 2014, on Mr Zulauf's instructions, the Defendant sent a SWIFT message to Bank of China refusing payment under LC1 because the documents presented were discrepant. The message contained the following headers and footers:

> "WE RELAY THIS MESSAGE ONLY AS RECEIVED FROM SUISSE BANK PLC 53 DAVIES STREET, LONDON W1K 5JH, UK
> QUOTE
>
> [Quoted message from SB PLC rejecting documents]
>
> UNQUOTE
> YR CHRGS ARE FOR BENF ACCOUNT.
> NO OUR (SBLTGB2L) RESPONSIBILITY FOR PAYMENT.
> BEST REGARDS, SBLTGB2L"

The message therefore included the Disclaimers.

(6) On 14 February 2014, SB PLC wrote to Bank of China via the Defendant stating "we have been informed that the applicant and beneficiary have agreed for a payment of docs presented … to be made outside the LC. Please confirm the consent from beneficiary by return SWIFT message". The Defendant again included the Disclaimers in the message. Mr Zulauf was invoiced on the same day for this message.

(7) At this point it appears that Mr Zulauf and Mr Black, of the Claimant, decided between them to open a second LC.

(a) This started, apparently, with an agreement dated 17 February 2014 between Laheq and SB PLC, stated to relate to LC1, that the new payment terms would be for a sum of $3m, with payment to be made in accordance with an agreed schedule, including two cheques which would be returned once payment had been received. In more detail, the arrangements for reimbursement as between "Suisse Bank Group" and the applicant were as follows:

> *"Dear Sirs,*
> *With reference to the payments under [LC1] we agree to the following payment terms:*

The new invoice amount will be 3 Mio USD + interest and banking charges (for example issuing of Letter & Credit Charges).
Therefore, the remaining 3 Mio USD has to be paid as follow [sic]:
A) 260 000 EUR already paid
B) 110 000 to be paid on next Wednesday 19.02.2014
C) First check of 1.5 Mio USD due date within the next 60 days
D) Second check of 1.5 Mio USD due date within the next 120 days.

Please be informed that both checks are only for security reason and if the amount of 1,5 Mio USD of each is paid before the due date, we will return the checks…"

(b) The document contains signatures and stamps on behalf of both Mr Zulauf and Laheq.

(c) On that same day, an email exchange commenced between Mr Zulauf and Mr Black. It is not easy to determine where others of the documents disclosed fit into the chronology visible from this email, but I set out in the paragraphs which follow the apparent trail.

(d) On 17 February, at 0441, Mr Zulauf emailed Mr Black with instructions as to how to download the SWIFT. That was clearly a SWIFT to Bank of China and I would infer that it was the message of 14 February to which I have made reference above.

(e) At 1026, Mr Black asked Mr Zulauf "to make sure you will open the new lc, and to please write a letter to our company". Mr Zulauf responded that this would be no problem and that the letter would be sent later that day. At 1100 Mr Black thanked Mr Zulauf, said that they wanted to finish this as soon as possible and asked when the new letter of credit would be opened. He also asked Mr Zulauf, reflecting perhaps a conversation between them, whether he was sure he only wished a new invoice. I have not seen a document in which Mr Zulauf stated this.

(f) After various chasing messages, which became increasingly urgent, Mr Black asked for confirmation that a letter would be sent, with SB PLC's signature and stamp, and Mr Zulauf stated that the letter would come within 30 minutes. By now it was about 1600 on 17 February 2014.

(g) At about this stage, Ms Dolibic, the executive assistant to Mr Zulauf and an employee or agent of the "Suisse Bank Group" sent an email to Mr Black containing three attachments:

(i) First, a letter from SB PLC to the Claimant, on headed notepaper and signed by Mr Zulauf, stating that "we will issue" a new LC within 48 hours of receiving a positive response to the 14 February 2014 SWIFT message (asking the beneficiary to confirm that payment had been agreed outside of LC1) and upon receipt of an application from its client for an LC in the sum of US$3 million payable at sight;

(ii) The SWIFT message dated 14 February 2014, referred to above;

(iii) A further attachment, which I am not sure that I have seen.

(h) Mr Black responded (still on 17 February 2014, and back in the email chain), asking that Mr Zulauf should retain the documents that had been presented, "in your bank". He said "this is very important to us … so we can get the new lc at sight, and when we send you a new invoice, we will get our payment". He went on to say that once a letter was received from Mr Zulauf then the Claimant's CFO would "confirm the SWIFT", get the new letter of credit at sight and get their payment on presentation of the new invoice. The Defendant pointed out that this email, and the preceding one, referred to "you" opening the letter of credit.

(8) On 18 February 2014, and in the email chain that I have referred to:

(a) Mr Black emailed Mr Zulauf asking him to send a draft of the new LC. Mr Zulauf refused to do so without a confirmation of the SWIFT message dated 14 February 2014 relating to the parties' agreement for payment outside the scheme of LC1.

(b) Mr Black said that "until yesterday, we didn't get the original SWIFT, maybe this morning" and asked whether the applicant had submitted an application to "your bank". Mr Zuluaf responded rapidly saying that the Claimant should have the SWIFT.

(c) Mr Black then posed certain further questions for Mr Zulauf, as follows:

"1) If your bank open a new LC to our company, what about the old document that we send to you? Because we write L/C no on B/L and packing list. My boss said if your bank will return us the documents and let us amend, it would be better. Or you open the new L/C first, then we confirm the SWIFT
2) Has Mr Laheq submit a new application to your bank? You know, we have transported my goods to Dammam, I am so worry about that, so my boss let me ask you how to believe that.

Don't angry, I know you are a good person. I must get permission from my boss, sorry for that…"

(d) On that day the seller's bank stated that they had received the SWIFT. It seems likely that it was dated 14 February.

(e) On the same day, Mr Zulauf responded again, stating that if the SWIFT message was not received on that day, then they would close the file and the Claimant would have to find another party who would issue a new letter of credit. He also went on to say that their compliance department would send a full report to the Chinese trade and commerce department and the Bank of China pointing out that the Claimant was involved in a fraud.

(9) On 20 February 2014, Bank of China replied to SB PLC via the Defendant stating "as we have no SWIFT bank key with you, pls regard this msgs as MT799… Pls be informed that beneficiary agree to effect payment outside the LC".

(10) On 24 February 2014, SB PLC wrote to Bank of China via the Defendant saying that it had been informed by the applicant that the beneficiary did not need "our" LC1, and asking for the beneficiary's confirmation that LC1 could be closed. The Defendant included the Disclaimers in the message.

(11) On 25 February 2014:

(a) Mr Zulauf sent on a corrected draft and a second SWIFT. That corrected draft is the one which was passed on the day before via SCC, asking for confirmation of cancellation of LC1. He pointed out that he did not have a relationship management agreement, or RMA, with the Claimant's bank so asked Mr Black to push his bank to agree on their (i.e. Suisse Bank's) RMA *"so that he could send the LC directly to the Claimant's bank"*.

(b) By return, Mr Black stated that they needed the letter of credit on that day (25 February) and so asked that it be issued to Bank of Ruifeng instead of Bank of China, who had been said to be the receiving bank. He explained that the urgency was that he needed to get the CO (certificate of origin) to Laheq that day.

(c) Later on the same day, then Mr Zulauf chased for the issue of a new certificate of origin, since otherwise demurrage charges were accruing. He suggested that it could be obtained under LC1. He asked that it be issued that day; otherwise Laheq would have to pay significant demurrage charges;

(d) Mr Black explained that, whilst he could in theory obtain a CO under LC1, as LC1 and LC2 were in different amounts, he would in practice have to obtain it under LC2 once issued. He suggested various banks that could be used.

(e) Some two and a half hours later, Mr Black emailed Mr Zulauf to say that it was the last day to get a certificate of origin, and that Mr Zulauf could issue the new letter of credit to Bank of Ningbo, Bank of Jiangsu or the Bank of New York Mellon. He stated that "due to the time difference, we have to get it today, help me please. I am online and waiting for you."

(f) On that day again, Mr Zulauf chased Mr Black for the certificate of origin, and said without it all deals would be cancelled, and "we will not issue new LC".

(12) Leaving the email traffic between Mr Black and Mr Zulauf, on 25 February 2014:

(a) SB PLC wrote to Bank of China via the Defendant informing Bank of China that SB PLC had cancelled "our" LC1 and closed "our files".

(b) Bank of China (acting on the Claimant's instructions) responded via the Defendant ("as we have no SWIFT bank key with you") agreeing to the closure of LC1. The Defendant pointed out that from this point onwards until 10 March 2014, there was no LC open in relation to the transaction, despite the fact that the goods had been shipped.

(13) On 26 February 2014, Mr Black sent on a copy of a new CO, for which he says he paid as much as US$3,000. This was before LC2 was issued. The Defendant says that the inference is that the CO was obtained in questionable circumstances, and relies on the fact that the documents eventually presented included a Certificate of Origin dated 13 February 2014 [sic], which appears to post-date both the shipment of the goods and the rejection of discrepant documents, whilst predating the email chain to which I have made reference. He wanted to know when the new LC would be received.

(14) Meanwhile, on 25 February 2014, Mr Zulauf had telephoned Ms Ilinskaya, of Eastlight, who was Mr Zulauf's private client manager and his contact point with the Defendant and explained that he wanted a new LC to be sent to Bank of China for a new shipment, again by way of MT700. He followed this up with an email asking for an invoice for the new LC2 and attaching a draft MT700. The draft was for a letter of credit in the sum of US$3 million, from SB PLC, with the same applicant and beneficiary as in LC1.

(15) On 6 March 2014, Mr Zulauf sent the Defendant an email with a link to a "Dropbox" account from which the Defendant could download a draft LC2. It is clear that Mr Zulauf drafted LC2.

(16) There followed some discussions between Mr Zulauf and Ms Ilinskaya, in which Ms Ilinskaya wrote as follows:

> *"I don't see the reason for this LC payment as NEGOTIATION if the draft should be issued in the name of negotiating bank…*
> …

Field 48 regulate a presentation period which cannot be calculated without shipping document…
Also delivery will be on CIF basis – that means B/L and insurance are for beneficiary account and should be presented as a docs confirming shipment, otherwise this instrument purpose is not a goods delivery."

(17) Later on 6 March 2014, Mr Zulauf sent Ms Ilinskaya a further draft of LC2. Mr Zulauf asked Ms Ilinskaya to invoice SBOL for sending LC2.

(18) On 7 March 2014, Mr Zulauf asked Ms Ilinskaya to amend LC2 to include FOB terms so that there would be no need for a bill of lading. Ms Ilinskaya replied:

"FOB basis – is a sea transportation basis which also should be confirmed by B/L. I do not recommend to remove shipping docs from the list of docs required.
In my opinion better to receive these docs and release to the buyer against his acceptance/payment otherwise the goods will be received and stolen (or maybe already stolen?).
Anyhow, B/L is the most important document … and can contain some discrepancies for further refusal from the issuer to pay/accept the docs…
You should have a weighty reason to remove B/L – but please clarify which document will confirm the date of shipment for filed 48 [sic].
So, I hope you are paid already for any docs claim under this credit, or trust to participants [sic]."

(19) On 10 March 2014, Ms Antoinette Alfred, the trade finance manager of "Suisse Bank Group", wrote to Mr Black. Her email says that she would send a document known as the "client procedure" by separate email. The email said that, in order to use its services, it was necessary first to become a shareholder. The email asked the recipient to check that "your beneficiary" accepts financial instruments of SUISSE BANK (OFFSHORE) LTD or SUISSE BANK PLC. The email cuts off midway through.

(20) Also on 10 March 2014, the Defendant sent a SWIFT containing LC2 to the Rural Commercial Bank of Zhangjiagang.

(21) On 11 March 2014, the Rural Commercial Bank of Zhangjiagang forwarded LC2 to the Claimant. On the covering form it specified that the "issuer" was the Defendant.

(22) By documentary remittance dated 18 March 2014, Bank of China presented documents under LC2 to SBOL. The documents included a commercial invoice and a packing list, both dated 13 March 2014. Again, the Defendants suggest that these documents are "curious". The Claimant relies on the fact that the documents name the Defendant as the issuer.

(23) On 19 March 2014, Bank of China (Hubei Branch) sent a MT999 to the Defendant. The MT999 said that documents had been "negotiated" the previous day, that the terms were complied with, and claimed US$3 million. The Defendant responded saying:

> *"…according to Field 78 of our MT700 … we have relayed your SWIFT MT999 message to applicant bank: [SBOL (Comoros)] (the issuer) and will revert to you once we received their respond … no our (SB2LTGB2L) responsibility for payment under this credit."*

(24) On 8 April 2014, Mr Zulauf asked the Defendant to convey, the following day, a message refusing to accept or pay the documents presented because of certain discrepancies.

(25) On 9 April 2014, Mr Zulauf asked Ms Ilinskaya to refrain from sending the message refusing payment.

(26) On 10 April 2014, Mr Zulauf asked Ms Ilinskaya to send a message waiving the discrepancies and accepting payment. The reasons for his reversal of position are not clear but the Defendants pointed out that there was (and is) no suggestion that the Defendant had any role to play in waiving such discrepancies. He attached a draft SWIFT to that effect, which contained the Disclaimers. The actual message (also containing the Disclaimers) was eventually sent on 14 April 2014, and in an authenticated manner on 16 April 2014. The message said that payment was to be on maturity date 11 October 2014, even though the maturity date under LC2 was in fact 120 days from the date of presentation or acceptance of documents, which would be a date in July or August 2014.

(27) On 14 April 2014, SB PLC wrote to Mr Laheq attaching a copy of a SWIFT message indicating acceptance of the documents. Two minutes later, it forwarded that email, with attachment, to Mr Black "as promised".

(28) On 18 September 2014, Mr Zulauf apparently sold his shares in SBOL, which was then re-named Asia Capital Development Bank.

(29) On 4 May 2018, the Claimant's representatives, in a draft chronology prepared for the purposes of this trial, apparently inadvertently suggested that on 27 September 2014 it had entered into an agreement with Laheq that (i) Laheq would return goods worth US$ 1.75 million to the Claimant for "non-compliance with Saudi standards" and pay a further US$ 1 million to the Claimant in two instalments of US$ 500,000; and (ii) the Claimant would cancel the LC (presumably LC2) issued from "the Suisse Bank" and have no further rights under the letters of credit. The Claimant gave no disclosure in relation to this alleged agreement, and mentioned it for the first time in the draft chronology sent inter partes on 4 May 2018. A copy of the agreement was first provided on the first day of the trial, and no further correspondence relating to it was ever provided. I was told that it was never in fact given effect to, and Mr Hargreaves of Covington and Burling, solicitors for the Claimant, swore a witness statement attesting to this. The Defendant contended that I should not accept this in the absence of any evidence from Mr Black.

(30) On 12 November 2014, Bank of China wrote to the Defendant asking it to relay to SBOL (Comoros) a message demanding payment under LC2. It sent a further chaser, in substantially the same terms and in the same way, on 26 November 2014. The messages each began and ended as follows:

> *"PLS RELAY THE FOLLOWING MSGS TO SUISSE BANK (OFFSHORE) LTD…*
> *QUOTE*
>
> *[Reference to previous messages and to "YR" LC2 … UP TO NOW WE HAVE NOT RECEIVED YR PAYMENT, PLS INVESTIGATE AND EFFECT PAYMENT IMMEDIATELY]*
>
> *UNQUOTE*
> *THANKS AND BEST REGARDS"*

(31) On 4 December 2014, the Defendant wrote to Bank of China (Hubei) saying that it was unable to relay its message to the issuer SBOL (Comoros) because it had no contact relation with it; additionally that SBOL had been sold and changed its name.

(32) On 20 April 2015, Mr Zulauf wrote to Mr Black attaching the SWIFT message dated 04 December 2014, which again repeated the phrase: "NO OUR (SBLTGB2L) RESPONSIBILITY FOR PAYMENT UNDER THIS CREDIT".

The factual witnesses.

6. I heard oral evidence from two factual witnesses, Mr Bullivant and Ms Ilinskaya, both of whom were called by the Defendant.

7. Mr Bullivant, who was a director of the Defendant, gave evidence as follows:

(1) His company was independent of Dorax and Eastlight, where their main contact point was Ms Ilinskaya. Dorax and Eastlight are private client managers, who utilise SCC's SWIFT messaging services to transmit messages.

(2) He had substantial banking experience with Bank of Scotland, and understood the SWIFT system. He knew that a MT700 was a message type used by issuing financial institutions when opening a letter of credit, and that a MT710 was a message used when advising a third party's letter of credit.

(3) He was introduced to Mr Zulauf by Dorax in about 2012 and carried out various due diligence checks on him and his companies.

(4) He, Mr Bullivant, did not recall ever being asked to issue a letter of credit by Mr Zulauf. Instead, on each occasion that he was asked by Mr Zulauf to perform services, he, Mr Bullivant, understood that he was not being asked to undertake the obligations of an issuer, and invoiced accordingly.

(5) SCC had never encountered any problems in relation to other MT700s that they had sent at the request of Mr Zulauf in the past.

(6) He had no real input into the drafting of the message in this case, which was drafted by Mr Zulauf with input by Ms Ilinskya. He believes that he would have checked the draft,

confirmed in his own mind that there was no risk to SCC and agreed to send it. I would conclude from the tenor of his evidence that he does not in fact remember this transaction.

(7) The prefix system that SCC use is designed to enable him to identify who SCC's client was, and to access the relevant file. Here, since, for example the client in relation to the first letter of credit was SB PLC, the prefix SB was used. He accepted, however, that the system was a purely internal one, and would not necessarily mean anything to the recipient of the document.

(8) The next thing that he remembers as a matter of fact is receiving an email from the Claimant's solicitors asking whether the documents purporting to emanate from SCC were legitimate. He responded that they were.

(9) Apart from outlining the remainder of the correspondence after this, which speaks for itself, and making a number of submissions as to the proper construction of the letters of credit, which I regard as of tangential utility since the parties have both called independent experts and since many of the matters raised are properly speaking matters of law and not fact, the above was the entirety of Mr Bullivant's evidence.

8. Ms Ilinskaya was an employee of Eastlight at the relevant time. She acted as a private client manager and one of her clients was Mr Zulauf. Eastlight made use of SCC's SWIFT messaging capabilities on behalf of its clients; in the case of SB PLC, the terms of their arrangements with SCC were set out in an offer for services dated 29 July 2013; and Ms Ilinskaya would add Eastlight's charges to those of SCC.

9. Ms Ilinskaya's evidence was largely confined to a recitation of the email correspondence between the parties. However, she did give certain limited further evidence, as follows:

(1) Mr Zulauf would always ask someone from Eastlight to help him with the drafting of his instruments. On previous occasions, MT700s were used to transmit messages by SCC, but this did not lead to claims against SCC.

(2) Prior to mid-2013, Eastlight had taken the view that they should use MT700 for advising letters of credit, because they understood the SWIFT system to mean that there could not be a MT710 unless there was a MT already in being.

(3) In mid-2013, their understanding changed, and they informed their clients that, from then on, they would only advise letters of credit by way of a MT710.

(4) In September 2013, SB PLC sent on a draft wording for LC1. There is no indication that anyone at Eastlight was involved in this. This letter of credit was in the same format as earlier ones. It was Ms Ilinskaya's evidence that various of the fields in that draft made clear that SCC was not issuer. This is a question of law, and not fact, and is a matter for me.

(5) She went on to say that Mr Zulauf had contacted her (orally) to say that he wished LC1 to be sent to the Bank of China in MT710 format, and that, because SCC did not have a relationship management agreement with Bank of China, but did have such a relationship with Bank of Ruifeng, the MT710 message would have to be sent to Bank of Ruifeng, who could then pass on this message in MT710 format to Bank of China. She agreed to this, despite the change in policy mentioned above. I regard this evidence as difficult to accept and I do not accept it. As I understood the expert evidence, then it would have been possible to send a MT710 to Bank of Ruifeng, who could still then have passed on a similar MT710 to Bank of China.

(6) Ms Ilinskaya then set out a chronology of what the documents show, interspersed with comments by way of submission. The submissions are not evidence of fact, but of law, and are for me. The documents speak for themselves.

(7) Following the closure of LC1, Ms Ilinskaya gave evidence that she was again contacted orally by Mr Zulauf to ask her to issue a new letter of credit in similar form to LC1, for the same reasons as set out above. She said that since there had been no problem under LC1, she was prepared to do this.

(8) Mr Zulauf then sent a draft of LC2, which was amended to take account of various of her comments and then sent on.

(9) She then goes on to set out an account of the later correspondence, between March and November 2014; once again, the correspondence speaks for itself.

(10) Finally, she went on to set out various opinions as to why the Claimant's case is wrong. Again, these are in reality submissions, and are matters for me.

10. Overall, I would say that:

(1) Much of the witness evidence, both written and in cross examination, consisted of either submission or recitation of what can be seen in the documents. I do not think that I gain any assistance from any of this evidence.

(2) I am quite sure that both of the witnesses were truthful and were not trying to hide anything.

(3) I am also satisfied that each of the witnesses genuinely believed that they were not undertaking the liabilities of an issuer. The best evidence of this is the level of charges levied.

(4) However, in my judgment, this evidence is of little assistance. The subjective understanding of one party to the contract is irrelevant. The question is, in the context of the contractual enquiry, what a reasonable person would have made, objectively, of their conduct; and in the context of the estoppel argument, whether the assumption relied upon was both shared, and known to be shared. I consider these points further below.

11. I did not however hear from Mr Black, of the Claimant. Although he was due to give evidence, at the last minute the decision was taken not to call him. The Defendant asked me to draw various inferences against the Claimant as a result of this, those inferences being as follows:

(1) The Claimant did not wish to be cross examined about the fact that the Claimant knew that the issuers of the letters of credit were Suisse Bank PLC and SBOL; I should draw the inference that the Claimant had this knowledge.

(2) The Claimant did not wish to be cross examined about the fact that it knew that the Defendant had no liability on the letters of credit; I should draw the inference that it did know this.

(3) The Claimant did not wish to be cross examined about its knowledge of the various banks involved; I should draw the inference that the Claimant had such knowledge.

(4) The Claimant did not wish to be cross examined about the extent to which Mr Black checked the letters of credit. I should draw the inference that he did check them.

(5) The Claimant did not wish to be cross examined about the "murkiness" of a number of aspects of the transaction, including:

(a) Why LC2 was opened and LC1 closed?

(b) Why was there a time gap between LC1 and LC2?

(c) What was the nature of the fraud referred to in the documents passing between Mr Zulauf and Mr Black?

(d) Why the second letter of credit gave the impression that there had been a further shipment when there had not been?

(e) Why was a second certificate of origin issued?

(6) The Claimant did not wish to be cross examined about the "negotiation" of the documents, which would show its knowledge or belief of the capacity in which the "negotiating" bank was acting.

(7) The Claimant did not wish to be cross-examined about the extension of the maturity date, how that came about and what that indicated about the knowledge or belief of the Claimant as to who it was to look to.

12. In this regard, I was referred to the decision of the Court of Appeal in *Wisniewski v Manchester Health Authority* [1998] PIQR P324. There the Court laid out general principles in relation to the drawing of adverse inferences in civil cases, as follows:

"(1)In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

13. The Claimant's explanation for the absence of Mr Black was that his evidence was not relevant to the issues. I do not accept this. Plainly the view was taken that his evidence was relevant at the time his witness evidence was prepared and tendered, and, as the major representative of the Claimant, this is what one would have expected. In addition, the decision not to call him meant that Mr Ayres QC did not have the opportunity to cross examine him. His evidence would have been relevant to the question of estoppel by convention, and would also have been relevant to such of the issues of construction which depend on what the knowledge of the parties was as to the part that other parties were in fact playing in the transaction.

14. Accordingly, I think that it is open to me to draw adverse inferences against the Claimant, in accordance with the principles quoted above. The precise extent of those inferences I consider below.

Disclosure.

15. At this point, I should say a word about disclosure in this case. It was clear, and Mr Brown very fairly accepted, that there were serious shortcomings in the Claimant's disclosure in

this case. Hence, until shortly before trial, the Claimant had provided no correspondence between it and its buyer relating to the underlying transaction or (more importantly) the letter of credit to be provided; it had provided no documentation showing communications between it and the banks in China through and to whom messages were relayed; and it had provided no, or no significant, correspondence between it and Mr Zulauf, of Suisse Bank and SBOL, with whom the letter of credit arrangements were clearly discussed.

16. Those documents which were provided raised more questions than they answered. I have referred above, by way of example, to the peculiar exchange by email in mid February 2014 relating to the circumstances in which LC2 was issued, which included a suggestion by Mr Zulauf, the individual who was behind Suisse Bank and SBOL that the Claimant was involved in some unspecified fraud. Moreover, I have also noted above the fact that certain documentation was provided shortly before trial which suggested that there might have been an agreement between the Claimant and its buyer to cancel LC2 on account of certain shortcomings in the goods and the agreement of an alternative method of payment by the buyer.

17. In my judgment, it is also open to me, by analogy with the principles governing the drawing of inferences from the absence of a witness, to draw appropriate inferences from the want of disclosure, if I am satisfied that relevant documents have not been provided. I propose therefore to draw on the principles set out above in this regard, and I have indicated above where there is a shortcoming. I consider below what inferences are appropriate.

The expert evidence.

18. Ms Miglorine gave expert evidence on behalf of the Claimant, whilst Mr Lee gave expert evidence on behalf of the Defendant. I found both of the witnesses to be both helpful and clearly expert in their field. Indeed, there was nothing of any substance between them in relation to question of general principle. In particular:

(1) The experts were agreed that the MT700 format was appropriate for the issuance of a letter of credit and not for advising another party's LC.

(2) The experts were also in agreement that the appropriate form of message to be used of advising a letter of credit was MT710.

(3) There was no real disagreement between them as to what each of the fields in the message type was used for and, indeed, since I was provided with the SWIFT manual guide to such there could not really be.

(4) Mr Lee's evidence, which I accept, is that the letter of credit has to be read as a whole in order to determine whether there are inconsistencies. I address below the proper legal approach to this question.

(5) Overall, to the extent that there was any real disagreement between them, it was really as to the correct construction of this letter of credit, which is of course a matter for me rather than either of the experts.

The relevant terms of the Uniform Customs and Practice for Documentary Credits 600 ("UCP 600").

19. The relevant terms of the UCP 600, for the purposes of this judgment, are as follows:

Article 1

> *"The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter of 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."*

Article 2 definitions

> *"Issuing bank" means "a bank that issues a credit at the request of an applicant or on its own behalf";*
>
> *"Nominated Bank" means "the bank with which the credit is available or any bank in the case of a credit available with any bank.";*
>
> *"Advising bank" means a "bank that advises the credit at the request of the issuing bank.";*
>
> *"Applicant" means "the party on whose request the credit is issued";*

"Beneficiary" means "the party in whose favour a credit is issued.".

Article 4

Credits v. Contracts

a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

b. A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

c. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like."

Article 5

Banks deal with documents and not with goods, services or performance to which documents may relate.

Article 6

a. A credit must state the bank with which it is available or whether it is available with any bank. A credit available with a nominated bank is also available with the issuing bank.

b. A credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation.

c. A credit must not be issued available by a draft drawn on the applicant.

d. i. A credit must state an expiry date for presentation. An expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation.

ii. The place of the bank with which the credit is available is the place for presentation. The place for presentation under a credit available with any bank is that of any bank. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.

e. Except as provided in sub-article 29 (a), a presentation by or on behalf of the beneficiary must be made on or before the expiry date.

Article 7

Issuing Bank Undertaking

a. Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:

i. sight payment, deferred payment or acceptance with the issuing bank;

ii. sight payment with a nominated bank and that nominated bank does not pay;

iii. deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;

iv. acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;

v. negotiation with a nominated bank and that nominated bank does not negotiate.

b. An issuing bank is irrevocably bound to honour as of the time it issues the credit."

Article 11(a)

An authenticated teletransmission of a credit or amendment will be deemed to be the operative credit or amendment, and any subsequent mail confirmation shall be disregarded.

Article 37(c)
A bank instructing another bank to perform services is liable for any commission, fees, costs or expenses ("charges") incurred by that bank in connection with its instructions. If a credit states that charges are for the account of the beneficiary and charges cannot be collected or deducted from proceeds, the issuing bank remains liable for payment of charges."

The SWIFT system.

20. The SWIFT system provides a platform for secure financial messaging around the world. It employs a system of common standards and forms for such messages, including standard forms for the issuing and advising of LCs. Such messages and forms are intended to be read and understood internationally by specialists in the trade finance departments of financial institutions, as well as by exporter/sellers. That context clearly has to be borne in mind when construing a LC sent via the SWIFT messaging system. Documentary credits sent via SWIFT are dealt with through trade finance specialists, well-versed in SWIFT.

21. One feature of SWIFT is that LCs are normally *issued* in a standard form message known as an "MT700". They are *advised* in a similar-looking standard form message known as an "MT710". Both LC1 and LC2 were sent by way of MT700. The SWIFT User Handbook explains that the MT700 "*is sent by the issuing bank to the advising bank which is used to*

indicate the terms and conditions of a documentary credit which has been originated by the sender (the issuing bank)".

22. In the instant case, the Defendant sent both LC1 and LC2 by way of MT700. The experts agree, and the Defendant now accepts, that that was an incorrect usage for a non-issuer. By their Joint Memorandum, the experts agree that the right form for advising is MT710.

23. There is also a SWIFT handbook which sets out what the numbered fields in the SWIFT message are designed for, and hence what they would convey to a party versed in the SWIFT system.

The letters of credit and the fields used.

24. As I have noted, the letters of credit here are annexed to this judgment. The various fields on which reliance was placed by the parties were as follows:

(1) The field "SWIFT output" states "FIN 700 Issue of a Documentary Credit". As I have noted, the experts were agreed that a form 700 is the form designed to be used by the issuer of a documentary credit.

(2) The "Sender" is identified as the Defendant;

(3) The "Receiver" in LC2 is identified as Rural Commercial Bank of Zhangjiagang (i.e. the first Advising Bank);

(4) The "Applicant" is identified as Laheq and the "Applicant Bank" is identified as SBOL;

(5) The "Beneficiary" is identified as the Claimant;

(6) Field 41D states that the L/C is "*available with*" SBOL "*by negotiation*". Field 41 is designed, according to the SWIFT handbook, to define the bank with which the credit is available (the place for presentation) and an indication of how the credit is available. The letter D indicates that the credit is available by negotiation.

(7) Field 42D identifies the "Drawee" as SBOL.

(8) Field 47A "Additional Conditions":

(a) Condition 5: "*all bank charges other than those of issuer are for account of beneficiary*";

(b) Condition 8: subject to UCP 600 and laws of England;

(c) Condition 10: "*this is an operative instrument and no confirmation shall follow*";

(9) Field 51D. The applicant bank in Field 51 was named as SBOL (Comoros). The SWIFT messaging guide states that "*This field specifies the bank of the applicant customer if different from the issuing bank*".

(10) Field 72: "*Sender to Receiver Information": "Yr chrgs are for benf account. No our (SBLTGB2L) responsibility for payment"*.

(11) Field 78: Instructions to paying, accepting, negotiating bank. Remitting bank to forward documents to "*Applicant Bank"* (SBOL). Payment will be effected by applicant bank at maturity upon receipt of complying documents at applicant bank counters.

25. The Claimant also relied on certain of the other inter-bank communications in relation to LC2. Thus:

(1) The Rural Commercial Bank of Zhangjiagang's Advice of Documentary Credit of 11 March 2014 referred to the Defendant as the "Issuing Bank";

(2) The Bank of China's documentary remittance cover sheet dated 14 March 2014 referred to the L/C having been issued by the Defendant;

(3) The Bank of China's message to the Defendant of 19 March 2014 used MT 754. MT 754 is the message type to be used in a communication from paying, accepting or negotiating bank to the issuing bank to advise that compliant documents were presented.

The issues.

26. As I have already said, these proceedings concern the Claimant's claim for payment pursuant to a letter of credit for US$3million, plus interest. The Defendant denies liability in its entirety on the principal basis that it was and is not the issuing bank liable to make payment in the event of non-payment by the nominated bank; alternatively that the terms of the LC are such that the normal liability of an issuing bank in the UCP 600 is excluded; and, thirdly, on the basis of an estoppel by convention.

27. There are therefore the following issues:

(1) Was the Defendant, on the true construction of the subject letter of credit (ie LC2) the issuing bank?

(2) If it was the issuing bank, was its liability to make payment excluded on the true construction of the letter of credit?

(3) Was there an estoppel by convention to the effect that the Defendant was not the issuing bank?

Issue 1: The construction of LC2: who was the issuing bank?

The relevant legal principles.

28. The relevant legal principles were stated to be as follows:

(1) The parties were agreed that ascertaining the parties to a contract, or the capacity in which they contract, is an exercise in contractual construction: see for example *Homburg Houtimport BV and others v Agrosin Private Ltd* [2004] 1 AC 715 *per* Lord Bingham at [9].

(2) The parties differed, however, on the appropriate role to be played by extrinsic evidence.

(a) Mr Brown, for the Claimants, originally contended that a letter of credit was to be regarded as akin to a bill of lading, being either negotiable or transferable. However, by the end of his submissions I understood him not to go this far. Instead, he submitted that even if not properly regarded as negotiable or transferable, then it was important to bear in mind the "audience" to whom the credit was addressed. In this regard, he referred me to *Lewison on The Interpretation of Contracts*, 6th edition, at chapter 3 section 18, in which this concept is explored. Thus, where, for example, the parties anticipate that the contract will be transferred, or will be read by a number of parties and relied on, the room for evidence of factual matrix will be more limited. He also referred me in this context to the speech of Lord Hodge JSC in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2017] 3 W.L.R. 1170 (UKSC), in support of the proposition that the LC must be construed within the "four corners" of the credit and UCP 600, which is incorporated by reference. This principle was expressed by Lord Hodge at [73] as follows:

"The autonomous nature of a letter of credit means that, subject to qualifications which are irrelevant in this case, the conditions governing the issuing bank's obligations to pay are to be found exclusively in the terms of the letter of credit."

(b) The Defendants, for their part, contended that despite their special nature, documentary credits subject to English law should be construed in accordance with the ordinary rules of contractual construction, including as to the admission of extrinsic evidence where appropriate, relying in this connection on *Jack on Documentary Credits, 4th ed, para 1.17.* In this regard, they submitted:

(i) The identity of the parties to a contract is a question of fact and may be established by evidence. Such evidence is admissible even where the contract is in writing, at least so long as it does not contradict its express terms, and possibly even where it does: *Homburg per* Lord Millett at [175].

(ii) Extrinsic evidence is admissible to prove the true nature of an agreement or the legal relationship of the parties: *Chitty on Contracts 32nd Ed, 13-119; Barclays Bank Plc v Landgraf* [2014] EWHC 503 (Comm) *per* Popplewell J at [32]-[39].

(iii) There are parallels between the instant case and the cases of contractual misnomer. In *Muneer Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470, the Court of Appeal conducted a review of the relevant authorities as to the admissibility of extrinsic evidence in misnomer cases, and drawing together the various strands concluded at [57] that:

"i) Where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue.
ii) In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.
iii) If the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification."

(iv) The Defendants also relied, in this regard, on *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC) per Ramsey J at [82], where he said:

> *"In my judgment those passages summarise the principle of misnomer as it has been generally applied in the earlier decisions set out above. First there must be a clear mistake on the face of the instrument when the document is read by reference to its background or context. In Nittan there was a clear mistake by the insurers in putting Sargrove Electronic Controls Limited instead of Sargrove Automation – a dormant company instead of the company which actually carried on the business. In Gastronome the mistake was made by addressing the guarantee to Gastronome at an address in France when the French company was not the party who was to contract with or invoice the company whose liabilities were to be guaranteed."*

(v) The subsequent conduct of parties may be admissible as evidence to prove the nature of the agreement or the legal relationship of the parties, even though this may vary or add to the written instrument: *AG Securities v Vaughan* [1990] 1 AC 417 *per* Lord Oliver at 469C and Lord Jauncey at 476G; *The Interpretation of Contracts***,** 6th Ed, 3.18**;** *Barclays Bank Plc v Landgraf* (*supra*) *per* Popplewell J at [39].

(vi) *Taurus Petroleum* is not authority for the proposition that the Claimant cite it for (ie that extrinsic evidence is inadmissible in relation to letters of credit.)

(A) The principle that letters of credit are autonomous is not to be conflated with the process of interpreting the terms of a letter of credit. The former is concerned with isolating the documents in which banks deal from the underlying transaction; the latter is concerned with the interpretation of the terms of the relationship between the various participants in the letter of credit.

(B) In fact, *Taurus Petroleum* (especially at [73]) is authority for the proposition that the ordinary principles of construing contracts, including reference to admissible background material, *do* apply to the interpretation of letters of credit. That paragraph (only part of which was cited by the Claimant) states, in whole, that:

73 The answer to the first question is found by construing the unusual terms of the letter of credit. A letter of credit has to be construed according to its terms which establish the nature and conditions of the bank's duty to pay. Like other contracts, a letter of credit must be construed as a whole: individual clauses must be interpreted in their contractual context. In ascertaining the meaning of a particular clause or clauses, especially in an unusual contract such as this letter of credit, it is helpful and often necessary to adopt an iterative process by which an initial prima facie view as to meaning is tested against indications of another meaning or other meanings which the document gives when considered as a whole. It is well-established law that a letter of credit creates an obligation to pay which is independent of and detached from the underlying contract between a seller and a buyer. The autonomous nature of a letter of credit means that, subject to qualifications which are irrelevant in this case, the conditions governing the issuing bank's obligations to pay are to be found exclusively in the terms of the letter of credit. The background to the letter of credit is the international sanctions against Iraq following the invasion of Kuwait and the later continuation by the government of Iraq of the arrangement for the payment of the proceeds of sales of oil by Iraq of which a portion was used to finance the UN compensation fund for Kuwait. But I agree with Moore-Bick LJ that that background in this case does not assist the construction of the letter of credit, not least as there does not appear to have been evidence of the banks' knowledge of those arrangements. The focus therefore is exclusively on the terms of the letter of credit.

(C) The weight to be attached to factual background depends upon the particular factual circumstances of the letter of credit in question, in line with *Wood v Capita.* In *Taurus Petroleum*, the court was concerned with the fact that, although a bank must carefully assess the creditworthiness of its own customer before agreeing to open a letter of credit at its request, the actual process of doing so is in most cases essentially mechanical. This is because the terms of the credit are likely to be determined largely, if not entirely, by the seller and will be communicated by the buyer to its bank. The bank in turn will issue the credit in terms undertaking a liability to the beneficiary against which it will seek an indemnity from its customer (see Lord Clarke at [8]). On facts such as those, one should be cautious before construing letters of credit by reference to extraneous circumstances.

(D) Furthermore, one of the reasons for looking only at the four corners of the letter of credit in *Taurus Petroleum* was that there was no evidence before

the court of the extent to which the parties to the transaction were aware of the particular background facts relied upon.

(3) I consider the relevance and admissibility of extrinsic evidence below, along with the evidence that is said to be relevant here.

(4) The parties were, as I understood it, in agreement (unsurprisingly) as to the legal principles governing interpretation. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Background means absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man, provided that it should have been reasonably available to the parties at the time of entering into the contract. If one would conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had: *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, *per* Lord Hoffmann at 912-913.

(5) The Defendant emphasised that the construction of a contract is not a literalist exercise focused solely on a parsing of the wording of a particular clause. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. Interpretation is a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. The extent to which textual or contextual analysis will assist the court in its task of constructing a contract will vary according to the circumstances of the particular agreement. Even negotiators of complex formal contracts may not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, or differing drafting practices. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type: *Wood v Capita Insurance*

Services Ltd [2017] AC 1173 at [10]-[13]. These principles were expressly applied in the context of letters of credit by the Supreme Court in *Taurus Petroleum per* Lord Hodge at e.g. [73] and Lord Mance (dissenting in the result) at [94].

(6) The Defendant pointed out that if an obviously inappropriate form is used, its language must be adapted to apply to the particular case: *Homburg per* Lord Bingham at [12] and Lord Millett at [182]. In this regard, there is no limit per se to the amount of red ink or verbal rearrangement or correction which the court is allowed to undertake when undertaking the analogous activity of rectifying a contract by construction. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 per Lord Hoffmann at [25].

(7) In addition, as the Defendant also pointed out, in a standard form contract, it is a well-established canon of construction that, where there is inconsistency between the printed terms of a standard form and the terms which the parties have themselves written into the document, the latter should prevail: *Homburg per* Lord Millett at [183]. This principle is applicable even where the inconsistent provisions are of equal importance and the printed form is appropriate to the particular case as well as to the general. *A fortiori*, primacy must be given to the written words where they describe the main intent and object of the particular contract: (*ibid,* [184]).

(8) Finally, the parties referred me to guidance as to the approach to the UCP.

(a) In *Glencore v Bank of China* [1996] 1 Lloyd's Rep 135, Sir Thomas Bingham said, at 148:

> *"[the UCP is] a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. When courts, here and abroad, are asked to rule on questions such as the present they seek to give effect to the international consequences underlying the UCP."*

(b) Thomas LJ in *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] 1 C.L.C. 276 stated at [29]:

"In my view, a court must recognise the international nature of the UCP and approach its construction in that spirit. It was drafted in English in a manner that it could easily be translated into about 20 different languages and applied by bankers and traders throughout the world. 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."

(c) However, the Defendant cautioned me that international banking practice cannot override the express effect of the credit or of the UCP: *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 at 153.

The Claimants' Contentions.

(a) SWIFT Custom and Practice

29. The SWIFT message type ("**MT**") used by the Defendant is of central importance. The MT enables the banking parties to the relevant relationship to understand without further inquiry whether the communication constitutes an operative documentary credit, advice of a documentary credit or something else. Given the requirement for consistency, efficiency, speed and uniform application (including by mechanical authentication by the receiving bank), the MT is central. If it were otherwise, there would be no point in using any MT other than the generic format (e.g. MT 999).

30. The SWIFT Category 7 messages are used for documentary credits and guarantees and are sent between parties having a Relationship Management Agreement (RMA) in place. The SWIFT RMA is a message capability enabling members of the SWIFT network to exchange those messages requiring authentication over the network. These messages are in prescribed format and the fields of the messages are structured so that the messages are

authenticated without the need for separate authentication. Both the MT700 and the MT 799 are authenticated messages.

31. The use of Form MT700 as the relevant form for the issuance of a letter of credit was common ground between the experts.

32. Mr Lee further stated in the Experts' Joint Memorandum that The Defendant "*should have transmitted the [L/C] using a MT710 rather than a MT700. A MT710 would have been the proper course to follow to advise of a Third Bank's or a Non-Bank's Documentary Credit."*

33. Mr Bullivant's evidence was that a MT700 is a SWIFT message type that is used by issuing financial institutions when opening an LC. This SWIFT message is sent by the issuing party to the advising bank. It is used to indicate the terms and conditions of a documentary credit which has been originated by the sender.

34. The Defendant chose to send the communication using MT700. It would therefore be understood by any recipient bank (or any other bank with whom the LC was later negotiated or traded) that the sender was the Issuer of the LC. The fact that the field would allow for automatic authentication (i.e. there would be no need for manual review) reinforces this conclusion. In other words, a recipient of an authenticated MT700 would (automatically) understand that it had received an operative LC from the issuer without the need to consider any further aspect of the LC (still less any other document).

<u>Interpretation of other relevant terms</u>

35. The conclusion that the Defendant is the Issuer is reinforced by other aspects of the letter of credit:

(1) Fields 41D and 42. Field 41D provides that the credit is "*available with*" SBOL by "*negotiation*". In its opening submissions, the Claimant argued that this indicated that SBOL was a nominated bank within the meaning of Article 2 of the UCP, since it was negotiating the drafts. However, by the time of closings, it had changed its position. Instead, Mr Brown contended that the word negotiation was not used in the defined sense,

since in this letter of credit SBOL was the drawee of the drafts as well as the bank to whom the documents were presented, which would, on the face of things, exclude the application of Article 2 of the UCP. Instead, he argued that the word negotiation was used in a common, but technically inaccurate way, relying on the discussion on *Jack on Documentary Credits* at 2.19.

(2) Field 51D: The SWIFT messaging guide states that "*This field specifies the bank of the applicant customer if different from the issuing bank*". Accordingly, the entry of SBOL in Line 51D was correct and refers to the Applicant's bank. This is an optional field which the Defendant elected to use.

(3) Field 78: includes repeated references to the "Applicant Bank" (rather than the issuing bank).

(4) For what it is worth, both Advising Banks in fact interpreted the letter of credit as having been issued by the Defendant. I have noted the relevant evidence above.

36. Mr Lee places emphasis on the letter of credit number and the prefix "SBLC". His evidence, however, is based (it would appear) on some evidence provided by the Defendant as to its own "*generic numbering system*". None of this was ever communicated to the Claimant. The Defendant's own internal messaging code is not a matter which objectively casts any light on the status of the Issuer. Even if the code was decipherable to a recipient (which it is not), it would equally be consistent with an arrangement whereby the Defendant acted as Issuer for an Applicant Bank.

37. Finally, Mr Lee's criticism that Ms Miglorine has "*failed to take account of the relevant wider context*" is plainly misconceived. The alleged "*wider context*" concerns a range of matters which are wholly irrelevant to the construction of the letter of credit.

The Defendants' Contentions.

38. The Defendant, against that legal background, made a number of submissions, which I consider under the following heads:

(1) General considerations.

(2) The relevant background to LC2.

(3) The terms of LC2.

(4) The underlying transaction.

(5) The subsequent conduct of the parties.

39. I consider each in turn.

General considerations.

40. The Defendant submitted I should bear in mind the following:

(1) The SWIFT messaging system and the importance of international conformity in the use of authenticated messaging systems. The SWIFT system provides a platform for secure financial messaging around the world. It employs a system of common standards and forms for such messages, including standard forms for the issuing and advising of letters of credit. Such messages and forms are intended to be read and understood internationally by specialists in the trade finance departments of financial institutions, as well as by exporter/sellers. That context clearly has to be borne in mind when construing a letter of credit sent via the SWIFT messaging system, and the Defendant accepted that this is a factor giving weight to the primary submission of the Claimant.

(2) The terms of the UCP 600 and the importance of international standards for its universal application.

(3) The fact that the parties to LC2 elected to be bound by English law, including English principles of contractual interpretation.

(4) The fact that letters of credit are (in general) mechanisms put in place to protect exporter beneficiaries and, in consideration of who should bear the risk of internal letter of credit

inconsistency, the fact that exporter beneficiaries agree to the terms of the letters of credit put in place prior to giving up possession and control of goods.

(5) The fact that UCP 600 does not contain any rules for determining the identity of an issuer; rather, the UCP assumes that an issuer exists and that there is no doubt as to its identity. Accordingly, it is not possible to answer the question "*who is the issuer*?" from an analysis of UCP 600. As such, no question as to the interpretation of UCP 600 in that regard arises in this case.

(6) UCP 600 recognises that letters of credit can be – as they have traditionally been – communicated by *any* international means, including telex and telegram. Neither SWIFT nor the SWIFT Users Handbook – which govern what is in essence one, albeit common, proprietary message authentication system – are mentioned anywhere in the UCP.

(7) It follows from the fact that the UCP does not have the automatic force of law that it can be incorporated into a credit subject to modification. It is then a question of interpretation (subject to possible instances which do not arise in this case) as to whether a particular term of the credit overrides a contrary provision of the UCP. One consequence is that an explicit statement that a particular UCP provision is not to apply occasions no difficulty and must be respected – and the beneficiary (for whose protection letters of credit are generally made) is entitled to accept or reject a letter of credit offered on such modified terms.

(8) The ICC makes available to interested parties expertise in the interpretation of the UCP in two ways. First, the ICC Commission on Banking Technique and Practice meets regularly to consider queries about the UCP, and publishes the resulting Opinions. Secondly, the ICC runs a "DOCDEX" system, which is a means of resolving letter of credit disputes through a decision of three experts appointed by the ICC's International Centre for Expertise from a list of experts maintained by the ICC Banking Commission; the resultant expert opinions are anonymised and published. The parties have both instructed experts to give evidence on market practice in relation to the issuance and advising of letters of credit and both, it can be assumed, have access to those databases. Neither has identified any Opinion or decision to the effect that the use of MT700 automatically and without more carries the consequence that the sender is both issuer and liable as such.

The relevant background information.

41. The admissible background context relating to the formation of LC2 was and is highly relevant: that is clear from the legal principles referred to above; the fact that this case is concerned with the interpretation of the terms of the documentary credit rather than anything to do with the underlying contract (and so does not engage the autonomy principle); the fact that the question of interpretation relates to the fundamental issue of the identity of the parties to the credit; and (as set out below) the fact that the circumstances of this particular transaction were far from mechanical. Altogether, the admissible background leaves no doubt that the Claimant clearly understood that SBOL, rather than the Defendant was the issuer.

(1) Whatever the ultimate explanation for the closure of LC1 and the opening of LC2, which the Claimant has never explained, it is clear that they formed one continuous course of dealing. As such, all matters relating to the whole of that course of dealing are of potential relevance to the interpretation of LC2.

(a) First, the Claimant already had LC1, which for these purposes was in materially identical terms to LC2, in that it was also sent by the Defendant by way of MT700, its key fields were filled out in the same way, there was reference at field 72 to "no our responsibility for payment", and it was advised by a correspondent bank in China to the Claimant. And yet, in relation to LC1, the Defendant repeatedly made clear by the Disclaimers that it was doing no more than transmitting messages on behalf of SB PLC and was not responsible for any payment under the letter of credit. The Defendant relied in particular on the following SWIFTs:

(i) SWIFT dated 5 February 2014 refusing discrepant documents.

(ii) SWIFT dated 14 February 2014 seeking confirmation that agreement for payment outside LC1 had been reached.

(iii) SWIFT dated 24 February 2014 asking for beneficiary's consent to close SWIFT dated 25 February 2014 cancelling LC1.

On each occasion, the messages – including the Disclaimers – appear to have been drafted by Mr Zulauf, demonstrating that he had relevant knowledge of the true nature of the agreement and of his obligations under it.

(b) Second, the documents presented under LC1 on 23 January 2014 included charter party bills of lading rather than regular bills of lading. Under the UCP, charter party bills are not permitted unless expressly allowed, which they were not here: see UCP Article 19(vi). Here, the charter party bill of lading names SB PLC as consignee. The consignee is generally the issuer because it is entitled to legal receipt of the goods upon delivery, and need only release them upon payment by the buyer/applicant and endorsement of the bill of lading. Nothing on the face of LC1 suggests that – if it was understood that the Defendant was the issuer – SB PLC should nevertheless be named as consignee. The fact that the Claimant chose to name SB PLC as consignee therefore strongly suggests that it was aware, under LC1, that SB PLC rather than the Defendant was issuer.

(c) The closure of LC1 was negotiated between the Claimant and Mr Zulauf on behalf of the Suisse Bank Group. There were no such negotiations with the Defendant. That is entirely in line with Art.10(a) of UCP 600, which provides that "a credit can neither be amended nor cancelled without the agreement *of the issuing bank*, the confirming bank, if any, and the beneficiary".

(d) Next, Mr Black and Mr Zulauf directly and expressly negotiated the opening of LC2 between themselves. It is quite clear from those negotiations that the mutual intention of the relevant parties was for a Mr Zulauf-linked company to issue LC2, alternatively that such company would be the only entity to which the Claimant could and would look for payment:

(i) In three separate emails on 17 February 2014, Mr Black wrote to Mr Zulauf referring to "you" opening a new LC;

(ii) Again on 17 February 2014, Mr Black asked Mr Zulauf to retain the presented documents "in your bank…so we can get the new lc at sight, and when we send

you a new invoice, we will get our payment" – i.e. playing the role of an issuing bank;

(iii) Mr Zulauf wrote to the Claimant, also on 17 February 2014, stating on behalf of the Suisse Bank Group that "we will issue" a new LC;

(iv) On 18 February 2014, Mr Black again wrote to Mr Zulauf making repeated references to "your bank" opening a new LC. Mr Zulauf responded saying that if he did not receive a SWIFT confirmation then he would close the file, and the Claimant "can try to find *other client*" who would open a new LC;

(v) On 24 February 2014, SB PLC wrote to Bank of China via the Defendant saying that it had been informed by the applicant that the beneficiary did not need "our" LC1. Bank of China responded on 25 February 2014;

(vi) On 25 February 2014, Mr Zulauf asked the Claimant to establish an RMA relation with him so that he could send the new LC directly to the Claimant's bank – i.e. not (at least to the Claimant's knowledge) involving the Defendant anywhere in the process;

(vii) Also on 25 February 2014, Mr Black asked Mr Zulauf to issue LC2 to Bank of Ruifeng;

(viii) Finally on 25 February 2014, SB PLC wrote to Bank of China via the Defendant informing Bank of China that SB PLC had cancelled "our" LC1 and closed "our files".

(ix) On 10 March 2014 – the day LC2 was issued – the Suisse Bank Group had sent an email to the Claimant inviting it to use its services.

(e) Here, the *seller* appears to have been in close contact with Mr Zulauf. There is plenty of documentary evidence as to what each of those parties knew, even despite the apparently large gaps in the Claimant's disclosure.

The terms of LC2 itself.

42. What the Claimant received, against all of that background, was LC2, sent on MT700 by the Defendant. The Claimant had had LC1 since September 2013, and had had a draft of LC2 since 25 February 2014, and therefore had plenty of time to consider and compare its terms. Moreover, the covering letters from its banks asked the Claimant to ensure that the terms were consistent and workable, and that any queries should be taken up with the issuer. The onus was therefore on the Claimant to consider those terms: letters of credit exist for the benefit of the international exporter, and the exporter properly takes the risk that they are problematically drafted.

43. In these circumstances, the Claimant would reasonably have said to itself "I have been negotiating for several months with Mr Zulauf. He opened and closed LC1 at my request, and LC2 follows directly on from that. I have asked him to open LC2 for me, and he has told me a number of times that he will issue this new LC2 on behalf of his client. Mr Zulauf has made no mention of the Defendant being the issuer. Moreover, Mr Zulauf is privy to the irregular nature of the transaction. I am aware that he uses the Defendant as an intermediary to send messages, and that every such message has said that the Defendant is not responsible for 'payment'. My own bank has told me that the Defendant is issuer, but, in light of everything I know, that must be incorrect."

44. Mr Lee's unsurprising evidence is that the reasonable and prudent recipient of a letter of credit would, according to International Standard Banking Practice and trade practice, take a holistic view of a letter of credit, reading all SWIFT fields and the document as a whole. That is consistent with the English approach to construing letters of credit: see *per* Lord Sumption in *Taurus Petroleum* at [61] (*supra*).

45. Here, therefore, the Defendant submitted that the reasonable international commercial reader of LC2 would, reading on from the fact that this was a MT700 sent by the Defendant, note the following.

(1) First, SBOL was described by the letter of credit as playing all the functional roles of issuing bank, in particular by making payment to the beneficiary. Applicant banks properly so-called (i.e. which are not issuers) never effect payment <u>to the beneficiary</u> under the letter

of credit: that role is solely performed by the nominated bank, the issuing bank and (where applicable) the confirming bank. In fact, SBOL is described as performing all key roles under the letter of credit.

(2) Second, the nominated bank (field 41) was based in the Comoros, a sovereign archipelago island nation in the Indian Ocean. Conventionally, a nominated bank is located in the beneficiary's home jurisdiction, and its purpose is to provide an efficient, convenient, and trusted address for the easy presentation of documents under a letter of credit. A bank in the Comoros could not have been a more unlikely candidate for the role of nominated bank. Whilst it is not impossible, the reasonable reader would have considered this very odd.

(3) Third, field 41D and 42D conflict with one another. Field 42D identifies SBOL (Comoros) as drawee; field 41D specifies that LC2 is available (and only available) with SBOL (Comoros) "by negotiation". But a bank cannot negotiate drafts drawn on itself: see also UCP article 2. This conflict would, if that were the only possible route of making a demand for payment under this LC2, render LC2 unworkable. For field 41D and 42D to reconcile and for the letter of credit to be a workable credit pursuant to which a demand for payment could validly be made and honoured, SBOL (Comoros) would have to choose to accept the drafts for sight payment rather than negotiate them. By accepting drafts for sight payment, SBOL (Comoros) would be playing the role usually played by an issuer.

(4) Fourth, field 78 specified that a SBOL branch in London would pay the letter of credit, as well as being the bank where presentation is made. The London branch in field 78 is described as the "applicant bank" but the "applicant bank" in field 51 is SBOL (Comoros). It is a nonsense or at least very odd to describe the applicant bank as going to effect payment: as observed above, that in practice is exclusively the role of the issuing bank, nominated bank, or (where applicable) the confirming bank. What field 78 tells us is that SBOL is not a true applicant bank; it must therefore be something else.

(5) A holistic reading of the letter of credit shows that the only entity undertaking payment obligations (whether as nominated bank, by negotiation, as drawee under the bill of exchange or as the entity obliged and instructed to make payment) was SBOL.

(6) Fifth, this is the text of field 72, which includes the Disclaimer in these terms:

"YR CHRGS ARE FOR BENF ACCOUNT.
NO OUR (SBLTGB2L) RESPONSIBILITY FOR PAYMENT."

(7) The first line of field 72 is a reference to the relevant administration fees, which are for the beneficiary to pay. That is an express, and not uncommon, attempt to contract out of the effect of Art.37(c) of UCP 600, which provides that "*A bank instructing another bank to perform services is liable for any commissions, fees, costs or expenses ('charges') incurred by that bank in connection with its instruction*". That is common ground between the parties.

(8) The second line goes on to refer to another matter entirely, i.e. the obligation to pay under the letter of credit. That is clear from a number of factors on the face of the document itself:

(a) The formatting: it appears as a new sentence and in a new line, which suggests that it is moving on to a new topic. A new line in a SWIFT message is a step change in a messaging system such as SWIFT;

(b) The wording in the first line was already sufficient to contract out of Art.37(c); Letters of credit are typically drafted in a terse and economic manner and repetition is unnecessary and liable to give rise to confusion;

(c) The first line refers to "charges", which is the language used in Art.37(c) to which it refers, whereas the second line refers to "payment", which in the context of a letter of credit usually refers to the means by which a credit is honoured (see e.g. Arts 7 and 8 of the UCP 600).

(9) On Ms Miglorine's suggested reading of this field (supported by the Claimant), the entry in field 72 is one continuous statement, all referring to the contracting out of charges otherwise payable under Art.37(c). On that suggested reading, the two separate sentences would be merely duplicative and the second sentence merely surplus. In a medium where terse and economic use of language is the norm, and in the context of prior communications and the other express terms of the letter of credit, this is less likely than the interpretation

that the Defendant is disclaiming liability for any payment under the letter of credit (even though it is the sender of a MT700).

(10) Consistent with all the other indications in the letter of credit so far, this is exactly the confirmation which one would expect: the sender (BIC identifier given) is not liable for payment.

(11) Sixth, the reference number for the letter of credit began "SB…", which were not the Defendant's initials but were certainly the initials of SB PLC or of SBOL. Whilst this is a small factor, it is not insignificant when taken together with the other features of the letter of credit.

(12) Seventh, the reasonable reader would also have reflected that, when all is said and done, MT700 is just a form, that letters of credit can be sent by any form of teletransmission, that this letter of credit incorporated and was governed by the UCP 600 and not by the SWIFT Users Handbook – and that the sender had done everything it reasonably could on the face of the (wrong) form to dispel ambiguity and clarify the relevant obligations of each of the parties. She would have recognised that the LC had been transmitted on the wrong standard form, and that the author had tried to retrofit the relevant information into the available fields, in particular by:

(a) Completing Field 51D, an entirely optional field which is very rarely used, to draw attention to the fact that the issuing bank was not the bank that was sending the SWIFT, but was rather SBOL;

(b) Including a lengthy description of SBOL's role as presentation and reimbursing bank at field 78;

(c) Expressly stating at field 72 that payment was not the Defendant's responsibility;

(d) Incorporating terms of the letter of credit whereby SBOL was obliged in practice to carry out all of the functions of an issuer, whereas the Defendant was described as playing no such role, and indeed no role at all.

(13) As against this, field 51D names SBOL (Comoros). According to the SWIFT Users Handbook, field 51D "*specifies the bank of the applicant customer if different from the issuing bank*" (underlining added). This, says the Claimant, means that SBOL cannot be the issuing bank – and so the issuing bank must be the Defendant because there is no other option. Field 51 is optional and is very rarely completed even where there is an applicant bank. The reasonable reader will know from the rest of the form that something has gone wrong, both with the use of this form and with the description of SBOL seemingly undertaking multiple inconsistent roles. The answer is not to fall back mechanically on the Defendant being the issuing bank; it is to understand that SBOL is the only entity undertaking obligations in this letter of credit.

(14) In its skeleton argument, at paragraph 30.7, the Claimant suggests that SBOL being identified as "drawee" is consistent with SBOL being a nominated bank. But it is no less consistent with SBOL being issuing bank: see for example Art.2 of UCP 600 (definitions), which defines "honour" as, amongst other things, meaning "to accept a bill of exchange ('draft') drawn by the beneficiary and pay at maturity if the credit is available by acceptance."

(15) The above makes it absolutely clear to the reasonable reader, giving due scrutiny to this letter of credit, that the wrong form had been used, that SBOL was in fact the issuer, and in any event that the Defendant assumed no liability under the letter of credit.

The underlying transaction.

46. The Defendant submitted that there were a large number of oddities about the underlying transaction. I will not set out all the alleged peculiarities, since, for the reasons I give below, I consider this material irrelevant to the questions that I have to decide.

Subsequent conduct.

47. The subsequent conduct of the parties, which is admissible to show the nature of the contract or the capacity of the parties to it, shows the following:

(1) The Claimant originally sought payment under LC2 from SBOL and never sought such payment from the Defendant;

(2) In pre-action correspondence from the Claimant's representatives, it was said that the Claimant had regarded the Defendant and SBOL as being within the same group of companies;

(3) In pre-action correspondence from the Suisse Bank Group, Mr Zulauf referred to SB PLC as being the issuer of LC1 and SBOL as being the issuer of LC2;

(4) Even now, there is no evidence in front of me from Mr Black that he understood at the time that the Defendant was the issuer;

(5) In the Claimant's (non-agreed) chronology, it refers to SBOL as issuing the credit, and to the Defendant only as sending the credit.

Discussion.

48. Those being the parties' respective contentions, I turn to consider my conclusions.

The use of extrinsic evidence.

49. I start with the relevant material for consideration as to who the parties to LC2 are. In my judgment, extrinsic evidence can be relevant to a letter of credit, and I accept the authority of *Jack*, cited above, on this issue. I do not accept that a letter of credit is akin to a negotiable or quasi-negotiable document. However, having said that, where the issue is as to the parties to the contract, and one party has, effectively, via the use of a particular form, indicated that it is issuer, then there is a need for caution about the evidence that one should look at. Quite clearly, there is the need to be satisfied that the relevant material goes to the question of the identification of the parties to the contract; and the further need to be satisfied that that material was known, or at the least, available to both parties. Further, as I discuss briefly below, evidence as to the understanding of the parties to the transaction as to who the parties were is clearly relevant to the question of estoppel; but it is questionable

whether it is relevant to the question of the objective interpretation of the contract. I consider matters on both bases in this judgment.

The extrinsic evidence here.

50. In this connection, I turn to the evidence that the Defendant relies on.

(1) First, the Defendant relied on oddities in relation to the underlying transaction. I can deal with this argument briefly. It is quite true that there were a number of unexplained peculiarities in the documentation. It may also have been that better disclosure or the presence of Mr Black might have cleared these up. However, given the (indisputable) principle of the autonomy of the letter of credit from the sale contract, and given that these matters do not, in my judgment, assist me in determining the issue of who the issuing bank under the letter of credit in question was, which must be a matter of construction of the letter of credit, against the background of material relevant to this issue available to both parties, I do not think it necessary to set out all the alleged peculiarities in this judgment.

(2) However, in my judgment, the evidence relating to LC1 falls into a different category. This documentation forms part of a continuous course of dealing in which the letter of credit to be used for payment under the sale contract was the subject of discussion and thereafter provision.

51. It is however then necessary to consider what that evidence in fact establishes, and in particular whether it is sufficient to show that both parties to the relevant letter of credit realised that the issuer was in fact SBOL. As to this:

(1) I saw no evidence as to the correspondence between the Claimant and its buyer or as between the Claimant and Mr Zulauf prior to the issue of LC1. It follows that there was no factual matrix evidence in the classic sense relevant to the construction of LC1.

(2) LC1 was then issued. That letter of credit was issued on a MT700 form, and was sent on by the Defendant, indicating that the Defendant was the issuer. The evidence of Mr Bullivant and Ms Ilinskaya was that they did not understand themselves to be undertaking

the obligations of an issuer and the amount charged to Mr Zualauf would support this evidence. However:

(a) There is no suggestion that this understanding, or the charging basis, was ever passed on to the Claimant at the time of the issuance.

(b) The evidence of the Defendant's witnesses was also that, as one would expect from parties involved in international financing, they understood that the MT700 form was the form which was used to transmit a documentary credit by the issuer of that credit, and that the appropriate form to be used if all that was intended was to advise the credit would be the MT710.

(3) The other fields of that letter of credit which I regard as of importance, particularly because many of them equate to those relied on in LC2 by the Defendant, were as follows:

(a) The applicant was the buyer.

(b) The applicant bank was Suisse Bank PLC. It was the evidence of Ms Miglorine, which I accept, that it is not often that this field is filled in. When it is, it is usually because the bank in question does not have access to SWIFT. It indicates that there is some relationship, outside the terms of the letter of credit between issuer and applicant bank. I accept this evidence.

(c) Field 41D stated that the credit was available by negotiation with Suisse Bank PLC at 53 Davies Street London.

(d) The drawee was Suisse Bank PLC in London. The drafts were to be at sight.

(e) Field 47A stated, at Condition 5, that all bank charges other than those of the issuer are for the account of the beneficiary.

(f) The letter of credit was governed by English law and was subject to English jurisdiction.

(g) There was to be no confirmation.

(h) The advising bank was Bank of China (Hubei branch).

(i) Field 72, under the heading of "Sender to Receiver Information" stated that "Yr Chargs are for Benf Account. No our (SBLTGB2L) responsibility for payment.

(j) The sender of the email was stated to be SBLTGB2L.

(k) The documents required included clean on board bills of lading.

(4) On the face of it, I would conclude that a reasonable reader of this email with the knowledge available to the Claimant and Defendant would conclude that the issuer of this LC1 was the Defendant.

(5) As I have already noted, when the notification of the letter of credit was passed on to the Claimant, the issuer was shown as the Defendant.

(6) When documents were then presented under that letter of credit, those documents showed the issuer under LC1 as the Defendant.

(7) Thereafter, as Mr Ayres QC pointed out, there were then a number of communications sent via the Defendant which included the Disclaimers, as defined above. What would these have conveyed to a reasonable person in the position of the Claimant? Whilst I think it arguable that they would have conveyed the fact that the Defendant did not regard itself as the party liable on the letter of credit, I do not think that these messages are clear enough to dispel the conclusion that the issuer was in fact the Defendant. They might equally have been messages sending on information from the nominated bank, which was the bank to whom the documents had been presented and by whom they had been rejected.

(8) This was the situation as at the time when LC1 was cancelled, which was on 25 February 2014. That cancellation was by mutual consent between beneficiary and Suisse Bank PLC. This would be consistent with Suisse Bank PLC, rather than the Defendant, being the

issuer; certainly one would have expected the Defendant to have been involved in any cancellation.

(9) Mr Ayres QC submitted that such evidence, ie of subsequent conduct, would be admissible as evidence of the actual relationship between the parties, in accordance with the cases and authorities referred to in paragraph 28(2)(b)(v) above. Those cases make clear that where the documentary evidence is a "sham", and conceals what both parties intended to be the true position, then evidence of the actual intention of the parties is admissible to demonstrate the true position. I accept, of course, this principle. However, I would take the view that there is no evidence in support of the suggestion that LC1 was a sham. I do not regard these authorities as of assistance on the facts of the present case.

(10) Overall, I take the view that the issuer of LC1 was the Defendant; and that although there is some indication that its view that it was not liable as such was passed on after the letter of credit was issued, the indications in the correspondence are not clear. However, the real question is then what, if anything, these indications tell one about who the correct parties to LC2 were, or were understood, to be. I turn therefore to LC2.

52. This leads me on to the correspondence leading to the issuance of LC2, and in particular the exchange of emails in mid February 2014, to which I have made reference in the chronology set out above.

53. I would make the following comments about these messages.

(1) The first is that none of these messages went to the Defendant. Thus, they evidence the state of mind of Mr Black and the Claimant, on the one hand, and Mr Zulauf, on the other.

(2) The second is that the communications do not, again, convey any very clear message. It is quite true that they talk in terms of Mr Zulauf issuing the new letter of credit. However, there is no indication that this letter of credit would not be issued by the same institution as LC1; and no indication that Mr Black knew that Mr Zulauf was not authorised by the Defendant to act on its behalf.

54. It is against this background that the actual terms of LC2 fall to be construed, as they would appear to a reasonable reader, with the background knowledge available to the parties, and with a reasonable technical knowledge of SWIFT.

The terms of LC2.

55. Both parties, as I understood it, were in agreement that the starting point was the fact that the message format utilised was a MT700 format. Both parties were also in agreement that this connoted that the sender was the issuer; and that a different form, namely the MT710, should have been utilised had the sender intended to indicate that it was not an issuer but was instead an advising bank. Given that this is an international form, designed to be read in the same way across the world, and in the context of an industry that utilises mechanisation to a large extent, this is a very important consideration, and I understood both experts and Counsel to agree this.

56. This being the starting point, what did the other terms of the letter of credit indicate?

(1) The applicant bank (field 51D) was SBOL. As Ms Miglorine explained it, and I accept her explanation, an applicant bank is likely to be a bank which does not itself have access to SWIFT. Mr Ayres QC suggested that the fact that this Bank was in the Comoros should have sounded an alarm bell with the beneficiary. I do not accept this. In fact, the applicant bank was of no real interest to the beneficiary.

(2) The amount was the reduced amount of $3,000,000. There was no explanation of this. However, there did not need to be. As the well known adage has it, the bank deals in documents and not in goods and would therefore not be interested in the explanation for the reduction in the price, which could have been accounted for in many ways.

(3) The credit was stated to be available with SBOL, in the Comoros, by negotiation. Again, Mr Ayres QC suggested that this was peculiar, because a nominated bank (under field 41D) would be expected to be in the same country as the beneficiary. Again, I quite accept the general proposition; but I do not accept that this is relevant to the question of who the issuing bank is.

(4) The method of payment is said to be by negotiation, via drafts, 120 days after sight, with the bills of exchange being drawn on SBOL. The difference between LC1 and LC2 in this regard was thus that the drafts under LC1 were to be sight drafts, whereas the drafts under LC2 were 120 days.

(a) Mr Ayres QC suggested that this made no sense, particularly in view of Article 2 of the UCP, since a bank cannot accept a draft drawn on itself. Article 2 states as follows:

"Negotiation means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank."

(b) Mr Brown, in response to this, argued that the term negotiation was used inaccurately but as it often is, relying on *Jack on Documentary Credits* at paragraph 2.19, where the authors say that:

"The term "negotiation" is sometimes used to refer to the acceptance and payment against documents of the full amount of the credit. This is a misuse. Negotiation is better used only when the paying bank pays less than the full amount by reason of a time element, as Article 2 indicates."

(5) I conclude that Mr Brown is correct on this. What is clear from the credit is that it was available; that it was available by negotiation; that there would be drafts, payable 120 days after sight; and that the drawee was to be SBOL. What the credit thus contemplates, expressly, is something other than negotiation as defined in Article 2. The conclusion to be drawn from this is not, as Mr Ayres QC suggests, that SBOL is not a nominated bank, but an issuer; but that the type of negotiation contemplated is not of the type defined in the UCP 600.

(6) Next Mr Ayres QC relied on Field 72. The credit provided that all bank charges other than those of the issuer were for the account of the beneficiary. That made clear that the charges of, for example, the receiving bank were for the beneficiary. In field 72, therefore, he argued that where there was a reference to the Defendant not being responsible for payment, that must have been indicating that the Defendant was not responsible at all, rather than

that the Defendant was not responsible for charges, since otherwise the provision would have been surplusage. He went on to argue that this was supported by the fact that the field was divided into two sections; and that if it had been intended that the whole contents should be read as a unitary whole, then the second sentence would have started immediately after the end of the first, in view of the fact that there were spaces remaining in the first line for this to happen.

(7) Mr Brown countered by arguing that Field 72 was to be read as a notification to the receiver of the email, namely the Rural Commercial Bank of Zhangjiagang, that not only were all charges to be for the beneficiary, but also that there was to be no recourse to the issuer, as would normally be the case, under Article 37 of the UCP. Whilst it was Mr Lee's evidence that in the Far East this would not arise, since the receiver would have insisted on advance payment of its charges, there was no evidence that this would be known to all involved in trade finance, irrespective of where they were located.

(8) In this regard, I prefer the contention of Mr Brown. Again, looking at the matter from the perspective of a reasonable observer with an understanding of the UCP, then there is, as Mr Brown says, a reason for including both of the terms to which I have referred – namely to include an exclusion of Article 37. Moreover, the suggestion that a reader of the email should read it with the degree of exactitude suggested by Mr Ayres QC – counting the spaces available in the line to conclude that the second sentence relates to a different matter from the first – is, in my judgment, unrealistic, and particularly so in the context of a contract which is intended to be dealt with rapidly and without close examination.

(9) Mr Ayres QC's next point was that the reference number for the LC began "SB…", which were not the Defendant's initials but were certainly the initials of SB PLC or of SBOL. He characterised this as a small point. I would not regard it as a point of substance at all. It is just as commensurate with the Defendant using a reference to identify who had asked it to issue a letter of credit as with a reference to identify the issuer; and, indeed, the recipient of the letter of credit would not be able to tell with any certainty who that reference number related to.

(10) Mr Ayres QC then submitted that the reasonable reader would have concluded that the sender had used the wrong form, but had then tried to make clear that this was so by:

(a) Completing Field 51D, an entirely optional field which is very rarely used, to draw attention to the fact that the issuing bank was not the bank that was sending the SWIFT, but was rather SBOL;

(b) Including a lengthy description of SBOL's role as presentation and reimbursing bank at field 78;

(c) Expressly stating at field 72 that payment was not the Defendant's responsibility;

(d) Incorporating terms of the LC whereby SBOL was obliged in practice to carry out all of the functions of an issuer, whereas the Defendant was described as playing no such role, and indeed no role at all.

(11) My response to these points is much the same as indicated in earlier parts of this judgment.

(a) Simply because Field 51D is an optional field that is rarely used, filling it in contains no indication that the issuing bank was not the sender but was instead the party named in this field as applicant bank – quite the opposite.

(b) Field 78 contains instructions given to the paying/accepting/negotiating bank, and indicates that that bank is not the issuing bank, since the instructions come from the issuing bank.

(c) I have dealt with Field 72 and my preferred construction of that field already.

(d) I do not accept that SBOL was to perform all of the functions of an issuing bank, as opposed to a nominated bank. In my judgment, the terms of the letter of credit are much more consistent with it being a nominated bank.

(12) In answer to the Claimant's point that, because field 51D names SBOL (Comoros), and because, further, according to the SWIFT Users Handbook, field 51D "specifies the bank of the applicant customer <u>if different from the issuing bank</u>" (underlining added), this

means that SBOL cannot be the issuing bank – and so the issuing bank must be the Defendant because there is no other option, Mr Ayres QC pointed to the fact that Field 51 is optional and is very rarely completed even where there is an applicant bank. He argued that the reasonable reader would know from the rest of the form that something had gone wrong, both with the use of this form and with the description of SBOL seemingly undertaking multiple inconsistent roles. The answer, he contended, was not to fall back mechanically on the Defendant being the issuing bank, but to conclude instead that SBOL was the only entity undertaking obligations in this letter of credit. I do not accept this argument. It seems to me that the Claimant's argument makes perfect sense, as indicating that SBOL was not the issuer. Instead, it was both the applicant bank and the nominated bank. Mr Ayres QC's argument, with very great respect, seems to me to beg the question. His starting point is that the reasonable reader would know that the wrong form had been used, whereas this at root is the question that one has to answer. It is the end of the enquiry, not the start point.

(13) As to the relevance of SBOL being identified as drawee, Mr Ayres QC at one stage seemed to be submitting that this was equally consistent with both parties' case, in which case it would be of no assistance to me. In fact, however, by the end of submissions, it seemed to me that he relied on this as a positive indication in favour of SBOL being the issuer, because of the inconsistency between the idea that a bank could be a nominated bank and yet could be undertaking a liability to pay against drafts drawn on itself. I have dealt with this argument above.

Subsequent conduct.

57. Mr Ayres QC then submitted that the various aspects of the subsequent conduct of the parties set out above, which is admissible to show the nature of the contract or the capacity of the parties to it, showed that the Claimant regarded SBOL as issuer of LC2. As I have said, I do not regard this as a case in which post contract conduct is properly admissible to assist me, since it is not alleged that the contract was a sham. In any event, I would not regard the conduct relied on as sufficient to show that, despite the fact that the MT700 message form had been used, the issuer was in fact SBOL and not the Defendant. Thus:

(1) The fact that payment was sought from SBOL does not show that the Claimant did not regard the Defendant as also liable.

(2) The fact that the Claimant may or may not have thought that SBOL and Defendant were in the same group of companies does not suggest that the Defendant was not undertaking liability by issuing LC2.

(3) Whether Mr Zulauf thought that the companies with which he was then concerned issued the letter of credit, in circumstances in which he was neither party's agent, cannot assist the Defendant.

(4) Whilst it is true that there is no evidence from Mr Black that he regarded the Defendant as the issuer, then, in the end, this is a matter of contractual construction. Moreover, there is evidence that his agents did regard the Defendant as the issuer, as I have indicated.

(5) References in a non-agreed chronology prepared for the trial cannot assist me in determining what the correct answer to the issue before me is.

The appropriate inferences as to the knowledge of Mr Black.

58. I turn to the question of the appropriate inferences to be drawn from the absence of Mr Black. I have set out the relevant legal principles above.

59. In my judgment, although I quite accept that it was clear that Mr Black did not wish to be cross examined, and I accept also that it may have been the case that this was because there were elements of the underlying transaction which were peculiar, and because he did not wish to be drawn on his knowledge, the real question for me must be to identify precisely what the proposition is that the Defendant suggests is that is relevant to my decision; to identify what evidence is available in relation to that topic; then to identify what evidence might have been available from the missing witness and whether it would be appropriate in the circumstances to draw inferences to support the proposition in question.

60. Under this heading:

(1) The relevant proposition, in my judgment, must be that the Claimant, in the person of Mr Black, understood that the true parties to the contract were SBOL and the Claimant, and not the Claimant and Defendant; that that understanding was objectively communicated by the Claimant to the Defendant; and that hence, as a matter of construction, a reasonable observer would have concluded that the parties to the contract were indeed the Claimant and SBOL, not the Claimant and Defendant.

(2) The Defendant has sought to rely on a number of matters in this regard, including the matters relating to the underlying transaction; the messages in relation to LC1 and LC2 in which, it is said, the Defendant made clear that it regarded itself as only a postbox, by virtue of the use of the disclaimers. In addition, it has sought to rely on the fact that Mr Black and Mr Zulauf negotiated the opening of LC2.

(3) I do not regard any of the above as establishing that Mr Black believed that the true counterparty to the letter of credit was SBOL and only SBOL. Thus:

    (a) The evidence relating to the underlying transaction is, in my judgment, irrelevant.

    (b) The messages from the Defendant might be said to show that the Defendant did not regard itself as issuer. However, I do not think that they are unambiguous in this respect, and, perhaps more importantly, I do not think that they say anything about the belief of Mr Black.

    (c) It is quite true that Mr Black and Mr Zulauf were the parties in contact in relation to LC2. However, that is perfectly consistent with Mr Zulauf procuring the issuance by the Defendant of that LC2, and the terms of the letter of credit itself are also consistent with this construction.

(4) Finally, I do not think that there is any evidence of the communication of a belief by Mr Black that the Defendant was not liable to the Claimant. Indeed, there are counter indications, for example in the documents when presented.

(5) Overall, I decline to draw any inference from the absence of Mr Black.

61. Equally, turning to disclosure, I deal firstly with the assertions made in relation to Mr Hargreaves' witness statement and, secondly, with disclosure generally.

(1) Mr Hargreaves' witness statement dealt with the agreement of September 2014. It was his evidence that this related to a proposed agreement to cancel LC2, upon a partial rescission of the sale. However, this agreement, according to his witness statement (given on instructions) was never acted on and the letter of credit was never cancelled. I have no evidence to the contrary, and Mr Hargreaves was not cross examined. Moreover, there is no evidence in support of an assertion that the letter of credit was in fact cancelled. Certainly the Defendant produced no such evidence, and it would appear that Mr Zulauf, in his responses to requests in correspondence, did not come back with what would have been an obvious response relying on such a cancellation had there been such. I therefore reject the criticism made by reference to this document.

(2) As to disclosure more generally, it is necessary to ask what the documents which might have been, but have not been, disclosed would have said and how this would have shed light on the matter. I can deal with this briefly. In order to be of material relevance, these would have to be documents which crossed the line, and, if they had, they would have been in the Defendant's possession. Accordingly, again, I do not think it appropriate to draw any inferences.

62. Drawing the threads together:

(1) I start off with an observation. That is that the matters relied on by the Defendant in support of their construction of the contract are, in essence, matters which show the subjective understanding of the parties as to their obligations. Those are matters which, in my judgment, are not the *type* of extrinsic facts which fall properly to be considered under the heading of contractual construction, as opposed to estoppel by convention, which I consider below.

(2) However, even if I am wrong in this, and it is permissible to rely on this type of material as an aid to construction, then, for the reasons I have set out, I do not accept that the various matters relied on by the Defendant show that the issuer of LC2 was not, as appears from the use of the MT700 format, the Defendant but was instead SBOL.

63. Overall, therefore, I do not accept the arguments of Mr Ayres QC, forcefully and helpfully though they were put. In my judgment, the Defendant was indeed the issuer of LC2.

64. I turn therefore to the second of the three issues with which I have to deal.

Issue 2: Exclusion of certain obligations in the UCP 600

The Claimant's contentions.

65. The Claimant, for its part, argued that, whilst the Defendant contended that Field 72 constitutes an exclusion pursuant to Article 1 of UCP 600 of its payment undertaking under Article 7(a)(iii), in fact that field simply indicated that the recipient bank's charges are for the account of the beneficiary (the Claimant) and are not the responsibility of the Issuer.

66. In *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 WLR 631 at 639C, the Court of Appeal held that the words "*expressly…excluded"* require an express provision stating that a particular UCP Article would not apply. Sir John Megaw said:

> *"To my mind, it is wrong to approach this question of construction by looking at the document first without reference to the Uniform Customs. The marginal note which I have cited provides unambiguously that, except insofar as otherwise expressly stated, this documentary credit is subject to the Uniform Customs. Unless, therefore, there is some express provision which excludes the Uniform Customs terms, they have got to be brought in. There is no such express provision excluding any relevant part of the Uniform Customs. It might be that, if it could be shown that there was some irreconcilable inconsistency between the Uniform Customs terms and the other terms of the document, the Uniform Customs terms would have to be ignored. In my judgment, there is no justification for reading into the contract any implied exclusion; and — I think this is probably part of the same proposition — there is no inconsistency between the terms which the Uniform Customs would incorporate and the terms which appear on the face of the document itself. On the contrary, those terms have been included by reference to the Uniform Customs terms, and are to be interpreted by reference to the relevant parts of the Uniform Customs terms."*

67. In the present case, there is no "*express provision which excludes"* the relevant UCP 600 term (i.e. UCP 7(a)(iii)).

68. The Claimant also relied on the following further matters as supporting its case:

(1) Article 37(c) of UCP 600 (set out above) specifically deals with the position regarding bank charges. It is open to an issuer to direct an Advising Bank that any bank charges are for the beneficiary (albeit it will retain liability to pay such charges). Field 72 is directed to precisely the situation envisaged by Article 37(c);

(2) It is specifically headed "*Sender to Receiver Information*". It is therefore communicating specific information which is relevant to the receiver (as opposed to the beneficiary). The information which is relevant to the receiver is that charges should be applied to the beneficiary. If there was a total exclusion of liability, that would not be information for the "*Receiver"* only;

(3) Similarly, Additional Condition 8 incorporates UCP 600 *in toto*. If the parties had agreed to exclude a fundamental condition of UCP 600 (i.e. the issuer's undertaking) they would have done so here;

(4) The "*Sender to Receiver Information*" in Field 72 can usefully be contrasted with the structure of the "*Additional Conditions*" (Field 47A). There, each Additional Condition is numbered separately which allows for distinction between different provisions. If the "*no our responsibility for payment"* provision were intended to be wholly independent from the "*yr chrgs are for benf account"* provision, they too would have been separately numbered. Field 72 therefore should be read as a whole and, read as a whole, states that the receiver's bank charges are not the responsibility of the sender;

(5) The words "*yr chrgs are for benf account*" would be redundant if the sender had no obligation at all. The words should be construed so as to avoid superfluity;

(6) Additional Condition 5 similarly deals with other bank charges and makes it clear that they are for the account of the beneficiary. That concerns bank charges of any bank (not just the receiving bank).

The Defendant's contentions.

69. The Defendant put forward what, in my judgment, were three contentions, as follows:

(1) UCP 600, Article 7, sets out the obligations of an issuing bank including, at 7(a)(iii), the obligation to honour the LC if it is available by "deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity". This provision (Article 7(a)(iii)) is the provision for breach of which the Claimant is suing the Defendant. It appears in any event to be mis-directed because the LC was only available at the nominated bank "by negotiation", not "deferred payment". So, Article 7(a)(iii) is irrelevant, and the Claimant appears to be trying to conflate the obligations of an issuing bank in the event of failure by the nominated bank with the obligations under a bill of exchange (which have nothing whatsoever to do with this case).

(2) In any event, UCP 600, Article 1, includes the words: "They are binding on all parties thereto unless expressly modified or excluded by the credit". For all the reasons set out above, if the Defendant is technically the issuer, the provisions of LC2 as a whole, and in particular fields 78 and 72, make it clear that the normal issuer obligations in Article 7 are excluded. Whilst the Claimant relies upon *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 WLR 631 at 639C for the proposition that provisions of the UCP 600 must be *expressly* excluded, the Court of Appeal also held, there, that if there were an irreconcilable inconsistency between the UCP and the other terms of the document, the UCP would have to be ignored. *Forestal* therefore does not assist this Claimant, as there *was* express provision in LC2 (as in LC1 and in every other communication between the parties) excluding the application of the effect of Art.7 of UCP 600, in both fields 72 and 78.

    (a) The Defendant sought to meet the points made by the Claimant (in paragraph 68 above) under this head as follows:

        (i) As to the first, this is common ground, save that the Defendant submits that only the first line of field 72 relates to the attempted exclusion of Art.37(c) of UCP 600.

(ii) The beneficiary is a recipient of the LC, just as much as (if not more than) an advising or correspondent bank is. The logical conclusion of the Claimant's contention is that the information in field 72 is only of relevance to the first recipient of the SWIFT containing the LC, even if there are subsequent advising/correspondent banks in the chain: that cannot be right. Nor is there any logical or commercial basis for the suggestion that the information contained in field 72 is only for the eyes of the messengers in a SWIFT communication, and not for the ultimate beneficiary itself. The words are express on the face of the LC and are within the four corners of the document. It is notable that neither expert has suggested this is a point of relevance.

(iii) Nothing can be read into the fact that the exclusion clause does not appear together with Additional Condition 8 in field 47A. The contents of an LC are drafted by the parties to the underlying contract; field 72 is the additional information added by the sender of a SWIFT.

(iv) The same point can be made in relation to the Claimant's new point that the structure of field 72 is to be contrasted with the fact that the Additional Conditions in 47A are each numbered: those Additional Conditions are drafted by the parties to the underlying transaction, the "sender to receiver information" is not. Again, it is notable that neither this point nor the point above occurred to either expert.

(v) There is no superfluity on the Defendant's interpretation. The first line of field 72 refers to charges; the second to payment. It is possible to be liable for either one, without the other. (See in particular Art.37(c), which links liability to charges to the giving of an instruction by one bank to another to perform services, not to the obligation to make payment under an LC). The Defendant excluded liability for both and had reason to do so.

(vi) As observed above, field 47A is a field which is generally drafted by the parties to the underlying transaction; field 72 is not. It is therefore unsurprising that there may be some duplication. But, in any event, as Mr Lee sets out in the

Expert's Joint Memorandum, field 72 is not duplicative: it is capable of referring to situations which Additional Condition 5 does not.

(3) The Claimant made a presentation of non-conforming documents under LC2. This was waived by Mr Zulauf (not by the Defendant) and has no effect with respect to the Defendant. No presentation was ever made to the Defendant (who only subsequently received the documents). Now, in the event that the Claimant wishes to seek payment from the Defendant, it must take the risk that its presentation was non-conforming. That risk has materialised.

Discussion.

70. I consider the three arguments set out by the Defendant in turn.

<u>The Article 7 point.</u>

71. Article 7 of the UCP provides as follows:

> ***UCP 600 - Article 7***
>
> *Issuing Bank Undertaking*
>
> *a. Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:*
>
> *i. sight payment, deferred payment or acceptance with the issuing bank;*
>
> *ii. sight payment with a nominated bank and that nominated bank does not pay;*
>
> *iii. deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;*
>
> *iv. acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;*
>
> *v. negotiation with a nominated bank and that nominated bank does not negotiate.*
>
> *b. An issuing bank is irrevocably bound to honour as of the time it issues the credit.*
>
> *c. An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.*

72. Article 7 therefore contemplates a series of situations where, if compliant documents are presented, the issuing bank must pay. I interpose at this stage to say that, equally, if non-compliant documents are presented but any such non-compliance is waived in a way that serves to bind the issuing bank, then Article 7 would apply.

73. Here Mr Ayres QC argued that the current situation was not within Article 7a.iii, which is the provision relied on in the pleading. He contended that it might have come within 7.a.v, but this had not been pleaded; and there was no evidence that, on the facts, the documents had been negotiated.

74. In my judgment, this argument is fallacious, for the following reasons.

(1) LC2 contemplated that payment would be made by SBOL, as nominated bank. SBOL were also the drawee of 120 days bills of exchange.

(2) The documents were then presented to SBOL. They were accepted, and discrepancies clearly waived.

(3) At that time, SBOL came under an obligation to pay on maturity. This would, on the face of things, be 120 days after acceptance, under the bill of exchange.

(4) In fact, the maturity date was extended. However, they accepted the obligation to pay.

(5) That obligation was not then satisfied.

75. Under Article 7 of the UCP, in my judgment, the necessary preconditions for the obligation of the issuing bank to come into play have been satisfied (subject to the waiver argument that I consider below). I myself would have said that the relevant subsection was 7(a)(iv), but I think that it is clear that 7(a)(iii), (iv) or (v) was satisfied. Mr Ayres QC said that his point was not merely a pleading point. In my judgment it is clearly not a point of substance. Insofar as a pleading point was pursued, then I think it is sufficiently within 7(a)(iii) to

mean that the point is not a good one, and I would have given permission to amend had this point been pursued as a pleading point alone.

Were the obligations of the issuer excluded?

76. In my judgment, there is here no question of exclusion of the terms of the UCP. The question is as to what those terms, as incorporated, mean, and, in particular, whether Fields 72 and 78 are inconsistent with the indication that the Defendant is the issuer, and, if so, whether they are sufficiently clear to negate that indication. The question is thus one of ordinary contractual construction. I agree with Sir John Megaw that the question for me is how the terms of the contract *"are to be interpreted by reference to the relevant parts of the Uniform Customs terms."* I would add that in this case, the question of interpretation must also take into account the SWIFT system and what each message type and field connotes. In this connection, I accept the evidence of Mr Lee that it is necessary to read the letter of credit as a whole.

77. The principles are those which must, therefore, be applied in relation to any type of contractual construction, where questions of consistency or inconsistency arise. Those are conveniently set out in *Chitty on Contracts*, 32nd ed, at paragraph 13-080, as follows:

"Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. When considering how to interpret a contract in the case of alleged inconsistency, the courts distinguish between a case where the contract makes provision for the possibility of inconsistency and the case where there is no such provision. In the latter case the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner. However, matters are otherwise in the case where there is a term in the contract dealing with the possibility of inconsistency. In such a case court should approach the interpretation of the contract without any pre-conceived assumptions and should neither strive to avoid nor to find an inconsistency but rather should approach the documents in a "cool and objective spirit to see whether there is inconsistency or not". To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. A term may also be rejected if it is repugnant to the remainder of the contract. However, an effort should be

made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement. Thus, if there is a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the proviso is inconsistent and void. But if a clause merely limits or qualifies without destroying altogether the obligation created by another clause, the two are to be read together and effect is to be given to the contract as disclosed by the instrument as a whole."

78. Here, the fields which are relied on by the Defendant as negativing the conclusion that would be drawn from the use of the MT700 form are fields 78 and 72.

(1) Field 78 includes instructions to the paying/accepting negotiating bank. Here, those instructions provide that the remitting bank is to forward the documents in one mailing to the applicant bank, SBOL at 53 Davies Street, London W1K 5JH, under SWIFT advice to SBOL via SBLTGB2L (ie the Defendant). Payment will be effected by applicant bank at maturity upon receipt of the complying documents at applicant bank counters. Here, this field indicated that payment was available by negotiation, since field 41D was chosen. Negotiation under the UCP is a defined term (under Article 2), and connotes the purchase by the nominated bank of drafts, drawn on a bank other than the nominated bank, and/or documents under a complying presentation, by advancing funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank. The nominated bank is defined as the bank with which the credit is available. Here the drawee was defined as SBOL, and the period of drafts was 120 days.

(2) Field 72 is for sender to receiver information. It is to specify additional information for the Receiver. Here, since there were no slashes, then the contents of this field were all narrative and not codes. There is no definition of Receiver in the UCP.

79. I do not accept that these fields are inconsistent with the Defendant being the issuing bank. Indeed, it seems to me that they are wholly consistent with this being the position.

(1) As regards Field 78:

(a) The argument of Mr Ayres QC, as I understood it, is that because the credit provided for payment by SBOL by acceptance of drafts drawn on SBOL, then, due to the definition of negotiation in Article 2 of the UCP, SBOL cannot have been the nominated bank, since negotiation is defined as acceptance of documents or drafts drawn on a bank other than the nominated bank. Since it was not the nominated bank, it must have been the issuer, and what would otherwise have been read into the email by reason of it being in the MT700 format, namely that the sender was the issuer, should not be.

(b) However, I have already indicated my conclusion, in line with the argument advanced by Mr Brown, that the phrase negotiation as used in this credit cannot have been intended to have the technical meaning laid down in the UCP. That is because the credit on its face made clear that payment was to be made by SBOL, but that payment would be by negotiation of drafts which named SBOL as drawee. Whilst this was not a correct use of the term negotiation as set out in the UCP, I would conclude that this is how a reasonable third party would construe this credit. Again, in this connection, I would refer to *Jack on Documentary Credits* at paragraph 2.19. Certainly, in my judgment, the existence of this field does not indicate clearly that, despite the use of the MT700 form, the obligations of the Defendant did not extend to being issuer.

(2) As regards Field 72, my conclusions in this regard are the same as those already set out in relation to Issue 1. Accordingly, I do not regard this field as in any way inconsistent with the Defendant undertaking the obligation of issuer.

<u>Presentation of discrepant documents.</u>

80. Here, as I have noted, the Defendant contended that the documents presented under LC2 were discrepant, and that, whilst there was a waiver of this by SBOL, there was no waiver by the Defendant.

81. The Claimant countered by contending that SBOL, as nominated bank, had actual, apparent or ostensible authority to waive the discrepancies, and that such waiver bound the

Defendant. In this regard, I was referred to *Jack on Documentary Credits* at 6.21, where the authors say:

"In performing its task of examining and accepting or refusing the documents the correspondent bank acts so far as the issuing bank is concerned as its agent. In Gian Singh & Co Ltd v Banque de l'Indochine Lord Diplock stated … "the customer did not succeed in making out any case of negligence against the issuing bank or the notifying bank which acted as its agent, in failing to detect the forgery". It is suggested that this is so whether or not the correspondent bank has confirmed the credit. If the correspondent bank accepts the documents, as between the issuing bank and the beneficiary, its acceptance will bind the issuing bank, its principal."

82. I accept this last submission. Accordingly, I hold that the waiver by SBOL of the discrepancies in the documents bound the Defendant, who thereby became liable to pay if the nominated bank – ie SBOL – did not. That is what has happened in this case.

Issue 3: Estoppel by convention.

83. I turn to the question of estoppel by convention. The relevant legal principles were not in dispute, being those set out in *Chitty on Contracts*, 32nd ed, at 4-108-112. Those paragraphs state as follows:

"4-108
Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other." The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been "materially influenced" by the common assumption) to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any representation or promise. It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party. It seems, however, that the assumption resembles the representation required to give rise to other forms of estoppel to the extent that it must be "unambiguous and unequivocal" and this common feature can make it hard to distinguish between these two forms of estoppel. Estoppel by convention has also been said to arise out of an express agreement by which the parties had compromised a disputed claim; but where such a compromise is supported by consideration (in accordance with the principles discussed earlier in this Chapter) it is binding as a contract, so that there is, it is submitted, no need to rely on estoppel by convention.

Further requirements of estoppel by convention

4-109

This kind of estoppel was discussed in Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd. In that case, A had negotiated with the X Bank for a loan to B (one of A's subsidiaries) for the purpose of acquiring and developing a property in the Bahamas. It was agreed that the loan was to be secured by a mortgage on that property and also by a guarantee from A. In the guarantee, A promised the X Bank, in consideration of the Bank's giving credit to B, to "pay you … all moneys … due to you" from B. This was an inappropriate form of words since the loan to B was not made directly by the X Bank but by one of its subsidiaries, the Y Bank, with money provided by the X Bank: hence, if the guarantee were read literally, it would not apply to the loan since no money was due from B to the X Bank. The Court of Appeal, however, took the view that this literal interpretation would defeat the intention of the parties, and held that, on its true construction, the guarantee applied to the loan made by the Y Bank. But even if the guarantee did not, on its true construction, produce this result, A was estopped from denying that the guarantee covered the loan by the Y Bank, since, when negotiating the loan, both A and the X Bank had assumed that the guarantee did cover it; and since the X Bank continued subsequently to act on that assumption in granting various indulgences to A in respect of the loan to B and of another loan made directly by the X Bank to A. It made no difference that the assumption was not induced by any representation made by A but originated in the X Bank's own mistake: the estoppel was not one by representation but by convention. The same principle was applied in The Vistafjord where an agreement for the charter of a cruise ship had been negotiated by agents on behalf of the owners. Both the agents and the owners believed throughout that commission on this transaction would be payable under an earlier agreement, but on its true construction this agreement gave no such rights to the agents. It was held that estoppel by convention precluded the owners from relying on the true construction of the earlier agreement, so that the agents were justified in retaining the amount of the commission out of sums received by them from the charterers. An estoppel by convention may, similarly, affect the amount payable under a contract. This was the position in ING Bank NV v Ros Roca SA,where a dispute had arisen between the claimant bank and the defendant company as to the way in which an "additional fee" payable to the bank by the company was to be calculated. On the true construction of the contract, the amount of the fee was indeed that claimed by the bank; but it was held that the bank was estopped, by reason of its conduct and statements from relying on this construction, and that the bank was entitled only to a lower fee, based on the parties' common assumption as to the way in which the fee was to be calculated.

"Communication" passing "across the line"

4-110

To give rise to an estoppel by convention, the mistaken assumption of the party claiming the benefit of the estoppel must, however, have been shared or acquiesced in by the party alleged to be estopped; and both parties must have conducted themselves on the basis of such a shared assumption: the estoppel "requires communications to pass across the line between the parties. It is not enough that each of two parties acts on an assumption not communicated to the other." Such communication may be effected by the conduct of one party, known to the other. But no estoppel by convention arose where each party spontaneously made a different mistake and there was no subsequent conduct by the party alleged to be estopped from which any acquiescence in the other party's mistaken assumption could be inferred. An estoppel by convention likewise cannot arise where neither party was aware of the facts on which the alleged common assumption is said to have been based; or where the conduct alleged to have given rise to the estoppel can with

equal or greater plausibility, be explained on grounds other than that the party alleged to be estopped shared an assumption made by the other party or as amounting to a communication by the former to the latter party. Nor can a party (A) invoke such an estoppel to prevent the other (B) from denying facts alleged to have been agreed between A and B if A has later withdrawn from that agreement; for in the light of A's withdrawal it is no longer unjust to allow B to rely on the true state of affairs.

Assumption of law

4-111

Many judicial statements support the view that the assumption giving rise to an estoppel by convention can be one of "fact or law." The point of the reference to "law" in this formulation appears to be to include within the scope of the doctrine assumptions about the construction of a contract; for, since the construction of a contract is often said to be a matter of "law," all such assumptions would be excluded from the scope of the doctrine (and its scope be unduly narrowed) if it did not include at least assumptions of this kind. The question whether estoppel by convention could be based on assumptions of "law" in a wider sense was the subject of conflicting views in Johnson v Gore Wood & Co. In that case, a company had brought a claim for professional negligence against a firm of solicitors who were told that a further claim based on the same negligence would be made against them by the company's managing director. The company's claim was settled on terms which limited some of the director's personal claims against the solicitors and when the director later brought other claims against the solicitors, it was held that this was not an abuse of process. Lord Bingham based this conclusion in part on estoppel by convention: in his view, the terms of the settlement were based on the common assumption that it would not be an abuse of process for the director to pursue the claims which he had in fact brought; and it would be unfair to allow the solicitors to go back on this assumption. All members of the House of Lords agreed with Lord Bingham's conclusion that there was no abuse of process; but Lord Goff was "reluctant to proceed on estoppel by convention" as the common assumption was one of law, a type of assumption which in his view did not give rise to this form of estoppel; while Lord Millett was equally reluctant to "put it on the ground of estoppel by convention" as he had "some difficulty in discerning a common assumption." Lord Millet's difficulty is an entirely factual one but Lord Goff's raises a more difficult issue of principle. Support for the view that estoppel by convention can be based on a common assumption of law is admittedly based only on dicta; but it is arguable that those dicta gain support from cases concerned with mistakes and misrepresentations of law. In these contexts, the distinction between matters of "law" and of "fact" has proved hard to draw and is now discredited. On the other hand, the extension of estoppel by convention to all common assumptions of "law" could undermine the security of commercial transactions by allowing a party to resist enforcement merely on account of an assumption as to the legal effect of a contract, the terms or meaning of which were not in dispute; and this is a type of assumption which, on the authorities, does not give rise to such an estoppel.

Effect of estoppel by convention

4-112

The effect of this form of estoppel is to preclude a party from denying the agreed or common assumption of fact or, at least to the extent suggested in para.4-111, above, of law. One such assumption may be that a particular promise has been made: thus it is possible to describe the result in Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd by saying that A was estopped from denying that it had promised the X Bank to repay any sum left unpaid by B to the Y Bank. But, although estoppel by convention may thus take effect in relation to a promise, it is quite different in its legal

nature from promissory estoppel. In cases of promissory estoppel, the promisor or representor is not estopped from denying that the promise or representation has been made: on the contrary, this must be proved to establish that kind of estoppel. The doctrine of promissory estoppel is concerned with the legal effects of a promise that has been shown to exist. Where, on the other hand, the requirements of estoppel by convention are satisfied, then this type of estoppel normally operates to prevent a party from denying a fact,i.e. that the assumed promise has been made, or that a promise contains the assumed term: it does not specify the legal effects of the assumed promise or term. In Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd, once A was estopped from denying the existence of the promise described above, no question arose as to its legal validity. There could be no doubt that that promise was supported by consideration: this was provided by the X Bank in making funds available to the Y Bank to enable it to make a loan to B, and in inducing the Y Bank to make that loan. Where the assumed promise is one that would, if actually made, have been unsupported by consideration, both types of estoppel can, however, operate in the same case: estoppel by convention to establish the existence of the promise, and promissory estoppel to determine its legal effect."

84. For the Defendant to succeed on this argument, therefore, it must show:

(1) An assumption as to who was the issuer;

(2) That was made by the Defendant; and

(3) That can be seen to have been shared by the Claimant from correspondence that crossed the line; and

(4) That materially influenced the Defendant.

85. In other words, what must be shown is that the Claimant must have known that the Defendant understood, or believed, that it was not the issuer, and that the Defendant acted in reliance on this belief.

The Claimant's contentions.

86. There is no room for estoppel by convention:

(1) The autonomy principle excludes consideration of other materials. It cannot be circumvented by a (vague and unparticularised) plea of estoppel;

(2) There is nothing referred to which predates the letter of credit;

(3) Nothing appended to the Defence evidences *"the true position"* (said to be that SBOL was the issuing bank and the Defendant was providing *"a messaging service only"*). The documents appended comprise:

(a) A free format (MT 999) message from the Defendant to Bank of China which refers to a message having been relayed to "Applicant Bank" (SBOL);

(b) A proprietary format (MT 998) message from the Defendant to Bank of China which records acceptance of compliant documents by SBOL. The same message was sent to Rural Commercial Bank of Zhangjiagang. Bank of China responded to the Defendant setting out its calculation of the maturity date;

(c) A free format (MT 999) message from Bank of China asking the Defendant to relay a message to SBOL stating that payment had not been received (which is consistent with SBOL having an obligation to pay as Nominated Bank). A follow up was sent on 26 November 2014;

(d) A free format (MT 999) message dated 4 December 2014 from the Defendant to Bank of China stating that SBOL was untraceable.

(4) Accordingly, the correspondence as between the Defendant and the various banks (whether or not they were acting as the Claimant's "*agents*") is entirely consistent with the Claimant's case, namely that documents were presented to SBOL in accordance with the letter of credit, SBOL was obliged to pay, SBOL has failed to pay and the Issuer is therefore liable on its undertaking under Article 7(a)(iii). It is not consistent with the "*true position*" asserted by the Defendant;

(5) The documents crossing between parties are entirely contrary to the Defendant's assertion in any event, such that there is no understanding by the Claimant's agents as alleged;

(6) The remainder of the appended correspondence is <u>from</u> SBOL's principal (Mr Zulauf) <u>to</u> the Claimant's former solicitors (King & Wood Malleson). That says nothing at all about

the parties' understanding – none of those documents even emanate from the Claimant or its solicitors.

The Defendant's contentions.

87. As set out more fully in the analysis above, all parties to the transaction acted on the assumption that SBOL was the issuer:

(1) The Claimant, through Mr Black, negotiated solely with Mr Zulauf and his employees; informed only Mr Zulauf of the relevant background; and initially pursued Mr Zulauf and his entities for payment under the letter of credit;

(2) The Defendant certainly did not consider itself to be the issuer, for all the reasons set out above.

88. Alternatively, the Defendant assumed that it was not the issuer and the Claimant acquiesced in that assumption.

89. All the communications referred to above, not least those in which the Defendant repeatedly disclaimed responsibility for payment under the letter of credit, passed across the line between the parties.

90. The Defendant was materially influenced by the common assumption. In particular:

(1) It agreed, in the division of responsibilities, that only SBOL would be required to examine the presented documents to determine whether or not they appeared on their face to constitute a complying presentation, pursuant to Art.14(a) of the UCP. It emerges from the chronology above that there were, in SBOL's view, apparent discrepancies in the presentation but that SBOL decided to waive these. If, contrary to the above, the Defendant is bound by Mr Zulauf's actions in waiving discrepancies in LC2, the agreement to that effect is detrimental reliance on the Defendant's part;

(2) Had the Defendant understood that it was issuer, it would have done further due diligence such as considering the underlying contract, carrying out a means test of the applicant, and

taking security from the applicant (or from Mr Zulauf). It has not protected itself in any way against the risk of non-payment by the applicant;

(3) Indeed, it became involved in a transaction which it may not have become involved in had it known that it was the issuer, given its questionable and risky nature;

(4) It charged a commission for the transaction which was well below (by a multiple of more than 10) the fee that would ordinarily be charged for issuing a US$7million followed by a US$3million LC.

91. For the above reasons, it would be unconscionable for the Claimant to deny the agreed common assumption as to the respective obligations of the parties, in particular as to the Defendant's non-liability. Furthermore, given that the LC is payable, in circumstances where it ought not to have been (either because the Defendant would never have become involved in such a transaction, or because it would never have waived the discrepancies in the presentation), the estoppel is on the facts of this case one that can never, conscionably, be reversed.

Discussion.

92. I turn therefore to consideration of the requirements as set out above.

93. I can start with the question of whether it is permissible to rely on an estoppel by convention in this context, or whether the principle of autonomy prevents this, as the Claimant contends. I reject this contention. The principle of autonomy means that the letter of credit transaction is separate from the underlying transaction. What is in issue in this case is who the parties to the letter of credit transaction were, and whether the Claimant is estopped from contending that its relevant counterparty was the Defendant. The principle of autonomy has nothing to do with this.

94. Accordingly, the real issue is whether the Defendant has established the estoppel pleaded.

95. The first question under this head is whether there was a shared assumption on the part of the Claimant and Defendant that the Defendant was not the issuer of LC2.

(1) As regards the understanding of the Defendant, I have already set out my conclusion that the Defendant, subjectively, did not think that it was the issuer. However, it is also the case that the Defendant knew that the use of the MT700 message format would convey to the recipient that it was the issuer.

(2) The evidence is thus that the Defendant's objective conduct in sending the MT 700 message would be understood by a reasonable observer as indicating that the Defendant was the issuer. It would not convey that the Defendant did not regard itself as issuer.

(3) Is this conclusion then negated by reference to the evidence relating to LC1, where, effectively, having sent a message that would on its face have been regarded as indicating that the Defendant understood that it was the issuer, the Defendant then sent several further messages in which it indicated that it was not? In my judgment, the answer to this question is no, for the simple reason that these messages did not convey this message clearly. They were just as consistent with the conclusion that, whilst ultimately responsible for payment under that letter of credit, they were passing on messages from the nominated bank, to whom the documents had been presented, and who was therefore primarily liable (in the sense that documents would be presented, and decisions in relation thereto taken, by that bank first).

(4) As regards the Claimant, and dealing with LC2, there is of course no evidence directly from the Claimant as to what it understood. I consider above the question of inferences.

(5) There is also no suggestion that there was ever any oral contact between Claimant and Defendant. Accordingly, the only relevant correspondence crossing the line is written. By definition, since this documentation would have crossed the line, it would be in the possession of both parties.

(6) The document primarily relied on by the Claimant in this regard is the document under cover of which the documents were presented by the Claimant's bank (ie Bank of China, Hubei Branch) to SBOL. That document named the issuer under the letter of credit as the

Defendant. In my judgment, Mr Brown is correct in saying that this is the best evidence of the understanding of the Claimant, and I conclude that the Defendant has not established that there was the shared assumption that is relied on.

96. This is sufficient to dispose of the plea of estoppel. It is therefore unnecessary for me to deal with the question of detrimental reliance, although I would say that I was far from convinced that the necessary detrimental reliance was established.

Overall Conclusions.

97. I can summarise my overall conclusions briefly, as follows:

(1) On the true construction of the contract, the Defendant was the issuer of the letter of credit, whilst SBOL was a nominated bank.

(2) The letter of credit did not clearly exclude the obligations of an issuer. In fact, on its true construction, there was nothing inconsistent with the fact that the Defendant was undertaking the obligations of an issuer.

(3) SBOL accepted the documents and therefore came under a primary obligation to pay at the relevant maturity date. They waived the discrepancies in the documents, and this waiver bound the Defendant.

(4) When SBOL did not pay, the Defendant remained liable as issuer to pay.

(5) There is nothing in the Defendant's point that the Claimant has pleaded the wrong part of UCP Article 7. It is clear, in my view, that, SBOL having failed to pay, the Defendant remains liable to do so.

(6) There was no shared assumption to the effect that the Defendant was not the issuer and therefore there was no estoppel by convention.