[2014] UKPC 31
Privy Council Appeal No 0035 of 2013

JUDGMENT

Alternative Power Solution Limited (Appellant) *v* Central Electricity Board and another (Respondents)

From the Supreme Court of Mauritius

before

Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge
Lord Toulson

JUDGMENT DELIVERED BY LORD CLARKE ON

9th September 2014

Heard on 2nd April 2014

Appellant

Aidan Casey
(Instructed by Sheridans Solicitors)

Respondent

Desire Basset SC
(Instructed by Blake Morgan Solicitors)

Respondent
Rishi Pursem SC
Nadeem Lallmamode
(Instructed by Carrington and Associates)

LORD CLARKE:

Introduction

1. This appeal centres on the fraud exception to the obligation of a bank to make a payment under a letter of credit. It arises out of an injunction granted by P Lam Shang Leen J ("the judge"), sitting in the Commercial Division of the Supreme Court of Mauritius, by which he restrained the second respondent ("Standard Bank") from making a payment to the appellant ("APS") under a letter of credit which had been issued in favour of APS. The letter of credit was issued as the means of payment under a contract of sale between APS and the first respondent ("the CEB"). The appeal arises out of an order made by the judge on 18 February 2011 in which he continued and, as it was put, made interlocutory an interim injunction which he had first granted against Standard Bank ex parte on 21 December 2010. APS appealed to the Court of Appeal in the Supreme Court, which is part of the Supreme Court in Mauritius. The appeal was heard by YKJ Yeung Sik Yuen CJ and Matadeen SPJ but the appeal was dismissed on 14 August 2012. APS now appeals to the Board pursuant to leave granted by the Court of Appeal.

2. The reasoning of the judge and the Court of Appeal were not the same but they both held that the CEB was entitled to an injunction restraining Standard Bank from paying APS under the letter of credit because there was sufficient evidence of fraud on the part of APS to the knowledge of Standard Bank to engage the fraud exception. As appears below, the Court of Appeal went further than the judge in this regard. It was submitted on behalf of APS and Standard Bank that both the judge and the Court of Appeal were wrong to conclude that there was sufficient evidence of fraud to engage the exception.

The contract

3. Not all the documents which might be relevant to the contract between APS and the CEB were before the courts below or before the Board. However, a sufficient number were put in evidence so that a clear picture emerges. During the course of 2010 there was a tender process during which APS bid for the supply of 660,000 compact fluorescent lamps ("CFLs") or bulbs to the CEB. The process led to a "Contract Agreement" dated 3 September 2010, which recorded that the CEB had accepted APS' bid for the supply of the CFLs for the total price of Rs23,370.000, which was equivalent to US$763,725.50. The price was

expressed to be DDU, which the Board understands to mean delivery duty unpaid.

4. The contract provided, so far as relevant:

> "*2.* The following documents shall constitute the Contract between the Purchaser and the Supplier and shall be read and construed as an integral part of the Contract:
>
> (a) this Contract Agreement;
> (b) Purchaser's Letter of Acceptance ref: CMO/CA3051/LOA/APSL dated 26 August 2010;
> (c) The General Conditions of Contract (GCC) for Procurement of Goods and the Special Conditions of Contract (SCC) and the bidding document CA/3051 dated 23 December 2010 [sic];
> (d) Supplier's Technical and Financial Proposals dated 19 January 2010 and replies to all Purchaser's clarifications; …
>
> 3. This Contract shall prevail over all other Contract documents. In the event of any discrepancy or inconsistency within the Contract documents, then the documents shall prevail in the order listed above."

5. The Letter of Acceptance referred to at 2(b) provided, so far as relevant:

> "You are hereby requested to: … (d) sign and return the attached Contract Document; … (f) manufacture and supply the above CFLs as per Technical Specifications contained in Part 2 of our bidding document OAB No.CA/3051 and as per your offer dated 19 January 2010…".

6. As to 2(c) the only section of the GCC in evidence was section 4, "Inspections and Tests", which provided, so far as relevant:

> (a) The CEB… shall have the right to inspect and/or to test the equipment to confirm their conformity to the Contract specifications. The CEB shall notify the Supplier in writing, in a timely manner, of the identity of any representatives retained for these purposes.
>
> (b) The inspections and tests shall be conducted on the premises of the Supplier…"

The SCC were in evidence. They were expressed to supplement or amend the GCC and, where there was a conflict, to prevail over the GCC. They provided inter alia for ICC arbitration in respect of all disputes arising in connection with the contract (GCC 10.2); for specific details of the "Shipping and other Documents to be furnished by the Supplier" (GCC 13.1); if goods were to be supplied from abroad, for payment by cash against goods or by letter of credit "at Supplier's option" (GCC 16.1); and for the provision of a "performance security" (GCC 18.1). The SCC further provided:

> "The inspections and tests shall be: The Manufacturer shall carry out all routine tests prior to shipment in the presence of the Purchaser's Representative/designated independent inspector as may be prescribed by the latter to the successful bidder, after Acceptance of offer" (GCC 26.1); and "The inspections and tests shall be conducted at: the Factory" (GCC 26.2).

7. As to 2(d), the "Technical and Financial Proposals dated 19 January 2010" were not in evidence in their entirety. However it was apparent that in its bid APS had identified the proposed manufacturer as Ningo Blunt International Trade Co Ltd. There was in evidence one request for clarification issued by the CEB, namely Clarification No 2, together with APS' reply to the request. The request referred to APS' bid document and included these requests:

> "a. Please provide the manufacturer's name, models and types of all Lamps proposed as per the manufacturer's/supplier's catalog;
>
> b. Please provide the ELI/EST certificate for each of the above proposed models/types.
>
> c. Please submit the Manufacturer's Authorisation Form duly signed by the Manufacturer…"

8. APS' replied to the request for Clarification No 2 under cover of an email of 8 February 2010, which referred to Philips but made it clear that Philips was not the contract manufacturer. Thus it stated:

> "(a)…Philips (China) Investment Company Limited is the brand owner… In the present tendering process, we would be supplying OEM/ODM product for CEB Mauritius out of a plant manufacturing for Philips and satisfying technical and performance requirements with minor deviations as per specifications laid down in the technical documents. However if you require specifically Philips brand on a co-branding exercise with the CEB, we will be happy to assess supply…

(b)… You would notice that the contract manufacturer is not listed as an ELI certified supplier, however the products they produce are certified and Philips has independently tested the product under their application. If you require more details you can contact by e-mail Ms ...

(c) We deal with Philips…We also deal with the contract manufacturer directly…

An ODM (original design manufacturer) is a company which designs and manufactures a product which is specified and eventually branded by another firm for sale. Such companies allow the brand firm to produce (either as a supplement or solely) without having to engage in the organization or running of a factory. A primary attribute of this business model is that the ODM owns and designs in-house the products that are branded by the buying firm. This is in contrast to a contract manufacturer or CM.

The letter of credit

9. The letter of credit was issued by Standard Bank and notified to APS on 27 September 2010. It was not suggested that it was not in conformity with the contract. It was described as Irrevocable Transferable and the Applicable Rules were described as UCP Latest Version. The date and place of expiry were stated to be "101230 Port Louis Mauritius". The date of expiry was thus 30 December 2010. The amount was US$763,725. Partial shipments and transhipment were allowed. The place of taking in charge or receipt was given as South Africa and/or Asia and the place of final destination or delivery was Port Louis, Mauritius. The latest date of shipment was 30 November 2010. The documents required were set out in detail and the period of presentation was said to be within 15 days after shipment date but within the validity of the credit. There was no requirement for any certificate of inspection or similar document to be presented to the bank. The credit was advised through and negotiated at Mauritius Commercial Bank Ltd ("MCB") who were in fact APS's bankers.

Relevant events before and at the application on 15 November 2010

10. The goods were manufactured by Sichuan CB Light Co Ltd ("Sichuan Light"). On 23 September 2010 the MCB provided the CEB with a performance guarantee for APS. In early October there were email exchanges between APS and the CEB about delivery in which Mr Dookhee of APS gave an indication of delivery dates and the CEB asked if the delivery could be "sped up" so that the first container reached them by the end of October. On 18 October MCB notified Standard Bank that the letter of credit had been partially transferred to CB Light

to the extent of US$ 613,800. On that day Mr Dookhee said by email that, subject to space, the first container should be leaving within 12 to 14 days and that the CEB's agent should be able to check the finished goods "in the southern city of foshan in guangdong province either in xiaolan or guzhen". He added that the agent would need to meet him in either Guangzhou or Shenzhen.

11. On 25 October the CEB submitted a request to Standard Bank for the letter of credit to be amended with regard to the additional documents to be submitted by APS, namely (i) a copy of an inspection certificate to be submitted to the CEB prior to shipment and (ii) a copy of written confirmation by the CEB that the goods could be released for shipment. Importantly, on 4 November MCB informed Standard Bank that APS was not agreeable to the amendment sought. The CEB was informed accordingly.

12. In the meantime, on 28 October Mr Dookhee emailed the CEB under the heading "Warehouse details for inspection" as follows:

> "As I have explained to you on various occasions and on the telephone yesterday, we contracted the manufacturing to an odm manufacturer. … The finished product is already ready and awaiting shipment. It can either be in a logistics centre at the assembly units either in light city (guzhen) or xiaolan, FOSHAN. DEPENDING WHERE GOODS ARE WHEN WE MEET YOUR INSPECTOR, WE WILL TAKE HIM THERE TO THE MOST LOGICAL PLACE TO ENSURE THAT HE CAN CARRY A THOROUGH INSPECTION.
>
> I REITERATE THAT OUR MODUS OPERANDI WE MEET AT GARDEN Hotel and from there we take you for inspection.

The email gave detailed information about shipment and said that normally custom clearance would take 2 to 3 days and transit would take 14 to 17 days. Mr Dookhee had also emailed on 25 or 26 October to say that they were ready to ship and to ask the CEB to liaise with their inspector and ask him to contact him. He added that, if he did not hear by Friday 29 October, he would assume that an inspection was no longer necessary. The CEB replied on 29 October that they would be "finalising the modalities of the inspection by early next week" and that they would inform him accordingly.

13. On 4 November the CEB's UK agents emailed to say that they had issued inspection instructions to their inspectors in China, namely Shanghai Inspection Company, and that they had requested their inspection co-ordinator, Ms Grace Qiang, to contact APS and arrange the inspection. The mail was copied to "grace". On 9 November Mr Dookhee emailed the CEB's agents to say that he had not heard from Ms Qiang and to ask them to forward her contact details so

that he could liaise with her and arrange for the inspection. On the same day he emailed Mr Tulloo of the CEB in these terms, putting pressure on them to assist:

> "We are currently liaising with your appointed crown agents in regards of the current order. We have also appointed bureau veritas and sgs to carry the spectroradiometric analysis on the goods. Our position still remain the same as per email on the 25th which was sent to the CEB.
>
> In the meantime, can you please ensure that the shipment dates are amended to reflect your intention and action when the ceb specifically requested to withold packing and mounting. We have all components ready and would like to go ahead with the finishing. I hope that we can get the inspection issues over with your agents.
>
> We will need to finalise parameters regarding inspection of your odm order."

On 10 November the CEB emailed Mr Dookhee saying that he had said during a telephone conversation on 9 November that the manufacturer was no longer Ningo Blunt and asking for the name and full contact details of the manufacturer, which were essential to them and their agents.

14. On 11 November the CEB lodged its first application in Mauritius for an injunction restraining Standard Bank from paying under the letter of credit. On the next day, 12 November, the CEB sent a fax to APS, with a copy to Standard Bank, referring to clauses 26.1 and 26.2 of the SCC, and saying that their representative would contact them shortly for the purposes of "all routine tests to be carried out at your factory prior to the shipment of the lamps." Also on 12 November, the CEB wrote to APS setting out the terms of clauses 26.1 and 26.2 (which are quoted in para 6 above) and adding that their representative would shortly contact APS "for the purpose of all routine tests to be carried out at your factory prior to shipping of the lamps". On 13 November the goods were shipped on board the M WELLINGTON in Guangzhou by CB Light, although it has been Mr Dookhee's evidence throughout that he was unaware that shipment had taken place.

15. The application lodged on 11 November came before the court on 15 November. The CEB and the then first respondent, Standard Bank, were represented by counsel and Mr Dookhee was there in person on behalf of APS, the then second respondent. According to the order signed by the judge, Mr Dookhee told the court that he did not have a copy of the application but that he had no objection to an inspection being carried out as per the SCC and that no shipment would take place unless the inspection was carried out to the satisfaction of the CEB. On that footing Standard Bank said that it would not make payment until

shipment was effected and the CEB withdrew its application. There was no order for costs.

Events before and at the application on 1 December 2010

16. On 17 November a bill of lading marked ECOTRANS was issued showing CB Light as the consignor (or shipper) of goods at Ghangzhou on board the vessel M WELLINGTON on 13 November for discharge in Singapore but with the place of delivery as Port Louis in Mauritius. The goods were stated to be consigned to the order of Standard Bank in Mauritius and the CEB in Mauritius were named as the notify party. On 20 November APS issued an invoice in respect of the goods.

17. On 22 November an attorney wrote to APS on behalf of the CEB making a number of allegations which can be summarised in this way. In an email dated 22 February 2010, which formed part and parcel of the contract dated 3 September 2010, APS had undertaken to supply bulbs manufactured by Philips. APS had agreed to supply to the CEB the factory address where the inspection of the bulbs would take place. The CEB would cause their agent to inspect the goods at the factory duly licensed by Philips to manufacture the bulbs. APS had made a commitment to the judge that there would be no shipment prior to inspection. The CEB would only accept delivery of bulbs manufactured by Philips and all the bulbs must be labelled Philips. The letter concluded by saying that, if it was found during the inspection that the bulbs had not been manufactured at a factory licensed by Philips or had not been manufactured by Philips, APS would be in breach of contract. The attorney added that the CEB reserved their right to take such legal steps as they might be advised.

18. On 24 November APS provided documents to MCB for presentation to Standard Bank under the letter of credit. It appears that the documents were so presented because on 29 November Standard Bank wrote to the CEB advising them that there were 11 discrepancies and asking them whether they waived the discrepancies or whether they wanted the documents to be returned to the negotiating bank, namely MCB. It appears that the CEB did not reply.

19. On 30 November, according to a second bill of lading, entitled "Ocean Bill of Lading – Negotiable", the bulbs were loaded on to a vessel named MALAYSIA EXPRESS at Singapore for discharge in Port Klang in Malaysia. The place of delivery was again described as Port Louis in Mauritius. It thus appears that the bulbs were transhipped from the M WELLINGTON at Singapore. The bill of lading named the consignor as Deutsche Factors and Trade Finance, which suggests that CB Light had discounted the transferred letter of credit.

20. On 1 December a further application was made in chambers. According to the order made on the same day it was made in the presence of APS (presumably through Mr Dookhee) and ex parte as to Standard Bank. It was ordered that an interim order in the nature of an injunction do issue prohibiting Standard Bank from making a payment under the letter of credit of US$ 801,911.18 or any lesser sum to APS. It was stated to be in force until 10.00 hours on 3 December, when Standard Bank and APS were to "show cause, if any, why above interim order should not be made interlocutory, enlarged, discharged or otherwise dealt with". The CEB gave an undertaking in damages. On 2 December Standard Bank repeated an earlier statement it had made on 8 November to the effect that if compliant documents were presented it would pay under the letter of credit.

The hearing on 3 December

21. At the hearing on 3 December, the CEB and Standard Bank were legally represented and APS was represented by Mr Dookhee. The following appears from the recitals to the order of that date. Counsel for the CEB submitted that Standard Bank could not make payment because there were certain discrepancies in the documents which had to be sorted out with the CEB. It is perhaps of note that there is nothing in the order to suggest that any allegations of fraud were being made, let alone fraud of which Standard Bank was aware. Mr Dookhee said that he would not retain counsel. He also told the court that he was surprised when he found out that the goods had been shipped and that, as soon as he knew about it, he caused payment to be stopped. He further said that he had asked that the goods be sent back to the factory for verification and that he had no objection to Standard Bank withholding payment until the goods had been checked by the CEB. According to the order, CEB moved to withdraw the application and the judge discharged the order, with no order as to costs.

22. In an affirmation made on 11 January 2011 Mr Dookhee said that the order did not accurately recite what he had said. He contended that what he said was that inspection at the factory could still be made available and that payment could await such inspection in that on 3 December the goods were on their way to Port Klang and could still be turned back. He added in the affirmation that the CEB did not seem to be interested and did not contact him for the necessary modification of the shipment date and payment as stated in his email to the CEB on 9 November, which is quoted in para 13 above. As was submitted on behalf of APS, it must have been apparent to all concerned that, if the goods were to be turned round, sent back to China and discharged for inspection, there was the need for extensions of the latest date of shipment and of the date of expiry of the letter of credit.

Events before and at hearings on 21 and 23 December 2010

23. Also on 3 December, at the request of the CEB, MCB recalled the discrepant documents, which were returned on 6 December. They were remitted back to the CEB on 7 December. On 9 December Standard Bank wrote to the CEB repeating that, should compliant documents be presented, it would proceed with payment under the letter of credit. On the same day APS issued a further invoice in the same amount and Mr Dookhee wrote to the CEB in these terms:

> "Please be advised that despite we have on numerous occasions offered both verification of goods and modus operandi of the verification for goods ordered under purchase order number CA/3051, you the CEB has failed to notify us in writing of the identity of the representative as per clause 4 (a) and further to that you have failed to provide parameters of inspection despite we have requested such OVER 7 WEEKS AGO."

He added that APS had no alternative other than to claim payment under the letter of credit, that the goods should be arriving in Mauritius on or about 1 January 2011 and that he had attached some samples. Those samples appear to have been received and signed for on 15 December.

24. On 10 December the CEB served a Mise en Demeure, which is a form of letter before action, on Standard Bank and APS. Among other things it set out the statements said to have been made on behalf of APS before the court on 15 November, namely that the goods would not be shipped until verification at the factory to the satisfaction of the CEB, and complained that those statements had been made notwithstanding the fact that, as it had learned on 30 November, the goods had been shipped on 13 November. Moreover, it was there asserted that, in breach of contract, APS had not allowed any verification or inspection of the goods and that no payment could or should be effected under the letter of credit until there had been inspection at the factory to the CEB's satisfaction.

25. It further relied upon the statements made on behalf of APS on 3 December that Mr Dookhee was not aware that the goods had been shipped, that as soon as he learned of that fact he caused payment under the letter of credit to be stopped, that he had requested the goods to be returned to the factory for verification and that he had no objection to payment being withheld until such an inspection had taken place. APS was called upon forthwith to write to Standard Bank informing it that no such inspection or verification had been carried out through no fault of the CEB and that it should not pay until such an inspection had taken place to the CEB's satisfaction. Standard Bank was called upon to confirm within 24 hours that it would not pay save in those same circumstances.

26. In Standard Bank's response of 15 December it took issue with the case against it (including any suggestion that it had given any relevant undertaking) and reiterated that, should compliant documents be presented on or before 30 December, it would be bound to pay within 5 banking days. In the meantime, on 14 December MCB presented what it said were conforming documents to Standard Bank. On 16 December the CEB made a demand under the performance guarantee asserting that the supplier had defaulted under the contract.

27. On 17 December Standard Bank communicated a further advice of discrepancy to CEB together with certain shipping documents. On 20 December Standard Bank sent a corresponding advice of refusal to MCB, which contested the discrepancy. The Board is unsure whether this issue was resolved.

28. On 21 December the CEB made a further application to the court. It sought and obtained an ex parte interim order restraining Standard Bank from paying under the letter of credit and an order requiring APS and Standard Bank to show cause why such an order should not be made interlocutory "pending the main case that will be lodged shortly". On the same day the judge made an order to that effect setting a return date of 23 December. He also required the CEB to give a cross-undertaking in damages, which it seems was to be given to both APS and Standard Bank. On 23 December the judge enlarged the injunction until a hearing fixed for 11 January 2011. He noted in the order that APS was represented by Mr Dookhee who tried to make certain comments but was advised to seek legal assistance in order to put everything in an affidavit. Counsel for Standard Bank indicated that, as one would expect, Standard Bank would abide by the decision of the judge and that he (counsel) would file an affidavit on its behalf. In the event the substantive hearing took place on 28 January 2011 and judgment was handed down on 28 February 2011.

The fraud alleged against APS

29. The case for the CEB was summarised in Mr Tulloo's affirmation of 21 December 2010. It alleged that the bid made by APS mentioned that the CFLs would be manufactured by Philips or under licence by Philips in China. It further alleged that APS was throughout in breach of the tender documents because it had not allowed and/or authorised the CEB to inspect and verify the 660,000 CFLs at the place of manufacture in China. It is perhaps notable that, as submitted on behalf of APS, although the affirmation was made in support of an ex parte application, it did not exhibit or make any reference to the various email exchanges and other communications relating to inspection which the Board has described above. APS was also said to be in breach of the contract and of an undertaking given to the court by Mr Dookhee on 15 November that he had no

objection to an inspection being carried out and that no shipment would take place unless an inspection was carried out to the satisfaction of the CEB because the true position was that the goods had already been shipped on 13 November 2010. Mr Tulloo further complained in para 24 that, contrary to the statements recorded in the orders of 15 November and 3 December, the goods were shipped from Singapore instead of China on 30 November 2010, whereas Mr Dookhee had stated on 3 December 2010 that he would cause the goods to be shipped back to China for inspection by the CEB. Moreover, according to the second bill of lading, the goods were loaded at Singapore and the consignor was stated to be Deutsche Factors and Trade Finance, which was unknown to the CEB. Mr Tulloo asserted that the consignor ought to have been a consignor from China which had manufactured the 660,000 units.

30. Based on those assertions, in para 25 Mr Tulloo sought to draw the inference that APS was acting fraudulently in order to defraud the CEB of US$763,725 without any consideration. APS should not be entitled to claim any payment because, as Mr Tulloo put it in para 26,

> "[APS] is not supplying the goods as agreed (ie bulbs manufactured by Philips or manufactured under licence by Philips) and has not allowed the [CEB] to inspect and verify the bulbs at the place of manufacture. [APS] has, twice, breached the undertaking given by it in Court."

Mr Dookhee's affirmation

31. Mr Dookhee made an affirmation on 11 January 2011 in response to that of Mr Tulloo. He exhibited the exchanges between the parties referred to above which show the attempts made by APS to arrange for the CEB to inspect the goods. Mr Dookhee admitted that on 15 November he had told that court that APS had no objection to a verification of the goods being carried out by or on behalf of the CEB as per the SCC in the contract and that the goods would not be shipped until that been done. However, he said that when he made that statement he did not know that the goods had already been shipped. It should be noted in this regard that the first bill of lading was dated 17 November, which was of course after the hearing on 15 November. Moreover, APS was not the shipper.

32. There is an issue as to what Mr Dookhee told the court on 3 December. There is no transcript of the hearing and there is no evidence as to how the recitals came into the order of that date. Mr Dookhee admitted that on 3 December he told the court that inspection at the factory could still be made available and that payment could await such inspection in as much as the goods were then on their way to Malaysia and could still turn back. He did not however accept that he had said

that he had already caused payment to be stopped or that he had asked that the goods be sent back to the factory for verification. By way of explanation of what happened thereafter, he added that the CEB did not seem to be interested and did not contact him for the necessary modification of the shipment date and payment date as stated in his email to Mr Tulloo on 9 November referred to in para 13 above. In his affirmation Mr Dookhee then described the subsequent presentation of the documents and denied any wrongdoing.

The judgment at first instance

33. The judge correctly recognised at page 24, line 22 that it was common ground that the court will not intervene to stop payment under an irrevocable letter of credit because, as he put it, that will have a far reaching effect on the international trade of the country. That is a reflection of the important principle stated in a number of cases that, subject to the fraud exception, the paying bank must pay under a letter of credit provided only that the documents presented to it conform to the formal requirements of the letter of credit. The bank is not concerned with any underlying dispute between the parties. That principle is underlined in this case by the fact that any such dispute is subject to the arbitration clause in the contract.

34. The judge referred to a number of cases including *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 WLR 393; and *United City Merchants (Investments) Ltd v Royal Bank of Canada* (also known as *The American Accord*) [1983] 1 AC 168. So far as the underlying principle is concerned, it is sufficient to refer to only two sources among many. The first is this sentence from judgment of Sir John Donaldson MR in *Bolivinter Oil SA v Chase Manhattan Bank NA* at p 393, which the judge quoted and underlined at p 26 line 20:

> "The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met."

The second source is the judgment of Lord Denning MR in the *Edward Owen* case, where he stated the general principle at p 169 and added his approval of what has now become the oft quoted statement of Kerr J in *RD Harbottle*

(Mercantile) Ltd v National Westminster Bank [1978] QB 146 at p 155 that irrevocable obligations assumed by banks are the life-blood of international commerce.

35. The judge therefore correctly recognised that an injunction should only be granted to restrain a bank from paying under a letter of credit where the fraud exception applies and the bank is aware of the fraud. He referred to a number of the relevant cases in this field. However, he did not state the relevant test in consistent terms throughout his judgment. For example, on page 26 at line 45 he quoted this further passage from the judgment of Sir John Donaldson MR in *Bolivinter*, also at p 393:

> "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank 's knowledge. It would certainly not normally be sufficient that this rests upon the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

The judge underlined the first sentence of that passage but not the rest. At p 28 line 32 the judge quoted the whole passage in support of the proposition that knowledge on the part of the bank as to the fraud must be established by strong corroborative evidence. He also cited *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyds' Rep 554 at 561 to that effect. After referring to other cases, the judge concluded at p 29 line 38 that it was clear that the bank is not obliged to investigate when there is an allegation of fraud. It is for the client to do so by producing compelling evidence that fraud has been committed.

36. The judge then referred to the question whether a man who makes a statement without care as to its truth or falsity commits a fraud and concluded that he does at p 30 line 10. He concluded at line 19 that it was clear that the court would not issue an injunction to restrain or prohibit payment under an irrevocable letter of credit if all the conditions had been complied with and that it is only in the case "where there is fraud on the part of the beneficiary which is to the knowledge of the bank that the court will interfere."

37. However, as the Board reads his judgment, the judge ultimately reached his conclusion by reference to a different test which he said was based upon the decision of Kerr J in *Harbottle*. The judge put it thus on p 33 at line 40:

> "In the light of the principles laid down in [*Harbottle*] I find that the applicant has raised a serious prima facie arguable case that there might be an attempt to defraud it which must be left to the competent court or to the arbitrator as provided for in the contract to deal with the issue. The balance of convenience clearly tilts heavily in favour of the applicant as [APS] is debarred to claim the amount until all the disputes had been cleared on the maxim of *ex turpi causa non oritur actio*. As regards any damage, if any, which [APS] considered it had suffered, the applicant had given an undertaking."

He therefore converted the interim order made on 21 December 2010 into (as he put it) an interlocutory order "pending the decision of the main case to be dealt with, most certainly, according to the contract, by the arbitrator".

38. It appears to the Board that the judge decided the application on the basis that it was an interlocutory application, that it was sufficient for the CEB to establish an arguable case (or, as he put it, a serious prima facie arguable case) and that it could properly be disposed of on the balance of convenience. The Board will return to the correctness or otherwise of this approach below.

39. The conclusions of fact reached by the judge seem to the Board to be divided into two parts, those relating to the question whether the CEB was entitled to relief arising out of the presentation of the documents on 14 December and the relevance of the misstatements said to have been made on behalf of APS to the court at one or more of the hearings in November and December. As the Board sees it, there can be no question of Standard Bank being required to pay as a result of the earlier presentation, when there were said to be 11 discrepancies.

40. In making his findings of fact, the judge set out a short summary of the contract on p 30. He correctly observed that it was important to identify the conditions stated in the letter of credit. He was struck by four points: (1) that among the documents required by the bank were the conditions of sale which could only be found in the contract; (2) that the period of presentation was within 15 days after shipment but within the validity of the credit; (3) that the validity expired on 30 December 2010 but that, more importantly, the latest date for shipment was 30 November; and (4) that the goods were to be imported from China but there was no bill of lading which showed that the goods had been loaded in China.

41. The judge observed that it was not in dispute that APS presented the documents immediately after the goods were shipped on 13 November (although the documents were in fact presented to Standard Bank on or shortly after 24 November) and that Standard Bank had notified the CEB of the presentation and

of the discrepancies that had been found. He further concluded that Standard Bank became aware of the fact that no shipment could be effected without verification of the goods at the place of manufacture in China at the latest at the hearing on 15 November, when the statement was made on behalf of APS. He added that it could not be gainsaid that shipment could not be effected without prior verification of the goods by the CEB in China. He held that the application for an injunction on 1 December was shortly after the CEB became aware that the goods had been shipped on 13 November. He further held that at the inter partes hearing on 3 December the representative of APS, who was of course Mr Dookhee, boldly made the statements set out in the recitals to the order. As stated in para 21 above, they were that that he was surprised when he found out that the goods had been shipped, that as soon as he knew about it, he caused payment to be stopped, that he had asked that the goods be sent back to the factory for verification and that he had no objection to Standard Bank withholding payment until the goods had been checked by the CEB.

42. It is plain that the judge took a dim view of Mr Dookhee because he said that his acts were contrary to those bold statements. The judge noted that APS had been advised to retain the services of legal advisers. As the Board reads the judgment, the judge did not reach a final conclusion as to the true position. He did however hold at p 31 line 34 that in all the circumstances it was certainly the duty of Standard Bank to ascertain that verification had been carried out before shipment. He did not explain the basis upon which he reached that conclusion.

43. The Board agrees with counsel for APS that the following passages (at pp 31 to 33) contain the ratio decidendi of the judge's judgment:

> "I am certainly not concerned with the specification of the goods whether they complied with the agreement or not, … What matters … is that no shipment of the goods would be effected until the goods had been verified by the applicant at the factory in China as per the terms of the agreement. In the circumstances, it was not open to [Standard Bank] to pay the irrevocable letter of credit as the bank is aware that the terms and conditions of the contract namely verification of the goods, which had been mentioned in the contract, the latter is a document which must be produced according to the irrevocable letter of credit, had not been complied with. It had also not received written confirmation from [the CEB]. If there is no verification, it stands to reason that the contract had not been complied with and consequently, there could be no shipment.
>
> > It must also be borne in mind that [Standard Bank] is saying that the request for payment was made on the strength of the document showing that shipment of the goods had been effected on the 30th November 2010. It must be clear to [Standard Bank] that the document in question could not be relied upon in view of the

> statements made by the representative of [APS] during the first two applications that there would be no shipment until there had been verification. [Standard Bank] was also given notice by [the CEB], which it could not ignore in the circumstances of the case, that confirmation would be given whether verification would be effected or not.
>
> I do not understand why no verification could be carried out as provided for in the contract and why [APS] is in a hurry to claim payment despite the undertaking given by its representative before me which it knew was a special condition of the contract and which had not been complied with. There is no evidence that [APS] had put [CEB] 'en demeure' to come to verify the goods at the factory and that the applicant had failed to comply with the notice. It seems that it was the applicant who through its attorney at law on the 22nd November 2010 was prepared to cause its agent to inspect the goods at the factory.
>
> …

What [APS] is trying to do in the circumstances is certainly deceit and fraudulent in the words of Cotton J alluded to above and which is to the knowledge of [Standard Bank] and which it could not feign not to be aware in the light of the two applications coupled with the notice given to it by [the CEB] and in the light of the various authorities referred to above. [APS]' representative had shown his utter bad faith in blatantly ignoring the undertaking made before me and trying to claim payment without complying with the terms of the irrevocable letter of credit. Even before any verification of the goods at the factory, the goods were allegedly loaded on the 30th November 2010 in Singapore. Obviously, that was done to beat the deadline as provided in the irrevocable letter of credit."

44. The reference to Cotton J is a reference to a statement by Cotton LJ which was approved by Lord Bramwell in *Derry v Peek* (1889) 14 App Cas 337, 350 to the effect that

> "the law is 'that where a man makes a statement to be acted on by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is without any reasonable ground for believing it to be true', he is liable to an action for deceit."

The judge also referred in passing to what he described as other matters which had been raised by the applicant regarding the bill of lading and the marine cargo policy which appeared to be disturbing but which he need not consider but left to the arbitrator to decide.

45. The judge then said that the case before him was not whether the bulbs must be of Philips make or not. That would be a contractual question not relevant to the question whether Standard Bank must pay under the letter of credit. He continued at p 33:

> "Here, the question is that there should be verification and inspection of the goods at the factory by the applicant before the goods could be shipped. It is to the knowledge of [Standard Bank] that there could not be shipment until verification and inspection had been carried out. It is a term of the contract which is mentioned in the irrevocable letter of credit and the conditions of sale must be produced as mentioned in the irrevocable letter of credit. The applicant had notified [Standard Bank] that it would send confirmation whether verification had been effected.
>
> The question is whether [APS] had fraudulently loaded the goods on board the ship without giving the applicant an opportunity to verify and inspect. It would have been a different matter had [APS] put the applicant "*en demeure*" to come, verify and inspect the goods at the factory and the applicant failed to attend. Nothing would have prevented [APS] to load and ship the goods then. [Standard Bank] cannot in the circumstances of the case be heard to be saying that if it received all the required documents, it would pay. Here an issue of fraud had been raised and [Standard Bank] is fully conscious that no shipment can be effected until verification and inspection. The date of shipment will be an issue (vide *The American Accord Case*) which [Standard Bank] had to check since it would only pay within 15 days of shipment on presentation of all relevant documents."

46. On the basis of those conclusions of fact the judge held that, in the light of the principles in the *Harbottle* case, the CEB had raised "a serious prima facie arguable case that there might be an attempt to defraud it which must be left to the competent court or to the arbitrator to determine as provided for in the contract". He added that the balance of convenience tilted heavily in favour of the CEB "as [APS] is debarred to claim the amount until all disputes had been cleared on the maxim of *ex turpi causa non oritur actio*." He added that if APS suffered any damage it would be protected by the undertaking in damages.

Decision of the Court of Appeal

47. APS appealed to the Supreme Court sitting as a Court of Appeal. As stated above, the appeal was dismissed. The Court of Appeal affirmed the decision and reasoning of the judge, relying in particular upon what Mr Dookhee said to the judge but went somewhat further. It held (which the judge expressly did not) that the contract required that "the lamps would be manufactured by Philips or

under licence by Philips in the Republic of China" and that clarification no 2 (referred to above) contained "misleading and false representations".

48. The Court of Appeal expressed itself in strong terms. As to the submissions made on behalf of APS on the fraud exception, it said at para 14:

> "The stand of the appellant as expounded by its Counsel on appeal that it is not the role of the bank to go beyond the ILC and to delve into the terms of the Contract before honouring the ILC is correct only in so far as it is the run of the mill case - not when it has been made a party in Court proceedings, undertakings have been given by the appellant and ought to have been complied with by the latter."

The court then accurately described the general principle in the cases, namely that the unique value of a letter of credit is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. It added that the exceptional case where an injunction to stop payment may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will be clearly fraudulent.

49. However, the court concluded at para 15 that on the affidavit evidence APS should have been estopped from applying for payment under the letter of credit

> "in view of (a) the commitment it took in the presence of the Bank not to claim payment under the ILC unless verification of the lamps had taken place at the factory to the satisfaction of CEB before the shipment; and (b) its shiftiness to name the factory where the lamps were to be manufactured and its inability to arrange for inspection at the factory before shipment."

50. In paras 23 to 25 it dismissed the submissions of APS on the terms of the contract and more generally in strong language as follows:

> "23. The appellant denied that it had a contractual obligation to supply Philips lamps or lamps manufactured under the licence of Philips and the stand taken before us at the hearing that the appellant's representations were mere "trade puffs" appear to us to be as base as they are shameless.

The apparent deceit to pass off a product which is different from the one it had undertaken to supply was canvassed before the learned Judge in Chambers and his decision cannot be challenged.

> 24. Considering the callous way in which the appellant's director had acted throughout the execution of the contract, knowingly making gross misrepresentations to obtain the tender and then reneging the undertakings given in Court during the various applications, one can only conclude that the case had been amply made out that the attempt to obtain payment was fraudulent. It is patent that Mr Dookhee had no intention of complying with his undertaking to supply Philips lamps or lamps manufactured under licence from Philips. He was bent on hoodwinking the CEB by giving flimsy undertakings in Court to foster his plan to make an abuse of the normal payment procedures and advantages of an ILC with clear intent to defraud the CEB.

25. There is no merit in this appeal which is dismissed with costs"

Discussion

51. Three grounds of appeal are advanced on behalf of APS as follows. (1) Whatever test is applied, there is insufficient evidence of fraud to establish the fraud exception so as to justify the grant of an injunction against Standard Bank. (2) The judge imposed too low a test. (3) In any event the balance of convenience did not, and does not, justify an interlocutory injunction. It is convenient to consider first the correct test (ground (2), secondly the evidence of fraud (ground (1) and thirdly the balance of convenience (ground (3).

The test

52. The judge's approach to the test is set out at paras 33 to 38 above. As there stated the judge held that the CEB had raised "a serious prima facie arguable case that there might be an attempt to defraud". He held that the issue of fraud must ultimately be determined by the court or arbitrator as provided in the contract (here the arbitrator). His decision to grant the injunction was based upon the application of the above test on the merits and his conclusion on the balance of convenience (discussed below). The Board does not accept the test formulated by the judge.

53. The courts have adopted different tests in different circumstances. In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 the House of Lords held that in the ordinary case, in order to obtain an interlocutory injunction, the claimant does not have to show that he will probably succeed, or that he has a prima facie case

or a strong prima facie case. It is sufficient to show that the claim is not frivolous or vexatious or, in other words, that there is a serious issue to be tried: see per Lord Diplock, with whom the other members of the House agreed, at p 407G. The remaining question is whether the balance of convenience justifies the grant of an injunction, having regard, among other things, to the cross-undertaking in damages.

54. The cases show that that is not the test in the case of a letter of credit. The test has been variously described. In *Bolivinter* at p 393 in the passage quoted at para 35 above Sir John Donaldson MR said that an injunction may be granted where it is proved that the bank knows that any demand made will clearly be fraudulent. It is evident that he was considering the position at the interlocutory stage because he drew attention to the irreparable damage that can be done to a bank's credit in the relatively brief time between the granting of such an injunction and the time when it can be discharged. The judge in this case recognised (as stated at para 35 above) that knowledge on the part of the bank must be established by strong corroborative evidence.

55. Other expressions of the test in the cases include the following. In *United Trading* at p 561 Ackner LJ identified the question as whether the plaintiffs had established that it is seriously arguable that, on the material available, "the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the performance bonds." See also, to the same effect, *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152, per Staughton LJ at p 1160, where he stated Ackner LJ's test. He then referred to Lord Diplock's statement of the general principle in the *United City Merchants* case at p 183 and, in particular, to Lord Diplock's reference to the only exception to the bank's obligation to pay against conforming documents:

> "that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue."

That might suggest a stricter test than that stated by Ackner LJ but Staughton LJ added at p 1161 that, when that principle is applied to an interlocutory application, the bank is bound to pay unless the demand of the beneficiary is "clearly fraudulent". He relied upon the *Edward Owen* case.

56. Staughton LJ however concluded that the right course on an interlocutory application was to adopt Ackner LJ's test. He added that he followed the view of Lloyd LJ in *Dong Jin Metal Co Ltd v Raymet Ltd* (unreported), 13 July 1993,

Court of Appeal (Civil Division) Transcript No 945 of 1993, that it does not make much difference whether one says that the letter of credit cases are special cases within the *American Cyanamid* guidelines, because of the special factors which apply in such cases, or whether one says that such cases fall outside the guidelines and that he preferred the former view.

57. In a detailed and impressive analysis of the law in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187 Rix J included the following:

> "(4) An additional dimension of complexity is superimposed by the fact that a final decision on the beneficiary's alleged fraud cannot be reached at a merely pre-trial hearing. Of course, the fraud exception is framed in such terms, requiring the fraud to be clear and to come to the timely knowledge of the bank, that in one sense there ought not to be a difference between a pre-trial application and the final trial. But life and the law are not perhaps as simple as that, and the difference between the tests formulated for the pre-trial stage and for final trial emphasize the difficulty. However, the fact that the claimant gets the benefit of a lower standard of proof for the purposes of a pre-trial hearing, places on the Court, as I believe the cases demonstrate, an additional requirement to be careful in its discretion not to upset what is in effect a strong presumption in favour of the fulfilment of the independent banking commitments." (p 202)

58. In *Solo Industries UK Ltd v Canara Bank* [2001] 1 WLR 1800, Mance LJ said this at paras 31 and 32:

> "31 … If instruments such as letters of credit and performance bonds are to be treated as cash, they must be paid as cash by banks to beneficiaries. The courts in the *Harbottle* and *Edward Owen* cases emphasised this, and, in my view, set a higher standard than 'a real prospect of success' in relation to all these situations. Short of 'established fraud', a bank will not normally be allowed to raise any defence or set-off based on alleged impropriety affecting the demand.
>
> 32. It may be suggested that the reformulation of the test in the *United Trading* case … lowers the standard. The court expressed the test at the interlocutory stage, as being (under the old rules) whether 'it is seriously arguable that, on the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the performance bonds'. In that reformulation, the first four words would now have to be replaced by the words 'there is a real prospect'. I have some reservations about the reformulation, and

note what Rix J said in the *Czarnikow-Rionda* case … point 4. The courts in the *Harbottle* and *Edward Owen* cases were concerned with the interlocutory stage. The test that they stated was undiluted by any reference to 'arguable case'. The defence that they and later authorities identify, of established fraud known to the bank, is, by its nature, one which, if it is good at all, must be capable of being established with clarity at the interlocutory stage. If and so far as that defence is limited to the time when demand was or payment should have been made, but the court will still refuse judgment if by the time of judgment fraud is established, again there would seem to be little room for considering whether there is an 'arguable case' or 'real prospect' of establishing fraud. On any view, as Rix J observed, the court should be careful not to allow too extensive a dilution of the presumption in favour of the fulfilment of independent banking commitments. The introduction of the balancing concept of 'the only realistic inference' and the actual conclusion on the facts in the *United Trading* case suggest that the court there also had this consideration in mind."

59. The Board agrees with the reasoning of Rix J and Mance LJ in those passages. It recognises that the test cannot be quite the same as at a trial and that the test at the interlocutory stage can properly be described as Ackner LJ described it, namely whether it is seriously arguable that, on the material available, "the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the performance bonds" and that the bank was aware of that fact. In the view of the Board the expression "seriously arguable" is intended to be a significantly more stringent test than good arguable case, let alone serious issue to be tried. As Mance LJ put it, a case of established fraud known to the bank, is, by its nature, one which, if it is good at all, must be capable of being established with clarity at the interlocutory stage. In summary, the Board concludes that it must be clearly established at the interlocutory stage that the only realistic inference is (a) that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and (b) that the bank was aware of the fraud.

Evidence of fraud.

60. The relevant presentation of documents under the letter of credit was the second presentation, which was on 14 December 2010. There is no suggestion that any of the documents presented to Standard Bank were forgeries or that any of them contained, to the knowledge of APS, any material express misrepresentation. Nor is it suggested that, in presenting the documents, APS made any implied misrepresentation, whether innocently, or knowingly and dishonestly.

61. So far as statements in the documents presented are relied upon, as stated in para 29 above, Mr Tulloo complained that the goods were shipped in Singapore instead of China and that the consignor was named as Deutsche Factors and Trade Finance, which was unknown to the CEB and was not in China. However, the Board accepts the submission made on behalf of APS that the second bill of lading did not contain any misrepresentation. It showed the port of loading as Singapore, which was within the terms of the letter of credit, which (as stated in para 9 above) provided for the place of taking in charge or delivery as South Africa and/or Asia and expressly permitted transhipment. The goods were shipped in China and transhipped in Singapore, both of which were permissible under the terms of the letter of credit. As to the identity of the consignor, no misrepresentation is alleged. Moreover the letter of credit contained no requirement as to the identity of the consignor as opposed to the consignee and, in any event, it seems that CB Light had discounted the transferred letter of credit.

62. Mr Tulloo further states in his second affirmation of 18 January 2011 that the CEB verily believed that the vessel M WELLINGTON did not originate from China and therefore that the first bill of lading may not be accurate. However, there is no evidence which supports that belief and Mr Dookhee said in his affirmation that it was well known in the shipping industry that the M WELLINGTON transported goods from China. Finally, there is an issue as to whether container numbers were not set out in either bill of lading. However, that does not appear to be correct and, in any event, there was no such requirement in the letter of credit.

63. It appears to the Board that the judge's decision was not so much based upon the documents presented to Standard Bank as upon the view he took of the representations made to the court by Mr Dookhee. In particular, as stated at para 15 above, the order signed by the judge shows that on 15 November Mr Dookhee said that he had no objection to an inspection being carried out in accordance with the terms of the contract and that no shipment would take place unless the inspection was carried out to the satisfaction of the CEB. The judge took a dim view of that statement because it later transpired that the ship had already sailed on 13 November with the goods on board. Mr Dookhee has maintained throughout that he did not know that shipment had already taken place. Although the judge was sceptical (to put it no higher), there is no evidence that Mr Dookhee was aware that the goods had already been already shipped. It seems most unlikely that he knew because, if he did, there seems no reason why he should promise that no shipment would take place until after a satisfactory inspection. Put another way, it is surely much more likely than not that the statement that there would be no shipment unless and until an inspection of the goods had been carried out was made on the premise that the goods had not yet been shipped.

64. The evidence set out at paras 10 to 13 above shows that Mr Dookhee had spent a good deal of time and effort into trying to arrange a time and place for inspection without any very satisfactory response from the CEB. Moreover, there was no requirement in the letter of credit that it was APS which was to ship the goods; so it is far from incredible that Mr Dookhee did not know that shipment had taken place, especially since the first bill of lading was dated 17 November, which was two days after the hearing before the judge on 15 November.

65. The next stage is discussed at para 16 to 20 above. As just stated, the goods were shipped on 13 November and the first bill of lading was issued on 17 November. Then on 22 November the CEB made its first allegations against APS as set out in para 17 above. They included allegations of breach of contract. An ex parte order was made on 1 December as stated at para 20 above and events at the hearing on 3 December are described at para 21. No allegations of fraud were made. The application was withdrawn because of discrepancies in the documents. However, Mr Dookhee told the judge that he was surprised when he found out that the goods had been shipped and that, as soon as he knew about it, he caused payment to be stopped. According to the recital to the order as drawn up he said that he had asked that the goods be sent back to the factory for verification and that he had no objection to Standard Bank withholding payment until the goods had been checked by the CEB.

66. As set out in paras 22 and 31, Mr Dookhee contended that the recital was not accurate and that what he said was that inspection at the factory could still be made available and that payment could await such inspection in that on 3 December the goods were on their way to Port Klang and could still be turned back. He added that the CEB did not however seem to be interested and did not contact him for the necessary modification of the shipment date and payment as stated in his email to the CEB on 9 November, which is quoted in para 13 above. As the Board indicated in para 22, it accepts the submission made on behalf of APS that it must have been apparent to all concerned that, if the goods were to be turned round, sent back to China and discharged for inspection, the need for an extension, both of the latest date for shipment and of the date of expiry of the letter of credit, would have been clear to all concerned. Moreover, the complaint made by Mr Dookhee in a message to the CEB on 9 December that the CEB had not co-operated in an inspection of the goods for over seven weeks seems to the Board to have been justified in the light of the exchanges between APS and the CEB, which are set out in detail above but which are not referred to by either the judge or the Court of Appeal.

67. There followed the Mise en Demeure described in para 24 in which the CEB complained that APS had not allowed any verification or inspection of the goods

and asserted (among other things) that no payment should be made until there had been an inspection at the factory to the CEB's satisfaction.

68. As appears in para 29 Mr Tulloo relied upon the failure of APS to supply bulbs manufactured by or under licence by Philips and its failure to allow the CEB to inspect and verify the bulbs at the place of manufacture. APS denies that it was in breach of contract in either of those respects and blames the CEB for failing to co-operate in setting up an inspection of the goods. For present purposes the difficulty with those allegations is that they are allegations of breach of contract and thus matters for arbitration and irrelevant to the liability of Standard Bank under the letter of credit. In so far as the judge relied upon them he erred in principle. The judge stressed on more than one occasion that what mattered was that no shipment was to be effected until the goods had been verified by the CEB at the relevant factory. Moreover he held that Standard Bank knew that that was the position and could not properly pay under the letter of credit. However, as the Board reads the judgment, the judge placed considerable weight on what Mr Dookhee said to him (and to Standard Bank) in court. Leaving that on one side, there is, in the opinion of the Board no possible basis upon which the fraud exception could apply, whatever the test.

69. The same is true of the Court of Appeal. It went further than the judge. So, for example, in para 24 (quoted in para 50 above) it apparently concluded that APS through Mr Dookhee acted fraudulently throughout, knowingly making gross representations to obtain the tender. It added that it was patent that he had no intention of complying with his undertaking to supply Philips lamps or lamps manufactured under licence from Philips. In the opinion of the Board, in so far as those conclusions depend upon an analysis of the true contractual position between the CEB and APS, they cannot form a proper basis for the grant of an injunction against Standard Bank.

70. It is striking that neither the judge not the Court of Appeal considered whether Standard Bank agreed to a variation of the letter of credit. In order to be valid, such a variation would have to be agreed by Standard Bank. The bank relies upon articles 4 and 10 of the relevant UCP, which is UCP 600. Article 4a provides:

> "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."

Article 10a provides that, subject to an irrelevant exception, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary. Thus if, contrary to the case for APS, APS and the CEB had at any stage agreed to a variation of the terms of the contract, in order to be effective against Standard Bank, the bank would have had to agree to any variation of the terms of the letter of credit.

71. There is no evidence that Standard Bank agreed to any variation of the terms of the letter of credit. On the contrary, as stated in para 11 above, when the CEB submitted a request to Standard Bank for the letter of credit to be amended with regard to the additional documents to be submitted by APS, namely (i) a copy of an inspection certificate to be submitted to the CEB prior to shipment and (ii) a copy of written confirmation by the CEB that the goods could be released for shipment, APS declined to agree and on 4 November MCB informed Standard Bank that APS was not agreeable to the amendment sought. The CEB was informed accordingly.

72. Whatever Mr Dookhee said to the judge, even if he promised to do something outside the terms of the contract, there is no evidence that Standard Bank agreed to any amendment of the letter of credit as a result. This is important because it appears to the Board that, in the case of both the judge and the Court of Appeal, the underlying basis for their conclusions was, not so much that APS was in breach of contract, but that it dishonestly gave undertakings to the court which it had no intention of honouring. This was no doubt based on the evidence of Mr Tulloo referred to in para 29 above that APS twice breached undertakings given to the court. Even if there were some force in this case as against APS, it is of no assistance to the CEB in this appeal unless Standard Bank either agreed a relevant variation of the letter of credit or knew that APS was acting fraudulently. There is no evidence of any such agreement and, in the opinion of the Board, notwithstanding the views expressed by the judge and the Court of Appeal, there is no evidence that Standard Bank knew that APS was acting fraudulently.

73. The Board accepts the submission made on behalf of Standard Bank that there was no allegation of fraud in the Mise en Demeure and that it was not put on notice of any such fraud. It was aware only of a contractual dispute between APS and the CEB that the lamps were shipped without verification that they complied with the contract, which was a dispute with which the bank was not concerned. Standard Bank has throughout taken the reasonable stance that, subject to the injunction it was ready to pay under the letter of credit when compliant documents were presented to it.

74. The central theme running through the parts of the judgment quoted above is that the judge considered that no shipment of the goods could be effected until they had been verified by or on behalf of the CEB at the factory in China in accordance with the terms of the contract and that Standard Bank was aware of

the position because it was aware of the terms of the contract and because of the statements made by Mr Dookhee to the court. However, as stated above, the judge's approach was flawed. He did not refer to the exchanges relating to inspection set out above. Moreover he did not apparently consider whether Mr Dookhee might be telling the truth when he said on 15 November that he was not initially aware that the goods had been shipped on 13 November.

75. As to the hearing on 3 December, the Board does not think that the remarks attributed to Mr Dookhee provide any real assistance to the CEB in this context. Mr Dookee disputed the account as attributed to him and the account may not be accurate. His account is consistent with the point he made that when he said that inspection at the factory could still be made available, that was on the basis that the vessel would turn back and that there would be agreed extensions of the letter of credit. Moreover Standard Bank did not perceive that the events of 3 December had somehow altered its obligations under the letter of credit. As stated at para 26 above, in its response to the Mise en Demeure it took issue with the case against it, including any suggestion that it had given any such undertaking. In any event the issues between the CEB and APS referred to above remain matters for arbitration even on the hypothesis that the events of 15 November and 3 December were of some relevance. There is certainly no basis upon which it could be held that any variation of the letter of credit could be inferred from those events.

76. In all the circumstances the Board reaches a different conclusion from the judge. As to the Court of Appeal, it too rested its decision in part upon the position under the contract between the CEB and APS, which is not permissible. As appears at para 48 above, the Court of Appeal accepted the general principle but added that it only applies in a run of the mill case:

> "not when it has been made a party in Court proceedings, undertakings have been given by the appellant and ought to have been complied with by the latter."

The Board does not accept that general conclusion or its application to the facts as quoted in para 49, which essentially gives the same reason as the judge discussed above. Further the reasons given in the Court of Appeal's paras 23 to 25 quoted in para 50 above are unsound. Para 23 again relates to a contractual issue and para 24 contains an exaggeration which is not justified on the facts.

77. In all these circumstances, the Board concludes that, whatever test is applied, neither the judge nor the Court of Appeal was entitled to reach the conclusion that the fraud exception was satisfied, in the case of either APS or Standard Bank.

Balance of convenience

78. As stated in para 46 above, the judge held that the balance of convenience tilted heavily in favour of the CEB "as [APS] is debarred to claim the amount until all disputes had been cleared on the maxim of *ex turpi causa non oritur actio.*" He added that if APS suffered any damage it would be protected by the undertaking in damages. The Court of Appeal did not address the balance of convenience at all.

79. The Board is unable to agree with the judge's approach to balance of convenience. The Board accepts the submission made on behalf of APS that the reasons why reported cases of injunctions being granted (or continued) under the fraud exception are so rare are (a) because it is almost never possible to establish the test for fraud as opposed to a mere possibility of fraud, but also (b) because the balance of convenience will almost always militate against the grant of an injunction.

80. In *Harbottle* Kerr J identified the problem thus at p 155:

> "The plaintiffs then still face what seems to me to be an insuperable difficulty. They are seeking to prevent the bank from paying and debiting their account. It must then follow that if the bank pays and debits the plaintiffs' account, it is either entitled to do so or not entitled to do so. To do so would either be in accordance with the bank's contract with the plaintiffs or a breach of it. If it is in accordance with the contract, then the plaintiffs have no cause of action against the bank and, as it seems to me, no possible basis for an injunction against it. Alternatively, if the threatened payment is in breach of contract, which the plaintiffs' writs do not even allege and as to which they claim no declaratory relief, then the plaintiffs would have good claims for damages against the bank. In that event the injunctions would be inappropriate, because they interfere with the bank's obligations to the Egyptian banks, because they might cause greater damage to the bank than the plaintiffs could pay on their undertaking as to damages, and because the plaintiffs would then have an adequate remedy in damages. The balance of convenience would in that event be hopelessly weighted against the plaintiffs."

81. APS further rely upon the reasoning in Rix J's judgment in the *Czarnikow-Rionda* case at pp 202-204 and, in particular his conclusion at point (11):

> "(11) I do not know that it can be affirmatively stated that a Court would never, as a matter of balance of convenience, injunct a bank from making

payment under its letter of credit or performance guarantee obligations in circumstances where a good claim within the fraud exception was accepted by the Court at a pre-trial stage. I do not regard Mr. Justice Kerr and the other Courts which have approved or applied the logic of his 'insuperable difficulty' as necessarily saying that it could *never* be done. It is perhaps wise to expect the unexpected, even the presently unforeseeable. All that can be said is that the circumstances in which it should be done have not so far presented themselves, and that it would of necessity take extraordinary facts to surmount this difficulty."

The Board agrees.

82. On the facts, the Board accepts the submission made on behalf of APS that nothing in paras 33-40 of Mr Tulloo's affirmation of 21 December 2010, where he dealt briefly with the balance of convenience, raises any facts, let alone extraordinary facts, capable of surmounting the difficulty. Only two substantive points were advanced by Mr Tulloo. First, CEB was willing to give a cross-undertaking in damages which it had the means to honour. Second, if no interim injunction was granted, the CEB would suffer irreparable damage in that it would be saddled with 660,000 bulbs which were likely to be counterfeit and which had not been inspected prior to shipment contrary to undertakings given to the court on 15 November and 3 December 2010. There is no evidence that the bulbs were likely to be counterfeit. Moreover the Board has already expressed the view that issues relating to lack of inspection prior to shipment are matters for arbitration and have no bearing on the liability of Standard Bank under the letter of credit. Moreover, the CEB has not satisfied the test for establishing the fraud exception, either on the part of APS or, critically, on the part of Standard Bank. In any event neither the CEB nor the judge or the Court of Appeal grappled with the difficulties identified by Kerr and Rix JJ.

CONCLUSION

83. For these reasons the Board allows the appeal. As to costs, its provisional view is that the CEB must pay the costs of APS and Standard Bank both before the Board and in the courts below. The Board will however consider submissions to the contrary if they are filed within 28 days of the judgment being handed down. Any submissions in response should be submitted within 14 days thereafter.